FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

January – March 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.]

I. Driving Under the Influence (DUI)

Goodman v. Florida Department of Law Enforcement, __ So. 3d __, 2018 WL 654442 (Fla. 2018)

After a car accident resulting in death, the defendant's blood was tested and he was arrested. At trial he moved to exclude his blood alcohol test results, partly because the nurse allegedly used a 25-gauge butterfly needle (the tubing of which does not have a separate anticoagulant) instead of the 21-gauge needle that was in the kit supplied by law enforcement. The defendant also filed a DOAH petition, in which he claimed it was an invalid exercise of delegated legislative authority for FDLE to promulgate rules related to blood collection (a claim he later dropped) and disputed the sufficiency of administrative code rules "to produce scientifically reliable results." Ultimately the defendant was convicted of DUI manslaughter/ failure to render aid and vehicular homicide/failure to give information or render aid. He appealed, and the Fourth District Court of Appeal affirmed and certified the following questions:

> (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?

The Supreme Court of Florida answered both certified questions in the negative. It stated that although "defendants may dispute whether clotting affected their sample or an analyst erred in preparing the sample [the defendant] failed to present any such challenge or evidence." It stated further that although there is no rule regulating needle gauge or tourniquet usage, Florida Administrative Code Rule 11D-8.012, governing blood labeling and collection,

> adequately ensures reliable results. Testimony established that any issues would likely result from poor blood collection practices. The Legislature provided for this concern by mandating that only medical experts such as doctors, nurses, or paramedics can collect blood for the purposes of determining its alcoholic content. § 316.1932(1)(f)2.a., Fla. Stat. Further, any clotting that could affect a test result would be noticeable when an analyst pipettes the sample because the pipette would be unable to cleanly draw a subsample. All analysts testified that they make a notation of any noticeable clotting on the laboratory file, which defendants can obtain via a public records request. In any situation, a defendant could challenge the accuracy of the test or qualifications of the analyst, which has been the law in Florida for nearly forty years. . . . Accordingly, we conclude that Rule 11D-8.012 facially ensures reliable blood test results and any question as to the accuracy of a particular test is best determined on a case-by-case basis."

The defendant also argued that Florida Administrative Code Rule 11D-8.012, which governs permitting of blood alcohol analysts, was inadequate "because it fails to specify that analysts must screen, document, and reject unfit samples." But the supreme court stated that the argument

> fails because blood analysts already screen, document, and reject unfit samples as an implicit and incidental part of headspace GC testing [the only approved method for blood alcohol testing under the FDLE Alcohol Testing Program]. And—without more—[the defendant's] position leaves him tilting at windmills. . . . Although it may be preferable for FDLE to promulgate a Rule that specifically lays out every minute detail of a test, this Court is not positioned to make that determination. Further, such an exercise "would swiftly devolve into a hopeless endeavor and serve only to expand [FDLE's] regulations to epic lengths."

http://www.floridasupremecourt.org/decisions/2018/sc16-1752.pdf

***Nishman v. State*, 25 Fla. L. Weekly Supp. 936a (Fla. 11th Cir. Ct. 2018)**

An officer saw the defendant at about 2 a.m. driving next to another vehicle on a wet road at 101 mph. The officer stopped the defendant for speeding, smelled marijuana, and got the defendant's consent to submit to breath and urine tests. The breath tests registered below the legal limit for alcohol intoxication, and at the police station the defendant could not produce a urine sample. The officer then asked the defendant for a blood sample but did not advise him of

his rights and the consequences of submission or refusal. Based on the blood test results, the defendant was charged with driving under the influence of drugs, racing on the highway, speeding, and reckless driving. He filed motions to suppress, which the trial court denied. But the circuit court, in its appellate capacity, reversed, stating it was error to deny the motion to suppress the results of the blood test: "Controlling authority has construed the Implied Consent law as non-compulsory. [The defendant] should not have been compelled to undergo a blood test when obtaining a urine test was not impracticable or impossible to perform, and when [he] did not require medical treatment at a hospital, clinic, ambulance or other medical facility."

***State v. Brown*, 25 Fla. L. Weekly Supp. 786a (Fla. 17th Cir. Ct. 2017)**

After an accident, the defendant was arrested for DUI. The trial court granted her motion to suppress breath test results, finding that she was too intoxicated to knowingly, intelligently, and voluntarily consent, and in a supplemental order stated that the ruling was also based on the accident and her appearance on the deputy's video. The state appealed, and the circuit court, in its appellate capacity, reversed, stating: "Defendant's submission to the breath test was knowing and voluntary, both implicitly through implied consent and explicitly by stating 'yes' she would submit to the breath test."

II. Criminal Traffic Offenses

***Anguille v. State*, __ So. __, 2018 WL 1413027 (Fla. 4th DCA 2018)**

The defendant appealed a sentence for misdemeanor possession of cannabis in excess of the statutory maximum, court costs for that offense under section 938.05(1)(b), Florida Statutes, after costs had been imposed under that section for a companion felony charge in the case, and (3) costs under section 318.18, Florida Statutes, when no traffic offense was charged in the case. The state confessed error, and the appellate court reversed the sentence and contested costs and remanded for further proceedings.
https://edca.4dca.org/DCADocs/2016/3964/163964_1709_03212018_09291243_i.pdf

***Granger v. State*, __ So. __, 2018 WL 1122132 (Fla. 5th DCA 2018)**

A jury convicted the defendant of DUI manslaughter, vehicular homicide, driving while license suspended, and DUI with property damage. She appealed, arguing that "convictions for both DUI manslaughter and vehicular homicide based upon a single death cannot stand because they violate her constitutional right to be free from double jeopardy." The state conceded error, and the appellate court reversed the conviction for vehicular homicide.
http://www.5dca.org/Opinions/Opin2018/022618/5D16-3406.op.pdf

***Pryear v. State*, __ So. __, 2018 WL 1096037 (Fla. 1st DCA 2018)**

The defendant made a left turn into the path of a semi-truck, and his passenger was killed. The defendant's blood was drawn at the hospital, and he was eventually convicted of DUI manslaughter and DUI with property damage. He appealed, raising claims of ineffective assistance of counsel because his attorney failed to renew his objection to the state's use of a peremptory challenge to strike a juror, move to strike the trooper's testimony that the defendant

was at fault, move for a judgment of acquittal based on the state's failure to prove impairment, object to erroneous jury instructions and an improper closing argument, and call a particular defense witness. He also argued that "the trial court committed fundamental error in instructing the jury on the statutory presumption of impairment, because the blood alcohol evidence was not properly introduced." But the appellate court affirmed, stating that the defendant's claims of ineffective assistance of counsel were meritless, and that the claim of fundamental error in instructing the jury should have been raised on direct appeal, and defense counsel had not objected to the introduction of the lab report.
https://edca.1dca.org/DCADocs/2017/3330/173330_1284_02282018_03094568_i.pdf

