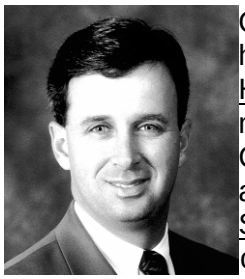
LUKS SANTANIELLO & PEREZ PETRILLO GOLD

LEGAL UPDATE

VOLUME 7, ISSUE 2
APRIL — JUNE 2008

Workers' Compensation

The Status of the Constitutional Challenge to F.S. 440.34 and the Potential for a Revision in 2008 *by David S. Gold, WC Managing Partner.*



David Gold, Partner

On April 9, 2008, the Florida Supreme Court is scheduled to hear oral arguments in the matter of Emma Murray v. Mariner Health/ACE USA, case number SC07-244. This may be the most anticipated case in the history of Florida Workers' Compensation. In this case, the Supreme Court will finally address whether the First DCA's holdings in Wood v. Four Seasons and Lundy v. Florida Rock, which upheld the constitutionality of the legislature's elimination of hourly fees, are correct. It is common knowledge that the 2003 amendments to F.S. 440.34 have resulted in a dramatic effect on the practice of Workers' Compensation as the number of litigated claims has plunged in the last few years. As a result, this is a case that is being watched closely by all who are involved in the Florida Workers' Compensation system.

In the Murray case, the Petitioner is seeking to argue that the fee awarded by the Judge of Compensation Claims in the underlying case was manifestly unfair in that it resulted in a fee of only $8.11 per hour for the prevailing attorney. The Petition cites a long line of cases in Florida in which such a result was found to be manifestly unfair. They also argue that such a low fee will prevent claimants from obtaining adequate representation in their claims. It is for these reasons that they argue the statute is unconstitutional. In addition**,** the Petitioner argues that the statutory construction of 440.34 actually allows for an hourly fee under certain circumstances and to find otherwise violated the rules of statutory construction.

Since this is likely to be the final legal challenge to the 2003 amendment to F.S. 440.34, many outside parties with an interest in the outcome of the case have filed amicus briefs with the Court. At last count, thirteen different amicus briefs had been filed by a variety of groups including several insurance carriers, the Florida Professional Firefighters, the Florida Police Benevolent Association and even a pro se claimant. Possibly the most interesting amicus brief is from Voices, Inc. because it was written by former First District Judge Richard Ervin III. Judge Ervin was a part of the panel who heard Lundy v. Florida Rock and in a separate opinion stated that the 2003 amendments are unconstitutional but that the panel was bound by the opinion previously issued by the First DCA in Wood.

If the Supreme Court were to reverse the First DCA and find that hourly fees are awardable, either because the revisions are unconstitutional or due to statutory construction, the effect on the Workers' Compensation system would be profound. It is likely that there will be a sharp increase in the number of litigated cases as attorneys seek to cash in while they can. Coincidently, the oral arguments in

Read more . . . Page 2

In This Issue

OFFICE LOCATIONS

TALLAHASSEE
T: 850.385.9901
F: 850.907.2087

PALM BEACH
T: 561.893.9088
F: 561.893.9048

FORT LAUDERDALE
T: 954.761.9900
F: 954.761.9940

MIAMI
T: 305.377.8900
F: 305.377.8901

ORLANDO
T: 407.540.9170
F: 407.540.9171

TAMPA
T: 813.226.0081
F: 813.226.0082

JACKSONVILLE
T: 904.791.9191
F: 904.791.9196

CLIENT RELATIONS
T: 954.847.2959

Edited by:
David S. Gold, Esq.
Daniel J. Santaniello, Esq.

Liability

Florida Standard Jury Instruction 5.1(b) on Concurring Cause Required when Plaintiff Alleges Aggravation of Pre-existing Condition by William J. Peterfriend, Esq.

Bill Peterfriend

In NAVARETE v. KERN 33 Fl. L. Weekly D737, Fl.4th DCA, 2008), the Fourth Circuit addressed whether Florida Standard Jury Instruction 5.1(b) is required when a Plaintiff alleges a motor vehicle accident resulted in an aggravation of a pre-existing condition. Plaintiff, Lisa Kern, filed a lawsuit alleging personal injuries resulting from a motor vehicle accident with Martin Navarette, Defendant. Defendant admitted liability. Plaintiff Kern tried the case on the theory that the motor vehicle accident aggravated a pre-existing condition. Plaintiff's expert testified that she suffered from a "pre-existing abnormal disc." The defense, in turn, argued degenerative changes in Plaintiff's neck.

