Law Bulletin from

CONROY SIMBERG

VOLUME 17, NUMBER 1 WINTER 2015

In This Issue:

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LIABILITY CASE LAW UPDATES

Florida Supreme Court addresses scope of "Coverage B", Employers' Liability Coverage, finding it mutually exclusive of Workers' Compensation coverage

On December 4, 2014, the Florida Supreme Court issued its opinion in Morales v. Zenith Ins. Co., Case No. SC13-696, a case certified to the Court by the federal Eleventh Circuit Court of Appeals. In Morales, Santana Morales, Jr. was crushed to death by a palm tree while working for his employer Lawns Nursery. His widow settled his workers' compensation claim with Lawns and its workers' compensation/employers' liability insurance carrier, Zenith. The settlement contained a release expressly electing workers' compensation as Morales' sole remedy under the Zenith policy.

Thereafter, in a separate wrongful death lawsuit which had been pending at the time of the workers' compensation settlement, Morales' Estate alleged that Lawns had been negligent in causing Morales' death. Lawns did not appear in Circuit Court and the state Circuit Court ultimately entered a default judgment against Lawns for $9.25 million. After Zenith refused to pay that judgment, Morales sued Zenith alleging that it breached its employers' liability policy, and the breach of contract case was removed to federal court. The federal court found that the employers' liability policy's workers' compensation exclusion barred coverage for the claim and entered a summary judgment in favor of the carrier.

On appeal, the Eleventh Circuit concluded that Florida law is unsettled as to whether the Estate would have standing to sue Zenith under the employers' liability portion of the policy, but also found that the workers' compensation exclusion barred the negligence claim against Zenith's insured Lawns, and further found that the settlement releasing Lawns and Zenith prevented the Estate from collecting the tort judgment from Zenith. Because one of the issues in the case was unsettled under Florida law, the Eleventh Circuit certified the case to the Florida Supreme Court for its resolution.

The first issue was whether the Estate had standing under the liability policy to sue Zenith for breach of contract, and the Supreme

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Court agreed with the Eleventh Circuit that it did. The Court reasoned that the Estate was a judgment creditor with standing to sue as a third-party beneficiary of the coverage that would have otherwise been available to Morales. The Court observed that Florida's nonjoinder statute expressly contemplated just such a suit, after the underlying tort action against an insured had concluded.

The second issue considered by the Court was whether the workers' compensation exclusion in the employers' liability insurance policy excluded coverage for the Estate's claim against Lawns. The Court found the exclusion for "any obligation imposed by a workers compensation . . . . law" clear, unambiguous and enforceable to warrant Zenith's denial of liability coverage under its policy. The Court explained that employers' liability coverage was designed to be a "gap-filler", providing the employer with insurance protection for those rare cases in which an employee has a right to sue in tort regardless of workers' compensation immunity. In this case, however, because Lawns was only sued in simple negligence, and not a willful or intentional tort for which there is no workers' compensation immunity, the Estate had no right to sue Lawns for its alleged negligence, because its sole remedy was workers' compensation benefits.

In an effort to avoid what would appear to be an absolute bar to collection of the judgment against Zenith, the Estate's counsel creatively argued that Zenith could not avoid coverage for the tort judgment because the duty to pay that judgment was imposed by law, rather than an "obligation imposed by workers' compensation law", which would have been covered under the workers' compensation portion of the Zenith policy. In other words, the Estate took the position that since that judgment was not covered under workers' compensation, it must necessarily be covered under the employers' liability section of the policy. The Supreme Court disagreed, finding that regardless of whether a claimant actually collects workers' compensation benefits under an employer's policy, where a claim would ordinarily have fallen within the scope of workers' compensation, it is excluded under the employers' liability portion of the policy, regardless of whether any workers' compensation benefits are actually paid. Thus, for example, if an employer unlawfully fails to obtain the required workers' compensation coverage, its failure to do so does not require its liability carrier to pay a claim that would have been covered by a workers' compensation policy; rather, it is the nature of the claim itself, and not the nature and scope of insurance coverage, which determines whether there is liability coverage for an employee's claim against his or her employer. The Court clarified that in this case, Morales' negligence claim against the decedent's employer was clearly within the scope of the workers' compensation law as well as Zenith's workers' compensation coverage, and therefore, it was necessarily excluded under Zenith's employers' liability coverage. Put another way, the two coverages are mutually exclusive.

The final question addressed by the Court was whether the Release signed by Morales' widow when she settled her workers' compensation claim against Lawns and Zenith barred the Estate's collection of the tort judgment from Zenith. Once again, the Court answered this question in the affirmative. The release provided, in part, "this settlement and agreement shall constitute an election of remedies by the claimant with respect to the employer and the carrier as to the coverage provided to the employer." The Court found this release absolutely clear in constituting an election of the Estate's remedies for Morales' death, regardless of whether there might have been liability insurance coverage for the claim. Further, because Zenith itself was a party to the

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agreement and was specifically released from liability, Zenith was entitled to enforce the terms of the settlement to avoid any obligation to pay the judgment rendered against Lawns.

Undaunted, the Estate argued that the release was not binding on Mrs. Morales because she signed the agreement in her capacity as parent and guardian of her four minor children, and not in her individual capacity or her capacity as the Personal Representative of the Estate. Further, since the probate court did not approve the settlement and the children were not represented by a guardian ad litem, Mrs. Morales could not have waived her children's tort claim. The Supreme Court disagreed, finding that since the workers' compensation law compensates an employee's beneficiaries, including the spouse and children, and does not require probate court approval or the appointment of a guardian ad litem, there was no reason why the workers' compensation settlement would not be binding on both Mrs. Morales and her children. The fact that Lawns was defaulted and a judgment rendered against it did not preclude Zenith from enforcing the remedy that Mrs. Morales elected. Accordingly, the Supreme Court returned the case to the Eleventh Circuit for final disposition, which will now affirm the federal Circuit Court's judgment in Zenith's favor.

* * *

Trial court did not err in permitting defense expert to inspect decedent's cell phone data from date of accident

In Antico v. Sindt Trucking, Inc., 148 So. 3d 163 (Fla. 1st DCA 2014), the First District addressed the issue of whether and when a party may seek to inspect another party's cell phone. In this case, the trial court permitted the defendant's expert to inspect the decedent's cell phone data from the date of the accident in which the decedent was killed. The appellate court rejected the Estate's argument that the inspection would constitute a violation of the decedent's privacy rights.

The Court found that the defense was not entitled to inspect the phone and its data, including call records, location information and social media postings, simply because the defense asserted that the decedent was on her cell phone in her car at the time of the accident, nor was the defense entitled to a "fishing expedition." Rather, the Court found that in this case the defense already had cell phone records showing that the decedent had been texting just before the accident and might have used her cell phone at the time of the accident. In addition, the defense argued, if the phone was GPS-enabled, it could show whether, for example, the decedent stopped at a stop sign and where she may have been texting from. The Court further noted that the trial court was careful to tailor its discovery order to minimize the impact on the decedent's privacy interests and accordingly, the appellate court declined to quash the discovery order on review.

