

# FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April - June, 2003

*[Editor's Note: In order to reduce possible confusion the defendant in a criminal case will be referred to as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court, that is, plaintiff or defendant. In administrative suspension cases, the driver will be referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will determine the placement order in these summaries.]*

## Driving Under the Influence

Arrowood v. State, 843 So. 2d 940 (Fla. 1st DCA 2003).

The defendant was sentenced to life imprisonment after being convicted of DUI manslaughter, failing to render aid, DUI with serious bodily injury (two counts), and DUI with damage to person. The life sentence, which exceeded the prescribed statutory maximum, was imposed because the total points scored on the Criminal Punishment Code Scoresheet was above the 363 required for such a sentence. That total included 18 points assessed by the judge for moderate victim injury points.

The district court reversed the life sentence, holding that the computation of points by the judge for the DUI damage to person conviction violated the rule enunciated in Apprendi v. New Jersey, 530 U.S. 466 (2000), to wit, that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and be proved beyond a reasonable doubt. Specifically, the district court held that the trial court erred in not submitting the matter to the jury for a finding as to whether the "damage to person" was moderate or light.

Department of Highway Safety and Motor Vehicles v. Megan-Neave, 845 So. 2d 934 (Fla. 5th DCA 2003).

The defendant was a passenger on her own motorcycle when the driver was arrested for driving under the influence. He was subsequently discovered to have been driving on a license revoked for a prior DUI conviction. The motorcycle was seized from the defendant pursuant to section 322.34(9)(a), Florida Statutes, which provides for the forfeiture of a vehicle driven by a person under the influence if that person's license has been suspended for a prior DUI conviction.

The defendant contested the forfeiture, claiming ignorance of the driver's revocation as a defense to such forfeiture, as authorized by section 932.703(6)(a), Florida Statutes. The trial court agreed with the defendant's position that the motorcycle was not subject to forfeiture.

The district court reversed, holding that the department had established by a preponderance of the evidence that the defendant was not an innocent owner, as described in section 932.703(6)(a), since she had reason to know her property was being used for a criminal activity, to wit, driving under the influence (a fact to which she admitted).

Department of Highway Safety and Motor Vehicles v. Whitley, 846 So. 2d 1163 (Fla. 5th DCA 2003).

After being observed driving in a weaving manner between lanes, the defendant was stopped. Upon approaching the defendant, the officer observed a strong odor of alcohol, glassy eyes, and slurred speech. The defendant was arrested for fleeing and eluding a law enforcement officer and, after being given his Miranda warning, admitted to having had too much to drink. He subsequently refused to take field sobriety tests, but did take a breath test, the results of which revealed a level above the legal limit. At this time he was formally charged with driving under the influence. A formal review of his drivers license suspension resulted in a six month suspension. Upon a petition for writ of certiorari, the circuit court quashed the final order of suspension, holding that a breath test must be incidental to a DUI arrest and thus a driving privilege may not be suspended unless the driver is first arrested for DUI and thereafter administered the test.

The district court granted certiorari and quashed the circuit court decision, holding generally that there was no statutory requirement that a breath test be administered in order to give an officer probable cause for a DUI arrest. The court observed that the officer had sufficient evidence to establish probable cause for a DUI arrest at the time of the stop of the defendant's vehicle, that is, erratic driving and physical signs of alcohol consumption. The district court then interpreted section 316.1932(1)(a)1., Florida Statutes, as requiring a breath test to be incidental to a lawful arrest, but observed that the statute authorized the test to be incidental to an arrest "for any offense allegedly committed while the person was driving . . . under the influence . . ." The court then agreed with the state's contention that the arrest for fleeing and eluding satisfied the statutory requirement since such offense was committed while the defendant was driving under the influence.

State v. Van Bebber, 848 So. 2d 1046 (Fla. 2003).

