LUKS, SANTANIELLO PETRILLO & JONES
Our verdicts tell the story.

LEGAL UPDATE

VOLUME 14, ISSUE 4
OCTOBER — DECEMBER, 2015

Liability

Joerg Decision and the Admissibility of Future Medicare, Medicaid and Other Social Legislation Benefits by Andrew Silvershein, Esq.


Andrew Silvershein

On October 15, 2015, the Supreme Court of Florida addressed the issue of whether evidence of a Plaintiff's future entitlement to Medicare, Medicaid, and other similar social legislation can be utilized as evidence to dispute future damages. After analyzing its prior decision of Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984), the Court decided to recede from Stanley and held that evidence of eligibility for future benefits from Medicare, Medicaid, and other social legislation was inadmissible at trial.

Joerg arose out of a negligence claim. Luke Joerg is a developmentally disabled adult who has lived with his parents for his entire life. As a result of his disabilities, Luke is entitled to reimbursement from Medicare for his medical bills. On November 19, 2007, Luke was riding his bicycle in Venice, Florida, when he was hit by a car. Luke's father, John, filed a negligence action against the driver and against State Farm Mutual Automobile Insurance Company. Prior to trial, Joerg withdrew his claim against the driver, and proceeded solely against State Farm.

Joerg filed a motion in limine to exclude evidence of any collateral source benefits that Luke was entitled to, including future discounted benefits under Medicare and Medicaid. The trial court initially granted Joerg's motion, but only with respect to past medical bills. After Joerg moved the trial court to reconsider, the court receded from its prior ruling and prohibited State Farm from introducing evidence of Luke's future Medicare and Medicaid benefits. However, State Farm was allowed to introduce evidence of "future medical bills

Read More . . . P. 2

Verdicts and Summary Judgments

Defense Verdict: Negligent Security — Bay County

Defense Verdict Bay County: Paul Jones, Orlando Managing Partner and Olu Aduloju, Esq. received a defense verdict in a negligent security rape matter styled Webb v. El Governor Motel on 9/4/15 in Bay County. The lawsuit arose from a burglary and subsequent rape committed by Ronald Lee, a guest at the El Governor Motel on or about April 15, 2011. Plaintiff, Janice Williamson checked into the motel on April 13, 2011 with Scott Webb, her fiancé, and Mr. Webb's minor son. They checked into room 524. At some point on April 15, 2011, Ronald Lee, a convicted felon who is currently serving a life

Read More . . . P. 7

INSIDE LEGAL UPDATE

OFFICE LOCATIONS

MIAMI
T: 305.377.8900
F: 305.377.8901

FORT LAUDERDALE
T: 954.761.9900
F: 954.761.9940

BOCA RATON
T: 561.893.9088
F: 561.893.9048

FORT MYERS
T: 239.561.2828
F: 239.561.2841

ORLANDO
T: 407.540.9170
F: 407.540.9171

TAMPA
T: 813.226.0081
F: 813.226.0082

JACKSONVILLE
T: 904.791.9191
F: 904.791.9196

TALLAHASSEE
T: 850.385.9901
F: 850.727.0233

WWW.LS-LAW.COM

Edited by:
Maria Donnelly, CR
Daniel J. Santaniello, Esq.

Joerg Decision and the Admissibility of Future Medicare, Medicaid and Other Social Legislation Benefits cont.

for specific treatment or services that are available to all citizens regardless of their wealth or status." After deliberation, the jury found for Plaintiff, awarding a total of $1,491,875.44 in damages, including $469,076 for future medical expenses.

On appeal, the Second DCA analyzed the evidentiary issue regarding future collateral benefits. The Second DCA reversed and remanded the award for future damages, and held that, under Stanley, Luke's Medicare benefits were considered "free and unearned". Therefore, the court found that such evidence should not have been excluded by the trial court under the collateral source rule.

Historically, the collateral source rule prevented the reduction of damages by collateral sources available to the plaintiff. See Gormley v. GTE Prods. Corp., 587 So. 2d 455, 457 (Fla. 1991). This principle was based on the notion that a tortfeasor should not benefit from collateral sources available to the plaintiff. Currently, trial courts are required to reduce awards by the total of all amounts which have been paid for the benefit of the claimant or that are otherwise available to the claimant from all collateral sources. See 768.76 (1) Florida Statutes (2014). The purpose of this statutory modification was to reduce insurance costs and prevent plaintiffs from receiving windfalls.

As an evidentiary rule, payments from collateral source benefits are generally not admissible because such evidence may confuse and mislead the jury with respect to both liability and damages. Sheffield v. Superior Ins. Co., 800 So. 2d 197, 203 (Fla. 2001) (citing Gormley, 587 So. 2d at 458). It is also well established in Florida that the admission of evidence of social legislation benefits, such as those received from Medicare, Medicaid, or Social Security, is considered highly prejudicial and constitutes reversible error. See Sheffield, 800 So. 2d at 203.

