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Liability Case Law Updates

SECOND AND FOURTH DISTRICT COURTS OF APPEAL DECLINE TO ADOPT A "BLANKET RULE" THAT CONSORTIUM CLAIMS ARE ALWAYS SO INTERTWINED WITH SPOUSE'S CLAIM THAT ALLOCATION OF TIME SPENT ON EACH CLAIM INDIVIDUALLY IS IMPOSSIBLE

In Blanton v. Godwin, 37 Fla. L. Weekly D1812 (Fla. 2d DCA, Aug. 1, 2012) and Saunders v. Dickens, 37 Fla. L. Weekly D2274 (Fla. 4th DCA, Sept. 27, 2012), the Second and Fourth District Courts of Appeal addressed the issue of whether consortium claims are so intertwined with the claimant's spouse's claim such that, where only one of the two plaintiffs are entitled to recover his or her fees pursuant to a proposal for settlement, the moving party can not and need not allocate the amount of time spent on each claim. Both courts found that absent evidence that allocation is impossible, the moving party may only recover those fees proven to be expended on the moving party's claim to the exclusion of his or her spouse's claim. The courts made it clear that the burden of proof is squarely on the moving party to allocate the time spent on both claims or present evidence that allocation was not feasible.

FOURTH DISTRICT QUASHES TRIAL COURT'S ORDER COMPELLING DISCLOSURE OF THE LOSING PARTY'S BILLING RECORDS ENTERED WITHOUT ANY SHOWING THAT THOSE RECORDS WERE RELEVANT OR NECESSARY TO ANY ISSUE IN DISPUTE WHERE THE PREVAILING PARTY'S COUNSEL ADMITTED THAT HE ONLY SOUGHT THE RECORDS IN ORDER TO RECONSTRUCT HIS OWN

In Estilien v. Dyda, 37 Fla. L. Weekly D1875 (Fla. 4th DCA, Aug. 8, 2012), the Fourth District Court of Appeal quashed the trial court's order compelling the defense to produce its billing records to the plaintiff after the plaintiff's counsel argued that he needed the records in order to reconstruct his own time because neither he nor his firm kept billing or time records. The appellate court found that since the defendant's records were not relevant to any issue in dispute, they were legally irrelevant. As with any work product, it was the discovering party's burden to demonstrate actual relevancy, need and undue hardship and the plaintiff's counsel's mere assertion that he could not reconstruct his own time without

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reference to the opposing counsel's time was insufficient to warrant an order compelling the defendant's work product.

FIFTH DISTRICT COURT OF APPEAL AFFIRMED TRIAL COURT'S ORDER GRANTING MISTRIAL AND STRIKING DEFENDANT'S PLEADINGS BASED ON ATTORNEY MISCONDUCT DURING TRIAL

In an unusual case, the Fifth District Court of Appeal affirmed the trial court's order granting a mistrial and striking the defendant's pleadings solely as a result of defense counsel's misconduct during trial. In Adams v. Barkman, 37 Fla. L. Weekly D2260 (Fla. 5th DCA, Sept. 21, 2012), the trial court granted a mistrial after defense counsel violated the trial court's order in limine precluding the investigating traffic officer from rendering any "expert" opinions during his testimony about his observations at the scene of an accident. Defense counsel asked the trooper whether his observations of tread marks indicated that the lead vehicle was traveling straight, versus turning right, and the plaintiff's counsel objected. After plaintiff's counsel rejected a curative instruction and insisted on a mistrial, the trial court granted the motion and thereafter, granted the plaintiff's motion to strike the defendant's pleadings, leaving only the issue of damages for resolution.

The Fifth District issued a sharply worded opinion affirming the trial court's order, finding that defense counsel intentionally violated the trial court's in limine order and further observing that, despite its own repeated admonitions to members of the bar not to engage in similar misconduct at trial, "the threat of an admonishment and a new trial appears to be of no avail," and further stating "maybe attorneys will get the message to either change their tactics or clients will stop hiring them." The case is currently pending motions for rehearing, rehearing en banc and certification.

FIFTH DISTRICT FINDS DOCTRINE OF JUDICIAL ESTOPPEL INAPPLICABLE AS A BAR TO SUBSEQUENT SUIT WHERE THE INITIAL CLAIM DID NOT WHOLLY COMPENSATE THE PLAINTIFF FOR HIS OR HER DAMAGES

In Brown & Brown, Inc. v. The School Board of Hamilton County, Florida, 37 Fla. L. Weekly D2091 (Fla. 5th DCA, Aug. 31, 2012), the School Board had a self-insured retention for medical insurance of up to $50,000 per employee and obtained excess medical insurance coverage with Ace American Insurance Company. Brown was the insurance agency administering the insurance plan.

An employee incurred medical bills of almost $300,000 and the excess coverage claim was denied by Ace on the grounds that the employee's preexisting medical condition and employment status had not been disclosed to Ace during the application period. The evidence reflected that Brown had received that information before the application process was concluded. The School Board sued both Ace and Brown and ultimately settled with Ace for an amount less than its actual damages. It then sought to recover the remainder of its damages from Brown.

