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LEGAL UPDATE

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Liability

Florida Legislature Enacts Law Which Will Curb Abusive, Costly Practices of AOB Contractors by Matthew Wendler, Esq. and Soobadra Gauthier, Esq.



Soobadra Gauthier

On July 1, 2019, the newly created provisions of Florida Statutes governing Assignment of Benefits (“AOB”) contracts (Fla. Stat. § 627.7152 and Fla. Stat. § 627.7153) went into effect. Section 627.7152 (“Assignment Agreements”) mandates specific requirements for a valid AOB, which should in large measure address the abuses inherent in litigation preceding the advent of this provision. Pursuant to section 627.7153 (“Policies restricting assignment of post-loss benefits under a property insurance policy”), an insurer can preempt AOB issues completely, as said section provides that “[a]n insurer may make available a policy that restricts in whole or in part an insured’s right to execute an assignment agreement”, provided certain conditions are met. Such conditions include that the insurer must also provide unrestricted coverage, the restricted policy is available at a lower cost than the unrestricted policy, policies prohibiting assignment in whole cost less than policies prohibiting assignment in part, and restricted policies must contain notice on its face. This is significant, as pursuant to Florida common law, policy provisions that previously prohibited insureds from assigning post-loss benefits were considered unenforceable. *See, e.g., Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 642 (Fla. Dist. Ct. App. 2016) (noting that “Florida stands apart from a minority of jurisdictions that permit an insurer to contractually restrict its insured’s post-loss assignment without the insurer’s consent”); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 753 (Fla. Dist. Ct. App. 2015) (“Even when an insurance policy contains a provision barring assignment of the policy, an insured may assign a post-loss claim.”).

Read More . . . P. 2

Verdicts, Summary Judgments, Appellate Results
Defense Verdict: First-Party Property (Brevard County)

On August 16, 2019, Stuart Office Managing Partner Lauren Smith, Esq. obtained a Defense Verdict in the five day trial of *Bocinsky v. Federated National Insurance Company*. The case involved a Hurricane Matthew price and scope dispute with several claims handling issues that were unfortunately allowed into evidence at trial, including the timing of Federated National’s post-suit cure payment for \$60,000 after the claim had originally been found to be below the deductible. Plaintiff sought an additional \$160,000 at trial, including \$100,000 for a completely destroyed dock and seawall, which the Defense maintained were excluded by the water damage/storm surge exclusion. Ultimately, after five days of trial, including testimony from five experts, the Defense was able to convince the jury that the insured’s damages did not exceed \$60,000 so that no additional coverage was owed. Pursuant to an expired proposal for settlement, the Defendant is now entitled to seek fees and costs.

Read More . . . P. 6

INSIDE LEGAL UPDATE

- Defense Verdicts, Summary Judgments, Appellate Results P. 1, 6-11
- Florida Legislature Enacts Law Which Will Curb Abusive, Costly Practices of AOB Contractors PP. 1 - 3
- The Sound of Silence....Admissibility of Google Photographs in light of *City of Miami v. Kho* PP. 4-5
- Risk Transfer Protocols . . Meet
- The Construction Defect Team . . P. 12
- Accounting Dept New Address. . P 13
- The Gavel National Conf IV . . . P. 14
- Firm Directory P. 15

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Florida Legislature Enacts Law Which Will Curb Abusive, Costly Practices of AOB Contractors, cont.



Matthew Wendler

As a checklist to aid first-party property insurers navigate this new law, we note that AOBs must comply with the following requirements:

- The new section defines “Assignment agreement” to mean any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property.
- The insurance policy cannot prohibit the AOB.
- The AOB must be in writing and executed by both parties (named insured - assignor and AOB contractor - assignee).
- The AOB must contain a provision allowing the named insured to rescind AOB without penalty within 14 days of its execution (and 30 days under certain other conditions related to commencement of work).
- The AOB must contain a provision requiring the AOB contractor to deliver a copy of the executed agreement to the insurer within 3 days of execution or commencement of remediation work whichever is earlier. Delivery is to be made by personal service, overnight de-

livery, or electronic transmission, with evidence of delivery in the form of a receipt or other paper or electronic acknowledgement by the insurer; or to the location designated for receipt of such 100 agreements as specified in the policy.

