CASE LAW SUMMARY
2011

Automobile Liability

Leased Vehicles/Rental Car Vehicles

Vargas v. Enterprise Leasing Company, 60 So. 3d 1037 (Fla. 2011)

The Supreme Court determined that the Graves Amendment did not violate the Commerce Clause and, as such, it preempted Florida Statute 324.021(9)(b)(2), Fla. Stat., which imposed vicarious liability on rental car companies and which placed a cap on amount of damages for which they could be held liable.

Permanency

Wald v. Grainger, 64 So. 3d 1201 (Fla. 2011)

The Defendant admitted fault and, therefore, the only jury issues were causation, permanency and damages. The Plaintiff's treating physician testified that the Plaintiff's injuries were all permanent and connected to the accident. The Defendant's expert testified that the Plaintiff had permanent right thigh numbness and giving the Plaintiff "the benefit of the doubt" determined that the condition was related to the collision, but believed that the Plaintiff did not sustain a permanent neck or back injury as a result of the accident. The Plaintiff moved for directed verdict on the issue of permanency and the trial court granted it only as to the right thigh condition. The trial court instructed the Defendant that he was free to argue that the Plaintiff's other injuries were not permanent and the jury was instructed that it was free to weigh, accept or reject the opinions of any expert witness. There was, however, no reference to permanency in the Verdict Form or in the Jury Instructions. The First District reversed the Final Judgment finding that the trial court committed reversible error by directing a verdict as to permanency finding that "the jury was free to reject any testimony regarding permanency, including uncontradicted testimony." The Supreme Court found that these statements were overly broad and quashed the First District's decision.

The Supreme Court noted that the jury's ability to reject testimony must be based on some reasonable basis and the evidence. This reasonable basis can include conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the Plaintiff to give the

medical expert an accurate or complete medical history; conflicting lay testimony or evidence that disputes the injury claimed; or the Plaintiff's conflicting testimony herself - - contradictory statements regarding the injury. In this case, the Supreme Court found that the medical experts agreed on the permanency of the thigh injury and that it was related to the accident. They also found that there was no conflicting testimony on this issue. As for the Jury Instruction issue, the Supreme Court found that this was not properly preserved.

Clair v. Perry, 66 So. 3d 1078 (Fla. 4th DCA 2011)

Perry was injured in a motor vehicle accident. Negligence was admitted and the matter proceeded to trial on damages only. At trial, Perry sought to introduce testimony of a treating physician on the issue of permanency. Clair objected, arguing that the opinion constituted an expert opinion and that same had not been disclosed before trial in accordance with Fla.R.Civ.P. 1.280(b)4. The trial court agreed and excluded that portion of the treating physician's testimony. The jury subsequently determined that Perry suffered no permanent injury. Perry filed a Motion for New Trial arguing that a treating physician is not an expert witness whose opinions are subject to disclosure under Rule 1.280(b)4. The trial court agreed and granted a new trial. Clair then appealed.

On appeal, it was held that the treating physician's opinion on permanency was not "acquired or developed in anticipation of litigation or for trial". The treating physician's opinion on permanency was therefore not subject to the pretrial disclosure and notification requirements of Rule 1.280(b)4. The trial court did not abuse its discretion in ordering a new trial after deciding to reconsider its decision to exclude a treating doctor's testimony regarding the permanency of a Plaintiff's injury or exclusion of the testimony was motivated by a fear of "trial by ambush" due to the fact that the doctor's opinion was not disclosed during discovery.

The Defendant had claimed to be prejudiced in her ability to mount a defense because she lacked notice of the substance of the doctor's testimony. Although the doctor's opinion was not disclosed in the course of discovery, the defendant was on notice that permanency would be an issue at trial and that the doctor might express an opinion on the lasting and permanent nature of the Plaintiff's injury where the Plaintiff listed the doctor as a treating healthcare provider on her Expert Witness List; explained that the doctor would testify as to injuries sustained by the Plaintiff; expressed in her pleading and Interrogatories that the Plaintiff has sustained a permanent injury; and, provided the Plaintiff with

the doctor's medical records containing all data upon which the doctor formed his permanency opinion.

Here, the Defendant knew that the Plaintiff claimed a severe chronic injury but chose not to depose the doctor and thus, any fault for any "surprise" lied at trial with the Defendant.