An exception to this rule was outlined in Stanley, 452 So. 2d at 516. In Stanley, the Defendants were allowed to introduce evidence of free or low cost charitable and governmental programs available to meet the needs of the plaintiff's son. Id. However, in Joerg, Justice R. Fred Lewis stated in the majority opinion that Stanley was never intended to apply to Medicare or Medicaid benefits or to collateral sources where a right of reimbursement or subrogation exists. Specifically, the majority rejected State Farm's argument that Luke's future Medicare benefits were "free" and "admissible" under Stanley. Instead, the Court concluded that future Medicare benefits are uncertain and a liability because Medicare retains a right to reimbursement, citing the Medicare Secondary Payer Act, 42 U.S.C.A. § 1395y(b)(2). The Court went even further and held that Stanley was a very narrow exception to the collateral source rule.

The majority opined that no windfalls to plaintiffs will result when an entity that provided the collateral source retains a right of reimbursement from the award of damages. The Court also concluded that it is speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive. For instance, a plaintiff may not stay eligible for the benefits or the benefits themselves may become insufficient. Even where very specific benefits are at play, extensive waiting lists may prevent an individual from actually receiving those benefits.

The Court's decision in Joerg is a vitally important decision in the field of defense and changes the evidentiary landscape regarding issues revolving around the admissibility of future Medicare, Medicaid, and other social legislation benefits. The Court has clearly receded from Stanley to the extent that it no longer supports the admission of social legislation benefits as an exception to the evidentiary collateral source rule. The Joerg decision will be impactful and may even affect how future plaintiffs choose to board billing in Medicare cases with post-trial set-offs. The Courts may now allow total billed to be presented to the Jury. We shall see.

About Andrew Silvershein

T: 561.893.9088
E: ASilvershein@insurancedefense.net

Andrew Silvershein is an Associate in the Boca Raton office and practices in the areas of automobile and general liability matters. He earned his Bachelor of Arts degree from the University of Michigan (2011) and Juris Doctorate from the University of Florida (2015). While attending law school, he was a member of the University of Florida Moot Court Team and won the esteemed 33rd Annual Hulsey/ Gambrell Moot Court Competition, which he argued before five Federal Appellate and District Court judges. Andrew also earned Dean's list honors at the University of Florida from 2013- 2015, and received a Book Award for Trial Practice. In addition, Andrew worked for the Honorable William Matthewman at the United States District Court for the Southern District of Florida, as well as the United States Attorney's Office in West Palm Beach, FL. Andrew is admitted in Florida (2015).

"The 57.105 Motion- A Cautionary Tale" by Marci Matonis, Esq.

Marci Matonis

Fla. Stat. §57.105 Motion for Sanctions continues to be a hot topic in Personal Injury Protection "PIP" litigation. It is an opportunity to encourage early settlement of the case but it can also be an opportunity for insurers to potentially recoup their attorneys' fees.

57.105 motions can be used to grab the attention of the Plaintiff PIP attorney and force them to take a closer look at the facts of their case at an early stage of the litigation. Plaintiff PIP attorneys file thousands of lawsuits and form complaints every year, assuming one case is exactly like the next, thus missing important facts that can bar them from recovery.

Florida Statute §57.105 states in pertinent part:

> Upon the…motion of any party, the court **shall award reasonable attorney's fees** to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court find that the losing party of the losing party's attorney **knew or should have known** that a claim or defense when initially presented to the court or at any time before trial:

A. Was not supported by the material facts necessary to establish the claim or defense; or

B. Would not be supported by the application of then existing law to those material facts.

The statute further provides that prior to filing the 57.105 motion with the Court, the party to whom the 57.105 is being served has 21 days to withdraw the frivolous claim. This gives the party an opportunity to withdraw the claim without any further repercussions. If the party does not take advantage of this 21 day "safe harbor" period, then the motion can be filed with the Court and litigated. *See* Fla. Stat. §57.104 (4).

The PIP defense attorney looks for issues where the law is well-established and well-founded. Some of the more common issues that will prompt a PIP defense attorney to serve a 57.105 motion include: standing; late billing; benefits exhausted; and EUO no shows.

Just recently, the Fifth District Court of Appeal in Mercury Insurance Company of Florida v. Emergency Physicians of Central, Etc., Et Al., 5D15-1064, (Fla. 5th DCA 2015), ruled that emergency physician providers, while they can take advantage of the $5,000 reserve pursuant to Fla. Stat. §627.736(4)(c), their bills are still subject to any deductible that may exist on the subject policy. This was a huge issue in Central Florida PIP litigation for several years involving thousands of cases, and virtually all of the county court and circuit court judges (acting in their appellate capacities), ruled in favor of the emergency physician providers. Assuming this decision by the Fifth District Court of Appeals remains, this will be another opportunity for the PIP defense attorney to file a 57.105 motion which will hopefully shut down the litigation at its earliest stages.

