

VOLUME 9, ISSUE 4

OCTOBER — DECEMBER 2010

### NEW Office Opening

**Miami Office:** 2950 S.W. 27th Ave, Suite 100, 33133  
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We are pleased to announce the opening of a Miami office located on 2950 S.W. 27th Ave. Charles Balli, Senior Associate will operate out of the Miami office. Charles has been an Insurance Defense litigator for over 23 years. He concentrates his practice in personal injury, wrongful death, premises liability, automobile negligence, PIP, commercial carrier liability, products liability, first party property damage claims and insurance coverage issues. Prior to joining the firm, he worked as in-house counsel for a major insurance carrier and for various private practices in South Florida.

### Liability

**How to Challenge Percutaneous Surgeries and LOPS** by James Waczewski and Daniel Santaniello.



James Waczewski

In personal injury actions, one of the most important components of a plaintiff's case is the amount of past medical expenses allegedly incurred as a result of the defendant's negligence. The total amount of past medical expenses is often used by the plaintiffs' bar, during settlement negotiations, or during closing arguments at trial. It's used as a suggested measuring stick for an appropriate award of future medical care and more importantly, for an appropriate award for non-economic "pain and suffering" damages – often suggested as three or four times the value of the plaintiff's past-medical expenses. From a plaintiff's perspective, greater past medical expenses increase the value of the case, both during settlement negotiations and before a jury. Whether any "surgery" was part of the past medical treatment is even more important from a plaintiff's perspective. Cases involving surgeries have always been treated more seriously by juries and receive greater consideration during settlement negotiations. Generally these considerations play a role in reaching a reasonable assessment of the value of a case. However, not all past medical expenses and surgeries are equal. The defense bar is well aware that in cases involving minor accident and soft-tissue injuries, the "past medical expenses" part of a plaintiff's claim is often padded with unnecessary or excessive chiropractic treatment designed both to take full advantage of our State's PIP laws and to increase the value of a case that otherwise would be treated as a nuisance case. This is often seen in cases involving a minor-impact auto accident, followed by a plaintiff's visit to a lawyer and the lawyer's referral of the client to a friendly clinic, followed by an extensive course of treatment for the client often exhausting, and exceeding, PIP limits. In the last thirty years, this case-set-up practice expanded to include unnecessary referrals to MRIs and, more recently, the unnecessary performance of untested procedures in order to turn

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## Workers' Compensation

The One IME rule under F.S. Section 440.13(5)(a) Clarified and Expanded by David S. Gold, WC Practice Partner.



David Gold

Under F.S. Sections 440.13(5), each party is limited to only one IME per accident. However, the application of this limitation has never been straight forward as there are often several medical disputes that can arise at different stages of a case. What happens, for example, if each party uses their one IME to address compensability and then there is a later dispute regarding MMI? The First District has sought to answer questions like this with their recent opinion in the matter of Gomar v. Ridenhour Concrete.

In this case, the Employer/Carrier had denied the compensability of the Employee's work place accident. In order to establish compensability, the Claimant had obtained an IME from Dr. Simon. Based on this IME, the Employer/Carrier ultimately accepted the claim as compensable and authorized medical care and treatment with Dr. Weber. After about a year of treatment, Dr. Weber placed the Claimant at MMI with a 0% impairment. The Claimant then exercised his right to a one time change on physicians and began treatment with Dr. Flynn. Shortly thereafter he was again placed at MMI with a 0% impairment. The Claimant then filed a Petition for Benefits seeking ongoing medical care and disputing that he had reached MMI. This PFB was denied by the Employer/Carrier. Upon the denial of the Petition, the Claimant underwent an "updated" IME with Dr. Simon who opined that he was not yet at MMI. At the Final Hearing, the Judge of Compensation Claims excluded all the evidence regarding the second IME with Dr. Simon finding that under F.S. Section 440.13(5) the Claimant had already used his one IME when he was originally seen by Dr. Simon.

On appeal the First District rejected the Judge of Compensation Claims narrow interpretation of F.S. Section 440.13(5). The Court observed that under F.S. Section 440.13(5)(a), the right to an IME arises when there is a "dispute" between the parties and that there is no limit in this section regarding how many disputes that an IME can be used to

resolve. Further, the Court noted that F.S. Section 440.13 defines an "Independent Medical Examiner" as a physician who carries out, "one or more independent examinations". So the Court concluded that while the parties were limited to the selection of only one IME physician per accident, the statute also clearly contemplates that the parties are allowed an IME whenever there was a dispute. When read together, the Court concluded that the only reasonable interpretation of the statute is that each party is entitled to an IME whenever there is a dispute, but that the IME has to be performed by the same IME physician each time.

