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Inside this Issue:

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LIABILITY CASE LAW UPDATES

Florida Supreme Court holds that where a judgment rendered against an insured has not been fully satisfied, an insurer paying a portion of the judgment may not seek equitable subrogation from the party whose negligence exacerbated the Plaintiff's injuries

The issue of whether a liability insurance carrier could seek equitable subrogation against a physician whose malpractice following a covered accident exacerbated the Plaintiff's injuries where the entire judgment has not been satisfied. In Allstate Ins. Co. v. Holmes Regional Medical Center et al., 2017 WL 2981863 (Fla., July 13, 2017), the Plaintiff was injured when his scooter collided with the insured's vehicle. After the accident, the Plaintiff was treated at Holmes Regional where, it was alleged, his injuries were exacerbated by his physicians' malpractice.

At the trial, the jury rendered a $14 million judgment, of which $11 million was assessed against the insured. Allstate paid its insured's $1.1 million in insurance coverage and the insureds did not pay the remainder of the judgment.

After the trial, Allstate sought equitable subrogation against Holmes Regional and its staff, alleging that its negligence exacerbated the Plaintiff's injuries and that it was entitled to recover its $1.1 million of the judgment it paid. The providers sought to dismiss the action because the judgment had not been satisfied. The trial court dismissed the Complaint with prejudice.

On appeal, the Fifth District found that a party is entitled to equitable subrogation where the entire payment has been made **or** a judgment has been entered. Since the judgment had been rendered against Allstate's insured, the Court found that Allstate had a viable claim for subrogation. The Court, however, found the issue to be one of great public importance and certified it to the Florida Supreme Court for review.

On review, the Supreme Court disagreed with the Fifth District and quashed its decision permitting the action to proceed. The Court

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held that an insurer may not seek equitable subrogation unless and until the judgment against its insured has been satisfied in full.

* * *

Florida Supreme Court finally resolves conflict between District Courts of Appeal on the issue of whether a liability insurance policy may cover claims for attorneys' fees against an insured who has rejected the opposing party's proposal for settlement

In Geico v. Macedo, 2017 WL 2981812 (Fla., July 13, 2017), the Florida Supreme Court dealt with a conflict between two District Courts of Appeal for many years on the issue of whether a liability insurance policy provides coverage for attorneys' fees assessed against an insured who has rejected the opposing party's proposal for settlement. In this case, the insured's policy provided it covered "all reasonable costs incurred by an insured at our request" and "all investigative and legal costs" but did not define the term "legal costs."

The First District Court of Appeal held that the policy language was ambiguous and should be construed to provide coverage for attorneys' fees levied against an insured because the insurer made the decision to reject the proposal. Therefore, the Court reasoned, its rejection could be construed to be costs incurred "at our request" as the policy's coverage for legal costs was not defined or limited to those incurred by the insured. Because there were multiple reasonable interpretations of the policy language, the First District concluded that the policy language was broad enough to encompass attorneys' fees taxed against the insured.

The Court noted that the Second District previously held to the contrary in Steele v. Kinsey, 801 So. 2d 297 (Fla. 2d DCA 2001), when it opined that "expenses incurred at our request" did not encompass attorneys' fees assessed against an insured. The Supreme Court disapproved Steele, finding that the Second District did not consider the policy language vesting the insurer with the sole discretion to settle a case against its insured where the claim could be settled within policy limits. The Court also disagreed with the Steele Court's finding that where the attorneys' fees were assessed against an insured, it was not the result of the carrier's "request."

Significantly, the Supreme Court did not address any policy language other than that contained in the Macedo and Steele policies, leaving open the possibility that its decision might have been different if the policy language clearly and unambiguously excluded legal fees assessed against an insured.

* * *

Supreme Court holds that caps on the recovery of personal injury noneconomic damages in medical negligence action provided in Florida Statute 766.118 are unconstitutional

The Florida Supreme Court addressed the constitutionality of statutory caps on the recovery of noneconomic damages in medical negligence actions in North Broward Hospital District v. Kalitan, 2017 WL 2481225 (Fla., June 8, 2017). In Florida Statute 766.118, the Legislature capped the recovery of non-economic damages in medical malpractice cases at $500,000 per claim or, in the case of catastrophic injuries resulting in permanent vegetation or death, up to $1 million. Several years ago, in Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014), the Supreme Court struck down a similar cap in wrongful death cases arising out of medical malpractice. In this case, the Fourth District relied on McCall in finding that the caps on similar damages in wrongful death actions were unconstitutional as in violation of the Equal Protection clause of the Florida Constitution.

The Court found that caps on non-economic damages in personal injury actions arising from

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medical malpractice violated the Equal Protection Clause because the caps only applied in medical malpractice claims and there was no rational basis for a distinction between such claims and other personal injury actions. The underlying rationale behind the caps was the legislature's concern that there was a malpractice insurance "crisis" that warranted a limitation on recovery in such cases. The Court found that the crisis, if it ever existed, no longer does such that there is no rational relationship to a legitimate state objective and were therefore arbitrary and unreasonable. The Court noted that there appeared to be no relationship between the damage caps and a reduction in medical malpractice premiums. Therefore, even if the statute was constitutional when it was passed, it was no longer, and, as is the case here, it could be deemed unconstitutional when its original purpose was no longer being served.

