Trial Issues

Admission against interest

Ring Power Court v. Condado-Perez, 219 So. 3d 1028 (Fla. 2d DCA 2017)

The Second District held that the trial court abused its discretion by excluding from evidence statements made by the Plaintiff to emergency medical technicians at the accident scene and contained in the EMS report in which "husband states he swerved to avoid a mattress in the road and lost control of the car and went off the road." The Second District held that the evidence was admissible as an admission and that the excluded evidence was not harmless error. Therefore, the Defendant was entitled to a new trial on liability.

Admission of liability

GEICO General Insurance Company v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017)

This case involved an uninsured motorist who was intoxicated. Both the uninsured motorist carrier and the Co-Defendant driver admitted liability. The court ordered that the Plaintiff could seek punitive damages against the driver. During the compensatory portion of the trial, the trial court allowed the Plaintiff to introduce evidence of the driver's intoxication. The Third District held that this was error because when a Defendant admits liability regarding the cause of the accident, evidence of the Defendant's drinking is irrelevant and prejudicial. The Third District also held that there was insufficient evidence to sustain the claim for future economic damages. In this case, the only evidence that the Plaintiff presented to support his claim for future medical expenses consisted of his testimony that, at the time of the trial, he was taking a prescription drug to detoxify himself from an opiate addiction. The evidence was unclear as to whether the addiction had any relationship to the accident. Further, there was a complete absence of any testimony which would show with reasonable certainty how long the Plaintiff would need to take the drug.

Alcohol

Stewart v. Draleaus, 226 So. 3d 990 (Fla. 4th DCA 2017)

In this motorcycle accident case, there was wildly conflicting testimony of how the accident occurred. One version was that the Defendant driver challenged the motorcyclist to a race. Another was that the Defendant had revved his engine

as a warning to the motorcyclist and then he saw one of the cyclists attempt to turn and did so directly into the path of another causing them to collide and hit a curb. There was also independent witness testimony that the motorcyclist and the Defendant were traveling 100 miles per hour and another witness who testified that the vehicles were traveling 55 to 60 miles per hour and that the car was nowhere near the motorcycle when one of the wheels began to wobble and then crash. There was yet another witness, a minor, who was involved in a fender bender shortly after the accident. She testified that she did not see the accident because a truck was traveling in front of her, but she saw the motorcycle speeding and weaving in and out of traffic before the accident occurred. When the truck turned on to an intersecting street, she saw three people laying on the road and on the sidewalk and she had to swerve to avoid them at which point she hit a car that was pulled over to render aid to the Plaintiffs.

The Plaintiffs moved in limine to keep out a minor witness' prior inconsistent statement where she told the police officers that she saw one of the motorcyclists move into the other motorcyclist's lane and make contact with it arguing that the statement was protected by the accident report privilege. The trial court excluded the testimony of the minor based upon that privilege. The Fourth District pointed out that the immunity provided by the accident report privilege is not extended to witnesses because they have no obligation to provide a statement to law enforcement. The Fourth District found that the trial court erred in excluding in the statement under the theory that the second accident was part and parcel of the first accident. The Fourth District found that conclusion erroneous because neither the minor witness nor the vehicle she struck had collided with the Plaintiffs, their motorcycles or any of the debris from the accident. Additionally, the investigating officer who obtained the minor's statement indicated in his proffered testimony that he was investigating only the motorcycle accident and not the minor's accident. In fact, the minor's accident was memorialized in a separate report authored by a different officer.

The trial court also excluded evidence of the Plaintiff's pre-accident alcohol consumption. Recognizing the inflammatory effects of a party's use of alcohol in the context of a car accident, the jury is still supposed to hear the totality of fault of each side and the specific acts of negligence of each party even when liability is admitted. In this case, one Plaintiff admitted that he had two drinks between 7:30 p.m. and 10:30 p.m. which meant he could have been drinking up to 48 minutes before the accident which happened at 11:18 p.m. A responding officer also smelled alcohol on one of the motorcyclists and one of the defense experts testified

that even small quantities of alcohol can impair a motorcycle operator's perception of events.

Because the evidence conclusively established that at least some of the Plaintiffs were drinking prior to the accident, the Fourth District ruled that the issue as to whether alcohol consumption was a contributing factor should have been admitted and made a question of fact for the jury. The Fourth District also ruled that the Defendant would be permitted to pursue his defense under Florida Statute 768.36 when the case was retried. This statute prohibits the Plaintiff from recovering damages for his or her own injuries when the Plaintiff was under the influence of alcohol or drugs to the extent that normal faculties were impaired or the blood alcohol level was .08% or higher and the Plaintiff was more than 50% responsible for his or her own harm.

Lastly, the Plaintiff successfully excluded evidence that one of the Plaintiffs had not taken a required examination and therefore only possessed a temporary motorcycle license that did not allow him to carry passengers. The Judge ruled a violation in this case was irrelevant because failure to take the requisite test and obtain the permit and license did not suggest negligence in the subject accident. The Fourth District stated that the vast majority of jurisdictions hold that a violation of a driver's license law is not evidence of negligence in the absence of some casual connection between the violation and the injury; however, in some situations the violation of a restriction may be relevant to show a driver's inexperience and incompetence.

Closing argument

Vickers v. Thomas, 43 FLWD 28 (5th DCA 12/22/17)

The Fifth District upheld the award for Plaintiff's future medical expenses finding that the evidence established the expenses with reasonable certainty. Conversely, the evidence was insufficient to support an award for loss of future earning capacity because the evidence revolved around the Plaintiff's fear of losing her job as opposed to diminished capacity to continue her employment. As such, the Fifth District remanded for remittitur a new trial on the issue of damages for loss of earning capacity.

They also highlighted that the Plaintiff had originally sought recovery for cervical, lumbar and shoulder injuries from the motor vehicle accident. Four days before the trial, she withdrew her claim for the shoulder injury and successfully obtained a ruling in Limine to prevent discussion of the withdrawn claim. During

the defense's case, the Defendant called an orthopedic surgeon specializing in shoulder surgery and he conducted a compulsory medical examination on the Plaintiff.

During closing arguments, the Plaintiff's counsel made several comments related to his qualifications as a shoulder specialist; questioning his ability to testify about cervical and lumbar injuries. The Plaintiff then attacked the defense counsel for electing to hire a shoulder specialist. The Defendant objected to this argument and it was sustained but the trial court incorrectly denied the request for a curative instruction according to the Fifth District. They added that a new trial was not warranted following an improper closing argument unless the statements were highly prejudicial, inflammatory and improper and here they did not find the statements to be so highly prejudicial and inflammatory so as to deny the Defendant a fair trial. As such, they found that the failure to give the curative instruction was harmless.

R.J. Reynolds Tobacco Company v. Robinson, 216 So. 3d 674 (Fla. 1st DCA 2017)

The First District reversed the trial court and determined that the Defendant was entitled to a new trial because of the Plaintiff's improper arguments which included suggesting that the Defendant was not accepting responsibility and characterizing its defense as a scheme to deceive the jury and otherwise disparaging the Defendant for defending itself. The court determined that the improper arguments were so highly prejudicial and inflammatory that they denied the Defendant to a fair trial.

Harrison v. Gregory, 221 So. 3d 1273 (Fla. 5th DCA 2017)

In this wrongful death action filed after a motor vehicle accident, the Fifth District ruled that the trial court correctly ruled that the statement "I just killed a kid" made by the driver of the vehicle to her sister was inadmissible pursuant to Florida Statute 90.403 because the probative value was substantially outweighed by the danger of unfair prejudice. At the same time, the District Court ruled that the trial court abused its discretion in failing to also exclude testimony of witness that heard the driver state on her cell phone that "I think I killed somebody."