The impact of this opinion is somewhat limited. While either party can now get more than one IME, the parties are still going to be limited to one physician and therefore one medical specialty. An interesting question could arise if the IME physician has more than one specialty such as a Neurologist/Psychiatrist or Internist/Cardiologist. Regardless, since the Claimant will still be required to pay for their own IME's, this will likely limit the amount of times an Employer/Carrier will see multiple Claimant IME's in a case. It is more likely that this opinion favors an Employer/Carrier who's deeper pockets will allow for multiple IME's more frequently. Because of this, now more than ever, it is important to be very careful when selecting the Employer/Carrier IME as you may be going back to this IME physician more than once to resolve disputes as they arise.

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### Zeb I. Goldstein Named Junior Partner



Zeb Goldstein

Congratulations to Zeb Goldstein who was named Junior Partner on June 1, 2010. Zeb has been a member of the firm since 2002 and has gained substantial trial experience and expertise litigating general liability, premises liability and negligent security matters for shopping malls and centers, retail stores, restaurants, night clubs and hotels in South Florida venues.

## Liability continued.



Daniel Santaniello

non-surgical claims (claims in which treatment does not include surgery as a viable option) into more valuable surgical claims (claims in which treatment includes past surgery, or the suggestion that surgery is appropriate).

Luks, Santaniello often receives new cases where part of the past medical treatment of the plaintiff includes non-proven surgeries. One such procedure is “Percutaneous Discectomy” or “Percutaneous Laser Disc Decompression” (PLDD). PLDD has been described as a minimally invasive alternative procedure for repair of a herniated disc causing nerve root compression. The procedure uses a laser to ablate a portion of the disc nucleus in order to relieve nerve root compression, whereas the traditional surgical treatment for herniated disks is an open lumbar discectomy or microdiscectomy, both of which entail the physical removal of disc material.

Just this year, a New Jersey appellate court affirmed a lower court’s decision that PLDD is “experimental” or “investigational” and noted that the greater weight of recent and independent medical authority reported that PLDD required further study to determine if it is indeed an effective treatment for herniated discs and nerve root compression. In July, 2008, the Center for Medicare Services issued a decision on Thermal Intradiscal Procedures, finding they are not reasonable or necessary for the treatment of low back pain.

In spite of the unproven nature of this type of procedure, PLDD procedures are often seen in Florida claims. This may be due, perhaps, because, in a 1994 opinion, the First District Court of Appeals reversed for a new trial a case involving such a procedure where the Defendant had argued to the jury, through a medical expert, that performing the procedure was tantamount to medical malpractice, and that the procedure aggravated the plaintiff’s condition; but the Trial Court refused the plaintiff’s request for a jury instruction indicating that an original tortfeasor is deemed to be liable for subsequent

injuries suffered by the plaintiff as a result of medical malpractice during related treatment of the plaintiff. See Dungan v. Ford, 632 So. 2d 159 (Fla. 1<sup>st</sup> DCA 1994). With Dugan in hand, plaintiffs’ lawyers often argue that the defendant cannot challenge the plaintiff’s decision to undergo such a procedure at trial, and that the cost of the procedure must be included as part of the damages in the case, whether, or not, performing the procedure constituted medical malpractice.

In appropriate cases, where it is clear that this procedure was performed not as an alternative treatment for a long-suffering patient, but as a means to increase the value of a case, this firm, as explained below, offers its clients aggressive counter-measures to attempt to minimize the impact of the plaintiff having undergone such an experimental procedure to the value of the case. This article discusses options available to combat claims involving a PLDD (or similar unproven procedures) whether it aggravated a plaintiff’s condition or whether it was merely used, more likely than not, as a means to increase the value of an otherwise weak claim.

