

**THE FLORIDA BAR BUSINESS LITIGATION COMMITTEE OF
THE BUSINESS LAW SECTION
Business Litigation Case Law Update -- January 19, 2006**

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Attorney's Fees\Offer of Judgment

***1 Nation Technology Corp. v. A1 Teletronics, Inc.*, 30 Fla. L. Weekly (Fla. 2d DCA 2005).** A1 Teletronics, Inc. sued 1 Nation and its president, McKay (Defendants). Prior to trial Defendants served A1 with an offer of judgment pursuant to section 768.79, Florida Statutes, in the amount of \$50,000. A1 rejected the offer and proceeded to trial. Defendants prevailed at trial and sought to recover their attorney's fees and costs incurred since the date of their offer. The trial court denied Defendants fees and costs, finding their offer deficient under Florida Rule of Civil Procedure 1.442(c)(2)(D) for failure to state with particularity all nonmonetary terms and conditions, specifically A1's request for injunctive relief. Defendants appealed.

The Second District Court of Appeal affirmed the trial court's denial of fees, despite ruling that the trial court erred in finding Defendants' offer deficient under Rule 1.442(c)(2)(D). The Second District held that Defendants' offer instead failed to comply with the requirement of Rule 1.442(c)(3) as defined by the Florida Supreme Court in *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005), in that the offer failed to state the amount and terms attributable to each party. In *Lamb* the Florida Supreme Court held Rule 1.442(c)(3) "expressly requires that a joint proposal of settlement made to two or more parties be differentiated." Defendants' offer provided that co-Defendants would be "jointly and severally responsible for a single payment of \$50,000.00" but did not differentiate between the parties. Thus Defendants' offer was deficient as to the particularity of the parties under Rule 1.442(c)(3).

***D.A.B. Constructors, Inc. v. Oliver*, 30 Fla. L. Weekly D2460 (Fla. 5th DCA 2005).** Plaintiff was involved in a motor vehicle collision with Defendant Cox while Cox was in the scope of his employment. Plaintiff sued Cox and his employer (D.A.B.) jointly and severally. Defendants subsequently made three joint offers to settle all claims. Each offer complied with the requirements of Florida Rule of Civil Procedure 1.442, except that none apportioned the liability between Defendants. Plaintiff refused all three offers. The case proceeded to trial and Defendants prevailed. Defendants moved for their attorneys' fees and costs. The trial court denied Defendants' motion, holding Defendants' settlement offers invalid under Rule 1.442(c)(3).

The Fifth District Court of Appeal affirmed, determining that it was "constrained" to do so under the Supreme Court's holding in *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005). Nevertheless, the Fifth District criticized the Supreme Court's strict interpretation of Rule 1.442, commenting that "it makes no sense" to require that an offer be

differentiated when made to one plaintiff from two defendants, one of whom is only jointly and severally liable or vicariously liable.

Event Services America, Inc., Etc. v. Anthony Ragusa and Karen Ragusa, et al., 30 Fla. L. Weekly D1913 (Fla. 3d DCA 2005). The Third Circuit Court of Appeal affirmed the trial court's order striking Event Services proposal for settlement. Defendant made nominal offers of settlement in the amount of \$500 to each of the Plaintiffs after an escalator accident at Pro Player stadium. The trial court held that the proposal for settlement was made in bad faith.

The Third Circuit affirmed the trial court holding that a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal. In this case, the court found that Plaintiff's claim had merit, and that the defendants had at least some exposure when the offers were made. The court noted that Plaintiffs claim against the Defendants survived a motion for summary judgment reflecting some exposure to Defendants.

McHale v. Grobowsky, 913 So.2d 1292 (Fla. 2d DCA 2005). The Second District Court of Appeal reversed a trial court order awarding attorneys fees based upon an offer of judgment (section 768.79, Florida Statutes), on the grounds that the offer was invalid because it contained a condition that required the participation of a nonparty.

