QUARTERLY NEWSLETTER

WINTER 2013

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"School of Claims" Seminar

Orlando, Florida

April 25th and 26th 2013

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2. Traumatic Brain Injury
3. Winning your Case at Trial
4. Biomechanics and Accident Reconstruction Analysis
5. Current Trends in Construction Industry Claims

BREAK OUT SESSION No. 2

6. Bad Faith in Florida
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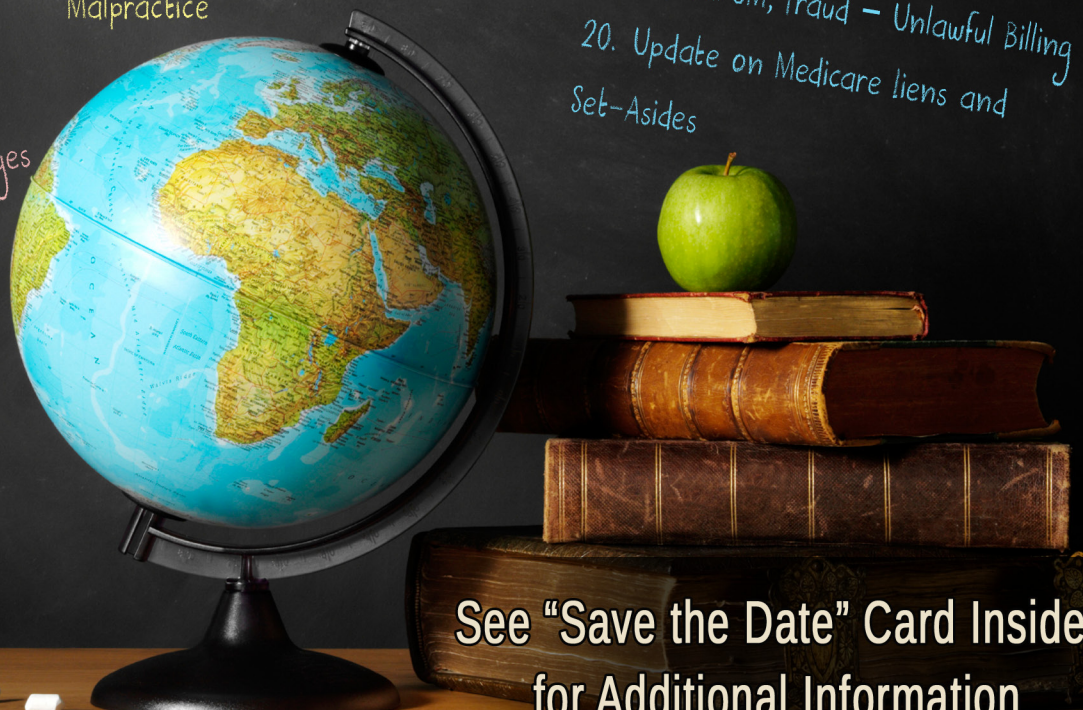

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The Guide to Traumatic BRAIN INJURIES

By Christopher Donegan

Between 2000 and 2006, an estimated 1.7 million people annually reported sustaining a traumatic brain injury ("TBI"), of which 52,000 people died, 275,000 were hospitalized and the remaining 1,373,000 were treated at their local emergency room and released without incident.[1] According to the Centers for Disease Control and Prevention, commonly known as the CDC, reported cases of TBIs have increased steadily over the past 10 years.[2] The reason for this increase is not exactly known. Some experts attribute it to over-diagnosis while others credit it to emergency rooms being better equipped to accurately diagnosis a TBI. Whatever the cause for the increase in these diagnoses, one thing is for certain, TBI claims are on the rise and they carry with them potential damages ranging anywhere from $85,000 for a mild TBI to $3 million for a severe one.[3] In 2000, it was estimated that direct and indirect costs associated with TBIs in the United States topped an estimated $60 billion.[4]

Whether dealing with a misdiagnosis or a real TBI claim, the bottom line to effectively handle these high value cases is to follow the old adage "knowledge is power." This article is going to walk readers through the initial evaluation of a TBI case starting with how to identify its leading causes and symptoms. It will then discuss why it is important to establish a baseline comparison of the plaintiff's cognitive function. Finally, it will conclude with a brief discussion of the techniques to use to determine whether you are dealing with a genuine TBI claim and how to deal with the plaintiff's claims during deposition.

Identifying a TBI

When the average person hears the term "traumatic brain injury," the image of Muhammad Ali or Steve Young might come to mind – both professional athletes whose livelihoods involved blows to the head. The image less likely to be thought of, but far more common, is the grandmother that slips on the sidewalk or the two-year-old that bumps into the coffee table reaching for that favorite toy. Thanks to a very liberal definition, however, a TBI can be classified as almost any contact that potentially causes a bump, blow, jolt or a penetrating injury that disrupts the normal function of the brain ranging in severity from mild to severe.[5]

The greatest causes of TBIs across all age groups, and in both genders, are simple slip and falls – which accounted for about 35% of all reported cases occurring between 2002 and 2006.[6] The leading cause of TBI related deaths during this same time period is motor-vehicle injuries – which accounted for about 17% of all reported TBI cases.[7] About 75% of all TBIs each year are classified concussions or mild traumatic brain injuries with a high probability of complete recovery.[8]

Common symptoms of a mild TBI include:[9]

a) Loss of consciousness for a few seconds or minutes, being dazed, confused or disoriented;
b) Memory, concentration problems or sensitivity to light or sound;
c) Headaches, dizziness or loss of balance;
d) Nausea, vomiting, blurred vision, ringing in the ears or dry mouth;
e) Mood changes or swings, feeling depressed or anxious; and
f) Difficulty sleeping, fatigue, drowsiness or sleeping more than usual.

Common symptoms of a moderate to severe TBI include those listed above for a mild TBI, as well as:[10]

a) Loss of consciousness for several minutes or hours;
b) Profound confusion, agitation, combativeness or other unusual behavior;
c) Slurred speech, weakness or numbness in fingers and toes;
d) Inability to awaken from sleep;
e) Loss of coordination;
f) Persistent headache or headache that worsens;
g) Repeated vomiting or nausea, convulsions or seizures; and
h) Clear fluid draining from the nose or ears.

Common symptoms of a TBI in young children who are unable to communicate include:[11]

a) Change in eating or nursing;
b) Persistent crying and inability to be consoled;
c) Unusual or easy irritability;
d) Change in ability to pay attention; and

e) Change in sleep habits, sad or depressed mood or loss of interest in favorite toys or activities.

Baseline Comparison and Medical Records

When a plaintiff presents with symptoms of a TBI, whether mild or severe, the first step in the evaluation process is to establish the plaintiff's baseline cognitive functioning. Here you are looking for anything that depicts the plaintiff's abilities prior to the alleged TBI, which can then be compared with the abilities they have claimed to have lost as a result of the accident. A common TBI claim is an alleged personality change not previously present prior to the accident. Good places to look for these records are:

a) School records and standardized testing;
b) Disciplinary records;
c) Employment records including applications, performance reviews and separation records;
d) Military records;
e) Social security records;
f) Other health disability or insurance records and/or applications

Next, you want to look for any pre-existing injuries the plaintiff may have suffered to the head, such as injuries incurred in any prior automobile accidents, sports injuries, and/or illnesses linked to cognitive dysfunction. If you are able to find a pre-existing condition, the plaintiff's experts will have to acknowledge that damages from brain injuries are cumulative, that the past brain injury may explain the plaintiff's current symptoms, and that it is virtually impossible to determine which injury caused which symptom. Other conditions to be on the lookout for are drug and alcohol addictions. If present, defense counsel might argue that the plaintiff's symptoms are connected to his or her addiction and not the subject accident.

