CONROY SIMBERG CONNECT

LIABILITY CASE LAW UPDATES

WHERE PROPOSAL FOR SETTLEMENT WAS MADE IN ERROR WITH RESPECT TO THE AMOUNT, TRIAL COURT ERRED IN DENYING MOTION TO WITHDRAW THE PROPOSAL AFTER IT WAS ACCEPTED

In Dale v. Schaub, 2020 WL 4810779 (Fla. 4th DCA Aug. 19, 2020), the Fourth District Court of Appeal reversed the trial court's order denying the plaintiff's motion to withdraw his own proposal for settlement to the defendant, Viktoria Schaub, on the grounds that his counsel made a unilateral error in making the proposal for $10,000, rather than Schaub's liability policy limits of $100,000. The plaintiff had $10,000 in UM coverage with State Farm. The plaintiff's counsel had asked his paralegal to prepare the PFS to Schaub, but she misconstrued his instructions and prepared with PFS to Schaub in the amount of $10,000 instead of $100,000.

As soon as Schaub's counsel received the proposal, he accepted it and issued a check for $10,000. The next day, the Plaintiff's counsel moved to withdraw the proposal on the grounds that it was obviously in error, and as support for the motion, he attached his paralegal's affidavit and the email chain between counsel and the paralegal demonstrating that the attorney had, in fact, instructed his paralegal to prepare a PFS for $100,000 and not $10,000. The attorney also attested that he ordinarily reviews all proposals for settlement and does not permit his paralegal to serve them without his review. In addition, the attorney attested that he was not authorized to serve a proposal for $10,000, because his client had $58,000 in medical bills and had previously rejected Schaub's offers more than that amount. The trial court denied the motion to withdraw, reasoning that the law required enforcement of a proposal that is clear and unambiguous.

On appeal, the appellate court concluded that the trial court misapplied the law by failing to consider the law that applies to enforcement of settlements, which permits the withdrawal or rescission of a settlement offer where it was based on a unilateral mistake that was not the result of an inexcusable lack of due care and the opposing party had not relied on the offer to his or her detriment. In this case, while the Court noted that the plaintiff's counsel had been somewhat negligent, that negligence was not inexcusable, and the plaintiff did not authorize his counsel to settle his case for a tenth of the available policy limits. In reversing the trial court's order denying the motion to withdraw, the appellate court explained that it was not reversing with directions to the trial court to reconsider the motion in light of the correct law because it was obvious from the record that the proposal was never authorized by the Plaintiff, was the result of a simple mistake, and because "further proceedings on this issue would be a waste of time and pursued in bad faith."

* * *

CONTRACTOR THAT PULLED PERMITS FOR CONSTRUCTION PROJECT WAS DEEMED TO BE THE PLAINTIFF'S STATUTORY EMPLOYER ENTITLED TO WORKERS' COMPENSATION IMMUNITY AND HAS NO LIABILITY INSURANCE COVERAGE FOR AN INJURED EMPLOYEE OF A SUBCONTRACTOR'S CIVIL CLAIM

The Federal Eleventh Circuit Court of Appeals, applying Florida law, affirmed a summary judgment rendered by the District Court in a case in which a property owner's employee named Blue, who was injured while engaged in construction work, sued the general contractor of record. In Mid-Continent Cas. Co. v. Arpin and Sons, LLC, 2020 WL 4464365 (11th Cir. Aug. 4, 2020), the general contractor's liability insurer sought a declaration that it had no duty to defend or indemnify the contractor in light of exclusions in its policy for "any obligation of the insured under a workers' compensation . . . law" and coverage for "bodily injury to . . . an employee of the insured arising out of and in the course of . . . employment by the insured; or performing duties related to the conduct of the insured's business," also known as an "employer's liability exclusion."

Inside this issue:

LIABILITY CASE LAW UPDATES Continued

In this case, Arpin, the "general contractor," was verbally hired to obtain construction permits for the Faith Deliverance Church (FDC), which was building housing. Arpin did not charge FDC, characterizing its services as "pro bono." Arpin had workers' compensation coverage and, as the general contractor of record, it was legally responsible for worksite safety and compliance. FDC'S pastor/owner of the property hired most of the subcontractors, and Arpin provided limited supervision. After Blue was injured, he sought and received workers' compensation benefits from Arpin's workers' compensation insurer, and he expressly represented in his petition that Arpin was his employer.

Several months after Blue's the accident, Arpin prepared and submitted an invoice to FDC in an effort to obtain a tax deduction for its work for FDC, a nonprofit institution. FDC acknowledged the "donation" in the amount of the invoice. It was undisputed, however, that Arpin never applied for or received any tax benefit relating to its work for FDC.

Blue sued Arpin in state court alleging that the contractor was negligently operated the construction site, specifically alleging that Arpin was the licensed general contractor for the project, charged with obtaining permits and performing all associated duties. Arpin sought liability coverage for Blue's claim, and its insurer, Mid-Continent (MCC) hired counsel to defend it under a reservation of rights. MCC then brought this declaratory judgment action in federal court seeking a determination as to the scope of its obligations to defend and indemnify Arpin in the state court litigation.

MCC moved for summary judgment, arguing that its workers compensation and employer liability exclusions applied, and that it had no duty to defend under the allegations of the state court litigation and no duty to indemnify Arpin in light of the undisputed facts of the case. The trial court granted MCC summary judgment, and Arpin and Blue appealed.

On appeal, Arpin and Blue argued that Arpin was not Blue's statutory employer under the workers' compensation law because MCC failed to demonstrate that Arpin actually undertook to provide construction services for FDC or that Arpin received any valuable consideration for doing so. According to Arpin and Blue, MCC did not demonstrate a contract between FDC and Arpin wherein Arpin agreed to act as FDC'S General Contractor. The appellate court disagreed, finding that although the Workers' Compensation act does not define the term "contractor," Florida courts have construed that term broadly to provide workers' compensation coverage to claimants. Pursuant to the case law, a licensed general contractor who obtains construction permits is deemed a "statutory employer" under the workers' compensation statute.

Arpin and Blue contended that because Arpin did not hire subcontractors, it did not "sublet" anything. However, the appellate court noted, whether Arpin hired the other contractors on the site was of no moment since Arpin, as a licensed general contractor who pulled the permits, assumed certain responsibilities attendant to the construction that rendered it ultimately responsible for the job, regardless of whether Arpin or FDC hired others to assist in the construction. Arpin had workers' compensation coverage for all the workers on the job and assumed some liability for worker safety. For these reasons, the Eleventh Circuit affirmed summary judgment in favor of MCC, finding that it owed Arpin no duty to defend or indemnify it in Blue's state court litigation.

HOTEL DID NOT OWE ITS GUEST A DUTY OF CARE TO ENSURE IT'S GUEST'S SAFETY OFF-PREMISES BY VIRTUE OF ITS PROVISION OF A COMPLIMENTARY SHUTTLE SERVICE

In Luckman v. Wills, 2020 WL 4341883 (Fla. 3d DCA July 29, 2020), the decedent, Luckman, was a guest at the Cheeca Lodge hotel in Islamorada, located on the east side of U.S. 1, a two-lane highway. The hotel offered its guests a complimentary shuttle to take them to, among other places, the Trading Post, a grocery store located on the opposite side of U.S. 1. The hotel also had a golf cart service to drive guests around the property, but golf carts were prohibited from traveling on public roads, other than to cross a road called Old Highway 1 in order to drop off and pick up guests on the east side of U.S. 1.

On the night of the accident, the decedent got into a golf cart, and once he was on, he asked the driver to take him to the Trading Post. Pursuant to hotel policy, he was dropped off near U.S. 1. While he was waiting to cross the road on foot, the decedent was struck by a car driven by Wills.

Before he died, Luckman sued the Cheeca Lodge for negligence, and his Estate was substituted as Plaintiff after he died. The Estate alleged that the Cheeca Lodge undertook a duty to transport Luckman in a reasonably safe manner and failed to warn him of the dangers of U.S. 1 when its employee dropped him off. The Lodge

moved for summary judgment on the grounds that 1) its conduct did not create a foreseeable zone of risk, 2) it owed its guests no legal duty to take them outside the property by golf cart, 3) it breached no cognizable duty owed to Luckman and 4) the danger of crossing busy U.S. 1 was open and obvious.

