Legal Update
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TRANSITORY SUBSTANCES, SLIP AND FALL LITIGATION, AND JURY INSTRUCTIONS

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A transitory substance has been defined as "any liquid or solid substance item or object located where it does not belong" *Blacks Law Dictionary 660* (7th ed, 1999). Historically, it was sufficient for plaintiffs to merely allege the condition of a transitory substance to establish constructive knowledge on behalf of the defendant. *Owens v. Publix Supermarkets, Inc.* 802. So.2d 315 (2001). The defendant would then be burdened to produce evidence to refute constructive knowledge of the transitory substance. However, this is no longer the status of the law.

In 2010, the Florida Legislature enacted FLA. STAT. § 768.0755, which effectively shifts the burden of proof to the plaintiff when a transitory substance is the cause of a slip and fall resulting in injury. Section 768.0755 states:

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DTI – DIFFUSE TENSOR IMAGING

Recently, we have seen an uptick in claims for traumatic brain injury ("TBI") resulting some very questionable injury mechanisms. The plaintiff's bar has been sending claimants for treatment with plaintiff-oriented medical practices that support TBI claims by sending the claimant for diffusion tensor imaging ("DTI"), which is an advanced brain MRI technique designed specifically to evaluate TBI. It is a relatively new technique that began seeing application for TBI around 2007. DTI uses an advanced pulse sequence to image the brain to evaluate the white matter tracts or wiring of the brain. It is useful in detecting abnormalities of the white matter in the brain. White matter abnormalities can be caused by TBI, MS, stroke, substance abuse, and other diseases. The proponents of DTI claim that the pattern of abnormality is specific for disease processes and DTI can be very useful for determining the actual cause of the white matter abnormality.

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(1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that

(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
(b) The condition occurred with regularity and was therefore foreseeable.

(2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

Recently, in *N. Lauderdale Supermarket v. Puentes*, 332 So. 3d 526 (Fla. 4th DCA 2021), Florida's Fourth District Court of Appeal recognized a conflict between this statute and Florida's standard jury instructions. In that case, Plaintiff fell on an oily substance which resulted in injury and a lawsuit. The parties could not agree on the jury instructions regarding slip and falls and transitory substances, with Defendant contending the standard jury instruction was not consistent with § 768.0755. The trial court ultimately overruled Defendant's objection and issued the standard instruction due to the absence of case law on the matter. On appeal, the Fourth District found Florida Standard Jury Instruction 401.20(a) was not legally correct without modification and the lower court erred in providing the unmodified jury instruction without appropriate modification consistent with § 768.0755.

Interestingly, Florida Standard Jury Instruction 401.20(a) specifically states under its notes of use that the phrase ". . . about which (defendant) either knew or should have known by use of reasonable care . . ." may be inappropriate in cases involving "transitory foreign objects." Florida Standard Jury Instruction 401.20(a)(2) (2018), and the Florida Bar version that is currently displayed on its website, state: "for transitory foreign substances in a business establishment, see *F.S.* 768.0755 and cases interpreting it."

Puentes fails to provide guidance as to what a proper or correct jury instruction would need so as to conform with the applicable transitory substance statute. This leaves individual courts open to interpret or modify the standard jury instructions until a body of case law exists clarifying the issue. Therefore, future transitory substance cases where jury instructions are contested will likely result in appellate action until a court clarifies the matter.

By: Eric R. Arckey

ELEVENTH CIRCUIT ALLOWS EMPLOYMENT DISCRIMINATION PLAINTIFF TO PROCEED ON ALTERNATIVE "CONVINCING MOSAIC" FRAMEWORK

In *Jenkins v. Nell*, 26 F.4th 1243 (11th Cir. 2022), a former employee of the Georgia Ports Authority sued his former supervisor under 42 U.S.C. §§ 1981 and 1983, alleging he was discriminated against based upon race and, therefore, unlawfully terminated. The trial court granted summary judgment in favor of the supervisor. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and remanded for trial.

