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ON APPEAL

# Appellate Court Reverses Appraisal Order in Hurricane Wilma Residential Claim

***Insured homeowner's tardy claims blew down his request for an appraisal***

The Third District Court of Appeal, in a case handled in part by Walton Lantaff Senior Partner Michael Galex, reversed an order sending a supplemental Hurricane Wilma claim to appraisal.

In doing so the court held that a "party seeking appraisal must comply with all post-loss obligations before the right to appraisal can be invoked under the contract." Thus, it is reversible error to "compel…appraisal before an insured has complied with his post-loss obligations."

In *State Farm Florida Insurance Company v. Hernandez*, No. 3D13-2263 (Fla. 3d DCA June 17, 2015), the insurer appealed the trial court's order compelling appraisal of the insured's supplemental Hurricane Wilma claim.

*Please see HURRICANE on page 2*

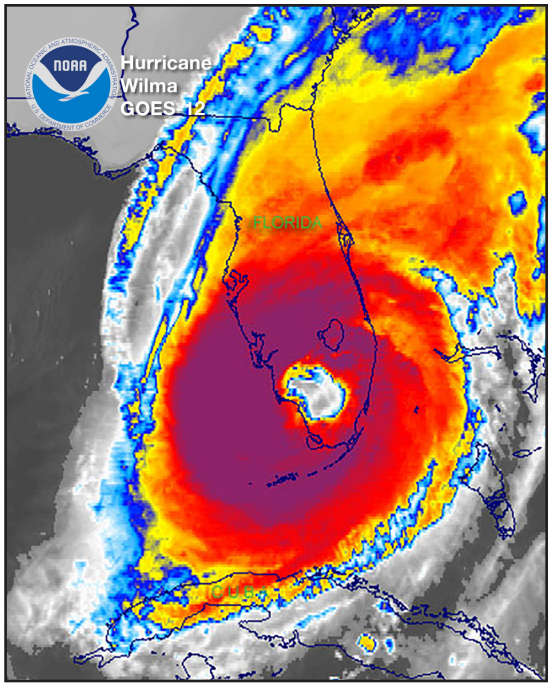


*Photo: NOAA, Oct. 24, 2005*

MIAMI PROPERTY DEFENSE

# WLSC obtains full defense verdict for property insurer

On July 22, 2015, Walton Lantaff Senior Partner, Michael Galex, and Associate Attorney, Jazmine Preston-O'Neill obtained a full defense verdict following a three-day trial on a first-party water loss dispute.

The insured claimed interior damages, including damage to the tile floor following a water heater leak. The insurer initially paid the insured's claim, and her water mitigation bill, but when the insured was not satisfied with the payment, she demanded appraisal. The insurer and insured were unable to reach an agreement regarding the scope of the appraisal, and the insured then sued, alleging the insurer breached the insurance policy by not fully indemnifying her for a covered loss.

The insured retained an expert who testified that the water heater loss was so severe and extensive that water seeped into gaps between the baseboards and tile floor allowing water to penetrate the wall cavities, and cause the tile floor to delaminate from the underlying slab thereby causing hollow tiles throughout the

*Please see WATER LEAK on page 7*

# Appellate Court Reverses Appraisal Order

*HURRICANE from Page 1*

Originally State Farm paid the insured $36,858.80 to repair the property, including $27,800.00 for full roof replacement. The insured never completed roof repairs until a year after payment. Then, allegedly after finding additional damage, the insured renovated the whole house by the end of 2007. The insured did not contact State Farm before, during or after these repairs. He only notified State Farm in November 2010, after retaining a public adjuster.

State Farm requested a sworn proof of loss and documents supporting the new damages. The insured sent a first proof of loss for $201,038.84 based upon the public adjuster's estimate, which included $53,000.00 for roof replacement. The insured later sent a second proof of loss for $168,346.12, which still included the roof replacement, and later admitted he spent only $65,000.00 to renovate the whole house. State Farm did pay $1,300.00 on the supplemental claim, but denied further payment.

The insured sued State Farm and sought to compel appraisal, which State Farm opposed because the insured breached his post-loss duties on the supplemental claim by providing late notice, not providing documents, not cooperating and potential fraud. After evidentiary hearing the court concluded the insured "sufficiently" complied with his post-loss duties and ordered appraisal. State Farm appealed.

