



For The DEFENSE

Spring/Summer 2006

QUINTAIROS, PRIETO, WOOD & BOYER P.A.
Attorneys At Law

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QPWB is a civil defense trial law firm comprised of over 100 professionals maintaining seven fully staffed offices - six in Florida and one in Jackson, Mississippi. The firm's attorneys are licensed in over ten jurisdictions, and have successfully tried hundreds of cases, including some in the country's most volatile jurisdictions; Florida, Texas and Mississippi.

QPWB represents individuals, professionals, businesses, healthcare facilities, and insurers in all types of civil liability actions, including claims involving premises/construction liability/ defects, medical, nursing, and/or facility malpractice, as well as auto negligence and other insurance claims.

Experience Passion Results

The hiring of an attorney is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.
MISSISSIPPI: FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST

www.QPWBLaw.com

QPWB "Spotlight"

Eric W. Boyer – Managing Partner, Operations Finding Solutions and Achieving Results



Whether negotiating settlements locally, or across the country, or managing and coordinating complex litigation for clients firm wide, Eric W. Boyer has the knack of finding the solution and achieving successful results. According to George F. Quintairos, "Eric is all about client service. He not only manages issues within the firm, but clients routinely call upon him to negotiate and/or facilitate settlements for other defense firms nationwide."

Eric Boyer's success and dedication is the focus of this issue's QPWB "Spotlight."

Mr. Boyer's areas of practice include general liability, insurance defense, premises liability, medical malpractice, nursing home defense litigation, as well as other entities and insurers. He counsels clients in loss prevention and risk management across a broad spectrum of issues, and manages and coordinates the handling of large complex litigation accounts to ensure guideline compliance and quality service.

Texas Trial Lawyer Suffers Heart Attack - QPWB Steps-in and Responds with Defense Verdict



George F. Quintairos (Miami) and **Peter J. Molinelli** (Tampa) had to overcome significant obstacles on their way to achieving a Defense Verdict in a serious nursing home case in Houston, TX- the 6th consecutive healthcare defense verdict for QPWB since November 2004. The Plaintiff, Judith Faithauer, was represented by David Marks, Jacques Balette and Henry Giessel of the Houston-based firm of Marks, Balette & Giessel; a prominent firm which has among the highest nursing home verdicts in the country, including verdicts for \$83 million and \$160 million,

respectively. This marked the second time the case was tried in 2005. In February 2005, a mistrial was declared when former defense counsel suffered a heart attack on the eighth day of trial. The case was reset, but QPWB was not substituted as counsel until three months before the retrial was to begin, giving attorneys Quintairos and Molinelli little time to ready themselves, interview witnesses, and arrive at a new trial strategy.



Details of this case are available at the firm's website at www.QPWBLaw.com

Summary Dismissal Won for Medical Provider



Christina Mesa and **Brooke Chastain Juan** (Tampa) won a Motion for Summary Judgment on behalf of Prison Health Services, Inc. (PHS), in a case alleging cruel and unusual punishment and deliberate indifference to the patient's medical needs.

that PHS infringed on his constitutional rights by the deliberate indifference to his serious medical needs. Sheppard also claimed that it was customary for PHS to be unresponsive to inmates' medical needs.



The Plaintiff, Daniel Sheppard, a detainee incarcerated in the Hillsborough County Jail, alleged cruel and unusual punishment, and

The Summary Judgment prevented a jury trial which was scheduled within two weeks of entry of the judgment.

Quintairos, Prieto, Wood & Boyer, P.A. attorneys are frequent speakers and writers on nursing home law, healthcare litigation, and legislative topics. Through seminars and workshops, we strive to educate clients on business trends, litigation tools and techniques, and effective ways to minimize exposure and prevent litigation.

