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Liability

The Validity of Pre-Accident Releases Entered into by Parents on Behalf of Minor Children *by Xavier J. Jackman, Esq.*



Xavier Jackman

While pre-accident releases are commonly entered into by parents on behalf of minor children, the validity of these releases had been an unresolved question in Florida Courts. The Florida Supreme Court resolved this issue, at least partially, in *Kirton v. Fields*, So.2d, 2008 WL 5170603, 33 Fla. L. Weekly S939 (Fla. Dec 11, 2008).

In *Kirton*, the Florida Supreme Court answered a certified question sent to them by the Fourth District Court of Appeal, to wit, whether a pre-accident release signed by a parent on behalf of a minor child is valid. The underlying action arose as a result of a parent's execution of a pre-injury release, a waiver of liability, an assumption of risk, and an indemnity agreement in order to allow his fourteen year-old son to gain entry into Thunder Cross Motor Sports Park ("Thunder Cross") for recreational operation of an all terrain vehicle or "ATV." Tragically, while the child was operating the ATV at Thunder Cross's facility, the child attempted a jump and missed the landing, causing him to be ejected from the vehicle. He was subsequently killed when the ATV he was operating landed on top of him.

Following his untimely passing, the estate of the minor ("The Estate") filed a wrongful death action against the owners and operators of Thunder Cross. In its Answer, Thunder Cross included an affirmative defense to the action relying upon the above mentioned release and subsequently sought summary judgment upon same.

The Trial Court granted the Thunder Cross motion, however the trial court's ruling was reversed upon appeal by the Fourth District. The Fourth District noted among other things, that there was no statutory scheme governing the issue of pre-injury releases signed by parents on behalf of minors, and refused to create one from the bench. In doing so, it certified a conflict with the Fifth District and certified the issue as a question of great public importance.

Thunder Cross asserted that the fundamental rights of a parent include the right to execute such a release. Thunder Cross analogized the release at issue to the pre-litigation right of a parent on behalf of a minor to reject a settlement offer and pursue litigation without the necessity of attaining judicial approval. The Estate countered that neither the common law, nor the legislature had provided a parent the authority to waive the substantive rights of a minor child.

The Florida Supreme Court was faced with two competing interests; 1) the protected interest of a parent in raising a child, an interest derived both from the Fourteenth Amendment as well as the guarantee of privacy afforded all citizens by article I, section 203 of the Florida Constitution; and 2) the responsibility of the State in assuring that its children are adequately protected. Upon reviewing these competing concerns, the Court held that a pre-injury release executed by a parent or guardian of a minor is not valid for *commercial enterprises*. The Court cited the doctrine of *Parents Patriae* that reasons that all children are under the protection of both the parent and the state, and that the state has a duty to protect these children. Pursuant to this doctrine, there can be limits on parental

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Workers' Compensation

Is this the Beginning of the End of Cap on Psychiatric Benefits? by Brian C. Karsen, Esq.



Brian Karsen

The First District Court has recently issued an opinion that seems to imply that the six month cap on the payment of TT/TP benefits due a psychiatric condition may no longer apply in certain cases. The opinion is confusing but will undoubtedly be used by Claimant's to argue that they are entitled to additional benefits. This opinion could be just the first of several that roll back the limitations imposed by Florida Statute 440.093.

Florida Statute 440.093(3) states in part "Subject to the payment of permanent benefits under s. 440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for more than 6 months after the date of maximum medical improvement for the injured employee's physical injury or injuries, which shall be included in the period of 104 weeks as provided in s. 440.15 (2) and (4)."

Presumably, if an injured employee was placed at MMI for her physical injuries but continued with psychiatric work restrictions, then temporary disability benefits would continue to be paid. According to section 440.093(3), it appeared that such temporary disability benefits were limited to only six months following the physical MMI date, at which time any applicable permanent impairment benefits would be paid. If the employee was not at overall MMI when placed at physical MMI, and still receiving temporary disability benefits related to an ongoing psychiatric disability, then it would not be appropriate to simultaneously issue payment of permanent impairment benefits based on any physical impairment rating.

