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LEGAL UPDATE

VOLUME 16, ISSUE 4
FALL, 2017

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INSIDE LEGAL UPDATE

Liability

Daubert Didn't Die by Stephanie Bendeck, Esq.


Stephanie Bendeck

A *Daubert* motion is a critical tool in ensuring that a jury will be allowed to hear reliable expert testimony. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) is the seminal Supreme Court case that determined the standard for admitting expert testimony in federal court. *Daubert* and its progeny govern the expert evidentiary standards in the majority of states, including that of Florida.

Section 90.702, Fla. Stat. dictates the parameters of when expert opinion testimony may be admitted into evidence. From 1989 to 2013, Florida was under the standard outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923). Under *Frye*, expert opinion testimony was admissible if the expert was qualified and the opinion fell within the witness's expertise. Florida's rule read as follows:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

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Verdicts, Summary Judgments, Appellate Results

Defense Verdict: Slip and Fall with Meds Billed Under a Letter of Protection: $5M Demand With Multiple Surgeries including Spinal Cord Stimulator (Collier County)

On November 3, 2017, Orlando Partner Paul Jones and Fort Myers Partner Howard Holden obtained a defense verdict in the slip and fall matter styled *Jennifer Romero v. Defendant Store*. Plaintiff was a business invitee and shopping in the water aisle of the supermarket side of Defendant store. After selecting a pack of water, Plaintiff turned to walk toward the registers and slipped in a puddle of water in the middle of the aisle. Plaintiff fell on her left knee and coccyx. Plaintiff sustained over $578,000 in past medical bills and over $900,000 in future medical treatment. Plaintiff was completely unable to return to work in any capacity. Accordingly, Plaintiff sustained over $1,100,000 in lost earnings. Plaintiff demanded $5,000,000.

Plaintiff immediately began conservative treatment, including physical therapy and lumbar injections, but soon had a microdiscectomy and laminotomy at L5/S1.

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OFFICE LOCATIONS

MIAMI
T: 305.377.8900
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F: 954.761.9940

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F: 561.893.9048

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F: 850.727.0233

PENSACOLA
T: 850.361.1515
F: 850.434.6825

WWW.LS-LAW.COM

Edited by:
Maria Donnelly, CR
Daniel J. Santaniello, Esq.

Daubert Didn't Die, cont.

Florida changed this rule of evidence in 2013 to adopt the *Daubert* standard. § 90.702, Fla. Stat. (2016) currently reads as follows:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

The *Daubert* standard narrowed the criteria that would allow an expert to testify. Under *Daubert*, expertise, alone, was no longer enough. *Baan v. Columbia Cty.*, 180 So. 3d 1127, 1133 (Fla. 1st DCA 2015), citing *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) ("If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong."); see also Charles W. Ehrhardt, 1 Fla. Prac., Florida Evidence § 702.3 (2015 ed.) ("When an expert is relying primarily on experience, the witness must explain how that experience leads to the opinion, why the experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts." (citing *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC,* 555 F.3d 1331 (11th Cir. 2009), and *Primiano v. Cook*, 598 F.3d 558 (9th Cir. 2010)). Under Florida's amended rule, the expert's experience and qualifications are still relevant, but the expert must explain the logic and relevance of the expert opinion that he or she aspires to render in court. The *Daubert* inquiry applies to all expert opinion testimony, not just "new or novel" scientific evidence. *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014).

