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LEGAL UPDATE

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Liability

***Daubert* in Florida – Where Are We One Year Later?** by Luis Menendez-Aponte, Esq.

Luis Menendez-Aponte

In an effort to curtail the problem of "junk science" and pure opinion testimony based on an expert's subjective belief and unsupported speculation, the Florida Legislature passed, and the Governor signed into law, amendments to the Florida Evidence Code effectively transforming Florida from a *Frye* jurisdiction to a *Daubert* jurisdiction. With that change, which went into effect on July 1, 2013, Florida joined the overwhelming amount of states and all federal jurisdictions in recognizing this standard of admission for expert testimony at trial. By abandoning the *Frye* "general acceptance test," Florida adopted a stricter and more scientific knowledge approach where the dual standards of "relevance" and "reliability" determine the admissibility of expert testimony.

These amendments to the Florida Evidence Code Sections 90.702 and 90.704 closely follow the Federal Rules of Evidence 702 and 703. As codified under 90.702 of the Florida Evidence Code, the *Daubert* standard, which applies not only to testimony based on scientific knowledge, but all expert testimony requires that:

a) The testimony is based upon sufficient facts or data;
b) The testimony is the result of reliable principles and methods; and
c) The witness has applied the principles and methods reliably to the facts of the case.

Additionally, the amendment to 90.704 of the Florida Evidence Code now specifies that facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative

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Verdicts and Summary Judgments

Negligent Security — Summary Judgment

Fort Lauderdale Junior Partner Dorsey Miller obtained a summary judgment in a negligent security matter styled CellRunners v. Sterling Properties and Butcher & Baecker Construction Co. Defendants rented space in a warehouse in Deerfield Beach. Plaintiff occupied the unit next to /Defendants. Plaintiff alleged that Defendants were negligent for leaving the door of their property unlocked, allowing burglars to enter Defendants' unit, then knock holes in the wall to gain access to Plaintiff's unit. Plaintiff was seeking upwards of $200k for stolen property. Court found that there was no duty on Defendants part to protect Plaintiff from criminal attacks by third parties, nor was the criminal act itself foreseeable.

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Daubert in Florida – Where Are We One Year Later? Cont.

value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

In its role under the *Daubert* standard, the court acts as a "gatekeeper" charged with ensuring the expert's testimony rests both on a reliable foundation and is relevant to the issue at hand. The court does this by assessing the scientific validity and reliability of the reasoning methodology and principles underlying the proposed expert testimony. Under the *Daubert* standard, a key question to be answered is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993). In order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method. *Id.* at 2795.

Preliminary questions concerning qualifications of the expert and admissibility of evidence must be established by a preponderance of proof by the party offering the expert. McCovery v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002) (quoting Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999)). The "pure opinion testimony" based on personal experience and speculation, which was frequently admitted under the *Frye* standard, will now have to satisfy the *Daubert* standard in order to be admissible. Under *Daubert,* if an expert is relying solely or primarily on the expert's experience, the expert must explain how the experience led to the conclusion, why the experience is a sufficient basis for the opinion and how the experience was reliably applied to the case. Hughes v. Kia Motors, 766 F.3d 1317 (11th Cir. 2014).

Earlier this year, the Third District Court of Appeal provided guidance as to the interpretation and application of the *Daubert* standard moving forward in Florida. In Perez v. Bell South Telecommunications, Inc., 138 So. 3d 492 (Fla. 3d DCA 2014), the Court affirmed the exclusion of an expert's "pure opinion" testimony by applying the *Daubert* standard. The case involved a claim against a plaintiff's former employer alleging that workplace stress and the employer's failure to accommodate the plaintiff's medical condition led to the premature birth, resulting surgeries, and developmental deficits in her baby. In support of the causation argument, the Plaintiff relied on her gynecologist/obstetrician who opined in deposition based on his own personal experience, that workplace stress, exacerbated by the employer's refusal to accommodate the Plaintiff's medical condition, was a causal agent of the injuries.

Using the *Frye* standard, which applied at the time, the trial court excluded the doctor's expert testimony. On appeal, the Plaintiff argued that the doctor's expert testimony was "pure opinion" testimony admissible under the *Frye* standard and Marsh v. Valyou, 977 So.2d 543 (Fla. 2007).

By the time the case reached the Third District Court of Appeal, Florida had already adopted the *Daubert* standard. In strictly adhering to the *Daubert* standard, the Third District Court of Appeal affirmed the exclusion of the Plaintiff's expert's opinion finding that there was no credible scientific support for the opinion, which by the expert's own admission was based purely on his own experience and not supported by any credible scientific research. The Court went on to hold that general acceptance in the scientific community alone is no longer a sufficient basis for the admissibility of expert testimony. In addition, the Court determined that the amendments to the Florida Evidence Code adopting the *Daubert* standard were procedural in nature, and therefore "indisputably" applied retroactively to all pending cases, including those at the trial and appellate levels.

Luis Menendez-Aponte

How the new amendments will be interpreted by the remaining courts of appeal in Florida remains to be seen. The Third District Court of Appeal laid a strong foundation in Perez by holding that it will strictly adhere to legislative intent that Florida courts interpret and apply the principles of expert testimony in conformity with Daubert, 509 U.S. 579, General Electric Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

We anticipate that this mandate for strict adherence to the *Daubert* standard will lead to greater scrutiny of Plaintiff's expert witness opinions by the courts, and prohibit the introduction of unsupported expert testimony, thereby preventing verdicts predicated on "junk science" and "pure opinion" testimony based on speculation.

