2013
CASE LAW SUMMARY

Automobile Liability

Bad Faith

GEICO Gen. Ins. Co. v. Harvey, 109 So. 3d 236 (Fla. 4th DCA 2013)

A third party bad faith claim against an insurer for failure to settle may not be brought in the underlying tort action but must be raised in a separate cause of action. This is because the bad faith action does not arise out of the same transaction or occurrence as the subject matter of the litigation, but arises from the insurer's breach of its duty to act in good faith in handling the claim against the insured. First party bad faith claims, however, may be brought in the same action and the trial court may either abate the bad faith action until coverage and damages have been determined, or dismiss the bad faith claim without prejudice.

Safeco Ins. Co. v. Fridman, 117 So. 3d 16 (Fla. 5th DCA 2013)

Fridman was injured in an auto accident and made a claim to Safeco, his insurer, for UM benefits. Safeco denied the claim and Fridman filed a Civil Remedy Notice alleging Safeco failed to attempt to settle the claim in good faith. Thereafter, Fridman filed a complaint for damages under his policy for UM benefits. Prior to trial, Safeco tendered the policy limits and filed a motion for entry of confession of judgment. Fridman opposed and the trial court denied the motion and required the case to proceed to trial. The trial court found that granting the motion would ignore the plain legislative intent of §627.727(10), Fla. Stat. Fridman obtained a $1,000,000 verdict and final judgment was entered in the policy limits.

On appeal, the Fifth District reversed and remanded with instructions for the trial court to delete reference of the jury verdict obtained. An insured is not required to obtain a verdict in excess of coverage as a condition precedent to bringing a first party bad faith action. A confessed judgment in the amount of the UM policy limits would provide the insured a sufficient basis to pursue a bad faith claim against the insurer which rendered the need to proceed to trial moot.

Dangerous Instrumentality Doctrine

Roman v. Bogle, 113 So. 3d 1011 (Fla. 5th DCA 2013)

The driver and passenger of an automobile died after the driver ran a red light and collided with a semi-trailer. The passenger's estate filed a wrongful death action against the Estate of the driver, and the driver's father who owned the vehicle. The vehicle owner, Lesore Gabriel, was named as a Defendant pursuant to the dangerous instrumentality doctrine. Roman, the Personal Representative of the deceased passenger, executed a Release with Mr. Gabriel, which released "Lesore Gabriel and First Acceptance Company, Inc., including their officers, agents, employees, successors and assigns."

The driver's Personal Representative raised the affirmative defense of release and accord of satisfaction based upon the Release executed between Roman and Gabriel. Roman did not file a reply to the affirmative defense. The driver's Personal Representative filed a Motion for Judgment on the Pleadings asserting that pursuant to the dangerous instrumentality doctrine the driver was the agent of Mr. Gabriel by virtue of the fact that he was driving the automobile with his consent. The trial court granted the motion and entered judgment in favor of the driver based on the release.

The primary issue on appeal was whether the application of the dangerous instrumentality doctrine necessarily makes the driver an agent of the owner for purposes of determining whether the provisions of a release, which releases and discharges the owner and his "agents", applied to relieve the negligent driver of liability. The Fifth District reversed, holding that the dangerous instrumentality doctrine is a judicially created doctrine premised on the theory that one who originates the danger by entrusting his vehicle to another is in the best position to make certain there will be adequate resources with which to pay the damages caused by its negligent operation. Liability pursuant to the doctrine is not premised on principles of respondeat superior, agency, or master and servant. Application of the dangerous instrumentality doctrine does not create an agency relationship.

IME's

Gomez v. Rendon, 126 So. 3d 315 (Fla. 3d DCA 2013)

The Plaintiff in a motor vehicle accident suffered a fractured ankle. Prior to suit being filed, the Plaintiff underwent surgery and once suit was filed, the Defendant filed a Request for a Pediatric Orthopedic Examination. This examination was conducted in March, 2010. In March, 2011, the Plaintiff advised the Defendant that he was going to have a second surgery in "the immediate future."