Under the *Frye* standard, if the expert testimony was to use "new or novel" scientific theory, principle, or discovery, then "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the field which it belongs." *Id.* at 496 (Fla. 3d DCA 2014), quoting *Marsh v. Valyou*, 977 So.2d 543, 546 (Fla. 2007). However, if the proposed expert testimony was not "new or novel" but based on the expert's personal experience, observation, and training, the *Frye* test would not apply if the methods used in formulating the opinion were generally accepted scientific methods. Some examples of "pure opinion" testimony are as follows: testimony of a neurologist, based upon clinical experience alone, that the failure of physicians to perform a caesarian operation on a mother in labor caused brain damage to her child at birth, *Gelsthorpe v. Weinstein,* 897 So.2d 504, 510 (Fla. 2d DCA 2005); testimony of an ophthalmologist, based on experience and training, that the exposure of an eye to polychlorinated biphenyles (PCBs) causes cataracts, *Florida Power & Light Co. v. Tursi*, 729 So.2d 995, 996–97 (Fla. 4th DCA 1999); and testimony of medical experts of recognized relationship or association between trauma and the onset of fibromyalgia, based on clinical experience, *State Farm Mut. Auto. Ins. Co. v. Johnson*, 880 So.2d 721, 722–23 (Fla. 2d DCA 2004).

Earlier this year, however, the Florida Supreme Court refused to adopt a *Daubert* amendment to § 90.702, Fla. Stat. *In re: Amendments to Florida Evidence Code*, 210 So.3d 1231 (Fla. 2017), the Court analyzed whether it should add the following language to subsection 3 of § 90.702, Fla. Stat.: "however, the opinion is admissible only if it can be applied to evidence at trial." The Court declined to accept this amendment to the extent that it was procedural because of undefined "grave constitutional concerns." *Id.* at 1241. Ultimately, no new version of § 90.702, Fla. Stat. was ever promulgated by the Florida Legislature or the Florida Supreme Court, and the Florida Supreme Court did not declare § 90.702, Fla. Stat. unconstitutional. Therefore, § 90.702, Fla. Stat. remains untouched.

When a court conducts a *Daubert* inquiry, it must determine whether the expert's testimony is "scientific knowledge" and derived from the scientific method. *Daubert* at 590. The scientific method's hallmark is "empirical testing – developing hypotheses and testing them through blind experiments to see if they can be verified." *Id.* at 593.

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Daubert Didn't Die, cont.

General acceptance within the scientific community is also relevant in a *Daubert* inquiry, but it is not a sufficient basis, standing alone, for determining the admissibility of expert testimony. *Marsh*, 977 So.2d at 547. The *Daubert* standard no longer leaves open a wide gate for "pure opinion" testimony. *Perez*, 138 So. 3d at 497. Lastly, the expert testimony, in addition to being based on scientific knowledge derived from the scientific method, must be reliably applied to the facts of the case. *State Department of Corrections v. Junod*, 217 So.3d 200, 206 (Fla. 1st DCA 2017). Subjective belief and unsupported speculation are inadmissible. *Perez*, 138 So. 3d at 499. Under both *Daubert* and *Frye*, an expert is not permitted to bolster his or her opinion by referring to other non-testifying experts or opinions expressed in treatises. *Junod*, 217 So.3d at 207.

The court acts as a gatekeeper by determining whether the expert's testimony meets all the requirements under § 90.702, Fla. Stat. *Booker*, 166 So.3d at 192; see also *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999). This gatekeeper role ensures that the expert "employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. The court has broad discretion in determining how to perform this gatekeeper function. *Booker*, 166 So.3d at 192.

To properly perform its gatekeeping function, the court must perform three inquiries. *Crane Co. v. DeLisle*, 206 So. 3d 94, 101 (Fla. 4th DCA 2016), citing *Daubert*, 509 U.S. at 593–94. The first inquiry is whether the expert is qualified in the area about which the expert seeks to testify. *Id.* The second inquiry is whether the expert is using "reliable methodology." *Id.* The third inquiry is whether the expert's testimony can "assist the trier of fact through the application of expertise to understand the evidence or fact in issue." *Id.*

In assessing whether an expert's methodology is reliable, the court should consider the following factors: (1) whether the theory "can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) "the known or potential rate of error" for "a particular scientific technique"; and (4) whether the "theory or technique has been generally accepted by the relevant scientific community." *Id.*

