

**ATTORNEY'S FEES CASES 2009 - 2010**

**By**

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## SIGNIFICANT 2009-2010 ATTORNEY’S FEES CASES

### CONTENTS

#### PART I. PROCEDURE

##### A. PLEADINGS

###### 1. In General

|                                                                                |   |
|--------------------------------------------------------------------------------|---|
| <u>Cooper v. Marriott International, Inc.</u> -----                            | 1 |
| <u>Cavalry Portfolio Services, LLC v. Enningham</u> -----                      | 1 |
| <u>Flagship Resort Development Corp. v. Interval International, Inc.</u> ----- | 1 |

###### 2. Waiver

|                                                                                         |   |
|-----------------------------------------------------------------------------------------|---|
| <u>Save On Cleaners of Pembroke II, Inc. v. Verde Pines City Center Plaza LLC</u> ----- | 2 |
|-----------------------------------------------------------------------------------------|---|

##### B. FLA.R.CIV.P. 1.525

###### 1. Rule Change

###### 2. Case Law

|                                           |   |
|-------------------------------------------|---|
| <u>AmerUs Life Ins. Co. v. Lait</u> ----- | 2 |
| <u>Jackson v. Anthony</u> -----           | 2 |

##### C. APPELLATE ATTORNEY’S FEES

|                             |   |
|-----------------------------|---|
| <u>Welch v. Welch</u> ----- | 3 |
| <u>White v. White</u> ----- | 3 |

## **PART II. PREVAILING PARTY**

### **A. MECHANIC’S LIEN**

|                                                           |   |
|-----------------------------------------------------------|---|
| <u>Trytek v. Gale Industries</u> -----                    | 3 |
| <u>Vose v. Gulfside Construction Services, Inc.</u> ----- | 3 |
| <u>MMII v. Silvester</u> -----                            | 3 |

### **B. EMPLOYMENT CONTRACT CASES- §448.08**

|                                              |   |
|----------------------------------------------|---|
| <u>Hingson v. MMI of Florida, Inc.</u> ----- | 4 |
|----------------------------------------------|---|

### **C. MULTI-PARTY COMPLAINT - VOLUNTARY DISMISSAL BY ONE PARTY**

|                                                       |   |
|-------------------------------------------------------|---|
| <u>Black Diamond Properties, Inc. v. Haines</u> ----- | 4 |
|-------------------------------------------------------|---|

### **D. SIGNIFICANT ISSUE OF THE CASE**

|                                |   |
|--------------------------------|---|
| <u>Carlin v. Javorek</u> ----- | 4 |
|--------------------------------|---|

## **PART III. OFFERS OF JUDGMENT**

### **A. APPLICATION**

|                                                                                                              |   |
|--------------------------------------------------------------------------------------------------------------|---|
| <u>Palm Beach Polo Holdings Inc. v.</u><br><u>Equestrian Club Estates Property Owner’s Association</u> ----- | 5 |
|--------------------------------------------------------------------------------------------------------------|---|

### **B. ACCEPTANCE**

|                                                 |   |
|-------------------------------------------------|---|
| <u>Baratta v. Bradford Electric, Inc.</u> ----- | 5 |
|-------------------------------------------------|---|

C. OFFER PROCEDURALLY DEFECTIVE

|                                                                   |   |
|-------------------------------------------------------------------|---|
| <u>Milton v. Reyes</u> -----                                      | 6 |
| <u>Abu-Ghazaleh v. Chaul</u> -----                                | 6 |
| <u>Andrews v. McPartland</u> -----                                | 6 |
| <u>Smith v. Loews Miami Beach Hotel Operating Co., Inc.</u> ----- | 6 |
| <u>Nationwide Mutual Fire Ins. Co. V. Pollinger</u> -----         | 6 |

D. CONDITIONAL OFFERS ARE DEFECTIVE

|                                                        |   |
|--------------------------------------------------------|---|
| <u>Attorneys' Title Ins. Fund, Inc. v. Gorka</u> ----- | 7 |
| <u>Traynor v. Delmonico</u> -----                      | 7 |
| <u>Three Keys, Ltd. v. Kennedy Funding, Inc.</u> ----- | 7 |
| <u>Donovan Marine, Inc. v. Delmonico</u> -----         | 7 |

E. §768.79(7)

|                                        |   |
|----------------------------------------|---|
| <u>Central Motor Co. v. Shaw</u> ----- | 7 |
|----------------------------------------|---|

F. FEDERAL STATUTES/ FEDERAL COURTS

|                                                     |   |
|-----------------------------------------------------|---|
| <u>Menchise v. Akerman Senterfitt</u> -----         | 8 |
| <u>Jones v. United Space Alliance, L.L.C.</u> ----- | 8 |

G. OFFER VALID

|                                                                        |   |
|------------------------------------------------------------------------|---|
| <u>Allstate Property &amp; Cas. Ins. Co. v. Lewis</u> -----            | 8 |
| <u>Eastern Atlantic Realty and Investment, Inc. v. GSMOR LLC</u> ----- | 8 |
| <u>Bosem v. Commerce and Industry Ins. Co.</u> -----                   | 8 |

H. CALCULATING THRESHOLD LEVEL (WHETHER THE PLAINTIFF RECOVERED MORE THAN 125% OF THE PLAINTIFF'S OFFER OR LESS THAN 75 % OF THE DEFENDANT'S OFFER)

|                             |   |
|-----------------------------|---|
| <u>Nilo v. Fugate</u> ----- | 9 |
|-----------------------------|---|

I. PROPOSAL OF SETTLEMENT RULE CHANGE

|                                  |   |
|----------------------------------|---|
| <u>Lamb v. Matetzschik</u> ..... | 9 |
|----------------------------------|---|

J. JURISDICTION

|                                                                                                |   |
|------------------------------------------------------------------------------------------------|---|
| <u>Service Experts, LLC v. Northside Air Conditioning &amp; Electrical Service, Inc.</u> ..... | 9 |
|------------------------------------------------------------------------------------------------|---|

**PART IV. EVIDENCE**

A. PROOF OF REASONABLE NUMBER OF HOURS

|                                                                                  |    |
|----------------------------------------------------------------------------------|----|
| <u>Braswell v. Braswell</u> .....                                                | 9  |
| <u>Trumbull Ins. Co. v. Wolentarski</u> .....                                    | 10 |
| <u>Quality Holdings of Florida, Inc. v. Selective Investments, IV, LLC</u> ..... | 10 |
| <u>Trovato v. Linden</u> .....                                                   | 10 |

B. BURDEN OF PROOF

|                                                   |    |
|---------------------------------------------------|----|
| <u>Custom Crown Homes, Inc. v. Sabatino</u> ..... | 10 |
|---------------------------------------------------|----|

C. EXPERT ATTORNEY’S FEES WITNESS

|                                                                              |    |
|------------------------------------------------------------------------------|----|
| <u>Sea World of Florida, Inc. v. Ace American Ins. Companies, Inc.</u> ..... | 10 |
| <u>Setilin &amp; Co. v. Phoenix Ins. Co.</u> .....                           | 11 |
| <u>Sourcetrack LLC v. Ariba, Inc.</u> .....                                  | 11 |

**PART V. ENTITLEMENT TO ATTORNEY’S FEES**

A. ATTORNEY’S FEES AGAINST THIRD PARTIES

|                                                                               |           |
|-------------------------------------------------------------------------------|-----------|
| <u>Bauer v. Dilib, Inc.</u> .....                                             | 11        |
| <u>Abu-Ghazaleh v. Chaul</u> .....                                            | 11        |
| <u>Dunkin Donuts Franchised Restaurants, LLC v. 330545 Donuts, Inc.</u> ..... | 11 and 12 |

|    |                                                                                                |    |
|----|------------------------------------------------------------------------------------------------|----|
| B. | LIS PENDENS                                                                                    |    |
|    | <u>McMillan/Miami, LLC v. Krystal Capital Managers, LLC</u>                                    | 12 |
| C. | §627.428                                                                                       |    |
|    | <u>Grider-Garcia v. State Farm Mutual Automobile, etc.</u>                                     | 12 |
| D. | EMINENT DOMAIN                                                                                 |    |
|    | <u>Calhoun, Dreggors &amp; Associates v. Volusia County</u>                                    | 13 |
| E. | CONTRACT ONLY PERMITS ATTORNEY’S FEES TO ONE PARTY –<br>RECIPROCAL ATTORNEY’S FEES. §57.105(7) |    |
|    | <u>Florida Hurricane Protection and Awning, Inc. v. Pastina</u>                                | 13 |