The Eleventh Circuit agreed that the plaintiff could not satisfy the familiar and frequently-utilized *McDonnell Douglas* burden-shifting framework, under which the employee must prove (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified to perform the job in question; and (4) his employer treated "similarly situated" employees outside his class more favorably. The comparator must be similarly situated in all respects. Once a plaintiff demonstrates a prima facie case, the burden shifts to the defendant to produce evidence of—but not necessarily prove—at least one legitimate, non-discriminatory reason for the adverse action. After the defendant makes this production, the plaintiff must prove that each legitimate, non-retaliatory reason for the adverse action was merely a pretext to mask retaliation.

The plaintiff in *Jenkins* could not identify a proper comparator and therefore could not satisfy the *McDonnell Douglas* burden-shifting framework. However, the plaintiff also contended—and the Eleventh Circuit agreed—he could proceed with his discrimination claims on a less frequently utilized and more flexible standard by demonstrating a "convincing mosaic" of circumstantial evidence that would allow a jury to infer intentional discrimination.

The Eleventh Circuit explained that a plaintiff may establish a convincing mosaic by pointing to evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) "systematically better treatment of similarly situated employees," and (3) pretext. The plaintiff in *Jenkins* demonstrated that (1) another employee committed a violation of the same rule as the plaintiff but remained employed, (2) no less than 18 employees in the same position as the plaintiff and of the same race as plaintiff retired, resigned, or transferred from the department since the supervisor took over, (3) evidence existed that the supervisor mistreated 3 other employees of the plaintiff's race, (4) the supervisor had a close relationship with the human resources department, (5) the supervisor made racially-based comments about individuals in plaintiff's employment position and of the same race as plaintiff, (6) the supervisor declined to change his accident report about an incident involving the plaintiff, and (7) the supervisor's presented shifting reasons for terminating the plaintiff.

The "convincing mosaic" framework has generally been infrequently utilized, sometimes overlooked by plaintiff's attorneys, and of somewhat uncertain validity in the Eleventh

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DTI specifically looks at the speed and uniformity of water movement in the highly organized white matter tracts in the brain, which are composed of axons, and represent the wiring of the brain. Just as an electrical current moves in one direction through a wire, the water movement through the axons moves in a very specific direction. Trauma to the brain can result in a shearing injury to the axons of the white matter tracts. DTI detects the injury to the axons by identifying a loss of the normal organized highly uniform water movement in the white tracts.

Imagine the white matter tracts in the brain are glass tubes and water is flowing through the glass tubes in one direction. When the glass tubes are struck by a hammer (such as the head taking a blow) the tubes fracture or crack and the water starts leaking out in all directions. DTI tells the practitioner if the tubes are in tact or if they have been cracked or broken because they can see that the water from the axons has leaked out in all directions in the brain. The cracked or disrupted white matter tracts are often associated with TBI.

Studies on the efficacy of DTI have been mixed. The proponents of DTI will acknowledge that it has a sensitivity rate of detecting minor TBI of about 30% to 40%, depending on which study you use. Defense attorneys have attacked admissibility of TBI for a number of reasons, including its low sensitivity rate. Additionally, for DTI to be valid, the facility performing DTI scans must establish a database of patients so that scans can be compared to the database to determine if the results are within or outside the standard deviation. The proponents of DTI claim the database needs the scans from a minimum of 125 patients before a valid database is established. This writer would suggest that number is arbitrarily low for a valid database.

Initially, the defense bar had some success in keeping DTI scans out of court through *Daubert* and *Frye* motions. However, the trend recently in both federal and state courts is to allow admission of the scans at trial. This does not bode well for defense of TBI cases. Plaintiff attorneys are putting radiologists on the witness stand claiming that the DTI scan is objective and irrefutable evidence of a TBI. The defense bar will need to develop their own experts to refute these claims as DTI becomes more ubiquitous in litigation.

