# TERRY'S TAKES

## June 11-17, 2023

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## Eleventh Circuit Court of Appeals

### Consumer Financial Protection Bureau v. Brown

**11th Circuit Court of Appeals**
**6/12/23, Judge Branch**
**Topics: Corporate Representative Deposition; Sanctions**

This is not a personal injury case, but it deals with an issue that comes up in most personal injury cases: the deposition of a defendant's corporate representative.

Judge Branch began her opinion with the admonishment that the Consumer Financial Protection Bureau is not exempt from the rules of discovery. The judge stated that the CFPB "tried to bring a wide-ranging civil lawsuit against 19 defendants without ever being deposed. When the district court ordered the CFPB to sit for Rule 30(b)(6) depositions, the CFPB doubled down by engaging in dramatic abuse of the discovery process" that incurred sanctions, and the Eleventh Circuit affirmed the sanctions.

During discovery, the defendants tried to use a 30(b)(6) depo (which does apply to government agencies) to "uncover the factual bases for the CFPB's claims against them." The CFPB fought against the depo by arguing that 1) it had already provided the information in interrogatory responses; 2) some of the topics involved law enforcement and deliberative process privilege; and 3) the deposition was an improper attempt to uncover the mental impressions and analyses of counsel.

The district judge overruled the objections, holding that factual matters are subject to inquiry even if those matters have been disclosed in interrogatory responses.

CFPB then moved for a protective order relying on the already-rejected arguments. The district court granted the motion in part, clarifying that facts including exculpatory facts could be asked about, but that CFPB's trial strategy was off limits.

During the first 30(b)(6) depo, CFPB's representative lodged 70 work product objections to questions about facts. It even maintained that the identity of witnesses were protected by work product. Most of the objections were accompanied by instructions from the attorney to the corporate rep to refrain from answering the questions.

Also, CFPB equipped its corporate rep with lawyer-prepared scripts that were hundreds of pages in length. The lawyer called them "memory aids." In response to a single question, the corporate rep read from his "memory aid" for 40 minutes, took a break, read for 18 minutes more, and then the parties stipulated that he had planned to read for 93 more pages. The court called this a "filibuster-style" tactic, and it occurred several times during the deposition. And when the deposing attorney objected, CFPB's lawyer insisted that the witnesses needed to finish the answer and that "maybe it will be [responsive.]"

Third, CFPB took the position that though it had to divulge exculpatory facts, it had not identified any exculpatory facts.

Despite a hearing with the judge, CFPB continued the same sort of obstructionist conduct during the next four depositions. (The multiple depos were due to the number of defendants).

Defendants filed a motion for sanctions under Rule 37 for contumacious conduct. Rule 37(b) pertains to failure to obey a discovery order. Rule 37(d) pertains to failure of a corporate rep to appear for deposition. Potential sanctions under the rules permitted striking pleadings in whole or in part. The district court found the defiance of the discovery order to be "willful," and the judge also found that despite physically appearing, the rep's refusal to answer questions beyond reading memory aids and refusal to address exculpatory evidence was essentially a constructive failure to appear.

Because CFPB's conduct was egregious, and the Court was not optimistic that further depos would be fruitful, the judge struck all claims against the complaining defendants and dismissed them from the case.

CFPB appealed. The Eleventh Circuit noted that the standard was abuse of discretion, and that discretion is "wide." If the district court applies an incorrect legal standard, fails to follow the appropriate procedures when making the relevant determination, or makes findings of fact that are clearly erroneous, it abuses its discretion. A factual finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The court did not reach the question about whether sanctions for non-appearance can be imposed under the constructive non-appearance approach of the district court. The case was resolved solely on the 37(b) failure to obey a discovery order. There was a discovery order, a clarifying order in response to the motion for protective order, and a phone hearing after the first deposition but before the other four depositions. The district judge's order was clear. Sanctions were appropriate.

In regard to whether the most severe sanction—dismissal of the case with respect to the five affected defendants—dismissal is okay if the party's conduct amounts to a flagrant disregard and willful disobedience of the discovery order. A district court must always assess whether lesser sanctions would suffice, but the court held that the finding need not be express when the rest of its analysis makes that finding obvious. Here, the court found that in light of the pattern of misconduct, the court was not optimistic that reopening the depositions would be fruitful. That satisfies the requirement that the possibility of lesser sanctions be addressed.

