CONROY SIMBERG

CONNECT

Legal News and Updates for Clients and Attorneys
Summer 2018—Volume 19, Number 3

Insurer prejudiced as a matter of law by insured's late notice of water leak

The Fourth District Court of Appeal affirmed a summary judgment rendered in favor of Florida Peninsula in De La Rosa v. Florida Peninsula Insurance Co., 2018 WL 2246781 (Fla. 4th DCA May 16, 2018), on a water leak claim where the parties did not dispute that the insureds provided untimely notice of the claim. In this case, the insured argued that although they were indisputably late in providing the carrier with notice of their loss such that the carrier was entitled to a rebuttable presumption of prejudice, they had sufficiently rebutted the presumption by presenting the affidavit of a licensed public adjuster that the leak was caused by a "one-time sudden and accidental waste line backup" and that affidavit was collaborated by the insureds' expert engineer with respect to the cause of the leak. The insureds argued that these affidavits sufficiently rebutted the presumption so as to give rise to a triable issue of fact with respect to the cause of the loss.

The trial court disagreed, finding that even though the cause of the accident remained in genuine dispute, the late notice indisputably prejudiced to the carrier, given that the delay hampered the carrier's ability to investigate the extent of the loss, especially because the insureds had repaired the property before giving the carrier notice. However, the insureds' own engineer opined that water damage only increases with time and inevitably causes mold if not promptly remedied.

LIABILITY CASE LAW UPDATES

Motion to enlarge time to respond to a PFS does not automatically toll time for acceptance

In Koppel v. Ochoa, 243 So. 3d 886 (Fla. 2018), the Florida Supreme Court resolved a conflict between two District Courts of Appeal on the

issue of whether the mere filing of a motion to enlarge time to respond to a Proposal for Settlement (PFS) tolls the time for acceptance or rejection while the motion remains pending. The Supreme Court found that the motion does not, in and of itself, toll the time within which the recipient has to accept the proposal. The Court reasoned that the PFS statute must be strictly construed as in derogation of common law, and neither the statute nor accompanying rule of civil procedure governing proposals provides for a de facto extension of time upon the filing of a motion for extension. Furthermore, case law provides for an extension only upon a showing of good cause, and, thus, if the mere filing of a motion sufficed to provide an indefinite extension, it would defeat the purpose of requiring that showing. Therefore, the Supreme Court found that, in order to obtain a valid extension of time within which to accept a PFS, the moving party must not only file a motion for extension, but also have it heard before the expiration of the 30-day period to accept.

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LIABILITY CASE LAW UPDATES
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Partner not married to decedent at time of injury, but later married by time of death, is a "surviving spouse" as defined in the Wrongful Death Statute, and the Estate is entitled to recover all of the insurance and Medicare payments made on behalf of the decedent without reduction even though the liens had been settled before trial

In Domino's Pizza v. Wiederhold, 2018 WL 2165224 (Fla. 5th DCA, May 11, 2018), the Fifth District Court held that the decedent's partner, who later became his wife, qualified as the "surviving spouse" under the Wrongful Death statute, such that she was a beneficiary in the action entitled to recover damages for her own loss. The Court found that the Wrongful Death statute did not define "surviving spouse" as married at the time of the **loss** but only at the time of the decedent's **death**. In doing so, the Fifth District certified direct conflict with Kelly v. Georgia-Pacific, LLC, 211 So. 3d 340 (Fla. 4th DCA), rev. denied, No. SC17-714 (Fla. Oct. 23, 2017), in which the Fourth District held to the contrary.

The Fifth District also found that, although the Estate had settled insurance and Medicare liens on its recovery before trial, the Estate was entitled to recover the gross amount of the bills without reduction under the collateral source statute because both the insurer and Medicare had a right of subrogation. Even though both had given up that right by the time of trial by virtue of their settlement with the Estate, the Estate was entitled to recover the full amount of the bills even though that resulted in a windfall.

Secret settlement between Plaintiff and one of two defendants was not a prohibited "Mary Carter" agreement when it was entered into after liability had been determined in a bifurcated trial

Ordinarily, secret agreements between a Plaintiff and one of several defendants is deemed a prohibited "Mary Carter" agreement that must be disclosed to a jury if the defendant agrees to litigate the case or testify in a particular way that would prejudice the remaining defendant(s). In Highwoods Properties, Inc. v. Millar Elevator Service Co., 2018 WL 2224987 (Fla. 1st DCA May 16, 2018), the First District Court held that, if such an agreement was entered into after liability had already been determined, it was not a prohibited agreement that required disclosure because the settling party had no incentive to litigate the case in a manner favorable to the Plaintiff.

Employer was not liable for allegedly serving employee alcoholic beverages knowing that employee was an alcoholic where employee was killed while on her way home from work

In Salerno v. Del Mar Financial Services, LLC, 2018 WL 2716927 (Fla. 4th DCA June 6, 2018), the Fourth District Court upheld the trial court's dismissal of the Estate's complaint for failure to state a cause of action. In this case, the Estate of a deceased employee brought suit against the employer, alleging that the employer violated the liquor liability statute, section 768.125, by serving its employee alcohol despite knowing that she was an alcoholic, after which it ejected the allegedly intoxicated employee from the building, and she was hit and killed by a train while she was walking home. The Fourth District held that the employer owed the employee no duty to protect her because she was not acting within the course and scope of her employment at the time of her accident.

Agency for Health Care Administration is not entitled to a lien on future medical expenses portion of a Medicaid recipient's tort recovery

The Florida Supreme Court held that AHCA is not entitled to a lien on future medical expenses in a tort claim brought by a Medicaid recipient. In Giraldo v. Agency for Health Care Administration, 2018 WL 3301563 (Fla. July 5, 2018), the Florida Supreme Court resolved a conflict between the First and Second District Courts on this issue by examining the portion of the Medicaid statute that permits recovery by Medicaid "to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual." The Court found this language clear in limiting Medicaid's lien on tort recovery to that portion of the recovery representing past medical expenses.

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Two jury verdicts reversed where first-party breach of contract claim was tried as they were bad faith cases involving the quality of an adjuster's performance

The Fourth District Court recently reversed two separate jury verdicts in favor of the Plaintiffs in first party property claims where, by virtue of the trial courts' misinstruction of the juries and failure to sustain the insurer's repeated objections to improper arguments, the focus of the trial became the adjusters' performance rather than whether the insurer actually breached its contract with the insured. In both Citizens Property Insurance Corp. v. Mendoza, 2018 WL 3301672 (Fla. 4th DCA July 5, 2018), and Homeowners Choice Property and Casualty Co. v. Kuwas, 2018 WL 3301890 (Fla. 4th DCA July 5, 2018), the plaintiffs' counsel focused the jury inappropriately on the insurers' alleged bad faith or improper claims handling and the trial court overruled the carriers' objections. The Fourth District reversed both verdicts, finding that the plaintiffs' counsel's arguments and questioning on issues unrelated to whether the insurers actually breached the insureds' contracts were sufficiently egregious to warrant new trials.

Non-joinder statute prohibits addition and abatement of claim against third-party insurer before conclusion of underlying litigation against insured

The Third District Court quashed a trial court order permitting the Plaintiff to amend to add a third-party bad faith claim against the insured driver's liability insurer in Geico General Insurance Co. v. Martinez, 240 So. 3d 432 (Fla. 3d DCA 2018). In this case, the trial court permitted the Plaintiff to amend his Complaint to add Geico as a party defendant in the tort litigation, but abated the Plaintiff's anticipated bad faith claim until the conclusion of the underlying litigation. In quashing the trial court's order, the appellate court distinguished this case from first-party cases, in which appellate courts have declined to quash abatement orders, reasoning that in third-party claims, the non-joinder statute applies to prohibit the addition of an insurer as a party to the underlying litigation until such time as that litigation has been resolved by judgment or settlement.

LIABILITY CASE LAW UPDATES Continued

Insured is not required to wait until the appraisal process has concluded before filing a Civil Remedy Notice

The Fifth District Court held that an insured need not wait until the appraisal process concludes before serving his or her carrier with a Civil Remedy Notice. In Landers v. State Farm Florida Insurance Co., 234 So. 3d 856 (Fla. 5th DCA 2018), after the parties appraised the insured's sinkhole claim, and State Farm paid the award, the insured filed a bad faith suit against the carrier predicated on a Civil Remedy Notice that it served on the carrier during the appraisal process. State Farm moved for summary judgment, arguing that it did not owe the insured any payments until the appraisal process completed, and thus it urged the trial court to deem the insured's CRN a legal nullity. The trial court granted the motion, and the insured appealed.

