Law Bulletin from

CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P. A.

VOLUME 16, NUMBER 1 FALL 2014

In This Issue:

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LIABILITY CASE LAW UPDATES

ACUPUNCTURE AND CHIROPRACTIC PHYSICIANS AND MASSAGE THERAPISTS LACK STANDING TO CHALLENGE PIP STATUTORY AMENDMENTS AS UNCONSTITUTIONAL

In McCarty v. Myers, 38 Fla. L. Weekly D2235 (Fla. 1st DCA Oct. 23, 2013), the First District Court of Appeal reversed a trial court order enjoining enforcement of certain amendments to the statute which, inter alia, required persons injured in motor vehicle accidents to seek initial medical care from certain types of providers within fourteen days after an accident, limited benefits for non-emergency medical conditions to $2,500 and excluded licensed massage therapists and acupuncturists from being reimbursed for medical benefits. The Plaintiffs, which included a Chiropractor, Massage Therapist and an Accupuncturist, sought declaratory and injunctive relief alleging that the 2012 PIP Act violated numerous provisions of the Florida Constitution, including denying access to courts.

After the complaint was filed, the Plaintiffs moved for a temporary injunction to enjoin the Office of Insurance Regulation (OIR) from enforcing or attempting to enforce the Act. In response, the OIR argued that the Plaintiffs lacked standing to bring the action because there was no allegation that the Plaintiffs were actually harmed by the legislation and any allegation of future harm was purely hypothetical such that there was no present real controversy to be adjudicated. The trial court granted the injunction finding that the Plaintiffs were seeking to enforce a right vested in members of the public at large and therefore, had standing to bring the action.

On appeal, the First District reversed the trial court's injunction, finding that the Plaintiffs lacked standing to assertthe claim and that the real parties in interest, injured motorists, were absent from the case. Because the Plaintiffs' claims were purely hypothetical, the Court found that the injunctive order could not stand.

The Plaintiffs are currently seeking review by the Florida Supreme Court.

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PLAINTIFF ESTATE MAY PLEAD DECEDENT'S OWN COMPARATIVE FAULT WHERE THE DEFENDANT HAS WITHDRAWN THAT DEFENSE

In Hartong v. Berhart, MD., 38 Fla. L. Weekly D2571 (Fla. 5th DCA, Dec. 6, 2013), the Plaintiff Estate filed suit for negligence and wrongful death after the decedent died from MRSA lobular necrotizing pneumonia. The defendants raised the decedent's comparative negligence as an affirmative defense, asserting that the presence of alcohol and hydrocodone in her system impaired her ability to fight the pneumonia and her death resulted, in part, from aspiration and intoxication. After the evidence was closed, the defendants withdrew their comparative negligence affirmative defense, which permitted the defendants to argue to the jury that the decedent's drug and alcohol abuse barred the Estate's recovery against the defendants. The Plaintiff sought to amend its pleadings to conform to the evidence of the decedent's comparative negligence, but the trial court denied the motion. The jury returned a defense verdict.

On appeal, the Fifth District reversed, finding that the Plaintiff was entitled to raise the decedent's comparative negligence as an affirmative defense because to hold otherwise, would permit the defense to control the Plaintiff's theory of its case. Since there would have been no prejudice to the defense if the Plaintiff had been permitted to amend the pleadings to conform to the evidence, the appellate court found that the trial court abused its discretion in denying the motion to amend and remanded for a new trial.

PREMATURE PROPOSAL FOR SETTLEMENT WAS NOT "HARMLESS TECHNICAL VIOLATION" OF THE RULES GOVERNING PROPOSALS; CONFLICT CERTIFIED

The Fourth District Court of Appeal addressed the issue of whether a proposal for settlement, which had been prematurely served within ninety (90) days after suit was filed, in violation of Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442, was a "harmless, technical violation" which would not render the proposal invalid. In Regions Bank v. Rhodes, 38 Fla. L. Weekly 2400 (Fla. 4th DCA, November 20, 2013), the Fourth District found that in Campbell v. Goldman, 959 So. 2d 223 (Fla. 2007), the Florida Supreme Court essentially held that because the offer of judgment statute and rule must be strictly construed as contrary to the common law, essentially rejecting the argument that there could be harmless, technical violations of the rule that would not affect the offer/proposal's validity. The Court recognized that the Third District Court of Appeal had issued two cases, predating Campbell, implying the contrary, and accordingly, the Fourth District certified the case to the Florida Supreme Court as in conflict with those decisions.

