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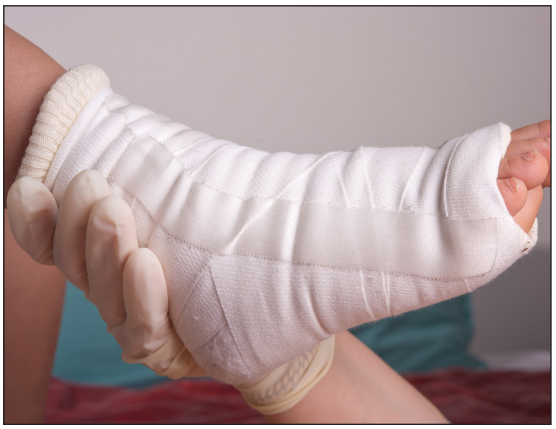
WORKERS' COMPENSATION DEFENSE

Witness account key to WLSC victory in First District Court of Appeal

Walton Lantaff victory in permanent total disability case is upheld by First District Court of Appeal

Walton Lantaff's West Palm Beach office secured another permanent total disability (PTD) victory through aggressive defense handling, and very well-prepared live witnesses.

The Claimant injured her ankle in an industrial accident, ultimately undergoing surgery. Later, she alleged to have complex regional pain syndrome. The Claimant was placed on sedentary duty. Her medical restrictions included the ability to elevate her leg as needed throughout the day to help relieve her pain. The Employer was able to accommodate the Claimant who had a fairly sedentary job even prior to the accident. The Claimant continued working for over a year following her release in this sedentary position. Eventually, the Claimant retired from her job



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with the Employer. Then she claimed PTD benefits.

At the hearing, the Claimant testified on her own behalf that her Employer did not accommodate her and that she was forced to

Please see MARGRE VICTORY on page 3

PROPERTY LIABILITY

Liability defense prevails on a motion for summary judgment in soupy slip and fall case

Plaintiff – unable to produce evidence as to how long pea soup had been on the floor prior to a slip and fall incident – enabled Court to grant the Motion for Summary Judgment

In May 2008, Vista Building Maintenance Services, Inc. was under contract with the City of Miami to provide janitorial services at the property when the Plaintiff entered the lobby and slipped and fell in the hallway between two banks of elevators. The

Please see SLIP AND FALL on page 7

When may an injured claimant change physicians?

WLSC's TIP: F.S. 440.13(f) provides that "upon the written request of the Employee, the Carrier shall provide the opportunity for a one-time change of physicians during the course of treatment for any one accident. The Carrier shall authorize an alternative physician (not previously affiliated with the prior physician) within five days after receipt of the request.

Cristina Brodermann, Esq.

The consequence of responding less than promptly and providing the request for the one time change is that the claimant may select the physician and said physician shall then be considered authorized. Thus, although the Employer/Carrier has very strong rights concerning the ability to control appropriate medical care and treatment of an injured employee, the strict requirement of FS 440.13(f) must be adhered to. The "five days" has been interpreted to mean five calendar days.

In *Hinzman v. Winter Haven Facility, 109 So. 3d 256 (Fla. 1st DCA 2013),* the Court held that five days is not business days, but calendar days. A timely response by the carrier is crucial and claimants' attorneys are aware of this! They will sometimes send a request on a Friday afternoon at 4:30 p.m. before a long holiday weekend.

Also be aware that claimants' attorneys may file a Petition for Benefits with language that is not immediately clear. WLSC recently received a Petition for Benefits late on a Friday afternoon and the benefit claimed was worded "Temporary Partial Disability benefits since 8/29/14, present and continuing. Employee/Claimant will exercise all options pursuant to FS 440/13(2)(f)." At first reading, it would seem to appear that the request was for temporary partial benefits. Yet, it is sufficient for a claimant to make reference to the statute and the subsection of same.

OUR TIP: CLOSELY REVIEW any written request, whether by fax, petition for benefits, email or correspondence for the request of a one-time change and respond in writing within five calendar days to the claimant and the claimant's attorney to maintain medical control of your case!

