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IN THIS ISSUE...

Event Spotlight 2
FJA Legislative Dinner Meeting and Joint Happy Hour

President’s Message 3

Choice Of Law And Insurance Bad Faith: Don’t Assume That You Don’t Have An Insurance Bad Faith Case 4

Cases of the Quarter 8

Calendar of Events 12

Loyal Advocate Sponsors 13

The Irony of Florida PIP Law and Fraud Protection! 16

Understaffing in Florida Nursing Homes: The Case for Punitive Damages 18


Welcome New Members 21

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High Roller Night presented by:

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2ND ANNUAL

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6:00 p.m. - 10:00 p.m. | The National Croquet Center
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Saturday | May 30th | 2015

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Event Spotlight

Feb 26th FJA Legislative Dinner Meeting

March 5th Joint Happy Hour with N. County Section of the Palm Beach Bar

Dan Zuniga, Grey Tesh, Greg Huber, and Dean Xenick

Farrah F. Mullen, Trey Lytal, and Greg Huber

Judge Alvarez, Grey Tesh, Jeff Liggio, and Robert Bertisch

Amy Triggs and Jim Lucas with Legal Graphicworks

Dean Xenick, Sia Baker-Barnes, and Jordan Hammer

Greg Zele and Rosemarie Guerini

Mark Greenberg and Greg Yaffa

Ryan Kranz, Keaton Robinson, and Salt Weekly Black Diamond Funding, and Stan Klett

Scott Smith and Vinny Cuomo with Grand Bank & Trust
President’s Message

I want to thank all of you for your support and entrusting me to guide this organization through 2015. This truly is one of the best - if not the best - voluntary bar associations in the state. During the upcoming year I will use this space to share some things I have learned over the past 18 years of practice that may be helpful to you in your practice as we all try to better ourselves for the benefit of our clients.

Every day insurance companies work harder to deny compensation to our clients. As jurors continue to grow increasingly skeptical of personal injury lawsuits largely thanks to the successful efforts of the tort reform lobby we need to seek new approaches to the way we present cases to the jury. It is imperative that we take steps to expose the lies of the insurance companies to our jurors and the public at large if we hope to be able to continue to practice personal injury law as we know it.

For example, how frustrating is it that the insurance companies essentially defend every minimal impact rear-end auto case the exact same way and yet the jury has no idea? The jury has no idea at all that the defense attorney is simply regurgitating a canned argument from a canned defense that he/she has used dozens - if not hundreds - of times in trials in the past. In order to stay a step ahead of the insurance companies we need to continually seek new approaches to the way we practice. It is time to stop using the same old tactics and methods we have always used just because that’s the way we were taught to do things as a young associate. Those methods do not cut it in 2015.

To that end, every lawyer reading this message needs to read Polarizing the Case by Rick Friedman and Reptile by Don Keenan and David Ball. Neither of these books is particularly new but if you haven’t read these books or haven’t read them lately, stop what you are doing right now (ok stop after you finish reading this) and go online and buy a copy of each today. Disclaimer: I am not a paid spokesperson for either of these books but after having read both of them in the past 2 years I have literally altered the way I approach my cases. I find myself constantly referring to them in my practice for the advice they contain from case selection and evaluation through trial. These books are filled with practical advice that you can put to work in your practice today.

In Polarizing the Case Friedman turns much of the conventional thinking of how we approach cases on its head. Rather than trying to find and build upon similarities with the defense or concessions made by the defense, Friedman advocates going in the exact opposite direction. Friedman believes that when you allow the defense to seize the middle ground you are making it harder for the jury to find in favor of your client. According to Friedman, at trial you need to offer the jury a clear choice between diametrically opposed positions so the jury is forced to choose one or the other and cannot take the intellectually lazy way out by simply agreeing with a convoluted defense that just seeks to poke holes in the Plaintiff’s case.

Reptile is a more challenging book to read than Polarizing the Case largely because it is packed with so much more detailed information. Like Polarizing the Case, Reptile advocates a completely different approach to evaluating cases and preparing them for settlement or trial. Reptile teaches how to appeal to jurors most basic instincts in order to motivate them to find in favor of your client.

The two books are complementary as Friedman is a clear disciple of the Reptile method, however, I suggest starting with Polarizing the Case because it is much easier read (think Reptile light). At this point if anyone is still reading this I will give the first three people that email me a twenty-five dollar gift card to the merchant of their choice. Both of these books have spawned other books as well as sequels etc. In fact, Keenan and Ball give a whole series of seminars centered around the Reptile method. As you seek new ways to stay ahead of the games played by the defense, I highly recommend that you make these books the first step in changing the way you approach cases in order to maximize the recovery of your clients.

After you are done reading these books it is going to be time for a drink or two! Fortunately we have a lot of exciting events coming up in the near future most notably our Joint Happy Hour with the Palm Beach County Chapter of the Florida Association of Female Lawyers at Roxy’s Rooftop Bar on May 7, Attorney and Paralegal “Got Civility” Breakfast on May 15 and, of course, our Second Annual High Roller Casino Night at the National Croquet Center in West Palm Beach on May 30. Hopefully you will join us for both of these exciting events over the next couple of months.

As always I am here to serve you. Hopefully you will join us for these exciting events over the next couple of months.
How many of you have ever had a case in which liability is clear, your client is catastrophically injured, and the tortfeasor has enough coverage to fully compensate your client? Yeah. Neither have I. What if there was a way to change that? Would you be interested in finding out about it? If the answer is “yes”, please read on.

Please note that this article focuses on third party (common law) bad faith claims.

