CASE LAW SUMMARY
2010

Trial Issues

Directed Verdict

Beltran v. Rodriguez, 36 So. 3d 725 (Fla. 3d DCA 2010)

The decedent made a u-turn during which time her car collided with another vehicle. The parties stipulated that she did not stop before she made the turn. She was hit in a side swiped manner, causing her vehicle to slide before coming to rest on the opposite side of the road, at which point (7 seconds later) she was hit by another car. She died as a result of the two crashes.

At the close of the Plaintiff's case, the trucking company (involved in the second collision) moved for a directed verdict. The case proceeded against the truck driver with a stipulation that if the driver was found liable, the company would be held vicariously responsible. The jury ultimately found no liability on the part of the driver.

The Plaintiff had alleged that the trucking company was negligent in inspecting and maintaining the vehicle. With scant evidence of negligent maintenance, the Plaintiff's expert testified that there was also no evidence that the driver took measures to avoid the collision, thereby showing that none of the truck's defects contributed to the accident. While there was evidence of the truck's defective condition, there was no evidence that the condition of the truck caused or contributed to the accident and thus no jury question was presented. Accordingly, the directed verdict was proper.

The Third District also found that the trial court properly refused Plaintiff's special instruction on concurring cause finding that the standard jury instruction was sufficient to properly resolve the issues in the case. Finding that the jury was not misled or prejudiced by the failure to give the additional instruction, the trial court's denial of the motion for new trial was affirmed.

Evidence – Expert Testimony

Corbett v. Wilson, 48 So. 3d 131 (Fla. 5th DCA 2010)

Plaintiffs in a motor vehicle accident sought to recover for a permanent traumatic brain injury and post-traumatic stress disorder. The jury entered an award for past medical expenses and for loss of consortium, but found no permanent injury and awarded no damages for pain and suffering, future economic damages or future loss of consortium damages. The Plaintiffs filed a motion for new trial claiming that they presented unrebutted expert on the issue of permanency.

The trial court granted the motion for new trial having first determined that a jury verdict adverse to the Plaintiff on the issue of personal injury cannot be sustained unless there is expert testimony that contradicts the Plaintiff's expert opinions. The trial court combined the testimony of two experts. The first expert testified that the Plaintiff suffered from PTSD as a result of the accident and the second expert testified that chronic PTSD is a permanent condition. The trial court also found that the Defendant failed to produce any admissible evidence to contradict the expert testimony. During the trial, the Plaintiff presented the testimony of Dr. Afield who testified that the Plaintiff suffered accident related PTSD and that it was permanent. Defense counsel impeached Dr. Afield with his prior deposition testimony where he opined that the Plaintiff did not have PTSD. The trial court decided that the Defendant could not use the impeachment testimony as substantive evidence.

The Fifth District correctly pointed out that the Florida Evidence Code allows prior inconsistent statements to be admitted as substantive evidence. Further, they also pointed out that expert testimony unrebutted by other expert testimony can be rejected by a jury as the jury is free to weigh the creditability of an expert witness, just as it can any other witness and the jury can reject such testimony even if it is uncontradicted.

Evidence – *Frye* Issues

Janssen Pharmaceutical Products v. Hodgemire, 49 So. 3d 767 (Fla. 5th DCA 2010)

In this case, the Plaintiff's expert calculated the decedent's anti-mortem drug levels based upon her post-mortem blood levels. The Defendant claimed that the

evidence did not meet the *Frye* level of admissibility by way of a motion in limine. The Motion in Limine was denied and the Fifth District determined that this preserved the issue for appellate review. They further held that the expert testimony was not subject to *Frye* where there was no dispute that post-mortem redistribution of medication was generally accepted or that the methodology for determining how the post-mortem redistribution ratio was calculated was generally accepted. As such, once it was shown that the underlying theory, methodology and principles are generally accepted, *Frye* would not exclude the expert's opinions even if the expert's opinion was not itself generally accepted.