## **PART VI. CALCULATING ATTORNEY’S FEES**

|    |                                                                                |    |
|----|--------------------------------------------------------------------------------|----|
| A. | REQUIREMENTS OF FINAL JUDGMENT                                                 |    |
|    | <u>Peacock v. Ace</u>                                                          | 13 |
|    | <u>Harris v. McKinney</u>                                                      | 13 |
|    | <u>Custom Crown Homes, Inc. v. Sabatino</u>                                    | 14 |
|    | <u>D’Alusio v. Gould &amp; Lamb, P.A.</u>                                      | 14 |
| B. | PARALEGAL FEES                                                                 |    |
|    | <u>Demedrano v. Labor Finders of the Treasure Coast</u>                        | 14 |
|    | <u>State Farm Mutual Automobile Ins. Co. v. Edge Family Chiropractic, P.A.</u> | 14 |
| C. | PRE-JUDGMENT INTEREST ON ATTORNEY’S FEES                                       |    |
|    | <u>Butler v. Yusum</u>                                                         | 15 |

D. MULTIPLIER

|                                                                                |    |
|--------------------------------------------------------------------------------|----|
| <u>Massie v. Progressive Express Ins. Co.</u>                                  | 15 |
| <u>State Farm Mutual Automobile Ins. Co. v. Edge Family Chiropractic, P.A.</u> | 15 |

E. ATTORNEY’S FEES FOR LITIGATING THE **AMOUNT** OF ATTORNEY’S FEES IN  
FAMILY LAW CASES IS **DISCRETIONARY** WITH THE TRIAL COURT

|                                                    |    |
|----------------------------------------------------|----|
| <u>Schneider v. Schneider</u>                      | 15 |
| <u>Baker v. Baker</u>                              | 15 |
| <u>Wight v. Wight</u>                              | 15 |
| <u>State Farm Fire &amp; Cas. Company v. Palma</u> | 16 |

F. COSTS

|                                                                             |    |
|-----------------------------------------------------------------------------|----|
| <u>United Automobile Ins. Co. v. Dade Injury Rehab Center, Inc.</u>         | 16 |
| <u>United Automobile Ins. Co. v. Comprehensive Health Ins. Center, Inc.</u> | 16 |
| <u>D’Alusio v. Gould &amp; Lamb, P.A.</u>                                   | 16 |

G. MULTI-PARTY COMPLAINT - DEFENDANT PREVAILS AGAINST ONE PARTY,  
BUT NOT THE OTHER PARTIES

|                                                 |    |
|-------------------------------------------------|----|
| <u>Black Diamond Properties, Inc. v. Haines</u> | 16 |
|-------------------------------------------------|----|

**PART VII. SANCTIONS**

A. ATTORNEY’S FEES AWARDED UNDER §57.105

|                                                                       |    |
|-----------------------------------------------------------------------|----|
| <u>Guede v. Windsor Capital Mortgage Co.</u>                          | 17 |
| <u>Long v. AvMed, Inc.</u>                                            | 17 |
| <u>Unifirst Corp. v. City of Jacksonville, Tax Collector’s Office</u> | 17 |
| <u>Klein v. Meza</u>                                                  | 17 |
| <u>Charlton v. Black Diamond Properties</u>                           | 18 |
| <u>Maradriaga v. 7 - Eleven</u>                                       | 18 |

B. ATTORNEY’S FEES ARE DENIED UNDER §57.105

|                                                              |    |
|--------------------------------------------------------------|----|
| <u>Chue v. Lehman</u>                                        | 18 |
| <u>Ultimate Makeover Salon &amp; Spa Inc. v. DiFrancesco</u> | 18 |

C. PROCEDURE/JURISDICTION

1. 21 Day Notice

|                                                                       |    |
|-----------------------------------------------------------------------|----|
| <u>Anchor Towing, Inc. v. Florida Dept. of Transportation</u>         | 18 |
| <u>Kenniasty v. Bionetics Corp.</u>                                   | 18 |
| <u>Montgomery v. Larmoyeux</u>                                        | 19 |
| <u>Unifirst Corp. v. City of Jacksonville, Tax Collector’s Office</u> | 19 |
| <u>Koch v. Koch</u>                                                   | 19 |

2. Jurisdiction

|                                                                                          |    |
|------------------------------------------------------------------------------------------|----|
| <u>Service Experts, LLC v. Northside Air Conditioning &amp; Electrical Service, Inc.</u> | 19 |
|------------------------------------------------------------------------------------------|----|

D. IS ATTORNEY 50% LIABLE FOR ATTORNEY’S FEES?

1. Attorney Liable for 50% of the Attorney’s Fees

|                                |    |
|--------------------------------|----|
| <u>Montgomery v. Larmoyeux</u> | 20 |
| <u>Long v. AvMed, Inc.</u>     | 20 |

2. Procedure/Due Process

|                           |    |
|---------------------------|----|
| <u>Ferdie v. Isaacson</u> | 20 |
|---------------------------|----|

E. COSTS

|                           |    |
|---------------------------|----|
| <u>Ferdie v. Isaacson</u> | 20 |
| <u>Bohner v. Bohner</u>   | 21 |

F. SET OFF

|                                                 |    |
|-------------------------------------------------|----|
| <u>Nationwide Mutual Fire Ins. Co. v. Voigt</u> | 21 |
|-------------------------------------------------|----|

G. CONFLICT OF INTEREST BETWEEN COUNSEL AND CLIENT

Geiger v. Spurlock-----21

H. INHERENT AUTHORITY OF THE COURT

Cooper v. Cooper-----21  
Campbell v. State of Florida-----21  
Gottfried v. The Kutner Law Firm-----22

I. STATUTORY CHANGE

§57.105(3)(d)(2010) -----22

J. RULE CHANGE - PROCEDURE FOR RECOVERING APPELLATE ATTORNEY'S  
FEES AS A SANCTION

Fla.R.App.P.9.410 (Effective December 1, 2010) -----22

**PART VIII. ATTORNEY/CLIENT DISPUTES**

A. CHARGING LIEN

McCarthy v. Estate of Krohn-----23  
Chastain v. The Cunningham Law Group, P.A.-----23  
Naftzger v. B. Lee Elam Fort Golf Partner, LLC -----23

B. RETAINING LIEN

Brickell Place Condo Ass'n. Inc. v. Joseph Gangizza & Associates, P.A.-----24

C. ATTORNEY/ATTORNEY DISPUTES

Chastain v. The Cunningham Law Group, P.A.-----24  
Morrison v. West -----24

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**SIGNIFICANT 2009-2010 ATTORNEY'S FEES CASES**

**I. PROCEDURE**

**A. PLEADINGS**

**1. In General**

Cooper v. Marriott International, Inc., 16 So.3d 156 (Fla. 4<sup>th</sup> DCA 2009)

If party is permitted to recover attorney's fees based on §44.103(6) (court ordered non binding arbitration in which the amount recovered was less than the amount suggested by the arbitrator) the right to attorney's fees under 44.103(6) need not be pled. 44.103(6) is akin to §768.79 (offer of judgment) because at the time the suit is brought there is no way to know whether there will be a statutory right to attorney's fees.

Cavalry Portfolio Services, LLC v. Enningham, 16 Fla. L. Weekly Supp. 141a (11<sup>th</sup> Cir. App. 2009).

Defendant sought attorney's fees against the plaintiff because the plaintiff was seeking attorney's fees based on a contract. The plaintiff pled for attorney's fees based on §57.105(1) instead of §57.105(7). Even though a party need not plead the **basis** for attorney's fees, Caufield v. Cantille, 837 So.2d 371 (Fla. 2002), because the defendant stated the wrong basis for attorney's fees, attorney's fees were denied.

