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LEGAL UPDATE

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Liability

The Downside of Selfies: How Facebook Can Jeopardize Your Damages Claim by Alison Wasserman, Junior Partner

Alison Wasserman

On February 4, 2010 Maria Nucci allegedly slipped and fell on a foreign substance on the floor of a Target store. She filed a lawsuit against Target and alleged the typical claims for damages: physical and emotional pain and suffering, lost earnings and ability to earn money, loss of ability to enjoy life and permanency of her injuries. Before Nucci's deposition took place on September 4, 2013, Target's counsel viewed her Facebook profile which included 1,285 photographs. During her deposition, Nucci objected to producing her Facebook photographs. Two days after her deposition, Target's counsel again viewed Nucci's Facebook profile but this time noted 1,249 photographs. Target moved to compel an inspection of Nucci's Facebook profile to which she objected, claiming that her Facebook profile was on a privacy setting wherein only her friends could view her profile and not the general public. Nucci claimed that she had a reasonable expectation of privacy regarding her Facebook information and that Target was conducting an "overbroad fishing expedition."

At the hearing on Target's motion, Target showed the Court surveillance footage depicting Nucci walking with either two purses on her shoulders or carrying two jugs of water. Target argued that since Nucci had put her physical condition at issue, the relevancy of the Facebook photographs outweighed Nucci's privacy rights, if any. The court denied the motion in part because Target's request was "vague, overly broad and unduly burdensome." Target then propounded narrowly tailored interrogatories and requests for production to Nucci, asking her to identify any social media sites in which she participated

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Attention 5-620 All Lines Adjusters

The Florida Liability Claims Conference will offer an **ADJUSTER TRACK** consisting of the **5-hour Law and Ethics Update seminar (Course ID 89653—Course Offering ID 1021675)** for 5-620 All Lines Adjusters that covers Regulatory Awareness, Insurance Law and Updates, Ethical Requirements and Disciplinary and Industry Trends. We are also seeking accreditation for 9 additional elective seminars on legal topics that will be open to conference attendees. The conference will be held June 4—5 , 2015 at Disney's Contemporary Resort in Lake Buena Vista. Luks, Santaniello has a limited number of complimentary registration vouchers available for our insurance clients. A commitment to attend will be required in order to receive the complimentary registration. Please contact Client Relations if you are interested in attending (E: MDonnelly@LS-Law.com or T: 954.762.7038).

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The Downside of Selfies, cont.

and produce copies or screenshots of all photographs on those sites for the two years prior to the loss to the date of the requests. Nucci again objected citing her right of privacy but this time the court compelled production. Nucci petitioned to the Fourth District Court of Appeals for a writ of certiorari to quash the order compelling production of her Facebook photographs.

In denying Nucci's petition, the Court considered four factors. First, the Court determined that Nucci's case did not meet the rigorous requirements for certiorari relief. Second, the Court reiterated that the scope of discovery in civil cases is broad and that trial court discovery rulings are reviewed for abuse of discretion. Third, the Court determined that the Facebook photographs sought by Target were highly relevant. Finally, the Court held that Nucci had a limited, if any, privacy interest in the photographs she posted on Facebook.

The Court noted that because trial courts are given such broad latitude in dealing with discovery matters, it is often difficult to establish certiorari jurisdiction of discovery matters. See Alvarez v. Cooper Tire & Rubber Co., 75 SO. 3d 789, 793 (Fla. 4th DCA 2011). Where a plaintiff seeks intangible damages, as in Nucci's case, the jury must examine the available evidence of the plaintiff's life pre- and post-injury to make a determination of the extent of the loss. In a well-penned explanation, the Court reasoned that perhaps a great novelist – be it Tolstoy, Dickens or Hemingway – could accurately explain the plaintiff's life before the injury. For the rest of us, however, a photograph is worth a thousand words. And for the Court, the photographs that Nucci chose to put on Facebook represented a powerful slide show of her life prior to her alleged injuries. The Court further noted that the relevancy was heightened because the surveillance footage obtained by Target suggested that her claims were questionable and that her own testimony may not be quite accurate. The Court additionally noted that the discovery requests were not overly broad because they were limited in time to the two years prior to the incident to the date of the requests.

Finally, the Court discussed Nucci's claimed right of privacy in her Facebook photographs. "'Before the right to privacy attaches, there must exist a legitimate expectation of privacy.'" Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985). Once the legitimate expectation is shown, the party seeking disclosure must show that disclosure is warranted by a compelling interest. In civil discovery disputes, courts must weigh the need for the discovery against the privacy interests. See Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987).

