Trial Issues

Additur

Gilen v. CFH Group, LLC, 324 So. 3d 1005 (Fla. 3d DCA 2021)

Following a slip and fall in the stairwell of an apartment, the jury awarded the Plaintiff $32,000 for past medical expenses, $7,500 for future medical expenses, $5,000 for past pain and suffering and $0 for future pain and suffering. The trial court denied motions for an additur, and new trial and the Third District affirmed finding that the awards of $5,000 for past pain and suffering and $0 for future pain and suffering were not shown to be inadequate or the product of any other error.

Kocik v. Rodriguez, 327 So. 3d 318 (Fla. 4th DCA 2021)

Plaintiff laborer obtained a jury verdict awarding him damages against the Defendant homeowner for injuries which the Plaintiff sustained while working on the Defendant's home renovation project. The Plaintiff presented evidence that the Defendant decided to conduct a home renovation project without hiring a licensed contractor and without obtaining a required building permit. Instead, the Defendant hired an unlicensed contractor and then left the country without providing any qualified work site supervision. During the project, the Plaintiff was hired to work as a day laborer to remove a wall and install a ceiling support beam. When the Plaintiff went to remove an electrical conduit after being instructed to do so, he was erroneously told the power was off. The Plaintiff received a shock that caused him to fall off the ladder and hit the floor causing him to fracture his femur. The Plaintiff underwent surgery, was in the hospital for three days and then received physical therapy over a three-month period. The surgeon testified that the surgery was a success and said that the Plaintiff's only future treatment might be a minor procedure to remove the screws that had been placed to repair the fracture. The Plaintiff testified he continued to have pain for nearly six years after the accident but admitted that he had resumed construction work after completing his physical therapy.

The jury found the Plaintiff to be 55% at fault and the Defendant to be at 45% at fault. It awarded the Plaintiff $81,000 for his combined past and future medical bills and $25,000 for combined past and future pain and suffering. The verdict form did not ask the jury to apportion between past and future damages. Post-verdict, the Plaintiff requested an additur of $250,000 for his pain and suffering and the Circuit Court awarded an additur of $225,000. The Fourth District reversed and concluded that the trial court had acted as a seventh juror. It distinguished cases where additurs had been successfully upheld for pain and suffering awards because those cases contained evidence demonstrating life-long injuries and lifestyle changes. In this

case, the Fourth District said the jury had weighed conflicting evidence regarding the Plaintiff's past and future pain and suffering, namely that the Plaintiff's own testimony was that the pain had diminished over time and that he had resumed construction work and had resumed his hobby of fishing. Coupled with his surgeon's testimony that the surgery was successful and that he would only need minor future treatment, the Fourth District concluded that this supported the jury's verdict and that the trial court abused its discretion in awarding an additur.

Binger

Montero v. Corzo, 320 So. 3d 976 (Fla. 3d DCA 2021)

The Third District held that the trial court abused its discretion in allowing the Defendants to introduce a surveillance video and the testimony of the investigator who recorded the video where the video and the investigator were not disclosed by the Defendant until three business days prior to trial. Here the trial court failed to consider and analyze the factors set forth by the Supreme Court in *Binger v. King Pest Control*, and failed to make appropriate findings including whether the Plaintiff was prejudiced by late disclosure. As such, a new trial was granted.

Callari v. Winkeljohn, 329 So. 3d 795 (Fla. 3d DCA 2021)

This case arises from an automobile accident which occurred when Callari crossed over the center lane and struck the Plaintiff's vehicle causing it to flip over. After filing suit, the Plaintiff later amended her Complaint to add a claim for punitive damages based upon allegations that Callari was under the influence of heroin when the accident occurred. Before trial, the parties were ordered to provide a list of their witnesses and a summary of expected expert testimony. Callari filed an expert disclosure for a CPA who was to testify as to "the Plaintiff's economic damages." On January 7, 2020, the trial court notified the parties that trial was scheduled for the week of January 21. Later that day, Callari filed a supplemental expert disclosure stating that his economist would "testify regarding Mr. Callari's net worth and the amount of money he needs to sustain himself. She will also testify as to punitive damages that would bankrupt/economically castigate Mr. Callari."

The Plaintiff filed an emergency Motion to Strike the untimely disclosure and the trial court entered an order limiting the economist's testimony to economic damages. The order did not address whether the economist's testimony of punitive damages or net worth would prejudice the Plaintiff. The trial was ultimately set for

February 24 and Callari moved for reconsideration of the order limiting the economist's testimony. The trial court denied the Defendant's motion concluding that the jury could figure out his net worth without the expert testimony.

At trial, Callari testified regarding his limited financial resources, but the jury was provided with very little information to assess his net worth or ability to pay punitive damages. Callari never called his economist as a witness. The jury returned a verdict in favor of the Plaintiff in the amount of $4,662,572 of which $1,000,000 was a punitive award. The trial court applied a collateral source set-off and entered final judgment in the amount of $4,561,097. The Third District reversed noting that the trial court failed to analyze the *Binger* factors before exercising its discretion to admit or exclude late disclosed witness testimony. Because the trial court failed to make any findings of prejudice or to analyze the *Binger* factors in any way, the entire judgment was reversed.

Closing argument

Florida Peninsula Insurance Company v. Nolasco, 318 So. 3d 584 (Fla. 3d DCA 2021)

Plaintiff's comments in closing argument which referred to opposing counsel and their expert witnesses as liars, as well as making inflammatory, prejudicial, and sexist comments about defense counsel constituted fundamental errors such that even though the comments were non-objected to, they were so highly prejudicial to impair the fair consideration and determination of the case by the jury. As such, the cause was remanded for a new trial.

R.J. Reynolds Tobacco Company v. Mahfuz, 324 So. 3d 495 (Fla. 4th DCA 2021)

In the least surprising decision of the year, the Fourth District reversed the trial court's judgment entered in favor of the Plaintiff and granted a new trial. In this case, the Plaintiff's counsel called Phillip Morris a "soulless enterprise of death," with a recklessness and indifference towards human life that was virtually criminal. The court ruled that counsel made these arguments to inflame the jury. The Plaintiff's counsel also read from George Orwell's novel, 1984, and compared the tobacco companies to Big Brother and a totalitarian state that monitors everybody. Counsel read a passage from the novel asking it to ensure that the decedent was not forgotten. The Fourth District noted that this argument urged the jury to save the

decedent's memory by giving a large verdict but that the passage had no connection to the evidence. Counsel also compared the tobacco companies to Dorian Gray, a playboy from Victorian England who looked in the mirror and saw things as rotten as they truly were. Plaintiff's counsel asked the jury to see the tobacco companies in that same light. Plaintiff's counsel also told the jury not to lose sight of the evil that men do and urged the jury to mete out a punishment with its verdict that would hurt. He added that "you can't plunge the spear all the way straight through their heart. They have to feel it though."

R.J. Reynolds Tobacco Company v. Neff, 325 So. 3d 872 (Fla. 4th DCA 2021)

In yet another case, a verdict in favor of the Plaintiff was reversed because of closing argument presented by the Schlesinger law firm. Highlights include quoting from the novel 1984; quoting Martin Luther King's speech regarding the arc of the moral universe; referring to the tobacco industry as an "enterprise of death;" misstating evidence; attacking Defendants for conceding medical causation; and injecting personal opinions. The Fourth District concluded that all of these actions were designed to inflame the emotions of the jury.

Daubert

Lively v. Grandhige, 313 So. 3d 917 (Fla. 2d DCA 2021)

The jury returned a verdict in favor of the Defendants. Thereafter, the Plaintiff timely moved for a new trial arguing that the verdict was against the manifest weight of the evidence and that a new trial was required to avoid a miscarriage of justice. After a hearing on the Motion, the trial court announced its rulings in open court making both factual findings and legal conclusions. An order was subsequently rendered denying the Motion for New Trial referencing the trial court's findings announced at the hearing and attached the transcript of the hearing. The Second District reversed because the Order Denying the Motion for New Trial, including the trial court's oral pronouncement regarding the admissibility of certain evidence under *Frye* which was incorporated into the Order Denying the Motion for New Trial, did not reflect that the trial court applied the correct legal standard which was to determine whether the verdict was against the manifest weight of the evidence.

