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LEGAL UPDATE

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Liability

A Party has Died - What Now? By Dorsey Miller, Junior Partner.


Dorsey Miller

I recently encountered a rare, but not completely unheard of situation in one of our personal injury matters, the death of a party. The plaintiff was in his late 70's and suffered from a number of ailments. His death presented us with an intriguing question – what happens to the claim when a litigant dies? Rule 1.260(a)(1) of the Florida Rules of Civil procedure generally sets forth the procedure to follow when a party dies during the course of litigation. The rule provides that upon the death of one of the litigants, a suggestion of death should be filed with the court. The rule does not, however, specify who should file the suggestion of death when the decedent is the Plaintiff, which has generally been interpreted to mean that any party may file it. Once the suggestion of death is filed, a motion for substitution of the proper party may be made by any party or by the successors or representatives of the deceased party. Together with the notice of hearing, it is to be served on all parties and upon persons not parties in the manner provided for the service of a summons. Rule 1.260(a)(1) further provides that the motion for substitution must be made within 90 days after the death is suggested upon the record. Florida courts have held that the 90-day time period is triggered by the recording or filing of the suggestion of death, rather than by the service. The failure to file the motion for substitution within the

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Verdicts and Summary Judgments
Trip and Fall — Final Summary Judgment

Boca Raton Junior Partner Marc Greenberg obtained a Final Summary Judgment in a Trip and Fall matter styled The Estate of Frank Romeo, Sr. v. Sebastian Lakes Master Association, Inc. before the Honorable Cynthia Cox on October 7, 2013. The case arose out of a trip and fall incident that occurred within the common elements of the Defendant's premise in 2009. The Estate claimed that the Decedent sustained a subdural hematoma, and died one year later as a result of the fall. The medical bills exceeded $100,000. The Defendant maintained that no defect existed in the common elements and that no one ever complained about any defects to the parking lot before the date of incident. Several depositions were taken which conclusively established that the Defendant had no actual or constructive knowledge of any alleged defect and summary judgment was granted on this basis. The Defendant's Motion for Entitlement to Attorney Fees and Costs was granted on November 7, 2013. Plaintiff has filed a notice of appeal.

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A Party has Died - What Now?

90-day time period may result in the action being dismissed as to the deceased party. This means that even if the deadline has past, the ultimate decision of whether to dismiss the claim or not is left to the judge's discretion.

Moreover, if a party is unable to procure substitution of the parties within the 90 days, that party may move for an enlargement of time pursuant to Rule 1.090(b), or may seek relief based upon a showing of excusable neglect pursuant to Rule 1.540(b).

As for the claim itself, Florida has long since abandoned the common law rule which held that the claim dies with the decedent. Instead, if the wrongdoer caused the death, any personal injury action abates and the personal representative may commence a wrongful death action and is entitled to the damages set forth in the wrongful death statute (i.e., the survivor's pain and suffering, loss of income and services, medical expenses, funeral costs, and the decedent's pain and suffering). If the wrongdoer did not cause the death, the personal injury action for losses to the decedent while alive may proceed. The decedent's estate is then entitled to recover for medical expenses, lost wages, and the decedent's pain and suffering from the date of incident to the date of death.

Death of a Defendant

Rule 1.260(a)(1) is silent as to who should file the suggestion of death when a defendant dies. However, courts have held that where the legal representative of the decedent's estate has knowledge of the pendency of a suit against the deceased, it has the duty to inform the attorneys of record of the decedent's death.

Defense counsel also has an obligation to disclose promptly the status of the estate, the identity of the personal representative, or, where appropriate, the identity of the next of kin or successors in interest. The failure to file a suggestion of death may estop the decedent's estate from raising certain defenses, such as asserting that the plaintiff's claim against the estate is untimely. All damages that would have been recoverable against the decedent had he or she lived are recoverable against the estate except for punitive damages.

