2012
CASE LAW SUMMARY

Trial Issues

Directed Verdict

Hollywood Medical Center v. Alfred, 82 So. 3d 122 (Fla. 4th DCA 2012)

The decedent was brought to the Hospital after having suffered seizures. On arrival, her vital signs were low and she had a Glasgow Coma Scale of 3. The ER physician ordered Valium to prevent an additional seizure. She was also given Atropine and epinephrine and an attempt to intubate her was unsuccessful. She was then given a paralytic in order to permit intubation and, shortly thereafter, the patient went into full cardiac arrest and died. Dr. Bruce Charash, the Plaintiff's cardiology expert, testified that the patient's death was preventable had she been intubated and put on a respirator immediately upon presentation to the emergency room. Plaintiff also presented the testimony of a nursing expert who testified to various deviations from a nursing standard of care, but did not offer any opinion on causation. They also presented testimony of Dr. Sichewski, an emergency medicine expert who also testified that the ER physician should have intubated the patient immediately upon arrival. He also testified that the ER physician should have never administered Anectine. The Hospital moved for directed verdict pointing out that the Plaintiff's experts testified that the ER physician had fallen below the standard of care in failing to timely intubate the patient and that no evidence was presented that any nursing staff malpractice caused or contributed to causing the patient's death. The 4th District reversed and ordered that a final judgment be entered in favor of the Hospital finding that the Plaintiff failed to show that the breach of the standard of care by the nursing staff caused the patient's death.

Mount Sinai Medical Center v. Gonzalez, 98 So. 3d 1198 (Fla. 3d DCA 2012)

The Plaintiff claims that as she and her husband walked down the steps at the hospital, her husband fell and broke his hip and, as a result, he passed away a few weeks later. In evaluating the evidence, the Third District reversed and ordered that a verdict be entered in favor of the hospital because the Plaintiff did not present competent evidence that her husband even fell on or down the steps, let alone that he did so because of a defective condition. Further, the Third District

noted that even if a directed verdict was not warranted, a new trial was required because the trial court erroneously admitted unsupported expert testimony. Specifically, while they found that the expert's testimony was arguably sufficient as to whether the steps were properly constructed; however, his testimony in the key issue of causation was not only "well beyond the witness's supposed expertise, but totally 'conclusory in nature and … unsupported by any discernable, factually-based chain of underlying reasoning.'"

Secondly, a new trial would have also been required because the trial court erred in admitting evidence of a prior slip and fall at the scene which was not similar to the one in question. The ruling was made as a purported "sanction" for an alleged discovery violation; however, the court questioned whether a harmful violation occurred at all and added that "even if it did, there was no justification - - and we have found no authority to support - - the admission of concededly otherwise inadmissible testimony, such as this to pollute the fair determination of issues before the jury. Thus, the punishment was way out of proportion to the alleged offense."

Tricam Industries v. Coba, 100 So. 3d 105 (Fla. 3d DCA 2012)

In a product liability lawsuit involving a ladder failure, the jury found that the Defendants did not place the ladder on the market with a design defect which was a legal cause of the decedent's death. Even though there was no other issue before the jury other than a design defect, the court and the parties then asked a follow up question on the verdict form as to whether there was negligence on the part of the Defendants which was a legal cause of the decedent's death. They answered "Yes" to this question and, after the verdict was read, neither the Plaintiff nor the Defendants objected to the verdict. On appeal, the Plaintiff conceded that the verdict in the case was inconsistent, but argued that the Defendants waived their objections to the inconsistency by failing to object before the jury was discharged. In a case of first impression in the Third District, the court applied the rule set down by the Fourth and Fifth District Courts which carves out an exception to the general rule where the inconsistency "is of a fundamental nature." Finding that the inconsistency was fundamental, the Third District ruled that a directed verdict should have been granted to the Defendants.