WLSC wins summary judgment for property insurer over lost evidence

Walton Lantaff Senior Partner **Michael Galex** recently won summary judgment for the insurer in a first-party water loss dispute. The insureds claimed damage to cabinets from water that overflowed from their kitchen sink. The only property damaged by the water was the kitchen cabinets, which the insureds discarded before the insurer could see the damage. The insureds also had a plumber tear into their terrazzo flooring in order to make the plumbing repair.

The insureds were seeking in excess of $50,000 to repair all of the damage, and they filed suit when the insurer denied the claim.

In discovery Mr. Galex established the water itself only damaged the kitchen cabinets. Mr. Galex also established that the insureds and their public adjuster either lost or intentionally discarded the kitchen cabinets, and that the insurer never had the chance to confirm the damage.

Mr. Galex sought summary judgment, arguing the insureds (1) violated the policy provision requiring the insureds to exhibit the damaged property as often as the insurer reasonably requested and (2) committed common law spoliation of evidence by discarding the cabinets. Mr. Galex argued irreparable prejudice to the insurer as it could not confirm any property damage from the water, which was required to trigger coverage.

The trial court agreed and granted summary judgment for the insurer. The court found the insureds both violated their post-loss duties under the insurance policy and committed common law spoliation of evidence.

The trial court further held that the policy breach irreparably prejudiced the insurer's ability to conduct its adjustment of the claim. The court concluded that the insurer was therefore entitled to summary judgment. *— Michael Galex, Esq.*

MALPRACTICE DEFENSE

Professional malpractice defense highlights

Fort Lauderdale Senior Partner **Deborah FitzGerald** and Associate **Kelly Vogt** have had an impressive year in 2014 defending professionals, including lawyers, accountants, real estate brokers and agents, and appraisers.

Deborah Poore FitzGerald, Esq.

Kelly Vogt, Esq.

Ms. FitzGerald and Ms. Vogt secured dismissals with prejudice without payment in four separate professional malpractice cases, including two accountant malpractice cases, a real estate malpractice case, and an attorney malpractice case. In each case, they argued the claims against the professionals had no legal or factual merit.

Also, recently Ms. FitzGerald and Ms. Vogt were speakers at the Broward County Bar Association's Annual Legal Malpractice Summit held on October 10, 2014. Ms. FitzGerald was part of a panel discussion on how to respond to a claim and Ms. Vogt provided a case law update on recent legal malpractice and attorney disciplinary decisions.

WORKERS COMPENSATION DEFENSE

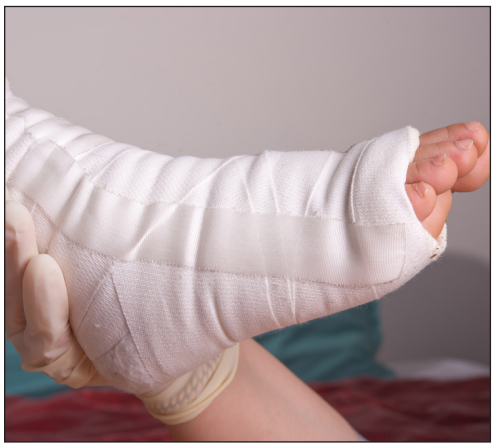
First DCA victory from testimony of vocational expert

...MARGRE VICTORY from page 1

retire. The Claimant put on a good show for the Judge: she cried when speaking about her condition and winced in pain frequently throughout the hearing. She wore a skirt and placed her leg on top of her attorney's table which she then covered with a blanket because she did not want anyone to see her leg. Fortunately, the Judge did not find her credible.

Gregg Margre, Esq.

Defense called the injured worker's supervisor to testify live at the hearing. The supervisor/employer representative was able to challenge the Claimant's credibility using past evaluations and other documents from the Claimant's personnel file that contradicted her testimony. She testified that the Claimant was being fully accommodated, that she refused to follow her restrictions, and that she constantly had to be reminded to stay seated. The Employer's witness was able to refute all the allegations the Claimant made when she testified.



