



LEGAL UPDATE

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Liability

Transparency in Health Care: A New Tool to Combat Overreaching

Medical Bills by Bradley M. Latone, Esq.



The Florida Legislature recently passed the Transparency in Health Care Act, which amends section 395.301, Florida Statutes. It was passed with overwhelming support in both the House and the Senate. As the name suggests, the legislation is aimed at increasing clarity in healthcare billing procedures and creating greater consumer access to healthcare pricing. It requires hospitals, ambulatory surgical centers, and healthcare practitioners providing non-emergency services in these facilities, along with certain insurers and HMOs, to post online the average payments received for various medical services. The

Agency for Health Care Administration (AHCA) is also required to create an all-payer claims database (APCD), which will provide an online, searchable database compiling all the foregoing information. Simply put, healthcare providers will no longer be permitted to shield their billing practices from the public.

Not only will this benefit consumers, but it will provide a significant tool to combat overreaching and unreasonable medical bills presented by plaintiffs. Specifically, it will allow defense counsel to provide the jury with average costs for procedures, based on real-world data to disprove artificially inflated medical specials. In addition, this information will be available without the need for extensive and expensive non-party discovery, depositions, motions, and expert costs. Whether APCD data will ultimately be admissible

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Verdicts, Summary Judgments, Appellate Results

Favorable Verdict: Slip and Fall

Founding Partner Jack Luks and Associate Allison Janowitz received a \$4,500 net verdict on a slip and fall matter styled Michelle Santovito v. Defendant Store on October 21, 2016. Defense served a Proposal For Settlement and has filed a Motion for Entitlement of Attorneys' Fees and Court Costs. Plaintiff Santovito, was walking in Defendant Store when she stepped in a liquid substance, and slipped and fell several steps later. There was no water in the proximity of the Plaintiff when she slipped. Plaintiff claimed that she suffered herniations at L3-L4, and L4-L5 bilaterally, resulting in a laminectomy with microdiscectomy. Plaintiff's initial demand was \$600,000.00. The Plaintiff incurred \$159,000.00 in past medical expenses and boarded \$220,000.00 in future treatment. However, a year prior to the accident, Plaintiff was admitted to the hospital with L1-L2,

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however, is unclear. As a preliminary matter, no court has conclusively ruled on the admissibility of APCD data despite wide-spread implementation across the country. Two states that have implemented an APCD, Tennessee and West Virginia, statutorily precluded the admissibility of the data in civil matters. Florida, however, does not contain this proscription. As a result, whether this data is admissible will be determined by traditional evidentiary rules.

Although a Plaintiff's medical bills are normally admitted as a matter of course, the defense is always permitted to contest whether those expenses are reasonable. See Irwin v. Blake, 589 So. 2d 973, 974 (Fla. 4th DCA 1991) (holding that trial court erred by barring defense from arguing plaintiff's medical bills were not reasonable and necessary); Berrios v. Deuk Spine, 76 So. 3d 967, 970 (Fla. 5th DCA 2011) (explaining that the defense "holds the right to challenge the reasonableness and necessity of the medical expenses"). Many times, the defense is limited in its ability to contest the reasonableness of a plaintiff's medical expenses. Traditionally, reasonableness is challenged through non-party discovery, cross-examination of the plaintiff's providers, Rule 30(b)(6) depositions, CME physician testimony, and medical coding experts. The goal is to obtain evidence of what medical providers are actually paid for certain medical procedures rather than the artificial charges presented by the plaintiff. With the implementation of the APCD, this information will already be available and, if admissible, may limit the need to engage in this discovery.

This type of evidence has routinely been declared relevant to the reasonableness of a plaintiff's medical expenses. See e.g., Gulfcoast Surgery Ctr., Inc. v. Fisher, 107 So. 3d 493, 495 (Fla. 2d DCA 2013); Columbia Hosp. (Palm Beaches) Ltd. Partnership v. Hasson, 33 So. 3d 148, 150 (Fla. 4th DCA 2010); Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc., 8 So. 3d 1232, 1235-36 (Fla. 2d DCA 2009). Most of the case law in this area, however, is related to discovery disputes rather than the ultimate admissibility of the information. For example, in Hasson, the Fourth District Court of Appeals granted a petition for writ of certiorari for discovery related to the amount a hospital charged for a surgery and the amounts it usually accepted as payment. 33 So. 3d at 150. The court explained that the defendant in a motor vehicle collision was entitled to this information from the non-party hospital to contest the reasonableness of the hospital's charges in the underlying litigation. Id. It did not, however, opine as to whether the evidence would ultimately be admissible.