Royal Caribbean Cruises, Ltd. v. Spearman, 320 So. 3d 276 (Fla. 3d DCA 2021)

Following a jury verdict for over $20,000,000 in favor of Spearman on her claims for Jones Act negligence and unseaworthiness, Royal Caribbean appealed. The Plaintiff presented evidence, requested jury instructions and argued on opening and closing that Royal Caribbean was negligent and/or provided an unseaworthy ship based upon four distinct theories of liability: (1) the door which crushed the crew members hand could have been designed to eliminate the "pinch point;" (2) Royal Caribbean failed to train the ship's crew members on how to avoid the pinch point; (3) the door lacked a warning sign or sticker regarding the pinch point; and, (4) the other crew member involved in the incident was negligent when she improperly overrode bridge control during the safety drill in which the injury occurred.

On appeal, the Third District found that the trial court abused its discretion by allowing the Plaintiff's engineer to testify regarding a computer assisted drawing prototype of a door that would have been a safer design than the door that caused the Plaintiff's injury where the testimony did not satisfy the *Daubert* standard. Specifically, it found that the Plaintiff's expert testimony did not meet the reliability factors set forth in *Daubert.* *Daubert* sets forth a list of five factors a lower court may consider to determine whether the expert's testimony is reliable: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the theory or technique; (4) the existence and maintenance of standards controlling the theory or technique's operation; and (5) whether the theory or technique has attracted wide spread acceptance within a relevant scientific community. These factors do not constitute a definitive check list or test and an expert's opinion must be based upon knowledge and not merely subjective belief or unsupported speculation. That said, rejection of expert testimony under *Daubert* is the exception rather than the rule. In this case, the Third District noted that there was not a single door utilized on any ocean-going vessel with a cutout similar to the cutout proposed by the Plaintiff's expert. Nevertheless, the Third District did not reverse on this issue because of the two-issue rule. Here the Plaintiff presented four theories of liability and two causes of action and Royal Caribbean agreed to a general verdict form which required the jury to resolve the two causes of action but did not require the jury to indicate which alternate theory was resolved in favor of which party. The Third District did note; however, that the trial court erred by failing to consider the factors set forth in Florida Statute §768.74(5) when ruling on the Defendant's Motion for Remittitur and as such, remanded the cause of action to the trial court to conduct a new hearing on the Motion for Remittitur.

United Automobile Insurance Company v. Progressive Rehabilitation and Orthopedic Services, LLC, 324 So. 3d 1006 (Fla. 3d DCA 2021)

Progressive Rehabilitation provided services to United Auto's insured due to injuries from a motor vehicle accident. The insured assigned his PIP benefits to the clinic. Eventually, the clinic filed a breach of contract action against United Auto for failure to pay PIP benefits. In its answer, United denied that the charges the clinic submitted for the services provided were reasonable. The clinic filed a Motion for Summary Judgment on the issue of reasonableness and attached an Affidavit of the clinic's owner and corporate representative who asserted the charges were reasonable. Prior to the clinic filing its motion, United filed an affidavit of its claim adjuster who asserted that the charges were unreasonable. The clinic requested a *Daubert* hearing as to the adjuster's qualifications and basis of her opinions, following which the court struck the affidavit and granted summary judgment in favor of the clinic.

The Third District reversed pointing out that the *Daubert* standard does not prohibit expert opinion testimony based upon experience. As the court stated "nothing in the rule prohibits expert opinion testimony based on experience. Indeed, the plain language of §90.702 permits an expert to be qualified by 'knowledge, skill, experience, training or education…'"

United Automobile Insurance Company v. Central Therapy, Inc., 325 So. 3d 252 (Fla. 3d DCA 2021)

Following a motor vehicle accident, United Auto's insured sought treatment at Central Therapy. Thereafter, the insured assigned his benefits to Central Therapy which submitted bills to United Auto. Eventually, United Auto refused to pay some benefits and Central Therapy then sued alleging a breach of contract. United Auto answered and denied that the charges were reasonable, and that the treatment was reasonable, related and necessary.

Central Therapy filed a Motion for Summary Judgment and filed an Affidavit of a physician who opined that the charges were reasonable and within the range of usual and customary charges charged in the community for similar procedures. United filed an Affidavit of its adjuster who detailed her background, training and experience and her knowledge of monetary reimbursements by Florida PIP insurers providing reimbursement for medical services in South Florida. She then opined that the charges were not reasonable. The trial court found that the adjuster's Affidavit was legally insufficient because her opinions were not based on sufficient facts and data and therefore did not satisfy *Daubert*. The Third District reversed

holding once again that the "*Daubert* standard does not prohibit…expert opinion testimony based on experience…indeed, the plain text of §90.702, Florida Statutes provides that experts may be qualified by 'knowledge, skill, experience, training, or education.'"

State Farm Mutual Automobile Insurance Company v. M & E Diagnostic Services, Inc., 327 So. 3d 363 (Fla. 3d DCA 2021)

Pinelo was insured by State Farm. Following a motor vehicle accident, Pinelo sought treatment with M & E Diagnostic Services. M & E, as the assignee of Pinelo sued State Farm alleging that it underpaid M & E for services rendered to Pinelo following the accident. The parties stipulated that M & E's treatment to Pinelo was medically necessary and related to the accident. M & E moved for summary judgment regarding the reasonableness of its charges. In opposition to the motion, State Farm filed the affidavit of Dr. Dauer, who is a medical doctor and an owner of a diagnostic imaging center. He opined that M & E's charges were not reasonable. M & E moved to strike the doctor's affidavit arguing that Dr. Dauer's opinion was pure opinion testimony based primarily on speculation and conjecture and failed to meet the *Daubert* test for admissibility. The trial court granted summary judgment and the Third District reversed. They noted that Dr. Dauer attested that he had personal knowledge and expertise regarding the range and rate of charges for medical care in the relevant community, including the range and rate of charges for radiological services provided in the area for patients by credentialed and experienced diagnostic centers and hospitals. Dr. Dauer then considered the reimbursement levels and charges in the community, his own charges in the community, various Federal and state medical fee schedules applicable to motor vehicles and other insurance coverages including worker's compensation, Medicare, HMOs, PPOs and other third-party insurance carriers, as well as the payments and reimbursements that M & E accepted from all sources. Dr. Dauer also attested to conducting numerous peer reviews and obtaining extensive personal knowledge and professional expertise regarding medical care and medical charges and reimbursements for Miami-Dade and Broward counties. The Third District found that Dr. Dauer's opinions satisfied Florida Statute §90.702 and was not pure opinion testimony based on speculation or conjecture. They explained that "pure opinion testimony is based solely on the expert's experience, without relation to the actual condition of the person in the relevant case."

State Farm Mutual Automobile Insurance Company v. Nob Hill Family Chiropractic, 328 So. 3d 1 (Fla. 2021)

In this PIP case, State Farm retained both an accident reconstructionist and a causation expert to testify that the forces from the insured's accident were insufficient to cause injury. The trial court granted Plaintiffs' Motion for a *Daubert* hearing and then conducted a two-day hearing involving the biomedical engineer and the medical doctor. The Plaintiff argued that the doctor's causation analysis was "semi-junk science" and asserted that the doctor was unfamiliar with several significant variables which would have impacted the force applied to the insured. Counsel argued that the doctor never physically examined the insured and had an opinion contrary to other doctors. The trial court concluded the hearing without making an oral ruling. Two months later, the trial court entered an order granting the *Daubert* challenge, finding that the insurer had met its prima facia burden to show that the doctor had minimal qualifications, but also finding that the doctor's data was insufficient, and his methodology was unreliable. The trial court made no factual findings that would support those conclusions. As to the insurance company's other expert, the trial court ordered State Farm to provide more complete and adequate responses to Interrogatories and awarded $1,000 in sanctions to the Plaintiff. When State Farm moved for reconsideration, the Plaintiff contended that the insurance company had not provided compliant responses due to inconsistencies and discrepancies. State Farm argued that, despite the discrepancies, the total amount that the insurance company had paid the physician/expert was $1,300,000 over the defined four-year period. The court found that there were deliberate violations of its orders, that Plaintiff suffered absolute prejudice in its ability to prepare a cross-examination of the expert, and that the prejudice was only cured by a continuance of the case that had been going on for over a decade. The court discussed the factors contained in *Kozel*, stating that they militated towards striking the doctor due to willful, deliberate, and contumacious disobedience. The Fourth District reversed both rulings. First it found that the trial court must make specific factual findings on the record sufficient for an appellate court to review a conclusion about whether testimony was scientifically reliable and factually relevant. In the absence of such findings, the court stated that Appellate Courts are not well-suited to exercise discretion reserved to trial courts in *Daubert* proceedings. Because the trial court here merely tracked the language of the relevant *Daubert* statute, §90.702, and only found factually that the doctor was essentially testifying as to the Plaintiff's medical condition without having ever examined the insured, the trial court concluded that the testimony was not reliable or trustworthy. The court also found that the Plaintiff failed to make a showing of willful failure of the Defendant to comply or to demonstrate any extensive prejudice with the withholding of the discovery and/or

