CONROY SIMBERG

VOLUME 17, NUMBER 3 FALL 2015

Inside this Issue:

Written and Edited by:

- **Hinda Klein, Esq.**
- **Stephanie A. Robinson, Esq.**
- **Elizabeth A. Izquierdo, Esq.**

Connect with Us!

/company/conroy-simberg

/conroysimberg

/conroysimberg

LIABILITY CASE LAW UPDATES

Third District reverses trial court's decision finding workers' compensation immunity statute unconstitutional

In State v. Florida Workers' Advocates, et al., 40 Fla. L. Weekly D1481 (Fla. 3d DCA, June 24, 2015), the Third District Court of Appeal reversed a trial court order finding the workers' compensation immunity statute unconstitutional. The appellate court did not reach the merits of the issue, finding that there was no justiciable case or controversy, there was no properly joined "defendant" in the case and the declaratory judgment action giving rise to the order was not procedurally proper.

In this case, Julio Cortes was an employee of Velda Farms and was injured within the course and scope of his employment. He and his wife brought a civil suit against Velda Farms for negligence, arguing that the employer was estopped from claiming workers' compensation immunity because the employer/carrier denied his claims. Velda Farms denied the estoppel allegations. The Plaintiffs did not raise the constitutionality of the immunity statute in reply to Velda Farms' affirmative defense. The Plaintiffs filed an amended complaint seeking declaratory judgment that Florida Statutes 440.09 and 440.11 of the Workers' Compensation Law are facially unconstitutional and unconstitutional as applied to Mr. Cortes. The Plaintiffs, however, did not properly join the State of Florida as an additional defendant.

The Florida Workers' Advocates ("FWA") and Workers' Injury Law and Advocacy Group ("WILG"), both attorney advocacy groups, intervened as additional plaintiffs, alleging that they had an interest in the case by virtue of their "devot[ion] to protecting the rights of Florida Citizens and upholding Florida Civil Justice System [sic]." Thereafter, Velda Farms withdrew its immunity defense and moved to strike or dismiss the constitutional claims as moot. FWA and WILG moved to sever the declaratory judgment count and to recognize their independent standing to test the constitutionality of the immunity statutes, and in doing so, they conceded that Velda Farms no longer had standing to respond to the constitutional claims because immunity was no longer at issue.

LIABILITY CONTINUED

The trial court granted the motion to sever the declaratory judgment count, and in doing so, it ordered the Attorney General, a non-party, to respond as to why Florida Statute 440.11 was constitutional. The trial court recaptioned the case FWA and WILG as "Petitioners" and the State of Florida as the "Respondent", despite the fact that the Petitioners had never properly joined the State or served it with process. In the meantime, Elsa Padgett, a workers' compensation claimant in an entirely unrelated matter, sought to intervene in the declaratory judgment claim alleging that she had obtained medical care and limited economic benefits under her employer's workers' compensation program, but needed to determine whether the workers' compensation statute provided the exclusive remedies for her on-the-job injury, because she received no compensation for her loss of wage earning capacity, which is not compensable under the workers' compensation statute. Ms. Padgett alleged that the Attorney General had been previously "contacted" and expressed no intention to participate at the trial level. Ms. Padgett's motion to intervene was granted and then she moved for summary judgment seeking a declaratory judgment that Florida Statute 440.11, the workers' compensation immunity section, was unconstitutional. Ms. Padgett did not name the State or the Attorney General as a "defendant" in her claim, nor did she serve them with process.

The trial court issued a show cause order as to why the amended motion for summary judgment should not be granted in light of the fact that it had not received a response to the motion from the Florida Attorney General's office. The State advised the trial court that it was not a party to the action and the trial court lacked subject matter jurisdiction to render a ruling on the constitutionality of the statute in light of that fact. Undaunted, the trial court entered a judgment in the Petitioners' favor finding that Florida Statute 440.11 was unconstitutional as not providing a reasonable alternative remedy to the tort remedy it supplanted.

On appeal, the Third District found that there was no viable case or controversy before it because Velda Farms had withdrawn its workers' compensation immunity defense and the State had never been made a proper party to the action, thereby rendering the case moot. The Third District rejected the appellees' assertion that their constitutional challenge was not moot, but rather, fell within a narrow exception to the mootness doctrine where a case is "capable of repetition, yet evading review." In so doing, the Third District found that workers' compensation claims are individualized and were not shown, as a category of cases, to be so short in duration as to "evade review".

In addition, the Third District found that the Intervenors Padgett, WILG, and FWA had no standing because their alleged "claims" were subordinate to the then-existing claims in suit as between Cortes and Velda Farms, and once the primary claim became moot, the Intervenors lost whatever standing they might have had if the primary claim had not become moot. The Court found that the Intervenors' indirect economic interest in establishing their clients' rights to file tort claims did not confer standing on the attorneys. Moreover, these groups were not threatened with any kind of immediate injury that might raise a justiciable issue. Therefore, the appellate court held, the trial court lacked subject matter jurisdiction because there was no viable case or controversy pending before it at the time it issued its ruling finding the workers' compensation immunity statute unconstitutional.

* * *

CONROY SIMBERG

LIABILITY CONTINUED

Fourth District Court of Appeal finds medical malpractice caps applied in personal injury cases unconstitutional

On July 1, 2015, the Fourth District Court of Appeal issued its opinion in North Broward Hospital District v. Kalitan, 40 Fla. L. Weekly D1531 (Fla. July 1, 2015), in which it found the statutory cap on noneconomic damages unconstitutional in medical malpractice personal injury actions.