* * *

Family vehicle exclusion for Uninsured Motorist benefits does not conflict with Section 627.727(3) when the exclusion is applied to a Class I insured and an insured claimant may reject stacking option on behalf of all claimants

The Florida Supreme Court addressed two issues certified as matters of great public importance in Travelers Commercial Insurance Company v. Harrington, 39 Fla. L Weekly S647 (Fla., Oct. 23, 2014). In this case, the Court addressed (1) whether the Family Vehicle Exclusion for UM benefits conflicts with Section 627.727(3) when the exclusion is applied to a Class I insured who seeks UM benefits after a single-vehicle accident in which the insured vehicle was being driven by a Class II permissive user who is otherwise underinsured and (2) whether UM benefits are stackable under Section 627.727(9) when those

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FOCUS ON WORKERS' COMPENSATION

Conroy Simberg represents employers, self-insureds, insurance companies, TPAs, excess carriers and public entities in all types of workers' compensation actions. A number of our attorneys are board certified by the Florida Bar in workers' compensation law and we effectively move cases through the legal system quickly, while vigorously defending our clients' interests in court.

Our legal team handles all aspects of workers' compensation claims, from initial investigation to file closure. We aggressively defend our clients' positions and push for quick settlements when it is in the best interest of the Employer and Carrier. When a trial is necessary, our attorneys combine their legal knowledge and courtroom experience to achieve winning results for our clients.

Our workers' compensation team prides itself on its extensive knowledge and skills with respect to the legal and medical issues which co-exist in every workers' compensation claim. Our experience extends to handling even the most catastrophic of injuries including, but not limited to, spinal cord injuries, traumatic brain injuries, exposures to deleterious substances, sick-building syndrome, and infectious diseases, such as AIDS/HIV. Moreover, our Firm has a unique and in-depth medical and legal understanding of Florida's two first responder statutes: (a) the "heart and lung" statute covering heart diseases, hypertension and tuberculosis; and (b) the "communicable disease" statute covering Hepatitis C, meningococcal meningitis and tuberculosis.

Conroy Simberg is passionately committed to the war against fraud perpetrated by workers, the war against drug abuse in the workplace, and determined to rid these claims from the system. With respect to the former, our Firm focuses on developing aggressive and successful defenses to such fraud claims. With respect to the latter, Conroy Simberg has decades of experience partnering with expert toxicologists and medical professionals to prevail in proving that workplace accidents were caused by the employee's impairment or intoxication.

As an indicator of Conroy Simberg's extensive legal knowledge and experience, our Firm has been a protector of the construction industry with our intimate knowledge of the inter-relationships between general contractors and subcontractors in coverage issues associated within the construction claims. Akin to the special needs required to defend the construction industry, our Firm has established a partnership in defending Florida's agricultural industry. Additionally, Conroy Simberg recognizes the growth of leasing companies and PEOs as becoming among the largest employers in the State and is experienced in representing the special needs and laws governing such entities. Another noteworthy partnership is our firm's longstanding relationship with the Florida Workers' Compensation Insurance Guaranty Association. (FWCIGA).

Our workers' compensation team at Conroy Simberg employs a strong understanding of the diverse foundational issues associated with workers' compensation claims, such as immunity, jurisdiction, statute of limitations, other affirmative compensable defenses and Coverage B. Whether the issue is causation, apportionment, permanent total disability, subrogation, or even representation in the most dangerous and contentious of litigations associated with Aguilera suits, our Firm provides a full service and zealous defense in every workers' compensation claim, irrespective of the legal and/or medical issues involved.

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benefits are claimed by an insured policyholder where a non-stacking election was made by the policy's purchaser but not the insured claimant. The Supreme Court answered both certified questions in the negative.

The claimant, Crystal Harrington, was involved in a single-car accident while she was riding as a passenger in a car owned by her father and driven by a non-family member Joey Williams. The car was one of three family vehicles insured by Travelers and Harrington's mother was the named insured on the policy, which provided both liability and Underinsured Motorist coverage. Williams had his own liability policy with Nationwide. Because he was driving with the permission of an insured, Williams was a Class II insured and Harrington was a Class I insured.

After Harrington was injured, she collected Nationwide's policy limits, which did not satisfy her damages. Travelers also tendered its liability policy limits but denied Harrington's UM claim because the vehicle in which she was traveling was not an "uninsured motor vehicle" as defined in the policy, because the policy contained a "family vehicle exclusion."

Harrington sued Travelers seeking payment of stacked UM benefits despite the fact that her mother, the named insured who purchased the policy, expressly selected and paid for non-stacking UM coverage. Harrington asserted that her mother's waiver did not apply to her claim and that each insured under the policy was entitled to elect stacking or non-stacking coverage.

In addressing the first certified question, the Supreme Court found that Florida Statute 627.727(3)(b) provides that the term "uninsured motor vehicle" includes an insured motor vehicle when the liability insurer thereof has provided bodily injury liability limits which are less than the claimant's damages, in accordance with the policy's terms and conditions. The Court found that the "family vehicle" exclusion in the policy was permissible and did not conflict with the statute's general definition of "uninsured motor vehicle" because the statute defined that term with respect to the "terms and conditions" of the policy such that Harrington's claim was excluded under the "family vehicle exclusion" set forth in the policy.

With respect to the second certified question, whether UM benefits are stackable under Section 627.727(9), which permits the purchaser of a policy to expressly elect non-stacking UM coverage, the Court found that Harrington's mother's election of non-stacking coverage bound all of the insureds under the policy. The First District had found that because Crystal Harrington did not herself elect non-stacking coverage, she would not be bound by her mother's election because subsection (9) did not contain the words "on behalf of all insureds." The Supreme Court disagreed, finding that the policy itself unambiguously stated that the coverage selection applied to all insureds under the policy. In addition, the Court recognized that automobile insurers have never provided individualized UM coverage and premiums are calculated based on the coverage selected for the policy as a whole. The appellate court's holding that different insureds could have different coverages would render the calculation of a single UM premium impractical and virtually impossible. Therefore, the Supreme Court concluded, the named insured's stacking election was binding on all insureds under the policy.

* * *

In the Fifth District, in contrast to the First District, once an insurer confesses judgment for policy limits, trial court lacked jurisdiction to take any action other than to enter judgment in the amount of UM policy limits

In Geico v. Barber, 147 So. 3d 109 (Fla. 5th DCA 2014), the Fifth District Court of Appeal

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quashed a trial court's order permitting the claimant, a UM insured, to amend its complaint for UM benefits to add a bad faith count after the carrier tendered its policy limits. The appellate court held that the trial court only had jurisdiction to enter a judgment on Geico's confession of judgment, by virtue of its tender of policy limits, and did not have jurisdiction to permit the plaintiff to pursue a new and different cause of action within the same lawsuit. The Court held that the insured was free to litigate the amount of his damages in a subsequently filed bad faith action.

The Fifth District's decision is in conflict with the First District's decision in Safeco Insurance v. Rader, 132 So. 3d 941 (Fla. 1st DCA 2014). In Rader, the First District denied Safeco's Petition for Writ of Certiorari to quash the trial court's order permitting the insured to amend his complaint to add a bad faith claim after Safeco tendered its UM policy limits.

