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Did You Know?

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In addition to providing superior legal services, the attorneys at Bush Graziano & Rice, P.A., routinely provide in-house training, in-services and continuing educational programs to clients and their insureds on an array of topics. Members of the Firm are available to assist clients in satisfying continuing education requirements in Florida and other jurisdictions, as well as providing in-house training to employees on litigation and risk management matters.

Chip Rice and Ron Bush recently conducted several in-services for Firm clients regarding documentation and other patient-care issues. Ron Bush is scheduled to present at the upcoming Florida Podiatric Association Annual Convention, and is also preparing an in-service on coverage and the Florida Claims Administration Statute at the request of a Firm client.

Members of the Firm are available to assist you and your employees with your training and educational needs on a number of topics, including:

- Stroke Patient Triage
- Documentation in Ob/Gyn Claims
- Documentation in Long-Term Care Claims
- The Presuit Process in Podiatry Cases
- Deposition Preparation of Nursing Staff
- Deposition Preparation of Physicians
- Effective Mediation of Long-Term Care Claims
- Defense of Administrative Law Actions for Dental Practitioners
- Civil/Legal/Malpractice Issues for Dental Practitioners

Please contact Ron Bush (813.204.2844; rbush@bgrtriallaw.com) or Chip Rice (813.204.2845; crice@bgrtriallaw.com) for additional information.

In the News

Bush Graziano & Rice, P.A. Associate, Eric T. Olson, has been selected to join the Hillsborough County Bar Association's Leadership Institute. The Leadership Institute program has been designed to help participants gain and develop skills, knowledge, and relationships which will help them emerge as future HCBA and Tampa community leaders.

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Recent Cases

NURSING HOMES – ARBITRATION

Rafaela Miranda Perez v. Life Care Centers of America,
34 Fla. L. Weekly D2276b (Fla. 5th DCA, November 6, 2009)

Plaintiff appealed the lower court's order compelling arbitration of claims brought against the defendant nursing home. Plaintiff argued the arbitration agreement was unenforceable on the grounds of unconscionability, as it called for arbitration under the rules and procedures of the American Arbitration Association ("AAA"). Notably, as a result of a change in AAA policy, the AAA no longer accepts administration of health care claims involving pre-dispute arbitration agreements.

The First District Court of Appeal upheld the lower court's ruling the arbitration agreement was enforceable because the Plaintiff did not demonstrate the arbitration agreement was substantively unconscionable. The Court reasoned that although the AAA no longer accepts administration of health care claims involving pre-dispute agreements, the Florida Arbitration Code specifically addresses situations where the method of arbitration set forth in an arbitration agreement fails. Specifically, the Florida Arbitration Code, in Section 682.04, *Florida Statutes*, provides that a court shall appoint one or more arbitrators, or an umpire, if an agreed arbitration method fails for any reason, or cannot be followed. Thus, the appellate court affirmed the lower court's ruling and indicated the trial court was authorized to appoint one or more arbitrators under Section 682.04.

TORTS – AUTOMOBILE ACCIDENT – JURORS

USAA Casualty Insurance Co. v. Roberta Allen and Thomas Allen,
34 Fla. L. Weekly D1934a (Fla. 4th DCA, September 23, 2009)

In the underlying automobile negligence trial, the jury entered a verdict in favor of the Plaintiff. The Defendant sought an appeal on three separate issues.

First, the Defendant argued the trial court erred in denying its use of a peremptory challenge against an African-American juror under the procedure required by *Melbourne v. State*, 679 So. 2d 759, 765 (Fla. 1996). Summarily, the Fourth District Court of Appeal ruled the Defendant failed to preserve its objection to the trial court's ruling because the Defendant accepted the jury without renewing its objection to the challenged juror. The appellate court further held the Defendant's initial objection was not close enough to the conclusion of jury selection that it could be considered preserved without the need for renewal.

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USAA Casualty Insurance (cont'd)

Secondly, the Defendant argued the trial court erred in denying its motion in limine to prevent the mention of surveillance evidence. However, the appellate court ruled the Defendant again failed to preserve the issue. Specifically, the Fourth District held the trial court never issued a definitive ruling on the motion in limine and, instead, deferred ruling on the issue. Therefore, it was incumbent on the Defendant to object when the Plaintiff sought to introduce the evidence.

Finally, the Defendant argued the trial court abused its discretion in allowing the admission of post-crash vehicle photographs. The Fourth District, however, was not persuaded and held the trial court did not abuse its discretion in admitting the photographs into evidence. As such, the trial court's ruling was affirmed.

