*Law Bulletin from*

CONROY SIMBERG

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## *In This Issue:*



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# LIABILITY CASE LAW UPDATES

**Supreme Court holds that exculpatory clauses releasing defendant from its own negligence may be enforceable even if they do not contain express language releasing the defendant for its own negligence or negligent acts**

In Sanislo v. Give Kids the World, Inc., 2015 WL 569119 (Fla., Feb. 12, 2015), the Florida Supreme Court issued an opinion, in which it disapproved of decisions from four out of five District Courts of Appeal, on the issue of whether an exculpatory clause that does not contain express language releasing a putative defendant from liability arising from its own negligence is effective to exculpate the defendant from liability. The majority of District Courts of Appeal have held that it is not, and that such clauses will only be given effect if they specifically state that the defendant is released from any liability arising from its own negligence, but the Fifth District Court of Appeal held to the contrary, finding that in order to be enforceable, an exculpatory clause need only contain clear and understandable language conveying that the defendant would be released from liability even from its own negligence. The Supreme Court adopted the reasoning of the Fifth District Court of Appeal, and disapproved contrary holdings from the remaining District Courts.

In *Sanislo*, the plaintiffs brought suit against Give the Kids the World, Inc. (GKW), a non-profit organization that provided free "storybook" vacations to seriously ill children and their families. The Sanislos were a married couple who brought their ill child to the resort, at which Mrs. Sanislo was injured.

As part of the application process for the vacation, the Sanislos executed a "wish request" form with an exculpatory clause releasing the GKW from any liability for any potential cause of action. After the wish was granted, the Sanislos executed another liability release form with a similar clause. While they were on the vacation, the Sanislos stepped onto a wheelchair lift for a picture, and the lift collapsed under the weight overload, causing injuries to Mrs. Sanislos' left hip and lower back.

*(Continued on page 3)*

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# LIABILITY CONTINUED

*(Continued from page 1)*

The Sanislos brought a negligence action against GKW, and the defendant raised release as an affirmative defense. The Sanislos moved for partial summary judgment on that defense and the trial court granted it. The jury returned a verdict in the Sanislos' favor and the defendant appealed. On appeal, the Fifth District reversed the judgment, finding that the release was clear and unambiguous in releasing GKW from all liability, including liability arising from its own negligence, regardless of the fact that it did not specify that the release included GKW'S own negligent acts within its scope. The Fifth District found that the exculpatory clause was not contrary to public policy because it was clear and understandable to the ordinary and knowledgeable person and therefore, the release warranted a judgment in favor of GKW. The Court further held that the relative bargaining of the parties was of no moment and should not be considered because it was outside of the public utility or public function context, and the Stanislos were not required to request a vacation from Give Kids the World. Because the Fifth District's decision conflicted with contrary opinions from the other four district courts of appeal, the Supreme Court accepted jurisdiction to resolve the conflict.

The Supreme Court held that, while public policy generally disfavors exculpatory contracts because they relieve one party of the consequences of its failure to use due care and they shift the risk of injury to the party usually least equipped to take the necessary precautions to avoid injury and to bear the risk of loss, countervailing policy favors enforcing contracts in general. Therefore, unambiguous exculpatory clauses are enforceable unless they contravene public policy. In order to be enforceable, the clause need only convey, in clear and unequivocal terms, the intention that one of the parties be relieved of all liability, including that arising from its own negligence, but the clause itself does not need to use any specific language in order to be enforceable. Since the clause in this case encompassed "any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen" to the Stanilos, they should have understood that they were releasing the defendant from any and all injuries that they might receive, including those occasioned by the defendant's own negligence. The Court reasoned that its basic objective in interpreting any contract is to give effect to the parties' intent and that a bright-line rule that only those contracts using specific language are enforceable, regardless of whether other language may clearly convey the same meaning, would defeat that objective.

The Court further noted that, with respect to indemnification agreements, prior precedent would still require those agreements to specifically state that a party is entitled to indemnification even for its own negligence in order for the indemnitee to obtain indemnification for its own fault. The Court declined to extend its holding in this case to such agreements.

* * *

**Negligent Security cases are premises liability cases, and not "general negligence" cases**

In Nicholson v. Stonybrook Apartments, LLC, 2015 WL 71839 (Fla. 4th DCA, Jan. 7, 2015), the Fourth District Court of Appeal affirmed a jury's verdict in favor of Stonybrook Apartments against Nicholson where the trial court instructed the jury that because Nicholson was a trespasser on the premises when she was shot in the leg during a party at the complex' common area, Stonybrook owed her only the limited duty to refrain from intentional misconduct proximately causing injury to an undiscovered trespasser, pursuant to Florida Statute Section 768.075.

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# LIABILITY CONTINUED

Nicholson argued that negligent security cases are not a species of premises liability, but rather, are grounded on simple negligence principles. The appellate court disagreed, finding that the status of the plaintiff as an invitee or trespasser is relevant in negligent security cases because they implicate premises liability principles, especially because Nicholson would have had no cause of action against Stonybrook but for the fact that she was injured on its premises.

* * *

**Florida Supreme Court holds that where insurer transferred father's prior auto policy to daughter, who thereafter applied for insurance in her own name after buying a new car, daughter's policy was a new policy for which a new UM election was required**

In Chase v. Horace Mann. Ins. Co., 2015 WL 686093 (Fla., Feb. 19, 2015), the Florida Supreme Court addressed the issue of whether the original policyholder's daughter was bound by her deceased father's rejection of higher limits of UM coverage on her behalf as a listed driver, but not a named insured, where the daughter later bought her own vehicle and applied for insurance in her own name. At issue was whether, under the UM statute, the daughter's policy was a "new" policy for purposes of Florida Statute Section 627.727(9); such that the insurer was required to obtain a new UM rejection of higher limits from the daughter, who essentially "took over" her father's policy and became the named insured, when she had not previously been so designated. The Supreme Court held that the policy was a new policy and since the daughter never had the opportunity to waive higher limits of UM coverage, her father's prior waiver, made on her behalf when she had only been listed as a "driver" under his policy, was ineffective to waive those higher limits after she became the named insured.