Nevertheless, in Lawton-Davis v. State Farm Mut. Auto. Ins. Co., the Middle District of Florida allowed the defendant to present evidence regarding the plaintiff's providers' usual and customary rates charged and received for the services and what other similar medical providers in the relevant market charged for similar services. 2016 WL 1383015, at *2-3 (M.D. Fla. 2016). The court made clear that this evidence was not to be conclusive as to reasonableness, but explained that it could be a factor the jury considered with proper instruction. Id.

The implementation of an APCD in Florida provides this exact information in a publicly available source. As a result, the evidence that once was only

available through non-party production is now available online. Assuming medical facilities provide accurate and complete information, there will be less need to engage in extensive non-party discovery because the information is already available. In addition, it will be beneficial when evaluating cases and assessing potential exposure as there will be a real-world figure of what a medical procedure actually costs, rather than the plaintiff's unreasonable bills.

However, a major obstacle to the admissibility of APCD data in state courts will be on hearsay grounds. Although it could be admissible as a public record, the answer is not clear. Section 90.803(8), Florida Statutes, provides that public records and data compilations are admissible if they set forth matters observed pursuant to a duty imposed by law as to matters which there was a duty to report.

Florida courts have clarified the foregoing to specifically include "official reports of a statistical nature" as falling within the activities of the office exception. See Benjamin v. Tandem Healthcare, Inc., 93 So. 3d 1076, 1082 (Fla. 4th DCA 2012). This definition has included an FDA report of pharmaceutical clinical trials, id., a study by the Department of Transportation regarding crash severity statistics, Am. Motors Corp. v. Ellis, 403 So.2d 459, 468 (Fla. 5th DCA 1981), and a report based on an inspection of a nursing home required by the Department of Health and Rehabilitative Services, Desmond v. Medic Ayers Nursing Home, 492 So. 2d 427, 431 (Fla. 1st DCA 1986).

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Alternatively, there is a line of cases that precludes the admission of “factual findings resulting from an investigation made pursuant to authority granted by law,” which are allowed under the federal rule. In Lee v. Dep’t of Health & Rehab. Services, the Florida Supreme Court determined that records relying “on information supplied by outside sources or that contain evaluations or statements of opinion by a public official are inadmissible” under the Florida version of the rule. 698 So. 2d 1194, 1201 (Fla. 1997). As the APCD data is supplied by outside sources, there is a potential hearsay issue based on Lee.

At the heart of Lee and its progeny, is that the contested records included opinions or evaluations of the person compiling the information. The APCD data, however, is not based on any evaluation or opinion. Instead, it is a factual report based upon data collected by the State pursuant to a statutory duty. Accordingly, the APCD data is more analogous to the FDA report, the crash statistics, and the nursing home report, all of which were based purely on factual or statistical data and were expressly admissible as public records.

Ultimately, the admissibility of this data will be resolved by the courts. The potential for combating overreaching medical bills is significant if the APCD develops as the Legislature intends. As the database grows and more information is available, we will begin to test whether Florida trial courts will admit this data and whether the appellate courts will provide a clear ruling. In the meantime, it provides one additional weapon in our arsenal to chal-

lenge overreaching and artificially inflated medical bills.

For questions about this article or assistance with your matters, please contact Bradley Latone, Esq. in the Jacksonville office (T: 904.791.9191).

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Florida's Claims Administration Statute—How to Successfully Assert a Coverage Defense by Vicki Lambert, Junior Partner.

Insurers issuing liability policies in Florida should be aware of the requirements of § 627.426, Fla. Stat. (2016) when considering issuing a reservation of rights letter based on a coverage defense. The first section of the statute provides certain actions an insurer can take without waiving its rights under the policy. The second section of the statute sets forth specific requirements that an insurer must meet before it can deny coverage based on a coverage defense.

What is a coverage defense? As contemplated by the statute, it means a defense to coverage that otherwise exists. AIU Ins. Co. v. Block Marina Inv., Inc., 544 So.2d 998, 1000 (Fla.1989). In a broad sense, if there would have been coverage but for the post-loss behavior of the insured, that is a coverage defense. For example, failure to submit to an examination under oath, failure to cooperate, late notice and settlement without the consent of the insurer constitutes a coverage defense in most instances. However, if coverage was never triggered, then this statute does not apply. For example, when there is an applicable exclusion or the policy has lapsed, such scenarios would not constitute a coverage defense. Rather, there was a lack of coverage. Florida Municipal Ins. Trust v. Village of Golf, 850 So. 2d 544 (Fla. Dist. Ct. App. 4th Dist. 2003).

