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LAW BULLETIN

Liability

FOURTH DISTRICT FINDS THAT A "PRANK" CAN BE DEEMED NEGLIGENT EVEN IF IT WAS INTENTIONALLY COMMITTED

The Fourth District Court of Appeal, in Borrack v. Reed, M.D., 36 Fla. L. Weekly D412 (Fla. 4th DCA, Feb. 23, 2011) held that where the Plaintiff alleged that the Defendant induced her to climb up a very steep cliff, after which he pretended to slip and fall into the water inducing the Plaintiff to dive in after him, the Plaintiff alleged a negligent, and not intentional, tort as the Defendant asserted. In a concurring opinion, Judge Melanie May observed that the obvious purpose of alleging that the Defendant's act was negligent and not intentional was to state a claim within the Defendant's insurance coverage, but Judge May also observed that the practical effect of

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SECTION 440.34(3), FLORIDA STATUTES (2009) LIMITS CLAIMANT'S ATTORNEY'S FEES TO A PERCENTAGE OF BENEFITS OBTAINED BASED ON THE FORMULA SET FORTH IN SUBSECTION(1), REGARDLESS OF WHETHER THE FEE IS AWARDED OR APPROVED BY THE JCC.

Kauffman v Community Inclusions, Inc./Guarantee Insurance Company 57 So.3d 919 (Fla. 1st DCA 2011) Herein, the JCC found the Employer/Carrier responsible for Claimant's attorney's fees pursuant to §440.34(3), Florida Statutes (2009), finding a reasonable fee to be $25,075.00. However, the JCC concluded that the statute as amended limited the fee to a percentage of benefits obtained, and thus, awarded Claimant's attorney a fee of $684.41 for obtaining $3,417.03 in benefits. This Order was appealed by the Claimant.

The first point on appeal was whether section 440.34 allows attorney's fees exceeding an amount resulting from application of the formula set forth in section 440.34 (1) when the fee is "awarded" rather than "approved" by the JCC. The Court found, except in cases where section 440.34 (7) applies, the statute limits Claimant's attorney's fees to a percentage of benefits obtained based on the formula set forth in subsection (1), and does so regardless of whether the fee is awarded or approved by the JCC.

The second contention on appeal was that the statute, as written is unconstitutional as it violates the Claimant's equal protection, due process, separation of powers, and access to the Courts. The Court, however, rejected these challenges to section 440.34

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the court's opinion was to find that a Defendant may be found negligent in committing an intentional act.

THIRD DISTRICT HOLDS THAT TRIAL COURT SHOULD DETERMINE WHETHER AN ARBITRABLE ISSUE EXISTS BEFORE DIRECTING PARTIES IN A FIRST-PARTY CLAIM TO APPRAISE THE LOSS, AND IF CARRIER ASSERTS THAT INSURED HAS NOT COMPLIED WITH ITS POST-LOSS OBLIGATIONS, COURT SHOULD DETERMINE WHETHER THE CLAIM IS RIPE FOR APPRAISAL IN THE FIRST INSTANCE

In Citizens Property Ins. Corp. v. Mango Hill Condo. Assoc., 54 So.3d 578 (Fla. 3d DCA 2011), the Third District Court of Appeal addressed the issue of whether a claim is ripe for appraisal on the demand of an insured where the insurer contends that appraisal would be premature because the insured failed to comply with its post-loss obligation to provide the carrier with certain requested documentation in accordance with its policy. In this case, the condominium association sued Citizen's, alleging that it complied with all conditions precedent, including producing certain documents and giving the carrier the sworn statement of its president, and in response, Citizen's denied coverage on the grounds that Mango Hill breached its policy by failing to comply with all of its post-loss requests for information.

Mango Hill sought to compel appraisal and the trial court granted the motion. Citizens appealed that order. On appeal, the Third District determined that while a trial court generally has discretion to determine the order in which coverage and loss issues are considered, a trial court must first determine whether an arbitrable issue exists, which the Court defined as a "meaningful exchange of information sufficient for each party to arrive at a conclusion." If, as Citizens contended, the insured had not complied with the conditions precedent to suit, then the loss would not be ripe for appraisal. Accordingly, the appellate court reversed the order compelling appraisal and ordered the trial court to conduct an evidentiary hearing on the specific issue of whether the insured sufficiently complied with its post-loss obligations such that an arbitrable issue existed.

SECOND DISTRICT RECEDES FROM PRIOR DECISION AUTHORIZING THE PROCEDURE OF ENTERING CONDITIONAL JUDGMENTS FOR ATTORNEY FEES

In Government Employees Ins. Co. v. King, 36 Fla. L. Weekly D969a (Fla 2d DCA, May 06, 2011)(en banc), Mr. King and his wife filed underinsured motorist claims with GEICO. The GEICO policy provided underinsured motorist coverage with limits of only $25,000 per person. Mr. and Ms. King each made a proposal for settlement in the amount of $100,000. GEICO did not settle the claims, and ultimately a jury returned a verdict in favor of Mr. King for $1,588,171 and in favor of Ms. King for $50,000.

On appeal, the Second District affirmed the judgment in favor of the Kings but denied Mr. King attorney fees in the appeal on the grounds that a judgment against an insurer in a UM action is limited to the policy limits. In this case, the appellate court found that the insured would be denied his fees because the carrier never disputed coverage and the insured's proposal for settlement was in the precise amount of the maximum judgment that could, and was, rendered against the carrier.

The appellate court rejected the insured's argument that he should be entitled to a "conditional" appellate attorneys' fee award, conditioned on his later prevailing in a bad faith action against the carrier predicated on the excess judgment. In doing so, the Court receded from that portion of its opinion in Allstate Insurance Co. v. Sutton, 707 So. 2d 760 (Fla. 2d DCA 1998) which appeared to authorize the procedure of entering conditional fee judgments at the trial court level before the bad faith claim has been litigated.

Significantly, the appellate court, in a footnote, questioned the now common practice of litigating the bad faith claim in the same lawsuit as the underlying claim by noting, "[i]n this case, the trial court reserved jurisdiction to allow the action to be amended to add a claim for bad faith. Although

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the propriety of bringing a bad faith claim by amending the original complaint is not at issue in this case . . . we agree with the Fifth District that this practice 'creates an abundance of problems.'" The Court further noted that a bad faith claim "is more appropriately brought as a separate cause of action," and further noted that "[a]t best, such an amendment in an action that has already reached final judgment on all of the claims pending at the time of the final judgment is a device that merely saves filing fees and service costs."

The significance of this footnote is that it may be used in the future to oppose motions to amend a claim to add a bad faith action after an excess verdict has been entered, which is a common ploy used by bad faith counsel to keep the bad faith case from being removed to federal court, because many federal judges have ruled that an amendment to add a bad faith count to the existing suit after the underlying litigation has concluded "relates back" to the inception of the case for purposes of determining whether a Notice of Removal is untimely. You should be aware that although this comment is in a footnote in the opinion and arguably dicta because, as the Court itself notes, the specific issue was not before it, appellate law provides that substantive footnotes have the same importance as does the body of the opinion.