In the United States, insurance bad faith laws range from the non-existent to the consumer-friendly. That’s why the choice of law issue is so important.

In law school, all of us were taught the doctrine of lex loci contractus, i.e., courts will apply the law of the state where the insurance policy was executed. With respect to issues of interpretation of an insurance policy, lex loci contractus almost always applies. However, with respect to issues of performance vel non pursuant to an insurance policy, do not assume that lex loci contractus applies. Making that assumption could be very costly to your client, and could expose you to a legal malpractice claim.

The bottom line is that when it comes to matters of performance vel non of an insurance contract, we have successfully argued for application of the insurance bad faith law of the state in which performance under the insurance policy was owed. As you might expect, this can be a real game-changer for your client. Literally, your client can go from having no prospect or a small prospect of an extracontractual recovery to having the real ability to recover the full measure of his or her damages, depending upon the facts of the case.

Let me give you a real-life example of how this works. Our firm handled a case where a Pennsylvania insurer issued and delivered to its insured’s, who were Pennsylvania citizens, a liability insurance policy with $25,000.00 limits. The insured’s loaned their insured vehicle to their grandson, another Pennsylvania citizen, who drove the car to Tallahassee, Florida to begin his freshman year in college. Very early in his freshman year, the grandson was at a fraternity party when someone fired a gun. Fearing for his life, he got in the car and tried to flee the scene. Tragically, he hit and killed a 19 year-old pedestrian, who was also a college student.

The personal representative of the estate of the deceased teenager hired an attorney in Tallahassee and an attorney in...

continued on next page
West Palm Beach. The attorneys sent a written demand for the policy limits to the insurer in Pennsylvania. When the insurer did not settle the case, suit was filed in Tallahassee. The parties later entered a consent judgment to end the wrongful death litigation, and our firm represented the Pennsylvania insured’s in their insurance bad faith lawsuit against the insurer.

The insurer filed a preemptive declaratory judgment action in the Northern District of Florida in Tallahassee. We counterclaimed for insurance bad faith. As the trial of the insurance bad faith case approached, the insurer filed a motion to determine applicable law. The insurer, relying upon lex loci contractus, argued that Pennsylvania insurance bad faith law should apply to the bad faith litigation. Having researched Pennsylvania insurance bad faith law, which was essentially an oxymoron at that time, we knew that the case would be very difficult, if not impossible, to win if we could not convince the court to apply Florida insurance bad faith law.

The leading case on the issue was a Florida Supreme Court case: Government Employees Ins. Co. v. Grounds, 332 So. 2d 13 (Fla. 1976). In Grounds, the automobile liability insurance contract was entered into in Mississippi. However, The Florida Supreme Court affirmed the applicability of Florida law to the bad faith action because “the obligation of the contract breached by [the carrier] was the obligation to provide [the insured] with a good faith defense to the action. ... the place of performance was Florida, where the cause of action against the [insured] was maintained and was defended by [the carrier].” Id. at 14 – 15.

As luck would have it, our trial Judge in Berry, The Honorable William Stafford, had been the plaintiff’s counsel in Grounds. In our case, Judge Stafford, relying on Grounds, ruled that the substantive law of an insurance bad faith action is determined by the state where performance under the insurance contract was actually to be “performed”. In our case, that state was Florida, since that is where the wrongful death action was brought, maintained, and defended, and where negotiation for settlement between the adjuster and plaintiffs’ counsel commenced. We won the trial. See Teachers Insurance Co. v. Berry, 901 F. Supp. 322 (N.D. Fla. 1995). Berry was the first federal court case in Florida to apply the holding of Grounds. Previously, in Adams v. Fidelity & Cas. Co., 920 F.2d 897 (11th Cir. 1991), the Eleventh Circuit Court of Appeal, in dicta, had cited Grounds for the distinction between interpretation and performance, but had not squarely applied its holding.

It is important to note that one of the facts relied upon by Judge Stafford was the fact that insurance bad faith in Florida is considered an action ex contractu rather than tort. In some states, an insurance bad faith action is considered a tort, not an action ex contractu. Obviously, you will need to consult the insurance bad faith law you are trying to apply to see whether it is considered to be ex contractu or a tort in that state.

Thereafter, In Shin Crest PTE, Ltd. v. AIU Ins. Co., 2008 WL 728388 (M.D. Fla. 2009), in a suit against a Taiwanese manufacturer of a defective chair sold by Walmart, Judge Susan Bucklew reached the same result. She applied Florida insurance bad faith law, despite the fact that the parties had agreed in the insurance contract that Taiwanese law governed breach of contract and declaratory judgment claims on the contract. Relying on Grounds, supra, the Court concluded that “matters concerning performance are governed by the law of the place of performance.” Id. at *2. Florida was the place of performance “because that is where the lawsuits against [the insured’s] were maintained and defended by [the carrier].” Id.

We have been able to use the aforementioned law in several cases to persuade courts to apply Florida bad faith law to actions in which the insurance policy was executed outside the state of Florida by an insured who was not a Florida citizen. As Florida has recognized common law bad faith since 1938, and as Florida insurance bad faith law is quite developed, winning application of Florida insurance bad faith law is typically a real game-changer in the case.

If you can get Florida insurance bad faith law to apply to your case AND you can obtain jurisdiction over a foreign insurer in Florida, then you and your client are in the best possible position. Florida law has also spoken on the jurisdiction issue.

