Law Bulletin from

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

VOLUME 14, NUMBER 2 JUNE/JULY 2012

In This Issue:

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SUPREME COURT FINDS NO SEPARATE CAUSE OF ACTION AGAINST AN INSURER FOR BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

The Florida Supreme Court, in QBE Ins. Corp. v. Chalfonte Condominium Apartment Assoc., 37 Fla. L. Weekly S395 (Fla., May 31, 2012) issued a long-awaited decision addressing several issues, the most important of which is whether Florida law recognizes a claim for breach of implied warranty of good faith and fair dealing by an insured against its insurer based on the insurer's alleged failure to investigate the insured's claim within a reasonable period of time. The Supreme Court held that there is no such cause of action separate and apart from a first-party bad faith claim under Florida Statute 624.155. The Court further opined that, while there is generally a duty of good faith owed by an insurer to its insured, any resulting cause of action for breach must be founded on a breach of a specific term of the contract. Thus, any cause of action brought by an insured against his/her own insurer which alleges a breach of the carrier's duty of good faith and fair dealing must ultimately allege a breach of contract in order to avoid dismissal. Pursuant to the governing law, the issue of whether the contract has been breached must first be litigated to fruition (which includes the appellate process) before any subsequent statutory bad faith claim becomes ripe for further litigation.

The Supreme Court also addressed the issue of whether an insured has a private right of action for a violation of Florida Statute 627.701, which governs the type size and

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SUPREME COURT DECISION - CONTINUED

style required for the required notice of a separate hurricane deductible contained in property insurance policies. The statute requires that policies that contain a separate hurricane deductible include the following language in 18-point bold-faced type: "THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR HURRICANE LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU." In this case, the carrier provided the requisite notice on the first page of its policy, but did so in 16.2-point type rather than the required 18-point type and used the word "windstorm" rather than "hurricane". After examining the statutory language and its legislative history, the Supreme Court concluded that a violation of this statute does not provide an insured with a cause of action for failure to comply with the language or type-size requirements. Moreover, the Supreme Court rejected the insured's alternative argument that the carrier's failure to comply with the notice requirements should render the hurricane deductible unenforceable. The Court reasoned that the legislature "is perfectly capable of crafting an express penalty" for a statutory violation and in the absence of a specified penalty, the Court would not itself divine one, especially where, as here, the carrier substantially complied with the statute and there was no evidence that the insured had no notice of the hurricane deductible, which was the obvious intent of the language and type-size requirements.

The final issue addressed in the Supreme Court's decision was whether, where the policy required payment of a claim within 30 days after the entry of a final judgment, the carrier was required to pay the judgment even if it appealed and bonded it. The Supreme Court held that the policy language did not "trump" the carrier's right to post an appellate bond to stay execution and that the policy language did not have the operative effect of waiving the carrier's right under the appellate rules to stay execution pending appeal.

Please feel free to contact our attorneys with any questions.

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Liability Case Law Updates

FOURTH DISTRICT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF THE INSURER IN A COMMON LAW THIRD-PARTY BAD FAITH CLAIM FINDING THAT THE UNREFUTED EVIDENCE ESTABLISHED THE INSURER'S GOOD FAITH IN ITS ATTEMPT TO SETTLE A CASE AGAINST ITS INSURED

In Goheagan v. American Vehicle Insurance Company, 37 Fla. L. Weekly D1388 (Fla. 4th DCA, June 13, 2012), the Fourth District Court of Appeal addressed the propriety of a summary judgment rendered in favor of American Vehicle Insurance Company against Olive Goheagan, the personal representative of the Estate of Molly Swaby. Swaby was killed in an automobile accident with AVIC'S insured John Perkins, and was comatose from the time of the accident until her death several months later.

The opinion sets forth in detail AVIC'S efforts to tender its limits to Swaby. Significantly, AVIC repeatedly contacted Goheagan, Swaby's mother, in an attempt to settle the claim, but the adjuster was advised within days after the accident that the family was represented by counsel, but neither Goheagan nor her husband would provide AVIC with the name of their counsel, despite the adjuster's repeated requests for that information. Because Swaby was in a coma, the adjuster was unable to obtain that information from anyone in her family. It was only after Swaby died and the Estate filed suit against Perkins that AVIC was finally able to determine the identity of the attorney.

AVIC immediately contacted the Estate's counsel and offered to tender its policy limits, but counsel rebuffed the offer, as well as a later settlement offer. Counsel advised AVIC that it should have offered to settle the claim earlier. The case went to trial and a final judgment of $2,792,893.65 was entered against Perkins.

