JOHNS EASTERN COMPANY, INC.
Claim Adjusters & Third Party Administrators
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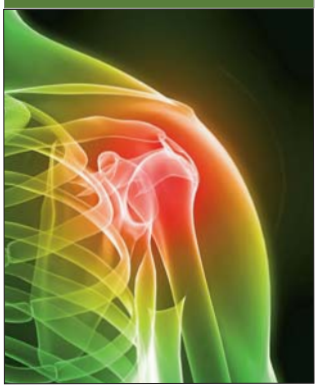
CEU SEMINARS

4/4/14: Failed Back Surgery / Update on Spine Surgery - Dr. Rajadhyaksha, and **Rotator Cuff Surgery, Meniscus Tears and ACLs -** Dr. Herrera 11:30 AM - 2:00 PM, Holiday Inn Lakewood Ranch, 6231 Lake Osprey Drive.

04/22/14: 120 Day Rule Presented by Eraclides, Gelman, Hall, Indek, Goodman & Waters Holiday Inn

05/20/14: Work related foot and ankle injuries, Why Do Foot and Ankle Injuries Take So Long to Reach MMI Presented by Dr. Medina with Orthopaedic center of South Florida

For more details: E-mail Rose Rome at rrome@johnseastern.com



COURTS DIFFER ON RIGHT TO RECOVERY

Do Medicare Advantage Plans have same rights as Traditional Medicare?

A Medicare Advantage Plan (MAP) is a Medicare health plan that is offered by a private company that contracts with Medicare to provide all of Part A and Part B benefits. While traditional Medicare has a firmly established right to recover payments made by Medicare when another entity had primary payment responsibility under the Medicare Secondary Payer Act[1] (MSP), the question becomes, do the MAPs have the same recovery rights as traditional Medicare? This question is significant since MAPs must follow Medicare rules.

In June 2010 Humana, a MAP, brought suit against pharmaceutical provider GlaxoSmithKline (GSK), alleging GSK was obligated to reimburse Humana for medical expenses Humana incurred in treating its MAP beneficiaries for conditions related to GSK's drug Avandia. In June 2011, the District Court dismissed the action that the MAP could not recover against a private cause of action. Humana appealed to the Third Circuit Court, which issued an opinion that the MSP regulations make clear that the MSP provisions extend the private cause of action to MAP and therefore, a MAP could seek recovery.[2]

The Ninth Circuit Court took a completely different view regarding a MAP's right to recovery. In *Parra v. PacifiCare of Arizona*, PacifiCare sought reimbursement for medical expenses from the proceeds of an automobile insurance policy. The District Court dismissed the causes of action and the Ninth Circuit Court determined that Medicare Part C laws did not create a private cause of action under the facts of this case, wherein PacifiCare pursued the decedent's family for recovery, rather than an insurer or estate.[3]

What is the future related to MAPs and their rights under the MSP? Both Courts agree that MAPs have rights of recovery; however, they disagreed as to what extent. What can you do to prevent penalties? Ensure you ask the Medicare recipient if they are or have ever been enrolled in a MAP program to assess if conditional payments have been made and provide reimbursement prior to penalties. Monitoring of MAP will be ongoing to determine the scope of MAP rights related to MSP.

Deborah L. Augusta
GENEX Services, Inc.

[1] 42 U.S.C. § 1395y(b)(3)(A).
[2] *In re Avandia Marketing, Sales Practices and Products Liability* Litigation, 2012 U.S. App. LEXIS 13230 (June 28, 2012)
[3] See *Parra v. PacifiCare of Arizona, Inc.*, F.3d, 2013 WL 1693713 (9th Cir. 2013);

Page 2
Indemnification May Aid in Reimbursement

Page 3
Court Reverses Ruling in Car Crash Case

Page 5
Lawsuit Targets High School Concussions

SEEKING REIMBURSEMENT THROUGH INDEMNIFICATION

The concept of a "statutory employer" can be helpful in workers' compensation cases.

A situation will often arise wherein an entity is held responsible for damages which resulted not from the negligence and/or fault of that entity, but from the fault of another. In this instance, the entity has available to it an affirmative, indemnification claim against the "at fault" party, from which claim they, if successful, could obtain reimbursement for any losses suffered.

There are two common forms of indemnification. The first, *contractual indemnification*, arises when the party held responsible (i.e., the party pursuing the indemnification claim / plaintiff) and the "at fault" party (the defendant) previously entered into a contract, whereby the defendant explicitly agreed to indemnify the plaintiff.

