

HYBRID MEDICAL WITNESSES: COMMERCIAL LIABILITY SLIP AND FALLS



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I. Elements of a Commercial Premises Liability Claim:

Generally, persons who own or occupy premises may be liable for the injury to a person, i.e. visitor, on the premises that are under their occupation or control. Liability, under a cause of action for premises liability, is based on the negligence of the property owner or occupant in allowing licensees and invitees to enter an area on the property, without warning, where that owner or occupant could foresee that such persons could be injured by a dangerous condition on the property that is not readily apparent. *Post v. Lunney*, 261 So. 2d 146 (Fla. 1972). Visitors upon the private property of others fall within one of three classifications:

1. trespassers,
2. licensees, or
3. invitees.

St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So. 2d 670 (Fla. 1950). The classification is important because it determines the duty of care owed the visitor by the property owner or occupier. *McNulty v. Hurley*, 97 So.2d 185 (Fla. 1957). The property owner must not willfully and wantonly injure a trespasser; he must not willfully and wantonly injure a licensee, or intentionally expose him to danger; and, where the visitor is an invitee, he must keep his property reasonably safe and protect the visitor from dangers of which he is, or should be aware. *Id.*

Therefore, to determine the duty of care a property owner owes to a visitor, it is necessary to ascertain the visitor's classification. Florida courts have traditionally defined members of each category in the following manner: (1) a trespasser is one who enters the premises of another without license, invitation, or other right, and intrudes for some definite purpose of his own, or at his convenience, or merely as an idler with no apparent purpose, other than perhaps to satisfy his curiosity; (2) a licensee is one who enters upon the property of another for his own convenience, pleasure, or benefit; and (3) an invitee is one who enters upon the premises of another for purposes connected with the business of the owner or occupant of the premises. *City of Boca Raton v. Mattef*, 91 So.2d 644 (Fla. 1956).

As discussed above, a business invitee is a person who is invited to enter or remain on the premises for a purpose directly or indirectly connected with business dealings with the possessor of the premises.

Of note is that a little over ten (10) years ago in a case decided by the Florida Supreme Court (*Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315 (2001)), the Court seemed to change the burden of proof in a slip and fall case involving transitory substances. Specifically, the Court held that:

1. Where a Plaintiff slips on a transitory, foreign substance in a business premises, once the Plaintiff established that she/he fell as result of the transitory, foreign substance, the burden shifts to the Defendant to produce evidence that it exercised reasonable care under the circumstances.

This apparent burden of proof shift was later codified by the Florida Legislature in Florida Statute § 768.0710 as follows:

Florida Statute § 768.0710: Burden of proof in claims of negligence involving transitory foreign objects or substances against persons or entities in possession or control of business premises.

- (1) The person or entity in possession or control of business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees on the premises, which includes reasonable efforts to keep the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage.
- (2) In any civil action for negligence involving loss, injury, or damage to a business invitee as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:
 - a. The person or entity in possession or control of the business premises owed a duty to the claimant;
 - b. The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence; and
 - c. The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

Thereafter, in July 2010, after much discussion and at the request of business owners, the above Florida Statute was repealed and replaced by Florida Statute § 768.0755, which stated the following.

Florida Statute § 768.0755: Premises liability for transitory foreign substances in a business establishment

- (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
 - a. The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
 - b. The condition occurred with regularity and was therefore foreseeable.
- (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

II. Retroactive Application of Florida Statutes §768.0755:

A. Substantive versus Procedural

B. Create new obligations for the Plaintiff or alter only the burden of proof

Kenz v. Miami-Dade County and Unicco Service Company, 2013 Fla. App. LEXIS 6592; 38 Fla. L. Weekly D 922

