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LEGAL UPDATE

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Liability

Florida's Noneconomic Damages Caps: The Dubious Future of Tort Reform
by Lynette Whitehurst, Esq.



Lynette Whitehurst

In the Florida Supreme Court's recent ruling in *North Broward Hospital District, et al. v. Kalitan*, 219 So. 3d 49 (Fla. 2017), Florida's High Court struck down the noneconomic damage cap for personal injury awards or settlements in medical negligence cases, finding the cap violates the Equal Protection Clause of the Florida Constitution. The decision was both disappointing and entirely predictable in the wake of the Court's 2014 ruling in *Estate of McCall v. U.S.*, where the Court found noneconomic damage caps unconstitutional in wrongful death medical negligence cases on the same grounds.¹

History of Noneconomic Damage Caps in Florida

The Court's ruling in *Kalitan* is seen as yet another setback for Florida lawmakers and other proponents of the noneconomic damage caps, who argue sweeping tort reform is necessary in the face of skyrocketing healthcare and insurance costs. In 2002, to this end, Governor Jeb Bush appointed the Select Task Force on Healthcare Professional Liability Insurance to address, "the impact of skyrocketing liability insurance premiums on healthcare in Florida."² Governor Bush appointed a select committee of then-current and past presidents of Florida A&M, University of Central Florida, University of Miami, and the University of Florida, among other notable Florida scholars.³ Governor Bush directed this new Task Force to conduct a comprehensive review of the topic, to include review of literature, studies, and testimony of experts in the field.⁴ The Task Force concluded

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Verdicts, Summary Judgments, Appellate Results

Defense Verdict: Premises Liability— Dump Truck Overturn on Unpaved Roadway (Polk County)

On May 11, 2018, Jacksonville Managing Partner Todd Springer, Esq. and Lynette Whitehurst, Esq. received a defense verdict in the premises liability matter styled *Renan Pierre, et al. v. Tiger Lake Subdivision Property Owners Association*. Plaintiff presented a combined loss of past and future earning capacity of over \$450,000 and future life care needs of over \$500,000. Plaintiff Pierre was dumping a load of shell rock when the dump truck he was operating overturned on the unpaved roadway owned by Tiger Lake. Plaintiff alleged that the road was unsafe and was not properly compacted. As a result of the accident, the Plaintiff was claiming he could no longer work as a commercial truck driver. The jury found no negligence on the part of Tiger Lake.

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The Florida Supreme Court’s Crippling of Florida’s Noneconomic Damages Caps, cont.

its tenure with the production of a 345 page report, comprising a compilation of the Task Force’s final conclusions and recommendations.⁵

The Florida Legislature met in 2003, and after debating the Task Force’s findings and recommendations, found in part:

- 1) Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude.
- 2) The Legislature finds that this crisis threatens the quality and availability of health care for all Florida citizens.
- ...
- 7) The Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss.⁶

Relying on these findings of fact, the Legislature then passed Section 766.118, Florida Statutes, including various measures the Legislature found would serve to abate the mounting medical malpractice insurance crisis.⁷ The new legislation included caps on noneconomic damages in certain actions under certain circumstances.

Florida Supreme Court’s Ruling in *McCall*

Some decade later in 2014, the Florida Supreme Court in *McCall* struck down the statutory cap on wrongful death noneconomic damages, as codified in Section 766.118, Florida Statutes, violated the Equal Protection Clause of the Florida Constitution because it “impose[d] unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants.”⁸

The Court further held that the cap bore no rational relationship to the purpose stated, and served no legitimate state interest.⁹ In their opinion, the Court unilaterally rejected the findings of the Florida Legislature that a, “medical malpractice insurance crisis of unprecedented magnitude” existed and necessitated the cap on wrongful death noneconomic damages.¹⁰ Instead, the Court supplanted their own findings of fact that no such crisis existed.¹¹

The Court’s New Ruling in *Kalitan*

More recently, in the June 8, 2017 holding in *Kalitan*, the Florida Supreme Court relied upon and extended the *McCall* reasoning to hold the cap on noneconomic damages in medical malpractice actions unconstitutional for the same reasons.¹² While the ruling was no surprise given the Court’s holding in *McCall*, the newest majority opinion left many again questioning whether the Florida Supreme Court has overstepped its role and veered into the policymaking realm of the legislative branch. The holdings in both *McCall* and *Kalitan* were bolstered with the

Court’s own *independent* findings of fact, which contradicted and dismissed the express findings of the Florida Legislature. In finding that the Legislature had no rational basis for imposing the caps, the Court undeniably substituted its own judgment for the Legislature’s, a move Justice Barbara Pariente, in *McCall*, opined was outside of the scope and role of the Judiciary.¹³

In her concurring opinion in *McCall*, Justice Pariente opined, “there is simply no precedent for this court to engage in its own independent evaluation and reweighing of the facts.”¹⁴ Justice Pariente noted that the rational basis test requires the presumption that the legislative findings are correct, unless the findings are found by the Court to be “clearly erroneous.”¹⁵ Essentially, the findings must be *irrational* under the rational basis standard to justify the Court’s own fact-finding, as they undertook in *McCall*.

