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In This Issue:

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LIABILITY CASE LAW UPDATES

DAMAGE TO TILE FLOOR DID NOT CONSTITUTE MARRING BY PLAIN LANGUAGE INTERPRETATION

In Ergas v. Universal Property and Casualty Ins. Co., 38 Fla. L. Weekly D900 (Fla. 4th DCA, April 24, 2013), the Fourth District Court of Appeal addressed the issue of whether a homeowner's property insurance policy exclusion for "wear and tear, marring, deterioration" excluded coverage for the insureds' claim for damage to their tile floor caused when an insured dropped a hammer on the floor, causing it to chip. The insureds argued that the term "marring" was ambiguous because it was not defined in the policy and that, in the context of the exclusion, the term contemplated damage gradually occurring over time. In response, Universal argued that none of the terms in the exclusion required interpretation by reference to the others. The appellate court affirmed summary judgment in favor of the carrier, finding that the exclusion for "marring" applied to exclude coverage for the insureds' claim.

WHERE POLICY PROVIDED THAT IT WOULD BE VOID IF THE INSURED MADE A FALSE STATEMENT IN HER APPLICATION FOR INSURANCE, INSURER WAS NOT REQUIRED TO DEMONSTRATE THAT THE INSURED INTENDED TO MISLEAD THE INSURER IN ORDER TO RESCIND THE POLICY FOR MISREPRESENTATION

The First District Court of Appeal, in Universal Property and Casualty Ins. Co. v. Johnson, 38 Fla. L. Weekly D950 (Fla. 1st DCA, April 30, 2013), addressed policy language in a homeowner's policy that permitted the carrier to void the policy if the insured 1) intentionally concealed or misrepresented any material fact or circumstance, 2) engaged in fraudulent conduct or 3) made false statements, relating to this insurance. The insured failed to disclose that she had five felony convictions within the ten (10) years prior to her application. After she suffered a loss and the carrier rescinded the policy, she argued that the policy language was more restrictive than that contained in Florida Statute 627.409, which permits carriers to rescind policies for a misrepresentation or concealment in the application that may be material to the carriers' acceptance of the risk, regardless of whether the insured intended to make a misrepresentation. The appellate court found that Universal's policy language was not inconsistent with, or more restrictive than, the

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misrepresentation statute such that the insurer would be required to demonstrate that the insured intentionally misrepresented a material fact and, accordingly, the Court reversed the judgment in favor of the insured with directions to the trial court to enter a judgment in the carrier's favor.

As of the date of this writing, the First District denied the insured's motion for rehearing and the insured has sought Supreme Court review.

FLORIDA STATUTE 768.0755 (2010), THE TRANSITORY FOREIGN SUBSTANCE STATUTE, RETROACTIVELY APPLIES TO CAUSES OF ACTION THAT AROSE BEFORE THE EFFECTIVE DATE OF THE STATUTE

The Third District Court of Appeal addressed the issue of whether Florida Statute 768.0755, which was enacted in 2010, can be retroactively applied to causes of action that accrued before its effective date, when Florida Statute 768.0710 (the negligent mode of operation statute) was in effect. In Kenz v. Miami-Dade County and Unicco Service Co., 38 Fla. L. Weekly D922 (Fla. 3d DCA, April 24, 2013), the appellate court held that 768.0755 superseded 768.0710, such that a slip and fall case that arose in 2008 was subject to the new statute enacted two years later. The new statute mirrors the common law in that the plaintiff has the burden of proof to establish the defendant's actual or constructive knowledge of a dangerous condition on its premises before the defendant can be held liable to a plaintiff who alleges that the defendant was negligent in failing to maintain its premises. The prior statute had shifted the burden of proof to the defendant to demonstrate that its mode of operation was not negligent and only when the defendant was able to satisfy that burden did the burden of proof shift to the plaintiff to demonstrate that the defendant was negligent in its maintenance of the premises.

WHERE UM INSURER CONFESSED TO A JUDGMENT AGAINST IT FOR ITS POLICY LIMITS AFTER INSURED FILED A CIVIL REMEDY NOTICE, TRIAL COURT ERRED IN REQUIRING THE PARTIES TO PROCEED TO TRIAL

In Safeco Ins. Co. of Illinois v. Fridman, 38 Fla. L. Weekly D1159 (Fla. 5th DCA, May 24, 2013), Safeco initially denied uninsured motorist benefits to its insured, and after the expiration of the insured's Civil Remedy Notice, Safeco tendered its $50,000 policy limits and filed a "Confession of Judgment". The trial court denied entry of a judgment and had the case proceed to trial. After a jury trial, the jury rendered its verdict in favor of the insured for $1 million.

While the trial court entered a $50,000 judgment, the judgment purported to reserve jurisdiction to determine the insured's right to amend his complaint to see and litigate the issue of whether Safeco acted in bad faith, and if so, to enter a judgment in accord with the jury's verdict in the UM action. On appeal, Safeco contended that the trial court erred in doing so, on the grounds that after it filed its "Confession of Judgment", the subsequent trial and jury verdict were rendered moot.

The appellate court agreed, finding that the jury's verdict was a nullity. The court also held that the "Confession of Judgment" gave the insured a sufficient basis for pursuing a bad faith claim against the insurer.