In a 2014 opinion, the Florida Supreme Court ruled that the cap on noneconomic damages in *wrongful death* cases imposed by Fla. Stat. § 766.118 was unconstitutional, in violation of the equal protection clause of the Florida Constitution. Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014). In Kalitan, the Fourth District was called on to decide if the statutory cap on noneconomic damages was also unconstitutional in personal injury cases. The plaintiff in Kalitan sued several health care providers, alleging that their medical malpractice caused her to suffer substantial personal injury and damages. The trial court reduced a jury award of $4,000,000 in noneconomic damages to approximately $2,000,000, determining that the statutory cap on noneconomic damages applicable to catastrophic injuries was applicable.

The Fourth District's opinion analyzes the various opinions in McCall, which utilized a rational basis test in determining that the statutory cap on noneconomic damages violated equal protection. To be constitutional under that test, the statute must bear a rational and reasonable relationship to a legitimate state objective, and cannot be arbitrary or capricious. In enacting the cap in 2003, the Florida Legislature found that Florida was in the midst of a medical malpractice insurance crisis. The Florida Supreme Court concluded that such a crisis no longer exists.

Consistent with the Florida Supreme Court's analysis in McCall, the Fourth District concluded that the absence of a medical malpractice insurance crisis mandated its determination that the statutory cap on noneconomic damages was unconstitutional not just in wrongful death cases, but in personal injury cases as well.

* * *

Where declaratory judgment action and liability claims are mutually exclusive trial court errs in staying declaratory judgment action in favor of tort claim

In Homeowners Property & Casualty Ins. Co. v. Hurchalla, 40 Fla. L. Weekly D1887 (Fla. 4th DCA, Aug. 12, 2015), the Fourth District Court of Appeal quashed an order of the trial court staying a declaratory judgment action brought by Homeowners against its insured seeking a declaration that it had no coverage for claims made against the insured for injunctive relief and economic damages. The appellate court found that the issues raised in the declaratory judgment action did not overlap with issues raised in the tort case so as to warrant a stay.

In order to warrant staying a coverage action pending resolution of a tort claim, the Supreme Court has held that the trial court must determine 1) whether the two actions are mutually exclusive, 2) whether proceeding on the coverage issue will promote settlement and avoid collusion between the claimant and the insured and 3) whether the insured has resources independent of insurance such that it would be immaterial whether the claim would or would not be covered under the policy.

In this case, the trial court had not addressed any of these factors and on appeal the Fourth District agreed with the carrier that all of the factors militated against a stay. Accordingly, the appellate court quashed the trial court's ruling staying the

(Continued on page 5)

Focus on: Premises Liability

The insurance defense attorneys at Conroy Simberg are highly experienced in building strong defenses to both routine and novel premises liability claims. Our skilled legal team represents clients in a broad range of premises liability lawsuits, including:

- Slip and falls
- Trip and falls
- Negligent security
- Liquor liability
- Inadequate lighting
- Physical attacks and sexual assaults
- Improper maintenance
- Other dangerous property conditions

When handling a premises liability case, our legal team seeks to resolve claims as quickly as possible while minimizing the potential liability of our clients. Our lawyers rapidly and accurately investigate each claim and provide clients with a thorough evaluation of their case. We strive to be responsive to our clients' needs and work collaboratively with them to develop a plan of action aimed at protecting their important business and financial interests.

At Conroy Simberg, our premises liability team concentrates on using direct negotiation and alternative dispute resolution methods, including mediation and arbitration, to close our clients' cases efficiently and economically.

When settling claims through these processes is not a viable option, we will not hesitate to try the case in court. The attorneys in our premises liability practice are accomplished trial lawyers with the skills and experience needed to successfully defend clients at all stages of the litigation process. These lawyers also work closely with our firm's dedicated appellate department to develop legal strategies that result in favorable outcomes should the premises liability case proceed to the appellate level.

LIABILITY CONTINUED

(Continued from page 3)

coverage action until after the tort action had concluded.

* * *

Insurer that paid its policy limits but did not thereby satisfy entire judgment against its insured was entitled to pursue equitable subrogation action before judgment had been satisfied

The issue of whether a judgment has to be satisfied in full before an insurer can pursue equitable subrogation was addressed in Allstate Ins. Co. v. Theodotou, M.D., 40 Fla. L. Weekly D1713 (Fla. 5th DCA, July 24, 2015). In that case, the Plaintiff sued the insured after he sustained head injuries when he was hit by the insured while on his scooter. After the accident, the Plaintiff was further injured during his treatment by his provider's medical malpractice. Pursuant to Stuart v. Hertz, 351 So. 2d 703 (Fla. 1977), because the malpractice was suffered as a direct result of the insured's tortious conduct, the insured was sued for all of the Plaintiff's injuries, including those suffered as a direct result of the malpractice.

The jury rendered a judgment against the insured in excess of $11 million and Allstate paid the Plaintiff its $1.1 million in policy limits. The insured did not satisfy the remainder of the judgment.

After the verdict was rendered, the Plaintiff filed a bad faith suit against Allstate and a medical malpractice claim against his physicians. Allstate intervened in the malpractice action, but its equitable subrogation claim was ultimately dismissed because the trial court was persuaded by the Plaintiff's argument that Allstate's subrogation claims was premature until the judgment had been satisfied in full.