For further information or assistance with your matters, please contact Luis Menendez-Aponte, Esq. in the Miami office. He can be reached at T: 305.377.8900 or e-mail LMenendez-Aponte@**LS-Law**.com.

3rd DCA Holds Insurer Liable for Its Insured's Fraud on the Court

by Joshua Parks, Esq.

Joshua Parks

Oswaldo St. Blanchard struck two pedestrians while driving his motor vehicle. GEICO, Blanchard's insurer, provided defense counsel pursuant to his policy of insurance. Blanchard was deposed and testified that at the time of the accident that he a) had no physical impairments that would prevent him from being a safe driver and b) had no impairments that would have affected his vision at the time of the accident. Written discovery was completed shortly thereafter and revealed that, contrary to Blanchard's deposition testimony, he was legally blind and had been advised by his doctors to cease driving prior to his auto accident.

The Plaintiff filed a motion for sanctions based on Blanchard's testimony alleging a Fraud on the Court. GEICO sent Blanchard a Reservation of Rights ("ROR") letter stating that there may be no coverage under the policy. GEICO directed Blanchard to the "Fraud and Misrepresentation" provision of the policy as grounds for the ROR. Subsequent to the ROR letter, an Order was entered granting the Plaintiff's motion for monetary sanctions, an amount which included both attorney's fees and costs. Additionally, the Order held GEICO responsible for payment.

GEICO appealed the ruling on two grounds: 1) that the GEICO policy was void ab initio based on the fraudulent statements of Blanchard at deposition, and 2) that GEICO should not be held responsible for attorney's fees based on the misrepresentations of Blanchard.

Part I: Fraud and Misrepresentation

GEICO's "Fraud and Misrepresentation" provision reads, in its entirety, as follows:

Coverage is not provided to any person who knowingly conceals or misrepresents any material fact or circumstance relating to this insurance:

1. At the time application is made; or
2. At any time during the policy period; or
3. In connection with the presentation or settlement of a claim.

On appeal, GEICO argued that Blanchard's misrepresentations in his deposition constituted a misrepresentation of material fact in connection with the presentation or settlement of a claim as contemplated by the provision. GEICO also argued that based on the first four words of the provision ("coverage is not provided"), Blanchard's misrepresentations allowed GEICO to void the policy ab initio.

GEICO suggested that the court treat Blanchard's misrepresentation in the deposition similar to a misrepresentation on an application for insurance.

The Court disagreed with these arguments and held that the misrepresentation must relate to the insurance provided under the policy and that GEICO had not detrimentally relied on any misrepresentation by Blanchard. "We hold that Blanchard's misrepresentations during his deposition – even though they were characterized by the trial court as "fraud on the court" – are not the type of misrepresentations contemplated by the "Fraud and Misrepresentation" provision in the GEICO policy. That provision plainly contemplates the ability of GEICO to void coverage in the event an insured makes a material misrepresentation to GEICO in order to obtain coverage." 2014 WL 4435956, p. 14.

Part II: GEICO Deemed Responsible for Paying Sanctions

Having held that the trial court correctly determined that GEICO'S ROR letter was ineffectual and improvidently issued, the Court addressed the sanctions argument by analyzing the following portion of the GEICO policy:

ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE LIABILITY COVERAGES ….

2. All court costs charged to an insured in a covered law suit.

The Court held that:

a) the matter was a "covered law suit" under the policy,

b) precedent states that costs may be charged to an insurance carrier,

c) GEICO did not define "court costs" within its policy, and

d) insurance policies are to be liberally interpreted in favor of coverage.

Based on the foregoing, the Court deemed the attorney's fees sanction

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Recent Amendment to Florida Statute §627.409 – Shifting The Cost For An Insured's Misrepresentation by Jorge Padilla, Esq.


Jorge Padilla

Florida law has long recognized an insurer's right to unilaterally rescind an insurance policy based on a material misrepresentation by an insured on the insurance application. The material misrepresentation defense is a powerful, and some would argue, draconian tool available to an insurance company facing an otherwise covered claim since it allows the carrier to void a policy *ab initio* (that is, to treat as invalid from the outset) for a material misstatement in, or omission from, an application for insurance without regard to whether the misrepresentation or omission was intentional. *See* Casamassina v. U.S. Life Inc. Co. in the City of New York, 958 So. 2d 1093 (Fla. 4th DCA 2007); Gainsco v. ECS/ Choicepoint Servs., Inc., 853 So. 2d 491, 493 (Fla. 1st DCA 2003). Where the misrepresentation or omission affects the insurer's risk or the insurer in good faith would not have issued the policy under the same terms or premium, rescission of the policy is generally proper. Continental Assurance Co. v. Carroll, 485 So. 2d 406, 409 (Fla. 1986).

Accordingly, insurance carriers have for many years relied on their statutory right to rescind insurance policies as a defense to otherwise covered claims, a right codified in § 627.409, Florida Statutes, which until recently provided as follows:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.

(b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

(2) A breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefor does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

§ 627.409, Fla. Stat. (1992).

