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LEGAL UPDATE

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Liability

Florida Motor Vehicle No-Fault Law by Andrew Chiera, Esq.



Effective January 1, 2013, Florida Statute 627.736(6)(g) as amended now mandates insureds and omnibus claimants alike to submit to an examination under oath, if and only if your underlying policy includes such a requirement. Compliance with this new subsection is a condition precedent to receiving PIP benefits. However, in order to limit the frequency of such EUO's, if an insurer has a general business practice of requesting EUO's without a reasonable basis it becomes subject to Florida Statute 627.9541 (unfair methods of competition and unfair or

deceptive acts or practices). The three most common questions about the new law include:

1. What is a "reasonable basis" to request an EUO?
2. What do we need to do to use this investigative tool?
3. Can you assist us with scheduling/completing EUO's?

First, "reasonable basis" is not defined in either Florida Statute 627.736 or 627.732. Obviously Courts have not yet considered the phrase as it applies to the new PIP Statute. While you'll certainly have to consider each claim on an individual basis, it appears that the goal is to allow insurers to use EUO's as an investigative tool but not as a license to partake in "fishing expeditions" or as a "gotcha" claim defense. Thus, if you're reviewing a new claim and something raises a red flag (i.e. previously undisclosed household members or vehicles), or you need to determine whether you need to extend coverage to an omnibus guest passenger claimant, these should be sufficient bases upon

Read More . . . P. 2

Verdicts and Summary Judgments

Slip and Fall — Defense Verdict

Daniel Santaniello, Managing Partner and Anthony Merendino, Junior Partner of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in a slip and fall case styled Ninfa Diaz v. Dr. Griselda Grullon d/b/a Loving Tender Pediatrics in Palm Beach County on November 1, 2012. Plaintiff demanded \$600,000 at trial. The jury deliberated less than 10 minutes before rendering a defense verdict. Plaintiff Diaz claimed that she slipped and fell on water inside of her granddaughter's pediatrician's office. Plaintiff alleged that as a result of the accident, she suffered multiple disc herniations in her cervical spine at C3-4, C4-5, and C6-7, and in her lumbar spine at L5-S1. Plaintiff underwent a bilateral decompression lumbar laminectomy, facetectomy and foraminotomy in her lumbar spine at L5-S1, as well as a bilateral microdiscectomy at L5-S1 performed by Dr. Yonas Zegeye. Dr. Zegeye gave a recommendation for surgery on Plaintiff's cervical spine in 2012, and recommended a spinal cord stimulator. Plaintiff was discharged by at least one of her treating physicians

More Verdicts . . . PP. 11, 12, 13

INSIDE LEGAL UPDATE

Florida MV NO-Fault Law . . . P. 1
 The Collection of Judgments. . P. 3
 Ex Parte Contact P. 5
 Rear-End Collision
 Presumption P. 8
 Sovereign Immunity P. 10
 Verdicts PP. 1, 11, 12, 13

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Florida Motor Vehicle No-Fault Law cont.

which to request an EUO. However, we would caution against setting an EUO because you have a “hunch” that something might be suspicious. We encourage you to discuss potential EUO requests with your supervisor and we are available to assist you if you are contemplating requesting an EUO.

Next, the Plaintiff’s bar successfully litigated the issue of the “permissive” fee schedule, establishing several DCA opinions on the issue. New (6)(g) states that an insured or claimant “must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath.” Thus, given the rulings on the fee schedule cases, it seems certain that your PIP insuring agreement or rental agreement needs to specify that an EUO is a condition precedent / requirement to an individual seeking PIP coverage. Without such terms, we fully anticipate that your policy/rental agreement will be challenged on the basis that it does not incorporate the “permissive” EUO requirement.

Finally, many adjusters rely upon third party vendors to schedule and manage their Independent Medical Examinations. Under the new PIP Statute, the proper handling of your EUO’s is just as important as your IME’s. Luks, Santaniello has created an innovative EUO scheduling website that will automate and facilitate the EUO claims process. This easy to use website will allow our insurance clients and insurance professionals that establish a relationship with our firm to:

- Schedule an EUO or multiple concurrent EUOs;
- Upload claims file documents through a HIPPA compliant site;
- Communicate with the attorney handling your EUO;
- Track multiple EUO assignments;
- Modify existing EUO requests;
- View attorney comments and add your case comments;
- Print a summary of your EUO submissions and case comments;
- Obtain tracking information for the EUO request letters for past and future appointments.

We look forward to assisting both existing and new clients alike as we all proceed under the new PIP statutory scheme. Please visit www.LS-Law.com for an upcoming announcement regarding the availability of the new site or contact Client Relations (MDonnelly@LS-Law.com) for further information. Please contact the members below for assistance with your EUOs or PIP matters.

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The Collection of Judgments in a Debtor State by Matthew Krause, Esq.



Matthew Krause

The litigation of tort claims generally does not provide for the award of attorneys fees to defendants. However, oftentimes our clients are awarded final judgments of attorneys' fees and costs in their favor. Through the use of Proposals for Settlement and our firm prevailing in the defense of the lawsuit, our members have been able to obtain final judgments in favor of its clients that award attorneys' fees and court costs.

