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## PERSONAL INJURY LIABILITY DEFENSE

## WLSC Slaloms Through Excuses in Upholding Waiver Signed By Motorcyclist

### *Novel Contract of Adhesion Argument Defeated*

Partners Richard Rosenblum and James Armstrong recently won a Motion for Final Summary Judgment in a serious personal injury liability case. The plaintiff was attending a motorcycle training class to obtain certification so she could obtain a State of Florida motorcycle endorsement.

A motorcycle endorsement is now required in the State of Florida to legally operate a motorcycle.

The plaintiff signed a Waiver of Liability form, attended two days of classwork and was then practicing with a motorcycle in the field when she ran into a nearby pole, causing severe facial fractures and other injuries.

Florida disfavors waivers in general, but will enforce them if the waivers are reasonable and the language used in the document is clear, from a layman's perspective, as to the rights being relinquished. The waiver employed by the motorcycle training school was clearly written

*Please see MOTORCYCLE on page 3*



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## PERSONAL INJURY LIABILITY DEFENSE

## Client Recovers Money After WLSC Partner Muralt Wins Complex Attorney Fee Motion



Linda Muralt, Esq.

Recently, Linda Muralt, a partner at our Tampa office, successfully argued a complex attorney fee motion before Judge John Schaefer, of the Sixth Judicial Circuit in and for Pinellas County, Florida.

The attorney fee entitlement arose in relation to a defense verdict in *Russell v. Neuman*, a personal negligence case in which the Plaintiff Wife

claimed she was injured by the negligence of the Defendant Husband, in conjunction with the negligent instruction to the Defendant Husband by his Defendant Wife. The Plaintiff Husband raised a consortium claim due to the loss of his wife's companionship after the incident.

*Please see FEE on page 3*

## Fourth DCA Affirms Dismissal of Claims for Discovery Violations

Partners Deborah FitzGerald and Kelly Vogt of Walton Lantaff's Fort Lauderdale office obtained an affirmation of a Palm Beach Circuit trial court's dismissal of claims against a Lawyer Insured due to repeated discovery violations.

They successfully argued at the trial level that the opposing party repeatedly ignored discovery requests and court orders during the litigation, requiring the trial court to apply the

*Kozel* factors and dismiss the claims as no lesser sanction was appropriate.

Following an evidentiary hearing, the trial court agreed and dismissed the claims. An appeal was taken and the Fourth District affirmed in a per curium opinion.

Ms. FitzGerald and Ms. Vogt defend professionals throughout the State of Florida, including lawyers, accountants, realtors, and appraisers.

