LUKS, SANTANIELLO PETRILLO, GOLD & JONES

LEGAL UPDATE

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Liability

After the Property Damage has Already Been Paid . . . . Diminished Value Claims? *by Julie M. Congress, Esq.*

Julie Congress

We have seen a recent trend in Florida to file a diminished value claim after the vehicle has been fully repaired to its pre-loss condition and after the property damage claim has already been paid. Florida insurance companies are experiencing an increasing number of claims for diminished value of motor vehicles. Diminished value is the difference between the value of a car pre-crash and post-crash, this difference may be as much as 18 percent.

Florida law recognizes claims for diminished value of motor vehicles. The Plaintiff has the burden of proof to demonstrate that the vehicle which was damaged actually diminished in value as a result of the motor vehicle accident. The measure of damages pursuant to the case law is the value of the vehicle immediately before the accident complained of less the value of the vehicle after all repairs have been made to the vehicle. The first such case in Florida regarding diminished value was *Airtech Service, Inc. v. MacDonald Construction Company*, 150 So.2d 465 (Fla. 3rd Dist. 1963), wherein the Court held that Plaintiff was entitled to recover damages for the diminished value of the aircraft after the aircraft was damaged in a fire while it was in the possession of Defendant. This case is cited with regard to the measure of damages in diminished value cases throughout the District Courts of Appeal in Florida.

The current case law suggests that claimants are not entitled to damages greater than the fair market value of the vehicle prior to its injury. The *Airtech Service, Inc. v. MacDonald Construction* Company case, decided in 1963, is still good case law and has been examined and discussed throughout the years by the Florida District Court of Appeals. Moreover, the following cases as to diminished value of the vehicle, although not recently decided cases, are all still good case law. The fair market value of a vehicle prior to its injury was examined in the case of *Badillo v. Hill*, 570 So.2d 1067 (Fla. 5th DCA 1990), wherein the Court determined that a Plaintiff is not entitled to damages greater than the fair market value of the vehicle prior to the injury. Other additional cases on this issue which have been examined by the District Courts of Appeal in Florida include *Merrill Stevens Dry Dock Company v. Nicholas*, 407 So.2d 32 (Fla. 3rd DCA 1985); *McHale v. Farm Bureau Mutual Ins. Co.*, 409 So.2d. 238 (Fla. 3rd DCA 1982); and *McMinis v. Phillips*, 351 So.2d. 1141 (Fla. 1ST DCA 1977).

Diminished value claims tend to be higher when dealing with luxury series vehicles and higher-end vehicles. The handling of these cases differs slightly from cases

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T: 850.385.9901
F: 850.907.2087

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Edited by:
Maria Donnelly, CR
Daniel J. Santaniello, Esq.

Liability

The Effect of the New Florida Slip and Fall Statute on Defense Motions for Summary Judgment *by Anthony J. Petrillo, Tampa Partner and Jennifer J. Seitz, Esq.*

Anthony Petrillo

Effective July 1, 2010, Fla. Stat. §768.0755 provides that a plaintiff who slips and falls on a transient foreign substance in a business establishment must prove that the business owner had actual or constructive knowledge of the dangerous condition. This tort reform measure essentially reinstates slip and fall law as it existed prior to the Florida Supreme Court's decision in *Owens v. Publix Supermarkets, Inc*. [1] By fully shifting the burden of proof back to the plaintiff, the new law greatly increases the odds of a favorable defense motion for summary judgment where there is no evidence of notice to the business owner of the transitory foreign substance.

In most cases, the business owner does not have, or the plaintiff cannot prove, actual notice of the dangerous condition. Therefore, the issue usually is whether there is sufficient evidence to prove the business owner's constructive knowledge. As set forth in Fla. Stat. §768.0755, constructive knowledge may be proven by circumstantial evidence showing that: (a) the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business owner should have known about the condition; or (b) the condition occurred with regularity and was therefore foreseeable.

