ATKINSON &
BROWNELL P.A.
ATTORNEYS AT LAW

One Biscayne Tower, Suite 3750, 2 South Biscayne Blvd. Miami, Fl 33131

April 19, 2011

CASE LAW UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Florida District Courts of Appeal. We have highlighted specific cases that may be of interest to you.

In *Comprehensive Health Center, Inc. v. United Automobile Insurance Company*, the Third District Court of Appeal held that summary judgment granted in favor of an insurer and against an insured resulting from the insured's failure to attend the required medical exam appointment did not depart from the essential requirements of law.

In *Joyce Drew v. Tenet St. Mary's, Inc.*, the Fourth District Court of Appeal affirmed the trial court's denial of a Plaintiff's motions for directed verdict and for a new trial on the issue of comparative negligence in a medical malpractice case in which there was a question of fact regarding whether the Plaintiff conduct was reasonable based upon her knowledge and experience.

In *Myles McNichol v. South Florida Trotting Center, Inc.*, the Fourth District Court of Appeal held the trial court erred in granted a directed verdict in favor of an equine sponsor based on statutory EQUINE immunity and assumption of risk in a case involving an equestrian accident because the accident may have been caused by a condition on the track that was not a normal condition and not a hazard associated with equine activities.

In *Jose Diaz v. Jose F. Cabeza and La Dorada Coral Gables, Inc.*, the Third District Court of Appeals found that whether the actions of a restaurant owner were in the scope of employment was a factual issue to be determined by a jury, thereby precluding summary judgment in favor of the restaurant owner on the issue of vicarious.

I. *Comprehensive Health Center, Inc. v. United Automobile Insurance Company*, 2010 Fla. App. LEXIS 19841, 36 Fla. L. Weekly D54 (Fla. 3d DCA 2010).

FACTS AND PROCEDURAL HISTORY

In 2007, Comprehensive Health Center ("the Plaintiff") filed a complaint on behalf of Erla Telusnor seeking personal injury protection ("PIP") from United Automobile Insurance Company ("the Defendant"). After Ms. Telusnor failed to attend her required medical exam appointment, the Defendant moved for summary judgment arguing that Ms. Telusnor was not entitled to receive benefits because she failed to appear at the required medical exams. In response, the Plaintiff filed a counter motion for summary judgment stating that Ms. Telusnor

never unreasonably refused to attend the medical examinations; that she failed to attend because she was never told about them by her attorney. The trial court granted summary judgment in favor of the Defendant. The Plaintiff appealed.

APPELLATE COURT DECISION

The relevant Florida Statute provides that if a person unreasonably refuses to submit to a medical exam, the PIP carrier is no longer liable for subsequent personal injury protection benefits.[1] Based on the wording of the statute, the court concentrated on the word "unreasonable" and whether Ms. Telusnor's reason for failing to attend her IME fit into that category.[2]

The court concluded that a circuit court does not depart from the essential requirements of law in finding that a medical exam is a condition precedent to a suit for PIP benefits.[3] As a result, when the Plaintiff fails to comply without a reasonable excuse, the insurer will be entitled to summary judgment if there is no genuine issue of material fact as to the reasons for non-attendance.[4] Pursuant to the rules of civil procedure, notice to the attorney constitutes notice to the client.[5] Where a claimant is represented by counsel and counsel received valid notice via certified mail, it is not a reasonable excuse for non-attendance if counsel did not tell the claimant, just the same as would be an unexplained failure to attend. Therefore, the claimant's refusal to submit to a medical exam was deemed unreasonable and the Defendant was entitled to summary judgment.

Also noteworthy was the court's holding regarding a second issue raised in this case, which was whether or not Ms. Telusnor's treating physicians were experts witnesses entitled to expert witness fees or fact witnesses. The appellate division of the circuit court found that treating physicians may not charge expert witness fees because they do not obtain information for the purpose of litigation but rather in the course of treating their patients, and thus declined to award expert witness fees to Ms. Telusnor's treating physicians. The court held that the appellate division of the circuit court relied on the correct precedent in making that determination[6], and therefore even if the appellate court believed that the circuit court was erroneous in its conclusion as applied to the facts, the appellate court should only grant second tier review when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice.[7] For that reason, the appellate court declined to exercise jurisdiction with regard to the expert fee issue.