* * *

Non-joinder statute applies to surplus lines carriers

The Fifth District Court of Appeal, in International Special Events and Recreation Assoc., Inc, et al. v. Bellina, 2017 WL 1548027(Fla. 5th DCA, April 28, 2017), addressed the issue of whether surplus lines carriers may be joined as parties in personal injury litigation against their insureds before the Plaintiff had prevailed in a claim against the insured. The Court found that Florida Statute 627.4136, Florida's non-joinder statute, applies to surplus lines carriers as well as Florida insurers, even though the statute does not specifically address surplus lines.

* * *

Temporary control of car by non-owner who was driving car with owner in front seat was a "loan" of the vehicle under Florida Statute 324.021(9)(b)(3) limiting owner's vicarious liability to $100,000

The Fourth District Court of Appeal addressed the issue of whether Florida Statute 324.021(9)(b)(3)(2014) applies to limit the vicarious liability of a vehicle owner who "loans" his or her car to a permissive user to $100,000 per person injured or $300,000 per incident if the permissive user has no insurance or less than $500,000 combined property damage and bodily injury liability coverage. In Richbell v. Toussaint, et al., 2017 WL 2664701 (Fla. 4th DCA, June 21, 2017), the trial court found to the contrary, concluding that the owner and driver were engaged in a joint undertaking.

The appellate court reversed, finding that the plain language of the statute did not distinguish between cases in which the owner was riding in the vehicle at the time of an accident and those in which the owner was not in the car. The Court observed that there was nothing in the legislative history of the statute supporting the plaintiff's argument that the statute would not apply in this instance. Accordingly, the Court reversed the trial court's ruling denying the defendant's motion to limit the judgment to $100,000.

* * *

Judgment against hotel reversed where drunk driver drove onto the property and into pool cabana, killing hotel guest, because hotel had no reason to anticipate freak accident

In Las Olas Holding Co. v. Demella, 2017 WL 3085329 (Fla. 4th DCA, July 19, 2017), the Fourth District considered a judgment rendered against the Riverside Hotel in a wrongful death action brought by the surviving husband of a woman who was killed while she was in the bathroom at

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the pool cabana. The decedent was killed by a drunk driver who drove her vehicle straight into the cabana at over 50 miles per hour from the road behind the hotel. The driver had not been drinking at the hotel. The jury rendered a verdict of over $24 million, of which 15% of the liability, or $3.6 million, was attributed to the hotel, with the remainder of the liability assigned to the driver.

The Plaintiff argued that the hotel was at fault because it should have foreseen the risk of having its pool and cabana about 15 feet from the roadway without any physical barriers protecting that portion of the property from errant drivers. The hotel contended that there had never been an instance of a vehicle traveling off the roadway, and certainly that far off the roadway, and the accident could not have been avoided.

The appellate court found that the hotel had no legal duty to anticipate the accident because there was no dangerous condition on its premises. Given the history of the roadway, the accident was not reasonably foreseeable, even though, as the Plaintiff's counsel argued, there had been incidents of speeding on the roadway. Even if the placement of the pool and cabana could be deemed a dangerous condition, the hotel breached no duty to the decedent because it had taken precautions to protect its guests from speeding cars on the roadway by ensuring that there were guards to accompany guests crossing the road to get to another part of the hotel property. Finally, the Court found that there was no negligence on the part of the hotel that proximately caused the decedent's death, and the Court characterized the accident as a "freak." The Court concluded that the judgment against the hotel would be reversed with directions to enter a judgment in its favor.

Although the Court found the hotel not liable as a matter of law and did not need to address the hotel's alternative arguments for a new trial, it took the opportunity to chastise the Plaintiff's counsel for his improper opening and closing arguments to the effect that the hotel "refused to accept any responsibility for its role" in the decedent's death. The Court also cited as improper the Plaintiff's counsel's argument that the jury could consider the "value of human life" arguments, in which counsel suggested that the jury consider what LeBron James earned in a year as a guide to determining damages.

* * *

Insurer properly sought declaratory relief to determine whether umpire selected by two appraisers of a homeowner's insurance claim was competent and impartial, as was required under the policy

In Heritage Property and Casualty Ins. Co. v. Romanach, 2017 WL 2960729 (Fla. 3d DCA, July 12, 2017), the appellate court addressed the issue of whether the trial court properly dismissed a declaratory judgment action brought by a property insurer to determine whether the Umpire chosen by two appraisers of a property claim was competent and impartial. The action was brought after the insurer could not reach an agreement with its insured as to the value of the insureds' claim and demanded appraisal. As required by the policy, the insureds obtained their own appraiser and the two appraisers agreed on an Umpire to oversee the appraisal.

After the appraisal, the insurer discovered that the insureds had a professional and familial relationship with the Umpire that called into question his impartiality. The insureds moved to dismiss the declaratory judgment action, arguing that it failed to state a cause of action. On appeal, the Third District found that the insurer's pleading stated a viable cause of action, but emphasized that it was not deciding the merits of the claim or the appropriate relief should the insurer prevail.

* * *

Focus on:

First-Party Property & Coverage Claims

Conroy Simberg is a premier insurance defense firm with more than 150 attorneys working in 10 offices strategically located throughout Florida. The attorneys in our first-party property and coverage practice are widely recognized throughout the insurance industry for their ability to successfully resolve and defend all types of first-party personal lines and commercial claims. Our legal team works with our clients to help them reach strategic and well-founded coverage decisions that best protect their business and financial interests.