By: Joseph D. Tessitore

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Circuit. There was some hope that the Eleventh Circuit abandoned the framework through *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019), but *Jenkins* undercuts those hopes. Interestingly, the Eleventh Circuit originally adopted the "convincing mosaic" framework from the Seventh Circuit. However, finding the "convincing mosaic" framework to have created a "rat's nest" of the law in that Circuit, the Seventh Circuit quickly dispensed with it entirely. The "convincing mosaic" framework provides some flexibility for plaintiffs and provides an additional route to proving discrimination and retaliation claims that, as shown by *Jenkins*, cannot survive the more frequently utilized *McDonnell Douglas* burden-shifting framework. It is likely that after *Jenkins*, more plaintiffs will attempt to rely upon the "convincing mosaic" framework for discrimination and retaliation claims.

By: Frank M. Mari

INSURANCE-BAD FAITH-CUNNINGHAM/COBLENTZ AGREEMENTS

Recently, in *McNamara v. GEICO*, No. 20-13251, 2022 WL 1013043 (11th Cir. Apr. 5, 2022), the Eleventh Circuit Court of Appeals issued an important decision in the insurance bad -faith arena. The Court, interpreting Florida law, considered the issue of whether a plaintiff may rely on a consent judgment, as opposed to a judgment secured pursuant to a verdict following trial, in order to establish that the insured suffered an" excess judgment" as a result of the insurer's actions. Under Florida law, a plaintiff who brings a bad-faith claim against an insurer for failing to settle a lawsuit against one of its insureds must prove, among other things, that the insurer's conduct caused his loss. Demonstrating that the insured suffered an "excess judgment" is the most straightforward way of establishing the requisite causation.

Previously, in *Cawthorn v. Auto-Owners Ins. Co.*, 791 F. App'x 60, 65, (11th Cir. 2019) the Eleventh Circuit held that only a judgment which followed a trial and resulted from a verdict could qualify as an "excess judgment" for bad-faith purposes, under Florida law. However, in *McNamara*, the Court found *Cawthorn* misinterpreted Florida law. It further recognized that under Florida law, a consent judgment can qualify for "excess judgment" status. The Court expressly recognized that either a "*Cunningham*" agreement (wherein the insurer and the injured party agree to try the bad-faith issues first; if no bad faith is found, the injured party agrees to settle for policy limits, thereby preventing the insured from facing an excess judgment) or a "*Coblentz*" agreement (wherein the insured, forced to defend against the injured party's claims on his own, agrees to settle with the injured party for policy limits; the injured party can then sue the insurance company on a bad-faith theory), can operate as the functional equivalent of an excess judgment. Therefore, for purposes of the bad-faith action, it does not matter whether the "excess judgment" results from a stipulated settlement, as opposed to a verdict following a trial.

The Court stressed that the plaintiff in a bad-faith action still has the obligation to prove the other elements of his claim, most notably that the insurer breached its duty of care to its insured, by acting in bad faith. Moreover, a consent judgment will be enforced against an insurer only to the extent that the judgment itself is reasonable in amount and untainted by bad faith on the part of the insured. Accordingly, the insurer in a bad-faith action may still challenge the reasonableness of the consent judgment and assert defenses of bad faith and collusion between plaintiff and the insured in reaching the stipulated settlement.

By: Michael J. Roper

PRE-SUIT REQUIREMENTS, STATUTE OF LIMITATIONS, AND THE ASSISTED LIVING FACILITIES ACT

Very recently, Florida's First District Court of Appeal issued an opinion affirming the dismissal of an assisted living facility resident's slip and fall claim based on a failure to comply with the pre-suit notice requirement and statute of limitations provided in the Assisted Living Facilities Act ("ALFA"). In *Cohen v. Autumn Village, Inc.*, No. 1D20-2206, 2022 WL 1163450 (Fla. 1st DCA Apr. 20, 2022), the plaintiff alleged an employee of the assisted living facility placed a food tray in front of a resident's door. The cup on the tray spilled, creating a puddle in the walkway. The plaintiff allegedly slipped in the puddle and sustained injuries from her fall.

