2013
CASE LAW SUMMARY

Trial Issues

Directed Verdict

Chaskes v. Gutierrez, 116 So. 3d 479 (Fla. 3d DCA 2013)

The patient was admitted to a nursing home with a Stage IV bed sore. The decedent's estate brought a claim against a physician and a nurse practitioner at the nursing home. At trial, the expert against the physician testified that the Defendant fell below the standard of care because only a topical anesthesia was utilized which precluded debriding deeply enough into the bed sore so as to remove all of the necrotic tissue. Further, the patient was anti-coagulated and the expert believed that the anti-coagulant should have been reversed before debriding the sore or the procedure should have been conducted in a hospital where a blood bank was available.

The Third District noted that the expert "ignor[ed] the fact that [the patient] had just been released from the hospital following a three-week stay only a few days before [the doctor] first saw her; that[the patient] was admitted to a different hospital only two days after [the doctor] first saw her…; and that [the patient] was re-admitted to the second hospital again [a couple of weeks later]---hospitalizations during which not one of her many caregivers ever suggested much less actually treated the sore as [Plaintiff's expert suggested]."

While the Plaintiff's expert testified that the Defendant's failure to comply with the standard of care resulted in an infection of the bed sore, he did not testify that had the Defendant doctor complied with the standard of care that the sore either would have healed or that would have healed more quickly without pain. To the contrary, Plaintiff's expert conceded that he could not predict within a reasonable degree of medical probability that his recommended procedure or compliance with the standard of care would have resulted in a different progression of the wound or less pain for the patient.

As for the nurse practitioner, the Plaintiff's separate nursing expert testified that the Defendant nurse practitioner departed from the standard of care in failing

to remove all of the necrotic tissue from the bedsore the first time it was debrided. The Third District noted that it was unclear whether it was the nurse practitioner or the Defendant doctor who performed the debridement, however, it was clear that the nurse practitioner was working side by side with her supervising physician; the Defendant doctor. There was no question that the Defendant doctor was responsible for the nurse practitioner and her treatment of the patient. As such, the Third District reversed the judgment in favor of the Plaintiff and directed that a directed verdict be entered on behalf of both Defendants for failure to satisfy the *Gooding* causation standard.

Failure to Pass Board Certification Exam May be Irrelevant

M.B. v. S.P., M.D., 124 So. 3d 358 (Fla. 2d DCA 2013)

In this medical malpractice case, the trial court granted a Motion in Limine thereby preventing the Plaintiff from introducing evidence that the Defendant doctor took seven years to pass the board certification examination and that he passed the written portion on the examination on his fourth try and the oral portion of the examination on his third try.

The Second District upheld the trial court's decision finding that the doctor's repeated failures of the board certification examination was irrelevant to the issue of his alleged negligence in performing the subject surgery. They contrasted their decision with other decisions which held that evidence of a physician's lack of board certification may be used to impeach the physician's creditability as an expert witness. Thus the Defendant may provide information regarding his education, training, professional experience and license to practice medicine and, if he does not offer evidence of his intellect, grades, special licenses, academic honors, etc., then failure to pass the board and certification examination is irrelevant.

At the same time, the Second District granted a Motion for New Trial finding that the trial court's failure to disqualify itself or grant a mistrial was an error. During the Plaintiff's testimony at trial, she described having to live with a nephrostomy tube and urine bag. During an extensive answer, counsel approached the bench and objected to the narrative and asked the trial court to "instruct the witness not to refer to incontinence." The Plaintiff's counsel conceded that his client was providing "a long answer" and at that point the trial court commented "it is." I am "bagged out."

Later during a sidebar, the Plaintiff's attorney saw a note affixed to the verdict form lying on the Court bench which read "bag lady with shits (full of) barfer, too." The Plaintiff's counsel immediately moved for a mistrial on the basis of the note. The Court initially acknowledged the note and then retracted it and stated that he did not have it and then continued by saying "what notes I take up here are absolutely no business of counsel" and that" if I sit up here and do crossword puzzles, it's none of your damn business either."

The Second District found that the Motion for Disqualification clearly met the requirements of the administrative rule and that the comments of the trial court in addition to his handwritten notes could cause the Plaintiff to have a well-founded fear that she would not receive a fair and impartial trial.

Failure to Preserve Error

Jackson v. Albright, 120 So. 3d 37 (Fla. 4th DCA 2013)

Following a verdict in favor of Defendant in a motor vehicle accident, the Plaintiffs sought a new trial which was denied. The Plaintiff argued that the trial court improperly allowed defense counsel to question her regarding a large monetary settlement she received in unrelated litigation a year before the accident which gave rise to this case. At the beginning of the trial, defense counsel advised the court that the Plaintiff might try to explain her sporadic medical care from the subject accident by claiming financial inability to afford treatment.

The defense requested that if she injected her financial status into the case, then the Defendant should be permitted to bring out the fact that she recovered a large settlement in an unrelated case less than a year before the accident. The trial court agreed. When the Plaintiff raised her lack of funds to seek medical treatment or surgery, defense counsel questioned her about this. The Plaintiff objected on the grounds that it would show Plaintiff's litigiousness and that it was overly prejudicial. The trial court overruled the objection.

During the trial, the Plaintiff was also impeached with a surveillance video and, post-trial, she filed a Motion for Sanctions and requested a new trial because a forensic expert reviewed the video and was of the opinion that it had been edited. On these grounds, the trial court denied the motion without a hearing even though the Plaintiff had filed an Affidavit from an expert. The Fourth District affirmed,

however, it was without prejudice for the Plaintiff to file an appropriate motion for relief from judgment because it appeared that the Affidavit raised an issue requiring an evidentiary hearing.

Lastly, the Plaintiff sought a new trial because the defense attorney questioned her as to whether the person she visited was a "disbarred attorney" in an effort to discredit the Plaintiff. The Plaintiff never objected to the question, however, the trial court immediately called a side bar and castigated defense counsel for asking the question. The Fourth District noted that the Plaintiff not only didn't object, she also asked for no curative instructions and didn't ask for a mistrial. As such, the issue was not preserved and the denial of the Motion for New Trial was affirmed.

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.