On appeal, the Fifth District examined the language of the first-party bad faith statute, section 624.155, finding that it provided no express impediment to the insured's filing of the Civil Remedy Notice before appraisal process concluded, and that preventing the insured from doing so would frustrate the statute's purpose by discouraging insurers from taking timely action to resolve a dispute with its insured. Accordingly, the appellate court reversed the summary judgment in the insurer's favor, but it noted that whether the carrier acted in bad faith remained to be litigated.

In medical malpractice action, issue before jury is what a reasonably prudent physician would have done and what another physician claims he would have done is legally irrelevant

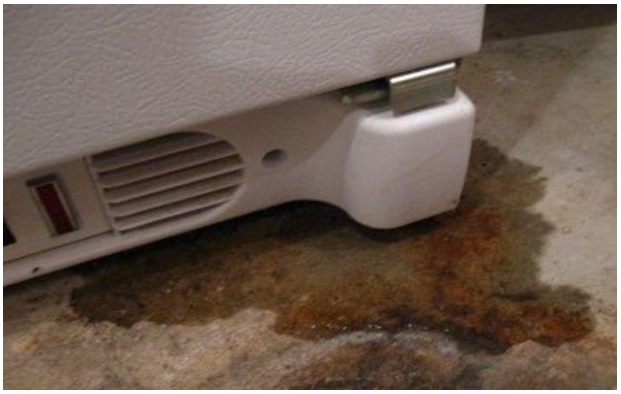
In Cantore v. West Boca Medical Center, 242 So. 3d 1032 (Fla. 2018), the Florida Supreme Court addressed the issue of whether a subsequent treating physician's testimony as to how he would have treated the plaintiff if she had arrived at the hospital earlier was admissible in a medical malpractice trial. The Court found that this testimony improperly mislead the jury as to the true issue of whether the defendant physician's treatment fell below the standard of care, and it was therefore inadmissible as legally irrelevant and more prejudicial than probative of any issue in dispute.

LIABILITY CASE LAW UPDATES
Continued

Conflict between Fourth and Fifth District Courts of Appeal on whether PIP insurer is required to apply the policy's deductible to the total amount of the provider's invoices to an insured before applying any fee schedule found in section 627.736, Florida Statutes

In Progressive Select Insurance Co. v. Florida Hospital Medical Center, 236 So. 3d 1183 (Fla. 5th DCA 2018), the Fifth District Court held that, when calculating the amount of PIP benefits due, it must subtract the deductible from the total amount of a provider's charges before applying any reimbursement limitation, such as a fee schedule. In doing so, the Fifth District certified the issue to the Florida Supreme Court as a question of great public importance.

A few weeks later, the Fourth District issued three opinions in conflict with the Fifth District's opinion. In Progressive Select Insurance Co. v. Blum, 238 So. 3d 852 (Fla. 4th DCA 2018), State Farm Mutual Automobile Insurance Co. v. Care Wellness Center, LLC a/a/o Barden-Diaz, 240 So. 3d 22 (Fla. 4th DCA 2018), and USAA General Indemnity Co. v. Gogan, M.D. a/a/o Ricks, 238 So. 3d 937 (Fla. 4th DCA 2018), the Fourth District held that the PIP statute mandates that a provider treating an injured party charge the insurer only a "reasonable amount." The legislature has defined "reasonable amount" in two ways, one being a fee schedule. To apply the fee schedule only after application of the deductible, the Fourth District reasoned, would result in the provider's recovery of different amounts depending on the amount of the deductible and would also permit the provider to actually recover more than is permitted by the fee schedule.



In contrast, in Progressive Select, the Fifth District found that the deductible provision in the PIP statute was enacted to permit a reduction in premiums charged by the insurer, and that coverage is not triggered until the deductible has been exceeded. It is only after coverage is triggered that the statutory reimbursement limitations for determining the amount of benefits due the insured is determined. The Fifth District further noted that nothing in the PIP statute precludes an insured from contesting any bill on the ground that it is unreasonable, regardless of whether that bill falls within the amount of the deductible and that providers are statutorily prohibited from rendering an unreasonable bill for the purposes of committing insurance fraud, which would include bills the provider never intends to collect from the insured in order to meet the deductible amount and trigger coverage.

Although the Supreme Court is not required to accept cases certified as of great public importance or those certified to be in conflict with opinions of another District Court of Appeal, it seems likely that the Court will consider this very important issue and resolve the conflict, although it may not do so within the next year.

Exclusion of damage caused by constant or repeated seepage or leakage of water over a 14-day period did not exclude coverage for damage caused during the first 13 days of the leak

The Fifth District, in Hicks v. American Integrity Insurance Co. of Florida, 241 So. 3d 925 (Fla. 5th DCA 2018), construed all-risk policy language which provided that "we do not insure . . . for loss . . . [c]aused by . . . [c]onstant or repeated seepage or leakage of water . . . over a period of 14 or more days." After his carrier denied coverage for a leak in his water supply line to his refrigerator, Hicks sued, alleging that the carrier breached the insurance contract. The carrier raised as an affirmative defense its policy language limiting coverage for damage from leaks lasting more than 14 days.

The carrier moved for summary judgment on the issue, arguing that its policy unambiguously excluded coverage for Hick's claim, since the leak indisputably lasted for more than 14 days. Hicks responded that, at the very least, the policy language was ambiguous such that it could be fairly read to mean that the policy covered damage he sustained during the first 13 days. The trial court granted summary judgment in favor of the carrier.

On appeal, the Fifth District reversed, agreeing with the insured that the policy did not unambiguously exclude coverage for the entire loss under the narrowed interpretation of exclusions. Furthermore, because this was an all-risk policy, once the insured established a loss within the terms of its policy, the burden shifted to the insurer to prove that a particular loss arose from an excluded cause. Whether that determination was possible, the Court concluded, was a genuine issue of material fact which precluded summary judgment and at trial, the carrier would have the burden to demonstrate that Hicks' loss was sustained after the 13th day of the leak.

LIABILITY CASE LAW UPDATES
Continued

Defendants were entitled to a collateral source setoff for Social Security Disability benefits without having to present evidence matching period covered by disability benefits with the period covered by jury's award for past lost wages

In Woudhuizen v. Smith, 241 So. 3d 216 (Fla. 5th DCA 2018), the Fifth District Court reversed, in part, a judgment entered in the claimant's favor after the trial court refused to set off Social Security Disability benefits received by the claimant in the five years between the accident date and the trial on the ground that the defense had not proven that the payments duplicated the damages awarded by the jury for the same time period. In reversing the trial court's order, the appellate court found that the Collateral Source statute, section 768.76, did not require that the defendant demonstrate, dollar for dollar, that the disability benefits received by a claimant duplicated the jury's verdict for the same damages. In fact, the statute requires the trial court to "reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant." Since the legislature did not see fit to require that the defendant match the collateral source benefits to the jury's verdict on a line-by-line basis, the Court declined to read this requirement into the statute.

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Personal knowledge of a party's death does not trigger the 90-day period for substitution of that party

The Second District Court of Appeal addressed the nature and extent of a party's knowledge of another party's death necessary to trigger the 90-day period for substitution of the deceased party's Estate for the deceased party. In Blue v. R.J. Reynolds Tobacco Co., 234 So. 3d 863 (Fla. 2d DCA 2018), the Court reversed a trial court's order dismissing a deceased smoker's claim for failing to timely move for substitution of the Estate as the party plaintiff after the smoker died. Rather than filing a formal Suggestion of Death, the Personal Representatives for the Estate merely appeared as Proposed Personal Representatives for the purpose of a dropping a party and the case was litigated for two years after the Plaintiff died.

When the Personal Representatives finally filed a motion to substitute, the defendants moved to dismiss, arguing that the pleadings in which the "proposed" Personal Representatives appeared effectively suggested the Plaintiff's death on the record such that they were required to have formally substituted themselves as parties within 90 days thereafter. The trial court agreed and dismissed the case.

On appeal, the Second District found that Florida Rule of Civil Procedure 1.260(a)(1) does not require a specific type of document be filed in order to trigger the 90-day period. However, the Court found that **some** type of document needed to be filed in the trial court in order to formally notify all litigants of a party's death. In this case, the Court found that the "proposed" Personal Representatives' notice of dropping party did not suffice trigger the time period, and it therefore reversed the trial court's dismissal.

Where pretrial order limited each party to one expert per specialty, permitting two of the same specialists to testify as treating physicians in addition to an expert did not violate order

The Florida Supreme Court addressed the difference between expert and treating physicians as witnesses in Gutierrez v. Vargas, M.D., 239 So. 3d 615 (Fla. 2018). In that case, the Supreme Court quashed the Third District Court's decision in Vargas v. Gutierrez, 176 So. 3d 315 (Fla. 3d DCA 2015), finding that the Third District erred in reversing the trial court's judgment rendered after a trial based on its finding that the Plaintiff violated the "one retained expert per specialty" limitation contained in the trial court's pretrial order.