Flagship Resort Development Corp. v. Interval International, Inc. 28 So.3d 915 (Fla. 3<sup>rd</sup> DCA 2010)

Flagship did not plead for attorney's fees in its original answer. **Three days prior** to the summary judgment hearing, Flagship moved to amend its answer to permit it to plead for attorney's fees. On November 25, 2008, **after the summary judgment hearing**, but **prior to ruling on summary judgment**, the trial court granted Flagship's motion to amend. The trial court granted Flagship summary judgment on January 8, 2009 and subsequently awarded it attorney's fees. The 3<sup>rd</sup> DCA ruled that trial court did not abuse its discretion in awarding Flagship attorney's fees.

## 2. Waiver

Save On Cleaners of Pembroke II, Inc. v. Verde Pines City Center Plaza LLC, 14 So.3d 295 (Fla. 4<sup>th</sup> DCA 2009)

Tenant included a request for attorney's fees in its **motion to dismiss**. It also argued for attorney's fees in its **memo of law**. However it never pled for attorney's fees in its answer. When the tenant prevailed, the landlord argued that the tenant was not entitled to attorney's fees, because he had **failed to plead** for attorney's fees as required by Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

4<sup>th</sup> DCA holds that because the landlord failed to object to the tenant's request for attorney's fees in either the motion to dismiss or the memo of law, the landlord **waived** the requirement that the tenant **plead** for attorney's fees. The 4<sup>th</sup> DCA ruled that pursuant to Fla.R.Civ.P. 1.090(b). (If issues not raised in the pleadings are tried by implied consent, they shall be treated in all respects as if raised in the pleadings.), the tenant is entitled to attorney's fees.

## B. FLA.R.CIV.P. 1.525

### 1. Rule Change

Effective January 1, 2011 if there are multiple parties and one party is dismissed from the case, then whichever party is seeking attorney's fees must serve its 1.525 motion no later than 30 days after the judgment as to that one party or notice that concludes the action to that one party.

### 2. Case Law

AmerUs Life Ins. Co. v. Lait, 2 So.3d 203 (Fla. 2008)

If the Final Judgment **Decides Issue of Entitlement to Attorney's Fees**, 1.525 Motion Need **Not** Be Served.

Jackson v. Anthony, 39 So.3d 1285 (Fla. 1<sup>st</sup> DCA 2010)

A motion for re-hearing of the final judgment for attorney's fees does **not** toll the 30 day time period to serve the post judgment Fla.R.Civ.P. 1.525 motion.

## C. APPELLATE ATTORNEY'S FEES

Welch v. Welch, 22 So.3d 153 (Fla. 1<sup>st</sup> DCA 2009)

The wife filed a motion for appellate attorney's fees in a divorce, stating that she had a need for appellate attorney's fees and her husband had the ability to pay her appellate attorney's fees. However the motion stated it was filed under Fla.R.Civ.P. 9.400 and not §61.16 (The statute that permits attorney's fees for the impecunious spouse).

Because the wife's motion failed to cite the proper statute, appellate attorney's fees were denied.

White v. White, 3 So.3d 400 (Fla. 2<sup>nd</sup> DCA 2009)

In a family law case, the appellate 9.400 motion for attorney's fees stated that the **basis** for appellate attorney's fees was Radios v. Radios, 791 So.2d 1130 (Fla. 2<sup>nd</sup> DCA 2001). Radios explained the 5 different scenarios regarding appellate attorney's fees in family law cases. However Radios does not constitute a **basis** for attorney's fees. Since White did not cite to Fla. Stat. §61.16 as the basis for appellate attorney's fees, the appellate attorney's fees were denied.

## II. PREVAILING PARTY

### A. MECHANIC'S LIEN

Trytek v. Gale Industries, 3 So.3d 1194 (Fla. 2009); see also Vose v. Gulfside Construction Services, Inc., 12 So.3d 322 (Fla. 2<sup>nd</sup> DCA 2009)

Gale prevailed on the mechanic's lien claim, but only recovered 10% of the amount sought. Trial court has the discretion to award attorney's fees to either party based on the **Significant Issue** of the case.

Trial court also has the authority **not to award attorney's fees to either party.**

MMII v. Silvester, 42 So.3d 876 (Fla. 4<sup>th</sup> DCA 2010)

MMII filed a 2 count complaint against Silvester. The first was for a mechanic's lien and the second was for a breach of contract. During the lawsuit MMII voluntarily dismissed its lien claim. However MMII prevailed on its breach of contract claim. The trial court ruled that Silvester was entitled to attorney's fees for prevailing on the lien claim, but the 4<sup>th</sup> DCA reversed

and held that Silvester was not entitled to attorney's fees. There was no decision on whether MMII was entitled to attorney's fees for prevailing on the contract claim.

B. EMPLOYMENT CONTRACT CASES - §448.08

Hingson v. MMI of Florida, Inc., 8 So.3d 398 (Fla.2<sup>nd</sup> DCA 2009)

When there is litigation between the employer and employee, the policy of §448.08 is to level the playing field for employee. Thus any benefit of the doubt regarding prevailing party will be resolved in favor of the employee.

C. MULTI-PARTY COMPLAINT - VOLUNTARY DISMISSAL BY ONE PARTY

Black Diamond Properties, Inc. v. Haines, 36 So.2d 819 (Fla. 5<sup>th</sup> DCA 2010)

There were multiple plaintiffs and one of the plaintiffs, Bristol, filed a voluntary dismissal. Even though the remainder of the case is still being litigated, the defendant is entitled to costs against Bristol immediately, because the entire case with Bristol is over.

D. SIGNIFICANT ISSUE OF THE CASE

Carlin v. Javorek, 42 So.3d 820 (Fla. 4<sup>th</sup> DCA 2010)

In a dispute between two sisters about their mother's estate, Ms. Carlin signed a stipulation that she would provide Ms. Javorek legible copies of the mother's medical records, along with HIPPA releases. Ms. Carlin provided the medical records, but not the HIPPA releases. The trial court ruled that the failure to provide the HIPPA releases was not a material breach and ordered both parties to pay their own attorney's fees.

The 4<sup>th</sup> DCA reversed and held that because the failure to provide the HIPPA releases was a material breach, Ms. Javorek was entitled to attorney's fees.

### III. OFFERS OF JUDGMENT

#### A. APPLICATION

Palm Beach Polo Holdings Inc. v. Equestrian Club Estates Property Owner's Association, 22 So.3d 140 (Fla. 4<sup>th</sup> DCA 2009)

Palm Beach Polo (Polo) sued Equestrian for \$8.6 million damages and for specific performance to force Equestrian to give Palm Beach access to a road. Equestrian made an offer of judgment of \$40,000 to settle the **entire** case. Palm Beach rejected the offer, but trial court ruled in favour of Equestrian. The trial court awarded Equestrian attorney's fees because the **prime focus** of the lawsuit was the \$8.6 million damages.

The 4<sup>th</sup> DCA ruled that because the offer would have settled not only the damage portion of the case, but the **equitable portion** as well, the offer of judgment statute did not apply. As a result the award of attorney's fees under §768.79 was reversed

Query: If Equestrian had only made the offer of judgment as to the damage count and not the equitable count, would the offer have been valid?

Does this mean that an offer of judgment may never be used when a party is seeking both damages and equitable relief, such as a suit to enforce a restrictive covenant?

#### B. ACCEPTANCE

Baratta v. Bradford Electric, Inc., 9 So.3d 694 (Fla. 4<sup>th</sup> DCA 2009)

Fla.R.Civ.P. 1.442(f)(1) states that a proposal shall be deemed rejected unless accepted within 30 days.

|                       |                                                                     |
|-----------------------|---------------------------------------------------------------------|
| May 4 <sup>th</sup>   | Defendant made an offer of judgment for \$50,000                    |
| June 28 <sup>th</sup> | Plaintiff accepts offer, even though more than 30 days has expired. |
| Sept. 7 <sup>th</sup> | Plaintiff changes his mind and rejects the offer.                   |

The defendant filed a motion to enforce the settlement and the 4<sup>th</sup> DCA agreed it should be enforced. The language in Fla.R.Civ.P.2.442(f)(1) only applies if the offer is rejected and there is a jury verdict for a sum less than 75% of the offer.

