NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

UNITED SERVICES AUTOMOBILE ASSOCIATION, a foreign corporation, Appellant, v. ROBYN L. REY, ALICIA CRUZ and CONSUELO MOLINA, Appellees.	)	Case No. 2D18-5120

Opinion filed August 5, 2020.

Appeal from the Circuit Court for Hillsborough County; Elizabeth G. Rice, Judge.

Ezequiel Lugo of Banker, Lopez and Gassler, Tampa, for Appellant.

George A. Vaka and Nancy A. Lauten of Vaka Law Group, Tampa, for Appellee, Robyn L. Rey.

No appearance for remaining Appellees.

LUCAS, Judge.

United Services Automobile Association (USAA) appeals a final judgment entered in favor of Robyn Rey in her uninsured/underinsured motorist claim. USAA raises three issues for our consideration. We find merit in the first argument, which

requires reversal and a remand for further proceedings.[1] The circuit court improperly directed a verdict on an issue that should have been submitted to the jury.

Ms. Rey was injured in an automobile accident on April 12, 2011. She filed a negligence claim against Alicia Cruz, the driver of the other vehicle involved in the accident, and Consuelo Molina, the owner of that vehicle, and a UM claim against USAA, Ms. Rey's UM insurer.[2] A trial commenced on November 6, 2017. All three defendants conceded Ms. Cruz's negligence, so the only issues to be decided were causation, permanency, and damages. On the second day of the trial, Ms. Rey's counsel informed the presiding judge that a settlement had been reached with Ms. Cruz and Mr. Molina. The trial then proceeded on the stipulated issues against the remaining defendant, USAA.

Ms. Rey claimed she had suffered various physical injuries from the accident, but we will focus on the one that precipitated the directed verdict—her left knee. The evidence at trial showed that she had previously suffered injuries to that knee in 2001 while attending the U.S. Naval Academy. Ms. Rey hurt it again in August 2010 while out walking in specialized shoes. She reported that injury to her then treating physician, Dr. Seth Gasser, whose records reflected that she said she had fallen when her knee "popped out." Ms. Rey recalled it felt like "a shell was being plunged under her kneecap." In February 2011, some two months before the car

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[1]Because of this disposition, we will not address the remaining two issues.

[2]At the time of the trial, USAA had a pending motion to substitute based on its claim that the relevant underinsured motorist policy had been issued by its subsidiary, Garrison Property and Casualty Insurance Company. It does not appear that that issue has yet been addressed by the trial court.

accident, Dr. Gasser performed arthroscopic surgery on Ms. Rey's knee, during which he confirmed she had a torn meniscus. Following that surgery, Ms. Rey stated that her knee was improving up until the day of the car accident.

After the car accident, Ms. Rey testified that her knee "hurt really bad." She sought treatment with several doctors until, eventually, she found Dr. Kevin Scott, who was willing to treat her under a letter of protection.[3] After meeting with Ms. Rey and going over her records, Dr. Scott performed arthroscopic surgery on Ms. Rey's left knee. He concluded that Ms. Rey had suffered an ACL tear that was caused by the April accident. He further testified that the injury was permanent. Dr. Scott's records and testimony, however, revealed contradictions—both with Ms. Rey's testimony and his own.

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[3]As the Florida Supreme Court explained in Worley v. Young Men's Christian Ass'n, 228 So. 3d 18, 23 n.4 (Fla. 2017):

> A letter of protection is a document sent by an attorney on a client's behalf to a health-care provider when the client needs medical treatment, but does not have insurance. Generally, the letter states that the client is involved in a court case and seeks an agreement from the medical provider to treat the client in exchange for deferred payment of the provider's bill from the proceeds of [a] settlement or award; and typically, if the client does not obtain a favorable recovery, the client is still liable to pay the provider's bills.

Id. (alteration in original) (quoting Caroline C. Pace, Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values, 49 Hous. Law. 24, 27 (2012)).

Dr. Scott testified that approximately forty percent of his patients were treated under letters of protection. He admitted that these accounts were sometimes sold to finance companies for between thirty-five to forty percent of the amount due and that, on some occasions, he would accept fifty percent of these bills in full satisfaction of his charges.