* * *

Insurer liable for sanctions award against the insured in a covered lawsuit

The Third District Court of Appeal, in Geico v. Rodriguez, 39 Fla. L. Weekly D1937 (Fla. 3d DCA Sept. 10, 2014), addressed the issue of whether sanctions levied against an insured defendant during the course of personal injury litigation would be Geico's responsibility, and found that it would. In Rodriguez, the insured was sanctioned for offering false testimony, in which he denied having any vision problems although he was legally blind at the time of the accident and was told by his doctors not to drive. As a result of the insured's false testimony, the trial court struck the insured's pleadings and granted the plaintiff's motion for leave to amend to add a claim for punitive damages. The Court also rendered monetary sanctions in favor of the plaintiff.

During the course of litigation, the insured died and his Estate was substituted as the defendant. After the Court levied sanctions, Geico served the Estate with a reservation of rights letter citing as support for its assertion that there might be no coverage for the sanction the "Fraud and Misrepresentation" provision contained in the "General Conditions" of Geico's policy. Thereafter, the trial court rendered its monetary sanction order and Geico filed suit against the Estate seeking a declaration that there was no coverage for the claim against its insured.

In the meantime, the Estate filed an appeal from the sanction order, but thereafter, the Personal Representative had a dispute with assigned defense counsel. The Estate retained new counsel who dismissed the appeal. Geico offered the Estate substitute counsel, but the Personal Representative would not agree to new counsel unless Geico withdrew its Reservation of Rights. When Geico would not withdraw its reservation, the Estate continued to be represented by counsel chosen by the Personal Representative, rather than substitute counsel offered by the carrier.

The Personal Representative sought coverage for the sanctions rendered against the Estate and entered into a consent judgment with the plaintiff for $750,000, well in excess of the insured's $20,000 policy limits. The trial court entered a final summary judgment on Geico's responsibility to pay the sanctions, finding that its Reservation of Rights letters violated the Claims Administration statute, because they were not sent within thirty (30) days after the insurer had notice of a potential coverage defense, but rather were served well after Geico became aware of the insured's false deposition testimony. In addition, the trial court found that the sanctions constituted a court cost charged against the insured in a covered lawsuit, and that as a result, the sanctions were covered under the terms of the policy.

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On appeal, the Third District found that the "Fraud and Misrepresentation" provision of Geico's policy did not provide Geico a defense to coverage because the provision did not apply to misrepresentations made by an insured during the course of a lawsuit. Rather, the Court found that a misrepresentation contemplated by this provision was one made to Geico, and not to the court during litigation. Therefore, the Court determined that whether the Reservation of Rights letters were timely was legally irrelevant since Geico had no coverage defense in the first instance.

The Court also found that the insured Estate did not breach the duty to cooperate contained in the policy by virtue of its insistence that Geico withdraw its reservation of rights in exchange for the Estate's acceptance of substitute defense counsel. The Estate argued, and the Court agreed, that once Geico issued its Reservation of Rights letter, the insured no longer owed it a duty to cooperate.

Finally, the Court found that under Geico's policy, it was liable to pay "all court costs charged to an insured in a covered law suit." Since the term "all court costs" was not defined or limited under the policy, that provision was broad enough to encompass sanctions levied against the insured for misconduct during litigation. The Court reasoned that Geico could have excepted sanctions from the ambit of its coverage, but it chose not to, and as a result, the Court would not interpret the policy language more narrowly than its clear language warranted.

* * *

Where trial court incorrectly ruled that PIP setoff would be determined post-trial and defense did not present setoff evidence during trial, trial court erred in denying post-trial setoff on the grounds that the defense failed to present evidence of PIP payments during the course of the trial

In Moody v. Dorsett, 149 So. 3d 1182 (Fla. 2d DCA 2014), the Second District reversed the trial court's denial of a PIP setoff from the jury's verdict in a personal injury action arising out of an automobile accident. During the trial, the trial court ruled that the determination of the setoff would be handled post-verdict, and as a result, defense counsel did not present evidence of PIP payments. Thereafter, defense counsel moved to set off the amount of those payments from the jury's verdict, but plaintiff's counsel objected, on the ground that because he did not stipulate to handling the matter post-verdict and the law required that evidence of PIP payments be admitted into evidence before the jury, the Court should deny the setoff. The trial court agreed and entered final judgment in the full amount of the jury's verdict.

On appeal, the Second District found that based on the unique circumstances of this case, even though the law required that the PIP setoff be addressed during trial, the trial court erred in denying the post-verdict motion for setoff. The Court found that defense counsel had a right to rely on the trial court's ruling that it would consider the setoff after trial and that to permit the plaintiff to avoid the setoff would result in a double recovery.

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Trial court erred in requiring the production of attorney-client privileged material in a bad faith action on the grounds that the material did not pertain to the alleged bad faith of the insurer

The Fourth District quashed a trial court order compelling an insurer's production of attorney-client privileged materials in a bad faith action on the grounds that those materials did not pertain to the insurer's alleged bad faith. In Geico v. Moultrop, 148 So. 3d 1284 (Fla. 4th DCA 2014), the Fourth District held that the attorney-client privilege is inviolate absent the applicability of a statutory exception, and there was no exception that would compel production of that material on the ground that it does not relate directly to the alleged misconduct at issue in the litigation.

* * *

Parties did not reach a binding settlement where defendant responded to plaintiff's demand letter by conditioning its acceptance on the execution of release that included broad indemnification language which constituted an "essential element" of the agreement; defendant's response was a counteroffer and not an acceptance of plaintiff's demand

In Thompson v. Maurice, 39 Fla. L. Weekly D2357 (Fla. 4th DCA Nov. 12, 2014), the appellate court reversed the trial court's order enforcing a settlement between the parties, on the ground that the alleged "acceptance" by the defendant was actually a counteroffer containing an additional material term not included in the settlement demand.

The plaintiff had made a settlement offer including several conditions for acceptance, including the insured's affidavit of no additional coverage, a copy of the insured's certified policy, tender of property damages and tender of a draft in the full amount of the bodily injury policy limits available to the insured. In response, the defendant provided the affidavit and a proposed release, which included an indemnification/hold harmless provision. The plaintiff rejected the defendant's "acceptance", and did not cash the settlement draft or sign the release. On motions by both parties, the trial court found that the parties had settled the claim and enforced that settlement.

On appeal, the Fourth District found that there was no enforceable settlement because the defendant's proposed release contained a material term that did not mirror the terms of the settlement offer, namely, an indemnification and hold harmless agreement. While the execution of a release is deemed an implicit provision of an offer of settlement, a release containing language other than that of a typical general release raises a new condition that does not "mirror" the plaintiff's offer and therefore, its inclusion in the release constituted a counteroffer that was not accepted by the plaintiff. Accordingly, the appellate court reversed the trial court's order granting summary judgment in favor of the defendant on its affirmative defense of release.

* * *

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WORKERS' COMPENSATION CASE LAW UPDATES

Where the employer, its superintendent or its foreman has knowledge of an injury, and has neglected to provide initial treatment or care, the Statute allows recovery of any amount personally expended by the Claimant for such care

Fortune v. Gulf Coast Tree Care Inc., 148 So. 3d 827 (Fla. 1st DCA 2014). The Claimant was preparing to enter a gated community to deliver an estimate for a customer when he was punched by an angry bicyclist, dislocating his shoulder. The Claimant received emergency care that day and his supervisor was immediately advised of the accident, yet a notice of injury was not prepared. In addition, the Claimant received follow up treatment at a VA Hospital and ultimately attempted surgical repair, during which time he continued to work for the Employer. The Carrier did not receive notice of the injury until 16 months after the injury and denied compensability.