The Court looked to the words of a Palm Beach Circuit Court judge who explained and summarized the nature of social networking sites such as Facebook. The jurist quipped that social networking sites had become a "treasure trove" of information as participating litigants shared all types of information with their friends and even mere acquaintances. See Levine v. Culligan of Fla., Inc., 2013 WL 1100404, at *2-*3 (Fla. 15th Cir. Ct. Jan. 29, 2013). Users of social media sites posted musings on their love life, professional life, personal life, and shared photographs of their choosing. Id. The Fourth District Court of Appeal agreed that photographs posted to a social media site were neither privilege nor protected by any right of privacy, despite whatever privacy settings the user may have attempted to utilize. The Court distinguished the information shared online via a social networking site from the information shared by a litigant with her attorney or physician. In the latter scenarios, the disclosures are confined and the confidential nature of relationship is clear.

Alison Wasserman

The Fourth District Court of Appeal decision reminds us that by simply creating a Facebook account, the user, such as Maria Nucci, acknowledges that her information would be shared with other users. After all, why else would someone join a social networking site if not to share information with other users? The Nucci opinion provides yet another important tool to utilize in the defense of a personal injury claim: it enables a defendant to go on the offensive and procure sound and credible impeachment evidence that will assist in obtaining a more favorable settlement or verdict.

For further information or assistance with your BI matters, please contact Alison Wasserman, Junior Partner in the Fort Lauderdale office. She can be reached at T: 954.761.9900 or E: AWasserman**@LS-Law**.com.

E-Discovery Bytes by Dale Paleschic, Junior Partner

Dale Paleschic

Plaintiffs and defendants are beginning to understand that the advent of e-mail communications, electronic data storage and even social media sites can be mined for useful information. E-discovery issues first became prevalent in Federal litigation and those decisions are now filtering their way through to our state court system.

In 2012, Florida amended its Rules of Civil Procedure to account for the growing burden faced by litigants and introduced the concept of proportionality into the rules. Rule 1.280 (b) (3) specifically authorizes parties to "obtain discovery of electronically stored information in accordance with these rules." The Rule goes on in subsection (d) to limit the discovery by instituting the concept of "proportionality." The Rule allows for objections if a party can show that "the information sought or the format requested is not reasonably accessible because of undue burden or cost." However, the trial court can still order the discovery for good cause shown. It must however apply a proportionality test as found in subsection (d)(2) (i) and (ii) which requires the court to balance the burden or expense of the discovery against its "likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issue."

A party's obligation to secure electronically stored information (ESI) begins once they begin considering litigation or know of threatened litigation. A primary obligation for litigants and counsel is to place a "litigation hold" on essential ESI. "The *who* issue is straightforward: "The preservation obligation runs first to counsel**,** who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction." Point Blank Solutions, Inc. v. Toyobo Am., Inc., No. 09-61166 -CIV, 2011 WL 1456029, at *12 (S.D. Fla. Apr. 5, 2011) (citations omitted).

Accordingly, clients *and* counsel should discuss what type of ESI is available at the earliest possible time and take proactive steps to secure the information. What must be preserved is determined on a case by case basis, but could conceivably include e-mails and files located on servers, local computers, tablets, cell phones or even in a network "cloud." If the party is a corporate entity, the IT department should prepare a "data map" which shows all potential sources of ESI within their system.

While it is inevitable that some information might be lost, being able to show the court that a party litigant took affirmative steps to implement a hold can be the difference between having sanctions imposed or not. Counsel or the party litigant should draft specific instructions to likely data custodians advising them of the procedure to follow in securing data. Potential data custodians should look at ESI stored on servers, PC hard drives, handheld devices, DVDs, thumb drives, phones, tablets, home computers, private email sites, and social networking sites. And while e-discovery issues seem more likely to apply in instances of commercial or corporate litigation, the concepts are the same in personal injury cases and clients should be forewarned. See for e.g., Allied Concrete co. v. Lester, 736 S.E. 2d 699 (Va. 2013) (Plaintiff sanctioned $180,000 for deleting Facebook information on advice of counsel to "clean up" page); Painter v. Atwood, 2014 WL 1089694 (D. NV March 18, 2014) (Plaintiff's removal of Facebook posts after initiating litigation of sexual harassment suit warranted adverse inference instruction about posts despite Plaintiff being only 22 years old and not being advised of obligation by her counsel).

Of course, securing ESI is only one part of the ESI equation. How the information is secured and produced is another piece of the equation. In Progressive Casualty Ins. Co. v. Delaney, 2014 WL 3563467 (D. Nev. July 18, 2014), the district court examined how much latitude the parties will be given to deviate from the court's pre-trial order required under the Federal Rules of Civil Procedure. In this case, Progressive sought declaratory relief that it did not have to provide coverage for directors of failed banks under E & O policies issued to banks. The FDIC receiver (FDIC-R) was the opposing party. The parties met and submitted an agreed protocol which was approved by the court. *Id.* Initial ESI discovery searches resulted in Progressive finding 1.8 million electronic documents to be produced. The parties then agreed to apply search terms to the documents in a further effort to

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E-Discovery Bytes cont.

reduce the volume. *Id.* This resulted in a reduction to 565,000 documents. *Id.* Progressive wanted to manually review the documents for privilege and relevancy but determined it would be too time intensive and expensive. They then decided to hire another expert who suggested using "predictive coding" as it would be more efficient and less costly. This method reduced the number of documents to 55,765 but was done without the knowledge or approval of the FDIC-R or asking the court to amend the ESI protocol found in the pre-trial order. *Id.* at 2. The court then went through a lengthy analysis and discussion of predictive coding or technology assisted review. The Court noted,

> "The cases which have approved technology assisted review of ESI have required an unprecedented degree of transparency and cooperation among counsel in the review and production of ESI responsive to discovery requests. As the authors point out, typically, courts give deference to a producing party's choice of search methodology and procedures in complying with discovery requests. In the handful of cases that have approved technology assisted review of ESI, the courts have required the producing party to provide the requesting party with full disclosure about the technology used, the process, and the methodology, including the documents used to 'train' the computer."