Subsequent to the entry of the final monetary judgment the issue then becomes how to perfect and collect on that judgment. The collection of a judgment in Florida is a difficult process as the laws of Florida have been created and interpreted in such a way as to make Florida a "debtor state." Florida provides a judgment debtor with many protections from collection by having established a number of exemptions which thereby limit the means by which a judgment creditor can satisfy its judgment. For example, the Homestead Exemption prohibits a judgment creditor from executing, levying or foreclosing on a judgment lien which is obtained against the judgment debtor's homestead property. Likewise, the Head of Household exemption prohibits the garnishment of a judgment debtor's wages and those wages which can be traced to a checking account of a person deemed to be the head of household that is providing more than one-half of the support for a child or other dependent.

This article discusses the procedures provided under Florida Law which allow a judgment creditor to "perfect" its judgment as a lien against the real and/or personal property of a judgment debtor. It should be understood that simply because a monetary judgment is obtained against a party, it does not necessarily mean that the judgment will be satisfied, partially or in full, or that it will be paid voluntarily. The Court will not force a judgment debtor to pay a final judgment but will assist a judgment creditor with enforcement procedures as provided under law should a judgment debtor fail to property reply and

respond to enforcement procedures and mechanisms initiated by the judgment creditor.

A final judgment entered in the State of Florida can be valid and enforceable as a lien upon real or personal property for up to twenty years from the date of the judgment, order, or decree (Florida Statute § 55.081). However, a final judgment is not self-enforcing and does not become a lien against a judgment debtor's real property automatically upon the entry of the final judgment. For a judgment to become a lien against a judgment debtor's real property a certified copy of the final judgment must be obtained and then recorded in the official records of the county in which the property is located. Generally this is a two step process:

- 1) The Judgment is entered by the Court and recorded by the Clerk of Court in the public records of that county as a matter of course.
- 2) Thereafter, a certified copy of the final judgment must obtained from the Clerk of Court whereupon the certified copy of the final judgment must be re-recorded in the public records of the county where the real property is located in order to become a lien against that real property. If the judgment debtor has real property in more than one county, a certified copy of the final judgment must be recorded in the public records of each county in which the judgment debtor owns real property.

The original lien against real property expires after an initial ten year period from the date of the recording of the certified final judgment unless the judgment creditor re-records a certified copy of the final judgment prior to the ten year expiration of the lien originally obtained. This extension of the lien against real property may be for an additional ten year period.

The process of recording a final judgment so as to become a lien against real property owned by the judgment debtor is a relatively inexpensive process. The lien against a judgment debtor's real property more times than not is a passive way of collecting the

[Read More . . . P. 4](#)

The Collection of Judgments in a Debtor State cont.

judgment and many times is not addressed by a judgment debtor unless or until such time that a judgment debtor attempts to sell the property or refinance the property. However, if the real property is the judgment debtor's homestead property the judgment creditor cannot foreclose a judgment lien against that property and the lien can be avoided under Florida Law if the judgment debtor enters into a contract to sell or refinance the homestead property (Florida Statute § 222.01).

As of October 1, 2001 the method for securing a judgment lien against a judgment debtor's personal property and the subsequent execution and levy thereon, became simplified under Florida Law. Pursuant to Florida Statute § 55.202 a judgment lien may be acquired on a judgment debtor's interest in all personal property in this State subject to execution other than to fixtures, money and negotiable instruments or mortgages by the filing of a Judgment Lien Certificate with the Florida Department of State after the judgment has become final. The effective date of the Judgment Lien Certificate is the date, including the time of day, that the Judgment Lien Certificate is filed. Priority among competing judgment liens is determined in the order of the filing date and time. The Judgment Lien Certificate can either be completed and mailed to the Department of State or completed online at the Florida Department of State website: <http://www.sunbiz.org>.

A judgment lien lapses and becomes invalid five years after the filing of the Judgment Lien Certificate. However, at any time within six months prior to, or six months after, the scheduled lapse of the original judgment lien, a judgment creditor may acquire a second judgment lien by filing a new Judgment Lien Certificate. The effective date of the new Judgment Lien Certificate is the date and time on which the second Judgment Lien Certificate is filed. The second judgment lien permanently lapses and becomes invalid five years after the date of filing the second Judgment Lien Certificate.

The obtaining of a judgment lien against a judgment debtor's property will provide the judgment creditor the opportunity to levy and execute upon personal

property of the debtor in any Florida county if it is determined that the judgment debtor has property upon which execution can lawfully be made and upon which execution is practicable from a cost analysis perspective. The obtaining of a judgment lien against a judgment debtor's personal property is a relatively inexpensive process, and if nothing else, provides notice to other parties in a centralized location that a judgment was entered against the judgment debtor and that the judgment has not been satisfied.

Although the collection of a monetary judgment in Florida is not an easy task, the offices of Luks Santaniello Petrillo & Jones is equipped to effectively assist its clients in the perfecting of any judgments obtained, evaluating the subsequent collectability of that judgment, and the methods to pursue collection of the judgment. For further information on collection of judgments or assistance with matters involving collection and creditor's rights, creditor's bankruptcy, foreclosure litigation and commercial litigation, please contact Matthew Krause, Esq., in the Fort Lauderdale Office direct at 954.847.2954 or e-mail: MKrause@LS-Law.com.