The appellate court noted that it was undisputed that the Ace and Brown claims were mutually exclusive in that either Brown failed to submit the necessary information to Ace, thereby justifying Ace's denial of coverage or Ace had the information and wrongfully denied the claim. After Ace settled the claim, Brown amended its Answer and raised the affirmative defense of judicial estoppel, alleging that by obtaining a settlement from Ace, the School Board had successfully maintained its claim against the carrier such that it could not now pursue an inconsistent claim against the agent. The doctrine of judicial estoppel prevents parties from taking totally inconsistent legal positions in separate proceedings where to do so would make "a mockery out of justice."

The appellate court found that where the parties settled the initial claim, that claim had not been "successfully asserted" so as to preclude a subsequent action asserting a contrary position. The Court found

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that since the School Board ultimately recovered no more than its actual damages after a jury trial against Brown, it had not received a double recovery or windfall that would "make a mockery out of justice."

In his dissenting opinion, Senior Judge Harris summed up the majority opinion by observing, "[t]his case proves that one can eat his cake and have it too."

INSURER DID NOT WAIVE ITS RIGHT TO APPRAISAL BY FAILING TO PROVIDE INSURED WITH TIMELY NOTICE OF MEDIATION UNDER SECTION 627.7015 WHERE INSURED PREMATURELY COMMENCED LITIGATION AGAINST INSURER

In American Integrity Ins. Co. of Florida v. Gainey, 37 Fla. L. Weekly D2297 (Fla. 2d DCA, Sept. 28, 2012), Gainey filed a homeowner's insurance claim with American, who inspected the residence and paid the claim. Gainey notified American that she believed the payment was inadequate and, with the carrier's agreement, she accepted the check without prejudice for Gainey to seek additional payment.

Gainey then filed a breach of contract action. American asserted its right to appraisal and provided Gainey with her statutory notice of mediation under Florida Statute 627.7015. Mediation proved unsuccessful, after which American moved to abate the action in favor of appraisal. Gainey argued that American had waived its right to appraisal because American failed to provide timely notice of mediation and the trial court lifted the abatement.

The appellate court reversed, finding that the mediation statute expressly contemplated mediation as a viable option before an insured has filed suit. By prematurely filing a breach of contract claim, Gainey took her claim outside the ambit of the statute and could not rely on the statute to avoid appraisal.

WHERE PROVIDER ENGAGED IN A PATTER OF MISLEADING BILLING PRACTICES, PIP CARRIER WAS ENTITLED TO DENY PROVIDER'S ENTIRE CLAIM AND NOT JUST THOSE CHARGES THAT WERE FALSE AND MISLEADING

The Fifth District Court of Appeal held that under Florida Statute 627.736(5)(b)(1)(c), a PIP insurer may deny a provider's entire claim, rather than just the portion of the provider's charges, where the insurer demonstrates that the provider "knowingly" submitted false and misleading charges. In Chiropractic One, Inc. v. State Farm Mutual Automobile, 37 Fla. L. Weekly D1565 (Fla. 5th DCA, June 9, 2012), the claims at issue involved 19 individual claimants who assigned the provider their claims. Claims made for every one of the 19 insured contained at least one false and misleading assertion and, according to the court, usually contained multiple false statements.

The provider did not deny that its statements were false and misleading, but instead simply argued that State Farm was only entitled to deny individual bills and could not deny future bills in claims where it had already demonstrated the provider's improper billing practices. Relying on the Statewide Grand Jury's investigation into the extent of PIP fraud in Florida and statutory amendments enacted thereafter, the Court found that the goals of these amendments were to stem the tide of PIP fraud and statesthat, "[i]t is perfectly consistent with that goal for the Legislature to intend to invalidate a billed claim is there is any knowing submission of false or misleading statements relating to the claim or charges submitted by a provider." The Court, however, declined State Farm's invitation to hold that all billings relating to a specific patient's accident both before and after the determination of billing misconduct would be invalidated.

PLAINTIFF'S FAILURE TO WEAR MOTORCYCLE HELMET IS EVIDENCE OF COMPARATIVE NEGLIGENCE WHERE THAT FAILURE CAUSED OR CONTRIBUTED TO THE PLAINTIFF'S INJURIES

Although it is well established that a plaintiff's failure to wear a seatbelt is evidence of comparative negligence and not evidence of a plaintiff's failure to mitigate his or her damages, the Fourth District Court of Appeal in Lenhart v. Basora, 37 Fla. L. Weekly

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D2439 (Fla. 4th DCA, Oct. 17, 2012), is the first case in Florida to hold that "[t]here is no meaningful distinction in a comparative negligence analysis between the failure to wear a seat belt and the failure to wear a helmet." Thus, such evidence is relevant to the plaintiff's comparative fault, even though, as has been argued, the failure to wear a helmet is not a statutory violation as is the failure to wear a seatbelt.

