2016
CASE LAW SUMMARY

Trial Issues

Additur

Emmons v. Akers, 187 So. 3d 900 (Fla. 1st DCA 2016)

Following a verdict in favor of the Plaintiff in a motor vehicle accident case, the trial court entered an additur. After the Defendant refused to agree to the additur, the trial court ordered a new trial on the issue of damages only. The Defendant argued that the jury's award was supported by the evidence and the court erred by disturbing the verdict. The First District held that where a trial court granted an additur or new trial and the additur was refused, the only issue before the Appellate court was the propriety of the order granting the new trial; not the propriety of the additur itself. As such, they affirmed the trial court's order for new trial.

Biochemical expert can testify regarding causation

Boyles v. Dillard's, Inc., 199 So. 3d 315 (Fla. 1st DCA 2016)

Following a verdict in favor of the Defendant in a rear collision case, the First District ruled that the trial court abused its discretion in denying Plaintiff's Motion for Mistrial. Specifically, defense counsel's closing argument referred to Plaintiff's testimony that she had tapped her brakes to take her vehicle off cruise control before turning into her driveway. Defense counsel told the jury "why is that important? We took her deposition for hours and it never came up." Plaintiff's counsel immediately objected and requested a sidebar to which defense counsel replied by turning to the jury, raising his hands and exclaiming "well that lasted about 12 minutes." The Plaintiff's counsel then moved for mistrial arguing that it was improper to refer to the deposition because it had not been previously introduced into evidence and because defense counsel was using this characterization of extra-record evidence to accuse the Plaintiff of dishonesty. The trial court denied the Motion for Mistrial and gave a curative instruction.

Although the First District noted that a single improper remark which is properly and immediately cured by instruction by the trial court will not necessarily constitute adequate grounds for a mistrial, it found that it did so in the

instant case where the issue of the Defendant's liability essentially hinged on the comparative credibility of the two opposing witnesses: the Plaintiff and the driver of the Defendant's car. The First District also found that the trial court improperly prevented Plaintiff's counsel from essentially reading the standard jury instruction regarding aggravation of pre-existing conditions and asking the jury *venire* whether anyone would have a problem applying that law. The court also found that the Defendant driver violated the accident report privilege; the defense counsel violated an Order in Limine preventing cross-examination as to how a treating physician had his bill paid; and improperly insinuated that the Plaintiff had previously received a speeding ticket. They also found that the trial court properly allowed Delta-V testimony by the Defendant's expert accident reconstructionist. The court repeated its prior opinions and held that while "a biomechanics expert is not qualified to give a medical opinion regarding the extent of any injury" he "is qualified to offer an opinion as to causation if the mechanism of injury falls within the field of biomechanics."

Biomechanical Expert/Medical Doctor Testimony Improperly Excluded

Maines v. Fox, 190 So. 3d 1135 (Fla. 1st DCA 2016)

The First District held that the trial court abused its discretion in refusing to allow an expert who was both a medical doctor and a biomedical engineer from offering an opinion as to the specific causation of Plaintiff's injury based upon biomechanical force analysis. They found, however, that the limitation of testimony was harmless error because the expert was allowed - - through other testimony - - to convey a substantial portion of his opinion to the jury. Ultimately, the only testimony excluded was that the forces from this particular accident could not have caused the injury to this specific Plaintiff.

In doing so, the court stated that biomechanical opinions as to the general causation of a type of injury are admissible however, they are not allowed to render opinions that require medical expertise. That being said, the courts allow medical experts to give opinions as to specific causation adding that "it is also not unusual for doctors to rely on anecdotal evidence of the history and severity of an accident in rendering a causation opinion."

Lastly, the First District held that it was error to award attorney's fees pursuant to a Proposal for Settlement where the Proposal for Settlement was ambiguous with regards to whether the proposal included attorney's fees and costs.

Breach of store's policies is not a *per se* breach of standard of care

Wal-Mart Stores, Inc. v. Wittke, 202 So. 3d 929 (Fla. 2d DCA 2016)

Following a verdict in favor of Wal-Mart, the trial court granted the Plaintiff's Motion for New Trial. The Second District reversed and found that the trial court erred because it equated the standard of care with compliance with the store's own internal policies and procedures, effectively determining that a breach of policies and procedures is a *per se* breach of the standard of care. The court noted several cases which stand for the proposition that internal safety policies do not themselves establish the standard of care and that internal policies and procedures may be admissible only if they are relevant to the standard of care.

Closing argument

R.J. Reynolds Tobacco Company v. Gafney, 188 So. 3d 53 (Fla. 4th DCA 2016)

The Fourth District held that a new trial was required because of improper comments made to the jury during Plaintiff's closing argument. The statements included "when you see that compensation part of this verdict, it's your call to action… and I say to you enough is enough. And your verdict should speak loud and it should speak clear." Further, some of Plaintiff's remarks insinuated that Defendant's attorneys were involved in a conspiracy to conceal the addictive nature of smoking.

Continuance improperly denied

Daher v. Pacha NYC, 194 So. 3d 456 (Fla. 3d DCA 2016)

The Third District reversed dismissal of a lawsuit and found that the trial court abused its discretion by denying the Plaintiff's Motion to Continue the Trial where the Plaintiff failed to appear at trial due to his inability to obtain a visa to travel from Brazil to the United States, the Defendant would not have been prejudiced by the granting of a continuance and the statute of limitation had run so the Plaintiff would be precluded from re-filing his Complaint.

Daubert

Rojas v. Rodriguez, 185 So. 3d 710 (Fla. 3d DCA 2016)

The Defendant admitted liability following an automobile accident and the case proceeded to trial on the issue whether the Plaintiff's herniated disc was caused by the accident. The Plaintiff's treating neurosurgeon testified that the herniated disc was consistent with the twisting of the body that the Plaintiff testified occurred when the vehicle spun after the impact. Defense counsel objected to the neurosurgeon's testimony on the basis that it was outside the scope of his expertise because he was not an accident reconstructionist or biomechanical expert. The trial court overruled the objection. After the Plaintiff rested his case, the defense moved for mistrial based upon the neurosurgeon lacking qualifications.