Surprisingly, in *Kalitan*, Justice Pariente backed away from her previous stance in *McCall*, instead joining the majority opinion in *Kalitan* which held, “we are compelled to conclude that section 766.118 presently lacks a rational and reasonable relation to any state objective, and thus fails both the concurring opinion’s ‘smell test’ as well as the rational basis test.”¹⁶ In joining the majority opinion, Justice Pariente agreed with the majority’s findings that the Legislature’s stated facts were clearly erroneous and that portion of the statute did not serve a legitimate governmental purpose. Justice Pariente’s move was largely a surprise,

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The Florida Supreme Court's Crippling of Florida's Noneconomic Damages Caps, cont.

and a further blow for supporters of the legislation who now fear that still more of section 766.118 may crumble under the High Court's gavel.

The Dubious Future of Tort Reform in Florida

In the wake of *McCall* and *Kalitan*, many proponents of Florida tort reform are left questioning whether it is possible to pass effective legislation that will pass constitutional muster. It remains to be seen whether the Florida Legislature will attempt to re-draft legislation to this effect, or whether the "medical malpractice insurance crisis" they described will continue to grow unchecked. Despite all of the findings of the Select Task Force on Healthcare Professional Liability Insurance, the Florida Legislature, and popular opinion, according to the Florida Supreme Court, at least, "even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided."¹⁷ So long as the Florida High Court is eager to reject and re-write legislative findings, it is dubious whether tangible tort reform legislation in Florida will stick.

About Lynette Whitehurst

Lynette Whitehurst, Esq. is an Associate in the Orlando office. She concentrates her practice in premises liability, general liability, auto liability, first party property claims and coverage opinions. Prior to joining the firm Lynette worked for several private practices handling med mal, personal injury, cd and coverage disputes. She has both a Bachelor of Arts degree and M.B.A. from St. Leo University. She obtained her Juris Doctor from the University of Florida, Levin College of Law. Lynette is admitted in Florida (2011) and to the U.S. District Court, Middle District of Florida.

¹*Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

² See, e.g., Governor Jeb Bush, Exec. Order No. 02-241 (Aug. 28, 2002); see also Governor Bush Creates Task Force to Address Healthcare Liability Insurance Crisis, ASSOCIATED INDUSTRIES OF FLORIDA, August 28, 2002, available at <http://www.aif.com/information/2002/otr020828.html> (last visited Jan. 19 2018).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Ch. 2003-416, § 1, 2 and 7, Laws of Fla., at 4035.

⁷ *Id.*

⁸ *McCall*, 134 So. 3d at 901.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 905-15.

¹² *Kalitan*, 219 So. 3d at 409-10.

¹³ *McCall*, 134 So. 3d at 916 (Pariante, J., concurring in result.)

¹⁴ *Id.* at 921.

¹⁵ *Id.*

¹⁶ *Kalitan*, 219 So. 3d at 411.

¹⁷ *McCall*, 134 So. 3d at 914.

Viability of Mode of Operations Claims When a Transitory Substance is Involved

by Franklin Sato, Esq.



Franklin Sato

Mode of operation claims are a form of negligence claims that focuses on a premises owner's method of operating its business or property. They are typically associated with slip/trip and fall cases involving some transitory foreign substance. Generally, under a mode of operation theory a claimant must prove that either the premises owner's method of operation is inherently dangerous, or that an operation is being conducted in a negligent fashion.¹ The focus of these claims are more on the acts of the premises owner and less on the transitory substance itself. Most notably, mode of operation claims do not require that the premises owner had notice of the transitory substance at issue.

The history of mode of operation claims, when it involves a transitory substance, has been back and forth. For context, we will pick up the history from the Florida Supreme Court's opinion in Owen v. Publix Supermarkets, Inc., 802 So.2d 315 (Fla. 2001).² The crux of the Owens case revolved around a slip and fall occurring in a grocery store as a result of a banana on the floor. One of the primary issues on appeal was whether the plaintiff needed to prove notice of the alleged transitory substance in order to hold the defendant liable. Upon review, the Supreme Court held at the time that:

"If evidence establishes a specific negligent mode of operation such that the

premises owner could reasonably anticipate that dangerous conditions would arise as a result of its mode of operation, then whether the owner had actual or constructive knowledge of the specific transitory foreign substance on floor is not an issue; the dispositive issue is whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence."

The Owen's Court based this on the theory that a transitory substance on the floor is inherently a dangerous condition, even going so far as to create a rebuttable presumption that the premises owner did not reasonably maintain the premises. Following the Owen's decision, in 2002, the Legislature passed Florida Statutes §768.0710, which partially codified the holding in Owen. In essence, it stated that; 1) a slip and fall plaintiff need not prove that the premises owner had actual or constructive knowledge of the transitory foreign substance; and 2) that a plaintiff could establish negligence using the mode of operation theory, regardless of whether the premises owner had actual or constructive knowledge of the specific factual circumstances resulting in the injury. This remained the law controlling premises liability claims involving foreign transitory substances for approximately 8 years, until 2010.