We counsel and represent insurance carriers on all types of first-party property and coverage claims made under personal lines and commercial policies of insurance, including:

- Damages to real property and personal property
- Business interruption losses and extra expense insurance coverage
- Assignment of benefits
- Civil authority coverage
- Claims made by mortgagees
- Excluded causes of loss, including arson and other intentional acts
- Fraudulent and/or exaggerated claims
- Material misrepresentations
- "Bad faith" claims

Our first-party property and coverage attorneys have decades of experience working in the field of insurance law and are committed to providing personalized service and attention. During an investigation, our legal team advises and assists insurance carriers to ensure that they fully understand the facts, coverage issues and potential exposures associated with the claim. Our lawyers conduct detailed and thorough examinations under oath and work closely with our clients to identify and obtain the documents and information they need in order to make well-informed insurance coverage determinations.

The attorneys at our firm provide detailed first-party property and coverage opinions to our insurance industry clients. We have a comprehensive understanding of all types of insurance policies and are highly skilled in deciphering complex policy language and analyzing complex coverage issues. In addition, we offer detailed risk analyses and regularly counsel and represent insurers facing bad faith claims.

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WORKERS' COMPENSATION CASE LAW UPDATES

The Claimant retains the right to select her own physician after the E/C agrees to specific authorization after the request

Milovan Zekanovic v. American II, Corp. / Gallagher Bassett Services, Inc., 208 So. 3d 851 (Fla. 1st DCA 2017). In the instant case, the Claimant argued that the JCC erred in finding that the E/C retained the right to select his one-time change of physician, even though they agreed that they failed to respond to his request within five days of its receipt.

The Claimant initially faxed a grievance to the E/C and their attorney requesting a one-time change from Dr. Pagano on 12/23/2015 and no response was provided until 1/5/2016. The Claimant then filed a Petition for Benefits requesting authorization of Dr. Hassan, a pain management physician, as his one-time change. The E/C denied authorization, and the Claimant never attended any appointments with Dr. Hassan.

The Court held, citing the decision in Gadol v. Masoret Yehudit, Inc., 132 So. 3d 939 (Fla. 1st DCA 2014), that a claimant may waive his or her right to select the physician if he or she subsequently agrees to the E/C's choice. The E/C's selection of a physician before or at the same time as the claimant makes his or her selection, does not constitute a waiver by the claimant, so long as the claimant has not attended any appointment scheduled by the E/C.

The Court also ruled, conforming to the decision in Harrell v. Citrus City, Sch. Bd., 25 So. 3d 675 (Fla. 1st DCA 2010), that where the court found that where a response to a request was untimely, the Claimant remained entitled to select her own physician even though the E/C advised claimant of specific authorization nineteen days after request. The Court thereby agreed with the Claimant finding that the JCC erred in finding that the E/C retained the right to select his one-time change of physician.

* * *

Evidence of pre-existing conditions found by EMA should be admitted into evidence without attribution the presumption of correctness

Hillsborough County School Board/Broadspire v. John E. Kubik, 208 So. 3d 1287 (Fla. 1st DCA 2017) The E/C appealed the JCC's order excluding the opinion of an Expert Medical Advisor (EMA) regarding causation and the need for treatment of the Claimant's neck. The E/C argued that the JCC should have admitted the opinion into evidence without attributing to it to the presumption of correctness prescribed in subsection 440.13(9), Florida Statutes.

The Court agreed with the E/C citing the decision in Lowe's Home Ctrs., Inc., v. Beekman, 187 So. 2d 318 (Fla 1st DCA 2016), which held that an EMA's opinion beyond the scope of inquiry was admissible but not presumptively correct.

The JCC also denied TTD benefits based on the EMA's opinion, despite evidence that the Claimant's authorized treating physician had taken him off work entirely and never informed him that he could never turn to work. On cross-appeal, the Claimant argued that the JCC should have relied on case law holding that an injured worker can rely on an authorized provider's instruction to refrain from working, even if there is retrospective testimony that claimant could have worked during this period. The Court agreed with the Claimant

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that his reliance on his doctor's instruction can support a TTD claim.

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The Legislative intent of the Florida Worker's Compensation law is to determine cases on their merits, considering all evidence

James D. Boyle v. JA Cummings, Inc./FARA, 212 So. 3d 1060 (Fla. 1st DCA 2017). The Claimant challenged a JCC order denying all requested benefits due to the exclusion of evidence and rejection of his argument based on the 120-day rule. The Court agreed with the Claimant that exclusion of the adjuster's deposition was an error affecting the 120-day rule analysis.

The facts indicate that the Claimant was injured and the Carrier authorized multiple providers to treat the Claimant. The Claimant was ultimately terminated and later filed a petition seeking temporary indemnity benefits and neck surgery as recommended by an authorized doctor. The E/C consulted an IME that indicated that the MCC of the need for neck surgery was pre-existing. The JCC subsequently appointed an EMA, which agreed with the IME. The Claimant argued that the E/C was estopped from asserting a MCC defense because the E/C failed to deny compensability within 120 days of initially providing benefits. The JCC denied the admission of the Adjuster's deposition because it was not filed ten days prior to final hearing. The Court reversed, opining The court noted that the JCC's exclusion of testimony from properly disclosed witnesses conflicted with the specific legislative intent that workers' compensation cases be decided on their merits and not on technicalities.