Evaluation and the Plaintiff's Deposition

Besides comparing the plaintiff to their baseline and analyzing their medical records, it is important to examine the scene of the alleged accident and interview witnesses to determine whether there was the potential for a TBI. When looking at the scene, defense counsel should try to locate evidence demonstrating the nature of the accident (*i.e.*, rear-end, T-Bone, side-swipe collision), the amount of property damage that resulted, and the speeds involved. The focus should be on whether there was the potential for the plaintiff to strike his or her head, or be restrained in such a way that their own inertia would cause a jolt. As a practice tip, an accident reconstructionist can provide valuable insight into whether there was the potential for the plaintiff to experience a bump, blow or jolt that could have resulted in a TBI.

When questioning potential witnesses, the focus should be on what he or she recalls about the plaintiff after the accident, such as any particular body part the plaintiff complained was injured, or if the plaintiff lost consciousness or was unable to communicate and/or control their body movements.[12] While symptoms of a TBI do not always present immediately, evidence that the plaintiff did not appear dazed, injured or confused can go a long way in convincing a jury that any alleged injury occurred after the fact, if at all.

The best place to seek this information is in the emergency medical services ("EMS") and police reports. When looking at the EMS report, defense counsel will want to see whether the plaintiff was able to give a complete medical history and whether they could recall exact facts of the accident. As for police reports, while not usually admissible, they can contain valuable information such as names of potential witnesses, the nature of the accident, and the extent of property damage and speed involved.

A common problem in evaluating whether a plaintiff has suffered from a TBI is malingering, the medical term for fabricating or exaggerating symptoms. To reveal when a plaintiff is malingering you must remember time is your friend, so plan on prolonging the plaintiff's deposition. Defense counsel might want to start by taking the plaintiff as far back in his or her memory as possible, and then slowly move forward. This will place the plaintiff at ease, and by the time he or she is being questioned about the subject accident and injury, they may be more likely to reveal any inconsistencies in their story.

By prolonging the testimony, the plaintiff may be placed in a position where maintaining the fabrication or exaggeration becomes both mentally and physically exhausting, thus creating more opportunities for him or her to make a mistake or reveal their malingering. In some cases, it may be beneficial to videotape the plaintiff's deposition, which will allow you to catch incidents where the plaintiff slipped out of character, and which may also give the defense experts something to evaluate and compare to other surveillance of the plaintiff.

The final step in effectively defending a TBI claim is retaining the right experts to help build the defense. When evaluating experts, it important to look to the experts' specialties and to try to match the experts' qualifications to the plaintiff's claims. For instance, if the case involves a child plaintiff, experts that specialize in pediatrics may be utilized. Potential TBI experts include:

a) Neuropsychologists;
b) Neuropsychiatrists;
c) Neuroradiologists;
d) Neurosurgeons;
e) Neurologists;
f) Psychiatrists; and
g) Psychologists.

As a practice tip, defense counsel should always obtain the raw data generated by the plaintiff's experts during neuropsychological tests. This is important because over-interpretation of the raw data is a frequent problem. It is also beneficial to retain similarly qualified experts, and to have all the raw testing data and radiological films interpreted by a defense expert. In addition, defense counsel should confer with the defense experts as to their opinions on the reliability of questionable radiological testing (*i.e.*, PET scans) and whether different medications might have had an impact on the test results.

Closing Thoughts

TBI claims are difficult to defend because of the lack of an examination that can definitively diagnosis a TBI and because the medical community still has no idea what the long-term effects are for a mild to moderate TBI.[13] Rampant malingering and over-diagnosis have only complicated the matter. Hopefully this article has helped to shed some light on the basic concepts involved in defending TBI claims.

(Endnotes)

1 Faul M, Xu L, Wald MM, Coronado VG. *Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations and Deaths 2002–2006*. Atlanta (GA): Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2010.

2 Finkelstein E, Corso P, Miller T and Associates. *The Incidence and Economic Burden of Injuries in the United States*. New York (NY): Oxford University Press; 2006.

3 Craig M. Kabatchnick, *The TBI Impact: The Truth About Traumatic Brain Injuries and Their Indeterminate Effects on Elderly, Minority, and Female Veterans of All Wars*, 11 Marq. Elder's Advisor 81, 102 (2009).

4 Finkelstein, *supra* note 2.

5 CDC analyzed existing national data sets for its report, *Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations and Deaths 2002–2006*. CDC's National Center for Injury Prevention and Control funds 30 states to conduct TBI surveillance through the CORE State Injury Program. TBI-related death and hospitalization data submitted by participating CORE states are published in CDC's *State Injury Indicators Report*.

6 *Id*.

7 *Id*.

8 *Id*.

9 Traumatic Brain Injuries, http://www.mayoclinic.com/health/traumatic-brain-injury/DS00552/DSECTION=symptoms (last visited October 13, 2012).

10 *Id*.

11 *Id*.

12 Traumatic Brain Injuries, http://www.mayoclinic.com/health/traumatic-brain-injury/DS00552/DSECTION=tests-and-diagnosis (last visited October 13, 2012).

13 *Report to Congress on Mild Traumatic Brain Injury in the United States: Steps to Prevent a Serious Public Health Problem*. Atlanta (GA): Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2003.

PROTECTING ORGANIZATIONS FROM ALLEGATIONS OF EMPLOYEE SEXUAL MISCONDUCT

By Jessica Arbour

It seems as if every time we turn on the news there is a new allegation of sexual abuse and assaults committed in the context of an employment relationship: teachers, day care workers, Boy Scout leaders, college football coaches, and even police officers. In other cases, the alleged victim is merely a woman who purchased a television and subsequently alleges she was raped by the company delivery man. In still other cases, the alleged victim works with the accused perpetrator. When the alleged victim and perpetrator are brought together as a result of an employment relationship, the employer, the proverbial "deep pocket," is generally the one who is sued.

No matter the relationship between the alleged victim and alleged perpetrator, most often related civil lawsuits are based upon alleged negligence by the organization which brought them into contact. Cases arising from sexual misconduct are generally based upon theories of negligent hiring and negligent retention/supervision.[1] The ultimate question in such cases is "whether it is reasonable for an employer to permit an employee to perform his job in light of information about the employee which employer knew or should have known.[2]" Negligent employment cases are successful when plaintiff's counsel is able to prove that the employer failed to properly screen an applicant or had lax supervision that the alleged perpetrator may have exploited to commit misconduct.

We all have an interest in preventing sexual abuse and assault. Not only are such crimes horrific for the victims, they can mean years of costly litigation and, in cases where abuse is alleged to be widespread, major public relations problems for an organization. Therefore, it is critical that employers understand what makes them vulnerable to claims and how best to prevent situations where allegations of misconduct may arise.

Evaluating Applicants

Under the law, an employer is liable for an employee's sexual misconduct where the employer is responsible for bringing the alleged victim into contact with its employee when the employer knows or *should have known* of the employee's predisposition to commit wrong under circumstances that create opportunity or enticement to wrong.[3] In every instance where an employee will have more than incidental contact with other employees and the general public, an employer has a duty to independently investigate applicants before hiring.[4] Depending on the position, the investigation goes beyond merely conducting a personal interview, receiving an application, and making personal observation of the applicant.[5]

The process of protecting an organization from allegations begins long before an employee is even hired. It is critical, particularly in cases of employees who will have contact with vulnerable populations such as children or the disabled, that a potential employer conduct a thorough background screening of each prospective

employee. This applies to applicants for *all* positions from a stock clerk to the CEO because potential sexual predators exist in every walk of life. A thorough background check includes more than just checking all references provided, though all references should be checked, bearing in mind that those people were hand-picked to provide glowing, positive information about the applicant.

Most importantly, the potential employer must speak with *all* of the applicant's previous employers to determine if the applicant has any history of misconduct that may disqualify him or her from employment with the new organization. Failing to check even a single prior job is evidence a plaintiff's attorney can use to show that an employer breached the standard of care and therefore was negligent in hiring an employee. Most previous employers will not share specific information about the applicant's history without authorization from the employee due to privacy and confidentiality laws. Prospective employers may consider requiring applicants to sign authorizations that allow representatives to speak with each prior employer when the employee is likely to have contact with the general public as part of the new job.