Medicare Rates/Physician's Refusal to Accept Insurance

Disla v. Blanco, 38 FLWD 2492 (Fla. 4th DCA 11/27/13)

Plaintiff appealed the denial of Motion for New Trial claiming multiple errors. First, Plaintiff claimed that the trial court improperly denied a challenge for cause as to one juror and erred by failing to conduct a complete analysis when the defense exercised a peremptory challenge as to another juror. The Fourth District ruled that neither claim was properly preserved for appellate review. Although Plaintiff's counsel requested an additional peremptory challenge from the Judge after he had exhausted his allowed challenges, he failed to identify an objectionable juror whom he would have challenged or who was seated. Further, as to the alleged improper peremptory challenge exercised by the Defendant, this also was not preserved because Plaintiff's counsel failed to renew his objection to the defense's exercise to the peremptory challenge prior to the swearing of the jury.

Plaintiff also claimed that the trial court erred in overruling objections to defense counsel cross-examining her neurosurgeon regarding his refusal to accept insurance; Medicare reimbursement rates; and his extensive practice performing a type of surgery of disputed efficacy but which was not the surgery performed in the case. The Fourth District noted that the trial court's rulings in this regard are reviewed using an abuse of discretion standard and they could not find an abuse of discretion because the doctor had testified on direct as to his extensive practice and qualifications and, therefore, the questions regarding the types of surgery he performed were relevant.

Additionally, the fact that he did not accept insurance was brought up in connection with the extent of the doctor's extensive medical litigation practice and the discussion of Medicare rates was relevant to the reasonableness of his charges. Additionally, the trial court actually sustained several of Plaintiff's objections to these questions, yet the Plaintiff never moved for a mistrial, thus, failing to preserve these objections.

The Plaintiff also argued that the trial court improperly limited her cross examination of the defense expert. This too is governed by an abuse of discretion standard and the Fourth District noted that the Plaintiff failed to proffer what injuries the Defendants suffered or how they would have impacted the opinions of the defense expert.

New Trial—Admission of DCF Shelter Orders

Hartong v. Bernhart, 38 FLWD 2571 (Fla. 5th DCA 12/6/13)

The Plaintiff sued the Defendants for causing her daughter's death based on a claim of medical negligence. Prior to trial, the Defendants asked the trial court to take judicial notice of two shelter orders from the Department of Children and Family Services in which a circuit court found probable cause to remove the decedent's children from her care. Both shelter orders included a circuit court finding regarding the decedent's abuse of alcohol and drugs, her failure to submit to court-mandated drug testing, and a history of domestic violence with the father of one of her children.

In opening statements, the Defendants advised the jury of the presence of alcohol and hydrocodone in the decedent's system and that this had a negative effect on her respiratory system which, when combined with pneumonia, impaired her ability to breathe and resulted in her death. During trial, one of the Defendants' expert witnesses testified that the decedent died of pneumonia complicated by aspiration and by drug – hydrocodone -- and alcohol intoxication.

After the close of the Defendants' case, the Defendants requested the Court take judicial notice of the DCF shelter orders and the Plaintiff again objected on the basis that the documents contained inadmissible hearsay and character evidence. The trial court took judicial notice and allowed the shelter orders into

evidence. The Defendants then rested and subsequently withdrew the affirmative defense of comparative negligence.

The Plaintiff then moved to amend the Complaint to conform to the evidence presented at trial so she could obtain a jury instruction on comparative negligence. The trial court denied the request and in closing, the Defendants argued the combination of alcohol, hydrocodone, lidocaine, and pneumonia, caused the decedent's death.

During deliberations, the jury was asked to consider whether there was negligence on the part of the Defendants which were the legal cause of death. The jury returned a defense verdict and the Plaintiff sought a new trial.

The Fifth District found that it was error to admit the shelter orders because they contained hearsay and they were admitted using only the judicial notice provision of Florida Statutes and not pursuant to an applicable hearsay exception. Further, the Fifth District found that the trial court erred in denying the Motion to Amend the Complaint to conform to the pleadings to evidence presented at trial and to include comparative negligence after the Defendants withdrew their affirmative defense of comparative negligence at the close of the evidence.

In doing so, they noted that by presenting evidence relative to the decedent's drug and alcohol use to attack causation without permitting the jury to consider her comparative negligence, the Defendants created a "take it or leave it" situation similar to contributory negligence which is against Florida law and public policy.

New Trial—Attorney Misconduct

Jackson v. Albright, 120 So. 3d 37 (Fla. 4th DCA 2013)

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The defense requested that if she injected her financial status into the case, then the Defendant should be permitted to bring out the fact that she recovered a

large settlement in an unrelated case less than a year before the accident. The trial court agreed. When the Plaintiff raised her lack of funds to seek medical treatment or surgery, defense counsel questioned her about this. The Plaintiff objected on the grounds that it would show Plaintiff's litigiousness and that it was overly prejudicial. The trial court overruled the objection.

During the trial, the Plaintiff was also impeached with a surveillance video and, post-trial, she filed a Motion for Sanctions and requested a new trial because a forensic expert reviewed the video and was of the opinion that it had been edited. On these grounds, the trial court denied the motion without a hearing even though the Plaintiff had filed an Affidavit from an expert. The Fourth District affirmed, however, it was without prejudice for the Plaintiff to file an appropriate motion for relief from judgment because it appeared that the Affidavit raised an issue requiring an evidentiary hearing.

Lastly, the Plaintiff sought a new trial because the defense attorney questioned her as to whether the person she visited was a "disbarred attorney" in an effort to discredit the Plaintiff. The Plaintiff never objected to the question, however, the trial court immediately called a side bar and castigated defense counsel for asking the question. The Fourth District noted that the Plaintiff not only didn't object, she also asked for no curative instructions and didn't ask for a mistrial. As such, the issue was not preserved and the denial of the Motion for New Trial was affirmed.

Howard v. Palmer, 123 So. 3d 1171 (Fla. 4th DCA 2013)

Before trial, the Plaintiff filed a Motion in Limine to preclude the Defendant from introducing evidence that he contacted an attorney on the day of the accident. That attorney referred the Plaintiff to a doctor who examined and treated the Plaintiff the following day. The trial court granted the motion, stating "the Plaintiff's objection is sustained." During cross examination of one of the Plaintiff's treating doctors, defense counsel asked the physician whether he knew that before seeing his first treating doctor, the Plaintiff already had an attorney. Plaintiff's counsel objected and the Court sustained and then gave a curative instruction.

The Fourth District ordered that a new trial be granted finding that the violation of the Motion in Limine in combination with other improper statements were so prejudicial that it required a new trial. Specifically, defense counsel asked

the same physician whether he was shown photographs of the vehicle and whether he knew that it was the Plaintiff's father "that took those lawsuit photographs?" The Plaintiff objected. The trial court sustained the objection but the Plaintiff did not ask for a mistrial or a curative instruction.

