FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

July – September 2016

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referenced as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court; that is, plaintiff or defendant. In administrative suspension cases, the driver will be referenced as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will control its placement order in these summaries.]

I. Driving Under the Influence (DUI)

State v. Chaveco, __ So. 3d __, 2016 WL 4607889 (Fla. 5th DCA 2016)

The defendant was arrested for DUI and filed a motion to suppress. The trial court granted the motion, but the appellate court reversed and remanded, agreeing with the state that based on the evidence, "the police had reasonable suspicion that [the defendant] was operating or in actual physical control of a motor vehicle while under the influence of alcohol." http://www.5dca.org/Opinions/Opin2016/082916/5D15-3573.reh.op..pdf

Mattos v. FDLE, __ So. 3d __, 2016 WL 4445940 (Fla. 4th DCA 2016)

After being found passed out behind the wheel of a vehicle, the defendant was charged with felony DUI based on prior DUI convictions. He filed a motion to suppress, arguing that the arresting officer was outside his jurisdiction. (The two cities had a mutual aid agreement, but the officer was not aware of it, so that exception did not apply.) The trial court denied the motion, "finding that there was a breach of the peace, which would give rise to an exception to the rule that a law enforcement officer may not make an arrest outside of his jurisdiction." The defendant appealed, arguing that the officer had not observed "a driving pattern that constituted a breach of the peace," that even if there was a breach of the peace the officer "could detain him but could not conduct a DUI investigation," and that "there was no probable cause to support a DUI arrest."

The appellate court found that the scene observed by the arresting officer did constitute a breach of the peace, giving the officer grounds to make a citizen's arrest, for which probable cause was not necessary. But it reversed and remanded, finding that the officer was acting under color of law rather than as a private citizen when he began conducting the DUI investigation, and "a private citizen would not have been permitted to lawfully administer a breathalyzer test and conduct field sobriety exercises." The appellate court stated that by merely approaching the defendant "in uniform, and after activating the police car's emergency lights, [the officer] was not acting under color of law. . . . However, once [he] attempted to have [the defendant] submit to a breathalyzer and perform field sobriety exercises, he was seeking evidence only available to him in his capacity of a law enforcement officer." It held that "the trial court erred in denying the motion to suppress, but only with respect to the evidence gathered by [the officer] once he began acting under color of law."
http://www.4dca.org/opinions/Aug%202016/08-24-16/4D15-4366.op.pdf

***Goodman v. FDLE*, __ So. 3d __, 2016 WL 4496973 (Fla. 4th DCA 2016)**

The appellate court denied the defendant's motion for rehearing, but granted his motion for certification and certified the following questions to the Florida Supreme Court as questions of great public importance:

> (1) ARE THE CURRENT RULES OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT (FDLE) INADEQUATE UNDER STATE v. MILES, 775 So. 2d 950 (Fla. 2000), FOR PURPORTEDLY FAILING TO SUFFICIENTLY REGULATE PROPER BLOOD DRAW PROCEDURES, AS WELL AS THE HOMOGENIZATION PROCESS TO "CURE" A CLOTTED BLOOD SAMPLE?
>
> (2) ARE THE PRESENT RULES SIMILARLY INADEQUATE FOR FAILING TO SPECIFICALLY REGULATE THE WORK OF ANALYSTS IN SCREENING BLOOD SAMPLES, DOCUMENTING IRREGULARITIES, AND REJECTING UNFIT SAMPLES?

http://www.4dca.org/opinions/Aug%202016/08-24-16/4D14-3263.reh.op.pdf

***State v. Chaveco*, __ So. 3d __, 2016 WL 4607889 (Fla. 5th DCA 2016)**

The defendant was charged with DUI and the trial court granted his motion to suppress. The state appealed, arguing that the officer had reasonable suspicion to arrest the defendant. The appellate court agreed and reversed and remanded, based on the record before it.
http://www.5dca.org/Opinions/Opin2016/070416/5D15-3573.op.pdf

***Malone v. State*, 195 So. 3d 1184 (Fla. 2d DCA 2016)**

After stopping the defendant after midnight for driving erratically, the officer smelled alcohol and noticed the defendant was slurring words and had watery, glassy eyes. The defendant performed poorly on field sobriety tests and was arrested for DUI. The county court found that the officer's dash camera video contained no indication that the defendant was impaired, and it granted his motion to suppress. On appeal, the circuit court reversed, concluding that "the county

court erred by rejecting or failing to consider testimony as to . . . impairment that was not discernible from the video"; i.e., the arresting officer's testimony. The defendant sought certiorari review, which the appellate court granted. It quashed the circuit court decision, holding that it had applied an erroneous standard of review and "went beyond determining whether the video on which the county court relied presented competent, substantial evidence to support the county court's conclusions" and reweighed the evidence and witness credibility. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/July/July%2008,%202016/2D15-4460.pdf

***State v. Harmon*, 24 Fla. L. Weekly Supp. 278a (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with DUI, and he filed a motion to suppress, arguing that the deputy lacked reasonable suspicion to stop him, and that by opening his car door without reasonable suspicion, the deputy had conducted an unreasonable seizure. The trial court granted his motion, and the state appealed, arguing that it was a consensual encounter because the deputy was conducting a welfare/medical check and the defendant "was already stopped and unconscious and not aware of what was going on," and that the opening of the defendant's car door was a continuing part of the check. The circuit court, in its appellate capacity, reversed, stating that because the deputy "was performing a medical/welfare check and thereby exercising his community caretaking function, his opening of [the defendant's] car door -- and even his earlier request for [him] to roll down his window -- was a continuation of his medical/welfare check and not an unconstitutional seizure given the particular facts of this case."

***State v. Morros*, 24 Fla. L. Weekly Supp. 276a (Fla. 17th Cir. Ct. 2016)**

After rear-ending a tractor-trailer at around 3:30 a.m., the defendant was found bleeding, unconscious, and smelling of alcohol. He was charged with DUI, and he filed a motion to suppress, "alleging that the police failed to obtain a warrant before drawing his blood." The trial court granted his motion, and the state appealed. The circuit court, in its appellate capacity, reversed, stating that, first of all, based on the severe crash and the odor of alcohol there was reasonable cause to believe that the defendant was under the influence before the blood draw, and therefore it was irrelevant whether he gave consent to have his blood drawn. The second issue was whether the defendant caused or contributed to the accident, because under *State v. Kliphouse*, 771 So. 2d 16 (Fla. 4th DCA 2000), "when the only indicia of impairment is 'the mere odor of alcohol on the breath of the unconscious driver, who was determined *not to have caused or contributed to* the accident that led to serious injuries,' it is not enough to establish reasonable cause under § 316.1932(1)(c)." But in this case, the defendant, at a minimum, contributed to the accident by looking down to retrieve his cell phone, which, in conjunction with "the odor of alcohol on his person, provided the officer with reasonable cause . . . to draw blood."

***State v. Wolfinger*, 24 Fla. L. Weekly Supp. 275b (Fla. 17th Cir. Ct. 2016)**

A police sergeant saw the defendant skid into an intersection, remain there for about half a minute, and then cross a double yellow lane. He stopped her, and after he explained why he did so she "remained confused and handed him an unpaid ticket, stating 'Here is my driver's license.'" The sergeant noticed the defendant had red, glassy eyes and slurred speech and

appeared confused, and she told him she had been at two bars and had had four or five beers. The defendant was ultimately arrested for DUI, and she filed a motion to suppress, arguing that she was illegally questioned without *Miranda* warnings, which the trial court granted. The state appealed and the circuit court, in its appellate capacity, reversed, noting that the defendant was not under arrest when she made the incriminating statements "but rather made them during a traffic stop when *Miranda* warnings were not required."

***State v. Rebholz*, 24 Fla. L. Weekly Supp. 213b (Fla. 17th Cir. Ct. 2016)**

The defendant was arrested for DUI, and the trial court denied the state's motion to issue a subpoena duces tecum for the defendant's medical records. The state sought review, which the circuit court, in its appellate capacity, granted, stating that "the trial court believed the State had enough evidence based on the breath alcohol result alone. However, . . . the fact that there was other incriminating evidence . . . is not a proper basis to prevent execution and issuance of the investigative subpoena. The State provided adequate notice to the [defendant] . . . . Furthermore, the [defendant's] blood and urine results are relevant to demonstrate whether [he] was driving under the influence."

***Rivera v. State*, 24 Fla. L. Weekly Supp. 101c (Fla. 11th Cir. Ct. 2016)**

The defendant was convicted of DUI. He appealed, arguing that the trial court erred in overruling his objection to the state's burden-shifting argument in rebuttal closing that he "knew that if he blew [in the Breathalyzer] he would have been over .08. So instead, he denied you that evidence." The circuit court, in its appellate capacity, affirmed because it found the state's comment, even if improper, was harmless under the facts. The jury had been instructed three times that the state had the burden of proof, its deliberation question "did not indicate any confusion about the state's burden of proof," and the evidence of impairment included the defendant's "inattentive driving, multiple confessions, half-digested beer, mumbled, slurred speech, stench of alcohol, blood-shot eyes, involuntary eye movements, inability to follow simple instructions, and poor balance."

***Andrade v. State*, 24 Fla. L. Weekly Supp. 99a (Fla. 11th Cir. Ct. 2016)**

The defendant was arrested for driving under the influence of a controlled substance (cannabis), and he appealed, one of his arguments being that the prosecutor improperly stated during closing that the officer "told you that the defendant had marijuana in his car at the time" despite there being no evidence to support that statement. The prosecution contended that the defendant waived the issue for review by failing to move for a mistrial. The circuit court, in its appellate capacity, agreed, but it vacated the judgment and remanded for a new trial based on other cumulative errors that possibly affected the verdict, including that "the State denigrated defense counsel by commenting: 'Remember the Defense, he would not even let [the officer] speak. Why? Because he didn't want you to hear the truth. He didn't want you to hear what was — [defense counsel's objection] — was being said.'" Further, the trial judge instructed the jury "to assume that defense counsel and the prosecutors were lying unless counsel substantiated their arguments with evidence."

