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LEGAL UPDATE

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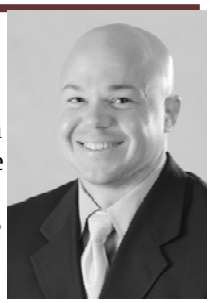
VOLUME 4, ISSUE 4

OCTOBER — DECEMBER 2005

Workers' Compensation

More Limits on Immunity in Bad Faith Claims Against Employer/Carriers.



Brian Karsen
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Protegrity Services, Inc. and Folksamerica Reinsurance Company v. Vaccaro, 30 Fla. L. Weekly D1989 (August 24, 2005).

This Fourth District Court of Appeals case further addresses the issue of limits on immunity in bad faith claims against employer/carriers as raised in the recent case of Aguilera v. Inservices, Inc., 30 Fla. L. Weekly S440 (June 17, 2004) and addressed in our most recent Legal Update. Aguilera is significant in that it holds insurance carriers to a reasonable standard of care and allows for the filing of intentional tort claims arising out of an employer/carrier's handling of a Workers' Compensation claim. While the merits of the Aguilera case have yet to be decided, the claimant was able to prevail on the employer/carrier's motion to dismiss so that the door is open to further litigation of bad faith claims, thereby increasing potential litigation-related expenses.

In the instance of the Vaccaro case, the claimant was severely injured and disabled in a Workers' Compensation accident on March 25, 1993. The employer/carrier paid benefits and provided medical treatment, which included ongoing treatment with Dr. Craig Lichtblau for many years after the accident. The treatment prescribed by Dr. Lichtblau included massage therapy that was stated to be medically necessary to reduce the number and intensity of dangerous and potentially life threatening seizures. In August 2002, however, the employer/carrier conducted a "utilization review" of the claimant's care and determined that the doctor's treatment and massage therapy were no longer necessary. The carrier informed Dr. Lichtblau of its intent to disallow further treatment and to seek reimbursement of some of its previous payments. Dr. Lichtblau subsequently advised the claimant he would no longer be able to treat her.

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2005 Client Satisfaction Survey

The firm will be conducting a 2005 Client Satisfaction Survey to measure how well we meet clients' expectations for service and support. The survey will be mailed to current clients of the firm in early November. Please assist us in assessing our firm's performance and areas in need of immediate attention by completing the survey. Instructions for completing and returning it will be included with the survey. If you prefer to complete the survey on-line, please visit our website for announcements of an on-line web based survey that will be available in November. The survey results will be evaluated and utilized to improve our performance in critical areas that drive success. Please contact Maria Donnelly, Client Relations (maria@**LS-LAW**.com) if you have any questions about the survey.

Recent Verdicts

Lester v. Store (Orange County). Defense verdict rendered August 18, 2005.

Paul S. Jones and Joseph F. Scarpa received a defense verdict for the store in a Products Liability case where the store was sued under the theory of strict liability. The plaintiff worked as a superintendent for a roofing company. His company purchased a folding ladder from the store for use on the job. The plaintiff claimed that he was climbing the ladder to access a roof when one of the hinge locking bolts broke. The ladder collapsed and the plaintiff fell to the ground severely fracturing his left ankle which required internal fixation surgery.

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1995 – 2005

A Decade of Litigation Excellence

In this months issue...

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Workers' Compensation, cont.

Vaccaro then filed a complaint in circuit court alleging intentional and wrongful termination of her Workers' Compensation benefits. She claimed the employer/ carrier made misrepresentations to Dr. Lichtblau that the "utilization review" was concluded and further threatened to initiate a utilization review with the Department of Labor and Employment Security and the Division of Workers' Compensation, which would impose penalties on him for over-utilization. The complaint alleged that this conduct was done intentionally to interfere with Vaccaro's relationship with her doctor and to deprive her of medical care. Vaccaro further alleged that the carrier knew or should have known that these threats were false since the administrative rules allowing utilization review had been repealed. Vaccaro's complaint alleged that as a result of this conduct she suffered new injuries apart from the initial accident, severe emotional disorders and other damages.

The carrier filed a motion to dismiss Vaccaro's complaint, claiming that the circuit court was without subject matter jurisdiction to hear the matter. This motion was denied and the Fourth District affirmed the lower court's ruling, citing case law wherein courts have recognized an intentional tort exception to Workers' Compensation immunity. These cases included Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000) and Allstates Fireproofing, Inc. v. Garcia, 876 So. 2d 1222 (Fla. 4th DCA 2004). The Fourth District also cited the recent Aguilera decision in determining that such a dispute is within the jurisdiction of the circuit court. The Vaccaro court found that the alleged actions of the employer/ carrier went beyond a mere claim delay or simple dispute involving benefits and were sufficient to overcome the motion to dismiss.