After the verdict for the Plaintiff, the defense once again renewed its objection to the doctor's testimony but never raised a *Daubert* objection. The Defendant's Motion for New Trial and/or Remittitur asserted that the neurosurgeon's testimony was outside the area of his expertise and raised *Daubert* for the first time. The trial court granted the motion citing to *Perez v. Bellsouth*, 138 So. 3d 492 (Fla. 3d DCA 2014). The Third District reversed finding that the failure to raise the *Daubert* objection prior to the end of trial was fatal to the Defendant's appeal; especially where the neurosurgeon had been on the Plaintiff's witness list 10 months prior to the start of trial. The court explained that because *Daubert* makes the court a gatekeeper, it stands to reason that such an objection must be timely raised to allow the trial court to perform its role properly. The court explicitly refused to rule whether the testimony would have been admissible under *Daubert*.

Directed Verdict

City of Miami v. Navarro, 187 So. 3d 292 554 (Fla. 3d DCA 2016)

The Plaintiff was injured after she tripped and fell over a raised brick while walking on a brick-paved sidewalk in the City of Miami. In order to maintain a *prima facie* case of negligence against the City, Navarro had to prove either that the City had actual knowledge of the sidewalk defect (of which there was no evidence), or constructive knowledge that the sidewalk defect existed long enough that the City should have known of it. In an attempt to establish the City's negligence, the Plaintiff relied upon a color photograph of the raised brick that she argued was sufficient, by itself, to infer that the defect had existed for a significant

period of time to establish the City's constructive notice of the defect. The Plaintiff did not provide any testimony as to the length of time that it would take for a brick paver to raise up in the manner she claimed the photograph demonstrated.

The trial court found that the photograph was legally sufficient and denied the City's Motion for Directed Verdict, thus allowing the issue of whether the defect had existed for a sufficient length of time to go to the jury. The Third District held that this was error citing to the Supreme Court's decision in *Hannewacker v. City of Jacksonville Beach,* 419 So. 2d 308 (Fla. 1982) which held that "if the photograph portrays a condition that has some distinguishing feature which clearly shows that the defect has existed for a long period of time, it may afford the jury a basis to infer that a significant period of time has passed. If a photograph is ambiguous on this point and what is shown makes it questionable whether a significant period has passed, the jury would necessarily be required to indulge in speculation to determine the duration of the condition. In such a case the photograph without live testimony is insufficient."

Dominguez v. Publix Supermarkets, Inc., 187 So. 3d 892 (Fla. 3d DCA 2016)

The Plaintiff sued Publix following a slip and fall. Surveillance video from the store reflected that the Plaintiff slipped and fell on a patch of laundry detergent that came from the top of a bottle that had just fallen from a store shelf. A video recording of the aisle showed that, in the eight minutes preceding the incident, several customers traveled through the aisle, including one who stopped in front of where the bottle was located, reached up to a shelf, and then walked out of the aisle.

At the time the bottle fell, an assistant grocery manager was examining shelves at the opposite end of the aisle. Upon hearing the crash, he ran to the spot of the spill. The video showed the manager straddling the spill and bending over to wipe the bottle nine seconds after the bottle fell. Four seconds later, the Plaintiff turned into the aisle and slipped on the detergent. The manager's back was to the Plaintiff as she turned into the aisle. As evidenced by the video camera, the entire incident from the time the manager heard the bottle fall to the time the Plaintiff slipped consumed 13 seconds.

As the Third District pointed out, the issue is not whether Publix failed to warn the Plaintiff of the substance on the store floor because it was an open and obvious condition. Rather, the issue is whether the store owner used ordinary care

to maintain its premises in a reasonably safe condition. In transitory foreign substance cases, courts look to the length of time the condition existed before the accident occurred. Based upon the facts of this case, the court held that the trial court erred in denying the Defendant's Motion for Judgment in accordance with the Motion for Directed Verdict.

Lastly, the Third District commented that the fact that Publix's internal operating procedures called for the manager to immediately block off the aisle where the detergent issued did not change the result in the case. The evidence relating to Publix's procedures about blocking the aisle was admissible and relevant to the jury's consideration of the manager's conduct after the spill, however, internal safety policies do not themselves establish the standard of care owed to the Plaintiff. As such, they held that if the store manager did, under the circumstances and within the five seconds "he was allotted by fate, demonstrated reasonable and ordinary care, the fact that he did not abide by Publix's internal operating procedure blocking off the aisle did not create a heightened duty of care in favor of the Plaintiff.

Error to allow Physician's Assistant to testify about final diagnosis

State Farm Mutual Automobile Insurance Company v. Long, 189 So. 3d 335 (Fla. 5th DCA 2016)

At the trial of an uninsured motorist claim, the Plaintiff presented testimony of a Physician's Assistant to testify regarding future medical expenses. The Physician's Assistant worked exclusively with the Plaintiff's orthopedic surgeon. The Physician's Assistant testified that, during the course of the Plaintiff's treatment, he administered at least four cortisone injections to relieve pain in the patient's shoulder and also testified that someone with the Plaintiff's condition could only receive a limited number of injections because too many injections may result in a weakened rotator cuff and tendon leading to a tear. He further testified that the Plaintiff probably could have had one or two more injections but beyond that surgery would be the only other option to relive the pain and he then testified regarding the associated costs.

This testimony was over the Defendant's objection who argued that the Physician's Assistant was not competent to give his opinion on the need for future surgery or the cost associated with such surgery. They also argued that he was not qualified to testify regarding the cost because he was not the one actually billing for and performing the surgery. The Fifth District held that it was error to allow

the Physician's Assistant to testify noting that they must be supervised by a physician and their services must be delegated by the supervising physician. Physicians may delegate many tasks and procedures to their Physician's Assistant but the duty to make a final diagnosis is non-delegable. In this case, the court stated that the Physician's Assistant was certainly qualified to testify regarding the treatment and care he provided but was not qualified to offer opinions as to what the orthopedic surgeon thought or would have done to treat the patient's condition in the future. As such, a new trial was granted.