Even without an authorization, a previous employer is likely to confirm the applicant's dates of employment and will usually answer the direct question, "Is the person eligible for rehire with your organization?" In the event an applicant is not eligible for rehire, or if the stated dates of employment are different from those provided by the applicant, the prospective employer *must* follow-up with the applicant. These are red flags that plaintiffs' attorneys live for; at the very least, the employee was a liar and should not have been hired, at worst, the company willfully failed to learn that he had a history of alleged misconduct. Most often, the reason an applicant is not re-hirable is relatively innocuous, but sometimes there is a pattern of conduct that is problematic, such as problems getting along with co-workers or a prior allegation of sexual harassment. Depending on the nature of the new position, companies may wish to take the extra step of requiring the applicant to sign an authorization allowing access his previous employer's personnel file to evaluate the situation. Likewise, prospective employers should not be afraid to verify other information contained in the application such as education and training. Overstating qualifications can also be a "red flag" that plaintiffs' attorney seek out, particularly when there is no follow-up by the employer.

Whenever possible, employers should conduct an additional criminal background check on all potential hires, particularly if the applicant has a history of unexplained relocations between cities or an unsteady job history. Until proven otherwise, companies should assume the worst and not rely upon the employee's explanation when this information is easily verifiable. Many private investigators will perform background checks in bulk for companies and it often involves little more than entering an applicant's name and Social Security Number into a computer. Every dollar spent before an employee is hired could result in saving your organization millions of dollars later on in the event the employee is the subject of a sexual misconduct allegation and the plaintiff can prove that simple things were missed or disregarded during the hiring process.

Under the law, prior allegations of misconduct need not be sexual in nature in order to create a foreseeable risk that sexual misconduct will occur.[6] Any indication of past violent behavior, drug use, or mental illness could lead a jury to conclude that an employer created a zone of foreseeable risk to the alleged sexual assault victim, in the event an allegation turns into litigation.

Any action a prospective employer takes during the hiring process helps establish that the organization met, and preferably exceeded, the "reasonably prudent organization" standard, which is the legal litmus test applied in litigation.[7] No matter what steps are taken, employers must be sure to document *every single contact* with an applicant, his previous employers, schools, and references, so that even years later, the exceptional due diligence can be shown.

Retaining and Adequately Supervising Employees

A case of negligent retention and supervision of an employee arises when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate an unfitness for duty but the employer fails to take further action, such as investigation, discharge, or reassignment.[8] Negligent hiring can give rise to a negligent retention/supervision claim even if the employee commits no other acts of misconduct between the time he is hired and the time the sexual misconduct allegation is made when the employer fails to take adequate precautions to adequately supervise or limit an employee's duties. Negligent retention/supervision claims formed the basis of the overwhelming majority of the child sexual abuse lawsuits against the Catholic dioceses in the United States; plaintiffs' attorneys argued that, despite a history of sexual abuse allegations against the particular priests, Catholic bishops routinely reassigned them to new parishes and continued to give them unfettered access to children without warning parents and other parish staff, or otherwise limiting their duties. In many cases, the accused priests were sent to work in rural parishes where they worked alone and had almost no regular interaction with their supposed supervisors.

It goes without saying that employees should be properly supervised at work. However, adequate supervision is a particularly crucial issue when an employer has some indication of an employee's unfitness- which might include involvement in the criminal justice system, mental health issues, or drug use- that may lead to danger. Plaintiffs' attorneys look for indications of lax supervision as evidence of employer negligence. For example, in the case of alleged rape of an incapacitated plaintiff during a CT Scan, the plaintiff's attorney may point to a hospital practice of allowing a CT Scan Tech to work alone on overnights, supervised only by the hospital's nursing supervisor who only entered the CT Scan room once every 2-3 weeks, as evidence of negligent supervision. Sexual misconduct does not occur in front of an audience, so adequate supervision will minimize or otherwise avoid situations where an employee is left alone with anyone who could be seen as a potential victim. As another example, some schools require teachers who tutor students after school to have a minimum of two students in the classroom at all times or require multiple teachers to use the same room in order to ensure that no one is unmonitored.

Where appropriate, employers should consider installing surveillance cameras in areas where employees congregate. In many cases of employee-on-employee misconduct, the cameras yield indisputable proof that an event did or did not occur, or, at the very least, may provide evidence to corroborate one employee's version of events. In either event, such evidence is usually helpful in the event of later lawsuits or EEOC complaints and is far more convincing than an attorney's argument about what the facts suggest *might* have happened.

Immediately upon receipt of an allegation of sexual misconduct, employers should err on the side of caution and remove the alleged perpetrator from all contact with the general

public as a company representative and, depending on the allegation, all contact with other employees. Nowhere is the axiom "better safe than sorry" more true for everyone involved than in a case of alleged sexual abuse or assault. In most cases, the employer is generally within his rights to terminate an employee without further action if it so wishes.[9] In some cases, an organization may instead choose to suspend an employee pending investigation of a claim. In this event, it is advisable to bring in a third party investigator with experience in this area, rather than have another company employee conduct the investigation. This leads to more dependable results that are not as easily subject to attack in later litigation, particularly if the employee is retained and additional allegations arise later on.

In the event that an employer chooses to retain an employee who has been accused and/or investigated for sexual misconduct, it should do so only after careful assessment of the potential risks. Consider the advice of those with more experience in these issues very carefully. Learn from the example of Penn State University, whose leaders first learned in 1998 that Jerry Sandusky was the subject of a police investigation, more than a decade before another boy says he was sexually abused: do not assume that the failure to make an arrest means the police have concluded the alleged incident did not occur and that the allegation is false; it generally means only that the prosecutor is not confident she could obtain a conviction based upon available evidence.

Any time an employer chooses to allow the employee to continue working but with new duty limitations, the employer must also account for proper monitoring and supervision to ensure the employee is abiding by the limitations and no other potentially dangerous situations occur. Failure to provide proper supervision following the first allegation of sexual misconduct is a key element in lawsuits arising from subsequent acts of alleged misconduct and is particularly damning because the plaintiff is able to show an employer's actual notice of a potential problem with the employee.

Conclusion

Sexual misconduct, be it sexual harassment, sexual assault, or sexual abuse, hurts everyone. When it occurs, there is very often a highly damaged victim who seeks retribution. Often, this means suing the organization that brought together the perpetrator and victim for damages. In some, albeit rare, cases, the allegations are made by someone who was not a victim of sexual abuse or assault, but who has other motivations. In either event, the costs and damage done to employers can be very high. Employers can limit the potential for allegations and prevent sexual misconduct all together by taking simple steps from the moment a potential employee begins the application process, and by making prudent decisions during the course of employment. This benefits everyone in the long run.

(Endnotes)

1 For ease of reference we will refer to all cases as "employment-based" cases, which also includes those in which the alleged perpetrator is an organization's volunteer.

2 *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 751 (Fla. 1st DCA 1991).

3 *See Garcia v. Duffy*, 492 So. 2d 435, 439 (Fla. 2d DCA 1986).

4 *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d at 751.

5 *Id.*

6 *Id.* at 757.

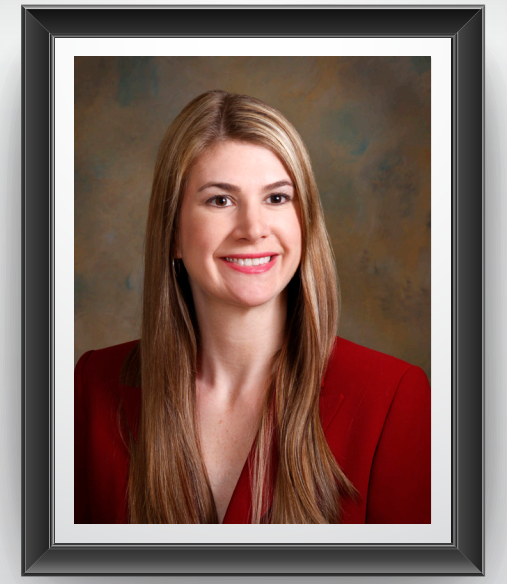
7 *Garcia v. Duffy*, 492 So. 2d at 440.

