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LIABILITY CASE LAW UPDATES

Insurer is entitled to rescind policy for material misrepresentation regardless of whether it has returned earned interest in addition to the premium

In Certain Underwriters at Lloyd's London v. Jimenez, 197 So. 3d 597 (Fla. 3d DCA 2016), the Third District addressed whether the return of all premiums plus interest was a condition precedent to an insurer's rescission of a policy for material misrepresentation. The court determined that there is no law precluding an insurer from rescinding a policy when it fails to return the interest on the insured's premiums at the same time as it returns the premiums.

* * *

Supreme Court holds that the interest rate as of the date of entry of the judgment remains the same until the judgment is paid

The Florida Supreme Court, in Townsend v. R.J. Reynolds Tobacco Co., 192 So. 3d 1223 (Fla. 2016), answered a question certified as a matter of great public importance, namely, whether section 55.03, Florida Statutes, alters the rate of interest on a final judgment after it has been entered. The statute was amended in 2011 to provide that the interest rate changes every quarter of the year. The Court found that the statute clearly and unambiguously provides that the interest rate as of the date of the judgment remains constant until the judgment is paid.

* * *

LIABILITY CONTINUED. . .

Property insurer not entitled to discover confidential settlement agreement between insured and another, subsequent carrier where the insurer had not yet admitted its liability for the loss

The Second District, in Allen v. State Farm Florida Ins. Co., 198 So. 3d 1871 (Fla. 2d DCA 2016), considered whether the trial court erred in permitting State Farm to discover the settlement agreement between its insureds and another insurer who had settled their property loss claim after it initially denied coverage on the grounds that the damage preexisted its policy. The appellate court quashed the trial court's order permitting the discovery, finding that the production of the settlement documents, which contained the insureds' private financial information, would irreparably injure them. The court further found that the settlement documents were not discoverable by State Farm because they would not lead to the discovery of admissible evidence. The Court held that since State Farm had not conceded its liability, it was premature to require disclosure of the settlement documents. In doing so, the Court rejected the carrier's argument that disclosure would permit it to consider its settlement options in the case.

* * *

Trial Court abused its discretion in applying a multiplier to fees awarded to insureds where there was no showing that they would have had difficulty finding competent counsel to represent them in a property insurance case

In Florida Peninsula Ins. Co. v. Wagner, 196 So. 3d 419 (Fla. 2d DCA 2016), the Second District reversed a trial court's order awarding the plaintiffs a multiplier after they were successful in obtaining a jury verdict for damages from their property insurer. The insureds did not testify at the attorneys' fees hearing, but their counsel testified that he believed their case was unique. Also testifying at the fee hearing was an attorneys' fees expert witness who testified that he had contacted a few attorneys before the hearing to ask them whether it was important for them to have a contingency fee multiplier in deciding whether to accept a first-party coverage dispute. The expert did not reveal what those attorneys told him, but testified that the skill required in the case reduced the number of attorneys qualified to take it. In response, the carrier's expert testified that there were 258 local attorneys listed in the Martindale Hubbell directory who held themselves out as first -party insurance attorneys. The carrier also argued that the amount of damages obtained by the insured was substantially less than the amount of stipulated fees even before application of the multiplier.

The trial court awarded the insured a 2.0 multiplier, finding that while there might be multiple attorneys who would be willing to go to a trial, "actually going to trial is another issue." The court found that the fact that the case went to trial amounted to a "market condition" that necessitated a multiplier.

The appellate court reversed, finding that there was no evidence that their was a dearth of the Tampa Bay attorneys who could not provide competent counsel for the insureds at the prevailing hourly rate. Significantly, the court added, "[c]ertainly, most (all?) attorneys would **prefer** to collect twice their market rate at the conclusion of a successful contingency fee case, a point that perhaps needed no expert testimony to illuminate."

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LIABILITY CONTINUED. . .

Second District certifies conflict with the Fifth District on the issue of whether the filing of a motion to enlarge the time to respond to a proposal for settlement operates to toll the time for acceptance until such time as the motion has been decided

In Goldy v. Corbett Cranes Servs., Inc., 692 So. 2d 225 (Fla. 5th DCA 1997), the Fifth District held that the filing of a motion to enlarge time to respond to a Proposal for Settlement tolls the time for acceptance until the motion has been decided. That Court found that, to hold otherwise, would punish a party who has a sincere desire to settle and legitimately needed additional time to respond.

In Ochoa v. Koppel, 197 So. 3d 77 (Fla. 2d DCA 2016), the Second District disagreed with the Fifth District's holding in Goldy. The Court found that there was no provision in the rules of civil procedure that would operate to toll the running of any time period on the mere filing of a motion. The Court opined that automatic tolling without judicial supervision, exercise of discretion or any substantive showing of need, could not have been intended under the rules.

The Court opined further that parties are still free to move for an enlargement of time, and if it is granted, even after expiration of the original deadline, the enlargement would be valid. It is only where the trial court denies the motion to enlarge that the moving party may have a problem, but the denial of that motion would mean that that party was not entitled to enlargement in the first instance. Therefore, the Court's holding in this case was not inequitable.

Because its decision was in direct conflict with Goldy, the Second District certified that conflict to the Florida Supreme Court for resolution.

* * *

Third District holds that where a landscaped area on commercial property had been in continuous use by pedestrians as a shortcut, there was a factual issue for the jury's determination on the issue of whether the properly owner could be held liable in a protruding re-bar, even though landscaping was not intended for pedestrian use

The Third District issued an opinion in stark contrast to numerous other cases throughout the state in Grimes v. Family Dollar Stores of Florida, 194 So. 3d 424 (Fla. 3d DCA 2016). In Grimes, the plaintiff tripped and fell on a protruding piece of re-bar while she was using an area of landscaping as a shortcut in the parking lot of a shopping center. The trial court granted the defendant's summary judgment, finding that since the landscaped area was not intended as a pedestrian walkway, it did not need to be made safe for the plaintiff's misuse. Accordingly, the defendants could not be held liable for failure to remedy a dangerous condition on their property.

In reversing that summary judgment, the Third District recognized that its opinion was inconsistent with other cases throughout the state holding that where a landowner provides a path or area for pedestrian use and the pedestrian is injured while walking through a landscaped area that was not intended for that use, the condition is so open and obvious that it does not constitute a dangerous condition as a matter of law. The Court distinguished this case from other cases based on evidence that numerous other pedestrians had also walked through the same landscaped area. This unintended pedestrian use of the premises put the owner and lessee on constructive notice of the condition, thereby triggering a duty to anticipate and prevent harm to their patrons. In addition, the re-bar on which the plaintiff claimed she fell was not a naturally occurring condition in landscaping. Accordingly,

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LIABILITY CONTINUED. . .

the appellate court reversed the summary judgment, finding that the case presented a question of fact for the jury as to whether the owner and lessee knew or should have known of the man-made hazard such that it should have been corrected.