AFFIRMED.
https://media.ca11.uscourts.gov/opinions/pub/files/202111340.pdf

## Cordero v. Transamerica Annuity Service Corporation

**11th Circuit Court of Appeals**
**6/16/23, Per Curiam (Wilson, Rosenbaum, and Conway)**
**Topics: Adult Protective Services Act; Structured Settlement; Vulnerable Adult**

Briefly, this opinion is mentioned to expose readers to a few unusual statues that may touch on a practitioner's personal injury practice.

Cordero, the plaintiff, was a childhood victim of lead poisoning. He was assigned rights to nearly one million dollars in structured settlement payment. Through six transfer agreements that he lacked the capacity to understand, he assigned his rights to his settlement payments to "factoring companies for pennies on the dollar." In exchange for a one-time lump sum payment of $268,130, he forfeit his right to the value of $959,834.42, which would have been paid out in monthly installments over 26 years.

Florida's Structured Settlement Protection Act ("SSPA") is found under section 627.99296(3)(a). That part of the act provides that a structured settlement payment rights transfer is only effective if the transfer is authorized in advance in a final order by a court of competent jurisdiction. Florida state courts approved the assignments in this case, finding, among other things, that the assignments were in Cordero's best interest. Only the factoring companies were represented at these hearings.

After burning through the money, Cordero tried to sue about the assignments. Instead of suing the factoring companies or attempting to void the assignments, he sued two companies that issues and funded his monthly payments prior to the assignment. Specifically, he brought a breach of contract claim under New York law, and he also brought a claim for exploitation of a vulnerable adult under Florida's Adult Protective Services Act ("FAPSA"), section 415.1111, Fla. Stat.

The Southern District of Florida dismissed the claims with prejudice. Cordero appealed, and the Eleventh Circuit submitted a certified question to the New York Court of Appeals. The result of that process was that New York confirmed that there is no cause of action in New York for breach of an implied covenant to object to the assignments.

In regard to the FAPSA claim, to show exploitation, one must alleged the "intent" to deprive the vulnerable adult of his funds, assets, or property, but because the complaint only alleged that the businesses in question "allowed" or "facilitated" the assignment and did not allege that those companies intended to take his assets, there was no proper claim of exploitation.

The basis for dismissing with prejudice as opposed to without prejudice is not clear from the opinion. After all, if the companies in question got to keep some or all of the approximately $700,000 at issue, it does not seem like massaging the language in the complaint to allege that their participation was an "intentional" deprivation would be difficult. In a footnote, the Court stated that the facts of the case "are truly troubling. They describe a situation where it appears an industry is able to **systematically victimize individuals** who are not in a position to protect themselves." How opportunity to amend can be denied where the court finds that there is a systematic victimization and all that is required is the allegation of an "intent" to deprive is almost as "truly troubling" as the original victimization. Looking back at the district court's opinion, the dismissal with prejudice appears to have been granted because the court held that in addition to there being no fiduciary duty by the companies to Mr. Cordero, the agreement required that New York law govern the case, and the FAPSA claim was a Florida claim. But that opinion appears to be incorrect, and the appellate court seems to have subtly rejected it. While the settlement agreement may have to be interpreted under New York law, that would not bar free-standing Florida statutory tort claims that do not arise out of the agreement. In a footnote, the Eleventh Circuit noted that it was free to affirm for any reason supported by the

record, even if not relied upon by the district court. (This is what, in Florida, is referred to as the "Tipsy Coachman" doctrine). But the problem is that while the district's rationale would lead to the conclusion that the Florida claim could never be amended enough to turn it into a New York cause of action, a simple defect in the element of "intent"—especially in light of the court's comment about a systematic victimization—is 100% something that could be fixed by an amendment to the complaint, making leave to amend appropriate. But the court affirmed the remedy without any further discussion of why the dismissal was with prejudice.
https://media.ca11.uscourts.gov/opinions/pub/files/202111340.pdf

# Supreme Court of Florida

## Coates v. R.J. Reynolds Tobacco Company

**Supreme Court of the United States**
**6/15/23, Justice Grosshans**
**Topics: Attorneys Fees; Offer of Judgment**

The Supreme Court of Florida has unequivocally held that section 768.79, Fla. Stat. (2022), the offer-of-judgment statute, is not a prevailing-party statute.

Coates sued R.J. Reynolds for wrongful death of her sister, a former smoker. Before trial, Coates served RJR with two Proposals for Settlement ("PFSs"). The first was for $75,000, and the second was for $749,000. RJR did not accept either.