Conclusion

Ultimately, the most important thing to remember when litigating a claim in which an opposing party has died is that time is of the essence. Filing a suggestion of death quickly will avoid the loss of any defenses when the decedent is the defendant, and will trigger the 90-day time period within which plaintiff's counsel must file a motion for substitution in the event of the plaintiff's death. Failure to act quickly may carry dire consequences in either circumstance.

For questions about this article or assistance with your matters, please contact Dorsey Miller at 954.847.2944 or e-mail DMiller@LS-Law.com.

About Dorsey Miller

Dorsey Miller, Junior Partner is a member of the firm's BI Division and works out of the Fort Lauderdale office. He has over a decade of experience in trial and appellate matters. He concentrates his practice in automobile liability, wrongful death, premises claims and construction litigation. Dorsey also handles commercial litigation and employment claims. In 2010, he was the recipient of the JM Lexus African American Achievers Distinguished Nomination. In 2009, he received the ICABA's Most Accomplished Blacks Nomination. He serves his community as a Board Member for the Boys and Girls Club of America (Nan Knox Unit) and the Florida HS Athletic Association, Section IV Appeals Committee, as Chairman. Dorsey earned both his Juris Doctorate and Bachelor of Arts degree from the University of Florida. He is admitted in Florida (2002) and to the United States District Court, for the Southern, Middle and Northern Districts of Florida; and the United States Court of Appeals, Eleventh Circuit.

Avoiding An Inconsistent Verdict Once Liability Has Been Admitted by Marlo Bodach, Esq. and Anthony Petrillo, Tampa Partner.

Marlo Bodach

Sometimes even though we, as defense attorneys, want to fight every aspect of the plaintiff's case, it may be in our client's best interest to admit liability for the incident. It is a trial strategy that is oftentimes utilized for many reasons, such as in the case of a rear-end collision where it may be impossible to overcome the presumption of negligence. Therefore, it is best to admit liability but dispute the other facets of the claim, causation of the alleged injury, and the actual damages as a result.

By the time a personal injury case goes to trial, both sides will have retained experts who obviously have differing opinions as to either the causation of the injury, or the treatment needed as a result. Going into trial, we only want to walk out having obtained a defense verdict. However, what happens if the defendant already admitted liability? For example, in a rear end collision in which the defendant already admitted they are at fault for the subject accident. Can a jury award zero damages and it still not be considered an inconsistent verdict?

A verdict is inconsistent when two findings of fact are mutually exclusive, such as when a jury finds the defendant is liable, but does not award any damages. Smith v. Florida Healthy Kids Corp., 27 So. 2d 692, 695 (Fla. 4th DCA 2010). That being said, if this is the scenario one finds themselves in at the end of trial, unless opposing counsel raises the issue and specifically request the issue be resubmitted to the jury before they are discharged, it is waived for purposes of appeal. If opposing counsel does raise such an issue, the judge can instruct the jury to continue to deliberate, which will allow the jury to possibly correct the inconsistent verdict. However, counsel does not have to raise the issue of an excessive or inadequate verdict before the jury is discharged to preserve the issue for appeal. Counsel can raise the latter issues for the first time in a post trial motion, such as a motion for new trial, or a motion for additur/remittitur.

The Court in Pack v. GEICO, 119 So. 3d 1284 (Fla. 4th DCA 2013), recently encountered such a potential issue. Pack was involved in a motor vehicle accident with an uninsured or underinsured motorist, and filed suit against her insurance carrier, GEICO, under her underinsured/uninsured motorist policy. At trial, GEICO admitted the negligence of the driver; therefore, the only issues for the jury to decide was whether that negligence was the legal cause of loss, injury, or damage allegedly sustained by Pack.

As is the case with most personal injury trials, Pack had treated with a physician who opined her injuries were as a result of the subject motor vehicle accident. In fact, Pack's expert physician opined she suffered a neck sprain, a fracture, and a herniation as a result of the accident with the uninsured/ underinsured tortfeasor. GEICO retained another physician to examine Pack, and rendered an opinion as to her injuries and specifically the cause of such. GEICO's medical expert ultimately opined Pack only suffered a neck sprain as a result of the subject accident.

