LITIGATION QUARTERLY

October, 2009

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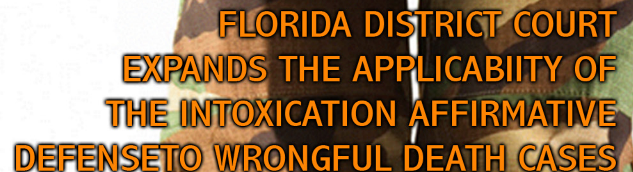

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A HOSPITAL'S ABILITY TO ENFORCE PERFECTED LIENS:

AN UNCERTAIN FUTURE

By Trevor Hawes, Michelle Dover and Erin Spira

If you manage liability claims, the following scenario plays out at least once or more times per year. The new claim message comes across your computer screen. It is a late reported claim with an injured party who was in a hospital for more than one month and for a significant period of that time, in an induced coma. You then look to the notes on the liability facts, which unfortunately paint a picture of probable liability against your insured, with no presently known other parties against whom liability could be shared. It strikes you that you wish you had eaten a better breakfast. You flip next to the screen showing your applicable coverage limits … $25,000 per person/ $50,000 per accident. But because you are keen to complex high risk claims, you see this new claim for what it represents, the unsavory trifecta of bad injuries, probable liability and low limits of coverage. Your thought process proceeds forward on your good faith claims management mode and taking the actions necessary to get this claim to closure so that you can afford the best protection for your insured within his or her policy limits. As you are busy developing your task list, the file comes to your desk with a handwritten note. The note is on the personal stationary of the family of the claimant, apparently drafted by the hand of the injured party's wife. The note, a work of prose deserving a literary award, discusses the strife that the injured party's family is experiencing and how just a modicum of assistance from the insurance company for the person who caused their breadwinning family member to be incapacitated for more than one month would go a long way to preventing a threatened foreclosure and would stop the credit card companies from calling day and night. The final sentence on the note mentions the need for a settlement as soon as possible and a payment that would not require this poor family to have to negotiate the settlement check with the hospital as a payee. After finishing the note, you realize it was probably better you did not eat breakfast. You quickly turn to the public records website for the county where the hospital is located and find, much to your chagrin, that there is a recorded hospital lien of $285,000, and then think to yourself, "how are we going to be able to settle this claim, not include the hospital, but also get to a resolution without placing the insured in some sort of jeopardy?"

In the past, fact patterns like the one above, if noticed early, were handled with circumspect care. It was not uncommon to see carriers double their per person policy limits, making a single policy limits payment to the injured party to fully and finally settle their claim against the insured, and concomitantly or subsequently making another policy limits payment to the hospital to settle the lien. Various approaches were taken, jointly negotiating with the hospital and seeking approval to settle with the injured party while doubling the limits versus settling with the injured party and then dealing with the hospital. Always, however, these settlements were high risk - wait too long and you may not be able to settle with the injured party or settle with the injured party too soon without obtaining authority from the hospital and the insured could face exposure of the **entire** hospital lien. The doubling the limits approach has been an easier recommendation, and therefore, decision when the limits of coverage were minimal. However, as the coverage limit went upwards from $25,000 to $100,000, $250,000 to $500,000, the decision became more difficult.

Dealing with hospital liens on personal injury presuit settlements in Florida has never been an easy prospect when the injured claimant is unrepresented.[1] Hospital liens were traditionally the most dangerous type of collateral claim because the jurisprudence dealing with liens provided that a hospital, in a lien impairment action, could potentially seek not just the amount of available coverage, but the value of its **entire** lien. When this exposure is added to the specter of attorney's fees being potentially recoverable by the hospital pursuing a lien impairment action, the conventional wisdom ranked hospital liens as one of the most prickly considerations in high exposure claims.

Throughout Florida, hospital liens are a creature of special laws and ordinances, rather than a general law which operates uniformly throughout Florida. As a result, the lien laws in Florida vary from county to county, resulting in a non-uniform patchwork of laws. At last count there were twenty-one counties (out of sixty-seven in Florida) with lien ordinances on the books, representing a mix of special laws and those which have yet to reach a determination of special versus general law. A special law

relates to, or operates upon, particular persons or things, or purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal.[2] Whereas, a general law operates universally throughout the state or uniformly upon subjects as they may exist throughout the state.[3] A general law can also operate uniformly within permissible classifications by population of counties or otherwise, or can be a law relating to a state function or instrumentality.[4] While the legislative purpose behind Florida's lien laws is recognized, the means used by the local governments to create these liens, i.e., special laws, is arguably unconstitutional.

In a recent decision, the First District Court of Appeals addressed this issue in *Mercury Insurance Co. of Fla. v. Shands Teaching Hospital & Clinics, Inc.* ("*Mercury*"), and held that Chapter 88-539, Florida Laws, as well as the Alachua County ordinance enacted pursuant to that law, violated the Florida Constitution's prohibition against special laws relating to the impairment of liens arising from private contracts.[5] In *Mercury*, the claimant sustained injuries as a result of an accident involving Mercury Insurance's insured.[6] The claimant was treated for her injuries at Shands, and as a result of said treatment, incurred medical expenses in the amount of $38,418.20.[7] Pursuant to Chapter 88-539, Shands perfected a lien in the amount of the medical expenses incurred by the claimant.[8] Thereafter, Shands delivered notice of the perfected lien to Mercury Insurance.[9] No doubt because of the high risk scenario before the carrier, Mercury Insurance settled with the claimant for the per person bodily injury policy limits of $10,000.[10] In exchange for the $10,000.00 limits payment, the claimant delivered a release memorializing the settlement.[11] Shands did not participate in this settlement between Mercury Insurance and the claimant.[12] Mercury Insurance, while in possession of notice of the lien, sought to reconcile and avoid an impairment claim by Shands and took the position that doubling its per person policy limits would act to shield it, and its insured, from such an action. Accordingly it paid an additional policy limit amount of $10,000.00 to Shands.[13] Though Shands accepted this payment, it determined that the amount was not adequate to satisfy its lien, and accordingly, filed suit against Mercury Insurance for impairment of its lien, seeking damages for the remaining amount.[14]

As part of its defense to the litigation, Mercury Insurance challenged the law which entitled charitable hospitals in Alachua County to a lien for the reasonable cost of hospital care.[15] This lien attached to lawsuits, demands, settlements or judgments that arose as a result of the patient's injuries which necessitated the hospital care.[16] Further, any release executed and accepted without the hospital joining in or executing same constituted an impairment of the lien entitling the hospital to an action at law to recover the reasonable cost for the hospital care rendered.[17] At the conclusion of a non-jury trial, the trial court found that Mercury Insurance had impaired Shands' lien and entered a judgment in Shands' favor after an unsuccessful motion for judgment notwithstanding.[18] On appeal, the First District Court of Appeals determined that Chapter 88-539 was a special law which, in the instant case, created a lien based upon a private contract between the plaintiff and Shands.[19] The court held that because Article III, Section 11(a)(9) of the Florida Constitution expressly provides that "[t]here shall be no special law or general law of local application pertaining to … creation, enforcement, extension or impairment of liens based on private contracts ...", Chapter 88-539 was specifically prohibited by the Florida Constitution, and as such, could not stand as law.[20] If this decision is upheld, it could act to nullify a hospital's ability to assert a cause of action for the impairment of a perfected lien against a tortfeasor and/or its insurance carrier. However, the holding in *Mercury* does not necessarily invalidate all lien laws in Florida. It may only invalidate those lien laws which were created by special laws and were based upon a private contract.

Although the recent decision in *Mercury* renders the enforcement of the Alachua County hospital lien ordinance conferred on its charitable hospital against tortfeasors and/or their insurance companies unconstitutional, other hospital lien laws have previously been able to withstand constitutional attack. For example, the constitutionality of the Hospital Lien Act, as well as various amendments thereto, was questioned in *State Farm Mutual Auto. Ins. Co. v. Palm Springs Gen. Hosp., Inc. of Hialeah* ("*State Farm*").[21] Pursuant to this Act, counties within certain specified population limits were entitled to a lien for hospital care.[22] The Third District Court of Appeals upheld the constitutionality of this Act only after conducting a substantive due process analysis, which resulted in a determination that there was a reasonable relationship between the population classification and the purpose of the law.[23] The court, however, was not inclined to explain its holding, but merely noted that with higher populations comes a greater need for having a mechanism in place to ensure payment from indigent individuals.[24] On appeal, the Supreme Court of Florida, in determining that a "logical and sensible conclusion" was reached by the court below, affirmed its decision and the constitutionality of the Act.[25]

In *Hosp. Bd. of Directors of Lee County v. McCray* ("*McCray*"), the Second District Court of Appeals addressed the constitutionality of a special act that, by statute, created liens upon demands, judgments, and settlements in favor of Lee Memorial Hospital.[26] While the trial court found this law to be unconstitutional, this decision was reversed by the Second District Court of Appeals.[27] The court reasoned that the Florida Constitution "prohibits those special laws which create liens based on private contracts, not all special laws which create

liens."[28] Because the court reasoned that the lien was created pursuant to a statute rather than by a private contract, the court found that Chapter 78-552 did not violate the Florida Constitution.[29] The court's decision was also based on the fact that a similar law was approved by the Supreme Court of Florida after a constitutional challenge in *State Farm*.[30]

It should be noted, however, that the holding in *Mercury* can be distinguished from the holdings in both *State Farm* and *McCray*. Specifically, the court in *State Farm* did not address the particular constitutional issue raised in *Mercury*. As discussed above, the court in *Mercury* addressed whether the challenged law was a special law, and whether it created a lien based upon a private contract.[31] In holding that the hospital lien law was unconstitutional, the court in *Mercury* found that the law violated the plain language of the Florida Constitution.[32] The court in *State Farm*, however, did not undertake this type of analysis to arrive at its decision to uphold the constitutionality of the Hospital Lien Act. Rather, the court conducted a substantive due process analysis and determined that because there was a reasonable relationship between the population classification and the legislative purpose behind the law, such law was therefore constitutional.[33] *Mercury* can also be distinguished from *State Farm* based upon the particular language contained within the respective lien law in each case. Specifically, the lien law challenged in *Mercury* permitted only charitable hospitals in Alachua County to benefit from the enacted lien law.[34] Whereas, the challenged lien law in *State Farm* permitted only those hospitals in counties who met certain population requirements to benefit from the enacted lien law.[35]

Although the courts in *Mercury* and *McCray* both considered the plain language of the Florida Constitution in rendering their respective decisions, it appears that each court applied a different meaning to said language. Thus, it could be argued that the *McCray* decision is fundamentally flawed. Specifically, the court in *Mercury* held that, "chapter 88-539 is a special law which creates a lien based on a private contract…", and therefore, violates the Florida Constitution.[36] However, the court in *McCray* found that "[c]hapter 78-552 was a lien created by a statute, rather than by a private contract…" and was therefore, not in violation of the Florida Constitution.[37] Based upon this reasoning, it appears that the court in *McCray* may have confused a lien right created by a private contract, with a lien right created by a special act but based upon a private contract. Although the holding in *Mercury* appears, on its face, to be favorable to insurance carriers, we must caution that this holding could be limited by the specific facts of the *Mercury* case. For example, the holding in *Mercury* arguably could not apply to cases involving publicly funded hospitals because the involved hospital, Shands, was a private hospital.[38]

The impact of the recent decision in *Mercury* is not fully known at this time. However, if this decision is upheld, it could have a positive effect on how insurance carriers handle settlements with unrepresented claimants when hospital liens are involved and the claimants are refusing to include the hospital as a co-payee. The hospital lien law which was challenged in *Mercury* imposed a duty upon insurance carriers to ensure that hospital liens were satisfied when settlement payments were made. By properly executing this duty, carriers were able to avoid a subsequent suit brought by the hospital pursuant to the lien law. However, the *Mercury* decision has, in essence, shifted the burden to satisfy a perfected hospital lien back to the patient, as the lien, according to the First District Court of Appeals, is a private contract between that individual and the hospital.[39] Thus, while a lien filed by a hospital against a patient for medical services rendered is not in itself unconstitutional, the decision in *Mercury* has limited the ability of a charitable hospital, in Alachua County, to proceed directly against said patient's interest in a third party liability policy settlement.