PIP CLAIM FORM MUST PROVIDE THE INSURER WITH PROPER NOTICE OF THE EXACT AMOUNT OWED

In MRI Associates of America, LLC v. State Farm Fire and Cas. Co., 36 Fla. L. Weekly D960b (Fla. 4th DCA, May 4, 2011), the Fourth District held that the presuit demand letter had been sent prematurely, because the HCFA form failed to specify the exact amount owed under the statute and therefore payment was not overdue. The same precision is required in a subsection 627.736(5)(d) health insurance claim form as is required in a subsection 627.736 (11)(b)3 demand letter. The court explained that this requirement of precision in medical bills discourages gamesmanship on the part of those who might benefit from confusion and delay.

PIP INSURER CANNOT ELECT TO USE THE MEDICARE PART B FEE SCHEDULES SET FORTH IN FLA. STAT. § 627.736(5)(A)(2) UNLESS ITS POLICY EXPRESSLY PROVIDES FOR THAT METHODOLOGY

Subsection 627.736(5)(a)2, which went into effect on January 1, 2008, provides both a mandatory and permissive method of reimbursement. An insurer is required to pay 80% of all reasonable expenses, but has the safe-harbor option to limit its reimbursement obligation and pay a fixed fee for individual services.

In Kingsway Amigo Ins. Co. v. Ocean Health, Inc., 36 Fla. L. Weekly D1062a (Fla. 4th DCA, May 18, 2011), the applicable policy made no reference to the permissive methodology of subsection 627.736(5)(a)2. It cited the No–Fault Act, stated it will pay "80% of medical expenses," and defined medical expenses as those that it is required to pay "that are reasonable expenses for medically necessary ... services." The policy did not say it will pay 80% of 200% of Medicare Part B Schedule as provided in subsection 627.736(5)(a)2. The insurer failed to reference in the policy or anywhere else the permissive language that was contained in the statute.

The Fourth District determined that the insurance policy was not in conflict with the permissive methodology set forth in the new statute and was therefore binding on the parties to the insurance contract. When an insurance policy provides greater coverage than the amount required by statute, the terms of the policy will control. It concluded that if the insurer wanted to take advantage of the permissive fee schedule, it should have clearly and unambiguously selected that payment methodology in a manner so that the insured patient and health care providers would be aware of it.

JUROR INTERVIEWS ALLOWED WHERE ISO CLAIMS HISTORY REPORT PROVIDED REASONABLE GROUNDS TO BELIEVE THAT JURORS FAILED TO DISCLOSE PRIOR INSURANCE

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CLAIMS HISTORIES DURING VOIR DIRE

In State Farm Mut. Auto. Ins. Co. v. Lawrence, 36 Fla. L. Weekly D1138a (Fla. 2d DCA, May 27, 2011), State Farm appealed a final order denying its motion for new trial following a jury verdict in favor of State Farm's insureds on their claim for uninsured motorist benefits. State Farm sought a new trial or, in the alternative, juror interviews based on the alleged failure of three jurors to disclose their personal automobile insurance claims histories during voir dire. State Farm argued that Insurance Services Organization (ISO) claims history reports on the three jurors and a supporting affidavit by the State Farm employee who conducted the research satisfied the requirements for obtaining a new trial. Alternatively, it argued that the ISO reports contained sufficient information to require interviews with the three jurors.

The Second District determined that the ISO reports, standing alone, were not sufficient to entitle State Farm to a new trial. However, because the ISO reports provided reasonable grounds to believe that the three jurors may have concealed relevant and material information during voir dire, it held that the trial court abused its discretion by denying State Farm's motion for juror interviews.

SECOND DISTRICT HOLDS THAT AWARD OF ATTORNEY FEES CANNOT BE BASED ON HOURLY RATE THAT EXCEEDS AGREED HOURLY RATE IN NONCONTINGENT FEE AGREEMENT.

In Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, 36 Fla. L. Weekly D1139a (Fla. 2d DCA, May 27, 2011), First Baptist was represented by insurance defense counsel appointed and paid by its carrier. The attorney billed the insurance company for his services at the rate of $170 per hour and that rate was not contingent in any respect. The agreement contained an additional provision which stated that if someone other than the insurance company paid the attorneys' fees, then the amount will be the greater of the amount charged the insurance company or the amount deemed a "reasonable fee" as determined by the Court. Pursuant to this provision, the trial court awarded attorney fees of $350 per hour.

The Second District held that a contingency risk multiplier was not applicable because the fee arrangement was not contingent, and First Baptist's attorney did not assume any risk of nonpayment for his services. Under the fee agreement, the attorney was entitled to payment at his hourly rate regardless of the outcome of the case. Therefore, the presence of the alternative fee recovery clause in the fee agreement could not serve as the basis for an award of a fee calculated at an hourly rate in excess of the negotiated hourly rate. The Second District determined that an award of attorney's fees at a rate higher than the agreed hourly rate in the applicable fee agreement is inconsistent with the rule that a court-awarded fee cannot exceed the fee agreement reached by an attorney and his or her client. It recognized that its decision is in direct conflict with the Fourth District's decision in Wolfe v. Nazaire, 758 So. 2d 730 (Fla. 4th DCA 2000), which had held such language binding on the opposing party, and accordingly, the Second District certified conflict with that case. First Baptist has sought discretionary review in the Florida Supreme Court (SC11-1280).

PLAIN LANGUAGE OF ENSUING LOSS EXCEPTION CONTAINED IN WINDSTORM EXCLUSION CONSTRUED TO MEAN THAT IF A WINDSTORM SETS IN MOTION ANOTHER CAUSE WHICH IS NOT EXCLUDED BY ALL RISK POLICY, AND THAT INTERVENING CAUSE RESULTS IN A COVERED LOSS, THE WINDSTORM EXCLUSION DOES NOT APPLY

In Certain Interested Underwriters at Lloyd's v. Chabad Lubavitch of Greater Fort Lauderdale, Inc, 36 Fla. L. Weekly D1218a (Fla. 4th DCA, June 08, 2011), a building owned by the Chabad was damaged when a crane landed on it during Tropical Storm Barry. Chabad had an "all risk" policy on the building issued by Lloyd's and made a claim under the policy for the storm damage. Lloyd's argued that the loss was caused by wind and that damage to the building was excluded under the policy. Chabad countered that the crane

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striking the building was the cause of damage, not wind.

The Fourth District concluded that the windstorm exclusion was unambiguous as covering loss or damage caused by a windstorm, and that the loss was not covered, regardless of whether any other cause or event contributed to the loss. Contained within the exclusion was an "Ensuing Loss" clause providing an exception to the windstorm exclusion. That clause provided that if a windstorm "results in a cause of loss other than rain, snow sand or dust, and that resulting cause of loss is a Covered Cause of Loss," the loss will be covered. According to the appellate court, the plain language of the provision meant that if a windstorm sets in motion another cause, which is not expressly excluded from coverage under the policy, and that intervening cause results in a covered loss, the windstorm exception does not apply and the loss would be covered by the policy. In this case, the crane striking the building was "a cause of loss other than rain, snow, sand or dust," and it resulted from wind. The appellate court explained that the exclusion would only apply if the crane fell from its perch solely because of the force of the wind and not because of some other intervening cause.

