LIABILITY CASE LAW UPDATES

HARMLESS ERROR STANDARD APPLIES TO IMPROPER DENIAL OF A CAUSE CHALLENGE

In Seadler v. Marina Bay Resort Condo. Ass'n, Inc., 2023 WL 8817327 (Fla. Dec. 21, 2023), the plaintiff in a premises liability case challenged a potential juror on the basis that he could not fairly and impartially decide the case, and the trial court denied the challenge without providing an explanation. After trial, the plaintiff appealed to the First District Court, arguing that the trial court improperly denied the cause challenge, which was "per se" reversible error. The First District disagreed and found that the harmless error standard applied, meaning that the defendant would have to show that the error did not contribute to the verdict.

The Florida Supreme Court accepted jurisdiction to resolve the conflict among appellate courts on this issue. The Court explained that although the "per se" reversible rule applies in criminal cases, that law cannot be extended to civil cases.

The Court reasoned that there were scenarios in which the error was harmless and should not require a new trial. For example, if the challenged juror served as the alternate and did not deliberate, there would be no harm to the challenging party since the error could not contribute to the jury's verdict.

Therefore, the Court clarified the conflict and made clear that the harmless error analysis applies on appeal when the trial court improperly denies party's a cause challenge.

***

DEFENDANT WAS NOT ENTITLED TO SET OFF DAMAGES PAID BY INSURER TO SETTLE BAD FAITH CLAIM

In Ellison v. Willoughby, 2023 WL 7203352 (Fla. Nov. 2, 2023), the plaintiff in an automobile accident case settled with his own uninsured motorist carrier for $10,000 in policy benefits and $3.99 million in bad faith damages. The plaintiff then obtained a verdict of over $30 million against the defendant at trial. The defendant requested that the trial court set off the amount of the plaintiff's settlement with the UM carrier from the judgment pursuant to the collateral source statute, Florida Statute 768.76, which the trial court denied. The Second District affirmed that ruling but certified the question to the Florida Supreme Court.

The Florida Supreme Court agreed with the Second District, finding that section 768.76 did not apply because it required a set off only of "insurance benefits" obtained by the plaintiff. The Court explained that a settlement for bad faith damages did not meet the definition of a "collateral source" because those were not benefits, but rather a statutory penalty and extracontractual damages. Therefore, the Court found that the trial court properly declined to reduce the judgment by the amount of the settlement.

Importantly, although the defendant also argued that she was entitled to a setoff under a different statute, Florida Statute 768.041, the Court found that she did not preserve that issue for appeal because she never cited that statute to the trial court. Therefore, the Court declined to reach that issue.

***

INSURER COULD NOT BE SUBJECT TO BAD FAITH CLAIM FOR DECLINING PROPOSAL FOR SETTLEMENT IN UNDERLYING CASE

In Markuson v. State Farm Mut. Auto. Ins. Co., 2023 WL 5986322 (Fla. 2d DCA Sept. 15, 2023), the insureds appealed a partial summary judgment entered in favor of State Farm on their bad faith claim. The underlying case arose out of an automobile accident between Benjamin and Erik, who was driving a vehicle owned by Stephen. Benjamin sued Erik and Stephen, who had $300,000 in policy limits for bodily injury. Benjamin offered to settle the case for: (1) the $300,000 policy limits; (2) a consent judgment for $1.9 million that would not be recorded or enforced; and (3) authorization for Erik and Stephen to assign any rights to claims

Inside this issue:

against their insurance agent. State Farm denied the proposal, and Benjamin obtained a judgment in excess of $3 million at trial.

Benjamin, Erik, and Stephen all brought a bad faith claim against State Farm, arguing State Farm improperly failed to settle the underlying action. State Farm moved for summary judgment, arguing it had no duty to enter a consent judgment for more than the policy limits. The trial court agreed and granted partial summary judgment on the claims to the extent they arose from State Farm's rejection of the settlement offers.

The Second District affirmed, reiterating the principle that an insurer had no duty to enter a "Cunningham" agreement that would result in a judgment for more than five times of its policy limits without also releasing the insurer from liability. The court concluded that the trial court properly granted summary judgment on these claims because State Farm could not have committed bad faith by rejecting the settlement offer under these circumstances.

***

DEFENDANT WAS NOT A CONTRACTOR ENTITLED TO VERTICAL WORKERS' COMPENSATION IMMUNITY

In Galue v. Clopay Corp., 2023 WL 5597436 (Fla. 3d DCA Aug. 30, 2023), Clopay entered into a lease with KTR for a portion of a building wherein Clopay would store its products. Clopay hired Florida Fire Safety to inspect the premises, including the exit and emergency lights. The inspector, Galue, noticed an exit light behind some pallets that required replacement. A Clopay employee used a forklift to move the pallets, during which the pallets collapsed and fell on Galue.

Galue obtained workers' compensation benefits and then sued Clopay and the forklift driver for the injuries he sustained in the accident. Clopay moved for summary judgment, arguing it was entitled to workers' compensation immunity pursuant to Florida Statute 440.10(1)(b) because it was the "statutory employer" of Galue at the time of the accident. According to Clopay, its lease with KTR required it to ensure that the fire safety equipment worked properly, and it subcontracted that obligation to Florida Fire Safety. The trial court granted summary judgment for Clopay based on the lease clause.

The Third District reversed, explaining that section 440.10 applies only when the employer is a contractor who subletted part of its contract work to the injured worker's employer. The court noted that the fact that the defendant has a contractual obligation to a third party does not alone give it workers' compensation immunity. Rather, the defendant must have an obligation to perform a job or service and then subcontract the performance of part or all of that work to a third party. The Third District found that Clopay's obligation under the lease was not a contract for the performance of a job or service. Therefore, the court concluded that Clopay was not entitled to summary judgment because it did not qualify as a "contractor" under the statute for immunity purposes.

***

FLORIDA SUPREME COURT LIMITS VICARIOUS LIABILITY UNDER DANGEROUS INSTRUMENALITY DOCTRINE

The case of Emerson v. Lambert, 2023 WL 7815643 (Fla. Nov. 16, 2023), concerned an automobile accident involving a family car being driven by Kyle, who struck a motorcyclist, Bruce, rendering him quadriplegic. The car was owned by Kyle's father, Keith, and mainly driven by his mother, Debbie, whose name did not appear on the title. Bruce sued all three defendants and alleged that both parents were vicariously liable under the dangerous instrumentality doctrine, which makes the owner of a vehicle liable for the negligence of a person whom they entrust to drive the vehicle. At trial, Debbie moved for a directed verdict because she could not be vicariously liable absent ownership of the vehicle even if she permitted her son to drive it. The trial court denied the motion, and the jury returned a significant verdict against all three defendants. The Second District reversed the judgment as to Debbie, finding that she could not be held vicariously liable under these circumstances.

The Florida Supreme Court approved the Second District's decision. The Court explained that the dangerous instrumentality doctrine generally applies to the owner of the vehicle. The Court distinguished legal tile from a bailment relationship, which does not come with the same rights and responsibilities as ownership. Since Keith owned the car and gave both Debbie and Kyle permission to use it, only he could be held vicariously liable for Kyle's negligence in causing the subject accident. Therefore, the Court found that the Second District properly reversed the judgment for vicarious liability as to Debbie.

***

INSURED WAS NOT ENTITLED TO PREJUDGMENT INTEREST WHERE INSURER NEVER DENIED COVERAGE AND TIMELY PAID THE APPRAISAL AWARD

In Citizens Prop. Ins. Corp. v. James, 2023 WL 5061747 (Fla. 3d DCA Aug. 9, 2023), the parties proceeded to an appraisal in a property insurance case. Citizens paid the appraisal award and stipulated to the insured's entitlement to an award of reasonable attorney's fees litigation. The parties disputed whether the insured was entitled to recover prejudgment interest. The trial court awarded interest, and Citizens appealed.

Citizens argued that prejudgment interest was recoverable only where: (1) it failed to pay the claim within the time frame contemplated by the policy; or (2) it denied coverage and later admitted coverage or had an adverse judgment on coverage. In this case, Citizens participated in an appraisal and timely paid the award pursuant to the policy. Therefore, the Third District found that the insured would have to prove that Citizens had previously denied coverage before the appraisal, which it did not. Accordingly, the court reversed the award of prejudgment interest.

***

PUNITIVE DAMAGES WERE NOT RECOVERABLE IN CASE INVOLVING ACCIDENTAL DAMAGE TO NEIGHBORING PROPERTY DURING CONSTRUCTION ACTIVITIES

In 701 Palafox, LLC v. Scuba Shack, Inc., 367 So. 3d 624 (Fla. 1st DCA 2023), an adjacent property owner sued a developer and contractor, alleging that their construction activities damaged its building. The plaintiff moved for leave to amend its complaint to add a claim for punitive damages. The plaintiff argued that the defendants ignored the recommendations of their geotechnical engineer not to use large, vibratory compaction equipment when compacting the subgrade because it could create shockwaves and potentially damage the adjacent property. The plaintiff argued that, contrary to that report, the defendants used vibratory equipment to install sheet piles at the property border.

The First District reversed, finding that the plaintiff presented no evidence that the defendants actually used the equipment referenced in the geotechnical report. The evidence instead showed that the defendants did not use that equipment for compacting the subgrade, and "large, vibratory compaction equipment" was also not used for installing sheet piles. The First District found that installing sheet piles, which were intended to protect the soil from collapsing on the plaintiff's property, was not a grossly negligent act that could subject the defendant to punitive damages.

***

PROPERTY INSURER WAS ENTITLED TO DIRECTED VERDICT BECAUSE THE INSURED DID NOT RESIDE AT THE PREMISES AT THE TIME OF THE LOSS

In Universal Prop. & Cas. Ins. Co. v. Gonzalez-Perez, 2023 WL 4610771 (Fla. 3d DCA July 19, 2023), the insured filed a claim for damage resulting from an act of vandalism on his property. In response to the lawsuit, the insurer argued that it had no duty to provide coverage because the insured did not reside at the property at the time of the loss. The evidence instead showed that the insured had leased the property to tenants and had not resided there for three years before the incident.

The case proceeded to trial, and the jury returned a verdict for the insured, finding that the insurer failed to prove that the property was not the insured's "residence premises" at the time of the loss. The Third District reversed the jury's verdict with instructions to enter a judgment for the insurer, finding that the trial court should have directed a verdict for the insurer at trial because the policy clearly required that the insured reside at the insured property at the time of the loss for coverage to apply. The insured indisputably was not living at the property at the time of the vandalism, and therefore, the policy provided no coverage.

***

SIXTH DISTRICT CERTIFIES CONFLICT WITH FOURTH DISTRICT REGARDING PRESUIT NOTICE IN PROPERTY INSURANCE CASES

In Hughes v. Universal Property & Casualty Ins. Co., 2023 WL 8108671 (Fla. 6th DCA Nov. 22, 2023), the Sixth District certified conflict with the Fourth District on the issue of whether the presuit notice provision set forth in Florida Statute section 627.70152 apply in cases where the policy went into effect before the effective date of the statute. The insured obtained an insurance policy and suffered a loss before the statute was enacted, but she filed suit after the statute went into effect. The trial court dismissed the complaint because the insured did not provide presuit notice as required by the statute.

The Sixth District reversed the dismissal, finding that the statute cannot be applied retroactively in cases in which the policy went into effect before the statute. The Court explained that the Legislature did not intend for retroactive application, and even if it did, the statute

cannot be applied retroactively because it affects substantive rights as opposed to purely procedural rights. The Sixth District certified conflict with the Fourth District's decision in Cole v. Universal Property & Casualty Ins. Co., 363 So. 3d 1089 (Fla. 4th DCA 2023), in which the Fourth District contrarily found that the statute applied retroactively.

