**TERRY’S TAKES**

**Your Weekly Florida Federal and State Appellate Caselaw Update for Personal Injury Lawyers**

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**Eleventh Circuit**

Knepfle v. J-Tech Corp. et al—(J. Branch; 9/14/22; 11th Cir.) This products liability case arose from the Middle District of Florida. Knepfle sued the defendants for an allegedly defective motorcycle helmet following an accident. The district court excluded the testimony of her expert witness, Dr. John D. Lloyd (“Dr. Lloyd”), after finding his testimony to be based on novel and untested theories that rendered his opinions unreliable under Daubert. One of the defendants, HJC, a South Korean company, also moved for summary judgment based on a lack of personal jurisdiction. That motion was denied as moot after the court granted summary judgment to all defendants. On appeal, the gist of that issue was that the Korean company was the parent company of another corporation that operates in Florida, but there was no analysis of piercing the corporate veil to establish that the Florida subsidiary was not separate from the parent company. The companies were separate entities, and the Korean parent company did not operate in Florida sufficiently to trigger jurisdiction. For some reason, the Eleventh Circuit reversed the district court’s failure to reach the personal jurisdiction argument before deciding the summary judgment motion and denying it as moot. The court decided that the lower court erred in finding only that HJC wins summary judgment; they should have found that they DOUBLE win! Yes, jurisdiction should be handled before merits. In this case, however, it seems odd that they went further than they needed to given that the finding of a lack of personal jurisdiction didn’t save HJC from having to endure proceedings in the district court and the Eleventh Circuit. They court reversed, it didn’t dismiss. So it doesn’t seem that HJC get any value from its double win. In regard to the Daubert issue, the helmet protected Knepfle’s head when her head struck the side of a vehicle, but her position was that the helmet must have popped off, leaving her head vulnerable when it struck the pavement. She sustained permanent injuries. Dr. Lloyd, her expert, sought to present his novel theory that the helmet’s double D-ring fasteners, which rest on the side of the chin rather than under it, are less secure and allow the helmet to slip off. Dr. Lloyd examined Knepfle’s actual helmet and saw no damage to the rear of the helmet, showing, in his view, that it never struck the pavement (and, therefore, probably flew off prior to her hitting the back of her head on the road). There were marks on the back of the helmet, but without providing any scientific basis, he opined that if the helmet had stayed on and struck the pavement, it would have shown more significant damage. Based on a 1988 Army study, Dr. Lloyd also opined that while the helmet was the correct size, the strap was too short. Defendants moved to exclude his testimony on the ground that he had not conducted any acceptable testing to determine whether Knepfle was wearing the helmet when she hit the ground. He failed to identify any generally-accepted test, peer-reviewed article, or independent study that supporting his opinion on the design defect or his theory of events. He did not measure the rear liner of the helmet. He did not look into whether other similar accidents occurred with other types of D-ring fasteners. His test demonstration involved manipulating the straps of the helmet in a way that would be impossible if it was on a human head. As far as his qualifications, he had been a senior researcher in biomechanics at the Department of Veteran’s Affairs and a director of the biomechanics laboratory and traumatic brain injury research laboratory. He had presented on biomechanics of brain injuries at scientific conferences. He had been published in peer-reviewed journals. He regularly testifies on helmet design in products liability cases. He had assisted the National Institute of Health to develop a helmet designed to mitigate the risk of head and brain injuries. When he demonstrated his theories to the court, however, he used a helmet that was not on a head, and when he showed a video of a helmet on a mannequin dummy head, the helmet used a chin strap, not a double D-ring strap like the one at issue in the case. Dr. Lloyd admitted that he had never performed his test on a double D-ring strap while it was on a head or mannequin head. Pursuant to FRAP 702, a district court should determine the admissibility of expert testimony by considering these three factors: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. Under prong 1, the district court found that Dr. Lloyd was a qualified scientist. Under prong 2, to assess the reliability of an expert’s testimony, courts consider: (1) whether the expert’s theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.” The district court found that Dr. Lloyd’s methodologies were unreliable. They had never been peer reviewed and were not generally accepted. No test of the theory had ever been performed by anyone. He did not offer physics calculations for his demonstration. He only “eyeballed” the helmet liner instead of measuring with instruments even though scientists generally use tools and there was no evidence that “eyeballing” damage was generally accepted in the scientific community. In regard to prong 3, helpfulness, expert testimony generally helps the trier of fact when the testimony concerns matters that are beyond the understanding of the average lay person. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* (unsupported dogmatic assertion) of the expert. (In other words, the expert can’t just say, “Trust me, I’m an expert.”) Rather, a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. Under Daubert, scientific testimony does not assist the trier of fact unless the testimony has a justified scientific relationship to the pertinent facts. Because he had not tested the kind of helmet at issue, his testimony was unhelpful. The Eleventh Circuit observed that “Knepfle’s entire claim distills to the contentions that Lloyd is an expert, he looked at the available evidence, and deduced what happened. Quite simply, Knepfle relies on Lloyd’s unreliable *ipse dixit*.” Because Dr. Lloyd’s testimony was the only evidence giving rise to a genuine issue of material fact and it was being excluded, the court granted summary judgment. It should be noted that the plaintiff’s entire response to the defendants’ motion for summary judgment was as follows:

