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LEGAL UPDATE

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Liability

Policy Modifications and Cancellations of Uninsured Motorist Coverage: A Cautionary Tale by Oluwaseun (Olu) Aduloju, Esq.

Olu Aduloju

"Things aren't always how they appear to be", a common euphemism we are all familiar with. In the fast paced world we occupy, it is all too common to miss the small details that can make the difference between right and wrong; justifiable denial of a claim and being forced to pay; successful litigation and a negative judicial ruling. Take for example the modification of an insured's policy. It is common place for immediate family members to share one insurance policy. Spouses commonly share one insurance policy even with the prevalence of multi-car households. Many insurance companies offer incentives or discounts when covering multiple household members and vehicles. But a failure to focus on the details as to who can modify could lead to a negative ruling once a claim is made under the policy. Such was the circumstance in a recently decided Florida 5th District Court of Appeals case. In *Progressive American Insurance Company v. John Grossi and Judy Grossi*, 2015 WL 2458129 (5th DCA 2015), the court was required to perform a nuanced evaluation that appears obvious on its face, but is a situation best avoided all together if

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The Challenges of Daubert, Summary Judgment and Pricing in PIP by Jairo Lanao, Esq.

Jairo Lanao

Since Florida amended its evidentiary rule on expert testimony in June of 2013, to go from one standard of expert testimony to another, PIP Plaintiffs in addition to testing the sufficiency of the evidence on summary judgments, have begun to test the reliability and relevancy of the expert testimony. The Plaintiffs' PIP Bar continues to set trends and has established somewhat of a practice to have the County Courts closely examine the expert testimony as to its reliability and admissibility. The amendment to Florida 's Rules of Evidence went into effect on July 1, 2013, by amending § 90.702 and 90.704 to

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Verdicts and Summary Judgments

Defense Verdict: MVA — Miami-Dade County

South Florida Managing Partner Daniel Santaniello and Miami Junior Partner Luis Menendez-Aponte obtained a defense jury verdict after admitting liability on an automobile accident involving a 2 level cervical neck discectomy with fusion in the matter styled

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Policy Modifications and Cancellations of UM Coverage cont.

possible. John and Judy Grossi (husband and wife) had a policy for automobile insurance with Progressive American Insurance Company with coverage beginning in May 2008. Mr. Grossi met with a Progressive Insurance agent to insure his 2005 Dodge Durango. At this time, Mr. Grossi acquired said insurance to include Uninsured Motorist coverage (UM). Mr. Grossi was named as the sole insured with his wife, Ms. Grossi, (who was not present for the meeting where the coverage was purchased and did not sign the policy), listed only as a driver, spouse and household member on the policy. It is important to note at this juncture that despite her status on the policy, Ms. Grossi was allowed to modify the policy on multiple occasions.

In July 2008, Ms. Grossi altered the driving history of her husband (which reduced the premium). Then in July 2008, Ms. Grossi added roadside assistance to the policy (which increased the premium). Subsequently in September 2008, Ms. Grossi deleted a covered vehicle from the policy (which again reduced the premium). Each of these transactions took place over the telephone and Progressive was able to provide transcripts of each call. Then, most importantly to this evaluation, during a March 3, 2009 telephone conference with Ms. Grossi, she rejected the UM coverage on the policy. Ms. Grossi later signed the UM rejection form. Predictably, on June 24, 2011, the Grossis were involved in a rear end collision with an uninsured motorist and made a claim under the UM coverage. Once coverage was denied, a lawsuit ensued.

Based on the above facts, the error of the Progressive agents is unmistakable. Ms. Grossi did not have the authority to make changes to this policy. But in haste, it is likely that the agents saw the same last name, received the necessary verification information for the policy from Ms. Grossi, noticed that she appears on the policy in some capacity. Given these assurances, the agents overlooked the specific authority she had with regard to the policy. In addition, there is the common sense analysis; she is his wife. But wait; that could be an expensive oversight? Furthermore, it is a mistake that never would be realized except for when a claim is made under the policy. Realizing a potential loop hole, the Grossis attempted to invalidate the changes made by Ms. Grossi arguing that she did not have authority to make those amendments. It would not be surprising if a judge rejected this argument outright (specifically because the Grossis ratified the changes by continuing to pay on the policy without challenge or question even with the “invalid” modifications). However, in June 2014, the lower court granted summary judgment in favor of the Grossis. This is where we begin our evaluation.

How could the lower court grant summary judgment in favor of the Grossis in a situation where there was a clear factual dispute as to the apparent authority for Ms. Grossi to change the policy? The answer to that question may be found in how Florida courts express they will review coverage ambiguities. The courts have repeatedly affirmed, “When language in an insurance policy is ambiguous, a court will resolve the ambiguity in favor of the insured by adopting the reasonable interpretation of the policy's language that provides coverage as opposed to the reasonable interpretation that would limit coverage.” See *Travelers Indem. Co. v. PCR Inc.,* 889 So.2d 779 (Fla. 2004). This concept can be expanded to include modifications of coverage.

If there is ambiguity as to whether the modification was valid, inferences could be resolved in favor of the insured.
The Grossis argument was further supported by *Omar v. Allstate Ins. Co.,* 632 So.2d 214 (Fla. 5th DCA 1994), which puts the burden on the insurer to demonstrate that the insured gave informed and knowing rejection of UM coverage. Per Florida Statutes 627.727(9)(e) only three categories of individuals have authority to reject UM coverage: (1) a named insured, (2) an applicant or (3) a lessee. By placing the burden of proof on the insurer, the Grossis were able to convince the lower court that Progressive could not clearly illustrate Ms. Grossi fell under a category which would allow her to reject UM coverage. Therefore, the ambiguity was resolved in their favor and summary judgment was entered for insured.

However, all was not lost. Progressive predictably argued apparent authority. Apparent authority establishes that where an agency relationship exists, in a situation where a reasonable person would understand that an agent had authority to act, the principal is bound by the agent's actions, even if the agent had no actual authority to carry said action. In other words, the court will use a common sense analysis in considering the facts presented to determine if apparent authority exists. Relying on *Acquesta v. Industrial Fire & Casualty Co.,* 467 So.2d 284 (Fla. 1985), Progressive argued, “Florida law states that a rejection of UM coverage may be carried out by a party authorized to sign forms or reject coverage on the named insured’s

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Policy Modifications and Cancellations of UM Coverage cont.

behalf such as a spouse with apparent authority to do so." In *Acquesta*, the court held that a husband who used his wife as an agent to reject UM coverage resulted in the wife having actual authority to change the policy.

