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MIAMI-DADE

WLSC defense wins jury trial, in contentious \$4 million construction defect case

Jury awards effectively zero damages for home owner's claims

Michael Jenks and David Tharp, Senior Partners in the Firm's Miami Office, and Junior Partner Stephanie Bandy recently completed a contentious construction defects trial in which the Plaintiffs sought nearly \$4 million in damages as a result of what they claimed to be defective construction of their \$5 million bayview home.

WLSC was retained by a prominent construction liability insurance carrier to defend its insureds after the Plaintiffs found numerous defects in their home shortly after it was completed. The case spanned more than five years and a month-long jury trial.

The case was tried before Miami-Dade County Circuit Court Judge Gill Feeman. Plaintiffs sued various persons including the architect that designed the home, the general contracting company, and the building contractor individually.

At trial, the WLSC team successfully argued that damages to the Plaintiff's home were substantially less than claimed by the Plaintiffs and largely the result of a lack of diligence by the Plaintiffs. Additionally, the Defendant argued that many of the damages were the result



Photo: ©Bing

of poor design by the architect. The architect settled prior to trial for approximately \$750,000.

Prior to the jury deliberating, Jenks secured a directed verdict for the building contractor individually. At the end of the trial, despite Plaintiff's counsel having sought nearly \$4 million, the jury found just over \$800,000 in total damages. The jury's verdict found the Plaintiffs (a lawyer and an architect) almost 50 percent at fault in the case, more than any other single defendant.

Jenks said, "The jury agreed that Plaintiffs had major responsibility for their own losses on account of long delays in making repairs to the dwelling, and the



David K. Tharp, Esq.



Michael R. Jenks, Esq.



Stephanie L. Bandy, Esq.

CONTINUESSee *Construction*, P. 5



PARTNER PROFILE

Deborah FitzGerald: Successes in and out of the courtroom

Appellate victory solidifies Florida law on effect of subsequent contracts

The ramifications of entering into subsequent and amended contracts have been explored on a very limited basis by Florida Courts. Since the late 1950's and 60's, only a couple of decisions have been published on this issue.



John P. Joy, Esq.



Sara M. Sandler, Esq.

WLSC recently defended against claims for negligent misrepresentation, fraudulent inducement, and negligence based on an alleged misrepresentation made by the defendants with regard to property leased to the plaintiff.

After the plaintiff discovered the alleged misrepresentations, the parties entered into an amendment to the original lease agreement. Subsequent to this amendment, the plaintiff brought suit against the defendants for misrepresentation.

Walton Lantaff was able to get all counts dismissed with prejudice against our clients based on, inter alia, the fact that the plaintiff had entered into an amended contract after discovering the alleged fraud, thereby waiving any claims against the defendants based on such allegations. The plaintiff appealed the trial court's order of dismissal.

Although there was limited case law on point, WLSC argued to the Fourth District Court of

Appeal that the plaintiff had forfeited any right to a claim against the defendants by continuing to negotiate on matters related to the original contract after discovering the alleged fraud.

The Fourth DCA affirmed the trial court's dismissal with prejudice as to all claims against WLSC's client. Specifically, the Fourth relied on the firm's argument that, by entering into an amendment to the original contract with knowledge of the alleged fraudulent activity, the plaintiffs waived any claims for fraud or breach of contract. This opinion has helped to solidify Florida law on this point, making it more difficult for plaintiffs to roll the dice, so to speak, by waiting to see whether they will profit from a deal before filing suit.

Deborah P. FitzGerald (Ft. Lauderdale) successfully handled the case at the trial level. John P. Joy (Ft. Lauderdale) and Sara M. Sandler (Ft. Lauderdale) successfully defended the case on appeal.

Senior Partner, Deborah FitzGerald, in the Firm's Ft. Lauderdale office, is having a banner year in 2011, in and out of the courtroom.

In the courtroom, Deborah has this year:

¶ Obtained a defense verdict in a professional business appraiser malpractice jury trial in West Palm Beach, FL. The Plaintiff sought \$500,000 in damages;

¶ Successfully defended a real estate broker against a claim of professional negligence in a non jury trial in West Palm Beach, FL;

¶ Successfully argued entitlement to 57.105 sanctions in a professional malpractice case against a certified public accountant in Dade County, FL. Awaiting a fee award in excess of \$50,000.00;

¶ Successfully argued a legal malpractice appeal to the Fourth District Court of Appeal following dismissal at the trial level in Broward County on statute of limitations grounds.

