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WORKERS' COMPENSATION

## Landmark Florida Supreme Court Ruling Overturns Attorney Fee-Limits Statute



C.C. photo by Bruin79 via Wikimedia Commons

The Florida Supreme Court recently ruled that the attorney fee provision in Florida's workers' compensation law was unconstitutional because it was not based on a reasonable fee.

In *Castellanos v. Next Door*, the court ruled 5-2 on April 28 that the 2009 statutory amendment to the fee provision, which had removed the term "reasonable," from the statute and which required attorney fee awards to be based solely on a sliding scale of the amount of benefits obtained, violated the due process guarantees of the Florida and Federal Constitutions.



Beth J. Leahy, Esq.

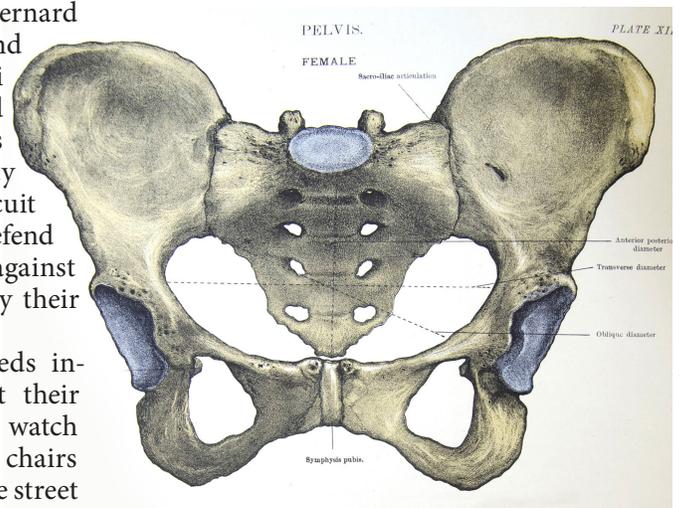
Please see *COMP COMEBACK* on page 3

PINELLAS COUNTY

## Walton Lantaff succeeds in defending home owner from guest's seaside fall claim

Recently, the defense team of Bernard Probst, Linda Muralt and Patricia Sierra, from the Miami and Tampa offices, secured a defense verdict for homeowners insured by Universal Property & Casualty Insurance Company in Pinellas Circuit Court. The firm was assigned to defend the insureds, Mr. and Mrs. Neuman, against claims of personal negligence raised by their former friends, Mr. and Mrs. Russell.

The incident arose when the insureds invited the Russells to have dinner at their Clearwater, Fla., condominium and to watch the Independence Day fireworks from chairs set up near the bay's waterline, across the street from their back door. When the two women walked across the back lawn, towards the street,



C.C. by University of Liverpool

Please see *RUSSELL* on page 2

# Walton Lantaff succeeds in defending home owner from guest's seaside fall claim

RUSSELL, from page 1

they came to a stop at a retaining wall, the top of which was level with the lawn behind the Neumans' unit.

