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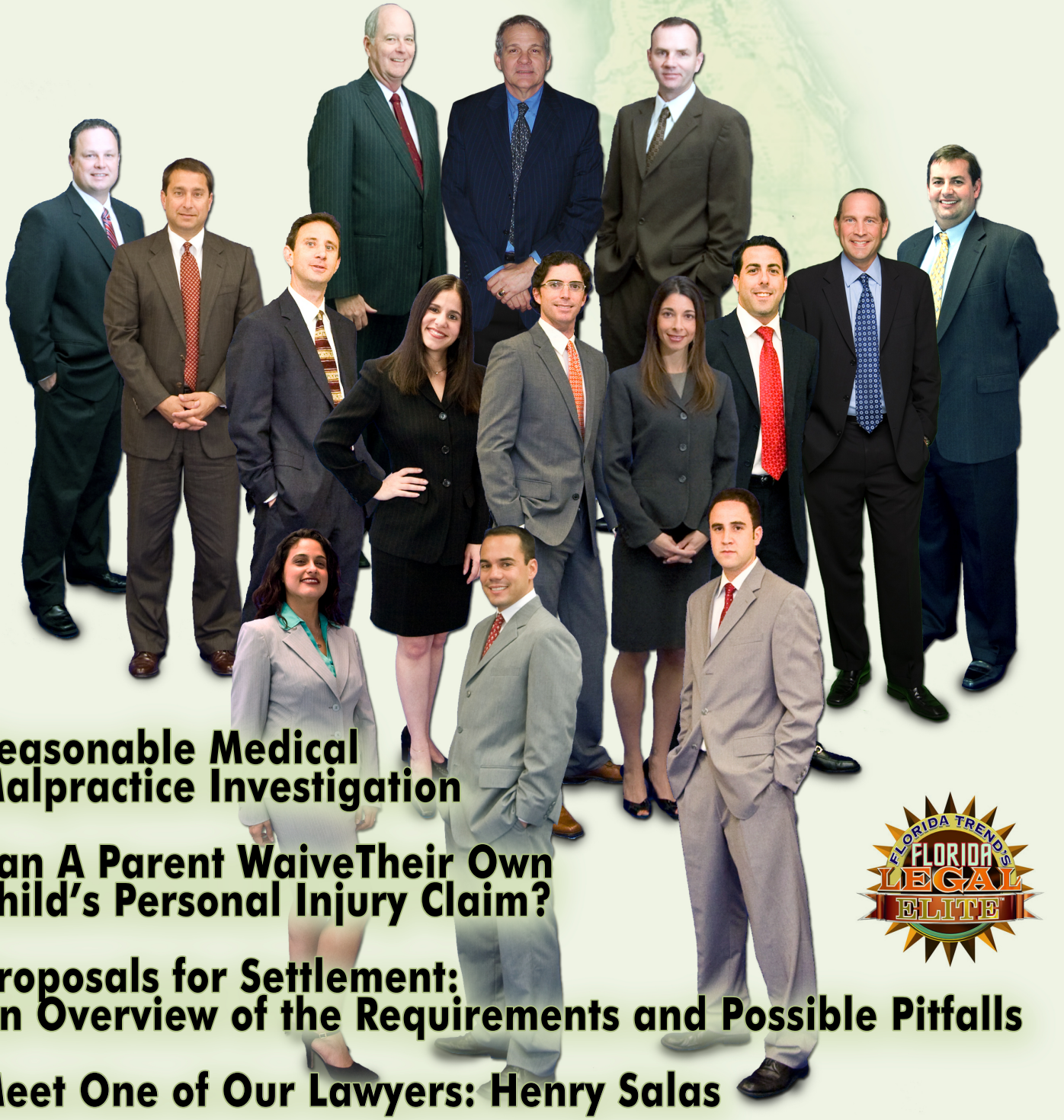

Reasonable Medical Malpractice Investigation

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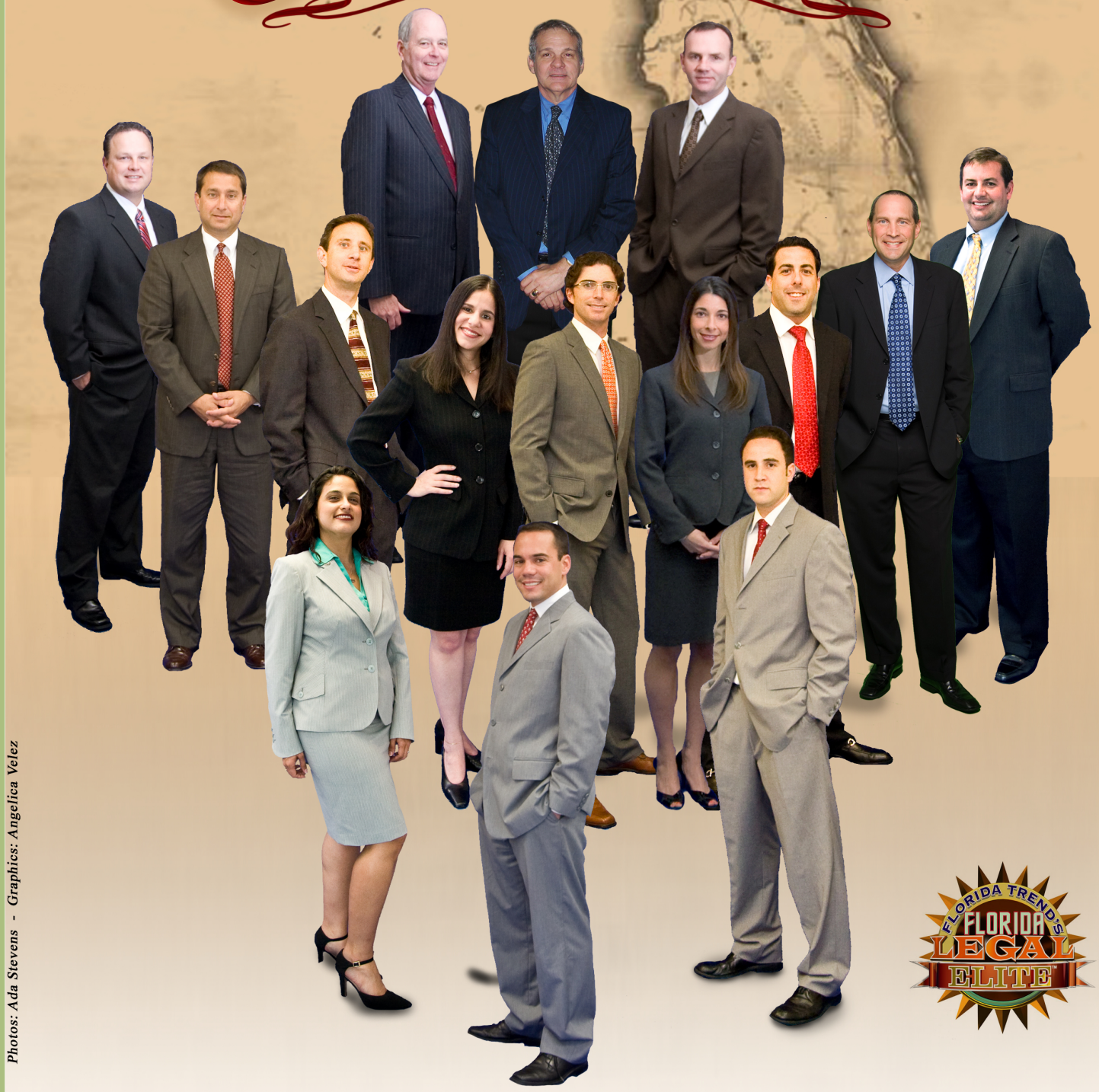

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Proposals for Settlement: An Overview of the Requirements and Possible Pitfalls

By
George R. Saoud, Jr.

Proposals for settlement[1] are authorized and controlled by both Rule 1.442 of the Florida Rules of Civil Procedure and Florida Statutes, Section 768.79. The rule takes precedence over procedural issues, while the statute controls the substantive issues. The language of the statute provides a substantive right to collect attorney's fees and costs for the other party's failure to accept reasonable settlement and terminate the litigation.[2] The Rule requires that the proposal to a defendant be served no earlier than 90 days after service of process, and a proposal to the Plaintiff be served no earlier than 90 days after the action has been commenced.[3]

As to the application of the Rule's time limits, the Fourth District Court of Appeal held that serving a proposal on the 87th day did not comply with the Rule.[4] However, the Third and Fifth Districts have disagreed with the interpretation that the rule is rigid and have held that failure to follow the rule was "merely a harmless technical violation which did not affect the rights of the parties."[5] Serving a proposal prematurely was "immaterial and certainly not prejudicial."[6]

The language of the statute requires that the proposal be in writing, state the amount of the offer, and name the offeree, and the offeror.[7] Further, the statute provides that:

> If a defendant files 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 the 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 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, and less than the amount of the plaintiff's award.
>
> If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he or she shall be entitled to reasonable attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor a demand is admissible in subsequent litigation, except for pursuing the penalties of this section.[8]

With regard to service requirements, a proposal must be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of Rule 1.442.[9] A proposal may be withdrawn in writing, provided the written withdrawal is delivered before a written acceptance is delivered.[10] Once the offer is withdrawn, it is deemed void.[11] A proposal will be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal.[12] If an offer is sent by mail, it is subject to the five day mailing rule, resulting in adding five days to the 30-day prescribed period in which the offeree may respond.[13] An oral communication will never constitute an offer, acceptance, or rejection under the rule.[14]

If a party seeks sanctions, the motion for sanction must be filed within 30 days after the entry of a judgment or the entry of a voluntary dismissal with prejudice or involuntary dismissal.[15] However, a voluntary dismissal *without* prejudice will avoid enforceability of the terms of an offer of judgment.[16]

Even if a party is entitled to an award for fees and costs under the Proposal for Settlement Statute, the court may not make such an award if it finds that the Proposal lacked good faith. For example, a nominal offer could be construed as lacking good faith.[17] A reasonable basis for a nominal offer exists only where the undisputed record

strongly indicates that the defendant had no exposure.[18] The bad faith issue can be subjective and holdings have varied from court to court. One Florida court held that there was no bad faith by plaintiff who made the proposal simply because he thought that the demanded amount would be accepted.[19]

Another integral question when deciding whether to serve a proposal for settlement is whether another statute applicable to the cause of action providing for attorneys' fees conflicts with Florida Statute, Section 768.79. The question has been raised by Florida courts regarding whether, when faced with a conflict as to attorneys' fee sanctions under other statutes, the proposal for settlement statute prevails over the more specific statute, under which the original cause of action was originally based. Florida courts have held that a specific statute which covers a specific subject should prevail over a more general statute covering the subject.[20] However, is this always the case?