Additionally, during opening statements, defense counsel who was representing a subcontractor of Comcast stated "and at first you are going to say when you look at the evidence, Comcast has nothing to do with the case. But maybe the evidence is going to show you that Comcast is the reason for this case." The Plaintiff objected and the trial court sustained the objection. The Plaintiff did not move for a mistrial or ask for a curative instruction and thus, these errors were not preserved. Nevertheless, the Fourth District determined that the cumulative effect of the two unpreserved errors, as well as, the violation of the Motion in Limine, was such that errors were not harmless.

New Trial—Closing Argument

Allstate Insurance Company vs. Marotta, 125 So. 3d 956 (Fla. 4th DCA 2013)

Marotta was hit by an uninsured motorist and filed suit against the uninsured motorist, who defaulted, and against Allstate, Marotta's uninsured insurance carrier. Following a verdict for Marotta, Allstate moved for new trial based on Marotta's improper closing argument and improper impeachment of Allstate's expert witness. The trial court denied Motion for New Trial and Allstate appealed.

Allstate argued a new trial was warranted due to improper argument made by Marotta's counsel during closing of rebuttal argument. In closing, Marotta argued over objection that Allstate denied the undisputed medical evidence, that they denied accepting responsibility, and stated, "I ask you, is that what it means to be in good hands?" The trial court sustained an objection when Marotta asked whether one of Allstate's doctors was enlisted as part of an effort to manufacture a defense and overruled an objection that Allstate can pay doctors who know what Allstate "really wants." Finally, Marotta requested the jury "make Allstate repent, make them take responsibility for what was caused by that uninsured motorist and make them pay for all the harms and losses caused."

Allstate also moved on grounds of improper impeachment of one of its expert witnesses, Dr. Robert Lins. Marotta requested Lins to provide any document or documents to show how many times Allstate and their attorneys had retained his

services and the total amount of fees that Allstate has paid to him in the past five years. Allstate's counsel informed the court that it had provided its tax identification records to Marotta in discovery which included payments for many items such as compulsory medical examinations without differentiating between items. These records with respect to Dr. Lins were introduced into evidence.

During cross-examination, Marotta asked Lins whether he would dispute that Allstate wrote him 30 checks in 2008. Dr. Lins responded that his office keeps track of that information but he does not. Marotta continued to press Dr. Lins and Allstate objected stating that the witness was not required to compile these types of records.

The Fourth District reviewed the order denying Motion for New Trial for abuse of discretion, and applied different standards based on improper closing argument depending on whether the comments challenged is improper or preserved or unpreserved. For preserved comments, the court should grant a new trial if the argument was so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial. For unpreserved comments, a new trial should be granted if the four-part *Murphy* test is satisfied which requires the comments be improper, harmful, incurable, and damage the fairness of the trial such that the public interest requires a new trial.

The Fourth District noted it is improper for counsel to suggest in closing argument that a defendant should be punished for contesting damages at trial. Marotta's comments urged the jury to punish Allstate for defending against Marotta's claim and exceeded the scope of permissible argument. Marotta's comments such as Allstate was attempting to avoid responsibility, or numerous and when getting context made the argument such that it was not designed to "prompt a logical analysis of the evidence in light of the applicable law."

With respect to impeachment of Dr. Lins, Florida Rule of Civil Procedure 1.280(b)(5)(a)(iii) provides that a party may obtain information regarding the expert's litigation experience including the percentage of work performed for plaintiffs and defendants, the identity of other cases in which the expert has testified by deposition or trial, and an approximation of the portion of the expert's work which is as an expert witness. An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce non-existing documents.

The Fourth District found Marotta's questioning of Dr. Lins was improper because the questioning regarded the absence of detailed records showing the number of and payment for compulsory medical examinations performed for Allstate instead of eliciting testimony which would tend to show Dr. Lins' bias in favor of Allstate.

Accordingly, the Fourth District reversed and remanded for new trial. The Fourth specifically found that cumulative errors in the case which included both improper closing arguments and improper cross-examination of Dr. Lins when viewed together created irreversible error. To determine whether the errors were harmless, the Court could consider the cumulative effect of the preserved and unpreserved comments. Further, closing argument shifted the focus of the case from compensating the Plaintiff to punishing the Defendant.

New Trial—Discrepancy in Economic Damages

Festival Fun Parks, LLC v. Bellamy, 123 So. 3d 684 (Fla. 4th DCA 2013)

Following a Plaintiff's verdict in a negligence action against an amusement park in which the Plaintiff was shot by a third party, the Defendants sought remittitur on the issue of future medical expenses. The Fourth District granted this because the Plaintiff's economic expert calculated the cost of 16 separate dorsal column stimulators over the course of the Plaintiff's life whereas the Plaintiff's expert testified that the Plaintiff would probably need only two dorsal column stimulators over the course of his life.

During deliberations, the jury requested to see the economist's summary and counsel for both parties recognized the discrepancy between the evidence at trial and the data used by the economist to calculate future medical expenses relative to the stimulator. Before the economist's summary was taken back to the jury room, the attorneys for both sides attempted to correct the summary so that it accurately reflected the evidence presented at trial. Unfortunately, the lawyers inaccurately adjusted the chart as it pertained to the dorsal column stimulators and although it was their collective intention to alter the summaries to comport with the evidence, their math was incorrect.

New Trial--Drug Use

Swanson v. Robles, 128 So. 3d 915 (Fla. 2d DCA 2013)

The Second District reversed and remanded for a new trial on compensatory damages when trial court erroneously allowed evidence of defendant's drug use during trial phase to determine compensatory damages. Defendant was involved in car accident and had drugs in his system. Without admitting that he was impaired at the time of the accident, the defendant admitted liability and plaintiff's entitlement to punitive damages. The trial was bifurcated, with one phase to determine compensatory damages and entitlement to punitives, and the second to determine amount of punitive damages. Because the defendant admitted liability and entitlement to punitives, his drug use was no longer to any issues in phase one and only served to inflame the jury. His drug use would be relevant to the jury's determination of amount of punitive damages.

New Trial—Ex Parte Communication Between Judge and Jury

Phelps v. Johnson, 113 So. 3d 924 (Fla. 2d DCA 2013)

The Defendants mistakenly identified the Plaintiff to law enforcement as the perpetrator of a robbery and kidnapping. The Plaintiff filed a Complaint against them, alleging that their identification was made in bad faith and, therefore, constituted false imprisonment. Following a verdict on behalf of the Defendants, the Plaintiff filed a Motion for New Trial arguing that the trial court erred in responding to a jury question outside the presence of the parties and their attorneys.