### C. OFFER PROCEDURALLY DEFECTIVE

Milton v. Reyes, 22 So.3d 624 (Fla. 3<sup>rd</sup> DCA 2009)

Offer was procedurally perfect, but the offer of judgment itself failed to contain a **certificate of service** (the certificate of service was contained in a Notice of Service of the Offer of Judgment, but it was not contained within the offer of judgment itself) as mandated by Fla.R.Civ.P. 1.442(c)(2)(G). Because award of attorney's fees is in derogation of the common law, the offer was found **defective!**

Abu-Ghazaleh v. Chaul, 36 So.3d 691 (Fla. 3<sup>rd</sup> DCA 2009)

Mr. Van Diepan was not a party, but convinced the plaintiff to file suit, with the understanding that Van Diepan would receive 18% of any recovery. Van Diepan selected the attorney, paid the attorney and reviewed all of the bills and even paid the medical costs of one of the expert witnesses. The defendant made an offer of judgment to the named plaintiff, but not Mr. Van Diepan

Although 3<sup>rd</sup> DCA found that Van Diepan was a de facto party, because Van Diepan was never served with the offer of judgment, he was not liable for attorney's fees based on the offer of judgment.

Andrews v. McPartland, 29 So.3d 342 (Fla. 5<sup>th</sup> DCA 2010)

Even if vicarious liability is not contested, an undifferentiated offer of judgment served on two defendants is defective. Effective January 1, 2011 Andrews will no longer be good law.

Smith v. Loews Miami Beach Hotel Operating Co., Inc., 35 So.3d 101 (Fla. 3<sup>rd</sup> DCA 2010)

After the defendant served an offer of judgment on the plaintiff, the plaintiff took a voluntary dismissal. Because the voluntary dismissal was **without prejudice**, the defendant was **not** entitled to attorney's fees.

Nationwide Mutual Fire Ins. Co. v. Pollinger, 42 So.3d 890 (Fla. 4<sup>th</sup> DCA 2010)

Nationwide hired 2 separate law firms in the suit brought by Mr. Pollinger. The Wicker law firm handled the Personal Injury Protection (PIP) claim and the Garagozlo firm handled the Uninsured Motorist (UM) claim. Both firms served offers of judgment on Mr. Pollinger. The Garagozlo offer stated in part:

In exchange for the payment set forth above, the Plaintiff Lawrence Pollinger will dismiss the Defendant NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, from **all claims, causes of action and damages arising from the incident or accident** giving rise to this lawsuit and will dismiss the lawsuit with prejudice. (Emphasis Added)

4<sup>th</sup> DCA rules that the Garagozlo offer was latently ambiguous because it was not clear whether that offer was only for the UM claim or included the PIP claim as well. Offer held defective.

#### D. CONDITIONAL OFFERS ARE DEFECTIVE

Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So.3d 646 (Fla. 2010); see also Traynor v. Delmonico, 35 So.3d 93 (Fla. 4<sup>th</sup> DCA 2010); Three Keys, Ltd. v. Kennedy Funding, Inc., 28 So.3d 894 (Fla. 5<sup>th</sup> DCA 2009); contra Donovan Marine, Inc. v. Delmonico, 40 So.3d 69 (Fla. 4<sup>th</sup> DCA 2010).

The Florida Supreme Court held in Attorneys' Title that an offer of judgment **conditioned** on multiple parties accepting the offer is **defective** and not enforceable. To illustrate:

P makes an offer of judgment to defendant X for \$10,000 and defendant Y for \$20,000, but only if **both** X and Y jointly accepts the offer. The offer is not valid because it does not allow each defendant to **individually** accept or reject offer.

#### E. §768.79(7)

Central Motor Co. v. Shaw, 3 So.3d 367 (Fla. 3<sup>rd</sup> DCA 2009) - Shepherd dissenting.

Shaw sued both Central Motors (CM) and Hyundai Finance (HF). CM made an offer of judgment (OJ) for \$1,000, which Shaw rejected. HF then settled the case for \$10,000 with Shaw; **CM** was **not** part of the **settlement** agreement. However the settlement was a **global settlement** and Shaw took a voluntary dismissal with prejudice against **both** CM and HF. CM sought attorney's fees based on its OJ.

A majority of the 3<sup>rd</sup> DCA ruled that because the settlement by HF benefited CM, CM was not entitled to attorney's fees. Majority held that the purpose of OJ is to settle cases and Shaw's rejection of CM's OJ **did not unnecessarily prolong the litigation** and therefore there should not be any sanctions, i.e. attorney's fees.

Shepard dissent - Because CM did not participate in settlement negotiations, the clear language of §768.79 mandates that CM recover attorney's fees. The **sole** basis to deny attorney's fees under §768.79(7) is if the offer by CM was not made in good faith. Since it was made in good faith, CM must get attorney's fees.

#### F. FEDERAL STATUTES/FEDERAL COURTS

Menchise v. Akerman Senterfitt, 532 F.3d 1146 (11<sup>th</sup> Cir. 2008); see also Jones v. United Space Alliance, L.L.C., 494 F.3d 1306 (11<sup>th</sup> Cir. 2007)

Because §768.79 is substantive in nature, Menchise v. Akerman holds that it applied to a **bankruptcy** proceeding where the issue involved was legal malpractice. §768.79 did not conflict with Federal Rule 68.

#### G. OFFER VALID

Allstate Property & Cas. Ins. Co. v. Lewis, 14 So.3d 1230 (Fla. 1<sup>st</sup> DCA 2009); see also Eastern Atlantic Realty and Investment, Inc. v. GSMOR LLC, 14 So.3d 1215 (Fla. 3<sup>rd</sup> DCA 2009)

In Allstate, the offer of judgment stated:

“Defendant hereby allows judgment to be taken against it...in settlement of all claims by the plaintiff... which is the subject matter of this lawsuit.”

This was a valid offer. Nothing in the wording of the offer precluded the plaintiff from filing a lawsuit against Allstate in the future based on a new set of facts.

Bosem v. Commerce and Industry Ins. Co., 35 So.3d 994 (Fla. 3<sup>rd</sup> DCA 2010)

The defendant made an offer of judgment for \$250 and later prevailed on summary judgment. The trial court ruled that because of the paucity of the offer, the offer was not made in good faith. Because the defendant was justified in believing that it has not liability, the 3<sup>rd</sup> DCA reversed and ruled that the defendant was entitled to attorney's fees.

H. CALCULATING THRESHOLD LEVEL (WHETHER THE PLAINTIFF RECOVERED MORE THAN 125 % OF THE PLAINTIFF'S OFFER OR LESS THAN 75 % OF THE DEFENDANT'S OFFER)

Nilo v. Fugate, 30 So.3d 635 (Fla. 1<sup>st</sup> DCA 2010)

Only **costs** incurred **prior** to the service of the offer of judgment may be added to the offer of judgment to determine if the threshold level has been reached.

I. PROPOSAL OF SETTLEMENT RULE CHANGE

Effective January 2, 2011 Fla.R.Civ.P. 1.442(c)(4) states:

If a party is **alleged** to be **vicariously** liable the offeror may make a **single joint offer** to the defendant and the vicariously liable defendant.

The rule procedurally overturns Lamb v. Matetzschik, 906 So.2d 1037 (Fla. 2005).

Note Bene: If the defendants are not vicariously liable, a single joint offer to or from multiple defendants will still not be permissible.

J. JURISDICTION

Service Experts, LLC v. Northside Air Conditioning & Electrical Service, Inc., 35 Fla. Law Weekly d 2093 (Fla. 2<sup>nd</sup> DCA 2010)

After 2 years of litigation, just before the hearing on summary judgment, the plaintiff took a voluntary dismissal without prejudice. Prior to the dismissal, the defendant had served an offer of judgment and the trial court awarded attorney's fees. This was error because a voluntary dismissal without prejudice is not enough to permit attorney's fees based on an offer of judgment. MX Investments v. Crawford, 700 So.2d 640 (Fla. 1997).

IV. EVIDENCE

A. PROOF OF REASONABLE NUMBER OF HOURS

Braswell v. Braswell, 4 So.3d 4 (Fla. 2<sup>nd</sup> DCA 2009)

The attorney testified at the attorney's fees hearing as to the **number of hours** he spent on the case, but the attorney failed to introduce his **time sheets** or invoices into evidence.

