2015
CASE LAW SUMMARY

Trial Issues

Additur

Ortega v. Belony, 41 FLWD 33 (Fla. 3d DCA 12/30/15)

As a result of a motor vehicle accident, the Plaintiff suffered a broken neck for which he was hospitalized in traction for eight days. Although he could have elected surgery, he declined and instead wore a "halo" for three months while the break mended. During this time, he lived with his brother who assisted him with his bathing and other needs. The Plaintiff also experienced difficulty sleeping, and, on one occasion, had to return to the hospital briefly to have the screws in his halo tightened.

At the end of three months, his injuries had substantially healed, the halo was removed and his only continuing ailment was mild neck pain. By the time of trial, his complaint was residual back pain. His doctors did not recommend any future treatment including follow up surgery or physical therapy after removal of the halo.

Less than a year after the accident, he sought treatment for neck pain from a spinal surgeon. Although his neck fracture had almost completely healed, the surgeon recommended surgery, which the Plaintiff again refused; instead opting for three injections to his neck. After receiving the injections, his physician told him to return if he felt any worse. By the time of trial, the Plaintiff had no difficulty performing the activities of daily living, and had not returned to seek further treatment from his spinal surgeon.

The jury initially returned a verdict finding the Plaintiff 70% comparatively negligent and awarded him the full amount of his past and future medical expenses of less than $33,000. They awarded zero damages for past and future pain and suffering. Believing the zero dollar award to be contrary to the evidence, the trial court ordered the jury to reconsider the pain and suffering award and after additional deliberations, they awarded $5,000 in past and future pain and suffering. The Plaintiff then moved for an additur which the trial court granted increasing the award to $250,000.

The Third District reversed noting that the test for determining the adequacy of a jury verdict is simply "whether a jury of reasonable persons could have returned that verdict." The Third District stated that the record did not establish that the jury was improperly influenced by prejudice, passion or corruption, but rather, noted that the Plaintiff was a stoic Plaintiff whose injuries healed quickly and, after a three month recovery, had no need for future medical treatment.

Ferrer v. La Serna, 179 So. 3d 523 (Fla. 4th DCA 2015)

Following a verdict in favor of a Plaintiff in a motor vehicle accident case, the trial court granted an additur for past and future medical expenses. In doing so, the trial court failed to include in the order an explanation why the additur was warranted nor did it provide an option for a new trial in lieu of the additur. As such, the Fourth District reversed. Further, the Fourth District also found that the additur was inappropriate because the evidence was conflicting regarding the cause of the patient's complaints of radiating pain in her arm and because the jury could have concluded that the costs associated with the radiating pain were unrelated to the motor vehicle accident.

Admission Against Interest Properly Admitted Even Though It Was Repetition Of Hearsay

Jones v. Alayon, 162 So. 3d 360 (Fla. 4th DCA 2015)

The Fourth District affirmed the trial court's denial of a Motion for New Trial filed by the Plaintiff following a trial in which Plaintiff was awarded lesser damages than had been sought. At trial, the court denied a Motion for Directed Verdict on the seatbelt defense because the evidence was undisputed that the seatbelt was not operational. The Fourth District noted that, proof that the seatbelt was available and fully operational is not a pre-requisite to establishing comparative negligence to the Plaintiff and the fact that the available seatbelt may be inoperable is one factor for the jury to consider in determining the issue of comparative negligence.

The Fourth District also held that the trial court did not abuse its discretion in granting a Motion in Limine to prevent admission of the fact that the Defendant, who was an off-duty police officer, fled the scene where the Defendant admitted

liability for causing the accident and the trial court determined that the probative value was outweighed by its prejudicial affect. This was so even though the Plaintiff claimed that it caused her emotional distress knowing that a sworn police officer fled the scene of the accident and failed to provide her husband with emergency medical care.

Lastly, they found that the trial court did not abuse its discretion in admitting hearsay that the decedent's wife spent the parties' money on drugs and alcohol. The testimony came in through a deposition excerpt from an out-of-state sister who testified as to statements made to her by another sister who was subsequently appointed Personal Representative of the estate. As the court noted "admissions need not be based on first hand knowledge by the party, the rationale being 'that a witness will not make a statement against his interest unless he or she has made an adequate investigation.'"

Even though the statement made to the Personal Representative made by another may have constituted hearsay, it was her repetition of the hearsay statement that constituted an admission against interest. As the court explained "that it is based upon what someone else may have told Jones' is unimportant, in that she would not make that statement without some investigation or indicia of reliability."

Backstriking

Aquila v. Brisk Transportation, L.P., 170 So. 3d 924 (Fla. 4th DCA 2015)

During jury selection, the parties tentatively accepted six jurors with further selection of alternates. The Court dismissed the 23 other potential jurors. Before the six jurors were sworn, one of them indicated that he could not serve because of interference with a pre-paid vacation. The Court dismissed that juror. The defense counsel then moved for mistrial because the dynamics of the jury had changed.

