FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

October – December 2018

[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.]

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I. Driving Under the Influence (DUI)

State v. Meyers, __ So. 3d __, 2018 WL 6204113 (Fla. 4th DCA 2018)

The defendant was arrested for DUI and filed a motion to suppress the results of his blood test. The trial court granted his motion, "finding that there was no evidence that the administration of a breath or urine test was impractical or impossible and that the officer failed to inform [him] of Florida's implied consent law" (he did not tell the defendant that the law "requires submission only to a breath or urine test and that a blood test is offered only as an alternative"). But the appellate court reversed and remanded, stating that because the defendant voluntarily consented to the blood test, the implied consent law did not apply. https://www.4dca.org/content/download/413051/4107805/file/180010_1709_11282018_09474456_i.pdf

II. Criminal Traffic Offenses

Shepard v. State, __ So. 3d __, 2018 WL 5660550 (Fla. 2018)

In *Shepard v. State*, 227 So. 3d 746 (Fla. 1st DCA 2017), the First District Court of Appeal certified conflict with *Gonzalez v. State*, 197 So. 3d 84 (Fla. 2d DCA 2016), on "whether an automobile can be considered a 'weapon' for purposes of enhancing a defendant's sentence to a higher degree under Florida's reclassification statute, section 775.087(1), Florida Statutes." The First District's decision also expressly and directly conflicted with *State v. Houck*, 652 So.

2d 359 (Fla. 1995). The Florida Supreme Court accepted jurisdiction and approved the First District's holding "that an automobile can be a weapon for purposes of the reclassification statute" and disapproved of *Gonzalez* to the extent it held otherwise. http://www.floridasupremecourt.org/decisions/2018/sc17-1952.pdf

***Owens v. State*, __ So. 3d __, 2018 WL 6681722 (Fla. 4th DCA 2018)**

Troopers saw the defendant driving erratically at 89 mph on the Turnpike, and a high-speed chase at 120 mph was unsuccessful at stopping him. The defendant eventually crashed and was convicted of fleeing or attempting to elude a law enforcement officer with lights and sirens activated while driving recklessly or at a high speed pursuant to section 316.1935(3)(a), Florida Statutes. He appealed, arguing that the trial court "erred in: (1) denying his motion for judgment of acquittal; (2) overruling his objection regarding the prosecutor's misstatement of law in closing argument; and (3) overruling his objections to the troopers' testimony characterizing the defendant's driving maneuvers as 'fleeing.'" The appellate court affirmed as to (1) and declined comment on (3), but it reversed and remanded for a new trial based on (2), stating: "Although the State may utilize different tools to infer knowledge, the prosecutor expressly told the jury that the applicable standard was a reasonable person standard, which is a misstatement of law. The trial court erred in overruling defense counsel's objection. . . . The improper statement here was not harmless because the State cannot show beyond a reasonable doubt that the prosecutor's misstatement of law did not affect the verdict . . . and the misstatement of law went directly to the only element at issue—whether defendant *knew* that he was being directed to stop." https://www.4dca.org/content/download/425096/4581743/file/173504_1709_12192018_09323403_i.pdf

***Brown v. State*, __ So. 3d __, 2018 WL 6566369 (Fla. 4th DCA 2018)**

After an initial mistrial, the defendant was convicted and sentenced in adult court for crimes he committed as a juvenile: vehicular homicide; fleeing and eluding; and driving while license canceled, suspended, or revoked causing serious bodily injury or death. He appealed, arguing that he should have been tried in juvenile court. But the appellate court affirmed, because the defendant had not raised the issue of divisional jurisdiction until after he was found guilty. It also noted that his claim of ineffective assistance of counsel should have been made in a motion for post-conviction relief rather than on appeal, and that it did not fall within the exceptions to that rule because it was not "apparent on the face of the record." https://www.4dca.org/content/download/422046/4559594/file/171110_1257_12122018_09175974_i.pdf

***Powers v. State*, __ So. 3d __, 2018 WL 6242301 (Fla. 4th DCA 2018)**

After a fatal crash, the defendant was convicted of DUI manslaughter. He raised six issues on appeal, and the appellate court reversed and remanded based on the trial court's error in "considering a scoresheet that contained improper prior record points." Eleven of the offenses listed on the scoresheet were committed more than ten years before the crash and, under Florida Rule of Criminal Procedure 3.704(d)(14)(A), should not have been scored. The state had argued that the defendant's probation for one of the previous offenses could have ended in 2011, a few weeks after he committed the primary offense, which would make rule 3.704(d)(14)(A)

inapplicable. But the court stated that while the trial court purported to terminate the defendant's probation in 2011, "it did not have jurisdiction to do so because [his] probation had already been automatically terminated by virtue of it expiring in 2001. Furthermore, the record does not reflect that anything occurred before March 2001 to toll the original expiration date for probation." https://www.4dca.org/content/download/413046/4107745/file/171652_1709_11282018_09171912_i.pdf

***Floyd v. State*, __ So. 3d __, 2018 WL 6051971 (Fla. 1st DCA 2018)**

The defendant was pulled over for going nearly double the speed limit, and he was charged as a habitual traffic offender (his license had been suspended or revoked 15 times) driving with a revoked license. He appealed, arguing that the habitual traffic offender statute was inapplicable because he never had a "driver license" but only a learner's permit. The appellate court affirmed, holding that "the statutory definition of 'driver license' includes learner's licenses like the one Floyd once held," notwithstanding that "Floyd (and perhaps others) refer colloquially to a 'learner's permit.'" It cited section 322.1615, Florida Statutes. https://edca.1dca.org/DCADocs/2018/1157/181157_1284_11202018_09571914_i.pdf

***Huckaba v. State*, __ So. 3d __, 2018 WL 6051432 (Fla. 1st DCA 2018)**

After an accident that killed four people, including one in utero, the defendant was convicted of vehicular homicide and reckless driving causing serious bodily injury. He appealed, arguing that "1) the charging instrument and jury instructions were fundamentally defective, as they were based on an incorrect version of the vehicular homicide statute; 2) the trial court failed to order a competency evaluation; 3) [he] received ineffective assistance of counsel; 4) prosecutorial comments about alcohol consumption entitle [him] to a new trial; and 5) the common law 'born-alive' rule precludes one of [his] convictions." The appellate court rejected arguments 2, 4, and 5 without discussion. It also rejected arguments 1 and 3, stating as to argument 1 that "even where the body of a charging instrument omits an essential element, such an error is a waivable technical defect, if the charging instrument references the correct statute, and the statute sets forth the required elements."