— *Deborah FitzGerald, Senior Partner*

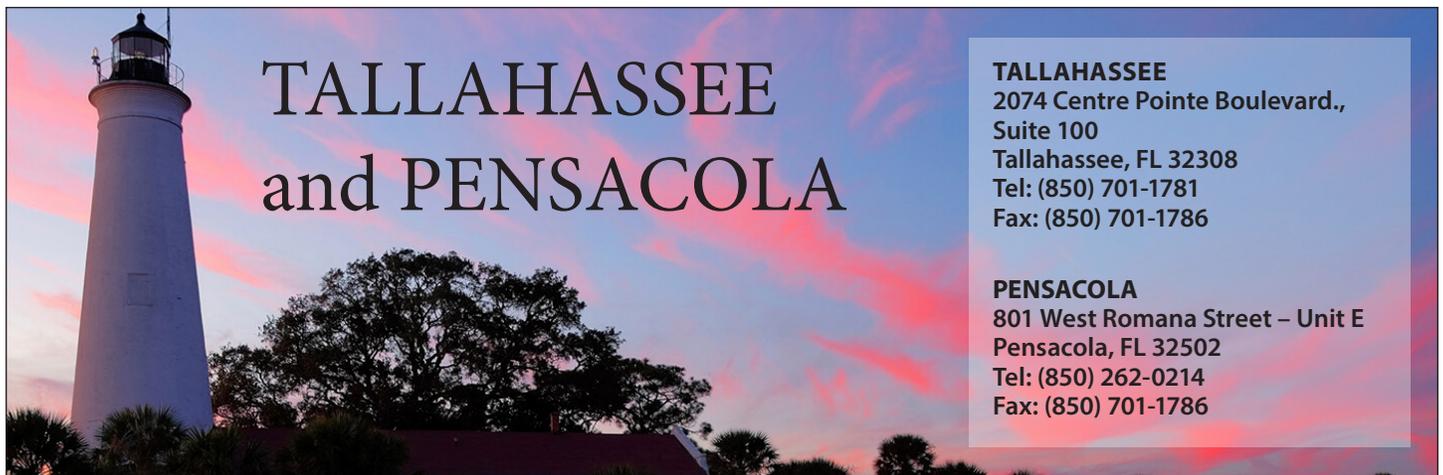


Deborah Poore FitzGerald, Esq.



Kelly M. Vogt, Esq.

### GET TO KNOW A WALTON LANTAFF LOCATION



## TALLAHASSEE and PENSACOLA

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The Tallahassee Office of Walton Lantaff is centrally located to service clients' needs throughout the Florida Panhandle, from Pensacola to Jacksonville and south to the Ocala area. The office is staffed to assist clients in all aspects of Workers' Compensation Defense, Insurance Defense (both first and third party claims), as well as additional specialty areas such as coverage and insurance regulatory issues. The Tallahassee Office also maintains an adjunct satellite location in Pensacola to meet our clients' needs.

**SCOTT V. BERGLUND, ESQ.**  
*sberglund@waltonlantaff.com*

Scott V. Berglund is a Partner in the firm's Tallahassee and Pensacola offices.

In 2004 he joined the Walton Lantaff team and opened its Tallahassee office in 2005. Since 1985 his practice



Scott Berglund, Esq.



Jose Pagan, Esq.

has focused primarily on Workers' Compensation Insurance Defense.

He represents a wide variety of clients including self-insured government agencies (including Cities, Counties, School Boards, and the State of Florida), self-insured funds, self-insured employers, and commercial carriers.

Berglund's extensive litigation experience also covers a spectrum of Civil Litigation experience. Berglund

has handled more than 50 appellate matters and has numerous published opinions.

**JOSE PAGAN, ESQ.**  
*jpagan@waltonlantaff.com*

Jose Pagan is a Partner in the firm's Tallahassee and Pensacola offices. He is an AV™ rated attorney with over 15 years handling both first-party and third-party claims, and over 25 years experience in the insurance industry.

Before joining Walton Lantaff, Pagan worked as in-house counsel for a Florida-based commercial property and casualty insurer, and previously worked as an Insurance Agent, an Insurance Specialist and Investigator for the Florida Department of Insurance as well. Pagan's practice focuses on all areas of insurance defense and regulatory matters, at both the trial and appellate levels.

## Student's Waiver Before Injury on Motorcycle Is Found Valid

*MOTORCYCLE, from page 1*

and contained language warning that personal injury or death could result in the training class and the student was waiving any right to sue for injuries.

In typical fashion, plaintiff argued the Waiver did not apply in this case because of gross negligence by the class instructor and a defective motorcycle provided to the plaintiff. Evidence of gross negligence can void a Waiver under certain circumstances.

While Partners Richard Rosenblum and James Armstrong have routinely won dismissals on these cases, the plaintiff's attorney, here, also threw in a new wrinkle in this case.

His novel argument was that since the State of Florida requires a motorcycle endorsement in order to ride a motorcycle, and a motorcycle class certification was required to get the State endorsement, plaintiff was essentially forced to sign the Waiver so she would ultimately have the right to operate a motorcycle.

Plaintiff argued the Waiver was, in



essence, an adhesion contract and the motorcycle training school, due to the State requirement, had unequal bargaining power which compelled the plaintiff to sign the Waiver. The defense countered by attacking plaintiff's argument, specifically all of the elements which are required to find



Richard G.  
Rosenblum, Esq.

James Armstrong,  
Esq.

that a contract is one of adhesion were not present, that the Waiver excluded claims for gross negligence and for defective equipment.