***

ASSIGNEE ROOFING COMPANY WAS SUBJECT TO INSURANCE POLICY'S FRAUD AND CONCEALMENT PROVISION

In SFR Services, LLC v. Tower Hill Signature Ins. Co., 2023 WL 4280884 (Fla. 6th DCA 2023), the plaintiff, a roofing company that received an assignment of benefits from the insured, appealed from a final judgment following a jury trial in which the jury found no coverage because the plaintiff made material misrepresentations regarding the value of the repairs in its estimate. The trial court denied the plaintiff's motion for directed verdict wherein the plaintiff argued that, as an assignee, it was not subject to the policy's prohibition against fraud and concealment.

The Sixth District affirmed the final judgment, rejecting the plaintiff's argument that the fraud and concealment provision applied only to the insured and not an assignee. The court found that the provision did not outline duties that had to be performed by the insured, but rather provided a remedy for the insurer in the event of fraudulent conduct. The court found that public policy dictated that an insured should not be permitted to escape the effect of this provision by assigning the claim to a third party. Therefore, the jury properly entered a defense verdict based on its finding that the assignee violated the provision by submitting the inflated estimate.

***

DEFENDANT WAS ENTITLED TO ATTORNEY'S FEES AFTER PREVAILING ON TWO COUNTS OF THE COMPLAINT BEFORE THE REMAINING COUNT WAS VOLUNTARILY DISMISSED

In Kuthiala v. Goldman, 2023 WL 5986480 (Fla. 5th DCA Sept. 15, 2023), the Fifth District considered whether a party could recover attorney's fees and costs based on a proposal for settlement where the party prevailed on part of the claim. The plaintiffs filed a three-count complaint against the defendant. During the litigation, the defendant served proposals for settlement on both plaintiffs. The trial court granted summary judgment for the defendant on two of the three counts in the complaint, after which the plaintiffs voluntarily dismissed the remaining count.

The defendant moved for attorney's fees and costs based on plaintiff's rejections of the proposals for settlement. The trial court denied an award of fees, finding that the defendant could not recover attorney's fees because the remaining count in the complaint was voluntarily dismissed without prejudice, which ordinarily does not trigger a right to fees. The Fifth District reversed, finding that the defendant was entitled to attorney's fees for prevailing on two of the three counts in the complaint. The court explained that this scenario was distinguishable from one in which the plaintiff dismissed all claims without an adverse adjudication, in which case the defendant would have no right to recover attorney's fees.

***

TRIAL COURT COULD NOT STRIKE PLEADINGS AND ENTER A DEFAULT WITHOUT CONSIDERING APPROPRIATE FACTORS

In City of Miami v. Marcos, 2023 WL 5944131 (Fla. 3d DCA Sept. 13, 2023), the plaintiff sued the City of Miami for injuries sustained in a trip and fall on a sidewalk. The City's attorney failed to appear at a mandatory calendar call, and the trial court entered a default for the plaintiff as a sanction. The case proceeded to trial, at which the City was limited to challenging only the amount of damages. The jury returned a verdict for the plaintiff, and the City appealed.

The Third District reversed, explaining that in the seminal case of Kozel v. Ostendorf, the Florida Supreme Court articulated a six-factor test that the trial court must employ before striking a party's pleadings as a sanction for an attorney's misconduct. The court found that the trial court erred by failing to consider and make express findings as to each of the Kozel factors, which are designed to ensure that a litigant is not disproportionately punished due to the actions of the litigant's counsel. Accordingly, the appellate court reversed the default order and the resulting final judgment.

***

LIABILITY CASE LAW UPDATES
Continued

INSURED WAS ENTITLED TO DIRECTED VERDICT AS TO INITIAL BURDEN TO PROVE A LOSS DURING THE POLICY PERIOD UNDER ALL RISKS POLICY

In Feldman v. Citizens Prop. Ins. Corp., 2023 WL 5597838 (Fla. 4th DCA Aug. 30, 2023), the insured obtained an HO-3 all risks policy of homeowner's insurance. At trial, the insured moved for a directed verdict, arguing that both parties' experts agreed that a loss happened during the policy period and disagreed only as to the cause of the loss. The trial court denied the motion, and the jury rendered a defense verdict, finding that the insured failed to prove that a loss occurred during the policy period.

On appeal, the Third District explained that under an "all risks" policy, the insured has the initial burden to prove that a loss occurred during the policy period. The insurer then has the burden to prove that the loss is excluded from coverage. The Third District found that there was no conflicting evidence as to whether the loss occurred during the policy's effective dates of coverage. Therefore, the trial court should have granted a directed verdict on that issue, and the verdict form should have proceeded directly to questions about coverage for the loss.

***

EXCUSABLE NEGLECT CAN RELIEVE A PARTY FROM THE FAILURE TO TIMELY FILE A MOTION FOR TRIAL DE NOVO AFTER NONBINDING ARBITRATION

In Barton Protective Security Servs., LLC v. Redmon, 2023 WL 5061649 (Fla. 3d DCA Aug. 9, 2023), the plaintiff sued the defendant for negligent security arising from a shooting death at an apartment complex. The trial court referred the case to nonbinding arbitration, which resulted in an over $10 million award for the plaintiff. The defendant filed a motion for trial de novo one day after the twenty-day deadline. The defendant then filed a motion for relief from the arbitration judgment, arguing that the failure to timely file the motion for trial de novo was due to excusable neglect. The trial court denied the defendant's motions without an evidentiary hearing, finding that excusable neglect could not warrant relief from a nonbinding arbitration decision.

The Third District reversed, finding that the excusable neglect standard applies to the failure to timely file a motion for trial de novo after arbitration. Since the defendant's motion set forth a colorable entitlement to relief based on excusable neglect due to calendaring issues, the Third District found that the trial court was required to conduct an evidentiary hearing before ruling on the motion. Therefore, the court remanded for the trial court to conduct the evidentiary hearing.

***

Written and Edited by:

Samuel B. Spinner, Associate

WORKERS' COMPENSATION CASE LAW UPDATES

IN ORDER TO BE COMPENSABLE, AN INJURY MUST ARISE OUT OF EMPLOYMENT

Normandy Insurance Company v. Bouayad, 372 So. 3d 671, (Fla. 1st DCA 2023)

The Claimant was a General Manger for Value in the Orlando International Airport Holiday Inn. The premises of the car rental business consisted of a kiosk desk inside the hotel atrium and an office in a separate building next to the hotel swimming pool. The kiosk and the office were separated by a 50' covered walkway with bushes on one side and what the Claimant alleges was a poorly lit smoking area on the other side. At the end of his workday, the Claimant would carry the final car rental agreements and any cash from the kiosk to the outside office. On June 28, 2019, around midnight, the Claimant was walking from the kiosk to the office with one last rental agreement, but no cash. As he passed the smoking area, an unknown assailant emerged and shot him seven times at close range. The Claimant managed to make his way back to the hotel lobby before collapsing. The Claimant told a hotel guest that "Robert shot me." He also advised the guest that the police should look for a blue Mustang. The Claimant's injuries were to his left hand, left leg, right arm, intestines, stomach, and brain. He suffered several strokes, lost his right kidney, and lost part of his vision.

The Employer/Carrier controverted this claim and denied all benefits. The Employer/Carrier argued that the Claimant's injuries sustained from the shooting did not arise out of the course and scope of employment. The shooting was likely related to a threat "Robert" made to the Claimant's wife and son the day before. The evidence confirmed that "Robert" owned a blue Ford Mustang. The police confirmed that "Robert" often stayed at the hotel where the Claimant worked and was shot. Surprisingly, the police did not charge "Robert" with the shooting.

At the Final Hearing, the Claimant contended that the shooting was work-related, even though he identified "Robert" on the night he was shot. The Claimant presented expert testimony from a criminologist that he faced an increased risk of becoming a crime victim when at work at Value as compared to the risk he faced when he was at home. The Claimant also presented testimony about past incidents of crimes at the workplace (i.e., rental cars were stolen, vandalism in the parking lots).

The Employer/Carrier also presented testimony from multiple criminology experts concluding evidence that the Claimant was a victim of targeted, pre-meditated violence. The Claimant was involved in a targeted attack. The criminologists also concluded that based on crime reports for a 1 mile area surrounding the Claimant's home versus that of the hotel, a higher risk of violent crime surrounded the Claimant's residence, rather than the hotel.

The JCC ruled in favor of the Claimant, finding the Claimant's injuries were compensable. The JCC found that the evidence did not prove the shooter's identity and, therefore, the evidence did not establish a motive for the shooting. The JCC concluded the Claimant's employment "substantially contributed to the risk of injury and to the risks which the Claimant would not normally be exposed to during his non-employment life." The JCC also concluded the Claimant's employment substantially contributed to the risk of an attack and to risks that the Claimant would not normally be exposed to during his non-employment life. Therefore, the Claimant's work performed was the major contributing cause of the shooting.

The First District Court of Appeal reversed the JCC's ruling, finding that the Claimant did not meet his burden to prove that the injuries he suffered arose out of the work performed. The sole cause of the Claimant's injuries was that he was shot. "At most, the work he performed for Value placed the Claimant in the wrong place at the wrong time. This is not enough to establish occupational causation."

The First District then certified the question to the Florida Supreme Court with the following question as great public importance:

> Notwithstanding Strother v. Morrison Cafeteria, 383 So.2d 623 (Fla. 1989), when an act of a third-party tortfeasor is the sole cause of an injury to an employee who is in the course and scope of employment, can the tortfeasor's act satisfy the occupational causation element, as defined by §440.02(36), Florida Statutes, necessary for compensability under the workers' compensation law?

The First District reiterated that for an accident to be compensable, an Employee must suffer "an accidental compensable injury . . . arising out of work performed in the course and scope of employment." "In the course and scope of employment" refers to "the time, place, and circumstances under which the accident occurs." "For an injury to arise out of and in the course of one's employment, there must be some causal connection between the injury and the employment or it must have had its origin and some risk incident to or connected to the employment or that it flowed from it as a natural consequence."

The Claimant had the burden of showing "occupational causation." The Court stated:

> Proof of occupational causation is a sine qua non for compensability of a workplace injury. Occupational causation cannot be established "based *solely* on a showing that but for the employee being at work, he should not have been injured in the manner and at the particular time that he was hurt" (c*iting* Silverberg, 335 So.3d at 155); Century Ins. Company v. Hamlin, 69 So.3d 1065, 1071 (Fla. 1st DCA 2011) ("near presence at the workplace is never enough, standing alone, to meet the "arising out of" prong of the coverage formula").

The Court held that it was not enough that the Claimant established that he was at work and was shot while walking between the premises of his Employer, the Claimant had to show that he was shot as a direct result of walking (arising out of).

The Court noted, however, that the occupational standard was set out by the Florida Supreme Court which found an employee's injury compensable, even when the injury is caused by an act of a tortfeasor. Strother v. Morrison Cafeteria, 383 So.2d 628 (Fla. 1980) (finding injuries from physical attack compensable when cashier was robbed by assailants who targeted her based on knowledge that she carried cash deposits for her employer); see also, Santizo-Perez v. Genaro's Corp., 138 So.3d 1148 (Fla. 1st DCA 2014) (employee was struck by a car driven by coworker's jealous boyfriend while the employee collected shopping carts for his employer in the grocery store parking lot).

The First District found that the Claimant failed to prove that the injuries he suffered in the shooting were caused by the work he performed for Value. The Court also found that it was not enough to satisfy his burden to prove occupational causation for the Claimant to present evidence suggesting that his workplace is in a high-gun area, making it more likely that he would become a crime victim.

***

THE EMPLOYER/CARRIER MUST PLACE CLAIMANT ON NOTICE OF THEIR DECISION TO PAY AND INVESTIGATE UNDER THE 120 DAY RULE OR WAIVE THEIR RIGHT TO DENY CLAIM

Churchill v. DBI Services, LLC, 361 So.3d 896 (Fla. 1st DCA 2023)

The Claimant worked for the Employer as a Rest Area Attendant. Her duties consisted of cleaning bathrooms in which she used various cleaning products. The products were mixed every day by pouring three chemicals and water into a plastic container. The specific quantities of each were never accurately measured. The Claimant "eyeballed" the amounts.