Evidence – Prior Inconsistent Statements

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Harmless Error

Webster v. Body Dynamics, Inc., 27 So. 3d 805 (Fla. 1st DCA 2010)

The plaintiff, a 26 year old university student, suffered a stroke after taking certain dietary supplements containing ephedrine. He sued the manufacturers/distributors and sellers of the product for negligent failure to warn.

The plaintiff testified that he took ephedrine-based supplements twice a day for approximately four months. Despite this, neither his blood nor his urine yielded any evidence of ephedrine present in the system during the pertinent time. There was also evidence offered that when young people suffer strokes, physicians often have no idea why. One of the treating physicians concluded that this was one of those cases. The plaintiff attempted to admit evidence that the FDA banned ephedrine products six years after this accident. The judge refused to allow the plaintiff to admit the 135 page document into evidence and would not let the evidence come in in any form.

The First District found that it was probably error for the trial court not to admit the evidence. Nevertheless, it found the error to be harmless because the plaintiff did not demonstrate that it was reasonably probable that a result more favorable to him would have been reached had the error not been committed. Under these facts, the court found that there was no evidence of ephedrine in the plaintiff's system and the court found that the jury could have reasonably concluded that he was one of the 40% of young people having an unexplained stroke. The court also noted that there was evidence that the FDA had banned the supplements; however, it was just the FDA report itself that did not come into evidence.

Philippon v. Shreffler, 33 So. 3d 704 (Fla. 4th DCA 2010)

The Plaintiff filed suit against a surgeon and a hospital for medical negligence and vicarious liability for negligently granting a surgeon privileges. A pre-trial order limited the parties to one expert per specialty; however, the court permitted the patient to present the testimony of her treating surgeon who testified that the patient's recurrent pain suggested a failed surgery. The witness also observed that the patient had gouges in her cartilage caused by sharp instruments

and concluded that the gouges were inflicted by the surgeon because he was the only person who had been in the hip joint before him. The treating physician then testified that the injuries were caused by the surgeon's procedure and the injury to the joint fell below the standard of care. The Fourth District refused to reverse on this point finding that the trial court had broad discretion to determine the number of witnesses to be called by either party and that the range of subjects about which an expert witness will be allowed to testify are within the trial judge's discretion.

Additionally, during trial, the patient sought to introduce the testimony of a surgical technician who had been present during the operation. During discovery, the patient repeatedly requested contact information regarding this individual, but despite court order, the hospital never provided the information. The patient's counsel did not locate the witness until he conducted an internet search during trial. The patient argued that there was no prejudice to the hospital because they clearly knew of her identity because her name was in the hospital records and in the hospital's answers to interrogatories. The hospital argued that they would have been prejudiced by her testimony because had they known she would testify, they would have changed their opening statements, their cross-examination of witnesses and their defense. They also would have investigated her background and history for purposes of cross-examining her. A deposition was allowed of the witness and, thereafter, the hospital also argued that they were prejudiced because she named people in her deposition that the hospital wanted to question.

The trial court found that there was no surprise because the patient had attempted to obtain the witness' information and both sides knew the witness' name and of her presence in the operating room. The trial court also concluded that the hospital knew or should have known how to locate this witness but found no evidence of willful non-disclosure or bad faith. The Fourth District found that the decision to allow the witness to testify was well within the broad discretion of the trial court under Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981). The Fourth District added that in determining that an undisclosed witness should be allowed to testify, the trial court determines whether there is prejudice and this "refers to the surprise in fact of the objecting party, and is not dependent on the adverse nature of the testimony."

Additionally, during trial, the patient's counsel advised the court that the Florida Supreme Court had issued Brandon Regional Hospital v. Murray, 957 So. 2d 590 (Fla. 2007), an opinion which permitted the discovery of the delineation of privileges. The trial court required the hospital to produce this document and admitted it into evidence over objection. In allowing this evidence in before the

jury, the Fourth District noted that a trial court's discretion to admit evidence is reviewed using an abuse of discretion standard of review is limited by the Rules of Evidence and found no abuse of discretion.