Approximately six months later, the Plaintiff underwent the second surgery on his ankle and the medical records from the surgery were then provided to the Defendant in October, 2011. In March, 2012, the IME doctor was deposed and testified that the Plaintiff had no permanent injury at the time that she examined the Plaintiff but did not know whether he had a permanent injury following the second surgery. The doctor further agreed that she would have been in a better position to tell the jury how the Plaintiff was doing if she had seen him after the second surgery.

Three days after the deposition, the Defendant filed a Motion for a Post-Surgery Defense Examination which the trial court denied noting that the examination should have been conducted prior to the deposition of the defense IME. The Third District granted certiorari and quashed the trial court's order finding that there was good cause for the IME and that irreparable injury would be caused by denying the request.

Letters of Protection

Pack v. GEICO General Insurance Company, 119 So. 3d 1284 (Fla. 4th DCA 2013)

The Plaintiff sued GEICO for injuries sustained following a car collision with an uninsured motorist. The evidence was undisputed that Pack suffered at least a neck sprain as a result of the accident and had medical expenses related to the diagnosis of the sprain. The jury returned a verdict for zero damages and the trial court then denied her motion for new trial.

The Fourth District reversed and remanded for new trial on damages and award for her undisputed, non-permanent neck sprain. In doing so, they noted that

although Pack failed to disclose prior neck injuries to her treating doctors and the IME physician, there was no evidence that the prior neck injuries required extensive treatment nor were there any videotapes depicting her physical capabilities as a result of those prior neck injuries. Further, both the plaintiff and defense experts agreed that plaintiff suffered at least a neck sprain as a result of the accident and therefore the jury had no reasonable basis to conclude that she suffered no injuries as a result of the accident.

Significantly, the Plaintiff also moved for a new trial claiming that it was error to allow the Defendant to introduce a letter of protection between her and her treating physician who testified as her expert witness on her claim of more serious injuries to her neck. The Fourth District affirmed the denial of the new trial on this basis finding that a letter of protection between the Plaintiff and the treating physician is relevant to show potential bias under Florida Statute 90.608(2).

Smith v. GEICO Casualty Company, 127 So. 3d 808 (Fla. 2d DCA 2013)

In this uninsured motorist claim, the Plaintiff's counsel sent letters of protection to his client's treating physicians. Under the terms of the letters of protection, the physicians agreed to reduce their bills if the Plaintiff failed to receive a full value of claims against the insurance company. The trial court allowed these letters of protection to be argued before the jury and to cross examine physicians about same. The Second District affirmed this stating that these were not evidence of a collateral source and, therefore, found that the trial court did not abuse its discretion in admitting same into evidence.

Motion to Compel Settlement

Gira v. Wolfe, 115 So. 3d 414 (Fla. 2d DCA 2013)

Wolfe was driving and struck Gira, a pedestrian, causing Gira severe injuries. Wolfe was insured by Auto-Owners. Counsel for Gira sent a letter to the claims representative requesting "all statements, documentation and all of the information required to be disclosed pursuant to §627.4137, Fla. Stat., in the manner and form as required by the statute." Six days later, the claims representative tendered policy limits of $50,000.00 and enclosed a check for payment and release. Thereafter, the claims representative sent a letter enclosing a "disclosure of insured information" which indicated the insurance policy provided $50,000.00 for bodily injury. The disclosure form had a section to disclose other insurance policies which may be available to the insured which was left blank. At

that time, Gira's attorney returned the check and release to the representative, explaining that the investigation was not complete and thus was not in a position to consider settlement.

A few months later, Gira's attorney made a formal offer to settle all claims for the bodily injury policy limits of $50,000.00. The letter stated in pertinent part:

> The offer and relevant conditions are as follows: in order to verify that we are receiving all available coverage, Auto Owners must also forward all documents, statements, and all information required to be disclosed pursuant to §627.4137, Florida Statutes, in the manner and form required by the statute. Compliance with all conditions, including delivery of Auto-Owners $50,000.00 policy limits, must be received in my office within 21 days from the date of this letter.

