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**Workers' Compensation**

[Barbra Mosquera v. Home Shopping Network En Espanol, LLC.](#)  
(Released by the First District Court of Appeal, January 19, 2005)

EMA MUST BE APPOINTED WHEN THERE IS A CONFLICT AS TO MEDICAL OPINIONS REGARDING THE CLAIMANT.

Claimant appealed the judgment of the Judge of Compensation Claims who denied her temporary partial disability benefits and the appointment of an Expert Medical Advisor. Specifically, the claimant stated that the JCC erred by not appointing the EMA to resolve a conflict of opinions between the claimants treating physician and her Independent Medical Examiner.

The appellate court stated that under § 440.13 (9)(c), Florida Statutes an EMA must be appointed when there is a conflict between expert medical opinions. Furthermore, the JCC does not have the authority to resolve conflicts of between physicians' opinions when the claimant has requested an EMA. [Chapman v. Nations Bank](#), 872 So.2d 390, 392 (Fla. 1st DCA 2004). Accordingly, the appellate court reversed the decision of the JCC and ordered the appointment of an EMA and payment of TTD benefits.

**Collateral Source Evidence**

**[Boyd v. Nationwide Mutual Fire Insurance](#)**

(Released by the Fourth District Court of Appeal, January 19, 2005)

TRIAL COURT DID NOT COMMIT ERROR WHEN THEY LIMITED EVIDENCE REGARDING MEDICARE PAYMENT OF MEDICAL BILLS, DID NOT GRANT A NEW TRIAL OR FIND THAT DEFENDANTS PROPOSAL FOR SETTLEMENT LACKED PARTICULARITY.

Ron Boyd, the plaintiff in a personal injury action appealed the judgment of the trial court. He stated that the court committed error when it limited evidence of medical bills paid by Medicare to the amount received by the Medicare provider. Furthermore, plaintiff stated that he should have been granted a new trial. Finally, the plaintiff stated the trial court erred in denying its motion for attorney fees with regards to defendants' proposal for settlement.

With regards to the first issue, the appellate court stated that the issue of limiting the evidence of medical bills paid by Medicare to the amount received by the Medicare provider pursuant to the Medicare fee schedule has already been decided adversely towards Boyd. See [Thyssenkrupp Elevator Corp. v. Lasky](#), 868 So.2d 547 (Fla. 4th DCA 2003), *as clarified on denial of rehearing*

by 29 Fla. L. Weekly D608 (Fla. 4th DCA March 10, 2004). Next, the court stated that although the jury did not award any economic damages, other than medical expenses, the evidence was disputed as to whether the Plaintiff suffered any such losses. There was a lack of evidence regarding his part-time job and the increase in his household expenses. The appellate court stated that the trial court broad discretion in granting new trials and the trial court did not abuse its discretion in this matter. See Persad v. State, 859 So.2d 535 (Fla. 4th DCA 2003). Finally, the defendants' proposal of settlement was valid because Nationwide included a summary of the substance of the general release that was sufficient to appraise Boyd of its terms. Therefore, the proposal for settlement did meet the particularity requirements required by the Florida Rules of Civil Procedure.

## **Premises Liability**

### **Schindler Elevator Corp. v. Carvalho**

(Released by the Fourth District Court of Appeal, January 19, 2005)

INJURED SHOPPER FAILED TO PROVE HOW ANY LACK OF MAINTENANCE WAS THE LEGAL CAUSE OF HER ACCIDENT AND INJURY. THUS, THE TRIAL COURT ERRED WHEN IT DID NOT GRANT A DIRECTED VERDICT FOR THE DEFENDANT.

Carvalho was shopping in a Sears store and attempted to go to the second floor of the store. However, when she approached the down escalator she saw that it was stopped. She stated that she saw a man on his knees at the bottom of the escalator but she did not see what he was doing. After, shopping on the second floor she returned to the down escalator and saw that it was in operation. While they were on the down escalator, Carvalho stated that she felt a jerk, which caused her to tumble down the stairs, resulting in her injuries. At trial the maintenance of the escalator came into question. Although the escalator maintenance log book did not contain all of the repair work done on the escalator, technicians who serviced the escalator stated that it was in good condition and properly maintained. An expert for the plaintiff opined that the lack of records demonstrated inadequate preventative maintenance, which rendered the escalator in an unsafe condition at the time of the accident. Following testimony Schindler moved for a directed verdict, which was denied. The jury found in favor of Carvalho and Schindler appealed.

The appellate court stated that the conclusions or opinions of an expert witness based on facts and inferences not supported by the evidence in a cause have no evidential value. Arkin Constr. Co. v. Simpkins, 99 So.2d 557 (Fla. 1957). Furthermore, the basis for conclusion cannot be deduced or inferred from the conclusion itself. Id. To illustrate, in Mesa, a plaintiff's expert testified that the plaintiff's asthma resulted from an unsafe concentrations of hazardous particles in the air. D'Avila, Inc. v. Mesa, 381 So.2d 1172 (Fla. 1st DCA 1980). However, there was no evidence that air contamination existed. Id. Likewise, the court stated, Carvalho's expert assumed the handrail on the escalator malfunctioned when there was no evidence presented that it did. The appellate court found that there was no factual evidence to support that the handrail was the problem. There was only the expert's assumption that the handrail was the cause of the accident. Moreover, even if there was evidence, the expert did not testify as to what could have caused the handrail to malfunction. The appellate court held that the testimony of Carvalho's expert was inadmissible, and that she failed to prove a prima facie case of negligence against the defendant.