The Estate defended the summary judgment by filing the affidavit of its expert witness, Rick Swope, who it retained to testify in the field of accident reconstruction and forensic engineering. Dr. Swope attested that the Cheeca Lodge had greater knowledge of the danger of crossing U.S. 1 than did Luckman, and that it failed to use reasonable care in transporting him. The hotel moved to strike Swope's affidavit as unsupported by the facts and evidence, based on insufficient data, and filled with legal conclusions within the sole purview of the Court. The trial court struck the affidavit and granted the hotel summary judgment.

On appeal, the Third District noted that whether the hotel owed Luckman a duty of care was a legal issue for the Court. Whether the hotel created a foreseeable zone of risk that would give rise to such a duty was likewise a legal issue if the material facts are undisputed. In this case, it was undisputed that the hotel's golf carts are prohibited from traveling on public roads outside the Lodge property but could cross Old Highway 1 to drop off its guests, and the hotel's employee complied with this policy by dropping off Luckman at the edge of its property. Luckman then voluntarily chose to attempt to cross U.S. 1 to visit the Trading Post and, as a result, he was killed.

The Court found that Cheeca Lodge did not create a foreseeable zone of risk and owed Luckman no duty of care with respect to any potential danger attendant to crossing U.S. 1. Its duties to Luckman ceased when he disembarked from the golf cart. Because it owed him no duty, Luckman's death was not caused by the hotel's breach of a duty.

The Court also addressed the propriety of the Court's ruling striking Swope's affidavit, though not necessary to resolve the primary issue on appeal. The Court found that Swope's legal conclusions were properly stricken by the trial court because those issues were entirely within the province of the trial court and not appropriately part of an expert's opinion.

LIABILITY CASE LAW UPDATES Continued

AN EXCULPATORY CLAUSE IN EMPLOYMENT AGREEMENT WAS NOT VOID AS AMBIGUOUS OR UNENFORCEABLE AS CONTRARY TO PUBLIC POLICY

In Merlien v. JM Family Enterprises, Inc., 2020 WL 4198040 (Fla. 4th DCA July 22, 2020), the plaintiff was employed by AlliedBarton, a security company, when he was assigned to work as a security guard for JM, one of its clients, and he signed a waiver as a condition of his employment. The waiver provided that the plaintiff understood that Workers' Compensation would cover his work-related injuries and that the he waived any and all rights to make a claim, commence a lawsuit, or recover damages or losses from his employer's customers.

JM moved for summary judgment based on the waiver, and the trial court granted that motion. On appeal, the plaintiff first argued that the waiver was unenforceable as ambiguous. The Court disagreed, finding that the waiver was clearly limited to those injuries that are covered under AlliedBarton's workers' compensation coverage. The Court also rejected the plaintiff's argument that the waiver was unenforceable as violative of Florida public policy because the Workers' Compensation statutes permit negligence claims against a third-party tortfeasor such as JM. The Court recognized that Florida Statute section 440.39 permits such claims but does not mandate that a claimant pursue a third-party remedy. As such, the Court found, there was nothing in the waiver that contravened public policy, especially given that it was limited to negligence claims, and would not preclude the plaintiff from pursuing his legal remedies if a customer committed an intentional tort that fell outside the scope of Workers' Compensation. Since the plaintiff was not forced to sign the waiver and voluntarily agreed to it as a condition on employment. The waiver was limited in its scope and application and was entirely consistent with the policy behind workers' compensation law, which is to provide "the quick and efficient delivery of disability and medical benefits to an injured worker." Accordingly, the appellate court affirmed the summary judgment in JM'S favor.

* * *

LIABILITY CASE LAW UPDATES
Continued

FOURTH DISTRICT RULES THAT ONLY THE AMOUNT PAID BY MEDICARE IN FULL SETTLEMENT OF MEDICAL BILLS IS ADMISSIBLE AT TRIAL AND IF THE DEFENDANT DOES NOT SEEKK TO EXCLUDE THE GROSS AMOUNT OF THE BILLS FROM EVIDENCE, IT CANNOT THEREAFTER SEEK A REDUCTION OF THE VERDICT FOR PAST MEDICAL EXPENSES TO THE AMOUNT PAID BY MEDICARE

In Matrisciani v. Garrison Property and Casualty Ins. Co., 298 So. 3d 53 (Fla. 4th DCA 2020), Matrisciani sued her UM insurer after she was injured in an accident. The jury awarded her a verdict for past medical expenses in excess of the amount paid by Medicare. After trial, the carrier sought to remit the verdict to the amount of Medicare's lien in addition to other setoffs. After the Court granted the motions for remittitur and setoff, Matrisciani recovered a judgment against Garrison for $0, since the net award was less than the tortfeasor's liability coverage. The trial court also granted Garrison's motion for attorneys' fees based on a $1,000 Proposal for Settlement it served on Matrisciani during the litigation.

On appeal, Matrisciani raised several issues, including the propriety of the trial court's order reducing her verdict by the amount of medical expenses in excess of what Medicare paid in settlement of the bills. The Fourth District reversed this ruling, finding that pursuant to its own precedent in Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547 (Fla. 4th DCA 2003), the plaintiff should not have been permitted to introduce evidence of medical bills in excess of what Medicare paid in settlement of the bills, but once the gross amount was admitted without objection, under the collateral source rule, the verdict should not have been reduced on post-trial motions. Because Garrison did not move in limine to exclude the gross amount of the bills from evidence, it waived its right to any reduction of those bills after trial.

WHERE PERMISSIVE USER OF VEHICLE HAD AVAILABLE INSURANCE COVERAGE IN EXCESS OF THE $500,000 THRESHOLD FOR LIMITING VEHICLE OWNER'S LIABILITY THE OWNER'S LIABILITY WAS CAPPED AT $100,000

In Walker v. Geico Indemnity Co., 295 So. 3d 829 (Fla. 4th DCA 2020), the Fourth District addressed the issue of whether a vehicle owner's stepson, a permissive user, had sufficient liability insurance coverage to cap the owner's vicarious liability at $100,000. In this case, the driver, who was killed in an accident with the plaintiff, had $250,000 in available coverage with Allstate, the owner's carrier, which paid the plaintiff its policy limits. GEICO, the driver's insurer, denied coverage for the claim on the grounds that the owner's vehicle was not an owned, non-owned, or temporary substitute vehicle under the policy, and that the vehicle was actually gifted to the driver by the owner.

The plaintiff argued that the vehicle owner's Allstate coverage of $250,000 could not be used to both satisfy the owner's maximum liability and count toward the driver's combined policy limits. In that case, the driver would not have the requisite $500,000 in combined coverage to satisfy Florida Statute section 324.021(9)(b), which provides that an owner's vicarious liability as owner of a vehicle involved in an accident is capped at $100,000 if the permissive user of the vehicle has at least $500,000 combined property damage and bodily injury liability.

The appellate court disagreed with the plaintiff's argument that the owner's insurance policy, which provided coverage for permissive users, could not count towards the driver's combined policy limits for purposes of the statutory cap. The Court reasoned that there was no language in the statute that would exclude coverage under the owner's policy from the calculation of available policy limits. In this case, the driver was actually insured under four (4) insurance policies and had a total of $ 1,050,000 per person and $ 1,950,000 per accident, well over the $500,000 threshold required to limit the vehicle owner's liability. The Court therefore affirmed the summary judgment in the owner's favor limiting his liability to $100,000 for this accident.

WHERE A DRIVER VOLUNTARILY CONSUMED SYNTHETIC MARIJUANA MARKETED AS POTPOURRI AND LABELED "NOT FOR HUMAN CONSUMPTION" AND THEREAFTER CAUSED A FATAL CAR ACCIDENT, THE POTPOURRI MANUFACTURER COULD NOT BE HELD LIABLE IN NEGLIGENCE OR STRICT LIABILITY

The First District Court of Appeal affirmed a summary judgment rendered in favor of the defendant, DZE Corporation, the manufacturer of potpourri, which was labeled "not for human consumption." In DZE Corp. v. Vickers, 299 So. 3d 538 (Fla. 1st DCA 2020), Christopher Generoso voluntarily consumed the "potpourri," which was actually synthetic marijuana, drove his car at high speed, and rammed his car into another vehicle, causing the decedents' deaths. Generoso was convicted of vehicular homicide and reckless driving and sentenced to prison.