discrepancies. With respect to the prejudice, the court said that it was notable that each time the insurance company filed its unverified responses to the Interrogatories, they were identical to the later filed verified responses and further found it was significant that the insurance company was willing to stipulate to the $1,300,000 payment amount for the period, despite the discrepancies. The court concluded that striking the insurance company's remaining expert witness was neither an appropriate sanction nor commensurate with the offense and therefore reversed.

Directed verdict

Hernandez v. Mishali, 319 So. 3d 753 (Fla. 3d DCA 2021)

The Third District ruled that the successor Judge who did not preside over the trial erred in granting a directed verdict in favor of the Defendant where there was competent substantial evidence to support the jury's verdict that the Defendant was negligent and to support the jury's rejection of the Defendant's defense that he unexpectedly lost consciousness or experienced syncope prior to the collision.

Martinez v. Lobster Haven, LLC, 320 So. 3d 873 (Fla. 2d DCA 2021)

The Plaintiff ate contaminated oysters at the Defendant's restaurant. He experienced severe gastrointestinal symptoms for 10 days and, after recovering briefly, began to experience pain, numbness, and weakness in his legs and feet two weeks later. He was diagnosed with Guillian-Barré Syndrome (GBS) which is a disorder where the body's immune system attacks the nerves. He ended up in the hospital for almost two months.

During the first trial, the Defendant unsuccessfully moved for directed verdict and the case ended up being mistried due to a hung jury. Before the second trial, the parties discussed various evidentiary stipulations, including a preservation of issues from the first trial. A major difference between the first trial and the second trial was the Defendant's stipulation that the food it served to the Plaintiff was defective. As such, the main issue for the jury was the cause of the GBS. The Defendant failed to move for directed verdict at the second trial and this time the jury reached a verdict for the Plaintiffs. The Defendant then moved for a judgment notwithstanding the verdict which the trial court granted.

The Second District reversed. Contrary to the Defendants argument that the Motion for Directed Verdict had been preserved as part of the stipulations made at the first trial, the court observed that the stipulation regarding the defectiveness of

the food rendered the evidence different and was certainly not susceptible to a Motion for Directed Verdict that had been made previously. Additionally, the court found that the Defendant's argument that the Plaintiff's expert had relied on stackable inferences was erroneous. The appellate court's analysis illustrates the difference between impermissible inference stacking and permissible deductions from inferences.

Strickland v. State Farm Mutual Automobile Insurance Company, 323 So. 3d 783 (Fla. 1st DCA 2021)

Strickland's car was hit from behind in two separate rear-end collisions within a two-week period. In both instances, Mr. Strickland was driving. He and his wife sued State Farm to recover damages. They alleged that the two other drivers were negligent in rear-ending their car. State Farm denied liability and asserted comparative negligence and failure to mitigate damages as affirmative defenses. After conducting depositions of the two other drivers, the Plaintiffs moved for Summary Judgment on the issues of liability and comparative negligence. State Farm opposed Summary Judgment arguing that both accidents involved Mr. Strickland's vehicle starting to move forward then stopping abruptly raising the possibility of negligence on his part. As a result, Summary Judgment was denied. Before trial, the parties entered into a Joint Stipulation in which State Farm admitted that the two drivers were negligent. State Farm also asserted that Mr. Strickland had a hand in causing the accident and failed to mitigate his damages. The jury returned a verdict finding negligence on the part of all parties and awarded Mr. Strickland past medical expenses but no other damages. They also found that he had not sustained a permanent injury caused by either accident.

The Plaintiffs argued that the trial court erred by not granting Summary Judgment in their favor on the issues of liability and his comparative negligence in causing the accident. The District Court advised that this issue became moot once the case proceeded to jury trial. Moreover, the Plaintiffs did not move for a directed verdict on the issue of liability nor did they oppose the submission of the comparative negligence issue to the jury. The Plaintiffs next argued that the evidence was insufficient to allow a jury to apportion negligence to the Plaintiff for failing to mitigate his business losses as well as his pain (because he rejected physical therapy). The District Court found that the issue was not preserved because the Plaintiffs did not move for a directed verdict on the issue upon the close of the evidence at trial.

Tallahassee Medical Center v. Kemp, 324 So. 3d 14 (Fla. 1st DCA 2021)

On a stormy day, the Plaintiff went to the hospital to visit a patient. At the time she was wearing rubber flip-flops. After riding the elevator to the fourth floor, she exited and began walking towards the patient's room. As she went past the nurses' station, she suddenly slipped and fell in front of a utility-room door and fractured her kneecap. She sued the hospital claiming that its negligence caused her injury because the floor was wet.

The case went to trial and the hospital moved for directed verdict. It argued that the Plaintiff had not presented sufficient evidence of a wet floor or that the hospital knew of such a substance on the floor for the case to go to the jury. The motion was denied and the jury awarded the Plaintiff over $1,000,000. The trial court denied the hospital's motion for new trial and remittitur.

The First District reversed and found that the Plaintiff did not present sufficient evidence that a foreign substance was on the floor where she fell or that the medical center knew if such a substance existed. At trial, Kemp testified that she felt like something wet was there but she did not see a wet substance on the floor before or after her fall (except a drink that she was carrying spilled when she fell). In fact, no one saw a wet substance responsible for her fall. Her then boyfriend believed that she slipped on a wet floor because of the way she fell but he also did not see a wet substance on the floor. Medical center employees working near where she fell also testified that they did not see anything wet on the floor and even though Kemp testified of having wetness on the back of her clothes after the fall, she did not know what caused the wetness.

At trial, Kemp mainly relied on video evidence from a hospital camera showing moment by moment action in the hallway where she fell. The video did not show a substance on the floor but it did reveal repeated action in the area where she fell as employees accessed a nearby utility room. The Plaintiff asserted that something delivered to the utility room by a hospital employee could have caused the wet substance to be deposited on the floor causing her to fall and that the spill could have resulted from a leaking bag that was dragged to the utility room, from a tray or from something dropped on to the floor from a housekeeping cart. The video itself however, showed no such leaks, spills, drops or other deposits of a liquid substance on to the floor.

The First District noted that Kemp was entitled to use circumstantial evidence like the video to prove her case but there were limits to the inferences that could be drawn from such evidence. It held that a directed verdict should be issued if a Plaintiff relies upon circumstantial evidence to establish a fact, fails to do so to the

exclusion of all other reasonable inferences and then stacks further inferences upon it to establish causation.

Fannin v. Hunter, 46 FLWD 2100 (Fla. 1st DCA 9/22/21)

The Plaintiff and his wife agreed to watch a friend's dog for a few days. They had done so in the past without an issue. The couple also owned two dogs. The Plaintiff testified that one night while watching his friend's dog, he turned his back, and the dog ran behind him and knocked him down rendering him unconscious. Because his back was turned; however, the Plaintiff did not see that the dog was running towards him and after he regained consciousness, the Plaintiff made his way back to the house and advised his wife of his fall. There was conflicting testimony regarding the details of the incident. Both the Plaintiff and the wife testified that the friend's dog was the only dog outside at the time of the incident; that their dogs were in crates at the time; and that they did not allow their dogs to go outside with their friend's dog. However, the Plaintiff's wife testified that the Plaintiff informed her that the incident had occurred while he had left the "dogs" outside and the medical reports indicated that one of the Plaintiffs' dogs caused the injury. There was also conflicting testimony about the day following the incident and whether the friend's dog was on a leash or not when he went home and whether the Plaintiffs' dogs were allowed outside with the friend's dog when he was not on a leash. The jury found for the Defendant.