DEFENSE COUNSEL WAS ENTITLED TO RECOVER FROM THE PLAINTIFF A GREATER HOURLY FEE THAN THAT PAID BY INSURER

In First Baptist Church of Cape Coral v. Compass Const., Inc., 115 So.3d 978 (Fla. 2013), the Supreme Court resolved a conflict between the Second and Fourth District Courts of Appeal on the issue of whether defense counsel hired by an insurance company and paid a relatively low hourly rate, may contract with the carrier for an alternative fee in the event that the defense was entitled to recover its fees

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from the Plaintiff. The Court reasoned that under well-established law, a party may generally not recover a fee in excess of its fee agreement, but Plaintiffs' counsel has been entitled to recover a reasonable hourly rate for their services even where that fee would exceed the permissible contingency amount. Since the trial court is constrained by the Florida Bar rules and case law to award only a reasonable fee, permitting the defense to recover a greater amount than its hourly fee would not result in the other party's having to pay an unreasonable fee, any more than the well-established law has permitted the Plaintiff's bar to recover an unreasonable fee. Thus, the Court concluded that if defense counsel has an agreement with its client or the insurer permitting it to recover a set hourly rate or whatever the court awards, if greater than that rate, defense counsel will be entitled to seek a reasonable fee from the opposing party.

FUTURE MEDICAL EXPENSES MAY BE CALCULATED AT LOWER MEDICARE REIMBURSEMENT RATES AND THOSE RATES ARE ADMISSIBLE INTO EVIDENCE IN PERSONAL INJURY TRIALS

The Second District Court of Appeal has addressed the issues of whether Medicare reimbursement rates are admissible into evidence in a personal injury action in order to enable the jury to calculate future medical expenses with reference to those lower rates, rather than the full cost of those expenses. In State Farm Mutual Auto. Ins. Co. v. Joerg, 38 Fla. L. Weekly D1378 (Fla. 2d DCA, June 21, 2013), the Second District Court of Appeal addressed this issue of first impression in a case in which the Plaintiff, a developmentally disabled adult, was injured when his bicycle collided with a car driven by an underinsured driver. Before trial, the Plaintiff settled with the driver and the trial court ruled that evidence of past medical expenses must reflect the lower Medicare reimbursement amounts because the Plaintiff was entitled to recover benefits pursuant to his disability. However, the trial court would not permit State Farm to admit into evidence those same lower reimbursement rates for the jury's use in calculating future medical expenses.

The appellate court reversed, finding that the Collateral Source rule is both a rule of damages and a rule of evidence. The underlying policy of the evidentiary component of the rule is that the admission of evidence that does not reflect a plaintiff's true damages may mislead the jury. The Second District noted that the Florida Supreme Court, in Physicians Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984), held that evidence about the availability of free or low cost charitable and governmental benefits available to anyone with specific disabilities is admissible on the issue of future damages because the Plaintiff did not earn those benefits. The appellate court determined that Stanley remained the law even though the Collateral Source rule was significantly amended in 1986, two years after the decision, because the Rule is primarily concerned with the admissibility of collateral source evidence in relation to past benefits. Accordingly, the Second District followed Stanley and held that where the Plaintiff has not contributed to or earned government or other benefits, those benefits are admissible into evidence and properly considered by a jury in determining the appropriate amount of future medical benefits to be awarded. The Court, however, cautioned that while that evidence may be considered by the jury, it does not limit the jury's award of reasonable costs of the plaintiff's future care.

WHERE PLAINTIFF CLAIMS THAT HE/SHE DID NOT HAVE THE RESOURCES TO CONTINUE MEDICAL TREATMENT FOR INJURIES SUSTAINED IN SUBJECT ACCIDENT, FACT THAT PLAINTIFF SETTLED AN UNRELATED PERSONAL INJURY CLAIM MAY BE ADMITTED INTO EVIDENCE TO IMPEACH TESTIMONY REGARDING LACK OF FUNDS

In Jackson v. Albright, 38 Fla. L. Weekly D1584 (Fla. 4th DCA , July 24, 2013), the Fourth District Court of Appeal held that the trial court did not abuse its discretion in permitting the defense to introduce evidence that the plaintiff had previously settled an unrelated personal injury claim for more than

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$400,000 in response to the Plaintiff's own testimony that she stopped her medical treatment because she could not afford to pay for it. The Court reiterated its prior holding that such evidence is not admissible for the sole purpose of prejudicing the jury by implying the plaintiff is litigious, but because the Plaintiff herself opened the door to the admission of counterevidence of her financial condition.

PIP STATUTE DOES NOT PERMIT EXAMINATIONS UNDER OATH AS CONDITION PRECEDENT TO RECOVERY OF BENEFITS

In Nunez v. Geico, 38 Fla. L. Weekly S440 (Fla. June 27, 2013), the Supreme Court of Florida recently held that the PIP statute does not permit examinations under oath (EUOs) as condition precedent to recovery of PIP benefits. This holding is consistent with Custer Medical Center a/a/o Maximo Masis v. United Auto. Ins. Co., 62 So. 3d 1086, wherein the Supreme Court stated in a footnote that the mandatory PIP statute doesn't recognize EUOs as a condition precedent. Since Custer, insurers and insureds have disagreed on the intent of the Supreme Court's footnote. Insurers have held the position that Custer's famous footnote on EUOs is dicta because the question before the Court in Custer pertained to medical examinations, not EUOs. Insureds, on the other hand, have taken the position that the footnote serves as a ruling and binding case law. Nonetheless, the Supreme Court in Nunez quotes the Florida 11th Circuit Court on the matter as stating, "Regardless of whether the Florida Supreme Court's discussion of EUOs in the Custer case is viewed as the holding, an alternative holding, or dicta, … the reasoning [is] persuasive." Mercury Ins. Co. of Fla. v. Dr. Eduardo Garrido, P.A., 18 Fla. L. Weekly Supp. 575, 577 n. 3 (Fla. 11th Cir. Ct. Apr. 7, 2011).