In the case of Clayton v. Bryan,[21] the Defendants, a law firm that the Bryans had sued for an alleged violation under the Fair Debt Collection Practices Act ("FDCPA"), sought attorneys' fees after the Bryans' case was dismissed.[22] Previous to the defense victory, the law firm had served a proposal for settlement to the Bryans that was not accepted.[23] The circuit court declined to award the law firm attorneys' fees.[24] The appellate court affirmed the decision of the lower court reasoning that, under the FDCPA,[25] attorneys' fees may only be awarded against an unsuccessful plaintiff in circumstances where the court expressly finds that the plaintiff's case was brought in bad faith or for purposes of harassment, and the federal statute trumped the state statute because it specifically addressed the issue of attorneys' fees.[26]

However, the Fifth District Court of Appeal distinguished situations such as the one in Clayton v. Bryan when applying the proposal for settlement statute in a claim dealing with the Magnuson-Moss Warranty Act ("MMWA").[27] That court ruled that, even though the MMWA addressed prevailing party attorneys' fees, unlike the FDCPA, it did not specifically address the subject of a prevailing *defendant's* attorneys' fees, and noted that the distinction is critical when determining whether to award sanctions in favor of a successful defendant who had tendered a proposal for settlement that was rejected by the plaintiff.[28]

When addressing personal injury protection (PIP) cases, the Third District Court of Appeal held that a proposal for settlement served pursuant to Florida Statute, Section 768.79 and Fla.R.Civ.P. 1.442 is applicable to PIP cases. [29] In U.S. Security Insurance Co. v. Cahuasqui, the Third District found that the plain meaning of the proposal for settlement statute, which applied to "any civil action for damages," justified making a proposal for settlement applicable in PIP matters. The court reasoned that the proposal for settlement statute does not unconstitutionally deny an insured's access to the courts by entitling an insurer to an award of attorney fees and costs if the insured rejects an offer of judgment and the insurer prevails on the claim for PIP benefits.[30] That court also found that while Florida's "No Fault" statute provided for attorney's fees and costs as to *insureds*, it makes no equal mention of attorney's fees and costs as to insurers,[31] thereby allowing the opportunity to enforce the terms of the previously served proposal.

Conclusion:

A proposal for settlement can be a very useful tool in compelling plaintiffs to carefully consider reasonable settlement offers. However, due to the strict construction of both the statute and the rule, one must be very careful when drafting and serving the proposal for it to ultimately be enforceable. Furthermore, special care should be taken when serving a proposal in a suit involving a claim based on a statute that may already detail the rights of a prevailing defendant with regard to attorney's fees and costs. Parties should also be careful not to serve proposals in bad faith, for doing so would also render the proposal unenforceable.

1 NOTE: Proposals for settlement are also referred to as "offers of judgment."

2 See Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 222 (Fla. 2003) (award of attorney's fees is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer," thus "unnecessarily continuing the litigation.")

3 Fla.R.Civ.P. 1.442

4 Grip Dev. Inc. v. Coldwell Banker Residential Real Estate, 788 So. 2d 262 (Fla. 4th DCA 2000).

5 Kuvin v. Keller Ladders, Inc., 797 So.2d 611 (Fla. 3d DCA 2001).

6 Mills v. Martinez, 909 So. 2d 340 (Fla. 5th DCA 2005).

7 Fla. Stat. § 768.79

8 Fla. Stat.§ 768.79(1).

9 Fla.R.Civ.P. 1.442(d).

10 Fla.R.Civ.P. 1.442(e).

11 Id.

12 Fla.R.Civ.P. 1.442(f).

13 Matheos v. Friar, 701 So. 2d 1248 (Fla. 5th DCA 1997).

14 Fla.R.Civ.P. 1.442(f). NOTE: An accepted proposal without payment means the court enters judgment on the settlement. Alexander v. Meyer, 732 So. 2d 44 (Fla. 4th DCA 1999).

15 Fla.R.Civ.P. 1.525; see also MX Investments, Inc.v. Crawford, 700 So. 2d 640 (Fla. 1997) (a voluntarily or involuntary dismissal with prejudice is equivalent to a judgment.)

16 Mx Invs., Inc. v. Crawford, 700 So. 2d 640 (Fla. 1997).

17 Fla. Stat. § 768.79(7)(a).

18 Event Servs. America, Inc. v. Ragusa, 917 So. 2d 882 (Fla. 3d DCA 2005).

19 Schmidt v. Fortner, 629 So. 2d 1036 (Fla. 4th DCA 1993).

20 McKendry v. State, 641 So. 2d 45 (Fla. 1994); Legal Environmental Assistance Foundation v. Department of Environmental Protection, 702 So. 2d 1352 (Fla. 1st DCA 1997).

21 753 So. 2d 632 (Fla. 5th DCA 2000).

22 Id. at 634.

23 Id.

24 Id.

25 It should also be noted that the Court stated the proposal for settlement statute also "takes a back seat" to the Florida Consumer Collection Practices Act, Fla. Stat. § 559.552, et seq., the Florida counter part to the FDCPA. Id.

26 Id.

27 Marcy v. DaimlerChrysler Corp., 921 So. 2d 781 (Fla. 5th DCA 2006).

28 Id. at 784.

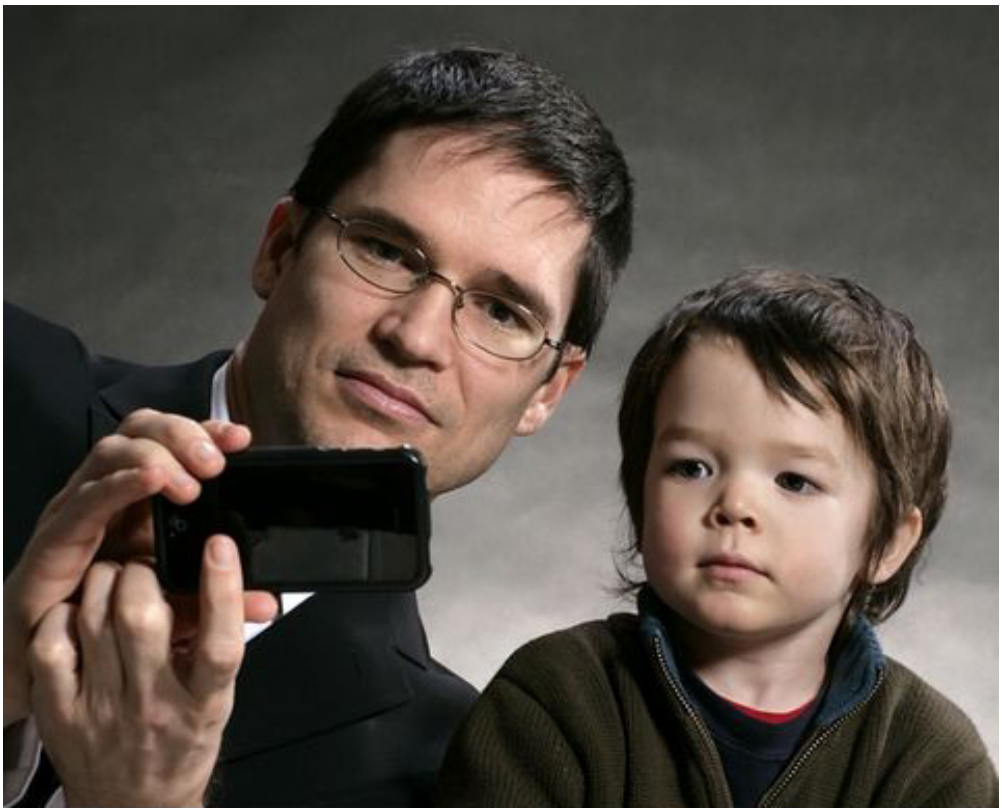
29 U.S. Sec. Ins. Co. v. Cahuasqui, 760 So. 2d 1101 (Fla. 3d DCA 2000).

30 Id. at 1107.

31 Id.

Can A Parent Waive Their Own Child's Personal Injury Claim?

By
Aram P. Megerian and Lara Dabdoub



Generally, an exculpatory clause is valid and enforceable when it clearly and unequivocally expresses a party's intention to be relieved from liability, even from their own gross negligence.[1] However, for an exculpatory clause to be effective and operate to absolve a defendant from liability arising out of his own negligent acts, the clause must clearly state that it releases a party from liability for his own negligence.[2]

> "Exculpatory clauses will release even a party's own negligence "to the extent that the intention to be released from liability was made clear and unequivocal in the contract; wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away."[3]

A parent does not generally have the authority to enter into an exculpatory agreement on behalf of their child under Florida law, with some exceptions.[4] However, recent decisions allowing the enforcement of arbitration clauses signed by parents on behalf of their children have caused a recent string of decisions allowing a parent to sign away a minor child's right to sue with a pre-injury release under all circumstances.[5] The issue is currently before the Florida Supreme Court. The Court recently heard oral arguments on June 11, 2008. The cases currently pending before the Florida Supreme Court, and the reasoning behind the various arguments, are addressed in this article.

In Fields v. Kirton[6], the Fourth District Court citing 59 Am.Jur2D Parent and Child § 40, 183 and Romish v. Albo[7], indicated that there was no basis in common law for a parent to enter into a compromise or settlement of a child's claim, or to waive substantive rights of a child without court approval. The court further stated that "if the legislature wished to grant a parent the authority to bind a minor child's estate by signing a pre-injury release, they could have said so."

Nevertheless, the cases holding that a parent does not have a right to decide what is best for their own child are not grounded on sound public policy arguments. The most often used analogy of the plaintiff's bar in backing this argument revolves around a parent's inability to resolve a minor child's claim without court approval. However, this argument does not take into account the everyday decisions that a parent makes for their child on a day-in and day-out basis. In fact, the state should have absolutely no place in telling a parent what is best for the child, unless a court of law has determined that the parent is unfit.

An analysis of this issue begins with the Fourteenth Amendment which gives parent's a fundamental right to make decisions relating to their minor children. Additionally, under Article I, Section 23 of the Florida Constitution, parents have a right to make decisions about their child's welfare without interference from third parties. However, this right has been limited by the Florida legislature to require the court's approval prior to a parent settling claims on behalf of a minor child.[8] In Von Eiff v. Azicri,[9] the court found that "neither the legislature nor the courts may properly intervene in parental decision-making." However, those against pre-injury releases have argued that a parent should not be permitted to "sign away" a child's personal injury claim.

