2009
CASE LAW SUMMARY

Trial Issues

Admission Against Interest

Petit-Dos v. School Board of Broward County, 2 So.3d 1022 (Fla. 4th DCA 2009)

The Fourth District held that the trial court erred in failing to admit statements from the school bus driver who admitted in deposition testimony feeling some responsibility for the accident. The Fourth District found that these were admissions against interest against her employer under F.S. §90.803(18)(d) and should have been admitted, however, the failure to admit the statements were harmless because the jury did assign liability to her employer. For further details about this case, please see the discussion under the Fabre subheading under Procedural and Legal Issues.

Directed Verdict

Fell v. Carlin, 6 So.3d 119 (Fla. 2d DCA 2009)

Defendant argued that he was entitled to a directed verdict on the issue of whether he sustained an injury as a result of the accident because every physician that testified at trial, including the physician who testified for the defense, opined that he had. The Second District held that a jury may reject uncontroverted expert medical testimony provided that it has a reasonable basis to do so, such as where there is conflicting testimony. In this case, medical opinions regarding his injuries were based only upon subjective complaints of pain and the plaintiff's candor was an issue for the jury to decide.

St. Joseph's Hospital v. Cox, 14 So.3d 1124 (Fla. 2d DCA 2009)

A claim was brought for failure to treat a stroke with tPA. The patient suffered a stroke and a person who witnessed it was able to narrow its onset to a 15-20 minute window. The Plaintiff arrived at the hospital within the window for administering the tPA but the ER physician did not treat the Plaintiff's stroke with thrombolytics because he did not know the time of the onset. Further, the Plaintiff had suffered a subdural hematoma 2½ years earlier.

The Second District determined that a directed verdict should have been entered because the Plaintiff failed to prove that he would have more likely than not benefited from tPA. The Plaintiff's causation expert suggested the need for tPA, but admitted that she had never given it to a patient with a prior intracranial hemorrhage. Further, the expert acknowledged that the NINDS study was the seminal study on the use of tPA in treatment of ischemic strokes. According to this study, 20% of stroke patients recover without any tPA and the rate of successful outcomes increases to 31% when tPA is given. The Plaintiff's expert could not testify that her rate of success with tPA therapy exceeded that reported in the NINDS study and, therefore, the Plaintiff did not satisfy the *Gooding* requirement that the Defendant more likely than not caused the Plaintiff's injuries.

Evidence of Prior Settlement

Saleeby v. Rocky Elson Construction, 3 So.3d 1078 (Fla. 2009)

The plaintiff was injured when roof trusses on a construction site collapsed and rendered him paraplegic. He collected worker's compensation and then sued the construction company that installed the trusses, as well as the company who manufactured them. Plaintiff settled with the manufacturer and then moved in limine to exclude evidence of the manufacturer's prior status as defendant. The trial court entered an Agreed Order on this. The remaining defendant raised the worker's compensation immunity. Plaintiff sought to show that the collapse resulted from the construction company's failure to follow safety requirements and industry standards in installing trusses.

The defendant sought to impeach the witness who testified that the trusses collapsed as a result of the installation and not from a manufacturing defect. The trial court allowed the defendant to impeach this witness with evidence that the manufacturer had previously been a defendant in the case and then settled. The trial court believed that the evidence went to the witness' bias because it was based on opinions he formulated when the manufacturer was a defendant.

The Fourth District previously ruled that the trial court did not abuse its discretion admitting the evidence because the witness first rendered the opinion when he was a defendant with a pecuniary interest in the case. The Supreme Court reversed and found that the plain language of F.S. §768.041(3) and §90.408 expressly prohibited the admission at trial of any evidence of settlement.

Expert Testimony

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Jury Selection

USAA Cas. Ins. Co. v. Allen, 17 So. 3d 1270 (Fla. 4th DCA 2009)

Final judgment was affirmed rendered after a jury verdict in favor of the Plaintiff in an automobile negligence case. It was noted that the appellant, USAA failed to preserve their objection to the trial court's denial of the appellant's use of a peremptory challenge against an African American juror. It was held that in order to preserve the issue on whether the trial court's ruling on the peremptory challenge constituted reversible error, the appellant must accept the juror or panel, subject to its prior objection and/or renew the objection before the jury is sworn. Because the appellant accepted the jury without renewing its objection to the challenged juror, the issue was not preserved.