The following Published articles are available at our website (www.QPWBLaw.com):

- **Make the Final Impression a Positive One**
by Christopher J. Steinhaus
Prepared for the Florida Association of Homes for the Aging
September 2005
- **The Likelihood of Conflict and Confusion Increases when Multiple Individuals are Making Health Care Decisions for Residents**
by Elmer C. Ignacio
Prepared for the Florida Association of Homes for the Aging
October 2005
- **Medication Administration in Assisted Living Facilities**
by John Brekka, Jr.
Prepared for the Florida Association of Homes for the Aging
November 2005
- **Incident Reports 101**
by Christina C. Mesa
Prepared for the Florida Association of Homes for the Aging
December 2005

West Palm Beach, FL: Defense Verdict in ALF Case Involving Serious Injury

West Palm Beach, FL- **Peter Molinelli** (Tampa) and **Jeffrey Creasman** (Miami) teamed up and won a defense verdict for Homewood Residence of Delray Beach, an assisted living facility owned by American Retirement Corporation.

The elderly Plaintiff, who worked at the facility's beauty salon, sustained serious injuries to her shoulder as a result of a fall in one of Homewood Residence's public bathrooms, which she claimed was negligently maintained. She underwent several surgeries on her shoulder and ultimately had a partial shoulder replacement. She further endured painful and extensive

physical therapy, but did not regain full use of her arm to allow her return to work at the facility's beauty salon. In addition to significant claims for pain and suffering, the plaintiff sought damages in excess of \$92,000 for medical expenses and \$60,000 for lost wages.

The defendant lacked any records evidencing that the bathroom was cleaned on the day of the incident; however, on cross examination of the Plaintiff, trial counsel was able to establish that Homewood maintained a clean facility and consistently conducted safety-checks of the bathroom in question.

AHCA Complaint Against DON Dismissed – Probable Cause Hearing Averted



Michael Karpinski

The Department of Health (DOH) launched an investigation against a Director of Nurses (DON) employed at an American Retirement ALF. The investigation stemmed from an AHCA survey where it was learned that the DON was a Licensed Practical Nurse (LPN), as opposed to a Registered Nurse (RN). Although the RNs were not performing duties outside the scope of what an LPN would perform, the surveyor filed a complaint with DOH due to the fact that the LPN was supervising RNs – a regulatory violation.

Attorneys **Michael Karpinski** and **Elmer Ignacio** (Tallahassee) worked the case jointly, gathering information, and investigating the details of the Complaint lodged against the DON. Together they fashioned a response to the Complaint,

which included details of the duties and responsibilities performed by those supervised by the DON. They also obtained Affidavits from the facility Administrator and one of the RNs supervised by the DON. This along with other information was submitted to the DOH investigating attorney.

The materials/investigation/affidavits compiled by attorneys Karpinski and Ignacio were, in turn, provided for expert review by the DOH attorney. The DOH, after considering expert opinion, determined that there was no violation/infraction committed by the LPN in the supervision of RNs. The DOH Complaint was dismissed and a probable cause hearing was averted.



Elmer Ignacio

The Florida Society for Health Care Risk Management and Patient Safety Seeks New Members

The Florida Society for Health Care Risk Management and Patient Safety (FSHRM & PS) has launched a new membership campaign to recruit Risk Managers practicing in long-term care settings. The FSHRM & PS will offer an educational track focused specifically on risk management exposures in long-term care settings during its annual conference scheduled for August 2-4, 2006 in Tampa, Florida. In addition to adding this important track at the annual educational conference, the FSHRM & PS also offers year round educational programming

developed by and for long-term care Risk Managers. Topics include: fall prevention, hazardous wandering/elopement, disaster management, and worker safety/injury prevention. These educational offerings include: white papers, power points, best practices, and audio conferences. Continuing education credit is also available. If you are interested in learning more about joining this association please contact Ken Nanni, Ph.D., Director of Client Risk Management Services/Education at: knanni@qpwblaw.com.



QPWB Petitions Supreme Court on Pre-Suit Notice Requirements



(Jackson, MS) The Mississippi Supreme Court has agreed to review a Petition for Interlocutory Order submitted by attorney **William "Sonny" Grubbs**, a resident of the firm's Jackson, Mississippi office, requesting Dismissal of a Complaint brought against a long-term care provider in Hinds County, Mississippi. The Plaintiff filed suit in Hinds County, MS, despite the fact that the Defendant facility is

located in Lee County, MS, a much more conservative venue. The Petition was filed following a Hinds County Court's Order staying the action against the Defendant as opposed to dismissing the Complaint for Plaintiff's failure to comply with the Pre-Suit Notice requirements prescribed in Miss. Code Ann. §15-1-36 (15).