PLAINTIFF'S WITHDRAWAL OF QUESTIONABLE CLAIMS ON THE FIRST DAY OF TRIAL PRECLUDED THE DEFENSE FROM UTILIZING EVIDENCE THAT THE PLAINTIFF LIED ABOUT THESE CLAIMS TO IMPEACH THE PLAINTIFF WITH RESPECT TO REMAINING CLAIMS

In Health First, Inc. v. Cataldo, 37 Fla. L. Weekly D1551 (Fla. 5th DCA, June 29, 2012), the Plaintiff filed suit against the defendant and its employee for injuries arising out of a motor vehicle accident, which the Plaintiff claimed caused her to sustain numerous injuries, most significantly, a brain injury. The parties litigated the case for several years and during that time, the defense was able to discover evidence that the Plaintiff's brain injury was dubious and that she lied about a number of things relating to that claim.

On the first day of trial, Plaintiff's counsel announced that he would drop the brain injury claim. The defense did not dispute that Plaintiff had that right, but moved to continue, arguing that the timing of the Plaintiff's withdrawal of that claim severely prejudiced the defense, which had prepared for the trial utilizing Plaintiff's impeachment as the cornerstone of its defense and because it was difficult, if not impossible, for the parties to separate out that claim from others given that numerous medical records contained references to several of the Plaintiff's claims including the brain injury claim such that it would be difficult for the parties to remove all of those references.

The appellate court found that the trial court did not abuse its discretion in denying the motion for continuance, although the Court recognized the request "very well might have been warranted." However, because the standard of review is whether the trial court abused its discretion, the appellate court determined that it could not second-guess the trial judge's denial of the motion.

SECOND DISTRICT RULES THAT A DEFENDANT HAS NO DUTY TO PRESERVE SURVEILLANCE TAPES WHERE IT HAD NOT BEEN REQUESTED IN WRITING TO PRESERVE THAT EVIDENCE AND PLAINTIFF ONLY CONTENDED THAT THE DEFENDANT SHOULD HAVE FORESEEN THE NEED TO PRESERVE THE TAPES SIMPLY BECAUSE THE ACCIDENT OCCURRED ON ITS PREMISES

In Osmulski v. Oldsmar Fine Wine, Inc., 37 Fla. L. Weekly D1578 (Fla. 2d DCA, June 29, 2012), the Second District Court of Appeal reviewed a final judgment rendered in a slip and fall claim against a liquor store found to be only 35% at fault for its customer's fall on its premises. During trial, the plaintiff requested a rebuttable presumption jury instruction because the videotape of the accident had been automatically deleted after the accident. Because the video was deleted before any suit had been filed and the plaintiff had made no demand for preservation, the Court found that the mere anticipation of future litigation was, in and of itself, insufficient to vest a defendant with a legal duty to preserve evidence in its possession. The appellate court also noted that if there had been a breach of a cognizable duty, the appropriate sanction would not have been a rebuttable presumption jury instruction, but rather, it would have been an instruction to the jury to assume that the missing tape would have contained evidence unfavorable to the defense.

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Focus Feature

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Workers' Compensation Case Law Updates

WHEN REQUESTING AN ORDER COMPELING AN IME, THE CARRIER HAS THE BURDEN TO PROVIDE EVIDENCE OF A LEGAL DISPUTE

Bellamy v. Golden Flake Snack Foods, Inc., 37 Fla. L. Weekly D2172 (Fla. 1st DCA 2012). The Claimant herein suffered a right hand injury which was accepted as compensable and for which medical treatment was provided. Despite the fact that there were no pending petitions, the Employer/Carrier filed a Motion for IME asserting that it disagreed with the impairment rating, the work restrictions and the extent of disability as detailed by the authorized providers. During this time, medical care was never denied. The JCC granted the motion for IME and the Claimant, in response, sought certiorari review of the Order. In its ruling, the First DCA noted that certiorari review is properly invoked when a JCC orders an IME without statutory authority as material harm may be established. The Court continued, stating that IME's are only appropriate when a "dispute" arises, and defining dispute as a "legal dispute cognizable under" the law. The Court looked to its prior holding in Lehoullier v. Grevity/Fire Equipment Services, 43 So.3d 834 (Fla. 1st DCA 2010) in stating that in order to create such a dispute, the Carrier would have to deny medical care. The Carrier herein failed to establish evidence of a denial and thus the order compelling the IME was quashed.

A PAYMENT OF AN ADVANCE IS NOT CONSIDERED A PAYMENT OF "COMPENSATION DUE" TO A CLAIMANT FOR PURPOSES OF FEE ENTITLEMENT

Williams v. State of Florida Department of Corrections/Division of Risk Management, 37 Fla. L. Weekly D2106 (Fla. 1st DCA 2012). At issue here was whether a Claimant may recover attorney's fees where the Employer/Carrier made a payment of $2,000.00 advance compensation just 20 days after receiving a Petition for Benefits requesting PTD benefits, but did not commence the initial installment of PTD benefits within 30 days of the Petition for Benefits. The JCC denied a fee, citing that the $2,000.00 advance constituted PTD benefits. However, the First DCA disagreed and reversed the Order, remanding the case back to the JCC. In doing so, the First DCA explained that entitlement to an advance as per section 440.20(12)(c) does not require proof that the claimant will actually receive the benefits in the future and is not limited to cases in which compensability is established. As such, even though the amount advanced is called "compensation" in fact, it is not a payment of "compensation due" to a claimant. Herein, the first payment of PTD was not via the advance, rather it was payment of the first installment of PTD which was made 41 days after the Employer/Carrier's receipt of the Petition for Benefits. Thus, the Claimant was entitled to recover a reasonable fee.