In determining whether the transitory foreign substance existed for a sufficient amount of time to put the business owner on notice, the appearance and condition of the substance is critical. Depending on the description of the substance, some Pre-Owens courts left the issue of constructive notice to the jury. Examples of substances which presented a factual question for the jury regarding how long the substance existed on the floor include: partially melted butter; [2] dirty, wet, black sauerkraut; [3] thawed, dirty, splattered ice cream; [4] an unidentified sticky substance that had dried; [5] wilted, dirty collard leaf; [6] thawed frozen orange juice, indicating it was on the floor long enough to thaw; [7] and an unidentified substance described as very dirty, trampled, skid marked, scuff marked, and chewed up. [8]

However, other courts have held that there was no constructive notice as a matter of law when nothing about the substance's appearance indicated the length of time it was on the floor. For example, in *Miller v. Big Sea Trading, Inc.* the Third DCA affirmed summary judgment in favor of the defendant supermarket where the plaintiff allegedly slipped on a grape and fell, because "there was no evidence to indicate that the grape had been on the floor for any length of time such as thawing, cart tracks, footprints or other indicia of constructive notice."[9]

Jennifer Seitz

Interestingly, the plaintiff attempted to rely on an inference that nearby store employees should have known, and therefore were on constructive notice, of the grape's presence before the accident. The court held it would be mere speculation to infer that the employees *could* have seen the grape, let alone *should* have seen it in time to remove it before the plaintiff fell. The court went on to further state that the mere fact there was no inspection for a given length of time did not prove that the condition actually existed for a sufficient period of time to place the business owner on reasonable notice of its existence.

It is thus abundantly clear that the courts who have granted summary judgment on the constructive notice issue have not allowed plaintiffs to rely on speculation, conjecture, supposition or inferences to prove the length of time a condition existed; there must be some actual circumstantial evidence of that fact such as melting, tire tracks, dirt, footprints, etc.

Further examples of substances which have been held as a matter of law not to give rise to constructive notice include: a slippery, oily substance without skid marks or smudges; [10] a slippery substance without dirt or footprints in it; [11] and uncooked, dry rice and beans that had not been ground into the floor or crushed. [12]

The enactment of Fla. Stat. §768.0755 will allow business owners and their insurers to prevail much more frequently on summary judgment where there is no evidence of actual notice to the business owner of the transitory foreign substance, and no clear circumstantial evidence proving the age of the substance. For further information, please contact Anthony Petrillo, Tampa Partner (ajp@LS-LAW.com).

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Diminished Value Claims cont.

dealing with average vehicles and may require additional cost measures which Claimants/ Plaintiffs attorneys are unwilling to undergo, such as retaining an expert early on to prove up their claim. With respect to average vehicles, we take an aggressive approach with these claims forcing Claimants/Plaintiffs to provide expert testimony up front in the litigation process to substantiate their claims. This makes it cost prohibitive for Plaintiffs to pursue frivolous claims. Should they be willing to undertake these costs, we likewise take an aggressive approach defending these claims by retaining our own experts to combat the claims. Luks, Santaniello recently successfully defended a case on appeal where Plaintiff claimed both loss of use and diminished value which exceeded the fair market value of the vehicle. The Appellate Court agreed with our position and reduced the judgment to the fair market value of the vehicle. *Duque v. Saidel*, 5 Fla. L. Weekly Supp. 736c (11TH Jud.Cir. App. July 17, 1998).

Who are the diminished value assessment service companies? Diminished value assessment service companies may take cases on a contingency fee basis, although it is unclear whether there are actual lawyers working at these companies who are licensed to practice law in the jurisdiction where venue would be proper to file a lawsuit. Some advertise as being licensed, bonded and insured claiming that the adjusters have attended and participated in specialized training specific to the automobile repair industry. These companies may be obtaining copies of police reports, calling up individuals involved in the accident, either sending them paperwork to sign up or directing them to their website to sign up.

Under this new trend, insurance companies doing business in Florida may now be inundated with diminished value claims. Remember, although Florida law does allow for these types of lawsuits, the burden of proof as to motor vehicle's diminished in value rests on the Claimant/Plaintiff making the claim. Also, a Claimant/Plaintiff is bound by the language of the insurance policy at issue.

Not all insurance policies allow for diminished value claims. If a policy of insurance does not allow for this type of claim, insurance companies should make sure that the language contained within the policy is clear and unambiguous. Also, just because a company files a claim for diminished value on behalf of an individual does not mean that the company itself is legally permitted to do so. Although it is unclear whether diminished value assessment service companies may provide legal representation to individuals suing for diminished value claims, we would expect them to specifically state that they have licensed attorneys working for them. For further assistance with diminished value claims or additional information, please contact Daniel Santaniello, Managing Partner (djs@LS-LAW.com).