On appeal, the Fifth District Court of Appeal reversed the trial court's dismissal. Although the Court recognized that there was some arguable Supreme Court precedent supporting the Plaintiff's argument that a party must satisfy a debt in full before an equitable subrogation action becomes ripe, the Fifth District found that the Plaintiff's arguments misconstrued that precedent. Ultimately, the Court found that an equitable subrogation action ripens either when 1) full payment has been made **or** 2) a judgment has been entered against the party (or its privy). Therefore, Allstate's subrogation action was not premature and it was entitled to pursue subrogation against the physicians to the extent of the judgment rendered against its insured.

In light of the significance of this issue, the Fifth District certified it to the Florida Supreme Court for consideration as a matter of great public importance.

* * *

Proposal for settlement which attached a release and provided that the offeror would consider proposed changes to the release was not ambiguous or otherwise invalid

In Wallen v. Tyson, 40 Fla. L. Weekly D2072 (Fla. 5th DCA, Sept. 4, 2015), the trial court struck a proposal for settlement in which the Plaintiff included as a condition the execution of an attached release, and provided in the body of the proposal that the Plaintiff was "willing to consider any suggested changes to the release". The appellate court reversed, finding that this language did not render the proposal ambiguous, noting "[w]e find no precedent sufficient to discourage a proposing party from offering to negotiate the terms of a proposed settlement or release."

* * *

(Continued on page 6)

LIABILITY CONTINUED

Nature and extent of relationship between medical provider and Plaintiff's counsel is subject to discovery and not privileged

In Worley v. Central Florida YMCA, 40 Fla. L. Weekly D1158 (Fla. 5th DCA, May 15, 2015), the Fifth District Court of Appeal reviewed a trial court order overruling the Plaintiff's counsel's privilege objections to discovery seeking production of information relating to whether the Plaintiff's counsel referred the Plaintiff to the provider and whether the Plaintiff's counsel had any formal or informal agreements with the Plaintiff's providers. The Court held that these issues are not always protected by the attorney-client privilege and the information was relevant to the provider's bias. If the provider claimed that it did not have that information, the Plaintiff's law firm was ordered to provide it and if the cost of production was significant, the Plaintiff's law firm was entitled to seek reasonable compensation for the production at the conclusion of the case.

The Plaintiff's counsel also argued that the trial court's order expanded the scope of permissible discovery as set forth in Allstate Ins. Co. v. Boecher, 733 So. 2d 993 (Fla. 1999), which held that a party may propound discovery requests directed to a party regarding the extent of that party's use of, and payment to, a particular expert. The appellate court noted that subsequent cases have extended Boecher to apply to treating physicians who are expected to testify as experts at trial. The Court also noted that defense counsel and insurers are routinely required to disclose the names of cases in which they referred a plaintiff to a specific doctor for a CME. Accordingly, the Court concluded that "[w]e see no meaningful difference between requiring defense counsel or insurers to disclose this information and requiring Worley or her counsel to disclose the clients that have been referred by Morgan & Morgan [plaintiff's counsel] to the healthcare providers in this case."

The appellate court certified conflict with the Second District's decision in Burt v. GEICO, 603 So. 2d 125 (Fla. 2d DCA 1992), on the specific issue of whether disclosure of an attorney's referral of a client to a healthcare provider is always protected by the attorney-client privilege.

CONROY SIMBERG

WORKERS' COMPENSATION CASE LAW UPDATES

Judge must consider the amount of attorney's fees awardable once entitlement is established, even if done through a washout settlement

Brady v. Cypress Communications of South Florida, 40 Fla. L Weekly D1732 (Fla. 1st DCA 2015). The JCC declined to approve a stipulation for attorney's fees to be paid by the E/C to the claimant's attorney, based on its suspicion of the fact that the carrier agreed to pay previously-petitioned-for medical bills at the time of a washout. However, the First DCA reversed the ruling, and on remand instructed the JCC to consider the amount of the fee given that the issue of entitlement was resolved by the parties' agreement.

* * *

Upon the claimant meeting her burden as to TTD benefits, the burden shifts to the E/C to show evidence that her work status changed

CVS Caremark Corporation v. McIntosh, 163 So. 3d 1270 (Fla. 1st DCA 2015). The JCC entered an initial order denying compensability of the claimant's post-traumatic stress disorder (PTSD), which was reversed and remanded by the First DCA. On remand, the JCC awarded psychiatric care but denied TTD and inpatient psychiatric care. The First DCA affirmed the award of compensability of the PTSD as the Court agreed with the JCC that the carrier waived its right to challenge compensability of the PTSD under the 120 day pay and investigate provisions of the statute by failing to establish any material facts that could not be discovered within the 120 day time period. With respect to TTD, the First DCA reversed the JCC's denial, noting that the claimant was able to meet her initial burden by submitting medical evidence of an inability to work from an authorized provider and that the carrier submitted no evidence showing that her work status changed from TTD. As to the inpatient facility, the JCC rejected the opinions of the authorized provider, which the Court noted he was free to do; however, provided an unclear basis for the rejection. Thus, the First DCA remanded that portion to the JCC to clarify his denial of the inpatient facility.

* * *

The Daubert test should be applied to expert opinions, including those of IMEs

Perry v. City of St. Petersburg, 40 Fla. L. Weekly D1855 (Fla. 1st DCA 2015). The JCC admitted into evidence the opinions of the carrier's IME without addressing the claimant's properly asserted Daubert challenge as to the admissibility of those opinions. In reversing and remanding the order, the First DCA directed the JCC to apply the Daubert test to determine whether the opinions of the carrier's IME were admissible.