PIP

MRI Associates of America v. State Farm, 61 So. 3d 462 (Fla. 4th DCA 2011)

MRI Associates made a claim for unpaid PIP benefits provided to State Farm's insured. MRI Associates performed two MRI scans under an Assignment of Benefits from the insured. State Farm hired an expert who performed a paper peer review and concluded that the MRI's were not reasonably related to the accident or medically necessary. State Farm then denied the claim. MRI Associates then submitted a pre-suit demand letter pursuant to §627.736(11). After receiving the demand letter, State Farm declined to pay. MRI Associates then filed suit in county court and the court entered Final Judgment in their favor. The Appellate Division of the Circuit Court reversed and the Fourth District affirmed the reversal. In so doing, they noted that the pre-suit demand letter was sent prematurely because payment was not overdue. Moreover, the health insurance claim form failed to specify the exact amount owed under the Statute and the total of the charges exceeded what was allowed for MRI's by the Statute.

Kingsway Amigo Insurance Company v. Ocean Health, Inc., 63 So. 3d 63 (Fla. 4th DCA 2011)

Kingsway provided PIP coverage to its insured. Following the motor vehicle accident, the insured assigned her PIP benefits to Ocean Health in return for chiropractic treatments. Ocean Health submitted bills directly to the insurance company and, after applying the deductible, the insurance company paid for services rendered at 80% of 200% of the Medicare Part B Fee Schedule. The amount paid is less than payment at 80% of the billed amount. In making payment, Kingsway relied upon Florida Statute 627.736(5)(a)(2). In so doing, they ignored the language of their policy which specified that they would pay 80% of medically necessary expenses. Accordingly, the Fourth District ruled in favor of Ocean Health noting that incorporation of the PIP Statute into the policy did not give the insurance company the unilateral right to ignore the only payment methodology referenced in the policy.

Ramirez v. United Automobile Insurance Company, 67 So. 3d 1174 (Fla. 3d DCA 8/17/11)

Where the insured prevailed in county court in an action on a PIP policy and the appellate division of the circuit court from the county court judgment, it was a miscarriage of justice for the circuit court to deny an award of appellate attorney's fees to the insured.

Rear End Collision

Sorel v. Koonce, 53 So. 3d 1225 (Fla. 1st DCA 2011)

The First District Court reversed a defense verdict and remanded the case to hold that the presumption of negligence against the rear driver in a rear-end collision had not been overcome by the evidence presented at trial that the lead vehicle made a sudden and abrupt stop which could not have been anticipated by the following driver. The court found that even though the lead driver was in a left turn lane with a green arrow, the following drivers should have anticipated the stop because the evidence shows that the vehicle traveling in the through lanes in the opposite direction ran a red light causing a sudden stop by the lead driver.

The court relied on several cases where it was held that, in intersection accidents, parties should provide a safe distance as it is not uncommon for the lead driver to have to stop for pedestrians, emergency vehicle equipment, or for other reasons such as red light runners. Therefore, the court held notwithstanding the fact that the green arrow that had already turned, the rear-end collision should have been avoided by the following automobile and a directed verdict on the presumption of negligence should have been granted.

McGill v. Martin Perez, et al., 59 So. 3d 388 (Fla. 2d DCA 2011)

It was error to enter summary judgment in favor of the Defendant, whose vehicle was rear ended by a vehicle driven by the Plaintiff, based on presumption that the Plaintiff, the lead driver, was negligent where there were disputed issues of material fact as to whether the Defendant may have been negligent himself when he pulled onto the roadway to merge and then moved into the next lane before he was rear ended. Furthermore, even if the Plaintiff was unable to overcome the presumption of his own negligence, evidence that the lead driver may have been comparatively negligent presented a jury question on the issue of shared liability

and apportionment of damages. When there is evidence of negligence on the part of the lead driver in a rear end automobile accident, the issue of fault must be resolved by the jury.