CARRIER'S CEO COULD NOT BE COMPELLED TO APPEAR FOR DEPOSITION IN FIRST PARTY CASE IN WHICH HE HAD NO KNOWLEDGE OF ISSUES

In General Star Indemnity Co. v. Atlantic Hospitality of Florida, LLC, 36 Fla. L. Weekly D515 (Fla. 3d DCA, Mar. 9, 2011), the Third District quashed a trial court's order compelling the President of General Star to appear for a deposition in a windstorm case. The appellate court found that the deposition was not "reasonably calculated to lead to the discovery of admissible evidence" because the President had no personal knowledge of the dispute. The Court further noted that it is the President's job to manage the company and not to fly around participating in depositions.

WHERE INSURED EXECUTED UM REJECTION FORM SUCH THAT UM CARRIER OWED NO COVERAGE, INSURED COULD NOT SUE AGENT FOR FAILING TO EXPLAIN IMPLICATIONS OF REJECTION FORM

The insured in Mitledier v. Brier Grieves Agency, Inc., 36 Fla. L. Weekly D346 (Fla. 4th DCA, Feb. 16, 2011) admitted that he executed a UM rejection form in which he waived his right to UM coverage. He argued, however, that his insurance agent was negligent in failing to fully inform him about the necessity for such coverage and he sued the agent, claiming that he never actually read the rejection form he signed. The appellate court held that Florida Statute 627.727(9) created a conclusive presumption that the insured's rejection of the coverage was informed and knowing and that presumption applied in any case against the agent, just as it does in a case against the carrier.

ATTORNEY CLIENT PRIVILEGED MATERIALS ARE NOT DISCOVERABLE IN FIRST PARTY BAD FAITH CLAIMS

In Genovese, M.D. v. Provident Life and Accident Ins. Co., 36 Fla. L. Weekly S97 (Fla., Mar. 17, 2011), the Florida Supreme Court addressed the issue of whether its prior decision in Allstate Indemnity v. Ruiz, 899 So. 2d 1121 (Fla. 2005), which held that work product materials are discoverable in first party suits, renders attorney-client communications equally discoverable. The Supreme Court held that Ruiz did not address the attorney-client privilege and in light of the fact that that privilege is statutory and that its policy is to encourage full disclosure between attorney and client, Ruiz did not abrogate it for purposes of first party bad faith litigation.

In Justice Pariente's concurring opinion, however, she acknowledged that while the Court did not have the authority to abrogate the statutory privilege, that privilege may be pierced where the attorney was not acting in his/her capacity as an attorney for the client as in cases where the attorney has been hired for the express purpose of conducting an investigation. Justice Pariente implied that in such cases, the privilege might not apply because the communications between the attorney and client might be more in the nature of work product, which can be overcome upon a

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showing of necessity. Justice Pariente suggested that where the privilege is asserted in bad faith litigation, the trial judge should conduct an in camera inspect to determine whether the materials sought are truly protected by the attorney-client privilege or whether the attorney was only hired to investigate the claim.

THIRD DISTRICT FINDS THAT WHERE CARRIER IMMEDIATELY TENDERED ITS POLICY LIMITS ALONG WITH CERTAIN DOCUMENTS, IT WAS NOT RELIEVED OF BAD FAITH LIABILITY AS A MATTER OF LAW

In United Automobile Ins. Co. v. Estate of Levine, et al., 36 Fla. L. Weekly D679 (Fla. 3d DCA, Mar. 30, 2011), the Court considered a jury verdict rendered against United Automobile arising out of an accident in which Judge Steven Levine's automobile was hit by a truck, killing both Levine and his passenger and injuring the truck's passenger. United Automobile was sued for bad faith after its tender of its $10,000 policy limits to the Estate of Judge Levine was rejected by the Estate, after the carrier had tendered the same policy limits to Levine's passenger's Estate and the truck driver's passenger. In addition to the tender, United had included several documents, including a subrogation waiver from any Uninsured Motorist Carrier, if applicable, written confirmation that all liens would be satisfied, a hold harmless agreement and a letters of administration appointed a Personal Representative for the Estate. The tender was not contingent on the Estate's return of any of the documents, but the check was returned with no explanation, other than that it was insufficient.

Ultimately, the bad faith claim was tried to a jury in Miami and a verdict in excess of $5 million was entered against United. The appellate court affirmed the judgment, finding that the trial court correctly excluded evidence that United paid policy limits to two other claimants in a timely manner and further found that the trial court correctly denied its motion for directed verdict, noting that "until there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in Berges, . . . juries will continue to render verdicts regarding an insurer's alleged bad faith where the pertinent facts are in dispute."

Judge Wells issued a firm dissent, disagreeing with the majority and opining that United committed no bad faith as a matter of law. Judge Wells noted that the carrier tendered its limits within a day after learning about the accident, and its inclusion of a release with the tender was not in bad faith because the tender had no conditions. Judge Wells also observed that the Estate's own conduct in not advising United why it was returning the tender was itself bad faith.

The case is currently pending on Motions for Rehearing and Rehearing En Banc.

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noting that similar challenges to section 440.34, as previously amended in 2003 were addressed in Lundy v. Four Seasons Ocean Grande Palm Beach, 932 So.2d 506 (Fla. 1st DCA 2006). Thus, the Court explained that although the Florida Supreme Court quashed its decision in Murray v. Mariners Health/ACE USA, 945 So.2d 38 (Fla. 1st DCA 2006), the Supreme Court did not address any constitutional issues in Murray, and did not cast any doubt on the reasoning used in Lundy when rejecting constitutional claims as those made in the instant case.

Lastly, the Court rejected the Employer/Carrier's argument that Claimant lacked standing to raise the constitutional arguments. In doing so, it noted that the Florida Supreme Court concluded in Murray, that a Workers' Compensation Claimant has standing to challenge the validity of the fee provisions in section 440.34, even though the Claimant is adequately represented by counsel.

*****Subsequent to the First District's release of the above opinion, the Claimant petitioned the Florida Supreme Court for jurisdiction which is currently pending, SC11-661. If jurisdiction is accepted, the Florida Supreme Court will consider these issues.***

A DOCTOR CAN IMPOSE WORK RESTRICTIONS RETROACTIVELY

Feacher v. Total Employee Leasing/Guarantee Insurance Company, 36 Fla. Law Weekly D1104 (Fla. 1st DCA May 23, 2011). The First District reversed and remanded the JCC's denial of TTD and/or TPD benefits from the date of accident until the date of her IME visit, and awarding TPD benefits from the IME visit through the date of the final hearing. The only medical evidence presented at the final merits hearing was that of the Claimant's IME who testified that the Claimant was on a no work status from the date of accident through the date of the IME and continuing, for a closed head injury as well as back and neck complaints, until such date that she received medical treatment.

The JCC denied TPD prior to the IME visit as there was no medical evidence of work restrictions for that period, based, in part, upon his rejection of the Claimant's testimony that she was advised by the emergency room staff that she would not return to work. However, the First District opined that the JCC either overlooked the IME's testimony or erroneously concluded that a doctor cannot retroactively impose work restrictions.

