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LEGAL UPDATE

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Liability

***Rodriguez v. Amerisure Insurance Company*: Third District Court of Appeal Holds That Third Party Spoliation Claims Must Be Abated or Dismissed Until Underlying Claim Resolved, But Questions In the Realm of Spoliation Law Remain**

by Shana Nogues, Esq. and Daniel Santaniello, Esq.

Shana Nogues

The Third District Court of Appeal added direction to the perplexing body of case law regarding spoliation on September 26, 2018 in *Amerisure Ins. Co. v. Rodriguez*, 3D18-1058, 2018 WL 4608993 (Fla. 3d DCA Sept. 26, 2018). In *Rodriguez*, the Third District joined the Second and Fourth Districts and held "that third-party spoliation claims should generally be abated or dismissed until the underlying tort claim is resolved." *Id.* at *2. Florida is among the minority of states that recognizes a cause of action for third party spoliation, but also allows sanctions for a first-party spoliator, so it is of special import to our clients to remain current on the state of spoliation law.

As mentioned above, there are two types of spoliation. First-party spoliation is the spoliation of evidence by an alleged tortfeasor. Florida does not recognize an independent cause of action against a first-party spoliator for the spoliation of evidence; rather, Florida law allows for discovery sanctions and a rebuttable presumption of negligence against a tortfeasor for spoliation. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005). Third-party spoliation "occur[s] when a person or an entity, though not a party to the underlying action causing the plaintiff's injuries or damages, lost, misplaced, or destroyed evidence critical to that action." *Id.* at 346 n.2. Florida allows an independent cause of action for third-party spoliation.

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Verdicts, Summary Judgments, Appellate Results

Defense Verdict: Trip and Fall (Broward County)

On August 2, 2018, Fort Lauderdale Managing Partner David Lipkin, Esq. and Senior Partner Dorsey Miller, Esq. obtained a defense verdict in the slip and fall matter styled *Maria Cadette v. Defendant Store.* Plaintiff, a then 57 year old woman alleged that on 8/31/14 she suffered a trip and fall injury at a Defendant store garden department caused by loose mulch which had spilled from ripped bags onto the floor. In support of her claim she offered several photographs alleged to have been taken shortly after her fall showing mulch on the ground. Defendant Store denied it was negligent and noted that plaintiff's fall was not caused by the mulch on the ground, but by plaintiff simply attempting to lift an entire bag of mulch by herself without assistance as plaintiff admitted on cross examination that the fall occurred as she attempted to lift a bag of that was stacked on a pallet at nose level.

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Rodriguez v. Amerisure Insurance Company: Third District Court of Appeal Holds That Third Party Spoliation Claims Must Be Abated or Dismissed Until Underlying Claim Resolved, But Questions In the Realm of Spoliation Law Remain, cont.

Dan Santaniello

Rodriguez deals with a third-party spoliation issue – whether a third-party spoliation claim can proceed concurrently with the underlying tort claim. There, Rodriguez sued Cosme Investment for personal injuries. *Rodriguez* at *1. Rodriguez, who was employed by BV Oil, Inc., was injured when he was knocked from the top of a gasoline tanker truck that he was fueling in Cosme's warehouse. *Id.* Following the accident, Rodriguez collected workers' compensation benefits through his employer's carrier, Amerisure. *Id.* At some point, Rodriguez learned that BV Oil and Amerisure had possession, at one time, of a videotape showing his accident which would have helped him prove his case against Cosme; however, that videotape was negligently lost or destroyed. *Id.* Rodriguez subsequently added BV Oil and Amerisure to the lawsuit alleging third-party spoliation and that the loss of the video significantly impaired his "ability to prove his claim and/or to address the comparative negligence defense, thereby affecting [his] potential recovery in [the] case." *Id.*

Over objection, the court set the trial of the underlying personal injury case at the same time as the spoliation action. *Id.* The trial court further, again over objection, ordered Amerisure to provide discovery related to the spoliation claim and claims handling related to the same. *Id.* Amerisure filed two Petitions for Writ of Certiorari – one to quash the trial order and one to quash the discovery orders. *Id.* The petitions were consolidated. *Id.* The Third District accepted the petitions noting that "[r]equiring Amerisure to provide discovery and proceed to trial regarding a claim that has not accrued, and may never accrue if Rodriguez is successful in his underlying claim, would constitute irreparable harm." *Id.* (internal citations omitted). In its analysis, the Court joined "the consensus of authority that holds third-party spoliation claims should be abated or dismissed until the underlying tort claim is resolved." *Id.* at *2.

Notably, in reaching this conclusion the Court refrained from deciding whether this general rule will apply to products liability cases in light of prior authority holding "that products liability claims and third-party spoliation claims concerning the allegedly defective products could be tried together." *Id.* (internal citations omitted). This issue was not before the Court; thus, it leaves a gray area in whether a third-party spoliation claim is concurrently maintainable with the underlying claim against a spoliator in the instance of an underlying products liability case.

Generally under Florida law, the essential elements of a spoliation of evidence cause of action are the (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *See Hagopian v. Publix Super Markets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001) (quoting *Cont'l Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. 3d DCA 1990). A duty to preserve evidence can arise by contract, statute, or a properly served discovery request. *See Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303 (N.D. Fla. 2002) citing to *inter alia*, *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984).

That said, there is a line of cases to suggest that a duty to preserve evidence arises when litigation is simply foreseeable. *See Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 393-93 (Fla. 2d DCA 2012); *Am. Hosp. Mgmt. Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005) (citing *Hagopian v. Publix Supermarkets, Inc.,* 788 So.2d 1088, 1090 (Fla. 4th DCA 2001), *review denied,* 817 So.2d 849 (Fla.2002) (recognizing retail establishment's duty to preserve evidence even without a contractual, statutory or administrative duty). We disagree with this approach, as it leaves our clients with many questions as to what needs to be preserved and when.

