2014
CASE LAW SUMMARY

Trial Issues

Appropriate to Use Videotaped Deposition of Defendant During Closing

Borden Dairy Company v. Kuhajda, 152 So. 3d 763 (Fla. 1st DCA 2014)

During closing argument, the Plaintiff played a portion of the deposition of the Defendant driver. This videotaped deposition was admitted into evidence at trial without objection. During the driver's live testimony at trial, the Plaintiff impeached him with portions of his transcribed videotaped deposition. Before resting her case, Plaintiff's counsel stated that he wanted to use a portion of the videotaped deposition during closing argument. The Defendant raised an objection to allowing the use of the deposition and the trial court reserved ruling on same.

In closing argument, the Plaintiff played the video clip from the deposition without objection. Following a verdict for the Plaintiff, the trial court denied a Motion for New Trial and the First District affirmed. Florida Rule of Civil Procedure 1.330(a)(2) provides that a party's deposition can be used for any purpose and once the videotaped deposition had been admitted into evidence, it was fully available for the jury to consider.

Collateral Source Setoffs

Hurtado v. Desouza, 39 FLWD 2462 (Fla. 4th DCA 2014) **Not released for publication.**

Following a verdict for Plaintiff, the Defendant sought a collateral source set off for payments of unemployment compensation received by the Plaintiff. The trial court granted the set-off and the Fourth District reversed finding that the plain language of the collateral source statute does not allow for a set-off of unemployment compensation benefits.

Directed Verdict

Marcum v. Hayward, 136 So. 3d 695 (Fla. 2d DCA 2014)

Trial court should have granted Marcum's directed verdict where she successfully established the defense of loss of consciousness. Marcum suffered a seizure, blacked-out and rear-ended Hayward. Hayward did not put forth an expert to refute Marcum's expert testimony that the seizure was unforeseeable. To establish this defense, the defendant must prove: 1) the defendant suffered a loss of consciousness or capacity; 2) the loss of consciousness or capacity occurred before the defendant's purportedly negligent conduct; 3) the loss of consciousness was sudden; and 4) the loss of consciousness or capacity was neither foreseen nor foreseeable.

Error to Deny Continuance Where No Extensive Prejudice to Opposition

Scott v. Reflections of Sebastian, LLC, 133 So. 3d 1046 (Fla. 4th DCA 2014)

It was error to prevent Defendant Scott from presenting evidence or testifying at trial as sanction for failure to comply with discovery deadlines. Most of the discovery failures were attributable to Scott's prior counsel and the trial court did not find that Scott's conduct was willful or contumacious. Scott obtained new counsel before trial who unsuccessfully moved for a continuance and to vacate the sanctions. Denial of the continuance was also improper as there was no extensive prejudice to the opposition – Reflections only asserted it was ready to go to trial and did not wish to wait.

Jury Instructions – Subsequent Medical Negligence

In Re: Standard Jury Instructions in Civil Cases 135 So. 3d 281 (Fla. 2014)

The Supreme Court approved the addition of standard jury instruction 501.15(c). This amendment was prompted by *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977) which determined that the treating doctor's negligence in rendering medical care to the victim for the initial injuries is part of the consequence caused by the original negligence that required the medical treatment. The amended instruction is intended for use in cases involving additional injury caused by subsequent medical treatment following the original tort. Although the Supreme Court approved this instruction, it did so without ruling on the correctness of the instruction. Further, the approval of the instruction did not foreclose requesting

additional or alternative instructions or even contesting the legal correctness of this instruction at trial.

Motions in Limine Alone Do Not Preserve Issue for Appeal

Boyles v. A & G Concrete Pools, Inc., 149 So. 3d 39 (Fla. 4th DCA 2014)

The Plaintiff was allegedly injured as a result of this 2008 motor vehicle accident. Notably, the Plaintiff had been involved in an accident in 2001 and claimed that he suffered from four herniated discs as a result of that earlier accident. When the patient's pain did not improve from the 2008 accident, he was referred to Dr. Katzman. Notably, the Plaintiff never told Dr. Katzman that he had any prior injuries to his neck.

