TERRY'S TAKES

Your Weekly Florida Federal and State Appellate Caselaw Update for Personal Injury Lawyers

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Eleventh Circuit Court of Appeals

Sutton v. Wal-Mart Stores East, LP

11th Circuit Court of Appeals
3/31/23, Judge Marcus
Topics: Negligence, Premises Liability, Transitory Foreign Substance

This case is useful enough that I have already used it in a response to a summary judgment motion. This is a plaintiff-friendly decision applying Florida law regarding the statutory additional element in slip-and-fall cases against businesses. That element requires plaintiffs to also prove (in addition to normal tort elements) that the business had knowledge of the substance that caused the slip and fall.

In Sutton v. Wal-Mart Stores E., LP, 2023 WL 2720766, at *1 (11th Cir. Mar. 31, 2023). In Sutton, Ms. Sutton sued a Wal-Mart after she slipped in their West Palm Beach location and suffered injuries. Id.

> While lying on the floor, she saw the culprit: a squished grape, accompanied by juice, a track mark, and footprints. No witnesses saw the grape before her fall, and a video in the record does not offer a clear picture of when the grape might have landed there.

Sutton v. Wal-Mart Stores E., 2023 WL 2720766, at *1 (11th Cir. Mar. 31, 2023). An employee had inspected that area an hour and a **half-hour** before Sutton's fall, but the employee had not seen a grape on the floor either time. Id. Another employee walked through the area **10 minutes prior** to the accident, and he hadn't seen anything either. Video did not clear up when the grape wound up on the floor. Id. Sutton testified, however, that the grape and juice on the floor were "dirty" and she noticed one track mark a few inches away, but she didn't know whose footprints they were. Id. **She even admitted they were possibly her own footprints**. Id.

In addition to the normal elements of negligence—duty, breach of duty, causation and damages—the Sutton court then examined the effect of Fla. Stat. § 768.0755 as follows:

> Under…Florida statutory law,
>
> **[i]f a person slips and falls on a transitory foreign substance in a business establishment**, the injured person must prove that the business establishment had **actual or constructive knowledge** of the dangerous condition and should have taken

> action to remedy it. **Constructive knowledge may be proven by circumstantial evidence showing that:**
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> **(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or**
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> (b) The condition occurred with regularity and was therefore foreseeable.
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> Fla. Stat. § 768.0755(1); see also Lago v. Costco Wholesale Corp., 233 So. 3d 1248, 1250 (Fla. 3d DCA 2017)("[I]n Florida Statutes section 768.0755 the legislature modified a business's duties when its invitees are injured by 'transitory foreign substances.' ").

Sutton, 2023 WL 2720766, at *1 (emphasis supplied).

Wal-Mart removed the case from Florida state court based on diversity jurisdiction and then moved for summary judgment, arguing that there was no evidence of actual or constructive knowledge. Id. The district court agreed with Wal-Mart, granted summary judgment, and Sutton appealed. On appeal, the Eleventh Circuit observed:

> We need only consider the first form of proof--evidence of the length of time that the dangerous condition existed -- to resolve this case.
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> "When considering whether there is an issue of fact for submission to a jury in transitory foreign substance cases, courts look to the length of time the condition existed before the accident occurred." Wilson-Greene v. City of Miami, 208 So. 3d 1271, 1275 (Fla. 3d DCA 2017). Florida's courts have found "at least **fifteen to twenty minutes**…to be sufficient for **defendants to be charged with knowledge of the condition and a reasonable time in which to correct it." Winn Dixie Stores, Inc. v. Williams, 264 So. 2d 862, 864 (Fla. 3d DCA 1972); accord Lynch v. Target Stores, Div. of Dayton Hudson Corp., 790 So. 2d 1193, 1194 (Fla. 4th DCA 2001)(per curiam).** Other decisions in Florida have determined that thirteen minutes or less is not enough time. See Oliver v. Winn-Dixie Stores, Inc., 291 So. 3d 126, 127–30 (Fla. 4th DCA 2020); see also Walker v. Winn-Dixie Stores, Inc., 160 So. 3d 909, 912 (Fla. 1st DCA 2014)(holding "less than four minutes" to be insufficient).
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> **It is rare**, however, **that there will be direct evidence of how long a substance was on the ground**, and "the mere presence" of the substance "is not enough to establish constructive notice." Delgado v. Laundromax, Inc., 65 So. 3d 1087, 1090 (Fla. 3d DCA 2011). **So, in the absence of direct evidence, Florida law requires that the plaintiff introduce circumstantial evidence of "additional facts" showing that that the substance had been on the ground for an extended period before the slip-and-fall to survive summary judgment.** Id.

