CONROY SIMBERG

# CONNECT

# LIABILITY CASE LAW UPDATES

**NO BRIGHT-LINE CAP ON NONECONOMIC DAMAGES AWARDED TO INDEPENDENT ADULT SURVIVING CHILD IN WRONGFUL DEATH ACTION**

The Florida Supreme Court quashed the decision of the Fourth District Court of Appeal in Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268 (Fla. 2018), in which the lower court held that "an adult child who lives independent of the parent during the parent's smoking related illness and death is not entitled to [a] multi-million dollar compensatory damages award." The Supreme Court found that the District Court erred in creating a cap on the amount of noneconomic damages recoverable by an adult surviving child in a wrongful death action (regardless of whether the case involved a smoking related death) and reinstated the jury's verdict. The Court held that the appellate court should have deferred to the trial court's decision on the defendant's motion for remittitur seeking a reduction in the jury's verdict and reversed that decision only on a finding that the trial court abused its discretion.

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**TRIAL COURT ERRED IN GIVING THE JURY AN ADVERSE INFERENCE INSTRUCTION AS A SANCTION FOR THE DEFENDANT'S FAILURE TO SEARCH FOR FORMER EMPLOYEES WHO MIGHT HAVE BEEN ABLE TO PROVIDE INFORMATION FOR CORPORATE REPRESENTATIVE'S DEPOSITION**

In Bechtel Corp. v. Batchelor, 250 So. 3d 187 (Fla. 3d DCA 2018), the Third District Court of Appeal reversed a multi-million award against the defendant Bechtel in a wrongful death action in which the Plaintiff alleged that Bechtel failed to warn the Plaintiff of the dangers of asbestos dust, which eventually caused the Plaintiff's mesothelioma. The alleged tortious act occurred well over thirty (30) years before the Plaintiff filed suit

During the trial, the Plaintiff requested that the trial court read the jury an "adverse inference" instruction as a sanction for Bechtel's failure to properly prepare its corporate representative for deposition. The plaintiff maintained that Bechtel should have attempted to locate retired employees who had worked at the facility during the time period when the Plaintiff was exposed to the asbestos. The appellate court acknowledged that a party may have the duty under Florida Rule of Civil Procedure 1.310(b)(6) to make reasonable efforts to contact ex-employees if current employees cannot provide requested information. However, given the difficulty in contacting employees who worked for Bechtel more than 30 years before the Plaintiff filed suit, the Court found that Bechtel's duties did not extend as far as the Plaintiff argued, especially because Bechtel was not subject to a court order requiring such expensive and time-consuming efforts. The Court held that the trial court erred in instructing the jury that it should determine whether Bechtel's failure to produce former employees who worked at the company between 1974 and 1980 was unreasonable and, if so, that their testimony would have been relevant to the Plaintiff's work activities and unfavorable to Bechtel. Because the Court could not find the instruction harmless in the context of the trial, it reversed the final judgment with directions to conduct a new trial.

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**TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFF'S EXPERT WITNESS IN FORENSIC TOXICOLOGY WAS NOT QUALIFIED TO EXPRESS AN OPINION ON WHETHER A DRUNK DRIVER SERVED ALCOHOL AT THE DEFENDANT'S RESTAURANT WAS AN HABITUAL ALCOHOLIC AT THE TIME OF SERVICE AND KNOWN TO BE SO BY THE DEFENDANT**

The Third District Court of Appeal affirmed a judgment rendered on a jury's verdict in a case in which the Plaintiff alleged that the Defendant, who owned a restaurant and bar, negligently served a patron who later drove while intoxicated and caused the death and injuries of Plaintiffs who were hit by the patron while they were on

**Inside this issue:**

a moped. In Hayes Robertson Group, Inc. v. Cherry, 43 Fla. L. Weekly D2752 (Fla. 3d DCA Dec. 12, 2018), the Plaintiffs sued the Defendant under Florida Statute 768.125, alleging that it knew or should have known that the driver was a habitual alcoholic but negligently served him alcohol. As support for their case, the Plaintiffs proffered the testimony of a forensic toxicologist who had a Bachelor of Science degree in chemistry and had completed some coursework in pharmacology, but who had no expertise in the area of habitual addiction to alcohol.

The expert previously opined that the patron was an alcoholic because he had a blood alcohol content of 0.16 but was able to function. The expert also relied on the fact that the patron admitted that he was an alcoholic and had been detained under the Marchman Act approximately six weeks before the accident while he was severely intoxicated. Before trial, the trial court excluded the expert's testimony on the ground that his training in forensic toxicology was insufficient expertise in the area of habitual addiction to alcohol.

The jury ultimately found in favor of the defense on the Plaintiffs' claims that the Defendant was negligent in serving alcohol to a known alcoholic and in permitting the defendant to thereafter leave its premises in an intoxicated condition. The appellate court affirmed the jury's verdict, finding that the trial court correctly excluded the expert testimony, under both the Daubert and Frye standards of admissibility, as well as the Florida Statute 90.702, which governs the Court's determination as to whether a putative expert witness is qualified to render a proffered opinion. The Court noted that the jury **was** provided with circumstantial evidence of the driver's intoxication and his addiction and fairly found in favor of the defense.

