LIABILITY CASE LAW UPDATES

UM CARRIER'S ADVANCE PAYMENT TO INSURED WAS A SET-OFF TO BE APPLIED BEFORE FINAL JUDGMENT WAS ENTERED ON A JURY VERDICT; WHERE SET-OFF EXCEEDED VERDICT, UM CARRIER WAS THE PREVAILING PARTY

In Solomon v. State Farm Mutual Auto. Ins. Co., 303 So. 3d 991 (Fla. 5th DCA 2020), Solomon's UM carrier, State Farm, tendered $185,000 to Solomon with a letter stating that it's "good faith payment" would be credited against any recovery Solomon received from the jury. The jury returned a verdict which, after other set-offs, was less than the amount State Farm had previously tendered. The trial court set off the jury's verdict by the amount of State Farm's payment, and since that payment exceeded the verdict after the other set-offs, entered a judgment in State Farm's favor. Not surprisingly, Solomon objected and appealed that order.

On appeal, Solomon contended that the pretrial payment should not have been set-off from the net verdict but should have been used as a "credit" toward State Farm's satisfaction of the judgment in his favor and that the trial court should have awarded him fees and costs without regard to the advance payment. The appellate court disagreed, finding that insurers should be encouraged to make advance payments benefitting their insureds by encouraging expedited payment without resort to trial.

PIP INSURED'S DEMAND LETTER WAS NOT SUFFICIENTLY SPECIFIC PURSUANT TO THE STATUTE RENDERING HIS PIP CLAIM SUBJECT TO DISMISSAL

In Rivera v. State Farm Mutual Auto. Ins. Co., 317 So. 3d 197 (Fla. 3rd DCA 2021), the insured sent State Farm a demand letter seeking overdue mileage benefits under his PIP policy. The County Court granted State Farm's motion for summary judgment based on the argument that the presuit demand letter was insufficiently specific and not in compliance with Florida Statute § 627.736 (10). On appeal, the Third District affirmed.

In this case, the insured failed to attach to the letter an itemized statement specifying the exact amount of the requested reimbursement for each trip to the insured's medical provider, the dates of treatment, the service, and whether he was seeking reimbursement for 12 or 16 trips, nor did the insured state with specificity the amount due or owed or the addresses to which the insured traveled for each trip. State Farm had advised the insured of these deficiencies before he filed suit, but in an abundance of caution, paid the insured what it believed it owed, reserving its right to raise the defense of insufficiency of the demand letter in the event that the insured sued. The insured deemed State Farm's payment insufficient and filed suit seeking the $2.59 he claimed he was underpaid.

The Third District held that all of these deficiencies rendered the demand letter insufficient notice of the claim such that the insured failed to comply with the condition precedent set forth in the statute. The Court found that the PIP statute was very specific as to the information that must be included in a demand letter in order to comply with the condition precedent to payment, in that it used phrases such as "shall state with specificity" and required "an itemized statement specifying each exact amount" claimed to be due. The Court explained that the purpose of the statute was not only to advise the carrier of the insured's intent to sue, but to also advise the carrier of the exact amount for which it will be sued if the insurer does not pay the claim.

The appellate court recognized that various County and Circuit court appellate divisions have differed in their interpretation of the statute, and that many of them have concluded, as did the Third District, that the statute requires strict construction of the demand letter provision. The Court cited with approval an opinion on the Eleventh Circuit's appellate division, in which it held that the demand letter section of the PIP statute "requires precision," as well

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as an Eleventh Circuit County Court ruling rejecting the insured's argument that it had "substantially complied" with the statute. In the latter case, the trial court opined that a "substantial compliance" standard would only engender more litigation as to the sufficiency of the demand and would be contrary to the obvious legislative intent behind the statute to reduce litigation by notifying carriers precisely what they still owe. The Third District held that the appropriate remedy for an insufficient demand letter is summary judgment and accordingly, it affirmed the final judgment in the carrier's favor.

THE FOURTH DISTRICT HOLDS THAT A PIP POLICY INCLUDING A PROVISION LIMITING THE BENEFITS THE INSURER IS OBLIGATED TO PAY BASED ON THE DIFFERENCE BETWEEN THE DEDUCTIBLE AND THE TOTAL AMOUNT OF EXPENSES INCURRED DOES NOT REQUIRE A CARRIER TO PAY MORE THAN 80% OF THE STATUTORY FEE SCHEDULE

The Fourth District Court of Appeal addressed a number of consolidated cases with the common issue of whether a PIP carrier's policy was ambiguous such that the carrier was required to reimburse medical providers who treated PIP claimants for the full amount of the cost of those services. In Plantation Open MRI, LLC v. Infinity Indem. Ins. Co., 304 So. 3d 9 (Fla. 4th DCA 2020), the appellate court addressed the question, certified by the County Court as in need of immediate resolution, of whether, where the PIP policy includes a provision limiting the benefits an insurer must pay based on the difference between the deductible and the total amount of the expenses incurred up to 80% of the statutory fee schedule, the insurer may be required to pay more.

The providers argued that Infinity's policy was ambiguous in providing that "reimbursement for medical expenses shall be limited to and shall not exceed 80% of the schedule of maximum charges set forth in § 627.736(5)(a)(1) . . ." A different portion of the policy provided that the deductible shall be deducted from the total amount of the loss and expense incurred by a claimant but if the total amount of the loss exceeds the deductible, "the total limit of benefits we are obligated to pay shall then be based on the difference between such deductible amount and the total amount of loss and expense incurred" up to the $10,000 policy limit.

In this case, the insurer reimbursed the providers at 80% of the statutory fee schedule set forth in subsection (5)(a)1., and the provider brought suit alleging that the carrier was incorrect in limiting payment in this manner. While the providers argued that the policy was ambiguous, the Fourth District disagreed, finding that it plainly provides that reimbursement is limited to 80% of the fee schedule. In doing so, the Court rejected the provider's argument that the "total" covered benefits should be paid, up to the policy limit, without regard to the plain language requiring that the "total limit of benefits" must be calculated with reference to the fee schedule.

AN INSURER'S INVOCATION OF THE APPRAISAL PROCESS BEFORE THE INSURED'S CIVIL REMEDY NOTICE WAS FILED AND SUBSEQUENT PAYMENT OF THE APPRAISAL AWARD AFTER THE EXPIRATION OF THE 60-DAY CURE PERIOD DID NOT CURE THE ALLEGED VIOLATION SO AS TO RENDER THE BAD FAITH CLAIM SUBJECT TO DISMISSAL

In Fortune v. First Protective Ins. Co., 302 So. 3d 485 (Fla. 2d DCA 2020), the trial court granted Fortune final summary judgment in a first-party bad faith case brought by its insured. Fortune had moved for summary judgment on the grounds that it had invoked the appraisal process in the underlying claim before the insured served it with a Civil Remedy Notice (CRN), and it timely paid the appraisal award after the 60-day cure period expired. The carrier argued that its payment amounted to a "cure" of the circumstances giving rise to the Notice such that it was entitled to summary judgment in the subsequently filed bad faith case.

The insureds contended that the pendency of appraisal should not affect the insurer's response to their CRN. The statutory prerequisites to filing a bad faith claim are: (1) a determination of the insurer's liability for coverage; (2) a determination of the extent of the insured's damages; and (3) the required notice (CRN). The appellate court found that the appraisal award satisfied the first two prerequisites and that, while an insured may not file suit before the amount of his/her claim has been determined, there is nothing precluding the insured from filing a CRN alleging that the carrier had not properly evaluated the claim, for example. Because the pendency of an appraisal does not toll the time period for an insurer's response and/or its cure, the appellate court declined to engraft one into the statute.

In response to the insurer's argument that the CRN did not contain a specific amount owed to "cure" the carrier's alleged bad faith and should have been deemed legally insufficient to support a bad faith claim,

the Court noted that the Notice did state that their public adjustor's estimate covered the full scope of necessary repairs and the carrier had that estimate at the time it received the CRN.

The Court addressed the public policy behind its holding by explaining that even if the policy requires mediation or appraisal to occur before suit is filed, an appraisal is not a condition precedent to the insurer's fulfilling its obligation to fairly evaluate an insured's claim. To hold otherwise, the Court opined, would allow an insurer to act in bad faith with impunity as long as it pays an appraisal award within the time required by the policy.

FAILURE TO COMPLY WITH SPECIFICITY REQUIREMENTS OF CIVIL REMEDY NOTICE CAN BE WAIVED BY AN INSURER

In Bay v. United Services Auto. Assoc., 305 So. 3d 294 (Fla. 4th DCA 2020), the Fourth District Court of Appeal addressed the question of whether an insurer who receives a defective Civil Remedy Notice can waive the specificity requirements in the bad faith statute. In this case, USAA received a CRN that misidentified the insurer as "USAA Casualty Insurance Company" instead of "United States Automobile Association" or "USAA," the correct insurer. The carrier responded to the Notice online and disputed its allegations, but never specifically stated that the Notice was deficient in misidentifying the insurer, although it raised other alleged deficiencies in its response.

After the insured brought this bad faith suit, USAA moved to dismiss on the ground that the CRN named the incorrect legal entity. The insured responded that USAA waived any right it may have had to attack the notice's insufficiency by failing to address it in its CRN response. The insured also argued that the Department of Financial Services' acceptance of the Notice demonstrated that the insured's Notice complied with the statute. In any event, the CRN was sufficient on its face.