Sutton, 2023 WL 2720766, at *2–3. The Eleventh Circuit found two separate bases for reversing the district court's order granting summary judgment.

> **First, and primarily, Sutton's own testimony created a jury issue on constructive notice. Sutton did not see the grape before she fell. After the fall, however, she testified that she saw a "dirty" grape with "track marks going through the grape and liquids," as well as "footprints." Time and again, Florida's appellate**

> **"courts have found constructive notice" when "the offending liquid was dirty, scuffed, or had grocery-cart track marks running through it," or if there was "[o]ther evidence such as 'footprints, prior track marks, changes in consistency, [or] drying of the liquid.'"**

Sutton, 2023 WL 2720766, at *3 (11th Cir. Mar. 31, 2023)(string-citation omitted).

The Sutton court then examined Welch v. CHLN, Inc., 2023 WL 2542275, at *1 (Fla. 5th DCA Mar. 17, 2023), a case from only weeks ago, describing Welch as follows:

> In Welch, the trial court had granted summary judgment for the defendant in a slip-and-fall case where the evidence included dirty liquid and "footprints in the puddle that were going in different directions" and that the plaintiff testified, with "certainty," "were not hers." Id. at ——, 2023 WL 2542275, *1. The appellate court reversed, emphasizing that "[i]n trying to assess how long a substance has been sitting on a floor, courts look to several factors, including 'evidence of footprints, prior track marks, changes in consistency, [or] drying of the liquid.'" Id. at ——, 2023 WL 2542275, *2 (second alteration in original)(emphasis and citation omitted). It stressed that "footprints are a common feature of analogous slip and fall cases that survive summary judgment because they allow a jury to find that the substance was on the ground long enough for the defendant to discover it before the plaintiff's fall." Id. The court observed that while the "dirty, murky, and slimy" liquid was "not enough -- by itself -- to create a jury question on constructive knowledge," the additional testimony of "footprints in the puddle -- not belonging to" the plaintiff "raise[d] a fact question about [the defendant's] constructive knowledge." Id. As a result, the Fifth District Court of Appeal reversed the grant of summary judgment and remanded the case for trial. Id. at ——, 2023 WL 2542275, *3.

Sutton, 2023 WL 2720766, at *3–4. Turning back to the facts in its own case, the Eleventh Circuit then noted:

> Here, Sutton unambiguously testified that there was a track mark and footprints through the grape. Thus, this case falls cleanly into the set of Florida cases that require a jury to decide whether the substance sat on the floor long enough to establish constructive notice. See Woods, 621 So. 2d at 711 ("Testimony of dirt, scuffing, or tracks in a substance generates sufficient inferences of constructive notice."); Guenther, 395 So. 2d at 246 ("Here, testimony that the liquid was dirty and scuffed and had several tracks running through it was, in our opinion, adequate to impute constructive notice of the hazardous condition to the store manager."). **Unlike in Welch, there is no definitive testimony here about whether the footprints were made by Sutton or someone else. Although a jury might eventually decide that the footprints belonged to Sutton, "an equally compelling inference from the dirty appearance of the [grape] is that it had gone undetected on the floor for a sufficient period of time to place [Wal-Mart] on constructive notice."** Colon, 721 So. 2d at 771. Additionally, however, Sutton's testimony is clear that she saw a track mark only a few inches away, and that also afforded the reasonable inference that the grape had been on the ground for a sufficient period of time to establish constructive notice. **All told, a jury must decide the case.**

Sutton, 2023 WL 2720766, at *3–4.

Testimony by the business's employees that it was routine or standard policy to have employees keep an eye out for transitory foreign substances on the floor did not help Wal-Mart's case. In Welch, where the defendant was a restaurant, employees testified that on a "busy night" like the night of Welch's accident, the restaurant would have had "at least two" employees assigned to the salad bar. One of those workers would have been stationed behind the salad bar "at all times." Among their other duties, the salad bar employees were there to keep the floor clean. Welch, 2023 WL 2542275, at *1. In Welch, when coupled with footprints and tracks, the "quantity, appearance, and consistency of the" "dirty, murky, and slimy" liquid in Welch all combined to raise a sufficient fact question about the restaurant's constructive knowledge. Welch, 2023 WL 2542275, at *2.