Id. at 10. Because Progressive had failed to be cooperative and transparent, the Court ordered Progressive to produce all 565,000 documents from the agreed upon original protocol. The case illustrates that reducing e-discovery production costs requires planning, foresight, and cooperation between the parties and counsel.

Another piece of e-discovery is how broad will a Court interpret ESI and attribute that to a party. In an interesting case last year, ESI by someone other than a direct party to the suit, was held against a party. The Third District Court of Appeals in Gulliver Schools, Inc. v. Snay, 137 So. 3rd 1045 (Fla. 3rd DCA 2014) found that a daughter's comments on Facebook that implied her father had won a case against the defendant and been paid monies large enough for her to go to Europe for the summer, could be considered a breach of the confidentiality settlement agreed to between the parties at the mediation conference. *Id.* at 1046. The appellate court held that her father's deposition testimony that his conversation with his daughter that his lawsuit against the defendant was settled and he was happy with the results established a breach of confidentially provision of settlement agreement. *Id.* at 1047. The father was forced to forego his entire settlement. *Id*. ESI, even when not under our direct control, can have severe consequences and parties should be notified and reminded of this upfront and often during the course of litigation.

Another recent opinion shows the importance of having at least some corroborating evidence in order to obtain ESI, as courts are loathe to let parties simply go on a fishing expedition. Where personal information is involved, the trial courts' discretion to permit discovery "must be balanced against the individual's competing privacy interests to prevent an undue invasion of privacy." McEnany v. Ryan, 44 So.3d 245, 247 (Fla. 4th DCA 2010).

In Antico v. Sindt Trucking, *Inc*., 148 So.3d 163 (Fla. 1st DCA 2014), the First District Court of Appeal allowed a defendant to inspect the cell phone data of a deceased driver (the estate's personal representative was the Plaintiff in the matter) under a very controlled methodology to protect the deceased driver's privacy interests. In the case, the defendants had already obtained some information from the driver's cell phone records. However, they sought additional information once discovery revealed that the deceased driver might have been on her cell phone at the time of the accident including affidavits from two witnesses who saw her using the phone while driving just before the accident, the testimony of state troopers that came to the same conclusion and the cell phone records themselves. *Id.* at 166-67.

In allowing the inspection to take place, the court noted that her smartphone might make it possible to "look at the data and figure out conclusively what happened in the moments leading up to the accident, i.e. whether she stopped at the stop sign or not and whether she was texting, Facebooking, Tweeting, or nothing at the time of the accident." With this in mind, the Court allowed the examination despite the Plaintiff's privacy objections.

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E-Discovery Bytes cont.

As time goes on, the Courts will continue to balance the need for information, versus the costs and privacy concerns. Litigants would be advised to consult with counsel as soon as possible to make sure that they do not get "bytten!"

For further information or assistance with your BI matters, please contact Dale Paleschic, Junior Partner in the Jacksonville office. He can be reached at T: 904.791.9191 or E: DPaleschic@**LS-Law**.com.

About Dale Paleschic

Dale Paleschic, Junior Partner is the President of the Florida Defense Lawyers Association (FDLA) and has more than 22 years of trial litigation experience. He is a member of the BI team in Jacksonville. Dale has been involved with the FDLA for several years, serving as an officer since 2012 and on the Board of Directors since 2009. 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. Martindale-Hubbell and his peers have also rated him AV® Preeminent™.

Dale is a frequent author and lecturer on electronic discovery issues and is a certified e-discovery expert by the Association of Certified E-Discovery Specialists. Dale is an avid member of the Defense Research Institute (DRI) and an approved instructor for Florida Adjuster Continuing Education.

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).

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Family Vehicle Exclusion for UM —Cutting off the UM-bilical Cord by Alec Masson, Esq.

Alec Masson

In Travelers Commercial Ins. Co. v. Harrington, — So.3d — 2014 WL 5365846 (Fla. 2014), the Florida Supreme Court held that a family vehicle exclusion in an automobile insurance policy, which excludes a family vehicle from the definition of an uninsured motor vehicle, does not conflict with Section 627.727(3), Florida Statutes. This decision became final on January 7, 2015, after The Florida Supreme Court denied Harrington's Motion for Rehearing.

