**TERRY’S TAKES**

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

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**Eleventh Circuit**

Great Lakes Insurance SE v. Wave Cruiser LLC—J. Jill Pryor. Two insurance companies had a dispute about coverage. Specifically, a boat’s engine damage was only covered by second insurance policy if an “external event” caused the damage, and the district court granted summary judgment, ruling that the first insurer did not put forth any evidence of an external event. The case is significant, however, because which party had the burden of proving (or disproving) an external event came down to maritime law or New York state law. Because the Policy provided for marine insurance, it would normally give rise to admiralty jurisdiction. The contract’s choice-of-law clause specified that disputes should be adjudicated under any well-settled admiralty law, but that if there was no well-established admiralty law on point, the agreement would be interpreted under New York law. The threshold question was whether maritime law allows parties to contract out of applying maritime law via a choice-of-law clause. The Eleventh Circuit stated, “Our Circuit has never examined whether a **choice-of-law provision is enforceable under federal maritime law,** **making this a question of first impression**.” The court followed the Third and Fifth circuits in approving application of the choice-of-law clause, though it reserved the right in a future case to decline to apply a choice-of-law clause “if its enforcement would be unreasonable or unjust.” Because federal law did not answer the question on burden of proof, the court applied New York law and placed the burden on the first insurer to demonstrate the external event, which it failed to do. Summary judgment was affirmed.

Wade v. Daniels, et al—J. Wilson. Wade sued four employees of the sheriff’s office in DeKalb County, Georgia, under section 1983, alleging excessive force in his arrest. Police had pursued him after he murdered a child. The police had asked the mother of the dead child to meet with Wade, her boyfriend, so that they could apprehend him. They met in a car that parked in a parking lot. While police walked up on either side of the car in a parking lot, Wade had a shotgun pointed at his own chin, apparently suicidal. The mother of the child said that she was afraid, and police heard that comment via a cell phone they had planted in the back seat of the car. When Wade heard the police approaching, he looked at his girlfriend, but the shotgun remained pointed at his own chin. An officer shot Wade three times, one shot hitting him in the head. Wade dropped the shotgun, and collapsed in the set. The firing officer said, “I shot that motherfucker in the head,” and that “mother-fucker will die any [] minute.” Police removed Wade from the car. When he had trouble breathing due to blood in his mouth, a restraining officer kept pressure on his head and would not allow him to sit up, but he tried to do so anyway, and was pistol-whipped, chipping his tooth and lacerating his face. The Court found that there was no law clearly establishing that the shooting was unjustified in light of the violence of Wade’s crime, the fact that he was armed, and the fact that the mother of the child (in the passenger seat) said she was afraid. Thus, the firing officer was entitled to qualified immunity. In regard to the pistol-whipping, however, Wade announced he was trying to change position only because he could not breathe. He no longer presented a danger at that point, and officers were not entitled to qualified immunity for pistol-whipping him. The court found a Fourth and Fourteenth Amendment violation due to a four-minute delay in calling for an ambulance. Wade had been shot three times, and a jury could conclude that the four-minute delay evinced deliberate indifference to the harm of delaying medical care. “Here, the investigators provide no justification for why it took *eleven* investigators *four minutes* to call an ambulance when Beach had searched, handcuffed, and restrained Wade.” Even though Wade met his burden that the officers violated his Fourteenth Amendment rights, however, the court concluded that there was no established law on how long before officers must request medical care for a suspect that has been shot to constitute deliberate indifference, so the officers were entitled to qualified immunity.

**First DCA**

Alachua County School Board v. Barnes—J. Jay. Barnes sued the school board for alleged violations of the Florida Civil Rights Act and the Workers’ Compensation Law. The Board denied Barnes’ claims, arguing that she could not prove *prima facie* cases of discrimination and retaliation. In discovery, the Board sought the production of documents from non-parties concerning Barnes’ healthcare and employment histories. Barnes objected, arguing that the Board’s requests were too broad, were not reasonably calculated to lead to the discovery of admissible evidence, and violated her right to privacy. The trial court sustained Barnes’ objections. As to the Board’s requests for documents from Barnes’ medical and psychiatric care providers, the trial court ruled that it would review the responsive documents *in camera* and allow Barnes to propose a privilege log for each document before it was turned over. As to documents from Barnes’ current and former employers, the trial court ruled that the requests were overbroad, ordering the Board to narrow its request to seek only applications for employment, job descriptions, pay and benefit records, and time and attendance records. The Board challenged the order via a petition for certiorari. The court held that the Board failed to show how the trial court’s order, which provides for an *in camera* review of responsive documents and the opportunity for the Board to revise its subpoenas, “effectively eviscerates” the Board’s ability to defend against Barnes’ lawsuit. “Indeed, it is not yet known what documents the Board will ultimately receive. Thus, at this early stage, any alleged injury to the Board is far too remote and speculative to invoke this Court’s certiorari jurisdiction.”