ASSERTING A JURISDICTION DEFENSE REGARDING PAYMENT OF BILLS OF AUTHORIZED PROVIDERS SERVES AS WAIVER OF ANY MEDICAL NECESSITY DEFENSES

Bergstein v. Palm Beach County School Board, 37 Fla. L Weekly D1978 (Fla. 1st DCA 2012). In this case, the First DCA affirmed the JCC's order finding that the parties' disagreement regarding payment of outstanding bills for medical care was a reimbursement dispute over which the JCC lacks jurisdiction. However, in so doing, the First DCA continued its discussion, noting that where an Employer/Carrier asserts a jurisdictional defense as to medical bills, it is a de facto concession by the Employer/Carrier that the services or products billed were provided by an authorized provider for compensable injuries "in accordance with" or "pursuant to" the workers' compensation statute. In other words, the Employer/Carrier waives any challenges to the medical necessity of the care and is solely financially responsible for the bills.

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JCC CANNOT RULE ON COMPENSABILITY OF A CONDITION WHERE IT IS NOT AT ISSUE

Williams v. Tarmac America, 37 Fla. L. Weekly D1923 (Fla. 1st DCA 2012). Herein, the Claimant drove a cement truck for the employer beginning in 1987. He started having back complaints some time before 1990 due to a work-related vehicular accident. In fact, the Employer/Carrier provided medical care for his increasing back pain throughout the 1990's. By 2004, however, the Claimant resigned, stating that his continued use of medication for back pain dulled his senses and made it difficult to drive safely. The Employer/Carrier continued to provide medical care. By 2010, the Claimant filed a Petition for Benefits requesting PTD benefits, describing the accident as a repetitive trauma and using a date of accident in 2004. Compensability of the back was not raised as an issue, assuming the accident as compensable. The JCC, based upon this Petition, denied PTD stating that the Claimant failed to establish a repetitive trauma injury. However, compensability of the back was never placed at issue, nor challenged by the Employer/Carrier. Furthermore, the Employer/Carrier continued to provide medical care for the back and never denied compensability of same. Thus, the JCC's order was reversed and remanded.

WHERE A CLAIMANT IS CLEARLY WITHIN THE COURSE AND SCOPE OF EMPLOYMENT WHEN INJURED AND ABSENT A COMPETING CAUSE FOR THE ACCIDENT AND INJURY, THE WORK ACTIVITY IS DE FACTO THE MAJOR CAUSE OF THE INJURY

Caputo v. ABC Fine Wine & Spirits, 93 So.3d 1097 (Fla. 1st DCA 2012). The Claimant herein fell and hit his head on the floor while cutting down shelving. There was no dispute that he was on the Employer's premises and performing one of his job duties while injured. In addition, while the Employer/Carrier denied the claim on the basis that his fall resulted from either a preexisting or idiopathic condition, the JCC rejected the argument that the Claimant had a preexisting condition. Despite rejecting a preexisting condition, however, the JCC denied compensability as idiopathic and not caused by the employment. The First DCA reversed and remanded the JCC's order noting that in finding that there was no preexisting condition which may have caused the fall and thus, in the absence of any "competing" causes for the accidental injuries, the Claimant satisfied the major contributing cause requirement where the evidence showed that he was removing shelving at the Employer's store at the time of accident and suffered closed-head injuries as a result of the accident. In a nutshell, if there is only one cause of the injuries, rather than competing causes, a claimant is not required to present additional evidence going to the issue of whether the workplace is the major contributing cause of the injuries.

The First DCA in Walker v. Broadview Assisted Living, 95 So.3d 942 (Fla. 1st DCA 2012) elaborated on its reasoning in Caputo v. ABC Fine Wine & Spirits, 93 So.3d 1097 (Fla. 1st DCA 2012). The First DCA in Walker reversed the JCC's order denying benefits for her shoulder injury. In this particular case, the Claimant was a receptionist. The Employer had requested that she drop off a package at UPS and in anticipation of same, she placed the package in her car. However, it appears that the UPS driver arrived at the Employer's place of business, prompting the Claimant to retrieve the package and give it to the UPS driver. As she was returning to her desk, she turned a corner and felt her foot slip from under her. The fall resulted in a rotator cuff tear. There was no evidence of a pre-existing condition that may have caused the fall. The JCC's denial was based upon the fact that the accident, while on the premises, did not arise out of her employment because her work activity at the time was not the major contributing cause of her fall or injury. In reversing the JCC, the First DCA pointed out that an unrelated medical condition did not cause the fall; nor was the injury caused by a preexisting condition. Thus, the Claimant did not have an increased burden to establish that the employment itself created the hazard of the risk. Rather, the DCA relied upon its prior ruling in Caputo and again stated that in the absence of competing causes of the accident injuries, the Claimant satisfied the major contributing cause requirements. Herein, the Claimant was engaged in a work related activity and

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there were no other competing causes of the accident and injury.