The defendant's argument 3, ineffective assistance of counsel, was based on his attorney "1) failing to object to the erroneous charging instrument and jury instruction; 2) failing to argue insufficient evidence of viability when moving for judgment of acquittal; 3) failing to object to evidence of alcohol use and comments drawn therefrom; 4) failing to object to questions asking Appellant to comment on the veracity of other witnesses; and 5) failing to timely move for a new trial." But the appellate court found that "none of these claims demonstrate indisputable prejudice or an inconceivable tactical explanation." https://edca.1dca.org/DCADocs/2017/0502/170502_1284_11202018_09404426_i.pdf

***Bush v. State*, __ So. 3d __, 2018 WL 5808467 (Fla. 1st DCA 2018)**

[The defendant was charged with DUI manslaughter and vehicular homicide.] The defendant appealed the summary denials of his postconviction motion, arguing that "(1) counsel was ineffective for failing to move to suppress the results of a legal blood draw, and (2) counsel was ineffective for failing to relay the State's plea offer or adequately advise him regarding the

sentencing guidelines and maximum penalties associated with his charges." The appellate court affirmed the summary denial of the first issue, but stated that "because the records attached to the order do not conclusively refute [the defendant's] allegation that counsel may have misadvised him or that counsel failed to inform him of the statutory maximum sentences, he is entitled to relief on the second issue."
https://edca.1dca.org/DCADocs/2017/2476/172476_1286_11072018_08151998_i.pdf

***Klingler v. State*, __ So. 3d __, 2018 WL 4959049 (Fla. 1st DCA 2018)**

The defendant was speeding and driving in the wrong lane when she struck a car, killing two people and seriously injuring two others. She was charged with two counts of DUI manslaughter (counts I and II), two counts of DUI with serious bodily injury (counts III and IV), and one count of child neglect with great bodily harm (count V). She pled no contest, and the state agreed to a sentencing cap of 40 years in prison. The trial court sentenced her to 29 years in prison followed by 11 years of probation, but several hours later, "after consulting with defense counsel and the prosecutor by email, the trial court modified the sentence for count V from 11 years of probation to 15 years in prison to be served concurrent with the prison sentences on the other counts." The modification did not affect the total sentence; the defendant's attorney agreed to the change because it meant that probation would run on only one count. The defendant appealed, arguing that "the trial court violated [her] double jeopardy rights when it increased her original legal sentence on count V after the sentencing hearing ended and she began serving her sentence." The appellate court agreed and reversed the 15-year prison sentence for count V and remanded for entry of an amended judgment and sentence reinstating the original 11-year probationary sentence on that count. It rejected the state's argument that the defendant had waived "any double jeopardy claim because her sentence was the result of a negotiated plea that capped her prison sentence at 40 years," stating that "the double jeopardy claim at issue . . . is not the type of claim that is deemed waived when the defendant enters a negotiated plea."
https://edca.1dca.org/DCADocs/2017/3173/173173_1286_10152018_03275616_i.pdf

***Edwards v. State*, 254 So. 3d 1195 (Fla. 5th DCA 2018)**

The defendant was convicted of leaving the scene of a crash involving personal injury. The appellate court reversed "because the State's evidence was insufficient to establish that a crash caused the injury alleged in the information."
http://www.5dca.org/Opinions/Opin2018/100818/5D17-1320.op.pdf

III. Civil Traffic Infractions

***Pena et al. v. State of Florida*, __ So. 3d __, 2018 WL 5851361 (Fla. 2d DCA 2018)**

Drivers appearing in county court for civil traffic infractions filed a joint petition for writ of prohibition, seeking review of the county judge's denial of their motions to disqualify the judge from presiding over their traffic cases. The circuit court denied the writ, concluding that the motions were legally insufficient. The drivers sought certiorari review, which the appellate court granted, stating that "the motions were legally sufficient and the circuit court departed from the essential requirements of the law in denying the petition for writ of prohibition." It stated that

> the allegations suggesting the county judge's tough stance on traffic defendants and noting his prior adverse rulings may not have been sufficient in themselves to show bias. . . . However, the petitioners also alleged that the county judge instructed the hearing officer to be less lenient on traffic defendants and that the county judge believed that drivers in the county were aggressive. Moreover, the petitioners alleged that the county judge inquired why counsel requested the judge's e-mails and that soon thereafter, counsel's clients' cases were removed from their original docket and transferred to the docket of this particular county judge. These allegations combined were sufficient to give the petitioners an objective fear that they would not receive a fair trial before this particular county judge in their traffic cases.

https://edca.2dca.org/DCADocs/2017/4465/174465_167_11092018_08135919_i.pdf

IV. Arrest, Search and Seizure

Lewis v. State, __ So. 3d __, 2018 WL 6845166 (Fla. 1st DCA 2018)

While on probation for drug offenses, the defendant was stopped and charged with other drug offenses. He filed a motion to suppress, arguing that the traffic stop was illegal. But the trial court denied his motion, finding that the defendant had run a stop sign and the stopping deputy smelled marijuana coming from the vehicle. The appellant challenged the trial court's denial of his motion, but the appellate court dismissed his appeal because he had "pled no contest without expressly reserving the right to appeal the ruling on his motion."
https://www.1dca.org/content/download/425516/4586103/file/174965_1279_12312018_09471276_i.pdf

Towns v. State, __ So. 3d __, 2018 WL 6071451 (Fla. 3d DCA 2018)

While on probation, the defendant was driving with three passengers in his car and was stopped for a traffic infraction. The police officer smelled marijuana and found marijuana and a stolen handgun under the middle of the back seat. Although the arresting officer testified that there was no evidence that the defendant "exercised dominion or control over the gun or bags of marijuana under the back seat, other than the fact [he] owned the car and . . . the driver's seat was reclined in such a way that the driver could have reached into the back seat area," the trial court concluded that the defendant had "willfully and substantially violated his probation by possessing the firearm, possessing the marijuana with the intent to sell, and by associating with persons engaged in criminal activity, i.e., the two backseat passengers." It revoked his probation and sentenced him to five years in prison. The defendant appealed, and the appellate court reversed the part of the probation revocation that was based on possession of a firearm and possession of marijuana with intent to sell, holding that the state failed to prove constructive possession. But it affirmed the part of the order that was based on associating with persons engaged in criminal activities, and it remanded for reconsideration of the revocation of probation "because the record does not make clear whether the trial court would have revoked [the] probation and imposed the same sentence based on the sole remaining probation violation."
http://www.3dca.flcourts.org/Opinions/3D17-0686.pdf

***State v. Brown*, __ So. 3d __, 2018 WL 6518155 (Fla. 3d DCA 2018)**

After a traffic stop, a firearm was found in the glove compartment of the defendant's vehicle and he was charged with possession of a firearm by a convicted felon. The trial court granted his motion to suppress the firearm, stating that the defendant's "brief look at the glove compartment, without more, does not support a finding that it was reasonable to believe he was dangerous or might gain control of a weapon in the car. . . . [The defendant] was cooperative throughout the encounter. . . . While [an officer] testified that she felt [the defendant] was hiding something, a feeling or a 'hunch' is not enough to justify a protective search" and "the officers did not have a reasonable and articulable suspicion of danger justifying the search of [the] car as protective." The appellate affirmed per curiam.
http://www.3dca.flcourts.org/Opinions/3D17-2452.pdf

***Davis v. State*, __ So. 3d __, 2018 WL 5622557 (Fla. 1st DCA 2018)**

The defendant was stopped, and a K-9 alerted to synthetic marijuana. The defendant was arrested and filed a motion to suppress, arguing that when he was stopped "the vehicle had been within the curtilage of [his] mobile home" and therefore "the warrantless canine sniff was an unreasonable search." The trial court denied the motion, and the appellate court affirmed, stating that while the parking area was only about 20 feet from the defendant's home, it was outside the fence around the home and was not per se curtilage; "Nothing in the record indicates that [the defendant] intended the parking area to be associated with the privacies of his home life."
https://edca.1dca.org/DCADocs/2017/0941/170941_1284_10312018_08423670_i.pdf

***G.A.Q.L. v. State*, __ So. 3d __, 2018 WL 5291918 (Fla. 4th DCA 2018)**

The defendant, a minor, was speeding, had an illegal blood alcohol limit, and crashed, and one of his passengers died. The police got a search warrant for the car and found two iPhones, got a warrant to search the phone alleged to belong to the defendant, and sought an order compelling the defendant to provide two necessary passcodes for accessing the phone. The trial court issued the order, holding that "the act of producing the passcodes is not testimonial because the existence, custody, and authenticity of the passcodes are a foregone conclusion." The defendant sought review, and the appellate court granted review and quashed the order compelling disclosure of the passcodes, stating: "The minor is being compelled to 'disclose the contents of his own mind' by producing a passcode for a phone and a password for an iTunes account. Further, because the state did not show, with any particularity, knowledge of the evidence within the phone, the trial court could not find that the contents of the phone were already known to the state and thus within the 'foregone conclusion' exception."
https://www.4dca.org/content/download/404430/3468412/file/181811_1704_10242018_09282906_i.pdf