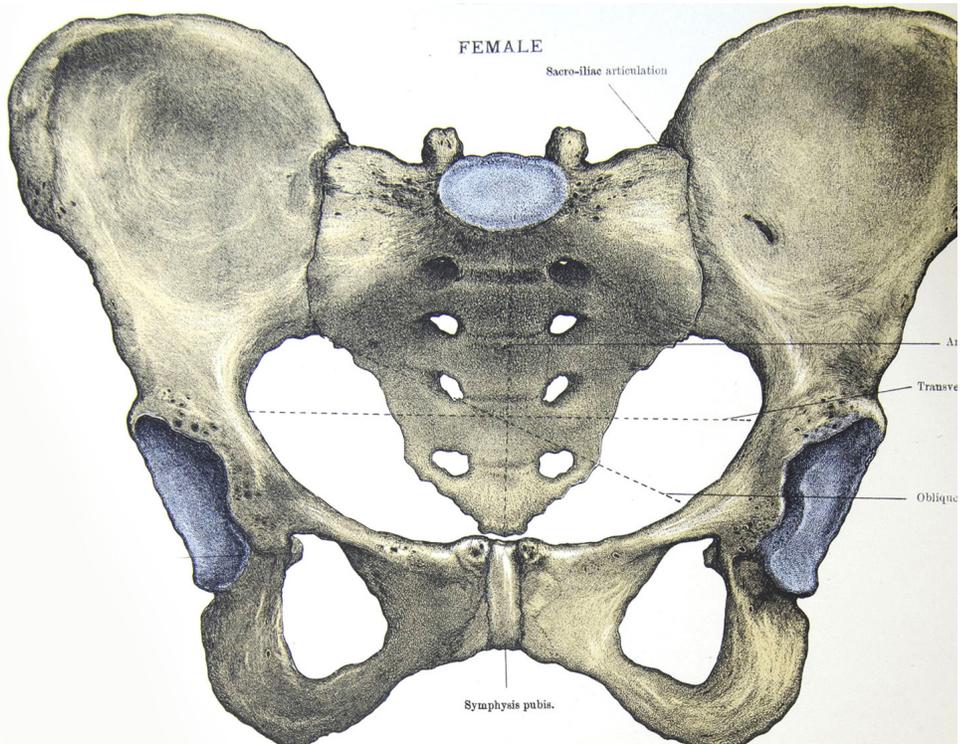
The area in front of the retaining wall was approximately two feet lower and was approximately level with the nearby sidewalk.

On the night in question, Mrs. Russell, the would-be plaintiff, alleged that she was standing on the top of the wall when Mr. Neuman picked her up by her calves without any warning, and lost his balance, dropped her on her back and landed on top of her. Mrs. Russell alleged that he lifted her up at Mrs. Neuman's urging.

In her complaint, Mrs. Russell alleged that she fractured her pelvis and she claimed past and future damages including: bodily injury, pain and suffering, disability and loss of capacity, inconvenience, physical impairment, disfigurement and scarring, mental anguish, loss of or diminution of earnings, aggravation of an existing defect, permanent injury and medical expenses. Mr. Russell raised a consortium claim based on her injuries. The plaintiffs were represented by Nicholas L. Ottaviano, of the law firm Florin Roebig P.A., in Palm Harbor, Florida.

The firm denied the allegations of negligence on behalf of the Neumans and advanced the theory that Mr. Neuman was acting as a Good Samaritan by trying to minimize Mrs. Russell's injuries after she voluntarily stepped off the wall in spite of Mr. Neuman's warning to not do so.

At trial, the jury heard the testimony of all parties to the action, a handful of treating physicians and the orthopedic surgeon who performed a compulsory medical examination for the defense. In addition to the medical testimony regarding her progressive bone loss condition, the jury also heard testimony relating to Mrs. Russell's confused and changing medical histories in relation to the injury; her decision



Bernard Probst, Esq.



Linda Muralt, Esq.



Patricia Sierra, Esq.

to drive across town to another facility rather than seek assistance at the hospital where she worked; and where she was at the time of onset of pain.

In addition to the conflicting patient histories, Mrs. Russell had initially reported and then denied having fallen approximately 10 days prior to the incident that formed the basis of the complaint, even though the earlier fall was reflected in her contemporaneous medical records and provided the first mention of localized pain in the sacrum portion of her pelvis.

As these causation and factual issues were successfully brought to light by Mr. Probst and Mrs. Muralt at trial, at the conclusion of the two-day trial,

the jury took only 20 minutes to deliberate and return a verdict finding that there was no negligence on the part of the firm's clients, Mr. and Mrs. Neuman.

As a result, the Neumans were also not liable for the consortium claim raised by Mr. Russell.

Currently, the firm's motion to tax attorney fees based on a rejected defense proposal for settlement and to tax costs based on the prevailing party statute are pending before the trial court.

*Patricia Sierra, Esq., practices Civil Litigation, Insurance Defense and Real Estate Law in Walton Lantaff's Miami office.*

# Fallout coming from Florida Supreme Court Workers' Comp fee case

*COMP COMEBACK, from page 1*

The court ruled that attorney fee awards are required to be reasonable and, while the sliding scale is the starting point in analysis, a determination of the quantum of a fee award must be based on the factors set out in Florida Bar Rule 4-1.5. That rule requires the judge to consider the time and labor a case required, the complexity of the case, the legal skill required, the fee customarily charged in the locality, the experience and reputation of the lawyer, and the time limitations imposed by the client or circumstances, among other required factors. Where a party can demonstrate that the sliding fee schedule results in an unreasonable fee, the fee award will deviate upwards or downwards from the fee schedule.