To successfully assert a coverage defense, you must issue a reservation of rights letter within 30 days of when the insurer knew or should have known of the coverage defense. This letter must be sent by registered or certified mail to the last known address of the in-

sured or by hand delivery. Once the insurer has complied with this 30 day requirement, the insurer has 60 days after having sent the initial reservation of rights letter or receipt of a summons and complaint naming the insured as a defendant, whichever is later but in no case later than 30 days before trial, to:

- 1) Deny coverage and give written notice to the named insured by registered or certified mail.
- 2) Obtain from the insured a non-waiver agreement executed by the insured after full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted, along with the duties, obligations and liabilities of the insurer during and following the pendency of the subject litigation.
- 3) Retain independent, mutually agreeable counsel.

The identification and preservation of a coverage defense and the evaluation of the options available to an insurer comes with practical pitfalls. Thus, as time is of the essence, immediate consultation with coverage counsel is recommended when faced with a potential coverage defense.

For assistance with a coverage opinion or questions about how to assert a coverage defense, please contact Vicki Lambert, Esq. in the Orlando office (T: 407.540.9170).

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Vicki Lambert, Esq. is a Junior Partner in the Orlando office and member of the BI Team. She has been practicing law for fifteen years and handles matters involving complex civil litigation. Vicki concentrates her practices in coverage opinions for property and casualty insurance policies, automobile liability, premises liability, general liability, professional liability and employment matters. She also handles commercial litigation matters.

Prior to joining the firm, Vicki served as Assistant General Counsel for two leading Insurance carriers where she managed House Counsel and Litigation operations for Personal Injury Defense and handled claim, coverage and litigation issues for commercial, property and auto lines of insurance. She has also worked at several private practices as a Litigation Attorney and Partner.

Vicki earned her Bachelor of Sciences degree from Jacksonville State University in 1997 and obtained her Juris Doctorate from the University of Alabama in 2000. She is admitted in Florida (2000).

Florida Appellate Court Reverses Verdict Against Manufacturers of Asbestos-Containing Products Based on Unreliable Plaintiff's Expert Testimony by Dale Spurr, Esq.



Dale Spurr, Esq.

On September 14, 2016, Florida's Fourth District Court of Appeal reversed an \$8 million verdict for the plaintiff in Crane Co. v. Delisle¹, handing manufacturers of chrysotile asbestos-containing products a major victory in asbestos litigation statewide. The Court found that the trial court abused its discretion in admitting unreliable expert testimony upon which the plaintiff relied to prove causation. The plaintiff, Richard Delisle, sued Crane Co., as well as the successors to cigarette maker R.J. Reynolds, for causing him to contract mesothelioma through products they manufactured that contained asbestos. Specifically, Crane had manufactured gaskets containing *chrysotile*² asbestos that Delisle claims he handled while working for a paper company from 1962 to 1966, whereas R.J. Reynolds made Kent cigarettes (with filters containing *crocidolite* asbestos) which he smoked from 1952 through 1956.

At trial, to link his mesothelioma to the chrysotile asbestos found in Crane's gaskets, Plaintiff introduced the opinion of James Dahlgren M.D. (Occupational and Environmental Medicine Expert) that "every exposure" to any kind of asbestos above background level³ would be a substantial contributing cause of mesothelioma.⁴ Plaintiff also introduced the testimony of James Crapo, M.D. (Pulmonology Expert) and James Rasmuson, Ph.D. (Industrial Hygiene Expert) to opine on the potency of crocidolite asbestos used in the Kent cigarette filters, which both ex-

perts declared was a "substantial contributing cause" to Delisle's mesothelioma. The defendants moved to exclude these experts' opinions under Section 90.702, Florida Statutes, which in 2013 adopted the *Daubert*⁵ standard for reliability and admissibility of expert testimony in Florida. *Daubert* hearings ensued, and the trial court denied the defendants' motions. The plaintiff's experts presented their challenged opinions at trial, and the jury awarded the plaintiff \$8 million in damages.

