Trial Issues

Causation

Cox v. St. Joseph's Hospital, 71 So. 3d 795 (Fla. 2011)

This was an action against a hospital and a emergency room physician alleging that administration of tPA would have prevented or mitigated the devastating consequences of the Plaintiff's stroke. Reversing judgment for the Plaintiff, the appellate court erroneously reweighed legally sufficient evidence from the Plaintiff's expert witness that the administration of tPA, more likely than not, would have mitigated the damages of the Plaintiff's stroke. Although an expert cannot merely pronounce a conclusion that the negligent act more likely than not caused the injury, here, the Plaintiff's expert did not simply provide a summary conclusion without a factual basis.

Here, the Plaintiff's expert conducted a full review of the Plaintiff's medical records; provided a detailed analysis as to why she believed that the Plaintiff would have been an excellent candidate for tPA; and, based her testimony on her experience, relevant medical literature, and her knowledge about the facts and records involved in this case, including an in depth analysis of the CT scan at issue. The Defendant had the opportunity to cross-examine the foundation of her opinion. During cross-examination, the expert expounded on the factual foundation for her opinion and in fact, explained during cross-examination that she disagreed with defense counsel's characterization of authoritative studies. It was therefore within the juries' province to evaluate the expert's credibility and weigh her testimony.

Continuance

Garner v. Langford, 55 So. 3d 711 (Fla. 1st DCA 2011)

The trial court abused its discretion in denying a Plaintiff's Motion for Continuance in order to secure the appearance of a witness for purposes of trial where the Plaintiff's attorney withdrew due to illness and the defense did not oppose the continuance. The factors to be considered in determining whether a trial court abused its discretion in denying a Motion for Continuance include: (1) whether denial of the continuance creates an injustice for the movant; (2) whether the cause for the request for continuance was unforeseeable by the movant and not a result of dilatory practices; and, (3) whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.

Here, the witness became unavailable as a result of a move and the parties inability to locate the new address. The witness was critical to the prosecution of the case and a continuance was timely moved for. Moreover, illnesses to counsel and counsel's family members placed the Plaintiff in the position of having to retain new counsel immediately prior to trial without proper time to prepare resulting in injustice to the Plaintiff. As such, there was no good reason for the trial court to deny the motion, particularly considering that it was agreed to by the opposing party.

Directed Verdict

Fetterman and Associates v. Friedrich, 69 So. 3d 965 (Fla. 4th DCA 2011)

It was error to deny the Defendant's Motion for Directed Verdict where the evidence established that the Defendant had no prior knowledge that a chair was defective or that the chair had been repaired; the Plaintiff's expert admitted that he did not know when the repair work had been performed and that could it have occurred anytime between the date of the manufacture and the date of accident; the Plaintiff's expert opinioned that he inspected his own office chairs every six months and that periodic inspections of office chairs was reasonable; and, although the expert testified that a flex test would have revealed a defect in the chair, the expert provided no timeframe concerning how long before the accident such testing would have been effective. Here, there was a lack of evidence establishing when the flex text would have revealed the defect in the chair prior to the injury which was an indispensible factor in determining liability. There was therefore, a lack of proof establishing a causal connection between the alleged failure to periodically conduct the flex testing and the accident itself.

Grider-Garcia v. State Farm Mutual Automobile Insurance Company, 73 So. 3d 847 (Fla. 5th DCA 2011)

The Fifth District determined that the trial court's granting of a directed verdict because the insured failed to introduce the relevant insurance policy as evidence in the trial was an abuse of discretion. The fact that the policy had never been formally introduced into evidence was first brought up during the Defendant's Motion for Directed Verdict at which time the policy holder's attorney moved the court to reopen the case for the purpose of introducing the policy which the trial court denied.