The Judge and the parties discussed several ways to remedy the problem and they centered on moving the first proposed alternate into the jury panel, but when both the Plaintiff and the Defendant wanted the right to backstrike jurors, the court refused to allow any backstriking.

After a recess, the Plaintiff insisted on the right to backstrike, without naming any particular juror on the selected panel that was subject to backstriking after moving the alternate on to the jury panel. Although one of the defense counsel had moved for a mistrial, Plaintiff's counsel did not agree to this but continued to insist on the right to backstrike as jury selection continued. The Court denied the backstriking and then swore in the five selected jurors with Plaintiff's counsel noting his objection to the denial of backstriking.

Jury selection then continued for the rest of the day and at the end, the parties selected two additional alternates with the first alternate moving into the jury panel. Plaintiff's counsel did not request to backstrike a member of the panel that had been sworn and he accepted the jury without mentioning his prior objection to the disallowance of backstriking.

The Fourth District ruled that the trial court erred in refusing to allow the backstriking of the panel originally selected, however, they added that the issue was not preserved. Citing the Florida Supreme Court decision of *Tedder v. Video Electronics, Inc.***,** 491 So. 2d 533 (Fla. 1986), the Court held that the right to the unfettered exercise of a peremptory challenge includes the right to view the panel as a whole before the juror was sworn.

They added that "a trial Judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made." In order to preserve the error, counsel must not only voice an objection but also seek to backstrike one of the sworn jurors. It failed to do so in this case, and, therefore, the error was not preserved.

Diminished Earning Capacity

Volusia County v. Joynt, 179 So. 3d 448 (Fla. 5th DCA 2015)

Following a verdict in favor of the Plaintiff for personal injuries, the District Court reversed an award of $500,000 for diminished earning capacity and $100,000 for future medical expenses noting that the trial court erred in failing to grant a Motion for Directed Verdict. On the claim for loss of future earning capacity, the evidence presented was that the Plaintiff was employed as a paraeducator but was voluntarily unemployed at the time of the accident; waiting for her youngest child to complete kindergarten.

A year after the accident, she resumed her full-time employment earning $18,000 per year with benefits. Although she faced some physical challenges, the record reflects that the challenges did not affect her ability to do her job. The Plaintiff testified that she loved her job and intended to continue her employment and the Principal at the school confirmed that she planned on having the Plaintiff return to her position the following school year. The Principal also had no concerns about the Plaintiff's progression as an educator and believed that none of her physical limitations would affect her ability to be promoted although she would be re-evaluated if her health ever declined.

The Plaintiff argued that her various injuries likely could have cost her her career and estimated that the $500,000 award was equivalent to earning slightly less than her base salary through the retirement age of 65. The District Court noted that there was no testimony presented to indicate that the Plaintiff was completely disabled from further gainful employment or that she was unable to work to the same age she would have otherwise worked. In fact, the evidence demonstrated that the Plaintiff's earning capacity not only did not diminish, but rather increased after the accident. The District Court ordered that this fact alone did not necessarily preclude recovery, however, it made it more difficult for the Plaintiff to show an economic loss.

As for the claim for future medical expenses, the District Court noted that the claimed future medical expenses were either not reasonably certain to be incurred, or if there was evidence from which the jury could infer the need for future medical treatment, there was no basis upon which the jury could have, with reasonable certainty, determined the amount of the expenses.

Directed Verdict

Trek Bicycle Corp. v. Miguelez, 159 So. 3d 977 (Fla. 3d DCA 2015)

The Plaintiff suffered injuries when an object got caught in the front wheel of his bicycle, causing the wheel to suddenly stop when the object hit the front carbon fiber forks of the bicycle. It is alleged that the bike manufacturer was negligent for failing to place a warning on the bicycle alerting Plaintiff to the potential of the carbon fiber to crack and possibly fail when damaged.

The Third District reversed the verdict in favor of the Plaintiff and held that the failure to warn was not the proximate cause of the Plaintiff's injuries. Rather, the proximate cause of the injury was road debris getting caught in the front spokes thereby causing the wheel to suddenly stop. The Third District concluded that the trial court erred in denying the Defendant's Motion for Directed Verdict on the claim of failure to warn.

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Error Not Preserved

Romero v. State, 169 So. 3d 1261 (Fla. 5th DCA 2015)

After beginning deliberations, the jury asked a series of questions which included whether the transcripts of testimony were available. Although defense counsel suggested that the testimony could be read back, when the trial judge summarized his proposed answers to the various questions propounded which included informing the jury that the transcripts were unavailable, defense counsel assented to those answers. The Fifth District held that it was error for the Court to respond that the transcripts were not available without advising the jury that the testimony could be read back. At the same time, they noted that the error was not preserved for appeal by objection and was not fundamental.

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denied the backstriking and then swore in the five selected jurors with Plaintiff's counsel noting his objection to the denial of backstriking.