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**THIRD DISTRICT FINDS POST-LOSS ASSIGNMENT OF CLAIM TO PUBLIC ADJUSTER INVALID BECAUSE IT VIOLATED FLORIDA LAW PROHIBITING PUBLIC ADJUSTERS FROM ENTERING INTO CONTRACTS CHARGING HOMEOWNERS MORE THAN 20% OF PAYMENTS MADE ON INSURANCE CLAIMS WHERE THE AGREEMENT REQUIRED HOMEOWNERS TO PAY ADJUSTER A PORTION OF THEIR RECOVERED ATTORNEYS' FEES AND COSTS**

In Gables Insurance Recovery, Inc. v. Citizens Property Insurance Corp., 43 Fla. L. Weekly D2178 (Fla. 3d DCA Sept. 20, 2018), the Third District Court of Appeal found that an insured's post-loss assignment of its claim to a public adjuster was invalid and did not confer the public adjuster with standing to sue the insured's carrier. Citizens argued that Florida Statute 626.854(11)(b) prohibits a public adjuster from entering into contracts with homeowners whereby they would recover more than 20% of the payments received by the homeowners. Gables Recovery argued that once suit was filed, it was no longer acting as a public adjuster, but the appellate court rejected this argument based on the adjuster's contract with the homeowners, which provided it "full discretion and authority to proceed with all efforts to recover any and all amounts due . . . including the filing of the claim in court." The appellate court found that this expansive language meant that the public adjuster continued to act in that capacity during the litigation process. Therefore, the Court reasoned, because the parties agreed that the public adjuster would be entitled to recover 10% of the insured's recovery plus attorney's fees and costs, it violated the statute capping a public adjuster's recovery to no more than 20% of the insured's recovery, and therefore was invalid as an assignment.

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**MEDICARE SECONDARY PAYER ACT DID NOT PREEMPT FLORIDA NO-FAULT LAW AND MEDICARE ADVANTAGE ORGANIZATIONS WERE NOT ENTITLED TO CLASS ACTION STATUS BECAUSE EACH INDIVIDUAL CLAIM HAD TO BE REVIEWED TO DETERMINE WHETHER ANY PIP BENEFITS WERE PAYABLE**

The Third District Court of Appeal reversed a trial court's order granting class action status to an assignee of a defunct Medicare Advantage Organization who brought suit as class representative seeking to recover monies it alleged Ocean Harbor should have paid on behalf of insureds whose medical bills after an accident were paid by the MAO and not the PIP carrier. In Ocean Harbor Casualty Insurance v. MSPA Claims, 1, 43 Fla. L. Weekly D2219 (Fla. 3d DCA Sept. 26, 2018), MSPA brought suit against the carrier seeking double damages it was allegedly entitled to as reimbursement from Ocean Harbor as the primary payer of its insureds' medical bills which had not been submitted to Ocean Harbor in the first instance.

Ocean Harbor fought the class action allegations on the ground that the PIP statute contained numerous conditions precedent to coverage and payment, and that unless and until the insured or its purported assignee complied with those conditions, it was not liable for PIP benefits and could not be deemed primarily responsible for bills paid by the MAOs. The carrier argued that because of the individualized nature of the inquiry as to whether

a particular bill was payable under its policy, class action status was wholly inappropriate because issues common to the class would not predominate over uncommon issues such that the necessary series of "mini-trials" would defeat the purpose of a class action. The MAO'S argued that the PIP carrier was, by definition, a primary payer, regardless of whether it would have owed the payments in the first instance and that, as an MAO and not an insured, it was not required to comply with the PIP statute and policy before recovering reimbursement for the monies it paid on behalf of its common insured.

The Third District disagreed with MSPA, finding that the Act, which permits an MAO or Medicare to recover payments that should have been paid by a primary payer under certain circumstances, does not preempt state law such that the MAO could recover its payments even if Ocean Harbor would not have been liable to pay its insured or the insured's providers PIP benefits. Accordingly, the Third District reversed the trial court's order certifying the class.

As of the date of this writing, MSPA has filed its notice of intent to invoke the discretionary jurisdiction of the Florida Supreme Court.

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**CLAUSE IN INSURANCE CONTRACT REQUIRING SIGNATURE OF ALL INSUREDS AND MORTGAGEES FOR AN ASSIGNMENT OF BENEFITS IS ENFORCEABLE; CONFLICT CERTIFIED TO FLORIDA SUPREME COURT**

In Restoration I of Port St. Lucie a/a/o Suitieri v. Ark Royal Insurance Co., 255 So. 3d 344 (Fla. 4th DCA 2018), the Fourth District Court of Appeal addressed the issue of whether a clause in an insurance policy that required the signatures of all insureds and mortgagees for a valid assignment of benefits violated Florida law expressly permitting post-loss assignments. The trial court found the clause valid and dismissed the assignee's declaratory judgment action seeking a determination that the clause was illegal. The appellate court affirmed that dismissal.

The Court acknowledged that in Security First Insurance Co. v. Florida Office of Insurance Regulation, 232 So. 3d 1157 (Fla. 5th DCA 2017), the Fifth District Court of Appeal invalidated a similar restriction in an insurance policy. The Court also noted that the Security First case involved the Office of Insurance Regulation (OIR) disapproval of a particular policy clause that restricted the ability of policy holders to assign post-loss benefits based



on the OIR'S reliance on long-standing legal precedent finding that anti-assignment clauses do not apply to post-loss assignments. In Restoration I, Ark Royal submitted the proposed language to the OIR, which had not yet indicated its disapproval of the clause as in contravention of the insurance statutes.

The Fourth District also disagreed with its Fifth District brethren that the long-standing case law prohibits any restriction on post-loss assignments, finding that the law only holds that the insurer need not consent to a post-loss assignment of benefits. The Court further noted that a restriction on post-loss assignments is not otherwise invalid because the insurer will have to cover the loss and pay someone the insurance benefits and a restriction requiring that all insureds and mortgagees sign off on an assignment would not result in a forfeiture of policy benefits.

To the extent that its opinion conflict with Security First, the Fourth District certified that conflict to the Florida Supreme Court for resolution and on December 27, 2018, the Supreme Court accepted jurisdiction to resolve this conflict.

