



LEGAL UPDATE

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Liability

No Consent, No Liability: New Fourth DCA Case Reinforces Florida's Take on Vehicle Theft and Conversion and Provides Guidance For Instructing the Jury by Shana Nogues, Esq.



Shana Nogues, Esq.

Under Florida's Dangerous Instrumentality Doctrine, the owner of a vehicle who voluntarily entrusts it to another is vicariously liable for any harm caused by the entrusted driver; however, Florida courts recognize theft as an exception to strict liability under this Doctrine. Hertz Corp. v. Jackson, 617 So.2d 1051, 1053 (Fla.1993). More specifically, the Supreme Court of Florida has held that "a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for the negligence of one to whom the owner has granted consent to operate the vehicle." Id. citing Susco Car Rental System v. Leonard, 112 So.2d 832, 835-36 (Fla.1959)).

In Jackson¹, the Supreme Court of Florida set out to answer a certified question from below:

[W]hether the liability of a car rental company under the dangerous instrumentality doctrine is affected by the facts that (a) the rental was secured by fraud, (b) the period for which the vehicle was rented was greatly exceeded and/or (c) the car rental company made efforts to recover the vehicle after it became aware of the fraud and that the vehicle was not timely returned.

Jackson, 617 So.2d at 1051. The plaintiff sued Hertz under a theory of negligent entrustment where the renters procured the vehicle with false names and a stolen credit

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Verdicts, Summary Judgments, Appellate Results

Favorable Verdict: Slip and Fall with Meds Billed Under a Letter of Protection (Pinellas County, FL)

On June 19, 2017, following a 6 day trial, Tampa Managing Partner, Anthony Petrillo, Esq. and Partner Joseph Kopacz, Esq. obtained a favorable jury verdict in the matter styled Tracy Demoss v. Tagco Oil Company in front of Judge Schaefer, in Pinellas County, Florida. This action arose from a Slip-and-Fall accident in the parking lot of TAGCO on August 30, 2015. At the time of the alleged fall, Plaintiff was wearing worn out flip-flops and alleged she slipped when she encountered a yellow-strip in the parking lot. Plaintiff claims the yellow strip did not have the required shark grip/additives presenting a sudden

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OFFICE LOCATIONS

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Edited by:

Maria Donnelly, CR
Daniel J. Santaniello, Esq.

No Consent, No Liability: New Fourth DCA Case Reinforces Florida's Take on Vehicle Theft and Conversion cont.

card. Id. at 1052. The rented vehicle was then held for more than ten days over the rental period, during which time Hertz made attempts to retrieve the vehicle, including sending certified letters to the renters. Id. Eventually, the vehicle was reported stolen two months after the rental date. Id. The subject accident occurred eleven days after the vehicle was reported stolen. Id.

At the trial level, the court directed a verdict in favor of Hertz after the jury became deadlocked on the issue of liability. Thereafter, the Third District Court of Appeal initially "affirmed the trial court, concluding that Hertz: (a) did not negligently entrust the vehicle; (b) did not delay in attempting to regain possession of the vehicle; and (c) was relieved of responsibility because, even if the vehicle was originally voluntarily entrusted by Hertz, a species of conversion or theft had occurred so as to relieve Hertz of vicarious responsibility under these facts." Id. at 1052. On rehearing *en banc*, the district court reversed its decision and found that the plaintiff was entitled to a directed verdict on liability. Id.

Upon review by the Supreme Court of Florida, the Court emphasized that "no vicarious liability is imposed on the owner of a vehicle for the negligence of a driver when a vehicle has been obtained without the owner's consent." Id. at 1052 (citing Commercial Carrier Corp. v. S.J.G. Corp., 409 So.2d 50 (Fla. 2d DCA 1981), review denied, 417 So.2d 328 (Fla.1982); Martinez v. Hart, 270 So.2d 438 (Fla. 3d DCA 1972); Keller v. Florida Power & Light Co., 156 So.2d 775 (Fla. 3d DCA

1963)). Upon review of the factual circumstances of Jackson, the Court determined that the rental vehicle was converted and theft had occurred; thus Hertz was entitled to a directed verdict on liability, and the case was remanded with instructions to affirm the decision of the trial court.

Very recently, the Fourth District Court of Appeal restated Florida's exception to vicarious liability in theft or conversion and provided guidance on appropriate jury instructions in the case of theft or conversion. In Stokes v. Wynn, the plaintiff was injured when he was struck by a vehicle rented by Wynn, but driven by Phillips. 4D15-0873, 2017 WL 2457348, at *1 (Fla. 4th DCA June 7, 2017). In Stokes, Wynn rented a Hertz vehicle while her vehicle was in the shop. Id. Wynn lived with multiple family members and their significant others, including Phillips, who would move each others' cars in the driveway in order to gain access to their own cars; however, on the day of the accident, Phillips took the keys to the subject vehicle without permission from Wynn to take the car to the store. Id.

In pertinent part, the lawsuit, as brought against Wynn, sounded in vicarious liability alleging that the vehicle was driven by Phillips with Wynn's express or implied consent. Id. At trial the court allowed Wynn's modified Jury instruction on express or implied consent to address the issue of whether Phillips' use of the subject vehicle exceeded the scope of use as permitted by Wynn relieving her from liability over objection to the bolded portions as follows:

The other claims [sic] against Delana Wynn is that she impliedly consented to the operation of the Hertz rental car by Nathaniel Phillips and is responsible for any negligence by him in the operation of the vehicle at the time of the collision.

....