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In addition, the Claimant's vocational expert opined in his report that the Claimant fell below sedentary-level duty as she had to elevate her leg as needed, which the Claimant alleged was very frequent, if not always. The Claimant's vocational expert further opined that there were no jobs which would allow the Claimant to elevate her leg to the extent the Claimant required for pain relief. He concluded there were no jobs within a 50-mile radius that the Claimant was capable of performing.

Attorney **Gregg Margre**, Esq. prepared his vocational expert very thoroughly and also had her appear live to testify. The Employer/Carrier's vocational expert conferred with the Claimant's treating physicians to obtain her true restrictions. The Employer/Carrier's vocational expert questioned the doctors with regard to specific jobs she found in the Claimant's geographic area to determine if they were appropriate for the Claimant. The Claimant was then sent several lists of employment opportunities, for which she did not apply, which complied with her restrictions and were approved by her doctors. As such, the Employer/Carrier's vocational expert was able to testify that there were many jobs in the Claimant's geographic area which she was able to perform.

The Judge of Compensation claims found the Employer/Carrier's witnesses more credible and denied the Claimant PTD benefits. The Claimant appealed, alleging the Judge of Compensation Claims erred when she refused to accept the Claimant's self-imposed limitations. The First DCA affirmed the lower court's ruling. Miami partner **Michele Ready**, Esq. handled the appeal.

FORT LAUDERDALE

Sued by claimant, adjuster vindicated by WLSC Defense

Attorneys **John P. Joy** and **Jonathan S. Wickham** obtained a dismissal with prejudice in a Fort Lauderdale case in which a liability adjuster had been sued for spoliation of evidence.

The Plaintiff joined the adjuster as a defendant in order to defeat diversity jurisdiction and prevent removal of the state court action to Federal court.

John P. Joy, Esq.

WLSC attorneys Joy and Wickham removed the action and argued that the joinder of the adjuster was fraudulent, as well-settled Florida law states that insurance adjusters cannot be sued for negligence arising out of their duties with the insurance carrier.

Jonathan S. Wickam, Esq.

The District Court for the Southern District of Florida agreed, dismissing the case against the liability adjuster with prejudice and finding the joinder fraudulent.

As a result, Judge James Cohn of the Southern District of Florida retained jurisdiction over the remaining defendants.

ON APPEAL

Expert medical examinations not limited only to geographic county of the case

The First District Court of Appeal confirmed that a Claimant can travel 200 miles for purposes of an Expert Medical Examination. Walton, Lantaff, Schroeder and Carson was successful in defending an appeal where the Petitioner/Claimant challenged an administrative decision that instructed a Claimant to travel from Miami Dade County to Naples for an Expert Medical Examination. The underlying case was handled by **Janetlee Garcia** and **Bernard Probst** and the appeal was handled by **Michele E. Ready**, all partners in the Miami office of Walton, Lantaff, Schroeder and Carson.

The underlying case dealt with a claim for medical treatment that was denied by the Employer/Carrier. The Claimant retained an Independent Medical Examiner in the field of neurology who opined that the Claimant's condition was related to the workplace accident and required treatment.

The Employer/Carrier retained their own Independent Medical Examiner in the field of neurology who opined that the Claimant's condition stemmed from a pre-existing pathology and that the Claimant did not require treatment for the workplace accident.

Bernard Probst, Esq.

Janetlee Garcia, Esq.

Michele Ready, Esq.

As a result of the conflict in medical opinions, an Expert Medical Advisor was appointed by the Judge of Compensation Claims. Due to the fact that the Claimant had retained the only EMA neurologist in Broward County as their IME and the Employer/Carrier had retained the only EMA neurologist in Miami-Dade County as their IME, the Judge of Compensation Claims looked to the next nearest EMA neurologist for appointment in this case.