About Matthew Krause



Matthew Krause, Esq. has over 20 years of practice concentrating in the areas of Collection and Creditor's Rights, Commercial Litigation and Civil Litigation. He has handled many matters involving Bankruptcy, Commercial Foreclosure, Claw Back Suits, Preferential Transfers, the Fair Credit Reporting Act and Fair Debt Collection Practices Act. His practice areas also include matters involving Lender's Liability, Commercial Landlord and Tenant and Judgment Enforcement.

Matthew's experience with Creditor's Bankruptcy matters has included stay relief litigation, preference actions and valuation disputes. He has handled large caseloads in commercial litigation and commercial collections involving personal property leases and secured transactions representing multinational corporations and banks.

Ex Parte Contact With Current and Former Employees

By James P. Waczewski,
Tallahassee Partner and Alec Masson, Law Clerk.



James Waczewski

In complex cases in which we represent a corporate defendant, or in which the opposing parties are corporations, the issue of ex parte communications with current and former employees of those corporations arises. That is – is the opposing party able to contact current and former employees of a corporate opponent without the consent of the corporation’s counsel?

Florida Rule of Professional Conduct [Rule 4-4.2](#), titled “Communication with Person Represented by Counsel,” provides in pertinent part:

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- In the case of an organization, this rule prohibits communications by a lawyer for 1 party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Although all reasonable parties would agree this rule limits attorneys from contacting certain current employees, it wasn’t always clear as to whether an attorney could even contact former employees. This very same question arose in *Barfuss v. Diversicare Corp. of America*, 656 So. 2d 486 (Fla. 2d DCA 1995). The court in *Barfuss*, approved a trial court order prohibiting *ex parte* communications with a nursing home’s former employees, finding this a “limited restriction” that did not depart from the essential requirements of law- where the former employees’ actions or inactions ultimately formed the basis of the complaint.

However, this was contrary to Florida Bar Ethics opinion 88-14 where The Board decided that rule 4-4.2 did not prevent counsel from contacting “former employees who have not maintained any ties with the corporation-who are no longer part of the corporate entity-and who have not sought or consented to be represented in the matter by the corporation’s attorneys.” Furthermore, the ABA had taken this very same position, even where a former employee’s negligence could be imputed to the opposing party. Other Florida District Courts of Appeal reached results different than the *Barfuss* court on the same issue.

The Florida Supreme Court ultimately resolved this conflict in *H.B.A. Mgmt. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997), by disapproving *Barfuss*, in favor of prior decisions below that were consistent with the Florida Bar and ABA’s ethics opinions. The Court in *Schwartz* made it clear that the “Florida Rule of Professional Conduct 4-4.2 was intended to specifically regulate an attorney’s contact with a person represented by counsel and the rule neither contemplates nor prohibits an attorney’s *ex parte* communications with former employees of a defendant-employer.”

Although the Court in *Schwartz* ruled this way for multiple reasons, the emphasis was that a contrary ruling made little sense as the communication rule is “intended to preclude the interviewing of employees who have *authority to bind* the corporation-not protect a corporate party from potential prejudicial facts- and a former employee’s statements cannot be construed as speaking on behalf of a corporation.”

The *Schwartz* court also reaffirmed and clarified the rules pertaining to *ex parte* communications with current employees of a represented organization, even though the case was primarily concerned with *ex parte* communications of former employees. Following the idea that the communication rule’s purpose is to preclude interviewing employees who have authority to bind the organization – not to shield an organization from prejudicial facts -- the Court in *Schwartz* noted that “it means an attorney cannot

Read More . . . P. 6

Ex Parte Contact With Current and Former Employees Cont.



James Waczewski

ethically communicate with an employee whose *actions* may impute negligence or criminal liability to the corporation or whose *statements* may constitute admissions at that time, i.e., at the time the current employee is acting or speaking.”

Again, the Court in *Schwartz*, citing the ABA’s ethics opinion, clarifies the bar applies only to communications with those employees who have managerial responsibility, those whose acts or omissions may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question.

In a more recent case concerning the issue of *ex parte* communications with current employees, the court in *Lee Mem’l Health Sys. v. Smith*, 56 So. 3d 808, 812 (Fla. 2nd DCA 2011), citing to Rule 4-4.2’s comment and *Schwartz*, rather explicitly states “the prohibition against communicating with members of a represented organization is applicable only to three categories of persons or employees: (1) those who supervise, direct, or regularly consult with the organization’s lawyer *concerning the matter*; (2) those who have the authority to obligate the organization *with respect to the matter*; or (3) those whose act or omission *in connection with the matter* may be imputed to the organization for purposes of civil or criminal liability.”

Currently, in Florida state level courts, the above appears to be the general rule on the issue of which current employees of a represented organization may be contacted. As one could expect, this test naturally requires the attorney exercise discretion, and varies depending on jurisdiction. For example, within the State of Florida, the result may differ depending on whether the case is pending in Federal or State Court.