The JCC also denied TTD benefits based upon his finding that the Claimant's headaches resolved by the time the final hearing took place. However, the JCC ignored the fact that the restrictions imposed by the IME also related to neck and back complaints.

In essence, the First District ruled that the JCC erred in rejecting the IME's unrefuted medical testimony that the Claimant should remain off of work from the date of accident until she received medical care.

LIFE CARE PLANS ARE NOT BENEFITS CONTEMPLATED UNDER CHAPTER 440. THE APPLICABLE STATUTE FOR AWARDING COMPENSATION FOR ATTENDANT CARE IS THE STATUTE IN EFFECT AT THE TIME COMPENSABLE CARE WAS GIVEN.

Bronson's Inc. v. Mann, 36 Fla. Law Weekly D1053 (Fla. 1st DCA May 18, 2011). The Claimant suffered a compensable accident in 1982 and, since that time, had lived with his parents and continued to work for the employer. He was, at the time of the appeal, 52 years old. The Claimant filed a petition for benefits requesting all the benefits listed in a life care plan prepared on March 15, 2010 by a vocational expert, rehabilitation counselor and certified life care planner, and attorney's fees and costs. Via a motion to dismiss, and later, at the final merits hearing, the Employer/Carrier argued that the benefits were not ripe, due or owing as the life care plan only dealt with projected evaluations; that claim for attendant care was not accompanied by a prescription stating the time periods, the level of care required, or the type of assistance required; and the recommended prescriptions were not from an authorized physician. The JCC approved the life care plan (with

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one minor exception) and granted the request for authorization of the recommendations made therein. He further ordered 8 hours per day in attendant care based upon the mother's testimony.

The First District reversed the JCC's ruling. The court first addressed the issue of whether the benefits were ripe, due and owing, noting that there was no question that a substantial portion of the benefits awarded were not in default or ripe, due and owing. The life care plan is not, in itself, a benefit recognized under the Workers' Compensation Act. Further, the JCC expressly stated that the Employer/Carrier would have to modify the order before it could deny the benefits recommended in the life care plan even though the benefits were not ripe, due and owing. This was in error and the First District reversed the award of "the recommendations made in the life care plan" as erroneous.

As to the attendant care, the court first noted that the applicable statute for awarding compensation for attendant care is the statute in effect at the time compensable care was given. The question addressed by the First District was whether the attendant care in the life care plan was medically necessary and whether it was specifically prescribed by a physician as required by section 440.13(2)(b), Florida Statutes. The First District pointed out that while the authorized doctor made a note stating that it was medically reasonable and medically necessary to implement all of the recommendations in the life care plan; this failed to specify the type of attendant assistance and the level of care required. The life care plan addressed the type of attendant care required as "provi[ding a] safe environment" which was deemed too vague to adequately describe the type of care required. Furthermore, the First District found that financial management which was identified in the life care plan as another purpose of the recommended attendant care was not a compensable form of attendant care. Lastly, the court rejected testimony of the attendant care provider and the life care plan provider to describe the care recommended by the doctor, noting that section 440.13(2)(b) requires that the prescription itself specify the time periods for such care, the level of care required and the type of assistance required. As the doctor's prescription was not specific, the attendant care award was reversed.

A NON-MEDICAL TOXICOLOGIST IS NOT QUALIFIED TO TESTIFY AS TO MEDICAL CAUSATION.

<u>Stokes v. Schindler Elevator Corporation</u>, 2011 WL 1744156 (Fla. 1st DCA 2011). In Stokes, the First District reversed the JCC's denial of death benefits. The employee suffered a compensable injury which necessitated an authorized ankle surgery. Post-surgery, however, his incisions did not heal, rather the wounds became swollen, pus-filled, odorous and inflamed. While under the care of a wound-care nurse, the employee became febrile, collapsed and died. The autopsy revealed visible colonies of coccoid bacteria formed in his heart, causing acute inflammation of the heart tissues. A post-mortem examination by a pathologist revealed marked swelling and redness around the wounds, with no other course of infection found. The official cause of death was acute bacterial infection in the heart, caused by bacterial infection resulting from ankle surgery. The Claimant's IME, a pathologist, related the employee's death to the ankle infection. However, the Employer/Carrier countered with the testimony of a toxicologist who stated that one could not scientifically determine the cause of death without culturing the ankle to match the bacteria in the ankle and heart, or identifying epidemiological studies linking ankle wounds to endocarditis.

The First District noted that a non-medical toxicologist is not qualified to testify as to medical causation per section 440.13(5)(e), Fla. Stat. (2007). The Claimant bore the obligation of proving that the fatal infection resulted from the ankle wound within a reasonable medical certainty - not absolute certainty - by medical evidence only. The JCC erred in relying upon a non-medical opinion as to the cause of death. The Court found that the pathologist's expert opinion

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testimony was evidence demonstrating causation.

IN ORDER TO ADMIT MEDICAL BILLS INTO EVIDENCE, A PARTY ADEQUATELY MUST ESTABLISH AN EXCEPTION TO THE HEARSAY RULE.

German v. Ryta Food Corporation, 36 Fla. Law Weekly D997 (Fla. 1st DCA May 9, 2011). Herein, the First District reversed the award of a medical bill from Jackson Memorial Hospital which was admitted into evidence by the JCC over objections of the Employer/ Carrier. The First District agreed that the Claimant failed to elicit testimony from the records custodian for Jackson which established authenticity or a predicate to any exception the hearsay rule. Specifically, while the JCC could concluded that the information was kept in the course of a regularly conducted business activity and it was the regular practice to make such a record; the JCC could not conclude that the records were made at or near the time of the events nor that they were made by a person with knowledge. Thus, because the JCC erred in admitting the billing and medical records, it was an error to award payment of one of the bills.

IN CONSIDERING ENTITLEMENT TO PTD BENEFITS, A JCC MUST DETERMINE WHETHER THE CLAIMANT CAN SHOW PERMANENT WORK RELATED PHYSICAL RESTRICTIONS COUPLED WITH AN UNSUCCESSFUL JOB SEARCH.

Martinez v. Lake Park Auto Brokers, Inc., 36 Fla. L. Weekly D911 (Fla. 1st DCA 2011). The JCC denied PTD benefits finding that the Claimant's job search did not establish that his inability to secure at least sedentary employment within a 50 mile radius of his residence was "due to his physical limitations." However, the First District noted that the JCC failed to consider whether the Claimant was entitled to PTD benefits by showing permanent work-related physical restrictions coupled with an exhaustive or unsuccessful job search. The case was remanded for the JCC to consider the adequacy of his job search.

AT FINAL HEARING, THE JCC CAN ONLY ADDRESS THOSE ISSUES CONTAINED IN THE PETITIONS FOR BENEFITS.

Clay County Board of County Commissioners/Scibal Associates v. Bramlitt, 36 Fla. L. Weekly D572 (Fla. 1st DCA 2011). The First District reversed the JCC's order requiring the Employer/ Carrier to reimburse a Claimant for out-of-pocket medical expenses. Since there was no pending petition seeking reimbursement of the expenses, the JCC's ruling violated the Employer/Carrier's due process rights.