Florida's workers' compensation statute includes a provision requiring the employer carrier to pay claimant's attorney fees when the claimant prevails on a petition for medical benefits only, after the employer carrier files a response to petition denying benefits, when the carrier employer denied that an accident occurred for which compensation benefits are payable or in a proceeding to enforce an order or in a modification proceeding.

In *Castellanos*, the Florida Supreme Court stated that the right of a claimant to obtain a reasonable fee when successful in securing benefits is a linchpin to the constitutionality of the worker's compensation law. Without the likelihood of an adequate fee award, the court noted that there is little disincentive for a carrier to deny benefits or raise multiple defenses.

The court noted that in light of the current complexity of the system, it is undeniable that today's workers need access to attorney representation to be assured the quick and efficient delivery of benefits intended by the system, and that navigation of the system after a denial of benefits without an attorney



C.C. photo by Bruin79 via Wikimedia Commons

ney would be an impossibility.

The 2009 statute required fee awards, other than those based on medical-only claims, to be based solely on a sliding statute. Fee awards were limited to a percentage of the benefits secured for the claimant. Awardable fees were limited to 20 percent of the first \$5,000 of benefits secured, 15 percent of the next \$5,000 of benefits secured, 10 percent of the remaining benefits secured to be provided during the first 10 years after the claim is filed and 5 percent of the benefits secured after 10 years.

This statute did not allow the awarding judges the ability to vary their award, even if the resulting fee was too low or too high to be reasonable. The court noted that this statute was unconstitutional because it established a conclusive irrefutable presumption that the formula will always produce an adequate fee in every case and did not allow for a challenge to the fee if it was not reasonable.

The impact of this decision on the quantum of fee awards is potentially illustrated by its own facts.

In *Castellanos*, the value of the awarded benefits was \$822.70. Using the sliding scale, the fee award was limited to \$164.54. This paid the attorney \$1.53 for each of his 107.2 hours. With the application of the now re-

quired analysis and consideration of the required factors, an award in the \$37,000 range is now possible. (The appealed order noted the judge had accepted 107.2 attorney hours as reasonable and necessary, the involved attorney was exceptionally skilled and such practitioners were awarded \$350 to \$400 per hour.)

While the *Castellanos* court noted its decision is not intended to create windfalls to claimant's attorneys, the decision will likely result in higher overall fee awards and an increase in claims. Employer carriers must consider the impact of fee exposure in their decision-making process regarding provision of benefits. The fee statute includes a 30-day window after receipt of a petition to provide a requested benefit without exposure for fees. To avoid fee exposure, employer carriers must be diligent in timely investigation and conscientious in their timely provision of benefits.

*Beth J. Leahy is a senior partner in the Fort Lauderdale office. She can be reached at [bleahy@waltonlantaff.com](mailto:bleahy@waltonlantaff.com).*

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# Florida Supreme Court declines jur

Since this article was published on April 28, 2016, the Florida Supreme Court released the *Castellanos* decision discussed on page one of this newsletter as well as the *Westphal* decision extending temporary total indemnity benefits to those claimant's who fell into the "gap" between the statutory limit of 104 weeks of indemnity and PTD benefits before reaching medical maximum medical improvement. Additionally, the Claimant's attorney in *Stahl* has filed for certiorari review of the Florida Supreme Court's decision. The nation's highest court has not announced whether it will accept the case for review. — Michele E. Ready

The Florida Supreme Court has ruled that it does not have jurisdiction in a case brought by an injured nurse that challenged the constitutionality of the entire Florida workers' compensation system.

In the case of *Stahl v. Hialeah Hospital*, the Court said, "After further consideration and hearing oral arguments in this case, we have determined that we should exercise our discretion and discharge jurisdiction. Accordingly, we dismiss review."



Michele E. Ready, Esq.