In Custer, the Supreme Court reasoned that EUOs are not a condition precedent to recovery of PIP benefits as the PIP statute does not authorize the use of EUOs. The Supreme Court in Nunez remained consistent, ruling that insurers cannot require an insured to attend an EUO as a condition precedent for recovery of PIP benefits prior to January 1, 2013. The Court in Nunez employed the two-prong test established in Flores v. Allstate Ins. Co., 819 So. 2d 740, 745 (Fla. 2000): "whether the condition or exclusion unambiguously excludes or limits coverage," and "whether enforcement of a specific provision would be contrary to the purpose of the ... statute." The first prong was not contested. The Court here reasoned that the PIP statute didn't authorize insurers to impose such a condition and, further, that EUOs interfere with the purpose of the PIP statute, i.e., "swift and virtually automatic payment." Gov't Emps. Ins. Co. v. Gonzalez, 512 So. 2d 269, 271 (Fla. 3d DCA 1987). The Court specifically noted that Merly Nunez filed her PIP claim four years prior to the Court's ruling, during which time she had not received PIP benefits, so it was clear that the enforcement of an EUO provision causes unnecessary delay and denial of benefits.

PIP INSURERS LIMITING REIMBURSEMENTS BASED ON MEDICARE FEE SCHEDULES MUST PROVIDE NOTICE IN POLICY

In GEICO v. Virtual Imaging Services, Inc., 38 Fla. L. Weekly S517 (Fla., July 3, 2013) the Supreme Court held, that "[w]ith respect to PIP policies issued after January 1, 2008," an insurer may not "limit reimbursements based on the Medicare fee schedules identified in Section 627.736(5)(a), Florida Statutes, without providing notice in its policy of an election to use the Medicare fee schedules as the basis for calculating reimbursements," rephrasing the certified question from the lower court. In this case, GEICO stipulated to relatedness and necessity, and moreover, GEICO did not challenge Virtual Imaging's claim that the charge of $3600 for two MRIs was reasonable. GEICO did, however, argue that it paid the charges pursuant to the PIP statute. GEICO further argued that the PIP statute lays out one payment methodology for PIP benefits, but the Supreme Court disagreed, ruling consistently with Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 63 So. 3d 63, 67 (Fla. 4th DCA 2011), in stating that subsection 5 lays out two separate payment methodologies.

The two payment methodologies for calculating reimbursements are: the permissive methodology of limiting reimbursements based on the Medicare fee

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schedules pursuant to (5)(a)(2) and the determination of reasonable provider charges based on enumerated factors in (5)(a)(1). GEICO argued that it was permitted to use the payment methodology of (5)(a)(2) because its policy referenced the 2008 amendments of the PIP statute, stating, "Under Personal Injury Protection, the Company [GEICO] will pay, in accordance with, and subject to the terms, conditions and exclusions of the Florida Motor Vehicle No-Fault Law, as amended..." However, the Court ruled that GEICO was not permitted to use Medicare fee schedules to limit reimbursements because the policy did not reference the permissive Medicare fee schedule payment methodology.

The Medicare fee schedules provision is permissive, not mandatory, because (5)(a) states, "If an insurer limits payment as authorized by subparagraph 2., the person providing such services, supplies or care may not bill or attempt to collect from the insured any amount in excess of such limits..." (emphasis added). The use of the word "if" indicates that use of the payment methodology is not mandatory, and as the (5)(a)(2) payment methodology is permissive, an insurer must notify its insured of its election to use it.

The Supreme Court approved Kingsway and other similar cases, but further noted that its ruling should not be interpreted to mean that using the permissive methodology would never satisfy the reasonableness mandate of (a)(1).

BAD FAITH CLAIM MAY NOT BE RAISED POST-VERDICT IN UNDERLYING TORT CLAIM

In Geico General Ins. Co. v. Harvey, 38 Fla. L. Weekly D178 (Fla. 4th DCA, Jan. 23, 2013), the Fourth District Court of Appeal addressed the issue of whether a bad faith claim may be raised post-verdict. In holding that the claim must be brought as a separate lawsuit, the appellate court recognized that permitting the claimant to raise the bad faith claim in the underlying tort action effectively precluded the carrier from removing the bad faith claim to federal court, based on diversity jurisdiction. Since the tort action and the bad faith claim arose at different times and were based on different facts, there was no reason why the bad faith claim should be permitted to be litigated in the same action.

FLORIDA STATUTE 768.075(4) BARS RECOVERY FOR ANY PERSON WHO IS INJURED WHILE COMMITTING A FELONY ON PROPERTY EVEN IF THE INJURY DOES NOT STEM FROM THE FELONY

The First District Court of Appeal, in Kuria v. BMLRW, LLP, 101 So. 3d 425 (Fla. 1st DCA 2012), held that where a putative claimant is injured during the course of his commission of a felony on defendant's property, the claimant is barred from recovering damages from the property owner even if the injury did not arise out of the commission of that felony. The Court held that the statute was clear in barring recovery to anyone engaged in the commission of a felony regardless of whether there was any causal connection between the felony and the injury.

SECOND DISTRICT HOLDS THAT SCHOOL BOARD HAD NO LEGAL DUTY TO USE A DEFIBRILLATOR BY VIRTUE OF ITS ACQUIRING ONE AND PROVIDING TRAINING IN ITS USE

In Limones v. School District of Lee County, 38 Fla. L. Weekly D280 (Fla. 2d DCA, Feb. 6, 2013), the Second District Court of Appeal affirmed a summary judgment in favor of the School Board in an action brought on behalf of a high school athlete who collapsed during a high school soccer game and suffered a brain injury when he was not promptly resuscitated after his collapse. The claimant's family alleged that since the School Board had purchased AEDs (defibrillators), it could be held liable for its failure to maintain one on or near to soccer field or its failure to use it on the plaintiff. The appellate court held that neither the Good Samaritan Act nor the Cardiac Arrest Survival Act set forth a duty to use an AED, and even if there was such a duty, the latter statute would have rendered the School Board immune from liability because it had an AED and made it available for use.