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They added that "a trial Judge may not selectively swear individual jurors prior to the opportunity of counsel to view as a whole the entire panel from which challenges are to be made." In order to preserve the error, counsel must not only voice an objection but also seek to backstrike one of the sworn jurors. It failed to do so in this case, and, therefore, the error was not preserved.

Error To Advise Jury Transcripts Were Unavailable Without Advising That Testimony Could Be Read Back

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Evidence Of Payments To Expert Witnesses

Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015)

In this motor vehicle accident case, the Plaintiff permitted the Plaintiff to present evidence that payments totaling almost $700,000 were made "by the defense or its agents" to the Defendant's expert witnesses over the past three years. On appeal, the Defendant argued that this evidence was irrelevant because she did not have any direct financial relationship with any of the experts and instructing the jury on payments made by "representatives of the Defendant" or, "Defendant or its agents" improperly imply the existence of insurance.

The Fifth District affirmed noting that a party may attack the credibility of a witness by exposing a potential bias and that "a jury is entitled to know the extent of a financial connection between the party and the witness, and the cumulative amount a party has paid an expert during the relationship." Because the trial Judge "adeptly permitted evidence of possible bias without disclosing the existence of insurance," the appellate court found no error.

Evidence Of Social Legislation Benefits Not Admissible

Joerg v. State Farm Mutual Automobile Insurance Company, 176 So. 3d 1247 (Fla. 2015)

Florida Supreme Court receded from its earlier decision in *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984) and ruled that evidence of future Medicare and Medicaid payments are not admissible claiming that future benefits are both uncertain and because there is a subrogation or reimbursement right retained by the government. They also held that admission of social legislation benefits is an exception to the evidentiary collateral source rule no longer applied in the State of Florida.

Future Medical Expenses

Volusia County v. Joynt, 179 So. 3d 448 (Fla. 5th DCA 2015)

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Judgment Reversed Where Plaintiff Failed to Plead Theory of Vicarious Liability

North Broward Hospital District v. Kalitan, 174 So. 3d 403 (Fla. 4th DCA 2015)

In a case of first impression, the Fourth District held that the caps on non-economic damage awards and personal injury medical malpractice cases were unconstitutional adopting the reasoning of the Florida Supreme Court in *McCall v. United Stated*, 134 So. 3d 894 (Fla. 2014).

The Fourth District also reversed judgment entered against Barry University for the conduct of a nurse anesthetist supervising a student nurse during a surgical procedure. In this case, the Plaintiff failed to specifically plead the theory of vicarious liability as to the University for the actions of the nurse. By contrast, the Plaintiff specifically plead vicarious liability claims against other parties in the same complaint. Having found that the record did not support a finding that the University expressly agreed to try the issue at trial, the Fourth District reversed this portion of judgment.

Juror Interviews

Barrios v. Locastro, 166 So. 3d 863 (Fla. 4th DCA 2015)

Following a verdict in a motor vehicle accident case, the trial court denied a Motion for New Trial for issues unrelated to juror concealment and denied a Motion for a Juror Interview. The Fourth District affirmed the denial of the

Motion for New Trial with reference to issues not predicated on juror concealment, but reversed on the failure to grant the Motion for Juror Interview.

During voir dire, the jury panel was asked the following questions: "have any of you or an immediate family member ever been a Plaintiff in a lawsuit where you or they were seeking to recover money because you or the family member had been injured which we haven't talked about? Please raise your hand if either you or an immediate family member, close friend, partner ever made a claim to recover money damages from someone because they had been injured without a lawsuit being filed."

The prospective jurors were also asked whether any close family member had been diagnosed with a herniated disc or whether any family members had ever made a claim to recover social security disability. Juror Diaz did not respond to any of the questions and was selected to serve on the jury. The appellant exhausted all three of her peremptory challenges. One was used on a prospective juror who disclosed that she had been involved in an accident that had resulted in a lawsuit and eventual settlement.

Another one was used on a prospective juror whose partner had brought a lawsuit years prior due to an injury to her hand. Two jurors who served on the jury each had family members who had been involved in car accidents. After the verdict was rendered, an investigation revealed that Juror Diaz's mother was currently a Plaintiff in a slip and fall lawsuit and that Juror Diaz was listed as a possible witness in her mother's case. Additionally, her mother had undergone surgery on her spine as a result of the fall and Juror Diaz's father had received Social Security Disability benefits.

The Fourth District found that the information that Juror Diaz concealed about her mother's lawsuit was material and pertained to a lawsuit similar enough to the instant case that not knowing the information prevented Appellant's trial counsel from making an informed decision. Further, they noted that Appellant had used two of her peremptory challenges on potential jurors who had history similar to that of Juror Diaz. As such, the case was reversed.