### **The Plaintiff’s duty to mitigate and his or her burden of proof burden with respect to medical expense damages.**

A plaintiff has a duty to mitigate his or her damages by exercising reasonable diligence and care to secure reasonably necessary medical treatment by competent physicians or surgeons, and to follow such doctor’s advice and instructions. See Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977). The result of the unreasonable failure by a plaintiff to obtain medical treatment for a personal injury is that the plaintiff may not recover full damages for the consequences of the defendant’s alleged tort if they might have been minimized by surgery or other treatment, but an injured person is required to submit to such treatment only when a reasonably prudent person under the circumstances would do so. See Ballard & Ballard v. Pelaiá, 73 So. 2d 840 (Fla. 1954). Conversely, it is well established in Florida that the Plaintiff has the burden to prove “the necessity and reasonableness

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## Liability continued.

of charges for medical attendance and treatment,” and that the jury is not required to award to a plaintiff compensation for all past medical expenses, even if the plaintiff presents some evidence that the care was received because of the accident at issue, if the evidence suggests that the treatment was unreasonable, or was necessitated by other unrelated causes. See Schmidt v. Tracey, 150 So. 2d 275 (Fla. 2d DCA 1963). See also, E.W. Karate Assn. v. Riquelme, 638 So. 2d 604 (Fla. 4<sup>th</sup> DCA 1994).

Thus, the rule would appear to be that a plaintiff is required to seek competent reasonably necessary medical treatment in order to minimize his or her damages, but should only be compensated for such treatment deemed necessary using a reasonably prudent person standard, and then for only “reasonable” charges for such treatment. Conversely, the issue of whether a procedure that plaintiff underwent was necessary, and the charges therefore reasonable, would seem to be relevant at trial. Also relevant is the question of whether the plaintiff properly mitigated his damages by seeking competent medical care and using reasonable care in following the recommendations of doctors. This should include the question of whether the plaintiff underwent a procedure not because it was needed, but in order to increase the medical bills and the overall value of his or her case, as well as whether a doctor who recommended and performed experimental surgery on the plaintiff can be deemed a competent doctor, particular in cases where the injury is minor. However, introducing such evidence at trial requires careful planning and strategy, as, generally, a defendant is not allowed to conduct a medical malpractice case as a defense to a tort action – that is, a defendant cannot, in a trial involving the question of whether the defendant’s negligence caused injuries to the plaintiff, make a focus of the case the fact plaintiff was injured by subsequent medical negligence rather than by the original tort, as explained below.

### **Malpractice Defense vs. Challenge to Reasonableness and Necessity of Medical Expenses.**

Under traditional negligence principles, a tortfeasor is responsible for all reasonably foreseeable consequences of his or her actions, whereas an independent, unforeseeable intervening force may serve to break the causal link and extinguish liability. See Gibson v. Avis Rent-A-Car Sys., Inc., 386 So.2d 520, 522 (Fla.1980). Typically, the question of whether an intervening cause is reasonably foreseeable is for the jury, but Florida courts have created an exception to this rule when subsequent medical negligence in treating the initial injury is involved. Under such circumstances, generally, the subsequent medical negligence is treated, as a matter of law, as foreseeable. Thus, it has long been the law in Florida that when one who is negligent injures another causing him or her to need, and seek, medical treatment, negligence in the administration of that medical treatment is foreseeable and will not serve to break the chain of causation. See Nason v. Shafranski, 33 So. 3d 117 (Fla. 4<sup>th</sup> DCA 2010). The Florida Supreme Court, in Stuart v. Hertz Corp., described this rule as follows:

“Where one who has suffered personal injuries by reason of the negligence of another **exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions**, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill or such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.”

See Stuart, 351 So.2d at 707 (emphasis added). When the rule in Stuart v. Hertz applies, the remedy of the defendant in the tort action – the “initial tortfeasor” -- against the succeeding negligent health care provider lies in a separate action for subrogation. See Underwriters at Lloyds v. City of Lauderdale

## Liability continued.

Lakes, 382 So.2d 702 (Fla.1980). The reasoning of the rule in Stuart v. Hertz is that it would not be fair to the plaintiff to allow a third-party malpractice claim to be tried as part of the main lawsuit over the plaintiff's objection.

There have been challenges to the Stuart v. Hertz rule, and the Fourth District Court of Appeal twice certified to the Florida Supreme Court the question of whether Stuart v. Hertz is still good law since the passage of the Tort Reform and Insurance Act of 1986, which made each tortfeasor liable only for his own negligence. See Caccavella v. Silverman, 814 So.2d 1145 (Fla. 4th DCA 2002); Letzter v. Cephas, 792 So.2d 481 (Fla. 4th DCA 2001). The Florida Supreme Court, however, has declined to answer the certified questions in both cases.

Thus, the question remains: how one does balance the above principles but still makes sure that the jury gets to consider evidence of unnecessary and unreasonable medical treatment?