II. Criminal Traffic Offenses

Gaulden v. State, 195 So. 3d 1123 (Fla. 2016)

The defendant was driving when he and his passenger argued, the passenger opened his door, the truck "accelerated and swerved," the passenger was ejected from the vehicle, and the defendant drove away. The passenger was later found dead by the roadway. The defendant was convicted of leaving the scene of a crash resulting in a person's death. The appellate court affirmed, concluding that under the hit-and-run statute "a driver's vehicle may be 'involved in a crash' . . . when a passenger separates from a moving vehicle and lands on the roadway or adjacent area," but it certified the following question: "WHEN A PASSENGER SEPARATES FROM A MOVING VEHICLE AND COLLIDES WITH THE ROADWAY OR ADJACENT PAVEMENT, BUT THE VEHICLE HAS NO PHYSICAL CONTACT EITHER WITH THE PASSENGER, AFTER THE PASSENGER'S EXIT, OR WITH ANY OTHER VEHICLE, PERSON, OR OBJECT, IS THE VEHICLE 'INVOLVED IN A CRASH' SO THAT THE DRIVER MAY BE HELD CRIMINALLY RESPONSIBLE FOR LEAVING THE SCENE?" The Florida Supreme Court answered in the negative and reversed. It stated that "the operative phrase 'any vehicle involved in a crash' means that a vehicle must collide with another vehicle, person, or object. Plainly, under the undisputed facts of this case, no vehicle was involved in a collision within the meaning of the statute."
http://www.floridasupremecourt.org/decisions/2016/sc14-399.pdf

Basaldua v. State, __ So. 3d __, 2016 WL 4962830 (Fla. 5th DCA 2016)

The defendant was convicted of driving while license suspended. On appeal he argued, and the state conceded, that "the trial court violated the prohibition against double jeopardy by resentencing him to prison after he had already served the entirety of his county jail sentence on the charge." The appellate court agreed and vacated the defendant's sentence and remanded for the trial court to reinstate his sentence of time served.
http://www.5dca.org/Opinions/Opin2016/091216/5D16-722.op.pdf

Balas v. State, __ So. 3d __, 2016 WL 4722425 (Fla. 2d DCA 2016)

The defendant entered an open guilty plea to causing death or serious bodily injury by carelessly or negligently operating a motor vehicle while his driver license was revoked. He filed a motion and an amended motion for postconviction relief, which the trial court denied. He appealed, and the appellate court reversed, stating that the court should have addressed on the merits the new claims in the amended motion because it had never ruled on the merits of the defendant's original motion.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/September/September%2009,%202016/2D15-2286.pdf

Pitts v. State, __ So. 3d __, 2016 WL 4701465 (Fla. 3d DCA 2016)

The defendant was convicted of driving while license suspended, revoked, canceled, or disqualified, even though she never had a driver license. The appellate court reversed and recertified conflict with *Newton v. State*, 898 So. 2d 1133 (Fla. 4th DCA 2005), and *State v. Bletcher*, 763 So. 2d 1277 (Fla. 5th DCA 2000).

http://www.3dca.flcourts.org/Opinions/3D15-1810.pdf

***Escobar-Mazariegos v. State*, __ So. 3d __, 2016 WL 4542391 (Fla. 3d DCA 2016)**

The defendant was convicted of driving while license revoked as a habitual traffic offender. The appellate court reversed based on *State v. Miller*, 193 So. 3d 1001 (Fla. 3d DCA 2016), and remanded for "the trial court to reduce the charge against the defendant to the lesser included offense of driving without a valid driver's license." It also certified conflict with *State v. Bletcher*, 763 So. 2d 1277 (Fla. 5th DCA 2000), and *Newton v. State*, 898 So. 2d 1133 (Fla. 4th DCA 2005).
http://www.3dca.flcourts.org/Opinions/3D15-0765.pdf

***Kopson v. State*, __ So. 3d __, 2016 WL 4445938 (Fla. 4th DCA 2016)**

The defendant was charged with seven counts arising from a DUI. He filed a motion to correct illegal sentence, which the trial court denied. There was a series of appeals, and in this case the appellate court reversed and remanded because the defendant's "sentence in count VII expired before the trial court changed the application of jail credit upon resentencing." It directed the trial court to vacate the consecutive 364-day sentence in count VII and reinstate the original time-served sentence, stating that that the trial court lacked jurisdiction to resentence the defendant as to count VII because he had already served his sentence on the one misdemeanor charge upon completion of the sentencing hearing. "By the time the trial court realized it awarded jail credit on each of the consecutive sentences, [the defendant's] sentence on count VII had already been served. To be clear, the trial court could readdress the jail credit it awarded as to counts II, III, and V at resentencing because the sentences on those counts had not yet expired."
http://www.4dca.org/opinions/Aug%202016/08-24-16/4D15-4145.op.pdf

***Ivey v. State*, __ So. 3d __, 2016 WL 4376746 (Fla. 3d DCA 2016)**

The defendant had been convicted of vehicular homicide, leaving the scene of a fatal accident, and DUI manslaughter. The appellate court had vacated the first two convictions on double jeopardy grounds, and the defendant filed a motion to correct illegal sentence. The trial court denied the motion, and the appellate court affirmed because the defendant had given a copy of the notice of appeal to a corrections official eight days after the deadline.
http://www.3dca.flcourts.org/Opinions/3D15-1981.pdf

***Mitchell v. State*, __ So. 3d __, 2016 WL 4375977 (Fla. 2d DCA 2016)**

The defendant pled guilty to leaving the scene of an accident involving death and driving with a suspended license in exchange for a nolle prosequi as to vehicular homicide, a charge which the state added in an amended information. He filed a motion for postconviction relief based on his attorney's failure to convey a plea offer that was made before the information was amended, and which called for a six-year-shorter sentence. The trial court summarily denied the motion. The defendant appealed, and the appellate court reversed for an evidentiary hearing because the defendant's claim "was legally sufficient and was not refuted by the record."
https://edca.1dca.org/DCADocs/2015/3132/153132_DC13_07252016_094303_i.pdf

***Burgess v. State*, __ So. 3d __, 2016 WL 4607547 (Fla. 2d DCA 2016)**

The defendant pled guilty to driving a motor vehicle when his driver license had been revoked for being a habitual traffic offender, but "reserved for appeal the denial of his motion to dismiss, which raised the issue of whether he can be convicted under the statute when he never actually had a driver's license." The appellate court noted: "We answered a similar question affirmatively in *Carroll v. State*, 761 So.2d 417 (Fla. 2d DCA 2000), and the trial court denied [the defendant's] motion to dismiss on that basis." However, the appellate court receded from *Carroll* and reversed the defendant's judgment and sentence, concluding that "a conviction under section 322.34(5) requires a defendant to have had a driver's license." The court certified conflict with *Newton v. State*, 898 So. 2d 1133 (Fla. 4th DCA 2005), and *State v. Bletcher*, 763 So. 2d 1277 (Fla. 5th DCA 2000), "which followed *Carroll* in unelaborated per curiam decisions." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/September/September%2002,%202016/2D14-4680rh.pdf

***Gonzalez v. State*, 197 So. 3d 84 (Fla. 2d DCA 2016)**

The defendant was convicted of failing to stop or remain at the scene of a crash resulting in death and of manslaughter and was sentenced to consecutive 20-year prison terms. He appealed, challenging "the reclassification of his manslaughter offense from a second-degree to a first-degree felony based on the use of a 'weapon,' which in this case was actually an automobile." The appellate court reversed and remanded "for the offense to be classified as a second-degree felony and for [the defendant] to be resentenced on that offense." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/July/July%2008,%202016/2D13-5575.pdf

***Crusaw v. State*, 195 So. 3d 422 (Fla. 1st DCA 2016)**

The defendant was convicted of vehicular homicide (count III) and careless driving with a suspended license resulting in death or serious bodily injury (count IV). The trial court denied his motion for postconviction relief, but the appellate court reversed that denial, holding that the conviction on count IV was barred by double jeopardy principles, and remanded for the trial court to vacate that conviction and resentence. https://edca.1dca.org/DCADocs/2015/3132/153132_DC13_07252016_094303_i.pdf

***Forte v. State*, 189 So. 3d 1043 (Fla. 2d DCA 2016)**

The defendant was sentenced to life in prison with a ten-year minimum mandatory term for robbery and carjacking, ten years as a habitual felony offender for carrying, possession, and fleeing convictions, and time served for obstructing an officer without violence. He sought postconviction relief, which the court denied. He appealed, arguing, among other things, that his trial attorney was ineffective for failing to ask for a continuance to depose the codefendant and failing to call the codefendant as a witness. The appellate court reversed and remanded with regard to those claims, stating: "Although the postconviction court attached the transcript from the codefendant's hearing [in which the codefendant stated that he had blacked out on the night in question and did not remember what happened] to the order denying [the defendant's] claims,

that transcript was not part of [the defendant's] record and the postconviction court erred in relying on it to deny the claims."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/April/April%2020,%202016/2D15-915.pdf

***Pehlke v. State*, 189 So. 3d 1036 (Fla. 2d DCA 2016)**

The state asked for six months' incarceration for the defendant, who was convicted of fleeing to elude a law enforcement officer with lights and sirens activated. The court imposed nine months' incarceration, and the defendant appealed, "arguing that the trial court committed fundamental error by considering his lack of remorse." The state conceded it was error, and the appellate court reversed the sentence and remanded for resentencing by a different judge, stating "The trial court's solicitation of an expression of contrition and imposition of a harsher than recommended sentence when expressions of remorse were not forthcoming lead to our conclusion that the trial judge contravened [the defendant's] due process right to maintain his innocence at all stages of the proceedings."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/April/April%2015,%202016/2D15-2150.pdf

***Guillen v. State*, 189 So. 3d 1004 (Fla. 3d DCA 2016)**

The defendant was convicted of DUI manslaughter with failure to render aid, vehicular homicide with failure to render aid, and leaving the scene of a crash involving death. He appealed, arguing that "the trial court abused its discretion by: (1) denying his motion for a continuance; (2) denying his motion to preclude the State from calling [a specific expert witness]; and (3) permitting the State to introduce photographs of the deceased victim's injuries." The appellate court affirmed, stating that the first issue was not preserved for appellate review, and the trial court did not abuse its discretion. While the state's expert was disclosed late, the state argued that this was "caused, in part, by the defendant's failure to disclose that [his] expert . . . had revised his vehicular speed calculations, and that these revisions required the opinion of a more experienced expert, like [the state's witness], to provide rebuttal testimony." The appellate court stated: "Although it appears that there was no discovery violation, because the record is unclear and because the trial court conducted a *Richardson* hearing, we will briefly address the *Richardson* factors." It held the record supported a finding that the alleged discovery violation was not willful, material, or prejudicial. It also agreed with the trial court that the probative value of the objected-to photographs of the victim's injuries was not outweighed by their potential prejudicial effect.
http://www.3dca.flcourts.org/Opinions/3D14-1540.pdf

***Mateos-Martinez v. State*, 24 Fla. L. Weekly Supp. 273a (Fla. 15th Cir. Ct. 2016)**

The defendant was convicted of no valid driver's license, and she appealed. The prosecutor had advised defense counsel that the state was going to introduce testimony from the arresting officer that after a *Miranda* warning the defendant "confessed to the crime and further admitted she did not have a license due to her immigration status." But the confession was not in the discovery materials provided by the state. Before trial, the defendant's attorney advised the court of the late disclosure, and the court conducted a *Richardson* hearing, during which the state

acknowledged the late disclosure but argued it was not prejudicial. The trial court allowed the trial to proceed, and the defendant appealed. The circuit court, in its appellate capacity, reversed and remanded, stating: "Although the State suggested any error was harmless, this court cannot find beyond a reasonable doubt that the defense was not procedurally prejudiced. The discovery violation involved the State's failure to disclose an alleged confession to the crime charged. It is difficult to imagine that evidence of a confession would not result in procedural prejudice."