On November 1, 2020, the Claimant was about to prepare the combination of cleaners when she noted her container already contained a portion of blue liquid which she recognized as toilet bowl cleaner. She added bleach to the mix and it "exploded in my face." The Claimant ran out of the restroom to get air. She then went back in, got the jug, carried it outside, and dumped it over the rail. The Claimant immediately started choking and coughing. An ambulance was called and she was taken to the hospital. She was diagnosed with "toxic effect of chlorinated hydrocarbon solvent and acute respiratory failure with hypoxia."

The Employer reported the claim to the Carrier which initially accepted the accident as compensable on November 13, 2020. The Carrier paid prescriptions on November 10, 2020 and commenced indemnity benefits on November 13, 2020. The Carrier authorized a follow-up treatment with a pulmonologist and an ophthalmologist and paid indemnity benefits for the periods of November 9, 2020 through November 15, 2020 and from December 1, 2020 to February 7, 2021. On January 8, 2021, over two months after the incident, the E/C issued a 120-day pay and investigate letter to the Claimant.

On January 25, 2021, the Carrier issued a Notice of Denial. However, thereafter, on February 22, 2021, the Carrier authorized follow-up medical treatment. The Adjuster testified that the Notice of Denial was issued in error, and then issued another Notice of Denial on February 24, 2021.

The Claimant filed a Petition for Benefits seeking compensability and continued medical care to which the Employer/Carrier denied, arguing the Claimant could not meet her burden of proof.

The Claimant sought to depose a corporate representative of the Employer/Carrier, moving to require the Employer/Carrier to designate a corporate representative as required by Rule 1.310(b)(6), Florida Rules of Civil Procedure. The Employer/Carrier moved for Protective Order seeking to prevent the designation. The Judge denied the Motion to Compel and granted a Protective Order, stating that he did not believe Rule 1.310(b)(6) applies to workers' compensation proceedings. Judge Frank Clark stated during the hearing:

> You know you don't need the stuff and you keep citing the Rules of Civil Procedure. We got (sic) our own rules . . . we got (sic) Rules of Workers' Comp Procedure. There's things in worker's comp that we have to prove that people in, you know, the civil procedural world, in circuit court world don't care about and vice versa.

In the Pre-Trial Stipulation, the Employer/Carrier actually changed their position and agreed to accept responsibility for payment of all medical bills and payment of treatment through February 24, 2021.

After the Final Hearing, Judge Clark denied the Claimant's claims, finding that the Claimant did not meet her burden

of proof supported by clear and convincing evidence as required under §440.09(1).

The First District reversed the Judge's ruling and gave a discussion on the 120-day rule. The Court held that an Employee/Carrier's election to delay their decision about compensability by "paying and investigating" requires written notice per subsection 440.20(4). The letter does not start the 120-day period. "Initial provision of compensation or benefit" does. But only the letter invokes the right to rely on the "pay and investigate statutory mechanism". Only a timely letter will suffice. Therefore, the letter is due "upon commencement of payment" **which means either at the time of making the payment or as soon thereafter as reasonably practicable**.

The Court stated:

> 59 days between commencement of payment and written notice invoking "pay and investigate" is too long a period to be "upon commencement of payment" and we hold that such a delay is not compliant with the requirements of §440.20(4). As for the corporate representative, that is governed by Rule 1.310 which requires the corporation to reasonably prepare its representative to testify on the specified subject matters through documents, past employees, or other sources to enable the witness to "give complete, knowledgeable, and binding answers on behalf of the corporation." Therefore, the Claimant was entitled to depose an Employer-designated corporate representative for the deposition.

***

EMPLOYER/CARRIER HAS DUTY TO MONITOR THE CLAIMANT'S INJURIES AND PROVIDE NEEDED BENEFITS

Kelly Girardin v. An Fort Myers Imports, LLC., 345 So.2d 921 (Fla. 1st DCA 2022)

The Claimant sought review of the JCC decision which denied her claim for attendant care because she did not provide the Employer/Carrier with a sufficiently specific written prescription.

The Claimant's authorized provider wrote a prescription for home health evaluation and attendant care, 12 hours/day 7 days per week. Claimant attached a copy of the prescription to the petition for benefits she filed a few days later. The Employer/Carrier responded by authorizing attendant care and stating that additional details would be provided under separate cover. When the adjuster contacted the provider for more information, the provider responded that he provided the home evaluation because he did not know anything about the Claimant's home and could not provide any specifics about the type of attendant care. The provider agreed to defer to the home evaluation. The Employer/Carrier hired agencies to provide the home evaluations. At final hearing, the Employer/Carrier took the position that they have offered care for up to 12 hours daily, but also maintained that the JCC could not award attendant care because it had not received a written prescription that satisfied the statute's specificity requirements. The JCC agreed finding that the Claimant was responsible for providing a written requests for attendant care for the time periods such care, the level of care and the type of assistance required.

The First District agreed that the statute requires a written prescription with certain information before the Employer/Carrier will be responsible for providing attendant care. However it did not relieve the Employer/Carrier of its obligation to monitor the Claimant's injuries and provide needed benefits or excuse any attempt to hide behind a wall of willful ignorance. The Court found that the Employer/Carrier immediately authorized the attendant care based on the prescription and informed that the Claimant they would provide more details and initiated a home health evaluation only to fail to provide the authorized provider with the results of home evaluation to that the provider could give them written specifics of the amount and type of care the Claimant required. Further, the Employer/Carrier took the position that he had authorized care up to 12 hours but also denied any obligation to provide the care until a sufficiently written prescription. This was little more than using the statute as a shield absolving the Employer/Carrier of its duty to monitor the Claimant's injuries and provide needed benefits.

***

SECURING AN INCREASE IN THE AWW, REGARDLESS OF WHETHER IT RESULTS IN ADDITOINAL INDEMNITY BENEFITS DUE, IS CONSIDERED A BENEFIT SECURED FOR PURPOSES OF ENTITLEMENT TO ATTORNEYS FEES

Guerrera v. Beckton Dickinson & Company, 338 So.3d 300 (Fla. 1st DCA 2022)

The JCC denied the Employer/Carrier-paid fee entitlement on an increase in the Claimant's average weekly wage because "no actual or real benefit was secured."

The First District reversed the JCC's ruling because "even though Claimant had received disability benefits since the date of accident at the maximum compensation rate, the AWW adjustment increased the 80% threshold for temporary partial disability entitlement." The Court also reasoned that the average weekly wage adjustment could also affect potential off-sets if the Claimant received Federal disability benefits. Finally, the Court found that even though the increase in the average weekly wage was smaller than what the Claimant had thought, "the law does not require an exact match between the claim and the award."

***

DEPENDENCY MUST BE ESTABLISHED FOR PURPOSES OF DEATH BENEFITS

Sandifort v. Akers Custom Homes, Inc. 343 So.3d 601 (Fla. 1st DCA 2022)

The Claimant appealed the JCC's denial of death benefits due to a lack of dependency as required by the statute. Claimant was the mother and sole caretaker of five children, 2 whom were minors, at the time of the industrial accident. There was no income other than nominal child support and SSI received for the Claimant's 16 year old son whom had a permanent learning disability. During the summer the Claimant's 16 year old son began working for the Insured. He had never been employed in his life and hoped to make some extra money to buy new shoes.

Unfortunately, on his first day on the job, the Claimant drowned in a work place accident. The Claimant's mother filed a petition for benefits seeking death benefits. The trial court noted that the statute bases entitlement on dependency upon the deceased and the amount of compensation is calculated as a percentage of the AWW. The essence of the Claimant's main argument was that the statute did not limit dependency to the Claimant wage earning ability or his capacity to separately provide for himself. The trial court disagreed and found the Claimant's surviving family were not dependents for purposes of the statute and denied the requested death benefits. The First District affirmed the ruling.

In coming to its conclusion, the First District noted how relief under Chapter 440 is directly related to loss of earning power either to the employee or those financially supported by him. It further noted that the law presupposes that the deceased was capable of supporting himself and in addition thereto of contributing to the support of another. The First District focused on how the decedent's SSI was paid to his mother to assist the decedent, and the fact the SSI was being paid for the decedent made him a dependent himself. It could not be used as a "wage" earned by the son, used to support the family. Further, the statute anticipated a dependency on the deceased employees wage earning capacity, not his entitlement to welfare payments. The Court stressed how the Claimant never held a paying job and the first wages he earned came on the last day of his life. As such the Claimant's mother could not as a matter of law show her deceased sons death on the job resulted in a wage loss for her on account of dependency of upon the deceased. That fact alone was dispositive of entitlement to compensation under the statute. As the Claimant's mother was not able to show any of this, the First District opined that the JCC was correct as the Claimant's mother could not show actual dependency on her son.

***

EMA IS APPROPRIATE WHERE THERE IS A DISPUTE IN MEDICAL OPINIONS

City of Orlando v. Moore, 351 So. 3d 41 (Fla. 1st DCA 2022).

The facts in the case reflect a prior Court Order that adjudicated the Claimant's hypertension as compensable pursuant to §112.18(1), Florida Statutes (2016). The Claimant subsequently filed a Petition for Benefits seeking payment of impairment benefits for his hypertension condition.

The Court appointed an EMA and subsequently accepted the opinion of the EMA which concluded that the Claimant had reached MMI for his hypertension on May 23, 2018 with a 42% impairment rating based on the Guides. The JCC further determined there was no clear and convincing evidence to support a rejection of the EMA, Dr. Borzak's, opinion because none of the other doctors could agree on either the date of MMI or the impairment rating.

The Claimant's authorized treating physician, Dr. Kakkar, assigned a 10% permanent impairment rating; the Claimant's IME, Dr. Parikh, assigned a 50% impairment rating; and the Carrier's IME, Dr. Nocero, assigned a 0% impairment rating – all of the aforementioned physicians assigning differing dates of maximum medical improvement.

Based on conflicts pertaining to both the date of MMI and impairment rating assigned, the JCC appointed EMA, Dr. Borzak. The First District emphasized that all parties were given an opportunity to depose Dr. Borzak to address/ challenge his opinions – neither party elected to do so.
The Employer/Carrier further argued the JCC erred in accepting Dr. Borzak's opinion because Dr. Borzak relied solely on an echocardiogram rather than an ECG in assigning the Claimant's impairment rating for left ventricular hypertrophy ("LVH") – arguing that his opinion was, therefore, not legally sufficient.

On appeal, the First District acknowledged that there was both ECG and echocardiogram basis establishing the Claimant had LVH, for which the Guides required LVH for a Class 3 impairment. Therefore, Dr. Borzak's opinion the Claimant had LVH is supported by the record (as there was no clear and convincing evidence to warrant rejecting that opinion).

The dicta in the case reflects the Appellants failed to preserve their Daubert argument for appeal. They first raised their Daubert objection in an Amendment to the parties' Pre-Trial Stipulation. However, they did not reaffirm the objection at trial or on rehearing and, moreover, made no attempt to depose the EMA to

ascertain whether he had a sufficient basis for his opinions and failed to file a Motion in Limine, Motion to Strike, or any other motion to limit or to exclude the EMA's opinions in this matter or provide a specific basis of their objection to the EMA opinion.

Accordingly, the First District upheld the JCC' reliance on Dr. Borzak's assessment of a 42% impairment rating for the Claimant's left ventricular hypertrophy ("LVH") finding:

1. There was a legitimate conflict in the medical opinions mandating the appointment of an EMA;
2. §440.13(9)(c) mandates that the EMA's opinion is presumed to be correct unless there is clear and convincing evidence to the contrary – as determined by the JCC and further stating it is not the Appellate Court to conduct a de novo review of the evidence by making an independent determination whether the evidence as a whole satisfies clear and convincing evidence – but rather, solely to determine whether the record contains competent substantial evidence to meet the clear and convincing evidence standard by the JCC.

***

A HOUSEKEEPER IS NOT, BY DEFINITION, AN EMPLOYEE

Wolfe v. Ruby, 360 So.3d 429 (Fla. 1st DCA 2023)

The Claimant was a housekeeper for Ms. Wolfe. Ms. Wolfe filed a Motion for Summary Final Order on the grounds that §440.02(17)(c)(1), Florida Statutes, expressly excludes domestic servants in private homes from the definition of "employment." The JCC denied the Motion which was appealed.