On appeal, Florida's 4th District Court of Appeals found that the trial court "failed to properly exercise its gatekeeping function" under the *Daubert* standard by allowing the Delisle to present unreliable and unsupported expert testimony to the jury. In addressing the factors that a trial court must adhere to in performing its "gatekeeping function," the Fourth DCA relied heavily on assessing whether an expert's methodology is reliable: (1) whether the theory can and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error for the particular scientific technique used; and (4) whether the theory or technique has been generally accepted by the relevant scientific community.

By simply taking the experts' word that their opinions were the product of sound scientific principles and reliable methodologies, and by not requiring the experts to identify reliable scientific data or studies to support their opinions, the trial court abused its discretion. The Fourth DCA affirmed a trial court's duty under *Daubert* to look beyond an expert's credentials and scruti-

nize the data and methodology upon which he relies. With regard to Dr. Dahlgren, the Court noted, "[A]lthough Dahlgren may be an expert in the field of occupational medicine and evaluation of mesothelioma, the record does not in any way support a finding that his opinions were supported by sufficient data or based upon reliable principles and methods under a proper *Daubert* analysis."

With regard to Dr.'s Crapo and Rasmuson, the Court found that these experts failed, in part, to demonstrate a reliable foundation or basis for their opinions regarding the Kent cigarettes, and thus these opinions should not have been admitted. The appellate court also reiterated that under the *Daubert* standard an expert providing an opinion on causation must specifically identify relevant scientific studies or data and explain how they support the expert's opinion, and the expert further must explain his or her methodology and how he or she applied it to the data relevant to the case. An "expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions," the Court said in its decision, adding that courts must "*affirmatively* prevent imprecise, untested scientific opinion from being admitted." (emphasis provided).

The ruling is a victory for manufacturers of chrysotile asbestos-containing materials sued in Florida for alleged defective products, and prohibits asbestos plaintiffs from relying any longer upon

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Florida Appellate Court Reverses Verdict Against Manufacturers of Asbestos-Containing Products Based on Unreliable Plaintiff's Expert Testimony cont.

unreliable and unscientific scientific theories of causation. Trial courts applying Daubert must do more than merely "rubber stamp" questionable expert opinions; similarly, expert witnesses cannot merely cite a laundry list of scientific studies and articles in their reports and then opine generally that the products at issue caused the plaintiffs' diseases. Experts *must* explain which studies support their opinions and why, regardless of their credentials or how many times their testimony has been admitted in the past.

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Dale Spurr, Esq. is a Senior Associate in the Miami office. Dale handles complex and high exposure matters in the areas of asbestos litigation, products liability, and toxic torts. Prior to joining Luks Santaniello, Dale worked for various law practices in the areas asbestos litigation, toxic torts, wrongful death, trucking litigation and maritime liability.

Dale brings a wide breadth of experience into the practice of law. Prior to entering the legal field, Dale served a decorated career in the United States Coast Guard, performing search & rescue, maritime environmental response, and counter-narcotics operations.

Dale obtained his Bachelor of Arts in Political Science from Florida International University in 2001, and earned his Juris Doctor from Florida International University College of Law in 2008. He is admitted to practice before all state courts in Florida, the United States District Courts for the Southern and Middle Districts of Florida, and the United States Court of Appeals for the Eleventh Circuit.

¹ Crane Co., R.J. Reynolds Tobacco Co., and Hollingsworth & Vose Co., Appellants, v. Richard Delisle and Aline Delisle, his wife, Appellees, Fla., 2016 WL 4771438 (Fla. 4th DCA, 2016, unpublished)

² Notably, chrysotile asbestos is widely considered throughout the scientific community to not cause diseases like mesothelioma that may be caused by other, more potent forms of asbestos.

³ "Background level" refers to the miniscule amount of asbestos fibers naturally present in all ambient environments, generally accepted to be approximately .0002 fibers per cc of breathable air.

⁴ Remarkably, Dr. Dahlgren did not identify any scientific data or study demonstrating an association between chrysotile asbestos and disease in humans. Additionally, Dr. Dahlgren did not know of any study which supported his "every exposure" conclusion, nor did he think such a study could be done.

⁵ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Sequestration Rule: Trial Court Abused Discretion by Granting a New Trial by Allison Janowitz, Esq.



Allison Janowitz, Esq.