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[1] Fla. Stat. § 627.736(7).
[2] *United Auto. Ins. Co. v. Gaitan*, 41 So. 3d 268 (Fla. 3d DCA 2010).
[3] *Custer Med. Ctr. V. United Auto. Ins. Co*, 35 Fla. L. Weekly S 640, S 644 (Fla. Nov. 4, 2010).
[4] *Tindall v. Allstate Ins. Co.*, 472 So. 2d 1291, 1293 (Fla. 2d DCA 1985).
[5] Fla. R. Civ. P. 1.080(b).
[6] *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981).
[7] *Custer Med. Ctr.*, 35 Fla. L. Weekly S 640, S 644

II. *Joyce Drew v. Tenet St. Mary's, Inc.*, 46 So. 3d 1165 (Fla. 4th DCA 2010).

FACTS AND PROCEDURAL HISTORY

After being diagnosed with breast cancer, Joyce Drew ("the Plaintiff") sought radiation treatment from Kaplan Cancer Center ("the Defendant"). While on a conference call with her surgeon, Dr. Ann Lewis, the Plaintiff asked if she needed to make any arrangements for transportation following the radiation treatment. Dr. Lewis informed her that radiation did not affect her physical or mental functioning and therefore no arrangements were necessary.

After the Plaintiff arrived for radiation treatment, the doctors determined that the Plaintiff required an additional procedure prior to receiving that treatment. Prior to that procedure, the radiation oncologist prescribed two milligrams of Ativan, an anti-anxiety drug, the help the Plaintiff relax. After the Ativan was ordered, the Plaintiff inquired of the nurse whether she could drive home after taking it. At that time, the Plaintiff indicated her familiarity with the medicine, noting that she had a "background with meds." The Plaintiff has previously been prescribed Ativan after the passing of her husband and was familiar with similar anti-anxiety medication. The nurse responded to the Plaintiff that she could not tell her whether or not she could drive, but that she could ask the doctor. Approximately an hour and twenty minutes after receiving the Ativan, the Plaintiff found it necessary to leave the facility. A nurse told the Plaintiff that she would not be able to have radiation treatment that day and that she would have to return the following day. The Plaintiff drove home and while on the way, crashed into a tree and suffered serious injuries. The emergency room noted that the accident was a result of the Ativan.

The Plaintiff brought suit and moved for a directed verdict on the issue of comparative negligence. Following a trial, the jury found that the Plaintiff was 70 percent comparatively negligent. The plaintiff moved for new trial, but that motion was denied. The appellate court affirmed, but its opinion relates only to the contention that the trial court erred in denying the plaintiff's motion for directed verdict.

APPELLATE COURT DECISION

The Plaintiff argued that there could be no comparative negligence on her part because the hospital had not presented her with proper information about driving while on Ativan. The Appelate court disagreed. First, by defining comparative negligence as conduct on the part of the plaintiff which falls below the standard which he should conform for his own protection.[8] Second, by establishing a defense of comparative negligence, in which a medical defendant must prove each of the following three elements: (1) that the patient owed himself a duty of care, (2)

[8] *Restatement (Second) of Torts* § 463.

that the patient breached that duty, and (3) that the breach was the proximate cause of the damage the patient sustained.[9] The court found that it was well recognized that comparative negligence is a defense in cases where the Plaintiff herself has knowledge of the danger that led to the injury, which requires the Plaintiff to exercise adequate care for her own safety given the known danger.[10]

The critical question was whether, given the circumstances of this case, the Plaintiff exercised adequate care for her own safety when she took the medication and proceeded to drive home without awaiting clarification from Dr. Lewis as to whether she could safely drive while on the drug. The court held that there was a reasonable question of the Plaintiff's comparative negligence and therefore the question was properly given to a jury. The trial court's denial of the plaintiff's motion for direct redirect was affirmed.