Specifically, the record reflects that the jury requested the definition of an "outstanding warrant" during deliberations and because the parties and their attorneys were at lunch, the Court advised the jury that they had heard all of the evidence, had all the law and were to continue their deliberations. When the parties and their attorneys returned from lunch, the Judge advised every one of his exchange with the jury.

Based upon Plaintiff's Motion for New Trial, the trial court granted same. The Second District reversed finding that the Plaintiff waived any objection to the

error because he was aware of the misconduct before the verdict was returned and did not raise an objection. Further, the Court noted that even if he had not waived his objection, he would be unable to show that he was prejudiced by the trial court's error.

In so doing, they noted that where a Trial Judge's ex parte communication with the jury in a civil case does not affect any substantial rights of the parties, the error will be deemed harmless. The complaining party must demonstrate specific prejudice, which might include a showing of an inability for the reviewing court to determine from the record whether the action was actually harmless.

New Trial—Expert Opinion Improperly Excluded

Olesky v. Stapleton, 132 So. 3d 592 (Fla. 2d DCA 2013)

In this medical malpractice trial, the Plaintiff sought damages for his wife's death following a double valve replacement. The Plaintiff maintained that Mrs. O'Lesky died from a treatable cardiac tamponade and aortic dissection. By contrast, the Defendants argued that she died from a spontaneous, simultaneous, bilateral coronary artery dissection which could not have been detected. During the trial, defense counsel objected to Plaintiff's expert testifying that, had an echocardiogram been performed, it would have shown a cardiac tamponade. The trial court sustained the objection. The Second District reversed noting that in a failure to diagnose malpractice case, an expert is allowed to testify as to what a test would have been expected to reveal. They also added that the failure to allow expert testimony, even if cumulative, is often reversible in medical malpractice cases.

New Trial—Expert's Work History with Insurance Company

Allstate Insurance Company vs. Marotta, 125 So. 3d 956 (Fla. 4th DCA 2013)

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Allstate argued a new trial was warranted due to improper argument made by Marotta's counsel during closing of rebuttal argument. In closing, Marotta argued over objection that Allstate denied the undisputed medical evidence, that they denied accepting responsibility, and stated, "I ask you, is that what it means to be in good hands?" The trial court sustained an objection when Marotta asked whether one of Allstate's doctors was enlisted as part of an effort to manufacture a defense and overruled an objection that Allstate can pay doctors who know what Allstate "really wants." Finally, Marotta requested the jury "make Allstate repent, make them take responsibility for what was caused by that uninsured motorist and make them pay for all the harms and losses caused."

Allstate also moved on grounds of improper impeachment of one of its expert witnesses, Dr. Robert Lins. Marotta requested Lins to provide any document or documents to show how many times Allstate and their attorneys had retained his services and the total amount of fees that Allstate has paid to him in the past five years. Allstate's counsel informed the court that it had provided its tax identification records to Marotta in discovery which included payments for many items such as compulsory medical examinations without differentiating between items. These records with respect to Dr. Lins were introduced into evidence.

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New Trial—Failure to Grant Motion to Disqualify

M.B. v. S.P., M.D., 124 So. 3d 358 (Fla. 2d DCA 2013)

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The Second District found that the Motion for Disqualification clearly met the requirements of the administrative rule and that the comments of the trial court in addition to his handwritten notes could cause the Plaintiff to have a well-founded fear that she would not receive a fair and impartial trial.

New Trial-_Failure to Specify Rationale for New Trial

Pugliese v. Terek, 117 So. 3d 1230 (Fla. 3d DCA 2013)

At trial, Defendants did not contest liability for a 2004 automobile accident and did not contest that the Plaintiff's 2006 surgery was as a result of injuries

received in that accident. The issues at trial were whether the medical costs for the 2006 surgery were reasonable and whether the surgery in 2009 was also the result of the 2004 accident and, if so, whether the medical expenses for that surgery were reasonable. After hearing evidence, the jury awarded $169,041.

On Plaintiff's post-trial Motion for Additur, the trial court granted the motion and awarded him the $341,981 he requested at the beginning of the trial. The Plaintiff rejected the additur and requested a new trial solely on the issue of damages which the trial court granted. The Order granting a new trial was unsupported by any fact or law or even a finding that the verdict was contrary to the manifest weight of the evidence.

The Third District noted that they would ordinarily relinquish jurisdiction and remand to the trial court to issue the orders to explain the rationale underlying the ruling however, in this case, the trial Judge (Judge Donner) was no longer available, was no longer on the bench, and belonged to a firm adverse to the defense counsel. The Third District further ordered that it was error to take away the jury verdict by granting a Motion for Additur, that the evidence at trial was conflicting and the jury could have reached its verdict in a manner consistent with the evidence. Based upon the trial record, they noted there was sufficient evidence by which the jury could have reasonably concluded that the 2009 surgery and related charges were not from the accident.

New Trial—High/Low Agreement

State Farm Mut. Auto. Ins. Co., v. Thomas, 110 So. 3d 66 (Fla. 2d DCA 2013)

The trial court erred in disallowing into evidence a high-low agreement the Plaintiff had with some of the defendants, and by limiting the scope of testimony of a defense expert. Over the course of two years, the Plaintiff was involved in two car accidents and brought suit against both drivers and her underinsured motorist insurance carrier, State Farm. The Plaintiff entered into a high-low agreement with the 2004 Defendant where the 2004 Defendant would pay a minimum of $100,000 and a maximum of $350,000. State Farm and the 2006 Defendant requested the jury be told of the agreement and likened it to a Mary Carter Agreement.

On appeal, the Second District noted that while not a true Mary Carter Agreement, the high-low agreement was analogous to one and therefore required disclosure to the jury. The same rationale to require disclosure of a Mary Carter

Agreement applied – "the integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of the three parties."

Through an amended witness list during pre-trial, State Farm disclosed an expert witness physician for the first time, after the deadline to disclose but sixty-nine days before trial. State Farm's provided a summary of the expert's testimony, provided the expert's report and the Plaintiff took the expert's deposition prior to trial. The expert opined that the Plaintiff's three shoulder surgeries and her knee surgery were unrelated to the 2006 accident. The trial court disallowed all of the expert's testimony except as to the need for her third shoulder surgery, which had been recently performed.

The Second District found error in limiting the expert's testimony. While a court has discretion to exclude testimony from an undisclosed witness, there must first be a showing of prejudice to the other party. Whether a party is prejudiced by the late disclosure is governed by *Binger v. King Pest Control*. Under *Binger*, factors for the court to consider are: 1) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; 2) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and 3) the possible disruption of the orderly and efficient trial of the case. *State Farm* met its burden to show it fulfilled the *Binger* requirements to mitigate any prejudice to the Plaintiff.