The Fifth District also noted that the fact that the Plaintiff's accident reconstruction testified that the vehicle had been transported to the storage yard by "the insurance company" violated an order in limine which prevented the parties from mentioning the existence of insurance before the jury although this comment was the only time that the insurance company was referred to during the trial, the

District Court nonetheless found that reversal was required when combined by the Plaintiff's counsel during closing argument. Specifically, there was evidence and argument allowed that the decedent's impairment by use of cocaine and marijuana was a causal factor and, in fact, the verdict form presented the issue of drug impairment in the decedent's comparative negligence for resolution by the jury. In closing, the Plaintiff's counsel advised the jury that there would be no recovery for the decedent's parents if the decedent was found 50% or more at fault. When combined with the violation of the order in limine, the Fifth District ordered a new trial be had.

Rasinski v. McCoy, 227 So. 3d 201 (Fla. 5th DCA 2017)

The Fifth District ruled that the trial court erred in failing to grant a remittitur and new trial as to the Plaintiff's claim of loss of earning capacity where the Plaintiff testified that he continued to work after the accident earning the same hourly rate as he did before the accident. In fact, the Plaintiff did not even begin working for his current employer until after the accident. Because the Plaintiff failed to introduce "a monetary standard against which the jury could measure any future loss" the Fifth District reversed. Further, the Defendant requested that the trial court set off payments furnished by the Plaintiff's healthcare provider for which it released its lien and waived its subrogation rights. The trial court denied the motion on the basis that the Defendant could not argue for additional set-offs after presenting expert testimony to challenge the reasonableness of the Plaintiff's medical bills which resulted in the jury awarding a reduced award for past medical expenses. The Fifth District found that Defendant was entitled to a set off because the lien and subrogation rights had been waived. Lastly, the Fifth District refused to grant a new trial based upon closing argument because defense counsel did not object to same and the court found that the comments did not rise to the level of egregiousness which warranted a new trial based on *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, Fla. 2000).

The Las Olas Holding Company v. Demella, 228 So. 3d 97 (Fla. 4th DCA 2017)

The Plaintiff sued the Defendant hotel for negligence related to an accident in which an intoxicated driver drove her car into a wall of the hotel's cabana. This caused a collapse of the structure thereby killing the Plaintiff. In this accident, the driver swerved from the roadway, traveled across a sidewalk and through bushes before colliding with the cabana but still had enough force to cause collapse of the steel-reinforced concrete columns of the cabana. The Fourth District found that the trial court should have granted the hotel's Motion for Directed Verdict.

In doing so, they held that the evidence that the hotel was aware of the roadway's slight curve and that some speeding occurred on the roadway was legally insufficient to establish that the hotel knew or should have known that a dangerous condition existed on its own premises. Further, even if a dangerous condition existed on the hotel's premises of which it knew or should have known (i.e. the placement of the cabana) the hotel did not breach its affirmative duty to protect the users of the pool cabana from these dangers and that even if it did breach its duty, the Plaintiff's death was unequivocally attributable only to "an improbable freak accident."

Additionally, the Fourth District also criticized Plaintiff's counsel who stated during opening that "the reason why we are in this courtroom today is that this corporation has refused to accept any responsibility for its role in this death." After the trial court sustained an objection, the Plaintiff's lawyer then stated "they will look at everyone else's conduct but their own and these are defenses that are just attempts to avoid responsibility." Lastly, in closing argument, the Plaintiff's counsel talked about the "value of a human life" which is not an element of damages and is not the proper topic for a closing argument.

Compromise Verdict

FLNC, Inc. v. Ramos, 220 So. 3d 1220 (Fla. 5th DCA 2017)

The Fifth District found that a verdict entered in favor of the Plaintiff contained hallmarks of an improper compromise verdict where the liability was highly contested and the jury found the Defendant liable and awarded past medical expenses only but no non-economic damages. They held that the trial court properly ordered a new trial where the Plaintiff rejected an additur order by the trial court as a remedy for the compromise verdict; however, because liability and causation were both highly contested, they ordered that a new trial should include the trial on all issues including liability, causation and damages.

Directed Verdict

Ruiz v. Tenet Hialeah Healthsystem, Inc., 224 So. 3d 828 (Fla. 3d DCA 2017)

The Third District affirmed the trial court's granting of a directed verdict in favor of an anesthesiologist who conducted a pre-anesthesia evaluation of the patient who died of exsanguination during surgery because there was no competent, substantial evidence that the anesthesiologist's behavior fell below the

standard of care or that any breach of the standard of care more likely than not caused the patient's death.

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Davie Plaza, LLC v. Iordanoglu, 232 So. 3d 441 (Fla. 4th DCA 2017)

The Fourth District ruled that the trial court erred in denying the Defendant's Motion for Directed Verdict where the circumstantial evidence presented by the Plaintiff was insufficient to establish the cause of the fall or even precisely where the fall occurred. Further, they found that the evidence was insufficient to support an inference that the ladder was placed on a defect in the premises to the exclusion of all other equally reasonable inferences.

Evidence

Knight v. State of Florida, 217 So. 3d 1194 (Fla. 3d DCA 2017)

Following a conviction for sexual battery, the Defendant appealed arguing that the trial court committed error by allowing the victim to testify that she saw a therapist and couldn't go out at night in the days and weeks after the attack. The Defendant contended on appeal that the probative value of the evidence was substantially outweighed by its unfair prejudice and, therefore, was inadmissible under Florida Statute 90.403.

At trial, the Defendant objected on the basis that the evidence was irrelevant. The Third District ruled that because the Defendant did not object to the testimony based upon prejudice, the issue was not preserved for appeal and as a result, waived the right to make the claim on appeal.

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The Fifth District also noted that the fact that the Plaintiff's accident reconstruction testified that the vehicle had been transported to the storage yard by "the insurance company" violated an order in limine which prevented the parties from mentioning the existence of insurance before the jury although this comment was the only time that the insurance company was referred to during the trial, the

District Court nonetheless found that reversal was required when combined by the Plaintiff's counsel during closing argument. Specifically, there was evidence and argument allowed that the decedent's impairment by use of cocaine and marijuana was a causal factor and, in fact, the verdict form presented the issue of drug impairment in the decedent's comparative negligence for resolution by the jury. In closing, the Plaintiff's counsel advised the jury that there would be no recovery for the decedent's parents if the decedent was found 50% or more at fault. When combined with the violation of the order in limine, the Fifth District ordered a new trial be had.

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The Plaintiffs moved in limine to keep out a minor witness' prior inconsistent statement where she told the police officers that she saw one of the motorcyclists move into the other motorcyclist's lane and make contact with it arguing that the statement was protected by the accident report privilege. The trial court excluded the testimony of the minor based upon that privilege. The Fourth District pointed out that the immunity provided by the accident report privilege is not extended to witnesses because they have no obligation to provide a statement to law enforcement. The Fourth District found that the trial court erred in excluding in the statement under the theory that the second accident was part and parcel of the first accident. The Fourth District found that conclusion erroneous because neither the minor witness nor the vehicle she struck had collided with the Plaintiffs, their motorcycles or any of the debris from the accident. Additionally,

the investigating officer who obtained the minor's statement indicated in his proffered testimony that he was investigating only the motorcycle accident and not the minor's accident. In fact, the minor's accident was memorialized in a separate report authored by a different officer.