***Louis v. Palm Beach Sheriff's Office*, 24 Fla. L. Weekly Supp. 106a (Fla. 15th Cir. Ct. 2016)**

The defendant was adjudicated guilty of speeding, and the trial court suspended his license for 60 days. He filed a motion to correct illegal penalty, arguing that the suspension was an illegal sentence. The trial court denied his motion, and he appealed. The circuit court in its appellate capacity agreed with the defendant and reversed and remanded for that part of his sentence to be vacated. Because the defendant was driving more than 30 mph over the speed limit, a mandatory hearing before a judge was required, and in traffic cases with mandatory hearings the available penalties are set forth in section 318.14(5), Florida Statutes, which provides that "the official may impose a civil penalty not to exceed $500 . . . or require attendance at a driver improvement school, or both." Driver license suspension is not included in the list of possible sanctions. "Rather, [the statute] provides that an individual's driver license *shall* be suspended in limited circumstances" that did not apply to the defendant. Nor did his violation result in an accident.

***Roberts v. DHSMV*, 24 Fla. L. Weekly Supp. 88b (Fla. 5th Cir. Ct. 2016)**

The defendant's license was revoked for 120 months for violating the right of way after she turned left at a stop sign and killed two motorcycle passengers. She sought review, arguing that "section 322.28(1), *Florida Statutes*, limits the maximum period for a driver's license suspension to one year." But the circuit court, in its appellate capacity, stated that section 316.655, Florida Statutes, was applicable, and it "allows a court to suspend or revoke driving privileges for any length of time"; therefore the trial court had authority to revoke the defendant's license for 120 months. However, it remanded for the trial court to make the factual findings that a trial court must make to support a suspension or revocation of over one year.

III. Civil Traffic Infractions

IV. Arrest, Search and Seizure

***Utah v. Strieff*, __ U.S. __, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016)**

The United States Supreme Court held that the exclusionary rule with regard to Fourth Amendment violations

> does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is

> subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

https://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf

***Presley v. State*, __ So. 3d __, 2016 WL 5404214 (Fla. 1st DCA 2016)**

The vehicle the defendant was riding in was stopped, the defendant admitted that he had drunk alcohol, and an officer found cocaine on him. Based on that, the defendant's probation was revoked. He appealed, arguing that the trial court had erred in denying his motion to suppress evidence obtained during the stop; that "the officer violated his Fourth Amendment rights by requiring him to stay at the scene of the traffic stop because the officer lacked reasonable suspicion that [he] was engaged in criminal activity." But the appellate court affirmed, stating that "concerns for police officers' safety during a traffic stop outweigh the limited intrusion on passengers' rights by requiring them to remain at the scene for the reasonable duration of the traffic stop. Thus, we hold that an officer may, as a matter of course, detain a passenger during a lawful traffic stop without violating the passenger's Fourth Amendment rights. . . . We also . . . declare conflict with . . . *Wilson v. State*, 734 So. 2d 1107 (Fla. 4th DCA 1999), *cert. denied*, 529 U.S. 1124 (2000), and its progeny."
https://edca.1dca.org/DCADocs/2015/4891/154891_DC05_09282016_100605_i.pdf

***Sanchez v. State*, __ So. 3d __, 2016 WL 4540081 (Fla. 4th DCA 2016)**

After a robbery in which a store owner was killed, a law enforcement officer responding to a BOLO stopped the car in which the defendant was a passenger, and the defendant was arrested. He filed a motion to suppress, arguing that the stop violated the Fourth Amendment. The trial court denied the motion and the defendant was convicted of first-degree felony murder. The appellate court reversed, holding that "the officer lacked reasonable suspicion to make the stop." It stated that "the only connections the officer made between the suspects and the BOLO were the number of suspects (prior to initiating the stop), their race, and gender. The BOLO was otherwise silent to their appearance, mentioned nothing about hair styles, did not include a vehicle, and was inconsistent with the direction of appellant's travel."
http://www.4dca.org/opinions/Aug%202016/08-31-16/4D12-1395.co-op.pdf

***State v. Maye*, __ So. 3d __, 2016 WL 4261970 (Fla. 5th DCA 2016)**

Police officers arrested the defendant for urinating in public at a shopping plaza. An officer searched the defendant and found his key fob, and pressed the panic button, which activated an alarm in a vehicle. The officer looked in the vehicle's window and saw a plastic baggy of cocaine, and the defendant was arrested. The trial court held that, while the key fob was lawfully obtained, there was no lawful basis for the officer to press a button on it, and therefore the officer violated the defendant's Fourth Amendment rights. But the appellate court reversed, stating that the officer's pressing of the button did not constitute a search for Fourth Amendment purposes; the defendant "had no reasonable expectation of privacy in the only information that

could be obtained when the officer touched the button on the fob lawfully in his hand—the presence of Maye's vehicle in the public lot."
http://www.5dca.org/Opinions/Opin2016/080816/5D15-3429.op.pdf

***Hudson v. State*, __ So. 3d __, 2016 WL 4132119 (Fla. 4th DCA 2016)**

The defendant was arrested after he was stopped for speeding and a gun was found in the trunk. He filed a motion for judgment of acquittal, arguing that "there was no evidence to establish that [he] had dominion and control over the shotgun, and the State failed to rebut his reasonable hypothesis of innocence." The trial court denied his motion, and he was convicted of possession of a short-barreled shotgun. He appealed, and the appellate court reversed, stating: "There were no fingerprints or DNA linking the defendant to the shotgun. There was no evidence that [he] ever opened the trunk. The defendant denied ownership and in fact indicated the shotgun belonged to the juvenile backseat passenger. His comment that his fingerprints might be on the shotgun was insufficient to establish constructive possession because [it] lacked indicia of the defendant's current ability to exert dominion and control over it."
http://www.4dca.org/opinions/Aug%202016/08-03-16/4D14-4167.op.CN.Dissent.pdf

***Horchak v. State*, __ So. 3d __, 2016 WL 4016164 (Fla. 4th DCA 2016)**

Law enforcement officers were surveilling a residence when they saw the defendant go into the residence and return to his vehicle with a backpack. The officers stopped the vehicle, in which the defendant was a passenger, for a traffic infraction, and saw the backpack on the passenger-side floor. Although the defendant claimed not to have known what was in the backpack, he was convicted of trafficking cocaine. He appealed, arguing that "the trial court's willful blindness [jury] instruction violated his rights to a fair trial and due process." The appellate court agreed and reversed.
http://www.4dca.org/opinions/July%202016/07-27-16/4D14-1827.op.pdf

***Underhill v. State*, 197 So. 3d 90 (Fla. 4th DCA 2016)**

After being stopped for not wearing a seatbelt, the defendant was arrested and charged with possession of methamphetamine and use or possession of drug paraphernalia. He filed a motion to suppress, arguing that "the officer unconstitutionally prolonged the stop by interrupting it to use a drug sniffing dog." The trial court denied the motion and the defendant was convicted. The appellate court reversed, stating that "the officer had obtained all the necessary information from dispatch and could have started to write the ticket immediately. Instead, he decided to interrupt the traffic stop for the dog sniff. Although it was only a short period of time until the dog alerted, under *Rodriguez*[*v. United States*, 135 S.Ct. 1609 (2015)], the sniff unconstitutionally prolonged the completion of the mission of the traffic stop."
http://www.4dca.org/opinions/July%202016/07-13-16/4D15-1778.op.pdf

***State v. Meachum v. State*, 196 So. 3d 496 (Fla. 1st DCA 2016)**

The defendant was parked at a motel with the engine running when police officers approached to speak with him. He was ultimately arrested for possession of cocaine and paraphernalia. He filed a motion to suppress, which the trial court granted, stating that the encounter between the defendant and the police officers was not consensual but rather was an

illegal detention. It based its holding on the facts "that the patrol car was occupied by three officers, that one officer went to the rear of the vehicle to obtain tag information while another approached and requested [the defendant's] driver's license to conduct a warrant search, and that one of the officers went to the hotel room to conduct further investigation." The appellate court reversed, stating that "the trial court erred when it concluded the encounter . . . was not consensual," and remanded "for the trial court to resolve the factual disputes as to the circumstances surrounding the search of the vehicle."
https://edca.1dca.org/DCADocs/2015/3444/153444_DC13_07132016_100108_i.pdf

***State v. Meachum*, 195 So. 3d 417 (Fla. 1st DCA 2016)**

The defendant was in a parking lot when police officers approached. An officer smelled alcohol and noticed the defendant was shaking and sweating. After the defendant exited the vehicle, another officer saw a crack pipe on the driver's side floorboard, and after a search the defendant was arrested for possession of cocaine and paraphernalia. He filed a motion to suppress, which the trial court granted, stating that the encounter between the defendant and the police officers was not consensual but rather was an illegal detention. It based its holding on the fact that "the patrol car was occupied by three officers, that one officer went to the rear of the vehicle to obtain tag information while another approached and requested [the defendant's] driver's license to conduct a warrant search, and that one officer went to the rear of the vehicle to obtain tag information." The appellate court reversed, stating that "the trial court erred when it concluded the encounter . . . was not consensual," and remanded "for the trial court to resolve the factual disputes as to the circumstances that followed the initial encounter."
https://edca.1dca.org/DCADocs/2015/3445/153445_DC13_07132016_100155_i.pdf

***State v. Liles*, *State v. Willis*, 191 So. 3d 484 (Fla. 5th DCA 2016)**

Liles and Willis were involved in separate fatal traffic crashes, but the cases were consolidated. They both initially refused blood draws, and after they were arrested and charged they filed motions to suppress. The trial court granted the motions because "the blood was obtained without a warrant, consent, or any other recognized exception to the warrant requirement." The state appealed, and the appellate court reversed, finding that, while neither the consent nor exigent circumstances exceptions applied, the good-faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984), did apply. It held that "it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)," Florida Statutes, and that exclusion of the blood in these cases "would have no deterrent effect on future police misconduct," which is the primary purpose of the exclusionary rule.
http://www.5dca.org/Opinions/Opin2016/040416/5D15-405.op.pdf

***Cole v. State*, 190 So. 3d 185 (Fla. 3d DCA 2016)**

After a concededly lawful traffic stop, the defendant was charged with trafficking in cocaine, tampering with evidence, and possession of drug paraphernalia. He appealed his conviction and sentence, arguing that the trial court erred in denying his motion to suppress and in denying three challenges for cause during jury selection. The state conceded that the trial court committed reversible error in at least one of its challenge denials, and the appellate court

reversed for a new trial. But it nevertheless addressed the motion to suppress, holding that the trial court properly denied it "because the defendant voluntarily abandoned the drugs found under the defendant's car, and the police inevitably would have discovered the drugs found on defendant's person." The defendant had argued that the officer did not have reasonable suspicion to pat him down, but the appellate court stated: "Florida's stop and frisk law requires 'not probable cause but rather a reasonable belief on the part of the officer that a person temporarily detained is armed with a dangerous weapon,'" which the evidence supported. While the appellate court agreed with the defendant that "the officer exceeded the limited scope of a patdown search, we nevertheless conclude that the evidence is not subject to suppression because the drugs found in [his] sock would have inevitably been discovered."