Disqualification of Counsel

Solomon v. Dickison, 2005 WL 3188344 (Fla. 1st DCA 2005). Petitioners sought certiorari review of a trial court order disqualifying their attorneys from this action because of a conflict of interest. Petitioners' attorney (Cressman) was a member of the law firm representing certain Respondents. Cressman's affidavit stated that the instant case was mentioned in his presence, but that facts and confidences were not shared with him. This was disputed by affidavits provided by a Respondent employee. The trial court disqualified Cressman and his new firm based upon the irrefutable presumption that confidences were disclosed, as stated under Rule 4-1.9, Rules Regulating the Florida Bar.

The First District Court of Appeal quashed the trial court's order because the trial court erred in applying Rule 4-1.9, rather than the correct standard under Rule 4-1.10(b). Rule 4-10(b) requires that the movant for disqualification show that the attorney in fact received confidential information material to this matter. Here, the affidavits were in conflict.

Arbitration Provisions

Mora v. Abraham Chevrolet-Tampa, Inc., 30 Fla. L. Weekly D2247 (Fla. 2d DCA 2005). Employer and employee signed an agreement for binding arbitration of any claim related to the employment. Employer later terminated employee, and employee filed a whistleblower suit. Employer filed an answer with ten affirmative defenses, making no mention of a right to arbitration, and proceeded to engage in discovery. Two

months later Employer moved to compel arbitration. The trial court granted Employer's motion to compel, holding that Employer had not intentionally waived the right to compel arbitration because its counsel did not become aware of the arbitration agreement until after serving the answer and affirmative defenses.

Employee appealed and the Second District Court of Appeal reversed holding that Employer waived its right to demand arbitration by failing to do so before participating in the litigation. *See Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707 (Fla. 2005). Here, the fact that Employer answered Employee's complaint and participated in discovery, instead of demanding arbitration, constituted a waiver because these actions were inconsistent with an intent to arbitrate the claim. As a signatory to the arbitration agreement Employer was legally charged with knowledge of its terms from the date it was signed, and was not excused by its attorney's lack of awareness.

***Citigroup, Inc. v. Boles*, 30 Fla. L. Weekly D2307 (Fla. 4th DCA 2005).** Plaintiffs acquired stock in MCI Communications, which was subsequently acquired by Worldcom. Between 1998 and 2001 Plaintiffs claimed to have read and relied upon articles in several investment publications (Fortune, Forbes, Smart Money, and Business Week) that quoted Jack Grubman, Salomon Smith Barney's (SSB) top telecommunications analyst. SSB was wholly-owned by Defendant Citigroup. Plaintiffs' complaint explored the relationship between SSB's Grubman and Worldcom executives and alleged Grubman made misrepresentations that resulted in substantial financial gain for Grubman and the executives. Plaintiffs' four-count complaint against Citigroup alleged false information negligently supplied for the guidance of others, outrageous conduct, fraud, and violation of Florida's Blue Sky laws.

Plaintiffs maintained an independent investment account to hold their Worldcom stock. By coincidence, they then moved the stock into an account with SSB in 2003, long after their decision to hold the stock and long after Worldcom had declared bankruptcy. As a requirement to open the account with SSB, Plaintiffs signed an agreement that contained an arbitration clause. Citigroup moved to compel arbitration of Plaintiffs' tort claims pursuant to this clause. The trial court denied Citigroup's motion.

The Fourth District Court of Appeal affirmed, finding that Plaintiffs' complaint did not involve or refer to the agreement, and that the agreement was not in any way related to the allegedly tortious advice. Plaintiffs did not allege bad advice from the investment house (SSB) in their complaint. There was simply no nexus between this dispute based on Grubman's advice and the account. The alleged misrepresentations made by Grubman were made long before the SSB account was opened, and the stock was nearly worthless before it was placed into the account. Thus, notwithstanding the fact that arbitration is generally favored in the law, Plaintiffs' tort claims were beyond the scope of the arbitration clause here because the parties did not intend or contemplate such claims when they entered the agreement.

***Kaplan v. Kimball Hill Homes Florida, Inc.*, 30 Fla. L Weekly D2787 (Fla. 2d DCA 2005).** Kaplan brought claims of fraud, fraudulent inducement and intentional infliction of emotional distress against Kimball Hill arising in connection with a construction contract. The contract contained an arbitration clause providing that any controversy or claim between the parties “relating to” the contract was subject to mandatory arbitration. Kimball Hill moved to compel arbitration, and the trial court ordered arbitration on the fraud and fraudulent inducement claims but denied arbitration on the intentional infliction of emotional distress claim. The parties appealed.