Canidate v. State, __ So. __, 2018 WL 859172 (Fla. 4th DCA 2018)

The defendant was convicted of fleeing a law enforcement officer at a high speed or wanton disregard for the safety of persons or property under section 316.1935(3)(a), Florida Statutes. The appellate court reversed and remanded, stating: "Because the State failed to establish a wanton disregard for the safety of persons or property, we reverse the conviction and sentence and remand for the entry of a judgment of conviction and sentence on the lesser included offense of fleeing to elude a law enforcement officer with sirens and lights activated under section 316.1935(2), Florida Statutes."
https://edca.4dca.org/DCADocs/2016/4162/164162_1709_02142018_10012159_i.pdf

Oakley v. State, __ So. __, 2018 WL 735942 (Fla. 4th DCA 2018)

After burglaries, a high-speed chase, and a car accident in which two bicyclists were killed, the defendant was convicted of two counts of first degree felony murder, two counts of vehicular homicide/failure to render aid, and five counts of burglary of a conveyance. He appealed, arguing that "the trial court abused its discretion by admitting certain photographic evidence" and that "it was error to sentence him on all four homicide counts when there were two, not four, deaths." The appellate court found no error as to the admission of the photographic evidence, but it agreed with the defendant's other argument and stated: "To correct the error, courts reverse the lesser offense conviction and affirm the greater. . . . We therefore reverse [the] convictions and sentences for both vehicular homicide/failure to render aid charges and affirm each first degree felony murder conviction and sentence, per the *Houser* rule."
https://edca.4dca.org/DCADocs/2015/4359/154359_1708_02072018_09123962_i.pdfv

Newton v. State, __ So. __, 2018 WL 527014 (Fla. 4th DCA 2018)

The defendant was convicted of high speed or wanton fleeing from a law enforcement officer with lights and sirens activated. He appealed, claiming the trial court erred in admitting his booking photograph into evidence. The appellate court affirmed, stating "because the defense raised questions about the deputy's ability to identify [defendant] as the person he arrested and transported to jail, the State used the booking information, including the booking photograph, to have the deputy confirm that it was [the defendant] that he arrested and transported to the station. Unlike the witness in *Roberts*[*v. State*, 778 So. 2d 512 (Fla. 4th DCA 2001)], the deputy had first-hand knowledge that the photograph taken during the booking process was of [the defendant]," and even if admission of the photograph was error, it was harmless.
https://edca.4dca.org/DCADocs/2016/3750/163750_1257_01242018_08522926_i.pdf

III. Civil Traffic Infractions

***Rocker v. City of Fort Lauderdale*, 25 Fla. L. Weekly Supp. 940b (Fla. 17th Cir. Ct. 2017)**

The defendant got a traffic citation for unloading a passenger in the roadway, and at his hearing he argued that the road was not a "limited access facility," which was an element of the infraction. The hearing officer found him guilty and he appealed. The circuit court, in its appellate capacity, reversed and advised the city to inform its law enforcement office which roads are limited access facilities, to avoid similar appeals in the future.

***Young v. State*, 25 Fla. L. Weekly Supp. 940a (Fla. 15th Cir. Ct. 2018)**

The defendant got a traffic citation for failing to yield to oncoming traffic while making a left turn. At trial she filed a motion to dismiss based on a lack of evidence that she had been driving the vehicle. The trial court denied the motion and found her guilty, and she appealed. The circuit court, in its appellate capacity, agreed with the defendant and reversed.

IV. Arrest, Search and Seizure

***Jefferson v. State*, __ So. __, 2018 WL 1415486 (Fla. 1st DCA 2018)**

An officer stopped the defendant for driving without a seatbelt, and within minutes the defendant was arrested for driving without a license. A K9 unit arrived about 20 minutes later and alerted, and officers found a firearm and ammunition in the car. The defendant was charged with driving without a license and possession of a firearm by a felon. He filed a motion to suppress, arguing that "police had no authority to hold the car during the twenty minutes between his arrest and the dog's alert"; that "police had completed all of the 'ordinary inquiries incident to the traffic stop' once they had arrested him, . . . meaning they could no longer maintain control over the car." The trial court denied the motion, and the appellate court affirmed, stating that "the car—whether seized or not—was not going anywhere until someone with authority to move it arrived at the scene. . . . [The defendant] was already under arrest for driving without a license and was not free to leave, irrespective of the sniff. . . . In short, from the time of the arrest until the sniff established probable cause, the car was sitting parked in a parking lot with no one available to take control of it. During that time, officers were free to initiate the sniff, so there was no Fourth Amendment violation."
https://edca.1dca.org/DCADocs/2017/1057/171057_1284_03222018_10075809_i.pdf

***McGraw v. State*, __ So. __, 2018 WL 1413038 (Fla. 4th DCA 2018)**

After an accident the defendant was taken, unconscious, to a hospital and was later charged with DUI, and he filed a motion to suppress the results of a warrantless blood draw. The county court denied the motion, holding that the blood draw was an unconstitutional search under the Fourth Amendment but was a good faith exception to the warrant requirement, and it certified the following question as one of great public importance:

Does the following sentence in § 316.1932(1)(c), Florida Statutes,

> Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such [blood] test.

remain constitutionally valid under the Fourth Amendment to the United States Constitution and Article 1, Section 12 of the Florida Constitution in light of *Missouri v. McNeely*, [569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696] (2013), *State v. Liles*, 191 So.3d 484 (Fla. 5th DCA 2016), and *Birchfield v. North Dakota*, —– U.S. ——–, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016)?

The appellate court rephrased the question as follows:

> Under the Fourth Amendment, may a warrantless blood draw of an unconscious person, incapable of giving actual consent, be pursuant to section 316.1932(1)(c), Florida Statutes (2016) ("Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing]."), so that an unconscious defendant can be said to have "consented" to the blood draw?