Lastly, during rebuttal and closing arguments, the patient's counsel made several comments which were inappropriate and which Defendant believed required a new trial. The Fourth District found that, as to those comments objected to contemporaneously, none warranted reversal. By way of explanation, they noted that during trial, the patient presented testimony of a witness who referred to a document while testifying to a chronology of events. Defense counsel requested a copy of the document, but the patient's counsel advised the court that the chronology was prepared by his law firm and that "it doesn't go into evidence." There were no further discussions or any rulings with respect to the chronology.

During closing argument, the patient's counsel argued "Where is the chronology? Why isn't in evidence if it's so important? They didn't move it into evidence." During closing argument, the patient's counsel also questioned where the delineation of privileges were that demonstrated that the surgeon had authorization to perform a hip arthroscopy at the hospital. The patient's counsel stated "We have been asking for it for years. And we get nothing. We get a stiff arm and a cocksure attorney who thinks that you've made up your mind." The hospital and the surgeon objected and the court sustained the objection.

After the closing arguments and after the jury had exited the courtroom, the appellant's attorney moved for mistrial specifically regarding the "cocksure comment" stating that it was a cheap shot. He also complained that there was no evidence that the patient had been asking for the delineation of privileges for years and that until recently it was privileged as a matter of law. The trial court ultimately denied the motion for mistrial.

The Fourth District held that the trial court did not abuse its discretion in refusing to grant a mistrial or a new trial. After the court sustained the objection to the "cocksure attorney" reference, the patient did not use the term again. As for the chronology argument, the Fourth District believed that the argument was unfair where, during trial, the patient argued that it was inadmissible work product. The Fourth District also stated "it also could be considered somewhat disingenuous" for the patient's counsel to insinuate that the hospital had failed to turn over the listing of privileges when it had been privileged until the Florida Supreme Court decision that was issued during trial. They concluded by stating that while the argument could be considered close to running afoul of the permissible bounds of advocacy,

they found that none of the arguments either individually or collectively were so prejudicial as to deny the defendants a fair trial.

New Trial – Attorney Misconduct

Companioni v. City of Tampa, 35 FLW S738 (Fla. 12/16/10)

Throughout trial, counsel engaged in improper conduct. The Supreme Court held that when a party objects to instances of attorney misconduct during trial and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a Motion for New Trial. In doing so, they looked to the earlier decision in Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985) which held that in order to preserve a sustained objection for appellate review, "unless the improper argument constitutes a fundamental error, a Motion for Mistrial must be made at the time the improper comment was made." The Supreme Court further held that in this case that if the issue is not preserved, then the conduct must be subject to fundamental error analysis under Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000).

New Trial – Closing Argument

Aills v. Boemi, 29 So. 3d 1105 (Fla. 2/25/10)

Following a jury verdict in favor of the plaintiff, the defendant moved for a judgment notwithstanding the verdict or for new trial and also sought remittitur of various portions of the jury award. The trial court granted the remittitur on certain elements, but rejected it on the award for non-economic damages. The trial court ordered a new trial on damages only and the plaintiff appealed. The doctor filed a cross appeal raising the issue of improper closing argument. The Second District previously reversed based upon the improper closing arguments made by plaintiff's counsel. The Supreme Court reversed the decision of the Second District and reinstated the trial court's order finding that the doctor had failed to advance specific grounds for the objection relied upon by the District Court for reversal.

The Supreme Court explained that, while the defendant had objected when plaintiff's counsel began to argue that the doctor failed to provide the plaintiff with appropriate post-operative care, the defendant's objection was that the remarks were improper because there was no basis in the record that the post-operative care was negligent or would have made a difference.

The Second District concluded that the issue of post-operative negligence had neither been pled in the complaint nor tried by consent and, therefore, the argument was improper. The Supreme Court reminded attorneys that in order to preserve error for appellate review, there must be: (1) a timely contemporaneous objection at the time of the alleged error; (2) a legal ground for the objection; and (3) the argument made on appeal must reflect the specific contention asserted as the legal ground for the objection. While there are no magic words required to make a proper objection, it must be sufficiently specific to inform the court of the perceived error.