In the U.S. District Court, Middle District of Florida, the court in *NAACP v. State of Florida*, granted a Motion For Leave to Interview Current Employees, while reasoning that there was “no appropriate bright-

line rule to follow . . . rather, the better analysis is to balance the competing interests: a plaintiff’s need to conduct discovery, investigate, and gather information on an informal basis and the defendant’s need to protect communications and for adequate and effective representation.” In that case, the Court allowed, under certain conditions, *ex parte* communications with both current and former employees.

The decision is important not only because it allowed communication with certain *ex parte* employees, but also because it imposed restrictions on communications with former employees – whereas the Florida Supreme Court in *Schwartz* seemed to suggest that virtually no limitations would exist with regard to communication with former employees.

Therefore, practitioners should keep in mind that significant consideration must be given before any *ex parte* contact is made, with full consideration given to the complex ethical issues presented, including review of the main cases on this issue, as cited above.

An important side issue is what can a defense counsel do to avoid *ex parte* communications. Both *Schwartz* and *NAACP* recognize that a former employee may be represented, and, if that is the case, no *ex parte* communication should occur. This does not mean, however, that the corporation’s defense counsel should claim to represent all current and former employees of the Corporation in order to avoid *ex parte* communications with them.

Ethical considerations apply equally to the corporation’s defense counsel. For example, with regard to former employees, the corporation’s counsel cannot simply claim to represent that person. Rather, the corporation’s counsel must obtain the informed consent of that person. In obtaining that consent, the corporation’s counsel should be mindful of Rule 4-4.3- “Dealing With Unrepresented Persons.”

Read More . . . P. 7

Ex Parte Contact With Current and Former Employees Cont.

Rule 4-4.3 (a) provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Thus, when corporate defense counsel seeks the consent of the former employee to represent him or her as well, the corporate counsel should consider, and explain to that person, whether there is any conflict of interest between the employee and the corporation (indeed, if there is a conflict of interest, the corporation's defense counsel may be prohibited from representing the former employee). The corporation's defense counsel should fully inform the potential "client" regarding his right to refuse representation, regarding his or her interests in the lawsuit, regarding his or her right to refuse to participate voluntarily in the case, etc.

This may be an easy task when the former employee used to perform a high-level management job with the corporation, particularly when that employee was in contact with the corporate defense counsel before he or she left the corporation. This task may be more difficult, and should be undertaken with greater care, when the former employee was a rank-and-file employee who may or may not understand what is at stake in the lawsuit, and what is the interest of the corporation's counsel – who is now seeking to "represent" him or her as well.

Once a former employee consents and is represented, communications are subject to the limitations of Rule 4-4.2 and he or she may not be contacted by opposing counsel, absent the corporate counsel's consent. But, again, obtaining the informed consent of former employees should not be taken lightly.

Ex parte communications help reduce the cost of litigation. However, as noted above, such communications give rise to various ethical issues that must be dealt with up front – whether we are

trying to prevent such communications, or trying to engage in such communications. The discussion herein serves as a starting point for any practitioner dealing with this issue – with further consideration and analysis needed on a case by case basis.

For further information about Ex Parte contact with current and former employees, or assistance with your matters in the Tallahassee area, please contact James Waczewski, Partner at T: 850.385.9901 or email JWaczewski@LS-Law.com.

1. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-359 (1991).
2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).
3. Ellen J. Messing and James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 Lab. Law. 353,(2004).("this issue has spawned an extraordinary amount of litigation with widely disparate results in various jurisdictions.")
4. *NAACP v. State of Florida*, 122 F. Supp. 2d 1335, 1341 (M.D. Fla. 2000).
5. Bernard H. Dempsey, Jr., *Ex Parte Communications with Current and Former Employees of a Corporate Defendant*, 71 Fla. B.J. 11 (Dec 1997).

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Florida Supreme Court Clarifies Rear-End Collision Presumption by Steve Hemmert, Esq.



Steve Hemmert

On November 12, 2012, the Florida Supreme Court released opinions on two cases involving rear-end collisions, which ended a conflict of authority on the effect of the rebuttable presumption of negligence that attaches to the rear driver in a rear-end motor vehicle collision case.

In deciding the two cases in conflict, *Birge v. Charron* (SC10-1755) and *Cevallos v. Rideout* (SC09-2238), the Florida Supreme Court held that:

1. Rear end motor vehicle cases are governed by the principles of comparative fault: the rear-end presumption is an evidentiary tool to facilitate cases where there is no disputed issue of comparative fault, not an alternative means of tort recovery.
2. Where there is evidence from which a jury could conclude that the front driver was comparatively negligent, the presumption is rebutted and the issues of negligence and causation should be submitted to the jury; once the presumption is rebutted, it is reduced to a permissible inference upon which the jury may, but is not required, to find negligence.
3. The presumption that the rear driver's negligence is the sole cause of a rear-end motor vehicle accident is available in a rear-end collision case, whether the plaintiff is a driver in the rear vehicle or passenger in either vehicle, and regardless of whether the driver of the rear vehicle is a party to the litigation.

Cevallos v. Rideout

The accident at issue in *Cevallos v. Rideout* involved a disabled vehicle on the downhill slope of an overpass. The drivers of two vehicles, who were not parties to the case, were able to avoid hitting the disabled vehicle and each other. The Defendant, who was driving the third vehicle, struck the second vehicle. The Plaintiff, driving the fourth vehicle,

struck the Plaintiff's vehicle. A fifth vehicle, in turn, hit the Plaintiff's vehicle.