The appellate court, while acknowledging the trial court has some discretion to compel appraisal, stated such "discretion is not absolute." The court then held that "the party seeking appraisal must comply with all post-loss obligations before the right to appraisal can be invoked under the contract" and "a trial court reversibly errs by compelling appraisal before an insured has complied with his post-loss obligations." The goal of appraisal "is only furthered when the parties have each had a real opportunity to inspect the damages and the receipts to come to a reasonable estimate of the amount of the covered loss."

Here the record showed the insured neither timely notified State Farm after making repairs nor provided sufficient proof of both the repairs and damages. The insured also submitted different sworn statements. These policy breaches were substantial, material and prejudicial to State Farm, so the Third DCA reversed the order compelling appraisal.

The court, in a footnote discussing the insured's exaggerated proofs of loss, also wrote that "[i]nsureds should carefully review…estimates to ensure accuracy before acknowledging them in a sworn proof of loss. At a minimum, the insured loses credibility, and submitting a false sworn proof of loss may result in a finding of fraud." Further, exaggerations of damages, like by this insured, "may lead to a denial of recovery."

This case should have a significant impact on further handling of supplemental Hurricane Wilma/Katrina claims. The Third District has now made abundantly clear that all insureds are obligated to first comply with their post-loss duties, even in supplemental claims, before appraisal can be compelled. Please note, however, the insured has filed a motion for rehearing before the entire Third DCA, so this decision is not yet final.

# Workers Compensation Practice Tips

### *A review of Fla. Stat. §440.13(13)(b)*

Generally, authorized providers are limited to the fee schedule. However, this subsection allows for deviations from the fee schedule in order to ensure that injured workers receive quality care at a reasonable cost if there is a written agreement. Possible agreements with the provider include the following:

- Timely scheduling of appointments
- Return to work programs
- Expedited reporting
- Continuing education requirements
- Utilization review
- Quality assurance
- Precertification
- Case management

Photo: Thinkstock

If a provider is paid more than the fee schedule permits, the provider may not be deemed by a JCC as properly authorized. This could jeopardize the evidentiary value of the medical opinion of a doctor that the E/C assumed was admissible under Fla. Stat. §440.13(5)(e). Therefore, if you do enter into an agreement with a provider to pay above the fee schedule, make sure that your departure from the fee schedule rates is documented as a written agreement between the carrier and the provider to further the purposes of the statutory scheme which is to provide the injured worker with quality care at a reasonable cost, and that the doctor agrees to one of the enhanced services listed above.

*– Michele E. Ready, Esq.*

WORKERS' COMPENSATION DEFENSE

# Rooftop Cleaning Mishap Unfortunate, But Not Negligent

***Walton Lantaff Attorneys Richard Rosenblum and Thomas Fabricio Obtain Defense Verdict for Universal Property & Casualty Insurance Company***

Managing Partner Richard Rosenblum and Fort Lauderdale Associate Thomas Fabricio, recently obtained a defense verdict after a four day jury trial in Broward County, Florida. The case involved a pressure cleaner who fell from the insured's ten foot high roof, injuring his neck and back. Our attorneys were defending a Universal Property & Casualty Insurance Company insured.

Plaintiff was on the roof using the pressure cleaning wand to clean the roof with the insured assisting. Plaintiff claimed the insured negligently pulled upon the hose running from the pressure cleaner to the wand, causing the plaintiff to slip, lose his balance and slide off the roof. The insured denied touching the hose and asserted the plaintiff simply slipped.

Richard Rosenblum, Esq.

Thomas Fabricio, Esq.

Both agreed as the plaintiff was sliding down the steep roof he was heading off the edge feet first. The plaintiff yelled to the insured not to touch him, but the insured admitted he reached out and grabbed the plaintiff's legs in an attempt to keep him from sliding off the roof. This attempt backfired in that it caused the plaintiff to rotate and fall off the roof head first instead of feet first. After a ten foot drop, the plaintiff landed on his back on a stump.