INTEREST ON LATE PAYMENTS OF BENEFITS IS MANDATORY; HOWEVER, PENALTIES ARE NOT DUE WHERE EVIDENCE SUPPORTS THAT LATE PAYMENT WAS BEYOND THE EMPLOYER/CARRIER'S CONTROL

Pupo v. City of Hialeah, 91 So.3d 925 (Fla. 1st DCA 2012). The Claimant in Pupo appealed the JCC's order denying penalties and interest on late payment of indemnity benefits. Regarding penalties, the First DCA upheld the denial of same based upon the fact that the record supported the JCC's ruling that the Employer/Carrier did not have control over the delay. Specifically, the adjuster testified that the late checks were sent regular mail; that she does not see the checks go out; but rather, it goes through "finance." The pay sheets documented that hundreds of payments, undisputedly received by the Claimant, were made the same way. Evidence of an office's standard mailing practices creates a rebuttable presumption that the particular item was mailed at which point the burden is on the Claimant to rebut this presumption. In Pupo, the Claimant did not meet his burden. Thus, the late payment was not within the Carrier's control and penalties were not due or owing. However, as to interest, in 1997 (the date of accident), there were no exceptions to entitlement to interest. Since there was no dispute that the payments were late, interest was mandatory and the denial of interest was reversed.

CLAIMANT'S TRIP TO WORK TO LOAD EQUIPMENT NEEDED FOR WORK LATER THAT EVENING DID NOT FALL UNDER THE "SPECIAL ERRAND" OR "DUAL PURPOSE" EXCEPTIONS TO THE "GOING AND COMING RULE"

Stewart v. Lakeland Funeral Home/Constitution State Service Company, 86 So.3d 1205 (Fla. 1st DCA 2012). The Claimant appealed the JCC's order which denied compensability of injuries sustained in a motorcycle accident while driving from his residence to work. Although the Claimant was scheduled to be off from work, he had to attend a memorial service for a client in the evening. In lieu of going to the service site as he normally does for the service, the Claimant chose to go directly to the funeral home to help load the equipment for the service, with help from an assistant funeral director.

The Claimant argued that the "going and coming rule" was not applicable in his case because his duties on the date of his accident fell under the special errand doctrine and/or the dual purpose exception to the going and coming rule.

The First DCA affirmed the lower Court's ruling, noting that the facts of the Claimant's case did not fall under the special errand and/or dual purpose exceptions to the "going and coming rule." In affirming, the DCA noted a "special errand" is characterized by "irregularity and suddenness." In the instant case, the Claimant was not asked at the last minute to attend the service or go to the funeral home for some business purpose. Lastly, the Court further noted that the Claimant's case did not fall under the dual purpose doctrine as the Claimant had not yet undertaken any business for the employer at the time of the accident.

A SEVERANCE AGREEMENT AND RELEASE NEGOTIATED AND EXECUTED BY THE CLAIMANT AT THE CONCLUSION OF EMPLOYMENT WHILE REPRESENTED, MAY SERVE TO RELEASE THE EMPLOYER/CARRIER FROM ANY AND ALL CLAIMS UNDER CHAPTER 440

Risco USA Corporation v. Alexander, 91 So.3d 870 (Fla. 1st DCA 2012). The Claimant herein sustained a compensable work accident during his first period of employment with the Employer on September 2, 2005. The Claimant retained counsel shortly after undergoing surgery for said work accident in February 2006. At the end of his second period of employment, the Claimant executed an Exit Interview & Separation of Employment Agreement releasing the Employer for all causes of actions from the beginning of his employment through the date of the agreement, to include any claims arising from or relating in any way to his employment. After executing the

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agreement, the Claimant filed a petition for benefits on December 24, 2010. The Employer/Carrier denied all benefits based on the separation agreement executed by the Claimant at the end of his employment. Although the JCC noted the Claimant was represented when he entered into the agreement, he nonetheless awarded benefits finding the agreement applied only to the second period of employment. However, the First DCA disagreed and reversed the JCC's order, remanding the case for entry of an order denying Claimant's entitlement to any further workers' compensation benefits.

The First DCA explained that although the Claimant had two periods of employment, he had only one employment relationship with the Employer and as such, the release applied to the Claimant's relationship with the Employer. Further, pursuant to section 440.20 (11)(c), F.S., a Claimant who is represented by counsel may waive all rights to workers' compensation benefits in exchange for a lump-sum payment. In conclusion, the First DCA, relying on Patco Transport, Inc., v. Estupinan, 917 So.2d 922 (Fla. 1st DCA 2005), held that the because the Claimant was represented by counsel and the plain language of the release indicates it applied to Claimant's employment relationship with the Employer, it was unnecessary for the agreement to be submitted to the JCC for it to be considered a settlement of Claimant's workers compensation claim.