The Court's opinion sets forth the distinction between expert and treating physicians insofar as their permissible testimony. While both are "experts," by definition, treating physicians are fact witnesses able to testify regarding past facts based on personal knowledge and their perception of the plaintiff's symptoms and their recommendations are also facts in issue. In contrast, a retained expert witness may testify only with the benefit of hindsight and have acquired their knowledge for the purpose of the litigation. Treating physicians are limited in their testimony to their medical opinions as they existed at the time they were treating the Plaintiff, while an expert may form new opinions in order to assist the trier of fact in deciding the case.

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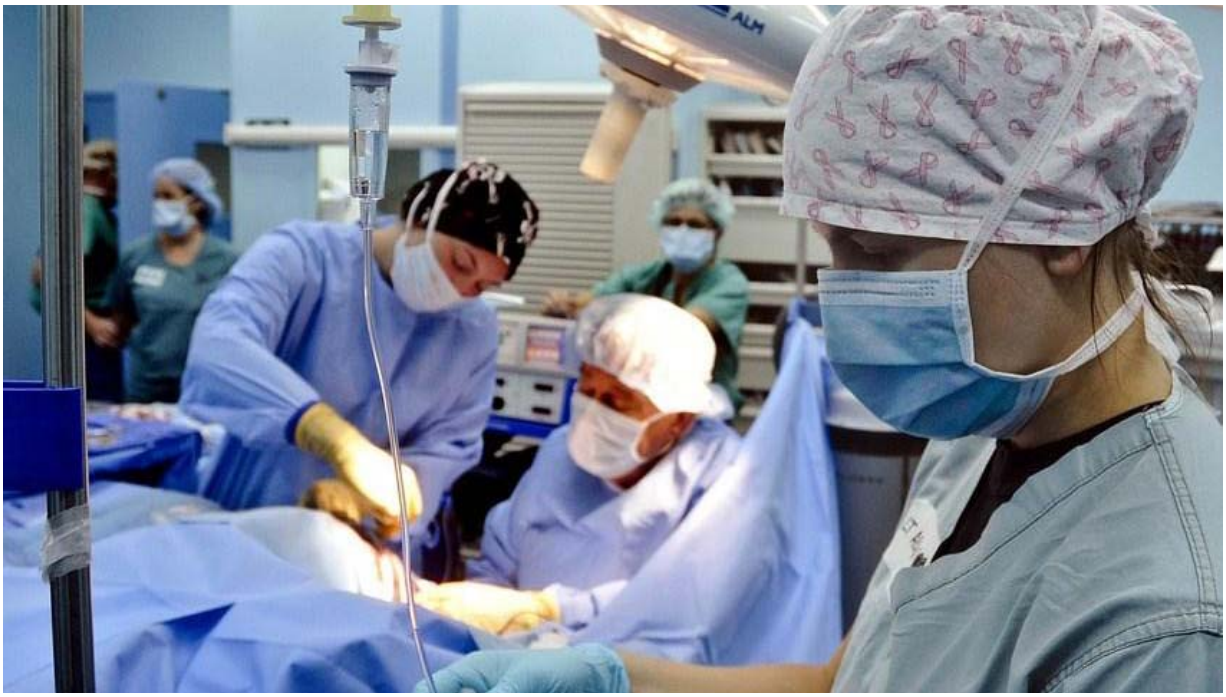
LIABILITY CASE LAW UPDATES
Continued

The Court, however, cautioned that not all medical opinions of a treating physician are admissible if, for example, they cross the line into the area of expert testimony or where it appears that a treating physician has developed opinions for the purpose of the litigation. Those opinions may also be excluded if duplicative of any retained expert opinions offered on the same subject. However, the Court also noted that the mere fact that treating physician opinion testimony is cumulative does not render is inadmissible per se; the Court must find that the probative value of the evidence is "substantially outweighed" by the danger of "needless presentation of cumulative evidence." The Court further explained that there is a difference between cumulative testimony subject to exclusion and relevant confirmatory testimony, which is not.



Trial Court abused its discretion in dismissing insured's breach of contract case with prejudice as a sanction for disobeying a court order prohibiting the insured from undergoing surgery before a CME could be performed

In Faris v. Southern-Owners Ins. Co., 240 So. 3d 848 (Fla. 5th DCA 2018), the Fifth District Court reversed a trial court's dismissal of the Plaintiff's breach of contract claim against his Uninsured Motorist carrier after the Plaintiff violated the trial court's order prohibiting him from undergoing surgery before the CME.

During the litigation, the Plaintiff notified the insurer he was having surgery to repair a herniated disc. The insurer gave the Plaintiff two dates for his CME, and the Plaintiff could not make either date. The insurer then moved to compel the Plaintiff's attendance at his pre-surgery CME, arguing that it had insufficient time to obtain that CME before the surgery. The trial court granted the motion to compel and ordered the Plaintiff to either make himself available for a CME before his surgery or postpone it. The insurer gave the Plaintiff one other date, but he was unable to obtain time off from work, although he continued to try to obtain approval. The insurer did not hold the date, and it lapsed.

The Plaintiff filed a motion for protective order seeking permission to have the CME after his surgery. The Plaintiff argued that the insurer would not be prejudiced by a post-surgical IME since it already had access to his pre-surgical X-rays, MRIs, and other records. The trial court denied the motion, but Faris had the surgery anyway. Thereafter, the trial court granted the carrier's motion for sanctions and dismissed the action based on its finding that the insured willfully and contumaciously violated its order.

The appellate court reversed, finding the sanction too harsh under the circumstances. The Court noted that the Plaintiff had no obligation to notify the carrier of his intent to have the surgery in the first place, a fact that the carrier acknowledged at oral argument. The Court also found that the insurer had itself violated the trial court's order to give Faris two possible dates for his CME, but only gave him one, and then would not agree to tentatively schedule the CME while Faris was seeking time off work from his employer. The Court concluded that under the particular circumstances of this case and in the absence of demonstrable prejudice to the insurer, Faris' good faith efforts to comply with the trial court's order precluded dismissal, even though his noncompliance was undeniably willful.

LIABILITY CASE LAW UPDATES
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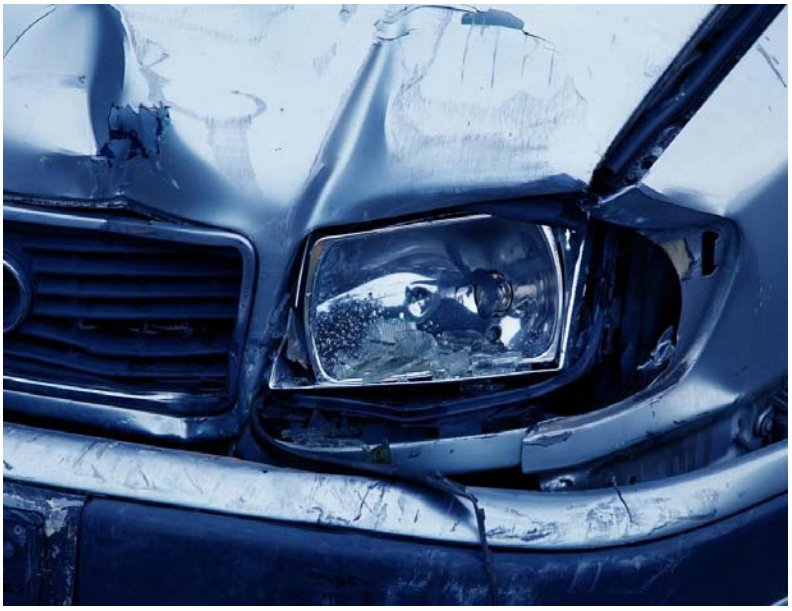

Where defendant's insurer complied with essential terms of Plaintiff's settlement demand and tendered a check for the full policy limits, the fact that the check included a hospital that had a lien for medical services as a co-payee was not a counteroffer

In Marin v. Infinity Auto Insurance Co., 239 So. 3d 751 (Fla. 3d DCA 2018), the Third District Court affirmed a trial court's order enforcing a settlement between the Plaintiff and the defendant's insurer and dismissing the case with prejudice. In this case, the Plaintiff demanded that the insurer tender its policy limits by a date certain, which the carrier did. However, the carrier added the Plaintiff's hospital as a co-payee on the check, and by accompanying letter, the carrier offered to reissue the check without the hospital on it if the Plaintiff's counsel had resolved the lien. The Plaintiff's counsel rejected the check, arguing that it amounted to a counteroffer because the carrier unilaterally imposed an additional condition by including the hospital on the check.