In W. G. Roe & Sons v. Javier Razo-Guevara, 34 Fla. L. Weekly D46 (January 9, 2009) the Judge of Compensation Claims limited an award of temporary total disability benefits to six months in applying section 440.093(3). The First District Court of Appeal overturned the JCC's decision. In doing so, the DCA stated that a court must look to the plain language when construing a statute. In the instant case, the DCA found that the six-month limitation on temporary psychiatric benefits was

conditioned on the payment of permanent benefits for the associated physical injury. "This means the limitation does not apply unless permanent benefits are being paid."

"Permanent" benefits within section 440.15 include permanent total disability benefits and permanent impairment benefits. Permanent total disability benefits are not paid concurrently with temporary disability benefits. Accordingly, the First DCA cannot have been referring to the payment of this particular class of benefits. The only remaining class of permanent benefits, then, is permanent impairment benefits.

The First DCA's opinion appears to suggest that the six month limitation does not apply unless permanent impairment benefits are being paid. Not that impairment benefits have been paid or will be paid, but that they are being paid. This, of course, is inconsistent with the principle that temporary indemnity benefits are owed if an employee is not at overall MMI and earning less than 80% of her average weekly wage.

The First DCA's opinion suggests that permanent impairment benefits related to a physical impairment should be paid once an employee is placed at physical MMI. Temporary indemnity benefits based on a continuing psychiatric disability would then be paid simultaneously, subject to the six month limitation per section 440.093(3) – or so it seems from the Court's decision.

The First DCA's interpretation of section 440.093 (3) leads to a confusing result. This decision is vague and seems to inconsistently combine sections 440.093(3) and 440.15. The idea that the six month limitation does not apply unless permanent impairment benefits - which would not yet be owed - are paid concurrently with temporary indemnity benefits does not fit with the "plain language" of Chapter 440. This opinion will undoubtedly create ambiguity in those cases involving psychiatric disability continuing beyond the date of physical MMI. Whether this is just the first step in rolling back the limitation on temporary benefits due to a psychiatric condition remains to be seen.

Liability

New Medicare Reporting Requirements for Liability Cases *by Brian E. Pabian, Esq.*



Brian Pabian

Medicare's obligation to cover medical costs is secondary to certain group health plans that includes liability insurance. Pursuant to 42 U.S.C. § 1395y(b)(2)(B)(ii), primary payers, and any entity that receives payment from a primary plan, are obligated to reimburse Medicare for conditional payments when it is demonstrated that a primary plan "has or had a responsibility" to make

payment.

The statute further provides that if the judgment or settlement with a claimant includes payment of Medicare-covered medical expenses, Medicare is legally allowed to recoup prior payments and to avoid any payment for future medical expenses that are covered by the settlement. Medicare can enforce its rights through a direct action against liability insurers, as well as through subrogation rights and rights of joinder and intervention. See 42 C.F.R. §§ 411.24(g) and 411.26.

The Federal Government has recently enacted legislation that strengthens Medicare's enforcement rights against liability insurers. The purpose of the new rules is to enable the Centers for Medicare and Medicaid Services (CMS) to ensure that it has the necessary information to determine when Medicare's financial responsibility is secondary, and if so, to establish whether it can reduce payments or attempt to recoup monies already paid.

Effective July 1, 2009, The Medicare, Medicaid, and SCHIP Extension Act of 2007 places an affirmative obligation on the part of liability insurers to determine if a claimant is entitled to Medicare benefits. If a claimant is entitled to such benefits, the insurer is required to timely notify Medicare if the claim is resolved through settlement, judgment, award or other payment, irrespective of issues of negligence or comparative fault. 42 C.F.R. § 411.25(a). Failing to provide timely notice could result in a penalty of up to \$1,000.00 per day for each claim until compliance is met.

Insurers must register online with the Medicare Coordination of Benefits Contractor between May 1, 2009 and June 30, 2009. Insurers must report on a quarterly basis, in an electronic format designated by CMS, any settlement, judgment, award or other payment made on or after July 1, 2009, with respect to a Medicare beneficiary, regardless of whether

there has been an admission or determination of liability. There will be an initial testing period, however, and the time frames for reporting are subject to change. Insurers must report the identity of a Medicare beneficiary whose illness, injury, incident, or accident was at issue as well as such other information specified by the Secretary of Health and Human Services to enable an appropriate determination concerning coordination of benefits, including any applicable recovery claim.