* * *

A Carrier's failure to timely respond to a request for medical treatment waives their right to contest medical necessity

In Pearson v. BH Transfer, 163 So. 3d 1280 (Fla. 1st DCA 2015), the First DCA reversed and remanded the JCC's denial of authorization for spinal surgery. The basis of the denial by the JCC was his opinion that the surgery was not medically necessary. However, the First DCA held that because the carrier failed to respond to the doctor's request for the procedure in accordance with section 440.13(3)(i), it waived the right to contest medical necessity.

* * *

WORKERS' COMPENSATION CONTINUED

A finding of misrepresentation under sections 440.09 and 440.105, Florida Statutes, forfeits a claimant's entitlement to any benefits being adjudicated

Leggett v. Barnett Marine, Inc., 167 So. 3d 480 (Fla. 1st DCA 2015). The JCC denied the claimant's claim for TTD benefits on the ground that the claimant made representations which forfeited his benefits pursuant to sections 440.09 and 440.105, Florida Statutes (2012). The claimant appealed, citing that he was entitled to benefits for periods predating his misrepresentation. The Court affirmed the JCC, noting that fraud was found before adjudication of the claimant's entitlement to TTD benefits. However, the Court acknowledged that it did not reach the issue of whether a misrepresentation made after the entitlement to benefits is legally established will disqualify an offending claimant from the right to payment of the benefits.

* * *

The deposition fee for an EMA is set at $200 per hour

Suarez v. Steward Enterprises, 164 So. 3d 132 (Fla. 1st DCA 2015). The claimant scheduled the deposition of the EMA who advised that his fee was $750.00. The claimant sought an order from the JCC limiting the fee to $200.00, which the JCC refused. The claimant petitioned for a writ of certiorari which the First DCA granted, noting that the highest permissible rate for the deposition of an EMA is $200.00 per hour.

* * *

An award of attendant care is governed by the statute in effect at the time the attendant care is being provided

Broadspire v. Jones, 164 So. 3d 708 (Fla. 1st DCA 2015). The claimant had a compensable accident in 1981 which resulted in multiple orthopedic injuries as well as psychological disorders of post traumatic stress disorder and depression. In 2013 the claimant sought attendant care from his wife which the carrier denied as unrelated to the work accident and encompassing services that were of the type provided by family members (gratuitous services). The JCC awarded the attendant care requested as the maximum allowed for family members (12 hours per day). In affirming the award for attendant care, the Court noted the causation standard in effect at the time of the accident was correctly applied by the JCC as this is a substantive right. However, the Court reversed and remanded the amount of attendant care, noting that this is governed by the statute in effect at the time the attendant care is provided. In the instant care, the JCC was directed to make specific findings and conclusions as to whether the care provided by the wife was compensable as "extraordinary services" or awardable "on-call" attendant care.

* * *

The payment of attorney's fees does not extend the statute of limitations for filing a petition for benefits

Sanchez v. American Airlines, 40 Fla. L. Weekly D1602 (Fla. 1st DCA 2015). The claimant appealed the JCC's finding that his petition was barred by the statute of limitations. Specifically, the claimant contended that the carrier's payment of attorney's fees to his counsel, with no other medical or disability benefits being paid simultaneously to the claimant and no petitions pending, extends the statute of limitations under section 440.19(2), Florida Statutes. The First DCA ruled that it does not and affirmed the JCC's order.

* * *

CONROY SIMBERG

WORKERS' COMPENSATION CONTINUED

(Continued from page 8)

TTD benefits based upon a psychiatric diagnosis is not payable more than 6 months after the date of physical MMI

School Board of Lee County v. Huben, 165 So. 3d 865 (Fla. 1st DCA 2015). The E/C appealed the JCC's award of TTD benefits based upon a diagnosis of post-traumatic stress disorder for a period beyond 6 months from the date of physical MMI. Specifically, there was a gap period of time from the date of physical MMI to the claimant being placed on a no work status from a psychiatric standpoint. Therefore, during that time period, she received IIBs based upon the physical impairment rating. Six months later, she received a no work status from a psychiatric standpoint and the JCC awarded TTD benefits from that date. The First DCA reversed this portion of the JCC's order, noting that section 440.093(3), Florida Statutes, provides a strict deadline after which no TTD benefits are payable on psychiatric injuries. The plain language of the statute dictates that the six months allowed for psychiatric temporary benefits commences on the date of physical MMI and stops six months from that date.

* * *

Overall MMI is reached upon a showing of MMI for each compensable condition for which a claimant is treating

Cruz v. State of Florida, 2015 WL 4923576 (Fla. 1st DCA 2015). At issue was whether the claimant had reached MMI and thus no longer qualified for temporary disability benefits. In her order, the JCC found that the claimant reached overall MMI; however, she also awarded an evaluation with a gastroenterologist as per the claimant's authorized provider, to assess his acid reflux. In affirming the JCC's ruling, the First DCA noted that the claimant's compensable conditions were cardiac and psychiatric. The physicians for those conditions opined that he was at MMI for both. The fact that the cardiac medication may have aggravated his preexisting GERD did not impact the MMI of the compensable conditions. In other words, treatment of the GERD would not reasonably be expected to improve his cardiac or psychiatric conditions.