* * *

Trial Court abused its discretion in improperly limiting the testimony of an expert witness who was both a biomechanical engineer and a medical doctor to exclude his opinion as to causation of the plaintiff's injury

In Maines v. Fox, 190 So. 3d 1135 (Fla. 1st DCA, 2016), the appellate court considered whether the trial court abused its discretion in excluding the opinion of an expert who was both a biomechanical engineer and an orthopedic surgeon. The expert's opinion concerned whether the plaintiff's injury was caused by a motor vehicle accident. The Plaintiff raised a Daubert challenge, contending that the witness lacked the expertise to render an opinion as to causation.

While biomechanical engineers may give expert testimony as to the general causation of a type of injury, they may not usually offer opinions requiring medical expertise. In this case, however, the expert was a medical expert who had the background and training to opine on the mechanism of injury. The Court therefore found the trial court's exclusion of the expert's testimony as to causation was an abuse of its discretion. However, on review of the excluded opinions, the court found that the trial court's error was ultimately harmless in the context of the trial because it could not reasonably have contributed to the jury's verdict. The jury heard all of the relevant facts and the admitted portions of the expert's testimony had sufficiently conveyed his causation opinion despite the improper exclusion by the trial court.

* * *

Homeowner entitled to dispute the scope of repairs before the repairs are completed, even where the insurer has a right to repair damaged property rather than making cash payment

In Diaz v. Florida Peninsula, 2016 WL 3087811 (Fla. 4th DCA, June 1, 2016), the Fourth District reviewed a trial court's order abating the homeowners' action against their property insurer for breach of contract and declaratory judgment action. The homeowners had sustained damage as a result of a leak in their air conditioning system and Florida Peninsula notified the homeowners that it would exercise its contractual right to repair the damage rather than pay the homeowners directly. The carrier requested that the insured sign a work authorization based on its contractor's proposed scope of repairs. The insureds refused, disputing the scope of the proposed repairs. The insurer denied the insured's claim because of their refusal to sign the work authorization.

The insureds filed an action for breach of contract and declaratory judgment action and the insurer moved to abate the action and to compel the insureds to comply with the conditions of its policy by permitting the repairs. The insureds sought review of the abatement order and on appeal, the Fourth District quashed that order, finding that the order completely precluded the insureds from obtaining a determination as to whether the carrier properly exercised its right to repair, and to further determine the parties' rights and obligations under the policy. The Court also found that where there is a dispute as to the scope of proposed repairs, a homeowner is entitled to dispute the scope before those repairs are completed.

* * *

LIABILITY CONTINUED. . .

Impact Rule applies in actions against an employer for negligent hiring, retention and supervision; employee's intentional misconduct did not merge with employer's negligence so as to subject employer to damages for plaintiff's emotional distress

In G4S Secure Solutions USA, Inc. v. Golzar, 2016 WL 4585934 (Fla. 3d DCA, Nov. 9, 2016), the Third District reversed a judgment for emotional distress damages rendered against Wackenhut, the employer of an employee who committed an intentional tort. Wackenhut was sued only for negligent hiring, retention and supervision arising out of Owens' employment as a security guard. The employee did not disclose prior criminal convictions on his application for employment. After he was hired, and during the course of his employment, he videotaped a teenager in varying states of undress. Owens was ultimately convicted of video voyeurism.

The Plaintiff brought suit against Wackenhut, seeking damages for past and future emotional distress caused by the incident. The Plaintiff did not allege that she suffered any type of physical injury and it was otherwise undisputed that Owens never touched her. After a trial, the jury awarded a verdict in the Plaintiff's favor and awarded her $1,332,588.08 in damages for her emotional distress.

On appeal, the judgment was reversed. The appellate court reiterated Florida's "impact rule", which holds that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." While there are certain exceptions to that general rule, like malicious prosecution, none of those exceptions applied in this case. While the impact rule only applies in negligence cases and not in cases predicated on intentional torts, the plaintiff only alleged that Wackenhut was negligent and its alleged vicarious liability for its employee's intentional tort did not operate to change the character of the case from one for negligence to one for intentional misconduct. Accordingly, the appellate court reversed the judgment against Wackenhut with directions to enter a judgment in its favor.

* * *

Trial Court correctly denied motion for new trial on ground that a juror disregarded the court's directions not to post comments on social media where the court determined that the juror's tweets were not prejudicial to the Plaintiff

The Fourth District Court of Appeal affirmed the trial court's denial of Plaintiff's motion for new trial based on the Plaintiff's argument that a juror was found to have posted comments on social media during the trial. In Murphy v. Roth, 2016 WL 5803658 (Fla. 4th DCA, Oct. 5, 2016), the appellate court found that although it was undisputed that the juror committed misconduct, it recognized that not every violation of the rule against using social media during a trial would warrant a retrial absent evidence of actual prejudice to the litigants arising therefrom. In this case, the trial court found that the Plaintiff suffered no prejudice as a result of the tweets, the juror's misconduct was neither intentional nor willful, and none of the tweets related to this specific case. The Fourth District held that the trial court did not abuse its discretion in denying the Plaintiff's motion for new trial and affirmed the final judgment.

* * *

LIABILITY CONTINUED. . .

Jury award of zero damages affirmed where, although the Plaintiff is ordinarily entitled to recover the cost of diagnostic testing reasonably necessary to determine whether the accident caused the Plaintiff's injury in cases in which the jury finds in the Defendant at fault, the Plaintiff was not honest with her treating physicians and failed to inform them of her prior accidents

The general rule in cases in which a defendant is found to have caused an accident but not the injury for which the Plaintiff seeks recompense is that the Plaintiff is usually entitled to recover at least the cost of diagnostic testing necessary to determine causation. However, in Finkel v. Batista, 2016 WL 5874614 (Fla. 3d DCA, Oct. 5, 2016), the appellate court affirmed the trial court's denial of the Plaintiff's motion for new trial based on the jury's failure to award the Plaintiff the cost of diagnostic testing. The appellate court found that since the Plaintiff had not been candid with her treating physicians regarding her prior accidents, the jury was entitled to award the Plaintiff nothing. In addition, the Plaintiff's counsel invited the error by failing to object to a verdict form that permitted the jury to render an award of no damages and by arguing during closing that the jury had the ability to award "all or nothing".

* * *

Plaintiff's counsel's argument that the jury should compensate the Plaintiff based on the rate the parties compensated their expert witnesses was reversible error where the jury appeared to have relied on counsel's suggestion in rendering its damage verdict

In Crane Co. et al. v. Delisle, 2016 WL 4771438 (Fla. 4th DCA, Nov. 9, 2016), the Fourth District reversed an $8 million jury verdict in favor of the Plaintiff for a new trial in part because the Plaintiff's counsel made numerous improper closing arguments, including the argument that the jury should consider the amount paid to expert witnesses as a guide in determining the amount of the Plaintiff's damages. The court found that although the amount paid to the experts was in evidence, the argument was nevertheless improper because it was entirely arbitrary as a measure of the plaintiff's damages arising from his mesothelioma. Accordingly, the trial court should have awarded a remittitur or new trial on damages.