Delana Wynn also denies those claims and ... additionally asserts an affirmative defense on the issue of whether she impliedly consented to Nathaniel Phillips' use of a vehicle. Specifically, she alleges that Nathaniel Phillips' use of the vehicle exceeded the scope of any alleged implied consent, so that ... his use of the vehicle amounted to a species of theft or conversion.

On one of the claims of the plaintiff against Delana Wynn there's a preliminary issue for you to decide. That issue is whether Nathaniel Phillips was operating the vehicle with the express or implied consent of Delana Wynn.

A person who rents a motor vehicle and who expressly or impliedly consents to another's use of it is responsible for its operation.

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No Consent, No Liability: New Fourth DCA Case Reinforces Florida's Take on Vehicle Theft and Conversion cont.

A lessee of a vehicle is one who has leased or rented the vehicle from its owner.

Some of the factors that you may consider in determining whether there is evidence of implied consent are the following; one, the driver's prior use of the vehicle. Two, the location and accessibility of the keys. The existence of a familial relationship between the owner and the driver. Four, the conduct of the parties after the accident. Id. at *2.

The jury answered the question, “[w]as Nathaniel Phillips operating the motor vehicle with the express or implied consent of Delana Wynn at the time of the collision?” in the negative, and found Phillips to be 100% responsible for the accident. Id. On appeal, the plaintiff argued “that instructing the jury that Wynn could not be liable if Phillips simply exceeded the scope of Wynn consent was error.” Id. The Fourth District Court of Appeal reviewed the instruction for abuse of discretion and surveyed past cases involving conversion and theft. Ultimately, the Fourth District Court of Appeal found that whether theft or conversion had taken place was an issue for the jury, and it was proper to instruct them on whether conversion or theft had taken place. Id. at *3. The court also found that the jury was properly instructed. Id.

Theft and conversion are important defenses to explore when a vehicle involved in an accident is not being driven by its owner, or in the case of a

rental vehicle, the renter. The jury instruction presented by Wynn and upheld by the Fourth District Court of Appeal provides clarity in drafting instructions that allow a jury to find that a theft or conversion has occurred; therefore, no liability rests with the defendant owner/renter. Even though the issue of theft or conversion is an issue for the jury, evidence of the same gives leverage to a defendant's position that there is no liability in order to obtain a favorable settlement, or, in the case of a trial, can lead a jury down the path of no liability, as seen in Stokes v. Wynn.

¹ Jackson was decided prior to the enactment of The Graves Amendment in 2005. The Graves Amendment abrogated liability of rental car companies by virtue of vehicle ownership, save limited exceptions. This article is not meant to address the ins and outs of The Graves Amendment, rather to address the abrogation of liability due to theft or conversion.

About Shana Nogues, Esq.

Shana Nogues, Esq. is a Senior Associate in the Boca Raton office and member of the BI Team. Shana concentrates her practices in general liability, automobile liability, premises liability and negligent security matters. She earned her Bachelor of Arts degree from the University of Florida, *summa cum laude*, and obtained her Juris Doctor from Tulane University where she served as Managing Editor of the Tulane Journal of Technology and Intellectual Property.

Since joining Luks, Santaniello, Shana has gained extensive experience in defense litigation. Prior to joining the Firm, she served as extern to a federal judge, the Honorable Judge Kurt D. Engelhardt, and served as a Guardian ad Litem for children committed to Florida's dependency system. Also, Shana is a published author, a member of the Junior League of Boca Raton and a supporter of Jewish Adoption and Family Care Options (JAFCO). She is admitted to practice in all Florida courts, the United States District Court for the Southern District of Florida, and the United States Court of Appeals for the Eleventh Circuit.

Shana is committed to providing sound and practical advice to achieve swift, efficient resolutions to legal matters and takes pride in her strategic, zealous representation of her clients.

Proposals For Settlement Are Powerful Weapons, But Make Sure You Don't Shoot Yourself (And Your Client) In The Foot by Karen Callejo, Esq.



Karen Callejo, Esq.

Proposals for settlement can be powerful weapons in a trial lawyer's arsenal. A valid proposal for settlement can allow your client to recover attorneys' fees incurred in prosecuting or defending a claim, even in cases where no contractual or statutory fee claim exists. It can also wield leverage as a bargaining chip at mediation or in a post-trial setting. However, the prudent litigator must make sure that the language in the proposal is clear, so that the proposal can serve its intended function.

To illustrate the importance of clarity when it comes to proposals for settlement, we can look to the recent Florida Third District Court of Appeal case, Dowd v. Geico General Insurance Co., 42 Fla. L. Weekly D1471 (Fla. 3rd DCA June 28, 2017). In Dowd, an insurer's proposal for settlement was found to be ambiguous and unenforceable because the proposal sought to resolve all claims for relief made in the lawsuit, as well as claims that could have been raised as "compulsory claims." However, the release attached to the proposal was more broadly worded, and required the insured to release all causes of action arising from the accident. The court held that, since the plaintiff may still have had a Personal Injury Protection (PIP) claim, which was not a compulsory claim, it was unclear as to whether the PIP claim was intended to be released.

The plaintiff in the case was struck by an underinsured motorist while riding his bicycle within a pedestrian crosswalk. He brought a claim asserting severe and permanent injuries as a result of the accident. Ultimately, the plaintiff filed a lawsuit against Geico seeking uninsured/underinsured motorist coverage through his own insurance policy. The case was tried and the jury returned a verdict finding the plaintiff and the driver that struck him to each be 50% responsible. The jury awarded the plaintiff \$110,000 for past medical expenses. Following a hearing on post-trial motions filed by both parties, the trial court entered final judgment in favor of the plaintiff in the amount of \$5,000. Geico moved for attorneys' fees based on its proposals for settlement.