THE EMPLOYER/CARRIER'S "INITIAL RESPONSE" TO A CLAIMANT'S PETITION FOR WORKERS' COMPENSATION BENEFITS IS ITS "RESPONSE TO THE PETITION FOR BENEFITS"

Miami-Dade County School Board v. Russ, 88 So.3d 1038 (Fla. 1st DCA 2012). The Employer/Carrier herein challenged the JCC's order rejecting its statute of limitations defense and awarding benefits. Specifically, the JCC found the Employer/Carrier's "initial response" to Claimant's petition for benefits included a notice of appearance, notice of deposition, and letter to the mediator-and not the Employer/Carrier's Response to Petition for Benefits, filed one day later. In reversing the JCC, the First DCA agreed, based on its observation in Certain v Big Johnson Concrete Pumping, Inc., 34 So.3d 149 (Fla. 1st DCA 2010), wherein it notes that the "initial response" "denied the claim in its entirety" evinces the need for an "initial response" to explicitly state a position either denying or conceding the particular claims therein.

JCC ERRED IN DENYING COMPENSABILITY OF CLAIMANT'S HYPERTENSION CONDITION WHEN CLAIMANT PRESENTED UNREFUTED MEDICAL EVIDENCE

Williams v. City of Orlando, 89 So.3d 302 (Fla. 1st DCA 2012). The Claimant herein appealed the JCC's order denying compensability of her hypertension on the ground she failed to establish eligibility to rely on the statutory presumption of occupational causation as set forth in section 112.18, Florida Statutes. By agreement of the parties, the Claimant met three of the four requirements of section 112.18, F.S. by being a police officer whose condition resulted in disability and who "successfully passed a physical examination upon entering into" the service. At issue here was whether the Claimant met the fourth requirement, that the condition be "tuberculosis, heart disease, or hypertension." Per Bivens v. City of Lakeland, 993 So.2d 1100 (Fla. 1st DCA 2008) (citing City of Miami v. Thomas, 657 So.2d 927 (Fla. 1st DCA 1995)), the Claimant must prove that her hypertension was "arterial or cardiovascular." Although the Claimant herein presented unrefuted medical opinion testimony that her "essential" hypertension is the "same thing" and "the same condition" as "arterial" hypertension, the JCC rejected the opinion testimony and denied all benefits.

The First DCA found the JCC erred in denying compensability because the JCC's reason for rejecting the evidence was based on his misunderstanding of the case law. The Court reiterated that a JCC may deny compensability of a claimant's hypertension if a claimant seeking benefits under section 112.18 produces no evidence that his hypertension is arterial or cardiovascular. It further noted that Bivens does not hold that "essential" hypertension is not covered by section 112.18, F.S. In Bivens, the Claimant did not produce evidence to support that his "essential" hypertension was "arterial" or "cardiovascular."

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FLORIDA STATUTES, SECTION 440.15(1)(B) LIMITING PTD BENEFITS FOR EMPLOYEES INJURED ON OR AFTER THE EMPLOYEE REACHES AGE 70, DOES NOT DISCRIMINATE ON THE BASIS OF AGE OR VIOLATE THE CLAIMANT'S RIGHT OF ACCESS TO THE COURTS

Berman v. Dillard's, 91 So.3d 875 (Fla. 1st DCA 2012). The Claimant herein challenged the constitutionality of section 440.15(1)(b), Florida Statutes limiting PTD benefits for an employee who is injured after the age of 70, arguing that because her claim was based on age discrimination and her right of access to the courts, it was subject to the strict scrutiny standard of review. The First DCA disagreed and affirmed the JCC's ruling finding the Claimant had exhausted her entitlement to PTD benefits under section 440.15(1)(b), F.S.

In rejecting the Claimant's argument that the strict scrutiny standard applies to her age discrimination claim, the Court noted that the Florida Supreme Court has stated that the "rational basis" test is the proper standard of review for constitutional challenges involving age limitations and restriction. Sasso v. Ram Prop. Mgmt., 452 So.2d 932 (Fla. 1984) The First DCA further elaborated, noting that "age limitations and restrictions may survive a constitutional challenge and be enforced if they pass the 'rational basis' test, i.e., the age classifications are reasonably related to a permissible governmental objective." Wright v. State, 739 So.2d 1230, 1232 (Fla. 1st DCA 1999).

The Court also rejected the Claimant's argument that strict scrutiny should apply to her right of access to the courts claim because only certain fundamental rights require application of the strict scrutiny standard of review. North Florida Women's Health & Counseling Services, Inc., v. State, 866 So.2d 612, 635 (Fla. 2003) The rational basis test for right of access to the courts for redress of a particular injury is set forth in Kluger v. White, 281 So.2d 1 (Fla. 1973). Specifically, the legislature may abolish such a right in two instances: (1) where it authorizes a reasonable alternative for the redress of injuries or (2) where it can demonstrate an overpowering public necessity for abolishing such a right. "The court named the Florida Workers' Compensation Law as an example of the first situation because it had: abolished the right to sue one's employee in tort for a job-related injury, but provided adequate sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury." Sasso, 431 So.2d at 209 (quoting Kluger, 281 So.2d at 4).

Successes/Announcements

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

- The facts and circumstances of your case may differ from the matters in which results have been provided.
- All results of cases handled by the firm are not provided.
- The results provided are not necessarily representative of results obtained by the firm or of the experience of all clients or others with the firm. Every case is different, and each client's case must be evaluated and handled on its own merits.