Penalver v. Masomere, 178 So. 3d 533 (Fla. 3d DCA 2015)

Following a verdict in favor of the Defendant in a medical malpractice action, the Plaintiff filed a Motion for Post-Trial Juror Interviews. The trial court granted the motion. All three of the jurors were asked questions regarding their involvement in litigation, either individually, through their family or close friend. In support of the motion, the Plaintiff alleged that the three jurors concealed their litigation history based upon an investigation of court records.

The first juror allegedly failed to reveal involvement in three cases. The first two cases involved a landlord/tenant matter and a contract indebtedness action which were both over 30 years old. Another civil case was over 20 years old. In each of the actions, Juror 1 was allegedly named as a Defendant. As for Juror 2, it was alleged that he was involved in an automobile negligence case as the Plaintiff. The case had been filed more than 10 years earlier. As for Juror 3, it was alleged that she failed to reveal being a Defendant in an eviction action.

The Third District granted certiorari and quashed the trial court's order. In doing so, it noted that even if Juror 1 was the individual involved in the litigation, the history was too remote in time and not relevant or material to the jury service in this case. As for Juror 2, his involvement in litigation was also too remote in time and thus irrelevant and immaterial. Further, the court found that that the Juror 2's alleged involvement as a Plaintiff in that case, as well as the fact that it was a motor vehicle accident case, supports a finding that it was not material to his service as a juror. As for Juror 3, the court stated that even if this was the same individual, her involvement in an eviction action was immaterial to her service as a juror in a medical malpractice action and, she may have only been minimally involved as evidenced by the case lasting only two months.

Jury Instructions

Dockswell v. Bethesda Memorial Hospital, 177 So. 3d 270 (Fla. 4th DCA 2015)

Mr. Dockswell was admitted to the hospital for surgery. The procedure included placement of a drainage tube to evacuate post-operative fluid. The following day, a nurse came to his room to remove the drainage tube. The patient's wife was present in the room and saw the nurse pull the tube. The patient experienced no immediate discomfort, but a 4½" section of the tube was

unknowingly left inside of him. Approximately four months later, after he experienced continuing pain in the region, a CT scan revealed that a portion of the drain remained in the body. A second surgery was performed to remove the remaining piece of the drain.

In their suit against the hospital, the Dockswells allege that the tube was negligently removed with excessive speed and force and, that the nurse negligently failed to inspect the drainage tube to insure that it was removed entirely which resulted in the tube fragment being overlooked. At trial, the patient testified that while he was on pain medication at the time the nurse attempted to remove the tube, he had a general recollection of her coming into his room and saying the drain needed to be removed. His wife also testified about the nurse removing the drain.

The Dockswells sought a jury instruction establishing a presumption of negligence against the hospital because of the presence of the tube fragment. The proposed instruction was based upon Florida Statue §766.102(3) which provides that a Plaintiff generally maintains the burden of proving a breach of the professional standard of care but that "the discovery of the presence of a foreign body…commonly used in surgical, examination, or diagnostic procedures, shall be prima facia evidence of negligence…"

The hospital asserted two arguments in opposing the instruction: (1) the presumption of negligence does not apply in instances where the Plaintiff is aware of and has evidence as to the culpable party; and, (2) the foreign body instruction is inapplicable to the first of the Plaintiffs' two claims (that the nurse negligently applied excessive speed and force) because the instruction in question would be applicable only as to the nurse's alleged failure to inspect which then resulted in the tube being left behind for later medical discovery.

Recognizing the distinction between the two claims, the trial court sought a set of proposed instructions applying the foreign body instruction to only the negligent inspection claim and not to the claim that alleged excessive speed and force during the removal of the drain. Neither the Dockswells nor the hospital submitted the instructions as requested and the trial court ultimately denied the requested instruction explaining that the Plaintiffs had the ability to present direct evidence of the nurse's negligence, whereas the word "discovery" in §766.102 and

the jury instruction suggests a situation where a patient is uncertain as to where responsibility for negligence lies.

The Fourth District affirmed; finding that a foreign body instruction was not necessary to allow the jury to resolve the issues in the case noting that the use of the foreign body jury instruction would have improperly permitted the jury to disregard the conflicting testimony of the standard of care experts. Further, they found that because the parties did not submit the proposed instructions differentiating the claims, the Court declined to address the unpreserved issue whether the foreign body instruction may have been properly applied to the claim of negligent inspection.

Originally, this was a unanimous decision. Upon Appellant's Motion for Rehearing, the Court denied the motion, however, Judge Conner dissented. In it, Judge Conner noted that neither side had contended on appeal that the doctrine of *Res Ipsa Loquitur* applied to this case and and thus the majority opinion affirmed the trial court on a legal analysis that was not argued by the parties below or used by the trial court.