Thereafter, Goheagan, as Swaby's personal representative, filed an action against AVIC alleging that AVIC acted in bad faith in failing to settle the claim against Perkins. AVIC moved for summary judgment, arguing that the evidence was undisputed, that it was unable to communicate with Swaby and that Goheagan's refusal to advise the insurer of the family's counsel rendered it impossible to settle the claim at any time before it discovered the identity of their counsel and tendered its limits. AVIC asserted that under the adjuster's Code of Ethics, it was precluded from settling the claim with Goheagan once the adjuster was advised that the family was represented by counsel..

The trial court granted summary judgment and the appellate court affirmed, in a two-to-one decision. The majority agreed that the undisputed facts of the case established that AVIC could not ethically have even tendered a check to Goheagan once it was advised that she was represented and tendering a check to her comatose daughter would have been futile. The appellate court found that the Estate's expert witness' affidavit opining that there were no ethical prohibitions preventing the adjuster from tendering the check was contrary to the plain language of the adjuster's code of ethics, contained in Florida Administrative Code 69B-220-201, which prohibits an adjuster from communicating with claimant represented by counsel. Therefore, the Court concluded, the expert's affidavit did not preclude summary judgment in favor of the insurer.

In addressing the dissent, the majority noted that it was not fatal that the carrier might have done things differently by, for example, sending Goheagan a written offer or tender and advising her to consult with her counsel, and the fact that AVIC did not do so did not mean that it acted in bad faith under all of the facts of this case. The majority cited numerous federal trial court cases granting summary judgment in bad faith cases, and quoted legal commentators when it concluded that "[t]he claim for 'bad faith' failure to settle should be exactly that – only for situations in which the insurer truly is refusing in bad faith to settle, not when it is in fact attempting to settle the claim."

In a sharply worded dissent, Judge Hazouri opined that he would have reversed the summary judgment, finding that there were issues of fact appropriate for jury resolution, specifically whether the family's retention of an attorney was an impediment to settlement and whether Swaby's condition rendered any settlement attempt futile.

Liability continued

As of the date of this writing, Goheagan has indicated her intent to file a motion for rehearing, and to pursue Supreme Court review in the event her motion is denied.

FIFTH DISTRICT HOLDS THAT A PROPERTY INSURANCE REQUIREMENT THAT THE INSURED ATTEND AN EXAMINATION UNDER OATH BEFORE FILING SUIT IS NOT A CONDITION PRECEDENT TO RECOVERY UNDER THE POLICY

The requirement that an insured attend the insurer's requested examination under oath before the carrier must pay the claim or before the insured may file suit has been deemed a condition precedent to payment of a property insurance claim by Florida courts for over a century. Despite this well-entrenched precedent, the Fifth District Court of Appeal, in Whistler's Park, Inc. v. The Florida Insurance Guaranty Association, Inc., 37 Fla. L. Weekly D1188 (Fla. 5th DCA, May 18, 2012), reversed a summary judgment in FIGA'S favor, on the ground that FIGA'S predecessor Southern Family's policy did not explicitly set forth that the failure to comply with this condition would result in a forfeiture of the insured's policy benefits. In doing so, the Court relied on its en banc decision in State Farm Mutual Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011), which is currently pending review before the Florida Supreme Court.

In Curran, the Fifth District held that a requirement in a UM policy that the claimant attend a compulsory medical examination (CME) as a condition of the payment of benefits was not a "condition precedent" because the policy did not contain language advising the insured that refusal to comply with that condition would result in forfeiture of policy benefits. Relying on Curran, the Whistler's Park Court impliedly criticized insurers for abusing their right to examinations, even though there was no evidence that FIGA or its predecessor Southern Family did so in this case, where the insured was repeatedly requested to provide documentation supporting its million dollar Hurricane claim and to provide a convenient date for its representative's examination under oath before it filed suit against Southern Family. Despite the fact that there was no evidence that Southern Family's requests were unreasonable, the Court opined that "[n]o doubt there can be genuine instances of insurance fraud, but the recent and ever-escalating number of EUO cases that have arisen all over the state appear to be more about strategy than truth". Despite the fact that neither Southern Family nor FIGA ever required the insured to attend an EUO without counsel, the Court noted that "[m]ost policies provide that an insurer can demand multiple EUO'S and unlimited records and that insureds cannot even have counsel present."