The Plaintiffs then successfully moved to set aside the verdict for entry of a directed verdict. The District Court admonished the trial court and stated that motions for directed verdict must be considered with extreme caution because the granting thereof amounts to a holding that the non-moving party's case was devoid of probative evidence. Under Florida Statute §766.01, dog owners are strictly liable for any damage done by their dogs to a person. The directed verdict in this case could only be sustained on appeal that there was absolutely no evidence rebutting the fact that the friend's dog caused the incident. Because the record contained conflicting evidence, the directed verdict was improper. In this case, the trial court not only granted a directed verdict but also a new trial. The Appellate Court pointed out that a trial court cannot simultaneously grant both. At most, the trial court may grant one and alternatively grant the other on the express condition that the latter only become effective if the former is reversed on appeal. Here the trial court's order expressly granted a new trial with respect to damages but not as an alternative to the directed verdict on the issue of liability. Thus, it appears that the trial court only meant to grant a new trial on damages only if the directed verdict on liability

was upheld. Because the trial court erred in granting the directed verdict, the order granting a new trial had to also be reversed.

Evidence

United Automobile Insurance Company v. NB Sports Massage and Rehab Corp., 326 So. 3d 130 (Fla. 3d DCA 2021)

NB Sports provided medical services to United Auto's insured following a motor vehicle accident. NB sports received an assignment of benefits and then sued United Auto for breach of contract for PIP benefits. On the day of trial, NB Sports moved to preclude United from reading the deposition testimony of its medical expert who performed an IME. NB Sports argued that the expert's deposition testimony, which read directly from his IME report was inadmissible because the witness did not remember the contents of the report and the report did not refresh his recollection. United sought to call the expert as a live witness in order to lay a proper foundation for the IME report to be introduced under the past recollection reported exception to the hearsay rule. The lower court denied the request and the Third District held that this was error pursuant to Florida Statute §90.803(5) which provides that "a memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party."

Demoura v. Travelers Home and Marine Insurance Company, 329 So. 3d 799 (Fla. 5th DCA 2021)

The Fifth District reversed for a new trial finding that the trial court reversibly erred when it prevented the Plaintiff from publishing to the jury, the deposition testimony of the corporate representative of Travelers pursuant to Florida Rule of Civil Procedure 1.330(a)(2).

Fabre

Crime v. Looney, 328 So. 3d 1157 (Fla. 1st DCA 2021)

The First District held that the trial court erred by interpreting the judicially created rear-end presumption in vehicle collision cases to defeat the Defendant's claim of comparative fault. Because there was admissible evidence that the Defendant was not the sole cause of the accident, the presumption should not have been utilized. The First District also found that the trial court erred in finding that the comparative fault defense was unavailable to the Defendant because she could not specifically identify the non-party she sought to allocate fault to. the First District noted that Florida Statute §768.81(3)(a)(1) states that a Defendant only need "describe the nonparty as specifically as practicable" when the non-party's identify is not known.

Inferences

Martinez v. Lobster Haven, LLC, 320 So. 3d 873 (Fla. 2d DCA 2021)

The Plaintiff ate contaminated oysters at the Defendant's restaurant. He experienced severe gastrointestinal symptoms for 10 days and, after recovering briefly, began to experience pain, numbness, and weakness in his legs and feet two weeks later. He was diagnosed with Guillian-Barré Syndrome (GBS) which is a disorder where the body's immune system attacks the nerves. He ended up in the hospital for almost two months.

During the first trial, the Defendant unsuccessfully moved for directed verdict and the case ended up being mistried due to a hung jury. Before the second trial, the parties discussed various evidentiary stipulations, including a preservation of issues from the first trial. A major difference between the first trial and the second trial was the Defendant's stipulation that the food it served to the Plaintiff was defective. As such, the main issue for the jury was the cause of the GBS. The Defendant failed to move for directed verdict at the second trial and this time the jury reached a verdict for the Plaintiffs. The Defendant then moved for a judgment notwithstanding the verdict which the trial court granted.

The Second District reversed. Contrary to the Defendants argument that the Motion for Directed Verdict had been preserved as part of the stipulations made at the first trial, the court observed that the stipulation regarding the defectiveness of the food rendered the evidence different and was certainly not susceptible to a

Motion for Directed Verdict that had been made previously. Additionally, the court found that the Defendant's argument that the Plaintiff's expert had relied on stackable inferences was erroneous. The appellate court's analysis illustrates the difference between impermissible inference stacking and permissible deductions from inferences.

Jury instructions

Belt v. USAA Casualty Insurance Company, 312 So. 3d 947 (Fla. 4th DCA 2021)

While traveling on I-95, the Plaintiff was first struck a pickup truck and was then hit by a phantom vehicle traveling next to her that did not stop before being struck by a third vehicle driven by an uninsured motorist. The Plaintiff alleged that the second two impacts constituted two separate accidents and she sought recovery against her uninsured motorist carrier for both. USAA argued that there was only one "incident" under its policy which defined a "hit and run" vehicle as one which could not be identified, but causes an accident involving bodily injury. The policy also provided that the insurance company's maximum limit of liability for each person would be for damages sustained in each accident, and the most the insurance company would pay would be the amount shown on the Declaration Page, regardless of the number of vehicles involved in that accident. At trial, the Plaintiff presented evidence demonstrating that there had been approximately one full minute between the impacts. The Defendant presented evidence that there was only a few seconds between impacts. To assist the jury in resolving the issues, the trial court instructed that it could find that multiple impacts would be considered one accident if there was but one proximate, uninterrupted, and continuing cause of injury. The Fourth District agreed that such an instruction was appropriate under the circumstances and affirmed the jury's verdict.

Adamson v. R.J. Reynolds Tobacco Company, 325 So. 3d 887 (Fla. 4th DCA 2021)

The decedent smoked 50 cigarettes a day and was diagnosed with a lung mass in May 1992 and died of cancer in 1993. She left behind her husband and a 10-year-old daughter. One of the disputed issues in the case was whether the decedent had primary lung cancer or secondary lung cancer. The only medical records available were 42 pages generated from the decedent's three-day hospital stay in March 1993 at a Rhode Island Hospital where she underwent surgery to treat a metastatic brain tumor. The records stated that she had presented with a lung mass in May 1992. The evidence was that lung cancer is usually diagnosed in people between ages of

65 and 75 and that a woman of the decedent's age would likely have contracted a gynecological form of cancer at that age.

It was not until July 2006 that the Florida Supreme Court decided the *Engle* case and stated that Plaintiffs could file individual claims. In an April 2008 call log, a paralegal at Morgan and Morgan representing the decedent's husband memorialized a phone call with him in which the firm was trying to "fill in the blanks on his discovery." The Plaintiff advised that he had shredded the decedent's medical records two years before because they were so old, and he did not think he would ever need them. The Defendant sought an adverse inference jury instruction which the trial court agreed to give.

The Fourth District affirmed the trial court's decision and noted that first-party spoliation occurs when a party to the action loses, misplaces, or destroys evidence. Prior to the court exercising such a leveling mechanism, the trial court must answer three threshold questions: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was critical to an opposing party being able to prove a *prima facie* case for defense. Here, it was clear that the evidence existed at one time and the evidence certainly could have been relevant. The court also noted that a duty to preserve the evidence is not required for an adverse inference instruction to apply.

Turner v. Gamiz, 327 So. 3d 1253 (Fla. 1st DCA 2021)

The First District reversed and found that the trial court abused its discretion by failing to give a jury instruction on aggravation of a pre-existing condition because the record did not establish that this was an inaccurate statement of the law. Further, the facts established at trial supported the instruction despite the Plaintiff's testimony that she did not suffer migraines before the accident; and, under the circumstances, the failure to give the instruction might have reasonably mislead the jury. As such, the case was remanded for a new trial on damages.

