

In Your Defense



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The Partners from left to right, top to bottom: Douglas McIntosh, Robert Peltz, Carmen Cartaya, Carol Finklehoffe, James Sawran, Terese Latham, A. Candace Marcus.

BIG WINS! MSPC OBTAINS SUMMARY FINAL JUDGMENT IN DEFENSE OF CIVIL RIGHTS CLAIM



Carmen Cartaya, Partner

Partner Carmen Cartaya and Senior Associate John Webber achieved the entry of Final Summary Judgment in favor of a physician providing prison health services who was sued by an inmate for alleged violation of civil rights. The inmate filed a complaint in Federal District Court asserting a violation of his civil rights under 42 USC §1983 for alleged deliberate indifference to serious medical needs, including the alleged failure to provide pain medication. The defense established that there were no questions of fact for trial because the medical records showed that Plaintiff received timely and appropriate care and was never denied pain medication. The defense further established that there were no constitutional violations because Plaintiff could not show deliberate



John Webber, Senior Associate

indifference on the part of the physician. The Magistrate Judge entered a Report and Recommendations that partial summary judgment be

granted. Defendant then filed objections to the Magistrate's Report as to the claims that remained pending and requested that the Court consider the matter de novo. The Court held Oral Argument and entered a detailed Order granting the physician Summary Final Judgment on all claims.

**FIRM ENSURES
REPRESENTATION OF NON-
PARTY TREATING PHYSICIAN
AT PRE-DEPOSITION
CONFERENCE**

On May 19, 2010, the Firm successfully defended in the Third District a trial court's order which rejected a dental malpractice Plaintiff's attempt to prevent a non-party treating oral surgeon from conferring with her counsel in preparation for her deposition.



Robert Weill, Senior Associate

In furtherance of his dental malpractice lawsuit, Plaintiff sought to depose a subsequent treating oral surgeon who was not sued in the case. The same insurer provided coverage for the Defendants and the oral surgeon. To avoid a potential ethical conflict and dispel any appearance of impropriety, the insurer retained separate attorneys to

represent Defendants and the oral surgeon. Plaintiff moved for a protective order to prevent the oral surgeon's attorney from conducting a pre-deposition conference with his client on the ground that such communication would violate Florida's physician-patient confidentiality statute. The trial court denied the motion, from which the appeal followed.

The Firm successfully represented Defendants in the appeal. Fort Lauderdale Senior Associate Robert Weill, who oversees the Firm's Appellate Division, successfully argued the appeal by asserting that Florida's confidentiality statute did not bar a healthcare provider from communicating with his attorney concerning an upcoming deposition. The Court noted that the public policy aspect of Florida's confidentiality statute aimed to protect a patient's confidentiality in prohibiting a treating physician from conferring with Defendant's counsel, and such concerns were not warranted in this case. The Third District also reasoned that the limited scope of the trial's court order which precluded the disclosure of any protected healthcare information and the attorney's ethical obligation to abide by the trial court's ruling afforded Plaintiff adequate protection of his privacy.

PRACTICE TRENDS

**U.S. SUPREME COURT
RULING ON RULES OF
CIVIL PROCEDURE**

On June 7, 2010, the U.S. Supreme Court issued an unanimous decision, reversing the 11th Circuit Court of Appeals in Krupski v. Costa Crociere, holding that the relation back doctrine governing amendments to Complaints under Federal Rule of Civil Procedure 15 depends on what the party to be added knew or should have known, not on the

amending party's knowledge or timeliness in seeking to amend the Complaint. Federal Rule 15 governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus timely although it was filed outside of the statute of limitations. The Supreme Court has interpreted Rule 15(c) to permit amendments to relate back, notwithstanding undue delay by the Plaintiff in seeking to amend the Complaint. The Court reasoned that the question is what the prospective Defendant should have reasonably understood about the Plaintiff's intent in filing the original Complaint against the first Defendant. The Court found that the Plaintiff intended to sue the company that "owned, operated, managed, supervised and controlled" the ship on which she was injured, but mistakenly named the wrong entity as Costa Cruises. The Court reasoned that prospective Defendant, Costa Crociere, should have known that it was not a named Defendant in the original Complaint due to the Plaintiff's confusion about which entity actually was in charge of the ship. The opinion was authored by Justice Sonia Sotomayor.