It answered the rephrased certified question in the affirmative and affirmed the county court's denial of the defendant's motion to suppress.
https://edca.4dca.org/DCADocs/2017/0232/170232_1257_03212018_09374456_i.pdf

***Biondi v. State*, __ So. 3d __, 2018 WL 1413004 (Fla. 4th DCA 2018)**

The defendant was stopped in Hollywood for a seatbelt violation by a Pembroke Pines police officer who was working as a special deputy for the sheriff's office's Multi-Agency Gang Task Force. A consensual search of the car revealed heroin, and the defendant was arrested. He filed a motion to suppress, arguing that the officer lacked jurisdiction to stop him. The trial court denied the motion and the defendant was convicted of possession of heroin, but the appellate court reversed, citing a "lack of evidence demonstrating jurisdiction," and noting that "[t]he officer did not testify that he was working undercover on the day of the stop. Nor did he testify that he was performing investigative work related to the gang task force when he pulled [the defendant] over for a seatbelt violation. Thus, his stop exceeded the grant of authority in the Notice of Appointment, which was the sole evidence of his authority produced by the state."
https://edca.4dca.org/DCADocs/2016/1711/161711_1709_03212018_09064918_i.pdf

***McFarlane v. State*, __ So. __, 2018 WL 1403825 (Fla. 2d DCA 2018)**

A detective stopped the defendant's car because he suspected the defendant was driving with a suspended license. A search incident to arrest disclosed methamphetamine and cocaine, and the defendant was convicted of possession of cocaine with intent to sell and criminal mischief. The appellate court reversed the conviction for possession of cocaine with intent to sell "because the State failed to prove the cocaine was intended for sale rather than for personal use. . . . Before the arresting officer stopped [the defendant's] car he did not observe [him] engage in any conduct consistent with illegal drug sales. [The defendant] did not have large amounts of drugs or money; he did not have a gun, scales, baggies, or any other items to indicate that he was

in the business of selling drugs. Further, the officers conceded at trial that [his] possession of the cocaine rocks could have been for his own personal use."
https://edca.2dca.org/DCADocs/2016/5462/165462_39_03212018_08442210_i.pdf

Cummings v. State, __ So. 3d __, 2018 WL 944684 (Fla. 1st DCA 2018)

The defendant was a passenger in a car that was stopped by police. He gave a false name and ran off. Officers caught him, found drugs on him, and arrested him, and he was charged with drug charges and resisting arrest. He filed a motion to suppress, which the trial court denied, and he pled no contest, reserving his right to appeal the denial of his motion to suppress. On appeal he argued that the officers "had no basis to detain him when they stopped the vehicle in which he was riding." But the appellate court affirmed, stating that "as he acknowledges in his reply brief, the recent Florida Supreme Court decision in *Presley v. State* forecloses this argument. 227 So.3d 95 (Fla. 2017), *cert. denied*," 138 S.Ct. 1007 (2018).
https://edca.1dca.org/DCADocs/2016/4167/164167_1284_02202018_12130268_i.pdf

Hudson v. City of Sunrise, __ So. 3d __, 2018 WL 857142 (Fla. 4th DCA 2018)

After witnessing what they believed to be a drug transaction, officers stopped the defendant's vehicle and smelled cannabis. A canine unit alerted, and a search of the vehicle revealed stolen credit cards, a receipt and a water bill in the defendant's name, and $1,770. Officers searched the address on the receipt and water bill and found, among other things, other persons' ID information, cannabis, and a towel that tested positive for cocaine, and seized the defendant's cash and vehicle for forfeiture. The defendant did not sign the notice of seizure or request an adversarial preliminary hearing, and the trial court entered an order finding probable cause. The city filed a motion for summary judgment, which the trial court granted, holding that the defendant did not have standing to contest the forfeiture and stating that "the only sworn testimony submitted in opposition to the City's motion for summary judgment, namely the [defendant's] mother's affidavit, was legally insufficient since it contained just one sentence that purported to describe a portion of the $1,770 as a birthday gift with no further facts as to how, when, or where the alleged gift to her son took place." The defendant appealed, and the appellate court reversed, holding that the trial court should have held an evidentiary hearing to establish whether the defendant had standing to contest the forfeiture.
https://edca.4dca.org/DCADocs/2017/0748/170748_1708_02142018_10112520_i.pdf

Jackson v. State, __ So. 3d __, 2018 WL 565809 (Fla. 1st DCA 2018)

After an armed robbery, officers found the described vehicle. An officer stopped the car and conducted a protective sweep. She did not see anything in plain view, but she opened the trunk, "consistent with her department's 'plus one' rule, under which (she later testified) officers always search the trunk of a vehicle during a felony traffic stop 'to make sure there's no other occupants either in the vehicle or in the trunk,'" and she found marijuana and a revolver. Backup officers arrived with the victims, who identified the defendant and another passenger, and a search of the passenger area revealed stolen items. The defendant was charged with various crimes. He filed a motion to suppress the evidence found in the trunk before the "show-up identification" and another motion to suppress the evidence found in the passenger compartment during the search incident to arrest. The trial court granted the first motion, stating that "it was

'not convinced that [the plus-one] rule actually exists' and that it was 'ludicrous' for officers to believe there could have been someone hiding in the trunk." It also rejected the state's argument that the evidence should in any case be admitted under the inevitable discovery exception. In a hearing on the second motion to suppress, the trial court held the officers were justified in detaining the defendant for the "show-up" and that "the show-up lineup would have occurred irrespective of whether the property in the trunk had been found." The jury convicted the defendant of burglary of a dwelling, aggravated assault, and two counts of armed robbery. On appeal, one of the defendant's arguments was that the trial court should have suppressed the evidence found in the passenger compartment; "that without the evidence found in the trunk, there was no basis for searching the vehicle a second time or for detaining the occupants for the show-up identification." The appellate court affirmed, noting:

> The trial court's order suppressing evidence from the trunk is not before us, and we are not obligated to presume the correctness of that order's legal conclusions—even assuming they were inconsistent with the court's later conclusions. The State was authorized to appeal the order suppressing evidence from the trunk, . . . but it chose not to. . . . The State is not obligated to appeal adverse suppression rulings just to preserve convictions secured despite those rulings. We therefore must decide whether the suppression ruling that is before us was correct in its own right. . . . Courts evaluating whether an investigatory stop based on a BOLO was justified consider "(1) the length of time and distance from the offense; (2) route of flight; (3) specificity of the description of the vehicle and its occupants; and (4) the source of the BOLO information." . . . These factors weigh overwhelmingly in the State's favor [and] officers had reasonable suspicion to stop the vehicle and detain the occupants for the show-up identification. Once the victims identified [the defendant], there was probable cause to arrest him. . . . And because officers reasonably believed that the vehicle contained evidence of the robbery, the subsequent search of the passenger compartment was justified as a search incident to arrest.

https://edca.1dca.org/DCADocs/2016/1755/161755_1284_02192018_09114301_i.pdf

Aguilar v. State, __ So. 3d __, 2018 WL 443165 (Fla. 3d DCA 2018)

