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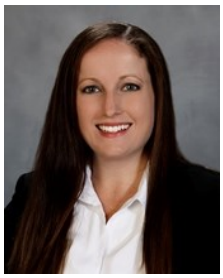
LEGAL UPDATE

VOLUME 16, ISSUE 2
APRIL — JUNE, 2017

Liability

Florida Statute § 768.125 is a Protective Statute that Will Preclude a Vendor from Apportioning Liability to a Habitual Drunkard who Commits a Tortious Act by Lauren Wages, Esq.



Lauren Wages, Esq.

Although vendors who sell alcohol are generally precluded from liability for the negligent acts of their patrons, under Fla. Stat. § 768.125 vendors can still be liable for ordinary negligence if they furnish alcohol to a person known to be habitually addicted to alcohol where that person commits a negligent act as a result of being intoxicated.

Fla. Stat. § 768.125 addresses the potential liability for injury or damage resulting from intoxication a vendor faces for selling alcohol to a habitual drunkard (or a minor). Fla. Stat. § 768.125 states that a person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

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Verdicts, Summary Judgments, Appellate Results

Defense Verdict after Seven Figure offer– Fees Recoverable: Triple Surgery case with Liability – Miami

On March 17, 2017, Dan Santaniello and Dorsey Miller received a defense verdict in premises liability matter styled Virginia Martinez v. Chanel, Inc. Plaintiff had over $606,000 in past medical expenses and her physiatrist, Dr. Craig Lichtblau, estimated that her future medical care and treatment would cost upwards of $850,000. The jury found us 100% at fault but awarded only $60,000 ($50,000 past medical expenses; $10,000 past pain and suffering) however, Plaintiff will get nothing because of a $500,000 Proposal for Settlement. Plaintiff Martinez was cleaning a glass jewelry case at the Chanel Boutique in the Bal Harbour Shopping Mall when an 8 foot decorative panel fell on her. Liability was not seriously contested. Plaintiff, a 36-year old mother of three with no priors, underwent a L4 hemilaminectomy, an L4-5 discectomy, a C3-4 and C6-7 stryker disk decompression, and a spinal cord stimulator implant. Plaintiff turned down a seven figure offer at the start of trial.

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Florida Statute § 768.125 is a Protective Statute that Will Preclude a Vendor from Apportioning Liability to a Habitual Drunkard who Commits a Tortious Act cont.

A recent case out of the Fourth District Court of Appeals, Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde, found there was no cause of action under Fla. Stat. § 768.125, rather the cause of action is for negligence. 199 So.3d 333, 338 (Fla. 4th DCA 2016). Fla. Stat. § 768.125 does not create a cause of action, rather, "it is a protective statute meant to *eliminate* a cause of action where one might not otherwise exist." Id. at 337. Proof that a vendor violated Fla. Stat. § 768.125 is not a per se determination of the elements of the duty and breach elements required in a negligence action, and a claimant must prove duty, breach, causation and damages as with any negligence case. Id. at 342. The court stated in *dicta* that, "proactive attempts by a drinking establishment to protect the public from a habitual alcoholic whom it has knowingly served may be sufficient to show that there has been no breach of a legal duty." Id.

In terms of apportioning liability between a habitual drunkard and a vendor, "section 768.81 [the statute interpreted in *Fabre*] does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor." Id. at 341 citing Grobman v. Posey, 863 So.2d 1230 (Fla. 4th DCA 2003). Derivative liability is that which "depends upon a subsequent wrongful act or omission by another." Id. The court in Wilde found derivative liability because the negligence of a vendor only results in liability when an intoxicated habitual drunkard engages in a "subsequent wrongful act or omission. Id. at 341-42. The risk of a habitual drunkard's tortious conduct is the very risk that makes a vendor's conduct negligent at the outset, and a habitual drunkard's foreseeable tortious conduct cannot be used to reduce the liability of the vendor. Id. at 341. Therefore, the court held that it was proper to exclude a habitual drunkard on the verdict form for the purpose of apportioning liability. Id. at 342.