The Second District Court of Appeal affirmed on the fraud and fraudulent inducement claims, and reversed on the intentional infliction of emotional distress claim. The Second District found the phrase “relating to” in the contract has a more expansive reference than the phrase “arising out of” or “arising under.” As such, tort claims fall within the scope agreement to arbitrate if they are based upon “duties that are dependent upon the existence of the contractual relationship between the parties.” Here, there was a nexus between all three claims and the contract.

Class Action Suits

***Ortiz v. Ford Motor Co.*, 30 Fla. L. Weekly D1979 (Fla. 3d DCA 2005).** Plaintiff sued Defendant in a class action complaint for unjust enrichment stemming from concealment of a design defect that caused rollovers. Plaintiff sought statewide class certification for “all persons and entities who, at any time prior to August 9, 2000, purchased, owned, or leased any 1991 to 2001 Ford Explorer sold or leased in the State of Florida and who either currently own or lease the vehicle(s) or previously owned or leased such vehicle(s).” The trial court denied class certification. Plaintiff appealed. The issue before the Third District Court of Appeal was whether the class representation satisfied the threshold elements of numerosity, commonality, typicality and adequacy under Florida Rule of Civil Procedure 1.220(a); and the additional requirements of predominance and superiority under Rule 1.220(b)(3).

The Third District affirmed the trial court order denying class certification. Under Rule 1.220(b)(3), “issues which are subject to generalized proof must predominate over issues that require individualized proof and the class action must be superior to other available methods ...” Here, the Third District found the differences surrounding each class member’s vehicle purchase and the warning (if any) of possible rollover outweighed any common issues of fact. Moreover, Plaintiff could not prove a design defect on a class-wide basis because Plaintiff failed to distinguish the characteristics on which he claimed the defect across different Ford Explorer models. Finally, the court held a class action would not be superior to any other alternative method for a fair and efficient adjudication of this cause of action.

***Hameroff v. Public Medical Assistance Trust Fund*, 30 Fla. L. Weekly D2031 (Fla. 1st DCA 2005).** Plaintiffs comprised a class of health care entities that filed suit seeking to declare Florida’s Public Medical Assistance Trust Fund (PMATF) annual assessment for funding health care services to indigent persons unconstitutional. Plaintiffs sought a refund of the assessments and reasonable attorneys’ fees. The parties reached a settlement agreement. The trial court approved this settlement and two days later awarded attorneys’ fees to class counsel. However, the trial court later vacated its judgment and reduced the amount of attorneys’ fees awarded. Plaintiffs appealed arguing that the trial court abused its discretion in unilaterally modifying the terms of the settlement agreement. The First District Court of Appeal reversed the trial court holding that a trial court “may not unilaterally modify the settlement by rewriting an agreement entered into by the parties.” The trial court must either accept or reject the settlement as a whole. Here, the class members agreed to pay their pro rata share of fees and costs. By reallocating the attorneys’ fee burden, the trial court impermissibly rewrote a term of the settlement agreement.

Corporate Litigation

***Morales v. Rosenberg*, 30 Fla. L. Weekly D2402 (Fla. 3d DCA 2005).** Rosenberg founded the corporation at issue and transferred fifty percent of the shares to Morales. Morales soon after filed a petition for dissolution of the corporation. Rosenberg then exercised her statutory right to purchase Morales’ shares. At issue was the valuation of Morales’ fifty-percent interest in the corporation, which the trial court valued at \$77,073.52. Morales appealed the valuation.

The Third District Court of Appeal affirmed in part, reversed in part. The Third District affirmed the valuation award. The Third District also affirmed the decision not to award Morales prejudgment interest on her shares because the Third District’s review of the record supported the trial court’s findings that Morales arbitrarily refused to accept reasonable offers of payment from Rosenberg for her shares, and that Morales’ refusal to accept the offers was not in good faith. (*Citing* section 607.1436(5) of the Florida Statutes.)

