CONROY SIMBERG

CONNECT

LIABILITY CASE LAW UPDATES

CAR DEALERSHIPS THAT LOAN VEHICLES TO THEIR SERVICE CENTER CUSTOMERS ARE IMMUNE FROM VICARIOUS LIABILITY UNDER THE GRAVES AMENDMENT AS LONG AS THEY ARE NOT INDEPENDENTLY AND DIRECTLY NEGLIGENT

The Fourth District Court of Appeal, in Collins v. Auto Partners V. LLC, 276 So. 3d 817 (Fla. 4th DCA 2019), addressed the issue of whether a car dealership that provided its customers with courtesy loaner vehicles was protected from liability under the Graves Amendment. 49 U.S.C. § 30106. Graves provides, in pertinent part, that "an owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State . . . by reason of being the owner of the vehicle . . . for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if – (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner . . . ."

In this case, the vehicle involved in the accident was loaned to an employee of the dealership who was having his personal vehicle serviced there. The employee was treated no differently than any other customer, although there were discrepancies in the rental agreement paperwork, which the Plaintiff/Appellant argued gave rise to issues of fact precluding summary judgment for the dealership. The trial and appellate court disagreed, finding that the paperwork was immaterial to Graves because it was otherwise undisputed that the employee was using the car as a customer, not an employee. Because there was no issue of fact as to whether the dealership was "engaged in the trade or business of renting or leasing motor vehicles" and was not alleged to have been actively negligent, issues relating to the validity of the rental agreement were neither "genuine" nor "material." Therefore, summary judgment was appropriately granted in the dealership's favor.

* * *

WHERE ALL INDICIA OF OWNERSHIP OF A VEHICLE, OTHER THAN "BARE" LEGAL TITLE, HAVE BEEN TRANSFERRED TO A NEW OWNER, THE TRANSFEROR IS NO LONGER VICARIOUSLY LIABLE FOR OPERATION OF THE VEHICLE

The Fourth District Court of Appeal addressed the issue of whether the fact that a transferor has not legally transferred title through the Department of Motor Vehicles, but has otherwise transferred all indicia of ownership to the transferee, is sufficient to ensure protect the transferee from being held vicariously liable for the operator's fault. In Ramirez-Lucas v. Hutchinson, 276 So. 3d 841 (Fla. 4th DCA 2019), the trial court granted a directed verdict in favor of a father who sold his car to his son and, in doing so, transferred possession of the car to his son, cancelled his insurance on the vehicle, and executed a transfer of title that his son never forwarded to the DMV. On appeal, the Fourth District found that the doctrine of beneficial ownership still existed after Christensen v. Bowen, 140 So. 3d 498 (Fla. 2014), in which the Supreme Court narrowed the beneficial ownership exception to the dangerous instrumentality doctrine, such that the exception only applies where the transferor only holds "bare legal title" to the vehicle. In this case, the Fourth District found the exception applied because the only indicia of ownership remaining with the father was legal title and nothing more. Accordingly, the appellate court affirmed the directed verdict in the father's favor.

* * *

ACCIDENT REPORT PRIVILEGE IS NOT A TRUE PRIVILEGE; STATEMENTS REFERENCED IN THE REPORT ARE DISCOVERABLE BUT NOT ADMISSIBLE

The Second District Court of Appeal, in Anderson v. Mitchell, 2019 WL 1496258 (Fla. 2d DCA 2019), addressed the issue of whether the so-called "accident report privilege" precludes discovery of the

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statements of individuals involved in the accident. The privilege, located section 316.066(4), Florida Statutes, provides that "[crash] report[s] or statement[s] may not be used as evidence in any trial, civil or criminal . . . ." The Court found that the word "privilege" is a misnomer in that the statements are discoverable, and the "privilege" only precludes the admission of those statements into evidence.

* * *

FINANCIAL RELATIONSHIP BETWEEN DEFENSE FIRMS AND EXPERT WITNESSES IS DISCOVERABLE AS USEFUL IN ASSISTING PLAINTIFF'S COUNSEL IN IMPEACHING EXPERT, BUT LAW MAY NOT BE FAIRLY APPLIED; CERTIFIED TO SUPREME COURT

In Worley v. Central Florida Young Men's Christian Ass'n, Inc., 228 So. 3d 18 (Fla. 2017), the Supreme Court held that the financial relationship between a plaintiff's law firm and a treating physician to whom the plaintiff was referred was not discoverable because the physician could be impeached for bias by way of a letter of protection or other means. In two cases, Younkin v. Blackwelder, 2019 WL 847548 (Fla. 5th DCA Feb. 22, 2019), and Dhanraj v. Garcia, 2019 WL 1302540 (Fla. 5th DCA Mar. 22, 2019), the Fifth District Court of Appeal denied a Defendant's Petition for Writ of Certiorari seeking review of a trial court order compelling the defense to produce information regarding its counsel and/or its insurer's relationship with a particular expert, finding that the current state of the law permitted that discovery. However, the Court acknowledged that the law in this area was not being even-handedly applied to all litigants, and thus it certified the question to the Florida Supreme Court as to whether Worley should be applied with equal force to the discovery of the relationship between the defense and its expert witnesses. The Supreme Court has accepted jurisdiction to consider the issue.

* * *

FLORIDA SUPREME COURT TO CONSIDER WHETHER INSURANCE DEFENSE COUNSEL MAY BE SUED BY RETAINING CARRIER FOR LEGAL MALPRACTICE

In Arch Insurance Co. v. Kubicki Draper, LLP, 266 So. 3d 1210 (Fla. 4th DCA 2019), the Fourth District Court of Appeal addressed the issue of whether an insurance company that hired a law firm to represent its insured in a liability action has standing to sue that firm for legal malpractice. In this case, the carrier alleged that the firm's delay in raising the statute of limitations as an affirmative defense in the case against its insured resulted in a larger settlement than it otherwise may have paid to settle the claim against its insured.

In reviewing the governing law, the appellate court first noted that, in these cases, defense counsel is representing the **insured**, and not the **insurer**, notwithstanding that the insurer has retained and paid counsel. In fact, the Court noted, if that was the case, the insurer would have had to disclose the dual representation to the insured and, here, there was no such disclosure or agreement to dual representation. Consequently, the insurer was not an intended third-party beneficiary of the relationship between the insured and the law firm. Because the governing law requires privity between a law firm and a putative plaintiff to vest the carrier with standing to sue the firm for malpractice, the insurer in this case could not sue defense counsel even if it had been damaged as a result of counsel's alleged professional negligence.

The Fourth District certified the issue to the Florida Supreme Court as a matter of great public importance, and the Supreme Court has agreed to hear the case.

* * *

INSURER MAY NOT DEMAND APPRAISAL UNDER FLORIDA STATUTE 627.7015 BEFORE PROVIDING INSURED WITH NOTICE OF THE RIGHT TO MEDIATION

In Kennedy v. First Protective Insurance Co., 271 So. 3d 106 (Fla. 3d DCA 2019), the Third District Court of Appeal reversed the trial court's order compelling appraisal on the insurer's motion. In this case, the parties disputed the Plaintiffs' Hurricane Irma claim for several months before the insurer moved to compel appraisal. The trial court granted the motion, and the Plaintiffs appealed. In reversing, the appellate court found that section 627.7015, Florida Statutes, which provides an alternative mediation procedure for the resolution of disputed property insurance claims, places the burden of notifying a policyholder of its right to participate in the mediation program on the insurer, and if the insurer does not do so, it has no right to compel appraisal of the claim.