Florida courts have recognized various exceptions in which releases signed by a parent on behalf of a minor child have been held enforceable. Typically, such exceptions are found with regards to non-commercial entities which require releases prior to participation, including not-for-profits, community-based organizations and schools. Florida courts have consistently held that a waiver executed by a parent on behalf of a minor child is supported by public policy when it relates to obtaining medical care, insurance, or participation in a school-related activity.[10]

In Gonzalez v. City of Coral Gables,[11] a minor child was injured while participating in a school program that trained students as fire rescue personnel. As a condition to participation, the parents of the participants were required to sign releases. The mother of the injured child brought suit against the defendant as a result of the injuries suffered by her daughter, and the defendant successfully moved for summary

judgment based upon the signed release. The Third District Court of Appeal concluded that the training program "fell within the category of commonplace child-oriented community or school-supported activities for which a parent or guardian may waive his or her child's litigation rights in authorizing the child's participation."[12]

The public policy arguments in favor of this general exception revolve around the need to allow these releases to make it easier for community-based entities to recruit employees and volunteers and limit the financial burden of expensive lawsuits and overbearing insurance premiums. If the courts did not uphold these exculpatory clauses, then the community would lose very important programs for the enrichment of the community as a whole.

Moreover, in Krathen v. School Board of Monroe County,[13] the court upheld a pre-injury release, signed by the mother of the minor child prior to her daughter's participation in a cheerleading program at her high school. The court found the release to be clear and unambiguous with regards to its intent to release the School Board from liability for "any injury or claim resulting from… athletic participation."[14] The court addressed whether a parent can bind their child to a waiver of liability. In addressing this issue, the court found its prior decision in Gonzalez v. City of Coral Gables to be controlling. The court addressed the issue of commercial and not-for-profit activities, specifically citing the Supreme Court's rejection of a distinction between same.[15] Further, the court found that "it is within a parent's authority to make this decision on behalf of his or her child."[16]

Based upon a recent Florida Supreme Court decision involving a parent's ability to sign away a child's right to a jury trial, a new line of cases have arisen which also allow a parent to decide what is best for their own child by signing a pre-injury exculpatory clause.[17]

The Supreme Court of Florida recently reversed the Fourth District Court of Appeal and upheld an arbitration provision in a pre-injury release finding it enforceable.[18] In the Shea case, the mother of the minor child executed a pre-injury release which contained a provision for arbitration. While on the safari, the minor child was tragically killed. His father brought suit on behalf of the minor child's estate and under the Wrongful Death Act. However, defendant, Global Travel moved to compel arbitration citing the arbitration provision in the pre-injury release. The trial court upheld the arbitration provision. However, on appeal, the Fourth District Court of Appeal reversed the trial court's ruling.

The Shea court reasoned that parental authority over decisions involving their minor children derives from the liberty interest contained in the United States and Florida Constitutions.[19] Furthermore, the legislature or the courts may properly intervene in parental decision making absent significant harm to the child threatened by or resulting from those decisions. The Court refused to make value judgments regarding the parents' decision to take a minor child on a safari, as the decision may have been made to expand the horizons of the child in a manner that only a parent should be able to make.

Recently, the Fifth District Court of Appeal has expanded the Supreme Court's reasoning in Shea finding that parent may execute a contract containing an exculpatory clause, signed by a parent on behalf of her child, in favor of a commercial enterprise, and the same would be enforceable to defeat the child's action to recover for personal injuries sustained by the child as a result of the enterprise's negligence.[20]

The Fifth District Court of Appeal in Lantz v. Iron Horse Saloon, Inc, also upheld a pre-injury release finding it valid and enforceable even though the release was in favor of a commercial enterprise. The court addressed a pre-injury release which released the premises owner "from all… causes of action, suits… damages… claims and demands whatsoever, in law or in equity, which [parent] ever had… or may have, against [owner]" which was executed by the parent allowing her son to ride a "pocket bike." The court found the release to be clear and unequivocal. However, the court never addressed the public policy concerns associated with a parent's right to sign the contract.

In the Applegate case, the parents of a minor child signed an exculpatory clause releasing the Defendant, Cable Water Ski, L.C. from liability. The Plaintiffs later brought suit against the Defendant, Cable Water Ski, L.C., for injuries which the child suffered while attending the Defendant's camp. On appeal, the Fifth District Court of Appeal addressed whether a contract containing an exculpatory clause was enforceable, signed by a parent on behalf of their minor child, ***in favor of a commercial enterprise***. Accordingly, the court acknowledged a distinction between public policy relative to commercial enterprises, who, according to the court are able to insure against the risk of loss and activities for children sponsored by not-for-profit, community-based organizations and entities. The court then ruled that the exculpatory contract was not enforceable as it was signed in favor of a commercial entity. However, the court then certified the question as one of great public importance for the Supreme Court to decide.

We believe in keeping with the precedent found in the Shea case, the Supreme Court will uphold a parent's ability to sign a pre-injury release on behalf of a minor child, thereby waiving their right to pursue a claim as a parent should have the right to determine what is best for their own child without any interference from the state.

To the extent that you have a claim involving an exculpatory clause, we would recommend addressing the following steps to determine whether the same will be enforceable under Florida law:

- Closely analyze the terms of the exculpatory clause to determine whether it is clear and unambiguous;
- Ensure that the pre-injury release was signed by a person with authority; and
- Determine the type of entity which the pre-injury release seeks to release from liability. Specifically, whether the entity is a commercial enterprise or a not-for-profit, community-based organization.

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1 Theis v. J & J Racing Promotions, 571 So.2d 92 (Fla. 2nd DCA 2005).
2 Goyings v. Jack and Ruth Eckerds Foundation, 403 So.2d 1144 (Fla. 2nd DCA 1981).
3 Lantz v. Iron Horse Saloon, Inc., 717 So.2d 590 (Fla. 5th DCA 1998).
4 In re Complaint of Royal Caribbean Cruises, 403 F.Supp.2d 1168, 1173 (S.D.Fla.2005).
5 Applegate v. Cable Water Ski, L.C. 974 So.2d 1112, 1115 (Fla. 5th DCA 2008); Lantz v. Iron Horse Saloon, Inc., 717 So.2d 590 (Fla. 5th DCA 1998).
6 961 So.2d 1127 (Fla. 4th DCA 2007).
7 291 So.2d 24, 25 (Fla. 3d DCA 1974),
8 Fla. Stat. § 744.387.
9 720 So.2d 510, 516 (Fla. 1998).
10 In re Complaint of Royal Caribbean Cruises, 403 F.Supp.2d 1168, 1173 (S.D.Fla.2005).
11 Gonzalez v. City of Coral Gables, 871 So.2d 1067 (Fla. 3d DCA 2004)
12 Id.
13 Krathen v. School Board of Monroe County, 972 So.2d 887 (Fla. 3d DCA 2007)
14 Id. at 888.
15 Global Travel Marketing, Inc. v. Shea, 908 So.2d 392 404 (Fla. 2005).
16 Krathen, at 890.
17 Globla Travel Marketing, Inc. v. Shea 908 So.2d 392 (Fla. 2005)
18 Global Travel Marketing, Inc. v. Shea, 908 So.2d 392, (Fla. 2005).
19 Id.
20 Lantz v. Iron Horse Saloon, Inc., 717 So.2d 590 (Fla. 5th DCA 1998); Applegate v. Cable Water Ski, L.C. 974 So.2d 1112, 1115 (Fla. 5th DCA 2008).

How Courts Have Differed As To What Constitutes The "Reasonable Investigation" Of A Medical Malpractice Claim During Pre-Suit Pursuant To Chapter 766, Florida Statutes

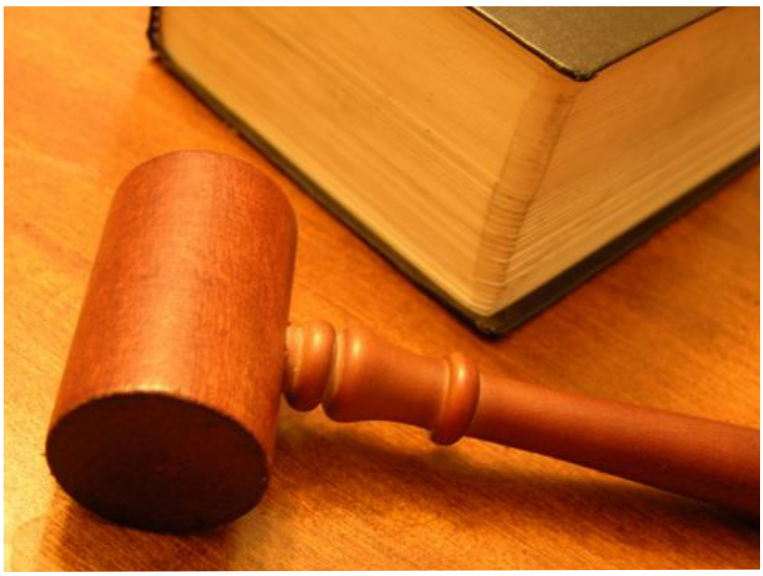
By
Charles J. Zimmerer

When initiating a claim for medical malpractice, a claimant is required to conduct an "investigation" to ascertain whether there are reasonable grounds to believe that a potential defendant was negligent in the care and treatment of the claimant.[1] An "investigation" is statutorily fulfilled when the plaintiff's attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert.[2] The plaintiff is then permitted to formally notify each prospective defendant of his or her intention to pursue the claim by certified mail.[3] The claimant must enclose a qualified medical expert's written opinion[4] and the medical records relied upon by the expert in rendering that opinion.[5] If the claimant has not complied with the foregoing requirements, then the court is mandated by statute to dismiss the claim and award attorney's fees and costs incurred to the defendant or the defendant's insurer.[6]

Courts have struggled over the past several years to determine what entails a "reasonable investigation."[7] The defense bar has challenged this by attacking the sufficiency of the notices and expert's pre-suit affidavit.