The trial court disagreed, finding that the carrier complied with the Plaintiff's demand by tendering its policy limits by the deadline. Because the Plaintiff's demand did not specify who should be on the settlement draft, the Court reasoned, the inclusion of the hospital was not an essential term of the agreement. Given that the Plaintiff's counsel had not shown to the carrier that the lien had been resolved and made no mention of it in his demand, he could not thereafter take the position that this was an essential term of the settlement. Accordingly, the appellate court affirmed the trial court's order compelling settlement.

Online form that did not permit a putative insured to accept or reject stacked UM coverage did not comply with UM statute which required that the carrier provide an insured with written notice and the opportunity to reject stacked coverage

In Jervis v. Castaneda and GEICO, 243 So. 3d 996 (Fla. 4th DCA Apr. 25, 2018), the Fourth District Court found that GEICO failed to comply with Florida's Uninsured Motorist statute by not providing its insured with a written notice of the availability of stacked UM coverage and the opportunity to reject that coverage. In this case, the insured applied for coverage online and the form did not permit the insured to reject or deselect stacked UM coverage, nor did the online form contain the required statutory warning language contained in the statute. GEICO argued that the insured had orally and knowingly rejected that coverage, but the Court found that without the required notice, GEICO gave no notice at all such that there could be no informed and knowing rejection of stacked coverage.

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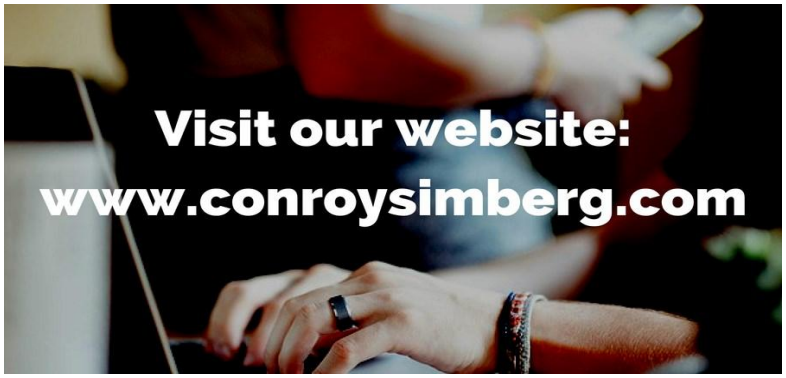


Focus Practice Feature

First-Party Property & Coverage Claims

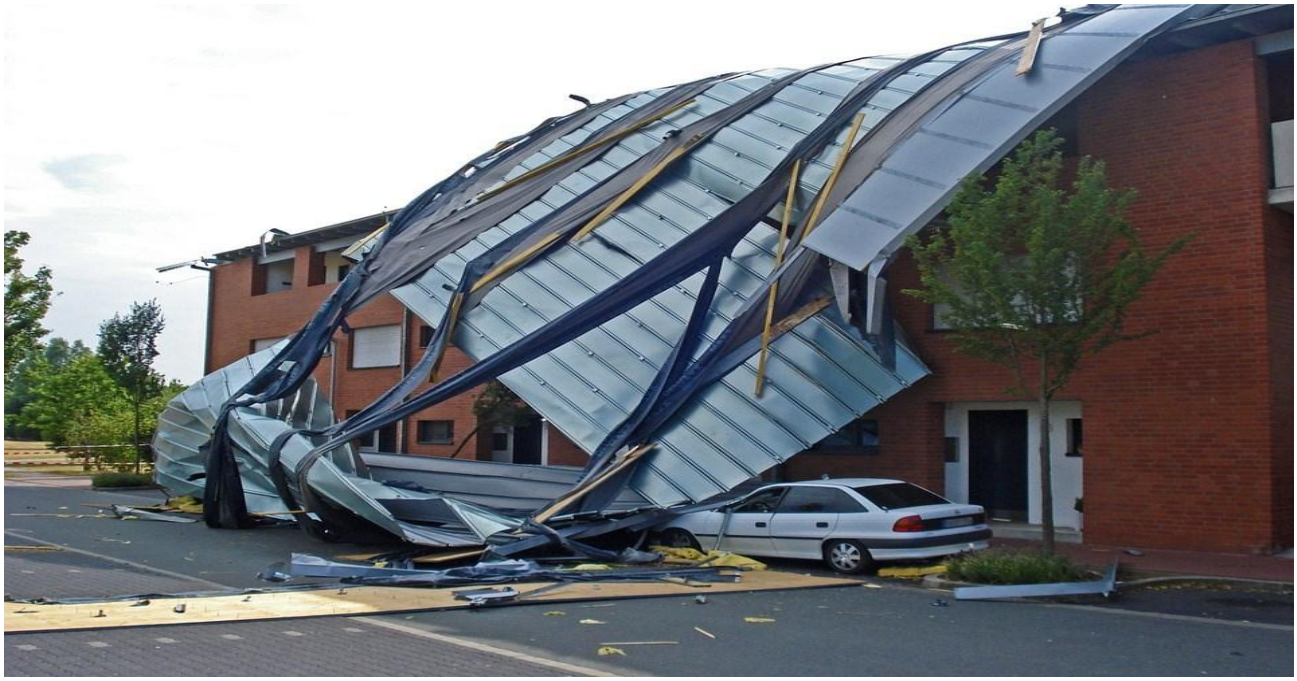
Conroy Simberg is a premier insurance defense firm with approximately 150 attorneys working in 11 offices strategically located throughout Florida and Georgia. The attorneys in our first-party property and coverage practice are widely recognized throughout the insurance industry for their ability to successfully resolve and defend all types of first-party personal lines and commercial claims. Our legal team works with our clients to help them reach strategic and well-founded coverage decisions that best protect their business and financial interests.

We counsel and represent insurance carriers on all types of first-party property and coverage claims made under personal lines and commercial policies of insurance, including:

- Damages to real property and personal property
- Business interruption losses and Extra expense insurance coverage
- Assignment of benefits
- Civil authority coverage
- Claims made by mortgagees
- Excluded causes of loss, including arson and other intentional acts
- Fraudulent and/or exaggerated claims
- Material misrepresentations
- “Bad faith” claims
- Evaluations and Coverage Analysis

Our first-party property and coverage attorneys have decades of experience working in the field of insurance law and are committed to providing personalized service and attention. During an investigation, our legal team advises and assists insurance carriers to ensure that they fully understand the facts, coverage issues and potential exposures associated with the claim. Our lawyers conduct detailed and thorough Examinations Under Oath and work closely with our clients to identify and obtain the documents and information they need in order to make well-considered insurance coverage determinations.

The attorneys at our firm provide detailed first-party property and coverage opinions to our insurance industry clients. We have a comprehensive understanding of all types of insurance policies and are highly skilled in deciphering complex policy language and analyzing complex coverage issues. In addition, we offer detailed risk analyses and regularly counsel and represent insurers facing “bad faith” claims.



WORKERS' COMPENSATION CASE LAW UPDATES

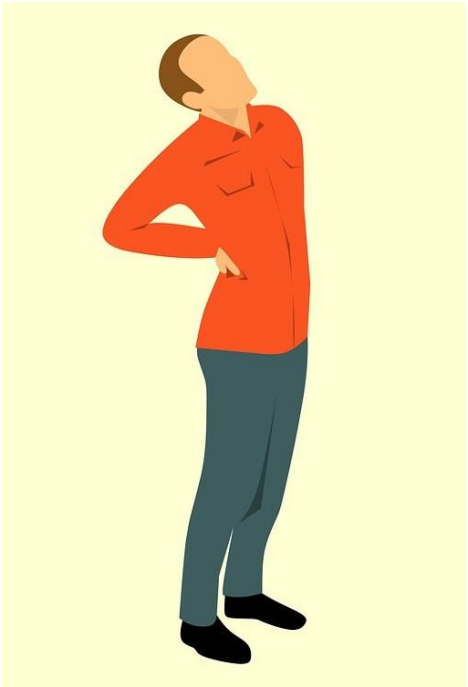
Claimant has the burden to rebut the presumption of a drug free work place

In Brinson v. Hosp. Housekeeping Servs., LLC, 2018 WL 3079426 (Fla. 1st DCA June 22, 2018), the Claimant fell and dislocated her left shoulder. She was transported to a medical clinic and provided a urine sample, pursuant to her employer's post-accident drug-testing policy. The tests were positive for marijuana, and her claim for workers' compensation benefits was denied.

In affirming the JCC's order, the First District Court noted that when a claimant tests positive for drugs after an accident, there is a presumption that the injury was due to the influence of drugs, and benefits will not be paid. The Court explained that a Claimant may rebut the presumption by presenting clear and convincing evidence that the "influence of the drug did not contribute to the injury." In the instant matter, however, the Claimant's expert witnesses claimed that the drug tests did not conclusively indicate whether drugs were active in the bloodstream or had caused any impairment. However, his testimony left open the question of whether she was under the influence when the accident occurred. Thus, the Claimant failed to rebut the statutory presumption attributing her injury primarily to the influence of drugs.