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LIABILITY CASE LAW UPDATES
Continued

DEFENDANT RAISING INTOXICATION DEFENSE UNDER FLORIDA STATUTE 768.36 MUST PROVE NOT ONLY THAT PLAINTIFF WAS INTOXICATED AND MORE THAN 50 PERCENT AT FAULT FOR THE ACCIDENT, BUT MUST ALSO FIND THAT THE INTOXICATION WAS CAUSALLY RELATED TO THE PLAINTIFF'S ACCIDENT

The Fifth District Court of Appeal held that, where the defendant raises the plaintiff's intoxication as an affirmative defense under section 768.36, Florida Statutes, which precludes the plaintiff's recovery where he/she was intoxicated and more than 50 percent at fault for the accident, the defendant must demonstrate, and the jury must find, that the plaintiff's fault was a result of his/her intoxication. In Kempton v. McComb, 264 So. 3d 1180 (Fla. 2019), the jury found that the Plaintiff was more than 50% at fault, and that his blood alcohol level was 0.08 or higher, but was not asked, and did not find, that the plaintiff's fault was "[a]s a result . . . [an] alcoholic beverage" as the statute expressly requires. The appellate court reversed the final judgment in the defendant's favor and remanded for entry of a judgment in the plaintiff's favor in the amount of the gross verdict less the amount attributed to the plaintiff's fault. The court made it clear that "[i]f a party intends to rely on section 768.36 as a defense, the jury must make all of the statute's required factual determinations."

* * *

A PRESUIT AFFIDAVIT SUBMITTED BY PLAINTIFF FROM A HEALTHCARE PROVIDER WHO DOES NOT SPECIALIZE IN THE SAME FIELD AS THE DEFENDANT DOES NOT MEET THE MEDICAL MALPRACTICE PRESUIT INVESTIGATORY REQUIREMENTS FOR FILING A MALPRACTICE ACTION

In Davis v. Karr, 264 So. 3d 279 (Fla. 5th DCA 2019), the Fifth District Court of Appeal addressed the issue of whether a presuit affidavit, which is required before a plaintiff may sue a healthcare provider for medical negligence, must be from a physician in the same field as the putative defendant in order to satisfy the statutory presuit notice requirement. Pursuant to the statute, the affidavit must address whether there are reasonable grounds to believe that the defendant provider's alleged negligence resulted in injury to the claimant.

In this case, the Plaintiff Estate procured three affidavits from an emergency room physician, a radiologist, and a nurse, respectively, asserting that Dr. Karr, an orthopedic surgeon, fractured the decedent's femur during hip replacement surgery. Dr. Karr contended that the affidavits were legally insufficient to satisfy the presuit requirements because none of them were provided by an orthopedic surgeon. The Plaintiff disagreed, arguing that the medical malpractice act contained a less stringent standard for the qualification of experts during the presuit screening process.

The trial and appellate courts disagreed, specifically finding that, in order to satisfy the statutory presuit requirements, the Plaintiff was required to produce an affidavit from an orthopedic surgeon to corroborate the negligence allegations against Dr. Karr. Accordingly, the appellate court affirmed the final judgment entered in Dr. Karr's favor.

* * *

TRIAL COURT MAY COMPEL PRODUCTION OF A VIDEO BEFORE PLAINTIFF'S DEPOSITION IF THE VIDEO WAS OF THE ACCIDENT AND NOT A SURVEILLANCE VIDEO TAKEN OF THE PLAINTIFF AFTER HIS OR HER INJURY FOR THE PURPOSE OF IMPEACHMENT

Ordinarily, a plaintiff is not entitled to discover surveillance footage taken by the defense for the purpose of impeachment before the he or she is deposed. However, in Business Telecommunications Services, Inc. v. Madrigal, 265 So. 3d 676 (Fla. 3d DCA 2019), the Third District Court of Appeal distinguished those videos taken of the plaintiff after an accident from those taken of the alleged incident, finding that the trial court did not err in compelling production of the accident video before the Plaintiff's deposition.

* * *

ATTORNEYS' FEES AWARDED AS A SANCTION FOR RAISING A CLAIM NOT SUPPORTED BY THE LAW COULD ONLY BE AWARDED AGAINST PLAINTIFF'S COUNSEL AND NOT THE PLAINTIFF HIMSELF

Section 57.105, Florida Statutes, allows a party to seek attorneys' fees as a sanction where a claim or defense is unsupported by fact and/or law, and the opposing party refuses to drop or withdraw that claim or defense after 21 days' notice of the moving party's intent to seek such sanctions. In Davis v. Bailynson, 268 So. 3d 762 (Fla. 4th DCA 2019), the Fourth District Court of Appeal clarified that, where a claim or defense is legally insufficient or otherwise insupportable as a matter of law, those sanctions are recoverable directly from the opposing party's counsel and not from the opposing party. This is in contrast to another part of the statute addressing claims or defenses unsupported by fact. In those cases, the moving party may seek attorneys' fees from both the attorney and his/her client, in equal amounts, unless the attorney reasonably relied on his/her client's representations, in which case, those fees are recoverable only against the client.

LIABILITY CASE LAW UPDATES
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FLORIDA STATUTE SECTION 627.7074, STAY PENDING NEUTRAL EVALUATION IN A SINKHOLE SUIT, DOES NOT TOLL THE TIME FOR SERVING A PROPOSAL FOR SETTLEMENT

The Second District Court of Appeal, in Old Dominion Insurance Co. v. Tipton, 269 So. 3d 653 (Fla. 2d DCA 2019), addressed the issue of whether, in a sinkhole suit that has been stayed pending neutral evaluation, the time for serving a proposal for settlement is likewise stayed. The Court found that the Proposal, which had been served more than 90 days after suit had been filed and after the stay had been lifted, was timely, and there was nothing in section 768.79, Florida Statutes, or Florida Rule of Civil Procedure 1.442 providing that a stay of court proceedings also stays service of a Proposal. Nor is there anything in the sinkhole statute, section 627.7074, that could be read to stay the period for serving a Proposal. Therefore, the Court reversed the trial court's order finding the Proposal unenforceable.

* * *

FINANCIAL DISCOVERY LIMITATIONS APPLICABLE TO AN EXPERT APPLY WITH EQUAL FORCE TO A BUSINESS ENTITY AFFILIATED WITH THE EXPERT

In Orthopedic Center of South Florida v. Sode, 274 So. 3d 1127 (Fla. 4th DCA 2019), the Fourth District Court of Appeal addressed an issue of first impression, namely, whether the financial discovery limitations set forth in Florida Rule of Civil Procedure 1.280(b)(5) apply to entities affiliated with the expert. The Plaintiff served a subpoena duces tecum on Orthopedic Center, the entity under which the doctor who performed the defendants' compulsory medical exams, seeking invasive financial discovery. The Center objected to the discovery as outside the scope of permissive discovery set forth in the civil procedure rules, and the Plaintiff responded that those rules did not protect the Center because it was a corporation, and therefore was not afforded the protections of the expert.

The trial court did not address the Center's objections against the backdrop of the civil procedure rules but sustained some objections and overruled others. The Center sought immediate appellate review on the grounds that the Court's order violated a "clearly established principle" and permitted discovery of highly sensitive financial information that, once disclosed, could not be remedied by post-disclosure orders, and the appellate court granted that relief. The Fourth District reasoned that permitting the type of broad and invasive financial discovery from a corporation that could not be sought from an individual provider would render the civil procedure rule limiting that discovery meaningless and would prejudice parties seeking expert witnesses.

* * *

THIRD DISTRICT DEFINES "SUPPLEMENTAL CLAIM" AS AN ADDITIONAL CLAIM MADE AFTER AN INSURED HAS ACTUALLY UNDERTAKEN OR COMMENCED REPAIRS AFTER INSURER HAS TENDERED INITIAL PAYMENT

The Third District Court of Appeal rendered an opinion on the issue of whether an insured's claim for additional payment was a "supplemental claim" or simply a "second bite at the apple" in a case in which the insured had already lost a first party property action against his insurer. In Chavez v. Tower Hill Signature Insurance Co., 278 So. 3d 231 (Fla. 3d DCA 2019), Chavez appealed from a final summary judgment rendered in favor of Tower Hill in an action that the trial court found duplicated a prior action brought by the insured against the insurer seeking damages for the same loss.