At trial, there was no dispute that the collisions occurred. A dispute arose, however, as to whether the Defendant first struck the second vehicle, causing Plaintiff to be unable to stop in time to avoid a collision with Defendant's vehicle, or whether Plaintiff first struck Defendant's vehicle, causing Defendant to hit the second vehicle.

At the close of the evidence, the trial court judge directed a verdict for the Defendant, concluding that Plaintiff had failed to produce "competent, sufficient evidence to overcome the presumption" that she was the sole proximate cause of the accident.

In its decision, reported at 18 So.3d. 661 (Fla. 4th DCA 2009), the Fourth District Court of Appeal affirmed the ruling by the trial court, holding that, where the Plaintiff is the driver of the rear vehicle, the Plaintiff has the burden of proving that the lead driver stopped abruptly and arbitrarily and that the evidence must establish that the rear-driver could not have reasonably been expected to anticipate the lead driver's sudden stop. Otherwise, there existed a presumption that the Plaintiff's own negligence was the sole proximate cause of the accident.

During this appeal, Plaintiff argued that the presumption of rear driver negligence did not apply to bar a claim by a rear-driver because the lead driver could be comparatively negligent: in other words, that the lead driver Defendant could not use the presumption as a shield to require the rear-driver Plaintiff to establish the absence of negligence on her own part to pursue her claim.

The Fourth DCA disagreed with this argument, reasoning that there was a distinction between a presumption of comparative negligence and a presumption regarding the sole cause of the accident, which is reasonably related to the purpose of the presumption: namely that it furthers the public policy of ensuring that following drivers leave a clear stopping distance between themselves and the car

Florida Supreme Court Clarifies Rear-End Collision Presumption Cont.

they are following. The Florida Supreme Court, citing to the opinion in *Birge v. Charron*, released the same day, reversed the Fourth DCA, concluding that evidence, when viewed in the light most favorable to the Plaintiff, provided a basis for the jury to conclude that the front driver was negligent, based on evidence that she was talking on a cell phone while driving 45 miles per hour over a hill in heavy traffic and while doing so, slammed her car into the stopped vehicle on the downward hill of the overpass. Therefore, there was a reasonable basis for the jury to conclude that the rear driver's negligence was not the sole proximate cause of the accident, and the presumption of rear-driver negligence was not a proper reason to direct a verdict in Defendant's favor.

Birge v. Charron

The accident at issue in *Birge v. Charron* occurred at a highway juncture where the traffic from a feeder street merged onto the main highway. The Defendant, who was traveling on the main highway, slowed to a near stop as he approached the junction. Defendant was unsure whether the driver of a pick-up truck, who was approaching from the feeder road, would yield the right-of-way to Defendant. A motorcycle, upon which Plaintiff was a passenger, then struck Defendant's vehicle. Plaintiff produced evidence that Defendant had abruptly come to a complete stop despite the fact that a complete stop was unnecessary because Defendant had the right-of-way.

The trial court entered summary judgment in Defendant's favor, based on the presumption that the driver of the motorcycle, as the rear-end driver, was presumed to be the sole proximate cause of the accident. On rehearing, Plaintiff unsuccessfully argued that, unless the evidence showed that Plaintiff herself was the sole proximate cause of the accident, her case should be given to the jury to determine the fault attributable to the Defendant.

In its decision, reported at 37 So.3d 292 (Fla. 5th DCA 2010), the Fifth District Court of Appeal reversed the trial court, holding that the rebuttable presumption of negligence that attaches to the rear driver in rear-end collision arises out of necessity in cases where the

lead driver sues the rear driver. The Fifth DCA reasoned that the issue in the case was whether Defendant as the driver of the front vehicle was negligent; not whether the presumption of the motorcycle driver's negligence was rebutted. If Plaintiff offered any evidence of Defendant's negligence, the presumption is rebutted; and summary judgment is improper.

In the light most favorable to the Plaintiff, the Defendant's decision to stop unnecessarily could form the basis of a conclusion that Defendant was negligent, because he stopped in an unexpected location rather than choosing an area that would not put others in a zone of risk. The Fifth DCA concluded that summary judgment should not have been entered in Defendant's favor and certified conflict with *Cevallos v. Rideout*.

The Florida Supreme Court affirmed the Fifth DCA's ruling, reasoning that under the comparative negligence framework, once any evidence of the front-driver's negligence is produced, there cannot be rule that fixes the sole proximate cause of the accident to the rear driver. Instead, the presumption exists as an evidentiary tool that applies only when there is no evidence of the front-driver's negligence. The presumption disappears and the jury apportions percentages of fault once any evidence of the front-driver's negligence is offered.

About Steven Hemmert



Steven Hemmert is an Attorney in the Miami office. His practice includes general liability, automobile liability, professional errors and omissions, premises liability and products liability. He has also represented clients in commercial litigation matters, landlord and tenant litigation, securities arbitrations and corporate transactions. He is admitted to practice in all Florida State courts and the Southern and Middle District Courts of Florida. For questions about this article or assistance with your matters, please contact him direct at 786.433.4145 or email SHemmert@LS-Law.com.