While the defendant was driving home after a party at which he had consumed sufficient alcohol to impair his faculties, he ran a stop sign and collided with a vehicle containing a family of six. The defendant pled nolo contendere and was convicted of one count of DUI manslaughter, one count of DUI with property damage, and three counts of DUI with personal injury (one serious bodily injury). At sentencing, the trial court downwardly departed on the sentence, based on the statutory mitigator in section 921.0026(2)(j), Florida Statutes, that is, that

the offense was “committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.” The district court affirmed, holding that this mitigator was applicable to driving under the influence cases.

The Supreme Court approved the district court’s opinion and disapproved State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), to the extent it conflicted with its holding. Specifically, the Court held that section 921.0026, which deals with mitigating circumstances, by its terms only excludes capital felonies from the scope of its operation and makes no specific reference to driving under the influence. The Court rejected the district court’s reasoning in Warner that drunk driving cannot be committed in an unsophisticated manner. The Supreme Court also rejected the state’s argument that such a holding conflicts with section 921.0026(3), Florida Statutes, which provides that the defendant’s substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor and cannot justify a downward departure, reasoning as follows:

We find that no conflict is created by holding section 921.0026(2)(j) applicable to felony DUI convictions. Under subsection (3), intoxication at the time of the offense cannot be used as a mitigating factor to support a downward departure from a sentence under the sentencing guidelines. There is no prohibition, however, against using the mitigators listed in section 921.0026(2) in cases where the offense is intoxication. In this case the trial court imposed a downward departure on the fact that [the defendant] was remorseful for an isolated incident committed in an unsophisticated manner. Again, if the Legislature intended to specifically exempt felony DUI offenses from this statutory scheme the Court must presume that it would have explicitly done so in the statute. As the Second District noted, ‘we shall not judicially legislate and interpret the law to negate the clear language used by the legislature.’

Department of Highway Safety and Motor Vehicles v. Swegheimer, 847 So. 2d 545 (Fla. 5th DCA 2003).

The defendant’s drivers license was suspended for refusal to submit to a chemical test. At the formal review before a hearing officer, the police officer’s probable cause affidavit, which contained a reference to a location within the city limit, was reviewed. The hearing officer rejected the defendant’s argument that the affidavit failed to establish that the offense was committed within the city limits. The circuit court quashed the suspension, concluding that the arresting officer failed to establish jurisdiction.

The district court granted the department’s petition for certiorari and quashed the circuit court decision. The district court held that the affidavit constituted competent substantial evidence of jurisdiction and was properly considered by the hearing officer pursuant to section 322.2615(11), Florida Statutes, which specifically authorizes a hearing officer to conduct a formal hearing “upon a review of the reports of a law enforcement officer.”

Weber v. Department of Highway Safety and Motor Vehicles, 845 So. 2d 300 (Fla. 5th DCA 2003).

The defendant was convicted of the offense of felony driving under the influence, which required the Department of Highway Safety and Motor Vehicles to revoke the defendant's license pursuant to section 322.26(1)(a), Florida Statutes. This provision had recently been invalidated by the Florida Supreme Court under a single-subject challenge in Department of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003). In 2002, the defendant had filed a "Complaint for Summary Judgment" seeking a declaration that section 322.26(1)(a) violated the single subject rule (based on the district court Critchfield opinion) and a further declaration that he "would not be legally barred from applying for a hardship license." The trial court denied the complaint, finding that the defendant's revocation was not part of the criminal sentence, but rather an action to be taken by the department, and that until the department took action there was no matter in controversy.

The district court affirmed, holding that the relief sought was properly denied. The court observed that the defendant's remedy was properly with the agency that allegedly revoked his license, not the court. The district court concluded that if the department acts unlawfully in failing to rescind the defendant's revocation or otherwise revokes his license without lawful purpose, the defendant may avail himself of the appropriate remedy at the time.

State v. McCabe, 845 So. 2d 327 (Fla. 2d DCA 2003).