Limitations On Expert Witnesses

Woodson v. Go, 166 So. 3d 231 (Fla. 5th DCA 2015)

At trial, the Plaintiffs gave notice that they intended to call two interventional cardiologists as witnesses. Approximately 11 months before trial, the Defendants filed a Motion to Strike the Cumulative Expert Testimony. The motion was never heard by the trial court. Six months prior to trial, the Defendants filed a Motion in Limine to preclude the Plaintiff from calling both witnesses. The trial court did not address this motion until the morning of trial. The Plaintiffs argued that although his expert's testimony would be cumulative in some respects, it would be inappropriate for the Court to limit him to one cardiology expert. The trial court reserved ruling on the motion but advised counsel that he did not intend to permit cumulative testimony. Both witnesses were eventually allowed to testify, however, the trial court determined that each party would be limited to one expert on the standard of care and one expert on causation.

The Fifth District found that this did not constitute an abuse of discretion, however, it expressed its concern that the trial court did not notify the parties of its

decision to impose restrictions on expert testimony until trial. "Litigants are entitled to fair notice of restrictions in expert witness testimony so that they may prepare their case accordingly."

New Trial Due To Exclusion Of Evidence

Maniglia v. Carpenter, 40 FLWD 2485 (Fla. 3d DCA 11/4/15)

The Plaintiff was involved in a motor vehicle accident in which he allegedly suffered personal injuries. A day after the accident, he went to visit his chiropractor and complained about right sided neck and back pain. During pre-trial discovery, the Plaintiff denied being involved in any subsequent accidents. Later investigation revealed, however, that the Plaintiff was involved in an unrelated accident and physical altercation less than a month after the subject car accident. Specifically, the Plaintiff was playing in a golf tournament during which time he drove a golf cart on to a public road, ran a red light, and collided with a car.

At impact, he fell from the golf cart and on to the street. He then got into a physical altercation with police at the scene which included fighting, kicking, and wrestling on the ground. There was evidence that the Plaintiff was intoxicated, that he did not have permission to use the golf cart, that he yelled profanity at the police, and kicked both feet against the rear passenger window of the police car and that he was arrested on the scene for battery on a law enforcement officer. Additional evidence proffered by the Defendant also showed that the Plaintiff failed to disclose the golf cart incident and altercation to his chiropractor when he returned to see him less than two weeks after the incident and that MRI's, relied upon the Plaintiff's surgeon when he recommended surgery, were not taken until after the golf cart incident.

Despite this, the trial court granted a Motion in Limine excluding details of this incident although the court allowed introduction of evidence that the Plaintiff had played "bumper cars" with the golf cart and that Plaintiff was intoxicated at the golf tournament. Following the verdict in favor of the Plaintiff, the trial court denied the Defendant's Motion for New Trial.

The Third District reversed and ordered a new trial finding that the golf cart incident included facts that addressed both the Plaintiff's credibility and issues of causation. The court added that because the Plaintiff was the beneficiary of the

erroneous exclusion of admissible evidence, he was required to "prove that the error complained of did not contribute to the verdict" or alternatively, "that there is no reasonable possibility that the error complained of contributed to the verdict." Having failed to satisfy this requirement, a new trial was granted.

New Trial Due To Exclusion Of Expert Testimony

Taylor v. Culver, 178 So. 3d 550 (Fla. 1st DCA 2015)

The First District held that the trial court abused its discretion in excluding the testimony of the Defendant's expert medical engineer where the proffered testimony was relevant to disputed issues in the trial concerning velocity and directional forces involved in the accident and the issue of causation. As such, the appellate court ordered a new trial in favor of the Defendant.

New Trial Due To Juror Misconduct

Meadowbrook Meat Company v. Catinella, 40 FLWD 402 (Fla. 2d DCA 2/11/15)

Catinella was injured while unloading a truck at Meadowbrook Meat Company. After a jury trial found in favor of Meadowbrook, the trial court granted a new trial. In its lengthy and detailed order, the trial court found that during the course of the case, Meadowbrook had destroyed evidence which required the Court to give the jury an adverse inference instruction; had materially violated a variety of court orders; and had engaged in systematic material, willful discovery violations to the prejudice of the Plaintiffs. The court also found that two jurors had engaged in misconduct by failing to disclose litigation history that was relevant and material to jury service. Finding no abuse of discretion, the new trial order was upheld.

New Trial For Destruction Of Evidence

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New Trial – Gotcha Tactics

Andreaus v. Impact Pest Management, Inc., 157 So. 3d 442 (Fla. 2d DCA 2015)

Ms. Andreaus suffered injuries when she slipped and fell as she exited an elevator at a condominium. She sued the Condominium Association and Impact Pest claiming that she slipped on pesticide that had been sprayed on the tile floor outside the elevator. Before trial, the Plaintiff filed a Motion in Limine to Exclude as inadmissible hearsay any mention in her medical records that she slipped on spilled water. While the medical records contained statements to that effect, the source of those statements was unknown. There was no witness that could be called at trial to testify about who made the statements and there was no indication that the statements were attributable to the Plaintiff and she denied making same.