The decedents' Estates filed suit against DZE, alleging that it was negligent and strictly liable, both of which theories were predicated on its duty to warn. At trial, DZE moved for directed verdict arguing, among other things, that it did not proximately cause the accident because Generoso's intoxicated driving was the sole proximate

cause. The trial court denied the motion and the jury found DZE 65% at fault and Generoso 35% at fault.

On appeal, the First District reversed, finding that, as a matter of law, Generoso's criminal conduct was the sole proximate cause of the accident. The Court reasoned that the conclusion that DZE was the proximate cause of the accident would require speculation that DZE could foresee that Generoso would 1) disregard the warning on the product and consume the potpourri, 2) become intoxicated, and 3) drive reckless in violation of the criminal laws, causing an accident.

The Court also noted that Florida law does not permit the jury to consider proximate cause where the person responsible for an injury is voluntarily impaired or intentionally misuses a product, both of which occurred here. Because there was no evidence that DZE was otherwise negligent in any way, the Court found that Generoso's conduct was the sole proximate cause of the accident, and the trial court should have directed a verdict in DZE'S favor.

A CGL INSURER MAY OWE DUTY TO DEFEND AND INDEMNIFY EMPLOYER'S PRESIDENT IN CIVIL SUIT BROUGHT BY EMPLOYEE'S ESTATE NOTWITHSTANDING EMPLOYER'S LIABILITY AND WORKERS' COMPENSATION EXCLUSIONS IN POLICY

The Eleventh Circuit Court of Appeals addressed the issue of whether a claim brought by a deceased employee's Estate against his employer's President triggered coverage under the employer's CGL policy, which contained employer liability and workers' compensation exclusions. In Maxum Indemnity Co. v. Massaro, 817 F. App'x 851 (11th Cir. 2020), the Court reversed a summary judgment rendered against 3rd Generation Plumbing's President, James Massaro, and in favor of the company's General Liability insurer, Maxum.

Employee Sanchez was killed while working on a job for his employer 3rd Generation. The Estate's complaint acknowledged that, ordinarily, the employer's President Massaro would be immune from civil liability under the workers' compensation statute, but further alleged that Massaro fell within an exception to this general rule because he was an officer acting within his managerial or policymaking capacity at the time of the employee's death, and Massaro's conduct constituted a violation of law for which a maximum penalty exceeds 60 days imprisonment.

In this case, the Estate alleged that Massaro's conduct fell within this exception to workers' compensation immunity because he provided inadequate supervision over the company's operation, altered machinery to bypass safety features, failed to perform adequate safety inspections of equipment, and provided inadequate training. The Estate further alleged that this conduct was illegal and was punishable under OSHA by way of a fine or up to six months' imprisonment. While the OSHA statute provided punishment for "employers," the Estate alleged that because Massaro was not only the company's President, but was also its Secretary and sole Director, he should be considered the decedent's employer.

The Court first addressed Maxum's duty to defend Massaro and applied the "separation of insureds" provision in the CGL policy, and substituting Massaro's name for that of the employer to determine whether the employer's liability exclusion applied to the alleged facts in the Complaint. The exclusion provided that there was no coverage for "bodily injury to . . . an 'employee' of the insured arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business. . . ." The Court found that the Estate's Complaint did not allege that the decedent was Massaro's employee but rather, alleged that 3rd Generation employed him. As such, the Court found that the underlying Complaint did not contain allegations that clearly brought the Estate's claim within the employer's liability exclusion.

Maxum contended that the Complaint had to allege that Massaro was the decedent's employer to avoid dismissal based on workers' compensation immunity. While the Court agreed that such an allegation was necessary in order to state a cognizable claim, it made the point that it would not read necessary allegations into the Complaint as written, and that Maxum still had a duty to defend even if the underlying Complaint was legally unsound.

With respect to the workers' compensation exclusion, Maxum's policy excluded "any obligation of [Massaro] under a workers' compensation, disability benefits[,] or unemployment compensation or any similar law." The Court found that any "obligation" Massaro owed to the Estate from this litigation would not arise under workers' compensation law, even though Massaro, as a corporate officer, would ordinarily be immune from liability under the statute. The Court reasoned that the Estate alleged that Massaro's conduct fell within the "criminal acts" exception in the workers' compensation

(continued on page 6)

statute. The Court then addressed the question of whether the workers' compensation exclusion barred coverage where, as here, the Plaintiff alleged that the tortious conduct occurred within the course and scope of the decedent's employment. The Court concluded that because Massaro personally owed the decedent no obligation under workers' compensation law to provide coverage for 3rd Generation's employees, the workers' compensation exclusion did not relieve Maxum of its duty to defend, Massaro in the underlying litigation because any liability imposed on Massaro would not be in the nature of workers' compensation.

Because the Court determined that Maxum owed Massaro a duty to defend him under its CGL policy, it reversed the summary judgment in its favor. The trial court's ruling on the duty to indemnify was predicated on its ruling finding that Maxum did not owe Massaro a defense, and therefore, the appellate court reversed that portion of the District Court's ruling as well.

SUMMARY JUDGMENT IN FAVOR OF AN INSURER IN A COMMON LAW BAD FAITH ACTION AFFIRMED WHERE THE INSURER DILIGENTLY AND PROMPTLY INVESTIGATED CLAIMS AGAINST ITS INSURED AND SCHEDULED A GLOBAL SETTLEMENT CONFERENCE AT WHICH IT MADE ITS FULL POLICY LIMITS AVAILABLE TO ALL CLAIMANTS

In Montanez v. Liberty Mutual Fire Ins. Co., 2020 WL 5085836 (11th Cir. Aug. 28, 2020), the Eleventh Circuit Court of Appeals affirmed a summary judgment rendered in favor of Liberty in a bad faith case. In the underlying case, the insured's son caused an accident involving two other cars and resulting in the Plaintiff's infant daughter's death, as well as injury to four other individuals. Liberty made its entire policy limits available to the potential claimants, but the Estate would not settle its case and filed suit against Liberty's insured. The insured and the Estate ultimately entered into a consent judgment of $8.25 million. The Estate then brought this bad faith claim against Liberty, alleging that it failed to timely settle the wrongful death claim. The District Court disagreed and granted Liberty's motion for summary judgment.

The insured, Douglas Brown, had a Liberty Mutual auto insurance policy with liability limits of $250,000 per person and $500,000 per accident. Liberty was informed about the accident on February 1, 2010. The claims adjuster immediately sent "other insurance" affidavits and excess exposure letters to the insureds, Brown and his son. The adjuster also requested a police report and ran an internet search during which she discovered that, in addition to the dead infant, the accident also seriously injured four other people. On February 2, 2010, the day after the initial report of the accident, the adjuster obtained an "events report" of the accident from the Sheriff's office, and she contacted the insured to advise him that it would be in his best interest to obtain personal counsel. The adjuster also determined that the insured's son, the driver, was not listed on Liberty's policy as an additional driver, thereby raising a potential coverage issue which prompted the adjuster to send the insureds a reservation of rights letter.

On February 5, 2010, the adjuster spoke to Progressive, the Plaintiff's PIP carrier, and learned that the Plaintiff had counsel, Mr. Toral. The adjuster called Mr. Toral and left several messages over the next few weeks, but he never returned her call and never confirmed that he was even representing the Plaintiff. The Progressive adjuster also advised Liberty's adjuster that the Plaintiff had sustained serious injuries, including a fractured pelvis and fractured hip bones, and that one of the claimants, Eduardo Gonzalez Jr., suffered serious injuries, including a head injury, after being ejected from the vehicle.

Liberty's adjuster also investigated the claims of the other injured victims, both of whom suffered neck and back injuries in the accident. The attorneys for these claimants assisted the adjuster in her investigation and provided her with information regarding their medical conditions.

On February 11, 2010, the adjuster forwarded the matter to Liberty's home office for a coverage opinion, which included a review of the specific questions asked by the sales agent who bound coverage and a determination as to whether the insured made any misrepresentations during the application process which might have affected the underwriting of the policy. Liberty completed its coverage investigation on March 3, 2010, concluding that the policy afforded coverage to the insured.