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MEDICAL MALPRACTICE

The Florida Supreme Court addressed the physician-patient confidentiality statute, Section 456.057, which prohibits ex parte communications between a non-party treating physician and an attorney hired by the defendant's insurance company, who was not representing the defendant but only representing the witness at her deposition, in Hasan v. Garvar, D.M.D., 37 Fla. L. Weekly S769 (Fla., Dec. 20, 2012). In Hasan, the Fourth District Court of Appeal had upheld an order by the trial court permitting such ex parte communications if those communications did not involve privileged matters. The Supreme Court quashed the appellate court's ruling, finding that all such ex parte communications are prohibited even if, as the treating physician's counsel contended, the physician and her counsel were discussing non-privileged issues.

The Supreme Court reasoned that it has long been the law that treating physicians could not engage in ex parte communications with the defendant's counsel. In this case, the defendant's insurer provided separate counsel for the non-party treating physician witness for the purpose of representing her at her deposition. The witness asserted that such a prohibition impinged on her First Amendment right to free speech but the Supreme Court disagreed.

The Court found that the statute prohibited such ex parte communications regardless of whether they involved only non-privileged matters. The Court found that the plain meaning of the statute prohibited any such communications, regardless of whether the non-party witness intends to disclose privileged information because the patient is not protected from even accidental disclosure. This was especially true in this case where the same insurer provided counsel for both the defendant and the non-party witness. The Court further found that the First Amendment was not implicated by the statute, which strikes a balance between necessary communications when a physician is a defendant in a malpractice action and a patient's privacy concerns when a physician is a non-party witness.

The dissent, in which two justices joined, opined that the majority's decision assumed that a physician would violate a patient's confidentiality, even where, as here, she is bound not to do so by virtue of a court order. The Court noted that the majority's "odd" ruling "is so breathtakingly broad that it even forbids the nonparty physician from consulting a lawyer that she may choose to hire independently" and further noted that the dissenting justices were unaware of any other circumstance where a Court has prohibited a person from consulting an attorney for legal advice.

OFFER OF JUDGMENT STATUTE DOES NOT APPLY TO CASES THAT SEEK BOTH EQUITABLE RELIEF AND DAMAGES

The Supreme Court addressed the issue of whether an Offer of Judgment or Proposal for Settlement could be served in a case which contains both equitable and damage claims for relief. In Diamond Aircraft Indus., Inc. v. Horowitch, 38 Fla. L. Weekly S17 (Fla. Jan. 10, 2013), the Supreme Court held that Florida Statute 768.79 which authorizes Offers or Proposals for Settlement, does not apply to equitable claims but by its own terms, is limited to claims in civil cases in which a party seeks damages. Significantly, the Court only addressed the issue of whether the statute authorizes an award of attorneys' fees where the offeror seeks to settle the entire claim, and specifically omitted any discussion as to whether a proposal might be served if the offering party only sought dismissal of the damages claim. The Court also held that the proposal in question was invalid because it did not specify whether attorneys' fees were included and whether such fees were part of the legal claim. The Supreme Court explained that because an attorneys' fee award was in derogation of the common law, all portions of the statute and operative Rule of Procedure 1.442 must be complied with and the failure to strictly comply with all of the requirements will invalidate the proposal, insofar as it provides a basis for an award of attorneys' fees.

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MEDICARE COMPLIANCE IN THIRD-PARTY LIABILITY CASES

Did you know that we have a group of attorneys dedicated to ensuring compliance with the Medicare Secondary Payer Act and Medicare Reporting Requirements in third-party liability cases?

Medicare compliance in third-party liability cases is an area of increasingly significant concern, especially since the implementation of Medicare's reporting requirements and the United States Department of Health and Human Service's Office of Inspector General's recent report indicating that it was going to begin reviewing third parties' (including insurers') compliance with the Medicare Secondary Payer (MSP) Act and Medicare reporting requirements. Under the MSP Act, if an insurer does not adequately "protect Medicare's interest" then it may be held personally liable for Medicare's payments and subject to penalties and interest. An insurer may also be subject to penalties for failure to comply with Medicare's reporting requirements.

Medicare compliance involves three separate and distinct areas of concern: (1) past payments by Medicare, which are termed "conditional payments," (2) potential future payments by Medicare, which are usually discussed in the context of a "set aside," and (3) reporting requirements. There are different statutes, regulations, and case law that apply to these three different areas of concern. Often, claimants, insurers, adjusters, lawyers, and even the courts confuse these three different areas of concern and their individual requirements.

Our Medicare Compliance Group can help guide you through the evolving maze of Medicare's statutes, regulations and guidelines and assist you in protecting Medicare's interests as a secondary payer and complying with Medicare's reporting requirements. On individual files, we assist claims handlers in determining whether a claimant is a current Medicare beneficiary or likely to become one during the life of a claim as well as obtaining information regarding the type of Medicare benefits a claimant may be receiving, the amount of any conditional payment reimbursement and the potential for future payments.