Two cases from the Ninth Judicial Circuit in Orange County are illustrative of the 57.105 motion in practice. In Florida Injury East, Inc. a/a/o Edessa M. Hernandez v. USAA Casualty Insurance Company, 21 Fla. L. Weekly Supp. 571b, (March 7, 2014), Plaintiff filed suit against Defendant, USAA, for breach of contract of unpaid PIP benefits. Defendant countered that its policy incorporated the fee schedule reimbursement methodology, thus Plaintiff had been paid in full. Defendant served Plaintiff with its 57.105 Motion for Sanctions along with the 21 day "safe harbor" letter advising Plaintiff that if it did not dismiss the action, Defendant would file its motion. Plaintiff failed to dismiss its case within the 21 days "safe harbor" period but ultimately filed a Notice of Voluntary Dismissal approximately 70 days later. Defendant, as the prevailing party, moved for attorney's fees and costs pursuant to its 57.105 motion.

The Court held that the Plaintiff "knew or should have known" that its claim was not supported by the facts or then-existing law. Boca Burger, Inc. v. Forum, 912 So. 2d 561, 570 (Fla. 2005) [30 Fla. L. Weekly S539a] (noting that the 1999 amendments to the statute relaxed the standard for granting fees and "greatly expand the statute's potential use"). The Court cited Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 63 So. 3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]

Read More . . . P. 4

"The 57.105 Motion- A Cautionary Tale" Cont.

(holding that an insurer may limit reimbursement to the fee schedule delineated in Florida Statute Section 627.736 (5)(a)2. as long as it provides for such in its policy). The Court further held that where the plaintiff has dismissed its case, the party seeking fees need no longer conclusively show that it would have prevailed had the case been determined on its merits. Boca Airport, Inc. v. Roll-N-Roaster of Boca, Inc., 690 So. 2d 640 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D602a]. The Court further held in this case, "[t]he Plaintiff did not file its Notice of Voluntary Dismissal until after the 21-day "safe harbor" period afforded under the statute had expired. Defendant is therefore entitled to recover its reasonable attorney's fees and costs." [1]

In Emergency Physician of Central Florida, LLP a/a/o Maria Vanatta v. Garrison Property and Casualty Insurance Company, 20 Fla. L. Weekly Supp. 521a, the Plaintiff filed suit against the Defendant for breach of contract of unpaid PIP benefits. The Plaintiff dismissed the suit approximately two months after the suit was filed and prior to any discovery being conducted. The Defendant moved for attorney's fees pursuant to Fla. Stat. §57.105. The Court denied the Defendant's motion finding that the record before the court was not sufficiently developed to support a determination that the suit was frivolous. There was no discussion in this order regarding the 21 day safe harbor period and whether that was or was not adhered to.

Thus, the 57.105 motion must include a thorough presentation of the facts as applied to the well-settled law that bars Plaintiff's recovery and must include the 21 day "safe harbor" letter. Another matter to be mindful of is serving 57.105 motions in cases where the law is unsettled or where Plaintiff has authority on its side contrary to your side. Plaintiff could serve its own 57.105 motion as the statute is available for both claims and defenses. For example, the Defendant could file a Motion for Summary Judgment on an affirmative defense for which the Plaintiff believes is frivolous. The Plaintiff can then file its own 57.105 motion against the Defendant for having to defend and respond to the motion for summary judgment. If the Court sides with the Plaintiff, the Defendant as well as the PIP defense attorney can be equally sanctioned for Plaintiff's attorneys fees and costs associated with their 57.105 motion.

The Court has a significant responsibility when considering a 57.105 motion for sanctions. The recent case Blue Infiniti, LLC and Jorge Diaz-Cueto v. Annette Cassells and Ricky Wilson, 170 So. 3d 136 (Fla. 4th DCA 2015) is on point. In Blue Infiniti, a lender brought suit against a borrower. The lender subsequently filed a voluntary dismissal of the claims with prejudice. The borrower moved for attorney's fees under 57.105. The trial court granted the borrower's motion and the trial court imposed attorney's fees on both the lender and its attorney. The lender appealed.

The Fourth District Court of Appeals discussed that in determining an award of fees under section 57.105, "[t]he [trial] court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law." Asinmaz v. Semrau, 42 So.3d 955, 957 (Fla. 4th DCA 2010) (quoting Wendy's of N.E. Fla., Inc. v. Vandergriff, 865 So.2d 520, 523 (Fla. 1st DCA 2003)); § 57.105, Fla. Stat. (2013). "A trial court's findings must [ ] 'be based upon substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the trial record.' "Montgomery v. Larmoyeux, 14 So.3d 1067, 1073 (Fla. 4th DCA 2009) (quoting Weatherby Assocs., Inc. v. Ballack, 783 So.2d 1138, 1141 (Fla. 4th DCA 2001)); Wapnick v. Veterans Council of Indian River Cnty., Inc., 123 So.3d 622, 624 (Fla. 4th DCA 2013).