The First District reversed the Judge's ruling finding that the Claimant failed to carry her burden of providing a competing affidavit demonstrating that the Judge had subject matter jurisdiction. The First District found there was no dispute that the Claimant was providing housekeeping services in a private home. Section 440.02(15)(a), Florida Statutes, defines "employment" as "all private employments which four or more employees are employed by the same employer." Section 440.02(17)(b)(2), Florida Statutes, defines "employer" as "every person carrying on an employment." Section 440.02(16)(a), Florida Statutes, specifically excluded housekeeping services as "employment."

***

GENERALLY, CLAIMANT MAINTAINS A DUTY TO PLACE EMPLOYER ON NOTICE WITHIN 30 DAYS OF ACCIDENT/INJURY

Bonhomme v. Staff Team Hotels Corp., 348 So. 3d 614. (Fla. 1st DCA 2022)

The Claimant allegedly injured his neck and back while lifting a mattress at work on May 22, 2019. Despite making repeated trips to the emergency room with consistent pain syndromes that he traced back to the incident that day, the records from those visits failed to indicate any complaint from him of neck or back pain until the emergency room visit on July 17, 2019 where the doctor mentioned to the Claimant the possibility of a strain but without giving that as a formal diagnosis. None of those records contain any findings to support the Claimant's claimed injury. The Claimant repeatedly testified that he had constant neck and back pain dating to the May 22, 2019 and that he knew the May 22, 2019 incident was the cause of the pain and that he reported that pain to the doctors during his emergency room visits.
Of note, the Claimant did not notify his Employer about the accident or injuries until July 19, 2019, two days after his July 17, 2019 hospital visit.

After reviewing all the evidence, the JCC denied the claim and dismissed the Petition. The Claimant appealed the Final Order. The Employer/Carrier also appealed arguing that the JCC erred by reaching the merits of the claim at all because the Employer/Carrier established that the Claimant's notice of the accident to the Employer was untimely. The First District affirmed.

At the heart of this appeal was the issue of whether the evidence sufficiently supported the JCC's Final Order denying compensability. While the First District opined that the JCC had ultimately ruled correctly based on the admitted evidence, the crux of the First District focus was on a Claimant's duty to report his accident/injuries to the Employer in a timely manner.

After noting the many inconsistencies between the Claimant's deposition testimony and the records from the emergency room regarding his reasons for presentation to the emergency room and when he started feeling his complaints of pain in his neck and back, the First District opined that the Claimant put himself in a difficult spot in connection with his claim as the records from his several hospital visits did not indicate that he was suffering from any symptoms until July 17, 2019, nearly two months after the incident that he claims was a workplace accident.

In its explanation the First District opined that the Claimant had to advise his Employer of an injury he believed he suffered from work within 30 days after the date of the injury where here was May 22, 2019. If for some reason the Claimant was initially unaware that he had suffered an injury at the time that he was lifting the mattress, then on that day, he had to advise the Employer of this injury within 30 days of the date of the initial manifestation. His failure to timely advise the Employer bars the Claimant's Petition unless he could show, among other things, that the Employer had actual knowledge of the injury, that he could discern that the cause of his injury without a medical opinion or exceptional circumstances, outside the scope of these other circumstances justified such a failure.

The First District explained that a diagnosis is not necessary to start the clock under the Statute unless the Claimant was either unaware at the time that the incident caused him some bodily harm, or he was unaware that the incident itself caused the debilitating symptoms he otherwise knew he was suffering.

The First District in fact found that the Claimant's deposition testimony perfectly reflected his knowledge that he suffered some bodily harm on May 22, 2019 with the work causing that harm, even if he did not know at the time the medical terminology used to describe it. It was enough that the Claimant's own admissions regarding the pain and when it started suffering. The running of the Statute starts 30 days from either when the Employee suffers the injury, or from the initial manifestation. There was never any doubt in the Claimant's mind about the cause of the injury and the medical opinion was not needed to clear that up.

The First DCA felt that it was evident that the Claimant was clearly aware that he had suffered some sort of injury when he lifted the mattress on the fourth delivery on May 22, 2019. Further, it was undisputed that he did not report this injury to the Employer until July 19, 2019, which means that in this scenario, the Claimant's claim was untimely and barred. The First District affirmed.

***

PTSD CAN BE SOUGHT UNDER EITHER 112.1815(2)(A) 3 OR 5

Williams v. Brevard County Fire Rescue. 353 So. 3d 1198 (Fla. 1st DCA 2022)

In this case, the First District affirmed the JCC's Final Compensation Order because the expert medical testimony credited by the JCC supported the conclusion that §112.1815(2)(a)3 claimed that the accident did not give rise to any need for treatment due to post-traumatic stress disorder or any other compensable mental injury, irrespective of the evidentiary standard used.

However, the First DCA also agreed that the Claimant's argument that the first responder Claimants can seek workers' compensation benefits for post-traumatic stress disorder under either §112.1815 (2)(a)3 or paragraph 5 or both.

***

STATUTE OF LIMITATIONS AND CALCULATION OF SAME

Ortiz v. Winn-Dixie, Inc.., 361 So. 3d 889 (Fla. 1st DCA 2023)

Winn-Dixie had been furnishing medical care to the Claimant as her Employer for years under the workers' compensation system in connection with a work-related accident. Sedgwick notified the Claimant that it was terminating the authorization of care because the two-year Statute of Limitations had run. The Claimant filed a Petition for Benefits thereafter.

The JCC dismissed the Claimant's Petition for Benefits and the Claimant appealed. The First District affirmed the Judge's Order.

The First District noted that the Claimant's injury occurred in 2003 when the Claimant tripped and fell which ultimately resulted in the removal of her right kidney. The Claimant received medical treatment related to her nephrectomy. In 2015, the Claimant treated with a new authorized physician. Between September 2015 and January 2019, the Claimant attended 8 appointments with the new physician which were authorized by Sedgwick and paid for. The last authorized visit occurred on January 29, 2019. Over one year later, in May 2020, Sedgwick inquired of the doctor regarding any recent dates of service. The doctor responded that the Claimant attended an April 7, 2020 appointment without Sedgwick's knowledge. The Claimant also treated with this doctor on August 1, 2019 and August 12, 2019, which had not been authorized or paid for.

On August 7, 2020, Sedgwick filed a Notice of Denial, de-authorizing the doctor. On August 26, 2020, the Claimant filed a Petition for Benefits seeking medical care. When the JCC denied her claims, the JCC stated the Claimant needed to prove more than the fact her August 2019 and April 2020 visits were with the authorized doctor.
The First DCA explained how the Statute of Limitations should be calculated and stated:

Under this approach, she would have had to present evidence to enable the JCC to perform some basic math, adding up how much time had elapsed in the following intervals:

1. Between the date of accident and the date of initial claim was filed;
2. During every period between the expiration of one tolling, and the start of another; and
3. From the putative expiration of the last tolling period to August 26, 2020 when the Petition was filed.

If the sum ended up being under two years, then the limitation period would not have run yet, and the PFB would not have been barred.

As the Claimant did not pursue this form of avoidance before the Judge of Compensation Claims, the Claimant failed in her burden of proof. The Court also stated that before an employer has "furnished" care in order to trigger the tolling of §440.19(2), either the carrier must have authorized the specific treatment, or the authorized provider must have treated the employee pursuant to the previously approved treatment plan. Cf. §440.13(2)(a), Florida Statutes.

***

Written and Edited by:
Stephanie A. Robinson, Partner

FIRM ANNOUNCEMENTS

Miles A. McGrane, IV Accepted into the American Board of Trial Advocates

Conroy Simberg is proud to announce that **Miles A. McGrane, IV,** a partner in the firm's Hollywood Office, has been accepted into the American Board of Trial Advocates (ABOTA).

Membership in ABOTA is by invitation-only and is considered one of the most prestigious affiliations for trial attorneys. All members must meet a list of professional requirements as well as extol the virtues of civility, integrity, and professionalism. The local Fort Lauderdale Chapter of ABOTA is comprised of only 98 select members of the legal community.

Founded in 1958, ABOTA is a national association of experienced trial lawyers and judges. The organization and its members are dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. Further, ABOTA is committed to preserving the independence of the judiciary, recognizing that judicial impartiality and fairness protect against the whims and demands of the government and special interests.

***

Joshua Canton Earns Board Certification in Civil Trial Law

Joshua Canton, managing partner of the firm's Tallahassee office, has achieved Board Certification in Civil Trial Law by The Florida Bar's Board of Legal Specialization and Education. Board certification identifies lawyers with specialized knowledge, skills and proficiency, as well as a reputation for professionalism and ethics. Board certification is the highest level of recognition by the Florida Bar. Of Florida's more than 107,000 lawyers, less than 1% are board certified in Civil Trial Law.

Joshua practices in the area of general civil litigation, and his trial practice has been devoted to wrongful death, products liability, negligent security, construction defect, premises liability, professional malpractice, and trucking/automobile liability. He also represents insurance companies in first party litigation and coverage disputes in casualty, environmental, and professional liability claims. Joshua also has experience defending claims involving fraternities and sororities. He practices in both State and Federal Court throughout Florida and Georgia.

***

Neil Ambekar Appointed as Vice Chair to Florida Bar Committee

Neil Ambekar, a partner in the firm's Orlando office, has been reappointed as Vice Chair of the Workers' Compensation Rules Advisory Committee. The scope and function of the Workers' Compensation Rules Advisory Committee is to carry out the mandate of the Florida Bar concerning the proposal of new rules of procedure and changes to existing rules.

Neil Ambekar represents employers and carriers in workers' compensation matters, including catastrophic claims, heart/lung bill claims, and dependency claims. He is board certified in Workers' Compensation Law, and rated AV Preeminent by Martindale-Hubbell.

***

Conroy Simberg Elects New Two Partners

Conroy Simberg, a premier insurance and litigation defense firm with offices in Florida and Georgia, has elected two attorneys to partnership.

Lindsay S. Katz| West Palm Beach

Lindsay S. Katz is a partner in Conroy Simberg's West Palm Beach office where she is a member of the firm's General Liability practice. Lindsay's practice is concentrated on the defense of a broad range of general liability, coverage, construction defect, wrongful death, personal injury, professional liability, and commercial litigation matters.

Lindsay earned a juris doctor, cum laude, from Fordham University School of Law in 2004 and a B.A. degree in Political Science and Sociology, summa cum laude, in 2001 from the University of Florida.

Elliott Tubbs III| Fort Myers

Elliott Tubbs III, a partner in Conroy Simberg's Fort Myers office, practices in general liability and casualty, first party property and coverage, premises liability, products liability, automobile litigation, and torts. He has experience in both civil and criminal litigation, including personal injury, class actions, and mass torts.

Elliott earned a juris doctor from Ave Maria School of Law and two undergraduate degrees in accounting and finance from Mercyhurst University.

***

FIRM ANNOUNCEMENTS

33 Conroy Simberg Lawyers Recognized in 2024 Editions of Best Lawyers and Best Lawyers: Ones to Watch

We are pleased to announce that 24 Conroy Simberg lawyers were selected by their peers for inclusion in the 2024 Edition – Best Lawyers in America directory. Additionally, 9 Conroy Simberg lawyers were selected to the Best Lawyers: Ones to Watch list.

Additionally, **Hinda Klein** has been selected as "Lawyer of the Year" in Fort Lauderdale in the area of Appellate Practice. Each year, only a single lawyer in a specific practice area and location is honored with a "Lawyer of the Year" designation.