The Court entered a short but well worded Order granting the Summary Judgment and specifically denying plaintiff's arguments that attempted to circumvent the Waiver.

The Court also felt the attempt to allege gross negligence, as a secondary method of trying to void the Waiver, was also inadequate. The Order will be of use as persuasive opinion in future cases.

— *Richard G. Rosenblum, Managing Partner*

### PERSONAL LIABILITY

## Tampa Partner Muralt Wins Complex Attorney Fee Motion, Recovers Sum for Client Universal Property

*FEE, from page 1*

Bernard Probst, of the Miami office, and Linda Muralt defended the action at trial. After the court entered a judgment which reflected the jury verdict finding no negligence on behalf of either Defendant, the defense filed a motion seeking to recover attorney's fees pursuant to the proposal for settlement statute, section 768.79, F.S., which is one of the non-contractual means to shift litigation expenses in the American legal system.

Because such fee-shifting statutes are contrary to historical common law concepts, the statutory requirements and the offers, themselves, are scru-

tinized carefully for statutory compliance and allegations of ambiguity before a court will grant entitlement to fees.

In addition to these standard issues on attorney fees based on a proposal for settlement, Muralt also argued issues raised by the Plaintiff Husband due to the untimely death of the Plaintiff Wife a few months after the judgment was entered.

While some Florida case law provides that apportionment of attorney fees is proper when an action includes multiple parties, Muralt successfully argued that the Plaintiff Husband's consortium claim would have required that he prove each element of

his wife's claim even if the husband's claim had been litigated alone.

Therefore, from a defense perspective all of the attorney's fees incurred by the defense since the date the proposal was served were recoverable.

The court agreed with Muralt on all matters and granted the defense's motion, awarding the Defendants' insurer, Universal Property & Casualty Insurance Company \$54,064.50 in attorney's fees and entitlement to recover all litigation costs under the prevailing party statute, section 57.041, Florida Statutes.

The court case is number 12-013666-CI-20 in Pinellas County Circuit Court. — *Linda Muralt, Partner*

# Investigation by Walton Lantaff Creates Doubt About Signature, Rolls Back Property Claims

On February 8, 2017, Ian Ronderos, Esq., and Melissa V. Jordon, Esq., obtained Final Summary Judgment against the Plaintiff Ronetta Forde in the case of *Ronetta F. Forde v. Universal Property & Casualty Insurance Company*. The subject case addressed a first-party insurance dispute regarding a broken drain line.

During the course of the claim, the Plaintiff's non-party husband, Jagdesh Paul, submitted three suspicious receipts for additional living expenses (ALE). These receipts were allegedly for \$1,550.00 per month for June, July, and August of 2017. Mr. Paul testified under oath that these receipts were from his friend and landlord Roxroy Nichols. He further testified that the signature 'R. Nichols' on the receipts was the signature of Mr. Nichols.

Walton Lantaff contacted Mr. Nichols, who confirmed that he made no such receipts and that the signatures on the receipts were not made by him. Walton Lantaff deposed Mr. Nichols, who confirmed under oath that the receipts and signatures were not his.

Based on these revelations, Walton Lantaff moved to amend Universal's Affirmative Defenses to add fraud as a defense. At this point, the Plaintiff's counsel began to panic and claimed that they had never made a claim for ALE. The Court initially denied the Motion based on this representation, but then reversed its ruling on a Motion for Reconsideration, in light of direct proof of Plaintiff's counsel having stretched the facts regarding whether an ALE claim was made.

With Universal's affirmative fraud defense in place, Mr. Ronderos filed Universal's Motion for Final Summary Judgment on January 6, 2017. Although not a named insured under the policy, the subject policy's terms defined Mr. Paul as an 'insured' under the policy. Mr. Ronderos successfully argued that Universal's policy had drafted around the common law innocent co-insured doctrine, which prevents the fraud on



Ian Ronderos, Esq.



Melissa Jordon, Esq.

one insured from being attributed to another insured.

