THE WEEK IN TORTS

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THIRD DISTRICT HOLDS *DAUBERT* STANDARD NOT ONLY OBLITERATES THE ADMISSIBILITY OF "PURE OPINION" TESTIMONY, IT ALSO APPLIES RETROACTIVELY

Perez v. Bellsouth, 39 Fla. L. Weekly D865 (Fla. 3rd DCA April 23, 2014):

The case arose out of a claim against Bellsouth. The baby of one of its employees suffered a significantly premature birth and numerous resulting surgeries and developmental deficits. Plaintiffs alleged the injuries were due to workplace stress created by Bellsouth, which refused to limit his mother's working hours, and provide the frequent bathroom breaks as her doctor prescribed.

Plaintiffs introduced the testimony of the plaintiffs' obstetrician as the only expert to tie the baby's premature birth to Bellsouth's conduct. During his testimony, the doctor admitted that he did not have any studies to support his finding that stress was a factor in determining the likelihood of a placental abruption, and that there was no literature to show such a correlation. Also, he did not know of anyone who had spoken at a conference regarding such a causation, and in his capacity as a professor at the University of Miami, he never spoke of the correlation between stress and placental abruption.

Instead, the doctor testified that in his 21 years of practice, he believed that a stress can cause a cardiac arrest causing your blood pressure to go up, and he is sure there may very well be a correlation between placental abruption and stress.

Before the Legislature's changes to expert witness admissibility in 2013, the court observed there were two ways to admit expert testimony: First, if an expert espoused a "new or novel" scientific theory, principle or discovery, the thing from which that deduction was made had to be sufficiently established to have gained general acceptance in the field pursuant to *Frye*. The second avenue occurred when the expert would give his or her "pure opinion" based on personal experience, observation and training (and the *Frye* test did not apply to that type of opinion).

However, the Third District in looking at the revisions to §90.702 where the Legislature changed Florida from a "*Frye*" jurisdiction to a "*Daubert*" jurisdiction, noted that *Daubert* not only applies to new or novel evidence, but to all expert testimony. The court further observed that expert testimony that might have otherwise qualified as pure opinion, was expressly prohibited by the Legislature.

The court made clear that the U.S. Supreme Court in *Daubert* wanted to be sure that the methodology used by experts--in other words the analytical technique by which the hypothesis is formulated and systematically tested through observation and experimentation--is reliable. General acceptance in the scientific community is simply not alone a sufficient basis for the admissibility of expert testimony any longer.

The court also ruled that the statute is procedural in nature and thus, "indisputably" applicable retroactively. It punctuated its decision by noting that the opinion that the plaintiffs' expert proffered was a "classic example of the common fallacy of assuming causality from temporal sequence." Ouch.

TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR EMPLOYER WHEN ISSUES OF FACT CALLED INTO QUESTION WHETHER THE EMPLOYER COULD BE RESPONSIBLE FOR THE EMPLOYEE'S *HUSBAND* WHO DROVE THE EMPLOYEE'S RENTED WORK VEHICLE

Adams v. Bell Partners, 39 Fla. L. Weekly D836 (Fla. 4th DCA April 23, 2014):

Plaintiffs were injured in an accident by a rental car paid for by an employer and authorized for its employee, but driven by the employee's husband. The trial court ruled that as a matter of law the employer could not be responsible for the husband's driving.

The defendant's employee traveled frequently for work. Her employer would either reimburse her for mileage, or pay for her to have a rental vehicle. Her employer never said she could use the rental car for purposes other than transportation to and from work (although she understood that). The employee testified that her supervisor did not object to her husband driving a rental car to Georgia to attend one of the defendant's employee's funerals, nor did he object to her husband driving, so that she could work in the car on another occasion.

The defendant's travel policy, however, prohibited personal use of the vehicles, and prohibited unauthorized drivers.

The court ruled that whether the defendant was vicariously liable for the husband's driving required a fact based inquiry of defendant's status as "bailee" of the vehicle. The analysis included questions of whether the husband's

driving constituted "conversion." The Fourth District concluded that the defendant could be liable for the use or misuse of the rental vehicle depending on how the jury weighed the remaining issues of the husband's alleged conversion, and those questions of fact precluded summary judgment.

On an additional note, the Fourth District touched upon F.R.C.P. 1.510(c). That rule requires summary judgment motions to state with particularity the grounds upon which they are based and the substantial matters of law to be argued, and also requires identification in the record of the matters to be relied upon. We should all be mindful of this rule, especially in light of this court's finding that the trial court erred in considering arguments that the defendant included in a memorandum filed only three days before the hearing.

A DEFENDANT'S PLEADINGS GET STRICKEN FOR FRAUD ON THE COURT AND THE COURT REVERSES

E.I. Dupont de Nemours v. Sidran, 39 Fla. L. Weekly D851 (Fla. 3rd DCA April 23, 2014):

This is a crazy and extremely lengthy case which at first seems like an injustice perpetrated by a defendant, and then ends up looking like a case thwarted by the unprofessional conduct of the plaintiff's lawyer.