Until recently, an insurance company had the right to rely on an applicant's representations in an application for insurance and was under no duty to inquire further unless it had actual or constructive knowledge that such representations were incorrect or untrue. *See* North Miami General Hosp. v. Central Nat. Life Ins. Co., 419 So. 2d 800, 802 (Fla. 3d DCA 1982). This right is based on the doctrine of *uberrimae fidei*, which "'requires that an insured fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk.'" Transamerica Leasing, Inc. v. Institute of London Underwriters, 267 F. 3d 1303, 1308 (11th Cir. 2001).

Effective July 2, 2014, the Florida Legislature amended § 627.409, and, in doing so, curtailed an insurer's right to rescind certain types of insurance policies, namely, residential property insurance policies. Under the amended version of § 627.409, a claim filed by an insured pursuant to a residential property insurance policy cannot be denied based on credit information available in pubic records if the policy has been in effect for more than ninety days. *See* Fla. Stat. § 627.409 (2014).

Section 627.409, as recently amended, now imposes a duty upon insurance companies to investigate certain matters (i.e., matters concerning "credit information available in public records") within ninety days of the effective date of the policy. Furthermore, rescission for misrepresentations or omissions

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Recent Amendment to Florida Statute **§627.409 – Shifting The Cost For An Insured's Misrepresentation** by Jorge Padilla

concerning such matters must be done, if at all, within the statutorily prescribed ninety days. Failure to do so eliminates the carrier's statutory right to rescind the policy for a material misrepresentation concerning the matters covered by the amendment.

Applications for residential property insurance commonly contain the following questions for the prospective insured: 1) Has any prospective insured been subject to any lien in the past 60 months, and 2) Has any prospective insured been subject to any judgments in the past 60 months? However, the recent amendment does not define the phrase "credit information available in public records."

Consequently, one of the issues raised by the recent amendment is whether liens and judgments are "credit information." In this regard, it bears noting that, pursuant to Chapter 28 of the Florida Statutes, the Clerk of the Circuit Court records both liens and judgments in one general series of books called "Official Records." Moreover, in recent years the public outcry over what has been referred to as the insurance industry's practice of "post-loss underwriting" has become increasingly louder. Therefore, the recent amendment appears to represent a compromise between an insurer's time-honored right to rely on the representations of the insured in performing its risk assessments and the public's perception that some of the questions on insurance applications are designed to provide insurers with the ability to perform its risk assessment after a claim has been filed.

In sum, although § 627.409 continues to provide a viable defense for insurance carriers, underwriting departments should be mindful of the new duty to investigate and rescind within the statutorily prescribed period set forth in the recent amendment.

For further information or assistance with your matters, please contact Jorge Padilla in the Miami office. He can be reached at T: 305.377.8900 or e-mail JPadilla@**LS-Law**.com

3rd DCA Holds Insurer Liable for Its Insured's Fraud on the Court cont.

as an additional cost of litigation. The 3rd DCA opined that GEICO could have avoided this result had it clarified "in its liability policy that monetary sanctions resulting from an insured's intentional misrepresentations during discovery made without the knowledge or consent of GEICO are not considered a 'Court cost' under the 'additional payments' provision of the GEICO policy." Id at p. 20-21. The Court did point out that they did not reach the issue of whether GEICO is exposed to liability for judgments in excess of its policy limits.

See GEICO General Insurance Company v. Edelmida and Paulino Rodriguez, et al., for the opinion in its entirety. 2014 WL 4435956 (The Westlaw citation is currently available). For further information or assistance, please contact Joshua Parks, Esq. in the Orlando office. He can be reached at T: 407.540.9170 or e-mail JParks@**LS-Law.**com

About Jorge Padilla

Jorge Padilla, Esq. is a member of the BI Team in the Miami office. He practices in the areas of automobile liability, general liability, premises liability, negligent security, wrongful death and commercial litigation matters. Prior to joining Luks, Santaniello, Jorge was a Litigation Associate at a Miami firm, and also a business owner. He has a Bachelor of Arts degree from the University of Florida. He earned his Juris Doctorate from the University of Miami. Jorge is admitted in Florida (2008), and to the United States District Court, Southern District of Florida. He is also admitted to the United States Court of Appeals, Eleventh Circuit. He is bilingual and fluent in Spanish.

About Joshua Parks

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No More Employer Immunity? The 11th Circuit Finds Florida's Workers' Compensation Act Unconstitutional by John Meade, Esq.

John Meade

The exclusive remedy provision of Florida's Workers' Compensation Act (§440.11 Fla. Stat.) providing employers with immunity from civil liability for on-the-job- accidents was recently declared unconstitutional by a Miami-Dade Circuit Court Judge. This ruling now may allow injured workers in Florida to receive both workers' compensation benefits and damages in civil liability suits against their employers in Miami-Dade County. The Order is not binding outside the 11th Judicial Circuit.

In a twenty-one page declaratory Order, Circuit Court Judge Jorge E. Cueto of the 11th Circuit, Miami-Dade County, ruled on August 13, 2014 in Florida Workers' Advocates v. State of Florida, Case No, 11-13661-CA-25, that §440.11 Fla. Stat. of the Florida Workers' Compensation Act is facially unconstitutional as it no longer provides adequate benefits to injured workers.

The case involved injured worker, Elsa Padgett, a Miami-Dade County government employee, who was injured in 2012 when she tripped over boxes left on the floor by a co-worker. Padgett's case started as a tort action when she filed a civil complaint against her employer alleging negligence among other claims. The employer raised the affirmative defense of workers' compensation immunity under §440.11 Fla. Stat. 2003. The Complaint was amended to add a count for Declaratory Relief and requested the Court declare §440.11 Fla. Stat. 2003, the exclusive remedy provision, invalid as violating the Due Process Clause of the 14th Amendment of the United States Constitution as well as the Access to Courts provision of Article 1, §21 of the Florida Constitution.