North Lauderdale Supermarket, Inc. v. Puentes, 47 FLWD 44 (Fla. 4th DCA 12/22/21)

The Plaintiff fell on an oily substance and sued the Defendant. The Defendant objected to the non-modified use of the standard jury instruction 401.20(a) arguing that the instruction was inconsistent with the current premises liability law and Florida Statute §768.0755 and further argued that the negligent maintenance

language needed to be removed or revised before the instruction would be given to the jury.

The Defendant argued that, in order to be consistent with the statute, the instruction had to be modified to focus on whether the Defendant negligently failed to correct the dangerous condition about which the Defendant knew or should have known in the use of reasonable care, or whether it failed to warn the Claimant of a dangerous condition about which it had or should have had greater knowledge of than the Plaintiff. The Plaintiff argued that the standard jury instruction was appropriate, and the trial court agreed.

The Fourth District reversed and noted that Florida Statute §768.0755 differed from its predecessor statute §768.0710 because it did not allow for liability based solely on the business establishment's general failure to maintain the premises. Instead, Florida Statute §768.0755 required the Plaintiff to prove that the business establishment had actual or constructive knowledge of the dangerous condition before liability could be found.

While the standard jury instructions were modified with a note to reflect the statutory change, the instruction itself was not. While the Defendant's Motion for New Trial was pending before the trial court, the Florida Supreme Court approved the committee's recommended amendment of instruction 401.20(a) where the court noted it did not foreclose either party from requesting additional and alternative instructions, or to contest the legal correctness of the instructions; specifically instruction 401.20(a). Because the instruction was incompatible with the law governing post-July 1, 2010 slip and falls caused by transitory foreign substances in a business establishment, the Fourth District found that the instruction should not have been given without modification and reversed for a new trial.

Jury selection

Lafayette v. Moody, 316 So. 3d 708 (Fla. 4th DCA 2021)

The Defendants appealed the trial court's order granting a new trial following a verdict in their favor. During jury selection, the Plaintiffs tried to strike potential jurors whom they believe might have potential biases favoring the Defendant trucking company or truck drivers in general. During *voir dire*, several prospective jurors were struck for cause because they either explicitly articulated, or it was otherwise clear that they were biased in favor of truck drivers. One prospective juror

indicated that her husband worked as a truck driver for over 30 years; however, unlike the other jurors who had ties to the trucking industry, she stated that nothing about her husband's occupation would cause her to favor one side or the other. When asked if she would like to serve on the jury and why, she answered yes because "everyone deserves to be heard." Neither Plaintiff nor Co-Defendant used a cause challenge against this juror; however, the Plaintiff decided to use a peremptory strike on her. Because this juror was African American and was the only African American remaining on the prospective jury panel, the Defendants requested a race-neutral reason for the peremptory strike. The Plaintiff first asserted that the juror's husband's significant experience as a truck driver was a reason for the challenge. The Co-Defendant's counsel accepted this as a race neutral reason; however, counsel for the Defendants did not. The Defendants stated that if this was a true concern, the Plaintiff should have asked to strike the juror for cause as she did with the other jurors who had ties to the trucking industry.

In response, the Plaintiff's counsel also proffered that this juror knew another member of the prospective jury panel (who was not ultimately selected as a member of the panel). The trial court denied the Plaintiff's peremptory strike ruling that she failed to meet the race neutral test under the *Neil and Batson* cases. This juror was selected as a member of the jury panel and the Plaintiff noted her objection to that selection on the record.

The day after the jury was selected, counsel for the Plaintiff revisited the issue regarding this juror by noting that the reasons provided for striking her, namely her husband's experience as a truck driver, were genuine. She also stated that the juror's perceived eagerness to serve on the jury was another reason to support a peremptory strike because it suggested she wanted to defend the honor of her husband's profession. Finally, the Plaintiff informed the trial court that it did not make a finding that either of the two reasons she initially offered for the peremptory strike were not genuine. Following trial, the jury returned a verdict for the Plaintiff finding the Co-Defendant driver 100% responsible for the accident and finding that the truck driver and his employer were not liable.

The Fourth District found that the trial court committed several errors during the trial and post-trial proceedings for which a new trial was the only appropriate remedy. Relevant to jury selection, it found that the trial court erred in applying the *Melbourne* test. It found that the trial court properly followed the first two steps of the *Melbourne* test. Under step one, the Defendants timely objected to the Plaintiff's challenge noting that the potential juror was an African American and requested that the trial court ask the Plaintiff the reason for her strike. When asked and in accordance with step two, the Plaintiff explained that she sought to strike the juror

because of her marriage to a truck driver. The Fourth District found that the trial court erred in applying step three of the *Melbourne* test and specifically erred in its analysis of the genuineness of the Plaintiff's stated reason for challenging the juror. The stated reason, the juror's potential bias, was clearly race neutral. Despite this, the trial court inexplicably found that the Plaintiff failed to meet the race neutral test annunciated in *Melbourne* and its state and federal predecessors. This was tantamount to a finding that the Plaintiff's stated reason for exercising a challenge on the juror was pretextual with nothing in the record to substantiate that finding.

Hialeah Hospital, Inc. v. Hayes-Boursiquot, 316 So. 3d 754 (Fla. 3d DCA 2021)

During jury selection, the hospital's counsel sought to exercise a peremptory challenge to excuse three potential jurors; one was a Haitian American and two were African American. Following each of the challenges, the Plaintiff's counsel timely objected noting that each challenged potential juror was a member of a protected class based upon race and sought a race-neutral and non-pretextual reason for the peremptory challenge. For the first potential juror, counsel proffered the race-neutral explanation that this potential juror expressed a devotion to policies and procedures in the context of her employment as a baker. Counsel explained that he exercised the challenge because policies and procedures would feature heavily during trial. The trial court found the explanation race-neutral and non-pretextual and overruled the challenge.

For the second challenged juror, hospital's counsel proffered that this potential juror's employment at a hospital and a relationship with a nurse rendered him unsuitable. After consideration, the trial court found the explanation pretextual and sustained the objection. For the third challenge, the only one challenged on appeal, the hospital's counsel proffered the race-neutral explanation that he sought to strike the potential juror due to his training and experience in the medical field as a licensed practical nurse. The trial court found that the hospital's race-neutral explanation was not genuine due to an impermissible pattern of seeking to excuse potential jurors based upon race.

The Third District sustained the trial court's decision, noting that during a *Melbourne* challenge, the trial court's focus is not the "reasonableness of the asserted non-racial motive…[but] rather…the genuineness of the motive,… a finding which turn[s] primarily on an assessment of credibility." The assessment of credibility by the trial court is judged based upon a clearly-erroneous standard of review. Thus, while it is well established that a juror's occupation can be the foundation of a proper peremptory challenge, here the record demonstrated that the hospital's counsel

exercised three peremptory challenges in a row on members of a race-protected class matching the decedent's identification. Additionally, the trial court found the proffered reasons for two of three such challenges pretextual. Accordingly, there was sufficient record evidence to support the trial court's credibility assessments such that they may not be disturbed under the clearly-erroneous standard.

Rivas v. Sandoval, 319 So. 3d 744 (Fla. 3d DCA 2021)

The Plaintiff was turning left when her car was struck by the Defendant. After the collision, the Plaintiff received emergency medical attention for shattered glass in her eyes, a laceration to her legs and a contusion to her knee. After being discharged, she experienced neck and back pain, sought medical attention, and was ultimately diagnosed with injuries to her neck and back.

During *voir dire*, the venire was asked whether any member had a personal or indirect experience of being involved in a car accident. Juror #5 explained that his son had been in a similar collision with his car and both had been sued. The potential juror further explained that the Plaintiff in that case was never taken to the hospital for neck and back injuries and based upon this did not believe that the Plaintiff was sufficiently injured to receive his $100,000 insurance policy limits. The prospective juror further explained that he was threatened by a law firm claiming it would put a lien on his house if he refused the payment of policy limits.

