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AUTOMOTIVE ACCIDENT –
DIRECTED VERDICT ON PERMANENCY AFFIRMED UNDISPUTED MEDICAL EXPERT TESTIMONY – APPEAL WAIVED ON JURY INSTRUCTION AND VERDICT FORM WHEN NO OBJECTION RAISED AT TRIAL COURT

Wald v. Grainger, 36 Fla. L. Weekly S211 (Fla. Sup. Ct. May 19, 2011)

The Florida Supreme Court held the trial court properly directed a verdict on the issue of the permanency of plaintiff's injuries when plaintiff's expert medical testimony of permanency was undisputed. The defendant also waived any objection to the jury instructions on verdict form since no timely objection was raised.

Howard Wald, Jr., was injured in an automotive collision. The defendant admitted fault in the accident and the case went to trial to determine damages. Wald alleged injuries to his neck, right elbow and right thigh. Plaintiff's treating

physician testified the neck, back, elbow, and right thigh were caused by the accident and permanent in nature. The defendant's expert testified the neck and back injuries were not permanent but conceded the thigh injury was permanent and causally related to the accident.

Over the defense's objection, the trial court granted Wald's motion for a directed verdict, but only on the issue of the permanency of Wald's right leg injury. As to the other injuries, the jury was instructed to weigh, accept, or reject the opinions of either expert witness. However, there was no mention of the issue of permanency of the injuries in the jury instructions or the verdict form. The jury awarded Wald over $1 million in damages.

On appeal, the 1st DCA held the trial judge erroneously directed a verdict as to the permanency of Wald's right leg injury. The 1st DCA noted that a jury is free to reject the testimony of an expert witness as it does any other witness, even if it is unchallenged testimony. Further, the 1st DCA stated that the plaintiff did not claim the right thigh numbness caused permanent pain. The 1st DCA reversed the directed verdict on permanency, finding there was disputed testimony on the permanent nature of the neck and back injury and "ambivalent" testimony on the thigh injury's nature. The jury can reject the plaintiff's expert testimony and the trial court should have denied the directed verdict.

The Florida Supreme Court stated that determinations regarding the permanency of an injury are *generally* made by juries. The court reasoned it is proper to direct a verdict on the permanency of injuries when there is no reasonable inference to support a jury verdict for the defendant. Once a plaintiff has offered expert testimony regarding permanency, the burden switches to the defense to present countervailing testimony. The court reasoned that without countervailing testimony, a directed verdict is appropriate. Moreover, the court ruled that juries are not free to weigh, consider or reject undisputed medical evidence. There must be a reasonable basis in the evidence to base its rejection of expert testimony.

DENIAL OF DIRECTED VERDICT PROPER WHERE PLAINTIFF'S EXPERT CREATED JURY ISSUE ON CAUSATION – WAIVER OF LIABILITY AND CONTRACTUAL INDEMNIFICATION – PARENT'S AGREEMENT TO INDEMNIFY THIRD PARTY FOR THIRD PARTY'S NEGLIGENCE AGAINST CHILD IS VOID AND AGAINST PUBLIC POLICY

Claire's Boutiques, Inc. v. Locastro, 36 Fla. L. Weekly D1001 (Fla. 4th DCA May 11, 2011)

Amy Locastro took her daughter Alexis to get her ears pierced. Claire's required parents of minor customers to sign a disclosure form that included a release from liability, as well as an indemnity provision requiring the parent to indemnify Claire's for any claims by the minor. After her piercing, Alexis developed an ear infection in the cartilage of her ear that ultimately required hospitalization. Consequently, parts of her ear cartilage became disfigured.

The trial court denied Claire's motion for directed verdict on causation finding the testimony from plaintiff's expert as to causation sufficient to defeat the motion. Claire's was found liable for nearly $70,000. However, the trial court found the indemnity clause valid and entered a judgment against the mother for over $200,000, including defense costs, attorney's fees, and the judgment against Claire's.

