2012
CASE LAW SUMMARY

Automobile Liability

Accident Report Privilege

Sottilaro v. Figueroa, 86 So. 3d 505 (Fla. 2d DCA 2012)

Sottilaro's car struck and killed a 14-year-old boy as he tried to cross a four-lane highway with a speed limit of 65 mph. Four of his friends gave sworn testimony to the police that the decedent was looking down at his phone and texting while crossing the highway; these statements were included in the officer's accident report. One of these friends testified in person. On cross-examination, he stated he did not know whether the decedent was texting or not. The portions of the deposition testimony of the other witnesses in which they were impeached by defense counsel with their prior statements to the deputy were redacted. The appellate court held that the trial court erred in refusing to allow defense counsel to impeach the witnesses with their prior inconsistent statements in the accident report. The accident report privilege set forth in § 316.066(5), Fla. Stat. (2010), did not apply to a witness to an accident, but only to a driver, owner, or occupant of a vehicle because those were the only people compelled to make a report under Florida's statutes. Therefore, the trial court erred as a matter of law in excluding the impeachment testimony of key witnesses.

Dangerous Instrumentality

Rippy v. Shepard, 80 So. 3d 305 (Fla. 2012)

In a case of first impression, the Florida Supreme Court held that a farm tractor is a dangerous instrumentality.

Discovery of a Defendant's Medical Records

McEnany v. Ryan, 77 So.3d 921 (Fla. 4th DCA 2012)

The Defendant was involved in a motor vehicle accident on December 17, 2008. The Fourth District held that his treating doctor's medical records from April 23, 2008 and May 1, 2009 were discoverable because it could help to establish whether the Defendant had a current prescription for Ritalin as of the date

of the accident. The production of records from dates beyond those visits were "solattenuated from the date of the accident that their disclosure would impinge on [Defendant's] constitutional right of privacy and medical records."

James v. Veneziano, 98 So. 3d 697 (Fla. 4th DCA 2012)

The Plaintiff sued the Defendant for a rear-end collision. The Defendant admitted in pretrial interrogatories that she suffered dementia and brain tumors sometime prior to the date of the accident, but he disclaimed any such infirmities at that time. When defense counsel subsequently canceled the scheduled pretrial deposition due to the Defendant presumably suffering a stroke, the Plaintiff moved the trial court to order the Defendant to both answer further interrogatories and to allow the Plaintiff to subpoena medical and other records concerning the Defendant's health. The Defendant objected asserting a right of privacy in the medical records.

The Fourth District quashed the trial court's order and granted certiorari finding that where a party challenges a discovery order concerning material to which he or she asserts a constitutional right to privacy, the trial court must conduct an in-camera examination to determine the relevance of the materials to the issues raised or implicated by the lawsuit.

Discovery of Treating Physicians Relationship to Plaintiff's Counsel

Steinger, Iscoe and Greene v. GEICO General Insurance Co., 103 So. 3d 200 (Fla. 4th DCA 2012)

In this case, the Steinger Law Firm represented Ms. Washington; a Plaintiff in an uninsured motorist claim against GEICO. During discovery, GEICO propounded standard expert witness interrogatories which the Plaintiff objected to. GEICO filed a motion to compel better answers and, at the hearing on the motion, Plaintiff's counsel admitted that some of the treating physicians would render expert opinions on matters such as causation, permanency and future damages. The trial court then granted the motion. A series of motions and hearings followed which led to GEICO seeking to depose the law firm's office manager in order to obtain information, including documents, relating to the nature and extent of the relationship between the law firm and the treating physicians who the Plaintiff admitted would be rendering expert opinions. All of the requests sought information concerning the financial dealings between the law firm and Plaintiff's healthcare providers including: (1) all record of payments by the firm to the

medical providers; (2) all Letters of Protection to those providers; (3) all phone records between the firm and the providers' and (4) all deposition and trial transcripts of the individuals or entities in the firm's possession. The law firm moved for protective order on a variety of grounds. The trial court denied the motion for protective order as to items 1, 2 and 4, but allowed the firm to redact the names of clients in cases that settled or where no lawsuit was filed.

The Fourth District correctly pointed out that the evidence code allows a party to attack a witnesses' credibility based upon bias. They then noted that, for purposes of uncovering bias, there was no meaningful distinction between a treating physician witness who also provides an expert opinion (i.e., a "hybrid witness") and retained experts.