The Court concluded, as it did in Curran, that the requirements that the insured provide the carrier with requested documentation supporting the claim and attend a requested EUO, were actually conditions subsequent such that in order to prevail on the affirmative defense that the insured failed to comply with the policy, the insured had the burden of proving that it was actually prejudiced by that violation. Once again, despite the fact that the law prevailing at the time of the summary judgment did not require the carrier to prove its prejudice and the claimant never made this argument, the Fifth District found that the record demonstrated that neither Southern Family nor FIGA was prejudiced by the insured's failure and refusal to comply with its obligations under the policy at any time during the eight (8) years since the loss. Accordingly, the Court reversed the summary judgment and remanded the case.

As of the time of this writing, the Fifth District has denied FIGA'S motions for rehearing, rehearing en banc and certification to the Supreme Court. It should be noted that this decision is only binding in the Fifth District.

Liability continued

SUPREME COURT HOLDS COUNTY HOSPITAL LIEN ORDINANCE VALID AND PIP CARRIER'S IMPAIRMENT OF THAT LIEN BY PAYMENT OF BENEFITS TO CLAIMANT AFTER LIEN HAD BEEN RECORDED ENTITLED HOSPITAL TO RECOVERY FROM THE CARRIER OF UP TO THE AMOUNT OF ITS LIEN UP TO THE AMOUNT OF THE POLICY LIMITS

In Shands Teaching Hospital and Clinics, Inc. v. Mercury Ins. Co. of Florida, 37 Fla. L. Weekly S407 (Fla., June 7, 2012), the Florida Supreme Court addressed the constitutionality of a statute creating a lien in favor of non-profit hospitals in Alachua County, finding it to be unconstitutional but a similar ordinance to be valid. The Court then addressed the issue of whether an insurance carrier that paid PIP benefits to a claimant thereby impairing the hospital's recorded lien, would be required to satisfy the entire lien, which was in excess of its policy limits.

The Court concluded that if the carrier had satisfied the lien instead of paying benefits to the claimant, it would have only been required to pay up to the amount of its limits, and therefore, impairment of the lien by the payment to the claimant could not result in any greater liability. Therefore, while the hospital had a claim against Mercury for impairment of its lien, it could only recover up to the policy limits .

SECOND DISTRICT REVERSES AN AWARD OF A CONTINGENCY FEE MULTIPLIER IN THE ABSENCE OF ANY COMPETENT EVIDENCE THAT THE PLAINTIFF PROVIDER WAS UNABLE TO OBTAIN COMPETENT COUNSEL WITHOUT THE POSSIBILITY OF A MULTIPLIER

The Second District Court of Appeal addressed a question certified by a County Court with respect to whether expert testimony alone could support the award of a contingency fee multiplier. In USAA Casualty Ins. Co. v. Prime Care Chiropractic Centers, P.A. a/a/o Woodard, 37 Fla. L. Weekly D1107 (Fla. 2d DCA, May 9, 2012), the Second District never reached the certified question, but instead, disposed of the case by finding that the trial court abused its discretion in awarding a multiplier that was not supported by competent, substantial evidence.

In this case, the provider's corporate representative testified at the attorneys' fee hearing that he had contacted three law firms in Polk County who refused to take the case. Ultimately, the provider retained an attorney in Tallahassee to handle the Polk County case. The provider's expert, Kevin Weiss, opined that the market required a multiplier in order for the provider to obtain competent counsel, but Mr. Weiss did not provide the court with any evidence to support this assertion. The trial court found that the evidence did not establish that the law firms who refused the case did not demonstrate that the firms would not take the case without a multiplier; rather, the firms refused the case for other reasons. Nevertheless, the trial court awarded the provider's counsel a 2.0 multiplier. The Second District reversed the multiplier on the ground that it was entirely unsupported by record evidence that the relevant market required a contingency fee multiplier to obtain competent counsel.

INSURANCE POLICY LANGUAGE WHICH PROVIDED THAT THE INSURER COULD REQUIRE AN INSURED TO SUBMIT TO AN EUO OUTSIDE THE PRESENCE OF ANY OTHER INSURED DID NOT ENABLE THE CARRIER TO EXCLUDE THE INSURED'S PUBLIC ADJUSTER FROM THE EXAMINATION

The Fourth District Court of Appeal held that where a property insurance policy permitted the carrier to take an insured's examination under oath outside the presence of any other insured under the policy, the carrier was not permitted to exclude the insured's public adjuster from attending the examination. In Nawaz v. Universal Property & Casualty Ins. Co., 37 Fla. L. Weekly D1402 (Fla. 4th DCA, June 13, 2012), the insured filed a declaratory judgment action and the carrier filed a counterclaim for the same relief after the carrier suspended his EUO after the insured refused to attend the statement without his public adjuster. The trial court entered a judgment in favor

Liability continued

of the insurer, finding that public adjusters are properly excluded from sworn statements.