On July 1, 2010, Florida Statutes

§768.0755 was enacted and became the new standard in Florida regarding a plaintiff's burden of proof in slip and fall cases involving foreign transitory substances. In enacting §768.0755, the Legislature did two things, first it repealed §768.0710 and second it established a new burden of proof in these types of cases. Pertinent portions of Florida Statute §768.0755 reads as follows:

If a person slips and falls on a transitory foreign substance in a business establishment, the injured person **must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it.**

The Statute goes on to state how constructive notice may be established. Nowhere in the new statute does it discuss mode of operation as a method of proving negligence. Again, what is notable here is that the Legislature specifically omitted the mode of operation theory as a method of proving negligence in slip and fall actions involving transitory substances and expressly requires that notice of the transitory substance be proven. Consequently, in every slip and fall case involving a transitory foreign substance, the plaintiff must prove that the establishment had actual or constructive notice of the alleged dangerous condition.³

In changing the burden and requiring
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Viability of Mode of Operation Claims When a Transitory Substance is Involved cont.

that a plaintiff prove actual or constructive notice in cases involving a foreign transitory substance, a plaintiff should no longer be allowed to rely on the mode of operation theory, since this theory was previously independent of the premises owner's knowledge. This should be the case regardless of whether mode of operation is commingled in a count for premises liability alleging notice or as an alternative theory of liability, so long as a foreign transitory substance is involved. In support we look at the Legislative intent. The Legislature specifically omitted the previous language establishing mode of operation as a burden of proof in transitory substance cases. The Legislature also expressly set forth the procedure for a plaintiff to meet its burden of proof through actual or constructive notice.

The Legislature's decision to recodify the burdens of proof relating to slip-and-fall cases and omit statutory language that was previously included in Florida Statutes §768.0710(2)(b) is indicative of the Legislature's intent to preclude plaintiffs from invoking the mode of operation theory in slip-and-fall cases arising in business premises. To conclude otherwise would suggest that the Legislature intended to do a useless act in repealing Florida Statutes §768.0710 and changing its burdens of proof. Stated differently, if a plaintiff is allowed to argue negligent mode of operation in cases involving a foreign transitory substance, they would for all practical purposes be skirting the notice requirement and giving the new statute no real effect. This is precluded by long established precedent.^{4,5}

In conclusion, by passing Florida Statutes §768.0755 the Legislature changed the burden of proof in slip and fall cases involving transitory foreign substances by requiring that the premises owner have actual or constructive knowledge of the substance. This was done to the exclusion of all other burdens of proof, including specifically negligent mode of operation theories. As such, mode of operation claims should no longer be viable in Florida in slip and fall claims involving a foreign transitory substance.

Best Practices Tips

In cases where a plaintiff has alleged negligent mode of operation, whether with or without concurrently alleging notice, strongly consider filing a motion to dismiss the complaint. This will not only clean up the pleadings but will often limit or better define what is discoverable from a defendant premises owner, especially when it comes to training materials, policies and procedures and even hiring practices. In addition, in cases where there is no mode of operation alleged or where the same was dismissed, strong consideration should be given to amending Florida Standard Jury Instruction 401.20, specifically the first portion where it reads, "[negligently failed to maintain the premises in a reasonably safe condition] or..." This portion, while categorized as a premises liability instruction, should not be used in premises liability cases involving foreign transitory substances. To do so invites the jury to hold a defendant premises owner liable in these slip and fall cases without the plaintiff first having to establish ac-

tual or constructive knowledge of the transitory substance at issue.

¹ See Schapp v. Publix Supermarkets, Inc., 579 So.2d 831 (Fla. 1st DCA 1991).

² Prior to Owens, the mode of operation theory had been applied only to racetracks and other comparable entertainment venues, and never to a supermarket or other retail establishment. Owens at 332.

³ The House of Representatives Staff Analysis associated with the enactment of Section 768.0755 summarizes the enactment of the statute as follows: "HB 689 repeals s. 768.0710, F.S., relating to the burden of proof in 'slip and fall' claims of negligence and approximates the law with respect to slip and fall law suits as it existed before [Owens was decided in] 2001." The Senate Bill Analysis and Fiscal Impact Statement provided a similar summary of Section 768.0755: "The bill repeals the current statute providing the burden of proof in 'slip-and-fall' negligence claims and delineates the new burden of proof in these cases. This new standard reiterates the requirement that the plaintiff prove that the business had actual or constructive knowledge of the dangerous condition causing the injury"

⁴ Capella v. City of Gainesville, 377 So. 2d 658 (Fla. 1979) ("When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment) (emphasis added) (citing Carlisle v. Game and Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977) and Arnold v. ShumPERT, 217 So. 2d 116 (Fla. 1968)).

⁵ In Arnold, the Florida Supreme Court explained: "[T]o accord merit to the appellants' argument would impute to the Legislature an intention to do a useless act in amending the statute at its 1967 session. The rule of construction, instead, is to assume that the Legislature by the amendment intended it to serve a useful purpose. [citations omitted]. Likewise, when a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment." 217 So. 2d at 119.

Mesothelioma Decision Reversal from the Third District Court of Appeal by Kelly Kesner, Esq.



Kelly Kesner

The American Tort Reform Foundation (ATR) released its annual "Judicial Hellholes Report for 2017-2018", and unfortunately, Florida was ranked #1. This was due in part to Plaintiff-friendly judges, a Supreme Court that disregards the will of the legislature, and therefore the voters, and corrupt attorney-referral schemes. The article painted a bleak picture for litigation in Florida. However, a recent decision on a Mesothelioma case from the Third District Court of Appeal may show there is some light in Florida.

On December 27, 2017, the Third District Court of Appeals released its opinion on the case of Bechtel Corporation vs. Richard Batchelor, where it reversed a plaintiff's verdict in the amount of \$15,381,721.12, and for his wife in the amount of \$6 million, and granted a directed verdict for the defendant Bechtel. This was an appeal from the Circuit Court for Miami-Dade County, on a trial in front of Judge William Thomas. This was a mesothelioma trial where the jury found that Bechtel was liable for Mr. Batchelor's mesothelioma because it was caused in part by exposure to asbestos at Florida Power and Light's ("FPL") Turkey Point power plant where Mr. Batchelor worked from 1974 to 1980. At that time, Bechtel was a large contractor for FPL, providing services at the power plant. The Plaintiff brought the case on Premises Liability, Negligence, Strict Liability, and Loss of Consortium. After a trial, the jury returned a verdict in favor of Richard Batchelor. The jury

attributed the fault between FPL (35%), Bechtel (60%), and Foster Wheeler (5%), but Bechtel was the only Defendant left at trial.