* * *

A Claimant's request for a one time change in providers should be readily apparent, unobscured, and unambiguous

Gonzalez v. Quinco Electrical, Inc., 40 Fla. L. Weekly D1617 (Fla. 1st DCA 2015). At issue was whether the carrier timely responded to the claimant's request for a one time change in accordance with section 440.13(2)(f), Florida Statutes. The claimant's attorney appeared of record in his initial petition for benefits. Three weeks later he filed a "Notice of Appearance" which contained standard language. However, on the second page of this document, he inserted a request for a one-time change in treating physicians. In fact, he admitted in the hearing that he expected the carrier would overlook the request. Upon the carrier realizing that there was a request, one day after the five days expired, it authorized a new doctor. The JCC ruled that the "Notice of Appearance" did not trigger the carrier's obligation to authorize a new doctor and that the carrier's authorization was proper. The First DCA, in affirming the JCC's holding, chastised the attorney and noted that the request should be readily apparent, unobscured, and unambiguous.

* * *

CONROY SIMBERG

ANNOUNCEMENTS

The information in this newsletter has not been reviewed or approved by The Florida Bar. You should know that:

- ◊ The facts and circumstances of your case may differ from the matters in which results have been provided.
- ◊ Not all results of cases handled by the firm are provided.
- ◊ 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 2015 Edition of Florida Super Lawyers

Conroy Simberg is pleased to announce that five attorneys from the firm have been selected to the 2015 Florida Super Lawyers and Rising Stars lists. **Hinda Klein** and **Diane H. Tutt** were listed as Super Lawyers. **Todd M. Feldman, Tashia M. Small** and **Ryan K. Todd** 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.

* * *

Diane Tutt Prevailed in a Petition for Writ of Certiorari in a PIP Case

Diane Tutt, an associate in the firm's appellate department, recently prevailed in a Petition for Writ of Certiorari in a personal injury protection ("PIP") breach of contract case. In State Farm Mutual Automobile Ins. Co. v. Florida Wellness & Rehab. Center, of South Miami, L.L.C., Case No. 14-249 AP, Ms. Tutt obtained a ruling from the Appellate Division of the Miami-Dade Circuit Court that the Plaintiff was not permitted to obtain discovery of any portion of the insurer's claim file, including adjuster notes, since the case did not involve a bad faith claim.

* * *

Michael Kast Earns Board Certification from The Florida Bar

We are proud to announce that partner **Michael Kast** in our Orlando office recently became Board Certified in Civil Trial Law by The Florida Bar. Board certification is one of the highest recognitions a lawyer in Florida can receive. Less than 1% of licensed lawyers in the State of Florida are Board Certified Civil Trial Lawyers.

* * *

Defense Verdict Obtained in Georgia Construction Defect Case

Joshua Canton, a partner in our Tallahassee office, recently received a defense verdict in a construction defect case tried in Valdosta, Georgia. The Plaintiffs in the case were homeowners who hired the Defendant, a custom home builder, to build a $2.275 million addition to their home, including exercise and guest wings, and an extensive pool area. When the project was mere weeks from completion, the Plaintiffs terminated the Defendant from the job and sued it claiming that its work was defective. The Defendant contended that its work met the contract specifications and was incomplete by virtue of the Plaintiff's termination. The Plaintiff's asked for $1 million at trial. The trial resulted in a defense verdict.

* * *

ANNOUNCEMENTS

Motion to Dismiss Obtained in Historic Mixed-Use Property on the Hollywood Broadwalk

Partner **Dale Friedman** and her associate, **Robert Bouvatte**, obtained a Motion to Dismiss with prejudice in the case of The Hollywood Beach Resort Rental Program, LLC v. Michael Jekic, Laura Welliver, Christian Morello, Maria Mejido, Judy Buchan, John Does 1-10 and Jane Does 1-10, Defendants and Hollywood Beach Hotel Owners Assoc., Inc. and Hollywood Beach Resort and Condo. Assoc., Inc., Nominal Defendants. This case was filed in federal action and involved the Hollywood Beach Resort, a historic mixed-use property on the Hollywood Broadwalk that operates through a condominium association as well as a timeshare association. Plaintiff was a timeshare rental company formed by Richard Schecher, the former President of the Board of Directors of the associations, and asserted claims against the individual members of the Board of Directors that succeeded Mr. Schecher's presidency.

Plaintiff's claims were brought to recover individual damages from the Defendants, who were officers of the Board of Directors of the associations, as well as damages on behalf of the Nominal Defendants for alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) and breaches of fiduciary duty under Florida law arising from a purportedly "fraudulent scheme" perpetrated on the unit owners at Hollywood Beach Resort. Plaintiff was given leave to amend his Complaint twice and the lawsuit was litigated throughout the discovery period at which time the District Judge dismissed Plaintiff's RICO claims with prejudice, and declined to exercise jurisdiction over the state law claims, dismissing them without prejudice. The Court held that Plaintiff lacked standing for both its direct and derivative claims, that Plaintiff could not adequately allege the existence of an "enterprise" or a "pattern of racketeering" as necessary for RICO claims, and that Plaintiff's damages theory did not satisfy the "proximate cause" requirement for damages under RICO.

* * *

Jackie Gregory Obtains Denial of Claimant's Motion for Advance

Jackie M. Gregory, a partner in our Hollywood office, successfully obtained denial of the claimant's Motion for Advance. The claimant alleged a back injury on 1/20/2014. Compensability was denied. The claimant then sustained a compensable hand injury on 1/23/2014 and filed Motions for Advances on both claims, but withdrew the motion on the compensable claim on the eve of the hearing. Judge Iliana Forte ruled that the claimant failed to meet statutory requirements, as set forth in Section 440.20(12)(c), Florida Statutes. While he did not return to the same or similar employment, he did not sustain a reduction in wages nor suffer a substantial loss of earning capacity. No evidence was presented that he had an actual or apparent physical impairment. The Motion for Advance was therefore denied.