Regions chose not to pursue Supreme Court review, and therefore, this arguable conflict stands.

APPELLATE COURT LACKS CERTIORARI JURISDICTION TO REVIEW A TRIAL COURT'S DENIAL OF A MOTION TO ABATE A BAD FAITH ACTION BASED ON AN INSUFFICIENCY IN PLAINTIFF'S CIVIL REMEDY NOTICE

In State Farm Ins. Co v. Ulrich, 38 Fla. L. Weekly D1834 (Fla. 4th DCA, Aug. 28, 2013), the Fourth District Court of Appeal dismissed a Petition for Writ of Certiorari filed by State Farm, in which it

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sought review of the trial court's denial of its motion to abate a bad faith claim filed by its insured. In Ulrich, the Plaintiff filed a first-party insurance claim after which State Farm invoked the appraisal provision in its policy and promptly paid the appraisal award. Thereafter, the insured brought a bad faith action pursuant to Florida Statute 624.155 and State Farm moved to dismiss the claim on the grounds that the civil remedy notice served on it was deficient in failing to set forth a specific amount necessary to cure an alleged violation. In addition, State Farm asserted, the notice did not specify a particular portion of its insurance policy allegedly breached or violated by the carrier.

The Fourth District dismissed the Petition, finding that while certiorari may be available to review an order determining that a party had complied with conditions precedent, it was not available as a means to obtain interlocutory review of an order addressing the sufficiency of evidence of the Plaintiff's compliance with conditions precedent, which could be reviewed only at the conclusion of the litigation.

SINGLE DOG BITE ATTACK MAY RESULT IN MORE THAN ONE "OCCURRENCE"

The Fourth District Court of Appeal, in Maddox v. Florida Farm Bureau General, 38 Fla. L. Weekly D1946 (Fla. 4th DCA, Sept. 13, 2013), addressed the issue of whether a dog bit attack in which two different plaintiffs were bitten, was one "occurrence" or two under the homeowner's policy. The policy defined the term "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition, which results . . . in . . . 'bodily injury'". After the claimants filed suit against the homeowners for their bodily injuries sustained in the attack by the homeowners' dog, their insurer, Florida Farm Bureau filed a Complaint for declaratory judgment seeking the trial court's ruling that the two dog bite injuries resulted from a single "occurrence" under the terms of the policy such that the carrier was only liable to pay its single limit of insurance. The trial court granted the carrier's motion for summary judgment, finding that because there was only one attack, there was only one occurrence under the policy.

On appeal, the Fourth District reversed, finding that each dog bite victim was entitled to recover the per claim limit. The Court explained that Florida law follows the "cause theory", which looks to the cause of a party's injuries to determine the number of "occurrences", and the amount of policy limits available to a claimant under the policy, in the absence of policy language to the contrary. In this case, since the dog bite that injured the first claimant was not the same bite that injured the second claimant, there were two occurrences under the policy.

FOCUS ON WORKERS' COMPENSATION

Our firm's workers' compensation division handles and litigates all aspects of workers' compensation claims, from initial investigation to file closure. We aggressively defend our clients' positions and push for quick settlement when it is in the best interest of the employer and carrier. If trial is necessary, our attorneys have used their extensive experience with successful results. The firm represents employers and carriers throughout Florida in all types of workers' compensation claims, including the following specialized areas of defense:

Catastrophic and PTD Claims - The firm has significant experience in the successful handling of catastrophic and PTD claims. Our attorneys work closely with adjusters, employers, and vocational experts to aggressively defend all such claims.