Because there was no substantial competent evidence as to the number of hours the attorney spent on the case, the 2<sup>nd</sup> DCA **reversed** and therefore the attorney was **not entitled to any attorney's fees**.

Compare with Trumbull Ins. Co. v. Wolentarski, 2 So.3d 1050 (Fla. 3<sup>rd</sup> DCA 2009); Quality Holdings of Florida, Inc. v. Selective Investments, IV, LLC, 25 So.3d 34 (Fla. 4<sup>th</sup> DCA 2009); Trovato v. Linden, 16 So.3d 290 (Fla. 4<sup>th</sup> DCA 2009).

The above cases reversed, but **remanded** back to the trial court to take additional evidence, because the party seeking attorney's fees failed to properly prove attorney's fees.

In Trumbull, the attorney seeking attorney's fees failed to keep contemporaneous time records. In fact, the testimony of the attorney and her expert was "**rank speculation**" and not based on any facts located in the record.

The 3<sup>rd</sup> DCA **struck the expert attorney's fees witness'** testimony. It then **remanded** the case back to the trial court to take additional evidence.

The 3<sup>rd</sup> DCA never discussed whether attorney's fees should be outright denied.

## B. BURDEN OF PROOF

Custom Crown Homes, Inc. v. Sabatino, 18 So.3d 738 (Fla. 2<sup>nd</sup> DCA 2009)

The party seeking attorney's fees has the burden of proof that it is entitled to attorney's fees for the entire case, even though it only prevailed upon one of multiple counts. In other words, the party entitled to attorney's fees has the burden of proof that the issues are inextricably intertwined.

## C. EXPERT ATTORNEY'S FEES WITNESS

Sea World of Florida, Inc. v. Ace American Ins. Companies, Inc., 28 So.3d 158 (Fla. 5<sup>th</sup> DCA 2010)

Mr. DeFault was injured on Sea World property because of the negligence of one its sub-contractors, Mr. Hobart. Mr. Hobart had previously agreed to indemnify Sea World for any attorney's fees incurred by Sea World, caused by Mr. Hobart's negligence. Because it was Mr. Hobart's negligence that caused Mr. DeFault's injuries, Sea World sued Mr. Hobart for the attorney's fees incurred in defending the DeFault lawsuit.

Mr. Thompson, the attorney who defended Sea World in the DeFault lawsuit testified to the jury in the Hobart indemnification case about the amount of time he expended on the DeFault

case. However Sea World did not present an **independent expert attorney's fees witness** to testify that the amount of time expended by Mr. Thompson was reasonable. Based on Setilin & Co. v. Phoenix Ins. Co., 650 So.2d 624 (Fla. 3<sup>rd</sup> DCA 1994) the trial court granted a directed verdict for Hobart.

The 5<sup>th</sup> DCA reversed and held that for indemnification cases an expert attorney's fees witness was **not necessary**. However in dicta, the 5<sup>th</sup> DCA reiterated the need for an expert attorney's fees witness when attorney's fees are sought against the opposing party in the same lawsuit.

Sourcetrack LLC v. Ariba, Inc., 34 So.3d 766 (Fla. 2<sup>nd</sup> DCA 2010)

If an appellate court issues a mandate to award appellate attorney's fees, the party seeking appellate attorney's fees must have an expert attorney's fees witness testify as to what constitutes a reasonable appellate attorney's fee.

## **V. ENTITLEMENT TO ATTORNEY'S FEES**

### **A. ATTORNEY'S FEES AGAINST THIRD PARTIES**

Bauer v. Dilib, Inc., 16 So.3d 318 (Fla. 4<sup>th</sup> DCA 2009)

Former employer sued both employee and new employer based on a contractual restrictive covenant that employee would not compete against employer. Former employer sought attorney's fees against employee's new employer.

Because §542 only deals with employer and former employees, there is **no right** for the former employer to recover attorney's fees from the **new employer**.

Certifies conflict with Sun Group Enterprises, Inc. v. De Witte, 890 So.2d 410 (Fla. 5<sup>th</sup> DCA 2004) which permitted attorney's fees against the **new employer**.

Abu-Ghazaleh v. Chaul, 36 So.3d 691 (Fla. 3<sup>rd</sup> DCA 2009); compare with Dunkin Donuts Franchised Restaurants, LLC v. 330545 Donuts, Inc., 27 So.3d 711 (Fla. 4<sup>th</sup> DCA 2010)

Abu-Ghazaleh v. Chaul

Mr. Van Diepan was not a party, but convinced the plaintiff to file suit, based on the civil theft statute, with the understanding that Van Diepan would receive 18% of any recovery. Van Diepan selected the attorney, paid the attorney and reviewed all of the bills and even paid the medical costs of one of the expert witnesses.

The civil theft statute permits attorney's fees to the prevailing party. The defendant prevailed, but the trial court ruled that the defendant could not recover attorney's fees against Van Diepan, because Van Diepan was not a party.

3<sup>rd</sup> DCA reversed, holding that because Van Diepan was a de facto party, Van Diepan was liable for attorney's fees.

Dunkin Donuts v. 330545 Donuts, Inc.

Mr. Moghaddam sued Dunkin Donuts in both his corporate capacity (330545 Donuts Inc.) and his individual capacity. Mr. Moghaddam settled the individual lawsuit and Dunkin Donut and Mr. Moghaddam agreed that each would bear their own attorney's fees.

In the corporate lawsuit, Dunkin prevailed and was entitled to attorney's fees under §44.103(6). Dunkin sought attorney's fees against Mr. Moghaddam individually. The 4<sup>th</sup> DCA ruled that because Mr. Moghaddam was individually no longer a party, the trial court did not have jurisdiction to award attorney's fees against him individually. Furthermore Mr. Moghaddam had not abused his power as President of the corporation to warrant that attorney's fees be assessed against him.

B. LIS PENDENS

McMillan/Miami, LLC v. Krystal Capital Managers, LLC, 1 So.3d 312 (Fla. 3<sup>rd</sup> DCA 2009) - Schwartz dissenting.

If a lis pendens is dissolved and it was filed in bad faith, the prevailing party will be entitled to attorney's fees up to the **amount of the bond**. S & T Builders v. Globe Properties, 944 So.2d 302 (Fla. 2006)

The majority of the 3<sup>rd</sup> DCA holds that if there is **no bond**, the prevailing party will still be entitled to attorney's fees.

Schwartz would hold that because the only basis for attorney's fees flows from the posted bond, there is no right to attorney's fees.

C. §627.428

Grider-Garcia v. State Farm Mutual Automobile etc., 14 So.3d 1120 (Fla. 5<sup>th</sup> DCA 2009)

Albeit **dicta**, the 5<sup>th</sup> DCA drops a **bombshell**. Because §627.428 only permits attorney's fees if the insured prevails on appeal, the 5<sup>th</sup> DCA states that even if the insured **prevails** on a

petition for writ of certiorari, because a petition for writ is not an appeal, the insured will **not** be entitled to attorney's fees for the time spent on the certiorari petition.

#### D. EMINENT DOMAIN

Calhoun, Dreggors & Associates v. Volusia County, 26 So.3d 624 (Fla. 5<sup>th</sup> DCA 2009)

A condemning authority informed the landowner that their property would be condemned. The landowner hired counsel and expert witnesses. Just before the eminent domain suit was to be filed, the condemning authority changed its mind and decided not to condemn the property. Because **no lawsuit** was ever filed, the **landowner's attorney was not entitled to recover attorney's fees** based on §73.092.

Whether attorney's fees should have been permitted under Article X, Section 4 of the Florida Constitution was never argued.

#### E. CONTRACT ONLY PERMITS ATTORNEY'S FEES TO ONE PARTY - RECIPROCAL ATTORNEY'S FEES. §57.105(7)

Florida Hurricane Protection and Awning, Inc. v. Pastina, 35 Fla. L. Weekly d 2025 (4<sup>th</sup> DCA en banc 2010).