Generally, these contracts must be written and are subject to the established rules of contract construction.[1] The courts have held, however, that if the contract can be interpreted in more than one way (i.e., whether indemnity should be permitted or denied), the interpretation that provides for liability must be applied.[2] It should be noted that contracts that attempt to indemnify a party against its own wrongful acts are looked upon unfavorably in Florida.[3]

The second form of indemnity arises from the common law and is aptly referred to as *common law indemnification*. Common law indemnification is an equitably imposed shifting of the burden of loss from the party who has been compelled to pay the loss to the party whose negligence is the primary cause of the harm. To prevail on a claim of common law indemnity, a party must satisfy a three-pronged test. First, the party seeking indemnification must be without fault, and its liability must be solely attributable to the wrong of another. Second, the indemnification can only come from a party who was at fault.[4] Finally, Florida courts have historically imposed a third requirement: a "special relationship" between the party seeking indemnification and the party subject to the indemnification claim.[5]

Indemnification can be a helpful tool in the workers' compensation arena when an entity is found to be a "statutory employer," i.e., the employer of an injured worker employed by an uninsured contractor. For instance, a hotel offers its patrons "complimentary" breakfast as part of its room package. The hotel contracts with a company to provide employees to cook this breakfast. One of these employees is injured while cooking. As is often the case, the actual employer of the worker lacks workers' compensation insurance, such that the employee files against the hotel under a "statutory employer" theory.[6] Under this example, the appellate court ultimately concluded that the hotel, while not the employee's actual employer, was responsible for providing benefits under a statutory employer theory. This, as the employee was injured while performing a contractual duty (making the breakfast) owed by the hotel to a third party (patrons of the hotel).

In this instance, the hotel could seek reimbursement of the resulting damages via an indemnification claim against the restaurant. Ideally, the hotel would have had a written contract with the restaurant, whereby (1) the restaurant agreed to provide workers' compensation coverage for its employees, and (2) the restaurant agreed to hold harmless / indemnify the hotel. If so, the hotel could use this contract as a means to assert a contractual indemnity claim against the restaurant. If no such contract existed (or, perhaps, it was not sufficiently specific), the hotel could pursue a claim in common law indemnity.

(continued on page 5)

COURT REVERSES ITS RULING IN CAR CRASH CASE

Ruth Vargas v. City of Ft. Myers, Florida

This is a Second District Court of Appeals case. Ruth Vargas appeals summary judgment entered in favor of the City of Ft. Myers, Florida, on the basis that Vargas failed to comply with section 768.28 Florida Statutes (2005) and the Statute of Limitations expired. We disagree. Reversed and remanded.

03/03/2005 - Traffic accident occurs involving Vargas' and a City Police car.

05/13/2005 - Ft. Myers receives a letter informing it of an accident, requesting policy information and noting the claimant is represented.

05/16/2005 - Ft. Myers acknowledges the letter and sends self-insured disclosure letter to the attorney representing Vargas.

03/09/2007 - Attorney sends a demand letter for policy limits describing the accident, injuries, and cost of medical care.

09/29/2008 - Ft. Myers sends a letter to claimant's attorney reiterating it is self-insured and including its coverage limits information.

11/17/2008 - Claimant's attorney sends another demand reiterating the first stating they have complied with statutory requirements set out in 768.28 (6)(a).

11/20/2008 - Ft. Myers sends letter to claimant's attorney notifying that the 3-year notice period has expired.

12/22/2008 - Vargas files suit for negligence against the City and the police officer.

03/17/2010 - Vargas files an amended complaint and attaches the March 9, 2007 demand.

03/22/2010 - The trial court grants Ft. Myers' motion to dismiss with prejudice the claim against the officer, and without prejudice the claim as to Ft. Myers and also grants Vargas 20 days to file an amended complaint.

04/03/2010 - Vargas files an amended complaint in which she states notice has been sent to Ft. Myers.

08/16/2010 - The trial court denies Ft. Myers' second motion to dismiss based upon the statute of limitations having run out, sovereign immunity notice pursuant to 768.28 (6) (a) and sovereign immunity pleadings subject to 768.28 (6) (b).

12/16/11 - Ft. Myers files a motion for summary judgment again, arguing that Vargas failed to comply with notice requirements.

11/23/2012 -The trial court grants Ft. Myers' motion for summary judgment on the basis that Plaintiff failed to comply with Florida Statute 768.28 and the statute of Limitations had expired.

Important distinctions made or cited in this appeal:

► To the extent that the March 9, 2007, letter does not contain Vargas' date and place of birth and Social Security number, providing this information is not necessary in the notice. See *Williams v. Henderson*, 687 So. 2d 838, 839 (Fla. 2d DCA 1996).