* * *

**Coverage by Estoppel is a viable cause of action**

In Bishop v. Progressive Express Ins. Co., 2015 WL 63648 (Fla. 1st DCA, Jan. 6, 2015), the First District Court of Appeal addressed the issue of whether there is a viable cause of action predicated on an insurer's wrongful termination of coverage after it has assumed an insured's defense with knowledge, actual or presumed, of facts that would have permitted the carrier to deny coverage. The Court explained that if the carrier has done so, an insured may have a cause of action for coverage by estoppel if the carrier has misrepresented a material fact, the insured has reasonably relied on that representation and the insured has detrimentally relied on that representation such that the insured would be prejudiced by the carrier's withdrawal of the defense. The Court emphasized that whether the insurer's conduct was wrongful and the insured's reliance was reasonable are ultimately jury questions.

* * *

**Third District continues its tradition of reversing default judgments entered where plaintiff's counsel actually knows that defendant is represented by counsel and intends to defend**

The Third District Court of Appeal is the most liberal district when it comes to reversing a trial court's denial of a motion to vacate a default where the plaintiff's counsel knows that the defendant is represented and intends to defend the case on the merits. In M.W. v. SPCP Group V, LLC, etc., 2015 WL 445369 (Fla. 3d DCA, Feb. 4, 2015), the Third District reversed a default judgment rendered after the plaintiff's and defense attorneys had presuit contact, after which the plaintiff's counsel decided not to notify defense counsel that he filed suit because defense counsel had been uncooperative. After plaintiff's counsel filed suit, but before he obtained a clerk's default, he did not advise

*(Continued on page 6)*

# FOCUS ON:
# PERSONAL INJURY PROTECTION INSURANCE

Conroy Simberg is extensively involved in the defense of Personal Injury Protection (PIP) claims in all trial and appellate courts in Florida. The attorneys at our firm have decades of experience investigating personal injury protection claims and aggressively representing insurance carriers involved in PIP litigation.

PIP can be a particularly challenging area of the law for insurance carriers. We regularly monitor new and emerging issues in the field and work closely with our clients to ensure that they are fully aware of all legal developments in this evolving legal landscape. Our firm is at the forefront of this specialized area of the law and we are proud of our strong reputation for delivering proactive and highly skilled PIP legal representation to our insurance industry clients.

## *Investigating and Evaluating PIP Claims*

When handling PIP claims, our attorneys work with insurance carriers to evaluate whether the claims presented for PIP benefits and medical payments are covered under the terms and conditions of the insurance policy. The legal professionals at Conroy Simberg have more than 40 years of experience working in the field of insurance law and are skilled in interpreting personal and commercial automobile policies. Our attorneys also carefully analyze claims to determine whether the medical expenses and treatments incurred were reasonable, necessary and related to the accident.

At Conroy Simberg we know that it is important to resolve claims as quickly and economically as possible. The legal professionals in our PIP practice are committed to becoming actively involved at the earliest stages of an investigation. Our attorneys take examinations under oath of claimants and witnesses and provide comprehensive reports for our clients. We also conduct extensive research to identify all documents, medical reports and evidence necessary to thoroughly investigate the claim and develop a plan of action.

In far too many instances, PIP claims involve insurance fraud or misrepresentation on the part of the claimant. When fraud is suspected, we work directly with our clients to aggressively investigate and uncover any fraud or misrepresentation. Our insurance defense attorneys are skilled in identifying fraud and are widely recognized throughout the insurance industry for their ability to deliver skilled representation to clients dealing with fraudulent claims.

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# LIABILITY CONTINUED

*(Continued from page 4)*

defense counsel that he intended to do so. Thereafter, defense counsel contacted plaintiff's counsel to inquire as to the status of the case, and plaintiff's counsel responded that he should contact his client's carrier because "we don't know what they are doing or not." The plaintiff proceeded to try the damages case and won a verdict of $1,250,000.

The trial court granted the defendant's motion to vacate the default judgment, finding that it was void for lack of notice. On appeal, the appellate court noted that "the plaintiff faces a high, almost insurmountable standard of review", namely, whether the trial court grossly abused its discretion in granting the motion to vacate the default. The appellate court observed that, regardless of whether defense counsel was uncooperative, neglectful and/or incompetent, as plaintiff's counsel contended, once plaintiff's counsel was aware that the defendant was represented and intended to defend the case, as an officer of the court, he had the obligation to provide defense counsel with notice of his intent to seek a default before he did so. Since the plaintiff's counsel failed to provide the requisite notice, the trial court properly vacated the default judgment.

In a concurring opinion, Judge Emas acknowledged that the panel was bound by prior Third District precedent on the subject, but questioned whether the notice requirement set forth in Florida Rule of Civil Procedure 1.500(b) should be triggered when, as in this case, there was no post-suit communication between counsel, and the only communication between counsel occurred some five (5) months before suit was filed. Judge Emas noted that, other than the *Apple Premium* case on which the Third District relied, all of the other case law throughout the state finding that a default should be vacated for lack of notice involved post-suit communications between counsel. Judge Emas opined that if he were writing on a "clean slate", he would find that presuit communications would not obligate a plaintiff's counsel to notify defense counsel before seeking a default.

* * *

**Affidavit in support of motion for summary judgment on material misrepresentation claim simply stating that insured's misrepresentation was material to the carrier's acceptance of the risk will not suffice; testimony or affidavit in support of carrier's contention must be factually detailed and not conclusory in order to support summary judgment or a verdict in carrier's favor**

The Second District Court of Appeal, in Mora v. Tower Hill Prime Ins. Co., 2015 WL 292007 (Fla. 2d DCA, Jan. 23, 2015), reversed a summary judgment rendered in favor of Tower Hill on the insured's homeowner's claim for benefits. Tower Hill contended that the insureds made material misrepresentations on their insurance application, in violation of Florida Statute Section 627.409, when they represented to the carrier that there had been no prior cracks in the home that had been repaired. When the insureds made a sinkhole claim and the carrier investigated, it discovered an inspection report issued when the Moras purchased the home, which detailed a large crack in the ceiling of the living room, and other cracks around the pool deck. Mrs. Mora had signed the inspection report, and there was a notation on the report that the cracks would be repaired.

