LUKS SANTANIELLO & PEREZ PETRILLO GOLD

LEGAL UPDATE

VOLUME 7, ISSUE 3
JULY — SEPTEMBER 2008

The Power to Dismiss a Lawsuit for Fraud is an Extraordinary Remedy Found only in Cases where a Deliberate Scheme to Subvert the Judicial Process has been Clearly and Convincingly Proved by Marcella L. Garcia, Esq.

Marcella Garcia

Tracy Bologna, A/K/A Tracy Hoffman, Appellant, v. Edwin Schlanger, etc., Et Al., Appellee. 5th District. Case No. 5D06-1017, Opinion filed June 20, 2008.

Bologna appealed the trial court's order dismissing her personal injury suit with prejudice for intentional and fraudulent conduct in responding to discovery and deposition testimony. The 5th DCA concluded that the trial court erred in dismissing the claim without conducting an evidentiary hearing and reversed. Basically, Bologna testified in her deposition she injured her neck and back as a result of the subject accident in March 2000. She also admitted to being involved in a prior accident in 1998, although denied any injury or medical treatment as a result of that accident.

Defendants filed a "Motion to Dismiss Repeated Intentional and Fraudulent Conduct in Respondent to Discovery," contending Bologna *knowingly and deliberately* made *perjurious statements* under oath in her deposition or interrogatories to *conceal* information regarding prior back and neck injuries. Apparently, medical records uncovered facts that Bologna sought treatment for back pain at least fifteen times prior to the subject accident. The trial court heard arguments from both parties, but no evidence was taken. The trial court found by clear and convincing evidence that Bologna committed fraud on the court by knowingly and intentionally failing to disclose her previous treatment for the same conditions for which she sought damages in the instant action. The court entered final judgment for Defendants, after granting the motion to dismiss.

The 5th DCA reversed the trial court's ruling because an evidentiary hearing was not held. Specifically finding, the power to dismiss a lawsuit for fraud is an extraordinary remedy found only in cases where a deliberate scheme to subvert the judicial process has been clearly and convincingly proved. Short of this, poor recollection, dissemblance, even lying, can be well managed through cross-examination. A testimonial discrepancy is usually not enough; there should be clear and convincing evidence of a scheme calculated to evade or stymie discovery of facts central to the case. This will almost always require an evidentiary hearing. *See Gehrmann*, 962 So. 2d at 1061; *Howard v. Risch*, 959 So. 2d 308, 312 (Fla. 2d DCA 2007); *Myrick v. Direct Gen. Ins. Co.,* 932 So. 2d 392 (Fla. 2d DCA 2006); *Medina v. Fla. East Coast Ry.,* 866 So. 2d 89 (Fla. 3d DCA 2004)*; Jacobs v. Henderson*, 840 So. 2d 1167 (Fla. 2d DCA 2003); *Simmons v. Henderson*, 745 So. 2d 1031 (Fla. 2d DCA 1999); *Furst v. Blackman*, 744 So. 2d 1222 (Fla. 4th DCA 1999).

Announcements Boca Raton Office New Location.

The Boca Office has moved to a more convenient location. The office phone and fax will remain unchanged. Please update your records to reflect the new office address at 301 Yamato Road - STE 1234, Boca Raton, FL 33431. Read more . . . Page 2

In This Issue

OFFICE LOCATIONS

TALLAHASSEE
T: 850.385.9901
F: 850.907.2087

PALM BEACH
T: 561.893.9088
F: 561.893.9048

FORT LAUDERDALE
T: 954.761.9900
F: 954.761.9940

MIAMI
T: 305.377.8900
F: 305.377.8901

ORLANDO
T: 407.540.9170
F: 407.540.9171

TAMPA
T: 813.226.0081
F: 813.226.0082

JACKSONVILLE
T: 904.791.9191
F: 904.791.9196

CLIENT RELATIONS
T: 954.847.2959

Edited by:
David S. Gold, Esq.
Daniel J. Santaniello, Esq.

Workers' Compensation

Waffle House and Brentwood Service Administrators, Inc. v. Scharmen, 33 Fla. L. Weekly D1347 *by Brian C. Karsen, Esq.*


Brian Karsen

In this First District Court of Appeal case, the employer/carrier asserted the statute of limitations had expired and denied the claimed benefits. The employer/carrier sought to depose claimant's counsel to determine whether counsel had informed the claimant of the statute of limitations, thereby establishing the claimant had actual knowledge. The claimant and his counsel objected and the Judge of Compensation Claims refused to allow the employer/carrier to depose claimant's counsel, citing attorney-client privilege. The Judge subsequently found that the employer/carrier failed to provide the claimant with notice of his rights under the Workers' Compensation law and that it was estopped from asserting the statute of limitations defense.