Eventually, they concluded that, where there is a preliminary showing that the Plaintiff was referred to the doctor by the lawyer (whether directly or through a third party) or vice-versa, the Defendant is entitled to discovery information regarding the extent of the relationship between the law firm and the doctor. The Fourth District concluded by noting that they were unable to determine whether GEICO had established the existence of a referral relationship between the healthcare providers and the law firm. At the very least, the healthcare providers must provide financial bias discovery like that permitted by Rule 1.280(b)(5)(A)(iii), as well as, any history of referrals between the healthcare providers and the law firm. Beyond that, if GEICO can establish that the law firm or healthcare providers referred Plaintiff to the other, a more extensive financial bias discovery from both of them may be appropriate.

New Trial – Cause of Accident

Diaz v. Fed Ex Freight East, Inc., 37 FLW D2849 (Fla. 5th DCA 12/14/12)

The decedent was killed when his motorcycle crashed into the side of a tractor trailer driven by the Defendant's driver. When the crash occurred, the decedent was traveling between 59-79 MPH in a 45-MPH zone. The tractor trailer was in the decedent's lane and it was alleged that the Defendant driver failed to stop at a stop sign before making his turn.

Prior to trial, the court granted the Plaintiff's motion in limine precluding testimony regarding the issuance of a citation or the assignment of fault. At trial, the Defendant elicited testimony from the traffic homicide investigator who had already testified regarding the decedent's excessive speed. In response to a

question regarding contributing causes of the accident, the detective testified that he was "given no reason to feel there was any fault on the part of the [Defendant] based on the information or the evidence that [he] found at the scene." The Plaintiff then moved for mistrial and the trial court denied it and gave a curative instruction in which he instructed the jury to disregard the testimony and also told them that the detective was not allowed or competent to testify as to fault. The Fifth District reversed and held that a mistrial should have been granted because the detective's testimony precluded the jury from finding that the Defendant negligently contributed to the accident, especially given the undisputed evidence that the decedent was exceeding the speed limit. They also held that the curative instruction was insufficient to overcome the prejudice because "when liability is at issue, curative instructions are usually insufficient to cure the error."

New Trial – Comparative Negligence

Lenhart v. Basora, 100 So. 3d 1177 (Fla. 4th DCA 2012)

The Plaintiff was a passenger on a scooter which was struck by a car driven by Basora. Basora abruptly turned into the scooter's traffic lane and caused the collision. The Plaintiff was not wearing a helmet and suffered permanent brain injury. The Defendant admitted that he negligently operated his car, but asserted that any recovery should be reduced by the Plaintiff's failure to wear a helmet. Before trial, the Defendant moved in limine to prevent the Plaintiff from introducing certain evidence pertaining to his negligence. This evidence included the fact that the Defendant had never been issued a driver's license; had driven a car only once before the accident on a joy ride when he was 13; he did not remember if he was wearing his glasses at the time of the collision; and that he failed to take his medication for depression and anger management on the day of the accident. The Defendant maintained that such evidence was irrelevant and lacked probative value because he admitted his negligence. The trial court agreed. The Fourth District reversed finding that the exclusion of the evidence prevented the jury from fully evaluating the parties' comparative negligence. In so doing, they noted that "comparative negligence means comparison… to parse out the comparative negligence of the parties, the trier of fact must hear the single 'totality of fault' of each side." The Fourth District added that, without the excluded evidence, the Defendant shielded the extent of his negligence from the jury while exposing all of the Plaintiff's conduct.

New Trial – Expert on Billing Improperly Excluded

State Farm Mutual Auto. Ins. Co., v. Bowling, 81 So. 3d 538 (Fla. 2d DCA 2012)

State Farm appealed a final judgment on grounds that its expert witness was improperly excluded from testifying at trial. Ms. Pacha was retained to testify as to the reasonableness of Bowling's medical bills for treatment related to the auto accident. The trial court excluded Ms. Pacha, finding that she did was not qualified to render that opinion and that her testimony would not assist the jury in determining whether Bowling's medical bills were reasonable. The Second District reversed. The court found Ms. Pacha's testimony would assist the jury becausae the reasonableness of medical bills is a technical issue that the jury would not have knowledge of. Further, it was clear from Ms. Pacha's deposition that she had the requisite knowledge because she was an expert in medical billing coding. Thus, while she was not qualified to render opinion whether the treatment was reasonable, she could give opinions whether the billing for that treatment was reasonable.