One-time change of physician must be with the same specialty, not similar specialty

In Myers v. Pasco County School Board, 2018 WL 2471511 (Fla. 1st DCA June 4, 2018), pursuant to the Claimant's request for a one-time change from her orthopedic surgeon, the Employer/Carrier authorized a neurosurgeon. When the Claimant filed a petition alleging that the authorization failed to meet the statutory requirements of section 440.13(2)(f), the JCC denied the petition reasoning that the term "specialty" is broader than the "specialty of [the] physician" and "should be extended to" the types of conditions the doctor treats. The JCC further argued that orthopedic surgeons and neurosurgeons both treat back injuries, and because the Claimant has a compensable back problem, the Employer/Carrier's authorization was in compliance with the statute.



Ultimately, the Court reversed the JCC's order, noting that section 440.13(2)(f) requires that the one-time change be made with a physician who practices in the "same specialty" as the originally authorized doctor. A physician who provides similar services in a different specialty does not qualify as a doctor in the "same specialty" because, as the court phrased, "'same' is different than 'similar.'"

Whether retirement is a break in causation as entitlement to TPD benefits depends upon whether the claimant left her employment for justifiable reasons

In Sarasota County School Board/Johns East Co. v. Brockman, 2018 WL 2472465 (Fla. 1st DCA June 4, 2018), the Claimant sustained a compensable injury. Upon her return to work, the Employer accommodated her work restrictions, and she received her full salary. Within five months she retired, and she subsequently filed a claim seeking TPD benefits and PICA. Since retirement, she had not worked nor reached MMI.

The JCC rejected the Employer/Carrier's argument that the Claimant's retirement was an intervening cause that boke the change of causation between the compensable injuries and her lost earnings, finding that Claimant's retirement was not entirely voluntary and was the equivalent of termination.

The First District Court, however, remanded for the JCC to address whether the loss of earnings was not caused by the involuntary retirement (termination) independent of the injury, or, in other words, whether the Claimant left her employment "for unjustifiable reasons." The Court further instructed that should the JCC conclude the involuntary retirement was an intervening cause, it would need to review the record for a "means by which a claimant may establish a causal relationship between a claimant's compensable injuries and claimant's temporary partial wage loss." The Court explained that if none are present in the record, the JCC should enter judgment for the Employer/Carrier. Alternatively, should the JCC concluded that the separation from employment was for justifiable reasons, he should rule for the Claimant.

WORKERS' COMPENSATION CASE LAW UPDATES Continued

Claimant must specifically plead application of the 120 day rule

In Harbor Freight Tools, Inc. v. Whitehead, 244 So. 3d 410 (Fla. 1st DCA 2018) the Court reversed the JCC's ruling, which awarded benefits based on the 120-day rule established by section 440.20(4), which precludes carriers from denying compensability if they begin paying benefits and do not challenge compensability within 120 days. As the Claimant did not specifically plead application of the 120–day rule, the JCC erred in awarding benefits based on this rule.

JCC reduction of attorney's fees must be supported by the record

In Willoughby v. Madison Corr. Institute/Division of Risk Management, 241 So. 3d 284 (Fla. 1st DCA 2018), the parties appealed the JCC's order declining to approve a stipulated Employer/Carrier-paid attorney's fee, approving a reduced fee amount, and ordering that the balance of the money to be remitted to Claimant. The JCC's based its ruling on its findings of fact regarding the reasonableness of the attorney's fee. The First District Court held that the record did not in fact support those findings and, therefore, reversed the portion of the order reducing the agreed upon attorney's fee, as well as the portion of the order reforming the stipulation.

Dismissal based upon lack of prosecution is retroactive

In Moise v. Disney Pop Century Resort, No. 1D17-1759, 2018 WL 2008663, (Fla. Dist. Ct. App. Apr. 30, 2018), the Claimant sustained two compensable work accidents on different days. The Claimant timely filed multiple Petitions in 2013 and 2014. At mediation in 2013 and 2015, those claims were resolved with the exception of attorney's fees and costs, which jurisdiction was specifically reserved on. Thereafter, the last provision of benefits for the 2011 date of accident was on April 14, 2014, while the last provision of benefits for the 2013 injury was on November 22, 2013. Subsequently, on August 19, 2016, the Employer/Carrier filed a motion to dismiss the 2013 and 2014 petitions based upon a lack of prosecution.

On September 1, 2016, after the filing of the motion and before a hearing, the Claimant filed two additional Petitions, covering both dates of accident, seeking medical benefits and attorney's fees and costs. In response, the Employer/Carrier filed notices of denial raising the statute of limitations defenses pursuant as to both dates of accident and denying entitlement to all further benefits. The Employer/Carrier's motion to dismiss resulted in a dismissal of all pending claims raised by the 2013 and 2014 Petitions. The JCC subsequently dismissed the 2016 Petitions as untimely, relying solely on Akers v. State of Florida–Department of Corrections, 987 So.2d 240 (Fla. 1st DCA 2008). In applying Akers, the JCC found that the 2016 Petitions were filed in an attempt to toll the statute of limitations before the Employer/Carrier's motion to dismiss for lack of prosecution could be determined.

The First District Court affirmed the JCC's holding, but it that Akers should not be misconstrued to require a JCC to determine the intentions or merits of a Petition filed subsequent to a motion to dismiss for lack of prosecution. Rather, the date of filing of a Petition which meets the specificity requirements of section 440.192, is the determining factor. In the instant matter, there was no dispute that the statute of limitation would have expired before the 2016 Petitions were filed. Once the JCC granted the motion to dismiss (which extinguished the pending claims) and that ruling became final, the 2016 Petitions were retroactively barred by operation of the statute of limitations.

If the intoxication presumption does not apply, the employer/carrier must establish by "greater weight of the evidence" the injury was caused by a claimant's intoxication to deny the claim

In Inmon v. Convergence Employee Leasing III, Inc., 243 So. 3d 1046 (Fla. 1st DCA 2018), the Employee, while in the course and scope of his employment, was struck and killed by a truck. Test results from the autopsy showed that his alcohol level was above the legal limit and the Employer/Carrier denied the claim for death benefits and funeral expenses based upon the intoxication defense.

During the trial, the Employer/Carrier presented surveillance video and the testimony of the traffic homicide investigator who investigated the Employee's death. The JCC reasoned that the Employee's death was primarily due to his own intoxication as he was in the middle of the road at the time he was killed. In support of this finding, the JCC pointed to the following evidence: (1) footage showing the Employee stumbling in and out of the road before being struck; (2) the location of the damage on the truck; and (3) where the Employee's body was found in relation to the truck.

However, in reversing and remanding the JCC's denial the First District Court found that the JCC's finding that the Employee's death was primarily occasioned by his intoxication due to him being in the road at the time of the collision was based upon inferences, as no direct evidence was set forth by the Employer/Carrier.

The Court noted that section 440.09(3), provides that if the injury was sustained primarily due to the claimant's own intoxication, compensation is not payable. The Court further noted that section 440.09(7)(b) provides that evidence of a certain blood alcohol level creates a presumption that the injury was due to the claimant's intoxication. However, in this instant case, the Employer/Carrier was not entitled to the presumption due to their failure to comply with collection and chain of custody procedures set forth in the administrative rules. Thus, because the presumption could not be applied, the Employer/Carrier was required to establish by the "greater weight of the evidence" that the injury was due to the employee's intoxication.

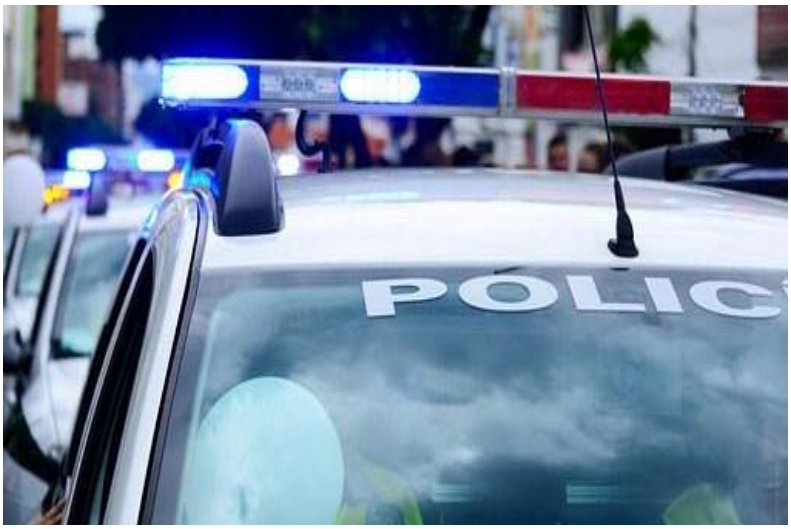
WORKERS' COMPENSATION CASE LAW UPDATES Continued

A no show fee for failing to attend an IME is only applicable if there is proper notice to the claimant

In Greenfield v. Tallahassee Police Department, 243 So. 3d 1050 (Fla. 1st DCA 2018) the Claimant's attorney was notified on October 14, 2015, of the IME scheduled for October 19, 2015. The Claimant's attorney replied to the Employer/Carrier on October 16, explaining that because the IME could not be listed as a witness for the upcoming hearing, there was no purpose for the Claimant to attend the IME.