On April 6, 2016, Mark Zientz, the attorney for injured worker Daniel Stahl, argued before the court that since the law was first enacted, the legislature has so eroded the available benefits that the law no longer passes constitutional muster.

## Outdated Law

Things have gotten so bad, according to Zientz, that the present law no longer represents the fair exchange intended by the original "grand bargain" in which workers gave up their right to sue in civil court in exchange for guaranteed benefits.



Photo: iStockPhoto

But judging by the questions asked during oral argument by Justices Barbara Pariente, Peggy Quince and James Perry – and to a lesser extent by Justice Fred Lewis – the Supreme Court seemed to be struggling with whether the court should be hearing the case at all. The Court seemed receptive to the arguments made by their former colleague and current attorney for the defendants, Kenneth Bell, who served on the Court from 2003 through 2008.

As the attorney for the employer (Hialeah Hospital) and their insurance company (Sedgewick Claims Management Services), Bell raised a procedural defense highlighting the legal path the *Stahl* case took to get before the Court. Bell argued that the

only route to challenge the entire statute (a "facial" challenge, as opposed to an "as applied" challenge) was to seek a declaratory judgment in circuit court.

In support of his argument, Bell noted that the *Stahl* case was on appeal from a lower administrative judge, and the record for review was only about 20 pages. Bell argued that *Stahl's* challenge could only have been made in circuit court. He also maintained that it would be improper for the Court to rule on the constitutionality of such a significant legislative scheme on the basis of such a minimal record.

In addition, Bell argued that the 2003 amendments to Florida's work-

# Jurisdiction in challenge to WC system



Photo: iStockPhoto

ers' compensation's scheme were enacted in response to an insurance crisis in the state of Florida at a time when premiums were the highest in the country. He said there was no evidence that the legislature had acted arbitrarily, capriciously or without a reasonable basis.

## Diluted System

On behalf of the injured worker, Zientz argued that the exclusivity clause (a provision that prevents injured workers from bringing civil suits against their employers except in very limited situations) is no longer constitutionally permissible because of cumulative reduction in medical and indemnity benefits.

Zientz argued that the system has been so diluted over time that workers were no longer getting a fair deal. Specifically, he said that the injured worker no longer has a right to full medical benefits and he pointed to the requirement that after an injured worker reached maximum medical improvement, he was required to make a \$10.00 co-pay in order to see

a doctor.

He also noted that the system allows for apportionment (or carving out a portion of medical benefits related to preexisting conditions), although he conceded that his case did not involve a preexisting condition. The entire categories of wage loss benefits, he said, had been eliminated over the years.

Zientz' comprehensive argument was dismissed by Bell as being a "kitchen sink" argument.

Nevertheless, several of the justices seemed to be sympathetic to the argument. Justice Pariente stated in her questioning that the inadequacies of the system had been pointed out before — specifically mentioning the changes regarding attorney's fees and "doctors being chosen by the insurance company" — and went on to conclude "it looks like it has become a very meager amount of compensation for an injured worker . . . and it's hard to deny that what's happened over the last 50 years has not been a diminution in workers' compensation benefits."

## Additional Cases

The Stahl case is not the only workers' compensation case currently pending before the Florida Supreme Court at this time. There are two other cases — *Castellanos v. Next Door Co., et. al.*, and *Westphal v. City of St. Petersburg* — that involve constitutional challenges to the workers' compensation law, although Stahl is the only one of the three which presents a challenge to the entire statute. The Florida Supreme Court heard Westphal in June of 2014 and Castellanos in November of that same year, yet no decision has been rendered on either case.

The workers' compensation law was originally enacted in 1935 as part of the "grand bargain" in which injured workers gave up the right to civil lawsuits in exchange for a no fault system where they receive medical care and wage loss benefits with a goal of returning them to work.

## Limits on fee growth

In recent years, the Republican-dominated Legislature has focused on keeping insurance premiums down for businesses, while balancing cost-cutting measures with increased efficiencies and anti-fraud measures. Bell argued that the policy concerns raised by the Stahl case were more appropriately resolved by the Legislature, and not the Court. Four justices asked no questions whatsoever, which could indicate they agree with Bell on this point.