* * *

Florida Statute 768.125 did not create a cause of action based on service of alcohol to an individual habitually addicted to alcohol and the Responsible Vendor Act imposes no legal duty on the part of a vendor

The Fourth District reversed an $11 million jury verdict in favor of the Plaintiff, who was injured when his motorcycle collided with a car driven by an individual who had been served numerous drinks while he was at the Fraternal Order of Eagles' premises. In Okeechobee Aerie 4137 etc. v. Wilde, 199 So. 3d 333 (Fla. 4th DCA 2016), the appellate court held that the trial court erred in denying the Defendants' motion for new trial on the ground that the jury was misinstructed as to the nature of the Plaintiff's cause of action. Specifically, the jury verdict form contained two separate liability questions; one predicated on simple negligence and one predicated on a violation of Florida Statute 768.125. The Court held that the statute does not itself create a cause of action and the only appropriate cause of action is one predicated on simple negligence with the threshold question being whether the statute was violated by virtue of the defendants' alleged service of alcohol to a person known to be habitually addicted to alcohol.

In addition to this error, the Court also found that the trial court erred in permitting the Plaintiff to argue that a violation of the Responsible Vendor

LIABILITY CONTINUED. . .

Act, which is a voluntary statute imposing no legal duties on vendors, may constitute evidence of negligence. The Court found that "[a] decision by an organization not to avail itself of certain optional protections is not proper evidence that it has breached some duty of care." The Act does not itself establish a standard of care, the breach of which may give rise to liability on the part of a vendor. Therefore, the appellate court reversed the jury's verdict for a new trial.

* * *

Co-insured's material misrepresentation in insurance application, if material to the insurer's acceptance of the risk, will be imputed to the other insured such that insurer may rescind the policy as to both insureds where the policy provided that the intentional concealment or material misrepresentation of one or more insureds will permit the insurer to disclaim coverage

In Moustafa and Ahmed v. Omega Ins. Co., 201 So. 3d (Fla 4th DCA 2016), the insured Moustafa failed to disclose prior losses on his application for homeowners' insurance with Omega. His wife, Ahmed, did not sign the application but was listed as a co-applicant and named insured under the policy. In reliance on Moustafa's representations, Omega issued a policy, which contained a "Concealment or Fraud" provision stating that if "one or more insureds" intentionally concealed or misrepresented any material act or circumstance or made false statements, the carrier would provide no coverage.

After the insured made a claim for water damage, it paid the repair costs but then discovered during the course of processing the claim that the insureds had two prior claims which had not been disclosed on their application. After the insurer's SIU department investigated, it sought an EUO during which Moustafa admitted the inaccuracies on his application. Omega rescinded the policy and the insureds filed suit against the carrier.

On summary judgment, the insureds argued that Moustafa's misrepresentations could not be attributed to his wife since she did not sign the application. The Court found that whether the misrepresentations were material was not in dispute and the definition section of the policy defined "insured" as not only the named insured listed on the Declarations page but also the insured's spouse if he or she resides in the same household. In addition, the policy explicitly provided that "if one or more insureds" intentionally concealed or misrepresented any material fact, the carrier would be entitled to disclaim coverage. Therefore, the fact that Ahmed did not sign the application was deemed irrelevant to the issue of Omega's entitlement to rescission.

* * *

Summary judgment reversed where defense counsel was late in attending the hearing because he stopped to go the restroom

The Fourth District Court of Appeal reversed a summary judgment rendered in Natiello v. Winn-Dixie Stores, Inc., 2016 WL 6778678 (Fla. 4th DCA 2016), a personal injury action. In this case, the defendant did not file a written response to the Plaintiff's motion, and while defense counsel was on time for the hearing, he chose to go to the restroom when he did not see Plaintiff's counsel in court. On his return, the hearing had already started and the trial court would not permit defense counsel to present his oral opposition to the motion**.** The appellate court found that because defense counsel was only a few minutes late to the hearing and had a reasonable explanation for his tardiness, the trial court abused his discretion in granting the motion for summary judgment by default.

* * *

LIABILITY CONTINUED. . .

Where employer denied workers' compensation benefits but the basis for that denial was ambiguous, trial court's order granting summary judgment on the ground that the employer was estopped from raising workers' compensation immunity as a defense would be reversed

In Gil v. Tenet Healthsystem North Shore, Inc., 2016 WL 6778274 (Fla. 4th DCA, Nov. 16, 2016), the appellate court reversed a partial summary judgment against the Plaintiff's employer on the issue of whether it was entitled to workers' compensation immunity. The Plaintiff had argued that the employer's denial of workers' compensation benefits estopped it from raising its immunity as an affirmative defense to the employee's personal injury action. The appellate court found that the basis for the employer's denial of the claim was ambiguous as to whether it was denied on the ground that the employee's injury occurred outside the course and scope of his employment or whether the denial was predicated on the employer's contention that the Plaintiff's employment did not result in his injury. Therefore, because there was a genuine issue of fact as to the specific basis for the employer's denial of compensability, summary judgment on that defense was reversed for further proceedings.

* * *

A defendant's internal policies and procedures do not establish a standard of care, the breach of which renders the defendant at fault

The Second District Court of Appeal reversed a trial court's order granting a new trial on the ground that the trial court believed that the defendant's failure to follow its own policies and procedures was sufficiently established such that the jury's defense verdict had to be vacated. In Wal-Mart Stores, Inc. v. Wittke, 2016 WL 6137357 (Fla. 2d DCA, Oct 21, 2016), the appellate court found that the court's error was one of law such that its order granting a new trial had to be reversed for entry of a judgment in favor of the defendant in accordance with the jury's verdict.

* * *

Supreme Court holds that technical omission in Proposal for Settlement does not render proposal invalid

In Kuhajda v. Borden Dairy Co., 202 So. 3d 391 (Fla. 2016), the Florida Supreme Court reversed course from its prior holdings that technical violations Florida Rule of Civil Procedure 1.442, which governs Proposals for Settlement, are sufficient to invalidate the proposal. In Kuhajda, the proposal in question did not specify whether it included attorneys' fees and whether those fees were part of the legal claim. The Plaintiff's cause of action did not contain a prayer for such fees. The First District found that, despite that fact, the omission of this information from the body of the Proposal rendered the proposal defective.

In quashing that decision, the Supreme Court found that this technical error would not invalidate the Proposal. The Court acknowledged that it previously found other technical violations rendered proposals deficient, but distinguished those prior cases as they involved omissions of elements that the Proposal for Settlement statute required. Since the purpose of Proposals for Settlement is to "reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions", the Court held that if a violation of the Rule governing proposals did not also violate the statute, the Rule would not be so strictly construed so as to defeat a statute it is designed to implement.