* * *

Accrued leave not earned during the week it was drawn has already vested and it cannot be included in the calculation of earnings during the week in which IBs are payable for the purpose of reducing IBs

Thomas Eckert v. Pinellas County Sheriff's Office/Pinellas County Risk Management, 215 So. 3d 161 (Fla. 1st DCA 2017). In this case, the Claimant appealed an Order from the JCC denying payment of impairment benefits (IBs), at "the correct rate." The Claimant argued that 23 non-consecutive weeks of the total 169 weeks that he was due were paid at half of the proper rate. The E/C paid the reduced amount of IBs for the 23 weeks during when the Claimant drew from his accrued leave, instead of working the entirety of his scheduled hours. The E/C argued that as a result of the Claimant's leave, his full paycheck constituted income equal to his AWW. The Court, however, agreed with the Claimant that the drawn leave cannot count towards his AWW for the week it was drawn because the leave was previously accrued, and thus not earned during each week at issue. The Court distinguished Florida State 440.15(3)(c), which indicates that "… such benefits shall be reduced by 50 percent for each week in which *the employee has earned income* equal to or in excess of the employee's AWW" (emphasis added).

* * *

Medically necessary apparatus must be proved by competent evidence to substantiate the need

AT&T Communications/Sedgwick CMS v. Victoria Murray Rosso, 2017 WL 1655233 (Fla. 1st DCA 2017) The E/C challenged a JCC's order on claims seeking authorization of lawn care, home renovations, attendant care for at least four hours per day, an evaluation and treatment by a podiatrist, AFO brace, and an evaluation for the

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need for specialized shoes. The Court affirmed the Order for lawn care citing that competent substantial evidence supported the JCC's finding that such care would improve Claimant's compensable depression and anxiety. The Court also affirmed the awards of attendant care, a podiatrist, an AFO brace, and evaluation of the need for specialized shoes.

The Court however, reversed the award for home renovations. The Court considered Timothy Bowswer Constr. Co., v. Kowalski, 605 So. 2d 885 (Fla. 1st DCA 1992), in which the Court held that the E/C may be responsible for providing an accessible living environment under the statutory requirement for the furnishing of "medically necessary apparatus." The Claimant, as a result of a workplace injury on 2/10/1989, underwent spinal fusion surgery in 2014 and developed a dropped foot for which she uses a cane to ambulate. The Claimant reported problems with balance and frequent falls and subsequently hired a registered nurse with rehabilitation experience and training to prepare a home assessment report. The report made several recommendations for home renovations including ramp access, outdoor motion sensor lighting, door widening, smooth flooring, and kitchen/bathroom modifications. The JCC improperly relied on the home assessment report, as well as testimony of the treating psychologist, pain management physician, and an unauthorized orthopedic surgeon, all of whom never particularized or indicated which renovations they were recommending, or the medical necessity for same. As a result, the Court reversed the awards for the home renovations finding that there was no competent substantial evidence to support the award.

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The Doctrine of Res Judicata does not bar a request for one-time change in physician under Section 440.12(2)(f)

Elsa Dominguez v. Compass Group/Gallagher Bassett Services, Inc., 2017 WL 2130237 (Fla. 1st DCA 2017). The Claimant appealed an order of the JCC denying her claim for a one-time change in physician. The Court reversed, citing Providence Prop. & Cas. v. Wilson, 990 So. 2d 1224, (Fla. 1st DCA 2008), which held that a claimant's right to a one-time change of treating physician is absolute if the request is made during the course of treatment. The Claimant had received treatment with Dr. Arango, an orthopedic hand specialist, and was ultimately placed at MMI with a 3% impairment rating as of October 2013. In May 2014, the Claimant filed a Petition for Benefits seeking authorization of medical care from a primary care provider. The E/C denied the claim and raised various defenses including MCC with regard to the need for any further medical care. In February 2016, the Claimant filed a petition seeking authorization of a one-time change in physician. The E/C asserted that *res judicata* barred the request and filed a summary final order. The JCC entered an order granting the E/C's summary final order holding that res judicata barred the request for a one-time change. The appellate court held that the claimant's right to a one-time change of treating physician is absolute if the request is made during the course of treatment. In Wilson, the "course of treatment" requirement is met so long as the claimant has treated with an authorized physician. In the instant case, because the Claimant was previously treated by an authorized physician, she was still within "the course of treatment." Therefore, the doctrine of res judicata did not apply and the Claimant was not barred from requesting a one-time change.

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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.

Four Attorneys Recognized in the 2017 Edition of Florida Super Lawyers

Conroy Simberg is pleased to announce that four attorneys from the firm have been selected to the 2017 Florida Super Lawyers and Rising Stars lists. **Hinda Klein,** and **Diane H. Tutt** were listed as Super Lawyers. **Todd M. Feldman** and **Tashia M. Small** were listed as Rising Stars.

Each year, no more than five percent of lawyers in the state are selected to receive this honor, and no more 2.5 percent are selected to the Rising Stars list.