On appeal, the First District Court of Appeal stated that "It is well-established that no privilege attaches to attorney-client communications consisting of non-privileged information or the attorney's recitation of statutory language." The Court cited *Kilbourne & Sons v. Kilbourne*, 677 So. 2d 855 (Fla. 1st DCA 1995) finding non-privileged attorney communication to client reciting statutory language and advising of statutory work search requirements and also *Watkins v. State, 516 So. 2d 1043* (Fls. 1st DCA 1987) finding non-privileged attorney's testimony regarding advising client of trial dates.

In this case, The First District Court of Appeal found that an attorney's communication of the applicable statute of limitation to a client is mere recitation of statutory language and, accordingly, is not privileged. The Court indicated that there was no reason to prevent the employer/carrier from trying to obtain this information and that, in fact, it was crucial to a correct resolution of the case. The Court held the Judge of Compensation Claims abused her discretion by preventing the employer/carrier from deposing claimant's counsel to obtain this crucial information and reversed the final order.

Announcements cont.

Ranking Among Florida Firms.

The Daily Business Review ranked **L**uks **S**antaniello **P**erez **P**etrillo & **G**old in 2008 among the 100 Largest Law Firms in Florida. The firm ranked **# 49**.

FWCI Workers' Compensation Conference.

The firm will be exhibiting at the FWCI 63rd Annual Workers' Compensation Conference in Orlando August 17 through 20, 2008. Visit us in booth **# 307.**

Defense Verdicts

Trip & Fall. Morea v. Forest. (Polk County). Anthony J. Petrillo, Partner received a defense verdict May 21, 2008 in a Premises Liability trial wherein Plaintiff, William Morea, a retiree, alleged the owners and managers of the apartment complex where he lived, were negligent. Plaintiff tripped and fell in and around the dumpster area where he had just finished discarding his recyclables. The case was bifurcated and tried on liability only. Plaintiff sought in excess of **$100,000** in damages seeking compensation for his knee surgery and other injuries.

Plaintiff alleged a crack in the concrete had eroded into a crevice, gouge, hole and even a "pothole", causing his foot to catch and send him to the ground injuring his wrists (carpal tunnel), thumb (trigger finger), back (herniation of a lumbar disk) and knees (one requiring arthroscopic surgery). Based on a proposal for settlement the Defendants will be seeking attorney's fees and costs from the date of service of the proposal.

Trip and Fall. Schwartz v. Pena. (Broward County). Daniel J. Santaniello, Managing Partner and Carl W. Christy, Associate received a defense verdict March 7, 2008 in an alleged Trip & Fall incident where Plaintiff demanded **$97,500**. Plaintiff alleged that while walking her dog on the sidewalk located in front of the Defendants' residence, she tripped and fell on an uneven, elevated sidewalk. Plaintiff alleged that Defendants breached their duties owed to the Plaintiff by: (1) negligently failing to maintain the sidewalk in a

Amendment to Unfair Claim Settlement Practices Statute *by Carl W. Christy, Esq., C.P.C.U.*


Carl Christy

The Florida Legislature added a new provision to Florida Statutes §626.9541 (1)(i), *Unfair claim settlement practices*, effective July 1, 2008. The amendment establishes a time limit for claims payments under first-party residential property insurance policies and specifies several situations in which an insurer may be excused from an untimely payment. Senate Bill 2860 was co-authored by Jeff Atwater, Republican, North Palm Beach and Senate Minority leader Steve Geller, Democrat, Cooper City. The amendment to §626.9541(1)(i)4. Fla. Stat. prohibits an insurer from failing to pay undisputed amounts of partial or full benefits owed under first-party residential property insurance policies within 90 days after determining the amount of partial or full benefits and agreeing to coverage. Violations of this provision could be grounds for a private civil remedy action under §624.155 Florida Statutes. The new legislation was implemented to bring about more prompt payment of amounts owed for residential property insurance claims benefiting policyholders. Legislative analysts acknowledge that the new statute may also result in overpayment of claims to avoid litigation and possibly increase litigation under the civil remedy statute. The text of the new provision is provided below:

> §626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined. - -
> (1)UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.- -
> (i) *Unfair claim settlement practices*.-
> 4. Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.

The essential elements of the new payment-triggering legislation are: (1) notice to the insurer; (2) determine the amount of partial or full benefits; and (3) agree to coverage. If each of these elements is met, the new statute requires that the insurer pay the undisputed amount of benefits owed within 90 days or it may be subject to a civil remedy action. The law provides extenuating circumstances under which an untimely payment may be excused as discussed below.