Because of these inconsistencies, our clients must be especially cautious when they have possession of evidence or potential evidence relating to a loss regardless of whether they are an alleged tortfeasor or have possession of evidence related to a possible claim. Just like in *Rodriguez*, where BV Oil and Amerisure were not parties to the action, but had possession of potentially helpful evidence, our clients can possibly be "on the hook" if it is later found that the elements of spoliation are met and the loss of evidence affected a party's ability to prove its case.

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Rodriguez v. Amerisure Insurance Company: Third District Court of Appeal Holds That Third Party Spoliation Claims Must Be Abated or Dismissed Until Underlying Claim Resolved, But Questions In the Realm of Spoliation Law Remain, cont.

Since the law regarding spoliation has many gray areas and is devoid of a national standard, or even a Florida-wide standard, we recommend following the more liberal foreseeability standard when determining when to preserve evidence and what to preserve. Since there exists a lack of uniformity as to what creates a duty to preserve, it is best practice to evaluate what related evidence exists at the time of a known incident or at the time of notice of an alleged incident. This evidence can range from the tangible item that allegedly caused the injury (i.e. a glass bottle or an automobile) and store surveillance footage to receipts and sweep or maintenance records.

Following the foreseeability standard puts this onus on our clients to take a step back and consider what they may possess related to a potential claim from the moment that the incident occurs or from the moment they are on notice of it. For example, if a slip and fall occurs, clients should consider what tangible and documentary evidence might be relevant to a potential claim – that is, an insured should preserve any floor sweep logs, related maintenance records, such as a nearby ice machine, and download and save any surveillance footage. Additionally, upon notification of a claim, claims professional should discuss with insureds what must be preserved and how to properly preserve relevant items.

We also recommend that our clients have written legal hold and document retention policies. Legal hold policies should contain a protocol for setting aside potential evidence and marking it clearly in a specified area. There should be an assigned custodian of this evidence, but all employees should know not to touch, remove, tamper with, destroy, or alter any items on legal hold. Document retention policies should clearly lay out the timeline for recording over, erasing, and disposing of documents. Any documents related to a potential lawsuit should be separated from others and placed on legal hold.

Unfortunately, due to the current climate of spoliation law, it is nearly impossible for our clients to fully protect themselves from claims of spoliation; however, following a foreseeability standard, making an effort to identify related evidence, and adhering to legal hold and document retention policies will help reduce the risk of exposure. Additionally, should a claim of spoliation arise down the road, these efforts should be considered by courts to mitigate the consequences.

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Florida Supreme Court Rejects *Daubert* and Adopts *Frye* While Quashing the Fourth DCA's Decision and Remanding to Reinstate an $8 Million Asbestos Verdict

by Christopher Beck, Esq.

Christopher Beck

In *DeLisle v. Crane Co., et al.*, No. SC16-2182, (Fla. Oct. 15, 2018), the Florida Supreme Court expressly rejected the *Daubert*[1] test and adopted the *Frye*[2] test for determining the admissibility of expert testimony in Florida courts. In doing so, the Court reinstated an $8 million asbestos verdict against multiple defendants.

The Court determined that chapter 2013-107, section 1, Laws of Florida, which revised section 90.702, Florida Statutes (2015) to incorporate the *Daubert* standard, infringes on the Court's rulemaking authority. It explained that, "Article II, section 3 of the Florida Constitution prohibits one branch of government from exercising any of the powers of the other branches," and that, "[s]ection 90.702, Florida Statutes, as amended in 2013, is not substantive," and, therefore, is a procedural regulation solely within the purview of the Court.

In doing so, it opined that the higher but more narrow *Frye* test for expert testimony that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs,"[3] (emphasis added) but which only applies to new or novel scientific evidence, is a better test than the lower, wider *Daubert* test for all expert testimony that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. … The focus, of course, must be solely on principles and methodology, not on the conclusions they generate." In a concurring opinion, Justice Pariente noted that a primary concern with the *Daubert* standard was the burden it placed on the court system and litigants via lengthy and expensive hearings that resulted from it, specifically noting "the time-consuming and potentially cost-prohibitive expense created by *Daubert* hearings, as well as the onerous barriers to admitting expert testimony…."

As applied to asbestos exposure, the Florida Supreme Court held that, "because the causation of mesothelioma is neither new nor novel, [the *Frye* test does not apply and, therefore,] the trial court's acceptance of expert testimony was proper." The Court, therefore, reinstated the $8 million verdict awarded by the trial court.

1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
3. The Court expressly noted: "However, this Court's case law makes clear that a proper and thorough application of *Frye* allows the trial judge to inquire beyond bare assertions of general acceptance." *DeLisle v. Crane Co., et al.*, No. SC16-2182, (Fla. Oct. 15, 2018).

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Florida's Statute of Repose for Construction Defects: Is There a Clear Risk Horizon? by Charles Bearden, Esq.

Charles Bearden

Until recently, Florida construction contractors, material suppliers and design professionals could reasonably expect that their liability for defects in "the design, planning, or construction of an improvement to real property" was extinguished "10 years after the date of actual possession by the owner, the date of the . . . certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the [design professional] or licensed contractor and his or her employer, whichever date is latest."[1] If no litigation or arbitration demand was filed during that 10 year period, their exposure had arguably ended. However, a recent ruling in *Gindel v. Centex Homes,*[2] together with the latest amendment to § 95.11(3)(c), Fla. Stat., has arguably rendered the exposure period indefinite.