On reviewing the policy language, the appellate court reversed, determining that under the express terms of the policy, the only individual(s) properly excluded from an EUO are other insureds and that the trial court's order holding otherwise effectively rewrote the contract between the parties. The Court noted if the carrier wanted to exclude others from attendance at EUOs, it would have been a "simple matter" for the carrier to include that restriction in the policy. Having failed to do so, the carrier had no right to exclude the insured's public adjuster and the judgment would be reversed and remanded for entry of a judgment in the insured's favor.

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Focus Feature

Commercial Division

The firm's Commercial Division handles far ranging business disputes for insurance companies, their insured's and private clients. These matters include real estate related litigation and arbitration, corporate matters, including shareholder derivative claims, adversary proceedings in bankruptcy and federal court, copyright and trademark infringement and traditional commercial and contractual disputes. These disputes often involve related tort claims, such as fraud and breaches of fiduciary duties. In addition to these varied types of business claims, we are often called upon to represent professionals, such as accountants and attorneys, in malpractice claims. For example, we recently successfully defended an accounting/auditor malpractice claim in which a group of investors sought in excess of $15,000,000 in alleged losses from our client. The summary judgment granted in our client's favor was affirmed on appeal.

The division is headed by Dale Friedman, who has been with the firm for more than twenty years representing insurance companies and their insured's in a litany of commercial matters. Her partner, Larry Gordon, has been a commercial lawyer with such firms as Greenberg Traurig and Feldman Gale, representing clients with complex business, real estate and intellectual property disputes. The division is supported by numerous seasoned and talented associates with commercial and corporate backgrounds who are admitted to Florida's state courts, federal court and bankruptcy court.

We pride ourselves in our comprehensive approach to litigation and are particularly aware of the additional information insurance companies need. We are always mindful of the client's goals in litigation and attempt to intelligently use the litigation process to position our clients for a positive and expedient resolution of their disputes.

Please contact Dale Friedman at 954-518-1252 or Larry Gordon at 954-518-1284 if you have any questions about our practice or if we may serve your litigation needs.

Workers' Compensation Case Law Updates

CLAIMANT IS NOT ENTITLED TO A ONE TIME CHANGE ON A NON-COMPENSABLE CLAIM

Falcon Farms and Travelers Casualty & Surety Co. v. Espinoza, 79 So.3d 945 (Fla. 1st DCA 2012). The Claimant herein alleged that she developed a 'bump' on her finger due to her use of a hand held "gun" used to put dates on flower bouquets. The doctor authorized through the managed care arranged opined that the condition was not work related. The Claimant thus filed a petition for benefits requesting her one time change in PCP. The JCC awarded the time change; however, also denied compensability of the accident. The E/C appealed, arguing that since the claim is not compensable, the Claimant is not entitled to a change in PCP. The Claimant cross-appealed, arguing that the finding of non-compensability is inconsistent with the award of a one time change.

In addressing the Claimant's cross appeal, the DCA noted that she failed to show that the JCC erred in denying compensability. The DCA noted that at no time prior to filing the appeal did she challenge the JCC's ruling; rather her whole argument was that the denial of compensability was not consistent with the award of the one-time change. Since the Claimant failed to raise this argument, even on a motion for rehearing, it was not preserved.

As to the E/C's appeal, the DCA agreed that given the accident was not compensable, noting that the plain language of section 440.134(10)(c), which provides for a one-time change under a managed care arrangement, requires that the injury be work related. Thus, since the JCC denied compensability of the claim, likewise, he erred in awarding the change in doctor.

CLAIMANT IS NOT AT MMI WHERE THERE IS A RESONABLE EXPECTATION OF IMPROVEMENT OF HIS CONDITION

Rosa v. Progressive Employer Services/SUNZ Insurance Company/USIS, 37 Fla. L. Weekly D867 (Fla. 1st DCA 2012). The Claimant in this matter appealed the JCC's order which denied temporary benefits and ruled on permanent impairment rating. As to the ruling on the permanent impairment rating, the DCA ruled that the JCC erred as this issue was beyond the scope of the final hearing and not listed on the Pre-Trial Stipulation or addressed by either party at the final merits hearing. The JCC, in fact, ruled that that Claimant reached MMI and then relied upon the erroneous ruling in denying temporary benefits.