The claim arose out of a water leak caused by a broken drain line. Chavez submitted a claim for the damage to Tower Hill, and both parties obtained competing estimates. Tower Hill issued payment in the amount of its estimate, less the deductible and depreciation. Chavez sued Tower Hill for breach of contract, and the trial court granted summary judgment in Tower Hill's favor, finding that that the insured had not incurred any damage over and above the payments already made, and further finding there was no evidence of additional damage. The summary judgment, which was affirmed on appeal, did not preclude Chavez from submitting a supplemental claim.

After the affirmance, Chavez submitted a "conditional contract" to Tower Hill for the repairs, which Chavez later claimed constituted a "supplemental claim" for damages arising from the same loss. Tower Hill obtained a competing estimate of far less than the insureds, and it issued an additional payment in conformity with that estimate. Chavez filed another suit against the carrier, alleging that it breached the contract by failing to pay his "supplemental claim." Tower Hill sought, and received, a summary judgment on the grounds that this second suit was barred because the claim was essentially identical to the first claim which had been litigated, and appealed, to fruition. Chavez once again appeal.

On appeal, the Third District found that a "supplemental claim" is "[a] claim for further relief based on events occurring after the original claim was made." Similarly, section 626.854(10)(a), Florida Statutes, which regulates public adjusters, defines a "supplemental claim" as one which "seeks additional payments for a claim that has been pre-

viously paid in part or in full or settled by the insurer." The Court noted that both definitions contemplate the insured making an additional claim after an insurer's initial payment, and neither contemplates the notion that a supplemental claim is nothing more than the identical claim previously litigated to finality. The Court concluded that a "supplemental claim" means "an additional claim made after an insured has actually undertaken or commenced repairs arising out of damages for a covered loss and after the insurer has tendered initial payment based upon its determination of actual cash value."

* * *

FIFTH DISTRICT CERTIFIES QUESTION OF WHETHER AN INSURED MAY RECOVER EXTRACONTRACTUAL, CONSEQUENTIAL DAMAGES IN A BREACH OF CONTRACT ACTION NOT INVOLVING BAD FAITH

In Manor House, LLC v. Citizens Property Insurance Co., 277 So. 3d 658 (Fla. 5th DCA 2019), the Fifth District Court of Appeal addressed the issue of whether an insured may recover extra-contractual, consequential damages in a breach of contract action against his or her insurer, in which the insured has not alleged a bad faith claim under section 624.155, Florida Statutes. In this case, the trial court granted Citizens a partial summary judgment on the insured's extra-contractual damage claim, in which the insured apartments alleged that Citizens breached its duties to timely adjust the claim and pay covered damages, and further alleged that as a result of the delay, it could not rent the apartments.

By statute, Citizens is immune from suit for bad faith claims. In this case, however, the insured alleged that it sought damages based solely on Citizens' alleged breach of contract, and not for bad faith conduct. The appellate court found that the insured was entitled to seek consequential damages arising from Citizens' alleged breach if those damages were contemplated by the parties at the time of insurance policy was created, just as in any other breach of contract action. The Fifth District certified the issue to the Florida Supreme Court as a matter of great public importance.

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TWO CASES ADDRESS ISSUE OF WHETHER SUITS ARISING FROM PATIENT FALLS SOUND IN NEGLIGENCE OR MEDICAL MALPRACTICE

In McManus v. Gamez, 276 So. 3d 1005 (Fla. 2d DCA 2019), the Second District Court of Appeal found that, where the Plaintiff alleged that he fell off an examination table after the completion of medical testing, the cause of action was one for simple negligence, rather than medical malpractice, which would have required the plaintiff to serve presuit notice of his claim. The Court acknowledged that some courts have found that similar claims sounded in malpractice, but determined that in this case, the testing had been completed at the time the patient fell off the table, and thus the claim was for ordinary negligence. The Court emphasized that it was basing its decision solely on the allegations of the complaint, which the trial court had dismissed with prejudice, but that if, during the course of discovery, the case "morphs" into more of a medical negligence claim, the defendants would not be foreclosed from challenging the claim based on the Plaintiff's failure to comply with the malpractice statute.

In contrast, the Fourth District, in North Broward Hospital District v. Slusher, 2019 WL 3938792 (Fla. 4th DCA Aug. 21, 2019), found that a claim based on a nurse's alleged negligence in assisting a patient in getting out of bed sounded in medical negligence. The patient had been designated as a "fall risk," and in the course of assisting the patient in getting out of bed to go to the bathroom, the nurse answered her cell phone, and the patient fell. The Court found that the claim arose out of medical treatment and was directly related to the improper application of medical services to the patient. The Court explained that the sufficiency of the nurse's supervision of an admitted "at fall risk" patient would require the factfinder's consideration of the professional nursing standard of care. Therefore, the Plaintiff's claim was for medical negligence.

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WHERE OFFER OF JUDGMENT EXPLICITLY STATED THAT IT DID NOT INCLUDE PUNITIVE DAMAGES WHICH HAD NOT BEEN PLEAD BUT WHICH WERE SOUGHT LATER IN THE CASE, PLAINTIFF WAS NOT ENTITLED TO RECOVER ATTORNEYS' FEES BASED ON A FINAL JUDGMENT INCLUDING PUNITIVE DAMAGES

The First District Court of Appeal, in Palmentere Bros. Cartage Service, Inc. v. Copeland, 277 So. 3d 729 (Fla. 1st DCA 2019), held that where the Plaintiffs' Offer of Judgment explicitly excluded punitive damages because they had not pled such a claim at the time they served the proposal, but the Plaintiffs sought and recovered those damages thereafter, they were not entitled to recover attorneys' fees under their Offer. The Court found that the Proposal for Settlement statute and accompanying Rule of Civil Procedure require that the Court

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determine entitlement based on the ultimate judgment obtained. In this case, that judgment included punitive damages, which Plaintiffs did not seek at the time they served the proposal. Because the Offer of Judgment must be evaluated at the time of the offer, and not against the backdrop of the ultimate recovery, and since the Defense could not have known that the Plaintiffs would later add a punitive damage claim, the Court found the Plaintiffs' Offer of Judgment unenforceable.

* * *

WORKERS' COMPENSATION "HORIZONTAL" IMMUNITY APPLIES ONLY WHEN A CONTRACTOR SUBLETS A PART OF ITS CONTRACT WORK TO A SUBCONTRACTOR OR SUBCONTRACTORS; ENTITY DEVELOPING PROJECT FOR ITSELF AS OWNER IS NOT CONSIDERED A "CONTRACTOR" SUBLETTING ITS WORK

The Second District Court of Appeal considered the question of whether employees of contractors who were working for Lennar, who was both the owner and developer of property, were entitled to workers' compensation immunity. In Heredia v. John Beach & Associates, Inc., 278 So. 3d 194 (Fla. 2d DCA 2019), the Plaintiff was an employee of QGS Department, Inc., which was hired by Lennar to perform road work in one of its subdivisions. Mr. Gross was an employee of JBA, which had also been hired by Lennar to provide surveying work, at the time he negligently backed his truck into Heredia. Heredia filed suit against Gross and JBA, both of whom raised workers' compensation immunity as an affirmative defense.

Both sides filed cross-motions for summary judgment on the issue of whether the defendants were immune from tort liability under section 440.10(b), Florida Statutes, the so-called "horizontal immunity" statute. The statute provides immunity when "a contractor sublets any part of parts of his or her contract work to a subcontractor or subcontractors." In this case, Lennar was not a contractor; it was an owner who had hired contractors. As such, the appellate court found, neither JBA nor Gross was immune from civil liability from Heredia's claim.

