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LEGAL UPDATE

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Verdicts, Summary Judgments, Appellate Results

Defense Verdict on Causation: Automobile Liability

[Admitted Liability; $173,000 2-level Cervical Disk Replacement; $618,000 Life Care Plan; Jury Defense Verdict on December 3, 2020].

Partners Chris Moore, Esq., (Stuart) and Jim Sparkman, Esq., (Boca Raton) tried a Post-COVID case to defense verdict in a rear-end accident case. The trial represented the first Post-COVID civil trial in the 19th Judicial Circuit. Before trial, we admitted liability on behalf of the defendants and vigorously defended causation. Plaintiff called 3 treating medical providers (Dr. Stuart Krost, Dr. Harold Bach and Dr. Michael Hennings) Read More . . . P.5

New Challenges Arise in the Litigation Battlefield of Expert Disclosures for Defense Counsel

by Joseph Donnelly, Esq., and Angela Valdivieso, Esq.

Joseph Donnelly

"To succeed in the other trades, capacity must be shown; in the law, concealment of it will do." – *Mark Twain*

In politics, there is a concept known as the Overton Window, an observance of phenomena where as a country grows and expands its politics shift to the left. Arguably in law, there is an equal phenomenon which could be dubbed the Plaintiff window. In theory, as a legal system progresses further and further, the advantage it grants to parties shifts from defense to plaintiff.

A classic hurdle facing defense counsel has always been determining what portion of damages is genuinely attributable to the plaintiff, and what portion has been manufactured either by plaintiff themselves or plaintiff's counsel. One common tactic employed by plaintiff attorneys is to encourage a plaintiff to seek treatment with a physician who is regularly employed by their offices. Instead of paying through insurance, however, the plaintiff may sign a letter of protection.

The major issue concerning letters of protection are their discoverability. As defense counsel, tactically we want these letters and the treatment files involved to provide us with a better picture of which damages we will be in a good or bad position to contest. Pertaining their discoverability, Florida courts have offered mixed messages in response.

Generally, under Florida law, evidence involving experts, including financial records and reports, is discoverable if acquired for the purpose of litigation. *Frantz v. Golebiewski*, 407 So.2d 283, 285 (Fla. 3rd DCA 1981). While treating physicians generally do not acquire their findings for the purpose of litigation, letters of protection are nevertheless discoverable for the purpose of impeaching a witness based on bias. *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.,* 228 So. 3d 18, 23 (Fla. 2017). Read More . . . P. 2

INSIDE LEGAL UPDATE

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New Challenges Arise in the Litigation Battlefield of Expert Disclosures for Defense Counsel Cont.

Angela Valdivieso

Worley outlined the broad protection that Florida courts will provide to treating providers moving forward,

"Even in cases where a plaintiff's medical bills appear to be inflated for the purposes of litigation, we do not believe that engaging in costly and time-consuming discovery to uncover a "cozy agreement" between the law firm and a treating physician is the appropriate response. We are concerned that this type of discovery would have a chilling effect on doctors who may refuse to treat patients who could end up in litigation out of fear of becoming embroiled in the litigation themselves. Moreover, we worry that discovery orders such as the one in this case will inflate the costs of litigation to the point that some plaintiffs will be denied access to the courts, as attorneys will no longer be willing to advance these types of costs. Finally, attempting to discover this information requires the disclosure of materials that would otherwise be protected under the attorney-client privilege." Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc., 228 So. 3d 18, 26 (Fla. 2017)

While the court in Worley made clear that plaintiff counsels' relationships with physicians can receive broad protection, this then raises another contested issue; does this new level of protection also apply to defense's relationship with its medical experts?