The appeal was handled jointly by Luks, Santaniello, Petrillo & Jones and White & Case. In Travelers, the Plaintiff, Harrington, was injured in a single-car accident, while riding as a passenger in a car owned by her father, but driven with permission by a non-family member, Williams. Harrington had the vehicle insured through Defendant, Travelers Commercial Insurance Company ("Travelers"), and Williams had his own insurance through Nationwide. Williams was covered under the liability provisions of Harrington's policy because the policy defined an "insured" as the named insured, the named insured's family, or any other person lawfully occupying the vehicle. Williams was lawfully occupying the vehicle. Nationwide paid Harrington the $50,000 limits of Williams' liability policy and Travelers also tendered its liability limit of $100,000. However, Harrington's damages still exceeded the combined liability payments, and she subsequently sought UM benefits from Travelers. Travelers denied the claim on the grounds that the vehicle was not an "uninsured motor vehicle" as defined in the policy. The policy's definition of "uninsured motor vehicle" included an "underinsured" vehicle. The policy also contained a "family vehicle exclusion" which Travelers argued excluded the vehicle in question from UM coverage.

After Travelers denied Harrington's claim for UM benefits, Harrington sued Travelers. Before trial, both parties moved for summary judgment. The trial court granted summary judgment in favor of Harrington, concluding that the policy provision excluding family vehicles from UM coverage was invalid because it conflicted with section 627.727(3)(b) and (c). Section 627.727 (3)(b) and (c) provide:

> (3) [T]he term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages.
>
> (c) Excludes liability coverage to a nonfamily member whose operation of an insured vehicle results in injuries to the named insured or to a relative of the named insured who is a member of the named insured's household.

On May 10, 2012, the First District Court of Appeals affirmed the trial court's entry of summary judgment in favor of Harrington. However, it also certified two questions to the Florida Supreme Court to be of great public importance. Travelers appealed to the Florida Supreme Court.

On October 23, 2014, the Florida Supreme Court reviewed the First District Court of Appeal's decision and framed the issue as follows:

> Whether the family vehicle exclusion for uninsured motorist benefits conflicts with section 627.727(3) (b) or (c), Florida Statutes, when the exclusion is applied to a class I insured who seeks such benefits in connection with a single-vehicle accident where the vehicle was being driven by a class II permissive user, and where the driver is underinsured and liability payments from the driver's insurance, when combined with liability payments under the class I insured's policy, do not fully cover the class I insured's [damages].

Ultimately, the Florida Supreme Court reversed the First District Court of Appeal's ruling, and held that family vehicle exclusion in an automobile insurance policy, which excludes a family vehicle from the definition of an uninsured motor vehicle, does not conflict with section 628.727(3) (b) or (c) Florida Statute.

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Family Vehicle Exclusion for UM — Cutting off the UM-bilical Cord cont.

Justice Polston noted that, under Florida law, insurers are required to provide UM coverage for all vehicles insured for liability purposes, unless the insured expressly rejects UM coverage. Thus, UM coverage only comes into play when the offending owner or operator either carried no liability insurance or was underinsured.

Section 627.727(3)(b) Florida Statute provides that underinsured vehicles shall be considered uninsured for purposes of UM coverage, but the statute also provides that the term uninsured motor vehicle is "subject to the terms and conditions of such coverage." Additionally, Justice Polston noted that an insurance "policy may contain other general conditions affecting coverage or exclusions on coverage as long as the limitations are unambiguous and consistent with the purposes of the UM statute." See Sommerville v. Allstate Ins. Co., 65 So. 3d 558, 562 (Fla. 2d DCA 2011).

Based on the facts in Travelers the terms and conditions of the policy expressly and unambiguously excluded the vehicle in question from the definition of an "uninsured motor vehicle." Thus, the court found that the family vehicle exclusion did not conflict with section 627.727(3)(b) because the statute clearly provides that the term "uninsured motor vehicle" is subject to the terms and conditions of the policy. As further support, the Court relied on its prior decision in Travelers Insurance Co. v. Warren, 678 So. 2d 324 (Fla. 1996). In Warren, it was held that section 627.727(3)(b) did not require stacking of both liability and UM benefits under the same policy and that section 627.727(3)(b) did not negate the effect of a policy's "your car" exclusion. Thus, based on Warren, Harrington could also not receive UM benefits under the Travelers policy as Travelers already paid out the liability limits.

The Court also held that the family vehicle exclusion did not conflict with section 627.727(3)(c). The Court explained that this subsection provides UM coverage for an insured vehicle when the insurer excludes liability coverage for a non family member, who while driving the insured vehicle, injures the named insured or the named insured's family. The family vehicle exclusion in the present case did not conflict with subsection (3)(c) because the liability policy did not exclude coverage for Williams, a non family member. Rather, the policy in question, consistent with the purposes of subsection (3)(c), covered any person who drove, with permission, any of the vehicles insured under the policy, and it also provided that an insured vehicle was considered uninsured for purposes of UM coverage if the liability policy excluded coverage for non family members whose operation of the vehicle caused injury to the named insured or the named insured's family.