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**IDENTICAL PROPOSALS FOR SETTLEMENT MADE TO TWO SEPARATE DEFENDANTS WERE NOT AMBIGUOUS AND UNENFORCEABLE WHERE EACH REFERRED ONLY TO THE RECIPIENT PLAINTIFF AND SPECIFIED THAT EACH WAS DESIGNATED TO SETTLE ANY AND ALL CLAIMS AGAINST THAT DEFENDANT**

The Supreme Court addressed the issue of whether identical proposals for settlement, one sent to the owner of a vehicle and the other to the allegedly negligent driver of that vehicle, were ambiguous and unenforceable despite each proposal clearly referring only to the specific offeree and specifying that acceptance of the proposal would resolve all claims against that offeree. In Allen v. Nunez, 258 So. 3d 1207 (Fla. 2018), the Supreme Court quashed the Fifth District Court of Appeal's finding that the proposals were ambiguous, holding that each PFS clearly limited the offer and settlement to only the recipient of the proposal. The Supreme Court further noted that the Fifth District's finding to the contrary constituted "nitpicking" of the offers by the district court in an effort to inject ambiguity into what was otherwise a clear and unambiguous proposal.

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## LIABILITY CASE LAW UPDATES
## Continued

### LEE MEMORIAL HOSPITAL LIEN LAW IS UNCONSTITUTIONAL AS A SPECIAL LAW PERTAINING TO THE CREATION OF LIENS BASED ON PRIVATE CONTRACT BETWEEN HOSPITAL AND PATIENT

In one of several cases challenging the constitutionality of Lee Memorial's hospital lien law, the Florida Supreme Court held that the law in question is unconstitutional because it was a special law impinging on a private contract. In Lee Memorial Health System v. Progressive Select Insurance Co., 2018 WL 6695982 (Fla. Dec. 20, 2018), the Supreme Court approved the Second District Court of Appeal's opinion finding that a special law authorizing Lee Memorial hospital liens and creating a cause of action to recover damages against parties who impair those liens is unconstitutional as based on a private contract between the hospital and its patient. Lee Memorial had argued that its admission contract with its patients was a "public" contract because it was a public hospital, but the Supreme Court disagreed, opining that the determination as to whether a contract is public or private turns on the nature of the subject matter of the contract and not, as Lee Memorial argued, the public status of one of the parties. As a result, the Supreme Court did not address the issue of whether, if the lien law was valid, Lee Memorial's recovery from an insurer who allegedly impairs its lien, was limited to recovering no more than the policy limits.

The Court, however, found that the Second District erred in reaching the issue of whether the lien law was also unconstitutional as an impairment of the contract between Progressive and its insured because Progressive failed to properly serve the Attorney General who is required to be notified in any case in which the constitutionality of a statute is at issue.

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### TRIAL COURT ERRED IN ENTERING A DIRECTED VERDICT IN FAVOR OF ANESTHESIOLOGIST WHO CONDUCTED A PRE-SURGICAL EVALUATION OF A PATIENT WHO DIED DURING SURGERY ON THE GROUND THAT THE ANESTHESIOLOGIST WAS NOT THE PRIMARY CAUSE OF THE DECEDENT'S DEATH

In Ruiz v. Tenet Hialeah Healthsystem, Inc., 43 Fla. L. Weekly S655 (Fla. Dec. 20, 2018), the Florida Supreme Court quashed the opinion of the Third District Court of Appeal on the ground that it improperly equated the proximate cause of the injury with the primary cause of the injury in a case in which the decedent died during cancer surgery after undergoing a pre-anesthesia evaluation with the defendant physician.

In this case, the decedent's primary care physician improperly cleared her for surgery, despite abnormal pre-surgery test results. Just before the surgery, an anesthesiologist performed a pre-anesthesia evaluation of the decedent, during which he reviewed some, but not all, of the primary care physician's testing and missed an abnormal urinalysis result and a potentially abnormal EKG, which was blurry. The anesthesiologist cleared the decedent for surgery, during which she went into cardiac arrest and could not be resuscitated. An autopsy report showed that the decedent's physicians misdiagnosed her brain tumor, which was determined to be multiple myeloma and not the osteosarcoma they had diagnosed.

The decedent's Estate brought this medical malpractice action against all of the physicians involved in the decedent's treatment, including the anesthesiologist. The Estate alleged that the decedent's death was caused by the failure to properly diagnose her condition, which can be treated only with radiation or chemotherapy, not surgery. The Estate claimed that if the physicians had been properly diagnosed the decedent, she never would have undergone the surgery. The Estate also argued that the anesthesiologist proximately caused the decedent's death because he failed to review all of her pre-surgical testing and failed to order a new EKG with more definitive findings. The Estate contended that if the anesthesiologist had adhered to the standard of care, the abnormal test results would have led the surgeons to realize that the decedent was suffering from multiple myeloma and would have cancelled the surgery.

The trial court granted the anesthesiologist's motion for directed verdict, finding that even if he was negligent in his care of the decedent, he did nothing more than place her in a position to be injured by the independent negligence of the surgeons. The Third District affirmed the directed verdict, finding that there was no competent, substantial evidence that the anesthesiologist was the "primary cause" of the decedent's death.

The Supreme Court quashed the Third District's opinion, opining that, while merely furnishing an occasion for a person to be injured by the supervening negligence of a third party is ordinarily not sufficient to constitution proximate cause, in this case, the anesthesiologist did more than that. While the anesthesiologist's negligence was not the primary cause of the decedent's death, he could nevertheless be held liable if his failure to read and report the abnormal test results contributed to it. The Court explained that in medical malpractice cases, a physician may be the proximate cause of a patient's injury even if he or she is not the primary cause, and that each physi-

cian's conduct must be independently examined to determine whether he or she acted in a reasonably prudent manner based on the standard of care. In this case, the trial court, and the Third District, erred in finding that, as a matter of law, the anesthesiologist's negligence must not have substantially contributed to the decedent's death "as part of a natural and continuous sequence of events which brought about that result."