* * *

Affirmance of Summary Judgment

Hinda Klein, the partner in charge of the firm's appellate division, was successful before the Second District Court of Appeal in obtaining an affirmance of a summary judgment rendered in a legal malpractice action in Professional Center of Internal Medicine, Inc. v. Jennis. The case was handled at the trial level by **Michael Kraft**, the managing partner of our Tampa office.

* * *

CONROY SIMBERG

ANNOUNCEMENTS

Joshua Losey Joins the Fort Myers Office

Joshua C. Losey will be the managing attorney for the workers' compensation division of our Fort Myers office. Josh earned his undergraduate degree from Clemson University in 1998 and his Juris Doctorate from Stetson University College of Law in 2003. He is admitted to the Florida Bar and the U.S. District Court, Middle District of Florida.

Josh has spent his legal career practicing insurance defense litigation in the Southwest Florida area. He has focused on workers' compensation claims, auto claims, property claims, PIP, and insurance fraud. He has represented large employers, insurers, and third party administrators during which time he has developed a strategy of close client contact and aggressive resolution of claims. He is also a Florida Supreme Court Certified Circuit Mediator.

* * *

Chris Varner Obtained Summary Judgement

Chris Varner, an associate in our Pensacola office, obtained summary judgment on behalf of a large vacation resort against a Plaintiff injured while riding a resort owned bicycle. The Plaintiff signed a bicycle rental agreement and then alleged that the resort rented him defective equipment resulting in an accident. Mr. Varner argued that the agreement signed by the Plaintiff contained clear and unequivocal exculpatory provisions and the Court agreed. The Court held that the contractual exculpatory clauses in the bicycle rental agreement prevented the Plaintiff from pursuing damages against the resort.

* * *

Katherine Letzter Prevailed Against Claimant on AWW Claim

In the case of Julie Goddard for Humberto Juarez vs. Quality Roofing, Inc./FRSA Self Insurers Fund, 14-016962EHL, **Katherine Letzter**, a partner in our Tampa office, prevailed against the claimant on an AWW claim. The claimant argued that the AWW should be calculated based upon the claimant's payroll periods, excluding the last payroll period because it included the day of the injury. As a matter of law, the JCC concluded that the claimant's method of determining the 13 week period was incorrect because it made use of payroll periods, which will vary from one employer to another and not calendar weeks as required by F.S. 440.114 (1)(a). The JCC also ruled that the carrier was entitled to recoup its overpayment of compensation benefits.

* * *

JCC Denied Entitlement to Approximately $20,000.00 Past Due TPD

Christopher A. Tice, the managing partner of the workers' compensation division in our Jacksonville office, recently prevailed when the JCC denied entitlement to approximately $20,000.00 in past due TPD. The JCC found there was a job available for the claimant within her restrictions, but the claimant began missing work because of her pre-existing condition. The JCC found no merit to the claimant's argument that that her return to work should be excused pursuant to Section 440.150 (6) because there was no evidence the claimant had a panic attack related to her work injury or that her continuing failure to show up for work had anything to do with the work-related injury. The JCC agreed with the defense that the claimant provided no evidence to suggest that she was ever temporary total disabled.

* * *

ANNOUNCEMENTS

Katherine Letzter Earns AV Rating from Martindale Hubbell

Katherine Letzter, a board certified workers' compensation attorney and managing partner of the workers' compensation division in our Tampa office, has achieved the AV® Preeminent™ Review Rating from Martindale-Hubbell thereby attaining the highest possible rating for both ethical standards and legal ability.

* * *

Affirmance of Summary Judgment

Elizabeth Izquierdo, an associate in the firm's appellate department, and **Hinda Klein**, head of the appellate department, were successful in obtaining an affirmance of summary judgment rendered in favor of their client, a title company, in Moreno v. First Intern. Title, Inc.. **Dale Friedman**, a partner in the Hollywood office, and her associate **Robert Bouvatte, Jr**., obtained the summary judgment, which was affirmed by the Third District Court of Appeal.

* * *

Summary Judgment Obtained in Motorcycle Accident

Michael Wilensky, a partner and **Stephan Greco**, an associate, in our Hollywood office, were successful in obtaining summary judgment on behalf of a global engineering firm after 3 1/2 years of litigation arising out of a motorcycle accident. As the Plaintiff was driving his motorcycle south on U.S. 1 in Monroe County, he left the roadway in an attempt to avoid vehicles that had stopped ahead of him and in so doing, he struck the corner of a butterfly valve manhole cover which had been installed in the median as part of a multiphase construction project for the replacement of 7 miles of the main water transmission pipe that provides potable water throughout the Keys. The Plaintiff was comatose for several days and suffered a traumatic brain injury as a result of the accident.

* * *

A. Lizette Flores, Partner, and Bianca R. Zuluaga, Associate, Join the Firm's Hollywood Office

Anna Lizette Flores earned her undergraduate degree in Criminal Justice and English from The George Washington University in 2001 and her Juris Doctorate from The University of Miami School of Law in 2004. She has considerable experience in the area of first-party property insurance claims, involving all areas of coverage, including windstorm, fire, theft, water damage and sinkhole matters. Lizette is admitted to practice before all Florida state courts and has tried coverage cases in Miami-Dade and Broward Counties. While at the University of Miami, Lizette was a recipient of the Miami Scholars Scholarship and was a Public Interest Summer Program Fellow, both targeted at public interest work. She then served as an Assistant Public Defender for Miami-Dade County, where she represented indigent individuals in all stages of litigation, through trials and verdict.