Evidence of "Free Programs"

Go v. Normil, 184 So. 3d 5541 (Fla. 4th DCA 2016)

Following a verdict of over $28,000,000 for injuries secondary to a herpetic infection in an infant, the Fourth District found that the trial court properly excluded testimony regarding "free programs" which were available to the child because the programs would be paid by Medicaid and, therefore, Medicaid would need to be reimbursed. The Fourth District found that the trial court properly excluded this testimony under *Florida Physician's Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984) and *Joerg v. State Farm Mutual Automobile Insurance Company*, 40 FLWS 553 (Fla. 10/15/15).

The Fourth District also reversed the trial court's decision which lowered the damage award in accordance with the caps set forth under Florida Statute §766.118 finding that the caps were unconstitutional because they violated equal protection.

Fabre

Edwards v. Rosen, 189 So. 3d 177 (Fla. 2d DCA 1/29/16)

Shortly before trial, the Defendants amended their *Fabre* defense to include other physicians as non-party Defendants. At trial, Plaintiff presented his case based upon the assumption that all of the doctors, including the *Fabre* physicians, would be on the verdict form. In fact, the Plaintiff's attorney told the jury about the affirmative defense during the course of the opening statement. Despite this, the Defendants then withdrew their *Fabre* defense on the last day of trial. The jury returned a verdict in favor of the Defendant and the trial court denied a Motion for New Trial.

The Second District reversed finding that the trial court abused its discretion in denying the Motion for New Trial stating that "considering the totality of the errors and improprieties in this case, we hold that a new trial is warranted. The specific sequence of events that transpired - - the belated amendment of the *Fabre* defense, the last minute withdrawal of the defense, and the trial court's failure to give a curative instruction to the jury - - generated prejudice that Edwards' counsel could not cure.

Failure to object

City of Miami v. Kinser, 187 So. 3d 921 (Fla. 3d DCA 2016)

During the course of this trial, Plaintiff's counsel made arguments which sought to bolster the credibility of witnesses, attacked the Defendant for asserting a defense and appealed to the conscious of the community. The Third District found that all of these arguments were improper, but that the prejudice to the Defendant caused by the arguments was mitigated by curative instructions given by the trial court after the Defendant objected to the arguments. The Third District found that a new trial was not required where the cumulative affect of the improper objected to and unobjected to uncured comments did not deprive the Defendant of a fair trial.

Burger King Corporation v. Lastre-Torres, 202 So. 3d 872 (Fla. 3d DCA 2016)

A substantial verdict against Burger King Corporation was affirmed despite "exceptionally improper closing arguments made by the Plaintiff's trial counsel" "because these improper arguments sailed by without objection by opposing counsel or intervention by the trial court." The court noted that the closing arguments were racially and ethnically charged and were made in an effort to invoke sympathy for the Plaintiff and anger against the seemingly uncaring corporate Defendant. Because none of these improper arguments were objected to by Burger King, they must establish fundamental error to obtain a new trial.

Under a fundamental error analysis, they were required to demonstrate that not only were the arguments improper and harmful, but also that they were incurable. As the court noted, the unobjected-to improper argument were not only curable; they were preventable. "As soon as Plaintiff's counsel embarked on his crusade to canonize his client and vilify the evil corporate Defendant, there should have been an objection, a request for curative instruction, a Motion for a New

Trial, and a request for the trial court to admonish the Plaintiff's counsel that such arguments would not be permitted."

Future Earning Capacity

Auto Club Insurance Company v. Babin, 204 So. 3d 561 (Fla. 5th DCA 2016)

Following Final Judgment entered in favor of the Plaintiff, the insurance company filed an appeal arguing that the trial court erred when it denied its Motion for Directed Verdict on the issues of future medical expenses for low back surgery, past lost wages and loss of earning capacity in the future. The Fifth District agreed and reversed. The Plaintiff's treating doctor testified that, if conservative therapy failed, the patient would need surgery. He also testified that the Plaintiff had not clinically progressed to the level of dysfunction where he believed that surgery was currently indicated. The Appellate Court agreed that whether the Plaintiff needed future low back surgery was, therefore, too speculative and the Appellate Court agreed.

As for the loss of future earning capacity, the Appellate Court noted that it should be measured by the Plaintiff's diminished ability to earn income in the future, rather than the Plaintiff's actual loss of future earnings. In this case, the Plaintiff was voluntarily unemployed at the time of the accident. He was, however, working to become a certified dive master and he testified that he expected to make $28,000 per year from the dive business "if we were a good, solid, safe operation." The Appellate Court noted that in order to recover damages for lost earning capacity, the Plaintiff was required to prove, with reasonable certainty, a loss of earning capacity as a result of his injury and that he failed to do so in this case.

Future Medical Expenses

GEICO v. Isaacs, 41 FLWD 2715 (Fla. 4th DCA 12/7/16)

Plaintiff received a verdict which included an award for future medical expenses of $360,000. GEICO moved post-trial for remittitur and for new trial arguing that the award for future medical expenses was excessive and against the manifest weight of the evidence. At trial, one of the Plaintiff's treating physicians testified that she would incur $2,000 in future medical expenses per year and also recommended that she undergo shoulder surgery which he estimated at a cost of $40,000 - $50,000. This was the only competent evidence presented on which the

award for future medical expenses could be based. There was, however, no testimony regarding the Plaintiff's life expectancy. Therefore, the Fourth District remanded the case for a new trial solely on the issue of her life expectancy.

JNOV inappropriate due to conflicting evidence

Christakis v. Tivoli Terrace, LLC, 181 So. 3d 579 (Fla. 4th DCA 2016)

The trial court entered a judgment notwithstanding the verdict following the Plaintiff's fall on the stairs. In this case, there was conflicting evidence as to causation because the Plaintiff showed that the steps in which she fell were in disrepair. Although the Plaintiff could not testify as to exactly what made her fall, the evidence presented by both the expert and the photos of the steps showed their damaged condition. As such, there was conflicting evidence as to causation and, therefore, a judgment notwithstanding the verdict/directed verdict would be inappropriate.