Wilde followed the holding initially articulated by the Florida Supreme Court in Ellis v. N.G.N. of Tampa, Inc. that Fla. Stat. § 768.125 does not by itself create a cause of action against a vendor for the negligent sale of alcohol to a habitual drunkard. 586 So.2d 1042, 1047 (1991). The Court stated, "although limited by the provisions of section 768.125, there is a cause of action against a vendor for the negligent sale of alcoholic beverages to a minor that results in the injury to or death of the minor or a third party." Id. The cause of action under the habitual-alcoholic exception to the statute "is ordinary negligence." Id. at 1049. "While we have not expressly addressed a case involving a habitual drunkard, we find that the same law applies [as it would to a minor] because: (1) it is an express exception to the statute limiting a vendor's liability, and (2) it is also a sale of alcohol to a class of persons who lack the ability to make a responsible decision in the consumption of alcohol." Id. at 1048. The Court further stated the standard is whether the vendor had some form of knowledge that the individual he was serving was a habitual drunkard, and said knowledge can be established through circumstantial evidence. Id. at 1048-49. Serving an individual unlawful drinks on one occasion would be insufficient, in and of itself, to establish that the vendor knowingly served a habitual drunkard alcoholic beverages. Id. at 1048. However, serving an individual a substantial number of drinks on multiple occasions would be circumstantial evidence, to be considered by a jury, in determining whether the vendor knew the person was a habitual drunkard. Id.

While the Court in Ellis found that vendors could be liable for ordinary negligence for the tortious acts of patrons known to be habitually addicted to alcohol, the Court did not address whether the liability of the vendor should be apportioned to the patron habitually addicted to alcohol who commits a tortious act. As the ruling in Wilde makes clear, a vendor who sells alcoholic beverages will not be able to offset its own liability for knowingly serving a person habitually addicted to alcohol by apportioning liability to the person who engages in a negligent act while intoxicated. As Fla. Stat. § 768.125 is a protective statute designed to insulate a vendor that sells alcoholic beverages from liability unless they knowingly serve a person habitually addicted to alcohol (or a minor), the law will not allow a vendor to apportion liability to a habitual drunkard who commits a tortious act because the risk of such conduct is what the statute was enacted to prevent.

A habitual drunkard is not a proper *Fabre* Defendant since a vendor's liability is derivative of the directly liable habitual drunkard. Therefore, a vendor will not be able to include a negligent intoxicated habitual drunkard on a verdict form for the purpose of apportioning liability. For further information on this topic or assistance with your matters, please contact Lauren Wages, Esq. in the Tampa office (T: 813.226.0081).

Transitory Substance Litigation: Strategy on Combating "Constructive Notice" Cases by Gregory Vallejos, Esq.

Greg Vallejos, Esq.

From the initial pleading, Plaintiffs are seemingly given every benefit of the doubt when it comes to establishing a *prima facie* case of negligence. Plaintiffs can even utilize a doctrine (*res ipsa loquitor*) that allows a jury to draw inferences of negligence when no direct proof exists. However, the defense has an often-overlooked weapon to combat these favorable inferences when a Plaintiff is unable to establish a *prima facie* case of negligence. This defense is commonly referred to as inference-stacking, and prohibits a jury from "stacking" or "pyramiding" inferences from evidence to reach a finding on an ultimate fact. Recently two decisions out of the Third District Court of Appeals analyzed this defense strategy in the context of premises-liability cases litigated under Florida Statute 768.0755. To fully understand impermissible inference stacking, however, it's important to fully understand how it works.

Negligence: Plaintiff's Prima Facie Case

For all negligence cases, specifically premises-liability matters, there is no presumption of negligence merely because an accident or injury happened. A plaintiff must prove:

(1) A duty by defendant to conform to a certain standard of conduct;
(2) A breach by defendant of that duty;
(3) A causal connection between the breach and injury to plaintiff; and
(4) Loss or damage to plaintiff.

Bartsch v. Costello, 170 So.3d 83, 86 (Fla. 4th DCA 2015). For premises liability matters, the duty of the landowner to a business invitee is to maintain the premises in a reasonably safe condition and to warn the invitee of latent perils which are known or should be known to the owner but which are not known to the invitee or which, by the exercise of due care could not be known to him. Wilson–Greene v. City of Miami, No. 3D14-3094, 2017 WL 361995, at *1–2 (Fla. 3rd DCA 2017). Nevertheless, the plaintiff must still introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362, 365 (Fla. 2013). Thus, "a mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Id. (citing Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984)).

Attempting to "Stack" or "Pyramid"

As noted above, under Florida law a jury may not "stack" or "pyramid" inferences from evidence in order to reach a finding on an ultimate fact. This was discussed in more detail within the Fourth District Court of Appeals:

> "[I]n a civil case, a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence. The limitation on the rule simply is that if a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences."