On September 12, 2018, in a matter of first impression, Florida's Fourth District Court of Appeal held that pursuant to § 558.004, Fla. Stat., service of a notice of construction defects qualifies as an "action" for the purpose of commencing "an action before the expiration of the statute of repose" period.[3] In *Gindel*, the Plaintiffs ("Homeowners") brought suit against Centex Homes for damages arising from alleged construction defects in their townhomes. The timeline is uncomplicated. "On March 31, 2004, the Homeowners closed on and took possession of their townhomes constructed by Centex. From this date, the statute of repose . . . began to run as to any construction defect, the expiration of which was" March 31, 2014. On February 6, 2014, and well within the ten-year statute of repose, the Homeowners served Centex with a § 558.004, Fla. Stat. notice of construction defects. Thereafter, Centex advised the Homeowners that it would not take action to remediate the alleged defects. Therefore, on May 2, 2014, and some thirty-two days after the statute of repose apparently expired, the Homeowners filed suit. Based on these chronological facts, the lower court granted Centex's motion for summary judgment regarding the Homeowners' claims, concluding that the "*action*" originated after the running of the repose period.

The Homeowners appealed the trial court's decision, arguing that they "actually commenced the action on February 6, 2014 by following the pre-suit filing requirements provided by Florida statute and Centex's own contracts," and that the "trial court erred in holding that, for purposes of the statute of repose, a construction defect case is commenced only when a civil action is filed."[4] In its Answer Brief, Centex responded that "participation in the steps outlined in Chapter 558, Florida Statutes . . . did not qualify as commencing an action for purposes of the Statute of Repose, nor was the Statute of Repose tolled while the 558 mechanism ran its course."[5]

The *Gindel* Court stated that the outcome of the appeal hinged on "whether the pre-suit notice required by Chapter 558 qualifies as 'an action,' as that term is defined in the statute of repose, section 95.011," which provides that a "civil action or *proceeding*, called 'action' in this chapter . . . shall be barred unless begun within the time prescribed in this chapter." However § 558.002(1), Fla. Stat. defines an action as "any civil action or arbitration proceeding." The Court stated that the "the trial court conflated the separate and distinct definitions of the term 'action' provided in Chapter 95 and Chapter 558," and that "in Chapter 95, 'action' is defined more broadly and without much context to limit the meaning of the term;" moreover "Chapter 95 . . . does not appear to rely on Chapter 558 or reference it in any way."

The Homeowners focused on the "proceeding" portion of the § 95.011 "action" definition and contended that the mandatory pre-suit notice and procedure set forth in Chapter 558 is a "proceeding" and is thus an "action." The appellate panel found the Homeowners' argument "logical and practical," and stated that, by interpreting an "action" exclusively as a "civil action," the trial court had rendered the balance of the definition—"proceeding"—as "meaningless surplusage." The panel further asserted that "Chapter 558 was not intended as a stalling device in order to bar claims," and that the "Homeowners should not be penalized for rightly complying with the mandates of the statute."

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Florida's Statute of Repose for Construction Defects: Is There a Clear Risk Horizon, cont.

As no Florida appellate court had directly addressed the issue of whether a 558 Notice constitutes an "action," the Fourth DCA analogized *Musculoskeletal Institute Chartered v. Parham*[6] for the proposition that compliance with the pre-suit notice and investigation requirements of sections 766.104(1) and 766.106(4), Fla. Stat.—for medical malpractice cases—constituted commencement of an "action" for purposes of the statute of repose. In *Musculoskeletal*, the Supreme Court of Florida held that "it would be an unconstitutional impediment to access to the courts if compliance with the statutory requirements . . . resulted in a potential claimant's suit being forever barred by the associated statute of repose." [7] The Fourth DCA noted that the same was true in the construction defects context.

Moreover, the appellate panel disregarded dicta from *Busch v. Lennar,*[8] a Fifth DCA case distinguishing the pre-suit requirements for medical malpractice actions—as discussed in *Musculoskeletal*—from those for construction defects. In *Busch*, the court stated that if "a potential medical malpractice litigant files suit prematurely, the case is subject to dismissal; however, if a claimant asserting a construction defect files suit prematurely, the lawsuit is simply stayed. . . . The stay provision thus ensures that section 558.004's requirements do not infringe upon a claimant's right to access the courts."[9] Dismissing this analysis, the Fourth District stated that "this [Chapter 558 stay] provision has no bearing on whether an action was commenced before the statute of repose period lapsed."

Further complicating the effect of the *Gindel* opinion is House Bill 875 (2018). The bill was approved by Governor Rick Scott on March 23, 2018, and amended Florida's statute of repose for construction defects effective July 1, 2018. The amendment, strictly speaking, creates a subsequent one-year repose period for construction defects to allow a defendant's counterclaims, cross-claims, and third-party claims to be filed up to one year after the service of an underlying *pleading* to which such claims relate, even if such claims would otherwise be time barred.[10] The underlying ten-year statute of repose remains unchanged.[11] Hence, the plaintiff must still commence its action within the ten-year repose period. However, considering that service of a timely Chapter 558 notice on a defendant is now considered commencement of an "*action*," and depending upon how courts may choose to define *pleading*, the defendant will possibly have leave to serve downstream 558 notices on third-parties for an additional year after initial notice of the claimant's underlying allegations of construction defects—up to eleven years from the date triggering commencement of the statute of repose period. Furthermore, as there is no limitation on the time during which Chapter 558 pre-suit notice and investigation requirements must be concluded, an actual lawsuit or demand for arbitration could arguably be filed at any time after service of the notice.

The interplay between the amendment to § 95.11(3)(c), Fla. Stat. and the *Gindel* holding renders an insured's liability for construction defects indefinite, but inarguably much longer than the ten years the Florida Legislature envisioned in drafting our statutes. Please contact Patrick Hinchey, Esq. or Eric Bearden, Esq. in our Jacksonville office for any questions regarding the preceding, or any members of our construction defects team throughout our nine Florida Locations.