At trial, a jury awarded $300,000 in compensatory damages and $16,000,000 in punitive damages. The trial court reduced the compensatory damages based on a 50/50 comparative fault (so, $150,000). The trial court kept the punitive damages.

In the first appeal, the 5th DCA reversed the punitive damages as excessive. Reviewing the certified question of great public importance, the January 5, 2023 opinion, by the Supreme Court of Florida, clarified how punitive damages are handled, applying a strong presumption that punitives in excess of a 3:1 ratio are excessive.

Coates had a motion for attorney's fees pending at the Supreme Court of Florida. RJR prevailed in the appeal. The punitives were slashed from $16,000,000 to $460,000. But the question was whether Coates had to prevail in the ***appeal*** or just prevail in the ***case*** as a whole in terms of the PFS.

If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. These awards are called "penalties" under the statute. And the statute expressly allows defendants to collect attorney's fees from *plaintiffs who prevail* if those plaintiff's do not beat a defendant's settlement offer by 75%. Thus, the statute is not a prevailing-party statute at all. In other words, even though Coates lost the appeal, she could win fees and costs for the appeal if she satisfies the PFS for the whole case.

The Court rejected RJR's argument that the ruling encourages frivolous appeals. The court did caution that the statute only allows "reasonable" fees, and that the trial judge is supposed to consider a "nonexhaustive list of factors including the merit of the clam, the closeness of questions of fact and law, and the amount of additional delay if litigation is prolonged." The Court stated that nothing in the opinion prevents a party from challenging the "reasonableness of fees by raising all relevant factors—including the frivolous nature of the appeal. However, we decline to hold that the outcome of an appeal is entirely dispositive as to the reasonableness of the appellate fees incurred."

In light of the fact that Coates obtained a judgment that had been affirmed in part, the court provisionally granted her motion for reasonable appellate attorney's fees. The amount is conditioned on the trial court finding, at the end of the case, that Coates is entitled to fees under a valid PFS.
https://supremecourt.flcourts.gov/content/download/871058/opinion/sc2021-0175.pdf

# First DCA

## Retherford v. Kirkland

**1st DCA**
**6/14/23, Judge Roberts**
**Topics: Motion to Quash Service; Personal Jurisdiction; Service of Process**

After the personal and business relationship of two individuals soured, Ms. Retherford sued Mr. Kirkland to attempt to walk away with their shared business. Mr. Kirkland was sued in Bay County, Florida, and service of process was given to his adult daughter at a friend's home in Santa Rosa Beach, Florida.

Mr. Kirkland moved to dismiss or change the venue to Alabama, where he lived. The motion ***did not take issue*** with the manner of service of process.

Four months later, Mr. Kirkland filed a motion to dismiss for improper service and motion for abatement of action for dismissal of lack of personal jurisdiction. The motion argued that substituted service on his daughter because he was a resident of Alabama, the address was not his usual place of abode, and his daughter was not a resident of that address, either. Ms. Retherford argued that service was proper but also that Mr. Kirkland waived the defense by failing to raise it in his first motion to dismiss.

The trial court granted the motion to dismiss for improper service and quashed service. Ms. Retherford appealed.

The DCA found that Mr. Kirkland waived his defense of improper service by failing to raise it in his first motion to dismiss. It did not matter that he amended the motion prior to the hearing. He waited 15 months to raise it. The DCA held that the "plain language of rule 1.140(g) provides for no" exception for curing waiver by amending the motion prior to the hearing. Under rules 1.140(g) and (h), when a party "makes a motion" under rule 1.140(b) and fails to join all rule 1.140(b) defenses then available to it, it cannot "thereafter make a motion" asserting the omitted defense and is deemed to have waived that defense. When a party fails to challenge personal jurisdiction or service in the first pleading, he cannot "thereafter make" another motion advancing it. The fact that [defendant] labeled

its second motion an "amended motion" and filed it prior to hearing on the original motion does not matter insofar as the rule as worded is concerned.