Reporting must be done after the claim is resolved through a settlement, judgment, award, or other payment or in situations where the insurer accepts "ongoing responsibility" for medical payments, irrespective of any stipulation or determination of liability. The practical effect is that all claims involving a claimant entitled to Medicare or a claimant who has potential future Medicare claims must be reported to CMS. Even a claim that is denied outright based upon a complete lack of liability must be reported. The exact reporting form and manner have not yet been specified by CMS, but it is clear that submissions are to be performed electronically.

This article provides only a summary analysis of the new reporting regulations and all liability insurers must stay abreast of announcements from CMS of the agency's implementation guidelines. For further information, please visit www.cms.hhs.gov/MandatoryInsRep or contact Brian Pabian, Esq. by e-mail (bep@ls-law.com).

DEFENSE VERDICTS

Construction Defect - Drowning

Sun International v. Centex Rooney et. al.
\$10M Sought
Miami-Dade County
Defense Verdict 1/16/2009
Daniel J. Santaniello, Managing Partner

Premises Liability - Slip and Fall

Leads v. Mall
Pinellas County
Defense Verdict 11/13/2008
Jack D. Luks, Partner

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control in situations such as truancy, child labor, etc.. The Court concluded, "While a parent's decision to allow a minor child to participate in a particular activity is part of the parent's fundamental right to raise a child, this does not equate with a conclusion that a parent has a fundamental right to execute a pre-injury release of a tortfeasor on behalf of a minor child. It cannot be presumed that a parent who has decided to voluntarily risk a minor child's physical well-being is acting in the child's best interest."

In rendering this decision, the Court conducted an analysis of previous decisions of the lower courts as well as foreign jurisdictions, and highlighted the fact that most of these jurisdictions have separate standards for commercial versus community and/or school-based activities. The Court engaged in a thorough analysis of the different public policy concerns involved in both community/school-based activities versus commercial activities. Yet in its holding, the Court specifically limited its ruling to situations involving commercial enterprises, and explicitly stated that its analysis regarding community and/or school-based functions was merely dicta and should not be relied upon as binding precedent.

It appears that this was a somewhat hotly contested case behind the scenes of the Court due to the publication of multiple concurring opinions as well as a dissent. In the concurring opinions, Justice Anstead specifically stated that the opinion was narrowly tailored to "commercial operators who *wrongfully and negligently* cause injury to a child." {Emphasis added} Justice Pariente, in her concurring opinion, pointed out the severe negligence on the part of the track operators, as well as the fact that the ATV at issue was not recommended for riders under the age of sixteen. She further differentiated between known risks and negligence. Justice Wells authored a dissent opining that this issue was a question for the legislature, and to rule that the release in question was void was unfair to the track operator, as the operator had no prior indication to believe this release would be held invalid. Justice Wells further lamented the lack of a concrete definition of the term "commercial operator," that a question remained as to the validity of pre-injury releases signed by a parent or legal guardian for non-commercial operators, and loathed the litigation expense that will be required to get answers to these questions.

As with many decisions of the Court, the result seems to be more questions than answers. Clearly the Court recognizes the different public policy issues presented by activities controlled by commercial enterprises as opposed to those that would be classified as community or school-based activities. Yet the question remains, will this be a sufficient basis for reaching an opposite result, and if so what will be the test to determine what is and is not a "commercial activity?" Of course, all this analysis could go by the wayside if the Legislature subsequently intervenes. Notwithstanding these questions, the one answer we do have is that the Courts will not hold valid any pre-injury release executed on behalf of a minor by a parent in favor of a commercial enterprise, and all businesses currently relying on such a release need to immediately insure themselves accordingly.

1 The Fifth District had previously upheld a similar release in Lantz v. Iron Horse Saloon Inc., 717 So.2d 590 (5th DCA 1998) (*Parent of child injured while operating "pocket bike" sued premises owner, claiming negligence in failing to provide safety equipment and failing to post rules. The Court held that: release executed by parent was sufficient to release claims based on premises owner's negligence.*)

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