### **Combating Unnecessary and Unreasonable Treatment in Court.**

In spite of Dungan, and Stuart, it is still possible to dispute medical decisions of plaintiffs and their doctors in Court. After all, it is well recognized that the Plaintiff has the burden of proof on whether the medical care he or she received, and the charges for that care, are reasonable and necessary. To do properly, we suggest the Plaintiff must offer testimony describing his injuries from the accident in detail, as well as his pre-accident condition. The plaintiff and/or the doctors (or an expert for the Plaintiff) must then testify in detail, connecting each treatment obtained to the injuries allegedly suffered in the accident (as opposed of an unrelated or pre-existing cause for the treatment). Finally, the doctors (or an expert for the Plaintiff), should offer testimony to show that the charges for the services performed on the Plaintiff were reasonable.

Additionally, we have had some success raising an affirmative defense that the treating doctors are engaging in overbilling and unnecessary treatment

which was not reasonably foreseeable to the defendant. Since our courts recognize that a plaintiff has a duty to mitigate by seeking needed medical care from a **competent** provider, then the Defendant should be able to challenge the bills when the plaintiff chooses a provider that engages in a scheme of overcharging or setting separate rates for accident cases. In this regard, our position is that the plaintiff did not properly mitigate his or her damages and that the scheme of overbilling or providing unnecessary treatment is not reasonably foreseeable, the key element in holding a defendant liable for any malpractice committed by the medical provider. Finally, also relevant to the duty to mitigate is the question of whether a reasonably prudent person under the plaintiff's circumstances would have undergone an experimental surgical procedure for a minor injury, in order to show that the procedure was not necessary and the Plaintiff did not fulfill his or her duty to mitigate when he or she sought treatment with no proven results where there was no need for such treatment in the first place.

Here are some of the approaches we have used to bring these issues before the jury.

### **Affirmative Defense.**

It is imperative to plead as an affirmative defense that some or all of the care received by the Plaintiff was not necessary and/or reasonable, and that the Plaintiff underwent excessive care and their treating physicians engaged in unnecessary or fraudulent treatment and billing that was not reasonably foreseeable.

We also plead that we should be entitled to HMO contract adjustments pursuant to 641.3154, Florida Statutes. That section provides that a doctor who accepts an HMO must accept the HMO, and not require the plaintiff to pay anything other than what the HMO contract requires. This essentially eliminates LOP excessive billing when Plaintiff's have health insurance.

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## Liability continued.

### Handling Experts

Plaintiff lawyers now attempt to argue that when a defense doctor challenges the treatment, that is essentially a malpractice argument that the defendant is ultimately responsible to pay only because malpractice is foreseeable. It is important that in addition to pleading the affirmative defenses above, your IME or other expert understand how to address the unnecessary treatment and billing so that a judge will not be confused into striking your affirmative defenses on the argument that your expert is essentially stating the treatment was improper i.e., malpractice. Appropriate handling of your doctor should avoid this tragic outcome and allow you to argue the bills to the jury.

### Trial Strategy.

#### **Subsequent Subrogation Actions Against Doctors.**

As noted above, as an alternative, a subsequent subrogation action may be brought against a medical provider who, through medical malpractice, caused further harm to a plaintiff for which the Defendant has been held legally responsible. This may not be easy or inexpensive, of course. There may be potential defenses by such a medical provider under the statute of limitations, or under the medical malpractice pre-suit claim requirements. This is a last choice, but one that may be effective, in the long-run, in curtailing the type of nearly-fraudulent, or fraudulent, practice described above.

### Conclusion

The Florida Supreme Court has granted great leeway to the Plaintiffs' bar in their examination of the bias of defense medical experts – allowing them to obtain discovery, and thus address at trial, any bias that expert may have towards the defendant by discussing in great detail how the defense expert benefits financially from his or her relationship with the Defendant. The Defense bar should likewise be able to explore the financial bias behind the testimony, and the medical decisions, made by plaintiffs. Our courts should not serve as a venue to enable fraud. Where there is evidence that a plaintiff

sought excessive and unnecessary medical care, or sought care from incompetent doctors, or underwent minimal-risk “surgical” procedures in order to enhance the value of his or her case, we follow the approaches discussed above in order get important factual evidence before the jury, without crossing the line and prosecuting a medical malpractice case within a personal injury case.

