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LEGAL UPDATE

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Liability

No Physical Injury Theories of Liability by Joseph Kopacz, Esq.



Joseph Kopacz

The law generally only allows plaintiff to file a lawsuit after sustaining a physical injury as a direct result of a negligent act of a defendant. The question is whether or not the law allows a plaintiff to recover from non-physical injuries (emotional distress and fear) when a plaintiff cannot show actual physical harm? Yes, there are several different circumstances where the law allows recovery for emotional or psychological injuries. Florida law has carved many exceptions to the impact rule to allow recovery for emotional damage when no physical injuries are present. Additionally, a trend has been to expand the emotional damages theory of liability to situations where plaintiffs fear they have been exposed to a dangerous chemical/substance and could later develop a disease. Plaintiffs have generally tried to recover medical expenses for medical monitoring without a physical injury present.

Florida's Impact Rule

In Florida, "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." R.J. v. Humana of Florida, Inc., 652 So.2d 360, 362 (Fla. 1995); see also Rowell v. Holt, 850 So.2d 474 (Fla. 2003). Otherwise known as the "Impact Rule," Florida courts have applied this rule "primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm." Rowell, 850 So.2d at 478.

Read More . . . P. 2

Verdicts and Summary Judgments

Slip and Fall — Final Summary Judgment

Fort Lauderdale Junior Partner David Lipkin obtained a final summary judgment in a slip and fall matter styled Leslie Ruiz v. Defendant Store before the Honorable John B. Bowman on January 8, 2014. Plaintiff slipped outside Defendant store while it was raining. Plaintiff contended the ground was slippery and Defendant Store failed to warn through cones or other signs. Defense was able to show there was no evidence of any defect to the area and Defendant Store therefore could not be responsible simply because the ground became wet when it rained. Plaintiff also had equal or superior knowledge of the condition as Defendant Store. Plaintiff alleged injury to her head, neck and back. Plaintiff also rejected a Proposal for Settlement, potentially exposing her to an attorneys fee sanction.

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No Physical Injury Theories of Liability cont.



Joseph Kopacz

Over the years, the Florida Supreme Court has carved out exceptions to the “impact rule.” Champion v. Gray, 478 So. 2d 17 (Fla. 1985). In Champion, the Supreme Court again revisited the often posed question about whether Florida should abrogate its impact rule. Champion involved a drunk driver who ran his car off the road and killed a young woman pedestrian. The young woman's mother heard the impact and immediately ran to the accident scene. In seeing her daughter's body, the mother overcome with shock and grief collapsed and died on the spot.

The Champion court noted that the impact doctrine gives practical recognition to the notion that there is some level of harm which each person has to absorb without recompense, as the price for living in an organized society. The court advised that there is a point at which the price of death or significant discernible physical injury caused by psychological trauma results in “too great a harm” to impose additional physical contact requirements as a prerequisite to recovery.” *Id.* at 21.

In 1995, the Florida Supreme Court again addressed the impact rule's viability. See Zell v. Meek, 665 So. 2d 1048 (Fla. 1995). In Zell, this case presented the Supreme Court with a scenario in which the physical injury did not result until almost nine months after the incident causing the emotional distress. There, a woman had witnessed her father's death at the hands of an anonymous bomber. Her father had picked up a small box left on the family's apartment doorstep, which led to a tremendous explosion that rocked the entire apartment, shattering windows, and blowing out smoke detectors and the thermostat from the wall.

Plaintiff eventually experienced a blockage in her esophagus, was unable to swallow, had difficulty in breathing, and had joint and hip pain all attributable to the psychological trauma suffered as a result of her father's death. Despite the fairly lengthy delay between the emotional trauma and the physical

manifestation of the injuries, the Supreme Court ruled that the impact rule did *not* bar the woman's claim. *Id.* at 1055.