Mercury has helped to give some hope for relief to claims professionals working to resolve high exposure claims with unrepresented claimants who have hospital liens. The lasting impact of *Mercury*, and whether the First District's holding will withstand further appeals are unknown. *Mercury* could be overturned on appeal, or could be found by other Florida jurisdictions to be limited to its facts and the ordinance in Alachua County. However, if *Mercury* is adopted in other districts and represents a trend in the courts, it could signify a paradigm shift, assisting claims professionals and insurance carriers facing the daunting challenge of an expeditious resolution in the face of a significant collateral claim from a hospital lien. As noted above, because the hospital lien ordinances are varied around the State, each should be examined based on their own pronouncements. Furthermore, each claim of lien should be examined in terms of its strict complicity with the respective ordinance for purposes of determining whether the lien has been properly perfected in the first instance. We are always available to discuss or assist with any hospital lien and claim settlement issues.

(Endnotes)

1 When an injured party is represented by counsel, that attorney has an ethical obligation to resolve any and all liens and subrogated interests applicable to the settlement proceeds. *The Florida Bar v. Sweeney*, 730 So. 2d 1269 (Fla. 1998). Ignoring liens and subrogated

interest claims could result in action by the Florida Bar and/ or criminal sanctions. *Id.; See also Durie v. State*, 751 So. 2d 685 (Fla. 5th DCA 2000).
2 *State ex. rel. Landis v. Harris et. al.*, 163 So. 237, 240 (Fla. 1935).
3 *Id.; See also Lawnwood Medical Center, Inc. v. Randall Seeger, M.D., etc.*, 990 So.2d 503 (Fla. 2008).
4 *Id.*
5 *Mercury Ins. Co. of Fla. v. Shands Teaching Hosp. & Clinics, Inc.*, Case No. 1D08-1198, 2009 WL 2151903 (Fla. 1st DCA July 21, 2009).
6 *Id.* at 2.
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 1.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *State Farm Mutual Auto. Ins. Co. v. Palm Springs Gen. Hosp., Inc. of Hialeah*, 232 So.2d 737 (Fla. 1970).
22 *Palm Springs Gen. Hosp., Inc. of Hialeah v. State Farm Mutual Auto. Ins. Co.*, 218 So.2d 793, 797 (Fla. 3d 1969).
23 *Id.* at 799.
24 *Id.*
25 *State Farm Mutual Auto. Ins. Co.*, 232 So.2d at 739.
26 *Hosp. Bd. of Directors of Lee County v. McCray*, 456 So.2d 936 (Fla. 2nd DCA 1984).
27 *Id.* at 939.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Mercury Ins. Co. of Fla.*, 2009 WL 2151903 at 1.
32 *Id.*
33 *Palm Springs Gen. Hosp., Inc.*, 218 So.2d at 799.
34 *Mercury Ins. Co. of Fla.*, 2009 WL 2151903 at 1.
35 *Palm Springs Gen. Hosp., Inc.*, 218 So.2d at 796.
36 *Mercury Ins. Co. of Fla.*, 2009 WL 2151903 at 1.
37 *McCray*, 456 So.2d at 939.
38 *Mercury Ins. Co. of Fla.*, 2009 WL 2151903 at 1.
39 *Id.*

COMMON BAD FAITH TRAP:

AVOID THE POTENTIAL FOR CREATING BODILY INJURY COVERAGE WHERE NONE INITIALLY EXISTS

By George R. Saoud, Jr.

An increasingly common scheme used by Plaintiff's attorneys to trap insurance claims handlers into a bad faith scenario involve the handling of catastrophic injury claims under policies of insurance which do not carry bodily injury liability ("BIL") coverage. Often, a claimant's attorney will offer to settle all claims under a property damage liability only policy for a nominal amount of money or for the limits of the property damage liability coverage. If the carrier undertakes to attempt to settle and/or defend a bodily injury claim, even though the carrier is under no contractual or statutory duty to do so, the carrier may find itself in a situation where the claimant (and/or the insured) could argue that the carrier essentially created bodily injury liability coverage under a policy where none originally existed; thus, exposing the carrier to a potential bad faith claim if it commits an error in the handling of such a claim up to the total amount of an underlying judgment against its insured.

Florida recognizes the principal that an insurer's duty to defend an insured is broader than that the duty to indemnify.[1] Generally, without an express statutory or contractual duty to defend, there is no such duty.[2] However, an insurer who accepts the defense of claims against the insured has a duty to use the same degree of care and diligence as a person of ordinary care and diligence in managing her own business.[3] In these circumstances, an insurer has a good faith duty to advise the insured of settlement opportunities and possible outcome of the litigation, including the possibility of excess judgment, so that she can make informed decisions.[4]

In Florida, the standard of care for insurers when undertaking the defense of their insureds is as follows:

> An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business .... The good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.[5]

Florida courts evaluate whether a carrier has acted in bad faith based on a review of the totality of the circumstances.[6]

Florida case law establishes that when an injured party brings forth both a covered claim and an uncovered claim against an insured, the insurer may incur a duty to act in good faith with respect to the uncovered claim if either it undertakes such a duty or if the circumstances otherwise create such a duty.[7]

In *Oser*, the Florida First District Court of Appeals held that Allstate owed its insured a duty to settle the claims against her for both bodily and property damage because there was an undertaking of the duty to settle. Thus, even without coverage

under the applicable insurance policy, an insurer could owe a duty to settle "because it expressly undertook such duty or because the circumstances created a duty."[8] This decision appears to indicate that a carrier may create extra contractual exposure if it fails to pay a property damage claim which could insulate its insured from uncovered bodily injury liability.

In support of these conclusions, the *Oser* Court cites two cases:

1. *Ging v. Am. Liberty Ins. Co.*, 423 F.2d 115 (5th Cir. 1970)- *Ging* is a federal appellate case, which in applying Florida law, reversed summary judgment in favor for the insurer in a bad faith claim for failure to settle an action seeking compensatory and punitive damages, rejecting the district court's determination that the insurer had no duty to act in good faith in relation to a claim for punitive damages, which were not covered by the insurance policy, because the insurer expressly undertook the defense of the lawsuit both as to compensatory damages, which included apprising the insured of settlement offers and warning of potential consequences of litigating.

2. *Hillery v. Conn. Indem. Co.*, 6 Fla. L. Weekly Supp. 427 (Fla. Cir. Ct. Mar. 31, 1999)- *Hillery* is a Circuit Court case out of Hillsborough County, in which the Circuit Court judge granted Plaintiff's motion for partial summary judgment, holding that the insurer owed a duty to the insured to act in good faith settlement negotiations dealt with both personal-injury and property damage, even though there was no coverage for the former. Further, the Order in *Hillery* specifically rejects the Florida federal case which is most favorable to the insurance carrier in defense of a bad faith suit under these circumstances, *Rodriguez v. American Ambassador Casualty Co.*[9]

In *Rodriguez*, the insured purchased an automobile insurance policy from the insurer that covered property damage liability and personal injury protection to $10,000.00; furthermore, the insured specifically rejected bodily injury liability coverage.[10] The insured then struck and severely injured a pedestrian. The following month, the pedestrian's attorney notified the insurer that he represented the injured party. The insurer promptly outlined the policy limits and informed counsel that the insurance policy did not cover bodily injury. Nonetheless, the pedestrian's attorney submitted claims of liens to the insurance company for the pedestrian's medical expenses.[11]

The pedestrian's attorney sent the claims adjuster a letter demanding settlement for his client's property damage. In the letter, the law firm also offered to release the Plaintiff from all claims, both property and potential personal injury claims, if the Defendant paid $536.58 in property damages by a certain date. The Insurance Carrier failed to meet this deadline, so the pedestrian's attorney sued the insured seeking damages for bodily injuries; but not property damage. The insured settled with the pedestrian for $2,000,000.00, in exchange for the pedestrian not coming after the insured for that amount.[12]

The insured then filed a bad faith complaint against the insurance company in state court contending that the insurance carrier acted in bad faith in failing to tell her about (and also accept for her) pedestrian's previous settlement offer.[13]

The U.S. Court for the Middle District of Florida analyzed the issue with regard to the breadth of an insurer's fiduciary duty to defend its insured. The court cited multiple cases presented by the insured, in support of her position that the insurance company had a duty to tell her about and/or accept pedestrian's settlement offer. The court held against the insured, however, because she offered no evidence or authority showing her insurer had a statutory or contractual duty to defend her against the pedestrian's personal injury claims. The court held that no such evidence existed because the insured rejected bodily damage protection, and could therefore not broaden her insurer's duty to defend her as she contended. Simply put, the Court ruled that the insurance carrier does not have a duty to defend bodily damage claims because the policy did not cover them.[14] Further, the *Rodriguez* court held:

> Plaintiff, or more accurately the injured pedestrian's lawyer, tried to create insurance coverage where none ever existed. Defendant had no contractual or statutory duty to defend the Plaintiff against bodily damage claims not covered in the policy. Neither the Plaintiff nor the pedestrian's counsel can manufacture such a fiduciary duty here… Obviously, the pedestrian's counsel crafted this strategy. His client could only collect from the Defendant the value of the items she wore, and the Plaintiff had no financial resources to cover the potentially costly personal injury damages. To offer to settle the property claim and her extensive personal injury claim for a little more than $500 would have been irresponsible otherwise.[15]

The other Florida federal case to analyze this issue is *Calhoon v. Leader Specialty Ins. Co.*[16] The Court in *Calhoon* found that the insurer was not liable for bad faith claims where the injured party's attorney demanded settlement of all claims although the insured only had property damage coverage. Specifically, claimant attorney's demand letter read as follows:

> "Please be advised that my client has authorized me to settle any and all claims she has against your insured for payment

of all available bodily injury limits and $500.00 for her property damage."

Thereafter, the insurer sent a settlement check for $500.00 pursuant to the demand. The claimant returned the check and subsequently received a verdict in excess of $11,000,000. In the bad faith phase of the litigation, the Court noted that the insured was not covered for bodily injury liability under the applicable policy. The Court then granted the insurer's Motion for Summary Judgment and stated that although the insurance company had the **opportunity** to settle, it did not have the **ability** to settle under the terms presented by Plaintiff's counsel. [17]

Thus, while federal case law is favorable to the insurance carrier in this type of bad faith scenario, the *Oser* case opens the door to the potential for an adverse decision against an insurance carrier (especially in suits brought in state court) due to its unfortunate reliance on the *Hillery* circuit court decision.