Cohen v. Arvin, 878 So. 2d 403 (Fla. 4th DCA 2004). In other words, a plaintiff must prove each element of a negligence claim with competent evidence, and only one inference can be made in each step. Robert C. Weill, The Overlooked Arrow in the Defense's Quiver: The Rule Against Impermissible Inference-Stacking, 26 Tr. Advoc. Q. 32 (Summer 2007).

The Cohen court further held that "the rule prohibiting impermissible inference stacking is applicable in a summary judgment context." 878 So. 2d at 405. In fact, the Cohen court found that "if a party could simply allege their beliefs as evidence of events that give rise to a cause of action to sufficiently overcome summary judgment, summary judgment would be meaningless." Id. Thus, unless there is only one possible theory as to how an accident happened, Florida law is clear that summary judgment is proper because the alternative (multiple reasonable theories) violates the inference-stacking

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Transitory Substance Litigation: Strategy on Combating "Constructive Notice" Cases cont.

rule. In a venue where obtaining summary judgment is like finding a four-leafed clover, this holding (and the recent cases discussed *infra*) is significant.

Inference-Stacking Rule and Premises Liability

Case #1: Wilson–Greene v. City of Miami, No. 3D14-3094, 2017 WL 361995 (Fla. 3rd DCA 2017)

In May of 2008, the plaintiff, Harriette Wilson-Greene, went into the lobby elevator bank at Miami Riverside Center, a building owned by the City of Miami. Upon arrival, she took an elevator from the lobby to the second floor and spent "longer than 15 minutes" on this floor. She came back down the same elevator bank, took a few steps to exit the elevator, and slipped and fell on a green substance that was "not hot." There was no dispute that this green substance was pea soup. The City of Miami and the management company at the time of the incident (Vista Maintenance Services, Inc.), argued that they had no actual or constructive notice of the dangerous condition. The trial court granted summary judgment in favor of both Vista and the City of Miami.

On appeal, one of the issues the Third District Court of Appeals analyzed was whether the defendants had constructive notice of the pea soup. The court noted that the length of time a condition existed before an accident occurred is significant when considering whether there is an issue of fact for submission to a jury in transitory foreign substance cases. Nevertheless, even though a non-moving party to a summary judgment motion may set forth a genuine issue of material fact through "justifiable inferences from facts presented to the trial court," the stacking of inferences is not permitted. The jury is allowed to draw one inference from a fact but cannot draw more than one inference unless the second inference is irrefutable.

In Wilson-Greene, the court opined that additional facts were needed in order to reach the conclusion that the soup was on the floor long enough to cool without assuming other facts (*e.g.*, the soup was hot prior to it being spilled). For example, the jury first would need to assume that the soup was hot prior to spilling on the floor (inference #1), and then that the soup was on the floor a sufficient amount of time for it to have cooled (inference #2). Thus, the court found that the jury in this case would have to **stack inferences** to conclude that Vista and the City of Miami had constructive notice of a dangerous condition and affirmed the trial court's order.

The Wilson-Greene court also analyzed "melting substances" and opined that there is no need to infer the substance was previously frozen. "Logic tells us that is a given," and only one inference from direct evidence needs to be drawn (*i.e.*, that the substance was frozen prior to the accident) which does not violate the inference-stacking rule.

Case #2: Encarnacion v. Lifemark Hosps. of Florida, No. 3D15-0834, 2017 WL 438325 (Fla. 3rd DCA, 2017)

On March 11, 2011, the plaintiff, Carmen Encarnacion, arrived at Palmetto General Hospital to help her elderly mother that had been treated for a stroke in the emergency room. While at the hospital, Ms. Encarnacion slipped and fell on what she "guessed" was spray liquid on the floor that was "oily," "dirty," and "dark." Lifemark Hospitals of Florida d/b/a/ Palmetto General Hospital ("Lifemark"), moved for summary judgment on the grounds that it had no actual or constructive knowledge of the condition. The trial court granted summary judgment in favor of Lifemark.

On appeal, the Third District analyzed Ms. Encarnacion's testimony that the substance on the floor was "oily," "dirty" and "dark." The court held that even if this were true, as they were required to assume on appeal, it was insufficient to create a jury issue. The court then cited Wilson-Greene, holding that in order for Ms. Encarnacion's testimony to create a jury issue, it must be accompanied by something more. Specifically, there were no additional fact or facts from which a jury could reasonably conclude that the substance was on the floor long enough to have become discolored without assuming other facts (*e.g.*, the substance, in its original condition, was not already "oily," "dirty" and "dark").