Courts have recognized plaintiffs can recover from emotional damages in many circumstances when there has not been any physical harm further carving out exceptions to the impact rule. See e.g. Rowell, 850 So.2d at 474 (“impact rule” does not apply to preclude recovery for psychological injury from attorney's negligence); Tanner v. Hartog, 696 So.2d 705 (Fla. 1997)(“impact rule” does not apply for non-economic damages for the parents of a stillborn child); Kush v. Lloyd, 616 So.2d 415 (Fla. 1992) (“impact rule” does not apply to actions for wrongful birth); Eastern Airlines, Inc. v. King, 557 So.2d 574 (Fla. 1990)(“impact rule” does not apply to intentional infliction of emotional distress).

Emotional/Fear of Injuries

The plaintiff's bar recently got a very large class action reversed in which the lower court had found liability when individuals who believed they were exposed to MTBE (methyl tertiary-butyl ether) due to an underground leak of a gasoline at a storage station could recover for alleged emotional distress for fear of developing cancer. See Exxon Mobil Corp. v. Albright, No. 15, 2013 WL 673738 (Md. Feb. 26, 2013). Maryland's highest court reversed a \$1.5 billion verdict finding Plaintiffs could not show they were actually exposed to MTBE or an objective injury from the exposure.

Similarly, plaintiffs have attempted to recover monetary damages from perceived damage to their lungs after years of smoking without developing any smoke related illness, but a heightened risk to developing lung cancer. Donovan v. Phillip Morris USA, Inc., 914 N.E. 2d 891, 902 (Mass. 2009) (smokers who had objectively identifiable damage to lung tissue and increased risk of cancer could bring claims for future expenses of medical monitoring).

Read More . . . P. 3

No Physical Injury Theories of Liability cont.

Along the same lines, Courts across the country have allowed a plaintiff to recover when they have feared they have been exposed to the HIV virus. The courts generally find that if the defendant negligently subjected the plaintiff to a reasonable fear of exposure to AIDS, then recovery of emotional damages is warranted. See Faya v. Almaraz, 329 Md. 435, 620 A.2d 327 (1993)(doctor's invasive operations on women without informing patient that he was an HIV carrier, recovery for the window of anxiety period); South Cent. Reg'l Med. Ctr. v. Pickering, 749 So. 2d 95 (Miss. 1999) (unsafe disposal of instruments, rebuttable presumption in favor of the plaintiff); Madrid v. Lincoln County Med. Ctr., 923 P.2d 1134 (N.M. 1996) (blood containers leaked onto plaintiff's hand; plaintiff had paper cuts, but did not know whether blood was infected); Phillips v. Restaurant Mgmt. of Carolina, L.P., 552 S.E.2d 686 (N.C. Ct. App. 2001) (restaurant worker spit into customer's food, customer could claim emotional harm after he discovered the saliva in his nachos, jury question whether emotional harm was sufficiently severe).

Conclusion

No physical injury theories of liability are hard to defend against and hard to evaluate from a monetary damages standpoint. Like pain and suffering claims stemming from physical injuries, emotional claims are very subjective and hard to predict how a jury may award damages for a single traumatic event. As plaintiff's counsel continue to find different ways to recover emotional and psychological injuries, businesses and individuals need to be aware of risks associated with these ever increasing ways of recovery.

For further information about no physical injury theories of liability or assistance with your matters, contact Joseph Kopacz, Esq. in the Tampa office at 813.226.0081 or e-mail JKopacz@LS-Law.com

About Joseph Kopacz



Joseph Kopacz is an Associate in the Tampa office. Joseph concentrates his practice in the areas of general liability, automobile liability, premises liability, product liability, wrongful death, construction defects, complex insurance coverage disputes and appellate matters. He has an M.B.A. from the University of West Florida in addition to a Juris Doctorate from the University of Toledo. Prior to joining the firm, Joseph worked for various law practices in the area of Insurance Defense. He also worked for Jury Verdict Research where he evaluated and assessed cost drivers associated with personal injury matters, medical malpractice and employment discrimination cases. Joseph is admitted in Florida (2007) and to the United States District Court, Southern, Middle and Northern Districts of Florida.