For further information or assistance with your Appellate matters, please contact James Waczewski, Senior Partner or Alec Masson, Esq. in the Tallahassee office. Both may be reached at T: 850.385.9901 or E: JWaczewski@LS-Law.com or AMasson@LS-Law.com.

1. The family vehicle exclusion excluded coverage to autos: "owned by or furnished or available for the regular use of you or a "family member" unless it is a "your covered auto" to which Coverage A of the policy applies and bodily injury liability coverage is excluded for any person other than you or any "family member" for damages sustained in the accident by you or any "family member".
2. The second issue as framed was "whether UM Benefits were stackable under section 627.727(9), where such benefits were claimed by an insured policyholder, and where a non-stacking election was made by the purchaser of the policy, but where the insured claimant did not elect non-stacking." Travelers prevailed on this issue as well. The take away is that the Florida Supreme Court held that if the named insured or purchaser of the policy makes a non-stacking election, this waiver applies to all insured under the policy.

Patent Defect for One, Patent Defect for All: *Slavin* Doctrine Revisited

by Paul Shalhoub, Esq.

Paul Shalhoub

In a recent decision issued by the Fifth District Court of Appeals, the Court found that a defect deemed patent as it pertained to the general contractor, was also deemed patent as it pertained to the design engineer, despite plaintiffs' assertions that the defect should be viewed differently as to each defendant.

In Transportation Engineering, Inc. v. Cruz, No. 5D13-923, 2014 WL 5782251, (Fla. Dist. Ct. App. Nov. 7, 2014), the Court affirmed the trial court's entry of summary judgment in favor of the defendant general contractor and reversed the denial of a summary judgment for the design professional with direction for the trial court to enter summary judgment in favor of the design professional. The decedent in this case, Vanessa Cruz, was killed when the vehicle she was traveling in veered off the Florida Turnpike and struck the end of a guardrail in the emergency crossover located in the median area between the north and south bound lanes. The Department of Transportation ("DOT") hired Transportation Engineering, Inc. ("TEI") to design the subject guardrail and D.A.B. Constructors, Inc. ("DAB") to build the guardrail. DOT was the owner of the guardrail.

Annette Cruz, as personal representative for Vanessa, filed suit against the DOT, TEI, and DAB for negligence. *Id*. at 1. Specifically, Cruz alleged that TEI and DAB breached their duties of care to Vanessa by negligently designing and building the subject guardrail end, and failing to follow the national safety/ DOT standards for the construction of guardrail ends. *Id*. Cruz also alleged the DOT breached its duty of care to Vanessa by failing to warn of, or remedy, the concealed dangerous condition, which was caused by the improperly designed and constructed guardrail. *Id*. Furthermore, Cruz alleged that DOT failed to provide safeguards to prevent vehicles from becoming impaled in the event they hit the guardrail end. *Id*.

At the time the guardrail was constructed, the DOT had specific design standards for guardrails located in emergency crossovers. *Id*. Specifically, Design Standard Index 400 required the use of "crash cushions" as end treatments for guardrails located in areas such as emergency crossovers. *Id*. at 2. However, the DOT design standards also allowed for an alternative, and consequently much cheaper, design – "Type II" end anchorages for the guardrails. *Id*. In short, the Type II alternative employed a "departure angle design" as opposed to crash cushions and purportedly served the same purpose as the cushions. *Id*. The Type II design would assist in the prevention of cars from crossing over the median into oncoming traffic, but would not necessarily mitigate the effect on a vehicle that collided into it.

DAB constructed the guardrails pursuant to TEI's design, all of which was pursuant to the requests and direction of the DOT. The DOT knew of the Design Standard calling for the use of crash cushions, but requested TEI prepare a design using the Type II approach in order to save money. *Id*. at 3. Furthermore, the DOT accepted the work performed by TEI and DAB. According to Cruz's sole standard of care expert, the only breach of duty identified was DAB's failure to construct the guardrail end anchorages with crash cushions. *Id*.

DAB and TEI filed motions for summary judgment on the basis that the alleged defect in the designed and construction of the guardrails was patent, said design and construction was accepted by the DOT, and therefore the DOT was responsible for any injuries arising from the defects pursuant to the *Slavin* doctrine. *Id*. at 4. Essentially the *Slavin* doctrine provides that "a contractor cannot be held liable for the injuries sustained by third parties when the injuries occur after the contractor completed its work, the owner of the property accepted the contractor's work, and the defects causing the injury were patent." Plaza v. Fisher Dev., *Inc.* 971 So.2d 918, 924 (Fla. 3d DCA 2007). The *Slavin* doctrine also "extinguishes the liability of a contractor for a defect by shifting the duty of care originally owed to others by the contractor to the accepting owner as long as any defects are patent." Foreline Sec. Corporation. v. Scott, 871 So.2d 906, 909 (Fla. 5th DCA 2004). The Florida Supreme Court later expanded the applicability of the *Slavin* doctrine to architects and engineers in the decision it rendered in Easterday v. Masiello, 518 So.2d 260 (Fla. 1988).