Juror sending tweets

Murphy v. Roth, 204 So. 3d 43 (Fla. 4th DCA 2016)

During *voir dire*, the jurors were questioned regarding personal injury lawsuits and frivolous lawsuits. One of the jurors answered as follows "I'm kind of like indifferent about it. Like, I really don't - - it's necessary. Some people, sure they need it. But I feel like some people also do it just for the money, like he said up front…I wouldn't say 80%. I can't put a number on it. But I feel like, sure, a good amount of people sue for dumb reasons." This juror was selected for service and, at the beginning of *voir dire* the jurors were instructed not to communicate with anyone about the case or their jury service; including tweeting. After the jury was selected and sworn, the trial court again gave an instruction about not communicating about the case. During trial, this juror posted a series of tweets which included the following:

a. I got picked as a juror…I hate this s---. I'm so pissed. I even half assed all my answers and I dressed terrible.
b. Being a juror isn't bad. People I'm working with are pretty cool. But I still hate the fact that I have to be here all day.
c. Everyone is so money hungry that they will do anything for it.

After a verdict in favor of the Plaintiff for past and future medical expenses and a determination that the Plaintiff suffered no permanent injury and therefore no pain and suffering damages were awarded, the Plaintiff moved for a new trial based upon juror misconduct. In hearing from the jurors post-verdict, the juror responded that he understood the Court's instructions to mean "don't talk about the case." He also testified that he did not tweet while sitting in the courtroom and did not intentionally or deliberately disobey the Court's order nor did he tell anyone else his views about the case prior to the commencement of deliberations. The Fourth District affirmed the trial court's denial of the new trial and pointed out that the tweets were fairly consistent with what he disclosed during *voir dire*. As such, the denial of the new trial was affirmed.

Jury Instructions

In Re: Standard Jury Instructions in Civil Cases, 191 So. 3d 380 (Fla. 2016)

In the first part of the opinion, the Supreme Court adopted an amendment to Florida Standard Jury Instruction 402.16 regarding emergency medical treatment claims. The instruction addresses the provisions of Florida Statute 768.13(2)(b). The instruction does not apply to cases involving patients capable of receiving treatment as non-emergency patients, even if treated in an emergency room. The Committee on Jury Instructions found that the standard instructions dealing with simple medical negligence were not appropriate for civil damage actions involving care provided under Florida Statute 768.13(2)(b).

In the second part of the opinion, the Supreme Court adopted a new jury instruction: Florida Standard Jury Instruction 301.11 (failure to maintain evidence or maintain evidence or keep a record in a medical malpractice case – - i.e. adverse inference/rebuttable presumption) and also amended Florida Standard Jury Instructions 402.4; 501.5; 501.7; and 502.7. These instructions deal with the failure to maintain evidence and addresses both an adverse inference, as well as, the burden shifting presumption and explains what is necessary to get those instructions. The amendments also modified the definition of medical negligence, as well as the instruction on other contributing causes of damage and reduction of damages to present money value in medical malpractice cases. In the event that the court determines that there was a duty to maintain or preserve missing evidence at issue, and the party invoking the presumption has established that the absence of the missing evidence hinders that party's ability to establish its claim or defense, then a burden shifting presumption is appropriate.

Juror Interviews

Philip Morris USA, Inc. v. Naugle, 182 So. 3d 885 (Fla. 4th DCA 2016)

After a retrial on damages, the court interviewed the jury foreperson. The interview disclosed that, after the return of the verdict in the damages retrial, the foreperson received a text message from a second juror which indicated that, over the weekend before the verdict, the second juror had Googled the prior verdict in the case. The Fourth District stated that "receipt of non-record information concerning the amount of the prior verdict is an overt act 'which might have prejudicially affected the jury in reaching their own verdict.'" They added that the existence of the text message from the second juror established reasonable grounds to believe that some juror misconduct occurred which constitutes a legal basis for an interview of the second juror and, therefore, they remanded to the trial court to conduct an interview of the second juror.

Mistrial

Boyles v. Dillard's, Inc., 199 So. 3d 315 (Fla. 1st DCA 2016)

Following a verdict in favor of the Defendant in a rear collision case, the First District ruled that the trial court abused its discretion in denying Plaintiff's Motion for Mistrial. Specifically, defense counsel's closing argument referred to Plaintiff's testimony that she had tapped her brakes to take her vehicle off cruise control before turning into her driveway. Defense counsel told the jury "why is that important? We took her deposition for hours and it never came up." Plaintiff's counsel immediately objected and requested a sidebar to which defense counsel replied by turning to the jury, raising his hands and exclaiming "well that lasted about 12 minutes." The Plaintiff's counsel then moved for mistrial arguing that it was improper to refer to the deposition because it had not been previously introduced into evidence and because defense counsel was using this characterization of extra-record evidence to accuse the Plaintiff of dishonesty. The trial court denied the Motion for Mistrial and gave a curative instruction.

Although the First District noted that a single improper remark which is properly and immediately cured by instruction by the trial court will not necessarily constitute adequate grounds for a mistrial, it found that it did so in the instant case where the issue of the Defendant's liability essentially hinged on the comparative credibility of the two opposing witnesses: the Plaintiff and the driver of the Defendant's car. The First District also found that the trial court improperly

prevented Plaintiff's counsel from essentially reading the standard jury instruction regarding aggravation of pre-existing conditions and asking the jury *venire* whether anyone would have a problem applying that law. The court also found that the Defendant driver violated the accident report privilege; the defense counsel violated an Order in Limine preventing cross-examination as to how a treating physician had his bill paid; and improperly insinuated that the Plaintiff had previously received a speeding ticket. They also found that the trial court properly allowed Delta-V testimony by the Defendant's expert accident reconstructionist. The court repeated its prior opinions and held that while "a biomechanics expert is not qualified to give a medical opinion regarding the extent of any injury" he "is qualified to offer an opinion as to causation if the mechanism of injury falls within the field of biomechanics."

New Trial

Acts Retirement-Life Communities, Inc. v. Zimmer, 41 FLWD 2668 (Fla. 4th DCA 11/30/16)

Acts is a facility at which Zimmer lived with his wife, and at which he lived alone after her passing. Residents live in units similar to condominiums, with their own kitchen and living areas. There are also common areas, including a community dining area and a health center. If necessary, residents can transfer to an Assisted-Living residence at the facility. At all times material to this case, Zimmer was living independently, in his own unit.