***Cowart-Darling v. State*, __ So. 3d __, 2018 WL 5076684 (Fla. 1st DCA 2018)**

After a traffic stop and a sniff test by a K-9 officer, the defendant was arrested for and convicted of possession of cocaine and possession of drug paraphernalia. He appealed, arguing that the trial court should have granted his motion to suppress. But the appellate court affirmed, holding that the deputy "developed reasonable suspicion when [the defendant] moved his head

up and down indicating an affirmative response to the deputy's inquiry about whether there were illegal substances in the vehicle. [His] subsequent verbal denial that there were illegal substances in the car was insufficient to dispel the deputy's concern. If anything, [his] conflicting answers heightened the deputy's suspicion that criminal activity was afoot."
https://edca.1dca.org/DCADocs/2017/5076/175076_1284_10182018_02133557_i.pdf

***Jones v. State*, __ So. 3d __, 2018 WL 4997613 (Fla. 1st DCA 2018)**

The defendant was stopped in a rental car for following the car in front of him too closely. He gave the trooper a fake name, so the trooper called a K-9 unit to the scene. The K-9 alerted to marijuana and cocaine. The defendant was charged with providing false identification to a law enforcement officer, possession of less than 20 grams of marijuana, possession of drug paraphernalia, and possession of cocaine. At trial, his attorney admitted to all charges except possession of cocaine, and moved for judgment of acquittal of that charge, arguing that "the State was required to provide independent proof that [the defendant] had knowledge of the cocaine and the ability to maintain dominion and control over it because the rental vehicle was jointly occupied." The trial court denied his motion, and he appealed. The appellate court agreed with the defendant and reversed the conviction for possession of cocaine.
https://edca.1dca.org/DCADocs/2017/2808/172808_1287_10162018_12042248_i.pdf

V. Torts/Accident Cases

***Allen v. Nunez*, __ So. 3d __, 2018 WL 4784606 (Fla. 2018)**

Nunez was driving his father's vehicle when he hit Allen's parked, unoccupied truck. Allen sued Nunez and his father for damages, including post-repair diminution in value of this truck, repair costs, and the loss of use of the truck. The Nunez's answered the complaint jointly, and then Allen served separate proposal for settlement on them, which neither of them accepted. After obtaining a final judgment for an amount higher than his proposals, Allen filed a motion for attorney's fees, which the trial court granted. The appellate court reversed, agreeing with the Nunez's that the language in one of the paragraphs of the proposals made them ambiguous:

> [P]aragraphs two, three, and four in each proposal for settlement make clear that payment of $20,000 by the [Respondent] named in the proposal would settle [Allen]'s claims brought in the case against that specific [Respondent]. However, paragraph five then stated that the proposal for settlement was inclusive of "all damages" claimed by [Allen]. As "all damages" claimed arguably are those that could have been (and were) imposed on both [Respondents] in this case, paragraph five of [Allen]'s proposal for settlement could be reasonably interpreted to mean that the acceptance of the proposal for settlement by only one of the [Respondents] resolved [Allen]'s entire claim against both [Respondents]. Put differently, if paragraph five had stated that the proposal was inclusive of all damages claimed by [Allen] against the individually named [Respondent], similar to the language in paragraph three of the proposal, there would have been no ambiguity.

Allen sought review based on conflict, and the supreme court granted review and quashed and remanded the appellate court decision, stating that the Nunez's and appellate court's interpretation of the proposals for settlement "ignores the well-established principle that 'the intention of the parties must be determined from an examination of the entire contract and not from separate phrases or paragraphs.' *Moore v. State Farm Mut. Auto. Ins. Co.*, 916 So.2d 871, 875 (Fla. 2d DCA 2005). Thus, any potential ambiguity in paragraph 5 is resolved by examining the proposal for settlement as a whole." The court stated further: "The 'nitpicking' of these offers by the district court below to find otherwise unnecessarily injected ambiguity into these proceedings and created more judicial labor, not less."
http://www.floridasupremecourt.org/decisions/2018/sc16-1164.pdf

State Farm Mutual Automobile Insurance Co. v. Wallace, __ So. 3d __, 2018 WL 6715791 (Fla. 5th DCA 2018)

Wallace was injured in an accident with an uninsured motorist. At trial his expert, Dr. Desai, testified using an exhibit consisting of two MRI images, with labels that restated his findings. Wallace sought to introduce into evidence Dr. Desai's exhibit, including his labels. State Farm objected because, "while it did not object to unaltered images being admitted into evidence, it did object to Dr. Desai's annotations, which, it contended, merely restated his opinions." Wallace argued that the images and labels were "factual findings" and thus were admissible. The trial court allowed the labeled exhibit into evidence. On appeal State Farm argued the trial court erred by allowing Wallace to present Dr. Desai's exhibit to the jury with his opinions superimposed on the MRI images. The appellate court held that Dr. Desai's exhibit should not have been admitted in evidence with his annotated opinions. It stated that the images themselves were admissible, but his annotations represented opinions and were not factual findings. The appellate court also held that the trial court erred by precluding State Farm from using Dr. Desai's exhibit to elicit its own expert's opinion on the same images. But it affirmed, finding the errors were harmless because State Farm's expert "was permitted to offer his opinion using substantially similar MRI images."
https://edca.5dca.org/DCADocs/2017/0813/170813_1257_12212018_08353261_i.pdf

Progressive Select Insurance Co. v. Bigney, __ So. 3d __, 2018 WL 6715523 (Fla. 5th DCA 2018)

Bigney was injured when she was hit by a vehicle driven by Thagard. She sued Thagard, his insurer Progressive, and Travelers, alleging, among other things, civil conspiracy between Progressive and Travelers by subrogating against their insureds settlement proceeds from their settlement with the at-fault parties, and that Progressive aided and abetted Travelers in the breach of its fiduciary duty to her against Progressive. Progressive moved to dismiss both counts under the nonjoinder statute (section 627.4136, Florida Statutes) '[b]ecause Bigney was a stranger to the Progressive policy and because she had not obtained a verdict against Thagard." The trial court denied the motion to dismiss, finding that the counts were independent from the insurance contract. Progressive sought review, which the appellate court granted. It stated:

> It is undisputed that Bigney had not obtained a settlement or verdict against Thagard prior to filing suit against Progressive. Thus, the question we must answer is whether the counts of civil conspiracy and aiding and abetting the

> breach of fiduciary duties are independent from the insurance contract. Inasmuch as both counts are explicitly based on "fiduciary duties," "legal obligations," "Med Pay benefits," and "liability limits" established in the insurance contract, we conclude they are not independent. Indeed, the insurance contract is the only reason Progressive has to deal with Bigney. . . .
>
> Because counts three and six are not independent of the insurance contract, they are premature until Bigney obtains a judgment or settlement against Thagard. Consequently, forcing Progressive to litigate those counts before they are ripe will result in irreparable harm.