The trial court granted DAB's motion for summary judgment based on the

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Patent Defect for One, Patent Defect for All: *Slavin* Doctrine Revisited cont.

Slavin doctrine since the guardrail was constructed without crash cushions, a condition which was unquestionably patent. However, the trail court denied TEI's motion for summary judgment without stating a clear basis for treating TEI differently than DAB. *Cruz* at 6. Judge Lawson stated in his opinion that the trial court may have denied TEI's motion for summary judgment based in part on the latency/patency issue surrounding TEI's design of the guardrail. *Id*. Cruz's counsel argued during the hearing on the motion for summary judgment that the issue before the court was not whether there were crash cushions (a patent condition), but whether or not the design was safe (a latent condition). *Id*.

Ultimately, the Court found that it was "undisputed at summary judgment that DOT accepted the project with bare (uncushioned) guardrail ends…and that this was an open and obvious condition. Therefore, even if TEI violated its standard of care by failing to follow Index 400 in its design…we agree that summary judgment should have been granted in TEI's favor based upon *Slavin* and *Easterday*." *Id*. at 9.

In sum, defendant design professionals have a stronger argument to support their *Slavin* doctrine defense if the alleged design defect yields a condition that is open and obvious after construction has been completed and accepted by the owner.

For further information or assistance with your construction defect matters, please contact Paul Shalhoub, Esq. or Chris Burrows, Junior Partner in the Boca Raton office. They can be reached at T: 561.893.9088 - E: PShalhoub@LS-Law.com or CBurrows@**LS-Law**.com. Chris Burrows is a Florida Bar Board Certified Construction Law Expert.

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Emergency Medical Condition – Scope of PIP Coverage When Medical Records Are Silent As To The Existence Of An Emergency Medical Condition by Melissa Bensel, Esq.

Melissa Bensel

In 2012, Florida's No Fault Law (Section 627.736, Florida Statute) was significantly revised with one intent to reduce fraud and PIP litigation. The statute does not however set forth the amount of PIP benefits available to an injured person when the records are silent as to the existence of an emergency medical condition. Given the infancy of this statute, there is currently no binding precedent on this issue. As stated by Broward County Court Judge Peter B. Skolnik this is "an unsettled (and intriguing) issue concerning the construction of F.S. s. 627.736(1)(a)(2012) that [has] spurred disagreement." Precision Diagnostics, Inc. (a/a/o Plumer, David) v. Progressive Express Ins. Co., 22 Fla. L. Weekly Supp. 393a (Brwd Cty, Jd. Skolnik, Sept. 11, 2014).

How have recent court decisions interpreted the emergency medical condition provision contained within section 627.736(1)(a)(3)-(4), Florida Statute. (2013)? A majority of the Florida county court decisions and at least two (2) federal court decisions have interpreted the statute to limit PIP benefits to $2,500 unless a physician, osteopathic physician, dentist, physician's assistant, or advanced registered nurse practitioner determines that the injured person has an emergency medical condition. See Glenaan Robbins v. Garrison Property & Casualty Insurance Co., Civil Action No. 13-81259-Civ-Scola (S.D. Fla. July 18, 2014); see also Sendy Enivert v. Progressive Select Insurance Co., Civil Action No. 14-CV-80279-Ryskamp/Hopkins (S.D. Fla. July 23, 2014).

In Precision Diagnostics, Inc. (a/a/o Allen, Jessica), the Court held that "only one reasonable and harmonious interpretation of the statute is possible: the statute is intended to limit medical benefits to $2,500, unless a qualified provider has determined that the claimant had an emergency medical condition." Precision Diagnostics, Inc. (a/a/o Allen, Jessica) v. USAA Ins. Co., 22 Fla. L. Weekly Supp. 389c (Brwd Cty Ct, Jd. Levy, Aug. 14, 2014). The Court further held that even if the statute was ambiguous, legislative intent controls. Id. For example, the House of Representatives Final Bill Analysis states:

> Medical benefits of up to $10,000 are available for emergency medical conditions diagnosed by specified providers; medical benefits of up to $2,500 are available for non-emergency conditions.

Id.; citing House of Representatives Final Bill Analysis, HB 119, 5/7/2012, at 9.

"Hundreds of cases are pending before the county courts, circuit courts, and even the federal courts regarding the proper interpretation of the recently enacted amendments to the Florida No -Fault Law, including specifically § 627.736(1)(a)(3)-(4), Fla. Stat. (2013)." Medical Center of the Palm Beaches d/b/a Central Palm Beach Physicians & Urgent Care, Inc. a/a/o Carmen Santiago v. USAA Casualty Insurance Company, 22 Fla. L. Weekly Supp. 279a (Palm Bch Cty Ct. Jd. Bosso-Pardo, August 20, 2014).