The plaintiff argued that the proposals for settlement cannot be reconciled with the language of the releases, thereby resulting in ambiguity. The district court agreed with the plaintiff, finding that "while perfection is not required, clarity is." The court cited to the case of State Farm Mut. Auto. Ins. Co. v. Nichols, where the Florida Supreme Court held that, given the nature of language, it may be impossible to eliminate all ambiguity, but also held that the rule governing proposals for settlement does require that the settlement proposal be sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification. Nichols, 932 So. 2d 1067, 1079 (Fla. 2006).

The Dowd court found that the discrepancy between the limited proposal for settlement and the much broader re-

lease creates the type of ambiguity that runs afoul of the particularity requirement in the Rule. See S. Fla. Pool and Spa Corp. v. Sharpe Inv. Land Tr., 207 So. 3d 301, 303 (Fla. 3d DCA 2016) (holding that where it was unclear when reading a proposal for settlement in tandem with its accompanying release whether a claim for fees was included or excluded from the settlement, the "lack of clarity creates an ambiguity rendering the proposal unenforceable").

In addition, the court found that the plaintiff may still have a viable PIP claim against Geico, and that it is unclear under the terms of the releases whether such a claim was intended to be included among those being released. While recognizing that a PIP claim is not a "compulsory" claim as set forth in the proposals, the court reasoned that it may fall within the broader release language. Accordingly, the district court held that the plaintiff's decision to accept or reject the proposals was reasonably affected by the ambiguity created among the documents. See Nichols, 932 So. 2d at 1079.

So, when drafting your proposals for settlement, don't shoot yourself and your client in the foot. Instead, keep the Dowd decision in mind, and make sure that the language in your proposal is clear, and that it matches the language in your release. That way, you will avoid being put in the unenviable position of having to explain to your client why your proposal for settlement was struck down, and why your client is left footing the bill.

Assignment of Homeowners Policy Benefits: Fighting A Crisis by Blair Hyman, Esq.



Blair Hyman, Esq.

Concerns surrounding defense handling are at an all-time high.

By now the typical situation is all too familiar: After an alleged loss, a homeowner hires a contractor, such as a restoration company, to mitigate and/or repair damages to the dwelling. In exchange for these services, the homeowner assigns his rights to benefits under a policy of homeowners' insurance to the contractor. The contractor relies upon the AOB to stand in the homeowner's shoes and access policy benefits directly.

This process has opened the door for inflated and improper claims, causing pre-conceived legal battles between contractors and carriers, unbeknownst to the policyholders. In addition, Fla. Stat. Sec. 627.428 awards attorney's fees against carriers, fueling the race to the courthouse and inundating dockets. In an effort to combat this abuse, carriers are increasing rates in light of lawmakers' failure to enact a legislative solution.

Previous efforts to effectively combat and dispose of lawsuits filed by assignees have been thwarted by courts. Florida jurisprudence holds that policy provisions which purport to prohibit assignments do not apply to an assign-

ment after loss. West Florida Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209 (Fla. 1917). Furthermore, an insured's right to assign such claims cannot be conditioned upon an insurer's written consent. Security First Ins. Co. v. Dep't of Fin. Servs., 177 So.3d 627 (Fla. 1st DCA 2015). This right accrues on the date of loss, regardless of whether payment is due. One Call Prop. Servs., Inc. v. Security First Ins. Co., 165 So. 3d 749, 754 (Fla. 4th DCA 2015). An assignee is not required to have an insurable interest at the time of loss in order to sue the insurer. Accident Cleaners, Inc. v. Universal Ins. Co., 186 So. 3d 1 (Fla. 5th DCA 2015).

As a potential source of relief, the Florida Constitution may provide a defense against AOBs in cases where the alleged loss is to homestead property. One Call Property Services, Inc. v. St. Johns Ins. Co., Inc., Case No. 13-000868-CA, 2014 WL 7496474 (Fla. 19th Cir. Ct. 2014), affirmed by One Call Property Services, Inc. v. St. Johns Ins. Co., 183 So. 3d 364 (Fla. 4th DCA 2016). Article X, Section 4 of the Florida Constitution protects homeowners by limiting the types of creditors who can force the sale of a homestead property. The homestead law is to be interpreted liberally and has been extended not only to the property itself, but also to insurance proceeds obtained as a result of damage to that property. See Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So. 2d 201 (Fla. 1962); Cutler v. Cutler, 994 So. 2d 341 (Fla. 3d DCA 2008); Kohn v. Coats, 103 Fla. 264 (Fla. 1931); Quiroga v. Citizens Prop. Ins. Corp., 34 So. 3d 101, 102 (Fla. 3d

DCA 2010) (In the event a homestead is damaged through fire, wind or flood, the proceeds of any insurance recovery are imbued with the same constitutional protection as the homestead itself). As a matter of public policy, a homeowner cannot through an unsecured agreement enter into an enforceable contract to divest himself from the exemptions afforded him through Article X, section 4(a). Id. This is consistent with the rule that waivers of constitutional rights must be "knowing, intelligent and voluntary." Chames v. DeMayo, 972 So. 2d 850 (Fla. 2007).