The case began when the plaintiffs brought suit in **1992** against Dupont, after their use of Benlate in their commercial nursery caused damage to their plants.

As part of the Benlate litigation, Dupont had set up a document depository containing millions of pages of documents. The depository was used by Dupont's lawyers to facilitate discovery, and was made available to opposing counsel for investigation and use as well.

The plaintiffs had their case tried twice to verdict, and twice were reversed on appeal (one was a plaintiffs' verdict, one was a defense verdict). After the second trial, the plaintiffs' case was turned over from their lawyer to his son, Robert Ratiner. At that point, the case veered from a negligence products liability case, to one against the defendant for fraud on the court, based on the plaintiffs' claim that Dupont's Benlate depository and collection were shams, created and manipulated by Dupont for the purpose of presenting an "appearance" of being responsive to Benlate discovery, when in reality it was not. The plaintiffs claimed that Dupont was engaged in an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate Benlate matters by unfairly restricting plaintiffs' ability to gather evidence to prove their claims.

The case goes on to detail a battle where the court suggests that plaintiffs overstated Dupont's lack of responsiveness, and overstated that it caught Dupont in misrepresentations.

The case also details how Dupont rebelled against plaintiffs' unending discovery requests, and how Dupont had enumerated many of plaintiffs' own misrepresentations to the court regarding its responsiveness, etc. Plaintiffs' counsel then sought sanctions against Dupont's counsel for falsely claiming that plaintiffs' counsel had brandished a gun during settlement negotiations in an unrelated case and commented to a lawyer that "as a Jew you must know what it's like to have a gun pointed at you." (This was only one in a long line of comments, many of the others much too vulgar and obscene to repeat in this PG publication). Ultimately, with this back and forth, the trial judge reported both attorneys to the Bar (the Bar found probable cause only against plaintiffs' attorney, and he was ultimately disciplined).

The bottom line in this rather sordid case, was that despite plaintiffs' ability to convince the trial court that Dupont had created a fraud on the court by its creation, use and representations concerning the document depository (Dupont's pleadings were stricken), the record **did not** support the finding that Dupont made the misrepresentation on which the trial court based its ruling, and **did not** demonstrate any willful intent on Dupont's part to mislead the trial court or opposing counsel. (It was also noteworthy to the Third District, that while plaintiffs' counsel was arguing about misrepresentations over the depository, there was no claim that Dupont failed to produce a single document that was necessary for plaintiffs to prove their claims, or that they were aware that any such documents could exist).

The court reversed the order finding fraud on the court, but represents a glimmer of encouragement that under the proper circumstances, courts will also strike defendants' pleadings for fraud on the court.

ERROR TO AWARD ATTORNEYS' FEES PURSUANT TO PROPOSAL FOR SETTLEMENT WHERE THE PROPOSAL DID NOT STATE THE AMOUNT AND TERMS ATTRIBUTABLE TO EACH DEFENDANT

Atfeh v. Gichimu, 39 Fla. L. Weekly D877 (Fla. 5th DCA April 25, 2014):

Defendant served $150,000 proposal for settlement on the plaintiffs but did not state the amount in terms attributable to each. At the time, Rule 1.442(c)(3) (2010) was in effect and did not yet provide the exception with respect to a party that is alleged to be solely vicariously liable. Thus, the proposal was invalid.

A MOTION FOR REHEARING/RECONSIDERATION DIRECTED AT DENIAL OF RELIEF FROM JUDGMENT IS UNAUTHORIZED, AND WILL NOT TOLL THE 30 DAY TIME LIMIT FOR FILING THE APPEAL

Helmich v. Wells Fargo, 39 Fla. L. Weekly D882 (Fla. 1st DCA April 25, 2014):

In this foreclosure action, the bank obtained a final judgment, and then the debtor filed a motion for relief from it. Days later, the court denied the motion for relief from the final judgment. The debtor subsequently filed a motion for rehearing.

Because that motion did not toll the time for filing the appeal, the appeal filed within 30 days of the denial of that second motion for rehearing was untimely.

MARY CARTER-STYLE AGREEMENT REQUIRING A SETTLING DEFENDANT TO REMAIN IN THE LITIGATION MUST BE DISCLOSED

Panama City-Bay County Airport v. Kellogg Brown, 39 Fla. L. Weekly D883 (Fla. 1st DCA April 25, 2014):

While the case facts are not material to our practice *per se*, it does mention Mary Carter-style agreements (those where a party plaintiff and a party defendant secretly agree to work together at trial to the detriment of a non-settling defendant).

The court reminded us that in *Dosdourian*, the Florida Supreme Court ruled to eliminate the sinister influence of these kinds of agreements, and the "sham of adversity" they present. It thus **outlawed the use of any agreement which requires the settling defendant to remain in the litigation, regardless of whether there is a specified financial incentive to do so**.

This is not to say, however, that *Dosdourian* validates the disclosure of settlement agreements in cases.