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LEGAL UPDATE

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Liability

No Speculation Allowed for Lost Earning Capacity and Future Medical Claims by Christopher Moore, Junior Partner

Chris Moore, Esq.

A sunbather sued the County for negligence after she was run over by a beach patrol truck in the matter styled Volusia County v. Joynt, 2015 WL 7017429, 40 Fla. L. Weekly D2563 (Fla. 5th DCA 2015). The trial court denied the defendant County's motion for directed verdict on damages for lost earning capacity and future medical expenses. The Fifth District Court of Appeal reversed the jury's award for those damages and remanded the case to the trial court to strike the lost earning capacity and future medical expense damage amounts from the final judgment. The Fifth District provided an excellent discussion as to the burden of proof a Plaintiff must meet in order to take such damage claims to a jury.

Plaintiff Joynt was sunbathing in Volusia County when she was run over by a County beach patrol truck in July 2011. She was hospitalized for six days due to skull fractures and internal injuries. After her return to her home in Kansas, she had surgery to reconstruct her left ear, and she had a gold weight inserted into her left eyelid to help her blink. Joynt also had paralysis on the left side of her face, chronic pain in her upper back, radiating chest pain, headaches, memory loss and continued to have difficulty hearing in her left ear.

Read More . . . P. 2

Verdicts, Summary Judgments, Appellate Results

Defense Verdict: Trucking Accident

Managing Partner Dan Santaniello and Miami Junior Partner Luis Menendez-Aponte received a defense verdict on December 3, 2015 in a traumatic brain injury Trucking liability lawsuit. Plaintiff, a 37 year old male was involved in a catastrophic intersection accident with an 18 wheeler semi-truck operated by the Defendant driver. Plaintiff's vehicle was completely destroyed due to the severe impact and the Plaintiff had to be extracted from the vehicle by first responders using the jaws-of-life. After Plaintiff's release from the hospital, the Plaintiff underwent pain therapy, orthopedic therapy, and began treating with a neurologist Nicholas Suite, MD and neuro-psychologist Alejandro Arias, Psy.D. for alleged traumatic brain injury sustained during the accident. The extent of the traumatic brain injury remained in dispute throughout litigation.

Plaintiff's total medical bills were $246,234.62. The present total value of future economic was estimated between $7,060,266 to $10,437,824 due to plaintiff's inability to work and

Read More . . . P. 10

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No Speculation Allowed for Lost Earning Capacity and Future Medical Claims cont.

The jury awarded $500,000 for Plaintiff's lost earning capacity. Plaintiff worked as a paraeducator until May 2010, when she and her husband agreed that she would take a break from work until their youngest child started kindergarten. A paraeducator is a teaching-related position to provide specialized assistance for students in elementary and secondary schools. She resumed working as a full-time paraeducator earning $18,000 per year with benefits, starting just over a year after the accident.

Plaintiff testified that she loved her job and intended to continue working there the following school year. Her principal confirmed that she planned for Joynt to return the next school year. The principal testified that none of Joynt's physical limitations would affect her ability to be promoted, but that she would be reevaluated if her health ever declined. Various doctors testified that her injuries would likely cost Plaintiff her job.

Plaintiff/Appellee Joynt argued on appeal that the $500,000 award was the equivalent of earning $17,241.38 per year until she was 65.

"A jury instruction on diminished capacity to earn in the future is warranted when the record demonstrates the existence of 'reasonably certain evidence that the capacity to labor has been diminished and that there is a monetary standard against which the jury can measure any future loss.'" Hubbs v. McDonald, 517 So. 2D 68, 69 (Fla. 1st DCA 1987) quoting Long v. Publix Super Markets, Inc., 458 So.2d 393, 394 (Fla. 1st DCA 1984). "A plaintiff must demonstrate not only reasonable certainty of injury, but must present evidence which will allow a jury to reasonably calculate lost earning capacity." W.R. Grace & Co.-Conn. v. Pyke, 661 So.2d 1301, 1302 (Fla. 3rd DCA 1995).

Here, the trial court discussed that "[i]t just would be pure, abject speculation" for a jury to pick out any particular age as the time when she would be unable to work her paraeducator job in the future, which the appellate court explained was precisely the reason why the claim should not have been submitted to the jury.

The jury awarded $100,000 for her future medical expenses. Dr. Amstutz testified that Plaintiff may continue being dependent on using supplemental artificial tears and gels, but had not treated her since October 2011. Plaintiff's ear surgeon testified it was possible, between a 40-50% chance, that she would require another surgery on her left ear. He did not provide the cost of another ear surgery nor the cost of a hearing aid.

Plaintiff's primary care physician testified that Plaintiff's upper back pain and right-sided chest pain would probably worsen or bother her, and she would probably need to continue on pain medication. This doctor also testified she may need a hearing aid and possibly would need epidural injections, but did not provide costs for either of those.

Plaintiff's primary care physician testified that Plaintiff's upper back pain and right-sided chest pain would probably worsen or bother her, and she would probably need to continue on pain medication. This doctor also testified she may need a hearing aid and possibly would need epidural injections, but did not provide costs for either of those.

Defendant's compulsory otologist testified a typical hearing aid would cost thousands of dollars and last between four and twenty years. He said she was a candidate for a hearing aid, but that actually getting one was her choice, and that she should continue seeing an ear specialist three to four times a year, and keep seeing her general practitioner to manage her sleep disturbances and medications.