In Largie v. Gregorian, the Third DCA[8] upheld dismissal of a medical malpractice action for failure to conduct a reasonable investigation into the claim before initiating suit.[9] The plaintiff, Winston Largie, consulted with Jessica Wang, a nurse practitioner at Dr. Gregorian's medical office, regarding his blood test results.[10] Two years later, Mr. Largie was diagnosed with prostate cancer.[11] The plaintiff sued, alleging that Nurse Wang deviated from that standard of care by failing to recognize Mr. Largie's elevated prostate-specific antigen levels (PSA) suggested ordering additional testing.[12] Upholding the trial court's dismissal of the case, the appellate court held that a reasonable investigation required the plaintiff to include the physician's name, job title, or job description in the pre-suit expert's affidavit.[13]

In Bonati v. Allen, the Second DCA followed the reasoning in Largie in dismissing a case against a physician for plaintiff's failure to abide by the pre-suit rules.[14] The plaintiff, Ms. Allen, presented to Dr. Bonati, the defendant, complaining of neck and back pain.[15] Dr. Bonati recommended a cervical foramenoplasty surgery, later performed by Dr. Mork.[16] Ms. Allen later sued alleging she was subjected to unnecessary treatment.[17] Her pre-suit expert opined, "[t]he selection of this procedure was inappropriate for this patient, as…[it] did not address the patient's underlying problem…[resulting] in unnecessary trauma."[18] Dismissing the case in favor of Dr. Bonati, the appellate court reasoned that, by definition, a reasonable investigation necessitated specific mention of the physician's name in the pre-suit expert's affidavit to corroborate that an investigation was conducted that confirmed a legitimate claim against each defendant.[19]



Nonetheless, subsequent to both Largie and Bonita, the Fifth DCA decided Mirza v. Trombley.[20] In Mirza, Mrs. Trombley, presented to Florida Regional Hospital where she was treated by Dr. Ahmad and subsequently by Dr. Mirza (all named defendants).[21] The plaintiff, Mrs. Trombley's personal representative, alleged that Mrs. Trombley's premature death was the result of the improper administration of heparin therapy, causing intracranial bleeding.[22] Distinguishing itself from the courts in the Third and Second DCA opinions in Largie and Bonati, respectively, the Fifth DCA ruled in Mirza that a reasonable investigation was conducted that revealed a legitimate basis to pursue a medical malpractice claim.[23] The court opined that the expert's affidavit "adequately" described the negligent care and treatment provided to the plaintiff, despite not mentioning Dr. Mirza by name.[24] The court ruled that Dr. Mirza received constructive notice of the claim because Dr. Ahmed, a member of Dr. Mirza's practice group, was properly served with a notice of intent.[25] This was sufficient to satisfy both the reasonable investigation and notice requirements.[26]

More recently, the Third DCA reconsidered its ruling in Largie in the case of Michael v. Medical Staffing.[2728] In Michael, Claude Michael was administered nitroglycerin by a nurse without supervision by a doctor.[29] The plaintiff discovered the name of the nurse and her staffing company after the pre-suit and statute of limitations expired.[30] Retreating from its position in Largie, the court reasoned that "[a] medical expert affidavit must sufficiently demonstrate that a reasonable investigation into the claim was undertaken…[as] the appearance of name job title, or job description is simply one way of showing that a reasonable investigation was done."[31] Specifically following the reasoning in Mirza, the court opined that a reasonable investigation merely required corroboration of the claim in general and its legitimacy (not of a defendant's involvement in the case), the alternative unduly burdening a Florida citizen's constitutionally guaranteed

right to access to the courts.[32]

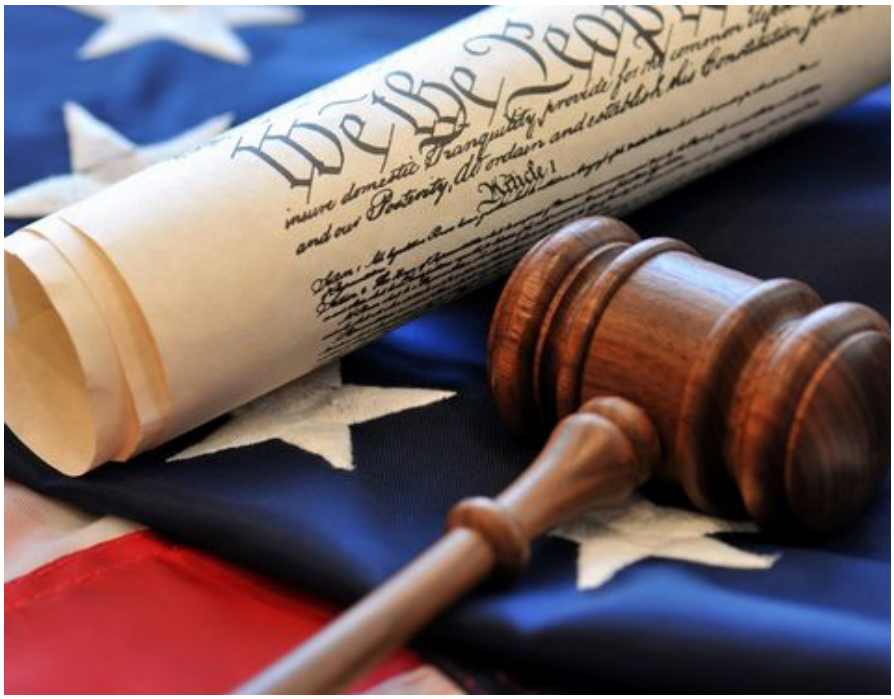
The decisions discussed above discourage motions to dismiss for failing to conduct a reasonable investigation when: (1) the expert's affidavit is written broadly enough to include the conduct of the potential defendant, and (2) the notice of intent to litigate is delivered to a person or entity that shares a "legal relationship" with the potential defendant.[33] In light of the rulings in Mirza and Michael, it seems even more imperative to consider the legal relationships of those who receive a notice of intent. A diligent defense would necessarily include an understanding of these issues and a conscious effort to aggressively test the sufficiency of claimants' notices and expert affidavits.

1 Fla. Stat. § 766.203(2) (2007). The seminal Florida Supreme Court case in this regard is Kukral v. Mekras, 679 So.2d 278 (Fla. 1996) (holding that compliance with the pre-suit statutes is not jurisdictional, so long as accomplished within the applicable statute of limitations period).
2 Fla. Stat. § 766.202(5) (2007).
3 Fla. Stat. § 766.106(2)(a) (2007).
4 Fla. Stat. § 766.203(2) (2007).
5 Fla. Stat. § 766.106(2)(a) (2007). A potential defendant is required to engage in his or her own pre-suit investigation. See Fla. Stat. § 766.106(3) (2007) and see also Fla. Stat. § 766.203(3) (2007). Moreover, the parties are statutorily authorized to engage in informal discovery. See Fla. Stat. § 766.203 (2007) through and including Fla. Stat. § 766.206 (2007).
6 Fla. Stat. § 766.206(2) (2007).
7 Fla. Stat. § 766.104(1) (2007).
8 (District Court of Appeal).
9 913 So.2d 635, 642 (Fla. 3rd DCA 2005).
10 Id. Although the legal relationship was not fully discussed, Nurse Wang apparently practiced with Dr. Gregorian's group. Id.
11 Id. at 638.
12 Id. at 642.
13 Id. at 639. Plaintiff's expert opined, "[f] ailure to do a follow up to an elevated PSA is a deviation from the standard of care." Id. During pre-suit, Nurse Wang was able to respond to plaintiff's notice of intent to litigate by providing a verified written expert opinion in support of her response denying the claim. Id. at 639, 641-42. In the dissenting opinion, Judge Cortinas opined that the existing legal precedent in the Third DCA, namely Maldonado v. EMSA, dictated that the affidavit and the notice of intent to litigate should be "taken together." Id. at 643. See also Maldonado, 645 So.2d 86, 89 (Fla. 3rd DCA 1994) (holding that the notice and expert affidavit are to be read together in determining the sufficiency of a pre-suit investigation). Based upon Maldonado, Judge Cortinas believed that the expert affidavit in Largie, indicating that there was a deviation from the standard of care in the case, and notice delivered to nurse Wang was sufficient to constitute a reasonable investigation. Id. at 644-45.
14 911 So.2d 285, 288 (Fla. 3rd DCA 2005).
15 Id. at 286.
16 Id. As in Largie, Dr. Bonati and Dr. Mork were members of the same practice group. Id.
17 Id.
18 Id. at 287.
19 Id. at 286.
20 Mirza v. Trobley, 946 So.2d 1096, 1098 (Fla. 5th DCA 2006).
21 Id.
22 Id.
23 Id. The court placed emphasis on the fact that Dr. Ahmed or ECHIS (his practice group) did not disclose that Dr. Mirza took over for Dr. Ahmed as the attending physician during the pre-suit discovery process. Id. Judge Thompson alluded in his dissenting opinion that claimant merely requested that the defendants name all parties who were responsible for the occurrence or complications, to which the corporate representative for ECHIS responded, "Dr. Ahmed is unaware of anyone who was responsible, in whole or in part, for the occurrence or any complications suffered by [Mrs. Trombley]…" Id. at 1101-02.
24 Id. at 1099 and 1101-02. In his dissent, Judge Thompson indicated that the plaintiff's expert affidavit did not mention Dr. Mirza by name and, in fact, wholly failed to show how Dr. Mirza would be negligent under the facts of the case. Id. at 1102.
25 Id. at 1098-99. Plaintiff's notice of intent to litigate was addressed as follows: "Dr. Ahmad, ECHIS (his practice group), and "all other prospective defendants who bear a legal relationship…" Id. at 1098.
26 Id.
27 947 So.2d 614 (Fla. 3rd DCA 2007).
28 Judge Cortinas authored the dissenting opinion in Largie. See Footnote 13, supra.
29 947 So.2d at 616.
30 Id.
31 Id. at 620.
32 Id. at 621 (citing Kukral, See Footnote 1, supra).
33 The appellate court in Michael, remanded the case to the trial court to evaluate the potential legal relationship between the defendant hospital and the nursing staffing company before ruling on whether there was adequate notice. Id. at 621.

Fraud on the Courts: When it Rises to the Level of Egregiousness Necessary to Warrant Dismissal

by
Jennifer Reynolds

Trial courts have inherent authority to dismiss lawsuits when one of the parties perpetrates fraud on the court or refuses to comply with court orders.[1] However, in application, this is a remedy that is rarely used, "only upon the most blatant showing of fraud, pretense, collusion, or other similar wrong doing."[2] While there is no simple test to establish when courts will dismiss a case for fraud, relevant case law helps provide a guide as to the factors that are influential in that decision.



Relevant Case Law

Material misrepresentations made in a sworn capacity regarding issues such as the Plaintiff's identity or medical background have been held to be enough to warrant dismissal based on fraud. In Cox v. Burke,[3] one of the leading fraud cases in the Fifth District, the Plaintiff sued two attorneys who

had allegedly failed to properly litigate a medical malpractice suit which they had been retained to bring on her behalf. In their defense, the defendants asserted that the Plaintiff had committed fraud on the court by making material misrepresentations about her identity, damage, and prior injuries. The trial court agreed that the Plaintiff had committed fraud on the court, and thus dismissed the Plaintiff's Complaint based on these material misrepresentations. On remand, the Fifth District Court of Appeals echoed the Federal Court's ruling in Aoude v. Mobil Oil Corp.,[4] that in order to dismiss a case, the requisite level of fraud must be such that "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."[5] Further, the Appellate Court stated that when considering whether a case should be dismissed for fraud, the Court should carefully consider both the public policy of maintaining the integrity of the judicial system as well as the competing policy of maintaining a judicial system which adjudicates cases based on their merits, and use dismissal as a remedy only in the most extreme situations since it is the most severe of all possible sanctions.[6] Ultimately, the court held that when considering all of these factors, the fact that the Plaintiff provided several false and misleading answers in sworn discovery regarding material issues such as prior medical history and identity was enough to constitute fraud such that the trial court did not abuse its discretion in dismissing the claim.