After racing another vehicle, Aguilar crashed into a previous crash scene, killing one person and injuring three others. A trooper noticed Aguilar was incoherent, smelled of alcohol, and had red watery eyes and slurred speech. Aguilar was taken to a hospital with serious injuries, where he was induced into a coma. The trooper asked the hospital for a blood draw, and testified later that time restraints prevented seeking a warrant. After the blood sample, Aguilar was arrested and charged with DUI manslaughter (count I), two counts of DUI causing serious bodily injury (counts III and IV), and two counts of DUI with person or property damage (counts II and V). He filed a motion to suppress the blood draw test results based on lack of probable cause and lack of a warrant. The court denied the motion, and the jury returned a guilty verdict as to counts I, III, and V, and as to counts II and IV found Aguilar guilty of the lesser included offense of DUI. He appealed, and the appellate court found the motion to suppress was properly denied, affirmed as to counts I, III, and V, but reversed as to counts II and IV "due to violations of the prohibition on double jeopardy."

http://www.3dca.flcourts.org/Opinions/3D13-2167.pdf

***Harris v. State*, __ So. 3d __, 2018 WL 443156 (Fla. 3d DCA 2018)**

Officers patrolling a residential area saw the defendant driving toward them on a dirt bike without headlights, taillights, turn signals, rearview mirrors, or a tag. After the defendant ran a red light, the officers tried to stop him and he fell off the dirt bike. One of the officers arrested him for reckless driving and driving an unregistered vehicle, took his backpack, and handcuffed him. The officer asked the defendant if he had proof of ownership, and the defendant told the officer to look in a specific compartment of his backpack for paperwork and told him not to open the main compartment. When the officer opened the small compartment, he smelled marijuana and therefore searched the rest of the bag, after which the defendant was charged with possession of marijuana, oxycodone, and drug paraphernalia. The defendant filed a motion to suppress, which the trial court denied, "finding that there was probable cause to stop Harris and that there was a valid search incident to arrest." The appellate court reversed, stating that "the warrantless search was not valid as either a search incident to arrest or an automobile search."
http://www.3dca.flcourts.org/Opinions/3D16-1101.pdf

V. Torts/Accident Cases

***Faris v. Southern-Owners Insurance Co.*, __ So. 3d __, 2018 WL 1219074 (Fla. 5th DCA 2018)**

After being injured by an uninsured driver, Faris make a claim for UM coverage with his insurer. His insurer denied the claim, and Faris filed a breach of contract complaint against it. The trial court dismissed the complaint "as a sanction for proceeding with surgery in defiance of [its] orders." The appellate court found the sanction too severe and reversed, citing Faris's good-faith efforts to comply with the trial court's orders, the absence of prejudice to the insurer, and the existence of "lesser sanctions that could have ensured Faris's ongoing compliance."
http://www.5dca.org/Opinions/Opin2018/030518/5D16-4037.op.pdf

***Tovar v. Russell*, __ So. 3d __, 2018 WL 1109653 (Fla. 4th DCA 2018)**

After being injured in an accident, Tovar sued Russell's insurer, State Farm, and made a settlement offer that did not address a release. State Farm accepted the offer, sent a check, and enclosed a proposed release, which Tovar claimed "contained uncommon restrictions on how the settlement funds could be spent." He asked State Farm for a standard release, and State Farm sent a revised version of the initial release and a standard release, noting that "execution of a release of the bodily injury claim is not a condition of settlement." Tovar's attorney responded by returning the check and asking for two new checks. State Farm replied that it believed the settlement offer had been accepted but was willing to modify it and reissue the checks as requested, but asked Tovar to explain why he had not asked for a new check previously. Tovar responded by filing a negligence action against Russell. Russell's answer alleged the action was barred by accord and satisfaction, and he moved to enforce the settlement. The trial court issued an order enforcing the settlement agreement, and Tovar appealed, arguing that "there was no settlement agreement because State Farm did not accept the offer, but instead made a counteroffer by requesting a release with new, material terms that did not mirror the offer." State

Farm responded that "it accepted the offer by substantially complying with the offer's essential terms, creating a settlement agreement. It specifically indicated that the release was neither a condition of the settlement nor a counteroffer." The appellate court affirmed, finding that there was competent substantial evidence to support a finding that the parties had entered into an enforceable settlement agreement.
https://edca.4dca.org/DCADocs/2017/1055/171055_1257_02282018_09092709_i.pdf

***Florida Highway Patrol v. Jackson*, __ So. 3d __, 2018 WL 1023746 (Fla. 1st DCA 2018)**

After a brush fire, a traffic accident occurred on I-75. The road was closed but was reopened several hours later, after which Robinson died in a multiple-vehicle crash caused by "a sudden deterioration in visibility." Jackson, as personal representative of Robinson's estate, sued FHP for negligence in reopening I-75, and FHP filed a motion for summary judgment based on, among other things, sovereign immunity. The trial court denied the motion, FHP appealed, and the appellate court dismissed the appeal, certifying this question: "DOES RULE 9.130 PERMIT AN APPEAL OF A NON-FINAL ORDER DENYING IMMUNITY IF THE RECORD SHOWS THAT THE DEFENDANT IS ENTITLED TO IMMUNITY AS A MATTER OF LAW BUT THE TRIAL COURT DID NOT EXPLICITLY PRECLUDE IT AS A DEFENSE?"
https://edca.1dca.org/DCADocs/2016/3940/163940_1279_02232018_09062656_i.pdf

***Marin v. Infinity Auto Insurance Co.*, __ So. 3d __, 2018 WL 988335 (Fla. 3d DCA 2018)**

After an accident, Marin sued Infinity's insured (Blanco). Infinity filed a motion to intervene in order to enforce an alleged settlement. The trial court granted the motion and dismissed the action with prejudice. Marin appealed, but the appellate court affirmed, stating:

> It is undisputed that Marin's . . . letter constituted an offer to settle his bodily injury claim against Blanco. The only issue before this Court is whether Infinity's . . . response constituted an acceptance or a counteroffer. The trial court found that: (1) the inclusion of JMH [the hospital] as a joint payee on the settlement check was not an essential term of the settlement agreement because Infinity did not condition settlement on Marin's agreement to that term, given that Infinity, in its letter tendering the check, invited Marin to propose modifications to the settlement draft; and (2) the inclusion of JMH was not an objectionable and unusual term because there was uncertainty whether JMH possessed a lien for the medical services rendered to Marin, which Infinity was required to protect under Florida law. Because we agree that Infinity's response to Marin's settlement offer constituted an acceptance, forming a valid settlement agreement, we affirm.