Plaintiff, who was uninsured, had $50,000 in past unpaid medical bills. His treating orthopedist testified plaintiff would need disc surgery at a cost of another $30,000. Plaintiff had a previous back surgery approximately five years before the date of this loss as a result of another fall and subsequent MRI scans showed new disc herniations. The defense argued the new herniations were simply normal progression of plaintiff's pre-existing degenerative problems. The defense also uncovered complaints of low back and radiating leg pain in the period following plaintiff's 2006 back surgery and the date of loss.

In closing argument, plaintiff's counsel asked the jury to return a verdict in the amount of $428,000. Mr. Rosenblum argued there was no liability on the part of the insured in causing the initial slip. He further argued that while the rescue attempt was not successful, it was instinctive and morally correct. As to damages, the defense argued the conditions exhibited by the plaintiff were not the result of this accident, despite the admittedly hard fall.

The jury deliberated for about an hour and a half before returning a verdict that there was no negligence on the part of the insured and, therefore, awarding no damages.

WORKERS' COMPENSATION

# Rule 60Q-6.124 may assist carriers in closing claims

The First DCA has recently stated that claims for attorneys fees and costs that are asserted in a Petition for Benefits toll the statute of limitations. *Black v. Tomoka State Park*, 106 So.3d 973 (Fla. 1st DCA 2013); *Longley v. Miami-Dade County School Board*, 82 So.3d 1098 (Fla. 1st DCA 2012). Thus, carriers are oftentimes presented with cases that never go away because prior claims for attorneys' fees and costs remain pending, and claimant's attorneys make no effort to litigate these claims. These cases end up existing in perpetuity. Recently, the firm was presented with such a scenario. The Claimant had not received medical care or indemnity benefits for more than a year, but the carrier could not close the claim because prior claims for fees and costs were outstanding. Despite several requests, the Claimant's attorney failed to provide any settlement demand to resolve the claim for attorney's fees and costs. In an effort to bring the claim for fees and costs to a resolution, the E/C filed a Motion to Require a Verified Fee Petition under Rule 60Q-6.124(4). Rule 60Q-6.124(4) specifically states that, "[u]pon motion by any party, the judge may require the claimant to file a verified motion for attorney's fees and costs and adjudicate the verified motion for fees and costs." In this case, the Claimant ended up dismissing all claims for fees and costs, thus resolving the only pending issues and permitting the statute of limitations to run. It should be noted that the rule is discretionary, and thus it is unclear whether the Judges are granting such motions. Notwithstanding, it is a tool carriers should consider to resolve old claims for fees and costs that prevent the statute of limitations from running.

Jonathan S. Wickham, Esq.

*— Jonathan Wickham, Esq., partner*

# Motion for Sanctio

## *How to deal with a lack of good-faith effort*

*By Michele Bachoon, Esq.*

Florida's workers' compensation system was created to be self-executing. The legislature's intention was for the Employer/Carrier and the injured worker, or claimant, to resolve any disputes among themselves; utilizing the workers' compensation courts, otherwise known as the Office of the Judges of Compensation Claims, as a last resort and not as the first step in dispute resolution. The law requires that a claimant attempt to obtain any benefits the claimant believes to be due by first contacting the Employer/Carrier and requesting the provision of the benefit. Fla. Stat. §440.191. This is called a "good faith effort". Following the "good faith effort," and if a dispute still exists, the claimant is authorized to file a petition for benefits, essentially asking the Judge of Compensation Claims (JCC) to decide the issue and determine if the claimant is entitled to the requested benefit.

Michele Bachoon, Esq.

Pursuant to Florida Statute §440.192(4) and Rule 60Q-6.115, a petition for benefits must include a certification or statement by the claimant or his attorney that a "good faith effort" was made to resolve the dispute and that the claimant or attorney was unable to resolve the dispute with the Employer/Carrier prior to the filing of the petition for benefits. Fla. Stat. §440.192 (4). Prior to 2012, if a claimant filed a petition for benefits and failed to make a "good faith effort," the Employer/Carrier could file a motion to dismiss the petition for benefits based solely on the lack of "good faith effort." More often than not, if no "good faith effort" was made, the offending petition for benefits was dismissed by the JCC without the need for a costly evidentiary hearing. Unfortunately, the infamous Blake-Watson case, in which the First DCA opined, "the statute governing procedure for resolving benefit disputes does not independently give the JCC authority to "go behind" attorney's representations of "good faith effort" to resolve a dispute," was released. *Palm Beach County School District & F.A. Richard & Associates v. Beverly Blake-Watson*, 91 So. 3d 176 (1st DCA, 2012), F.S. 440.192.