While living at Acts, Zimmer made friends with multiple employees, in particular, a culinary manager named Maria. He gave a variety of "gifts" to these employees including at least $30,000 in cash and a $42,000 Mercedes to Maria. The nature of whether these were unsolicited tips or gratuities or whether they were the result of exploitive and manipulative actions by employees taking advantage of Zimmer.

Zimmer's son became concerned with his father's finances and after discovering more information about the "gifts" he alerted Acts. Acts conducted an appropriate and timely investigation and terminated every employee who had accepted a gift from Zimmer, including Maria, because doing so violated their internal policy against employees accepting gratuities. Even after her termination, Maria and her husband remained friends with Zimmer and Zimmer requested that Acts' employees drive him to see Maria at various locations. These employees complied because driving residents was part of their job duties. Maria also

continued to see Zimmer by picking him up directly. Within half a year of the employee terminations, Zimmer died. After his death, his estate filed suit against Acts and Maria. The claims against Maria were settled and the case against Acts went to trial. Eventually, the jury found Acts liable in the amount of $50,000.

The Fourth District ruled that the trial court erred in entering judgment for the Plaintiff because there was insufficient evidence that the Acts knew or should have known that their employees were likely to commit a fraud upon the Plaintiff. Further, Acts could not properly be found liable for the actions of the employees after the employee was terminated and, further, Acts could not be found liable for negligent supervision of employees who were not terminated, but only drove Plaintiff to visit the terminated employees because those employees were not committing any tort and were acting within the scope of their employment.

GEICO v. Isaacs, 41 FLWD 2715 (Fla. 4th DCA 12/7/16)

Plaintiff received a verdict which included an award for future medical expenses of $360,000. GEICO moved post-trial for remittitur and for new trial arguing that the award for future medical expenses was excessive and against the manifest weight of the evidence. At trial, one of the Plaintiff's treating physicians testified that she would incur $2,000 in future medical expenses per year and also recommended that she undergo shoulder surgery which he estimated at a cost of $40,000 - $50,000. This was the only competent evidence presented on which the award for future medical expenses could be based. There was, however, no testimony regarding the Plaintiff's life expectancy. Therefore, the Fourth District remanded the case for a new trial solely on the issue of her life expectancy.

State Farm Mutual Automobile Insurance Company v. Gold, 186 So. 3d 1061 (Fla. 4th DCA 2016)

Plaintiff was in a car accident while covered by an uninsured motorist policy issued by State Farm. Before closing arguments, the trial court instructed the jury that "Plaintiff was insured under a policy with State Farm. This insurance policy provided uninsured/underinsured motorist benefits. State Farm is responsible for any injuries or damages sustained by Plaintiff legally caused by the accident." Following this instruction, Plaintiff's counsel made the following argument:

> "We're here because Mr. Gold had purchased uninsured motorist coverage so this wouldn't happen. State Farm has denied his claim and now he's facing down a stack of medical bills and he's been

> carrying this burden with him until today and State Farm to this day, to this minute, has never taken responsibility for the damages in the crash and for the injuries that are covered under this policy, and they're not going to do it unless you force them to do it with your verdict."

While the Plaintiff's attorney was making this statement, a power point slide was visible to the jury that read "Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake. State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial." State Farm objected to both the spoken comment and the slide. The trial court sustained the objection. At the end of the Plaintiff's closing argument, a slide was displayed that said "Gold has done the right thing all along. Has the Defendant?" State Farm again objected, but the court overruled the objection and the jury found in favor of the Plaintiff.

The Fourth District reversed for a new trial. Although they acknowledged that the comments made did not make up a substantial part of the total closing statement, their affect was not inconsequential because they book ended Plaintiff's closing argument. Adding to this conclusion is the fact that the Plaintiff's first comment was not only spoken, but projected and continued to be displayed to the jury during a bench conference discussing the Defendant's objection. They also found that the final slide shown, although not spoken, was projected to the jury noting that visual aids are used during arguments because they are effective ways of communicating ideas and themes to a jury.

Thus they held that the cumulative affect of the statements and the jury instruction that focused the jury's attention on State Farm's liability and culpability rather than on the issue of damages compelled the new trial. In doing so, they emphasized that they were following the harmless error standard set forth in the Supreme Court's *Special* decision. That is, they were unable to say that the Plaintiff had proven that there was no reasonable possibility that the errors contributed to the verdict.

State Farm Mutual Automobile Insurance Company v. Long, 189 So. 3d 335 (Fla. 5th DCA 2016)

At the trial of an uninsured motorist claim, the Plaintiff presented testimony of a Physician's Assistant to testify regarding future medical expenses. The Physician's Assistant worked exclusively with the Plaintiff's orthopedic surgeon.

The Physician's Assistant testified that, during the course of the Plaintiff's treatment, he administered at least four cortisone injections to relieve pain in the patient's shoulder and also testified that someone with the Plaintiff's condition could only receive a limited number of injections because too many injections may result in a weakened rotator cuff and tendon leading to a tear. He further testified that the Plaintiff probably could have had one or two more injections but beyond that surgery would be the only other option to relive the pain and he then testified regarding the associated costs.

This testimony was over the Defendant's objection who argued that the Physician's Assistant was not competent to give his opinion on the need for future surgery or the cost associated with such surgery. They also argued that he was not qualified to testify regarding the cost because he was not the one actually billing for and performing the surgery. The Fifth District held that it was error to allow the Physician's Assistant to testify noting that they must be supervised by a physician and their services must be delegated by the supervising physician. Physicians may delegate many tasks and procedures to their Physician's Assistant but the duty to make a final diagnosis is non-delegable. In this case, the court stated that the Physician's Assistant was certainly qualified to testify regarding the treatment and care he provided but was not qualified to offer opinions as to what the orthopedic surgeon thought or would have done to treat the patient's condition in the future. As such, a new trial was granted.