https://edca.5dca.org/DCADocs/2018/2124/182124_1255_12212018_09004242_i.pdf

***MacGregor v. Daytona International Speedway*, __ So. 3d __, 2018 WL 6715462 (Fla. 5th DCA 2018)**

To enter the restricted area of a speedway, MacGregor signed a release and waiver of liability and assumption of risk agreement. During the race she was injured when a tow truck backed over her, and she sued the speedway. The trial court entered final summary judgment in favor of the speedway, holding that the release applied to gross negligence, and that in any case as a matter of law the speedway did not engage in conduct that constituted gross negligence. MacGregor appealed, and the appellate court reversed, stating: "Although the language of the release states that it 'extends to all acts of negligence,' in the context of closed-course motorsport facilities, the Legislature has explicitly excluded gross negligence from the definition of negligence for injuries occurring in the nonspectator areas of the facility. § 549.09(1)(e), Fla. Stat. (2013). The explicit exclusion of gross negligence from the definition of negligence in this context prevents the release in this case from barring the gross negligence claim." The appellate court also held that the trial court erred when it determined as a matter of law that the speedway did not commit gross negligence, that "the determination of whether conduct amounts to gross negligence is a jury question," and that there was evidence "supporting at least a prima facie case for gross negligence when construed in the light most favorable to" MacGregor.
https://edca.5dca.org/DCADocs/2017/2989/172989_1260_12212018_08455717_i.pdf

***Seminole Lakes Homeowner's Association, Inc. v. Esnard*, __ So. 3d __, 2018 WL 6681726 (Fla. 4th DCA 2018)**

Esnard was rear-ended by Upshur while returning to his home in Seminole Lakes. He sued Seminole Lakes Homeowner's Association (SLHA), which had allowed parking on both sides of the community's streets, contrary to its governing documents. SLHA moved for a directed verdict, arguing that permitting cars to park on the street was not a proximate cause of the accident. The jury found SLHA was 30% liable, and SLHA appealed. The appellate court reversed, stating that while proximate causation is generally an issue for the trier of fact, "there are instances where the issue should be decided as a matter of law." It stated:

> The parking situation was patently obvious to any and all drivers using the streets in Seminole Lakes. There was no evidence that the Esnards were forced to make a sudden emergency stop or otherwise take evasive action to avoid the parked vehicles. This court sees no difference between this situation and a car being

> stopped behind a city bus waiting to pick up passengers. While Seminole Lakes' failure to enforce the parking rules was a cause-in-fact of the accident, its negligence only furnished the occasion for Upshur's negligence.
>
> In light of all of the evidence, including the lack of any prior incidents of this nature, and the general conditions of this residential neighborhood, we hold that Upshur's negligence was not reasonably foreseeable by Seminole Lakes, and the failure to enforce its parking rules was not the proximate cause of the Esnards' injuries.

https://www.4dca.org/content/download/425099/4581779/file/180015_1709_12192018_09422838_i.pdf

***Heartland Express, Inc. of Iowa v. Farber*, __ So. 3d __, 2018 WL 6615571 (Fla. 1st DCA 2018)**

After Torres was injured in an accident, he sued Heartland, and Farber was substituted as his limited guardian. The jury found Heartland's negligence was the proximate cause of Torres' injuries and awarded compensatory damages in the amount of $888,417.57, but it did not find that Heartland's employee's conduct was wanton and made no finding as to punitive damages. Farber moved for new trial on the issue of wantonness and punitive damages. The trial court granted his motion and entered a final judgment in the amount of $888,417.57. Heartland appealed, and the appellate court reversed the trial court's order granting a new trial and remanded "for the reinstatement of the jury's verdict on the issue of wantonness." Farber then argued that he was entitled to post-judgment interest from the entry of the December 2014 final judgment, while Heartland argued that he was entitled to post-judgment interest only from the entry of the amended final judgment after remand because "the order granting Farber's motion for new trial had the effect of vacating the December 2014 Final Judgment and, thus, rendering it a non-final order." The trial court ruled that the appellate court's remand "d[id] not affect or alter the underlying Final Judgment entered by this Court on December 23, 2014" and therefore found that post-judgment interest accrued from the date of the December 2014 final judgment. Heartland appealed, but the appellate court agreed with the trial court and affirmed, stating: "The trial court's subsequent Amended Final Judgment simply affirmed this Court's mandate and reinstated the jury's original finding as it related to punitive damages."
https://www.1dca.org/content/download/425025/4580902/file/181305_1284_12182018_12260260_i.pdf

***Little v. Davis*, __ So. 3d __, 2018 WL 6579902 (Fla. 1st DCA 2018)**

Davis was rear-ended at less than 5 mph by Little. Initially, Davis did not complain of any injuries, but nine days later she claimed she had pain in her left arm, and eight months later she sued Little, claiming permanent injuries. The jury returned a verdict in favor of Davis and awarded past medical bills, but found that she did not sustain permanent injuries and did not award damages for pain and suffering. Davis moved for a new trial, arguing that a hearsay question posed to her by defense counsel on cross – "if your left arm is still injured, how come [your boyfriend] testified that you don't complain to him about problems with your arm anymore" – was so prejudicial that it warranted a new trial. The trial court granted the motion,

but the appellate court reversed, holding that "the trial court failed to apply the four-part test outlined in *Murphy*[*v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000)] in ruling on Davis's motion for new trial, and . . . the *Murphy* test cannot be met on this record." https://www.1dca.org/content/download/422259/4562014/file/174469_1287_12142018_10450608_i.pdf

***Hayes Robertson Group, Inc. v. Cherry*, __ So. 3d __, 2018 WL 6518137 (Fla. 3d DCA 2018)**

Mira, an off-duty employee of a restaurant owned by the Hayes Robertson Group (HRG), was DUI and struck two couples riding mopeds, killing one rider and seriously injuring the others. The survivors and the decedent's personal representative sued HRG based on the liability of an employer that permits an employee to leave the premises intoxicated, Mira, and Mira's father as owner of the vehicle Mira was driving. The plaintiffs rejected HRG's three proposals for settlement (the first two offered $500 per plaintiff, and the third offered $100 per plaintiff), and after a jury verdict in favor of the defense, HRG sought attorney's fees. The plaintiffs argued that the proposals were not made in good faith and that "the proposed release of all claims appended to the proposals for settlement rendered the proposals ambiguous and unenforceable." The trial court denied HRG's motion for attorney's fees, and HRG appealed. The plaintiffs also appealed, contending that the trial court erred in, among other things, assessing the admissibility of their expert's testimony regarding Mira's alleged habitual addiction to alcoholic beverages. The appellate court affirmed both the final judgment in favor of HRG as to liability and the order denying HRG's motion for attorney's fees.
http://www.3dca.flcourts.org/Opinions/3D18-0106.pdf

***Eckols v. 21st Century Centennial Insurance Co.*, __ So. 3d __, 2018 WL 6422088 (Fla. 5th DCA 2018)**

21st Century insured two cars and a truck for Eckols' family. Eckols was injured in an accident while operating a motorcycle he owned, and he sought UM coverage under his family's policy. 21st Century denied UM coverage, and the trial court entered a final summary judgment in favor of 21st Century. Eckols appealed, and the appellate court reversed because the clause excluding UM coverage was "ambiguous as to whether it applies to motorcycles."
https://edca.5dca.org/DCADocs/2017/2904/172904_1260_12072018_08324407_i.pdf