1. Defendants’ Motion for Summary Judgment is wholly without merit.

2. There is no basis to strike Dr. Lloyd’s opinions under Daubert.

3. Plaintiff filed a brief in opposition to Defendants’ Motion to Exclude Testimony and Opinions of Dr. Lloyd on March 2, 2021. Plaintiff adopts and incorporates that brief in opposition here, as the arguments are basically the same.

4. Because there is no basis to strike Dr. Lloyd’s opinions, Defendant’s [sic] Motion for Summary Judgment must be denied.

The district court had not only granted summary judgment, but it also found that plaintiff’s response to the summary judgment was so lacking in argument and citations that it constituted a **waiver** of opposition to summary judgment. On appeal, without using the word “waiver,” the Eleventh Circuit agreed that Knepfle’s summary judgment response “set forth no argument…as to why the district court should not grant defendants’ motion for summary judgment.” Plaintiff had conceded during the Daubert hearing that their case turned entirely on Dr. Lloyd’s testimony. Exclusion of the expert and granting of summary judgment was affirmed, though the denial of summary judgment on jurisdictional grounds was reversed.

**Supreme Court of Florida**

In Re: Amendment to Florida Family Law Rule of Procedure 12.200 (SC22-574)—(Per Curiam; FLSC; 9/15/22). The Supreme Court of Florida deleted the portion of Rule 12.200 requiring that orders setting pretrial conferences in family law cases be “uniform throughout the territorial jurisdiction of the court.” Now I guess different circuits can go wild and change the pretrial conference orders from county to county or judge to judge. They could change the font and stuff. Or put the dates in British style with the day, then the month, then the year. The judge’s imagination is the only limit. Crazy times.

**First DCA**

Khayrallah v. State of Florida—(PCA; 1DCA; 9/14/22). Though this was a *per curiam* affirmance (PCA), two of the three judges took the time to write special concurrences. It’s a criminal case, not a personal injury case, but it’s a fun read. The defendant was convicted of a second degree felony applicable if a person “sends or procures the sending of…an electronic communication,” written by him, “containing a threat to kill or to do bodily injury to the person to whom such communication is sent.” § 836.10, Fla. Stat. (2017). Mr. Khayrallah argued that he did not “send” his threatening letter to the chief judge of the Fourth Judicial Circuit because it went to the clerk’s office, not the judge directly. JUDGES TANENBAUM AND LONG CONCURRED SPECIALLY, with Judge Tannebaum writing several pages about how “sending” something is a completed act regardless of whether someone else “receives” the letter. And while Khayrallah also argued that his letter was too vague to constitute a threat to kill or do bodily harm, the judges found that the letter more than met the qualifications of a threat. So here, courtesy of Judge Tanenbaum’s concurrence, is the letter for your reading pleasure:

This Message is for The No Good Low Down Bastard Mark Mahon and his Administration. I’m coming for your No good Ass! I’m going to Deal with you! Don’t be Mad because I haven’t forgot about you! You incompetent political bastard! I got you Peeped also like the other no good OL Bastard John Rutherford! You ain’t got rid of me! Remember Allah has my back! I got something for your Ass! Go back to the Pitts of Hell where you come from! No good Low Down Bastard! Tell the Devil that made you that You are not Sufficient and your Incompetence has made t you low Down Sum of Shit! No Good Bastard!