The defendant was clocked by law enforcement at seven miles over the speed limit, but subsequently stopped on her own. At that time the officer walked up to her vehicle and, suspecting that she was impaired based on her physical appearance, arrested her for driving under the influence and eventually for possession of a controlled substance. The trial court granted the defendant's motion to suppress, concluding that: 1) the police officer did not have probable cause to stop the defendant's vehicle, even though the defendant, according to the radar unit, was seven miles over the speed limit, since the officer elected not to apprehend her for speeding, but chose to wait while she drove eight blocks; 2) the defendant was not weaving, nor was there any indication that she was having sufficient difficulty with the vehicle to justify a stop; and 3) the police officer did not stop the defendant for speeding but rather wanted to stop her to conduct an investigation with no founded suspicion.

The district court reversed, holding that the trial court misapplied the law to the facts in using a subjective intent standard to reach the conclusion that the officer made the stop for an improper purpose, a DUI investigation. The district court observed that the officer's purpose was irrelevant, given that the speeding infraction provided probable cause for the stop.

Sunby v. State, 845 So. 2d 1006 (Fla. 5th DCA 2003).

The defendant was stopped, according to an officer's testimony, for weaving within his lane and cited for the failure to maintain a single lane. The citation was later dismissed because there was no evidence that the defendant's driving endangered the officer or anyone else, as

required by section 316.089(1), Florida Statutes. The county court had granted the defendant's motion to suppress after viewing a videotape of the defendant's driving and finding that there had been no infraction committed in the officer's presence, based on the tape. The court chose to disregard the officer's testimony that prior to the taping, the defendant was observed striking the center line and driving more erratically than the tape indicated. The circuit court overturned the order of suppression.

The district court granted the defendant's petition for writ of certiorari, holding that the circuit court had improperly reweighed the evidence and chose to believe a state witness which the county court judge chose not to believe. The district court observed that the trial court as the fact-finder was free to ignore or place less emphasis on certain testimony based on credibility determinations.

State v. Shumaker, 846 So. 2d 1199 (Fla. 2d DCA 2003).

The defendant was stopped for failing to dim high beams within 500 feet of an oncoming vehicle in violation of section 316.238(1)(a), Florida Statutes, and failing to dim high beams within 300 feet of another vehicle in violation of section 326.238(1)(b). He was subsequently charged with driving under the influence (fourth offense) and driving while license suspended. The trial court granted the defendant's motion to suppress, but failed to make any findings of fact.

The district court reversed, holding that while the trial court was correct in finding that the officer did not have probable cause to stop the defendant for failing to dim for an oncoming vehicle since he was driving on a divided highway, the finding was incorrect in relation to failing to dim high beams while behind another vehicle. The district court observed that the officer testified without contradiction that the defendant was "maybe two" car lengths behind the car in front of him, and that by any strained construction of the phrase one could not conclude the defendant was more than 300 feet from the vehicle in front of him. Since the only evidence before the trial court indicated that the defendant's car was within 300 feet of another vehicle, its legal conclusion was in error and the motion to suppress should not have been granted.

Vedner v. State, 28 Fla. L. Weekly D1401 (Fla. 5th DCA June 13, 2003), opinion withdrawn and superseded by, 849 So. 2d 1207 (Fla. 5th DCA 2003).

As a result of a crash in which the defendant rear-ended another vehicle, a passenger in the defendant's vehicle was killed. The defendant was subsequently convicted of DUI manslaughter, vehicular homicide, DUI causing damage or injury, and possession of drug paraphernalia. Prior to being charged, the defendant was interviewed three times by law enforcement. Testimony regarding all three interviews was admitted at trial, despite the fact that the defendant only received a Miranda warning in relation to the first interview.