In Sutton, a second basis for reversing summary judgment was that

> the video evidence presented also creates a material issue of fact in dispute about constructive notice. See Tallahassee Med. Ctr., Inc. v. Kemp, 324 So. 3d 14, 16 (Fla. 1st DCA 2021)(per curiam)(noting that a plaintiff "may use circumstantial evidence -- like the video evidence here -- to prove her case"). **The video spans an hour and fifteen minutes before Sutton's fall; and it runs two hours in all. The video never shows anyone dropping a grape on the floor.** As Wal-Mart admits, "the video does not show the alleged condition, how it got on the floor, or when." **A reasonable jury could infer from the absence of a clear moment when the grape fell to the floor in the video that the grape had been on the floor for more than one hour--far exceeding the time required for constructive knowledge.** See Williams, 264 So. 2d at 864.
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> Nevertheless, Wal-Mart insists that the affidavits of [two employees] establish not only that they walked by a total of three times over the course of an hour (and one time ten minutes) before the fall, but that they never saw a grape. That testimony is undermined by the account offered by Sutton and the video itself. So a jury must settle the score. Wal-Mart also argues that Sutton did not present evidence of where the grape came from, how it landed on the floor, or when it got there. All of that is true. **But Florida law does not demand direct evidence about who or what caused the dangerous substance and when exactly it happened. Instead, circumstantial evidence that sufficiently establishes the dangerous condition was present for a long enough period of time is enough.** See Fla. Stat. § 768.0755(1)(a). Taken in a light most favorable to the plaintiff, Sutton offered ample evidence.

Sutton, LP, 2023 WL 2720766, at *5 (emphasis supplied).
https://media.ca11.uscourts.gov/opinions/pub/files/202210162.pdf

Supreme Court of Florida

In Re: Amendments to Florida Rule of Civil Procedure 1.453

Supreme Court of Florida
3/30/23; Per Curiam
Topics: Rules of Civil Procedure (Florida)

The Supreme Court of Florida has given birth to a brand new baby rule of civil procedure! Rule 1.453 articulates how trial courts are to proceed when a juror in a civil case asks for trial transcripts or asks for trial testimony to be read or played back. If a juror asks for a readback or playback of trial

testimony, the trial court may, after giving notice to counsel for the parties, read or play back the testimony in open court.

In the alternative, the trial court may, in its discretion, respond to the request in writing, as long as the parties are afforded an opportunity to place objections on the record. If a juror asks for trial transcripts, the trial court must notify the jury that transcripts are unavailable but that a request for a readback or playback may be made and that such a request may or may not be granted at the court's discretion.
https://supremecourt.flcourts.gov/content/download/864780/opinion/sc2022-0803.pdf

Third DCA

Reyes v. Baptist Health South Florida Foundation, Inc.

3d DCA
3/29/23, Chief Judge Fernandez
Topics: Medical Malpractice, Statute of Limitations, Summary Judgment Standard

This is a huge win for plaintiffs regarding accrual of the statute of limitations for medical malpractice cases. In 2005, a child was born with a neurological injury that the parents allege were caused by the medical malpractice of Baptist. At the time of the pregnancy and birth, the mother was told that her baby was developing normally. The child was diagnosed with cerebral palsy.

In 2008, the mother filed for a petition for extension for filing a malpractice suit under section 766.104(2), Florida Statutes (2008), and she requested medical records pursuant to the medical malpractice statute.

In 2012, the child's doctor recommended that the mother look into details of the child's birth as a possible cause for the cerebral palsy. As a result, the mother and father filed the medical malpractice suit in 2013 both as parties and as guardians for the child.

Baptist moved for summary judgment, arguing that the 2008 petition for extension commenced the running of the statute of limitations, and because the mother waited another five years to file suit, it was time barred.

Section 95.11(4)(b), which provides the statute of limitations for medical malpractice actions, states, in pertinent part, that:

> (b) **An action for medical malpractice shall be commenced within 2 years** from the time the incident giving rise to the action occurred **or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence;** however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, **except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday….** In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered

> or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred, except that this 7-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday.