Regarding the temporary benefits, and as noted above, the JCC denied temporary benefits based upon the finding of MMI. However, while the JCC found that the Claimant was MMI, he also awarded medical treatment based upon the opinion of an EMA. In fact, the EMA testified that the procedure was medically necessary because it could bring about some degree of improvement in the Claimant's condition. The DCA noted that it is well established that the date of MMI "marks the point after which no further recovery or improvement from an injury or disease can be *reasonably* anticipated." The DCA continued this line of reasoning, pointing out that MMI "is precluded where treatment is being provided with a reasonable expectation that it will bring about some degree of recovery, even if that treatment ultimately proves ineffective." Thus, the finding of MMI in the instant case was reasoned to be incorrect, and the JCC's order was reversed and remanded for further findings concerning entitlement to temporary benefits.

PRIOR TO DISMISSING A PETITION FOR BENEFITS, THE JCC MUST FIND THAT A CLAIMANT'S FAILURE TO COMPLY WITH A PRIOR ORDER WAS WILLFUL, DELIBERATE OR CONTUMACIOUS

Jones v. Royalty Foods, Inc. and Gallagher Bassett Services, Inc., 82 So.3d 1162 (Fla. 1st DCA 2012). The Claimant appealed the JCC's dismissal of his petitions for benefits as a sanction for his non-payment of an earlier award of prevailing party costs to the employer and its carrier.

Workers' Compensation continued

In reversing the JCC's dismissal, the DCA noted that the JCC did not find that the Claimant's conduct was willful, deliberate or contumacious. In fact, to the contrary, the JCC found that the Claimant was indigent, unemployed and homeless and specifically stated that his conduct was NOT willful. Regardless, he struck the petition under section 440.24(4) which states that "[i]n any case wherein the employee fails to comply with any order of a judge of compensation claims within 10 days after such order becomes final, the judge of compensation claims may dismiss the claim or suspend payments due under said claim until the employee complies with such order." However, the DCA noted that it has consistently held that in exercising such discretion, the JCC may not dismiss a petition for benefits absent a specific finding that a party or its attorney has willfully refused to comply with an order.

CLAIMANT DIDNOT WAIVE RIGHT TO UNDERGO EVALUATION BY PREVIOUSLY ORDERED EMA AFTER HE UNILATERALLY DECIDED TO UNDERGO SURGERY FOR THE DISPUTED CONDITION

Arlotta v. City of West Palm Beach, 82 So.3d 1221 (Fla. 1st DCA 2012). The Claimant herein sustained a work related accident when he strained his quadriceps tendons while working as a police officer. Subsequent to the accident, the Claimant requested medical care for his gynecomastia condition, a condition that is defined as excessive development of th emale mammary glands. The E/C denied compensability of the condition pursuant to the opinions of a treating physician and an IME. Thereafter, the JCC granted Claimant's request for an EMA and ordered the Claimant to attend an evaluation with the selected EMA. When the Claimant failed to show for the EMA, the JCC rescheduled the EMA appointment. When the Claimant moved to submit the records of a doctor who performed surgery to address the Claimant's gynecomastia condition to the EMA, the E/C objected and moved to dismiss all claims as the Claimant's unilateral decision to undergo surgery prevented the EMA from answering questions at issue and prejudiced the E/C's ability to defend the claims. The JCC found that the Claimant's decision to undergo surgery, altered his condition to such a degree that an evaluation with an EMA would be futile. She concluded that the claimant had not met his burden and that the claims at issue were now moot because the Claimant had undergone surgery, the only treatment recommended for the condition. As such, the JCC denied all claims and dismissed the Claimant's petitions. The Claimant appealed, arguing that the JCC abused her discretion and erred in disallowing the EMA to proceed and in dismissing the claims.

The 1st DCA agreed that the JCC abused her discretion in cancelling the EMA and erred in denying the claims without the benefit of the EMA's opinion. Thus, all issues were reversed and the matter remanded for further proceedings.

CLAIMANT'S TRIP TO WORK TO LOAD EQUIPMENT NEEDED FOR A FUNERAL SERVICE HE WAS ATTENDING THAT EVENING AS HIS EMPLOYER'S FUNERAL DIRECTOR 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, Fla. L. Weekly D1059 (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

Workers' Compensation continued

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 from the employer at the time of the accident.