Plaintiff testified that she would prefer to not get a hearing aid. She said she spent about $80 per month on pain and sleep medication and did not expect that amount to change.

Florida's standard jury instruction 501.2(b) limits the recovery of future medical expenses to those "necessarily or reasonably ...to be so obtained." "[A] recovery of future medical expenses cannot be grounded on the mere 'possibility' that certain treatment 'might' be obtained in the future." White v. Westlund, 624 So.2d 1148, 1150 (Fla. 4th DCA 1993) citing 2 *Damages in Tort Actions*, sect. 9.55(1), at 9-45 (1986).). "In every case, plaintiff must afford a basis for a reasonable estimate of the amount of his loss and only medical expenses which are reasonably certain to be incurred in the future are recoverable." Loftin v. Wilson, 67 So.2d 185, 188 (Fla. 1953). Further, the amount of past medical expenses incurred does not by itself

Read More . . . P. 3

No Speculation Allowed for Lost Earning Capacity and Future Medical Claims

provide a reasonable basis for a jury to compute future medical expenses. See DeAlmeida v. Graham, 524 So.2d 666, 668 (Fla. 4th DCA 1987).

Here, the appellate court found that Plaintiff failed to meet her burden of providing evidence from which a jury could determine with reasonable certainty the future medical expenses that would be incurred. Instead, the evidence was just speculative assertions. Further, Plaintiff failed to show the cost for future medical treatment. Plaintiff's reliance on past billing statements was insufficient as they did not clearly set forth the cost of a medical visit.

Ultimately, the Fifth District affirmed only the $2 million past and future pain and suffering jury award, which was not challenged by the County on appeal.

About Chris Moore

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Chris Moore, Esq. is a Junior Partner in the Boca Raton office and member of the BI Team. He has been practicing for over a decade and handles matters involving complex civil litigation. Chris concentrates his practices in construction defect claims, premises liability, automobile liability, general liability, wrongful death and products liability matters. He also handles insurance coverage disputes, uninsured/underinsured motorist claims and matters involving fraud. Prior to joining the firm, he was a trial attorney and shareholder at a law firm in West Palm Beach.

Chris earned his Bachelor of Arts degree from Baylor University (1998) and obtained his Juris Doctorate from the University of Miami (2001). In 2012, Chris was a fellow at the ABOTA National Trial College at Harvard University. He is admitted in Florida (2001) and to the United States District court, Southern District of Florida.

Spoliation by Dexter Romanez, Junior Partner

Dexter Romanez, Esq.

A simple rear-end accident can cost a carrier millions, when evidence is lost or destroyed. Spoliation of evidence can be negligent, intentional, or in bad faith, and can be committed by plaintiffs, defendants, or third parties such as rental car companies or insurance companies. The remedies for spoliation of evidence can vary from sanctions, adverse inferences, rebuttable presumptions, or tort damages.

In order to hold a party liable in Florida under a spoliation of evidence claim, the party must prove: 1) existence of a potential civil action, 2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, 3) destruction of that evidence, 4) significant impairment in the ability to prove the lawsuit, 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and 6) damages.[1]

An action for spoliation of evidence exists only when there is a potential litigation of an underlying action, such as a negligence action when the complaint is filed. However, some courts have held that notice of intent to file a lawsuit is enough.

In examining claims for spoliation of evidence against our insured, the first issue would be whether or not there was a legal duty to preserve the evidence in question. Florida law has consistently held that there is no common law duty to preserve evidence in anticipation of litigation in Florida.[2] However, a duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request (after a lawsuit has already been filed).[3]

I. By Contract or Waiver

A duty will be imposed if a party orally agrees to preserve evidence at the request of another party.[4] In Miller v. Allstate, the insurer agreed to preserve the evidence and the court later found there to be a duty imposed on Allstate based on the oral agreement.

A governmental agency may waive its sovereign immunity to claims for spoliation of evidence if it creates a special relationship and corresponding duty to the party by promising or agreeing to take some specific action at the individual's request, in this case to preserve the evidence.[5]

II. Statutory Duties to Preserve

The Workers' Compensation and Medical Malpractice Statutes impose a duty to preserve evidence. Interestingly, requests for examination under 1.380 of the Florida Rules of Civil Procedure has also been found to trigger a duty to preserve evidence.

A. Workers' Compensation

Employer has duty to cooperate with Workers' Compensation claim and that includes preserving critical evidence. [6] The statutory duty arose from Florida Statutes section 440.39(7) that imposes a duty on an employer to cooperate with an employee in the prosecution of claims and potential claims against third-party tortfeasors. General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So.2d 276 (Fla. 3d DCA 1995) (holding section 440.39(7) imposes duty to preserve evidence). Furthermore, the employer's workers' compensation immunity will not bar a spoliation claim against the employer. [7]

B. Medical Malpractice

Under Florida Statutes section 395.3025, the medical care provider has a statutory duty to preserve records and provide copies of the same to the patient, guardian, curator, or personal representative after treatment has ended. St. Mary's Hospital, Inc. v. Brinson, 685 So.2d 33 (Fla. 4th DCA 1996).