Although four issues were raised on appeal, the Court only addressed two in its opinion: 1) the trial court should have granted a new trial because the court erred in providing an adverse jury instruction, and 2) the trial court should have directed a verdict because there was insufficient proof of possession and control of the premises.

This Complaint was filed on January 2, 2016. Because of Mr. Batchelor's medical condition, the case was set for trial on an expedited basis to begin August 22, 2016. On July 2, 2016, Batchelor noticed the depositions of Bechtel's corporate representatives. These depositions took place on August 4 and 5, 2016. Immediately after the depositions were taken, Batchelor moved for sanctions, asserting that Bechtel failed to adequately search for documents and information that might have been provided by retired former employees.

At a hearing on this matter, the trial court indicated that Bechtel could have mailed postcards to the last-known addresses of employees (despite the fact that the trial court had never previously issued an order compelling Bechtel to take any such action). The trial court granted the motion for an adverse inference, and allowed Plaintiffs to present a jury instruction that essentially allowed the jury to infer that because Bechtel could not produce persons employed at Turkey Point (from 30-40 years ago) to testify about Mr. Batchelor's employment, they were

permitted to infer that the evidence would be unfavorable to Bechtel. The 3rd DCA held that this was unreasonable and constituted reversible error. Given the expedited nature of the case, it was unreasonable to expect Bechtel to take such extreme measures to reach out to former employees. The 3rd DCA held that this reversible error would require reversal for a new trial, except for their next holding.

The Court's next holding had to do with the premises liability claim. Mr. Batchelor was an FPL employee and would be in proximity to removal of insulation. At times during shut downs he would work on units that Bechtel employees were refurbishing. FPL was the premises owner and never actually ceded control of the premises. In order to prove his theory, Batchelor was required to prove that Bechtel controlled the premises. The parties agreed that the jury was instructed that the preliminary issue to decide was if Batchelor was invited on the premises in the possession or control of Bechtel.

The 3rd DCA held that the evidence at trial was not sufficient to support a jury finding that Bechtel possessed or controlled the premises. The appellate court held that there was a complete absence of direct evidence. Instead, Batchelor relied on inferences such as the number of contractors Bechtel had at the premises, or the service contracts, which did not contain any language of Bechtel possessing or maintaining control of any or part of the plant. In short, the appellate court

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Mesothelioma Decision Reversal from the Third District Court of Appeal cont.

found that there was a lack of evidence showing that FPL ever permitted a third party to take control or possession of this facility. Therefore, the motion for directed verdict should have been granted. The 3rd DCA reversed with instructions to enter judgment for Bechtel.

This is certainly rare in the realm of appellate decisions. When reversals happen, they usually constitute new trials. But here, the 3rd DCA was unafraid to correct the obvious errors made by the trial court and enter a directed verdict. Perhaps decisions like this signal that there is a light at the end of the tunnel, and Florida will not remain a judicial hellhole forever.

About Kelly Kesner

Kelly Kesner, Esq. is a Senior Associate in the Miami office. Kelly has over a decade of experience handling corporate law, commercial litigation, general liability, premises liability and toxic tort litigation. She has served as national counsel in mass toxic tort product liability and premises liability cases. Kelly also has substantial experience handling a wide variety of securities litigation and financial litigation involving churning, fraud, breach of fiduciary duty, negligence, and investment analyst/banking conflicts of interest. In her work as a corporate lawyer, Kelly handled matters involving copyrights and trademarks, EULAs and privacy policies, workers' compensation, employee benefits, sexual harassment, unemployment claims, as well as contract claims.

Prior to attending law school, Kelly was a Director of Investment Research and Associate Vice President in Investment Management Services. She is admitted in Florida (2004) and to the United States District Court, Southern, Middle and Northern Districts of Florida.

About Franklin Sato

Franklin Sato, Esq. is a member of the bodily injury team and handles general liability, premises liability, negligent security, automobile liability and wrongful death claims in the Fort Lauderdale office. He also concentrates his practices in commercial litigation and has handled contract disputes and collection claims and repre-

sented auto manufacturers, auto dealers, retailers and insurance companies in arbitrations before the New Motor Vehicle Arbitration Board, American Arbitration Association, Forum Arbitration and BBB Arbitration. Franklin also handles first party condominium property claims.

Franklin obtained his Bachelor of Science degree from East Carolina University and his Juris Doctor from St. Thomas University School of Law. He is admitted in Florida (2008) and to the U.S. District Court, Southern District of Florida (2008). He also admitted to the United States Bankruptcy Court, Southern District of Florida. He has been selected to the Super Lawyers Rising Stars in Civil Defense over the last four consecutive years.

About Kristi Gillen

Kristi Gillen, Esq. is an Associate in the Boca Raton office. She practices in the area of general liability. Kristi has both a Bachelor of Arts degree and Bachelor of Science degree from the University of Florida where she majored in Sociology and Psychology. She attended Nova Southeastern University Law School and graduated cum laude. While in law school, Kristi interned with the 17th Judicial Circuit of Florida for the Honorable David A. Haimes. Kristi is admitted in Florida (2017).