The following tips may assist an insurance claims representative to avoid this situation altogether:

1. **Recognize the bad faith set-up**- If the claimant's attorney offers a deal that appears too good to be true, then it probably is. When in doubt as to whether you are being set up, consult a bad faith attorney immediately. It is better to be safe rather than sorry later.
2. **Forward the offer to the insured**- Immediately send a letter to the insured explaining the offer and that his or her subject policy does not cover bodily injury claims and that the carrier will not undertake to settle and/or defend any such claim on the insured's behalf regardless of the circumstances. If the insured wishes to make a deal with the claimant's attorney regarding bodily injury claims, then he should contact that attorney directly. It is also prudent to advise the insured to retain his own counsel to deal with any bodily injury claims as the carrier will not appoint counsel to the insured for defense of bodily injury claims.
3. **Reply to the Claimant Attorney**- Immediately send a responsive correspondence to the claimant's attorney informing the attorney that the subject policy carries only property damage liability coverage and no bodily injury liability coverage. Also advise that the carrier will not undertake to settle or defend any bodily injury claims nor attempt to obtain a release from the claimant of bodily injury claims on behalf of the insured. Advise that the carrier is ready, willing, and able to settle all claims covered under the insurance policy. **Note:** When sending a proposed release to a claimant's attorney, be sure that the language of the release is limited to claims covered under the subject policy. If the release contains language concerning the release of bodily injury claims, it may provide a basis for the claimant to later argue that the carrier undertook to settle the bodily injury claim.

Please note that these are general tips, and the appropriate manner to deal with this type of bad faith set up may vary depending upon the circumstances. As noted above, if a claims representative is in doubt as to how to proceed, it is always prudent to consult a bad faith attorney.

(Endnotes)

1 *Allstate Insurance v. v. RJT Enterprises, Inc.*, 962 So.2d 142, 144 (Fla. 1997); *Aetna Insurance Co. v. Borrell-Bigby Electric Co., Inc.*, 541 So.2d 139 (Fla. 2d DCA 1989); *Kopelowitz v. Home Insurance Co.*, 977 F.Supp. 1179, 1185 (S.D. Fla. 1997).
2 *Allstate Insurance v. v. RJT Enterprises, Inc.*, 962 So.2d 142, 144 (Fla. 1997).
3 *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).
4 *Ging v. American Liberty*, 423 F.2d 115 (5th Cir. 1970).
5 *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).
6 *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 63 (Fla. 1995).
7 *See Allstate Indem. Co. v. Oser*, 893 So.2d 675, 677 (Fla. 1st DCA 2005).
8 *Id.* at 677.
9 4 F. Supp. 2d 1153 (M.D. Fla. 1998).
10 *Id.* at 1155.
11 *Id.*
12 *Id.* at 1156.
13 *Id.*
14 *Id.* at 1157, *citing Spencer v. Assurance Co. of America*, 39 F.3d 1146 (11th Cir. 1994) (summary judgment entered for insurer against assignee seeking indemnification because policy did not cover underlying claim and insurer had no duty to defend).
15 *Id.*
16 2007 WL 4098840 (M.D. Fla. 2007).
17 *Id.*

FLA. R. CIV. P. 1.201: FLORIDA'S NEW "COMPLEX LITIGATION" RULE

By Howard Scholl

This summer, the Florida Supreme Court approved the addition of Rule 1.201 to the Florida Rules of Civil Procedure, which is certain to change the landscape of litigation for a variety of cases.[1] Entitled "Complex Litigation," Rule 1.201 establishes a framework akin to the Federal Rules of Procedure, with mandatory case management conferences, required disclosures at certain intervals, and a guarantee of a trial within two years in order to promote the *efficient* and *timely* disposition of cases, excepting matters concerning family law.[2] The following is a synopsis of the Rule and its practical

application.

First, any party may, on motion, request that a case be declared complex either after service upon all parties, or prior to service, if there is a showing as to why all defendants have not been served.[3] If the motion is opposed, the Court is to hold a hearing, and issue an Order within 10 days of the conclusion of that hearing, determining whether the rules of complex litigation will apply.[4] Complex actions are defined as actions that involve "complicated legal or case management issues."[5] Considerations that factor into this determination include the novelty of issues, logistical concerns related to the number of represented parties, the number of witnesses or anticipated volume of evidence, as well as the presentation of evidence at trial, judicial involvement following judgment, and "any other analytical factors identified" which are "likely to arise."[6]

At first blush, it would appear this Rule would only apply to matters such as claims for professional malpractice, commercial litigation or any other type of suit with a complex or intricate fact pattern. However, with the inclusion of cases that present management issues, a relatively simple dispute which involves multiple parties would also fall under the penumbra of this rule, such as is often the case in class action disputes.

In all actions deemed "complex," a case management conference must be held within 60 days.[7] Prior to that hearing, all parties are required to confer in order to prepare and file a discovery plan which outlines the facts and theories supporting the allegations and defenses asserted, addresses the possibility of settlement and the appearance of additional parties.[8] Of note, the attorney of record must be identified and the parties are also urged to simplify issues and agree to admitted facts, avoid motion practice, identify and agree to the authenticity of documents, and identify both fact and expert witnesses.[9] Furthermore, both the "lead trial attorney and a client representative" must attend the case management conference.[10] Thereafter, a Case Management Order establishing discovery deadlines including disclosure of witnesses and expert opinions will be issued.[11]

At the case management conference, the trial will be set to occur "no sooner than 6 months and no later than 24 months" after the initial conference. Furthermore, Rule 1.201 specifically provides that continuances should "rarely be granted" and only for good cause.[12] Finally, 90 days prior to trial there is to be another case management conference to address pending motions and other trial issues.[13]

This author expects that the tactical advantages offered by application of Rule 1.201 will lead practitioners to invoke this rule whenever possible. For example, while the Rules of Judicial Administration provide a jury trial in a civil matter should occur 18 months after being noticed at issue for trial, Rule 1.201 may be used by Plaintiffs who have positioned their case for trial prior to the filing of a Complaint in order levy pressure on Defendants who will be forced to prepare within a certain window.[14]

Arguably, the ability to prepare for trial may also be complicated by external forces, such as the failure of non-parties to respond to subpoenas or witnesses failing to appear for deposition. However, Rule 1.201 does provide a mechanism for addressing these issues with a subsequent conference 90 days before the trial period.[15]

Rule 1.201 should also preclude other practices which often frustrate parties leading up to trial, especially the disclosure of new opinions from expert witnesses or treating physicians. Typically, if new opinions were disclosed at the eleventh hour, a party needed to demonstrate prejudice in order to seek recourse.[16] However, surprise opinions or disclosure of evidence, in contradiction to the deadlines established by the Court, may be more readily dealt with under Rule 1.201 as the Courts have plenary power to impose a sanction for violation of an Case Management Order.[17] Logically, this will also apply to other common discovery disputes which arise. Unfortunately, some parties (either though laziness or in an effort to gain some sort of perceived advantage) may stall in responding to discovery or provide deficient answers. Rather than go through the time consuming process of filing a Motion to Compel, discovery disputes may be brought to the immediate attention of the Court. Fortunately, many of the issues discussed here can easily be ameliorated through a prompt and fair evaluation of the case, immediate identification of defense issues, and aggressively seeking out evidence in harmony with your litigation plan.

(Endnotes)

1 Mark D. Killian, *Court OK's Complex Litigation Rule*, *Florida Bar News* (June 15, 2009).
2 In Re: Amendments to the Florida Rules of Civil Procedure – Management of Cases Involving Complex Litigation, Case No.: SC08-1141.
3 Fla. R. Civ. P. 1.201(a).
4 Fla. R. Civ. P. 1.201(a).
5 Fla. R. Civ. P. 1.201(a)(1).
6 Fla. R. Civ. P. 1.201(a)(2).
7 Fla. R. Civ. P. 1.201(b).
8 Fla. R. Civ. P. 1.201(b)(1).
9 *Id.*
10 Fla. R. Civ. P. 1.201(b)(2).
11 Fla. R. Civ. P. 1.201(c).
12 Fla. R. Civ. P. 1.201(b)(3).
13 Fla. R. Civ. P. 1.201(d).
14 Fla. R. Jud. Admin. 2.2250.
15 Fla. R. Civ. P. 1.201(d).
16 *See, e.g.*, *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981).
17 See, *e.g.*, *Michalak v. Ryder Truck Rental, Inc.*, 923 So. 2d 1277 (Fla. 4th DCA 2006).

FLORIDA LEGISLATURE RESTORES CAPS ON ATTORNEY'S FEES IN WORKERS' COMPENSATION CASES

By Michael Beane

On May 29, 2009, Florida Governor Charlie Crist signed into law House Bill 930. The law was in direct response to the Florida Supreme Court's ruling in *Murray v. Mariner Health,* 994 So. 2d 1051 (2008), which held that attorneys were entitled to a "reasonable" attorney's fee in workers' compensation cases.[1] In *Murray*, the Supreme Court of Florida determined that the 2003 amendment to Florida Statute Section 440.34, was ambiguous with respect to attorney's fees paid by the employer/carrier to a claimant's attorney when prevailing on workers' compensation claims.[2] The 2003 amendment had placed strict caps on attorney's fees when a claimant's attorney obtained benefits on behalf of the injured worker. The ruling in *Murray*, however, left the opportunity for the legislature to respond to the decision because the Supreme Court of Florida simply reinterpreted the 2003 amendment and did not declare the statute unconstitutional. The Florida legis-

lature has redressed the ambiguities of section 440.34 and restored fee caps on attorney's fees in Florida workers' compensation cases.

The 2003 Amendments to Section 440.34

The legislature made the most dramatic and substantive changes to section 440.34 in 2003. These changes were made to remedy a Florida workers' compensation system that had become highly fee driven. Section 440.34(1) states as in relevant part:

> Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000.00 of the amount of the benefits secured, 15 percent of the next $5,000.00 of the amount of benefits secured, 10 percent of the remaining amount of benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.[3]

While the statute clearly defined the statutory fee in subsection (1), the language in subsection (3) created an ambiguity that allowed for the Supreme Court of Florida to hold that a claimant's attorney was entitled to a reasonable fee. Section 440.34(3) states:

If any party should prevail in any proceeding before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees. A claimant shall be responsible for the payment of her or his own attorney's fees, **except that a claimant shall be entitled to recover a <u>reasonable</u> attorney's fee from a carrier or employer:**

> a. Against whom she or he successfully asserts a petition for medical benefits only, if the claimant has not filed or is not entitled to file at such time a claim for disability, permanent impairment, wage loss, or death benefits arising out of the accident;
>
> b. In any case in which the employer or carrier files a response to a petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition;
>
> c. In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability; or In cases where the claimant successfully prevails in proceedings under Sections 440.24 or 440.28.[4]

Murray v. Mariner Health

In *Murray*, the petitioner, a certified nursing assistant, sustained a work injury when lifting a patient.[5] She was diagnosed with a uterine prolapse and underwent a hysterectomy.[6] The claimant filed a petition for workers' compensation benefits requesting temporary total disability, temporary partial disability, medical care, attorney fees and costs.[7] The claim was denied by the carrier, asserting as defenses that the accident did not occur within the course and scope of employment and fraud.[8] At the Final Hearing, the Judge of Compensations Claims found that the petitioner's claims were compensable and awarded her $3,244.21 in benefits.[9]

The parties agreed that the petitioner was entitled attorney's fee from respondents pursuant to section 440.34, but disputed the method by which the award should be calculated.[10] At the hearing to determine the amount of fees to be awarded, the petitioner argued entitlement to a "reasonable" fee even though subsection (1) of section 440.34 no longer set forth factors for determining the reasonableness of attorneys' fees.[11] The respondents, conversely, argued that the fee should be calculated based on the strict formula in subsection (1).