Jayne et al v. City of Defuniak Springs et al—(Per Curiam; 1DCA; 9/14/22). Once again, the First DCA issued a PCA that is, nevertheless, notable for a written opinion. In this case, rather than a concurrence, the notable opinion was a vigorous DISSENT by JUDGE MAKAR. The facts are pretty simple. The decedent was murdered by her co-worker in her home after he threatened her several times. She had reported his threats to the police, and the police specifically told her that they would escort her from work to her home, that they would do security checks at her home, and they would issue a trespass warning to the guy who threatened her. They did none of this. She went home after work, he was waiting in her residence, and he killed her. Her estate tried to sue the police. The lower court decision—affirmed without written opinion—was that the police had no duty to provide extra protection and could not be sued because of sovereign immunity. The plaintiff’s position was that the “undertaker’s doctrine” trumped the claim of sovereign immunity. The undertaker’s doctrine is a common law theory of tort liability where one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. Had City police escorted her home as they had told her and were obligated to do, they would have discovered Taylor lying in wait to kill her inside her home. Judge Makar would have allowed the suit to go forward. He cited a number of cases that support the undertaker’s doctrine, and he thought that sovereign immunity did not protect the police here because the failure to follow through on protecting her was operational level in nature, not a policy-based discretionary decision. But the majority (Judge’s Brad Thomas and Nordby) apparently didn’t buy it. (NOTE: Remember, a PCA has no precedential value. Thus, this theory of relief seems ready for a second attempt in any DCA including the First).

Levitan v. Dancaescu—(Per Curiam; No. 1D21-806; 9/14/22). This was a breach of contract case about the purchase of a corporation, so it is not extensively summarized. For personal injury practitioners, it’s enough to note that Dancaescu’s filed a motion to amend an answer around the time the case was proceeding to summary judgment. The judge found for the plaintiff and dismissed the complaint. On appeal, Dancaescu essentially said, “Hey, I had a motion to amend the answer. The trial court can’t grant the plaintiff summary judgment. My amended answer would have changed the outcome.” But on appeal, the DCA held that Dancaescu failed to preserve the issue by failing to insist on a hearing on the motion to amend the answer prior to the summary judgment motion. While the motion to amend the answer was filed before summary judgment, the court was entitled to enter summary judgment based on the pleadings as they were at the time of the summary judgment hearing if Dancaescu made no effort to have the motion to amend **heard** by the court prior to the summary judgment hearing.

Verasso v. State of Florida—(Per Curiam; 1DCA; 9/4/22). This is another criminal case, and it may not be applicable to civil cases even though there is no principled reason why criminal defendants should be subject to a different and higher standard. At any rate, the First District’s opinion will likely strike fear into the heart of every appellate practitioner, especially criminal appellate attorneys. While the court granted a motion to supplement the appellate record with a videotape of the defendant’s interrogation by police, the court (Judges Brad Thomas, Kelsey, and Winokur), took time to note

an issue that has arisen in multiple criminal cases. Specifically, this Court has noted an increase of cases where the counsel for an appellant files multiple motions to supplement the record. In many of these cases, the motions have included requests for records or transcripts that could have been requested in one motion had a thorough review of the record been conducted. The Court notes that counsel has an obligation to thoroughly review the record upon assignment. The Court does not construe the opportunity to supplement the record as an ongoing mechanism to obtain an indirect extension of time, much less a series of such extensions, as to material that counsel knew, or should have known through the exercise of diligent review at inception of the appeal, existed and was or might be needed for the appeal. Counsel’s obligation of timeliness demands an early, careful, and complete assessment of the need to supplement the record on appeal, so as to avoid unnecessary delay in disposition.