Evidence of Expert's Relationship with Insurer

Herrera v. Moustafa, 96 So. 3d 1020 (Fla. 4th DCA 2012)

The Fourth District upheld a lower court verdict in which the defense experts were permitted to be asked whether they knew that "defense attorney's employer" had paid him over $330,000 for expert services. The defense attorney's employer was GEICO; however, GEICO was not mentioned nor was insurance mentioned. Reviewing this under an abuse of discretion standard, the Fourth District noted that "where an insured provides a defense for its insured and is acting as the insured's agent, the insurer's relationship to an expert is discoverable from the insured."

Exclusion of Expert Testimony

Duss v. Garcia, 80 So. 3d 358 (Fla. 1st DCA 2012)

It was alleged that the defendant obstetrician was negligent in using a fetal vacuum extractor during the delivery of the Plaintiff and that this negligence caused the Plaintiff to suffer an ischemic stroke resulting in brain injury and leaving the Plaintiff with cerebral palsy. During trial, the defendants' experts testified that the obstetrician's use of the vacuum extractor was within the standard of care and that use of the device cannot cause an ischemic stroke. The expert testimony was that the child's strokes and brain injury resulted from a placental abnormality.

On appeal, the Plaintiff contended that the trial court incorrectly excluded expert testimony establishing that the obstetrician's breach of the standard of care created an obstetrical condition known to increase the likelihood of the neurologic injury suffered by the child. As a result of not allowing this testimony, the Plaintiff contended that he was unable to establish a link in the chain of causation between the obstetrician's negligence and the ischemic stroke. The Plaintiff also argued that the trial court improperly allowed the Defendant's experts to opine on causation using authoritative sources, effectively diminishing the credibility of the Plaintiff's own experts on the ultimate issue of liability.

The First District held that the trial court did not err in excluding testimony of the Plaintiff's standard of care expert which would have linked a breach of the standard of care to the Plaintiff's alleged ischemic stroke because such testimony

would go to causation and thus exceed the scope of the matters on which that expert was qualified to testify. Even though the Plaintiff's expert obstetrician was not qualified to render causation opinions, the Plaintiff offered testimony from a pediatric neurologist and neonatologist who were qualified to render such opinions.

The appellate court also found that the defendants' obstetrical experts' testimony referencing studies conducted by the National Institute of Health did not amount to improper bolstering. Such government conducted research may not independently be introduced as evidence; however, such information is properly relied upon by an expert witness as a basis for his or her opinion.

Incomplete Deposition Usage After Witness Dies

Bank of Montreal v. Estate of Antoine, 86 So. 3d 1262 (Fla. 4th DCA 2012)

Jacque Antoine had worked for Harris Bank and, in this capacity, embezzled over $13 million dollars from Bank of Montreal and Harris Bank. Subsequently, he purchased real property in Weston, Florida with money from the same business account that he had used to embezzle the money. He eventually pled guilty to criminal charges that were filed as a result of the embezzlement. The Bank of Montreal and Harris Bank then filed a civil Complaint against Antoine and his wife alleging fraud, constrictive trust, attachment and garnishment. They also sought to impose an equitable lien on the property bought in Weston. While in custody for the criminal charges to which he pleaded, Antoine testified at deposition in connection with the civil litigation. Antoine's wife, who was not involved in the embezzlement, was notified of the deposition and her counsel was present. Antoine admitted to using money from the business account at Harris Bank to buy the property in Weston acknowledging that the funds used to purchase the property were embezzled from the bank. Following this statement, the deposition was terminated due to the fact that Antoine had chest pains. Seven days later, he died before his deposition could be completed. His estate was substituted as a party and his wife then moved to strike the deposition as being incomplete because she did not have an opportunity to cross-examine him during the deposition. She also moved to strike the plea agreement. The trial court granted these motions and ultimately, entered a directed verdict in favor of the wife.

