

# CASE LAW

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# Update

Barbara Green, P.A.  
Attorney at Law  
(305) 669-1994

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## Collateral Source

### ***Ingenix v. Ham***

Case No. 2D09-2211 (Fla. 2d DCA May 5, 2010)

Section 768.76(4), Fla. Stat., limits a collateral source provider's right of reimbursement from a claimant's recovery from a tortfeasor. It provides that the collateral source provider's recovery: shall be limited to the actual amount of collateral sources recovered by the claimant from a tortfeasor, minus its pro rata share of costs and attorney's fees incurred by the claimant in recovering such collateral sources from the tortfeasor. In determining the provider's pro rata share of those costs and attorney's fees, the provider shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement or settlement which is for costs and attorney's fees.

The Second DCA holds that this provision controls over any provision to the contrary in a health insurance policy.

The health insurer was not entitled to reimbursement of the full amount of medical bills it had paid, even though the policy stated that it was. The insurer's reimbursement had to be reduced by its pro rata share of costs and attorney's fees.

## Compulsory Medical Examination

### ***Prince v. Mallari***

2010 WL 1626522 (Fla. 5th DCA April 23, 2010)

### ***Gaskins v. Canty***

29 So.3d 432 (Fla. 2d DCA 2010)

In two recent decisions, the Fifth and Second Districts have clarified some of the parameters for compulsory medical examinations. While these examinations commonly arise under Florida Rule of Civil Procedure 1.360, they also occur in other situations, for example, at the behest of an insurance company in a PIP case, or in a worker's comp case pursuant to §440.25(7), Fla. Stat. The Supreme Court has applied the same analysis to all of these contexts. See *U.S. Security Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000) (holding that the person examined has the right to have their own attorney and a video camera or court reporter present). The Court has also recognized that the term "independent" and that the term "compulsory examination" may be more realistic. See *Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 995 n.4 (Fla. 1999) (noting that Rule 1.360 "specifically provides that the witness 'shall not be identified as being appointed by the court.'")

In *Gaskins*, following the Court's "liberal view" in *Cimino*, the court stated that the party being examined is generally entitled to have their attorney, videographer or court reporter present unless the other party establishes a case-specific reason why such attendance would disrupt it, and that no other examiner in the area would conduct an examination with a third party present. The *Gaskins* court, like the *Cimino* court, quashed an order prohibiting the plaintiff from having their attorney or videographer at the examination.

In *Prince*, the court held that the defendant could not have its own videographer at the CME. It pointed out that the examination is "'adversarial' and the plaintiff is entitled to protection." The plaintiff is generally unsophisticated and is "placed in the awkward position of being physically examined by someone not of his or her choosing, who has no interest in the plaintiff's well-being and not for medical treatment."

The examining physician is an expert witness for the opposing party. The plaintiff must be protected from improper questioning about liability issues by the defendant's doctor, and the plaintiff's privacy must be protected. "The defendant has no such right and needs no such protection."

The defendant's attorney is not allowed to attend the examination, see *Chavez v. J&L Drywall*, 858 So.2d 1266 Fla. 1st DCA 2003), and, the court held in *Prince*, is not permitted to attend by proxy through a videographer. "If the examination is recorded by her own attorney, she has control of it. To allow a stranger into the examining room to record the examination on behalf of

one's opponent, to be viewed and used as the opponent sees fit, is completely outside the operation of the rule."

Finally, the court in Prince held that the video is entitled to work product protection unless the plaintiff decides to use it at trial.

It was my privilege to serve as the plaintiff's appellate counsel in the *Prince* case.

## **Insurance – Bad Faith**

### ***Perera v. United States Fidelity & Guaranty Co.,* Case No. SC08-1968 (Fla. May 6, 2010)**

Answering, in slightly revised form, a question certified from the 11th Circuit Court of Appeals, the Supreme Court holds that a cause of action for third-party bad faith against an indemnity insurer may not be maintained when the insurer's actions were not a cause of the damages to the insured or when the insurer's actions never resulted in exposure to liability in excess of the policy limits of the insured's policies.

The insured had multiple layers of insurance coverage. The USF&G policy at issue was a \$1 million indemnity policy. An indemnity policy requires the insured (not the insurer) to undertake the defense of a claim. In contrast, under liability policies, the insurer controls the defense. The other policies were a primary \$1 million policy and a \$25 million excess policy with Chubb. USF&G asserted a coverage defense and refused to settle.

Ultimately, the plaintiff settled with the two other carriers, but did not obtain an assignment from the excess carrier of the claim against USF&G.

The case against USF&G went to trial, and the jury found that USF&G had acted in bad faith. However, the Supreme Court stated, there is no indication from this record that the case, had it gone to trial, would have resulted in a jury verdict in excess of the combined insurance policies. Therefore, the plaintiff did not have a cause of action against USF&G.