The carrier did not ask the Moras any questions about the report during their depositions, but instead, moved for summary judgment on the grounds that this information constituted a material misrepresentation sufficient to support a denial of the claim. In support of the motion, Tower Hill submitted the affidavit of its Assistant Vice President of Underwriting concluding that if the carrier had known the true facts, it would not have issued the policy, but not explaining how the misrepresentation was material or why it

*(Continued on page 7)*

# LIABILITY CONTINUED

would not have issued the policy. The appellate court found that the conclusory statements in the affidavit were not sufficient to sustain a summary judgment in the absence of specific facts supporting those conclusions. Accordingly, the appellate court reversed the summary judgment in Tower Hill's favor.

* * *

**Quarterly Safety Reports deemed work product even though they were prepared in the ordinary course of business**

In Millard Mall Services, Inc. v. Bolda, 2015 WL 543041 (Fla. 4th DCA, Feb. 11, 2015), the Fourth District Court of Appeal granted a Petition for Writ of Certiorari taken by the defense after the trial court ordered production of, among other things, its quarterly safety committee reports, which included incident reports involving other accidents on the premises of the Sawgrass Mills Mall, where the plaintiff slipped and fell. Before she sought those reports, she requested, and received, discovery relating to prior incidents on the property. The trial court reviewed the reports *in camera*, overruled the defendant's work product objection, and ordered the documents produced.

On appeal, a majority of the Court found that even a report routinely prepared may still qualify as work product, including reports prepared after an accident on premises. The panel noted that such reports "certainly are not prepared because of some morbid curiosity about how people fall" on the premises, and that they are typically prepared by the business in recognition that "experience has shown all retail stores that people who fall in their stores try to be compensated for their injuries. Experience has also shown those stores that bogus or frivolous or exaggerated claims might be made". Id. (quoting Publix Supermarkets, Inc. v. Anderson, 92 So. 3d 922, 923 (Fla. 4th DCA 2012)).

In this case, the panel noted, the plaintiff was permitted to obtain relevant information regarding the subject incident, as well as other similar incidents, which would be relevant to the issue of whether the mall had prior notice of the alleged dangerous condition on its premises, and the plaintiff failed to show that she needed this additional information in order to demonstrate the mall's prior knowledge or notice of the alleged dangerous condition. Since the plaintiff failed to demonstrate that she could not obtain the substantial equivalent of the information contained in the safety reports, the appellate panel found that the plaintiff had not overcome the defendant's work product privilege, and quashed the discovery order on review.

* * *

**Facebook photos may be discoverable and privacy interest in them minimal**

In *Nucci v. Target Corp.*, 2015 WL 71726 (Fla. 4th DCA, Jan. 7, 2015), the Fourth District considered a Petition for Writ of Certiorari filed by a plaintiff who was subject to a trial court's order compelling production of photos from the plaintiff's Facebook account. In her slip and fall case, the plaintiff alleged that she suffered bodily injury as a result of her accident on the floor of a Target store. At the hearing on the plaintiff's objections to the defendant's requests to produce the photos, the defendant showed the trial court photos from a surveillance video in which the plaintiff was seen walking with two purses on her shoulders and carrying two jugs of water. Since the plaintiff had put her physical condition squarely in issue in the litigation, Target argued that the relevancy of her Facebook photographs outweighed any alleged right to privacy attaching to those photos. Target narrowly tailored its discovery requests to those photographs showing the plaintiff, and not other people, and the trial court ultimately compelled the production of photographs associated with the Facebook account during the two years prior to the date of the plaintiff's injury up to the present. The court also compelled production of

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# LIABILITY CONTINUED

*(Continued from page 7)*

photographs taken on the plaintiff's phones for the same period of time.

The plaintiff argued that the order departed from the essential requirements of law because it constituted an invasion of privacy. The appellate court denied Certiorari, finding that the trial court's order did not depart from the essential requirements of law and the plaintiff would suffer no irreparable injury as a result of the production of the photographs because photos posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of the user's privacy settings.

* * *

**Where individual demands for judgment were served on three separate defendants who, on plaintiff's request, were treated as a single defendant on the verdict form, plaintiff's demands for judgment were unenforceable as grounds for attorneys' fees against the individual defendants**

In Hilton Hotels Corp. v. Anderson, 153 So. 3d 412 (Fla. 5th DCA 2015), the Fifth District Court of Appeal found that where the plaintiff served three separate demands for judgment on three separate defendants, but thereafter requested that all of the defendants be treated as a single defendant on the verdict form, the plaintiff could not thereafter seek to recover attorneys' fees under the Offer of Judgment statute, especially since the total of all three demands exceeded the amount recovered by the plaintiff.

* * *

**Trial Court may reduce the amount of the lodestar fee awardable to a prevailing party where the plaintiff recovers substantially less in damages than it had sought**

The Fourth District Court of Appeal, in Jomar Properties, L.L.C. v. Bayview Construction Corp., 2015 WL 159055 (Fla. 4th DCA, Jan. 14, 2015), addressed the issue of whether a trial court abused its discretion in reducing the amount of attorneys' fees to be awarded a prevailing plaintiff who recovered far less than it sought in the litigation. The Court noted that the Supreme Court held, in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), that once a trial court determines the "lodestar" amount of attorneys' fees (i.e., the reasonable number of hours times the reasonable hourly rate), the court may add or subtract from that fee based on the "results obtained" in the litigation. The Fourth District held that the "results obtained" permits the trial court to adjust the amount of recovery to reflect the fact that the plaintiff only recovered a limited amount of its alleged damages because the case law gave the courts the discretion to equitably and flexibly analyze the appropriate fee based on all of the circumstances in the case. Therefore, the appellate court held, the trial court did not abuse its discretion and it affirmed the trial court's judgment reducing the amount of attorneys' fees sought by the plaintiff.