* * *

TRIAL COURT CANNOT CONSIDER VIDEO EVIDENCE THAT COMPLETELY NEGATES OR REFUTES CONFLICTING EVIDENCE PRESENTED BY NON-MOVING PARTY ON SUMMARY JUDGMENT; QUESTION CERTIFIED

In Estate of Lopez v. Wilsonart, LLC 275 So. 3d 831 (Fla. 5th DCA 2019), the Fifth District Court of Appeal addressed the novel question of whether the trial court may consider video evidence that refutes allegedly conflicting evidence cited by the non-moving party in opposition to a motion for summary judgment. In this rear-end collision case, the defendant had a forward-facing dashboard camera which showed that the defendant's driving pattern blatantly contradicted eyewitness testimony that the defendant suddenly changed lanes right before the impact. The trial court considered the video, which had not been altered in any way, as evidence supporting summary judgment in the defendant's favor. The appellate court reversed, finding that by determining that the video was stronger evidence than the eyewitness testimony, the court improperly weighed the competing evidence, which is prohibited on summary judgment.

However, the Court found that in light of "technological advancements" rendering video and digital evidence more frequently used in court, the issue was one of great public importance and it certified the question to the Supreme Court for its consideration. On October 15, 2019, the Supreme Court agreed to consider the case.

* * *

WHERE AN INSURANCE POLICY DESIGNATES A CORPORATION "D/B/A" FICTITIOUS ENTITY AS THE NAMED INSURED, COVERAGE IS LIMITED TO THE FICTITIOUS ENTITY'S BUSINESS AND OPERATIONS AND NOT TO ANY AND ALL BUSINESSES OPERATED BY THE CORPORATION

The First District Court of Appeal, in Musselwhite v. Florida Farm General Insurance Co., 273 So. 2d 251 (Fla. 1st DCA 2019), addressed an issue of first impression in Florida, namely, whether an insurance policy that lists the named insured as a corporation "doing business as" a fictitious entity covers the business of the fictitious entity or businesses operated by the corporation. In this case, the policy was obtained by Joseph Hart, who operated a Feed Store through his corporation at the time he took out the policy. Several years after he first obtained the policy, Mr. Hart began a new business drilling wells, which he operated under the same corporate name, but with a different "d/b/a." Mr. Hart did not obtain insurance for his new venture because he could not afford the premium. Florida Farm, the carrier, did not insure well-drilling businesses.

Mr. Musselwhite, an independent contractor working for Mr. Hart, sustained serious injuries while drilling a well on a customer's property, and thereafter sued Mr. Hart and his corporation. The Defendants sued Florida Farm, which denied coverage for the claim based on its

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determination that neither Mr. Hart nor his corporation had coverage for claims arising from the well-drilling business. The parties filed cross-motions for summary judgment, and the trial court ruled in FFB's favor, finding that its policies provided no coverage for Mr. Musselwhite's claims because those policies were limited to the Feed business.

On appeal, the First District affirmed the summary judgment, rejecting Musselwhite's argument that, because a fictitious name was not a viable legal entity separate and apart from its corporate principal, the policy should be deemed to insure the corporate entity for any business it operates under a fictitious name. It likewise rejected Musselwhite's contention that, because well drilling was not specifically excluded under the policy, the risk should be covered. Finally, the Court rejected Musselwhite's argument that well drilling activity was "incidental or related to the operation of the feed store" such that it should be covered under the terms of the policy.

The appellate court acknowledged that courts in other jurisdictions have been split on the issue of whether, where the named insured under a policy is identified as "doing business as," coverage is limited only to the business done under the fictitious name. However, the Court reasoned, the greater weight of authority supported the trial court's conclusion that the "d/b/a" designation limited coverage to the business operated under the "d/b/a" because to hold otherwise would frustrate the intent of the policy and subject insurers to open-ended exposure to liability for any new business ventures that might be undertaken by the principal entity.

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THIRD DISTRICT CLARIFIES WHETHER AN INSURER MUST PLEAD AND PROVE THAT IT WAS PREJUDICED BY AN INSURED'S NON-COMPLIANCE WITH POST-LOSS OBLIGATIONS IN A HOMEOWNER'S POLICY WHERE THE POLICY PROVIDES THAT NO SUIT MAY BE BROUGHT AGAINST THE CARRIER UNTIL THE INSURED HAS "FULLY COMPLIED" WITH THE POLICY TERMS

In American Integrity Insurance Co. v. Estrada, 276 So. 3d 905 (Fla. 3d DCA 2019), the Third District Court of Appeal addressed the issue of whether an insurer must plead and prove that it was prejudiced by an insured's failure to satisfy post-loss obligations contained in his policy. The Court recognized that this issue has not be definitively decided in the Third District in spite of the fact that it has adjudicated innumerable property insurance cases.

In a lengthy and detailed opinion, the Court concluded that in order for an insurer to successfully prove a coverage defense based on its insured's failure to satisfy post-loss obligations to the extent that coverage should be forfeited, the insurer must plead and prove that the insured has materially breached a post-loss policy provision. If and when it does so, the burden then shifts to the insured to prove that any such breach did not prejudice the carrier.

The Third District acknowledged that case law from the Fourth and Fifth Districts conflicted on the issue of whether an insurer must demonstrate that it has been prejudiced by the insured's non-compliance with a post-loss obligation in order to warrant a forfeiture of coverage. The Fourth District has held that the insurer need not demonstrate its prejudice if it proves that the insured has breached a material condition of the policy, while the Fifth District has required that the insurer demonstrate its prejudice before it would be entitled to deny coverage based on a breach of policy conditions. The Third District agreed with the Fifth District that the insurer must be prejudiced by the insured's non-compliance with a post-loss condition in order for the insured to forfeit coverage. In doing so, the Third District certified conflict with the Fourth District's case law on the issue.

On the issue of prejudice, the Third District clarified the parties' respective burdens. The Court held that when an insurer has proven the affirmative defense that the insured has failed to substantially comply with his or her post-loss obligations, the insurer's prejudice is presumed, and the burden then shifts to the insured to show that the carrier was not prejudiced.

* * *

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Focus Practice Feature

Construction Litigation

Conroy Simberg has developed a diverse and well-respected construction law practice. Our lawyers actively defend contractors, subcontractors, developers, condominium owners and associations, property owners, engineers, suppliers and architects in all aspects of complex construction litigation.

Whether we are representing a client facing a multimillion dollar construction defect claim or working to resolve a complex breach of contract case, our attorneys strive to secure the best results for our clients in a timely and cost-effective manner. Time is critical in the construction industry and we understand that disputes and legal claims can result in costly delays for our clients.

Construction Law Claims

The construction law team at Conroy Simberg advises and represents clients in a wide range of construction law matters, including:

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

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

Our construction law attorneys are frequently requested to prepare coverage opinions on construction and indemnity claims, and litigate those issues in declaratory judgment actions. We also regularly review contracts for businesses and professionals working across the construction industry, including design professionals and contractors. Our attorneys carefully analyze contracts to identify critical legal, business, and financial concerns in order to develop contractual arrangements that avoid future problems and liability issues in representing healthcare providers in state licensing issues and disciplinary matters relative to their practices.

Chair of the Construction Practice

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WORKERS' COMPENSATION CASE LAW UPDATES

IME REPORT IN WORKER'S COMPENSATION CAN BE PROPERLY AUTHENTICATED THROUGH A RECORDS CUSTODIAN DEPOSITION.

In Blanco v. Creative Management Services, 2019 WL 5250797 (Fla. 1st DCA Oct. 17, 2019), the Claimant alleged that exposure to construction or cement dust from his job site caused his respiratory condition. Weeks before his employment with the insured, the Claimant was seen by his PCP, whose report documented that he was a heavy smoker and an increase in his use of an inhaler. The Claimant then started working with the insured and claimed that he observed dust and debris in the air at work, which caused him to increase the use of this inhaler, and in fact, within 11 days of working, his wife called paramedics and had him transported to the ER after which he was diagnosed with advanced COPD and an acute exacerbation of unspecified asthma. The JCC denied the claim, and the Claimant appealed, arguing that the admission of expert testimony and evidence supporting the denial was improper.