Pursuant to the Employer/Carrier's motion seeking an award of a no-show fee, the JCC entered an order awarding the fee. The Employer/Carrier then filed a motion to tax prevailing party costs that included a request for reimbursement of the costs associated with the failed IME. In the course of the hearing, the JCC described the notice requirement as a "technicality" and awarded a no-show fee of $1,750.00 and a $1,000.00 charge for a records reviewed by the doctor, in addition to $2,113.33 in costs.

The First DCA reversed the Order and remanded the claims back to the JCC. In so doing, the first DCA noted that sections 440.13(5)(c)–(d), require the Employer/Carrier to "confirm the scheduling agreement in writing with the claimant and the claimant's counsel, if any, at least 7 days before the date upon which the [IME] is scheduled to occur," and no cancellation fee will be imposed if the Employer/Carrier "fails to timely provide to the employee a written confirmation of the date of the examination pursuant to paragraph (c)." As the Employer/Carrier failed to provide timely notice to the Claimant and his attorney, they were not entitled to either the no-show fee or any costs relating to the IME.



Hinda Klein Obtains Reversal of Jury Verdict in Case Involving a Player Injured in a Softball Tournament

Appellate managing partner **Hinda Klein,** of the firm's Hollywood office, was successful in obtaining a reversal of a jury verdict in favor of the Plaintiff in Competitive Softball Promotions, Inc. v. Ayub, 2018 WL 1823091420 (Fla. 3d DCA Apr. 18, 2018). In that case, the Plaintiff was injured during a softball tournament played at a public park. The company running the tournament rented several of the fields for the tournament from Miami-Dade County, but it did not control any of the common areas of the public park. On the morning of the tournament, during one of the first games, several members of two teams were involved in a verbal dispute, which led to both teams forfeiting the game. That evening, another fight broke out, and the Plaintiff, who was the captain of one of the teams, was injured while in a common area when he attempted to keep other players from fighting. He sued Competitive Softball Promotions on a premises liability theory, alleging that it had a duty to provide security, and negligently failed to do so. At trial, the trial court denied CSP'S repeated motions for directed verdict, on the grounds that since CSP used the common areas, it had a duty to ensure the safety of its players, regardless of whether they were injured while on the rented ball fields.

The Third District Court reversed, finding that CSP lacked sufficient possession or control of the common areas of the park so as to vest it with a duty to ensure the safety of those areas. The Court noted that CSP had no right to control access to those portions of the park and, as a result, it did not have the duties of a landowner or possessor. The appellate court also rejected Ayub's argument that CSP had a duty to secure the area where the fight occurred because it was foreseeable to it that there might be a fight on premises it did not control. The Court found that while there is case law holding that a landowner or possessor can, in some cases, be held liable for injuries sustained outside the borders of their premises, that exception only applies where the defendant's conduct actually creates a zone of risk outside the boundaries of its premises. Since CSP created no such risk, the exception did not apply here. Accordingly, the appellate court remanded the case with directions to the trial court to enter a judgment in favor of the defendant.

Hinda Klein, Appellate Managing Partner

APPELLATE WINS

Father Shoots and Kills Wife and Children then Commits Suicide

Conroy Simberg Obtains Favorable Summary Judgment on Coverage and Duty to Defend

In the case of Gulfstream Property and Casualty Insurance Co. v. Estate of Navas et al., **Diane H. Tutt,** an appellate partner in the firm's Hollywood office, and **Jeffrey A. Blaker**, a partner in the firm's West Palm Beach office, recently obtained a summary final judgment on all issues in favor of Gulfstream in a declaratory judgment case.

In this tragic case, a man became intoxicated at a party at his residence. After the party he shot and killed his wife and three children, then committed suicide. There were no eyewitnesses, but the investigating detective concluded that it was a murder/suicide and the medical examiner concluded that none of the shootings were accidental.

The personal representative of the estate of the wife and the children brought suit against the insured, assailant Sonny Medina, and notified his insurer, Gulfstream, about the suit. Although the complaint alleged that the deaths were due to accidental discharge of a firearm, for which there could be coverage, Gulfstream took the position that this was a murder/suicide, and intentional acts are not covered by the policy. Gulfstream filed a separate declaratory action seeking a determination of no coverage and no duty to defend the underlying suit. Gulfstream was given a copy of the underlying complaint but was never advised that the plaintiff in the underlying case arranged for the appointment of a personal representative for the insured who promptly waived service of process and participated in an arbitration of the underlying case, all without notice to Gulfstream. The arbitrator found that the deaths were due to the negligent discharge of a firearm and awarded damages of nearly $2.5 million against the Estate of Sonny Medina.

In the declaratory judgment action, the plaintiff in the underlying wrongful death action argued two things: first, that the court was bound by the arbitration award and resulting judgment in the underlying case, and second, that Sonny Medina could not have formed the intent to kill because of his intoxication. Gulfstream's positions, which the court in the declaratory judgment action accepted, were that Gulfstream was not bound by the collusive arbitration award for which it had no notice, that Gulfstream did not have the duty to defend the underlying action unless and until service had been effected on the personal representative for Sonny Medina, and that, according to Florida Supreme Court precedent, voluntary intoxication does not turn an intentional act into an accidental one.

APPELLATE WINS continued

Conroy Simberg Earns Two Workers' Compensation Appeals Wins

Diane Tutt, a partner in the firm's appellate department, recently prevailed in two workers' compensation appeals. The first win was in Pierce v. Kilyn Construction, Inc. In a previous appeal in that case, Ms. Tutt secured reversal of an order which required the carrier to contribute to rent on a large home on acreage, essentially as a penalty for the carrier not having provided assistance in locating alternative housing for the paralyzed claimant, when he vacated the apartment complex where the carrier had been contributing its share of the rent on an apartment. On remand for additional findings, the new JCC ruled in favor of the employer/carrier, finding the claimant's selection of housing to be unreasonable. The claimant appealed and the First District affirmed.

The second workers' compensation appeal recently won by Ms. Tutt was in McClelland v. Highlands County School Board. In that case, a one-time change physician was timely offered by the employer/carrier, but the selected physician later declined the claimant as a patient. An alternative physician was offered, but after the five-day period from the initial request. The claimant filed a petition seeking his own choice of physician. **Christian Petric**, a partner in the firm's West Palm Beach office, prevailed before the JCC. The JCC found that the first physician was timely authorized under the statute and, based on the totality of circumstances, the employer/carrier acted appropriately and did not lose the right to select the new physician. The claimant appealed and the First District affirmed.

* * *

Appellate Court Reverses Summary Judgment in PIP Appeal

Diane Tutt also recently won a PIP summary judgment appeal in the case of State Farm v. Rivera-Morales a/a/o Emile Dimanche. The sole issue on appeal was whether summary judgment on the reasonableness of the plaintiff medical provider's charges was appropriate. State Farm did not have an expert witness in the case; the reasonableness issue does not require expert testimony. The Miami-Dade Circuit Court sitting in its appellate capacity reversed the summary judgment which had been entered in favor of the plaintiff, finding that evidence presented through the affidavit of State Farm's adjuster regarding the amount of reimbursements allowed under various state and federal fee schedules was sufficient to create a fact question for the jury.

Diane H. Tutt, a partner in the firm's appellate department, was successful in obtaining affirmance of a summary judgment in a first-party property case that had been handled in the trial court by **Robert S. Horwitz**, a partner in the firm's West Palm Beach office, and **Maria Chapman**, an associate in the firm's Tampa office. In Chapman v. Florida Peninsula Insurance Company, the trial court granted the defense a summary judgment on two grounds, misrepresentation on the policy application and lack of coverage due to pre-existing damage.

* * *

Hinda Klein, managing partner of Conroy Simberg's appellate division, successfully defended a summary judgment before the First District Court in Stringer v. Dugger, in which the decedent committed suicide with a defendant's gun, while she was in their home. The Court found that neither the decedent's boyfriend, who owned the gun, nor his parents, had any legal duty to the decedent to ensure that she did not kill herself with a gun in their home.