Carlan v. Ashley (as Sheriff of Okaloosa County)—This is a citation PCA that reaffirms that negligence claims against a sheriff’s office alleging that deputies were negligent for failing to involuntarily commit a decedent under Florida’s Baker Act will be rejected (it was not specified whether it was a dismissal or summary judgment) because decisions about whether to Baker Act someone are a “category II function for which there is no duty of care under Trianon Park Condo. Ass’n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985)).”

Elwer v. Steinberg—the time for filing a notice of appeal of a final judgment on a single count of a complaint to quiet title was not tolled by a motion for rehearing. The order was an appealable nonfinal order, as it was an order on “the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve, or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment.” For all appealable nonfinal orders (listed under Rule 9.130), motions for rehearing are **not authorized**, and filing one will **not** toll the time for filing a notice of appeal.

**Second DCA**

DecisionHR USA, Inc. v. Mills—J. Labrit. DecisionHR filed a motion for protective order to prohibit the plaintiff from deposing their director and CEO. The trial court denied the motion (and would have permitted the depo), but DecisionHR filed a petition for certiorari, and the Second DCA granted the writ. In August 2021, the Supreme Court of Florida amended Fla. R. Civ. P. 1.280 to add subpart (h), which codifies the “**Apex Doctrine**.” That subpart of the rule states that a current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition if they lack unique, personal knowledge of the issues being litigated unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The deposition in this case was set prior to the effective date of the new rule, but the deposition was to occur after the rule change, the rule applies to pending cases, and the trial court departed from the essential requirements of law in not applying the rule.

Hull v. State—J. Labrit. A 2-1 opinion over J. Atkinson’s vigorous dissent. Applies a canon of construction called the “**recent controversy rule**.” This canon of construction states that when the court interprets a statute to say one thing, there is controversy, and the legislature amends the statute to command a different interpretation, the court can invoke the “recent controversy rule” to revisit its own prior decision and essentially apply the new amendment retroactively, not just prospectively, by concluding that it interpreted the statute incorrectly to begin with. J. Atkinson DISSENTED, arguing that amendments are prospective. The majority left wiggle room for a future case, stating: “Our dissenting colleague raises important constitutional considerations concerning the operation of the recent controversy rule in criminal cases. Mr. Hull, however, didn't raise those issues so we are precluded from considering them.” For civil cases, however, the canon of construction is apparently a powerful tool for essentially arguing that statutory amendments can effectively be applied as if they are retroactive if there is legislative history indicating that the amendment was made in reaction to a court decision or other controversy.

Phillips v. Lyons Heritage Tampa, LLC—J. Rothstein-Youakim. Mixed-race couple sued builder for construction delays, alleging that the delays were motivated by racial discrimination. The Phillips argued that an arbitration clause in the contract between the parties should not be enforced, but the DCA disagreed. The DCA assured the Phillips that they could pursue punitive damages at arbitration. The Phillips argued that they could not obtain prevailing parties fees for federal claims if they prevailed in arbitration as opposed to a court proceeding. They brought claims under section 1981 and 1982 of federal law and would be entitled to prevailing party fees under section 1988 if they prevailed. The DCA agreed and noted that a fees provision that eliminates the statutory right to prevailing party attorney's fees violates public policy. The DCA found that an arbitration provision that would bar prevailing fees and costs was unenforceable, but also found that the clause was severable and held that the **arbitrator** could award prevailing fees and costs. Further, section 682.11(2), Fla. Stat., states that an arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. Thus, there was no reason not to enforce the arbitration clause.

**Third DCA**

BLNK Holdings LLC v. Mark Herskowitz—alarming holding that appears to lay down black-letter rule that the court will not find fundamental error in a civil case where a party challenges a court’s admission of (or failure to admit) deposition testimony because an alleged evidentiary error of this kind does not go to the heart or foundation of the case.