The argument specifically involved the toxicologist, a board certified occupational medicine doctor who the Carrier selected as their IME. The Claimant argued that because he was not board certified in internal medicine or pulmonology, he was not qualified to render opinions as to the cause of the Claimant's respiratory condition. The First District Court of Appeal, in rejecting this argument, noted that the doctor in fact was board certified in occupational medicine and had extensive training and experience in exposure cases.

The Claimant further argued that the IME report, which was admitted through a records custodian deposition, did not qualify as a business record and thus was hearsay. In other words, it was not proper to admit an IME report through the deposition of the records custodian versus the deposition of the physician. The First District dismissed this argument, holding that case law disallowing IME reports through a records custodian deposition did not apply in workers' compensation as the IME is allowed through statute, that admissibility of records in workers' compensation is limited to only authorized providers, IMEs and EMAs, and because there is no impact on a jury as a JCC hears these cases.

* * *

ISSUES RELATING TO DISQUALIFICATION OF A JCC NEED TO BE BROUGHT UP IMMEDIATELY AND NOT FOR THE FIRST TIME ON APPEAL.

In Godwin v. Hillsborough School Board, 277 So. 2d 141 (Fla. 1st DCA 2019), the JCC denied compensability of the Claimant's accident. On the appeal, the Claimant first argued that the denial was not based upon competent substantial evidence. In upholding the denial, the First District Court of Appeal addressed the second contention, which was that that JCC had an ex parte meeting with the EMA doctors, and thus the JCC should be disqualified. Specifically, upon reviewing the EMA, the JCC noted that several diagnostic tests were recommended, and thus the JCC reached out to the doctor to address the need for diagnostics. The following day, the JCC informed the parties of the conversation and instructed the Claimant to return to the EMA for diagnostics. The Claimant sought to disqualify the JCC; however, the First District held that the Claimant could not raise this argument for the first time on appeal.

* * *

ONLY ISSUES LISTED IN THE PRETRIAL STIPULATION SHOULD BE ADDRESSED IN A FINAL MERITS HEARING

In Napier v. City of Riviera Beach, 278 So. 3d 881 (Fla. 1st DCA 2019), the Employer/Carrier appealed the JCC's ruling determining a date of MMI which was not ripe. In reversing this MMI opinion, the First District Court of Appeal noted that the parties were scheduled for a Final Merits hearing solely on the issue of back surgery; however, ten days beforehand, the Claimant filed a new Petition requesting temporary benefits. The indemnity claim had not been mediated, and was not addressed in the pretrial statement. Thus, because the only issue before the JCC was the issue of surgery, which did not require a determination of MMI, and there were no claims in the pretrial requiring a determination of MMI, the JCC erred in addressing the MMI status.

* * *

AN ESTOPPEL ARGUMENT MUST INCLUDE EVIDENCE OF MISREPRESENTATION AND DETRIMENTAL RELIANCE

In Schain v City of Hollywood Police Department, 27 So.3d 209 (Fla. 1st DCA 2019), the Claimant appealed the denial of his claim as untimely based on the statute of limitations, arguing that the Employer/Carrier should have been estopped from raising that defense. There was no dispute that the statute of limitation had run. By way of background, on August 30, 2017, Claimant's counsel sent a fax to the Employer/Carrier requesting authoriza-

tion of a replacement neurologist because the prior neurologist died and authorization of an orthopedic doctor as the one-time change. The following day, the Claimant filed a Petition for Benefits requesting these benefits along with attorney's fees and costs. By September 1, 2017 (same day as the Petition) the defense counsel sent an email advising that the Employer/Carrier authorized a one-time change, and that the new adjuster would set the appointment information shortly. However, by September 6, 2017, the Employer/Carrier filed a formal response to the Petition and argued that the statute of limitations had run.

The Claimant argued that the email from defense counsel constituted the initial response to the Petition, and thus the Employer/Carrier was estopped from raising the statute of limitations defense. Alternatively, he argued that the agreement to provide a one-time change revived the statute of limitations. In contrast, the Employer/Carrier noted that the email in fact was responding to the attachment which was the August 30, 2017 request and, in fact, the formal Response to Petition for Benefits was the initial response to the Petition.

In rejecting the estoppel argument, the Court noted that, in order to demonstrate estoppel under section 440.19(4), Florida Statutes, the Claimant must show that: (1) the E/C misrepresented a material fact; (2) he or she relied upon the misrepresentation; and (3) Claimant detrimentally changed his or her position because of the misrepresentation. The Court noted that the record was devoid of any evidence of reliance upon the email and, in fact, the Claimant filed the Petition before receiving the response to the email.

* * *

CLAIMANT MUST ESTABLISH ENTITLEMENT TO PT SUPPLEMENTAL BENEFITS AFTER THE AGE OF 62 WITH SUFFICIENT EVIDENCE

In SBCR d/b/a Southern Concrete Repair v. Doss, 275 So.3d 1290 (Fla. 1st DCA 2019), the Employer/Carrier appealed the JCC's ruling that the Claimant satisfied the statutory exception to age limit, and thus awarded PT Supplemental benefits to the Claimant after the age of 62. In this instance, the Employer/Carrier accepted the Claimant as PTD as a result of his work accident in 2009, and thus paid PTD and PT Supplemental Benefits until the Claimant reached age 62, at which time PT Supplemental Benefits ceased. The issue was whether the Claimant established that he was not eligible for either social security disability benefits or social security retirement benefits, which is an exception to the cap of PT Supplemental benefits. The Claimant conceded that he was entitled to social security retirement benefits but testified that his post-accident application for social security disability benefits was denied because he had not worked enough quarters. He further testified that he would have continued to work for the Employer but for the injury.

In reversing the JCC's order, the First District noted that its review was limited to whether competent, substantial evidence supported the JCC's findings of fact. The only evidence was the Claimant's testimony that he did not have enough quarters, and that he would have continued to work but for the accident. The Claimant provided no documentation to support these assertions. Specifically, the First District noted that there was no documentation as to how many quarters he was short, the date of his application, the date of the denial, or the precise dates of the relevant 10 year time period (the standard is at least 20 quarters during the ten years prior). The Claimant further failed to show when he became unable to work as a result of the work accident.

* * *

ENTITLEMENT TO TPD STEMS FROM LOST WAGES RESULTING FROM DISABILITY. VOLUNTARY DEMOTION (MADE PRIOR TO THE ACCIDENT) IS NOT A BASIS FOR TPD BENEFITS.

In Publix Risk Management v. Carter, 278 So. 3d 204 (Fla. 1st DCA 2019), the Employer/Carrier appealed an award of TPD benefits. Approximately one month prior to her work accident, the Claimant changed jobs with the insured so that she could work at a location closer to her home. Consequently, her hourly rate decreased from $17.75 per hour to $15.20 per hour. Post-accident, she continued to work within her restrictions at a rate of $15.20 per hour. Six months later, she filed a petition for TPD benefits, which the E/C denied on the basis that the claimed loss of earnings was caused by the Claimant's voluntary decision to take a demotion just before the accident. On appeal, the E/C argued that the work injuries did not cause the Claimant's lost wages, and in fact her post-accident wages were unchanged as compared to those she was earnings in the month before the accident. The First District agreed, reversing the JCC's award on the basis that the Claimant's decrease in earnings were caused by her change of job before the accident, not as a result of her disability.