In One Call, the Fourth District Court of Appeal affirmed the trial court's finding that an AOB was invalid and void as a matter of law because it impermissibly sought to divest the homeowners of constitutionally protected insurance proceeds from homestead property. This case arises from an alleged water loss at the insureds' property. One Call performed mitigation services in exchange for an AOB signed by one of the insureds. St. Johns retained an engineer who determined that the loss was not caused by a covered peril. One Call refuted these findings with its own engineer. St. Johns denied coverage and One Call filed suit. The trial court granted summary judgment in favor of St. Johns as follows:

1. Plaintiff has brought suit against Defendant for breach of contract stemming from a water loss at homestead property of the Defendant's insureds, Carl and June Schlanger.

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Assignment of Homeowners Policy Benefits: Fighting A Crisis cont.

2. Plaintiff's standing to maintain this lawsuit is based on an alleged "Assignment of Benefits" which was executed only by Carl Schlanger.
3. Under Florida law, the proceeds of any insurance recovery from homestead property are constitutionally protected to the same extent as the property itself, and a homeowner cannot be divested of those proceeds through an unsecured agreement. See Quiroga v. Citizens Prop. Ins. Co., 34 So. 3d 101 (Fla. 3d DCA 2010).
4. In this case, the "Assignment of Benefits" impermissibly seeks to divest the homeowners of these constitutionally protected insurance proceeds and, therefore, the agreement is invalid. This is particularly true where, as here, the contract was not executed by June Schlanger.
5. Furthermore, the "Assignment of Benefits," and Plaintiff's actions in attempting to adjust the loss on behalf of the insureds, violate Florida Statute § 626.854. The Court finds that Plaintiff's conduct in this case falls within the definition of "public adjuster" in § 626.854(1), and violates the prohibition against unlicensed public adjusting found in § 626.854(16). Although no record evidence was presented to this Court establishing that Plaintiff is a licensed public adjuster, even if licensed and compliant as a public adjuster, the Court finds that Plaintiff's con-

duct would violate Florida Statute § 626.8795.

6. Therefore, the "Assignment of Benefits" is invalid and void as a matter of law, and Plaintiff lacks standing to maintain the instant lawsuit.

One Call appealed to the Fourth DCA, but the court affirmed in a per curiam opinion. Accordingly, this case is not binding precedent; however, it does create persuasive authority that AOBs from homestead property are invalid as a matter of law and do not confer standing on the assignee. On the other hand, in cases involving partial payment of claims, this defense is potentially waived as the insurer has arguably accepted the AOB as valid and enforceable.

Other possible defenses include violations of a valid anti-assignment clause where the language of an AOB is overbroad and effectively assigns the entire policy. In addition, a claim filed by an assignee does not relieve the insured from complying with all policy conditions.

The increase of AOB claims/cases and rising insurance rates continues to broaden awareness of abuse in this process. By challenging the ability of assignees to file suit, One Call is a clear step in the right direction. Although the case does not provide controlling authority, it appears to signal a significant change in approach to this issue.

About Blair Hyman, Esq.

Blair Hyman, Esq. is a Junior Partner in the Boca Raton office and has a decade of experience handling personal injury protection, general liability, as well as extra-contractual liability matters. Blair covers EUOs and PIP matters in Palm Beach, Martin, Indian River, St. Lucie and Okeechobee counties. He obtained his Bachelor of Arts degree from the University of Florida and his Juris Doctor from Nova Southeastern University. He is admitted in Florida (2007) and to the United States District Court, Southern, Northern, and Middle Districts of Florida.

About Karen Callejo, Esq.

Karen Callejo, Esq. is a Junior Partner in the Miami office and has been practicing law for 21 years. Martindale-Hubbell and her peers have rated her **AV® Preeminent™**. She previously served as City Attorney for Hialeah for over a decade where she defended the City in automobile negligence and premises liability lawsuits. She was also the Attorney/Advisor to the City's Personnel Board at labor management meetings and for compliance with ADA, FMLA and collective bargaining agreements. Karen has a Bachelor of Arts degree from Florida International University (1992) and obtained her Juris Doctor from Nova Southeastern University (1996). Karen is admitted in Florida (1996) and to the United States District Court, Southern District of Florida. She is also admitted to the United States Court of Appeals, 11th Judicial Circuit. Karen is bilingual, Fluent in Spanish and English.

2nd DCA Narrows Threshold for Dismissal for Fraud on the Court by Erin O'Connell



Erin O'Connell, Esq.

A recent 2nd DCA accident, however he left off two providers detailed the threshold for having a Personal Injury claim thrown out for fraud on the Court. Edelmiro Duarte was the driver of a vehicle

stopped in traffic on I-75 on January 18, 2008. He was subsequently rear-ended by Norman Mullins, driving a truck owned by Snap-on Incorporated, at 60mph, causing catastrophic injuries to several of his three passengers, including his girlfriend who was rendered a paraplegic. The three passengers settled their injury claims with Snap-on and Mr. Mullins, and Mr. Duarte brought his suit for damages against both Snap-on and Mr. Mullins related to his injuries and pain and suffering on January 12, 2012.

The parties stipulated to liability, and a question of causation was raised as to Mr. Duarte's alleged injuries to his back and arm. In early 2012, Snap-on served Mr. Duarte with personal injury Interrogatories. Subsequently, on March 12, 2012, Mr. Duarte was involved in a secondary rear-end collision. He answered Snap-on's Interrogatories in April of 2012, identifying eight providers and dates of treatment between the January, 2008 accident and April of 2012. In April of 2013 he amended his Answers to disclose additional providers from March to June of 2012.