Chmilarski v. Empire Fire and Marine Insurance Company—J. Logue. Chmilarski petitioned the court for a writ of prohibition after the trial judge denied a motion for disqualification. In ruling on claims of recission in an insurance case, the judge *sua sponte* wrote in an order that “for purposes of any subsequent attorney’s fees claim that neither party has significantly prevailed on the issues raised in the course of this case **and the Court further notes that, should either party move for attorney’s fees, the Court reserves its right, sua sponte, for the first time in 29½ years on the bench, to show cause why Fla. Stat. § 57.105 should not be applied to either party for the nature and character of the litigation over the past five years**.” Chmilarski filed a verified motion to disqualify the judge, contending that the trial court had crossed the line from simply forming mental impressions to actually pre-judging the issue of their entitlement to attorney’s fees before a motion had even been filed or argued, and the judge denied the motion to disqualify as legally insufficient. As to whether the threat of sanctions indicated that the judge prejudged motions for attorneys fees, Judge Logue wrote, “Frankly, we do not see how the language could be interpreted in any other way.” The fee motions were not yet even filed, and the order “contained none of the qualifications, caveats, or reservations of the sort that would cause a reasonably prudent person to conclude the trial court’s mind was still open and the court was merely sharing preliminary mental impressions which are a natural part of the decision making process.” The court granted the petition requiring that the judge be disqualified, but did not issue the writ, stating that it was confident that the judge would comply with the order without granting the writ.

Levy v. FMF&J Investments, LLP—foreclosure case. Reversed and remanded because the trial court erred in denying motion for continuance where a key witness continually thwarted discovery by refusing to sit for deposition and produce documents and then filed a notice of unavailability on the day of trial, citing a death in the family. The opinion noted that the absence of a witness will not always require a continuance, but the party’s case “relied in substantive part” on the witness’s expected testimony. The nonmoving party showed no evidence it would have been prejudiced by a continuance.

Sager v. Blanco—J. Miller. This appeal involves the application of vicarious liability under the dangerous instrumentality doctrine first adopted by the Florida Supreme Court over a century ago in Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920). Plaintiff was a neighbor who intervened in a domestic dispute. Driver was the person committing the domestic violence, and his mother owned the car. The Driver-Son started to leave the scene in Mother’s car, but then intentionally backed up and ran over Plaintiff. The trial judge barred a vicarious liability claim in light of the son’s criminal behavior. Because there were ample indicia of foreseeability in the case, summary judgment was reversed. Under the dangerous instrumentality doctrine, the owner of a dangerous instrumentality like an automobile who entrusts its use to another is strictly liable for damages caused by the negligence of the operator. There are important exceptions. The Supreme Court of Florida created three of the exceptions to the doctrine. First, one who voluntarily entrusts his or her vehicle to a repair service is not liable for injuries caused by the negligence of an employee of the service so long as the owner does not exercise control over the injury-causing operation of the vehicle and is not otherwise negligent. Second, a breach of custody amounting to a species of conversion or theft will relieve the owner of liability. Third, where a vehicle owner possesses bare naked title while another party holds beneficial ownership, vicarious liability will not lie. The Florida Legislature also narrowed the doctrine by declaring (1) that a powered shopping cart in a retail establishment is not a dangerous instrumentality; (2) by limiting liability to a vessel operator unless the owner is present; (3) by limiting the liability of a lessor of an automobile subject to registration for operation on public roads, depending on the duration of the lease; and (4) by limiting the liability of owners who are natural persons and lend their car to any permissive user. Congress has also prohibited states from imposing vicarious liability on car rental companies. Judge Miller observed that it was “axiomatic that weapon-like use with the intent to cause harm constitutes a marked departure from the intended use of a motor vehicle,” and under “such circumstances, the resultant harm is not inherent to the operation of the vehicle, and imputing liability to the owner fails to withstand intellectual muster.” Conversely, however, “where the weaponization of the vehicle is foreseeable, the departure from the expected use is reasonably anticipated, and the underpinnings of the doctrine militate in favor of application.” In the instant case, the primary issue was whether an injured party is precluded from pursuing a claim for vicarious liability against an owner when the driver has weaponized the vehicle with the intent to cause bodily harm. **Held:** **“Adhering to an expansive body of cogent legal authority, we conclude that where [using a car as a weapon] is reasonably foreseeable, liability may be imputed under the [dangerous instrumentality] doctrine.”**