Chin v. Caiaffa, 42 So. 3d 300 (Fla. 3d DCA 2010)

The Third District reversed the trial court for having denied Defendant's Motion for New Trial finding that the Plaintiff's counsel, Ronald Simon, improperly appealed to the passion and sympathy of the jury in his opening statement, gave an improper and prejudicial closing argument and improperly attacked the character of the defense expert during cross-examination. The opinion details all of the improper actions and statements undertaken by Plaintiff's counsel noting that his conduct was similar to that in another case also involving the same Plaintiff's counsel: SDG Dadeland Associates v. Anthony, 979 So. 2d 997(Fla. 3d DCA 2008).

The highlights includedthe Plaintiff's counsel arguing that his client would be "living for over 50 years with half his manhood missing" when the evidence showed that a testicle was injured in the accident, but it was not destroyed nor had it been surgically removed. Plaintiff's counsel also repeatedly told the jury "by their negligence, [the Defendant] wrote a blank check". Plaintiff's counsel also argued that the defense was "frivolous" and argued "We all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. Then you make a bigger one when you call on witnesses that don't tell the truth. Anything to win. Anything to save the day." The Third District also found the closing argument flawed by comparing the Plaintiff's life to a Picasso painting valued at $10,000,000 suggesting that "If this case had been about a $10,000,000 painting, you would go back and in 5 minutes you would write out a $10,000,000 check."

New Trial – Damages

Ailles v. Boemi, 29 So. 3d 1105 (Fla. 2d DCA 2010)

The jury awarded $150,000 for future medical expenses. The Plaintiff's treating physician estimated that she would require five additional medical procedures as a result of the alleged negligence and that each additional procedure would cost $10,000-$15,000 each. As such, the Second District found that the trial court abused its discretion in failing to remit the award of future medical expenses to $75,000. They then instructed the trial court to do so and to order a new trial if the Plaintiff rejected the remittitur.

As for the award of past and future non-economic damages, the jury awarded $8,000,000 to the Plaintiff. The trial court reduced the award to $2,500,000. This was based upon post-trial submissions by the Defendant in which he argued that a non-economic damage award of 4-5 times the actual medical damages incurred would be appropriate. They also submitted a listing of jury verdicts throughout the country involving plaintiffs who sustained injuries similar to those suffered by the Plaintiff. The jury awards ranged from $55,000 to amounts in the low seven figures with most awards in the low-mid six figures. The highest verdict in a similar case was $3,500,000 for a plaintiff who suffered injuries believed to be more severe than those sustained by the Plaintiff.

The Second District approved the trial court's order of remittitur as to the award of past and future non-economic damages and affirmed the trial court's alternative order granting a new trial on damages because of the Plaintiff's rejection of the remittitur.

Montesinos v. Zapata, 43 So. 3d 97 (Fla. 3d DCA 2010)

Finding that the award of future medical expenses was not supported by competent substantial evidence (the Plaintiff attempted to justify an award of $93,000 by suggesting that it was a multiple of the $14,000 the jury awarded for past medical expenses) and finding that the record lacked testimony regarding a probable need for any medical treatment in the future, the Third District reversed for a new trial on the issue of future medical expenses or alternatively ordered remittitur as to the amount of future medical expenses.

New Trial – Discovery

Alvarez v. Cooper Tire and Rubber Company, 35 FLW D2630 (Fla. 4th DCA 12/1/10)

The Fourth District granted a new trial based upon the trial court's unreasonable restriction on discovery. In this case, the decedent was killed in a motor vehicle accident in which it was alleged that a tire, manufactured by Cooper Tire and Rubber Company, unexpectedly separated. The trial court restricted Plaintiff's discovery regarding Defendant's passenger-light truck tire design and production to the subject tire and "substantially similar" tires which essentially restricted discovery to only the model tire involved in the accident even though the Fourth District noted that, under federal guidelines, the general nature of passenger-light truck tire production is standard for all models and the records of tread separation in any of them could lead to admissible evidence at trial.

New Trial – Evidence

Hogan v. Gable, 30 So. 3d 573 (Fla. 1st DCA 2010)

The plaintiff was a surgeon who volunteered to sit in a dunking booth at a fundraiser sponsored by his hospital and the American Cancer Society. The hospital borrowed a dunking booth from a local fire department. While climbing inside the booth, the surgeon lacerated his hand on metal mesh and, as a result of the injury, he could no longer perform surgery.