The significance of this decision, as was the case in Aguilera, is that the door remains open for the filing of such claims which now appear more likely to survive the motion to dismiss stage. The decision also reinforces the reasonable standard of care to which insurance carriers will be held. In effect, even in cases where a carrier's behavior would not appear to be egregious, the potential exists for additional litigation expenses associated with the defense of a tort claim. Given the current statutory limitations on the awarding of attorney's fees, this may be an avenue more frequently explored by the claimant's bar.

by: Brian C. Karsen, Esq.

Recent Verdicts, cont.

Also, his doctors' testified at trial that plaintiff would need a second surgery to fuse the ankle joint to eliminate ongoing complaints of pain. Plaintiff's past medical expenses were $50K. His doctors estimated another $50K for future medical care, including the future surgery. Plaintiff's vocational expert and economic expert both testified that the plaintiff sustained over $381K in lost wages and lost earning capacity due to his permanent physical limitations.

Plaintiff presented two liability experts. His engineer/ accident re-constructionist testified that the ladder was defectively designed in the manner the ladder's hinges locked resulting in an alleged risk that a user could inadvertently unlock the ladder while in use. Plaintiff's metallurgical expert testified that the materials used to die cast the locking bolts were defective and too weak for their intended use. The defense argued that the plaintiff was solely responsible for his fall and failed to ensure the ladder was properly set up and locked.

Napper v. Laboratory Corporation of America (Miami-Dade - Pedestrian Hit). $500,000 sought- $0 verdict- Defense Verdict rendered August 25, 2005. Daniel J. Santaniello, Partner and Robin Levine, Partner received a Defense Verdict in Miami-Dade County. Plaintiff alleged that decedent Richard Napper, a pedestrian was crossing the street when he was negligently struck by the Laboratory Corporation vehicle driven by their employee, Miguel Hernandez. Plaintiff claimed that Defendant Hernandez carelessly failed to yield to Richard Napper and had sufficient time to avoid colliding with him. Defendants argued that Richard Napper was the sole cause of the accident because he entered the intersection while intoxicated, against the light and 10 feet outside of a designated crosswalk. Plaintiff first filed the case as a Wrongful Death when Mr. Napper died weeks later from complications of the ankle, claiming an emboli. Defendant aggressively fought the death claim, claiming Plaintiff had prior similar conditions causing Plaintiff to drop it before trial and proceed solely on a survivor claim for the accident. Plaintiff claimed compensation for injuries to his head, neck, back and a comminuted, displaced left ankle fracture and dislocation which required 3 surgeries leading up to his death. Plaintiff asked the jury for approximately $70,000 in past medicals and $500,000 in pain and suffering. The jury came back and gave a defense verdict agreeing that Defendant was not negligent in causing the accident. The defense is also entitled to costs and attorney's fees due to a rejected Proposal for Settlement.

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Liability

Insurance and the Additional Insured.

Koala Miami Realty Holding Co. v. Valiant Insurance Co., 2005 Fla. App. LEXIS 14844.

David Alvarado sued, *inter alia*, Aetna Maintenance Company ("Aetna") and Koala Miami Realty Holding Company ("Koala") for injuries he allegedly suffered during a slip and fall on Koala property, specifically, the bathroom. At the time, a contract existed between Aetna and Koala requiring Aetna to perform janitorial services on the Koala premises. The contract also required that Aetna listed Koala as an "additional insured" on their CGL policy with Valiant Insurance Company ("Valiant").

The amended complaint alleged that Aetna was responsible for janitorial services on the property and all defendants had a duty to inspect and maintain the restrooms in a reasonably safe condition. Further allegations stated that the Plaintiff's injuries were a direct result of the collective Defendants' negligence for installing slippery floor tile, failing to repair leaky plumbing and failing to provide adequate lighting.

Koala brought a declaratory action against Valiant requesting a coverage determination regarding its status as an "additional insured" under the Valiant policy issued to Aetna. Secondly, whether Valiant had a duty to defend and indemnify if Koala was, in fact, an additional insured of Valiant was determined by the allegations of the amended complaint pursuant to Patriot General Ins. Co. v. Automobile Sales Inc. 372 So. 2d 187 (Fla. 3d DDCA 1979). Cross-motions for summary judgment were filed by Valiant and Koala and the trial court ruled in favor of Valiant stating that Koala was not an additional insured under the Valiant policy. Koala appealed.