The case of Virginia Farm Bureau Mutual Ins. Co. v. Dunford, 877 So. 2d 22 (Fla. 4th DCA 2004), also handled by our firm, is instructive. Dunford involved an automobile accident that occurred in Florida, but with a tortfeasor who resided in Virginia and was insured under a liability policy issued in Virginia. The court did not address whether Virginia or Florida bad faith law would apply to the contractual duties, but did make findings regarding where the insurance contract was performed for purposes of Florida’s long arm jurisdiction. Interpreting Florida Statutes section 48.193(1)(g), which provides for jurisdiction where a defendant is alleged to have breached a contract by failing to perform acts in Florida

continued on next page
that were required under the contract to have been performed in Florida, the court held that defending the insured in a Florida court was “a contractual obligation to be performed in Florida.” Id. at 23 – 24. Similarly, the court found that the minimum contacts necessary to support jurisdiction based on the fact that the insurer conducted its duty to defend the insured in a Florida court.

Notably, the court focused on the “activity of the insurer” and distinguished two cases relied upon by the carrier because neither case “involved excess judgments resulting from bad faith occurring in the state in which the suit against the insured was filed.” Id. at fn. 1. In this regard, the Court suggested again in its conclusion that the insurer’s breach of any duty under the contract occurred in the state where the claimant resided: “[The carrier] should have foreseen that a breach of that duty in Florida, resulting in a Florida judgment, would subject it to being hailed into a Florida court.” Id. at 25.

Recently, in Betzoldt v. Auto Club Group Ins. Co., 124 So.2d 402 (Fla. 2d DCA 2013), the court agreed with Dunford, and held that a Michigan insurer, which issued insurance policies only to Michigan drivers, was subject to personal jurisdiction in Florida in a third-party bad faith case arising out of the Michigan insured’s car crash in Florida. The court stated: “Dunford is nearly on all fours with this case”. Id. at 405. Betzoldt is a lengthy, scholarly opinion which is recommended reading for anyone who is interested in this interesting jurisdictional issue.

CONCLUSION

So, if you are interested in trying to maximize your client’s recovery, as your ethical obligations require, how might you try to use the information contained in this article?

First, recognize that lex loci contractus should not control the issue of which state’s insurance bad faith law should apply. The law of the state where performance is owed under the contract should apply.

Second, research the insurance bad faith law (if any) of each and every state which reasonably could be argued to be the place of performance. As the issue of performance really depends upon the state in which the case can be settled, your ethical obligation to the client may even require you to consider co-counseling with or referring the matter to a competent lawyer in a state with consumer-friendly insurance bad faith law. Doing so might benefit the client, and receiving 25% or 50% of the fee in a case with an extracontractual recovery might be more beneficial to you than receiving 100% of the fee in a case with inadequate insurance coverage.

Third, consider the issue of obtaining personal jurisdiction over the insurer. While you could obtain personal jurisdiction over an insurer in a state other than the state whose insurance bad faith law you wish to apply, doing so can lead to a judge applying the law of another state. I have never been comfortable with that. Ceteris paribus, I would rather obtain personal jurisdiction over the insurer in the state of the insurance bad faith law I am seeking to have applied.

If you do not consider these issues, you may fail to obtain the best possible recovery for your client. If that happens, and the client discovers your failure to consider these issues, you may have exposure to your client for legal malpractice. Nobody wants to see that happen.

If you have any questions or comments about anything in this article, please feel free to contact me.

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Supreme Court Finally Releases New Products Liability Instructions

In re Standard Jury Instructions in Civil Cases, 40 Fla. Law Weekly F163 (Fla. March 26, 2015):

In a process that began in the committee years ago, and first made its appearance in front of the Florida Supreme Court in 2012, the Florida Supreme Court approved amendments and provided an overhaul to the standard jury instructions applicable to products liability cases. Notably, as the court described in the decision, the strict liability instruction found in 403.7 as amended, now provides separate definitions for manufacturing defect and design defect, but retains both the consumer expectations and the risk/benefit tests used to define a design defect.

The court also noted how there is no instruction found in 403.11 (Inference of Product Defect or Negligence) based on government rules, that there is no “preliminary issue” instruction (403.13), and there is no actual instruction on crash-worthiness and enhanced injury claims (as previously set forth in 403.16).

The new instructions point out that in general, plaintiffs are not required to prove privity to establish strict liability, but if it is necessary to submit a factual issue on privity to the jury, it gets submitted in the style of a “preliminary charge” on the status of duty.

Also, in the comments to instruction 403.7 on strict liability, the committee explicitly states that in some instances it may be appropriate to instruct the jury that in addition to the designer and manufacturer, any “distributor, importer, or seller in the chain of distribution is liable for injury caused by a defective product.” The instruction comments also reflect that when strict liability and negligence claims are tried together, in order to clarify differences between them, it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product (i.e., cannot apportion fault among strictly liable and negligent tortfeasors).

RELATED NOTE: Whenever committees propose amendments to rules or to the jury instructions, they elicit comments through the Florida Bar News. On these instructions, there were literally only seven attorneys who provided comments, three of whom were in our law firm. As it turns out, the supreme court adopted every suggested change we made. Being able to have a true and positive impact on the law is something everyone should consider when changes are proposed, especially because we often end up living with these changes for decades to come.

Supreme Court Reverses Fourth District’s Entry Of Directed Verdict In A Negligent Security Case – Record Contained Evidence To Support A Finding That The Landlord’s Breach More Likely Than Not Contributed To The Death, Including Evidence That The Apartment Had A Security Gate Which Was Inoperable

Sanders v. ERP Operating, 40 Fla. Law Weekly S85 (Fla. Feb. 12, 2015):

Two young women were killed in a “gated community” apartment complex. They had been shot to death by unknown assailants inside their apartment, and there was no sign of forced entry (though things were stolen from the apartment). The evidence revealed that in the three years prior to the murders, there had been two criminal incidents where the gate had been broken and perpetrators followed residents onto the premises. The plaintiffs asserted that the defendant had failed to maintain the premises in a reasonably safe condition by failing to maintain the front gate, having adequate security, preventing dangerous persons from gaining access to the premises, and protecting and warning residents of dangerous conditions and criminal acts.