In this case, the Court found there was nothing in the record that would constitute substantial competent evidence for the trial court to find that the claim filed by the lender could not be supported by the facts or an application of existing law. The Court concluded that a full *evidentiary* hearing was necessary for the trial court to make such a determination against the lender and its counsel. The Court stated "[a] 'full hearing' is one during which the party was 'represented by counsel, examined witnesses, and had the opportunity to offer evidence.' " Ferdie v. Isaacson, 8 So.3d 1246, 1250 (Fla. 4th DCA 2009) (quoting Brinkley v. Cnty. Of Flagler, 769 So.2d 468, 472 (Fla. 5th DCA 2000)). Here, because the trial court did not allow the lender's attorney to testify, even though he specifically informed the court that he appeared at the hearing in order to do so, neither he nor the lender was afforded a full hearing on the issues.

The trial court must make *detailed* and *specific* findings of bad faith. "[I]f the trial court concludes that an award of fees under section 57.105 is

Read More . . . P. 5

"The 57.105 Motion- A Cautionary Tale" Cont.

an appropriate sanction, 'it should recite in its order the facts upon which it bases that conclusion.' "Lago, 120 So.3d at 75 (quoting Regions Bank v. Gad, 102 So.3d 666, 667 (Fla. 1st DCA 2012)); *see also* Avis Rent A Car Sys., Inc. v. Newman, 641 So.2d 915 (Fla. 3d DCA 1994). The Court held it was error for the trial court to impose sanctions upon the lender and its attorney prior to affording a full opportunity to be heard and without making detailed findings in its order.

In PIP litigation practice, here is a potential hypothetical: A Plaintiff files a 57.105 motion in response to the Defendant insurer's motion for summary judgment as to late billing and the parties go to hearing on both motions. The Court denies the Defendant's motion for summary judgment on the late billing and because the Court denied the motion for summary judgment, he might also grant the Plaintiff's 57.105 motion. It is important to remember that these two motions are completely separate legal remedies with different burdens. Under *Blue Infiniti, supra*, the trial court is required to make detailed and specific findings of bad faith in its order awarding fees under 57.105, and after a full evidentiary hearing. In the above hypothetical, the trial court's 57.105 order would be subject to appeal.

In closing, 57.105 motions are a good tool to encourage settlement and possibly recoup attorney's fees against PIP Plaintiffs. However, keep in mind that the Plaintiff PIP attorney also knows about the 57.105 motion and is not afraid to use it. Since monetary sanctions against the attorney, as well as their client, is the harshest discipline meted out in civil law, the 57.105 motion should always be used thoughtfully and with caution. For further information or assistance with your PIP matters, please contact Marci Matonis, Esq. in our Orlando office.

[1] See e.g. Argyle Chiropractic Center (a/a/o Zecorrie Vann) v. United Services Automobile Association, 20 Fla. L. Weekly Supp. 1218b (4th Jud. Cir. Cty. Ct. 2013); Joseph Ciccarello, D.C., P.A. (a/a/o Vonda Larson) v. State Farm Mutual Automobile Ins. Co., 9 Fla. L. Weekly Supp. 137a (13th Jud. Cir. Cty. Ct. 2001); Medical Rehab and Therapy Center v. State Farm Mutual Automobile Ins. Co., 10 Fla. L. Weekly Supp. 643b (13th Jud. Cir. Cty. Ct. 2001). In fact, the statute requires such an award. *See* Ins. Corp. of New York v. M & J Health Center, Inc. a/a/o Julio Ruiz, 13 Fla. L. Weekly Supp. 682a (11th Jud. Cir. App. April 2006) (finding that lower court abused its discretion in denying defendant's 57.105 motion when plaintiff had waited until after the 21-day "safe harbor" period to dismiss its baseless case).

About Marci Matonis

T: 407.540.9170
E: MMatonis@insurancedefense.net

Marci Matonis, Esq. is an Associate in the Orlando office and has been practicing for 15 years. She practices in the areas of PIP, Auto Liability, General Liability, Insurance Law and Coverage, Collections and Real Property Valuation litigation, and Appellate matters. While attending law school, Marci completed both Federal and State Judicial internships. She earned her Bachelor of Arts degree from the University of Central Florida (1993) and Juris Doctorate from Stetson University (1999). She is admitted in Florida (2000).