8 *Tallahassee Furniture* at 753

9 Of course, when terminating an employee for mental or physical health reasons, be sure that you comply with applicable federal, state and local laws regarding discrimination and disability accommodation.

Meet one of our Attorneys

Cathi Carson-Freymann



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Her areas of practice include all aspects of insurance and general liability defense, including personal injury defense, premises liability, automobile liability, automobile no-fault litigation, and insurance coverage disputes. Ms. Carson-Freymann also has extensive experience with intellectual property litigation, including trademark prosecution and domain name dispute resolution.

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Ms. Carson-Freymann spent more than eight years as an on-air investigative reporter. She provided commentary on major trials, uncovered fraud, and exposed government waste. She was awarded 1st Place for Investigative Reporting and 1st Place for Individual Achievement by the Florida Associated Press.

Ms. Carson-Freymann is admitted to practice before the United States District Court for the Southern District of Florida, and all courts within the State of Florida. She is also admitted to practice in Georgia.

E-Discovery & Nursing Home Litigation:

What You Need To Know

By Rochelle J. Nunez

Electronic discovery, more commonly known as "e-discovery," refers to the use and preservation of information that is created or maintained in electronic media. This type of data, referred to as electronically stored information ("ESI"), incorporates emails, voice mails, word processing documents, databases, digital images, audio recordings, telephone logs, and other compilations that are generated or stored electronically. E-discovery is said to be the modern-day equivalent of the paper trail.[1] However, the complex nature of electronic data has brought about many changes in the gathering and preservation of evidence in legal proceedings.

E-discovery has particularly impacted the healthcare industry as it transitions into a new era of electronic health records. Electronic documentation is said to improve the quality of care and facilitate communication among healthcare providers, ensuring the legibility of nursing notes and reducing the likelihood of charting errors. However, it has also raised various concerns regarding HIPAA compliance, preservation duties, scope of discovery, and form of production. Further, the constant changes in technology and the destructible nature of electronic data have given rise to the need for new policies and procedures to protect against the possible destruction or loss of evidence. However, the implementation of practical and effective e-discovery procedures is often difficult due to the lack of standardized guidelines.

Rules Governing E-Discovery

The Florida Rules of Civil Procedure do not explicitly reference the discovery of electronic data. However, Florida courts have held that the Rules of Civil Procedure are sufficiently broad to encompass electronic discovery.[2] Additionally, the Florida Bar has recently approved proposed amendments to the Florida Rules of Civil Procedure which specifically reference the duty to produce electronic discovery. Presuming that the Florida Supreme Court also approves of the proposed amendments, there will likely be an upsurge in e-discovery. Nevertheless, like the references to e-discovery contained in the Federal Rules of Civil Procedure, the new rules will only provide limited guidance as to when the duty to preserve electronic data arises, what measures should be taken to preserve the data, and how to identify the type of data that needs to be preserved.

Duty to Preserve Electronic Data

The duty to preserve evidence is fundamental to the litigation process.[3] Failure to do so can lead to the imposition of sanctions for spoliation of evidence.[4] These sanctions can range from monetary fines to adverse inferences.[5] They can also be imposed irrespective of a party's willfulness in destroying evidence and can result from an inadvertent failure to preserve evidence.[6] It is therefore critical to establish when a duty to preserve evidence is triggered.

Generally, a duty to preserve evidence arises when a party reasonably anticipates litigation.[7] In Florida, however, there is no common law duty to preserve evidence in anticipation of litigation.[8] Absent a common law duty to preserve, the duty must originate either in contract, statute, or upon receipt of a properly served discovery request after a lawsuit has been filed.[9] Nursing homes, for example, have a statutory and administrative duty to retain medical records, paper or electronic, for a period of five years from the date of a resident's discharge.[10] Contrary to Florida state courts, the United States district courts

have recognized a duty to preserve evidence upon imminent or pending litigation.[11] Similarly, Florida's Fifth District Court of Appeal has held that a duty to preserve evidence commences upon a reasonable belief of an impending lawsuit.[12] Based on these conflicting views, it is good practice to commence the preservation of evidence upon anticipation of litigation, as this would ensure compliance with both Florida state and federal district courts.

Measures to Preserve Electronic Data

The preservation of electronic data is a complex process that requires a good faith effort to avoid the destruction or loss of evidence. Once the duty to preserve is triggered, a party should issue a litigation hold and cease the deletion of electronic records to ensure the preservation of relevant documents.[13] Courts have often refrained from the imposition of severe sanctions where parties have implemented reasonable measures and e-discovery practices.[14] Conversely, severe sanctions have been issued when litigants failed to establish proper procedures to prevent the destruction of evidence.[15] Accordingly, nursing home operators should establish policies and procedures for the proper imposition of litigation holds, as well as the retention and destruction of ESI.

Once the duty to preserve discovery is triggered, the Nursing Home Administrator should issue a litigation hold and cease the deletion of all electronic records. A litigation hold is crucial for the preservation of electronic records, as failure to timely notify all key personnel and to suspend any routine deletion programs can lead to the destruction or loss of material evidence.[16] Specific deadlines should also be established for the retention and destruction of data. Additionally, back-up tapes should be kept for disaster recovery purposes and electronic data should be screened for privilege to ensure than no unauthorized and protected health information is produced in discovery.

Identifying Electronic Data for Preservation

To identify which documents should be preserved for litigation, we have prepared a compilation of electronic data that has been reviewed by Florida courts for discovery purposes.

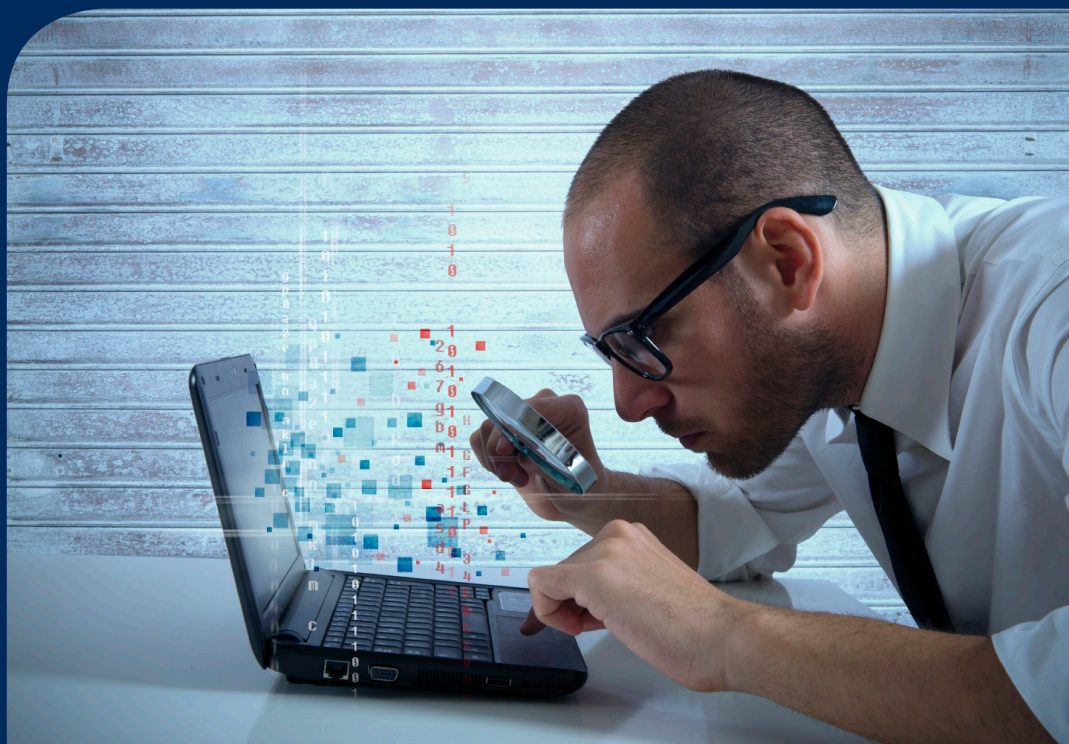
1. ***Grievance Logs.*** Grievance logs of employee and consumer complaints filed in compliance with Fla. Stat. § 400.147(4) are discoverable, following an *in camera* inspection and upon a showing of need and the inability to obtain equivalent information without undue hardship. However, grievance logs prepared from quality assurance and risk management meetings are not discoverable, pursuant to Fla. Stat. § 400.119.[17]