Mr. Ronderos argued the matter before Judge Cueto in Miami-Dade County, Fla. in January.

During the hearing, Mr. Ronderos presented the Court with Mr. Paul's self-damning testimony and the forged receipts that he submitted. Plaintiff's counsel admitted that Mr. Paul had

committed fraud, but argued that it was not material as he had not made a claim for ALE (which he actually had).

Rejecting Plaintiff's arguments, the Court requested further briefing.

Mr. Ronderos and Ms. Jordon crafted a well-reasoned memorandum showing that the weight of Florida law demanded summary judgment be granted, as it had been granted in a prior case with nearly identical facts.

Having read the memorandum, the Court granted final summary judgment against the Plaintiff in favor of Universal. Bernard Probst, Esq., and Lance Stephan, Esq., also provided invaluable assistance on this case.

Mr. Ronderos also obtained fee entitlement for Universal, as Walton Lantaff had previously filed a Proposal for Settlement which had expired.

— Ian Ronderos, Partner

## Sanctions Against Aggressive Claimant's Attorney Include Costs for New Deposition

The Ronderos and Jordon team (Junior Partner and Associate respectively in the Firm's Miami office) recently prevailed on a motion for sanctions in Vero Beach, Florida for improper conduct by plaintiff's counsel at the Firm's deposition of the plaintiff.

Counsel continuously attempted to distract and de-rail Ms. Jordon's line of questioning by making inappropriate speaking objections which Ms. Jordon repeatedly pointed out were inappropriate on the record and reminded him that it was a discovery deposition and her opportunity to ask questions was being impaired.

At one point, counsel went so far as to assert that the defense position was "silly."

At the hearing, Mr. Ronderos adroitly laid out the numerous and specific instances of counsel's repeat conduct that mirrored behavior high-

ly discouraged and prohibited by the Rules of Professional Conduct of The Florida Bar.

Relying on the argument and examples presented by Mr. Ronderos and the Court's review of the guidelines for conduct issued by the Center for Professionalism of The Florida Bar, the judge found that counsel's conduct was in violation of the rules.

In granting the Firm's motion for sanctions, the Court ordered that the plaintiff resubmit to deposition allowing the Firm a second opportunity to depose the plaintiff regarding issues where counsel inappropriately interjected.

Finally, the judge ordered monetary sanctions that counsel bear the costs of the re-deposition as well as the reasonable costs and attorney's fees for the Firm having to bring the subject motion.

— Melissa Jordon, Associate

## Three Walton Lantaff Attorneys Recognized as Rising Stars in Miami by Super Lawyers

Partners Douglas Cohen, Sara Sandler and Joseph Suarez have been named to the Super Lawyers 2017 Rising Stars list. Please join us in congratulating them.



Douglas M. Cohen, Esq.



Sara M. Sandler, Esq.



Joseph A. Suarez, Esq.

## Legal Guide Recognizes WLSC Partner Serving Broward County

DOUGLAS COHEN of the Fort Lauderdale Office was selected as a 2017 Top Up and Comer in the area of Insurance Litigation, by the South Florida Legal Guide which recognizes the next generation of leaders in the South Florida legal community nominated by their peers.

Summer 2017

MEDICARE

# Federal Judge Declares Medicare's Conditional Payment Recovery Practice 'Unlawful'

Last month, a federal United States District Court Judge presided over a legal challenge to the Center for Medicare and Medicaid Services' (CMS) conditional payment collection practices that was brought by the California Insurance Guarantee Association (CIGA). *Cal. Ins. Guar. Ass'n v. Price* 2017 U.S. Dist. LEXIS 67589 CIGA is the default insurer for dissolved carriers. As such, CIGA was willing to challenge CMS' practice of insisting upon reimbursement for any line-item payment that included a diagnosis code for a covered injury, even if the treatment/service was rendered for multiple unrelated diagnosis codes.

Essentially, CIGA complained that CMS was refusing to break down their conditional payment recovery requests beyond the individual billing amounts. CIGA objected to this practice because in some cases the lump sum payments included items or services that were unrelated to the injuries that were covered by insurance policies for which CIGA was now responsible.