Furthermore, in Distefano v. State Farm Mut. Auto. Ins. Co.,[7] the Plaintiff in a personal injury suit repeatedly failed to disclose injuries she had sustained both prior and subsequent to the accident in question, as well as the related accidents. As such, the trial court found that the Plaintiff "knowingly concealed the existence of these prior knee injuries with the intent to perpetuate a fraud upon the Court," and held that based on the number of times the Plaintiff had attempted to conceal the information, the case should properly be dismissed for fraud.[8] On remand, the First District Court of Appeals affirmed the trial court's decisions, and held that the Ms. Distefano's actions were so egregious and willful as to constitute fraud on the Court.

Likewise in Savino v. Florida Drive In Theatre Mgmt., Inc.,[9] the Plaintiff in a premises liability case claimed brain damage and lost wages due to injuries sustained on the Defendant's premises. In support of the damages element of his claim, the Plaintiff provided false testimony during depositions and false responses to sworn discovery regarding his level of education, claiming he had received a Masters degree in Engineering when no such degree had ever been conferred. Additionally, further evidence suggested that he had also lied to doctors about his previous level of intelligence, pre-injury. The trial court accordingly dismissed the Plaintiff's complaint with prejudice, based on fraud on the court. On remand, the Fourth District Court of Appeals held that the appellant's "repeated fabrications undermined the integrity of his entire action," and upheld the trial court's dismissal.[10]

However, lies made under oath have to be proved fallacious and willful to a reasonable degree of certainty before the courts will base dismissal upon them. In Young v. Curgil,[11] the Plaintiffs, who were roommates, were both involved in the same automobile accident and sustained no injuries observable at the time of the accident. With the exception of one emergency room visit, neither woman received medical treatment until they saw the same doctor 21 days after the accident, and the treatment each woman eventually received was almost exactly the same as the treatment received by the other. The trial court made the above findings of fact and correspondingly dismissed the Plaintiffs' case based on suspected collusion and fraud. On remand, the Third District Court of Appeals held that while the trial court's findings "constitute a basis from which it may be inferred that the plaintiffs' claimed injuries herein were feigned and their subsequently incurred medical expenses fraudulent, collusive and unnecessary…it is by no means an overwhelming or compelling inference", and thus overturned the lower court's dismissal.[12]

Likewise, in Gehrmann v. City of Orlando,[13] the Plaintiff in a personal injury case did not disclose the presence of previous medical treatment or injuries that were minor and did not require follow-up care. Despite the Plaintiff's arguments that his failure to disclose was unintentional, the trial court dismissed the case based on fraud on the court. On remand, however, the Fifth District Court of Appeals held that there was no evidence that the Plaintiff gave false responses "with the intent to defraud", and thus reversed the lower court's ruling.[14] Additionally, the appellate court held that mere allegations of false statements or inconsistencies that have not been proven to be intentional should be handled through cross-examination or impeachment, not dismissal.[15]

Moreover, in Ruiz v. City of Orlando,[16] the Plaintiff in a personal injury action failed to disclose previous injuries which had occurred over 35 years before the incident in question. The trial court accordingly dismissed the action based on fraud. On remand, the appellate court reversed this dismissal. The court distinguished the case from Cox by stating that in Cox, the fraudulent information was pervasive, repeated, under oath, and went to the core of the Plaintiff's identity. In contrast, the court stated that in the current matter there was no evidence to suggest the Plaintiff made a knowing misrepresentation regarding her previous injuries which occurred so long ago. The Court held that "except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements, are well managed through the use of impeachment and traditional discovery sanctions."[17]

Finally, in Amato v. Intindola,[18] the Fourth District Court of Appeals held that possible misrepresentations made during a deposition were not enough to dismiss the Plaintiff's case for fraud. Here, the appellant brought a personal injury claim against the appellees for injuries sustained in an automobile collision; these injuries included, among other things, a recurrence of previous back problems as well as knee injuries. Thereafter, in his deposition, the appellant stated that at that time he was unable to go up or down stairs without pain, lift excessive weight, get under the car or change a tire, and would further be unable to perform home maintenance activities. A surveillance videotape obtained by the appellee two days prior to the appellant's deposition show him in his garage, doing work around the house, climbing a ladder to the roof and lifting an electric motor to the roof. A second surveillance video obtained six months earlier showed the appellant working on his truck, moving partially underneath his car, and then changing his tire. As such, the appellee filed a Motion to Dismiss the Plaintiff's Complaint based on fraud upon the court and the trial court granted the Motion to Dismiss. The Fourth District Court of Appeals held that while the videotape showed the appellant performing some tasks mentioned in his deposition, it does not and cannot show whether he performed those tasks with or without pain. Additionally, what the Plaintiff stated he was unable to do at the time of the

deposition did not necessarily bear directly on what he was or was not able to do six months earlier. As such, the court stated that the evidence did not demonstrate "a knowing and unconscionable scheme to interfere with the judicial system's ability to impartially adjudicate a proceeding" to a reasonable degree of certainity, and reversed the lower court's ruling.[19]

Conclusion

In conclusion, the various appellate courts' willingness to dismiss cases based on fraud on the court is very fact-intensive; however, some general rules can be extrapolated from the case law. When a party makes false statements under oath regarding material issues, such as his or her identity, medical history, or other relevant issues that deal with the heart of the litigation, such as in sworn discovery responses or during deposition, the court will generally hold that such statements constitute fraud such that dismissal is warranted. However, mere false statements are generally not enough; there must additionally be some indicia of willfulness or collusion – such as repeated misstatements about facts that are material and highly detrimental to the Plaintiff, or misrepresentations or omissions that are highly unlikely to be caused by poor memory or mistake. Since dismissal is the "death knell of the lawsuit,"[20] it is not favored, and if the Court believes that the false statements could be attributed to poor memory or mistake, it will most likely hold that the statements do not rise to the level of egregiousness needed to dismiss the case.

1 Kornblum v. Schneider, 609 So.2d 138 (Fla. 4th DCA 1992).
2 Granados v. Zehr, 979 So.2d 1155 (Fla. 5th DCA 2008).
3 706 So.2d 43 (Fla. 5th DCA 1998).
4 892 F.2d 1115 (1st Cir. 1989).
5 Cox at 46 (quoting Aoude at 1118).
6 Cox at 46 (citing Bird v. Hardrives of Delray, Inc., 644 So.2d 89 (Fla. 4th DCA 1994)).
7 846 So.2d 572 (Fla. 1st DCA 2003).
8 Id. at 576.
9 697 So.2d 1011 (Fla. 4th DCA 1997).
10 Id. at 1012.
11 358 So.2d 58 (Fla. 3d DCA 1978).
12 Id. at 59-60.
13 962 So.2d 1059 (Fla. 5th DCA 2007).
14 Id. at 1062.
15 Id.
16 859 So.2d 574 (Fla. 5th DCA 2003).
17 Id. at 576.
18 854 So.2d 812 (Fla. 4th DCA 2003).
19 Id. at 815.
20 Cox at 46 (quoting Aoude at 1118).

Contribution Of Joint Tortfeasors And Its Potential Effects Upon Case Resolution:

Just When You Think You're Out, They Pull You Back In

By
Michael W. Shiver, Jr.

A key concern in the resolution of any claim, whether prior or subsequent to the initiation of actual litigation, is whether the potential resolution proposed will bring final closure to the particular dispute. In a typical case, this may be easily accomplished by requiring a claimant to execute a general release of his or her claims, as consideration for the payment of consideration in the form of monetary remuneration and/or affirmative relief. In conjunction with unambiguous settlement agreements and stipulations of dismissal with prejudice, when applicable, the execution of a properly-worded release – which should include, of course, exculpatory language for the benefit of not only the defendant, but also the defendant's agents, representatives, principals and insurers – will generally accomplish the critical goal of bringing final resolution and repose to a given dispute. Both the claimant/plaintiff and the respondent/defendant may move forward with their lives and businesses, secure in the knowledge that the dispute, its concurrent disruptions and the fear of possible negative financial consequences, is no more.

This ultimate goal is significantly affected, however, by the threat of claims sounding in contribution, indemnity and equitable subrogation. When representing a defendant in any action with multiple potential tortfeasors, or in any action in which there *may have been* multiple tortfeasors, it is vital to consider the potential for such claims. No counsel wants to see their client released by a plaintiff – who then continues to seek recovery against joint tortfeasors – only to have their client brought back into the case by way of a third-party claim sounding in indemnity or contribution.

Such an outcome essentially eliminates the advantages of early settlement or other resolution, insomuch as costs of defense and attorneys' fees continue to accrue and the danger of a finding of liability remains.

There are a number of potential ways to avoid this outcome. For example, a plaintiff may agree, as a condition of any settlement, to include a "hold harmless" provision in the release at issue. Such provisions contractually require a plaintiff to provide a defense to the released party, up to the amount of the settlement monies tendered. It should go without saying that such provisions are not common, and that plaintiffs are far from enthusiastic over the prospect of binding themselves to such terms.

Another possibility is to secure releases of potential third-party claims or cross-claims from the joint tortfeasors, as a condition for the payment of settlement monies. It may be emphasized to these parties that, by contributing to settlement of a portion of a larger claim, your client is reducing the potential exposure for all of the joint tortfeasors. Nevertheless, the securing of such releases requires additional negotiation and, to a large extent, depends upon the logic and reasonableness of third parties. It would be vastly preferable if there were a clear legal framework governing how a settlement by a single party affected multi-party litigation and potential apportionment of liability among joint tortfeasors.

The Florida legislature has addressed this problem, in the form of the Uniform Contribution Among Tortfeasors Act.[1] While the initial subsections of this statute were motivated by a desire to allow for contribution between joint tortfeasors,[2] the provision of §768.31(5) provides a protection of singular strength to parties who have determined that early resolution of multi-party litigation is the proper course. Specifically, this provision states:

> RELEASE OR COVENANT NOT TO SUE. – When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) it does not discharge any of the other tortfeasors …, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and (b) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

The effects of this statutory language upon the conundrum described above should be immediately apparent. The Act provides that, in litigation in which a plaintiff is seeking recovery against multiple tortfeasors for a single injury, one party may extricate itself from said litigation via settlement, and may remain confident in the fact that they will not be brought before a court for the same incident by any of their joint tortfeasors in any action sounding in contribution.[3]

The Act does not, however, affect any rights arising from concepts of indemnity.[4] Unlike contribution, indemnity is recognized as a valid cause of action at common law among joint tortfeasors, and may further arise from contractual commitments among joint tortfeasors.[5] It should come as no surprise that claims for contractual indemnity will arise from agreements between joint tortfeasors, and any analysis of potential exposure to same should flow from the actual terms of the agreement. As for common law indemnity, it should be noted that a party seeking the same must overcome a difficult burden: (1) the party seeking indemnification must show that they are faultless and their liability must be solely vicarious for the wrongdoing of another; and (2) in order for the faultless party to shift liability to the other, the party against whom indemnification is sought must be at fault.[6]

Equitable subrogation presents another situation in which the UACTA protections for parties who make an early exit from a dispute do not apply. Rather than providing a mechanism for bringing a party who settles back *into* litigation, however, subrogation allows a party who has (1) resolved a matter prior to judgment, (2) has paid 100% of both its and the joint tortfeasor(s)' obligations and (3) has secured a release or covenant to the benefit of joint tortfeasors, to seek compensation from said joint tortfeasors.[7] Accordingly, this concept does not present the danger that §§(5) of UACTA seeks to avoid – i.e. a negotiated resolution that does not bring final closure to litigation for the party who settles.