In his rebuttal, Zientz concluded "This is an important issue. This is something that involves tens of thousands of people who are hurt every day, not hurt on the job, but hurt by the system. And this is the court that has to make that decision as to whether or not they continue to get hurt or on whether or not we can stop that."

*Michele Ready is a partner in the firm's Miami office specializing in Workers' Compensation Defense and Medicare issues. Reach her via [mready@waltonlantaff.com](mailto:mready@waltonlantaff.com).*

GET TO KNOW A WALTON LANTAFF LOCATION



# ORLANDO

Senior Partner James Armstrong Esq. leads the team of seasoned attorneys in downtown Orlando. From this office, Walton Lantaff Schroeder & Carson LLP serves all of Central Florida, Jacksonville, Daytona Beach, St. Augustine, Ocala, Gainesville, and the Space Coast.

The office is centrally located at 7680 Universal Blvd., Suite 260 Orlando, FL 32819. Dial 407-425-3250 to reach the office any time or 407-425-3255 to send documents via fax.



**JAMES T. ARMSTRONG, ESQ.**  
Practice Areas: Business Litigation; Insurance Defense; Construction Defense; Civil Litigation; Personal Injury; Maritime/Jones Act; Longshore/Admiralty; Harbor Workers' Compensation Act Defense; Worker's Compensation Defense  
Admitted to Practice: Florida Bar, 1980.  
Education: U. of Miami, J.D., 1980.

Additionally, Mr. Armstrong has a long standing commitment to volunteer work, including being awarded the John Edward Smith Child Advocacy Award in 2010, having volunteered for over 20 years as a Guardian Ad Litem in the children's judicial system/family courts and previously was awarded the *Eleventh Judicial Circuit Court Guardian Ad Litem Pro Bono Attorney Award* in 1987 and in 2002.



**BRITTANY MELENDEZ, ESQ.**  
Practice Areas: Business Litigation; Insurance Defense Litigation; Construction Defense Litigation; Civil Litigation; Workers' Compensation Defense;  
Admitted to Practice: Florida Bar, 2015  
Education: Florida A&M, J.D., 2015.

MICHELE BACHOON of our West Palm Beach office was reappointed recently to the Florida Bar Workers Compensation Rules Advisory Committee. Her appointment is until 2018.

THE FIRM SPONSORED THE TROPHIES for the 2016 RIMS Golf Classic. RIMS is the national risk management society. Michele Bachoon was on the committee for the charity event, with proceeds going to the Safety Council of Palm Beach County.

WORTH NOTING

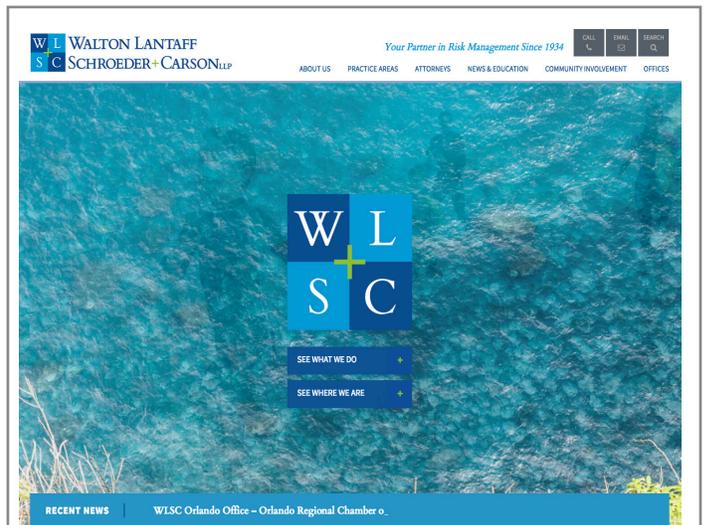


**INSURANCE FRAUD EXPERT SPEAKS:** Jose Pagan, Esq., who joined Walton Lantaff in April, was a featured five-hour speaker at the Florida Department of Insurance Fraud Convention. Pagan focuses on insurance defense and regulatory matters, at both the trial and appellate levels, in Walton Lantaff's Tallahassee office. He's third from left in the photo above.