Case law from the Supreme Court of Florida and the Third District have interpreted the statute to mean that the statute of limitations accrues (begins running) when the plaintiff not only has knowledge of the injury by **also "knowledge that there is a reasonable possibility that the injury was caused by medical malpractice."** If the injury is something that could have occurred naturally, the statute does not begin to run until such time as there is reason to believe that medical malpractice may have occurred.

The trial court agreed that the 2008 filing showed that the mother had knowledge of a reasonable possibility that medical malpractice had occurred, that the statute had run prior to the 2013 filing, and the claim was time-barred. The parents appealed.

The DCA cited Florida case law for the proposition that the determination of **when a person knew or reasonably should have known of the possibility of medical malpractice is "fact-specific and within the province of the jury, not the trial judge."** The fact that the mother ***suspected*** medical malpractice as early as 2008 was not determinative. **Suspected wrongdoing is not enough to trigger the statute of limitations.** Garcia claimed that until 2012, **every** medical provider told her that the child's cerebral palsy occurred from natural causes**. Contacting an attorney isn't enough to trigger the statute. Sending a 766.204 letter requesting medical records isn't enough. Filing a 766.014(2) petition for an extension is not enough. Instead, it is only enough when the plaintiff possesses knowledge of a reasonable possibility of medical malpractice. And the question of when that point occurs is fact-specific and a matter for the jury.** Because there was a genuine issue of material fact as to when the statute began to run, summary judgment was reversed and the case was remanded. (Note: Compare this with the Halum case from the Fourth District below).
https://supremecourt.flcourts.gov/content/download/864696/opinion/211945_DC13_03292023_095424_i.pdf

Fourth DCA

Halum v. ZP Passive Safety Systems US, Inc.

4th DCA
3/29/23, Chief Judge Klingensmith
Topics: Negligence, Products Liability, Statute of Repose

In 2015, the plaintiff was involved in a motor vehicle that he (through his estate) alleged resulted from a defect in the seat belt buckle. The car was sold to its first user in 2001 and re-sold to the plaintiff in 2004.

The plaintiff sued the seatbelt manufacturer for negligence, strict products liability, and loss of consortium.

The manufacturer raised section 95.031(2)(b), the statute of repose, as a defense and moved for summary judgment. For those that need a refresher on the difference between a statute of limitation and a statute of repose, the DCA explained that in "contrast to a statute of limitations, which procedurally limits a plaintiff's remedy at some point after the cause of action accrued (i.e., after the defendant breached a duty), a statute of repose abolishes or eliminates an underlying substantive right of action." In pertinent part, the statute in question provides:

> (b) An action for products liability under s. 95.11(3) must be begun within the period prescribed in this chapter, **with the period running from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence,** rather than running from any other date prescribed elsewhere in s. 95.11(3), except as provided within this subsection. Under no circumstances may a claimant commence an action for products liability, including a wrongful death action or any other claim arising from personal injury or property damage caused by a product, to recover for harm **allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. All products, except those included within subparagraph 1. or subparagraph 2., are conclusively presumed to have an expected useful life of 10 years or less**….
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> 2. Any product not listed in subparagraph 1., which the manufacturer specifically warranted, through express representation or labeling, as having an expected useful life exceeding 10 years, has an expected useful life commensurate with the time period indicated by the warranty or label. Under such circumstances, no action for products liability may be brought after the expected useful life of the product, or more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product, whichever is later….
>
> (d) **The repose period prescribed within paragraph (b) is tolled for any period during which the manufacturer through its officers, directors, partners, or managing agents had actual knowledge that the product was defective in the manner alleged by the claimant and took affirmative steps to conceal the defect.** Any claim of concealment under this section shall be made with specificity and must be based upon substantial factual and legal support. Maintaining the confidentiality of trade secrets does not constitute concealment under this section.

The manufacturer argued that because 14 years had passed between when the vehicle had been sold to the first owner in 2001 and the date of the accident in 2015, the claim was time-barred.

Plaintiff invoked subsection (d) above, however, alleging that the manufacturer was aware of the defect in 2001 and concealed it from the vehicle's maker and the National Highway Transportation and Safety Administration. Plaintiff eventually showed knowledge from a manager with authority and responsibility over production, but did not show that an executive-level employee knew of the defect.

Mid-level management, the trial court held, did not constitute "officers, directors, partners, or managing agents" under the tolling statute.