For files in litigation, we have developed several specific tools to assist in handling claims for Medicare or potential Medicare beneficiaries, including Medicare-specific discovery requests, a Notice of Medicare Involvement with the court, and Medicare release terms specific to a claimant's Medicare status and the types of benefits he/she is receiving. We also provide advice regarding other potential issues that may arise in the settlement and/or mediation of claims for Medicare or potential Medicare beneficiaries, including apportionment and funding issues. Our attorneys are also available to represent you at a court hearing on the merits to determine the reasonableness of any Medicare set-aside allocation, a court hearing on a motion to enforce a settlement agreement, and/or in any other post-judgment Medicare litigation, including Medicare or Department of Justice enforcement actions or private rights of action.

The Medicare Compliance Group can help you develop internal policies and procedures for handling claims of Medicare beneficiaries and potential Medicare beneficiaries. We are also available to come to your office to give a seminar on important Medicare topics, including the processing of a potential Medicare claim, determining conditional payment reimbursement amounts and/or whether a liability set-aside should be utilized, and recommending key provisions in any settlement agreement and/or release.

WORKERS' COMPENSATION CASE LAW UPDATES

WHEN A MANAGED CARE ARRANGEMENT GOVERNS, CLAIMANT'S RIGHT TO A ONE-TIME CHANGE IN PHYSICIAN IS SEPARATE AND INDEPENDENT FROM RIGHT TO SELECT PRIMARY CARE PROVIDER

Stroman v. H.T. Hackney, 115 So. 3d 1135 (Fla. 1st DCA 2013). Herein, the Claimant challenged the JCC's order denying a claim for a change in treating physicians under section 440.134(10)(c), Florida Statutes (2006). The Court reversed the JCC's denial, noting that the JCC erred in finding that the Claimant previously exercised her statutory right to a change in physicians by selecting her primary care provider as permitted by section 440.134(6)(c)10. In so doing, the Court reiterated that the selection of a primary care physician in a managed care arrangement is separate and independent of her right to a one-time change in physician.

IN ORDER TO SECURE AN IME RELATING TO UTILIZATION REVIEW, THE CARRIER MUST DEMONSTRATE IT IS ENGAGED IN THE STATUTORY UTILIZATION REVIEW PROCESS.

Torres v. Costco Wholesale Corp., 115 So. 3d 1111, (Fla. 1st DCA 2013). The Court granted the Claimant's petition for certiorari review of the JCC's order compelling her to submit to an IME. Herein, the Employer/Carrier filed a Motion for IME based upon the continued treatment, the frequent visits and amounts of medications being prescribed by the authorized pain management physician. The Claimant argued that the Carrier failed to detail any legally cognizable dispute regarding overutilization, rather only had speculation relating thereto. The Court, in granting the petition, noted that it is the Employer/ Carrier's burden to establish the factual and legal basis for the examination. While a claim to need a utilization review can potentially constitute a "dispute" as required for an IME; the Employer/Carrier must present some evidence to demonstrate that it was engaged in the statutory utilization review process. Simply expressing unilateral speculative concerns is insufficient.

A CLAIMANT MAY RETAIN COUNSEL, AND PAY FOR LEGAL SERVICES, TO DEFEND A MOTION TO TAX COSTS AGAINST HIM WITHOUT VIOLATING SECTIONS 440.34 AND 440.105(3)(C), FLORIDA STATUTES

Jacobson v. Southeast Personnel Leasing, 113 So. 3d 1042 (Fla. 1st DCA 2013). The Claimant herein appealed the JCC's order which granted the Employer/Carrier's Motion to Tax Costs against him and further denied the Claimant's Motion to Approve a Retainer Agreement. The Retainer Agreement detailed limited representation specifically for defending against the Employer/Carrier's Motion to Tax Costs. The Court reversed and remanded the decision, noting that insofar as section 440.34 and 440.105(3)(c) prohibit a claimant from retaining counsel to defend a motion to tax costs against him, the statutes infringe upon a claimant's constitutional rights under the First Amendment of the Constitution and thus, are unconstitutional as applied herein.

THE JCC'S DESIRE FOR AN ORDERLY HEARING DOES NOT OUTWEIGH A PARTY'S DUE PROCESS RIGHT TO CALL WITNESSES

Miami-Dade County School Board v. Smith, 116 So. 3d 511 (Fla. 1st DCA 2013). The Employer appealed the JCC's award of PTD benefits, stating that it should have been permitted to depose the authorized treating physician. The First DCA reversed and remanded. In this matter, the Claimant sustained a compensable injury in 1998. He continued to work for the Employer in a modified capacity until his retirement, upon which time he filed a claim for PTD benefits. Approximately 4 months prior to the Final Merits Hearing, the authorized provider issued a report imposing additional permanent restrictions which were not in place while the Claimant was working with the Employer. According to vocational

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evidence, these new restrictions arguably supported a finding of PTD. The Employer/Carrier scheduled the deposition of the doctor to take place two months before the Final Merits Hearing; however, at the time set for the deposition, the attorney for the Employer and the court reporter appeared at a different location than the doctor. The doctor declined to do the deposition via telephone. As a new date could not be secured prior to the Final Merits Hearing, the Employer/Carrier filed a Motion for Continuance or, in the alternative, a Post-Hearing Deposition. The JCC denied the motions as it would disrupt the occurrence of an orderly hearing. Thus, the hearing went forward with the Employer/Carrier being denied the right to challenge the doctor's newly imposed permanent work restrictions. Based upon the evidence before him, the JCC awarded PTD.

In reversing the Order, the Court noted that among a litigant's most important due process rights is the right to call witnesses. Furthermore, the Court noted that the rules of procedure for workers' compensation adjudication allow a JCC to admit post-hearing evidence for "good cause." In addition, continuances can be granted if the requesting party demonstrates that the reason for the request arises from circumstances beyond the party's control. Here, the circumstances were beyond the Employer/Carrier's control. Thus, it was an abuse of discretion by the JCC to deny the Employer/Carrier the right to depose the doctor.