* * *

Focus on: Construction Litigation

Construction Litigation

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- Construction accidents and injury claim defense
- Construction insurance defense
- Contract disputes
- Contract review
- Delay and impact defense
- Design and material failure defense
- Defense of construction claims under civil statutes, including Section 553.84, and Workers' Compensation Immunity Issues under Chapter 440
- Design professional malpractice E/O claims

The legal professionals in our construction law practice are dedicated to providing clients with the highest quality legal services in a personalized and professional manner. Our attorneys combine their in-depth legal knowledge with an extensive understanding of the construction industry in order to fully evaluate and resolve complex construction law case.

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WORKERS' COMPENSATION CASE LAW UPDATES

Attorney's Fees cannot attach until 30 days after the Petition for Benefits is received and successful prosecution must take place after this 30 day time period

Vincent Sansone v. Frank Crum/Frank Winston Crum Insurance Company, 201 So. 3d 1289 (Fla. 1st DCA 2016). In the instant case, the Employer/Carrier initially denied compensability of the entire claim. Thereafter, the Claimant, through counsel, filed a Petition for Benefits requesting payment of disability benefits, payment of outstanding hospital bills and attorney's fees. Within thirty days of receiving the petition, the Employer/Carrier rescinded their denial, paid disability benefits, and accepted responsibility for the hospital bill. A few weeks later, the hospital bill was paid. The Judge denied attorney's fees for securing payment of the hospital bill and the First DCA affirmed.

In so doing, the First District explained that fees cannot attach until thirty days after the employer receives the petition. Therefore, section 440.37(3)(b) requires some part of the "successful prosecution" to occur after thirty days. The Court elaborated, explaining that if the petition fully succeeds before the thirty days have run, then attorney's fees do not attach. Here, the question became whether the petition succeeded when the Employer/Carrier accepted responsibility for the bill, or when they actually paid the bill which was after the 30 day grace period. The Court distinguished these facts from earlier cases in which it held success is not achieved until there is acceptance and payment, noting that in those prior cases, the issue was for benefits payable directly to the Claimant. Here the payment at issue was to the hospital, not the Claimant. Thus, the benefit was the relieving the Claimant of any obligation to pay the hospital himself. The point at which the bill was actually paid is considered immaterial to the Claimant.

* * *

In order to prove estoppel relating to the statute of limitations defense, the Claimant must demonstrate a detrimental reliance upon a misrepresentation or omission made by the Employer/Carrier

City of Dania Beach v. Zipoli, 2016 WL 5885982 (Fla. 1st DCA, Oct. 10, 2016) The Claimant in this matter filed a petition for benefits more than four years after he received any compensation benefits, either medical or indemnity. He had been paid IIBs in accordance with a rating, although penalties and interest on a late payment had not been paid. The Employer/Carrier denied the claim using a statute of limitations defense. The Claimant, in turn, argued that the Employer/Carrier should be estopped from asserting this defense based upon their failure to pay penalties and interest due, the failure to use the correct AWW (resulting in an underpayment of benefits), a misstatement of the applicable statute of limitations in a letter dated September 2009, and the fact that the authorized treating physician told the Claimant the case was closed. The JCC agreed with the Claimant and held that the Employer/Carrier was estopped from asserting the defense.

However, the First District found that the facts herein were distinguishable from prior estoppel cases, specifically that in Gauthier v. Florida International University, 38 So. 3d 221 (Fla. 1st DCA 2010), noting that in Gauthier, the Employer/Carrier had a pattern of failing to file the proper documents, secure MMI or place the Claimant on notice of her rights and obligations under workers compensation. In contrast, in this case, there was no evidence that the Claimant detrimentally relied upon a misrepresentation or omission made by the Employer/Carrier. The only evidence of reliance was the Claimant's reliance on the authorized doctor's office staff,

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WORKERS' COMPENSATION CONTINUED. . .

which was completely unconnected to the Employer/Carrier. There was no evidence that the Employer/Carrier had any knowledge of this discussion or in any way encouraged the Claimant's mistaken belief. Thus, the denial based upon estoppel was reversed.

* * *

Medical opinions of an unauthorized "self-help" doctor are not admissible until it is established, by other admissible evidence and medical opinions, that the care rendered was compensable and medically necessary

Hidden v. Day & Zimmerman, 202 So. 3d 441 (Fla. 1st DCA 2016) involved a Claimant who, as a result of neck complaints, was transported to the emergency room. The accident and all medical care were denied as pre-existing and not work-related. The Claimant then sought treatment on his own, arguing that care was compensable under the self-help provision of section 440.13(2)(e). In deposition, the Employer/Carrier objected to the admissibility of the opinions of these doctors on the grounds that they were not authorized treating providers, IMEs or EMAs. The Judge agreed, and excluded the opinions from evidence.

On appeal, the Claimant asserted that the opinions were admissible due to the fact that the doctors were authorized by operation of law. However, in affirming the Judge's decision, the First District noted that these opinions could not establish their own admissibility by their content. Rather, the Claimant must establish their admissibility by other admissible evidence and medical opinions, that the care rendered by the self-help doctor was compensable and medically necessary.

* * *

A JCC lacks jurisdiction to compel a verified petition where there is no reservation of jurisdiction relating to attorney's fees and costs

Souza v. Truly Nolan, 199 So.3d 531 (Fla. 1st DCA 2016). The Judge of Compensation Claims issued an order in 2008 determining that the Claimant settled his claim and dismissing all petitions for benefits. There was an appeal on this order, and in the interim, Claimant's former counsel withdrew his pending claims for attorney's fees under section 440.34, Florida Statutes, and did not reserve jurisdiction on any claim. Years later, the Employer/Carrier filed a Motion to Dismiss all pending claims which was denied by the Judge as there were no outstanding claims to dismiss. Thereafter, the Employer/Carrier filed a motion to compel verified petition against former counsel, which was granted, resulting in this appeal. In reversing the Judge's order, the First District found that the Judge lacked subject matter jurisdiction because there were no pending claims. In essence, the dismissal of all petitions without reservation as to any issues/claims divests the JCC of jurisdiction to take further action on the claim.

