# TRIAL ADVOCATE QUARTERLY

Volume 36 • Number 3 SUMMER 2017

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A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

# Recent Legal Developments

By Esther E. Galicia

## SUPREME COURT DECISIONS

**1. When do new claims asserted in an amended complaint relate back to the original complaint?**

The Florida Supreme Court in *Palm Beach County School Board v. Doe*, 210 So. 3d 41 (Fla. 2017), reiterated that amendments to a complaint asserting new claims can relate back to the original pleading so long as they arise out of the same conduct, transaction or occurrence as the original claims. The proper focus of the inquiry is not whether the amended pleadings sets forth a new or different claim. Accordingly, the Supreme Court disapproved of a line of cases establishing a bright-line rule that an amendment asserting a new claim can never relate back to the filing of the original pleading.

**2. Who has the burden of proof in cases where a foreign body is left in the patient? Does direct evidence of negligence preclude use of the foreign body presumption?**

In *Dockswell v. Bethesda Memorial Hospital, Inc.*, 210 So. 3d 1201 (Fla. 2017), the Florida Supreme Court held that the defendant has the burden to prove the nonexistence of medical negligence in malpractice cases involving a foreign body being left inside the patient's body. The foreign body presumption of negligence is mandatory, regardless of whether direct evidence exists of negligence or who the responsible party is for the foreign body's presence. Unlike the common law res ipsa loquitur doctrine, the statutory foreign body presumption provides plaintiffs with a presumption of negligence even if there is direct evidence of negligence.

**3. Is Amendment 7 preempted by the Federal Patient Safety Act?**

In *Charles v. Southern Baptist Hospital of Florida, Inc.*, 209 So. 3d 1199 (Fla. 2017), the Florida Supreme Court held that Amendment 7 to the Florida Constitution, providing for patient access to records relating to adverse medical incidents, is not preempted by the Federal Patient Safety and Quality Improvement Act. Adverse medical incident reports do not constitute patient safety work product under the Federal Act.

**4. May the Legislature limit the amount of attorney's fees authorized by section 768.28(8), Florida Statutes, via a claims bill?**

In *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181 (Fla. 2017), the Supreme Court stated that the Florida legislature is not constitutionally permitted to limit the amount of attorney's fees that may be recovered pursuant to its claims bill if contrary to the 25 percent of any judgment or settlement amount authorized by section 768.28(8), Florida Statutes.

**5. Are malicious prosecution actions barred by the litigation privilege?**

The Supreme Court in *Debrincat v. Fischer*, 217 So. 3d 68 (Fla. 2017), found that the litigation

## ABOUT THE AUTHOR

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privilege does not bar the filing of a claim for malicious prosecution based on the adding of a party defendant to a civil suit.

**6. Which statute of limitations applies to the enforcement of foreign judgments?**

Florida's Supreme Court in *Patrick v. Hess*, 212 So. 3d 1039 (Fla. 2017), held that the 20-year statute of limitations set forth in section 95.11(1), Florida Statutes (2012), applies to foreign judgments once they are recorded under the Florida Enforcement of Foreign Judgments Act.

**7. Must a plaintiff disclose that an attorney referred him/her to a physician? Must a law firm produce documents evidencing a possible referral relationship with its client's treating doctors?**

In *Worley v. Central Florida Young Men's Christian Ass'n*, 42 Fla. L. Weekly S443 (Fla. April 13, 2017), the Supreme Court held that the attorney-client privilege protects a plaintiff from disclosing that an attorney referred him or her to a doctor for treatment. By the same token, the attorney-client privilege allows the law firm representing the plaintiff to decline to produce documents related to a possible referral relationship between the firm and its client's treating physician.

## FIRST DISTRICT DECISIONS

**8. What type of improper closing arguments warrant a new trial?**

In *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674 (Fla. 1st DCA 2017), the First District concluded that a new trial was required because plaintiff's counsel's improper arguments were so highly prejudicial and inflammatory that they denied defendant its right to a fair trial. The improper arguments included suggesting that the defendant was not accepting responsibility, characterizing the defense as a scheme to deceive the jury, and disparaging the defendant for defending itself.