When a party makes a timely, pre-trial objection to an expert via a motion in limine, the trial court should conduct an inquiry, particularly in cases where the motion is accompanied by depositions and other materials raising a significant issue concerning the relevancy or reliability of the testimony. See *Booker*, 166 So.3d at 194. Depending on the basis for the challenge, the objection should include substantiated facts and questions regarding the basis for the expert's testimony. *Id.* at 193. Objections must be directed to the specific opinion testimony and state a basis for the objection beyond a bare *Daubert* objection. *Id.* Although there is no legal requirement that the trial court conduct a *Daubert* hearing prior to trial, well-supported *Daubert* motions are an excellent method of protecting a case from the attack of opposing experts who seek to unfairly influence jurors through faulty and untrustworthy testimony.

About Stephanie Bendeck, Esq.

T: 239.561.2828

E: Sbendeck@insurancedefense.net

Stephanie Bendeck, Esq. is an Associate in the Fort Myers office. She is an experienced trial attorney having tried over fifty cases, both jury and non-jury, as well as argued complicated motions involving complex legal issues to the court. She concentrates her practices in the areas of general liability, bad faith, insurance fraud and coverage litigation.

After being admitted to the Florida Bar in 2009, she joined the State Attorney's Office of the Twentieth Judicial Circuit, serving in Lee and Hendry Counties. During her career as a prosecutor, she handled a wide variety of cases, from the simplest misdemeanor to serious, violent felonies, including firearms offenses. She also served as co-counsel on homicide cases and Special Victims Unit cases, including cases that involved the physical or sexual abuse of women and children. She is experienced in preparing, defending, and cross-examining both lay and expert witnesses. She also served in an "on-call" capacity for law enforcement, responding to legal questions presented by law enforcement during ongoing investigations and reviewing search warrants.

Stephanie earned her Bachelor of Arts degree from the University of Florida (2005) and Juris Doctor from Stetson University College of Law (2009). Stephanie is admitted in Florida (2009).

Ask First, Deny Later: Why Unequivocally Denying A Claim Before Asking An Insured To Comply With Policy Conditions May Limit An Insurer's Defenses by Stephanie Williams, Esq.

Stephanie Williams Esq.

Many courts have held that when an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier waives its ability to assert that the insured's failure to comply with the policy's conditions bars their recovery. *see Tower Hill Select Ins. Co. v. McKee, 151 So.3d 2, 3-4 (Fla. 2d DCA 2014); see also Indian River State Bank v. Hartford Fire Ins. Co, 35 So.228, 246 (Fla.1903); Hartford Accident & Indem.Co. v. Phelps, 294 So.2d 362,365 (Fla. 1st DCA 1974)*.

This consensus among the courts was reaffirmed by the Second District Court of Appeals in its recent ruling in the matter of *Juan Castro and Myriam Lopez v. Homeowners Choice Property & Casualty Insurance Company*. In that case, Mr. Castro and Ms. Lopez appealed the final summary judgment in favor of their insurance company, Homeowners Choice, in a breach of contract action. On May 4, 2010, Mr. Castro and Ms. Lopez noticed what appeared to be damage to their home as a result of sinkhole activity. They made a claim with their homeowners insurance carries, Homeowners Choice. Homeowners Choice retained an engineer company to investigate the alleged loss and ultimately determined that there was no evidence of any sinkhole activity. Based on their engineer's findings, Homeowners Choice denied coverage for the loss based on a policy exclusion regarding movement of the earth beneath the residence. Notably, prior to issuing the denial to the Insureds, Homeowners Choice never requested them to submit to an examination under oath or to conduct a recorded statement.

Approximately four-years after the denial of the claim, Mr. Castro and Ms. Lopez hired an engineer to conduct an investigation, and he determined that there was damage caused by sinkhole activity. Based on this information, the Insured submitted a letter to Homeowners Choice which enclosed a copy of the engineer's findings and requested that the insurance company reconsider its denial of coverage. Homeowners Choice responded by requesting the Insureds to submit to an examination under oath and to provide a sworn proof of loss. The Insureds proceeded to file suit against the insurance company without adhering to Homeowners Choice requests.