In this matter, Plaintiff's counsel attempted to circumvent Mississippi's tort reform measures by disregarding the Pre-Suit Notice requirements, and prematurely filing his Complaint against the facility the day before Mississippi's Tort Reform Act would go into effect. Attorney Grubb's position is that Mississippi's Pre-Suit Notice language is clear, that it is improper for the Plaintiff to "begin" an action against these Defendants without any form of notice whatsoever. To permit this action to proceed in violation of the statute's intended purpose would be to render the statute null and void, and further deny the Defendants their substantive rights under Mississippi's Tort Reform Act, under which the proper venue would be a more conservative Lee County, and subject the Plaintiff to the newly enacted limitation of damages pursuant to Mississippi's Tort Reform Act.

Attorney Grubb is cautiously optimistic that the Mississippi Supreme Court will agree with his position and dismiss the case – a result which would significantly decrease the case value for the client.

Federal Recognition Order

On October 19, 2005, the Department of the Army and the Air Force National Guard Bureau in Washington, D.C., announced Tom W. Fuller's promotion to Colonel. Col. Fuller is the spouse of attorney Mary Fuller, a resident in the firm's Jackson, Mississippi office.

Chaplain (Colonel) Tom Fuller was deployed in Iraq as the Brigade Chaplain from January 2005 until January 2006. While serving in Iraq, was instrumental in obtaining visas for a six year old Iraqi girl to come to the United States for heart surgery, which was successful, and will allow her to lead a normal life. He also organized a project of providing school supplies for Iraqi elementary schools, and is currently on active duty for another year with the Army.

Col. Fuller is the recipient of over 20 distinguished service decorations, awards and citations since he began his military career in 1987.

QPWB recognizes Col. Fuller and would like to express gratitude and appreciation for the meritorious service he has given to our country, and for his dedication and contribution to humanitarian causes.

Congratulations Col. and Mrs. Tom Fuller and thank you for your service!

Tradeshaw in Mississippi

June 27-29, 2006 – Choctaw, MS

Mississippi Health Care Association

QPWB will participate in the 2006 Convention and Tradeshaw Pearl River Resort
Visit us at Exhibit Booth #49

Attending Attorneys:

- Eric W. Boyer
- Michael C. Moore
- William "Sonny" Grubbs
- Sheila K. Nicholson

Seminars for Credit – QPWB Attorneys a Big Hit

QPWB attorneys are rated among the best speakers at workshops and seminars – attorneys **Sheila Nicholson** (Tampa) and **Robin Khanal** (Orlando) exemplify the firm's commitment to deliver outstanding and informative presentations to the individuals and businesses we serve. Most recently, attorneys Nicholson and Khanal received commendation for their presentation at FAHA's Third Annual Advanced Practice in Nursing: Dynamic Directions Workshop in February 2006. Those who attended the session rated their evaluations "Excellent", and the participants found their materials "very informative and incredibly useful." The evaluation letter can be viewed at the firm's website at: www.QPWBLaw.com.

Certified for Credit:

QPWB provides In-Service Presentations and Seminars in a number of areas, many of which qualify for continuing education credits for adjustors, risk managers, physicians, nurses, nurses-aides and administrators. These presentations can be customized to meet your needs, both in terms of time, location and subject matters. For more information, please contact Kenneth R. Nanni, Ph.D., at: Knanni@qpwb.com. Dr. Nanni currently serves as Coordinator of Healthcare Risk Management Certification and is an adjunct Professor at the School of Aging Studies at the University of Florida.

Medicare's Part B Therapy Cap and New Exception Process

By Sheila K. Nicholson, Esq.



Effective January 1, 2006, Medicare beneficiaries needing and/or receiving outpatient rehabilitation services are now under an annual cap of \$1740 for any combination of outpatient Part B physical and speech-language therapy services as well as a \$1740 cap for occupational therapy.

An important exception is that outpatient rehab services received in a hospital outpatient unit are exempt from the therapy caps. Thus, if a Medicare beneficiary receives outpatient therapy in a hospital's outpatient rehab unit and those services are billed to Medicare under Part B, there will be no applicable cap for those services.