The Court issued a "judicial declaration" that CMS' interpretation of 42 U.S.C. §1395y(b)(B)(ii) regarding one "item or service" is not the same thing as one line-item charge on a payment summary form issued by CMS. In effect, if a single line-item includes multiple diagnosis codes, CMS is only entitled to recover from CIGA for those items that are covered by the insurance policy that CIGA assumed. The Court declined CIGA's invitation for a declaratory injunction against any future claims for reimbursement, but did clearly state that "CMS's interpretation of the MSP is unlawful with respect to reimbursement of conditional payments." The Court also noted that the Medicare Secondary Payer statute (MSP) now provided for an administrative appeal process that could review any challenges to the conditional



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payment recovery process.

**TAKE-AWAY:** When responding to CMS's conditional payment reimbursement requests, carefully review the payment summary forms, and review the diagnosis codes that are included for each line-item payment.

If some or all of the diagnosis codes are not related to your covered injury, make sure that your request either the unrelated items to be redacted entirely, or if the treatment or service is only partially related to your injury, request a reasonable and corresponding reduction in CMS's reimbursement request. Keep in mind that the MSP now provides an administrative appeals process to challenge any claims for reimbursement that you believe are unlawful.

— Michele Ready, Partner

AWARDS AND HONORS

## Fleetest 15 From Walton Lantaff Join Corporate Run in Downtown Miami



Photo by J.R. Rivera

Walton Lantaff's South Florida offices supported the 33rd Mercedes-Benz Corporate Run in Miami. The event drew a record 28,104 runners from 846 companies.

## Miami Associate Melissa V. Jordon to Join Board of Dade County Bar

MELISSA V. JORDON, associate in the Miami office of the Firm, has been elected to the Board of Directors of the Dade County Bar Association. As a member of the Board, Melissa will serve a three-year term and be one of 35 voting members (spread out among various age groups); the Board is engaged in policy making for the DCBA and its membership (over 10,000 lawyers and non-lawyer affiliates) and is an integral part of establishing educational and civic outreach programs that benefit the DCBA and the citizens of Miami-Dade County.



Melissa Jordon, Esq.

The Dade County Bar Association was founded in 1916 and incorporated in 1920; it is the largest voluntary Bar association in Florida. Since its inception, the DCBA has been dedicated to serving its members and the residents of Miami-Dade County by providing programs which enhance attorney professionalism, establishment of the Dade County Legal Aid Society, and sponsoring informative legal aid clinics to educate the citizenry of its rights and obligations under the law. The Firm has long supported the DCBA, both financially and through service of Firm members in various elective and appointed positions within the DCBA.

The Firm congratulates Melissa and is proud of her commitment to service to the community.

## Attorney Jerome Jackson Featured

Fort Lauderdale associate JEROME JACKSON was featured in the April edition of The Florida Bar News, in recognition for speaking to the student-athletes of Athlete University. Athlete University is a sports performance organization with a high school development program for athletes (mainly football) to participate in off-season speed, agility, and strength training, with a mentoring component to prepare for the unique challenges of being a collegiate student-athlete that are not often discussed. Former Stanford teammate and Athlete University co-founder, Tim Sims, asked Jerome to speak to the program participants regarding the mindset and preparation necessary for a collegiate student-athlete to transition to law school. This will be an ongoing engagement between Jerome and Athlete University.



Jerome Jackson, Esq.

## Orlando: Continuing Ed Opportunity

Walton Lantaff Schroeder & Carson LLP will offer a complimentary Continuing Education Units (CEU) event for the insurance and legal community near Orlando on October 6th, 2017, at the Hilton Orlando Altamonte Springs, 350 S. Northlake Blvd., Altamonte Springs.

Please visit [www.waltonlantaff.com](http://www.waltonlantaff.com) as the date approaches to register and for more information.