* * *

**Fourth District holds that where the seatbelt defense has been raised by the defense, whether the plaintiff's seatbelt was inoperable is not dispositive of the applicability of the defense**

In Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984), abrogated in part by Ridley v. Safety Kleen Corp. 693 So. 2d 934 (Fla. 1996), the Florida Supreme Court held that "evidence of failure to wear an available and fully operational seat belt may be considered by the jury in assessing a plaintiff's damages where the 'seat belt defense' is pled and it is shown by competent evidence that failure to use the seat belt produced or contributed substantially to producing at least a portion of the damages." In Jones v. Alayon, 2015 WL 1545005 (Fla., 4th DCA, April 8, 2015), the Fourth District Court of Appeal addressed the issue of whether the

*(Continued on page 9)*

# LIABILITY CONTINUED

defendant could be deprived of his/her seatbelt affirmative defense where the plaintiff demonstrates that his seatbelt was inoperable at the time of the accident.

In this case, the Estate argued that the decedent Mr. Nye, who was ejected from his truck and run over by two other vehicles after being rear-ended by another vehicle, could not have worn his seatbelt because there were two coins stuck in the locking mechanism of his seatbelt. The Estate argued that Pasakarnis required the defense to demonstrate the operability of an unused seatbelt before it could raise the seatbelt defense as evidence of the decedent's comparative fault. In response, Alayon's counsel argued that the Florida Statute requiring the front-seat passengers to use seatbelts whenever they drive was enacted **after** Pasakarnis, and the statute did not mention the operability of the seatbelt as a mitigating factor or an excuse for violating the statute. While the Court observed that the operability of the seatbelt may be considered along with all of the evidence in the case in determining whether the plaintiff was him/herself negligent, the availability and operability of the seat belt was not dispositive of the issue of whether the plaintiff was comparatively negligent.

In this case, the jury heard the evidence on the operability of Nye's seatbelt and the Estate's argument as to why Nye was not comparatively negligent in failing to wear the belt because he allegedly could not, and the trial court properly instructed the jury on the seat belt statute. Therefore, the appellate court concluded that the jury's verdict finding the decedent Mr. Nye 70% at fault for his death should be affirmed.

* * *

**Plaintiff not comparatively negligent in wearing high-heeled shoes**

In Bongiorno v. Americorp, 2015 WL 1360871 (Fla. 5th DCA, Mar. 27, 2015), a slip and fall case, the Plaintiff was wearing 4-5 inch heels when she slipped on an unusually slippery floor. The parties tried the premises liability case at a bench trial at which defense counsel argued that wearing heels that high was akin to an assumption of the risk. The trial court found both parties negligent and assigned 50% of the fault to each party. The appellate court reversed the judgment on the grounds that the plaintiff did not create the risk simply by wearing high heels.

* * *

**School District not immune from liability under the Cardiac Arrest Survival Act because it did not use, or attempt to use, an available AED on a high school athlete who collapsed on school property**

Florida Statute 768.1325(3), also known as the Cardiac Arrest Survival Act, provides that "any person who uses or attempts to use an automated external defibrillator [AED] on a victim of a perceived medical emergency, without objection of the victim of the perceived medical emergency, is immune from civil liability for any harm resulting from the use or attempted use of such device". In Limones v. School District of Lee County, 2015 WL 1472236 (Fla. April 2, 2015), the Florida Supreme Court addressed the nature and extent of the immunity under the statute, and construed it according to its plain language. The Court found that the statute only applied in cases in which the putative defendant had actually used or attempted to use an available AED, but did not apply in this case to cloak the School District with immunity for its failure to maintain an external defibrillator on or near the soccer field where the student collapsed and in failing to use it on the student after he fell ill. The mere purchase or availability of an AED will not satisfy the statute and will not protect the purchaser from liability for its failure to use the AED. The Supreme Court opined that a literal reading of the statute did not defeat, but instead supported, the legislative intent to encourage bystanders to use potentially life-saving AED'S when appropriate.

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# WORKERS' COMPENSATION CASE LAW UPDATES

**An impairment rating does not automatically give a claimant the right to continuing medical treatment**

Echevarria v. Luxor Investments, LLC, 2015 WL 1223705 (Fla. 1st DCA 2015).

The Claimant herein received remedial medical care up until the date he reached MMI with an assigned permanent impairment rating. After that date, the JCC denied future care as no longer medically necessary, as the industrial accident was no longer the major contributing cause of his need for follow up care. The First DCA, in affirming the JCC's denial, noted that some permanent injuries do not require ongoing active treatment. The Claimant, as a consequence of having a permanent impairment, does not have an absolute right to ongoing care. Rather, he must establish that either periodic visits or further evaluations by the authorized provider are appropriate for his compensable workplace injury.

* * *

**A Statutory Guideline Fee Is Applicable To Each Claim Asserted During The Course Of Work Injury**

*Cortes-Martinez v. Palmetto Vegetable Co.*, 2015 WL 1021122 (Fla. 1st DCA 2015).

The issue before the Court was the JCC's interpretation of the statutory formula for a guideline attorney's fee. Specifically, the JCC reasoned that there can only be one $5,000.00 in benefits secured for which a 20% fee can be approved and only one $5,000.00 in benefits secured for which a 15% fee can be approved. Thus, once the $10,000.00 threshold is reached, any additional fee is limited to 10% of the benefits secured. The First DCA disagreed with this interpretation, noting that there can be more than one "claim" which suggests that there can be more than one claim which would qualify for the full formula.

* * *

**A "Pamphlet" Can Provide Sufficient Evidence Of An Implied Contract In Order To Meet The Requirement For A Claimant To Be Considered A Statutory Employee**

Mitchell v. Osceola County School Board, 2015 WL 1018551 (Fla. 1st DCA 2015).

The issue in this matter was whether the Claimant was the statutory employee of the School Board. The Claimant worked at Pawsitive Action which was housed at a high school in Osceola County. There was a business partnership between Pawsitive and the high school whereby high school students in the school's veterinary assisting program were able to earn clinical hours while assisting Pawsitive in providing services to county residents at a reduced cost. This business relationship was documented by a pamphlet titled "Harmony High School Veterinary Pet Clinic" which described the school's program and the low cost services available. The pamphlet was printed by the School Board and distributed at the front desk of the high school and through the guidance counselor's office. The JCC ruled that the Claimant was not a statutory employee given the lack of contractual evidence to a third party. However, in reversing the JCC, the First DCA noted that it is well established that the contractual obligation can be implied and does not need to be stated through an express written provision in a contract. The Court felt that there was evidence that could establish a contract between the School Board and the community for low-cost veterinary services as evidenced by the pamphlet. Furthermore, the Court noted that there was evidence that some portion of this contractual obligation was sublet to Pawsitive.