* * *

WORKERS' COMPENSATION CASE LAW UPDATES Continued

JUDGE MUST ADDRESS WHETHER THERE IS A JOB AVAILABLE WHEN DETERMINING A VOLUNTARY LIMITATION OF INCOME DEFENSE AGAINST TPD BENEFITS

In Clarke v. Florida Department of Financial Services, 275 So.3d 846 (Fla. 1st DCA 2019), the Claimant appealed the denial of TPD benefits, penalties, and interest. Specifically, the Claimant sustained an accident in 2003 wherein he injured his neck, ultimately resulting in a cervical discectomy and fusion, necessitating pain management treatment. Ultimately, per the JCC's findings, he was at overall MMI as of February 13, 2018. Following his release to return to work post-surgery, but prior to MMI, the Claimant worked for several employers through 2014. Most recently, he worked at a company earning $100.00 weekly but took off at the end of June 2014 after his father's death. Upon returning, this employer did not have work available. The Carrier, in turn, paid TPD sporadically, most recently through June 30, 2014. In its Order, the JCC denied TPD benefits from July 1, 2014, on the grounds that the Claimant voluntarily limited his income by not working. In reversing the denial of TPD benefits, The First District Court of Appeal noted that the JCC did not make a finding as to whether a job was available to the Claimant when he returned to Florida after his father's death. The Court determined that the JCC's insufficient findings did not support the denial. The Court also rejected the Employer/Carrier's argument that there was a break in causal connection between the workplace injury and any loss of earnings because, while there was support for this argument on the record, the JCC did not make any findings on the break of causation.

* * *

EMA STATUTE FOUND CONSTITUTION AS IT DOES NOT VIOLATE SEPARATION OF POWERS, EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE FLORIDA AND FEDERAL CONSTITUTIONS

In De Jesus Abreu v. River land Elementary School, 2019 WL 2505304 (Fla. 1st DCA 2019), the Claimant appealed the JCC's denial of shoulder surgery, arguing that the presumption of correctness afforded to an EMA's opinions is unconstitutional as a violation of separation of powers, equal protection, and due process guarantees of the Florida and United States constitutions. The First District Court of Appeal disagreed and upheld the denial. Notably, the EMA's opinion addressed whether the Claimant had a full thickness tear and thus whether surgery is medically necessary, to both of which his opinion was no. The parties did not depose him; rather this report was the sole source of his opinions.

At the Final Hearing, the Claimant argued that the EMA opinion should be rejected as conclusory, baseless, and not supported by competent, substantial evidence. The Claimant challenged the opinions reviewed and the thoroughness of the examination. The JCC denied the request for surgery based upon the opinion of the EMA, finding that, although the Claimant's IME testimony was "persuasive," it was not convinced, without hesitancy, that the opinion of the EMA were not correct.

The First District upheld both the JCC's ruling and the constitutionality of the statute. As to the separation of powers argument, the Court noted that the heightened burden of persuasion created by section 440.13(9)(c), Florida Statutes, does not violate the constitution because it falls within the purview of the Legislature regarding evidentiary issues in workers' compensation cases. As to due process, the Claimant essentially argued that the presumption is too strong, and overturning the presumption is insurmountable in light of the restrictions on admissible testimony in workers' compensation cases. The Court found that the presumption is not insurmountable and that it does not deny the right to present evidence because it still permits notice and opportunity to be heard. The Court reasoned that the Claimant made a strategic decision to forego deposing the EMA before the hearing, despite denials of her motion to strike the EMA opinions, which diminishes this argument. Finally, under equal protection, the Court found that the EMA statute applies equally to both Claimant's and Employer/Carriers.

In terms of the EMA opinion itself, the JCC was within its discretion to deny the surgery based upon the presumption of correctness of the EMA opinion as she found no clear and convincing evidence to the contrary.

* * *

CONROY SIMBERG CONNECT

Written and Edited by:

Stephanie A. Robinson, Partner

Samuel Spinner, Associate

Hinda Klein, head of the firm's appellate department, successfully defended a directed verdict in favor of a father who had transferred ownership of a vehicle to his son before his son was in a car accident that killed the plaintiff's decedent. In Ramirez-Lucas v. Hutchinson, trial counsel obtained a directed verdict on the issue of whether the father still owned the vehicle solely because his son had neglected to transfer the title with the Department of Motor Vehicles. The trial and appellate courts found that the father's retention of "bare legal title," without beneficial ownership, was insufficient to render him vicariously liable for his son's negligent driving.

* * *

Ms. Klein, along with associate **Sam Spinner**, was also successful in defending a summary judgment she obtained in Collins v. Auto Partners V, LLC, in which the defendant auto dealership had provided a "loaner" vehicle to its repair shop customer, who was in an accident while driving the vehicle. At issue was whether the Graves Amendment protected the dealership from vicariously liability for the driver's negligence because it was in the business of renting or leasing vehicles and was not otherwise negligent. In this case of first impression, the trial court and the Fourth District Court of Appeal agreed that, under the Graves Amendment, the dealership would not be deemed the owner of the vehicle for purposes of assessing vicarious liability.

* * *

Ms. Klein was able to obtain an affirmance of a defense verdict in Frazier v. Florida Public Utilities Co., a case in which FPU'S employee hit a pedestrian while driving an FPU van. The jury found that FPU'S employee was not negligent in failing to see the Plaintiff, who was crossing the street at night and outside the cross-walk, before he hit her. On appeal, the Plaintiff argued, among other things, that the trial court abused its discretion in excluding from evidence FPU'S failure to maintain the vehicle's "black box" because the Plaintiff never raised the failure to maintain that evidence at any time before trial.

* * *

Ms. Klein obtained an affirmance of a summary judgment in an insurance coverage case handled by West Palm Beach partner, Bob Moses. In Musselwhite v. Florida Farm General Ins. Co., Mr. Moses obtained a summary judgment on the issue of the extent of insurance coverage provided to a corporation "d/b/a" fictitious name. In a case of first impression in Florida, the trial court found that Florida Farm's coverage was limited to the business of the fictitious entity and did not cover claims made against the corporate entity arising from activities other than those conducted by the fictitious entity. The First District affirmed that summary judgment in all respects.

APPELLATE WINS

* * *

Ms. Klein succeeded in obtaining a partial reversal of a multi-million dollar verdict rendered in a coverage case involving excess insurance for a hurricane claim filed on behalf of a company that was in the process of renovating and upgrading a property into a luxury hotel at the time two hurricanes hit the Vero Beach area. In the first trial in Pin-Pon Corp. v. Landmark American Ins. Co., the Plaintiff's counsel stipulated that the Plaintiff was seeking the policy limits of $2.5 million in Code Upgrade coverage, but after the first verdict was reversed for a retrial on that element of damages, the Plaintiff's counsel withdrew his initial stipulation and sought, and was awarded, more than $6 million in damages on this same claim. The Fourth District reversed the second judgment, finding that the trial court erred in permitting the Plaintiff to withdraw its prior stipulation as to the policy limits and the amount of damages it sought.

* * *

Sam Spinner obtained affirmance of a final summary judgment argued by trial counsel, **Jeff Carter**, a partner in the firm's Orlando office, in Dupree v. Speer. In that case, an employee of Jaymor Management was involved in an auto accident while leaving work in Orlando heading home to Daytona Beach. The parties did not dispute that the employee had finished her work for the day, was not performing any tasks for Jaymor, and was driving directly to pick up her children from daycare in Daytona. The plaintiff nonetheless argued that Jaymor was vicariously liable for the accident because Jaymor required the employee to commute to Orlando on a short-term basis to train a new employee, while she usually worked in Daytona, and because Jaymor reimbursed her for her commuting expenses. The Fifth District Court of Appeal disagreed and affirmed the summary judgment, finding that the employee was not in the course and scope of her employment while driving home from work.