The Third District reversed on the issue of Morales’ entitlement to costs holding that the trial court erred in denying Morales’ motion for costs and granting Rosenberg’s motion for costs because the court failed to recognize that this issue was governed by section 607.1431(4) of the Florida Statutes, a more specific statute with a more particular provision concerning corporate dissolutions. The Third District reversed and remanded the trial court’s cost award with directions that the trial court consider the award pursuant to section 607.1431(4) of the Florida Statutes.

***Campellone v. Cragan*, 30 Fla. L. Weekly D2212 (Fla. 5th DCA 2005).** Campellone and Cragan were 51% and 49% shareholders, respectively, of three corporate entities. Cragan filed suit against Campellone claiming embezzlement, misappropriation, breach of fiduciary duty, and battery, and named the entities as nominal defendants. Attorney Mann appeared as counsel of record for both Campellone and the entities, and

Cragan moved to disqualify Mann as counsel for all defendants on the ground that the representation violated Rules 4-1.13 and 4-1.7 of the Rules Regulating the Florida Bar.

The trial court explained that the Rules noted that most derivative actions are a normal incident of business, to be defended by corporate counsel as any other suit. However, if a conflict of interest arises and the claim involves serious charges of wrongdoing by controlling persons, joint representation should not continue. Here, because the complaint alleged serious wrongdoing by Campellone injurious to the corporate entities, the trial court found that Campellone's interests and those of the entities were not aligned, and that it would be of no benefit to align them. The trial court also noted that Cragan's consent was required for Mann's representation of the entities. Finally, the trial court disqualified Mann from representing *either* Campellone *or* the entities because Mann, through his dual representation, had access to information regarding the entities that could give Campellone an unfair advantage in the derivative suit. Campellone sought certiorari review of the order disqualifying Mann.

The Fifth District Court of Appeal held that the trial court did not abuse its discretion in disqualifying Mann from representing the corporations. However, the trial court did abuse its discretion in ruling that Mann could not represent Campellone. The Fifth District did not agree with the trial court that Mann had access to confidential financial and other information that would give Campellone an "unfair advantage" over Cragan in the derivative action.

Contract Interpretation

***Jenkins v. Eckerd Corp.*, 30 Fla. L. Weekly D2291 (Fla. 1st DCA 2005).** Parties entered into a shopping center lease that provided Lessee (Eckerd) with the right to terminate the lease if the anchor tenant (Delchamps) "fail[ed] or cease[d] to lease and pay rent for its store" in the shopping center. The lease also contained an integration (merger) clause providing that the agreement was a complete manifestation of the parties' intent and could only be modified in writing. The Delchamps lease included an assignment provision granting Delchamps the right to assign its lease. Delchamps subsequently assigned its lease, and, based upon this assignment, Eckerd canceled its lease. Lessor filed suit against Eckerd for breach. At trial, Lessor sought to introduce testimony relating to the parties' negotiations and their intent in drafting the lease to show that the assignment did not trigger the (ambiguous) termination clause. Eckerd objected on parol evidence and relevancy grounds, and the trial court sustained the objection. At the close of Lessor's case the trial court granted Eckerd's directed verdict motion, concluding that the lease clearly and unambiguously gave Eckerd the option to cancel the lease if Delchamps ceased to lease and pay rent for the use of its store.

The First District Court of Appeal affirmed. The dissent argued that the lease contained a latent ambiguity because it was silent as to the rights and duties of the parties in the event Delchamps assigned its lease.

***Langford v. Paravant, Inc.*, 30 Fla. L. Weekly D1890 (Fla. 5th DCA 2005).** Plaintiff/employee appealed adverse summary judgment granted in favor of Defendant/employer. Plaintiff's employment contract provided for him to receive an annual base salary and commissions on "sales" over certain thresholds. Defendant company was awarded a \$300,000,000 military subcontract and subsequently fired the Plaintiff after 17 months of work exclusively on the awarded contract. The Fifth District Court of Appeal found that because "sales" was not defined and was ambiguous, the trial court could use parole evidence to determine the intent of the parties. The Fifth District held that when an agreement is ambiguous and the parties present different interpretations, the issue of proper interpretation becomes an issue of fact precluding summary judgment.