In the case styled Dismex Food, Inc., and Elkin O Tellez v. Bobby U. Harris, the Trial Court abused discretion by granting a new trial on the grounds that the defense violated sequestration rule, and that the defense expert witness violated a court order that he not testify as to new opinions that were not included in his report.

In February, 2011, Plaintiff, Bobby U. Harris, was rear-ended by a truck operated by the Defendant Elkin O. Tellez, and owned by Dismex Food, Inc. Harris began to treat with a chiropractor and ultimately ended up with two different doctors, Dr. Cameron and Dr. Stauber. The chiropractor referred Harris to have an MRI in March, and then, because she wasn't informed of a prior MRI, Dr. Cameron sent Plaintiff to have a second MRI in May. Neither the chiropractor nor Dr. Cameron suggested that Harris undergo any type of surgery. In December, 2011, Harris sought another opinion with Dr. Martin Stauber, and only told Dr. Stauber of the May MRI. After performing a physical examination, Dr. Stauber concluded that Harris would need surgery because he had lower back spinal ligament injury.

Dr. Elliot Lang was retained as the defense expert witness at trial, and completed a report after a physical examination of Harris. He concluded in his report among other things:

1.The image of Harris's spine from

March, 2011 MRI was "essentially normal";

2. There was evidence of injury in the May MRI that was not present in the March MRI;
3. An intervening incident must have caused the injuries to the spine;
4. Harris did not require surgery; and
5. Harris had a 0% impairment rating from the subject accident.

During Motions in Limine, the Court ruled that Dr. Lang was not permitted to testify to his new opinions that were not included in the CME report and invoked the sequestration rule set forth in section 90.616 of the Florida statutes.

During trial, Dr. Stauber testified that he would not have relied on the March, 2011 MRI as the diagnostic quality was quite poor. This was the first time Dr. Stauber had presented this opinion. Defense counsel then conferenced with Dr. Lang regarding the testimony given by Dr. Stauber, in preparation for the testimony that Dr. Lang would give the next day. There is record evidence supporting the finding that Dr. Lang and defense counsel discussed Dr. Stauber's testimony. Dr. Lang then testified consistent with his CME report that the March MRI was of diagnostic quality; he did not believe the March MRI depicted an acute injury and (3) because the May MRI showed evidence of bruising that was not present in the March MRI, there must have been an intervening injury.

The jury returned a verdict awarding Harris \$48,428.00 in past and future medical expenses but found that Harris

did not sustain a permanent injury. Harris moved for a new trial on the grounds that the conference between Defense Counsel and Dr. Lang amounted to a violation of the sequestration rule and that Dr. Lang's testimony amounted to new opinions in violation of the Court order. The trial court granted the motion for the new trial without specifying grounds for its decisions. Further, the trial court was ordered to enter a ruling pursuant to Florida Rule of Civil Procedure 1.530(f) specifying the reasons for a new trial.

As stated by the Florida Supreme Court, "the rule of sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding." Wright v. State, 473 So.2d 1277 (Fla. 1985). Thus, if the sequestered witness's testimony did not substantially differ from what it would have been without the sequestration rule being violated, then any claim that there was a violation warrants a new trial or a mistrial is meritless. Mendoza v. State, 964 So.2d 121 (Fla. 2007).

In the case at hand, it was accepted that the defense counsel violated the rule when he spoke to Dr. Lang about Dr. Stauber's testimony. However, the harsh result was rejected and that an automatic exclusion of a witness let alone a new trial should not be granted for the mere technical violation.

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The Trial Court identified two areas where Dr. Lang's testimony allegedly differed as a result of the conversation:

1. The diagnostic quality of the March MRI; and
2. That the MRIs did not show evidence of an acute injury.

After reviewing the report, and the record, it was concluded that neither instance of Dr. Lang's testimony substantially differed from what it would have been had he not been told that Dr. Stauber testified as he did. Dr. Lang's report contained several diagnostic findings based on his review of the March MRI, and therefore it cannot be argued that Dr. Lang did not believe that the MRI was of sufficient diagnostic quality. He detailed his records review in his report. Dr. Lang's CME report indicated that Harris's lumbar spine was "essentially normal." Dr. Lang also noted in his MRI that Harris's failure to inform his doctors of a March MRI resulted in the additional and unnecessary May MRI. As his report reflected, Dr. Lang believed that the March MRI was of sufficient quality to perform his analysis and to reach his conclusions. Therefore, inherent in Dr. Lang's report was his opinion the March MRI was of sufficient diagnostic quality.