Third DCA Case Affirms Defendant's MSJ for Slip and Fall on a Transitory Foreign Substance and Highlights the Legislative Intent to Shift the Burden of Proof on to Plaintiff

by Kristi Gillen, Esq.



Kristi Gillen

On December 13, 2017, in *Largo v. Costco Wholesale Corp.*, Florida's Third District Court of Appeal ("Third DCA"), affirmed the decision of the lower court, granting summary judgment to the defendant in a slip and fall incident resulting in the premises liability action. *Lago v. Costco Wholesale Corp.*, 3D16-1899, 2017 WL 6346869, at *1 (Fla. 3d DCA 2017). The court concluded that, as in two noted Third DCA cases, granting summary judgment was proper where no additional facts were present other than the floor was wet and plaintiff slipped and fell. In order to succeed Plaintiff had to present additional evidence as to the amount of time the liquid was on the floor and the regularity of the incident, if any.

Plaintiff sued Defendant following the broken knee injury she sustained after she fell on a slippery liquid substance near the entrance of the store. *Id.* The court listed the four elements of a negligence claim and highlighted the modified business duties when invitees are injured by transitory foreign substances. *Id.* at *2. A transitory foreign substance was defined by the Florida Supreme Court as, "any liquid or solid substance, item or object located where it does not belong." *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315, 317 n.1 (Fla. 2001). Customarily, under Florida law, a business owner is obligated to: "(1) to take ordinary and reasonable care to keep its premises reasonably safe for invitees; and (2) to warn of perils that were known or

should have been known to the owner and of which the invitee could not discover." *Delgado v. Laundromax, Inc.*, 65 So. 3d 1087, 1089 (Fla. 3d DCA 2011).

However, section 768.0755, Florida Statutes, makes it clear that Plaintiff had the burden to show that Defendant should have known of the dangerous condition through time or regularity of the condition as follows:

- 1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
 - (a) The dangerous condition *existed for such a length of time* that, in the exercise of ordinary care, the business establishment should have known of the condition; or
 - (b) The condition *occurred with regularity* and was therefore foreseeable.

This statute effectively places "the burden of proof in constructive knowledge negligence actions fully onto a plaintiff," for the breach element of the negligence claim. This legislative intent to shift the burden provides a favorable outcome for the defendant where the only evidence in the case was that the floor was wet and the plaintiff fell. The court further elaborated that "without more evidence, 'the mere presence of

water on the floor was not enough to establish constructive notice.'" *Largo*, 3D16-1899, 2017 WL 6346869, at *2 (citing *Delgado*, 65 So. 3d 1087, 1090 (Fla. 3d DCA 2011)).

In *Encarnacion*, the plaintiff "slipped and fell due to what she 'guess[ed],' was spray liquid on the floor." *Encarnacion v. Lifemark Hosps. of Florida*, 211 So. 3d 275, 276 (Fla. 3d DCA 2017), *reh'g denied* (Mar. 7, 2017). In her interrogatories and deposition testimony, the business invitee plaintiff never provided evidence to suggest the defendant had any knowledge of the foreign substance on the floor or how long it had been there resulting in the court's decision to affirm the defendant's motion for summary judgment. *Id.* at 279.

Here as in *Delgado* and *Encarnacion*, the court found no genuine dispute regarding the material facts of the case and thereby granted Defendant's summary judgment motion. This case reinforces the notion that plaintiffs have to establish additional evidence in order to have a successful negligence claim when a transitory foreign substance is to blame. This statute serves to help shield business defendants from blameless claims without valuable evidentiary details to support the action.

Verdicts and Summary Judgments cont.



Defense Verdict: \$800K Demand— MVA with Multiple Surgeries

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On June 27, 2018, Managing Partner Dan Santaniello, Esq. and Boca Raton Junior Partner Chris Moore, Esq. obtained a defense verdict in a motor vehicle accident in a negligence case styled *Keith Friberg v. Defendant Driver*. Plaintiff claimed he was physically attacked from behind while going to the bathroom at a gentlemen's club by Defendant's friend, then had to leave to avoid further attack by the other friends of the attacker. Plaintiff testified that he kicked and stomped his attacker in self-defense, then drove away while Defendant Driver and his friends pounded on his car to continue the attack. After thinking he had successfully avoided further confrontation, Plaintiff testified at trial that he saw Defendant Driver travel across four lanes of traffic on I-95 and ram into his vehicle, causing both vehicles to crash into the concrete barrier at 70 mph, and skid about 100 yards, totaling both vehicles and causing all of the airbags in Plaintiff's vehicle to go off.

Plaintiff put on evidence at trial that Defendant Driver and his friends then fled the scene due to the Defendant Driver's consciousness of guilt for the accident as he had been drinking at the gentlemen's club for hours prior. Plaintiff claimed fractures to each of the fifth digits of his hands, which required a total of four surgeries, as well as low back injuries with two herniations, including an annular tear, that Plaintiff asserted would require a future back surgery and treatment for the rest of his life between \$257,000 and \$417,000. Up until trial began, Plaintiff further claimed he had lost income and lost earning capacity of \$1.4 million as he could no longer perform his then-job of owning and running a health food juice bar that he had to sell months after the

subject incident, after having owned and run the business for some 10 years prior. Plaintiff dropped that claim at trial after Defendant established via pretrial discovery that Plaintiff's own treating surgeon did not believe he would be unable to perform that type of work, and Plaintiff's own litigation expert physiatrist was forced to agree he was capable of working any job, except for returning to the NFL. Defendant claimed the hand fractures were from the bathroom fight and that Plaintiff leaving the scene, rather than wait for the police, showed he was not the victim he claimed to be, and was the reason for the pursuit to identify him given the brutal head injuries he inflicted on his claimed attacker. Defendant Driver testified he left the accident scene because he believed the Plaintiff was pulling a gun out on him when he went to check on him after the accident.