The JCC granted reimbursement for the emergency visit and future treatment; however, denied the claim for reimbursement of medical expenses, mileage and co-payments since the Claimant failed to request this medical care, or any medical care, from either the Employer or Carrier. In reversing and remanding the JCC's denial, the First DCA pointed to section 440.13(2)(c), Florida Statutes (2010) which allows recovery of any amount personally expended for initial treatment or care "where the nature of the injury requires such initial treatment, nursing, and services and the employer or his or her superintendent or foreman, having knowledge of the injury, has neglected to provide the initial treatment or care." The First DCA held that the JCC erred in failing to give effect to this portion of the statute where the employer neglected to provide the initial treatment or care.

* * *

Failure of an Employer/Carrier to timely file a Motion to Dismiss for Lack of Specificity and/or Lack of Ripeness serves as a waiver of both defenses

Panzer Law, P.A. v. Palm Beach County School District, 150 So. 3d 823 (Fla. 1st DCA 2014). In this matter, the Claimant's former counsel filed a petition for benefits seeking, in part, authorization of a second opinion with a shoulder surgeon. At that time, the Claimant had an authorized orthopedic surgeon, yet he failed to attach to the petition for benefits a written recommendation from the doctor for this referral. The Carrier failed to either respond to the petition for benefits or file a motion to dismiss the petition based upon lack of specificity. Instead of litigating the issue of entitlement to this second opinion, the carrier eventually authorized the benefits (a year after the request was made); however they contested fee entitlement for securing the second opinion, asserting that the petition did not meet the ripeness and specificity requirements of section 440.192, Florida Statutes (2006). The JCC agreed, denying a fee and the First DCA reversed and remanded. In doing so, the First DCA held that the failure of the Carrier to move to dismiss the petition for benefits in a timely manner waived both legal defenses (lack of ripeness and lack of specificity).

* * *

Judge of compensation claims does not have jurisdiction to re-write the terms of a settlement agreement

Taylor v. CVS, 39 Fla. L. Weekly D2239 (Fla. 1st DCA Oct. 27, 2014). The JCC granted the Employer/Carrier's motion to enforce a settlement agreement obtained at mediation. In so doing, the JCC compelled the Claimant to sign an additional release and a separation of

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employment. The First DCA upheld the JCC's finding that the Claimant knowingly and voluntarily settled all indemnity and medical benefits under Chapter 440 for a lump sum payment; however the First DCA noted that the agreement did not list the signing of the release and separation of employment as a conditions precedent to receiving the settlement proceeds. The First DCA modified the JCC's order, striking the portion which required the Claimant to sign and return additional settlement documents.

* * *

The JCC has jurisdiction to consider the reasonableness or appropriateness of a fee charged by an IME doctor

Hancock v. Suwannee County School Board, 149 So. 3d 1188 (Fla. 1st DCA 2014). The JCC ordered the Claimant to pay half of the IME physician's cancellation fee after the doctor cancelled the IME appointment due to the Claimant's refusal to pay a $1,500.00 fee as a pre-condition to allowing the IME to be videotaped. In so doing, the JCC concluded that he lacked jurisdiction to determine the reasonableness of the fee. The Claimant filed a writ of certiorari. The First DCA reversed the JCC's order, and held that the JCC has jurisdiction to determine whether the doctor's video fee was permissible, and remanded for additional proceedings for the JCC to determine the propriety and reasonableness of the doctor's additional, in-advance, video fee. At that time the JCC was further instructed to determine whether the Claimant should pay half of the no-show fee and which party, if any, is responsible for the video fee.

* * *

Section 57.105, Florida Statutes (2013) is not applicable to original proceedings in workers' compensation claims brought under Chapter 440

Lane v. Workforce Business Services, 39 Fla. L. Weekly D2378 (Fla. 1st DCA Nov. 12, 2014). The Employer/Carrier denied compensability of the Claimant's accident and injury and the Claimant filed a petition for benefits seeking a determination of entitlement to benefits under chapter 440. Extensive litigation commenced and, on the day before the final merits hearing, the parties entered into a stipulation whereby the Employer/Carrier accepted compensability of the claim and agreed to payment of litigation costs as well as a statutory guideline fee under section 440.34, Florida Statutes (2011). The Claimant also sought additional attorney's fees under section 57.105, Florida Statute (2013) and the parties agreed that the JCC would retain jurisdiction to address this issue. The JCC denied fees claimed under section 57.105 and concluded that such fees are not awardable in workers' compensation proceedings before a JCC. The First DCA upheld this portion of the JCC's order, noting that Chapter 440 establishes the liability of an employer as exclusive and in place of all other liability to an injured employee. The Court held that Chapter 440 does not provide the statutory authority for the application of section 57.105.

* * *

Apportionment is an affirmative defense which must be demonstrated under the standards detailed in Daubert v. Merrell Dow Pharmaceuticals

Giaimo v. Florida Autosport, Inc., 39 Fla. L. Weekly D2484 (Fla. 1st DCA Nov. 26, 2014). The Claimant was injured in a work accident that aggravated his injuries from a previous non-work accident. This portion of the JCC's order was upheld by the First DCA with very little discussion. However, the JCC further found that the

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Claimant's benefits should be apportioned, and thereby reduced, which the First DCA reversed.

As to apportionment, the First DCA noted that this is an affirmative defense and the burden of proof rests with the Employer/Carrier. The issue in the case was whether the testimony by the Employer/Carrier's expert witness was based on medically acceptable evidence and whether the Employer/Carrier met its burden to establish apportionment. The First DCA explained that in 2013 the Florida Legislature adopted standards for expert testimony consistent with Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). Under the revised rule, if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert may testify about it in the form of an opinion or otherwise, if the following conditions are met:

1. the testimony is based upon sufficient facts or data;
2. the testimony is the product of reliable principles and methods; and
3. the witness has applied the principles and methods reliably to the facts of the case.

The Court explained that "pure opinion" testimony is prohibited under this standard. The Employer/Carrier's expert based his opinions on the medical records, including diagnostic studies, from the doctor who treated the Claimant prior to his work accident. Thus, the First DCA held that the first requirement was sufficiently met.

However, as to points two and three, the First DCA noted that the expert's opinion evidenced a lack of "reliable principles and methods" and as such no reliable application of them. The doctor, in fact, testified that he arrived at the percentages attributable to the pre-existing condition as follows: "when I was asked and thought about it, that is the answer that I came up with." The Court held that because the testimony of the doctor offered no insights into which principles or methods were used to reach his opinions it was inadmissible as "pure opinion" testimony.

* * *

Section 440.13(2)(c), Florida Statutes (2010) requires that a Claimant specifically request authorization for medical care or treatment prior to the self-help provision being applicable

Sears Outlet v. Brown, 39 Fla. L. Weekly D2555 (Fla. 1st DCA Dec. 9, 2014). After back surgery, the Claimant experienced a recurrence of back pain. As a result, the Employer/Carrier authorized an orthopedic work up for a second back surgery during which an MRI to the lumbar spine revealed a right kidney mass suspicious for renal cancer. The Employer/Carrier authorized a urologist to clear the Claimant for the back surgery. The urologist referred the Claimant to the hospital for further diagnostic testing with partial or complete removal of the kidney. The Claimant did not request authorization for the recommended kidney diagnostics or surgery from the Carrier; rather he had the procedure done at the hospital on an unauthorized, non-emergency basis. Only after the procedure, which involved removing his kidney and a final diagnosis of renal cancer, did the Claimant ask the Employer/Carrier to pay for this treatment.