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.

Lisa Torron-Bautista, Partner in charge the Workers' Compensation Department in our Orlando office, is speaking at the *67th Annual Workers' Compensation Education Conference* in Orlando, Florida on August 19-23, 2012. She will be speaking from 11:15 a.m. to 12:15 p.m on August 22, 2012 regarding Successive Injuries and Concurrent Awards, Defenses and Claims at the Breakout on Longshore and Harbor Workers' Compensation Act, Jones Act and Defense Base Act in the Cypress Ballrooms 1, 2 & 3/Convention Level.

Successes/Announcements

Stephanie Robinson, Associate in our Hollywood office, recently prevailed at an Attorney Fee Hearing on a 1987 date of accident. The Claimant argued entitlement to a Carrier paid attorney fee for securing authorization of surgery based upon medical only claim. Furthermore, a fee was claimed based upon bad faith as defined under the statute for that date of accident. Ms. Robinson defended against entitlement to attorney's fees and costs, arguing that surgery was timely authorized and paid by the Carrier, despite delays caused by the Claimant. Furthermore, Ms. Robinson argued against fee entitlement relating to payment of past medical bills based upon recent case law which states that a JCC does not have jurisdiction to resolve billing disputes with authorized providers and as a result, a fee cannot attach. The JCC agreed and denied entitlement to attorney's fees on both the medical only claim and bad faith claim.

* * *

Ms. Robinson also prevailed on a claim for past PTD benefits. Although the Employer/Carrier accepted PTD benefits administratively, there was a period of time in excess of one year, wherein PTD benefits were not paid as the Claimant was not, at the time, at overall MMI despite 104 weeks of TTD/TPD being expended. Ms. Robinson argued that despite the Employer/Carrier's administratively accepting PTD as of the date of overall MMI (which was over a year later), for the time period at issue there was no competent medical evidence suggesting that the Claimant would have permanent restrictions or that he would have been unable to work in a less than sedentary capacity. The JCC agreed and denied the past PTD benefits.

* * *

David M. Abosch, Associate in our Hollywood office, obtained summary judgment in favor of an insurer in a significant claim submitted for property damage benefits reportedly from hurricane Wilma. The carrier denied coverage for the claim, which was submitted for the first time nearly four years after the loss. The denial was based upon the insured's failure to comply with numerous post-loss conditions. The carrier served Plaintiff with a Proposal for Settlement which Plaintiff failed to accept. The carrier then prevailed via summary judgment as a result of the insured's failure to comply with post-loss conditions. The carrier also obtained a fee and cost judgment against Plaintiff pursuant to Florida's Proposal for Settlement/Offer of Judgment rule.

* * *

Mr. Abosch also successfully obtained the dismissal of a Hialeah-based condominium association's property insurance claim against an insurer for damages reportedly caused by hurricane Wilma. The claim was timely reported and adjusted by the carrier. A supplemental claim was then submitted four years after the carrier adjusted the loss. The corporate representative testified that all repairs were completed, and the amount the Association paid to repair the damages did not exceed the carrier's adjusted loss. Nevertheless, the Association filed suit and pursued a six-figure judgment. Mr. Abosch obtained the dismissal of the action.

* * *

In a "Heart and Lung" claim brought under FS 112.18, **Neal Ganon**, Name Partner in our West Palm Beach office, prevailed before Judge Basquill, who found that the presumption that the Claimant's coronary artery disease and resultant coronary artery stenting came from his occupation as a firefighter was successfully rebutted by the E/SA based on personal risk factors of genetics, family history, and high cholesterol, thereby denying compensability of the entire claim.

* * *

Dale Friedman, Partner in our Hollywood office, and the co-defendants' attorneys prevailed on their award of attorneys fees, costs and expenses as a sanction against the law firm of Amlong & Amlong, P.A. in the case of Norelus v. Denny's, et al when the Eleventh Circuit Court affirmed the judgment of $ 389,739.07 on December 27, 2010. The Amlongs moved for Rehearing en banc which the Eleventh Circuit denied on December 27, 2011.

Successes/Announcements

* * *

Ms. Friedman, also successfully had the sale of a residential property worth $1.6 million in Panama City, Florida set aside after the lender's law firm mistakenly failed to have the foreclosure sale cancelled and the property was sold to a third party for $75,000. **Ms. Friedman** also obtained summary judgment in a case where a mortgage borrower alleged fraud against his mortgage lender for allegedly inducing him to enter into a loan modification that the lender knew he could not afford. **Hinda Klein**, Partner in charge of our Appellate Division, handled the appeal and the Fourth District Court of Appeal affirmed the judgment without opinion.