For further information about this subject, please contact author Carmen Cartaya, Fort Lauderdale Partner in the Firm's Medical Malpractice/Healthcare Law Division.

**FLORIDA SUPREME COURT
OVERHAULS CIVIL
JURY INSTRUCTIONS**

On March 4, 2010, the Florida Supreme Court approved the publication of new standard jury instructions for civil cases which represents a complete overhaul of the prior version. The changes do not incorporate any new laws, common law or otherwise, but instead, reflect substantial reorganization, ex-

panded substantive instructions and conversion of legalese to plain English throughout.

The organization of the new instructions follows the normal sequence of a trial: standard oaths are included in section 100; preliminary instructions are in section 200; procedural instructions relating to evidence that may be necessary during trial are contained in section 300; substantive instructions including those relating to general negligence, professional negligence and products liability are in section 400; instructions relating to damages are contained in section 500; and instructions involving matters during and after jury deliberations are contained in section 800.

To facilitate locating substantive instructions for distinct causes of action, such instructions appear in separate sections for each cause. For example, all negligence instructions appear in section 401. Common instructions, such as the introductory instruction, greater weight of the evidence, and legal cause, are repeated in each section in order to provide a complete set of instructions for a given case in one location. This facilitates compilation of a set of instructions for said case and lessens the chance of mistakenly omitting a necessary instruction.

A complete set of the newly reorganized instructions in Word format can be found on the internet at <http://www.floridasupremecourt.org/civjuryinstructions/instructions.shtml>.

For further information about this subject, please contact author Robert Weill, Fort Lauderdale Senior Associate, who oversees the Firm's Appellate/Litigation Support Division.

BAD FAITH: EXCESS JUDGMENT NOT REQUIRED BUT CAUSAL CONNECTION TO DAMAGES IS

On May 6, 2010, the Florida Supreme Court decided a case of first impression in the insurance/bad faith arena. *See Perera v. United States Fid. & Guar. Co.*, No. SC08-1968, 2010 WL 1791151 (Fla. May 6, 2010). The issue at the forefront in *Perera* was whether a third-party bad faith action could be maintained against an insurer when the insurer's actions were not a cause of the damages to the insured, or when the insurer's actions never exposed the insured to liability in excess of its policies' limits.

In this case, Mitchell Perera was crushed to death while working for his employer, Estes Express Lines Corp. ("Estes"). Perera's estate sued Estes and some of its employees for wrongful death. At the time, Estes carried three separate insurance policies: (1) a Cigna primary CGL policy with limits of \$1 million and a \$500,000 deductible; (2) an excess worker's compensation/employer's liability policy issued by United States Fidelity and Guarantee ("USF&G") with a \$1 million limit; and (3) a Chubb excess umbrella liability policy with a limit of \$25 million.



David Dunham, Senior Associate

From the outset of the litigation, Cigna and Chubb engaged in settlement negotiations with the Plaintiff. Conversely, USF&G denied coverage based on the "intentional acts" exclusion in its policy. At one point, USF&G offered \$100,000, but still denied coverage. Eventually, Perera, Estes, and its employees, along with Chubb and Cigna negotiated an agreement whereby Perera accepted a consent judgment against Estes for \$10 million. In turn, Chubb and Cigna agreed to pay the first \$5 million of the judgment, while the remaining \$5 million would be pursued by Perera against USF&G as the assignee of Estes.

Perera sued USF&G in state court and USF&G removed to federal court. The U.S. District Court entered summary judgment in favor of USF & G holding that without an excess judgment, there can be no cause of action for bad faith. This decision was appealed to the U.S. Eleventh Circuit Court of Appeals. The Eleventh Circuit remanded the case to have a jury determine whether USF&G acted in bad faith. At trial, a jury found that USF&G acted in bad faith and the case was returned to the Eleventh Circuit. The Eleventh Circuit ruled that the consent judgment was not an excess judgment and questioned whether an excess judgment was a necessary part of a claim for bad faith under Florida law. The Eleventh Circuit certified the question to the Florida Supreme Court.

