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LEGAL UPDATE

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Liability

Huge Medical Bills and Questionable Surgery In LOP Cases: How The 4th DCA Upholds Our Strategy To Expose The Physician

by Shana P. Nogues, Esq. and Daniel J. Santaniello, Managing Partner.



Dan Santaniello

In the April Issue (2013) of Legal Update, we presented various defense strategies to challenge inflated medical bills based upon a Letter of Protection. Recently, the Fourth District Court of Appeal reviewed our strategy on appeal and upheld a huge win on a case where hundreds of thousands were billed on a LOP for cervical surgeries that the jury ultimately found were not reasonable or recoverable.

Dan Santaniello represented the defendant ¹ in an automobile accident case styled Mayruis Disla v. Joseph Blanco. Prior to litigation, Plaintiff, Disla's attorney referred her to a physiatrist/pain management specialist, Stuart Krost, who then referred her to a neurosurgeon, Heldo Gomez, who performed two surgeries under a Letter of Protection. Gomez performed a spinal fusion surgery for which he charged an exorbitant amount and proposed an expensive large life care plan. Because of the exorbitant medical bills and life care plan, the Defendant was looking at specials that exceeded \$1,000,000. Policy limits had been tendered and rejected so the case went to trial.

Defendant, Blanco, was driving Plaintiff, Disla, home late one night, when he suffered a seizure causing him to lose control of the vehicle, go over two curbs, swipe a tree, and run into a house. Disla, who was an alleged unrestrained passenger in the vehicle at the time

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Verdicts and Summary Judgments Rear-End Collision — Defense Verdict

Miami Junior Partner Derek H. Lloyd and Managing Partner Daniel J. Santaniello obtained a defense verdict in a Rear-End collision matter styled Lorenzo Wilson v. Evens Jeune in Miami-Dade County on June 7, 2013. Plaintiff was stopped at an intersection's stop sign when Defendant rear-ended Plaintiff. Liability was admitted prior to trial, and the only issues at trial revolved around damages. Plaintiff alleged that as a result of the accident, Plaintiff suffered multiple disc herniations in cervical spine at C4/5 and C5/6 and lumbar spine at L5/S1, L3/4, L4/5. Plaintiff underwent lumbar spine injections, one injection was done at each level. Dr. Jeffrey Kugler opined that Plaintiff had a 2% impairment to the neck, and a 2% impairment to the back, and stated that his

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Huge Medical Bills and Questionable Surgery In LOP Cases: How The 4th DCA Upholds Our Strategy To Expose The Physician cont.



Shana Noguez

of the accident, suffered a broken neck and had an emergency anterior cervical fusion with bone graft and plating at C3-4. Following her release from Broward General, Disla continued to have neck pain and related neurological symptomatology. Sometime thereafter, Disla's attorney referred her to Stuart Krost, M.D., a physiatrist/pain management specialist, who then referred her to Heldo Gomez, a neurosurgeon. The neurosurgeon performed a second larger spinal fusion surgery under a Letter of Protection.

At trial, we attempted to show that Dr. Gomez's billings on the second surgery were unreasonable, and that he was not a true physician, but more of a litigation physician. An aggressive cross examination ensued where, at one point, Plaintiff's counsel moved for mistrial, and asked the Court for a recess to engage defense counsel on the sidewalk. The cross was brutal. Gomez admitted to involvement in thousands of percutaneous cases and that he was not on any health insurer list in the world. Gomez tried to justify the surgery by testifying that following her initial surgery, Disla developed progressive deterioration at C4-5 and C5-6 with kyphosis, angulation, and large osteophytes at C4-5 and C5-6 and, due to the condition, the neurosurgeon performed an anterior fusion at C4-5 and C5-6 with plating.

Disla had no insurance and, at the time of trial, had incurred **\$230,651 in past medical expenses** for the two surgeries and pain management. Disla's physiatrist/pain management specialist, Dr. Krost, further testified regarding a life care plan wherein he opined plaintiff would need **\$776,337.00 in future medical** care over the course of her lifetime consisting of office visits, medications, injections, and physical therapy.