The jury returned a verdict in favor of GEICO, and found that although the underinsured/uninsured tortfeasor was the legal cause of damage to Pack, they did not award her any damages. Pack moved post trial, for a new trial and alleged the verdict was both inadequate and against the manifest weight of the evidence. After the trial court denied Pack's motion for new trial, the Fourth District Court of Appeal addressed the issue.

The Court of Appeal noted that generally a plaintiff may recover the medical expenses incurred for needed diagnostic testing to determine if there is actually an injury as a result of the accident. *Id* at 1286, citing Sparks-Book v. Sports Authority, Inc., 669 So.2d 767, 768 (Fla. 3rd DCA 1997), irrespective of if the jury finds that accident was the legal cause of the injury. However, as always, there are exceptions to the general rule if certain factors are met. The factors include pre-existing injuries with extensive treatments, lack of candor with the treating physicians, videotapes that show actual physical

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Anthony Petrillo

capabilities, and expert medical opinions which conflict as to causation. *Pack* at 1268, citing Department of Transportation v. Rosario, 782 So. 2d 927, 928 (Fla. 2nd DCA 2001). The Court of Appeal found that Pack did not meet any of the exceptions, and also noted that both Pack's and GEICO's medical experts opined she sustained at least a neck strain. Thus, the Court of Appeal held the jury had no reasonable basis to conclude Pack did not suffer an injury as a result of the subject accident. As a result, the verdict was against the manifest weight of the evidence, and an "award" of zero was inadequate. (The test to be applied in determining the adequacy of a verdict is whether a jury of reasonable persons could have returned that verdict. Griffins v. Hill, 230 So. 2d 143, 145 (Fla. 1969).) As none of the noted exceptions applied, the Court of Appeal held Pack should have been awarded the costs of the diagnostic testing to determine if she had sustained an injury. (*Pack* also addresses other issues, which were not explored for purposes of this article.)

Thus, based on the exceptions noted in the above referenced cases, if a jury returns a zero verdict after liability was admitted, and opposing counsel argues it is an inconsistent verdict, defense counsel should argue any extensive pre-accident treatments for the same injury, surveillance of the plaintiff, omissions or other false information given to his/her doctors and any conflicting medical causation opinions. With regard to the diagnostic costs, usually there will be a PIP setoff, so counsel can concede that although the accident caused no injuries, it was not unreasonable to want to get examined in an abundance of caution. Therefore, if the jury awards the cost for diagnostic testing and there is a PIP setoff, the end result will still be an award of zero damages payable to the plaintiff after the trial.

For questions about this article or assistance with your matters, please contact Marlo Bodach, Esq. or Anthony Petrillo, Partner in the Tampa office at 813.226.0081 or e-mail MBodach@LS-Law.com or AJP@LS-Law.com.

About Marlo Bodach

Marlo Bodach, Esq. is a member of the firm's BI Division and works out of the Tampa office. She has dedicated her practice to handling first and third party automobile litigation, premises liability, construction defect, wrongful death matters and professional errors and omissions. Her practice also includes matters involving property damage claims and sinkhole litigation. Marlo received a Bachelor of Arts degree from The Ohio State University and earned her Juris Doctorate from Thomas M. Cooley School of Law. She is admitted to in Florida (2006) and to the United States District Court, Middle District of Florida (2008).

About Anthony Petrillo

Anthony J. Petrillo is the Managing Partner of the firm's Tampa office. He is an expert in Civil Trial and Board Certified by The Florida Bar. He has 22 years of trial litigation experience in Florida State and Federal courts. Martindale-Hubbell and his peers have rated him AV® Preeminent™. Anthony has extensive experience in the defense of large exposure, Wrongful Death claims. He practices in the areas of Auto and Trucking Liability, Premises Liability, Product Liability, Construction Litigation, General Liability, Professional Liability, Employment Practices Liability and Commercial Litigation. He received his Bachelor of Science degree from the University of Florida and obtained his Juris Doctorate from Nova Southeastern University. He is admitted in Florida (1991), and to the United States District Court, Middle and Southern Districts of Florida and the United States Court of Appeals, Eleventh Circuit.

