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## **Alamo and National Win Landmark Federal Decision Eliminating Vicarious Liability for Rental Car Companies In Florida.**

Luks, Santaniello, Perez, Petrillo & Gold set the stage for a landmark decision March 5, 2007 when Federal Court agreed with them that the Federal Transportation Equity Act preempted Florida state law that made rental car companies vicariously liable for accidents caused by their renters in Florida (*Garcia v. Vanguard Car Rental, Inc.*, 2007 WL 686625 (March 5, 2007 M.D. Fla.)). Daniel Santaniello, Managing Partner, Paul Jones, Orlando Managing Partner and James Waczewski, Esq. (Appellate team) representing



National and Alamo, filed a Petition for Declaratory Relief in United States District Court for the Middle District of Florida, seeking to have that court validate the Federal Transportation Equity Act which had come under serious attack in the state systems. Judge W. Terrell Hodges, United States Judge for the Middle District of Florida, wrote "this is an important case of first impression." In his analysis he found the new federal statute preempted Florida law on vicarious liability and granted summary judgment for National and Alamo. Although the decision was contrary to several Florida State Court decisions that held otherwise, Judge Hodges wrote "no other Federal Court has analyzed the preemptive scope of the Graves Amendment and there is lack of persuasive Florida legal authority addressing the intersection of the act and Florida Statutes 324.021(9)(b)."

### **In this months issue...**

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## **Liability**

### **Evidentiary Burden for Plaintiff's Entitlement to a Lodestar Multiplier in Florida by Brian E. Pabian, Esq.**

In *Progressive Express Insurance Company v. Schultz*, 32 Fla. L. Weekly D 548 (Fla. 5th DCA Feb. 23, 2007), the Fifth District Court of Appeal held that the award of an attorney's fee multiplier constituted error when determining the insured's award of attorney's fees in an action to recover personal injury protection ("PIP") benefits regarding unpaid chiropractic bills.

A Progressive insured, Donald Schultz, was injured in an automobile accident and began chiropractic treatment the next day. After four months of treatment with the same chiropractor, Progressive elected to have Schultz examined by another chiropractor. After that chiropractor determined that no further chiropractic treatment was reasonable, Progressive stopped paying PIP benefits, leaving Schultz with a balance of \$1,315 owed to his chiropractor. After a consultation, Schultz retained an attorney, who then filed a PIP suit in county court, seeking to recover the outstanding chiropractic bills, mileage, attorney's fees and costs. Following extensive pretrial discovery, the parties settled the bulk of their dispute, leaving only the issue of the amount of attorney's fees and the appropriateness of a fee multiplier for resolution by the court. After a hearing, at which Progressive conceded Schultz's entitlement to fees, the county court approved the attorney's fee request for 193.75 hours at \$400 per hour, resulting in a lodestar fee of \$77,500. After the county court approved a 2.5 multiplier, the fee totaled \$193,750.

Progressive appealed the fee award to the circuit court, which affirmed the county court's judgment. Progressive sought certiorari review of the circuit court's decision, and the Fifth DCA elected to exercise its discretionary certiorari jurisdiction, concluding that the application of a multiplier was a "manifest injustice."

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Edited by:

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## Workers' Compensation

### The First District Court Opines Regarding One Time Change of Physicians by David S. Gold, WC Managing Partner.

In the recent case of Butler v. Bay Center, 32 FLW D123a, December 29, 2006, the First District sought to clarify the circumstances under which an injured worker is entitled to a one time change of physicians. In the process, the First District also established that the 2005 revisions to Section 440.13 are procedural and thus apply to all current claims, regardless of the date of accident.

Brenda Butler filed a Petition for Benefits seeking the authorization of a specific pain management physician as a result of her 1985 industrial accident. In response to the Petition the Carrier scheduled an appointment for the Claimant with a pain management physician of its own choice. The Claimant refused to attend the appointment and instead made a request for a one time change of then physicians which the Carrier refused. After a Merits Hearing, the Judge of Compensation claims ruled that the Carrier had no obligation to authorize a one time change of physicians when the Claimant had never begun treatment with the pain management physician that was originally authorized. The Claimant appealed alleging that the initial response to the request for a specific physician was not timely and that the Claimant had a right to select the doctor for the one time change.

The most significant finding in the First District's opinion is that the 2005 revisions to Section 440.13(2)(c), (f) are procedural in nature and as such apply to the Claimant's 1985 accident. This is a very significant finding given that this now means that all prior accident dates are governed by the much more restrictive language of the 2005 revisions to Section 440.13. As

noted by the First District, the Carrier is no longer required to offer a list of three names to the Claimant when there is a request for an alternate physician. In addition, a Claimant is now limited to only one request for an alternate physician, not one per specialty. Thus, this opinion profoundly impacts the Carrier's obligations to provide medical care on all claims that are not governed by managed care, regardless of the original date of injury. Adjusters should make note of this ruling when making a decision about how to respond to a request for treatment arising from accidents prior to the 2005 revisions.