- The AOB must contain a notice advising the named insured of their giving up certain policy rights. Notice must be in 18 point boldfaced and uppercase type.
- The AOB must contain Indemnification language requiring the assignee to indemnify and hold harmless the assignor from all liabilities, damages, losses, and costs, including, but not limited to, attorney fees, should the policy subject to the assignment agreement prohibit, in whole or in part, the assignment of benefits.
- The AOB must include a written, itemized, per-unit cost estimate of the services to be performed.
- The AOB must relate only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.
- The AOB may not contain penalties for rescission or cancellation of the agreement, and may not contain administrative fees or mortgage processing fees
- If the AOB is for residential property and the assignor acts under “urgent and emergency circumstances”, claimed post-loss bene-

fits cannot exceed the greater of \$3,000.00 or 1% of Coverage A.

If an insurer receives an AOB that does not comply with any of these requirements, the insurer has grounds to avoid the obligations imposed by it pursuant to section 627.7152(2)(d), which provides that “[a]n assignment agreement that does not comply with this subsection is invalid and unenforceable.” Thus, the statute places the burden on the contractor to ensure that its AOBs comply with the law. Moreover, the new statute also places the burden on the assignee to demonstrate that the insurer has not been prejudiced by the assignee’s failure to do any of the following:

- to maintain records of all services provided under the assignment agreement;
- to cooperate with the insurer in the claim investigation;
- to provide the insurer with requested records and documents related to the services provided, and permit the insurer to make copies of such records and documents; and,
- to deliver a copy of the executed assignment agreement to the insurer within 3 business days after executing the assignment agreement or work has begun, whichever is earlier.

This provision is also significant: pursuant to Florida common law, it used to be the insurer’s, rather than an assignee’s, burden to prove that the insurer had been prejudiced by an assignee’s failure to cooperate pursuant to the insurer’s requests for such information.

[Read More . . . P. 3](#)

Florida Legislature Enacts Law Which Will Curb Abusive, Costly Practices of AOB Contractors, cont.

See, e.g., *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985) (noting that in a case where a cooperation clause was allegedly breached, the insurer must prove that the failure was “material” and prejudiced it). Moreover, the statute requires the assignee to timely provide initial and supplemental estimates to the insurer, to ensure that it performs all work in accordance with accepted industry standards, and puts in place numerous conditions precedent to suit, including, but not limited to, obligating the assignee to submit to examinations under oath and participate in appraisal, if the insurer so requests.

Last, but not least, the mandatory one-way attorney-fee shifting statute does not apply with regard to AOB claims. Rather, now attorney fees can only be pursued by assignees under section 57.105 of the Florida Statutes, the statute litigants use when attempting to recover attorney fees in cases where the claim lacked a basis in law or fact. Pursuant to this statute, the judge has discretion to determine whether attorney fees are awarded, and the *insurer* may also be able to recover fees. Specifically, “[i]f the difference between the judgment obtained by the assignee and the presuit settlement offer is” (1) “[l]ess than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees”; (2) “[a]t least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees”; or (3) “[a]t least 50 percent of the disputed amount, the assignee is entitled to an award of reasonable attorney fees.” Thus, the statute encourages assignees to accept reasonable settle-

ment offers; indeed, if they fail to do so, the assignee may be required to pay the insurer’s attorney fees.

After years of failed attempts to enact meaningful reform in cases involving AOBs, the Florida Legislature has finally enacted a statute with some teeth: policy provisions that previously took aim at abusive AOB practices are now enforceable; the burden of proving that the contractor acted reasonably with regard to the claim is now placed on the contractor; and the changes relating to attorney fees are likely to level the playing field.

About Matthew Wendler

Matthew Wendler, Esq. is a Senior Associate in the Fort Lauderdale office. He has 10 years of trial litigation experience. Matthew has handled claims for both businesses and insurers. His practice is devoted largely to general liability, bodily injury, auto liability, premises liability, professional liability, wrongful death and negligent security. He obtained his Bachelor of Science degree from the University of Pittsburgh. He earned his Juris Doctor from the University of Pittsburgh School of Law.

Matt is admitted in Florida (2009), Pennsylvania (2010), West Virginia (2011), New York (2012), Colorado (2013), the United States District Court for the Western District of Pennsylvania (2010), to the United States District Court for the Southern District of West Virginia (2011) and to the United States District Court for the Southern District of Florida (2014).

About Soobadra Gauthier

Soobadra Gauthier, Esq. is a Junior Partner in the Orlando office. She practices in the areas of first-party property insurance coverage disputes and defense litigation, including commercial and residential coverage and policy interpretation issues, declaratory judgment actions and the claims for bad faith/extra contractual damage. She handles claims that include arson, theft, suspected fraudulent claims, windstorm, hurricane and hail damage claims, fire losses and business interruption. She also handles claims involving earth movement and sinkhole activity/loss, water losses and damage, mold claims, and assigned claims litigation including roofing companies and emergency services vendor/water mitigation litigation.