Conditional Payments: When Can CMS Demand Payment? By Rey Alvarez, WC Managing Attorney

Rey Alvarez

I was recently asked a relatively simple question, "when are conditional payments due?" The quick answer was after a case settles. However, as with anything Medicare-related, there is no sure, complete answer to a question. CMS can issue a final demand letter in instances other than a settlement.

A final demand letter is issued whenever there is a Total Payment Obligation to the Claimant (**TPOC**). TPOC is the resolution of a claim by settlement, judgment, award or other payment. Whenever one of these events occurs in a case, the RRE is required to submit certain information to Medicare regarding the injured party's medical condition. This is the primary reporting trigger for liability cases, workers' compensation and no-fault cases. The TPOC date is important because it prompts Medicare to issue a final demand letter for conditional payments.

So, conditional payments are due after a case settles? Right and Wrong. Other circumstances will also bring about a final demand letter, namely "a judgment, award or other payment". Medicare is not going to simply write off conditional payments if a case does not settle. When a case does not settle, Medicare has built in some checks and balances.

In a Workers' Compensation or a Liability case,, treatment can go on for years, and cases may never settle. Let's assume that a case is denied for a while and the injured party incurs several thousand dollars in conditional payments. The case never settles, or the claimant dies from other causes unrelated to the accident. Or perhaps the claimant simply gives up on his case, and there remains thousands of dollars outstanding in conditional payments. In all of these scenarios, there will never be a settlement.

Is it possible that Medicare will never issue a final demand letter? Yes, it is conceivable. The mandatory reporting requirements, if followed correctly, should not allow that to happen. However, if it is not reported, then Medicare may never find out about the settlement, judgment, award or other payment.

Even if the case is not reported as required, CMS will still have ways to determine conditional payments. Under CFR 41 1 .21 a conditional payment is defined as a "Medicare payment for services which another payer is responsible", made either on the bases set forth in subparts C through H of this part or because the intermediary or carrier did not know that the other carrier existed.

Subpart C through H referenced here indicate that if it is determined that a primary payer will not make a payment promptly, Medicare will make a conditional payment. Any conditional payment made by Medicare is conditioned on reimbursement by the primary payer.

Under CFR 411.22 the reimbursement obligations are outlined. A primary payer's responsibility for payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release of payment for items or services included in a claim against the primary payer payer's insured or by any other means. Any other means includes but is not limited to a settlement, award, or contractual obligation. CFR 411.24(b) indicates that CMS may initiate recovery as soon as it learns that payment has been made or could have been made by a primary payer. Nonetheless, this does not appear to be the path that CMS is currently following. CMS is waiting for a case to settle before it issues a final demand letter.

The next step was to review the MRSPC website. The website HTTP://WWW.MSPRC.INFO was created to assist individuals with the maze that Medicare has created. It has a flow chart that shows the recovery steps. The flow chart indicates that once a case is identified, CMS will issue a Rights and Responsibility letter. Shortly thereafter, CMS will issue a Conditional Payment letter that contains the conditional payments that Medicare has identified thus far. This letter is not a final Demand letter.

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Conditional Payments: When Can CMS Demand Payment? by Rey Alvaez, WC Managing Attorney.

This is the step in which the parties can determine if the conditional payments are accurate. This is the step in which they can challenge some of the payments listed. The flow chart goes on to indicate that CMS will issue the final Demand letter once there is a settlement, judgment, award, or other payment is reached.

Again, when are conditional payments due? The answer is whenever there is a reimbursement obligation to CMS, which is anytime a primary payer has a responsibility for payment that can be demonstrated by, a settlement, award, or contractual obligation or other payment. Obviously, that raises some concerns that need to be addressed proactively.