The jury found the apartment owner 40% responsible and awarded damages of $4.5 million. The defendant moved for a new trial and JNOV, which the trial court denied. The Fourth District reversed, finding directed verdict was proper. That court concluded that without proof of how the assailants gained entry into the apartment, the plaintiffs simply could not prove causation.

The Supreme Court disagreed. Finding evidence such as the broken gate and the existence of prior opportunistic crimes, it held a reasonable jury could have determined that the defendant’s failure to maintain the security gate, and the failure to have the courtesy officer visible, probably allowed the assailants to get to the decedents’ door without being detected.

In order for a court to remove a case from the trier of fact and render a directed verdict, there can only be one reasonable inference to be drawn from the plaintiffs’ evidence. However, where the jury has to draw multiple inferences from direct evidence to reach a decision regarding the defendant’s negligence, the jury is entitled to make the ultimate factual determination. Based on this, the Supreme Court reversed the Fourth District granting a directed verdict.

When The Named Insured On The Policy Is Changed, The Insurer Must Obtain A New Waiver Of Um Benefits


A man procured $100,000/$300,000 in liability limits on an insurance policy, and selected reduced UM coverage in the amount of $25,000/$50,000. His daughter was listed as a “driver” but not a “named” insured on the policy and had no right to select UM limits.

At some point, the insurer removed the father as the sole named insured and made the daughter the sole named insured. It changed the vehicle to one she had acquired days before. The vehicle was titled only in the daughter’s name and at the same time, the insurer issued a new policy to the father as the sole named insured.

The insurer argued that the change of the named insured constituted a change to the existing policy, and therefore did not automatically require it to allow the new insured to make certain waivers. However, the Supreme Court found the policy in question was indeed a new policy, because the only “named insured” had not previously been a named insured and, thus, had never had an opportunity to make any of the express waivers required by law.

Although the daughter’s policy retained the same liability limits as her father’s previous policy, she had not been a named insured on the first policy. Being listed as a named insured on the new policy made it the first time that the only named insured on the policy had the opportunity to make a statutorily required waiver and, therefore, the failure
to obtain such a waiver resulted in a finding that the policy provided UM coverage under the policy.

**Trial Court Did Not Err In Finding Slavin Doctrine Applicable To Claim Against Design Company—Evidence Supported Finding That While Design Company Was Negligent, Design Was Accepted And Discoverable By Fdot With The Exercise Of Reasonable Care**


Plaintiff appealed an adverse jury verdict stemming from a tragic car accident that resulted in the death of the plaintiff's father. Plaintiff argued that the trial court erred in finding that the Slavin doctrine applied to the design company, that the evidence did not support the jury's finding that the completed intersection had been accepted before the accident, and that the design defect was latent. The Fourth District found no error and affirmed the defense verdict.

In this case, Pembroke Pines asked FDOT to install traffic signals at an intersection. FDOT hired TEI Engineers and Planners who in turn hired Progressive Design and Engineering to design the signals. The design company submitted the traffic signal it designed to FDOT, which provided it to Broward County Traffic Engineering.

During the review process, an FDOT employee commented that a special signal might be necessary to make sure drivers did not see the wrong indication from the quite large, almost diamond-like, interchange design. The design company responded to the comment and FDOT approved their response. Plaintiff’s expert opined the FDOT probably spent only a couple of hours reviewing the design plan, while the design company would have spent hundreds of hours. After the design plans were reviewed and almost complete, there was a meeting and FDOT accepted the final comments.

A Broward County employee testified that its acceptance was conditional with final acceptance occurring after the “burn-in.” Broward County did not object to the traffic signal’s sequencing and conditionally approved the intersection. The design company’s engineer described the “burn-in” period as a contractor warranty period where the contractor maintained the traffic signals if something went wrong. After the “burn-in” period concluded, FDOT would then transfer control of the intersection to Broward County for maintenance purposes.

The plaintiff moved for directed verdict based on Slavin arguing that Broward County had not accepted the project because the “burn-in” period had not ended. Yet, the trial court denied the motion. The trial court instructed the jury on Slavin over plaintiff’s objection, and said that if it found the design of the intersection was accepted by FDOT, it had to determine whether FDOT knew about the defects; if it found that FDOT knew of the defects, or should have discovered them, then the verdict should be for the design company.

The jury found the design company was negligent. But it also found FDOT accepted it, and that the negligent design was discoverable with the exercise of reasonable care.

The Fourth District reminded us that Slavin was born out of a need to limit a contractor’s liability to third persons. As long as a defect is patent and the work is accepted, the law insulates the contractor.

The plaintiff’s argument that acceptance did not occur because of the 90-day “burn-in” period had allowed the contractor to correct any errors was rejected. The design company asserted that its work had been completed and accepted by the FDOT months before the accident, and therefore, it no longer had control. The court agreed.

The real dispute was whether the acceptance of the design company’s work was to be by FDOT which controlled the project and accepted the design company’s design, or by Broward County which would ultimately maintain the intersection. In this case, FDOT controlled the acceptance and each step along the way, was the party in control and bore the burden of correcting the patent defects.