* * *

The AWW is generally calculated as one-thirteenth of the total wages during the 13 weeks preceding the accident, regardless of whether employment was full-time or part-time

Great Cleaning Corp. v. Bello, 201 So. 3d 186 (Fla. 1st DCA 2016). The First District found that where the Claimant only worked full-time for the Employer for three weeks before the industrial accident, but worked for the Employer in at least a part-time capacity for the 13 weeks before the industrial accident, the AWW should have been calculated as if the Claimant worked substantially for the 13 weeks before the industrial accident. Based on the aforementioned timeline, the JCC

WORKERS' COMPENSATION CONTINUED. . .

had calculated the Claimant's AWW at a higher rate, only utilizing the three weeks when the Claimant worked full-time. The E/C appealed, arguing the AWW should have been calculated based on the Claimant's earnings for the 13 weeks prior to the accident, as set forth in section 440.14 (1)(a). The First District reversed, holding that the application of Section 440.14(1)(a) does not require evidence of "full-time hours of employment," but rather, whether the employee worked substantially the whole of the 13 weeks prior to the accident for that one Employer. Here, the Claimant worked in one employment for the Employer for substantially the whole of the 13 weeks, even though she did not begin to work full-time hours until the last three weeks of the period. Therefore, the AWW should have been calculated in accordance with Section 440.14(1)(a), wherein the AWW is one-thirteenth of the total amount of wages earned during the 13 week period.

* * *

In order to prove the special hazard exception to the going and coming rule, a claimant needs to show close association between the hazard and the access route to the work premises

In Evans v. Holland & Kinght, 194 So. 3d 551 (Fla. 1st DCA 2016), the court held that neither exception to the "going and coming rule" applied where accident occurred off the premises of the workplace and the hazard did not exist on an access route in close association with the Claimant's workplace. The Claimant sought compensability after she stepped onto a 12" diameter metal plate that was below ground level in the parking garage where she parked, using the parking pass provided by her Employer. The JCC found that the accident did not occur on the Employer's premises because there was no evidence that the Employer exercised actual dominion and control over the parking lot and its use. The JCC also found that although the plate was a hazard, it did not exist on an access route in close association with the Claimant's workplace premises. The First District affirmed the JCC's decision

The concurring opinion laid out the facts in this claim: the parking garage was a public parking garage owned by the City of Tampa, and the Employer did not own, lease, maintain, or operate it. Furthermore, the garage was three blocks, or a 10-minute walk, from the Employer's offices, and the Employer did not instruct its employees to take a specific route from the parking garage to the offices. These facts were distinguishable from the special hazard exception rule, which provides: "Where there is a special hazard on a normal route used by an employee as a means of entry to and exit from his place of work, the hazards of that route under appropriate circumstances become the hazards of employment." Naranja Rock Co. v. Dawal Farms, 74 So. 2d 282 (Fla. 1954). Here, the Claimant failed to establish a close association of the access route to the work premises, as required by Kramer v. Palm Beach Cty., 978 So. 2d 836 (Fla. 1st DCA 2008).

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ANNOUNCEMENTS

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- ◊ The results provided are not necessarily representative of results obtained by the firm or of the experience of all clients or others with the firm. Every case is different, and each client's case must be evaluated and handled on its own merits.

Five Attorneys Recognized in the 2016 Edition of Florida Super Lawyers

Conroy Simberg is pleased to announce that five attorneys from the firm have been selected to the 2016 Florida Super Lawyers and Rising Stars lists. **Hinda Klein, Neal Ganon** and **Diane H. Tutt** were listed as Super Lawyers. **Todd M. Feldman** and **Tashia M. Small** were listed as Rising Stars.

Each year, no more than five percent of lawyers in the state are selected to receive this honor, and no more 2.5 percent are selected to the Rising Stars list.

* * *

New Jacksonville Office Address

Effective July 13, 2016 our new address for the Jacksonville office will be: **4190 Belfort Road, Suite 222, Jacksonville FL 32216.** No changes were made to our phone numbers or email addresses.

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The First District Court of Appeal affirmed the JCC'S final order in Gearhart v. Securitas Security Services USA/Sedgwick CMS

The First District Court of Appeal affirmed the JCC'S final order in Gearhart v. Securitas Security Services USA/Sedgwick CMS, which was handled before the JCC by Partner **Chris Tice,** of our Jacksonville office and argued at the Workers' Compensation Convention (on Wednesday, August 23, 2016) by Partner **Hinda Klein** of our Hollywood office. The case involved the issue of whether the claimant's total knee replacement was caused by his industrial accident, in which he twisted his knee and tore his meniscus. After the claimant underwent arthroscopic surgery to repair the meniscus, he had a total knee replacement of the same knee, which, he argued, was caused or exacerbated by his accident.

There were competing medical opinions regarding the major contributing cause and need for the knee replacement surgery and, on the E/C'S motion, the JCC appointed an EMA to resolve the dispute. The EMA opined that the knee replacement was necessitated by the Claimant's preexisting arthritis and the JCC found no clear and convincing evidence to overcome the EMA'S opinion. Significantly, the claimant had not disclosed that he had sought medical treatment for pain in both knees some seven (7) years before his accident and had arthroscopic surgery on his other knee at that time. The E/C ultimately discovered those records and provided them to the treating physician, Dr. Abraham Rogozinski. Dr. Rogozinski initially opined that the accident caused the claimant's need for the knee replacement, but then changed his opinion after reviewing the previously undisclosed

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records, which showed that the claimant had significant arthritis long before his accident. Only Dr. Rogozinski and the EMA had reviewed those records before the final hearing. The JCC found the EMA opinion to be presumptively correct and denied the request for the total knee replacement.

On appeal, the Claimant's counsel argued that the MCC and EMA statutes were both unconstitutional, although it was unclear precisely how or why. In response, the E/C argued that there was no true constitutional infirmity and, in any event, the JCC'S order could be affirmed on the alternative ground that the claimant misrepresented his prior history in an effort to obtain workers' compensation benefits. Because the First District did not write an opinion explaining the rationale for its affirmance, it is not possible to discern the precise reason(s) for its decision.

* * *

Final Summary Judgment Obtained

Robert S. Horwitz, a partner in our West Palm Beach office, recently obtained final summary judgment in favor of a window installer and sub-contractor Defendant.

The matter arose out of an alleged fall from a scissor lift in Ft. Lauderdale, Florida. Plaintiff, a painting tradesman, allegedly fell off of a scissor lift and sustained multiple injuries throughout his body, including fractured ribs, multiple level thoracic spine fractures, and lacerations of the arm and face. Plaintiff incurred over $40,000 in medical specials and made an unspecified claim for lost wages. Plaintiff alleged the Defendant failed to maintain the premises in a reasonably safe condition, allowed a dangerous condition to exist, failed to warn of and inspect for dangerous conditions, and otherwise operated the job site and/or scissor lift in a negligent manner.

The Defendant sought summary judgment on the basis that Plaintiff could not prove the Defendant's negligence caused Plaintiff's injuries. The trial court granted final summary judgment in the Defendant's favor.

* * *

Defense Verdict Obtained in Lee County Case Involving a Motor Vehicle Accident

Joseph M. Sette, a partner, and **Robert V. White**, an associate, in our Fort Myers office, recently obtained a defense verdict following a four day jury trial. The lawsuit styled Fernandez-Valdez v. Davey, arose out of a 2009 motor vehicle accident and both liability and damages were disputed.