AN EMPLOYER/CARRIER PAID ATTORNEY FEE IS DUE WHEN MORE THAN 30 DAYS ELAPSE FROM PETITION BEING RECEIVED AND BENEFITS BEING PROVIDED.

Neville v. JC Penney Corp., 38 Fla. L. Weekly D1102 (Fla. 1st DCA 2013). At issue was whether the Claimant's attorney was entitled to an attorney fee paid by the Employer/Carrier under section 440.34 (3)(b), Florida Statutes (2008). The Claimant filed a Petition for Benefits on November 17, 2009, requesting additional dental treatment, to which the Employer/Carrier did not respond. At mediation in September 2010 the Carrier agreed to provide additional dental care. Since more than 30 days elapsed from the date the Employer/Carrier received the petition and the Claimant thereafter successfully achieved acceptance and payment of the benefits, attorney's fees attached. The JCC's denial of an attorney fee was reversed and remanded.

THE CLAIMANT HAS THIRTY DAYS TO FILE A NOTICE OF APPEAL ON FINAL ORDERS. PENDING CLAIMS THAT ARE NOT RIPE FOR ADJUDICATION DO NOT SERVE TO EXTEND THIS TIME REQUIREMENT.

Ake v. United States Sugar Corporation, 112 So. 3d 171 (Fla. 1st DCA 2013). The Claimant filed a notice of appeal on February 7, 2013, relating to an Order denying PTD benefits dated February 6, 2012. He argued that the Order was not final as it did not dismiss all of the claims but instead directed that the surviving claims (for TTD/TPD) were to proceed to mediation, a necessary statutory condition-precedent to the conduction of a final hearing. The Claimant argued that the Order did not become final until such time as the entry of a subsequent Order relating to TTD/TPD benefits. However, the Court noted that the claim for PTD was disposed of with finality in the original order. In noting that the TTD/TPD claim was premature, as it had not been mediated, the Court noted that an order in the context of workers' compensation decides all issues that are then ripe for adjudication. Thus, an order may be final even though it does not represent an end to all judicial labor and even where additional claims not then ripe for adjudication remain pending. Thus, the appeal was dismissed for lack of timeliness.

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.

TRIAL VICTORIES

Rod Lundy, Partner in our Orlando office, and his trial team of Associates, **Jeffrey Carter, Lisa Clary,** and Senior Associate, **Diane Tutt**, obtained a complete defense verdict in Marion County, Florida, case styled, Buffington Development, LLC v. Westwind Contracting, Inc., Case No. 2011-978-CAG, a mixed commercial/tort case. The Amended Complaint alleged counts in breach of contract, trespass and unjust enrichment. The dispute involved an agreement regarding a mound of dirt approximately 35 feet high and approximately 2 ½ acres in diameter.

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

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

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John E. Herndon, Partner, and **Riley M. Landy**, Associate, in our Tallahassee office, obtained a Defense verdict on a property damage case involving tree limbs from an adjacent property owner's land in Leon County, Florida, styled Allen A. Cyzon v. Gregory R. Morrison.

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Millard Fretland, Partner, in our Pensacola office, won a trial in June by defense verdict. The case was titled Spurgeon v. Albertsons, LLC and involved a claim of improper maintenance of a grocery store leading to a slip and fall. The case was particularly significant on damages issues because both the plaintiff and her uninjured husband claimed to have attempted suicide due to the severity of the plaintiff's injuries. Venue was in Escambia County and the Judge was Hon. Mike Allen.

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Seth Goldberg, Partner, in our Hollywood office tried a Wrongful Death case in Broward County, Estate of Smith v. Estate of Jeanne Rubin, arising out of an automobile accident. Liability and causation were both admitted. The sole survivor of the Estate was the decedent's 54 year old son, who resided with his mother at the time of her death. The Plaintiff asked for $1,000,000 in pain and suffering damages plus over $300,000 in medical bills, as the decedent was hospitalized for several months before she passed away. The jury awarded $100,000 plus the medical bills.

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Marc Gutterman, Partner, and **Matthew Struble**, Associate, both in our Hollywood office, obtained a defense verdict at trial in the case Magic Tinting Window & Car Alarm Inc., v. Scottsdale Insurance

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Company, Case No. 5-22072 CA 32 in Miami-Dade County Circuit Court. This was a first party property action involving the Plaintiff's claim for stolen inventory. Plaintiff claimed that the Defendant failed to pay the proper amount for the stolen inventory. Defendant claimed that it did not breach the contract because it paid the Plaintiff all amounts owed and also claimed that the Plaintiff committed fraud by submitting invoices that were actually proposals. The jury found in favor of the Defendant by finding that Scottsdale Insurance Company was not liable on all counts.

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Marc Gutterman and **Matthew Struble** also successfully resolved a claim after four days of trial in Juan and Ann Cerda v. Olympus Insurance Company, Case No. 11-12028 CA 42 in Miami-Dade County Circuit Court. This was a first party property action involving the Plaintiffs' claim for damages caused by a roof leak. Defendant was successful in striking the Plaintiffs' causation expert after he testified, resulting in a confidential settlement of the case shortly thereafter.