Two years after the decision in *Worley*, the proverbial shoe was placed on the other foot. In *Younkin v. Blackwelder*, No. 5D18-3548, 2019 WL 847548, (Fla. 5th DCA Feb. 22, 2019), *review granted,* No. SC19-385, 2019 WL 2180625 (Fla. May 21, 2019), defendant was sued in an automobile accident. As part of its coverage, Allstate Insurance provided defendant with legal counsel. Said counsel retained an Orthopedic surgeon to perform a CME on plaintiff pursuant to Florida Rules of Civil Procedure. In response, plaintiff's counsel sought discovery from defense counsel on the amount of money it paid their surgeon expert and how many times they have been utilized by said firm in the past 3 years.

Defense counsel in *Younkin* objected to the discovery on the precedent established in *Worley.* Specifically, that law firms are not considered parties to a case and therefore do not have discoverable information. However, the court in *Younkin* referenced and recognized an observation by the court in *State Farm Mut. Auto. Ins. Co. v. Knapp*, 234 So.3d 843, 845 n.1 (Fla. 5th DCA 2018), "

"*Worley* seems, as a practical matter, to permit full *Boecher* discovery only when it is directed to personal injury defendants and their insurers, while shielding injured plaintiffs from having to disclose information about similar repetitious referral relationships that exist between doctors and plaintiffs' counsel by invoking the attorney-client privilege". *Younkin at 2*

Both the *Younkin* court and a year later the court in *Routhier v. Barnes,* No. 5D20-1862, 2020 WL 6532943, at *1 (Fla. 5th DCA Nov. 6, 2020), refused to rule on this issue of fairness and instead certified the following question to the Supreme Court of Florida.

"WHETHER THE ANALYSIS AND DECISION IN *WORLEY* SHOULD ALSO APPLY TO PRECLUDE A DEFENSE LAW FIRM THAT IS NOT A PARTY TO THE LITIGATION FROM HAVING TO DISCLOSE ITS FINANCIAL RELATIONSHIP WITH EXPERTS THAT IT RETAINS FOR PURPOSES OF LITIGATION INCLUDING THOSE THAT PERFORM COMPULSORY MEDICAL EXAMINATIONS UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.360?"
*Routhier at *1*

The Supreme Court has yet to rule on the issue of fairness, but its decision will have a broad ripple effect and dynamically shift future discovery and trial strategies of defense attorneys for years to come.

As we await the Court's determination of whether to level the playing field and afford the same protections to defendants, we can continue to rely on letters of protection as an effective means for establishing the bias of Plaintiff's physicians. Further, demonstrating the timeline of when a Plaintiff retained counsel via the Letter of Representation, coupled with the Letter of Protection executed by Plaintiff's counsel protecting the bill of the Plaintiff's physicians, allows the jury to appreciate the bias inherent in the dynamics of the personal injury scheme.

Luks, Santaniello recently launched the *Surgical SIU | LOP Practice Group.* The practice handles a number of specialized issues for the firm, including corporate representative depositions, unreasonable CPT code billing discovery, financial bias discovery, LOP fraud/abuse discovery and trial strategy.

Read More . . . P. 3

New Challenges Arise in the Litigation Battlefield of Expert Disclosures for Defense Counsel Cont.

The practice group is headed by 3 chairs: Managing Partner Daniel Santaniello, Esq., and Partners Angela Valdivieso, Esq., and James Sparkman, Esq. For further assistance with your matters, please contact our practice chairs. For more information about this specialized practice area, visit **https://www.insurancedefense.net/surgical-siu-lop.**

About The Authors

Joseph C. Donnelly, Esq., is an Associate in the Tampa office. He is a member of the bodily injury team and concentrates his practice in general liability, premises liability and auto liability matters. While in law school Joseph was a law clerk for Luks, Santaniello in the Miami office. As a law clerk, he assisted attorneys in general liability, bodily injury, slip and fall and toxic tort matters. In this capacity he assisted with motions to compel, motions for spoliation and drafting third-party complaints. He also served as a Judicial Intern for the Honorable Samantha Ruiz Cohen in the Eleventh Judicial Circuit in and for Miami -Dade County, Florida that provided observation and exposure to judicial proceedings: motion calendars, domestic violence hearings, custody hearings and negotiations. While in law school, Joseph worked in the Business Transactions Clinic and provided legal assistance in forming a limited liability company, a sole proprietorship and filing trademark applications.