At trial, Plaintiff sought $2.2 million. Plaintiff's past medical expenses totaled approximately $31,000.00 and he also alleged that he required a future fusion surgery. Plaintiff's liability expert, Miles Moss, maintained that Defendant drove his motor vehicle through a red light and struck Plaintiffs motor vehicle. Nubia Fernandez's sole claim for damages was for loss of consortium.

Defendant maintained that Plaintiff ran a red light and caused the subject collision. At trial, Barry Peak, an engineer, testified on behalf of Defendant and agreed that Plaintiff had run the red light.

After deliberating for less than an hour, the jury returned a unanimous defense verdict on August 26, 2016 in favor of Defendant and awarded no damages to the Plaintiffs.

* * *

Jayne Pittman Speaks at the DRI Construction Conference in New Orleans

Jayne A. Pittman, Orlando partner and chairwoman of the firm's Construction Practice Group, recently presented "Hurricanes, Floods

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and Storms," at the DRI Construction Conference in New Orleans, Louisiana. Pittman defends general contractors, subcontractors, manufacturers, suppliers and design professionals in complex construction defect litigation, and products liability cases in civil, federal and arbitration venues. She also represents carriers at mediation on insurance coverage issues relating to construction litigation to include additional insured recovery and indemnification demands.

* * *

Summary Judgment in Trespass Case Affirmed on Appeal

Christopher T. Corkran, a partner in the firm's Hollywood Office, obtained a summary judgment on behalf of Bonaventure Country Club, which has recently been affirmed on appeal. **Diane Tutt**, a partner in the firm's appellate department, successfully handled the appeal in the Fourth District Court of Appeal in Sanchez v. Bonaventure Partners, LLC d/b/a Bonaventure Country Club. The case involved a man who was injured while walking on the Bonaventure Country Club's golf course, after hours. He walked there often, and saw many other non-golfers using the property for walking and recreational sports. He slipped and fell while attempting to avoid a loose dog which was running toward him.

Mr. Corkran successfully argued that the plaintiff was a trespasser, not an invitee, even though the golf course was frequently used by non-golfers. On appeal, Ms. Tutt successfully argued that, even if the owner of property is aware that persons are using the property without permission, those visitors are still trespassers, or "uninvited licensees", and the only duty owed to them is to refrain from wanton negligence or willful misconduct and to warn them of a defect or condition known to the landowners to be dangerous when such danger is not open to ordinary observation by the visitors. That conduct did not occur in this case and summary judgment for the landowner was appropriate. Bonaventure was also awarded attorney's fees for the trial and appellate proceedings, pursuant to a proposal for settlement.

* * *

Order Denying Motion to Vacate Final Judgment in PIP Case Reversed on Appeal

Diane Tutt was also successful on appeal in the case of State Farm Mutual Automobile Ins. Co. v. Inline Chiropractic Group, Inc. a/a/o Ana Garcia, in the Broward County Circuit Court. In this personal injury protection ("PIP") case, the parties went to arbitration, following which State Farm timely moved for trial de novo in the County Court. The motion was mailed to the court but instead of timely docketing the motion in the correct county court case, the clerk's office first stamped the motion in the circuit court, and the motion was not docketed in the county court case until after the deadline. The judge issued a final judgment on the arbitrator's decision because the judge did not see a motion for trial de novo on the docket. When the final judgment was received, **Melissa G. McDavitt**, a partner in the firm's West Palm Beach Office, immediately moved to vacate it, offering proof that the motion for trial de novo had been timely submitted to the court. The judge refused to vacate the judgment, finding that it was State Farm's obligation to make sure the motion was docketed in the correct court. The appellate court reversed, finding that the motion had been timely submitted and conditionally granted State Farm's motion for appellate attorney's fees pursuant to a proposal for settlement.

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Defense Verdict Obtained

John Morrow, a partner, and **Dina Piedra**, an associate, in our Orlando office, obtained a defense verdict for State Farm Automobile Insurance Company in a two day jury trial held in Orlando, Orange County, Florida on August 22 and 23, 2016. The plaintiff alleged that Sate Farm improperly denied bills submitted by Ocoee based orthopedic surgeon Richard Smith who performed a series cervical epidural injections designed to relieve pain experienced by the insured. State Farm contended that treatment rendered by Dr. Smith did not relate to bodily injury caused by the subject accident and was otherwise not medically necessary. After two hours of deliberation, the jury concluded that the treatment did not relate to the subject accident.

* * *

E/C Prevailed on Claim for Payment of Fees 440.34

Katherine G. Letzter, a partner in our Tampa office, prevailed against the claim for payment of fees to the guardianship examining committee. The Judge of Compensation Claims found that the claimant had failed to establish a "plausible nexus." The Employer/Carrier was also awarded prevailing party costs pursuant to F. S. 440.34. The claimant has appealed this ruling.

* * *

PIP Defense Summary Judgment

On April 12, 2016, **Manuel Negron**, an associate in the Miami office, obtained a summary judgment on a 2010 PIP case. The Court found the insured made a material misrepresentation in her policy application regarding where the insured vehicle would be garaged. The insurer of the underlying claim ceased operations and merged with another company, the Defendant. To prove materiality, instead of relying on an affidavit from its own underwriting representative, the successor company's representative had to rely on documentation from the predecessor's underwriting representative. The Court agreed with Defendant that the successor insurer was entitled to rely on the underwriting information in the predecessor insurer's documents and that these were admissible business records.

To prove the misrepresentation, defense counsel obtained an Affidavit from the applicant regarding where she garaged her vehicle. Thereafter, Plaintiff's counsel obtained a second Affidavit from the applicant, attempting to negate the first and show, among other things, that the applicant did not properly review or know what she was signing when she signed the first Affidavit or her application. The Second Affidavit was not sufficient to create a fact issue regarding whether the applicant disclosed the incorrect garaging address on the application. The Court rejected arguments that the misrepresentation was the fault of the broker who allegedly filled out the application for the applicant and that the broker was an agent of the predecessor insurer. Ultimately, construing the plain language of Fla. Stat. 627.409, the Court was persuaded that the determinative factor in a material misrepresentation case is whether the insurer received incorrect information, not why the information was incorrect or from whom it was received.

* * *

John Lurvey Participated at a Masters In Trial Seminar

John Lurvey, Managing Partner of the liability division in our West Palm Beach office, recently participated at a Masters In Trial full day seminar presented by the Palm Beach Chapter of the

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American Board of Trial Advocates (ABOTA). ABOTA is a national, invitation-only organization of lawyers and judges who are recognized for their outstanding trial work and professionalism in the courtroom. ABOTA strives to elevate the standards of integrity, honor and courtesy in the legal profession. John is the Past President of the Palm Beach Chapter of ABOTA.

John conducted the closing arguments as part of the Defense Trial Lawyer Team. Masters in Trial is a mock trial before a presiding judge and jury - complete with witnesses, experts, courtroom visuals and actual jury deliberations.