# WORKERS' COMPENSATION CONTINUED

**An Order Denying An Advance Is A Final Order For Purposes Of Appeal**

Shannon V. Cheney Brothers Inc., 2015 WL 404127 (Fla. 1st DCA 2015).

In this matter, the First DCA noted that an order by a JCC denying an advance payment of compensation benefits is considered a final order for purposes of appellate review. The Claimant suffered a compensable back injury for which he filed a motion for advance payment of $2,000.00. After an evidentiary hearing, the JCC denied the motion, which the Claimant did not appeal. Thereafter, the parties proceeded to a final hearing based upon pending petitions for benefits. The JCC denied all of the claimed benefits and the Claimant filed a notice of appeal relating to both orders. Because the Claimant waited more than 30 days from the date of the order denying the advance, it was not timely and the First DCA lacked jurisdiction to review the challenged order.

* * *

**Claimant Has The Burden To Prove The Quantity, Quality And Duration Of Attendant Care Services Claimed**

American Airlines v. Hennessey, 2015 WL 733281 (Fla. 1st DCA 2015).

The Claimant sustained a compensable injury on September 29, 2013, wherein he suffered a torn meniscus and ultimately was diagnosed with an infection to the thigh which required hospitalization as well as a lengthy course of antibiotic medication. As a result the Employer/ Carrier provided wound care by authorizing a home health nurse to attend to the Claimant daily, until the wound healed.

The Claimant filed a petition for benefits requesting attendant care from the date of accident and attached thereto a hand written note, signed by the doctor, stating that Anne Hennessey (the wife) had been taking non professional care of the Claimant 24 hours per day since the accident and would continue to do so until the wound was healed. Thereafter, on May 12, 2014, the doctor clarified in a medical record that the care was needed from the date of accident through March 11, 2014, for 12 hours per day on a daily basis. The doctor continued noting that the Claimant required assistance with ascending and descending stairs in him home as well as with bathing, cooking, cleaning, dressing and with transportation.

In the pre-trial stipulation dated March 11, 2014, the Employer/Carrier noted that they were actively investigating the prescription and gathering information from the doctor and that the Claimant did receive wound care. At final hearing, the Employer/Carrier also asserted that there was no valid prescription for attendant care; and that household duties are not compensable. The Employer/Carrier attempted to offer into evidence the deposition of the home health nurse who provided wound care and who also assessed the Claimant's ability to independently care for himself. The Claimant objected to the deposition as the testimony was not listed on the pre-trial stipulation; and alleged that she was prejudiced by same, despite attending the deposition.

The JCC sustained the Claimant's objection to the deposition testimony of the nurse and directed the Employer/Carrier to pay attendant care from the date of accident through March 11, 2014, at varying hours per day. The Employer/Carrier as a result challenged the JCC's exclusion of the testimony. The First DCA agreed with the Employer/Carrier, noting that late disclosure of a witness which does not result in actual prejudice does not ordinarily warrant the exclusion of the evidence and may be unduly harsh. The First DCA directed the JCC to consider the testimony of the nurse and in so doing reminded the JCC

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# WORKERS' COMPENSATION CONTINUED

*(Continued from page 11)*

that the Claimant has the burden to prove the quantity, quality and duration of attendant care services claimed. Furthermore, the Court reiterated that it is erroneous to award attendant care without regard to the actual services performed by the caregiver.

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**Once Compensability Of An Injury Is Established, An Employer/Carrier Must Show A Break In Causation In Order To Challenge Future Compensability**

Perez v. Southeastern Freight Lines, 2015 WL 1268017 (Fla. 1st DCA 2015).

The Claimant suffered a compensable injury per stipulation of the parties. He claimed TTD benefits which were denied based upon a lack of objective medical findings as per section 440.09 (1), Florida Statutes. However, in reversing the JCC's denial, the Court noted that although the Claimant had the burden to prove entitlement to workers' compensation benefits, once he established compensability of an injury the Employer/Carrier could not challenge the causal connection between the work accident and the injury. Rather, the Employer is limited to challenging only the causal connection between the injury and the requested benefits. As such, the Claimant was not required to establish objective relevant findings where the Employer/ Carrier had already stipulated to compensability. In order for such a challenge to prevail, the Employer/Carrier would need to show a break in the chain of causation from the compensable injury to the requested claim for benefits. The Court did acknowledge that the Claimant still had the burden to establish other aspects of proof, such as medical necessity (but that was not at issue).

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**Dual Employment Occurs Where A Single Employee Is Under A Contract Of Hire With Two Employers, And Under The Separate Control Of Each, Performs Services For The Most Part For Each Employer Separately, And The Service For Each Employer Is Largely Unrelated To That For The Other.**

Roof Painting by Hartzell Inc. v. Hernandez, 40 Fla. L. Weekly D435 (Fla. 1st DCA 2015).

The JCC in this matter found the contractor as well as its subcontractor to be dual employers of the Claimant which resulted in an appeal and cross-appeal by the two employers. In reversing and remanding the JCC's determination of a dual employer relationship, the Court noted that none of the parties argued a theory of dual employment. Herein, the evidence supported a finding that the contractor was hired to provide pressure cleaning, who in turn hired the subcontractor to provide the labor for the contracted services. There was no evidence that the Claimant did anything beyond the work and tasks provided for in the subcontract.

In so noting, the Court explained that a dual employment occurs where a single employee is under a contract of hire with two employers, and under the separate control of each, performs services for the most part for each employer separately, and the service for each employer is largely unrelated to that for the other. Given the facts of this case, there was no evidence of a dual employment relationship.

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CONROY SIMBERG

# ANNOUNCEMENTS

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

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

Conroy Simberg is pleased to announce that the firm is listed in the Top Law Firm category and three of its South Florida partners have been included in the 2015 edition of the *South Florida Legal Guide*. The Top Lawyer and Top Law Firm listings are published annually and are based on peer nominations. Nominees then are evaluated on accomplishments and individual credentials prior to being named to the list.