At the hearing, the petitioner introduced evidence that the rate of pay for attorneys' fees in workers' compensation cases involving similar issues was $200.00 per hour.[12] The testimony further indicated that the petitioner's attorney spent 80 hours working on the case and would only be entitled to a statutory fee of $684.84 in attorneys' fees.[13] This equated to an hourly rate of $8.11 per hour.[14] The Judge of Compensation Claims, however, awarded a statutory fee of $684.84 in attorneys' fees based on the fee schedule allocated in subsection (1).[15] On appeal, the First District Court of Appeals affirmed the order awarding the petitioner $684.84 in attorneys' fees.[16]

On appeal to the Supreme Court of Florida, the petitioner challenged the 2003 amendment on the basis that the section 440.34 was ambiguous and the statute

violated the claimant's constitutional rights of equal protection, due process, access to courts and separation of powers.[17] However, the Supreme Court of Florida was able to avoid the issue of constitutionality, by resolving the issue on the basis of statutory construction and the ambiguity contained in the statute.[18] The Supreme Court of Florida held that when reading the statutory formula contained in subsection (1) compared with subsection (3), the result is an "unclear and ambiguous statute."[19] In using the traditional rules of statutory construction, the Supreme Court of Florida determined that subsection (3) was controlling and allowed the claimant to pursue a reasonable fee based on an hourly rate.[20]

In other words, the Supreme Court Florida held that the specific subsection (3) controls over the general subsection (1), thereby allowing for a reasonable attorney fee.[21] The Supreme Court of Florida further held that if subsection (3) was controlled by subsection (1), then the reasonable fee requirement contained in subsection (3) would essentially be rendered meaningless and absurd because the application of statutory fee caps would result in inadequate fees in some cases and excessive fees in other cases.[22] The Court noted that inadequate and excessive fees are not reasonable fees as defined in subsection (3).[23] Thus, the *Murray* decision avoided the constitutional challenges and interpreted the law to allow for a "reasonable" attorney based on an hourly rate. The ruling led to a return to a fee driven workers' compensation system which had existed prior to 2003 amendments to section 440.34.

The 2009 Amendments to Section 440.34

The Florida Legislature responded to the decision in *Murray* by amending subsection (3) to essentially remove the ambiguous language. In relevant part, section 440.34(3) now states:

> If any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees. A claimant is responsible for the payment of her or his own attorney's fees, ***except that a claimant is entitled to recover an attorney's fee in an amount equal to the amount provided in subsection (1) or subsection (7) from a carrier or employer.***[24]

Because the amended version of section 440.34 (3) deletes the reasonable fee language, there no longer exists an ambiguity in the statute as subsection (1) and subsection (3) can read together in harmony with one another. As such, a claimant's attorney will only be entitled to a statutory fee as indicated in subsection (1) or a "medical only" fee in subsection (7). Subsection (7) states:

> If an attorney's fee is owed under paragraph (3)(a), the judges of compensation claims may approve an alternative to attorney's fee not to exceed $1,500 only once per accident, based on a maximum hourly rate of $150 per hour, if the judge of compensation claims expressly finds that attorney's fee amount provided for in subsection (1), based on benefits secured, fails to fairly compensate the attorney for disputed medical-only claims as provided in paragraph (3)(a) and in the circumstances of the particular case warrant such action.[25]

Therefore, a claimant will no longer be entitled to a "reasonable fee," based on an hourly rate, but rather the strict statutory fee caps as outlined in sections (1) and (7). The law became effective on July 1, 2009 and applies to accident dates on or after July 1, 2009.

Effect on Insurance Rates

Section 440.34 and the *Murray* decision have had a dramatic effect on workers' compensation insurance rates. Section 440.34 was originally enacted in 2003 to curb Florida's workers' compensation rates, which were consistently ranked the first or second highest in the country prior to the 2003 amendment.[26] The reform in attorney's fees in 2003 certainly achieved its goal as Florida dropped out of the top 10 for highest rates in the country.[27] After the 2003 amendments, there were 6 consecutive drops in insurance rates resulting in a statewide average of more than a 60% decrease in rates.[28] This had the potential to save Florida employers more than $610 million.[29] These 6 consecutive filings were the largest consecutive cumulative decreases on record for Florida's workers' compensation rates, dating back to 1965.[30]

However, following the *Murray* decision on October 23, 2008, the workers' compensation rates began to increase, prompting lobbying efforts for the *Murray* decision to be addressed by the Florida legislature. Effective April 1, 2009, Florida Insurance Commissioner Kevin McCarty approved a 6.4% increase in Workers' Compensation premium costs.[31] The increase reflected the anticipated cost of legal fees due to the claimant's ability to collect increased fees for their services as a result of the *Murray* decision.[32] While the increase was significant, it was not as dramatic as the increase proposed by the National Council on Compensation Insurance (NCCI). On November 14, 2008, the NCCI proposed an 18.6% increase over the next two years.[33] Though

the Florida Office of Insurance Regulation did not increase the rates as dramatically as proposed, a gradual increase appeared imminent as a response to the *Murray* decision. However, with the recent legislative changes to section 440.34, we can expect that trend to be discontinued. In fact, as of June 3, 2009, the 6.4% increase in insurance rates was repealed by Kevin McCarty, effective immediately, upon Governor Christ approving House Bill 930.[34] Employers can expect that workers' compensation rates will remain reasonable as long as section 440.34 remains in effect

Constitutional Challenges

Undoubtedly, we can expect that there will be constitutional challenges to section 440.34, as amended in 2009. However, overturning a statute on constitutional grounds can be a daunting challenge due to the fact that "every presumption is to be indulged in favor of the validity of that statute."[35] To date, all constitutional challenges to Section 440.34 have been denied by Florida courts.

Opponents of this statute have argued that the legislature has impermissibly encroached on the powers of the judiciary by placing strict caps on attorney's fees. However, in *Lundy*, the court ruled that the legislature may limit the amount of fees that a claimant's attorney may charge as the state legislature has a legitimate interest in regulating attorney's fees in workers' compensation cases.[36] Additionally, opponents have argued that the law violates the injured workers' right to due process and equal protection. However, a challenge based on equal protection will be unlikely successful because an injured worker is not a "suspect class" and thus, the review will be pursuant to a quite deferential rational basis standard. The statute will need only bear a reasonable relationship to a legitimate state interest.[37] The burden is on the party challenging the statute to show that there is *no* conceivable factual predicate which would rationally support the classification under attack.[38] A statute subject to the rational basis standard is seldom overturned as having no reasonable relationship to a legitimate state interest.

Opponents of section 440.34 have also argued that the law impermissibly restricts the right to freely contract. A statute restricting the right to contract will not be invalidated if the restriction was enacted to protect the public's health, safety or welfare.[39] In *Lundy*, the Court addressed this issue indicating that Section 440.34(1) was enacted to protect the public's welfare, as it ensured that the placement of caps on attorney's fees would allow an injured worker to retain a substantial portion of the benefits awarded. In turn, this would prevent the burden of providing medical treatment from being placed upon society, because the injured worker would have the means to pay for medical treatment.[40]

Critics of the statute have also indicated that the law may violate the claimant's right to due process by denying access to courts. In order to prevail on a due process challenge, Florida courts have held that an injured worker must be denied the opportunity to be heard in a meaningful, full and fair, and not merely colorable or illusive way.[41] To prove this, the claimant will need to demonstrate that the statute has unduly burdened the claimant's ability to retain counsel in order to secure benefits, or that the statute limits the types of benefits a claimant is authorized to pursue under Section 440.[42] The claimant would need to present evidence that, since the time the law was enacted, there has been a substantial increase in *pro se* injured workers or a substantial decrease in litigated cases. In *Lundy,* the Court noted that the claimant's challenge on this theory was unpersuasive as it lacked evidentiary support.[43] Therefore, it appears unlikely that a claimant would be successful on this type of constitutional argument unless there was clear evidence that the Section 440.34 somehow impairs a claimant's opportunity to be heard.

Conclusion

The Florida legislature has responded to the *Murray* decision, effectively restoring strict caps on attorney's fees. Employers can expect that workers' compensation rates will continue to decrease, which will favor business owners and may, as many argue, disfavor the injured worker. However, future constitutional challenges to Florida Statute section 440.34 remain a near certainty. While all constitutional challenges to the law, to this point, have been turned aside by Florida Courts, many critics of section 440.34 believe that the Supreme Court of Florida will once again be charged with the task of deciding whether the statute is constitutional. Since the Florida legislature has removed the ambiguity in section 440.34, opponents will have no choice but to challenge the statute strictly on constitutional grounds. Thus, the Florida Supreme Court may ultimately be required to make a ruling as to the constitutionality of section 440.34 once and for all.

(Endnotes)

1 *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008).
2 *Id.*
3 Fla. Stat. § 440.34(1) (2008) (emphasis added).
4 Fla. Stat. § 440.34(3) (2008) (emphasis added).
5 *Murray*, 994 at 1053.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 1054.
10 *Id.* at 1055.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at 1056.
18 *Id.* at 1062.
19 *Id.* at 1061.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 Fla. Stat. § 440.34(3) (2009)(emphasis added)
25 Fla. Stat. § 440.34(7) (2009)(emphasis added)
26 FLOIR Media Release, Florida Insurance Commissioner Recommends Workers' Compensation Insurance Rate Increase Due to Court Ruling. http://floir.com/pressreleases/viewmediarelease.aspx?id=3088 (last visited July 31, 2009).
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 Insurance Journal, Florida Approves 6.4% Workers' Compensation Insurance Rate Hike, http://www.insurancejournal.com/news/southeast/2009/02/11/97813.htm (last visited July 31, 2009).
32 *Id.*
33 *Id.*
34 National Underwriter Property & Casualty, Fla. Drops Comp Rates After Attorney Fee Cap Restoration, http://www.property-casualty.com/News/2009/6/Pages/Fla-Drops-Comp-Rates-After-Attorney-Fee-Cap- Restoration-.aspx (last visited July 31, 2009).
35 *Golden v. McCarty*, 337 So. 2d 388, 389 (Fla. 1976).
36 *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506,509(Fla. 1st DCA 2006)(citing *Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980)).
37 *Id.*
38 *Florida High School Activities Association, Inc. v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).
39 *Khoury v. Carvel Homes S., Inc.*, 403 So. 2d, 1043, 1046 (Fla. 1st DCA 1981).
40 *Lundy*, 932 So. 2d at 510.
41 *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA).
42 *Lundy*, 932 So. 2d at 510.
43 *Id.*

MAR WARS, OR IS A CHIPPED TILE WORTH $81,000?

By Andrea B. Chirls

Everyone who has homeowners insurance expects the insurer to pay when the home is damaged by a covered event, such as a hurricane, fire or plumbing leak. The typical homeowner simply wants their home restored to its prior condition and wants the insurer to pay what is rightfully owed. Over the past several years, however, there has been a new type of claim that results in extreme overreaching by the insureds, their public adjusters and their attorneys.