(NOTE: That most appellate practitioners do not have time to review the record twice or have clerks do it for them was not mentioned in the opinion. Certainly, some practitioners have abused record supplements as backdoor extensions, but the notion that the DCA might deny the supplements of critical parts of the record on the basis that the motion to supplement was successive or untimely seems to cut against the command of the Supreme Court of Florida in Rule 9.200(f)(2), which states that “[i]f the court finds the record is incomplete, it **shall** direct a party to supply the omitted parts of the record. **No proceeding shall be determined, because of an incomplete record**, until an opportunity to supplement the record has been given.” Then again, maybe courts will rule that the “opportunity” to amend the record passes at some point early in the appeal. But because the DCA granted the motion to supplement, the issue of whether denial of a motion to supplement the record where the record was truly incomplete would be lawful was not really presented. But the opinion has the tone of a warning shot across the bow.)

**Second DCA**

Allstate Insurance Company v. Ray—(J. Kelly; 2DCA; 9/16/22). The DCA granted a motion for clarification and substituted a new opinion in the place of an opinion that was issued back on January 19, 2022. The particulars of the deadly motor vehicle accident and the ensuing litigation are unimportant. The person at fault in the accident (Ray) died due to the accident. In a trial solely on damages, a jury awarded nearly $45 million to the plaintiff. The estate (represented by Allstate, the insurer), filed a motion for new trial or remittitur, and the trial court allowed the estate to choose between either accepting a new trial or accepting a reduced $18 million verdict. Allstate chose the $18 million verdict. The decedent driver’s estate (Allstate’s insured) sued Allstate for bad faith for failing to settle the case and for breaching the duty to defend by accepting the $18 million instead of opting for a new trial. In discovery, the estate sought the internal emails between the adjusters and attorneys regarding the handling of the claim. One adjuster had been assigned to the anticipated bad faith portion of the case while the underlying case was underway. In Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121, 1129-30 (Fla. 2005), the Supreme Court of Florida explained that all materials contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages are not protected by the work product privilege. The Estate sought essentially all of the emails by adjusters and attorneys concerning the case from its inception. Allstate claimed that many of the emails the estate sought from the date AFTER the conclusion of the underlying case were protected work product, especially those that were created by an adjuster assigned not to the underlying case but solely assigned to the anticipated bad faith claim. (There were separate adjusters assigned to the underlying litigation and the bad faith claim from early on). When the trial court ordered production of everything, Allstate petitioned the DCA for a writ of certiorari, and the DCA agreed with Allstate. The test for what to disclose to the insured is not simply based on the date the material was created, but whether it pertains to the processing or litigation of the underlying claim. If it does, it is discoverable. If it’s stuff that pertains only to the post-claim bad faith case—even if it was created while the underlying case was still pending—it is protected. To make the determination of whether specific materials are protected, the trial court will have to examine the materials *in camera* to see if they fall into the category of work product. And attorney-client materials are always privileged even in a bad-faith claim *except* when the attorney was not offering legal advice to the insurance company and was only working on the underlying claim without offering advice. (Examples were not given, but one can imagine that emails about scheduling depositions, for instance, are not protected). That stuff is discoverable. While Allstate also challenged the requirement of an *in camera* inspection of post judgment materials, the DCA held that that could not qualify for cert relief because Allstate could not establish irreparable harm from an *in camera* review, only from an order to produce protected materials *after* the *in camera* review was completed. But the portion of the order requiring production of all materials was quashed, and the trial court is going to have to sort through which ones pertain to the underlying litigation (unprotected) and which ones pertain to the bad faith litigation (protected). <https://www.floridasupremecourt.org/content/download/849107/opinion/211020_DC03_09162022_090840_i.pdf>