Homeowners Choice filed a Motion for Summary Judgment on the grounds that Mr. Castro and Ms. Lopez's refusal to comply with its demand for EUOs and the submission of a sworn proof of loss violated the policy's conditions precedent to filing suit. The trial court was persuaded by the insurance company's argument and entered final summary judgment in favor of Homeowners Choice. Upon appeal, the Second District Court of Appeals reversed the trial court's ruling and remanded it for further proceedings.

In its rationale, the appellate court reiterates that when an insurance carrier denies an insureds claim, it forecloses its right to later assert failure to comply with the policy's conditions precedent. Specifically, the Court opined that the Insured's submission of the engineering report four years after the denial of coverage did not constitute a re-opening of the claims, thereby requiring the insureds to comply with conditions precedent to filing suit. The Court points out that the subject policy did not include any reference to or definition of the term "reopened claim" and it did not have any language that would put an insured on notice that attempting to negotiate a settlement after a denial of coverage would act as a reopening of a claim. Accordingly, the Court held that the fact that the Insureds provided the report to Homeowners Choice did not legally resuscitate the requirement that they comply with the policy's conditions precedent to filing suit. Therefore, the appellate court found that the trial court erred in determining that Mr. Castro and Ms. Lopez were barred from bringing a breach of contract action and for granting summary judgement in favor of the insurance company.

The appellate court's findings appear to have broad consequences. The court appears to be of the opinion that once a claim has been denied pursuant to coverage exclusion, the failure to comply with post-loss conditions becomes irrelevant and the insurer becomes estopped from raising the same as a defense. This can become particularly problematic if courts do not consider certain acts to constitute a "re-opening" of the claim. It should be noted, however, that while a denial of coverage may constitute waiver of future requests for compliance with post-loss conditions, it does not estop the insurer from asserting the defense of failure to comply with previously invoked post-loss conditions precedent to recovery as coverage cannot be created by estoppel. *See Aetna Cas. & Sur. Co. of Am. v. Deluxe Sys.*, 711 So. 2d 1293 (Fla. 4th DCA 1998) (The appellate court found that the lower court erred in asserting that Aetna was estopped

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Ask First, Deny Later: Why Unequivocally Denying A Claim Before Asking An Insured To Comply With Policy Conditions May Limit An Insurers Defenses cont.

from additional grounds for denial not asserted in the denial letter.)

Accordingly, as a matter of course, insurers should seek request for compliance with conditions precedent to filing suit prior to issuing unequivocal denials, because the failure to ask could end up costing them valuable defenses.

About Stephanie Williams, Esq.

T: 305.377.8900
E: Swilliams@insurancedefense.net

Stephanie Williams, Esq. is an Associate in the Miami office. Stephanie practices in the areas of general liability, premises liability, automobile liability and First and Third Party Insurance Defense. Stephanie earned her Bachelor of Arts degree from Florida Memorial University (2010) and Juris Doctor from Michigan State University (2014). Stephanie has also studied abroad in Egypt, Greece and Japan. While attending law school, Stephanie was a legal intern with the Miami-Dade State Attorney's Office. Prior to joining the firm, Stephanie worked for various private insurance defense practices in south Florida. She is admitted in Florida (2014).

Verdicts and Summary Judgments cont.

Romero defense verdict cont. from Page 1

Plaintiff had a second back surgery at the same level consisting of an L5/S1 disc replacement and fusion. Plaintiff had a third surgery after intractable back pain and underwent a trial procedure for a spinal cord stimulator. Plaintiff then underwent her fourth back surgery by having the permanent implant of the spinal cord stimulator. Plaintiff also underwent two arthroscopic left knee surgeries to repair cartilage damage under the patella, totaling six surgeries from her fall at Defendant store. Defendant's overnight stocker employee was working in the aisle and close to Plaintiff's location at the time stocking bottled water. The overnight stocker admitted in testimony that he had spilled water while he was stocking the shelf. Defendant claimed that there was insufficient evidence to show how long the water had been on the floor from the stocker to hold the store responsible.