In a footnote, the court points out that, had Chubb (the excess carrier) assigned a claim of equitable subrogation against USF&G as part of the settlement, the plaintiff may have been able to bring a bad-faith claim based on damages sustained by Chubb in the amount of any difference between what Chubb actually paid and the amount it would have paid had USF&G settled in good faith.

The moral of the story is that, if you are going to settle a case with multiple layers of coverage, you must obtain an assignment of the excess carrier's rights against the primary carrier that acted in bad faith and forced the excess carrier to drop down and protect the insured.

## **Insurance – Presumptions – Sink Hole Coverage**

### ***Warfel v. Universal Ins. Co. of North America,* Case No.2D08-3134 (Fla. 2d DCA May 12, 2010)**

The Second DCA has certified to the Florida Supreme Court a question of great public importance concerning presumptions about sink hole damage coverage under §627.7073(1)(c). That section provides: "the findings, opinions, and recommendations of the engineer and professional geologist as to the verification or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as to land and building stabilization and foundation repair shall be presumed correct."

The DCA held that the trial court erred when it instructed the jury that it must presume that the findings of the insurer's experts are correct and that the burden is on the insured to rebut those findings by a preponderance of the evidence. The court held that the presumption is a "vanishing" or "bursting bubble" presumption which affected only the insured's burden of presenting evidence. Once the insured has presented contrary evidence, the presumption vanishes and the jury is not to be instructed about it.

The court certified the following question to the Supreme Court:

Does the language of section 627.7073(1)(c) create a presumption affecting the burden of proof under section 90.304 or does the language create a presumption affecting the burden of producing evidence under section 90.303.

## **Limitations – Tolling**

### ***Ramirez v. McCravy* Case No. SC09-490 (Fla. May 20, 2010)**

The court dismisses, as improvidently granted, review of *Ramirez v. McCravy*, 4 So.3d 692 (Fla. 3d DCA 2009), which held that the Supreme Court's hurricane tolling orders, despite their broad wording, were only intended to help people who could not get to the courthouse because of hurricane conditions or their aftermath, and could not be used to extend a statute of limitations where the hurricane tolling order was entered months before the statute of limitations ran and the plaintiff's ability to file was not affected by the storm or its aftermath.

## **Mary Carter Agreement**

### ***La Costa Beach Club Resort & Condo Assoc. v. Carioti,***

Case No. 4D07-4838 (Fla. 4th DCA April 14, 2010)

A *Mary Carter* agreement is an agreement entered into between a plaintiff and one or more but not all defendants which typically has the following features: (a) secrecy; (b) the agreeing defendants remain as party defendants in the lawsuit; (c) the agreeing defendants' liability is decreased in direct proportion to the nonagreeing defendants' increase in liability; (d) the agreeing defendant guarantees to the plaintiff a certain amount of money if plaintiff does not receive a judgment against any of the defendants or if the judgment is less than a specified sum.

The court held that the agreement in this case was not an illegal *Mary Carter* agreement. The settlement provided that the settling defendant would pay the plaintiff a specified amount for dismissal and "full and complete satisfaction of all claims asserted by plaintiff" against him; that the plaintiff would execute a general release in his favor, and that the settling defendant would make himself available for the trial against the remaining parties.

The settlement was to remain confidential unless a court ordered otherwise. The settling defendant remained in the case as a cross-defendant.

However, the fact that there was a settlement was never hidden from the other defendants before or during the trial, and the settling defendant testified that he had settled, although he remained a cross-defendant. The other defendants' lawyer reminded the jury about the settlement in his closing argument. Further, there was no substantive change in the settling defendant's testimony between his deposition and trial.

## **Med Mal – Ex Parte Communications**

### ***Hasan v. Garvar***

Case No. 4D10-136 (Fla. 4th DCA May 19, 2010)

The trial court did not depart from the essential requirements of law when it entered an order allowing a treating doctor who was not a defendant in the medical malpractice case to consult with an attorney prior to his deposition, allowing them to discuss general deposition techniques but not the plaintiff's "health care information." The same insurance company was providing an attorney to the treating doctor as to the defendants.

The court stated, "Though we are not naïve, we also are not so cynical to accept the plaintiff's assumption that the prohibition [against discussing the plaintiff's "health care information"]

will be disobeyed simply because the same insurer is providing attorneys to both the defendants and the oral surgeon, albeit separate attorneys. See Comment to R. Regulating Fla. Bar 4-1.8(j) ("[T]he representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks.")

The court distinguished *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996); *Keel v. Psychiatric Inst. of Delray, Inc.*, 668 So. 2d 691 (Fla. 4th DCA 1996); *Kirkland v. Middleton*, 639 So.2d 1002, 1004 (Fla. 5th DCA 1994); *Lemieux v. Tandem Health Care of Fla., Inc.*, 862 So. 2d 745 (Fla. 2d DCA 2003); *Dannemann v. Shands Teaching Hosp. & Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st DCA 2009); and *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2006).