The trial court granted the carrier's motion to dismiss with prejudice, finding that the insurer had not been provided with proper notice under Florida Statute § 624.155, and specifically with respect to naming the proper entity. The Court found that the statute was in derogation of common law and that it must be strictly construed. The insured filed an appeal from the dismissal.

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On appeal, the appellate court agreed that the statute must be strictly construed to require, among other things, the designation of the correct entity allegedly committing the bad faith. However, the Court found, one can waive a statutory right by failing to address it in its response to the insured's CRN, and USAA had waived its right to seek dismissal on that ground. Accordingly, the Court reversed the trial court's dismissal and remanded the case to the trial court to address other issues raised by the carrier in its motion to dismiss.

THE DEPARTMENT OF FINANCIAL SERVICES' FAILURE TO RETURN AN INSURED'S CIVIL REMEDY NOTICE DID NOT ESTABLISH THAT THE NOTICE WAS LEGALLY SUFFICIENT

In Julien v. United Property & Cas. Ins. Co., 311 So. 3d 875 (Fla. 4th DCA 2021) (on Appellant's Motion for Rehearing, Rehearing En Banc and Certification of Question of Great Public Importance), the Fourth District Court of Appeal addressed an argument that it avoided in the Bay case cited above, namely, whether the Department of Financial Services' acceptance of an insured's Civil Remedy Notice established its legal sufficiency under the bad faith statute. In this case, the insured's notice failed to "state with specificity" the policy language and statutory provision at issue, instead citing some thirty-five statutory provisions and nearly every provision in the insured's policy as grounds for his contention that the insurer acted in bad faith. The circuit court dismissed the insured's bad faith action with prejudice, finding that the CRN did not comply with the statute and the insured appealed.

On appeal, the Fourth District held that by listing every statutory and policy provision in its Notice, the insured failed to comply with the requirement that the Notice set forth, with specificity, the statutory and policy provisions at issue. In addition, the Court held that, while the bad faith statute provides that the Department of Financial Services "may" return a deficient notice, the Department's discretion is not determinative of the legal sufficiency of the Notice itself. Even if it was of some relevance, the courts must independently review the notice even if the Department found it to be in compliance. Therefore, the Fourth District rejected the insured's arguments on appeal and affirmed the trial court's dismissal of his case with prejudice.

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AN INSURED WHOSE HURRICANE POLICY REQUIRED THE FILING OF A SUPPLEMENTAL CLAIM BEFORE AN ACTION COULD BE BROUGHT AGAINST THE INSURER BREACHED THE POLICY BY FAILING TO DO SO, ENTITLING INSURER TO SUMMARY JUDGMENT ON HIS CLAIM FOR PROPERTY DAMAGE

The Third District Court of Appeal addressed the issue of whether an insured who had already been paid for his hurricane claim but disputed the amount of that payment was entitled to bring suit against the carrier without having filed a supplemental claim. In Goldberg v. Universal Prop. and Cas. Ins. Co., 302 So. 3d 919 (Fla. 4th DCA 2020), the Fourth District held that, under the express terms of Universal's policy, the insured was required to give notice of a supplemental claim for windstorm or hurricane damage as a prerequisite to a subsequent suit against the carrier.

In this case, Universal adjusted Goldberg's hurricane claim and paid what it determined was covered. Several weeks later, Goldberg contacted the carrier advising that he had an estimate much higher than Universal's, and Universal requested that he send it to the carrier, but Goldberg never did. Thereafter, he sued Universal alleging that it breached the policy by underpaying his claim. In response, Universal contended that Goldberg never filed a supplemental claim and never provided it with the estimate before filing suit.

The trial court granted summary judgment in Universal's favor finding that Goldberg breached Universal's "no action" clause by failing to file a supplemental claim before resorting to litigation. Universal's policy provided that one of the insured's pre-suit duties after loss is to notify the carrier of a "supplemental claim" within three years after the windstorm/hurricane. The policy defined a "supplemental claim" as "any additional claim for recovery from us for losses from the same hurricane or windstorm which we have previously adjusted pursuant to the initial claim." This language tracks the language contained in Florida Statute § 627.70132, which also defines the term "supplemental claim." Therefore, because Universal had previously adjusted the claim, albeit not the insured's satisfaction, any request for additional policy benefits arising out of the same storm required an additional pre-suit claim for specified losses. Goldberg's estimate would have satisfied his obligations under the policy if he had forwarded it to the carrier as it requested. The trial court's summary judgment was affirmed with respect to Goldberg's claim for property damage, although the appellate court reversed the summary judgment in Universal's favor with respect to Goldberg's personal property claim because Universal had denied coverage for this claim altogether, thereby waiving its right to require Goldberg's compliance with the policy conditions.

A PUBLIC ADJUSTER WITH A CONTINGENCY INTEREST IN INSURED'S RECOVERY UNDER PROPERTY INSURANCE POLICY WAS NOT A "DISINTERESTED APPRAISER" UNDER THE TERMS OF THE POLICY; CONFLICT CERTIFIED

The Second District Court of Appeal, in State Farm Florida In. Co. v. Parrish, 312 So. 3d 145 (Fla. 2d DCA 2021), addressed the issue of whether a public adjuster who had a contingency interest in the insured's recovery was a "disinterested appraiser" under the terms of State Farm's insurance policy, such that he was disqualified from representing the insured during the appraisal process. In this case, the insured initially demanded appraisal naming as his appraiser his public adjuster. State Farm also demanded appraisal but requested that Parrish choose a different appraiser. After receiving no response, State Farm filed an action seeking to compel Parrish to choose a different appraiser with no pecuniary interest in the outcome. The trial court denied State Farm's petition and dismissed the litigation. State Farm appealed that order.

Although the appellate court was skeptical as to whether the "Petition" was a viable means of addressing an appraisal issue, it nonetheless determined that it had jurisdiction to consider the overarching issue of whether the insurer could disqualify the public adjuster from serving as an appraiser under the terms of its policy which expressly required that each participant select a "qualified, disinterested" appraiser in response to an appraisal demand.

Parrish argued that his public adjuster was as "disinterested" as necessary because, he correctly noted, each appraiser is compensated by the party who hires him/her and therefore, it is of no moment that Parrish's appraiser had negotiated a contingency fee. The appellate court, however, reasoned that the fact that the public adjuster's compensation was inextricably tied to the insured's recovery, rendering the adjuster/appraiser prohibitively interested in the results of the appraisal, in violation of State Farm's policy. More importantly, the Court found, the adjuster/appraiser owed his/her insured a duty under the adjuster's Code of Ethics to put his/her client's interests above his own and is contractually bound to negotiate with the insurer on the insured's behalf. Accordingly, the Court concluded that a public adjuster that has a contingency interest in the insured's appraisal award is not a "disinterested appraiser" under the terms of State Farm's policy and would be disqualified.

The Court recognized that its holding conflicted with the

Third District's holding in Brickell Harbour Condo. Ass'n v. Hamilton Specialty Ins. Co., 256 So. 3d 245 (Fla. 3rd DCA 2018), which had held that an appraiser's interest in the policy proceeds need only be disclosed and was not grounds for disqualification. The Court certified the issue to the Florida Supreme Court for resolution of the conflict.

As of the date of this writing, Parrish has filed a Notice of Discretionary Jurisdiction seeking Supreme Court review, but the parties have not yet filed any substantive briefs.

WHERE AN INSURED'S CONTRACTOR REMOVED A PORTION OF THE INSURED'S ROOF IN THE COURSE OF CONSTRUCTION AND THE HOME SUSTAINED DAMAGE WHEN IT RAINED, INSURED WAS NOT ENTITLED TO COVERAGE UNDER HER HOMEOWNER'S POLICY

An insured hired a General Contractor to construct an addition to her house and in the course of its work, the Contractor removed a portion of the insured's roof and left it open to the elements. As a result, the insured's home sustained water damage when it rained. In Saunders v. Florida Peninsula Ins. Co., 2020 WL 7635823 (Fla. 3rd DCA, Dec. 23, 2020), the insured brought a claim against her property insurer, asserting that the exclusion in its policy for faulty or defective workmanship was ambiguous, such that it should not preclude her from recovering insurance benefits.

The trial court granted Florida Peninsula's motion for summary judgment on the insured's claim, finding that its policy was not ambiguous and clearly excluded coverage for her claim. The appellate court agreed with the trial court that a policy's faulty workmanship exclusion is not ambiguous merely because it could be susceptible to two different meanings. Rather, the Court held that, whether a policy provision is ambiguous should be determined with reference to the context of the policy and specifically, the terms within which it is associated.

In this case, the Court noted, the faulty workmanship exclusion was listed in the subsection of the policy excluding from coverage damage occurring as a result of a faulty product ("design and specifications") as well as a faulty process ("repair, construction, renovation" etc."). Therefore, the Court rejected the insured's argument that the exclusion only applied where the finished product was flawed in favor of the more expansive interpretation, which also excluded claims founded on a Contractor's negligent means of performing the work.

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AN INSURER DID NOT WAIVE ITS RIGHT TO APPRAISAL BY EXTENDING ONLY PARTIAL COVERAGE TO THE INSURED'S LOSSES AND ABATING THE APPRAISAL PROCESS AFTER THE INSURED FILED SUIT FOR BREACH OF CONTRACT

The Third District Court of Appeal addressed the issue of whether a property insurer which afforded coverage to its insured for damage to the inside of her home but not for the roof damage waived its right to appraisal in People's Tr. Ins. Co. v. Portuondo, 307 So. 3d 932 (Fla. 3rd DCA 2020). In this case, People's Trust declined to pay for the roof damage and demanded appraisal after the insured filed suit but before the insurer had been served. After the carrier was served, it instructed its adjuster to stop work on the appraisal and filed Motions to Compel Appraisal, to Compel its Right to Repair, and to Compel Payment of the Policy's deductible.