The EMA appointed was located in Naples, FL. Thereafter, an appeal to the interlocutory order rendered by the Judge of Compensation Claims, in which he compelled the claimant to attend an EMA appointment in Naples, Florida, was filed. The appeal was centered on the premise that the Claimant would suffer irreparable harm if she had to travel to an EMA which was 200 miles away. Michele Ready responded that no irreparable harm would flow to the Claimant by attending the Expert Medical Examination in Naples and that, in rendering their decision on the matter, the Judge of Compensation Claimant did not depart from the essential requirements of the law as is required for appellate purposes.

The First District Court of Appeal agreed with Ms. Ready and issued a "per curiam" denial.

MIAMI

WLSC secures dismissal of commercial first party bad faith claim, without payment to insureds or their attorneys

On March 6, 2015 Walton Lantaff Senior Partner **Michael Galex** won dismissal of a 2006 Hurricane Wilma lawsuit. Plaintiffs owned two adjacent commercial buildings damaged by Hurricane Wilma. The insurer paid $400,000.00 on the claim and asked Walton Lantaff to help resolve the amount of loss issue. After investigating, Mr. Galex had the insurer invoke appraisal because the insureds would not amicably resolve the dispute. The insurer invoked appraisal in August, 2006.

The next month the insureds sued for breach of contract, to compel appraisal and bad faith. The court granted the insurer's request to stay and dismissed the bad faith claim. After appraisal was completed, the insurer timely paid the additional insurance proceeds and sought dismissal of the entire lawsuit. The insureds sought confirmation of the appraisal award and for entitlement to attorney's fees. The court refused as the insurer timely paid the award and the lawsuit was unnecessary since the insurer performed its duties under the policy.

The insureds then sought to amend the complaint to allege bad faith. The trial court first denied the request and dismissed the case, but then reversed itself and allowed the amendment. After further litigation on the pleadings, Mr. Galex served discovery on the insureds, which they never answered despite two orders requiring response.

When plaintiffs did not comply with these orders, Mr. Galex filed a third motion to dismiss, this time with prejudice. The insureds voluntarily dismissed their case on the Friday before the hearing on the third motion to dismiss. While the insurer paid what it owed under the policy following appraisal, plaintiffs and their attorneys did not recover any attorney's fees, costs or other damages after litigating the case for over eight years.

GUARDIAN AD LITEM

Mother chooses boyfriend over her eldest son

Walton Lantaff attorney's recommendation helps two boys to safer, more secure and loving household

Walton Lantaff Orlando resident partner **Jim Armstrong** served as a pro bono guardian ad litem (GAL) for two foster children, Adam and Charlie (not their real names). Jim was appointed to represent the boys two years ago shortly after they were removed from their mother's house.

Adam at five and Charlie at two were found in squalid conditions with rotten food, feces, dirty diapers, lots of roaches and only junk food to eat.

The mother's boyfriend, Charlie's father, was alone with the boys while the mother worked. The boyfriend, who has never worked, spent his days playing violent video games and drinking while the boys' mother worked full time. Adam, at five years of age, knew the latest violent video games, but did not know how to hold a pencil. Adam immediately required root canals on six teeth. Charlie had spent his days in dirty diapers without normal stimulation so that he was nonverbal and could only crawl.

James Armstrong, Esq.

Jim served as the brothers' GAL for two years during which time Charlie was placed in a loving foster home and Adam went to live with his biological father and his wife who welcomed Adam into their home. Charlie was soon walking and talking the same as other children his age. By the end of his first year of school Adam was performing at the same level as his classmates. Both boys continued to lead normal lives for children their age.

During the time the brothers were making great progress with the mother and Charlie's father, her boyfriend's psychological evaluations determined that they had a toxic relationship.

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Their therapists agreed that Charlie's parents should not be a couple because Charlie's father should not be around children at all due to a personality disorder, his inability to control his anger and history of domestic violence. From the inception of the case Adam's therapist warned that Adam was terrified of the boyfriend, Charlie's father, such that Adam should never be reunified with the mother while she was in the relationship.