Dismex Food, Inc. v. Harris, 194 So. 3d 497 (Fla. 3d DCA 2016)

The Plaintiff claimed injuries following a motor vehicle accident. During the course of discovery, he was examined by the defense's medical expert who issued a report pursuant to Rule 1.360 essentially stating that the Plaintiff's spine was normal, the patient did not require surgery and he had a 0% permanent impairment. Before trial, the Plaintiff moved in limine to prohibit the doctor from testifying as to new opinions not included in the report and the Plaintiff also invoked the Sequestration Rule as set forth in Florida Statute §90.616.

During trial, the Plaintiff's doctor testified for the first time that he would not have relied upon the MRI due to its poor diagnostic quality. Following that, the defense counsel conferenced with the defense expert about the testimony he would give the next day. The jury awarded the Plaintiff his medical expenses, but found no permanent injury and the Plaintiff then moved for a new trial arguing that the defense attorney conferred with his expert regarding the Plaintiff's doctor's testimony, thereby violating the Sequestration Rule and also because the IME

offered new opinions. The trial court granted the Motion for New Trial and the Third District reversed and found that while there may have been a violation of the Rule of Sequestration, the testimony did not substantially differ from what it would have been without the violation of the rule. Further, the expert's testimony was consistent with his report and did not substantially differ and therefore it was error to grant the new trial.

Boyles v. Dillard's, Inc., 199 So. 3d 315 (Fla. 1st DCA 2016)

Following a verdict in favor of the Defendant in a rear collision case, the First District ruled that the trial court abused its discretion in denying Plaintiff's Motion for Mistrial. Specifically, defense counsel's closing argument referred to Plaintiff's testimony that she had tapped her brakes to take her vehicle off cruise control before turning into her driveway. Defense counsel told the jury "why is that important? We took her deposition for hours and it never came up." Plaintiff's counsel immediately objected and requested a sidebar to which defense counsel replied by turning to the jury, raising his hands and exclaiming "well that lasted about 12 minutes." The Plaintiff's counsel then moved for mistrial arguing that it was improper to refer to the deposition because it had not been previously introduced into evidence and because defense counsel was using this characterization of extra-record evidence to accuse the Plaintiff of dishonesty. The trial court denied the Motion for Mistrial and gave a curative instruction.

Although the First District noted that a single improper remark which is properly and immediately cured by instruction by the trial court will not necessarily constitute adequate grounds for a mistrial, it found that it did so in the instant case where the issue of the Defendant's liability essentially hinged on the comparative credibility of the two opposing witnesses: the Plaintiff and the driver of the Defendant's car. The First District also found that the trial court improperly prevented Plaintiff's counsel from essentially reading the standard jury instruction regarding aggravation of pre-existing conditions and asking the jury *venire* whether anyone would have a problem applying that law. The court also found that the Defendant driver violated the accident report privilege; the defense counsel violated an Order in Limine preventing cross-examination as to how a treating physician had his bill paid; and improperly insinuated that the Plaintiff had previously received a speeding ticket. They also found that the trial court properly allowed Delta-V testimony by the Defendant's expert accident reconstructionist. The court repeated its prior opinions and held that while "a biomechanics expert is not qualified to give a medical opinion regarding the extent of any injury" he "is

qualified to offer an opinion as to causation if the mechanism of injury falls within the field of biomechanics."

Okeechobee Aerie 4137 v. Wilde, 199 So. 333 (Fla. 4th DCA 2016)

A known alcoholic left a bar while heavily intoxicated and ended up seriously injuring a man on a motorcycle. The Plaintiffs brought suit pursuant to Florida Statute 768.125. The Defendant never contested that the driver was a habitual drunkard pursuant to the statute. Pursuant to Florida Statute 561.701-06, the Responsible Vendor Act, the Plaintiffs suggested that there were two causes of action that they could present to the jury: the first under Florida Statute 561.701 and the second under Florida Statute 768.125.

The Fourth District ruled; however, that Florida Statute 768.125 does not "create" a cause of action; rather, it is a protective statute meant to eliminate a cause of action where one might otherwise exist, except in certain circumstances. Importantly, a determination that a drinking establishment knowingly served a habitual alcoholic is not a *per se* determination that the duty and breach elements of a negligence action have been met. The Fourth District advised that proactive attempts by a drinking establishment to protect the public from a habitual drunkard whom it has knowingly served, may be sufficient to show that there has been no breach of the legal duty. Thus, to be clear, the cause of action in the case was still negligence. Plaintiff simply alleged that the negligence in the case was not limited by Florida Statute 768.125.

The Plaintiffs also asserted that there was another cause of action available under the Responsible Vendor Act. That law; however, is a voluntary statute that imposes no duties on any vendor. Instead, the Act serves to protect a vendor from certain administrative penalties resulting from serving an underage person or from selling or allowing the sale of illegal drugs on its premises. Thus, while a violation of a statute may be "evidence of a breach of a standard of care," the rule does not apply to the Responsible Vendor Act because the Act cannot be violated *per se*. In other words, a vendor may choose to comply with the Act or not, and then it suffers the consequences because of its decision.

The Plaintiffs' argued that the Responsible Vendor Act was not used to show a breach of the standard of care, but rather was used to show that the Defendant was aware of the existence of the law. Even though the trial Judge instructed the jury, statements made by the Plaintiffs in opening and closing, as well as the Judge's instructions to the jury before closing, diminished the apparent

effectiveness of the limiting instruction given by the trial Judge. The admission of evidence related to the Responsible Vendor Act also lead the trial Judge to allow in evidence of a prior lawsuit against the bar for an accident caused by someone who had allegedly been drinking there.

The Plaintiffs asserted that the accident was introduced for the purpose of showing that the Defendants were on notice of the Act. However, because notice was not relevant to the issue in the case, the Court ruled the trial court erroneously admitted the evidence. Even if it were relevant, it was more prejudicial than probative. The Court then addressed several specific statements made during the closing argument by Plaintiffs' counsel. Plaintiffs' counsel had argued that there was no one other than the jury to act and that the Alcohol Beverage and Tobacco Bureau would not act. The Fourth District found that this argument was not designed to increase damages, but rather was a proper argument asking the jury to impose liability against the Defendants. The statement in closing argument that this case "will long be remembered or it will soon be forgotten" was found to be an improper conscience of the community argument because it was combined with an "it will just keep happening" statement.