TORTS – MEDICAL MALPRACTICE

Eugenia Derespina v. U.S. and North Broward Hospital District,
34 Fla. L. Weekly D2094b (4th DCA, Oct. 14, 2009)

Appellant appealed a final order dismissing her action with prejudice in her medical malpractice suit.

By way of background, Appellant was admitted to the North Broward Hospital District for an elective total hip replacement. After the surgery, nurses applied an anti-embolism stocking to Appellant's left thigh pursuant to the doctor's orders. Appellant alleged the stocking was too small and caused blistering and scarring. Therefore, she instituted a medical malpractice action against North Broward Hospital District.

Appellant's notice of intent to initiate litigation included the affidavit of her sister, a nurse with forty-six years of experience, who was also the mother of Appellant's attorney. The affiant stated she had reviewed Appellant's medical records and concluded the medical malpractice claim had merit.

Appellee filed a motion to strike Appellant's pleadings, claiming the affidavit failed to demonstrate Appellant reasonably investigated the claim prior to initiating a medical malpractice action. Appellee argued the obvious family bias evidenced lack of a reasonable presuit investigation.

The trial court granted Appellee's motion to strike and dismissed the case. Significantly, the statute of limitations had run and Appellant was not able to correct the presuit deficiencies.

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Eugenia Derespina v. U.S. and North Broward (cont'd)

On appeal, the Appellee relied on the case of *Grau v. Wells*, in which a patient brought a medical malpractice suit against his doctor following plastic surgery. 795 So.2d 988, 989 (Fla. 4th DCA 2001). In *Grau*, the defendant doctor attached the affidavit of his business partner in support of his pleadings. The trial court found that because the affiant was clearly biased, his affidavit was insufficient to show the defendant and his counsel conducted a reasonable presuit investigation. The trial court thus concluded no reasonable investigation had occurred and subsequently entered a default judgment in favor of the patient.

Based on the foregoing, the Appellate Court noted Appellant's expert was her sister and the mother of her attorney. Further, Appellant's expert did not bill for reviewing the case. Failure to bill for review of a case is unusual and, according to the Appellate Court, demonstrated the expert did not perform an unbiased review. As such, the Court agreed with the trial court's ruling that Appellant could have obtained a nurse expert without family ties to give an expert opinion but failed to do so. Therefore, the trial court's conclusion that the investigation conducted by the Appellant did not constitute a reasonable investigation, as contemplated by the statute, was not an abuse of discretion. Thus, the trial court's ruling was affirmed.

TORTS -- MEDICAL MALPRACTICE -- LIMITATION OF ACTIONS

Rose Cohen v. Robert N. Cooper, M.D.,
34 Fla. L. Weekly D2210a (4th DCA October 28, 2009)

Appellant appealed the trial court's decision to grant summary judgment on the grounds her medical malpractice claim was barred by the statute of limitations.

By way of background, on November 14, 1997, Robert Cooper performed a facelift and eyelid surgery on Ms. Cohen. Ms. Cohen awoke after the surgery to "excruciating pain" in her left eye, as well as severe pain in her jaw that prevented her from chewing. Cooper examined Cohen's eye at that time and found no foreign object.

On November 17th, an ophthalmologist examined Cohen's eye and found two sutures in her eyelid that had scratched her cornea and lacerated her lower eyelid. Several days later, Cooper told Cohen her eyelid was probably damaged by a "retractor" used to hold her eyelid

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Cohen v. Cooper (cont'd)

in place during surgery. Cooper removed the stitches at that time; however, the eyelid did not heal. On December 24, 1997, Cooper attempted to repair the eyelid surgically.

Dr. Cooper continued with Ms. Cohen's follow-up care for months after the initial surgery. During these visits, Cooper continued to assure her it was a "slow recovery process" and that her pain was "normal". According to Cohen, she did not realize Dr Cooper had erred in performing the procedure until September of 1998.

On October 27, 1999, Ms. Cohen filed a ninety-day extension of the Statute of Limitations, pursuant to section 766.104, *Florida Statutes*. She filed a notice of intent to initiate litigation on April 2, 2000. She then filed a one-count complaint against Cooper on July 20, 2000.

Cooper moved for summary judgment, arguing the claims were barred by the Statute of Limitations. The trial court granted the motion as to the claims concerning the eye and eyelid. However, the court found the timeliness of the facial scarring claims to be an issue of fact to be determined by a jury. At trial the court granted Cooper's motion in limine to exclude all evidence regarding the eye and eyelid injury. The jury found in Cooper's favor.

On appeal, The Fourth District Court of Appeals held the trial court erred in granting summary judgment on Statute of Limitations grounds where the parties presented conflicting evidence as to the date on which Cohen should have known of the reasonable possibility her eye pain was the result of medical negligence.

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