For any case that has a Medicare beneficiary, conditional payments need to be proactively addressed. So that when it comes down to a settlement, judgment, award or other payment, the parties are ready to address the situation. It may be beneficial to contact CMS to open up a claim before the TPOC event occurs so that conditional payment information can be obtained before the TPOC event. That way, all parties can be prepared to better handle conditional payments.

For assistance with future medical cost projections, evaluation and reduction of conditional payments or settlement value and exposure and non-covered allocations (non-Medicare covered medical services and treatments), please contact Rey Alvarez at T: 305.377.9900 or e-mail RAlvarez@LS-Law.com.

About Rey Alvarez, Esq.

Rey is the Managing Attorney for the Workers' Compensation and Medicare Compliance Division of Luks and Santaniello. He works out of the Miami office on 150 West Flagler Street. He has substantial Workers' Compensation defense experience. Rey has more than a decade of experience in preparing Medical Cost Projections, Medicare Set-Asides and Conditional Payment Lien negotiations with CMS. Rey co-authored a White Paper on Medicare Reporting that was published in the Trial Advocate Quarterly (i.e., Volume 30, Number 4, Fall 2011). Rey also authored an article on "Reducing the Cost of Funding a Medicare Set-Aside" that was published in the Florida Bar Workers' Compensation Section 'News & 440 Report' (Summer 2011).

He is a panel speaker at a Medicare Lien boot camp sponsored by the National Business Institute on November 22, 2013. He is also a featured speaker at the National Alliance of Medicare Set-Aside Professionals' (NAMSAP) Regional Conference on January 10, 2014. In 2012, Rey spoke at the American Academy of Disability Evaluating Physicians Conference.

Rey is a member of the Florida Defense Lawyer's Association (FDLA) and Claims & Litigation Management Alliance (CLM). He has a Bachelor of Arts degree from Barry University and earned his Juris Doctorate from the University of Miami. He is admitted in Florida (2003).

Follow Rey Alvarez and his discussion of current Workers' Compensation case law and important decisions at his WC blog site. The blog site is: http://floridaworkerscomp.blogspot.com
Follow Rey for Workers' Compensation news on twitter @reyalvarez.

Certain Legal Issues Surrounding the Failure to Provide a Required Child Restraint System by Joseph Scarpa, Junior Partner

Joseph Scarpa

Many assume that a defense of failing to ensure a child Plaintiff was in a proper restraint system can be asserted as a standard defense, especially when the failure contributed and/or proximately caused the damages complained. However, the issue becomes convoluted when a child Plaintiff, through his/her parent(s), sues for injuries and you attempt to name the non-parental caretaker as a non-party (or Fabre) Defendant in an attempt to apportion fault, for failing to use a proper restraint system.

The main issue surrounding such a defense begins at Florida Statue 316.613, which states in pertinent part:

316.613 Child restraint requirements.—

(1)(a)Every operator of a motor vehicle as defined herein, while transporting a child in a motor vehicle operated on the roadways, streets, or highways of this state, shall, if the child is 5 years of age or younger, provide for protection of the child by properly using a crash-tested, federally approved child restraint device. For children aged through 3 years, such restraint device must be a separate carrier or a vehicle manufacturer's integrated child seat. For children aged 4 through 5 years, a separate carrier, an integrated child seat, or a seat belt may be used…

(3) The failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence. (emphasis added).

In Quarantello v. Leroy, 977 So.2d 648 (Fla. 5th DCA 2008), the appellate court was called upon to interpret 316.613(3) and determine whether it prohibits introduction of any evidence of failure to provide and use a child passenger restraint in a negligence action brought by an injured child against a caretaker. In Quarantello, the injured child, age 11 months, through his guardian, brought suit against his maternal grandmother for failing to use a proper child restraint system provided by the child's mother.

The Quarantello court deemed 316.613(3) not an example of good legislative draftsmanship, agreeing it was poorly worded and ambiguous, and concluded that "the latter phrase, 'evidence ... with regard to negligence,' gives effect and meaning to the former phrase, 'comparative negligence.'" Id. Thus, their interpretation of 316.613(3) indicated "that the Legislature intended to prohibit evidence of comparative negligence and evidence of negligence that may be similarly used to reduce an injured child's recovery." Id.