http://www.3dca.flcourts.org/opinions/3D17-0891.pdf

***Sukraj v. Phoeung*, __ So. 3d __, 2018 WL 844736 (Fla. 2d DCA 2018)**

After a car accident, Sukraj sued the Phoeungs for past and future medical expenses and noneconomic damages. The jury awarded Sukraj nothing for noneconomic damages, and the trial court denied his posttrial motion for additur or new trial. He appealed, and the appellate court stated: "[B]ecause the evidence that Sukraj had suffered past pain and suffering for the injuries to his neck and back and would experience future pain and suffering as a result of the accident was

disputed at trial, we affirm the trial court's denial of Sukraj's motion on that basis. On remand, additur should be limited to Sukraj's past pain and suffering for his shoulder injury." https://edca.2dca.org/DCADocs/2017/0159/170159_114_02142018_08301466_i.pdf

***Woudhuizen vs. Smith*, __ So. 3d __, 2018 WL 665139 (Fla. 5th DCA 2018)**

After a motor vehicle accident, Smith sued Woudhuizen and the jury awarded Smith $125,000. The trial court declined to apply Social Security disability payments as a collateral source setoff to the judgment, finding that "Defendants could not show that the collateral source payments duplicated the damages awarded by the jury" and that any such claim was too speculative. Woudhuizen and the other defendants appealed, arguing that section 768.76, Florida Statutes, "does not require a party to present evidence matching the 'period covered by the disability benefits' with the 'period covered by the jury's award of past lost wages.'" The appellate court agreed and reversed.
http://www.5dca.org/Opinions/Opin2018/012918/5D17-575.op.pdf

***Hitchcock v. Mahaffey*, __ So. 3d __, 2018 WL 663800 (Fla. 5th DCA 2018)**

Mahaffey was seriously injured after being struck by a vehicle driven by Hitchcock. The jury awarded Mahaffey a significant sum "for certain intangible damages and for 'medical expenses, household goods or services, or other economic losses,'" and the trial court denied Hitchcock's motion for a new trial or remittitur regarding the jury award of $250,000 for future economic damages. Hitchcock appealed, and the appellate court affirmed on all issues except it reversed as to the order denying Hitchcock's motion for a new trial or remittitur, stating that "other than the sum of $5365 for future surgery, . . . the award for the balance of the future economic damages is based on Mahaffey's testimony as to the amount that she has paid for her past medical expenses and for past household goods and services subsequent to the motor vehicle accident. However, 'the amount of past medical expenses incurred does not—at least by itself—provide a reasonable basis for a jury to compute future medical expenses.'"
http://www.5dca.org/Opinions/Opin2018/012918/5D16-533.op.pdf

***State Farm Mutual Automobile Insurance Co. v. Harmon*, __ So. 3d __, 2018 WL 559488 (Fla. 5th DCA 2018)**

After an accident, Harmon sued her insurer, State Farm, for underinsured motorist benefits. State Farm contested injury causation and related damages, but the jury awarded Harmon an amount that included $100,000 for future medical expenses. State Farm challenged trial court rulings regarding whether the scope of one expert's testimony was properly disclosed before trial, whether a treating physician could testify as to why he referred Harmon to a neurosurgeon, and whether comments Harmon's attorney made during closing argument were unfairly prejudicial. The appellate court affirmed as to those issues, but it reversed the trial court's denial of State Farm's motion for new trial or remittitur with regard to the jury award of $100,000 for future medical expenses, stating: "Without any testimony regarding the frequency or specific type of treatments beyond routine follow-up visits, the jury had no basis for reaching the dollar amount that it did." It remanded for the trial court to either grant State Farm's motion for remittitur or conduct a new trial to determine future medical expenses.
http://www.5dca.org/Opinions/Opin2018/012218/5D16-2948.op.pdf

Gustavsson v. Holder, 236 So. 3d 476 (Fla. 5th DCA 2018)

While a pedestrian, Gustavsson was struck by a vehicle owned by Holder and driven by Beck and suffered serious and permanent injuries. He sued them, and the jury found Beck 1% negligent and Gustavsson 99% negligent. The jury awarded an amount for medical damages that was about the amount of his claimed past medical bills, "but awarded no damages for pain and suffering, physical impairment, mental anguish, inconvenience, aggravation of disease or physical defect, or loss of capacity for the enjoyment of life. In light of the directed verdict on permanency and the award of past medical damages, the parties agreed the jury verdict was inconsistent, and the court sent the jury back for further deliberation" with an instruction that, because of the court's finding of permanent injury and the award for past medical expenses, "there must be an accompanying award of pain and suffering." After 11 minutes, the jury returned the same verdict for medical damages and added only $1,000 for past non-economic damages and $1,000 for future non-economic damages. Gustavsson moved for additur or new trial, arguing that the award was inadequate as a matter of law. The trial court denied the motions and his later motion for reconsideration. The appellate court reversed on the issue of past non-economic damages but affirmed on the issue of future non-economic damages, and also affirmed on the issue of liability based on a compromised verdict because Gustavsson did not preserve it for appeal.
http://www.5dca.org/Opinions/Opin2018/010118/5D16-1442.op.pdf

Amica Mutual Insurance Co. v. Willis, 235 So. 3d 1041 (Fla. 2d DCA 2018)

Willis was hit by an underinsured golf cart while walking on a paved pathway. Her liability insurance policy with Amica had an exclusion "for vehicles 'designed mainly for use off public roads' with an exception for 'any non-owned golf cart," but her UM coverage did not provide that exception. Amica denied benefits, and the trial court entered final summary judgment in Willis' favor, ruling that "the exclusion was invalid as against the public policy requiring UM coverage to be reciprocal to its liability coverage." The appellate court agreed and affirmed.
https://edca.2dca.org/DCADocs/2016/2319/162319_65_01172018_08311004_i.pdf

Markovits v. State Farm Mutual Automobile Insurance Co., 235 So. 3d 1018 (Fla. 1st DCA 2018)

After an automobile accident, Markovits sued State Farm for UM benefits under her policy. She made a proposal for settlement, which State Farm rejected. Markovits obtained a final judgment that was more than 25% greater than her proposal for settlement, but the trial court rejected her motion for attorneys' and paralegals' fees, agreeing with State Farm that the proposal was served prematurely. Markovits appealed, and the appellate court reversed, stating: "Based on our case law which establishes that service on an insurer is perfected when the Chief Financial Officer of the State of Florida (CFO) is served as an insurer's 'attorney to receive service of all legal process issued against it in any civil action or proceeding in this state,' we hold that the proposal was not premature."
https://edca.1dca.org/DCADocs/2017/1623/171623_1287_01032018_02540466_i.pdf