Settlements

Knowling v. Manavoglu, 73 So. 3d 301 (Fla. 5th DCA 2011)

The Plaintiff suffered bodily injuries and property damage as a result of a motor vehicle accident. The Defendants were insured by Allstate. Shortly after the accident, Plaintiff's counsel wrote to Allstate and requested insurance information pursuant to §627.4137. Allstate responded to the letter and included an Affidavit of Insurance; however, it did not include a copy of the policy as requested, but indicated it would forward a copy of the policy. Subsequently, the Plaintiff received the policy and he offered to settle the bodily injury claim stating that "actual performance was required for acceptance" and included three requirements: (1) a check for all available policy limits; (2) all items described in Florida Statute 627.4137; and (3) a general bodily injury release of the insureds. Allstate responded by sending a letter promising to tender the policy limits "in full, final and complete settlement of [all] claims arising out of the accident" and also indicated that the enclosed release was appropriate to the claim adding that "not all release forms precisely fit the facts and circumstances of every claim" and added that it did not "consider the release of document which created any new terms or conditions governing the resolution of the claims." The release would resolve any claims from the accident and also contained a hold harmless and indemnification provision which would protect the Defendants and Allstate from any validly asserted lien. Allstate then forwarded a check for $10,000 stating that the payment was for the Plaintiff's claim for bodily injury from the subject accident. The Plaintiff did not cash the check and no further correspondence was exchanged between the parties. The Plaintiff's counsel returned the check indicating that, because Allstate had not complied with the demand, he would file suit. Once suit was filed, Allstate raised that there had been a settlement. After a hearing, the trial court determined that the bodily injury claim had been settled pre-suit. The Fifth District reversed and ruled that to be binding, "mutual acceptance as to all essential terms is required." Thus, "for acceptance of an offer to bind the maker of the offer, it must be absolute, unconditional and identical with the terms of the offer." Here, the Fifth District found that the release tendered by Allstate did not meet the dictates of the offer. The offer was expressly conditioned upon acceptance by performance which included a provision of a "ready for signature" release to settle the claim for bodily injury only. The tendered release purported to encompass all

claims arising from the accident and included the indemnification language which was not a term of the offer. As such, the Fifth District ruled that Allstate's response was nothing more than a counteroffer.

Subsequent Tortfeasors

Tucker v. Korpita, 36 FLW D2494 (Fla. 4th DCA 11/16/11)

Where there was testimony by the Defendant's expert that the treatment provided to the Plaintiff following a motor vehicle accident was inappropriate and could have accelerated the degenerative process in the Plaintiff, the trial court erred in failing to give a requested instruction on intervening cause.

Here, the specific testimony went beyond questioning the medical advisability of treatment advocated by the Plaintiff's expert, or questioning the wisdom of the diagnosis, prognosis or causal relationship between the purported injuries and the alleged incident. Instead, the Defendant's experts concluded that the treatment utilized by the Plaintiff's experts would make things worse or could make things worse clinically. While the former scenario may not generally require an intervening cause instruction, the latter situation, like in this case, should result in the instruction being given as requested.

The law is well settled that the initial tortfeasor may also be held liable for subsequent injuries caused by the negligence of healthcare providers. As stated by the Florida Supreme Court in *Stuart v. Hertz*, where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of incompetent physician or surgeon, and in following his advise and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds the original tortfeasor liable therefore.

Uninsured Motorist

State Farm Mutual Auto Insurance v. Curran, 36 FLW D2635 (12/2/11)

The court found that the insured plaintiff's failure to attend a compulsory medical examination before filing suit violated a condition precedent and was a

breach of the policy prohibiting her recovery. Therefore, the case was remanded for judgment in favor of *State Farm*.

Mitleider v. Brier Grieves Agency, Inc., 53 So. 3d 410 (Fla. 4th DCA 2011)

Execution of an uninsured motorist coverage rejection form absolves an insurance agency and its agent of liability for negligently failing to procure uninsured motorist coverage. The court found that Fla. Stat. §627.727(9) creates a conclusive presumption that an informed and knowing rejection of uninsured motorist coverage was made. The Fourth District Court also found that this conclusive presumption not only applied in favor of the insurance carrier on the coverage case, but it also extended the same protection against a claim made against the insurance agent and its agency for failing to secure uninsured motorist coverage in the automobile policy.

Ruddy v. Carelli, 54 So. 3d 1055 (Fla. 5th DCA 2011)

The Fifth District reversed final summary judgment in favor of Metropolitan Insurance Company finding that its policy provision requiring a tortfeasor be joined as a party or suit could not be brought against the UM carrier was void as against public policy.