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Because the evidence conclusively established that at least some of the Plaintiffs were drinking prior to the accident, the Fourth District ruled that the issue as to whether alcohol consumption was a contributing factor should have been admitted and made a question of fact for the jury. The Fourth District also ruled that the Defendant would be permitted to pursue his defense under Florida Statute 768.36 when the case was retried. This statute prohibits the Plaintiff from recovering damages for his or her own injuries when the Plaintiff was under the influence of alcohol or drugs to the extent that normal faculties were impaired or the blood alcohol level was .08% or higher and the Plaintiff was more than 50% responsible for his or her own harm.

Lastly, the Plaintiff successfully excluded evidence that one of the Plaintiffs had not taken a required examination and therefore only possessed a temporary motorcycle license that did not allow him to carry passengers. The Judge ruled a violation in this case was irrelevant because failure to take the requisite test and obtain the permit and license did not suggest negligence in the subject accident. The Fourth District stated that the vast majority of jurisdictions hold that a violation of a driver's license law is not evidence of negligence in the absence of some casual connection between the violation and the injury; however, in some situations the violation of a restriction may be relevant to show a driver's inexperience and incompetence.

R.J. Reynolds Tobacco Company v. Ryan, 231 So. 3d 484 (Fla. 4th DCA 2017)

The Fourth District held that the Surgeon General's Reports were erroneously admitted into evidence and found that they were hearsay and not admissible as either public records or adoptive admissions. They also found that the reports were improperly being used to bolster the opinions of testifying experts.

Miami-Dade County v. Jones, 232 So. 3d 1127 (Fla. 3d DCA 2017)

The Third District held that the trial court erred in denying the County's post-trial Motion for Directed Verdict and Judgment Notwithstanding the Verdict finding the County liable for injuries sustained by the Plaintiff where she slipped and fell on a grease spot on County-owned sidewalk where the Plaintiff failed to introduce evidence that the County have actual or constructive knowledge of the dangerous condition. The Third District noted that there was no evidence in the record indicating how long the grease was present on the sidewalk. As the court noted "Jones failed to present any evidence that a grease spill occurred on the discolored sidewalk even once before Jones' fall, let alone with such frequency that the county should have known about it."

The Plaintiff also introduced evidence that County inspectors and employees were present in the area numerous times over a course of years; however, the Plaintiff did not introduce any evidence to suggest that there was grease on the sidewalk during any of these inspections which would have put the County on notice that the grease collection system employed by the adjacent restaurant was insufficient. The Third District also noted that the trial court erred in introducing County ordinances related to inspections and permits for public food establishments as evidence tending to show that the County had constructive notice of the grease spill.

The Third District noted that the mere fact that an ordinance may cover the subject of inspecting food establishments does not imply that the County had constructive knowledge of a dangerous condition created by a food establishment. Moreover, they concluded that the ordinances would only be relevant if they were introduced to show that the County should have had or failed to comply with its duty to inspect the barbeque stand; however, the County has sovereign immunity from liability for enforcing or failing to enforce its laws. Lastly, the Third District concluded that the trial court erred in allowing the Plaintiff to testify that the barbeque stand was owned and operated, in part, by off-duty County bus drivers. The Third District concluded that such testimony was irrelevant because the

County was not sued for its off-duty bus drivers who were clearly not acting within the scope of their employment.

Evidence of speed

Sajiun v. Hernandez, 226 So. 3d 875 (Fla. 4th DCA 2017)

A motorcyclist was killed after a collision with a truck driver. Following a verdict in favor of the Defendant, the Plaintiff appealed several evidentiary rulings which the Plaintiff contended required reversal either standing alone or when combined with the other rulings. At first, the trial court allowed a man sitting behind a privacy fence who only "heard" the motorcyclist proceeding on the adjacent road to testify that he believed the motorcyclist was speeding. It should be noted that the witness had operated a motorcycle since 1980 and could tell the difference between sounds emitted by the engines of a Japanese motorcycle and a Harley Davidson. The court allowed this testimony because two other defense witnesses, a mother and a daughter who were traveling together, encountered the motorcycle and testified that the noise of the engine drew their attention and that they commented to each other about how fast the motorcycle was going and that he had been cutting off cars.

The case also involved the psychotherapist-patient privilege. The Plaintiff's suit sought damages for pain and suffering and the trial court entered an agreed order allowing a Motion to Compel Production of the records of the psychotherapist who treated one of the children. Subsequently, the Plaintiff listed the records as a trial exhibit. At trial, the Plaintiff withdrew the mental anguish claim and argued for the reinstatement of the psychotherapist-patient privilege; however, the jury instruction included an instruction on pain and suffering. It is questionable as to whether that was wrong because the courts have ruled other non-economic damages besides mental anguish may be pursued without putting the Plaintiff's mental health at issue. Eventually, the Fourth District ruled that pursuant to Florida Statute 90.507, the voluntary disclosure of the records waived the privilege even though they noted that the waiver of the privilege itself was not irrevocable. That said, once the information was disclosed, the privilege ceases to exist.

Failure to object

Knight v. State of Florida, 217 So. 3d 1194 (Fla. 3d DCA 2017)

Following a conviction for sexual battery, the Defendant appealed arguing that the trial court committed error by allowing the victim to testify that she saw a therapist and couldn't go out at night in the days and weeks after the attack. The Defendant contended on appeal that the probative value of the evidence was substantially outweighed by its unfair prejudice and, therefore, was inadmissible under Florida Statute 90.403.

At trial, the Defendant objected on the basis that the evidence was irrelevant. The Third District ruled that because the Defendant did not object to the testimony based upon prejudice, the issue was not preserved for appeal and as a result, waived the right to make the claim on appeal.

Future medical expenses

GEICO General Insurance Company v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017)

This case involved an uninsured motorist who was intoxicated. Both the uninsured motorist carrier and the Co-Defendant driver admitted liability. The court ordered that the Plaintiff could seek punitive damages against the driver. During the compensatory portion of the trial, the trial court allowed the Plaintiff to introduce evidence of the driver's intoxication. The Third District held that this was error because when a Defendant admits liability regarding the cause of the accident, evidence of the Defendant's drinking is irrelevant and prejudicial. The Third District also held that there was insufficient evidence to sustain the claim for future economic damages. In this case, the only evidence that the Plaintiff presented to support his claim for future medical expenses consisted of his testimony that, at the time of the trial, he was taking a prescription drug to detoxify himself from an opiate addiction. The evidence was unclear as to whether the addiction had any relationship to the accident. Further, there was a complete absence of any testimony which would show with reasonable certainty how long the Plaintiff would need to take the drug.

Haney v. Sloan, 214 So. 3d 718 (Fla. 1st DCA 2017)

Plaintiff and Defendant were involved in a motor vehicle accident. After the accident, the Plaintiff received chiropractic and pain management care and had a spinal fusion on her neck. After her medical interventions and appointments

substantially subsided, she was involved in an unrelated accident approximately 21 months later. After the second accident, she also sought medical help and had many treatments with her chiropractor and pain management doctors and was then diagnosed as having a TMJ disorder.

Plaintiff sued Defendant to recover for injuries from the first accident. Defendant admitted liability as to the Plaintiff's neck injury but disputed fault for her other injuries and her TMJ condition. After the parties presented their evidence, Plaintiff moved for a directed verdict as to all of her past medical expenses incurred both before and after the second accident. She argued that a jury could not differentiate between her injuries caused by the two accidents based upon the evidence presented and, therefore, must attribute all of her injuries to the initial accident.