* * *

Ron Buschbom, Partner in our Ft. Myers office, was recognized by Gulf Shore Magazine as a Top Lawyer.

* * *

Alison Schefer, Name Partner in our West Palm Beach office, prevailed in the defense of an exposure claim. Judge Punancy agreed with the employer and carrier that the Claimant did not meet her burden of proof in accordance with Florida Statute 440.02 (1) and under the case of Matrix Employee Leasing v. Pierce. The court found that the Claimant did not prove the specific substance to which she was exposed, nor the levels of the alleged exposure. Further, the court found that the Claimant did not show that the exposure could cause the claimant's alleged injury. As such, all of the claims for medical, indemnity and attorney's fees were all denied.

* * *

Ms. Schefer also successfully defended a claim asserting that a claimant was not an employee and as such had not suffered a compensable accident. The employer/carrier presented the testimony of the General Contractor which disputed the Claimant's contention that he worked for a subcontractor on one of the Contractor's job sites. Judge Basquill found that the Claimant's testimony was not credible. He further found that the documentation provided by the General Contractor contradicted the claimant's testimony that he was on the job site on the date of the alleged injury. Accordingly, the Judge therefore denied all claims for medical, indemnity and attorney's fees.

* * *

Jeffrey K. Rubin, Associate in our West Palm Beach office, successfully obtained a summary judgment in a premises liability/negligence case in the Nineteenth Judicial Circuit, in and for Indian River County. In that case, the Plaintiff alleged that the tiles in the foyer and sunken living room of a private residence were a dangerous condition because they were the same color and there was no sign or warning posted. **Mr. Rubin** filed a motion for summary judgment arguing that a change in elevation in a residential setting is not a dangerous condition and no warning was necessary. In her response to the motion, Plaintiff attached an expert affidavit claiming that the tiles were dangerous because they were not clearly distinguished in shade or tone. In granting the motion for summary judgment, Judge Cynthia Cox determined that the change in elevation was not a dangerous condition.

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Jack Weiss, Associate in our workers' compensation division in our Ft. Myers office, successfully argued at final hearing that a claimant was not entitled to any indemnity benefits as he did not have any wages. The claimant was the owner of the Employer and told the adjuster that he earned $40,000 per year. Based on this the Carrier paid over $21,000 in indemnity benefits. However, when the claimant required a second surgery, and was placed back on temporary indemnity status, the Carrier refused to pay until the claimant provided written proof of his earnings. Mr. Weiss argued that the tax and wage records the claimant provided the Carrier actually proved the claimant had no wages and, alternatively, that no taxes were paid on any wages. The Judge of Compensation Claims agreed and denied any further temporary indemnity benefits. The Judge also ruled the over $21,000 in indemnity benefits previously paid was an overpayment.

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Successes/Announcements

Congratulations to Partners **Larry Craig** and **Hinda Klein** and Associate **Diane Tutt** for being named a 2012 "Super Lawyer" in Super Lawyers Magazine. **Jesse Feldman**, an Associate in our West Palm Beach office, was named a 2012 "Rising Star" in the same publication.

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Hinda Klein, Partner and head of the firm's appellate department, was successful before the Fourth District Court of Appeal in obtaining an affirmance of a summary judgment rendered in favor of the insurer in a third-party bad faith claim in Goheagan v. American Vehicle Insurance Company.

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Ms. Klein also obtained a reversal at the Third District Court of Appeal of a dismissal rendered as a sanction in foreclosure in U.S. Bank v. Cowell.

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Congratulations to **Matthew I. Bernstein**, Associate in our West Palm Beach office, for being named a 2012 Up & Comer in Florida Trend's Legal Elite publication.

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Matthew Struble, Associate in our Hollywood office, recently obtained two summary judgments in favor of insurers being sued for breach of contract by arguing that the Plaintiffs were precluded from recovery based on their failure to comply with the insurance policy's conditions.

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Mr. Struble also recently obtained a summary judgment involving a claim for a chipped floor tile located in the kitchen. As a result of the chipped tile the Plaintiff claimed damages in excess of $50,000.00 even though the property had other chipped floor tiles. Mr. Struble argued that the insurer was prejudiced by the failure to promptly report the claim. He also argued that claim was excluded by the "wear and tear" exclusion along with other exclusions. The court granted Defendant's Motion for Final Summary Judgment.