Just before trial began, the fire department sought to offer evidence that there had been no complaints of injury related to the dunking booth since its construction in 1990. The plaintiff objected to the introduction of such non-occurrence evidence arguing that they had not shown that the booth was in a substantially similar condition since its construction in light of testimony regarding modifications that were made to the booth, including addition of the wire mesh and a door between 2000 and 2002. The plaintiff also argued that the defendant could not show that the booth had been previously used at night and under the same lighting conditions. The defendant argued that a showing of substantial similarity was not necessary because the purpose of offering the evidence was to show that they were not on notice of a dangerous condition in the booth.

Although the trial court's decision to admit evidence of the occurrence or non-occurrence of prior accidents under substantially similar conditions was within the sound discretion of the trial court, the First District held that because of the modifications to the dunking booth, as well as, the fact that the non-occurrence evidence was a feature of the trial, they were unable to determine whether, without the introduction of the non-occurrence evidence, the jury would have reached the

same verdict. As such, they found that the introduction of such evidence was harmful and ordered a new trial.

Estate of Murray v. Delta Health Group, 30 So. 3d 576 (Fla. 2d DCA 2010)

A resident of a nursing home died and his personal representative sued the nursing home for negligence. The trial court allowed portions of the decedent's doctor's deposition to be read. In the deposition, the doctor opined that the nursing home was "not negligent" in his care of the decedent. The plaintiff argued that the physician was an expert who should not have been permitted to render an opinion that applied a legal standard to the facts of the case and that his testimony invaded the province of the jury. The Second District reversed and found that a new trial was required because while experts may render opinions on the ultimate issue in the case, they are not permitted to render opinions that apply legal standards to a set of facts.

New Trial - Exclusion of Evidence

JVA Enterprises v. Prentice, 48 So. 3d 109 (Fla. 4th DCA 2010)

The Plaintiff claimed injuries involving a herniated disc in his neck and a torn right rotator cuff, both of which required surgical repair. In answers to interrogatories, the Plaintiff denied that he was seeking compensation for exacerbation of any pre-existing injury and disclosed that he filed a Worker's Compensation claim and a personal injury suit in California in the 1980's. The Defendant actually located information which suggested that the Plaintiff had filed three Worker's Compensation claims in the past. The Worker's Compensation claim records reflect injuries in the upper back radiating into the left arm, stiffness in both sides of his neck and difficulty turning his head and using his arms. There were also disc bulges in the neck and he was diagnosed with chronic cervical myofascial strain. A motion for sanctions and to strike the pleadings based on fraud to the court was denied finding the temporal distance between the 1991 injury and the 2008 trial to be compelling.

In denying the motion, the trial court indicated that it might be an appropriate area for cross-examination or impeachment. The Plaintiff then filed a motion in limine asking the trial court to preclude admission of the 1991 Worker's Compensation records finding that they were unrelated to the 2003 and 2004 injuries. The trial court granted the motion in limine. In closing, the Plaintiff's counsel argued "Where is the testimony to support the speculation of some big,

bad neck injury, or shoulder injury in the past? Where is the testimony or evidence?" The Fourth District noted that it is improper for a lawyer, who successfully excluded evidence, to seek advantage before the jury because the evidence was not presented. As such, a new trial was ordered.

Greenberg v. Schindler Elevator Corp., 50 So. 3d 794 (Fla. 3d DCA 2010)

Plaintiff sued Schindler and Miami-Dade County for injuries she received when she fell on an escalator at Miami International Airport. During trial, the Plaintiff's physical medicine specialist was prepared to testify that, although he was not a back surgeon, the Plaintiff would require surgery in the future. The trial court precluded this testimony. Additionally, the Defendant successfully convinced the trial court to exclude evidence of prior problems with the subject escalator and then, in closing, argued that there was no evidence of prior problems.