Hollywood, FL

- **Dale L. Friedman** - Litigation - Insurance
- **Seth R. Goldberg** - Litigation - Insurance; Product Liability Litigation - Defendants
- **Hinda Klein** - Appellate Practice
- **Scott Krevans** - Insurance Law; Product Liability Litigation - Defendants
- **Thomas J. McCausland** - Insurance Law
- **Bruce F. Simberg** - Litigation - Insurance; Product Liability Litigation - Defendants
- **Diane H. Tutt** - Appellate Practice

Jacksonville, FL

- **Tashia Galloway** - Insurance Law; Litigation - Insurance
- **John Viggiani** - Insurance Law; Litigation – Insurance

Orlando, FL

- **Neil A. Ambekar** - Workers' Compensation Law - Employers
- **Michael S. Kast** - Commercial Litigation
- **Rodney C. Lundy** - Insurance Law; Litigation - Insurance
- **Jayne Ann Skrzysowski-Pittman** - Construction Law; Litigation – Construction

Pensacola, FL

- **Millard L. Fretland** - Insurance Law; Litigation - Insurance; Product Liability Litigation - Defendants
- **Christopher E. Varner** - Insurance Law

Tallahassee, FL

- **Michael Bonfanti** - Insurance Law
- **Joshua C. Canton** - Insurance Law; Litigation - Insurance; Personal Injury Litigation - Defendants
- **John Edward Herndon, Jr**. - Insurance Law; Litigation - Insurance; Personal Injury Litigation - Defendants; Product Liability Litigation – Defendants

Tampa, FL

- **Kristan S. Coad** - Insurance Law; Litigation - Insurance
- **Brian Haskell** - Insurance Law
- **Michael Kraft** - Insurance Law; Litigation - Insurance; Personal Injury Litigation – Defendants
- **Nicole F. Soto** - Litigation - Insurance

West Palm Beach, FL

- **Jeff A. Blaker** - Professional Malpractice Law – Defendants
- **Jeffrey K. Rubin** - Litigation - Insurance

"ONES TO WATCH" List

Fort Myers, FL

- **Yasmine Kirollos** - Insurance Law
- **Elliott Tubbs** - Mass Tort Litigation / Class Actions - Defendants

Hollywood, FL

- **Samuel Kugbei** - Litigation - Construction; Product Liability Litigation - Defendants
- **Lauren McEndree** - Commercial Litigation; Litigation - Construction
- **Jared S. Ross** - Insurance Law; Litigation - Construction

Orlando, FL

- **Derek A. Conn** - Litigation - Construction
- **Tylar Heintz** - Insurance Law; Product Liability Litigation – Defendants

Tampa, FL

- **Ryan W. Royce** - Litigation - Construction; Product Liability Litigation – Defendants

West Palm Beach, FL

- **Brittany L. Orlando Weisberg** - Insurance Law

***

TRIAL WINS

Fort Myers Attorneys Obtain Defense Verdict in Construction Defect Case

Cris Casal, partner, and **Glenn Gunsten**, associate, in the Fort Myers office obtained a defense verdict on behalf of a grading subcontractor in a defense and indemnity jury trial on a construction defect claim in Collier County, Florida. The general contractor filed a third-party claim against its subcontractors whose scope of work was purportedly implicated in the underlying suit with the homeowner. The lawsuit was the culmination of six years of litigation in which all of the named subcontractors settled their claims against the general contractor prior to trial, except for the grading subcontractor. The jury deliberated for slightly more than an hour before returning with a defense verdict in favor of the grading subcontractor. The grading subcontractor will now seek to collect attorney's fees and costs stemming from a rejected Proposal for Settlement that was served more than four years ago.

***

Defense Verdict Secured in Negligent Security Case

Miles A. McGrane, IV, and **Tom McCausland**, both partners in our Hollywood office, recently obtained a defense verdict in a negligent security case in Broward County, Florida. Plaintiff alleged that our client, a restaurant located on the Hollywood Beach, was negligent in allowing a man wielding a machete to attack the plaintiff, who was dining at our restaurant at the time. Plaintiff, a US Army Veteran, sustained a laceration to his forearm and alleged that he suffered from debilitating PTSD as a result.

This case was hotly litigated by Mr. McGrane for over 6 years and had resulted in a prior mistrial. At the retrial, Plaintiff asked the jury to award over $3 million dollars for pain and suffering alone. We argued that this incident was neither foreseeable nor preventable as well as argued that Plaintiff does not now suffer from PTSD as a result. After several hours of deliberation the jury returned with a defense verdict.

***

Orlando Attorneys Secure a Favorable Verdict in an Admitted Auto Liability Case

Rod Lundy, partner, and **Tylar Heintz**, associate, both of our Orlando office, secured a favorable verdict in an admitted liability auto jury trial where defense experts testified to existence of an non-permanent injury, and defendants conceded $30,000 of the $179,000 in past medical expenses. As such, the judge granted the plaintiff a directed verdict on causation for the soft tissue injuries but allowed the defense to dispute causation and permanency.

The plaintiff underwent a low back discectomy, foraminotomy, and multiple rhizotomies, and his several doctors opined he needed future back and neck fusions and related care. Additionally, the plaintiff claimed $2 million in future and past medicals, and $8 million in past and future intangibles, asking for over $10 million at trial.

The plaintiff was 23 at time of 2017 accident and sought damages over the next 50 years. The jury awarded only $39,000 in past medical expenses and wage loss with no award of future medical expenses and a finding of no permanent injury.

***

Defense Verdict Obtained in a Georgia Admitted Liability Case

Joshua C. Canton, managing partner, and **Justin B. Hales**, an associate, both in the firm's Thomasville, Georgia office, obtained a defense verdict in an admitted liability case involving a semi-tractor in Spalding County following a three-day jury trial. Plaintiff claimed that the crash caused him to require a reconstruction of his mandible, and he asked for $1.8 million at trial. Defendant argued that Plaintiff's mandible reconstruction was caused by a preexisting condition, and that the plaintiff was not injured in the crash. After two hours of deliberation, the jury returned a full defense verdict.

***

Defense Verdict Obtained in Cast Iron Plumbing Suit

Robert Horwitz, a partner in the West Palm Beach/Hollywood office, and **Jesse Dyer**, an associate with our appellate department, obtained a defense verdict with a finding of no coverage. The carrier had first found coverage during its claim investigation and paid the insured for repairs to his kitchen, after which the insured filed a supplemental claim for payment of tear out of his entire case iron plumbing system and repairs to his entire home.

After litigation ensued, new facts came to light on the original cause of loss which would require the carrier to reverse its coverage position and argue no covered cause of loss. At trial the

TRIAL WINS

Plaintiff argued that the carrier already confirmed coverage, and thus this was simply a denial of a supplemental claim. Plaintiff relied on a plumbing expert who testified that the entire cast iron drain system failed, allowing toxic waste to wick up into the slab of the home causing damage. In opposition, the defense expert showed videos of the plumbing system and identified that all lines, except the kitchen line, were in working order with no leaks. He further confirmed the absence of any "sudden and accidental" loss as required by the policy.

After a four-day jury trial the jury came back and found that the Carrier was correct and there was no sudden and accidental loss to covered property.

***

Tallahassee Attorneys Obtain a Defense Verdict in a First Party Windstorm Case

Joshua Canton, **Michael Bonfanti**, and **Taylor Hansford** from the firm's Tallahassee office recently tried a first party windstorm case in Flagler County. The Plaintiffs argued at trial that the damage to the tile roof and interior of the home was caused by a non-catastrophic windstorm. The Defendant argued that the damage to tile roof occurred due to wear, tear, and/or deterioration. The Defendant also argued the interior damage was excluded from coverage as it was not the result of a wind created opening caused by a peril insured against. The jury found for the Defendant and awarded the Plaintiffs nothing ($0) for repair of the home.

***

Conroy Simberg Attorneys Obtain Defense Verdict

Miles McGrane, IV, a partner in the firm's Hollywood office, along with **Aaron Zeilberger**, an associate in the firm's Orlando office, obtained a defense verdict on behalf of a trucking company and its driver in a personal injury case after a five-day jury trial in Lake County, Florida. The case was bifurcated, and this trial was on liability only. The jury deliberated for only thirty minutes before returning with their full defense verdict.

***

Orlando Attorneys Obtain a Favorable Verdict in an Admitted Liability Auto Case

Rod Lundy, partner, and **Tylar Heintz**, associate, of our Orlando office secured a favorable verdict in Orange County, Florida following a seven-day jury trial.

The defense admitted liability for an automobile accident that resulted in catastrophic injuries to two plaintiffs, one of whom was standing outside their vehicle at the time of the crash. The injuries included a traumatic amputation of a lower extremity to one plaintiff and multiple spinal surgeries to the other.

The Plaintiff sought an award of significant punitive damages, arguing that the Defendant driver was under the influence of alcohol at the time of the crash. The jury awarded compensatory damages but found that no punitive damages were warranted.

***

Cris Casal Obtains Defense Verdict in a Trucking Case

Cristobal A. Casal, managing partner of the firm's Fort Myers office, obtained a defense verdict on behalf of a trucking company and its driver in a personal injury case after a three-day jury trial in Hillsborough County, Florida. Plaintiff was a warehouse employee who suffered significant bodily injuries when the Defendants' tractor-trailer pulled away from the loading dock while it was being unloaded. Defendants argued that the Plaintiff violated his own employer's loading dock policies and procedures when he began unloading the trailer without properly restraining it. The jury deliberated for less than an hour before returning with their defense verdict.

***

Conroy Simberg Attorneys Obtain Defense Win In $161 Million Fire Loss Case

Robert Horwitz, a partner in the firm's West Palm Beach office, along with **Diane Tutt**, an appellate partner in the firm's Hollywood office and **Jared Ross**, an associate in the firm's Hollywood office, recently prevailed with a complete defense verdict after a three-week non-jury trial in Miami-Dade County.

We represented a defendant/cross defendant in a negligence case brought by the owners of the iconic Deauville Hotel in Miami Beach, which claimed $161 million in property damages and lost profits arising from a 2017 fire. Our client was an electrical subcontractor who allegedly caused an overcurrent in the hotel's electrical system. The hotel has since been demolished.

After a three week non-jury trial involving multiple electrical engineers and other experts, the Court, as the finder of fact, found that our client was not negligent and that there was no

causal link between the defendants' actions and the fire. The court also found that the contractor who claimed indemnity against our client could not recover on that claim (which will also resolve a duty to defend claim), because the contractor which hired our client admitted for the first time on the stand that they "erred" and had our client sign the wrong contract.

We now have a claim for fees against the contractor for all defense fees.

***

Fort Myers Attorneys Obtain Defense Verdict in a First Party Property Case

Cristobal Casal and **Elliott Tubbs**, both partners in the Fort Myers office, obtained a defense verdict in a first party property case tried over two days in Lee County, Florida. Plaintiff was a roofing company who claimed that the property was damaged by Hurricane Irma, and that the insurance carrier breached the policy by not providing coverage for the alleged roof damage. Plaintiff demanded the full amount of an entire roof replacement for a roof that was built in 2003. The jury found that the Plaintiff had not met its burden of proving that the roof was damaged within the policy period and returned a defense verdict after deliberating for less than fifteen minutes.

***

Hollywood Attorneys Obtain a Favorable Verdict in an Auto Negligence Case with Admitted Liability

Tom McCausland and **Josh Nathanson,** both partners in the Hollywood office, tried an admitted liability auto negligence case where Plaintiff sustained significant fractures to both wrists with surgery and hardware secured to both wrists. Plaintiff had additional claims of Complex Regional Pain Syndrome and PTSD, which would require treatment for over 50 years following the accident. The defense argued that Plaintiff sustained a permanent injury from an orthopedic standpoint, but received a good result and required no future treatment, and that she did not suffer from Complex Regional Pain Syndrome. The defense stipulated to past medical bills of $126,439.51. The plaintiff's attorney asked the Jury to award $20 million for her injuries and the Defense suggested the jury award $650,000. After deliberating for 3 hours, the jury returned a verdict of $1,465,439.51. There was over $5 million in coverage and there was never a demand of less than the policy limits.