C. Rules of Civil Procedure

The Florida Rules of Civil Procedure can impose such a duty. Florida Rule of Civil Procedure 1.360 has been interpreted to create a duty to preserve evidence once the opposing party has filed a formal request for an independent medical exam.[8]

III. Properly served discovery request or subpoena

Florida definitely recognizes a duty to preserve evidence *after* a lawsuit has been filed. "[A] party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request."[9] However, there are cases from the District Court of Appeal for the Fourth District of Florida that have

Read More . . . P. 5

Spoliation Cont.

expanded that duty to earlier stages in litigation.

IV. Self-Created Duty As a Result of Preservation Efforts

In Hagopian v. Publix Supermarkets, the court required a defendant to preserve evidence once it took the proactive steps to preserve it on its own.[10] In that case, Publix initially preserved broken glass bottles that caused some injuries, but later could not produce it when requested to do so. As a result, the court allowed the jury to hear a spoliation claim against Publix.

When the Spoliator is the Defendant

What happens when the spoliator is the defendant in the underlying negligence case? The Fourth District Court of Appeals held in Martino v. Wal-Mart that (1) the duty to preserve evidence is not a strict legal duty and (2) there can be no claim of spoliation against a defendant in a related negligence case where the same defendant unintentionally misplaced or destroyed evidence prior to litigation. [11] Why? There are sufficient remedies available to the Court under Florida Rules of Civil Procedure 1.380 of the to deal with this problem, such as striking pleadings.

Rather than filing a separate cause of action for spoliation of evidence, the Plaintiff would benefit from an inference favorable to it in the related negligence case regarding the missing evidence. The Fourth District Court of Appeals further held in Martino that where the unexplained destruction or loss of evidence was unintentional and preceded the litigation, the unfavorable inference was not mandatory but rather at the discretion of the court. [12]

Where a party fails to preserve crucial evidence once an action has commenced, the court may order a new trial with a negative inference against the spoliator regarding the missing evidence.[13] In Pinedo, the management company failed to preserve a toilet on which the plaintiff hit her head after she sustained a fall in a bathroom on the premises. The toilet was discarded by an agent of the defendant after the complaint had been filed and discovery had begun. The toilet apparently aggravated her injuries in the fall because of its poor condition or construction.

There, the court ordered the jury to consider the plaintiff's spoliation claim only if the jury found against the plaintiff on the negligence claim since the defendant had discarded the evidence upon which the plaintiff's case rested. The jury found for the plaintiff only on the spoliation claim. On appeal, the Court remanded for a new trial on the negligence claim with an adverse inference regarding the toilet that was unfavorable to the defendant, thereby creating a rebuttable presumption of negligence.[14]

On July 7, 2005, the Florida Supreme Court heard the Martino v. Wal-Mart case and reversed two decades of Florida precedent by holding that there is no longer a "first-party" tort cause of action for spoliation of evidence. In that decision, the plaintiff sued Wal-Mart for negligence after she suffered an injury when her shopping cart collapsed while she was ringing up goods at a cashier's station. During discovery, Martino requested inspection of the shopping cart, as well as electronic surveillance video, both of which Wal-Mart could not produce. Martino filed a second amended complaint and added a claim of spoliation. At trial, Martino sought an adverse inference jury instruction, which the trial court denied. Instead, the court granted Wal-Mart's motion for directed verdict.

Martino appealed, arguing that the trial court should have allowed an adverse inference jury instruction due to Wal-Mart's destruction of electronic evidence. The Fourth District found no independent cause of action for spoliation for electronic discovery violation. The Florida Supreme Court agreed, finding that the use of presumptions or sanctions may create serious due process concerns. The Florida Supreme Court also found there was no independent cause of action for first-party spoliation of evidence in Florida. The Court held that while failure to produce the electronic material could lead to an adverse inference, an adverse inference was not proper because Martino had filed suit two years after the incident and no court order required Wal-Mart to preserve evidence.

As noted by Justice Wells, the issue of duty to preserve is a critical one because "storage space, both in warehouses and in computers, have finite limits." The uncertainty as to whether the courts will find a presuit common law duty at all, or, if notice is required, whether such notice was "adequate" to

Read More . . . P. 6

Spoliation Cont.

create the duty, presents great problems and risks for businesses who are subject to the "constant threat of litigation." [15]

A. SETTLEMENT AGREEMENTS & SET-OFF

Spoliation is **not** an injury arising out of and in the course of performance; thus, a carrier is not entitled to recover a *pro rata* share of damages its insured is required to pay to an employee for negligent destruction of evidence.[16] The spoliation claim is a cause of action that is essentially the same as a tort claim for damages on negligence or products liability substantially impaired by the lack of evidence.[17] In that context, a settlement agreement in a products liability claim could not be admitted in the related spoliation claim. There also was a right of set-off of the damages awarded in the spoliation claim.