The Florida Supreme Court ruled that an excess judgment was not a prerequisite for a bad faith action, but damages claimed by the insured or its assignee must be caused by the insurer's bad faith. Accordingly, the Court decided that Perera could not maintain the bad faith action because there was no causal connection between Estes' alleged damages and USF&G's bad faith.

The court explained that there was no potential that Estes would be exposed to a judgment in excess of the available coverage. Estes still had available coverage well beyond the \$10 million dollar consent judgment under Chubb's \$25 million umbrella policy. Although Chubb's coverage would only attach after the first \$1 million of USF&G's policy, the record showed that Chubb was willing to waive this requirement. Furthermore, since USF&G's policy was an indemnity policy with no duty to defend, Estes had not been left to its "own devices to protect itself" when it entered into the agreement for the consent judgment. Both Cigna and Chubb had actively engaged in settlement negotiations. Thus, Estes was protected at all times.

For further information about this subject, please contact author David C. Dunham, Fort Lauderdale Senior Associate in the Insurance Coverage/Bad Faith and Medical Malpractice/Healthcare Law Divisions. In writing this article, Mr. Dunham was assisted by Fort Lauderdale Law Clerk Bruno Renda.

HIGH MARKS FROM CLIENT SATISFACTION SURVEY



*Douglas McIntosh, Managing Partner
Executive Committee Member*

The fifth annual Client Satisfaction Survey gave MSPC high marks for delivery of quality, client-focused legal representation. The survey continues to be an important tool in our efforts to ensure that clients are experiencing the elements of responsiveness, teamwork and preparation that we espouse as core values.

Participants were asked to respond to a variety of questions with a specific grade ranging from 5 (Outstanding) to 1 (Unsatisfactory). Clients were also asked to comment on the clarity of our invoices and the value added by our services. In addition, clients were asked to offer specific feedback through a series of open-ended questions. Performance aspects being rated included overall quality of work, level of expertise, availability and responsiveness. MSPC was solidly rated between Above Average and Outstanding in virtually all categories surveyed. However, our goal is to score even higher as we strive to provide service that exceeds expectations. All feedback is thoroughly reviewed by our Executive Committee, and discussed with our partners who also personally follow up on specific concerns or ideas shared by survey participants. In addition, all Firm personnel receive an overview of the results and are invited to share ideas for strengthening and improving our efforts.

Thank you for completing the 2010 Client Satisfaction Survey and for continuing to make this interactive tool an important component of our professional service model.



*James Sawran, Partner
Executive Committee Member*

**OF SERVICE
MOCK TRIAL PRESENTATION**

Fort Lauderdale Partners Carmen Y. Cartaya and A. Candace Marcus and Paralegal Marilu Ramos Coffman presented a Mock Trial at North Shore Medical Center. The group conducted three sessions to enable all nursing shifts and technical hospital staff to attend the presentation. The focus of the presentation was on proper documentation and timely communication among healthcare providers



A. Candace Marcus, Partner

as essential elements to quality health care and the prevention of claims for medical negligence. The audience commented on the benefits of this presentation in facilitating patient care and proactively avoiding litigation. In particular, the nursing staff was impressed by "the testimony of the nurse", as portrayed by Ms. Ramos Coffman (pictured here) which highlighted the direct examination of a witness by an aggressive plaintiff's lawyer.



Marilu Ramos Coffman, Paralegal

MSPC EMPLOYEES PARTICIPATE IN FUNDRAISING WALK/RUN

On Sunday May 16th, several MSPC employees, along with their families and friends turned out bright and early in support of the 3rd Annual Ryan's Heroes 5K Walk/Run for Histiocytosis. The event was held at Hollywood North Beach Park on a beautiful South Florida day.

Histiocytosis is a rare blood disease caused by an excess of white blood cells which may cluster together and attack the skin, bones and other organs. The disease may range from limited involvement, to chronic, debilitating and life threatening. Histiocytosis is so rare that there is little research into its cause and treat-

ment. Thus, it is known as an "orphan disease", getting little government support for research.