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Liens - The firm places a strong emphasis on recovery of monies expended by clients. In that regard, the firm's workers' compensation attorneys are well versed in recovering third party liens.

Appeals - The firm's appellate division specializes in preparing workers' compensation appeals on behalf of employers, carriers, and servicing agents. The attorneys specializing in workers' compensation appellate work are involved in all elements of appellate process including research, brief writing, and oral argument before the First District Court of Appeal

WORKERS' COMPENSATION CASE LAW UPDATES

ORDER GRANTING MOTION FOR SUMMARY FINAL ORDER IS APPROPRIATE WHEN THERE ARE NO FACTUAL ISSUES IN DISPUTE AS RELATES TO THE APPLICATION OF A RES JUDICATA DENIAL

Moya v. Trucks and Parts of Tampa, Inc., 39 Fla. L. Weekly D23 (Fla. 1st DCA 2013). By way of background, the Claimant claimed an injury on September 19, 2005. In an Order dated January 30, 2009, the JCC found that the accident was merely a temporary exacerbation of his pre-existing cervical and shoulder conditions, noted that he was at MMI, and found that no further treatment was medically necessary for his cervical and shoulder complaints. The JCC did award continuing care relating to his bilateral carpal tunnel syndrome. Thereafter, on December 27, 2012, the Claimant filed a petition for benefits requesting authorization of an MRI to the right shoulder per the authorized physician. The Carrier filed its response denying further care based upon the January 30, 2009 Order and thereafter filed a Motion for Summary Final Order asserting that res judicata prohibited re-litigating compensability of the shoulder complaints. At the hearing, the Claimant asserted that the prescription was written by his authorized doctor, that he was setting him for deposition and that the issue was not appropriate for a motion for summary final order. No other factual allegations or supporting affidavits or documents were submitted. Thus, the JCC granted the motion noting that the mere fact that the authorize provider recommends the testing does not negate the JCC's order of January 30, 2009. The Claimant appealed.

The First DCA provided a *de novo* review as to whether disposition by Summary Final Order was appropriate. The First DCA upheld the JCC's Order noting that the Claimant failed to demonstrate a material factual issue precluding the application of res judicata based upon the January 30, 2009 Order.

PRO RATA PORTIONS OF CORPORATE PROFITS MAY BE INCLUDED IN THE DEFINITION OF "WAGES" WHEN CALCULATING THE AVERAGE WEEKLY WAGE

K-C Electric Company v. Walden, 122 So.3d 514 (Fla. 1st DCA 2013). At issue herein was whether the 1994 amendments to the Workers' Compensation statute permitted the inclusion of pro rata portions of corporate profits in the definition of "wages" when calculating the average weekly wage. The Carrier argued that because the 1994 amendments added "and reported for federal income tax purposes" that "wages" should mean wages as defined by the federal tax code, which would not include the pro rata portions of corporate profits. However, in rejecting this argument, the First DCA pointed out that the workers' compensation statute defines "wages" and although it excludes wages not reported for federal income tax purposes, it does not limit the manner of reporting, nor does it exclude from wages those that are not counted as wages under the federal tax code. Thus, the reasoning in *Pischotta v. Pischotta File & Marble*, 613 So.2d 1373 (Fla. 1st DCA 1993) still applies: "a Claimant's AWW includes his pro rata portion of corporate profits where the profits were 'almost entirely the direct result of personal management and endeavor.'" Herein, the Claimant reported these profits to the IRS, just not necessarily as "income," and given to him as a result of his active income, and thus included in the AWW.