Florida Hurricane's (FH) contract stated that the consumer would be responsible for all costs of **collection**, including attorney's fees. FH walked off the job, forcing the consumer to hire another contractor. The consumer sued FH for damages and prevailed. A 6-5 majority held that the consumer would **not** be entitled to attorney's fees against FH, because the lawsuit did not involve the issue of collection. The minority led by Judges Taylor and Farmer would have permitted attorney's fees to the consumer because any time there is a contract that permits attorney's fees to only one party, if the other party prevails, he/she should recover attorney's fees.

### VI. CALCULATING ATTORNEY'S FEES

#### A. REQUIREMENTS OF FINAL JUDGMENT

Peacock v. Ace, 24 So.3d 750 (Fla. 2<sup>nd</sup> DCA 2009); Harris v. McKinney, 20 So.3d 400 (Fla. 2<sup>nd</sup> DCA 2009)

Even without a transcript it is **fundamental error** for the trial court to fail to make a finding of the reasonable number of hours and the reasonable hourly rate. Case was reversed on

that issue alone. Issue is certified to the Florida Supreme Court as one of great public importance.

Custom Crown Homes, Inc. v. Sabatino, 18 So.3d 738 (Fla. 2<sup>nd</sup> DCA 2009)

In a multi-count complaint, the trial court must make specific finding of fact whether the separate counts are inextricably intertwined or separate and distinct issues. The reason is that when the court determines the reasonable number of hours it needs to determine whether the prevailing party is entitled to attorney's fees for the entire case or only attorney's fees for the counts that the party prevailed upon.

D'Alusio v. Gould & Lamb, P.A., 36 So.3d 842 (Fla. 2<sup>nd</sup> DCA 2010)

The **losing** party's expert attorney's fees witness testified that \$22,000 was reasonable for the appeal, but the trial court only awarded \$6,875. This was reversible error because the final judgment for attorney's fees did not make specific findings as to why it was awarding attorney's fees less than the amount testified by the losing party's attorney expert. The 2<sup>nd</sup> DCA then awarded \$22,000 for the appeal.

## B. PARALEGAL FEES

Demedrano v. Labor Finders of the Treasure Coast, 8 So.3d 498 (Fla. 1<sup>st</sup> DCA 2009)

In a worker's compensation case, the contract between the claimant and his attorney stated that paralegal fees would be considered a part of costs, not attorney's fees, to avoid the cap on attorney's fees pursuant to §440.34. Since paralegal fees are defined as attorney's fees under §57.104, the 1<sup>st</sup> DCA ruled that paralegal fees could not be considered costs.

State Farm Mutual Automobile Ins. Co. v. Edge Family Chiropractic, P.A., 41 So.3d 293 (Fla. 1<sup>st</sup> DCA 2010)

If a multiplier is permitted for attorney's fees, the hourly rate for the paralegal will also be multiplied.

C. PRE-JUDGMENT INTEREST ON ATTORNEY'S FEES

Butler v. Yusum, 3 So.3d 1185 (Fla. 2009)

If attorney's fees are sought based on an indemnification agreement, indemnee is entitled to pre-judgment interest.

Butler signed a contract with Yusum which stated that Yusum would indemnify Butler for any attorney's fees that Butler incurred in litigation with the FDIC. Butler incurred significant attorney's fees in the FDIC litigation and eventually paid the FDIC \$1.72 million. When Yusum refused to pay Butler's attorney's fees that he incurred in the FDIC suit, Butler sued to be reimbursed his attorney's fees as "special damages" and prevailed.

The Florida Supreme Court held that Butler was entitled to pre-judgment interest on attorney's fees that was incurred from the time that Butler paid the FDIC \$1.72 million.

D. MULTIPLIER

Massie v. Progressive Express Ins. Co., 25 So.3d 584 (Fla. 1<sup>st</sup> DCA 2009)

Trial court permitted a multiplier even though the client did not testify he had difficulty obtaining counsel. There was evidence from the attorney's fees expert that no attorney would have taken the case, but for a multiplier. Circuit court reversed, but 1<sup>st</sup> DCA reinstated the multiplier. Conflicts with Progressive Express Ins. Co. v. Schultz, 948 So.2d 1027 (Fla. 5<sup>th</sup> DCA 2007), which reversed a multiplier because the client did not testify he had difficulty obtaining counsel.

State Farm Mutual Automobile Ins. Co. v. Edge Family Chiropractic, P.A., 41 So.3d 293 (Fla. 1<sup>st</sup> DCA 2010)

1<sup>st</sup> DCA affirmed a lower court's ruling permitting a multiplier of 1.5 for one case and 2.0 for two other cases, for a total of \$161,195 in attorney's fees.

E. ATTORNEY'S FEES FOR LITIGATING THE **AMOUNT** OF ATTORNEY'S FEES IN FAMILY LAW CASES IS **DISCRETIONARY** WITH THE TRIAL COURT

Schneider v. Schneider, 32 So.3d 151 (Fla. 4<sup>th</sup> DCA 2010); see also Baker v. Baker, 35 So.3d 76 (Fla. 2<sup>nd</sup> DCA 2010) (court may award attorney's fees for litigating the amount of temporary attorney's fees); contra Wight v. Wight, 880 So.2d 692 (Fla. 2<sup>nd</sup> DCA 2004) - Silberman concurring.

In State Farm Fire & Cas. Company v. Palma, 629 So.2d 830 (Fla. 1993) the Florida Supreme Court ruled that where attorney's fees are awardable to the insured based on §627.428, an attorney, who took the case on a contingent fee basis, was permitted attorney's fees for litigating **entitlement** to attorney's fees, but not the **amount** of attorney's fees.

The 4<sup>th</sup> DCA ruled in Schneider that *Palma* did not apply family law cases because the right to attorney's fees is not based on the "prevailing insured" concept, but rather need and ability to pay. Furthermore family law cases are equitable in nature, and thus the right to attorney's fees for the impecunious spouse should be **liberally** construed. Thus trial courts have **discretion** to award the impecunious spouse attorney's fees for litigating the **amount** of attorney's fees.

#### F. COSTS

United Automobile Ins. Co. v. Dade Injury Rehab Center, Inc., 17 Fla. L. Weekly Supp. 82a (11<sup>th</sup> Cir. App. 2009); United Automobile Ins. Co. v. Comprehensive Health Ins. Center, Inc., 16 Fla. L. Weekly Supp. 1143a (11<sup>th</sup> Cir. App. 2009)

If a medical provider sues in its own name for recovery of damages, and the doctor from the plaintiff medical provider is deposed, that doctor is **NOT** entitled to an **expert witness fee**, because that doctor is a fact witness, not an expert witness.

D'Alusio v. Gould & Lamb, P.A., 36 So.3d 842 (Fla. 2<sup>nd</sup> DCA 2010)

An expert attorney's fees witness must testify in order for a party to recover **appellate** attorney's fees.

It was error for the trial court not to award the attorney who testified as an expert attorney's fees witness a reasonable fee.

The **losing** party's expert attorney's fees witness testified that \$22,000 was reasonable for the appeal, but the trial court only awarded \$6,875. This was reversible error because the final judgment for attorney's fees did not made specific findings as to why it was awarding attorney's fees less than the amount testified by the losing party's attorney expert. The 2<sup>nd</sup> DCA then awarded \$22,000 for the appeal.

#### G. MULTI-PARTY COMPLAINT - DEFENDANT PREVAILS AGAINST ONE PARTY, BUT NOT THE OTHER PARTIES

Black Diamond Properties, Inc. v. Haines, 36 So.3d 819 (Fla. 5<sup>th</sup> DCA 2010)

There were multiple plaintiffs and one of the plaintiffs, Bristol filed a voluntary dismissal. The defendant was entitled to attorney's fees against Bristol, but those attorney's fees would be limited to only that time spent directly attributable to Bristol, such as taking Bristol's deposition.

## VII. SANCTIONS

### A. ATTORNEY'S FEES AWARDED UNDER §57.105

Guede v. Windsor Capital Mortgage Co., 18 So.3d 1257 (Fla. 3<sup>rd</sup> DCA 2009)

Windsor sued Guede for mortgage fraud and filed a motion to produce the Guede's mortgage application. Guede objected arguing that the application was testimonial in nature and might incriminate him. The trial court ordered that the application be produced and Guede appealed. Because the application was clearly not testimonial, Windsor was entitled to **appellate attorney's fees**.