The trial court denied the insurer's motion to compel appraisal because it only afforded partial coverage for the insured's loss. People's Trust appealed and the appellate court reversed the trial court's order denying appraisal. The appellate court found that the trial court should grant an insurer's motion to compel appraisal an insurer decides to repair a covered loss, and the parties cannot agree on the scope of repairs.

The insured also argued that the carrier waived its right to appraisal by ordering its adjuster to stop working on the appraisal after it was served with suit. The appellate court disagreed, finding that there was no authority equating an abatement of the process with conduct inconsistent with the appraisal process.

AN INSURER THAT PROVIDED A COURTESY DEFENSE TO CLAIMS OUTSIDE THE SCOPE OF ITS COVERAGE WAS NOT JOINTLY AND SEVERALLY LIABLE ON FINAL JUDGMENT UNDER THE NONJOINDER STATUTE

Under the heading of "no good deed goes unpunished," an insurer that provided only $10,000 in property damage coverage to an insured driver, but not bodily injury coverage, wound up jointly and severally liable with its insured for a $679,526.03 final judgment on the Plaintiff's personal injury claim against the insured driver. In Security Nat'l Ins. Co. v. Gonzalez, 46 Fla. L. Weekly D679 (Fla. 2d DCA, Mar. 26, 2021), the insured had no coverage for anything other than property damage with Security National. When the insured was sued, the carrier provided him with a "courtesy defense" to the bodily injury claim, and advised the insureds that they had no coverage for the Plaintiffs' bodily injury and loss of consortium claims. Security

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National also advised the insureds that it was reserving its right to disclaim coverage, that it had no duty to defend any claims not covered under their policy, that the insureds would become legally responsible to pay the Plaintiffs' bodily injury damages, and that they were welcome to hire their own counsel at their own expense. In addition, Security National advised the insureds that it recommended that the property damage portion of the Plaintiffs' claim be settled, but that that settlement would not extinguish the remaining bodily injury counts.

The property damage claim was resolved, and that count was dismissed. For reasons unclear, Security National continued its "courtesy defense" of the insureds. The Plaintiffs served Proposals for Settlement on the insureds, which they rejected. The case went to trial and resulted in a $ 762,805.63 verdict, which was later reduced in the final judgment. The Plaintiffs' moved for attorneys' fees and costs, and that motion was deferred pending this appeal from the final judgment, which was ultimately affirmed.

After the appeal, the Plaintiffs moved to join Security National as a party defendant under the Non-Joinder Statute, Florida Statute § 627.4136(4), which permits the joinder of an insured as a party defendant on a judgment rendered against its insured if there is coverage for that judgment. Initially, the trial court denied the motion, but it granted a supplemental motion after the Plaintiffs contended that Security National was estopped from denying coverage because it failed to either deny coverage outright or defend the insureds under a reservation of rights under the Claims Administration Statute.

On appeal, Security National argued that it was improperly joined as a party defendant because it did not cover the bodily injury claims against the insureds and the only covered claim, for property damage, had been settled long before the entry of the final judgment. The Plaintiffs argued that Security National was properly added to the judgment pursuant to the Supplementary Payments provision of its policy providing that it was liable to pay "other reasonable expenses incurred at our request." In doing so, the Plaintiffs relied on case law holding that a Plaintiffs' attorneys' fees and costs awarded under a Proposal for Settlement are deemed to be covered under this language.

The appellate court rejected this argument, noting that in the case law cited by the Plaintiffs, there was no dispute that the underlying litigated claim was covered under the carrier's policy, while in this case, it was undisputed that Security National covered no part of the final judgment rendered against its insured.

The Second District also rejected the estoppel argument because Security National consistently advised the insureds that they had no coverage. While the Plaintiffs argued that the carrier violated the Claims Administration statute by failing to advise the insureds of a "coverage defense" within 30 days and/or failing to send the insureds a "Reservation of Rights" letter and obtaining a non-waiver agreement or retaining mutually agreeable independent counsel, the Court noted that the law was clear that the absence of coverage does not equate to a "coverage defense" as that term is used in the statute. In any event, it was equally clear that even if Security National had breached the Claims Administration statute, that breach would not create coverage where there was none – it could be used to prevent a forfeiture of coverage that otherwise exists. Accordingly, the appellate court reversed the final judgment with directions to the trial court to enter a new final judgment in the insured's name only.

WHERE WORK THAT UTILITY CONTRACTED OUT TO A WORKER'S EMPLOYER WAS NOT PERFORMED PURSUANT TO A CONTRACT BETWEEN THE UTILITY AND ITS CUSTOMERS, UTILITY WAS NOT ENTITLED TO WORKERS' COMPENSATION IMMUNITY

Tampa Electric Company appealed the denial of its motion for summary judgment on its affirmative defense of workers' compensation immunity in Tampa Elec. Co. v. Gansner, 35 Fla. L. Weekly D2358 (Fla. 2d DCA, Oct. 16, 2020). In that case, two employees of Zachry Industrial Inc., a contractor hired by Tampa Electric to perform maintenance work at Big Bend Power Station, were seriously injured, and they brought suit against the utility.

Tampa Electric raised the affirmative defense of workers' compensation immunity, arguing that Zachry's employees qualified as its "statutory employees" under the workers' compensation statute such that the utility was immune from a civil suit. The trial court denied Tampa Electric's motion for summary judgment and the Second District affirmed.

On appeal, the utility argued that it had a contractual obligation to its customers to provide them with utility services, and that this obligation sufficed to render Zachry a subcontractor. The appellate court found that the use of the term "contract work" in the workers' compensation statute is not the same as "work that contributes to the performance of the contract," which would encompass virtually every

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contract to which Tampa Electric was a party. The appellate court concluded that Tampa Electric was not a "contractor" within the meaning of the workers' compensation statute because it had not sublet a contractual obligation that it had to a third party. The Court reasoned that the utility's "contract work" with its customers does not include maintenance of its electrical equipment at its facilities, which is required by regulation, and not by contract. Thus, Tampa Electric was not the plaintiffs' "statutory employer" entitled to workers' compensation immunity.

THE DELAYED DISCOVERY DOCTRINE DID NOT APPLY TO EXTEND THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS BROUGHT BY MINOR PLAINTIFFS, WHO WERE ALLEGEDLY SEXUALLY ABUSED DURING BABYSITTING SESSIONS, AGAINST THE ABUSER'S PARENTS AND THEIR EMPLOYERS

In R.R. v. New Life Cmty. Church of CMA, Inc., 303 So. 3d 916 (Fla. 2020), minor plaintiffs who were allegedly sexually abused during babysitting sessions brought suit against the abuser's parents and their employers, alleging that they were vicariously liable for their damages. At issue in the case was when the statute of limitations for the claims began to run and whether it was tolled at any point until the minors obtained the age of majority or until a formal representative knew or should have known of the minors' claims.

The minors alleged that their abuse occurred from 1998 to 2005, when they were as young as 4 years old. S.B., one of the minors, testified that she did not tell anyone about the alleged molestation until after she turned eighteen, but also testified that she had never forgotten it. R.R., the other minor, testified that she told her parents about the abuse within a week after it happened, and her father contacted the abuser's parents who made the abuser apologize to R.R. Much later, the abuser plead guilty to child pornography charges and is now serving a lengthy sentence.

This lawsuit was filed in 2014, long after the alleged abuse occurred, and was filed against the abuser's parents, New Life Community Church, and two of its affiliates. The claims sounded in negligence and alleged that the defendants were vicariously liable for the abuser's actions.

The defendants moved for summary judgment on the ground that the statute of limitations applicable to negligence claims had run before suit was brought. They also argued that under Florida Statute § 95.031(1), which provides that "except as provided in" the limitations statute, "the time within which an action shall be begun under any statute of limitations accrues when the last element constituting the cause of action occurs," which, in this case, was well before suit was filed.

In response, the claimants argued that their incapacity to sue until they reached eighteen "tolled" the statute of limitations. They also cited to two limitations statutes governing suits against an abuser. Section 95.11 (7), for Intentional Torts Based on Abuse, provides that an action founded on alleged abuse could be commenced at any time within 7 years after the victim reached the age of majority, within 4 years after the victim leaves the dependency of the abuser or within 4 years after the discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later. Section 95.11 (9) provides that, with respect to criminal charges for sexual battery on a victim under 16, an action may be brought at any time.

The trial court rejected the claimants' arguments, finding that the "delayed discovery" rule, which tolls the time for suits predicated on abuse, applied only to claims against the abuser him or herself, and not to negligence claims predicated on that abuse. On appeal, the Second District affirmed the summary judgment in the defendant's favor. In doing so, that Court certified conflict between its decision and two decisions from the Third and Fourth District Courts of Appeal on the issue of when the negligence claims began to accrue under the applicable statutes of limitation.

