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TESTIMONY THAT A SUBSEQUENT TREATING PHYSICIAN WOULD NOT HAVE TREATED THE PLAINTIFF DIFFERENTLY HAD THE DEFENDANT PHYSICIAN ACTED WITHIN THE APPLICABLE STANDARD OF CARE, IS BOTH IRRELEVANT AND INADMISSIBLE, AND WILL NOT INSULATE THE DEFENDANT PHYSICIAN FROM LIABILITY FOR HIS OR HER OWN NEGLIGENCE

Saunders v. Dickens, 39 Fla. L. Weekly S494 (Fla. July 10, 2014):

The decedent saw the defendant neurologist stating that he was experiencing back pain, leg pain and unsteadiness on his feet. Plaintiff also informed doctor that he was experiencing cramps in his hands and feet as well as numbness in his hands and feet. The doctor concluded that because the plaintiff displayed normal reflexes, the numbness and tingling in his hands was due to peripheral neuropathy due to diabetes.

The doctor did not perform a test to confirm this purported neuropathy. Instead, he recommended the decedent be admitted to the hospital for a brain and lumbar MRI. After receiving lumbar results, the defendant doctor asked a subsequent neurosurgeon for consultation. The neurosurgeon performed a neurological examination and then performed lumbar surgery. The feeling was he would later have cervical surgery.

The decedent's condition continued to deteriorate after he had a lumbar surgery. He never had cervical surgery, became a quadriplegic, and ultimately died.

The plaintiff settled with the neurosurgeon and went to trial against the original neurologist only. The plaintiff presented expert testimony that the defendant doctor had breached the standard of care by not recognizing the plaintiff's symptoms could be related to cervical cord compression. Another expert testified that had the surgery been performed in the cervical cord compression area in July 2003, plaintiff more likely than not would not have become quadriplegic.

The defendant's expert suggested that it was reasonable for the neurosurgeon to do surgery on the lumbar spine originally, and also introduced the deposition of the neurosurgeon which had been taken prior to the settlement between him and the plaintiff. The neurosurgeon stated that even if he had possessed the results of a cervical MRI, he would not have operated on the neck because the plaintiff had not yet experienced problems with his upper extremities.

At the close of the evidence the defendant moved for a directed verdict, contending the deposition of the neurosurgeon rendered it impossible for the plaintiff to establish that the decedent's injury had been caused by any negligence by defendant. The trial court denied the motion.

Subsequently, the defense lawyer contended during closing that the plaintiff had not established causation. The defense lawyer asserted that the neurosurgeon testified that even if the defendant neurologist had ordered the film, he would not have done anything differently. The defense lawyer asked the jury then how could it be that if the doctor would not have done anything differently, that the defendant neurologist could be responsible.

The plaintiff's lawyer sought a curative instruction that *Fabre* is an affirmative defense, and that the defendant bears the burden of proof. The plaintiff, as such, did not have to prove that the nonparty was never negligent. The trial court declined to give it.

Telling the jury that the original defendant could be held not to be liable because the subsequent doctor said he would not have done anything differently was a misstatement of law. The plaintiff was required to only establish that the doctor's care fell below that of a reasonably prudent physician, and that more likely than not, adequate care by the defendant would have prevented the plaintiff's devastating injuries. As a result, the trial court erred in permitting the defense attorney to mislead the jury during closing.

Also, because the defense erroneously informed the jury that the plaintiff had not proven causation based upon the neurosurgeon's testimony in his deposition at a time he was in an adversarial relationship with the plaintiff, the error was harmful. The jury could never have learned about the settlement between the plaintiff and the neurosurgeon. The defendant improperly shifted the burden of proof.

The Supreme Court concluded that the testimony that the subsequent treating physician would not have treated the plaintiff differently was both irrelevant and inadmissible, and could not insulate the defendant physician from liability for his own negligence. The burden on the plaintiff with regard to causation is only to establish that adequate care by the physician more likely than not would have avoided injury.

CLAIM THAT PLAINTIFF'S DOCTOR PERFORMED UNNECESSARY SURGERY WAS NOT BARRED BY *STUART V. HERTZ* OR *DUNGAN*--EVEN ASSUMING ISSUE WERE PRESERVED (WHICH WAS NOT), EXPERT'S TESTIMONY WENT TO THE CAUSAL LINK BETWEEN THE SURGERIES AND NOT TO THE THEORY THAT THE SURGERIES WORSENED THE PLAINTIFF'S CONDITION--NO ABUSE OF DISCRETION IN DENYING MOTION FOR NEW TRIAL ON GROUND THAT VERDICT FINDING NO NEGLIGENCE WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE

Boyles v. A and G Concrete Pools, 39 Fla. L. Weekly D1374 (Fla. 4th DCA July 2, 2014):

The plaintiff was injured in this accident in 2008, but had been involved in an accident in 2001, and had suffered four herniated discs as a result. When his pain did not improve from the accident, he was referred to Dr. Katzman. He never told the doctor he had any previous injuries to his neck. When the doctor later discovered that the plaintiff had experienced pain back 2001, the plaintiff maintained that the problems had been resolved at least two years before the accident.