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South Florida Legal Guide Recognizes Conroy Simberg as a 2017 Top Law Firm and three of the firm's partners as Top Lawyers

Conroy Simberg has been listed in the Top Law Firm category and three of our South Florida partners have been included in the 2017 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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John L. Morrow Achieves Recertification in Civil Trial Law

The Florida Bar Board of Legal Specialization & Education has recertified **John L. Morrow**, as a board-certified Civil Trial Lawyer. He is an equity partner and the managing liability partner in the firm's Orlando office. Board certification recognizes attorneys' special knowledge, skills and proficiency in various areas of law and professionalism and ethics in practice. Board Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys. Only 1.2% of the 86,000 + attorneys in Florida who are in good standing and eligible to practice are Board Certified Civil Trial attorneys.

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Hinda Klein Prevailed Before the Fourth District Court

Hinda Klein, partner in charge of the firm's appellate department, prevailed before the Fourth District Court of Appeal in obtaining a reversal of a $3.6 million judgment against the Riverside Hotel in a wrongful death action. In Demella v. Las Olas Properties, the Plaintiff sued the hotel after a drunk driver purposefully drove onto the hotel premises and ran into the hotel's cabana, killing a young woman who was inside. The Court reversed the judgment with directions to enter judgment in the hotel's favor.

Ms. Klein was also successful in defending a summary judgment in a legal malpractice action in Lift v. Law Offices of Rich, at the Fourth District Court of Appeal.

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New Trial Awarded on Appeal in Motorcycle Crash

Diane H. Tutt, a partner in the firm's appellate department, was successful in obtaining reversal of a $700,000 judgment entered on a jury verdict in a motor vehicle/motorcycle case. In Stewart v. Draleaus, the Fourth District Court of Appeal found that the trial court should have allowed the defense to introduce evidence of the plaintiffs' alcohol consumption, that the accident report privilege did not apply to bar an eyewitness from testifying as to what she saw, and that the defense should have been allowed to introduce evidence that one of the plaintiffs was not permitted by his license status to have a passenger on the back of his motorcycle.

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Defense Verdict Obtained in Lawn Mower Accident

Michael J. Paris and **Seth R. Goldberg**, both partners in the Hollywood office, obtained a defense verdict in the case of Palis v. Billy Goat Industries and Florida Outdoor Power.

The Plaintiff purchased a Billy Goat "Finish Mower" lawn mower to use in her new landscaping business in 2008, and used it as her primary mower until sometime in 2009. At the time she bought a bigger more expensive riding mower and the Billy Goat became her back up mower. On July 5, 2014, the plaintiff was using her Billy Goat finish mower to cut wet long grass when the mower developed clogs in the cutting deck with the grass. On nine occasions, the plaintiff, in violation of the manual and warnings, placed her right hand below the cutting deck, without turning off the mower. On the tenth time she placed her hand there, she severed a portion of her right thumb and damaged her index and middle finger.

The plaintiff alleged that the Billy Goat mower was defective because it did not adequately test the mower before putting it on the market and did not use what their expert believed were state of the art components.

The defense claimed the mower had not been properly maintained and proved at trial through their expert that the mower, properly maintained, would stop the cutting blades within 1 second. The defense also argued that the Plaintiff read all of the warnings and the manual and that she understood them.

The plaintiff claimed more than $200,000 in past medical bills for 7 surgeries, and asked the jury for one to two million dollars. The plaintiff also told

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the jury they should or could forgive the plaintiff for her conduct.

The plaintiff's theories of liability were strict liability for design and warnings, and negligence in the design and warnings. The jury deliberated for slightly more than 2 hours, before returning a defense verdict on all counts.

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Summary Judgment in PIP Case Reversed

In State Farm Mutual Automobile Insurance Company v. Hollywood Diagnostics Center, the Circuit Court of Broward County, acting in its appellate capacity, reversed a summary judgment that had been entered in favor of the provider in a PIP case. **Diane Tutt** handled the appeal for State Farm. The court found that there were material issues of fact in dispute on the issues of medical necessity and relatedness.

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Summary Judgment Obtained in Case Alleging Homeowner Failed to Prevent Plaintiff's Electrocution

Robert Horwitz, a partner in the firm's West Palm Beach office, with the assistance of Associate **Kristian Bie** and appellate partner **Diane H. Tutt**, obtained final summary judgment for an insured homeowner in the case of Brown v. Fischer, Case No. 2014 CA 006451 NC, in the Sarasota County Circuit Court.

The plaintiff was hired to install a new dishwasher for the defendant homeowner. The plaintiff admitted that he was fully in charge of the manner in which the job was to be completed and that he alone decided that he did not need to turn the power to the dishwasher off to perform his work. However, when he plugged in the new dishwasher, he was electrocuted. Fortunately, he survived, because the homeowner was present and he asked her to go turn off the power because he could not do so himself. The plaintiff claimed that his injury was worsened by the homeowner's delay in turning off the power, which was due to the presence of materials stacked in front of the main electrical box in the garage, slowing down her ability to access it.

In entering summary judgment for the insured, the court recognized that the plaintiff had full control over whether the electricity needed to be turned off before he started the installation. The court rejected the plaintiff's argument that the defendant owed and breached a duty under the "Undertaker's Doctrine," that imposes liability on a person who assumes a duty and performs it negligently, making the plaintiff's situation worse. Here, the homeowner did not make the plaintiff's situation worse because he would have died without her intervention.