Defense Verdict: Trip and Fall with Arthroscopic Left Knee Surgery (Gadsden County)

On November 1, 2017, Tallahassee Partner Dale Paleschic, Esq. and Associate Alec Masson, Esq. obtained a defense verdict in the matter styled *Mendiola v. Defendant Store*. The verdict came on the fourth trial day. Plaintiff alleged he slipped on a blue-green liquid (thought to be detergent) off available security camera views. The slip and fall was reported to employees who verified a spill of approximately 8 to 10 inches and cleaned up the area. Plaintiff subsequently underwent conservative treatment and failing that, underwent arthroscopic left knee surgery. Plaintiff alleged that he was now unable to work because of instability and pain in his left knee. Plaintiff's treating surgeon casually related the fall to the injury. The Plaintiff claimed medical specials were $97,000. Plaintiff's counsel requested a total of $1,067,280 in damages. The case was defended on issues of negligence and causation. The Defense maintained that available security footage was inconsistent with the Plaintiff's version of the facts and that any knee injury was caused by degenerative disease and the heavy physical labor of the Plaintiff over the years. The jury returned its defense verdict after 50 minutes of deliberation.

Defense Verdict: Trip and Fall (Flagler)

On October 31, 2017, Jacksonville Partners Todd Springer, Esq. and Christopher Ritchie, Esq. obtained a defense verdict in the trip and fall matter styled *Darlene Finley v. Defendant Store*. On the night of September 12, 2014, after backing her truck up to the delivery bay, Plaintiff was walking behind the store to enter through a rear door when Plaintiff tripped and fell over a speed bump. As a result of her fall, the Plaintiff suffered a laceration to her chin, broken tooth, left shoulder and neck injuries and past lost wages. At the close of Plaintiff's case the Defendant moved for directed verdict on medical causation as to the Plaintiff's claimed left shoulder and neck injuries. The Court granted the Defendant's directed verdict leaving only the chin laceration, broken tooth and past lost wages to be considered by the jury. After twenty five minutes the jury returned a verdict finding no negligence on the Defendant. The Plaintiff alleged that this was her first time to that Defendant store and there was inadequate lighting resulting in her not being able to see the speed bump causing her fall. The Defendant argued that the lighting was in fact adequate and that the speed bump was an open and obvious condition. Further, it was the Defendant's position that the Plaintiff was distracted while walking causing her to fall.

Final Judgment/No Appeal: PIP

Boca Raton Partner William Peterfriend, Esq. and Associate Erin O'Connell, Esq. prevailed in Final Judgment in a PIP matter styled *East Coast Medical Rehab, Inc. a/a/o Reyna Terrero v. State Farm Mutual Automobile Insurance Company.* This order was a coverage opinion, wherein the Plaintiff attempted to argue that the assignor, Terrero, was covered for a loss which occurred on August 13, 2014. The matter was heavily litigated. The assignor made no payments for a period of several months, which resulted in a cancellation of the policy. After the motor vehicle accident, the assignor then made a payment. This was deemed too late.

Verdicts and Summary Judgments cont.

Motion for Summary Judgment: False Arrest (Leon County)

Tallahassee Associate Alec Masson, Esq. prevailed on a Motion for Summary Judgment in the False Arrest matter styled *Lawanda Brown v. Defendant Store and The City of Tallahassee*. Plaintiff alleged false arrest and negligent reporting of a crime against the Defendant Store arising out of a photo-lineup misidentification. We argued that Defendant Store should be granted summary judgment under the *Pokorny* privilege (as enunciated in *Pokorny v. First Fed. Sav. & Loan Ass'n of Largo*, 382 So. 2d 678, 682 (Fla. 1980)) where neither employee requested that law enforcement arrest the suspect. With respect to the negligent reporting of a crime count (recently confirmed to exist as a valid cause of action in *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1 (Fla. 2016).), we argued that despite a misidentification, there was no additional conduct on the part of Defendant Store or its agents rising to the level of punitive conduct as required by *Valladares*. Final Summary Judgment was granted in Defendant Store's favor.