Challenging Plaintiff's Attempt to Inference Stack

The first challenge defense counsel must pursue when Plaintiff attempts to

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Transitory Substance Litigation: Strategy on Combating "Constructive Notice" Cases cont.

inference stack is to pursue a motion for summary judgment. Cohen and its progeny make it clear that such a litigation strategy is proper. Effective resolution of slip and fall cases through summary judgment will require detailed knowledge of the substance and facts surrounding the plaintiff's alleged accident. Written discovery and deposition testimony must be focused on demonstrating that impermissible inference-stacking is the only way the plaintiff is able to prove his or her case. These issues are likely to arise when there are no witnesses to the incident or when the plaintiff cannot describe how the accident happened.

Defense counsel must also be wary of plaintiffs attempting to utilize experts to draw impermissible inferences when the evidence does not support it. Thus, defense counsel should move to strike expert testimony when a plaintiff's expert offers unwarranted and unfounded opinions by relying on hypothetical facts.

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Lauren Wages, Esq. is an Associate in the Tampa office and handles 1st party property claims, contract disputes, general liability and commercial litigation matters. She has a Bachelor of Arts degree from the Kennesaw State University and obtained her Juris Doctor, *cum laude*, from Florida Coastal School of Law. She is admitted in Florida (2011).

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Gregory Vallejos, Esq. is an Associate in the Fort Lauderdale office and handles general liability, premises liability and negligent security matters. Gregory has a Bachelor of Arts degree from the University of Notre Dame and obtained his Juris Doctor from Chicago-Kent College of Law. He is admitted in Florida (2013).

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Rey Alvarez is the Managing Partner for the Workers' Compensation and Medicare Compliance Division. He also serves as WC Committee Chair for the Florida Defense Lawyers Association. Martindale-Hubbell and his peers have rated him AV® Preeminent. He has more than a decade of experience in preparing Medical Cost Projections, Medicare Set-Asides and Conditional Payment Lien negotiations with CMS.

Rey is a member of the Florida Defense Lawyer's Association (FDLA) and Claims & Litigation Management Alliance (CLM). Rey co-authored with Seth Masson, Esq. of Luks, Santaniello an article on "How Big Is the Gig? The Sharing Economy's Impact on Workers' Compensation" that appeared in the February—March 2016 issue of the Claims and Litigation Management Alliance's Workers' Compensation magazine. Rey is a monthly columnist for the publication. Rey also co-authored with Shana Nogues, Esq. of Luks, Santaniello an article on "Understanding The Application of Florida's Workers' Compensation Immunities" that was published in The Florida Defense Lawyers' Association publication of Trial Advocate Quarterly (Spring 2015). He also co-authored with Managing Partner Daniel Santaniello a White Paper on Medicare Reporting that was published in the Trial Advocate Quarterly (i.e., Volume 30, Number 4, Fall 2011) and authored an article on "Reducing the Cost of Funding a Medicare Set-Aside" that was published in the Florida Bar Workers' Compensation Section 'News & 440 Report' (Summer 2011).

Rey has a Bachelor of Arts degree from Barry University and earned his Juris Doctorate from the University of Miami. He is admitted in Florida (2003).

Liability Medicare Set-Asides Will Be Here Sooner Than You Expect. Are You Ready?

By Rey Avarez, Esq.

Rey Alvarez, Esq.

In addition to Original Medicare, Medicare Advantage Organization plans, conditional payments, convincing plaintiff's counsel to letting the carrier resolve the lien, final demand letters, and Medicaid, Medicare is giving us something brand new to worry about, namely Liability Medicare Set-Asides (LMSA).

As in Workers' Compensation settlements, we will soon be required to account for future medical treatment post settlement when we settle liability cases. The question is no longer will they be a reality, instead the question is when will it happen. Every indication points to the LMSA becoming a reality by early next year. Last year, Medicare issued a request for proposal for an LMSA recovery coordinator and earlier this year, Medicare issued a change request to providers indicating that starting in October 2017, Medicare would no longer pay for services that should be covered under an LMSA. With the possibility of reform to Obamacare, Medicare is seizing the moment of getting their LMSA policy together.

If this occurs, it will have a major effect on how cases are handled. However, only cases involving Medicare Beneficiaries or persons close to becoming a Medicare Beneficiary are affected. For the most part, the vast majority of cases will not be affected at all. Nonetheless, this is something that is needed. Last year, the U.S. Government Accountability Office (GAO) estimated that Medicare improperly paid out $41 billion. In order for Medicare to continue into the future, we have to curtail the overflow. The Set-Aide accounts are a major first step in that direction.