In November of 2013, Mr. Mullins served Mr. Duarte with Interrogatories similar to those served by Snap-on. His answers included several providers from which he sought treatment for back pain following the March, 2012

Mr. Duarte claimed that he had not intentionally mislead anyone, that he did not read or speak English, and that he suffered from memory deficiencies due to age and medications. Based on the exhibits of the Defendants' Motion, the Court ruled that Mr. Duarte told "repeated untruths" and entered an Order dismissing the case with prejudice. Mr. Duarte appealed.

Mr. Duarte was then deposed in April of 2013 and May of 2014. When asked of secondary accidents, he testified that he had not been involved in any, "unless it was that one time that I was parked and someone hit me from behind and broke one of my lights, but I don't know if that's considered an accident." He minimized the impact and amount of damages during his deposition, although he did affirm that the impact made his back "hurt even more, much more."

Snap-on and Mr. Mullins filed their Motion for Fraud on the Court, seeking a dismissal of the pleadings, in October of 2014, alleging that Mr. Duarte testified falsely about the severity of his March 2012 accident in his deposition, and that he failed to disclose the March 2012 accident and subsequent treatment in his Answers to Interrogatories. The Motion included testimony given by Mr. Duarte in an Examination Under Oath taken by his insurance company in his claim for property damage in the March, 2012 accident. He alleged that the accident involved a hard impact which severely aggravated his back injury that he sustained in the January, 2008 accident. Judge Elizabeth Krier of Lee County heard the Motion without taking additional evidence.

Mr. Duarte claimed that he had not intentionally mislead anyone, that he did not read or speak English, and that he suffered from memory deficiencies due to age and medications. Based on the exhibits of the Defendants' Motion, the Court ruled that Mr. Duarte told "repeated untruths" and entered an Order dismissing the case with prejudice. Mr. Duarte appealed.

The Appellate Court noted that it had authority to review for the trial court's abuse of discretion. Citing Howard v. Risch, 959 So. 2d 308, 310 (Fla. 2d DCA 2007), the Court noted that dismissal with prejudice for fraud on the court is only to be employed under extreme circumstances. Per Howard, where the trial court makes a decision without hearing evidence, the decision is given less deference than where evidence is heard.

The threshold to dismiss with prejudice based on fraud upon the court must be proven by the movant by clear and convincing evidence. This standard balances 1) the Court's preferred policy to adjudicate civil cases on their merits and 2) maintaining the integrity of the judicial system. Citing Gilbert v. Eckerd Corp of Fla., 34 So. 3d 773, 776 (Fla. 4th DCA 2010), the Court noted "[U]nless it appears that the process of trial has itself been subverted, factual inconsistencies or even false statements are well managed through the use of impeachment at trial or other traditional discovery sanctions, not through dismissal of a possibly meritorious claim." (See also Howard, 959 So. 2d at 311).

2nd DCA Narrows Threshold for Dismissal for Fraud on the Court cont.

Snap-on and Mr. Mullins claimed that Mr. Duarte tried to play the January 2008 and March 2012 accidents off of each other in order to maximize his claims in both. He allegedly minimized the accident in 2012 in his litigation of the 2008 accident in order to obtain a bigger settlement as to his injuries, and played up the impact of the 2012 accident to his insurance company to cash out on his policy. The Appellate Court ruled, however, that the paper record was not a sufficient basis to dismiss Mr. Duarte's claims as to the 2008 accident instead of allowing him to be impeached at trial or imposing some lesser sanction.

The Court relied on a previous decision, Jacob v. Henderson, 840 So. 2d 1167, 1168 (Fla. 2d DCA 2003), where it ruled that only a finding that the individual knowingly perpetrated a fraud would support a dismissal of all claims. Like in Jacob, Mr. Duarte had actually suffered injuries, the only question was the severity and causation. The power to resolve disputes over the truth or falsity of his claims belongs to a jury. Id.

The Court pointed out that the dispute in this matter was to the extent of the injuries and the extent to which the March 2012 accident caused or contributed to them. Mr. Duarte did not hide the fact that the accident occurred, and even testified that the incident made his back hurt "much more" than it had following the January 2008 accident. The testimony given to his insurance company while making his claim on the March 2012 accident diminished his deposition testimony, however, without additional facts, the

Court could not establish that Mr. Duarte set in motion an unconscionable scheme to defraud the Court. The inconsistencies in his Answers to Interrogatories, deposition testimony, and EUO claims were found to be matters of fact and credibility for a jury to resolve. Finally, the Court noted that the trial court erred for dismissing the case after failing to conduct an evidentiary hearing, and thus lacked a sufficient evidentiary basis for determining that fraud on the Court had occurred.

The decision was reversed and remanded back to the trial Court. Judge Salaro issued the Opinion, joined by Judges LaRose and Sleet, who concurred. May 3, 2017.

About Erin O'Connell, Esq.

Erin O'Connell, Esq. is a Senior Associate and member of the PIP team in the Boca Raton office. Erin covers EUOs, PIP and SIU matters and has litigated fraudulent insurance claims involving policyholders and/or medical providers. She also focuses her practice in automotive bodily injury defense. Erin covers matters in Palm Beach, Martin, Indian River, St. Lucie, Okeechobee, Broward and Miami-Dade counties. She obtained her Bachelor's degree in Business Administration from Fordham University and her Juris Doctor from the University of Miami. She is admitted in Florida (2013).

Verdicts and Summary Judgments cont.

Slip and Fall with Meds Billed Under a Letter of Protection (Cont. from P.1)

and unexpected change in slip resistance causing her to fall. Defendant argued the parking lot was in compliance with all applicable codes and industry standards. The yellow strips were slip resistant and no additional shark grip/additives were required to be used in this particular area that was a fire zone.