The defendant moved to dismiss the complaint, arguing the plaintiff had failed to comply with the ALFA's pre-suit notice requirements and its two-year statute of limitations. On appeal, the First District agreed with the defendant. It explained the ALFA authorizes civil actions against assisted living facilities and contains the following exclusive remedy provision:

> Sections 429.29–429.298 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a resident arising out of negligence or a violation of rights specified in s. 429.28. This section does not preclude theories of recovery not arising out of negligence or s. 429.28 which are available to a resident or to the agency.

See Fla. Stat. § 429.29(1). The Court explained that claims that fall within this provision are subject to certain limitations, including a pre-suit notice requirement under § 429.293(2), and a two-year statute of limitations under § 429.296(1).

The plaintiff argued the ALFA's exclusive remedy provision applies only to claims arising from *professional* negligence. The First District disagreed, finding the ALFA applies to a common-law negligence claim, such as the plaintiff's. Because the ALFA applies to the plaintiff's claim, the Court found her claim was subject to both the pre-suit notice requirement and the two-year statute of limitations. It further found the plaintiff failed to comply with these conditions.

Going forward, pursuant to *Cohen*, assisted living facilities facing common-law negligence claims should investigate whether the plaintiff has complied with all conditions of the ALFA, including both the pre-suit notice requirement and the two-year statute of limitations. Such defenses may potentially be grounds for a favorable resolution of the case near the outset of litigation.

By: John M. Janousek

FIRM SUCCESS

MOTION FOR FRAUD UPON THE COURT GRANTED – PLAINTIFF INTENTIONALLY LIED ABOUT PRIOR ACCIDENTS AND INJURIES

Attorneys Joseph D. Tessitore and Jennifer C. Barron obtained a dismissal of the Plaintiff's case for fraud upon the court in the case of *Smith vs. Goodwill Industries of North Florida*. The Plaintiff alleged she injured her low back after falling from an allegedly loose toilet seat in a Goodwill restroom. In a lengthy written order, the Court detailed the Plaintiff's failure to disclose relevant information about prior accidents and injuries. In particular, in her answers to written discovery requests and at deposition, the Plaintiff disclosed two vehicle accidents, but denied any prior injuries to her low back and denied seeking treatment at a hospital emergency room prior to the subject incident. Records revealed that the Plaintiff failed to disclose a prior workers' compensation accident and claim of injury and a third vehicle accident, all which occurred prior to the subject incident and were only discovered due to the efforts of the defense. Significantly, the Plaintiff also failed to disclose that just 18 months prior to the alleged incident at Goodwill, she had a prior injury to her low back involving an almost identical incident where she claimed to have fallen off of a broken toilet seat in a Publix restroom. Medical records revealed that as a result of that incident, she sought treatment at an emergency room for an injury to her low back. We also uncovered that the Plaintiff made a claim against Publix for injuries to her low back from that incident and accepted a settlement. Despite direct questions at deposition, Plaintiff unequivocally denied, on multiple occasions, any prior injury or incident involving a fall from a toilet seat.

The Court explained that being injured by a fall from a toilet seat in a store restroom, once in one's lifetime, is an unusual incident. This was not something the Plaintiff could have forgotten only 18 months later, particularly given she was directly asked if she had ever fallen from a toilet seat in the past. Her non-disclosure and unequivocal denial of the prior toilet seat incident was an intentional effort to mislead the court and trier of fact. This was further compounded by her failure to disclose the workers' compensation claim and prior vehicle accident. The court found that the Plaintiff had every opportunity to be forthcoming about her accident and medical history, but deliberately chose to mislead the defendant despite being directly asked questions that would prompt disclosure of this information. If she had been successful in her scheme to conceal her accident and medical history, Goodwill would have been harmed in its defense. Based upon the ample record, a dismissal of the Plaintiff's Complaint for fraud was warranted, as it was demonstrated by clear and convincing evidence that the Plaintiff sentiently set in motion an unconscionable scheme to interfere with the judicial system's ability to impartially adjudicate the case by improperly influencing the trier of fact and unfairly hampering the presentation of Goodwill's defense.

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