For example, Dr. Scott testified that Ms. Rey had told him that she had had a "complete resolution of her prior knee symptoms" just before the April 12, 2011, accident. At trial, however, Ms. Rey denied ever telling Dr. Scott that. To the contrary, she admitted that she was still experiencing some pain, including "clicking, catching, and popping" in that knee in the days leading up to the accident. Two medical records—both of which Ms. Rey had admitted as evidence—also appeared to cast doubt on Dr. Scott's opinions. The first was a physical therapy note dated ten days after the accident (but prior to Dr. Scott's surgery), which indicated that Ms. Rey had been performing some type of therapy when her left knee "cracked," causing her pain. The second was an MRI dated April 28, 2011, which included a notation that Ms. Rey's "anterior cruciate ligament [ACL] is intact."

Ms. Rey moved for a directed verdict at the close of USAA's case. With respect to the left knee, the circuit court appeared persuaded by Ms. Rey's argument that USAA's failure to call an expert witness to rebut her experts' testimony meant that there was no competent evidence upon which the jury could reach a verdict in USAA's favor. The court directed a verdict in Ms. Rey's favor as to that discrete component of Ms. Rey's claim for both causation and permanency. The court instructed the jury that "Robyn L. Rey sustained a permanent injury to her left knee that was caused by the automobile collision of April 12th, 2011." At the conclusion of closing arguments, the court submitted a verdict form to the jury that omitted any questions of causation or permanency but simply asked the jury to determine an amount of damages for Ms. Rey's injuries. The jury then returned a verdict in favor of Ms. Rey in the amount of $446,000.

Following posttrial motions, the court entered a final judgment against USAA in the amount of $80,000, reflecting the policy's $50,000 limit and $30,000 of taxable costs. This is USAA's appeal.

We begin with some first principles about directed verdicts in negligence actions. They should rarely be granted. Nunez v. Lee County, 777 So. 2d 1016, 1016 (Fla. 2d DCA 2000) ("Florida law cautions against a motion for directed verdict in negligence cases since the evidence to support the elements of negligence are frequently subject to more than one interpretation." (quoting Regency Lake Apartments Assocs. v. French, 590 So. 2d 970, 972 (Fla. 1st DCA 1991))); Yellow Cab Co. of St. Petersburg, Inc. v. Betsey, 696 So. 2d 769, 771 (Fla. 2d DCA 1996) ("Directed verdicts in negligence cases must be granted in an especially cautious manner." (citing Phillips v. Van's Elec. of Lake Worth, Inc., 620 So. 2d 253 (Fla. 4th DCA 1993))); Lee v. Southland Corp., 253 So. 2d 268, 269 (Fla. 2d DCA 1971) ("In a tort action the trial [c]ourt should always be extremely chary in directing a verdict at trial . . . ."); MasTec N. Am., Inc. v. Morakis, 288 So. 3d 685, 688 (Fla. 4th DCA 2019) ("Motions for directed verdict are rarely appropriate in negligence cases." (quoting Howell v. Winkle, 866 So. 2d 192, 195 (Fla. 1st DCA 2004))). A directed verdict takes away the jury—a constitutional right—from a civil litigant. See Teare v. Local Union No. 295 of the United Ass'n of Journeymen & Apprentices of Plumbers & Pipe Fitters Indus. of U.S. & Can., 98 So. 2d 79, 81 (Fla. 1957) ("We have held that the power to direct a verdict should be cautiously exercised in order to avoid encroaching on a party's right to a jury trial in a common law action."); Robison By & Through Burgera v. Faine, 525 So. 2d 903, 905 (Fla. 3d DCA 1987) ("The authority to direct a verdict must be exercised with great

caution as in doing so the court is encroaching upon the right of a litigant to a jury trial . . . ." (quoting Marcano v. Puhalovich, 362 So. 2d 439, 441 (Fla. 4th DCA 1978))).[4]

Thus,

> [a] motion for directed verdict should be granted only where no view of the evidence, or inferences made therefrom, could support a verdict for the nonmoving party. In considering a motion for directed verdict, the court must evaluate the testimony in the light most favorable to the nonmoving party and every reasonable inference deduced from the evidence must be indulged in favor of the nonmoving party. If there are conflicts in the evidence or different reasonable inferences that may be drawn from the evidence, the issue is factual and should be submitted to the jury.