In this case, the Third District Court of Appeals reviewed a case involving a slip and fall on a transitory foreign substance that occurred on May 13, 2008, to determine whether Florida Statutes §768.0710 or Florida Statutes §768.0755 should apply. The Court held that the analysis of whether a change in the statutory law should receive retroactive application requires a determination whether the statute sought to be applied retroactively is substantive in nature or procedural/remedial in nature. Substantive law prescribes duties and rights, whereas procedural law concerns the means and methods to enforce those duties and rights. Under Florida case law, issues relating to a party's burden of proof are generally procedural matters. The Court held that Florida Statutes §768.0755 does not operate to alter a prima facie case for a negligence claim as the Plaintiff who has a cause of action because of an injury due to a transitory foreign substance or object in a business establishment continues to have the same cause of action, and actual or constructive knowledge is not a "new" required element. Therefore, the Court held that Florida Statutes §768.0755 should be applied retroactively.

III. Causes of Action for Negligent Mode of Operation:

A. Was there a common law cause of action for negligent mode of operation?

Prior to the July 1, 2010, Florida Statutes §768.0710(2)(b) specifically provided that “The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning or mode of operation of the business premises.”

Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (Fla. 1948)

Plaintiffs sued the Palm Beach Kennel Club in a personal injury action for negligence. Plaintiffs alleged that after viewing the races from the grandstand they proceeded to leave the premises which Defendant was required to keep in good and reasonably safe condition, yet notwithstanding such duty, they alleged that they carelessly and negligently permitted an empty bottle to be in the aisle of the grandstand that defendant knew, or could have known by the exercise of reasonable diligence, that it was there. As a result, they allege that Plaintiff stepped on said bottle which rolled from under her foot causing her to fall to the floor suffering injuries. Plaintiffs alleged that Defendant sold bottled beverages but did not provide trash receptacles for the patrons to discard the empty bottles in, and as a result, the Defendant created the dangerous condition. In this case, the Court recognized a common law claim for negligent mode of operation as it related to places of amusement.

Markowitz v. Helen Homes of Kendall Corporation, 826 So. 2d 256 (Fla. 2002)

Plaintiffs brought suit against Helen Homes of Kendall Corporation alleging that while Plaintiff was visiting her mother, a resident at the nursing home operated by Helen Homes, Plaintiff slipped and fell on a grape in the main area of the nursing home facility and sustained serious injuries. Plaintiff alleged negligence under a theory of mode of operation in that despite the fact that residents of the facility were elderly and infirm in varying degrees, Helen Homes permitted them to carry food from the dining room to their rooms after their meals. Plaintiffs retained an expert who testified that it was not reasonable to allow residents to remove food from the dining room area and to allow residents to move through the facility with food created an unnecessary and unreasonable hazard. He further testified that the risk was foreseeable to Defendant since it was well known that elderly people in facilities are likely to spill food because of their diminished balance, strength and equilibrium. In this case, the Court recognized a common law claim for negligent mode of operation.

B. Has Florida Statute §768.0755 foreclosed the “mode of operation” theory as an available method of proof of negligence in slip and fall cases involving transitory substances?

At this point, question remains undecided. Accordingly, we use the following excerpt from the Florida Senate Bill Analysis and Impact Statement to argue that Florida Statute §768.0755 has foreclosed the mode of operation theory.

Section 1 creates s. 768.0755, F.S., to change premise liability for business establishments. When a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove:

- That the business establishment had actual or constructive knowledge of the dangerous condition;
- The condition existed for a sufficient length of time; and
- Because of that time, the business should have, in the exercise of ordinary care, known about the condition and taken action to remedy it.

Constructive or actual knowledge may be proven by circumstantial evidence showing that:

- The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
- The condition occurred with regularity and was therefore foreseeable.

In effect, the bill reverses the portion of the Owens ruling which eliminated the requirement that the claimant prove that the business owner had actual or constructive knowledge of the transitory foreign object or substance. Additionally, the mode of operation theory of liability is discarded.