Section 95.031 does not define the term "managing agent." However, Florida courts have expounded on who is—and who is not—a "managing agent" for the purposes of imposing corporate liability for punitive damages based on their acts. Those cases have found a managing agent must be "more than a mid-level employee who has some, but limited, managerial authority." A "managing agent" under section 95.031(2)(d) must be an individual of such seniority and stature within the corporation or business to have ultimate decision-making authority for the company. So the allegations that middle management knew of the defect did not pass muster for purposes of tolling the statute of repose.

Further, the plaintiff only showed some evidence that the mid-level employees "should have known" about the defect, not that they actually did to conceal it, which was also a requirement of the statute. Summary judgment was affirmed.
https://supremecourt.flcourts.gov/content/download/864709/opinion/213217_DC05_03292023_095939_i.pdf

JD Restoration, Inc. v. Citizens Property Insurance Corporation

4th DCA
3/29/23, Judge Levine
Topics: Rule 1.540 Motion

JD Restoration (as the assignee of a homeowner) sued Citizens Property for breach of a homeowner's insurance contract. The trial court issued an order scheduling a summary disposition and instructing the parties that they could file affidavits. JD Restoration did not appear at the hearing or file anything to be considered by the court, so the trial court entered summary disposition in Citizens' favor.

JD Restoration then filed a Rule 1.540 motion asking the trial court to vacate the final disposition order. In the motion, JD Restoration's attorney alleged that a paralegal at its law firm failed to calendar the summary disposition hearing, which constituted excusable neglect. At a hearing on the motion, Citizens did not quibble with the argument that a paralegal failing to calendar a hearing constitutes excusable neglect, but Citizens argued that JD Restoration's failure to file anything in response to the order was unexplained. The trial court denied the motion to vacate, and JD appealed.

On appeal, Citizens argued that the trial court did not abuse its discretion in denying JD Restoration's motion because JD had not presented a meritorious defense. **The requirement that a movant demonstrate a meritorious defense only applies to defendants seeking to vacate a default judgment. Because JD showed excusable neglect and due diligence, the trial court abused its discretion.** Citizens conceded error.

The DCA noted that it would be unreasonable to excuse the failure to calendar the hearing but not allow the assignee the opportunity to submit affidavits in opposition to summary disposition. The order setting the summary disposition hearing was the same order directing the parties to submit affidavits. "Logically, we can assume the reason why the assignee did not submit evidence in opposition of summary disposition was because the directive to do so was in the same order that the

paralegal failed to calendar. Thus, if the assignee excusably missed the summary disposition hearing, its failure to submit affidavits was also excusable." Reversed and remanded with instructions to grant the Rule 1.540 motion and hold another summary disposition hearing with opportunity for JD Restoration to submit affidavits.
https://supremecourt.flcourts.gov/content/download/864715/opinion/220140_DC13_03292023_100300_i.pdf

Fifth DCA

Cooper v. Gonzalez

5th DCA
3/31/23, Judge Edwards
Topics: Directed Verdict, Negligence, Non-Economic Damages

In 2018, Kipp Cooper was driving a van owned by his employer when he rear-ended Tammy Gonzalez's vehicle causing her injury. Cooper and his employer admitted fault/liability, but they challenged plaintiff's claims about the nature, extent, permanency, and causation of Gonzalez's injuries.

Ms. Gonzalez had preexisting injuries, degenerative changes, and prior motor vehicle accidents that resulted in medical treatment. She received chiropractic treatment (neck), injections (neck), a microdiscectomy (back), a vertebral fusion (back), and arthroscopic shoulder surgery after the accident in this case. Her neck and shoulder pain largely resolved after treatment, but her back still caused pain, though the vertebral fusion had lessened the pain.

Cooper retained Dr. McBride to perform a record review and compulsory medical exam ("CME") of the plaintiff. He opined that he could not say one way or the other whether the accident in this case caused the lumbar disc herniation.

In 2021, the case went to trial, and on the evening prior to his testimony, Dr. McBride had a totally legitimate, not-at-all-made-up eureka moment where he realized that he could now opine that the accident definitely did not cause the herniation because he had "come across" a 2013 CT scan that documented the same condition at the same location and documented pain indicative of a herniation.

Cooper disclosed the new opinion and admitted that it was untimely, and the trial court ruled that Dr. McBride had to stick to his timely-disclosed opinion during his trial testimony. Regardless, the jury found no permanent injury, and the jury awarded $36,250 for past medical expenses. Right after the verdict, something caused a mistrial, everyone agreed that a mistrial was warranted, and no one appealed.