WORKERS' COMPENSATION CONTINUED

THE FIRST DISTRICT COURT OF APPEAL ADDRESSED THE DEFINITION OF EMERGENCY MEDICAL CARE AND SERVICES

Cespedes v. Yellow Transportation, Inc., 38 Fla. L. Weekly D2525 (Fla. 1st DCA 2013). The Claimant injured his low back in March 2006 which was accepted by the Employer/Carrier as compensable. Authorized care was provided by Dr. Christopher Brown, orthopedic spinal surgeon, who recommended surgery which the Claimant declined. Ultimately Dr. Brown placed him at MMI with a 6% impairment rating in September 2006. Over the next four years, the Claimant treated with Dr. Brown, on occasion, with complaints of recurrent low back pain and Dr. Brown continued to recommend surgical intervention which he declined. In fact, in December 2010, Dr. Brown referred the Claimant to pain management, reporting significant improvement. However, after a second epidural injection the Claimant developed significant back and leg pain with difficulty standing. As a result, on March 19, 2011 he was admitted to and treated at the emergency room of Kendall Regional Hospital, was treated and discharged. The following day he returned to the emergency room and was admitted under the care of Dr. Pablo Acebal who ordered an MRI revealing a significant herniated disc. Based upon the clinical findings and the MRI he recommended prompt surgery at L5-S1. On this date, Dr. Acebal contacted Dr. Brown and offered to transfer care. However, Dr. Brown advised that if the condition was emergent and required surgery when he should probably not be transferred. In fact, in his deposition, Dr. Brown explained that if he could have been transferred, then the surgery would be considered "elective" in nature and not emergent. Within two days, the surgery was performed by Dr. Acebal.

The main issues before the Court were whether the work accident was the major contributing cause of the need for surgery and whether the surgery constituted "emergency services and care."

The First DCA first addressed the issue of major contributing cause noting that the Employer/Carrier accepted previously stipulated that the Claimant's L5-S1 disc herniation was a compensable injury and provided care for over five years. Furthermore, Dr. Brown testified that the herniation was caused in major part by his employment. In order to avoid responsibility herein, the Employer/Carrier would have to demonstrate a break in the causation chain between the work accident and the compensable low back injury, and prove that the surgery was to treat a new and unrelated injury or medical condition. The JCC found that there were two causes of his low back condition: the L5-S1 herniated disc; and preexisting spondylosis. In addition the JCC awarded ongoing care to the low back, rejecting the Employer/Carrier's contention that the work accident was no longer the major cause of his low back condition.

As to emergency services and care, the First DCA referred to section 395.002(10), Florida Statutes, which provides three relevant questions to address: 1) whether the service provider is a licensed physician; 2) whether an evaluation, screening, or examination is conducted by that physician; and 3) whether such care was undertaken by the physician with the intent of determining "if an emergency medical condition exists." All three elements were met herein. Thus, there are two additional elements to meet as follows: 1) whether the care medically necessary; and 2) whether the injury requiring emergency care around as a result of the work place accident. The JCC herein was directed, on remand, to consider all elements above.

The First DCA also addressed admissibility of Dr. Acebal's medical opinion testimony, stating that if Dr. Acebal provided medically necessary and compensable emergency services and care to the

WORKERS' COMPENSATION CASE LAW UPDATES

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Claimant, then he will be considered a treating provider "authorized" to provide such care under Chapter 440, making his opinions admissible.

THE INFORMATIONAL BROCHURE APPROVED BY THE DEPARTMENT OF FINANCIAL SERVICES ENTITLED "FACTS FOR FLORIDA INJURED EMPLOYEES" IS SUFFICIENT NOTICE OF A CLAIMANT'S RIGHTS AND OBLIGATION AS REQUIRED BY SECTION 440.185(4), FLORIDA STATUTES

City of North Bay Village v. Guevara, 38 Fla. L. Weekly D2318 (Fla. 1st DCA 2013). The issue herein was whether the Employer/Carrier was estopped from raising a statute of limitations defense. Specifically, the Claimant, a law enforcement officer, advised his Employer that he had been placed on light duty following a physical which showed his blood pressure to be elevated on March 15, 2007. The supervisor completed a "Notice of Injury" which the Carrier received on March 23, 2007. On March 26, 2007, within the statutory time frame required, the Carrier sent to the Claimant the "initial claim packet" via certified mail which was accepted by the Claimant's wife. This included the informational brochure approved by the Department of Financial Services entitled "Facts for Florida Injured Employees," in accordance with section 440.185(4), Florida Statutes. The Claimant filed his first petition for benefits on October 18, 2011, well beyond the two-year limitations period set forth in section 440.19(1), Florida Statutes. However, the JCC rejected the statute of limitations defense as the claim packet sent to the Claimant was "too generic" and did not contain information regarding the statutory presumption of causation afforded to law enforcement officers in section 112.18(1), Florida Statutes. The JCC also focused on the fact that medical care was not provided, rather the claim was controverted as per the Notice of Denial dated April 4, 2007.