IV. Disclosure of Surveillance Tapes/Photographs:

**A. Store Surveillance Tapes v. Post-Incident Surveillance of the Plaintiff-
What is protected from Discovery?**

Dodson v. Persell, 390 So. 2d 704 (Fla. 1980)

In this case, the Petitioner contended that the existence and content of surveillance films and photographs taken of the Plaintiff after the date of the subject incident by a private investigator retained by the Defendant should be disclosed prior to

trial in order for the Plaintiff to be able to effectively challenge or prepare rebuttal evidence against surveillance materials. Respondents contended that surveillance films and materials are protected by the work product privilege and consequently are not subject to discovery. Respondents further contended that if the Plaintiff is informed of the existence of surveillance materials and views the contents before trial, Plaintiff will tailor Plaintiff's testimony to reconcile any possible inconsistencies. The Court held that the rules of discovery are intended to prevent the use of surprise and trickery and therefore, upon request, a party must reveal the existence of any surveillance information he possesses and cannot remain hidden as knowledge of its existence is necessary before a judicial determination can be made as to whether the contents are privileged. Additionally, the Court held that revelation through discovery procedures before trial encourages settlement of cases and avoids costly litigation. The Court further ruled that the contents of surveillance films and materials are subject to discovery **where they are intended to be presented at trial** for substantive, corroborative or impeachment purposes.

Target v. Vogel, 41 So. 3d 962 (Fla. 4th DCA 2010)

In this case, Target sought certiorari review of a circuit court's discovery order compelling production of a store surveillance video tape and photographs of the Plaintiff prior to the taking of the Plaintiff's deposition in a slip and fall case. Target argued that the Plaintiff should be deposed before she saw the video and photograph as the Plaintiff was not accurate in portraying the incident in the history that she provided to her medical providers. Plaintiff argued that she should be allowed to refresh her memory of the incident with the security video and accident scene photographs prior to being deposed. The trial court granted the Plaintiff's Motion to Compel, requiring production of the photographs and video prior to the Plaintiff's deposition. The Fourth District Court of Appeals distinguished Dodson v. Persell and ruled that store surveillance videos are not work product and **are discoverable (even if not plan to use at trial)** to prevent the use of surprise, trickery, bluff and legal gymnastics.

Trial Court and Judges sometimes differ as to their rulings as to when the store surveillance video should be precluded (before or after the Plaintiff's deposition), so it is something that we routinely contest in our cases.

V. Invasion of Privacy:

As an offshoot of businesses using video surveillance, Plaintiffs' lawyers have become creative in their attempts to bring additional claims.

Smith v. Volusia County, 2011 U.S. Dist. LEXIS 46479 (M.D. Fla. Apr. 28, 2011)

This case outlined Florida law regarding the tort of invasion of privacy and the elements required to prove such a cause of action. Florida recognizes three categories

of the tort of invasion of privacy: (1) appropriation – the unauthorized use of a person’s name or likeness to obtain some benefit; (2) intrusion – physically or electronically intruding into one’s private quarters; and (3) public disclosure of private facts – the dissemination of truthful private information which a reasonable person would find objectionable.

In regard to proving and prevailing on a cause of action for this vis a vis a store video surveillance, it seems like an uphill battle, but lawyers may be willing to try.

VI. Attacking the Medical Bills:

A. HYBRID MEDICAL EXPERTS

Rule 1.280(b)(4)(A)(iii), Florida Rules of Civil Procedure

Elkins v. Syken, 672 So2d 517 (Fla. 1996)

In this case, the Court established guidelines for the taking of discovery from an expert medical witness concerning the probability he was biased in favor of the party upon whose behalf he was retained. The Florida Supreme Court held that this decision struck a **reasonable balance between a party’s need for information concerning an expert witness’s potential bias and the witness’s right to be free from burdensome and intrusive production requests.**

Allstate Insurance Company vs. Boecher, 733 So.2d 993 (Fla. 1999)

In this case, the Florida Supreme Court addressed the issue of limits of expert witness discovery propounded by a party. The issue was whether Elkins and Rule 1.280 precluded a party from obtaining from its opponent, discovery concerning the extent of the opponent’s relationship with an expert witness. **The Court held that the concerns it discussed in Elkins are not present when a party is asked about the extent of its relationship with an expert and the amount of money the party has paid the expert over time.** The Court concluded that the guidelines it adopted in Elkins and incorporated into Rule 1.280 did not apply.