Over the Defendant's objection, the trial court granted the motion and advised the jury that all of Plaintiff's past medical expenses (almost $131,000) were legally attributable to the first accident and caused by the Defendant. The Defendant then argued at closing that the jury should award future medical expenses and pain and suffering based upon the premise that the Defendant had solely caused all of Plaintiff's injuries. The jury returned a verdict in favor of the Plaintiff in the amount of just under $1,631,000.

The First District reversed and found that the trial court improperly directed a verdict on the amount of the past medical expenses where there was conflicting record evidence at trial regarding the proper attribution of some medical bills. Because the Plaintiff argued to the jury that future medical expenses and pain and suffering expenses should all be attributable to the first accident based upon the court's directed verdict, it was necessary to recalculate all the damages at a new trial.

Inferences

Davie Plaza, LLC v. Iordanoglu, 232 So. 3d 441 (Fla. 4th DCA 2017)

The Fourth District ruled that the trial court erred in denying the Defendant's Motion for Directed Verdict where the circumstantial evidence presented by the Plaintiff was insufficient to establish the cause of the fall or even precisely where the fall occurred. Further, they found that the evidence was insufficient to support an inference that the ladder was placed on a defect in the premises to the exclusion of all other equally reasonable inferences.

Juror interviews

Westgate Palace, LLC v. Parr, 216 So. 3d 747 (Fla. 5th DCA 2017)

The Fifth District held that the trial court abused its discretion in denying the Defendant's Motion for post-trial interview of a juror who misrepresented that she had been involved in no past civil or criminal litigation based upon a post-trial investigation which determined that she had been involved in extensive civil and criminal litigation. The Fifth District also directed the trial court to reconsider the Defendant's Motion for New Trial following the juror interview.

Childrens Medical Center, P.A. v. Kim, 221 So. 3d 664 (Fla. 4th DCA 2017)

Following a verdict in favor of a Defendant in a medical malpractice action, the trial court ordered a post-trial interview of two jurors based upon an alleged failure of them to disclose litigation history in their responses to jury questionnaires. The Fourth District reversed finding that Plaintiff failed to establish relevance and materiality, concealment and due diligence which are the three elements necessary to warrant a post-trial interview. In this case, the Plaintiff filed an action against the Defendants alleging a failure to diagnose their infant son's skull fracture and brain bleed that were allegedly related to his birth. The two jurors in question allegedly failed to disclose their involvement with a restraining order involving domestic violence, as well as, the respondent in numerous domestic violence actions. Plaintiff argued that child abuse or non-accidental trauma was an issue in their case because the Defendants believed that the child's injury was caused by abuse.

At the hearing on the Motion for Juror Interviews, Plaintiffs' counsel argued he would have used his remaining peremptory challenges had he known about the jurors' domestic violence cases-assuming the case has involved a child. The Defendants argued that the prior litigation was too remote in time and it was unclear that the individuals in those two cases were the two jurors.

In reversing the trial court's ruling, the Fourth District pointed out that it was unclear that the litigation histories belonged to the two jurors in question. Further, they found that most of the history was remote with some occurring more than eight years before and that all the matters were unrelated to the subject of the instant case - - medical malpractice. Further, the District Court found that Plaintiffs' counsel did not appear to be concerned with prior litigation in general or child abuse in particular based upon his questioning of the other jurors during *voir dire.* In fact, they noted that one prospective juror noted a domestic violence

incident in her family in response to a question on the juror questionnaire and Plaintiffs' counsel did not ask a single follow-up question concerning that response.

Additionally, the Fourth District found that the question on the questionnaire was not straight forward and was reasonably subject to misinterpretation by prospective jurors. Specifically, the question asked "have you or any family member ever been sued or have you sued someone else? (this includes suits which were settled after being filed). If so, please explain." The Fourth District emphasized that, by its very wording, this question excluded criminal and other legal matters. They also emphasized that Plaintiffs' counsel did not articulate to the prospective jurors that the litigation history question sought disclosure of all prior legal matters and more specifically, if any of them had been involved in domestic violence or child abuse.

Lastly, the court emphasized that Plaintiffs' had 10 days between the conclusion of their *voir dire* and the start of Defendants' *voir dire* to run a public records search. The Plaintiffs had an additional 11 days between the close of evidence and closing argument to conduct the search. Instead, it was not until after the jury returned an unfavorable verdict that Plaintiffs' undertook their investigation.

Jury instructions

Laycock v. TMS Logistics, Inc., 209 So. 3d 627 (Fla. 1st DCA 2017)

Following a verdict in favor of the Plaintiff, a juror contacted the court and spoke to the Judge's assistant. The Defendant announced that one of its attorneys had also spoken to jurors. According to an Affidavit that attorney later submitted, two jurors approached her as she left the courthouse. They offered opinions on the case generally, along with specific details on jury deliberations and one juror "kept repeating that jurors agreed not to follow the court's instructions."

Over the Plaintiff's objection, the trial court ordered a limited interview of one juror. The Plaintiff filed no certiorari petition to stop it and the interview went forward. After that, the trial court considered the Defendant's Motion to Interview Additional Jurors and the court ultimately concluded that the Defendant "established by sworn factual allegations and the testimony of [the juror already interviewed] a *prima facie* case of juror misconduct." The court continued and stated that the misconduct would require a new trial if found to be true unless the

Plaintiff could "demonstrate there is no reasonable possibility that the juror misconduct affected the verdict."

As such, the trial court ordered that it would contact the remaining five jurors and schedule the interviews. The Plaintiff then sought certiorari review and the First District denied same stating that the Plaintiff could not demonstrate irreparable harm that could not be remedied on appeal. Specifically, continuation of litigation does not constitute irreparable harm nor is the claim that there would be injury to the jurors or the sanctity of their process likewise does not constitute irreparable harm. The court added that "if the interviews go forward and lead to an order granting a new trial, then [Plaintiff] can appeal that order."

Dockswell v. Bethesda Memorial Hospital, 210 So. 3d 2101 (Fla. 2017)

In this case, the Florida Supreme Court quashed the decision of the Fourth District Court of Appeal on the interpretation of Florida Statute §766.102(3)(b) ruling that, in a medical malpractice case involving a foreign body left inside a patient's body, the burden of proof shifts to the Defendant to prove that no medical negligence occurred. In doing so, the Supreme Court ruled that the foreign body presumption of negligence is mandatory when a foreign body is found inside the patient's body, regardless of whether direct negligence exists of negligence or who the responsible party is for the foreign body's presence.

In this regard, they noted that the statutory foreign-body presumption differed from the common low doctrine of *Res Ipsa Loquitur* because the foreign-body presumption provides Plaintiffs with the presumption of negligence even if direct evidence of negligence exists. As such, they determined that the trial court's decision in failing to give Florida standard jury instruction 402.4c which states "negligence is the failure to use reasonable care. The presence of (name of foreign body) in [patient] body establishes negligence unless (Defendant proves by the greater weight of the evidence) that it was not negligent" was in error and that the error was not harmless.

Persaud v. Cortes, 219 So. 3d 241 (Fla. 5th DCA 2017)

The Plaintiff sought punitive damages against the Defendant who rear-ended the vehicle in which the decedent was a passenger. The Defendant had been convicted of DUI manslaughter. The Fifth District held that it was error to refuse to give an instruction that the jury may not award an amount that would financially destroy the Defendant. They further held that the court was required to give the

instruction where the Defendant requested the instruction and presented evidence of his net worth.