**9. When is a supermarket entitled to summary judgment in a trip and fall case?**

The First District in *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129 (Fla. 1st DCA 2017), affirmed the trial court's summary judgment for the defendant supermarket where the plaintiff tripped over a pallet which he had previously seen and walked around. The district court determined that the defendant did not owe a duty to warn the plaintiff of the open and obvious condition since the defendant's knowledge of the condition was not superior to that of plaintiff. Additionally, the defendant did not breach its duty to maintain the premises in a reasonably safe condition because the condition was open and obvious and not inherently dangerous. Moreover, even if the pallet's location was dangerous, the court found that it was so open and obvious, and previously observed by the plaintiff, that the defendant could reasonably have expected the plaintiff to protect himself from the allegedly dangerous condition.

## SECOND DISTRICT DECISIONS

**10. Is a claim for negligent security and supervision arising from the sexual assault of a hospital patient subject to the presuit notice requirements of Florida's Medical Malpractice Act?**

In *St. Joseph's Hospital, Inc. v. Doe*, 208 So. 3d 1200 (Fla. 2d DCA 2017), the Second District held that the trial court did not depart from the essential requirements of law by denying the defendant hospital's motion for summary judgment based on the plaintiff's failure to comply with the medical malpractice presuit notice requirements. The plaintiff's claims for negligent supervision and negligent security alleging that she was sexually assaulted in her room by a hospital employee while she was a mental health patient at the hospital did not involve the rendering of medical care or services.

**11. Do general allegations satisfying the minimal jurisdictional amount render damages liquidated, thereby eliminating the need for an evidentiary hearing on damages after a default?**

The Second District in *Premise, Inc. v. Withlacoochee River Electric Cooperative, Inc.*, 215 So. 3d 123 (Fla. 2d DCA 2017). (Fla. 2d DCA 2017), found that the trial court erred in entering a default judgment awarding damages without an evidentiary hearing where the damages were unliquidated. The assertion in the complaint that "damages are at a minimum" is inconsistent with the subsequent assertion that the trial court can determine liquidated damages without a hearing. The defaulting defendant was therefore entitled to notice of the required hearing on damages.

## THIRD DISTRICT DECISIONS

**12. Is a driver's intoxication relevant to both compensatory and punitive damages?**

The Third District in *Geico General Insurance Co. v. Dixon*, 209 So. 3d 77 (Fla. 3d DCA 2017), held that the trial court erred in admitting evidence and permitting argument regarding the uninsured motorist's intoxication at the time of the accident in the compensatory damages phase of the trial. The defendant uninsured motorist insurer and defendant uninsured motorist admitted liability and the damages trial was bifurcated

into the compensatory and punitive damages phases, thereby rendering the intoxication issue irrelevant in the compensatory damages phase.

**13. May constructive notice be proven in a slip and fall case simply because the soup on which the plaintiff stepped on was cold?**

The district court in *Wilson-Greene v. City of Miami*, 208 So. 3d 1271 (Fla. 3d DCA 2017), found that the trial court did not err in entering summary judgment in favor of the defendant owner of a building and the defendant maintenance company where the plaintiff stepped in soup on the floor of the building lobby and there was no evidence that the defendants were on notice of the dangerous condition. In order for the jury to have found constructive notice simply because the soup was cold, the jury would have been required to impermissibly stack inferences.

**14. When may the rule permitting non-final order appeals be used to review sovereign immunity rulings?**

In *Miami-Dade County v. Pozos*, 42 Fla. L Weekly D418 (Fla. 3d DCA Feb. 15, 2017), the Third District dismissed an appeal filed pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(x), (xi) where the trial court failed to determine that, as a matter of law, the defendant county was not entitled to sovereign immunity.

**15. Must a defendant disclose its non-party guests' names and contact information?**

The Third District in *Josifov v. Kamal-Hashmat*, 42 Fla. L. Weekly D789 (Fla. 3d DCA April 5, 2017), quashed the trial court's order compelling disclosure of the names and contact information of non-party guests of the defendant hotel who completed the hotel's guest survey. The guests' information was private and constitutionally protected.

## FOURTH DISTRICT DECISIONS

**16. Are venue selection clauses in LLC operating agreements enforceable?**

The Fourth District in *Powers v. Melick*, 211 So. 3d 122 (Fla. 4th DCA 2017), determined that the trial court erred in transferring venue from Martin County to Palm Beach County in a suit against a member of an LLC. The contractual venue clause in the LLC's operating agreement authorized the filing of an action against an individual member in any Florida state or federal court and provided that the parties expressly waived venue objections.