Finally, the trial court ruled that the trial Judge properly excluded the drunk driver from the verdict form in this case against the bar. Florida Statute 768.81 does not require the apportionment of responsibility between a Defendant whose liability is derivative and the directly liable negligent tortfeasor. In this type of case, there is negligence only when there is a subsequent wrongful act by the person intoxicated and thus the Defendant's liability was derivative. As such, the Fourth District reversed for a new trial.

Wal-Mart Stores, Inc. v. Wittke, 202 So. 3d 929 (Fla. 2d DCA 2016)

Following a verdict in favor of Wal-Mart, the trial court granted the Plaintiff's Motion for New Trial. The Second District reversed and found that the trial court erred because it equated the standard of care with compliance with the store's own internal policies and procedures, effectively determining that a breach of policies and procedures is a *per se* breach of the standard of care. The court noted several cases which stand for the proposition that internal safety policies do not themselves establish the standard of care and that internal policies and procedures may be admissible only if they are relevant to the standard of care.

Robinson v. Ward, 203 So. 3d 984 (Fla. 2d DCA 2016)

The Second District upheld an order granting a new trial on the basis that defense counsel's misconduct during the trial, damaged the fairness of the trial, despite multiple instances in which the Plaintiff's attorney did not object. As the court noted "it is also important to keep in mind that where one party's counsel repeatedly refuses to comply with the court's ruling, the other party's counsel is put in a difficult situation. On the one hand, an objection is necessary to preserve the error. But on the other hand, making numerous objections may alienate the jury." Additionally, the Second District found that the trial court did not abuse its discretion by imposing sanctions against the attorney whose misconduct, including presenting evidence which had been excluded by the court and cross-examining Plaintiff about matters which the court had instructed him not to raise, damaged the fairness of the trial, thus requiring a new trial. Although the order imposing sanctions did not include the specific words "bad faith" it did state that the attorney's actions were "improper and deliberate" and resulted in a miscarriage of justice.

Murphy v. Roth, 204 So. 3d 43 (Fla. 4th DCA 2016)

During *voir dire*, the jurors were questioned regarding personal injury lawsuits and frivolous lawsuits. One of the jurors answered as follows "I'm kind of like indifferent about it. Like, I really don't - - it's necessary. Some people, sure they need it. But I feel like some people also do it just for the money, like he said up front…I wouldn't say 80%. I can't put a number on it. But I feel like, sure, a good amount of people sue for dumb reasons." This juror was selected for service and, at the beginning of *voir dire* the jurors were instructed not to communicate with anyone about the case or their jury service; including tweeting. After the jury was selected and sworn, the trial court again gave an instruction about not communicating about the case. During trial, this juror posted a series of tweets which included the following:

d. I got picked as a juror…I hate this s---. I'm so pissed. I even half assed all my answers and I dressed terrible.
e. Being a juror isn't bad. People I'm working with are pretty cool. But I still hate the fact that I have to be here all day.
f. Everyone is so money hungry that they will do anything for it.

After a verdict in favor of the Plaintiff for past and future medical expenses and a determination that the Plaintiff suffered no permanent injury and therefore no

pain and suffering damages were awarded, the Plaintiff moved for a new trial based upon juror misconduct. In hearing from the jurors post-verdict, the juror responded that he understood the Court's instructions to mean "don't talk about the case." He also testified that he did not tweet while sitting in the courtroom and did not intentionally or deliberately disobey the Court's order nor did he tell anyone else his views about the case prior to the commencement of deliberations. The Fourth District affirmed the trial court's denial of the new trial and pointed out that the tweets were fairly consistent with what he disclosed during *voir dire*. As such, the denial of the new trial was affirmed.

Auto Club Insurance Company v. Babin, 204 So. 3d 561 (Fla. 5th DCA 2016)

Following Final Judgment entered in favor of the Plaintiff, the insurance company filed an appeal arguing that the trial court erred when it denied its Motion for Directed Verdict on the issues of future medical expenses for low back surgery, past lost wages and loss of earning capacity in the future. The Fifth District agreed and reversed. The Plaintiff's treating doctor testified that, if conservative therapy failed, the patient would need surgery. He also testified that the Plaintiff had not clinically progressed to the level of dysfunction where he believed that surgery was currently indicated. The Appellate Court agreed that whether the Plaintiff needed future low back surgery was, therefore, too speculative and the Appellate Court agreed.

As for the loss of future earning capacity, the Appellate Court noted that it should be measured by the Plaintiff's diminished ability to earn income in the future, rather than the Plaintiff's actual loss of future earnings. In this case, the Plaintiff was voluntarily unemployed at the time of the accident. He was, however, working to become a certified dive master and he testified that he expected to make $28,000 per year from the dive business "if we were a good, solid, safe operation." The Appellate Court noted that in order to recover damages for lost earning capacity, the Plaintiff was required to prove, with reasonable certainty, a loss of earning capacity as a result of his injury and that he failed to do so in this case.

New trial required due to late withdrawal of *Fabre* defense

Edwards v. Rosen, 189 So. 3d (Fla. 2d DCA 1/29/16)

Shortly before trial, the Defendants amended their *Fabre* defense to include other physicians as non-party Defendants. At trial, Plaintiff presented his case

based upon the assumption that all of the doctors, including the *Fabre* physicians, would be on the verdict form. In fact, the Plaintiff's attorney told the jury about the affirmative defense during the course of the opening statement. Despite this, the Defendants then withdrew their *Fabre* defense on the last day of trial. The jury returned a verdict in favor of the Defendant and the trial court denied a Motion for New Trial.

The Second District reversed finding that the trial court abused its discretion in denying the Motion for New Trial stating that "considering the totality of the errors and improprieties in this case, we hold that a new trial is warranted. The specific sequence of events that transpired - - the belated amendment of the *Fabre* defense, the last minute withdrawal of the defense, and the trial court's failure to give a curative instruction to the jury - - generated prejudice that Edwards' counsel could not cure.