Stokes v. Wynn, 219 So. 3d (Fla. 4th DCA 2017)

The Fourth District upheld the trial court's decision to instruct a jury that the lessee of the vehicle would not be liable where the driver's use of the leased vehicle exceeded any express or implied consent amounting to a species of theft or conversion finding that this instruction was consistent with the Florida Supreme Court's decision in *Hertz Corp. v. Jackson*, 617 So. 2d 1051 (Fla. 1993).

Jury request for read-back

Philip Morris USA, Inc. v. Duignan, 42 FLWD 2426 (Fla. 2d DCA 11/15/17)

The Second District found that the trial court abused its discretion and should have granted a new trial based upon the trial court's response to the jury's request for a read back of testimony. At trial, the trial Judge stated that, although a read back was "not impossible," it "is not generally done" and that the jury should rely on its "collective recollection." The Second District found that the trial court abused its discretion in giving this response because it was calculated to prevent the jury from asking for a read back and thereby interfered with the jury's ability to discharge its duties as a finder of the fact in this case. Because the District Court found that the trial court abused its discretion, the burden was upon the Plaintiff to show that the error was harmless. Having failed to do so, the Court remanded for a new trial.

Mental anguish

Sajiun v. Hernandez, 226 So. 3d 875 (Fla. 4th DCA 2017)

A motorcyclist was killed after a collision with a truck driver. Following a verdict in favor of the Defendant, the Plaintiff appealed several evidentiary rulings which the Plaintiff contended required reversal either standing alone or when combined with the other rulings. At first, the trial court allowed a man sitting behind a privacy fence who only "heard" the motorcyclist proceeding on the adjacent road to testify that he believed the motorcyclist was speeding. It should be noted that the witness had operated a motorcycle since 1980 and could tell the difference between sounds emitted by the engines of a Japanese motorcycle and a Harley Davidson. The court allowed this testimony because two other defense witnesses, a mother and a daughter who were traveling together, encountered the

motorcycle and testified that the noise of the engine drew their attention and that they commented to each other about how fast the motorcycle was going and that he had been cutting off cars.

The case also involved the psychotherapist-patient privilege. The Plaintiff's suit sought damages for pain and suffering and the trial court entered an agreed order allowing a Motion to Compel Production of the records of the psychotherapist who treated one of the children. Subsequently, the Plaintiff listed the records as a trial exhibit. At trial, the Plaintiff withdrew the mental anguish claim and argued for the reinstatement of the psychotherapist-patient privilege; however, the jury instruction included an instruction on pain and suffering. It is questionable as to whether that was wrong because the courts have ruled other non-economic damages besides mental anguish may be pursued without putting the Plaintiff's mental health at issue. Eventually, the Fourth District ruled that pursuant to Florida Statute 90.507, the voluntary disclosure of the records waived the privilege even though they noted that the waiver of the privilege itself was not irrevocable. That said, once the information was disclosed, the privilege ceases to exist.

New trial

Ivey v. Florida, 42 FLWD 2004 (Fla. 1st DCA 9/13/17)

Following a conviction, the Defendant filed an appeal arguing that the trial court erred in allowing a peremptory challenge to strike an African-American juror where the state's race-neutral reason was that the juror gave the prosecutor a dirty look where this "dirty look" occurred outside the presence of the trial court and defense counsel. Because the defense counsel raised the objection to the peremptory challenge and confirmed the objection just prior to the jury being sworn by continuing objection, the issue was preserved for appeal and the First District agreed and reversed for a new trial.

Philip Morris USA, Inc. v. Duignan, 42 FLWD 2426 (Fla. 2d DCA 11/15/17)

The Second District found that the trial court abused its discretion and should have granted a new trial based upon the trial court's response to the jury's request for a read back of testimony. At trial, the trial Judge stated that, although a read back was "not impossible," it "is not generally done" and that the jury should rely on its "collective recollection." The Second District found that the trial court abused its discretion in giving this response because it was calculated to prevent the jury from asking for a read back and thereby interfered with the jury's ability to

discharge its duties as a finder of the fact in this case. Because the District Court found that the trial court abused its discretion, the burden was upon the Plaintiff to show that the error was harmless. Having failed to do so, the Court remanded for a new trial.

Vickers v. Thomas, 43 FLWD 28 (5th DCA 12/22/17)

The Fifth District upheld the award for Plaintiff's future medical expenses finding that the evidence established the expenses with reasonable certainty. Conversely, the evidence was insufficient to support an award for loss of future earning capacity because the evidence revolved around the Plaintiff's fear of losing her job as opposed to diminished capacity to continue her employment. As such, the Fifth District remanded for remittitur a new trial on the issue of damages for loss of earning capacity.

They also highlighted that the Plaintiff had originally sought recovery for cervical, lumbar and shoulder injuries from the motor vehicle accident. Four days before the trial, she withdrew her claim for the shoulder injury and successfully obtained a ruling in Limine to prevent discussion of the withdrawn claim. During the defense's case, the Defendant called an orthopedic surgeon specializing in shoulder surgery and he conducted a compulsory medical examination on the Plaintiff.

During closing arguments, the Plaintiff's counsel made several comments related to his qualifications as a shoulder specialist; questioning his ability to testify about cervical and lumbar injuries. The Plaintiff then attacked the defense counsel for electing to hire a shoulder specialist. The Defendant objected to this argument and it was sustained but the trial court incorrectly denied the request for a curative instruction according to the Fifth District. They added that a new trial was not warranted following an improper closing argument unless the statements were highly prejudicial, inflammatory and improper and here they did not find the statements to be so highly prejudicial and inflammatory so as to deny the Defendant a fair trial. As such, they found that the failure to give the curative instruction was harmless.

GEICO General Insurance Company v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017)

This case involved an uninsured motorist who was intoxicated. Both the uninsured motorist carrier and the Co-Defendant driver admitted liability. The court ordered that the Plaintiff could seek punitive damages against the driver. During the compensatory portion of the trial, the trial court allowed the Plaintiff to introduce evidence of the driver's intoxication. The Third District held that this

was error because when a Defendant admits liability regarding the cause of the accident, evidence of the Defendant's drinking is irrelevant and prejudicial. The Third District also held that there was insufficient evidence to sustain the claim for future economic damages. In this case, the only evidence that the Plaintiff presented to support his claim for future medical expenses consisted of his testimony that, at the time of the trial, he was taking a prescription drug to detoxify himself from an opiate addiction. The evidence was unclear as to whether the addiction had any relationship to the accident. Further, there was a complete absence of any testimony which would show with reasonable certainty how long the Plaintiff would need to take the drug.

Doctors Company v. Plummer, 210 So. 3d 711 (Fla. 5th DCA 2017)

The patient visited a family clinic complaining of ear pain. The doctor gave him two prescriptions for antibiotics and told him to follow up in two weeks. At that time, the patient complained of chronic ear problems that had been persisting for one month. During the visit, the chart failed to reflect that any ear exam took place. Although not reflected in the chart, the doctor later testified it would usually be his standard of care to check the ears. The doctor recommended a steroid with instructions to follow up in a month.

When the patient followed up, he complained of intense right ear pain. On examination, he had a bulging membrane in his ear. The doctor noted no redness and no puss in the ear canal or discharge. The next morning, the patient visited an ear nose and throat practice where he was seen by a physician's assistant and complained of a history of a clogged right ear with muffled hearing. The physician's assistant noted the presence of puss and fluid, as well as redness. The day after that, a physician surgically placed a tube in the ear to relieve the fluid build up. He believed that the ear infection had progressed into a brain infection and the patient ended up passing away several days later.