THERE IS A HUGE CAVEAT TO THIS. THE FIRST AND SECOND DISTRICTS FOLLOW THIS RULE, BUT BOTH THE SECOND DCA OPINION FOLLOWED BY THE FIRST DCA IN THIS CASE AND THE FIRST DCA OPINION

> acknowledged that the Third, Fourth, and Fifth Districts "have held that when a party files an amended motion under rule 1.140(b) before a hearing on an original motion under the rule, it may assert a previously omitted rule 1.140(b) defense in the amended motion and have it treated as timely." See Cepero v. Bank of N.Y. Mellon Tr. Co., N.A., 189 So. 3d 204, 206 (Fla. 4th DCA 2016); Snider v. Metcalfe, 157 So. 3d 422, 424–25 (Fla. 4th DCA 2015); Re-Emp. Servs, Ltd. v. Nat'l Loan Acquisitions Co., 969 So. 2d 467, 470 (Fla. 5th DCA 2007); Waxoyl, A.G. v. Taylor, Brion, Buker & Greene, 711 So. 2d 1251, 1254 (Fla. 3d DCA 1998).

Bizarrely, the DCA just states that the Third, Fourth, and Fifth Districts are wrong, but then the DCA did not go on to certify conflict. And amazingly, there was no motion for rehearing to seek certification of conflict and no attempt to take the case to the Supreme Court of Florida. The mandate issued on July 3, 2023, and the case was closed. The DCA REVERSED AND REMANDED for further proceedings.
https://supremecourt.flcourts.gov/content/download/870955/opinion/download%3FdocumentVersionID=60f87ed4-64b6-4b9e-84ea-2c87580cc38b

# Second DCA

## Petzold v. Castro

**2nd DCA**
**6/16/23, Judge Khouzam**
**Topics: Attorney-Client Privilege; Discovery; Writ of Certiorari**

Mr. and Mrs. Castro moved to compel discovery from the Petzolds. The underlying litigation involved claims for breach of contract for sale of real property and fraud in the inducement. As part of the Petzold's summary judgment motion, they included an email between Mr. Castro and the Petzold's former attorney (Attorney Overfield) and then a follow-up between Ms. Petzold and Attorney Overfield and the attorney's conversation with Ms. Castro and advice about the timing of mediation and related litigation strategy. The email did not address the substance of the case.

In response, the Castros sought in discovery copies of all emails between the Petzolds and Attorney Overfield or her office, all communications with the Petzold's current attorney (Attorney Sellars), and all communications with any other attorney regarding the case. The Petzoids, of course, objected based on attorney-client privilege, but the Castros responded that the Petzoids **waived all attorney-client privilege** with respect to the entire case by including the emails from their former attorney as summary judgment exhibits. The Castros added that the Petzoids could not claim that the disclosure was inadvertent because they never asserted privilege under Rule 1.285(a) for inadvertently disclosed attorney-client privileged materials and they had used the email as an exhibit.

The current attorney, Attorney Sellars, took full responsibility and stated that his clients had not instructed him to use the email and that it was inadvertently included because it had nothing to do with the claims in the case and was not being relied on as evidence. He did not use the Rule 1.285 process to try to protect the inadvertently disclosed email because he said he did not care about the material that was actually disclosed. There was nothing harmful in the email, and he did not think it would open the door to an attempt to compel further non-disclosed communications.

The trial court granted the motion to compel, and the Petzoids filed a petition for a petition for writ of certiorari. The DCA recited the test of 1) harm that causes a) material injury throughout the remainder of the proceedings below that b) cannot be effectively remedied on appeal and 2) that the trial court's order constitutes a departure from the essential requirements of law.

The DCA agreed that an order compelling disclosure of privileged material meets the test for irreparable harm. The DCA also agreed that the order to compel departed from the essential requirements of law based on the findings that the disclosure was 1) inadvertent; 2) it was only a single email; 3) and the email bore upon no substantive issues in the case. Under such circumstances, the waiver could not be seen as voluntary. Inadvertent disclosure does not constitute a waiver of attorney-client privilege.

The DCA recognized that Rule 1.285(a) provides only 10 days to assert protection over inadvertently disclosed privileged material, but the only thing forfeit here was the privilege over the single disclosed email, not other non-disclosed emails.