Outside of the courtroom, Deborah has been:

¶ Installed as President of the Ft. Lauderdale Chapter of American Board of Trial Advocates (ABOTA). A national organization, ABOTA is limited to accomplished civil jury trial lawyers and is equally split between defense and plaintiff, and is by invitation only;

¶ Elected President-Elect of the Broward County Bar Association (BCBA) without opposition. The BCBA consists of 2,200+ lawyer members and is one of the largest voluntary county bar associations in Florida;

¶ Reappointed to the Federal Bench-Bar Conference Committee by Chief Judge Moreno. The committee plans and hosts a Biennial Conference with 600+ attendees;

¶ Reappointed to the Federal Bar Mediation Selection Committee by Chief Judge Moreno. This committee approves mediators for certification in the Southern District. Deborah is the only member to serve on the committee since its inception in 2000.

Deborah concentrates her practice to the defense of professionals, including lawyers, accountants, appraisers and real estate brokers and agents.



Deborah Poore
FitzGerald, Esq.

MIAMI

WLSC defense: Hurricane Wilma claimant waited too long

Court agrees, deems four years, 11 months not timely reporting for \$80,000 claim

Daniel Alvarez, associate with the Firm's Miami Office, recently secured a final summary judgment in favor of a homeowners' insurer based on an insured's failure to timely report his claim to his insurer.

Approximately one month before the deadline to report Hurricane Wilma damage, the insured retained a public adjuster and presented a claim for Hurricane Wilma damage in excess of \$80,000.

After a thorough investigation by the insurer, it was determined that prejudice had resulted from the insured's failure to report the claim in a timely matter as required by his insurance policy.

The WLSC team moved for

summary judgment on the insured's failure to timely report the claim and the resulting prejudice to the insurer.

Based on the newly reported *Kroener v. F.I.G.A.*, which deemed that two years and two months from the date of loss was not timely reporting as a matter of law, Mr. Alvarez argued that four years and eleven months was also not timely reporting.

Following a contentious hearing, the Miami-Dade Circuit Court Judge found that, as a matter of law, four years and eleven months was not timely reporting under the terms of the insurance policy. The insured's attorney has vowed to appeal the ruling.

- Daniel A. Alvarez, Esq.



Daniel Alvarez, Esq.



Hurricane Wilma was the third hurricane of the Atlantic 2005 season to reach category 5 status. Its swath included at least 10 counties.



Wilma made landfall near Chokoloskee. (Credit: NOAA image and map)

MIAMI

Industrial accident didn't cause claimed impairment

Strong, agile defense by WLSC in response to live testimony



Bernard I. Probst, Esq.



Janetlee Garcia, Esq.

Senior Partner Bernard I. Probst and Partner Janetlee Garcia tried a case before Judge Stephen Rosen on September 22nd.

The Claimant was requesting indemnity benefits and medical care due to an alleged medical condition resulting from an industrial accident with the Employer.

Through depositions of the doctors, the deposition of the Claimant and the Claimant's live testimony at Final Hearing, Mr. Probst and Ms. Garcia were able to prove that the Claimant had no impairment as the

result of the industrial accident.

The Judge found in favor of the Employer/Carrier and entered an Order in favor of the Employer/Carrier, denying all claimed benefits, dismissing with prejudice all claims for penalties, interest, fees and costs and reserving jurisdiction for a determination of costs to the prevailing party.

Furthermore, in his Compensation Order, the Judge noted that the the Claimant's allegedly compensable condition was not related to the accident.



Subrogation and the hunt to recover revenue from liabilities

When an adjuster closes a case, it's rarely the end of the chase

Douglas M. Cohen and Beth J. Leahy of WLSC's Ft. Lauderdale Office recently presented on the ins and outs of subrogation at The Hartford. Subrogation is an effective tool in minimizing an insurer's exposure and can be used in almost every type of transaction where the party invoking it has been required to pay a debt for which another is primarily liable.

Subrogation often comes into play in the insurance setting. Subrogation can be statutorily based, equitably based, or contractually based. Regardless of classification, subrogation allows an insurer, upon payment of an insured's claim, to step into the shoes of the insured and acquire all of the rights the insured may have against a third party. This allows for the recovery of settlement costs and defense costs by the insurer.

Areas subrogation applies to include, but are not limited to, workers' compensation, uninsured motorist, Medicaid/Medicare, and tort cases.

Douglas Cohen is available to present on the subject of subrogation and is also available to answer your questions pertaining to an existing or future case. Douglas can be reached at (954) 463-8456 or dcohen@waltonlantaff.com.



Douglas Cohen, Esq.

CONTINUING EDUCATION

WLSC Supports Community in Offering Education for Risk Managers

More than 100 insurance and worker's compensation professionals traveled to Sunrise, Fla. to hear two veteran Walton Lantaff attorneys in live discussions at the 13th Annual Southeast Florida Workers Claims Conference held by the International Association of Rehabilitation Professionals.