Following this fall, Plaintiff had two surgeries including a right shoulder surgery and neck surgery at C6-C7 (Anterior Cervical Discectomy and Fusion). The shoulder surgery was to repair a torn labrum and a complete supraspinatus tear. Plaintiff's medical bills were in excess of \$419,000 and all plaintiff's medical bills were billed under Letters of Protection ("LOP").

The jury returned a verdict finding plaintiff 60% at fault and Defendant 40%. The jury awarded: past medical expenses: \$419,000, future medicals: \$10,500, past pain and suffering: \$40,000 and future pain and suffering: \$20,000. After the comparative fault reduction, the jury verdict was reduced to **\$195,823**. The final verdict was essentially **20%** of what Plaintiff requested from the jury.

[Tampa Partner Anthony Petrillo, Esq. is a Florida Bar Board Certified Civil Trial Expert and AV® Preeminent™ rated. Tampa Partner Joseph Kopacz, Esq. is a Florida Bar Board Certified Construction Law Expert and AV® Preeminent™ rated].

Defense Verdict: Trip and Fall with 2 Surgeries (Pinellas County)

On May 1, 2017, Tampa Partner, Joseph Kopacz, obtained a Defense Verdict in the matter of Kimberly Ellison v. Dag 3, LLC in Pinellas County, Florida in front of Judge Pamela Campbell. Plaintiff alleged Dag 3 was negligent in the maintenance of the parking lot at the shopping center by allowing a piece of exposed rebar to protrude from the top of a wheel stop causing her to fall. The plaintiff's construction expert testified that the exposed rebar violated the ASTM standards and general maintenance

guidelines. The defendant's construction expert testified that the subject parking lot complied with all building codes and industry standards. Testimony from the plaintiff's friend confirmed in fact he backed his pick-up truck (with a trailer hitch) into the parking space over the wheel stop in which plaintiff claimed to trip over. Defense argued plaintiff tripped over the trailer hitch attached to rear of the pick-up truck and not the exposed rebar on the wheel stop. The plaintiff broke both of her wrists from the fall and was rushed by ambulance to the hospital. Plaintiff was claiming medical expenses near \$100,000 for the two surgeries performed to her left and right wrist. The case was tried on liability only. The jury deliberated for 5 minutes before rendering a defense verdict.

Favorable Verdict: Slip and Fall with Multiple Surgeries (Seminole County)

Orlando Partner Paul Jones, Esq. and Senior Associate Douglas Petro, Esq. obtained a favorable verdict in the slip and fall matter styled Alba v. Defendant Store. Plaintiff slipped and fell on a liquid left behind by the store's floor scrubbing machine and there were no warning cones in place at the time. Plaintiff incurred \$300,000 in medicals for multiple surgeries (knee arthroscopy, cervical fusion, hardware removal from prior lumbar fusion) with another \$140,000 needed for future medical expenses including revision surgeries testified to by her treating neurosurgeon. Plaintiff asked the jury for over \$800,000 in total. The jury awarded \$18,000 representing the cost of initial treatment only and no award for pain and suffering damages. Defendant prevailed on its proposal for settlement and Plaintiff's Motion for New Trial was denied.

[Orlando Partner Paul Jones, Esq. is a Florida Bar Board Certified Civil Trial Expert].

Verdicts and Summary Judgments cont.

Favorable Verdict: Slip and Fall with Multiple Surgeries (Miami-Dade County)

Orlando Partner Paul Jones, Esq. and Miami Partner Luis Menendez-Aponte, Esq. obtained a favorable verdict in the slip and fall matter styled Pineda v. Defendant Store. Plaintiff slipped and fell in Defendant's store from water leaking from melting ice bags. The store had six months of repair work orders from the ice machine producing melting ice leading up to the day of the incident. Plaintiff sustained a large abrasion on her knee from the fall that was captured in photographs. She actively treated with an orthopedic surgeon which ultimately resulted in two surgeries involving her knee and her shoulder. Plaintiff incurred \$133,755 in medical bills. At trial, the plaintiff presented documentary evidence and testimony from her orthopedic surgeon that she required additional surgery, including a total knee replacement, from the fall. The plaintiff asked the jury for \$330,755. The jury rejected the future care, found the plaintiff 50% at fault for the fall, and declined to award her any pain and suffering damages. The net verdict was approximately \$68,000, half of the plaintiff's final demand before trial.

Notice of Voluntary Dismissal: Premises Liability (Palm Beach County)

Boca Raton Senior Partner Marc Greenberg, Esq. obtained a favorable result in the premises liability matter styled John Doe v. Retail Store. Plaintiff alleged in her complaint that she slipped and fell on a wet mat that was adjacent to a water fountain in the Defendant's store. Plaintiff sustained a hip fracture resulting in surgery. Her total past medical bills exceeded \$240,000. The incident video showed that Plaintiff fell on her own accord, and approximately 2 feet away from the mat. Contrary to the allegations in the lawsuit, Plaintiff never impacted the subject mat.

Based on the videographic evidence, Defense sent a draft 57.105 Motion for Sanctions to Plaintiff's Counsel and attached the incident video. As a result of this proposed Motion, Plaintiff filed a Notice of Voluntary Dismissal with Prejudice.