The 4th DCA affirmed the trial court's denial of the directed verdict. The court noted there was sufficient evidence Claire's actions were a substantial factor in causing Alexis' injury. Citing the Ms. Locastro's and Alexis' testimony, as well as plaintiff's expert medical testimony, the court held the facts were not so unequivocal as to lend themselves to only one reasonable inference.

The 4th DCA found the parent's indemnification clause of a third party for the third party's own negligence to be a violation of public policy. The court held that pre-injury releases on behalf of a minor in tort actions resulting from injuries suffered in participating in a commercial activity were against public policy. ***See Kirton v. Fields***, 997 So. 2d 349 (Fla. 2008). Noting parents have a duty to protect their

children's best interest, the Locastro court held it would be against public policy to discourage parents from prosecuting the minor's claim due to the financial burden it would place on the family unit. To hold otherwise, the court reasoned, would be to undermine the parent-child relationship.

The Locastro court acknowledged F.S. § 744.301(3)(2010), which permits parents to execute releases against commercial activity providers under certain circumstances. The court, however, ruled that those circumstances did not include releasing the commercial provider from liability for its own negligence as was attempted by Claire's in their release.

The dissent argued that the majority incorrectly struck down the trial court's ruling indemnifying Claire's Boutiques $200,000. The dissent contended that although Florida courts generally disapprove of contracts indemnifying a party against its own negligence, the mother freely executed the indemnity agreement. As such, there was no precedential or legislative reason to reverse the trial court's finding.

TORTS – WAIVER OF LIABILITY – TYPOGRAPHICAL ERRORS ARE NOT SUFFICIENT TO INVALIDATE EXCULPATORY PROVISION WHERE INTENT IS CLEAR THROUGHOUT WAIVER – SUMMARY JUDGMENT PROPER

Hinley v. Florida Motorcycle Training, Inc., 36 Fla. L. Weekly D1031 (Fla. 1st DCA May 13, 2011)

Mary Hinley was injured while participating in a Florida Motorcycle Training, Inc. course. Prior to her injury, she signed a registration form containing a waiver releasing FMT from any liability arising from an accident occurring during a training course. She filed suit against FMT alleging several forms of negligence. She further claimed that the registration form was ambiguous and, in the alternative, was against public policy. FMT contended the registration form Hinley signed was unambiguous and released it from any liability stemming from the accident.

The trial court granted summary judgment and the 1st DCA affirmed. The 1st DCA reasoned the plain meaning of the exculpatory clause, though it had a typographical error in the heading, was clearly intended to relieve FMT of liability arising from an accident in a training course. The 1st DCA noted that as the error was not repeated elsewhere in the document, FMT's intent to reduce future liability was clear.

The 1st DCA also dismissed Hinley's contention that the exculpatory clause violated public policy. The court held Hinley failed to satisfy the three factors needed to hold the provision void. First, she failed to offer evidence FMT provided a service of great public importance. Second, the FMT course was not an essential service because it was not a prerequisite to obtaining a license. Lastly, Hinley could not establish that FMT wielded superior bargaining power.

RES JUDICATA – FEDERAL
CLAIMS INVOLVING STATE CLAIMS - TRIAL COURT ERRED IN DISMISSING COMPLAINT AS PLAINTIFF VOLUNTARILY WITHDREW ALL STATE LAW CLAIMS BEFORE THE FEDERAL COMPLAINT WAS DISMISSED WITH PREJUDICE

Anderson v. Vanguard Car Rental USA Inc., 36 Fla. L. Weekly D1019 (Fla. 4th DCA May 11, 2011)

Lennon Anderson filed a complaint against Vanguard in the United States District Court for the Southern District of Florida on August 11, 2005. The complaint and subsequent amended complaint were both dismissed without prejudice for failure to state a claim on which relief could be granted. On August 10, 2007, Anderson filed a second amended complaint, which contained three counts based on Florida law.

Concurrently, Anderson also filed a complaint in Broward County circuit court on July 6, 2007 based on the same facts as the federal complaint. In response, on August 31, 2007, Vanguard filed a motion to dismiss the complaint, or in the alternative, stay proceedings. Before the state court could rule on Vanguard's motion, Anderson voluntarily withdrew his state law claims from the federal case.