The JCC accepted the testimony of medical providers that the kidney mass needed to be removed before the Claimant could undergo further evaluation of the low back, have back surgery or take medications. The JCC applied the hindrance-to-recovery doctrine and determined that the Employer/Carrier was responsible for treating the unrelated kidney condition to the extent necessary to remove the hindrance it created to treating the low back.

WORKERS' COMPENSATION CONTINUED

The JCC further found that the Claimant's failure to request authorization for the kidney surgery was excused under the self-help provisions of section 440.13(2)(c), Florida Statutes (2010).

However, the First DCA reversed the award of medical costs related to the renal mass/cancer. The Court held that it was undisputed that the Claimant did not specifically request the Employer/Carrier provide the treatment and care recommended by the authorized urologist and provided by the hospital. The Court noted that while the urologist recommended care, he also specifically indicated that it was unlikely that the kidney condition was related to the workers' compensation injury. The Court did not agree that the language in the urologist's report could be reasonably construed as a specific request for treatment.

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

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

Diane Tutt, Board Certified Appellate Lawyer in the firm's Appellate Department, was recently successful in obtaining affirmance in a number of cases, including:

In Ortega v. Concorde Careers-Florida, Inc., et al., Case No. 4D11-4837, the Fourth District Court of Appeal affirmed a summary judgment in favor of a former commercial building owner, in a case in which the plaintiff was injured by a defect in the premises that existed when the defendant owned the property. We successfully argued that the doctrine of caveat emptor or "let the buyer beware" is a viable doctrine as to commercial properties, although it has been abrogated for residential property. Under that doctrine, the seller of a commercial property has no duty to disclose defects, nor does it have any duty to third parties who may be injured on the premises after the sale.

* * *

In Flagler Hospital, Inc. v. Association Ins. Co., Case No. 1D13-1229, the appellant hospital argued that it was entitled to be paid by a workers' compensation carrier for emergency services, even though the employee who obtained treatment never filed a workers' compensation claim. The hospital filed a claim directly with the Department of Financial Services, which found that it lacked subject matter jurisdiction as there had been no determination of compensability. We represented Association Ins. Co. which, along with the Department of Financial Services, successfully convinced the First District Court of Appeal to uphold dismissal of the claim and to reject the hospital's constitutional arguments, in which the hospital argued it was denied access to the courts since its doctors believed the injury was work-related and it should be able to obtain payment even if the employee had not reported a work-related injury.

* * *

In Powell v. Centerline Homes at Boggy Creek, LLC, et al., Case No. 5D12-4787, the plaintiff appealed an adverse summary judgment which had been entered in favor of a home builder which built and sold a home to the plaintiff, who claimed that he was injured by poor construction of the pool deck. Summary judgment was entered on the basis that the pool deck was built by a subcontractor, not the contractor. The Fifth District Court of Appeal affirmed.

* * *

In Faddis v. City of Homestead, et al., Case No. 3D14-121, the Third District Court of Appeal affirmed a substantial award of attorney's fees and costs against the plaintiff and her attorney, following the dismissal of the case for fraud on the court, which dismissal the court had earlier affirmed. The court rejected the plaintiff's multiple arguments, including that she was not afforded an evidentiary hearing and that the court had not sufficiently explained the basis for the award. We were able to show the Third District that the request for an evidentiary hearing had been waived by not timely

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requesting same, and also, that the court had sufficiently explained its reasoning both in the original order of dismissal and in the attorney's fee order.

* * *

In Allen v. Newport Marketing LLC/Retail First Ins. Co., Case No. 1D14-2919, the First District Court of Appeal affirmed an order of the JCC which had determined that the carrier's right to a second opinion regarding the need for surgery was part of its grievance procedure under its managed care arrangement, and therefore, the JCC lacked jurisdiction over the claimant's petition for benefits until the claimant attended the second opinion appointment requested by the carrier.

* * *

Ms. Tutt was also successful in obtaining reversal in the following cases:

Praetorian Ins. Co. v. Ocean Harbor Cas. Ins. Co., Case Nos. 12-167 AP & 12-244 AP, was a PIP appeal in the Miami-Dade County Circuit Court. In that case, the trial court determined that Praetorian Ins. Co., our client, was responsible for paying PIP benefits to an injured claimant under resident relative coverage, because it provided insurance to the claimant's sister with whom claimant lived. However, the appellate court agreed with our argument that another insurer, Ocean Harbor Ins. Co., was responsible for the PIP benefits, because it insured the car the claimant was driving at the time of the accident and a car the claimant co-owned with her boyfriend.

In three cases involving the issue of whether the insureds had waived the right to seek appraisal under the insurance policy, the Fifth District Court of Appeal held that there had been a waiver, as the insureds participated in discovery and other litigation proceedings after the Florida Insurance Guaranty Association ("FIGA") was substituted as the defendant and agreed there was a covered loss. FIGA v. Rodriguez, Case No. 5D13-3362; FIGA v. Maroulis, Case No. 5D13-3185; and FIGA v. Reynolds, Case No. 5D13-4510.

* * *

Summary Judgment Obtained in Premises Liability Case

Michael Wilensky, Partner, and **Elizabeth Izquierdo**, Associate, in our Hollywood office, recently won summary judgment in favor of a landowner in a premises liability action involving a decedent who stepped on a skylight while painting a warehouse and fell to his death. The decedent was an employee of an independent contractor hired to paint the roof of a warehouse owned by the defendant. The plaintiff alleged that the owner negligently failed to maintain its premises or allowed a dangerous condition to exist on the premises, or negligently failed to warn the decedent that the skylight would not support his weight. The court granted summary judgment in favor of the owner, finding that as a general rule an owner of property is not liable for injuries sustained by the employees of an independent contractor while performing work on the premises. The court further found that the exceptions to that general rule did not apply because the evidence established that the decedent was repeatedly warned about the danger of stepping on the skylight, and because the owner did not actively control the work of the decedent. The Plaintiff attempted to rely on an affidavit of George Zimmerman to argue that code violations existed on the property. The Court struck Mr. Zimmerman's affidavit, and found that an alleged code violation could not create a duty where none existed at common law.

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Summary Judgment Obtained in Wrongful Death Case

Cristobal Casal and **Diane Tutt,** Associates in our Hollywood office, obtained final summary judgment on October 6, 2014 in favor of Defendant, Up & Down Equipment Rental Inc. in the case of The Estate of Manual Juarez v. Florida Power & Light Co., et al., a wrongful death lawsuit filed in the Eleventh Judicial Circuit, Case No. 11-20553 CA 20, before Judge Ronald Dresnick in Miami, Florida. Manual Juarez was electrocuted while working as a painter on an elevated scaffold, or swing stage, rented to the contractor by our client, Up & Down Equipment Rental. Mr. Juarez's metal paint roller pole came in contact with a live electric line while he was working near the top of an apartment building in Miami Beach. The decedent's personal representative sued a number of defendants including our client, which was sued for negligence, negligent entrustment and vicarious liability under the dangerous instrumentality doctrine.