***State Farm Mutual Automobile Insurance Co. v. Hawkinson*, 235 So. 3d 1017 (Fla. 1st DCA 2018)**

After an automobile accident, Hawkinson sued State Farm for UM benefits under her parents' policy. The trial court entered a partial final judgment in her favor, determining that she was a covered "relative" because she was unmarried, unemancipated, and away at college at the time of the accident. State Farm appealed, but the appellate court affirmed, stating: "Although there was conflicting evidence that reasonably could have supported a contrary finding regarding Ms. Hawkinson's emancipation status, we are constrained to affirm because the finding made by the trial court is supported by competent substantial evidence."
https://edca.1dca.org/DCADocs/2016/5692/165692_1284_01022018_02294598_i.pdf

***State Farm Automobile Insurance Co. v. Knapp*, 234 So. 3d 843 (Fla. 5th DCA 2018)**

Knapp was involved in two automobile accidents within six months. He sued the other drivers, and he sued State Farm for uninsured/underinsured motorist benefits and bad faith. As permitted under *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999), and Florida Rule of Civil Procedure 1.280(b)(5), Knapp sought discovery about Dr. Zeide, an expert witness State Farm had hired, regarding how often State Farm hired him and how much it paid him in the preceding three years. The trial court ordered State Farm to produce documents that State Farm claimed were protected by the work product doctrine and the attorney-client privilege, and State Farm filed a petition for a writ of certiorari regarding the discovery orders. The appellate court granted the petition and quashed the orders, stating:

> Although the trial court reviewed the documents *in camera*, its orders did not state which documents State Farm properly designated as work product nor which documents contained privileged attorney-client communications. Furthermore, the trial court's orders failed to explain the justification for requiring State Farm to turn over its work product documents to . . . Knapp, and there is no justification here for ordering production of confidential attorney-client documents to opposing counsel. Under the circumstances, the trial court departed from the essential requirements of the law, subjecting State Farm to harm that cannot be remedied in a later plenary appeal.

http://www.5dca.org/Opinions/Opin2018/010818/5D17-447.op.pdf

***GEICO General Insurance Co. v. Martinez*, __ So. 3d __, 2018 WL 271823 (Fla. 3d DCA 2018)**

Martinez was injured after Guevara struck the car she was riding in. Martinez sued Guevara, and seven years later the trial court granted Martinez's motion to amend her complaint to add GEICO as a defendant and to add a third-party bad-faith claim against GEICO. GEICO moved to dismiss the third-party bad-faith count because it had not yet accrued (Martinez would first have to obtained a settlement or verdict against Guevara on the negligence claim). The trial court denied the motion to dismiss "and instead, abated the action to await resolution of Martinez's underlying negligence action against Guevara." GEICO sought review, which the appellate court granted. It quashed the orders "because, under these circumstances and given our

existing precedent, abatement (rather than dismissal) of a third-party bad-faith claim filed in contravention of the express requirements of the nonjoinder statute . . . constitutes a departure from the essential requirements of the law, and results in irreparable harm that cannot be remedied on appeal."
http://www.3dca.flcourts.org/Opinions/3D17-1086.pdf

VI. Drivers' Licenses

***Burnett v. DHSMV*, 25 Fla. L. Weekly Supp. 933a (Fla. 6th Cir. Ct. 2017)**

After his arrest for DUI, the defendant refused to provide a urine sample and his license was suspended. A hearing officer affirmed the suspension, and the defendant sought review, arguing "not . . . that the traffic stop itself was improper, only that in the instant case, the record lacks competent substantial evidence that [he] was under the influence of anything other than simply 'medications,'" and that "[b]ecause not all medications are controlled substances, . . . there is insufficient evidence to show that his alleged impairment was attributable to controlled substances." But the circuit court, in its appellate capacity, denied review, stating that "the record is replete with outward manifestations that indicate the influence of controlled substances."

***McMillan v. DHSMV*, 25 Fla. L. Weekly Supp. 931a (Fla. 6th Cir. Ct. 2017)**

After stopping the defendant, who had drifted off the road and almost hit a motorcyclist, for speeding and driving without headlights, a trooper noticed indicia of impairment, and the defendant was arrested for DUI and his license was suspended. The defendant sought review, but the circuit court, in its appellate capacity, denied review, finding sufficient evidence for the hearing officer's decision.

***Haughey v. DHSMV*, 25 Fla. L. Weekly Supp. 854a (Fla. 6th Cir. Ct. 2017)**

The defendant had DWAI (driving while ability impaired) and DWI convictions in New York in 1992, 1999, and 2003, and a DUI conviction in Florida in 2017. His license was revoked for four convictions, and he sought review, arguing that the New York DWAI was "not similar to a DUI because a DWAI is a traffic infraction punishable by a fine whereas a DUI is a criminal offense," and it should not have been counted. But the circuit court, in its appellate capacity, denied review, holding that a review of case law caused it to find that "DHSMV did not depart from the essential requirements of law in determining that the New York DWAI is an alcohol-related traffic offense similar to a Florida DUI."

***Pelkey v. DHSMV*, 25 Fla. L. Weekly Supp. 853b (Fla. 5th Cir. Ct. 2017)**

After allegedly failing to stop at a stop sign in Lake County, the defendant was stopped and arrested by Volusia County officers, and his license was suspended for refusal to submit to a breath test. The hearing officer affirmed the suspension, finding that the arresting Volusia County officers were working under the authority of a mutual aid agreement with the Lake County Sheriff's Office during the latter's annual Bike Fest. The defendant sought review, and the circuit court, in its appellate capacity, granted review and quashed the suspension, stating:

> All of the events giving rise to this case occurred in Lake County, outside the arresting VCSO officers' jurisdiction. [DHSMV] argues that the Hearing Officer's Order is backed by competent substantial evidence because the record below contains a valid mutual aid agreement. . . . The simple fact that the Hearing Officer placed the mutual aid agreement into evidence does not, alone, serve as competent substantial evidence that the arresting officers were excused from their jurisdictional constraints by the mutual aid exception. Although there is evidence of LCSO's knowledge of the VCSO officer's presence and activities in Lake County, there is no record evidence showing that the Lake County Sheriff actually requested VCSO's assistance pursuant to . . . the Mutual Aid Agreement. Looking only to the evidence that is, and is not, present in the record below, without reweighing it, there is no evidence showing that the VCSO officers acted pursuant to, and in compliance with, the Mutual Aid Agreement.