In attempting to establish Ms. Grossi had authority to cancel the UM coverage on the policy, Progressive also referenced *Mercury Ins. Co of Florida v. Sherwin,* 982 So.2d 1266 (Fla. 4th DCA 2008), where summary judgment in favor of insured was later reversed. In that case, it was initially determined that a husband who was an additional driver on the policy could not reject UM coverage for his wife who was the only named insured on the policy. The summary judgment was reversed, but a factual distinction exists between *Sherwin* and the Grossi policy; both Mr. and Ms. Sherwin signed the policy whereas only Mr. Grossi signed the policy in question. However, the court found that signing the policy was not the only determining factor when evaluating apparent authority to modify.

Progressive also relied upon, *Banyan Corp. v. Schuklat Realty Inc.,* 611 So.2d 1281 (Fla. 2d DCA 1992). This case provides that "Even if originally unauthorized, an agent's acts may be subsequently ratified, and such ratification relates back and supplies original authority." In other words, even if the court finds that Ms. Grossi was not authorized to modify the policy as an agent of her husband (which was not conceded by Progressive), the Grossis' subsequent actions of failing to correct the oversight on declarations pages following the changes, accepting the reduced premiums, and paying the lower rate for the coverage ratified the changes to the policy.

The trial court rejected the arguments provided by Progressive and found that only John Grossi, as the named insured, could reject U.M. coverage and that Judy Grossi lacked both actual and apparent authority to reject the coverage. However, the Florida 5th District Court of Appeals viewed the issue more sensibly and reversed the summary judgment stating "Ample evidence supports Progressive's contention that Judy Grossi acted as her husband's agent in modifying the coverage of the policy. At the very least, there are disputed issues of material fact." It is disturbing that the trial court was willing to ignore the evidence presented by Progressive of the apparent authority of Ms. Grossi to modify the policy. The trial court was also able to overlook the potential inequitable windfall the Grossis would receive by ruling in their favor. Such a ruling if allowed to stand could set a precedent where spouses team up to play a game against insurance companies where one signs up for the coverage, another modifies the policy, and in the event of an accident the original signer argues entitlement to coverage the couple has not paid for or agreed to. After all, if a spouse does not have apparent authority to act on behalf of another spouse, who does?

However, to avoid such controversy, insurers should confirm that they are always dealing with an insured who has authority to change that policy. When someone calls in on a policy to make changes, there needs to be a safeguard check in place that verifies said person has both apparent and actual authority to modify or change the policy. Similarly, a safety check is necessary at the point where documents are being signed finalizing modifications to a policy. The respective forms should be accepted only when an authorized signer's signature appears. If regulations requiring authorized insureds to make changes to the policy are not followed and safeguards to finalizing such changes are not monitored, the door is open to loopholes that could provide additional unwarranted coverage. For further information or assistance with your matters, please contact Olu Aduloju, Esq. in the Orlando office.

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Olu Aduloju, Esq. is a member of the firm's BI Division in the Orlando office. Olu concentrates his practice in the areas of general liability, personal injury, negligence, automobile liability and premises liability. He has also practiced in the area of medical malpractice defense and commercial litigation. Prior to joining the firm, Olu worked for an Insurance Defense firm in civil litigation, and also as Assistant State Attorney with the Ninth Judicial Circuit State Attorney's Office where he tried in excess of 80 cases. Olu earned his Bachelor of Science degree in Legal Studies from the University of Central Florida. He obtained his Juris Doctorate from Florida Agricultural and Mechanical University. Olu is admitted in Florida (2008) and to the U.S. District Court, Middle District of Florida (2013).

All Fla. Stat. § 766.118 Noneconomic Damage Award Caps Declared Unconstitutional by Jordan Greenberg, Esq.

Jordan Greenberg

On July 1, 2015, in *North Broward Hospital District v. Kalitan,* the Fourth District Court of Appeal ("Fourth DCA") addressed an issue of first impression—whether *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), similarly affects non-economic damage awards in personal injury medical malpractice cases. *N. Broward Hosp. Dist. v. Kalitan*, 4D11-4806, 2015 WL 3973075, at *10 (Fla. 4th DCA 2015). After analyzing the Supreme Court of Florida's decision in *McCall*, the Fourth DCA decided to expand *McCall's* holding by declaring that caps on noneconomic damage awards, imposed by section 766.118, Florida Statutes, in *personal injury* medical malpractice cases are unconstitutional as violative of the equal protection clause of the Florida Constitution. Art. I, § 2, Fla. Const. Notably, while expanding *McCall's* precepts to encompass both wrongful death *and* personal injury medical malpractice actions, the Fourth DCA also held that the *McCall* decision applies retroactively and not prospectively.

Kalitan arose out of a medical negligence action. During Plaintiff's 2007 outpatient surgery to treat carpal tunnel syndrome in her wrist, Plaintiff's esophagus was unknowingly perforated during intubation as part of the administration of anesthesia for surgery. After Plaintiff awoke from her wrist surgery she complained of excruciating chest and back pain. The anesthesiologist, unaware of the perforated esophagus, treated her chest pain and discharged her from the hospital later that afternoon. The following day, Plaintiff's neighbor found her unresponsive on the floor and rushed her to the emergency room where Plaintiff's perforated esophagus was diagnosed and repaired. Once awake from a drug-induced coma, Plaintiff continued to have additional surgeries and undergo intensive therapy. During trial, Plaintiff testified that as a result of the incident she now suffered from continuing pain in her upper body and serious mental disorders due to the loss of her independence since the accident.

After deliberation, the jury found for Plaintiff, awarding her $4,718,011 in total damages—including, noneconomic damage awards of $2 million for past pain-and-suffering and $2 million for future pain and suffering. Several post-trial motions were filed and subsequently rejected by the trial court, including Plaintiff's challenge that the caps on noneconomic damages in medical negligence actions were unconstitutional. The trial court issued a written final judgment as to damages limiting the $4 million noneconomic damage award by the jury to around $2 million pursuant to section 766.18, Florida Statutes—limiting noneconomic damages for negligence of practitioners and non-practitioners. The noneconomic damages award was also reduced by about $1.3 million since the Defendant-hospital's share of liability was capped at $100,000 due to its sovereign entity status under section 768.28, Florida Statutes.