Morgan, Colling & Gilbert, P.A., vs. Pope, 798 So.2d 1 (Fla. 2nd DCA 2001)

In this case, the defense sought to discover from the plaintiff’s law firm the extent of its financial relationship with two experts the firm retained on behalf of the plaintiff. **The Court held that a defendant may question a plaintiff about any relationship between his or her attorney and the plaintiff’s expert and the court ordered that the order permitting discovery of a financial relationship between a witness and a party representative does not depart from the essential requirements of the law.**

Linda Valente, Scott Katzman, MD and Advanced Orthopedics vs. J.C. Penney Corporation, Inc. (United States Court of Appeals for the Eleventh Circuit 2011)

This is an appeal taken by non-party, Scott Katzman, MD. Plaintiff alleged that J.C. Penney negligently installed certain home furnishings at her residence which ultimately led to her suffering serious injury. Dr. Katzman provided medical services to the Plaintiff. During discovery, J.C. Penney **subpoenaed certain documents from Dr. Katzman and his medical practice in order to evaluate his billing practices and in order to ascertain whether the medical charges assessed for Plaintiff's treatment were reasonable.** Dr. Katzman filed a motion challenging the subpoena and requesting the Court issue a protective order. The District Court denied Dr. Katzman's motion and **ordered him to comply with the subpoena.** Dr. Katzman was eventually sanctioned for his non-compliance. The Court further issued a sanctions order and concluded that no evidence from Dr. Katzman could be introduced at trial. The appellate court affirmed the ruling of the district court.

Scott Katzman, MD vs. Rediron Fabrication, Inc., George Martin and Allison Minjares, 76 So.3d 1060 (Fla. 4th DCA 2011)

In this case, the Court was confronted with the scope of permissible discovery from what it termed a "hybrid" witness. Plaintiff's lawyer referred his client to Dr. Katzman in anticipation of litigation. Dr. Katzman both treated the plaintiff thus making him a fact witness and the doctor was expected to testify at trial concerning the permanency of the plaintiff's injuries and need for future medical care thus making him an expert witness. Dr. Katzman provided those services pursuant to a letter of protection whereby he would be paid out of the proceeds of the lawsuit. Consequently, the court found that he had a financial stake in the outcome of the litigation. Dr. Katzman performed what the appellate court described as "an allegedly controversial outpatient surgical procedure" and the defense believes that a large portion of Katzman's income was generated by recommending this procedure for patients referred to him in litigation cases, and that he charges more for the procedure in litigation cases than in non-litigation cases. **The appellate court advised that generally financial bias discovery from such a hybrid expert should not exceed that permitted under Elkins and Rule 1.280, however, in this case, the discovery that was sought is not relevant merely to show that the witness is biased based on an ongoing financial relationship with a party or lawyer. The discovery requested in this case was found to be relevant to a discreet issue, whether the expert has recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether the expert, as a treating physician, allegedly overcharged for the medical services at issue in the lawsuit. The Court held that the limited intrusion into the private financial affairs of the doctor in this case is justified by the need to discover case-specific information relevant to the substantive issues in the litigation, i.e., the reasonableness of the cost and necessity of the procedure.**

Crable vs. State Farm Mutual Automobile Insurance Company, 2012 U.S. District Court (Middle District of Florida 2012)

This case involved an action for uninsured/underinsured motorist benefits brought by the Plaintiff against State Farm for injuries she allegedly incurred in a motor vehicle accident. Following the accident, Plaintiff underwent medical treatments and she retained the law firm of Morgan & Morgan, P.A. to represent her. Morgan & Morgan referred the Plaintiff to Dr. Ara Deukmedjian at Millennium Medical Management a/k/a The Deuk Spine Institute, which entered into an agreement with the Plaintiff to take a lien on the proceeds of the lawsuit rather than bill her insurance carrier. Dr. Deukmedjian examined the Plaintiff and performed surgical procedures on her cervical spine. After the Plaintiff was treated at The Deuk Spine Institute, Morgan & Morgan withdrew as her counsel. State Farm then served a non-party subpoena duces tecum on the records custodian at Morgan & Morgan seeking extensive discovery concerning the relationship between the law firm and The Deuk Spine Institute. State Farm also attempted to subpoena records from The Deuk Spine Institute. Both Morgan & Morgan and the Deuk Spine Institute objected to the non-party subpoenas.