Summary Judgment: Wrongful Death (Palm Beach County)

On April 27, 2018, Boca Raton Junior Partner Chris Moore, Esq. obtained a final summary judgment in the matter styled *Siddique v. Defendant HOA, et al.* The Estate of Rayyan Siddique sued for wrongful death arising out of a drowning incident in a manmade pond after the young autistic boy was last seen alive going into the water by a neighbor from across the pond. The Defendant HOA was listed in the development permit documents as the operating entity for the subject pond. Plaintiff's Complaint alleged the Defendant HOA breached their duty under the South Florida Water Management District permit by failing to properly comply with the permit conditions and causing or allowing the subject pond to deteriorate, and causing the death of the child. A co-defendant unsuccessfully opposed the summary judgment motion based on an opposing affidavit from an engineer. The issue came down to whether simply being listed as the operating entity in the permit documents would lead to a legal duty of care. Mr. Moore located and filed the now-years out of date and no longer published applicable Florida Administrative Code provisions showing the requirement of a written paper trail giving notice of the permit obligations, along with a supporting affidavit of an expert engineer with land development experience. The Court agreed with the Defendant HOA that it had no liability as a matter of law as there was no proof of transfer of the pond permit requirements to the operating entity from the developer, which is required by the Florida Administrative Code and the permit, and that the Defendant HOA did not own the subject pond.

Verdicts and Summary Judgments cont.



Defense Verdict: \$350K Demand— MVA with Multiple Surgeries

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Stuart Cohen, Miami Managing Partner
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Miami Managing Partner Stuart Cohen, Esq. and Senior Partner Luis Menendez-Aponte, Esq. obtained a defense verdict on 12/15/2017 in the automobile liability matter styled *Arianny Pinero vs. Laura Ruiz*. The Defendant admitted negligence in causing the accident, but denied that her negligence was the legal cause of any loss, damage or injury to the Plaintiff. Plaintiff demanded \$350,000. The Plaintiff underwent an MRI which revealed a herniation at C3-C4 and a bulge at L4-L5. Plaintiff underwent lumbar facet joint pain management injections and sacroiliac joint pain management. Plaintiff also underwent a bilateral lumbar rhizotomy from L3 to S1; a bilateral sacroiliac joint rhizotomy at sacroiliac joint, SI, to S3. In 59 minutes, the jury returned a complete defense verdict finding that the negligence of the Defendant, Laura Ruiz, was not the legal cause of loss, injury, or damage to the Plaintiff, Arianny Pinero. After having filed a proposal for settlement on October 11, 2011, the Defendant was entitled to pursue attorney's fees; and costs as the prevailing party.

Final Summary Judgment: Trip and Fall with Arthroscopic Knee Surgery (Miami-Dade)

On July 9, 2018, Senior Partners Luis Menendez-Aponte, Esq., Stuart Cohen, Esq. and Senior Associate Matthew W. Van Wie, Esq. obtained Final Summary Judgment in favor of the Defendant Global Cargo Alliance Corp. in relation to a trip-and-fall incident in matter styled *Gonzalez, Armando & Deliaimar vs. Global Cargo Alliance, Corp.* The Plaintiff, a deliver-yman, suffered a severe knee injury after he tripped and fell on a concrete riser step which led exclusively into the unit lease by the Defendant. As a result of the fall, the Plaintiff underwent arthroscopic knee surgery to repair the damage, and received a medical recommendation for a second surgery.

The Plaintiff alleged that riser step that led exclusively to the Defendant's unit posed a dangerous condition as it did not meet the height requirements under the applicable building code. The Defense team successfully argued that it did not owe the Plaintiff a duty of care as it did not possess or control the area of the subject fall. Relying on the specific terms of the lease with its landlord, applicable case law, and deposition testimony, the Defense successfully argued that when the owner of a commercial property leases part of the property to tenants while at the same time retaining the sole responsibility under the lease to maintain the common areas, the obligation of keeping the area safe fall upon the landlord and not the tenant. The Defense intends to move for recovery of costs.

Verdicts and Summary Judgments cont.



Construction Defects: (Miami-Dade County)

Adam Richards, Senior Associate
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Senior Associate Adam Richards, Esq. obtained a dismissal with prejudice in the matter styled *Empire Indemnity v. Bazely*. This case was a \$775,000 subrogation action filed by the condominium association's insurance company against our client, a unit owner. A dismissal was obtained in light of our arguments relying upon language within subject insurance policy as well as the condominium documents.

Adam Richards, Esq. also obtained a very favorable resolution on behalf of plumbing contractor in a wrongful death matter styled *Solis v. 3rd Generation*, filed in state court, as well as in the associated coverage action in federal court between contractor and its insurer.

Adam Richards, Esq. also obtained a dismissal with prejudice on behalf of a condominium association in a subrogation action brought by a unit owner's property insurance carrier in the matter styled *Zackarakis v. Venetia Condominium*. A dismissal was obtained in light of our arguments relying upon language within subject insurance policy.