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Motion for Summary Judgment Obtained

Melissa McDavitt, a partner and **Shannon Darsch,** an associate, in the West Palm Beach office prevailed on Defendant's Motion for Summary Judgment before Judge Panse on State Farm's 9810A policy form. Specifically, the court held that it was proper for the Defendant to limit the reimbursement based on the schedule of maximum charges (i.e., 200% of the Medicare Fee Schedule) and that the election for reimbursement was unambiguously reflected in State Farm's 9810A policy form of insurance. The court's ruling opinion has not been appealed.

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Summary Judgment Obtained

Rodney C. Lundy, a partner in our Orlando office, obtained a summary judgment on the duty to defend and indemnify in a coverage case alleging a pharmacy technician was persuaded into filling a prescription and providing a label for a person other than the one seeking the medication. The court ruled the complaint's allegations fell within the policy's professional liability exclusion.

* * *

Subrogation Unit Successfully Recovers $780,000 for Large Insurance Company

Stuart Cohen, a partner in the Hollywood office who manages the firm's large loss subrogation/ recovery unit, was successful in recovering $780,000 for a prominent insurance company in a complex recovery claims involving the construction of USCENTCOM in Tampa. Stuart was able to achieve this recovery despite the fact that the claims involved multiple defendants, multiple insurance coverage disputes and several different causes of loss.

* * *

Defense Verdict Obtained in Premises Liability Case in Landlord/Tenant Case

Michael Kast, a partner, and **Gregory A. Jackson**, an associate, in our Orlando office successfully obtained a defense verdict in a landlord/tenant situation. The plaintiff was a tenant in an apartment complex owned by our client, the insured. She claimed she reported prior problems with the burners on her stove. One day while attempting to heat oil in a frying pan, she left the kitchen for no more than 5 minutes, and when she came back the pan was on fire. She attempted to move the pan to put the fire out but suffered burns, some 3rd degree, to her hand, foot, chest and thigh. Skin grafts were required. The defense was the stove operated properly and the plaintiff was comparatively negligent. The jury deliberated for approximately 30 minutes before returning a defense verdict.

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Summary Judgment Obtained in Case Involving Structural Collapse

Robert Horwitz, a partner in the firm's West Palm Beach office, with the assistance of associate **Katie M. Nieves** and appellate partner **Diane H. Tutt**, obtained final summary judgment for an Insurer in the case of Reimundo v. Florida Peninsula Insurance Company, Case No. 2015 007407 CA 01, Section 13 in the Miami-Dade County Circuit Court.

The plaintiff filed suit against the insurer claiming a "collapse" in a bathroom occurring while it was in use. The defendant's expert determined the plaintiff had long-term leaks in the home's bathroom resulting in the long-term rotting and collapse of the floor structure under the bathroom, which predated the policy. Prior to the policy inception, the plaintiff put new flooring on a downward slope in lieu of correcting the collapse.

In entering summary judgment for the insurer, the Court recognized that there is no coverage because there was no "sudden and accidental direct loss to the property" under the policy. The Defendant's engineer's photographs and affidavit confirmed longstanding damage not involving any movement of the bathtub as alleged by the Plaintiff. The Court rejected the plaintiff's argument that a "collapse" occurred during the policy period.

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Summary Judgment Obtained

Jeffrey Rubin, an associate in the West Palm Beach office, prevailed on summary judgment on the Plaintiff's claims for vicarious liability, negligent retention, negligent hiring, and negligent supervision, in the case of O'Donnell v. The Polo Club of Boca Raton in Palm Beach County. The Plaintiff in that action underwent two lumbar spine surgeries and incurred more than $400,000 in past medical and special damages.

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Insurance Coverage Action

Thomas J. McCausland, a partner, and **Shannon P. McKenna**, an associate, in our Hollywood office recently prevailed in an insurance coverage action. The homeowner sought a defense and indemnification under his homeowner's policy for a "negligence" claim brought by a third party, who allegedly sustained injuries when the homeowner grabbed her by her hair. Finding that the homeowner's conduct was excluded under the policy's physical abuse exclusion, the trial court entered judgment in favor of the insurer.

* * *

Christian Petric Successfully Defended a Total Controvert Case

Christian Petric, a partner in the West Palm Beach office, was successful in defending a total controvert in the claim of Alis Orellana Marquez, OJCC# 16-005277MAD. The Claimant alleged that the defendants should be considered her statutory employer since her actual employer was uninsured. The JCC did not agree since the actual employer was not a subcontractor within the definition of the law. The JCC found that there had to be a contract with a third party whom the alleged statutory employer was obligated. Christian successfully argued that those facts were not present in the instant case.

* * *

Summary Judgments Affirmed

Diane H. Tutt, a partner in the firm's appellate department, was successful in obtaining affirmance of a summary judgment in a first-party property case that had been handled in the trial court by **Robert S. Horwitz**, a partner in the firm's West Palm Beach office, and **Maria Chapman**, an associate in the firm's Tampa office. In Chapman v. Florida Peninsula Insurance Company, the trial court granted the defense a summary judgment on two grounds, misrepresentation on the policy application and lack of coverage due to pre-existing damage. The Second District Court of Appeal affirmed on all issues.