- **Jonathan C. Abel** – Medical Malpractice – Defense, Product Liability – Defense
- **Scott D. Krevans** – Insurance Litigation – Defense, Personal Injury and Wrongful Death – Defense
- **Bruce F. Simberg** – Product Liability – Defense, Construction Litigation

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### Transportation Company Found Not Liable for Injury to Passenger

**Seth Goldberg**, Partner, and **Joshua Nathanson**, Associate, obtained a defense verdict in the case of Hilda Levine v. Southeastern Florida Transportation Group and Theona Little. In this matter, the Plaintiff alleged that Ms. Little, as an employee of Southeastern Florida Transportation Group, was negligent in the operation of a non-emergency transportation vehicle. The Plaintiff was 96 years old at the time of the accident and was being transported from her home, where she was living independently, to the Florida Atlantic University Campus. The Plaintiff testified that she was advised by Ms. Little that she did not need to wear her seatbelt in the vehicle. She further testified that Ms. Little began to drive carelessly on the campus and she was thrown from her seat. As a result of being thrown from her seat, Ms. Levine fractured her hip and has not lived by herself since. Ms. Little testified that she watched the Plaintiff get into the vehicle and fasten her seatbelt. As far as Ms. Little knew, the Plaintiff was wearing her seatbelt the entire trip and was surprised when the Plaintiff fell out of her seat after she drove over a speed bump. The Plaintiff's attorney argued that as a common carrier, Ms. Little had an increased duty to make sure the Plaintiff remained belted throughout the entire trip. Plaintiffs hired an accident reconstructionist in an attempt the show that the Plaintiff was thrown from her seat by a u-turn, as opposed to going over a speed bump. The Defense did not hire any experts. During closing arguments, the Plaintiff asked for $500,000. After deliberating for nearly two hours, the jury returned a defense verdict.

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### Summary Judgment Obtained in Premises Liability Case

**Christopher Corkran**, partner in the Hollywood office, recently secured a final summary judgment on behalf of his client in Broward county circuit court in the case of Sanchez v. Bonaventure Partners. In this case, the Plaintiff was injured while walking along the golf course property of the Defendant. The Plaintiff was

# ANNOUNCEMENTS

walking along the golf course property for exercise and not as a golfer. The golf course had no "no trespassing" signs or other warnings requesting that non-golfers stay off of the property, and the undisputed testimony was that there were non-golfers coming onto the golf course property every single day for years for their own leisure activities, especially as the golf course was situated right next to an upscale housing development where residents frequently used the golf course property to walk their dogs; ride their bikes; and play with their children. Plaintiff alleged that since non-golfers were found on the golf course property every day for years and that he had never been told to leave the property anytime before, he qualified as an invitee and was owed a duty by the Defendant to provide him with a reasonably safe premises and to warn him of any hidden dangers. Attorney Corkran moved for final summary judgment on the grounds that no such duty of that degree was owed to the Plaintiff as the Plaintiff should qualify as a "licensee" or "trespasser" under the circumstances, as opposed to an "invitee". The trial judge agreed with Attorney Corkran and granted the motion for final summary judgment. Plaintiff counsel then moved for a rehearing on the issue and the trial judge subsequently denied this motion. The Defendant had also previously served the Plaintiff with a proposal for settlement, and same was never accepted by the Plaintiff, such that the Defendant is now seeking the entry of a final judgment inclusive of reimbursement of applicable attorneys' fees and costs associated with the defense of the claim.

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### Jonathan Abel Speaks on EHRs Effect on Malpractice Claims

**Jonathan C. Abel,** the firm's medical malpractice partner and healthcare division practice group leader, recently participated in a panel titled "Show Me the Data – EHRs Effect on Malpractice Claims," at the annual Crittenden Medical Insurance Conference, which was held on April 12 -14, 2015 in Miami, FL. The discussion focused on the pros and cons of EHRs, discovery dangers and data collected to date.

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### Summary Judgment Obtained in PIP Case

**Stephanie Hoffman,** Associate in our Fort Myers office, recently obtained summary judgment in Charlotte County due to Plaintiff's failure to serve a demand letter that strictly complied with the requirements of the PIP statute. Even though the Plaintiff was given a second chance when the judge allowed abatement of the case for forty-five days, the Plaintiff didn't mail the new demand letter until the forty-sixth day and the late demand letter was thrown out.

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### Hinda Klein Has Become an Equity Partner in the Firm

**Hinda Klein** has been the head of Conroy Simberg's appellate department since she joined the firm in 1991 and has been a partner since 2000. She supervises all of the appellate attorneys at the firm and has been involved in more than 550 civil appeals and extraordinary writs since joining the firm. In addition to her appellate work, Hinda handles numerous dispositive motions and she and her staff provide the entire firm with litigation support, including drafting jury instructions, attending charge conferences, as well as preparing and arguing pre-and post-trial motions. Hinda also provides

CONROY SIMBERG

# ANNOUNCEMENTS

litigation and appellate support for other lawyers and law firms who do not have an appellate/litigation support department.

Ms. Klein obtained her B.S. Degree from the University of Florida in 1982, and was admitted to practice in 1985, after graduating from Syracuse University School of Law, where she served as the Notes and Comments Editor of the Syracuse Law Review and was an active member of the Moot Court Board. Since becoming a member of the Florida Bar, she became admitted to practice before the Federal Southern and Middle District Courts, the Eleventh Circuit Court of Appeal and the U.S. Supreme Court.

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**Rina Clemens Speaks on Ethics and Professionalism**

**Rina K. Clemens,** Associate in our West Palm Beach office, recently served as a panelist and spoke on issues of ethics and professionalism at The Florida Bar *Practicing with Professionalism Seminar* on February 13, 2015, a mandatory course for all young attorneys.