State v. Jennings, 189 So. 3d 1001 (Fla. 4th DCA 2016)

The trial court had granted the defendant's motion to suppress, in which he had argued that the stop was not based on a "well-founded suspicion of criminal activity." The state appealed, but the appellate court affirmed, "[d]eferring to the trial judge's evaluation of credibility."
http://www.4dca.org/opinions/April%202016/04-06-16/4D15-993.op.pdf

Foley v. State, 188 So. 3d 930 (Fla. 5th DCA 2016)

The defendant was a passenger in a vehicle that was stopped for a traffic infraction. The driver refused consent for the deputy to search the vehicle, and the deputy called for a K-9 backup. The dog alerted to the front passenger door, and the deputies found methamphetamine, a gun, and ammunition. The defendant was arrested and filed a motion to suppress. The court denied the motion, holding that the defendant did not have standing to contest the search. But the appellate court reversed, stating that the defendant "established a proprietary interest in what was located in one of the bags (ammunition) and had standing to contest the search of the bag. . . . Second, if the length of time of the traffic stop was prolonged by the dog sniff, then [the defendant's] continued detention became unlawful, and he had standing to seek to suppress evidence obtained during the subsequent search."
http://www.5dca.org/Opinions/Opin2016/040416/5D15-1995.op.pdf

State v. Seward, 188 So. 3d 927 (Fla. 5th DCA 2016)

The defendant was charged with driving while his license was revoked as a habitual traffic offender. He filed a motion to dismiss, claiming that he was "allegedly riding a bicycle," and that while he was prohibited from "driving a motor vehicle with a revoked driver's license, section 322.01(27), Florida Statutes (2014), excluded motorized bicycles from the definition of 'motor vehicle.'" The state filed a traverse, arguing that "the officer's sworn statement that [the defendant] was driving a gas-powered bicycle in excess of thirty miles per hour precluded [the defendant's] reliance on the 'motorized bicycle' exclusion" under the statutory definition of "bicycle." The trial court granted the motion to dismiss, and the state appealed. The appellate court reversed, stating that the state's traverse specifically denied the defendant's "averment that he was riding a bicycle. Additionally, the . . . traverse asserted additional material facts [that], if proved at trial, would remove [the] 'bicycle' from the motorized bicycle exclusion to the definition of a motor vehicle." The defendant had also argued that the state's traverse "included a

defective jurat." But the jurat "recited that the information set forth in the traverse was 'based on evidence and sworn testimony received by the Office of the State Attorney in the investigation of this case.' This type of jurat has been found to be sufficient."
http://www.5dca.org/Opinions/Opin2016/040416/5D15-3568.op.pdf

***Exantus-Barr v. State*, 193 So. 3d 936 (Fla. 4th DCA 2016)**

After an armed robbery was reported, the defendant was located via a tracking app on the victim's iPhone and identified from the victim's description of the robber. As police officers approached, the defendant and two others got in a car and drove away. An officer stopped them, found some of the victim's stolen items, and arrested the defendant. He filed a motion to suppress, claiming the stop was unlawful. But the appellate court affirmed, stating that "the totality of the circumstances . . . gave rise to a reasonable suspicion" for the stop.
http://www.4dca.org/opinions/April%202016/04-06-16/4D14-2889.op.pdf

***Aguiar v. State*, __ So. 3d __, 2016 WL 1260891 (Fla. 5th DCA 2016)**

The defendant was a passenger in a vehicle that was stopped because a brake light was out and the driver was not wearing a seat belt. Ultimately the defendant was convicted of possession of cocaine, attempted tampering with physical evidence, and possession of drug paraphernalia. He appealed, and the appellate court considered "whether a police officer may, as a matter of course, detain a passenger who attempts to leave the scene of a lawful traffic stop without violating the passenger's Fourth Amendment rights." It affirmed, holding that an officer could do so, receding from previous case law and certifying conflict with other district courts of appeal.
http://www.5dca.org/Opinions/Opin2016/032816/5D15-1627.en%20banc.op.pdf

V. Torts/Accident Cases

***Saterbo v. Markuson*, __ So. 3d __, 2016 WL 5113913 (Fla. 2d DCA 2016)**

After an automobile accident, Markuson sued Erik Saterbo (the other driver) and his father Stephen Saterbo (the vehicle owner). He made a proposal for settlement as to both claims for $1.5 million, without an apportionment of the amount due from each defendant. The defendants rejected the proposal, and judgment was entered against the Saterbos jointly and severally for $600,000, and against only Erik for $2,484,074, resulting in a total award of $3,084,074. The Saterbos appealed, and Markuson filed a motion for appellate attorneys' fees based on his proposal for settlement, which had been made to both defendants. But the motion sought appellate attorney's fees only from Erik and his insurer, not from Stephen. The appellate court affirmed the final judgment without opinion and granted Markuson's motion for appellate attorney's fees contingent on a determination by the trial court that he was entitled to them.

Markuson then filed a motion in the trial court for appellate attorney's fees against Erik and his insurer and for appellate costs against both Saterbos. The trial court granted Markuson's request for costs. But the court denied his motion for appellate attorney's fees against Erik and his insurer because "Stephen was not solely vicariously liable for the direct claims made against Erik, and as a result, Markuson's joint proposal for settlement failed to strictly comply with

Florida Rule of Civil Procedure 1.442. The trial court also concluded that the proposal was ambiguous and lacked particularity because it failed to account for the fact that Stephen's liability was capped pursuant to section 324.021(9)(b)(3)." Markuson sought review of the denial of attorney's fees, and the appellate court reversed, concluding that "the trial court erred by finding that Markuson's proposal for settlement was unenforceable." It noted that "while rule 1.442(c)(3) does generally require that joint proposals 'state the amount and terms attributable to each party,' rule 1.442(c)(4) contains an exception applicable to this case. Specifically, . . . that 'when a party is alleged to be solely vicariously . . . liable, . . . , a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party.'" It stated further:

> The Saterbos argued that because Stephen's liability was statutorily capped at $600,000, he was not *solely* vicariously liable for the entire amount of damages suffered by Markuson. Thus, they contended that the exception stated in rule 1.442(c)(4) was inapplicable and that Markuson was still required to apportion damages between Erik and Stephen in the joint proposal. The trial court apparently agreed, finding that because Stephen was not vicariously liable for the direct claim against Erik, the proposal failed to appreciate the ambiguity that arose when applying the statutory cap on Stephen's liability. But our interpretation of the rule leads us to a different result. The focus of the exception contained in rule 1.442(c)(4) is not whether a party is liable for the full amount of damages, but rather, it is whether the claims against the party are direct claims or solely claims of vicarious or other forms of indirect liability. The proposal here offered to settle all claims against both Erik and Stephen. Yet the fact remains that the only claim made against Stephen was based on his status as the owner of the vehicle, that is, one solely of vicarious liability. Consequently, apportionment was not necessary pursuant to rule 1.442(c)(4), and Markuson's proposal was sufficient to meet the requirements contained in the rule.

The Saterbos also argued that the proposal was ambiguous, but the appellate disagreed and stated:

> Although the trial court seemed to focus on whether *both* of the Saterbos could make independent, informed decisions as to whether to accept the proposal, that analysis appears to have flowed from the trial court's erroneous understanding of the motion before it. The trial court's order states the motion was made against both of the Saterbos, but that is incorrect. The motion was made solely against Erik (and his insurer). Furthermore, while the Saterbos relied on cases that discuss the necessity for multiple offerees to have the ability to independently evaluate and settle their respective claims, those cases are distinguishable because they involved the prior version of rule 1.442(c), which did not permit joint proposals without apportionment. . . . But because rule 1.442(c)(4) now permits joint proposals without apportionment where one party is solely vicariously liable—as in this case—an analysis of whether the proposal was sufficiently unambiguous as to Stephen is unnecessary to resolve the issue of Markuson's entitlement to an award of appellate attorneys' fees from Erik (and his insurer).

http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/September/September%201,%202016/2D14-2737or.pdf

***Padilla v. Schwartz*, __ So. 3d __, 2016 WL 4680475 (Fla. 4th DCA 2016)**

After a car accident, Padilla sued Schwartz, claiming that Padilla was driving within the speed limit and that "Schwartz's car then appeared suddenly in front of him without warning, and though he applied the brakes, he was unable to avoid hitting the back left area of Schwartz's vehicle." The trial court entered a final summary judgment in favor of Schwartz, finding that Padilla "failed to rebut the rebuttable presumption of negligence which, under Florida law, attaches to the rear driver in a rear-end collision." Padilla appealed, and the appellate court reversed, stating that "considering the evidence in the light most favorable to Padilla, we find that Padilla sufficiently rebutted the presumption by showing through credible evidence that there was a genuine issue of material fact as to whether Schwartz contributed to causing the accident by suddenly changing lanes."
http://www.4dca.org/opinions/Sept.%202016/09-07-16/4D14-3874.op.pdf

***Allen v. Montalvan*, __ So. 3d __, 2016 WL 4547993 (Fla. 4th DCA 2016)**

After an accident in which Allen and three of her family members were injured and two were killed, she hired Jacobs' law firm to sue the defendants on their behalf. Progressive sent the law firm two checks in exchange for releases, but the conditions of the releases were in dispute. The children received nothing from Progressive, and about two weeks after the releases were returned to Progressive, Allen, through a new law firm, filed a complaint for damages against the defendants. The defendants raised affirmative defenses in their answer, "including that the claims were barred by settlement or accord and satisfaction arising from the prior release, as well as contributory negligence on the part of the mother and deceased driver." Progressive intervened and moved to enforce the purported settlement by dismissing the claims against the defendants, and to set a nonjury hearing to determine the validity and enforceability of the purported settlement. Allen objected, arguing that the settlement issue should be submitted to a jury. The trial court held in favor of the defendants and granted their motion to enforce the settlement, and dismissed the children's claims. Allen appealed, and the appellate court reversed for further proceedings, stating: "Progressive, in good faith, left the amounts given to each injured party to be determined by [Allen] and her attorneys. . . . However, Progressive, on behalf of the insureds, had an obligation to ensure the settlement was legally binding to protect the insureds. . . . Because the proposed settlement did not comply with the requirements of section 744.3025, it was invalid as to the claims of the children. As such, the trial court erred by dismissing the children's complaint based upon that agreement."
http://www.4dca.org/opinions/Aug%202016/08-31-16/4D15-675.reh'g.op.pdf

***Wert v. Camacho*, __ So. 3d __, 2016 WL 4607535 (Fla. 2d DCA 2016)**

Camacho was injured at work when Wert, an employee of a different company, hit him with his truck. Camacho and his wife sued Wert for negligence and sued Wert's employer, Rubber Applications, for vicarious liability. A final judgment was entered against Wert and Rubber Applications, and they appealed. The appellate court reversed, holding that because "Wert and Camacho were not employees of the same employer, the trial court erred in ruling that

the unrelated works exception to workers' compensation immunity applies in this case to allow the Camachos to recover from Wert and Rubber Applications."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/September/September%2002,%202016/2D14-1525rh.pdf