The Plaintiff's counsel then asked the juror if the case was one where he could not be fair and impartial and treat both parties equally at the beginning of the case. The juror responded "yes." Defense counsel further questioned the juror and asked if he would be open minded and he stated that he would be because every case was different. At the conclusion of *voir dire*, the Plaintiff moved to exclude this juror for cause and the trial court denied this. The Plaintiff then initially accepted this juror but later used a peremptory challenge "based upon the denial of the Motion for Cause."

After the Plaintiff had exhausted all of her peremptory challenges, the Plaintiff was asked to accept Juror 15 who had previously worked for several insurance companies. The Plaintiff then asked for an additional peremptory challenge based upon the denial of the cause challenge for Juror 5. The trial court denied the request for an additional peremptory. The Third District held that the trial court erred in denying the request to strike the prospective juror for cause and stated that the juror's later answer that he would keep an open mind because "every case is different" was insufficient to rehabilitate the juror.

Craven v. State, 328 So. 3d 1129 (Fla. 1st DCA 2021)

During voir dire, a potential juror said multiple times that he "did not remember a lot of stuff" and indicated that he had several memory deficits. Following his admissions about his poor memory, the State moved to excuse him for cause. The trial court granted the motion over the Defendant's objections. The Defendant appealed and argued that the cause challenge was not well-taken because the juror's memory issues were exaggerated and did not provide grounds to support the Motion to Strike. The First District held that while the juror's memory problems may not have risen to the level of mental incapacity, they were significant amount to render him unable to perform the duties of a juror and thus the court upheld the cause challenge.

Dabbs v. State of Florida, 330 So. 3d 50 (Fla. 4th DCA 2021)

During jury selection in a criminal case, the trial Judge in making a point about the Defendant being innocent until proven guilty asked the entire venire what the verdict would be if he sent them to deliberate before hearing any evidence. The juror in question, an engineer, loudly and quickly responded "not guilty" because criminal Defendants are presumed innocent. The State then exercised a strike against this juror and the Defendant objected because the juror was female and Hispanic. When asked for gender and race neutral reason for the strike, the State responded that the juror seemed exceptionally smart in terms of technical matters and that as a result she might be lured into looking too far into things. The prosecutor also noted that there had been no pattern of striking female or Hispanic jurors. Under these circumstances, the trial court allowed the strike.

In trying to determine whether the proffered explanation was genuine or was actually a concealed attempt to discriminate based upon race, the Fourth District looked at all of the relevant circumstances and applied the five non-exclusive factors (a failure to examine the juror or a perfunctory examination of the juror; a showing that the alleged group bias was not shown to be shared by the juror in question; singling the juror out for special questioning thereby designed to invoke a certain response; whether the reason for the strike was unrelated to the facts of the case; and/or whether the challenge was based upon reasons equally applicable to a juror who was not challenged). The Fourth District found that the trial court properly followed the procedure set forth in the *Melbourne* decision and that the Defendant failed to rebut the presumption that the State's peremptory strike was genuine and did not show that the trial court's ruling was clearly erroneous.

The Fourth District also upheld the trial court's refusal to grant the Defendant's Motion to Disqualify. Personal bias as the Fourth District stated, must come from an extra-judicial source such as bias directed at a Defendant simply because of the category of their case. In this case, the trial Judge expressed the belief that the Appellate Court's prior rulings overturning a conviction were erroneous. The Fourth District noted that it may have been better for the trial Judge to refrain from saying those things; however, the remarks themselves were only evidence of judicial bias and not reasonably sufficient to create a well-grounded fear in the Defendant that he would not receive a fair trial.

Medical bills

Gulfstream Park Racing Association, Inc. v. Volin, 326 So. 3d 1124 (Fla. 4th DCA 2021)

The Fourth District held that the trial court erred in allowing the Plaintiff to introduce evidence of the gross amount of her medical bills rather than the discounted amount that Medicare paid in full satisfaction of the Plaintiff's medical expenses. The Fourth District reaffirmed its earlier decisions that when a provider charges for medical services/products and later accepts a lesser sum in full satisfaction by Medicare, the original charge becomes irrelevant because it does not tend to prove that the Claimant has suffered any loss by reason of the charge. They also certified the following question of great public importance to the Florida Supreme Court:

> DOES THE HOLDING IN *JOERG v. STATE FARM MUTUAL AUTOMOBILE INSUANCE COMPANY*, 176 So. 3d 1247 (Fla. 2015), PROHIBITING THE INTRODUCTION OF EVIDENCE OF MEDICARE BENEFITS IN A PERSONAL INJURY CASE FOR PURPOSES OF A JURY'S CONSIDERATION OF FUTURE MEDICAL EXPENSES ALSO APPLY TO PAST MEDICAL EXPENSES?

Medical issues

Parsons v. Culp, 328 So. 3d 341 (Fla. 2d DCA 2021)

The Defendants' dog ran towards the Plaintiffs' dog and caused the leash from the Plaintiffs' dog to wrap around the Plaintiff's ankles. As a result, she fell and suffered multiple fractures. The Plaintiff sued the Defendants based upon Florida

Statute §767.01 which renders owners of dogs liable for damage done by their dogs or person. The jury awarded the Plaintiff $1,000,000. The Defendants sought to avoid liability for the dog's actions by blaming the Plaintiff herself, as well as the manufacturer/seller of their dog's collar which had broken. As for the comparative fault of the Plaintiff, the court noted that Florida Statute §767.01 is a strict liability statute but still requires an affirmative or aggressive act by the dog. The court also discussed Florida Statute §767.04 which requires an actual dog bite (which did not take place here). The Second District noted that these two statutory provisions had become intermingled in the common law, and it further noted that comparative negligence was added to §767.04 and ultimately concluded that it was required to read a comparative default defense into Florida Statute §767.01. The Second District then noted that if the legislature wanted to include negligence of a third party as a statutory defense to a dog related injury claim, it could do so. As a result, the Second District concluded that comparative fault applied based on §767.04 even though the case did not involve an actual dog bite but found that *Fabre* did not, thereby precluding the defendants from introducing the alleged fault of the non-party manufacturer/retailer.

Lastly, the Second District once again ruled that the trial court should not admit evidence of the full amount of past medical bills when Medicare has paid these bills. Instead, it ruled that the trial court should only introduce the reduced amount.

Mention of insurance

Winters v. Harper, 322 So. 3d 192 (Fla. 1st DCA 2021)

During trial, there were two references to automobile insurance in the course of a four-day trial. The First District held that these references did not require a new trial. First, the Plaintiff testified that following the accident, she sought information from the Defendant so "that I'll be able to report to my insurance." A request by the Defendant for a curative instruction was denied and the District Court agreed that this testimony could have served to turn the jury's sympathy against her efforts at recovery.

The second mention of insurance occurred during the cross-examination of the teenage driver of the Defendant's car when the Plaintiff's lawyer asked "to be clear, sir, other than your mother's insurance- - I'm sorry, other than your mother's phone number - -." The Defendant objected and moved for a mistrial. The trial court reserved on the mistrial but granted Defendant's request for curative instruction. The First District stated that either the Plaintiff's testimony about her own insurance nor the unanswered and misstated question to Defendant about his mother's

insurance amounted to actual evidence of the Defendant's auto insurance coverage. Further, to the extent that even a single, fleeting suggestion that the Defendants had auto insurance could still be considered problematic, the trial court acted within the proper bounds of its discretion when it sustained the Defendant's objection, determined that the mention by the Plaintiff's lawyer of insurance was inadvertent and promptly gave curative instructions suggested by the Defendant.

New trial

Hamblen v. Pilot Travel Centers, 312 So. 3d 218 (Fla. 1st DCA 2021)

Samantha Hamblen died in a car crash on a highway next to a travel center owner by Pilot. Her estate sued the Defendant under the wrongful death act and awarded Stephen Hamblen, the only statutory survivor $200,000 per year for 25 years for his mental pain and suffering. The $5,000,000 verdict was then reduced by the comparative negligence of non-parties. Pilot Travel timely moved for a new trial and while the motion was pending, Stephen Hamblen died. The trial court later denied the Defendant's Motion for a New Trial. The Defendant then moved for relief from judgment arguing the award to Stephen Hamblen for mental pain and suffering should be reduced to zero dollars.