B. INSURANCE POLICY COVERAGE (COMMERCIAL AND WORKERS' COMP)

Any claims for spoliation of evidence under a workers' compensation policy must be closely examined to see if there is coverage. A workers' compensation policy covering "bodily injury by accident" will **not** cover a spoliation of evidence claim because a spoliation of evidence claim arises from the damages suffered from the loss or impairment of the related tort claim, not from the actual bodily injury.[18] In a separate case, the court ruled that a general commercial liability policy with a "bodily injury by accident" exclusion will **not** cover a spoliation claim since the claim has its basis in a bodily injury.[19]

SANCTIONS AND REMEDIES

Where the Court finds that there has been prejudice to the Plaintiff when the spoliator has lost evidence after a request to preserve, it may strike the defenses of the spoliator under Florida Rule of Civil Procedure 1.380, strike expert witness testimony, enter adverse inferences regarding evidence, or use jury instructions.[20] The sanction will vary according to the prejudice to the other party, what is required to cure, and the extent of bad faith by the spoliator.[21] A court may enter a judgment against the spoliator in the most egregious cases where there is a proven intent to destroy evidence and harm the opposing party's claim.[22]

In order to avoid imposition of sanctions for destruction of evidence in pending lawsuits, consider the following:

- Take the opportunity to inspect evidence, if offered by the opposing party. Courts will not sanction exclusion of evidence or otherwise assist a party that demonstrates it had no intention of inspecting evidence later destroyed by the opposing party.

- Be certain to advise adverse parties or likely adverse parties and offer them an opportunity to inspect any physical object in its post-accident condition. Keep a record of any offers to inspect and the responses received.

- If it is necessary to discard or destroy physical evidence before a potential opponent has had an opportunity to inspect it, make a careful photographic or video record. Although some courts may not accept such evidence as a substitute, an effort to minimize any prejudice the destruction may cause can be considered when determining the spoliator's culpability.

- Take all reasonable steps to locate missing evidence, including tracing it to third parties, before seeking judicial intervention. As the injured party, in many jurisdictions, the movant bears the burden of demonstrating the absence of the destroyed evidence will cause it prejudice and it did all it could to locate the missing evidence.

- Do not assume the absence of a pending lawsuit leaves your client free to discard or destroy potentially relevant evidence without adverse consequences.

- Bear in mind, when analyzing requests for sanctions for spoliation, courts generally focus on culpable conduct and prejudice to the innocent party.

For questions about spoliation or assistance with your matters, please contact Dexter Romanez, Esq. in the Miami office (T: 305.377.8900).

1. Cont'l Ins. Co. v. Herman, 576 So.2d 313 (Fla. 3d DCA 1990).
2. Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So.2d 843 (Fla. 4th DCA 2004).

Read More . . . Page 7

Spoliation Cont.

Endnotes

[3] Gayer v. Fine Line Const. & Elec., Inc., 970 So.2d 424, 426 *Fla. 4th DCA 2007).

[4] Miller v. Allstate, 573 So. 2d 24 (Fla. 3d DCA 1990).

[5] Brown v. City of Delray Beach, 652 So. 2d 1150 (Fla. 4th DCA 1995).

[6] Builders Square Inc. v. Shaw, 755 So. 2d 721 (Fla. 4th DCA 1999).

[7] Townsend v. Conshor, Inc., 832 So. 2d. 166 (Fla. 2d DCA 2002).

[8] Vega v. CSCS International, N.V., 795 So.2d 164 (Fla. 3rd DCA 2001).

[9] Strasser v. Yalamanchi, 783 So.2d 1087, 1093 (Fla. 4th DCA 2001).

[10] Hagopian v. Publix Supermarkets, Inc., 788 So.2d 1088 (Fla. 4th DCA 2001).

[11] Martino v. Wal-Mart, 835 So. 2d 1251 (Fla. 4th DCA 2003).

[12] Martino v. Wal-Mart, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003).

[13] Safeguard Management, Inc. v. Pinedo, 865 So.2d 672, (Fla. 4th DCA 2004).

[14] *See also* Amlan Inc. v. Detroit Diesel Corp., 651 So.2d 701, 703 (Fla. 4th DCA 1995).

We distinguish cases in which the [discovery] misconduct alleged is the destruction or unexplained disappearance of crucial evidence. In those cases, an instruction **may** be given concerning the inference that the withheld or missing evidence would be unfavorable to the party failing to produce the evidence. Also the destruction or unexplained absence of crucial evidence **may** result in a permissible shifting of the burden of proof.

[15] **Martino, 908 So. 2d at 349** (Wells, J. specially concurring). Of course, plaintiffs control when (and if) a lawsuit is brought, and plaintiffs individually, generally speaking, have far less evidence to preserve than a big corporation. However, because insurance companies often store physical evidence for a plethora of potential plaintiffs, "[i]t is essentially impossible for everyone (even an insurance company) to hold onto every piece of potential evidence just because there is a possibility that litigation may arise sometime in the future." Silhan, 236 F. Supp. 2d at 1309 n.8. Therefore, although at first glance it would appear that a common law presuit duty to preserve evidence pragmatically makes a little more sense for plaintiffs than it does for defendants from a "storage space" viewpoint, it actually does not in the real world.

[16] Shaw v. Cambridge Integrated Services Group, Inc., 888 So. 2d 58 (Fla. 4th DCA 2004).

[17] Builders Square Inc. v. Shaw, 755 So. 2d 721 (Fla. 4th DCA 1999).

[18] Shaw v. Cambridge Integrated Services Group, Inc., 888 So. 2d 58 (Fla. 4th DCA 2004).

[19] Lincoln Insurance Co. v. Home Emergency Services, Inc., 812 So. 2d 433 (Fla. 3d DCA 2001).