## Florida Constitution Review Group Taps Veteran Walton Lantaff Partner

ROBERT J. STRUNIN, left, senior partner in the Firm's Miami office and a long-time member of the Executive Council of the Workers' Compensation Section of The Florida Bar, was appointed by the Council to serve as its liaison to the Florida Constitutional Revision Commission, an appointed body which meets every twenty years to review Florida's Constitution and suggest amendments to it.



Robert J. Strunin, Esq.

Robert was also re-elected to the Executive Council last August and will begin serving his fifth term on the Council commencing August 2017.

Robert was also an invited speaker at a recent meeting of The Florida Bar's Young Leadership Council to discuss the practice of workers' compensation and talk about the function of the Executive Council of the Workers' Compensation Section; about 40 young lawyers, all identified as future Bar leaders, were in attendance.



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2017 HURRICANE SEASON IS HERE

## *Effective Communication is Key When Handling Claims in the Aftermath of a Hurricane*

### Communications Tip: Set Expectations, Avoid Empty Promises

After the 2016 hurricane season, property adjusters were required to handle more claims with greater efficiency. In order to meet that challenge, adjusters need to simultaneously focus on their professional obligations while successfully finalizing an increased number of claims.

Handling property claims is taxing enough without the additional volume presented by hurricane losses. Nevertheless, we must comply with certain standards required by both company guidelines and general insurance industry regulations.

During this post-hurricane crunch, remember that claimants may not appreciate the adjuster's workload. The influx of hundreds or even thousands of new claims, requires a refocusing of effort in a more stressful environment. Effective communication is key to successfully managing this situation.

### Poor Communication

In my experience, communication problems typically arise due to issues between the insureds or their representatives and their adjusters. In some instances, the customers' unrealistic expectations may be the issue. In other cases, the customers' ignorance of what may be reasonably required of them is the issue. In either case, the adjuster should educate the customer so that they understand and can assist with bringing the claim to a conclusion.

In our more connected environment, people expect expedited (sometimes instantaneous) responses. Because some claims or issues do not

lend themselves to such immediate resolution, we must patiently educate our customers as to the process. Education involves explaining the goals and reasonable timetables, not ignoring or postponing action. This will result in less stress for both adjusters and insureds, as well as better efficiency in claims resolution.

### Listen to the Customer

Remember that our industry is focused on people. When damage occurs, people may become distraught, angry or confused. As a result, there are varied responses: some people cry, some people yell, some people get quiet, and some just do not understand. Discerning the customer's issue rather than focusing on their emotions will help identify and resolve any problems (and the claim).

Remember that nobody likes to be put off, especially when their home has been damaged. While you may not be able to handle every phone call, e-mail, letter or request at the very instant received, you do have to respond within a reasonable time.

You must learn to prioritize — set realistic deadlines for each case and communicate them to the insured timely. Do not promise something that cannot realistically be accomplished, as that will lead to frustration. At the same time, follow through on those deadlines and goals you have set.

We should maintain open and regular communication with the insured, so even if we do not have "the" answer, the insured knows that we are working on the issue and when we expect

to conclude the matter. This will go a long way toward managing expectations and lowering frustration levels.

Complications can be anticipated, and honest communication will generally help. For example, obtaining the additional information from outside sources can be a challenge. If this happens, communicating with the insured can often lead them to provide assistance in expediting the receipt of information from third parties and can also help to identify any problems.

Finally, if you feel overwhelmed or are facing an issue you haven't encountered before, do not be afraid to ask for help. Even very experienced adjusters encounter new, difficult or strange issues that they are not equipped to handle. Recognizing that we need help is critical; the sooner assistance is sought the less time it will take to resolve the issue.

Also if you have a problem prioritizing tasks, ask your managers for help. While managers will be similarly overtaxed, knowing that your cases will be handled expeditiously should more than make up for time spent assisting you.

Effective communication with both internal and external parties leads to better management and resolution of increased demands required in a challenging claims environment following the aftermath of a hurricane.

— *WLSC Partner Joe Pagan focuses his practice primarily in the areas of insurance defense and regulatory matters, at both the trial and appellate levels.*

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## Going to the 72nd Workers' Compensation Educational Conference in Orlando?

*August 6-9, 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.*

