# TERRY'S TAKES

## June 18-24, 2023

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## Announcements

On September 11, 2023, the Third and Fourth DCAs will transition away from the near-perfect E-DCA and move to the objectively awful ACIS system. Enjoy having easy access to case documents get a bit exciting and complicated again!!

## Eleventh Circuit Court of Appeals

### American Builders Insurance Company v. Southern-Owners Insurance Company

**11th Circuit Court of Appeals**
**6/20/23, Judge Marcus**
**Topics: Preservation; Summary Judgment Standard**

This is a rehearing from an opinion concerning bad faith and an insurance company's obligation to pursue settlement. The Eleventh Circuit granted rehearing to change one thing about its opinion, and it's very much a good thing—in theory. Just not in this case.

In the January opinion, the court rejected the claim that the trial court erred in denying summary judgment. The claim was not re-raised in a post-trial motion. The panel stated that even if the issue was a pure issue of law, any challenge to a denial of summary judgment cannot be raised on appeal after a jury trial. The United States Supreme Court, however, in Dupree v. Younger, 143 S. Ct. 1382 (2023), made it clear "that arguments denied at summary judgment are appealable after a trial on the merits if they raise 'purely legal issues.'" The factual issues are extinguished by the jury considering the facts, but the pure issues of law do not need to be re-preserved by a post-trial motion because the issue of law was never considered by the jury and the argument about the issue of law was already rejected by the judge. Because they are issues of pure law unaffected by development of the facts at trial, there is "no benefit" to having a district court pass on the same question again in order to preserve it.

That said, the Eleventh Circuit really, really, really did not want to review the merits of this issue that Southern-Owners despite it looking enough like a "pure issue of law" back in January that they expressly stated in that opinion that even a pure issue of law from a denied summary judgment motion cannot be argued on appeal.

In the panel's view, Southern-Owners' argument that a policy provision excluded coverage for bodily injury was not argued as a purely legal issue, so they don't have to apply the Supreme Court's new case. Now the panel says that Southern-Owners relied in their summary judgment motion on facts to establish that Guthrie, the injured person, was in the scope of his employment, and summary judgment was denied based on the existence of a genuine issue of material fact, not a purely legal policy exclusion.

The Eleventh Circuit notes that Southern-Owners never re-raised the argument in a post-trial motion. Because it "**potentially** relied on facts in dispute at summary judgment, it was presumptively unappealable without being re-raised in district court in a Rule 50 motion." In other words, the court just held the same thing again even though the ruling seems precluded by the court's own description of the Supreme Court's standard here. STILL AFFIRMED.
https://media.ca11.uscourts.gov/opinions/pub/files/202113496.reh.pdf

# Second DCA

## Goznar v. Goknar

**2nd DCA**
**6/23/23, Chief Judge Morris**
**Topics: Attorneys Fees; Inequitable Conduct Doctrine; Sanctions**

A brother and two sisters were involved in litigation over a family trust. An arbitration order instructed all parties to return $100,000 each to the trust, but the brother did not comply. The sisters filed a motion for contempt.

Thereafter, the trial court approved and adopted the arbitrator's order and also ordered the brother to return the $100,000 to the trust within 60 days. The judge reserved ruling on the motion for contempt. The brother defied the judge's order. The trial court put out an order to show cause and one of the sisters sought the brother's financial records to show he could pay the money back. Before a hearing, the brother repaid the money to the trust, but it was long after the 60-day mark.

The trial court still ordered the brother to produce the financial records, and after a hearing, the trial court still found the brother in contempt because he waited so long to pay. The judge also awarded fees to the sisters for having to litigate the matter.

Part of the fee award included amounts for litigating the appropriate AMOUNT of fees. In fact, the "vast majority" of the fees awarded were for time periods that came **after** the date of the order finding the brother in contempt (which was also after the date that he had repaid the trust). Awarding attorney's fees for time spent litigating over the appropriate amount of a fee award is termed "fees for fees." While litigating the AMOUNT of fees is not ordinarily something that can be awarded to the opposing party, the trial court held that it was awarding "fees for fees" under the inequitable conduct doctrine.

The inequitable conduct doctrine permits the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith. The doctrine is rarely applicable. It is reserved for those extreme cases where a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons. Before exercising its inherent authority to impose sanctions, a trial court must provide to the parties notice and an opportunity to be heard—including the opportunity to present witnesses and other evidence. Fees as sanctions must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees. And the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct. "Fees for fees" may be awarded where one party had exhibited an egregious recalcitrant and/or callous attitude.