Esther Zapata Ruderman, Partner in the firm's West Palm Beach office, prevailed in the case styled Castillo v. Palm Beach County School District before Judge Mary D'Ambrosio on the issue of transportation to and from medical appointments. In denying the Claimant's claim, Judge D'Ambrosio ruled that the Employer/ Carrier have the initial choice of the means of transportation and that it was not reasonable for the Employer/Carrier to provide transportation to the Claimant to her medical appointments, under the facts of that case. The Claimant had a working vehicle, no driving restrictions, and the Claimant had been attending her medical appointments for several years. Also, the Carrier had been reimbursing the Claimant's mileage.

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Sharon Hendon, Associate in the firm's Orlando office, has expanded her practice to include Family Law. She is experienced in all areas of family law including dissolution of marriage (divorce), modification, custody, establishment of support, establishment of paternity, and adoption.

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Diane Tutt, Board Certified Appellate Lawyer, Associate in the firm's appellate department, was successful in obtaining affirmance of a workers' compensation order in which the JCC had rejected the Claimant's calculation of supplemental benefits in the case of Reynolds v. General Electric/Sedgwick. Claimant had argued that supplemental benefits should be calculated on the basis of 5 percent of his "compensation rate" which is defined by Rule as 66 2/3 of his AWW, even though his PTD benefits are capped at a lower amount. **Sharon Hendon**, Associate in the firm's Orlando office, prevailed at trial, convincing the JCC to calculate supplemental benefits based on 5 percent of the Claimant's capped PTD benefits, since the supplemental benefits statute provides that the injured employee shall receive additional weekly compensation benefits equal to 5 percent of his "weekly compensation rate, as established pursuant to the law in effect on the date of his injury." Since the Claimant's PTD benefits were capped "pursuant to the law in effect on the date of his injury," the 5 percent must be calculated on the capped benefit amount, not the higher "compensation rate." The First District Court of Appeal agreed with our position and affirmed the JCC just two days after the appellate oral argument.

Ms. Tutt also obtained affirmance in the First District Court of Appeal in the case of Bishop's Court at Windsor Parke Condo. Assoc. v. Colony Ins. Company. The case involved the insurer's duty to defend and duty to indemnify under a commercial general liability policy issued to a building inspection company. In 2005, the insured had inspected an apartment project that was being converted to condominiums and it was alleged that the inspector missed numerous construction defects and that the condominium buyers relied on the inspection report in purchasing their units. Although the plaintiff tried to allege that the inspector caused property damage, which is required for coverage under the policy, the trial court disagreed, adopting the order submitted by Colony's trial counsel, **John Edward Herndon, Jr.**, Partner in the firm's Tallahassee office. The First District Court of Appeal affirmed the trial court's order, just days after oral argument was presented by **Ms. Tutt**, thus agreeing with the trial court that not only did the insured not cause property damage, but that damage revealed during Colony's 2008/2009 policy was merely a worsening of damage that first manifested itself prior to the policy

Successes/Announcements

period, and thus, would not be covered in any event.

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Christian Petric, Partner in the firm's West Palm Beach office, successfully obtained a dismissal of a claim for compensability of a cervical injury and recommendation for cervical fusion on the eve of a final merits hearing. The Claimant alleged that the cervical condition occurred either as a result of performing physical therapy for a compensable lower back condition or as a result of continued employment after the lower back injury. Through intensive discovery and multiple expert and doctor depositions it was established that the cervical condition and need for the cervical fusion were not related to the Claimant's employment or therapy for the lower back.

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We would like to congratulate **John Lurvey,** Name Partner in the firm's West Palm Beach office, for being elected as Vice President of the Palm Beach Chapter of American Board of Trial Advocates!

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Marc M. Crumpton and **Jennifer K. Forte,** Associates in the firm's Tampa office, obtained a defense verdict on behalf of the City of St. Petersburg and Urban Retail Properties, Inc. after a 5 day trial ending on October 19, 2012 in Pinellas County (Clearwater division) before Hon. W. Douglas Baird. The Plaintiff had filed suit against the city and the city's management company alleging inadequate security when she was struck in the face by a flying football thrown by another guest on her wedding day at The Pier in St. Petersburg in 2003. Plaintiff claimed injuries that consisted of temporalmandibular joint dysfunction and resulting surgery, multiple spine injuries, and debilitating pain and treatment that spanned 9 years leading up to trial. A jury returned the verdict of no liability on the part of the City and its management company in 40 minutes and Plaintiff was awarded no damages as a result of the jury's finding.

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Jackie Gregory, Partner in the firm's Hollywood Office, successfully defended a Miami-venue claim where the following benefits were requested: authorization for orthopedic care, cervical and lumber MRIs, nerve conduction velocities, SSERs & EMGs of upper & lower extremities, facet blocks of cervical and lumbar, epidural blocks, as well as attorneys' fees and costs. The Employer/Carrier asserted that the major contributing cause of the need for further treatment is no longer the job accident. The Judge of Compensation Claims agreed and all benefits were denied.