It defies logic and common sense to suggest that Dr. Lang's testimony at trial could not have included his testimony as to the quality of the MRI, and therefore was not a new opinion which violated the Court's order. Further, his testimony was not substantially different as a result of being informed of Dr. Stauber's testimony regarding the

quality of the March MRI.

Because the record reflected that Dr. Lang's testimony was consistent with his CME report and not beyond the scope of the work, and did not substantially differ as a result of the violation of sequestration rule, it was concluded that the trial court abused its discretion by granting a new trial. The trial court's order granting a new trial was reversed, and the entry of a final judgment was to be entered in accordance to the jury verdict.

For questions about this article or assistance with your matters, please contact Allison Janowitz, Esq. in the Fort Lauderdale office at (T: 954.761.9900).

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Verdicts and Summary Judgments cont.

L3-L4, and L4-L5 disc bulges with degenerative disc disease and chronic pain syndrome. She was also diagnosed with a tear in her right shoulder. Plaintiff admitted that she had some problems with her left leg prior to the accident including tingling. The Plaintiff complained of constant pain and discomfort in her back, pain in her leg and shoulder pain, which significantly affected her ability to enjoy life.

Slip and Fall— Fraud on Court

Miami Senior Associate Shana Nogues obtained an order striking Plaintiff's pleadings for fraud on the Court before Judge Cueto in matter styled Leda Obregon v. Rosana Corp. Plaintiff, who was represented by Rubenstein Law, slipped and fell in Defendant's restaurant allegedly injuring her neck and back and requiring two spine surgeries performed by Dr. Roush. Her medical bills totaled over \$432,000. Through thorough investigation, Defense discovered a prior motor vehicle accident for which Plaintiff treated over 40 times for the same injuries, a SSDI application and finding based in part on the injuries she was claiming stemmed from the subject accident, over 25 additional medical providers, and payment of collateral source benefits, all of which Plaintiff failed to disclose in her discovery responses and deposition testimony. During the hearing on Defendant's Motion to Strike Plaintiff's Pleadings for Fraud on the Court, the Court stated that the Plaintiff's credibility was "shot" and she "wouldn't last a minute before a jury." Following the hearing, the Court entered its Order Striking Plaintiff's Pleadings for Fraud and dismissed the case with prejudice.

Dismissal With Prejudice— Premises Liability

Edgardo Ferreyra obtained a dismissal with prejudice in the premises liability matter styled Philip Rotondo v. Defendant Retail Store. The Plaintiff alleged he was pushing a flat bed cart in the flooring aisle when he cut his leg.

Dismissal— False Imprisonment

Edgardo Ferreyra obtained a dismissal in the False Imprisonment matter styled Shane Burnett v. Defendant Retail Store. The Plaintiff appealed to the Eleventh Cir. Court and the appeal was dismissed.

Summary Final Judgment — Fall Through Sky Light in Warehouse Building

Tampa Jr. Partner, Joseph Kopacz, obtained Summary Final Judgment in the matter of Brett Stout v. Desmond Rowden, LLC., in Hillsborough County in front of Honorable Judge Isom on August 24, 2016. Plaintiff alleged negligence against Desmond Rowden, LLC. following his fall through a skylight on a roofing job in which he was responsible for removing and replacing several skylights on a warehouse building. Plaintiff sustained significant injuries with medical bills being paid through workers' compensation of over \$650,000. Defense argued Rowden did not owe a duty as a permit holder to Plaintiff under Florida Statutes 489 and Desmond Rowden, LLC. was protected as an agent of Plaintiff's employer based on workers' compensation immunity.

Summary Judgment – Trip and Fall

Jacksonville Associate Deana Dunham, Esq. prevailed on a Motion for Summary Judgment in a trip and fall matter styled Sowders v. Simon Property Group d/b/a Pier Park LLC. on September 26, 2016. Plaintiff was shopping at the Mall and was walking in the parking lot when she tripped on a parking curb in front of her vehicle. Plaintiff lost her balance and fell, fracturing her right distal radius, and injuring her right elbow and left knee. Plaintiff claimed that she was caused to trip on a piece of rebar sticking out of the concrete parking curb. However, Plaintiff testified that she did not actually look at the parking curb before she tripped and assumed that it was the rebar which caused her to trip. Plaintiff also testified that, even though she did not see the rebar before she tripped, she was able to see it from the entry way of a store, where she was seated after the fall. The rebar itself protruded approximately half an inch from the top of the parking curb. The Court held that the condition which caused Plaintiff's fall was so open, obvious, and ordinary that the concrete parking stop and rebar that secured it to the parking lot did not constitute a foreseeable risk of harm to individuals patronizing the mall, and granted summary judgment in favor of the Mall.