Simmons v. State Farm Florida Insurance Company, 55 So. 3d 636 (Fla. 5th DCA 2011)

The Fifth District affirmed summary judgment in favor of *State Farm*, the uninsured motorist automobile liability umbrella insurer. The injured insured filed a declaratory judgment action to determine that since the UM umbrella policy covered four vehicles and three drivers, then as a matter of law, he shall be allowed to stack the coverages for a total of $4.0 million instead of the stated policy limits of $1.0 million under the umbrella policy.

The court disagreed and found that when the amount of the premium depended upon the number of rateable exposures as opposed to the number of vehicles or drivers. In other words, because there was a single premium paid for the liability coverage, and a single premium paid for the UM coverage, the *State Farm* policy issued to its named insured was a non-stacking policy as a matter of law. The court noted that stacking of coverage "is a judicial creation, based upon the common sense notion that an insured should be entitled to get what is paid for". That is, if an insured "pays separate premiums for UM protection on separate

vehicles, the insured should get the benefit of coverage for each individual premium paid". In this case, there was no additional premium paid for by the number of vehicles or the number of drivers, rather it was the type of coverage purchased under one collective premium per exposure. It is also noteworthy that the court declined to enforce the requirement that *State Farm* had to obtain a rejection of UM stacking coverage pursuant to §627.727(9). However, it found that since this was a non-stacking policy, the rejections were not required but they would have been if it was a stacking type policy.

Swan v. State Farm Mutual Automobile Insurance Company, 60 So. 3d 514 (Fla. 3d DCA 2011)

The Third District affirmed judgment on behalf of State Farm holding that the personal representative of the estate of the deceased and the surviving insureds were not entitled to stack UM benefits on two different policies insuring separate vehicles when the insured on one of the policies knowingly rejected UM benefits and did not pay any premiums for UM benefits on that policy. Therefore, the court found that the only UM benefits that were available was the single policy where UM was expressly accepted and paid for.

The court disagreed with the policyholder that purchasing "stacked" on one of the policies presupposes that there are at least two UM policy limits that will be added together to give greater coverage than a single policy limit alone. The court noted that the policyholder confuses UM coverage, which insures that an insurer will pay damages for bodily injuries sustained in an accident with an uninsured motor vehicle, with "aggregating" UM policy limits. A crucial distinction between stacked and non-stacked coverage is that, unlike stacked coverage, non-stacked UM coverage does not provide coverage for every vehicle that the insured owns – it only provides coverage for the vehicle on which the UM premium was paid. The court gave three examples to clarify this distinction:

- If Swan paid a premium for stacked UM coverage on both policies in the household, then it would not matter which vehicle he and his wife were occupying at the time of the accident. They would both be entitled to recover UM benefits from both policies under the Florida Supreme Court Coleman v. FIGA, 517 So.2d, 686 (Fla. 1988).

- If Mr. Swan accepted and paid a reduced premium for non-stacked UM coverage on one car, but rejected UM coverage on the other car, then he and his wife would only be able to recover the UM limits only if they

were in the vehicle for which they purchased UM coverage. There would be no UM coverage whatsoever if they were occupying the vehicle that they did not purchase and pay a premium for UM coverage on.\

- Lastly, if, as in this case, Mr. Swan paid a premium for stacked coverage on one vehicle, but rejected UM coverage on the other vehicle, then it did not matter which vehicle he and his wife were occupying at the time of the accident. He and his wife would be entitled to the UM benefits under the policy regardless of which car they were occupying at the time of the accident. However, under Coleman, they would only be entitled to receive the $100,000 per person for a total of $200,000 under the policy for which UM coverage was paid for and not any benefits under the policy which UM benefits were rejected.

Allstate Insurance Co. v. Staszower, 61 So. 3d 1245 (Fla. 4th DCA 2011)

Allstate was joined as an uninsured motorist carrier. The verdict did not exceed the tortfeasor's primary liability limits. As such, the uninsured motorist insurer was the prevailing party and was entitled to its taxable costs. Additionally, the Fourth District found that the trial court erred in denying the insurer's Motion for Attorney's Fees made pursuant to Florida Statute §768.79 where Allstate made a good faith Proposal for Settlement in the amount of $100. At the time Allstate filed the Proposal; they had an IME report from a doctor that said that the Plaintiff had no permanent injury and needed no surgery. Thus, they could reasonably conclude that any resulting judgment would not exceed the underlying primary limits.