* * *

In Vancelette v. Boulan South Beach Condominium Association, **Diane Tutt** also obtained an affirmance of the summary judgment that had been obtained by **Cris A. Casal**, a partner in the firm's Hollywood office. In that case, the Third District Court affirmed summary judgment in favor of the four on the ground that the plaintiff's injury did not occur on the defendant's property, but rather on an adjoining sidewalk.

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In Baxter v. St. John, **Diane Tutt** obtained an affirmance by the Fourth District Court on a summary judgment obtained in the trial court by **John A. Howard**, a partner in the firm's West Palm Beach office. This case involved a claim of breach of fiduciary duty on the part of member of the board of directors of a condominium.

* * *

Diane Tutt, a partner in the firm's appellate department, obtained affirmance of workers' compensation final orders, in a case successfully defended by **Katherine Letzter**, a partner in the firm's Tampa office. In Carmona-Rodriguez v. PA Contractors/Florida Citrus Business & Industry/USIS, the First District Court affirmed an order finding that our employer was not the actual or statutory employer of the claimant.

Diane H. Tutt, Appellate Partner

FIRM SUCCESSES

Conroy Simberg Attorneys Score Favorable Trial Verdict in Premises Liability Case

Hollywood partners **Seth R. Goldberg** and **Cris A. Casal** earned a favorable premises liability verdict in the case of James Kelly v. Sheila Shine, Inc. during a five-day jury trial in Miami-Dade County.

This case involved a fall from a staircase that occurred on the defendant's property in January of 2014. The plaintiff fell while descending a staircase that was missing a step while he was in the course and scope of his employment. The plaintiff claimed to suffer injuries to his left shoulder, right knee, and neck. The defendant admitted fault for the accident prior to the start of trial, and the only issues for the jury to determine were whether the entirety of the injuries and treatment were related to the accident. The defendant disputed that the plaintiff's torn rotator cuff, torn meniscus, and aggravation to his neck condition were related to the fall. The plaintiff underwent surgeries to his left shoulder and right knee and had extensive treatment to his neck that included trigger point injections. The plaintiff also claimed a substantial past and future wage loss claim due to his inability to work and make sales since he was 100% dependent on commissions. He demanded more than $1,000,000 in damages during closing argument.

The defense team offered the plaintiff significantly more than the jury's ultimate award of $192,676.00. However, the jury awarded nothing for future loss of earning capacity and future pain and suffering.

The defense also served the plaintiff a Proposal for Settlement for $300,000.00 several months before the trial. Because the plaintiff failed to recover within 25% of the offered amount, the defense team is now entitled to pursue recovery of attorneys' fees.

Legal Team Obtains Defense Verdict Win in Homeowner's Insurance Action

Robert Horwitz, a partner in the West Palm Beach and Hollywood offices, and **Pamela Moody,** an associate in the West Palm Beach office, were successfully defended an insurer in a homeowner's insurance action in which the insureds sought replacement of their kitchen after a drain line leak allegedly damaged their home. The defense successfully established that the leak predated the inception of the policy and was never repaired, and that the insureds' damages likewise predated the policy period. The jury rendered a verdict finding that there was no "sudden and accidental" loss to the property during the policy term.

* * *

Update in Georgia Case Involving the Fireman's Rule

In James Todd Kirkland et al v. Watson Used Cars, LLC, the Georgia Supreme Court denied the petition for certiorari in this case. The plaintiffs sought to overturn the ruling attorney **Joshua C. Canton** received from the Court of Appeals on the Fireman's Rule. Josh serves as the Managing Partner of the Thomasville, Georgia office.

* * *

Ross Department Stores Prevail in Slip and Fall Lawsuit

Seth R. Goldberg, a partner in Conroy Simberg's Hollywood office, recently scored a court trial victory in the case Kimberly Burnis v. Ross Dress for Less, Inc., a slip-and-fall case.

The plaintiff claimed that she sustained injuries to her knee and damages as a result of the defendant's negligence. The defense team uncovered medical records that revealed the defendant had a significant history of knee problems that she failed to disclose to her treating physicians. With the help from an expert orthopedic surgeon, the defense argued that the plaintiff's knee injury was not related to the incident at Ross.

The defense also argued that Ross had no actual or constructive notice of any foreign substance on the floor. A surveillance video captured the incident that showed numerous customers and employees walking through the area where the plaintiff slipped. No other customer or employee slipped or noticed anything on the floor.

The Plaintiff was seeking $375,000 for past and future medical expenses as well as pain and suffering. After a three-day trial, the jury deliberated for one hour before returning a defense verdict in favor of Ross.

Seth R. Goldberg, Partner

* * *

Fourth District Court Of Appeal Affirms Conroy Simberg Trial Victory In Private Nuisance Case

Michael Paris, Partner

In Pickett v. Hummel, the Fourth District Court affirmed a defense verdict in a private noise nuisance case. The case was tried by partner **Michael Paris** and associate **Stephan Greco**, and handled on appeal by partner **Diane Tutt**, all from the firm's Hollywood office.

The lawsuit was brought by one neighbor against another, who both reside in a multi-million dollar exclusive community in Boca Raton. The plaintiff contended that our clients' outdoor equipment - four air conditioners, a pool pump and an irrigation pump -were so loud that the plaintiff's blood pressure would rise and he could not sleep. All of the defendants' equipment was originally installed by the builder and there were no modifications. At trial the defense convinced the judge that the defendants' use of their property was not unreasonable and that the plaintiff had unique sensitivities to sound.

This was a contentious case from start to finish. In the five years of litigation before it went to trial, there were multiple mediations and offers to compromise by the defendants, but the plaintiff was unwilling to do so. The plaintiff even rejected an offer of compromise made after the case was on appeal. The plaintiff wanted all the equipment moved to the other side of the defendants' home and would not consider anything less.

Stephan Greco, Associate

FIRM SUCCESSES
continued

Additional Litigation News & Notes

Britney A. Quow, an associate in the firm's Orlando office, has been appointed to The Florida Bar's Diversity & Inclusion Committee for the 2018-2019 term.

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In Brooks v Sloan's, **Jeffrey Rubin**, an associate in the West Palm Beach office, prevailed on a motion to strike a plaintiff's claims for low back injuries due to fraud upon the court by the plaintiff.

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Robert Horwitz, a partner in the firm's West Palm Beach office, with the assistance of associate **Ruwan Sugathapala,** obtained an order granting summary judgment for the insurer in the case of Ultimate Restoration LLC a/a/o Joel Sumlin and Deloris Sumlin v. Florida Peninsula Insurance Company in the Broward County Circuit Court.

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FIRM SUCCESSES
Continued

Jackie Gregory, Partner, Hollywood Office, successfully asserted the Employer/Carrier's Motion for Summary Final Order related to a Petition for Benefits which was filed without adherence to the carrier's established grievance process. Petitioner requested significant medical treatment. The Claims representative responded, indicating that the managed care process was not exhausted. The Judge agreed that there were no material facts in dispute, and the Motion for SFO was granted, with PFB dismissed without prejudice.

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Carol K. Shalaby, a partner in our Hollywood Office, successfully obtained a taxable costs award of $4,445.90 payable to the carrier, the prevailing party, by the Claimant after voluntarily dismissing claims for benefits on the eve of trial. After challenging the recovery pf costs sought by the Employer/Carrier in a worker's compensation case arguing that they were not ripe until there was final determination on the merits of the claim or a second voluntary dismissal had taken place, the Judge of Compensation Claims ruled in the Carrier's favor.

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Summary Judgment Affirmed on Appeal

Chris Corkran, a partner, and **Miles McGrane**, an associate, in the firm's Hollywood Office were able to obtain a summary judgment in a case where Plaintiff was alleging that our client had spoliated evidence and violated Florida's Workers' Compensation Statute by failing to cooperating with the investigation and prosecution of claims against third-party tortfeasors by an employee following the fingers of his right hand being cut off by an industrial punch press. Following numerous motions and hearings, the Court granted summary judgment in favor of our client ruling that there is no private right of action for damages based on an employer's alleged violation of the "duty to cooperate" imposed by the Workers' Compensation Statute. Plaintiff appealed to the Third District Court of Appeal. **Hinda Klein**, a partner, and **Samuel Spinner**, an associate, in the firm's Appellate Department handled the appeal. Following oral argument, the Third District Court affirmed the trial court's order granting summary judgment in favor of our client.

* * *

We are pleased to announce that **Cris Casal**, a partner in the Hollywood office has relocated to Fort Myers to manage the liability division. Joe Sette, the former managing partner is returning to California with his family. We wish Joe Sette the best and thank him for his years of service. Cris is experienced in handling all insurance defense related matters.