PIP insurers that are limiting benefits to $2,500 take the position that under section 1(a)(3) a specific determination that a patient has an "emergency medical condition" is necessary for the insured patient to be entitled to $10,000 in PIP benefits. In the absence of any such determination, the insured patient's PIP benefits are automatically limited to $2,500 under Section 627.736(1)(a)(4).

Medical providers and their counsels disagree. They argue that Section 1(a)(4) only authorizes a PIP insurer to limit PIP coverage to $2,500 if one of the qualified medical providers that rendered treatment to the insured patient affirmatively determines that the insured patient did not have an "emergency medical condition."

In the absence of a treating physician's determination that the insured patient did not have an emergency medical condition, the insured patient's PIP coverage remains at the $10,000 level of coverage mandated by Section 627.736(1).

In Medical Center of the Palm Beaches d/b/a Central Palm Beach Physicians & Urgent Care, Inc. a/a/o Carmen Santiago, the Court held that PIP benefits are limited to $2,500 unless a qualified provider determines that an emergency medical condition exists. Thereafter, the Court certified the following question to the Court of Appeal for the Fourth District as being of great public importance:

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Emergency Medical Condition cont.

IN AN ACTION BY AN ASSIGNEE FOR NO-FAULT INSURANCE BENEFITS UNDER A POLICY OF MOTOR VEHICLE INSURANCE, ARE BENEFITS ABOVE $2,500 ONLY AVAILABLE WHERE THERE HAS BEEN A CERTIFICATION BY A MEDICAL PROVIDER AUTHORIZED BY STATUTE THAT AN EMERGENCY MEDICAL CONDITION EXISTS, AS DEFINED IN THE FLORIDA NO-FAULT LAW?

Medical Center of the Palm Beaches d/b/a Central Palm Beach Physicians & Urgent Care, Inc. a/a/o Carmen Santiago, 22 Fla. L. Weekly Supp. 279a (Palm Bch Cty Ct. Jd. Bosso-Pardo, Aug. 20, 2014).

The Fourth District Court of Appeals recently accepted jurisdiction to answer this question. However, it is likely that this issue will be appealed to the Supreme Court of Florida.

As it now stands, as many as six (6) Florida trial courts and at least two (2) federal courts have ruled on the level of benefits available to a claimant in the absence of a definitive determination that an emergency medical condition does or does not exist. The majority of which found that the only reasonable interpretation of the statute, in light of the clear legislative intent to limit PIP claims as part of the revisions to Florida's No-Fault Law, is that the default level of benefits is $2,500.

We conclude that there is sufficient although non-binding case law to justify limiting PIP benefits to $2,500 in situations where a qualified provider has not determined that an emergency medical condition exists. This is the obvious intent of the statute and the case law is clearly settling in the insurer's favor. It is also likely that this dilemma will be addressed by future legislative changes, and the default level of benefits will be more clearly defined.

For further information or assistance with your PIP matters, please contact Melissa Bensel, Esq. in the Fort Lauderdale office. She can be reached at T: 954.761.9900 or e-mail MBensel@**LS-Law**.com.

About Melissa Bensel

Melissa Bensel, Esq. is a member of the PIP team in the Fort Lauderdale office. She also practices in the areas of general liability, insurance law and coverage and auto liability. Prior to obtaining a Juris Doctorate, Melissa worked as a Paralegal for 10 years in South Florida at various private practices. While attending law school, she was a research assistant regarding Securities Regulations. She also researched the need for underwriter role disclosure in IPO Registration Statements. Melissa earned a Bachelor of Business Administration from Florida Atlantic University and obtained a Juris Doctorate from Nova Southeastern University, magna cum laude. She is admitted in Florida (2014).

Verdicts and Summary Judgments

Final Declaratory Judgment— Motor Cycle Accident

Tallahassee Partner James Waczewski and Associate Alec Masson obtained a final declaratory judgment in favor of our client Ascendant in a coverage lawsuit styled Ascendant Commercial Insurance, Inc., v. Donald Hightower, Jr., Leonard Losey Brownless, Eugene Rice and Eugene Rice D/B/A A Taxi Now. The underlying claim involved a taxi driver, working for a taxi company insured by Ascendant, who collided with the Underlying Plaintiff who was riding a Motorcycle. The collision ultimately resulted in the amputation of the Underlying Plaintiff's leg. In the declaratory action, Ascendant sought an order declaring that it had no duty to defend or indemnify because the taxi driver was not a scheduled driver on the Policy at the time of the accident. Ascendant won its first MSJ on all issues before the court in May of 2014. However, at the hearing on that MSJ, the Court also allowed the remaining declaratory defendants to amend their affirmative defenses to assert an additional affirmative defense. Ascendant filed another MSJ on this last remaining argument and it again prevailed. The Court agreed to enter a final judgment in favor of Ascendant declaring that it owes no duty to defend or indemnify with respect to that claim.