Bianca R. Zuluaga earned her undergraduate degree in Legal Studies and Political Science from the University of Central Florida in 2008 and she obtained her Juris Doctorate from the University of Miami in 2011. While in law school, Bianca was a fellow in the Professional Responsibility and Ethics Program, she served as a judicial intern with the Florida Eleventh Judicial Circuit Court and she interned with the transactional and litigation departments of Royal Caribbean International. Prior to joining the firm, Bianca handled residential and commercial first party property

CONROY SIMBERG

ANNOUNCEMENTS

insurance defense cases, as well as defended cruise lines in personal injury actions. She currently focuses her practice on first-party property insurance defense.

* * *

Summary Judgment Obtained

Rod Lundy, a partner in our Orlando office, won summary judgment in a declaratory judgment action on behalf of a carrier, where the insured sought coverage for a suit against him for harassment, assault, battery, and false imprisonment by a fellow worker.

* * *

Jackie Gregory Obtained a Voluntary Dismissal

Jackie M. Gregory, a partner in our Hollywood office, obtained a voluntary dismissal after arguing and litigating lack of causal connection between a claimant's cardiovascular incident and his employment. In the case of White v. Denny's, the claimant had a transient loss of consciousness/syncopal episode at work. The E/C asserted that the claimant suffered from a pre existing medical condition, and that at the time of the alleged incident the claimant was not performing any unusual physical exertion nor non-routine work. Litigation ensued and the claimant voluntarily dismissed his petition, and the claim was resolved for nuisance value.

* * *

Reversal of Dismissal Obtained

Hinda Klein, head of the firm's appellate department, and **Elizabeth Izquierdo**, an associate in the appellate department, obtained a reversal of a dismissal with prejudice of a subrogation action brought by a homeowner's insurer against a contractor. Florida Peninsula Ins. Co. v. Ken Mullen Plumbing, Inc., was appealed to the Fifth District Court of Appeal, which reversed the dismissal on all grounds.

* * *

Compensability was Denied in Chinese Drywall Case

In Cortorreal v. Epicron, **Stephanie A. Robinson**, an associate in our Hollywood office, prevailed when the claimant alleged toxic exposure to Chinese drywall which he claimed caused him respiratory injury. The E/C denied compensability and the parties prepared for a final merits hearing with IME testimony, toxicology documentation and other medical testimony. On the eve of the hearing and in light of the evidence, all petitions were dismissed with prejudice.

*** * ***

Final Summary Judgment Obtained

Millard L. Fretland, a partner, and **Christopher E. Varner**, an associate, in our Pensacola office, obtained a final summary judgment in a trip and fall case in which the Plaintiff fell down an open flight of three stairs located on a restaurant rooftop lounge. The fall occurred in daylight. Despite the Plaintiff's expert's testimony that the steps constituted a dangerous condition for which warning was required, the trial court agreed with our argument that open and obvious changes in floor levels located in a business are not a dangerous condition as a matter of law and that as such there was no way that the Plaintiff could establish the elements of a negligence case.

* * *

ANNOUNCEMENTS

Claimant Denied Reimbursement for Unauthorized Care

Esther Zapata Ruderman, a partner in our West Palm Beach office, prevailed on a claim in which the claimant refused testing that was authorized by the carrier and then sought to have the E/C pay for the unauthorized testing that he underwent. In the case styled Cain v. Palm Beach County School Board, Judge Mary D'Ambrosio ruled that the carrier timely authorized the testing and the claimant failed to show that the facilities that were authorized were inappropriate, unreasonable or insufficient. Therefore, she denied the claimant's claim for reimbursement for unauthorized care.

* * *

E/C Prevailed at Final Hearing on the Issue of Authorization of PCP

In Ortega v. Bruzo's Bar, which stems from a 1987 accident, **Stephanie Robinson**, an associate in our Hollywood office, prevailed when the parties went to a final hearing on the issue of authorization of a PCP. The claimant, a paraplegic, alleged that her immobility caused other conditions, such as diabetes and high blood pressure, which prompted the need for a PCP. Based upon the testimony of the referring doctor, who did not relate the need for a PCP to the accident and did not find any co-morbidities which were hindering her compensable treatment, the JCC denied the claim for a PCP.

* * *

Tampa Office Welcomes Nicole Soto

Nicole F. Soto has more than nine years of litigation experience, including personal injury, product liability litigation, and construction defect litigation. She has extensive experience defending self-insureds, insurers and their policyholders in claims involving personal injury, catastrophic loss, and construction defect litigation from case inception through trial.

Ms. Soto earned her undergraduate degree in Philosophy from Florida International University in 2001. She earned her Juris Doctorate degree from Loyola University of Chicago School of Law in 2005. While in law school, Ms. Soto served as Production Editor for the Loyola University Chicago Law Journal. Ms. Soto is licensed to practice in both Florida and Illinois. She is also admitted to practice in the Southern and Middle Districts of Florida federal courts.

* * *

Reversal of Trial Court's Order

Appellate attorneys **Shannon McKenna** and **Hinda Klein** obtained a reversal of a trial court's order staying a coverage action in favor of a pending tort action brought against an insured in Homeowners Property & Cas. Ins. Co., Inc. v. Hurchalla, at the Fourth District Court of Appeal.