Florida Statute §768.24 states that "a survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his or her death." Because there was no claim for lost support and services, the Defendant argued the recovery for pain and suffering should be vacated. The dispute in this case turns on when the final judgement occurred. The Defendant argued that because its Motion for New Trial was pending when Stephen Hamblen died, the judgement was not yet final.

The estate argued that the trial court should interpret the final judgment in the context of abatement law and conclude that it occurred before his death. The trial court found the Defendant's argument more persuasive and reduced the judgment. The First District affirmed the trial court pointing to its precedent which states that a final judgment does not occur until a Motion for Rehearing has been disposed of under Rule 1.540(b). They then held that the same is true of motions for new trial.

McKinney v. Graham, 313 So. 3d 867 (Fla. 5th DCA 2021)

Graham was properly stopped when he was struck from behind by McKinney. Because McKinney was intoxicated at the time of the accident, Plaintiff sought punitive damages against him. Defendant stipulated that if the jury awarded compensatory damages to Graham, that Plaintiff would also be entitled to punitive damages.

The Defendant then moved to bifurcate the trial and exclude evidence of McKinney's intoxication during the compensatory damage phase of the trial at which the jury would determine whether the accident caused Graham's injuries and, if so, the extent of those injuries. The trial court agreed to bifurcate the trial but declined to exclude evidence of intoxication in the compensatory phase.

The Fifth District reversed holding that the trial court erred in allowing the Plaintiff to introduce evidence of Defendant's intoxication during the compensatory phase of the bifurcated trial despite the Defendant's pre-trial concession as to both liability and entitlement to punitive damages. The Fifth District also held that, on remand, the Defendant should be allowed to present additional portions of the deposition of Plaintiff's expert where the reason for the Defendant's untimely counter-designation of deposition testimony was because of the Plaintiff waiting until the day before trial to make his initial designation of testimony from the expert's deposition.

In this case, the Plaintiff's expert had socialized with Plaintiff's counsel and had been a groomsman in his wedding. The Appellate Court held that the defense counsel should be allowed to inquire into the extent of the personal relationship between the Plaintiff's expert and the Plaintiff's counsel because if counsel elects to retain personal friends as experts, that relationship is relevant to the issue of bias.

Lively v. Grandhige, 313 So. 3d 917 (Fla. 2d DCA 2021)

The jury returned a verdict in favor of the Defendants. Thereafter, the Plaintiff timely moved for a new trial arguing that the verdict was against the manifest weight of the evidence and that a new trial was required to avoid a miscarriage of justice. After a hearing on the Motion, the trial court announced its rulings in open court making both factual findings and legal conclusions. An order was subsequently rendered denying the Motion for New Trial referencing the trial court's findings announced at the hearing and attached the transcript of the hearing. The Second

District reversed because the Order Denying the Motion for New Trial, including the trial court's oral pronouncement regarding the admissibility of certain evidence under *Frye* which was incorporated into the Order Denying the Motion for New Trial, did not reflect that the trial court applied the correct legal standard which was to determine whether the verdict was against the manifest weight of the evidence.

Dayes v. Werner Enterprises, Inc., 314 So. 3d 178 (Fla. 3d DCA 2021)

The Third District reversed the trial court and granted a new trial. In this case, the decedent was killed when a tractor-trailer backed up over him. One of the issues in the case is whether the Defendant driver honked his horn before backing up and, if he did, why the decedent did not hear the horn and move to a safe position.

At trial, the trial court admitted the deposition of a police detective who testified that another officer told him that the decedent had an ear bud in his ear when lying on the ground after the accident. The testifying detective did not see the ear bud himself. As such, the testimony constituted inadmissible hearsay and, under the facts of the case, the error was not harmless, thus requiring a new trial.

Additionally, although the district court did not reverse on this point, it noted that the trial "got off to a rocky start" when Defense counsel asked the jury during jury selection "Could you imagine how you'd feel if somebody told you that you killed someone and you don't think it's your fault? Do you think there is pain and suffering on both sides of this equation?" The trial court sustained an objection but denied a mistrial.

The Defendants returned to this theme in their opening and stated "Mr. Minott...lives this day every day. Particularly on Sundays because he remembers having conversations with Mr. Dayes about watching football…and so it particularly hits him on Sundays…we're going to ask you to avoid making this tragedy worse…". The trial court again denied a mistrial.

Florida Peninsula Insurance Company v. Nolasco, 318 So. 3d 584 (Fla. 3d DCA 2021)

Plaintiff's comments in closing argument which referred to opposing counsel and their expert witnesses as liars, as well as making inflammatory, prejudicial, and sexist comments about defense counsel constituted fundamental errors such that

even though the comments were non-objected to, they were so highly prejudicial to impair the fair consideration and determination of the case by the jury. As such, the cause was remanded for a new trial.

Turner v. Gamiz, 327 So. 3d 1253 (Fla. 1st DCA 2021)

The First District reversed and found that the trial court abused its discretion by failing to give a jury instruction on aggravation of a pre-existing condition because the record did not establish that this was an inaccurate statement of the law. Further, the facts established at trial supported the instruction despite the Plaintiff's testimony that she did not suffer migraines before the accident; and, under the circumstances, the failure to give the instruction might have reasonably mislead the jury. As such, the case was remanded for a new trial on damages.

Callari v. Winkeljohn, 329 So. 3d 795 (Fla. 3d DCA 2021)

This case arises from an automobile accident which occurred when Callari crossed over the center lane and struck the Plaintiff's vehicle causing it to flip over. After filing suit, the Plaintiff later amended her Complaint to add a claim for punitive damages based upon allegations that Callari was under the influence of heroin when the accident occurred. Before trial, the parties were ordered to provide a list of their witnesses and a summary of expected expert testimony. Callari filed an expert disclosure for a CPA who was to testify as to "the Plaintiff's economic damages." On January 7, 2020, the trial court notified the parties that trial was scheduled for the week of January 21. Later that day, Callari filed a supplemental expert disclosure stating that his economist would "testify regarding Mr. Callari's net worth and the amount of money he needs to sustain himself. She will also testify as to punitive damages that would bankrupt/economically castigate Mr. Callari."

The Plaintiff filed an emergency Motion to Strike the untimely disclosure and the trial court entered an order limiting the economist's testimony to economic damages. The order did not address whether the economist's testimony of punitive damages or net worth would prejudice the Plaintiff. The trial was ultimately set for February 24 and Callari moved for reconsideration of the order limiting the economist's testimony. The trial court denied the Defendant's motion concluding that the jury could figure out his net worth without the expert testimony.

At trial, Callari testified regarding his limited financial resources, but the jury was provided with very little information to assess his net worth or ability to pay punitive damages. Callari never called his economist as a witness. The jury returned a verdict in favor of the Plaintiff in the amount of $4,662,572 of which $1,000,000 was a punitive award. The trial court applied a collateral source set-off and entered final judgment in the amount of $4,561,097. The Third District reversed noting that the trial court failed to analyze the *Binger* factors before exercising its discretion to admit or exclude late disclosed witness testimony. Because the trial court failed to make any findings of prejudice or to analyze the *Binger* factors in any way, the entire judgment was reversed.

Demoura v. Travelers Home and Marine Insurance Company, 329 So. 3d 799 (Fla. 5th DCA 2021)

The Fifth District reversed for a new trial finding that the trial court reversibly erred when it prevented the Plaintiff from publishing to the jury, the deposition testimony of the corporate representative of Travelers pursuant to Florida Rule of Civil Procedure 1.330(a)(2).

Fannin v. Hunter, 46 FLWD 2100 (Fla. 1st DCA 9/22/21)

The Plaintiff and his wife agreed to watch a friend's dog for a few days. They had done so in the past without an issue. The couple also owned two dogs. The Plaintiff testified that one night while watching his friend's dog, he turned his back, and the dog ran behind him and knocked him down rendering him unconscious. Because his back was turned; however, the Plaintiff did not see that the dog was running towards him and after he regained consciousness, the Plaintiff made his way back to the house and advised his wife of his fall. There was conflicting testimony regarding the details of the incident. Both the Plaintiff and the wife testified that the friend's dog was the only dog outside at the time of the incident; that their dogs were in crates at the time; and that they did not allow their dogs to go outside with their friend's dog. However, the Plaintiff's wife testified that the Plaintiff informed her that the incident had occurred while he had left the "dogs" outside and the medical reports indicated that one of the Plaintiffs' dogs caused the injury. There was also conflicting testimony about the day following the incident and whether the friend's dog was on a leash or not when he went home and whether the Plaintiffs' dogs were allowed outside with the friend's dog when he was not on a leash. The jury found for the Defendant.