***Carpenter v. Chavez*, __ So. 3d __, 2016 WL 4536451 (Fla. 2d DCA 2016)**

After an accident Chavez sued Carpenter, claiming to have incurred $203,723.86 in past medical expenses. But the jury, which heard evidence that Chavez had a preexisting condition of four disc herniations in her neck, awarded her $47,840, finding that she "had not sustained a permanent injury as a result of this accident," and it awarded no future damages. Carpenter appealed, raising an issue regarding the setoff of PIP benefits, and Chavez cross-appealed, arguing "that the trial court erred in denying her challenges for cause during voir dire." The appellate court affirmed on the cross-appeal without discussion, but reversed the final judgment and remanded "for the full PIP benefits of $10,000 to be set off from the jury's verdict."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/August/August%2031,%202016/2D14-6010.pdf

***GEICO General Ins. Co. v. Perez*, __ So. 3d __, 2016 WL 4376755 (Fla. 3d DCA 2016)**

After an accident, the trial court entered a final declaratory judgment as to UM/UIM coverage in favor of the Perez's. GEICO appealed, but the appellate court dismissed the appeal as premature because "[t]he order adjudicates only one count of [the Perez's] six-count complaint," the claim that their policy provided stacked UM/UIM coverage for the crash. The remaining counts of the complaint "are intertwined with, and are not independent of, the adjudicated count. Irrespective of how the order is captioned, the order is non-final and non-appealable; related claims remain pending between the parties." The court also stated that rule 9.110(m), Florida Rules of Appellate Procedure, which provides for appeals of nonfinal orders that determine the existence or nonexistence of insurance coverage when a claim is disputed by the insurer, was inapplicable because it "provides for interlocutory appeals for third-party claims, and not for first-party claims seeking UM/UIM benefits."
http://www.3dca.flcourts.org/Opinions/3D16-1601.pdf

***Safeco Ins. Co. of Illinois v. Fridman*, 196 So. 3d 1284 (Fla. 5th DCA 2016)**

Fridman was injured in an accident with an uninsured driver. He sued his insurer, Safeco, and was awarded $1 million, including lost past earning and future earning capacity. Safeco appealed, arguing, among other things, that it was error for the trial court to deny its motion for remittitur because the evidence did not support the lost earnings and lost future earning capacity awards. The appellate court agreed and reversed, holding that the jury awards on those claims "were primarily based on Fridman's speculation about his potential earnings if he had been able to continue to operate his new wholesale marble and tile business. . . . This type of speculative testimony is insufficient to support an award of damages."
http://www.5dca.org/Opinions/Opin2016/080816/5D12-428.rem%20op.pdf

***State Farm Mut. Auto. Ins. Co. v. Hawkinson*, 195 So. 3d 1202 (Fla. 1st DCA 2016)**

State Farm filed a motion to determine jurisdiction to review an order on appeal. The court determined it lacked jurisdiction, noting that an order awarding summary judgment to insureds on the issue of entitlement to uninsured motorist coverage was not a partial final judgment when a related claim for uninsured motorist benefits remained pending. https://edca.1dca.org/DCADocs/2016/2075/162075_DA08_08112016_020911_i.pdf

***Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde*, __ So. 3d __, 2016 WL 4132105 (Fla. 4th DCA 2016)**

Wilde was injured in an accident with Felt, who had been drinking at the Fraternal Order of Eagles (FOE). Wilde and his wife sued the FOE for negligence under section 768.125, Florida Statutes, for serving alcohol to "a person habitually addicted to the use of any or all alcoholic beverages" and were awarded about $11 million in damages. The FOE and its insurance company appealed, arguing the trial court committed error or abuse of discretion by, among other things, (1) its instructions on, and allowance of evidence regarding, the Responsible Vendor Act, because section 768.125 was the only cause of action; (2) allowing the plaintiffs to introduce evidence of a previous lawsuit against the FOE brought by a different party; and (3) not including Felt on the verdict form. The plaintiffs cross-appealed, arguing that the trial court abused its discretion in admitting evidence of the FOE's charitable work.

The appellate court reversed, holding that:

> there is no cause of action under section 768.125; that the cause of action actually alleged in this case was negligence; that the jury verdict contained two questions in order to answer both the predicate requirement of section 768.125 and the substantive issue of negligence; that "noncompliance" with a statute that imposes no legal duty or responsibility on organizations cannot be used as evidence of negligence; that, despite the limiting instruction, this is how the RVA was used in this case; and that, even if the RVA was limited to showing notice, its minimal probative value was substantially outweighed by the confusion it likely caused the jury. Evidence of the RVA should not have been admitted.

The appellate court further held that it was error to admit evidence of a previous lawsuit against the FOE, but it was not error to exclude Felt from the verdict form or to allow evidence about the FOE's charitable work under the circumstances. http://www.4dca.org/opinions/Aug%202016/08-03-16/4D14-2770.op.pdf

***Botta v. Florida Power & Light Co.*, __ So. 3d __, 2016 WL 4035622 (Fla. 4th DCA 2016)**

Betty Botta was seriously injured when a car driven by her husband was struck by an FPL truck. The jury found in favor of the Bottas, and FPL moved for a new trial. The trial court granted the motion, and the Bottas appealed. The appellate court affirmed but stated that "because the trial court's order [was] unclear as to the scope of the new trial granted, we . . . clarify that the new trial should be on the issue of comparative liability only; the finding of FPL as liable, and the damages award, should not be disturbed." http://www.4dca.org/opinions/July%202016/07-27-16/4D14-1514.op.pdf

***Boyles v. Dillard's Inc.*, __ So. 3d __, 2016 WL 3974849 (Fla. 1st DCA 2016)**

Robinson suffered shoulder injuries in an automobile accident and sued Dillard's and its driver. The trial court entered a final judgment in favor of the defendants, and after she died (unrelated to the accident) her estate, through Boyles, appealed, alleging multiple trial court errors and defense counsel misconduct. It also appealed the trial court's denial of its motion for directed verdict and the admission of delta-v testimony by the defendant's expert accident reconstructionist, Dr. Ipser. The appellate court affirmed without discussion the trial court's denial of the plaintiff's motion for directed verdict. It also affirmed with regard to the admission of Dr. Ipser's delta-v testimony, stating:

> This Court herself has repeatedly held that while "a biomechanics expert is not qualified to give a medical opinion regarding the *extent* of an injury," he "is qualified to offer an opinion as to causation if the mechanism of injury falls within the field of biomechanics." . . .
>
> Dr. Ipser's testimony below was well within these parameters; he did not render inadmissible opinions that required medical expertise, and he didn't even render *admissible* opinions as to the causal mechanisms of the sorts of injuries plaintiff suffered. To the extent defense counsel "erred" at all in proffering Dr. Ipser's testimony, it was on the side of caution and, therefore, in [the plaintiff's] favor. Accordingly, the trial court did not abuse its discretion when it allowed Dr. Ipser to testify about the physical forces involved in the accident, and defense counsel did not act improperly when he implied during closing arguments that the jury should take relevant physical forces into account when determining the effect of such on whatever injuries plaintiff suffered.

However, the appellate court reversed for a new trial because "defense counsel's misconduct was so prejudicial as to warrant a new trial." Defense counsel's referral to a deposition was improper "because it had not previously been introduced into evidence defense counsel was using this characterization of extra-record evidence to accuse plaintiff of dishonesty." Further, defense counsel and openly disparaged plaintiff's counsel for registering "an eminently reasonable objection to the impropriety." The appellate court also noted improprieties regarding voir dire and evidentiary issues.
https://edca.1dca.org/DCADocs/2014/5276/145276_DC08_07252016_092727_i.pdf

***Cal v. Forward Air Solutions, Inc.*, __ So. 3d __, 2016 WL 3918721 (Fla. 3d DCA 2016)**

After an automobile accident, Cal sued Forward Air Solutions and Hazoury, claiming the accident exacerbated back and neck injuries she had incurred in an earlier slip and fall accident. The trial court ordered Cal to produce documents relating to the slip and fall settlement, to provide better responses to interrogatories about the settlement, and to attend an IME. She failed to attend the IME, and the trial court granted the defendants' motion for sanctions and dismissing the case with prejudice. Cal appealed, but the appellate court affirmed, stating that

> the record fully supports the trial court's findings that . . . Cal willfully violated the trial court's . . . order compelling discovery, willfully failed to attend the required IME, and lied under oath during several depositions and interrogatories. [Her] false testimony was particularly prejudicial because, while [she] alleges that

> her neck and back have been injured as a result of the defendants' negligence, [her] false testimony has guaranteed that her medical history from her [earlier] accident can no longer be fully discovered, as the treatment facility she attended . . . has since gone out of business. Thus, the defendants can no longer conduct discovery regarding the full extent of [her] prior back injuries.

The court also found unconvincing Cal's "claim to have a faulty memory."
http://www.3dca.flcourts.org/Opinions/3D15-2800.pdf

***Goheagan v. Perkins*, 197 So. 3d 112 (Fla. 4th DCA 2016)**

Swaby was severely injured in a car accident and died three months later. Her estate, through Goheagan, sued the driver of the other vehicle, resulting in a multi-million dollar verdict. Then Goheagan brought a third-party bad faith claim against the driver's insurer and settled the case for $1,000,000. The Florida Agency for Health Care Administration then asserted a lien for $95,476.60 against those settlement proceeds based on section 409.910(11)(f), Florida Statutes (responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable), Florida Statutes. Goheagan filed a motion for equitable distribution to reduce the Medicaid lien, arguing that the statute "was preempted by federal law to prevent the state from being reimbursed from monies recovered by a beneficiary for any category of damages other than past medical expenses." But the trial court ordered the estate to reimburse AHCA in the full amount of its Medicaid lien. The estate appealed, and the issue on appeal was whether the trial court erred by applying section 409.910(11)(f) "in refusing to reduce the Medicaid lien to an amount equal to the amount recovered by the Estate for past medical expenses." The estate argued that, while section 409.910(11)(f) would permit AHCA to recover the full amount of benefits paid, it was preempted by the anti-lien provision of federal Medicaid law (42 U.S.C. § 1396a), which would allow AHCA to seek reimbursement only "from the non-medical expense portion of a recipient's recovery." The trial court held that the reimbursement formula under section 409.910(11)(f), not the anti-lien provision of the federal Medicaid statute, applied in *wrongful death* cases. It denied the estate's motion to reduce the lien and ordered it to reimburse AHCA the full amount of its Medicaid lien for benefits it had paid on behalf of the deceased. The appellate court affirmed, noting that the federal Medicaid Act's anti-lien statute "applies only to living Medicaid recipients."
http://www.4dca.org/opinions/July%202016/07-20-16/4D14-4843.op.pdf

***Restrepo v. Carrera*, 189 So. 3d 1033 (Fla. 3d DCA 2016)**

[Substituted opinion on motion for clarification.] Restrepo sought review of a trial court order that directed her to "provide cell phone numbers and/or names of providers used during the six (6) hour period before the time of the crash and the six (6) hour period after the crash, same to be provided within thirty (30) days from the date of this Order." Carrera conceded, and the appellate court found, that the order violated Restrepo's "Fifth Amendment rights, while her criminal case is pending, and constitutes a departure from the essential requirements of law from which petitioner has no adequate remedy on appeal." Therefore, the appellate court granted review and quashed the order.
http://www.3dca.flcourts.org/Opinions/3D15-1964.rh.pdf