The Third District reversed finding that defense counsel should not have been allowed to argue there was no evidence of prior problems after the trial court excluded such evidence noting that it is improper to obtain exclusion of evidence and then, in closing argument, criticize the Plaintiff for failing to produce that very evidence. Additionally, the Third District found that it was error to exclude the physical medicine physician's opinions regarding the need for future surgery because, in his practice, he normally referred patients for surgery. Further, as a treating physician, he was a fact witness and not an expert witness. Therefore, he did not need to be an expert back surgeon in order to testify to his belief that the Plaintiff would need surgery in the future.

New Trial – Improper Comments

Samuels v. Torres, 33 So. 3d 117 (Fla. 5th DCA 2010)

During voir dire, the defense attorney stated that his client and not an insurance company was responsible for paying any judgment. The plaintiff requested a mistrial which was granted. A jury was then selected and during opening statements, the defense attorney advised the jury how little his client earned as a owner/operator of a truck. The plaintiff then moved for mistrial again; however, the trial court allowed the trial to continue. The Fifth District ultimately reversed noting that interjection of the wealth or poverty of any party is irrelevant and highly prejudicial because it diverts the jury from a fair assessment of damages.

Fasani v. Kowalski, 43 So. 3d 85 (Fla. 3d DCA 2010)

Plaintiff was injured when riding in an elevator when granite tile separated from the wall and struck him on his head. Finding that the trial court improperly denied the Motion for New Trial based on improper argument and that the Plaintiff failed to present appropriate evidence for a claim for future medical expenses, the Third District reversed. Throughout the trial, Plaintiff's counsel made arguments like "this is a case about a company … that wanted to make a couple of extra dollars."; "Why didn't they send them to a doctor instead of just kicking him out on the street like a dog and telling him we're giving you nothing."; "The unsafe condition of the elevator was due to "corporate arrogance and corporate greed."; "They wanted a pretty elevator and they didn't care who got hurt or how bad it was and when somebody got hurt, they said, you know what, we made a mistake but we are not giving you anything."

Plaintiff's counsel also argued "If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying $80,000,000 to replace it. Why is it any different when it is a man's brain?"; and "Ask a reasonable person, look, how much money would you take for me to hit you in the head with a baseball bat as hard as I can?" He concluded his argument by stating "You're the ones that have the power so that they can't get away with this. It's up to you. And when you in the jury room, you're the ones that can hold them to this. You're the ones that can make them do the right thing because they haven't done it on their own and they have no intentions of doing it on their own. You're gonna have to make them do the right thing."

The Third District reversed and noted that it was improper for an attorney to disparage an opposing party's defense of a case or to suggest that a party should be punished for contesting a claim. They noted that such argument served no purpose other than to inflame and prejudice the jury. As for the Picasso argument, the Third District noted that "such value of life arguments are improper".

As for the claim of future medical expenses, the Third District once again emphasized that it is the Plaintiff's burden to establish that future medical expenses will more probably than not be incurred and there must be evidence in the record from which a jury could, with reasonable certainty, determine the amount of medical expenses which would be likely to be incurred. The testimony of the Plaintiff's treating physicians did not establish the extent or nature of the future care recommended, how often the care would be needed in the future or a basis to

determine the amount of expenses. Accordingly, they struck that portion of the jury award.

New Trial – Jury Instructions

Nason v. Shafranski, 33 So. 3d 117 (Fla. 4th DCA 2010)

The Defendants admitted negligence in causing a motor vehicle accident, but disputed the amount of damages. During the trial, the Defendants were allowed to present expert medical testimony regarding unnecessary surgeries, thereby shifting the blame for Plaintiff's damages from the Defendants to the Plaintiff's treating physician. The Plaintiff argued that the trial court compounded the error by refusing to give the Plaintiff's requested jury instruction that the Defendants were responsible for any damages resulting from any negligent or improper medical treatment. The Fourth District agreed that it was error and reversed the trial court's decision.

In this case, the defense doctor was allowed to testify, over objection, that he would not have recommended that the Plaintiff undergo reconstructive surgery. This point was argued throughout the trial and, during jury deliberations, the jury asked whether the Defendant could be relieved of liability if the Plaintiff was a victim of "unscrupulous" medical treatment. The Fourth District rejected the defense argument that the Defendants were merely contesting the reasonableness of the medical expenses. Notably, Judge Farmer drafted a jury instruction which takes into account subsequent negligent medical treatment.