New Trial—Improper Closing Argument

Choy v. Faraldo 120 So. 3d 92 (Fla. 4th DCA 2013)

In this motor vehicle accident case, the Plaintiff sued Choy and his employer, Meric for causing the accident. Choy denied liability and Meric denied liability and denied that Choy was acting within the course and scope of his employment. During closing argument, Meric's attorney began to discuss the Plaintiff's alleged damages and, specifically, Plaintiff's contention that she had reduced her future earning capacity by $85,000 per year and then held up a copy of a Sports Illustrated magazine which he had just received and which prominently portrayed Marc Buoniconti in a wheelchair.

The purpose of this was to illustrate that there are people in wheelchairs who have other physical impairments who can continue to be productive. The trial court sustained the objection to this and denied a Motion for Mistrial. The jury returned a verdict finding that Choy was 100% liable for the accident and that he was not acting within the scope of his employment. The jury awarded damages to the Plaintiff, but for an amount far less than she sought. The trial court granted a new trial and the Fourth District reversed this decision in part and ruled that only a trial on damages would be held because the improper argument was not such that it would affect the decision on liability.

New Trial—Including Dismissed Party on Verdict Form

Holmes v. Area Glass, Inc., 117 So. 3d 492 (Fla. 1st DCA 2013)

It was error to include a dismissed party in the caption on a verdict form at trial. Plaintiffs brought suit against State Farm and Area Glass for damage to their vehicle after Area Glass repaired the front windshield. State Farm directed the Plaintiff's to use Area Glass but there were no allegations that State Farm was vicariously liable for Area Glass. Area Glass settled and was voluntarily dismissed before trial. Plaintiffs submitted a proposed verdict form which omitted Area Glass in the caption. State Farm objected on grounds that case captions should not be changed and that this absence would lead a jury to infer that State Farm was Area Glass' insurer or was otherwise vicariously liable for Area Glass. The trial court left Area Glass on the verdict form. During deliberation, the jury questioned why Area Glass was listed as a defendant on the verdict form. The trial court responded: "look to the testimony and the evidence that was presented and draw conclusions from that." Shortly thereafter, the jury returned a verdict for State Farm.

The First District granted a new trial, finding there was no valid reason to include Area Glass on the verdict form and its inclusion violated §768.041, Florida Statutes. Section 768.041 prohibits admitting any evidence of settlement or dismissal at trial. The jury could only infer that Area Glass had settled, which was compounded by the trial courts response to the jury's question. Moreover, there is no rule that the caption listed on the verdict from must be identical to the caption used on pleadings.

New Trial—Juror's Comments During Voir Dire

Williams v. Osking, 105 So. 3d 653 (Fla. 4th DCA 2013)

The Plaintiff alleged back injuries as a result of a boating injury. During jury selection, a list of the Defendant's respective witnesses was read to the jury panel. When asked if he knew any of the potential witnesses, one of the prospective jurors stated that he was familiar with the Defendant's medical expert. The potential juror stated "my dad had a law suit against him. Well I just thought about it. He kind of screwed my dad's back up." At side bar, the Defendant moved to strike the entire venire. The Court denied the Motion to Strike but granted the cause challenge as to the prospective juror who made the comment.

Thereafter, the court and the parties engaged in a day-long individual, sequestered examination of each remaining member of the panel. Each panel member was asked whether the member heard the comment, whether hearing the comment would affect the member's judgment of the medical professional's expert testimony, and whether the member could apply the law fairly after hearing the comment. Every potential juror who expressed potential bias as a result of hearing the comment was struck for cause. The jurors that eventually served in the case stated that they would be able to disregard the comment and apply the law fairly.

After a jury verdict in favor of the Plaintiff, the Defendant moved for a new trial on several grounds, including the denial of the Motion to Strike the panel. The Fourth District upheld the trial court's decision noting that the Defendant was given a full opportunity to question the potential jurors regarding the comment and he was unable to show that the jurors were unfairly biased as a result of hearing the comment.

New Trial—Juror Misconduct

Hillsboro Management, LLC v. Pagono, 112 So. 3d 620 (Fla. 4d DCA 2013)

Following a verdict in favor of the Plaintiffs, the Defendant discovered that one of the jurors had a significant history of litigation which he failed to disclosed in voir dire. The Trial Court, however, denied the Motion for New Trial based upon Juror Misconduct without conducting a juror interview. The Fourth District reversed and directed the Trial Court to permit a juror interview and then reconsider the Motion for New Trial.

During voir dire, the prospective jurors were asked whether they had ever been involved in the trial of a lawsuit, either as a Plaintiff, a Defendant or a witness. The juror in question disclosed that his daughter had been involved in an accident in the 1980's resulting in litigation and his wife was also involved. He stated that there was nothing about the case that would affect his ability to serve on the case. Later on voir dire, he was again questioned about the case and he again assured the attorneys that the case would not affect his service as a juror in this case. The Defendant's attorney then asked the jury about litigation and said

> "You were asked, folks, about litigation, particularly medical malpractice, claims against nursing homes, automobile accidents. But let me ask you that question about your involvement in litigation in a more expansive and broader definition of litigation, which can include problems with your credit card company, bankruptcy, landlord/tenant problems, slip and falls, commercial disputes, contract disputes, probate litigation, may be a claim where there is no lawsuit or lawyer involved, but just you against somebody else. Does anybody have any other litigation that hasn't been disclosed or ready?"

Several other potential jurors offered additional litigation experience. The defense attorney then specifically addressed the juror in question asking him "the only litigation involving your family was a lawsuit involving your youngest daughter, is that correct sir?" The juror replied "yes." Post-verdict, the Defendant found 12 actions filed in Broward County involving a juror with the same name; one of which was the automobile accident mentioned in voir dire.

The list included a domestic injunction, several foreclosures and civil damage suits. The defense attorney also filed an Affidavit stating that "in view of [the juror's] extensive litigation history and the character of same, I likely would have exercised a peremptory challenge with regard to [the juror]." He went on to state that the litigation history was relevant to his honesty and impartiality and that his participation and negligence in foreclosure cases may have given him a bias or prejudice against litigation proceedings.

Furthermore, each suit for civil damages involved a corporate entity leading to a question of bias against corporate entities like his client and a domestic violence accusation gave doubt to his temperament and fitness to serve as a juror. Lastly, defense counsel stated that the failure to disclose the information deprived

the Defendant of the fair opportunity to ask the questions of the juror regarding same and to make an informed judgment which likely will result in a peremptory challenge.