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**Summary Judgment Obtained in PIP Case, Voiding Policy for Material Misrepresentation Related to Business Use**

**Manuel Negron**, Associate in our Miami office, obtained a final summary judgment in favor of Defendant, Star Casualty Insurance Company in the case of Eduardo Garrido, D.C., P.A. a/a/o Francisco Garay v. Star Casualty Insurance Company, a lawsuit for PIP benefits filed in the Eleventh Judicial Circuit, Case No. 09-3898 CC 05, before Judge Lourdes Simon in Miami, Florida. The claimant's wife and named insured represented on the insurance application that the insured vehicles would not be used for business purposes. At their EUO's, both Mr. and Mrs. Garay testified that they had been using the insured vehicles to pick up clothing to sell at flea markets on the weekends as well as to transport the poles and tarps to put together the infrastructure of their flea market stand.

As a preliminary matter, the Court had to deem the EUO transcripts admissible for summary judgment purposes. Relying on a case likening EUO transcripts to Affidavits, which are ordinarily admissible on summary judgment; the Court agreed the claimants' EUO transcripts contained indicia of reliability greater than or equal to Affidavits, which are often drafted by attorneys. We also argued that the EUO transcripts were admissible as an admission by a party opponent pursuant to Fla. Stat. s. 90.803 (18). While claimants in PIP suits are arguably non-parties, we presented the Court with cases where the statement of an insured non-party could be used against a litigant standing in the shoes of or in the same position as the insured non-party whose statements are being offered against the litigant.

The Plaintiff argued that the part of the application where the applicant swears not to use the insured vehicles for business purposes became a part of the policy and thereby effectively became a coverage exclusion. Since coverage was excluded for business use, any misrepresentation in the application regarding business use would not be material to the risk being assumed by the insurer. The Court agreed with Defendant that it must first separately determine whether there was a material misrepresentation before incorporating any part of the application into the policy. If there was a material misrepresentation, then there is no policy into which any part of the application can be incorporated. The Court found that the applicant had made a material misrepresentation and voided the policy as if it

# ANNOUNCEMENTS

had never been written.

Defendant made a nominal Proposal for Settlement at the inception of litigation in 2009. Defendant's motion to tax costs and attorney's fees is currently pending.

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**Florida Bar Appoints Jayne Pittman to Construction Law Certification Committee**

**Jayne Ann Skrzysowski-Pittman,** a partner in our Orlando office, has been appointed to the Construction Law Certification Committee of The Florida Bar. Ms. Pittman will serve a three-year term commencing July 1, 2015. The Committee is responsible for establishing standards for board certification of construction lawyers in Florida, including the preparation and grading of the certification exam.

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**Denial of Benefits Obtained**

**Christopher Tice,** Managing Partner for the Jacksonville office, successfully obtained a complete denial of benefits on a statutory employer defense. In Bru v. Carlton Construction Co./Builder's Insurance Group, the Judge agreed that while the Claimant may have been injured on the property, he was never hired by the uninsured subcontractor. Without an Employer/Employee relationship with the uninsured subcontractor, the General Contractor could not be a statutory employer.

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**Denial of Temporary Benefits Obtained**

**Christopher Tice** also successfully obtained a denial of Temporary Benefits from the date of accident until the Claimant saw an authorized physician. In Cole v. Southern Ceilings/Berkley, the authorized treating physician testified that he would be speculating that the Claimant was off work and/or on light duty from the date the claimant went to the Emergency room up until his first visit with the authorized physician. The JCC found the Claimant failed to meet his burden of providing objective relevant medical evidence and denied benefits.

* * *

**John Lurvey Participated as a Moderator**

**John A. Lurvey,** the Managing Partner of the Liability Division of our West Palm Beach office, recently served as a moderator for the Palm Beach County Bar Association Bench Bar Conference, Personal Injury sessions. John moderated two sessions whose panelists included Circuit Court Judges and personal injury litigators.

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**Diane Tutt,** Board Certified Appellate Lawyer in the firm's Appellate Department, was recently successful in the following appellate matters:

**Ms. Tutt** prevailed in three cases involving application of a 2011 amendment to the Florida Insurance Guaranty Association ("FIGA") statute, which applies to sinkhole losses and precludes direct payment to the insured of repair costs. The Second and Fifth District Courts of Appeal agreed with FIGA's position that the amendment is applicable to cases in which the insurer's insolvency, and thus FIGA's involvement, post-dated the statutory amendment, even though the policy and loss pre-dated the amendment. FIGA v. Rodriguez, Case No. 2D13-5451; FIGA v. Frank, Case No. 2D13-5453; FIGA v. Simmons, Case No. 5D13-4095. In the Frank and Simmons cases, the courts certified a question of great public importance to the Florida Supreme Court, and in Rodriguez, the insured's motion for certification is pending.

In Ray Coudriet Builders, Inc. v. R.K. Edwards, Inc., Case No. 5D13-2176, **Ms. Tutt** prevailed in the

CONROY SIMBERG

# ANNOUNCEMENTS

Fifth District Court of Appeal in obtaining reversal of an order dismissing a third-party claim by our client, a building contractor, against one of the subcontractors on the job, whose work was alleged to be defective by the plaintiff/ owner, Mark Tremonti.

In a personal injury protection ("PIP") breach of contract case, **Ms. Tutt** was successful in a petition for certiorari in the Miami-Dade County Circuit Court, obtaining a ruling that the plaintiff was not permitted to obtain discovery of any portion of the insurer's claim file, including adjuster notes. Mercury Insurance Company v. Citystar Rehab Center (a/a/o Jose Infante), Case No. 14-013 AP.

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**Cristobal Casal** and **Diane Tutt**, Associates in the firm's Hollywood office, were recently successful in obtaining summary judgment on behalf of clients in the Miami-Dade County Circuit Court. In Cowan v. Hewlett Packard, et al., Case No. 09-31480 CA 25, summary judgment was obtained on behalf of an apartment building owner and maintenance company, in a case in which the plaintiff was burned after she fell asleep in her apartment and a fire erupted. The plaintiff contends that the fire started in her laptop computer and that the property owner and maintenance company were negligent in not having an operational smoke alarm in the apartment. However, the court accepted the argument that, pursuant to the local Fire Code, inspections of the smoke alarms were carried out by an independent inspection company, and that the lease required the plaintiff to notify the landlord of any problems with the smoke detector.