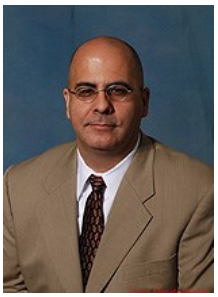
[20] Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824 (Fla. 4th DCA 2002.

[21] Fleury v. Biomet, 865 So.2d 537, (Fla. 2d DCA 2004).

[22] Tramel v. Bass, 672 So.2d 78 (Fla. 1st DCA 1996).

CMS to Collect Conditional Payments Prior to Settlement: CRC Process for Collection of Conditional Payment

by Rey Alvarez, Junior Partner



Rey Alvarez, Esq.

Late last year, you may have noticed a difference in the way CMS is approaching the collection of conditional payments. If a liability insurer, no fault or workers' compensation entity that has an ongoing responsibility for medical, CMS is now collecting conditional payments before settlement. CMS through their recovery contractor, the Commercial Repayment Center (CRC) is being very aggressive in their collection practices, If a deadline is missed you can find yourself facing legal action from the department of Treasury. In more than one case I have seen letters from CMS ignored which resulted in collection actions from the Department of Treasury. The conditional repayment process explained below offers ways to dispute conditional payments. There are very precise time periods that must be followed.

In July 2015, CMS announced that effective October 2015 "the CRC will assume responsibility for the recovery of conditional payments where CMS is pursuing recovery directly from a liability insurer (including a self-insured entity), no-fault insurer or workers' compensation (WC) entity as the identified debtor". If an insurance company has an ongoing responsibility for medical, the CRC will now be attempting to collect conditional payments even prior to settlement.

Now more than ever, it is extremely important to pay attention to any mailings received from CMS or their contractors.

Medicare defines a conditional payment as a "Medicare payment for services for which another payer is responsible…" It is a three part test, first the injured person must be a Medicare Beneficiary. Secondly, Medicare made a payment and lastly, there is another payor that should responsible for the payment.

The first two parts of the definition are relatively simple, the injured person must be on Medicare and Medicare must have a payment. The last part is where it gets a little fuzzy. Upon reviewing conditional payments, if you believe that some of the conditional payments are inaccurate, you must act quickly.

Based on information from CMS' website, below is an example of a typical recovery case, where Medicare is pursuing recovery directly from the applicable plan.

1. Medicare is notified that the applicable plan has primary responsibility.

Medicare may learn of other insurance through a Medicare, Medicaid, and SCHIP Extension Act (MMSEA) Section 111 report or beneficiary self-report. If Medicare is notified that the applicable plan is primary to Medicare, Medicare records are updated with this information.

2. CRC searches Medicare records for claims paid by Medicare based upon the information reported.

The CRC begins identifying claims that Medicare has paid that are related to the case, based upon details about the type of incident, illness, or injury alleged. The claims search will include claims from the date of incident to the current date. If a termination date for Ongoing Responsibility for Medicals (ORM) has already been reported, the CRC will collect claims through and including the termination date.

3. CRC issues Conditional Payment Notice (CPN) to the applicable plan.

The CPN provides conditional payment information. **It advises the applicable plan that certain actions must be taken within 30 days of the date on the CPN or the CRC will automatically issue a demand letter**. This notice includes a claims listing of all items and services that Medicare has paid that are related to the case. It also explains how to dispute any items and services that are not related to the case.

4. Applicable plan submits a dispute.

The applicable plan has 30 days to challenge the claims included in the CPN. The applicable plan may contact the CRC or use the Medicare Secondary Payer Recovery Portal (MSPRP) to respond to the CPN.

5. CRC issues demand letter.

The demand letter advises the applicable plan of the amount of money owed to the Medicare program and requests reimbursement within 60 days of the date of the letter. Failure to pay or appeal may result in notice of Intent to

Read More . . . P. 9

CMS to Collect Conditional Payments Prior to Settlement: CRC Process for Collection of Conditional Payment cont.

Refer the debt to the Department of Treasury and further collection actions, including, but limited to, fines, interests and double damages if legal action is taken. Again, the CRC is being very aggressive.

6. Applicable plan submits an appeal.

An applicable plan has 120 days from the date the applicable plan receives the demand letter to file an appeal. Receipt is presumed to be within 5 calendar days absent evidence to the contrary.

7. Applicable plan submits payment.

If the CRC receives payment in full, it will issue a letter stating that the specified debt has been resolved. The letter will also note that new cases may be created if the applicable plan maintains ORM or the CRC receives information on additional items or services paid by Medicare during the period of ORM. Interest on the debt accrues from date of the demand letter and, if the debt is not resolved within 60 days, is assessed for each 30 day period the debt remains unresolved.

As you cans see, every step of the process carries a particular time frame, now that CMS can collect conditional payments **prior** to settlement, it is imperative that any and all CMS letters that are received, be reviewed carefully and that the appropriate steps be followed as outlined herein.

For assistance with Workers' Compensation claims or please contact Rey Alvarez in the Miami office (T: 305.377.8900).