What form will these LMSA take place? No one really knows. However, they will have to be different than the Workers' compensation Set-Asides.

As history, Workers' Compensation has been the primary payer to Medicare since it first came out in the late 1960's. That was way back when Johnson was president and long hair was in. Medicare never enforced their secondary status when it came to future medicals until 2001 when the Workers' Compensation Medicare Set-Aside was born.

Liability did not become primary to Medicare until the eighties when Reagan was president, MTV actually played music and The Breakfast Club came out. However, Medicare's secondary status has never been enforced for future medicals.

Why did it take so long for Medicare to even consider making liability future medicals? Let's be realistic, Workers' Compensation was low hanging fruit for Medicare. Workers' Compensation is pretty much straight forward, lost wages and medical care and treatment. Even so, there were a lot of headaches and highly inflated settlements for several years. It took many years of changes and tweaking until Workers' Compensation Medicare Compliance became something easy to handle.

Now comes liability with all its nuances. With policy limits, comparative negligence and so much more, liability is a different monster. Medicare will have a hard time trying to fight a one size fits all approach to protecting their interests. Given the movement of late towards an LMSA, it appears Medicare believes they are ready to move forward.

Medicare may have to look at each case differently or they may take a percentage approach. One thing is certain, whatever approach they take, there is no doubt that they will be met with resistance every single step of the way. I anticipate several years of confusion, refusal to participate, head banging, increased settlement amounts and probably many more trials because the parties just cannot agree on how to resolve cases with the increased LMSA requirements.

LMSA require a more conservative approach to claims handling. Defense will have to get IMEs to ensure certain body parts do not get on Medicare's radar. Plaintiff's counsel will also need to take a more conservative approach or they may force themselves into more trials. Doctors will play a much bigger role as they will determine the amount of the LMSA. Medicare will look at the treatment plus take into consideration the proper conditions. At least in Workers' Compensation MSA, Medicare will try to analyze the records to ascertain the reasonable future medical treatment the plaintiff will need as a result of the injuries they sustained in the lawsuit.

The time to get prepared is now. Get a list of the related ICD10 codes and CPT codes, get the treating doctors and/or the IME's to opine on the related body parts. Get the doctors to opine as to the specific future treatment needed. Try to get the doctors to minimize the prescription medications. Get an end date for treatment. Medicare Set-asides are not adversarial. Both sides need to get together to ensure the Medicare Set-Aside does not derail a settlement.

Get ready, for once the LMSA gets here, its going to be a long ride. One thing is for sure, we will no longer be in Kansas, Toto!

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The Art of Negotiating
Boca Raton Resort & Club, A Waldorf Astoria Resort
The Gavel Inaugural Conference
June 12 - 14, 2017

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Don't miss this opportunity to develop your negotiation style and master skills taught by Vetted Attorneys and Claims Professionals. The Gavel's Inaugural Conference on The Art of Negotiating will be held June 12 – 14, 2017 at the **Boca Raton Resort & Club** in Boca Raton, Florida. The conference will feature intense discussions on building a framework and strategies for negotiating pre-suit/pre-assignment settlements.

Claims professions may attend 2 General Sessions and choose from 8 small group break out sessions on principled negotiation methods and strategies for getting to the agreement. Accreditation for CLE and CEU has been requested for approximately 25 states on the conference topics.

A General Session on the "**Power of Relationships"** will explore the value of your defense counsel's relationships with opposing counsel, experts, mediators in leveraging your advantage in obtaining a favorable outcome in negotiations.

A General Session on "**Negotiating with Smart Tactics: Vinegar or Honey?"** will feature short video reenactments of various negotiation tactics involving complex issues of liability and damages. Claims professionals will dissect effective and ineffective settlement tactics used. Panel participants will share their own opinions, strategies and experience on the use of certain tactics. Presenters will walk attendees through caucus strategies, figuring out the opposing party's bottom line and share insight on creative strategies necessary for a successful outcome in high severity claims.

Meet and connect with Claims Professionals at the welcome cocktail reception and main event and dinner. The exhibit hall will also provide opportunities to speak with experts, investigators, field adjusters and mediators exhibiting at the event. The resort also offers golf, Spa and fishing options.

Risk Management or Insurance Professionals that would like a complimentary registration may inquire with Pamela Pettus, Chief Executive Officer of The Gavel or Dan Santaniello, Managing Partner of Luks, Santaniello. The conference has limited space, so please register promptly. For further information, please contact Pamela Pettus directly at (561) 226-2520 or email Pamela@TheGavel.net.

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