* * *

Sam Spinner and **Hinda Klein** also obtained an affirmance of a judgment for a car dealership following a bench trial. In Hoffman v. Stewart Agency, Inc., the plaintiffs brought their vehicle to the defendant car dealership for an oil change. The car was involved in a minor accident while in the dealer's possession and required new brackets for the front bumper. The dealership made the repairs free of charge to the plaintiffs. However, the parties disputed whether the plaintiffs actually authorized the dealership to make those repairs. The plaintiffs sued for various causes of action, most notably under the Motor Vehicle Repair Act. The trial court granted judgment for the dealership, finding that it did not violate the Repair Act because that statute concerns differences in oral estimates versus the price actually charged, and the dealership did not charge the plaintiffs for the repairs to their vehicle in this case. The Fourth District Court of Appeal affirmed the judgment for the dealership on all counts.

* * *

SUCCESSFUL LITIGATION DECISIONS

Lara Edelstein, an associate in the firm's appellate department, and **Hinda Klein** obtained two post-trial orders in a property damage case, and subsequently obtained affirmances of both orders in the appellate court. As to the counterclaim in the case of Bocaire Country Club, Inc. v. Altomare, a jury determined that Altomare was entitled to damages from its homeowner's association for claims based on negligence and nuisance, but found that Altomare was 35% comparatively at fault. Bocaire moved for a reduction of the verdict representing the percentage of Altomare's fault, and Altomare objected, and demanded pre-judgment interest. The trial court agreed with Bocaire on both points, entering final judgment in the reduced amount, and refusing to award prejudgment interest. The Fourth District Court of Appeal affirmed the final judgment in all respects.

Additionally, Altomare sought an award of attorney's fees, relying on section 720.305, Florida Statutes, Florida's Homeowner's Association statute, which provides for an award of attorney's fees under certain circumstances. However, nowhere in the pleadings, and at no time during the litigation, did Altomare assert that the lawsuit was brought pursuant to Chapter 720. Consequently, the trial court found that Altomare was not entitled to an award of attorney's fees, and the Fourth District affirmed.

* * *

Samuel Spinner, an associate in the firm's appellate department, obtained an affirmance on appeal of the trial court's order transferring venue in a first-party breach of homeowner's insurance policy action by a remediation company that received an assignment of benefits from the named insured in Structural Wrap, LLC v. Security First Ins. Co. The plaintiff filed suit in Miami-Dade County, despite the fact that the property was located in Bay County, arguing that venue was proper because it demanded that the insurer issue payment to the its office in Miami. The insurer moved to transfer venue to Bay County on the basis that the plaintiff's demand for payment in Miami did not make Miami-Dade County an appropriate venue. The trial court agreed and granted the motion to transfer. The Third District Court of Appeal affirmed, reasoning that the plaintiff had no greater rights than its assignee—the named insured. Therefore, because the named insured had no connection to Miami-Dade County, the trial court properly transferred the case to Bay County despite the plaintiff claiming that payment under the invoice attached to its complaint was due at its office in Miami. The insurer was represented at the trial level by associates **Michael Bonfanti** and **Nicholas Busse** in the firm's Tallahassee office.

* * *

Robert S. Horwitz, a partner in the West Palm Beach office, **Adriana Kiszynski**, an associate in the Hollywood office, and **Lara Edelstein,** an associate in the firm's appellate department, obtained a summary judgment in a first-party property damage case arising out of a loss due to Hurricane Irma. After the insured and insurer disagreed as to the scope and amount of damage, the insured invoked the appraisal provision in the policy. The Appraisal Award was issued, and the insurer issued payment on the covered aspect of the award, but did not pay the non-covered landscaping. The insured filed suit to collect on the rest of the appraisal award, arguing that because the Appraisal Award issued an amount for the landscaping, payment for landscaping was owed. However, the policy did not cover landscaping, and the Appraisal Award stated it did not consider the terms of the policy which may limit the insurer's liability. The trial court agreed with the insurer that it was not liable to cover the loss to landscaping and granted the insurer's motion for summary judgment.

* * *

Robert Moses, a partner, and **Hope Baros**, an associate in the firm's West Palm Beach office, obtained a defense verdict in a contested motor vehicle accident case in Palm Beach County. It was not contested that both the plaintiff and the defendant were traveling west on a multilane street in West Palm Beach. The plaintiff claimed that the defendant's flatbed truck carrying 90,000 pounds of brick pavers entered her lane of traffic, resulting in an impact sending her car occupied by her and her three children off the side of the road. The defendant driver contested this claim, claiming that the plaintiff drifted into his lane of traffic resulting in the collision. The plaintiff claimed herniated discs in the cervical and lumbar spine for which she underwent multiple injections. The defense argued that all of her alleged injuries pre-existed the accident and that her "in creditable claim of injuries" was a reflection of the creditability of her liability claim. The jury was out for less than 45 minutes and returned a verdict for the defense.

* * *

Kristan S. Coad, a partner, and **Ryan W. Royce**, an associate, in our Tampa office prevailed before the Fifth Judicial Circuit in arguing their motion for final summary judgment. Plaintiff was an unlicensed independent contractor who was hired by the Defendant to build and install dormers on her roof. Plaintiff was on the Defendant's roof performing work when he fell through an architectural design/atrium, landing on the concrete patio below. He broke both of his legs in multiple places and underwent a total of four surgeries to install hardware in the affected areas. Plaintiff incurred a total of approximately $310,866.85 in medical bills. The Defense argued that there was no evidence demonstrating that the Defendant exerted supervision or gave direction that would control the manner in which the Plaintiff performed his work, that the Plaintiff was aware of the atrium before his fall, and that there was no material dispute as to the open and obvious nature of the atrium. In granting the De-

fense's motion, the Court agreed with the foregoing arguments, holding that the Defendant had no duty to warn the Plaintiff of the atrium, and thus was not liable for his injuries.

* * *

Rod Lundy, a partner in Orlando, and **Sam Spinner**, an associate in the appellate department, obtained a summary judgment in a trip-and-fall third party homeowners case. Plaintiff alleged she fell while walking through the insured's residential yard as an invitee because the grass was 3-4 inches tall. She claimed at one point her foot sank into the grass causing her to lose balance, but conceded she'd had this sensation for every step while walking and could not identify why she fell at this point and not earlier. The trial granted the insured homeowner final summary judgment, ruling 3-4 inch high grass in a residential yard did not constitute a dangerous condition as a matter of law.

* * *

Jeffrey A. Blaker, a partner, and **Jeffrey K. Rubin**, an associate, in West Palm Beach, obtained a defense verdict in premises liability case in Palm Beach County. The Plaintiff claimed to have tripped and fallen on a step, thereby causing him to undergo a three-level cervical spine fusion. The Plaintiff claimed over $135,000.00 in past medical bills. The jury found that the Defendant property owner was not negligent.

* * *

Jackie Gregory, a partner in the Hollywood office, prevailed at a Final Hearing at which Permanent Total Disability benefits was adjudicated. In the case of Kovar v United Airlines, Claimant asserted a claim for Permanent Total Disability and Supplemental benefits. The Employer/Carrier asserted various defenses, including failure to perform an exhaustive job search, ability to perform at least sedentary employment within a 50 mile radius of the residence, as well as other pertinent defenses. A significant number of medical and lay witness depositions took place. The JCC analyzed the medical testimony and considered the live testimony of the two vocational specialists. The JCC concluded that the Claimant is able to engage in at least part-time sedentary employment within a 50 mile radius of her residence. Consequently, the claim for PTD, supplemental benefits, attorneys' fees and costs were denied.

* * *

Jeffrey K. Rubin, an associate in West Palm Beach, prevailed on a motion for final summary judgment in a premises liability case in Palm Beach County. The Plaintiff claimed to have slipped and fallen on a mahogany seed pod, thereby causing her to fracture her ankle. The Court ruled that the seed pod was not a dangerous condition. As such, the Court determined that the Defendant property owners and property manager did not owe the Plaintiff a duty of care.