The motion for summary judgment demonstrated that the scaffold supplied by Up & Down Equipment Rental was not defective, nor was there any indication when it was rented to the contractor that the scaffold would be used in an unsafe manner. Those facts resulted in the court granting summary judgment on the negligence and negligent entrustment claims. As to the claim under the dangerous instrumentality doctrine, the court declined to extend that doctrine as the plaintiff had requested, to a mechanized scaffold, notwithstanding plaintiff's argument that construction hoists and cranes had been determined to be dangerous equipment. The court accepted our argument that the dangerous instrumentality doctrine, which imposes strict liability on the owner of the dangerous instrumentality, is a narrow doctrine applicable only to dangerous vehicles or equipment driven or operated in public areas, not on construction sites.

* * *

Construction company found not liable for injury and subsequent death of thoroughbred horse

John Howard, Partner, and **Scott Clayton**, Associate, in our West Palm Beach office, obtained a defense verdict in the case of Radosevich v. Dreamstar Custom Homes, Inc. Originally, the case involved issues of negligence, fraud, and breach of contract relating to the construction of an equestrian estate in Wellington, FL. The case was bifurcated by the court so that the negligence portion of the trial could be tried separately from the breach of contract and fraud claims. In the negligence case the Plaintiff alleged that within 2-3 days of moving into the new equestrian estate, her prize-winning thoroughbred horse, a grandson of Secretariat, stepped on a piece of construction debris that had been negligently discarded by Dreamstar, which caused an abscess in the right front hoof, caused the horse to founder, and led to the ultimate demise of the horse by euthanasia in February 2009. The defendant argued that the actual cause of the horse's injury and ultimate death was unknown and that there was no evidence that the horse stepped on construction debris, as opposed to any other object on the ground. A Motion for Summary Judgment and Motion for Directed Verdict were denied by the Court, which held that the evidence was sufficient for the jury to draw an inference that the horse stepped on construction debris, which was the proximate cause of the horse's injury. After deliberating for 45 minutes, the jury returned a defense verdict, finding that the Defendant was not negligent.

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Defense successfully negotiates obstacle course of Ross, Caputo and Walker to defeat major contributing cause and further establishes misrepresentation and fraud

Neal Ganon, name partner in our West Palm Beach office, and managing partner of the firm's workers' compensation division, recently prevailed at Final Hearing in the case of Harriet Smith v. Palm Beach County Police Benevolent Association. Claimant sustained serious injuries as a result of falling at work while walking to a restroom. Despite the fact that Claimant had a longstanding history of treatment for sciatica and active use of a cane, she claimed that she was merely carrying her cane at the time of the fall. However, multiple witnesses testified to the contrary, that Claimant's bad placement of the cane appeared to initiate her fall. The claim was controverted from the beginning under the theory that this was an idiopathic fall and that Claimant had made misrepresentations.

The main issue was whether the employment was the major contributing cause of the fall and, thus, whether there was medical evidence to establish occupational causation – i.e. that the fall "arose out" of the employment. In a 22-page opinion, the Judge accepted the opinions of the Employer/Carrier's independent medical examiner over those of the Claimant's IME physician. Moreover, the case turned on successfully distinguishing a thorny triumvirate of cases - Ross, Caputo and Walker all dealing with competing causes and occupational causation. Additionally, the way in which Mr. Ganon lined up the live witnesses' testimonies wove a theme into the trial, ending with the Claimant's testimony where she made several self-damaging outbursts, highlighting the incredulity of her testimony, and further leveraging the inconsistencies and misrepresentations made by the Claimant throughout the claim, of which the Judge took notice. Mr. Ganon also successfully maneuvered Claimant's counsel during the discovery phase of the case to stipulate away any increased hazard at the workplace, thus eliminating any "competing cause" at trial.

The Court found for the Employer/Carrier on both defenses of major contributing cause and misrepresentation, noting that when a Claimant's injuries are shown to be from a pre-existing or idiopathic condition, the proper test is whether the injuries arose out of the employment or whether the employment created an increased hazard. As the Employer/Carrier's IME physician opined that the pre-existing condition was the major contributing cause of the fall, and, the Claimant having stipulated away any increased hazard at the workplace, the Judge denied all of the Claimant's claims.

* * *

PIP Defense Verdict for State Farm

Edward Winitz, Partner and **Scott Wachholder**, Associate, in our Hollywood office, obtained a defense verdict in a jury trial in a personal injury protection (PIP) case. The issue was the medical necessity of a cervical spine MRI performed by the Plaintiff, MRI facility. The claimant first sought treatment from a chiropractor 98 days post accident. The chiropractor treated the claimant for 31 office visits before ordering the MRI, and 15 office visits after the MRI, despite the medical records indicating that the claimant was improving and had stopped complaining of neck pain.

Plaintiff had previously received a partial Summary Judgment on reasonableness and relatedness. However, in anticipation of Plaintiff arguing that the MRI was paid in accordance

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with the fee schedule, and that Plaintiff would argue that State Farm, therefore, determined that the MRI was medically necessary, we filed and argued a Motion in Limine to prevent the jury from hearing any testimony regarding any payment by State Farm. The motion was granted the day before the trial commenced.

Mr. Winitz was successful at impeaching the treating/referring chiropractor at trial by projecting his records on a screen in front of the jury, and showing that the claimant complained of numbness in the left arm on only the first date of service.

The jury deliberated for just under 30 minutes and found that the MRI was not medically necessary, rendering a verdict in favor of State Farm. Before trial, the Plaintiff rejected a $100.00 proposal for settlement and the Defendant's motion to tax attorneys' fees and costs is currently pending.

* * *

Arbitrator Awards $0 In Property Damage Claim

Ed Herndon, Partner in our Tallahassee office, obtained an arbitration award in favor of Simmons Moving and Storage, Inc. on August 27, 2014 before Arbitrator Thomas Bateman in Tallahassee, Florida. The Plaintiffs, Mr. and Mrs. Smith, contracted to store some of their personal belongings and furniture with Simmons in 1993. In 2012, the Smiths requested that their belongings be removed from storage and transported by a third-party moving company to their residence in Missouri. Upon arrival of the items at the Smiths' home in Missouri, the Smiths discovered substantial damage to most items of furniture and other property. The Smiths filed a lawsuit in Leon County, Florida, but agreed to attend arbitration pursuant to the contract for storage.

At the arbitration proceeding, the Plaintiffs claimed that Simmons damaged all of the items that had been stored for the past 19 years, and requested a refund of all payments made for the storage of their items, all monies paid towards insurance on the stored items, and $40,000 for the property itself, for damages totaling $63,948.73. Simmons admitted that it was responsible for damage to a few of the pieces of furniture, but argued that it was not responsible for any further damage and pointed out that the measure of damages in this instance was the value of the property at the time the damage was discovered.

The Arbitrator agreed with the Defendant that the Smiths were not entitled to the return of their payments for storage or insurance, and failed to provide any evidence as to the value of the damaged property. Accordingly, the Arbitrator made an award in favor of Simmons Moving and Storage, Inc., awarding the Plaintiffs $0.