In an attempt to assist with some of the difficulties created with the arbitrary cap, on February 13, 2006, CMS released the new exception process for Medicare beneficiaries to obtain coverage for certain medically necessary services if their treatment regimen was expected to exceed the \$1740 cap for services provided on or after January 1, 2006. Congress authorized this new exception process as part of the Deficit Reduction Act (DRA) (S. 1932) that President Bush signed February 8, 2006.

The exception process to a therapy cap will be implemented through CMS' claims processing contractors. The new law mandated CMS make a decision within 10 days as to whether the services sought were deemed medically necessary; otherwise, the services would automatically be deemed medically necessary. While CMS' claims processing contractors are implementing the exception process, they have been directed to

accept requests for adjustment of claims for services in 2006 that were denied for exceeding the caps.

It should be noted that the exceptions process will be effective retroactively to January 1, 2006. Hence, any Medicare Part B beneficiary that has had claims for outpatient therapy services denied based on exceeding the therapy cap should request an adjustment from the claims processing contractors. Any funds the Medicare Part B beneficiary paid for therapy services not covered related to exceeding the cap, should contact the provider of services after requesting an adjustment from the claims processing contractor to verify if any refund is owed.

The therapy cap exception process for medically necessary services allows for an automatic exception and/or a manual exception. An automatic exception will be given for certain conditions without a written request. Thus, when therapy services are for conditions or complexities related to a list of diagnosis codes, and are appropriately provided and documented, CMS through the claims contractor anticipates the beneficiary will automatically qualify for an exception to the therapy cap.

The exception process is a method to help beneficiaries receive the therapy services required. There is a comprehensive list of diagnosis codes related to conditions that should qualify for exceptions provided that the services are medically necessary. This comprehensive list, and other valuable information can be found on the CMS web page at <http://www.cms.hhs.gov>.

Sheila K. Nicholson, Esq., MBA, PT is an associate in the firm's Tampa office. Her areas of practice include medical malpractice and nursing home defense litigation. She is licensed to practice law in Florida and Mississippi.

New Additions to QPWB



Elaine J. LaFlamme, Esq.
Associate-Litigation & Appellate Division/Ft.Lauderdale Office

Ms. LaFlamme possesses nearly five years of experience in the areas of medical malpractice, nursing home and general liability defense. She has authored and co-authored a number of appellate briefs, presented argument before Florida Appellate Courts and has achieved several appellate victories for her clients. Her appellate experience and know-how is an asset to clients in need of monitoring counsel, appellate opinions and litigation support.

Ms. LaFlamme is a graduate of LaSalle University, where she received her Bachelor's of Arts Degree in Political Science and Economics in 1993. Ms. LaFlamme earned her Master's in Business Administration and Juris Doctorate *magna cum laude* from Nova Southeastern University in 2001.

She is a member of the Florida Bar (Broward County) Disciplinary Committee and a member of the Florida Defense Lawyers Association, Defense Research Institute, Florida Association of Women's Lawyers, American Bar Association and American Trial Lawyers Association.



Lawrence A. Falco, AIC, ARM
Director of Quality Control/Insurance Liaison

Mr. Falco manages the firm's third party claims as well as general liability claims of insureds whether litigated or non-litigated. As an experienced multi-line adjuster in matters of commercial property and general liability, he assists defense counsel through the entire claims process. Mr. Falco's responsibilities also include assessing risk factors and identifying problem areas and potential claims. He has spent over 15 years evaluating and developing quality control measures and performing claims audits.



Kenneth R. Nanni, Ph.D.
Director of Client Risk Management Services/Education
University of Florida Professor
Assists Clients with Pro-Active Strategies.

Dr. Nanni has joined QPWB as Director of Client Risk Management Services and Education.

Dr. Nanni currently serves as coordinator of health care risk management certification and as an adjunct Professor at the School of Aging Studies at the University of Florida. Recently, he served as a consultant to the Florida Health Care Association on legislative and policy issues. Dr. Nanni's expertise includes identifying and preventing losses by providing educational programs specifically designed for health care risk management. He will utilize his knowledge in healthcare to identify ways in which QPWB client's interests are aligned with those of health care consumers. He is a licensed healthcare risk manager in Florida and is certified in health care safety administration. Dr. Nanni received his Ph.D. in social and systemic studies from Nova Southeastern University in 2004 and his M.S. degree in Health Care Administration from the University of Florida in 1999.