**17. When is it futile for a plaintiff to add a former third-party defendant as a new defendant?**

In *McCray v. Bellsouth Telecommunications, Inc.*, 213 So. 3d 938 (Fla. 4th DCA 2017), the Fourth District held that the trial court did not err in denying the plaintiff's motion to amend to add an additional defendant prior to trial where the proposed defendant was a third-party defendant until the third-party plaintiff voluntarily dismissed its complaint. Upon the dismissal of the third- party complaint, the trial court was divested in personam jurisdiction over the plaintiff's proposed new defendant and the statute of limitations had run as to that proposed defendant, thereby rendering the amendment of the complaint futile.

**18. May a claim for punitive damages be asserted when the plaintiff has alleged a claim for intentional inference with a business relationship?**

The district court in *Bistline v. Rogers*, 215 So. 3d 607 (Fla. 4th DCA 2017), found that merely pleading a facially sufficient claim for intentional interference with a business relationship does not automatically permit the pleading of a claim for punitive damages. Before granting leave to assert a claim for punitive damages, the trial court should have determined whether the plaintiff had established a reasonable evidentiary basis to recover punitive damages based on the alleged intentional conduct and whether there was a reasonable evidentiary showing that the conduct rose to the level of culpability sufficient to support punitive damages. Certiorari was therefore granted to quash the trial court's order granting the plaintiff's motion to amend to assert claims for punitive damages.

**19. Are section 57.105(7) fees permitted when standing to sue under the contract was successfully challenged?**

The Fourth District court in *Nationstar Mortgage LLC v. Glass*, 42 Fla. L. Weekly D815 (Fla. 4th DCA April 12, 2017), found that the reciprocity of attorney's fees provision under section 57.105(7) could not be used as a basis for claiming attorney's fees under a contract where the contractually-based suit was dismissed for lack of standing. Simply put, the movant failed to establish that the parties to the suit were also parties to the contract containing the fee provision.

## FIFTH DISTRICT DECISIONS

**20. Should expert testimony that is not disclosed until opening statements be excluded?**

The Fifth District in *Doctors Co. v. Plummer*, 210 So. 3d 711 (Fla. 5th DCA 2017), found that the trial court