The Supreme Court accepted jurisdiction to resolve the conflict. The Court began by citing its prior precedent holding that the "delayed discovery" doctrine, which provides that a cause of action does not accrue until the plaintiff knows or reasonably should know of the tortious act giving rise to the cause of action applies in cases of fraud, products liability, professional and medical malpractice or intentional torts founded on abuse. The Court noted that there was no statute delaying the accrual of tort claims where the putative plaintiff is a minor, but § 95.051(1)(i) provides a tolling provision which tolls the time for bringing suit after accrual, while the plaintiff is a minor. The Court emphasized that accrual and tolling are distinct concepts in that a cause of action is only tolled after the cause of action has accrued. The Third and Fourth District opinions in other cases implied that there was a judicially created delayed accrual rule, while the Second District in this case predicated its opinion on the

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statutory limitations period applicable to the plaintiffs' claims.

In its lengthy opinion, the Court found that the Third and Fourth District Courts were wrong in essentially creating new law by engrafting a delayed accrual rule where the legislature has not provided for one. The Court rejected the claimants' arguments in this case that their negligence claims were subject to delayed accrual under Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000), in which the Court held that "the delayed discovery doctrine applies to the accrual of the instant cause of action (intentional tort) based on a claim for childhood sexual abuse accompanied by traumatic amnesia." While the Court recognized that its opinion in that case was not predicated on legislation, the statutory default rule in § 95.031, which provides that a cause of action accrues when the last remaining element of the claim occurs, ostensibly supported its decision. In the present case, the Court appears to have receded from its decision in Hearndon, although not expressly since that case did not govern the disposition in the case at bar.

The Court ultimately included that neither it nor any other Court had the discretion to legislate from the bench by carving out exceptions to the statutes of limitations enacted by the legislature. Absent an express provision in Chapter 95 that delays the accrual of a cause of action for negligence predicated on underlying sexual abuse, the Court held, it could not create one by judicial fiat. Because the statutes of limitation did not delay accrual of the cause of action under the facts of this case, the Court approved the appellate court's decision affirming summary judgment in favor of the defense.

A SECURITY PROVIDER COULD NOT BE HELD LIABLE FOR ASSUMING DUTIES BEYOND THOSE SET FORTH IN ITS CONTRACT WITH ITS EMPLOYER, A HOSPITAL

The Third District Court of Appeal addressed the issue of the scope of a security company's duty to a visitor to the hospital which hired the company to provide security on its premises. In Glickman v. Kindred Hosps. E., LLC, 314 So. 3d 630 (Fla. 3rd DCA 2021), an 87-year-old man, Theobaldo Tames, invited the Plaintiff, Mrs. Glickman, to meet him in the lobby of Kindred Hospitals East to visit a patient who was a close friend of both of them. Mr. Tames arrived first and signed in with a hospital employee who recognized him as a frequent visitor. When Mrs. Glickman arrived, Mr. Tames shot her several times and then shot and killed himself.

It was hospital policy not to permit anyone to bring a firearm or deadly weapon into the hospital, and there was a prominent sign to that effect. The security guards hired by the hospital were likewise unarmed, and there had never been a prior shooting.

The Glicksteins sued Kindred and others related to it, as well as the security company Kindred hired to guard the premises. The security company moved for summary judgment on the grounds that it owed the Glicksteins no legal duty because its contract with the hospital limited its obligations to protecting the hospital and its employees, and expressly disavowed any duty to protect others and further argued that nothing the security company did broadened the "zone of risk" of such a crime on the hospital premises. The trial court granted the summary judgment motion, and the Glicksteins appealed.

The appellate court affirmed the summary judgment in favor of the security company, rejecting the Glicksteins' argument that the security company assumed a generalized duty to protect anyone on the hospital premises. The Court cited well-established case law holding that a security company's duties are limited to those assumed in its contract with its principal. While the Glicksteins argued that the security company's written contract had actually expired after the first year and was never renewed in writing, the Court noted that the company continued to provide the same services set forth in the initial written contract and the hospital continued to pay for those services for years after the written agreement had expired.

The Glicksteins also argued that the security company voluntarily assumed duties in addition to those set forth in its contract because it made suggestions to the hospital on how to improve its security by adding cameras, among other things. In addition, an official from the security company, in his deposition, agreed with the plaintiff's counsel's general proposition that "the purpose of security officers was to 'promote' the safety of patients, visitors, and employees." Despite this testimony, the appellate court found that no reasonable jury could find that the security company expressly or impliedly agreed to expand the scope of its services beyond those stated in the written contract between the hospital and the security company.

* * *

Written and Edited by:

Hinda Klein, Partner

Samuel Spinner, Associate

WORKERS' COMPENSATION CASE LAW UPDATES

JCC HAS RESPONSIBILITY TO PERFORM NECESSARY DAUBERT ANALYSIS ONCE DAUBERT OBJECTION IS RAISED BY A PARTY

In Cristin v. Everglades Corr. Ins., 310 So. 3d 951 (Fla. 1st DCA 2020), the Claimant fell at work and sustained a serious head injury. The JCC entered an order denying compensability of his workplace fall based on the Judge's acceptance of the opinions of an EMA. The EMA was brought in due to conflicting IME testimonies as to the cause of the Claimant's injuries. The Claimant's IME opined that no pre-existing condition explained the Claimant's syncope, which led to his fall, and suspected that he fainted due to stressors at work. In contrast, the E/C's IME opined that the Claimant's syncopal episode occurred due to hemodynamic state of volume depletion. Specifically, to treat the Claimant's prostate cancer, he started a treatment regimen known as Gerson therapy, which required a vegan diet, a large number of nutritional supplements, and two or more daily coffee regimes. The E/C's IME explained that his use of frequent enemas, fatigue, and medications created an instance of low blood pressure induced by volume depletion/dehydration, which led him to faint.

Claimant's counsel raised a Daubert objection to the E/C's IME, asserting that it was "pure opinion," on several occasions. The E/C then filed a motion for the appointment of an EMA based on the disagreement in the IMEs. Then, the E/C filed a motion to strike the Daubert objection, which was denied. The Claimant then filed a motion to exclude the E/C's IME on the basis that he was (1) not qualified to testify as to dehydration or volume depletion and (2) the testimony was pure opinion based on unreliable methodology. The JCC denied the motion because exclusion of the testimony was "not literally possible" where the JCC is both the trier of fact and the arbiter of the admissibility of evidence.

The EMA was appointed and opined that the Claimant's faint was more likely related to the Gerson regimen. The Claimant renewed his objection for exclusion of the E/C's IME testimony. The JCC ultimately found no clear and convincing evidence to reject the presumptively correct EMA opinion that the MCC of the syncopal event was malnutrition and denied all benefits.

In reversing and remanding the JCC's order, the First District noted that, generally, a JCC's decision whether to admit evidence is reviewed for abuse of discretion, but a JCC's statutory interpretation is subject to de novo review. It found a JCC is required to apply the Daubert test to a challenge to admissibility of an expert opinion, reiterating that the judge's role is that of evidentiary "gatekeeper," who determines whether the expert's testimony meets the Daubert standard for admissibility of expert testimony. Had the JCC appropriately applied the Daubert test after the Claimants first objection, there might not have been a disagreement in medical opinion thereby triggering the appointment of an EMA. However, he denied the motion, ruling that he could not exclude the testimony as he was "necessarily exposed to the testimony." The First District found that the JCC erred as a matter of law by failing to address the Claimant's Daubert objections and the successor JCC similarly erred by declining to apply a Daubert analysis when the objection was renewed.

Courts have ruled that that it is reversible error for a trial court to abdicate its gatekeeper role and refuse to assess the reliability of an expert's testimony as opposed to merely addressing the qualifications of the expert. Further, courts have held that abdicating the gatekeeping role is in itself an abuse of discretion and applies whether the trier of fact is a judge or a jury. The trial court must adequately demonstrate by specific findings on the record that it performed its duty as gatekeeper.

The First District ultimately concluded the JCC abused its discretion as a matter of law by refusing to address the Claimant's Daubert challenge, and it remanded as appellate courts are not well-suited to exercise the discretion that the Daubert rule gives to the trial court, and therefore remanded. The First District further noted that the error was not harmless, as the admissibility of the objectionable opinion would have affected the extent to which the EMA's opinion was presumptively correct.

A CLAIM FOR INDEMNITY BENEFITS RELATING TO PTSD BEGINS ON THE DATE OF THE QUALIFYING EVENT THAT CAUSED THE PTSD, NOT THE DATE OF MANIFESTATION

In Palm Beach Cty. Fire Rescue v. Wilkes, 309 So. 3d 687 (Fla. 1st DCA 2020), the Claimant, a fire-fighter, was initially awarded indemnity benefits as the lower court found his PTSD was a result of a qualifying event listed in section Florida Statute § 112.1815(5)(a) 2.a-k. and further found that that his claim was filed properly noticed within the 52 weeks after the qualifying event.

In 2015, the Claimant witnessed the rescue of a young boy who drowned, and he experienced symptoms of PTSD in the following years. In April or May of 2019, he went underwater diving with friends and later had a dream that the drowned boy was his own son. At the end of May 2019, he was diagnosed with PTSD for which the 2015 incident was the precipitating cause. He was placed on sick leave in May 30, 2019. On August 5, 2019, he filed a PFB claiming entitlement to indemnity benefits. The E/C raised various defenses, including late reporting and notice of claim.

Florida Statute § 112.1815(5)(a) states that the time for filing notice of the injury for compensable PTSD is measured from one of the qualifying events or the manifestation of the disorder, whichever is later. Further, the statute says a claim must be properly noticed within 52 weeks of the qualifying event.