The First DCA rejected the JCC's holdings, noting that neither section 440.185(4) nor section 112.18(1) require the Employer/Carrier to provide an injured worker the details of the presumption found in section 112.18(1). Furthermore, the packet sent to the Claimant was published by the Department of Financial Services and is specifically required by section 440.185(4). In so stating, the First DCA found that the Claimant's right to file a petition for benefits was barred by the statute of limitations.

IN ORDER FOR THE "TWO-DISMISSAL" RULE TO APPLY, THE PRIOR DISMISSALS MUST BE VOLUNTARY

Brown v. Jerry Pybus Electric, 124 So.3d 436 (Fla. 1st DCA 2013). The Claimant appealed the JCC's denial of his petition based upon the "two-dismissal" rule which states that a second notice of *voluntary* dismissal shall operate as an adjudication of denial or any claim or petition for benefits previously the subject of a voluntary dismissal. There was no dispute that many of the prior petitions were resolved administratively (by stipulation or at mediation). The Court noted, however, that evidence or concession that the petitions were administratively resolved does not establish that the claims therein were "voluntarily dismissed" as the term is used in the two-dismissal rule. The record, in fact, did not contain any filings that could constitute notices of voluntary dismissal of the claims, or announcements on the record that would indicate that the petitions were dismissed.

The First DCA also addressed a 2008 order of the JCC titled "Order Closing File" which stated

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that all petitions/claims were dismissed and that any party could file a written objection within 30 days of the date of the order. Even if this constituted a dismissal of petitions, it would not be considered voluntary because it was not instigated by the claimant and did not meet the requirements of 60Q-6.116(2) that it be made by "filing, or announcing on the record, a voluntary dismissal."

Last, the Court pointed out that prior voluntary dismissals need to be for the same benefit requested which was unclear in this particular claim.

UPON RECEIPT OF A PARTIES' NOTICE OF CONFLICT IN MEDICAL OPINIONS, THE JCC IS STATUTORILY OBLIGATED TO REVIEW THE OPINIONS AND, IF HE AGREES THAT THERE WAS A DISAGREEMENT SUFFICIENT TO REQUIRE THE APPOINTMENT OF AN EMA, DIRECT ON HIS OWN MOTION THAT THE CLAIMANT BE EVALUATED BY AN EMA.

Banuchi v. Department of Corrections, 122 So.3d 999 (Fla. 1st DCA 2013). The Claimant herein appealed the JCC's failure to appoint an EMA on his own motion after it brought to his attention that there was a material disagreement in the opinions of health care providers as to whether the Claimant had reached MMI. The Claimant filed a notice of conflict in the medical opinions, asking the JCC, on his own motion, appoint an EMA. The JCC treated this as the Claimant's Motion for EMA and granted the motion, thereby making the Claimant "responsible for all costs associated with the EMA." The Claimant filed a motion for rehearing, explaining that she had not requested the EMA, rather was asking the JCC to appoint an EMA on his own motion. The motion for rehearing was denied. At the final merits hearing, she again reiterated her argument which the JCC rejected. The hearing went forward without an EMA and the JCC denied entitlement to the claimed TPD benefits.

In reversing the JCC's order, the First DCA noted that upon notice and the presentation of evidence sufficient to manifest a disagreement in the opinions of health care providers, the JCC is required to order, on his own motion, that the Claimant be evaluated by an EMA. Thus, in the facts above, upon receipt of the Claimant's notice of conflict, the JCC was statutorily obligated to review the opinions and, since he agreed that there was a disagreement sufficient to require the appointment of an EMA, direct on his own motion that the Claimant be evaluated by an EMA.