In Vancelette v. Boulan South Beach Condominium Association, **Diane Tutt** also obtained an affirmance of the summary judgment that had been obtained by **Cris Casal**, a partner in the firm's Hollywood office. In that case, the Third District affirmed summary judgment entered on the ground that the plaintiff's injury did not occur on the defendant's property, but rather on an adjoining sidewalk.

Additionally, in Baxter v. St. John, **Diane Tutt** obtained an affirmance by the Fourth District Court of Appeal on a summary judgment obtained in the trial court by **John A. Howard**, a partner in the firm's West Palm Beach office. This case involved a claim of breach of fiduciary duty on the part of member of the board of directors of a condominium.

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Subrogation Team Recovers $350,000 for National Insurance Company

Stuart Cohen, a partner in the Hollywood office who runs the firms large loss subrogation/ recovery unit, was successful in recovering $350,000 in a "pay and chase" claim brought by a large insurance company. After settling a liability claim, Stuart pursued a medical negligence claim against several healthcare providers who had enhanced the injuries originally sustained by the injured claimant.

* * *

Workers' Compensation Orders Affirmed in Guardianship Case

Diane Tutt, a partner in the firm's appellate department, obtained affirmance of two workers' compensation final orders, in cases successfully defended by **Katherine Letzter**, a partner in the firm's Tampa office. In Cage v. Employee Staff LLC/Zurich, the First District Court of Appeal affirmed an order denying the request for examining committee's fees to be reimbursed to the claimant's guardian, where the JCC had previously found that no guardianship was appropriate but a family member had nevertheless proceeded to file a guardianship case without notice to the employer/carrier. In Carmona-Rodriguez v. PA Contractors/Florida Citrus Business & Industry/USIS, the First District affirmed an order finding that our employer was not the actual or statutory employer of the claimant.

* * *

John Viggiani Delivers Commercial Vehicle Liability Presentation at the 2017 JADC

John Viggiani, managing partner of the firm's liability division in Jacksonville, presented at the 2017 Jacksonville Association of Defense Counsel (JADC) Annual Retreat on "Driver Qualifications & Employee Liability in Cases Involving Commercial Vehicles."

* * *

Motion for Summary Judgment Obtained

Jeffrey Rubin, an associate in the West Palm Beach office, prevailed on summary judgment on Plaintiff's claims that a roadway contractor was negligent and caused a dangerous condition such that a trucking accident occurred in the Martin County case of Trempe v. J.W. Cheatham.

* * *

Summary Judgment Obtained in Declaratory Judgment Action

Ed Herndon, the managing partner of Conroy Simberg's Tallahassee office, obtained a summary judgment for our client, Sawgrass Mutual Insurance Co. ("SMIC") in a declaratory judgment action entitled Sawgrass Mutual Ins. Co. v. Scott Lowry. In this matter, a wrongful death lawsuit was brought by the Lowry estate, and others, against SMIC's insured, Steven Stepp, alleging that he had negligently designed and manufactured a private pleasure vessel. The suit alleged that these design and manufacturing defects and deficiencies caused the boat to break apart at high speed that resulted in the death of Mr. Lowry and severe injuries to the other occupants of the vessel. While defending Mr. Stepp under a reservation of rights, SMIC sought a declaratory judgment that it had no duty to defend or indemnify Mr. Stepp due to the applicability of a "business pursuits" exclusion

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contained within the homeowners policy issued by SMIC. On cross motions for summary judgment, the Court determined that the exclusion applied and, as a result, SMIC was no longer obligated to defend Mr. Stepp and had no duty to indemnify him for any damages that may be awarded in the wrongful death lawsuit.

* * *

Manny Alvarez prevailed at Final Hearing

Manny F. Alvarez, a partner in the Pensacola office, recently prevailed in a final hearing involving a paraplegic claimant's request for the carrier to pay for a house rather than an apartment. The claimant filed a PFB seeking reimbursement and payment of a house rather than a handicap accessible apartment at a rate of $3,500 (less $650 rent differential per month). Former JCC Laura Roesch initially ruled in favor of the claimant requiring the carrier to pay for the claimant's 4-bedroom/3-bathrrom house sitting on 5 acres. On appeal, the First District reversed and remanded the issue of housing back to the JCC for rehearing on medical necessity. Judge John Lazzara presided over the remanded final hearing. Through our expert witnesses, we established that the claimant did not provide any supporting medical evidence that the 4-bedroom/3-bathroom house sitting on 5 acres was not medically necessary. The JCC agreed with the carrier's position that it was only responsible to pay the difference between the apartment he occupied at the time of the accident and a 2-bedroom handicap accessible apartment. The JCC denied the claimant's request for payment of the house he currently occupies.

* * *

Laura Blundy Reappointed to Commission on Civil Rights Florida Advisory Committee

Laura J. Blundy, an associate in the Orlando office, has been was reappointed to serve another 2-year term on the U.S. Commission on Civil Rights Florida State Advisory Committee.

Advisory committee members conduct reviews and provide recommendations on local civil rights issues, including justice, voting, discrimination, housing, education, and other important themes. The commission has committees in all 50 states and the District of Columbia.