* * *

Dismissal for Fraud Upon the Court Obtained in Lee County Case Involving a Motor Vehicle Accident

Joseph M. Sette, a partner, and **Robert V. White**, an associate, recently obtained a complete dismissal of a personal injury lawsuit with prejudice for fraud upon the Court. The lawsuit, styled Yamamoto v. Rothlisberger arose out of a rear-end motor vehicle accident which occurred in 2014.

As trial approached, discovery revealed that the Plaintiff provided false testimony at her deposition and failed to disclose prior medical care in sworn discovery responses. Plaintiff also failed to disclose numerous medical professionals who had treated her for issues related to her knee, neck, and back and falsely denied having been involved in a subsequent motor vehicle accident. Defense counsel discovered that Plaintiff had been involved in a subsequent motor vehicle accident, retained the **same law firm** representing her in the instant matter to bring claims arising from that subsequent motor vehicle accident, and treated with a completely different set of medical doctors in support of those separate claims. Defense counsel also discovered that Plaintiff had obtained an impairment rating for the subsequent motor vehicle accident while treating with an undisclosed doctor on the day before the deposition at which she provided false testimony in the instant matter.

Six days before trial was scheduled to begin, the Court granted Defendant's Motion to Dismiss for fraud upon the court. As the parties prepared for trial, Plaintiff was claiming approximately $97,000.00 in medical bills related to the subject incident and had previously rejected a Proposal for Settlement in the amount of $67,501.00.

* * *

Hinda Klein Obtains Reversal of Order Granting New Trial

Hinda Klein, partner and head of the firm's Appellate Department, was successful at the Third District Court of Appeal in obtaining a reversal of an order granting a new trial in a hotly contested personal injury action Harris v. Dismex. In that case, the trial court granted the Plaintiff a new trial after a jury found that the Plaintiff did not sustain a permanent injury in an automobile accident, finding that the defense counsel improperly communicated with his expert witness during the trial, thereby violating the rule of sequestration, which prohibits witnesses from hearing the testimony of other witnesses before they testify. In reversing the new trial order, the appellate court found that regardless of whether the rule had been violated, there was no prejudice to the Plaintiff as a result, and the jury's verdict was well supported by the evidence at the trial.

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Chris Tice Successfully Defends a Petition for Modification of a Final Order

Christopher Tice, Managing Partner of the Jacksonville office, successfully defended a Petition for Modification of a Final Order based on an alleged Mistake of Fact. In Bru v. Carlton Construction Co./Builder's Insurance Group, the Claimant argued the Judge mistakenly determined the Claimant called the potential employer as the phone records did not show the phone call ever took place. The Judge reiterated that he did not believe the Claimant at the last Final Hearing nor did he believe the Claimant at the current hearing. The Judge agreed that the Claimant failed to prove the case or secure sufficient evidence at the trial. The Judge found the "mistake of fact" was due to the Claimant's attorney's mistake, not the Judge's mistake. Therefore, the petition was denied.

* * *

11th Judicial Circuit Affirms Policy Voided for Material Misrepresentation re "Business Use"

In Eduardo J. Garrido, D.C., P.A., a/a/o Francisco Garay v. Star Casualty Insurance Company, **Diane Tutt** obtained an affirmance of summary judgment in favor of Defendant in a case involving a material misrepresentation. **Manuel Negron**, an associate in the firm's Miami office, handled proceedings in the lower court. The panel of judges affirmed the lower court's finding that Examinations Under Oath ("EUO") are admissible for purposes of summary judgment. At their EUO's, both insureds, who were not parties to the personal injury protection suit filed by a medical provider, testified that they had been using the insured vehicles to pick up clothing to sell at flea markets on the weekends as well as to transport the poles and tarps to put together the infrastructure of their flea market stand. This "business use" was not disclosed in the insurance application, thus warranting the voiding of the policy for material misrepresentation.

The panel also rejected the medical provider's argument that a provision in the insurance application providing that coverage could be denied if the vehicles were used for business purposes was a part of the policy and is construed like an exclusion therein. If that language had been an actual exclusion in the policy, the misrepresentation would not have been material. However, the court affirmed the trial court's determination that, notwithstanding the language in the application concerning possible denial of coverage, there was no actual exclusion in the applicable policy section pertaining to "business use."

* * *

Notice of Dismissal for Lack of Prosecution

Manuel Negron, and **Robert A. Strickland**, associates in our Miami office, recently obtained a dismissal for lack of prosecution of a 2011 claim. The Court rejected Plaintiff's timely good cause filing and found that failure to calendar a pleading deadline and settlement negotiations did not amount to good cause. The ruling is significant because the Court reiterated the often misapplied rule that good cause must be sworn and that filings more than 60 days after the Notice of Lack of Prosecution do not count as record activity under Rule 1.420(e). The Court also agreed that dismissal is mandatory, and it had no discretion to deny dismissal where there is no record activity for a year and no good cause had been shown.

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Defense Verdict Obtained In Palm Beach County Case Involving A Slip And Fall Accident

Thomas J. McCausland, a partner, and **Evan Roberts**, an associate, in our Hollywood office, obtained a defense verdict in the case of Rokoff v. Water Bagels 247, LLLP. The Plaintiffs claimed that the Defendant was negligent in not properly mopping the floor, which caused Mr. Rokoff to slip and fall and hit his head. The incident occurred approximately two months after Mr. Rokoff had a shunt implanted in his brain to combat the effects of Normal Pressure Hydrocephalus. The Plaintiffs also claimed that the fall resulted in a mild traumatic brain injury that exacerbated Mr. Rokoff's significant pre-existing medical conditions, erased the gains realized from the shunt implantation, and caused his health to significantly deteriorate.

The Defendant, however, produced the former employee who had mopped the floor; who testified that she did not mop where Mr. Rokoff claimed to have slipped. The former restaurant manager witnessed the accident, and testified that Mr. Rokoff had been walking extraordinarily slowly in moments beforehand. When he ran to the area immediately after the accident, the former manager testified that the floor was dry except for the drink that Mr. Rokoff spilled when he fell. The Defendant showed the jury that, at the time of the accident, Mr. Rokoff continued to suffer the effects of his Normal Pressure Hydrocephalus, was in physical therapy for that condition, and that the physical therapist noted that he had a significant risk of falling who exhibited periods of sudden loss of balance. The Plaintiff asked the jury for over $1.5 million and the jury came back with a defense verdict in an hour and a half.

* * *

Christian Petric Prevailed at Final Hearing

Christian Petric, a partner in our West Palm Beach office, recent prevailed at final hearing in the claim of Loglisci v. Martin County School Board. The Claimant underwent a cervical fusion surgery and lumbar fusion surgery on her own with an unauthorized doctor, despite medical treatment being authorized by the Employer/ Carrier. The Claimant alleged that the Employer/ Carrier was denying medically necessary treatment and that under the "self help" provision of the law, the Employer/Carrier must pay for the unauthorized treatment or surgeries. Christian was able to establish that the surgeries were not medically necessary and that the "self help" provision of the law did not apply since treatment was already being authorized.