Does a Municipal Transit Authority Have Sovereign Immunity? by Stuart Goldberg, Esq.



Stuart Goldberg

In the case styled Keck v. Eminisor, the Florida Supreme Court reviewed the sovereign immunity of a corporation created by an agency of the state that is wholly controlled by and intertwined with the agency of the state.

The defendants in the case were Jacksonville Transit Authority (JTA), Jax Transit Management Corporation (JTM) and Andreas Keck. The plaintiff, Ashleigh Eminisor filed the complaint alleging that JTA owned a trolley operated for the purpose of public transportation and an employee of JTM, Keck, was operating the trolley when it hit the plaintiff. The appeal to the Florida Supreme Court resulted when Keck's motion for summary judgment on sovereign immunity was denied. The trial court held that JTM was neither a state agency or subdivision under section 769.28(9) (a), Florida Statutes because JTM was created to be a private employer for public bus drivers and mechanics in Jacksonville. Keck attempted to take an interlocutory appeal with the First District Court of Appeals, but the First District declined to grant *certiorari*.

The First District Court of Appeals then certified the question of "whether review of the denial of a motion for summary judgment based on a claim of individual immunity under section 768.28(9)(a) without implicating the discretionary functions of public officials, should await the entry of a final judgment in the trial court". An Appeal taken with the Florida Supreme Court rephrased the certified question as follows: "Should review of the denial of a motion for summary judgment based on a claim of individual immunity under section 768.28(9)(a), Florida Statutes await the entry of a final judgment in the trial court to the extent that the order turns on an issue of law?"

JTM is a corporation that was formed to be the employer of unionized JTA workers. JTM was incorporated in the early 1990s and entered into a management contract in 1992. JTM is a private corporation that "is wholly controlled by and intertwined with JTA." Additionally, "JTM's sole function is to provide bus drivers and maintenance workers for JTA." Also, even though Keck was employed by JTM, "he works for, is supervised by, and is ultimately paid by JTA."

In its opinion, the Florida Supreme Court discussed several important issues. First, the Court found that Keck was entitled to the individual immunity provided in section 768.28(9)(a), Florida Statutes. The Court determined that Keck was entitled to the same because section 728.28(9)(a), Florida Statutes, makes no distinctions between public officials whose jobs involve some level of discretion and public employees, as Keck was, and the statute applies equally to every "officer, employee, or agent of the state or any of its subdivisions." The Court noted that if a defendant who is entitled to immunity under 728.28(9)(a), Florida Statutes is erroneously named as a defendant and is required to stand trial and an interlocutory appeal is denied then the statutory immunity is meaningless. Therefore, the Court answered the certified question in negative – the review of the denial of summary judgment based on a claim of individual immunity under section 768.28(9) (a), Florida Statutes should not await the entry of final judgment.

Next, the Court discussed whether Keck was entitled to immunity under section 768.28(9)(a), Florida Statutes. The Court held that he was entitled to immunity "by virtue of his employment with JTM, a corporation acting primarily as an instrumentality of JTA, an agency of the state." The Court discussed the construction of section 768.28(9)(a), Florida Statutes and determined that JTA was a part of the state. Finally, the Court addressed whether JTA's immunity extended to JTM and found that:

- A corporation that acts primarily as an instrumentality of an agency or independent establishment of the State is perforce an instrumentality of the State. The State acts through its agencies and independent establishments and a corporate instrumentality of an agency or independent establishment is an instrumentality of the State.

Therefore, JTM, as an instrumentality of JTA, is entitled to immunity and is a state agency or subdivision under section 768.28(9)(a), Florida Statutes because it primarily acts as an instrumentality of JTA, which is within the statutory definition of a state agency. In sum, the Court held that both JTM and Keck are entitled to sovereign immunity under section 768.28(9)(a), Florida Statutes.

Verdicts and Summary Judgments

with a 13% impairment to the body as a whole. Plaintiff claimed approximately \$200,000 in past medical expenses, and between \$150,000 and \$200,000 in future medical expenses. There were no prior medical records of the Plaintiff as Plaintiff moved to the United States from Guatemala. Defendant served two (2) Proposals for Settlement on the Plaintiff prior to trial. Plaintiff initially made a past wage loss claim in the amount of \$105,000 and a loss of future earnings claim in the amount of \$240,000, but dropped those claims prior to trial. A motion for Attorney fees and costs is pending.

Catastrophic Claim MVA — Dismissal

Managing Partner Daniel Santaniello and Stuart Goldberg, Associate of Luks, Santaniello, Petrillo & Jones obtained the dismissal of a catastrophic claim involving a motor vehicle accident in the case styled Weston, Karen vs. Metro Mobility Management Group. The claim was brought against Palm Beach County and its transportation authority, Palm Tran. Karen Weston was severely injured in a motor vehicle accident involving a hot-rodding driver and a paratransit van owned and operated by an independent agency which had contracted with Palm Beach County to provide transportation services to disabled people in Western Palm Beach County. Plaintiff claimed the County and Palm Tran were vicariously liable for the negligence of the van operator, who was accused of contributing to the accident. Judge Catherine Brunson granted the motion for judgment on the pleadings for both the County and its transportation agency and entered a final judgment for them, accepting our argument that both defendants were protected by sovereign immunity from claims based on vicarious liability.