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**INSURED PREVAILING IN ACTION AGAINST HIS UNINSURED MOTORIST INSURER WHO THEN AMENDS TO ADD A FIRST PARTY BAD FAITH CLAIM IS NOT ENTITLED TO RECOVER HIS ATTORNEYS' FEES UNDER A PROPOSAL FOR SETTLEMENT UNTIL THE CONCLUSION OF THE BAD FAITH ACTION**

In 21st Century Centennial Insurance Co. v. Walker, 254 So. 3d 978 (Fla. 4th DCA 2018), the Fourth District Court of Appeal addressed the issue of whether an insured who obtained an excess verdict in a tort case against his UM carrier, after which he amended his complaint to add a first-party bad faith action against the carrier, is entitled to recover attorneys' fees under a Proposal for Settlement before the bad faith litigation concludes. In finding that an attorneys' fee award would be premature under these circumstances, the Fourth District held that a party prevailing on a jury verdict is not entitled to recover fees until a final judgment has been entered. While the insured obtained a jury verdict in excess of its policy limit, the only judgment yet rendered was for the policy limits, which were in an amount which did not trigger entitlement under the Offer of Judgment statute. Because the excess amount recoverable will be included only in a final judgment rendered at the conclusion of the bad faith litigation, the Fourth District found that the insured would be entitled to recover his attorneys' fees only if and when the trial court entered a final judgment exceeding the threshold necessary to trigger an attorneys' fee entitlement.

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**SUPREME COURT HOLDS THAT FLORIDA STATUTE 627.739 (2) REQUIRES THAT A PIP DEDUCTIBLE BE APPLIED TO THE TOTAL MEDICAL CHARGES BEFORE REDUCTION UNDER THE REIMBURSEMENT LIMITATION IN THE PIP STATUTE**

In Progressive Select Insurance Co. v. Florida Hospital Medical Center, 2018 WL 6816810 (Fla. Dec. 28, 2018),

## LIABILITY CASE LAW UPDATES Continued

the Florida Supreme Court addressed a question of great public importance certified to it by the Fifth District Court of Appeal, namely, whether, in calculating PIP benefits due, the deductible must be applied to the total amount of medical charges before applying the reimbursement limitation in 627.736 (5) (a) 2.b. While this case was pending, the Fourth District Court of Appeal, in State Farm Mutual Automobile Insurance Co. v. Care Wellness Center, LLC, 240 So. 3d 22 (Fla. 4th DCA 2018), held that the deductible should be applied after the reimbursement limitation in direct conflict with the Fifth District's decision in Progressive Select, in which that court found that the deductible should be applied to the total amount of the bills before application of the reimbursement limitation.

The Supreme Court resolved the conflict by approving the Fifth District's opinion that the deductible must be applied to the total amount of the charges. In doing so, the Supreme Court noted that Florida Statute 627.739 (2) previously required that a deductible be subtracted from benefits "otherwise due" to an insured, but the statute was amended in 2003 to provide that the deductible must be applied to "100 percent of . . . expenses and losses." The statute does not define "expenses and losses" and thus, the Court looked to the PIP statute to determine how those terms were used in that context. The term "benefits" is used in the PIP statute to refer to the amount due the insured after application of the deductible, and in the context of Florida Statute 627.739(2), that term is contrasted with the terms "expenses and losses." The Court therefore concluded that the plain language of the PIP statute requires that the deductible, which is essentially the insured's self-insurance, be applied to the gross amount of the medical charges before the reimbursement limitation, which represents the insurer's responsibility, is calculated.

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# Focus Practice Feature

## Medical Malpractice Division

Our medical malpractice defense attorneys have decades of experience representing clients facing complex medical malpractice claims. The legal professionals at our firm have an extensive understanding of the health care industry and are able to quickly identify, evaluate and respond to the legal and medical issues that typically arise in medical malpractice litigation.

Our firm uses a state-wide practice group format to deliver consistent and successful legal representation to clients located throughout the southeast. Through an experienced legal team of partners, associates, nurses and paralegals, we defend clients facing all types of liability claims that may arise within the health care setting. These legal professionals collaborate across our firm's 11 office locations to advise and represent all types of health care professionals and health care facilities, including:

- Hospitals and Health Care Systems, including Specialty Hospitals
- Nursing Homes
- Mental Health Facilities
- Assisted Living Facilities
- Adult Retirement Communities
- Physicians
- Psychiatrists
- Psychologists
- Pharmacists
- Nurses and Nurse Practitioners
- Allied Health Professionals
- Pedorthists
- Optometrists
- Dentists

Many of our medical malpractice attorneys have extensive backgrounds within the health care industry and are actively involved in legal, medical, and insurance industry organizations, including the American Society for Healthcare Risk Management and the International Association of Defense Counsel. Our firm has also established a staff of full-time nurse paralegals to assist our attorneys in analyzing and evaluating complex clinical records.

The medical malpractice group at Conroy Simberg has significant experience advising and counseling health care facilities on the disclosure of adverse medical incident reports under Florida's Amendment 7, the Patient's Right to Know About Adverse Medical Incidents, and Code 15 regulations.

Our attorneys also defend professionals that fall outside of the scope of Florida's Medical Malpractice Act, including audiologists and massage therapists. Additionally, our legal professionals are experienced in representing healthcare providers in state licensing issues and disciplinary matters relative to their practices.

**Medical Malpractice and Health Care Division Leader**
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# WORKERS' COMPENSATION CASE LAW UPDATES

### A CLAIMANT IS STILL CONSIDERED A FIREFIGHTER EVEN WHEN ON WORKERS' COMPENSATION LEAVE

In St. Lucie FCRD v. FMIT, 43 Fla. L. Weekly D2719 (Fla. 1st DCA Dec. 10, 2018), the Claimant suffered a heart attack in 2015 while employed as a firefighter for St. Lucie. Thereafter, the Claimant went on workers' compensation leave while continuing his employment with St. Lucie. During this time, Florida Municipal Insurance Trust (FMIT) was St. Lucie FCRD's workers' compensation carrier.

The Claimant suffered a second heart attack in 2016. By this time, St. Lucie FCRD's workers' compensation carrier was PGCS Claim Services.