* * *

Summary Judgment Obtained in Premises Liability Case

Michael Wilensky, a partner in our Hollywood office, and **Shannon McKenna**, an associate in the appellate department in our Hollywood office, obtained a final summary judgment in a premises liability case in St. Lucie County, Florida.

* * *

CONROY SIMBERG

ANNOUNCEMENTS

Jonathan Walker Earns AV Rating from Martindale Hubbell

Jonathan E. Walker, the managing partner of the workers' compensation division in our Pensacola office, has achieved the AV® Preeminent™ Review Rating from Martindale-Hubbell thereby attaining the highest possible rating for both ethical standards and legal ability.

* * *

Obtained Affirmance on Appeal

In Duvon-Ortega v. Bruzo's Bar, **Tom Regnier** and **Shannon McKenna**, associates in our appellate department, were successful in obtaining an affirmance from the First District Court of Appeal of the JCC'S denial of the claimant's request for a Primary Care Provider. The case was originally handled, and won, by **Stephanie Robinson**, a workers' compensation associate in our Hollywood office.

* * *

Conroy Simberg Welcomes Joy Zubkin to the Orlando office

Joy Zubkin's practice is primarily focused on counseling and defense in the areas of medical negligence, healthcare litigation, and personal injury litigation. She received her Bachelor of Science Degree in Nursing from Villanova University and Juris Doctorate from Barry University School of Law. Before receiving her law degree, she worked as a Registered Nurse in inner-city Philadelphia medical/surgical units, transplant unit, as well as critical care areas. In her legal profession, Joy has represented hospitals, physicians, radiologists, emergency room practitioners, anesthesiologists, nurses and nurse practitioners in complicated medical malpractice litigation dealing with not only adult injuries but also injuries regarding children and babies, resulting in successful resolutions. She has also successfully represented physicians regarding issues with the Department of Health as it relates to licensure and challenges. Joy Zubkin is admitted to practice in all state courts within the State of Florida and in the United States District Court for the Middle District of Florida.

* * *

JCC Denied Compensability

Christopher A. Tice, the managing partner of the firm's workers' compensation division in our Jacksonville office, recently prevailed in Bru v. Carlton Construction, Inc. in which the JCC denied compensability on the grounds that our client was not his statutory employer.

* * *

Jackie Gregory Obtained Voluntary Dismissal

Jackie M. Gregory, a partner in our Hollywood office, obtained a voluntary dismissal on a claim in which a 58 year old claimant alleged that a cardiovascular incident was job related. In the case of Livrance v. Denny's, the claimant sustained a major stroke which he argued arose out of his employment. The claim was heavily litigated and experts were utilized. The claim was voluntarily withdrawn on the eve of trial.

* * *

Summary Judgment Obtained in Negligent Security Case

Rod Lundy, a partner in our Orlando office, obtained a summary judgment in a negligent security case on behalf of a landlord whose tenant operated a night club where the Plaintiff was shot. The court ruled as a matter of law that the landlord did not have control of the premises

CONROY SIMBERG

ANNOUNCEMENTS

sufficient to impose liability for security of the tenant's patrons.

* * *

Proposal for Settlement Enforced in PIP Case Following Summary Judgment Voiding Policy for Material Misrepresentation Related to Business Use

Manuel Negron, an associate in our Miami office, obtained a ruling enforcing the Defendant's Proposal for Settlement, entitling the Defendant, Star Casualty Insurance Company, to recover its fees and costs in the case of Eduardo Garrido, D.C., P.A. a/a/o Francisco Garay v. Star Casualty Insurance Company, a heavily litigated lawsuit for PIP benefits filed in 2009 in the Eleventh Judicial Circuit, Case No. 09-3898 CC 05, before Judge Lourdes Simon in Miami. Mr. Negron had previously obtained a summary judgment in favor of the Defendant, voiding the policy for material misrepresentation due to the insured's representation on the application that it would not use the insured vehicles for business purposes. The Defendant made a nominal Proposal for Settlement. Since the Defendant had obtained the EUO's of the insureds, wherein they testified that they used the vehicles to transport merchandise for sale at flea markets, the Court found that the Defendant had a reasonable basis at the time it made the Proposal to believe its exposure was nominal. Opposing counsel also argued, in part, that the form Medicare set-aside language rendered the Release attached to the Proposal ambiguous. The Court disagreed since the Plaintiff is in a uniquely superior position to the Defendant to know whether Medicare could have a lien on any potential recovery. The Plaintiff also argued that the description of the Release within the Proposal was insufficient and ambiguous. The Court disagreed because any ambiguity regarding the description of the Release could be resolved by reviewing the actual Release attached to the Proposal.

* * *

IF YOU HAVE RECENTLY MOVED, KINDLY SEND US AN E-MAIL WITH YOUR NEW INFORMATION TO:
csg@conroysimberg.com

CONROY SIMBERG

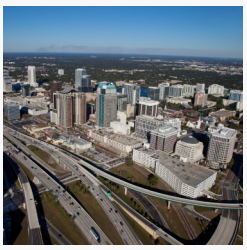
10 offices throughout Florida

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
4887 Belfort Road
Suite 103
Jacksonville, FL 32256
(904) 296-6004
Fax (904) 296-6008

Miami
9155 S. Dadeland Blvd.
Suite 1000
Miami, Florida 33156
(305) 373-2888
Fax (305) 373-2889

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