The Second District noted that the trial court correctly ruled that the statements were inadmissible and Plaintiff's counsel then reviewed approximately 1500 pages of medical records and made redactions consistent with the Court's ruling. The redacted medical records were then admitted into evidence at trial.

Shortly before the close of trial, defense counsel suggested in closing argument that the Plaintiff's had presented evidence that was "untruthful" and asked if he could approach the bench. Outside the hearing of the jury, defense counsel asked if he could comment on a portion of the Plaintiff's medical records as redacted. There were two references in the record to a "spill" and "spilling of water" which had been missed by Plaintiff's counsel which had not been redacted.

Plaintiff's counsel explained to the Court that the incomplete redaction was a clerical error and objected to any comment on the mention of a spill of water because they had previously been ruled to be inadmissible hearsay and then requested they further redact the medical records before they were published to the jury. Defense counsel did not ask the Court to revisit its prior ruling on the

admissibility of the references but instead asserted that he should be able to comment on the records as redacted because they had already been admitted into evidence.

The trial court agreed noting that because the records had already been admitted into evidence, the Plaintiff could not remove the reference before the records were published to the jury. Following a defense verdict in favor of the Defendant, Plaintiff filed a Motion for New Trial which was denied. The Second District reversed noting that it would not condone "gotcha" tactics.

New Trial Required Due to Cumulative Expert Testimony and Improper Argument

Vargas v. Gutierrez, 176 So. 3d 315 (Fla. 3d DCA 2015)

In this medical malpractice action, the Plaintiff sued Dr. Vargas for failing to timely diagnose a child's underlying kidney disease. This ultimately resulted in renal failure, dialysis, and kidney transplants. The trial court issued a "one expert per specialty" Order, however, at the time of trial, the subsequent trial Judge allowed the Plaintiff to call four separate pathologists to testify regarding the nature of the disease that caused the child's injuries, whereas, the Defendant was limited to one pathology expert.

In this case, two of the four pathology experts called by the patient were doctors who analyzed specimens immediately before and immediately after the patient's kidneys were removed. Notably, neither of the pathologists involved in her actual care came to the conclusion that they ultimately testified to while involved in the patient's treatment. Additionally, the Plaintiff was allowed to call a rebuttal expert (the fourth of the pathologists).

As the Third District noted "unfair cumulative expert testimony is prejudicial in most cases and will rarely be considered harmless error." The Third District also reversed because Plaintiff's counsel misstated the evidence and bolstered the Plaintiff's expert opinion testimony during closing argument telling the jury that they had heard conclusive evidence of causation when no such evidence had been presented.

New Trial Required Due To Testimony Regarding Citation

Soto v. McCulley Marine Services, Inc., 40 FLWD 2770 (Fla. 2d DCA 12/16/15)

The decedent's estate filed an action against a tug boat service whose Captain moored a tug boat and barge to a dock in a configuration that allegedly caused currents to suck the decedent, who was operating a jet ski, under the vessels thereby causing him to drown despite his use of a life jacket. During the trial, a juror asked whether a citation had been issued by the officer from the Florida Fish and Wildlife Commission who investigated this accident. The trial court responded that the officer did not do so and claimed that the Plaintiff opened the door to the admission of this evidence because they had argued that the Defendants were negligent because they violated a Coast Guard regulation.

The Second District reversed with instructions to grant a new trial noting that "arguing that a Defendant violated a provision of law that is relevant to the determination of negligence simply does not open the door to admitting a law enforcement officer's decision on whether to issue a citation for that violation. Such evidence is particularly prejudicial when it comes from the trial court itself, as it did here."

New Trial – Exception to Rule Regarding Recovery of Medical Bills

Schwartz v. Wal-Mart Stores, Inc., 155 So. 3d 471 (Fla. 5th DCA 2015)

Schwartz filed suit against Wal-Mart Stores alleging that she was struck in the back by an ornamental pumpkin while shopping and, as a result, sustained injuries. Wal-Mart admitted that its employees committed a negligent act, but vigorously contested causation and damages. The jury found that Wal-Mart was not the legal cause of Schwartz's claimed loss and, thereafter, the trial court granted Schwartz's Motion for New Trial as to the "issue of damages for initial medical evaluation sought…after the accident and nothing more." Schwartz appealed the order contending that the retrial on damages should not be so limited and Wal-Mart cross-appealed arguing that the Court erred in granting the new trial.

Wal-Mart called a biomedical engineer who opined that the degree of force exerted when the pumpkin struck Schwartz was well-below the injury producing threshold. In her Motion for New Trial, Schwartz argued that even though the jury

found in favor of Wal-Mart on the issue of causation, the failure to award her damages for at least the cost of the medical evaluation was error because it was undisputed that she sought medical care and treatment almost immediately after the incident.

In so doing, she cited to the general rule that even when a jury finds a Plaintiff was not injured as a result of the subject accident, the Plaintiff is still entitled to recover those expenses incurred for medical examination and diagnostic testing reasonably necessary to determine whether the incident caused injuries. This rule, however, has exceptions which include the presentation of expert medical opinion which conflict as to causation.