Athienitis v. Makris—(J. LaRose; 2DCA; 9/16/22). Amazingly, getting angry and logging off of a Zoom hearing actually SAVED a party in a case. This family law case applies law that would be relevant to any civil case. The trial court set a hearing to address six separate issues. Once the hearing started, however, one party started offering testimony and argument on a separate attorney’s fee issue. Due to anger at the ruling, the former wife twice logged off of the Zoom hearing. The court imposed the fees and costs, and Athienitis appealed, arguing that that fee issue was not noticed for hearing, so the judge erred in considering the issue. In response, Makris argued that the issue was tried by consent because there was no objection to the issue being heard. It is well settled that an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process. An issue may be tried by implied consent, however, where a party raises the issue and the other party fails to object at the hearing. So was this trial by consent? The clear answer is “no.” Unpled issues tried when a party does **not appear** are not tried by consent, but *in absentia*. The non-noticed issue was raised while the former wife had logged off. Her failure to attend that portion of the hearing did not constitute consent; it was just a hearing *in absentia* on an unnoticed issue, which is a denial of due process and a fundamental error. So the portion where the unnoticed fee issue was decided while the former wife was logged off was reversed and remanded.

<https://www.floridasupremecourt.org/content/download/849109/opinion/212376_DC08_09162022_091321_i.pdf>

The Kidwell Group, LCC v. American Integrity Insurance Company of Florida—(J. LaRose; 2DCA; 9/16/22). As predicted, the 2019 amendments to the assignment of benefits statutes are about to make life more difficult for the insured. The insurer, American Integrity, issued a homeowners insurance policy, and the insured homeowner suffered hurricane damage in 2017. In 2019, the homeowner assigned postloss benefits to The Kidwell Group (“Kidwell”) in exchange for services such as an environmental study, mold testing, etc, relating to the damage. The assignment of benefits (“AOB”) specially stated that the non-emergency assessment was not meant to repair the property or mitigate against future damages. After providing the services, Kidwell billed the insurance company under the water/mold provisions of the policy, and American Integrity denied the claim. Kidwell, sued, attaching the AOB but not the policy to the complaint. American Integrity moved to dismiss under two provisions of the 2019 statutory amendments. First, they argued that the AOB did not contain required provisions for an AOB under section 627.7152(2)(a), Fla. Stat. That section requires that an AOB contain a ton of terms about the ability to rescind, the requirement that the AOB be sent to the insurer within 3 days, an itemized estimate of services, a notice of rights in 18-point uppercase type, and an indemnification clause. Second, American Integrity argued that Kidwell failed to comply with the presuit notice requirements of section 627.7152(9)(a), which requires 10 days written notice of intent to sue that contains a demand and the amounts sought and an itemized list of everything provided (or an estimate for future services) and proof that the work performed was done under the proper standards. Kidwell had two responses to this. First, they said that the AOB was not really an AOB because they weren’t hired to actually *fix* anything or mitigate against future damages to the property; they were just conducting a study. Second, they argued that the 2019 statutory amendments weren’t retroactive and did not apply to this 2017 loss. The trial court agreed with American Integrity that the AOB was really an AOB, and it dismissed the complaint after holding that because the AOB was executed in 2019, after the statute was amended, it didn’t matter that the loss was back in 2017. The statute applied to any AOB enacted after the effective date of the statute. On appeal, the DCA essentially ruled that the trial court got it right. An improper AOB is “invalid and unenforceable.” In regard to whether this was actually an AOB, the DCA noted that, "[i]f it looks like a duck, and quacks like a duck, then it is a duck." See generally Villamorey, S.A. v. BDT Invs., Inc., 245 So. 3d 909, 911 (Fla. 3d DCA 2018) ("This well-known abductive reasoning test posits: 'If it looks like a duck, and quacks like a duck, then it is a duck.'"). The services provided by Kidwell “quacked” like a service contract. The point of the report was to prescribe or confirm remediation procedures, and that was close enough to a service provider to trigger the AOB requirements. Second, in regard to whether the 2019 statute applied to a 2017 loss, retroactivity was a red herring, The date of the loss or date of the contract was not important. The statute applies to AOBs executed on or after July 1, 2019, and this AOB was executed months after that date. So the statute applies. The court noted that the Fifth DCA held the opposite way for the same party just recently. The Fifth DCA thought it was important that the insurance contract was not attached to the complaint and the trial court should not have looked beyond the four corners of the complaint. The Second DCA had no problem reviewing the case, however, because the statute in question is aimed at the AOB, not the policy. The AOB was attached. The underlying policy itself was just a “distraction.” The dismissal based on a faulty AOB was affirmed.