***

Conroy Simberg Attorneys Obtain Defense Verdict in Products Liability Case

Hollywood partners **Seth R. Goldberg, Joshua E. Nathanson**, **Michael J. Paris,** and appellate partner **Hinda Klein** recently obtained a defense verdict in a products liability case in which Plaintiff suffered severe burns while using the defendant's portable generator. The defense argued that the generator had no defect, noting that several hundred of the same generators were sold by the defendant without incident. Despite the fact that Plaintiff told the ER Doctor he was putting gasoline in the generator when it exploded, Plaintiff's attorney asked the jury to ignore this fact and argued that the generator was defective and that is what caused the injuries.

The trial was very contentious and lasted two weeks. Plaintiff asked for $6 million and Seth Goldberg and Josh Nathanson obtained a defense verdict in less than two hours. There was a valid proposal for settlement filed, and the defendant will be seeking fees and costs in this matter.

***

Hollywood Attorneys Obtain Defense Verdict in a Premises Liability Case

Thomas McCausland, partner, and **Lauren McEndree,** associate, in the firm's Hollywood Office, obtained a defense verdict in a premises liability case that was tried over four days in Miami-Dade County. Plaintiff claimed she slipped and fell in the parking lot of the defendant's gas station as a result of an improperly painted parking stripe. The jury ruled for defendant in under fifteen minutes of deliberations having concluded that defendant was not negligent.

***

Workers' Compensation Win

Esther Ruderman, a workers' compensation partner in our West Palm Beach Office, and **Diane Tutt,** an appellate partner in our Hollywood Office, were successful in a significant workers' compensation case involving a teacher whose leg fell asleep while sitting on a chair in the classroom, causing him to fall when he got up, sustaining injury.

Ms. Ruderman was successful in obtaining a favorable ruling from the Judge of Compensation Claims, who found, based on the medical evidence, that the Claimant failed to prove occupational causation by competent substantial evidence. The JCC noted that

there was no evidence presented that the Claimant sat or stood any differently than he would in his non-employment life, and the Claimant testified that he did not stand abruptly. The IMEs on both sides testified that the Claimant's leg going to sleep could have happened at any time, at work or not, and that it was caused by nerve compression.

The Claimant appealed and Ms. Tutt successfully defended the appeal. The First District Court of Appeal wrote a 20-page opinion, analyzing occupational causation, including the "increased hazard" test, noting that it was merely fortuitous that the Claimant's leg fell asleep at work. Sitting in a chair at work met the "but for" test, but that was not the predominant cause, considering the medical evidence that the numbness he experienced, caused by nerve compression, could have happened after sitting on anything, even a toilet. Simply put, there was nothing about the work environment (no hazard) which caused the Claimant to fall.

***

Defense Verdict Obtained in Hurricane Irma Case

Cristobal Casal and **Elliott Tubbs**, both partners in the Fort Myers office, obtained a defense verdict in a first party property case tried over three days in Lee County, Florida. Plaintiffs were the insured homeowners who claimed that their home's shingle roof and a significant amount of the interior of the home was damaged as a result of Hurricane Irma, and that the insurance carrier breached the subject policy of insurance by denying the claim. The jury found that the Plaintiffs had not met their burden of proving that the home was damaged by Hurricane Irma.

***

Fort Myers Attorneys Obtain Defense Verdict in Hurricane Irma Case

Cristobal Casal, managing partner in the Fort Myers office, obtained a defense verdict on behalf of a property insurer in a three-day jury trial in Lee County. The Court previously granted the insurer's partial summary judgment finding Plaintiffs breached the policy of insurance by their failure to promptly report the claim.

Plaintiffs were insured homeowners who claimed the exterior and interior of their property sustained damage as a result of Hurricane Irma. In addition to interior damages, Plaintiffs sought a full roof replacement, citing that more than 25% of the roof was damaged from that one time wind event. Plaintiffs alleged that, despite the failure to promptly report their claim, the insurer breached the policy of insurance through their coverage denial. The jury entered a verdict in favor of the defense after fifteen minutes of deliberation. Defendant filed a Proposal for Settlement that was allowed to lapse. Defendant will now be entitled to pursue recovery of attorney's fees and costs via the filing of a post-trial motion.

***

Jacksonville Attorneys Obtain Defense Verdict in Trucking Case

John Viggiani, managing partner, and **Lissa Dayton**, an associate in the firm's Jacksonville office obtained a defense verdict for our trucking company client and its driver in a three day jury trial in Jacksonville, Florida. The defense admitted responsibility for causing the accident, which involved the defendant driver backing up and hitting the front of Plaintiff's vehicle while she was stopped in traffic. Plaintiff claimed to have crushed her left foot in the accident and to have subsequently developed Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome. Both of Plaintiff's treating physicians indicated the injury to her foot and subsequent problems were caused by the accident and developed over the years following the accident. Neither of Plaintiff's doctors were aware that Plaintiff presented to the Emergency Room three days after the accident and without any indication of any injury or problem with her left foot.

***

Fort Myers Partners Obtain Defense Verdict in a Premises Liability Personal Injury Lawsuit

Cristobal Casal and **Yasmine Kirollos,** both partners in the Fort Myers office, obtained a defense verdict in a premises liability personal injury lawsuit involving a slip and fall at a Naples hotel. The hotel was sued under allegations that it allowed a dangerous condition to exist on an exterior staircase on which Plaintiff alleged that he slipped and fell. Plaintiff was an out-of-town guest who claimed that the hotel's air conditioning units were leaking water out onto the exterior walkway, which then made its way onto the staircase resulting in algae and mold developing on the steps over time. Defendant denied that any such condition existed on the steps or the walkway.

As a result of the alleged fall, Plaintiff sustained a comminuted calcaneal fracture of his left foot which ultimately required subtalar fusion surgery. Plaintiff also claimed to have sustained an aggravation of a pre-existing neck and low back condition. Plaintiff boarded more than $106,000.00 in incurred medical expenses and asked the jury to award him that in addition to past

and future pain and suffering damages. The trial took place over three days in Collier County, Florida. The jury deliberated for a little more than an hour before rendering their verdict in favor of the defense. The hotel will be entitled to pursue its attorneys' fees and costs as there was a Proposal for Settlement served on Plaintiff that was allowed to lapse

***.

Orlando Attorneys Obtained a Favorable Verdict in a Case Involving a Rear-End Collision with Admitted Liability

Rod Lundy, partner, and **Tiffany Miles**, associate, of our Orlando office secured a favorable verdict for our defendant company and its driver in Lake County following a five-day trial. The defense admitted liability for the rear-end collision, which was captured on the company's onboard video system.

Plaintiff claimed permanent aggravation of his previous back herniation and acute tear of his left rotator cuff. Plaintiff underwent surgery for both and his expenses exceeded $200,000. Plaintiff was involved in previous accidents in 2012 and 2013, in which the herniation was initially diagnosed and also alleged some shoulder issues. However, after a few months of treatment in 2013, plaintiff had no additional treatment before our 2017 accident.

Plaintiff asked for the $205,000 in medical bills and almost $700,000 in non-economic damages. The jury awarded plaintiff only $50,000 in medical bills, and found no permanent injury. As such, plaintiff's verdict was for only $50,000.

Plaintiff's pre-suit demand was $500,000. Defendants served a proposal for settlement for $100,000. Defendants' motion for fees and costs is pending.

***

Defense Verdict Obtained in First Party Property Hurricane Irma Case

Cristobal Casal, and **Elliott Tubbs,** both partners in the firm's Fort Myers office, obtained a defense verdict in a first party property case tried over three days in Lee County, Florida. Plaintiff was an insured homeowner who claimed that his home's tile roof was damaged as a result of Hurricane Irma, resulting in interior damage, and that the insurance carrier breached the subject policy of insurance by denying the claim. The jury found that the Plaintiff had not met his burden of proving that the home was damaged within the policy period.

***

First Party Defense Verdict Obtained in Hurricane Michael Trial

Michael Bonfanti and **Joshua Canton**, partners in the firm's Tallahassee office, and their associate **Taylor Hansford**, obtained a defense verdict in a Hurricane Michael first party property case tried over three days in Bay County, Florida. The Plaintiffs argued at trial that their home was rendered a total loss due to structural damage to the pilings caused by the hurricane. The Defendant argued that the home had no structural damage, was repairable, and that it had already paid Plaintiffs the reasonable costs to repair the home prior to litigation. The jury awarded $0.00 for repair of the home. Plaintiffs also failed to secure a verdict above the expired exclusive Proposals for Settlement served upon each Plaintiff, entitling the Defendant to recover its attorney's fees.

***

APPELLATE WINS

Hinda Klein Obtains Reversal of a Directed Verdict on Causation

Hinda Klein, head of the firm's appellate division, obtained a reversal of a directed verdict on causation in a case before the newly-created Sixth District Court of Appeal in Lancheros v. Burke, 2023 WL 4536454 (Fla. 6th DCA July 14, 2023).

The case involved a 24-year-old Plaintiff who was in an accident with our client and claimed to have suffered serious low back injuries. Plaintiff did not complain of back pain in the emergency room, did not seek medical attention for his back pain for over two weeks after the accident, and was previously and subsequently engaged in competitive rowing crew. In addition, Plaintiff consulted a chiropractor before the accident for low back pain and did not complete his course of treatment. The trial court directed a verdict against the defense on the ground that no expert testified the Plaintiff had not suffered some injury in the accident.

On appeal, the Sixth District held that the trial court erred because it did not take into account non-expert and other circumstantial evidence and testimony in the case in considering whether there was a factual dispute on the causation issue. The case has been remanded for a new trial on all issues.

***

Affirmance on Appeal of a Defense Verdict in a First Party Homeowner's Insurance Case Secured

Hinda Klein, appellate partner, recently obtained an affirmance on appeal of a defense verdict in a first party homeowner's insurance case brought by an assignee roofing company in SFR Services, LLC v. Fla. Peninsula Ins. Co., 364 So. 3d 1044 (Fla. 6th DCA 2023).

At trial, which was handled by partner **Robert Horwitz,** the jury returned a verdict for the insurer, finding that the roofing company failed to demonstrate that Hurricane Irma damaged the property's roof.

Plaintiff appealed to the Sixth District Court of Appeal. After oral argument—our firm's first before the new court—the Sixth District affirmed the judgment for the insurer. The Court rejected Plaintiff's argument that it met its burden to prove a loss during the policy period based on the homeowner's testimony that there was damage to his pool screen enclosure as a result of Hurricane Irma. We successfully argued on appeal that, since Plaintiff's estimate was limited solely to replace the property's roof, any damage to other areas of the home were irrelevant to its claim. The jury properly weighed competing expert testimony as to the date of any roof damage and found that the roofing company failed to prove any damage during the policy period.

***

Reversal of Attorney's Fee Award In PIP Case Involving Claim of $.14 In Interest

Hinda Klein obtained a reversal of a trial court's award of an award of over $20,000 in attorney's fees in a PIP suit filed over a mere $.14 cents in statutory interest in attorney fees in a PIP suit filed over pennies of interest in Liberty Mututal Ins. Co. v. Pan Am Diagnostic Servs., Inc., (Fla. 4th DCA 2022).

Plaintiff initially filed suit against Defendant for underpayment of interest in the amount of $0.14. Summary Judgment was granted for Defendant on underpaid interest, and final judgment was entered against Defendant for $0.14 in underpaid interest and $24,028.27 in attorney's fees and costs. Plaintiff neither sought nor was awarded any PIP benefits.

Defendant appealed the judgement for attorney's fees and costs to Plaintiff, as a direct conflict with Florida Statutes 627.428(1) and 627.736(8). The Fourth District agreed with Defendant, stating "the trial court erred in awarding the Provider's attorney's fees because interest owed on a late PIP benefit is not in and of itself a PIP benefit." Litigation over whether interest is due is not a dispute over benefits are owed and thus does not trigger entitlement to attorney's fees.

In short, Plaintiff was not entitled to an award for attorney's fees and costs absent an award for PIP Benefits under Florida Statute 627.736(8).

Chief Justice Klingensmith issued a special concurring position pointing out the amount of time, effort, cost, and judicial recourses expended only for a provider to recover $0.14. According to him this case "was never about the appellee being shorted pocket change" but rather purely for the purposes of procuring attorney's fees.