Scott Katzman, M.D. and Advanced Orthopaedics, P.A. vs. Ranjana Corporation, d/b/a Lakewood Park Liquor & Pub, Tammy Green and Edward Green, 90 So.3d 873 (Fla. 4th DCA 2012)

This case involved a Plaintiff that alleged that she was injured in a slip and fall incident at a bathroom at Defendant's business premises. Plaintiff was referred to Dr. Katzman for treatment by another doctor, not by her attorney. Plaintiff did receive medical treatment from Dr. Katzman under a Letter of Protection (LOP) executed by the Plaintiff and her attorneys. In preparation for trial, Plaintiff listed Dr. Katzman on her Amended Expert Witness Disclosure as an expert witness to testify at trial. **Defendant then set Dr. Katzman for deposition and served Dr. Katzman and Advanced Orthopaedics, P.A. with a Subpoena Duces Tecum, calling for production of documentation evidencing the amounts Dr. Katzman collected from health insurance coverage on an annual basis in the preceding four years for the same type of surgery as the surgery performed on the Plaintiff, the number of patients for whom he performed such a procedure in each year, and the amounts received during each of those years from health insurers.** The Subpoena Duces Tecum for deposition also requested the production of documentation evidencing the amounts Dr. Katzman collected under Letters of Protection received from attorneys on an annual basis for the preceding four years for the same type of surgery as the surgery performed on the Plaintiff, the number of patients for whom he performed such a procedure in each year and the amounts received during each of those years pursuant to those letters of protection. Dr. Katzman and the P.A. filed objections to the Subpoena Duces Tecum and a Motion for Protective Order, arguing that the requests sought irrelevant information and confidential, private business and financial records

which exceeded the scope of permissible discovery. **They also argued that the requests were extremely burdensome and would require thousands of man hours and thousands of dollars to accumulate the information requests. The trial court heard argument on the objections and motion for protective order, and entered its order denying the motion and requiring Dr. Katzman and the P.A. to respond to the subpoena duces tecum.** The appellate court followed the revised and clarified opinion in *Katzman v. Rediron* which explained that it is not the LOP which injects the doctor into the litigation. **Instead, it was the referral of the patient by the lawyer to the doctor in anticipation of litigation that triggers the discovery provisions as a hybrid witness.**

Steinger, Iscoe & Greene, P.A. and Tammy Washington v. Geico General Insurance Company, 103 So.3d 200 (Fla. 4th DCA 2012)

This case involves a trial court order involving the law firm representing a Plaintiff in an Uninsured Motorist case against Geico General Insurance Company. **Geico sought to depose the law firm's office manager in order to obtain information, including documents, relating to the nature and extent of the relationship between the law firm and the treating physicians.** These physicians were listed by the Plaintiff as witnesses that would be rendering expert opinions. All of the requests sought information concerning the financial dealings between the law firm and the plaintiff's health care providers. The law firm moved for a protective order, arguing among other things that the request invaded the privacy of non-party patients and violated the attorney-client privilege of the law firm's former clients. Additionally, the law firm argued that production of such documents would require extensive manual review of thousands of confidential files which would be burdensome and expensive. The trial court denied the motion for protective order, but allowed the law firm to redact the names of clients in cases that had settled or where no litigation was filed. The appellate court was required to balance the need for the discovery against the burden placed upon the witness. **In this case, the Fourth District Court of Appeals held that where there is a preliminary showing that the plaintiff was referred to the doctor by the lawyer (directly or through a third party) or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor.**

Burt v. Government Employees Insurance Company, 603 So.2d 125 (Fla. 2nd DCA 2001)

As you navigate the scope of available discovery in these situations, it is important to keep in mind the Second District Court of Appeals' ruling in Burt v. Government Employees Insurance Company. In this case, the Plaintiffs petitioned the Second District Court of Appeals to quash an order compelling the wife to answer questions related to when she obtained counsel and whether counsel referred her to a

particular physician. The Second District Court of Appeals quashed the trial court's order in part.