The Florida Workers' Advocates (FWA) and Workers' Injury Law & Advocacy Group (WILAG) were allowed to intervene in the lawsuit. The employer withdrew its affirmative defense of workers' compensation immunity and was severed from the Amended Complaint. The Court held that Padgett, and similarly situated workers in Florida (represented by FWA and WILAG), had standing even though the issue as to the original plaintiff had become moot with the withdrawal of the employer's affirmative defense of immunity because the Court was obligated to rule on the constitutional issue as presented with the issue capable of repetition in the future but might evade review.

In his ruling, Judge Cueto held that §440.11 Fla. Stat. does not provide full medical care for injured workers or any indemnity for permanent partial loss of wage earning capacity for injured workers. In so doing makes the Act an inadequate exclusive replacement remedy in place of common law tort claims as required by the Due Process Clause of the 14th Amendment of the United States Constitution as well as the Access to Courts provision of Article 1, §21 of the Florida Constitution. Judge Cueto further opined that amendments made to §440.11 Fla. Stat. in 1968, and in particular those of 2003, decimated the benefits under the Act to such a degree that the system denied workers access to the civil courts as a reasonable alternative and therefore is no longer constitutional.

Judge Cueto's ruling focuses on the 1968 amendment and whether employees' rights were eliminated as to "opt out" of the workers' compensation system and that the Florida Legislature has not replaced that loss with an adequate remedy or provided a reasonable alternative in exchange for eliminating the right to "opt out." The Court found that the amendment of 1968 made the Act the exclusive legal remedy when an employee is injured in the workplace, provided full medical care benefits and some indemnity benefit for either permanent partial disability or permanent impairment to the body as a while.

Since 1968, the State Legislature has repealed numerous classes of benefits without replacing them with equivalent benefits. Comparing benefits available to an injured worker under the Act in 1968 and those currently available, the Court noted that a worker could get 350 weeks of temporary total disability benefits in 1968 and 5 years of temporary partial disability benefits for a total of 12 years versus the current 2 year maximum post-2003 amendments.

In 1968, permanent and total disability was a lifetime benefit where currently the employee receives permanent impairment benefits under the Florida guidelines but nothing else unless the employee is permanently and totally disabled (PTD).

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No More Employer Immunity? The 11th Circuit Finds Florida's Workers' Compensation Act Unconstitutional by John Meade, Esq.

The Court further held that even if the worker is PTD, the post-2003 Act cuts off benefits once the injured work turns 75 or receives the impairment benefits for five years, whichever is greater. Further, the 2003 amendments apportioned medical costs between the employer and the worker requiring injured workers to pay medical co-pays after they reach maximum medical improvement. If the injured worker is unable to pay his or her share of the cost, then no medical care is provided at all. The Court reasoned that if the Act provided full medical care and some compensation for total or partial disability, it would remain constitutional; however, as it stands presently, it is an inadequate as an exclusive remedy for all injured workers.

In its reasoning as to the unconstitutionality of the Act after the 2003 amendments, the Court's cited to the U.S. Supreme Court case of New York Central Railroad v. White, 243 U.S. 188 (1917) which affirmed the use of workers' compensation laws in place of tort remedies and noted that the benefits of the replacement remedy must be significant if the exclusive remedy is to pass muster under the 14th Amendment. Judge Cueto opined that "the benefits provided by the Act should have increased substantially to account for the change in value of the trade; i.e., the allegedly fast, sure and adequate payments in exchange for the tort remedy that was cumbersome, slow, costly and under which it had been legally difficult for injured workers to prevail." Judge Cueto held that without full medical care or any indemnity for permanent partial loss of wage earning capacity, §440.11 Fla. Stat. fails the significant benefits "test" under New York Central Railroad, *id.* The Order also noted Florida workers have a fundamental right to workers' compensation based on the holding in De Ayla v. Florida Farm Bureau Casualty Co., 543 So.2d 2014 (Fla. 1989) and Article 1, §2 of the Florida Constitution providing individuals "the right to be rewarded for industry." Further, the Court cited to Martines v. Scanlan, 582 So.2d 1167, (Fla. 1991) where the Florida Supreme Court held that some level of permanent partial disability benefit must be provided for the workers' compensation act to be constitutional. However, since the October 1, 2003 amendments eliminated the payment of compensation for a permanent loss of wage-earning capacity that is not total in nature and the "last vestige of compensation for partial loss of wage earning capacity" was repealed and no reasonable alternative put in its place by the Legislature, the Act is constitutionally infirm and invalid.

Judge Cueto held that as a matter of law, Chapter 440, as it exists with the October 1, 2003 amendments, is facially unconstitutional so as long as it contains §440.11 as an exclusive remedy because it is no longer an adequate exclusive replacement to common law tort as required by the 14th Amendment to the US Constitution or the Access to Courts provision of Article 1, §21 of the Florida Constitution. Further, the Court found that every injury is capable of producing a partial loss of wage earning capacity, so every injured worker must have the option of accepting workers' compensation benefits or choosing to sue in tort.

Whether it's a sign of things to come or an Order from a rogue Circuit Judge, additional litigation is all but certain, with injured workers likely bringing negligence lawsuits against their employers in Miami-Dade County.