THE WORKERS' COMPENSATION ACT COVERS ACCIDENTS OCCURING UNDER A CONTRACT OF EMPLOYMENT FORMED IN FLORIDA.

Owens v. CCJ Auto Transport, 36 Fla. L. Weekly D473 (Fla. 1st DCA 2011). Here the First District reversed and remanded the JCC's order finding that the Claimant's contract of employment was formed in Utah, not Florida, thereby removing his claims from coverage under the Florida Worker's Compensation Act. The Claimant was injured in Georgia. The facts found by the JCC established that his contract of employment was formed while the Claimant was living in Florida, for work to be performed mostly outside of Florida, and that the Claimant's acceptance of the employment offer (the last act required to form the contract) occurred in Florida. The court further noted that upon formation of the contract the Claimant was required to drive to Utah. The First District found that this act was not a prerequisite to forming the contract but rather was undertaken by the Claimant in performance of the contract. According to section 440.09(1)(d), Florida Statutes (2007), the Act covers accidents occurring under a contract of employment formed in Florida.

THE JCC DOES NOT HAVE JURISDICTION TO VOID AB INITIO A WORKERS'

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COMPENSATION POLICY. FURTHERMORE, AN EMPLOYER'S ACT OF FRAUD CANNOT SERVE AS A BASIS TO DENY A CLAIMANT HIS BENEFITS UNDER CHAPTER 440.

Bend v. Shamrock Services, 59 So.3d 153 (Fla. 1st DCA 2011). In this case, the Claimant challenged the Order of the JCC which voided ab initio the Employer's contract for workers' compensation benefits with the Carrier based upon misrepresentations made by the Employer to the Carrier, either during or shortly after the completion of its application for workers' compensation coverage. The Claimant herein was injured while driving an Employer owned truck, en route to a painting job. Upon its receipt of notice of the accident, the Carrier's investigation revealed that the company was a multi-faceted business, contrary to the employer's application description of his company as a lawn maintenance service with five employees. The Carrier immediately cancelled coverage, despite it being in effect for over three years. In so doing, the Carrier also denied the Claimant's workers' compensation claim asserting that the Claimant was not an employee but an independent contractor and that the claim should be denied based upon misrepresentations made by the Employer in the application process and/or based upon the Employer's failure to regularly submit documentation and reports to the Carrier per the Workers' Compensation Act.

The JCC ruled that the Claimant was an uninsured independent contractor for painting activities and that this painting work was a type of service within the "construction industry" which is, by definition, a covered employee. However, the JCC further concluded that because of the Employer's multiple misrepresentations, the workers' compensation policy was void ab initio per section 627.409(1)(a), Florida Statutes (2007) and thus, the Claimant was precluded from recovering benefits under the policy.

In quashing the JCC's order, the First District noted that while Chapter 440 allows a JCC to determine whether a policy is in effect or has been properly cancelled, and may be required to interpret contacts and examine pertinent evidence, the JCC cannot reform contracts or effect a remedy not provided in chapter 440. Except in one instance, chapter 440 addresses the cancellation of expiration of policies only after timely notice. Chapter 440 does not contain the remedy afforded by the JCC here, and is in contrast to the statutory proclamation that the liability of a carrier to an employee shall be "as provided" by chapter 440.

The Court further noted that upon issuing the policy, the Carrier could have requested extensive documentation from the Employer and performed pre-policy inspections, which it did not. In addition, the policy was in effect for three years, during which time the Employer never updated his application as required by Chapter 440 and never submitted his quarterly earnings reports. Yet the Carrier did not comply with the mandatory reporting scheme imposed by section 440.105(1)(a) which requires the Carrier to report this failure to the Department of Insurance Fraud, Bureau of Workers Compensation Fraud, and chose, during this time not to avail itself of its right to cancel coverage. Furthermore, the court pointed out that the Carrier failed to conduct periodic audits as required by Chapter 440. While the Carrier attempted twice to audit the Employer, there was no cooperation from the Employer. Regardless, in lieu of cancelling the policy, it renewed the policy and collected additional premiums. Lastly, the court pointed out that Chapter 440 clearly notes that an employer's act of committing fraud against the carrier shall not affect benefits payable to the employee by the employer or carrier.

FIRST DISTRICT REVERSES AND ENFORCES THE PARTIES SETTLEMENT AGREEMENT FINDING THAT A LETTER MEMORIALIZING THE SETTLEMENT DID NOT OBJECTIVELY CREATE ANY CONTINGENCIES TO SETTLEMENT

In United Airlines v. Nemoto, 36 Fla. L. Weekly D817 (Fla. 1st DCA 2011), the Employer/Carrier challenged two JCC orders wherein the JCC awarded Claimant attorney's fees for prevailing on a claim filed prior

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Workers' Compensation continued

to the settlement agreement and wherein the JCC rejected the Employer/Carrier's defense that the parties settled the case. The Employer/Carrier contended that that the parties settled the case which was confirmed by Claimant's attorney with a letter memorializing the amount and confirming that the Claimant did not believe an MSA was necessary as he was not a Medicare recipient nor did he have any intention of becoming a Medicare recipient.

The letter also noted that the Employer/Carrier was in the process of obtaining an MSA and that the settlement was not final until the parties reviewed and approved any MSA requirement. The First District reviewed the plain language of the letter and held that the parties had in fact reached an agreement, as the letter did not objectively create any contingencies. Thus, it reversed and remanded both orders for approval of fees associated with the settlement agreement.

WHEN AN EMPLOYER/CARRIER FURNISHES INDEMNITY OR A MEDICAL BENEFIT BEFORE THE STATUTE OF LIMITATION EXPIRES, CLAIMANT MUST FILE A PETITION WITHIN TWO YEARS AFTER THE EMPLOYEE KNEW OR SHOULD HAVE KNOWN OF THE WORK INJURY OR WITHIN ONE YEAR AFTER PAYMENT OF INDEMNITY AND/OR MEDICAL BENEFIT

Varitimidis v. Walgreen Company/Sedgwick Claims Management Services, 58 So.3d 406 (Fla. 1st DCA 2011). The Claimant filed his first petition for benefits on February 8, 2010 seeking benefits relating to a December 10, 2007 work accident. The Employer/Carrier denied all benefits asserting the statute of limitations defense. The JCC found that that the medications furnished by the Employer/Carrier in November 2009 were furnished inadvertently and that Claimant had failed to prove detrimental reliance. As such, the JCC concluded that the petition for benefits filed on February 8, 2010 was barred by the statute of limitations.

On appeal, the First District held that the JCC erred in concluding that the Petition was barred by the statute of limitations. The First District reiterated that pursuant to section 440.19(1) & (2) a petition for benefits is timely filed if: (1) filed within two years after the employee knew or should have known the injury or death arose out of work performed in the course and scope of employment; and (2) if filed within one year from payment of indemnity benefits or furnishing of remedial treatment, care, or attendance pursuant to either notice of injury or petition for benefits. The court noted that in the instant case, the statute of limitations could not have run before December 11, 2009. Claimant had no need to assert waiver or estoppel against the Employer/Carrier, to prove detrimental reliance upon an Employer/Carrier's mistake, or to prove inadvertence when a petition is properly filed. As such, the Court found that the petition for benefits filed on February 8, 2010 was timely as the Employer/Carrier's furnishing of medication extended the limitations period for one year from November 12, 2009.