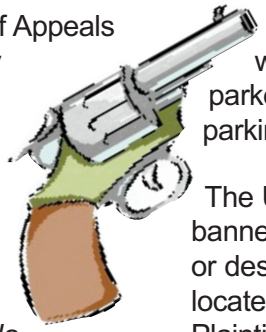
► This court reviews a trial court's order on a motion for summary judgment de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

► "The underlying purpose of a motion for summary judgment 'is to determine whether any genuine issues of material fact exist for resolution by the trier of fact.'" *Coral v. Garrard Crane Serv., Inc.*, 62 So. 3d 1270, 1273 (Fla. 2d DCA 2011) (quoting *CSX Transp., Inc. v. Pasco Cnty.*, 660 So. 2d 757, 758 (Fla. 2d DCA 1995)).

continued on page 4

UNIVERSITIES MAY NOT BAN GUNS SECURED IN VEHICLES

The First District Court of Appeals (DCA) in Florida recently decided a case involving guns on state university campuses that will have a dramatic impact on public universities.



In *Florida Carry Inc. v. University of North Florida*, the First DCA addressed the question of whether "a state university may prohibit the carrying of a securely encased firearm within a motor vehicle that is parked in a university campus parking lot."

The University's policy at issue banned the storage of any weapon or destructive device in a vehicle located on University property. The Plaintiff, a student at the University, filed suit because she desired to carry a firearm while traveling to and from school as a lawful method of self-defense. The University argued that is was permitted to adopt a written policy banning weapons in vehicles under F.S. 790.115, which authorized "school districts" to adopt such a policy.

Ultimately, the First DCA sided with the Plaintiff and held that the "school district" exception did not apply to the University.

Sniffen & Spellman, P.A.

continued from page 3

► "If the record reflects the existence of any genuine issue of material fact, or the possibility of an issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Christian v. Overstreet Paving Co.*, 679 So. 2d 839, 840 (Fla. 2d DCA 1996).

► Courts should be cautious when granting motions for summary judgment in negligence suits. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985).

► According to section 768.28(6)(a): "An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing..."

► The notice requirement is a condition precedent to maintaining an action. § 768.28(6)(b). "The purpose of the notice requirement is to provide the State and its agencies sufficient notice of claims filed against them and time to investigate and respond to those claims." *Aitcheson v. Fla. Dep't of Highway Safety & Motor Vehicles*, 117 So. 3d 854, 856 (Fla. 4th DCA 2013) (quoting *Cunningham v. Fla. Dept of Children & Families*, 782 So. 2d 913, 915 (Fla. 1st DCA 2001)).

► The notice "must be sufficiently direct and specific to reasonably put the department on notice of the existence of the claim and demand." *LaRiviere v. S. Broward Hosp. Dist.*, 889 So. 2d 972, 974 (Fla. 4th DCA 2004). Moreover, it must be written and "sufficiently describe or identify the occurrence so that the agency may investigate it." *Aitcheson*, 117 So. 3d at 856 (alteration in original) (quoting *LaRiviere*, 889 So. 2d at 974). While strict compliance with the section is required, "the form of the notice is not specified." Id. at 856.

The cases to date yield no talismanic rule as to the specificity of the notice. Here, the letter sent on March 9, 2007, described the accident, Vargas's injuries, the amount of her medical bills, and that a demand was being made. Ft. Myers was placed on adequate notice and was able to investigate the claim based on the information provided in the letter. As such, Vargas's letter satisfied the notice requirement set forth in section 768.28(6)(a).

As to the statute of limitations having run out, the Appellate Court noted that Vargas' subsequent amended complaints merely added the language that she had satisfied the notice requirement and dropped the police officer as a party to the action. Because the amended complaints related back to the date of the original pleading, Vargas did not file outside of the statute of limitations. See *Fla. R. Civ.* P. 1.190(c); see also *C.H. v. Whitney*, 987 So. 2d 96, 99 (Fla. 5th DCA 2008) ("The relation back doctrine is to be applied liberally").

Because Vargas satisfied the requirements set forth in section 768.28 and because she filed her complaint within the statute of limitations, we reverse.

Jim Boelter
Johns Eastern Company, Inc.

LAWSUIT TARGETS HIGH SCHOOL FOOTBALL CONCUSSIONS

► A first-of-its-kind lawsuit against the national body governing high school athletic associations has been filed by a Mississippi father in Federal court.

The lawsuit seeks class action status for all high school football players as of December 2013. The NCAA is also a named defendant in the suit, which wants both organizations to provide high school players with current concussion-related risk information and standard of care practices within their possession. The suit also seeks a program where high schools certify that they have concussion management plans in place and also provide insurance as a last resort to uninsured players.

The National Federation of State High School Associations (NFSHSA) and NCAA have not yet filed responses to the complaint. Other similar lawsuits have been filed against the NCAA and the NFL.