Final Summary Judgment: Slip and Fall (Escambia County)

Pensacola Partner Gary Gorday, Esq. and Tallahassee Partner Dale Paleschic, Esq. and Associate Alec Masson Esq. prevailed in Final Summary Judgment in a slip and fall matter styled *Lisa Dees v. Gulf Winds Federal Credit Union*. The motion was prepared by Alec Masson and Dale Paleschic (Tallahassee office) and argued by Thomas "Gary" Gorday (Pensacola office). This matter involved a slip and fall in the interior entrance way of a credit union. It had recently been raining outside and Plaintiff conceded that she walked through the wet parking lot and side walk on her way into the credit union. The Defendant argued that it owed no duty to warn the Plaintiff of the natural accumulation of water in the entrance way as Plaintiff's knowledge of the condition was equal and/or superior to that of the Defendant.

In the alternative, Defendant argued that if it owed a duty to warn under the facts, it satisfied its duty by placing a wet caution cone in the entryway. With respect to the duty to maintain, the Defendant argued that the normal accumulation of rain water in an entry way was not an unreasonable hazard and therefore imposed no duty to maintain. Alternatively, Defendant argued that the condition was so "open and obvious" that the duty to maintain, if any, was discharged. The Court granted Defendant's Motion for Final Summary Judgment as to all arguments.

Summary Judgment: Premises Liability

Fort Lauderdale Managing Partner David Lipkin, Esq. prevailed in Summary Judgment in the premises liability matter styled *Delia Garcia and Jose Garcia v. Cobblestone Community Association, Miami Management, Inc., et al.* Defense represented the homeowner's association and the property management company in a lawsuit brought by the plaintiffs in which Plaintiff, Delia Garcia alleged she was injured by a dog that that was loose on the association common grounds. Defense defeated the motion by showing there was no evidence showing the HOA or management company knew or should have been aware of the dog or its alleged violent propensities. Plaintiffs sought a continuance of the hearing on our motion to take additional depositions but we were able to defeat plaintiff's Motion for Continuance by citing to case law requiring the plaintiff to file affidavits in opposition to the Motion for Summary Judgment showing the existence of additional relevant evidentiary matter, and setting forth what plaintiff has done to obtain it and that the failure to obtain it did not result from their own inexcusable delay. We had previously served Proposals for Settlement on both plaintiffs and are now positioned to recover attorney's fees.

Arbitration Award of Zero: Construction

Boca Raton Partner William Peterfriend, Esq. obtained an Arbitration Award of Zero on behalf of Joseph Horschel, asserting that the flow through claims of Kopelousos against Horschel should clearly fail.

Plaintiff, Villa Verde Condominium, Inc., filed suit against Defendant/Third Party Plaintiff, Kopelousos Construction Company, Inc. ("Kopelousos"), alleging damages resulting from work it was contracted to perform on the Villa Verde Condominium building, located at 3500 S. Atlantic Avenue, Cocoa Beach, Florida. Kopelousos had no involvement in the original construction; rather, they were retained to perform certain remodel work on the building in an effort to sell condominium units. Kopelousos began its work on the project after contracting with the Plaintiff on April 29, 2011. The contract amount was $312,633.80.

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Verdicts and Summary Judgments cont.

Plaintiff demanded $7,000,000 due to the many issues with the condominium development. Kopelousos was hired by the Plaintiff to perform punch list and other cosmetic work on a distressed property, for as little money as possible, to get the project to market. Kopelousos retained Horschel to perform very minor punch list type work on the west terrace of the penthouse, as well some minor pond-stabilization work. As discussed herein, during the course of the first two days of the arbitration proceeding, there was no evidence presented by the Plaintiff and no evidence presented by Kopelousos that any of the work performed by Horschel, or for which Horschel was contracted to perform, was done in a negligent manner and was the proximate cause of any of the damages alleged by the Plaintiff in the case.