[1] § 95.11(3)(c), Fla. Stat. (2017).
[2] *Gindel v. Centex Homes*, No. 4D17-2149, 2018 WL 4362058, at *1 (Fla. 4th DCA Sept. 12, 2018) (not final until disposition of timely filed motion for rehearing).
[3] *Id*. All further quotes from and references to the *Gindel* opinion may be found within the cite at endnote 2.
[4] Appellants' Initial Brief, *Gindel v. Centex*, 2017 WL 5514749 at *11, 14 (Fla. 4th DCA).
[5] Appellees' Answer Brief, *Gindel v. Centex*, 2017 WL 6508492 at 6 (Fla. 4th DCA).
[6] 745 So.2d 946 (Fla. 1999).
[7] *Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 952 (Fla. 1999).
[8] 219 So. 3d 93 (Fla 5th DCA 2017).
[9] *Busch*, 219 So. 3d at 96 n. 2.
[10] FL Staff An., H.B. 875, 3/23/2018.
[11] § 95.11(3)(c), Fla. Stat. (2018).

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PIP Fraud By Maria Garcia Bahamonde, Esq. and David Chalela, Esq.

Maria Garcia Bahamonde

Florida is the nation's third largest car insurance market with approximately 16 million drivers. It is one of the few states that still requires personal injury protection coverage through a no-fault system. Unsurprisingly, given the amount of drivers and accidents, this multi-billion dollar system has been plagued with fraud and litigation. For example, in 2017, more than 60,000 lawsuits were filed as a result of insurance claims,[1] and although repeal of this system has received increased support in recent years, there is no guarantee that an alternative would be better.

2018 Florida Legislature Update

The Florida Legislature has amended our PIP laws several times since its inception. Due to costly premiums and the prevalence of fraud, the House of Representatives has made several attempts in the last few years to change the PIP laws.[2] Recently, the House famously passed a bill to repeal PIP. It died in the Senate, just as it had for the four previous years.

This year during the 2018 legislative session, the House attempted to make changes once again by proposing a mandatory system that excluded both PIP and Medical Payments. This proposal received so much support that the bill passed with an 85-15 vote.[3] It did not survive the Senate. The Senate had originally proposed a bill that would have repealed PIP and would have instead installed a mandatory bodily injury version that differed from the House's proposal. It included $5,000 in Medical Payments. Opponents concluded this version would have increased insurance rates. With 2018 being an election year, the Senate let the bill die in the Banking and Insurance Committee.

Many, including hospitals, medical providers, insurance commissions, and lawyer organizations argue a repeal will be expensive. It could bring about more lawsuits. Fraudsters may find new ways to circumvent the law. For now, PIP is here to stay and remains unchanged. However, given the amount of support that the proposed changes recently received in the House, similar proposals are likely to resurface in the 2019 legislative session.

PIP Fraud Investigations

The Florida PIP fraud problem is especially bad in South and Central Florida. In 2015, the A&E Network broadcasted an investigation into a fraud ring in Palm Beach, Martin, and Miami-Dade Counties.[4] The following year, two brothers from Lake Worth were sentenced to nine-year prison terms following an investigation into a sham clinic that had defrauded dozens of insurance companies resulting in $3 million of unneeded or nonexistent treatments.[5]

This past year, the Broward County Sheriff investigated a suspected $23 million auto insurance fraud operation. The scheme was alleged to have defrauded 10 insurance companies between 2010 and 2017. According to the indictment, a group involving several attorneys who owned several chiropractic clinics fraudulently used licensed chiropractors as nominee owners in order to obtain licenses for the clinics. The indictment alleged illegal kickbacks and solicitation fees to individuals associated with tow truck companies and others who allegedly solicited automobile accident victims in order to get the victims to their clinics.[6]

David Chalela

The indictment further alleged that once accident victims got to the clinics, the individuals would bill the entire $10,000 PIP coverage motivated by profit over medical necessity. Other allegations included falsification of initial pain levels and billing for costly and invasive nerve conduction velocity tests. The indictment further alleged that the claimants were told to return to the clinic if they hadn't received at least 30 treatments.

Ultimately, six attorneys were charged. One attorney from Boca Raton was sentenced to one year and nine months in prison and ordered to pay $1.8 million in restitution.[7] Another attorney received 10 years of probation. Unfortunately, fraud is still prevalent. Criminal investigators suspect other fraudulent chiropractor clinics are still operating throughout the state, especially in Central and South Florida. If you suspect PIP or other insurance fraud on a claim, please give us a call at 813-226-0081. We are here to help.

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PIP Fraud continued.

[1] Elmore, Charles, *PIP Lawsuits in Florida Soar to Record Level; 60,000 Lawsuits in 2017 Represents Rise of Close to 50% in One Year*, The Palm Beach Post, February 26, 2018.

[2] Hale, Nathan, *PIP Insurance Repeal Rejected by Fla. Senate Subcommittee*, Law360, March 1, 2018.

[3] The Florida Senate, Calendar for 5/3/2018. https://www.flsenate.gov/Session/Bill/2018/00019.

[4] Elmore, Charles, *Takedown of Accused Palm Beach, Martin Fraud Ring Airs on A&E*, The Palm Beach Post, July 8, 2015.

5 Musgrave, Jane, *Owner of Rumbass, Brother Handed 9-Year Terms in Scam*, The Palm Beach Post, January 27, 2017.

[6] Schlein, Zach, *No Prison Time for South Florida Attorney Who Pleaded Guilty in Multimillion-Dollar Insurance Fraud*, Daily Business Review, August 31, 2018.

[7] Claims Journal, *Florida Lawyer Gets Prison for Role in $23M PIP Fraud Scheme*, April 18, 2018.

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The Supreme Court Diminishes Ambiguity Arguments in Proposals for Settlements by R. Lee Page, Esq.

Lee Page

On October 4, 2018, the Supreme Court of Florida decided the case of *Allen v. Nunez*, Slip Opinion, WL 4784606, (Fla. 2018), a decision that has significance for a wide array of claims due to its implications with the proposal for settlement process. In the majority opinion, the Court tried to clarify the standard to reach for finding a proposal for settlement unenforceable due to perceived ambiguities.