It is significant to note that the Fourth District stated that it may be time to reconsider whether parties should check on line information for prospective jurors during the course of the trial. They explained "all counties now have their official public records on line and Court files are also on line. A paralegal in the Courtroom can most likely search the public records of each juror as the juror is called during voir dire. While such searches are not perfect and would be able to pull records in the County in which the case is being tried, it could result in catching obvious non-disclosures, such as the case here.

Duong v. Ziadie, 125 So. 3d 225 (Fla. 4th DCA 2013)

Prior to trial, the Court conducted a pre-qualification of prospective jurors which asked the following question: "have you or any members of your immediate family ever been a party to a lawsuit, where you brought suit or suit was brought against you, either civil or criminal? (give specifics)." Jurors 1 and 2 responded "no."

Following a Plaintiff's verdict, defense counsel investigated the backgrounds of the jurors and discovered that both had past involvement in civil and criminal cases. The Defendant then moved to interview the jurors and, after the interviews, the Defendant moved for a new trial based upon juror misconduct which the trial court denied.

Juror 1's involvement involved a criminal welfare fraud conviction; a collection action; an eviction; and a paternity and child support actions brought by the Florida Department of Revenue. As for juror 2, three lawsuits involved collections which resulted in judgments against the juror that had not been paid.

Ultimately, the trial court determined that the information was immaterial because there was no evidence the jurors were biased or sympathetic to the Plaintiff based on their past litigation experience and because the Defendant accepted another juror with similar past litigation experience.

In affirming the lower Court's decision, the Fourth District noted that other prospective jurors, including one who served, had litigation experience but they

were either not questioned about the experience or challenged by the Defendant in the case. In fact, one of the jurors had a cousin who died as a result of paramedic malpractice and the cousin's family filed a lawsuit. The Defendant did not challenge for cause or use a peremptory challenge to remove this juror.

New Trial—Limited to Discrete Damages

Rolon v. Burke, 112 So. 3d 118 (Fla. 2d DCA 2013)

Following a verdict in favor of the Plaintiff who was injured in a motor vehicle accident, the Plaintiff moved for additur or a new trial contending that the damages awarded to her for past medical expenses, past lost wages, future medical expenses and future pain and suffering were inadequate. The jurors had determined that the Plaintiff sustained a permanent injury but only awarded damages for past pain and suffering. The trial court determined that it had made two evidentiary errors and granted a new trial. The new trial order, however, did not limit the trial to the damages addressed in the Plaintiff's motion, but rather, granted a new trial on all damages, including past pain and suffering and on the question of whether she had suffered a permanent injury.

The Second District reversed finding that the evidentiary issues determined by the trial court to warrant a new trial did not relate to permanency or pain and suffering damages. Moreover, the Plaintiff did not challenge the award for past pain and suffering. Because those damages are a discrete category separate from the damage award disputed in her motion, the new trial was to be limited to the damage awards that she had contested.

New Trial—Limiting Expert Testimony

State Farm Mut. Auto. Ins. Co., v. Thomas, 110 So. 3d 66 (Fla. 2d DCA 2013)

The trial court erred in disallowing into evidence a high-low agreement the Plaintiff had with some of the defendants, and by limiting the scope of testimony of a defense expert. Over the course of two years, the Plaintiff was involved in two car accidents and brought suit against both drivers and her underinsured motorist insurance carrier, State Farm. The Plaintiff entered into a high-low agreement with the 2004 Defendant where the 2004 Defendant would pay a minimum of $100,000 and a maximum of $350,000. State Farm and the 2006 Defendant requested the jury be told of the agreement and likened it to a Mary Carter Agreement.

On appeal, the Second District noted that while not a true Mary Carter Agreement, the high-low agreement was analogous to one and therefore required disclosure to the jury. The same rationale to require disclosure of a Mary Carter Agreement applied – "the integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of the three parties."

Through an amended witness list during pre-trial, State Farm disclosed an expert witness physician for the first time, after the deadline to disclose but sixty-nine days before trial. State Farm's provided a summary of the expert's testimony, provided the expert's report and the Plaintiff took the expert's deposition prior to trial. The expert opined that the Plaintiff's three shoulder surgeries and her knee surgery were unrelated to the 2006 accident. The trial court disallowed all of the expert's testimony except as to the need for her third shoulder surgery, which had been recently performed.

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New Trial—Peremptory Challenges

Disla v. Blanco, 129 So. 3d 398 (Fla. 4th DCA 2013)

Plaintiff appealed the denial of Motion for New Trial claiming multiple errors. First, Plaintiff claimed that the trial court improperly denied a challenge for cause as to one juror and erred by failing to conduct a complete analysis when the defense exercised a peremptory challenge as to another juror. The Fourth District ruled that neither claim was properly preserved for appellate review.

Although Plaintiff's counsel requested an additional peremptory challenge from the Judge after he had exhausted his allowed challenges, he failed to identify an objectionable juror whom he would have challenged or who was seated. Further, as to the alleged improper peremptory challenge exercised by the Defendant, this also was not preserved because Plaintiff's counsel failed to renew his objection to the defense's exercise to the peremptory challenge prior to the swearing of the jury.

Plaintiff also claimed that the trial court erred in overruling objections to defense counsel cross-examining her neurosurgeon regarding his refusal to accept insurance; Medicare reimbursement rates; and his extensive practice performing a type of surgery of disputed efficacy but which was not the surgery performed in the case. The Fourth District noted that the trial court's rulings in this regard are reviewed using an abuse of discretion standard and they could not find an abuse of discretion because the doctor had testified on direct as to his extensive practice and qualifications and, therefore, the questions regarding the types of surgery he performed were relevant.

Additionally, the fact that he did not accept insurance was brought up in connection with the extent of the doctor's extensive medical litigation practice and the discussion of Medicare rates was relevant to the reasonableness of his charges. Additionally, the trial court actually sustained several of Plaintiff's objections to these questions, yet the Plaintiff never moved for a mistrial, thus, failing to preserve these objections.

The Plaintiff also argued that the trial court improperly limited her cross examination of the defense expert. This too is governed by an abuse of discretion standard and the Fourth District noted that the Plaintiff failed to proffer what injuries the Defendants suffered or how they would have impacted the opinions of the defense expert.