As a general rule, the Fifth District noted that the trial court has broad discretion to allow the party to reopen its case to present additional evidence whether it does so after a party rests, after the close of all evidence, or even after having a directed verdict for one of the parties entered into. In this case, the Plaintiff's attorney, while incorrect, was not unreasonable in believing that the policy attached to the complaint would be considered evidence and given the fact that the policy terms was litigated extensively throughout the course of the discovery and trial, it would not be prejudicial to the carrier if the court allowed the Plaintiff's counsel to reopen its case briefly to go through the formality of introducing the policy as evidence.

Juror Interviews

Parra v. Cruz, 59 So. 3d 211 (Fla. 3d DCA 2011)

The trial court found that various jurors failed to disclose their litigation histories and, on this basis, granted post-trial juror interviews. The Third District quashed the order permitting juror interviews. In so doing, they found that jurors' litigation history must be "relevant and material to jury service in the case" in question. In this automobile negligence action, the Third District found that prior litigation involving divorces, paternity actions; contract indebtedness actions, eviction proceedings; probate proceedings and criminal matters were not material to the jury service in that case.

Simon v. Maldonado, 65 So. 3d 8 (Fla. 3d DCA 2011)

A juror failed to disclose some details of her prior litigation history including two liens, minor-collection related suits and two mortgage foreclosures. The hospital lien was more than eleven years before the trial and was never shown to be against the juror individually. A contractor roof repair lien was resolved without litigation and involvement of attorneys. A 6-year old subrogation suit brought against the juror's husband without her knowledge, as well as an AT&T bill with a stipulation for payment were not material. The foreclosure actions did not show that service was affected or that they were filed until after jury selection. Additionally, another juror who was involved in an automobile accident which resulted in a lawsuit was seated on the jury. In this case, the Third District found that the failure to disclose this information was not material to service on this jury.

State Farm v. Lawrence, 65 So. 3d 52 (Fla. 2d DCA 2011)

The appellate court held that the trial court abused its discretion by denying an insurer's motion to interview three jurors, post trial, based on their alleged failure to disclose personal automobile insurance claims history during voir dire. It was determined that ISO claims history reports on the jurors were not sufficient themselves to require a new trial. However, the ISO claims reports were sufficient to provide reasonable grounds to believe that the jurors may have concealed relevant and material information during voir dire to justify the request for juror interviews. The appellant court instructed the trial court on remand that, if it was determined after the juror interviews were conducted that the jurors in fact concealed relevant and material information, the trial court would then be in a position to determine whether the insurer was entitled to a new trial.

Gamsen v. State Farm, 68 So. 3d 290 (Fla. 4th DCA 2011)

This case involved a Motion for New Trial filed by the Defendant uninsured motorist carrier on grounds that two jurors had failed to disclosed their involvement in prior litigation. The Fourth District held that the trial court abused its discretion in granting the Motion for New Trial where it was unclear that either juror intended to conceal prior litigation answering "no" to general questions during voir dire about whether they had been "in court". Both jurors admitted some litigation history, however, the uninsured motorist attorneys did not do their due diligence of asking questions to develop information that may have caused defense counsel to challenge them. Moreover, one of the two juror's previous litigation involved a case dissimilar from the case at issue and was also remote in time. Hence, the prior litigation was immaterial to jury service in the present case.

There is a three part test used to evaluate juror nondisclosure in the count of a Motion for New Trial. The complaining party must establish that: (1) the information is relevant and material to jury service; (2) the juror concealed the information during question; and, (3) the failure to disclose the information was not attributable to the complaining parties' lack of diligence.

Here, while the Defendant uninsured motorist carrier did not have the benefit of all of the litigation history of these two jurors, there was no evidence of an act of concealment and no evidence of diligence on the part of counsel to seek additional information. It was therefore, an abuse of discretion to grant the Motion for New Trial.