**THOMAS P. FABRICIO** in the firm's Fort Lauderdale office, was recently inducted as a member and precinct committeeman into the Broward Republican Executive Committee. Fabricio presented a case law update regarding recent Property Damage cases in Florida, for CEU credit, on a webinar to insurance adjusters nationally.



Thomas Fabricio, Esq.



Walton Lantaff Schroeder & Carson LLP

**NEW FIRM WEBSITE:** Waltonlantaff.com, the firm's website, was recently redesigned by Paperstreet Web Design. It's now more mobile-friendly and browsing news articles is easier. And, reaching out to our attorneys is easier than ever.

# The date has been set for our annual seminar in Fort Lauderdale for our insurance adjuster/risk manager clients and friends:

Friday, September 9, 2016

Fort Lauderdale Marriott North, 6650 North Andrews Ave., Fort Lauderdale, FL 33309

**To attend the required five-hour update, select one of two options:**

## Seminar Option 1A LIABILITY

*Required by the Division for all Adjusters every 2 years*

- 9 a.m.–3 p.m.: Five-hour Law and Ethics Update – Liability (5 CEUs)
- To receive credit, you must attend the entire 5-hour session from 9 a.m.–3 p.m.
- No partial credit can be given for the five-hour course

## Seminar Option 1B WORKERS' COMPENSATION

*Required by the Division for all Adjusters every 2 years*

- 9 a.m.–3 p.m.: Five-hour Law and Ethics Update – Workers' Compensation (5 CEUs)
- To receive credit, you must attend the entire five-hour session from 9 a.m.–3 p.m.
- No partial credit can be given for the five-hour course.

**If you already attended the 5-Hour Update, select classes from the two options below. Attend all or some in one seminar or some in each seminar:**

## Seminar Option 2A

*For those who have already attended the required five-hour Liability Update*

### 9 a.m.–3 p.m.: Liability Law Seminar

- 9 a.m.–10 a.m. What's New: Industry Trends Update on MSA, Social Media, and increased concern over drug use impacting the handling of claims
- 10 a.m.–11 a.m. First-Party Property Claims Statutes and Case Law Update
- 11 a.m.–Noon Coverage Traps: How to recognize, avoid, and deal with them
- Noon–1 p.m. Complimentary Lunch
- 1 p.m.–2 p.m. Handling Third-Party Claims: Recent Case Law and Jury Instruction Changes impacting the adjusting of third-party liability claims
- 2 p.m.–3 p.m. Claims Handling

## Seminar Option 2B

*For those who have already attended the required five-hour Workers' Compensation Update*

### 9 a.m.–3 p.m.: Workers' Compensation Seminar

- 9 a.m.–10 a.m. What's New: Industry Trends Update on MSA, Social Media, and increased concern over drug use impacting the handling of claims
- 10 a.m.–Noon A review of Chapter 440 and its 2015 and 2016 Workers' Compensation Case Law
- Noon–1 p.m. Complimentary Lunch
- 1 p.m.–2 p.m. Handling Your Cases in Light of the Florida Supreme Court Imposed Changes to the Florida Workers' Compensation Law
- 2 p.m.–3 p.m. Claims Handling

**To RSVP, please contact Robert Freschlin at [rfreschlin@waltonlantaff.com](mailto:rfreschlin@waltonlantaff.com) or call (407) 425-3250.**

- To receive credit(s) for a class, you must be present from the start of the class to the finish. No partial credit(s) can be given.
- If you arrive late for a class and/or after the start of the class, no credit(s) can be given.
- CEU credits established only for Florida Insurance Adjusters through the Florida Department of Financial Services. Continuing Education credits in any other fields or professions are not applicable.
- This course has been designated by the Florida Department of Financial Services as INTERMEDIATE LEVEL for Insurance Adjusters only. It is intended for the student who has a basic knowledge with the subject matter or who has a limited experience with the subject matter.



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## Going to the 71st Workers' Compensation Educational Conference in Orlando?

*August 21 - 24, 2016  
The Orlando World Center Marriott*

### **Meet Our Attorneys**

**MONDAY, 11:30am**  
Luncheon @ San Antonio Room.

**TUESDAY, 11:30am**  
Luncheon @ San Antonio Room.

*Note: Seating is limited.*