Adam Richards, Esq. obtained a voluntary dismissal with prejudice in the matter styled *Universal Property & Casualty v. Almeria Park Condo Assoc.* Plaintiff sought reimbursement for amount paid to its insured, and Defense obtained dismissal due to interpretation of condominium documents and the applicable insurance policy.



Motion for Summary Judgment: Negligence (Broward County)

Dorsey Miller, Partner
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Fort Lauderdale Senior Partner Dorsey Miller, Esq. prevailed on a Motion for Summary Judgment in *Joseph vs. Broward County Sheriff's Office and Israel*. Plaintiff brought a 6-Count Complaint against BSO for fraud, breach of fiduciary duty, breach of public trust, preparing a false police report, violation of Plaintiff's rights under section 1983 and negligent supervision. Plaintiff claimed BSO failed to properly document an incident involving him and a third party at a dog park, which prevented him from obtaining benefits from the Florida Crime Victims' Fund for his injuries. Defendant argued that most of Plaintiff's claims were not cognizable under Florida law and that even if they were, Plaintiff could not prove causation, as there was no evidence that he would automatically be entitled to benefits from the fund even if the report were written as he believes it should have been.

Voluntary Dismissal: Slip and Fall (Broward County)

Dorsey Miller, Esq. obtained a voluntary dismissal in the Premises Liability matter styled *Coral v. BodyTek Fitness*. Plaintiff fell and broke her arm while performing the "box jump" at Defendant's gym. Plaintiff signed a waiver giving up her right to sue and Defense filed an MSJ based on that waiver.

Verdicts and Summary Judgments cont.



Motion to Dismiss: Non-Profit D&O

Michael Kestenbaum, Senior Partner
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Michael Kestenbaum, Tampa Senior Partner obtained good result in non-profit directors and officers matter styled *First Transit, Inc. vs. Pinellas Suncoast Transit Authority and Jolley*. District Court Judge's Order adopted the Magistrate's Report and Recommendation (in all respects) granting both defendants' (Jolley Trolley's and PSTA's) Motions to Dismiss and denying First Transit's Amended and Renewed Motion for Preliminary Injunction.



Motion to Dismiss: Breach of Contract (St. Lucie County)

Marc Greenberg, Managing Partner
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In the matter styled *Reyes v. Defendant Retail Store*, Plaintiff filed a lawsuit for conversion, property damages, pain and suffering, and breach of contract resulting from work performed by our client on Plaintiff's automobile. Plaintiff was seeking more than \$26,000 in damages. We moved to dismiss the case for failure to state a cause of action. The day before the hearing, Plaintiff agreed to amend the Complaint, and an Order was entered giving Plaintiff 20 days to file an Amended Complaint. Plaintiff failed to amend the Complaint, and the case was closed by the Court 45 days thereafter.



Summary Judgment: Slip and Fall

Michael Bohnenberger, Senior Associate
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On November 30, 2017, Tampa Senior Associate, Michael Bohnenberger, Esq. obtained a summary judgment in Federal Court on the slip and fall matter styled *Valorie Cave vs. Defendant Store*. Plaintiff was a business invitee shopping several aisles away from the produce department. After selecting some juice, Plaintiff turned into an aisle and slipped on a grape and some clear liquid towards the middle of the aisle. Plaintiff fell on her left knee. The fall was captured on video. Plaintiff claimed permanent injuries to her neck with associated migraines, lower back, left knee and bilateral hips to include left knee internal derangement and PCL tear along with L3-4 and L4-5 bulging discs. Plaintiff underwent left knee arthroscopy with intraarticular shaving, chondroplasty patella and lateral tibial plateau and partial anterior cruciate ligament debridement. Plaintiff incurred approximately \$75,000 in past medical expenses and claimed future medical expenses, past lost wages and loss of future earning capacity. The case was removed to the United States District Court, Middle District of Florida. In granting Defendant's Motion For Summary Judgment, the Court held that Plaintiff could not establish Defendant Store's notice of the dangerous condition as a matter of law.

Dismissal of Action: (Palm Beach County)

In the matter styled *McCown v. Defendant Retail Store*, Plaintiff tripped and fell over an L-Card that was left in an aisle by our employee. Plaintiff claimed injuries to her neck and back. Dr. Steven Dutcher of Boca Raton opined that Plaintiff was a candidate for a L4-5 decompressive hemilaminectomy with discectomy and intralaminar stabilization as well as an anterior cervical decompression with fusion at C3-4, 4-5, and 5-6. Plaintiff's past and future boardable medical bills exceeded \$400,000. We took an aggressive approach on liability, causation, and damages resulting in two favorable discovery court orders. Ultimately, Plaintiff violated two court orders resulting in a dismissal of the action by the Palm Beach County Circuit Court Judge.

Verdicts and Summary Judgments cont.