On March 4, 2010, Liberty's adjuster sent a letter to counsel for all of the claimants making its full $250,000/$500,000 policy limits available to settle the claims and advising that it would be arranging a settlement conference in order to assist the claimants in reaching an apportioned settlement. The following day, March 5, 2010, attorney Lewis Jack called the adjuster to advise that he, along with Mr. Toral, represented the Plaintiff. This was the first communication that adjuster had received from anyone on the Plaintiff's behalf. It was not

(continued on page 7)

LIABILITY CASE LAW UPDATES
Continued

until almost 4 weeks later, on March 31, 2010, that the Plaintiff sent Liberty its first correspondence regarding the Plaintiff's claims. In that letter, the Plaintiff rejected any offer to settle the Plaintiff's wrongful death claim, stating that Liberty should have immediately tendered to the Estate the $250,000 policy limits instead of attempting to resolve all of the victim's claims at a settlement conference. The Court noted that the Estate had never demanded the policy limits, but the Plaintiff demanded that Liberty pay the Plaintiff $125,000 for her personal injury claims and $125,000 for Eduardo Gonzalez' personal injury claims.

On April 6, 2010, the insured defendant accepted the Plaintiff's settlement offer, and Liberty issued two $125,000 checks in settlement of Plaintiff's and Gonzalez's personal injury claims. The Defendant offered the remaining $250,000 in available policy limits to settle the wrongful death claim brought on behalf of the deceased infant, and it forwarded a check to Plaintiff's counsel. Rather than settle, the Plaintiff and Gonzalez filed suit against the insureds for their personal injury and wrongful death claims and all claims except the wrongful death claim were eventually settled. As previously noted, the wrongful death claim was the subject of an $8.25 million consent judgment against the insured.

On June 15, 2018, Plaintiff filed this common law bad faith claim against Liberty, alleging that it breached its duties of good faith by failing to timely tender the $250,000 bodily injury liability limit to settle the wrongful death claim and to protect its insured from an excess judgment. Liberty moved for summary judgment, arguing that within a month after being notified of the accident, it offered its fully policy limits to all claimants to be apportioned at a global settlement conference after it investigated the five bodily injury claims in two different vehicles and potential misrepresentation issues that would have voided the insured's coverage, all while receiving no communication from the Plaintiff's counsel. The District Court determined that no reasonable juror could conclude that Liberty acted in bad faith.

The appellate court noted that given Plaintiff's counsel "radio silence," Liberty lacked any knowledge regarding whether the Plaintiff would have been willing to settle the wrongful death claim for the policy limits. In a footnote, the Court observed that the trial court determined that the Plaintiff's counsel's lack of communication manufactured the very delay she complained about. While the Court noted that the Plaintiff's perceived gamesmanship would not, in and of itself, be determinative as to whether Liberty acted in bad faith, that gamesmanship deprived the carrier of important information about whether the Plaintiff would have settled the claim for the policy limits. The Court further found that Liberty's decision to pursue a global settlement was entirely consistent with its duty of good faith under Florida law and that, as a result of the Plaintiff's lack of communication, it could not have known whether it was exposing its insured to an excess verdict by failing to immediately tender its policy limits for the wrongful death claim. Accordingly, the Eleventh Circuit affirmed the summary judgment in Liberty's favor.

* * *

Written and Edited by:

Hinda Klein, Partner

Samuel Spinner, Associate

Focus Practice Feature

COVID-19 Response Team

COVID-19 will undoubtedly trigger a new and uncharted wave of litigation in the general and premises liability areas. Conroy Simberg's litigators have the experience and resources necessary to assist you in evaluating and defending these claims.

We anticipate that the Plaintiff's bar will attempt to argue that properties and establishments failed to anticipate and put procedures in place to safeguard invitees from contagious diseases, including COVID-19. In addition, we foresee that, in an attempt to establish liability for this novel pandemic, they may assert that property and business owners failed to follow CDC guidelines in maintaining their properties and/or in operating their businesses.

The Conroy Simberg team is ready to defend property and business owners from COVID-19 claims. In addition to standard tort defenses, our litigation team is focused on several key areas of defense to COVID-19 claims, including: (1) whether there is a duty on the part of the property/business owner to protect invitees against a pandemic, especially where, as here, the government and scientist's guidance is unclear and at times, inconsistent; (2) whether the Plaintiff will be able to demonstrate how and where the Plaintiff may have contracted the virus and (3) whether the Plaintiff's expert(s) can withstand Daubert scrutiny. Conroy Simberg's litigation team stands ready to use all available tools to protect and defend you against COVID-19 claims and lawsuits.

For more information about our COVID-19 Response Team, please visit: www.conroysimberg.com

WORKERS' COMPENSATION CASE LAW UPDATES

EMPLOYER/CARRIER CANNOT PAY CLAIMANT PERSONAL SICK OR LEAVE TIME IN LIEU OF INDEMNITY BENEFITS

Medina v. Miami-Dade County, 200 WL 3988475 (Fla.1st DCA 2020). Claimant, a corrections officer, sustained an injury at work and ultimately underwent a compensable surgery to his right knee. There was no dispute by the parties as to his work status as temporarily disabled from the date of surgery through the date of surgery. At issue was the time period, post-surgery, from January 8 through January 27 and then February 11 through February 24 where the Carrier did not pay indemnity as the Employer was paying "full pay" through payroll. However, the evidence reflected that the "full pay" was in fact docked against the Claimant's bank of personal sick or leave time. The Carrier testified that because the benefits were related to workers' compensation, the leave time and vacation would ultimately be reinstated. However, the Carrier could not confirm that it had in fact been reinstated and there was no evidence presented at the final hearing that it had in fact been reinstated. The Employer did not provide testimony. The JCC, in her Order, ordered that the Claimant was entitled to reinstatement of his sick/vacation bank and denied penalties and interest.

In reversing the JCC's order, the First DCA noted that the Claimant was not paid workers' compensation or pay in lieu of wages and as such was entitled to TPD benefits along with penalties and interest. The First DCA further noted that the JCC does not have jurisdiction to order that the Employer reinstated sick and/or vacation time.

* * *

HEART-LUNG PRESUMPTION OF SECTION 112.18(1)(A) CAN BE OVER COME BY SHOWING NON-OCCUPATIONAL CAUSE OF CONDITION

City of Jacksonville v. O'Neal, 297 So.3d 630 (Fla. 1st DCA 2020). This Order from the First DCA was on a Motion for Rehearing and replaced an Order from April 23, 2020 after a previous remand called for additional findings. The Claimant was a corrections officer in 2002 when he began experiencing heart issues, including fluttering and lightheadedness when exercising. At the time he sought medical attention and was diagnosed with atrial tachycardia and atrial fibrillation. This went to Final Hearing in 2016 where the JCC noted that while the atrial tachycardia was congenital, it "could have been" triggered by job related stress and thus found the claim compensable. On remand, the JCC was directed to identify the underlying condition and resulting diagnosis so that the DCA could evaluate the scope of the potential liability on this 2002 claim. The JCC, on remand, recognized the diagnosis as atrial tachycardia that degenerated into atrial fibrillation, arrhythmias, and concluded it was compensable under the occupational presumption as job stress "could have been" a trigger.

The DCA specifically reviewed the application of the "trigger theory" and the occupational presumption in the Florida's heart-lung statute, section 112.18(1)(a). The Court started by reiterating that when a covered officer passes a physical examination upon entering into service, and is later disabled by heart disease or hypertension, it is presumed that the condition was contracted accidentally and in the line of duty. Furthermore, the injury is compensable even if the Claimant presents no evidence other than the presumption, so long as the Employer does not rebut the presumption. Finally, the Court noted that the Employer's cased to overcome this presumption essentially requires demonstration that the accident arose from a non-work related cause or causes.

In this instance, the Court was determining whether the JCC properly applied the trigger theory of compensable. There was no dispute that the Claimant had a non-work related congenital tachycardia condition. The Court explained that when a statutorily covered employee has a congenital heart problem, it is recognized that the underlying condition may still lead to a compensable injury if a work related cause triggers the ultimate diagnosed injury, or if an unknown cause triggers the injury. The "trigger theory" of compensability requires three things: (1) and underlying condition; (2) a trigger; and 3) resulting heart disease. This theory is two-tiered and the Employer has to overcome the presumption of section 440.18(1) (a) for (1) the underlying condition and, if applicable (2) the condition's triggering event.