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FIRM ANNOUNCEMENTS

Six Attorneys Recognized as Florida Super Lawyers and Rising Stars

Hollywood attorneys **Hinda Klein**, Chair of the firm's appellate practice group, and **Diane H. Tutt**, an appellate partner, have been selected to the 2018 Florida Super Lawyers list. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor.

Additionally, Jacksonville partner **Tashia M. Small** and West Palm Beach associates **Matthew W. Innes, Jeffrey K. Rubin** and **Ruwan P. Sugathapala** have been selected to the 2018 Florida Super Lawyers Rising Stars list. Each year, no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor.

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Jayne Ann Skrzysowski-Pittman Appointed Chair of The Florida Bar Construction Law Certification Committee

President of The Florida Bar, Michelle R. Suskauer, has named Conroy Simberg partner **Jayne Ann Skrzysowski-Pittman** the 2018-2019 Chair of The Florida Bar's Construction Law Certification Committee. The group is responsible for overseeing the application process and examination for qualified attorneys seeking Bar certification or recertification in Construction Law. Jayne is the Chair of Conroy Simberg's Construction Practice and is based in Orlando.

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Gregory A. Jackson, an associate in the firm's Orlando office, was recently appointed to the Government & Public Policy Advocacy Committee for the Florida Bar. Gregory was also appointed by the Orange County School Board to the Unitary Status Advisory & Oversight Committee and will be a featured speaker at the Bethune-Cookman University 2018 Education & Social Justice Conference.

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Rachel H. Minetree, a partner in the firm's Miami office and **Melissa G. McDavitt**, a partner in the firm's West Palm Beach office presented at the Florida Insurance Fraud Education Committee (FIFEC) Conference in Orlando. Their presentation on PIP Fraud identified current trends in insurance fraud, including first party property and Personal Injury Protection (PIP) claims.

The FIFEC is a joint effort between law enforcement and the special investigations units of the insurance industry whose mission is to provide education and training for the insurance fraud investigation community.

* * *

Jonathan C. Abel, the firm's medical malpractice partner and healthcare division practice group leader, will participate in a panel titled "**Interactive Discussion on Hot Topics in MPL**," at the *Claims and Risk Management/Patient Safety Workshop* held on September 12-14 in Chicago, Illinois. The discussion will focus on current red-hot topics that are emerging in medical professional liability claims against physicians. Some examples include the recent trend in large loss claims resulting in runaway verdicts, the increasing incidence of patient suicide claims against physicians, the dangerous trend of (and necessary approach to) opioid-related claims, as well as other recent developments that have a potential impact on claims and risk management. The panelists will explain how these trends will affect the medical community and offer their suggestions for reducing potential exposure.

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Conroy Simberg Elects Three New Partners in Florida

Conroy Simberg recently elected three attorneys to partnership in Florida, therefore boosting the firm's diverse legal capabilities across the state.

Timothy O. McMahon, a partner in the firm's Orlando office, currently practices in all areas of general liability defense, with an emphasis on construction defects. He has represented general contractors, developers and subcontractors of various trades in disputes involving apartment complexes, multi-story/multi-family condominium projects, and single family homes. McMahon is admitted to practice in all Florida and Michigan state courts, the United States District Court for the Middle District of Florida, the United States District Court for the Eastern District of Michigan and the United States Courts of Appeal for the Sixth Circuit.

Tashia M. Small, a partner in the firm's Jacksonville office, focuses her practice on liability matters including insurance defense, automobile liability, professional liability, general liability, premises liability, trucking/transportation, employment law, SIU/PIP and construction defects. She is admitted to practice in all Florida state and federal courts. In her spare time, Small is actively involved in the Jacksonville Alumnae Chapter of Delta Sigma Theta Sorority, Inc., where she currently serves as the Parliamentarian and Legal Review Chair.

Nicole F. Soto, a partner in the firm's Tampa office, has experience defending self-insureds, insurers and their policyholders in claims involving personal injury, catastrophic loss, and construction defect litigation from case inception through trial. Her premises liability practice focuses on the representation of restaurants, supermarkets, parking lots, drinking establishments, DOT-controlled facilities, stadiums, shopping malls, large warehouses and home improvement stores. In Soto's commercial trucking and transportation practice, she works with motor carriers including semi-tractor-trailers and tankers, buses, ambulances, waste haulers, and moving and storage van lines. Her real estate practice involves the prosecution and defense of title insurers, sellers and purchasers of real estate, mortgage lenders, and construction lienors in title disputes, priority lien challenges, and other real property proceedings.

* * *

Hope N. Baros, an associate in the firm's West Palm Beach office, recently co-chaired a three-part Lunch and Learn Trial Practice Series for the Palm Beach County Bar Association's Criminal Practice Committee. Baros organized the series with Judges John Kastrenakes and Samantha Schosberg Feuer. Attorneys participated in a live mock trial forum based on an accident reconstruction fact pattern, thereby allowing participants to perfect their trial skills, specifically in the areas of Voir Dire, Direct and Cross Examination of an Expert, and Closing Argument.

Baros, a member of the firm's First Party Property and Coverage department, who has tried over 90 cases to verdict, organizes and presents Continuing Legal Education seminars and forums for the Palm Beach County Bar Association, whose mission is to serve its members, foster professionalism, and enhance the public's understanding and awareness of the legal system.

* * *

Conroy Simberg Expands Workers' Compensation Division in Pensacola

Christopher E. Varner has been selected to lead the Workers' Compensation Division in Conroy Simberg's Pensacola office. The group's diverse insurance defense capabilities are enhanced by attorneys **Kyle J. Griffin** and **Patrick W. Luna** who contribute additional degrees of experience.

An accomplished trial attorney who joined the firm in 2011, Chris Varner has represented clients in more than 1,000 cases in a wide range of litigation matters including worker's compensation, longshore and harbor workers' compensation, general civil liability, tort liability, construction law, criminal defense, labor/employment law, landlord/tenant, civil rights, and contracts.

Kyle J. Griffin has devoted his practice to representing employers and insurance carriers in workers' compensation matters and has practiced law in the Florida Panhandle region for the majority of his legal career. Kyle earned his undergraduate degree from the University of West Florida and his Juris Doctorate from the Barry University School of Law.

Patrick W. Luna handles a broad range of insurance defense cases. After earning a Bachelor of Arts degree in Political Science from the University of West Florida, he then moved to New Orleans where he earned a Juris Doctor from the Loyola University New Orleans College of Law.

Conroy Simberg Announces Two New Partners in Hollywood and Orlando

Conroy Simberg attorneys **Albert E. Blair** who practices in Hollywood and **Jeffrey A. Carter** in Orlando have been promoted to partner.

Albert E. Blair is based in our Hollywood office and focuses his construction litigation practice on defending design professionals, general contractors and subcontractors. He also represents companies in other complex construction matters, such as contract disputes, liens, insurance coverage, landlord-tenant disputes and collection matters, in both state and federal court. Albert has more than 20 years of experience in the areas of construction, commercial and insurance defense and has handled numerous claims in excess of $20 million.

Jeffrey A. Carter practices in our Orlando office and is devoted solely to representing clients in liability defense matters including automotive negligence, premises liability, construction litigation, consumer liability, professional malpractice and wrongful death. He is AV-rated by Martindale- Hubbell and is admitted to practice before all Florida State Courts and the United States District Court for the Middle District of Florida.

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John L. Lurvey, Managing of the West Palm Beach office, recently participated in a panel discussion titled "Professionalism: 'To Speak of Not to Speak that is the Question'" during the American Board of Trial Advocates (ABOTA) – Palm Beach Chapter's Trial College.

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The Florida Bar Board of Legal Specialization and Education has recertified **John L. Morrow,** managing liability partner in the firm's Orlando office, as a board-certified Civil Trial Lawyer.

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Hinda Klein, partner in charge of the appellate division of the firm, has been appointed to The Florida Bar's Civil Procedure Rules Committee, which is charged with proposing new or amended rules of procedure to the Florida Supreme Court for approval.

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Conroy Simberg has been listed in the Top Law Firm category and three of our South Florida partners have been included in the current edition of the South Florida Legal Guide

Bruce F. Simberg has been listed as a "Top Attorney" for Product Liability – Defense and Construction Litigation in the current edition of the South Florida Legal Guide.

Scott D. Krevans has been listed as a "Top Attorney" for Insurance Litigation – Defense and Personal Injury and Wrongful Death – Defense in the current edition of the South Florida Legal Guide.

Jonathan C. Abel has been listed as a "Top Attorney" for Medical Malpractice – Defense and Product Liability – Defense in the current edition of the South Florida Legal Guide.

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Jackie Gregory, a partner in the Hollywood office, presented as part of an Interactive Panel Discussion at the 2018 Workers' Compensation Conference. The topic of discussion was: "The Graying Effect: Managing Workers' Compensation Claims and Exposures with a Maturing Workforce."

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