***Bruck v. DHSMV*, 25 Fla. L. Weekly Supp. 784e (Fla. 20th Cir. Ct. 2017**)

The defendant's license was suspended for DUI, and she sought review, arguing that her "wide turn" wasn't sufficient legal cause for a traffic stop since she didn't endanger other drivers and the deputy who stopped her did not suspect impairment until he had already stopped her. She also argued that the deputy's testimony regarding his concern about her medical well-being was irrelevant. But the circuit court, in its appellate capacity, denied review, holding that deviation from a lane "by more than what was practicable" was a traffic violation regardless of whether another driver was endangered, and there was no evidence contradicting the deputy's testimony about his concern for the defendant's safety.

The defendant also argued that there was an "obvious conflict" about whether she drove outside her lane because the video did not show erratic driving. But the court noted that the video was not on yet when the deputy observed the wide turn, so there was no conflict.

The defendant's third argument was that there was not probable cause to arrest her because her physical problems and "irregularities" affected her field sobriety exercise performance. But the court held that the deputy "observed other, independent, indicators [of impairment] that gave him probable cause to make the arrest."

The defendant also argued that her due process rights were violated because the department failed to timely publish Intoxilyzer inspection reports, and that there were problems with the machine. But the court noted that the machine had been inspected two weeks before the defendant's arrest, and the inspection report and affidavit of breath test results were in the record and "were sufficient to show that the Intoxilyzer in question was in substantial compliance with the rules and the statute. . . . The Department is, therefore, correct that the 'ongoing problems' of almost a year prior to the arrest are irrelevant in this context."

***Dolan v. DHSMV*, 25 Fla. L. Weekly Supp. 782c (Fla. 17th Cir. Ct. 2017**)

The defendant's license was revoked for his being a habitual traffic offender. His request to reinstate it was denied, and he sought review. The circuit court, in its appellate capacity, denied review. The concurring opinion noted that the defendant's last traffic offense was nearly

25 years earlier, but that "there is no limitation on how far back the offenses within a five (5) year period may occur. . . . At some point, as a matter of relevance, or constitutional due process, it is just too old. The overbroad application by [DHSMV] of section 322.264, Florida Statutes, needs clarification by the legislature or a superior court."

***Mejia v. DHSMV*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. 2017)**

The defendant's license was suspended for his refusal to submit to a blood test. He sought review, arguing that there was not competent substantial evidence that a breath test was impossible or impractical when the officer asked him to submit to a blood test. The circuit court, in its appellate capacity, agreed and granted review and quashed the suspension. It stated that there was no evidence that the defendant "was unconscious or immobile at the time of the request" or that "prior to requesting the blood sample the officer made any inquiry with medical personnel as to how long [the defendant] would remain at the hospital or what treatment he needed. . . . The Court is mindful of, and shares the officer's concern about the potential effect that the passage of time would have on breath-alcohol results. . . . However, . . . the mere passage of time is not -- standing alone -- sufficient to establish the impossibility of impracticality of a breath test."

***Bracetty v. DHSMV*, 25 Fla. Law Weekly Supp. 773b (Fla. 6th Cir. Ct. 2017)**

An officer responding to a report of a fight saw the subject vehicle stopped in the through lane of a parking lot with its brake lights on. Other officers arrived, and the defendant was arrested for DUI. She refused to submit to a breath test, and her license was suspended. She sought review, claiming that she was unlawfully detained because the officer's "'only reason for seizing [her] was a breach of the peace,' and competent substantial evidence does not support a detention for that reason." But the circuit court, in its appellate capacity, denied review, stating: "Regardless of whether the evidence supports a detention for breach of the peace, the [officer's] finding that [the defendant] was lawfully detained for safety reasons is supported by competent substantial evidence." The officer had testified that he "was concerned with all the people walking around that [the defendant] might put [the vehicle] in gear and take off."

VII. Red-light Camera Cases

***White v. City of Miami Gardens*, 25 Fla. Law Weekly Supp. 938a (Fla. 11th Cir. Ct. 2017)**

The defendant got a citation based on red-light camera footage. She had a hearing before a special master to determine whether the citation "was improperly issued by a third-party vendor rather than by a traffic enforcement officer, as required by section 316.0083 of the Florida Statutes." The special master determined that the city's red-light camera program met the requirements set forth in *State by and through City of Aventura v. Jimenez*, 211 So. 3d 158 (Fla. 3d DCA 2017). The defendant appealed, arguing that (1) "she was denied the right to confront her 'accuser'"; (2) there was insufficient evidence at the hearing to support the special master's determination; and (3) the city had inappropriately delegated its citation-issuing authority to the third-party vendor. But the circuit court, in its appellate capacity, affirmed, stating that the Sixth Amendment (Confrontation Clause) applies only to criminal cases, and that "the Special Master correctly applied . . . *Jimenez*, and was presented with competent, substantial evidence . . . to

support the finding that the City's third party vendor did not issue citations, but instead performed statutorily permitted ministerial, non-discretionary tasks."

***Lencovski v. City of Miami Gardens*, 25 Fla. L. Weekly Supp. 934a (Fla. 11h Cir. Ct. 2017)**

The defendant got a red-light camera violation citation for failing to comply with a steady red signal. He requested a hearing but was three hours late because of his son's hospital appointment, and the special master had already left. The special master's final administrative order upheld the violation, and the defendant appealed. The circuit court, in its appellate capacity, affirmed, stating that (1) any due process issue was waived; (2) section 316.0083(1)(a), Florida Statutes, read in its entirety, provides that "a right turn at a red light is permissible after the driver makes a complete stop and then proceeds in a reasonable and prudent manner," which the defendant did not do; and (3) without a record of the administrative hearing, the court could not conclude that the hearing officer's decision was not supported by the evidence.

***Evans v. State*, 25 Fla. L. Weekly Supp. 929a (Fla. 1st Cir. Ct. 2016)**

The defendant got a red-light camera violation citation, and the county court found him liable for the fine and certified the following question: "Pursuant to section 316.00[8]3, Florida Statutes . . . is a registered owner of vehicle responsible to pay the fine when the state proves the owner's vehicle violated a red traffic signal pursuant to section 316.075(1)(c)1., the State did not identify who was driving the owner's vehicle, the owner did not file an affidavit naming another in the 'care, custody, or control' of the owner's vehicle and the Defendant raises the failure to identify the driver as a defense at the infraction hearing?" The defendant appealed, but the circuit court, in its appellate capacity, affirmed, stating: "'Section 316.0083(1)(e) employs a burden shifting mechanism which allows the State to prove a red light violation without proving the identity of the driver.' . . . The statute provides a rebuttable presumption that the 'owner' was driving and allows the 'owner' to rebut that presumption. The record shows that the [defendant] did not rebut the statutory presumption."