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

TRIAL VICTORIES

Occidental Fire & Casualty Company of North Carolina v. Security National Insurance Company

Case No. 2007-030944

17th Judicial Circuit, Broward County, Florida

Seth Goldberg and **Thomas McCausland**, Partners in our Hollywood Office, along with **Shannon P. McKenna**, an Associate in our Appellate Division, also in our Hollywood Office, won a verdict on December 10, 2013 in an equitable subrogation claim brought on behalf of their client, an automobile insurer, for its costs of defense (attorney fees and court costs) against another automobile insurer. In this case, this firm represented Occidental Fire & Casualty Company of North Carolina ("Occidental") who filed suit to recover defense costs it incurred in defending the driver of a vehicle, who was insured by Security National, who was sued in a wrongful death action arising out of an automobile accident on February 10, 2005, in which a vehicle owned by the driver's father collided with another vehicle resulting in a deadly accident. The driver's father's vehicle was insured by Occidental. The driver was also insured by Security National.

Occidental retained counsel to represent the interests of its named insured (the driver's father) as well as to defend the driver, a permissive user of the vehicle. During the pendency of the wrongful death suit, Occidental settled the claims arising from the accident against its named insured for the full limits of its liability policy. Occidental notified Security National that it exhausted its policy limits and, therefore, no longer owed a duty to provide the driver with a defense. It then requested that Security National provide the driver, its named insured, with a defense. Security National hired an attorney to monitor the case, but never agreed, orally or in writing, to assume the defense of its named insured. Occidental continued to pay the costs of defending the driver in the underlying wrongful death suit through trial.

In this case, under an equitable subrogation theory, Occidental sought to recover the costs it incurred in defending the driver after it tendered the defense to Security. Occidental claimed that in paying the continued defense costs of the driver it was acting to protect its own interests and not as a volunteer. Security claimed that Occidental was not entitled to recover any money because it paid the continued defense costs as a volunteer because Security hired an attorney to take over the driver's defense and that attorney was prepared to do so.

Following a six day jury trial and four hours of deliberation, the jury found that Occidental paid the continued defense costs to protect its own interest and not as a volunteer. The jury also rejected Security's defense that it retained an

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attorney to take over the driver's defense who was prepared to do so. The jury awarded Occidental $102,000 in damages for its continued defense costs. Security had also brought a counter-claim seeking that Occidental reimburse Security for its payment of the cost judgment in the underlying wrongful death suit. The jury awarded Security zero dollars on its counter-claim.

* * *

Linda Brown v. Ball Harbour Condominium Association, Inc.

Case No. 12-007471-CI-15

6th Judicial Circuit, Pinellas County, Florida

Marc Crumpton and Jennifer Forte, Associates in our Tampa office, obtained a defense verdict in a premises liability - slip and fall.

Plaintiff, a resident and owner of a condominium alleged that she fell on the common areas of the outside walkway of the premises on September 7, 2011. The Plaintiff's theory was that the Defendant was negligent in the ownership, possession, control, and maintenance of the common areas of the condominium complex where Ms. Brown resided. On the date in question, it was undisputed that it had been raining for several days and that Plaintiff had walked out in the rain wearing well worn flip flops with the intent of taking photographs of ducks near the lake on the premises near her unit. As she was walking back to her unit, she slipped and fell in an area of the walkway that was connected to a water run-off drainage area. Plaintiff alleged that a "slippery substance" had accumulated causing her to fall when it became wet as a result of the rain.

Trial lasted 3 days and Plaintiff called several witnesses to identify that a slippery substance was present on the walkway and adjacent drain area and that this substance had become wet when it rained. Plaintiff alleged that the Defendant's maintenance supervisor was negligent in not remedying this substance prior to the rain with a bleach or other cleaning agent so that it would not have been present at the time Plaintiff chose to walk there. Defense argued that Plaintiff was not paying attention to her surroundings as a witness testified that Plaintiff appeared to be possibly distracted with her digital camera and looking down at the time of her fall. Further, it was argued that Plaintiff was negligent based on a series of choices she made beginning with walking out in the rain to take photos, wearing well worn flip flops, and not keeping a safe watch of her surroundings during the rain event.