The Quarantello Court cited Parker v. Montgomery, 529 So.2d 1145 (Fla. 1st DCA 1988), a case wherein the Montgomery child was killed in an automobile accident and the Defendant asserted comparative negligence of the child's parents for failure to secure baby Montgomery in an appropriate child restraint in violation of 316.613. The trial court had previously entered an order striking that defense. In response, Defendant amended his Affirmative Defenses and asserted failure to mitigate damages and avoidable consequences, claiming the injuries to the child could have been mitigated or avoided if the parents had complied with 316.613. The Parker Court concluded that the defenses of avoidable consequences and mitigation of damages are prohibited under the 316.613. As a result, the Quarantello court believed "…the Legislature intended to prohibit defenses similar to those alleged in Parker when it included the second phrase of section 316.613(3)." 977 So.2d 648 (Fla. 5th DCA 2008).

The Quarantello court concluded "…section 316.613 (3) does not prevent introduction of evidence that Mrs. Leroy, the child's caretaker at the time of the accident, may have failed to use an appropriate child passenger restraint provided by the child's mother," as "…the jury, presented with all of the evidence, will have a better opportunity to find the truth regarding the cause of Alexander's injuries and make an informed decision whether he is due recompense

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Certain Legal Issues Surrounding the Failure to Provide a Required Child Restraint System cont.

from Mrs. Leroy." Id. The Quarantello and Parker decisions are important Florida cases that pertain to an attempted submittal of evidence that a child was unrestrained and/or improperly restrained in violation of Florida Statute 316.613. Who is suing will determine the admissibility of such evidence, as further explained herein.

In Quarantello, the lawsuit was brought by the injured child against the Defendant caregiver, who wanted evidence of improper restraint stricken per Florida Statute 316.613(3). The Quarantello court ruled such evidence could be used in the child's lawsuit against his caregiver because such evidence was not being used as comparative negligence, nor was it being used as evidence of negligence to reduce the injured child's recovery.

In Parker, the lawsuit was brought by the deceased child's parents. The Parker court, explicitly precluded the admission of evidence relating to the failure of a child to be placed in a child restraint device for comparative negligence purposes. The court precluded it as the concept of mitigation of damages was inseparable under the circumstances from the doctrine of comparative negligence, making the non-use of the child restraint similarly statutorily inadmissible when such non-use is attempted to be interjected as a defense.

The Quarantello and Parker cases, along with Florida's Comparative Fault Statute, provide some guidance as to whether a Defendant would be precluded from asserting the fact that a non-party/ Fabre Defendant failed to secure a child Plaintiff in a proper child restraint system, which caused and/or contributed to the injuries asserted by the child Plaintiff.

Florida Statute 768.81 (2010), Florida's "Comparative Fault" Statute, states in pertinent part, as follows:

(3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

(a) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.

(b) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

A non-party/Fabre defense falls under Florida's Comparative Fault Statute and will be found to be an assertion of comparative negligence. This is supported by the Florida Supreme Court's decision in Nash v. Wells Fargo, 678 So.2d 1262 (1996), citing W.R. Grace & Co. v. Dougherty, 636 So.2d 746, 748 (Fla. 2nd DCA 1994), that "the defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict…without evidence of the nonparty defendant's negligence, the named defendant has 'not satisfied the foundation necessary for a jury to receive jury instructions and a verdict form to decide the case pursuant to section 768.81, Florida Statutes, and Fabre'."