Recently, Florida's Attorney General, Pam Bondi, filed a Motion for Rehearing which was denied. Attorney General Bondi has now filed a Notice of Appeal to the Third District Court of Appeals. For further information or assistance with your matters please contact John Meade in the Fort Myers office. He can be reached at T: 239.561.2828 or e-mail JMeade**@LS-Law**.com

About John Meade

John Meade, Esq. is a member of the BI Team in the Fort Myers office. He concentrates his practice in the areas of general liability, personal injury, negligence, wrongful death, automobile liability, premises liability, property damage litigation and workers' compensation. Prior to joining the firm, John worked for various private practices in southwest Florida in civil litigation and workers' compensation. Prior to law school, John was a paralegal for 10 years and an auto claims adjuster with several major insurance carriers. He earned his Bachelor of Arts degree from Dickinson College and obtained his Juris Doctorate from Suffolk University in Boston, MA. He is admitted in Florida (2004).

Workers' Compensation Misrepresentation Defense—Use of Surveillance by Rey Alvarez, Junior Partner.

Rey Alvarez

The Florida Workers' Compensation laws guarantee that injured workers are provided with the proper medical care for their injuries. Additionally, the statute ensures that injured workers get paid for any time they miss from work due to the work injuries.

Unfortunately, the ability to stay home from work and get paid has led to some injured workers being less than truthful about their injuries. Defense counsel, claimant attorneys and even the Courts use the term "fraud defense", however, that term is not in the Workers' Compensation statute. The appropriate term is "misrepresentation defense".

I have had the opportunity to be involved in a few cases in which we have successfully used the misrepresentation defense. A successful misrepresentation defense program can lead to hundreds of thousands of dollars in savings to the employer/carrier. It may also lead to the arrest of the claimant. It sends a message to claimants and to claimant attorneys as well. More cases should be investigated for misrepresentation. I would go as far as saying that every case should have some sort of misrepresentation investigation.

The term fraud should not be used in pleadings or in litigation. The controlling portions of the statute for a misrepresentation defense are sections 440.015 and 440.09. In order to be successful in a misrepresentation defense, you need to prove that the claimant was in violation of section 440.015 and 440.09.

440.105(b)(9) indicates that it shall be "unlawful for any person to knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits".

440.09(4)(a) indicates that "employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation …determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105"….this section goes on to indicate that "the term "intentional" shall include, but is not limited to, pleas of guilty or nolo contendere in criminal matters".

Throughout the years, the First DCA has issued many opinions that have helped clarify and mold what is and what is not misrepresentation. In order to have a successful misrepresentation defense, the Employer/Carrier needs to show:

1. That the claimant made a *verbal* or *written* statement;
2. That he knows is false, fraudulent, incomplete, or misleading;
3. Additionally, the verbal or written statement must be made with the intent of securing or supporting his/her workers' compensation benefits.

In Village of North Palm Beach v. McKale, 911 So2d 1282, (Fla 1DCA 2005), the 1DCA held that the JCC is only required to determine whether Claimant knowingly or intentionally made any false, fraudulent, incomplete, or misleading statement, whether oral or written, for the purpose of obtaining workers' compensation benefits, or in support of his claim for benefits. It is not necessary that a false, fraudulent, or misleading statement be material to the claim; it only must be made for the purpose of obtaining benefits.

Before performing any sort of surveillance, you need to know exactly what you are looking for. Sometimes, doctors will give very general restrictions, i.e. light duty or stand as tolerated. A misunderstanding or any vagueness as to what restrictions the doctor has placed on the claimant can be very detrimental to a misrepresentation defense. As a result, it is very important that there be very specific restrictions that the claimant can not wiggle out of later on. Clarify any restrictions that need to be clarified before getting surveillance. A conference with the treating doctor can be very useful. A restriction of light duty is obviously not very specific. However a restriction of 2 hours standing is also not very specific. Is it 2 hours of standing a day or is it 2 hours of standing at a time? Multiple days of surveillance are needed showing that the claimant consistently is able to do things he has claimed he is not able to do.

Communication with the surveillance company is also very important.

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Workers' Compensation Misrepresentation Defense— Use of Surveillance by Rey Alvarez, Junior Partner

They need to know what they need to look for. Too many times a surveillance company is just filming a claimant's "activities". That type of surveillance is useless and expensive. Surveillance companies need to focus on specific behaviors or actions that address the claimant's abilities. For example, if the injury is to the back, you want to see video of the injured worker that concentrates on activities that affect the back. i.e. entering and exiting a vehicle, you want to see him getting up from a bend, you want to him see walk, etc… whereas that video would be less useful if the injury is the right upper extremity.

Good surveillance by itself is not enough. It is important to remember that surveillance has value only to the extent that it contradicts or disproves an oral or written statement made by a Claimant. Dieujuste v. J. Dodd Plumbing, Inc., 3 So.3d 1275 (Fla. 1DCA., 2009).

Often times, a surveillance company will only send you snippets of the video taken. You want to view all of the unedited surveillance. You need to breakdown the video to the last detail. If the injury is a left arm condition, count the number of times the claimant uses his left arm versus the right arm, count the number of times the claimant reaches for things with either arm, does the claimant hesitate using the injured arm?

Additionally, do not look at the video from a defense point of view. Try to view it from the claimant's perspective, have another person view the video to see if they see what you see.