Prior to trial, Plaintiff failed to disclose her intent to present evidence that the physician's decision to provide Levaquin constituted a breach of her duty of care. As a result, the Defendant filed a Motion in Limine to preclude the Plaintiff from presenting any evidence that the Levaquin would have cured or eliminated the infection discovered during this visit noting that no witness, including expert witnesses, had rendered the opinion or otherwise testified that the Levaquin samples provided to the patient would have cured, eradicated, killed or otherwise eliminated the infection that was present.

During opening statements, Plaintiff's counsel advised the jury that Levaquin was not an FDA-approved drug for ear infections and that the Defendant should not have given samples of this drug to the patient. The doctor's counsel timely objected and argued that there had been no pre-trial testimony regarding Levaquin and argued that this was a "unfair surprise" and a "new opinion." Defendant also moved for a mistrial. After overruling the objection and denying the Motion for Mistrial, Plaintiff's counsel then argued that the physician failed to follow the manufacturer's instructions when giving the patient the Levaquin. Specifically they argued that the manufacturer advised the physicians not to prescribe the antibiotic before culturing the infection first. Consistent with this opening statement and over the Defendant's continued objection, the Plaintiff presented two standard of care experts who testified that the Defendant breached the standard of care by dispensing Levaquin.

The Fifth District ordered a new trial and stated that the trial court erred in admitting argument and surprise testimony that the Defendant had negligently provided the patient with samples of a drug without following manufacturer's instructions when the Plaintiff first disclosed its intent to present such evidence in opening statement. The Fifth District found that this error was compounded by allowing the drug's package insert to be admitted into evidence noting that although a prescription drug package insert may have some significance in identifying a doctor's standard of care in the administration and use of a prescription drug, it could not be used as a "stand-alone proof" of the standard of care.

Lastly, the District Court held that the trial court reversibly erred in excluding the deposition of an emergency physician who treated the patient when he arrived at the hospital shortly before his death. The emergency physician made certain observations of the patient that arguably supported the Defendant's theory of the case. In excluding the emergency physician's deposition, the trial court initially observed that the witness had not been subpoenaed. When defense counsel argued that Florida Rule of Civil Procedure 1.330(a)(3)(F) expressly authorized the use of a deposition by any party for any purpose that the trial court found that the witness was an expert or a skilled witness, "the trial court inexplicably declined to find" that he was a "skilled witness." The Fifth District noted that the emergency physician was a skilled witness, particularly "where it was uncontroverted that [he] was a licensed and experienced emergency room physician, who was board certified in emergency medicine."

Haney v. Sloan, 214 So. 3d 718 (Fla. 1st DCA 2017)

Plaintiff and Defendant were involved in a motor vehicle accident. After the accident, the Plaintiff received chiropractic and pain management care and had a spinal fusion on her neck. After her medical interventions and appointments substantially subsided, she was involved in an unrelated accident approximately 21 months later. After the second accident, she also sought medical help and had many treatments with her chiropractor and pain management doctors and was then diagnosed as having a TMJ disorder.

Plaintiff sued Defendant to recover for injuries from the first accident. Defendant admitted liability as to the Plaintiff's neck injury but disputed fault for her other injuries and her TMJ condition. After the parties presented their evidence, Plaintiff moved for a directed verdict as to all of her past medical expenses incurred both before and after the second accident. She argued that a jury could not differentiate between her injuries caused by the two accidents based upon the evidence presented and, therefore, must attribute all of her injuries to the initial accident.

Over the Defendant's objection, the trial court granted the motion and advised the jury that all of Plaintiff's past medical expenses (almost $131,000) were legally attributable to the first accident and caused by the Defendant. The Defendant then argued at closing that the jury should award future medical expenses and pain and suffering based upon the premise that the Defendant had solely caused all of Plaintiff's injuries. The jury returned a verdict in favor of the Plaintiff in the amount of just under $1,631,000.

The First District reversed and found that the trial court improperly directed a verdict on the amount of the past medical expenses where there was conflicting record evidence at trial regarding the proper attribution of some medical bills. Because the Plaintiff argued to the jury that future medical expenses and pain and suffering expenses should all be attributable to the first accident based upon the court's directed verdict, it was necessary to recalculate all the damages at a new trial.

R.J. Reynolds Tobacco Company v. Robinson, 216 So. 3d 674 (Fla. 1st DCA 2017)

The First District reversed the trial court and determined that the Defendant was entitled to a new trial because of the Plaintiff's improper arguments which included suggesting that the Defendant was not accepting responsibility and characterizing its defense as a scheme to deceive the jury and otherwise

disparaging the Defendant for defending itself. The court determined that the improper arguments were so highly prejudicial and inflammatory that they denied the Defendant to a fair trial.

Ring Power Court v. Condado-Perez, 219 So. 3d 1028 (Fla. 2d DCA 2017)

The Second District held that the trial court abused its discretion by excluding from evidence statements made by the Plaintiff to emergency medical technicians at the accident scene and contained in the EMS report in which "husband states he swerved to avoid a mattress in the road and lost control of the car and went off the road." The Second District held that the evidence was admissible as an admission and that the excluded evidence was not harmless error. Therefore, the Defendant was entitled to a new trial on liability.

FLNC, Inc. v. Ramos, 220 So. 3d 1220 (Fla. 5th DCA 2017)

The Fifth District found that a verdict entered in favor of the Plaintiff contained hallmarks of an improper compromise verdict where the liability was highly contested and the jury found the Defendant liable and awarded past medical expenses only but no non-economic damages. They held that the trial court properly ordered a new trial where the Plaintiff rejected an additur order by the trial court as a remedy for the compromise verdict; however, because liability and causation were both highly contested, they ordered that a new trial should include the trial on all issues including liability, causation and damages.

Harrison v. Gregory, 221 So. 3d 1273 (Fla. 5th DCA 2017)

In this wrongful death action filed after a motor vehicle accident, the Fifth District ruled that the trial court correctly ruled that the statement "I just killed a kid" made by the driver of the vehicle to her sister was inadmissible pursuant to Florida Statute 90.403 because the probative value was substantially outweighed by the danger of unfair prejudice. At the same time, the District Court ruled that the trial court abused its discretion in failing to also exclude testimony of witness that heard the driver state on her cell phone that "I think I killed somebody."

The Fifth District also noted that the fact that the Plaintiff's accident reconstruction testified that the vehicle had been transported to the storage yard by "the insurance company" violated an order in limine which prevented the parties from mentioning the existence of insurance before the jury although this comment was the only time that the insurance company was referred to during the trial, the District Court nonetheless found that reversal was required when combined by the

Plaintiff's counsel during closing argument. Specifically, there was evidence and argument allowed that the decedent's impairment by use of cocaine and marijuana was a causal factor and, in fact, the verdict form presented the issue of drug impairment in the decedent's comparative negligence for resolution by the jury. In closing, the Plaintiff's counsel advised the jury that there would be no recovery for the decedent's parents if the decedent was found 50% or more at fault. When combined with the violation of the order in limine, the Fifth District ordered a new trial be had.

Rasinski v. McCoy, 227 So. 3d 201 (Fla. 5th DCA 2017)

The Fifth District ruled that the trial court erred in failing to grant a remittitur and new trial as to the Plaintiff's claim of loss of earning capacity where the Plaintiff testified that he continued to work after the accident earning the same hourly rate as he did before the accident. In fact, the Plaintiff did not even begin working for his current employer until after the accident. Because the Plaintiff failed to introduce "a monetary standard against which the jury could measure any future loss" the Fifth District reversed. Further, the Defendant requested that the trial court set off payments furnished by the Plaintiff's healthcare provider for which it released its lien and waived its subrogation rights. The trial court denied the motion on the basis that the Defendant could not argue for additional set-offs after presenting expert testimony to challenge the reasonableness of the Plaintiff's medical bills which resulted in the jury awarding a reduced award for past medical expenses. The Fifth District found that Defendant was entitled to a set off because the lien and subrogation rights had been waived. Lastly, the Fifth District refused to grant a new trial based upon closing argument because defense counsel did not object to same and the court found that the comments did not rise to the level of egregiousness which warranted a new trial based on *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, Fla. 2000).