Oakley Transportation Group, Inc. v. Shinault—J. Scales. In personal injury case, Plaintiff sued Oakley after he sustained permanent injuries following an explosion allegedly caused by an Oakley employee who, at the time of the incident, was pumping vinegar from Oakley’s tanker truck. The explosion allegedly caused Plaintiff to fall from a ladder. Plaintiff sought production of documents related to Oakley’s training procedures for unloading cargo, operating the truck’s pumping mechanism, and addressing leaks. Oakley objected that the requests were overbroad because Plaintiff did not specify a timeframe. An “ISO certification” folder from a third party based on Oakley’s compliance with its policies and procedures became the focus of debate. Oakley argued that the documents were stamped “proprietary trade secret,” and the Plaintiff should have to sign a confidentiality agreement to view the audits of compliance with their safety procedures. The trial court overruled objections to the discovery and ordered Oakley to produce the documents. Oakley filed a petition for a writ of certiorari in the DCA to quash the discovery order. Oakley argued that the requests were overbroad because Plaintiff sought documents that were not in existence at the time of the March 6, 2017, explosion. The court observed, however, that “**overbreadth is not a sufficient basis for certiorari relief** if the discovery request appears reasonably calculated to lead to the discovery of admissible evidence.” Oakley’s **current** training policies and procedures **could shed light** on Oakley’s training policies and procedures **as they existed** at the time of the March 6, 2017, incident. Thus, Oakley failed to show irreparable harm, and the court dismissed the petition.

United Automobile Insurance Company v. Millenium Radiology, LLC—This was one of several cases decided on the same day where the insurance company appealed summary judgment orders entered on the principle of collateral estoppel. The circuit court had granted summary judgment for Millenium in several cases where the same issues were raised with respect to different insured persons who assigned Millenium their rights. Citing its own precedent from January 2022 that answered this question, the 3d DCA reversed all of the orders of summary judgment on the ground that “the **identity of the parties” element of collateral estoppel is not met where** the assignees and medical providers are identical but **the insured or assignor is different**.” Specifically, the court noted that “Millennium’s ‘identity’ is not the same in each of these cases against United Auto; Millennium draws its identity from its assignor from case to case. The identity element of collateral estoppel, therefore, is not satisfied.”

White v. AutoZone Investment Corp.—J. Gordo. Court held that section 11A-28(10) of the Miami-Dade County Code establishes a private cause of action to sue an employer for discrimination based on sexual orientation. White complained about verbal abuse at work due to his sexual orientation, he made a formal complaint to corporate office, was placed on leave pending investigation, and was then fired. He filed a discrimination complaint with the Miami-Dade Commission on Human Rights and received a right-to-sue notice from the Commission giving him 90 days to sue, which he did. Trial court granted motion to dismiss, holding that code did not create a cause of action, but the DCA reversed, allowing the suit to go forward.

**Fourth DCA**

Godfrey v. People’s Trust Insurance Co.—order on rehearing. Court addressed insurance company’s argument that a “Suit Against Us” clause in insurance policy barred suits unless plaintiff was in **perfect** compliance with insurance policy. Plaintiff was out of compliance with policy in a way that did not prejudice the insurance company. Elsewhere in the policy, it was stated that insured could not sue if she was out of compliance with policy in a way that **prejudiced** insurer. Court stated that it was unwilling to bar access to courts under the language that would trump the policy’s own requirement of prejudice before the insured can seek judicial relief.

Grieco v. Daiho Sangyo Inc., AW Distributing Inc., and Wal-Mart Stores East LP—C.J. Klingensmith. The product involved in this case is known as Ultra Duster. It is a compressed gas dusting spray that is not particularly distinct from other compressed gas dusters referred to as “keyboard cleaners,” “compressed air,” or “dust removers.” Ultra Duster is manufactured by Daiho, distributed by AW,