Medical bills from the second heart attack were submitted to FMIT and denied. PGCS began paying benefits for the second heart attack under the pay-and-investigate provision, Florida Statute section 440.20(4). However, PGCS later denied compensability, arguing that the Claimant was not a firefighter on the date of accident.

St. Lucie FCRD and PGCS filed a motion for indemnification/reimbursement from FMIT, arguing that the Claimant did not qualify as a firefighter pursuant to section 112.18 because he was "not on active duty status" at the time of the accident. However, the JCC held that the Claimant was firefighter and denied the motion.

In affirming the JCC's order, the First District relied on City of Clearwater v. Carpentieri, 659 So.2d 357 (Fla. 1st DCA 1995), which held that a claimant was still considered a firefighter, even though he was already using accumulated leave and had applied for retirement and pension.

* * *

### A CARRIER IS NOT REQUIRED TO COVER CLAIMS WHICH WERE KNOWN TO THE INSURED PRIOR TO SEEKING COVERAGE BUT NOT DISCLOSED TO THE CARRIER

In Normandy Insurance Co. v. Sorto, 43 Fla. L. Weekly D2452 (Fla. 1st DCA Oct. 31, 2018), the Claimant's foot was run over by a Bobcat machine. J.A.M. Construction, the employer, called their broker that morning and reported the accident. Because no workers' compensation policy was in place at the time of the accident, the broker immediately contacted Normandy. A policy effective from that date forward was provided; however, the broker failed to disclose that morning's accident to Normandy. Once Normandy was made aware of the accident, they filed a motion seeking repayment from the general contractor. The JCC, however, found the policy between Normandy and J.A.M. was effective as of 12:01 a.m. of the Claimant's accident and, thus, the court entered summary judgment against Normandy.

Ultimately, the First District reversed the JCC's order, noting that the purpose of insurance is to "cover uncertainties, not certain losses." *Normandy Ins.* at 2. The Court also noted, pursuant to *Mena* v. J.I.L. Construction Group Corp., 79 So.3d 219 (Fla. 4th DCA 2012), given that J.A.M., the subcontractor, failed to obtain workers' compensation coverage, the general contractor is liable.

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### EXPERT TESTIMONY MUST BE BASED ON OWN INDEPENDENT OPINION AND PROVIDE SUFFICIENT FACTUAL FOUNDATION TO ESTABLISH CAUSATION

In Crown Diversified Indus. Corp. v. Prendiville, 43 Fla. L. Weekly D2718 (Fla. 1st DCA Dec. 10, 2018), the Claimant filed a petition in 2016, seeking benefits for symptoms she was experiencing following exposure to mold at work. The Employer/Carrier denied the compensability, and the case went before the JCC. Following the testimony of Dr. Powers's, the Claimant's IME, the JCC found that the Claimant met her burden of proving that the mold exposure at work was the major contributing cause of her injury.

However, the First District found that the JCC abused its discretion in admitting Dr. Powers's testimony and, as such, the JCC's order was reversed.

The First District found that Dr. Powers's testimony was "improperly bolstered by the professional opinions and reports of others." Dr. Powers testified to be board certified in family practice. As he had never treated a patient with an "'extreme'" condition like the Claimant's, he consulted with Dr. Uppal, an infectious disease doctor that specialized in mold exposure. Additionally, Dr. Powers relied on numerous articles he found on the internet. Given these circumstances, the First District found that Dr. Powers did not rely on "'his own independent opinion.'"

## WORKERS' COMPENSATION CASE LAW UPDATES Continued

The second problem the First District found with Dr. Powers's testimony was that it lacked "sufficient factual foundation to establish occupational causation." In fact, Dr. Powers could not establish specifically which mold caused the Claimant's symptoms.

In light of the above, the First District determined that JCC abused his discretion in allowing Dr. Power's testimony, and thus it reversed the JCC's order .

* * *

**JCC RETAINED JURISDICTION OVER CLAIM FOR TPD BENEFITS EVEN THOUGH APPEAL OF PRIOR ORDER, MAKING THE SAME CLAIMS AND ARGUMENT WAS STILL PENDING**

In Marraffino v. Stericycle/Sedgwick CMS, 43 Fla. L. Weekly D2663 (Fla. 1st DCA Nov. 30, 2018), the Claimant's compensable accident occurred in December 2014. In September 2017, the Claimant filed a petition seeking, *inter alia*, TPD benefits from August 19, 2017 and continuing. The JCC entered an order awarding TPD benefits; however, TPD benefits were not due after August 28, 2017 as the Claimant reached MMI. The parties then appealed this order.

Thereafter, before any disposition on the prior petition was made, the Claimant filed another petition seeking TPD benefits after August 28, 2017. The JCC dismissed the TPD claim, concluding that the issue as to whether the Claimant was at MMI on August 28, 2017, which was on appeal in the prior petition, had to be addressed first.

The First District remanded the JCC's order for consideration of the award of TPD benefits based on the merits. The First DCA concluded that the JCC failed to consider that the Claimant could be entitled to additional care, even after being placed at MMI, if there is a change in his condition.

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**A CLAIMANT'S REFUSAL OF EMPLOYMENT WILL NOT ENTITLE HER TO TEMPORARY BENEFITS**

In Employbridge v. Rodriguez, 255 So. 3d 453 (Fla. 1st DCA 2018), the Employer/Carrier appealed the JCC's order awarding temporary benefits to the Claimant, despite her refusal to accept employment. The JCC reasoned that the Claimant's refusal was justifiable under section Florida Statute 440.15(6).

The First District reversed the JCC's order and concluded that despite the employment offered was in another office and required a longer commute, the refusal was not justifiable.

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**WHEN LATENT AMBIGUITY IS PRESENT, PAROL EVIDENCE MAY COME IN TO SHOW LACK OF MEETING OF THE MINDS**

In Napoli v. Bureau of State Employee's W/C Claims/ The Division of Risk Management, 43 Fla. L. Weekly D2667 (Fla. 1st DCA Nov. 30, 2018), the Claimant filed a motion to enforce mediation agreement, in which the Employer/Carrier agreed to provide "'the requested bed.'" As the brand of the bed was not specified, the Claimant refused to accept the bed that the Employer/Carrier attempted to deliver.