Joseph received his Bachelor of Science from Bryant University (2015) in Politics and Law. He obtained his Juris Doctor from Western New England School of Law (2020) where he received a 75% academic scholarship. Joseph was awarded the **CALI Excellence** for the Future Award in Corporate Social Responsibility. Joseph is admitted to practice law in Florida (2020).

Angela C. Valdivieso, Partner is Chair of our Surgery Center SIU team and a member of the Liability/Bodily Injury team. She is also Co-Chair of the PIP division and has over 23 years of civil litigation experience in South Florida. Angela is AV® Preeminent™ Rated by Martindale-Hubbell, the highest possible rating in legal ability and ethical standards, reflecting the confidential opinions of members of the Bar and Judiciary.

Angela's practice is primarily dedicated to defending third party and first party medical claims including BI/UM, Special Investigations/Fraud, PIP/MedPay, and Premises Liability.

She specializes in handling large scale investigation projects against medical providers, often involving improper billing and CPT coding, as well as questionable medical services. She has handled hundreds of Examinations Under Oath, which are an important tool for insurance companies to investigate claims and identify any potential fraud on the part of the insured or medical providers. Angela provides coverage opinions for insurers and is well versed in bad faith/extra contractual matters. She assists carriers with responding to time sensitive, policy limit demands and also handles global mediations.

Angela obtained a Bachelor of Arts from Georgetown University. She obtained her Juris Doctor from Nova Southeastern University, Shepard Broad School of Law. Angela is admitted in Florida (1997). Additionally, Angela is admitted to the United States District Court for the Southern District of Florida (2007).

James T. Sparkman, Partner is a Florida Bar Board Certified Civil Trial Expert with over 300 jury trials throughout Florida as "first chair." He has over 35 years of trial litigation experience. Martindale-Hubbell and his peers have also rated him AV® Preeminent™. James' practice has focused on personal injury, catastrophic injury, and wrongful death in the areas of Motor Vehicle Liability, Premises Liability, Construction, Professional Liability, Transportation and Trucking liability. He has also handled bad faith and coverage cases. James has also defended nursing homes and assisted living facilities. He is the co-chair of the *Surgical SIU | LOP Practice Group.*

James earned a Bachelor of Science from the University of Tennessee (1975). He also earned a Masters degree from the University of Tennessee (1978). James obtained his Juris Doctor from Nova Southeastern University (1984). James is admitted in Florida (1984) and to the United States District Court for the Southern District of Florida (1985). James is also admitted to the United States District Court for the Middle District of Florida (2006).

Overview of the Supreme Court's Committee Changes to Standard Jury Instructions, January 23, 2020 by James Sparkman, Esq.


James Sparkman

The Florida Supreme Court has filed its *per curiam* affirmance of the Jury Instruction Committee's proposed changes, *In Re: Standard Jury Instructions in Civil Cases- Report 2019-04 (January 23, 2020).* The same were adopted as of July 31, 2020. The most significant change from the 2018 version, especially for the defense, deals with the concept of permanent injury in automobile negligence cases. Model Instruction 1, at 501.3, advises jurors that the permanency of an injury must be decided by the jury. It defines the same accordingly, "an injury is permanent if it, in whole or in part, consists of an injury that the evidence shows is permanent to a reasonable degree of medical probability," *Id.* at 20.

The verdict form in Model Instruction 1 is preferable because it brings back an actual question for the jury to expressly answer whereas the former verdict form did not. Rather, the prior verdict form merely provided:

If the greater weight of the evidence shows that John Doe's injuries were in whole or in part permanent within a reasonable degree of medical probability, please answer question 6:

> 6. What is the total amount of John Doe's damages for pain and suffering, disability physical impairment, disfigurement…$_____

In sharp contrast, the new version provides:

> 6. Did John Doe sustain a permanent injury? YES____ NO____

Gone are the days of the defense submitting a separate verdict form containing the permanent injury question, accompanied by an argument to the judge that a verdict from without this question violates due process because no one could be certain that the jury came to a unanimous decision on the issue of permanent injury. Gone also are the days of spending precious closing argument time convincing the jury that if just one person didn't agree that there was a permanent injury, then the jury could not proceed to the question of damages for pain and suffering. Henceforth there will be no question that the jury's decision, one way or another, is unanimous.