The letter also stated that all conditions were material and should not be construed otherwise. Thereafter, counsel for both parties worked on clarifying issues for the release. The claims representative sent a letter which enclosed a check for $50,000.00, indicated his agreement with the corrected release, and stated that per Gira's request, enclosed was all the information required to be disclosed pursuant to §627.4137 of the Florida Statutes. Again, the disclosure left the area to list other policies blank. In response, Gira sent a letter stating that Wolfe had not complied with the previous demand letter and specifically by failing to provide a "statement from the insured or the insured's insurance agent stating the name and coverage of each known insured to the claimant." Gira also returned the settlement drafts and enclosed a courtesy copy of the Complaint.

Wolfe filed an Answer and Affirmative Defense and asserted that Gira had made an offer of settlement which was accepted prior to suit being filed and therefore there was an enforceable settlement agreement. Wolfe filed a Motion to Enforce Settlement, and Gira filed a Motion for Partial Summary Judgment as to a settlement defense. The trial court rendered an Order granting the Motion to Enforce the Settlement Agreement and rendered final judgment in favor of Wolfe.

On appeal, the Second District found that Wolfe failed to comply with a material term of the settlement offer by failing to disclose whether there were additional policies that would have covered Wolfe. Thus, the parties did not reach a settlement. § 627.4137(1) provides in pertinent part that the insured or her or his insurance agent, upon written request of the claimant or the claimant's attorney, shall disclose the name and coverage of each known insurer to the claimant.

Contract law governs the interpretation of settlement agreements and although the law favors settlement agreements and their enforcement, the evidence must clearly demonstrate that there was a mutual agreement to the material settlement terms. Compliance with the statute was a material term to the settlement agreement because Gira's letter expressly stated so and additionally, the legislature by enacting the statute, was recognizing parts of the claimant's access to the type of insurance information in order for the claimant to make a settlement decision.

No Liability for Leasing Car to Driver with Suspended License

Rivers v. Hertz Corporation, 121 So. 3d 1078 (Fla. 3d DCA 2013)

Rivers was killed in a car accident while a passenger in a car rented by Hertz to William Walker. At the time the car was rented, Walker's driver's license had been suspended due to a speeding ticket he received in another State; however, Hertz was unaware of this. The trial court dismissed the Complaint, and the Third District affirmed noting that there was no claim that Hertz failed to perform its statutory duty under Florida Statute 322.38(2) to make sure that the renter's signature and the signature on the driver's license has been compared and verified. There were no facts alleged that Hertz knew or should have known that Walker was an unfit driver when he presented a facially valid driver's license and absent any facts to demonstrate that Hertz had some knowledge of the deficient driver's license, there can be no duty imposed upon it to investigate and discover Walker's suspended driver's license. Further, even if Hertz had violated the terms of Florida Statute 322.38(2) the alleged failure to comply with the statute was not the proximate cause of the Plaintiff's injuries because the lack of license did not make Walker unfit or incompetent to drive.

No Settlement

Villareal v. Eres, 128 So. 3d 93 (Fla. 2d DCA 2013)

In a wrongful death and personal injury claim stemming from a car accident, the Plaintiff, Eres, asked for insurance coverage information and offered to settle for policy limits. The settlement offer contained a number of conditions, including a time-limit for acceptance and a requirement that the release not contain hold-harmless/indemnification language. Villareal complied with all conditions, except the proposed release contained hold-harmless/indemnification language. Eres advised this was a counter-offer, rejected and filed suit.

Villareal raised the affirmative defense that the parties had entered a settlement. Eres denied this and obtained partial summary judgment in her favor. The case proceeded to trial and resulted in a large verdict for Eres. On appeal, the Second District noted that settlement agreements are governed by contract law and found that no settlement was entered in to. Correspondence from Eres' counsel stated: "Please understand providing us with any release containing . . . a hold harmless indemnity agreement, would act as a rejection of this good faith offer to settle this matter."

The Second District determined that Eres' offer was an offer for unilateral contract, which conditioned Villareal's acceptance on specified performance, a release with the exact terms as specified in the offer. Of no importance to the court was Villareal's counsel's correspondence to the effect that she would change or strike any objectionable language in the release.