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PRETRIAL RESOLUTIONS

The matter of Environmental Control Systems, Inc. & Leslie Noel v. Alpha General Services Inc., et al., filed in the Circuit Court for Palm Beach County, involved a class action complaint on a claim of strict liability for product design and manufacturing defects. The allegedly defective products at issue were several models of fiberglass septic tanks designed and manufactured by Alpha General Services Inc. The tanks were sold, distributed, marketed and installed in all sixty-seven counties in the State of Florida. Alpha manufactured at least 11,743 tanks since 2002, and the record evidence showed at least 5500 tanks permitted for installation in Florida during that time (the remainder were marketed to Alabama, Georgia and Louisiana). Damages were within a range of five to ten thousand dollars per tank depending on the size of the tank and the property where the tank was installed. **John Lurvey**, Partner, and **Chris DeLorenzo**, Associate, both of the West Palm Beach Office presented the case to the Court in the context of a two-day evidentiary hearing on the Plaintiff's Motion for Class Certification. Leading up to the two-day evidentiary hearing in this matter, the parties conducted six months of intensive certification–oriented discovery on the issues of numerosity, commonality, typicality, adequacy of representation, predominance and superiority. The Plaintiffs presented evidence arguing that a negligent design and manufacturing process at Alpha resulted in tanks with surfaces below legally required thickness specifications and otherwise lacking in dimensional tolerance such that all tanks installed would inevitably fail and crack for the same reasons allowing raw sewage to permeate the surrounding property and water table. The Defense presented evidence showing that any given tank failure would just as likely result from a combination of multiple factors surrounding individual tank construction, installation methods utilized for individual tanks, conditions at the installation site, and usage history of individual tanks. Each factor would have to be addressed on a tank by tank basis on the issues of causality, liability and damages. In short, the Defense presented evidence destroying the Plaintiffs' ability to establish commonality and predominance, typicality and adequacy of representation. Following a two-day hearing, the Court agreed with the Defense presentation and entered an Order denying the Plaintiffs' Motion for Class Certification finding that the defense demonstrated the absence of the required elements for certification and the matter could not proceed as a class action.

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Dale Friedman, Partner, and **Diane Tutt**, Senior Associate, both in our Hollywood office, received a dismissal with prejudice of a class action lawsuit against a law firm alleging violation of the Federal Fair Debt Collection Practices Act ("FDCPA"). In their Amended Complaint, Plaintiffs alleged that on or about July 2009, the law firm filed a state court lawsuit seeking to foreclose upon Plaintiffs' residence.

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In that lawsuit, the law firm sought attorney's fees, costs and other money notwithstanding the fact that Plaintiffs' debt had been previously discharged in bankruptcy.

Defendant moved to dismiss the Amended Complaint alleging, among other things, that it was time-barred under the FDCPA. On June 4, 2013, the court granted Defendant's Motion to Dismiss with Prejudice holding that the claim was barred by the applicable statute of limitations. Eric R. Espich and Adria L. Espich v. Law Offices of Marshall C. Watson, P.A. and Marshall C. Watson, individually, United States District Court for the Southern District of Florida, Ft. Pierce Division, Case No. 12-14384-CIV-Martinez-Lynch.

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Dean Mallett, Associate, in our Hollywood office, obtained final summary judgment in favor of FIGA in front of Judge Murphy in Broward County. The insureds presented a claim for property damage, and coverage was denied by FIGA. During the claim repairs, and before suit was filed, the named insured signed an Assignment of Benefits in favor of a water extraction company. The document provided, "I hereby assign and transfer any and all insurance rights, benefits, and causes of action under my property insurance policy to [water extraction company]."

FIGA's position was that the insureds no longer had standing to pursue their lawsuit because they assigned their entire claim to a third party. Plaintiffs submitted affidavits from themselves and the water extraction company asserting that the assignment was not a full assignment of their insurance claim and was only intended to be an assignment of the portion of the claim related to water extraction services. They also asserted that the assignment was not a complete assignment because the named insured's spouse, who was not a named insured on the policy, did not sign the assignment. We successfully argued that the assignment unambiguously assigned the entire post-loss claim to a third party and the affidavits were improper parol evidence. The court agreed and entered final judgment in favor of FIGA.

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Marc Gutterman, Partner and **Matthew Struble,** Associate, both in our Hollywood office, obtained a final summary judgment in Angela Temperino v. Liberty Mutual Insurance Company, Case No. 50 2011 CA 001609 in Palm Beach County Circuit Court. This was a first party property action involving the Plaintiff's claim for property damages caused by a roof leak. Defendant filed a Motion for Final Summary Judgment arguing that the Plaintiff's damages were the result of long-term leaks that did not occur during the policy period and the motion was granted.

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WORKERS' COMPENSATION

In Alba Raudez v Pizza Hut/FHM Insurance Company, OJCC# 12-011334GCC, **Neal Ganon**, Name Partner and head of our Workers' Compensation division, obtained a defense verdict from Judge Castiello who denied compensability of a heart attack and 6 coronary artery bypass grafts by establishing that Claimant's condition was the result of personal risk factors, including but not limited to, family history, hypertension, diabetes and hyperlipidemia, as opposed to alleged unusual exertion at work.

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Manny Alvarez, Associate, in our Pensacola office, prevailed in the case of Steven Lord vs. Santa Rosa Correctional Institution, the Division of Risk Management, OJCC# 99-023206NSW, before Judge Nolan Winn on the issue of attorney's fee amount. The dispute regarded claimant's counsel's claim for his time billed after the mediation conference. The carrier agreed to provide the benefits at the time of the mediation conference and stipulated to fee entitlement. The carrier asserted that claimant's counsel's time stopped at the time of the mediation and that the benefits were timely provided. The Judge ruled that the claimant's attorney stopped accruing fees at the time of the

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mediation conference. Therefore, claimant's counsel did not receive an award for attorney's fees beyond the mediation date.