**Trial Court Departed From Essential Requirements Of Law In Permitting Plaintiff To View A Post-Accident Surveillance Video Before Her Deposition—Fairness Required that The Defendant Be Permitted To Depose The Plaintiff Before Turning Over The Video**


In finding that the benefit of the surveillance video may be irreparably lost if the plaintiff is permitted to view the video before the defendant has an opportunity to question the plaintiff, the court found irreparable harm for certiorari jurisdiction, and granted the writ and quashed the order of the circuit court.

Essentially, it is error when a trial court permits a plaintiff to view a post-accident surveillance video before allowing a defendant to depose the plaintiff. The court emphasized that a bright line rule is preferable in this area because it will impose uniformity and avoid disparate rulings based primarily on the identity of the trial judge.
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Calendar of Events

**MAY 7**
Joint Happy Hour with FAWL
Roxy’s Rooftop
309 Clematis Street
5:30 p.m. - 7:30 p.m.

**MAY 15**
Attorney & Paralegal Civility Breakfast
Bear Lakes Country Club
1901 Village Blvd.
8:30 a.m. - 10:30 a.m.

**MAY 30**
2nd Annual High Roller Night
The National Croquet Center
700 Florida Mango Road
6:00 p.m. - 10:00 p.m.

Register for any of our events online
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Advocate Members & Attorney Advocates

The following advocate members are loyal supporters of the Palm Beach County Justice Association. Some have been with us from the very beginning and some are brand new this year, so please take a moment to review our growing list of notable advocates. As you know they are the cornerstone of the PBCJA. The wide range of educational and networking events offered to the members wouldn’t be possible without their financial support. Please join us in thanking our old and new Advocate Members for their support.

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Florida’s Motor Vehicle No-Fault Law statute, more commonly referred to as “Personal Injury Protection” (hereinafter “PIP”) was significantly changed and is now abysmal thanks to the lobbying efforts of Florida PIP insurers. These changes have severely limited Florida’s injured citizen’s rights to health care, wage loss, and death benefits covered under PIP. As those who watched the “new PIP law” (House Bill 119) being passed recall, interested parties promoting these pro-insurer changes claimed that it was to combat Florida’s alleged “rampant PIP fraud” and promised that the changes would lower the costs of car insurance for all Florida drivers. Since the PIP statute changes were actually implemented back in 2013, let’s fast forward to the present day and see if Florida drivers got the “big break” in the reduction of their premiums since we were able to attack this alleged PIP fraud problem. Have Florida automobile insurers lowered their premium rates? Did the new statute put an end to PIP fraud? Or instead was the real fraud committed against Florida drivers and citizens by Florida insurers and their politically and financially backed constituents?

Florida law mandates that insurers writing automobile policies in the state of Florida must provide PIP protection to their insureds. Before the passage of HB 119, an injured Florida motorist or pedestrian injured by an automobile was entitled to the full $10,000.00 of PIP coverage they were forced to purchase under Florida law. These insureds and omnibus insureds were free to seek treatment with any healthcare provider of their choice. That included massage therapy and acupuncture. Additionally, they were not limited to a timeframe in which they had to seek medical treatment. So if they didn’t want to seek treatment immediately, but wanted to wait and see if the injury worked itself out first, they could do so without risking losing their entitlement to PIP benefits.

The irony of Florida PIP law and fraud protection!

By Peter Hunt, LaBovick Law Group

The pre-House Bill 119 version of the PIP law (the “old” PIP law) already provided numerous protections and safeguards to fight PIP fraud. Those protective mechanisms included:

1. Disallowing PIP benefits to people who caused their car accidents intentionally
2. Allowing PIP insurers thirty (30) days in which to investigate a claim
3. Disallowing PIP benefits to those who commit a material act or omission
4. Disallowing PIP benefits to those who commit fraudulent acts
5. Allowing Florida insurers to recover attorney fees and costs in any action where fraud is revealed to have been committed
6. Disallowing PIP benefits made by a broker or a person making a claim on behalf of a broker
7. Disallowing PIP benefits for any treatment not lawful at the time it was rendered
8. Disallowing PIP benefits

continued on next page
to any person who knowingly submits a false or misleading statement relating to the claim and/or charges

9. Allowing PIP insurers to toll the time that benefits are due by requesting a plethora of documents from the health care providers to allegedly substantiate their claims for reimbursement

10. Allowing insurers to force their insureds to undergo mental and physical examinations to allegedly substantiate claims

11. Allowing insurers civil actions for insurance fraud, kickbacks, and patient brokering, including recovery of attorneys’ fees and costs and compensatory, consequential, and punitive damages

12. Granting a $25,000.00 reward to any person providing information that results in an arrest and conviction of persons committing fraud

13. Making it a crime and/or Florida Bar violation for any person to solicit another for purposes of filing a PIP lawsuit.

That was a pretty comprehensive list! What does the new PIP law do to help combat fraud and lower automobile insurance premiums? Absolutely nothing. But in the pretense of those interested parties whose constituents are campaign-backing insurance companies, the following provisions have been implemented into law in the current version of the PIP statute:

1. Florida drivers must continue to pay for $10,000.00 in PIP coverage, but can only receive $2,500.00 in benefits unless a medical doctor, doctor of osteopathic medicine, dentist, physician assistant, or an advanced registered nurse claims the injured person has an “emergency medical condition” (defined as serious jeopardy to patient health, serious impairment to bodily function, or serious dysfunction of any bodily organ or part).

2. Florida drivers no longer receive PIP benefits for acupuncture or massage treatment.

3. Florida drivers must now seek medical treatment within fourteen (14) days of the date of the accident to be eligible for PIP benefits. Failure to do so bars a person’s claim for the PIP benefits they are forced to pay for.