and retailed in several stores, including Wal-Mart. The gas used, 1.1-difluoroethane (“DFE”), can make users “high” for a few seconds if inhaled. To discourage this, Ultra Duster—like many DFE products—contained a “bitterant” designed to make inhaling it unpleasant. The product had a warning label. Amy Merrill was a DFE addict undeterred by the “nasty taste.” She knew about the warnings. She inhaled DFE while driving home from Wal-Mart, lost control of her vehicle, and severely injured the plaintiff. He sued the manufacturer, distributer, and Wal-Mart by alleging (1) Strict Liability for Defective Design; (2) Strict Liability for Failure to Warn; and (3) Negligence. As the factual basis for his suit, appellant asserted appellees knew: (1) consumers used products like Ultra Duster to get high; (2) the added bitterant was not evenly distributed throughout the product to deter misuse; and (3) the canister’s warning label was not adequate to prevent Merrill and others from misusing the product. Relying on a recent First DCA opinion, the trial court held that Merrill’s voluntary conduct of driving while impaired **broke the causation chain** so that appellees had no liability to appellant as a third party. On appeal, the Fourth DCA affirmed. C.J. Klingensmith noted that Florida tort law provides that the manufacturer of a defective product may be subject to liability under two theories: negligence and strict liability. In order to prevail under either theory, the plaintiff must establish that the product was defective or unreasonably dangerous.” “[P]roof of a defect determines a breach of duty under a negligence theory and the presence of an unreasonably dangerous condition under a strict liability theory.” “[S]trict liability theories are generally distinct from negligence.” “Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence.” “Strict liability is not concerned with the reasonableness of a manufacturer’s conduct. Instead, the focus is on the product itself and the reasonable expectations of the consumer. In contrast, “under the negligence theory, the focus is on the whether a duty of care was owed to the injured parties, and whether the defendants breached that duty of care.” “[T]he term ‘strict liability’ is something of a misnomer. A manufacturer is not strictly liable for all injuries caused by its product, however it is used. On the contrary, **a manufacturer is liable only when the product is used as intended**.” Therefore, “**[i]n order for strict liability to apply to the manufacturer, the product must have been used for the purpose intended” without regard for reasonable foreseeability of unintended use**. Applied to this case, strict liability attaches only when Ultra Duster is used as it was intended to be used, that is, for the purpose of cleaning dust and removing debris. In regard to the count alleging design defect for failure to distribute the bitterant equally in the can, the court observed that while the elements of strict liability and negligence are similar, strict liability focuses on the reasonable expectations of the consumer. As the warning label clearly states, Ultra Duster employs a bittering agent to discourage ingesting the product, not to guarantee deterrence or prevent misuse from occurring. Although the alleged failure of the bitterant to disperse throughout the entire canister of Ultra Duster could potentially lead to more inhalation misuse of the product, inhalation is not the product’s intended use. Merrill used several different products with DFE and had grown accustomed to the bad taste. In regard to the count alleging strict liability for failure to warn, the court observed that for claims premised on a failure to warn, Florida courts have recognized that “[a] warning should contain some wording directed to the significant dangers arising from failure to use the product in the prescribed manner, such as the risk of serious injury or death.” Under the Restatement (Third) of Torts as incorporated into Florida law, a product is considered defective “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings” and their omission “renders the product not reasonably safe.” “Unless the danger is obvious or known, a manufacturer has a duty to warn where its product is inherently dangerous or has dangerous propensities.” The presumption that an adequate warning would be heeded does not apply in a case where the product’s user is already fully aware of the danger. Additionally, “a manufacturer has a duty to warn of dangerous contents in its product which could damage or injure even when the product is not used for its intended purpose.” “To warn adequately, the product label must make apparent the potential harmful consequences. The warning should be of such intensity as to cause a reasonable man to exercise for his own safety caution commensurate with the potential danger.” The sufficiency and reasonableness of a manufacturer’s warning, considering whether an injured person knew of the danger, are generally questions of fact left to the jury; however, that is not the case where the “warnings are ‘accurate, clear, and unambiguous.’” The label in this case was clear that inhalation could be harmful or fatal. Merrill was aware of the warning, and she had lost consciousness from inhaling DFE in the past. In regard to the claim of negligence, the court observed that only when foreseeability is a “close case” does a question of fact arise. When the issue of foreseeability is clear, the courts should decide the issue as a matter of law. Two components of negligence employ a foreseeability analysis: duty and proximate cause. The foreseeability component of duty requires a general analysis of the broad type of plaintiff and harm involved without regard to the facts of the actual occurrence. The foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence. This is why proximate cause is normally a factual question for the jury while duty is usually a legal question for the court. To determine whether the risk of injury to a plaintiff is foreseeable under the concept of duty, courts must look at whether it was objectively reasonable to expect the specific danger causing the plaintiff’s injury, not simply whether it was within the realm of any conceivable possibility. “The duty element of negligence focuses on whether the defendant’s conduct foreseeably created a broader ‘zone of risk’ that poses a general threat of harm to others.” “This concept is not to be confused with the proximate cause element of negligence which focuses on ‘whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred.’” “The court in proximate cause cases must determine (1) causation in fact, i.e., whether the defendant’s conduct was a substantial factor in producing the result, and (2) whether the defendant’s responsibility is superseded by an abnormal intervening force.” Therefore, proximate cause is not always a jury question. **Courts may resolve the question of proximate cause as a matter of law in certain cases such as those involving intervening negligence**. The Fourth DCA followed the First DCA in holding that “**Florida law does not permit a jury to consider proximate cause where a person responsible for the injury is voluntarily impaired or intentionally misuses a product**.” **In Florida, there is no duty to prevent—and no liability for—a third party’s misconduct absent the existence of a special relationship**. Therefore, to succeed on his negligence claim, appellant must also show that appellees owed a specific duty to him. None exists here between appellant and appellees, nor did such a relationship exist between appellees and Merrill to support the imposition of any such duty. “**Without the existence of a special relationship with Merrill, appellees had no ability to supervise or control her behavior and no involvement in her decision to become impaired while driving. No contractual relationship existed between appellant, appellees, and Merrill**. The accident did not involve either an employee or vehicle owned or operated by appellees, nor did it occur on their property. Nor did the canister used by Merrill malfunction to directly cause appellant’s injury. Although we can foresee that a person who is distracted or impaired while driving might cause an accident, we do not agree with the leap in logic which appellant asks us to make—that it is likewise foreseeable to any legally significant extent that the manufacture and ultimate sale of Ultra Duster would result in a car crash. Stated differently, the subject product did not cause this accident; rather, Merrill’s impaired faculties resulting from the product’s inappropriate use caused the accident. Taken to its logical extension, appellant’s theory of liability against appellees could allow almost limitless legal responsibility relating to any ordinary consumer product which a driver could conceivably and improperly use to cause injury or damage.”