JCC'S DISMISSAL OF ALL CLAIMS WITH PREJUDICE FOR CLAIMANT'S FAILURE TO COMPLY WITH COSTS ORDER AND CLAIMANT'S FAILURE TO APPEAR AT HEARING ON ORDER TO SHOW CAUSE WAS IMPROPER AS SECTION 440.24(4), FLORIDA STATUTES, ONLY AUTHORIZES DISMISSAL OF PETITIONS "UNTIL THE EMPLOYEE COMPLIES WITH SUCH ORDER".

In Hernandez v. Palmetto General Hospital, 36 Fla. L. Weekly D686 (Fla. 1st DCA 2011), the Claimant appealed a JCC's order dismissing all petitions for benefits with prejudice based on Claimant's failure to pay and her failure to attend a hearing to explain her failure to pay the costs entered against her after the dismissal of several prior petitions. The Claimant while represented by her former attorney, Richard Zaldivar, filed several petitions that were later voluntarily dismissed. As a result, the JCC ordered the Claimant to pay costs in the amount of $3,647.86 to the

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Employer/Carrier pursuant to section 440.34(3), Florida Statutes. This cost Order was *per curiam* affirmed in an earlier opinion rendered by the First District in Hernandez v. Palmetto Gen. Hosp., 25 So3d 563 (Fla. 1st DCA 2009). Subsequent to this, the Employer/Carrier moved to dismiss the Claimant's new petitions for failure to comply with the cost order. The Claimant requested an evidentiary hearing in response to the JCC's order directing a written response as to why the petitions should not be dismissed. A short time prior to the hearing, the Claimant contacted another firm and spoke to a paralegal who assisted the Claimant and confirmed with a secretary at Zaldivar's office that the hearing had been canceled. This information was also confirmed by the Claimant via personal contact to Zaldivar's office. No contact was made by the Claimant to the JCC to confirm whether the hearing was in fact canceled. However, the hearing had not been cancelled and was held as scheduled. The Claimant did not attend the hearing and the JCC, unaware of the Claimant's reasons for not attending, dismissed all pending petitions with prejudice based on Claimant's failure to pay the costs as required by the cost order, her failure to show good cause for non-payment; and her failure to appear at the hearing. The JCC further found that the Claimant had "willfully and wantonly failed to appear in violation of this tribunal's . . . Notice of Hearing requiring her to appear live[ ]" and that although the Claimant might not have been able to pay the costs, her financial affidavit was "self-serving" and thus, insufficient evidence to justify her failure to comply with the cost order.

After the dismissal order, the Claimant's new attorney filed an emergency motion to set aside the order, along with affidavits from the Claimant and the paralegal. After an evidentiary hearing was held, the JCC denied the Claimant's motion to vacate the dismissal order on the grounds that the Claimant's reliance on the statements made by a secretary at Zaldivar's office and the paralegal at her new attorney's office was "unreasonable" and neither the Claimant or the paralegal had contacted the JCC's office to confirm the status of the hearing.

The First District affirmed the JCC's finding that Claimant's failure to appear at the hearing on the order to show cause was "unreasonable" under the circumstances; however, the record did not support a finding of the level of willful or flagrant conduct necessary to justify dismissal of the petitions with prejudice. Thus, the Court held that the JCC had abused his discretion by imposing the ultimate sanction, dismissal of petitions with prejudice. The First District also found that the dismissal of the petitions with prejudice under section 440.24 (4), was improper as section 440.24(4) does not authorize dismissal with prejudice, but only authorizes claims to be dismissed "until the employee complies with such order".

A JCC DOES NOT HAVE JURISDICTION OVER REIMBURSEMENT ISSUES BETWEEN AN AUTHORIZED DOCTOR AND THE CARRIER.

Cook v. Palm Beach County School Board, 51 So.3d 619 (Fla. 1st DCA 2011). The Claimant appealed the JCC's Order granting the Employer/Carrier's Motion for Summary Final Order. The Claimant sustained a compensable injury in 1994. In February 2010, she filed a Petition for Benefits seeking payment of five medical bills for treatment she received from Dr. Iglesias. The Employer/Carrier formally responded advising that they had not denied the treatment, rather the doctor never submitted any bills for payment. Upon receipt of the bills from Dr. Iglesias, they were sent for processing and were paid. The Employer/Carrier then filed its Motion for Summary Order arguing that the request for payment of Dr. Iglesias' bills is a reimbursement issue over which the JCC lacks jurisdiction. In her appeal, the Claimant argued that there was a genuine dispute of material fact as to whether Dr. Iglesias was and continues to be authorized. The court, however, noted that there no evidence presented by the Claimant that he was not authorized; and all evidence, viewed in a light most favorable to the Claimant, supported that Dr. Iglesias was and remained authorized. Thus, the First District affirmed the JCC's Order.

Appellate Department

Focus Feature

In each Newsletter, we will be focusing on a different department in the firm and in this issue, we are highlighting the appellate department. Our appellate department consists of seven (7) appellate attorneys, all of whom are dedicated to appellate practice and litigation support in both liability and workers' compensation cases. Unlike other firms, our appellate attorneys do not handle a litigation caseload, in order that they may be available to address emergencies that arise before, during and after trials, and in order that they be able to devote their time to handling appeals without having to juggle litigation deadlines or other litigation matters that could keep them out of the office for extended periods of time.

The department is headed by Hinda Klein, a board-certified appellate attorney with 26 years experience who has been named as a Florida Superlawyer for the last six (6) years. Not only does Ms. Klein handle appeals, but she frequently co-counsel's with trial attorneys from other firms, as well as in-house counsel, in order to provide emergency trial support and assists trial attorneys in preserving the record on appeal. In that capacity, she and the other attorneys in her division routinely prepare and argue dispositive motions, jury instructions, directed verdict motions and trial memoranda and post-trial motions. Ms. Klein actively supervises 6 other appellate attorneys and no brief leaves the office without her review and revision.

Other attorneys in the department have been practicing from 3 to 30 years, and include another Board-certified appellate attorney Diane Tutt who, like Ms. Klein, has been designated as a Florida Superlawyer in the area of appellate practice. Ms. Tutt has participated in over 400 appeals throughout her career in all areas of the law with an emphasis on insurance defense. Other members of the department have had varied experience, including experience in real estate, criminal appeals, and one, Kasey Prato, joined our firm after working for the Florida Bar as a prosecutor. Two of our attorneys, Rolando Soler and Shannon P. McKenna, have handled numerous appeals for the Attorney General's and Public Defenders' offices, respectively, and Ms. McKenna provided significant trial support for public defenders. Karen Berger, our youngest associate, previously worked as a bankruptcy attorney for a real estate firm, before joining Conroy Simberg, and Carlos Cabrera, an associate with 11 years of experience, had previously practiced as a litigator before joining the department five years ago.