In the final analysis, the UACTA should give considerable peace of mind to any party seeking to resolve its involvement in litigation featuring multiple tortfeasors and identical injuries. While third party actions sounding in indemnification or subrogation may still prevent full and final closure to a proceeding, a defendant who chooses to resolve a claim may avoid the greater danger of a quick third party claim of contribution from a joint tortfeasor, which prevents an effective exit from the dispute. So long as the resolution in question is made in good faith,[8] joint tortfeasors will be limited to the comparatively difficult doctrines of indemnity and subrogation – which should be relatively easy to identify at an early stage in any matter – to state their claims. Even if liability is apportioned to the tortfeasor who settled the matter prior to disposition, and even if it be 100% liability in the eyes of the judge or jury, the UCATA provides enviable protection against concurrent or subsequent suit by a joint tortfeasor.

In short, by understanding and employing the protections of the UCATA, a defendant may be confident that, once they have gotten out, no one will be pulling them back in.

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1 Florida Statute §768.31 (the "UCATA").

2 See id. at §§(2)(a)-(b)("…when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them … [b] …[n]o tortfeasor is compelled to make contribution beyond her or his own pro rata share of the entire liability.") This language overruled prior common law rules denying an action in contribution between joint tortfeasors for a single harm. See e.g. St. Paul Fire & Marine Ins. Co. v. Shure, 647 So.2d 877 (Fla. 4th DCA 1994).

3 See id. It should be further noted that actions for intentional torts, breach or trust or breach of fiduciary duty are specifically excluded from the UCATA. See id. at §§(g); see also Bel-Bel Intern. Corp. v. Barnett Bank of South Florida, N.A., 158 B.R. 252 (S.D. Fla. 1993). Accordingly, an intentional tortfeasor, or a tortfeasor who is found to have breached a position of trust or fiduciary relationship cannot seek contribution from a joint tortfeasor. See id.; see also Robert L. Turchin, Inc. v. Cather Industries, Inc., 487 So.2d 850 (Fla. 4th DCA 1986).

4 See Fla. Stat. §768.31(2)(f). Very generally stated, a claim for indemnity essentially alleges that the party raising the claim should be held entirely harmless for the alleged wrongful act, with 100% of its judgment obligation, if any, paid by a third party/joint tortfeasor. See e.g. Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999).

5 The use of the term "indemnity" in the UCATA has been interpreted to include the closely related concept of subrogation. See McKenzie Tank Lines, Inc. v. Empire Gas Corp., 538 So.2d 482 (Fla. 1st DCA 1989). As with indemnification, subrogation may be either contractual or equitable. *See id*.

6 See generally Radio Station WQBA, 731 So.2d 638.

7 See id.

8 See Boca Raton Transp., Inc. v. Zaldivar, 648 So.2d 812 (Fla. 4th DCA 1995); see also International Action Sports, Inc. v. Sabellico, 573 So.2d 928 (Fla. 3d DCA 1991).

The Effect of a Lis Pendens

By Robert Malani

During recent months, the number of foreclosure actions in the United States has increased dramatically. According to the May 2008 RealtyTrac U.S. Foreclosure Market Report, there were 261,255 foreclosure actions filed in the United States in May of 2008.[1] This figure represents an approximate fifty percent increase in foreclosure actions in the United States since May of 2007.[2]

In Florida, there were 37,364 properties subject to foreclosure actions in May of 2008.[3] This equates to roughly one out of every 228 Florida households being subject to a foreclosure action, making Florida the state with the fourth highest foreclosure rate in the United States during this period.[4] Predictably, the substantial number of foreclosure actions has led to an increase in litigation in which various professionals, including closing agents, have been sued for malpractice relative to their roles in these real estate transactions.

As a frequent result of a foreclosure action, a lis pendens is filed on the property which is the subject of foreclosure. A lis pendens provides notice to future purchasers or encumbrancers of the property, that a lawsuit has been filed which could affect the title of the subject property.[5] A lis pendens serves the purposes of protecting purchasers from unanticipated disputes, and of protecting those claiming an interest in the property from intervening liens.[6]

In Florida, there were 25,736 lis pendenses filed in May of 2008.[7] In order to file a lis pendens, a party must file a notice of commencement with the circuit court in the county where the subject property is located.[8] This notice must contain the names of the subject parties, the time of institution of the action, the name of the court in which it is pending, a description of the property involved or to be affected, and a statement of the relief sought as to the property.[9]

The Florida Statutes permit a real estate broker to file a lis pendens on a property when the filing is expressly permitted by the contractual agreement of the parties involved in the subject real estate transaction.[10] Additionally, a real estate broker may be permitted to file a notice of lis pendens on a property, as a method to collect the sales commission owed to the broker.[11]

The filing of record of a lis pendens has important legal implications for all parties involved in the subject real estate transaction, including closing agents. Such filing of a lis pendens impacts the enforcement of unrecorded mortgages and other liens on the subject property.[12] For example, if a notice of lis pendens is filed in relation to a particular property, then a party is generally barred from enforcing an unrecorded mortgage or lien on the property.[13]

Relative to claims for malpractice, closing agents may face liability in the event that they fail to discover a lis pendens on a property, and allow a real estate transaction to close without notifying the subject parties of the existing lis pendens. In an effort to avoid potential liability resulting from failing to discover the existence of a lis pendens, closing agents may be well advised to perform due diligence, such as obtaining a title search, a tax search, and checking the payoff balances of any existing mortgages on a property, before permitting a transaction to close. Today, with many property records available online, and the potential liability from failing to discover an existing lis pendens, it may make sense for closing agents to determine if a property is in foreclosure, and to find out if a lis pendens has been filed on the property, prior to closing.

In taking such preventative measures early on, closing agents may be able to avoid liability from claims of malpractice developing from separate foreclosure lawsuits, which are being filed at increasing rates in the State of Florida.

1 RealthyTrac Staff, "Foreclosure Activity Increases 7 Percent in May" (May 2008), http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4728&accnt=64847.

2 Id.

3 Id.

4 Id.

5 See Von Mitschke-Collande v. Kramer, 869 So.2d 1246, 1249 (Fla. 3d DCA 2004).

6 See Von Mitschke-Collande, 869 So.2d at 1249.

7 See RealthyTrac Staff, "Foreclosure Activity Increases 7 Percent in May" (May 2008).

8 Fla. Stat. §48.23 (1)(a).

9 Id.

10 Fla. Stat. §475.42(1)(j).

11 See Alamagan Corp. v. Daniels Group, Inc., 809 So.2d 22, 28 (Fla. 3d DCA 2002). In Alamagan, a real estate broker was awarded a final judgment for her commission against the purchaser of the subject property; however, the purchaser refused to pay the broker's commission. The court determined that the broker's filing of a lis pendens was the only step that the broker could take to preserve her rights.

12 Fla. Stat. §48.23 (1)(b).

13 Id. Except for the interest of persons in possession or easements of use, the filing for record of such notice of lis pendens shall constitute a bar to the enforcement against the property of unrecorded mortgages and other liens, unless the holder of any such unrecorded interest or liens shall intervene in such proceedings within 20 days after the filing and recording of said notice of lis pendens.

COLE, SCOTT & KISSANE, P.A.

CONSTRUCTION DIVISION

Cole, Scott & Kissane, P.A., now boasts over 130 attorneys, with 9 offices throughout the State of Florida. The firm has experienced and respected attorneys in many areas of law. To continue meeting its clients' needs, Cole, Scott & Kissane has invested critical resources, and devoted valuable time, in becoming one of the State leaders in construction defects as well as architects and engineers litigation.

Cole, Scott & Kissane is proud to announce the arrival of attorney Henry E. Marinello and paralegal Bob Knapp to its Miami office. Henry and Bob join Cole, Scott & Kissane's construction law division with a combined 40 years of experience. In addition to their vast knowledge, Henry and Bob have unparalleled reputations managing, litigating, and trying a variety of construction and construction-related matters.

Henry, who represents clients statewide, was born in 1956 in Havana, Cuba and speaks English and Spanish: both with native fluency. Since 1961, Henry has been a resident of Florida. After earning his Bachelor of Science at Brigham Young University in 1986, with a major in Microbiology and a minor in Chemistry, he earned his Juris Doctor in 1989: also from Brigham Young University. Henry was admitted to the Florida Bar in 1990 and has since practiced before Florida State trial and appellate courts, the United States District Court for the Southern District of Florida, and the United States Eleventh Circuit Court of Appeal.

Over the past 18 years, Henry has developed a legal expertise in many areas of the construction industry, including, but not limited to, construction defects litigation, architects and engineers litigation, and transactional work. He has been retained by clients as a legal consultant at the pre-bid phase of competitive bidding on public construction and road projects, and has litigated in administrative hearings relative to bid protests on public projects. Henry has also litigated construction and performance bonds and Chapter 713 mechanic's liens. In addition to his construction litigation background, Henry is proficient in drafting Prospectuses, Declaration of Condominiums, and Articles of Incorporation for Condominium Associations for the development of condominium projects. He has also handled land use matters, which include master plan development, zoning, use-variances, and lobbying before government agencies for the development of residential and commercial real estate.

Henry's strengths in construction litigation stem from his extensive knowledge of construction industry practices, which includes building plans drafting and review, permit processing, and standard construction practices as outlined in the Florida Building Code. He has extensive knowledge of the scope of work required of general contractors, architects and engineers, and specialty subcontractors involved in large and small commercial and residential construction projects, and in the different American Institute of Architects (AIA) standard forms of agreement.

Henry's undergraduate major in microbiology has given him a distinct edge in litigating mold contamination and mold remediation cases to the extent that these areas apply to the defense of mold claims. This expertise has made the difference in his analysis and successful resolution of mold-related cases when opposing experts have attempted to place fault upon the design and installation of HVAC systems, water intrusion cases, and negligence during mold remediation.

Bob, who is among other things, a certified State of Florida Private Investigator, hails from New York State – where he owned a general contracting firm and was a licensed general contractor from 1980 until 1987. Additionally, Bob is a former police officer, who in response to the September 11th attacks, joined the Department of Homeland Security as a Federal Air Marshall. In this capacity, Bob conducted Federal law enforcement duties, including, but not limited to, national security defense, implementation of anti-terrorism measures relative to airline safety, passenger safety, and airport security.

Bob has managed complex construction matters through all phases of litigation. He has also prepared dozens of cases for trial and attended these trials as the paralegal in charge of all pertinent materials. Together with Henry, Bob has specifically developed a paralegal expertise in many areas of the construction industry, including, but not limited to, construction defects litigation, architects and engineers litigation, and transactional work.