In applying the facts to the above criteria, the Court noted that exercise was deemed a triggering event with one physical stating that job stress "could" play a role in causing the arrhythmias. The Claimant testified that he first noticed the arrhythmias while exercising. Thus, the Court noted that because the medical evidence showed that the Claimant's exercise work outs in 2002 triggered the degeneration of his congenital heart condition into atrial fibrillation, and the JCC failed to evaluate this evidence as a non-occupational cause that would overcome the presumption, the case was remanded for further consideration.

* * *

IN ORDER TO SATISFY BURDEN FOR ENTITLEMENT TO TPD BENEFITS, CLAIMANT MUST FIRST ESTABLISH ACTUAL WORK RESTRICTIONS

Guerlande v. Delray Beach Fairfield Inn, 2020 WL 4814167 (Fla. 1st DCA 2020). Claimant appealed the JCC's denial of TPD benefits for a 12 day period of time, six weeks post-accident (she was paid TPD benefits both before and after this 12 day period).

The First DCA upheld the JCC's denial, explaining that during this 12 day period, the Claimant's work restrictions were briefly lifted. In fact, she was advised by the Urgent Care center that an injection was recommended which the Claimant declined. She was then instructed to return should her symptoms worsen, which she did, 12 days later, at which time she was again assigned work restrictions. The JCC determined, and the First DCA agreed, that the Claimant was unable to satisfy her burden to show that work restrictions for those 12 days either had, in fact, been imposed, or, if not, would have been medically justified.

* * *

EMPLOYER/CARRIER HAS THE BURDEN TO ESTABLISH MISREPRESENTATION DEFENSE BY PREPONDERANCE OF THE EVIDENCE

LSG Chefs v. Santabella, 45 Fla. L Weekly D1727 (Fla. 1st DCA 2020). The Order under review included the JCC's rejection of the Employer/Carrier's misrepresentation defense and award of a second psychological opinion evaluation. The award of the second psychological opinion was upheld as medical necessity was waived and the Employer/Carrier did not properly challenge the finding. The Court, however, addressed the misrepresentation defense in detail, and ultimately upheld the JCC's rejection.

By way of background, the Claimant sustained a compensable accident in September 2015, injuring her low, which ultimately resulted in surgery. By March and May of 2019 she filed Petitions requesting additional medical care, including a second opinion psychological consultation for a spinal cord stimulator. Initially the Carrier denied based upon her not being entitled to this request; however, the denial was amended thereafter to include a misrepresentation defense based upon the Claimant's misrepresenting her post-injury earnings and medical condition.

The Court reiterated that a misrepresentation defense must be raised with specificity in the pre-trial stipulation and that the Employer/Carrier must provide the violations by a preponderance of the evidence. The JCC had to determine whether the Claimant knowingly or intentionally made any false, fraudulent, incomplete, or misleading statement, whether oral or written, for the purpose of obtaining workers' compensation benefits or in support of her claim for benefits.

As to the post-injury earnings, the Claimant testified in three occasions that she worked for ADL Delivery, explaining that she applied for the position as the company required female drivers, but that her husband did the work, with her just riding along. Sometimes she would do the paperwork required. DWC-19s reflected that she did not receive income from any other source but that the checks were in her name but her husband did the work. She did not list the earnings from ADL on the DWC-19.

The JCC found that the Claimant did not misrepresent her post-injury earnings, focusing on the fact that the statutory definition of wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only wages earned and reported for federal income tax purposes. In short, wages are both earned and reported. The facts supported that the Claimant did not, in fact, earn the wages from ADL which the First DCA upheld. There was no misrepresentation by the Claimant and that the Claimant lacked the requisite intent because she did not knowingly misrepresent her earnings with the intent to obtain benefits.

The Employer/Carrier also submitted surveillance evidence which, per the doctors, showed the Claimant engaging in activities beyond the recommendations and what she represented during treatment. They Employer/Carrier further submitted the defense that in her deposition of May 2019 she denied being able to walk, climb stairs, dress, bathe or tie her shoes without support; however, surveillance showed her walking, ascending into a pickup truck, and hinging at 90 degrees at the waist without support or apparently distress.

The Employer/Carrier did not cite to any oral or written statement by the Claimant to either doctor that would serve as the necessary predicate for a valid misrepresentation defense. Furthermore, one of the doctors testified that the surveillance activities were not inconsistent with her diagnosis, albeit were ill advised. Neither doctor testified that the Claimant had not knowingly or intentionally misrepresent her condition to him.

Finally, contrasting the surveillance to the deposition taken in May 2019, the Claimant testified that she in fact attempted to engage in activities without assistance; and that some surveillance showed her walking slowly with a cane. The Court noted that for the most part, the surveillance was consistent with the Claimant's testimony that she had difficulty walking without assistance. Although there were some inconsistences, the JCC found that they were not intentional which was consistent with her being a poor historian.

The First DCA upheld the JCC's rejection of the misrepresentation defense.

* * *

DATE OF RETIREMENT DOES NOT IMPACT DISABILITY AS RELATES TO PTD BENEFITS UNDER 1999 VERSION OF STATUTE

Pannell v. Escambia County School District, 295 So.2d 285 (Fla. 1st DCA 2020). The Claimant herein appealed the JCC's denial of her claim for PTD benefits. The Employer/Carrier cross-appealed the JCC's award of TTD benefits and supplemental income benefits. The Claimant herein sustained compensable injuries to her neck, back, and right shoulder, as well as a psychological injury resulting in a diagnosis of depression, twenty years prior to the Final

Hearing in April 2018. In June 2003 the Claimant successfully petitioned for disability retirement through the Florida Retirement System, listing conditions that preexisted her work accident. In January 2002 the Employer/Carrier suspended TTD benefits due to the fact that while she was not at MMI and was on no work status, the 104 weeks of entitlement to temporary benefits had exhausted. However, in 2017, the Employer/Carrier reinstated TTD benefits through April 9, 2003. In fact, the Claimant did not reach overall MMI until May 27, 2011; however, she would have exhausted, as per the JCC, the 260 weeks of TTD as of December 30, 2004. In 2017 Petitions were filed requesting TTD benefits from January 1, 2002 and PTD benefits from November 10, 2004. The JCC awarded TTD benefits from April 10, 2003 through December 30, 2004 (remainder of 260 weeks of TTD) but denied PTD benefits. The First DCA affirmed the award of TTD benefits; however, reversed the denial of PTD benefits.

Given the date of accident, the 1999 version of section 440.15(1), Florida Statutes, was in effect. The Court found that the JCC erred in focusing on the Claimant's retirement date as well as her disability status at that time, because the relevant date for determining whether a Claimant qualifies for PTD is the date of either overall MMI or the expiration of her entitlement to temporary benefits, whichever comes first (assuming that she would remain totally disabled when overall MMI). The Court explained that workers' compensation benefits operate in real time and that benefits have the potential to become ripe, due or owing along a linear timeline, not at once. The JCC herein erred in requiring that the Claimant, who retired prior to when the possibility of entitlement to PTD ripens, must show a deterioration of her condition upon reaching MMI in order to establish entitlement to PTD benefits. The Court noted that this was wrong and that retirement does not serve to sever causal relationship. The First DCA found, instead, that the Claimant met the criteria for PTD benefits at the time she reached overall MMI on May 27, 2011.

UNDER 440.13(2)(F), THE EMPLOYER/CARRIER HAS 5 DAYS TO AUTHORIZE THE ONE-TIME CHANGE; HOWEVER, SHOULD NOT DELAY THEREAFTER IN ACTUALLY PROVIDING THE BENEFIT

City of Bartow v. Flores, 46 Fla. L. Weekly D1298 (Fla. 1st DCA 2020). On appeal was the JCC order which found that the Employer/Carrier failed to comply with section 440.13(2)(f), Florida Statutes (2015), the "one-time change provision" and thus awarded the Claimant his choice of one-time change. Although the First DCA affirmed the JCC's decision, they certified to the Florida Supreme Court the question of what satisfies the Employer/Carrier's obligation to "provide" an alternate physical or forfeit its right of selection.