Past Lost Earnings Need Not Have Documentary Proof

Maggolc, Inc. v. Roberson, 116 So. 3d 556 (Fla. 3d DCA 2013)

The Plaintiff was injured in a scooter accident. Following a verdict in favor of the Plaintiff, post-trial motions were denied and the Defendant appealed seeking a directed verdict, remittitur or new trial only as to the awards of past lost earnings and future lost earning capacity. The Defendant argued that the Plaintiff's testimony was "skimpy" and was unsupported by financial records of any kind. The Plaintiff, a personal trainer, was the only witness to provide numerical evidence regarding his earning history and future prospects.

Though he claimed an annual income before the accident of approximately $80,000, the Plaintiff conceded that he had not filed tax returns, had no receipts or appointment records, had no bank records, had no information regarding expenses and had no client testimony about hourly rates, number of training sessions or similar details. An acupuncturist who worked out of an adjacent area at a hotel in Miami Beach testified that she had seen the Plaintiff training clients and giving them workouts. She did not know how many clients the Plaintiff had nor did she have any estimate of his charges or income.

The evidence in the record regarding his claim for past lost earnings and loss of future earning capacity consisted of his own testimony estimating that he made approximately $80,000 before the accident; that he was paid $90-$150 "per session" and earned between $1,500 to $2,000 per week before the accident and that his annual earnings had dropped to $15,000 in 2010 and $20,000 in 2011. He also testified that he expected to work as a trainer for another 8 years. Additionally, his medical expert testified that he had a 7% permanent physical disability.

Finding that the issues presented were for the jury to weigh and to assess the Plaintiff's credibility, the Third District affirmed the trial court finding that there was competent substantial evidence regarding the Plaintiff's injury, the causal connection between the injury and its adverse effect on his job. They also noted that "no Florida court has determined that a claim for an individual's lost past earnings must be supported by documentary evidence, or that the failure to file income tax returns for those earnings (at an annual level that clearly requires a return) precludes recovery."

Permanency

Duclos v. Richardson, 113 So. 3d 1001 (Fla. 1st DCA 2013)

At trial, the Plaintiff presented expert testimony of three physicians who testified that her neck injury was permanent. Defense expert, Dr. Von Thron testified based on his examination of the Plaintiff and review of the medical records that her injury was not permanent. Dr. Von Thron also testified that the Plaintiff did not sustain a permanent aggravation of an existing condition as a result of the accident.

Dr. Von Thron agreed the Plaintiff had neck pain and might continue to need treatment for pain, but opined she did not need future medical treatment for

injuries stemming from the accident. On cross examination, the doctor clarified that the neck injury caused by the accident was temporary and the Plaintiff's more recent neck pain stemmed from another cause; specifically arthritis. After Dr. Von Thron's testimony, Plaintiff moved for directed verdict on the issue of permanency which the Court denied. At the close of all the evidence the Plaintiff renewed her Motion for Directed Verdict "on an aggravation of a pre-existing condition" or to strike Dr. Von Thron's expert opinion testimony because "there is no basis for it."

The trial court denied the motion and ruled the jury could weigh Dr. Von Thron's opinion against the testimony of the other experts and the documents and surveillance in evidence. The jury awarded Plaintiff damages for some past medical expenses but awarded nothing for future medical expenses finding the neck injury was not permanent. The trial court granted Plaintiff's Motion for New Trial and JNOV holding that Dr. Von Thron's testimony was incredulous and was confusing, mistaken and not reasonable in light of all of the other evidence in the case and expert medical testimony regarding permanency regarding the Plaintiff's injury resulting from the accident.

On appeal, the First District reversed the Order granting JNOV holding that Dr. Von Thron's opinions were not so confusing, contradictory, etc. as to lack any probative value. He clearly responded to counsel's questions and did not waiver from his expert medical opinion that the injuries suffered by Plaintiff as a result of the auto accident in 2006 were not permanent and did not require future treatment.

His qualifications as an expert were not genuinely contested. His testimony did not mislead the jury by introducing outside considerations, such as the subjects prohibited by the Court's Pretrial Orders on Motions in Limine. The jury was free to consider the weight and creditability of the opinions of Plaintiff's experts versus those of Dr. Von Thron. The trial court's entry of JNOV invaded the province of the jury.