At the close of trial Plaintiff's counsel asked the jury for **\$3,000,000**. Upon deliberation, the "jury found both parties to be the legal cause of damage to Disla, but apportioned 90% of the fault to Disla (for her

failure to wear a seatbelt) and 10% to Blanco. The jury awarded \$115,325 in past and \$40,000 in future economic damages, as well as \$25,000 in each past and future non-economic damages, for total damages of \$205,325. After allocating the percentages of fault and reducing the amount by PIP benefits, the court entered judgment in favor of Disla for **\$10,532.50**, plus costs." ²

Disla then appealed the trial court's final judgment. On appeal, Disla raised multiple issues including whether the trial court erred in overruling objections on the grounds of relevance and materiality to defense counsel's cross-examination of Plaintiff's "*neurosurgeon regarding his refusal to accept insurance, Medicare reimbursement rates, and his extensive practice in a type of surgery of disputed efficacy, but which was not the surgery performed in this case.*" ³ The Florida Fourth District Court of Appeals found that the trial court did not abuse its discretion in allowing the defense to cross-examine the doctor regarding these topics when "[t]he doctor has testified on direct to his extensive practice and qualifications, and the questions regarding the types of surgery he performed were relevant to that issue," and "[t]he fact that he did not accept insurance was brought up in connection with the extent of the doctor's extensive medical litigation practice." ⁴ . Moreover, the Court found that "the discussion of Medicare and its rates was relevant to the reasonableness of the doctor's charges." ⁵ On this basis and other grounds, the Fourth District Court of Appeal affirmed the judgment of the trial court.

Discovery Strategies

Florida jury instructions state that a plaintiff is entitled to be compensated for the reasonable value or expense of hospitalization and medical care and treatment necessarily or reasonably obtained by the plaintiff in the past. Of course, hiring a billing and coding expert or having the compulsory physical examiner review the bills to testify that the charges for the surgery performed are not reasonable and exceed the customary charges for the surgery

Huge Medical Bills and Questionable Surgery In LOP Cases: How The 4th DCA Upholds Our Strategy To Expose The Physician cont.

are useful and necessary tools; however, the *Disla* opinion condoned our strategy to break down the charges by a surgeon treating on a Letter of Protection. Discovery should be aimed at determining the types of surgery performed by the surgeon and the relative volume of each, comparing the surgeon's charges under the Letter of Protection to the Medicare fee schedule and the reimbursements of other insurance providers, and the extent of the surgeon's involvement in litigation practice.

A. Discovery to Surgeon

- a. Determine what, if any, insurance providers are accepted by the surgeon and whether the surgeon accepts Medicare.
- b. Determine what the surgeon bills each and every insurance provider for all of the treatments performed in the case and what amount each and every insurance provider will reimburse for all of the treatments and procedures done by the surgeon.
 - i. Determine the Medicare fee schedule amount for each of the treatments performed by the surgeon on a Letter of Protection (LOP).
 - ii. Challenge the physician on how they set their fees and compare their CPT code billing to the Medicare fee schedule found on CMS.gov.
- c. Determine the surgeon's involvement in litigation.
 - i. Compare the amount of patients the surgeon sees who are involved in litigation versus who are not.
 - ii. Ascertain whether the plaintiff was referred to the surgeon by his attorney.
 1. If so, explore the relationship between the attorney and the surgeon.
- d. Determine the types of surgery that are generally performed by the surgeon.
 - i. Determine whether the surgeon performs different types of surgery or is more conservative in non-litigation case.
- e. Find out how the surgeon decided to charge what she did for her services.
 - i. Subpoena any related materials, challenge the methodology.