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Verdicts and Summary Judgments cont.

Motion for Final Summary Judgment

Founding Partner Jack Luks and Senior Partner Zeb Goldstein prevailed on Motion for Final Summary Judgment in trip and fall matter styled Leon, Arthur vs. Simon Property Group, Inc. d/b/a Sawgrass Mills Mall on September 10, 2015 in front of Judge Henning in Broward County. The lawsuit stemmed from a trip and fall outside PF Chang's at the Sawgrass Mills Mall, over what Plaintiff claimed was construction debris and/or obstacles on the walkway. Plaintiff was a Vietnam vet and a retired Wall Street trader with significant jury appeal – he was a survivor of the 9/11 attacks and had developed permanent respiratory issues as a result. He was a likeable grandfather, who spends the majority of retired life shuttling his 4 grandkids to and from school and other extra-curricular activities. He fell on Father's Day, 2012, however his testimony as to the nature of the alleged condition was vague and he was unable to articulate the nature of the defect.

Defense moved for MSJ based on his non-descript testimony and the impermissible stacking of circumstantial inferences. Plaintiff's counsel attempted to create an issue of material fact by filing an Affidavit from Plaintiff a month before the hearing, "clarifying" his client's testimony regarding the defect at issue. We filed a response to same, arguing that this self-serving Affidavit was impermissible and could not be considered evidence in light of Plaintiff's prior deposition testimony. Judge Henning agreed. Plaintiff was diagnosed with a tear in his medial meniscus as a result of the fall. He had pre-existing heart issues, COPD, emphysema and asthma.

Due to his heart issues, he had been unable to undergo the recommended knee arthroscopic surgery from this incident, as his doctors were concerned about his circulation. He attempted to have a blockage removed from the femoral artery before knee surgery, however the doctors were not able to perform same and that procedure was cancelled while he was in the hospital. His pain was every day and unrelenting. As a result of our incident, he walked permanently with a cane,

obviously inhibiting his activity level. This case involved some fairly significant future medical needs and pain/suffering.

Order of Dismissal with Prejudice—Premises Liability

Tallahassee Associate Alec Masson obtained an Order of Dismissal with Prejudice in the premises liability matter styled Roberts, John vs. Hundur Ltd. d/b/a Sandpiper Beacon Beach Resort and SBBR, LLC. due to Plaintiff's repeated discovery violations and failure to obey court orders. The Court also entered an Order awarding the Defendants Attorneys' Fees and Costs as sanctions.



LUKS, SANTANIELLO PETRILLO & JONES

OUR VERDICTS TELL THE STORY



Firm News

Construction Defect Team Members

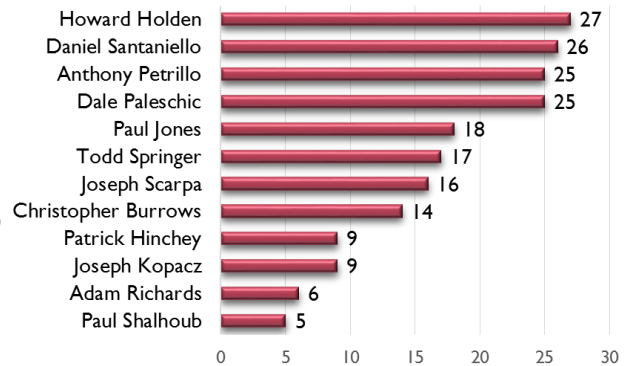


Joseph Kopacz, Esq. Patrick Hinchey, Esq. Chris Burrows, Esq.

Congratulations to Joseph Kopacz, Esq. in the Tampa office who recently passed the Board Certification Exam for Construction Law. Members of the CD Team who are Board Certified Construction Law Experts include Christopher Burrows, Esq. in the Boca Raton Office and Patrick Hinchey, Esq. in the Jacksonville office. The CD team includes 12 attorneys, half of the members are rated AV® Preeminent™ by Martindale-Hubbell with experience ranging from 5 to 27 years. The newest member is Adam Richards, Esq. in the Miami office. Prior to joining the firm, Adam was General Counsel and Vice President of Operations for a leading residential Roofing Systems company where he negotiated construction contracts and spearheaded Federal and State law compliance efforts.

