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Liability

Proposals for Settlement: The Apportionment Trap.

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The fact that there are three recent district cases in Florida addressing improperly drafted and/or confusing offers of judgment signifies that the offer of judgment rules are still not, nor may they ever be, crystal clear. In Faith Carr Hibbard o/b/o Amanda K. Carr v. Michael McGraw and Dual Incorporated, 30 Fla. L. Weekly, D2714 (Fla. 5th DCA, 2005), the 5th DCA, upon reconsideration on mandate from the Supreme Court of Florida, agreed with the plaintiff's argument that the defendants' proposal for settlement was ambiguous and did not, therefore, support an award of fees to the defendants under the offer of judgment statute, F.S. §768.79, or Rule 1.442, F.R.C.P. The underlying suit involved damages claimed by a minor pursuant to a motor vehicle accident. The jury found negligence on the part of the defendants and comparative negligence on the part of the plaintiff. After collateral source set-offs, a judgment was entered in favor of the defendants. An offer of judgment had been served by defendants and rejected. The offer of judgment in Hibbard was served to "Plaintiff, Amanda K. Carr". Amanda K. Carr was a minor at the time the suit was initially filed so the suit was brought on her behalf and individually by her mother, Faith Hibbard. After the offer was served, there was a motion to amend the pleadings to show Amanda Hibbard as the sole plaintiff. The appellate court, relying on Dudley v. McCormick, 799 So.2d 436 (Fla. 1st DCA 2001), a case with virtually identical facts, found the offer to be ambiguous because Amanda Carr was not the named plaintiff, and that the mother was the real party in interest with regard to her individual claims.

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Recent Verdicts

In this issue of Legal Update, Luks, Santaniello, Perez, Petrillo & Gold reports a Final Summary Judgment for Negligent Security.

Dominguez v. Club Level (Miami-Dade County). Jack Luks, Partner and Zeb Goldstein, Associate, received an Order of Final Summary Judgment on January 5, 2006, in Circuit Court of Miami, Florida. Plaintiff's most recent demand for settlement was $900,000.00. Plaintiff alleged that while working as an off-duty police officer at Club Level in Miami Beach, Florida on the evening of January 1, 2001, he was involved in a fight which broke out inside the nightclub at 2:30 p.m., at which time he was assaulted by one of the club customers, sustaining extensive injuries, initially that of a fracture of the vomer, compound fracture of the nose and abrasions to the skull. Plaintiff further claimed that he would require future corrective surgery due to the deviated septum. He complained of frequent nose bleeds, frequent headaches, neck pain, loss of memory and depression. Plaintiff had alleged future surgery and future care was needed to correct his medical and psychological problems, at an approximate cost of $10,000.00 per year. The Plaintiff was only 29 years old at the time of the incident. As to lost wages, Plaintiff claimed 119 days of missed work as a police officer. He also claimed he was unable to work as a security officer ever again, which accounted for a minimum of $14,000 to $15,000 in supplemental income per year. As of the date of the hearing, Plaintiff had placed his lost wages from the date of injury to the present at $70,000.00. The Court agreed with Defendant's arguments, specifically that a security guard employed by an independent contractor could not maintain a case of action against a property owner, as his precise duty for which he was employed, i.e. guarding the premises, resulted in his injury.

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Workers' Compensation

Employer/Carrier's timely offer of three alternate physicians was sufficient to prevent Claimant from seeking treatment from an unauthorized physician or from appointing said physician as the Claimant's IME.

St. Augustine Marine Canvas and Upholstery, Inc. and Associated Industries Insurance Company, Inc. v. Mildred Lunsford, 30 Fla. L. Weekly D2853.

The First District Court of Appeals reversed the order of JCC Ivy Cream Harris in which she awarded medical benefits for services of an unauthorized physician. The Court also reversed the award of temporary benefits based on the medical testimony of the same doctor. The time line of events and consistent responses of the Carrier are important factors in the outcome of this case and illustrate how prompt, consistent responses can be the best defense.

In this case, the Claimant was receiving medical treatment for a compensable accident. She had an authorized treating orthopedic surgeon, Dr. Northrup and Dr. Jyoti, a pain management physician. The first PFB requesting authorization of a new orthopedic physician, Dr. Graham-Smith, was filed on July 25, 2002. The Employer/Carrier refused to authorize that doctor, but provided her a list of three orthopedic surgeons from which she could choose a different treating physician. The Employer/Carrier also advised the Claimant she was entitled to an Independent Medical Examination. Despite this denial, Dr. Graham-Smith's office later contacted the Employer/Carrier regarding authorization to evaluate and treat the Claimant, along with a pre-payment of $600.00. This request was denied and the Carrier informed the doctor that he was not authorized to treat the Claimant.