School Law Alert

► A gun bounty program in Miami-Dade County received an anonymous tip that a high school student, K.P., was possibly in possession of a firearm. After being informed of the tip, the school's assistant principal and two school security guards went to K.P.'s classroom and took possession of his book bag. During a search of K.P.'s book bag, the officers found a loaded, semi-automatic handgun. K.P. was charged as a juvenile with carrying a concealed weapon and possession of a firearm on school property.

In *K.P. v. State*, K.P. sought to exclude the handgun from evidence, arguing that the search of his book bag violated his Fourth Amendment right to be free from unreasonable searches and seizures. The search of K.P.'s book bag was upheld and the search deemed legal. The Court held that "the level of reliability required to justify a search is lower when the [anonymous] tip concerns possession by a student of a firearm in a public school classroom." The Court reasoned that a student's expectation of privacy in the school setting is reduced and the government's interest in protecting school children is heightened.

► The mother of a Florida girl who committed suicide after she was allegedly bullied is standing behind proposed House Bill 451, and an identical bill in the Florida Senate, that would make it a first-degree misdemeanor to harass or cyber-bully another person and a third-degree felony if there is a credible threat involved in the harassment. The possible penalties would include counseling, community service or juvenile detention. Punishment for a felony charge would be harsher.

Currently, Florida does not have a bullying law.

Sniffen & Spellman, P.A.

(continued from page 2)

Certainly, if available, contractual indemnity is the preferred approach for the pursuit of these claims (at least, for the party seeking the indemnification), insofar as there is already an explicit agreement to introduce to the court. It may be advisable to ensure that you or your clients incorporate an "indemnification clause" into any contracts you / your clients have with third parties. The precise language in any clause is something that should be explored with legal counsel as a preventative measure.

Kristen Magana, Esq.
Broussard & Cullen, P.A.

[1] *Improved Ben. and Pro. Ord. of Elks v. Delano*, 308 So. 2d 615, 617 (Fla. 3d DCA 1975).
[2] *Maule Industries, Inc. v. Central Rigging Contracting Corp.*, 323 So. 2d 631, 632-633 (Fla. 3d DCA 1975).
[3] *Charles Poe Masonry v. Spring Lock Scaffold*, 374 So. 2d 487, 489 (Fla. 1979).
[4] *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).
[5] Id. But see *Diplomat Resorts Limited P'ship v. Tecnoglass, LLC*, 38 Fla. L. Weekly D1126a (Fla. 4th DCA 2013), wherein the court found that a party does not need to specifically plead the existence of a special relationship because this "merely describes a relationship which makes a faultless party only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party at fault."
[6] *Antinarelli v. Ocean Suite Hotel*, 642 So. 2d 661 (Fla. 1st DCA 1994).

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TIME SPENT DONNING SAFETY GEAR NOT COMPENSABLE

The Supreme Court recently issued a decision in *Sandifer v. United States Steel Corporation*, which addressed whether an employee's time spent "donning and doffing" protective gear is compensable time under the Fair Labor Standards Act ("FLSA"). The Court concluded that this time was not compensable.

The underlying suit involved a class action brought under the FLSA by employees of U.S. Steel who sought back pay for time they spent putting on and taking off pieces of protective clothing that U.S. Steel required workers to wear.

A provision of the FLSA, 29 U.S.C. §203(o), allows parties to collectively bargain over whether "time spent in changing clothes . . . at the beginning or end of each workday" is compensable. If protective gear was considered clothing, time spent donning the gear would not be compensable under the FLSA.

Sniffen & Spellman, P.A.

IN THE SPOTLIGHT

WELCOME!
Dawn Mehler is the new Director of Safety & Risk Management for the Greater Orlando Aviation Authority.

CONGRATULATIONS!
Johns Eastern recently recognized the following employees for their length of service:

5 Years: William Knight, Jason Elder, Lea Harlow, Andrea Manigault, Chris Jackson, Scott Brandt, Erik DeMartinis, Sam Shapiro, Beth Jurvelin, Aviva Lederman, Theresa Ross, Annette Chapman, Barbara Bradley, Christine Hamilton
10 Years: Mary Anderson, Larry Luca, Dawn Prosser, Misty Boutieller, Linda Trefethen, Magda Perez, Amanda Radcliffe, Shirley Chavis
15 Years: Steve Yerger, Barbara Brunet, Greg Rosen
20 Years: Frank Feldman, Shannon Kwiatkowski, Jim Milner
25 Years: Caryn Price, Greg Lingerfelt, Jim Boelter
35 Years: Harriette Wohlgamuth, Marti Hogan

Helping Feed Hungry Children

Johns Eastern employees Meagan Pfahler and Greg Burden finish loading food donations to benefit Feeding Empty Little Tummies (F.E.L.T.) in Manatee County. F.E.L.T. furnishes backpacks filled with a variety of foods to school children whose only balanced meal comes from the weekly school lunch.