On appeal, the Fourth DCA analyzed the constitutionality of the caps on noneconomic damages imposed by section 766.118, Florida Statutes, as it relates to personal injury medical malpractice cases, under the construct set forth by the Supreme Court of Florida in *McCall.*

After setting forth the factual and procedural history of *Kalitan*, the Fourth DCA proceeded to analyze and utilize the analytical framework of the plurality and concurring opinions of five justices of the Supreme Court of Florida in *McCall* to decide the subject appeal. In *McCall*, the question addressed by the plurality and concurring opinions was "whether the statutory cap on *wrongful death* noneconomic damages under section 766.118 violated the right to equal protection guaranteed by the Florida Constitution." *Kalitan*, 2015 WL 3973075, at *4 (emphasis added) (citing *McCall,* 134 So. 3d at 900). The Fourth DCA first analyzed the plurality opinion authored by Justice Lewis, who concluded that the noneconomic damages caps under the statutory scheme where irrational, and incongruently impact single versus multiple claimant/survivor actions. Id. at *4–6. (quoting *McCall,* 134 So. 3d at 901–02).

> [T]he caps "irrationally impact[] circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor." Under the statutory scheme, "the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for those losses."

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All Fla. Stat. § 766.118 Noneconomic Damage Award Caps Declared Unconstitutional cont.

Justice Lewis then proceeded to analyze the constitutionality of the statutory cap under a rational basis test. Id. at *5. Justice Lewis, while expressing doubt as to whether a medical malpractice crisis existed in Florida when the caps were instituted, held that no legitimate purpose *currently* exists that would support the constitutionality of such caps. Id. at *5–6. The concurring opinion, written by Justice Pariente, while disagreeing with Justice Lewis's review of the legislature's factual and policy findings while undertaking a constitutional rational basis analysis, nonetheless agreed "that the arbitrary reduction of survivors' noneconomic damages . . . based on the number of survivors lacks a rational relationship to the goal of reducing medical malpractice premiums." McCall, 134 So. 3d at 921–22 (Pariente, J. concurring). Accordingly, both the plurality and concurring opinions "held that the noneconomic damages caps encompassed in section 766.118, as applied to wrongful death actions, violate the Equal Protection Clause of the Florida Constitution." Kalitan, 2015 WL 3973075, at *6.

Next, the Fourth DCA applied the precepts of McCall to *personal injury* medical malpractice damage awards. The court first reemphasized that under article 1, section 2, of the Florida Constitution "'everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation.'" Id. at *6 (quoting McCall, 134 So. 3d at 901). As in McCall, the Fourth DCA applied a rational basis test to discern the constitutionality of the noneconomic damages caps as they apply to *personal injury* actions under section 766.118, Florida Statutes. The Fourth DCA acknowledged that the "Florida Legislature, in passing section 766.118, found that 'Florida [was] in the midst of a medical malpractice insurance crisis of unprecedented magnitude.'" Id. (quoting Ch.2003–416, § 1, Laws of Fla., at 4035). However, the court followed the agreed conclusion of the five majority Justices in McCall: "[T]hat the medical malpractice 'crisis' no longer exists and, consequently, there is no justification for "the arbitrary reduction of survivors' noneconomic damages in wrongful death cases based on the number of survivors . . . without any commensurate benefit to the survivors and without a rational relationship to the goal of reducing medical malpractice premiums." Id. (quoting McCall, 134 So. 3d at 921 (Pariente, J., concurring)).

While the Defendants, in Kalitan, sought to distinguish McCall by arguing that McCall only applied to *wrongful death* actions, the Fourth DCA refused to limit McCall in such a manner.

> So long as the caps discriminate between classes of medical malpractice victims, as they do in the personal injury context (where the claimants with little noneconomic damage can be awarded all of their damages, in contrast to those claimants whose noneconomic damages are deemed to exceed the level to which the caps apply), they are rendered unconstitutional by McCall, notwithstanding the Legislature's intentions.

Id. at *10. The Fourth DCA stated that while the plurality concurring opinions of McCall "addressed only the caps on noneconomic damages awarded to survivors in wrongful death actions, section 766.118 applies to *both* personal injury and wrongful death actions." Id. at *7. (emphasis added) (citing Fla. Stat. § 766.118(2)(a) (2011)). Moreover, since McCall struck at the underlying objective of the statute—by concluding that the medical malpractice crisis is of no current consequence—"then there is no longer a 'legitimate state objective' to which the caps could 'rational[ly] and reasonabl[y] relate.'" Id. (quoting McCall, 134 So. 3d at 901). Thus, the Fourth DCA concluded that

> the section 766.118 caps are unconstitutional not only in wrongful death actions, but also in personal injury suits as they violate equal protection. It makes no difference that the caps apply horizontally to multiple claimants in a wrongful death case (as in *McCall*) or vertically to a single claimant in a personal injury case who suffers noneconomic damages in excess of the caps (as is the case here). Whereas the caps on noneconomic damages in section 766.118 fully compensate those individuals with noneconomic damages in an amount that falls below the caps, injured parties with noneconomic damages in excess of the caps are not fully compensated.

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All Fla. Stat. § 766.118 Noneconomic Damage Award Caps Declared Unconstitutional cont.

Id. Consequently, the Fourth DCA reversed the trial court's decision insofar as it reduced the jury's award of noneconomic damages based on the caps in section 766.118, Florida Statutes. Id. at *7, *10. However, the court also made clear that its holding does not invalidate all damage award limitations and specifically acknowledged that an award "may still be limited by the doctrine of sovereign immunity. Id. at *10. The impact of the Fourth DCA's decision to expand the impact of the Supreme Court of Florida's analysis of section 766.118, Florida Statutes, in *McCall* is far reaching as it changes the landscape of available damages in all medical malpractice actions currently in litigation. For further information, please contact Jordan Greenberg, Esq. in the Boca Raton office or a member of our Medical Malpractice Defense team.

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The Challenges of Daubert, Summary Judgment and Pricing in PIP cont.

conform to the federal evidentiary standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In 1993, Federal courts began to apply the *Daubert* standard regarding the admissibility of the expert testimony as it gradually replaced the *Frye* standard for filtering expert testimony previously established in *Frye v. United States*, 293 F.2d 61 1013 (D.C. Cir 1923) and finally, articulated by the U.S. Supreme Court in a couple of seminal cases where Daubert's application and reach was better enunciated in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichae*l, 526 U.S. 137 (1999). These cases are considered to be the trilogy [of Daubert].