***Grover v. Jacksonville Golfair, Inc.*, 30 Fla. L. Weekly D2422 (Fla. 1st DCA 2005).** This case involved a consolidated appeal of two final judgments entered in related lawsuits involving two written option agreements to purchase two motels in Jacksonville, Florida. The trial court held that: (1) Appellee/purchasers validly exercised their written purchase option agreements; (2) Appellee/purchaser possessed enforceable contracts to purchase the motel properties in question; (3) Appellants/sellers breached their obligations under the options by refusing to close the transactions; and (4) Appellee/purchaser should be awarded benefit of the bargain damages and prejudgment interest. The First District Court of Appeal affirmed the trial court in full because the contracts at issue contained all of the essential terms for the purchase of the two motels, including property identification, purchase price, financing terms, and closing cost allocation. Further, Appellee/purchaser established that there was substantial performance of the conditions precedent relating to each option agreement and that the Appellant/seller's actions constituted a lack of good faith supporting the award of benefit of the bargain damages in both actions. Finally, Florida courts have long recognized that pre-judgment interest on "benefit of the bargain" damages runs from the date of breach.

***Blue Paper, Inc. v. Provost*, 914 So. 2d 1048 (Fla. 4th DCA 2005).** Provost (buyer) and Blue Paper (seller) executed a sales contract for the purchase of townhouse. The contract identified the buyer as "William Provost, on behalf of a Limited Liability Company to be formed." Provost signed the contract in his individual capacity. The contract called for Provost to make a deposit of \$100,000 upon execution of the contract. Provost paid only \$75,000 at the signing, and Blue Paper orally agreed that the remaining \$25,000 could be paid prior to closing. Pertinent to the appeal, the contract also provided that: (1) the contract could only be modified in writing; and (2) any contract provisions found void were severed from the remainder of the contract. Subsequently, Blue Paper entered into a separate contract with a different party for the same townhouse unit that had more favorable terms to Blue Paper. Blue Paper then claimed that Provost defaulted on his contract for failure to pay the full deposit of \$100,000. The trial court ruled in Provost's favor and ordered specific performance from Blue Paper. The Fourth District Court of Appeal affirmed finding that Blue Paper could not terminate the contract for failure to pay without notifying Provost and giving him reasonable time to perform. "The law is well settled that the vendor cannot take advantage of a delay in performance that he condones or was a party to." The oral modification to extend the time for tender was

valid even where, as here, the contract contained a provision prohibiting modifications except in writing.

Non-compete Agreements

A. Solicitation – Direction of Contact

Costal Loading, Inc., v. Tile Roof Loading, Inc., 908 So.2d 609 (Fla. 2d DCA 2005). The Second Circuit held that the sellers of a company did not breach the covenant not to solicit because the evidence did not establish that the sellers called, or solicited business from, customers of the sold company. Instead, the customer called the sellers of the company. The court did not perform a *Scarborough* analysis.¹

B. Contract Expiration

Gray, Dallin, and Management By Pinnacle, Inc. v. Prime Management Group, Inc., 30 Fla. L. Weekly D2346, (Fla. 4th DCA 2005). Employee entered into a five year term employment agreement. The employment agreement contained a non-competition covenant. The employee worked for a period after the employment agreement expired, before leaving and starting his own management company. The Fifth District Court of Appeal reversed the grant of temporary injunction because enforcement of the non-compete clause after the expiration of the employment agreement, absent express language extending the non-compete provisions after termination, would violate the Statute of Frauds.

The Court disregarded the trial court's conclusion that by continuing the agreement past the expiration of the employment agreement, the parties displayed a mutual assent to a new contract containing the same provisions as the original. Instead,

¹ *Scarborough v. Liberty National Life Insurance Company*, 872 So. 2d 283 (Fla. 1st DCA 2004). The Florida First District Court of Appeal held that client initiated contacts may be considered "solicitation." *Scarborough* would appear to be an expansion of the rights of employers to stop former employees from selling competing products. The First District Court of Appeal relied on a broad law dictionary definition of "solicitation" to include conduct "regardless of who initiates the meeting." *Id.* The touchstone for the Court was that the former employee compared the price of his current employer's product with that of his former employer's product.