2. ***Nursing Home Director's Notes.*** Nursing home director's notes regarding a patient's injury, which is taken during an internal investigation of the incident and as part of a risk management investigation, are not discoverable.[18]

3. ***Nursing Home Personnel Records.*** Nursing home personnel records, including employee complaints, disciplinary records, and performance evaluations, are not subject to discovery on the bases of the quality assurance, risk management, self-critical analysis, or peer review privilege under Fla. Stat. § 766.101.[19] However, personnel records for assisted living facilities are not protected from discovery under the constitutional right of privacy of the employees.[20]

4. ***Internal Peer Review Evaluations.*** Nursing home internal peer review evaluations and other electronic materials containing internal review of the nursing staff's performance are not discoverable, absent a showing of need and an inability to obtain equivalent documents without undue hardship, despite allegations of negligent care.[21]

5. ***Incident Reports.*** Nursing home incident reports filed in compliance with Fla. Stat. § 400.147(4) are discoverable, following an *in camera* inspection and upon a showing of need and the inability to obtain equivalent information without undue hardship. However, incident reports prepared from quality assurance and risk management meetings are not discoverable, pursuant to Fla. Stat. § 400.119.[22]



6. ***Former Nursing Home Resident's Information.*** A nursing home was ordered to provide Plaintiff with the name, birth date, Social Security number, and forwarding address of a former nursing home resident, who was Plaintiff's roommate and potential material witness, notwithstanding the nursing home's duty of confidentiality to residents under Fla. Stat. § 400.022. The nursing home was required to redact any medical information pertaining to the resident prior to producing said records to Plaintiff.[23]

7. ***Computer Source Code in its Binary Form.*** The computer source code can be produced in its native form if the data is deemed relevant and the necessary safeguards are in place to protect the patient's privacy. However, an *in camera* review is required to identify the relevance of the computer source code prior to discovery.[24]

8. ***Computer Hard Drive.*** A forensic evaluation of a computer hard drive is permissible if there is sufficient evidence to show that material data has been intentionally deleted or erased.[25]

9. ***Computer Database.*** A computer database may undergo forensic review if: (1) there is proof that responsive data has been purged and could be retrieved; (2) there is no alternative source to obtain the requested data; and (3) there are safeguards in place to protect the patient's records.[26]

10. ***Financial Reports.*** Financial reports generated by a computer database were deemed discoverable based on relevance and absent any evidence of undue burden and expense to produce.[27]

11. ***Emails.*** Emails are discoverable if the information contained therein is relevant and there is no undue burden or expense to produce. Florida courts have yet to rule on whether emails should be produced in its printed or native form. However, other courts have held that emails must be produced in its native form.[28]

12. ***Information Contained in a Personal Data Assistant (PDA).*** Internal notes stored in a PDA are subject to discovery if the information is relevant and not privileged.[29]

The Impact of E-Discovery on HIPAA

A nursing home operator needs to establish a balance between a nursing home's duty to furnish electronic data and its obligation to adhere to HIPAA requirements.[30] Where privacy issues arise during the preservation or production of electronic records, federal courts have consistently found that strict compliance with HIPAA is required.[31] Additionally, the Northern District of Florida has recently held that a nursing home was not obligated to produce medical records under Fla. Stat. § 400.145 because it was contrary to HIPAA and therefore preempted under the Supremacy Clause.[32]

To ensure compliance with HIPAA when producing electronic records, the Health Information Technology for Economic and Clinical Health (HITECH) Act requires an accounting of certain protected electronic health records. Also, a pending proposal to amend HIPAA's Privacy Rule would require health care providers to submit, upon request, an accounting for disclosure of electronic health records used for treatment, payment, and health care operations in the past three years.[33] The HIPAA amendment would also require production of an "access report" for disclosure of specific names and times when a patient's electronic protected health information is accessed.[34]

Conclusion

The rules governing electronic data are constantly changing due to the rapid advancement in technology. This has given rise to a complex e-discovery process that requires compliance with both federal and state laws to avoid any potential sanctions. The need to preserve electronic records requires a re-evaluation of one's internal policies and procedures, which should provide for the proper imposition of litigation holds, specific timelines for the retention and destruction of evidence, and a full-proof disaster recovery plan. Additionally, healthcare providers should adopt affirmative measures to avoid HIPAA violations and to educate their staff on the anticipated challenges that this new era of electronic health records will bring.

(Endnotes)

1 *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAI, 2005 WL 4947328, at *6 (Fla. 15th Cir. Ct. Mar. 1, 2005).

2 *Strasser v. Yalamanchi*, 669 So. 2d 1142, 1143-44 (Fla. 4th DCA 1996) (Florida Rules are broad enough to encompass electronic discovery); Fla. R. Civ. P. 1.280, (parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action … including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things).

3 *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp. 2d 456, 462 (S.D.N.Y. 2010) (a duty to preserve means what it says and that a failure to preserve records, paper or electronic, will inevitably result in the spoliation of evidence).

4 *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1256 (Fla. 4th DCA 2003) (any number of sanctions and negative consequences are available against parties in litigation who destroy, conceal, or alter evidence).

5 *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. 502003CA005045XXOCAI, 2005 WL 4947328, at *6 (Fla. 15th Cir. Ct. Mar. 1, 2005) (the court sanctioned Morgan Stanley for failing to preserve electronically stored information and back-up tapes); *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987) (failure to preserve evidence may lead to a rebuttable presumption of negligence for the underlying tort).

6 *Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (sanctions are appropriate when evidence has been destroyed intentionally or inadvertently); *Martino*, 835 So. 2d at 1254 (an adverse inference is not based on a strict legal duty to preserve evidence; rather, an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence).

7 *Univ. of Montreal Pension Plan*, 685 F.Supp. 2d at 466 (acknowledging that it is well-established that the duty to preserve evidence arises when a party reasonably anticipates litigation).

8 *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (noting that a duty to preserve evidence did not exist at common law); *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004).

9 *Id.*., at 426 (a duty to preserve evidence must originate either in a contract, a statute, or a discovery request); *Strasser*, 783 So. 2d at 1093 (noting that there is an affirmative duty to preserve evidence upon a duly served discovery request).

10 Fla. Stat. § 400.145; Fla. Admin. Code § 59A-4.118.

11 *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp. 2d 1273, 1277 (S.D. Fla. 1999) (a litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action); *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22-KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 9, 2007) (noting that there may be additional circumstances from which a duty may arise if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation).

12 *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1019 (Fla. 5th DCA 2000) (stating that if one knows that he, she, or it is about to become involved in a civil action, this alone should be sufficient to impose a duty to preserve evidence that a reasonable person would foresee as material to the potential action).

13 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (stating that once a party reasonably anticipates litigation, it must suspend its routine document retention and destruction policy and must put in place a "litigation hold" to ensure the preservation of relevant documents).