4. Florida automobile insurance companies can now delay a claim for benefits an additional sixty (60) days if it has “reasonable belief” that fraud has been committed.

5. Additional Medicare limits can now apply to PIP claims to limit them as well.

When we look at these changes we must ask how they were considered a deterrent to fraud? The changes do nothing to protect against fraud and simply create limitations on an injured person’s right to recover PIP benefits. This in turn increases insurance companies’ profits at the expense of consumers who need their benefits that they are obligated to pay for.

But what about the fact that it could be a win-win situation for both Florida automobile insurance companies and Florida drivers by significantly lowering automobile insurance premium? Are insurance companies passing along the savings as promised to those of us who pay for and maintain coverage on our vehicles?

According to a January 18, 2015, article in the Palm Beach Post, Florida’s automobile insurance industry saved more than half of a BILLION dollars in PIP claims in one year alone while the change in overall consumer bills has been close to zero. The article goes on to state that sixteen (16) of the top twenty-five (25) insurers have actually RAISED automobile insurance premium rates since the “new” PIP law was passed. Despite the reforms which included that the PIP carriers must provide a twenty-five percent (25%) reduction in insurance rates, those insurers who actually have reduced rates only did so by an average of less than fourteen percent (14%)! The article provided the following statistics of PIP premiums versus direct losses:

In other words, the insurance industry no longer has to honor the benefits Florida drivers are required to pay for, but they still get to collect their premiums, have less risk, and honor less in the benefits that even make it to “compensable” status! On top of that, they are not reducing premiums but in many cases are even increasing them!

The only real effect of these pro-insurer changes in PIP is to enable the insurance industry to become richer. The result is that drivers have been paying more in PIP premiums and getting less in benefits in return. These rate-reducing promises, ignored by those interested parties in passing the “new” PIP law, had the effect of limiting injured drivers’ right to recovery. We now have a very pro-insurer statute with nothing gained by Florida residents in exchange.

This situation is reminiscent of the legislative changes, promoted by the insurance industry, made to Florida workers’ compensation claims via the Workers Compensation Reform Act (hereinafter “the Act”). Prior to the implementation of the Act, Florida’s worker’s compensation system too provided Florida residents open access to courts for litigation until the insurance companies and their lobbying efforts secured a workers’ compensation system that provides shields to insurers and leaves Florida citizens at their mercy. Just like in PIP, the lobbying efforts of Florida’s worker’s compensation insurers were allegedly aimed to reduce costs and fraud. Florida’s Legislatures and former Governor Jeb Bush then signed into law a provision with statutory caps on claimant’s attorney’s fees while allowing defense counsels unlimited attorney’s fees. This was illustrated in the Florida Supreme Court case of Emma Murray v. Mariner Health and ACE USE, 994 So.2d 1051 (2008), wherein the claimant’s attorney made only $8.00 an hour for her eighty (80) hours of work as a result of the statutory fee caps. Conversely, the defense counsel was paid an uncapped $125.00 an hour for their one-hundred and thirty-five (135) hours of work, even though they lost the case for their insurer client. How the Act combated fraud and costs by limiting attorney’s fees and, resultant, injured Florida workers’ access to counsel is anyone’s guess. Perhaps the better route would have been to pass a law making worker’s compensation insurers more honest in their claims so that litigation would be less necessary.

How many times are insurance company backed officials in the State of Florida going to promise its citizens better insurance rates through false promises that benefit only the insurers?

In sum, we were all falsely led to believe that there was rampant fraud in Florida’s PIP system and that PIP reform would save drivers money. But in the end, the only real fraud was committed by those who actually had insurers’ best interest at heart. Insurance companies have failed to deliver the promised savings on car owners’ premiums that were supposed to have been achieved by limiting what injured victims can recover.
Growing up in sunny southern California, I knew very little about Florida. What I did know, however, was that it was home to giant mosquitos, Mickey Mouse, and a disproportionate number of elderly people. For decades, retirees have been flocking to South Florida to spend their sunset years on the golf course and away from the snow blower. As the market for goods and services for Florida’s eldest residents continues to grow, the one thing you don’t see on the myriad of billboards plastering the highways and advertising for nursing homes filled with smiling grandmothers and grandfathers, is the number of residents who are unnecessarily hurt or killed because of the negligence of these facilities.

The numbers really are staggering. A recent study published by the Department of Health and Human Services found that fifty-nine percent of adverse incidents at skilled nursing facilities were preventable. Of that, fifty-six percent of the harm was the result of treatment which was provided exclusively by the CNAs working that particular facility. The CNAs were simply not budgeted into their day or the dayshift was not long enough to provide the staff levels required to avoidable resident injuries. This leads to malnutrition and a deterioration of the resident’s skin condition.

At least once a week, I receive a call from a distressed child or spouse regarding the care a loved one is receiving in a nursing home. Most of these calls follow a similar outline: their loved one enters the facility for what is supposed to be a short period; care plans are either not put into place or not followed; injury or death ensue. The most infuriating aspect of many of these phone calls is that adequate staffing levels would have likely prevented these injuries. While I love my job and the help that I can give to clients, I would definitely prefer that they never need my services in the first place.

Far too many of my cases involve elderly residents who are forced to soil themselves because no one will assist them to the bathroom, or who suffer debilitating falls when they try to get to the bathroom on their own. More often than not, those same residents are forced to lay in their own waste for hours, because a staff member who does not have time to assist residents with the most basic of tasks certainly does not have time to clean the resident once the inevitable happens. You can bet that if no one is coming to change the resident, they aren’t turning and repositioning the resident every two hours either; and a resident who is forced to lay in a moist cesspool for hours will quickly lose skin integrity and develop bed sores. In these instances, it is also very common for residents to go without meals simply because a CNA does not have the time to feed them. This leads to malnutrition and a further deterioration of the resident’s skin condition.