When Dr. Katzman later discovered that the patient had experienced back pain from the 2001 accident, the patient maintained that the problems had resolved at least two years before the 2008 accident. When conservative treatment did not improve the patient's symptoms, Dr. Katzman performed a lumbar procedure and then a cervical procedure. Dr. Katzman related both procedures to the injury sustained in the 2008 accident. The lumbar procedure was successful; however, the cervical procedure was not successful.

The patient then saw Dr. Dare; a neurosurgeon. During the initial evaluation with Dr. Dare, the patient did not advise him of the 2001 car accident nor did he advise him of the treatment for back pain he received over many years. Dr. Dare later received medical records from the Plaintiff's attorney revealing a prior medical history; he questioned the patient who reported that he was back to normal at the time of the 2008 accident. Dr. Dare performed additional surgery on the patient's back and his condition ultimately improved.

An IME was subsequently performed and the IME physician stated that he would not have recommended surgery because the patient did not show neurological deficits. Two years before trial and before the IME, the Plaintiff filed an extensive Motion in Limine which, amongst other things, sought to exclude testimony regarding unnecessary or unreasonable surgeries. The Fourth District admonished against the use of these kinds of motions and criticized the fact that the motion was generic and filed before most evidence was even in the record, as well as, the fact that it was argued so long before the trial.

The Judge who entered the order on the Motions in Limine did not try the case. A successor Judge looked at the Motion in Limine and it appears as though he suggested that timely objections would be necessary. When the IME physician was questioned regarding the unnecessary surgery, the Plaintiff failed to object. As such, the Fourth District found that the issue was not preserved.

Further, they noted that even if the lawyer had preserved the objection, the testimony of the IME doctor still could be admitted because the testimony did not involve an expert trying to attribute subsequent malpractice or trying to avoid subsequent malpractice, but rather, the testimony had to do with the causal link between the surgeries and the accident in question. Further, in cases where the IME testimony was ruled to be inadmissible, the claim was that the inappropriate or unnecessary surgery worsened the Plaintiff's condition. Here, however, the Plaintiff's own witnesses testified that that surgery made the condition better.

Motion to Interview Juror

Naugle v. Philip Morris USA, Inc., 133 So. 3d 1235 (Fla. 4th DCA 2014)

Following a jury verdict for the Plaintiff, the jury foreman left a voicemail message at the Judge's office that he received a text from a juror that something was done wrong by them during the trial process. The trial court issued an order memorializing the message and prohibiting juror contact by the parties and counsel. Philip Morris filed a motion to interview jurors and to preserve the text message. The trial court then entered an order for the foreman to bring his cell phone so the judge could review the text *in camera*. The Judge could ask questions of the foreman. The parties could submit proposed questions but could not question the foreman directly.

On appeal, the Fourth District held the order allowing the limited *in camera* inquiry did not invade the sanctity of jury deliberations or violate Florida Rule of Civil Procedure 1.431(h), which provides the requirements for juror interviews. Additionally, the court did not violate Florida Statute §90.607(2)(b) which does not allow juror questions except of matters involving overt prejudicial acts. The Fourth District noted that the voicemail did not establish any actual misconduct that could amount to an overt prejudicial act, but the trial court's limited review would only establish if there were grounds for a full blown interview. Furthermore, no sworn testimony from counsel or a party is necessary to accompany a motion to interview where the juror contacts the court directly.

New Trial – Evidence of Settlement

Bern v. Camejo, 39 FLWD 94 (Fla. 3d DCA 2014)

This was a motor vehicle accident case involving a three car collision. Bern, who was injured, sued: Acevedo as the driver of one vehicle; Camejo as the owner of the vehicle driven by Acevedo; Perez, the driver of the third vehicle; and Martinez, the owner of the vehicle driven by Perez. Prior to trial, Bern settled her claims against Perez and Martinez and dismissed them from the suit and proceeded to trial against Acevedo and Camejo. Before trial, Bern filed a Motion in Limine seeking to exclude any evidence or argument that Perez had previously been sued or named as a Defendant in the action or any evidence that the claims against Perez had been settled or dismissed.