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Rey is the Managing Partner for the Workers' Compensation and Medicare Compliance Division. He also serves as WC Committee Chair for the Florida Defense Lawyers Association. Martindale-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 is a member of the Florida Defense Lawyer's Association (FDLA) and Claims & Litigation Management Alliance (CLM). Rey co-authored with Seth Masson, Esq. of Luks, Santaniello an article on "How Big Is the Gig? The Sharing Economy's Impact on Workers' Compensation" that appears in the February—March 2016 issue of the Claims and Litigation Management Alliance's Workers' Compensation magazine. Rey is a monthly columnist for the publication. Rey also co-authored with Shana Nogues, Esq. of Luks, Santaniello an article on "Understanding The Application of Florida's Workers' Compensation Immunities" that was published in The Florida Defense Lawyers' Association publication of Trial Advocate Quarterly (Spring 2015). He also co-authored with Managing Partner Daniel Santaniello a White Paper on Medicare Reporting that was published in the Trial Advocate Quarterly (i.e., Volume 30, Number 4, Fall 2011) and 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).

Rey 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).

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Dexter Romanez, Junior Partner in the Miami office is an expert in Civil Trial and Board Certified by The Florida Bar. He has been practicing for over a decade and handles matters involving catastrophic injuries. Dexter concentrates his practices in trucking negligence, automobile negligence, premises liability and negligent security, wrongful death and bad faith matters. He earned his Bachelor of Science degree from Florida International University (1999) and obtained his Juris Doctorate from Nova Southeastern University (2003).

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Verdicts and Summary Judgments cont.

attendant care. In addition to the Plaintiff's personal injury claims, the Plaintiff alleged separate causes of action against the Defendant driver's employer including vicarious liability, negligent hiring, negligent retention, negligent training, negligent entrustment, negligent maintenance of the semi-truck, and various violations of Federal Motor Carrier Safety Regulations resulting in injuries to the Plaintiffs. The Court permitted a claim for punitive damages against both defendants based upon repeated FMCSA violations.

Furthermore, the Plaintiff's spouse alleged a loss of consortium claim. Due to the punitive damage and negligent hiring/retention claims, the Court trifurcated trial into three phases. Liability was tried in phase one. The Defendants did not appear at trial as the driver was in jail and the company was dissolved. Defense counsel contended that the independent eyewitness, a CDL driver who was driving alongside Plaintiff on U.S. 27, was not reliable when he testified the Defendant ran the red light. The defendant also argued that Plaintiff had a sufficient time to stop if he had reacted normally (1.5-3 seconds), even if Defendant ran the red light. The jury found no negligence on the part of the Defendant driver.

Defense Verdict— Motor Vehicle Accident

Managing Partner Dan Santaniello and Miami Junior Partner Luis Menendez-Aponte received a defense verdict on January 8, 2016 in the motor vehicle accident matter styled Evelia Rodriguez v. Humberto Torres. The accident occurred when the Defendant, Humberto Torres, rear-ended the Plaintiff, causing significant property damage to the Plaintiff's vehicle. The Defendant pled the affirmative defense of sudden loss of consciousness. According to the Defendant, the accident happened when he lost consciousness due to the sudden onset of an epileptic seizure, a condition he had never suffered from before this accident. To dispute the Defendant's claim of sudden loss of consciousness, the Plaintiff introduced the Defendant's own medical records which indicated that the Defendant had been experiencing the epileptic condition for several years. The Defendant disputed the information contained in his medical records as entered in error, and stressed the fact that the only records evidencing complaints of epileptic seizure were generated after the accident.

The Plaintiff received care in the form of chiropractic treatment for several weeks, along with orthopedic and neurological consultations. Ultimately, the Plaintiff underwent a meniscectomy to repair the torn ligament in the right knee. Plaintiff incurred medical bills totaling $66,087. The Plaintiff's final settlement demand prior to trial was $250,000. In addition to disputing negligence, the Defendant also disputed causation. The Defendant highlighted the Plaintiff's documented complaints of knee pain for years prior to the accident, and presented medical testimony to dispute the mechanics of the injury as alleged. The Jury entered verdict finding that Defendant, Humberto Torres, suffered a sudden loss of consciousness or capacity before the alleged negligence that was neither foreseen nor foreseeable.

Defense Verdict— Premises Liability

Founding Partner Jack Luks and Senior Partner David Lipkin received a defense verdict in the premises liability matter styled Felipe Ernani vs. Mynt Holding Co., LLC. on March 9, 2016. Mynt lounge was the only remaining defendant, both the city and the police officers settled out of this case several years ago. The plaintiffs alleged that as the police officers were off duty and working for Mynt as specially assigned off duty police officers paid for by Mynt, that Mynt was responsible for their conduct. Tallahassee Appellate Partner James Waczewski obtained summary judgment on these claims. Plaintiff continued to argue that Mynt was responsible for the damages caused by the police as Mynt's security guards allegedly set in motion the chain of events. This was also rejected by the court as were claims of negligent hiring and supervision. Plaintiff continued to allege battery and intentional infliction of emotional distress against Mynt for the acts of the security guards and the jury returned a defense verdict on those claims. However, in its subsequent written order the negligent supervision claim as to the Mynt bouncers remained at issue for trial.

Read More . . . P. 11

Verdicts and Summary Judgments cont.

Plaintiff alleged injury to his head, neck, back and a rotator cuff tear and plaintiff underwent artrhoscopic shoulder surgery in Brazil in August 2014. Plaintiffs asked for $400,000 at trial.

