

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL ACTION

MARY BOTTINI, as Personal
Representative of the Estate of
GERARD BOTTINI,

Plaintiff,

CASE NO. 08-08851

v.

DIVISION "T"

GEICO GENERAL INSURANCE
COMPANY, a foreign corporation
and MARISSA D. PENSA,

Defendants.

AMENDED MOTION FOR NEW TRIAL

Comes now the Defendant, GEICO, by and through undersigned counsel and pursuant to Rule 1.530(b) of the Florida Rules of Civil Procedure, and hereby files this its Motion for New Trial.

1. This case involves a claim for damages due to a wrongful death claim presented under the Plaintiff's Uninsured Motorist Insurance policy with the Defendant.
2. A jury trial in the above-styled case commenced on January 24, 2010, and a verdict was returned on February 3, 2011.
3. The jury returned the following verdict as it related to damages:
 - Damages of the Estate: \$103,552
 - Economic Damages of Mary Bottini: \$522,478
 - Non-economic Damages of Mary Bottini: \$14,000,000
 - Economic Damages of D [REDACTED] E [REDACTED]: \$363,070
 - Non-economic Damages of D [REDACTED] E [REDACTED]: \$5,000,000
 - Economic Damages of G [REDACTED] E [REDACTED]: \$423,256
 - Non-economic Damages of G [REDACTED] E [REDACTED]: \$5,000,000
 - Economic Damages of K [REDACTED] E [REDACTED]: \$459,910
 - Non-economic Damages of K [REDACTED] E [REDACTED]: \$5,000,000

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EXHIBIT N

4. Based upon multiple errors throughout the course of the trial inclusive of pretrial motions, a new trial is appropriate.
5. According to *Brown v. Estate of A. P. Stuckey*, 749 So. 2d 490 (Fla. 1999), there are three grounds on which a new trial may be granted: (1) the verdict shocks the judicial conscious; (2) the jury has been unduly influenced by passion or prejudice; (3) the verdict is contrary to the manifest weight of the evidence.
6. The grounds for the motion for new trial are as follows:

- a. The court improperly limited the testimony of witness Garrick Lampkin, pursuant to Plaintiff's Motion in Limine. Mr. Lampkin had testified in discovery that he believed Mr. Bottini "overcompensated" while swerving to avoid an impact and that this led to his loss of control of the vehicle. This subject was proper testimony from a lay witness who had been driving for many years. Mr. Lampkin was a professional truck driver who had witnessed many, many drivers on the road and who was trained as a driver in accident avoidance and safe driving methods. His opinion, derived from his unique experience and qualifications, as well as simple observation of Mr. Bottini's driving was entirely appropriate and should not have been excluded. The exclusion of this testimony, was prejudicial to the Defendant, as he was one of the few persons who had actually witnessed Mr. Bottini's driving immediately prior to the accident. Moreover, while the Court excluded this testimony, it still allowed Mr. Lampkin to testify regarding his observations that directly inferred that Ms. Geisbert and Ms. Pensa appeared impaired was doubly prejudicial to defendant. Certainly Mr. Lampkin was not qualified to ascertain whether these persons were impaired, yet the court allowed him to present such testimony to the jury. The exclusion of testimony that was directly within the scope of his knowledge while allowing highly prejudicial testimony regarding matters that are far outside the scope of his knowledge was extremely prejudicial to Defendant.

In a case like this in which liability for the accident was so highly contested and the questions of fault and sympathy so tightly drawn, the exclusion of any evidence relevant to those issues was error. The fact that the jury assigned 100% of the fault to Ms. Geisbert, despite evidence of Mr. Bottini's careless operation of his vehicle is clear indication of prejudice to the Defendant.

- b. The court improperly permitted graphic and highly inflammatory photos of the autopsy to be admitted into evidence. This was highly prejudicial as no one was disputing his death or that his death resulted from the accident. There was no right to recover for pain and suffering between time of injury and time of death and the autopsy photos established nothing of relevance to this lawsuit. They did nothing but inflame the

sympathy of the jury. Defendant was grossly prejudiced by the admission of these photos and the amount of the verdict clearly shows such inflammatory prejudice was present.