As GAL for the two boys, Jim assessed the parent's compliance with the tasks necessary for reunification and made recommendations to the Circuit Court Judge. Ultimately the boys found permanence when the judge ruled (consistent with Jim's recommendation) that Adam permanently remain in his biological father's home where Adam was doing well in school having bonded with his stepmother and stepsister. Charlie was returned to his mother however the Judge adopted Jim's recommendations for visitation restrictions to insure Charlie's safety at his mother's new apartment. Adam's mother insisted on a continuing relationship with Charlie's father despite every GAL report advocating against returning Adam while she continued the toxic relationship.

Adam now enjoys the security of remaining in his father's home without the possibility that he will be returned to his mother who remains in a relationship with Charlie's father.

— James Armstrong, Esq.

PALM BEACH COUNTY

Successful Motion for Summary Judgment saves insurance carrier time and noney

Attorneys **John P. Joy** and **Jonathan S. Wickham** obtained a summary judgment in favor of an insurer in an action for declaratory judgment.

The insured went to an event at the Palm Beach Yacht Club with her fiancée.

Some time during the event, the insured and her fiancée began arguing loudly. A couple at an adjoining table asked the insured and her fiancée to quiet down.

In a complaint brought by the neighboring couple, they alleged that this enraged the insured's fiancée and he brutally attacked the other couple.

John P. Joy, Esq.

Jonathan Wickham, Esq.

The insured and her fiancée were sued for their actions arising out of the fight at the Palm Beach Yacht Club. The complaint filed in the underlying action described the incident as a "brutal attack" and a "criminal assault." The fiancée was sued for his actions in the physical attack.

The named insured was sued for negligence, with the plaintiffs alleging that the named insured knew her fiancée had a problem with alcohol and violent outbursts, and therefore, should not have brought him to the event.

The Palm Beach County trial court entered summary judgment in favor of the carrier in the declaratory judgment action holding that there was no coverage for the underlying action.

THE FIRM WELCOMES NEW ASSOCIATES

Oliver Sepulveda, Esq.

Oliver is a 2014 graduate of the University of Miami School of Law, where he graduated with honors.

While at UM, Oliver was the Business Managing Editor of the University of Miami Race and Social Justice Law Review. During law school, Oliver interned with Judge Isicoff at the U.S. Bankruptcy Court in the Southern District as well as Judge Lagoa at the Third DCA.

Oliver Sepulveda, Esq.

He also interned with the Florida Office of the Attorney General in Fort Lauderdale and was a clerk at Gersten & Muir. Prior to law school, Oliver graduated from Florida International University with a Bachelors in Business Administration and a Masters in Management Information Systems; he spent four years working as an IT professional. Oliver will be practicing in the Fort Lauderdale office with John P. Joy's insurance coverage/appellate group.

Cassandra Shanbaum, Esq.

Cassandra is a 2014 graduate of the University of Miami School of Law, where she graduated with honors. While at UM, she excelled in her legal communications and writing classes. She also interned with the Children and Youth Law Clinic in Coral Gables and then clerked with (and ultimately began her legal career with) Beighley, Myrick & Udell in Miami where she practiced in PIP defense and commercial litigation. Prior to attending UM, Cassandra graduated cum laude with a degree in psychology from Michigan State University. Cassandra will be practicing here in the Fort Lauderdale office with Deborah FitzGerald's professional malpractice defense group as well as Jack Joy's insurance coverage/appellate group.

Cassandra Shanbaum, Esq.

Walton Lantaff supports our troops

Walton Lantaff believes it is our duty to support those who have dedicated themselves to protecting our Country and its freedoms. In August of 2014, the Firm began to sponsor an Army Unit, the 3rd Calvary Regiment, which had been deployed to Afghanistan. The Firm contributed by sending numerous care packages and letters of support and thanks to the Unit. The Firm also reached out to the local community and was able to have letters sent from pre-schools, a high school football team, members of the Broward County Bar Association, a Boy Scout troop, a local woman's charity group, and a parent teacher organization. **We recently learned and are happy to report that the 3rd Cavalry Regiment will be coming home soon!**

Walton Lantaff is also a proud to be a member of the Wounded Warrior Project's Advance Guard program, making monthly contributions to honor and support the sacrifices made by our Country's wounded service members. The Wounded Warrior Project provides unique, direct programs and services to meet the needs of injured service members and raises awareness for the needs of those injured while serving our Country. The Firm is honored to contribute to such a worthy and necessary cause.