New Trial

Central Square Tarragon, LLC v. Great Divide Insurance Company, 36 FLW D1467 (Fla. 4th DCA 7/6/11)

The Plaintiff purchased a property from Great Divide's named insured. As part of the purchase, the named insured added the purchaser to the insurance policy. Thereafter, Hurricane Wilma destroyed the property and the purchaser/assignee made a claim with the insurance company which was partially paid. Because it did not cover the entire claim, the purchaser filed a Complaint against the insurer. Prior to trial, a joint pretrial stipulation was entered in which the parties essentially admitted that the only dispute was the insurer's payment was sufficient to cover the damages sustained. Stipulated facts included that the named insured had assigned its rights to the insurance proceeds to the purchaser/assignee and that the insurance company had issued a payment to the purchaser/assignee prior to trial. Therefore, the only issues at trial were to be whether there was a breach of the contract and the amount of any covered damages not previously paid.

Prior to trial, the insurance company filed a Motion in Limine to exclude evidence concerning its underwriting file arguing that it had already paid proceeds to the purchaser/assignee making the only remaining issue whether the payment was sufficient. During opening statement, counsel for the insurance company conceded the purchaser's entitlement to the insurance proceeds. Nevertheless, at the close of the Plaintiff's case, the insurer moved for directed verdict arguing that the purchaser had failed to prove the existence of the assignment. The trial court denied the motion. At the close of the Defendant's evidence, they renewed the Motion for Directed Verdict which the court denied. Nevertheless, the court found that the existence of a valid assignment was a jury question and specifically instructed the jury on this issue. The jury then found that there was no valid assignment thereby ending its deliberations. The trial court denied the Motion for New Trial and the Fourth District reversed finding that the trial court and defense counsel had impermissibly abandoned the stipulation adding that "our system of justice depends upon lawyers as officers of the court. Here, insurance counsel abandoned that role and engaged in gamesmanship by failing to honor the stipulation. That conduct deprived the purchaser of a fair trial; and justice requires a new trial."

Cascanet v. Allen, 36 FLW D1776 (Fla. 5th DCA 8/12/11)

This was an action arising out of an automobile accident in which the Plaintiff suffered herniated discs in his spine resulting in chronic pain likely to require surgery to alleviate the problem because non-surgical methods had been ineffective. It was held that the trial court erred in allowing a doctor hired to perform an independent medical examination by the Defendant to testify that "many studies" had shown spontaneous recovery of disc herniations and that there were other possible causes of the Plaintiff's pain where these opinions were not reflected in the doctor's IME report or his written addendum. Because these opinions were not disclosed, the Plaintiff's attorney could not have been prepared to rebut or effectively cross-examine the doctor on those theories where the IME unambiguously confirmed the diagnosis of herniated discs and that there was little more that could be done from a conservative standpoint.

Furthermore, it was also held on appeal that the trial court abused its discretion in allowing defense counsel to ask whether it was "fair" to "burden" the Defendant with a substantial damage award and state that it was "a bad day for her as well" during closing arguments where such arguments were nothing more than an attempt to conjure sympathy for the young Defendant to reduce the damage award by improperly asking the jury to weigh the effect of a substantial award on her.

The impact of the improper jury argument was readily discernable from the fact that the jury awarded the Plaintiff almost the exact amount defense counsel said was a "fair burden" and by the jury's failure to award future economic and non-economic damages. The case was reversed and remanded for a new trial. The court noted that a party is prohibited from currying sympathy from the jury for a favorable verdict in asking the jury to consider the economic status of either party or the potential impact a substantial verdict would have on a party.