On de novo review, the First District reversed the JCC's decision. Upon analyzing the plain language of the statute, the First District found that a *claim* under the section must be properly noticed within 52 weeks of the *qualifying event*, not the manifestation of the symptoms. The Claimant argued that the PTSD manifestation was itself a qualifying event, but the statute only lists eleven very particular events, and manifestation is not one of them.

Further, the appellate court found that the statute is a statute of repose, which bars actions by setting a time limit within which an action must be filed as measured from a specific act, after which time the cause of action extinguished. The Florida Legislature unambiguously chose the qualifying event date as the measuring point for filing a timely claim, and there is no evidence of any contrary legislative intent.

APPRORTIONMENT/AGGRAVATION OF AN INJURY MUST BE ASSERTED WITHIN THE TIME LIMITS OF THE 120-DAY RULE

In Sullivan v. Broadspire, 308 So.3d 659 (Fla. 1st DCA 2020), the Claimant injured his right shoulder in a compensable workplace accident. The initial MRI revealed significant preexisting changes. The E/C authorized an orthopedic surgeon, the Claimant underwent surgery, and he was ultimately placed at MMI with an 18% PIR about two years later. The authorized doctor signed a letter prepared by the E/C's attorney stating that the workplace accident aggravated a preexisting condition and that an apportionment of 60%/40% was reasonable, relating to impairment benefits. The next month, the E/C deauthorized the treating provider and reduced IIBs under the apportionment provision of Florida Statute § 440.15(5)(b). The Claimant filed petitions seeking full payment of IIBs and authorization of medical care with the authorized orthopedist. The E/C asserted that IIBs/future care should be apportioned as the injury was limited to an aggravation of the preexisting condition and the workplace injury was no longer the MCC of the need for medical care. In response, the Claimant raised waiver under the 120-day rule in § 440.20(4).

The First District reversed, stating that the E/C raised the right to compensability of the pre-existing condition by operation of the 120-day rule provision. The E/C was put on notice of the pre-existing conditions, per results of the Claimant's initial MRI, and no investigation took place until about 2 years later, well outside the 120 day time period. Further, there was no evidence that the E/C ever directed any provider to treat the *aggravation* of the right shoulder. Therefore, the E/C could not deny compensability of the pre-existing condition, and apportionment did not apply. Further, as to deauthorization of the physician, the First District found that unilateral authorization of an authorized treating physician is not permitted.

AN AWARD OF ATTORNEY'S FEES MUST CONSIDER BOTH THE SCOPE OF ISSUES ACTUALLY LITIGATED AND THE REASONABLE PREDICTABILITY OF THE BENEFITS ON WHICH ENTITLEMENT IS TO BE BASED

In Praxair Inc. v. Celentano, 305 So.3d 563 (Fla. 1st DCA 2020), the Claimant sustained a compensable injury in 2017. A final order in 2017 denied the Employer's misrepresentation defense and awarded Claimant authorization for lumbar surgery, payment of TPD benefits and impairment benefits, and entitlement to fees and costs. The Claimant did not undergo the requested surgery. F ive months later, the Claimant filed a petition for PTD benefits and PICA. The Employer timely and voluntarily accepted the Claimant as permanently disabled, but maintained that PICA was not due.

In 2019, the JCC entered a final Order asserting that attorney's fees and costs were not due as it was not reasonably predictable that Claimant would be permanently and totally disabled following the surgery and, further, limitation and restrictions, if any, could not

be determined until she reached MMI after the surgery. The fact that the Claimant didn't have the surgery does not change the predictability of the benefits that would flow from the issues litigated.

While the Claimant argued that the award of permanent disability flowed from her attorney's work in defeating the misrepresentation defense to her original claim for TPD benefits, the First District agreed with the JCC's conclusion that it was not reasonably predictable that permanent disability would flow from the defeat of the Employer's misrepresentation defense.

In affirming the decision, the First District held that fee entitlement and amount are tied to both specific work and the specific benefits secured. A court must consider the scope of the issues actually litigated and the reasonable predictability, from that legal work, of the benefits on which entitlement is to be based and amount is to be calculated. Here, the Claimant's attorneys' efforts to defeat misrepresentation did not result in permanent disability benefits. Further, even though counsel completed legal work to secure TPD benefits, future entitlement to permanent disability benefits was not reasonably predictable.

PRETRIAL STIPULATION ACCEPTING SPECIFIC BODY PART BUT RAISING MCC DEFENSE DOES NOT CONSTITUTE ACCEPTANCE OF COMPENSABILITY FOR SURGERY OF A PREEXISTING CONDITION

In Noland v. City of Deerfield Beach, 308 So.3d 222 (Fla. 1st DCA), the Claimant, a firefighter, injured his left knee at work in 1997. He filed a notice of injury, but did not file a Petition for Benefits at that time, nor did the E/C authorize any treating physician/treatment for this injury. In fact, the Claimant treated outside the workers' compensation system through his private health insurance. He argued that his former employer had to provide an orthopedic surgeon to treat his left knee following a 2018 surgical replacement that was performed under his private health insurance.

In the parties' joint pretrial stipulation as to the PFB requesting ongoing treatment for his left knee, and fees and costs, the E/C agreed that "left knee' was the "specific body part [ ]/psychiatric condition [ ]" that was "accepted as related to the accident." The E/C authorized a physician to treat the left knee. I n the same stipulation, the E/C asserted MCC and other defenses, and asserted as an affirmative defense that the treatment requested is no longer related to the work accident.

The evidence showed the Claimant was bowlegged and had a history of knee problems long before his 1997 work accident. The doctor who first recommended the 2018 surgeries, and the doctor who performed the surgeries, opined that the surgeries were because of his preexisting osteoarthritis. Further, the E/C's IME concurred with these opinions. The Claimant's IME, and the Claimant's personal testimony, was the only evidence presented at trial relating the need for ongoing treatment of the left knee following his 2018 surgery to his 1997 injury. The JCC denied the claim, concluding that preexisting osteoarthritis was the major contributing cause of the need for further left-knee treatment.

In affirming the lower court decision, the First District found the Claimant's argument that the E/C accepted the left knee "condition' as compensable in the pretrial stipulation, and that "condition" included the preexisting osteoarthritis as an overly broad reading of the pretrial stipulation. The Claimant relied on Meehan v. Orange Cty. Data and Appraisals, 272 So.3d 458 (Fla. 1st DCA 2019), in which the parties entered into a broad stipulation which encompassed the treatment at issue due to its broad wording. Here, the E/C merely agreed that the left knee was the body part involved in the industrial accident. Further, the E/C timely and specifically raised its defense to the casual connection between the 1997 accident and 2019 surgeries. T he mere identification of a body part in the pretrial stipulation does not negate such defense. Further, no causal connection was established in the first place. Therefore, the First DCA found that the E/C's defense was timely, consistently, and adequately preserved and then proven at trial by competent, substantial evidence.

ONCE COMPENSABILITY IS ESTABLISHED, THE E/C CANNOT CHALLENGE THE CAUSAL CONNECTION BETWEEN THE WORK ACCIDENT AND INJURY

In Sanchez v. YRC Inc./ Sedgwick, 304 So.3d 358 (Fla. 1st DCA 2020), the Claimant sustained a lumbar injury in 2004, which was deemed compensable, and medical care was provided. In 2016, the parties stipulated as to the compensable body parts and treatment, which included the lumbar spine. In the following years, medical care for the lumbar spine was limited, but Claimant's authorized physician recommended a lumbar MRI. The MRI showed degenerative disc disease, among other findings, and the treating doctor referred the Claimant to pain management and recommended an epidural injection. The E/C denied these benefits, noting in the pretrial stipulation that the initial lumbar strain was no longer accepted and that the diagnosis of degenerative disc disease was an intervening event that broke the causal chain. The only evidence at final hearing was medical records of the treating physician, which the JCC found unreliable. The JCC then denied the claims for medical

care finding that the Claimant did not satisfy his burden of showing that the work accident was the MCC. While the E/C noted conceded that there was no evidence of a lumbar sprain, the First District found that there was no supporting evidence of a specific accepted diagnosis whatsoever.

The First District reversed and remanded for an entry of an order granting the requested medical benefits, finding that the E/C cannot challenge the causal connection between the work accident and injury once compensability is established, but may question the causal connection between the injury and the requested benefit. It was thus the E/C's burden to demonstrate a break in causation – and the E/C failed to do so. Rather, the E/C argued that it only accepted a lumbar strain, while there was never such diagnosis, and the E/C had previously agreed to treatment relating to the Claimant's lumbar spine. Similar to the Meehan and Jackson cases, the parties here entered into a broad stipulation that did not define the accepted compensable injury any more narrowly than the lumbar spine.

Written and Edited by:

CONROY SIMBERG CONNECT

Stephanie Robinson, Partner

Samuel Spinner, Associate

FIRM ANNOUNCEMENTS

Conroy Simberg is pleased to announce that **Hinda Klein**, a partner in Hollywood and chair of the firm's appellate practice group, and **Jayne Pittman**, managing partner in Orlando and chair of the firm's construction practice, were selected to the 2021 Florida Super Lawyers list. Additionally, **Matthew Troy**, a partner in Orlando, **Tashia Small**, a partner in Jacksonville, and **Matthew Innes**, an associate in West Palm Beach were selected to the 2021 Rising Stars list.