In response, the Defendants argued that they should be allowed to present evidence that Perez was a prior Defendant in the case because her status as a Defendant at the time she gave her deposition was relevant in weighing her credibility. Although the Defendants intended to argue at trial that it was Perez's negligence which caused the accident, the Defendants also sought to establish that it was the Plaintiff who first alleged that Perez caused the accident and sued Perez for such negligence.

The trial court granted the Motion in Limine in part and denied it in part agreeing with the Defendants that Perez's status as a former Defendant in the case was relevant to establishing her bias during her deposition testimony and granted the Motion in Limine insofar as it prevented the parties from mentioning or introducing evidence that Perez had settled with Bern. Throughout the trial, there were repeated references made to Perez's status. The Third District reversed the trial court's ruling noting that Florida Statute §768.041(3) "plainly and unambiguously prohibits disclosure to the jury of any evidence of settlement or that a former Defendant was dismissed from the suit."

New Trial – Exclusion of Evidence as Surprise

Kellner v. David, 140 So. 3d 1042 (Fla. 5th DCA 2014)

In a collision between a motorcycle and a motor vehicle, the Defendant was not permitted to testify regarding accident scene measurements he took several

days before trial. In so doing, the trial court found that the measurements were taken after the discovery cut off. Further, the trial court prevented the Defendant from testifying regarding his estimate as to the distance between his vehicle and the motorcycle at the time of the accident.

The Fifth District affirmed noting that rulings on evidentiary matters are generally within the sound discretion of the trial court. They also noted that such testimony should be excluded as surprise under the *Binger* decision. Accordingly, the denial of the new trial was affirmed by the appellate court.

The dissent noted that the Defendant did not have an opportunity to testify to his measurements before the Court called him up to sidebar. There was no objection from the Plaintiff at this point. Further, the dissent noted that the Plaintiff did not ask the Defendant questions regarding his estimate of the distance between the motorcycle and the car at his deposition and, therefore, could not claim surprise. The dissent also noted that an expert is not required in order to measure a distance between vehicles adding that witnesses may generally testify as to both distance and speed.

New Trial – Failure to Object to Testimony Waives Right to Object Later on Same

Hguyen v. Wrigley, 39 FLWD 1398 (Fla. 5th DCA 2014) **Not released for publication.**

The Plaintiff sued the salon for injuries she sustained while receiving a paraffin wax manicure. At trial, the Plaintiff called a witness who testified that, shortly after placing her hands inside the wax treatment mittens, the Plaintiff started complaining that her fingers were burning. After that, the Plaintiff's fingernails turned black and started ripping back and tearing off like blisters. The Plaintiff testified that her nails remained in this condition for nine months.

The Plaintiff's counsel introduced three photographs of the Plaintiff's fingernails which allegedly depicted the Plaintiff's injuries after two hours, two weeks, and four weeks. On cross-examination, the defense attorney questioned the witness about the photographs and the witness testified that she took all of the photographs shown, as well as, many more.

During closing, defense counsel argued that the witness admitted she took the photographs of the nails and then asked the jury rhetorically why the Plaintiff did not present the other photos. Plaintiff's counsel objected and this objection was sustained. During closing, defense counsel argued that the Plaintiff filed a lawsuit and this was a court room and not a lottery and once again, counsel immediately objected and the objection was sustained with the jury being instructed to disregard the comment. No Motion for Mistrial was made.

The jury returned a verdict attributing 20% of the fault to the Defendant and 80% to the Plaintiff. When the trial court granted the new trial, the Fifth District reversed. It found that the Plaintiff's failure to object when the witness testified regarding the other photos waived the right to complain later about the comment on same. The court also found that the isolated reference to the lottery was not enough to damage the public's interest in the system of justice requiring a new trial.