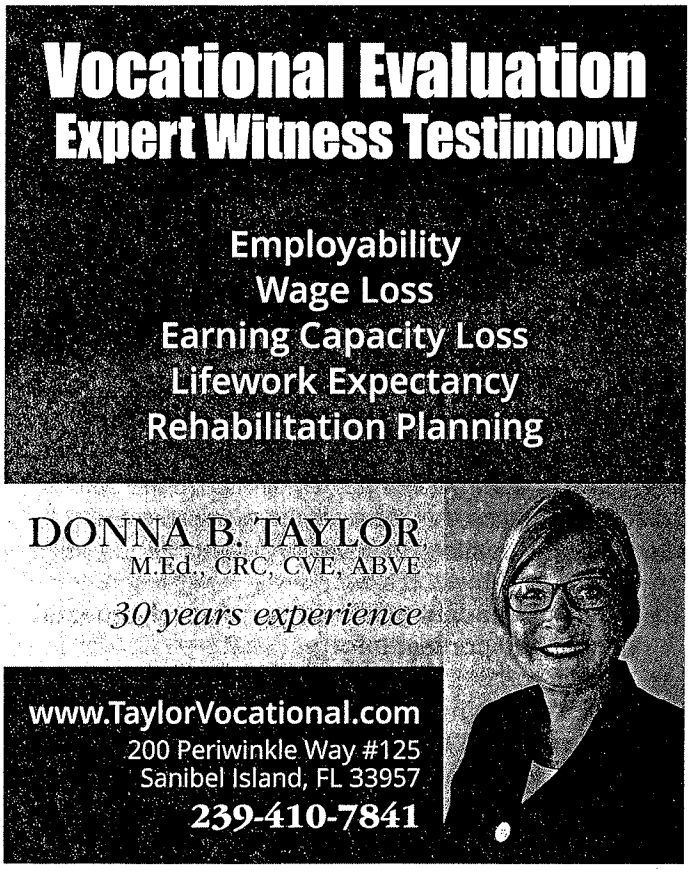
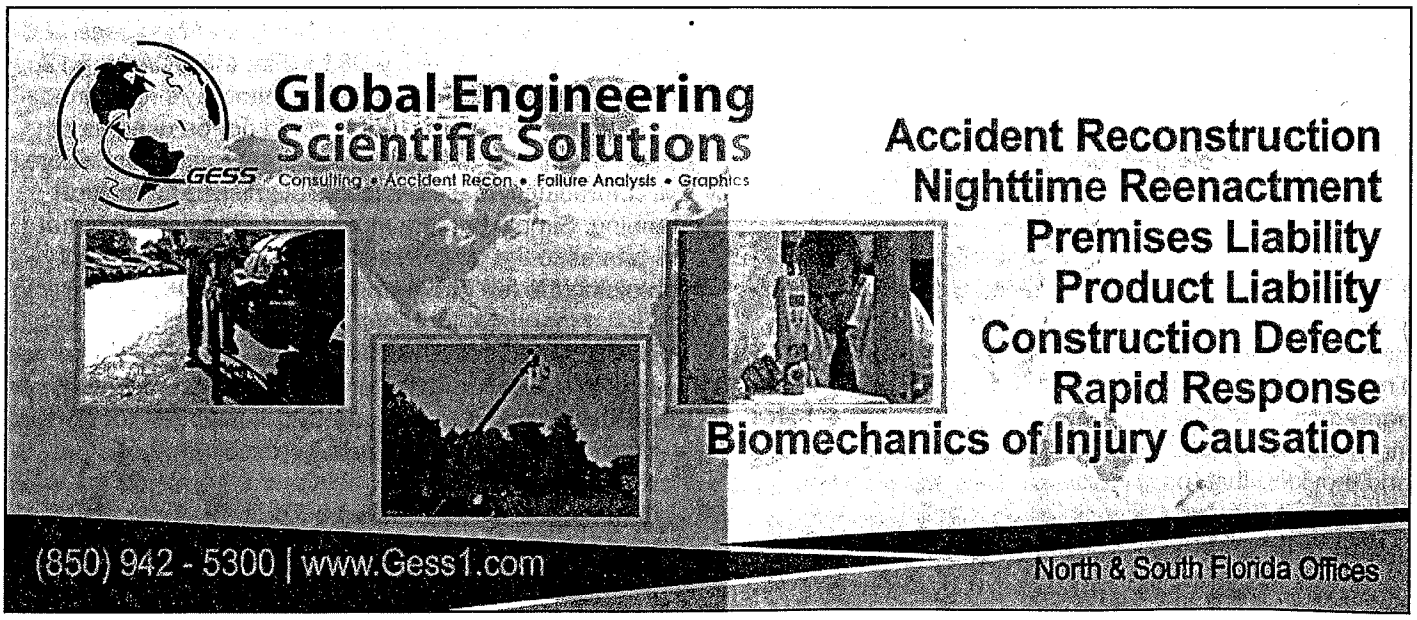
erred in admitting argument and surprise testimony of plaintiff's expert witnesses that defendant had negligently provided decedent with samples of a drug without following the manufacturer's instructions. Plaintiff had not disclosed his intention to present such evidence until opening statements.

**21. Does excusable neglect extend the 30-day deadline of Rule 1.525?**

In *Hovercraft of South Florida, LLC v. Reynolds*, 211 So. 3d 1073 (Fla. 5th DCA 2017), the Fifth District held that the trial court erred in awarding attorney's fees to the prevailing parties where they failed to file their motion for attorney's fees within 30 days after the final judgment which stated that the court reserved jurisdiction to determine attorney's fees and costs. Purported excusable neglect may not be used to circumvent the 30-day window under Florida Rule of Civil Procedure 1.525.

**22. Is a judge's recusal required where he and the petitioner represented opposing parties 10 years earlier?**

The district court in *Shapiro v. Craig*, 210 So. 3d 782 (Fla. 5th DCA 2017), required the disqualification of the trial judge who allegedly previously represented the non-movant and participated in a case in which the petitioner and judge represented opposing parties in contentious litigation 10 years earlier. The reviewing court agreed that petitioner had a well-founded fear that he would not receive a fair trial.

**23. May an order striking expert witnesses be reviewed via certiorari?**

The Fifth District in *Rhoades v. Rodriguez*, 212 So. 3d 1140 (Fla. 5th DCA 2017), denied a petition for writ of certiorari seeking review of the trial court's order striking the petitioner's expert witnesses because post-judgment appellate relief is available.