III. *Myles McNichol v. South Florida Trotting Center, Inc.*, 44 So. 3d 253 (Fla. 4th DCA 2010).

FACTS AND PROCEDURAL HISTORY

The South Florida Trotting Center ("the Defendant") was used to train horses for harness racing. In August and September 2004, the track was impacted by a series of tropical storms and a hurricane. Following the storms, the Defendant used a road grader to push dirt from the track into the inside apron of the track, creating an approximately two foot tall mound of dirt around the entire inside of the track. Myles McNichol ("Plaintiff") was training a horse on the track when that horse was suddenly spooked by a vehicle adjacent to the track and as a result bolted across the track and into the dirt mound. The Plaintiff was ejected from his jog cart and severely injured.

The Plaintiff filed suit against the Defendant, alleging it breached its duty of care and was negligent in allowing the dirt mound to be placed on the inside edge of the track. The Defendant responded that it had absolute immunity for injuries resulting from the inherent risks of equine activities pursuant to Fla. Stat. § 773.02. At the conclusion of the Plaintiff's case at trial, the Defendant moved for directed verdict, arguing that the Plaintiff failed to establish a *prima facie* case of negligence. The trial court granted the Defendants motion, finding that the Defendant was entitled to immunity pursuant to the above referenced statute or alternatively that the Plaintiff assumed the risk of an open and obvious condition. The Plaintiff appealed.

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[9] *Borenstein v. Raskin*, 401 So. 2d 884, 886 (Fla. 3d DCA 1981).
[10] *Langmead v. Admiral Cruises, Inc.*, 610 So. 2d 565 (Fla. 3d DCA 1992); *Gonzalez v. G.A. Braun, Inc.*, 608 So. 2d 125 (Fla. 3d DCA 1992); *Kolosky v. Winn Dixie Stores, Inc.*, 472 So. 2d 891 (Fla. 4th DCA 1985).

APPELLATE COURT DECISION

In its decision, the court analyzed the relevant statutes in detail. Fla. Stat. § 773.01(6) defines the "inherent risks of equine activities." That definition includes the risks resulting from the unpredictability of the equine's reactions, their propensity to behave in ways that may result in injury, collisions with other equines, the potential negligence of other participants, and certain hazards such as surface and subsurface conditions.[11] Fla. Stat. § 773.02 provides immunity to equine activity sponsors, professionals or any other person for the injury or death of a participant resulting from the inherent risks of equine activities. However, the court noted that Fla. Stat. § 773.02(6) provides an exception to that immunity when the sponsor commits "an act or omission that a reasonably prudent person would not have done or omitted under the same or similar circumstances.

In this case, the jury was presented with evidence that the Defendant created a two-foot mound that blocked access from the track to a grass infield, which was generally used as a safe spot for trainers to go when their horse was out of control. The presence of the dirt mound was not a normal condition for training tracks and was a hazard not associated with training horses. Because evidence was presented at trial to establish that this mound was a hazard not associated with training horses, the court found that the issue of whether the mound was an inherent risk should have been presented to the jury.[12] The court opined that the jury could have found from the evidence presented that the negligence exception applied if it determined that the Defendant had a specific responsibility to act as a reasonably prudent person by removing the mound.[13]

With regard to the trial court's finding that the Plaintiff's claim was barred because he expressly assumed the risk of injury, the court found that the doctrine of *express* assumption of risk did not totally bar recovery when the injured party consented to a known risk.[14] For example, the doctrine applied to instances where one voluntarily participated in a contact sport.[15] In contrast, the court found that the doctrine of *implied* assumption of risk may not be invoked as a total bar to recovery. For example, the doctrine includes aberrant conduct in non-contact sports.[16] The court held the Plaintiff's conduct was properly characterized as implied assumption of risk, not express assumption of risk. As such, the Plaintiff's conduct must be evaluated by the jury under the principles of comparative negligence. In support of its holding, the court cited two

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[11] *Id.*
[12] *See Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309 (Fla. 1986)
[13] *See McGraw v. R & R Invs., Ltd.*, 877 So. 2d 886, 890 (Fla. 1st DCA 2004), in which the court found that a sponsor's failure to post a sign required in Fla. Stat. § 773.04 was one that a "reasonably prudent person would not have done or omitted under the same circumstances.
[14] *See Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 320 (Fla. 4th DCA 1984).
[15] *Blackburn v. Dorta,* 348 So. 2d 287, 290 (Fla. 1977).
[16] *Mazzeo v. City of Sebastian*, 550 So. 2d 1113, 1116 (Fla. 1989); *Kendrick v. Ed's Beach Serv., Inc.*, 577 So. 2d 936, 938 (Fla. 1991).

cases holding that a diver's comparative negligence must be evaluated by a jury when evaluation claims for injuries resulting from dives into shallow water. [17]

Although harness racing is a contact sport, the defense of express assumption of risk only bars recovery for those risks inherent in the contact sport itself.[18] The court concluded that the jury should have been able to determine whether the placement of the mound was an inherent risk of equine activities or whether an act or omission of placing the dirt mound is something a reasonably prudent person would not have done, thereby precluding the Defendant from immunity under the equine statute.