Long v. AvMed, Inc., 14 So.3d 1264 (Fla. 1<sup>st</sup> DCA 2009)

Prior to the suit being filed, the insurance company agreed to pay the claim. The trial court denied attorney's fees and the insured appealed. The insured was entitled to appellate attorney's fees.

Unifirst Corp. v. City of Jacksonville, Tax Collector's Office, 42 So.3d 247 (Fla. 1<sup>st</sup> DCA 2010)

Attorney's fees were imposed for the appellant filing a frivolous motion for **re-hearing** that failed to comply with the purpose of Fla.R.App.P. 9.330, which is to inform the court that it overlooked or misapplied the law. In addition the motion for re-hearing included new arguments that had been previously addressed in the briefs.

Finally Unifirst argued that the 1<sup>st</sup> DCA decision, which was a PCA affirmed, conflicted with a written opinion from the 3<sup>rd</sup> DCA. It was frivolous that an opinion which says nothing (the 1<sup>st</sup> DCA PCA affirmed case) can conflict with another DCA written opinion.

Klein v. Meza, 20 So.3d 945 (Fla. 3<sup>rd</sup> DCA 2009)

Ms. Klein was liable for trial court attorney's fees for forging a deed.

Charlton v. Black Diamond Properties, 17 So.3d 790 (Fla. 5<sup>th</sup> DCA 2009)

5<sup>th</sup> DCA affirmed attorney's fees of \$24,000 for the opposing party filing a frivolous §57.105 motion.

Maradriaga v. 7 - Eleven, 29 So.3d 440 (Fla. 1<sup>st</sup> DCA 2010)

**After** the 1<sup>st</sup> DCA dismissed an appeal for lack of jurisdiction, it assessed attorney's fees based on §57.105.

B. ATTORNEY'S FEES ARE DENIED UNDER §57.105

Chue v. Lehman, 21 So.3d 890 (Fla. 4<sup>th</sup> DCA 2009)

Lehman filed suit, but Chue, who lived in Panama, filed a motion to dismiss based on lack of personal jurisdiction. Before the motion could be heard, Lehman filed a voluntary dismissal. The trial court did not err in denying attorney's fees.

Ultimate Makeover Salon & Spa Inc. v. DiFrancesco, 41 So.3d 335 (Fla. 4<sup>th</sup> DCA 2010)

Even though the defendant properly served a §57.105 motion that the Plaintiff's cause of action was barred by the statute of limitations, the trial court did not err by refusing to award attorney's fees under 57.105.

C. PROCEDURE/JURISDICTION

1. 21 Day Notice

Anchor Towing, Inc. v. Florida Dept. of Transportation, 10 So.3d 670 (Fla. 3<sup>rd</sup> DCA 2009)

Pursuant to §57.105(4) the notice giving the opposing party 21 days to withdraw their position may only be done by **motion**, not by letter.

The motion can not be filed with the court until after the 21 day time period has expired.

Kenniasty v. Bionetics Corp., 10 So.3d 1183 (Fla. 5<sup>th</sup> DCA 2009)

21 day notice applies **to cases filed prior** to adoption of §57.105(4) as long as the **motion** for attorney's fees was served after the adoption of §57.105(4).

Montgomery v. Larmoyeux, 14 So.3d 1067 (Fla. 4<sup>th</sup> DCA 2009)

A motion for attorney's fees was filed prior to the expiration of 21 days, and as a result the 4<sup>th</sup> DCA denied attorney's fees under §57.105.

Unifirst Corp. v. City of Jacksonville, Tax Collector's Office, 42 So.3d 247 (Fla. 1<sup>st</sup> DCA 2010)

Unifirst filed a frivolous motion for re-hearing. Based on Fla.R.App.P. 9.330(a) the City of Jacksonville had to respond within **10 days**. The City of Jacksonville **filed its §57.105 motion** for attorney's fees within 10 days. Even though the §57.105 motion did not give Unifirst 21 days to withdraw its motion for re-hearing, as required by §57.105(4), the 1<sup>st</sup> DCA imposed appellate attorney's fees based on §57.105(1) on its own motion.

Koch v. Koch, 35 Fla. L. Weekly d 2091 (Fla. 2<sup>nd</sup> DCA 2010) - Wallace dissenting

Former wife negotiated a marital settlement agreement (MSA) pro se. After signing the MSA she hired an attorney to overturn it. All of her grounds to revoke the MSA were frivolous. The former husband sought attorney's fees as a sanction, but did not state the basis for such fees in his motion. The former husband never served a 21 day §57.105 motion prior to the court hearing. The trial court awarded §57.105 fees on its own motion and because there is no precondition that 21 day notice be given when attorney's fees are awarded by a court, the 2<sup>nd</sup> DCA affirmed and noted conflict with Davidson v. Ramirez, 970 So.2d 855 (Fla. 3<sup>rd</sup> DCA 2007) in which the 3<sup>rd</sup> DCA held that if a trial court simply adopted the motion of the party seeking fees under §57.105, if there was no 21 day notice, the §57.105 fees must be reversed.

The 2<sup>nd</sup> DCA pointed out that §57.105(1) does not imply that if the party's motion seeking attorney's fees under §57.105 is procedurally defective this precludes a court from awarding attorney's fees on its **own motion**. Wallace dissenting would have held that because the former wife was not given the 21 day safe harbor notice, the court should not have awarded §57.105 fees.

## 2. Jurisdiction

Service Experts, LLC v. Northside Air Conditioning & Electrical Service, Inc., 35 Fla. Law Weekly d 2093 (Fla. 2<sup>nd</sup> DCA 2010)

After 2 years of litigation, just before the hearing on summary judgment, the plaintiff took a voluntary dismissal without prejudice. Prior to the dismissal, the defendant had served a §57.105 motion. The 2<sup>nd</sup> DCA stated:

“Also, the Northside defendants’ request for sanctions under §57.105 filed in response to Service Experts’ complaint did not vest upon them a right to have sanctions **determined** or awarded against Service Experts.” (Emphasis Added)

Based on the above quotation, the 2<sup>nd</sup> DCA seems to be saying that the trial court **lacked jurisdiction** to even determine whether §57.105 attorney’s fees should be imposed. The denial of attorney’s fees under §57.105 for this reason is troubling to the author.

However the 2<sup>nd</sup> DCA went on to state in the opinion that there was no evidence on the record before the 2<sup>nd</sup> DCA that Service Experts would not have prevailed at trial. The allegations of fraud were simply too weak to warrant sanctions. Finally the trial court never ruled on the merits of whether there was a basis for an award of §57.105 fees.

#### D. IS ATTORNEY 50% LIABLE FOR ATTORNEY’S FEES?

##### 1. Attorney Liable for 50% of the Attorney’s Fees

Montgomery v. Larmoyeux, 14 So.3d 1067 (Fla. 4<sup>th</sup> DCA 2009)

Attorney was 50% liable for \$209,000 in attorney’s fees.

Long v. AvMed, Inc., 14 So.3d 1264 (Fla. 1<sup>st</sup> DCA 2009)

AVMED agreed to pay the insured prior to suit being filed, but the amount was not actually paid until after suit was filed. The trial court ruled that the lawsuit was a pretext to recover attorney’s fees. Even though the trial court did not assess §57.105 attorney’s fees, the 3<sup>rd</sup> DCA assessed attorney’s fees against both the attorney and client for the appeal.

##### 2. Procedure/Due Process

Ferdie v. Isaacson, 8 So.3d 1246 (Fla. 3<sup>rd</sup> DCA 2009)

Once the issue of entitlement to attorney’s fees has been decided, both the losing party and his attorney are entitled to a full evidentiary hearing on whether the attorney is 50% responsible for the losing party’s attorney’s fees.

#### E. COSTS

Ferdie v. Isaacson, 8 So.3d 1246 (Fla. 3<sup>rd</sup> DCA 2009)

Because costs are not mentioned within §57.105, it was error to award costs to the party entitled to §57.105 attorney's fees.