## **NICA**

### ***Florida Birth-Related Neurological Injury Comp. Assoc. v. Dept. of Administrative Hearings***

29 So.3d 992 (Fla. 2010)

The delivering physician provided the required notice of NICA participation, but the hospital did not. The court held that both are required to provide notice, but the requirement is severable. "If either the participating physician or the hospital with participating physicians on its staff fails to give notice, then the claimant can either (1) accept NICA remedies and forgo any civil suit against any other person or entity involved in the labor or delivery, or (2) pursue a civil suit only against the person or entity who failed to give notice and forgo any remedies under NICA."

## **Offer of Judgment / Proposal for Settlement**

### ***Attorney's Title Ins. Fund v. Gorka***

Case No. SC08-1899 (Fla. April 1, 2010)

A joint offer of judgment or proposal for settlement that is conditioned on the mutual acceptance by all joint offerees is invalid and unenforceable. The offer stated that it was conditioned on both offerees accepting the offer and that neither could accept it independently of the other. The offer was invalid because each offeree must be able to independently evaluate or settle his or her respective claim. An offeree cannot be subject to the sanctions of Rule 1.442 and §768.79, Fla. Stat., because of the conduct of another offeree over whom he or she has no control.

***Smith v. Loews Miami Beach Hotel Operating Co., Inc.,***

Case No. 3D09-1244 (Fla. 3d DCA May 12, 2010)

Where plaintiff voluntarily dismissed her claim without prejudice while defendant's motion for summary judgment was pending, the defendant was not entitled to fees pursuant to the offer of judgment statute or rule. This was plaintiff's first voluntary dismissal. The plaintiff properly preserved her objection by raising it for the first time at the hearing to determine the amount of the fees.

**PIP – Assignment of Benefits**

***Shaw v. State Farm Fire & Cas. Co.***

2010 WL 1812596 (Fla. 5th DCA May 7, 2010)

Many people have no other way to obtain medical treatment after an accident except by assigning their right to PIP benefits to a treating doctor. The 5th DCA, en banc, holds that, when an insured assigns his PIP benefits to a treating doctor, the doctor is not required to submit to an examination under oath (EUO). The insurer cannot include in the policy a provision that extends the duty to submit to an EUO to assignees of the insured's right to insurance proceeds. The assignment of a contract right does not entail the transfer of any duty under the contract to the assignee unless the assignee assents to assume the duty. The duty of performance of conditions remains with the assignor. "An obligor cannot unilaterally attach conditions to the obligee's right of assignment and cannot bind the assignee to any performance under the contract unless the assignee has agreed." The Third District reached the same result in *Marlin v. State Farm Mut. Auto. Ins. Co.*, 897 So.2d 469 (Fla. 3d DCA 2004).

The duty to submit to an EUO remains with the insured. The doctor merely agreed to accept assignment of the money due under the policy; he did not become the "insured" and did not undertake any duty under the policy.

**PIP – Retroactivity**

***Menendez v. Progressive Express Ins. Co.***

Case No. SC08-780 (April 22, 2010)

An amendment to the PIP statute requiring a PIP insured to provide presuit notice in order to be entitled to PIP benefits was substantive and could not be applied retroactively to an insurance policy issued before the statute was enacted.

**Preservation of Error**

***Aills v. Boemi***

29 So.3d 1105 (Fla. 2010)

The proper preservation of error requires three components: (1) the party must make a timely, contemporaneous objection at the time of the alleged error; (2) the party must state the legal grounds for the objection; (3) the specific argument made on appeal must have been asserted below as the legal ground for the objection or motion below. In this case, the court held that the objection made below was not the same as the one raised on appeal, and therefore the argument on appeal was waived.

**Successive Tortfeasors**

***Nason v. Shafranski***

No. 4D08-4293 (Fla. 4th DCA April 28, 2010)

In *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), the Florida Supreme Court held that an initial tortfeasor could not bring a third-party medical malpractice action against a plaintiff's treating doctor, because the initial tortfeasor is liable for any aggravation of the plaintiff's injuries caused by the treating doctor. See *J. Ray Arnold Corp. v. Richardson* 141 So. 133 (Fla. 1932).

In this case, the defendants argued that the plaintiff's treating doctor had performed unnecessary surgeries on the plaintiff. The plaintiff requested an instruction, pursuant to *Stuart v. Hertz*, that the defendants were responsible for any damages resulting from negligent or improper medical treatment. The court held that the refusal to give the instruction was reversible error.

**Workers Comp Immunity**

***Ramcharitar v. Derosins***

Case No. 3D09-1313 (Fla. 3d DCA May 12, 2010)

The plaintiff was injured by a subcontractor of his employer prior to the 2003 amendment to the workers comp statute. The lawsuit was filed after the effective date of the amendment. The 2003 amendment provided horizontal and vertical immunity for subcontractors for injuries to other subcontractors or to employees of the employer. The court held that the amendments could not be applied retroactively and that the subcontractor was not entitled to immunity.