Struck by Shopping Cart —Favorable Verdict

Managing Partner Dan Santaniello and Miami Junior Partner Dexter Romanez received a defense verdict in the personal injury matter styled Carlos J. Colman, Sr. v. Defendant Retail Store on March 28, 2016. Plaintiff was struck by an industrial shopping cart loaded with lumber as he exited Defendant Store, when the wheels of the cart got stuck on the threshold at the exit and the lumber fell forward, causing the cart to shoot directly into the plaintiff's chest. Plaintiff immediately fell to the ground in pain unable to breathe and claimed he sustained injuries to his chest, left shoulder, cervical, thoracic, and lumbar spines. Plaintiff underwent an anterior cervical discectomy with a total disc arthroplasty at C5-6 with Dr. Thomas Roush. Plaintiff was eventually seen by Dr. Kingsley Chin for low back pain and eventually underwent a lumbar decompression with interspinous fixation and fusion at L5-S1 to resolve a disc herniation.

Plaintiff claimed permanent limitations performing activities of daily living, including the ability to run or walk without a significant limp. Plaintiff's counsel asked the jury for **$1,520,000** which included $320,000 for past medical expenses, $200,000 in future medical expenses; and $1 million in past and future pain and suffering. The jury found the Plaintiff 50% comparative negligence. The verdict was 25% less than the Proposal for Settlement and Defendant is entitled to attorney's fees and costs.

Motor Vehicle Accident —Favorable Verdict

Managing Partner Dan Santaniello and Miami Junior Partner Dexter Romanez received a favorable verdict in the motor vehicle accident matter styled Kazandra Bern v. Dafne Acevedo and Marcelle Camejo on February 18, 2016. The matter went back to trial four times. Plaintiff's counsel asked the jury for **$4.6 million**. Defendant, Dafne Acevedo was driving her son's Chevy F-250 turbo diesel pickup truck westbound on 135th Street intending to go through the intersection of 135th & Biscayne Boulevard. As Ms. Acevedo entered the intersection her vehicle was struck by two (2) vehicles attempting to turn left onto northbound Biscayne Boulevard – a 1993 Honda Civic driven by Keilin Perez followed by a 2000 Honda Civic driven by plaintiff, Kazandra Bern. Both Keilin Perez and the plaintiff contended that they entered intersection on a green turn arrow, while defendant, Dafne Acevedo maintained that she had a green light at all times. Note - Keilin Perez was initially named as a party defendant but settled with plaintiff and was a Fabre defendant at trial.

Defendant cross examined plaintiff's expert, Bryan Buchner and pointed out that the evidence was consistent with either party's version of the incident. The Court admonished Mr. Buchner's attempt to opine on the credibility of defendant's witnesses. Defendant introduced testimony from Ms. Perez that she was not a licensed driver and had never received any driver's training or education in the United States. Defendant brought out testimony from Raquel Torres that Ms. Perez became very nervous due to the presence of a police vehicle in the area and "hurried up her left turn". Defendant also elicited testimony from Ms. Torres that other cars at the intersection had to wait for traffic to clear before proceeding to turn left. This would suggest that plaintiff was turning on a green light and had a duty to yield to defendant's lane of traffic.

During the cross examination of plaintiff, defendant established that Ms. Bern did not apply her brakes, horn and otherwise did not take steps to avoid the accident. Defendant also noted that plaintiff "inadvertently" testified at her deposition that she had a green light [as opposed to a green turn arrow]. In addition, defendant called an accident reconstruction specialist, Donald Felicella who testified that the evidence was consistent with defendant's version of the accident. Lastly, Ms. Acevedo unequivocally testified that she had the green light while entering the intersection of 135th Street and Biscayne Blvd.

Plaintiff underwent a total of 5 surgeries, including a tibiocalcaneal fusion. At the time of trial, Ms. Bern's past medical expenses totaled $966,759.13. Plaintiff called rehabilitation specialist (life care planner), Larry Foreman, C.R.A. who testified that Plaintiff will need approximately $489,000 in future medical care over the remainder of her lifetime consisting of office visits, medications, injections and physical therapy. Prior to the accident, Ms. Bern worked as a medical transcriptionist earning $15.00 per hour. Her past and future loss of earning claim totaled $288,684.00. The jury found Plaintiff comparative negligence 11.67%, Fabre Defendant 50% and Defendant 38.33%. After set–offs, the net effective verdict is approximately $447,984.86. Read More . . . P. 12

Verdicts and Summary Judgments cont.

Appellate Trip and Fall — Summary Final Judgment Affirmed

Appellate Junior Partner Doreen Lasch prevailed on Appeal in a trip and fall matter styled Jeanette Garguilo v. A & N Management, Inc. and Sausalito Place HOA. Plaintiff appealed a Summary Final Judgment entered in favor of defendants homeowner association and property management company wherein plaintiff tripped and fell in a "tree hole" located in her front lawn adjacent to her driveway and sustained multiple injuries. The homeowner association and property management company maintained the lawn. Plaintiff alleged that the homeowner association and the management company were negligent in creating and maintain the dangerous condition. The appellate court affirmed the Summary Final Judgment.