Conservative treatment did not improve the plaintiff's symptoms, so Dr. Katzman performed a lumbar procedure November 2008 and a cervical procedure in January 2009. The doctor related both procedures to the injuries sustained in the 2008 accident. The lumbar procedure was successful, but the cervical one was not.

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

Contrary to his representation to the doctors, the evidence showed that plaintiff had been injured in two prior accidents, and had continued to encounter back and neck pain as a result.

The CME doctor testified that he would not prescribe surgery in this case because plaintiff did not show neurological deficit.

Two years before trial, plaintiff had filed a multiple paragraph, boilerplate motion in limine which among other things, sought to exclude testimony regarding unnecessary or unreasonable surgeries. The Fourth District admonished against the use of these kinds of motions, and was critical that the motion was generic, and filed before most evidence was even in the record, as well as because it was heard so long before the trial.

As it also turned out, plaintiff's counsel had not objected to the testimony of the CME doctor when he testified, leading the court to conclude the issue was not preserved.

Still, the court ruled, that even if the lawyer had preserved the objection, the testimony of the CME doctor in this case was distinguishable from the testimony in *Dungan*, because it did not involve an expert trying to attribute subsequent malpractice or trying to avoid subsequent malpractice, but rather, the court said, this testimony had to do with the causal link between the surgeries and the contested accident.

Also, in the cases where the testimony was ruled to be inadmissible, the claim about inappropriate or unnecessary surgery was argued to have worsened the plaintiff's condition, and that was the main point of the attack.

Here, even according to plaintiff's own witnesses, the surgeries ultimately made the plaintiff's condition better. Thus, plaintiff did not claim his condition was worsened by the surgeries. Instead, the doctor was asked and testified that the surgeries did not result from the 2008 accident. Even if the order could have been understood to bar this causation type testimony, the court explained that it would have been error to grant the motion on those grounds.

The plaintiff also asserted that the defense verdict was against the manifest weight of the evidence. However, because the plaintiff had been less than candid with his doctors, having failed to tell them of his prior accidents, and minimizing his prior injuries and complaints when the medical records showed continuous complaints over the years, the court held there was evidence in the record to support the verdict.

NO ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION TO TRANSFER VENUE AFTER THE ONLY LOCAL DEFENDANT WAS DROPPED FROM THE CASE--DEFENDANTS FAILED TO SHOW EITHER SUBSTANTIAL INCONVENIENCE OR UNDUE EXPENSE REQUIRED TO GET A CHANGE OF VENUE FOR THE CONVENIENCE OF THE PARTIES OR WITNESSES

R.J. Reynolds v. Mooney, 39 Fla. L. Weekly D1386 (Fla. 3rd DCA July 2, 2014).

ACTION AGAINST BANK BY PLAINTIFF WHO SUFFERED PERSONAL INJURIES AT THE HANDS OF THE POLICE WHEN THE BANK MISTAKENLY REPORTED THE PLAINTIFF TO BE A BANK ROBBER UNAVAILING – A PERSON CANNOT BE HELD LIABLE FOR SIMPLE NEGLIGENCE FOR CONTACTING THE POLICE TO REPORT SUSPECTED CRIMINAL ACTIVITY

Bank of America Corporation v. Valladares, 39 Fla. L. Weekly D1390 (Fla. 3rd DCA July 12, 2014):

A bank teller mistook the plaintiff for a bank robber (not sure why, but case doesn't say) and called the police. The police responded to the scene, and injured the plaintiff while apprehending him.

The plaintiff sued the bank for his personal injuries, asserting claims for battery, false imprisonment and negligence. The jury awarded him over $3 million for his injuries (my guess is the evidence of him being a bank robber wasn't that great after all).

On appeal, the bank asserted that it could not be responsible for simple negligence under the circumstances. The court reviewed law to determine under what circumstances a person who mistakenly reports a possible crime can be liable to the individual reported, if the individual turns out to be innocent and is injured.

Florida law in many contexts recognizes that a person who reports a suspected crime to the police cannot be held liable if the report is made in good faith. In other words, liability only can be found if the person reporting acts maliciously.

Even though the general allegations of the complaint included allegations rising to the level of bad faith/gross misconduct, the court found that because those allegations were technically incorporated by reference into the specific counts, the plaintiff's complaint proceeded to trial based on simple negligence only. In light of this theory not being enough for the plaintiff to prevail upon under the circumstances--one he chose--he was not entitled to a new trial based on a new theory.