In this case, on June 20, 2017, the Claimant requested the one-time change and the following day, the Employer/Carrier advised that they were authorizing Dr. Mary Ellen Shriver, and that Dr. Henkel (the original doctor) was no longer authorized. The Employer/Carrier advised that an appointment letter would be forthcoming under separate cover. Between June 28 and July 19, 2017 multiple communications resulted between the parties as to the status of the appointment with the new doctor. On July 19, 2017, a Petition was filed requesting a one-time change and designating Dr. Koebbe as the alternate doctor as the Employer/Carrier had not provided the response requested within 5 days from the request for change. On August 16, notably 56 days after the first receipt of a request for a one-time change, a letter was advised of an appointment with Dr. Shriver for September 11, 2017 (63 days after the initial request). The Claimant refused to attend.

In response, the Employer/Carrier filed a Motion for Summary Final Order to which the Claimant objected asserting that there were issues of fact to be considered, including the timeliness of the Employer/Carrier's actions and the "implied statutory standard of reasonableness." The Claimant emphasized the lack of authorized medical care during the two month delay period. The motion, as a result, was denied.

At Final Hearing, the Employer/Carrier represented several calls to Dr. Shriver's office, on June 23, 24 and 25, and that then the Carrier had to send records for the doctor to review prior to agreeing to an appointment date. The Claimant, in contrast, argued that he was entitled to his choice due to the Employer/Carrier's failure to provide an appointment with Dr. Shriver in accordance with section 440.13(2)(f). The evidence at the Final Hearing was limited; however, the JCC found that it could be reasonably inferred that attempts to contact Dr. Shriver were not initiated until a month following the request for the change and multiple emails from Claimant's counsel.

The JCC agreed with the Claimant in that while the Employer/Carrier authorized Dr. Shriver within the 5 days, the Employer/Carrier then sat on its hands and did not notify the Claimant of an appointment for 56 days, during which time the Claimant was without authorized medical care. Thus, the Employer/carrier did not "provide" the one-time change within a reasonable time. The First DCA explained, in upholding the JCC's ruling, that in the context of section 440.13(2)(f), "authorize" connotes an administrative function while "provide" encompasses affirmative action. The delay by the Employer/Carrier is in start contrast to the overall purpose of Chapter 440 to efficiently deliver benefits to the injured worker. There is an implied duty to act reasonably and fairly to ensure a quick and efficient delivery of disability and medical benefits.

Written and Edited by:

Stephanie A. Robinson, Partner
Samuel Spinner, Associate

FIRM ANNOUNCEMENTS

17 Conroy Simberg Lawyers Recognized in 2021 Editions of Best Lawyers and Best Lawyers: Ones to Watch

We are pleased to announce that 8 Conroy Simberg lawyers were selected by their peers for inclusion in the 2021 Edition – Best Lawyers in America directory. Additionally, 9 Conroy Simberg lawyers were selected to the inaugural edition of Best Lawyers: Ones to Watch:

2021 Best Lawyers in America

- **Kristan S. Coad**
- **Millard L. Fretland**
- **John Edward Herndon, Jr.**
- **Hinda Klein**
- **Michael Kraft**
- **Jayne Pittman**
- **Diane H. Tutt**
- **John Viggiani**

Best Lawyers: Ones to Watch

- **Hope Baros**
- **Courtney L. Bryant**
- **Cindy L. Cumberbatch**
- **Gerardo Fernandez-Davila**
- **Lateshia Frye**
- **S. Tylar Heintz**
- **Zachary A. Karber**
- **Ryan W. Royce**
- **Robert V. White**

* * *

Conroy Simberg Attorneys Recognized as 2020 Florida Super Lawyers and Rising Stars

Conroy Simberg is pleased to announce **Hinda Klein**, a partner in Hollywood and chair of the firm's appellate practice group, and **Jayne Pittman**, chair of the firm's construction practice and managing partner in Orlando, were selected to the **2020 Florida Super Lawyers list.** Additionally, partners **Tashia Small** in Jacksonville and **Jeffrey Rubin** in West Palm Beach and associate **Matthew Innes**, also in West Palm Beach, were selected to the 2020 Rising Stars list.

* * *

Hope Baros, an associate in the firm's West Palm Beach office and member of the firm's First Party Property and Coverage Division, has been appointed as the co-chair of the Palm Beach County Bar Association's Social Justice and Racial Equality Committee.

* * *

Kristen Gottfried has been named partner within the Workers' Compensation Department. Ms. Gottfried relocated from South Florida to the Tallahassee office and is now managing the Tallahassee Workers' Compensation practice. A member of the Florida Bar since 2011, Ms. Gottfried focuses her practice on the representation of insurance carriers, servicing agents and self-insured employers.

* * *

APPELLATE WINS

Hinda Klein, Chair of the firm's appellate department, and **Michael Wilensky**, a partner in the Hollywood office, prevailed on summary judgment in a first-party coverage claim brought by the lessee of a restaurant space located in a shopping center. The lessee, Tennis Bums, LLC. d/b/a Alabama Joes, sued its insurer Capacity Insurance Company seeking insurance benefits stemming from a leak which allegedly damaged the flooring in the leased premises. Tennis Bums had not installed the flooring, nor did it pay for it. Its policy with Capacity covered only a lessee's "improvements and betterments" that were acquired by or made at the insured's expense. The insured asserted that it "acquired" the floor covering, which it asserted was an improvement or betterment, by virtue of its assumption of the duty to maintain the flooring in its lease. The trial court rejected that argument, finding that the flooring was already installed in the leased premises at the time Tennis Bums leased the premises and, as such, the flooring was not acquired or paid for by Tennis Bums.

Alternatively, the insured contended that the flooring was a "fixture" under the policy, and included in the definition of "Business personal property." However, the policy actually deemed the flooring part of the business premises which were not insured under the lessee's policy because it was insured under the lessor's policy. In addition, the policy excluded coverage for claims covered under other insurance policies, and since the lessor's policy covered the loss, the trial court granted final summary judgment in favor of Capacity.

* * *

Ms. Klein also recently prevailed in a summary judgment in which a car dealership raised the Graves Amendment as an affirmative defense to a claim brought by a plaintiff who was injured in a car accident involving the dealership's loaner vehicle. In Romero v. Fields Motorcars, the trial court granted the dealership's motion for summary judgment, finding that the Court was bound by the Fourth District's holding in Collins v. Auto Partners, in which that court found that the Graves Amendment applied to immunize a car dealership from liability for the negligence of its customers driving loaner vehicles. The Romero case is currently on appeal to the Fifth District Court of Appeal.

* * *

Ms. Klein, along with **Seth Goldberg,** a partner in our Hollywood office, also prevailed on a motion for summary judgment in a coverage case arising from a negligent security action brought against the owner and manager of an apartment complex. That case was settled, and the manager sued the security company and its carrier seeking indemnity for the amount it paid to the guard. The defendants argued that the pleadings in the underlying case brought by the security guard did not trigger the security company and its carrier's duty to defend, and the evidence did not trigger a duty to indemnify because the security guard alleged that the security at the property was inadequate, and only the property owner and manager were liable for inadequate security where, as here, there was no allegations, or proof, that the security company breached its contract with the owner.

* * *

Sam Spinner, an appellate associate in the firm's Hollywood office, obtained affirmance on appeal of a final summary judgment argued by trial counsel, **Stuart Cohen**, a partner in the Hollywood office, in Brothers Painting v. Curry-Dixon Construction. In that case, the plaintiffs contracted for renovations to their condo unit. A fire broke out after a painting subcontractor left an oil-soaked rag in the unit rather than disposing it off-site as required. After the general contractor settled with the plaintiff, it pursued a common law indemnification claim against the subcontractor on the basis that the subcontractor was wholly at fault for the fire, and the general contract had no active fault. The trial court granted summary judgment for the general contractor, and the Third District Court affirmed, finding that the evidence conclusively showed that the general contractor was merely vicariously liable to the plaintiffs for the subcontractor's sole negligence.

* * *

Sam Spinner obtained affirmance on appeal of a final summary judgment argued by trial counsel, **Jeffrey Blaker**, a partner in the West Palm Beach office, in Winslow v. St. Lucie County. In that case, the plaintiff sued the defendant County after she drove into a canal along a rural dirt road, arguing that the County knew the road was dangerous. The trial court granted summary judgment for the defendant on the basis that the County had sovereign immunity because the plaintiff sued based on the design of the road, not the failure to maintain it. The Fourth District Court affirmed the judgment for the defendant.