Other Considerations

Instruction 201.3 (voir dire) contains a reminder to the jury that its duty is to determine the facts and not the law. The names of *Fabre* defendants are to be listed in instructions 501.4 and 502.5. Model Instruction Number 1 is intended to represent the "full illustration of the instructions," including Model Instructions 2 through 6, (*Id.* p.2). The presentation of the Closing Instructions, Section 700, is intended to be presented after closing arguments and not at the beginning of the case. In the introductory instruction, 201.21, Alternative B, concerning cell phone use and communication with others, has been removed.

In its conclusion the Supreme Court cautioned:

> (W)e express no opinion on their (the instructions) correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions, (*Id.* p. 3).

For example, it would be advised to submit a verdict that addresses permanent injury as:

> Did John Doe suffer a permanent injury within a reasonable degree of medical probability as the result of the subject accident?

This language would be consistent with Fla. Stat. §627.737 that governs the plaintiff's recovery of non-economic damages in an automobile case.

The "relation back" of instruction 501.3 to its original wording and the accompanying verdict form on permanent injury will guide the trial lawyer and the trial judge in presenting the law to the jury and shorten the charge conference at the close of the evidence. Other ministerial changes in Model Instruction 1 should bring uniformity to the drafting of jury instructions for all causes of action, lessening the mixed bag of instructions from firm to firm that has sometimes been experienced in the past.

For questions about this article or assistance with your matters, please contact Partner **James Sparkman,** Esq., in our Boca Raton office. James is a Florida Bar Board Certified Civil Trial Expert with over 300 jury trials throughout Florida as "first chair." He has over 35 years of trial litigation experience.

Verdicts and Summary Judgments, cont.

Defense Verdict on Causation
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and retained and called a neuro-radiologist (Dr. Eric Pfeiffer) to testify the accident was the cause of plaintiff's injuries and surgery. Plaintiff incurred over $173,000 in medical bills, stemming primarily from a 2 level cervical disk replacement. In addition, the Plaintiff obtained a life care plan by Dr. Stuart Krost for future medicals in excess of $618,000. Plaintiff contended that he essentially never had prior neck problems and that the few prior medical visits he had with neck pain years prior were temporary, far less severe and he had not treated for more than 2 years prior to the subject DOA.

The defense focused on the property damage photographs and used a mechanical engineer to explain to the jury the low forces involved in the subject incident. In addition, the defense used board certified surgeon Dr. Gaetano Scuderi to opine that image studies did not support any recent injury to the spine from the subject accident, but showed long standing, chronic degenerative changes. The defense expert explained to the jury how the prior disc problems would not heal themselves, but would grow worse over time and lead to the need for the actual disc replacement surgery that occurred in this case. The defense also vigorously challenged plaintiff's treating physicians on their billing and ownership interest in Ambulatory Surgery Center of Boca Raton, which was allegedly not disclosed to the plaintiff in violation of Florida Law. The defense was able to get a special instruction on Section 456.052, Florida Statutes, which requires surgeons to disclose financial interests that they may have in facilities, such as a surgery center.