This is the typical case we have defended: Mr. Insured was hanging a picture on the wall. He accidentally dropped his five-pound hammer. When the hammer hit the floor, it chipped or cracked a tile.[1] Mr. Insured, through his public adjuster, makes a claim. The claim is not, however, for a chipped or cracked tile. The claim is for $80,000 worth of new tile throughout the entire house.[2] Everywhere in the home that the tile runs continuously from room to room is claimed as requiring replacement. The stated reason is that the one damaged tile cannot be replaced because a matching tile cannot be found. The insureds never have left over tile from when the floor was installed and they cannot have a mismatched tile in their floor because they are entitled to matching tile. The argument is that pursuant to Fla. Stat. § 626.9744, the claims settlement statute, an insurer must make reasonable repairs or replacement of matching items in adjoining areas.

In the past, insurers tried to bargain. "We do not need to replace the entire floor because we can harvest a matching tile from a hidden area, such as under the refrigerator."[3] Eventually, however, the cases typically settle.

Like mold claims before them, these "dropped object" claims have fomented ever more claims with bigger and more extensive demands and payouts. At least one insurer refused to give in to such obvious overreaching. That insurer began denying the claims as falling under an exception to coverage. The insurer, after fully investigating the claims, including having an engineer inspect the damage[4], denied such claims as "marring" pursuant to the "wear and tear, marring, deterioration" exception to coverage.[5] Naturally, the insureds and their public adjusters pushed back.

The resulting lawsuits allege either breach of contract for failure to pay a covered claim or demand appraisal of the claim pursuant to the policy's appraisal provision.[6] Almost invariably, the insurers make the economic decision to settle the cases or agree to appraisal to cut their losses and cut off the attorneys' fee claims.

Enter *Raul Maestri v. Florida Peninsula Insurance Company*.[7] Florida Peninsula Insurance Company had long been denying these tile damage claims as "marring" but usually ended up settling the claims or participating in appraisal (either voluntarily or involuntarily). No one had yet come up with an argument against such claims until Mr. Maestri's attorney filed his standard motion for summary judgment on the right to have the claim decided by appraisal. It was then that Florida Peninsula authorized Cole, Scott & Kissane to go on the offensive.

One of the insured's standard arguments is that in interpreting an insurance policy, the court must look at the words surrounding the term at issue. "Marring" falls between "wear and tear" and "deterioration." The terms "wear and tear" and "deterioration" imply a long-term and gradual condition, thus, "marring" should be interpreted the same way. In counter to this argument, it is first noted that, while these HO-3 policies are "all risk" policies, "all risk" does not mean "all loss."[8] In addition, the general rule is that a single policy provision should not be read in isolation and out of context but that the contract should be interpreted according to all of the terms set forth in the policy.[9] The "wear and tear, marring, deterioration" exception is only one subparagraph of a larger exception to coverage that also includes occurrences that are sudden and unexpected, such as mechanical breakdown and discharge of pollutants. Thus, the entire exception can be read as excepting ***both*** gradual and sudden occurrences.

The insured then argued that because the parties disagree as to the meaning of "marring," the policy is ambiguous and must be resolved in favor of coverage.[10] Simply saying a policy is ambiguous does not make it so. Insurance contracts are interpreted like all other contracts—"according to the plain language of the policy except when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction."[11] Unambiguous policy provisions should be enforced according to their terms whether they are providing coverage or excluding coverage.[12] The lack of a definition of a policy term does not, therefore, create an ambiguity.[13] "The mere fact that an insurance contract is complex and requires some analysis to interpret it does not, by itself, render the agreement ambiguous."[14] "Mar," in its ordinary definition, means "to inflict damage, especially disfiguring damage, on."[15] A chip or crack in a tile falls within that definition. This type of case does not involve the problem of ambiguity, but simply whether the policy provision applies to the type of

damage claimed.[16]

There are no cases in Florida that address the "wear and tear, marring, deterioration" provision. Only one case involving homeowners insurance directly addresses "marring."[17] In *Ehsan v. Ericson Agency, Inc.*, the insured owned a rental property. A prospective tenant stole the keys and moved his family into the property. Upon evicting the squatters, the insured discovered extensive damage throughout the house. The insurer denied the claim, in part, as "marring." The court notes the context of the word as appearing between "wear and tear" and "deterioration" and that the term is, thus, meant to include marring of appearance caused by wear and tear or deterioration resulting from ordinary use over time.[18]

The facts of *Ehsan* involve more extraordinary damage than the claim of a dropped object chipping a tile during the ordinary and normal use of the insured's premises over time. Thus, while *Ehsan* interprets "marring" in a way that seems to go against excluding the chipped tile as marring, *Ehsan* and the chipped tile case are factually distinguishable.

In *Gerawan Farming Partners, Inc. v. Westchester Surplus Lines Ins. Co.*, the insured's farming operation made a claim against its policy when its fruit began exhibiting surface pitting some time after the packing process.[19] The insurer denied the claim, in part, based on the marring exception. The court adopted the definition of "mar" used by the court in *Ehsan*.[20] The court thus found the pitting on the surface of the fruit to be marring under that definition. The court then looked at the structure and organization of the exception. The court concluded that all of the terms in the exclusionary paragraph must be related, but that the damage being claimed did not fall into the category of blemishing that occurs over time through the normal use of property.[21]

The crux of the argument against coverage for a damaged tile claim evolved into fitting the claim within the entire exception and not just focusing on "marring." The "wear and tear, marring, deterioration" provision applies to the insured property as a whole, not to individual components of the property. When people go through their daily lives in their homes carrying things from one room to another, performing maintenance work, etc., objects are dropped, potentially inflicting damage. This is part of the wear and tear of the home. It also begs the question: Does the insurance company owe an insured for a houseful of tile every time something heavy is dropped on one or a few tiles? That cannot possibly be what was expected by the issuance of an insurance policy or intended by the parties when they entered into the insurance contract.[22]

Back, then, to Mr. Maestri and his claim for $81,000 in insurance benefits due to damage to one floor tile. A hearing was held on Mr. Maestri's motion for summary judgment on July 29, 2009, in front of Miami-Dade Circuit Court Judge Ronald Friedman. Judge Friedman began by stating that he was "troubled" by such a large claim for such a small amount of damage. After a rather abbreviated argument, Judge Friedman ruled that the insurance policy at issue was not intended to cover the claimed incident.[23] Thus, the first win for the insurance industry and the first chink in the insureds' armor.

It remains to be seen whether any ruling, for or against coverage, will be taken up on appeal. If so, we may finally have our first Florida appellate decision that fairly and favorably interprets this exception to coverage.

(Endnotes)

1 Other such cases handled by Cole, Scott & Kissane include a dropped "scotch" glass, a dropped serving platter, a dropped fax machine and a wrench dropped after fixing a plumbing leak that resulted in a separate, paid claim.

2 Not only does the damage estimate include tile for almost every room in the home, but it includes repainting every room in which the tile is replaced, sometimes repainting the ceiling and occasionally replacing the kitchen cabinets. One estimate from a public adjuster notes that the kitchen cabinets in the insured property are too old to withstand removal and resetting after installation of the new tile.

3 Although the insureds argue that this could not and would not work, it does not appear that this method of repair ever was actually attempted.

4 Every engineer's report the author has read contains the same conclusion: The damage is not inconsistent with the date and description of the occurrence. Occasionally, the report will contain an added conclusion that the tile was improperly or poorly installed. This, too, is excluded by the terms of the policy.

5 The standard HO-3 policy contains the following:

> We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property. We do not insure, however, for loss:
> * * *
> 2. Caused by:
> * * *
> e. Any of the following:
> (1) Wear and tear, marring, deterioration

6 After arguing in favor of coverage in the appraisal cases, the insured then claims that coverage includes all continuous tile throughout the house. This argument is based on Fla. Stat., §626.9744, the claims settlement statute, which requires an insurer to make reasonable repairs or replacement of matching items in adjoining areas. The insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without that cost, the remaining useful life of the undamaged portion and other factors.

7 Case No. 08-43156 CA 02, Eleventh Judicial Circuit, Miami-Dade County, Florida.

8 *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005).

9 *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003); Fla. Stat., §627.419.

10 The insureds never actually explain what the ambiguity is or cite any law that holds this provision is ambiguous. They seem to rely on the fact that they say the damage is covered and the insurer says it is not for support of the argument that this, then, must be ambiguous.

11 *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (citation omitted); *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 712 (Fla. 2003). One must also look to the intent of the parties at the time the contract was made. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 881 (Fla. 2007).

12 *Taurus Holdings, Inc.*, 913 So. 2d at 532.

13 *State Farm Mut. Auto. Ins. Co. v. Mashburn*, 2009 15 So. 3d 701, 705 (Fla. 1st DCA 2009).

14 *Mashburn*, 15 So. 3d at 704.

15 American Heritage Dictionary (on-line ed.).

16 There are two cases that find the entire exception to be unambiguous. *See Brodkin v. State Farm Fire & Cas. Co.*, 217 Cal. App. 3d 210, 218 (Cal. App. 1989); *Ehsan v. Ericson Agency, Inc.*, 2003 WL 21716345, n. 18 (Conn. Super. 2003) ("marring" defined but not found to be ambiguous).

17 *Ehsan v. Ericson Agency, Inc.*, 2003 WL 21716345 (Conn. Super. 2003). *Gerawan Farming Partners, Inc. v. Westchester Surplus Lines Ins. Co.*, 2008 WL 80711 (E.D. Cal. 2008), also involves interpretation of "marring" but in the context of a commercial property policy.

18 *Ehsan v. Ericson Agency, Inc.*, 2003 WL 21716345, n. 18 (Conn. Super. 2003).

19 2008 WL 80711 (E.D. Cal. 2008).

20 The court defined "mar" as a disfiguring mark or blemish and defined a blemish as an imperfection that seriously impairs appearance. *Gerawan Farming Partners, Inc. v. Westchester Surplus Lines Ins. Co.*, 2008 WL 80711, *14 (E.D. Cal. 2008).

21 There is at least one case that states that "marring" can be the result of a sudden occurrence. *See Gibson v. Farmers Ins. Co. of Wash.*, 2007 WL 1180999 (Wash. App. 2007) (discussing "marring" as part of a similar exception to coverage in *dicta*).

22 *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 881 (Fla. 2007).

23 After much discussion, the parties could not agree on the language of the order. Judge Friedman chose to enter the order proposed by Cole, Scott & Kissane. Currently the insured's Motion for Rehearing is pending before the court.

FLORIDA DISTRICT COURT EXPANDS THE APPLICABILITY OF THE INTOXICATION AFFIRMATIVE DEFENSE TO WRONGFUL DEATH CASES

By Giselle Mammana

Lady Justice gave the Florida defense bar an early Christmas present in July. On July 31, 2009, the First District Court of Appeals upheld the trial court's ruling that the intoxication affirmative defense applies to wrongful death cases, thereby expanding the application of the intoxication affirmative defense from plaintiffs being sued individually to individuals suing under a derivative capacity, such as wrongful death claims.

In *Phillip J. Griffis, as Personal Representative of the Estate of Frank E. Griffis*, Deceased v. Wheeler[1], one of the issues presented involved the interpretation of Florida Statute § 768.36, which is also known as the "Alcohol or Drug Defense" statute. Section 768.36 states:

> (2) In any civil action, a plaintiff may not recover any damage for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:
> (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath level of 0.08 percent or higher; and
> (b) As a result of the influence of such alcoholic beverage or drug, the plaintiff was more than 50 percent at fault for his or her own harm.