The "selective disclosure" doctrine forbidding parties from disclosing the privileged stuff that helps their case (a metaphorical sword) and then hiding behind privilege (a metaphorical shield) to decline to disclose privileged material that may rebut the disclosed materials or otherwise harm their case does not apply because the disclosed email "does not pertain to any substantive issue in the case, and—unsurprisingly—the Petsolds did not rely on it in any way. Under these circumstances, it cannot be said that its disclosure was self-serving or that the privilege was being used as a sword." The petition was GRANTED, and the discovery order was QUASHED.
https://supremecourt.flcourts.gov/content/download/871160/opinion/224024_DC03_06162023_092253_i.pdf

# Fourth DCA

## DeSanto v. Grahn

**4th DCA**
**6/14/23, Per Curiam (C.J. Klingensmith and Judges May and Ciklin)**
**Topics: Malpractice (Legal); Punitive Damages**

Richard John DeSanto is a disbarred attorney. He was sued by former clients, and the trial court allowed those clients to add a claim for punitive damages. Section 768.72(1), Fla. Stat. and rule 1.190(f) permit punitive damages claims only where the plaintiff presents the trial court with a "reasonable showing by **evidence in the record or proffered** by the claimant which would provide a reasonable basis for recovery of" punitive damages. The trial court allowed the claim, and DeSanto appealed. An order granting or denying a claim for punitive damages is one of the non-final orders that can be immediately appealed prior to an entry of final judgment.

The parties disagreed about the meaning of the word "proffered" in the above statutory language. DeSanto argued that a proffer has to consist of evidence, not just allegations. The former clients, however, argue that showing actual evidence is not necessary under the statute and that they can show "either evidence or anticipated evidence."

The DCA sided with Mr. DeSanto. Caselaw states that pleadings alone cannot form an evidentiary basis for punitive damages. Whether the evidence is "in the record" or merely "proffered," it still has to qualify as "evidence." (NOTE: One wonders how, under this reading, any evidence proffered by a plaintiff would not then be "in the record."). The attachment to the motion to amend the pleadings to add the claim of punitive damages was not accompanied by any record evidence, was not verified, and did not attach any affidavits. What the former clients *did* attach was the record of the disbarment proceedings wherein the Bar found that the attorney committed acts that might trigger a right to punitive damages, but those acts were committed against a *different* client, not the plaintiffs. The implication is that the attorney did these thing to the plaintiffs, too, but no evidence was submitted that substantiated that. The DCA held that without requiring actual evidence of outrageous conduct, a trial court cannot effectively act as a gatekeeper against meritless punitive damages claims. REVERSED AND REMANDED.
https://supremecourt.flcourts.gov/content/download/870978/opinion/222701_DC13_06142023_101608_i.pdf

## Serrano v. Dickinson

**4th DCA**
**6/14/23, Judge Gross**
**Topics: Intervening Cause; Proximate Cause; Summary Judgment Standard**

A good outcome for a plaintiff! This case arises out of two accidents that occurred within a short time on a rainy afternoon on the Florida Turnpike. Defendant Dickinson lost control of her Jeep, which collided with the median barrier and came to rest in the middle of the two southbound lanes. An off-duty cop stopped to help. Dickinson smelled smoke and oil and decided to walk across the road to the right median.

As cars and trucks slowed or stopped because they saw the jeep, one semi-truck slowed to a stop, but another semi-truck apparently didn't notice and plowed into the back of the first semi after braking only at the last second. That rear offender's semi jackknifed, and a backhoe loader that it was hauling fell off of the truck and landed on top of a Plaintiff Clark's Camaro. Plaintiff had stopped her car on the highway after seeing the Jeep accident ahead. Plaintiff Clark suffered a shattered ankle and other injuries. About 90 seconds elapsed between the Jeep striking the median and the real semi rear-ending the front semi.

Plaintiff Clark sued the driver of the jeep for negligence and because she was apparently on the clock, she sued her employer for vicarious liability. Plaintiff Clark also sued the rear-offender semi-truck driver (Mr. Serrano) for negligence and his employer, Central Florida Equipment Rentals, Inc. ("CFER") for vicarious liability and negligent failure to maintain the semi truck (due, apparently, to the possibility that something faulty about the brakes made it impossible for the driver to stop).

The Jeep driver's employer (Biomet) moved for summary judgment, arguing that the backhoe falling onto Plaintiff's Camaro was not really the Jeep driver's fault. Biomet argued that the rear-offender trucker's own negligence or the poor condition/negligent maintenance of the semi itself (if

the driver was unable to brake) were independent and intervening causes of the plaintiff's injuries that were not the responsibility of the Jeep driver. Naturally, the Jeep driver joined her employer's motion.

The trial court sided with the Jeep driver and her employer, finding, at the summary judgment phase, that there was enough separation in time between the Jeep ramming the median and Serrano rear-ending the semi that the semi-truck accident (the second accident) was an intervening cause that broke the chain of causation between the Jeep driver's own negligence and the injury resulting from the backhoe falling onto Plaintiff's Camaro.