Beth J. Leahy, Esq.

Senior Partner Beth J. Leahy presented, "Best Practices: Reducing Workers Compensation Costs."

Senior Partner Allison Chittam Hartnett presented, "The Use of Vocational Experts in Florida W.C. Cases."



Allison Chittam Hartnett, Esq.



Walton Lantaff Partners, Staff 'Put Something Back' in 2011 Pro-Bono Day

Miami-Dade County Mayor Carlos A. Gimenez and the county commissioners proclaimed October 28th as Pro Bono Day to honor the Dade County Bar Association and Dade Legal Aid for the "Put Something Back" Pro Bono Project.

Many Walton Lantaff attorneys provide pro-bono services under the Put Something Back program in support of the of indigent in Miami-Dade, and WLSC's Miami office has 100% participation in the Dade County Bar Association.

New fixed-percentage option for Medicare recovery claim

Effective November 7, 2011, the Centers for Medicare & Medicaid Services has implemented a new and simple fixed percentage option that is available to certain beneficiaries. This option is available to beneficiaries who receive certain types of liability insurance (including self-insurance) settlements of \$5,000 or less.

A beneficiary who elects this option will be able to resolve Medicare's recovery claim by paying Medicare 25% of his/her total liability insurance settlement instead of using the traditional recovery process. This means that a beneficiary will know what he/she owes and will be able to immediately pay Medicare.

In order to elect this option, the following criteria must be met:

- The liability insurance (including self-insurance) settlement is for a physical trauma based injury. (This means that it does not relate to ingestion, exposure, or medical implant);

- The total liability settlement, judgment, award, or other payment is \$5,000 or less;
- The beneficiary elects the option within the required timeframe and Medicare has not issued a demand letter or other request for reimbursement related to the incident;



WLSC's Michele E. Ready consults on any Medicare Set Aside issues.

- The beneficiary has not received and does not expect to receive any other settlements, judgments, awards, or other payments related to the incident.

A full explanation, including instructions on how and when to elect this option, is available in

the section of both the Attorney and Beneficiary Toolkits. Visit <http://www.msprc.info>.

Note: When a beneficiary elects this option, he/she must understand that as part of choosing the option he/she will be giving up the right to appeal the fixed payment amount or request a waiver of recovery for the fixed payment amount.

CONSTRUCTION

Continued from page 1.



Photo: ©Google

"The jury agreed that Plaintiffs had major responsibility for their own losses on account of long delays in making repairs to the dwelling..."

-- Michael R. Jenks, Esq.

exorbitant amount spent for the repairs and additional living expenses incurred."

Additionally the jury found two additional Fabre defendants responsible for 30 percent of the damages. The WLSC client was found at fault for about 20 percent of the amount sought by Plaintiff's Counsel. After applying a set-off amount of the prior settlement with the architect, it is likely that the building contracting company or their insurer may not be liable for any damages following the trial. Additionally, the individual defendant, for whom the directed verdict was obtained, will be able to secure taxable costs as a result of prevailing at trial.

FORT LAUDERDALE

WLSC obtains victory for Insurer in fatal workplace mishap

Court finds no coverage under insurance policy for wrongful death suit

Senior Partner Jonathan Davis (Ft. Laud.) and Associate Kelly Corcoran (Ft. Laud.) recently obtained a Final Declaratory Judgment on behalf of the insurer in an action to determine insurance coverage for a wrongful death suit against the insured.

The suit arose out of an incident in which decedent was crushed while working on a truck. The insurer defended the insured in the wrongful death suit, and

simultaneously filed a complaint for declaratory relief seeking a ruling that it had no duty under the policy to defend or indemnify the insured with regard to the suit based on the business pursuits exclusion.

Judge John Thornton, Jr. ruled in favor of the insurer, finding that the insurer had no duty to defend or indemnify the insured with regard to the wrongful death suit.



Kelly Corcoran, Esq.



Jonathan Davis, Esq.

WEST PALM BEACH



4th DCA reaffirms that Defense proved prisoner waited too long to report gunshot wound

Beth Leahy and Jonathan Wickham obtained a dismissal with prejudice on behalf of a governmental entity in a case involving an inmate's claims of inadequate medical care and other negligence at a local detention facility.



Beth J. Leahy, Esq.

The inmate claimed that the detention facility failed to adequately treat the inmate's gunshot wound and broken finger, and that the conditions at the local detention center caused the inmate to acquire staph infection.



Jonathan S. Wickham Esq.

Leahy and Wickham successfully argued that the plaintiff failed to file his Complaint timely and therefore his claims were barred by the statute of limitations.

Leahy and Wickham recently received more good news for the client when the Fourth District Court of Appeal affirmed the dismissal with prejudice.