In *Griffis,* the Appellant/Plaintiff, as personal representative of the decedent, filed a wrongful death action against Appellees/Defendants, who were alleged to have negligently operated their vehicle on a four-lane highway so that it fatally collided with the 39-year-old decedent, who was walking in the Appellees/Defendants' lane of traffic at night. At the time of the fatal vehicle collision, the decedent was intoxicated with a blood alcohol level exceeding 0.08 percent. Appellee/Defendant, who was driving the vehicle under the speed limit, testified that he could not have braked in sufficient time to avoid the collision with the pedestrian decedent.

Appellees/Defendants affirmatively defended on the grounds of comparative negligence and the intoxication defense under § 768.36, stating that the decedent's ethanol/alcohol concentration was .27 and his blood alcohol level exceeded 0.08 percent at the time of the accident.

The issue regarding statute interpretation of § 768.36 circled around the word "plaintiff," in light of the wrongful death claim brought forth derivatively through the decedent's survivors. The question was raised: Can the intoxication affirmative defense be applied to an individual suing derivatively through the decedent in a wrongful death action? The following will outline (1) the history of the Wrongful Death Act, (2) the First District Court of Appeals' ruling and reasoning in *Griffis* with respect to the intoxication defense statute, and (3) how this landmark ruling will affect defense litigation.

I. Overview of the Wrongful Death Act

An action for wrongful death is a purely statutory right.[2] Section 768.19, Florida Statutes (2009), which defines the right of action under the Wrongful Death Act, provides:

> When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

The right of action created under the Wrongful Death Act is conditioned on the decedent's entitlement to "maintain an action and recover damages if death had not ensued." The Florida legislature has expressly provided that the Wrongful Death Act should be liberally construed to affect its remedial purposes.[3] Specifically, the Florida Legislature expressed its intent as to shift the losses, resulting when wrongful death occurs, from the survivors of the decedent to the wrongdoer.

The Wrongful Death Act created a new and distinct right of action. In *Florida East Coast Railway v. McRoberts*, 149 So. 631 (Fla. 1933), the Florida Supreme Court explained:

> The fact that the statute provides that an action for death by wrongful act can be maintained by the statutory beneficiaries only when the alleged wrongful death has been caused under such circumstances as would have entitled the injured party himself to maintain an action had he lived is simply a regulation of, and a limitation on, the new statutory right of action created.

In *Ake v. Birnbaum*, 25 So. 2d 213, 221 (Fla. 1946), the Florida Supreme Court emphasized the distinct nature of an action for wrongful death under Florida's statutory scheme:

> It will be observed that the statute gives a right of action to certain statutory beneficiaries for the recovery of damages suffered by them by reason of the death of the party killed; but it makes no provision for the recovery of the damages suffered by the injured person by reason of the injury inflicted upon him. Nor was the death by wrongful act statute ever intended to afford such a remedy. It was not the purpose of the statute to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived; but to create in the expressly enumerated beneficiaries an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by them, not the decedent, as a consequence of the wrongful invasion of their legal right by the tortfeasor.[4]

In light of the affirmative defense under § 768.36, or the "alcohol or drug defense," the Florida statute clearly applies had the decedent lived and filed a lawsuit against the tortfeasor. The intoxication affirmative defense, however, is silent as to whether this defense may be asserted in derivative actions, such as wrongful death actions where personal representatives serve as plaintiffs. Solely based on a strict reading of § 768.36, the affirmative defense only applies to "plaintiffs," and not an individual filing claims on behalf of the decedent's survivors.

II. Griffis Court: "Appellant's argument that the decedent's survivors should not be subject to the same limitations because the decedent was intoxicated makes little sense."

Appellant/Plaintiff argued to the First District Court of Appeal that Florida Statute § 768.36 did not expressly apply to derivative actions, such as wrongful death actions, when § 768.36 speaks only to plaintiffs, their injuries, and their being under the influence. In further support, Appellant/Plaintiff argued that the Florida Legislature could have included the word "decedent" or "death" in drafting the statute. Accordingly, when a statute is clear and unambiguous, it must be given its plain and obvious meaning, as established in Florida law.[5]

The First District Court of Appeal rejected the Appellant/Plaintiff's preferred interpretation of the intoxication defense statute and declined to interpret § 768.36 out of context. The district court agreed with the trial court when the trial court stated:

> Plaintiff conceded that if [the decedent] had survived, then [he] would be barred any recovery if

the standards of F.S. Sec. 768.36(3) were met. Yet by virtue of his death, his Estate acquires greater legal rights than [the decedent] himself could ever have had (again, assuming the standards of F.S. Sec. 768.36 were met). Statutory interpretation cannot be stretched to an absurd result.

Therefore, the First District Court of Appeal stretched the application of the intoxication defense statute and held that § 768.36 applied to a decedent's survivors. Otherwise, the literal interpretation of § 768.36 would lead to an absurd or unreasonable result. The First District Court of Appeal reasoned that if the decedent would have been precluded from recovery because of his intoxication, his survivors should also be limited. Accordingly, Appellees/Defendants could assert the intoxication affirmative defense against the decedent's survivors, as they could have if the decedent would have survived the vehicle collision.

III. The Effect of the Griffis Court's Ruling on Defense Litigation

Under Florida law, one who is voluntarily intoxicated is required to exercise the same degree of care and caution in avoiding danger as is required of a sober person of ordinary prudence under similar circumstances.[6] Prior to *Griffis v. Wheeler,* the intoxication affirmative defense was interpreted to apply directly to plaintiffs only. In *Hetherly v. Sawgrass Tavern Inc.*, 975 So. 2d 1266, 1268 n.4 (Fla. 4th DCA 2008), the Fourth District Court interpreted § 768.36 to apply "only when the claimant is found to have caused more than 50% of his own injuries and bars any recovery for those caused by the defendant."

Other Florida case law involving § 768.36 explained the statute's application to summary judgments. In *Pearce v. Deschesne*, 932 So. 2d 640 (Fla. 4th DCA 2006), the Fourth District Court held that § 768.36 does not entitle the defendant to summary judgment on liability because the plaintiff's intoxication was the sole cause of his injuries. The *Pearce* court reasoned that a judge considering a motion for summary judgment was most decidedly not a "trier of fact" when § 768.36 plainly stated that "it is the finder of fact who must determine whether plaintiff was more than 50 percent at fault for his injuries." Nonetheless, the *Pearce* court did not address the application of § 768.36 in the context of wrongful death claims.

Since § 768.36 took effect on October 1, 1999, Florida courts have not dealt with § 768.36 in the context of wrongful death actions. *Griffis v. Wheeler* is a remarkable breakthrough for attorneys defending wrongful death suits where the decedent was found intoxicated at the time of the incident. Until the Florida Legislature expressly re-drafts § 768.36 to preclude wrongful death claims or until another district court interprets § 768.36 different from the First District Court of Appeal's interpretation, *Griffis v. Wheeler* stands as very persuasive law in favor of the defense in wrongful death claims.

To all defense litigators and insurance claims representatives, gladly add *Griffis v. Wheeler* to your arsenal when affirmatively defending a wrongful death suit on the ground of the intoxication defense statute.

(Endnotes)

1 *Griffis v. Wheeler*, 2009 WL 2342722 (Fla. 1st DCA Jul 31, 2009).

2 *See, e.g., Florida East Coast Ry. v. McRoberts,* 149 So. 631, 632 (1933).

3 See § 768.17, Fla. Stat. (2009); see also, *Stern v. Miller*, 348 So. 2d 303, 308 (Fla.1977).

4 See also *Bilbrey v. Weed,* 215 So. 2d 479 (Fla.1968); *Stokes v. Liberty Mut. Ins. Co*., 213 So. 2d 695 (Fla.1968); *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla.1968); *Shearn v. Orlando Funeral Home, Inc.*, 88 So. 2d 591 (Fla.1956); *Brailsford v. Campbell*, 89 So. 2d 241 (Fla.1956); *Klepper v. Breslin,* 83 So. 2d 587 (Fla.1955); *Parker v. City of Jacksonville*, 82 So. 2d 131 (Fla.1955); *Shiver v. Sessions,* 80 So. 2d 905 (Fla.1955); *Epps v. Railway Express Agency, Inc.*, 40 So. 2d 131 (Fla.1949).

5 *Saleeby v. Rocky Elson Constr., Inc.,* 3 So. 3d 1078,1082 (Fla. 2009).

6 *Checker Cab Operators v. Castleberry*, 68 So. 2d 353 (Fla. 1953).

HOW LOW CAN YOU GO?

PERSONAL LIABILITY OF EMPLOYEES OF COMMERCIAL PROPERTY OWNERS

By David A. Cornell and Ryan K. Williams

Plaintiffs sometimes allege personal liability against the employees of a commercial business following a slip and fall, or a criminal attack, that occurred on the business premises. Frequently, this maneuver is simply an attempt to defeat diversity jurisdiction and the removal of the matter from state court to federal court.

However, in order to establish personal liability against an employee, a significant burden must be met under Florida law to demonstrate that the employee was either in sufficient control of the property to prevent the incident or was personally responsible for the negligent act giving rise to the injury.

It is well established Florida law that the "duty to protect others from injury resulting form a dangerous condition on premises" belongs to the party which has the "right to control access [to the premises] by third

parties." *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661 (Fla. 5th DCA 1987). This right to control access to the premises belongs to the possessor of the premises; generally the owner or lessee of the property. *Id*. Thus, if a corporation is the party which possesses the right to control access to the premises, it is the corporation, not the corporation's employees, which owes the duty to protect others from dangerous conditions that may be present on the premises.

For example, in *Aguila v. Hilton*, 878 So. 2d 392 (Fla. 1st DCA 2004), a woman was killed after an intoxicated college student left a hotel party and crashed into the woman's vehicle. The woman's estate then sued the hotel for allowing an intoxicated person to leave their hotel. *Id*. The court held that a duty existed to those who "create" a risk to "either lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Id*. at 396; *citing McCain v. Florida Power Corporation*, 593 So. 2d 500 (Fla. 1992). A duty does not exist unless the defendant both "created" the risk and "had the ability to avoid the risk." *Id.* at 396. No duty exists on the part of the defendant to protect a third party from injury simply because the risk may have been foreseeable to the defendant. *Id*. Therefore, unless the defendant "created" the risk and was in a "position to control the risk" no duty to protect a third party exists. *Id*.

Moreover, Florida law does not impose a duty on the possessor of commercial property, let alone an employee, to ensure the safety of business invitees. *Cassel v. Price*, 396 So. 2d 258 (Fla. 1st DCA 1981); *Aguila*, 878 So. 2d at 395. Florida law imposes two duties upon possessors of property to invitees upon their premises. *Cassel*, 396 So. 2d at 264. First, a land possessor must use reasonable care in maintaining his premises. *Id*. Second, the possessor must warn invitees of all hidden perils, which are known, or should be known, to the possessor. *Id*. Thus, Florida law does not impose a duty upon employees to be the insurers of the safety of business invitees. Imposing such a duty would cause the duty element of negligence to be "stretched totally out of shape." *Aguila*, 878 So. 2d at 395. Such a duty would "impose an unreasonable and prohibitively burdensome duty" on possessors of land and their employees. *Cassel*, 396 So. 2d at 265.