DEFENSE COUNSEL DID NOT IMPROPERLY REFERENCE PHOTOGRAPHS OUTSIDE THE RECORD BY COMMENTING ON THE FAILURE TO PRODUCE ADDITIONAL PHOTOS, WHERE THE PLAINTIFF'S WITNESS TESTIFIED TO THE EXISTENCE OF A LOT MORE PHOTOGRAPHS THAN THE PLAINTIFF INTRODUCED INTO EVIDENCE, AND PLAINTIFF'S COUNSEL NEVER VOICED AN OBJECTION WHEN WITNESS MADE HER SPONTANEOUS STATEMENT REGARDING THE EXTRA PHOTOGRAPHS OR WHEN DEFENSE COUNSEL ASKED CLARIFYING QUESTION--ISOLATED REFERENCE TO LOTTERY TICKET WAS ALSO NOT ENOUGH TO REQUIRE A NEW TRIAL

Hang Thu Hguyen d/b/a Millenia Day Spa v. Wigley, 39 Fla. L. Weekly D1398 (Fla. 5th DCA July 3, 2014):

Plaintiff sued the salon for injuries she sustained while receiving a paraffin wax manicure. At trial, the plaintiff called a witness who testified that shortly after placing her hands inside the wax treatment mittens, the plaintiff started complaining that her fingers were burning.

After that, the plaintiff's fingernails turned black and started ripping back, tearing off like blisters. Plaintiff explained that her nails remained in this condition for nine months.

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

During closing, defense counsel argued that the witness admitted she took the photographs of the plaintiffs fingertips nails. Counsel then asked the jury rhetorically, why Plaintiff did not present the other photos. Plaintiff's counsel did object and was sustained.

Also, during closing, defense counsel argued that plaintiff filed a lawsuit and that this was a courtroom and not a lottery. Plaintiff's counsel immediately objected, and the objection was sustained, with the jury being instructed to disregard the comment. No motion for mistrial was made.

The jury returned a verdict attributing 20% of the fault to the defendant and 80% to the plaintiff.

While the trial court granted a new trial, the appellate court reversed. It first found that the plaintiff's failure to object when the witness testified regarding the other photos waived the right to complain. Additionally, the court also found that the isolated reference to the lottery was not enough to damage the public's interest in the system of justice requiring a new trial.

It seems like because there was no motion for mistrial made, the court found the issue unpreserved, and went to a fundamental error test, even though plaintiffs did immediately object to the statement.

Kind of a big deal for the trial court to reverse the grant of a new trial, if you ask me.

THE TRIAL COURT ERRED BY CONCLUDING THAT INSURER'S CLAIM FILE LOST ITS QUALIFIED WORK PRODUCT PRIVILEGE, BECAUSE THE CLAIM WAS CLOSED WITH NO LITIGATION HAVING MATERIALIZED

State Farm v. Marascuillo, 39 Fla. L. Weekly D1401 (Fla. 5th DCA July 3, 2014):

While the trial court correctly concluded that there could be some documents in the 2004 claim file that were relevant to the issues in the current litigation that could be discoverable under the good cause or exceptional circumstances exception, the insurer was deprived from the essential requirements of law, when the court ordered production of the entire claim file, without first conducting an in camera inspection to determine whether any of the relevant documents would meet the standard for production of otherwise privileged product documents.

TRIAL COURT ERRED IN AWARDING THE PREVAILING PARTY EXPERT WITNESS COSTS, WHEN THAT PARTY FAILED TO PRESENT EVIDENCE SUPPORTING ITS REQUEST-ATTORNEY WHO TESTIFIED AS TO REASONABLENESS OF ATTORNEY'S FEES PRESENTED NO TESTIMONY REGARDING EXPERT COSTS, AND IN ANY EVENT, WOULD NOT BE COMPETENT TO TESTIFY AS TO THE REASONABLENESS OF THE COSTS, BECAUSE HE WAS NOT A QUALIFIED EXPERT IN THE SAME FIELD

Oak Square Joint Venture v. U.S. Bank National, 39 Fla. L. Weekly D1409 (Fla. 1st DCA July 7, 2014):

The prevailing party's burden at an evidentiary costs hearing to recover an expert's witness fees, is to present testimony concerning the necessity in the reasonableness of the fee. The moving burden is to present specific evidence of reasonableness and necessity of expert witness costs and evidentiary hearing.

Here, the plaintiff only presented testimony from an attorney hired to testify to the reasonableness of the fees. Not only did the witness fail to present testimony regarding expert witness costs, he was not competent to testify as expert costs because he was not a qualified expert in the same field. Without supporting evidence, the trial court erred in awarding such costs.