Soobadra has conducted in-house training seminars for insurers and claims personnel on property insurance, coverage, and litigation issues and instructed on adjuster ethics and case law developments. She is an approved instructor for Florida, Georgia and North Carolina insurance adjuster continuing education.

Soobadra received her Bachelor of Laws degree (LL.B.) with honors in 1983 from the University of the West Indies (established in 1948 as an external College of the University of London). In 1986 she graduated *magna cum laude* from the University of Central Florida with a Bachelor of Arts degree. In 1991, Soobadra was awarded her Juris Doctor degree, *cum laude*, from Stetson University College of Law.

Soobadra is a member of the Florida Bar and practices in all Florida trial and appellate courts. She is admitted to practice before the United States District Courts for the Middle and Southern Districts of Florida and the United States Court of Appeals for the Eleventh Circuit.

The Sound of Silence....Admissibility of Google Photographs in light of *City of Miami v. Kho* by Andrew Dressler, Esq.



Andrew Dressler

And in the naked
light I saw
Ten thousand people,
maybe more
People talking without
speaking
People hearing without
listening
People writing songs
that voices never share
No one dared
Disturb the sound of
silence

*Simon and Garfunkle – The Sound
of Silence (1964)*

In courtrooms all across Florida, The Sound of Silence is a bigger hit now than it was when first released in 1964. This does not mean, however that Simon and Garfunkle will be performing in a courtroom near you any time soon. What this does mean is that lawyers must now place even greater attention on laying the foundation for admitting photographic evidence, especially photographic evidence from an internet source like Google Earth or Google Street View, in light of the Third District Court of Appeal's recent decision in *City of Miami v. Kho*, No. 3D18-2369 (Fla. 3d DCA Oct. 16, 2019).

In *Kho*, the plaintiff brought suit against the City of Miami for negligence following a 2010 trip and fall on a city sidewalk. To prove constructive notice at trial, the plaintiff sought the introduction into evidence of a Google Maps photograph from 2007 showing that the defective condition existed prior to the incident so as to show actual or constructive knowledge by the City. See *Kho*, at 2-3. In attempting to authenticate the photograph at trial, the plaintiff relied on the testimony of her expert, who testified that there were no sub-

stantial difference between the 2007 Google Maps photograph and the condition of the location as depicted in 2010. See *id.* at 3. Notably, the plaintiff's expert did not visit the property before 2010. In addition, there was no testimony by anyone with knowledge of the location's condition in 2007, nor was any testimony introduced from a Google representative regarding the equipment that captured the image. See *id.* Despite all this, the trial court overruled the City's objection and admitted the Google photograph into evidence. Ultimately, the admission of the photograph allowed the plaintiff to defeat the City's motion for directed verdict regarding constructive notice and eventually obtain a \$90,000 jury verdict. See *id.* at 4.

On appeal, the Third District reversed, holding that the trial court should not have allowed the Google Maps photograph into evidence, as it had not been properly authenticated. In reversing the trial court's judgment, the court held that "a Google Maps image must be authenticated in the same manner as any other photographic evidence before it is admitted in evidence." *Id.* at 4. In conjunction with this, the court then reiterated that there are two ways to authenticate photographic evidence in Florida: The pictorial method and what has come to be known as the "silent witness method." *Id.* at 5.

As a threshold matter, it should be noted that both of these methods place the burden on the proponent of the evidence to present sufficient evidence to support a finding that the photograph is what it purports to be. This is consistent with the standard prescribed by Rule 104(b) of the Federal Rules of Evi-

dence and Florida Statutes Section 90.105(b) of the Florida Evidence Code.

The pictorial method is the more frequently used method of admitting photographs into evidence. Under this method, all that is required is that a witness with knowledge of what is depicted in the photograph review it and testify that it represents a fair and accurate depiction of the place or condition at the time in question. See *Dolan v. State*, 743 So.2d 544, 545 (Fla. 4th DCA 1999). This technique is routinely taught in basic trial advocacy courses and is the most common method of authenticating most photographic evidence.

Although pictorial authentication is common, there are times, especially in insurance litigation, where it is not practical, such as when there are no available witnesses or the accuracy of the source (such as Google Earth) is disputed by the parties. As such, the silent witness method may provide an alternative means of authenticating photographs that may otherwise be inadmissible.