The Fourth District also held that the appellant's claim that the trial court erred in denying his motion in limine to prevent the mention of surveillance evidence was not properly preserved. Florida Statute §90.104(1) provides that if

the Court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not in renew an objection or offer proof to preserve a claim of error for appeal. In the present case, the trial court never issued a definitive ruling on the motion, noting twice that it had deferred its ruling. The court concluded that it was incumbent on the appellant to object when the apellee sought to introduce the evidence.

New Trial-Closing Argument

Community Asphalt Corp. v. Bassols, 13 So.3d 538 (Fla. 3d DCA 2009)

In a motorcycle accident case, the Plaintiff's sister testified about negotiations he had with Red Bull regarding a potential contract worth $1.4 million dollars. In closing argument, defense counsel argued "at no time before the day that he heard his sister testify did he know about a $1.4 million dollar deal with Red Bull. He did not even know it was Red Bull. He thought it was maybe Sony. He wasn't sure. He let his sister handle all of that stuff. News to him: $1.4 million. You should expect more evidence than his sister coming into a court. **You should expect something from Red Bull**." The Plaintiff objected stating that the argument violated the rule that when witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. The Third District concluded that the objection was properly overruled finding that the phrase "something from Red Bull" did not necessarily mean a witness. In fact, after the objection was overruled, the next statement from defense counsel was "you should expect a contract". The Third District found that this was permissible argument.

New Trial - Damages

Tavakoly v. Fiddlers Green Ranch, 998 So.2d 1183 (Fla. 5th DCA 2009)

The plaintiff sustained a fractured hip after a fall. The jury awarded various damages, but awarded no money for future pain and suffering and no damages for loss of consortium. The trial court denied a new trial and the Fifth District affirmed the denial of the new trial. The Fifth District noted that there was not indisputable medical evidence that the plaintiff sustained a permanent impairment and would continue to experience pain in the future. Thus, an award of no future medical expenses was not inconsistent based upon the fact that the treating doctors said he simply needed to be monitored on an annual basis. Nevertheless, they found that the wife was entitled to a new trial on the issue of damages because it

was undisputed that she sustained at least nominal damages. Therefore, a zero verdict was inadequate as a matter of law.

Latner v. Preusler & Associates, Inc., 11 So.3d 388(Fla. 5th DCA 2009)

The Plaintiff brought an action for breach of contract and for foreclosure of a construction lien. The jury found that the Defendants breached the contract but awarded no damages. The jury was also asked not to determine the amount of damages to be awarded on the lien foreclosure. Because the Plaintiff did not properly and timely challenge the inconsistency or the sufficiency of the verdict, the trial court had no choice but to enter judgment according to the verdict in favor of the Defendants.

New Trial-Improper Comments

Hulick v. Beers, 7 So. 3d 1153 (Fla. 4th DCA 2009)

This case arises from a fatal automobile accident on the Sawgrass Expressway that began when the appellant Sheila Hulick struck the rear of a vehicle driven by the decedent Leslie Beers. It was before the close of the Plaintiff's case, that the decedent's brother-in-law, David Mole, testified that months after the decedent's death, he was approached by the appellant. Although unsolicited, Mr. Moles, during direct examination, responded "We were at the criminal traffic trial, I believe.", in describing the location of the conversation he had with the appellant. At this point, defense counsel moved for a mistrial. The trial court asked counsel if he wanted a curative instruction, but the defendant declined the offer, explaining that no instruction could cure the prejudicial effect of the testimony and that any instruction would draw even more attention to the criminal traffic trial reference.