Utilizing the Supreme Court's conflict jurisdiction, a split Court ultimately overturned the decision of the Fifth District Court of Appeals, which had held the two almost identical proposals for settlement ("PFS") were ambiguous and, therefore, unenforceable. *Nunez v.* Allen, 194 So. 3d 554 (Fla. 5th DCA 2016).

In *Allen*, the Petitioner, W. Riley Allen was involved in a motor vehicle accident with the Respondent, Gabriel Nunez. Nunez's vehicle was owned by his father, Jairo Nunez, who was also a Respondent. The accident consisted of an impact between the vehicle being driven by Nunez and Allen's unoccupied truck parked legally on a street. Allen brought an action against both Gabriel and Jairo Nunez seeking damages that consisted of cost of repair, diminution in value, and loss of use of his truck. Respondents jointly filed an answer. Allen gave both Respondents separate but identical proposals for settlement in the amount of twenty thousand dollars. Neither Respondent accepted their proposal. Accordingly, the proposals were considered rejected.

After Allen received a sum of $29,785.97 in a final judgement, he sought an award of attorney fees under Florida's offer of judgement law. Respondents argued the proposals were ambiguous due to a paragraph stating the monetary damages were inclusive of all damages claimed by Allen. The paragraph failed to specify whether one of the proposals would have resolved the case against both Respondents or only the Respondent who accepted.

The trial court granted Allen's motion to enforce, awarding attorneys' fees in the amount of $343,590. On appeal, the Fifth District reversed, finding the proposals were ambiguous and thus unenforceable. The district court relied on a Second District Court of Appeal decision in *Tran v. Anivl Iron Works, Inc.*, which held two identical proposals for settlement unenforceable due to their ambiguity. 110 So.3d 923 (Fla. 2d DCA 2013).

Upon review of the district court's reversal, the Supreme Court set out an analysis of Florida Rule of Civil Procedure 1.442. (Majority op. at 6). The Majority opinion cited its recent decision in *Anderson v. Hotels Corp.*, finding two identical proposals for settlement were in fact enforceable and unambiguous. 202 So. 3d 846 (Fla. 2016). The decision also cites two other conflicting opinions from the Second District Court of Appeal which rejected similar proposals as ambiguous and therefore unenforceable. *See Miley v. Nash*, 171 So. 3d 145 (Fla. 2d DCA 2015); *Bright House Networks, LLC v. Cassidy*, 242 So. 3d 456 (Fla. 2d DCA 2018).

Overall, the Majority opinion held the District Court erred in holding the proposal ambiguous. Finding that although standing alone the cited paragraph was arguably ambiguous, upon a reading of the proposal as a whole the "only reasonable interpretation is that Allen offered to settle his claims with only the Respondent specified in each respective proposal." (Majority op, at 21). Accordingly, the Court found that the Respondents' assertion of ambiguity ignores the well-established principle that the parties' intent is not determined from a contract's subparts and individual paragraphs but from the contract's entirety.

Justice Polston authored a dissent, with which Justices Canady and Lawson concurred. However, the dissent does not concern the substance of the majority opinion, but instead takes issue with whether the Court had jurisdiction. (Dissenting op. at 26).

Suggestions and Recommendations

This opinion is likely a setback for ambiguity arguments in proposals for settlements in general. The Court here seems to be sending a message that it will not accept "nit picking" of proposals for settlements and wants the courts to enforce them whenever possible.

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Justice Pariente, writing in her concurrence with the majority opinion stated:

> "I write separately to, once again, highlight the proliferation of litigation surrounding proposals to settle, which runs counter to the entire purpose of these proposals—to reduce litigation. In light of the exorbitant amount of litigation, I urge courts to focus on the goal of reducing litigation when reviewing a proposal for settlement."

Given this statement, there is no real way to effectively reduce litigation unless the courts stop awarding exorbitant fees. We recommend keeping any proposal for settlement/offer of judgment in its simplest form and with few, if any, conditions to try and increase the chance of enforcement.

About R. Lee Page, Esq.

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Lee Page, Esq. is an Associate in the firm's Tallahassee office. He concentrates his practice on the representation of clients in the areas of general liability, automobile liability, premises liability. He also is experienced with workers' compensation and employment matters. Prior to joining the firm, Lee represented carriers and self-insureds at a regional insurance defense firm. Lee began his legal career as an Assistant Attorney General at the Florida Office of the Attorney General where he defended the State of Florida from federal civil rights actions. He is admitted in Florida (2015).

Verdicts and Summary Judgments, cont.

David Lipkin, Fort Lauderdale Managing Partner
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Dorsey Miller, Fort Lauderdale Senior Partner
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Defendant Store also noted that plaintiff's footwear, flip flops, contributed to her fall. It was also noted that the photographic evidence undermined her claim as the photographs that showed mulch on the ground largely showed the mulch next to a different brand of mulch then the brand plaintiff was known to be near when she fell.

Plaintiff alleged that as a result of her fall she mild traumatic brain injury and herniated cervical and lumbar discs. She ultimately treated with three different spinal surgeons, two neurologists and a pain management physician. In addition, over three years post incident the plaintiff's counsel directed her to two additional separate evaluations with an additional spinal surgeon and neurologist. Defendant Store had the plaintiff undergo CME's with a spinal surgeon and neurologist, both of whom opined the plaintiff did not suffer permanent injury as a result of the alleged incident. Defendant Store served a Proposal for Settlement which was rejected and as a result of the defense verdict Defendant Store is entitled to seek recovery of its attorney's fees and costs.