Similar to Henry, Bob's strengths in construction litigation stem from his vast knowledge and experience in various areas of the construction industry. Bob has worked with general contractors, architects and engineers, and specialty subcontractors involved in large and small commercial and residential construction projects, and in the different American Institute of Architects (AIA) standard forms of agreement. Bob is expected to be licensed in the State of Florida by the end of the Fall as a general contractor.

NO LONGER IN DENIAL

A Brief Discussion on the Florida Supreme Court's Expansion of Coverage for Construction Defects to CGL Policies

By: David Salazar, Esq. & Valerie Jackson, Esq.

Florida's Supreme Court recently handed down two rulings which, in the context of construction defects litigation, will have widespread impact on both insurers and policyholders alike. U.S. Fire Ins. Co. v. J.S.U.B., 32 Fla. L. Weekly S811a (2007); and Auto-Owners Ins. Co. v. Pozzi Window Co., 2008 WL 2369244. These two cases were decided in conjunction with one another in December 2007. In U.S. Fire, the Court held that a subcontractor's faulty workmanship is covered under the completed operations coverage of a standard post-1986 Commercial General Liability ("post-1986 CGL") policy issued to a general contractor, if it finds that: 1) the insured neither intended, nor expected, the damage; and 2) the subcontractor's faulty work caused damage to completed, otherwise non-defective work. While the Court decided that – in the circumstances discussed above – there was coverage, in Auto-Owners, it held that the cost to repair or replace that work was covered only if the windows at issue were purchased by the homeowner and not defective before being installed. Any other damages – whether consequential or incidental – will be based upon the terms of the insurance policy at issue.

The U.S. Fire holding was, in large part, based upon the interpretation of the term "occurrence," which the Court found includes a subcontractor's defective work that results in damage to the completed project. It also bears mentioning that the Court made a clean break with the tort/contract distinction with regard to determining whether faulty workmanship is covered by the insuring agreement. The Court found this distinction illusory and unsupported by the language of the post-1986 CGL policy that was at issue. Accordingly, a lawsuit that seeks damages in breach of contract is not automatically excluded by a commercial general liability policy. The determination will instead depend upon whether the breach of contract was intentional or accidental. As a practical matter, the Court noted that insurers are free to add a breach of contract exclusion to the policy which will be upheld by Florida courts.

The Auto-Owners case turned upon the interpretation of the phrase "property damage," which the Court found did not include the cost to repair or replace the damaged work where the property was not defective before installation and the homeowner made the purchase; otherwise, because the subcontractor's defective work was not itself physical injury to tangible property, there was no property damage. With these two holdings, the Court provided both insurers and policyholders clearer instruction on: 1) the coverage that flows from post-1986 CGL policies; 2) the extent to which there is coverage; and 3) the language necessary to exclude, and/or include, certain coverage.

As for the impact, practical application, and policy considerations that resulted from the Florida Supreme Court's holdings in U.S. Fire and Auto-Owners, we have provided a brief analysis below. To that end, the simplest way for insurers to avoid these problems is to implement the proper contractual modifications that were discussed in U.S. Fire and Auto-Owners. This is particularly so because completed operations policies contain the subcontractor exception to the "Your Work" exclusion and do not contain a breach of contract exclusion, which is, in fact, what allowed the U.S. Fire Court, and many other courts throughout the country, to determine that the faulty work of subcontractors is covered under these policies. Carriers can, thus, either remove the subcontractor exception to the "Your Work" exclusion and/or add a breach of contract exclusion from such completed operations polices.

Two other strategies that carriers may employ include:

- Having the subcontractor's carrier name the general contractor as "an additional insured" under the subcontractor's policy, as well as requiring the subcontractor to carry primary and non-contributory insurance, as this would transfer the risk back to the subcontractors. Without this language, courts will look to the "other insurance" clauses in the respective policies to determine the priority of coverage.
- If not, carriers may also consider filing a declaratory action for the courts to make an early determination to resolve coverage issues.

With this in mind, carriers and policyholders can hopefully better manage matters related to post-1986 CGL policies. In closing, it is important to note that U.S. Fire and Auto-Owners have not been published in the official West reporter, as the Florida Supreme Court has not submitted its final drafts of these opinions. Given the amount of time that has elapsed since the Court ruled on these matters, it seems likely that changes to these opinions, if any, will be substantively minimal. Should the Court modify these opinions in any manner that would affect our analysis, we will supplement this article accordingly.

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Miami Office

Managed his own construction and commercial law firm for 13 years; Extensive experience in construction defects and architects and engineers litigation; Legal consultant in competitive bidding on public construction and road projects; Litigates administrative matters in bid protests on public matters; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Drafts Prospectuses, Declaration of Condominiums, and Articles of Incorporation for Condominium Associations; Litigates and consults on AIA contracts; B.S. degree in microbiology; Distinct knowledge of mold contamination and mold remediation

Bob Knapp
Miami Office

Over 20 years of paralegal experience, specializing in construction defects and architects and engineers litigation; Has managed hundreds of construction matters; Sits for his General Contractor's License in July 2008

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Extensive experience in construction defects and architects and engineers litigation; Tried over 100 cases to verdict; Voted one of Florida's Top Trial Attorneys by Florida Trend Magazine 2008

Valerie Jackson
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Extensive experience in construction defects and architects and engineers litigation, with a specialty in coverage issues; Co-Author of the brief submitted to the Florida Supreme Court in U.S. Fire v. J.S.U.P – a landmark opinion in the area of construction defects litigation as it relates to insurance coverage

David Salazar
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Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Litigates and consults on AIA contracts; Co-Chair of the Florida Defense Lawyers Association – Young Lawyers Division; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2008

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Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Litigates and consults on AIA contracts; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2008

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Extensive experience in construction defects as well as architects and engineers litigation; A.V. rated; Member Tampa Inn of Court; Tried over 100 cases to verdict

Lee Smith
Tampa office

Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Litigates and consults on AIA contracts; Served as a Project Manager on high-end commercial construction projects as well as large industrial projects prior to practicing law

Daniel Shapiro
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Extensive experience in construction defects and architects and engineers litigation; Owned pool and patio contracting firm prior to practicing law; A.V. rated; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2008

James Sparkman
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Extensive experience in construction defects and architects and engineers litigation; Managed his own A.V. rated law firm for eleven (11) years prior to joining the firm; A.V. rated; Has tried cases in Dade, Broward, Palm Beach and Monroe County; Board Certified Trial Attorney

CONSTRUCTION DIVISION BIOGRAPHIES

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Extensive experience in construction defects and architects and engineers litigation; Member of the Dade County Bar Association and serves as a pro bono attorney through the guardian ad litem program; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2008

Stafford Shealy
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Extensive experience in construction defects and architects and engineers litigation; Licensed Engineer (worked for Kimley-Horn & Associates before joining CSK); Has participated in structural inspections of high-end single family homes, designed and permitted site plan and storm water systems, and conducted underwater structural inspection of the Port of Palm Beach Florida

Robert Swift
Orlando office

Extensive experience in construction defects and architects and engineers litigation; Twenty (20) years of experience in the property-casualty industry where he managed a litigation department of over one hundred employees

Barry Postman
West Palm Beach office

Extensive experience in construction defects and architects and engineers litigation; A.V. rated; Board Certified Trial Attorney; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2006, 2007, and 2008

Daniel Kissane
Jacksonville office

Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Litigates and consults on AIA contracts; Prime Member of the Association of Defense Trial Attorneys; Author of various articles and guides on civil litigation; Voted one of Florida's Top Civil and Commercial Litigators by Florida Trend Magazine 2006

Trevor Hawes
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Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens and the underlying contracts thereto; Litigates and consults on AIA contracts; Defends design builders in E & O matters

Dave Cornell
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Extensive experience in construction defects and architects and engineers litigation; Litigates construction and performance bonds and Chapter 713 mechanic's liens; Litigates and consults on AIA contracts

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Cole Scott & Kissane

success stories

Automobile Negligence #1

Brad Martin and Vince Gannuscio of the Tampa office recently obtained a judgment in a case where the plaintiff pedestrian had alleged serious injuries after purportedly being run over by an automobile. We were able to establish, by way of a summary judgment motion, that the plaintiff, who was high on drugs at the time of the accident, intentionally ran into our client's vehicle.

Automobile Negligence #2

Michael Brand and Yvonne Pandolfo recently tried to verdict a Key West case involving an automobile vs. pedestrian accident in which our 81 year old driver struck a pedestrian in the crosswalk, fracturing her ankle. The only independent eyewitness testified that our client ran the red light and that the plaintiff had proceeded into the crosswalk with a green light. As a result, plaintiff needed to be casted twice, followed by a walking boot and then a brace. In addition, she was wheelchair-bound for approximately three months. Plaintiffs' counsel called a vocational economist who opined that there were approximately $50,000 in past and future economic losses. After the close of evidence, the jury returned a verdict apportioning liability at 50% on our client and 50% on the plaintiff. In addition, the jury awarded only $25,000 for past pain and suffering to the plaintiff, awarding no economic damages, no future pain and suffering (despite finding that she had suffered a permanent injury) and no award for the consortium plaintiff, her husband of over 40 years. The total award, after reduction, was $12,500.

Professional Negligence

Edward Polk handled a legal malpractice case in which we obtained a summary final judgment in favor of the defendant attorney. The plaintiff had retained the attorney to represent her in the closing of her first home purchase. The seller provided a false affidavit stating that there were no liens and no unauthorized work had been done on the property, when in fact she had made several unpermitted additions that also encroached on neighboring land, and the county had sent her letters demanding that the additions be removed. There were, however, no liens of record at the time of the sale. During the plaintiff's deposition we were able to get her to admit that she received certain notices on a particular date, that she understood immediately that she had a problem and she was upset with the attorney for not finding the issue (even though there was no public record of it) and did not believe him when he responded to her inquiry by telling her to not worry about the county's notices (he denies such comments). On that basis we were able to obtain summary final judgment on a statute of limitation argument. The title closing agent, the realtors and the surveyor all paid settlements to get out of the case.

Medical Malpractice

Michael Brand and Jami Gursky obtained a complete defense verdict in a medical malpractice case involving allegations that a psychiatrist prematurely discharged the patient to an inappropriate facility. On the date of the patient's discharge, he was noted to be psychotic, responding to internal stimuli, and hallucinating. Two days after his discharge, he was struck by a car. Less than

two hours later, he was again struck by a car, causing him to sustain catastrophic injuries that left him in a permanent vegetative state. The medical expenses alone (past and future) were in excess in $10,000,000. After less than 1 1/2 hours of deliberation, the jury returned a complete defense verdict.