A week after the mistrial, the case was transferred to a new just who entered an order applying to several cases (perhaps COVID-related?) that ordered a "freezing" of this case and several others, meaning that all discovery, listing of witnesses, pre-trial motions, and cut-off dates were now "ceased" and relief could only come via court order.

A week after the "freeze" order, Cooper provided to Gonzalez the updated report from McBride, which Cooper planned to use at the second trial now that it would not be such a surprise to

the plaintiff. But Cooper had not sought relief from the "freeze" order, so Gonzalez moved to strike or limit Dr. McBride's testimony. At a hearing on that motion, the new judge ordered that due to the "freeze" order, the disclosure was again untimely, so the revised opinion would again be excluded in the second trial. Cooper moved for a continuance so that Gonzalez could depose Dr. McBride, but the judge denied the motion.

At the second trial, Dr. McBride's prior testimony was simply read into the record.

Per section 627.737(2), Fla. Stat., a plaintiff in an automobile accident case may only recover for non-economic damages like pain, suffering, mental anguish, and inconvenience if she has received a "permanent" injury. To establish a permanent injury, Plaintiff only relied upon the 6% permanent impairment rating ("PIR") from her shoulder surgeon assigned just after the surgery (and apparently did not even assert that there was a permanent injury or permanent aggravation of prior injury to the neck or back).

The defendant's doctor, Dr. Halperin, essentially opined that he examined the plaintiff two years after surgery, and her shoulder was doing just fine. Oddly, the plaintiff did not call her shoulder surgeon at the second trial, and they relied on the **defense doctor** to discuss the surgery and permanent impairment rating. The defense doctor said the 6% PIR had been for limitation in range of motion that existed after the surgery, but those limitations had disappeared after two years, so the PIR was 0%. On cross-examination, the doctor admitted that shaving some of the bone as part of the surgery was a permanent change inside her body, but plaintiff was fully functional and did not qualify as permanently injured in his view.

At the close of evidence, Gonzalez moved for directed verdict due to scarring from the shoulder surgery, but she eventually agreed that the level of scarring (whether it was "significant" per the definition of permanent injury) was a matter for the jury. Gonzalez maintained, however, that the shaving of bone during the surgery was a permanent anatomical change that qualified as a permanent injury. The defense answered that a permanent anatomical change did not trigger a finding of a permanent injury under the definition in the statute. Rather, a permanent injury is one that results in

(a) Significant and permanent loss of an important bodily function;
(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement;
(c) Significant and permanent scarring or disfigurement; or
(d) Death.

The trial judge entered a directed verdict in plaintiff's favor on the issue of permanency, and Cooper appealed.

On appeal, the DCA actually affirmed the trial court's decision to force the defense to use Dr. McBride's original opinion. It did not overly analyze whether the freeze order was unreasonable, particularly in light of the fact that the plaintiff had been aware of the new opinion since it had been disclosed in the middle of the prior trial.

The directed verdict was a different story. "A directed verdict is proper [only] when the evidence and all inferences from the evidence, considered in the light most favorable to the non-moving party, support the movant's case as a matter of law and there is no evidence to rebut it."

Because of Dr. Halperin's opinion that there was no permanent injury (and because the "permanent anatomical change" test only existed in plaintiff's attorney's brain and is not found in the statute), directed verdict was improper. The DCA reversed and remanded for a third trial on everything but liability, which had been conceded. (NOTE: In this case, an ill-considered argument for DV blew up in the plaintiff's face. The defense got fees and costs of the appeal. And now that opinion from Dr. McBride is probably getting in, right?).
https://supremecourt.flcourts.gov/content/download/864899/opinion/220079_DC08_03312023_084549_i.pdf

Song v. Jenkins

5th DCA
3/31/23, Judge Edwards
Topics: Motion in Limine, Negligence

Fu Lu Song was driving a tractor trailer owned by American Trucking Company. He was driving in Interstate 95 near Jacksonville when a car in front of him suddenly slowed down. The roads were wet. To avoid rear-ending that car, Song veered into the right lane. Trying to avoid hitting Song's truck, a second car swerved to its right and collided with a van in which Jenkins was a passenger. Song kept on truckin'. He saw the accident in his rear-view mirror, but testified that he did not think he needed to stop because he didn't collide with any other vehicle. The whole thing was caught on a dashcam video by another driver, Mr. Jordan.