The Claimant filed a second PFB on December 23, 2002 requesting a second opinion with Dr. Graham Smith. The Carrier again refused this request noting that no managed care arrangement was in place. The Claimant then filed a third PFB on February 6, 2003 requesting indemnity benefits, a one-time change of physician to Dr. Graham-Smith and a second opinion by an orthopedic surgeon. The Carrier responded by agreeing to a one-time change in physicians and again provided the names of three orthopedic surgeons. During a subsequent mediation conference held on March 6, 2003, the Carrier again provided a list of three orthopedists to the Claimant. Finally, the Claimant filed a fourth PFB on April 23, 2003 requesting an evaluation and second opinion by Dr. Graham-Smith regarding maximum medical improvement. However, attached to this petition was a letter dated April 16, 2003, drafted by Claimant's counsel but signed by Dr. Northrup. In this letter, Dr. Northrup recommended evaluation by Dr. Graham-Smith to determine if the Claimant was a candidate for percutaneous nucleoplasty. He indicated that the reason for this recommendation was the fact that Dr. Graham-Smith was the most experienced practitioner in northeast Florida with regard to this procedure. The Carrier responded to this final petition on May 12, 2003 indicating that Dr. Graham-Smith was not authorized but stated the Claimant could have an IME or select a new physician from the list previously provided.

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The Claimant's attorney followed up this final PFB with a letter to the Carrier informing them that he had scheduled an appointment with Dr. Graham-Smith for June 10, 2003 and requested a $600.00 pre-payment for the visit. The Carrier informed Dr. Graham-Smith's office that the appointment was not authorized. Despite this, Dr. Graham saw the Claimant on June 10, 2003 and began billing the Employer/Carrier for treatment. Eventually he performed a left sacroiliac joint fusion on October 9, 2003.

At final hearing, Judge Ivy Cream Harris ruled that Dr. Graham Smith was authorized by operation of law. On appeal, the First District reversed finding that the JCC erred by ordering the Employer/Carrier to pay for unauthorized medical treatment. They noted that under Section 440.13, the Employer/Carrier only has to provide treatment within a reasonable time, not to authorize the doctor of the Claimant's choice. By consistently offering the Claimant a choice of three orthopedic surgeons, the Carrier had met this obligation. It is important that because this was not a managed care case, the Carrier was not required to provide an extensive provider list. Therefore, the Court found that the Carrier did not have to authorize Dr. Graham and because the Carrier had informed the doctor that he was not authorized prior to any treatment, they did not have to pay his medical bills.

The Court also found that after commencing unauthorized treatment with Dr. Graham-Smith, the Claimant could not designate Dr. Graham-Smith as her IME. The Court held that the statutory definition found in §440.13 (1) (j) of an independent medical examiner as, "a physician selected by either an employee or carrier to render one or more independent medical examination in connection with a dispute arising under this chapter" contemplates selection before evaluation. However, the Claimant did not designate Dr. Graham-Smith as her IME physician until two days after she began treating with him, despite filing four petitions requesting treatment and second opinions with him. This being the case, the Court found that Dr. Graham-Smith was neither a treating physician, IME physician nor an EMA and therefore his opinions should not have been admitted into evidence.

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Liability, cont.

The offer should have specified the amount and claims to be addressed specifically for the mother and the minor child. Because the offer sought to resolve "all claims against the Defendants", it was not clear whether the offer including all damages of any kind arising out of the accident as to both parties or only the minor's claims for future medical expenses, future lost earning capacity and pain and suffering. It is important to note that, even though the mother was not listed in the style as having an individual claim, the court found there to be two distinct plaintiffs each with identifiable interests.

Similarly, the 5th DCA in D.A.B. Constructors, Inc. and Cornell B. Cox v. John P. Oliver, 30 Fla. L. Weekly D2460 (Fla. 5th DCA, 2005) had previously held that an offer of judgment that does not apportion the amount of the offer from each defendant is not valid even if one of the defendants is only vicariously liable. Cox, an employee of D.A.B., while driving a vehicle owned by D.A.B. in the scope of his employment, was in a motor vehicle accident, following which Oliver filed the relevant suit for damages against both Cox and D.A.B. alleging joint and several liability. Cox and D.A.B. served joint proposals for settlement to the claimant, John Oliver, and another to his wife, Teresa Oliver, to settle all claims; they did so again after an amended complaint was filed. Neither of the proposals was accepted. Each proposal complied with the requirements of Rule 1.442, F.R.C.P., except that the offers did not apportion the amounts between the defendants. The case proceeded to trial and resulted in a directed verdict in favor of defendants. Defendants sought to obtain fees and costs based on their rejected proposals but the court held that the offers did not comply with Rule 1.442(c)(3) which expressly requires that a joint proposal of settlement "shall state the amount and terms attributable to each party."