* * *

Defense Verdict obtained in Georgia case alleging that defendant driver was negligent per se for hitting pedestrians

Joshua C. Canton, Partner in our Tallahassee office, obtained a defense verdict on behalf of Nationwide Mutual Insurance Company and Harold L. Lindsey in a pedestrian versus vehicle/underinsured motorist case. Plaintiffs, Mr. and Mrs. Brockway, were a retired couple on vacation in Savannah, GA for a month. The accident occurred on the Plaintiffs' first evening in Savannah as they were crossing the street at a crosswalk in a historic downtown neighborhood. The tortfeasor, Mr. Lindsey, was driving to a gas station from his nearby home. Plaintiffs alleged that Mr. Lindsey was negligent for pulling into the crosswalk and colliding with them, after he stopped at the stop bar. They alleged that Mr. Lindsey was negligent for

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failing to watch where he was driving and that he was negligent per se for violating Georgia statutes requiring a driver to yield to a pedestrian in a crosswalk. Mr. Lindsey alleged that the Plaintiffs suddenly stepped in front of his vehicle from behind a large bush on the corner that obstructed his vision, after they observed that Mr. Lindsey was looking away from them. Nationwide alleged that the damages did not exceed the underlying limits of $50,000/$100,000.

Mr. Brockway alleged that the accident caused bilateral rotator cuff tears, bilateral carpal tunnel syndrome requiring surgery, and low back pain. Mrs. Brockway alleged that the accident caused low back pain, neck pain, and headaches. Plaintiffs hired an accident reconstruction expert who testified at trial that the accident was Mr. Lindsey's fault and that the bush did not obstruct Mr. Lindsey's vision. The defendants did not retain an expert. During closing arguments, Plaintiffs' attorney asked the jury to award $150,000.00 to Mr. Brockway and $50,000.00 to Mrs. Brockway. The Defendants argued that the jury should find that the Brockways were themselves negligent for stepping in front of Mr. Lindsey's vehicle after seeing that he was looking away from them and that their injuries were pre-existing and not related to the subject accident. After deliberating for one hour and forty minutes the jury returned a verdict for the Defendants.

* * *

Loretta Cephus v. Gator Heating and Air Refrigeration Ice Machines, LLC

Marc Crumpton, Associate in our Tampa office, obtained a directed verdict in favor of the Defendant during a jury trial in a negligence slip and fall case in Wauchula, Florida. The Plaintiff, Loretta Cephus, was a tenant in an apartment owned by a local property owner when she allegedly slipped and fell on water that had leaked from an air conditioning vent located inside the apartment on December 13, 2012. On at least one occasion before the accident, the Defendant, Gator Heating and Air Refrigeration Ice Machines, LLC, had been called to the property by the owner to repair a faulty AC unit that was not cooling and repaired the motor. Plaintiff alleged that the defendant was negligent in the maintenance and repair of the unit, causing it to leak inside, which in turn, resulted in the Plaintiff's accident. The Plaintiff alleged that her lower and mid back were injured in the fall.

At the conclusion of the Plaintiff's case we moved for directed verdict, on the grounds that the Plaintiff failed to present any evidence establishing that the Defendant owed her a duty or had breached such a duty. After over an hour of argument, Judge Ezelle granted the motion and entered a judgment in favor of the Defendant. Before trial, the Plaintiff rejected a $250.00 proposal for settlement and the Defendant's motion to tax attorneys' fees and costs is currently pending.

* * *

Summary Judgment Obtained In Negligent Security Action

Stephan Greco and **Thomas Regnier**, Associates in our Hollywood office, obtained summary judgment on June 16, 2014, in favor of Defendant, AW & JR Properties, Inc., in The Estate of Paola Cordoba vs. AW & JR Properties, Inc. et al, a wrongful death lawsuit filed in the 11th Judicial Circuit, Case No. 13-31702 CA 42, before Judge Daryl Trawick in Miami, Florida. Plaintiff had met friends at a bar located on AW & JR's property and got into a verbal altercation with another woman, Marie Tellez. The women

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left the bar and continued their altercation in the City of North Miami parking lot used by bar patrons. As Plaintiff walked away from Ms. Tellez, Ms. Tellez got into her BMW X5 and ran over Plaintiff, killing her.

* * *

Altenel, Inc., et al. v. Millennium Partners, LLC., et al.

This case arises out of a series of real-estate transactions relating to a hotel/condominium development in downtown Miami known as the Four Seasons Tower which consists of 221 hotel units, 84 condominium hotel units and a number of private condominium residences. We were retained to represent the various owners and developers of the project. Plaintiffs are ten individual and corporate entities that purchased condominium hotel units between 2003 and 2005. After closing on their units, each Plaintiff signed a Rental Program Agreement with one of the Defendants where Four Seasons was to market the units and assist in renting out the units to third parties.

Plaintiffs filed their original Complaint on May 18, 2010. By January 6, 2012, Plaintiffs had filed a 136-page Third Amended Complaint containing 19 counts alleging breach of contract, fraud, conspiracy and securities claims against the various Defendants. The Court dismissed 11 fraud and securities claims, but declined to dismiss the various breach of contract claims.

In October 2013, **Diane Tutt**, Senior Associate, and **Dale Friedman**, Partner, of our Hollywood office, moved for summary judgment or judgment on the pleadings on all of the remaining claims against their clients, Millennium Partners, LLC., FSM Hotel, LLC, Terremark Brickell II, LTD and Millennium Partners Florida Property Management, LLC. On June 5, 2014 the Court granted all motions resulting in a complete defense win for our clients.

* * *

Connie Harris v. Contemporary Services Corp/American Zurich Insurance Co.

Diane H. Tutt, Senior Associate in our Hollywood office, and **Neal Ganon**, name partner in our West Palm Beach office, recently prevailed at an evidentiary hearing addressing the competency of the claimant in the workers' compensation matter of Connie Harris v. Contemporary Services Corp/American Zurich Insurance Co., OJCC Case No. 12-010010JJL. In this case, the claimant sustained a serious work-related injury, in which a motorcycle collided with her, resulting in a traumatic amputation followed by a stroke.

Compensable treatment was extensive, including an inpatient facility secondary to claimant's physical injuries and cognitive deficits. While residing in an inpatient facility, the claimant exhibited behaviors of concern, including leaving a frying pan on a stove, resulting in a fire. The claimant wanted to remove herself from the facility, notwithstanding the E/C's position that such a move would endanger her health and welfare. Based on the treating neuropsychologist's declaration that the claimant was incompetent, the E/C moved on three separate occasions to have the JCC determine her competency under Fla. Stat. Section 440.17. After two denials, Judge Lazarra held an evidentiary hearing and issued an order finding the claimant incompetent, thereby protecting her from making decisions which could endanger her AND providing protection to the E/C, which argued that such decisions, including settlement, were subject to being voided if the claimant was not competent to make them.

The parties were scheduled to attend a mediation on recent petitions for benefits filed

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by the claimant's attorney seeking housing, attendant care, home modifications and a van, among other benefits. Judge Lazarra directed the parties to open a guardianship in circuit court and obtain the appointment of a guardian. The workers' compensation case, and mediation, were stayed.

* * *

Live Face On Web, LLC v. Tweople, et al.

On January 10, 2014, Plaintiff Live Face on Web, LLC filed a copyright infringement action against twenty-one Defendants, which include a competitor of Plaintiff, Tweople, Inc. and its alleged customers.