VI. Drivers' Licenses

Futch v. DHSMV, 189 So. 3d 131 (Fla. 2016)

The defendant was stopped and allegedly refused to submit to a blood-alcohol test. His license was suspended for a year, and he sought review. At his hearing, the hearing officer did not allow the defendant's attorney to ask more than two questions of his expert witness and upheld the suspension. The defendant sought review, and the circuit court invalidated the suspension, finding the hearing officer denied the defendant due process. DHSMV sought second-tier review, and the Fifth District Court of Appeal granted review and found that while the hearing officer had violated the defendant's due process, the proper course was for the circuit court to remand back to DHSMV for another hearing rather than invalidate the suspension. The defendant sought supreme court review based on conflict with opinions from the First and Second district courts of appeal. The supreme court granted review and quashed the decision of the Fifth District Court of Appeal to grant certiorari review, and remanded for reinstatement of the circuit court's decision. It stated that "the Fifth District inappropriately exercised its certiorari jurisdiction to review the circuit court order. We reassert that 'second-tier certiorari should not be used simply to grant a second appeal; rather, it should be reserved for those situations when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.' . . . There was no miscarriage of justice here."
http://www.floridasupremecourt.org/decisions/2016/sc14-1660.pdf

Sullivan v. State, __ So. 3d __, 2016 WL 5682496 (Fla. 2d DCA 2016)

A county court had certified as involving a matter of great public importance the question "WHETHER A SISTER STATE'S MOTOR VEHICLE RECORD, ADMITTED INTO EVIDENCE UNDER [SECTION] 90.902, FLORIDA STATUTES, IS SUFFICIENT TO ESTABLISH THE ELEMENT OF A PRIOR ADMINISTRATIVE SUSPENSION FOR A REFUSAL TO SUBMIT TO TESTING." The appellate court did not accept the appeal or answer the certified question but rather transferred the appeal to the circuit court, appellate division, pursuant to rule 9.160(f)(2), Florida Rules of Appellate Procedure.
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/September/September%2030,%202016/2D15-1397.pdf

Anthony v. DHSMV, 24 Fla. L. Weekly Supp. 282b (Fla. 19th Cir. Ct. 2015)

The circuit court, in its appellate capacity, granted the defendant's petition for writ of certiorari "because he was not afforded a meaningful opportunity to be heard when the Martin County Sheriff's Office liaison refused to accept service for [the] Deputy. . . . Rule 15A-6.012(3) of the Florida Administrative Code provides the procedure for serving a subpoena on a law enforcement officer, including three exceptions. 'Deputy in training' is not an enumerated exception to the rule."

Salazar v. DHSMV, 24 Fla. L. Weekly Supp. 216b (Fla. 12th Cir. Ct. 2016)

A sheriff's lieutenant saw the defendant's vehicle parked on the side of a busy road with emergency flashers on. He stopped to render aid to the disabled vehicle and saw the defendant slumped over the steering wheel. The defendant was ultimately arrested for DUI and refused a

breath test, and her license was suspended. She sought review, arguing that there was a lack of competent substantial evidence to support the legality of the stop; that "her interaction with law enforcement became an investigatory stop, and therefore she was illegally detained, when [the] Lieutenant activated his vehicle's emergency lights and proceeded to exhibit a show of authority by knocking on her window [and] that, if the encounter were consensual, [he] would not have activated his emergency lights, and would not have attempted to engage with her once he saw that there was no sign of trauma and no contraband in the vehicle," and that "a person sleeping in a lawfully parked vehicle should expect law enforcement to leave him or her alone." DHSMV argued that the lieutenant was performing a community caretaker function. The defendant argued that the doctrine "does not justify law enforcement's intrusion into a vehicle where the facts do not support the police officer's claim that he believed the defendant may have been suffering from a medical condition." But the circuit court, in its appellate capacity, denied review, noting that under the circumstances the lieutenant did have reasonable suspicion to believe that the defendant had committed or was about to commit a crime. And as to whether a seizure had occurred, the court stated: "'[T]he activation of police lights is *one important factor* to be considered in a totality-based analysis as to whether a seizure has occurred.' . . . [The lieutenant's] decision to activate his blue emergency lights when he parked behind [the defendant] is not dispositive of the assertion that law enforcement had illegally detained [her]. Not only were there traffic safety concerns, but [the defendant] had activated her emergency flashers, giving the indication that she may need aid, and increasing the likelihood that law enforcement would stop and attempt to render assistance."

***Newlands v. DHSMV*, 24 Fla. L. Weekly Supp. 215a (Fla. 20th Cir. Ct. 2016)**

The defendant hit a road sign and was stuck in a grassy median. He told a law enforcement officer that he believed he was impaired, and he performed poorly on field sobriety exercise. He was arrested for DUI, and his license was suspended for refusal to take a breath, urine, or alcohol test. The defendant had an earlier license suspension for refusal to submit to a breath test, and he had a business-purpose-only license. He sought review, arguing that there was insufficient evidence to conclude he was the operator or in physical control of the vehicle while under the influence without the statements he gave the officer, and that the officer was initially conducting a traffic accident investigation, and the accident report statements could not be used "in any trial, civil or criminal proceedings." But the circuit court, in its appellate capacity, denied review, noting the state's argument that "the 2006 amendments to Fla. Stat. §322.2615 make crash reports not only admissible in administrative proceedings, but specifically dictate that a hearing officer shall consider the crash report." It held that "the record, including the crash report, contains substantial competent evidence to support the hearing officer's order upholding the suspension" and that the defendant was afforded procedural due process.

***Strang v. DHSMV*, 24 Fla. L. Weekly Supp. 208a (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to take a breath, urine, or alcohol test. He sought review, arguing that the hearing officer had "improperly found that (1) [the defendant] refused to submit to a breath test after properly being read the implied consent warning after the arrest; (2) that [the defendant] was lawfully arrested; and (3) there was probable cause to believe that [he] was driving while under the influence." As to his first claim, the defendant argued that inconsistencies regarding the timing of his arrest and refusal (the refusal affidavit stated that he

was arrested hours after he was stopped) made it unclear that he was arrested before his refusal. But the circuit court, in its appellate capacity, denied review, stating that there was competent, substantial evidence that the defendant "was pulled over for speeding, then arrested, transported to a law enforcement office, observed, and then refused to take a breath test." The court also held that the arrest was lawful: the defendant was speeding, he admitted having had some drinks, the deputy noticed indicia of impairment, and the defendant refused field sobriety exercises.

***Malowski v. DHSMV*, 24 Fla. L. Weekly Supp. 199a (Fla. 6th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to take a breath test. He sought review, arguing that "the field sobriety tests . . . were not properly administered; there was no probable cause to arrest [him]; and there was no evidence that [he] was read implied consent." But the circuit court, in its appellate capacity, denied review, stating that the refusal affidavit, officer's testimony, arrest report and affidavit, and the alcohol influence report constituted competent, substantial evidence that the defendant was read the implied consent warning. The court also held that the defendant "failed to demonstrate the results of the field sobriety tests were inadmissible." There was also sufficient evidence to support probable cause to arrest the defendant for DUI even without testimony as to the field sobriety tests, so "[a]ny error in considering HGN results was harmless error."

***Bellnier v. DHSMV*, 24 Fla. L. Weekly Supp. 197c (Fla. 6th Cir. Ct. 2016)**

The defendant's license had been permanently suspended after four DUI convictions. He obtained a restricted license, which was revoked after his participation in the Special Supervision Services Program was canceled based on a medical history form on which he reported having four to ten alcoholic drinks per week. He sought review, claiming that the medical history referred to past alcohol use, but that the form did not allow indicating a time frame, and that he had been denied due process. But the circuit court, in its appellate capacity, denied review, stating that "[t]he finding that the medical history form references current alcohol consumption is supported by the record," and that the defendant was "not entitled to a restricted license as of right, but was granted the privilege on certain conditions. The lack of pre-deprivation procedures does not amount to a due process violation in this case."

***Hoyne v. DHSMV*, 24 Fla. L. Weekly Supp. 197a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended. The circuit court, in its appellate capacity, granted his petition for review and quashed the suspension, stating that "there was no evidence in the record that a breath or urine test was either impossible or impractical. The [defendant] did not refuse a breath or urine test. Accordingly, there was no evidence that justified the request for a blood test. . . . The uncontroverted evidence shows that no officer believed that the [defendant] was injured and [he] did not request medical treatment. In any event, the mere presence at a hospital is not sufficient in itself to justify a request for blood."

***Lofton v. DHSMV*, 24 Fla. L. Weekly Supp. 105a (Fla. 13th Cir. Ct. 2016)**

The defendant was arrested for DUI and refused a breath test, and her license was suspended for one year. She sought review, arguing that the hearing officer departed from the essential requirements of law "1) by failing to invalidate the suspension based upon her refusal to

submit to a breath-alcohol test in light of misinformation given her by the arresting officer; and 2) by failing to invalidate the suspension based upon the results of the [HGN] Test." The circuit court, in its appellate capacity, denied review, stating that the defendant "does not contest that she was properly advised of the Implied Consent Law and she refused the lawful request, but rather attempts to invalidate that refusal based upon subsequent statements about a matter that has no bearing to the warning provided in the Implied Consent Law. The law does not require officers to become experts on or properly advise about the administrative process that occurs after they complete their job." As to the hearing officer's error in considering evidence of the HGN, the court noted that "where, as here, competent substantial evidence exists to support the Hearing Officer's conclusion, consideration of the HGN Test is harmless error."

***Marquez v. DHSMV*, 24 Fla. L. Weekly Supp. 101b (Fla. 11th Cir. Ct. 2016)**

The defendant's license was suspended for one year for obtaining a license by fraud. He sought review, based on DHSMV's failure to schedule a formal review hearing within 30 days. The circuit court, in its appellate capacity, granted review and quashed the suspension order based on lack of procedural due process.

***Cosper v. DHSMV*, 24 Fla. L. Weekly Supp. 89a (Fla. 6th Cir. Ct. 2016)**

After the defendant nearly hit an officer's car, the officer pulled him over for careless driving, noticed indicia of impairment, and called the DUI unit, after which another officer arrested the defendant for DUI. The defendant refused to perform field sobriety exercises or take a breath test, and his license was suspended. He sought review, arguing that (1) the documentary evidence contained material discrepancies as to the times and dates of the arrest, which prevented a determination that his refusal to submit to a breath test was incident to a lawful arrest, (2) the stopping officer lacked reasonable suspicion to detain him for a DUI investigation, and (3) the arresting officer did not have probable cause to arrest him for DUI. The circuit court, in its appellate capacity, denied review, stating that (1) there was more evidence than just the documentary evidence in that three officers testified at the defendant's hearing, (2) the totality of the circumstances supported the hearing officer's finding as to reasonable suspicion, and (3) there was competent substantial evidence to support the hearing officer's determination that the officer had probable cause to arrest the defendant DUI.