Specifically, the Court ruled that "although the first question [when the wife obtained counsel] does not violate the attorney-client privilege in this instance, the second question [whether the attorney referred her to a particular physician] seeks discovery of confidential communications constituting her attorney's advice regarding the lawsuit."

This case could make it more difficult for defense counsel to prove that the Plaintiff's lawyer referred him to the physician in question, thereby making it more difficult to establish the "link" necessary for the Defendant to obtain the subject information directly from the physician or lawyer.

B. BILLING EXPERTS

In cases where you are confronted with a hybrid medical witness you may want to retain a billing expert to challenge the reasonableness of the medical bills/damages that the Plaintiff is trying to claim in their case.

1. Qualifications

In most cases, you will want to look for a certified medical coding expert. This is generally represented by the initial CPC following the person's name. CPC stands for Certified Professional Coder.

A helpful research tool for experts can be found at the AAPC website located at: www.aapc.com. AAPC was founded in 1988 to provide education and professional certification to physician-based medical coders and to elevate the standards of medical coding. AAPC credentialed coders have a proven mastery of all code sets, evaluation and management principles and documentation guidelines.

2. Benefits of Medical Billing Expert;

- a. Will be able to testify as to the comparison to the usual, customary and reasonable rates for the geographical area.
- b. Can address unbundling issues – inappropriately billing more CPT/HCPCS codes than necessary. This applies when certain codes represent procedures or services that are basic steps in accomplishing the primary procedure. Typically, these steps are included within the primary procedure or service. In essence, it is

the process of billing multiple procedure codes that are covered by a single comprehensive code.

- c. Can address use of modifiers – modifiers are used to indicate that a procedure or service was distinct or independent from other services performed on the same day.

C. CME EXPERTS

Plaintiff has the burden of proving that any and all medical expenses alleged were reasonable, related and necessary. You may be able to utilize an expert retained by the defense to establish that the medical bills alleged were not reasonable, not related and/or were not necessary. This is another tactic sued by defense lawyers to lower the overall potential damages presented to a jury.

D. LIMITATIONS ON REDUCING DAMAGES AFTER-THE-FACT

Ordinarily, a tortfeasor is responsible for only the reasonably foreseeable consequences of his or her actions. An independent unforeseeable intervening act may break the causal connection and prevent the tortfeasor from being responsible for damages caused by that independent act. An exception to this general law applies in the area of subsequently caused injury due to medical malpractice. A tortfeasor who causes an injury which is later aggravated by medical malpractice is liable, as a matter of law, for that subsequent injury so long as the plaintiff has not been negligent in choosing his physician who causes the aggravation or in following the directions of that physician.

Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977)

This case standard for the well-established legal principle that “a wrongdoer is liable for the ultimate result, although the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong.” Stated another way, an initial tortfeasor may be held responsible for all subsequent injuries, including those caused by medical negligence.

Nason v. Shafranski, 33 So.3d 117 (Fla. 4th DCA 2010)

In this case, the Defendants argued that the plaintiff’s treating doctor had performed unnecessary surgeries on the plaintiff. The Plaintiff then requested an instruction, pursuant to Stuart V. Hertz, that the defendants were responsible for any damages resulting from negligent or improper medical treatment. The Court appellate court held that the refusal to give the jury instruction was reversible error.

Unfortunately, the only way around this limitation is to prove that the procedures done by the doctor were not reasonable or necessary. If all else fails, the Defendant can always bring suit later on against the medical provider to recover any money paid out due to his negligence, but this is often costly and there is no guarantee of a recovery.