Sims v. Cristinzio, 898 So. 2d 1004, 1005 (Fla. 2d DCA 2005) (citations omitted). The evidentiary question a trial judge faces in a directed verdict motion is not *should* a jury consider an issue to reach a particular verdict, but rather, *could* a jury reach a particular verdict on that issue. Id.; Lee, 253 So. 2d at 269 (observing that a defendant's directed verdict motion should not have been granted since a verdict for the plaintiff "was within the orbit of legal possibility"). We review a trial court's decision to grant a directed

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[4]Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("[T]he concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." (quoting O. Holmes, Collected Legal Papers 237 (1920))); Margaret M. Moses, What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence, 68 Geo. Wash. L. Rev. 183, 185 (2000) (observing that, by several accounts, the absence of a specific guarantee of a civil jury trial was what prompted the debate to add a bill of rights to the constitution).

verdict de novo. Krueger v. Quest Diagnostics, Inc., 280 So. 3d 518, 520 (Fla. 2d DCA 2019); Kim v. Jung Hyun Chang, 249 So. 3d 1300, 1305 (Fla. 2d DCA 2018).

From our review of this record, we conclude that the circuit court erred when it directed a verdict on the issue of causation and permanency for Ms. Rey's knee injury claim. The absence of an expert to rebut Dr. Scott's testimony was not fatal to USAA's right to have the disputed issues in this case decided by a jury. Cf. Wald v. Grainger, 64 So. 3d 1201, 1205-06 (Fla. 2011) (explaining that a jury may reject an expert's testimony on permanency where there is "conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or complete medical history, conflicting lay testimony or evidence that disputes the injury claim, or the plaintiff's conflicting testimony or self-contradictory statements regarding the injury"). Here, there were two medical records that cast doubt upon Dr. Scott's conclusion that the accident caused an ACL tear in Ms. Rey's knee. There was also a substantial amount of evidence about prior injuries to Ms. Rey's knee and conflicting testimony about the condition of her knee when the accident occurred. A jury could reasonably question Dr. Scott's credibility, even if only because he was providing his services under a letter of protection. Cf. Bellezza v. Menendez, 273 So. 3d 11, 15 (Fla. 4th DCA 2019) ("[L]etters of protection may be admitted to establish bias . . . ."); Leggieri v. Costco Wholesale Corp., No. 17-81257-CIV, 2018 WL 8300260, at *3 (S.D. Fla. May 23, 2018) ("If Dr. Rousch routinely accepts nothing from patients who do not recover any damages in litigation, but accepts some other amount when a patient recovers in litigation, such a scenario could support an argument by Costco that Dr. Rousch's testimony in this

matter may be biased in favor of Plaintiff and her recovery in this litigation."). And based upon Ms. Rey and Dr. Scott's testimony, the jury could have concluded that Ms. Rey had not reported her knee's condition accurately to Dr. Scott (or that Dr. Scott had not recalled it accurately).

When viewed in its entirety and in the light most favorable to USAA, the record before us does not support the circuit court's directed verdict. USAA may not have put on as extensive of a case as Ms. Rey, but a jury could have found in USAA's favor had it been given the case. Accordingly, we reverse the judgment below and remand this case for further proceedings.[5]

Reversed and remanded.

CASANUEVA and SMITH, JJ., Concur.

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[5]Because the jury was never given an opportunity to reach a verdict on the issues of causation and permanency, it appears that, absent some other resolution, a new trial will have to be convened. We would take this opportunity to repeat the advice the Florida Supreme Court has offered concerning directed verdict motions:

> "[T]rial judges who are inclined to grant a directed verdict at the conclusion of the case should instead reserve ruling thereon, allow the jury to return a verdict, and thereafter rule on the motion. . . ." [I]t often makes more sense for the trial court to wait until the jury renders a verdict, regardless of what stage the trial is in at the time the motion is made, since the jury's action may moot the motion.

Ricks v. Loyola, 822 So. 2d 502, 506 (Fla. 2002) (quoting Gutierrez v. L. Plumbing, Inc., 516 So. 2d 87, 88 n.2 (Fla. 3d DCA 1987)).