The silent witness method does not require the proponent to prove the accuracy of the photograph, but instead to prove that the equipment used to take the photograph was working properly at the time of capture. In determining whether photographs are admissible through this method, courts consider the following factors: "(1) evidence establishing the time and date of the photographic evidence; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy

Read More . . . P. 5

The Sound of Silence....Admissibility of Google Photographs in light of *City of Miami v. Kho*, cont.

and reliability of the photographic product;(4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the relevant participants depicted in the photographic evidence.” *Wagner v. State*, 707 So.2d 827, 830 (Fla. 1st DCA 1998). In establishing these factors, the Third District instructed that “[a] witness responsible for the videotape system, able to confirm the accuracy of the time and date on which the tape was made, and able to confirm that the tape was not edited or tampered with, should be presented if there is no stipulation on these points, to “provide the indicia of reliability required to authenticate a videotape for purposes of the ‘silent witness theory.” *Lerner v. Halegua*, 154 So.3d 445, 447 (Fla. 3d DCA 2014).

When applied to the situation outlined in *Kho*, it is clear that the plaintiff should have called a witness from Google to authenticate the evidence. In order to avoid this situation, attorneys should familiarize themselves with the silent witness method and be prepared to implement it to authenticate crucial evidence. This is particularly important in first and third party matters where the images can prove the existence of a condition, or lack thereof, that will either allow defenses to be proven or undermine the plaintiff’s case in chief. As such, the following steps should be taken to prepare for, and ultimately use, the silent witness method:

First, be ready to subpoena the source’s corporate representative for

deposition. When setting this deposition, make sure to designate the following areas of inquiry pursuant to Rule 1.310(b)(6) of the Florida Rules of Civil Procedure or Federal Rule of Civil Procedure 30(b)(6):

1. The photographic equipment used to capture the image,
2. The procedures used for capturing the image at the time in question,
3. The maintenance and security of the equipment used to capture the image at the time in question,
4. The condition of the equipment at the time in question, and the accuracy of the equipment at the time in question.
5. The date and time the image was captured.

Next, be sure to question the corporate representative on these topics at the deposition so as to ascertain that the documents can in fact be authenticated. Be thorough in your questioning and make sure no details are left unturned as any missing details could mean the difference between admissibility or inadmissibility. Additionally, before concluding the deposition carefully review the testimony to ensure that each element of the silent witness method has been covered so that you can ultimately argue for admission of the evidence at trial.

Finally, be prepared to ask the corporate representative these same questions at trial. Always keep in mind that you must present enough evidence to support a finding that the photograph is

authentic. As such, take the time to prepare your corporate representative to explain the systems and procedures of the equipment. You should also make sure to cover the security and accuracy as thoroughly as possible to not only ensure the integrity of the evidence, but to persuade the jury to credit the evidence.

In all, the silent witness method provides an excellent opportunity to use modern technology and the Internet to gather and present evidence in support of your client’s defenses at trial. However, before using it, be sure to familiarize yourself with each necessary element of authentication as this could be the tipping point between success or failure at trial.

About Andrew Dressler

Andrew L. Dressler, Esq. is an Associate in the Miami office and handles first-party property defense. Before joining the firm, Andrew worked at a South Florida insurance defense firm where he handled first party property defense, commercial general liability defense, and insurance coverage matters and represented multiple insurance carriers in both trial and appellate courts throughout the State of Florida. Prior to entering private practice, Andrew served as an Assistant State Attorney with the Miami-Dade State Attorney’s Office where he prosecuted both misdemeanor and felony cases and tried numerous bench and jury trials. Andrew holds a Bachelor of Arts degree from Syracuse University and a Juris Doctor from Hofstra University School of Law. He is admitted to practice law in Florida and is also admitted to the United States District Court, Southern District of Florida.

Verdicts and Summary Judgments cont.



Motion for Summary Judgment: First - Party Property

Lauren Smith, Esq.
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Stuart Managing Partner Lauren Smith, Esq. obtained a motion for summary judgment in a first-party insurance matter. In the case styled *Water Extraction Team a/a/o Sonderman v. FedNat*, Plaintiff received a partial assignment of insurance benefits from FedNat's insured. Three days later, FedNat and the insured entered into a settlement agreement that encompassed the entire claim. Plaintiff moved for summary judgment, arguing that the release did not apply to its portion of the claim because the assignment preceded FedNat's settlement. We filed a competing motion for summary judgment on behalf of FedNat, asserting that the settlement barred Plaintiff's suit because FedNat did not receive notice of the assignment until after the insured executed the full release. The Court agreed with our position and granted FedNat's motion, resulting in dismissal of Plaintiff's case.