Therefore, because Wal-Mart presented such testimony, the Fifth District found that it was error to grant the Motion for New Trial on the issue of damages for the initial medical evaluations. Further, the Fifth District noted that Schwartz failed to object to the verdict form and the jury instructions and, specifically, did not ask the Court to have the jury determine whether it was reasonable and necessary for Schwartz to have incurred medical expenses for her initial diagnostic care after a finding of no causation. Additionally, the Fifth District noted that Schwartz never moved for a directed verdict on the issue of recovery for the initial medical bills and, in failing to do so, elected to leave the issue up to the jury. Accordingly, the Order granting the Motion for New Trial was reversed.

New Trial Granted Using *Special* Standard

Hurtado v. Desouza, 166 So. 3d 831 (Fla. 4th DCA 2015)

The denial of a Motion for New Trial was previously affirmed by the Fourth District, however, following the Supreme Court's decision in *Special v. West Boca Medical Center*, the Fourth District granted the Defendant's Motion for Rehearing and reversed the trial court's denial of Defendant's Motion for New Trial.

This case involved a minor auto collision in which the jury awarded over $1,000,000 in damages. The Fourth District found that the trial court erred in allowing evidence regarding the Plaintiff suffering mental anguish as a result of Defendant's desire to leave the accident scene, Defendant's failure to apologize to the Plaintiff for causing the accident and the Defendant's delay in admitting negligence until just prior to trial. Further, the Fourth District held that it was error

for the trial court to admit evidence that the Plaintiff lost their home in a foreclosure action and didn't get medical treatment because of lack of health insurance following Florida's long standing rule that "no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's."

In reversing the trial court, the Fourth District stated that the error could not be considered harmless under the new standard announced in the *Special* case where the Plaintiff cannot prove that there is no reasonable possibility that the error complained of contributed to this verdict. The Fourth District also reversed the trial court setting off unemployment compensation benefits finding that they are not within the collateral source statute and therefore it was error to set them off from the Final Judgment.

New Trial Properly Denied

Jones v. Alayon, 162 So. 3d 360 (Fla. 4th DCA 2015)

The Fourth District affirmed the trial court's denial of a Motion for New Trial filed by the Plaintiff following a trial in which Plaintiff was awarded lesser damages than had been sought. At trial, the court denied a Motion for Directed Verdict on the seatbelt defense because the evidence was undisputed that the seatbelt was not operational. The Fourth District noted that, proof that the seatbelt was available and fully operational is not a pre-requisite to establishing comparative negligence to the Plaintiff and the fact that the available seatbelt may be inoperable is one factor for the jury to consider in determining the issue of comparative negligence.

The Fourth District also held that the trial court did not abuse its discretion in granting a Motion in Limine to prevent admission of the fact that the Defendant, who was an off-duty police officer, fled the scene where the Defendant admitted liability for causing the accident and the trial court determined that the probative value was outweighed by its prejudicial affect. This was so even though the Plaintiff claimed that it caused her emotional distress knowing that a sworn police officer fled the scene of the accident and failed to provide her husband with emergency medical care.

Lastly, they found that the trial court did not abuse its discretion in admitting hearsay that the decedent's wife spent the parties' money on drugs and alcohol. The testimony came in through a deposition excerpt from an out-of-state sister who testified as to statements made to her by another sister who was subsequently appointed Personal Representative of the estate. As the court noted "admissions need not be based on first hand knowledge by the party, the rationale being 'that a witness will not make a statement against his interest unless he or she has made an adequate investigation.'"

Even though the statement made to the Personal Representative made by another may have constituted hearsay, it was her repetition of the hearsay statement that constituted an admission against interest. As the court explained "that it is based upon what someone else may have told Jones' is unimportant, in that she would not make that statement without some investigation or indicia of reliability."

New Trial Required Where Juror Said One Side Would Start Ahead of Other Side

Kochalka v. Bourgouis, 162 So. 3d 1122 (Fla. 2d DCA 2015)

In this motor vehicle accident case, the Second District ruled that the trial court erred in refusing to exclude a potential juror for cause because she stated that one side would start ahead of the other in this trial and because she lacked faith in the jury system. Further, the District Court found that the trial court erred in excluding testimony of an orthopedic surgeon who was to testify that the knee damage complained of would not have occurred as a result of a blunt force impact with the dashboard finding that this was the proper subject of medical testimony.

Lastly, the trial court cautioned the Plaintiff about conduct during a re-trial. During voir dire, Plaintiff's counsel questioned at least two prospective jurors who had made prior claims regarding the name of the insurance company that was involved. Defense counsel objected and moved to strike the panel noting that the insurance carrier was not a party to the case. When asked to explain why he had asked the questions of the prospective jurors, Plaintiff's counsel stated that he wanted to see if the insurance carrier involved in those cases was the same as the insurance carrier in this case.