Webb v. El Governor Motel Verdict continued

sentence for his actions, made entry into Plaintiffs' room. Mr. Lee took several items belonging to Mr. Webb and Ms. Williamson, including cell phones and money, from room 524 back to his room next door, room 525. These items were later discovered during the police investigation of this incident. Mr. Lee then made a second entry into room 524 where he removed Ms. Williamson's pants and began to rape her as she laid next to her fiancé and his minor son in the next bed. The Plaintiffs sued the Motel due to the Motel's alleged mishandling of the room keys. Mr. Lee told police that he entered the room using a key. The Motel had a practice of using metal keys that were marked with the room numbers on the keys. The Motel also failed to rekey the rooms when a key was not returned by a guest. The Defendant's own security expert admitted that the Motel's key handling practice violated industry standards. The Plaintiff asked the jury for over $10 million. Nevertheless, the defense convinced the jury that the perpetrator accessed the room by climbing the balconies and entering through the back door making the Motel's key handling practices irrelevant. The jury agreed and returned a verdict for the defendant, Motel.

Be Careful What You Sign: Contractually Raising The Standard Of Care by Patrick Hinchey, Esq.

Patrick Hinchey

Florida's Fourth District Court of Appeal issued a recent opinion addressing professional liability in School Board of Broward County v. Pierce Goodwin Alexander & Linville, 137 So.3d 1059 (Fla. 4th DCA March 19, 2014) (rehearing denied June 4, 2014). The most critical part of the opinion addressed what a jury can hear regarding the standard of care for an architect.

During renovations of a school, a peer reviewer criticized the architect's plans due to the design of a balcony without a staircase—the peer reviewer stated this design was not code compliant. The architect disagreed with the reviewer's proposed solution, and provided an alternative solution, which the architect believed was approved by the building code official. The peer reviewer disagreed with the alternative solution, as well. The plans were sent out for bid incorporating the architect's alternative solution, without the staircase. After the bidding process, the building code official determined that the architect's alternative solution was, in fact, not code compliant, resulting in redrafting of plans to include a staircase.

The school board paid more for the renovation because the bid did not contemplate the construction of the subject staircase. Initial construction had to be reworked, which allowed the general contractor to charge more money through issuance of a change order, modifying the original contract/bid amount. The school board blamed the architect's omission of the staircase for the increased construction costs and eventually filed suit.

At the trial court level, the jury was instructed on a negligence theory and was specifically told **not** to decide whether the architectural plans at issue were code compliant. The jury found there was no breach of duty by the architect in omitting the balcony staircase.

On appeal, the District Court ordered a new trial because it found that the trial court improperly instructed the jury as to the applicable standard of care. The District Court found that the architect had contractually agreed to provide a set of plans subject to a heightened standard of care, and this required the jury to determine whether the plans were code compliant, rather than whether the plans were simply in accordance with the standard of care used by similar professionals in the community under similar circumstances.

As a matter of common-law, professionals rendering professional services are to perform such services in accordance with the standard of care used by similar professionals in their community under similar circumstances. Trikon Sunrise Association, LLC v. Brice Bldg. Co., 41 So. 3d 315 (Fla. 4th DCA 2010). Thus, as long as an architect uses the same ordinary and reasonable skill as other architects in their community, the common law standard of care is met. See Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n., 573 So. 2d 889 (Fla. 2d DCA 1990). However, if an express provision in a professional services contract provides for a heightened standard of care, the professional must then perform in accordance with the terms of the contract. CH2M Hill, Inc. v. Pinellas Cnty., 698 So. 2d 1238, 1240 (Fla. 2d DCA 1997). As a result, a design professional (and, arguably, any professional services provider or other service provider) can contractually agree to perform services at a standard of care higher than the common law standard.

In the instant case, the District Court found that the architect had agreed to a heightened standard of care when the design contract called for the design work to be performed in accordance with customary professional standards currently practiced by firms in Florida **and** in compliance with any and all applicable codes, laws, ordinances, etc.

The School Board of Broward County decision also addressed an important issue with regard to damages. The Court held that "first-cost" items (i.e. costs for items that would have been borne by the owner had they been included in the original plans) should not be included in damages that flow from an error in the design plans. Therefore, the fact that costs had to be incurred later to repair/remediate does not create additional liability for the design professional. This "first-cost" principle can be applied to reduce damages flowing from many construction claims.

Read More . . . P. 7

Be Careful What You Sign: Contractually Raising The Standard Of Care Cont.

The potential impact of this decision highlights the fact that owners, design professionals, general contractors, and subcontractors must clearly understand the standard of care that will apply in any services contract **at the front end,** to avoid problems in subsequent litigation.

Further, once litigation has commenced, an evaluation of any contractual risk-allocation is of primary importance and may be determinative of the outcome of the litigation. Insurers for design professionals (as well as for all service providers) need to be aware of any heightened standard of care in any contract for services, because the contract will almost certainly be determinative of the requisite standard of care. For questions about this article or assistance with your construction defect matters, please contact Patrick Hinchey in the Jacksonville office.