Mr. Scarborough, the former employee, has sought discretionary review from the Florida Supreme Court of the District Court's decision, arguing that the decision "thrusts into turmoil, and ambiguity" the law of non-solicitation agreements. Prior law, decided under a previous statute, suggested that accepting or servicing former clients did not constitute "solicitation". See *JKR Inc. v. Triple Check Tax Serv.*, 736 So. 2d 43,44 (Fla. 1st DCA 1999); *Kephart v. Hair Returns, Inc.*, 685 So. 2d 959, 960 (Fla. 4th DCA 1996).

the Court held that the Statute of Frauds requires the written renewal of the employment agreement.

Citing *Sanz v. R.T. Aerospace Corp.*, 650 So.2d 1057 (Fla. 3d DCA 1995), the Court agreed that when a covenant not to compete is contained in an employment contract, it cannot always be enforced after its expiration when an employee has continued working under an oral contract. Absent an express provision, the fact that the non-compete clause was independent of other covenants in the agreement did not mean that it survived the expiration of the contract. Finally, the Court held that continued performance of the written agreement could not remove the restrictive covenant from the Statute of Frauds.

C. Breach by Employer

Spencer D. Lee, M.D. v. Mark A. Pinsky, M.D., P.A., 30 Fla. L. Weekly D526 (Fla. 4th DCA 2005). The Fourth District Court of Appeal held that where an employer breached an employment contract by failing to compensate an employee for the services performed, the employer failed to demonstrate a substantial likelihood of success on the merits of its claim to enforce a non-compete agreement.

Northern Trust Investments v. Domino, 2005 WL 475385 (Fla. 4th DCA March 2, 2005). The Fourth District Court of Appeal upheld the trial court's denial of a temporary injunction on the grounds that the employer breached the employment agreement between the parties by failing to pay monies owed. In sum, an employer who has refused to pay an employee earned income is barred from enforcing restrictive covenants, even if the restrictive covenants are otherwise enforceable.

D. Timing of Injunction

Vela v. Kendall, 905 So.2d 1003 (Fla. 5th DCA July 8, 2005). Plaintiff ran a delivery service to various retail stores to whom Defendant was hired as an independent contractor to provide such delivery services. Defendant was terminated, and Plaintiff brought suit seeking an injunction and damages pursuant to Defendant's alleged violation of a restrictive covenant (two year non-compete clause) in his employment contract with Plaintiff. The trial court ruled in favor of Plaintiff, awarded damages, and granted a two year injunction. Defendant appealed. The Florida Fifth District Court of Appeal affirmed the ruling in all respects except the injunction. In so doing, the court held that the time of the two year non-compete clause had already run, Plaintiffs received sufficient damages for that time period, and the trial court was without authority to further extend the restrictive covenant for another two years in the final judgment.

E. Required Findings

***Masters Freight, Inc. v. Servco Inc., and AVXA, Inc.*, 30 Fla. L. Weekly D2396 (Fla. 2d DCA 2005).** The Second District Court of Appeal reversed a grant of temporary injunction because the trial court did not make specific findings which would support injunctive relief. The Court held that the trial court did not find clear, definite, and unequivocal proof that “immediate and irreparable injury, loss, or damage will result” to the moving party. Additionally, the Court ruled that the trial court failed to address the availability of an adequate remedy at law.

Civil Procedure

***Taylor v. Mazda Motor of America, Inc.*, 30 Fla. L. Weekly D2560 (Fla. 3d DCA 2005).** The trial court entered an order striking the trial testimony of the Plaintiff and her expert for failure of her counsel to comply with the Court’s pretrial order by not making witnesses available for deposition because he was moving. The Third District held that the trial court’s striking of Plaintiff’s only two witnesses was not an appropriate sanction. The Third District determined that Plaintiff should not be punished for her counsel’s failure to follow the provisions of the pre-trial order.