Additionally, as the Plaintiff described the accident during the trial, she testified that the Defendant apologized and then they exchanged insurance information. The Defendant moved for mistrial and the trial court reserved and ultimately denied the motion on that basis. Again, the District Court cautioned the litigants about this noting that "the injection of any insurance issues into the case, whether deliberate or inadvertent, is improper and creates grounds for mistrial."

New Trial Reversed Because Defendant Failed To Continue Case Following Unfair Surprise

London v. Dubrovin, 165 So. 3d 30 (Fla. 3d DCA 2015)

The trial court granted a Motion for New Trial in favor of the Defendant based upon cumulative unfair surprise. Specifically, the Plaintiff served his exhibit list six business days before the start of the trial in violation of the pretrial order. Second, the Plaintiff took a video tape deposition of a witness the day before trial in violation of the pretrial order and the Plaintiff failed to request leave of the trial court for the untimely deposition. Third, the Plaintiff filed a Motion to Amend the Complaint the day before trial. Additionally, the Plaintiff filed its jury instructions the night before the charge conference and also waited until the morning of the charge conference to provide opposing counsel with case law supporting his position. In each instance, the Defendant was either offered a continuance or failed to request a continuance after each incident of claimed unfair surprise. Accordingly, the Third District ruled that the trial court abused its discretion in granting the Defendant a new trial on the basis of cumulative unfair surprise.

Objection to Inconsistent Verdict Must Come Before Jury is Discharged

Coba v. Tricam Industries, Inc., 164 So. 3d 637 (Fla. 2015)

In this case, the jury found that the Defendant was negligent in the design of a product, but also found that the product did not contain a design defect. The Defendant failed to timely object to the inconsistent verdict and specifically, did not object before the jury was discharged. Under these circumstances, the defect was waived. The Supreme Court ruled that in products liability cases, there is no fundamental nature exception to the general rule, and, therefore, the verdict in favor of the Plaintiff was reinstated.

Remittitur

Arnold v. Security National Insurance Company, 174 So. 3d 1082 (Fla. 4th DCA 2015)

Following a verdict in favor of the Plaintiff against his uninsured motorist carrier, the trial court remitted future medical damages from $126,000 to $30,000; past pain and suffering from $500,000 to $200,000; and future pain and suffering of $800,000 to $200,000. In doing so, the trial court did not explain what demonstrated the need for Remittitur and the reason for the amount chosen. As such, the Fourth District remanded for entry of an order which contained the necessary findings and conclusions to support the Remittitur.

Testimony of Co-Treating Physician Properly Admitted

Cantore v. West Boca Medical Center, Inc., 174 So. 3d 1114 (Fla. 4th DCA 2015)

In this case, Alexis Cantore had a diagnosis of hydrocephalus. Following a repeat ventriculostomy at Miami Children's Hospital, Alexis began experiencing painful headaches and vomiting. Her parents called Miami Children's Hospital and a nurse told them to bring Alexis to the nearest hospital for a CT scan if they could not make it to Miami. She was taken by ambulance to West Boca Medical Center where the scan revealed worsening hydrocephalus. The ER physician called Dr. Sandberg who was a neurosurgeon at Miami Children's Hospital. She advised Dr. Sandberg that Alexis was stable. The emergency physician also spoke with the Emergency Department physicians at Miami Children's Hospital in order to arrange for transfer via helicopter. On arrival at Miami Children's Hospital, Alexis suffered a brain herniation. She was taken straight into the Emergency Department where she was seen by Dr. Sandberg who performed an emergent ventriculostomy.

At trial, Dr. Sandberg's deposition was read to the jury. He was asked hypothetical questions as to how the patient would have been treated had she arrived at the hospital an hour or two earlier. Dr. Sandberg stated that, even if she had arrived earlier, she would have had the exact same outcome because she would not have received a ventriculostomy until she deteriorated.

The Plaintiff sought a new trial due to the admission of this testimony. The Fourth District noted that the trial court did not abuse its discretion by allowing Dr.

Sandberg to answer hypothetical questions despite the Florida Supreme Court's decision in *Saunders v. Dickens*, 151 So. 3d 434 (Fla. 2014). The Fourth District distinguished the *Saunders* decision from this case noting that Dr. Sandberg was not a subsequent treating physician testifying that adequate care by the Defendant would not have altered the subsequent care.

Rather, the Fourth District found that Dr. Sandberg was explaining his medical decision-making process and how different decisions by him would have impacted the patient's status and condition. The Fourth District also described Dr. Sandberg as a "co-treating physician" adding that "his role squarely exceeded that of a subsequent treating physician." Further, because he was contacted by West Boca Medical Center, he was described as being a co-treating physician or a consulting treating physician as to this facility. Accordingly, the Fourth District found that the trial court properly admitted the testimony based upon admissible hypothetical questions from both sides. As such, the judgment was affirmed.