* * *

Defense Verdict Obtained in an Admitted Liability Automobile Collision Case

Joshua Canton, a partner in the firm's Tallahassee office, recently obtained a defense verdict in Leon County Circuit Court in an admitted liability automobile collision case. The plaintiff claimed that she sustained traumatic carpal tunnel syndrome and cubital tunnel syndrome in the low velocity rear-end collision. The plaintiff's neurosurgeon and pain management physician both testified that the plaintiff's injuries were related to the collision. The defendant admitted that she was negligent for rear-ending the plaintiff's vehicle, but disputed that the plaintiff's claimed injuries were caused by the collision. After a Daubert hearing, the defense was permitted to put on the testimony of a biomechanical engineer, who testified that no mechanisms of injury for carpal tunnel syndrome or cubital tunnel syndrome were established in the collision. The defense also submitted the testimony of an orthopedic surgeon, who testified that the plaintiff's carpal tunnel syndrome and cubital tunnel syndrome pre

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-existed the collision. During closing arguments, The plaintiff requested that the jury award $225,000. The jury returned a defense verdict in less than 2 hours.

* * *

Hinda Klein successfully Defends Summary Judgment in Suicide Case

Ms. Klein successfully defended a summary judgment before the First District Court of Appeal in Stringer v. Dugger, in which the decedent committed suicide with a defendant's gun, while she was in their home. The Court found that neither the decedent's boyfriend, who owned the gun, nor his parents, had any legal duty to the decedent to ensure that she did not kill herself with a gun in their home.

* * *

Hinda Klein Appointed to Florida Civil Procedure Rules Committee

Hinda Klein, partner in charge of the appellate division of the firm, has been appointed by Florida Bar President Michael Higer to the Civil Procedure Rules Committee, which is charged with proposing new or amended rules of procedure to the Florida Supreme Court for approval.

* * *

Summary Judgment Obtained in Water Mitigation Services Case

Robert Horwitz, a partner in the firm's West Palm Beach office, with the assistance of associate **Ruwan Sugathapala**, obtained an order granting summary judgment for the insurer in the case of Ultimate Restoration LLC a/a/o Joel Sumlin and Deloris Sumlin v. Florida Peninsula Insurance Company in the Broward County Circuit Court where the AOB company sought payment of the insured's deductible from the carrier when it was reduced from the AOB company's payment.

The Plaintiff was hired by the insured to perform water mitigation services relating to a loss sustained at the insured's home. In connection with its services, the insured authorized direct payment and assigned her property insurance rights, benefits and proceeds to the Plaintiff as consideration for the services rendered. After determining that the loss was covered under the subject policy of insurance, the insurer issued payment to the Plaintiff for the invoice price less the insured's $2,500 deductible. The Plaintiff filed suit for breach of contract, alleging it was entitled to the deductible amount and only the insured should be responsible for the deductible.

In granting the carrier's motion for summary judgment, the Court recognized that the functional purpose of a deductible, frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay ripens. The carrier successfully argued that the policy clearly provided that the Insureds, not the carrier, was responsible for paying the first $2,500 of damage. In granting summary judgment, the Court accepted the carrier's argument that the prevailing case law was consistent with the purpose of a deductible, which is to contractually agree upon the point at which the insurance company's obligation to pay ripens, including in application to an assignment of benefits.

* * *

Defense Verdict Obtained in an Admitted Liability Motor Vehicle Accident Case

Michael Kraft, a partner, and **Nicole F. Soto**, an associate, in our Tampa office successfully

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obtained a defense verdict in a motor vehicle accident with admitted liability. The case was tried in Hillsborough County over a four-day period. The 61-year-old female plaintiff alleged that she suffered new lumbar and cervical herniation(s) as well as aggravation of preexisting lumbar and cervical conditions when she was involved in a rear-end accident with the insured driver. The insured driver and his employer admitted liability, but contended that the plaintiff's injuries were unrelated to the subject incident. After the accident, the plaintiff underwent cervical injections with past medical specialists in the amount of $54,000. In addition, the plaintiff's treating physician recommended a cervical fusion. The jury found that negligence on the part of the defendants was not a legal cause of damage to the plaintiff. The defendants previously offered $45,000 by way of proposal for settlement. Post-trial motions for defendant's attorney's fees and costs are currently pending.

* * *

Summary Judgments Obtained in Dental Malpractice and Employment Discrimination Cases

Stuart Cohen and **Shannon McKenna**, a partner and associate in our Hollywood office, were successful in obtaining a summary judgment on behalf of a defendant dentist in a federal civil rights action. The plaintiff alleged that the dentist delayed and denied him treatment for his injured jaw, which constituted deliberate indifference to a serious dental need in violation of the Eighth Amendment of the U.S. Constitution. The Federal District Court for the Northern District of Florida, found that there were no genuine issues of material fact on either the objective, subjective or causation elements of an Eighth Amendment claim and granted summary judgment in favor of the dentist.

Stuart Cohen, and **Matthew Webber**, a partner and associate in our Hollywood office, were successful in obtaining a summary judgment in an employment discrimination claim brought in Federal Court in the Northern District of Florida.

* * *

Dismal of Benefits Claims Dismissed Against Construction Company

Katherine G. Letzter, a partner in our Tampa office, obtained dismissal of the Claimant's petitions for benefits in Shmukler v G.C.M. Construction, Inc./American Interstate Insurance Company. The JCC found that the Claimant was not an employee of the named employer.

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