Beltran v. Rodriguez, 36 So. 3d 725 (Fla. 3d DCA 2010)

The decedent made a u-turn during which time her car collided with another vehicle. The parties stipulated that she did not stop before she made the turn. She was hit in a side swiped manner, causing her vehicle to slide before coming to rest on the opposite side of the road, at which point (7 seconds later) she was hit by another car. She died as a result of the two crashes.

At the close of the Plaintiff's case, the trucking company (involved in the second collision) moved for a directed verdict. The case proceeded against the truck driver with a stipulation that if the driver was found liable, the company would be held vicariously responsible. The jury ultimately found no liability on the part of the driver.

The Plaintiff had alleged that the trucking company was negligent in inspecting and maintaining the vehicle. With scant evidence of negligent maintenance, the Plaintiff's expert testified that there was also no evidence that the driver took measures to avoid the collision, thereby showing that none of the truck's defects contributed to the accident. While there was evidence of the truck's defective condition, there was no evidence that the condition of the truck caused or contributed to the accident and thus no jury question was presented. Accordingly, the directed verdict was proper.

The Third District also found that the trial court properly refused Plaintiff's special instruction on concurring cause finding that the standard jury instruction was not sufficient to properly resolve the issues in the case. Finding that the jury was misled or prejudiced by the failure to give the additional instruction, the trial court's denial of the motion for new trial was affirmed.

New Trial –Miscellaneous

Sullivan v. Kanarek, 34 So. 3d 808 (Fla. 2d DCA 2010)

Following a contentious medical malpractice case involving the death of a 23 month old boy which resulted in a defense verdict, the Plaintiffs moved for a new trial arguing that the totality of defense counsel's tactics and behavior deprived the Plaintiffs of a fair trial. The alleged improprieties consisted of verbal behavior which was reflected in the record, as well as, non-verbal behavior which was not reflected in the record. At the conclusion of the initial hearing on the estate's motion for new trial, the presiding judge commented on the record that, in her 20 years on the bench, she had never had such great concerns as to the fairness of a trial based upon the conduct of a litigant's attorney (in this case the defense attorney). In fact, she noted that she cleared the courtroom twice during the course of the trial.

Before the motion for new trial was ruled upon, the defense attorney moved to disqualify the judge and she granted the motion. The case was then reassigned to a series of successor judges. Ultimately, the final judge acknowledged that he was in a difficult position based upon the recusal of the trial judge and because apparently many of the problems were off the record or based on non-verbal conduct.

The Second District reversed the trial court's denial of the motion for a new trial stating that, in civil cases where there are unusual circumstances, such as

death or involuntary recusal, a successor judge is supposed to review the entire trial court record and rule to the best of his or her ability. If, after reviewing the record, the successor judge determines that a particular credibility issue exists which prevents the trial court from adequately ruling on the merits, the successor judge may grant the motion and explain it under written order regarding the specific circumstances justifying the new trial without ruling on the merits.

New Trial –Preservation of Error

Aills v. Boemi, 29 So. 3d 1105 (Fla. 2010)

Following a jury verdict in favor of the plaintiff, the defendant moved for a judgment notwithstanding the verdict or for new trial and also sought remittitur of various portions of the jury award. The trial court granted the remittitur on certain elements, but rejected it on the award for non-economic damages. The trial court ordered a new trial on damages only and the plaintiff appealed. The doctor filed a cross appeal raising the issue of improper closing argument. The Second District previously reversed based upon the improper closing arguments made by plaintiff's counsel. The Supreme Court reversed the decision of the Second District and reinstated the trial court's order finding that the doctor had failed to advance specific grounds for the objection relied upon by the District Court for reversal.

The Supreme Court explained that, while the defendant had objected when plaintiff's counsel began to argue that the doctor failed to provide the plaintiff with appropriate post-operative care, the defendant's objection was that the remarks were improper because there was no basis in the record that the post-operative care was negligent or would have made a difference.