Plaintiff's injuries consisted of an acute T-9 thoracic compression fracture, and bulges in the cervical and lumbar regions. Experts for both parties agreed that the thoracic compression fracture was caused by the sudden fall and that the fracture had long since healed. Plaintiff claimed despite the medical findings that the fracture had healed that her life and activities had been drastically altered as a result of the fall and that she had sustained a permanent injury. Plaintiff requested $21,000.00 in past medical expenses, $96,000.00 in future medical care, and requested the jury to, "do the right thing" with regards to pain and suffering. Prior to trial, Plaintiff had demanded $125,000.00 and Defense offered $50,500.00 through formal proposals for settlement. The jury was out for 41 minutes and returned a verdict of no liability on the part of the Defendant. Post trial motions for Defense attorney's fees and costs are pending.

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Son Thi Voung v. Tammie T. Styles

Case No. 2009 CA 004824
2nd Judicial Circuit, Leon County, Florida

Joshua Canton, Associate in our Tallahassee office, won a defense verdict in an automobile negligence case on 9/16/13. The Plaintiff claimed that the Defendant negligently operated her vehicle on 12/16/05, thereby causing the Defendant's vehicle to enter the Plaintiff's lane of travel, resulting in a motor vehicle accident. The Defendant claimed the Plaintiff negligently operated her vehicle thereby causing the motor vehicle accident. There were no witnesses to the accident other than the parties.

The Plaintiff claimed that her pre-existing soft tissue injuries to her neck, shoulder and back were aggravated by the motor vehicle accident. Her medical specials were $10,000. She claimed $25,000 in lost wages. She demanded $50,000 to settle the case before trial.

The jury deliberated for 15 minutes, then came back with a defense verdict.

* * *

Buffington Development, LLC v. Westwind Contracting, Inc

Case No. 2011-978-CAG
15th Judicial Circuit, Marion County, Florida

Rod Lundy, Partner in our Orlando office, and his trial team of Associates, **Jeffrey Carter**, **Lisa Clary**, and Senior Associate, **Diane Tutt**, obtained a complete defense verdict in a mixed commercial/tort case. The Amended Complaint alleged counts in breach of contract, trespass and unjust enrichment. The dispute involved an agreement regarding a mound of dirt approximately 35 feet high and approximately 2 ½ acres in diameter.

Buffington, the property owner, alleged it granted our client, a road contractor, temporary use of the property to store large volumes of dirt during construction of a four lane road in return for certain improvements to the property. We defended on the premise the property owner wanted the dirt to remain for his later use in developing the land, and that conditions precedent to making improvements to the property were never met, so any alleged contract was never breached. The property owner also challenged the quality of the dirt, alleging it did not conform to the verbal agreement. The trial, which lasted 7 consecutive days, including Saturday and Sunday, included expert testimony from contractors, geo-technical engineers and real estate appraisers, over 12 lay witnesses.

Plaintiff sought damages of over $800,000 for each count, ultimately seeking over $2.4 million dollars for removal of the dirt and installation of the promised improvements. The jury deliberated approximately two and a half hours before returning a verdict for the defense.

* * *

Bayside Healthcare Centers a/a/o Laura Tabares v. State Farm Mutual Automobile Insurance Company

Case No. 2004-SC-009144-O
9th Judicial Circuit, Orange County, Florida

Matthew J. Corker, Associate, and **Rodney C. Lundy**, Partner, both in our Orlando office, obtained a directed verdict against a medical provider in a 2004 peer review PIP case. The case involved the reasonableness, relatedness,

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and medical necessity of a physical capacity examination.

Following close of plaintiff's case, we moved for directed verdict, contending plaintiff lacked standing as it failed to present evidence of an assignment of benefits. Plaintiff then motioned to re-open their case and call defendant's corporate representative to authenticate the assignment of benefits in order to admit it into evidence.

The court denied the motion based on our argument the assignment of benefits was not a listed exhibit. The court then directed verdict for our client on the basis of lack of standing.