Verdicts continued from Page 1

Webb v. El Governor Motel

sentence for his actions, made entry into Plaintiffs' room. Mr. Lee took several items belonging to Mr. Webb and Ms. Williamson, including cell phones and money, from room 524 back to his room next door, room 525. These items were later discovered during the police investigation of this incident. Mr. Lee then made a second entry into room 524 where he removed Ms. Williamson's pants and began to rape her as she laid next to her fiancé and his minor son in the next bed. The Plaintiffs sued the Motel due to the Motel's alleged mishandling of the room keys. Mr. Lee told police that he entered the room using a key. The Motel had a practice of using metal keys that were marked with the room numbers on the keys. The Motel also failed to rekey the rooms when a key was not returned by a guest. The Defendant's own security expert admitted that the Motel's key handling practice violated industry standards. The Plaintiff asked the jury for over $10 million. Nevertheless, the defense convinced the jury that the perpetrator accessed the room by climbing the balconies and entering through the back door making the Motel's key handling practices irrelevant. The jury agreed and returned a verdict for the defendant, Motel.

Defense Verdict — Civil Rights

Fort Lauderdale Junior Partner Dorsey Miller received a defense verdict in Civil Rights matter styled Joe Mathis v. Det. Erick Quigley and Det. Justin Augustus. Plaintiff claimed that he was beaten by two BSO Officers, Deputy Quigley and Deputy Augustus, resulting in a broken nose. According to the BSO Event Report, Mr. Mathis was the subject of a "buy-bust" operation in Pompano Beach. During that operation, an undercover officer brokered an illegal narcotics transaction with Plaintiff, after which BSO deputies moved in to arrest him. Plaintiff fled to a nearby apartment located at 1565 NW 14th Circle and locked the door behind him. After initially ignoring several verbal commands to open the door, he finally relented, at which point Deputies Quigley and Augustus entered the apartment and attempted to place him under arrest. A scuffle ensued and Deputy Quigley attempted a knee strike to the Plaintiff's abdomen to gain control over him, but wound up striking him in the face. Plaintiff then ceased resisting arrest and was taken into custody. Plaintiff alleged a violation of his right to be free from excessive force under the Fourth Amendment. Defendants denied all allegations and claimed qualified immunity. After a 2-day jury trial, a directed verdict was granted in favor of Det. Augustus and a defense verdict was entered in favor of Det. Quigley after 10 minutes of deliberation.

About Patrick Hinchey

T: 904.791.9191 Ext. 305
E: PHinchey@insurancedefense.net

Patrick Hinchey, Esq. is an Associate in the Jacksonville office and handles complex multi-party construction defect matters. He has extensive experience handling cases from inception, through mediation and up to and including jury trial. Patrick earned his Bachelor of Arts from the University of Georgia (1991). He obtained his Juris Doctorate from the Florida Coastal School of Law, *cum laude*, 2007. He is admitted in Florida (2007) and to the United States District Court, Middle District of Florida (2014), and in Georgia (2008).

Verdicts and Summary Judgments cont.

Final Declaratory Judgment — MVA

Tampa Senior Associate Joseph Kopacz obtained a final declaratory judgment in the matter styled Ascendant Commercial Insurance vs. Autoplex Used Car Super Center, LLC, Musharraf H. Babu, & Krystal Moore before Judge Patricia Campbell (Pinellas County) on June 30, 2015. Krystal Moore ("Moore") sustained a brain injury in a two-vehicle accident requiring multiple surgeries and an extensive stay in the hospital. On August 2, 2012, Moore was a passenger in a vehicle driven by her boyfriend Musharraf H. Babu ("Babu"), who was an employee and owner of Autoplex Used Car Super Center, LLC. ("AutoPlex"), when the vehicle was hit near an intersection. The vehicle driven by Babu at the time of the accident was a 2006 Chevrolet Cobalt. Moore's counsel filed a negligence action against AutoPlex alleging they were the owner of the 2006 Chevrolet Cobalt as well as an UM action against AutoPlex. Ascendant Commercial Insurance filed a separate Declaratory Judgment Action against all parties involved in the subject accident. Additionally, the underlying action was stayed until the Declaratory Judgment action was resolved. Ascendant's position was the 2006 Chevrolet Cobalt was not owned by AutoPlex and Babu was an excluded driver under the policy. The Ascendant policy did not clearly define what was classified as an "owned" vehicle under the policy. Moore's counsel argued strenuously that AutoPlex owned the vehicle under an "Open Title" theory even though Autoplex was not the registered owner according to the state of Florida's records. Moore's counsel argued AutoPlex had displayed the subject vehicle for sale on its website days before and after the subject accident. However, Moore's counsel failed to authenticate the website photographs of the vehicle. Based on the record evidence demonstrating AutoPlex was not the owner of the 2006 Chevrolet Cobalt, Judge Campbell granted Final Declaratory Judgment for Ascendant against all named Defendants – including underlying Plaintiff, Moore.