New Trial—Rehabilitation of Juror

Pelham v. Walker, 38 FLWD 1962 (Fla. 2d DCA 9/18/13)

During voir dire, a member of the venire was asked about her feelings on non-economic damages. She stated that "I don't like them but I can follow the law." When asked why she did not like non-economic damages, she stated that she was a risk manager and that such damages seem punitive against the other side."

She further explained that, for the past 12 years, she had assessed worker's compensation and general liability claims and reviewed about 300-400 claims per year. When asked if she "might be more defense oriented, she answered yes, absolutely."

There were attempts made to rehabilitate this juror and, in fact, the trial court denied a challenge for cause. Plaintiff's counsel then requested an additional peremptory challenge which was refused and this juror was sworn as a member of the jury panel. The Second District reversed noting that a juror is not impartial when one side must overcome a preconceived opinion in order to prevail. Further, because the juror "never recanted or receded from her earlier expressed view that she was absolutely defense oriented and believed that non-economic damages are punitive to the defense" it would be difficult if not impossible to rehabilitate her so that she could sit as a fair and impartial juror.

Additionally, a new trial was required because, prior to trial, the Defendant successfully argued that the Plaintiff's determination that she was disabled by the Social Security Administration and was receiving disability benefits should be excluded. At trial, defense counsel questioned the Plaintiff's daughter about the fact that her mother did not work, had not made any effort to seek work and that her mother "basically lays around and watches TV all day."

After this line of questioning, the Plaintiff's counsel made a motion for the admission of her disability status claiming that the door had been opened by the defense's questioning. The trial court denied this motion. While noting that evidence of collateral sources is generally inadmissible to establish malingering by the Plaintiff or to rebut or impeach the Plaintiff's stated motivation to return to work, the District Court noted that, once the defense introduced the incomplete and misleading testimony, the Plaintiff should have been allowed to offer the complete picture to the jury by explaining the reasons why she was not working.

New Trial—Social Security Disability

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New Trial—Standard of Review

Van v. Schmidt, 122 So. 3d 243 (Fla. 2013)

In reviewing an order granting a new trial based upon a trial court's conclusions of law, the appellate court properly applies a *de novo* standard of review, however, when reviewing a new trial granted based upon the manifest weight of evidence, the trial court's findings of fact and determinations of

credibility are entitled to deference. In this case, the Supreme Court found that the First District properly reversed the trial court's granting of a new trial where the order was premised on an erroneous conclusion of law that the jury could not reject the uncontroverted expert testimony that the Plaintiff's injuries were caused by the accident.

At the same time, however, the Supreme Court found that the District Court erroneously re-weighed the evidence and ordered reinstatement of the jury verdict. Thus, when an appellate court has determined that the trial court's granting of a new trial is premised, at least in part, on an error of law, the inquiry then becomes whether the trial court would have granted the new trial but for the error of law. Where the appellate court is unable to ascertain whether the trial court would have reached the same result but for the error of law, the proper remedy is to order return of the case to the trial court for reconsideration of the order granting new trial in light of the legal principle that the jury could properly reject the uncontroverted testimony of experts.

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."

Remittitur

R.J. Reynolds Tobacco Company v. Webb, 38 FLWD 2637 (Fla. 1st DCA 12/17/13)

The jury awarded the Plaintiff $7,200,000 in compensatory damages and $72,000,000 in punitive damages in this wrongful death suit. The First District vacated the damage award earlier finding that the amount of the compensatory damages suggested an award that was the product of passion. It remanded the case to the trial court with directions to either grant Reynold's Motion for Remittitur or hold a new trial on damages.

On remand, the Plaintiff sought a Remittitur to $4,000,000 in compensatory damages and $25,000,000 in punitive damages. Reynolds responded with a renewed Motion for Remittitur seeking $250,000 or less in compensatory damages and a similar amount in punitive damages. The trial court entered an order of remittitur remitting damages to $4,000,000 less 10% comparative negligence for a total award of $3,600,000 and also awarded $25,000,000 in punitive damages. The order went on to state that the Defendant was "not entitled to a new trial for compensatory and punitive damages unless it was at the election of the Plaintiff" and gave the Plaintiff 10 days to consent or object to the Remittitur. The Plaintiff consented, the Defendant objected and the trial court entered a final judgment for a total of $28,600,000.

RJ Reynolds argued that the trial court erred in failing to hold a new trial on damages after they objected to the remitted damaged amounts. The First District agreed concluding that, because RJ Reynolds was "the party adversely affected" by the remittitur, and because they timely objected, it was entitled to a new trial on damages.

Stacking of Inferences

Shartz v. Miulli, 127 So. 3d 613 (Fla. 2d DCA 2013)

The decedent was 17-years old when he died during a pre-season baseball workout as a result of congenital aortic valve stenosis. The decedent was born with a patent ductus arteriosus and was diagnosed with aortic stenosis shortly after his birth. For 10 years prior to his death, the decedent was under the care of Dr. Thomas Edwards; a pediatric cardiologist. The patient, who died in 2005, had been under the care of Dr. Edwards for 10 years prior to his death.

In 2001, Dr. Edwards saw the patient and noted that he was playing baseball and he ordered an echocardiogram. Dr. Edwards also advised that the patient would need a stress test before participating in the 2002 baseball season beginning in January. The stress test was not performed until August, 2002 but following that test and an additional test was ordered by Dr. Suh, a pediatric cardiologist, and Dr. Edwards signed a sports medical authorization indicating that the decedent could participate in all sports except football with no other restrictions.

Dr. Edwards did not testify at trial, but his records were in evidence and indicated that the patient was to return for a cardiology follow up in 6-months and that this information was relayed to the decedent's father prior to providing him with a sports authorization. It is undisputed that the patient did not see Dr. Edwards, Dr. Suh or any other cardiologist between August, 2002 and the time of his death. It was also undisputed that, during that time, he continued to play baseball.

In addition to seeing cardiologists, the patient was also treated by primary care physicians; including Dr. Shartz. In July, 2003, the patient saw Dr. Shartz who found him to be in good physical condition. He also noted that he was overdue for his cardiology examination. In August, 2004, the patient's mother took her son to Dr. Shartz for a physical and completion of a sports medical release

which the mother had obtained from the internet. Dr. Shartz conducted a physical examination and inquired as to when the patient had last seen a cardiologist.

The response to this question was a contested issue at trial. Dr. Shartz testified that the mother told them that her son had been to see a cardiologist within the last year and that his cardiac evaluations were current. By contrast, the decedent's mother testified that she told Dr. Shartz that it had been "at least a year" since her son had been seen. Because his records did not include a recent cardiology update, Dr. Shartz noted that he would call Dr. Edwards, however, in the interim, he signed the authorization allowing him to play sports.