Applying the Court's reasoning in Quarantello and Parker to our non-party/Fabre scenario, a Judge will likely find the non-party/Fabre defense to be the same type of comparative negligence claim Florida's Legislature intended to prohibit under 316.613(3), and an attempt to interject evidence of negligence whose purpose is to reduce the child's recovery. However, if we change the legal scenario to one where the child's parents have also brought a loss of consortium claim, the argument would be that the caregiver's failure to properly restrain defense is being asserted

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Certain Legal Issues Surrounding the Failure to Provide a Required Child Restraint System cont.

to reduce the parents' (not the child's) recovery and, as such, should not be excluded. If that argument is accepted, the risk would be the Judge bifurcating (separate trials) the parents' loss of consortium claim from the child's bodily injury claim in order to ensure the jury appropriately applies the non-party/Fabre evidence of failure to use a proper restraint system.

The Parker and Quarantello cases were decided by Florida's appellate courts and The Florida Supreme Court has continually ruled that "…decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court …... [t]hus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts." Pardo v. State, 596 So.2d 665 (1992).

Our non-party/Fabre defense scenario in relation to the child restraint law would present a factual argument the appellate courts have not previously addressed and there is no guarantee the Florida Supreme Court would weigh-in, as in Quarantello they declined the opportunity to interpret Florida Statute 316.613(3).

For questions about this article or assistance with your matters, please contact Joseph Scarpa, Junior Partner in the Orlando office at 407.540.9170 or e-mail JScarpa@LS-Law.com.

About Joseph Scarpa

Joseph Scarpa, Junior Partner is a member of the firm's BI Division and works out of the Orlando office. With 13 years of Defense experience, Joseph handles catastrophic personal injury matters and concentrates his practice in wrongful death, general liability, premises, product liability and construction litigation. He also handles federal and employment claims. He earned his Bachelor of Science degree from Florida State University and his Juris Doctorate from Nova Southeastern University. He is admitted in Florida (2000) and to the United States District Court, for the Southern, Middle and Northern Districts of Florida.

Verdicts and Summary Judgments cont.

Fall from Ladder — Final Summary Judgment

Ft. Lauderdale Associate Steven Hemmert obtained a Final Summary Judgment in a case involving a fall from a ladder styled Jaime Zamorano v. Jose Lavergne and Milagro Lavergne, in the Eleventh Judicial Circuit (Miami-Dade County) before the Honorable Rosa Rodriguez. Plaintiff, a handy man hired to paint Defendants' house, alleged that the Defendants negligently maintained the yard area where the Plaintiff was working; provided Plaintiff with a ladder which Defendants knew or should have known was not reasonably safe and suitable for the use supplied under the conditions of use; and failed to give adequate warning regarding the dangers of use of the ladder under the conditions.

Plaintiff suffered a fractured femur requiring surgical implant of a metal plate and a two week hospitalization. The medical bills exceeded $110,000. The Motion for Summary Judgment successfully established that the soft ground existing in a planter bed on Defendants' property was an open and obvious condition, that there was no evidence that Defendants had any greater knowledge of the danger of setting up a ladder on soft ground than Plaintiff, and that there were no patent or latent defects in the ladder used by Plaintiff. Therefore, as a matter of law, Defendants could not have breached any duties owed to the Plaintiff.

Trip and Fall—Appellate Court Affirms Summary Judgment

James Waczewski, Tallahassee Partner and Joseph Kopacz, Tampa Associate, successfully handled the appeal, before the First District Court of Appeal, of a summary final judgment that Todd Springer, Jacksonville Partner, had obtained from the Trial Court in favor of our clients. The appeal is styled Ramsey (Plaintiffs/Appellants) v. Store and Newbern (Defendants/Appellees). The appellate court issued a nine-page unanimous opinion affirming the summary judgment on October 25, 2013. Appellant Mrs. Ramsey was a customer at Appellees' store and parked her car in one of the designated accessible parking spaces. On her return to the car, Appellant Ramsey tripped and fell over a concrete wheel stop that protruded a few inches from underneath her vehicle on the driver's side because she had parked in an angle.

Appellants alleged that although there was nothing defective with the wheel stop, it was nonetheless a dangerous and hazardous condition because it was located in a handicap parking space, and because it was redundant. Redundant as there was also a concrete bollard, which held the handicap pole/sign, and already prevented vehicles parking there from accessing the designated walkway to the store.