The DCA held that there was a "notice" problem here, however, because the brother was never placed on notice that "fees for fees" might be awarded under the inequitable conduct doctrine. The motion for contempt never sought "fees for fees." The order of contempt did not specifically award "fees for fees." The DCA held that if "fees for fees" are imposed as a sanction under the inequitable conduct doctrine, the opposing party must be provided notice that such fees are being sought so he can decide to stop the bad conduct. (NOTE: This seems to make the inequitable conduct doctrine more like a 57.105 motion, where a "safe harbor" warning is required, not just notice that you are seeking fees for past conduct.)

Further, the trial court did not make sufficient findings for the DCA's taste. The trial court made sufficient findings to support fees as a sanction for the brother's behavior leading up to the contempt proceedings, but the trial court did not make specific findings as to why the brother should be further sanctioned by paying an award for litigating the amount of fees. In the final fee orders, the trial court found that the brother's "egregious, recalcitrant and/or callous attitude persisted even after" the court's contempt order "to a diminished degree," but the trial court did not elaborate. REVERSED IN PART AND REMANDED WITH INSTRUCTIONS TO OMIT "FEES FOR FEES" FROM THE ORDER.
https://supremecourt.flcourts.gov/content/download/871661/opinion/221407_DC08_06232023_080223_i.pdf

# Fourth DCA

## Napleton's North Palm Auto Park, Inc. v. Agosto

**4th DCA**
**6/21/23, Judge Forst**
**Topics: Punitive Damages**

Agosto and an unnamed fellow employee both worked at Napleton's North Palm Auto Park, a car dealership. The unnamed employee ("Employee") had a few alcoholic drinks at lunch. Later that evening, he drove his car into Agosto's parked car. The Employee was charged with a DUI and fired.

Agosto sued his employer for negligent hiring, retention, and supervision.

Agosto moved to add a claim for punitive damages, which required a reasonable showing through record or proffered evidence that a Dealership "managing agent" engaged in gross negligence. Agosto pointed to three events purportedly establishing the Dealership's knowledge of Employee's history of driving while intoxicated: (1) Employee's DUI conviction in 2006, twelve years before the Dealership hired him; (2) the Dealership's discipline of Employee in January 2020 based on another employee's suspicion that Employee was intoxicated while on the clock; and (3) the assistant service manager's observation that Employee was acting "off" and "loopy" on another occasion.

The trial court agreed that the employer had sufficient notice that the Employee had a drinking problem but took no real action, so the court permitted the addition of a punitive damage claim. The Dealership appealed the order permitting the punitive damage claim, which is indeed an appealable nonfinal order.

Section 782.72 requires the trial court to act as a gatekeeper to verify that there is reasonable evidence, not merely allegations, to show gross negligence.

Here, the judge improperly believed that it had to accept the pleadings as true, but the special punitive damages procedure actually requires the judge to be a factfinder and weigh the evidence.

Under section 768.72(3) and (3)(c), to stick an employer, principal, or corporation with punitive damages, there has to be evidence both that the tortfeasor employee/agent was grossly negligent ***and*** that the employer/principal/corporation was grossly negligent.

The Dealership argued that there was no reasonable evidence that the corporation engaged in conduct that was grossly negligent. When a corporation is involved—as it is here—the plaintiff must show that a "managing agent" of the corporation committed the acts in question. A "managing agent" must be more than mid-level management; it has to be someone of such seniority and statute within the corporation or business to have "ultimate decision-making authority for the company." Here, plaintiff identified three midlevel managers (the Dealership's platform manager, Employee's service manager, and Employee's assistant service manager who directly supervised Employee), but none of them were policymakers for the whole corporation.

Bizarrely, a "manager" who acts as an agent of the corporation is one of the types of people expressly excluded by case law as a "managing agent." Vice presidents who don't sit on the board aren't high enough. It has to be someone like a president or primary owner whose actions could be deemed to be acts of the corporation. (NOTE: This test seems completely at odds with the concept of negligent supervision. Negligent supervision is the LACK of an action. The FAILURE to do something. Apparently when the corporation gives full hiring/firing authority to someone to retain an obvious drunk, that negligent supervision of middle management cannot meet the test for gross negligence. The corporation is apparently allowed to hear nothing, see nothing, know nothing, and it can place all of its power in the hands of managers and then deny that a managing agent took specific bad actions. There is arguably a grossly negligent act, but the law as applied by the DCA prohibits the business from bearing responsibility for it.) REVERSED.
https://supremecourt.flcourts.gov/content/download/871467/opinion/222507_DC13_06212023_100551_i.pdf