Once you fee feel that you have enough surveillance, it is time to take the claimant's deposition and talk to the doctors. Again, the claimant's doctors cannot see or know about any video surveillance until opposing counsel is given a copy of the surveillance.

A misrepresentation defense deposition of a claimant differs from a regular deposition of claimant. The goal is to obtain a verbal or written misstatement from the claimant. You are not there to trick the claimant. You are taking the deposition to give the claimant every opportunity to tell the truth. The questions asked cannot be vague or nonspecific. The answers also cannot be vague and nonspecific. "I am in pain", or "I can lift some" are too vague, you need to drill down until you get more specific responses:

Q: "What is the heaviest thing you can weigh?"
A: "I don't know."
Q: "Can you lift a gallon of milk?"
A: "No, not really."
Q: "Do you do the household chores like cleaning?"
A: "I try."
Q: "Can you lift bucket of water to mop your floor?"
A: "Oh no."
Q: "Have you been able to lift a gallon of milk?"
A: "Yes, but it is difficult."
Q: "How many times a day can you lift a gallon of milk?"
A: "At most, once a day".
Q: "So for clarification, the heaviest thing you can carry is a gallon of milk and you can do that once a day?"
A: "Yes."

Additionally, technical jargon such as, MMI, Temporary benefits, medical terms should not be used as the claimant may eventually state that he did not understand the questions.

The deposition of the treating doctors may also be needed to support the misrepresentation defense. You are trying to get that based on the video, the claimant exaggerated his subjective complaints. The ultimate goal of a treating doctor's deposition in a misrepresentation defense is that had he known what the claimant was capable of doing, he would have had a different medical opinion as to the claimant's abilities.

Not every case in which good surveillance is obtained will lead to a successful misrepresentation defense, but if used properly, it should at least lead to a less expensive settlement. For further information or assistance with your Workers' Compensation matters, please contact Rey Alvarez in the Miami office. He can be reached at T: 305.377.8900 or e-mail RAlvarez**@LS-Law**.com

About Luis Menendez-Aponte

Luis Menendez- Aponte, Esq. is a member of the BI Team in the Miami office. Luis practices in general liability, automobile liability and premises liability matters. He has been practicing since 2004 in both civil and criminal matters and has handled over 40 jury trials to verdict. Prior to joining the firm, he was a senior associate at a Miami firm where he handled personal injury defense, fraud/SIU claims, homeowners' insurance claims and examinations under oath for multiple major insurance carriers. While there he litigated fraudulent insurance claims ranging from staged accidents to medical billing fraud. He was also staff counsel for a major insurance carrier in the Law and Regulation department where he handled personal injury, property damage, and PIP claims, and assisted the SIU with investigating insurance claims by conducting thorough EUOs.

Early on in his legal career, Luis was an assistant state attorney at the Miami -Dade State Attorney's office. He also served as Division Chief responsible for the prosecution of homicide cases and the supervision of felony division attorneys.

Luis is an approved instructor for adjuster continuing education by the Florida Department of Financial Services. He has spoken on investigating staged accidents, independent medical examinations, fraud, and SIU tips and tactics. He obtained his Bachelor of Arts degree from Florida International University and earned his Juris Doctorate from Florida State University. Luis is admitted in Florida (2004) and to the Southern, Middle and Northern Districts of Florida. He is bilingual and fluent in Spanish.

About Rey Alvarez

Rey (Reinaldo) Alvarez is the Managing Attorney for the Workers' Compensation and Medicare Compliance Division of Luks, Santaniello. He also serves as the WC Committee Chair for the Florida Defense Lawyers Association (FDLA). Martindale-Hubbell and his peers have rated him AV® Preeminent™. Rey has substantial WC experience defending employers, insurance carriers, tpa's, government entities and self-insureds throughout Florida. He also has more than a decade of experience in preparing Medicare Cost Projections, Medicare Set-Asides and Conditional Lien negotiations with CMS. Rey handles all firm wide conditional lien negotiations. Prior to working at Luks, Santaniello, Rey managed a Medicare Reporting and Set-Aside Department with his last firm.

Rey authored and published a book on the new Medicare Reporting and MSA requirements. More recently, he co-authored with Dan Santaniello, a Medicare White Paper that was presented at the 15th Annual Florida Liability Claims Conference and was published in the FDLA issue of 'Trial Advocate Quarterly' (Volume 30, Number 4, Fall 2011). Rey also wrote an article on "Reducing the Cost of Funding a Medicare Set-Aside" that was published in the Florida Bar Workers' Compensation Section 'News & 440 Report' (Summer 2011). A.M. Best released an Insurance Law Podcast (2012) featuring Dan Santaniello and Rey Alvarez discussing Medicare Compliance issues.

Rey spoke in January 2014 at the NAMSAP Regional Conference on WC MSA trends and impact, reporting and conditional liens. He was a featured speaker at a Medicare Lien boot camp sponsored by the National Business Institute in November 2013. Rey was a speaker at the American Academy of Disability Evaluating Physicians on WC Impairment Ratings and Impairment Benefits. He also spoke in an AM Best Insurance Law pod cast on the SMART Act. He writes a blog on current Workers' Compensation case law and important decisions.

Rey earned his Bachelor of Arts Degree from Barry University (1998) and obtained his Juris Doctorate from the University of Miami (2003). Rey is admitted in Florida (2003).

Verdicts and Summary Judgments cont.