Allstar Cleaning Service, Inc. v. Grinwis, 227 So. 3d 790 (Fla. 5th DCA 2017)

Following a verdict in favor of the Defendant in a failure to warn slip and fall case, the trial court granted Plaintiff's Motion for New Trial having concluded that the verdict was against the greater weight of the evidence. The Fifth District reversed and reinstated the defense verdict noting that there was conflicting testimony regarding liability and injury causation from a number of witnesses and "a jury verdict is contrary to the manifest weight of the evidence only when the evidence is clear, obvious and indisputable" and that "a jury's verdict is generally

not against the manifest weight of the evidence when the record shows conflicting testimony from two or more witnesses."

The Las Olas Holding Company v. Demella, 228 So. 3d 97 (Fla. 4th DCA 2017)

The Plaintiff sued the Defendant hotel for negligence related to an accident in which an intoxicated driver drove her car into a wall of the hotel's cabana. This caused a collapse of the structure thereby killing the Plaintiff. In this accident, the driver swerved from the roadway, traveled across a sidewalk and through bushes before colliding with the cabana but still had enough force to cause collapse of the steel-reinforced concrete columns of the cabana. The Fourth District found that the trial court should have granted the hotel's Motion for Directed Verdict.

In doing so, they held that the evidence that the hotel was aware of the roadway's slight curve and that some speeding occurred on the roadway was legally insufficient to establish that the hotel knew or should have known that a dangerous condition existed on its own premises. Further, even if a dangerous condition existed on the hotel's premises of which it knew or should have known (i.e. the placement of the cabana) the hotel did not breach its affirmative duty to protect the users of the pool cabana from these dangers and that even if it did breach its duty, the Plaintiff's death was unequivocally attributable only to "an improbable freak accident."

Additionally, the Fourth District also criticized Plaintiff's counsel who stated during opening that "the reason why we are in this courtroom today is that this corporation has refused to accept any responsibility for its role in this death." After the trial court sustained an objection, the Plaintiff's lawyer then stated "they will look at everyone else's conduct but their own and these are defenses that are just attempts to avoid responsibility." Lastly, in closing argument, the Plaintiff's counsel talked about the "value of a human life" which is not an element of damages and is not the proper topic for a closing argument.

R.J. Reynolds Tobacco Company v. Ryan, 231 So. 3d 484 (Fla. 4th DCA 2017)

The Fourth District held that the Surgeon General's Reports were erroneously admitted into evidence and found that they were hearsay and not admissible as either public records or adoptive admissions. They also found that the reports were improperly being used to bolster the opinions of testifying experts.

Miami-Dade County v. Jones, 232 So. 3d 1127 (Fla. 3d DCA 2017)

The Third District held that the trial court erred in denying the County's post-trial Motion for Directed Verdict and Judgment Notwithstanding the Verdict finding the County liable for injuries sustained by the Plaintiff where she slipped and fell on a grease spot on County-owned sidewalk where the Plaintiff failed to introduce evidence that the County have actual or constructive knowledge of the dangerous condition. The Third District noted that there was no evidence in the record indicating how long the grease was present on the sidewalk. As the court noted "Jones failed to present any evidence that a grease spill occurred on the discolored sidewalk even once before Jones' fall, let alone with such frequency that the county should have known about it."

The Plaintiff also introduced evidence that County inspectors and employees were present in the area numerous times over a course of years; however, the Plaintiff did not introduce any evidence to suggest that there was grease on the sidewalk during any of these inspections which would have put the County on notice that the grease collection system employed by the adjacent restaurant was insufficient. The Third District also noted that the trial court erred in introducing County ordinances related to inspections and permits for public food establishments as evidence tending to show that the County had constructive notice of the grease spill.

The Third District noted that the mere fact that an ordinance may cover the subject of inspecting food establishments does not imply that the County had constructive knowledge of a dangerous condition created by a food establishment. Moreover, they concluded that the ordinances would only be relevant if they were introduced to show that the County should have had or failed to comply with its duty to inspect the barbeque stand; however, the County has sovereign immunity from liability for enforcing or failing to enforce its laws. Lastly, the Third District concluded that the trial court erred in allowing the Plaintiff to testify that the barbeque stand was owned and operated, in part, by off-duty County bus drivers. The Third District concluded that such testimony was irrelevant because the County was not sued for its off-duty bus drivers who were clearly not acting within the scope of their employment.

Peremptory challenges

Ivey v. Florida, 42 FLWD 2004 (Fla. 1st DCA 9/13/17)

Following a conviction, the Defendant filed an appeal arguing that the trial court erred in allowing a peremptory challenge to strike an African-American juror where the state's race-neutral reason was that the juror gave the prosecutor a dirty look where this "dirty look" occurred outside the presence of the trial court and defense counsel. Because the defense counsel raised the objection to the peremptory challenge and confirmed the objection just prior to the jury being sworn by continuing objection, the issue was preserved for appeal and the First District agreed and reversed for a new trial.

McCray v. State of Florida, 220 So. 3d 1119 (Fla. 2017)

The Supreme Court held that the trial court did not abuse its discretion in rejecting the Defendant's Motion to Withdraw his peremptory challenge of one juror so that he could instead use that peremptory challenge on a juror who was already seated on the jury panel after the Defendant had exhausted his peremptory challenges and the State had accepted the jury panel. The Supreme Court ruled that withdrawal of peremptory challenges after a party has exhausted its challenges could be warranted by unusual or extenuating circumstances.

Punitive damages

Persaud v. Cortes, 219 So. 3d 241 (Fla. 5th DCA 2017)

The Plaintiff sought punitive damages against the Defendant who rear-ended the vehicle in which the decedent was a passenger. The Defendant had been convicted of DUI manslaughter. The Fifth District held that it was error to refuse to give an instruction that the jury may not award an amount that would financially destroy the Defendant. They further held that the court was required to give the instruction where the Defendant requested the instruction and presented evidence of his net worth.

Remittitur

Vickers v. Thomas, 43 FLWD 28 (5th DCA 12/22/17)

The Fifth District upheld the award for Plaintiff's future medical expenses finding that the evidence established the expenses with reasonable certainty. Conversely, the evidence was insufficient to support an award for loss of future earning capacity because the evidence revolved around the Plaintiff's fear of losing her job as opposed to diminished capacity to continue her employment. As such, the Fifth District remanded for remittitur a new trial on the issue of damages for loss of earning capacity.

They also highlighted that the Plaintiff had originally sought recovery for cervical, lumbar and shoulder injuries from the motor vehicle accident. Four days before the trial, she withdrew her claim for the shoulder injury and successfully obtained a ruling in Limine to prevent discussion of the withdrawn claim. During the defense's case, the Defendant called an orthopedic surgeon specializing in shoulder surgery and he conducted a compulsory medical examination on the Plaintiff.

During closing arguments, the Plaintiff's counsel made several comments related to his qualifications as a shoulder specialist; questioning his ability to testify about cervical and lumbar injuries. The Plaintiff then attacked the defense counsel for electing to hire a shoulder specialist. The Defendant objected to this argument and it was sustained but the trial court incorrectly denied the request for a curative instruction according to the Fifth District. They added that a new trial was not warranted following an improper closing argument unless the statements were highly prejudicial, inflammatory and improper and here they did not find the statements to be so highly prejudicial and inflammatory so as to deny the Defendant a fair trial. As such, they found that the failure to give the curative instruction was harmless.