The Plaintiff appealed. The DCA notes that intervening cause is something that "absolves a negligent actor of liability," and the doctrine is "conceptually tied into the proximate cause element of negligence." Proximate cause is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. Harm is proximate if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question. It is not necessary, however, that the initial tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur. And the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve. The judge can take the issue from the jury only where the facts are unequivocal and the evidence supports only one reasonable inference. Where reasonable persons could differ as to whether the specific injury was genuinely foreseeable or merely an improbable freak, resolution must be left to the fact-finder.

Intervening cause extinguishes an original tortfeasor's liability only where the intervening cause is completely independent of, and not in any way set in motion by, the original negligence. If an intervening cause is foreseeable, the original negligent actor may still be held liable. The question of whether an intervening cause is foreseeable is a question for the trier of fact. Whether an intervening cause was foreseeable to the original tortfeasor turns on whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct.

Here, the relevant question was whether the subsequent accident (the semi rear-end accident) was the type of harm that may be expected from a stationary vehicle blocking lanes on an expressway or an interstate highway? And the DCA stated that the answer, well-established by case law, is yes. After going through case after case essentially saying that subsequent accidents foreseeably arise from an initial car accident, the summary judgment order was REVERSED AND REMANDED.

But one final note of EXTREME INTEREST to personal injury lawyers is WHAT was deemed foreseeable in the eyes of the DCA in that it creates, in *dicta* at least, a somewhat surprising laundry list of **foreseeable** byproducts of an original traffic accident.

> On an expressway or interstate highway, with no stop lights or stop signs and the potential for **highway hypnosis**, a **driver's inattention can arise from a multitude of causes**, including using a **cell phone**, **changing radio stations**, **falling asleep**, or **dealing with children fighting in the backseat**. Because ***such inattention is a foreseeable cause of a collision with a stopped vehicle on an expressway***, the law permits the conclusion that Dickinson's conduct set in motion a chain of events resulting in injury to the plaintiff.

At least in *dicta*, this seems for foreclose intervening-cause defenses and may even have comparative negligence implications for subsequent or second defendants in multi-car pileups where the fact that a second driver was, for instance, texting while driving, will not shift all liability away from the first tortfeasor.

The majority also added that under the Supreme Court of Florida's holding in McCain v. Fla. Power Corp., 593 So. 2d 500 (Fla. 1992), which is relied on throughout the opinion, the test of foreseeability does not require a defendant to foresee exactly *how* an accident will unfold. The law does not require an absurd degree of specificity. As the McCain court explained, "it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent." McCain, 593 So. 2d at 503.

CHIEF JUDGE KLINGENSMITH CONCURRED SPECIALLY with a single paragraph, noting that while the outcome was correct in this case, he questioned the viability of Cooke v. Nationwide Mutual Fire Insurance Co., 14 So. 3d 1192, 1193, 1197 (Fla. 1st DCA 2009), a case relied upon by the majority, because of the new summary judgment standard. Cooke had a similar holding, but in that case, the second accident occurred despite a cop setting out road flares warning of an accident scene. That accident had occurred over an ***hour*** prior to the second accident. Chief Judge Klingensmith notes, "A long time interval between an initial roadway accident and a subsequent mishap might well justify a judicial finding of the existence of an intervening cause," but the gap in this case was only 90 seconds and they were all reacting to the Jeep's accident in real time, not an hour later after road flares were set out to warn drivers.
https://supremecourt.flcourts.gov/content/download/870974/opinion/220742_DC13_06142023_100641_i.pdf

# Fifth DCA

## Autoquotes (Florida), Inc. v. Albright

**5th DCA**
**6/16/23, Per Curiam (Boatwright, Kilbane, and Pratt)**
**Topics: Attorney's Fees; Costs; Non-Final Orders**

At the conclusion of litigation, both parties appealed the merits of the case. In a separate appeal that traveled together with the appeal of the substantive final order, Autoquotes appealed the trial court's attorney's fee and costs order. Unfortunately for Autoquotes, however, the order was not appealable. The order denied Autoquotes' own motion for fees and costs and granted Albright entitlement to fees and costs. The order reserved on the amount of those fees and costs, however.

An award of fees does not become final and appealable until the amount is set by the trial court. It is a non-final, non-appealable order, and the DCA lacks jurisdiction to review it. DISMISSED.
https://supremecourt.flcourts.gov/content/download/871131/opinion/230105_DC05_06162023_083145_i.pdf