State Farm Mutual v. Swindoll, 36 FLW D2718 (Fla. 3d DCA 12/14/11)

Swindoll was involved in an automobile accident and allegedly injured his neck. Following the accident, he sought treatment from various physicians for which State Farm paid $10,000 in PIP benefits and an additional $5,000 in Med Pay benefits. It refused, however, to pay further sums under the uninsured motorist portion of the policy claiming that the medical treatment for which he sought payment did not stem from injuries incurred in the automobile accident. At trial, over objection, the trial court allowed the State Farm claims adjuster to be

questioned regarding the policy and interaction between PIP, Med Pay and UM coverages. With reference to the PIP benefits, the Plaintiff was allowed to repeatedly elicit testimony from the adjuster that PIP benefits were payable for those medical services which were reasonable, necessary and related to the accident. As a result, the Plaintiff's counsel then suggested that UM benefits were payable upon exhaustion of PIP and Med Pay benefits. The Third District held that evidence regarding the standard for payment of an insurer's payment of PIP benefits is irrelevant when determining the propriety of payment of the UM benefits. Additionally, they noted that no evidence of payment of Med Pay benefits should have been elicited at trial because Med Pay benefits are a "collateral source to which the general collateral source statute is applicable." Accordingly, a new trial was granted.

Morton's of Chicago/North Miami Beach, LLC v. Bermudez, 53 So. 3d 69 (Fla. 3d DCA 2011)

The Third District set aside a trial court's granting of a motion for a new trial and reinstated the jury verdict finding *Morton's* not liable for a slip and fall accident in its restaurant. Prior to trial, the trial court granted a motion in limine precluding the plaintiff's safety expert to testify that they observed construction deviations violating the life safety code in the ADA at trial. However, the Third District found that the uncontroverted evidence was that the plaintiff who was 84-years old fell at an area completely away from any of the proffered construction deviations in the life safety code, and the proffered testimony of the experts of these violations were irrelevant. Therefore, the Third District noted that the trial court's initial analysis and pretrial ruling excluding such testimony was correct and his subsequent change of position allowing for a new trial on the basis of this evidence was in error.

Parrish v. The City of Orlando, 53 So. 3d 1199 (Fla. 5th DCA 2011)

The Plaintiff and her husband were walking to a Citrus Bowl football game when she tripped and fell on an uneven sidewalk seriously injuring her left shoulder. The City of Orlando was responsible for the maintenance of the sidewalk and accordingly, the city was sued as a Defendant. As a result of her fall, the Plaintiff treated with several orthopedic surgeons for a comminuted proximal humeral fracture of her left shoulder. She required several subsequent surgeries and developed a nerve palsy. The testimony at trial was undisputed that the Plaintiff suffered a permanent injury as a result of the fall. Neither permanency nor causation were disputed at the time of trial.

The jury returned a verdict awarding past economic damages and future economic damages. There was no award for past or future non-economic damages. The Plaintiffs filed a Motion of Additur which was denied.

On appeal, The City of Orlando properly conceded error as to past non-economic damages. However, the City argued forth that Florida law permits an award of future economic damages with no corresponding award for future non-economic damages. The appellate court found this to be true. However, when medical evidence on permanence or causation is undisputed, unimpeached or not otherwise subject to question based on other evidence presented at trial, the jury is not free ignore or arbitrarily reject the evidence and render a verdict in conflict with it.

The failure to make an award for future non-economic damages is unreasonable when there is undisputed evidence of permanent injury and the need for treatment in the future. In light of the undisputed and unimpeached evidence, the jury verdict awarding no past or future non-economic damages was against the manifest weight of the evidence and a new trial on the issue of damages was required.

Peterson v. Sun State International Trucks, LLC, 56 So. 3d 840 (Fla. 2d DCA 2011)

A jury found that the Plaintiff had sustained a permanent injury as a result of an automobile accident. The jury awarded the Plaintiff damages, but failed to award the Plaintiff's husband any damages on his loss of consortium claim. Because the Plaintiffs presented substantial, unrebutted testimony concerning the adverse affect that the Plaintiff's injuries had on their marital life, the Plaintiff's husband was entitled to an award of at least nominal damages on his claim. The trial court's order was reversed in part and the case was remanded for a new trial limited to the issue of the amount of the Plaintiff's husband's damages for loss of consortium.