- 1 MTBE is a chemical compound that is manufactured by the chemical reaction of methanol and isobutylene. MTBE is produced in very large quantities (over 200,000 barrels per day in the U.S. in 1999) and is almost exclusively used as a fuel additive in motor gasoline. It is one of a group of chemicals commonly known as "oxygenates" because they raise the oxygen content of gasoline. At room temperature, MTBE is a volatile and flammable liquid that dissolves rather easily in water.

H.B. 187: Will it Reduce Bad-Faith Lawsuits? By Kate Kmiec, Esq.



Kate Kmiec

On October 17, 2013, State Representative Kathleen C. Passimodo (R- Naples) filed proposed legislation which has the potential, if enacted, to reduce the number of third party bad-faith/failure to settle lawsuits against insurers in the State of Florida. House Bill 187 (H.B. 187) amends Florida Statute Section

624.155 (Civil Remedies against Insurers) to add a separate, specific written notice procedure for third party bad-faith/failure to settle claims, and gives insurers a safe harbor period to avoid such lawsuits.

If H.B. 187 is enacted, a party seeking to file either a statutory or common law third-party bad-faith/failure to settle lawsuit against an insurer must provide the insurer with written notice of loss as a condition precedent to filing a lawsuit. This written notice is separate and distinct from the civil remedy notice provisions currently in Section 624.155. If the insurer offers to pay either the policy limits or the amount the claimant is seeking, whichever is less within 45 days of receiving written notice of loss, the insurer extinguishes any potential third party bad-faith/failure to settle claim.

H.B. 187 states that if insurers offer to settle under these conditions, "then the insurer is not in violation of the duty to attempt in good faith to settle the claim and is not liable for bad-faith failure to settle under this section or the common law." If enacted, the provisions of H.B. 187 have the potential to reduce the number of bad-faith/failure to settle claims in the State of Florida, as insurers can take advantage of the safe harbor period to resolve claims.

While no legislative analysis of H.B. 187 has been published to date, its most significant impact will be on reducing the number of third-party bad-faith/failure to settle claims arising from automobile accidents where a claimant's damages clearly exceed the policy limits pre-suit.

As of this writing, H.B. 187 is in front of the Florida

House of Representatives Civil Justice Subcommittee for action in the upcoming regular legislative session, which begins on March 4, 2014. As this bill has the potential to reduce the number of third party bad-faith/failure to settle lawsuits against insurers in Florida, we strongly urge our clients to support this proposed legislation.

For further information on bad faith lawsuits or assistance with your matters, contact Kate Kmiec at 407.540.9170 or e-mail KKmiec@LS-Law.com. The full text of H.B. 187 is available at:

http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0187_.docx&DocumentType=Bill&BillNumber=0187&Session=2014

About Kate Kmiec

Katherine "Kate" Kmiec is an Associate in the Orlando Office and has been practicing law for over 12 years. She is a member of the PIP Team. Her practice areas also include labor and employment, professional liability, personal injury, products liability, premises liability, motor vehicle liability, motor carrier liability, homeowner and condominium owners' association and contract matters. Kate has represented major insurance carriers in uninsured/underinsured motorist claims, breach of contract actions and several area hotels in slip and fall actions, and numerous business and rental car companies in matters involving complex litigation and serious injury in both Federal and State Courts. Recently, Kate's practice has expanded to include civil rights actions brought under 42 U.S.C. 1983 in both employment and police misconduct matters as well as some limited appellate matters. Prior to joining Luks Santaniello, Kate served on active duty in the United States Navy's Judge Advocate General's Corps. Kate has a Bachelor of Arts degree from Goucher College, an MPA from Penn State. She obtained her Juris Doctorate from Tulane University. Kate is admitted in Florida (2001) and is a Qualified Judge Advocate, USN (2002).

5TH DCA Rules Medicaid Lien Formula Not Mandatory by Philip Partridge, Esq.