The JCC reasoned that it was the Claimant's burden, as the moving party, to prove that there was a meeting of the minds when the contract was formed. *Id*. Further, the JCC indicated that there was a latent ambiguity which allowed parol evidence in, as each of the parties read the same document, yet came to opposite and reasonable conclusions. As such, the Employer/Carrier presented the doctor's deposition, which was taken prior to the mediation. Pursuant to the doctor's deposition, there was evidence to suggest that the "'requested bed'" meant any bed which would satisfy the doctor's requirements.

Accordingly, the First District affirmed the JCC's findings and concluded that there was no agreement to enforce.

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## APPELLATE WINS

**Hinda Klein,** head of the firm's appellate department, recently obtained a partial reversal of an $8.7 million judgment for Code Upgrade damages in favor of the hotel owner/insured who had suffered damage in Hurricanes Frances and Jeanne. At issue was whether the hotel was entitled to withdraw its pretrial stipulation that the policy limits of an excess policy were $2.5 million, which was the amount it was seeking , entered into before an earlier trial. On the retrial, which was a bench trial, the trial court permitted withdrawal of the pretrial stipulation and ultimately entered judgment well in excess $2.5 million. On appeal, the Fourth District found that, while the stipulation as to policy limits was a legal one, which the trial court could ignore, the stipulation as to what the Plaintiff was seeking as damages was one of fact, which the Plaintiff could not withdraw absent good cause. Because the Plaintiff did not establish good cause prior to the withdrawal, the appellate court reversed the judgment, ordering that it be reduced to the $2.5 million less the amount already paid by the carrier.

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**Hinda Klein**, head of the firm's appellate department, successfully appealed the trial court's order certifying a class action in Ocean Harbor Casualty Insurance v. MSPA Claims, 1, 43 Fla. L. Weekly D2403 (Fla. 3d DCA Oct. 24, 2018). Partners **Dale Friedman** and **Michael Wilensky** handled the case at the trial court level.

In this case, MSPA Claims 1, LLC ("MSPA"), which alleged that it was an assignee of a defunct Medicare Advantage Organization ("MAO"), filed sued on behalf of an enrollee for damages under the Medicare Secondary Payer Act ("Act"). MSPA sought reimbursement for medical bills for which Ocean Harbor, a no-fault automobile insurer, was allegedly responsible as a primary payer. The trial court certified the class of MAOs, healthcare providers, and individual enrollees who paid out-of-pocket expenses. The Third District Court reversed the certification, finding that MSPA failed to prove the "predominance" element necessary for a class action.

MSPA argued that it had an automatic right to recover any conditional payments. In other words, MSPA argued that, as long as a payment under Medicare was paid on behalf of an Ocean Harbor insured, Ocean Harbor was responsible for reimbursement regardless of any contractual or statutory defenses to payment—such as, for example, the bills being unrelated to an automobile accident. The Third District disagreed, holding that the Act did not preempt Florida no-fault law, and that MSPA had to prove for each individual enrollee that Ocean Harbor failed to make the payment based on its insurance contract and statutory no-fault law.

The Third District explained that predominance generally means that the class representative proving their claim will necessarily prove the claims of the remaining class members. In this case, however, the Third District found that each individual would have to prove their own claim, and that Ocean Harbor could raise any applicable defenses to the same. The Third District determined that this would necessarily devolve in a series of "mini-trials," which is inappropriate for a class action. Accordingly, the Third District quashed the trial court's order and de-certified the class.

The Third District's opinion has important, wide-spread implications as MSPA has filed hundreds of similar cases against no-fault insurers in state and federal courts throughout the country. This is the first reported appellate decision that has determined that MSPA does not have an automatic right to reimbursement absent a settlement or other admission that the no-fault insurer was responsible for the payment of medical bills in the first instance.

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**Hinda Klein**, head of the firm's appellate department, obtained new trial from the trial court in two separate cases. In the first, Plaintiff's counsel, repeatedly made objectionable arguments during his closing and kept doing so even after he was warned against it by the trial court. After the jury's verdict in favor of the Plaintiff, the trial court granted our motion for new trial finding that the Plaintiff's repeated arguments, many of which insinuated that the defense case was "smoke and mirrors," constituted "fundamental error," warranting a new trial on both liability and damages. In the second case, our motion for new trial was predicated on the plaintiff's "surprise" claim for economic damages for the cost of a household helper, which had not been disclosed in response to discovery requests and which was only requested from the jury in European euros and not in American dollars, preventing the jury from calculating the damage award with any certainty . The Plaintiff's counsel also violated the trial court's order in limine relating to an ADA violation which had nothing to do with the merits to the litigation.

**Ms. Klein** also obtained an affirmance of a summary judgment in a slip-and-fall case where the Plaintiff did not know how she fell or what she may have slipped on. On summary judgment, her counsel argued that since the store did not maintain more than a couple of minutes of surveillance videotape, which showed the accident, but nothing before it, the Plaintiff should be entitled to a "Valcin" presumption that the missing videotape would have been favorable to the Plaintiff, thereby defeating a summary judgment. The defense argued that it had no legal duty to maintain any particular amount of surveillance.

## APPELLATE WINS continued

Since the Plaintiff was unable to attest to the substance which caused her to fall and how long it might have been there, the Second District Court of Appeal affirmed the summary judgment.

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**Lara Edelstein**, an associate in the firm's appellate department, obtained an affirmance in a personal injury case where the Plaintiff claimed work-related injuries due to the negligence of his supervisor. The defense, handled in the trial court by **Joshua Canton**, a partner in the firm's Tallahassee office, successfully moved to dismiss the lawsuit based on Workers' Compensation immunity and failure to state a cause of action based on any exceptions to the immunity. The Plaintiff failed to move for leave to amend his complaint. Because the Plaintiff was unable to establish on appeal that any of the exceptions to Workers' Compensation immunity applied, and because he waived his argument that he was entitled to amend his complaint, the First District Court affirmed the dismissal of the lawsuit.