The Federal Rules of Evidence were later amended to adopt the *Daubert* standard in 2000. The Florida Legislature did the same by amending its old evidentiary Rule as to the testimony by experts, and amended § 90.702 and § 90.704 in an effort to afford greater discretion to sift out "junk expert opinion".

> Section 90.702, reads, "Testimony by experts. – If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion **or otherwise if**:
>
> (1) The testimony is based on sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The expert has reliably applied the principles and methods to the facts of the case."

The U.S. Supreme Court in *Daubert* held that under Rule 702, "general acceptance" is not a precondition to the admission of scientific evidence. This decision changed 70 years of *Frye*'s "general acceptance" inquiry for determining admissibility of scientific expert testimony. In its review of the trial court's application of Rule 702, the appellate court outlined four factors for the trial judge to weigh in assessing "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."

The four factors the Court considered in *Daubert* are 1) whether the theory or technique can (and has been) tested; 2) whether it has been subject to peer review or publication; 3) whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are standards controlling the technique's operation; and 4) whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

In South Florida, the Third District Court of Appeals confirmed the applicability of *Daubert* at least as to the "pure expert opinion" and resolved any doubts, in *Perez v. Bell South*, 3D11-0445 (3rd DCA, April 23, 2014) which involved a claim against plaintiff's former employer for injuries sustained during her first pregnancy. Specifically, the plaintiff claimed that stressful work conditions caused her to suffer a placental abruption and deliver her child 20 weeks early. To prove her claim, plaintiff offered the testimony of an obstetrician/gynecologist, who testified from his own personal experiences that "there may very well be a correlation between placental abruption and stress." The expert admitted that there was no credible scientific research to support this opinion. At the time, Florida had adopted the new rule of evidence, and the Third District stated that Florida changed "from a *Frye* jurisdiction to a *Daubert* jurisdiction," and that "[t]he legislative purpose of the new law is clear: to tighten the rules for admissibility of expert testimony in the courts of this state."

The Third District explained that the *Daubert* standard, as "reaffirmed and refined" by the *Joiner* and *Kumho Tire* cases, applies "to all expert testimony," not just medical expert testimony. As a result, while the "general acceptance" of a scientific theory in the community remains one of many factors a court should consider under the *Daubert* standard when determining admissibility, that factor, alone, "is no longer a sufficient basis for the admissibility of expert testimony." Further, the court explained that the Legislature also expressly intended to prohibit "pure opinion" testimony, such as the testimony involved in this case. Thus, while previously admissible under Florida's *Frye* standard, "[s]ubjective belief and unsupported speculation are henceforth inadmissible."

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The Challenges of Daubert, Summary Judgment and Pricing in PIP cont.

Because the methodology employed by the expert did not meet the relevance and reliability standards set forth in *Daubert* and its progeny, the appellate court affirmed the judgment in favor of the defendant.

Under Fla. R. Civ. P. 1.510(e), a court may consider evidence at a summary judgment hearing only if it would be "admissible in evidence." In summary judgments on pricing, County Courts have not found reliable affidavits of defense experts without a more "scientific" basis. They have rejected "pure opinion" testimony. In all practical sense, pricing is technical in nature - there is no scientific method to consider. Courts have expressed their preference to have the expert reference sources of data such as trade publications as in the case of *Millennium Radiology, LLC a/a/o Roberto Diaz vs. United Automobile Insurance Company,* 22 Fla. L. Weekly Supp. 1100a (March 27, 2015). Other times, the absence of the expert's own pricing in the affidavit has been one of the reasons to strike the affidavit. See, *MR services I, Inc. a/a/o Alex Zhukov v. United Automobile Insurance Company*, 22 Fla. L. Weekly Supp. 964a (February 2, 2015).

In *Roberto Rivera-Morales MD a/a/o Humberto Clavijo v. State Farm Mutual Insurance Company*, 22 Fla. L. Weekly Supp. 833b, (October 31, 2014), the court struck one of the defense expert's affidavit because the expert's mention of the source did not detail how his conclusions were formulated based on said source. The court also rejected the second expert's affidavit for not spelling out the factors considered under Fla. § 627.736(5)(a)(2013), the usual and customary charges, payments accepted by the [provider, reimbursement levels in the community, etc.

The burden is on the proponent of the expert's testimony to establish the proper foundation for admissibility by a preponderance of the evidence. *See United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1132a] (indicating with regard to expert testimony that "[t]he burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion, whether the proponent is the plaintiff or the defendant in a civil suit, or the government or the accused in a criminal case"); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999); *Pembroke Pines Physician Associates v. State Farm*, 21 Fla. L. Weekly Supp. 703a (Fla. Broward Cty. Ct. March 5, 2014) (stating that "[u] nder the new law, the proponent of the opinion must demonstrate *to the court* that the expert's opinion is 'based upon sufficient facts or data' " (citation omitted)); *State v. Stern*, 21 Fla. L. Weekly Supp. 193b (Fla. Broward Cty. Ct. Oct. 1, 2013) (stating that "[o]nce a party opposing the expert testimony objects, the proponent of the expert testimony bears the burden of establishing the testimony's admissibility. . . . The proponent of the expert testimony bears the burden of establishing all the foundational elements of admissibility by a preponderance of the evidence" (internal citations omitted).

Relevant evidence must tend "to prove or disprove a material fact." § 90.401, Fla. Stat. (2014). With regard to expert testimony, section 90.702 emphasizes the relevancy requirement by requiring that the expert's testimony "will assist the trier of fact in understanding the evidence or in determining a fact in issue." The question should be whether the expert in pricing will assist the trier of fact and whether the opinion is based on a reliable foundation, on sufficient facts and data, and is the product of reliable principles applied reliably to the facts at issue.

In some instances, defense experts will state that "reasonableness" is a matter of opinion. What is important is to show to the court the indicia of reliability and perhaps not only detail the method(s), but also the specific pricing of the Coding Procedural Terminology (CPT) codes highlighting the competency of the expert.