The federal court granted Vanguard's motion to dismiss with prejudice for failure to state a claim on which relief could be granted. The 11th Circuit Court of Appeals affirmed the trial court's ruling and the Supreme Court denied cert.

In November 2009, Vanguard filed a motion with the circuit court to lift the stay and dismiss Anderson's pending state action. Basing its decision on res judicata, the trial court granted Vanguard's motion to dismiss with prejudice. Res judicata, or claim preclusion, must meet four requirements when applied in federal court: 1) a final judgment on the merits; 2) rendered by a court of competent jurisdiction; 3) in a case with identical parties; and 4) on the same cause of action.

The 4th DCA held Anderson's state law claims were not procedurally barred based on res judicata, as the federal court never decided any of the state law claims on their merits. Once Anderson voluntarily dismissed his state law claims, the federal court no longer had pendent jurisdiction over those claims. Therefore, the state law claims were preserved for adjudication in state court.

LIFE INSURANCE – POLICY VOID *AB INITIO* WHEN POLICY HOLDER HAD NO INSURABLE INTEREST IN THE INSURED'S LIFE – PREMIUMS PAID IN FURTHERANCE OF SUCH POLICY ARE UNREFUNDABLE AND PARTIES WILL BE LEFT AS COURT FOUND THEM

TTSI Irrevocable Trust v. Reliastar Life Insurance Co., 36 Fla. L. Weekly D1022 (Fla. 5th DCA May 13, 2011)

In October, 2004, Paul W. Moses II insured the life of 85-year-old Verlee Tennant with ReliaStar Life Insurance for $370,912. Although not related by law or blood, Mr. Moses was Ms. Tennant's broker from approximately 1993 to 1996.

In 2008, Ms. Tennant received correspondence from ReliaStar, which included a copy of the policy. The policy did not name Mr. Moses as the beneficiary, but instead TTSI Irrevocable Trust, K.M. Kern, Trustee. In the portion of the application describing the relationship between the owner and the insured, it read "family trust." Ms. Tennant then informed

ReliaStar that she did not know Mr. Kern and had no family trust. In fact, the beneficiaries of the TTSI Irrevocable Trust were Mr. Moses and his children. ReliaStar then voided the policy and informed Mr. Moses the premiums he paid would be used to offset the cost of issuing the policy and recouping the commission paid to him.

In January of 2009, TTSI brought suit against ReliaStar. In its complaint, it alleged breach of contract, anticipatory breach, and sought declaratory relief, asking the court to reinstate the policy. TTSI contended that because Ms. Tennant was a "key client" of Mr. Moses, an insurable interest existed. In response, ReliaStar moved for summary judgment, arguing the contract was void *ab initio* because TTSI never had an insurable interest in Ms. Tennant's life. Ultimately, the trial court granted summary judgment for ReliaStar.

The 5th DCA affirmed the trial court's ruling, holding the insurance policy was void *ab initio* because it was a "wagering contract" and against public policy. The court also dismissed TTSI's request to be reimbursed for the premiums it paid. The court was able to distinguish the instant case from similar cases with voided contracts because, unlike those cases, this case did not involve a *voidable* contract. Instead, the policy here was never in effect because it was void at the outset. The 5th DCA stated courts will leave parties as they were before litigation began if the contract is determined to be contrary to public policy.

INTERFERENCE WITH A BUSINESS RELATIONSHIP – INSUFFICIENT EVIDENCE SHOWING DEFENDANT HAD KNOWLEDGE OF PLAINTIFF'S BUSINESS RELATIONSHIPS

Castelli v. Select Auto Management, Inc., 36 Fla. L. Weekly D1027 (Fla. 2d DCA May 13, 2011)

Select Auto Management, Inc. had two agreements with Robert Melvin, a used car salesman, whereby Select would buy customers' financing agreements at a discount. Under the first agreement, Melvin sold customer's finance agreements outright to Select,

who would collect payments directly. Under the second agreement, Melvin would receive the loan payments and subsequently send Select its share of the received payment.