Philip Partridge

The parents of a minor Medicaid recipient who was injured in an auto accident petitioned for approval of a \$1,000,000 settlement in Marion County. The settlement allocated \$23,926.88 towards the recipient's medical expenses. The actual lien held by the Agency for Healthcare Administration ("AHCA") was \$232,928.87. The trial court awarded AHCA the full amount of its lien reasoning that the statutory provision in § 409.910(11)(f), Florida Statutes (2012) was *mandatory*. The statutory provision applicable at the time of this case stated that AHCA was entitled to half of a third party tort recovery, after attorney fees and costs, up to the amount of its lien.

The 5th DCA in Davis v. Roberts, 2013 WL 6687849 (Fla. 5th DCA 2013), reversed the trial court and held that the statutory formula under § 409.910(11)(f) was not mandatory and the parents were entitled to the opportunity to demonstrate that AHCA's lien exceeded the portion of the settlement allocated for medical expenses. At the trial court level, the parents argued that the actual value of this claim was \$10,000,000 and that the settlement amount was 10% of the true value and therefore the Medicaid lien should be allocated accordingly. While the trial court did not disagree with the evidence presented at a post-settlement hearing, it believed it was hamstrung by the mandatory language in the statute.

However, as the 5th points out in the Davis decision, there are a number of factors that allow a Medicaid recipient to seek a reduction at an evidentiary hearing. The problem with Florida's mandatory language in § 409.910 is that it was incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses. In other words, Florida's law was inconsistent with Federal law. Moreover, the 5th DCA relied upon two other Florida State appellate decisions that demonstrate that the pertinent statute is a default provision rather than a mandatory provision. See Smith v. Agency for Health Care

Admin., 24 So.3d 590 (Fla. 5th DCA 2009) and Roberts v. Albertson's Inc., 119 So.3d 457 (Fla. 4th DCA 2012)

One of the lessons to be learned from the Davis case is that even though there may be a State statutory provision that has mandatory language such as "shall" or "must", if it involves Federal law, it is important to look at Federal case law and Federal acts to ensure that the State law is consistent with any Federal mandates. Interestingly, the Florida Legislature has since amended § 409.910 to allow the Medicaid recipient an opportunity to challenge the amount of the lien in an administrative hearing. The recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses rather than the amount calculated by the agency to the formula in § 409.910 (11)(f). It also seems that it would be prudent for the parties settling a case to allocate specifically the amount of the medical expenses apportioned in the settlement as a prelude to this new administrative hearing procedure. For questions about Medicaid Liens or assistance with your matters, contact Philip Partridge, Esq. at 407.540.9170 or e-mail PPartridge@LS-Law.com.

About Philip Partridge

Philip Partridge is an Associate in the Orlando office and has been practicing law for 22 years. His practice is devoted to general liability, vehicular liability, personal injury, premises, first-party property, real property litigation, estate & trust disputes and appellate matters. Phil's practice also includes matters involving coverage, mediation and dispute resolution. Philip has served as claims litigation counsel for major insurance companies prior to joining the firm. He is a Florida Supreme Court Certified Circuit Court Mediator, a Florida Supreme Court Approved Arbitrator and Florida Supreme Court Certified Appellate Mediator. He is also a Certified Mediator for the United States District Court, Middle District of Florida. Philip earned his Juris Doctorate and undergraduate degrees from the University of Florida. He is admitted in Florida (1991), and to the United States District Court, Middle District of Florida (1991) and U.S. Court of Appeals, Eleventh Circuit (1991).

The Rise of the Qui Tam by Justin Schwerling, Esq.



Justin Schwerling

The False Claims Act (FCA), codified today as 31 U.S.C. §§ 3729-3733 was enacted in 1863. The FCA has had many ups and downs throughout its history since its enactment. 1943 congressional amendments all but eliminated the law by reducing the relator's (the individual who brings the suit) share and not allowing suits when the government had knowledge of the abuse. Not surprisingly, fraud against the government increased.