The district court affirmed, holding that while testimony regarding one of the interviews should not have been admitted, any error was harmless. In all the interviews the accident

investigator and criminal investigator were involved. In relation to the first interview, conducted the day after the crash, the defendant properly received Miranda warnings. At the second interview, five days later, the defendant did not receive any warning but was advised that he was free to leave at any time. The third interview occurred six months later, at which time the defendant was told he was free to leave but not given a Miranda warning. At this interview, the defendant admitted to drug usage (his blood alcohol level was under .08). In ruling that evidence from the third interview should not have been admitted (but was harmless error), the district court stated as follows:

The third interview, however, is problematic. [The defendant] specifically inquired about the reasons for the additional questions, and he was told that it was for the accident investigation, not a criminal investigation. Here, there was an “indication” that he was required to answer the questions, and he should have been advised under Miranda. We conclude that the failure to warn [the defendant] under Miranda prior to eliciting the statements that were used against him in a criminal trial violated his right against self-incrimination. It was error, therefore, to allow the jury to hear and consider those statements.

Taylor v. State, 848 So. 2d 410 (Fla. 1st DCA 2003).

The defendant pled to DUI manslaughter and was sentenced to seven years imprisonment. She filed a motion for postconviction relief, arguing that the state committed a violation of Brady v. Maryland, 373 U.S. 83 (1963), by failing to reveal several pieces of evidence that would have been favorable to her. The trial court denied the motion.

The district court reversed and ordered the trial court to conduct an evidentiary hearing on the Brady claim. The district court noted that the claimed violations, to wit, that the state failed to reveal the results of the blood test of the other driver involved in the accident (which would have shown the presence of alcohol and drugs in her system) and statements by a witness to law enforcement indicating that the other driver was intoxicated, driving erratically, and talking on a cell phone at the time of the offense, were facially sufficient to establish a Brady violation of such prejudice that the defendant would not have entered a plea if she had knowledge thereof.

## **Criminal Traffic Offenses**

State v. Barnes, 841 So. 2d 614 (Fla. 2d DCA 2003).

The defendant was convicted of vehicular homicide. The trial court downwardly departed on the defendant’s sentence based on a finding that the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant had shown remorse.

The district court affirmed, rejecting the state's argument that the applicable statutory provision, section 921.0026(2)(j), Florida Statutes, was inapplicable since the offense of vehicular homicide could not be committed in either a sophisticated or unsophisticated manner. The district court observed that the statute makes no exception for vehicular homicide and that the record supported the trial court's finding.

J. J. v. State, 842 So. 2d 266 (Fla. 2d DCA 2003).

The defendant was adjudicated delinquent of aggravated fleeing to elude and leaving the scene of an accident. The trial court found the defendant guilty of the latter charge as a lesser included offense of the charged offense of leaving the scene of a crash with injury.

The district court reversed, holding that the lower court had found the defendant guilty of a non-existent offense. Specifically, the court reasoned that:

Pursuant to section 316.027(1), it is a third-degree felony to leave the scene of a crash resulting in injury and a second-degree felony to leave the scene of a crash resulting in death. Pursuant to section 316.061(1), it is a second-degree misdemeanor to leave the scene of a crash resulting in damage to a vehicle or other property. There is no statute that makes it a criminal offense to leave the scene of a crash when there is no resulting death, injury, or damage to a vehicle or other property. The trial court correctly recognized that the State failed to introduce any evidence of injury as required to support a delinquency adjudication under section 316.027(1)(a). Likewise, however, there was no evidence of damage to any vehicles or other property.

Arnett v. State, 843 So. 2d 340 (Fla. 1st DCA 2003).

The defendant was convicted of felony driving while license revoked pursuant to section 322.34(5), Florida Statutes. At trial an order of license revocation issued by the Department of Highway Safety and Motor Vehicles was introduced to prove that the defendant was an habitual traffic offender.