What is evident is that Courts in summary judgments seem to allow more leeway to the plaintiff provider affidavit to stand as competent evidence as the owner and developer of the business, i.e., as to his method of setting the pricing unless the defense counsel is able to provide record support for a serious, specified and substantial question as to the continued reliability of the science, theory or methodology", *State v. Miller*, 21 Fla. L. Weekly Supp. 775, 777 (15th Cir. Ct. 2014). Judges agree that chiropractors clearly are competent to testify as to their own pricing for services, as well as how they set those prices", *Id*. The court found a *Daubert* hearing unnecessary when such a hearing would not be fruitful for a case as a truly constructive use of the court's time and resources.

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The Challenges of Daubert, Summary Judgment and Pricing in PIP cont.

The affidavit of the defense expert should reflect the "knowledge, skill, experience, training or education" which is the basis of the opinion; see *Vega v. State Farm Mut. Auto,* 45 So. 3d 43, 44 (Fla. 5th DCA 2010). Other considerations on the qualification of an expert may include continuing education, certifications, professional affiliations, and fellowships. Id. There is no licensure or professional training mandate in order to qualify as an expert. Id. Knowledge obtained from an occupation or business may qualify someone to proffer expert opinions on a subject matter pending before the court. *Id.* Nonetheless, "[i]t is not enough that a witness is qualified in some general way; he [or she] must have special knowledge about the discrete subject upon which he is called to testify." *Id.*

When the expert's testimony is contested on this basis, the inquiry may require a full blown evidentiary hearing as to the actual expert opinion being proffered, the facts and data underlying the proffered opinion and the method used to select the underlying facts and data. Nevertheless, the witness' qualifications and competency are determined by the trial judge. See Fla. Stat. §90.105 (2013). A party must demonstrate their expert's competence on a subject matter pending before the court by a preponderance of the evidence.

Under *Frye* the Florida Judge's role was to assure that when an expert offered testimony based on new or novel scientific theories or techniques, the theory or technique utilized by the expert was generally accepted as reliable in the relevant scientific community. As such, the *Frye* standard only applied when an expert attempted to render an opinion based upon new or novel scientific techniques. In instances where the expert's opinion was not based upon a new or novel scientific technique, even the *Frye* standard was inapplicable.

The *Daubert* standard includes the *Frye* "general acceptance" standard but goes beyond that and requires a trial Judge to determine that the testimony (1) is based upon sufficient facts or data; (2) is the product of reliable principles and methods; and (3) has applied the principles and methods reliably to the facts of the case. *Daubert's* application is more encompassing and may lead to more success in challenging questionable expert testimony through motions *in limine* or *Daubert* motions. The *Daubert* standard relies on a "scientific knowledge" approach to determining whether expert testimony is not only relevant, but also *reliable*, and, therefore, admissible as evidence. *Daubert*, 509 U.S. at 590. The focus of the *Daubert* test is solely on the "principles and methodology" used by testifying experts, "not on the conclusions that they generate."

Some believe that *Daubert* more firmly establishes the court as "gatekeeper" to prevent unsupported opinion testimony from reaching the jury. As such, inherent to this process is the danger that the County Courts confuse *Daubert*'s admissibility standard and summary judgment's sufficiency standard. It is clear, the Courts have to maintain the jury's exclusive fact finding role while at the same time, Section 90.702 allows judges to exclude evidence in a pretrial *Daubert* hearing—either through a Motion for a *Daubert* challenge by the plaintiff or through a motion *in limine*, and may well result in precluding the jury's weighing of that evidence entirely affecting the outcome of any summary judgment hearing. Notwithstanding the possible bad outcome for the defense, it is a good tactical move for the plaintiff to raise the issue of expert reliability and the defense needs to be prepared as the opponent will have an opportunity to disqualify the expert and, at the very least, will have the opportunity to preview the adversary's case, enabling the plaintiff to prepare its own expert for trial. *See Johnson v. Vane Line Bunkering, Inc.*, 2003 WL 23162433 (E.D. Pa. 2003) (although court ultimately denied motion *in limine* and motion for summary judgment, it provided extensive review of the strengths and weaknesses of challenged expert).

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Jairo Lanao, Esq. is a Junior Partner and heads up the PIP team in the Fort Lauderdale office. Prior to joining the firm, Jairo was In-house counsel for 3 major insurance carriers where he represented the insurance companies from lawsuits arising from first-party and PIP coverage of policies from discovery to trial. He has an LL.B. from Los Andes University in Bogotá, Colombia as well as a J.D. (1995) and an LL.M. (1992) in Comparative Law from the University of Miami, School of Law. He was formerly employed as an assistant public defender at the Office of the Public Defender of Miami Dade County and as in-house counsel for the Inter American Press Association. Jairo is also an Adjunct Professor at the University of Miami, School of Law and currently teaches a seminar on Latin American Contracts in the Spanish language. He is admitted in Florida (1996) and a member of the Colombian Bar Association (1989). Jairo is bilingual.

The District Split on Malicious Prosecution in Florida by Edgardo Ferreyra, Esq.


Edgardo Ferreyra

In recent months, there has been a rise in the filing of Complaints by *pro se* plaintiffs, many of whom can be classified as "professional plaintiffs," with multiple cases filed before several court dockets and across varying venues. Many of these cases involve plaintiffs that have been arrested for shoplifting at retailers. After the pro se plaintiff is arrested for theft, the State Attorney's Office prosecutes the *pro se* plaintiff, but for one reason or another (the most cited reason being that witness subpoena are not properly sent), the case is *nolle prossed* prior to trial for failure of the witness(es) to appear. Increasingly, *pro se* plaintiffs are using the fact that the State entered a nolle prosse and the witnesses failure to appear as a basis for filing complaints against the store where the theft occurred for, among other causes of action, malicious prosecution. Although the litigation privilege would often serve as an absolute defense to malicious prosecution, a new case decided in the Fourth District of Appeal has cast doubts as to the use of the privilege as a defense and as a sword for summary judgment purposes.

Though the case of *Fischer v. Debrincat,* did not directly deal with *pro se* plaintiffs, its holding that the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution is directly on point to those dealing with claims for malicious prosecution being brought by "professional" pro se plaintiffs. 2015 WL 4269259, *5 (Fla. 4th DCA 2015).