The Second District concluded that the issue of post-operative negligence had neither been pled in the complaint nor tried by consent and, therefore, the argument was improper. The Supreme Court reminded attorneys that in order to preserve error for appellate review, there must be: (1) a timely contemporaneous objection at the time of the alleged error; (2) a legal ground for the objection; and (3) the argument made on appeal must reflect the specific contention asserted as the legal ground for the objection. While there are no magic words required to make a proper objection, it must be sufficiently specific to inform the court of the perceived error.

Peremptory Challenges and Challenges for Cause

Johnson v. State, 27 So. 3d 761 (Fla. 2d DCA 2010)

During jury selection, the defendant objected when the State struck a male juror who would have taken the last seat on the jury. Defense counsel noted that the jury would consist entirely of females if the court upheld the strike and demanded a gender neutral reason for the strike. The State replied that it had wanted two other jurors who were both male, but the defendant struck them. The State also explained that it "didn't get a good feel" for the last juror. The court then reviewed all of the State's strikes and found that it struck an equal number of male and female jurors and concluded "so just by looking at the math, I really don't think anyone is striking anyone because of gender."

A jury was ultimately selected and the court asked the defendant if he was satisfied with the jury selection process and the jury and he replied that he was. A recess was then held and upon reconvening, the court on its own revisited the defendant's objection to the peremptory strike of the last juror. The court ultimately ruled that the State's reason was gender neutral based upon the fact that the State had struck an equal number of male and female jurors.

The Second District held that it was error to uphold the strike for the reasons stated and also found that it was inappropriate for the court to consider the overall make up of the jurors that had been seated in determining the sufficiency of the gender neutral reason for the peremptory strike. The court also held that the objection was properly preserved even though the defendant did not object to the jury prior to its being sworn in.

The Supreme Court previously held that "acceptance of the jury without the renewal of the objection leads to a reasonable assumption that the earlier objection is abandoned." The Second District noted that this requirement is to put the trial judge on notice that error may have been committed and give the court an opportunity to correct the error; however, under the circumstances of this case, the purpose of this rule was fulfilled.

Harriell v. State, 29 So. 3d 372 (Fla. 4th DCA 2010)

Excusing a juror because they were sleeping during jury selection is a race-neutral reason justifying the exercise of a peremptory strike.

Remittitur

Aills v. Boemi, 41 So. 3d 1022 (Fla. 2d DCA 2010)

The jury awarded $150,000 for future medical expenses. The Plaintiff's treating physician estimated that she would require five additional medical procedures as a result of the alleged negligence and that each additional procedure would cost $10,000-$15,000 each. As such, the Second District found that the trial court abused its discretion in failing to remit the award of future medical expenses to $75,000. They then instructed the trial court to do so and to order a new trial if the Plaintiff rejected the remittitur.

As for the award of past and future non-economic damages, the jury awarded $8,000,000 to the Plaintiff. The trial court reduced the award to $2,500,000. This was based upon post-trial submissions by the Defendant in which he argued that a non-economic damage award of 4-5 times the actual medical damages incurred would be appropriate. They also submitted a listing of jury verdicts throughout the country involving plaintiffs who sustained injuries similar to those suffered by the Plaintiff. The jury awards ranged from $55,000 to amounts in the low seven figures with most awards in the low-mid six figures. The highest verdict in a similar case was $3,500,000 for a plaintiff who suffered injuries believed to be more severe than those sustained by the Plaintiff.

The Second District approved the trial court's order of remittitur as to the award of past and future non-economic damages and affirmed the trial court's alternative order granting a new trial on damages because of the Plaintiff's rejection of the remittitur.

Montesinos v. Zapata, 43 So. 3d 97 (Fla. 3d DCA 2010)

Finding that the award of future medical expenses was not supported by competent substantial evidence (the Plaintiff attempted to justify an award of $93,000 by suggesting that it was a multiple of the $14,000 the jury awarded for past medical expenses) and finding that the record lacked testimony regarding a probable need for any medical treatment in the future, the Third District reversed for a new trial on the issue of future medical expenses or alternatively ordered remittitur as to the amount of future medical expenses.