PIP Set-Off

Forest v. Sutherland, 38 FLWD 742 (Fla. 4th DCA 4/3/13)

The Plaintiff was injured in a car accident and sued the Defendant for negligence. At trial, the jury awarded $9,737 for past medical expenses and awarded no other damages. Post-verdict, the Defendant filed a Motion for Collateral Source Set Off for PIP benefits paid or payable, arguing that the award should be reduced by $10,000. The trial court rejected the Plaintiff's argument that

the set off should be reduced by premiums paid by the Plaintiff to obtain PIP coverage and, thereafter, entered judgment in favor of the Defendant. The Fourth District reversed and ordered that the trial court determine the amount paid by the Plaintiff in obtaining PIP coverage and then use that to offset against any reduction.

Reimbursement of Attorney's Fees for Defense of Mutual Insured

Progressive v. Fla. Dept. of Fin. Svcs., 125 So. 3d 201 (Fla. 4th DCA 2013)

Ortiz entered into a subcontract agreement with TBT and Patco for trucking services, which required Ortiz to maintain an auto policy at his expense. Ortiz secured coverage with Progressive as his primary insurance and TBT and Patco's insurance (Aequicap) as the excess insurer. The subcontract agreement also contained an indemnification provision that required Ortiz to hold harmless and provide TBT a defense. TBT was named an additional insured on the Progressive policy.

Thereafter, Ortiz was involved in an auto accident. The injured filed suit against Ortiz, TBT and Patco. Several months after demanding indemnity and a defense, Progressive agreed to defend TBT and Patco. TBT and Patco filed suit against Progressive for attorney's fees and costs incurred in the months before Progressive assumed the defense. The trial court entered summary judgment in TBT and Patco's favor.

On appeal, Progressive argued that the trial court's order violated the "anti-subrogation" rule which prohibits reimbursement for defense costs between insurers of a mutual insured. The Fourth District rejected this argument, as this rule does not apply where there is an indemnification agreement.

Self –Insured is Uninsured

State Farm v. Siergiej, 116 So. 3d 523 (Fla. 2d DCA 2013)

Plaintiff was involved in a crash with a motorcycle operated by a Sheriff. Plaintiff sued the Sheriff and *State Farm*, his uninsured motorist insurance carrier. He settled with the Sheriff for $50,000 when $100,000 in coverage was available. The Plaintiff went to trial against *State Farm*, and obtained a $211,000 verdict. The trial court entered judgment in favor of the Plaintiff for his $100,000 policy limits

with *State Farm*. *State Farm* requested a credit against the verdict for $100,000, the Sherriff's policy, and other setoffs.

Section 627.727(6), Florida Statutes, provides that a UM insurer is entitled to a credit against its insured's total damages in the amount of the underinsured's liability policy in cases where the UM carrier has given its permission to settle in an amount that does not fully satisfy the insured's claim. However, because the Sherriff was self-insured, he was considered an "uninsured" and not an "underinsured," and the statute did not apply. The Second District upheld the $100,000 judgment against *State Farm* for the policy limits.

Status as Unlicensed Driver Relevant

Lopez v. Wink Stucco, Inc., 124 So. 3d 281 (Fla. 2d DCA 9/18/13)

In this bifurcated case of liability for causing an accident, the Defendant presented evidence that the driver of the car transporting the decedent was an unlicensed driver. The trial court allowed in the evidence that he was unlicensed and the Second District affirmed noting that this was a case in which the violation of the licensing statute was relevant to the injuries incurred. Specifically, it was the Defendant's liability that the unlicensed driver has insufficient experience to safely judge whether he had enough time to make the left turn in front of the van operated by the Defendant.

In support of this theory, they also offered testimony that the unlicensed driver also followed other cars into the intersection after the green arrow had gone off, thereby making a left turn directly in the path of the Defendant's car. Further, the evidence was that the unlicensed driver was 18 years old and that he had only driven occasionally since he was 15 or 16 because his parents didn't like for him to drive a car.