Final Summary Judgment — PIP

Junior Partner Daniel Fox was granted Final Summary Judgment based upon the fee schedule language in the policy in PIP matter styled Health And Wellness Services, Inc. v. Occidental Fire and Casualty Company on September 24, 2015 in Miami-Dade county. The Plaintiff provided medical services to Occidental's insured. Occidental reimbursed the medical provider pursuant to the fee schedule set forth in Fla. Stat. §627.736(5)(a)2. – 5., hereinafter referred to as the "PIP fee schedule". The issue for this Court to determine was whether the subject Occidental policy of insurance, including its amendments and endorsements, clearly and unambiguously elected payment under the PIP fee schedule set forth by Florida's No-Fault Statute. After a review of the subject Occidental policy and its endorsements and amendments, the Court found that the Occidental policy clearly and unambiguously elected payment under the PIP fee schedule set forth by Florida's No-Fault Statute. Judge Charles Johnson in Miami-Dade County determined that, "[a]s the 1st DCA noted in Allstate Fire & Cas. Ins. v. Stand-Up MRI of Tallahassee, *P.A.*, 40 Fla. L. Weekly D693 (Fla. 1st DCA Mar. 18, 2015), *Virtual Imaging* requires no magic words in the policy to incorporate the PIP fee schedule other than a "simple notice requirement", advising the insured that insurer intends to limit payment to the fee schedule-based limitations found in the statute. It follows that Occidental's policy language gave legally sufficient notice to its insureds of its election to use the Medicare fee schedules as required by *Virtual Imaging.*"

Final Summary Judgment — Negligence

Junior Partner Jorge Padilla in the Miami office was granted Final Summary Judgment in a negligence action arising out of a slip-and-fall matter styled Ricardo U. Aquino v. The Gardens of Kendall Property Owners Association, Inc., Et Al. on November 2, 2015.

Read More . . . P. 9

Verdicts and Summary Judgments cont.

Voluntary Dismissal With Prejudice— Negligence

Tampa Senior Associate Joseph Kopacz obtained a voluntary dismissal with prejudice along with a payment of partial fees through a lapsed Proposal for Settlement ('PFS") in the negligence matter styled Adelia Samaha v. Hubbard Construction Company pending in Pinellas County, Florida. Plaintiff's husband in this case drove Plaintiff's Lexus into a closed construction zone significantly damaging the undercarriage of the vehicle. From the start, Defendant took a strong no liability position. Plaintiff filed the subject negligence action against Hubbard alleging they failed to comply with the DOT standards by leaving the subject entrance ramp open; they failed to clean up construction debris from the on-ramp; they failed to ensure there was no significant degree of road surface differential that would impair use of the ramp; and they failed to block or detour traffic from the subject on-ramp. This case was litigated for over two years. Early in the case, Hubbard sent a low/nominal Proposal for Settlement to Plaintiff based on the position of no liability which Plaintiff allowed to expire. Trial was scheduled to start on October 5, 2015. Days before the trial, Plaintiff's counsel agreed to a voluntary dismissal with prejudice and the payment of a significant portion of the attorney's fees, (based on the lapsed PFS) Hubbard was required to pay to defend this action over the two-year period.

Appellate Affirmed Final Judgment

Fort Lauderdale Junior Partner Doreen Lasch prevailed on appeal in matter styled Ruimy v. Beal. Plaintiff appealed a directed verdict entered in favor of owner of vehicle on plaintiff's direct negligence claim and a defense jury verdict on plaintiff's claim of vicarious liability against owner under the dangerous instrumentality doctrine. Jury had found defendant owner to be 10% liable, but trial court entered directed verdict in her favor after the verdict was returned which resulted in a final judgment in favor of the defendant vehicle owner. The Third District Court of Appeal affirmed the final judgment on both issues on September 30, 2015.

Summary Judgment— General Negligence

Fort Lauderdale Senior Partner David Lipkin received a Summary Judgment in a general negligence matter styled Moran v. Beach Bars USA and El-Ad FL Beach LLC. This lawsuit arose from an incident at Dirty Blondes Bar in Ft. Lauderdale where the Plaintiff alleges he was assaulted after a dispute concerning the payment for drinks. Plaintiff alleged lumbar and cervical injuries and underwent lumbar fusion. Plaintiff incurred in excess of $116,000 in medical bills and was also making a lost wage claim.

Plaintiff sued the bar owner/operator Beach Bars USA as well as our client El-Ad FL Beach, LLC. El-Ad was the owner of the building and property and plaintiff argued that as the owner of the property El-Ad had a non-delegable duty to ensure the premises were safe and would thus be liable for the acts of others on its property, including its tenants. Defense was able to show that the exclusive possession doctrine precluded liability against El-Ad. Defense referenced the subject occupancy agreement which we noted gave operating control to the co-defendant in addition to an affidavit that also supported our position. Plaintiff attempted to argue that we maintain a right of control as we were able to enter the property to show it for possible sales and make repairs that we deemed needed but Defense countered with case law specifically rejecting such arguments. Plaintiff then also referred to the occupancy agreement's failure to delegate responsibility for security as evidence that we would be liable for negligent security and also pointed to the language in the agreement requiring the tenant to indemnify the landlord and provide it insurance as evidence that it was contemplated that El-Ad could be liable for what occurred inside the establishment. Defense countered with other case law which also rejected these theories. Prior to the motion for summary judgment, we had served a Proposal for Settlement for $5,000 and plaintiff may now be liable for attorney's fees.