The district court reversed, holding that the state had failed to establish the necessary predicate for admission of the record as a business record. Citing section 90.803(6)(a), Florida Statutes, the court observed that a business record must be shown to have been (1) made at or near the time of the event recorded, (2) by or from information transmitted by a person with knowledge, (3) kept in the course of a regularly conducted business activity, and (4) the regular practice of that business to make such a record. The district court, observing that business records are admissible if the records custodian or other qualified witness testifies as to manner of preparation, reliability, and trustworthiness of the record, held that the state's presentation of the "skeletal" testimony of a 31-year employee to the effect that she was familiar with the department's recording system, and that the order was sent to the defendant as required by some unspecified statute, failed to establish any of the four predicate elements for admission. The

court concluded that because the order was the only evidence to establish two of the elements necessary to prove the defendant's conviction (that his license was revoked and that the revocation was based on the habitual-traffic-offender statute), the error could not be considered harmless.

Jones v. State, 846 So. 2d 662 (Fla. 2d DCA 2003).

The defendant pled guilty to driving with a license revoked as an habitual traffic offender and resisting arrest without violence. Conditions of probation included submission to random drug testing at the defendant's expense and fifty dollars restitution to the sheriff's office.

The district court reversed on both conditions of probation. In relation to the drug testing, the court, observing that this condition had not been orally pronounced in court, upheld the testing requirement, but struck the provision that the defendant pay. The district court then struck the restitution requirement, noting the sheriff's office did not qualify as a victim for payment of restitution pursuant to section 775.089(1)(c), Florida Statutes. The district court observed, however, that the defendant had agreed to pay \$50 to the sheriff's office as part of his written plea agreement, and held that upon remand the trial court could include this assessment as an individual condition of the defendant's probation.

Santiago v. State, 847 So. 2d 1060 (Fla. 2d DCA 2003).

The defendant was convicted of various offenses, including the second degree felony of aggravated fleeing or eluding pursuant to section 316.1935(4), Florida Statutes. The district court reversed the felony conviction, stating that there was no proof that the defendant was leaving the scene of a crash as the statute required, whether a crash involving death, personal injuries, or damage to vehicle or property. The court observed that the evidence elicited at the trial was undisputed that the defendant was leaving the scene of a shooting, not a crash, and remanded for entry of judgment and sentence on the simple misdemeanor of fleeing and eluding.

Fonteyne v. State, 855 So. 2d 99 (Fla. 2d DCA 2003).

The defendant was convicted of reckless driving and placed on one year of probation. The district court reversed, holding that since the maximum term of imprisonment for a first conviction of reckless driving was 90 days, the probation for such offense could not exceed 90 days, irrespective of whether the defendant agreed to such a term.

Keller v. State, 849 So. 2d 385 (Fla. 2d DCA 2003).

The defendant was convicted of vehicular homicide as a result of crashing into a car containing the victim, who was making a left turn in front of him. Evidence introduced at trial indicated that the defendant had been drinking and driving erratically prior to the crash and was speeding without his headlights on (at night) when the crash occurred. At trial, the court denied

the defendant's request for special instructions detailing the traffic regulations relating to the definition of an intersection, violation of the right of way by a vehicle turning left, and proper left turns in an intersection.

The district court reversed and remanded for a new trial, noting that the failure to give the special instructions (refused by the trial court on the grounds that they were either not relevant or that any relevance was outweighed by the potential for jury confusion) was error. The district court, observing that the defendant's expert accident reconstruction expert witness had testified that if the victim had turned at the intersection rather than cutting a corner the accident would not have occurred, held that the defendant had established his entitlement to a special jury instruction by proving that the instruction was supported by the evidence, was a correct statement of the law, was not confusing or misleading, and that the standard instruction did not adequately cover the theory of the defense.

### **Arrests, Search and Seizure**

State v. McClendon, 845 So. 2d 233 (Fla. 4th DCA 2003).

The defendant was a passenger in a vehicle parked in the middle of a road with its lights out. A law enforcement officer asked the driver why the vehicle was parked in this manner, at which time the defendant responded that he had gotten out of the car to change his shoes. The defendant then asked to go to a nearby gas station, but he did not move in that direction. After determining that the defendant was the unlicensed lessee of the rental car, the officer subsequently discovered cocaine as a result of a canine alert. The trial court granted the defendant's motion to suppress.