Negligent Security – Final Summary Judgment

Tampa Associate Joseph Kopacz obtained a final summary judgment in a negligent security matter styled James Pantages v. Sub Station I, Michael Hallal, and Deborah Hallal before Judge Patricia Thomas (Citrus County) on September 5, 2014. Plaintiff claimed defendants were negligent in allowing a homeless Vietnam Veteran on the premises who eventually stabbed plaintiff after a physical altercation. The homeless man was allowed to stay in a tent in the woods behind the insureds' restaurant. Plaintiff was employed as a cook at defendants' restaurant. The homeless man also worked part-time at the restaurant and was friends with plaintiff. An altercation took place in the kitchen when plaintiff attempted to remove the homeless man from the premises, in turn, the homeless man stabbed plaintiff in the stomach. Plaintiff was air-lifted to Tampa General with a laceration to his abdomen requiring 30-40 staples. The Court found defendants did not breach any duty owed to Plaintiff which was a legal cause of the injury.

Slip and Fall – Final Summary Judgment

Tampa Associate Joseph Kopacz obtained a final summary judgment in a slip and fall matter styled Shane Newcome v. Pilot Travel Centers before the Honorable Linda Babb on September 19, 2014. Plaintiff claimed he slipped on diesel fuel in one of the diesel fuel islands after there was evidence plaintiff actually placed sand over the diesel fuel spill causing fall. Plaintiff alleged Defendant negligently maintained the area around the diesel fuel islands by allowing a wet and slippery hazardous condition to exist on its premises, and that Defendant knew or should have known of the existence of this slippery condition, which caused Plaintiff, to slip and fall. Plaintiff alleged serious injuries to his left shoulder and neck as a result of the fall. The Motion for Summary Judgment successfully established Defendant was not on actual or constructive notice of the alleged spill. Judge Babb applied the new Florida Statutes §768.0755 and found Plaintiff failed to establish the required element of constructive knowledge against Defendant.

UM—Florida Supreme Court Opinion

The Florida Supreme court reviewed the matter styled Travelers Commercial Insurance Company vs. Crystal Marie Harrington, In a unanimous decision (with Justice Lewis concurring in the result only), the Florida Supreme Court quashed a decision of the First District Court of Appeal which had ruled for the Plaintiff by affirming a summary judgment in favor of the insured in a UM claim. The Florida Supreme Court held that a UM carrier can exclude a family vehicle from the definition of "uninsured vehicle", and that the rejection of stacked coverage by the applicant/named insured is binding on all other insureds.

Although the First District had ruled in favor of the insured, it recognized that the arguments we made for Travelers were valid and raised important issues, hence the First District certified the two questions in the case as questions of great public importance, and the Florida Supreme Court granted review.

At the Supreme Court, James P. Waczewski of Luks Santaniello was teamed with Justice Cantero and Maria Beguiristain of White & Case. The team obtained a full victory for Travelers on the two certified issues considered by the Court. Thus, the Court held that a Class I insured cannot, in a single car accident, recover under both the liability and UM portions of the same policy. Furthermore, the Court held that if the named insured elects non-stacked coverage, and thus pays a reduced premium, other insureds are bound by the named insured's decision as well.

The First District's ruling on these issues was quite disturbing, and many insurers, concerned with the effect of the opinion, kept a close eye on this case.

Verdicts and Summary Judgments cont.

Slip and Fall – Verdict

Tampa Managing Partner Anthony Petrillo and Associate Joseph Kopacz obtained a favorable jury verdict in a slip and fall matter styled Terry and Barbara Tallent v. Pilot Travel Centers on October 16, 2014. Plaintiffs demanded $3.5 million at mediation and eventually filed Proposals for Settlement in the amount of $2.0 million 45 days prior to the start of the trial. The jury found Plaintiff 35% comparative negligence and returned a net verdict of $44,525.

Plaintiffs contended Pilot Travel Center was negligent for failing to clean up a diesel fuel spill in a timely manner. The diesel fuel spill was caused by an unknown trucker minutes before Plaintiff pulled into the Pilot Travel Center parking lot. Plaintiff alleged defendant negligently failed to place "caution tape" around the spill despite its knowledge of the spill. The evidence disclosed Plaintiff was aware of the spill, that the incident occurred after Plaintiff had walked in the area several times, and that the barrels had been placed to barricade the area. The defendant maintained that it takes between 1/2 hour and an hour to effectively clean the area, notwithstanding it's use of oil absorbent, known in the trade as "Kitty Litter." The defendant contended that the sole cause of the incident was the negligence of Plaintiff, Mr. Tallent. Following the fall, Plaintiff was able to drive his 18 wheeler loaded with vehicles from Punta Gorda, Florida back to Laurel, Mississippi.

Two days after the incident, Plaintiff filed a workers' compensation (WC) claim and received treatment for the next 7 ½ years including 5 surgeries: 2 left shoulder surgeries; 2 SI joint surgeries, and a left knee surgery. Plaintiff employer's WC carrier asserted a $450,000 lien in the pending lawsuit. Plaintiff Mr. Tallent claimed he was totally disabled and was no longer able to work. Mr. Tallent claimed over $600,000 in past lost wages and $1.1 Million in loss of future earning capacity.

Plaintiff Mr. Tallent was earning $80,000 the year before the fall at Pilot, and claimed $120,000 in past medical expenses. Mr. Tallent was also claiming past and future pain and suffering based on a daily figure calculated in the past as well as into the future based on his life expectancy of 25 plus years.