* * *

Hinda Klein and **Sam Spinner** successfully petitioned for certiorari and obtained an order quashing the county court's order compelling discovery from a third-party. In Florida Hospital v. Victoria Fire & Casualty, the plaintiff hospital, as assignee of the defendant's insured, sued for PIP benefits on the basis that the insured suffered an emergency medical condition. The insurer contracted with a third -party to provide medical bill intake and technology that the insurer utilized to access medical information when adjusting claims. The county court compelled the third-party to produce documents regarding the manner in which the insurer adjusted the claim. The Ninth Circuit Court quashed the order, finding that the insurer had standing to challenge the third-party discovery, and that the materials were not discoverable because how the insurer adjusted the claim is not relevant in a breach of contract case.

* * *

Sam Spinner and **Rob Horwitz**, a partner in the West Palm office, obtained a final summary judgment in a first-party property case. In Hunter v. Florida Peninsula, the plaintiff reported that his toilet was not flushing properly, and a plumber determined that there was plant matter in the plumbing system. The insurer denied the claim on the basis that there was no ensuing loss because the evidence showed that no water escaped from the plumbing system and caused damage to covered property. The trial court granted summary judgment because there was no contrary evidence to show that covered water damage occurred.

* * *

SUCCESSFUL LITIGATION DECISIONS

Sam Spinner and **Mark Goldstein**, an associate in the Hollywood office, obtained a final summary judgment in a wrongful death case. In Paul v. Harnick, the defendant called FPL to replace a burnt out light fixture. FPL sent the plaintiff, a subcontractor, to respond to the service call. While using a bucket truck to access the light fixture, a fire broke out, and the plaintiff later died from his injuries. His estate sued the property owner, arguing that it knew or should have known that the light fixture/ transformer was dangerous. The trial court granted summary judgment for the defendant, finding that the plaintiff was an independent contractor who was injured while performing his job duties, and that the defendant did not know of or create any dangerous condition on the property that caused the accident.

* * *

Sam Spinner and **Seth Goldberg**, a partner in the Hollywood office, obtained a final summary judgment for the defendant in a slip-and-fall case. In McReal v. Ross, the plaintiff slipped and fell on an unidentified orange liquid on the ground. She did not know what the liquid was or how long it was on the floor before the accident. The trial court granted summary judgment for the defendant on the basis that the evidence showed that it had no actual or constructive knowledge of the substance on the floor before the plaintiff fell. The case is currently on appeal in the Fourth District.

* * *

Partners in the Hollywood Office, **Diane Tutt** and **Dale Friedman** won an appeal in a federal case in which the Plaintiff was alleged she had her children taken away from her by the Deptartment Children and Family Services and a contractor who we represented. The district court dismissed the case, and the Eleventh Circuit Court of Appeals affirmed in a written opinion of April Fox v. Dept. of Children and Families.

* * *

In another federal case successfully handled by **Dale Friedman** and **Diane Tutt**, in which the Plaintiff sued our client, a charter school, and the Homestead Police Department for a litany of claims stemming from an arrest for trespass of the Plaintiff, a student's parent, the district court granted summary judgment, and the Eleventh Circuit Court of Appeals affirmed in a written opinion in the case of Mark Turner v. Homestead Police Dept., et al.

* * *

Jeff Carter and **Rod Lundy**, partners in the firm's Orlando office, obtained a defense verdict in a premises case in Alachua County, Florida. The case was tried on liability only as the defense previously convinced the court to bifurcate the case.

Plaintiff claimed Defendant and his company negligently placed cable wiring along a door threshold in plaintiff's home while installing cable in multiple rooms. Plaintiff claimed he put a throw rug over the wiring, and he called the cable company multiple times to remedy the situation but it was never fixed before he tripped over the wiring a month later. However, other witnesses testified the cable company's call logs showed Plaintiff called only on performance issues, not wiring issues, before his fall.

In court, Plaintiff identified Defendant as the cable installer who performed the wiring, and his former girlfriend, appearing via video deposition, gave a description of the installer matching Defendant. Though Defendant was unsure if he'd performed cable work in Plaintiff's home, he testified he did not perform the wiring at issue because he would have been fired, and a part shown in the photographs was not the type he used in his work. The defense also argued plaintiff was aware of the wire, recognized it as a trip hazard, and could have easily corrected it by unscrewing the cable wire from the bedroom wall The defense also argued the *Slavin* doctrine.

The jury found there was no negligence on Defendants' part that was the legal cause of Plaintiff's fall.

* * *

Ed Herndon, a partner in the Tallahassee office, obtained a judgment in an underinsured motorist case. The case was tried non-jury in the United States District Court for the Northern District of Florida before the Hon. Roger Vinson.

The Plaintiff claimed that she suffered permanent neck and back injuries as the result of a minor rear end accident that occurred in 2013 in Destin, Florida. The carrier for the allegedly at fault driver had previously tendered its $10,000 bodily injury limits. With respect to the impact between the two vehicles, the evidence offered by the defense at trial revealed that there was no damage to the rear of plaintiff's vehicle, and that the at fault driver, at the time of the accident, was unaware that an accident had taken place. With respect to damages, the evidence established that, in the 18 months prior to the accident, the plaintiff had over 110 chiropractic treatments and adjustments for cervical pain and discomfort, but there were also inconsistencies in the Plaintiff's testimony regarding her post accident treatment and her accident related complaints.

In a 26 page opinion, Judge Vinson found that virtually none of the plaintiff's testimony regarding the nature of the impact and her alleged injuries stemming from the impact was credible, and, as a consequence, the defendant was entitled to a judgment in its favor.

* * *

Jeffrey K. Rubin, a partner in the West Palm Beach office, recently prevailed on a Motion for Final Summary Judgment in a premises liability case in Broward County. In that case, the Plaintiff was riding a bicycle at night and hit a curb which he claimed was hidden and dangerous. In his Motion for Final Summary Judgment and Supplemental Memoranda, Mr. Rubin argued that our client, an asset management contractor, had no duty to alter the curb from the condition designed and constructed by others. He also argued that since the curb was maintained in accordance with the plans, specifications, and design standards, the curb was not a dangerous condition. He further contended that the curb was not a dangerous condition as a matter of law under the Open and Obvious Danger Doctrine. After a contentious hearing, the Court granted the Motion. The Plaintiff did not appeal or move for reconsideration.

* * *

Cristobal Casal, managing partner, and **Yasmine Kirollos**, an associate, in the firm's Fort Myers office, obtained a defense verdict in a premises liability case tried over 4 days in Charlotte County, Florida. Plaintiff claimed that she slipped and had a near fall in the service bay of a local automobile dealership. She alleged that the dealership allowed a dangerous condition consisting of an unidentified liquid to exist in the service area where customers would routinely drop off their vehicles. She further alleged that there was no warning communicated to her as to the presence of the liquid, nor of the slippery nature of the surface of the floor on which she had her near fall incident. Defendant contended that it had a well-established set of policies and procedures in place for patrolling, inspecting, and maintaining the service area free and clear of any potential slip or trip hazards. Defendant also denied that there was any such substance on the date of the incident.

As a result of the near fall, Plaintiff alleged that she suffered a neck, right shoulder, and low back injury for which she received extensive treatment. Plaintiff underwent a two level anterior cervical disc fusion (ACDF) and incurred almost $250,000.00 in medical bills that she boarded at trial. She also alleged an inability to have constant employment from the date of her injury through her expected age of retirement of 65 or 70. The Plaintiff asked the jury to award $2,500,000.00 at the close of trial.

The jury deliberated for less than 90 minutes before rendering its verdict of no liability against the Defendant.

* * *

Glenn Gunsten, an associate in the Fort Myers office, obtained a defense verdict award at non-binding arbitration in claim involving allegations of an aggravation of a long-standing respiratory condition. Plaintiff alleged that she entered the bathroom of a commercial building where she worked and was exposed to toxic fumes when she opened the faucets in the restroom to wash her hands. It was determined through discussions with the building's maintenance personnel that they had placed Pine Sol in the floor drains of the bathrooms the day before to resolve a complaint of a sewer smell in the bathrooms. Defendants argued that Pine Sol has no toxic chemical properties and that it could not have caused the Plaintiff's claimed injuries. In response, Plaintiff argued a new theory at the arbitration that the injuries came from use of a toilet bowl cleaning product that had been recently purchased prior to servicing of the restroom.