***State Farm Mutual Automobile Insurance Co. v. Hanania*, __ So. 3d __, 2018 WL 6442040 (Fla. 1st DCA 2018)**

Hanania was injured after three vehicles were involved in an automobile accident allegedly cause by a ladder in the road. She sued Coca-Cola, which owned the van that hit her, and its driver for negligence, and brought an uninsured motorist claim against State Farm. State Farm moved for directed verdict, arguing that the ladder could have ended up on the road from another cause than that it fell from a "phantom" vehicle due to the owner or operator's negligence. The trial court denied State Farm's motion, and the appellate court affirmed, stating: "Because the inference that the ladder came from a phantom vehicle was inescapable, it would constitute an acceptable basis for the second inference that the owner or operator of that vehicle was negligent in failing to properly secure it."

https://www.1dca.org/content/download/421832/4557509/file/172237_1284_12102018_09442700_i.pdf

***Araj v. Renfro as Guardian and Next Friend of Jones*, __ So. 3d __, 2018 WL 6254417 (Fla. 5th DCA 2018)**

Jones was injured in an accident while driving a scooter, and he sued the Arajes. The trial court denied the Arajes' request for the following jury instruction:

> Members of the jury you are instructed that no person shall operate upon a limited access facility any bicycle, motordriven cycle, animal-drawn vehicle, or any other vehicle which by its design or condition is incompatible with the safe and expedient movement of traffic.
>
> You are also instructed that a limited access facility is defined as a street or highway especially designed for through traffic and over, from, or to which owners or occupants of abutting land or other persons have no right of easement, or only a limited right of easement . . .

and the jury awarded Jones $6 million. The Arajes appealed and the appellate court reversed, stating that the Arajes

> were entitled to their requested jury instruction because it constituted a correct statement of law, was supported by the evidence, and addressed their theory of the case that Jones was not lawfully driving at the time of the accident because the . . . Causeway was a limited access facility and the scooter was incompatible with the safe and expedient movement of traffic. . . . Further, we reject the argument that because the jury allocated twenty-five percent fault to Jones, any error was harmless. We cannot conclude that the degree of fault allocated by the jury for driving too slowly would have been the same if the jury instead found that Jones was driving on a road on which he was legally prohibited to ride the scooter.

https://edca.5dca.org/DCADocs/2017/0130/170130_1260_12042018_02191952_i.pdf

***Brown & Brown, Inc. v. Gelsomino*, __ So. 3d __, 2018 WL 6242302 (Fla. 4th DCA 2018)**

While working for T & T Services in 2002, Gelsomino was injured in a car accident. Brown & Brown was the insurance broker, and Ace American Insurance Company was the insurer. The insurance policy mistakenly named T & T Contracting rather than T & T Services, and Ace denied Gelsomino's claim. He settled his claim against Ace and got a consent judgment against T & T Services, and later a jury found in his favor and apportioned fault. Gelsomino filed a motion seeking final judgment for the entire jury award from Brown & Brown, alleging that it could be held jointly and severally liable under the 2002 version of the comparative fault statute. The trial court entered final judgment in favor of Gelsomino (less his percentage of fault and a setoff), and Brown & Brown appealed. The appellate court reversed, stating:

> Initially, joint and several liability was the standard under the common law until the legislature in 1986 began to redefine the statute, eventually prospectively

> eliminating it in 2006. The legislature then passed another law in 2011 which, according to appellant, made the elimination of joint and several liability retroactive.
>
> . . . . Gelsomino was injured in 2002 and the trial and verdict was in 2014. The trial court applied joint and several liability. Therefore, the question remains: which version of section 768.81, applies—the statute passed and effective in 2002, 2006, or 2011?
>
> We find that when the legislature passed the legislation in 2011, it included language that made the abolition of joint and several liability retroactive. This makes the 2011 version the operative statute when this case went to trial.

https://www.4dca.org/content/download/413050/4107793/file/173737_1709_11282018_09445482_i.pdf

***Mattick v. Lisch*, __ So. 3d __, 2018 WL 5726695 (Fla. 2d DCA 2018)**

After an accident, Mattick sued Conrads, who died before process was served. Lisch was eventually named as attorney ad litem for Conrads' estate and answered the complaint. The trial court dismissed the case based on Mattick's failure to timely substitute the estate as the party defendant, but the appellate court reversed, holding that

> the court should have abated the action instead of dismissing the complaint. . . . There is no dispute that the motion to substitute was filed within ninety days of the suggestion of death. . . . [T]he trial court had the authority to dismiss the complaint as a sanction for dilatory conduct. . . . However, the record does not support a finding that Mattick's failure to open the estate was willful or deliberate. . . . There was confusion on both sides regarding which party was to open the estate. And Lisch had filed an answer and affirmative defenses on behalf of the estate. Furthermore, Mattick was in the process of opening the estate at the time the motion to dismiss was heard. Under these circumstances, the court should have abated the action instead of dismissing it.

https://edca.2dca.org/DCADocs/2017/3645/173645_39_11022018_08230700_i.pdf

***Barthelemy v. Safeco Insurance Co. of Illinois*, __ So. 3d __, 2018 WL 5291274 (Fla. 4th DCA 2018)**

Barthelemy was in an automobile accident. His insurer, Safeco, asked him three times to submit to an examination under oath, but he failed to do so and Safeco denied his claim. He sought declaratory relief, seeking coverage up to his policy limits. Safeco raised a "failure to cooperate" defense. The jury was instructed that for Safeco to prevail on that defense, it had to establish that Barthelemy "**did not comply** with his post-loss obligations" and that Safeco "was **actually prejudiced**" by the defendant's failure to comply. Barthelemy objected to the jury instruction, arguing that it "needed to include language regarding 'material failure to comply' and 'substantial prejudice,' and that the jury instruction given was erroneous." He also requested "a jury instruction and verdict form requiring findings of materiality and substantial prejudice."

The jury returned a verdict for Safeco, and the trial court entered a final declaratory judgment in its favor. Barthelemy appealed, arguing that the jury instruction was based on an incorrect statement of the law. The appellate court agreed and reversed and remanded for a new trial.
https://www.4dca.org/content/download/404418/3468304/file/171254_1709_10242018_08400867_i.pdf

***IDS Property Casualty Insurance Co. v. MSPA Claims 1, LLC*, __ So. 3d __, 2018 WL 5270503**

MSPA Claims, a claims-recovery assignee of Florida Healthcare Plus (a defunct Medicare Advantage Organization), alleged that IDS, a PIP insurer, failed to reimburse MSPA for conditional payments made by Florida Healthcare Plus on behalf of its Medicare enrollees who were also covered under an IDS automobile insurance policy. MSPA filed a motion to certify a plaintiff class consisting of Florida's 37 Medicare Advantage Organizations, which the trial court granted. IDS appealed, and the appellate court reversed, based on its holding that "MSPA has failed to establish that common issues predominate over individual issues," and on the alternate ground of standing.
http://www.3dca.flcourts.org/Opinions/3D17-1170.pdf

***Brickell Motors, LLC v. Torres*, __ So. 3d __, 2018 WL 4905222 (Fla. 3d DCA 2018)**

Hours after buying a car from Brickell Motors, Torres was in a car accident. He sued Brickell Motors, alleging that the accident was caused by defects in the car. Rather than answer the complaint, Brickell Motors filed a motion to compel arbitration. At the hearing on the motion, the trial court denied the motion and ordered Brickell Motors to answer the complaint. Brickell Motors appealed, and the appellate court reversed, stating: "The motion was not noticed for hearing. . . . Moreover, Torres had filed no objection or memorandum of law in opposition to the motion and therefore the motion was not briefed; Torres did not argue for denial at the hearing; the transcript of the hearing indicates that the trial court provided no verbal explanation for its decision; and the order itself provides no rationale. Indeed, on appeal, Torres provides no argument why the motion should have been denied. Because the basis for the denial is unclear, effective and meaningful appellate review is impossible."
http://www.3dca.flcourts.org/Opinions/3D17-2666.pdf