As to the defendant's constitutional arguments — "[o]ne, that red light cameras unconstitutionally violate the Fourth Amendment and, two, they violate the Fifth Amendment right against self-incrimination" — the court stated that since the arguments were not presented at trial, they could only be reviewed on appeal "to the extent they pertain to a claim of a facially unconstitutional statute," and that they were without merit.

VIII. County Court Orders

***Reyes v. Windhaven Insurance Co.*, 25 Fla. L. Weekly Supp. 983a (Hillsborough Cty. Ct. 2017)**

Reyes sued Windhaven Insurance Co., and Windhaven filed an amended motion to dismiss for lack of subject matter jurisdiction, arguing that the court had to "combine all coverages on the face of the policy (the $10,000 PIP coverage and $11,000 property damage coverage) to reach a combined amount of $21,000 which would be in excess of the jurisdictional limits of county court." But the court denied the motion, stating that

> Plaintiff is not making a claim for PIP benefits [but rather her] claim is limited to property damage. Taken to its logical end, . . . Defendant's argument, if followed, would result in county courts losing jurisdiction over all PIP matters. Every automobile policy in Florida is required to have $10,000 in PIP coverage and $10,000 in property damage. Combined, that is $20,000 and in excess of the $15,000 jurisdictional limits of county court. As enticing as it may be for this court to divest itself of all PIP litigation, the absurdity of Defendant's position becomes self-evident. Only the $11,000 in property damage coverage is at stake in this case.

***Reyes v. Windhaven Insurance Co.*, 25 Fla. L. Weekly Supp. 982a (Hillsborough Cty. Ct. 2017**)

After a one-car accident, Reyes sued her insurer (Windhaven) for approximately $11,000 for repairs to her car. Windhaven rescinded the policy because Reyes' household included people who were not listed on the insurance policy. Reyes sought a declaration of her coverage rights, and a Windhaven underwriter gave an affidavit and deposition stating that Reyes' premiums would have been higher had the other household members been disclosed. The court granted Reyes' motion for summary judgment, noting that (1) the undisclosed residents were neither occupants of the vehicle nor licensed drivers, and (2) the underwriter's "assertion of a premium difference is based solely on inadmissible hearsay."

***State v. Moseley*, 25 Fla. L. Weekly Supp. 979b (Sarasota Cty. Ct. 2017**)

The defendant was involved in a crash that resulted in no damage. After a crash investigation, an officer "gained reasonable suspicion" that the defendant was DUI, and after a DUI investigation the defendant was arrested. He filed a motion to suppress, arguing that "since there was no damage, there was no lawful basis to conduct a crash investigation and that the reasonable suspicion to conduct the DUI investigation was the fruit of the unlawful detention of the Defendant while conducting the crash investigation." The court agreed and granted the motion.

***State v. Young*, 25 Fla. L. Weekly Supp. 896a (Volusia Cty. Ct. 2015**)

A deputy saw the defendant's car parked on the grass, running and with the lights on. He parked and went up to the window, saw the defendant slumped forward in the driver's seat, and directed her to put down the window, and the defendant was ultimately arrested for DUI and drug charges. She filed a motion to suppress, contending "that the deputy seized her without a reasonable suspicion when he ordered her to roll down her window." The court granted her motion, agreeing that the encounter became a seizure "when the deputy knocked on the window and told Defendant to roll down the window. . . . A reasonable person on the receiving end of such a direction would not believe he or she was free to terminate the encounter and drive away." Therefore, the next question was "whether the seizure was objectively supported by a reasonable suspicion that Defendant was committing a crime." The court held that it was not: "To the extent the State . . . appears to argue that the officer's actions were justified under the community caretaking doctrine, . . . the evidence does not support that theory. The deputy testified that he did not believe an emergency was occurring. After observing Defendant asleep in the car, before

attempting to rouse her, the deputy returned to his patrol car and called not for a paramedic but instead for backup. Under these circumstances, the Court finds that the deputy was conducting a criminal investigation, not a well-being check."

***State v. Kepics*, 25 Fla. L. Weekly Supp. 893a (Leon Cty. Ct. 2017)**

The defendant was arrested for DUI and agreed to provide a breath test sample, and her BAC was .000/.000. The officer, without seeking a warrant, then re-read the defendant the implied consent form, and her urine sample was submitted to FDLE for testing. The defendant filed a motion to suppress, arguing that the officer's request that she submit to a urine test under the implied consent law without a warrant was unlawful under *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), and that the state could not rely on voluntary consent because the officer "secured the urine sample pursuant to the implied consent law." She argued in the alternative that "even if she could voluntarily consent to the urine test, the evidence failed to support the conclusion her consent was voluntary by either a preponderance of evidence or clear and convincing evidence." The court granted the motion to suppress, stating:

> In *Birchfield*, the Court crafted a specific test for examining the legitimacy of a warrantless search in DUI investigations. This new test consists of three parts: (1) the amount of physical intrusion required in obtaining the evidence, (2) the extent to which the sample may be preserved and used to acquire additional private information, and (3) the amount the test would significantly increase the embarrassment already inherent in an arrest.

The court noted that "[s]ince the physical intrusion to obtain a urine sample is negligible or nonexistent, this factor weighs in favor of the State." As to the second prong of the test, the court noted that urine tests "'can be used to detect and assess a wide range of disorders and can reveal whether an individual is pregnant, diabetic, or epileptic.' . . . As a result, 'the taking of a urine sample . . . raises the same privacy concerns that the Court addressed in *Birchfield* with regard to blood tests.'" As to the third prong, the court stated that with a urine test, "[v]isual monitoring did exist, and it is the visual portion rather than the profession [of the person conducting the test] that increases the embarrassment." Having held that a urine test requires a warrant, the court then addressed whether the officer's failure to obtain one could be excused by one of the exceptions to the warrant requirement and held that it could not.

As to whether the defendant voluntarily consented to the urine test, the court held that she had not, stating: "Voluntary consent cannot be obtained after reading a driver the implied consent warning and any test conducted based on voluntary consent after an officer reads the implied consent warning must be suppressed." And in any case, the burden would have been on the state "to establish, by clear and convincing evidence, 'an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action,'" but here the state "presented no evidence to establish any break in the chain of prior illegal action. Thus, [the defendant's] consent would have to be rendered involuntarily because the threat that her license would be suspended for refusing to submit to a urine test would be an incorrect statement of the law."