\$125,431.56 Fee & Cost Judgment against Plaintiff

Stuart Managing Partner Lauren Smith, Esq. obtained a favorable result in matter styled *Pelecki v. FedNat*. when trial court granted - \$125,431.56 Fee & Cost Judgment against Plaintiff. This first-party case was brought by a husband and wife for Hurricane Matthew damage. On behalf of FedNat, we served separate proposals for settlement on the Plaintiffs, each with a setoff condition that applied if only one proposal was accepted. The proceeds received by the settling spouse would be set off against any verdict obtained by the remaining spouse. Mr. Pelecki accepted his \$30,000 proposal while Mrs. Pelecki opted to go to trial. The jury awarded Mrs. Pelecki just \$15,000 of the \$130,000 she sought in damages. Post-verdict, the trial court setoff the \$30,000 settlement from the \$15,000 verdict, resulting in a net zero judgment in FedNat's favor. Pursuant to the expired proposal served on Mrs. Pelecki, the trial court found that FedNat was entitled to its fees and costs. Following a four hour evidentiary hearing, the trial court granted FedNat every item of fees and costs that it sought, resulting in a \$125,431.56 against Mrs. Pelecki. This judgment will be collectible because Mrs. Pelecki purchased PFS insurance prior to trial.

Verdicts and Summary Judgments, cont.



Motion for Summary Judgment
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Daniel Weinger, Esq.
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On October 18, 2019, Pensacola Managing Partner Gary Gorday, Esq. presented oral argument on Defendant's Motion for Summary Judgment in *Dwyer v Gulf Coast*, a case involving a fall by a disabled person outside of an office building. The Motion for Summary Judgment was authored by Appellate Partner, Daniel Weinger, Esq. The Plaintiff exited a vehicle, which was parked in a handicap space, from the passenger side. The driver of the vehicle did not observe the actual fall and there were no eye witnesses as the Plaintiff is a disabled person suffering from dementia and did not even recall the accident. The Plaintiff filed suit against our client, the owner of the office where the Plaintiff was visiting. Plaintiff claimed that because the parking lot was located at a medical office building, it was required to have handrails outside of the unloading area. Further, the Plaintiff claimed the slope in the pavement in the handicap space was too steep and in violation of the applicable building code. In the Motion for Summary Judgment, we argued that the Plaintiff's case depended on the impermissible stacking of inferences in order to prove causation, as there could have been multiple other reasons for the fall. The Plaintiff failed to file any evidence to overcome these arguments. The owner of the parking lot itself joined in our Motion. Agreeing with our arguments, the trial court granted Final Summary Judgment in favor of both Defendants.



Dismissal with Prejudice for Fraud on the Court
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Tampa Senior Associate, Susan Mazuchowski, Esq. obtained a dismissal with prejudice in the case styled *John Balogh v. Defendant Store*. Plaintiff claimed he tripped and fell at the store causing him to sustain personal injuries that included shoulder injuries requiring surgery. In his deposition, Plaintiff denied prior shoulder complaints or issues. The Defense filed a Motion to Dismiss for Fraud on the Court as discovery revealed medical records that reflected multiple prior shoulder complaints, including complaints one week prior to the incident. The Court found, by clear and convincing evidence, that Plaintiff committed fraud on the Court and perjured himself and entered an order dismissing Plaintiff's case and entering judgment in favor of the Defendant.

Final Summary Judgment—Slip and Fall Pinellas County

Tampa Senior Associate Susan Mazuchowski, Esq. obtained a Final Summary Judgment in the slip and fall matter styled *Monnier v. Defendant Store in Pinellas County*. The Plaintiff's complaint alleged he slipped on the paint of the crosswalk entering the Defendant's store. Discovery revealed that there had been rain throughout the day. Plaintiff had over \$60K in medical bills. In his deposition, the Plaintiff could not state what caused him to fall nor could he state how the Defendant caused the fall. The Court ruled there was no evidence to support his claim and the Defendant was granted summary judgment.

[Read More . . . P. 8](#)

Verdicts and Summary Judgments cont.



Notice of Voluntary Dismissal with Prejudice

Pre-suit Demand \$450K

Medical Bills \$91K

Marc Greenberg, Senior Partner

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Marc Greenberg, Senior Partner obtained a notice of voluntary dismissal with prejudice in matter styled *Jane Doe v. International Airport, et al.* Plaintiff was in Terminal 3 of a South Florida International Airport walking to her connecting flight to return home to Texas when a ground transportation operator negligently impacted Plaintiff with a flat-bed luggage cart. Plaintiff sustained a left wrist fracture resulting in surgery, a nose fracture, and various facial abrasions. Her past medical bills were \$91,000 at the time of the filing of the lawsuit. Plaintiff's pre-suit global demand was \$450,000.