Figure 1

Construction Defect Attorneys Years Admitted



Luks, Santaniello Attorneys Speak at RIMKUS 8th Annual CE Seminar



Carl Christy, Esq. Dorsey Miller, Esq. Erik Vieira, Esq. Paul Shalhoub, Esq.

Attorneys Carl Christy, Esq. and Dorsey Miller, Esq. of the Fort Lauderdale office, along with Erik Vieira, Esq. in the Miami office and Paul Shalhoub, Esq. in the Boca Raton office teamed up to present the 5 hour Law and Ethics Update seminar to adjusters attending the RIMKUS Annual Seminar. The 8th Annual CE Seminar was held on October 21, 2016 at the Ft. Lauderdale Marriott Coral Springs hotel. Carl Christy, Esq. spoke on Regulatory Awareness, Erik Vieira, Esq. and Dorsey Miller, Esq. presented the section on Insurance Law and Updates while Paul Shalhoub, Esq. discussed ethical requirements. Carl Christy, Esq. and Dorsey Miller, Esq. teamed up to complete the session addressing Disciplinary and Industry Trends. Volunteering their time to provide the 5 hour update seminar was a valuable service provided by these attorneys on behalf of insurance adjusters.



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Firm News and New Attorneys



TALLAHASSEE: Dale Paleschic, Esq. has relocated to the Tallahassee office and will serve as its Managing Litigation Partner. He is AV® Preeminent™ Rated by Martindale-Hubbell with over 25 years of trial litigation experience. He is admitted in Florida (1991) and to the U.S. District Court, Southern, Middle and Northern Districts of Florida, and the U.S. Court of Appeals, Eleventh Circuit, and to the U.S. Supreme Court.



JAMES WACZEWSKI: James Waczewski, Esq. will serve as Appellate Managing Partner in the Tallahassee office. The Appellate division provides key support before, during and after trial to ensure we present decisive legal authority for our position. James is AV® Preeminent™ Rated by Martindale-Hubbell with 18 years of experience. He is admitted in Florida (1998) and to the U.S. District Court, Southern, Middle and Northern Districts of Florida, and the U.S. Court of Appeals, Eleventh Circuit.



MIAMI: Adam Ritchards, Esq. is an Associate in the Miami office and concentrates his practices in construction defect, products liability, asbestos litigation, general liability, real estate, employment law and commercial litigation. Prior to joining the firm, Adam was General Counsel and Vice President of Operations for a leading residential Roofing Systems company where he negotiated construction contracts and spearheaded Federal and State law compliance efforts. He has also worked for various insurance defense practices, defending construction industry professionals in construction defect claims, as well as a multitude of national manufacturers and suppliers in asbestos litigation. He has developed transactional proficiency in commercial and residential construction and real estate, mergers and acquisitions, business entity formation, and management and dissolution. Adam has a Bachelor of Arts degree from SUNY at Binghamton and obtained his Juris Doctorate from the University of Miami. He is admitted in Florida (2010) and to the United States District Court, Southern and Middle Districts of Florida.

JACKSONVILLE: Christopher Ritchie, Junior Partner is AV® Preeminent™ Rated by Martindale-Hubbell and his peers with 18 years of insurance defense experience. Christopher works out of the Jacksonville office and handles auto, premises liability, general liability, products liability, employment, property damage and first-party property claims. He earned his Bachelor of Arts degree from the University of North Florida and obtained his Juris Doctorate from Nova Southeastern University, graduating *cum laude*. He is admitted in Florida (1998) and to the United States District Court, Middle, Northern and Southern Districts of Florida.

BOCA RATON: Hayley Newman, Esq. is an Associate in the Boca Raton office. Haley obtained her Bachelor of Arts degree from Florida Atlantic University and her Juris Doctorate from Nova Southeastern University, graduating *cum laude*. While in law school, Hayley was a Research Assistant for legal research and writing in the area of professional responsibility and legal education. She also served as a mediator in the Dispute Resolution Clinic mediating diversionary cases for juveniles arrested for misdemeanors and felonies. Hayley was also a law clerk for a private practice for commercial litigation matters and was a judicial intern with The Honorable Linda Pratt of the 17th Judicial County Court in Fort Lauderdale. She is admitted in Florida (2016).

This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

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