New Trial – Limitation on Cross-Examination

Poland v. Zaccheo, 82 So. 3d 133 (Fla. 4th DCA 2012)

Poland sued Zaccheo for injuries sustained in an automobile accident. She then appealed the jury verdict which awarded her a fractional percentage of the damages she claimed. The Defendant admitted negligence in causing the accident, but disputed the degree of the Plaintiff's injuries and damages. The Plaintiff contends that the trial court erred by limiting the cross-examination of the defense's medical expert and by denying her request for a jury instruction pursuant to *Stuart v. Hertz*.

The Fourth District did not address the jury instruction issue; however, they found that a new trial was warranted based on the limitation of cross-examination. At trial, the Defendant called an orthopedic surgeon to opine that the automobile accident had caused only a temporary cervical strain and that the majority of the Plaintiff's injuries were attributable to pre-existing disc bulges and degeneration associated with morbid obesity. The defense expert concluded that the Plaintiff suffered no permanent injuries to her neck or back as a result of the accident and would not need future treatment. Apparently, the defense expert also testified that the patient's surgery was unrelated to the automobile accident. As a result, the Plaintiff's counsel attempted to ask the doctor what the surgery was related to if it

was not from the automobile accident. The defense responded that if the doctor was going to be questioned about this, then he would go back and ask him about the AMA's opinion that the patient had undergone a worthless surgery. As a result, the trial court sustained the objection and prevented the doctor from being asked questions about his opinion as to what was the cause of the surgery.

New Trial – Insufficient Damages

Martin v. Brubaker, 87 So. 3d 797 (Fla. 2d DCA 2012)

The Defendant in an automobile accident case admitted liability and the issues of causation and damages were presented to a jury. The jury found that the Defendant's negligence was not the legal cause of the Plaintiff's injuries and no damages were awarded. The Second District affirmed as to the jury findings on causation, but reversed and ordered a new trial on the issue of damages because "once liability is admitted in a case where the Plaintiff made a reasonable trip to the Emergency Department, the jury must return a verdict awarding at least the minimal damages that undisputedly are not barred by the No-Fault threshold." In this case, the Plaintiff went to the hospital for pain in her neck and back within a few hours after the accident and, therefore, it is undisputed that the initial diagnostic tests and treatment were reasonable and necessary as to the accident. Thus, the failure to award at least the costs of the initial medical evaluation as damages was against the manifest weight of the evidence and a Motion for New Trial on new damages would be granted.

PIP

GEICO General Ins. Co., v. Tarpon Total Healthcare, 86 So. 3d 585 (Fla. 2d DCA 2012)

Tarpon provided chiropractic treatment to the insured for injuries from an auto accident. Tarpon submitted five claim forms to GEICO but omitted the doctor's license number as required by §627.736(5)(d), Fla. Stat. (2004). GEICO denied the claims without referencing the omission. The statute requires the healthcare provider to furnish the insurer with written notice of the claim within 35 days of rendering services on a properly completed standard form. Subsection (4)(b) states that the insurer explain its reason for rejecting any claim. The county court awarded GEICO summary judgment on grounds that failure to provide the license failed to put GEICO on notice. The Second District affirmed the circuit

court's reversal, applying law from the Third District, holding that an insurer is put on notice of a covered claim by submission of a substantially completed form.

GEICO General Ins. Co., v. Virtual Imaging Svc's, Inc., 90 So. 3d 321 (Fla. 3d DCA 2012)

The trial court certified the question of whether an insurer was allowed to limit provider reimbursement to 80 percent of the schedule of maximum charges described in § 627.736(5)(a), Fla. Stat., if its policy did not make a specific election to do so. The Third District answered it did not. GEICO reimbursed the provider for MRI services based on 80 percent of 200 percent of Medicare fee schedule pursuant to § 627.736(5)(a)(2)(f). The provider argued it was entitled to additional compensation based on language of the policies indicating the insurer would pay 80 percent of reasonable medical expenses. GEICO argued that § 627.736(5)(a)(2) was incorporated into the policies under § 627.7407(2), Fla. Stat. The policies stated that the insurer would pay 80 percent of all reasonable medical expenses. The Third District disagreed with GEICO's argument, finding that even if § 627.736(5)(a)(2) were incorporated into the policies, the resulting ambiguity of which method an insurer would use would be settled in favor of reimbursing the provider for the largest amount within the language of the policies.