New Trial – Harmless Error Test

Special v. West Boca Medical Center, 39 FLWS 676 (Fla. 2014)

In this case, the Florida Supreme Court reversed a defense verdict ruling that the test for harmless error in a civil appeal requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict. That is, the beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict. In this case, the Supreme Court held that it was error for the trial court to preclude the Plaintiff from cross-examining the defense expert concerning whether this hospital was over diagnosing amniotic fluid embolism. Further, it was error to exclude evidence related to alleged witness tampering by defense counsel.

New Trial – Order Granting New Trial Reviewed for Abuse of Discretion

Meadowbrook Meat Company v. Catinella, 39 FLWD 2515 (Fla. 2d DCA 2014) **Not released for publication in reporter. Opinion withdrawn and superseded by 40 FLWD 402 (Fla. 2d DCA 2015)**

Following a verdict for the Defendant, the trial court granted a new trial. In doing so, it issued a detailed order setting forth that the Defendant had destroyed

evidence, had violated Court Orders, had willful discovery violations and that two jurors had engaged in misconduct by failing to disclose their litigation history. The Defendant did not argue that the trial court's observations were unsupported by the record, but rather, argued that the trial court abused its discretion in concluding that the circumstances detailed in its order warranted a new trial. Finding no abuse of discretion, the Second District affirmed the granting of the new trial.

New Trial – Juror Non-Disclosure

Weissman v. Radiology Associates of Ocala, 152 So. 3d 754 (Fla. 5th DCA 2014)

Following a verdict for the Plaintiff, the Defendant filed a Motion to Conduct Juror Interviews alleging material non-disclosure by several jurors. The trial court conducted juror interviews and then granted the Motion for New Trial finding that three of the jurors had failed to disclose material information. The Plaintiff appealed contending that the trial court abused its discretion in ordering a new trial arguing that none of the alleged non-disclosures were sufficient to grant the new trial.

During voir dire, the prospective jurors were asked whether they had "ever been to Radiology Associates of Orlando (RAO)." They were also asked whether they had any negative feelings about doctors, hospitals or healthcare providers. None of the prospective jurors responded affirmatively. After conducting a post-trial search of its internal billing records, RAO claimed that one of the jurors had received services from them at an area hospital and that her account had gone into collection.

At the hearing on the motion, RAO's counsel provided documents to the Court over the Plaintiff's objection showing that the juror had been billed for services performed and that the account had been sent to collections. During her interview, however, the juror never testified that she had been to RAO, received services from RAO, received any bills from RAO, or that any bills from her had gone to collection. Accordingly, the Fifth District concluded that, because RAO failed to properly authenticate its documents and presented no witnesses at the hearing to identify the documents, that these documents were improperly admitted into evidence.

As for the second juror, RAO asserted that he failed to disclose that he had filed a Chapter 13 bankruptcy. During voir dire, the prospective jurors were not specifically asked about bankruptcy filings. Rather, counsel for the Plaintiff asked if the jurors had ever been involved in any kind of litigation, either as a Plaintiff or Defendant. None of the jurors responded affirmatively. The third juror also failed to disclose a Chapter 7 bankruptcy. The Fifth District found that the question asked about prior litigation was too imprecise to question these responses.

New Trial – Peremptory Challenge Must Be Raised Before Jury Sworn

McNeil v. State of Florida, 39 FLWD 1016, (Fla. 5th DCA 2014) **Not yet released for publication.**

During trial, the State moved to exercise a peremptory challenge against a juror who informed the Court Deputy during a recess that he recognized the Defendant's son who had been called to testify for the defense and that the juror had treated the Defendant's son for a football-related injuries in his capacity as a Physical Therapist for a local high school. The trial court allowed the exercise of the peremptory challenge and the Fifth District reversed noting that there were no cases which have permitted a trial court to use a peremptory challenge mid-trial.