Defense counsel was retained at the end of August 2019 to defend a ground transportation company that was working within Terminal 3 at the time of incident, but that had no knowledge of the subject incident. Defense immediately demanded production of the incident video. We were provided with the video and watched it with airport personnel and our client, which fully exonerated our client of any liability. Thereafter, our director of operations memorialized an affidavit that reflected his observations of the incident video that we watched together to be used as a quick tool in attempts at early resolution. We then sent Plaintiff a proposed Florida Statute 57.105 Motion for Sanctions with the required safe harbor letter that incorporated the affidavit and made our affiant available for deposition during the 21 day safe harbor period.

Plaintiff filed a Notice of Dropping our client with Prejudice within 24 hours of receipt of our Proposed Motion for Sanctions, and the Defendant paid nothing. Our file was closed within 30 days of receipt of this assignment.



Court Strikes Pleadings Based on Plaintiff's Fraud Uncovered by Defense Team

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Fort Lauderdale Managing Partner William Peterfreund, Esq., Senior Associate Erin O'Connell, Esq., and Appellate Partner Daniel Weinger, Esq. obtained a favorable result when the court granted Defendant's Motion to Strike Pleadings for Fraud on the Court. In the matter styled *Sultan v. Verdes Tropicana, Inc.*, Plaintiff, Diane Sultan, was claiming injuries and damages stemming from a slip and fall in a bowling alley due to an alleged malfunction of a Keigel Ion lane machine, which Plaintiff claimed dropped oil when being moved from one lane to the next. Plaintiff claimed that oil dripped and was the cause of her fall while bowling in a league at the Defendant, Verdes Tropicana, Inc.'s bowling alley. Sultan claimed that she had seen Defendant's mechanic operating a lane-oiling machine prior to her fall, and alleged that the Defendant was negligent by allowing oil to spill onto the ground in front of the foul line, causing her to fall. Throughout discovery, the defense was able to bring out inconsistencies in Plaintiff's testimony and version of events. The defense also learned of voicemails left by the Plaintiff on her daughter's cellular phone. The voicemails evidenced Plaintiff offering her daughter money in exchange for the daughter to lie about the fact that she observed and/or felt oil on the ground before her mother fell. Plaintiff's voicemails to her daughter evidenced monetary offers of first \$10,000 and then \$100,000 in exchange for her false testimony. Defendant filed its Motion to Strike the Pleadings for Fraud on the Court based upon the attempt to suborn witness testimony.

Read More . . . P. 8

Verdicts and Summary Judgments cont.



MSJ Granted

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Miami Partner Kelly Kesner, Esq. and Appellate Partner Edgardo Ferreyra, Esq. obtained an MSJ in the premises liability matter styled *Lanza v. Charles Group Hotels, Inc. d/b/a Best Western Plus Atlantic Beach Resort*. The case stemmed from a slip and fall in the stairwell of the Best Western Resort. Plaintiff testified that he fell on standing water in the stairwell. Importantly, Plaintiff noted that the water was clean and clear; there were no footprints and no track marks. Plaintiff also conceded there was no actual notice of the condition. Plaintiff's counsel argued at the Motion for Summary Judgment that because there was water leaking from a light fixture near the elevators, Defendant had constructive notice of the condition on the floor of the stairwell – which was wholly separate from the area near the elevators. The judge found that Defendant had no actual or constructive notice and granted Defendant's Motion for Summary Judgment.

Summary Judgment

On October 17, 2019, Miami Partner Kelly Kesner, Esq. and Appellate Partner Edgardo Ferreyra, Esq. obtained final summary judgement in the matter of *JL Shoes v. Downtown Investments Corp.* It was alleged by Plaintiff that Hurricane Irma caused damage to the building in which plaintiff leased retail space. The Plaintiff alleged that the building owner negligently maintained the roof, and that as a result, the retail store had been severely damaged causing the loss of the store's entire inventory of shoes. Plaintiff sought damages for the lost inventory, consequential

damages, as well as moving and build out costs. It was successfully argued on behalf of the building owner that Plaintiff had failed to establish with any reasonable degree of certainty the damages that it had suffered. The "build out" costs were not alleged in the Complaint. Plaintiff's representative, who had been deposed, could not quantify any of the damages, that he did not have any support for the approximately \$900,000 damages being sought. In response to the Motion for Summary Judgment, Plaintiff filed an Affidavit stating that the corporate representative could now quantify damages through the use of photographs and videos, which he could not do before. The Court struck the affidavit to the extent it contradicted former testimony. The Court further granted summary judgment finding that all of Plaintiff's damages were speculative.