International Village Association, Inc. v. Weiss—J. Damoorgian. It is well established that “[a] party may recover attorney’s fees for time spent establishing **entitlement** to fees; however, a party cannot recover fees for time spent contesting or determining the **amount** of fees due.” Even after entitlement to fees was ordered, however, Weiss continued to contest entitlement to fees, and trial court erred in denying further fees for relitigating the challenge to entitlement.

The Kidwell Group v. United Property & Casualty Insurance Co.—J. Conner. Homeowner assigned benefits of homeowners’ insurance contract to The Kidwell Group, and there was a suit in small claims court. Insurer moved to dismiss based on improper assignment of benefits, and trial court granted dismissal. On appeal, the Fourth DCA affirmed, noting that 627.7152(2)(a) provides in pertinent part, that an **assignment of benefits agreement must be in writing and executed by and between the assignor and the assignee and must “[c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.”** Appellant argues it satisfied the statute by having provided the homeowner with an invoice which it attached to the complaint along with the assignment of benefits, but the court disagreed because the “invoice was unexecuted and dated five days after the assignment was executed.”

**Fifth DCA**

Electric Boat Corporation v. Sylvia Fallen—J. Eisnaugle. (Is this not the best case name?!? Sounds like a 70s funk rock band versus a goth rock icon). Electric Boat Corporation was entitled to summary judgment on its affirmative defense of workers compensation horizontal immunity, which protects employers from civil suits if they insure employees with workers compensation coverage. Workers can get out from under workers compensation immunity and sue employers in tort for workplace injuries if the employer was “grossly negligent.” Unlike ordinary negligence, gross negligence consists of a conscious and voluntary act or omission. The three elements to prove gross negligence are: (1) circumstances constituting an imminent or clear and present danger amounting to a more than normal or usual peril, (2) knowledge or awareness of the imminent danger on the part of the tortfeasor, and (3) an act or omission that evinces a conscious disregard of the consequences. Workers moved stairs at a construction site and forgot to move them back. Fallen…fell after she did not notice the stairs were missing because she began her work day when it was dark outside. The facts showed a mistake, not a conscious act, so employer was entitled to immunity from tort suit.