14 *Gaalla v. Citizens Med. Ctr.*, 2011 U.S. Dist., LEXIS 57317, at *4-5 (S.D. Tex. May 27, 2011) (holding that failure to preserve back-up tapes did not result in sanctions where the court found that defendant had taken "reasonable preservation" steps and enacted a litigation hold).

15 *Univ. of Montreal Pension Plan*, 685 F.Supp. 2d at 465 (holding that the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information).

16 *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 283 (D. Del. 2008) (Intel made several critical errors in implementing a litigation hold; it sent notices to a target group instead of all personnel four days after litigation had commenced and it failed to suspend it automatic email deletion program that would purge email communications every 35 days).

17 *Mariner Health Care of Metrowest, Inc. v. Best*, 879 So .2d 65, 66-67 (Fla. 5th DCA 2004).

18 *Beverly Enters-Fla., Inc. v. Olvera*, 734 So. 2d 589, 590 (Fla. 5th DCA 1999).

19 *Mugridge v. Tandem Health Care of St. Petersburg, Inc.*, No. 04-000205-CI-20, 2005 WL 6400749 *1 (Fla. 6th Cir. Ct. Mar. 4, 2005).

20 *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 942 (Fla. 2002).

21 *Beverly Enters-FL, Inc. v. Ives*, 832 So. 2d 161, 162-63 (Fla. 5th DCA 2002).

22 *1620 Health Partners, L.C. v. Fluitt*, 830 So. 2d 935, 938 (Fla. 4th DCA 2002); *Paradise Pines Health Care Associates, LLC v. Bruce*, 27 So. 3d 83, 84 (Fla. 1st DCA 2009).

23 *Delta Health Group, Inc. v. Estate of Collins*, 36 So. 3d 711, 712 (Fla. 1st DCA 2010).

24 *Beck v. Dumas*, 709 So. 2d 601, 603 (Fla. 4th DCA 1998).

25 *Holland v. Bartfield*, 35 So. 3d 953, 955-956 (Fla. 5th DCA 2010) (in a wrongful death case, the personal representative of the deceased's estate could not require the defendant to produce her computer's hard drive and mobile phone's SIM card absent no evidence of any destruction of information); *Menke v. Broward County School Board*, 916 So. 2d 8, 12 (Fla. 4th DCA 2005).

26 *Strasser*, 669 So. 2d at 1145.

27 *Kyker v. Lopez*, 718 So. 2d 957, 959 (Fla. 5th DCA 1998).

28 *In re PriceLine.com Inc. Securities Litigation*, 233 F.R.D. 88, 89-90 (D. Conn. 2005).

29 *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121, 1130 (Fla. 2005).

30 Health Insurance Portability and Accountability Act of 1996.

31 *Law v. Zuckerman*, 307 F.Supp. 2d 705, 707 (D. Md. 2004); *Opis Mgmt. Res., LLC v. Dudek*, 4:11-CV-400/RS-WCS, 2011 WL 6024092, at *2 (N.D. Fla. Dec. 2, 2011).

32 *Dudek*, 2011 WL 6024092, at *2-4 (Fla. Stat. § 400.145 requires nursing homes to furnish a copy of resident's records to "the spouse, guardian, surrogate, proxy, or attorney in fact"; HIPAA allows production of protected health information only to the resident himself or his personal representative who has legal authority to act on behalf of resident).

33 HIPAA Privacy Rule Accounting of Disclosures, 76 Fed. Reg. 31426 (proposed May 31, 2011) (to be codified at 45 C.F.R. pt. 164).

34 *Id*.

PLAINTIFFS CAN NOW MITIGATE SANCTIONS FROM A PROPOSAL FOR SETTLEMENT BY UTILIZING THE NEW INSURANCE PROGRAM PROVIDING COVERAGE FOR ATTORNEY'S FEES AND COSTS INCURRED UNDER FLORIDA'S PROPOSAL FOR SETTLEMENT STATUTE


By Randy Rogers & Scott Welner

With the advent of the mediation process (which is mandatory in any civil action in Florida), over 95% of all lawsuits now settle before trial. From the moment a complaint is served, each party seeks to identify, establish and exploit any potential advantage. In the chess match that is civil litigation, leverage is king. The key to the creation of leverage against an adversary is to convince them to settle their case rather than risk the unpredictable results of trial.

One of the more widely used methods for establishing such leverage is a Proposal for Settlement or Offer of Judgment. Florida's Proposal for Settlement statute, section 768.79, Florida Statutes, was intended to encourage settlements by imposing court costs and attorney's fees as sanctions upon a party who unreasonably rejects a Proposal for Settlement.[1] Defense counsel frequently employs the use of Proposals for Settlement as a fee shifting mechanism, with the logic being that a plaintiff will become more reasonable in settlement negotiations if there is the potential that they will be responsible for paying the defendant's attorney's fees and costs if an unfavorable result is obtained at trial.[2]

The threat of potential sanctions for a plaintiff's failure to accept a reasonable settlement offer before trial can now be essentially eliminated due to the creation of fee-shifting insurance. On October 9, 2012, Willis Programs, a subsidiary of Global Insurance broker Willis Group Holdings (NYSE:WSH), announced an insurance program that covers liability for attorney's fees and costs under Florida's Proposal for Settlement Statute. This dynamic new insurance, termed LegalFeeGuard, affords Florida state court litigants indemnification for sanctions under the Proposal for Settlement Statute. [3]

LegalFeeGuard offers policies for general negligence matters, which are defined to include automobile, motorcycle, slip and fall, and products liability matters. The program, as advertised, does not specifically identify coverage for premises liability actions, negligent security, or other types of negligence matters, but coverage for such actions may be available as long as the underwriter's criteria is satisfied. LegalFeeGuard also offers policies for professional negligence matters at a slightly higher premium due to the fact that court statistics indicate that professional malpractice cases are resolved through actual trial more than other types of liability cases. LegalFeeGuard does not advertise which types of professional negligence matters are covered, but we assume that policies will be available for actions which have triggered a party's error and omissions policy.

LegalFeeGuard's coverage limits and costs are as follows:

Coverage Limit	General Negligence	Professional Negligence
$10,000	$500 Premium	$750 Premium
$25,000	$1,000 Premium	$1,500 Premium
$50,000	$2,000 Premium	$3,000 Premium
$100,000	$3,500 Premium	$5,000 Premium

Therefore, as an example, a plaintiff can protect against fee sanctions in a general negligence action up to $100,000.00 for a relatively small premium payment of $3,500.00. The above policy premiums are non-refundable and carry no deductible. It is important to note that Florida Bar Staff opinion 78705 (revised) of the Professional Ethics Committee of the Florida Bar indicates that an attorney in Florida may advance the cost of the premium of the LegalFeeGuard policy and make the repayment of that premium contingent on the lawyer making a recovery on behalf of the client. This allows for easier access to LegalFeeGuard for plaintiffs, and we expect to begin to see plaintiffs' attorneys shielding themselves and their clients from exposure to fees and costs from failing to accept a valid Proposal for Settlement by purchasing LegalFeeGuard. From a defense attorney and claims professional perspective, you should expect plaintiffs' attorneys and their clients to be less affected by the threat of payment of the defense attorneys' fees and costs during settlement discussions before trial due to the availability of this insurance.

It should also be noted that LegalFeeGuard is available to either plaintiffs or defendants, so insurance carriers and their insureds can also benefit from this insurance in the appropriate cases.

(Endnotes)

1 Florida Rule of Civil Procedure 1.442, which implements section 768.79, adds additional requirements concerning the content of the Proposal for Settlement.

2 In any civil action for damages filed in the courts of Florida, if a defendant serves an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him, or on a defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25% less than such offer, and the court shall set off such costs and attorney's fees against the award. Fla. Stat. § 768.79 (1).