We close with a quote from a concurring opinion by Judge Harris of the Fifth District Court of Appeal, who wrote:

I also disagree with *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994), which was relied on in denying the defense the opportunity to challenge the reasonableness of some of the services performed by Dr. Seconi who, in attempting to support the reasonableness of his charges, testified that his treatment was both reasonable and necessary. There are two components to a reasonable fee—a reasonable rate applied to justifiable services. By denying the defense the right to challenge the justification for the services, the court denied it the opportunity to challenge the reasonableness of the fee. While it is true that one is responsible also for the medical malpractice of a doctor whose services are required because of his negligence, he has never been required to pay the doctor for that privilege. Here, Dr. Seconi was not alleged by the plaintiff to be guilty of malpractice. Instead, the doctor was called as a witness to relate injuries to the accident and to testify as to the reasonableness of his charges for the purpose of assessing them against the defendant. As a witness, the good doctor is not immune from challenge. If the jury believes that the doctor provided unnecessary treatment either because of incompetence or in order to pad his bill, the jury may choose to disbelieve the doctor's testimony on other points as well. This is

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## Liability continued.

called impeachment and the truth cannot be found without it. One might reasonably ask, as between the plaintiff and the defendant, who should pay for the unjustified services. The answer is neither.

See Tetrault v. Fairchild, 799 So.2d 226 (Fla. 5<sup>th</sup> DCA 2001).

We obviously agree with Judge Harris on this issue, but until the Florida Supreme Court decides the issue, you are better to follow our approach on the defense of these issues. For further information or questions, please contact Dan Santaniello, Managing Partner (DJS@LS-LAW.COM) or James Waczewski, Tallahassee Managing Attorney (JWACZEWSKI@LS-LAW.COM).

## Verdicts & Summary Judgments

- *Mayruis Disla v. Joseph Blanco*, Vehicular Liability, Broward County, Daniel J. Santaniello and Thomas J. Gibbons, **\$3M Sought, \$20,532.50 Net Verdict**, 10/5/2010.
- *Audrey Snover (Plaintiff/Appellee) v. Officers Crosby and Murrow (Defendants, Appellants)*, United States Court of Appeals, Eleventh Circuit, James Waczewski, Denial of the officers motion for **summary judgment on the basis of qualified immunity reversed**, 9/30/2010.
- *Fitzsimmons v. Pro Fitness Services, Inc. and The Yacht Club on the Intracoastal Condominium Ass'n, Inc.*, Palm Beach County, Doreen E. Lasch, **Dismissal of Claim for Indemnity**, 9/24/2010.
- *Fair Housing Center (Plaintiff/Appellant) v. The Shutters Condominium Association, Carol Ravantii Lalla, and Mildred Miner (Defendants/Appellees)*, Appeal to United States Court of Appeals, Eleventh Circuit, Doreen E. Lasch, of **Judgment entered in favor of Defendants/Appellees, Judgment affirmed**, 9/24/2010.
- *Harbaugh v. Hubbard Construction Co.*, Palm Beach County, (**Defense Verdict after 2 week trial, \$2.3 Million sought, "0" awarded**), Daniel Santaniello, Paul Jones and Sherri Bauer, 8/26/2010.

- *Betty Kipp and Gordon Kipp v. Laboratory Corporation of America*, Slip and Fall Incident, Volusia County (**\$250K sought**), Paul Jones and Dina O'Piedra, **Defense Verdict 9/16/2010**.

## Florida Defense Lawyers Association 2010 President's Award



Daniel Santaniello

Daniel Santaniello was the recipient of the Florida Defense Lawyers Association's (FDLA) 2010 President's Award recognizing outstanding service. He is a member of the Board of Directors.

## New Members

**Matthew G. Krause** has joined the Fort Lauderdale office as an Associate. Krause will be primarily involved in representing clients in all aspects of commercial litigation, collection and creditor's rights. He can be reached at (954)761-9900 or mkrause@LS-LAW.com

**David A. Lipkin** has joined the Fort Lauderdale office as a Senior Associate. Lipkin's practice is devoted largely to health insurance litigation, managed care litigation, wrongful death, professional liability, general liability and premises liability. He can be reached at (954) 761-9900 or dlipkin@LS-LAW.com.

**Douglas J. Petro** has joined the Orlando office as an Associate. Petro concentrates his practice in vehicular liability, premises liability, negligent security, products liability, mold and toxic torts. He can be reached at (407) 540-9170 or dpetro@LS-LAW.com.

**Charles L. Balli** will work out of the Miami office as a Senior Insurance Defense Litigation Associate. Balli concentrates his practice in personal injury, wrongful death, vehicular liability, PIP, premises liability, products liability, first party property damage claims and insurance coverage issues. He can be reached at (305)377-8900 or cballi@LS-LAW.com.