A corporation can only act through its officers, agents and employees. *Browning v. State*, 133 So. 847 (Fla. 1931). Officers, agents and employees of a corporation <u>that possess the right to control the premises</u> may be held personally liable to a third person if:

> 1) The corporation owes a duty of care to the third person, breach of which has caused the damage for which recovery is sought.
>
> 2) The duty is delegated by the principle or employer to the defendant officer.
>
> 3) The defendant officer has breached this duty through personal-as opposed to technical or vicarious-fault.
>
> 4) With regard to personal fault, personal liability cannot be imposed upon the officer simply because of his general administrative responsibility for performance of some function of his employment. He must have a personal duty towards the injured third person, breach of which specifically has caused the person's damages.

See McElveen v. Peeler, 544 So. 2d 270 (Fla. 1st DCA 1989). Stated differently, most employees do not have the right to control the premises. A corporate officer or employee is not liable for the torts of the company simply because of the person's position with the company. *Vesta Construction and Design, L.L.C v. Lotspeich & Associates, Inc.*, 974 So. 2d 1176 (Fla. 5th DCA 2008); *See also, Orlovsky v. Solid Surf, Inc.,* 405 So. 2d 1363, 1364 (Fla. 4th DCA 1981).

However, if an employee personally caused the incident, this breach of duty is personal, and the employee can be held individually liable. *Orlovsky v. Solid Surf, Inc.*, *supra*. In *Orlovsky*, the owner of a skate park personally rented defective skateboards that caused injury to an invitee. The court held the owner and possessor of the premises personally participated in the tort by personally renting defective equipment. *Id*. Therefore he was properly a party, individually, to the suit. Indeed, officers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment. *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357 (Fla. 1st DCA 2006); *See also McElveen v. Peeler*, *supra*; *White-Wilson Med. Ctr. v. Dayta Consultants, Inc.,* 486 So. 2d 659, 661 (Fla. 1st DCA 1986).

In order to establish liability of an individual employee, the complaining party must allege and prove that the employee owed a duty to the complaining party, and that the duty was breached through personal (as opposed to technical or vicarious) fault. *White,* 918 So. 2d at 357; *McElveen,* 544 So.2d at 272. In *White*, the court specifically noted that an officer or employee may not be held personally liable "simply because of his general administrative responsibility for performance of some function of his [or her] employment." He or she must be actively negligent. If a complaint alleges more than mere technical or vicarious fault, such as the employee being directly responsible for carrying out certain responsibilities and that he or she negligently failed to do so, and that resulted in injury to a plaintiff, then such allegations may be legally sufficient to withstand a motion to dismiss for failure to state a cause of action.

As stated at the outset, naming an employee as an individual defendant is usually a tactic used to avoid removal of a state court case to federal court. The employee is usually a citizen of the State, whereas the corporate defendant many times is not. This defeats federal jurisdiction under diversity of citizenship jurisdiction. This tactic is also referred to as fraudulent joinder. For example, in *Pritchard v. Wal-Mart Stores, Inc.*, WL 580425 (M.D. Fla. 2009), consumers bought a contaminated jar of peanut butter from the Wal-Mart (an Arkansas defendant), but could not subsequently establish that a store manager (a Florida defendant) was directly and personally at fault. Accordingly, the court held that the manager had been fraudulently joined as a defendant in order to defeat diversity jurisdiction. The *Pritchard* court reiterated the standard for determining the liability of an employee of a corporation as noted in *White*, *supra*, as follows:

> "Officers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment. However, to establish liability, the complaining party must allege and prove that the officer or agent owed a duty to the complaining party, and that

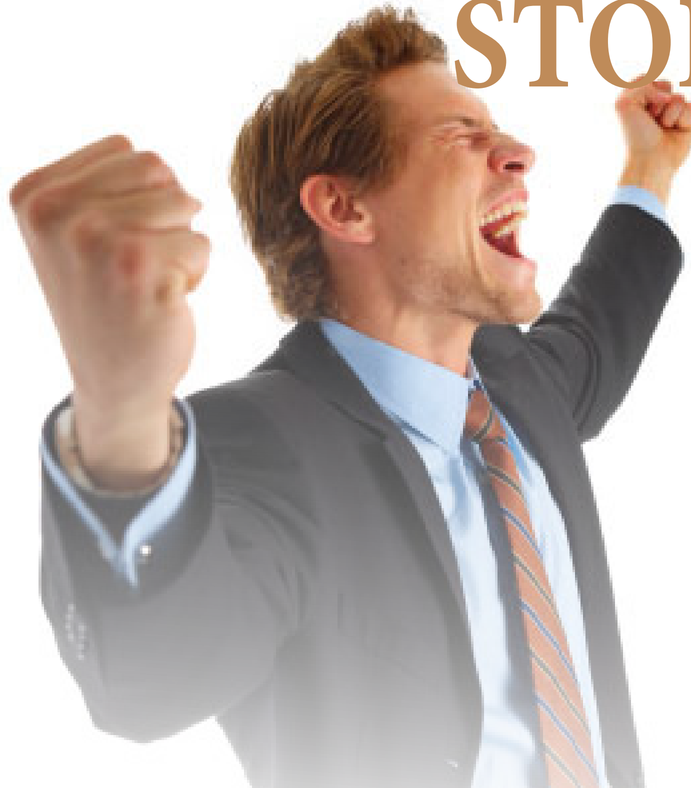
the duty was breached through personal (as opposed to technical or vicarious) fault.... [A]n officer or agent may not be held personally liable simply because of his general administrative responsibility for performance of some function of his [or her] employment-he or she must be actively negligent"

In *Pritchard*, *supra*, Wal-Mart argued that since the plaintiffs could not establish that the store manager was personally at fault for the plaintiffs' injuries in any way, he had been fraudulently joined as a defendant in the lawsuit. The court agreed. Indeed, the court noted that there was no evidence to support the plaintiffs' claim that the manager was actively negligent, and therefore, the store manager was found to have been fraudulently joined, and the case remained in Federal Court.

However, in *Allen v. Monsanto Co.*, 2009 WL 426546 (N.D. Fla. 2009) after a plaintiff filed a motion to remand a cause of action back to state court and the defendant opposed the motion claiming that the individually named plant manager was fraudulently joined, the court ultimately found that under Florida law the plant manager was in sufficient control of the plant and had a duty to lessen the risk of injury to the plaintiff, thus making the manager a proper party. In so holding, the court did recognize "[a] defendant's right to removal cannot be defeated by a fraudulent joinder of a residential defendant having no real connection to the controversy." *Id. See also Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92, 97 (1921). *See also Crowe v. Coleman,* 113 F.3d 1536, 1538 (11th Cir. 1997).

In conclusion, for those cases where a low level manager or store employees, are named individually, one must look to why the individual is being named. If it is to defeat diversity jurisdiction and possible removal to federal court, the matter still may be removed on the basis that the non-diverse employee has been "fraudulently joined" to the action. Only in those cases where the employee possesses the requisite control over the property, or is alleged to have actively engaged in some conduct that is the cause of the claimant's harm will the federal courts find that a proper cause of action has been stated against the individual employee, and remand the matter back to state court.

SUCCESS STORIES



After initiating a complex, fourteen-defendant commercial foreclosure action on a $25,000,000.00 note, David Salazar, Christopher Burrows, and Colin Riley obtained a $30,000,000.00 judgment on behalf of Banco Popular. Initially a foreclosure action, this matter evolved into a construction law action regarding, among other things, counter-allegations of fraud, failure to notice contractors of cessation on disbursement of funds, negligent misrepresentation, and replevin. David, Chris, and Colin obtained the judgment as against all but two parties, whose counter-claims were severed from the action. Given the significance of the case, and the amount of the claim, these efforts were recognized in the Daily Business Review on September 17, 2009, in an article entitled: "Foreclosure -- Unsold Cynergi units going to highest bidder."

Alejandro "Alex" Perez won an appeal of the trial court's order granting a motion to dismiss on both jurisdictional and substantive grounds. The Plaintiff filed suit against her sister for allegedly committing fraudulent acts to persuade her mother to remove the Plaintiff as Trustee of a seven-figure family trust. Plaintiff also sued several parties, including our client, an Arizona attorney assigned to serve as a guardian ad litem to Plaintiff's mother. On appeal, Alex Perez persuaded the Fourth District Court of Appeal to affirm the dismissal of Plaintiff's third amended complaint for lack of standing, a lack of personal jurisdiction, and a failure to state a claim. *Wells v. Wells*, __ So. 3d __, 2009 WL 2949277 (Fla. 4th DCA Sept. 16, 2009). Alex also successfully moved for attorney's fees under Fla. Stat. § 57.105 for the first time on appeal.

Alex Perez persuaded the Fourth District Court of Appeal to dismiss an appeal as frivolous, thereby saving the client the cost of defending a full-blown appeal.

Alex Perez obtained a dismissal of an appeal before the Fourth District of Appeal due to the Appellant's failure to observe appellate briefing deadlines.

Gene Kissane obtained a complete defense verdict after a three day trial in Key West involving a plaintiff who suffered an orif to her ankle after slipping on our client's steps.

Scott Bassman and Jennifer Viciedo obtained summary judgment on behalf of a criminal defense attorney in Miami in a

professional negligence action arising out of our client's involvement in the return of seized funds that were administratively forfeited by the U.S. Customs office.

Jonathan Vine and Nicole Panitz successfully obtained final summary judgment in a legal malpractice case in Palm Beach County, in which the Plaintiff alleged that our clients breached their fiduciary duty to her by simultaneously representing both her and her husband in connection with the preparation of their Living Trust Agreement. Plaintiff claimed over $200,000.00 in damages. We argued that no conflict of interests existed in their simultaneous representation of Plaintiff and her husband relative to the creation of the Trust, and that as a result, the disclosure and consent directives provided by the Rules Regulating the Florida Bar, were not triggered. Prior to obtaining summary judgment on Plaintiff's count for breach of fiduciary duty, Mr. Vine and Ms. Panitz received a dismissal with prejudice of Plaintiff's cause of action for breach of duty of loyalty. The defense was successful in demonstrating that Plaintiff waived the attorney-client privilege and authorized our client to appear for the deposition in the underlying case. The Court also granted CSK attorneys' Motion for Entitlement to Fees and Costs Pursuant to Florida Statute § 57.105.

Barry Postman, Jana Leichter and Joshua Goldstein successfully obtained summary judgment in a case involving the interpretation of a homeowners association's documents. The Association sought to build a storage facility to store the equipment used to maintain the Association's common areas. The Plaintiffs claimed that the association failed to comply with its governing documents prior to submitting the plans to construct the facility as the documents were silent as to the association's authority and thus the association needed to either pass an amendment or obtain the approval of all homeowners. Plaintiffs also claimed that constructing a new building was not maintenance. The central arguments raised on behalf of our client was that the association acted within the authority provided to it in the governing documents and there was no requirement for the association to obtain unanimous consent.

Jonathan Vine, Rachel Beige and Joshua Goldstein successfully obtained an order granting dismissal of a legal malpractice matter arising out of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff claimed that a letter offering to settle her debt was an improper communication because it gave Plaintiff less than 30 days to dispute her debt. The Court found that nothing in the letter would mislead the least sophisticated consumer into believing that she had less than thirty days to dispute the debt, and dismissed the matter with prejudice.