IV. *Jose Diaz v. Jose F. Cabeza and La Dorada Coral Gables, Inc.*, 51 So. 3d 556 (Fla. 4th DCA 2010).

FACTS AND PROCEDURAL HISTORY

Jose F. Cabeza ("Cabeza") was the president and sole shareholder of La Dorada Coral Gables, Inc. ("Restaurant"). Although Cabeza lives in Spain, he manages the restaurant when he is here. When he is managing the restaurant, Cabeza is verbally and physically abusive to his employees. Three employees filed affidavits regarding Cabeza's abuse. Jose Diaz ("Plaintiff"), one of the employees, alleged that Cabeza was verbally abusive, hit him with a wine bottle, and stabbed him with a fork. The Plaintiff sued Cabeza for assault and battery and the Restaurant on the theory that the restaurant was vicariously liable for Cabeza's acts.

The Restaurant moved for summary judgment, claiming that it could not be held liable for Cabeza's actions. The Restaurant argued that Cabeza's assault and battery could not have been motivated by a purpose to serve the interests of the restaurant, and therefore there could be no vicarious liability. The trial court entered summary judgment on the restaurant's behalf and the Plaintiff appealed.

APPELLATE COURT DECISION

The question before the court was whether Cabeza's actions were within the scope of his employment.[19] The incident took place while the Plaintiff was at work and Cabeza was there giving orders. Based on the allegations and the testimony contained in depositions and affidavits, the court concluded that although the assault was described as taking place for "no apparent

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[17] *Mazzeo,* 550 So. 2d at 1117; *Kendrick*, 577 So. 2d at 938.
[18] *Ashcroft*, 492 So. 2d at 1311.
[19] *Canaveras v. Cont'l. Group, Ltd.*, 896 So. 2d 855 (Fla. 3d DCA 2005); *Montadas v. Dade Scrap Iron & Metal, Inc.*, 666 So. 2d 1054 (Fla. 3d DCA 1996); *Woods v. City of Miami*, 646 So. 2d 836 (Fla. 3d DCA 1994); *Rivas v. Nationwide Personal Sec. Corp.*, 559 So. 2d 668 (Fla. 3d DCA 1990); *Gonpere Corp. v. Rebull*, 440 So. 2d 1307 (Fla. 3d DCA 1983).

reason", which a jury could have reasonably concluded that Cabeza employed aggressive behavior to make his staff work harder and faster. Because of that permissible inference, it was an issue for the jury to decide, precluding summary judgment.

In support of its position, the court cited two cases.[20] The first was a case in which a pizza delivery man delivering pizza to a business was attacked by the business owner after delivering the pizza late.[21] The court held that there was a factual issue regarding whether the president/owner was acting in the furtherance of the business.[22] The second case cited by the court involved an assault at a supermarket by a security guard.[23] In that case, a security guard at the supermarket got into a physical altercation with the manager of that supermarket.[24] A customer screamed for help and was also punched by the security guard.[25] The court held that there was a jury issue regarding whether the assault and battery arose out of a job dispute and was therefore within the scope of the security guard's employment.[26] Accordingly, the trial court's summary judgment order was reversed.

We hope you find the above cases helpful and insightful. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,

REBECCA A. BROWNELL
JOSEPH V. MANZO

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[20] *Montadas*, 666 So. 2d 1054; *Rivas*, 559 So. 2d 668.
[21] *Montadas*, 666 So. 2d at 1055.
[22] *Id.*
[23] *Rivas*, 559 So. 2d 668.
[24] *Id.*
[25] *Id.*
[26] *Rivas*, 559 So. 2d at 669.