PRETRIAL RESOLUTIONS

Dale L. Friedman, Partner in our Hollywood office, obtained summary judgment in an invasion of privacy case and then, was awarded attorneys fees and costs against the Plaintiff and her attorney. This case began in 2009 and early 2010, when Faddis was Deputy City manager for the City of Homestead (City). The City Manager was Mike Shehadeh (Shehadeh) and an investigation was commenced against him for possible misconduct in late 2009. Patrick Franklin (Franklin) was hired by the City to conduct the investigation. During the investigation, text messages sent by Shehadeh to Faddis were uncovered, which related to Shehadeh's feelings towards Faddis.

Faddis was interviewed during the investigation and told Franklin she knew of no improper or inappropriate behavior by Shehadeh. Franklin prepared a report to the City Council that incorporated the text messages. Shehadeh was terminated and then sued the City for his contractual severance. Faddis testified in that case that she was never sexually harassed by Shehadeh. She was represented by her own attorney, Kelsay Patterson (Patterson). The City settled the lawsuit with Shehadeh for $250,000, in part, due to the testimony of Faddis.

Then, Faddis sued Franklin for invasion of privacy and the City defendants for invasion of privacy and negligence relating to the publication of the text messages, but she neither sued nor alleged she was sexually harassed. Dale Friedman of Conroy Simberg was retained to represent Franklin. During discovery, Plaintiff testified in her deposition that she was sexually harassed by Shehadeh, which was directly contrary to her testimony in Shehadeh's case. When confronted with her change in testimony, Faddis could not explain it and essentially acknowledged being untruthful.

CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.

IS PLEASED TO ANNOUNCE THAT THE FOLLOWING ATTORNEYS HAVE BECOME PARTNERS IN THE FIRM:

JOSHUA C. CANTON
Tallahassee Office
(850) 383-9103
jcanton@conroysimberg.com

Joshua C. Canton was admitted to practice in Florida in 2002. Joshua began practicing in the firm's Orlando office in 2006. He has practiced in the firm's Tallahassee office since 2011. Joshua has handled numerous complex cases, including wrongful death, products liability, negligent security, construction defects, premises liability, first party property, professional malpractice and automobile liability, as well as, coverage disputes. He is a member of the Florida Bar, the Georgia Bar, and the District of Columbia Bar, and he practices in both State and Federal Court throughout the States of Florida and Georgia.

MATTHEW J. CORKER
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Matthew J. Corker was first admitted to practice in 2004 in New York, and practiced in the area of consumer credit (debtor/creditor) law until relocating to Central Florida in 2005. He was admitted to practice in Florida in 2006 and since that time has been practicing civil litigation in various fields from debt collection, subrogation to insurance defense. Since joining Conroy Simberg in 2009, he has been practicing exclusively in the area of Personal Injury Protection (P.I.P.) defense.

ANNOUNCEMENTS

We are very proud to announce that several of our attorneys made The LEGAL LEADERS List for South Florida's Top Rated Lawyers of 2013. These are Attorneys who have an AV Preeminent Rating with Martindale Hubbell. Below is the list of Attorneys from our firm who were named to this prestigious list. Please join us in congratulating them!

- **Thomas W. Conroy (Retired) - Workers' Compensation Law**
- **Stuart F. Cohen - General Practice, Insurance Law, Litigation**
- **Dale L. Friedman - Discrimination Law, Insurance Law, Labor & Employment Law**
- **Neal L. Ganon - Workers' Compensation Law**
- **Lawrence S. Gordon - General Practice, Intellectual Property**
- **Hinda Klein - Appellate Law, Insurance Law, Litigation**
- **Scott D. Krevans - Insurance Law, Personal Injury Law**
- **John A. Lurvey - Insurance Law, Personal Injury Law**
- **Thomas J. McCausland - Insurance Law, Litigation**
- **Michael J. Paris - Insurance Law**
- **Bruce F. Simberg - Construction Law, Litigation, Product Liability**
- **Edward N. Winitz - Personal Injury Law**

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