### PRACTICE TIPS:

- Ensure the motion for sanctions deals only with the issue of lack of "good faith effort"; if there are any other grounds for seeking dismissal such as lack of specificity or major contributing cause, file a separate motion to dismiss.
- Ensure the motion for sanctions specifically states the offense committed by the claimant, i.e the claimant alleged a "good faith effort" was made when no such effort was made. We like to send a Request to Produce along with the motion for sanctions asking for any evidence of a "good faith effort." As the claimant has 30 days to respond to the Request to Produce, we afford extra time to withdraw the petition for benefits. This allows us to prove to the JCC that we truly used a "good faith effort" to resolve this issue prior to the filing of the motion for sanctions.
- Allow the claimant a minimum of 21 days or more to rectify the situation and withdraw or otherwise dismiss the petition for benefits at issue.

*The First DCA ruled the JCC must take the petition for benefits at face value and the JCC may not grant a motion to dismiss a petition for benefits for lack of "good faith effort"...*

In *Blake-Watson*, the claimant filed a petition for benefits which included a claim for Employer/Carrier-paid attorney's fees and costs. The Employer/Carrier provided some benefits but then moved to dismiss the petition for benefits, arguing the claimant had not made a "good faith effort" to resolve the dispute before filing the petition for benefits, as required by Florida Statute §440.192(4). The claimant argued the petition for benefits stated a "good faith effort" was made and the JCC has no jurisdiction to look behind the statement of "good faith" to determine its veracity.

The First DCA ruled the JCC must take the petition for benefits at face value and the JCC may not grant a motion to dismiss a petition for benefits for lack of "good faith effort" if the statement alleging a "good faith effort" was made is on the petition for benefits; even if no "good faith effort" was actually made.

Many assumed that due to the *Blake-Watson* decision, the Employer/Carrier would now be forced to defend against petitions for benefits which did not actually comply with, but merely alleged compliance with, the rules and the specificity requirements of Florida

# ons: A Useful Tool

AS SEEN IN:

CLAIMS JOURNAL

http://www.claimsjournal.com/news/southeast/2015/06/22/264084.htm#

Statute §440.192(4). In other words, many assumed the Employer/Carrier could no longer file a motion to dismiss based on lack of "good faith effort." In claims wherein the Employer/Carrier is providing all due benefits but a petition for benefits is nevertheless filed, for many times benefits already provided to the claimant by the Employer/Carrier, the aforementioned assumption is more troubling. Fortunately, there is still a way to achieve the desired result of the offending petition for benefits being dismissed, or in most cases voluntarily withdrawn, due to lack of "good faith effort."

In *Blake-Watson*, the Court acknowledged that Rule 60Q-6.125, the administrative code provision governing sanctions in workers' compensation proceedings, arguably permitted the Employer/Carrier to seek sanctions against the claimant for failure to comply with the workers' compensation statute which requires that a petition for benefits include a certification that the claimant has made a "good faith effort" to resolve the dispute. However, for a petition for benefits to be dismissed pursuant to the rule governing sanctions, the Employer/Carrier must comply with the procedural requirements of the rule.

A motion for sanctions may be filed pursuant to Rule of Procedure for Workers' Compensation Adjudications 60Q-6.125(1) due to lack of "good faith effort"; however, to be successful, the Employer/Carrier must ensure the following criteria are met:

(a) The motion for sanctions must be made separately from other motions or requests;

(b) The motion for sanctions must describe the specific conduct alleged to violate the rules or statute;

(c) The motion must be served but not be filed unless the petition for benefits is not withdrawn or appropriately corrected within 21 days after service of the motion.

If warranted, the JCC may award the cost of the proceeding and attorney's fees incurred in presenting or opposing the motion to the prevailing party. The JCC may enter an order describing the specific conduct that appears to violate the rule and directing an attorney or party to show cause why sanctions should not be imposed.