The jury found the defendant 65% negligent, the plaintiff 35% comparatively negligent and rendered a gross award of $68,500 including $40,000 for past lost wages, $15,000 for past medical bills,$9,000 for past pain and suffering and $4,500 to Mrs. Tallent for loss of consortium. Defendant currently has a Motion for Post-Trial Set-off pending which should reduce the jury verdict down to zero.

Firm News

Luks, Santaniello to Host All Day Seminar: 5 Hour Law and Ethics Update

Luks, Santaniello is approved to offer the **new** 5 hour Law and Ethics Update seminar for 5-620 All Lines Adjusters. All Lines Adjusters are required to complete a 5 hour update course with their remaining hours completed in elective courses beginning with the continuing education periods ending 10/31/2014 or later.

We are planning on offering this seminar at a conference in February 2015 for approximately 200 attendees who register. If you are interested in attending, please email client relations at MDonnelly@LS-Law.com. More information about the conference will be forthcoming.

Magna Legal Services "Chopped" Mock Trial

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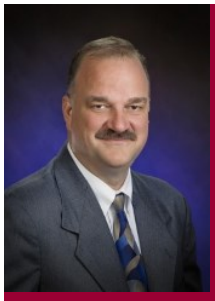
Magna Legal Services will host its second annual live Chopped Mock Trial competition to raise $5,000 for the Children's Hospital of Philadelphia (CHOP). Four trial attorneys will compete against each other in Magna's version of the television show "Chopped". Daniel Santaniello, Managing Partner of Luks, Santaniello, Petrillo & Jones is one of several panel judges that will judge the Opening, Cross of the Plaintiff, Cross of the Defendant and Closing Arguments. The judges will have an opportunity to CHOP one attorney and share their commentary with Counsel. The mock trial involves a fictitious wrongful death suit brought by Plaintiff Atherton Mustard, son of decedent Reginald Mustard ("the Colonel") seeking $150M in damages against the estate in order to block Defendant Russel from recovering under the will. According to the fiction story line, the 72 year old "Colonel" was killed by his 36 year old wife Cynthia Russel with a leaded candle stick in the library of the couples' summer home. Cynthia Russel was cleared of criminal charges after two mistrials. The event will be held in Atlantic City, New Jersey at the Golden Nugget November 12-13, 2014. For further information please visit, http://www.magnals.com/about/events.shtml

Firm News

Luks, Santaniello Welcomes Dale Paleschic, President of the FDLA



Dale J. Paleschic, Esq. has joined the firm in our Jacksonville office as a Junior Partner. He is joined by his paralegal Jennifer Pace. Dale brings to the team more than 22 years of trial litigation experience. He is also the President of the Florida Defense Lawyers Association (FDLA). Dale has been involved with the FDLA for several years, serving as an officer since 2012 and on the Board of Directors since 2009. Martindale-Hubbell and his peers have also rated him AV® Preeminent™. His practice is devoted largely to general liability, automobile liability, premises liability, products liability, personal injury, professional liability, medical malpractice, construction litigation and commercial litigation matters. He also handles complex civil litigation matters in the areas of first-party property, community associations and real estate disputes. Dale joins Todd Springer and Sam Maroon covering North East Florida matters.

Prior to joining the firm, Dale was an attorney with law firms in Boca Raton, Orlando and in Gainesville where he had his own law practice for many years. He earned a Bachelor of Business Administration with honors from Florida Atlantic University (1988) and a Juris Doctorate with honors from the University of Florida (1991). He is admitted in Florida (1991) and to the Southern(1998), Middle (2012) and Northern (2001) Districts of Florida, and the United States Court of Appeals, Eleventh Circuit (2003), and to the United States Supreme Court (2006). Dale is an avid member of the Defense Research Institute (DRI) and an approved instructor for Florida Adjuster Continuing Education. Contact Dale at T: 904.791.9191 or e-mail DPaleschic@**LS-Law**.com.

Luks, Santaniello Welcomes New Attorneys

In 2014, Luks, Santaniello doubled its Miami office capacity and opened the Fort Myers office. Each of the 8 offices have added new attorneys this year. New attorneys in Miami include Jorge Padilla (BI) and Luis Menendez-Aponte (BI), Patrick Graves (PIP), Daniel Feight (PIP) and Jillian Dion (PIP— image not shown). In Boca Raton, Joshua Vincent joined the PIP team. Fort Lauderdale added PIP Attorneys Melissa Bensel and Rachelle Adams (not shown). The Tampa office added PIP Attorney Jessica Santiago-Carrier (not shown), Orlando added PIP Attorney Marci Matonis and BI Attorneys Joshua Parks and Lisa Clary. Fort Myers added John Meade (BI), and Jacksonville added Dale Paleschic (BI).

Jorge Padilla

Luis Menendez-Aponte

Patrick Graves

Daniel Feight

John Meade

Marci Matonis

Lisa Clary

Melissa Bensel

Joshua Parks

Joshua Vincent

Firm News

OCTOBER IS NATIONAL BREAST CANCER AWARENESS MONTH

In a show of workplace unity, our staff put away their work attire and sported pink to bring attention to the cause and show their support for breast cancer awareness. Five of our eight offices are shown below, from left to right, Fort Lauderdale, Tampa, Orlando, Miami, Boca Raton. Paul Shalhoub, Esq. is sporting a pink tie.

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Our verdicts tell the story.

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