Jackson v. Pena, 58 So. 3d 303 (Fla. 5th DCA 2011)

The Defendant's attorney repeatedly disregarded the trial judge's instructions not to use the terms "guilty" or "innocent" when questioning witnesses or addressing the jury with regard to the issue of the Defendant's standard of care. On appeal, the Court held that reversal of the verdict against the Plaintiffs was not

required. The Court found that it was highly unlikely that defense counsel's comments affected the jury verdict, particularly given that the trial court corrected defense counsel in the jury's presence and gave timely curative instructions to the jury and properly instructed the jury on the burden of proof at the conclusion of trial. The Court noted that, while an attorney's misconduct may not rise to the level of reversible error, such conduct be eliminated because it lowers the profession reputation of the bar and brings disrepute to the judicial system.

Schmidt v. Van, 65 So. 3d 1105 (Fla. 1st DCA 2011)

The trial court abused its discretion in awarding the Plaintiff a new trial upon determining that the jury verdict for the Defendant, finding that the Plaintiff had not suffered an injury as a result of an automobile accident, was against the manifest weight of the evidence. The trial court erroneously concluded that the jury could not reject testimony of expert medical witnesses who opined that the Plaintiff's injury and resulting surgery were caused, at least in part, by an automobile accident, despite conflicting lay testimony.

A jury is entitled to reject expert testimony so long as that rejection is based on some reasonable basis in the evidence and conflicting lay testimony and evidence in the case provided a reasonable basis for the rejection of such expert testimony. By failing to recognize the juries' prerogative to reject the expert testimony on causation, particularly in light of the lay testimony which conflicted with expert testimony, the trial court erred in concluding that the manifest weight of the evidence was contrary to the jury verdict.

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.

Durse v. Henn, 68 So. 3d 271 (Fla. 4th DCA 2011)

Here, the trial court abused its discretion in allowing the investigating officer to testify as to which car caused the first impact where the officer did not perform any kind of test to determine the first impact but instead relied primarily on statements taken at the scene of the accident. The issue was preserved for appeal when the Defendant objected to the police officer testifying to statements given by drivers at the scene of the accident, which was granted, yet overruled as to the Defendant's objection to prevent the police officer from testifying as to his opinion who caused the first impact. There was no need to move for mistrial to preserve the issue because it was preserved by way of the Defendant's objection and same being overruled.

On appeal, it was also determined that the trial court erred in excluding the Plaintiff's medical bills showing the full amount of charges even though the Plaintiff was not obligated to pay those full amounts. While the Plaintiff did not have health insurance, by negotiating a lower amount the Plaintiff had "earned in some way" the lowered final amount of his medical bills and thus was entitled to present the full amount to the jury subject to set-off post trial.

Gamsen v. State Farm, 68 So. 3d 290 (Fla. 4th DCA 2011)

This case involved a Motion for New Trial filed by the Defendant uninsured motorist carrier on grounds that two jurors had failed to disclosed their involvement in prior litigation. The Fourth District held that the trial court abused its discretion in granting the Motion for New Trial where it was unclear that either juror intended to conceal prior litigation answering "no" to general questions during voir dire about whether they had been "in court". Both jurors admitted some litigation history, however, the uninsured motorist attorneys did not do their due diligence of asking questions to develop information that may have caused defense counsel to challenge them. Moreover, one of the two juror's previous litigation involved a case dissimilar from the case at issue and was also remote in time. Hence, the prior litigation was immaterial to jury service in the present case.

There is a three part test used to evaluate juror nondisclosure in the count of a Motion for New Trial. The complaining party must establish that: (1) the information is relevant and material to jury service; (2) the juror concealed the information during question; and, (3) the failure to disclose the information was not attributable to the complaining parties' lack of diligence.

Here, while the Defendant uninsured motorist carrier did not have the benefit of all of the litigation history of these two jurors, there was no evidence of an act of concealment and no evidence of diligence on the part of counsel to seek additional information. It was therefore, an abuse of discretion to grant the Motion for New Trial.