* * *

Brian Buczynski, an associate in the Fort Myers office, prevailed on a Motion to Dismiss a Third-Party Complaint filed by a Defendant in a third-party, property damage case brought in Collier County Circuit Court. The Third Party Plaintiff, an insurance carrier for a condominium unit owner, alleged that our client, a plumbing company that initially installed a water line to a refrigerator more than 10 years earlier, negligently performed its installation work that purportedly failed and caused water damage to the unit below. The insurance carrier for the tenant for whom our client did the work filed a Third Party Complaint.

A General Magistrate granted the Motion to Dismiss based on the 10 year statute of repose pursuant to section 95.11(3), Florida Statutes. The General Magistrate, persuaded by case law, and no finding of clear legislative intent to make a savings clause, found in the July 1, 2018 amendments to section 95.11(3)(c), retroactive, granted our corporate client's Motion to Dismiss in his Report and Recommendations. After reviewing the Exceptions and our Response in Opposition to the Exceptions, the Circuit Judge adopted the General Magistrate's decision to grant our Motion to Dismiss.

* * *

Yasmine Kirollos, an associate in the Fort Myers office, recently prevailed on a Motion for Summary Judgment in an insurance coverage dispute in County Court venued in Manatee County, Florida. The Plaintiff, a tenant leasing commercial property, argued that a commercial HVAC unit was damaged by lightning, a covered peril under the Commercial Property Coverage Part of the insurance policy issued by the Defendant. The Plaintiff contended that the damaged HVAC unit was covered as "Building Personal Property" under the Policy. The Defendants argued on summary judgment that the Building Personal Property coverage did not apply to the HVAC unit, and that the HVAC unit would have been covered under "Building" coverage had the Plaintiff purchased that coverage. The Court agreed and granted Final Summary Judgment in favor of the insurance carrier as the Plaintiff did not pay a premium for Building coverage. The Plaintiff subsequently moved for rehearing but the motion was denied.

* * *

Matthew Troy, a partner in the firm's Orlando office, prevailed at a Merits Hearing. The original orthopedic and Claimant's one time change placed claimant at MMI with a 3% rating with no need for further treatment. The Employer/Carrier denied on-going medical care, including palliative care, based on the opinions of the physicians. The JCC noted that palliative care after MMI was not precluded under the law, but accepted the testimony of the physicians that no further

medically necessary care was required for the compensable aggravation of a pre-existing condition.

* * *

Jeffrey Rubin in our West Palm Beach office prevailed on a motion for summary judgment in a legal malpractice case in Indian River County. The plaintiff terminated our client, who was her first attorney in a criminal case, then retained new counsel and pleaded no contest. The court granted summary judgment as the plaintiff failed to establish a pre-condition to filing suit by receiving post-conviction or appellate relief of the underlying criminal plea.

* * *

FIRM ANNOUNCEMENTS

Conroy Simberg is pleased to announce **Hinda Klein**, chair of the firm's appellate practice group, was selected to the 2019 Florida Super Lawyers list. Additionally, partners **Melissa McDavitt** and **Tashia Small**, and associates **Matthew Innes**, **Jeffrey Rubin** and **Ruwan Sugathapala**, have been selected to the 2019 Rising Stars list.

Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates, and peer reviews by practice area. The result is a credible, comprehensive, and diverse listing of exceptional attorneys.

* * *

John Lurvey, managing partner in our West Palm Beach office, was recently a co-moderator at the 9th Annual James Otis Lecture Series in conjunction with the Palm Beach County School District. The lecture program focused on the Constitution and was presented by scholars, judges, and American Board of Trial Advocates (ABOTA) members. Students were asked to interact with the experts, ask questions and seek solutions for constitutional issues that exist today.

ABOTA created the James Otis lecture series to educate and inspire students across our nation so they will have appropriate knowledge of and respect for the United States Constitution. John Lurvey is a past president of the ABOTA Palm Beach Chapter. John practices in all areas of general liability, premises liability, and negligent security, and has handled and tried to verdict numerous high-notoriety and catastrophic claims, as well as good faith claims.

* * *

Hinda Klein has recently been honored by Best Lawyers in America as a "Lawyer of the Year" for her work in *Appellate Law in Fort Lauderdale.* Recognition for the BestLawyers.com "Lawyer of the Year" award is based solely on peer review.

Each year, only a single lawyer in a specific practice area and location is honored with a "Lawyer of the Year" designation. The 2020 "Lawyer of the Year" awards were awarded in 137 practice areas across 182 metropolitan regions.

BestLawyers.com is the oldest and most respected attorney ranking service in the world. It has recognized the very best lawyers in each practice area and metropolitan region in the country for almost 40 years. For the 2020 Edition of The Best Lawyers in America, 8.3 million votes were analyzed.

* * *

Jayne Ann Skrzysowski-Pittman has been named Managing Partner of the firm's Orlando office. Jayne is a Board Certified Construction Lawyer by the Florida Bar who serves as Chair of the firm's Construction Practice Group. Jayne is a graduate of the University of Miami School of Law and a veteran of the U.S. Army serving in the JAG Corps. Jayne has been a litigator for more than 23 years and has been with Conroy Simberg for 15 years.

* * *

Jackie Gregory, a partner in the Hollywood office, participated as a panel member, at the Council for Litigation Management's Workers' Compensation Conference, which took place in Chicago on May 22-23, 2019. She presented on the topic of "Maximizing the Productivity of an Aging Workforce." The impact of aging "baby boomers" in the workforce, trends regarding injury rates amongst the different age groups, comparison regarding severity of injuries, and cost drivers we among the issues discussed.

* * *

Hope Baros, an associate in our West Palm Beach office, recently participated as a "Panel Judge" at the 2019 Upperclassmen Feinrider Competition Oral Argument Bench Brief at Nova Southeastern University Shepard Broad College of Law.

Additionally, she was a panel speaker for the 2019 Orientation at Nova Southeastern University Shepard Broad College of Law. The program was titled "Introduction to Legal Professionalism and Ethics Program." The Introduction to Legal Professionalism and Ethics Program is a unique and interactive introduction to the concepts of professionalism and professional identity; focusing on the need for law students and lawyers to go beyond merely following the rules.

* * *

FIRM ANNOUNCEMENTS continued

Conroy Simberg was a Prime Sponsor at the 74th Annual Workers' Compensation Educational Conference (WCI) held in Orlando, Florida in August 2019. In addition, **Stephanie Robinson**, a partner in our Hollywood office, was a panel speaker in a breakout session tilted "Is the Doctor In?" The presentation provided an overview of relevant medical issues that may arise during mediation.

Once again, our attorneys supported Give The Kids The World by participating in their annual Gala and volunteering to complete Village service projects throughout the day.

Give Kids The World Village is an 84-acre, nonprofit resort in Central Florida that provides weeklong, cost-free vacations to children with life-threatening illnesses and their families.

* * *

Conroy Simberg attorneys (L-R): Chad Bubis, Nicholas Latour, Matt Troy and Chris Tice.

William (Bill) Mitchell, Sr., an associate in our Tampa office, is a member of the 2019 Congressional Medal of Honor Convention Planning Committee. The Convention was held in Tampa, Florida on October 22-26, 2019, with 47 recipients of the Medal in attendance.

The purpose of the Congressional Medal of Honor Society is maintaining the memory of those Medal of Honor recipients who have died; protecting and preserving the dignity and honor of the Medal of Honor and its recipients; and providing assistance to needy Medal recipients, their spouses or widows and children. As part of the week-long convention, recipients of the Medal will visit with local area school children speaking on the Society's Character Development program, which focuses on the concept that ordinary people can do extra-ordinary things.

Bill practices primarily in the areas of first-and third-party property loss disputes and property coverage matters. In addition, Mr. Mitchell has experience handling business litigation, auto-glass replacement claim litigation, construction defect litigation, and judgment collections. Aside from his practice of law, Bill serves in a variety of roles as an engaged advocate for the veteran community.

Attorney Bill Mitchell with recipient Harvey C. "Barney" Barnum.

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