The district court reversed, holding that under circumstances where the officer feared the defendant (being unable to see one of his hands), a reasonable governmental invasion of the defendant's personal security was appropriate.

State v. Diaz, 850 So. 2d 435 (Fla. 2003).

Upon observing that the vehicle driven by the defendant had a temporary tag in the rear window, a law enforcement officer initiated a stop. While approaching the vehicle, the officer could clearly read the tag, which he determined to be in proper order. He subsequently obtained information from the defendant leading to the charge of felony driving with a suspended license. The defendant was convicted as charged.

Upon appeal, the district court reversed, holding that once the officer found the temporary tag to be proper, no further stop or inquiry was justified. The court stated that the subsequent continued detention of the defendant was illegal and that any information obtained was

inadmissible. Observing that the Fourth and Fifth District Courts of Appeal appeared to have reached a contrary legal conclusion, the district court certified conflict to the Supreme Court.

The Supreme Court affirmed, stating as follows:

[Under United States Supreme Court precedents] it appears that once a police officer has totally satisfied the purpose for which he has initially stopped and detained the motorist, the officer no longer has any reasonable grounds or legal basis, for continuing the detention of the motorist. Here, as soon as the officer determined the validity of [the defendant's] temporary tag, he no longer had reasonable grounds or any other basis legal or otherwise, to further detain [the defendant]. Having completely ascertained the validity of the temporary license plate, the law enforcement officer no longer had any cause or suspicion supporting the existence of a traffic or any other violation. Further, under the facts presented here, he certainly had no articulable or reasonable suspicion to support the detention of [the defendant]. There was nothing whatsoever questionable about the vehicle or those persons in the vehicle and there simply was no hint of any criminal activity. While the officer's reason for the initial stop may arguably have been legitimate, once that bare justification had been totally removed, the officer's actions in further detaining [the defendant] equated to nothing less than an indiscriminate, baseless detention, not unlike that held to be inappropriate and unconstitutional by the United States Supreme Court in [citation]. The continued detention of [the defendant] after full knowledge had been acquired that totally removed any articulated question constituted an infringement upon his Fourth Amendment rights. To hold otherwise would permit law enforcement officers to randomly stop any and all vehicles having a temporary license plate designed and created by the State and conduct a further examination and interrogation of the driver, and later justify the stop by claiming the tag, a product created by the State, was unreadable. Such random stops and extended detentions, having no basis are unconstitutional . . .

Sanchez v. State, 847 So. 2d 1043 (Fla. 4th DCA 2003).

The defendant was the subject of an anonymous tip regarding the transport of cocaine. After being followed for a distance, the defendant was stopped for speeding. While the officer was writing the citation another officer arrived with a dog who alerted on the defendant's vehicle, leading to the discovery of cocaine and a firearm. The trial court found that the stop was valid and the defendant was convicted of various drug and firearm offenses.

The district court affirmed, holding that the passage of five to ten minutes, during which the officer obtained the defendant's license and registration, ran a check on both, noticed that the license was limited to business purposes, and questioned the defendant regarding his destination, was not unreasonable. The court also rejected the defendant's argument that the multitude of

traffic offenses was so large and difficult to obey that it permitted law enforcement officers to single out anyone they want to stop, noting that this argument had been previously rejected by the United States Supreme Court.

Frierson v. State, 28 Fla. L. Weekly D1329 (Fla. 4th DCA 2003), opinion withdrawn and superseded by, 851 So. 2d 293 (Fla. 4th DCA 2003).