Final Summary Judgment

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On July 9, 2019, Miami Partners Heather Calhoon, Esq. and Appellate Partner Edgardo Ferreyra, Esq. obtained final summary judgment in the matter of *Butler v. Wolthuis*. The case involved a motor vehicle versus pedestrian accident. The Plaintiff was struck by the defendant driver as she attempted to cross a busy Miami roadway. Plaintiff alleged severe physical injuries, including a traumatic brain injury. At the summary judgment hearing, it was successfully argued that the plaintiff had failed to produce any record evidence that the driver had been negligently operating his vehicle at the time the incident occurred.

Read More . . . P. 10

Verdicts and Summary Judgments cont.



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In matter styled *Liberty Mutual Fire Ins. Co. a/s/o Puccini, Inc., d/b/a 5 Napkin Burger v. AA Fire Equipment Co.*, Construction Defect Partner David Rosinsky, Esq. and Senior Associate Hayley Newman, Esq. obtained a favorable result when court granted the Defendant's motion for summary judgment. The subrogation action was for damages due to a restaurant fire that originated in kitchen. Plaintiff's insured was the owner of the building, which included a restaurant. The restaurant underwent a build-out, which included installation of a grill hood and associated ventilation system. The general contractor was sued by Plaintiff insurance carrier and subsequently filed a third party claim against various subcontractors and material suppliers. We represented a sub-subcontractor whose scope of work was limited to connecting the fire suppression system integrated into the grill hood, which was provided by others. We filed a Motion for Summary Judgment against the general contractor as there was no duty owed to them for common law indemnity based upon a lack of a special relationship and the lack of evidence that the fire originated in the grill hood within the area protected by the fire suppression system. The Court granted our motion based upon the general contractor's agreement to the relief sought in our motion.

On September 11, 2019, Fort Lauderdale Junior Partner Franklin Sato, Esq. and Appellate Partner Daniel Weinger, Esq. obtained a good result when court granted motion for summary judgment in matter styled *Martinez, Altagracia vs. Emerald Lake Office Center*. Plaintiff was an invitee of one of the commercial condominiums tenants. As she is making her way down from the second floor to the first, Plaintiff slipped and fell due to water on stairs that was only partially covered from the elements. As a result Plaintiff sustained both lumbar and cervical injuries to her spine. Plaintiff's theory of liability was that Defendant failed to maintain the premises free from transitory substances and to warn of the same. She had also had a claim for negligent mode of operation, which was successfully dismissed at the initial pleading stage setting us up for our eventual motion for summary judgment. Plaintiff claimed that she did not know where the water came from and did not think it had been from rain earlier that day. Through discovery, we were able to establish that it had rained earlier that day and that the water was consistent with rain. Defense also established that there were warning signs posted at both the top and bottom of the stairwell advising Plaintiff that the stairs may get wet and become slippery. On these grounds and after cleaning up the pleadings, we filed a motion for summary judgment against Plaintiff's claims. The Court agreed with our findings and entered summary judgment in favor of the Defendant.

Verdicts and Summary Judgments cont.



MSJ Granted
Construction Defect
Christopher Burrows, Esq.
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Hayley Newman, Esq.
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On January 30, 2019, Boca Raton Senior Associate, Hayley Newman presented oral argument on Defendant's Motion for Summary Judgment in *JAFCO v. D&S Plumbing*, a case involving construction and design defects at a children's center in Broward County. Senior Partner Christopher Burrows authored the Motion for Summary Judgment with assistance from Hayley Newman. The plaintiff initiated this lawsuit against the general contractor, alleging construction defects and deficiencies in the work performed on the project. The general contractor filed a Third Party Complaint against its subcontractors, including our client a plumbing subcontractor. The general contractor's four causes of action in the Third Party Complaint included contractual indemnity/breach of contract, common law indemnity, contribution, and negligence, alleging breach of its indemnification obligation in the subcontract. We devised a plan to settle directly with the Plaintiff for a nominal amount in exchange for a scope of work release for our client and the general contractor. This enabled us to file a Motion for Summary Judgment as to the Third Party Complaint. We successfully argued that the general contractor's claims were pass through claims based on, and limited in scope, to the claims made by Plaintiff, which we eliminated. The general contractor filed a Cross Motion for Summary Judgment against our client seeking indemnity for plaintiff's claims against the general contractor.

Ultimately, the trial court granted Final Summary Judgment in favor of our client and denied the general contractor's Cross Motion for Summary

Judgment. As a result, the Court granted our client entitlement to fees and costs based on a prevailing party fee provision in the subcontract.