* * *

Conroy Simberg was a proud sponsor of the 2021 Hillsborough County Bar Association (HCBA) Diversity & Inclusion Virtual Networking Social. Tampa attorney Bill Mitchell participated in the Zoom meeting with approximately 100 attendees, including law students from schools in Florida.

The Networking Social is designed to connect law students from across the state with local attorneys, law firms, judges, local bar associations, public service organizations and government institutions in a casual, friendly, and low-pressure environment.

Bill Mitchell, a member of the firm's Diversity Committee, focuses his practice primarily in the areas of first and third party property loss disputes and property coverage matters.

* * *

Matthew J. Troy, a partner in Conroy Simberg's Orlando office, presented "*The Employment Relationship, Employee Leasing Companies, Covered and Excluded Employment, Defenses to Claims and Fraud,"* at the 2021 Florida Bar Workers' Compensation Forum in Orlando, Florida on April 15, 2021.

Matthew J. Troy, Board-certified by The Florida Bar in Workers' Compensation, represents employers, carriers, TPAs, uninsured employers, PEOs and self-insured funds in all types of workers' compensation cases including permanent total disability, catastrophic injuries, toxic exposure, heart and lung bill presumption cases, drug test denials and PEO coverage.

* * *

Jayne Ann Skrzysowski-Pittman, Managing Partner of the Orlando office and Chair of the firm's Construction Practice Group, presented "*Construction Defect Damages and Developments*," at the Construction Law Institute an event sponsored by The Real Property, Probate and Trust Law Section of The Florida Bar on May 21, 2021.

Board-certified in Construction Law, Jayne has completed more than 500 construction meditations and defended more than 175 expert depositions of engineers, architects and industry executives.

Hinda Klein recently presented "*Practical Approach to Defending Against Letters of Protection*," at the 2021 Florida Liability Claims Conference (FLCC). The presentation focused on the practical methods and tools which can be employed to defend against the new wave of Letters of Protection.

* * *

Alexis D. Lezama, an associate in Conroy Simberg's West Palm Beach office and member of the firm's First Party Property & Coverage practice group, has been selected for inclusion into the Top 40 Under 40 Black Lawyers in Florida, an honor given to only a select group of lawyers for their superior skills and qualifications in the field. Membership in this exclusive organization is by invitation only and is limited to the top 40 attorneys under the age of 40 in each state who have demonstrated excellence and have achieved outstanding results in their careers.

* * *

We are proud to announce that the following attorneys have been named partners in the firm.

Debrah L. Antell (Hollywood) – Deb presents employers, carriers, TPAs, uninsured employers, PEOs, and self-insured funds in all areas of workers' compensation defense matters.

Todd M. Feldman (Hollywood) – Todd practices in the firm's recovery and subrogation division and handles cases throughout the state.

Matthew W. Innes (West Palm Beach) – Matt handles Personal Injury Protection (PIP) insurance litigation.

Yasmine Kirollos (Fort Myers) – Yasmine practices in a wide range of areas including general liability & casualty, automobile litigation, premises liability, insurance coverage, bad faith & extra contractual litigation.

Drew M. Levin (Hollywood) – Drew focuses on medical and dental malpractice, medical device products liability, and pharmaceutical litigation.

Krista L. Pendino (Tampa) – Krista handles general liability, premises liability, automobile property damage, construction defect, wrongful death and personal injury defense matters.

Brittany L. Orlando Weisberg (West Palm Beach) – Brittany practices exclusively in personal injury protection insurance (PIP) law.

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APPELLATE WINS

Hinda Klein, Chair of the firm's Appellate Department prevailed before the Florida Supreme Court in Peoples Gas Sys. v. Posen Contr., Inc. on a novel issue involving Florida's Underground Facility Damage Prevention and Safety Act. The case arose from an accident in which an employee of Posen Construction was seriously injured when he ruptured a gas line during excavation. The employee received workers' compensation benefits from Posen, and he sued PGS in state court for his injuries. PGS settled the employee's claim and then filed suit in federal court seeking indemnity from Posen for the monies paid to the employee, predicating its indemnity claim on the Act. Posen moved to dismiss on the grounds that the Act did not authorize a cause of action for statutory indemnity. The federal district court granted the motion to dismiss, and PGS appealed to the Court of Appeals for the Eleventh Circuit. On appeal, the Eleventh Circuit determined that there was no state law on the subject, and that it could not determine how the Florida Supreme Court might rule on the issue, deciding to certify the case to the Florida Supreme Court for its review. The Florida Supreme Court determined that the District Court was correct in concluding that there was no statutory cause of action for indemnity.

* * *

Ms. Klein also prevailed before the Fifth District Court of Appeal in Depositors Ins. Co. v. Pasco-Pinellas Hillsborough Cmty. Health Sys., a PIP case. In that case, the trial court determined that, where there was no affirmative determination that the insured had suffered an emergency medical condition (EMG), PIP benefits were not limited to $2500 because the policy, which tracked the language of the PIP statute, did not expressly require an affirmative determination on the part of an authorized medical provider that the insured had not suffered an EMC. The appellate court disagreed with the trial court and reversed, holding that unless there is an affirmative determination that the insured has suffered an EMG, PIP benefits are limited to $2500, and not $10,000, as the provider had argued.

* * *

Ms. Klein also prevailed by obtaining a reversal of the entire damage award in Gulfstream Park Racing Ass'n v. Volin, in which the Plaintiff tripped and fell while at the Gulstream Racetrack. At issue was whether the trial court properly permitted the Plaintiff to introduce the gross amount of her medical bills, which had been settled by Medicare for an amount substantially less than the gross bills. After the trial was concluded, the trial court reduced the jury's verdict for past medical expenses to the amount paid by Medicare in full and final settlement. On appeal, Ms. Klein argued that the trial court erred as a matter of law in permitting the Plaintiff to "board" the gross medical bills, because that did not reflect of the true amount of the Plaintiff's medical expenses, which were limited to what Medicare paid. Ms. Klein further argued that the appellate court should reverse the entire damage award because it may have been inflated as a result of the phantom economic damages the Plaintiff claimed as past medical expenses. The appellate court agreed, and reversed the case for a new trial on damages.

Ms. Klein and **Samuel Spinner**, an appellate associate in the firm's Hollywood office, also prevailed before the Second District in a rule nisi action arising from an underlying workers' compensation case. In Zurich v. Samson, the claimant's workers' compensation carrier, Zurich, agreed to provide evaluation and treatment for a work-related injury. After some scheduling issues resulted in treatment being delayed, claimant filed a petition for rule nisi in circuit court, seeking millions of dollars in sanctions in form of disgorgement of Zurich's profits from its insurance business in Florida. The circuit court rejected that request for a disgorgement, but ordered Zurich to pay claimant a $15,000 fine.

The Second District reversed the imposition of this fine, explaining that, while the circuit court could impose sanctions for civil contempt, it could not award an unconditional fine without giving Zurich the ability to "purge" the fine before its enforcement. Because this fine was unconditional, the Second District found that it amounted to an improper criminal contempt sanction. The Second District reversed for the circuit court to reconsider the award.

* * *

Mr. Spinner also prevailed in appeal before the Fourth District Court of the order granting summary judgment for the defendant department store in a slip-and-fall action, which motion was also argued by **Mr. Spinner**. In McReal v. Ross, the plaintiff claimed that she slipped and fell on an unidentified orange liquid on the floor. The plaintiff could not identify the substance and she did not know how long it was on the floor before the accident. However, the plaintiff argued that Ross's failure to preserve the video surveillance footage from the time of her accident created an inference of negligence sufficient to withstand summary judgment. The Fourth District disagreed and affirmed the final judgment for Ross.

* * *

Mr. Spinner also prevailed before the Second District Court in a premises liability action in which the plaintiff tripped and fell down a set of steps in a restaurant/bar. In Strandberg v. Pokey's, Inc., the plaintiff alleged that the steps were a "dangerous condition" because they were hidden behind a door with no warning sign. **Michael Kraft**, managing partner of the firm's Tampa office, argued on summary judgment that the steps were not dangerous because they were textured, painted yellow in part, and there was a handrail on the wall. The trial court granted summary judgment, and the Second District affirmed after oral argument.

SUCCESSFUL LITIGATION DECISIONS

Cristobal Casal, managing partner, and **Elliott Tubbs**, an associate, in the firm's Fort Myers office, obtained a defense verdict in a first party property case tried over two days in Lee County, Florida. Plaintiff, a water mitigation contractor, claimed that 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 Plaintiff failed to meet its burden to prove that the home was damaged within the policy period.

* * *

Rod Lundy, a partner, **Tylar Heintz**, an associate, both of our Orlando office**,** obtained a favorable verdict in Orange County, Florida before Judge Denise Beamer. Plaintiff was a pedestrian in the crosswalk and was contacted by the collapsible mirror of defendant's vehicle, which was a making a left across plaintiff's path of travel. The incident was captured on a traffic video camera. Defendant admitted liability, but argued comparative fault, causation, and damages.

The jury found plaintiff 30% at fault. Plaintiff contended she sustained a low back herniation causing radiculopathy and need for a microdisectomy. We countered that she had no complaints of back pain the day of the incident or 5 days later when treated, nor any sign of radiculopathy 43 days later when she first made complaints of back pain to a provider.

We also contended in the 5 years post-accident, Plaintiff attended the YMCA 247 times, had numerous gaps in treatment (as long as 575 days), and surveillance footage showed her jogging and biking. Plaintiff countered those activities caused her pain but were therapeutic.