The defendant was stopped for the failure to signal, in violation of section 316.155(1), Florida Statutes, and driving with a cracked tail light, in violation of section 316.610, Florida Statutes. The trial court found that the stop was invalid, given that no drivers were affected by the defendant's failure to use a turn signal and that the tail light in question was in fact operating. However, the trial court denied the defendant's motion to suppress evidence of the illegal firearm found in the defendant's vehicle after he was subsequently arrested on an outstanding warrant, even though the warrant turned out to be invalid (another person had given law enforcement the defendant's name and date of birth). The trial court based its denial on the fact that the existence of the arrest warrant constituted an intervening circumstance which dissipated the taint of the illegal traffic stop.

The district court agreed that the traffic stop was improper, observing that the failure to use a turn signal charge was unsupported in the absence of evidence suggesting the turn created a safety concern and that the existence of a cracked reflector rather than a cracked light was insufficient to support that charge. The district court then reversed the denial of the motion to suppress, holding that it should have been granted because the initial traffic stop was not supported by reasonable cause and that subsequently discovered evidence was the fruit of the poisonous tree. The court discussed, but did not find dispositive, the fact that the error that led to the defendant's arrest may have not been attributable to law enforcement and thus may have been subject to a good faith exception if the stop had occurred for that reason alone.

### **Torts/Accident Cases**

Dozier v. Hodges, 849 So. 2d 1094 (Fla. 3d DCA 2003).

The plaintiff received a final judgment and an order awarding attorney fees and costs as the result of a motor vehicle crash. The district court affirmed, holding that the trial court had not erred by prohibiting the introduction of evidence that the plaintiff received a traffic citation and paid it by mail (distinguishing case law in which evidence had been admitted in a case where the driver had pled guilty to a traffic infraction by mail, because in that case a personal appearance was required), and by excluding the expert testimony of a law enforcement officer relating to the plaintiff's speed in light of the fact that the officer had taken no measurements, made no calculations, and had no factual basis for his opinion.

Matalon v. Lee, 847 So. 2d 1077 (Fla. 4th DCA 2003).

The plaintiff's vehicle was rear-ended by the defendant's vehicle, after which the defendant left his vehicle to check on the plaintiff and then fled the scene. The jury awarded the plaintiff compensatory and punitive damages. The trial court declined to enter a remittitur.

The district court affirmed, rejecting various procedural arguments. The court then specifically upheld the award of punitive damages, which it stated are awardable when voluntary intoxication is involved in an accident. The court noted the abundant (if not direct) evidence of intoxication, to wit, testimony of bar-hopping, admissions of drinking and having driven 80 miles in the wrong direction, the fact of having rear-ended a vehicle during daylight hours and in clear weather, fleeing the scene, and failure to contact police.

Zuckerman v. Robinson, 846 So. 2d 1257 (Fla. 4th DCA 2003).

As a result of a hit-and-run, rear-end collision in which the defendant was at fault and intoxicated at the time of the crash, the plaintiff was awarded compensatory damages and punitive damages of \$250,000 by the jury. Undisputed evidence produced in relation to the latter issue revealed that the defendant had minimal assets and income. The judge declined to order a remittitur.

The district court reversed the trial court's denial of the defendant's motion for remittitur based on the holding in Arab Termite & Pest Control of Florida v. Jenkins, 409 So. 2d 1039 (Fla. 1982), and commented as follows:

Thus, the cases hold that while the jury has broad discretion in fixing an amount of punitive damages, its discretion is limited by the current financial resources of the plaintiff. The amount of punitive damages may not be so large as to exceed the defendant's financial ability. Where the amount awarded exceeds defendant's financial ability – that is, when it is greater than the “reasonable range within which the jury may properly operate” – it is ipso facto an abuse of discretion for the trial judge to refuse a remittitur and corresponding right of new trial. Hence it was error for the trial judge to refuse a remittitur or new trial.

The district court, after discussion of arguments undermining the continuing validity of Arab Termite, certified the following question to the Supreme Court as a question of great public importance: whether the economic castigation limitation on punitive damages should be eliminated entirely or at least amended in cases of injury caused by driving while intoxicated.