Bohner v. Bohner, 24 So.3d 622 (Fla. 4<sup>th</sup> DCA 2009)

Because the former husband was unnecessarily litigious, 4<sup>th</sup> DCA affirmed lower court's ruling that attorney was entitled to recovery attorney's fees for **travel time** from West Palm Beach to Delray Beach.

#### F. SET OFF

Nationwide Mutual Fire Ins. Co. v. Voigt, 21 So.3d 895 (Fla. 2<sup>nd</sup> DCA 2009)

If attorney's fees are awardable under §57.105, the attorney's fees will be set off against any damages recovered by the opposing party.

#### G. CONFLICT OF INTEREST BETWEEN COUNSEL AND CLIENT

Geiger v. Spurlock, 30 So.3d 704 (Fla. 5<sup>th</sup> DCA 2010)

An attorney argued on appeal that the attorney should not be 50% responsible for trial court awarded §57.105 attorney's fees. The appeal was brought in the name of **both the client and attorney**. The 5<sup>th</sup> DCA noted that because the attorney was seeking to place the entire burden of attorney's fees on the former client, there was a conflict of interest between the attorney and client.

#### H. INHERENT AUTHORITY OF THE COURT

Cooper v. Cooper, 16 So.3d 156 (Fla. 4<sup>th</sup> DCA 2009)

The trial court could assess 100% of the attorney's fees as a sanction against the lawyer, where attorney's fees were based on the inherent authority of the court.

Campbell v. State of Florida, 9 So.3d 59 (Fla. 1<sup>st</sup> DCA 2009)\

Plaintiff filed a class action against the State of Florida to recover some of the tobacco settlement for Medicaid recipients. The state suspected that the named plaintiff was not a Medicaid recipient and served a **§57.105** motion. However the state was not able to prove its allegation and attorney's fees were denied. The state did not appeal the trial court's ruling.

Months later, the state found sufficient evidence that the named plaintiff was not a Medicaid recipient. After a hearing, the trial court granted attorney's fees based on its **inherent authority**.

The 1<sup>st</sup> DCA reversed, holding that if attorney's fees are denied as a sanction (§57.105), the party seeking attorney's fees may not use an alternative theory (inherent authority of the court) to recover attorney's fees as a sanction.

Gottfried v. The Kutner Law Firm, 34 So.3d 56 (Fla. 3<sup>rd</sup> DCA 2010)

After the divorce was filed, the husband absconded to Israel with marital funds for 4 months. The trial court orally ruled that the wife was entitled to attorney's fees as a sanction for the time period that the husband was in Israel. Upon the husband's return, both the husband and wife entered into a marital settlement agreement that **both parties would bear their own attorney's fees**. Both the husband and wife argued that the Kutner law firm should not be entitled to any attorney's fees. Nevertheless, the trial court sanctioned the husband by assessing over \$90,000 in attorney's fees and the 3<sup>rd</sup> DCA affirmed.

#### I. STATUTORY CHANGE

§57.105(3)(d)(2010)

If any claim or defense would not support the applications of then existing law to the material facts, (§57.105(1)b the **attorney** representing the party will be **100% responsible** for attorney's fees, for not properly advising his/her client on the law. The represented party will **not** be liable for **any attorney's fees**.

#### J. RULE CHANGE - PROCEDURE FOR RECOVERING APPELLATE ATTORNEY'S FEES AS A SANCTION

Fla.R.App.P. 9.410 (Effective December 1, 2010)<sup>1</sup>

(b) A party may serve a motion for attorney's fees as a sanction.

(2) Such a motion must include a certificate of **service** in accordance with 9.420(d) and certificate of **filing** 9.410(4). 9.410(4) requires that the certificate of filing state that the party seeking sanctions had previously furnished a copy of the motion for sanctions to the opposing party and the date on which the motion for sanctions was served.

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<sup>1</sup> Synopsis of Appellate Rule

- (3) The motion for sanctions may only be initially served on the opposing party. The motion must be served no later than the time for serving any permitted response or 15 days after the challenged paper is served by the opposing party or any claim made at oral argument. The certificate of **filing** the motion for sanctions should **not be dated, nor should it be signed**.
- (4) The opposing party has 21 days to withdraw the offending paper or allegation after service of the appellate motion for sanctions. If the offending party does not withdraw the offending motion or allegation, then the party seeking attorney's fees must **file** the motion for sanctions no later than the reply brief or 30 days after service of the motion for sanctions.
- (5) Once the motion for sanctions is filed with the court the party against whom sanctions are sought has 10 days to respond. The court may extend or shorten the time period to respond on its own motion.

## **VIII. ATTORNEY/CLIENT DISPUTES**

### **A. CHARGING LIEN**

McCarthy v. Estate of Krohn, 16 So.3d 193 (Fla. 4<sup>th</sup> DCA 2009)

The contract between the attorney and client was contingent upon recovery. The client fired his attorney and the attorney filed a charging lien. The attorney was entitled to pre-judgment interest from the date the client received the proceeds of the settlement.

Chastain v. The Cunningham Law Group, P.A., 16 So.3d 203 (Fla. 2<sup>nd</sup> DCA 2009)

The attorney advanced the client costs. Because the contract stated that the client would be required to reimburse the attorney the costs upon receiving the settlement, pre-judgment interest ran from the date of settlement and not from the date when the costs were paid by the lawyer. Had the contract stated that interest would run from the date that the costs were paid, then the 4<sup>th</sup> DCA would have allowed interest from the date of payment and not settlement.

Naftzger v. B. Lee Elam Fort Golf Partner, LLC, 41 So.3d 944 (Fla. 2<sup>nd</sup> DCA 2010)

Mr. Naftzger hired Mr. Elam and then fired him. Mr. Elam gave oral notice to all parties that he was going to file a charging lien, but did not do so until after the trial court dismissed the case. Because the case had been dismissed, the trial court lacked jurisdiction to enforce the charging lien.

## B. RETAINING LIEN

Brickell Place Condo Ass'n. Inc. v. Joseph Gangizza & Associates, P.A., 31 So.3d 287 (Fla. 3<sup>rd</sup> DCA 2010)

A retaining lien (the right to retain the former client's files) does not apply to contingent fee cases, if the contingency has not yet occurred.

## C. ATTORNEY/ATTORNEY DISPUTES

Chastain v. The Cunningham Law Group, P.A., 16 So.3d 203 (Fla. 2<sup>nd</sup> DCA 2009)

Mr. Chastain was suspended from the Florida Bar. Mr. Chastain turned over his files to the Cunningham Law Group (Group) and the Group agreed to pay Mr. Chastain his previously incurred attorney's fees based on quantum meruit. The contract was approved by the Florida Bar. Later, Mr. Chastain filed a petition with the Florida Bar to resign for disciplinary reasons (which is tantamount to disbarment). The Florida Supreme Court granted Mr. Chastain's motion to resign.

Based on Faro v. Romani, 641 So.2d 69 (Fla. 1994), the Group argued that since Mr. Chastain **voluntarily** withdrew from representation, by resigning from the Bar, Mr. Chastain was not entitled to any fee after the Florida Supreme Court granted Mr. Chastain's motion to resign. The 2<sup>nd</sup> DCA disagreed because Faro dealt with a dispute between an attorney and client whereas this dispute was between two law firms. Mr. Chastain was entitled to his previously incurred attorney's fees based on quantum meruit.

Morrison v. West, 30 So.3d 561 (Fla. 4<sup>th</sup> DCA 2010)

Mr. West is licensed to practice law in North Carolina, but is not licensed to practice law in Florida. Even though Ms. Morrison knew that Mr. West was not licensed in Florida, she hired Mr. West to represent her in a complex estate matter on a contingency fee basis. Mr. West never obtained Florida co-counsel. After the case settled, Mr. West demanded \$1,000,000 from Ms. Morrison, but she refused to pay and Mr. West filed suit.

If a contingency fee agreement between a Florida lawyer and client fails to comply with the Rules of the Florida Bar, the contingency fee agreement is **void**, but the Florida attorney is still entitled to attorney's fees based on **quantum meruit**.

However because Mr. West was **not licensed** to practice law in the State of Florida, without Florida co-counsel, his contract with Ms. Morrison was **illegal** and therefore Mr. West was not entitled to recover any attorney's fees against Ms. Morrison based on quantum meruit.