In 1 Nation Technology Corp. and Rick McKay v. A1 Teletronics, Inc., 30 Fla. L. Weekly D2435 (Fla. 2nd DCA, 2005), wherein A1 Teletronics sought injunctive relief and unsuccessfully sued 1 Nation Technology and McKay for tortuous interference with an employment contract and business relationships, the defendants fell into a similar language compliance trap. Prior to the relevant trial, defendants 1 Nation and McKay, the company president, served A1 with a proposal for settlement which was rejected. The jury found no liability on the part of the defendants after which the defendants sought to recover attorney's fees and costs incurred since the date of their rejected offer to A1. The 2nd DCA upheld the trial court's denial of attorney's fees and costs to defendant finding that the offer was deficient because it "failed to state with particularity all non-monetary terms", namely that the offer failed to mention A1's request for injunctive relief." However, in upholding the underlying decision, the 2nd DCA disagreed with the bases given for the rejection by the trial court. Where the trial court found that the injunctive relief was not addressed, the 2nd DCA found that Paragraph two of the proposal which intends "to resolve all claims" made by A1 "in this action arising out of the incident giving rise to the Plaintiff's complaint" is sufficient to encompass the injunctive relief sought, especially when read with Paragraph three of the proposal which requires A1 to execute a general release of "all pending claims" and a "dismissal of the case with prejudice." The 2nd DCA did find, however, that 1 Nation and McKay's offer did fail to differentiate the amounts attributable to each offeror, so the proposal for settlement was not valid.

The significance of the foregoing cases lies not only in the consistency with which even well-heeled attorneys and sophisticated clients are not in compliance with the relevant proposal for settlement / offer of judgment requirements set forth in F.S. §768.79, or Rule 1.442, F.R.C.P, but in the delicacy with which a proposal must be prepared, especially in vicarious liability cases. Whether a proposal is being made pursuant to F.S. §768.79, or Rule 1.442, F.R.C.P, the following requirements are consistent:

(1) The proposal shall be in writing and identify the applicable Florida law under which it is being made;
(2) The proposal shall name the party or parties making the proposal and the party or parties to whom the proposal is being made;
(3) The proposal shall state with particularity the amount offered to settle a claim for punitive damages, if any;
(4) The proposal shall state the total amount offered.

Rule 1.442, F.R.C.P. proposals must comply with the following additional requirements as well:

(1) The proposal must identify the claim or claims the proposal is attempting to resolve;

(2) The proposal must state with particularity any relevant conditions;

(3) The proposal must state with particularity all non-monetary terms of the proposal;

(4) The proposal must state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and

(5) The proposal must include a certificate of service in the form required by rule 1.080(f).

(6) A joint proposal shall state the amount and terms attributable to each party.

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Workers' Compensation, cont.

Therefore, because Dr. Graham-Smith was the only doctor who provided evidence supporting an award of temporary benefits and his testimony was not admissible, the award of temporary benefits was reversed. This case is noteworthy for many reasons. First, it confirms that absent a managed care arrangement, the Carrier can fulfill its obligation to provide medical care by providing a list of at least three providers from which a choice can be made within a reasonable time of receiving a request for treatment. Second, the Claimant does not have free rein in choosing a one-time change of physician. Just because a doctor recommends a certain physician, does not mean that the Carrier has to authorize it. Once an authorized treating doctor recommends a specific type of doctor, the Carrier need only provide a list of specialists. Third, it shows that designation of an IME is something that is intended to occur before any evaluation or treatment begins. The Court seems unwilling to allow Claimants to begin treatment and if they secure the opinion they want, then allow them to designate the doctor as their IME. This last finding is very significant in that Claimants can no longer go to an unauthorized doctor with the belief that this physician will be designated as an IME if the Carrier refuses to authorize the treatment.

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Liability, cont.

It is important to note that the requirement that a joint proposal state the amount and terms attributable to each party is not a requirement enumerated in F.S.§768.79, a distinction which appears to have been overlooked in the aforementioned cases. The two principal cases on the subject which were thought to have resolved the issue of apportionment of offers between parties, Lamb v. Matetzschk, 906 So.2d 1037 (Fla. 2005) and Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So.2d 276 (Fla. 2003), also rest on the requirements of Rule 1.422, F.R.C.P. Lamb and Willis Shaw also involved proposals for settlement served under both F.S. §768.79 and Rule 1.442, F.R.C.P. In Willis Shaw, the Supreme Court of Florida upheld the invalidity of the plaintiff's proposal for settlement because it did not apportion out specifically the amounts demanded by each party. Likewise, the Supreme Court of Florida in Lamb upheld the invalidity of the plaintiff's proposal for settlement because it did not apportion out specifically the amounts to be paid by each defendant.

The unfortunate result of the combined foregoing rulings is that the purpose of the proposal for settlement initially stated in Willis Shaw and referenced in the Carr case, that is "to sanction a party who does not timely accept a settlement offer made prior to trial by shifting payment and recovery of costs after the offer is made," loses its impact when there are multiple parties in a vicarious situation. This is especially troublesome for the defendants who are offering from the same pot so to speak, such as occurs in driver-owner and employee-employer situations. Apportionment of the offer results in a lower amount from which to calculate the number used to determine whether or not the Defendant is entitled to attorney's fees and costs. Consequently, a plaintiff will not need to obtain as large a verdict to defeat the defendants' entitlement to attorney's fees and costs under F.S. §768.79 and Rule 1.442, F.R.C.P. If the full pot is offered on behalf of only one defendant, then the other defendant or defendants could remain liable at trial, despite the acceptance of the offer. Accordingly, the apportionment of a proposal for settlement from multiple defendants must be seriously considered and delicately exercised.

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