B. Deposition of Plaintiff

- a. Was the plaintiff aware that the surgeon was not going to bill any other insurance plans or HMOs because she was treating under a LOP?
- b. Does the plaintiff understand how his bills from this surgeon are to be paid if his insurance or HMO is not being billed?
- c. Does the plaintiff understand that he is responsible for the entire amount of his bills from the surgeon?
- d. Was the plaintiff aware that the surgeon was going to charge a higher rate to treat him under a LOP?
- e. Does the plaintiff think he should be charged more for the surgery because the surgeon treated him under a LOP?

More than likely, the plaintiff will have no idea that he agreed to inflated charges for treatment by the surgeon by entering into a LOP. This is compelling in front of jury.

Trial Strategies

At trial, it is necessary to expose to the jury that the surgeon's charges under the LOP are exorbitant, exceed usual and customary charges, and are not in accordance with customary billing practices. This can be done by putting the reasonableness of the surgeon's charges at issue and discussing the reimbursement rates of insurance carriers and Medicare rates for each item billed by the surgeon. This should be permitted as the *Disla* court found that "the discussion of Medicare and its rates [are] relevant to the reasonableness of the doctor's charges."⁶ The Medicare Fee Schedule is public record and can be found at CMS.gov. We carefully cross examine

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Huge Medical Bills and Questionable Surgery In LOP Cases: How The 4th DCA Upholds Our Strategy To Expose The Physician cont.

physicians on how they determined their fees, to which they usually shy away from any answer. We then compare them to Medicare's fee schedule. Although most agree the fee schedule is conservatively low, most doctors further agree that 2, 3, or even 5 times the fee schedule is reasonable. However, we find that many "litigation" physicians are charging 10, 20, or even 30 times the fee schedule.

It is also necessary to cross-examine the surgeon regarding her involvement in litigation. If the surgeon is involved in extensive litigation it is, based on the *Disla* opinion, appropriate to cross-examine the surgeon regarding whether she accepts insurance. The exposé of the surgeon's extensive litigation practice, coupled with her refusal to accept insurance and likely exorbitant bills will help convince the jury regarding the inflatedness and unreasonableness of the charges. Finally, it is important to cross-examine the surgeon on the types of surgery she performs. According to the *Disla* court, the types of surgery performed are relevant to the surgeon's extensive practice and qualifications. *Id.* It is especially helpful if the defense can expose the surgeon's tendency to perform different surgeries or take a more conservative course of treatment in non-litigation.

The Fourth District's decision in *Disla v. Blanco* and these suggestions may assist in forming a defense strategy and designing discovery that reveals what a surgeon is normally paid for the same services she has provided to a plaintiff under a LOP. The tactics discussed herein may also assist the defense in obtaining a vastly reduced damages award in high exposure cases involving surgeries performed under a Letter of Protection. For further information about defending cases that involve surgeries performed under a Letter of Protection, please contact Dan Santaniello in the Boca Raton office direct at T: 888.372.8711 or by e-mail at DJS@LS-Law.com.

About the Authors

Shana Pollack Nogues is an Associate in the Boca Raton office. She is a graduate of Tulane University School of Law where she was Managing Editor of the Tulane Journal of Technology and Intellectual Property. While at Tulane, Shana was also the SBA Executive Chair of Student Affairs and Community Service. She served as Extern for the United States District Court, Eastern District of Louisiana and also as a Law Clerk for the Office of Statewide Prosecution in West Palm Beach, Florida. Shana practices in the areas of PIP, Automobile Liability, Premises Liability, Negligent Security and General Liability. She recently authored the article, "Paving the Way to Fair Jury Trials: Using Batson Challenges" which was published in *Minority Trial Lawyer*, a publication of the American Bar Association, Section of Litigation in 2012. She earned her Bachelor of Arts degree, *summa cum laude*, from the University of Florida. She is admitted in Florida (2012). Contact Shana direct at T: 561.939.1874 or e-mail SPollack@LS-Law.com.