Amendments in 1986 and 2009 brought back the strength of qui tam. The amendments raised the relator's share (between 15 – 30% of the recovered damages), allowed for the recovery of treble damages, reduced the proof of fraud, and granted whistleblower protection. Additionally, the Fraud Enforcement and Recovery Act of 2009 permitted penalties and fees for the relator's attorneys. The changes (especially the 2009 amendment) brought with them a flood of new litigation. Where qui tam filings averaged no more than 400 filings a year for the previous two decades, 2012 brought about almost 650 actions. That same year, the Department of Justice collected \$5 billion in settlements and judgments.

While the FCA continues to be used to reign in government contractors it has spread to other areas such as insider trading, Ponzi schemes, and most significantly, for the recovery of Medicaid and Medicare fraud. In 2008 alone, \$1.3 billion was recovered from both qui tam and cases brought by the United States. The area of health-related cases is vast and can include any number of areas. For example, qui tam suits could be brought for a medical provider upcoding services or billing for duplicate services (i.e. billing both chiropractic manipulation and massage for one 15 minute session). While whistle blower actions have exploded since the 2009 amendment, it is about to get even worse.

The Patient Protection and Affordable Care Act of 2010 (ACA) will allow for easier access to relators by allowing whistleblowers to bring suit when they have

knowledge that is "independent of and materially adds to the publically disclosed allegations" as opposed to "direct and independent knowledge." Moreover, the federal funds used in the new healthcare exchanges are now subject to FCA accountability.

While some may feel that the plaintiffs and attorneys that are filing many of the qui tam suits are mere modern day bounty hunters exploiting weaknesses in the system, one thing is for sure, with the 1986 and 2009 amendments, as well as the enactment of the ACA (and recently opened insurance exchanges), we are about to see a rise in qui tam suits that will likely overshadow significantly any previous years.

For further information on the False Claims Act, contact Justin Schwerling, Esq. at 954.847.2957 or e-mail JSchwerling@LS-Law.com

About Justin Schwerling

Justin Schwerling is a PIP Attorney in the Fort Lauderdale office. He covers matters in Broward, Collier, Hendry and Lee counties. His practice areas also include general liability, commercial litigation and coverage matters. Prior to joining Luks, Santaniello, Justin worked as an Attorney for several private practices in the Miami-Dade county. He earned his Bachelor of Arts degree in Communications from Ohio University and a Masters from the University of Heidelberg in Germany. He obtained his Juris Doctorate from Florida International University (FIU). Justin also studied abroad in Scotland. While in Law School, Justin cofounded the Government and Politics Student Association and served as its Vice President. He was also a legal volunteer at the Maurice & Jane Sugar Law Center for Economic and Social Justice in the area of Labor & Employment Law.

Verdicts and Summary Judgments cont.

Fall off Ladder— Final Summary Judgment

Dan Santaniello and Alison Marshall obtained a final summary judgment in the premises liability matter styled Lavoy v. EMCOR Facility Services, Inc. before the Honorable Marina Garcia-Wood on December 16, 2013. Plaintiff, an independent contractor, was hired to perform roof inspection services at the co-defendant's business premises. EMCOR was the maintenance company at the premises and was not involved in the owner's ongoing roof project. Plaintiff fell off a ladder while inspecting the roof and suffered severe injuries to his leg, including multiple compound fractures requiring multiple surgeries and had many complications as a result. Medical bills totaled \$257,905. Plaintiff alleged that EMCOR had a duty to maintain the premises, had provided him with the ladder, knew the ladder was in poor repair. In our MSJ, we argued that EMCOR had no duty to the Plaintiff as an independent contractor and furthermore, our maintenance man on premises did not know Plaintiff was coming to the premises on the day of his accident, did not provide the ladder to the Plaintiff and finally, the ladder did not belong to EMCOR but rather to the roofing company performing the actual repair work. Plaintiff had even testified in his deposition that his visit that day was unannounced and that he felt the ladder was safe to use. The Court agreed with us and granted our motion. Plaintiff has 30 days from 12/16/13 to appeal.