***State Farm Automobile Insurance Co. v. Lyde*, __ So. 3d __, 2018 WL 4839968 (Fla. 2d DCA 2018)**

State Farm issued separate, identical policies for Nieves and for her daughter Lyde. Lyde was injured in an accident with an uninsured motorist, and the trial court entered final summary judgment requiring State Farm to pay the higher of the two limits for UM coverage; i.e., under Nieves' policy. State Farm appealed, arguing that although Lyde was insured under both policies, the trial court erred in disregarding an exclusion for UM coverage in Nieves' policy. The appellate court agreed and reversed and remanded.
https://edca.2dca.org/DCADocs/2017/1014/171014_39_10052018_08312251_i.pdf

***Pogue v. Garib*, 254 So. 3d 503 (Fla. 4th DCA 2018)**

Pogue rear-ended Garib, and Garib sued. The jury found that Garib had suffered a permanent injury and awarded her about one fourth of her requested past medical expenses, about one twentieth of her requested future medicals, and zero for past and future pain and suffering. The parties and trial court agreed there were inconsistencies in the verdict, but Garib did not agree to an additional instruction and instead moved for a mistrial. The trial court denied her motion and gave an instruction Garib objected to, the jury awarded $500 for past and $500 for future pain and suffering, and Garib moved for additur or new trial. A successor judge heard the motion, admitted that he had not reviewed the entire trial transcript, found the jury instruction the plaintiff had objected to was a departure from the standard instruction, and awarded an additur of $20,000. The defendant rejected the additur, the successor judge granted a new trial on damages only, as he had indicated he would do, and the defendant appealed.

The appellate court reversed and remanded for reinstatement of the jury verdict, agreeing with the defendant that "the $1,000 award for past and future pain and suffering was consistent with the conflicting evidence at trial. . . . The successor judge was not permitted to 'sit as a seventh juror,' and had no record basis to conclude the jury could not have reached its verdict based on the evidence."
https://www.4dca.org/content/download/403539/3460131/file/172638_1709_10032018_09043711_i.pdf

VI. Drivers' Licenses

Elso v. State, DHSMV, __ So. 3d __, 2018 WL 6332313 (Fla. 3d DCA 2018)

The defendant was arrested for DUI, and after he refused to submit to a breath alcohol test his license was suspended. The circuit court granted his petition for review, agreeing that the hearing officer had denied him due process when she refused to recuse herself, and remanding. The defendant did not request a second formal review hearing, and the circuit court's order did not have a time frame for it. DHSMV unilaterally set it and mailed notice to the defendant's attorney, but neither the defendant nor his attorney attended the hearing. The hearing officer upheld the license suspension, and the defendant sought review again in the circuit court, arguing that DHSMV set the second hearing more than 30 days after the court order was rendered, and that he did not receive notice of the second hearing date. The circuit court held that section 322.2615, Florida Statutes, did not require invalidation of the license suspension absent a renewed or new request for a hearing by the defendant. But it did remand for a formal review hearing within 30 days based on the defendant's claim that he and his attorney did not receive notice of the second hearing.

The defendant sought review, arguing the circuit court erred in holding that (1) section 322.2615 did not require invalidation of the license suspension, and (2) a remand, rather than invalidation of the license suspension, was proper even though more than two years had passed since the suspension expired. But the appellate court denied review, stating that (1) "the circuit court correctly applied section 322.2615 in determining that [the defendant's] license suspension was not required to be invalidated thereunder," and (2) "[t]he fact that [his] license suspension expired during the appellate review process does not require quashal of the suspension."
http://www.3dca.flcourts.org/Opinions/3D18-1183.pdf

***Curry v. State*, __ So. 3d __, 2018 WL 5733434 (Fla. 4th DCA 2018)**

In 2004 the defendant entered a plea to felony driving while license revoked as a habitual traffic offender. In 2018 he filed a motion to vacate the plea, based on *State v. Miller*, 227 So. 3d 562 (Fla. 2017) (defendant who never obtained license could not be convicted under section 322.34(5), Florida Statutes). The trial court denied the motion. The appellate court affirmed, holding that the motion "was untimely and that the rule 3.850(b)(2) exception is not met as *Miller* did not announce a new fundamental constitutional rule and, therefore, is not retroactive." https://www.4dca.org/content/download/404778/3636238/file/181294_1257_10312018_09551731_i.pdf

***DHSMV v. Sperberg*, __ So. 3d __, 2018 WL 4905220 (Fla. 3d DCA 2018)**

DHSMV permanently revoked the defendant's license based on his four DUI convictions in Virginia. He timely filed a petition for writ of certiorari, "arguing that Florida must give full faith and credit to a Virginia order restoring [his] driving privilege in Virginia." In its response, DHSMV submitted the defendant's uncertified driving transcript, which the defendant argued was inadmissible under the best evidence rule. The circuit court granted the petition, and DHSMV sought review. The appellate court granted review and quashed the circuit court order, stating that "the circuit court addressed issues that neither party raised for the circuit court to review" and "in analyzing the unraised issues, the circuit court improperly reweighed evidence." http://www.3dca.flcourts.org/Opinions/3D18-0551.pdf

***DHSMV v. Kamau*, 253 So. 3d 781 (Fla. 1st DCA 2018)**

The defendant filed a motion to enforce the appellate court's mandate in his case, arguing that the circuit court erred when it denied his petition for writ of certiorari on remand because it "did not apply *Wiggins v. Florida Department of Highway Safety and Motor Vehicles*, 209 So.3d 1165 (Fla. 2017), which was issued after the mandate." But the appellate court denied the defendant's motion to enforce the mandate, stating:

> *Wiggins* did not overrule the well-established rule . . . that the circuit court in a first-tier certiorari proceeding is not permitted to reweigh the evidence presented to the hearing officer. Rather, the decision merely recognized a narrow exception to that rule in cases where the hearing officer's findings are directly contradicted by a video recording. . . . Here, because there was no video recording of the stop that led to the suspension of [Kamau's] driver's license, *Wiggins* has no bearing on the law that the circuit court was required to apply in ruling on the petition for writ of certiorari. Accordingly, because we determined in our prior opinion that the circuit court "improperly reweighed the evidence concerning the lawfulness of Respondent's detention and arrest" when it granted the petition for writ of certiorari, it follows that the court complied with the mandate when it declined to "reconsider[ ] the merits" and denied the petition on remand.

https://edca.1dca.org/DCADocs/2015/0497/150497_1281_10032018_09295060_i.pdf

***Davis v. DHSMV*, 26 Fla. L. Weekly Supp. 544a (Fla. 8th Cir. Ct. 2018)**

The defendant's license was suspended for DUI and he sought review, arguing that there was not competent and substantial evidence to support the determination (1) that law enforcement had reasonable suspicion to conduct the initial stop, (2) that he wasn't de facto arrested before probable cause was established, (3) that his normal faculties were impaired and therefore there was no probable cause to arrest him, and (4) that he refused to submit to a breath test. The circuit court, in its appellate capacity, disagreed with each claim and denied review.

