PUBLICATION UPDATE

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LexisNexis® Practice Guide: Florida Civil Discovery

Publication 1367 Release 38 November 2023

HIGHLIGHTS

AMENDMENTS TO FLORIDA RULES OF PROCEDURE AND STATUTES

New and Amended Statutes and Laws

A massive tort reform bill passed the legislature and was signed into law by the Governor this term. The reforms impact civil remedies and attendant issues from attorney's fees—to contributory negligence and apportionment of fault—to limitations on damages. The entire bill is enrolled as Ch. 2023-15, and the pertinent new and amended statutes are covered throughout this release. The amendments made by this act to Fla. Stat. § 95.11 (Statutes of Limitations) apply to causes of action accruing after the effective date of this act. The Act shall not be construed to impair any right under an insurance contract in effect on or before the effective date of the Act. To the extent that the Act affects a right under an insurance contract, it only applies to insurance contracts issued or renewed after the effective date of the Act, which is March 24, 2023. Except as otherwise expressly provided in the Act, it applies only to causes of action filed after the effective date. Here are the highlights of the changes in the law covered in this work:

Statute of Limitations: The statute of limitations for negligence was reduced from four to two years in Fla. Stat. § 95.11(4)(a). *See* §§ 1.42; 1.77; 1.79.

Admissibility of evidence to prove medical expenses in personal injury or wrongful death actions; disclosure

of letters of protection; recovery of past and future medical expenses damages: The Florida Legislature created a new statute concerning the admissibility of evidence to prove medical expenses in personal injury or wrongful death actions, including disclosure of letters of protection and the admissibility of extensive medical bill information and reimbursement as well as evidence of the recovery and existence of past and future medical expense damages. Fla. Stat. § 768.0247 is applicable to cases filed after March 24, 2023, and this law will substantially affect the relevance and discoverability of letters of protection, medical costs, and medical charges. *See* §§ 2.17[2]; 9.07[1][e]; 13.08; 13.09[1].

Amendments to the Florida Rules of General Practice and Judicial Administration

Amendments to Fla. R. Gen. Prac. & Jud. Admin. 2.420(d)(1)(B)(xv) added documents related to the settlement of a minor's claim or the settlement of a claim for a ward to the records afforded confidentiality in court files. In addition, modifications were made to the prescribed form Notice of Confidential Information Within a Court Filing. *See* §§ 1.112; 2.52; 3.17[1]; 5.61; 6.61; 7.61; 9.33[6]; 14.30; 16.40.

Cases of Note through Jun 30, 2023 included in this Release

Admissibility of Electronic Records

In Fu Lu Song & Am. Trucking Co. v. Jenkins, 2023 Fla. App. LEXIS 2208 (Fla. 5th DCA Mar. 31, 2023), dash cam video from a car following defendant's truck during and immediately after an accident was admissible in part; but video outside of the 48 seconds showing the accident and its immediate aftermath audio comments made by the owner of the dash cam were not admissible because they were either irrelevant, unduly prejudicial under Fla. Stat. § 90.403, or cumulative. *See* § 5.46.

Words of a contract are not hearsay because they characterize verbal acts and thus have independent legal significance. Thus, a party in a foreclosure case should be permitted to establish standing by admitting a Pooling and Servicing Agreement ("PSA") showing standing. A party seeking to admit a PSA into evidence at trial need not establish that the PSA is admissible under the business records exception to the hearsay rule because the PSA is not hearsay but instead is admissible for its independent legal significance. The PSA would need to be authenticated, if challenged according to U.S. Bank Nat'l Ass'n v. Bell, 355 So. 3d 980 (Fla. 5th DCA 2023). *See* § 5.50.

Attorney Client Privilege—Waiver

In Florida, waiver of the attorney-client privilege is not favored, and unless the record shows a clear, intentional waiver of the privilege by a client or counsel, protection for privileged communications and work product remain intact. In Petzold v. Castro, 2023 Fla. App. LEXIS 4029

(Fla. 2d DCA Jun. 16, 2023), the Second DCA held that the circuit court departed from the essential requirements of law by treating the inadvertent disclosure of a single privileged email bearing upon no substantive issues in the case as a voluntary waiver of the privilege over all attorney-client communications with that counsel's entire office. *See* §§ 2.24[2][b]; 5.17[1].

Discovery—Hospital Safety Incident Reports

In Shands Teaching Hosp. & Clinics v. Beylotte, 357 So. 3d 307, 2023 Fla. App. LEXIS 1497 (Fla. 1st DCA 2023), the First DCA held that a report assembled by a provider for reporting to a patient safety organization that was in fact reported to a patient safety organization and could result in improved patient safety qualifies as privileged patient safety work product even if the injured party is not a patient. The court reasoned that improving potential slip-and-fall conditions in patient-traversed corridors is necessarily related to improved patient safety. *See* § 2.26[9][a]; 3.05[6]; 14.23.