<https://www.floridasupremecourt.org/content/download/849105/opinion/210205_DC05_09162022_090450_i.pdf>

Xenes v. State of Florida—For those of you who practice criminal law, be aware that there is a conflict between the 5DCA and 2DCA and the 2nd DCA has certified a question about whether criminal defendants can be compelled to orally disclose a smartphone passcode.

<https://www.floridasupremecourt.org/content/download/849106/opinion/210977_DC05_09162022_090611_i.pdf>

**Third DCA**

Seaway Biltmore, Inc., et al. v. Abuchiabe—(J. Hendon; 3DCA; 9/14/22). Abuchiabe (“Plaintiff”) was a reservations agent at the Biltmore (a hotel) between 2005 and 2011. She was fired in 2011 and filed a complaint with the EEOC for age-based discrimination and retaliation. In 2012, she and the Biltmore reached a settlement that involved her being reinstated, and the settlement future retaliation. In 2015, she got into an argument with the Biltmore’s chief information officer, and she was fired. She sued under the 2012 agreement alleging retaliation and alleging a violation of Title VII of the Civil Rights Act. Plaintiff sought production of documents and alleged that Biltmore hindered and delayed discovery. The trial judge agreed, referring the discovery matters and imposition of discovery sanctions to a special magistrate. The magistrate held a four-day hearing and found that some of the discovery violations were unintentional and recommended that sanctions not be imposed. In regard to deletion of data, however, the magistrate recommended that the court find spoliation of evidence and recommended that the court give a jury instruction that jurors could presume that the destroyed evidence was unfavorable to the Defendants. The Biltmore filed its objections to the report, the sanctions imposed, and to the recommendation that the trial court instruct the jury that it should presume that Biltmore intentionally destroyed IT records to deprive the Respondent of relevant information. The trial court approved, ratified, and adopted the special magistrate’s report and recommendation. Biltmore filed a petition for certiorari. The Biltmore argued that the trial court’s ruling created an unrebuttable presumption that would preclude it from offering evidence and would cause irreparable harm. The DCA disagreed. In 1987, in Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 599 (Fla. 1987), the Supreme Court of Florida got rid of unrebuttable presumptions due to spoliation, changing the remedy to a rebuttable presumption where destruction of documents by a party opponent hinders the plaintiff’s ability to make a *prima facie* case. So Biltmore can attempt to rebut the presumption at trial. Because Biltmore failed to show an irreparable injury, the petition was dismissed.