Daniel Santaniello is a Founding Partner of Luks, Santaniello, Petrillo & Jones. He is Board Certified by The Florida Bar in Civil Trial. Dan has 23 years of trial litigation experience in Florida State and Federal courts. Martindale-Hubbell and his peers have rated him AV® Preeminent™. Dan is also President of the Florida Defense Lawyers Association (FDLA) and was the recipient of the FDLA's President's Award in 2010 for outstanding service to the defense bar. Dan was selected to Florida Super Lawyers in 2012 and 2011 and the Miami Daily Business Review selected him as a Most Effective Lawyer (Finalist) in 2007. Over the last 23 years, Dan has led the firm's litigation practice and tried numerous high exposure cases to verdict. Contact Dan Santaniello in the Boca Raton office at 888.372.8711 or by e-mail at DJS@LS-Law.com.

¹ *Disla v. Blanco*, [2013 WL 3811805] (*Fla. 4th DCA* 2013).

² *Id.* at *2.

³ *Id.* at *3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at *2.

May an Insurer Limit Reimbursements Based on the Medicare Fee Schedules Without Providing Notice in its Policy of an Election

by Derek Lloyd, Junior Partner.



Derek Lloyd

On July 3, 2013, the Supreme Court of Florida, in Geico v. Virtual Imaging Services, Inc., ruled on the following certified question: “With respect to PIP policies issued after January 1, 2008, may an insurer limit reimbursements based on the Medicare fee schedules identified in Section 627.736(5)(a), Florida Statutes, without providing notice in its policy of an election to use the Medicare fee schedules as the basis for calculating reimbursements?”¹ The Supreme Court held that notice to the insured, through an election in the policy, is necessary because the PIP Statute, Section 627.736, requires the insurer to pay for “reasonable expenses...for medically necessary...services,” but merely permits the insurer to use the Medicare fee schedules as a basis for limiting reimbursements. Stated another way, the PIP statute provides that the Medicare fee schedules are only one possible method of calculating reimbursements to satisfy the PIP statute’s reasonable medical expenses coverage mandate, but does not provide that they are the only method of doing so.

The key issue regarding whether the insurer can use Medicare fee schedule in determining reasonable fees for medical services turns on notice. On July 1, 2012, the Florida Legislature specifically incorporated a notice requirement into the PIP statute. For the first time, in 2008, the PIP statute was modified by the Florida Legislature, to allow the insurer to elect, among other options, to utilize 200 percent of the allowable amount under the participating physicians schedule of Medicare Part B. Therefore, the holding in the above case specifically applies only to policies that were in effect from the 2008 to 2012.

In the instant case, Virtual Imaging, as the assignee of PIP benefits under the insured’s policy, sued GEICO in county court, alleging that GEICO’s reimbursement was insufficient and failed to satisfy the full amount of PIP insurance benefits due to Virtual Imaging under its assignment of benefits in the insured’s policy. The parties stipulated to the

basic facts and filed cross-motions for Summary Judgment. The county court issued an order granting Virtual Imaging’s motion for Final Summary Judgment and certified the following question to the Third District: “May an insurer limit provide reimbursement to 80% of the schedule of maximum charges described in F.S. 627.736(5)(a) if its policy does not make a specific election to do so?”² On appeal, based on the Third District’s prior opinion in Virtual I, the Court affirmed the county court’s order.

Since its inception, the Florida PIP Statute has required insurers to provide coverage for reasonable expenses for necessary medical services. The provision in the PIP statute authorizing insurers to limit reimbursements for medical services rendered pursuant to the Medicare fee schedules, has its genesis in a series of changes the Legislature made to the PIP statute, beginning in 2001, that were designed to regulate the amount providers could charge PIP insurers and policyholders for the medically necessary services PIP insurers are required to reimburse.

The 2008 amendments provided more specific guidelines regarding a PIP insurer’s ability to limit reimbursements. The provisions provided that an insurer “may limit reimbursement”³ to eighty percent of a schedule of maximum charges set forth in the PIP statute. With respect to medical care other than emergency services, such as MRIs that were the focus of this case, the 2008 amendments provided that an insurer “may limit reimbursement”⁴ in accordance with the Medicare fee schedules.