Everyone agreed that the first 48 seconds of Mr. Jordan's dashcam video were relevant to show the wet conditions, the busy traffic, and then the sequence of events that led to the accident. After the first 48 seconds, however, the video continued for more than four minutes that included video and audio of Mr. Jordan essentially shouting about the accident and chasing Song to get his license plate number. The video/audio included Jordan's 911 call, Jordan's excited utterances about the crash, and his opinions that Song had been driving dangerously fast and caused the wreck. Jordan also stated on the video that Song was essentially fleeing the scene, which is why he was pursuing him.

The defense moved *in limine* to exclude all audio and the portion of the video after the 48 second mark. Defendants argued that the video after the crash and all of the audio were irrelevant to any issue, that Mr. Jordan's comments were inadmissible lay opinions about liability, and that the accusations of fleeing the scene were more prejudicial than probative. The trial court overruled the objections and allowed the full 5 minutes of audio and video to be played.

The "fleeing the scene" theme was a major portion of closing argument, and the trial attorney implored the jury to place 100% of fault on Song for that reason. **"The conduct of the defendant coming after the collision and incurrence of injuries could have no proximate or causal relationship to the negligence or causal relationship to the negligence or liability question."** Therefore, it was irrelevant, and the court was wrong to admit it. The repeated comments on the soundtrack that Song was fleeing the scene were unfairly prejudicial and irrelevant. Song never claimed he stopped at the scene. He never disputed something disproven by the "chase" portion of the tape. Showing how Jordan obtained the license plate merely duplicated Jordan's trial testimony. Jordan's lay opinions that Song was going too fast for conditions and that Song caused the wreck were not admissible and invaded the province of the jury.

The DCA also found error in the admission of an accident report diagram that was part of the official traffic crash report. It was not to scale and was demonstrably inaccurate in its depiction of events when compared to the dash cam video. It was not authenticated by anyone, and it was not based on any scientific accident reconstruction. No evidence was presented regarding who prepared it, who provided whatever information was considered, nor how the path of each vehicle was determined. That diagram was essentially a non-verbal depiction of opinions formulated by an anonymous witness, relying on unknown information, employing an undisclosed methodology. Initially, over Appellants' objections, Jenkins convinced the trial court to allow him to use the diagram as a "demonstrative aid." He argued that counsel could get any one of the percipient witnesses to step over to the ubiquitous courtroom easel to draw a similar diagram. (NOTE: For some reason, Judge Edwards used the word "percipient" twice in the opinion to mean a witness who perceived the events. The word really refers to a character trait (i.e. she is perceptive and discerning), and it not usually used in this fashion. Apparently this is his word of the week. Maybe we can get it trending). The DCA acknowledged that many such simple diagrams prepared in court are usefully employed as a demonstrative aid to generally orient the jury to the accident scene, location of witnesses, etc.

The Defense also objected that the diagram was inadmissible under the accident report privilege contained in section 316.066(4), Fla. Stat., which flatly states that **accident reports may not be used as evidence in any civil or criminal trial.** The plaintiff's attorney claimed that he cured this problem by removing references to it being part of an accident report. His better argument was that there was no proof that the diagram was based on any statement from a witness to the accident. (NOTE: You could just FEEL Judge Edwards resisting the urge to call them 'percipient' witnesses to the accident.) If the diagram was based, in whole or in part, on information provided by any of the people actually involved in the accident it would be inadmissible; however, no proof one way or the other was offered on that issue.

But then plaintiff's lawyer really stepped in it. Demonstrative aides are more like argument; they are not evidence, kids. It was a close question on whether it wrong to use the diagram as a demonstrative aid given how it inaccurately depicted the scene, but then the **attorney moved to make the diagram an actual exhibit and move it into evidence, which the judge allowed**. And Judge Edwards was eminently percipient in holding that, under the circumstances, "given that it was not properly authenticated, not to scale, generally unexplained, and differed in its depiction from what is clearly seen in the dash cam video, the trial court erred in overruling Appellants' objections to admitting it into evidence." Jenkins argued that the error was harmless, but he failed to argue that there was no reasonable possibility that the error contributed to the verdict.

The court held: "We find that the errors described above, **individually and cumulatively**, deprived Appellants of a fair trial. Accordingly, we reverse for a new trial on all issues."
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