***Clark v. DHSMV*, 26 Fla. L. Weekly Supp. 486a (Fla. 20th Cir. Ct. 2018)**

The defendant was stopped and refused to take a breath test (second refusal). He was arrested for DUI and his license was suspended. He sought review, arguing that there was not competent substantial evidence for the hearing officer's decision because the affidavit of refusal to submit to breath and/or urine test was not notarized or attested to, the implied consent warning and Intoxilyzer operator influence report were not notarized or attested to and constituted hearsay with no exception, and the deputy's probable cause affidavit indicated that the defendant "was not fully advised of the consequences of failure to submit a breath sample." But the circuit court, in its appellate capacity, disagreed and denied review, agreeing with DHSMV that "the refusal affidavit not being notarized 'does not warrant invalidation of the suspension when another sworn statement in the record [the arrest affidavit and the breath test operator's affidavit] establishes that the [defendant] was read implied consent and maintained his refusal to submit to a breath test.'" And while the defendant "testified that he was not warned that a second refusal would be a separately charged crime, the implied consent warning, which was read to the [defendant] and signed by him, contains the language that 'if your driving privilege has been previously suspended for a prior refusal to submit to a lawful test of your breath, urine or blood, you will be committing a misdemeanor.'"

The defendant also argued that there was not competent substantial evidence to support the finding of probable cause for the deputy to believe he was DUI. But the court noted that the defendant admitted three times that he had been drinking that evening, he was unable to stay in his lane, and he displayed indicia of impairment.

The defendant argued further that "(t)here was no competent or substantial evidence that [he] was informed he was being placed under arrest for DUI and actually lawfully arrested for DUI." But the court noted that the deputy's sworn statements supported the hearing officer's findings and the defendant "did not unequivocally state" that he "was never told that he was under arrest until he was put in the jail. Additionally, [the deputy] informed [the defendant] of his *Miranda* rights when [he] was in the patrol car. . . . [T]his would have led a reasonable person to understand that he was under arrest. The implied consent warning and refusal happened after that time, not before."

***Millard v. DHSMV*, 26 Fla. L. Weekly Supp. 484d (Fla. 18th Cir. Ct. 2018)**

After a crash, DHSMV suspended the defendant's license for DUI. After continuances, the defendant filed a motion to invalidate the suspension based on the arresting officer's failure to appear at two hearings. The hearing officer denied the motion, and the defendant sought review, which the circuit court, in its appellate capacity, granted. It stated that while there are circumstances that can excuse the appearance of a subpoenaed arresting officer, "regardless of

the reason offered by the arresting officer at the third review hearing, the hearing officer was not permitted to grant a second continuance."

***Davis v. DHSMV*, 26 Fla. L. Weekly Supp. 477a (Fla. 15th Cir. Ct. 2018)**

After a crash, DHSMV suspended the defendant's license for DUI. The hearing officer affirmed the suspension, and the defendant sought review, which the circuit court, in its appellate capacity, granted, quashing the order affirming the suspension. The officer had told the defendant that

> he would order a blood draw "if it's okay with you." We find that this statement does not convey . . . that the implied consent law requires submission only to a breath or urine test and that the blood test is offered as an alternative. At best, [it] conveys to [the defendant] only that the officer would not physically perform a blood draw unless [he] is "okay with [it]." But this falls short of letting [the defendant] know that the law does not require [him] to be "okay with [it]," and, more importantly, will not penalize him if he is not. We cannot say that the "the consent was knowingly and voluntarily made and not as the result of the acquiescence to lawful authority" where the suspect was not apprised of his legal right to decline.

***Barrow v. DHSMV*, 26 Fla. L. Weekly Supp. 474a (Fla. 13th Cir. Ct. 2018)**

After being stopped for running a red light at 3:44 a.m., and showing signs of impairment, the defendant was taken into custody and was asked to submit to a breath test. He refused before and after implied consent was read to him, and his license was suspended. He sought review, arguing that based on the fact that soon after the stop "he experienced a medical emergency and was transported to a hospital for further evaluation," and also based on "a subsequent 'direct file' with the State Attorney," he was not arrested until 2:34 p.m. and therefore the request to take a breath test was not pursuant to a lawful arrest. The circuit court, in its appellate capacity, disagreed, noting that "arrest was initially effected at about 4:03 a.m. [and the defendant] was requested to take the test after he was taken into custody." The defendant further argued that "his refusal was not properly documented because the officer did not use the Department affidavit form to indicate his refusal. Again, the court disagrees. Section 322.2615(2), Fla. Stat., requires only an affidavit that the test was requested, that implied consent warnings were given, and that the person arrested refused to submit to the test. It does not require a particular form."

***Garcia v. DHSMV*, 26 Fla. L. Weekly Supp. 457a (Fla. 11th Cir. Ct. 2018)**

After rear-ending a garbage truck, the defendant performed poorly on field sobriety exercises and was arrested for DUI. She refused a breath test, and her license was suspended. The investigating officer did not appear at her formal review hearing, claiming a family emergency, but failed to submit just cause in writing as ordered by the hearing officer. The hearing officer upheld the license suspension, and the defendant sought review. The circuit court, in its appellate capacity, denied review, stating that the hearing officer did not depart from the essential requirements of the law or deny the defendant due process, because she gave the

defendant the opportunity to seek a continuance or judicial enforcement of the subpoena if the investigating officer did not submit just cause for his nonappearance, but the defendant said she would instead move to invalidate her license suspension. The court also noted that the absent officer "was not the arresting officer, nor did he perform the duties of a breath technician" and therefore section 322.2615(11), Florida Statutes, was inapplicable to invalidate the suspension.

***Diaz v. DHSMV*, 26 Fla. L. Weekly Supp. 451a (Fla. 5th Cir. Ct. 2018)**

After an officer responding to a call about a battery stopped the defendant and noticed indicia of impairment, the defendant refused to take field sobriety exercises or a breath test, and he was arrested for DUI. DHSMV suspended the defendant's license, and he sought review. The circuit court, in its appellate capacity, denied review, stating that there was substantial competent evidence to support (1) the lawful stop, as the call that resulted in the stop was made by a citizen informant and was not anonymous; (2) a finding that reasonable suspicion of DUI existed; (3) a finding that probable cause existed to arrest the defendant for DUI; and (4) a finding that the defendant refused a lawful request to submit to a breath test.

***Richey v. DHSMV*, 26 Fla. L. Weekly Supp. 450a (Fla. 4th Cir. Ct. 2018)**

The defendant left his wallet, which contained a valid Florida driver license and a fake one, at a gas station, and DHSMV received a copy of the fake license. After reviewing the defendant's driving record, DHSMV suspended his license for one year. He sought review, arguing there was no competent substantial evidence that he knowingly had in his possession the fraudulent driver license, because it was found at a gas station and not on or near his person. The circuit court, in its appellate capacity, denied review, noting that the wallet contained the defendant's valid driver license, and that the fake license had his picture on it. Therefore, both elements of constructive possession — that the license was within the defendant's dominion and control, and that he had knowledge of the presence of the fake license — were met.

The defendant also argued that his due process rights were violated because the suspension order and accompanying letter, which suspended the license without preliminary hearing, referred only to section 322.212, Florida Statutes, but the license was suspended under section 322.27. But the court stated this was not a due process violation; the defendant "was placed on notice of the underlying statute alleged to be violated, which was Section 322.212. . . . The other statute referenced in the Final Order, Section 322.27. . . , merely provides the Department the authority to suspend the driver license based on the underlying violation. § 322.27(1)(d), Fla. Stat. The omission of the statute referencing the Department's authority to suspend is not required on the initial notice." The court found further that the defendant "was afforded due process in the administrative context through in-camera inspection of the fraud packet prior to the show cause hearing."