Motion to Dismiss- Judgment entered for the Defense: MVA

Michael Bohnenberger, Senior Associate
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On May 8, 2018, Tampa Senior Associate, Michael Bohnenberger, Esq. obtained a case dismissal and entry of final judgment for the Defendants in the matter styled *Gass, Carey vs. William Young Warren and HCW Transport Company, LLC*. On August 14, 2017, Defendants moved to dismiss the case for Plaintiff's failure to effectuate service of process within 120 days per Florida Rule of Civil Procedure 1.070(j). On February 7, 2018, the Court heard argument on Defendants' Motion To Dismiss Case. On March 13, 2018 the Court entered an order granting the Motion and dismissed the case without prejudice; however, because the statute of limitations had run, the dismissal was in effect, a final dismissal. Plaintiff subsequently served process on the corporate defendant and also filed a Motion For Reconsideration. On May 8, 2018, the Court heard Plaintiff's Motion For Reconsideration. The Court specifically considered the factors listed in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) for dismissal of a case. After hearing argument from both Plaintiff and the defense, the Court found there was no evidence of good cause or excusable neglect and that the prejudice suffered by the defendants outweighed the consideration of the case being tried on the merits. The Court, aware of the discretion afforded to it under Rule 1.070(j), denied Plaintiff's Motion For Reconsideration and granted Defendants' Motion For Entry of Final Judgment.

Verdicts and Summary Judgments cont.



Allison Janowitz, Senior Associate
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Motion for Summary Judgment: Trip and Fall

Fort Lauderdale Senior Associate Allison Janowitz, Esq. prevailed on a Motion for Summary Judgment and Motion for Sanctions for Fraud on the Court in a trip and fall matter styled *Liliana Yanez v. Defendant Mall*. This matter involved an alleged Trip and Fall at Boynton Beach Mall. Plaintiff alleged that she sustained extensive dental damage as a result of the fall. The Motion for Summary Judgment was based on the fact that the wrong entity was named in the Complaint. The Motion for Fraud was based on the damages that Plaintiff claimed as a result of the accident. Plaintiff claimed that she needed extensive dental work as a result of the trip and fall at Boynton Beach Mall. Defendant successfully argued that she had recommendations for the same extensive dental work prior to the fall. The Court granted the Motion for Summary Judgment and the Motion for Sanctions for Fraud.



Edgardo Ferreyra, Senior Associate
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Motion for Summary Judgment: MVA

A Motion for Summary Judgment was granted in the case of *Gonzalez v. Avis Rent A Car*. Judge Arzola granted our Motion for Summary Judgment today on a claim of negligence against Avis Rent A Car System under Florida's Unattended Motor Vehicle Statute. Plaintiff was injured when an Avis rental vehicle, driven by an individual who gained access to the vehicle, struck Plaintiff's car and then struck the Plaintiff. The individual fled the scene of the accident, as his identity remains unknown. The rental vehicle was returned to Avis the following day, after the scheduled return date. The renter, Jennifer Rico, stated in an affidavit that she gave the keys to the rental vehicle to an employee of a body shop to return to Avis. The body shop had no affiliation with

Avis. At the hearing, and in response to our MSJ, Plaintiff argued that Avis owed a duty to locate their overdue rental vehicle and protect the Plaintiff against a foreseeable risk of injury. We argued that there is no such duty, and that Avis' conduct did not create or control the risk, which is required before liability may be imposed. We also filed a PFS in the amount of \$500, and have a pending Motion for Attorney's Fees.

New Attorneys Join the Firm

Our offices are growing and we have added many new attorneys across south and central north offices, shown by practice area concentration below.



Boca Raton
Tamar Gelin, Esq.
AGL



Miami
Christopher Horne, Esq.
1st Party/Commercial
Property and AGL



Miami
Stephanie Williams, Esq.
1st Party and Commercial
Property



Miami
Cassandra Springer, Esq.
1st Party and Commercial
Property



Miami
Glenn Palaia, Esq.
1st Party and Commercial
Property



Miami
William Saintilus, Esq.
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Miami
Christopher Beck, Esq.
E&O Professional Liability
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Bonnie Sack, Esq.
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Fort Lauderdale
David Rosinsky, Esq.
CD



Fort Lauderdale
Dean Myers, Esq.
CD



Fort Lauderdale
Blair DeLeon, Esq.
1st Party and Commercial
Property



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Daniel Weinger, Esq.
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Joshua Meadow, Esq.
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Orlando
Paul Bloomquist, Esq.
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Orlando
Terese Latham, Esq.
Med Mal, GL BI, E&O



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AGL, E&O



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AGL



Orlando
Jonathan Ray, Esq.
AGL, CD, EPL



**LUKS, SANTANIELLO
PETRILLO & JONES**
OUR VERDICTS TELL THE STORY



2018 Claims Awards: Blue Boxing Glove



The Argo Group recognized Managing Partner Daniel Santaniello, Esq., as a contender in his venue and presented him with the 2018 “Blue Boxing Glove Award.” Recipients are selected for going the distance in defense of their client and challenging the fiercest of Plaintiff lawyers. Daniel is AV® Preeminent™ rated by Martindale-Hubbell and a Florida Bar Board Certified Civil Trial Expert with 28 years of trial litigation experience. Dan has over 100 published Florida jury verdicts. He is admitted to practice before the State of Florida, State of Massachusetts and the U.S. District Court, Southern, Middle and Northern Districts of Florida, including Trial Bar and the U.S. District Court, District of Massachusetts.

The Gavel National Conference III and Education Program

The Gavel National Conference III will be held January 21 – 23, 2019 at the Boca Beach Club in Boca Raton, Florida. The education committee has selected litigation sessions and round-table workshops ranging from emerging technology in claims and litigation; to analytics and L-Task codes for case progression, gaps in specific phases, and harnessing information that yields action points; and changemaking initiatives in value portfolio management; along with safeguarding the professional in digital work communications, and many other topics. The Gavel and Luks, Santaniello are able to offer a number of conference scholarships to claims professionals (if your employer allows). Please contact Maria Donnelly (MDonnelly@insurancedefense.net) for further conference details.



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