Cancer Fundraiser "No Shave November Event"

Reprinted with permission from the Palm Beach Post.

From left: Greg Coleman, Charlie Fischer, Paul Shalhoub, Bob Shalhoub, Bob Bertisch and Ari Goldberg at Morton's Steakhouse. All six men have been growing out their facial hair as a part of "Movember" to raise money for legal aid (Brianna Soukup / The Palm Beach Post).

In a creative effort to raise awareness for cancer, The Young Lawyers Section of the Palm Beach County Bar Association held its first Annual No Shave November Event. Paul Shalhoub, Esq. in our Boca Raton office chaired and founded the charitable event. Members of the bar and leaders in the community refrained from shaving for one month with the event culminating in a public shave off on November 12, 2015.

Donations will benefit the Cancer Alliance of Help and Hope and the Palm Beach County Legal Aid Society in the fight against cancer. To make a donation in support of the fundraiser, visit https://www.palmbeachbar.org/news/yls-no-shave-november-event/

Kids 2 Kids — High School Students Help Orphans

It is estimated that upwards of 8 million children live in orphanages worldwide (Washington Post, 2013). Children in orphanages range in age from newborn to 18 years old and are the world's forgotten kids. While orphanages may do their best to provide for the kids, sometimes they simply cannot. Not anymore says 17 year old Anastasia Alvarez and her 15 year old sister, Anna, high school students and daughters of Junior Partner Rey Alvarez. They are starting a charitable organization Kids 2 Kids – Project Help to ensure that orphans have the basic necessities and even some "nice things. They are collecting clothing and books for local orphanages. To learn more about items needed, email kids2kidsprojecthelp@gmail.com or find them on Facebook or Instagram.

Doreen Lasch, Esq. Admitted to U.S. Supreme Court

Appellate Partner, Doreen Lasch, Esq., in our Fort Lauderdale office was sworn in as a member of the Bar of the United States Supreme Court on November 9, 2015 in Washington, D.C. Doreen provides key support before, during and after trial. She is admitted in Florida (1991) and to the U.S. District Court, Southern District of Florida (1991) and the U.S. Court of Appeals, Eleventh Circuit (1991); and to the U.S. Supreme Court (2015).

LUKS, SANTANIELLO PETRILLO & JONES

Our verdicts tell the story.

Jack D. **LUKS**, Founding Partner
AV Preeminent® Rated, Peer Review Rated
110 SE 6th Street—20th Floor
Fort Lauderdale, Florida 33301

Daniel J. **SANTANIELLO**, Founding/Managing Partner
Florida Bar Board Certified Civil Trial Expert
AV Preeminent® Rated, Peer Review Rated
301 Yamato Road—STE 1234
Boca Raton, Florida 33431

Anthony J. **PETRILLO**, Tampa Partner
Florida Bar Board Certified Civil Trial Expert
AV Preeminent® Rated, Peer Review Rated
100 North Tampa Street—STE 2120
Tampa, Florida 33602

Paul S. **JONES**, Orlando Partner
Florida Bar Board Certified Civil Trial Expert
255 S. Orange Avenue—STE 750
Orlando, Florida 32801

Contact Us

MIAMI
150 W. Flagler St—STE 2750
Heather Calhoon, Senior Partner
T: 305.377.8900
F: 305.377.8901

BOCA RATON
301 Yamato Rd—STE 4150
Dan Santaniello, Managing Partner
T: 561.893.9088
F: 561.893.9048

FORT LAUDERDALE
110 SE 6th St—20th Floor
Jack Luks, Founding Partner
T: 954.761.9900
F: 954.761.9940

FORT MYERS
1412 Jackson St—STE 3
Howard Holden, Senior Partner
T: 239.561.2828
F: 239.561.2841

ORLANDO
255 S. Orange Ave—STE 750
Paul Jones, Managing Partner
T: 407.540.9170
F: 407.540.9171

TAMPA
100 North Tampa ST—STE 2120
Anthony Petrillo, Managing Partner
T: 813.226.0081
F: 813.226.0082

JACKSONVILLE
301 W. Bay St—STE 1050
Todd Springer, Senior Partner
T: 904.791.9191
F: 904.791.9196

TALLAHASSEE
6265 Old Water Oak Rd – STE 201
James Waczewski, Senior Partner
T: 850.385.9901
F: 850.727.0233

FIRM ADMINISTRATOR: 954.847.2909 | **CLIENT RELATIONS: 954.762.7038** | **ACCOUNTING: 954.847.2903**

HUMAN RESOURCES: 954.847.2932 | www. **LS-Law**.com | E: LS@**LS-Law**.com