Spalding v. Zatz, 70 So. 3d 692 (Fla. 5th DCA 2011)

The trial court granted a new trial on the basis that the defense expert's trial testimony materially varied from the deposition that he gave. The Fifth District reversed the granting of the new trial because Plaintiff did not make a contemporaneous objection to the testimony, failed to timely move for a mistrial and instead crossed-examined the expert regarding the change in testimony and

focused on that change in testimony in closing argument. Furthermore, the Fifth District found that this did not rise to the level of fundamental error because the Plaintiff could not claim surprise of the expert's trial opinions because the Plaintiff had actually sought to exclude these opinions on other grounds by way of a Motion in Limine. Furthermore, the Plaintiff was already prepared to address the topic of the trial opinion with evidence because the issue was already being addressed by other defense experts.

Harris v. Grunow, 71 So. 3d 186 (Fla. 3d DCA 2011)

Two trial related evidentiary issues formed the subject of this appeal. First, a Motion in Limine was granted by the trial court precluding evidence regarding settlements with former party Defendants. At trial, the Plaintiff's attorney questioned an employee of a former party to the litigation as to whether he was concerned whether his employer would be pulled into the case. The employee responded "we already were at that point." Neither the question nor the answer indicated that there had been a settlement or dismissal. The court noted that it is Florida's public police to encourage settlements and to eliminate from the jury's minds the considerations that where there has been payment there must be liability. To this end, a release or covenant not to sue, or that any Defendant who has been dismissed by order of court cannot be offered into evidence or disclosed at the jury. On appeal, it was held that neither the applicable Florida Statues nor the questions elicited at trial constituted evidence of a settlement, compromise, release or dismissal of the claim. The jury had no knowledge that any prior party had settled the claim or been dismissed or that the Plaintiff had received payment for such claim. Thus, the questions were proper.

The second issue dealt with statements during closing arguments as to "missing witnesses." It was alleged that the Defendants impermissibly argued that the Plaintiffs failed to produce certain witnesses at trial. The Plaintiffs did not object to references to persons identified during the testimony of other witnesses but not called at trial and no Motion for Mistrial was made regarding the allegedly improper argument. The appellate court noted that there are four requirements for granting relief in a civil case based on allegedly improper, but unobjected to, closing arguments: (1) the argument must be improper; (2) the argument must be so highly prejudicial and as such collective impact as to gravely impair a fair consideration and determination by the jury; (3) the improper argument must be incurable; and, (4) the complaining party must show that the argument so damaged the fairness of the trial that the public's interest in the system of justice requires a

new trial. Here, even if the comments were improper, the other three requirements were not met.

New Trial – Closing Argument

Cascanet v. Allen, 36 FLW D1776 (Fla. 5th DCA 8/12/11)

This was an action arising out of an automobile accident in which the Plaintiff suffered herniated discs in his spine resulting in chronic pain likely to require surgery to alleviate the problem because non-surgical methods had been ineffective. It was held that the trial court erred in allowing a doctor hired to perform an independent medical examination by the Defendant to testify that "many studies" had shown spontaneous recovery of disc herniations and that there were other possible causes of the Plaintiff's pain where these opinions were not reflected in the doctor's IME report or his written addendum. Because these opinions were not disclosed, the Plaintiff's attorney could not have been prepared to rebut or effectively cross-examine the doctor on those theories where the IME unambiguously confirmed the diagnosis of herniated discs and that there was little more that could be done from a conservative standpoint.

Furthermore, it was also held on appeal that the trial court abused its discretion in allowing defense counsel to ask whether it was "fair" to "burden" the Defendant with a substantial damage award and state that it was "a bad day for her as well" during closing arguments where such arguments were nothing more than an attempt to conjure sympathy for the young Defendant to reduce the damage award by improperly asking the jury to weigh the effect of a substantial award on her.