While the appellate courts have seen numerous suits over trifling amounts, Justice Klingensmith stated that "here the bar has been lowered even further to fourteen cents", and that had the "issue of de minimis been raised in the lower court and on appeal, I would have reversed on that ground as well."

SUCCESSFUL LITIGATION DECISIONS

Conroy Simberg Partners Secure Huge Result in Putative Class Action Matter

Conroy Simberg partners **Dale Friedman**, Hollywood and **Michael Kast**, Orlando defended a putative class action lawsuit where Plaintiff sued Defendant for negligence arising out of two separate gas line strikes during a road improvement project that caused over 100 businesses to temporarily lose gas service.

Plaintiff sought to certify a liability issue class under Florida Rule of Civil Procedure 1.220(d)(4). After complying with a detailed case management order which required early mediation followed by written class fact discovery, class and fact witness depositions and expert witness disclosures including reports and opinions, the Court held an evidentiary hearing on Plaintiff's (third) motion to conditionally certify a liability class action.

Approximately two months after the hearing, the Court entered a detailed order denying Plaintiff's motion for numerous reasons, including failing to meet the requirements for class certification. This order was appealable, however, the parties entered into a settlement agreement where Plaintiff was paid the actual damages it incurred as a result of one of the gas line breaks, signed a full release and filed stipulation of dismissal with prejudice. The plaintiff's initial demand was $15 million, yet the final settlement was for less than $1,500, and their attorneys did not seek any attorney's fees.

***

Jackie Gregory Prevails at Final Hearing

Jacqueline M. Gregory, partner in the firm's Hollywood office, prevailed on behalf of the Employer/Carrier at Final Hearing on a claim where the issue of entitlement to Permanent Total Disability benefits was litigated.

The JCC issued a comprehensive 19-page order outlining the evidence presented. There was a significant amount of medical testimony submitted. In addition, there was live testimony provided by the Employer/Carrier's vocational expert, with another expert via Zoom platform The Judge concluded that based on the medical and vocational evidence, Claimant is able to engage in at least part-time sedentary employment within a 50-mile radius of her residence. Thus, Claimant has not met her burden of proof to establish that she is entitled to permanent total disability benefits as a result of the industrial accident. PTD benefits, penalties, interest, attorneys' fees and costs were denied. Claimant has not worked sufficient quarters to qualify for Social Security benefits, therefore, the indemnity exposure was substantial.

***

Summary Judgment Secured in Slip and Fall Case

Jeffrey Rubin, partner in the firm's West Palm Beach office, recently prevailed on a motion for final summary judgment in a slip and fall case in Volusia County, Florida. The Court found that our client, a painting contractor, did not owe Plaintiff a duty of care. The court also determined that our client did not proximately cause the Plaintiff's alleged damages, injuries or losses.

***

Final Summary Judgment Secured In Trucking Accident Case

John Viggiani, managing partner of the Jacksonville office, and **Jesse Dyer,** appellate associate, recently prevailed on a motion for final summary judgment in a personal injury action arising from a trucking accident in Duval County, Florida, in which Plaintiff was rendered paraplegic. Defendant was an international transportation services company, against whom the plaintiff alleged theories of negligent brokering and vicarious liability. The Court concluded that Plaintiff's vicarious liability claim failed as a matter of law because the entity that brokered the shipment was acting outside the scope of any agency relationship which may have existed with the defendant. The Court concluded that Plaintiff'snegligent brokering claim failed as a matter of law because the defendant did not act as a broker for the specific transaction at issue.

***

West Palm Beach Attorneys Prevail on their AOB Motion to Dismiss

West Palm Beach attorneys **Melissa G. McDavitt** and **Brittany N. Jones**, prevailed on their Motion to Dismiss Plaintiff's Complaint with Prejudice in an Assignment of Benefits (AOB) case.

The Judge granted the Order based upon the requirement to indemnify and hold harmless as well as the written, itemized, per-unit cost estimate. While Plaintiff's counsel argued that hold harmless and indemnify are synonymous terms and therefore both do not need to be included, the Judge found that the Legislature requires both terms by their inclusion in the statute. Additionally, the Judge found that the requirement of work performed to protect, repair, restore, or replace and dwelling was more appropriate to be heard on a Motion for Summary Judgment as more evidence would be needed beyond the four corners of the Complaint to determine Plaintiff's primary purposes for the services rendered.

***

SUCCESSFUL LITIGATION DECISIONS

Tallahassee Attorneys Prevail on Motion for Summary Judgment in Wrongful Death Case

Joshua C. Canton, partner, and **Justin B. Hales**, associate, in the firm's Tallahassee office, recently prevailed on a motion for summary judgment in a wrongful death action where Plaintiff claimed that Defendant committed an intentional tort during the course and scope of Plaintiff's employment, which caused the decedent to contract COVID-19 and perish in Leon County, Florida. Mr. Canton and Mr. Hales successfully argued Plaintiff was not a survivor under the wrongful death act, therefore, and had no claim.

***

Summary Judgment Secured in Homeowner's Insurance Case

Associates **Jesse Dyer** and **Augusto Vaccaro** recently prevailed on a motion for final summary judgment in a homeowner's insurance case in Miami-Dade County, in which Plaintiffs alleged that the insurer breached the insurance policy by failing to make payment for property damage resulting from a plumbing failure. The Court agreed with the insurer that a $10,000 sublimit applied to the entirety of Plaintiffs' insurance claim, and that coverage under the sublimit had been exhausted. Plaintiffs contended that the $10,000 sublimit did not apply because the plumbing failure resulted in mold, but the Court rejected this argument both because there was not any timely, competent evidence to show mold damage, and Plaintiffs' mold theory was not alleged in the Complaint.

***

Summary Judgment Secured in a Trip and Fall Case

Associate **Tylar Heintz** of our Orlando office obtained summary judgment for a residential homeowner in a trip and fall sidewalk case in Orange County, Florida. Plaintiff alleged he tripped due to underground tree roots buckling the concrete sidewalk adjacent to the homeowners' residence. Plaintiff brought suit against the homeowners, the HOA, the management company, and Orange County.

The Court agreed with Mr. Heintz's argument that a property owner has no duty to maintain or repair a public sidewalk, and therefore the Court granted final summary judgment in favor of the Defendant homeowners.

***

Summary Judgment Granted in a Late Reported Irma Hurricane Case

William M. "Bill" Mitchell, Sr., partner in the firm's Tampa office, recently prevailed on a motion for summary judgment in a late reported Hurricane Irma claim in Collier County. The Insurer will now be seeking an award of fees and costs as the result of an expired proposal for settlement.

Bill practices in the first party property division in the firm's Tampa, practicing primarily in the areas of first and third party property loss disputes and property coverage matters. Mr. Mitchell and his team represent a multitude of insurance carriers handling both litigated claims and pre-suit investigations across the state.

***

Summary Judgment Obtained In Homeowner's Insurance Case

Associates **Jesse Dyer** and **Noelia Vaccaro** recently prevailed on a motion for final summary judgment in a homeowner's insurance case in Miami-Dade County, in which Plaintiff alleged that the insurer breached the insurance policy by failing to make payment for mold testing. The Court agreed that the insurance policy only provided coverage for mold testing to the extent there was reason to believe mold was present, and Plaintiff's affidavits failed to create a genuine issue of material fact because they were conclusory in nature.

***

Summary Judgment Obtained in Hurricane Irma Claim

Michael Bonfanti, and **Taylor Hansford** of the firm's Tallahassee office, prevailed on a motion for summary judgment in a late reported Hurricane Irma claim in Indian River County. The Defense argued that Plaintiffs breached the policy by failing to timely report the underlying loss, and submit a timely Sworn Statement in Proof of Loss to the insurance company. The Court agreed that the insurer was prejudiced by Plaintiffs' breach of their post-loss duties, and therefore, the insurer was entitled to summary judgment because it could not make a reasonably informed coverage determination.

***

Tiffany Miles Wins a *Daubert* Motion

Orlando associate attorney, **Tiffany Miles**, recently won a "Daubert" Motion, striking a plaintiff's tire manufacturing and design engineer expert with over thirty years of experience in an auto negligence case pending in Volusia County, Florida. Ms. Miles deposed the expert engineer and composed the motion, arguing that under Florida Statute 90.702(1), the expert had come to conclusions that were speculative, bore no relation to the facts of the case, were not based upon "sufficient facts or data" to

stand alone, and were rife with inadmissible "inference stacking."

After an evidentiary hearing with a proffer by Plaintiff and cross-examination of the tire expert, the Court granted defendant's motion in full, finding the expert had not relied upon the facts of the sufficient to meet the standard of admissibility of expert testimony. The Court refused to admit any testimony by the expert at trial.

***

Summary Judgment Obtained in Premises Liability Case Involving Electrical Cables

Tampa associate **Eric Faulkner** secured a summary judgment victory in a premises case involving a fall over electrical cables between vendor stalls at a public event. Plaintiff, who used adaptive devices, including a motorized scooter, hit the ramp covering the cables, fell, and sustained significant orthopedic injuries.

Relying on language in contract between our vendor client and the property owner, we successfully argued that no reasonably jury could conclude the vendor had control over the equipment/areas at issue and therefore it owed no duty to prevent Plaintiff's accident. The issue came down to whether possession was enough to trigger a duty or if you needed possession plus control (or ability to control) - we argued the latter. The Court agreed and granted summary judgment for our client.

***

Orlando Attorneys Obtain Summary Judgment for an Automobile Insurer in a Declaration Action

Orlando attorneys **Rod Lundy** and **Tiffany Miles** recently obtained summary judgment in Hillsborough County for an automobile insurer in a declaration action, where the court found no duty to defend or indemnify an insured for a motor vehicle accident. The insured was driving a rented U-Haul when he struck a vehicle occupied by six passengers, all of whom claimed injuries. The carrier denied coverage, alleging the rented U-Haul was not covered under the insured's automobile insurance policy. The insured retained counsel after the six individuals in the opposing vehicle filed claims. Mr. Lundy and Ms. Miles filed a declaratory judgment action, contending the rented U-Haul as a commercial vehicle was not a "covered" "insured" or "listed" auto under the policy, as it was a private passenger vehicle with "a cab separate from the cargo area;" they further contended the insured's business use of the U-Haul fell within the policy's "commercial enterprise" exclusion. Several corporate and individual depositions preceded the carrier's motion, which was opposed by the insured. The motion for summary judgment was granted in full, and a final judgment was entered on behalf of the insurance company.

***

Ryan Royce Prevailed on a Motion for Summary Judgment in a Declaratory Action

Ryan W. Royce, an associate in the firm's Tampa office, prevailed on a motion for summary judgment in a declaratory judgment action brought by Plaintiff against a condominium association after its board voted for the removal of the onsite sewer system and construction of a new sewer lift station to be able to connect to county sewer lines. Plaintiff objected to construction of the new sewer lift station and filed a declaratory judgment action seeking a determination that a majority unit owner vote was required and that the granting of an easement in favor of the county should be deemed void as a matter of law. In our motion for summary judgment, we successfully argued that although an easement is a real property interest in land, it is a right distinct from ownership of the land itself and does not confer title to the land on which the easement is imposed. Further, because an easement is a right of use and does not transfer title, the Association had the power to grant sewer related easements to the County without a unit owner vote. The trial court agreed with the defense and granted final summary judgment for the defendant. The defendant is now pursuing recovery of its attorney's fees and costs.

***

Conroy Simberg Attorneys Secure Summary Judgment in a Premises Liability Case

Cris Casal, a partner in the firm's Fort Myers office, along with **Douglas Kemp** and **Samuel Spinner**, associates in Fort Myers and Hollywood respectively, prevailed on a motion for summary judgment in a premises liability case in which Plaintiff tripped and fell over a tree root in a landscaped area of a commercial plaza. Plaintiff testified that she was heading to retrieve the mail for her employer when she crossed through a landscaped area and stepped on a tree root causing her to "roll her ankle" and fracture her foot. The Defendant landscaping company moved for summary judgment arguing that the tree root was open and obvious and that there was no duty owed, nor breached as to the condition in question. The trial court agreed with the defense and granted final summary judgment for the defendant. The defendant is now pursuing recovery of its attorney's fees and costs pursuant to an expired proposal for settlement.