Defense Verdict: $224K Demand—Slip and Fall with Multiple Surgeries (Duval)

Todd Springer, Jacksonville Managing Partner
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Deana Dunham, Senior Associate
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On October 11, 2018, Jacksonville Managing Partner Todd Springer, Esq. and Senior Associate Deana Dunham, Esq. obtained a defense verdict in a slip and fall matter styled *O'Neal v. Shops at St. Johns.* Plaintiff demanded $224,000 at trial. Plaintiff was walking next to her daughter back to her car when she suddenly fell, coming down on brick pavers. Plaintiff alleged that an uneven brick paver protruded above the rest, causing her to trip and fall. The court allowed in evidence that a prior fall had taken place only two months before the Plaintiff's fall in the same area on an abutting sidewalk joint only inches from where the Plaintiff fell. Following the prior fall the Defendant performed repairs to correct the condition of the sidewalk but not the abutting pavers.

The Plaintiff incurred $112,000 in past medical specials and underwent arthroscopic surgery performed by Dr. Stephen Lucie. Following the arthroscopic procedure, a second surgery was performed by Dr. Lucie consisting of a total knee replacement. The Defendant presented evidence that the Plaintiff suffered from axonial polyneuropathy, a nerve disorder, that affected her coordination, balance and strength. Defendant argued that it was the Plaintiff's pre-existing medical condition which caused the fall and not the allegedly protruding brick paver.

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Verdicts and Summary Judgments cont.

Defense Verdict: First-Party Property Slab Leak (Miami-Dade)

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Cristina Sevilla, Associate
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On July 19, 2018, Managing Partner Dan Santaniello, Esq. and Miami Associate Cristina Sevilla, Esq. received a complete defense verdict in a first-party property matter styled *German Chavez and Maria Del R Morales v. Citizens Property Insurance Corporation.* Plaintiffs made a homeowner's insurance claim alleging their property was damaged as a result of a hot water supply line leak beneath the floor slab. At trial, Plaintiffs offered the expert opinions of Grant Renne, P.E. who testified the water discharge caused tile debondment and foundational damage. Plaintiffs' loss consultant, Ricardo Tello, estimated the cost of repairs to be in excess of $90,000. While the parties stipulated that an accidental discharge of water beneath the floor slab did occur, Defendant maintained there was no direct physical loss to covered property as a result of the water discharge. Defendant was able to successfully defend Plaintiffs' coverage claim and the jury returned a verdict in favor of the Defendant, finding Plaintiffs did not prove that Defendant breached its policy of insurance by denying coverage. Prior to trial, Plaintiffs conveyed a six-figure demand. After having served a proposal for settlement to each Plaintiff, Defendant was entitled to pursue attorneys' fees and costs as the prevailing party.

Defense Verdict: $100K Demand Slip and Fall (Hillsborough)

Anthony Petrillo, Tampa Managing Partner
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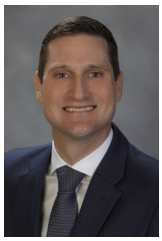

Michael Bohnenberger, Senior Associate
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On September 20, 2018, Tampa Managing Partner Anthony Petrillo, Esq. and Senior Associate Michael Bohneberger, Esq. received a defense verdict in the slip and fall matter styled *Smith, Jonnie Mae v. United Services Group.* Plaintiff alleged that she slipped in a puddle of dark liquid located on the floor in front of the Dairy Queen/Orange Julius located inside the University Mall. Video surveillance footage of the area was able to show that no such puddle existed. The case was bifurcated and only liability was at issue at the time the Defense verdict was entered.

Plaintiff claimed that as a result of the slip and fall, she suffered from bilateral ankle sprains and torn ligaments with resultant lifetime brace requirement, bilateral knee injuries with resulting lifetime brace requirement, left hip pain, back injury, right elbow injury with resulting lifetime brace requirement, and bilateral wrist injuries. Based on her medical records, Defendants found that Plaintiff had an extensive list of ongoing medical conditions that pre-dated the incident at issue, including pre-existing conditions in the same body parts alleged to have been injured in this incident. More importantly, Plaintiff also suffered from a joint-debilitating condition known as Marfan's syndrome and had multiple syncope episodes that resulted in falls in the past.

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Verdicts and Summary Judgments, cont.

Final Summary Judgment (Okaloosa)

Gary Gorday, Pensacola Managing Partner
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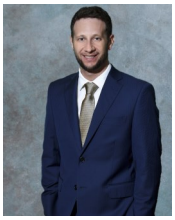
Pensacola Partner Gary Gorday, Esq. obtained a Final Summary Judgment in the slip and fall matter styled *Gainer, Connie v. Defendant Store.* The Plaintiff's complaint stated she slipped on the paint of a crosswalk entering Defendant's store. Discovery revealed there had been a light rain earlier. The Plaintiff allegedly aggravated previous surgery to her shoulder and demanded $250,000. Defendant made no offer. In her deposition, Plaintiff could not state what caused her to fall nor could she describe any fault of Defendant. The Court ruled there was no evidence to support her claim and the Defendant was granted Summary Judgment.



Dismissal WO Prejudice (Miami-Dade)

Adam Richards Senior Associate
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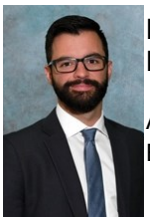
Senior Associate Adam Richards, Esq. obtained a dismissal without prejudice in the matter styled *Cabrera v. Everlast Drywall*. Adam represented subcontractor in worksite accident lawsuit filed by another subcontractor's employee, arguing that the allegations within the complaint failed to state a claim in light of the workers' compensation immunity afforded to subcontractors under certain circumstances pursuant to Chapter 440, Fla. Stat.



Dismissal With Prejudice (Miami-Dade)

Anthony Perez, Senior Associate
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Miami Senior Associate Anthony Perez obtained a dismissal with prejudice in the matter styled *Emergency Remediation Services, LLC. a/a/o Luis Mesa v. Citizens Property Insurance Corporation*. Plaintiff filed this lawsuit, pursuant to an assignment of benefits, alleging a breach of contract. Defense moved for final summary judgment, maintaining the position that Defendant's contractual obligations are not triggered until the moment notice of an assignment is provided. As notice of this assignment was provided simultaneously with the filing of the breach of contract claim, it could not be said that prior to the filing of this lawsuit, Defendant had ever denied a valid claim that would have given rise to Plaintiff's breach of contract action. Plaintiff dismissed the action with prejudice.