Rear-End Collision Presumption

Shirey v. State Farm, 94 So. 3d 619 (Fla. 4th DCA 4/25/12)

The auto accident occurred when a first car, driven by an unidentified person, slowed down to make a right turn, and two following cars slowed down in reaction. Shirey, who was driving the fourth or last car, rear-ended the third car, driven by the insured, causing his vehicle to rear-end the second vehicle. The second and third drivers testified that they slowed down in response to the first car, and did not hit one another until Shirey's car slammed into the third car. The Fourth District held that statements of the insured's expert did not establish that the drivers stopped their cars abruptly and arbitrarily, and that the presumption of negligence on the part of a rear driver in a rear-end collision applied. The expert's opinions established that the drivers maintained the safe operation of their respective vehicles in response to the phantom vehicle's right-hand turn. Even without the presumption, there was no material evidence of negligence by the second and third drivers. But for the Shirey's own negligence in failing to maintain a safe distance and in applying the appropriate braking, no accident would have occurred.

Jiminez v. Faccone, 98 So. 3d 621 (Fla. 2d DCA 2012)

Appellant driver, Jiminez, appeals final judgment in favor of Faccone, a motorist and the Personal Representative of a decedent's Estate, in a personal injury action stemming from an automobile accident. Faccone and two other people exited their stalled car in order to push it through the intersection when Jiminez hit the rear of the vehicle, causing injuries to Faccone and the decedent. Prior to trial, the trial court granted summary judgment to Faccone on the issue of liability for the accident and also prevented the driver from asserting the threshold defense under § 627.737, Fla. Stat. (1997), requiring Faccone to establish a threshold injury in order to recover non-economic damages.

The Second District held that disputed issues of material fact existed which should have precluded entry of summary judgment as there was an issue of fact as to whether the emergency flashers on Faccone's vehicle were illuminated. The presumption that the rear-driver's negligence was the sole cause of the accident was rebuttable by proof that Faccone's car was in the left lane of traffic, that the traffic light was green, and that the vehicle was unexpectedly stopped. Further, the trial court erred in concluding that the permanent injury threshold defense was unavailable to Jiminez. Jiminez, a statutory nonresident, became subject to Florida's no-fault law because she owned and operated a vehicle in the state and was required to register the vehicle. The court reversed and remanded for a new trial.

Birge v. Charron, 37 FLW S735 (Fla. 11/21/12)

The Supreme Court held that because tort recovery in Florida is governed by principles of comparative negligence, the presumption that a rear driver's negligence is the sole cause of a rear-end automobile collision can be rebutted and its legal affect dissipated by the production of evidence from which a jury could conclude that the front driver was negligent in the operation of his or her own vehicle. They further held that the rear-end presumption is an evidentiary tool to facilitate a particular type of negligence case where there is an absence of a jury question on the issue of comparative fault; it is not an alternative means of tort recovery in derogation of Florida's law governing recovery based on comparative negligence. As such, where evidence is produced from which a jury could conclude that the front driver in a rear-end collision was negligent and comparatively at fault in bringing about the collision, the presumption is rebutted and the issues of disputed fact regarding negligence and causation should be

submitted to the jury. Further, where the presumption of rear-driver negligence is rebutted, the legal affect of the presumption is dissipated and the presumption is reduced to the status of a permissible inference or deduction from which the jury may, but is not required to, find negligence on the part of the rear-driver.

Threshold Defense

Jiminez v. Faccone, 98 So. 3d 621 (Fla. 2d DCA 2012)

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Uninsured Motorist

Gay v. Association Casualty Insurance Company, 103 So. 3d 1028 (Fla. 5th DCA 2012)

The trial court entered a summary judgment finding that there was no uninsured motorist coverage because the insured failed to give written notice to the insurer of his uninsured motorist claim. The Fifth District reversed because notice was given by the insured to the insurance broker and the Fifth District held that the

notice was given to the insurer because the broker was both an agent of the insured and the insurer. They also noted that, even though was no written notice of claim as required by the policy, the written notice requirement can be waived when the insurer had actual notice of the claim.

Work Product

Heartland Express, Inc., v. Torres, 90 So. 3d 365 (Fla. 1st DCA 6/25/12)

Deposition questions posed to corporate representative regarding the risk management investigation of an accident were subject to work product privilege. The First District held that because the risk management investigation was conducted in anticipation of litigation, information related to the investigation qualified for work-product protection. Further, counsel could instruct deponent not to answer the questions in order to preserve the privilege.