Nursing Homes know that their low staffing levels lead to avoidable resident injuries, yet they continue to understaff and create an environment where patient care is less important than investor return. Discovery early on to find out not only whether these facilities were meeting the minimum staffing requirements set forth by the state, but also to find out whether they really were taking into account the acuity of care required by the residents is key to showing an institutional failure. At a recent deposition, a nursing supervisor told me that, in the sixty bed acute care wing she manages, an average of eighty percent or more of the residents are incontinent and require perineal care. She told me that each resident requires perineal care three to four times each shift, and that such care takes at least twenty minutes to complete. Perineal care is done exclusively by the CNAs at this facility and the number of residents who need it is not taken into consideration when that particular facility calculates its staffing needs. There are seven to nine CNAs on each shift. Assuming seventy-five percent of the residents require perineal care three times a shift, with nine CNAs working the shift, that comes out to five hours of perineal care per CNA each shift. That is five hours of care for each CNA that is simply not budgeted into their day. Is it little wonder, then, that residents are not toileted, cleaned, fed, or turned when they should be? The nursing home is purposefully understaffing its facility by choosing to ignore the most basic needs of its residents.

Prior to 1999, that standard for awarding punitive damages was willful, wanton, or gross misconduct of a “gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects...or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.” White Const., Inc. v. DuPont, 455 So. 2d 1026, 1028-29 (Fla. 1984). In 1999, when the Florida Legislature established caps on punitive damages with Fla. Stat. § 768.73, it also lowered the standard of proof required for awarding punitive damages to a showing of gross negligence or intentional misconduct.

The evolution of the gross negligence standard in Florida dates back to at least 1959, when the Florida Supreme Court in Carraway v. Revell, 116 So. 2d 16 (Fla. 1959) explained the distinction between simple negligence and gross negligence: “simple negligence is that course of conduct which a reasonable and prudent man would know might possibly result in injury to persons or property whereas gross negligence is that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property.” Id. at 182.
In 1970, the Second District in Glaab v. Caudill, 236 So. 2d 180 (Fla. 2d DCA 1970) observed that “from the standpoint of degree, it is clear that gross negligence lies between simple negligence and the ‘willful and wanton’ conduct sufficient, if death results, to constitute ‘culpable negligence’ within the crime of manslaughter.” Id. The court in Glaab also laid out the required elements of a prima facie case for gross negligence: 1) a showing of circumstances which constitute a clear and present danger; 2) awareness of that danger; and, 3) “a conscious, voluntary act or omission in the face thereof which is likely to result in injury.” Id. at 185. These elements are consistent with the definition of gross negligence provided in Fla. Stat. § 768.72(2)(b), which states: “the defendant’s conduct was so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.” The statutory definition, like its common law counterpart, address conduct which a reasonably prudent person should know will create a clear and present danger of injury to others.

In the nursing home context, a culture of disregard for the sanctity of human life is prevalent. It starts with chronic understaffing and low wages, and permeates into the attitudes of the individuals charged with caring for some of our state’s most vulnerable citizens. Even the most well-intentioned CNA will quickly learn that it is physically impossible to complete all of the tasks required to provide each resident with the “the highest practicable physical, mental, and psychosocial well-being.” It is a recipe for disaster, and many nursing homes would rather risk a potential lawsuit than increase staffing levels. When the possibility of punitive damages are thrown into the mix, however, the cost of doing business the right way might suddenly seem like the cheaper option.

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In Mejia v. Citizens Property Ins. Corp., 2014 WL 6675717 (Fla. 2d DCA Nov. 26, 2014), the plaintiff had received documentation in discovery that over the past 3 years, the defendant insurance company paid nearly $10 million to an engineering firm that employed the defense expert witnesses. At trial, however, the trial court excluded this evidence. On appeal, the defendant claimed the trial court correctly exercised its discretion as, according to the defendant, Boecher only addressed discovery rather than admissibility.

The appellate court in Mejia held, however, that the trial court had abused its discretion in excluding this evidence. Quoting Boecher, the Second District observed in Mejia, 2014 WL 6675717, at *3 (emphasis added by the Second District):

A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness’s financial incentive to continue the financially advantageous relationship.

This evidence, according to the Second District, was not just relevant, but “meaningful.” Mejia, 2014 WL 6675717, at *3. The appellate court’s holding in Mejia makes clear that the specific financial and business connection between the retained expert witness and insurance company was admissible at trial. The court cited favorably to an earlier decision that ruled this specific financial/business evidence was also admissible, Herrera v. Moustafa, 96 So.3d 1020 (Fla. 4th DCA 2012). As the Second District noted in Mejia, the “twist” in Herrera is that it was a third-party case where the insurance company could not be “identified” as the entity retaining experts or having a relationship with the defendant tortfeasor’s law firm. Mejia, 2014 WL 6675717, at *3 (discussing Herrera, supra).

In Herrera, the tortfeasor defendant contended that the trial court erred in allowing the plaintiff to ask a defense expert, “And are you aware that defense counsel’s employer has paid you [dollar figure omitted] between January ’06 and December ’08 for your personal services as an expert witness?,” and to a second defense expert, “And the defense provided evidence that their employer has paid your practice [dollar figure omitted] to expert services between January 2006 and December 2008. Do you have any basis to dispute that number?” 96 So.3d at 1021.