Dale Friedman, Partner, and **Rebecca Williams**, Associate, both in our Hollywood office, represented Doan Law Firm, P.C., a Texas personal injury law firm with its principal place of business in Houston, Texas. Doan Law Firm had never been registered or authorized to do business in Florida, had no offices in Florida, and never had any employees, representatives or agents in Florida. No attorney of Doan Law Firm had ever provided legal services in Florida, had ever been admitted *pro hac vice* in a Florida court, had ever handled a legal matter as counsel for a Florida resident or had provided legal services in Florida. Doan Law Firm's alleged contacts with Florida were solely through its dealings with Florida-based Tweople, which is headquartered in Orlando, Florida.

We moved to dismiss the Complaint for lack of personal jurisdiction on the grounds that Plaintiff's Complaint neither established a basis for the exercise of personal jurisdiction under Florida's long-arm statute, nor established that Doan Law Firm had the requisite minimum contacts with Florida to satisfy constitutional due process requirements.

The Court granted Doan Law Firm's motion to dismiss with prejudice for lack of personal jurisdiction finding, among other things, that Plaintiff "despite being challenged by competent and substantial affidavits in support of the Motion to Dismiss" failed to present any evidence to corroborate its jurisdictional allegations and therefore failed to meet its burden with respect to Florida's long-arm statute. With respect to due process requirements, the Court further found that while a single act can support jurisdiction if it creates a "substantial connection" with the forum state, the Plaintiff's deficient allegations in the Complaint coupled with Plaintiff's failure to present any useful evidence once jurisdiction was contested, required the finding that Doan Law Firm did not exhibit the requisite minimum contacts.

* * *

Reynaldo Bello Castillo v. Idlewild Stable, Inc.

Christian Petric, Partner in our West Palm Beach office, recently prevailed at Final Hearing in the workers' compensation matter of Reynaldo Bello Castillo v. Idlewild Stable, Inc. In this claim, the Claimant sustained a compensable hernia and lower back injury. Treatment had been provided for years until the expiration of temporary benefits. The Claimant then filed a claim for permanent total disability.

Subsequently, the Carrier obtained surveillance footage of the Claimant conducting numerous activities he claimed he was unable to do, such as walking outside without a cane, walking without a limp, going up and down stairs without any difficulty, doing laundry, taking out the trash, squatting, bending and speaking on the cell phone without difficulty.

The Judge of Compensation Claims found that the Claimant made false statements knowingly or intentionally for the purpose of securing workers' compensation benefits and accordingly, the JCC

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denied the claimant all benefits. The Judge even went so far as to order the Claimant to repay to the Carrier 57 weeks of temporary benefits that were inadvertently overpaid to the Claimant.

* * *

Taylor v. City of Port St. Lucie, et al,

Jeffrey Blaker, Partner, and **Chris DeLorenzo**, Associate, both in our West Palm Beach office, obtained summary judgment on May 15, 2014, in favor of Defendants, the City of Port. St. Lucie, the five members of the city council, and the City Attorney in Taylor v. City of Port St. Lucie, et al, a lawsuit filed in the United States District Court for the Southern District of Florida by former assistant city attorney Gabrielle Taylor. Ms. Taylor had been employed as an assistant city attorney for 6 years when she was terminated in March 2012 by the City Attorney. Her termination was the result of a late-night DUI stop by City of Port St. Lucie police officers who then drove Ms. Taylor home.

Ms. Taylor sued the defendants under the Americans with Disabilities Act (ADA), alleging that she was terminated because the City perceived her as being an alcoholic, a disability recognized under federal law, and that she was subjected to disparate treatment under the ADA. In addition, she sued the City, individual council members and City Attorney for violations of Florida's Sunshine Act. Less than a week before trial, the District Court entered final summary judgment in favor of the defendants on all claims.

* * *

Nancy Severs, v. The Woods of Manatee Springs, Inc., D/B/A Manatee Springs Care & Rehabilitation

Eric M. Thorn, Partner in our Jacksonville office, and **Brian P. Haskell**, Associate in our Tampa office, obtained a defense verdict in a nursing home negligence action.

Plaintiff alleged personal injury and violation of her Chapter 400 residents rights relative to a fall and dislocated hip. The defense strenuously argued that Plaintiff's alleged injuries were minor, particularly in comparison to her other comorbidities and injuries. The jury found negligence, but awarded only $1 in past medical expenses and $1 for pain and suffering. The verdict was substantially lower than the Proposal for Settlement the Defendant filed, and the Defendant is seeking fees and costs pursuant to the same.

* * *

Linda Brown v. Bal Harbour Condominium Association, Inc.

Marc Crumpton and **Jennifer Forte**, Associates in our Tampa office, obtained a defense verdict in a premises liability - slip and fall.

Plaintiff, Linda Brown, a resident and owner of a condominium at Bal Harbour Condominium Complex, alleged that she fell on the common areas of the outside walkway of the premises on September 7, 2011. The Plaintiff's theory was that the Defendant, Bal Harbour Condominium Association, Inc. was negligent in the ownership, possession, control, and maintenance of the common areas of the condominium complex where she resided. On the date in question, it was undisputed that it had been raining for several days and that Ms. Brown had walked out in the rain wearing well-worn flip flops with the intent of taking photographs of ducks near

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was undisputed that it had been raining for several days and that Ms. Brown had walked out in the rain wearing well-worn flip flops with the intent of taking photographs of ducks near the lake on the premises near her unit. As she was walking back to her unit, she slipped and fell in an area of the walkway that was connected to a water run-off drainage area. Ms. Brown alleged that a "slippery substance" had accumulated causing her to fall when it became wet as a result of the rain.

Trial lasted 3 days and Plaintiff called several witnesses to identify that a slippery substance was present on the walkway and adjacent drain area and that this substance had become wet when it rained. Plaintiff alleged that the Association's maintenance supervisor was negligent in not remedying this substance prior to the rain with a bleach or other cleaning agent so that it would not have been present at the time Plaintiff chose to walk there. The Defendant argued that Plaintiff was not paying attention to her surroundings as a witness testified that Plaintiff appeared to be possibly distracted with her digital camera and looking down at the time of her fall. Further, it was argued that Plaintiff was negligent based on a series of choices she made beginning with walking out in the rain to take photos, wearing well-worn flip flops, and not keeping a safe watch of her surroundings during the rain event.

Plaintiff's injuries consisted of an acute T-9 thoracic compression fracture, and bulges in the cervical and lumbar regions. Experts for both parties agreed that the thoracic compression fracture was caused by the sudden fall and that the fracture had long since healed. Despite the medical findings that the fracture had healed, Plaintiff claimed that her life and activities had been drastically altered as a result of the fall and that she had sustained a permanent injury. Plaintiff requested $21,000.00 in past medical expenses, $96,000.00 in future medical care, and requested the jury to, "do the right thing" with regards to pain and suffering. Prior to trial, Plaintiff had demanded $125,000.00 and the Defendant offered $50,500.00 through formal proposals for settlement. The jury deliberated for 41 minutes and returned a verdict of no liability on the part of the Defendant, Bal Harbour Condominium Association, Inc. Post trial motions for the Defendant's attorney's fees and costs are pending.

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Save the Date!

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Ft. Lauderdale, Florida 33316
(954) 765-5900

Friday, May 8, 2015
Rosen Centre Hotel
9840 International Drive
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The Registration Package and additional information will be mailed out and available on our website soon!