New Florida Slip and Fall Statute continued.

[1] *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315 (Fla. 2001).

[2] *Ramey v. Winn Dixie Montgomery, Inc.*, 710 So.2d 191 (Fla. 1st DCA 1998).

[3] *Ress v. X-tra Super Food Centers, Inc.*, 616 So.2d 110 (Fla. 4th DCA 1993).

[4] *Camina v. Parliament Ins. Co.*, 417 So.2d 1093 (Fla. 3rd DCA 1982).

[5] *Hodges v. Walsh*, 553 So.2d 221 (Fla. 2nd DCA 1989).

[6] *Montgomery v. Florida Jungle Stores, Inc*., 281 So.2d 302 (Fla. 1973).

[7] *Vrizzard v. Colonial Stores, Inc*., 330 So.2d 768 (Fla. 1st DCA 1976).

[8] *Woods v. Winn Dixie Stores, Inc.*, 621 So.2d 710 (Fla. 3rd DCA 1993).

[9] *Miller v. Big Sea Trading, Inc.*, 641 So.2d 911, 911 (Fla. 3rd DCA 1994).

[10] *Wal-Mart Stores, Inc. v. King*, 592 So.2d 705 (Fla. 5th DCA 1991).

[11] *Evens v. Eastern Airlines, Inc*., 468 So.2d 1111 (Fla.1st DCA 1985).

[12] *Winn Dixie Stores, Inc. v. Gaines*, 542 So.2d 432 (Fla. 4th DCA 1989).

The Daily Business Review's 2010 "Review 100" — Florida's Largest Law Firms

Luks Santaniello has been ranked four consecutive years (2010, 2009, 2008 and 2007) among the top 50 largest law firms in Florida by the Florida Daily Business Review. The firm ranked 47 in 2010, and increase over 2009 and has placed in the top 50 for the last 4 years.

Defense Verdicts/Summary Judgments

Bruno v. Defendant Store, Wrongful Death, Palm Beach County, Jack D. Luks and Zeb I. Goldstein, Partial Summary Judgment, May 7, 2010.

Rivero v. Solivan, Vehicular Liability, Miami-Dade County, Howard W. Holden and Julie M. Congress, Defense Verdict, May 18, 2010.

Anca Dudar v. St. Andrews at El-Ad Nob Hill Condominium Association, Premises Liability, Broward County, Daniel J. Santaniello and Thomas J. Gibbons, Defense Verdict, May 20, 2010.

New Seminars

Three new seminars are available from Luks, Santaniello. Please contact Client Relations to schedule a complimentary ceu/cle seminar (mdonnelly@**LS-LAW**.com or direct 954.762.7038).

Claims Negotiation Skills

Claims Negotiation Skills provides 3 adjuster optional ceus and teaches adjuster ethics and the principled negotiation method & strategies for getting to the agreement. The 4 phases of negotiation (a) planning and analysis (b) information exchange including first offer, (c) concessions and compromise and (d) reaching an agreement are discussed in detail. The instructor will address dirty negotiation tactics, psychological warfare and positional pressure tactics that may be used by adversaries and how to counter these tactics. 5 challenging insurance claims scenarios and how to negotiate through them will be discussed.

Discovery

This seminar provides 3 ceus (2 adjuster law & policy and 1 optional) and discusses why we need discovery, the various forms of discovery, responding to discovery and why discovery matters.

Rules of Professional Conduct

Rules of Professional Conduct provides 1 adjuster ethics ceu and discusses the ethical responsibilities of the claims professional in the evaluation, handling and negotiation of claims. The course outlines ethical considerations and constraints for the various classes of insurance adjusters and also addresses settlements/ negotiations, bad faith and civil remedies notices.

The Luks, Santaniello, Petrillo, Gold & Jones

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Luks, Santaniello, Petrillo, Gold & Jones
110 S.E. Sixth Street—20th Floor
Ft. Lauderdale, FL 33301

T: 954.761.9900
F: 954.761.9940

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