The 2008 amendment caused numerous disputes, resulting in an amendment to the PIP statute in 2012, which stated that “[e]ffective July 1, 2012, an insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of the issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph.”

The question, therefore, before the Supreme Court, was whether the “may” in the 2008 PIP statute

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May an Insurer Limit Reimbursements Based on the Medicare Fee Schedules Without Providing Notice in its Policy of an Election cont.

allowed the insurer to utilize the Medicare fee schedule without actual notice to the insured. Specifically, GEICO took the position that, pursuant to the 2008 amendments to the PIP statute, it was permitted to limit reimbursements in accordance with the Medicare fee schedules because the Medicare fee schedules represent the Legislature's determination, consistent with the cost-cutting intent of the 2008 amendments, of the proper way to determine the reasonableness of a medical expense. GEICO contended that there are not two separate methodologies for determining reasonableness.

The Supreme Court found that this was not so; there were two methodologies in determining reasonable medical costs. The Medicare fee schedule was one—however, the other, in the event of a dispute, was that a fact finder must determine whether the amounts billed were reasonable. Therefore, the Supreme Court held that the 2008 amendments were clearly permissive and offered the insurers a choice in dealing with their insureds as to whether to limit reimbursements based on the Medicare fee schedules or whether to continue to determine the reasonableness of provider charges for necessary medical services rendered to a PIP insured based on 627.736(5)(a).

Due to the above, and because the fee schedule provision of Section 627.736 is permissive and not mandatory, and because the Medicare fee schedules are not the only mechanism for calculating reimbursements, the Supreme Court concluded that neither Section 627.7404(2) nor the policy's incorporation of the PIP statute alters the fact that the insurer cannot take advantage of the Medicare fee schedules to limit reimbursements without notifying its insured by electing those fee schedules in its policy.

Accordingly, even if the Medicare fee schedules are incorporated into the insured's policy, and neither the insured nor the provider knows, without the policy providing notice by electing the Medicare fee schedules, that the insurer will limit reimbursements,

the insured is not bound by the insurer's choice of method of calculating reasonable payments.

In practical use, the PIP provider is unaffected by this decision when the policy expressly limits its obligation to pay a reasonable amount by reference to the applicable schedule of maximum charges. When the policy unquestionably notifies policyholders (and their provider assignees) that the PIP provider will limit payment based on the application of the schedule of maximum charges, same does not render the PIP provider's methodology unclear.

In the event that the Court finds that the PIP provider's policy does not explicitly permit it to use the schedule of maximum charges to limit provider reimbursements as a matter of law, then the adequacy of the PIP provider's reimbursement will be measured solely against the standard of "reasonableness."

Nothing in this Supreme Court decision mandates that the PIP provider is obligated to pay whatever amount is billed by a medical provider. The PIP provider is certainly allowed to argue that declining to pay for unreasonable charges in excess of the schedule of "maximum charges" is consistent with this result. In that event, it will be the fact finder's job to evaluate all the factors referenced in the PIP Statute and the subject policy and make a determination as to whether the medical provider billed a reasonable amount; and whether the PIP provider paid a reasonable amount. For further information or assistance with your matters, please contact Derek Lloyd in the Miami office direct at T:786.433.4145 or e-mail DLloyd@LS-Law.com.

¹ *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 2013 WL 3332385, 38 FLA. L. Weekly Supp. 517 (Fla. 2013).

² *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.*, 90 So.3d 321.322 (Fla. 3d DCA 2012).

³ §627.736, Fla. Stat. (2012). (*emphasis added*).

⁴ *id.*

Is The Service Reimbursable Under Medicare Part B? By Andrew Chiera, Junior Partner.