Jonathan Vine and Joshua Goldstein successfully obtained an order granting dismissal in a case involving amendments to a homeowners associations documents. The association had amended its documents to require all new homeowners who purchased homes in the community to become members of the community's country club, however, all current homeowners were provided an exemption. Plaintiff filed a class action complaint on behalf of all homeowners who purchased homes prior to the passage of the amendment requesting declaratory judgment that the amendment was void, Plaintiff additionally requested restitution for all monies paid to the country club as a result of this amendment. The court found that the applicable statute of limitations barred the Plaintiff's claim and dismissed the complaint against our client, the homeowners association.

Daniel Klein and Anthony Yanez recently obtained a dismissal with prejudice on behalf of the owner and operator of an apartment complex. The plaintiff filed a personal injury suit against our client after she sustained a severe dog bite from a K-9 unit responding to a complaint on our client's premises. After the plaintiff's deposition, Messrs. Klein and Yanez filed a Section 57.105 Motion that resulted in the dismissal of the Plaintiff's claim.

Daniel Klein and Anthony Yanez recently obtained a complete dismissal for a regional shopping mall in a premises liability case. Specifically, the Plaintiff slipped and fell on non-slip resistant yellow paint after exiting a Sears Roebuck store, and fractured her left femur and left wrist. There was testimony from liability experts and lay witnesses reflecting that the paint had violated numerous industry standards. As a result of the accident, the Plaintiff underwent nine (9) surgeries and developed reflex sympathetic dystrophy (RSD) to her left wrist, among other neurological complications. Having incurred $268,000.00 in medical liens for treatment for her alleged injuries, the Plaintiff had demanded $4 million, but Messrs. Klein and Yanez persuaded Plaintiff to withdraw their claims against our client, who did not own or maintain the area in question.

Daniel Kissane and George Saoud recently obtained summary judgment for Accident Insurance Company and Appalachian Underwriters, Inc. in the United States District Court for the Northern District of Florida (Tallahassee). The case arose out of a hotel construction project and involved claims of defective construction, water intrusion damage as a result of abandonment and poor workmanship, and breach of payment and performance bonds. A slight portion of the damages were covered under the CGL policy issued to the insured (the General Contractor). As a creative means of terminating the defense obligation and ending this litigation sooner, rather than later, CSK had the carrier pay a small amount to the surety to settle the covered damages claim and obtain a release for this portion of the claim. The carrier then filed a motion for final summary judgment on its declaratory judgment action and obtained a ruling that there was no insurance coverage for the balance of the claims in the case, including crossclaims and third-party complaints, and that the carrier was entitled to discontinue its defense of the insured. By utilizing the creative approach of entering into an early settlement for the small portion of the damages that were arguably covered, this permitted the carrier to file a strong motion for final summary judgment on the remaining claims and to conclude this litigation prior to the expense of a lengthy construction defect trial involving more than 25 parties.

Sanjo Shatley has recently obtained a complete defense award from an Arbitral Panel of the American Arbitration Association in a matter in which Cole, Scott & Kissane represented the interests of a subcontractor seeking to recover unpaid contractual amounts due from its general contractor for work performed. The arbitral panel unanimously awarded our client the unpaid contract amount, as well as amounts for additional approved work performed, for a net award amount of $599,442.32, and also determined, that the general contractor was not entitled to recover any amount for its counterclaim.

Jim Sparkman obtained an interesting defense verdict in Lee county. In this auto negligence case, the plaintiff contended that

the insured ran a stop sign in a residential area resulting in a herniated disc in the neck. The insured contended that she did stop at the sign, but had to inch forward to see around a landowner's bush. the insured also testified that the plaintiff was driving on the opposite side of the road at a high speed. The insured stated that she and her mother (vehicle owner) went back to the scene a couple of days later to take a picture of the bush, but that the same had been trimmed. The plaintiff called an eyewitness who was behind the insured and observed the insured run the stop sign, and the landowner who stated that he had never trimmed the palm since he planted it. The jury found the plaintiff to be 95% at fault, and the insured to be only 5% at fault. The jury reduced the medical bills and wage loss and found no permanent injury. The net verdict was reduced to $92.12.

Barry Postman and Lee Cohen obtained a complete defense verdict in a medical malpractice case in Palm Beach County, Florida. The Plaintiff, a 17 year old boy, alleged that his neurologist failed to timely diagnose cancer resulting in significant permanent neurologic damage, extensive medical bills in the past and in the future and the loss of the capacity to earn income in the future. On behalf of the neurologist, it was asserted that the care and treatment was appropriate and within the standard of care. It was further asserted that any permanent neurologic damage occurred as a result of the cancer and resulting treatment as opposed to a delay in diagnosis, if any. The Plaintiff asked the jury to return a verdict of $5,900,000.

Lee Cohen obtained a complete defense verdict in a slip and fall jury trial in Palm Beach County, Florida. The Plaintiff alleged that he slipped and fell in diesel fuel injuring his back, neck and knee due to the failure of a gas station to adequately maintain the premises in a reasonably safe condition. The Plaintiff further claimed that he lost wages and was required to undergo two surgical procedures for his injuries. At trial, the Plaintiff sought $150,000.

Aram Megerian obtained a defense verdict for Tampa General Hospital in a major med mal case with potential damages into the eight figures. Plaintiff was a 39-year-old successful plaintiff's attorney who suffered a stroke while bicycling less than a mile away from the TGH ER. There were multiple issues regarding the nature and extent of the guy's injuries and appropriate diagnostic and treatment procedures that should/should not have been done, and the hospital had some serious questions to answer about their response and subsequent care/treatment. Nevertheless the jury returned a complete defense verdict.

Jeff Alexander, with legal research assistance from Josh Frachtman, obtained a Directed Verdict against the Plaintiff in a property damage case tried in the Palm Beach County. Plaintiff alleged over $150,000 in damage to personal property after a water heater ruptured in a house she was renting from Defendant. At the conclusion of the Plaintiff's case, Mr. Alexander moved for a Directed Verdict. Judge David French ruled that Plaintiff failed to present competent evidence that the Defendant had any notice of any defect with the water heater. Furthermore, that Plaintiff did not provide competent evidence that the water heater was in fact in violation of any applicable code.

John Penton recently won an appeal of entry of final judgment in favor of a realtor client in a real estate malpractice case. Our client had been sued for alleged misrepresentations that were made concerning the closing terms and conditions of a commercial real estate transaction. At the trial level, the Court entered summary judgment in favor of our client on the basis that the alleged misrepresentations, even if made, were disclosed in a subsequent written contract and therefore non-actionable. Prior to entry of Final Summary Judgment, the Court also denied the Plaintiff's Motion for leave to amend to plead a Fifth Amended Complaint. On appeal, the Plaintiff argued that he should have been permitted leave to amend prior to entry of final summary judgment, and that the subject misrepresentations were actionable. The Third District Court of Appeal affirmed.

Craig Novick of CSK's Orlando office obtained a Final Summary Judgment in a race/national origin discrimination case in the Middle District of Florida.

Howard Scholl and Dan Shapiro obtained a very favorable result in an admitted liability case involving an at-fault auto accident. Defendant's sole affirmative defense was a failure to mitigate damages. Defendant only had a $10,000 policy and the plaintiff received $300,000 from UM carrier. The jury returned a verdict for $500,000 with 75% comparative against the plaintiff, resulting in a total judgment for Plaintiff of $125,000. However, because the judgment did not exceed the amount paid by the UM carrier, Plaintiff recovered nothing from our client.

Andrea Chirls obtained final summary judgment on a case featured in this edition of the litigation quarterly. The plaintiff claimed that they were entitled to $80,000 to replace the tile throughout the home because of a crack or chip in one of the tiles. Andrea convinced Judge Friedman in Miami that the policy excluded coverage for this type of event under the normal wear and tear exclusion.

Dan Shapiro and Bryan Rotella obtained a dismissal in a personal injury matter, where an off-duty police officer alleged that a cannon prop that had been placed on a float in a local parade was sounded negligently and caused significant damage to his hearing. Dan and Bryan represented the company hired to obtain sponsorships and coordinate a children's area for the parade. Dan and Bryan aggressively sought the dismissal of their client from the inception of the litigation based on the lack of any evidence that they were in anyway involved with the float and cannon prop. When the plaintiff refused initial informal requests for dismissal, Dan and Bryan applied additional pressure via the filing of a Motion for Summary Judgment, including the signed affidavit of the company's representative attesting to their lack of involvement with the floats in the parade. The corporate representative's deposition was taken shortly before the hearing was scheduled on the Motion for Summary Judgment. Dan and Bryan ensured she was thoroughly prepared to testify and shortly after her deposition the plaintiff's attorney agreed to a complete dismissal.

Giselle Mammana successfully obtained a final summary judgment on the wrongful death/negligence action against our client, who was the landowner where the Decedent was working as a construction surveyor. Decedent fell from his ladder and died. The Decedent's children were the only eye witnesses to the fatal accident. At the deposition of the Decedent's children, Giselle obtained testimony that there was no construction debris or materials within eyesight from where the Decedent situated his ladder, even though there indeed was broken concrete and uneven surfaces at another location on the premise. Due to the testimony that Giselle derived from the depositions, Plaintiff could not oppose our client's motion for summary judgment at the hearing.

MEET ONE OF OUR LAWYERS

Valerie Jackson

Valerie Jackson is an attorney in our Miami office who performs work throughout the state. Ms. Jackson is licensed in New York State and Florida. She earned her Bachelors of Art (cum laude) from Long Island University where she studied political science. She earned her Juris Doctorate (cum laude) from the University of Miami and an LLM in International Law from the University of Miami as well. Ms. Jackson is licensed in all federal and appellate courts in Florida.

Ms. Jackson has a very broad practice which ranges from insurance coverage and bad faith litigation to personal injury to commercial litigation and even appellate practice. Ms. Jackson currently heads up the Property Insurance Group in Miami which consists of six lawyers. Although she practices in various areas of law, Ms. Jackson specializes in complex insurance coverage matters in both the first and third party contexts. For the past ten years, Ms. Jackson has provided opinion representation for insurance companies in the areas of commercial general liability, errors and omissions (claims made and occurrence based policies), directors and officers, automobile claims (including uninsured and underinsured motorist coverage), home owner's polices (liability and first party property coverage), and surplus lines policies.

Ms. Jackson co-authored an article entitled, "Is it Bad Faith to Settle on Behalf of One, But Not All of Your Insureds," Coverage, Volume 12, Number 1, January/February 2002 which was published in Coverage magazine has been cited to authoritatively by the State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility.

In addition, Ms. Jackson has several published opinions on coverage related and non coverage related issues. These opinions include:

- *Clarendon America Ins. Co. v. Bayside Restaurant LLC,* 2006 WL449247 (M.D. Fla. 2006)
- *Key Custom Homes, Inc. v. Mid-Continent Cas. Co.,* 450 F.Supp.2d 1311 (M.D.Fla. 2006)
- *BMW of North America, LLC v. LaRotta*, 921 So.2d 702 (Fla. 4th DCA 2006)
- *Prieto v. Miami-Dade County,* 803 So.2d 780 (Fla. 3d DCA 2001)

<u>Retraction</u>: The article titled "Using the PIP Fee Schedule to Properly Evaluate Bodily Injury Claims," contained in the June 2009 edition of the Litigation Quarterly erroneously listed Yvonne Pandolfo as the author instead of Michelle Davis.

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