King v. Sharita Starks, Sailormen, Inc. d/b/a Popeyes Chicken and Biscuits, et al.,

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**Diane Tutt,** a partner in the firm's appellate department, recently prevailed in obtaining affirmance of a defense verdict in a federal Eleventh Circuit appeal. In Bivins v. Stein, a federal jury in a legal malpractice action awarded $16.4 million against a co-defendant, but **Jeffrey A. Blaker**, a partner in the firm's West Palm Beach office, obtained a defense verdict for his New York law firm and attorney clients, in a case alleging breach of fiduciary duties and wasting of assets of an incompetent ward, whose guardian had hired the various law firms that were later sued. The plaintiff appealed the judgment in favor of Mr. Blaker's clients, arguing a number of issues, including that the plaintiff's expert was improperly stricken at the request of Mr. Blaker. Ms. Tutt successfully handled the appeal. The appellate court rejected all of the arguments made by the Plaintiff.

**Diane Tutt** also recently won an appeal in a summary judgment case in the Florida Second District Court of Appeal. In Brown v. Fischer, **Robert Horwitz,** a partner in the firm's West Palm Beach and Hollywood offices, prevailed on summary judgment in a case alleging that the Plaintiff, who was hired to install a new dishwasher for the defendant homeowner, had suffered an electrocution injury while plugging in the new dishwasher. Although 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, he argued in the trial court and on appeal that the defendant increased his injury because she delayed in turning off the power when requested, because there was an obstruction in front of the electrical panel. The Plaintiff himself could not turn off the power because the sustained flow of electricity "froze" his hand to the socket. The appellate court determined that summary judgment was properly entered.

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**Chris Varner**, a partner in the firm's Pensacola office, and **Sam Spinner,** an associate in the firm's appellate department office, obtained final summary judgment on behalf of a car dealership represented by the firm in an FMLA dispute involving one of its employees.

The dealership brought in a director of operations to improve profitability. He restructured the business in substantial respects by eliminating some positions and drastically cutting salaries. The changes included outsourcing many of the plaintiff's duties and later eliminating the plaintiff's position. The Plaintiff was offered a substantially lower paying job in another department but turned it down.

The Plaintiff saw the restructuring as it progressed and started looking for jobs with other employers. He saw a doctor for stress and was told to take leave. The Plaintiff asked for, and the dealership provided, FMLA leave. By the time he returned to work, the restructuring had reached his department and his job was gone. Plaintiff alleged he was fired in violation of the FMLA.

The Federal Judge, in the Northern District of Florida, granted final summary judgment in favor of our client. The Court ruled that there was no violation of the FMLA. The evidence established that Plaintiff's position was eliminated for a legitimate, non-retaliatory reason: the restructuring that was in progress before the plaintiff asked for leave.

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## SUCCESSFUL LITIGATION DECISIONS

**Jackie Gregory**, partner at the Hollywood Office, prevailed in the defense of a claim for Permanent Total Disability and Supplemental benefits, adjudicated before Judge of Compensation Claims, Daniel Lewis in the Ft. Lauderdale District. In the case of Kovar v United Airlines/SedgwickCMS, this 48 year old customer service representative sustained a compensable lumbar injury. Physical restrictions were assigned, however, Claimant felt that she could not return to any type of employment. Medical and vocational evidence was presented to the Judge, including live testimony by the vocational experts. Claimant was not presumptively permanently and totally disabled based on a listed injury. She was not able to show that she could not engage in at least sedentary employment within a 50 mile radius of her home, and she had not conducted an exhaustive job search. The opinions of the authorized treating physicians were accepted as more credible than Claimant's IME's opinion. Based on the evidence presented, including the medical and vocational evidence, the Judge found that Claimant is able to

engage in at least part-time sedentary employment; therefore, the claim for PTD and supplemental benefits was denied.

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**John Lurvey**, managing partner in the West Palm Beach office and **Jeff Rubin**, an associate in the West Palm Beach office, recently prevailed on a summary judgment in a defamation case in St. Lucie County.

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**Conroy Simberg Announces Five New Partners**

**Sarah Finney Kjellin,** a partner in the firm's Tallahassee, Florida and Thomasville, Georgia offices, focuses her practice on the defense of insureds in varying types of liability matters, including construction defect, automobile and trucking litigation, and general liability and casualty throughout Georgia and Florida. Sarah is a member of the Georgia and Florida state bars, the United States District Courts for the Northern, Middle and Southern Districts of Georgia and the Northern District of Florida, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. Sarah previously served as a member of the Georgia Bar Young Lawyers Division Board of Directors and as Chair of its Leadership Academy. Sarah is an active member of the Thomasville and Tallahassee Bar Associations.

**Miles A. McGrane, IV,** a partner in our Hollywood office, dedicates his practice to representing clients in premises liability, general liability and casualty, automobile litigation, products liability, intentional torts, first party property and coverage, and insurance coverage matters. He is admitted to practice in all Florida state courts, the U.S. District Court for the Southern District of Florida and the 11th Circuit U.S. Court of Appeals.

Active in The Florida Bar, Miles currently serves as Vice Chair of Florida Bar Grievance Committee 17 D.He is also a Fellow of The Florida Bar Foundation. Previously, he was an elected member of the Board of Governors for the Young Lawyers Division of The Florida Bar, Vice Chair of the Federal Courts Practice Committee, a member of the Standing Committee on Professionalism and the Civil Procedure Rules Committee. Miles is also a member of the Broward and Palm Beach County Bar Associations.