Untimely payment of undisputed benefits due an insured or claimant under a residential first-party property insurance claim may be excused if the delay is the result of: (1) an act of God; or (2) impossibility of performance. In addition, the new legislation excuses insurers from timely payment of the undisputed amount if the actions of the insured or claimant constitute fraud, lack of cooperation or intentional misrepresentation regarding the claim for which the benefits are owed.

Schwartz v. Pena cont.

reasonably safe condition, (2) negligently creating a tripping hazard, (3) negligently failing to inspect the sidewalk, (4) negligently failing to warn Plaintiff of the dangerous and hazardous condition on the sidewalk, (5) negligently planting trees close to the sidewalk causing the trees' root system to lift the sidewalk and (6) failing to repair the sidewalk which they knew or should have known required repairs.

The Defendants denied the allegations, contending that the Plaintiff did not trip where she alleged, a distance of some twenty-five-feet from where she ultimately landed and that she, in fact, tripped over her own feet as she admitted to a neighbor who offered assistance immediately after the fall. Defendants further argued that the elevated sidewalk condition was open and obvious and known to the Plaintiff who lived in the subject subdivision for fifteen years.

Plaintiff had comminuted fracture of mid-shaft of left humerus accompanied by separation of humeral head. Surgical repair resulted in placement of intramedullary rod and five screws. Plaintiff incurred **$38K** in medical treatment expenses reduced by health insurance payments to $10,100. Plaintiff made no claim for lost earnings or earning capacity.

Defense Verdicts cont.

Negligent Security. Mrad and Deniz v. Store. (Hillsborough County).
Anthony Petrillo, Partner received good results in a Negligent Security matter when the Jury found Plaintiff 80% responsible for his own damages, and Defendant store 20% at fault. The case was bifurcated and tried on liability only. Plaintiff was violently attacked by another customer, which was captured on the in-store surveillance camera. Plaintiff was rendered unconscious and transported to the ER. Plaintiff claimed over **$100,000** in medical specials and a permanent brain injury causing him a multitude of psychological and memory problems. Plaintiff sought **7 figure monetary damages** and his wife sought consortium damages. Defense was able to establish that Defendant Store's security measures were reasonable and adequate and that Plaintiff contributed to his injuries by engaging in a verbal altercation, escalating the situation. Defense obtained a directed verdict on the issues of Negligent Hiring and Retention. The verdict was rendered March 12, 2008.

Slip and Fall. Vogelsong v. Store. (Polk County).
Anthony Petrillo, Partner was granted a Motion for Summary Judgment on liability for a store Slip and Fall incident in Polk County. Plaintiff sued on a Mode of Operation (MOO) theory after he fell from a shelf he climbed to retrieve a medicine cabinet. Plaintiff shattered his kneecap in the fall and sought significant money damages. Plaintiff's medical bills totaled approximately **$42,000**. Defense argued that there was no genuine issue of material fact on inadequate staffing and no viable theory of negligence to proceed under. Anthony Petrillo, on behalf of Defendant store argued at the hearing that Plaintiff was the sole proximate cause of his own injuries and the Court agreed. Summary Judgment rendered May 2, 2008.

Motor Vehicle Accident. Jericiau v. Vasquez. (Palm Beach County).
Paul Jones, Partner and Marc Greenberg, Associate, received a big win February 7, 2008 on a motor vehicle accident matter where the judge granted Plaintiff's motion for directed verdict on liability. Plaintiff asked the jury for over **$250,000.** Plaintiff presented evidence of past lost wages of **$60,000** with a continuing wage loss of **$20,000 per year**. Plaintiff's past medical expenses were over **$35,000.**

After proceeding through the intersection of Military Trail on Okeechobee Boulevard, rush hour traffic came to a stop. Plaintiff was rear-ended by Defendant and pushed into the car in front of him. Plaintiff had his right hand on the steering wheel at the time of the significant rear impact. Orthopedic surgeon, Dr. Jeffrey Kulger, performed arthroscopic surgery on Plaintiff's right shoulder and debrided what Dr. Kulger visualized as a full-thickness tear of the rotator cuff. Plaintiff also experienced neck pain from the impact. MRI of Plaintiff's cervical spine revealed disc herniations at C4-5 and C5-6 with spinal cord compression and impingement of the C6 nerve root. Plaintiff underwent a series of cervical epidural steroid injections which he reported provided only minimal relief. Surgery was recommended. The Defense convinced the jury that Plaintiff's injuries were not caused by the impact from the subject accident. Judgment was entered in favor of the Defendant.

The Luks, Santaniello, Perez, Petrillo & Gold

LEGAL UPDATE

Luks, Santaniello, Perez,
Petrillo & Gold

515 East Las Olas Blvd.
Suite 1100
Ft. Lauderdale, FL 33301

T: 954.761.9900
F: 954.761.9940

Visit us on the Web at
www.LS-LAW.com