-- Jonathan S. Wickham



Labor/employment practice, family/criminal practice added at WLSC West Palm Office

Continued Expansion and Statewide Growth at WLSC

In addition to the Worker's Compensation and Real Estate Law practice our West Palm Beach Office has expanded its expertise to include Labor and Employment law as well as Criminal and Family Law, areas already provided in the firm's statewide practice.

The addition of Labor and Employment law is great news for our Employers and Insurance Carriers as most workers' compensation attorneys do not also handle labor and employment law claims. Many times a Claimant in worker's compensation claim alleges violations of other laws such as Florida's anti-discrimination laws in an attempt to force our insureds and insurers to settle their claim for much more than it is worth.

Walton Lantaff is one of the few law firms in Florida that is capable of providing Employers and Insurers full service when it comes to all claims an Employee may bring against them. For any labor and employment matters please contact Michele Bachoon, Esq. (in West Palm Beach); Beth Leahy, Esq. (Fort Lauderdale); Allison Hartnett, Esq. (Miami) or Michael Sperounes, Esq. (Tampa).

The expansion of our existing Criminal and Family Law Practice Groups into the West Palm Beach area is also welcome news. Now, in addition to the Employers and Insurance Companies who already retain us for their professional matters, we are able to represent individual clients in their personal matters as well.

Our West Palm Beach Office can handle all aspects of clients' Family Law and Criminal Law matters, including: divorce, child support, timesharing, relocation issues, as well as driving under the influence, misdemeanor, and



felony criminal matters. Please contact Kelly R. Ziegler, Esq. for any Family or Criminal Law matters. In Miami and Broward County, contact Elisa Terrafirma, Esq. and in Tampa contact Linda Muralt, Esq. for family law matters and contact Mike Galex, Esq.

in Miami for criminal law matters.

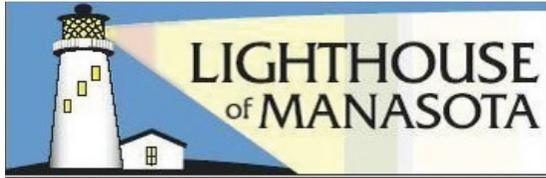
By expanding our areas of practice in West Palm Beach, we will be able to better service our existing clients. Walton, Lantaff, Shroeder and Carson has always strived to provide exceptional service to our corporate clients. Now we are pleased to offer that same level of expertise to individuals.

Charity golf event raises \$70k to benefit those with impaired vision

Walton Lantaff was an "Eagle Sponsor" of the annual Dr. James Morrish, Sr. Golf Challenge fundraiser, which successfully raised more than \$70,000 for the Lighthouse of Manasota.

Players teed off at El Conquistador Country Club in Bradenton on September 10th.

The funds raised at this event benefit Lighthouse programs and services. The Lighthouse of Manasota exists to advance the individual growth and independence of adults and children with vision loss.



Shining new light on living with vision loss



Charity Golfers: David C. Cruikshank, President, Service Insurance Company; Michael Gurley, Vice president of Claims, Service Insurance Company; Stephanie L. Bandy and Michael R. Jenks, Walton Lantaff Schroeder & Carson.

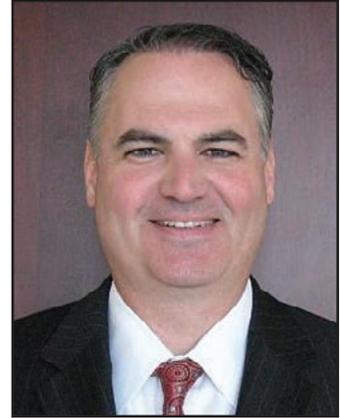
Race supports 9/11 responders, kin



Running for a Cause: Walton Lantaff was a sponsor and four WLSC athletes ran in the Steven Siller Tunnels to Towers 5k race on Sept. 10th in Fort Lauderdale. Pictured are Jonathan Wickham, Douglas Cohen, Kelly Corcoran and Kelly Vogt. The event honors the courage and dedication of first responders, our military men and women and their families and benefits the Steven Siller Foundation. More at <http://tunneltotowersrun.org>.

Fall 2011

WALTON LANTAFF WELCOMES THE FOLLOWING NEW ASSOCIATES



Shawn Devendorf

Primarily represents insurance companies in matters involving insurance coverage disputes, premises liability, and medical malpractice



Jorge Maza

University of Florida J.D., 2011, works primarily on first-party property cases



Jennifer L. Hogue

Currently focuses on first-party property insurance defense

We're always mindful of the thanks we owe our clients and community. From our family to yours, please enjoy an abundant Thanksgiving and happy holiday season.



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