### **Pep Boys v. Four Seasons Commercial Maintenance Inc.**

(Released by the Fourth District Court of Appeal, January 26, 2005)

ISSUE OF MATERIAL FACT REMAINED IN TRIP AND FALL ACCIDENT WHICH PREVENTED RULING OF SUMMARY JUDGMENT IN FAVOR OF THE CONTRACTOR

A customer of Pep Boys was injured following a trip and fall accident, allegedly caused by a nail protruding from an asphalt parking lot. Prior to the accident, Four Seasons had installed 'parking bollards' in the parking lot area. The complaint alleged that the nail was a defect resulting from the installation of the 'parking bollards.' The court granted summary judgment in favor of Four Seasons stating that Pep Boys had presented no evidence that the nail was not discernable or that the dangerous nature of the nail would not have been discoverable during the course of a reasonable inspection. Pep Boys then appealed this ruling.

Four Seasons stated that summary judgment should be granted based on the Florida Supreme Court ruling in Slavin v. Kay, 108 So.2d 462 (Fla. 1959). Four Seasons further asserted that Pep Boys had accepted the project from the contractor and the defective nature of the imbedded nail was obvious and clearly discoverable upon reasonable inspection. The court in Slavin stated that a contractor is not liable to third parties once the work has been accepted and the owner has knowledge of the defect, or the defective nature of the condition is patent. Slavin, 108 So.2d at 466. Moreover, the test for latency is whether the defective nature of the condition would be obvious to the owner with the exercise of reasonable care. Kala Inv., Inc. v. Sklar, 538 So.2d 909,913 (Fla. 3d DCA 1989). The appellate court stated that there was deposition testimony that the nail was dark in color and difficult to see. Furthermore, the nail was blended in with the surrounding asphalt, which made it difficult to see. Testimony from the store manager and the assistant store manager stated that the nail was not observable unless someone actually came upon it. Therefore, the appellate court ruled that there was an issue whether the nail was observable. The court stated that where a jury could find from the evidence that a defect is latent, summary judgment should not be entered. Brady v. Penn Paving Corp., 693 So.2d 612,613 (Fla. 4th DCA 1997). Moreover, the court found that latent defects have been defined as "not apparent by use of one's ordinary senses from a casual observation of the premises." Id. at 614. The court held that whether a reasonable person would discover the defect upon a reasonable inspection remained an issue of fact.

### **K.M. v. Publix Super Markets, Inc.**

(Released by the Fourth District Court of Appeal, January 26,2005)

EMPLOYER DID NOT HAVE DUTY TO WARN ONE EMPLOYEE ABOUT A SECOND EMPLOYEES CRIMINAL BACKGROUND, WHERE THE WARNING PERTAINS TO THE EMPLOYEES' PERSONAL RELATIONSHIP OUTSIDE WORK.

K.M.'s mother was an employee at Publix. Due to her work schedule she was unable to take care of her daughter during the day. However, the mother had arranged to have Robert Woodlard, one of her co-workers, to babysit. The store manager was aware of this arrangement and was further aware that Woodlard was on parole for attempted sexual battery on a minor under 12. Unaware of Woodlards criminal background, the mother entrusted K.M. to him over a three-month period. Unfortunately, sexually abused K.M. on at least two occasions. K.M.'s mother sued Publix alleging that the store manager knew or should have known that Woodlard was unfit to provide child care, but failed to warn the mother of the danger. The trial court dismissed her case with prejudice. K.M. appealed.

The appellate court began by stating the general rule is that a party has no legal duty to prevent the misconduct of third persons. Michael & Philip, Inc. v. Sierra, 776 So.2d 294 (Fla. 4th DCA 2000). However, there is an exception to this rule. The existence of a special relationship gives rise to a duty to control the conduct of third persons so as to prevent them from harming others. Daly v. Denny's Inc., 694 So.2d 775 (Fla. 4th DCA 1977). Furthermore, the court cited Restatement of Torts Section 317, which states that the duty of a master to control his servant is limited to acts committed by employees with the employers chattels or upon the premises of the employers or premises upon which the servant is privileged to enter only as the employer's servant.

Moreover, Section 319 of the Restatement imposes a duty of care upon one “who takes charge of a third person whom he knows or should have known to be likely to cause bodily harm to others if not controlled.” The appellate court found that the actions of Woodlard did not fall upon either of these sections of the Restatements, which have been adopted, by Florida courts. The criminal acts that occurred did not happen on the premises of Publix and Publix did not “take charge” of Woodlard to the extent envisioned in Section 319. Consequently, this matter was controlled by Section 314 of the Restatement which states that “the fact that a person realizes or should realize that action on his part for another’s aid or protection does not itself impose a duty to take such action.” Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257 (Fla. 4th DCA 1985). In conclusion, the court held that the facts of this case did not impose a duty on Publix with respect to its employee’s away-from-work childcare decisions. An employer does not owe a duty to persons who are injured by its employees while the employees are off duty, not then acting for the employer’s benefit, not on the employer’s premises, and not using the employer’s equipment.

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