When Select learned that Melvin's business was collapsing in June 2005, it ended Melvin's right to collect payments under the second plan. Select sent letters out to all Melvin's customers informing them to redirect all loan payments to Select. Meanwhile, Melvin, who leased the car lot from Saverio Castelli, closed his used car business and left while Castelli was on vacation. When he returned, Castelli surprisingly found the car lot and office empty. Thereafter, as he was still owed money under his agreement with Melvin, Castelli informed those customers on whose loans he had a lien to redirect their payments to him directly.

In July 2005, Select sent a representative to speak with Castelli at Melvin's former offices. Select informed Castelli that it owned the financing agreements on 105 vehicles and that he should not accept any payments on those vehicles. Believing Select sought assistance only in collecting its own payments, Castelli agreed to collect payment for Select. However, Castelli continued accepting payments on all cars loans indiscriminately. On August 19, 2005, Select sent a letter to Castelli's attorney demanding that he stop accepting payments on 134 vehicles. Castelli testified that he stopped accepting payments on August 13, 2005.

After a bench trial, Select was awarded $152,223. The trial court cited four factors used in determining whether Castelli tortiously interfered with Select's business: 1) the existence of a business relationship; 2) Castelli's knowledge of the relationship; 3) Castelli's intentional and unjustified interference with the relationship; and 4) Select's damages as a result of the interference. The trial court held Select's evidence successfully proved its claim.

The 2d DCA reversed the trial court, reasoning that Castelli was not aware of the full extent of Select's business relationships until August 19, 2005. Additionally, Select failed to establish that the letters Castelli authored to

customers actually were received or acted upon by Select's customers. Without the knowledge of the direct business relationship between Select and the individuals paying the loan, Castelli could not be held liable for tortious interference.

ATTORNEY'S FEES – TRIAL COURT ERRED IN DENYING FEES BASED UPON QUANTUM MERUIT SOLELY BECAUSE ATTORNEY DID NOT KEEP, OR ATTEMPT TO RECREATE, ACCURATE TIME REOCRDS

Morgan & Morgan, P.A. v. Guardianship of Larry McKean, 36 Fla. L. Weekly D1028 (Fla. 2d DCA May 13, 2011)

Larry McKean was severely injured in a motorcycle accident. Beth Brockmann, McKean's sister and representative, contacted Morgan & Morgan, P.A. to represent her brother. As part of Morgan & Morgan's agreement to accept the case, Ms. Brockmann signed a contingency fee agreement. Within a month, Morgan & Morgan settled with the insurance company for the policy limits. However, Ms. Brockmann grew dissatisfied with Morgan & Morgan and refused to honor the contingency agreement. Ms. Brockmann argued that the agreement was invalid and sought to determine fees based on quantum meruit.

The trial court agreed with Ms. Brockmann, and declared the contingency agreement invalid. The court then held a hearing to determine fees under quantum meruit. The trial court entered an order denying any fees because there were no time records or any attempt to recreate any records with any degree of specificity. The court acknowledged that law firms normally operating under contingency agreements are unaccustomed to keeping track of the time they invest in a particular case, but some basis needed to be provided to sustain an award of fees.

The 2d DCA affirmed the trial court's ruling that the contingency agreement was invalid and attorney's fees should be determined under the theory of quantum meruit. However, the court reversed the trial court's determination that there was no basis on which to award attorney's fees. As Morgan & Morgan had a reasonable expectation that it would be compensated for its services, and Mr. McKlean's estate reasonably expected to pay for the services it received, an equitable agreement under

quantum meruit was appropriate. Thus, the 2d DCA held the trial court erred by not employing a "totality of the circumstances" standard.

Under that standard, the hourly rate and hours expended are factors to be considered along with all relevant factors bearing on the professional relationship. Those other factors include the work actually done on behalf of the client and benefits obtained. The case was remanded for the court to determine whether to award fees under this standard.

RBM/DJR/tsr