*Failure to follow the Rules ... may subject a party to sanctions which include striking of claims, petitions for benefits, defenses, or pleadings, imposition of costs or attorney fees, or other sanctions ...*

Failure to follow the Rules of Procedure for Workers' Compensation Adjudications, may subject a party to sanctions which include striking of claims, petitions for benefits, defenses, or pleadings, imposition of costs or attorney fees, or other sanctions as the JCC may deem appropriate. As such, if the Employer/Carrier is certain that no "good faith effort" was made, there is an opportunity to obtain dismissal of a petition for benefits and be awarded attorney fees and costs.

A motion for sanctions may seem drastic; however, keep in mind that when a petition for benefits is filed alleging "good faith effort" where none has been made, a material misrepresentation to the JCC has occurred. By filing a petition for benefits or presenting argument at a hearing, the claimant or claimant's attorney is certifying that the petition for benefits is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase in the cost of litigation and that the allegations and other factual contentions are true and have evidentiary support. Florida Rule of Procedure for Workers' Compensation Adjudications 60Q-6.125(2). This includes the Certificate of Good Faith in which the claimant alleges that the Employer/Carrier was contacted in good faith.

It has been our experience that when no "good faith effort" is made prior to the filing of a petition for benefits, the benefit usually has already being provided and the claim is moot. As such, in these cases, an assumption that the claimant is attempting to needlessly increase litigation to make settlement more appealing or to argue for Employer/Carrier-paid attorney fees and costs in the future is reasonable, thus the claimant is once again blatantly acting contrary to the Rules.

We have found the service of a motion for sanctions to be very successful and the offending petition for benefits is usually withdrawn or dismissed prior to filing of the motion for sanctions with the JCC. Remember, the offending party must be given 21 days to correct its error, i.e., dismiss the petition for benefits. In our experience, no attorney wants it pointed out to the JCC that he or she blatantly made a misrepresentation and will usually voluntarily dismiss the offending petition for benefits before the 21 day deadline. Proper use of a motion for sanctions can also change the way claimants' attorneys handle future claims, i.e., the claimants' attorneys will send a "good faith effort" prior to the filing of a new petition for benefits thus saving the Employer/Carrier from increased litigation costs when a claimed benefit is not at issue and benefits have not been denied.

FORT LAUDERDALE

# WLSC Wins Big on Issue of First Impression for Florida on Physical Abuse Exclusion

Senior Partner, Jack Joy (Ft. Laud) and Junior Partner, Sara Sandler (Ft. Laud) obtained a huge appellate victory in the Fourth DCA in which the Court considered an issue of first impression for Florida regarding the physical abuse exclusion found in standard homeowner's policies.

The underlying claim against the insured was that he negligently entrusted a weapon to his sister, who then used the gun to shoot her son-in-law (the Plaintiff/Appellant) in an attempt to murder him. The coverage issue was whether the negligence claim against the insured was an excluded claim for bodily injury arising out of physical abuse.

A declaratory judgment action resulted in summary judgment in favor of the insurer, finding that the physical abuse exclusion applied to the subject claim.

On appeal, counsel for the Plaintiff/Appellant argued that, based on the other terms in the exclusion, the court should only apply the physical abuse language if the claim involved elements of torture or degradation.

With no Florida law to rely on, Joy and Sandler argued that a plain meaning analysis of the policy language should apply and thus, pursuant to Black's Law Dictionary and other standard dictionary definitions, the plain meaning of "physical abuse" clearly applied to the intentional shooting of the Plaintiff/Appellant by his mother-in-law.

John P. Joy, Esq.

Sara Sandler, Esq.

In a unanimous four-page opinion, the Fourth DCA ruled that the plain language of the exclusion applied to preclude coverage for the shooting claim.

As the Court noted in its opinion, this was an issue of first impression in Florida. As the physical abuse exclusion is standard in homeowner's policies issued in Florida, the precedential value of this decision is far reaching.

# Strunin Re-Elected Without Opposition to Workers' Compensation Executive Council

Miami senior partner **Robert Strunin, Esq.,** was re-elected to his seat on The Florida Bar's Workers' Compensation Section Executive Council at the recently concluded Workers' Compensation Institute Educational Conference in Orlando; Robert's new term commences 7/1/14 and is for a duration of three years.