Appellate Decisions

In the Appellate Decision styled *Obregon v. Rosana Corp,* Edgardo Ferreyra, Jr. and Shana Nogues received an opinion from the Third District Court of Appeal affirming Judge Cueto's Order striking Plaintiff's pleadings for fraud on the Court and reversing the trial court's finding that the "legal representatives" in the release attached to the Proposal for Settlement filed by Defendant was ambiguous. Plaintiff/Appellant, who was represented by Rubenstein Law and Wasson & Associates, slipped and fell in Defendant's restaurant allegedly injuring her neck and back and requiring two spine surgeries performed by Dr. Roush. Her medical bills totaled over $432,000. Through thorough investigation, we discovered a prior motor vehicle accident for which Plaintiff treated over 40 times for the same injuries, a SSDI application and finding based in part on the injuries she was claiming stemmed from the subject accident, over 25 additional medical providers, and payment of collateral source benefits, all of which Plaintiff failed to disclose in her discovery responses and deposition testimony and filed a Motion to Strike Plaintiff's Pleadings for Fraud on the Court which was granted. The Plaintiff appealed arguing that a proper evidentiary hearing was not held and the Defendant did not show by clear and convincing evidence that the Plaintiff's conduct was "willful;" however, the Third District Court of Appeal agreed that the record evidence was considered which clearly reflected that the trial court's dismissal was supported by clear and convincing evidence. The Court found that the "legal representatives" language was "clear, unambiguous, and enforceable" as to entitle Defendant to recover attorneys' fees.

Dismissal With Prejudice Fraud on Court

Shana Nogues obtained a dismissal with prejudice for fraud on the court in the matter styled *Alvarez v. El Faro Latin Cafe, Inc., Martinez Distributors Corp, and Camanchaca, Inc. T*he case stems from alleged ciguatera poisoning after eating fish at the restaurant. Plaintiff was claiming a slew of illnesses, including neurological damage. The Plaintiff produced over 1,000 photographs depicting his alleged illness, including several that he testified depicted the very fish he ate at the restaurant. Through investigation, we discovered that the metadata embedded in the photos purported to be the fish he consumed were taken more than a year after the alleged consumption of the subject fish. In his deposition, the Plaintiff confirmed that he threw up the pieces of fish depicted in the photos within a week of eating at the restaurant and that he never ate fish again. The Defendants presented the uncontradicted testimony of computer expert, Jake Stone confirming that the photos were, in fact, taken over a year after the Plaintiff testified he ate fish and took the photos. The court found, by clear and convincing evidence, that Plaintiff had perpetrated a fraud on the legal system and noted the "inherent problem here is not memory loss; it is a cogent, calculated fabrication of false evidence and testimony…"

Partial Summary Judgment on Duty to Warn

Boca Raton Partner Anthony Merendino, Esq. and Associate Jordan Greenberg, Esq. obtained a Motion for Partial Summary Judgment in the premises liability matter styled *Robert Copper v. Defendant Store.* Plaintiff allegedly struck his eye on a cordage meter (rope cutter) which was attached to the shelf at Defendant Store and claims injury to his right eye as well as an aggravation of his Graft Versus Host Disease (GVHD). We moved for Partial Summary Judgment on the duty to warn theory of liability based upon the fact that the cordage meter was open and obvious and not inherently dangerous. Judge Laurie Buchanan granted Defendant's Motion for Partial Summary Judgment on 11/16/17 on the grounds that the alleged condition (cordage meter) was open and obvious and not inherently dangerous.