Our appellate attorneys work with attorneys in all of the other eight offices in the firm and are able to work closely together and collaborate on emergencies when necessary. The department handles cases in all Circuit and District Courts of Appeal throughout Florida as well as the Florida Supreme Court and the Federal Eleventh Circuit Court of Appeal. We have found that having a separate dedicated appellate department ensures that the more complex legal research and writing is done by attorneys able to perform that work quickly and proficiently, which in turn enables our trial attorneys to do what they do best, namely, litigate. Our appellate department ensures that all of the firm's attorneys are immediately notified of significant changes in the law, and that our clients are provided with the most thorough and persuasive work product on a timely basis and that the work product meets our stringent quality control standards.

If you have any questions about the department and what we can do for you, please do not hesitate to contact Hinda Klein at the office at 954-518-1248 (Direct Line) or at 954-303-1907 (Cell).

Successes/Announcements

If you are interested in reading the following information about the firm's past results, please read below.

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

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

* * *

John L. Morrow, Partner, and **Matthew J. Corker**, Associate, in our Orlando office, obtained final summary judgments in Orange and Brevard Counties in Personal Injury Protection suits involving the improper unbundling of CPT Codes by medical providers. In each case, the Courts ruled that the National Correct Coding Initiative is incorporated into Florida PIP law as part of the Medicare payment system. The Courts held that, where medical providers improperly unbundle services when billing for comprehensive treatment charges and component treatment charges, neither the insurer nor the insured was obligated to pay for the unbundled amounts.

* * *

Partners, **Hinda Klein** and **Larry Craig**, and Senior Associate, **Diane Tutt**, have been selected as 2011 Super Lawyers by Super Lawyers Magazine, published by Thomson Reuters.

As explained on its website, "Super Lawyers" is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations."

* * *

Jonathan C. Abel, Partner in our Hollywood office, authored an article titled "Psychiatrists and Prevention of Patient Suicide: Legal Duties in Medical Negligence Claims", which was published in the 2011 First Quarter edition of *Physician Insurer* magazine.

* * *

Christopher A. Tice, Partner in our Jacksonville office, successfully defended a Major Contributing Cause defense. The Carrier accepted two claims reported by the Claimant and authorized treatment. Subsequently, the authorized physician and the one time change in physician indicated the claimant was at MMI with a 0% disability rating and no further treatment was indicated for either accident. The JCC found the 120 day rule did not apply and denied future benefits as the MCC for the current need for treatment was no longer related to either accident.

* * *

John Lurvey, Managing Partner of the Liability Division in our West Palm Beach office, was elected to the American Board of Trial Advocates and subsequently elected to the Executive Committee of the Palm Beach Chapter.

* * *

Alison Schefer, Partner in our West Palm Beach office, was elected to the Executive Committee of the Workers' Compensation Section of the Florida Bar. Her term is to begin on July 1, 2011

* * *

Jeffrey Blaker, Partner, and **Robert Mayer**, Associate, from our West Palm Beach office received a defense verdict in a jury trial in St. Lucie County Circuit Court. Plaintiff made two key material misrepresentations on her homeowner's insurance policy application. After the plaintiff's residence suffered a fire the carrier denied coverage and cancelled the policy relying on the material misrepresentations. Partial summary judgment was granted to the carrier determining that the representations were "material" and a jury was asked whether the plaintiff's answer to questions on the insurance application were true and complete and made to the "best of her knowledge and belief". After two days of trial that jury responded

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"no" and found in favor of the insurance carrier. The case was defended primarily on the credibility of the plaintiff and it was successfully shown to the jury that plaintiff's allegations, that she misunderstood the question, defied belief.

* * *

Daniel Simpson, Partner and head of Workers' Compensation in our Hollywood office, in the case of Garcia v. Town of Davie, successfully defended a claim for temporary partial disability benefits based upon the affirmative defense that the Claimant willfully refused suitable employment as codified in Florida Statute Section 440.15(6). The Claimant alleged that his restrictions of no driving were enough to justify his refusal to come to work; however, we were able to convince the Judge of Compensation Claims that the Claimant could have arranged alternative means for transportation either through a family member, employee car pool or public transportation.

* * *

Carlos D. Cabrera, Associate in the firm's appellate department, obtained a reversal of a summary judgment entered in favor of a medical provider in a PIP case, where the appellate court held that a question of fact existed with regard to whether "massage therapy" was part of "chiropractic care".

* * *

Larry Gordon, Partner in the firm's commercial division, obtained a $14,000,000 judgment after a jury trial, and a $1,800,000 settlement in a mortgage foreclosure action.

* * *

Kelly Schaet, Associate in our West Palm Beach office, was successful in obtaining a summary final order. The Claimant was not entitled to an increase in his average weekly wage post resignation as the Employer was already paying 100% of the Claimant's health insurance pursuant to Florida Statutes Section 112.19.

* * *

Robert J. Mayer, Senior Associate in our West Palm Beach office, obtained a defense jury verdict in a case in which plaintiff claimed that a Florida storage warehouse was negligent in the handling and storage of her household goods. The storage facility accepted the plaintiff's property from a national moving company after that company moved the plaintiff's property in 2005 from her home in Connecticut and then delivered it back to the same moving company for delivery to Plaintiff's new home in North Carolina in 2007. Liability hinged upon issues involving the Interstate Commerce Act and general principles of negligence. The jury's verdict found no negligence on the part of the storage company.

* * *

Katherine Letzter, Partner in our Tampa office, prevailed at final hearing on the issue of authorization for a change in primary care providers, where the Carrier denied compensability within 120 days after the initial provision of benefits. The Judge of Compensation Claims found that the Claimant was not entitled to a one-time change in providers, as the Claimant did not suffer a compensable accident or injury. This matter is currently on appeal.

* * *

Kristan Coad and **Jennifer Forte**, Associates in our Tampa office, were successful in obtaining a favorable ruling on Defendant's Motion for Final Summary judgment in a case involving a slip and fall allegedly due to a change in floor elevation and inadequate lighting, resulting in a femur fracture injury to Plaintiff. Plaintiff filed a complaint for injuries sustained when she fell at Defendant's home while stepping down into the garage from inside the house. Plaintiff contended that the inadequate lighting in the garage, the failure to warn of a step down, and the step down itself created a dangerous condition. Plaintiff admitted at her deposition that she fell merely because she did not notice the step down curb in the garage. Following a review of expert affidavits, the court concluded that the step down was not in violation of any building codes nor was it deemed to be of an uncommon design or mode of construction.

The court granted Defendant's Motion for Final Summary Judgment, noting that Florida law is well settled that a change in floor elevation generally does not constitute a dangerous condition. Further, the amount of interior lighting in a house cannot transform a difference in floor levels into an inherently dangerous condition in absence of unusual

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circumstances, which the court determined not to be present in the instant case.

* * *

Daniel Simpson, Partner and head of Workers' Compensation in our Hollywood office, and **Stephanie Robinson**, Associate in our Hollywood office, in the case of Russell Adams v. Montenay Power Corporation and Sedgwick, teamed up to successfully defend claims for permanent total disability benefits, compensability of a new date of accident and compensability of multiple body parts based upon the Claimant's incredulousness and web of inconsistencies. Our successful defense was due largely to our due diligence during the discovery phase of the litigation, as well as, our trial memorandum and cross examination of the Claimant.