After the jury returned a verdict for the plaintiff, the defendant filed a motion for new trial; the motion was denied. The defendant argued on appeal that the trial court abused its discretion refusing to grant them a new trial because the witness' reference to a criminal traffic trial clearly implied that the defendant received a citation in connection with the accident. The Fourth District noted that where fault is at issue, evidence of a presence or absence of a traffic citation will almost always constitute prejudicial error and warrant a mistrial. However, in the present case, the defendant driver admitted to careless driving and an overwhelming amount of evidence was presented that this careless driving caused the subject crash. The court failed to see how the jury's knowledge of a traffic

citation could have had any prejudicial impact on the jury's resolution of the liability issue. Further, it was held that a curative instruction could have informed the jury that neither the defendant, not anyone else, was criminally prosecuted in connection with the accident, and that where the defendant rejects the trial court's order to cure the affect of inadmissible testimony, a mistrial should not be granted except in extreme cases where the comment is so prejudicial as to vitiate the entire trial.

New Trial-Miscellaneous

Plaut v. Norwegian Cruise Lines, 2 So.3d 1120 (Fla. 3d DCA 2009)

The Plaintiff sued for a fall on a cruise ship. Shortly prior to trial, counsel for the cruise line obtained a statement from one of plaintiff's neighbors. The neighbor was not listed as a witness, the statement was not disclosed by opposing counsel, and the statement was inadmissible as substantive evidence. During cross-examination of the plaintiff, defense counsel tried to refresh the recollection of the plaintiff regarding different issues while using the statement. The trial court did not allow the statement to be used to refresh the plaintiff's recollection.[1] The Third District found that the error was harmless where defense counsel was not permitted to use the statement in any way after objection and defense counsel did not refer to the statement during closing arguments. As such, they found that the trial court did not abuse its discretion in denying the plaintiff's motion for new trial.

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[1] The use of the statement was in the context of the defense counsel questioning whether the plaintiff was using her walker at trial to garner sympathy for her claimed injuries. She denied using the walker for that purpose, and she was asked whether she recalled discussing this with the neighbor.

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Cooper Tire v. Pierre, 18 So.3d 700 (Fla. 4th DCA 2009)

The jury awarded a widow and her five children $1.5 million dollars in damages for the death of her husband due a defective tire. The jury found the decedent owner of the vehicle 35% responsible and the driver 15% responsible. After the trial concluded, the foreperson filed an affidavit stating that the jury was divided 3 to 3 throughout the process of deliberations, but after many hours they agreed to find Cooper 50% responsible if the other jurors would agree to decrease the award of damages. The trial court that what allegedly occurred during jury deliberations did not rise to the level of reaching a verdict by aggregate or by lot and that the jury negotiated its verdict by the normal means of "give and take". Having found that the affidavit merely recounted matters that inhered and the verdict and that there was no illegal compromise, the Fourth District found that the trial court properly denied the Motion for New Trial.

Probkevitz v. Velda Farms, LLC., 22 So. 3d 609 (Fla. 3d DCA 2009)

Plaintiff appealed the denial of his motion for a new trial and the entry of an adverse final judgment in a wrongful death action. Among the issues taken on

appeal, was the trial court's decision to allow defense counsel to elicit the opinion testimony from an officer of the Florida Highway Patrol stating that the decedent had failed to obey a flashing red signal. The Third District held the officer could act as a fact witness, testify regarding her observations, measurements and the test results from her investigation. However, over objection, she then opined that the decedent had violated the traffic signal. The court concluded that this was prejudicial error and reversed.

Honeywell International, Inc. v. Guilder, 23 So.3d 867 (Fla. 3d DCA 2009)

The Plaintiffs obtained a $24 million dollar verdict for injuries the Plaintiff sustained due to exposure to asbestos. Before trial, the manufacturer unsuccessfully sought to exclude a letter written by an employee of a successor manufacturer. The trial court refused to allow the successor manufacturer to be listed as a *Fabre* defendant even though it may have been relevant to prove the manufacturer's knowledge of the danger of asbestos. The Third District reversed the lower court's decision because the letter contained the following sentence: "My answer to the problem is: if you have enjoyed a good life while working with asbestos products, why not die from it. There's got to be some cause"; finding that this was unfairly prejudicial and should have been redacted.

New Trial-Preservation of Error

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Peremptory Challenges and Challenges for Cause

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