Patricia Ramos, Legal Secretary

The Walk/Run was initiated by a MSPC employee, Patty Ramos, a Legal Secretary in the Fort Lauderdale office, to raise funds and awareness in the fight against Histiocytosis and to provide support to the patients and families who are facing this unpredictable disease. Patty's son, Ryan, was diagnosed with the disease in 2007. At this time Ryan has completed his chemotherapy and is doing very well. Ms. Ramos' efforts raised \$4,481.00 for this cause.

The Firm was proud to be one of the sponsors of this important and worthy fundraising event.

**WHO'S WHO?
THURM SERVES AS
OF COUNSEL TO MSPC**

Milton Thurm, a former New York practitioner, has become Of Counsel to MSPC and is resident in the West Palm Beach office. Mr. Thurm has over 35 years of experience as an attorney specializing in insurance defense and coverage law. He focuses on complex insurance coverage litigation involving primary, excess, umbrella and reinsurance issues. Thurm has tried cases involving professional errors and omissions, governmental liability, employment practices and bad faith

claims. He is adept at assisting insurers in developing manuscript endorsements dealing with contractors' and subcontractors' exposures.

Mr. Thurm is "AV" rated by Martindale-Hubbell, the highest distinction afforded by this leading legal publication based on recommendations of one's peers. He is admitted to practice in both Florida and New York, as well as before all the federal district courts of New York, the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States.



Milton Thurm, Of Counsel

Mr. Thurm is a frequent speaker to insurance-oriented groups and has authored a number of articles for the *Federation of Defense and Corporate Counsel (FDCC) Quarterly* and for *Declarations*, the publication of the International Association of Claims Professionals (IACP), formerly the Excess & Surplus Lines Claims Association (ESLCA). He is a member of FDCC and an associate member of IACP. Thurm serves as Vice Chairman of both the FDCC's Admissions Committee as well as its Insurance Coverage Section. He has also served as a panelist in presentations made by the Excess Line Association of New York to its member broker groups and has been a frequent presenter at New York State Bar Association Insurance Section Seminars. Mr. Thurm is a member of the Defense Research Institute (DRI) the Voice of the Defense Bar, the Florida De-

fense Lawyers Association (FDLA), the New York State Bar Association and the American Bar Association.

PELTZ RECEIVES HONORS

Miami Partner Robert Peltz was named one of Florida’s Super Lawyers in the Transportation and Maritime Field, as published by *Law & Politics*. This is the fifth consecutive year that he has received this designation. Mr. Peltz heads up the Firm’s Admiralty and Maritime Division which serves clients throughout the United States.



Robert Peltz, Partner

Peltz was also re-appointed Chairman of the Maritime Law Association’s Cruise Lines and Passenger Ships Committee. The Committee provides a forum for those involved

in the industry, reviews problems and developments arising from ship operations and monitors governmental regulations affecting the industry.

MARCUS ADDS NEW CREDENTIAL

Partner A. Candace Marcus successfully completed the Health Care Risk Management Program at the University of Florida. She earned the Certificate which will enable her to apply for licensure as a risk manager in the state of Florida. The title of "HCRM" adds yet another dimension to her already impressive list of credentials and qualifications in the fields of healthcare, nursing and law. As a member of the Firm’s Medical Malpractice/Healthcare Law Division, Ms. Marcus devotes her trial practice to personal injury, wrongful death, medical/dental negligence and pharmacy law, as well as representing clients before their respective Boards of Licensure in disciplinary proceedings.

MUSCARELLA HONORED FOR COMMUNITY INVOLVEMENT

Fort Lauderdale Paralegal, Doris Muscarella, was honored as one of the *100 Outstanding Women of Broward County* at an event presented by The Susan B. Anthony Recovery Center. This was the second annual event with proceeds

benefiting the Recovery Center as well as the Boys & Girls Clubs of Broward County. The award recognized Ms. Muscarella’s extensive work in charitable organizations including fundraising for Gilda’s Club, serving as founder and president of



Doris Muscarella, Paralegal

The Women of the Round Table and establishing a foundation for Haiti earthquake relief. Recipients of the award were honored at a dinner and accompanying ceremony attended by 900 guests including distinguished members of the community. Partner Carmen Y. Cartaya attended and represented MSPC in support of Ms. Muscarella’s commitment to local and national charitable organizations.

In Your Defense Newsletter

The hiring of an attorney is an important decision and should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

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