Anthony Perez, Esq. also obtained a dismissal with prejudice in the matter styled *William Guy v. Tower Hill Select Insurance Company.* Plaintiff filed this lawsuit, alleging a breach of contract, challenging the validity of the insurance policy's windstorm exclusion endorsement. Defense asserted compliance with Florida Statute Section 627.712, and advised Plaintiff of its intention to pursue sanctions under Florida Statute Section 57.107. Plaintiff dismissed the action with prejudice.

Anthony Perez, Esq. Also obtained a dismissal with prejudice in the matter styled *911 Restoration, Inc. a/a/o Cutler Venture, LLC vs. Citizens Property Insurance Corporation*. Plaintiff filed this lawsuit, pursuant to an assignment of benefits, alleging a breach of contract. Defense contended that the contract, a named-perils insurance policy, did not provide coverage for the loss. Defendant advised of its intention to pursue sanctions under Florida Statute Section 57.107. Plaintiff dismissed the action with prejudice.

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Verdicts and Summary Judgments cont.

Final Summary Judgment: Trip and Fall

Allison Janowitz, Senior Associate
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On August 29, 2018, Fort Lauderdale, Senior Associate Allison Janowitz, Esq. prevailed on a Motion for Summary Judgment in a trip and fall matter styled *Lisa Ruggiero v. Simon Property Group, Inc.* This matter involved an alleged trip and fall at Boca Town Center, where Plaintiff alleged that as a result of tripping over roots she sustained an evulsion fracture requiring an open reduction ankle surgery. The Motion for Summary Judgment was based on the fact that Plaintiff cut through bushes in front of the Mall, and tripped over a tree root which was found among the bushes. Defendant claimed that the tree root was open and obvious, and that the Mall did not have a duty to warn of an open and obvious condition such as tree roots. Further, Defendant argued that there is no duty to maintain a landscaped area and a tree root such as the one on which Plaintiff tripped. The Court granted the Motion for Final Summary Judgment.

Allison Janowitz, Esq. also prevailed on a Motion for Final Summary Judgment in the slip and fall matter styled *Lynne Gewant v. Simon Property Group, Inc. and One Blood, Inc.* This matter involved an alleged Fall at Town Center at Boca Raton. Plaintiff alleged that she sustained extensive dental and jaw damage as a result of the fall. The Motion for Final Summary Judgment was based on the fact that the Town Center did not have owe a duty to the Plaintiff for any medical issues that arose after having given blood. Plaintiff claims that because One Blood was allowed to park in the Mall's Parking Lot, the Mall was responsible for everything and anything that happened as a result of an individual giving blood. By Plaintiff's own testimony, there were no defects in the parking lot that caused her to fall, but instead she fell because she gave blood and passed out. Plaintiff relied on the argument that by allowing One Blood to park in the Mall, the Mall had created a foreseeable zone of danger. Defendant successfully argued that Plaintiff has failed to allege a duty upon the Mall. The Court granted the Motion for Final Summary Judgment.

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

Marc Greenberg, Managing Partner
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In the matter styled *Manuel De Jesus Balcarcel Veliz As Personal Representative of the Estate of Amado De Jesus Veliz Veliz AKA Heriberto Nieves v. La Quinta Holdings, Inc. DBA La Quinta Inns & Suites DBA La Quinta Inn, et al*, Plaintiff filed a wrongful death lawsuit as a result of a shooting that occurred on the Defendant's premise on February 11, 2016. Plaintiff sought leave and obtained permission to file an Amended Complaint naming the Franchisee as a party Defendant on July 12, 2018, more than 2 years after the subject incident. Defense moved to dismiss the operative complaint on behalf of the Franchisee based on the statute of limitations set forth in Florida Statute 95.11, which allows a plaintiff to file a lawsuit based on wrongful death within 2 years of the death.

St. Lucie County Circuit Court Judge Janet Croom granted the Franchisee's Motion to Dismiss with Prejudice on October 29, 2018. That Defendant has a pending Motion for Attorney Fees and Costs based on an expired Proposal for Settlement and previously filed a 57.105 Motion for Sanctions requesting that the Franchisee be dropped from the case with prejudice, which did not occur.

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Verdicts and Summary Judgments cont.

Dismissal With Prejudice: Slip and Fall

Alec Masson, Senior Associate
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In the Matter of *Vena Williams v. Defendant Store*, Plaintiff claimed she slipped and fell in the store causing her to sustain personal injuries that included severe head trauma. Tallahassee Senior Associate Alec Masson Esq. filed a Motion for Summary Judgment and sought related sanctions primarily arguing that: (1) that there was no evidence of actual or constructive notice of any substance on the part of the Defendant and (2) the evidence conclusively established that the Plaintiff's fall was caused by an epileptic seizure event. As a result, Plaintiff filed a dismissal of the suit with prejudice.

Discrimination Claim—Order granting Summary Judgment in Federal Court (Northern District)

Alec Masson Esq. also obtained a final summary judgement in the United States District Court for the Northern District of Florida in matter styled *Shawn Thomas v. Defendant Store* in favor of the Defendant Store. The Plaintiff, a member of a constitutionally protected minority class, worked as a contractor and had bought supplies at Defendant Store for years. But, he was ultimately trespassed after shortly after some alleged inappropriate behavior towards store employees. Plaintiff sought relief under 42 U.S.C. § 1981, asserting that his trespass was due to racial discrimination. The Defendant prevailed via summary judgment by establishing that the Plaintiff could not meet his burden of proof that race was a motivating factor for the Defendant's trespass, and, by also conclusively establishing that there were nondiscriminatory reason for having the Plaintiff trespassed.