The Fourth District reversed finding that, even though the wife's attorney did not have an opportunity to cross-examine Antoine, the broad scope of Florida Rule of Civil Procedure 1.330(a) which provides that "at the trial … any part or all of the deposition may be used against any party who is present or represented at

the taking of the deposition. Further, subsection (3) provides that the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead. The Fourth District also found that the plea agreement should have been admitted because it was admissible as a declaration against his interest insofar as it related to his diversion of funds to purchase real estate.

Juror Interviews

Rodgers v. After School Programs, Inc., 78 So. 3d 42 (Fla. 4th DCA 2012)

Following a defense verdict in a wrongful death case, the Plaintiffs sought to interview the jurors to demonstrate that juror non-disclosure during voir dire warranted a new trial. On appeal, the Fourth District affirmed, finding that Plaintiffs' motion failed to meet the three part test of *De La Rosa v. Zequeira.* Plaintiff's motion must have: (1) established that the information is relevant and material to jury service in the case, (2) that the juror concealed the information during questioning, and (3) that the failure to disclose was not attributable to the complaining party's lack of diligence. The Plaintiffs' failed step three because their questioning regarding the jurors' prior involvement with the court system was ambiguous and counsel failed to clarify the ambiguity in their responses.

Borroto v. Garcia, 103 So. 3d 186 (Fla. 3d DCA 2012)

The Third District reversed the trial court's denial of a motion for a juror interview in a motor vehicle accident case where it was found that two jurors had failed to reveal prior involvement in auto accidents and then filed PIP claims. Further, one of the jurors who stated that she had never been injured in any way, allegedly was involved in an accident approximately 3 years before the trial and had injured her low back, neck and left arm and sought treatment for the injuries. Further, a juror who reported being involved in an accident 12 years earlier apparently was also injured in another accident 2 years before and did not report it.

Morgan v. Milton, 105 So. 3d 545 (Fla. 1st DCA 2012)

In a 2-1 decision, the First District upheld a trial court's denial of Defendant's Motion for New Trial based upon a juror's concealment of pending litigation. All jurors were asked to complete a questionnaire which included a history of litigation. Additionally, the trial court asked the venire if any of them had been involved in an automobile accident or had been a party to a lawsuit.

Several members of the jury answered the questions in the affirmative; however, the juror in question remained silent. The juror in question affirmatively stated that "I have never served on a jury or been a party or a witness." On the day the jury delivered its verdict, the trial court advised that he had a collections case scheduled on his docket for the following week and that the Defendant in the case was the juror in question. The First District upheld the denial of the Motion for New Trial because the Defendant failed to exercise peremptory challenges to strike two other members of the venire who had disclosed involvement in litigation activities. The dissenting judge noted that the fact that the collection proceeding was before the very same judge who was presiding over the trial was material and, therefore, a new trial should have been granted.

Jury Instructions

Costa v. Aberle, 96 So. 3d 959 (Fla. 4th DCA 2012)

Plaintiff appeals an Order granting a new trial based on special jury instructions given in a personal injury case. At trial, defense counsel argued that Plaintiff's treating physician improperly used a particular device to treat the Plaintiff and that the treatment performed was unnecessary. During the charge conference, the trial gave Plaintiff special instructions based on *Stuart v. Hertz* and *Dungan v. Ford*. The *Stuart* instruction was essentially that any damages incurred due to treatment received due to the accident would be regarded as caused by Defendant's negligence. The *Dungan* instruction was that the question of treatment necessity is to be viewed from the Plaintiff's perspective.

The Fourth District found no error in giving the special instructions. The *Stuart* instruction was proper because Defendant put forth testimony to demonstrate that the treatment was not causally related to the accident. The *Dungan* instruction was proper because Defendant contended that treatment rendered was unnecessary and improper. Further there was no evidence that the jury was misled by the instructions.