The impact of the improper jury argument was readily discernable from the fact that the jury awarded the Plaintiff almost the exact amount defense counsel said was a "fair burden" and by the jury's failure to award future economic and non-economic damages. The case was reversed and remanded for a new trial. The court noted that a party is prohibited from currying sympathy from the jury for a favorable verdict in asking the jury to consider the economic status of either party or the potential impact a substantial verdict would have on a party.

Linzy v. Rayburn, 58 So. 3d 424 (Fla. 1st DCA 2011)

During opening statements, defense counsel introduced the owner of his corporate client and noted that this individual did not try to run away from

responsibility for the accident and admitted fault. He then argued that the Plaintiff wanted his individual client to pay for his injuries, including some which had occurred in the past. During trial, the Plaintiffs filed a Motion in Limine to prevent defense counsel from making any statements during closing arguments that this individual would be solely responsible for paying any damages awarded because the Defendants were represented by insurance company counsel, would be covered by their policy and that this argument would be misleading. During closing argument, defense counsel stated that "Mr. Crews is being asked to pay for a lifetime of pain management …". Defense counsel continued making further comments in this regard whereupon the Plaintiffs objected and moved for a mistrial. The judge took the motion under advisement and admonished defense counsel. Eventually, a verdict was rendered for the Defendant. The trial court then granted a Motion for New Trial. The First District affirmed the granting of the new trial noting that "despite the fact that Mr. Crews was not a named Defendant in the case and that defense counsel was retained by an insurance company to represent the Defendant, defense counsel repeatedly stated that Mr. Crews would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy for Mr. Crews."

Ring Power Corporation v. Rosier, 67 So. 3d 1115 (Fla. 1st DCA 2011)

The Plaintiff underwent bilateral amputations of his legs after brake failure on a backhoe loader caused him to be pinned up against the brick wall. During closing argument, defense counsel referred to exculpatory language in the customer service agreement. The Plaintiff did not object to the argument or move for a mistrial. Thus, the District Court noted that a motion for new trial could only be granted if the argument rose to the level of fundamental error. As such, they determined that the argument did not rise to the level of fundamental error because the argument was not improper, harmless, incurable or damaging. The customer service agreement was a joint exhibit introduced by the parties and the Plaintiff never requested the redaction of any portion of the agreement. Thus, it was not improper for defense counsel to read from the agreement in his closing argument.

Harris v. Grunow, 71 So. 3d 186 (Fla. 3d DCA 2011)

Two trial related evidentiary issues formed the subject of this appeal. First, a Motion in Limine was granted by the trial court precluding evidence regarding settlements with former party Defendants. At trial, the Plaintiff's attorney questioned an employee of a former party to the litigation as to whether he was

concerned whether his employer would be pulled into the case. The employee responded "we already were at that point." Neither the question nor the answer indicated that there had been a settlement or dismissal. The court noted that it is Florida's public police to encourage settlements and to eliminate from the jury's minds the considerations that where there has been payment there must be liability. To this end, a release or covenant not to sue, or that any Defendant who has been dismissed by order of court cannot be offered into evidence or disclosed at the jury. On appeal, it was held that neither the applicable Florida Statues nor the questions elicited at trial constituted evidence of a settlement, compromise, release or dismissal of the claim. The jury had no knowledge that any prior party had settled the claim or been dismissed or that the Plaintiff had received payment for such claim. Thus, the questions were proper.

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New Trial – Juror Misconduct

Alonso v. Ford Motor Company, 54 So. 3d 562 (Fla. 3d DCA 2011)

Plaintiff moved for a new trial alleging that one of the jurors was intoxicated at one or more points during the trial. The trial court conducted an inquiry into it and denied the Motion for New Trial. One juror indicated that another jury had been intoxicated but the comments were based upon subjective impressions and hearsay comments purportedly made by other jurors. The juror never saw his fellow juror drink any alcoholic beverage. A second juror also testified that the juror in question smelled of liquor on two occasions, but did not appear intoxicated, but admitted that he never saw the juror in question drinking or fall

asleep during the trial. The Third District affirmed the denial of the new trial noting that none of the jurors or any other witness saw the juror in question consume an alcoholic beverage whether at lunch or at any other point during the trial and counsel for the Appellant never accepted the suggestion that they interview the juror in question. Further, there was no proof that the juror's conduct during trial actually influenced the verdict rendered.