In *Fisher*, the appellee commenced a lawsuit against various defendants for defamation, defamation per se, tortious interference, and conspiracy. The plaintiff moved to amend and was granted leave to add the appellant as a party, alleging the aforesaid causes of action. Thereafter, appellee dropped appellant/defendant as a party. In turn, the appellant filed a lawsuit for malicious prosecution against appellee/plaintiff for malicious prosecution, alleging that the lawsuit that had been filed against him was done so with malice and without probable cause. Naturally, the appellee raised the litigation privilege as an affirmative defense in the answer, and eventually moved for summary judgment. In the motion for summary judgment appellee argued that the litigation privilege afforded them immunity for their conduct in joining appellant in the initial lawsuit. The lower tribunal granted the motion for summary judgment in appellee's favor, and appellant appealed. *Id*. at 1.

The specific issue presented in *Fisher* is whether the litigation privilege bars a claim for malicious prosecution.

The Tort of Malicious Prosecution

In order to prevail in a cause of action for malicious prosecution, a plaintiff must allege and prove:

"(1) an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued;
(2) the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding;
(3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff;
(4) there was an absence of probable cause for the original proceeding;
(5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding." *Id*. at 1—2; *see also Alamo Rent—A—Car, Inc. v. Mancusi*, 632 So.2d 1352, 1355 (Fla. 1994).

The Litigation Privilege

Noting the tension and interplay between the tort of malicious prosecution and the litigation privilege, the *Fisher* court recognized that Florida's litigation privilege was founded in *Meyers v. Hodges*, 44 So. 357, 361 (1907), wherein the Florida Supreme Court held "that that defamatory statements made in the course of a judicial proceeding are absolutely privileged if they are relevant to the proceeding, but are protected only by a qualified privilege—which can be overcome by a showing of malice—if they are irrelevant to the proceeding." *Fisher*, 2015 WL 4269259 at 2.

Therefore, the litigation privilege generally "extends to the protection of the judge, parties, counsel, and witnesses, and arises immediately upon the doing of any act required or permitted by law *in the due course of the judicial proceedings or as necessarily preliminary thereto.*" *Id*. (quoting Ange v. State, 123 So. 916, 917 (1929)) (emphasis supplied).

The Florida Supreme Court further extended the litigation privilege holding that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a

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The District Split on Malicious Prosecution in Florida cont.

defamatory statement or other tortious behavior ... so long as the act has some relation to the proceeding." *Id*. (quoting *Levin, Middlebrooks, Mabie, Thomas, Mayes, Mitchell, P.A. v. United States Fire Ins. Co*., 639 So.2d 606, 608 (Fla. 1994)).

Ultimately, the Florida Supreme Court found that "[t]he litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin." *Id*. (quoting (*Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla. 2007)).

The Florida Third District Court of Appeal, relying upon the holding of *Levin*, held that the litigation privilege applied to causes of action for malicious prosecution, finding that act of filing a complaint and briefly prosecuting a case were protected by the litigation privilege because those actions "occurred during and were related to the judicial proceeding." *Wolfe v. Foreman,* 128 So.3d 67, 70—71 (Fla. 3d DCA).

The *Fischer* Case

On appeal, the appellant argued that the trial court improperly granted summary judgment on the basis of the litigation privilege. More specifically, appellant argued that as the tort of malicious prosecution was based upon "the unfounded prior civil proceeding itself" and not the acts taken in the course of that proceeding," the lower tribunal granting of the summary judgment was in error. Conversely, the appellee argued that the trial court properly entered summary judgment on the basis that when the appellant was joined as a defendant in the underlying lawsuit, appellee was protected by the litigation privilege because appellee was performing an "act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto." *Id*. at 1.

The *Fisher* Court expressly disagreed with the Third District Court of Appeal, finding that in *Wolfe,* the Third District "went too far in its application of the litigation privilege." *Id*. at 3. As the commencement of "an original criminal or civil judicial proceeding is an act 'occurring during the course of a judicial proceeding' and having 'some relation to the proceeding,' malicious prosecution could never be established if causing the commencement of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege." As such, the Fisher Court reasoned that if the litigation privilege applied to bar a cause of action for malicious prosecution, the tort of malicious prosecution would be effectively abolished in Florida. *Id*. at 3.

The *Fisher* Court did recognize that *Echevarria* contained broad language "stating that the litigation privilege applies 'in all causes of action, whether for common-law torts or statutory violations,'" but did not believe that language was intended to provide absolute immunity from liability for malicious prosecution. *Id*. at 4. Moreover, the Fisher Court reasoned that if the Supreme Court "meant for the litigation privilege to immunize conduct that would otherwise constitute malicious prosecution under the common law, one would have expected the court to say so explicitly." *Id*.

Lastly, the *Fisher* court held that the broad application of the litigation privilege would "mean that a malicious prosecution claim would rarely, if ever, be actionable," and moreover, it would be "difficult to envision how a malicious prosecution claim would ever be actionable where the original proceeding was a civil lawsuit." *Id*. As such, the Fisher Court found that the litigation privilege did not bar the filing of a claim for malicious prosecution. The Fourth District reversed the summary judgment, remand for further proceedings, and certified conflict with *Wolfe*.

Therefore, although the litigation privilege may still be used as a shield in the Third District to prevent the filing of a claim for malicious prosecution in the context of *pro se* plaintiffs filing retaliatory actions for retailers that prosecute theft charges and then fail to have witnesses show for trial, the privilege will not bar such actions in the Fourth District. Now that the Fourth District has certified conflict with the Third District, it might not be much longer that the litigation privilege will serve as a defense to the tort of malicious prosecution. With the influx of "professional" *pro se* plaintiffs, it will be interesting to see how the District split is resolved and affects the choice of venue for these *pro se* plaintiffs.

For further information or assistance with your matters, please contact Edgardo Ferreyra in the Miami office at T: 305.377.8900 or e-mail EFerreyra@insurancedefense.net.

Will Uber Change How Workers' Compensation Defines Employees by Rey Alvarez, Junior Partner

Rey Alvarez

There is nothing that you cannot get from your cell phone nowadays. With the tap of a few buttons on your cell phone, you can order, pay and tip for almost any possible service. Do you want a car service to pick you up? Easy, Uber, Lyft or another similar car service will pick you up within a few minutes and take you to your destination. Do you need a doctor to make a house call, get the Pager app. Do you want pizza delivered, get the Push for Pizza app. Need some tedious household chores or laborious yard work done, get the Task Rabbit app. Need some cheap moving help, get the Bellhops app. Delivery services, laundry services, cleaning services, the list goes on and on.