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 – Closing Argument

RJ Reynolds Tobacco v. Townsend, 90 So. 3d 307 (Fla. 1st DCA 2012)

The Defendant argued that they were entitled to a new trial because of several improper comments made by Plaintiff's counsel in closing argument. The Defendant, however, waited until the end of closing argument to object and move for mistrial and failed to object specifically to distinct portions of the argument. The First District found that no new trial was warranted based upon the trial strategy.

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 – Conduct of Counsel

Irizarry v. Moore, 84 So. 3d 1069 (Fla. 5th DCA 2012)

The Fifth District granted a new trial because defense counsel's egregious behavior, viewed as a whole, gave the Court no confidence that the parties received a fair trial on the issues. Some of counsel's inappropriate behavior included: using the terms "guilty" and "innocent" to describe burden of proving negligence during voir dire; suggesting Plaintiff was guilty of fraud without evidence; failure to comply with pre-trial orders; attempting to introduce information from the police report of the accident; and unnecessarily interrupting opposing counsel's closing to suggest counsel was taking too much time. The Court determined that while each individual incident might not justify a new trial, viewing them in their totality did.

Reffaie v. Wal-Mart Stores, Inc., 96 So. 3d 1073 (Fla. 4th DCA 2012)

The Plaintiff slipped and fell at a Wal-Mart. The jury found in favor of the Plaintiff and although the Plaintiff presented bills of almost $150,000, the jury awarded just under $50,000 for medical expenses and $50,000 for pain and suffering. During cross-examination of the Plaintiff's treating neurologist, defense counsel suggested that the doctor had a business relationship with personal injury lawyers wherein clients were referred to him throughout the State of Florida. Defense counsel also suggested that as many as 10 personal injury Plaintiffs were placed in a van and driven to his office for purposes of having him perform

percutaneous discectomies. The doctor responded that this had been brought up in a deposition, but he was not aware of the form of transportation.

In closing argument, defense counsel argued that the physician had an existing relationship with personal injury law firms and also argued that as many as ten Plaintiffs would be brought to his office in a bus for purposes of performing this surgical procedure. The Plaintiff objected to these arguments and the Fourth District found that the comments were highly prejudicial and inflammatory and constituted harmful error. They noted that the improper comments were intended to and did impugn the doctor's credibility and objectivity in the eyes of the juror. **"While we have little issue with the line of questioning,** the problem here is that defense counsel did not obtain the desired answers, but continued in closing argument as though he had." Noting once again that the medical bills totaled almost $150,000 and the jury awarded only $49,158, the Fourth District found that the improper comments only affected the issue of damages and remanded for a new trial on the issue of damages only.

Adams v. Barkman, 37 FLWD 2260 (Fla. 5th DCA 9/21/12)

In this motorcycle-SUV accident, a jury returned a verdict awarding $1.3 million dollars. The Defendant contended that the trial court abused its discretion by granting the Plaintiffs' Motion for Mistrial based upon the improper conduct of defense counsel and in striking the Defendant's pleadings, as well as, bifurcating the case between negligence and causation and damages. The Fifth District upheld the lower court even though they noted that striking a party's pleadings is a severe sanction which should be used sparingly adding that it is justified where a litigant or the lawyer's behavior indicates "a deliberate and contumacious disregard of the court's authority, bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness." The district court added that the issues giving rise to the sanctions were not pretrial discovery violations, but were violations of the court's rulings that involved conscience and intentional acts during the course of the trial. They found that the trial court properly considered all the factors under *Kozel v. Austendorf*, 629 So.2d 817 (Fla. 1993) and that defense counsel was given every opportunity to provide a valid explanation for his conduct. They concluded by pointing out that they have admonished lawyers in at least three other cases over the past two years for improper conduct. While agreeing that cases should be tried on the merits, they added that "the threat of an admonishment and a new trial appears to be of no avail. By sanctioning a party… maybe attorneys will get the message to either change their tactics or clients will stop hiring them."