Summary Judgment— Hit Riding Bike

Tallahassee Partner James Waczewski and Associate Alec Masson, Esq. obtained a Summary Judgment in premises liability matter styled David Sisam and Julie Sisam v. Sandestin Owners Association. The case involved a Doctor who sued Sandestin Owner's Association ("Sandestin") for an incident where he was hit by a Shipes Landscaping Truck ("hired by "Sandestin") while riding his bicycle. Prior to filing suit, he executed a general release which specifically released Shipes Landscaping and Old Dominion (Shipes' Insurer) along with "all other corporations", "Associations", etc. It was undisputed that Sandestin was both a corporation and association. Our MSJ argued that Mr. Sisam's claims were barred per the plain language of the release. Plaintiff's primarily alleged that the form of the release created a latent ambiguity and tried to introduce an affidavit of Mr. Sisam claiming he only intended to release the specifically named parties. Ultimately, we prevailed as the court found the release clear and unambiguous and thus there was no need to resort to extrinsic evidence of the parties' intent.

Motor Vehicle Accident – Fraud Upon The Court - Dismissal

Tampa Senior Associate Joseph Kopacz obtained a Motion to Dismiss Plaintiff's Complaint for Fraud Upon the Court and entry of judgment against Plaintiff in a motor vehicle accident matter styled Shawn Grey v. Palm Beach Transportation Company, LLC and Michael P. Ryan, on March 21, 2014. Defendant Ryan was operating a Palm Beach Transportation Company yellow cab and struck Plaintiff's vehicle. Plaintiff claimed the subject accident caused severe headaches and significant TMJ complaints, requiring multiple surgeries with past medical bills of **$90,000**. Plaintiff alleged in deposition no prior headaches or TMJ complaints. Defense uncovered approximately 20 prior complaints of both headaches and TMJ complaints months and years prior to the alleged accident.

Plaintiff claimed several medical providers simply confused him and his brother who was treated for TMJ complaints with some of the same doctors. Plaintiff had used these exact medical records to appeal a wrongful termination decision by his employer months prior to the subject accident. Additionally, Plaintiff and his brother did not share the same dentist as children. Plaintiff had annual complaints of TMJ problems dating back to when he was 15 years old up until months prior to the accident. After an extensive hearing, Judge Mark Shames had some very strong criticism to Plaintiff who attempted to perpetrate a fraud on the Court.

Plaintiff appealed the trial court's decision to the Second District Court of Appeal. After briefing, the Second District Court of Appeal held Oral Argument on December 2, 2014. The panel of Judges were Sleet, Crenshaw, and LaRose. The Second District Court of Appeal Per Curiam Affirmed on December 18, 2014. Plaintiff is appealing decision to the Florida Supreme Court.

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Verdicts and Summary Judgments cont.

Appellate—Judgment Affirmed

On November 26, 2014, the Fourth District Court affirmed the judgment in condominium association's favor in the case styled Brown v. Pipers Cay Condominium Association, Inc. Appellate Junior Partner Doreen Lasch handled the appeal and Dan Santaniello and Marc Greenberg represented the defendant in the trial court proceedings. Minor plaintiff and his mother were tenants residing in a condominium development. They sued the condominium association as a result of the child having been attacked and bitten by a pit pull belonging to another tenant living in one of the units in the development. The Association Prospectus prohibited Pitbulls from being on the premises at anytime. From the onset of the case we denied liability by maintaining that the Insured had no knowledge of the Pitbull, and therefore did not have a legal duty to remove it from the premises. Ultimately, the minor Plaintiff was injured within the common elements and sustained two 5 inch scars to his left leg and 1 scar on his left hand. The Plaintiff's Pre-Trial demand was **$525,000**. The jury found no negligence that was the legal cause of the Plaintiff's damages. The Court also granted a Directed Verdict as to the Consortium Plaintiff's claims. At the conclusion of a jury trial, Plaintiffs moved for a new trial and when their motion was denied, they appealed the verdict.

2015 Medical Claims Defense Network Spring Seminar

Junior Partners Kate Kmiec and Daniel Fox will speak on Proposals for Settlement at the Medical Claims Defense Network seminar on March 11, 2015. The seminar will be held at the Double Tree by Hilton Orlando at Sea World.

2015 CLM Annual Conference

Daniel Santaniello, Managing Partner along with fellow panelists Insurance Carriers and In-house Counsel will speak on "The Millennials in Action: Trial Strategies for a Challenging Generation." The conference will be held March 25—27, 2015 in Palm Dessert, California.

RIMS™ New Orleans | April 26-29 | 15

The Risk and Insurance Management Society will hold its annual conference April 26—29, 2015 in New Orleans. Be sure to stop by our booth 107 in the Exhibit Hall to learn more about our legal services and how we work with clients. Orlando Partner Paul Jones, Jacksonville Partner Todd Springer, Firm Administrator Sherri Bauer and Client Relations Maria Donnelly will be on hand to answer questions. This year's event includes more educational sessions, three keynote presentations, more networking opportunities and exciting events each day in the Exhibit Hall. RIMS '15 early bird rates expire February 20th. Register today at www.RIMS.org/RIMS15.

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Our verdicts tell the story.

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