Plaintiff asked the jury to award over 4 million dollars, consisting of 460k for past damages and 3.6 million for future damages. The jury awarded only past medical expenses of 55k and future medical expenses of 10k, but found Plaintiff had not sustained a permanent injury, which precluded an award for past and future pain and suffering. The total verdict of 65k was reduced 30% by the comparative fault finding for a total before PIP set off of 45.5k. We filed a Proposal for Settlement in the amount of 125k before trial, which the Plaintiff rejected.

* * *

Ed Herndon, a partner in our Tallahassee office and **Tom McCausland**, a Hollywood partner, recently tried a case in Washington County in which the Plaintiff, a truck driver, was injured in a traffic accident, after which he fell out of his truck onto the ground. The defense admitted liability but contested causation of the Plaintiff's primary complaint that he developed Atrial Fibrillation as a result of the accident. The defense did not contest that the Plaintiff suffered a broken wrist in the accident, nor did the defense contest that that injury was permanent. Plaintiff's counsel sought between $2 and $3 million in damages. The jury awarded the Plaintiff approximately $219,000.00 in total damages.

* * *

Tom McCausland, **Seth Goldberg**, and **Hinda Klein**, partners in our Hollywood office, and **May Swartz**, a partner in our Tallahassee office, recently tried a trucking accident case in Orange County, in which the Plaintiff sought in excess of $4 million in damages. The defense admitted negligence, but disputed causation and permanency. The jury determined that the Plaintiff did not sustain a permanent injury in the accident and awarded her approximately $29,000 in damages, well below what had previously been offered.

* * *

Cristobal Casal, and **Yasmine Kirollos,** partners in the firm's Fort Myers office, obtained a defense verdict in a premises liability case tried over 2 days in Collier County, Florida. This was the first in-person civil jury trial in Naples since the pandemic resulted in the courthouse's closure more than a year ago.

Plaintiff was a customer at the Defendant's store, and was in the health and beauty supply aisle looking for a cosmetic bag when she was struck by a box of merchandise on a flatbed cart that she alleged was left unattended by Defendant's employees. There was video footage of the incident that showed the events unfolding. The Plaintiff and her daughter-in-law were escorted to the aisle by a store employee, the employee moved the cart with the boxes out of the way for them to access the products they were looking for and then stayed to speak with the Plaintiff before leaving the aisle. Another store employee was nearby stocking the opposite side of the shelf that the Plaintiff and her daughter-in-law were browsing with items from the flatbed cart. The flatbed cart with the boxes was left undisturbed for about two minutes, and then the video showed the Plaintiff's daughter-in-law pull the cart carelessly and abruptly which caused the boxes to immediately fall off the edge of the cart and strike the Plaintiff.

At her deposition, the Plaintiff's daughter-in-law denied moving the cart, and she was confronted with that inaccuracy at trial. At trial, Plaintiff argued that merchandise should not be restocked during business hours, that the cart should never be left unattended, and that Defendant's own employee created the dangerous condition by moving the cart and causing the boxes to become unstable before Plaintiff's daughter-in-law moved it. Defendant denied that the store's practice was dangerous or that the cart was unattended since the video showed two employees at or around the cart while the Plaintiff was shopping. Defendant further argued that the incident

would have occurred but for Plaintiff's daughter-in-law carelessly pulling on the cart instead of asking the nearby store employee for help. Consequently, Defendant denied all liability for the occurrence of the accident.

As a result of the event, Plaintiff suffered a vertebral fracture to her lumbar spine that required a kyphoplasty at the emergency room. She also subsequently alleged a neck fracture for which she minimally treated. Defendant contended that she obtained an excellent result from the procedure and that there was no need for any type of ongoing medical care or treatment in the future.

The Plaintiff asked the jury to award $716,000.00 at the close of trial. The defense argued that there was no evidence of any fault against Defendant.

The jury deliberated for about two hours before returning its defense verdict.

* * *

Robert Horwitz, a partner in the West Palm Beach office, and **Adriana Kiszynski,** an associate in the Hollywood office, obtained a defense verdict after a five-day live jury trial in Lee County, Florida. The Case involved a Hurricane Irma claim with an Assignment of Benefits from a roofing contractor. The Plaintiff, SFR Services LLC, sought approximately $122,000.00 in damages to replace the insureds' tile roof, claiming Hurricane Irma caused damages throughout the roof including 50-60% of the roof "lifting and moving" due to the storm. The trial involved competing experts, with the plaintiff's expert being permitted to testify despite performing his first inspection the night before live trial testimony.

At trial, the defense was able to get the insured to admit that he never had his roof inspected at the time of purchase, had never gone up on his roof to see any damage, and had never contacted his carrier until he was visited by the AOB contactor. Even more compromising was the fact he admitted he was demanding over $100,000 to replace his roof, but admitted that his neighbors were getting their roofs replaced for half the price. The AOB contractor's corporate representative tried to explain why his estimate was over twice the amount paid by the insureds, but on cross-examination, he refused to disclose his costs for replacing the roof and how much had he built in for profit.

Florida Peninsula called its field adjuster, pre-suit engineer and corporate representative to detail Florida Peninsula's extensive investigation into the loss and lengthy documentation of preexisting damages. At trial, the defense admitted into evidence over 160 photographs with extensive discussion by the engineer that the claimed damage resulted from thermal expansion and contraction, wear and tear and preexisting damage as evidenced by multiple repairs through the roof system.

At the end of trial, the jury rendered a defense verdict.

* * *

Joshua E. Nathanson, a partner in the firm's Hollywood office, obtained a verdict in an admitted liability rear-end auto collision. This was one of the first live trials held in Miami, Dade County following the COVID-19 shutdown.

This was a rear-end automobile accident, where the parties stipulated to fault for the accident. The Plaintiff was treated on the date of the accident at the emergency room and then had follow-up treatment with a chiropractor and orthopedic surgeon, who performed a percutaneous discectomy to the lumbar spine. The orthopedic surgeon also recommended a cervical fusion and lumbar fusion in the future. Plaintiff's past medical bills were $169,519.92 and she asked for $235,000 for future medical treatment. The defense called a neurosurgeon, whom the Plaintiff saw for a second opinion, and he testified that he did not have enough information at the time to say if the Plaintiff was a surgical candidate. The defense CME doctor opined that the Plaintiff did not sustain a permanent injury from the accident, but conceded that because the Plaintiff went to the emergency room on the date of the accident, it was reasonable that she undergo a couple weeks of therapy and one visit to an orthopedic physician. In closing argument, the Plaintiff attorney asked the jury to award $1.4 million dollars for the Plaintiff's claim and between $140,000 to $280,000 for the husband's consortium claim.

The jury awarded past medical bills of $68,696 and future medical bills of $160,000. The jury found that that the Plaintiff did not sustain a permanent injury and awarded $0 for the husband's consortium claim.

* * *

Robert Horwitz and **Rinat Rubinstein**, an associate in the West Palm Beach office, obtained a Final Summary Judgment in a first-party property case filed by a contractor pursuant to an assignment of benefits. In The Kidwell Grp. v. Edison Ins. Co., the contractor submitted a claim for payment for a providing an engineering report related to a Hurricane Irma loss, but the insurance carrier denied it. The defendant filed a motion for summary judgment arguing that there was no coverage for the engineer's report in the policy and the assignment of benefits was invalid and unenforceable because it did not comply with § 627.7152, Fla. Stat. The trial court agreed and granted final summary judgment.

* * *

Rachel Minetree, a partner in the Hollywood office, and **Allison Bregman,** as associate in the Hollywood office, obtained a Final Summary Judgment in a first-party property case filed by a contractor pursuant to an assignment of benefits. In M & G Restoration Grp. Citizens Prop. Ins. Corp., the contractor submitted a claim for payment for services rendered in connection with a 2017 water loss, but the insurance carrier denied it because it did not insure the property at the time of the loss. The defendant filed a motion for summary judgment, arguing that there was no coverage because there was no policy in effect at the time of the loss, and the trial court agreed and granted the motion.

* * *

Jeffrey Rubin, a partner in the West Palm Beach office, prevailed on a motion for summary judgment in a premises liability case. The plaintiff alleged that a sidewalk and curb adjacent to the Hollywood Boulevard Bridge was a hidden and dangerous condition. Judge Keathan Frink entered final summary judgment in favor of our client, an asset maintenance contractor, finding that the condition was not dangerous as it was maintained in accordance with the design plans and specifications.

* * *

Jeffrey Rubin also prevailed on a motion for summary judgment in a premises liability case in Palm Beach County. The plaintiff alleged that our clients, a property owner and developer, were negligent in allowing her to fall off a scaffold while she worked for a painting contractor at that property. The plaintiff incurred over $500,000 in past medical bills. The court held that our clients were entitled to summary judgment under the Independent Contractor Doctrine. The court also determined that the exceptions to that defense did not apply.

* * *

Jeffrey Rubin also prevailed on a motion for final summary judgment in a premises liability case in the Seventeenth Judicial Circuit of Florida, in and for Broward County. The firm represented the Florida Department of Transportation in a case where the plaintiff allegedly tripped and fell on a plastic bottle on a sidewalk. The plaintiff sustained a vertebral fracture and claimed past medical bills of over $400,000. In the motion for summary judgment, we argued that the Department did not have constructive or actual knowledge of a dangerous condition. The Honorable Carlos Rodriguez, a circuit court judge in the Seventeenth Judicial Circuit granted the motion finding that there was no competent evidence demonstrating actual or constructive knowledge of a dangerous condition.