***Long v. DHSMV*, 24 Fla. L. Weekly Supp. 88c (Fla. 6th Cir. Ct. 2016)**

After the defendant was stopped and given a citation for improper use of a horn, he was arrested for DUI and refused to submit to a breath, urine, or blood test. His license was suspended, and he sought review. The circuit court, in its appellate capacity, granted review, stating:

> There is no record evidence that concern for the public's safety was a factor in stopping [the defendant]. Therefore, for the initial stop to have been lawful, [the deputy] must have had probable cause that [the defendant] committed a traffic violation. [The defendant] correctly contends that the initial stop was unlawful because section 316.271(3) merely states proper horn usage, not a prohibition on the use of a horn in the manner in which [he] used his horn. Although [DHSMV]

> argues that the Court should interpret section 316.271(3) broadly to mean that a driver shall not use his or her horn when it is not reasonably necessary to ensure safe operation, this argument is without merit. In consideration of the 2013 language change to section 316.271(3), [the defendant's] use of his horn was not prohibited by statute, and he did not violate section 316.271(3). Since the only basis for the stop was a violation of section 316.271(3), [the deputy] did not have probable cause for the initial stop and the Hearing Officer's finding that the initial stop was lawful is not supported by competent substantial evidence.

***Cribb v. DHSMV*, 24 Fla. L. Weekly Supp. 87a (Fla. 4th Cir. Ct. 2016)**

After a car accident, the defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that the trooper's report "does not describe how he came to the conclusion that [the defendant] was a driver of one of the vehicles," and, there were no witness statements or any description of any physical evidence in the record to place the defendant behind the wheel. The circuit court, in its appellate capacity, granted review and quashed the license suspension, finding that while the trooper's affidavit contained his "conclusory statement" that the defendant was the driver of one of the vehicles, "the record is devoid of competent substantial evidence upon which [that] statement was based or could be reasonably inferred."

***Shoot v. DHSMV*, 23 Fla. L. Weekly Supp. 902a (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. He sought review, arguing that "the contents of the evidence admitted into the record at the formal review hearing . . . failed to rise to the level of competent, substantial evidence needed in order to justify making a valid stop of [his] vehicle." The circuit court, in its appellate capacity, granted review, finding "it necessary to direct a response" from DHSMV. It gave DHSMV 30 days to file a "written response showing cause why the relief requested by [the defendant] should not be granted" and then giving the defendant 20 days from the filing of the response to file a reply.

***Gilbert v. DHSMV*, 23 Fla. L. Weekly Supp. 900a (Fla. 12th Cir. Ct. 2016)**

The defendant's license was suspended for DUI. During the hearing, he filed a motion to invalidate the suspension based on an affidavit of the former program manager of FDLE's Alcohol Testing Program, stating that the breath test instrument was not in substantial compliance with the rules and that the breath test was invalid for outlined scientific reasons. The hearing officer denied the motion. The defendant sought review, citing the denial of the motion and the finding that he had an unlawful breath-alcohol level of 0.08 or higher. But the circuit court, in its appellate capacity, denied review, finding that the hearing officer observed the essential requirements of law and the decisions were supported by competent substantial evidence. It held that the agency inspection report admitted at the defendant's hearing "sufficiently established a presumption of proof," and the burden shifted to the defendant to establish that the testing instrument was not in substantial compliance with the rules.

The defendant's claims were that (1) there was no FDLE inspection of the Intoxilyzer after it was returned to the sheriff's Office; (2) "[t]he alcohol reference solution or sources used

to inspect the Intoxilyzer . . . were not properly approved by the FDLE"; and (3) the Intoxilyzer was transported to the sheriff's office "in conditions that violate the requirements of Rule 11D-8.007(2)." But the circuit court stated that "the location of the inspection -- whether at the repair facility prior to return, or at the agency after return -- is of no consequence where the inspection was made after maintenance or repair." Further, "none of the evidence admitted at the hearing contained the information necessary to determine whether the reference solutions or sources used to inspect [the] Intoxilyzer . . . complied with the FDLE approval process outlined in Rule 11D-8.0035," and the "documents relating to the approval of the reference solutions and sources at issue . . . were not actually offered at the hearing; instead, the evidence of noncompliance consisted of [the former program manager's] hearsay claims based on her review of evidence not before the hearing officer." As to the defendant's third claim, "Rule 11D-8.007 . . . neither requires that breath test instruments be shipped in a climate-controlled environment nor prohibits shipping breath test instruments by common carrier. Instead, [the defendant] was required to demonstrate that [the] Intoxilyzer . . . was not kept clean and dry," but his assertions were "conclusory and speculative."

***Baumann v. DHSMV*, 23 Fla. L. Weekly Supp. 899a (Fla. 49h Cir. Ct. 2016)**

The defendant's license was permanently revoked after four DUIs, and the hearing officer denied his request for early reinstatement because the defendant admitted drinking wine during a toast at his son's wedding within five years after the revocation. He sought review, arguing that he was denied due process because (1) DHSMV waited more than 20 years to revoke his license and (2) "the hearing officer acted arbitrarily and capriciously in not reinstating his license due to the alcohol consumption, but ignoring his driving during the previous five years." Holding that neither argument had merit, the circuit court, in its appellate capacity, denied review. It stated:

> First, this is not a petition to review the Order of Revocation. That order was entered in 2011, and, as stated in the order, the time to seek judicial review was within thirty days. . . . A circuit court is without jurisdiction to review an order of revocation when the petition for writ of certiorari is filed beyond that time limit. . . . Second, [the defendant] argues that the hearing officer choosing to deny the request for reinstatement based on his drinking alcohol within the past five years, and stating that she would have been able to disregard [his] driving within the past five years, was an arbitrary and capricious decision. A look at the timeline of events and the hearing officer's statement regarding this decision reveals that it is neither.

***McDonald v. DHSMV*, 23 Fla. L. Weekly Supp. 898a (Fla. 9th Cir. Ct. 2016)**

At about 2 a.m., an officer pulled up next to the defendant's vehicle and opened his passenger side window. The defendant opened his window, and the officer asked if he was lost, to which the defendant replied "I just want to go home." The officer noticed indicia of impairment, and the defendant performed poorly on sobriety exercises. The defendant was arrested for driving with unlawful blood alcohol level and his license was suspended. He sought review, arguing "there was no probable cause for the stop and no reasonable suspicion to conduct

a DUI investigation." But the circuit court, in its appellate capacity, denied review, finding competent substantial evidence that the interaction was voluntary.

***Ramirez v. DHSMV*, 23 Fla. L. Weekly Supp. 893a (Fla. 7th Cir. Ct. 2016)**

After being stopped for speeding, the defendant was arrested for DUI and his license was suspended for refusal to submit to a breath test. The defendant sought review, arguing there was a lack of "competent substantial evidence to establish probable cause to request that [he] exit his vehicle and perform roadside field sobriety exercises." The circuit court, in its appellate capacity, granted review and quashed the suspension, stating: "The evidence that the hearing officer had before her regarding indicia of impairment was the minimal articulation from [the deputy] and the probable cause affidavit. This consisted of the observance of a strong odor of alcohol . . . , the [defendant] having some difficulty in removing his driver license from his wallet, and his failure to provide other requested documents," but no other indicia of impairment. Further, the hearing officer ignored the cases the defendant had provided her to support his argument and "failed to consider the deputy's testimony where he clearly indicated there were no other observations to add to his report to support his request for the [defendant] to perform the FSE's." Therefore, it found that the hearing officer did not afford the defendant due process and did not have competent substantial evidence on which to base her decision to uphold the suspension.

The court also noted that there were "conflict and inconsistencies in the documents." The times stated in three citations "were inconsistent with the flow of the stop and arrest of the [defendant]. . . . Florida Courts have held that 'if the department is going to choose to present no live testimony but to rely exclusively on written documents, then clearly it cannot ask the court to ignore discrepancies and inconsistencies in the written documentation where the cause for such discrepancies and inconsistencies is not explained by sworn testimony'."

***Delaney v. DHSMV*, 23 Fla. L. Weekly Supp. 890b (Fla. 6th Cir. Ct. 2016)**

After being stopped for driving with a flat tire, the defendant was arrested for DUI and his license was suspended. He sought review, but the circuit court, in its appellate capacity, denied review, stating:

> Driving with a flat tire that is "not causing more damage than the average wear and tear" to the road is not against the law in Florida. . . . However, . . . [a] police officer may stop a vehicle "at any time, upon reasonable cause to believe that a vehicle is unsafe." . . . Therefore, if the flat tire "as it existed and as it was observed by the officers would have created an objectively reasonable suspicion that [the] vehicle was unsafe," then the stop is valid. . . . This objective test "mak[es] the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." . . .
>
> Here, [the officer's] mistaken belief that driving on a flat tire violates the law does not invalidate the stop since an objectively reasonable suspicion that [the defendant's] vehicle was unsafe existed.

***Fanning v. DHSMV*, 23 Fla. L. Weekly Supp. 889a (Fla. 4th Cir. Ct. 2016)**

After a car accident, the defendant's license was suspended for refusal to submit to a breath test. The defendant sought review, arguing a lack of competent evidence that he was the operator of the vehicle involved, as the officer "did not observe [him] behind the wheel and did not relate how he came to that conclusion." But the circuit court, in its appellate capacity, denied review, noting that the arrest report stated that the victim and another witness saw the defendant behind the wheel of his vehicle during the accident.

***Sutton v. DHSMV*, 23 Fla. L. Weekly Supp. 888a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended for 18 months for refusal to submit to a breath, blood, or urine test. The hearing officer admitted an unauthenticated, uncertified driving record, which showed a prior refusal, into the record over the defendant's objection. He sought review, which the circuit court, in its appellate capacity, granted, and it quashed the suspension and remanded.

***Gomez v. DHSMV*, 23 Fla. L. Weekly Supp. 887b (Fla. 2d Cir. Ct. 2016)**

The defendant's license was suspended after his fourth DUI conviction. He argued that there was a lack of competent substantial evidence, based on his unrebutted testimony that he had never been in or been convicted of DUI in Taylor County, that his 1974 conviction was "unreadable," and that "the driving record submitted to the hearing officer was not a certified copy." The hearing officer entered a final order finding that the defendant had "provided sufficient evidence to show that his driving privilege should not have been revoked," but 13 days later entered an amended final order reversing the decision. The defendant sought review, and the circuit court, in its appellate capacity, granted review, quashed the suspension, and remanded, stating that "the amended final order constituted a denial of due process," and finding that under rule 15A-6.010(6), Florida Administrative Code, "the hearing officer had the authority to correct or amend the final order *for substantive reasons* within 15 days from the date of issuance of the order. However, the Court also finds that the Department failed to recite or explain in the amended final order why the prior ruling was being corrected and, further, the hearing officer did not give [the defendant] the opportunity to respond to the proposed change."