Final Summary Judgment: Road Way Construction Accident/MOT

On June 5, 2017, Tampa Junior Partner, Joseph Kopacz, obtained a final summary judgment in the matter styled Lee Billups v. Hubbard in front of Judge Schaefer in Pinellas County, Florida. The subject motor vehicle/moped accident occurred on July 31, 2013 in Kenneth City, Florida. Plaintiff, Lee A. Billups ("Billups"), was the driver of a 2012 GMVV moped which was struck by a 1999 Chevy Silverado pick-up truck driven by Angela M. Baker ("Baker"). The accident occurred in the westbound inside closed lane of 54th Avenue North, just west of the intersection of 58th Street North. The roadway of 54th Avenue North is an undivided, four-lane roadway which travels east and west. The inside lane was closed to traffic and Hubbard set-up the Maintenance of Traffic (MOT) at the intersection.

Baker was traveling and attempted to make a left-hand turn after being directed by the cones prior to the intersection. Instead of waiting for the light to green, Baker cut-across the intersection and entered the inside closed lane. Plaintiff was traveling in the outside lane and attempted to make a left-hand through the closed lane into the Winn Dixie parking lot. At that point, Baker struck Plaintiff traveling approximately 45 mph. Plaintiff was critically injured and airlifted to the hospital. Plaintiff sustained multiple internal injuries and several broken bones including breaking both his left and right ankles. Plaintiff stayed in the hospital for over 3 weeks and had over \$400,000 in medical bills.

Plaintiff argued Hubbard failed to use MOT standard index 616 which allowed Baker to enter the closed inside lane. Hubbard argued they complied with the applicable standard indices 613 & 615 and Baker and Billups were the proximate cause of the subject of the accident. This was a very heated litigation that lasted over 3 years.

Verdicts and Summary Judgments cont.

Final Summary Judgment: Premises Liability

Boca Raton Associate Jordan Greenberg, Esq. received a Final Summary Judgment in the premises liability matter styled Wise v. Defendant Store. This matter arose from Plaintiff's allegations that she was injured by being struck by an electric pallet jack operated by a store employee in the electronics action alley on "Black Friday." Plaintiff claimed that when she was struck in the left ankle by the passing equipment, she fell back into shelving and then onto the ground, injuring her left ankle, left foot nerve damage, hip, neck and lower back. Plaintiff alleged that as a result of the subject incident she underwent two surgeries to her left ankle and foot, as well as epidural steroid injections in her cervical and lumbar spine. Plaintiff's physician Dr. Johnathan Cutler opined Plaintiff had a 12% impairment of her lower left extremity. Plaintiff alleged \$131,208.37 in past medical expenses, \$100,000 in future medical expenses, \$46,800 in past wages, \$336,960 for loss of future earning capacity, and \$300,000 for Plaintiff's past and future pain and suffering for a total claim of \$914,968.37.

Plaintiff claimed that at the time of the incident she was accompanied by several family members who had sworn through deposition testimony or affidavit that the subject incident occurred as described by Plaintiff. While attending a site inspection at the store, Plaintiff photographically documented the location of the subject incident. Plaintiff subsequently admitted that the photographed location in the electronics action alley of the store was within three feet of the incident in response to Defendant's Request for Admissions attaching the same photograph.

Importantly, the Defendant retained footage of electronics action alley from the hour before and after the alleged incident showing Plaintiff and her family in the subject area. By narrowing the area of the incident to a fixed location through Plaintiff's admission, Defendant established that the undisputed video evidence from the date of the incident of the subject location proved that Plaintiff's incident did not occur. In opposition to Defendant's

Motion for Final Summary Judgment, Plaintiff cited to her own testimony and that of her family members as to their recollection of the subject incident, as well as an affidavit by Plaintiff's Forensic Analyst Expert, Christopher Faiella, who opined that the in store surveillance video produced was not sufficient to ascertain whether the Plaintiff's incident had occurred, in an attempt to get past summary judgment.

Prior to the hearing on Defendant's motion, we deposed Mr. Faiella and elicited testimony revealing that he had no personal knowledge of the subject surveillance system, the layout of the store, and did not know the admitted location Plaintiff's alleged incident—much less whether that location was captured by the retained footage. The Court found that the video evidence of the admitted location was dispositive in proving that no incident had occurred and granted Defendant's Motion for Final Summary Judgment. Prior to the motion for summary judgment, we had served a Proposal for Settlement and Plaintiff may now be liable for attorney's fees.

Court Granted Motion for Attorney Fees & Costs:- Property Damages Claim (Martin County)

Boca Raton Senior Partner Marc Greenberg obtained a favorable result in the property damage matter styled Jane Doe v. Residential Community. Plaintiff sought property damages due to a tree falling on her purported classic vehicle on the Defendant's premises, and for the unauthorized towing and sale of her vehicle, following Plaintiff's abandonment on Defendant's premises. Defendant's Arborist Expert opined that a tree limb, not a "large tree", as Plaintiff contended, caused damages to her vehicle. Also, Defendant's Valuation Expert opined that Plaintiff's 1992 Toyota Camary was not a classic vehicle, which was strongly contested by Plaintiff. Plaintiff's last settlement demand was \$200,000. The Defendant prevailed on a Motion for Judgment on the Pleadings shortly before trial. As a result of that dispositive ruling, the Court granted the Defendant's Motion for Entitlement to Attorney Fees and Costs in furtherance of its expired Proposal for Settlement to Plaintiff. Thereafter, on June 9, 2017 the Court executed an Attorney Fee Judgement against Plaintiff for more than \$17,000.

Verdicts and Summary Judgments cont.