Andrew Chiera

On April 24, 2013 the Second District Court of Appeal issued its decision in Allstate Fire & Cas. Ins. Co. v. Perez ex rel. Jeffrey Tedder, M.D., P.A., which can be found at 111 So.3d 960, 38 Fla. L. Weekly D915. The narrow issue on appeal was framed as follows:

“When a particular CPT billing code is no longer recognized by Medicare Part B but the service represented in that billing code remains covered under Medicare Part B, is the service ‘Reimbursable under Medicare Part B’ for purposes of Section 627.736(5)(a)(2)(f), Florida Statutes (2009)?” ¹

The issue arose when the insurer applied the Workers’ Compensation fee schedule amount to the charges submitted by the provider under CPT Code 99245. In 2010 that particular CPT Code was not recognized by Medicare, and as such the insurer relied on Fla. Stat. §627.736(5)(a)2.f. which provides “However, if such services, supplies, or care is not reimbursable under Medicare Part B, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under Workers’ Compensation, as determined under s. 440.13.”

Fla. Stat. §627.736(5)(a)3., however, provides that “For purposes of subparagraph 2., the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect at the time the services, supplies, or care was rendered and for the area in which such services were rendered, except that it may not be less than the allowable amount under the participating physicians schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.” ²

The first issue the Court noted was that the insurer did not consider whether or not the particular CPT Code was reimbursable under 2007 Medicare Part B. Unfortunately, not only was CPT Code 99245 reimbursable under 2007 Medicare Part B, but the allowable amount also exceeded the Workers’ Compensation amount utilized for reimbursement in clear violation of the floor established under

subsection 3. Therefore, consideration must always be given to the allowable amount under the 2007 Medicare Part B participating physician’s schedule to determine if the allowable amount exceeds either the current allowable amount under Medicare Part B or Workers’ Compensation for those codes no longer recognized by Medicare.

The second, and perhaps more important issue the Court noted was that while CMS undoubtedly eliminated CPT Consultation Codes (ranges 99241–99245 and 99251–99255) as of January 1, 2010, the *services* themselves continue to be reimbursable, so long as they are medically reasonable and necessary. Thus, subsection (5)(a)2.f.’s reference to services/supplies/care “reimbursable under Medicare Part B” is deemed to incorporate and requires careful consideration of the underlying *service/supply/care* and not just the CPT Code selected by the provider.

Consequently, if/when a claim is presented with a CPT Code that Medicare no longer recognizes and you want to consider the allowable amount under Medicare for either a strict application of the fee schedule methodology or for purposes of reasonableness, a two-step process is recommended. First, make sure that you determine whether or not the 2007 Medicare Part B participating physician fee schedule recognized the particular CPT Code submitted and compare/consider the corresponding allowable amount, if applicable.

Second, if you want to be certain that you are considering the true nature of the underlying *service/supply/care*, consider sending a Fla. Stat. §627.736(6) (b) letter to the provider asking them to clarify exactly what *service/supply/care* the charges relate to. For all post January 1, 2013 policy claims, you may also want to consider rejecting the charge but sending a (4)(b)3. correspondence/Explanation of Benefits and reconsidering the charge if there is a timely response. The benefit is that instead of guessing what the provider meant to submit as a charge, the burden is placed upon the provider to validate or perfect its claim. For further assistance, please contact Andrew Chiera, Esq., in the Boca Raton office direct at T: 561.226.2527 or e-mail ACHiera@LS-Law.com.

Verdicts and Summary Judgments cont.

injury was permanent, and causally related to the accident. Additionally, the Plaintiff had a lost wage claim of 5 1/2 weeks.

Plaintiff asked for the jury to award Lorenzo Wilson \$21,000 for past medical bills, \$6,100 for past lost wages, and \$115,000 for past and future pain and suffering, for a total verdict of \$143,000. The Jury found that Evens Jeune was not the legal cause of loss, injury or damage to Lorenzo Wilson. The Defense argued that the Plaintiff was not injured at the scene, that his job was light duty and therefore he did not need to miss more than a day or two of work, and that the injuries were pre-existing and not exacerbated by the accident. The Defense argued that Dr. Kugler, Dr. Bistline, and Palm Beach Lakes Surgery Center stood to benefit from performing the injections, and that their treatment was not related to injuries from the accident.