The second significant finding in the opinion is that the First District held that a review of the plain language of the statute revealed that there could not be a right to a "change" of physicians when the Claimant had refused treatment by a specialist authorized by the Carrier in a timely manner. The Court cautioned that when a Claimant requests a one time change the Claimant risks receiving another physician that the Claimant does not like. Thus, the Court has made it very clear that it is the Carrier, and not the Claimant, who controls the authorization of medical care so long as the Carrier responds to medical requests in a timely manner.

Not surprisingly, the Claimant in this matter has appealed to the Florida Supreme Court seeking to overturn or at least limit the impact of this opinion. It is unclear at this point if the Florida Supreme Court will accept the appeal but if it does, it will likely take well over a year for a new opinion to be issued. Until then, adjusters should take note of this opinion when considering requests for a one time change of physicians.

## Recent Verdicts

**Rivera v. Holloway Funeral Home, Inc., Woodlawn Park Cemetery Company, American Memorial Centers, Inc., and Pemier Funeral Services & Cremations, Inc.** Orestes Perez and Allison Marshall obtained a win in a Negligence & Breach of Contract case in Miami-Dade County. Plaintiff's husband died in a car accident in Lake City, Florida. His body was subsequently brought to the Duval County Medical Examiners where an autopsy was performed. In accordance with standard practice, the decedent's internal organs were placed in a heavy red plastic bag conspicuously marked "BIO HAZARD." After the funeral had taken place, Rivera unknowingly received a white bag containing the organs under the presumption they were the effects of her husband. Rivera sued Holloway Funeral Home, Inc., American Memorial Centers, Inc., Woodlawn Park Cemetery Company and Premier Funeral Services & Cremations, Inc., claiming they had negligently and

carelessly failed to discharge their duties. She additionally sued claiming, breach of contract, Violation of Chapter 470 and Chapter 497 of Florida Statutes, Tortuous Interference with a dead body, Negligent Infliction of Emotional Distress, and Intentional Infliction of Emotional Distress. The jury found that Woodlawn failed to perform its duty under the contract in failing to bury the organs with the body, and awarded Rivera \$3,000. The jury found in favor of the Defendants on all of the other counts.

**Windecker v. Hildalgo (Palm Beach County).** Daniel Santaniello and Marc Greenberg obtained a defense verdict for a vehicular liability case on February 15, 2007 when the Jury found that the Defendant was not the legal cause of loss, injury or damage to the Plaintiff.

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## ***Liability, cont.***

Underlying the Court's analysis was the premise that both the applicable statute, section 627.428(1), Florida Statutes (2003), and the Rules Regulating the Florida Bar require that all fees awarded by the court be *reasonable*. While the concept of a fee multiplier first appeared in Florida jurisprudence in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985), it was refined by the supreme court in *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), which set forth a number of factors to be considered in evaluating the need for a multiplier, including:

- (1) [W]hether the relevant market requires a contingency fee multiplier to obtain competent counsel;
- (2) [W]hether the attorney was able to mitigate the risk of nonpayment in any way; and
- (3) [W]hether any of the factors set forth in *Rowe* are applicable.

The Fifth District stated that because Schultz did not testify at the fee hearing, the Court had no evidence to suggest that he had any difficulty obtaining competent counsel to pursue his PIP claim. As the Court observed, "[i]t seems that few insureds, if any, have difficulty obtaining competent counsel to represent them. To the contrary, every television station and telephone book, and many billboards and buses, call out with ads from lawyers seeking to represent the insured."

The Court also indicated that it chose to exercise its discretionary jurisdiction in this case because judges

## ***Defense Verdicts, cont.***

The Plaintiff, a thirty (30) year old Accountant, filed suit alleging that on April 30, 2001 the Defendant, Miguel Hidalgo, rear ended her at a moderate rate of speed on Okeechobee Blvd. in West Palm Beach. The Defendant admitted liability, but alleged that the moderate-impact accident was not the legal cause of loss, injury or damage to the Plaintiff. The Plaintiff maintained that the injury to her neck was permanent, and left her unable to enjoy life, effecting her ability to engage in physical activities, and maintain relationships with co-workers, friends, and family. The Plaintiff was first treated by Chiropractor Lisa Lust on the date of the accident. The Plaintiff presented to Lisa Lust approximately 150 times, spanning nearly 6 years. The Chiropractor assessed the Plaintiff with a **10%** whole body impairment rating as a result of injuries sustained to the Plaintiff's neck due to the April 30, 2001 automobile accident. Although MRI Scans revealed disk herniations at four (4) levels, C3-4, C4-5, C5-6, C-6-7, Defendant's Neuroradiology Expert Michael Raskin, M.D. opined that although the disk herniations were present at the

"have a special responsibility in determining reasonable fees for both attorneys and expert witnesses." At the fee hearing, Schultz's attorney testified that the only time he charged \$400 per hour was when he testified as a fee expert for other lawyers, and he further acknowledged that the accident was a "fender-bender." The Court also recognized in a footnote that "[t]he fee approved here, \$400 an hour before the multiplier, certainly pushes the upper limit for hourly fees, even in the most complex litigation."