* * *

Carlos D. Cabrera, Associate in the firm's appellate department, obtained a notice of voluntary dismissal of an appeal in a hotly contested medical malpractice case after he served plaintiff's counsel with a 57.105 motion with the intent of seeking attorneys' fees and costs against plaintiff and plaintiff's counsel if they did not withdraw the appeal. **Jonathan C. Abel**, Partner, and **John S. Stevens**, Associate, both in our Hollywood office, had obtained summary judgment in favor of the doctor at the trial court.

* * *

John L. Morrow, Partner, and **Matthew J. Corker**, Associate, in our Orlando office, obtained final summary judgments in Orange and Seminole Counties in Personal Injury Protection suits involving the Outpatient Prospective Payment System (OPPS). The Courts concluded that the requirement that an insurer pay the "allowable amount" under Medicare Part B participating physicians fee schedule allows the insurer to apply the Outpatient Prospective Payment System cap, which is expressly incorporated into the "allowable amount" under the fee schedule.

* * *

Starlene McGory, Associate in our Tampa office, obtained a defense ruling on a permanent total disability claim, as the Judge of Compensation Claims held that the Claimant was capable of performing at least sedentary work within a 50 mile radius of his residence. In addition, the Judge of Compensation Claims also ordered the Claimant to reimburse taxable costs of the Employer/Carrier pursuant to Florida Statutes Section 440.34(3).

* * *

Daniel Simpson, Partner and head of Workers' Compensation in our Hollywood office, in the case of Cecilia Eusse v. SCI/Zurich North America, successfully prevailed on a motion for summary final order dismissing a claim in it's entirety based upon a statute of limitations defense. The claim was totally controverted and the Claimant was currently in a wheelchair, which she alleged was the result of a work accident. In support of the defense, we were able to not only establish a prima facie case that the statute had expired but also that the Claimant's argument for estoppel was not established by clear and convincing evidence since it was the Claimant who failed to report an accident to the employer even though she was aware of the Employer's posting regarding workers' compensation in compliance with Florida Statute Section 440.055.

* * *

Katherine Letzter, Partner in our Tampa office, prevailed at final hearing on the issue of authorization of medical care under the supervision of a specific physician. The Judge of Compensation Claims denied the claim, as the Employer/Carrier has the right to select the physician to treat, when they have timely responded to a request for authorization.

* * *

Christopher Tice, Partner in our Jacksonville Office, successfully overcame the presumption of correctness on an Expert Medical Advisor (EMA) opinion and defeated the claimant's claim for compensability of the left elbow and Temporary Total/Partial disability benefits from April 10, 2010 to the present. Judge Humphries essentially accepted the entire defense argument that the claimant's history of the accident was not credible based on the medical records and the claimant changing the description of injury over a year after the accident. Since the claimant's history was not credible, the Judge rejected the EMA as he determined that the EMA's opinion of causal relationship was without factual basis.

* * *

Successes/Announcements

In a wrongful death case arising out of a workplace accident at a residential construction site, **Shannon P. McKenna**, Associate in the Appellate Division in our Hollywood Office, successfully defended an appeal of a trial court's order granting summary judgment based on horizontal workers' compensation immunity.

Ms. McKenna also successfully defended the appeal of a trial court's denial of the plaintiff's motions for leave to file a fourth amended complaint and a supplemental complaint, after the trial court had already granted a motion to dismiss the third amended complaint with prejudice.

In a construction defect case, **Ms. McKenna**, also successfully defended the appeal of a trial court's order granting summary judgment on statute of limitation grounds, as more than four years had passed since the plaintiffs became aware of water intrusion into their home, even though the plaintiffs did not discover the specific nature of the defect causing the water intrusion until several years later.

In a first party property damage case, plaintiff filed a supplemental claim for Hurricane Wilma damage. The trial court compelled arbitration without first determining if plaintiff complied with his post-loss duties under the insurance policy. **Ms. McKenna** successfully appealed the trial court's order compelling arbitration, and the case was remanded to the trial court to conduct an evidentiary hearing to determine if plaintiff complied with his post-loss duties under the insurance policy.

* * *

The firm congratulates Orlando partner **John Morrow**. The Florida Bar has announced that he has met the standards of Certification and is now Board Certified as a specialist in Civil Trial law. Board certification identifies and recognizes a lawyer as having special knowledge, skills and proficiency, as well as a reputation for professionalism and ethics. The designation distinguishes a lawyer as a specialist and expert in the certified practice area.

* * *

Esther Zapata Ruderman, Partner in our West Palm Beach office, recently won a trial in the Alison v. Paner Services, Inc. case. The claims that went to trial before Judge Shelley Punancy were the Claimant's requests for authorization of a specific doctor, Dr. Libreros-Cupido; authorization of a neurologist and neurosurgeon; and payment of medications prescribed by Dr. Libreros-Cupido. This case involves a March 23, 1994 car accident in which the carrier accepted as compensable and authorized various doctors. In 2007, the claimant moved to South Carolina where the carrier authorized care. In 2010, she moved to Tampa, Florida wherein she demanded that the carrier re-authorize a prior doctor from 2007, Dr. Libreros-Cupido. The E/C defended the case by arguing that it timely authorized a different doctor, and not Dr. Libreros-Cupido. Florida Statutes 440.13 and Florida case law, grants the E/C the right to control the medical benefits and thus, the claimant could not dictate to the E/C who she wanted to treat with. Judge Punancy agreed with the E/C and denied all of the Claimant's claims.

* * *

Hinda Klein, Partner in charge of our appellate division, and **Carlos Cabrera,** Associate in that division, were successful in obtaining an affirmance of a directed verdict obtained by West Palm Beach litigation partner Jeff Blaker in Cousteau Soc. Inc. v. Capitol Risk Concepts of Florida, Inc., a coverage action.

Ms. Klein was also successful in obtaining a reversal of an attorneys' fee award rendered in favor of an insured against the Florida Insurance Guaranty Association (FIGA), on the grounds that pursuant to Florida Statute 631.70, an insured prevailing against FIGA in a suit in which it has been substituted for an insolvent insurance carrier, may only be entitled to recover attorneys' fees if it is determined that FIGA has affirmatively denied the insured's claim. The Fourth District disagreed with the insured's argument that the mere raising of affirmative defenses in response to the insured's complaint is sufficient to demonstrate the requisite affirmative action denying the claim.

CONROY, SIMBERG, GANON, KREVANS, ABEL,
LURVEY, MORROW & SCHEFER, P.A.

Successes/Announcements

We are proud to announce that effective February 1, 2011:

LAURENCE F. VALLE

and

LAWRANCE B. CRAIG, III

joined the firm as Partners and

MICHAEL F. KELLEY

and

MANUEL I. NEGRON

joined the firm as Associates.

Attorneys Valle, Craig, Kelley and Negron will be working out of our Miami office located at:

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csg@conroysimberg.com