* * *

Jeffrey Rubin and **Jeff Blaker**, partner in the West Palm Beach office, prevailed in a binding arbitration. The matter involved allegations of negligent repairs and the failure to warn of a defect in a motor vehicle. The attorneys defended a vehicle repair facility. The claimant asserted that alleged defects with the vehicle's transmission and steering caused an auto accident. T he claimant asserted over $2 million in past medical bills as damages due to the accident. The arbitrator determined that the greater weight of the evidence did not establish negligence by the dealership or a failure to warn of a dangerous condition.

* * *

Megan McDonough, an associate in the firm's West Palm Beach office, represented Walmart in two related Wrongful Death cases. The Plaintiffs alleged that Walmart negligently sold a canned air product to a third party who allegedly huffed the product to the point of impairment and crashed into the decedents' vehicle resulting in the death of four individuals. We filed a Motion for Summary Judgment, arguing that the third-party's criminal behavior was an intervening and the sole proximate cause of the deaths in this case. We further argued that Walmart did not owe a duty of care to the decedents for the third party's purposeful misuse of a product that has an intended and legal use. The court agreed and entered final summary judgment for Walmart in both cases.

* * *

Stephanie Robinson, Workers' Compensation partner out of Hollywood/West Palm Beach, prevailed as relates to compressibility in the matter to Thomas v. Pitney Bowes. Claimant alleged an accident in May 2017. The E/C initially accepted the claim, not asserting the 120 day pay and investigation of the statute. The claim was thereafter denied based upon preexisting conditions. At final hearing, the E/C asserted that the Claimant's refusal to participate in initial discovery was the direct cause of any delay with the denial. The E/C further argued that the Claimant waived the 120 day objections. The E/C further argued that the alleged work accident was not the MCC of her complaints, based upon its IME. The JCC agreed and the claim was denied in its entirety.

* * *

Stephanie Robinson, also prevailed on entitlement to attorney's fees in the matter of Diaz v. Dade Truss Company. After having to compel the Verified Petition, the Claimant's counsel filed his verified petition for attorney's fees, claiming fees based upon provision of physical therapy and for securing prevailing party costs. The Carrier disputed entitlement, asserting that there was no good faith attempt made prior to filing the petition for benefits and that regardless, the benefit was provided prior to the filing of the petition for benefits. The parties went to the a fee hearing and the judge agreed with defense, denying entitlement to attorney's fees and costs.

* * *

Melissa McDavitt, a partner in the West Palm Beach office, recently prevailed on a Motion to Dismiss Plaintiff's Complaint for Plaintiff's failure to Comply with Florida Statute § 627.7152. Plaintiff brought the subject suit pursuant to a purported assignment of benefits in St. Lucie County. In 2019, the Florida Legislature passed HB 7065, which bill was entitled, "An Act relating to insurance assignment agreements." Ch. 2019-57, Laws of Fla. Under § 627.7152 an assignments of benefits must include an written, itemized, per-unit cost estimate of the services to be performed by the assignee, among other requirements, to be enforceable. In this case, the Court found that the AOB attached to the Complaint failed to satisfy those requirements, and was, therefore, invalid and unenforceable.

* * *

Elliott Tubbs III, an associate in the Fort Myers office, received a defense verdict at arbitration in a first party property damage case in Lee County. The plaintiffs alleged that our client breached the subject insurance policy and wrongfully denied coverage. The plaintiffs alleged that their property was damaged as a result of Hurricane Irma, and that the damage amounts to over $66,000. The arbitrator found that the burden under the policy was on the Plaintiffs and that the Plaintiffs did not meet their burden of proof.

* * *

Michael J. Bonfanti, a partner in the Tallahassee office, obtained summary judgment in a first-party property case. The trial court held the language contained with the limited water damage endorsement, which limited coverage to $10,000, was unambiguous, and thus the insurer exhausted coverage by paying that amount such that no further amounts were owed.

* * *

Rachel Minetree, partner, and **Samuel Spinner,** appellate associate, in the firm's Hollywood office obtained a final summary judgment in a first-party property case brought by an assignee remediation company. In G&R Plumbing v. Citizens, the plaintiff reported a leak under the kitchen sink. The insurer's expert determined that the damage occurred over several years, not from a one-time loss. The plaintiff filed a plumber's counter-affidavit in which he stated that there was a one-time leak on the reported date of loss. We argued that, even if there was a larger discharge of water on that date, the entire loss was excluded based on the policy's anti-concurrent cause provision because both losses contributed to the same damage. The trial court agreed and granted final summary judgment for the insurer.

* * *

Chris Varner, a partner in our Pensacola office, **Sam Spinner** obtained a final summary judgment in a first-party property case. In Get Dry v. Edison Ins. Co., the plaintiff was a contractor who alleged it had a valid Assignment of Benefits ("AOB"). The Defense argued that the AOB was invalid for lack of definite price, as no cost or price was listed in the AOB, and no invoice or estimate was attached to the AOB when it was signed. The Court found that the contractor lacked standing because the AOB was invalid due to a lack of price and did not include an estimate or mechanism to determine the price for the contractor's services.

* * *

Sam Spinner and **Tom McCausland** obtained final summary judgment on the basis of workers' compensation immunity in Suarez v. Plaza Constr. Group. The plaintiff worked for an electrical subcontractor on a condominium development project, installing electrical boxes inside rebar cages on which one of the defendants, Commercial Forming, suspended concrete forms. While the plaintiff was installing a box, a suspended concrete form fell on top of his leg. The plaintiff sued Commercial and Plaza, the general contractor, for gross negligence. We successfully argued on summary judgment that Plaza, a general contractor, could be sued only for an intentional tort, not gross negligence, because it was the statutory employer of the plaintiff. As to Commercial, we successfully argued that the plaintiff failed to show that it committed gross negligence because thousands of columns were set up in this way and none of them fell before the accident, and the plaintiff admitted he could have gotten out of the way instead of continuing to install the electrical box after another worker alerted him that there was an issue with the concrete form above him.

* * *

Sam Spinner and **Robert Horwitz** obtained final summary judgment in a first party property case. In Cardenas v. White Pine, the plaintiff alleged that Hurricane Irma created openings in the roof and exterior walls that allowed for interior water intrusion and resulting damage. Both parties presented expert testimony, and we successfully argued that the plaintiff's expert's opinion was insufficient to show that water entered through an opening in an exterior wall. The trial court found that there was no issue of fact and entered summary judgment for the insurer.

* * *

Sam Spinner and **Robert Horwitz** obtained final summary judgment in a first party property case in which a remediation company filed suit without first making a claim to the insurer. In Moreno Roofing v. Florida Peninsula, the plaintiff argued that the lawsuit itself served as notice of the claim and requested an abatement for 90 days for the insurer to adjust the claim. We argued that the lawsuit itself cannot be a claim, and the trial court agreed, granting summary judgment on the basis that the plaintiff was required to notify the insurer of its claim before filing suit.

* * *

Sam Spinner and **Rachel Minetree** obtained final summary judgment in a first party property case in which the plaintiffs claimed that Hurricane Irma created an opening in the roof. In Ramos v. Citizens, the plaintiff presented testimony from a contractor who stated that Hurricane Irma damaged the roof. However, we presented counter-evidence that there was no storm-created opening that led to interior water intrusion. The trial court agreed and entered final summary judgment for the insurer.

* * *

In a potentially high profile defamation case filed in the Circuit Court of Miami Dade County, Plaintiff took a voluntary dismissal of his lawsuit after **Dale Friedman**, a partner in our Hollywood office moved to dismiss or stay the case on behalf of the Defendant. The plaintiff was Amit Raizada, a public figure who had disputes with Rick Fox, a well-known former basketball player who played in the National Basketball Association for the Boston Celtics and the Los Angeles Lakers, and Echo Fox, LP which resulted in Fox being interviewed by various news agencies, publications, broadcasters, and other media outlets where he allegedly made false statements about Raizada.

Plaintiff claimed in this case that he was defamed in a live interview given by Fox, certain articles published by Newsweek and others. Plaintiff sought to blame Defendant, The Red Banyan for providing public relations advice to two individuals who had dealings with Plaintiff and had sued him in another lawsuit in another state for defamation. In our investigation, we learned that an award against Raizada in that other case had been issued finding all the statements that were alleged to be defamatory were in fact true and, after a final judgment was issued, would be dispositive of the instant lawsuit.

* * *

In a lawsuit filed in Broward County alleging negligence by Plaintiff against Defendant, a charter school, **Dale Friedman** and **Brian Tenzer**, a partner and associate in our Hollywood office were granted summary judgment on July 26, 2021. The allegations of negligence were based on an incident where a student allegedly slipped and fell on a liquid substance while outside on the school's premises, injuring her knee. Defendant, as a charter school, is a Florida public school and part of the State's public school system. Florida Statute §1002.33(1).

As a Florida public school that is part of the State's public school system, the school is also subject to Florida's sovereign immunity statute which provides that "[a]n action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also,… presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues …" Florida Statute §768.28(6)(a). Section 768.28 involves the State's statutory waiver of sovereign immunity and must be strictly construed. The failure to do so, is fatal to an action. Levine v. Dade County Sch. Bd., 442 So.2d 210, 212 (Fla.1983).

Because Plaintiff did not serve notice to the Department of Financial Services prior to the filing of this action within the requisite three years, the Court granted Defendant summary judgment.

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