Final Summary Judgment: Premises Liability

Stephanie Bendeck, Associate
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On October 2, 2018, Associate Stephanie Bendeck, Esq. obtained final summary judgment in the matter styled *Thomas Ashworth v. Cape Coral Cove Condominium Assoc, Inc.* Plaintiff lacerated his leg on a cut-back shrub that was present in the rear yard area of his condominium building. The shrub was part of a continuous series of shrubs that lined an exterior wall of a neighboring residential building. Plaintiff's leg laceration became infected and subsequently required a skin graft, which initially did not take effect and required the procedure to be repeated. Plaintiff claimed that the Association failed to maintain the subject area and failed to warn of the offending shrub. In its final order, the Court noted that the photographs in the record established that the shrub was an open and obvious condition as a matter of law, thus eliminating the Association's duty to warn. Additionally, the duty to warn was eliminated by evidence demonstrating the Plaintiff's prior knowledge of the shrub's presence, making his knowledge equal to or superior to that of the Association. Lastly, Plaintiff, who consciously ignored the paved walkways made available by the Association, voluntarily chose to walk through a landscaped area, for which the Association had no duty to make safe for pedestrian use when there was no evidence that the subject area was under continuous and obvious use by pedestrians sufficient to put the Association on constructive notice.

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Verdicts and Summary Judgments, cont.

***Per Curiam Affirmance* (PCA)**

Dale Paleschic, Tallahassee Managing Partner
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Daniel Weinger, Appellate Managing Partner
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Tallahassee Managing Partner, Dale Paleschic, Esq. and Daniel Weinger, Esq. and Managing Partner of the firm's Appellate Division, recently teamed up and successfully defended the appeal of a trial court order dismissing a complaint in a case of alleged assisted living facility abuse based on the Plaintiff's failure to follow statutorily mandated presuit notice requirements of Florida Statutes section 429.293. As a result of the Second District Court of Appeals affirmance of that dismissal, the Plaintiff's claims are forever time barred.

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OUR VERDICTS TELL THE STORY

Pink-Palooza Event Benefits Breast Cancer Research Foundation

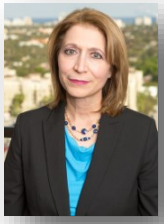
Orchestrated annually by our Accounting Manager DeeDee Lozano, employees joined our **Pink-Palooza Event** in the fight against Breast Cancer in October. All 9 offices across Florida showed their Pink Spirit and wore pink to work for our annual fundraiser with donations going to the Breast Cancer Research Foundation. Employees also participated in the Making Strides Against Breast Cancer walk in Tampa.

Don't be SPOOKED by our legal attire!

IT was just Halloween at the offices.

New Attorneys Join the Firm

Our offices are growing and we continue to add new attorneys in key practice areas across south and central north Florida offices.



Maria Donnelly, Client Relations and Daniel Weinger, Managing Partner of the firm's Appellate Division are teaming up to serve as co-editors for Legal Update. Please reach out to them with any claims or litigation topics that you would like discussed in Legal Update.
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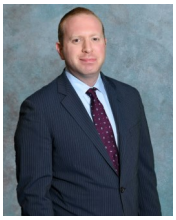

Miami Office | Bodily Injury Claims Team
Please join us in welcoming **Larry Krutchik, Esq**. who joins our bodily injury claims team in the Miami office. Larry is AV® Preeminent™ Rated by Martindale-Hubbell and handles catastrophic bodily injury and wrongful death claims. Over the last 9 years, he has worked for several private practices representing carriers and self-insured businesses in complex civil litigation matters. Larry is admitted in Florida (2009) and to the U.S. District Court, Southern, Middle and Northern Districts of Florida. He is also admitted to the U.S. Court of Appeals, 11th Judicial Circuit and U.S. Tax Court. E: LKrutchik@insurancedefense.net

Fort Lauderdale Office | 1st Party Property Claims Team
Jeremy Fischler, Esq. joins our 1st party property claims team in our Ft. Lauderdale office. Jeremy also handles coverage opinion matters. Prior to joining the firm, he worked for several private practices representing multiple insurance carriers and self-insured businesses in civil litigation matters. He is admitted in Florida (2013), and to the United States District Court, Southern District of Florida.
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Fort Lauderdale Office | 1st Party Property Claims Team and Commercial Litigation
Jonah Kaplan, Esq. joins our 1st party property claims team and will be handling commercial litigation matters in our Ft. Lauderdale office. Jonah brings a solid financial background working for Fortune 500 Accounting and Financial Consulting firms as a former Financial and Tax Consultant and CPA. He has been practicing law for a decade. He is admitted in Florida (2008), and to the United States District Court, Southern and Middle Districts of Florida. E: JKaplan@insurancedefense.net

Orlando Office | Bodily Injury Claims Team
Welcome back to the firm **Lisa Clary, Esq**. who is a Junior Partner and member of the bodily injury claims team in the Orlando office. Lisa is handling general liability, personal injury, negligence, wrongful death, auto liability, premises liability, negligent security and sinkhole litigation. She is admitted in Florida (2007) and to the U.S. District Court, Middle District of Florida. E: LClary@insurancedefense.net.

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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 Conference is an annual event for claims risk professionals to strategize and deliberate about litigation management and claims handling with vetted attorneys and experts. The agenda includes optional activities programs and an education program with dynamic and relevant workshops. Application has been made to all states for continuing education consideration. Topics being offered include:

- Navigating Pre-suit Investigations and Protecting Privileged Information
- Changemaking Initiatives in Value Portfolio Management
- Ethics and Liability of Electronic Communications
- Effective Use of Medical Science to Combat Pain Management, Polypharmacy and Opioids
- Pursuing and Defending Against Indemnification
- Emerging Technology in Claims and Litigation
- Punitive Damages
- Cell Phone Use and Distracted Driving
- #MeToo Movement and Its Impact on the Defense of Harassment Claims
- Trends in Trucking Litigation
- Defense of Professional Negligence Claims, Cyber Claims, Bad Faith and much more.

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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