Robert Strunin, Esq.

Robert holds the "defense bar seat" for Florida's Third Appellate District which encompasses Miami-Dade and Monroe Counties and which coincidently also comprises the jurisdiction of the Miami District Office of the OJCC.

Robert has served with distinction on the Executive Council since June 2004.

# Walton Lantaff In The Community

Walton Lantaff Schroeder & Carson is pleased to be the exclusive law firm sponsor of Do the Right Thing of Miami, Inc. (DTRT), a non-profit that recognizes and rewards Miami youth for their exemplary behavior, accomplishments and good deeds. Through a partnership with the City of Miami Police Department, the Miami-Dade Schools Police Department, and other participating law enforcement agencies in Miami-Dade, the DTRT Awards Program distinguishes exceptional school-age children who choose to be drug and crime free, exhibit non-violent behavior, do well in school, make a difference in their communities and demonstrate turnaround behavior.

WLSC partner Robert Strunin attended DTRT's 25th Silver Anniversary Summer Salute Awards Night on June 10 at Jungle Island, where the firm was honored for their commitment to the organization.

PROPERTY CLAIMS

# WLSC obtains full defense verdict for property insurer

***WATER LEAK FROM PAGE 1***

risk.

The defense argued that the insurer fully paid the insured for the direct physical loss sustained as a result of the water heater leak, which was limited to the areas immediately surrounding the water heater. The defense presented an expert witness who acknowledged hollow tiles throughout the home, but attributed them an installation defect. The defense also debunked the insured's expert testimony by highlighting omissions and flaws in his investigative techniques and conclusion.

At the conclusion of evidence and arguments, the jury returned a full defense verdict after deliberating for less than 30 minutes. The jury agreed with the defense that the insurer paid what it owned under the policy, and the plaintiff was not entitled to any additional money for claimed damages that were not a direct physical loss to the property. Ultimately, the insured did not recover any additional money, and her attorney did not recover any attorneys' fees or costs after litigating the case for over three years.


# Walton Lantaff Attorneys in the News

Walton Lantaff Schroeder & Carson is pleased to announce that the following attorneys have been recognized in the media for their achievements:

**Michele Bachoon** was appointed to serve on The Florida Bar's Animal Law and Workers' Compensation Rules Advisory Committees. She will serve a one-year term.

**Thomas Fabricio** (photo above) has been appointed to the City of Miramar's Planning and Zoning Board. He was appointed by City Commissioner Maxwell Chambers.

**Jazmine Preston-O'Neill** (photo below left) was recognized by *Legacy Magazine* as one of its "40 Black Leaders of Today and Tomorrow."

**Kelly Vogt** and **Sara Sandler** (photo below right) were elected to the Broward County Bar Associatioan's Young Lawyers Committee. Kelly was named President-Elect and Sara will serve as Secretary. They will serve a one-year term.

**Sara Sandler**, a partner in the Fort Lauderdale office, was selected by the Daily Business Review as one of the 2015 Rising Stars in the South Florida community. She was honored at an event on September 17.


Jazmine Preston-Oneill, Esq., (center) was recognized for her leadership in South Florida.

Kelly Vogt and Sara Sandler among other directors of the BCBA.

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## COVERAGE DENIED: Walton Lantaff Succeeds in Defending E/C's Decision to Controvert

In the case of *Santillan v. Florida State Drywall and Association Insurance Co.*, the claimant had purchased a cell phone from a co-worker on the job site during work hours.

Many months later when the two were no longer co-employees, the seller confronted the claimant at claimant's job site demanding more money for the cell phone. The claimant refused and engaged in an oral argument with the seller. The seller then attacked the claimant causing multiple serious injuries.

The claimant filed a workers' compensation claim against our clients, his employer, and their workers' compensation carrier. The employer/carrier denied the claim in full taking the position that the accident did not arise out of and in the course and scope of employment. One of our Partners, Scott Berglund, took our client's denial to trial and the Judge of Compensation Claims, Mark A. Massey (Tampa) agreed with the employer/carrier's defense argument and entered an Order denying compensability and dismissing the claim in full. That Order has been appealed.

The Order was entered by Judge of Compensation Claims Mark Massey on July 25, 2015.