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 – Expert Unqualified

L.B. v. The Naked Truth III, Inc., 37 FLW D366 (Fla. 3d DCA 2/8/12)

L.B., an employee of Naked Truth, appealed the judgment which found in favor of the store on the employee's claim for negligent security. The employee was working an overnight shift at the store when an assailant entered the store and raped her. During the trial on the employee's claim of negligent security, the store's expert was permitted to testify that the attack was a "victim-targeted" crime, which was unforeseeable and unpreventable by any security measures. This opinion was based on testimony by a coworker that, a few days before the attack, the assailant asked at the store for the employee. The Third District reversed holding that the trial court erred in admitting this testimony.

The security expert was qualified under § 90.702, Fla. Stat. (1985) to render an opinion on security matters and on the store's allegedly negligent security practices, but not on the assailant's motives for choosing the employee as his target because this was beyond the scope of his expertise. The trial court did not abuse its discretion in admitting the coworker's testimony. The testimony regarding the fact that the assailant asked for the victim three days before the assault was both

relevant to the issue of foreseeability and admissible under § 90.803(3), Fla. Stat. (2009) because it tended to prove the assailant's act.

New Trial – Failure to Disclose Witness Address

Jones v. Publix Super Markets, Inc., 37 FLW D1787 (Fla. 5th DCA 7/17/12)

The Jones' filed a personal injury complaint against Publix. The trial court entered a final judgment in favor of the supermarket. The Jones' appealed, arguing that the trial court erred by denying their motion for sanctions for failure to timely disclose a key witness's known address. Publix offered no defense of its failure to disclose the address, but basically argued that they supplied the name of the witness and Jones' counsel should have found the address herself.

The Fifth District found that this was a violation of the most basic rule of discovery by failing to timely disclose the address that was on its witness statement. By the time the Jones' got the address, the witness no longer recalled the details of the incident. The late disclosure of the witness's address adversely impacted the Jones' case and their trial preparation. While the witness had been able to describe the incident shortly after it occurred, he was unable to do so by the time contacted. Importantly, the details described by the witness suggested that the Mr. Jones did fall due to water on the floor and that Publix had notice of the water prior to the fall. The judgment of the trial court was reversed and the case was remanded for a new trial. The Jones' were awarded reimbursement of fees and costs for uncovering the witness's address.

New Trial – Fundamental Error and Mistrial

Sullivan v. Kanarek, 79 So. 3d 900 (Fla. 2d DCA 2012)

Defense counsel behavior at trial was improper on several instances, some reflected in the record and others not. The Plaintiff objected to each instance, which were sustained, but never moved for mistrial. Plaintiff then moved for a new trial following a defense verdict. On remand from the Supreme Court, the Second District noted that when a party fails to preserve the issue by timely moving for mistrial, the conduct is subject to fundamental error analysis.

Under the fundamental error analysis, the party moving for a new trial must first establish that the argument being challenged is, in fact, improper. The party must then establish that the argument is harmful, which requires that the comments

be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. In sum, the improper closing argument comments must be of such a nature that they reach into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments. Third, the improper comment must be incurable, meaning that the sustaining of a timely objection and a curative instruction could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict. Last, the party must establish that the argument so damaged the fairness of the trial that the public's interest in the system of justice requires a new trial. This category necessarily must be narrow in scope. Once a party has demonstrated all four requirements, that party is entitled to a new trial on the basis that the errors amount to fundamental error.

New Trial – Inadequate 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.

Santiago v. Abramovitz, 96 So. 3d 1091 (Fla. 4th DCA 2012*)*

The trial court denied Plaintiff's motion for a new trial on damages even though the jury awarded nothing. The Plaintiff argued that the zero verdict was inadequate as a matter of law because: (1) the Defendant stipulated before trial that his negligence caused the accident; (2) the Defendant stipulated during trial that the Plaintiff sustained a permanent injury because of the accident; and (3) the trial court gave a jury instruction which stated in part that "the Defendant was

negligent and such negligence was a legal cause of some loss, injury or damage to the Plaintiff. The Plaintiff is, therefore, entitled to recover from the Defendant for the loss, injury or damages shown by the greater weight of the evidence to have been caused by the Defendant." The 4th District ordered a new trial.