Finally, the Court concluded that the use of a multiplier in this case failed in several respects. There was no evidence that Schultz had any difficulty obtaining competent counsel to represent him, and this was a fairly unremarkable contract case involving a dispute over \$1,315. In the Court's view, "there is nothing about this case that calls for a fee multiplier."

Thus, the Fifth DCA concluded that the circuit court departed from the essential requirements of law in affirming the county court's order allowing the use of an attorney's fee multiplier. The Court granted the writ and quashed the judgment to the extent it sanctioned the use of an attorney's fee multiplier in this case.

Along with other recent decisions, the appellate courts are sending a clear message that multipliers are something to be used sparingly and only in cases where they are required by the market and supported by the facts of the case.

four levels of the cervical spine, there was no clinical correlation between injuries sustained in the subject automobile accident and the findings on the May 18, 2001 MRI of the cervical spine. Michael Raskin, M.D. opined that the disk herniations present at the four levels of the cervical spine were pre-existing, degenerative in nature, and longstanding. The Plaintiff claimed to have sustained approximately **\$19,000** in past medical bills, **\$96,000** in future medical expenses, and an additional **\$90,000** in pain and suffering, for a total of **\$205,000**.

**Fajo v. Naso (Broward County)**. Daniel Santaniello and William Peterfriend obtained a defense verdict on March 7, 2007 for a vehicular liability case when the Jury found that the Defendant Ms. Naso was not the legal cause of loss, injury or damage to the Plaintiff. Plaintiff filed suit alleging that on September 29, 2003 the Defendant violated a stop sign on Commerce Parkway.

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## Defense Verdicts, cont.

Defendant admitted liability, but alleged that the accident was not the legal cause of loss, injury or damage to Plaintiff. Plaintiff claimed that as a result of the subject accident, she sustained permanent injuries to her lower back. Plaintiff also alleged to have suffered injuries to her neck, left arm, left knee and left thigh. Plaintiff maintained that the injury in her back was permanent and left her unable to enjoy life and severely limited her future earning capacity as a Chemist. Plaintiff was first treated in the Emergency Room which documented an injury to the back and left knee, with severe bruising and evidence of trauma. Plaintiff's treating physician Dr. Guido Perez, M.D., opined that Plaintiff had a 5% impairment rating. Dr. Perez based his entire opinion regarding permanency on the AMA guidelines and Plaintiff's continued abnormal physical exams in conjunction with continued problems.

Defendant's expert, Dr. Jay Stein, a board certified orthopedic surgeon testified that Plaintiff had no objective findings to substantiate her subjective complaints and that although she did have Crepitus in the left knee, it could have been pre-existing. Plaintiff claimed to have sustained **\$11,000** in past medical bills, **\$40,000** in future medical expenses, and lost earning capacity in excess of **\$100,000** and an additional **\$30,000** in pain and suffering.

**Thomas v. CSX Transportation (Duval County)**. The Plaintiff sued CSX Transportation pursuant to the Federal Employers Liability Act (F.E.L.A.) for failing to provide a safe place to work. Paul Jones and Todd Springer obtained good results when the jury found Plaintiff **70%** comparatively negligent for his injuries resulting in a total award of only **\$3,600** (i.e., \$12,000 awarded). On September 4, 1999, the Plaintiff mounted a van at Baldwin Yard to be taken to the Yard office after finishing his shift as a brakeman. The Plaintiff alleged that before he was seated in the rear of the van and before he was able to put on his seatbelt, the driver of the van drove away at an excessive speed hitting a pothole in the dirt road causing him to strike his head against the roof of the van. Plaintiff testified that he immediately felt pain in his neck and reported the injury to his supervisor at CSX. As a result of the accident the Plaintiff never returned to any employment and claimed lost wages from September 4, 1999, through December 12, 2006, when he turned sixty five years old. The Plaintiff claimed **\$383,000** in lost wages and benefits and **\$400,000** in pain and suffering for a total of **\$783,000**. The Plaintiff had undergone a cervical fusion and discectomy in 1998. It was alleged that the September 4, 1999, van accident caused an aggravation to his pre-existing neck injury which prevented him from returning to work at CSX in his previous position as a brakeman.

Under F.E.L.A. the Plaintiff only had to prove that the alleged negligence of the van driver, who was an agent of CSX, caused in whole or in part his damages. The Defendant argued that the Plaintiff was comparatively negligent for failing to wear his seatbelt and for failing to ask the driver to stop until he could have put it on. The Defendant presented evidence from the Neurology Department of Shands Hospital from 2002 that Mr. Thomas had not suffered any long term effects from the September 4, 1999 accident and that any symptoms he experienced in 2002 were the same that he experienced following the 1998 surgery. The Defendant also argued that the Plaintiff was employable and in fact had been offered, via letter, the opportunity to take part in the vocational rehabilitation program at CSX on three different occasions following the September 4, 1999, accident.

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