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**Summary Judgment Obtained in Wrongful Death Case**

Partner **Thomas McCausland** and Associate **Diane Tutt** were successful in obtaining summary judgment in a Miami-Dade County wrongful death case in which was filed after one business partner shot the other during a business meeting, then turned the gun on himself. In Weiss v. Siegel, Case No. 13-00563 CA 09, the widow of the person who was shot, in her capacity as personal representative of his estate, filed suit against our clients, the widow and estate of the person who committed the shooting. As to the estate, the plaintiff alleged that the shooting was negligent, as opposed to intentional, in an effort to obtain insurance coverage for the estate. The court ruled that all accounts of the incident showed that it was an intentional shooting and, therefore, the negligence claim could not stand. The plaintiff sued the widow of the person who committed the shooting, contending that she was liable because she knew her husband was depressed and nevertheless allowed him to go to New York for the business meeting, where she knew he kept a gun in a home they owned there. This theory was abandoned once we made the plaintiff's counsel aware that the law does not impose any duty under these circumstances, because, generally, a person is under no duty to control the actions of another person. However, the plaintiff then asserted liability under the "undertaker's doctrine" which may impose liability on a person who otherwise has no duty to the plaintiff, if the defendant undertook to take action to prevent injury to another, and in so doing, increased the risk of harm. There was evidence that, during the business meeting, the person who committed the shooting sent a text message to his wife (our client) saying he was sorry for what he was about to do. His wife then tried to contact him and others, including

# ANNOUNCEMENTS

the wife of the person who was shot, to no avail. The court accepted our argument that there was no undertaking of any duty to warn which increased the risk to anyone.

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### John Viggiani Joins as a Partner In Jacksonville

**John Viggiani** joins as a Partner and will manage the Liability Division in our Jacksonville office. For more than two decades, John has been providing legal counsel to individuals and companies throughout Florida. John earned his undergraduate degree in Public Administration at Florida Atlantic University in 1984. He attended Thomas M. Cooley Law School in Lansing, MI where he received his Juris Doctorate in 1987. John is licensed in both Florida and Michigan and successfully practiced in both states since 1988 and 1989, respectively. John has been primarily defending claims and lawsuits on behalf of clients, insurers and insureds since 1998. While defending most aspects of insurance related claims and cases, his primary focus has been on handling trucking/transportation, professional liability and construction related matters.

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### Restaurant Found Not Liable for Injury to Patron

Partner **Seth Goldberg** and Associate **Stephan Greco** obtained a defense verdict in the case of Odine Cherilus v. Sun Steaks, LLC. The Plaintiff alleged that Sun Steaks was negligent in the operation of their restaurant after she slipped and fell on a sidewalk outside the entrance where an employee was mopping using a slip resistant chemical solution. The Defense argued that the restaurant's maintenance policies and procedures were properly followed, that the condition was open and obvious, and that there was no negligent mode of operation. The Plaintiff's treating physicians opined that she had suffered multiple disc bulges and a herniation which necessitated surgery. The Defense orthopedic surgeon testified that there was no herniation and that the bulges were degenerative, as evidenced by the arthritic changes at each disc level. Plaintiff asked for $300,000 in damages. After deliberating for 36 minutes, the jury returned a defense verdict, finding that the Defendant was not negligent.

* * *

### JCC Denied Claimant's Request for Full Payment

**Manny Alvarez**, an associate in the Pensacola office, recently defended an employer and carrier against a claim for payment of full housing costs arising from a catastrophic industrial accident resulting in permanent paraplegia to the claimant. Claimant rented a one-bedroom apartment at the time of the accident at a monthly rate of $625. Following the accident, the claimant rented a three-bedroom. The carrier agreed to pay the claimant's partial rent for a two-bedroom apartment and issued the claimant the partial rent difference in advance. Claimant filed a petition for benefits seeking full payment of the rent for the three-bedroom apartment. During robust and detailed cross examination at final hearing, Manny impeached the claimant with multiple inconsistencies in the claimant's deposition testimony and the final hearing testimony. The employer and carrier prevailed when the JCC denied the claimant's request for full payment of the claimant's three-bedroom apartment.

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CONROY SIMBERG

# ANNOUNCEMENTS

### John Lurvey Serving as the 2015 ABOTA President for the Palm Beach Chapter

**John A. Lurvey,** Managing Partner of the Liability Division in our West Palm Beach office is currently serving as President of the American Board of Trial Advocates (ABOTA), Palm Beach Chapter. ABOTA works to elevate the standards of integrity, honor and courtesy in the legal profession.

* * *

### Gregory Jackson Appointed as Interim General Counsel

**Gregory Jackson,** Associate in our Orlando office, has been appointed as Interim General Counsel to the Community Redevelopment Agency for Eatonville and the District 2 Commissioner/Representative for the Board of Zoning Adjustment in Orange County, Florida.

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### Melissa McDavitt Named Partner

**Melissa G. McDavitt** has been named a partner in the firm's West Palm Beach office. Melissa has been with Conroy Simberg since 2008 and practices before all Florida state courts. She specializes in personal injury protection (PIP), no-fault and special investigations unit (SIU) claims. She has handled and tried numerous cases, including those involving PIP fraud, improper billing, and coverage. She is licensed in Florida to provide continuing education courses to insurance adjusters. She obtained her Bachelor of Science in Business Administration from the University of Florida in 2001 and her Juris Doctorate, *magna cum laude*, from Nova Southeastern University in 2007.

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### Summary Judgment Obtained in Negligent Security Case

**Rod Lundy,** Partner in our Orlando office, obtained a summary judgment in a negligent security case on behalf of a landlord whose tenant operated a night club where Plaintiff was shot. The court ruled as a matter of law that the landlord did not have control of the premises sufficient to impose liability for security of the tenant's patrons.

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### Small Claims Rules Must be Followed

**Stephanie Hoffman,** Associate in our Fort Myers office, obtained dismissal of three cases filed in Small Claims Court in Lee County in the Twentieth Judicial Circuit due to Plaintiff's failure to comply with the Small Claims Rules. Judge Gonzalez ruled that in a PIP case, a provider bringing a case as assignee of an insured must attach the written assignment of benefits to the complaint. This ruling is a powerful procedural ruling that will allow our attorneys to attack the sufficiency of the written assignments of benefits via a motion to dismiss rather than a motion for summary judgment.

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