United Automobile Insurance Company, etc. v. G&O Rehabilitation Center, Inc. et al—(J. Lobree; 3DCA; 9/14/22). G&O, the plaintiff, was a medical provider who was assigned rights by the insured after treating the insured for an auto accident. When G&O billed United for the medical care, the insurer failed to pay. G&O sued, and United raised, as an affirmative defense, that the insured failed to attend an independent medical examination (“IME”) in violation of a statutory requirement. G&O filed a reply that non-attendance of an IME is excused if there is a “reasonable excuse.” G&O supported this statement with an affidavit from the insured that she took a break from work to attend the appointment, but could not find a parking space at the building and eventually gave up and returned to work. She had gone to a prior IME, but worked Monday to Saturday 7 a.m. to 7 p.m., could not leave work frequently, and had done the best she could. At the summary judgment stage on this issue, the trial court accepted the affidavit of the insured that it was impossible to attend that IME, and the trial court also required the insurer to demonstrate prejudice from the failure to attend the IME. When United was unable to show prejudice, the trial court granted summary judgment to the plaintiff. The insurer appealed. Section 627.736(7), the IME statute at issue, provides that the insured “shall” attend an IME whenever their mental or physical condition is at issue and when the insurer requests it, and the insured’s unreasonable failure to submit to the IME means that the insurer is no longer liable for subsequent personal injury protection benefits. Notably, there was no transcript of the summary judgment hearing, but the DCA felt confident that the issue was preserved by the motions and responses and that it could also rely on the written order and the documents submitted for the summary judgment motion sufficiently to review the case. In regard to requiring a showing of prejudice, the trial court confused the standard under 627.736 with the standard for a compulsory medical examination (“CME”) in an uninsured motorist case. Those are governed by the neighboring statute, 627.727. That statute makes CMEs a condition subsequent, not a condition precedent, to coverage. Under the statute in this case, compliance with the IME was a condition precedent to coverage, and United did not have to show prejudice to invoke the condition. Thus, the trial court applied an incorrect standard. Further, the trial court erred in holding that the insured’s explanation of her nonattendance of the IME—the inability to find a parking spot and her busy work schedule—was not unreasonable. That was a question of fact that was required to be submitted to a jury. That said, the statute is only a bar to benefits “subsequent” to an unreasonable failure to attend the IME. The dates of service were mostly before the date of the IME, and the DCA interpreted the word “subsequent” to mean that the insurer could not deny bills incurred prior to the date that the IME had been scheduled to take place. Thus, the DCA affirmed summary judgment for the bills prior to the IME date (because it will not matter if a jury finds that failure to attend the IME was unreasonable for purposes of the pre-IME bills). The court reversed and remanded for further proceedings with respect to the medical services provided after the date that the IME had been scheduled. (NOTE: I endeavor to summarize the court’s views, not my own. And I’m delighted to see a plaintiff mostly prevail. That said, the DCA’s holding seems questionable in regard to its interpretation of the language in the statute that allows denial of benefits for unreasonable failure to attend an IME. The statute requires an IME upon request when the medical condition is material to any claim for “past or future” PIP benefits, and the statute says that if a person unreasonably refuses to submit to an examination, the personal injury protection carrier “is no longer liable for subsequent personal injury protection benefits.” But subsequent to what? The DCA says, essentially, says the carrier is not liable for any services incurred after the date the IME was to take place, but still liable for all services that took place before the date the IME was to have occurred. I would think, however, that the language clearly means that the carrier is not liable to pay any further benefits after an unreasonable failure to attend an IME regardless of the service date. Does the court truly mean that if an insured has a serious preexisting back condition in April, has an accident in May that he says injured his back, has back surgery in June, and the carrier wants to dispute causation in light of a preexisting condition and requests an IME in July, that the carrier is still liable for 100% for the back surgery even if the insured unreasonably fails to attend the IME because the date of the surgery was prior to the request for the IME? The obvious reading to my eyes is that from the date one unreasonably refuses an IME material to the claim, the carrier is no longer liable regardless of the date of service of the medical benefits. I read the provision to mean that the carrier could not seek reimbursement for any benefits *actually paid* prior to the demand for an IME and unreasonable failure to attend, but they don’t have to pay another dime after the insured unreasonably no-shows a material IME. Again, this is a wonderful win for plaintiffs or service providers who are bringing claims as assignees of insured persons, but one has to wonder whether this opinion will bear much scrutiny.)

**Fourth DCA**

Thompson v. GEICO Indemnity Company—(Per Curiam; 4DCA; 9/14/22). Following a PCA, the Fourth DCA granted Thompson’s motion for a written opinion as to why it affirmed the trial court’s order granting attorneys’ fees pursuant to a proposal for settlement (“PFS”). Thompson argued that Geico’s PFS did not comply with Rule 1.442, Fla. R. Civ. P. That may or may not be true, but the DCA held that the argument was unpreserved. Thompson did not respond to Geico’s motion for fees and costs in writing, but at the fee hearing, Thompson argued that the PFS was not made in good faith. After the court granted fees and costs, Thompson got serious, filed a motion for rehearing, raised an argument that Geico’s PFS failed to comply with Rule 1.442 because it failed to state whether attorneys’ fees were part of the legal claim as required by Deer Valley Realty, Inc. v. SB Hotel Associates LLC, 190 So. 3d 203, 206 (Fla. 4th DCA 2016), and conceded that it was raising that issue for the first time. Thompson argued in the motion for rehearing that the judge had the right to reconsider any nonfinal orders prior to entry of final judgment. The DCA agreed that the judge had the authority to reconsider the fee order, but disagreed that the judge had the **obligation** to do so when the movant makes an argument that could have been—but was not—raised at the prior hearing or in a pre-hearing filing. The court found, on the merits, that there was no abuse of discretion in finding that the PFS was made in good faith. Affirmed.