The Plaintiffs then successfully moved to set aside the verdict for entry of a directed verdict. The District Court admonished the trial court and stated that motions for directed verdict must be considered with extreme caution because the granting thereof amounts to a holding that the non-moving party's case was devoid of probative evidence. Under Florida Statute §766.01, dog owners are strictly liable for any damage done by their dogs to a person. The directed verdict in this case could only be sustained on appeal that there was absolutely no evidence rebutting the fact that the friend's dog caused the incident. Because the record contained conflicting evidence, the directed verdict was improper. In this case, the trial court not only granted a directed verdict but also a new trial. The Appellate Court pointed out that a trial court cannot simultaneously grant both. At most, the trial court may grant one and alternatively grant the other on the express condition that the latter only become effective if the former is reversed on appeal. Here the trial court's order expressly granted a new trial with respect to damages but not as an alternative to the directed verdict on the issue of liability. Thus, it appears that the trial court only meant to grant a new trial on damages only if the directed verdict on liability was upheld. Because the trial court erred in granting the directed verdict, the order granting a new trial had to also be reversed.

North Lauderdale Supermarket, Inc. v. Puentes, 47 FLWD 44 (Fla. 4th DCA 12/22/21)

The Plaintiff fell on an oily substance and sued the Defendant. The Defendant objected to the non-modified use of the standard jury instruction 401.20(a) arguing that the instruction was inconsistent with the current premises liability law and Florida Statute §768.0755 and further argued that the negligent maintenance language needed to be removed or revised before the instruction would be given to the jury.

The Defendant argued that, in order to be consistent with the statute, the instruction had to be modified to focus on whether the Defendant negligently failed to correct the dangerous condition about which the Defendant knew or should have known in the use of reasonable care, or whether it failed to warn the Claimant of a dangerous condition about which it had or should have had greater knowledge of than the Plaintiff. The Plaintiff argued that the standard jury instruction was appropriate, and the trial court agreed.

The Fourth District reversed and noted that Florida Statute §768.0755 differed from its predecessor statute §768.0710 because it did not allow for liability based

solely on the business establishment's general failure to maintain the premises. Instead, Florida Statute §768.0755 required the Plaintiff to prove that the business establishment had actual or constructive knowledge of the dangerous condition before liability could be found.

While the standard jury instructions were modified with a note to reflect the statutory change, the instruction itself was not. While the Defendant's Motion for New Trial was pending before the trial court, the Florida Supreme Court approved the committee's recommended amendment of instruction 401.20(a) where the court noted it did not foreclose either party from requesting additional and alternative instructions, or to contest the legal correctness of the instructions; specifically instruction 401.20(a). Because the instruction was incompatible with the law governing post-July 1, 2010 slip and falls caused by transitory foreign substances in a business establishment, the Fourth District found that the instruction should not have been given without modification and reversed for a new trial.

Remittitur

Royal Caribbean Cruises, Ltd. v. Spearman, 320 So. 3d 276 (Fla. 3d DCA 2021)

Following a jury verdict for over $20,000,000 in favor of Spearman on her claims for Jones Act negligence and unseaworthiness, Royal Caribbean appealed. The Plaintiff presented evidence, requested jury instructions and argued on opening and closing that Royal Caribbean was negligent and/or provided an unseaworthy ship based upon four distinct theories of liability: (1) the door which crushed the crew members hand could have been designed to eliminate the "pinch point;" (2) Royal Caribbean failed to train the ship's crew members on how to avoid the pinch point; (3) the door lacked a warning sign or sticker regarding the pinch point; and, (4) the other crew member involved in the incident was negligent when she improperly overrode bridge control during the safety drill in which the injury occurred.

On appeal, the Third District found that the trial court abused its discretion by allowing the Plaintiff's engineer to testify regarding a computer assisted drawing prototype of a door that would have been a safer design than the door that caused the Plaintiff's injury where the testimony did not satisfy the *Daubert* standard. Specifically, it found that the Plaintiff's expert testimony did not meet the reliability factors set forth in *Daubert.* *Daubert* sets forth a list of five factors a lower court may consider to determine whether the expert's testimony is reliable: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or

potential rate of error of the theory or technique; (4) the existence and maintenance of standards controlling the theory or technique's operation; and (5) whether the theory or technique has attracted wide spread acceptance within a relevant scientific community. These factors do not constitute a definitive check list or test and an expert's opinion must be based upon knowledge and not merely subjective belief or unsupported speculation. That said, rejection of expert testimony under *Daubert* is the exception rather than the rule. In this case, the Third District noted that there was not a single door utilized on any ocean-going vessel with a cutout similar to the cutout proposed by the Plaintiff's expert. Nevertheless, the Third District did not reverse on this issue because of the two-issue rule. Here the Plaintiff presented four theories of liability and two causes of action and Royal Caribbean agreed to a general verdict form which required the jury to resolve the two causes of action but did not require the jury to indicate which alternate theory was resolved in favor of which party. The Third District did note; however, that the trial court erred by failing to consider the factors set forth in Florida Statute §768.74(5) when ruling on the Defendant's Motion for Remittitur and as such, remanded the cause of action to the trial court to conduct a new hearing on the Motion for Remittitur.

Baptist Health Medical Group Orthopedics, LLC v. Fernandez, 328 So. 3d 1092 (Fla. 3d DCA 2021)

Following a verdict in favor of the Plaintiffs, the Defendants filed a Motion for Remittitur. The trial court only considered the quality of the marriage between the decedent and her surviving spouse. The Third District noted that this had some relevance to the injury suffered; however, the trial court gave no consideration to the remaining statutory criteria. Accordingly, pursuant to precedent, this was a procedural oversight which constituted reversible error and therefore the cause was remanded for the trial court's reconsideration of the Motion for Remittitur.

Set-off

Ellison v. Willoughby, 326 So. 3d 214 (Fla. 2d DCA 2021)

The Second District granted rehearing and reaffirmed its prior rulings that (1) the bad faith settlement the Plaintiff reached with his uninsured motorist carrier for almost $4,000,000 more than its policy limits could not constitute a "set-off" under §768.041(2) against the Plaintiff's excess verdict against a Co-Defendant. This statute presupposes the existence of multiple Defendants being jointly and severally liable for the same damages and the Plaintiff's settlement funds from the UM carrier

applied only to the claims he asserted for breach of contract for failure to pay uninsured motorist benefits not asserted against the Co-Defendant. Secondly, there was no set-off under §768.76(1) because the bad faith settlement proceeds did not fall within the statutory definition of "collateral source," as set forth in the statute, because the subrogation or reimbursement rights still existed, and UM payments are not collateral sources to be deducted from jury verdicts. Third, the Settlement Agreement recited that $1,735,000 was payable to the Plaintiff for his damages of personal injury or sickness within the meaning of §104(a)(2) of the Internal Revenue Code. To the extent that those payments were viewed as compensation for past medical expenses and future medical expenses, they also could not be collateral sources as defined by §768.76(2)(a). Likewise, the $2,265,000 payment to the trust account of Plaintiff's counsel did not fall within that definition either. Where there may have been some portion of the proceeds in an amount less than the amount attributed to past medical expenses, that amount fell within the definitional scope of §409.910(6) (involving Medicaid liens) and had no bearing on whether the proceeds met the definitional criteria of §768.76(2)(a) which provides a narrower and more specific definition of benefits and sources than does §409.910(6). Because this was a case of first impression, the District Court certified a question of great public importance asking the Florida Supreme Court to answer the questions about whether the settlement payment made by an uninsured motorist carrier to settle a first party bad-faith claim can be subject to a set-off under §768.041(2) or is a collateral source within the meaning of §768.76.