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Arlene Franconero, Associate, in our West Palm Beach office, had a significant trial success on affirmative defense of fraud/misrepresentation in the PTD case of Maconochie v Baccari Caroll/AllC, 02-020785; upheld on appeal.

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Christopher A. Tice, Partner, in our Jacksonville office, prevailed in the case of Santarelli vs. Fidelity National Information Services/Sedgwick CMS, OJCC Case No. 12-026391WRH before Judge Holley on the issue of authorization of surgery and medical care. The JCC found that the Employer/Carrier authorized an alternative treating orthopedic physician when the authorized physician refused further treatment. By refusing to attend the appointment, the claimant was unable to prove that the alternate physician was not qualified to treat her injury. The JCC also found that the Employer/Carrier correctly denied surgery as there was no request for surgery; rather the physician recommended another opinion on surgery and terminated care.

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Christian Petric, Partner, in our West Palm Beach office, recently prevailed at a Final Hearing in front of Judge Punancy on a total controvert. The Claimant owned a janitorial company that was retained to clean a nearly built town house. The Claimant alleged that she should be afforded coverage by the building developer on the job after she was hurt. Christian was able to establish that the Claimant was an independent contractor whose work did not fall within the definition of "construction industry". Christian also established that she was not considered a subcontractor as her services were not retained by the building developer so that the building developer could fulfill a contract with a third party.

Kelly Schaet, Associate, in our West Palm Beach office, obtained a defense verdict on behalf of Gallagher Bassett and Broward Sheriff's Office. The Claimant was pursuing compensability of his hypertension condition under F.S. §112.18, compensability of the Claimant's valvular disease under F.S. §112.18, compensability of his kidney disease, and authorization of medical care for the hypertension and kidney disease. There were issues as to timely reporting under F.S. §440.185 and whether the Carrier timely denied under F.S. §440.20 (4). The JCC determined that the hypertension, the kidney disease and the care associated therewith were not compensable. The JCC determined that the valvular condition was compensable as the Employer/ Carrier waived its right to deny compensability of the Claimant's mitral valve/valvular insufficiency by not conducting a reasonable, good faith investigation within the 120-day pay-and-investigate provision of Florida Statute §440.20(4). However, the Claimant would have to present evidence that the major contributing cause of the need for treatment was the mitral valve condition, as opposed to the Claimant's hypertension and kidney disease.

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Alison Schefer, Name Partner, and **Jason Durham**, Associate, both in our West Palm Beach office, were successful in the case of Daikel Dumont-Rodriguez v. Staffing Concepts, OJCC # 13-003482RDM in proving that a claimant's severe back injury did not occur at work and that the claimant failed to provide timely notice of any alleged accident. Claimant alleged a communication barrier to overcome the notice defense, but the JCC did not find such representations to be credible and concluded claimant exaggerated his lack of English proficiency. Based upon the evidence presented, the JCC held claimant did not sustain an industrial accident and further did not report the alleged accident in a timely manner. The JCC also found an undisputed slip and fall episode did not result in any injuries. Compensability of both cases were denied.

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Esther Zapata Ruderman, Partner, in our West Palm Beach office, recently prevailed on a claim for permanent total disability benefits in Jose Izquierdo v. Palm Beach County School Board, OJCC #06-027466SHP.

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Daniel J. Simpson, Partner in our Hollywood office, prevailed in the case of Hernandez v. A & A Maintenance/CastlePoint Risk Management of Florida, Corp., OJCC# 12-007438KSP before Judge Kathryn S. Pecko on the issue of temporary partial disability benefits and an increase in the average weekly wage.

Mr. Simpson also prevailed in the case of Menjivar v. Safway Services, LLC/York Risk Services Group, OJCC# 12-011225DEJ before Judge Doris E. Jenkins on the issue of a one time change in physician.

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Compensability of claim was litigated in Miami venue by **Jacqueline M. Gregory**, Partner in our Hollywood office, who successfully utilized the 2 Strike Rule in getting the entire claim dismissed. Aguilar v. Assured Contracting, OJCC# 09-025574CMH.

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Katherine Letzter, Partner in our Tampa office, prevailed at a Tax Costs Hearing, in the case of Sanderfer v. Accord Human Resources d/b/a Freedom Optimum Health Care/Lumberman's Underwriting Alliance Claims Service, OJCC # 11-017699JEM. The Judge of Compensation Claims awarded reimbursement of costs to the Employer/ Carrier, despite the Claimant's counsel's argument that the Claimant was also a prevailing party in defeating an affirmative defense and in preserving a compensable injury.

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Jack A. Weiss, Managing Associate in our Ft. Myers office, settled a potentially catastrophic claim for less than the cost of defense. In Pinter v. Mario's Air Conditioning and Heating, OJCC Case No. 13-0062885SLR, the claimant injured his low back when he fell. Claimant tested positive for drugs but had prescriptions for them. He also had prior low back work accidents. Jack argued for misrepresentation under Martin v. Carpenter as claimant had failed to disclose the prior back injuries on his post-hire medical questionnaire. Claimant accepted a nominal settlement rather than risk losing at trial.

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Medical benefits were disputed before Judge Castiello in Miami. Benefits requested were MRIs, SSERs, EMG/NCV, lumbar and cervical facet blocks, epidurals and ongoing treatment; **Jacqueline M. Gregory**, Partner in our Hollywood office, prevailed on behalf of the Employer/Carrier as all benefits were denied. Victorero v. FWCIGA, OJCC# 04-006815GCC.

IF YOU HAVE RECENTLY MOVED, KINDLY SEND US AN E-MAIL WITH YOUR NEW INFORMATION TO:
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