The interesting thing about these new businesses is that for the most part they have no employees. The people providing the services work whenever they want. There is no shortage of people willing to provide the services. The new pay for the service economy, also called sharing economy or Gig economy is changing the employment landscape.

The most famous and recognizable of these new sharing economy businesses is Uber. They serve as the poster child of this new way of doing business. Remember calling a taxi and having to wait for it to get there? Well, Uber is using the power of the internet to get there in a fraction of the time and for a fraction of the cost of a taxi. Uber insists that their drivers are independent contractors. As a result, they do not have to offer insurance, paid vacations, retirement, savings plans or other employee type benefits. Basically they have a much lower overhead than an employee based business. These savings get passed on to their customers. According to a recent New York Times article, Uber has long positioned itself as merely an app that connects drivers and passengers.

Uber customers are very passionate. Uber has become an indispensable commodity to the Millennial generation. However, the passion for Uber to continue as they are starts and stops with their customer base. For a myriad of reasons, Uber is threatening the way businesses are run. They are getting resistance from almost every side for their business practices. Just recently, Uber moved out of Broward County, Florida due to political pressures. Uber was almost run out of New York City. Uber and these Gig economy businesses will face an uphill battle to stay in business.

From a workers' compensation perspective, the issue is what happens when the Uber driver gets into an accident? Would this accident be accepted as compensable or will the Work Comp insurance Carrier deny the claim? Compensability and entitlement to workers' compensation benefits rests on whether a person is an employee or not, in other words, an independent contractor is not entitled to workers' compensation. In Florida, there does not appear to be any workers' compensation case right on point. However in California, a Court recently ruled that Uber drivers were employees and in New York, a Court ruled that they were independent contractors. Confusing? Well to add to the employee/independent contractor conundrum, a Florida resident who worked for Uber was recently awarded unemployment benefits, a benefit that is usually reserved for prior employees of a company.

As we move towards a sharing or Gig economy, more and more of these individuals will test the independent contractor checklist. As time goes on, the black and white definitions of an employee and independent contractor may become blurred and there may be litigation that will further obscur that line.

At this point, all we can do in Florida is turn to the statute to determine whether an individual is an employee or independent contractor. Florida Statute 440.02 defines an independent contractor and lays out a multi-step checklist to see if an individual is truly an independent contractor. In pertinent part, 440.02, reads "In order to meet the definition of independent contractor, at least four of the following criteria must be met:

(I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;

(II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;

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Will Uber Change How Workers' Compensation Defines Employees cont.

(IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;

(V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or

(VI)The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

b. If four of the criteria listed in subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.

(II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.

(III) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform.

(IV)The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.

(V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.

(VI) The independent contractor has continuing or recurring business liabilities or obligations.

(VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

c. Notwithstanding anything to the contrary in this subparagraph, an individual claiming to be an independent contractor has the burden of proving that he or she is an independent contractor for purposes of this chapter."

The common sense approach to these situations would tend towards Uber drivers being independent drivers. However, political pressures may have the pendulum swinging towards the Uber driver being employees. In the end, it appears that there will be a lot of litigation and appeals in deciding the employment status of these new gig economy businesses.

About Rey Alvarez

Rey is the Managing Attorney for the Workers' Compensation and Medicare Compliance Division. He also serves as WC Committee Chair for the Florida Defense Lawyers Association. Martinedale-Hubbell and his peers have rated him AV® Preeminent. He has more than a decade of experience in preparing Medical Cost Projections, Medicare Set-Asides and Conditional Payment Lien negotiations with CMS. Rey co-authored a White Paper on Medicare Reporting that was published in the Trial Advocate Quarterly (i.e., Volume 30, Number 4, Fall 2011). Rey also authored 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). He recently coauthored an article on "Understanding The Application of Florida's Workers' Compensation Immunities" that was published in Trial Advocate Quarterly (Spring 2015). Rey is a member of the Florida Defense Lawyer's Association (FDLA) and Claims & Litigation Management Alliance (CLM). He has a Bachelor of Arts degree from Barry University and earned his Juris Doctorate from the University of Miami. He is admitted in Florida (2003).

About Edgardo Ferreyra

Edgardo Ferreyra is a Senior Associate in the Miami office. Ed handles complex and high exposure matters in the area of products liability, medical products, general negligence, personal injury, automobile liability and premises liability, bad faith and insurance coverage. His practices also include commercial litigation, commercial contracts and agreements, auto finance and dealership agreements and actions for wrongful replevin at both the state and federal level. Prior to joining the firm, Ed worked for various Insurance Defense firms in civil litigation, and also as Assistant State Attorney with the Eleventh Judicial Circuit, where he tried and prosecuted criminal offenses. Ed earned his Bachelor of Arts degree from Florida International University. He obtained his Juris Doctorate from Nova Southeastern University (2003). He is admitted in Florida (2003) and to the Southern, Middle and Northern Districts of Florida, and to the United States Court of Appeals, Eleventh Circuit.

Verdicts and Summary Judgments

Defense Verdict: MVA cont.

Jonathan Pallone vs. Harvey Ruiz-Padilla and Orlando Villanueva on July 2, 2015. The Defendant admitted negligence but disputed causation and damages. The Plaintiff demanded **$527,828.62** at trial. The jury returned a defense verdict finding that the Defendant's negligence was not the legal cause of the Plaintiff's damages. The Plaintiff was rear-ended by the Defendant during stop-and-go traffic in NW Miami-Dade County. Policy limits were tendered but rejected by Plaintiff.

The Plaintiff, a 29 year old male with no history of neck or back complaints, alleged he received two herniated disks from the impact. Plaintiff initially sought treatment from his Primary Care Physician, then underwent six months of therapy with Ray Tolmos, DC. Thereafter, he tried acupuncture with Russell Rogg and underwent a cervical MRI, which was read by Grazie Christie, MD, and revealed two recent herniated discs at C3/C4 and C4/C5. The Plaintiff thereafter sought pain management, that included facet joints injections from pain specialist Manuel Barbieto, MD. He then obtained three surgical recommendations from Nicholas Suite, MD., spine surgeon Rolando Garcia, MD., and orthopedic specialist Fernanda Moya. MD. After several years of treatment without improvement, Plaintiff underwent a two level cervical discectomy with Aizik Wolf, MD at Larkin Hospital. Following the surgery, the Plaintiff continued having pain. He continued to receive care with neurologist, Ray Lopez, MD, who testified at trial along with Aizik Wolf. Radiologist Christie testified at trial that plaintiff had no arthritic condition before the accident.