3 However, this insurance is not available in federal court actions.

Cole, Scott & Kissane, P.A.

Is pleased to announce that we have several new partners as of January.
Please join us in congratulating the following
members of the firm:



David Harrigan
Orlando

Rhonda Beesing
Tampa

John Kozak
Tampa

Temys Diaz
Miami

Eric Rieger
Miami

Genevieve Rupelli
Fort Lauderdale

Each of these people has distinguished themselves with quality work,
extra effort on behalf of the clients and firm, associate mentoring
and client development and services.
Our firm's growth and prosperity is dependent on these continued efforts.

SUCCESS STORIES

TRIAL WINS

Bad Faith

Linares v. United Automobile
Venue: Miami-Dade County

Tom Scott and **Scott Cole** of Cole, Scott & Kissane's Miami office won a bad faith case before in Miami-Dade County Circuit Court, defeating a claim that the insurance company had acted in bad faith for failing to settle a claim against the insured when they could have and should have done so. The case was tried before a jury, who agreed that the insurance company had not failed in any duty to its inured.

Personal Injury

Robbins v. Armington
Venue: Monroe County

Tullio Iacono of the Miami office and **James Sparkman** of the West Palm Beach office of Cole, Scott, & Kissane obtained a complete defense verdict in a case involving a twenty-one-year old who received a brain Injury when he fell off a golf cart in which he was riding as a passenger. The firm represented the young women who was driving the golf cart at 1:30 a.m. after drinks at the local bar. However, the jury agreed that there was no proof of negligence on her part that caused the Plaintiff to be ejected from the golf cart. The Plaintiff asked for a $2,000,000.00 recovery. He got nothing. There had been a $100,000.00 proposal for settlement served by the Defendant. The Plaintiff filed a Motion for New Trial, which was denied.

SUMMARY JUDGMENT SUCCESSES:

Medical Malpractice

Epperson v. Smith, M.D., et al
Venue: United States District Court, Middle District of Florida

Shelby Serig and **David Cornell** of Cole, Scott & Kissane's Jacksonville office obtained an Order granting Final Summary Judgment on behalf of a doctor in the United States District Court, Middle District of Florida, Jacksonville Division. Plaintiff alleged that the insured doctor, and other physicians, violated Plaintiff's Eighth Amendment rights by being deliberately indifferent to Plaintiff's serious medical needs. Plaintiff sought compensatory and punitive damages allegedly flowing from the physicians' medical mistreatment of the Plaintiff. Following Plaintiff's deposition, and extensive briefing by all parties, the United States District Judge ruled that Plaintiff failed to provide any competent medical evidence to support his claims that the Defendants were deliberately indifferent to his serious medical needs. The Court further found that the Defendants were engaged in discretionary functions during the events in question, did not violate Plaintiff's constitutional rights, and were therefore entitled to qualified immunity. The Court granted Summary Judgment for the insured doctor and against the Plaintiff.

The Estate of Jacqueline Granicz v. Joseph Chirillo, M.D. and Millennium Physicians Group, LLC
Venue: Sarasota County

Sally Slaybaugh of Cole, Scott & Kissane's Tampa office obtained a final summary judgment in this medical malpractice case. The Plaintiff alleged Defendant physician failed to meet the standard of care with respect to treating a psychiatric patient and alleged the Plaintiff's suicide death was due to Defendant's negligence.

Legal Malpractice

Mollie Barrow, as Personal Representative of Melinda Barrow v. Weitz & Luxenberg, P.C., et al
Venue: Orange County

Edward S. Polk and **Arabella Puentes** of Cole, Scott & Kissane's Miami office obtained a Summary Final Judgment in this legal malpractice case. The defendant law firm had represented the plaintiff in products liability litigation arising from breast implants that resulted in gel bleed. The implant case went to trial in federal court in 1997, and resulted in a judgment for the Plaintiff for over $750,000. Plaintiff then sued her lawyers in 1999, asserting that she would have recovered nearly $4,000,000 had the case been properly prepared and presented at trial. Although both sides had experts who rendered opinions as to the quality of the trial team's efforts, the court agreed with the defense position that everything the Plaintiff asserted was a matter of strategy and granted Summary Final Judgment on the basis of Florida's doctrine of judgmental immunity, whereby the strategic decisions of a trial lawyer are not the basis for a claim of malpractice. **Jonathan Vine** of the firm's West Palm Beach office and **Jessica Arbour** of the Miami office also provided invaluable assistance in obtaining this result.

Sinkhole Claims

Lonnie James v. Citizens Property Insurance Corporation
Venue: Hillsborough County

Wesley Todd and **Aram Megerian** of Cole, Scott & Kissane's Tampa office obtained a favorable summary judgment in litigation involving a sinkhole claim. Applying a 2011 (pre-Senate Bill 408) policy form, the Court ruled that the insured was not entitled to any recovery for subsurface stabilization repairs because, although she entered into a contract in accordance with her expert's recommendations, she did not enter into a contract in accordance with the recommendations of the engineer retained by the insurer. Two weeks prior, the Court denied an insurer's motion for summary judgment on the same issue, and that hearing involved the same attorney as the attorney arguing for the insured in this case.

Mr. Todd and Mr. Megerian directed the Court to the provision in virtually every sinkhole endorsement stating that if the engineer selected by the insurer determines it will cost more to repair, then the policy allows the insurer to pay the applicable liability limits or finish the repairs, and argued that litigation is not the time to dispute the repair protocol. Only once the repairs have begun, and after the policyholder has entered into a contract in accordance with the insurer's retained expert's recommendations, must the insurer concede a dispute regarding the repair protocol. The Court agreed and granted summary judgment for the insurer on the subsurface repairs coverage. There has been a history of mixed orders on the issue for all insurers.

Windstorm Claims

Del Rio v. Florida Peninsula Insurance Corporation
Venue: Hillsborough County

On a Motion for Final Summary Judgment, **Wesley Todd**, **Hal Weitzenfeld**, and **Andrew Bickford** of Cole, Scott, & Kissane's Tampa office obtained the Court's order that the insured in his application for insurance misrepresented the existence of damage at the property.

In a hotly-contested case involving strong allegations by the insured, the firm's attorneys conducted a detailed investigation to assess potential defenses for the insurer, including interviewing the prior owners of the property, underwriting inspectors, the real estate agent who sold the property, and county code compliance officials. Once that investigation was complete, the Defendant insurer had established a comprehensive timeline of the damages at the property and had multiple witnesses whom would testify that this property had a substantial amount of damage at the time of the insured signed the application. At his deposition, the insured testified that he did not notice any damage and had repaired any damage he saw. At the hearing on summary judgment, overwhelming evidence was introduced showing that the insured misrepresented the existence of damage at the property.

Slip and Fall/Premises Liability

Edgar Rodriguez v. Antonio Izquierdo
Venue: Miami-Dade County

Benjamin M. Esco and **Giancarlo V. Nicolosi** of Cole, Scott & Kissane's Miami office obtained a dismissal with prejudice following summary judgment arguments in this slip and fall/premises liability case. The Plaintiff filed suit against our insured, lessor of subject premises, and a Co-Defendant, lessee, for negligence

alleging that the insured owned and controlled the subject premises wherein the Plaintiff slipped on an alleged grease spill on the floor. Defense counsel argued that the insured was not liable to a third person due to a dangerous condition in the premises that is under the exclusive possession and control of the tenant. Defense counsel further argued that neither the owner nor occupant of the premises had actual or constructive notice of the alleged dangerous condition. The court agreed and granted summary judgment, which disposed of the case entirely, which also disposed of an indemnity and contribution claim filed by Co-Defendant against the insured, due to ownership.