The Plaintiff complained of a burning sensation in her nose and throat, as well as a loss of smell and taste. Thereafter, the arbitrator issued an award in favor of the defense finding no liability against either the property owner or the property management company. Following receipt of the award, they entered into a confidential settlement that resolved the case in its entirety.

* * *

Jeffrey Rubin, a partner in the West Palm Beach office, prevailed on a motion for final summary judgment in a premises liability case in favor of a property owner. The Defendant argued that possession, control, and usage of the stairway where the Plaintiff slipped and fell had been assumed by the non-party tenant pursuant to a lease agreement. Thereafter, the Plaintiff filed a motion for reconsideration of the final judgment in favor of the Defendant. Mr. Rubin and Diane Tutt, a partner in the appellate department in our Hollywood office, successfully argued against the motion for reconsideration, which was denied by the Court.

* * *

Two of our Pensacola attorneys, **Millard L. Fretland,** a partner and **John R. Mahoney**, an associate, teamed up to score Summary Judgment victories in two First Judicial Circuit cases.

The first case was a trip and fall that occurred on the premises of our client's elegant hotel. Upon checking into her room, the Plaintiff was walking from the bedroom to the entry foyer when she tripped over the edge of the tile surface of the foyer which was higher than the carpeted surface of the bedroom. The Plaintiff alleged the edge constituted a dangerous condition which our client should have corrected. The Plaintiff sustained a broken hip and accumulated nearly $100,000.00 in medical bills. Mr. Mahoney took excellent depositions of the Plaintiff and her husband and then prepared a written Motion for Summary Judgment based on their testimony. The Motion cited Florida law that held commercial landlords are not liable when the change in floor level is open and obvious unless the change in floor level is disguised in some fashion. The testimony established that there was no material dispute as to the open and obvious nature of the flooring in the hotel room. Mr. Fretland argued the Motion for Summary Judgment before the Circuit Court Judge. The Court agreed with Mr. Fretland, granted the motion, and entered judgment for the Defendant.

The second case involved a rear end automobile accident. The Plaintiff drove her car into the back of a construction truck owned and operated by our client. The force of collision totaled the Plaintiffs car, and she injured her neck, shoulder, and elbow. She was claiming roughly $60,000.00 in past medicals and anticipated the need for future surgeries. The Plaintiff argued that the truck's rear elevator lift obscured the brake lights and she could not avoid the accident. This case was unique as the Plaintiff had captured the entirety of the accident on her dashboard camera. The video depicted the Plaintiff slamming into our client's truck full speed without braking or taking any evasive maneuver. After depositions were taken, Mr. Mahoney and Mr. Fretland collaborated with Samuel Spinner, an associate in the appellate department, to prepare a Motion for Summary Judgment. The motion asserted that under Florida law there is a rebuttable presumption that the rear driver in a rear-end motor vehicle accident is wholly at fault for the accident. Mr. Mahoney argued the Motion before the Circuit Court Judge. Mr. Mahoney highlighted how the Plaintiff's deposition testimony and video evidence proved that the Plaintiff could not rebut this presumption. The Plaintiff did not have a substantial and reasonable explanation for having rear ended our client's truck other than her own inattentive driving. The Court agreed, granted the Motion for Summary Judgment, and dismissed the case.

* * *

Brian Buczynski, an associate in the firm's Fort Myers office, obtained a non-binding arbitration award for the defense in a lawsuit involving a first party Hurricane Irma claim.

After Hurricane Irma passed through, Plaintiffs hired a roofer to replace twelve concrete roof tiles on their two-year-old roof that were allegedly damaged during the storm. A month later, another roofing company made an unsolicited sales call to the Plaintiffs' home, informed them that they required a complete roof replacement, and provided an estimate for over $100,000.00. The insurer's field adjuster found the relatively new roof to be in good condition, but provided an estimate for replacement of eight roof tiles. The insurer's engineer opined that fractured roof tiles were caused by improper installation, not wind, but that the roof tiles were available and could be individually replaced.

This case was referred by the court to mandatory non-binding arbitration. After presentations were made during arbitration, discovery was left open long enough so that Plaintiffs' expert engineer could be deposed. Plaintiffs' engineer testified that individual roof tiles could not be replaced without replacing the underlayment since holes in the underlayment from fasteners could not be filled once individual roof tiles were removed, which would cause water penetration. However, based on the Florida High Wind Concrete and Clay Tile Installation Manual, roof tiles can be replaced and underlayment can be repaired as necessary. Since there was no evidence provided of damage to the underlayment caused by Hurricane Irma and only 5% of the roof tiles sustained minor storm related damage that was repairable, the arbiter awarded a defense verdict for the Defendant insurer.

* * *

Cristobal Casal, managing partner, and **Yasmine Kirollos**, an associate, in the firm's Fort Myers office, obtained a non-binding defense arbitration award in a Target case.

This matter arose out of a slip and near fall incident at a Target store located in Cape Coral, Lee County, Florida. The Plaintiff alleged to have slipped in a puddle of water from a leak in the ceiling and twisted her body before catching herself. Target had video surveillance from the date of the incident which showed the Plaintiff shopping in the store, but it did not capture any slip incident as alleged by the Plaintiff. Additionally, the video was enhanced to reveal that the condition in question likely came from two children playing in the area just 60 seconds before the Plaintiff walked through it. After the alleged incident, the Plaintiff can be seen on the video surveillance shopping in the store for another 11 minutes before reporting the condition of water on the floor to a nearby employee. She notably did not report slipping in the water until she returned to the store the next day. The Plaintiff did not present any evidence of a leak in the ceiling beyond photos of a stained ceiling tile taken several months after the alleged incident. Target and its roof maintenance vendor produced work orders for roof and ceiling maintenance confirming no documented leak in the area of the alleged incident.

The Plaintiff complained of neck pain after the fall and treated with pain management and physical therapy before undergoing an anterior cervical discectomy and fusion at the C5-C6 level. She incurred a total of $126,644.56 in medical bills.

The parties submitted to non-binding arbitration on May 26, 2020 and presented testimony from the Plaintiff and five Target employees along with the store surveillance video and the Plaintiff's medical records and bills. At the close of the arbitration session, the arbitrator returned a non-binding arbitration award in favor of the defense, finding no liability against Target. Following receipt of the award, the Plaintiff dismissed the lawsuit.

* * *

Legal Disclaimer: The accounts of recent trials, jury verdicts and settlements contained on this newsletter are intended to illustrate the experience of the firm in a variety of litigation areas. Each case is unique, and the results in one case do not necessarily indicate the quality or value of another case. If you have any questions regarding any of these cases or wish to discuss a potential case, please contact us.

Offices Throughout Florida and Thomasville, Georgia

Hollywood
3440 Hollywood Boulevard
Second Floor
Hollywood, FL, 33021
(954) 961-1400
Fax (954) 967-8577

Pensacola
125 West Romana St.
Suite 320
Pensacola, Florida 32502
(850) 436-6605
Fax (850) 436-2102

West Palm Beach
1801 Centrepark Drive East
Suite 200
West Palm Beach, FL 33401
(561) 697-8088
Fax (561) 697-8664

Tallahassee
325 John Knox Road
Atrium Building
Suite 105
Tallahassee, FL, 32303
(850) 383-9103
Fax (850) 383-9109

Orlando
Two South Orange Avenue
Suite 300
Orlando, Florida 32801
(407) 649-9797
Fax (407) 649-1968

Tampa
201 E. Kennedy Boulevard
Suite 900
Tampa, Florida 33602
(813) 273-6464
Fax (813) 273-6465

Fort Myers
4315 Metro Parkway
Suite 250
Fort Myers, Florida 33916
(239) 337-1101
Fax (239) 334-3383

Jacksonville
4190 Belfort Road
Suite 222
Jacksonville, FL 32256
(904) 296-6004
Fax (904) 296-6008

Miami
5201 Blue Lagoon Drive
Office Number 925
Miami, Florida 33126
(305) 373-2888
Fax (954) 967-8577

Naples
1415 Panther Lane
Suite 389
Naples, FL 34109
(239) 263-0663
Fax (239) 263-0960

Thomasville, Georgia
126 North Broad Street
Thomasville, GA 31792
(229) 236-6126
Fax (229) 226-5744