Discovery- Insurance Claims File

The fact that insurer asserted defenses did not allow the trial court to order the production of the entire claims file according to Family Sec. Ins. Co. v. Stein, 355 So. 3d 454, 2023 Fla. App. LEXIS 822 (Fla. 4th DCA 2023), which held that the trial court departed from the essential requirements of the law by ordering the insurer to produce a field adjuster's loss report, nonfinal estimate, and supporting documentation without conducting an in camera inspection to determine whether there were any relevant documents that met the Fla. R. Civ. P. 1.280(b)(4) standard for production of the work product privileged documents. *See* § 2.21.

Discovery—Sanctions

It is improper for defense counsel to obtain updated medical records from one of Plaintiff's medical providers without Plaintiff's knowledge and consent by sending a letter to the medical provider referencing a prior subpoena and the need for "missing" records. There is no authority for the proposition that discovery subpoenas are continuing in nature, permitting a treating physician subpoenaed once for records to continue to produce updated records to the party that subpoenaed him upon an informal, *ex parte* request. Such procedure improperly denies the plaintiff the opportunity to object to the requested documents and potentially violates the Bar regulatory rules according to Rhoades v. Rodriguez, 2023 Fla. App. LEXIS 742 (Fla. 5th DCA Feb. 3, 2023). *See* § 6.09[1].

Discovery—Scope of Discovery

The scope of discovery in slip and fall cases may be limited due to the requirements of Fla. Stat. § 768.0755, which does not permit proof of liability in slip and fall cases under the negligent mode of operation theory. In Publix Super Mkts., Inc. v. Blanco, 2023 Fla. App. LEXIS 483 (Fla. 3d DCA Jan. 25, 2023), the Third District Court quashed a discovery order to the

extent it grants corporate-wide discovery because the order permitted impermissible carte blanche discovery that resulted in irreparable harm and departs from the essential requirements of the law. Likewise this term, in Publix Super Mkts., Inc. v. Roth, 355 So. 3d 1056, 2023 Fla. App. LEXIS 1072 (Fla. 2d DCA 2023), the Second District Court held that the trial court departed from the essential requirements of law in ordering carte blanche to discovery in a slip and fall case without applying the proper standard under Fla. Stat. § 768.0755. *See* § 2.11.

Dismissal for Fraud on the Court

The trial court did not abuse its discretion by granting a purchaser's motion to strike a company's complaint for fraud because the company failed to file a response to the motion, and at the evidentiary hearing, it did not present any evidence in opposition and presented no live rebuttal witness according to Oracle Elevator Co. v. 8660 Bldg., 353 So. 3d 689 (Fla. 3d DCA 2023). *See* § 15.05A.

Expert Witness—Scope of Testimony

Although an expert may be qualified by experience, it does not follow that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express. When an expert is relying primarily on experience, the witness must explain how that experience leads to the opinion, why the experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts. According to Anderson-Moody v. Wilson, 357 So. 3d 1240, 2023 Fla. App. LEXIS 997 (Fla. 1st DCA 2023), a life care planner should not have used his own medical opinions when testifying because he was not offered as a medical expert, and appellant's motion *in limine* excluded him from testifying about his medical exam. *See* § 2.17[1].

Stay

The Fifth Amendment cannot be used as a sword and a shield by asserting Fifth Amendment protections as a basis to stay a lawsuit as a plaintiff. A plaintiff seeking affirmative relief in a civil action may not invoke the fifth amendment and refuse to comply with the defendant's discovery requests, thereby thwarting the defendant's defenses according to Perez v. Gallego, 354 So. 3d 614 (Fla. 3d DCA 2023). *See* § 2.25[1].

Public Records Law Violations

Two cases this term addressed attorneys fee awards for violation of the public records law and are included in this update. Entitlement to fees requires meeting the criteria in Fla. Stat. § 119.12(a) and (b). The first criterion, found in Fla. Stat. § 119.12(1)(a), requires a finding that the agency "unlawfully refused to permit a public record to be inspected or copied." Unlawful refusal under Fla. Stat. § 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them according to Jackson v. City of S. Bay, 2023 Fla. App. LEXIS 968, 2023 WL 2027556, at *2 (Fla. 4th DCA Feb. 15, 2023). Where

delay is at issue the court must determine whether the delay was justified under the facts of the particular case. Only an unjustified delay in making nonexempt public records available violates Florida's public records law according to Roldan v. City of Hallandale Beach, 2023 Fla. App. LEXIS 2276 (Fla. 4th DCA Apr. 5, 2023). *See* § 2.06A; 5.17[1].

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