Cruise Line Liability/Admiralty

Arch Insurance Company and Navigators Management (UK) Ltd. v. NCL (Bahamas), Ltd. d/b/a Norwegian Cruise Line
Venue: United States District Court, Southern District of Florida

Barry Postman, **Rachel Beige** and **Ryan Fogg** of Cole, Scott & Kissane's West Palm Beach office received a final summary judgment in favor of a cruise line client who was being sued for indemnity and contribution by two national insurers who claimed millions in dollars of damages. The victory was particularly satisfying as the lawyer for the plaintiffs by claiming that the firm had failed to understand admiralty law that thus failed to appreciate why the defense's six-figure offer was not sufficient, and millions of dollars should be offered. Instead, the case was disposed of summarily by the Court.

Hurricane Wilma Claims/Windstorm Claims

Slominski v. Citizens Property Insurance Corporation
Venue: Palm Beach County

Valerie Jackson and **Jennifer Smith** of Cole, Scott & Kissane's Miami office obtained a final summary judgment in this first party property case. The summary judgment was affirmed with written opinion by the Fourth District Court of Appeal.

The case involved an alleged Hurricane Wilma claim which was reported to the insurer three-and-a-half years late. The insurance company denied the claim, asserting that it was prejudiced by the failure to timely report the claim.

The insurer filed a Motion for Summary Judgment alleging that the claim was not timely reported and that the Plaintiff failed to rebut the presumption of prejudice that arose as a result of that failure. During the course of discovery, the defense took the depositions of Plaintiff's contractor and engineer. The contractor admitted that he could not be sure that the damage was caused by Hurricane Wilma as opposed to Hurricane Frances. As to the water damage, he admitted that he could not differentiate between one storm and another. The engineer admitted that he could not determine when the interior damage or roof damage occurred, but opined that it was caused by hurricane damage. He admitted that his conclusions about the wind-driven rain were based on considerations of facts presented by the homeowner.

The Plaintiff submitted affidavits which completely contradicted the deposition testimony. In his affidavit, the contractor stated that he was able to determine that the damages as alleged in the lawsuit were the result of Hurricane Wilma. The engineer attested that the damage to roof and door, and window displacement were due to the vibration, wind-driven rains, and high winds caused by Hurricane Wilma.

Rejecting the notion that an issue of fact was presented by the affidavits which conflicted with the deposition testimony, the trial court granted the motion for summary judgment, finding that the insurer was prejudiced by the late notice. The Fourth District affirmed the final summary judgment with a written opinion.

Negligent Security/Assumption of the Risk

Shawn Friedman v TCI Championships International, LLC
Venue: Broward County

Gregory Willis and **Lonni Tessler** of Cole, Scott, and Kissane's Fort Lauderdale office obtained final summary judgment in a negligent security matter.

The Defendant was running a flag football tournament in which the Plaintiff was a participant. The Plaintiff alleged that during the game, there was a lot of "trash-talking" between the two teams which escalated into a physical altercation between the Plaintiff's team members and the opposing team. The Plaintiff entered the altercation in an effort to break it up, but was "jumped" by the opposing team and sustained a broken jaw. He also claimed to have sustained emotional injuries, including a drug addiction which resulted in a long stint in drug rehab. The Plaintiff alleged that the Defendant failed to have sufficient security at the tournament and failed to properly train the referees in stopping the game before the verbal altercation escalated. Defense counsel successfully argued that the Plaintiff assumed the risk of injuries when he voluntarily entered the fight. The court agreed and granted Defendant's motion for summary judgment.

SIGNIFICANT DISMISSALS:

Contract Dispute/Property Damage

Sylvia Landa v. El Lago N.W. 7th Condominium Association, Inc. and Vilar Property Management, Inc.
Venue: Miami-Dade County

Benjamin Esco and **Giancarlo Nicolosi** of Cole, Scott & Kissane's Miami office obtained a dismissal in this contract dispute resulting in damage to property.

The Plaintiff alleged that the Defendants owed certain duties, derived from a contract, to the Plaintiff, including but not limited to, maintaining, repairing, replacing common areas, or systems for the benefit of the members of the association, including the Plaintiff. In a nutshell, the Plaintiff claimed damages to her personal property and her apartment due to water leaks allegedly coming from the roof of her unit and filed a negligence claim against the Defendants.

Defense counsel argued that the Economic Loss Rule bars a negligence action to recover solely economic damages in circumstances where the parties are in contractual privity, and since the damages sought were for purely economic loss, they were thus barred by the Economic Loss Rule. Defense counsel further argued that the prohibition against tort actions to recover solely economic damages for those in contractual privity was designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. The court agreed and granted the Defendant's motion for dismissal.

APPELLATE VICTORIES:

Third District - Legal Malpractice

Anthony v. Perez-Abreu
Venue: Third District Court of Appeal

Kristen Tajak of Cole, Scott & Kissane's Miami office obtained an appellate victory in the Third District on a hotly-contested legal malpractice matter. The appeal was the second appeal that stemmed from allegations of a civil conspiracy regarding the Plaintiff's ex-wife and her divorce attorney conspiring to steal confidential records from the Plaintiff's law office during the course of a divorce proceeding. Plaintiff's settlement demands were always well into the six figures. Plaintiff was so confident at prevailing that he stipulated to paying defense appellate fees if he lost.

Eleventh Circuit - Personal Injury/ Liability Waiver

Johnson v. Unique Vacations, Inc.
Venue: Eleventh Circuit Court of Appeals

Scott Cole of Cole, Scott & Kissane's Miami office prevailed on appeal in this appeal from the United States District Court for the Southern District of Florida, to the Eleventh Circuit Court of Appeals. Mr. Cole successfully defended the summary judgment obtained in favor of the resort on the vacationers' claims that the resort's alleged negligence resulted in injuries the Plaintiff sustained during a horseback-riding excursion at the resort. The Plaintiff had signed an excursion ticket sales receipt acknowledging that there was no agency relationship between the operator of the tour and the resort. Further, the Plaintiff signed a waiver of liability on the sign-in sheet for the excursion. Plaintiff had claimed that the resort was vicariously liable for the acts of the excursion company. The resort Defendant, meanwhile, had defended on the basis of contractual waiver, failure to establish an agency relationship, and *forum non conveniens*.

CSK - Key West Office

Cole, Scott & Kissane, P.A.

Is proud of its longstanding presence in the Florida Keys, with an office located in the heart of Key West, just steps away from the Courthouse.

CSK has enjoyed an excellent track record in representing its clients throughout the Florida Keys, from Key Largo all the way down to Key West.

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FROM THE FLORIDA OFFICES OF COLE, SCOTT & KISSANE, P.A.

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COLE, SCOTT & KISSANE, P.A.

SAVE THE DATE

"School of Claims" Seminar

April
25th and 26th
2013
Orlando, Florida

TOPICS WILL INCLUDE

LOCATION

JW Marriott
Orlando Grande Lakes Resort
4040 Central Florida Parkway
Orlando, Florida 32837

9150 South Dadeland Boulevard
Suite 1400
Miami, FL 33256

BREAK OUT SESSION No. 1
1. The Science of Sinkholes
2. Traumatic Brain Injury
3. Winning your Case at Trial
4. Biomechanics and Accident Reconstruction Analysis
5. Current Trends in Construction Industry Claims

BREAK OUT SESSION No. 2
6. Bad Faith in Florida
7. Medical Malpractice Arena for 2013
8. Problem Employee - Harassment, Terminations and Discrimination
9. Florida's Recent legislative Changes
10. Nursing Home Claims

BREAK OUT SESSION NO. 3
11. Successful Tactics for a Winning Mediation
12. Defeat Assignments of Benefits
13. Social Media and the Internet
14. Florida's Claims Administration Statute
15. Non-Delegable Duties in the Medical Malpractice

BREAK OUT SESSION No. 4
16. Multi-Conditional Settlement Demands
17. Condo Association law
18. Water loss and the 14 Day Rule
19. PIP/BI/UM, fraud – Unlawful Billing
20. Update on Medicare liens and Set-Asides

More detailed information will be sent via E-mail/US mail