Motion to Dismiss Granted with Prejudice: COVID Coverage and Business Interruption
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The firm's COVID Coverage team of Partner Vicki Lambert, Esq., and Appellate Partner Daniel Weinger, Esq., prevailed in a Declaratory Judgment Action brought by an insured for Civil Authority coverage pursuant to a Business Owners Policy with Business Interruption and Extra Expense coverage. This case *DAB Dental PLLC d/b/a Sunshine Dentistry v. Main Street American Protection Insurance Co.,* arises out of Florida's Hillsborough County (Tampa). The Plaintiff contended that coverage was triggered due to the Governor's Stay at Home Order, which closed their dental practice, under the Civil Authority portion of the policy. The Court found that a plain reading of the Policy contradicted the Plaintiff's position. Further, that the Civil Authority provision requires direct physical loss or damage, and Florida law supports a legal conclusion that the mere presence of COVID-19 on business premises does not constitute direct physical loss or damage. Without such, there is no covered cause of loss. Even if the Plaintiff's allegations established coverage, the Virus Exclusion applies to preclude coverage. The Plaintiff's Complaint for Breach of Contract and Declaratory Action was dismissed with prejudice.

Read More . . . P. 6

Verdicts and Summary Judgments, cont.

MSJ Granted: Wrongful Death

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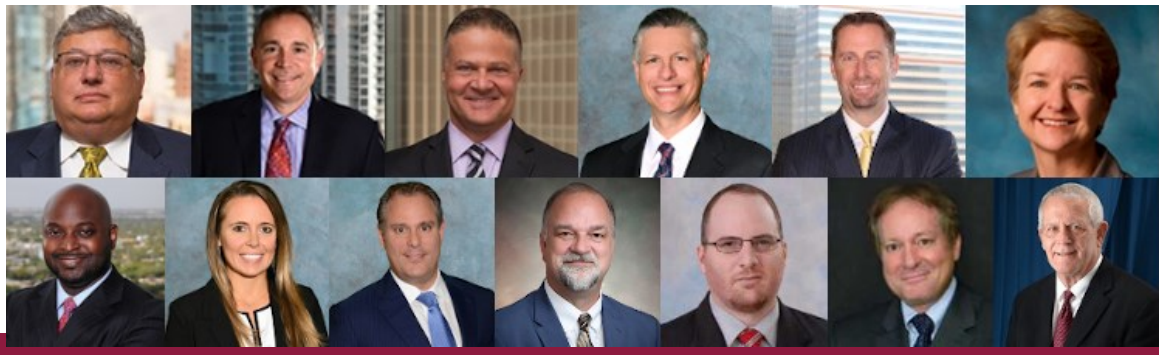
Managing Partner Dan Santaniello, Esq., Partner Chris Moore, Esq., and Appellate Partner Daniel Weinger, Esq., received Summary Judgment in a wrongful death matter. The case arose out of the tragic disappearance and presumed deaths of Perry Cohen and Austin Stephanos on July 24, 2015. Our firm was retained to represent the Father of one of the boys who was alleged to have been negligent due to the undertaker's doctrine in matter styled *John Eric Romano, as personal representative of the Estate of Perry Cohen v. William 'Blu' Stephanos, et al.* Plaintiff asserted that our client delayed the official search and rescue, failed to call 911, failed to provide information to the authorities and that his actions in conducting his own search made him responsible for the presumed deaths.

In defense of these claims, our firm conducted a thorough and aggressive investigation and learned of the facts that had not been made public, and found additional evidence that supported the actions taken by our client. In fact, we found witnesses and ocean images that established the boys had been seen just prior to and during the storm just off the coast, that the Coast Guard had been contacted and that the boat was then seen in the ocean images overturned and with no signs of life—all before our client was even aware the boys had not timely checked in. The firm's client was not in custody or control of the boys that day, and he was working at his office so he had no information about the storm.

Ultimately, we filed a summary judgment motion based primarily on the total lack of evidence that our client breached any duty of care. The Order granted summary judgment on behalf of our client and found that his actions did not increase the risk of harm, and that he committed no breach of any duty of care. The case was later amicably resolved.

The summary judgment order in our client's favor is vindication for the actions of a parent, whose concern and attempt to find his son was not wrong, nor actionable. In the words of the well-reasoned order, "The Defendant went looking for his son and for his son's companion, Perry. This simple, and understandable act, does not give rise to liability based on the undertaker doctrine." We add that his actions and determined efforts to search undaunted for weeks should be praised and emulated.



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