Hicks v. Wipperfurth, 73 So. 3d 297 (Fla. 5th DCA 2011)

This case involved a motor vehicle accident. Following a verdict for the Defendant, the Plaintiff moved for a new trial alleging a juror's non-disclosure of a prior felony conviction and that he had been involved in several automobile accidents in the past. Further, one of the accidents occurred fewer than 2 years before the trial and the juror was found to be at fault for improperly changing lanes. The trial court granted the Motion for New Trial finding that had Plaintiff's counsel known of the undisclosed information; it "may well have led to a peremptory challenge." The Fifth District noted that this was not the proper standard and that they were inclined to reverse and remand the matter to the trial court for a determination as to whether a new trial should be granted based upon the proper standard; however, the parties agreed at Oral Argument that the District Court was in just as good of a position as the trial court to determine whether a new trial was appropriate under the circumstances. Thus, the appellate court found that the undisclosed information prevented counsel from making an informed judgment which in all likelihood would have resulted in a peremptory challenge. Therefore, they affirmed the granting of the new trial.

New Trial – Surprise Evidence/Testimony

Thompson v. Wal-Mart Stores, Inc., 60 So. 3d 440 (Fla. 3d DCA 2011)

Wal-Mart retained an expert who testified, in deposition, that the surgeries which the patient underwent were unnecessary, except for an arthroscopy. The night before the last day of trial, Wal-Mart provided the Plaintiff with a 45 slide power point presentation entitled "Understanding Wrist Fractures" that the expert was going to use to testify. The Plaintiff objected to this arguing that there would be no time for her own experts to evaluate them. The court allowed the testimony over objection. The expert also changed his testimony and stated that even the arthroscopy was unrelated to the accident. The Third District reversed finding that the trial court abused its discretion when it allowed the expert's surprise testimony

and his power point slides, neither of which had been disclosed to the Plaintiff prior to the last day of trial.

Peremptory Challenges

Szymanski v. Cardiovascular Associates of Lake County, 62 So. 3d 649 (Fla. 5th DCA 2011)

The Fifth District reversed for a new trial finding that the trial court erred by not allowing the Plaintiffs to use the remaining preemptory challenges to back strike members of the original jury after alternates were chosen. In this case, six potential jurors were picked and, before the alternates were selected, the Defendant requested that the Plaintiffs either waive any remaining peremptory challenges or the trial court swear in the jurors at that time. The trial court eventually acceded to the Defendant's request and the Fifth District reversed for a new trial.

Witness Misconduct

State Farm Mutual Auto Insurance v. Swindoll, 54 So. 3d 548 (Fla. 3d DCA 2011)

The Third District reversed an order granting an award of sanctions, including attorney's fees against *State Farm* because its expert witness' comment caused a mistrial. The Court held that sanctions against the part were not warranted when there was nothing the carrier or its counsel said or did in bad faith that led to the mistrial.

The court found that the orthopedic surgeon expert stating that "the plaintiff will no longer claim injury the day after trial is concluded" justified the mistrial and the Appellate Court added that the plaintiff had a right to seek the imposition of sanction against the physician personally at a subsequent hearing after remand. The trial transcript showed that the court repeatedly warned the physician not to be combative and make extraneous comments despite having testified in hundreds/thousands of cases over the years. Therefore, they found the physician should have known better. The original basis for granting the sanction against *State Farm* was that its counsel should have had better control over its witnesses, however, the Third District disagreed finding that the expert witnesses' improper testimony could not be the basis for an award of sanctions against the party or the attorney, and only he would have to answer to his improper comments before the jury.