Medical Malpractice #2

Aram Megerian and Paula Parisi had a medical malpractice case defending the registered nurse first assistant to a gastric bypass procedure where the surgeon incorrectly reattached the anatomy that caused the Plaintiff to vomit repeatedly and could not pass anything through her bowels. A subsequent surgeon identified the mistake 8 months after the original surgery. Plaintiff did not file the notice of claim against our client until the statute of limitations had expired but argued he did not discover the registered first assistant until the end of presuit, at which time, the statute of limitations began to run. I filed a Motion for Summary Judgment based upon the expiration of the statute of limitations and argued that the statute begins to run at the time of the incident or when Plaintiff should have known of the injury not upon the discovery of potential defendants. The trial court agreed and granted our motion. The hospital settled at mediation and the remaining defendant-surgeon had no insurance. Our client carried a million dollar policy.

Premises Liability #1

Gene Kissane and Daniel Klein successfully tendered the defense and indemnity to a Co-Defendant in a premises liability case where the Plaintiff was seriously injured while at the insured's commercial warehouse complex, after being hit by, and trapped underneath a forklift. Gene and Daniel argued that the Co-Defendant be required to provide a defense for, and fully indemnify their client, pursuant to an indemnification provision contained in the landlord/tenant Lease Agreement.

Premises Liability #2

In a restaurant slip and fall case, which arrived at CS&K with a default already entered against the defendant. Edward Polk first successfully had the default vacated, then obtained the plaintiff's deposition in which she admitted that she did not know why she fell other than noticing a sticky substance on her shoe after she got up from the floor. The court reluctantly denied summary judgment because of the sticky substance, but expressed doubt that any viable claim could really be asserted at trial. One week later, the plaintiff voluntarily dismissed with prejudice in exchange for our not pursuing taxable costs or attorney fees under our proposal for settlement.

Premises Liability #3

In another slip and fall in a restaurant that was already in default when CS&K received the case. It had been in default for about six months before the plaintiff attempted to get a hearing date for damages or contact the adjuster for settlement (apparently hoping to hold on to the default). Edward Polk got the default vacated on the basis of invalid service of process, then the plaintiff was diagnosed with cancer and died within two weeks. Her deposition had never been taken and there were no eyewitnesses. The case was therefore over with no payment and very little defense expense. For once, a plaintiff's attorney who had tried to play a cute game saw his case evaporate. Had he not held the default in his pocket for so long, we would likely have taken the plaintiff's deposition in the normal course of discovery and her testimony would have been preserved.

Premises Liability #4

Aram Megerian and Lee Smith prevailed on a Motion for Summary Judgment in a premises liability action, wherein the Plaintiff suffered debilitating injuries while felling a tree on the landowner's property. Aram and Lee successfully argued that the Plaintiff was an independent contractor, and the landowner owed no duty to him under well-settled principles of the master-servant doctrine.

Civil RICO

Edward Polk had a recent success in obtaining a dismissal of a federal RICO case. CS&K represented a law firm in which one of its former partners was engaged in a real estate business with the plaintiff. The plaintiff had alleged that the former partner and the law firm (which handled real estate closings for the business) had tricked the plaintiff into executing unfavorable partnership agreements and conspired to deprive the plaintiff of moneys owed under the real estate transactions. The case was dismissed because the plaintiff's allegations did not amount to a violation of the federal RICO statute, and because his unsubstantiated RICO claims were barred by applicable statutes of limitation.

Appellate - Professional Negligence

On June 11, 2008, the Third District Court of Appeal released an opinion, reducing a $5.4 million dollar tort-based, jury verdict in favor of the plaintiffs, an aircraft charter company and its agent subsidiary fixed base operator (FBO), to $60,500 in contract damages against the defendant, an aircraft manufacturer. This third-party action had been brought by the plaintiffs after their last-remaining jet was repossessed while it was in the aircraft manufacturer's possession for recurring fuel leak repairs. Plaintiffs' allegations were that the aircraft manufacturer was professionally negligent and dilatory in repairing the jet, which had precipitated Plaintiffs' financiers repossessing the jet and the resulting failure of their businesses.

Cole, Scott & Kissane attorney, John S. Penton, Jr., drafted the post-trial motions in the case and drafted the appellate briefs with Miami-Dade County Court Judge Lisa S. Walsh, prior to her recent appointment to the bench. John argued in post-trial motions and in the appeal that the agent subsidiary FBO had signed repair contracts with the aircraft manufacturer that were fully binding upon the principal aircraft charter company. At trial, the plaintiffs had been permitted to claim that the principal aircraft charter company had no contract and could therefore pursue damages under various tort theories even though the plaintiffs' pleadings stated that the subsidiary FBO was at all times material acting as its authorized agent.

The 3d DCA found that the contract was binding upon both plaintiffs, and the contract contained a limitation of liability provision that effectively reduced any damages to $60,500. The economic loss rule precluded any tort recovery. The court specifically followed the Florida Supreme Court's decision in Moransais v. Heathman, holding that professional negligence actions are only an exception to the economic loss rule when they are brought against individual professionals.

Plaintiffs had elected not to bring any actions against the aircraft manufacturer's individual engineers. Since the aircraft manufacturer's taxable costs exceed the plaintiffs' contract damages, the net result will be a complete victory for the client.

Appellate – Civil Procedure

Luisa Linares recently received a PCA (per curiam affirmed) from the Second District Court of Appeal. In this case, the trial court dismissed the case with prejudice because the plaintiff failed to file an amended complaint by the due date the court had ordered. The trial court also denied the motion for rehearing. The plaintiff filed his complaint one-day before his statute of limitations was going to run out against the defendant.

Appellate – Civil Procedure

Scott A. Cole successfully convinced the Florida's Fourth District Court of Appeals to reverse a jury verdict and enter judgment in favor of the defendant. The Fourth DCA held that fitness clubs have no duty to render CPR to their patrons or to maintain AEDs (defibrillators) on their premises. The Fourth DCA further held that fitness club fulfill their duty of reasonable care in rendering aid to their patrons by summoning paramedics within a reasonable time.

Wrongful Death

Dan Shapiro and Lee Smith obtained a dismissal in a catastrophic wrongful death case, wherein a maintenance worker, an employee of a property management company, was murdered by a tenant at an apartment complex. Representing the apartment complex, Dan and Lee filed a Motion for Summary Judgment, arguing that the complex was either the decedent's statutory employer under the worker's compensation statute, in which case worker's compensation would provide the sole remedy, or the decedent was an independent contractor, such that the complex owed him no duty. Plaintiff's counsel, who initially made a $5,000,000.00 settlement demand, dropped the suit on the eve of the hearing on the summary judgment motion.

News and Notes

With Support from CSK Partner and the Community, Cadette Girl Scout Troops Design a Sensory Garden and Earn Their Silver Award

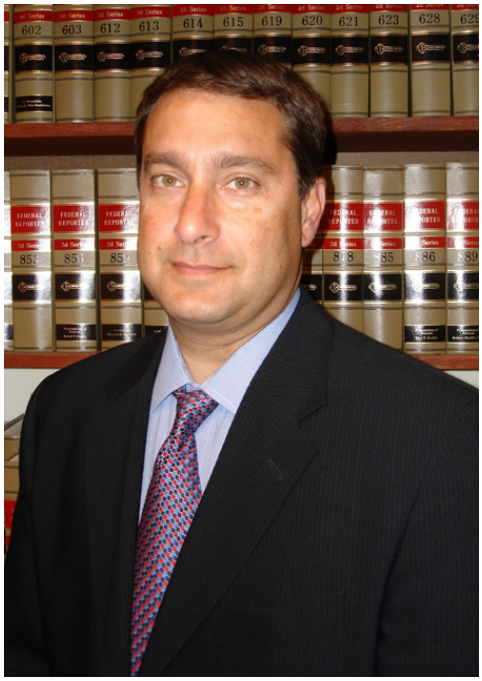
Girl Scout Troop 270 and 626 from the Homestead/Redland area achieved the second highest award for Cadette Girl Scouts, the prestigious Silver Award, by designing and building a Sensory Garden at Island Dolphin Care in Key Largo, Florida.

Island Dolphin Care provides therapy to children with special needs. The dolphins provide these children a type of companionship and feeling of inner peace that cannot be provided in the form of traditional therapy.

Now these children have a sensory garden as a result of the Girl Scouts efforts. Each Girl Scout was responsible in designing a section of the sensory garden. Additionally, they raised funds and did the physical work of planting and landscaping the sensory garden.

One of Cole, Scott, & Kissane's paralegals, Shelly Cartaya, is the mother of one the girls in Troop 270. After presenting the idea to Cole, Scott & Kissane partner, Richard P. Cole, he did not hesitate to provide a generous donation to the project.

Meet One of Our Lawyers



Henry Salas

Henry Salas is a partner in the firm's South Miami office. He practices in all phases of civil litigation with a focus on Federal and State Civil Litigation with an emphasis on the defense of products liability, admiralty and commercial litigation actions.

Mr. Salas attended the University of Miami where he received a Bachelor's degree in Business Administration in 1986. Mr. Salas then earned his Juris Doctor degree from Nova Southeastern University School of Law, graduating within the top 20% of his class.

After graduation from Law School, Mr. Salas focused his practice on Federal and State Civil Litigation where he was responsible for all pretrial and trial activities. He worked under the guidance and supervision of former State and Federal Judge and U.S. Attorney for the Southern District of Florida, Thomas E. Scott where he did extensive trial work in defense of white-collar criminal actions in Federal Court throughout Florida. Before joining Cole, Scott & Kissane, P.A., Mr. Salas was a founding partner of a firm in Miami, Florida where he focused on admiralty defense and products liability actions. Mr. Salas' firm received a Martindale-Hubbell AV rating which is the highest peer rating attainable.

In the last 12 months, Mr. Salas has enjoyed several courtroom victories. Some of those successes include: a complete defense jury verdict in a month long wrongful death products liability trial; a complete defense verdict in an alleged sudden acceleration products liability trial against elderly plaintiffs; a complete defense verdict in a Federal products liability alleged ladder defect action; a complete defense jury verdict in a slip and fall admiralty action against a sympathetic elderly passenger; a settlement after three weeks of trial for an amount significantly less than Plaintiff's demand on a commercial litigation case with punitive damages in play; and most recently a successful argument for summary judgment on the eve of trial wherein the jury returned a verdict of over $24.2 million against the lone defendant.

Mr. Salas has served as an adjunct professor at Nova Southeastern University School of Law teaching pre-trial and trial skills to second year law students and he currently teaches products liability at Florida International University School of Law.

Mr. Salas is admitted to practice in all State and Federal Courts in Florida. He is also an active member of the International Association of Defense Counsel, American Bar Association, the Miami-Dade County Bar Association, Cuban American Bar Association and the Florida International University Athletic Association Board.

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Cole, Scott & Kissane thanks the more than 600 attendees at the Claims Management Seminar for making it a success

Cole, Scott & Kissane thanks the Sponsors who made of the Claims Management Seminar a great success

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