The Fourth District affirmed the trial court’s ruling, albeit the appellate court held the trial court’s ruling, albeit “phrased differently” to avoid reference to the “defense attorney’s employer.” Id. Some defendants now argue that the Fourth District’s statement in Herrera that the trial court did not “abuse[] its discretion” in permitting this testimony means that trial judges in other cases are free to rule on a case-by-case basis whether to allow this same type of testimony. Id. This reasoning by defendants is plainly incorrect.

The standard of review for a trial court’s evidentiary ruling is generally for an abuse of discretion, so the appellate court correctly utilized that abuse of discretion test. Also, the Fourth District’s reference to “discretion” concerns the manner in which the questions were asked at trial, not the subject matter. Had the trial court categorically excluded the evidence, it seems clear this would have been an abuse of the trial court’s discretion. After all, the Fourth District in Herrera recognized that “a jury is entitled to know” of the financial and business connection. 96 So.3d at 1021 (citing Boecher, supra). The Second District’s very recent decision in Mejia confirms that this [specific] financial/business information is not just discoverable, but must be admissible.

Neither the Second District in Mejia nor the Fourth District in Herrera addressed how the plaintiffs obtained the specific financial figures in discovery to then use at trial. Fla. R. Civ. P. 1.280(b)(5)(A), of course, establishes as a default rule that retained experts are not required to turn over specific financial/business relationship figures at the outset of discovery. Yet, it is often overlooked by practitioners that the last provision of this subsection states:

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances. . . .

While there must be “unusual or compelling circumstances,” this is often rather easy to meet in practice. As a few examples, the expert may not keep financial records at all, or may be vague in discovery answers, or may often provide contradictory information in discovery. Remember, this is some 15 years after Boecher, Elkins, and Rule 1.280(b)(5) established the requirements of adequate record-keeping.
Another very recent opinion briefly addressed this “unusual and compelling circumstances” issue. See Brana v. Roura, 144 So.3d 699 (Fla. 4th DCA 2014). It appears this case is also being misapplied by some defense attorneys. In Brana, the lower court entered an Order denying the expert’s motion to, inter alia, limit subpoenas issued to insurance carriers requiring disclosure of the payments made by the carriers to the experts as a litigation expert. The appellate court held the subpoenas should have been quashed, because they requested specific earnings of the expert. The appellate court did not hold, however, that this information is categorically shielded from discovery. Rather, the appellate court reasoned that “the lower court’s Order did not “state any basis for a finding of unusual or compelling circumstances in this case.” Id. The lower court’s Order had not included these requisite findings, and the case was remanded to the lower court.

On remand, the trial court issued an order with those findings, and the expert has pursued a second appeal of that subsequent order. Nonetheless, this Opinion is a reminder that expert witnesses (and here, a medical provider such as a hospital) can be required to turn over specific financial and business relationship information where there are unusual or compelling circumstances.²

Of course, even if these circumstances are not met, there are at least two other methods to obtain this specific information, and all relevant financial and business information of the connection between lawyer/insurer and retained expert. As everyone facing treating physician discovery knows, a direct discovery request to an opposing counsel’s law firm is available. The quoted questions from the trial in Herrera, supra, suggest that the tortfeasor’s law firm had provided the evidence of the financial connection between the law firm and tortfeasor’s insurance company. And, you may also obtain and use the information about retained experts gathered in other cases. Herrera and Mejia, consistent with the Florida Supreme Court’s Opinions in Boecher and Elkins, clearly hold this is admissible evidence at trial.

Trial judges, accordingly, do not have “discretion” under this case law to exclude this meaningful testimony concerning retained expert witnesses. Another recent appellate decision demonstrated this does not just concern specific financial information, but other business connections. See Orthopedic Care Center v. Parks, 2014 WL 6679042 (Fla. 3d DCA Nov. 26, 2014) (affirming the trial court’s Order that required a defense CME to itemize the number of people he treated vs. people for whom he performed CME exams, for depositions and trial testimony over the last 3 years).

Finally, while this article focuses over the last 3 years). But that article focuses on retained expert witness discovery, the developing area of treating physician financial discovery is also relevant to expert witness discovery. There is no rational reason retained experts should be permitted to block financial discovery, but yet treating physicians would be compelled to produce the same financial information. Hiding behind Rule 1.280(b) is a simple explanation, but it is not a logical one. The meaningfulness of this financial and business record discovery cannot possibly be greater for physicians who treat their patients, without voluntarily injecting themselves into the litigation.

CONCLUSION
Much attention has been given lately to the area of treating physician discovery, and it is a developing and still-uncertain area of the law. Whatever the final word is on that area of discovery, some recent appellate decisions are a reminder that broad and specific retained expert witness discovery is not just discoverable, but admissible. While Rule 1.280(b)(5)(A) has default rule limitations for retained experts, there are a host of avenues to pursue and obtain broader information for use at trial.

Andrew A. Harris
Burlington & Rockenbach, P.A.
(561) 721-0400
aah@flappellatelaw.com


[2] Ordinarily, a witness cannot be compelled to create documents that do not exist. See Fla. R. Civ. P. 1.280(b) (5)(A)(ii) (“An expert . . . may not be compelled to compile or produce nonexistent documents.”). But that prohibition does not apply when the information sought is information the nonparty must produce anyway, and has been required to produce for over 15 years. This is clearly demonstrated by Orkin Exterminating v. Knollwood Properties, 710 So.2d 697, 698 (Fla. 5th DCA 1998). Moreover, when the financial and business information provided is vague or contradicted by other evidence, compelling circumstances can be established.
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