The day after signing the authorization, Dr. Shartz spoke to Dr. Edwards to confirm that the patient had been cleared to play baseball. During that phone call, Dr. Shartz learned that the child had not been to a cardiologist since 2002 and he further advised Dr. Shartz that Matthew was not to play any sports before having a repeat stress test and echocardiogram.

Dr. Shartz testified that, after this conversation with Dr. Edwards, he made multiple attempts to contact the Plaintiffs to revoke the authorization to participate in sports. He testified that he repeatedly called and left two voice messages on the family's answering machine on August 3, two more messages on August 4; another message on August 5; and a final message on August 6. He also left a message on Mr. Miulli's cell phone on August 5. At trial, the Plaintiffs denied receiving these phone messages despite confirming that the numbers called were correct.

In addition to these phone calls, on August 10, 2004, Dr. Shartz mailed letters to the Miulli's advising that Matthew was not to participate in any sports until he saw Dr. Edwards. One letter was sent via regular mail and one was sent via certified mail. At trial, the Miulli's denied receiving the letters and denied any knowledge that Dr. Shartz no longer believed that Matthew should participate in sports. The Miulli's confirmed that the address to which the letter was sent was their home address and the letter mailed via regular post was not returned, however, the certified letter was returned to Dr. Shartz's employer, however, this information was not relayed to Dr. Shartz until much later.

It was undisputed that the medical release obtained was unnecessary for his participation in pre-season baseball workouts. Further, the Plaintiffs testified that they did not intend to use the release signed by Dr. Shartz for their son's

participation in varsity baseball in January, 2005, admitting that they knew their son would need an echocardiogram and stress test before being permitted to participate in baseball and that they intended to have their son seen by a cardiologist before the start of the regular season. At the time of his death, Matthew had not been to a cardiologist and did not have a scheduled appointment with a cardiologist or any other doctor.

At trial, the Plaintiffs called a family medicine physician who testified that she was critical of Dr. Shartz for failing to "close the loop" by confirming that the parents understood that their son was not to participate in sports before seeing a cardiologist. She was also critical of him signing the sports medical release without first speaking with a cardiologist and believed that his care substantially contributed to causing the decedent's death because, in his parent's mind, their son had been cleared to play baseball. She was also critical of Dr. Shartz's employer based on its handling of the unclaimed certified letters.

During trial, the mother testified that if she had received the letter from Dr. Shartz she would have "immediately made a call," however, she did not testify as to who she would have called. She also did not testify if she would have taken her son to a cardiologist or another physician for immediate testing and did not testify that she would not have permitted him to participate in baseball conditioning. The father also testified that had he known the information outlined in Dr. Shartz's letter, he would have acted upon it but provided no specifics about what he would have done. He did not testify that he would have not permitted his son to participate in baseball conditioning.

The Defendants moved for directed verdict which was denied and a verdict was entered against the Defendants with a significant assignment of liability to the parents. The Second District reversed and found that the Plaintiffs' expert testimony was insufficient to withstand the directed verdict noting that multiple facts needed to be established in order to create a jury question including that, had Dr. Shartz "closed the loop" the decedent would not have participated in baseball conditioning; and that had Dr. Shartz "closed the loop" the parents would have taken him to a cardiologist; the cardiologist would not have signed a sports medical release; and the decedent would not have participated in baseball conditioning.

Without testimony that Matthew would not have participated in baseball conditioning had Dr. Shartz "closed the loop" and would not have suffered a cardiac event and would not have died, the expert's opinions that the Defendants'

actions and inactions contributed to his death were conclusory, speculative and not based on facts presented at trial thus requiring an impermissible stacking of inferences. Further, the district court noted that Plaintiff's expert could not testify because she is not a cardiologist and could not opine as to whether Dr. Shartz's actions contributed to or caused Matthew's death with any degree of medical probability. She did not base her causation conclusion on medical experience or medical literature and provided no testimony as to his heart condition in 2003, 2004 or the month of his death.

Waiver of Right to New Trial Where Agreed to Verdict Form

Hernandez v. Gonzalez, 124 So. 3d 988 (Fla. 4th DCA 2013)

The Plaintiffs were rear-ended by the Defendants. Both Plaintiffs were taken to the hospital from the scene of the accident by ambulance for evaluation. In the months that followed, they both sought medical treatment for physical problems they claimed were a result of the accident. At the conclusion of the trial, the jury returned a damage verdict of "zero" and the Plaintiffs moved for new trial arguing that the verdict was against the manifest weight of the evidence. The trial court denied post-trial motions and took an appeal.

At trial, the Defendants admitted negligence, but disputed both causation and damages. They presented evidence to support the claim that one of the Plaintiffs had significant pre-existing injuries that were the cause of all of the medical treatment expenses she subsequently incurred. The Defendants also presented evidence that the other Plaintiff was not injured at all including a witness that testified that she saw him laughing and giggling at the hospital. Both Plaintiff denied the allegations and presented evidence to refute these claims.

The Defendants did not dispute the reasonableness of the cost of the medical treatment provided to the Plaintiffs at the scene of the accident or at the hospital immediately thereafter. Further, it was undisputed that the expenses were incurred as a result of the accident.

Notably, however, at the close of evidence, neither Plaintiff moved for directed verdict on their entitlement to these medical expenses. The parties then agreed to a verdict form. Both parties argued that if the jury found that the Plaintiffs were not injured from the accident, they should answer "no" to the

question as to whether the Defendants were the legal cause of loss, injury or damage to the Plaintiffs.

Although the general rule is that the Plaintiff may recover the cost of medical expenses for diagnostic testing reasonably necessary to determine whether the accident caused injuries, regardless of whether the jury ultimately finds the accident to be the legal cause of the claimed injuries, there are exceptions to this general rule which can allow a jury to award a zero verdict, regardless of the medical expenses incurred. For example, when there is sufficient evidence presented at trial regarding pre-existing injuries with extensive treatment, lack of candor with treating physicians, video tapes that show actual physical capabilities and expert medical opinions which conflict as to causation, the jury can award a zero verdict. Further, entitlement to certain elements of damages can be waived.

In this case, the Plaintiffs failed to move for directed verdict for the cost of medical treatment at the accident scene and the emergency department and rather, presented the issue of damages to the jury on a "all or nothing" basis. Because the Plaintiffs failed to object to the verdict form and jury instruction, Plaintiff cannot now complain about an error for which he or she was responsible for. Accordingly, the Fourth District affirmed the denial of the Motion for New Trial.