**Joshua E. Nathanson** is a partner in the firm's Hollywood office and concentrates his practice in a variety of liability matters including automobile litigation, general liability and casualty, trucking litigation, premises liability, and intentional torts. Before joining the firm, Joshua worked as an Assistant State Attorney in Broward County, where he was a Felony Trial Unit Supervisor

**Nicole E. Roero,** a partner in Conroy Simberg's West Palm Beach office, represents employers, carriers, TPAs, uninsured employers, PEOs and self-insured funds. She also has experience handling heart and lung claims, catastrophic claims, traumatic brain injuries, occupational diseases, and infectious diseases claims. Nicole is admitted to practice before all Florida state courts.

## FIRM ANNOUNCEMENTS

**Christopher E. Varner**, a partner in our Pensacola office, is a member of the general liability and workers' compensation practices. An accomplished trial attorney, he has represented clients in more than 1,000 cases in a wide range of litigation matters including workers' compensation, longshore and harbor workers' compensation, general civil liability, tort liability, construction law, criminal defense, labor/employment law, landlord/tenant, civil rights, and contracts. In addition to trying federal cases in the Northern District as well as state court cases in Florida, Chris has appeared before administrative agencies throughout the state including Judge of Compensation Claims, Federal Administrative Law Judges, Public Employee Relations Commission, DMV Bureau of Driver Improvement, and Florida Commission on Human Relations.

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**Conroy Simberg Welcomes Shantay Hightower to our Thomasville, Georgia Office**

**Shantay D. Hightower** is a member of the firm's General Liability practice. She focuses her practice on the defense of insureds in varying types of liability matters, including construction defect, automobile and trucking litigation, and general liability and casualty throughout the state of Georgia. Prior to joining the firm, Shantay was an Assistant Public Defender for the Southern Judicial Circuit of Georgia, where she served in a variety of divisions as a trial lawyer. Shantay has also worked for a general practice firm during her career and has gained valuable experience in the areas of personal injury, bankruptcy, real property, worker's compensation, and social security disability law.

Shantay is a Georgia licensed attorney, and is admitted to practice before the Georgia Court of Appeals and the United States District Courts for the Middle and Southern Districts of Georgia. She earned her Juris Doctor from Nova Southeastern University in 2012. She earned her undergraduate degree in Criminal Justice, cum laude, from Florida Atlantic University in 2004.

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## FIRM ANNOUNCEMENTS continued

**Jackie Gregory,** a partner in the firm's Hollywood office, will be a panel speaker at the Council for Litigation Management Worker's Compensation Conference, scheduled to take place in Chicago, May 21 to 23. She will participate in a Panel presentation on the topic of: "Maximizing the Productivity of an Aging Workforce." This will be her second panel presentation, as she spoke at last year's Conference, also in Chicago.

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**Robert S. Horwitz**, a partner in our West Palm Beach and Hollywood offices, participated in two panel discussions tiled "A Legal and Scientific Perspective: The First 14 days of Water Exposure," and "The M Word: Managed Repair," at the 2019 Windstorm Insurance Conference in Orlando, FL.

Robert Horwitz practices in insurance litigation with a focus on liability and first party property claims including complex commercial and construction defect cases, homeowners' claims, mold remediation, fraud, pre-suit investigations, arson, personal injury, wrongful death and business disputes. He has briefed and argued before several Florida District Courts of Appeals on insurance defense and commercial matters.

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Partners **Melissa McDavitt, Rachel Minetree** and **Kristan Coad** will present on the topic of "Evolution of EMCs," at the Medical Claims Defense Network conference on March 6, 2019.

This presentation will detail everything from the exams to diagnostic tests to their associated billing strategies used to allege an Emergency Medical Condition. It will cover the impact these findings have on 1st- & 3rd-party claims. The MCDN has been providing educational seminars to Florida's automobile insurance claims industry since 1995.

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**Conroy Simberg Welcomes Attorney Catherine Blackshear to its Medical Malpractice Division**

Conroy Simberg is pleased to announce the addition of Catherine S. Blackshear to its Medical Malpractice Division. She will be based in the firm's Hollywood office.

Catherine S. Blackshear primarily focuses on medical malpractice, medical device, and nursing home litigation. Before joining the firm, she represented clients in civil litigation in the areas of medical malpractice and personal injury throughout the State of Florida. Catherine is also a former prosecutor for the State of Florida. Catherine has extensive experience in the healthcare industry. Catherine has been a Registered Nurse for 24 years, where she primarily practiced in the hospital setting as a Critical Care and Emergency Department Registered Nurse. Catherine has served in roles such as Patient Safety, Risk Management, Chief Nursing Officer, and as a Clinical Liaison in the medical device in industry. Catherine earned a Juris Doctorate from the University of Colorado School of Law, and an undergraduate degree in Nursing from Texas Woman's University.

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We are proud to announce that **Hinda Klein** and **Jayne Pittman** have been named in the 2019 edition of Best Lawyers in America, an honor that recognizes the top 4 percent of practicing attorneys in the nation.

Best Lawyers® is the oldest peer review publication in the legal profession and their annual lists of outstanding attorneys are a result of exhaustive peer review surveys in which tens of thousands of leading lawyers evaluate their professional peers.

**Hinda Klein** was selected for Appellate Law and **Jayne Pittman** was selected for Construction Law.

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Tampa attorneys **Nicole Soto** and **Dayana Echeverry** conducted a sensitivity workshop for one of their clients. The workshop included sensitivity and anti-discrimination training as to gender, age, national origin, sexual orientation, and family status. Dayana also presented two of the workshops exclusively in Spanish.

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**Jayne Pittman**, chairwomen of the firm's construction practice and Chair of the Florida Bar Construction Law Certification Committee, will lead a panel discussion on advancement of women in the construction field. The event will take place at the Women's Leadership Breakfast at the Construction Law Institute on Friday, March 08, 2019.

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**Registration will open soon for our 2019 Digital Webinar Series.**


**Dates: Tuesday, April 23-Thursday, April 25, 2019. More details to follow shortly.**

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