Rasinski v. McCoy, 227 So. 3d 201 (Fla. 5th DCA 2017)

The Fifth District ruled that the trial court erred in failing to grant a remittitur and new trial as to the Plaintiff's claim of loss of earning capacity where the Plaintiff testified that he continued to work after the accident earning the same hourly rate as he did before the accident. In fact, the Plaintiff did not even begin working for his current employer until after the accident. Because the Plaintiff failed to introduce "a monetary standard against which the jury could measure any future loss" the Fifth District reversed. Further, the Defendant requested that the

trial court set off payments furnished by the Plaintiff's healthcare provider for which it released its lien and waived its subrogation rights. The trial court denied the motion on the basis that the Defendant could not argue for additional set-offs after presenting expert testimony to challenge the reasonableness of the Plaintiff's medical bills which resulted in the jury awarding a reduced award for past medical expenses. The Fifth District found that Defendant was entitled to a set off because the lien and subrogation rights had been waived. Lastly, the Fifth District refused to grant a new trial based upon closing argument because defense counsel did not object to same and the court found that the comments did not rise to the level of egregiousness which warranted a new trial based on *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, Fla. 2000).

Surprise evidence/Testimony

Doctors Company v. Plummer, 210 So. 3d 711 (Fla. 5th DCA 2017)

The patient visited a family clinic complaining of ear pain. The doctor gave him two prescriptions for antibiotics and told him to follow up in two weeks. At that time, the patient complained of chronic ear problems that had been persisting for one month. During the visit, the chart failed to reflect that any ear exam took place. Although not reflected in the chart, the doctor later testified it would usually be his standard of care to check the ears. The doctor recommended a steroid with instructions to follow up in a month.

When the patient followed up, he complained of intense right ear pain. On examination, he had a bulging membrane in his ear. The doctor noted no redness and no puss in the ear canal or discharge. The next morning, the patient visited an ear nose and throat practice where he was seen by a physician's assistant and complained of a history of a clogged right ear with muffled hearing. The physician's assistant noted the presence of puss and fluid, as well as redness. The day after that, a physician surgically placed a tube in the ear to relieve the fluid build up. He believed that the ear infection had progressed into a brain infection and the patient ended up passing away several days later.

Prior to trial, Plaintiff failed to disclose her intent to present evidence that the physician's decision to provide Levaquin constituted a breach of her duty of care. As a result, the Defendant filed a Motion in Limine to preclude the Plaintiff from presenting any evidence that the Levaquin would have cured or eliminated the infection discovered during this visit noting that no witness, including expert witnesses, had rendered the opinion or otherwise testified that the Levaquin

samples provided to the patient would have cured, eradicated, killed or otherwise eliminated the infection that was present.

During opening statements, Plaintiff's counsel advised the jury that Levaquin was not an FDA-approved drug for ear infections and that the Defendant should not have given samples of this drug to the patient. The doctor's counsel timely objected and argued that there had been no pre-trial testimony regarding Levaquin and argued that this was a "unfair surprise" and a "new opinion." Defendant also moved for a mistrial. After overruling the objection and denying the Motion for Mistrial, Plaintiff's counsel then argued that the physician failed to follow the manufacturer's instructions when giving the patient the Levaquin. Specifically they argued that the manufacturer advised the physicians not to prescribe the antibiotic before culturing the infection first. Consistent with this opening statement and over the Defendant's continued objection, the Plaintiff presented two standard of care experts who testified that the Defendant breached the standard of care by dispensing Levaquin.

The Fifth District ordered a new trial and stated that the trial court erred in admitting argument and surprise testimony that the Defendant had negligently provided the patient with samples of a drug without following manufacturer's instructions when the Plaintiff first disclosed its intent to present such evidence in opening statement. The Fifth District found that this error was compounded by allowing the drug's package insert to be admitted into evidence noting that although a prescription drug package insert may have some significance in identifying a doctor's standard of care in the administration and use of a prescription drug, it could not be used as a "stand-alone proof" of the standard of care.

Lastly, the District Court held that the trial court reversibly erred in excluding the deposition of an emergency physician who treated the patient when he arrived at the hospital shortly before his death. The emergency physician made certain observations of the patient that arguably supported the Defendant's theory of the case. In excluding the emergency physician's deposition, the trial court initially observed that the witness had not been subpoenaed. When defense counsel argued that Florida Rule of Civil Procedure 1.330(a)(3)(F) expressly authorized the use of a deposition by any party for any purpose that the trial court found that the witness was an expert or a skilled witness, "the trial court inexplicably declined to find" that he was a "skilled witness." The Fifth District noted that the emergency physician was a skilled witness, particularly "where it

was uncontroverted that [he] was a licensed and experienced emergency room physician, who was board certified in emergency medicine."

Use of expert/skilled witness deposition

Doctors Company v. Plummer, 210 So. 3d 711 (Fla. 5th DCA 2017)

The patient visited a family clinic complaining of ear pain. The doctor gave him two prescriptions for antibiotics and told him to follow up in two weeks. At that time, the patient complained of chronic ear problems that had been persisting for one month. During the visit, the chart failed to reflect that any ear exam took place. Although not reflected in the chart, the doctor later testified it would usually be his standard of care to check the ears. The doctor recommended a steroid with instructions to follow up in a month.

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During opening statements, Plaintiff's counsel advised the jury that Levaquin was not an FDA-approved drug for ear infections and that the Defendant should not have given samples of this drug to the patient. The doctor's counsel timely objected and argued that there had been no pre-trial testimony regarding Levaquin and argued that this was a "unfair surprise" and a "new opinion." Defendant also moved for a mistrial. After overruling the objection and denying

the Motion for Mistrial, Plaintiff's counsel then argued that the physician failed to follow the manufacturer's instructions when giving the patient the Levaquin. Specifically they argued that the manufacturer advised the physicians not to prescribe the antibiotic before culturing the infection first. Consistent with this opening statement and over the Defendant's continued objection, the Plaintiff presented two standard of care experts who testified that the Defendant breached the standard of care by dispensing Levaquin.

The Fifth District ordered a new trial and stated that the trial court erred in admitting argument and surprise testimony that the Defendant had negligently provided the patient with samples of a drug without following manufacturer's instructions when the Plaintiff first disclosed its intent to present such evidence in opening statement. The Fifth District found that this error was compounded by allowing the drug's package insert to be admitted into evidence noting that although a prescription drug package insert may have some significance in identifying a doctor's standard of care in the administration and use of a prescription drug, it could not be used as a "stand-alone proof" of the standard of care.

Lastly, the District Court held that the trial court reversibly erred in excluding the deposition of an emergency physician who treated the patient when he arrived at the hospital shortly before his death. The emergency physician made certain observations of the patient that arguably supported the Defendant's theory of the case. In excluding the emergency physician's deposition, the trial court initially observed that the witness had not been subpoenaed. When defense counsel argued that Florida Rule of Civil Procedure 1.330(a)(3)(F) expressly authorized the use of a deposition by any party for any purpose that the trial court found that the witness was an expert or a skilled witness, "the trial court inexplicably declined to find" that he was a "skilled witness." The Fifth District noted that the emergency physician was a skilled witness, particularly "where it was uncontroverted that [he] was a licensed and experienced emergency room physician, who was board certified in emergency medicine."