***McCray v. DHSMV*, 23 Fla. L. Weekly Supp. 887a (Fla. 2d Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test. She sought review, asserting that the probable cause affidavit and refusal affidavit "failed to contain the written declaration declaring the penalties for perjury in accordance with Fla. Stat. 92.525." But the circuit court, in its appellate capacity, denied review, stating that there was no evidence that the deputy "did not swear or affirm under oath to the statements made in the Arrest/Probable Cause and Refusal Affidavits. . . . The . . . Affidavits are not legally defective where [the deputy] swore or affirmed to the contents of the documents in the presence of another law enforcement officer, who indicated on the jurat that he was a CO 'Corrections Officer' with id# 508, a person authorized under section 92.525 to administer oaths. . . . Section 92.525 prescribes three different ways to establish verification of pleadings, and the written declaration section is just one of those mechanisms."

VII. Red-light Camera Cases

Parker v. American Traffic Solutions, Inc., __ F.3d __, 2016 WL 4542719 (11th Cir. 2016)

The plaintiffs filed a class action against red-light camera vendor American Traffic Solutions, Inc. (ATS), alleging that their citations were void, and the fines therefore unlawful, "because the red-light camera programs violated Florida law in several respects." Other plaintiffs filed similar actions in Florida, and all the actions were consolidated with this case. The master complaint alleged that the Florida Department of Revenue and three red-light camera vendors, including ATS, "unlawfully issued citations and collected fines for traffic violations recorded by red-light cameras. Among other claims, it includes an unjust enrichment claim in which Plaintiffs seek disgorgement of the fines they paid to Defendants." The defendants moved to dismiss the unjust enrichment claim, arguing it "was a 'quasi-contract' claim barred by sovereign immunity under Florida law. The district court denied the motion, construing the unjust enrichment claim as a claim to recover an "unlawful monetary extraction," to which Florida sovereign immunity does not apply. The defendants filed an interlocutory appeal, which the plaintiffs moved to dismiss "for lack of jurisdiction and for a frivolity determination and sanctions pursuant to Federal Rule of Appellate Procedure 38." The federal Eleventh Circuit court denied the plaintiffs' request for sanctions under Rule 38 but granted their motion to dismiss the appeal for lack of jurisdiction. It stated that "an order denying state official or sovereign immunity is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability. . . . This Court, however, has interpreted Florida sovereign immunity law to provide only a defense to liability, rather than immunity from suit." Therefore, the Eleventh Circuit lacked jurisdiction over the appeal. http://media.ca11.uscourts.gov/opinions/pub/files/201513721.ord.pdf

State by and through City of Aventura v. Jimenez, __ So. 3d __, 2016 WL 4016645 (Fla. 3d DCA 2016)

Jimenez got a traffic citation for running a red light at an intersection with a no-turn-on-red sign. He challenged the citation, arguing that the city's red-light camera program was illegal because it gave unfettered discretion to the vendor. The appellate court rejected the arguments, distinguishing the case from *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014), and stating that a municipality's vendor, as its agent, is authorized when,

> as here, (1) the vendor's decisions in this regard are strictly circumscribed by contract language, guidelines promulgated by the municipality, and actual practices, such that the vendor's decisions are essentially ministerial and non-discretionary; (2) these ministerial decisions are further limited by an overarching policy of automatically passing all close calls to the police for their review; (3) it is the police officer that makes the actual decision whether probable cause exists and whether a notice and citation should issue; and (4) the officer's decision that probable cause exists and a citation issues consists of a full, professional review by an identified officer who is responsible for that decision and does not merely acquiesce in any determination made by the vendor.

The trial court had certified three questions to the appellate court:

1. Does the review of red light camera images authorized by Florida Statute 316.0083(1)(a) allow a municipality's vendor, as its agent, to review and then select which images to forward to the law enforcement officer, where the municipality has provided the vendor with specific written guidelines for determining which images to forward or not to forward?

2. If the vendor is permitted to review and then forward images in accordance with a municipality's written guidelines, is it an illegal delegation of police power for the vendor to print and mail the [citation], through a totally automated process without human involvement, after the law enforcement officer has affirmatively made a probable cause determination and authorizes the prosecution of the violation by selecting the "accept" button?

3. Does the fact that the [citation] data is electronically transmitted to the Clerk of the Court from the vendor's server via a totally automated process without human involvement violate Florida Statute §316.650(3)(c) when it is the law enforcement officer who affirmatively authorizes the transmission process by selecting the "accept" button?

The appellate court answered the first question in the affirmative and the second and third in the negative but certified the following three issues to the Florida Supreme Court:

1. Does the review of red light camera images authorized by section 316.0083(1)(a), Florida Statutes (2014), allow a municipality's vendor, as its agent, to sort images to forward to the law enforcement officer, where the controlling contract and City guidelines limit the Vendor to deciding whether the images contain certain easy-to-identify characteristics and where only the law enforcement officer makes the determinations whether probable cause exists and whether to issue a notice of violation and citation?

2. Is it an illegal delegation of police power for the vendor to print and mail the notices and citation, through a totally automated process without human involvement, after the law enforcement officer makes the determinations that probable cause exists and to issue a notice of violation and citation?

3. Does the fact that the citation data is electronically transmitted to the Clerk of the Court from the vendor's server via a totally automated process without human involvement violate section 316.650(3)(c), Florida Statutes (2014), when it is the law enforcement officer who affirmatively authorizes the transmission process?

http://www.3dca.flcourts.org/Opinions/3D15-2303.rh.pdf

***Cascio v. City of Boynton Beach*, 24 Fla. L. Weekly Supp. 211a (Fla. 15th Cir. Ct. 2016)**

The defendant was mailed a notice of violation for running a red light, and about 6 weeks later a UTC was issued to him and received by the clerk of court. He appealed, but the circuit court, in its appellate capacity, affirmed, stating that he "raises two primary issues on appeal.

First, . . . that the Reports of Mailing introduced at the final hearing were improperly admitted under the business records exception to the hearsay rule because they were not the business records of the City, but rather the business records of the City's contracted third-party vendor, QuestMark," and that "without these records, the City cannot establish that it timely mailed the NOV and UTC" to him. But the court noted that the defendant failed "to cite to a case that supports the proposition that a party is not permitted to rely on the business records of another if that party follows the notice and certification requirements" of the Evidence Code. "To the contrary, courts regularly admit business records of nonparties, so long as the party seeking admission of the evidence complies with the [statutory] requirements." The court stated further:

> To the extent [the defendant] complains that he was only on notice of the City's intent to rely on the records of ATS and not those of QuestMark, a review of the record reveals that the City's Notice announced its intent to rely on the "certification/declaration(s) of business records from American Traffic Solutions *and/or its agents*." (emphasis added). It is unclear whether in the proceedings below [the defendant] challenged the agency relationship between ATS and QuestMark or whether he was provided reasonable opportunity to inspect the business records in accordance with section 90.803(6)(c), but he makes no such challenge on appeal. The certification and declarations by QuestMark appear to comply with the requirements of section 90.902(11), Florida Statutes . . . , and without a transcript revealing the factual determinations on which the hearing officer's decision to admit this evidence was based, we cannot conclude that these records were improperly admitted into evidence under the business records exception to the hearsay rule.

The defendant also argued that the city failed to comply with section 316.650(3)(c), Florida Statutes, "because the electronic copy of the UTC was transmitted to the Clerk of Court by the 'City Clerk's office' and not by a Traffic Infraction Enforcement Officer ('TIEO') as required by the statute. Although we agree that section 316.650(3)(c) appears to require that a TIEO personally transmit the electronic copy of the UTC to the Clerk of Court, a careful review of the record on appeal fails to reveal any evidence to support [the] claim, and without a transcript of the proceedings below, we again must defer to the factual findings of the lower tribunal."

The defendant raised other issues, but these were either waived or not properly preserved for appeal.

VIII. County Court Orders

State v. Ledford, 24 Fla. L. Weekly Supp. 301a (Flagler Cty. Ct. 2016)

The defendant was charged with DUI and filed a motion to suppress, which the court granted. The arrest could be justified only as a citizen's arrest, but the first, third, and fourth prongs of the *McAnnis v. State*, 386 So. 2d 1230 (Fla. 3d DCA 1980), test for a valid citizen's arrest were not met ("(1) A purpose or intention to effect an arrest under a real or pretended authority; . . . (3) a communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) an understanding by the

person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him").

***State v. Deboer*, 24 Fla. L. Weekly Supp. 297b (Duval Cty. Ct. 2016)**

An officer stopped the defendant after seeing her car traveling very slowly and "wobbling," which the officer later discovered was caused by a flat tire. He did not notice the defendant smelled of alcohol, had bloodshot eyes, or staggered, and her speech was not slurred. Nevertheless, he detained her for a DUI investigation, after which the defendant was arrested for DUI. She filed a motion to suppress, which the court granted. It stated: "Because the officers here had no more than a bare suspicion or hunch that [the defendant] may have been impaired, the detention and request for field sobriety exercises [were] unlawful."

***State v. Llewellyln*, 24 Fla. L. Weekly Supp. 192b (Seminole Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress, which the court granted. The evidence that the defendant was behind the wheel was his admission to an officer, who reported the admission in a supplemental report created more than three months after his initial report, at the state attorney's request. The supplemental report was based only on the officer's memory rather than on notes or memos he wrote at or about the time of the offense. Therefore the court found "that the officer's credibility is in great question as to whether or not he complied with the fundamental requirements of Miranda, the 5th Amendment and the traffic accident report privilege."

***State v. Howard*, 24 Fla. L. Weekly Supp. 178a (Broward Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress, which the court granted, stating: "There is no law against sleeping in a car in that casino parking garage and the officer observed no illegal activity and there were no BOLOS or warrants for the Defendant's arrest. There was no evidence that the Defendant was ill or in distress. She was just sleeping in her car. There were no signs telling anyone they could not sleep in their car. Thereupon the officer and a back-up officer went into the car and found evidence *after* they entered the car that the Defendant may have been a DUI and affected [sic] an arrest. . . . The court finds that there was no valid basis for entering the car or making a DUI arrest."

***State v. Rivera*, 24 Fla. L. Weekly Supp. 150a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI. She asked for a blood test in addition to the breath test, but the officer refused. She argued that the case should be dismissed because "the breath test results were 0.085 and 0.083 and the video shows no (or minimal) indicators of impairment, and that "if the case is not dismissed that the breath test result be suppressed and in addition, that a special jury instruction be approved instructing the jury that as the Defendant inquired about the possibility of a blood test but was misinformed that a blood test was not available, the jury is directed to presume that a blood test result would have been favorable/exculpatory for the Defendant." The court found that "the defendant was denied the proper information and/or reasonable assistance pertaining to the independent blood test." It held that dismissal was too severe a remedy but granted the motion to suppress the breath test.

***State v. Miller*, 24 Fla. L. Weekly Supp. 149a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress, which the court granted. It stated that the stop was lawful because even if there were no traffic violations, the defendant's driving pattern gave the officer reasonable suspicion to stop her "to determine if she was ill, tired, or impaired, based upon a BOLO." However, the detention was unreasonable, as the defendant was detained for over 40 minutes by three deputies, any one of whom could have started a DUI investigation but did not.

***State v. Bowers*, 24 Fla. L. Weekly Supp. 148a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress, which the court granted, stating: "Although the caller in this case was a citizen informant, the details he provided to dispatch fall short of establishing a reasonable suspicion of criminal activity."