* * *

Defense Verdict Obtained in Collier County Case Involving Premises Liability

Joseph M. Sette, a partner, and **Robert V. White**, an associate, in our Fort Myers office, obtained a defense verdict in a jury trial. The lawsuit, styled Nunez v. Here We Grow of Naples, LLC, arose out of a premises liability incident which occurred on Defendant's property. Both liability and damages were disputed.

Before trial, Plaintiff rejected a $40,000.00 Proposal for Settlement. Plaintiff had previously undergone surgeries to her left shoulder and lumbar spine and incurred approximately $135,000.00 in medical expenses. Her doctors testified that she would someday require a fusion surgery valued at approximately $125,000.00. As for liability, Plaintiff alleged that she fell on a mat placed outside the front door of Defendant's property.

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Summary Judgments Affirmed

Hinda Klein, Partner in charge of the firm's appellate department, successfully obtained an affirmance of a summary judgment on statute of limitations grounds in Luna v. FIGA, appealed to the Second District Court of Appeal.

Ms. Klein also successfully defended a summary judgment before the Third District Court of Appeal in Portocarrero v. BH-AW Palmetto, LLC., a trip and fall case, on the grounds that there was no dangerous condition on the premises.

* * *

Defense Verdict Obtained in PIP Case

Rachel Minetree, a partner and **Gianina Ferrando**, an associate, in our Miami office, obtained a defense verdict for State Farm Mutual Automobile Insurance Company in a three day Personal Injury Protection (PIP) trial held in Miami Dade County. The issues at trial were the medical necessity of the services rendered by the Plaintiff, which were contested by a post-suit chiropractic peer review and the reasonableness of the charges for the services. The jury found the treatment was medically necessary but determined Plaintiff's charges were unreasonable.

* * *

Petitions for Benefits Denied

Katherine G. Letzter, a partner in our Tampa office, obtained a favorable ruling in a case where the claimant brought petitions for benefits against multiple Employers. The JCC found that the claimant had not established that he was an "employee," as defined by chapter 440, of either of the Employers from whom he had sought benefits. The petitions for benefits were denied and dismissed with prejudice. The Employer/ Carrier was also awarded reasonable taxable costs.

* * *

First District Reverses JCC Order Awarding Housing and Vehicle Insurance

The Claimant was paralyzed in a work-related accident and was awarded a handicap van and handicap accessible housing. At all times, the Carrier paid the agreed amount for an apartment. When the Claimant moved to a larger apartment he could not afford and then left to avoid eviction, he found a much larger home on acreage and sought payment by the Carrier of rent five times what it had been paying. The JCC granted that Petition, finding that the Carrier had not assisted with finding housing after Claimant vacated his apartment. The JCC also required the Carrier to pay car insurance which was high due to Claimant's driving history and business use. Fortunately, the First District Court of Appeal reversed. In Kilyn Construction, Inc./FRSA SIF v. Dedrick Pierce, handled by **Diane H. Tutt**, a partner in the firm's appellate department, the First District ruled that if a Carrier fails to provide assistance in obtaining housing for a claimant, the Claimant's choice of housing must be reasonable. Additionally, the court ruled that the Carrier was not required to pay for insurance higher than normal for reasons personal to the Claimant, like his driving history.

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Defense Verdict Obtained in Homeowner's Insurance Breach of Contract Hail Case

Robert Horwitz and **Jeffrey Blaker**, both partners in our West Palm Beach office, were successful in defending against a homeowners insurance company breach of contract action, where the insured sought a total roof replacement and interior ensuing damages as result of an alleged 2013 hail storm. The trial included extensive expert testimony involving competing scientific evidence on the formation, tracking and severity of storms/hail, as well as forensic evaluation by licensed roofing contractors on roof damage to determine cause and origin. The defense was successful in establishing through an expert meteorologist that little to no hail fell at or near the insured's home during the storm. In addition, the defense was able to use its roofing expert to explain the alleged damage to the roof as not related to any storm/hail event during the policy term and the fact the roof was not in need of replacement. The jury determined there was no "sudden and accidental loss" to property during the terms of the insureds' all-risk policy.

* * *

Defense Verdict Obtained in PIP Case

Rachel Minetree, the managing partner of our Miami office, and **Jody Tuttle**, an associate in our Hollywood office, were successful in obtaining a defense verdict for State Farm Mutual Automobile Insurance Company in a two day PIP trial in Miami Dade County on the issue of medical necessity. State Farm had obtained an IME terminating future chiropractic services and the jury agreed that all services rendered by the Plaintiff were not medically necessary.

* * *

Award of Attorneys' Fees Affirmed on Appeal

Ms. Klein, a partner and head of the firm's appellate department, and **Brian Ellison**, an associate in the appellate department, prevailed on appeal before the Second District in Professional Center For Internal Medicine, Inc. v. Jennis. In this case, the Plaintiff sought reversal of an order awarding attorney's fees, entered pursuant to proposals for settlement which it argued were ambiguous and not enforceable. The appellant claimed that the proposals included $10 as consideration for keeping the settlement confidential, and that it was unclear whether this $10 was part of, or independent of, the $100,000 offer to settle the case. The Second District Court of Appeal agreed with the defense that the proposals were met ambiguous and affirmed the order granting the defense attorney's fees.

* * *

Dismissal of Worker's Comp Claim Affirmed on Appeal

Ms. Klein and **Mr. Ellison** were victorious in the worker's compensation case, Tucker v. A.I.G. Insurance, in which the First District Court of Appeal affirmed the JCC's denial of a petition for benefits following a motion to dismiss, filed on behalf of the Employer/Carrier. The appellant in the case, Tucker, sought enforcement of an arbitration provision in his employment contract. Relying on a previous federal court injunction forbidding lawsuits in the matter without leave of court, the Employer/Carrier moved to dismiss the appeal. Ultimately, the Court affirmed the JCC's ruling in the Employer/Carrier's favor.

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Dismissal of Fraud Claim Affirmed on Appeal

Ms. Klein and **Mr. Ellison** also successfully defended a judgment in a third recent appeal, in Jallali v. Christiana Trust. The Plaintiffs sought review of an order dismissing their complaint, which alleged claims of fraud and conspiracy against the attorneys representing a bank in a foreclosure action. The appellants also argued that the trial judge's written order of dismissal conflicted with the oral pronouncement. The defense contended that the action was barred by the litigation privilege, the appellants lacked standing, and the claims were already pending in a collateral action. They also demonstrated that the oral and written rulings were entirely consistent. The Fourth District rejected all of the appellants' arguments and affirmed the dismissal of the complaint.

* * *

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