Objection to Juror must be Renewed Prior to Swearing in Jury

Johnson v. State, 141 So. 3d 698 (Fla. 1st DCA 2014)

During voir dire in this criminal case, the prosecutor asked a catch-all question seeking to learn if there was anything that he had not asked that the prospective jurors felt they should tell him. A prospective juror then said something which suggested he believed the Defendant had a prior criminal record.

Defense counsel approached the bench and requested the trial court strike the entire panel arguing that the comment had put the suggestion of the prior criminal record in the panel's mind and had tainted all of them. After the jurors were selected, however, defense counsel failed to object again before the jury was sworn. The failure to do so waived the objection and the Court affirmed the Defendant's conviction based upon the lack of preservation of error.

Party Can Challenge Juror Any Time Before Jury is Sworn

State v. Page-Martin, 135 So. 3d 491 (Fla. 2d DCA 2014)

Before a jury had been sworn in, the prosecutor requested to use his remaining peremptory challenges as back strikes even though the original jury venire had been dismissed. The trial court denied this request and the State filed a Petition for Certiorari. The Second District granted the Petition holding that it was a departure from the essential requirements of the law to deny the State's request noting that "parties may challenge a prospective juror at any time before the jury is sworn…a trial Judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn."

Permanent Injury Does Not Require Award for Future Non-Economic Damages

Buitrago v. Feaster, 40 FLWD 81 (Fla. 2d DCA 2014)

The jury awarded the Plaintiff damages for past medical expenses, lost wages and non-economic damages and $450,000 in future medical damages but no future non-economic damages. The Plaintiff moved for a new trial claiming that the evidence and verdict established that she was entitled to future non-economic damages. The trial court granted the Motion for New Trial and the Second District reversed noting that a verdict is not inadequate as a matter of law when the jury finds a Plaintiff has suffered a permanent injury but does not award future intangible damages.

They further noted that the correct standard to apply in considering a Motion for New Trial based on an allegedly inadequate award of non-economic damages is whether the verdict was against the manifest weight of the evidence. Because the Plaintiff failed to argue this standard and because the record below makes it clear that the trial court did not consider the weight of the evidence in granting a new trial, the new trial order was reversed.

Following the trial, the jury returned a verdict substantially in excess of the proposal for settlement. The trial court granted the attorney's fees, however, the First District reversed saying that the proposal deprived the driver of the ability to evaluate and independently act to resolve the case against her.

Waiver of Right to New Trial Where Agreed to Verdict Form

Millsaps v. Kaltenbach, 152 So. 3d 803 (Fla. 4th DCA 2014)

Millsaps sued Kaltenbach for causing an accident. Kaltenbach filed an Answer in which he affirmatively alleged the negligence of the driver of an unidentified vehicle. Millsaps then filed an Amended Complaint that added an additional claim for uninsured/underinsured motorist coverage against State Farm under the belief that the Defendant was underinsured for the damages claimed, but not under the theory that State Farm would stand in the shoes of the driver of the unidentified third vehicle. At trial, and over objection, the Plaintiff was permitted to amend her pleadings to conform to the evidence regarding the third vehicle's negligence that the Defendant presented during the trial and to add that vehicle to the uninsured motorist claim against State Farm.

During the charge conference, however, counsel for Plaintiff abandoned the uninsured motorist claim against State Farm for the actions of the unidentified third vehicle driver and advised the Court that they did not want to blame that driver. As a result, the Court directed a verdict in favor of State Farm on the uninsured motorist claim for the actions of the unidentified third vehicle and the Plaintiff did not object.

Thereafter, proposed jury instructions and the verdict form were drafted to include the question of the unidentified driver's negligence, but only as an Affirmative Defense. Counsel for the Plaintiff advised that he had no objection to either the jury verdict form or the instructions. Thereafter, the jury found that there was no negligence on the part of Kaltenbach. A Motion for New Trial was denied and the Fourth District affirmed finding that the actions of the Plaintiff essentially dismissed the claim against the unidentified third party.