False Arrest — Final Summary Judgment

Anthony Merendino, Junior Partner of the Boca Raton office of Luks, Santaniello, Petrillo & Jones obtained a Final Summary Judgment in a false arrest case styled Rose M. Cortez vs. Defendant Retail Store in the United States Southern District of Florida on January 31, 2013. It was alleged that Defendant store wrongfully caused Plaintiff, a cashier at the

subject Defendant store, to be arrested after Defendant store conducted an investigation into allegations that Plaintiff was allowing customers to leave the store without paying for merchandise in exchange for cash tips. Plaintiff brought a four (4) count Complaint for False Imprisonment, Abuse of Process, Intentional Infliction of Emotional Distress, and Negligence. Plaintiff was arrested at the subject Defendant store, but ultimately acquitted of the theft charges in the underlying criminal case.

The Court in the civil case found that there was probable cause for Plaintiff's arrest thereby eliminating her false imprisonment claim pursuant to Florida's shopkeeper immunity statute (section 812.015); that the record evidence did not support Plaintiff's abuse of process and negligence claims; and that Plaintiff did not sufficiently demonstrate by the record evidence that any actions on the part of Defendant store were outrageous enough to sustain her intentional infliction of emotional distress claim. Plaintiff's highest settlement demand was \$1,000,000.

Brain Injury — Federal Court — Dismissal

Howard Holden, Junior Partner of Luks, Santaniello, Petrillo & Jones obtained a Motion to Dismiss in Federal Court in a Brain Injury case styled Cohl v. Motorsport Rally Corp. Plaintiff alleged negligent installation by Defendant of after-market motor cycle parts. Defendant installed front wheel of motorcycle on the day prior to the accident. While traveling down I-95 south at 70 mph, Plaintiff lost control, motorcycle overturned and Plaintiff was ejected. Plaintiff sustained incapacitating injuries and was transported to Holmes Regional Hospital. The good faith estimate of economic damages was \$730,000.

Negligent Security — Final Summary Judgment

Steven Hemmert, Associate of Luks, Santaniello, Petrillo & Jones obtained a Final Summary Judgment in a negligent security case styled Matthew Robinson v. Lee Park Condominium Association, Inc., et al in Miami-Dade County, November 1, 2012. The case

Read More . . . P. 12

Verdicts and Summary Judgments cont.

involved a non-resident visitor to the condominium property who was beaten by unidentified individuals after instigating a fight on the insured's property in April of 2008. Shortly after serving its answer, Defendant served requests for admissions, including a request that Plaintiff admit Defendant's actions or inactions were not the proximate cause of the incident and that Defendant was wholly without fault with regard to the incident. Despite an order from the court compelling him to do so, Plaintiff failed to serve a written response to the requests for admission prior to the hearing on the motion for summary judgment. Judge Beatrice Butchko found that Plaintiff's failure to respond was deemed an admission of each of the requests, which in turn, supported the entry of final judgment on the issue of Defendant's liability.

Wrongful Death—Motion for Final Summary Judgment

Paul Ginsburg, Junior Partner of Luks, Santaniello, Petrillo & Jones obtained a Motion for Final Summary Judgment in the Wrongful Death case styled Estate of Jay C. Ciocon v. J.H.O.C. d/b/a Premier Transportation, Charles Dale Ballew, Eduardo Torres and Ydania Rodriguez, Defendants Eduardo Torres was the driver and Ydania Rodriguez, the owner of a van which was stopped and disabled in the emergency breakdown lane of westbound I-75 just west of Weston Road in Broward County, Florida. The decedent was travelling west on I-75 when he veered across several lanes of traffic, ultimately colliding, in a glancing blow, with the left rear corner of our Defendant's van, after which his vehicle went back across several lanes of I-75 and collided with a tractor-trailer owned by co-defendant J.H.O.C. d/b/a Premier Transportation, and operated by their driver, Charles Dale Ballew. After the collision with the tractor-trailer, Plaintiff's decedent's vehicle was propelled into the concrete barrier wall on the far right side of the expressway, causing the fatality.

Slip and Fall — Final Summary Judgment

Tampa Managing Partner Anthony J. Petrillo obtained a Final Summary Judgment in a slip and fall case styled Tallent, Terry and Barbara v. Pilot Travel Centers, LLC., in the Twentieth Judicial Circuit,

before the Honorable Joseph Foster, on February 20, 2013. Plaintiffs alleged Defendant Pilot negligently failed to warn, failed to inspect and failed to properly maintain its premises when it allowed a diesel fuel spill to remain on its premises for an unreasonable length of time. The alleged dangerous condition caused Plaintiff bodily injury after he slipped and fell in the spill as he attempted to walk across the premises to make a fuel purchase. Defendant had notice of the spill and was in the process of cleaning it up when Plaintiff fell. Plaintiff's injuries included five surgeries and lien amounts over \$400,000. Plaintiff's last demand was \$1,000,000. The Motion for Summary Judgment successfully established Defendant Pilot met its duty to use reasonable care (in the process of cleaning it up) and to warn of any concealed dangers that are unknown to Plaintiff. Defendant Pilot owed no duty to warn Plaintiff of alleged hazards on the premises, as the conditions were open, obvious, and actually known to Plaintiff who walked by the spill and appreciated it three times before he fell.