***

SUCCESSFUL LITIGATION DECISIONS

Conroy Simberg Attorneys Prevail on Motion for Summary Judgment in Wrongful Death Case

Joshua C. Canton, a partner in the firm's Tallahassee, Florida office, **Justin B. Hales**, an associate in the firm's Tallahassee, Florida office, and **Jesse Dyer**, an associate in the firm's appellate department, recently prevailed on a motion for summary judgment in a wrongful death premises liability negligent security claim in Madison County, Florida where they argued that the Defendant apartment complex breached no duty owed to the Plaintiff because the incident was not foreseeable, and, even if there was a breach of duty, the Defendant was not the proximate cause of decedent's death.

***

Summary Judgment in Wrongful Death Case Obtained

Dale L. Friedman, a partner in the firm's Hollywood Office, and **Diane H. Tutt**, an appellate partner in the firm's Hollywood Office, recently obtained summary judgment in a wrongful death case brought by the personal representative (mother) of an intellectually disabled adult who was residing in a group home and was struck and killed by a vehicle as he walked across a roadway to get a snack. The Plaintiff was represented by a very well respected personal injury law firm in Palm Beach.

The decedent was never ruled incompetent and was in a non-lock down group home at the request of his mother. His mother, as personal representative, sued the group home for negligence related to her son's care and supervision, and sued our client, a Medicaid waiver support coordinator, who was responsible for obtaining approval for supports and services for the decedent from the Agency for Persons with Disabilities. The allegations against our client were that the support coordinator failed to ensure that the decedent obtained a behavioral assessment which the Plaintiff claimed could have resulted in the decedent not leaving the group home at night and not walking across a busy roadway.

The court ruled that because our client had not been the support coordinator for at least a year before the accident, it did not have a duty of care, pursuant to case law holding that a defendant has a duty of care only if the defendant has the ability to "control the risk." The court also ruled that, even if there was a duty, there was no breach by our client.

***

Motion for Summary Judgment Granted in Hurricane Irma Case

Noelia Vaccaro, an associate in the firm's Hollywood office, recently prevailed on a motion for summary judgment on a first-party property claim that was originally reported as a loss caused by a faulty sprinkler head. Several years later, and in the middle of the case, the plaintiffs changed the cause of loss to Hurricane Irma. The trial court granted final summary judgment for the defense, finding that the evidence showed that Hurricane Irma did not create an opening in the property's exterior walls that allowed for interior water intrusion

***

Pensacola Partners Prevail in Construction Arbitration

Pensacola partners **Chris Varner** and **Laura LaBianca Puente** prevailed in a binding 4-day arbitration. The matter involved allegations of construction defects relating to remediation of windows and stucco on a multi -story condominium complex located on Mexico Beach. Claimants were seeking 2.4 million. Chris and Laura successfully asserted a statute of limitations defense. Claimant has been ordered to pay defense costs.

***

Hollywood Attorneys use Daubert Standard to Dismiss Case Before Trial

Noelia Vaccaro, an associate in the Hollywood Office, and appellate associate, **Sam Spinner**, were recently successful in a first-party property Tropical Storm Gordon claim. The Defense filed a Daubert motion to strike the plaintiff's expert. The court agreed that the plaintiff's expert testimony did not meet the Daubert standard as the methodology was conclusory. As a result of the Court granting defendant's Daubert motion, the plaintiffs dismissed the action on the eve of trial.

***

Tallahassee Attorneys Prevail on Motion for Summary Judgment in Premises Liability Case

Joshua C. Canton, a partner in the firm's Tallahassee, Florida office, along with **Justin B. Hales,** an associate in the firm's Tallahassee, Florida office, recently prevailed on a motion for summary judgment in a premises liability slip and fall accident in Leon County, Florida where they argued that Plaintiff was a trespasser, and the Defendant breached no duty owed to the Plaintiff.

***

SUCCESSFUL LITIGATION DECISIONS

West Palm Beach Attorneys Successfully Prevailed on their Motion for Final Summary Judgment in "Out of State Coverage" PIP Matter

West Palm Beach attorneys **Melissa McDavitt** and **Madison O'Connell** prevailed on their Motion for Final Summary Judgment. In granting the Defendant's Motion, the Court found the policy of insurance is not ambiguous as to the "Out of State Coverage" provision, nor has the Plaintiff articulated any ambiguities. The "Out of State Coverage" provision is clearly and purposefully placed under the Liabilities portion of the policy. The "Out of State Coverage" provision is not applicable to the policy at large and is not specifically applicable to the PIP Statute.

***

Motion for Summary Judgment Granted in a Georgia Motor Vehicle Accident

Joshua C. Canton a partner in the firm's Thomasville, Georgia office, along with **Justin B. Hales**, an associate in the firm's Thomasville, Georgia office, recently prevailed on a motion for summary judgment in a pedestrian versus motor vehicle accident in Athens-Clarke County, Georgia where they argued that Plaintiff walked into oncoming traffic without regard for the right-of-way. An offer of settlement was served by Defendant resulting in a claim against the Plaintiff for defense fees and costs.

***

Summary Judgment Obtained in a Premises Liability Case

Cristobal Casal and **Yasmine Kirollos,** partners in our Fort Myers office, obtained summary judgment in favor of a retail store in a premises liability lawsuit in which Plaintiff alleged that she suffered a slip and fall while at the store. Plaintiff claimed she fell due to a spill involving a blue liquid in one of the main aisle ways. The lawsuit was initially filed in state court, however, we removed the case to the United States Middle District Fort Myers Division citing diversity of jurisdiction. We argued that Plaintiff failed to prove that the store had actual or constructive notice of the substance under the requirements of the state's transitory foreign substance law. The federal court agreed in entering summary judgment and found Target to be the prevailing party in this matter.

***

Melissa McDavitt and Brittany Jones Successfully Prevailed on their Motion for Final Summary Judgment in Hurricane Irma Case

West Palm Beach attorneys **Melissa G. McDavitt** and **Brittany N. Jones,** prevailed on their Motion for Final Summary Judgment on a late reported hurricane Irma claim. The court, in granting the Defendant's Motion found Plaintiff failed to rebut the presumption of prejudice to the Defendant as a result of their late reporting.

***

Melissa McDavitt and Sarah Kippers Successfully Prevailed on their Motion for Final Summary Judgment in PIP Case

West Palm Beach attorneys **Melissa McDavitt** and **Sarah Kippers** for successfully prevailing on their Motion for Final Summary Judgment. In granting the Defendant's Motion, the Court found the recent Supreme Court ruling in MRI Associates of Tampa, Inc. v. State Farm Mutual Auto. Ins. Co., NO. SC 19-1390 to be determinative of the issues and held there is nothing in the PIP statute or the Policy that would require an insurer to pay in excess of 80% of a submitted charge.

***

Premises Liability Case Results in Summary Judgment Victory

Aaron B. Zeilberger, an associate in the firm's Orlando office, recently prevailed on a Motion for Final Summary Judgment in a Premises Liability/Slip and Fall Case on behalf of a hotel. The Defense argued that there was insufficient evidence to prove the existence of a dangerous condition caused by a transitory foreign substance on the floor, and that the plaintiff could not provide enough evidence to demonstrate negligence on the part of the Defendant. The Court agreed and granted Summary Judgment in the Defendant's favor. The court reserved jurisdiction to consider attorney's fees and costs

***

Tallahassee Attorneys Prevail on Florida's "Stand Your Ground" Law

Joshua C. Canton, a partner in the firm's Tallahassee, Florida office, along with **Justin B. Hales**, an associate in the firm's Tallahassee, Florida office, recently prevailed on a Motion to Declare the Defendant Immune from Civil Action pursuant to Florida's "Stand Your Ground" Law. Mr. Canton and Mr. Hales successfully argued that while there was an altercation at Defendant's place of employment, Defendant had no duty to retreat, Plaintiff's spittle and forehead hit the Defendant and placed the Defendant in imminent fear for his safety, and Defendant was immune from prosecution as he was authorized to stand his ground and use non-deadly force when he struck Plaintiff.

***

SUCCESSFUL LITIGATION DECISIONS

Seth Goldberg Prevails on Motion for Summary Judgment in a Slip-and-Fall Case

Seth Goldberg, a partner in the firm's Hollywood office, prevailed on a motion for summary judgment in a slip-and-fall case involving a transitory foreign substance. The plaintiff testified that she did not see the liquid before she fell, did not know how long it was on the floor, and did not know how it got on the floor.

The defense moved for summary judgment, arguing the plaintiff could not meet her burden to prove that the business owner had actual or constructive knowledge of the substance before the accident as required by Florida Statute section 768.0755. The plaintiff argued that the defendant must have known of the substance because there was an employee in the area where she fell. The trial court rejected this argument, agreeing with the defense that there was no evidence the employee spilled the liquid on the floor or knew about it before the accident. Therefore, the trial court granted final summary judgment for the defendant.

***

Motion for Summary Judgment Granted in a Late Reported Hurricane Case

William M. "Bill" Mitchell, Sr., partner in our Tampa office, was recently successful on a Motion for Final Summary Judgment. The Court granted the Motion in favor of the insurer finding that as a result of the Insureds' late reporting of their claim for Hurricane damages the insurer was entitled to a presumption of prejudice and that upon review of the evidence presented, the Insureds had failed to rebut the presumption of prejudice. As such, there was no coverage for the Insureds' loss and summary judgment was appropriate. The Insurer will now be seeking an award of fees and costs as the result of an expired proposal for settlement.

***

Tallahassee Attorneys Successfully Obtain Final Summary Judgment in Employment Discrimination and Breach of Contract Lawsuit

Joshua Canton, managing partner of the firm's Tallahassee, office, along with **Justin B. Hales**, an associate in the firm's Tallahassee, office, recently prevailed on a Motion for Final Summary Judgment in a fourteen count employment discrimination and breach of employment contract suit, wherein Plaintiff alleged she was terminated due to her gender and pregnancy status and was subject to a hostile work environment. The Defense argued that Plaintiff had executed a valid release in Defendant's favor which related to the nine contractual counts. The Defense further argued that Plaintiff was terminated for legitimate non-discriminatory non-pretextual reasons. After a ten hour evidentiary hearing the Court granted final summary judgment in the Defendant's favor.

***

Offices Throughout Florida and Thomasville, Georgia

Hollywood
3440 Hollywood Boulevard
Second Floor
Hollywood, FL, 33021
(954) 961-1400
Fax (954) 967-8577

Pensacola
125 West Romana St.
Suite 320
Pensacola, Florida 32502
(850) 436-6605
Fax (850) 436-2102

West Palm Beach
1801 Centrepark Drive East
Suite 200
West Palm Beach, FL 33401
(561) 697-8088
Fax (561) 697-8664

Tallahassee
Monroe Park Tower
101 North Monroe Street,
Suite 120
Tallahassee, FL 32301
(850) 383-9103
Fax (850) 383-9109

Orlando
Two South Orange Avenue
Suite 300
Orlando, Florida 32801
(407) 649-9797
Fax (407) 649-1968

Tampa
201 E. Kennedy Boulevard
Suite 900
Tampa, Florida 33602
(813) 273-6464
Fax (813) 273-6465

Fort Myers
12730 New Brittany Blvd
Suite 300
Fort Myers, Florida 33907
(239) 337-1101
Fax (239) 334-3383

Jacksonville
4190 Belfort Road
Suite 222
Jacksonville, FL 32256
(904) 296-6004
Fax (904) 296-6008

Miami
5201 Blue Lagoon Drive
Office Number 925
Miami, Florida 33126
(305) 373-2888
Fax (954) 967-8577

Naples
1415 Panther Lane
Suite 389
Naples, FL 34109
(239) 263-0663
Fax (239) 263-0960

Thomasville, Georgia
126 North Broad Street
Thomasville, GA 31792
(229) 236-6126
Fax (229) 226-5744