Arbitration – Trial *De Novo*

***Nicholson-Kenny Capital Management, Inc. v. Steinberg*, 30 Fla. L. Weekly D2825 (Fla. 4th DCA 2005).** Appellant (Nicholson) sued Appellee (Steinberg) for misappropriation of trade secrets. After discovery, Steinberg moved to set the case for trial. The trial court entered an order setting calendar call and ordering the parties to non-binding arbitration pursuant to Rule 1.820 of the Florida Rules of Civil Procedure. The arbitrator awarded Nicholson \$1.5 million in damages. Nicholson subsequently noticed a pretrial conference with Steinberg. Steinberg participated in the pretrial conference and discovery, including depositions, proceeded post-arbitration pursuant to the previously entered order setting trial. Both parties participated in trial preparations and calendar call, and together prepared the pretrial statement. Nicholson requested a trial date at the final docket hearing, and Steinberg voiced no objection. Steinberg thereafter moved for final judgment, however, alleging that because Nicholson failed to “motion for trial” *de novo* the trial court was compelled by Florida Rule of Civil Procedure 1.820(h) to enter final judgment on the arbitrator’s decision. The trial court agreed and entered final judgment.

The Fourth District Court of Appeal reversed, concluding that Steinberg was precluded from raising the issue of noncompliance with Rule 1.820 because: (1) the case was set for trial prior to the arbitration proceeding; (2) Nicholson filed a notice for a pretrial conference after the arbitration; and (3) Steinberg actively participated in post-arbitration trial preparations. Under these circumstances, the Fourth District found that the filing of a pleading styled “motion for trial” was unnecessary. The Fourth District ruled that the purpose behind Rule 1.820 was effectuated because Nicholson provided Steinberg with notice that it rejected the arbitration award and was renewing its demand

for trial. The Fourth District reprimanded Steinberg's attorney for its "gotcha" tactics, where the attorney's conduct led Nicholson's attorney to believe that it had assented to Nicholson's request for a trial *de novo* prior to moving for final judgment.

Florida Evidence Code – Amendment

In re: Amendments to The Florida Evidence Code-Section 90.104, 30 Fla. L. Weekly S701 (Fla. October 20, 2005). The Supreme Court of Florida adopted Chapter 2003-259, section 1, Laws of Florida, which amended section 90.104(1)(b) of the Florida Evidence Code to the extent section 90.104(1)(b) was procedural. Section 90.104(1)(b) states in pertinent part that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Chapter 2003-259, section 1, amended section 90.104(1)(b) to eliminate the need for a trial objection in order to preserve an evidentiary issue for appeal when the trial judge has made a definitive ruling on the admissibility of the evidence.

Florida Rules of Civil Procedure – Amendments

In Re: Amendments To Florida Rules of Civil Procedure (Two Year Cycle), 30 Fla. L. Weekly S848 (Fla. 2005). The Supreme Court of Florida, based in part upon submissions made by the Civil Procedure Rules Committee, adopted amendments to the Florida Rules of Civil Procedure as follows:

Rule 1.380(a)(2) Failure to Make Discovery; Sanctions – Motion, amended to require attorneys certify that they have made a good-faith attempt to resolve discovery disputes with opposing counsel before filing a motion to compel.

Rule 1.380(a)(4) Failure to Make Discovery; Sanctions - Award of Expenses of Motion, amended to prohibit the award of expenses to a moving party who fails to certify a good-faith effort to obtain discovery.

Rule 1.380(d) Failure to Make Discovery; Sanctions – Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection, amended to provide that any motion filed under clause 2 (failure to serve answers or objections to interrogatories), or clause 3 (failure to serve a written response to a request for inspection), must contain a good-faith certification that the movant conferred or attempted to confer with the party from whom the information is sought.

Rule 1.420(e) Dismissal of Actions – Failure to Prosecute, amended to provide that after ten months of record inactivity, notice may be served on the parties by any interested person, the court, or the clerk of the court, indicating that no record activity has occurred. Following proper service of the notice, the party has sixty days to conduct record activity in order to avoid dismissal. After sixty days, if no record activity takes place, reasonable notice shall be provided to the parties and the action shall be dismissed in the absence of a demonstration of good cause.

Rule 1.431(c) Trial Jury – Challenge for Cause, amended to provide that a party may make a challenge for cause to a prospective juror who has a familial or employment relationship with nonparties who, based on the pleadings, are subject to liability or blame.