Plaintiffs had presented the affidavit of an expert who opined that the parking space was negligently designed, even though its design did not violate any building code, statute, or industry standard. Our firm argued, on behalf of Defendants/Appellees, that the wheel stop was open and obvious, that Defendants complied with their duty to maintain the premises in a reasonably safe condition, and that the Plaintiffs' expert's personal opinion did not create an issue of fact that would prevent the Court from deciding the case as a matter of law.

Defense expert Rowland Lamb, a professional engineer, had also opined that the accessible parking spaces met the requirements of the Americans with Disabilities Act, the Florida building Code, and the Escambia County Land Development code. The First District Court of Appeal agreed that the trial court properly granted summary judgment and noted that Plaintiff's expert's affidavit was conclusory and did not raise an issue of fact that precluded the entry of summary judgment.

MAGNA LEGAL SERVICES "CHOPPED" CONTEST TO BENEFIT THE CHILDREN'S HOSPITAL OF PHILADELPHIA (CHOP)

Dan Santaniello went head-to-head against three other litigators in mock trial in Atlantic City November 7.

Daniel Santaniello, Managing Partner at Luks, Santaniello, Petrillo & Jones is one of four trial attorneys from across the country who competed against each other in Magna Legal Services' version of the television show "**Chopped.**" The trial litigators battled each other in a mock trial setting and presented their best case to a panel of judges. After each phase of the trial, the judges voted to 'CHOP' one lawyer from the competition, leaving one ultimate champion at the end. The audience and a panel of judges made up of claims executives and in-house counsel provided real-time feedback on the effectiveness of the presentations via Magna's handheld audience response system. As part of the event, **$5,000** was donated to CHOP **(The Children's Hospital of Philadelphia)**. The attorneys competed for a portion of that amount to be donated in their respective law firm's name. The event was part of the Magna Legal Services Annual Conference that was held November 6-7, 2013 at Revel Hotel and Casino in Atlantic City, NJ.

TRUCKING INDUSTRY DEFENSE ASSOCIATION (TIDA) 21ST ANNUAL INDUSTRY SEMINAR

Dan Santaniello to speak at the TIDA Seminar on November 15 in Orlando, Florida.

Dan Santaniello, Managing Partner along with Charles Tetunic, Shareholder of Upchurch, Watson, White & Max will co-present a session at the TIDA Annual Industry Seminar on "What Mediators Really Think About You". Orlando Partner Paul Jones and Boca Raton Junior Partner Howard Holden will also attend the conference.

MEDICARE LIEN BOOT CAMP SPONSORED BY THE NATIONAL BUSINESS INSTITUTE

Rey Alvarez to speak at the Medicare Super Lien and Other Liens Simplified Seminar November 22.

Rey Alvarez, WC Managing Attorney will be a featured speaker at a Medicare Lien boot camp sponsored by the National Business Institute on November 22, 2013 in Dania, Florida. The conference, a full-day lien boot camp will provide attendees with sample forms, checklists, practice tips and information to help navigate CMS requirements. In addition to discussing reporting requirements, conditional payments and Medicare Set- Asides, Rey will provide an update on 2013 changes and will address innovative ways to settle a case.

CLM 2014 ANNUAL CONFERENCE BOCA RATON

Luks, Santaniello has been selected as a session presenter for the Claims and Litigation Management Alliance (CLM) 2014 Annual Conference.

Luks, Santaniello will co-moderate a panel discussion on the topic "Mediating High Severity Claims: Creative Approaches and Tactics for Successful Outcomes". Our panel co-moderators include four CLM Fellows who will consider various vehicular accident scenarios and will dissect effective and ineffective mediation tactics used in each situation. The conference will be held April 9 - 11, 2014 in Boca Raton, Florida.

OCTOBER WAS NATIONAL BREAST CANCER AWARENESS MONTH

Fort Lauderdale staff wore pink in support of breast cancer awareness.

In a show of workplace unity, our staff put away their work attire and sported pink to bring attention to the cause and show their support for breast cancer awareness.