Motion to Strike Plaintiff's Pleadings for Fraud on Court: Slip and Fall (Okeechobee County)

Boca Raton Senior Partner Marc Greenberg obtained a favorable result in the premises liability matter styled John Doe v. Retail Store. Plaintiff's Complaint asserted that he slipped and fell on liquid on the Defendant's premises, resulting in significant and permanent injuries to his dominant right hand. During the infancy of discovery Plaintiff stated that he had never injured his right hand before the subject incident. Moreover, during Plaintiff's February 2017 Deposition, Plaintiff testified that prior to the subject incident he never (1) received any medical treatment relative to his right hand, (2) never had diagnostics administered to his right hand, (3) was never diagnosed with arthritis to his right hand, (4) was never diagnosed with degeneration to his right hand, (5) and had never complained of right hand pain to any clinician.

Prior to Plaintiff's Deposition we were in possession of 9 different dates of service to hospitals, diagnostic imaging center, and various doctors which showed that Plaintiff had arthritis, degeneration, a contracture, and trigger finger to his dominant right hand before the subject incident. Those medical records spanned from 2000 up until April of 2013, which was less than two years prior to the subject accident. In support of Defendant's Motion to Dismiss with Prejudice for Fraud on the Court, we provided Plaintiff's Counsel with the above-referenced medical records, which contradicted Plaintiff's Sworn Testimony.

During the June 7, 2017 Motion for Fraud on the Court Hearing, Plaintiff attempted to counter the Motion by testifying that (1) he has experienced memory loss for many years and a doctor has issued that diagnosis (2) that he was prevented from taking breaks during his Deposition and that (2) he exhibited a 106F temperature throughout his Deposition. In response, we (1) showed the Court the deposition testimony wherein Plaintiff testified that he had never experienced either short term or long term memory loss at any time and (2) we showed the Court

portions of Plaintiff's videotaped deposition wherein he testified that "I am good" and "I am fine" in order to refute the high temperature assertion and (3) we played the Court portions of the testimony wherein Plaintiff repeatedly declined to take breaks throughout the deposition each time we offered, which was countless times.

The Court ruled that Plaintiff purposely and deliberately calculated a scheme to defraud the Defendant relative to his prior injuries to his right dominant hand during Plaintiff's Deposition when asked 13 different questions, and may have "committed criminal contempt" during the Evidentiary Hearing, as well as during his Deposition. The Defendant served a Proposal for Settlement to Plaintiff, which expired long before the hearing. As a result, the Defendant is proceeding with Entitlement to Attorney Fees and Costs in this matter.

Favorable Settlement: Premises Liability (Palm Beach County)

Boca Raton Senior Partner Marc Greenberg obtained a favorable result in the premises liability matter styled Rivera v. Retail Store. Plaintiff alleged a slip and fall within the Defendant's premises while walking down an aisle with several family members. Plaintiff's counsel \$750,000 settlement, emphasizing Plaintiff has a C4-5 and C6-7 herniation, and disc bulges at C2-3, 3-4, and 5-6 that his Orthopedist is relating to the incident. Plaintiff underwent a series of lumbar and cervical epidurals within 90 days post accident, and his Orthopedist is recommending a C4-6 posterior lumbar decompression at a cost of up to \$150,000. The past boardable medical bills were approximately \$40,000.

Defense obtained productive surveillance footage of Plaintiff over 3 consecutive days engaging in normal activities of daily living and advised Plaintiff's Counsel of its existence. The case settled within 20 days of receipt of assignment for less than 1/10th of Plaintiff's settlement demand.



LUKS, SANTANIELLO PETRILLO & JONES

OUR VERDICTS TELL THE STORY



DRI Asbestos Medicine Seminar | November 2-3, 2017 | Las Vegas, Nevada



Miami Senior Partner Stuart Cohen, Esq. will co-present a session at the DRI Asbestos Medicine Seminar on “Rolling the Dice on Removal: Evaluating Whether You Can and Should Remove Your Case to Federal Court.” The seminar will be held in Las Vegas, Nevada from November 2-3, 2017. For over 25 years, Stuart Cohen, Esq. has been handling defense of toxic tort, carbon monoxide, lead poisoning and environmental claims involving significant injury and death. He represents manufactures of asbestos-containing products and products containing silica and other toxins relating to all myriad of exposures. Stuart is AV® Preeminent™ rated and is admitted in Florida (1992) and to the United States District Court, Southern, Middle and Norther Districts of Florida; and to the United States Supreme Court.

Congratulations to Dorsey Miller, Esq. who joins 18 Attorneys at Luks, Santaniello, Petrillo & Jones that are AV® Preeminent™ rated by Martindale-Hubbell and their peers.



TIDA 25th Annual Seminar | October 25-27, 2017 | Las Vegas, Nevada

Join The Gavel.net, LLC. nationwide claims defense network and Luks and Santaniello at the TIDA 25th Annual Seminar from October 25-27, 2017 in Las Vegas, Nevada. For further details, please view the Calendar at <http://www.thegavel.net/index.php?page=110>



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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 4150
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
Stuart Cohen, 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 Lusk, 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
Dale Paleschic, Senior Partner
T: 850.385.9901
F: 850.727.0233

PENSACOLA

3 W. Garden Street - STE 409
Thomas Gary Gorday, Senior Partner
T: 850.361.1515
F: 850.434.6825

FIRM ADMINISTRATOR: 954.847.2909 | CLIENT RELATIONS: 954.847.2936 | ACCOUNTING: 954.847.2903

HUMAN RESOURCES: 954.847.2932 | ATTORNEY COMPLIANCE OFFICER: 954.847.2937

www. LS-Law.com

| LS@LS-Law.com