- c. The Court improperly permitted Plaintiff to play a statement from Katie Geisbert that was taken prior to trial. While portions of the statement may have contradicted her in-court testimony as to who was driving the vehicle, the remaining portions of the statement served no purpose, but to inflame the jury against her. They did not impeach any statements that she made in court or deposition and did not relate to any issue in the case. Indeed, had Defendant sought to use testimony of her opinion regarding Plaintiff's poor driving ability, this would have been excluded as an improper opinion from a lay witness, much like the court did with Mr. Lampkin's testimony regarding Mr. Bottini's overcompensation. The clear reason Plaintiff sought to play Ms. Geisbert's statement was to portray her in a negative light through her cursing and other slurs. In addition, the statement played to the jury included comments regarding Ms. Geisbert's prior accidents, without any opportunity to establish whether she was at-fault for the accidents. This was clearly improper impeachment and such evidence would never have been admissible during cross examination on the stand. To allow such evidence in "through the back door" of an investigator's "statement" is highly improper, directly in violation of the rules of evidence and, in this case, has severely prejudiced the defendant. Ms. Geisbert's credibility was a key issue in the defense and to the extent that improperly admitted evidence has reduced her credibility, Defendant has been prejudiced.

The court's conclusion that Katie Geisbert could be treated like a party is legally incorrect. Ms. Geisbert was not a party to this action. There is no provision in the rules of evidence for "*de facto* parties" or "functional equivalent parties". Accordingly, relying on rules applicable to parties for evidentiary issues related to non-parties is improper. As stated above, the error was prejudicial to Defendant.

- d. The Court improperly admitted videotape evidence of the vehicles showing alcohol within Katie Geisbert's vehicle, as well as a cigarette roller. Such portions of the video could have been easily redacted and served no purpose other than to inflame the jury against Katie Geisbert and to portray her in a negative light. The presence of alcoholic beverages in a vehicle is so highly prejudicial that, unless there is independent evidence that the driver is impaired, should never be shown to the jury. In this case, there is no such independent evidence of impairment and no evidence that the beer bottle shown in the photo had been consumed on the day of the incident. This could have been edited out of the video and the failure to do so was highly prejudicial. Moreover, since Geisbert was not a party and there was no evidence that she was impaired, it was entirely irrelevant. Plaintiff could not establish that they played any part in causing this accident and to show them to the jury served no relevant purpose at all.

- e. Shortly after showing the jury the improper and prejudicial video discussed above, the court then permitted Mr. Yerrid to show Ms. Geisbert a photo that showed medication bottles that had also been in the car. The photo had not been admitted because it was too highly prejudicial. Thus, jury would never have known about the medications. However, when counsel published the photo to the witness, she defensively blurted out that they were "her medications." This thus enabled Plaintiff to put before the jury evidence which this court had concluded was too highly prejudicial to be admissible. The manipulation of the witness in such a manner should not be permitted. This incident, following so closely on the heels of the improper video tape showing beer and a cigarette roller was cumulatively so prejudicial and Defendant immediately sought a mistrial, which was denied. Again, such evidence was not relevant, since there was no issue to the jury as to whether Ms. Geisbert was impaired. The sole purpose of the evidence was to paint a negative picture of Ms. Geisbert and to prejudice the jury against her and thereby against Defendant who is vicariously liable for her conduct. However, the prejudice does not arise from her being negligent or not negligent, but rather from the jury thinking she is a bad person. That is clearly improper and, again, since she was a critical witness for the Defense, such "bad person" evidence was extremely prejudicial.
- f. The Court improperly permitted Kerry Brown to testify at length regarding the survivors' need for future medical treatment. Even though counsel stated that these were not damages they "were seeking" this did not cure the prejudice. Such damages are not recoverable for survivors under the wrongful death Act and evidence of such damages should never have been permitted. The entire purpose of such evidence was to improperly give the jury the impression that they needed to compensate the survivors for such treatment. This can only be done by exaggerating and increasing the other awards in the case. Given the shocking verdict in this case, it is clear that this worked quite successfully and the jury did, indeed, factor in such improper items as the survivors' need for counseling and other future medical treatment.
- g. The court improperly precluded relevant and critical evidence that related to the true economic value of the decedent's business which was directly related to the loss of net accumulations and lost support. The jury awarded \$1,768,714 in lost support and services to the various survivors. This number was clearly based on distorted and inaccurate figures because the court prevented Defendant's economic expert from explaining the full financial impact of payroll tax liability on plaintiff's business. This liability was clearly owed by the decedent's business and obviously impacted the profitability of the business. Accordingly, the financial figures upon which the jury based their lost support and services award were in error and the end result is an improper and reversibly tainted verdict.
- h. The Court improperly limited Defendant's engine expert from examining the engine prior to trial, improperly restricted his ability to testify at trial regarding his viewing of the engine and by not compelling Plaintiff to produce the engine for his use during trial testimony. The engine had been marked for identification, and should never have been