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Diane Tutt, Board Certified Appellate Lawyer, Associate in the firm's appellate department, was successful in obtaining affirmance of a worker's compensation order which had limited the amount of attorney's fees to the claimant's counsel, in the case of Salas v. Southern Waste Systems and Guarantee Insurance Company. The claimant's counsel argued that in calculating attorney's fees under Florida Statute Section 440.34, the judge of compensation claims should not both reduce future benefits to present value and apply the statutory five percent to benefits to be paid after ten years, since these two reductions were essentially performing the same function. The judge of compensation claims applied all aspects of the statutory sliding scale to the present value of future benefits. The First District Court of Appeal affirmed this decision, without opinion.

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Ms. Tutt also obtained affirmance in the Third District Court of Appeal in the case of Canizales v. Fisher Island Community Association. The appeal involved dismissal of a defamation complaint filed by an ex-employee of Fisher Island, who claimed that a security officer at the community had defamed him by broadcasting accusations that the plaintiff had exposed himself to a young nanny and her charge. The issue was whether the complaint adequately pled that the accusations had been conveyed to a wider audience than other Fisher Island employees, which is allowed under defamation law. The Third District affirmed the dismissal, determining that the complaint had not adequately alleged a broader audience.

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Ms. Tutt also obtained affirmance of a summary judgment on a malicious prosecution claim in the case of Hernandez v. Strategic Hotel Capital, also in the Third District Court of Appeal. The case involved an altercation between two women at a bar in a hotel; the plaintiff was accused of cutting the other woman with a wineglass, was prosecuted, but found not guilty by a jury. She then sued the hotel and a security guard employed by the hotel, who had told the police that he had seen the

Successes/Announcements

plaintiff intentionally cut the other woman. In affirming the judgment, the Third District agreed with the trial court that a person who in good faith reports what they see to the police cannot be held liable for malicious prosecution, particularly where there are no facts to suggest some personal motive to lie to the police.

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The firm congratulates Hollywood associate **Shannon McKenna**. The Florida Bar has announced that she has met the standards of Certification and is now Board Certified as a specialist in Appellate Practice. Board certification identifies and recognizes a lawyer as having special knowledge, skills and proficiency, as well as a reputation for professionalism and ethics. The designation distinguishes a lawyer as a specialist and expert in the certified practice area.

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Ms. McKenna obtained an affirmance in the Fourth District Court of Appeal in the case of Doe ex rel. Doe's Mother v. Sinrod. The appeal involved the dismissal of a minor plaintiff's complaint alleging claims of negligence and violation of Title IX against a school board. The dismissal was based on the plaintiff's failure to timely file the complaint within the relevant statutes of limitations. **Scott D. Krevans**, Name Partner, **Thomas J. McCausland**, Partner, and **Carlos Cabrera**, Associate, all in our Hollywood office, handled the matter in the trial court.

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Ms. McKenna also obtained an affirmance in the Second District Court of Appeal of the trial court's entering of summary judgment against the plaintiff in Sciallis v. Simpson and Larkin Restaurants LLC. The plaintiff, a former chef at a restaurant, filed suit against the restaurant for an injunction and damages claiming the restaurant was not authorized to use his name on the restaurant. The issue on appeal was whether the former chef had without limitation consented to the use of his name on the restaurant. **Ron Buschbom**, Partner in our Ft. Myers office, obtained the summary judgment in the trial court.

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Ms. McKenna was also involved in an appeal of a worker's compensation order in the case of Glindmeier v. Kaebel Wholesale Inc. et al in which the employee filed a pro se appeal in an an attempt to overturn the JCC's denial of an order to vacate the JCC's earlier order finding that the employee and E/C had reached a binding settlement agreement. After we filed a motion to dismiss the appeal as untimely, the First District Court of Appeal summarily affirmed the appeal. **Stephanie Robinson**, Associate in our Hollywood office, obtained the denial of the order to vacate before the JCC.

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Marc Gutterman, Partner, and **Dean Mallett**, Associate, both in our Hollywood office, successfully obtained a defense verdict in a first-party property case based on a fraudulent misrepresentation in an insurance application. The insurer was able to prove that the insureds' failure to disclose the operation of a marijuana grow room in the home was a fraudulent misrepresentation and the insurer was able to rescind the policy and void coverage for the claim.

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