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The Third District Court of Appeal reversed and remanded the case, reasoning that the Valiant policy (1) clearly named Koala as an additional insured and that (2) the factual allegations of the amended complaint were sufficient such that Valiant does have a duty to indemnify and defend Koala. First, the court looked to the insurance policy issued by Valiant, particularly the endorsement which named Koala as an additional insured. There was limiting language in the policy, however, that indicated Koala was only an additional insured for liability "*arising out of your ongoing operations performed for that insured*". Since the wording was ambiguous as to whether it applied to the named insured's or additional insured's own negligence for purposes of coverage, the ambiguity would be construed against the insurance carrier. Therefore, in the absence of any further specific, limiting language covering only the named insured's direct negligence the Valiant policy is found to provide coverage to the additional insured, Koala, for Koala's own negligence as well. *See*, Fla. Power & Light Co. v. Penn. Am. Ins. Co., 654 So. 2d 276 (Fla. 4th DCA 1995). Secondly, Valiant had a duty to defend *and* indemnify Koala as well. A reading of the policy's provisions in tandem with the complaint gave rise to these duties. Since the amended complaint's allegations sufficiently pled that the plaintiff's injuries were as a result of the direct negligence of Koala, they invoked coverage under the Valiant policy provisions.

by: Jason D. Montes, Esq.

Recent Verdicts, cont.

Rockhold v. Mall. (Duval County). Defense Verdict rendered April 22, 2005.

Jack D. Luks, Partner and Todd T. Springer, Managing Attorney (i.e., Jacksonville Office) received a defense verdict on behalf of Defendant Mall. At trial, the Plaintiff asked the jury for approximately $3.1M. The Plaintiff alleged that while she was walking out of the Orange Park Mall, she tripped over a deviation in the slabs of sidewalk at the food court patio. The Plaintiff alleged that the mall negligently maintained the sidewalk where the accident took place and failed to warn the Plaintiff of the dangerous condition.

Plaintiff presented evidence that the maintenance staff and mall management knew of the alleged dangerous condition before the fall and that an estimate had been obtained to perform repairs to the food court patio area two weeks prior to the Plaintiff's fall. In fact, repairs were made to the food court patio area approximately two weeks after the Plaintiff's fall. The Defendant argued that the Plaintiff was negligent herself for the fall in failing to look out for her own safety and that no unreasonably dangerous condition existed. The Defendant also argued that the Plaintiff's alleged injuries were not caused by the fall.

The Plaintiff had past medical expenses in the amount of $29,955.64. The Plaintiff was diagnosed with a bulging disc at C5-6 and a herniation at C6-7 with left sided radiculopathy.

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Announcements

FWCI Workers' Compensation Conference

Luks, Santaniello, Perez, Petrillo & Gold were one of 300 exhibitors at the FWCI 60th Annual Workers' Compensation Educational Conference held in Orlando, August 2005. David Gold, Partner, Amy Hunter, Firm Administrator and Maria Donnelly, Client Relations spoke with clients and attendees about case handling and service. Brian Karsen, Esq. and Iris Dubois, Esq. from the firm's Workers' Compensation Practice were also on hand to answer questions and talk with attendees.

David Gold, Amy Hunter & Maria Donnelly

Recent Verdicts, cont.

She had undergone 138 trigger point injections to her cervical spine as well as radio frequency lesionings performed by Dr. Ismail Salahi. Dr. Salahi also placed the Plaintiff on medications including Ultracett, Ambient, Actiq and Duragesic patches which he opined the Plaintiff would need for the remainder of her life. She was cleared as a surgical candidate for a cervical fusion by neurosurgeon, Dr. Javier Garcia-Bengochea. Furthermore, because of the chronic nature of the Plaintiff's neck pain and the failure of conservative modalities to alleviate her neck pain, Dr. Christopher Roberts offered the Plaintiff the option of the implantation of a spinal cord stimulator or an intrathecal pump.

Bertin-Maurice v. Daniels. (Miami-Dade County), Defense Verdict rendered September 28, 2005.

Daniel J. Santaniello, Partner received a defense verdict for a motor vehicle accident which occurred on June 17, 2004. Plaintiff alleged she was proceeding west though the green light at the Intersection of Northwest 6th Street and Northwest 2nd Avenue, at which time she was struck by Defendant, Earnest Daniels, who was ticketed for the accident. Plaintiff further alleged that Defendant was the sole cause of the accident through his negligence by entering the subject intersection against a red light for his direction of travel. Plaintiff claimed she was a 22 year old female with no prior back or neck complaints, when she was struck violently and taken to the hospital. She was treated for 2 years and had a positive MRI for 2 level bulging disks. Defendant claimed the accident did not cause the bulging disks, through their Ortho and Neuro experts. The jury found for the Defendant on all counts, and Plaintiff did not even recover $16,000 in past medical expenses. Plaintiff sought future medical expenses of approximately $160,000 ($3,000 per year x 55 year life expectancy), as well as pain and suffering.

Invoice Questions & Change of Address: Please contact DeeDee Lozano (Direct: 954.847.2903 or e-mail DeeDee@LS-LAW.com) for invoice questions or to update your billing address/contact information.

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