No fundamental error

Burger King Corporation v. Lastre-Torres, 202 So. 3d 872 (Fla. 3d DCA 2016)

A substantial verdict against Burger King Corporation was affirmed despite "exceptionally improper closing arguments made by the Plaintiff's trial counsel" "because these improper arguments sailed by without objection by opposing counsel or intervention by the trial court." The court noted that the closing arguments were racially and ethnically charged and were made in an effort to invoke sympathy for the Plaintiff and anger against the seemingly uncaring corporate Defendant. Because none of these improper arguments were objected to by Burger King, they must establish fundamental error to obtain a new trial.

Under a fundamental error analysis, they were required to demonstrate that not only were the arguments improper and harmful, but also that they were incurable. As the court noted, the unobjected-to improper argument were not only curable; they were preventable. "As soon as Plaintiff's counsel embarked on his crusade to canonize his client and vilify the evil corporate Defendant, there should have been an objection, a request for curative instruction, a Motion for a New Trial, and a request for the trial court to admonish the Plaintiff's counsel that such arguments would not be permitted."

Oral Motion for New Trial

Negron v. Hessing, 186 So. 3d 1139 (Fla. 4th DCA 2016)

Plaintiff sued Defendants for personal injuries arising out of an automobile accident. During trial, the Plaintiff's orally moved for a mistrial which the Court denied. After the jury rendered its verdict in favor of the Defendant, but before the Court entered a final judgment, Plaintiff again orally asked the Court about their prior Motion for Mistrial and the court replied "I denied it." Plaintiffs then renewed their Motion for Mistrial noting that if the Court was inclined to deny that motion again, that the Plaintiffs moved for a new trial. The Court responded "my ruling stands and I will deny the Motion for New Trial." Despite this ruling, and 11 days after the jury verdict, Plaintiff filed a written Motion for New Trial. Defendants filed their response to the motion noting that the Court had already ruled on the motion and the written motion did not raise any new grounds for a new trial. The Court did not address the written motion and instead entered a final judgement in Defendants' favor. The Plaintiffs did not appeal the final judgment and the case sat largely dormant for two years.

Two years later and after the presiding Judge who denied the Motion for New Trial left the civil division, Plaintiffs set their Motion for New Trial before a successor Judge. After hearing oral argument on the motion, the successor Judge granted the motion and ordered a new trial. The Fourth District reversed ruling that the trial court's oral denial of the Plaintiff's *ore tenus* motion properly disposed of the motion and the trial Judge and successor Judge were without jurisdiction to reconsider the matter. Further, it ruled that the written Motion for New Trial was deemed denied once final judgment was entered at which point the proper remedy was to appeal the final judgment.

Post-trial Interest

Shoemaker v. Sliger, 187 So. 3d 863 (Fla. 5th DCA 2016)

As a result of a prior appeal, the amount of judgment was modified. The District Court ruled that post-trial interest accrues from the date of the original judgment as opposed to the date of the verdict.

Remittitur

R.J. Reynolds Tobacco Company v. Odom, 41 FLWD 2670 (Fla. 4th DCA 11/30/16)

The Fourth District held that an award of $6,000,000 in compensatory damages to an adult child for the loss of her mother was excessive where, although evidence established that the Plaintiff and mother had a close and unique relationship, Plaintiff was not living with her mother nor was she financially or otherwise dependent on her mother at the time of her mother's death. They reversed and remanded the case with directions that the trial court grant a Motion for Remittitur or order a new trial on damages only.

GEICO v. Isaacs, 41 FLWD 2715 (Fla. 4th DCA 12/7/16)

Plaintiff received a verdict which included an award for future medical expenses of $360,000. GEICO moved post-trial for remittitur and for new trial arguing that the award for future medical expenses was excessive and against the manifest weight of the evidence. At trial, one of the Plaintiff's treating physicians testified that she would incur $2,000 in future medical expenses per year and also recommended that she undergo shoulder surgery which he estimated at a cost of $40,000 - $50,000. This was the only competent evidence presented on which the award for future medical expenses could be based. There was, however, no testimony regarding the Plaintiff's life expectancy. Therefore, the Fourth District remanded the case for a new trial solely on the issue of her life expectancy.

Safeco Insurance Company v. Fridman, 196 So. 3d 1284 (Fla. 5th DCA 2016)

The Fifth District found that the trial court abused its discretion in denying the insurance company's Motion for Remittitur for lost past earnings and loss of future capacity where the awards were primarily based upon the insured's speculative testimony about his potential earnings if he had been able to continue to operate his new business. Although the Plaintiff presented evidence that he was unable to continue with his wholesale marble and tile business because of the injuries he sustained in the collision, he failed to present any evidence of the amount of earnings that he reasonably could expect from such a business other than his unsubstantiated speculation that he could make $100,000-$200,000 in "a good year." The Court found that this type of speculative testimony was insufficient to support an award of damages.

Sanctions

Public Health Trust of Miami-Dade County v. Denson, 189 So. 3d 1013 (Fla. 3d DCA 2016)

In this medical malpractice case, the Defendant doctor had conversations with witnesses within ear shot of jurors on two separate occasions. Ultimately, the trial court granted a Motion for Mistrial. The Plaintiff then moved for sanctions seeking $49,000 in attorney's fees representing the time preparing for the first trial. The trial court denied the motion without prejudice. A second trial resulted in a mistrial due to a shortage of potential jurors. A year later, the third trial went forward to conclusion. The Plaintiff then renewed her Motion for Sanctions and sought $238,000 in preparation for all three trials.

The trial court awarded $208,000 in fees finding that the Plaintiff was not entitled to recover fees for the second trial, but she was allowed to recover fees for the first and third trials. The trial court specifically found that the Defendant physician had engaged in a pattern of behavior that reflected a total disregard for and disrespect to the court and that such misconduct was supported by the record.

The Third District upheld the decision to award sanctions, however, it found that the trial court abused its discretion in awarding attorney's fees beyond that necessary to compensate the Plaintiff for the preparation and conduct of the first trial. The Third District found that the time spent for the second and third trials did not directly relate to the Defendant's misconduct and therefore remanded to the trial court for entry of an award consistent with the time spent in preparation for and attendance at the first trial.