LUKS, SANTANIELLO PETRILLO & JONES

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National Retail and Restaurant Defense Association Annual (NRRDA) Conference
New Orleans February 28 - March 2, 2018

The Gavel Nationwide Claims Defense Network will host its Claims and Risk Professionals Appreciation Dinner in New Orleans at the same time as the National Retail and Restaurant Defense Association [NRRDA] Annual Conference. Luks, Santaniello clients that are attending the NRRDA Conference are invited to the Appreciation dinner on February 27, 2018 from 6 p.m. - 8 p.m. at the Fogo de Chao, Brazilian Steakhouse. Luks, Santaniello is the Florida member of The Gavel National Claims Defense Network of vetted lawyers, specialists and resources. Let us know if you are attending the conference and would like to be our dinner guests at Fogo de Chao by contacting Client Relations (MDonnelly@LS-Law.com).

Property & Liability Resource Bureau Claims Conference & Insurance Services Expo
Orlando April 16-18, 2018

Visit Luks & Santaniello at the Insurance Services Expo in booth #1240 in conjunction with the Property & Liability Resource Bureau Claims Conference at the Orlando Marriott World Center.

RIMS Annual Conference
San Antonio April 15—18, 2018

Visit The Gavel.net LLC and Luks & Santaniello at RIMS in Booth # 442 at the Henry B. Gonzalez Convention Center. Luks, Santaniello clients that are attending the RIMS Annual Conference are invited to the Claims and Risk Professionals Appreciation Dinner on April 16, 2018 at the Fogo de Chao, Brazilian Steakhouse. Let us know if you are attending the conference and would like to be our dinner guest at Fogo de Chao by contacting Client Relations.

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Call 844-MY-GAVEL (694-2835)
Email admin@thegavel.net

Jack D. **LUKS**, Founding Partner
AV Preeminent® Rated, Peer Review Rated
110 SE 6th Street—20th Floor
Fort Lauderdale, Florida 33301

Daniel J. **SANTANIELLO**, Founding/Managing Partner
Florida Bar Board Certified Civil Trial Expert
AV Preeminent® Rated, Peer Review Rated
301 Yamato Road—STE 4150
Boca Raton, Florida 33431

Anthony J. **PETRILLO**, Tampa Partner
Florida Bar Board Certified Civil Trial Expert
AV Preeminent® Rated, Peer Review Rated
100 North Tampa Street—STE 2120
Tampa, Florida 33602

Paul S. **JONES**, Orlando Partner
Florida Bar Board Certified Civil Trial Expert
255 S. Orange Avenue—STE 750
Orlando, Florida 32801

Contact Us

MIAMI
150 W. Flagler St—STE 2750
Stuart Cohen, Senior Partner
T: 305.377.8900
F: 305.377.8901

BOCA RATON
301 Yamato Rd—STE 4150
Dan Santaniello, Managing Partner
T: 561.893.9088
F: 561.893.9048

FORT LAUDERDALE
110 SE 6th St—20th Floor
Jack Luks, Founding Partner
T: 954.761.9900
F: 954.761.9940

FORT MYERS
1412 Jackson St—STE 3
Howard Holden, Senior Partner
T: 239.561.2828
F: 239.561.2841

ORLANDO
255 S. Orange Ave—STE 750
Paul Jones, Managing Partner
T: 407.540.9170
F: 407.540.9171

TAMPA
100 North Tampa ST—STE 2120
Anthony Petrillo, Managing Partner
T: 813.226.0081
F: 813.226.0082

JACKSONVILLE
301 W. Bay St—STE 1050
Todd Springer, Senior Partner
T: 904.791.9191
F: 904.791.9196

TALLAHASSEE
6265 Old Water Oak Rd – STE 201
Dale Paleschic, Senior Partner
T: 850.385.9901
F: 850.727.0233

PENSACOLA
3 W. Garden Street - STE 409
Thomas Gary Gorday, Senior Partner
T: 850.361.1515
F: 850.434.6825

FIRM ADMINISTRATOR: 954.847.2909 | CLIENT RELATIONS: 954.847.2936 | ACCOUNTING: 954.847.2903

HUMAN RESOURCES: 954.847.2932 | ATTORNEY COMPLIANCE OFFICER: 954.847.2937

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