Hot or not, soup is at the center of Miami slip and fall case

...SLIP AND FALL from page 1

Plaintiff sued Vista Building Maintenance Services, the City of Miami, and Karlen Foods, Inc. alleging negligence against each of the Defendants.

WLSC was retained to defend Vista Building Maintenance Services, Inc. against the Plaintiff's claim for damages (including $199,021.08 in medical bills). The case was handled by **Michael R. Jenks** (Sr. Partner –Miami) and **Stephanie M. Suarez** (Associate – Miami).

Michael R. Jenks, Esq.

In the Motion for Summary Judgment, two issues were raised by Vista Building Maintenance Services, Inc.: (1) Vista Building Maintenance Services owed no duty to the Plaintiff to inspect the property based on the terms of the contract with the City of Miami; and (2) the Plaintiff would be unable to establish that Vista Building Maintenance Services, Inc. had actual or constructive knowledge of the existence of the alleged foreign substance (pea soup) or that Vista Building Maintenance Services, Inc. allowed the dangerous condition to occur with such regularity that the Plaintiff's alleged accident was foreseeable under Florida Statute § 768.0755.

Two hearings were held on Vista Building Maintenance Services, Inc.'s Motion for Summary Judgment. At the first hearing, the Court ruled that the lobby was considered a common element and therefore, Vista Building Maintenance Services, Inc. had a duty to inspect that area. The only issue that remained for the Court to consider was whether Vista Building Maintenance Services had constructive knowledge that the foreign substance was on the lobby floor. The Plaintiff opposed the Motion for Summary Judgment arguing that the Plaintiff did not attempt to proffer evidence to prove that Vista Building Maintenance Services had actual knowledge of the dangerous condition or that the condition occurred with regularity and was therefore foreseeable.

The Plaintiff further argued that because she knew, from an unidentified third party's statement, that the foreign substance she slipped on was pea soup and the soup was at room temperature (an alleged indication that the soup was hot and then cooled), the motion should be denied.

The Court ruled that the unidentified third party's statement that the substance on the floor was pea soup was inadmissible because it was hearsay and not a spontaneous utterance under the applicable hearsay exception. Further, the fact that the pea soup was room temperature did not indicate the length of time that the substance was on the floor. To err on the side of caution, the Court decided to allow the Plaintiff 60 days to take the deposition of the security officer or a representative of the security company monitoring the property on the day of the slip and fall. The hearing on the Motion for Summary Judgment was continued.

The Plaintiff did not depose the security officer who was at the property and created an incident report the day of the accident, and instead deposed the representative of the security company, who was unable to authenticate the incident report.

At the second hearing on the Motion for Summary Judgment, the Plaintiff moved for a continuance of the Motion for Summary Judgment so the deposition of the records custodian for the City of Miami could be taken in order to authenticate the incident report. To avoid any further delay, Vista Building Maintenance Services, Inc. stipulated to the authenticity of the incident report.

The Plaintiff argued that based on the incident report the Court could not grant the Motion for Summary Judgment because it indicated that the soup was hot when the Plaintiff slipped and fell. The incident report did not state the temperature of the soup; it only mentioned that there was soup on the floor.

The Court ruled that as there was no mention of temperature in the report and there was no indication of the temperature of the soup in the evidence or any evidence as to the length of time the soup was on the floor prior to the slip and fall. As a result, the Court entered Summary Judgment in favor of Vista Building Maintenance Services.

The Plaintiff appealed to the Third District Court of Appeals, which is now pending.

— by Stephanie M. Suarez

F.S. 768.0755: Premises liability for transitory foreign substances in a business establishment.

(1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:

(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

(b) The condition occurred with regularity and was therefore foreseeable.

(2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

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