Plaintiff called a reconstruction expert to opine the impact was significant and at least 12 mph. The Plaintiff's total medical bills were $115,828.62 and the Plaintiff demanded $527,828.62 in total damages at trial. The defense position was that plaintiff had spondolysis that was pre-existing and that the accident was the not the legal cause of the surgery. The defense IME expert was spine surgeon, Kenneth Jarolem, who testified by video. In less than one and a half hours, the jury determined that the Defendant's negligence was not the legal cause of the Plaintiff's damages, thus finding a complete defense verdict. The Defendant had served a proposal for settlement prior to trial and currently has a Motion to Tax Fees and Costs pending before the Court.

Favorable Verdict: MVA — Palm Beach County

South Florida Managing Partner Daniel Santaniello obtained a favorable jury verdict in a motor vehicle accident case styled Julio Perez Eschevarria vs. Laboratory Corporation Of America, and Charlotte R. Hill on June 19, 2015 in Palm Beach County. Plaintiff demanded $800,000 prior to the start of the trial. The jury found Plaintiff 60% comparatively negligent and returned a net verdict of $13,962.01. Plaintiff contended that Defendant Charlotte Hill violated his right of way when she made a left turn into his path of travel. Plaintiff, was riding a bicycle equipped with a 66 cc, 2.75 HP gasoline engine, capable of speeds in excess of 30 mph, in the bicycle lane of a major highway at night. Plaintiff had purchased his vehicle from a bicycle shop approximately four days prior to the accident. Defendants presented evidence that plaintiff's vehicle was illegal and unsafe to operate on a public roadway. Defendants also presented evidence that the Fabre defendant, the bicycle shop, sold the vehicle to Plaintiff without providing Plaintiff with warnings of the hazards of operating the vehicle or that the vehicle was illegal to operate on a public

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Verdicts and Summary Judgments cont.

roadway. Plaintiff was treated at the scene by Greenacres Public Safety for an obvious deformity to the ankle and abrasions to his hands, arms and legs. Plaintiff was transported by ambulance to JFK Medical Center in Atlantis Florida, where Plaintiff presented with a dislocated comminuted distal tibia fracture. Dr. Arnold Zager performed a left ankle closed reduction with application of Orthofix unilateral fixator external fixator. On February 12, 2014, Dr. Zager performed a, open reduction with internal fixation to repair Plaintiff's Left pilon fracture and adjusted the external fixator. Plaintiff remained in the hospital until February 14. Dr. Zager and Defendant's retained orthopedic surgeon testified that Plaintiff would require a fusion of the left ankle in the future.

Prior to the accident, Plaintiff had been working as a commercial diver, cleaning boat hulls in marinas, and earning $12 per hour. Plaintiff testified that this was his dream job, and he would never again be able to work in the commercial diving industry, as a result of the injuries suffered in the accident. Plaintiff sought $411 thousand in future lost earning capacity. Defendants offered testimony that a job as a scuba diver was ideal for Plaintiff post fusion surgery, as the weightless environment under water would not require Plaintiff to bear weight on his ankle during the majority of his work day. Plaintiff's total medical bills admitted into evidence were $305,512.99. Plaintiff requested a verdict of $2.4 million from the jury at closing. The jury found the defendant 7% negligent, the plaintiff 60% comparatively negligent and found the bicycle shop that sold the vehicle to Plaintiff 33% negligent. The Jury rendered a gross verdict of $199,457, including $12,000 for past lost wages, $5,000 for future lost earning capacity, $82,457 for past medical bills, $30,000 for future medical expenses, $30,000 for past pain and suffering and $40,000 for future pain and suffering.

Dismissal with Prejudice: Negligence

Miami Senior Associate Edgardo Ferreyra obtained a dismissal with prejudice in the matter styled Dorsey vs. Hertz Corp., 14-12081 CA 06. The negligence action arose out of an alleged automobile accident on June 5, 2010 and was initially filed against The Hertz Corporation only on May 8, 2014, but was amended on February 2, 2015, after the expiration of the Statute of Limitations, to add Rosita Simmons as a defendant. On May 6, 2015, Ms. Simmons Motion to Dismiss based on failure to state a cause of action was granted without leave to amend and The Hertz Corporation's Motion to Dismiss based on The Graves Amendment with leave to amend only if Plaintiff's could state a basis for active negligence or criminal wrongdoing against The Hertz Corporation. Following the dismissal, Plaintiff filed his Second Amended Complaint against The Hertz Corporation only alleging vicarious liability by virtue of its ownership of the rental vehicle driven by Rosita Simmons in the subject accident. The Hertz Corporation filed a Motion To Dismiss Plaintiff's Second Amended Complaint pursuant to The Graves Amendment which was granted with prejudice on July 29, 2015.

Motion For Final Summary Judgment: Slip and Fall

Luks, Santaniello was granted a Motion for Final Summary Judgment in a slip and fall in an office building stairwell case styled Bernadine Jenkins vs. Preferred Building Services. The court found that there was no evidence the Defendant janitorial and maintenance company had any notice of an alleged dangerous condition on the stairwell where Plaintiff fell.

Summary Judgment: Negligent Security

Boca Raton Associate Jordan Greenberg obtained a Final Summary Judgment on June 26, 2015 in a negligent security matter styled Lynn Cannon, as PR of the Estate of Garrett Egan Cannon v. Villa San Remo HOA and Hawk-Eye Management, in the Fifteenth Judicial Circuit (Palm Beach County). The 25 year old decedent died after a night with his friends in the clubhouse parking lot of the Defendant homeowner's association, during which plaintiff indulged in a cocktail of illegal drugs, including, cocaine, bath salts and LSD. The decedent was found dead in his friend's car the next day caused by multiple drug intoxication and positional asphyxiation. Plaintiff alleged that the Defendants failed to exercise reasonable care to prevent, deter and control reasonably foreseeable criminal conduct on the association's property and that the association was responsible for providing adequate protection against general and specific threats to the safety of invitees resulting from criminal activity. The Motion for Summary Judgment successfully established that the homeowners' association had no duty to protect the decedent from the consequences of his own criminal activity. Therefore, as a matter of law, Defendants could not have breached any duties owed to the Decedent.

LUKS, SANTANIELLO PETRILLO & JONES

Our verdicts tell the story.

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