Wrongful Death — Final Summary Judgment

Todd Springer, Managing Attorney of the Jacksonville office of Luks, Santaniello, Petrillo & Jones obtained Final Summary Judgment in a wrongful death case styled, Ileana Liset De La Torre vs. Defendant Church and Defendant Pastor, in Duval County on January 18, 2013. It was alleged that a pastor had provided negligent counseling to the decedent and acted in such a way as to worsen his mental and/or physical condition pursuant to the Undertaker's Doctrine by failing to notify third parties of the decedent's prior suicide attempts and harass, bully, and humiliate him ultimately contributing to and/or causing him to commit suicide. The Defendants filed a Motion for Summary Judgment which was granted. Judge Wallace found that there was a lack of the necessary, "special relationship", or the ability to control the conduct of the decedent, to create a duty to prevent the suicide of another. Additionally, the Court found that because the actions of someone such as the decedent was not foreseeable, there was no duty for the pastor to warn third parties of his prior suicide attempts. Plaintiff's highest settlement demand was \$3,000,000.

Read More . . . P. 13

Verdicts and Summary Judgments cont.

Ladder Injury Slip and Fall — Defense Verdict

Managing Partner Daniel Santaniello and Douglas de Almeida, Esq., obtained a defense verdict in a ladder injury case styled Kevin Connor v. Villa D'Este Condominium, Inc. and Campbell Property Management and Real Estate, Inc. The case was tried over six days before a jury in Broward County. Plaintiff was a 57 year old man, who was on his ladder cleaning the top of his neighbor's wall when he claimed that the ladder slipped out from under him. Plaintiff alleged that the driveway was dangerously slippery and sued the Homeowner's Association and Property Management Company for failing to remedy the allegedly dangerous condition.

Both sides presented expert testimony. Plaintiff's expert opined that the driveway did not meet recommended slip resistance standards while Defendants' expert opined that all applicable slip resistance standards were met. Defense was able to demonstrate to the jury that Plaintiff believed that the driveways were slippery before he placed his ladder on the driveway and then Plaintiff misused the ladder in various ways including failing to have someone hold the ladder or otherwise secure the ladder; using an undersized ladder for the job; wetting the driveway making it more slippery and finally getting Plaintiff to admit that he reached out, farther than arm's length, to retrieve a brush when the ladder fell.

As a result of his injuries, Plaintiff lost 3 teeth and required two implants and a permanent bridge to replace them. Plaintiff also claimed that he suffered injuries to his right shoulder and hip from the fall. Plaintiff was impeached however on his failure to disclose a prior similar condition and treatment to his right shoulder. Plaintiff's total medical bills for his claimed injuries were \$47,000. Plaintiff's lowest demand before trial was \$110,000. Plaintiff asked the jury to award him over \$400,000 for his past and future medical bills and pain and suffering. After approximately 1 1/2 hours of deliberation, the jury returned a verdict finding no liability on either Defendant.

Pedestrian Hit — Defense Verdict

Managing Partner Daniel Santaniello, Orlando Partner Paul Jones and Doreen Lasch, Junior Partner obtained a defense verdict in a Pedestrian hit case style Ruimy, Laura vs. Flor N. Beal. This case involved two jury trials and a demand for \$1,000,000. The Plaintiff was a 17 year old female from Canada visiting a relative in Miami who was hit by a car while crossing the streets of Miami Beach. Defendant Alex Beal was making a right turn and struck plaintiff. The vehicle was owned by Defendant Flor N. Beal, and had been left at her parents' house while she went on a trip to New York. The vehicle was taken by Alex Beal without the knowledge of Flor Beal, and without the express or implied permission and/or consent of the owner, Flor Beal, after which the accident occurred.

Alex Beal admitted negligence for the operation of the motor vehicle, while Flor Beal denied that the vehicle was used with her knowledge, and without her express or implied permission and/or consent. Plaintiff was initially treated in the ER and admitted to Mount Sinai Medical Center as a patient for over two weeks before she was transported to Montreal Children's Hospital where she was further admitted for assessment and treatment. Plaintiff's injuries included fractures of the right acetabulum, left foot great toe and navicula as well as skin abrasions and bruises. Defense Expert Salvador Ramirez, MD, testified that the Plaintiff had a 5% permanent impairment to the body as a whole due to the fractures; however he testified Plaintiff had no functional impairment as a result thereof. Plaintiff claimed total damages of \$81,611.69, with \$56,611.69 in past medical expenses and \$25,000 in pain and suffering. Plaintiff stated she had to drop out of school because of her injuries.

The Jury found that Defendant Alex Beal did not have express or implied permission to use the vehicle owned by Flor Beal. Although the jury further found that Flor Beal was 10% negligent and that Alex Beal was 90% negligent which was the legal cause of loss, injury or damage to Plaintiff, Laura Ruimy. The Court granted Defendant's motion for directed verdict on the issue of direct liability finding there was no direct negligence and no liability on the part of defendant. A motion for costs is pending.