Favorable Verdict: \$450K Demand
Shoulder Tear Surgery Case
(Sarasota)
Jeffrey Benson, Esq.
Tampa Senior Partner
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On August 22, 2019, Tampa Partner, Jeffrey Benson, Esq. obtained a favorable verdict in a four day jury trial styled *Bass v. Lorence*. In the case, the Defendant side-swiped the Plaintiff and then fled the scene of the accident. After undergoing surgery, the Plaintiff planned to present nearly \$100,000 in medical bills to the jury. Defense counsel limited Plaintiff's medical bills to what was actually paid by Medicaid, instead of what was originally billed to Medicaid. This reduced the medical bills to \$35,000. During the case, the Defense showed that approximately \$21,000 (of the \$35,000) was for "pain management" in the form of Oxycodone. Confronted with the argument that the Plaintiff was attempting to finance an Oxycodone habit through a lawsuit, Plaintiff's Counsel withdrew the "pain management" bill in the middle of trial, reducing the medical bills to \$13,929.18. The jury found Defendant 50% at fault and Plaintiff 50% at fault for the accident. The jury awarded the Plaintiff \$6,964.59 for his past medical bills and found he was not permanently injured (despite surgery), which mooted the question of past or future pain and suffering under Florida's threshold defense. The Defendant beat both of her proposals for settlement and has a pending motion to collect her fees and costs.



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Ask us about Risk Transfer Strategy and Risk Protocols
Construction Defect Team

- Split Defense w/other Insurer(s)
- Cost Share among multiple Defendants
- Successful AI Tender to other Insurer
- Successful Contractual Tender to Co-Defendant
- Successful Third Party Complaint against Non-Party or other Insurer
- Contributions to Settlement by Others (above Co-Defendant’s % of fault or by other Insurer(s))
- Successful Wrap Policy Tender
- Successful Miscellaneous Risk Transfer



BOCA RATON
CHRISTOPHER BURROWS
TEAM LEADER

Board Certified
Construction Law



FT. LAUDERDALE
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JACKSONVILLE
PATRICK HINCHEY
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Boca Raton
Valerie Edwards



Boca Raton
Dan Santaniello



Boca Raton
Hayley Newman



Boca Raton
Scott Chapman



Stuart
Lauren Smith



Orlando
Jonathan Ray



Ft. Myers
Howard Holden



Ft. Myers
Dustan Lorimer



Ft. Lauderdale
Jessica Franklin



Ft. Lauderdale
William Peterfriend



Ft. Lauderdale
Allison Janowitz



Tampa
Anthony Petrillo



Tampa
Jeffrey Benson



Jacksonville
Charles Bearden



Jacksonville
Todd Springer



Tallahassee
Dale Paleschic



Pensacola
Thomas Gary Gorday



Need Assistance?
Client Relations
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LUKS, SANTANIELLO — PETRILLO & COHEN —

OUR VERDICTS TELL THE STORY

Accounting Department New Office Address — Sunrise



The Accounting Department has moved to 1000 Sawgrass Corporate Parkway, Suite 125, Sunrise, FL 33323. Please update your records with the new remit address for payment of invoices. The Accounting office phone (954) 761-9900 and fax numbers (954) 761-9940 will remain the same.

DeeDee Lozano

Accounting Manager

dlozano@insurancedefense.net | (954) 847-2903

Pink-Palooza Event Benefits Breast Cancer Research Foundation

Orchestrated annually by our Accounting Manager DeeDee Lozano, employees joined our **Pink-Palooza Event** in the fight against Breast Cancer in October. All 10 offices across Florida showed their Pink Spirit and wore pink to work for our annual fundraiser with donations going to the Breast Cancer Research Foundation.



This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

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OUR VERDICTS TELL THE STORY



The Gavel National Conference IV
January 20 — 22, 2020

Managing Partners Dan Santaniello and Stuart Cohen along with Maria Donnelly, Client Relations are speaking on several panel sessions at the upcoming Gavel conference.

Session: New Paradigms of Collaboration in a Digital World

[Daniel Santaniello](#), Managing Partner of [Luks, Santaniello, Petrillo & Cohen](#)

[Maria Donnelly](#), Client Relations of [Luks, Santaniello, Petrillo & Cohen](#)

Daniel Winkler, Director - Claims Legal Support of Westfield Insurance

Joseph Fowler, Partner of Fowler, Hirtzel, McNulty & Spaulding

Session: Artificial Intelligence in Legal Services

[Stuart Cohen](#), Miami Managing Partner of [Luks, Santaniello, Petrillo & Cohen](#)

[Maria Donnelly](#), Client Relations of [Luks, Santaniello, Petrillo & Cohen](#)

Lincoln LeVarge, Esq. and AVP Tower Hill Insurance Group



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