permitted out of the courthouse. Plaintiff sought to admit the engine into evidence, and Defendant agreed that such admission was proper. The engine had been timely disclosed and listed as an exhibit for trial. The court's reason for excluding it from evidence was improper and without support in Florida law. The consequence of all these rulings was that Defendant's expert was improperly prevented from demonstrating to the jury why the Geisbert engine failed and why it was not the result of her negligence. This was a highly contested issue at trial and the restrictions on Defendant's ability to fully explore this issue with the jury was fatally prejudicial to Defendant.

The error in failing to admit the engine or to compel its return to the courthouse was further compounded when counsel for Plaintiffs actually testified to the jury regarding the reasons why the engine was not present. There was no evidence in the proceedings on that issue and such testimony from counsel is highly improper and prejudicial.

- i. The court improperly instructed the jury on a legal issue that had never been pleaded and on which no evidence had ever been admitted and which was legally incorrect. At the charge conference, Plaintiff moved to include an instruction that Tim Lloyd was an agent of Katie Geisbert and Anita Lloyd. The sole basis for such purported agency relationship was because he was Anita's husband and because they trusted him to do repairs on the vehicle. In so doing, the court directly imputed any of Lloyd's negligence to Geisbert and thereby to GEICO. However, there is absolutely no factual support to find that an agency relationship existed between Geisbert and Lloyd and this instruction was error as a matter of law. It was prejudicial because the jury was thereby prevented from possibly assigning a portion of fault for the accident to Lloyd. Since any negligence attributed to Lloyd would have reduced the negligence attributed to Geisbert and thereby reduced GEICO's responsibility for the damages, such instruction was patently error and highly prejudicial to Defendant.
- j. The Court improperly refused to give a curative instruction or grant a mistrial when counsel for the Plaintiff, an experienced trial lawyer, attempted to equate the damages in this case to some type of priceless painting or other work of art. Counsel knew full well that such argument was improper, having already represented to the court that he would not make such argument in response to Defendant's motion *in limine* on that very topic. The argument is clearly and unequivocally improper. *Chin v. Caiaffa*, 42 So.3d 300 (Fla. 3rd DCA 2010)(finding that closing argument where counsel compared plaintiff's life to a Picasso painting was reversible error). In this case, there was a timely objection and motion for mistrial, thus, Defendant does not have to establish that this was fundamental error. *cf. Carnival Crop. v. Pajares*, 972 So. 2d 973, 979 (Fla. 3rd DCA 2007)(finding a Van Gogh comparison to be "highly improper" but not fundamental error); *Fasani v. Kowalski*, 43 So.3d 805 (Fla. 3rd DCA 2010).
- k. Even if any of the above errors was not, in and of itself, sufficiently prejudicial to warrant a new trial, the cumulative effect of the errors clearly supports a new trial. As stated by the Third DCA in *Fasani*,

Although "a single improper remark or argument might not be so prejudicial as to require reversal," *Pajares*, 972 So. 2d at 979,... the cumulative effect of ... counsel's numerous improper comments and arguments operated to deprive the appellants of a fair trial. See *Muhammad v. Toys "R" Us, Inc.*, 668 So. 2d 254, 259 (Fla. 1st DCA 1996) ("[T]he collective import of counsel's personal injections, and irrelevant and inflammatory remarks, was so extensive as to have prejudicially pervaded the entire trial, precluding the jury's rational consideration of the evidence and resulting in an unfair trial."). Accordingly, a new trial is warranted."

Fasani, 43 So.3d at 811-12.

7. Due to the above, the verdict was as a result of the jury being unduly influenced by passion or prejudice and was against the manifest weight of the evidence.
8. In addition to the grounds stated above, undersigned counsel moved for mistrial during the Plaintiff's rebuttal closing argument and this court reserved ruling.
9. Based upon the above stated grounds, a motion for new trial is appropriate and should be granted.

WHEREFORE, Defendant respectfully requests this court enter an order granting its motion for new trial and/or granting its motion for mistrial.