Rule 1.510(d) Summary Judgment – Motions and Proceedings Thereon, amended to state that a motion for summary judgment must specifically identify evidence upon which it relies, and require that any evidence not already on file with the court must be served with the motion. Additionally, the amendment provides that the adverse party must also notify the opposing party of any summary judgment evidence on which it relies, and must provide copies of any evidence not already on file with the court. The language of the summary judgment standard is amended to expand the types of evidence to be considered in a summary judgment motion, by adding “other materials as would be admissible in evidence.”

Rule 1.525 Motions for Costs and Attorneys' Fees, amended to reflect that a motion seeking costs and/or attorneys' fees shall be served “no later than” thirty days after the judgment is filed.

The foregoing amendments became effective on **January 1, 2006**.

Alternative Dispute Resolution

In Re: Report of the Alternative Dispute Resolution Rules and Policy Committee on Senior Judges as Mediators. 30 Fla. L. Weekly S742 (Fla. 2005). The Supreme Court of Florida, concerned with “the propriety of a senior judge acting as both a mediator and an assigned senior judge” amended: the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Juvenile Procedure, the Florida Rules for Certified and Court-Appointed Mediators, the Florida Family Law Rules of Procedure, and the Code of Judicial Conduct. Such amendments were ordered upon consideration of the Amended Final Report on Senior Judges as Mediators (Report) filed by the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (Committee).

As directed by the Supreme Court, the focus of the Committee’s report concerned the issue of senior judges continuing to serve as mediators and the related issue of whether further requirements and safeguards should be imposed if the practice is to continue. The Committee specifically considered the potential for ethical conflict in a senior judge serving as a mediator and other potential adverse consequences of such dual service. The Committee found “no published authority relating to complaints against senior judges serving as mediators [and] no evidence that the Code of Judicial Conduct is not working properly in relation to the practice of senior judges serving as mediators.”

The Committee’s first recommendation was that senior judges continue to be permitted to serve as mediators, subject to certain proposed additional ethical safeguards, namely: (A) Senior judges who intend to mediate should be required to be certified by the Supreme Court as mediators pursuant to Rule 10.100, Florida Rules for Certified and Court-Appointed Mediators; (B) If a mediator who is a senior judge has presided over a case involving any party, attorney, or law firm in the mediation, the mediator should be obligated to disclose that fact prior to mediation; (C) A senior judge should be required to disclose if the judge is being utilized or has been utilized as a mediator by any party, attorney, or law firm involved in the case pending before the senior judge. Absent express

consent of all parties, a senior judge should be prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three years; and (D) Any person who is or intends to be both a senior judge and a mediator should be required to attend a minimum of one judicial education course offered by the Florida Court Education Council. The course should specifically focus on the areas where the Code of Judicial Conduct or the Florida Rules for Certified and Court-Appointed Mediators could be violated. The Supreme Court approved Recommendation 1 (A-D) and each safeguard in full.

The Committee's second recommendation was that there should be no limit on the number of mediations performed by a senior judge on active status, and no subject matter or geographic restrictions on mediations conducted by senior judges. The Supreme Court agreed that a limit on the number of cases a senior judge could mediate could arbitrarily and unnecessarily preclude a senior judge from engaging in mediations that present no ethical problems, and approved this portion of the recommendation. However, the Court found potential conflicts of interest and the appearance of impropriety more likely to arise when a senior judge presides over the same type of cases in court and in mediation in the same geographic area, and that this potential sufficient to warrant continuation of some geographic and subject-matter restrictions. The Court deleted this portion of the recommendation.

The Committee's third recommendation was that the Clerk of the Supreme Court or appropriate entity should collect information from senior judges, in connection with senior judge certification renewal, regarding whether the senior judge has served as a mediator and, if so, in how many cases the judge served as mediator. The Court endorsed this recommendation and ordered that a senior judges seeking reassignment to indicate in the appropriate questionnaire submitted to the Court and forwarded to the appropriate district review board whether the judge has worked as a mediator in the past year and to list all cases mediated. The Court further directed all review boards to begin including in their reports the information recommended by the Committee (which some district review boards had already done in practice.)