Slip and Fall — Final Summary Judgment

Boca Raton Senior Partner Marc Greenberg received a Final Summary Judgment in a slip and fall matter styled Klein v. Defendant Store and John Doe. The lawsuit arose when eighty one year old Plaintiff, a patron in Defendant Store alleged he slip and fell on a liquid substance near the drinking fountain. Plaintiff alleged blood clots in the lung, hip fracture and facial lacerations and underwent two surgeries. Plaintiff's doctor Russel Weisz opined Plaintiff had a 13% lower extremity impairment and 5% whole body impairment. Plaintiff alleged $700,000 in past medical expenses. Prior to the motion for summary judgment, we had served a Proposal for Settlement and plaintiff may now be liable for attorney's fees.

Appellate Fall from Ladder— Final Judgment Affirmed

Appellate Junior Partner Doreen Lasch prevailed on Appeal in a personal injury matter styled Kevin Connor v. Villa D'Este and Campbell Property Management. Plaintiff was injured when he fell from a ladder onto the driveway of his neighbor's house while he was helping his neighbor clean the parapet over his garage door. Plaintiff sued the homeowner association and property management company alleging that the ladder slipped out from under him due to the slippery condition of the driveway which had been re-sealed by the defendants. A trial resulted in a defense verdict and final judgment was entered in favor of both defendants. Plaintiff appealed the final judgment contending that the trial court made several evidentiary errors which, together with improper comments by defense counsel, prevented him from receiving a new trial. The Fourth District Court of Appeal affirmed the Final Judgment in favor of defendants.

Appellate Negligent Security – (per curiam) *affirmed*

On December 22, 2015, the Fifth District Court of Appeal Per Curiam Affirmed final summary judgment in a negligent security matter styled James Pantages v. Sub Station I, Michael Hallal, and Deborah Hallal. Tampa Senior Associate Joseph Kopacz handled the appeal to the Fifth District Court of Appeal and the hearing on the Motion for Summary Judgment before Judge Patricia Thomas (Citrus County) on September 5, 2014. Plaintiff claimed defendants were negligent in allowing a homeless Vietnam Veteran on the premises who eventually stabbed plaintiff after a physical altercation. The homeless man was allowed to stay in a tent in the woods behind the insureds' restaurant. Plaintiff was employed as a cook at defendants' restaurant. The homeless man also worked part-time at the restaurant and was friends with plaintiff. An altercation took place in the kitchen when plaintiff attempted to remove the homeless man from the premises, in turn, the homeless man stabbed plaintiff in the stomach. Plaintiff was air-lifted to Tampa General with a laceration to his abdomen requiring 30-40 staples. The Court found defendants did not breach any duty owed to Plaintiff which was a legal cause of the injury. The Fifth DCA upheld this decision.

LUKS, SANTANIELLO
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Our verdicts tell the story.

Luks, Santaniello, Petrillo & Jones Adds New Legal Division To Represent Environmental Claims and Expand Professional Liability Team.

Stuart L. Cohen

Erik M. Vieira

Dale J. Spurr

Luks, Santaniello, Petrillo & Jones has added a new legal division spearheaded by **Stuart L. Cohen, Senior Partner** to represent environmental insurance claims. Cohen has twenty-three years of experience in environmental litigation, professional liability and product liability matters. The section will assist businesses and insurers with litigation involving bodily injury, death and/or property damage claims attributed to environmental exposures from Asbestos, Silica, Lead, Benzene, hazardous materials and toxic substance exposures. The new division also adds Attorneys **Erik M. Vieira, Esq**. and **Dale J. Spurr, Esq**. who are admitted in both Florida State and Federal Courts. Cohen, Vieira and Spurr are based out of the firm's Miami office. The division will serve manufacturers, distributors, contractors, transporters and insurers who face substantial risk from high-exposure Toxic Tort and Environmental litigation.

The new members add to the firm's professional liability practice handling directors and officers, professional errors and omissions, and employment practices liability claims. New members will expand the practice to assist insurance agents and brokers, real estate professionals, and securities brokers and broker-dealers on cases involving allegations of negligence, fraud, breach of fiduciary duty, failure to procure insurance, failure to be licensed, and other common law and statutory claims. They will also assist broker-dealers in securities arbitration proceedings with the Financial Industry Regulatory Authority (FINRA) and representation of professionals in the securities field including defending against claims of account-churning, suitability, violations of "Blue-Sky Laws," and other state and federal claims arising from the relationship between securities brokers and their clients, as well as licensing issues.

Cohen is a 1991 graduate of Nova Southeastern University School of Law and a 1988 graduate of City University of New York, Queens College. Vieira is a 2007 graduate of Catholic University of America, Columbus School of Law where he also earned a Masters of Social Work. He earned his Bachelor of Arts degree in 2003 from St. John Vianney College Seminary. Spurr is a 2008 graduate of Florida International University Law School where he also earned his Bachelor of Arts degree in 2001.

"The new legal division will allow us to broaden our services to clients in the areas of environmental litigation and professional liability," says **Daniel J. Santaniello, Managing Partner**. "Our mission is to provide our clients with legal services that help them manage risk and reduce exposure. Our goal is to ensure that our clients obtain equal justice in the courtroom. "

For assistance with your matters, please contact Stuart Cohen, Erik Vieira or Dale Spurr in the Miami office on 150 West Flagler Street—STE 750.

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