This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

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CLM 2014 Annual Conference Boca Raton

Luks, Santaniello will co-moderate a panel discussion on "Mediating High Severity Claims: Creative Approaches and Tactics for Successful Outcomes" at the annual conference. The conference will be held April 9 - 11, 2014 in Boca Raton, Florida.

Adjuster CE Seminars

As you may know, Adjusters (All-Lines) are required to complete statutorily prescribed hours of continuing education courses. The continuing education requirements for each license type/class can be viewed on the Florida Department of Financial Services (DFS) website. Please contact Client Relations (MDonnelly@LS-Law.com) for information about our seminars. New seminars include:

Spoliation of Evidence Law in Florida— Course 87682

This 2 hour seminar will discuss the six elements of spoliation, discovery sanctions, spoliation as a defense, timing of a cause of action, and other states' approach to spoliation. The seminar will review the current Florida case law and provide tips to avoid spoliation. The seminar is designed to increase adjuster and attorney competence in preventing spoliation and convey awareness of the ongoing need to preserve evidence.

Aggressive Pre-Trial Strategies *

This seminar discusses aggressive pretrial strategies including the use of motions to dismiss for fraud on the court and the use of 57.105 motions for sanctions. The seminar will analyze cases that have been dismissed for fraud on the court, unsuccessful attempts to dismiss a case for fraud on the court, and cases related to the use of 57.105 motions for fees. The 57.105 portion of the seminar will focus specifically on obtaining 57.105 fees against opposing counsel and will review cases in which fees were awarded against a party's attorney. This seminar is not currently accredited.

Attorneys Named Junior Partners

Congratulations to the following Attorneys who were named Junior Partners on January 1, 2014.



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Rey Alvarez has been named Junior Partner. He has 10 years experience in handling Florida Workers' Compensation claims. From the Miami office, he oversees WC and Medicare Compliance matters. He is on the WC Committee for the Claims and Litigation Management Alliance and has authored several articles published by the Florida Bar's Workers' Compensation Section. He also coauthored a Medicare White paper that was published by the Florida Defense Lawyers Association in the Trial Advocate Quarterly (2011). Rey also spoke in several AM Best Insurance Law pod casts on Medicare Compliance and the SMART Act. Rey counsels clients and frequently speaks on WC and Medicare Compliance. Rey spoke at the NAMSAP Regional Conference (January 2014) and at a Medicare Lien boot camp (November 2013) sponsored by the National Business Institute. Rey spoke on WC Impairment Ratings and Impairment Benefits at the American Academy of Disability Evaluating Physicians conference (January 2012). He also writes a blog on WC case law and important decisions. <http://floridaworkerscomp.blogspot.com>.



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Daniel L. Fox, Esq. in the Miami office has been named a Junior Partner. Daniel is a member of the PIP Team and also devotes his practice to Auto, Bodily Injury, Coverage, General Liability and Premises Liability matters. He has conducted numerous depositions and examinations under oath, prepared and argued Motions for Summary Judgment. He is very familiar with the judges in Miami and Broward counties. He has a Bachelor of Science degree from the University of Texas and obtained his Juris Doctorate from the University of Miami. Daniel is admitted in Florida (2007) and Texas (2008). He presents client seminars on Florida PIP case law and his articles have been featured in Legal Update and as client Law Alerts.



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Steven G. Hemmert, Esq. in the Fort Lauderdale office has also been named a Junior Partner. Steve's practice areas include General Liability, Automobile Liability, Premises Liability, Professional Errors & Omissions and Products Liability. He has also represented clients in Commercial Litigation matters, Landlord and Tenant litigation, Securities Arbitrations and Corporate Transactions. Steve received a Bachelor of Arts degree from the University of California and earned his Juris Doctorate from Boston University. He is admitted in Florida (2002). He is also admitted to the United States District Court, Southern and Middle Districts of Florida. He was also admitted to practice law in California in 1999 (presently inactive).