Slip and Fall – Final Summary Judgment

Fort Lauderdale Junior Partner Zeb I. Goldstein obtained a Final Summary Judgment in a Slip and Fall case styled Andrea Tomlinson v. Glendale Properties & Investments, Inc., D/B/A Hawaiian Palms I in the Seventeenth Judicial Circuit, before the Honorable Michael L. Gates, on June 5, 2013. Plaintiffs alleged Defendant Pilot negligently failed to warn, failed to inspect and failed to properly maintain its premises when it allowed a liquid substance (water or coffee) 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 she attempted to enter the property management office to pay her rent. Plaintiff's injuries included extensive physical therapy and arthroscopic knee surgery, with outstanding medical bills exceeding \$80,000. Plaintiff's last demand was \$500,000. The Motion for Summary Judgment successfully established Defendant Glendale had no actual or constructive notice of the alleged water/coffee spill, as the testimony demonstrated that several office

employees had gone through the same area where Plaintiff allegedly slipped just ten minutes before Plaintiff encountered the area. Plaintiff has filed her Notice of Appeal to the 4th District Court of Appeals.

Pedestrian Hit – Summary Judgment

Fort Lauderdale Junior Partner David Lipkin obtained a Summary Judgment in a Pedestrian Hit case styled Ricardo Nouel, and Emag Insurance Inc., v. Littler and Ultra Finish After Market Services. The accident occurred on the grounds of a Morse auto dealership where Plaintiff Nouel was working at the time. Co-defendant Litter was employed by Ultra Finish, an on-site car detailing company that provided its services to Morse and its customers, on the date of the subject accident. Co-defendant Littler while operating his motorcycle struck Plaintiff who was a pedestrian in his employers parking lot. It was alleged that co-defendant's negligent operation of his motorcycle caused the accident. Plaintiff also alleged Ultra Finish was vicariously liable for the negligence of co-defendant Littler. Plaintiff underwent cervical laminectomy, right knee ACL repair and meniscectomy and was also scheduled for shoulder surgery. The medical expenses to date were above \$250,000 and there also was a lost wage claim. The court ruled that the insured's employee was outside the scope of his employment at the time of the accident. The plaintiff tried to argue that the "Premises Rule" applicable to Workers' Compensation cases applied because even though the employee just clocked out he was still on the premises. The court refused to apply the premises rule and found the employer could not be responsible for its employee who was riding his motorcycle when he struck the plaintiff who was on foot.

Slip and Fall – Final Summary Judgment

Tampa Junior Partner Michael H. Kestenbaum obtained a Final Summary Judgment in a Slip and Fall case styled Thomas Wernet v. Defendant Retail Store, pending in the Thirteenth Judicial Circuit - Hillsborough County before the Honorable James

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Verdicts and Summary Judgments cont.

Barton, II. Plaintiff alleged Defendant negligently failed to properly maintain, inspect, correct, and/or adequately warn Plaintiff of a dangerous condition at or near the store's front entrance door, specifically alleged to be water on the floor known to the Defendant and/or in existence for a sufficient length of time such that Defendant should have known of it. Plaintiff contended that he suffered significant bodily injury as a result of the fall, including multiple surgical procedures resulting in medical bills in excess of \$500,000 and resulting liens for the treatment in excess of \$300,000. The Motion for Final Summary Judgment successfully established that Defendant lacked any actual or constructive knowledge or notice of the allegedly dangerous condition and therefore, as a matter of law, Defendant could not have breached any duty owed to the Plaintiff. Plaintiff has filed his Notice of Appeal to the 2d District Court of Appeals.

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¹ *Allstate Fire & Cas. Ins. Co. v. Perez ex. rel. Jeffrey Tedder, M.D., P.A.*, III So.3d 960 (Fla.2d DCA 2013).

² §627.736, Fla. Stat. (2009).