Law Matters

Tort Reform: Joint and Several Liability Abolished in Florida

By John Brekka, Esq.- Director of QPWB's Appellate Division



The state of Florida has made the Doctrine of Joint and Several Liability a thing of the past. Unfortunately, it has taken over three decades for the Doctrine of Joint and Several Liability to be abolished despite its many unfair results. In addition, it has been twenty years since the Doctrine's injustice was highlighted in the dissenting opinion of *Walt Disney World v. Wood*, 515 So.2d 198 (1986), where *Walt Disney World* was found only 1% at fault but was required to pay the entire amount of the verdict minus 14%, the degree of fault assessed to the plaintiff. There is nothing fair about a system that allowed a defendant who was only 1% at fault to pay 86% of the loss, but that is what the majority opinion held in *Walt Disney World v. Wood*.

In 1986, the Florida Legislature eliminated the provisions for non-economic (pain and suffering) damages from the Doctrine of Joint and Several Liability. Various reports have noted that the elimination of non-economic damages led to a reduction in the number and size of frivolous lawsuits. In 1999, the Legislature enacted further limitations by creating monetary limits of liability in awarding economic (actual cost) damages.

Nonetheless, a scenario where a defendant who was found 15% at fault could be made to pay 100% of the loss was entirely possible under Florida's most recent comparative fault scheme (see F.S. 768.81(3)(2005). Oftentimes, this would cause "deep-pocket" defendants to settle questionable cases out of court, rather than risk a trial where they may be found only 1% at fault, but be on the hook for a substantial award, because the real wrongdoer is judgment proof.

It is important to note that the abolition of the law does not prevent plaintiffs from seeking compensation for injuries wrongfully caused by another. The plaintiff may recover from the defendant based upon that defendant's percentage of fault. A fair and equitable tort system should be based on laws where defendants, persons or corporations, big or small, pay in accordance with their respective responsibility.

There is little dispute that the elimination of non-economic damages in 1986, and the further enactment of limitations in 1999, led to a reduction in the number and size of frivolous lawsuits. It is reasonable to conclude, therefore, that lawsuit abuse will continue to decrease now that the Doctrine has been abolished.

Non-Resident Corporate Parent Dismissed From Suit

Two non-resident corporate shareholders, and one individual non-resident shareholder were sued in Orlando, Florida for negligence, wrongful death, and breach of fiduciary duty. In this Second Amended Complaint, Plaintiff stated that the corporate defendants, a Delaware limited liability company, and a New York Corporation respectively were doing business in Florida, and that its largest shareholder, an individual, was also doing business in Florida.

QPWB filed Motions to Dismiss for lack of personal jurisdiction, and supporting these motions with the sworn affidavits of personal and corporate counsel. The affidavits specifically denounced Plaintiff's allegations that the subject defendants were "doing business" in the state of Florida.

The sworn affidavits specifically stated that the subject defendants are nonresident corporations which do not conduct business in Florida, maintain their principal place of business outside of Florida, are not qualified to do business in Florida, have not conducted business in Florida, have neither incurred nor paid taxes to Florida, have not appointed an agent for service of process in Florida, have no office or place of business in Florida, have no employees in Florida, and own no real estate in Florida.

Counsel for Plaintiff argued that the controlling authority "that ownership of a subsidiary is not enough to subject a parent corporation to jurisdiction under §48.193," is inapplicable because as a managing member of an LLC, the defendants had a duty to manage the premises properly. The trial court rejected there was a distinction between LLCs and Corporations, and that the members, managers, and managing members of a limited liability company are not liable, solely by reason of being a member or serving as a manager or managing member.

Ultimately, the Fifth District Court of Appeals agreed with the trial court's dismissal and entered an order affirming the dismissal of the subject nonresident defendants for lack of personal jurisdiction. A virtually identical case filed against the same nonresident defendants was previously dismissed and affirmed by the Second District Court of Appeals in Tampa.

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