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Stephanie Robinson, Associate in the firm's Hollywood office, recently prevailed at a Final Hearing defending against PTD benefits. Specifically, in a Motion for Rehearing Ms. Robinson convinced the Judge of Compensation Claims that she misapplied the law in her original order for PTD. The Final Order denied PTD altogether on the basis that the Claimant did not meet his burden of proving that he had permanent, less than sedentary work restrictions.

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Dale L. Friedman, Partner in the firm's Hollywood office, and **David S. Rothenberg,** Associate, obtained summary judgment in a negligence case involving an alleged slip-and-fall on a slippery "substance" in a department store in the Nineteen Judicial Circuit in and for Indian River County. The Court determined the plaintiff was unable to demonstrate the defendant's actual or constructive knowledge of the alleged "substance" on the floor prior to the incident.

Ms. Friedman also successfully had a plaintiff's pleadings struck for lying under oath. The plaintiff had previously testified as a witness in a lawsuit brought by her former supervisor for severance that he never sexually harassed her. Subsequently, she brought her own lawsuit against her former employer and changed her testimony, claiming she was sexually harassed. Defendants filed a motion for sanctions in response to which the Judge struck the plaintiff's pleadings.

Successes/Announcements

In addition, **Dale Friedman** obtained a dismissal with prejudice of a lawsuit against a law firm alleging Wrongful Attempt to Foreclose and Fraud arising out of the law firm's representation of a mortgage lender and the mortgage foreclosure lawsuit.

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Millard L. Fretland, Partner in the firm's Pensacola office, **Thomas J. McCausland**, Partner in the firm's Hollywood office, and **Christopher E. Varner**, Associate in the firm's Pensacola office, successfully defended a two week product liability trial in Okaloosa County, Florida involving a severe brain injury to a teen aged boy allegedly caused by an inflatable amusement device called a Bungee Run. The plaintiff was represented by Catfish Abbott of Jacksonville, Florida and Dixie Dan Powell of Crestview, Florida. Liability was contested with expert testimony on both sides on the issues of design defect and adequacy of product warnings. Plaintiff contended that he was unable to work in the future and required continual attendant care due to his injury, while the defense presented evidence that the plaintiff had recovered his functioning to pre-injury levels. The plaintiff asked the jury for an award of $36,000,000 while the defense contended the product was not defective and that the plaintiff was entitled to nothing as a result. After four days of deliberations, the jury returned a verdict of $477,000 which primarily consisted of the plaintiff's past economic damages. This result was considerably less than the defense's final settlement offer.

* * *

Congratulations to **Hinda Klein**, **Diane H. Tutt**, **Michael J. Paris**, **Edward N. Winitz**, **Scott D. Krevans**, **John A. Lurvey**, **James M. Eckhart**, **Dale L. Friedman**, **Jeffrey Blaker**, **Stuart F. Cohen**, **Thomas J. McCausland**, **Lawrence S. Gordon**, and **Neal L. Ganon** who have been listed as top rated lawyers in the 2012 Edition of "South Florida's Top Rated Lawyers."

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Michael Kraft, Partner in the firm's Tampa office, was successful in obtaining a defense verdict on a trip and fall case. The plaintiff tripped and fell on a pebble outside of her place of employment, sustaining a comminuted fracture of her arm requiring four surgeries and in excess of $400,000 in medical bills. The matter was bifurcated and the jury returned a defense verdict in 17 minutes.

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Hinda Klein, Partner in charge of the firm's appellate department, was successful in obtaining an affirmance of a summary judgment entered in the insurer's favor in a bad faith claim. In Goheagan v. American Vehicle Ins. Co., 37 Fla. L. Weekly D1388 (Fla. 4th DCA, June 13, 2012), the Fourth District affirmed the judgment in AVIC'S favor finding that it was not in bad faith in failing to settle a claim against its insured where the claimant was in a coma and her guardian would not give AVIC'S adjuster information regarding the family's legal counsel. Because AVIC was advised that the family had legal representation and the adjuster's code of ethics prohibited the adjuster from communicating with the family directly and the adjuster repeatedly requested the name of the claimant's counsel, to no avail.

* * *

Jackie Gregory, Partner in the firm's Hollywood office, was successful on a Motion for Summary Final order pertaining to dismissal of petitions for benefits which had been previously voluntarily dismissed by Claimant's Counsel. The Employer argued the applicability of the two-dismissal rule regarding various claims. Hon. Judge Hill found that there was no genuine issue of material fact which revealed that multiple claims were pending at the time of the voluntary dismissal. Therefore, certain claims asserted against the employer were barred by the two dismissal rule as a matter of law. The Employer's Motion for Summary Final Order was therefore granted.

Ms. Gregory was also successful in defending against a claim for temporary benefits, permanent total disability benefits as well as medical

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benefits. The primary defense asserted was that the industrial accident no longer remained the major contributing cause of the Claimant's disability or need for medical treatment. Based on medical opinion, the JCC ruled for the Employer/Carrier and denied Claimant's claims for continued compensability, temporary benefits, permanent total disability benefits, continued orthopedic care and fees.

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Congratulations to **John Lurvey**, Name Partner in the firm's West Palm Beach office, for being named "Defense Attorney of the Year" by the American Board of Trial Advocates in Palm Beach!

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