***King v. DHSMV*, 26 Fla. L. Weekly Supp. 449a (Fla. 2d Cir. Ct. 2018)**

The defendant was stopped after he ran a red light in the early morning. He was arrested for DUI, and at the jail he refused to submit to a breath or urine test, and his license was suspended. The hearing officer upheld the suspension and the defendant sought review, arguing that the hearing officer's decision was "not supported by competent substantial evidence because

the document's [sic] relied upon by [DHSMV] are 'hopelessly inconsistent' as to the alleged time of [the] arrest and the alleged time when [the defendant] refused to submit to breath testing. Second, [the defendant] argues that his refusal to submit to the allegedly simultaneous request for a breath and urine test, without an independent factual basis to support a urine test, also entitles him to relief." The circuit court, in its appellate capacity, agreed and granted review and quashed the order upholding the license suspension, stating that "nothing supported the hearing officer's conclusion that the arrest of the [defendant] preceded his refusal to submit to a breath test, and the evidence is 'hopelessly in conflict.' The determination of the time of arrest and the time when an individual refuses to submit to a breath test is the heart of the driver's license suspension inquiry."

VII. Red-light Camera Cases

VIII. County Court Orders

***State v. Jacula*, 26 Fla. L. Weekly Supp. 692a (Pasco Cty. Ct. 2018)**

After being stopped for speeding, the defendant was arrested for DUI. He filed a motion to suppress. The court suppressed the results of his field sobriety tests and any other evidence obtained after he was moved from the stop to another location for the tests. It held that the custody was without probable cause for arrest because probable cause was not satisfied until after the FSTs. It also suppressed the results of the Intoxilyzer test because the trooper's "erroneous statement that the defendant would be breaking the law by continuing to refuse the intoxilyzer test was said to make the defendant's taking the intoxilyzer not a free and voluntary act." There were also issues with the Intoxilyzer's functioning, but the court stated that those issues "go to the weight not the admissibility of that evidence."

***State v. Myers*, 26 Fla. L. Weekly Supp. 689a (Brevard Cty. Ct. 2018)**

The defendant was arrested for DUI. She filed a motion to suppress, arguing that the officer should have given her a *Miranda* warning. The court denied her motion. It stated that her initial roadside detention did not constitute a custodial detention for *Miranda* purposes, nor did her voluntary transfer to a nearby police department parking lot for field sobriety exercises render the interrogation custodial.

***State v. Vessels*, 26 Fla. L. Weekly Supp. 686a (Brevard Cty. Ct. 2018)**

The defendant was given a citation for driving while license suspended, and 13 years later when she paid the fine it resulted in an adjudication of guilt. This caused her to have three DWLS convictions within five years, and therefore her license was revoked for five years as a habitual traffic offender. She filed a motion to amend or correct conviction to a withhold of adjudication, arguing that she did not know that paying the fine would result in the revocation. The court denied her motion because it was filed outside the 60-day limitation under Florida Rule of Traffic Court 6.490 for filing a motion to reduce a legal penalty, and there was no excusable neglect. The court stated that the ruling was without prejudice, because rule 6.490 was amended effective January 1, 2019, after which the court presumably will re-hear a new motion.

***State v. Lynch*, 26 Fla. L. Weekly Supp. 668a (Sarasota Cty. Ct. 2018)**

After police responded to a call about a suspicious vehicle in a parking lot, the defendant was arrested for DUI. He filed a motion to suppress, which the court granted. It stated: "Although the contact between the officers and the Defendant began as a welfare check, the welfare check ceased prior to the officer's command to open the window. Therefore, the command to open the window was a seizure without reasonable suspicion and suppression is proper. . . . Neither officer was concerned enough to break a window to get him out had he not ultimately opened the window. Further, both said that once the Defendant woke up, their major concerns were dispelled. Any remaining concerns (which were minor) could have been addressed by simply asking the Defendant if he was alright."

***State v. Murphy*, 26 Fla. L. Weekly Supp. 656a (Duval Cty. Ct. 2018)**

An officer stopped the defendant for operating a vehicle on the wrong side of the roadway. The defendant filed a motion to suppress evidence gathered following stop, detention, and/or arrest. The court granted her motion, noting there was no other infraction alleged, and the video evidence did not support the charge.

***CW of Jax, P.A. v. State Farm Mutual Automobile Insurance Co.*, 26 Fla. L. Weekly Supp. 654a (Duval Cty. Ct. 2018)**

After an automobile accident, the defendant requested the deposition of the plaintiff's treating physician but objected to the physician's request for a reasonable expert witness fee. The court held: "The mere fact that [the physician] treated [the plaintiff] after the subject motor vehicle accident does not prohibit him from receiving an expert fee and does not render him a fact witness."

***State v. McCloud*, 26 Fla. L. Weekly Supp. 653a (Leon Cty. Ct. 2018)**

The defendant was arrested on DUI charges. She filed a motion to dismiss or to suppress blood test evidence and results because of the state's failure to comply with a discovery order. The court ordered that all evidence relating to, and the results of, the defendant's blood testing be suppressed.

***State v. Brown*, 26 Fla. L. Weekly Supp. 605b (Brevard Cty. Ct. 2018)**

A police officer responded to a report of a person slumped over the steering wheel of a parked vehicle. He saw the defendant in the vehicle, which was still running. There was no indication of criminal activity, and the officer did a welfare check and smelled alcohol. The defendant was arrested and filed a motion to suppress, arguing that there was no need for a welfare check. The court agreed and granted his motion, stating that "the welfare check was permissible to the extent that [the officer] was allowed to alleviate any concern's [sic] he might have for the driver's health. It is clear from [the officer's] testimony that there was nothing . . . that would indicate that there was anything wrong with the driver. . . . As part of a consensual encounter, [the defendant] was not obligated to roll down his window and acknowledge the officer. [The officer's] persistence, although not verbal, in demanding [the defendant's] attention, after it was apparent that the Defendant was simply sleeping, runs afoul of [case law]."

***State v. Jones*, 26 Fla. L. Weekly Supp. 588a (Polk Cty. Ct. 2017)**

After a crash, the defendant told the investigating deputy "I don't have a license." He was arrested for driving while license suspended or revoked and filed a motion to suppress the statement and his identity. The court granted his motion, holding that the defendant's statement and the biographical information he furnished, "including but not limited to his name, date of birth, and address," are privileged under the Accident Report Privilege and inadmissible at trial.

***State v. Sanchez-Vasquez*, 26 Fla. L. Weekly Supp. 499b (Leon Cty. Ct. 2018)**

After a crash, the defendant was arrested for DUI. He filed a motion to suppress, arguing that law enforcement took his blood without a warrant or his voluntary consent. The court granted his motion, stating that law enforcement may not obtain blood from a defendant, without a warrant, in a DUI accident involving serious bodily injury under section 316.1933(1), Florida Statutes, and that (2) the defendant's consent to submit to a blood test was not given freely and voluntarily under the circumstances. (On the implied consent form, the defendant had marked the box for "breath," not the box for "blood," and his "family going over a form marked 'breath' does not mean the Defendant had an understanding that what was actually sought by law enforcement was blood.")

***State v. Abalo*, 26 Fla. L. Weekly Supp. 499a (Escambia Cty. Ct. 2018)**

The defendant was arrested for DUI. He filed a motion in limine, arguing that the Intoxilyzer "failed to comply with the administrative inspection requirements because the monthly inspections were conducted more than 30 days apart" and that the single low-volume sample obtained from him should be excluded. The court held that the Intoxilyzer did not fail to comply with administrative inspection requirements, which just require that the machines be inspected at least once each calendar month. It also held that the sample "shall be excluded as invalid unless proven reliable through the traditional predicate. It is well-settled that when the State seeks to introduce breath test results into evidence by using the traditional scientific predicate, the State is not entitled to an instruction on the statutory presumptions."