New Trial – Juror Misconduct

Royal Caribbean Cruises v. Pavone, 92 So. 3d 243 (Fla. 3d DCA 2012)

The jury returned a substantial verdict in favor of the Plaintiff. The trial court granted a new trial and the Third District affirmed where there was clear evidence of juror misconduct during voir dire. Specifically, a member of the jury "flat out lied, both in writing and in answer to the jury questionnaire and in open court by his failure to respond to the court's and counsel's specific questions on the point, when he denied personal involvement in any other litigation." The juror was a Plaintiff in a personal injury action pending in the circuit court which was set for trial a short time thereafter.

New Trial – Late Disclosure of Expert Witnesses

Intramed, Inc. v. Guider, 93 So. 3d 503 (Fla. 4th DCA 2012)

In a pharmaceutical malpractice case, Plaintiff was granted a speedy trial pursuant to §415.1115 Fla. Stat. Trial was set for September 27, 2012. In July, Plaintiff provided a witness list disclosing four expert doctors. In late August, Plaintiff disclosed Dr. Lichtblau as an additional expert to testify on future care needs. The trial court denied Defendant's motions for continuance, to strike the expert and did not permit a compulsory medical examination of Plaintiff. Four days before trial, Defendants were able to depose Dr. Lichtblau, who testified that Plaintiff's life expectancy was four to seven years and needed 24 hour care for the rest of her life. Plaintiff's late disclosure prevented the Defendant from securing a rebuttal expert for the issue of damages.

Further, Plaintiff's counsel made comments in closing argument improperly suggesting the Defendant should be punished for defending the case. The jury returned a verdict for the Plaintiff. Defendant appealed and the Fourth District reversed and remanded for a new trial. The Court found that when viewed together, the errors were not harmless because they influenced the jury and contributed to the verdict.

New Trial – Limitation of 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.

Use of Deposition At Trial – Witness From Another Case

Rich v. Kaiser Gypsum Company, Inc., 103 So. 3d 903 (Fla. 4th DCA 2012)

In this wrongful death action, it was alleged that the decedent died as a result of exposure to asbestos in products manufactured by different companies. At trial, two of the Defendants published the former testimony of two unavailable witnesses from a different lawsuit who testified regarding the makeup of their product and how it was factually impossible for them to be responsible for exposing the decedent in this case to asbestos. In an exhaustive review of Florida Statute 90.804 and its predecessor Florida Statute 92.22, the Fourth District held that Florida Statute 90.804(2)(a) does not require strict privity between a party and his

"predecessor" in interest. They further noted that the proponent of the former testimony must show "that in the former suit a party having a like motive to cross-examine about the same matter as the present party would have, was accorded an adequate opportunity for such examination" and if this occurs, the testimony may be received against the present party.

Use of Deposition At Trial – Witness Unavailable

Hutchings v. Liles, 86 So. 3d 1279 (Fla. 1st DCA 2012)

Hutchings appealed a final verdict finding Liles not negligent in a personal injury accident on grounds that the deposition of the defendant driver should not have been introduced as evidence. Liles' deposition was read in her absence at trial. Her attorney filed an affidavit explaining he unsuccessfully tried to locate her for trial and in their last conversation Liles stated that she would be out of state temporarily for work with a federal military agency and would be difficult to reach. The trial court allowed reading the deposition based on the affidavit which provided sufficient evidence that Liles was more than 100 miles away and had not procured her own absence. The First District affirmed, finding that the decision to allow the deposition was within the court's sound discretion under rule 1.330(a)(3)(B), Fla. R. Civ. P. Moreover, accepting a temporary job assignment was a compelling reason sufficient to show that Liles' absence was not self-procured.