This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

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Daniel Santaniello Voted President FDLA



Daniel Santaniello, Managing Partner was voted in President of the Florida Defense Lawyers Association (FDLA) on August 10, 2013 at the FDLA's Annual Meeting. The Florida Defense Lawyers Association is comprised of more than 1000 members that are attorneys in private practice, employed by public agencies and private corporations. The FDLA provides continuing legal education programs, development, networking and support to its members. Daniel Santaniello previously served as the FDLA Secretary-Treasurer from 2011-2012 and has served on the FDLA's Board of Directors since 2007. He was also the recipient of the FDLA's President's Award in 2010 for outstanding service.

Adjuster CE Seminars

As you may know, Adjusters (All-Lines) are required to complete statutorily prescribed hours of continuing education courses. The continuing education requirements for each license type/class can be viewed on the Florida Department of Financial Services (DFS) website. Please contact Client Relations (MDonnelly@LS-Law.com) for information about our seminars.

New Seminars

Florida PIP Case Law and 2013 Developments – Course # 85762

This 1 hour seminar discusses amendments to 627.736(1) and (4) - (11) and the effect of §627.7311 on PIP policies, including 2013 recent developments and implications for PIP claims. The seminar provides 1 Adjuster Law and Policy CEU.

Attorneys Named Junior Partners

Congratulations to the following Attorneys who were named Junior Partners on August 1, 2013.



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Dorsey C. Miller, III has been named a Junior Partner. Dorsey is a member of the firm's BI Division and works out of the Fort Lauderdale office. He has over a decade of experience in trial and appellate matters. He concentrates his practice in automobile liability, wrongful death, premises claims and construction litigation. Dorsey also handles commercial litigation and employment claims. In 2010, he was the recipient of the JM Lexus African American Achievers Distinguished Nomination. In 2009, he received the ICABA's Most Accomplished Blacks Nomination. He serves his community as a Board Member for the Boys and Girls Club of America (Nan Knox Unit) and the Florida HS Athletic Association, Section IV Appeals Committee, as Chairman. Dorsey earned both his Juris Doctorate and Bachelor of Arts degree from the University of Florida. He is admitted in Florida (2002) and to the United States District Court, for the Southern, Middle and Northern Districts of Florida; and the United States Court of Appeals, Eleventh Circuit.



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Derek H. Lloyd has also been named Junior Partner. Derek is a member of the firm's complex and high exposure trial team in the Miami office. Derek is a seasoned litigator with over 10 years experience, practicing in the areas of automobile, trucking and general negligence, as well as premises liability, negligent security, construction defect, products liability and employment discrimination matters. He has represented a variety of clients on a wide range of matters handling all phases of litigation from trial through appeal. He has a Bachelor of Arts degree from the University of Illinois and earned his Juris Doctorate from the University of Miami. He is admitted in Florida (2001) and Illinois (1997). He is also admitted to the United States District Court, Southern District of Florida (2001).



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Matthew G. Krause has been named Junior Partner. For over 20 years, he has dedicated his practice to representing major financial services firms in Collection and Creditor's Rights, Creditor's Bankruptcy, Foreclosure Litigation and Commercial Litigation matters. Matthew works out of the Fort Lauderdale office and handles 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. He has a Bachelor of Science degree from the University of Florida and earned his Juris Doctorate from the Stetson University. He is admitted in Florida (1990) and to the United States District Court, for the Southern, Middle and Northern Districts of Florida (1990).



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Andrew L. Chiera has also been named Junior Partner. Andrew heads up the PIP Division out of the Boca Raton office. His practice also includes vehicular liability, general liability and commercial litigation matters. He has represented clients in Miami-Dade, Palm Beach, Lee, Collier and Broward counties and is very familiar with all judges in the tri-county area. Andrew has conducted and defended countless depositions, regularly prepared adjusters for depositions, conducted examinations under oath, prepared and argued numerous Motions for Summary Judgment. He has a Bachelor of Science degree from the University of Florida, *general honors*, and earned his Juris Doctorate from the Florida State University. He is admitted in Florida (2007). Andrew serves his community as a Board Member of the N.R. Chiera Golf and Tennis Classic for the American Cancer Society.