Plaintiff's counsel requested the Court charge the jury with Florida Standard Jury Instruction 5.1(b) on concurring cause. The Court, in turn, declined and charged the jury with 6.2(b), the damage instruction on aggravation of an existing disease or physical defect.

The jury awarded $11,238 in past medical bills and lost wages, but found Plaintiff did not sustain a permanent injury. The Court then granted Plaintiff's Motion for New Trial, ruling it was error not to give Instruction 5.1(b). The 4th DCA has held that Florida Standard Jury Instruction 5.1(b) is "required where the defendant's negligence acts in combination with plaintiff's physical conditions to produce resulting injury." Marinelli v. Grace, 698 So. 2d 833 (Fla. 4th DCA 1992); Dutcher v. Allstate Ins. Co., 655 So. 2d 1217 (Fla. 4th DCA 1995).

In Marinelli, the Court rejected the argument that giving instruction 6.2(b) on aggravation made up for failure to give the concurring cause instruction. The Court wrote the "instruction on assessing damages, standing alone, is patently insufficient protection against the risk of confusion arising by a failure to give the concurring cause instruction." 608 So. 2d at 834. Without the concurring cause instruction, "the jury could have been under the erroneous impression the required permanent injury had resulted solely from another accident." Dutcher, 655 So.2d at 1219.

Workers' Compensation continued

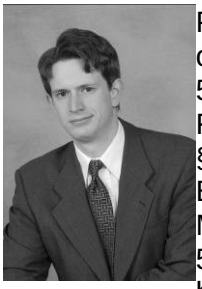
Murray are scheduled for the day after April 8, 2008, when the legislature is scheduled to end its regular session. This may be a signal from the Supreme Court to the legislature to fix the matter on their own before the court fixes it for them. Indeed, on March 10, 2008, Senate Bill 2548 was introduced and among several proposed changes, is a revision to F.S. 440.34 to allow an award of an attorney's fee that is based, in part, on the hours expended in the prosecution of the claim. If this bill is passed it would serve to limit, either way, the effect of any opinion issued in Murray to the period of October 1, 2003 to September 30, 2008 and thus help stabilize the system and provide a degree of certainly regarding how claims that occurred after October 1, 2008 will be litigated.

Regardless of how the Supreme Court rules in Murray, it appears that changes to F.S. 440.34 may be in store for the future. If you are interested in reading the briefs filed with the Supreme Court in Murray they are available on line at http://www.floridasupremecourt.org/clerk/briefs/2007/201-400/index.shtml.

A copy of SB2548 is available at http://www.flsenate.gov/cgi-bin/view_page.pl?Tab=session&Submenu=1&FT=D&File=sb2548.html&Directory=session/2008/Senate/bills/billtext/html/.

Liability continued

HB589 Seeks to Curtail Actions Brought by Insureds Against Insurers by Daniel B. Reinfeld, Esq.


Daniel Reinfeld

Pending before Florida's House of Representatives is House Bill 589, which seeks to amend Florida's Civil Remedies Statute, §624.255. First Reading of the Bill took place in Committee on March 4th of this year. House Bill 589 seeks to curtail actions brought by insureds against insurers and specifies a duty to cooperate with insurers in asserting demands for settlement.

Subsections (1), (3), and (8) of section 624.155, Florida Statutes, are amended, and subsections (10), (11), (12), and (13) are added.

The proposed bill aims to provide insurers a defenses for claims made under §624.255 if the insured (a) failed to cooperate fully in facilitating settlement; (b) imposed time limits or conditions on settlement without demonstrating valid reasons that such conditions were reasonable, necessary, and unrelated to the possibility of obtaining damages under the section; or (c) lacked authority to make the demand or accept the amount demanded in full settlement of all claims, including liens, arising from the occurrence.

The proposed bill also revises time periods relating to notice requirements; provides for preemption of all other remedies and causes of action for extra-contractual damages for failure to settle under an insurance contract; provides for effect of judgments; provides a clear and convincing evidence standard for actions against insurers for unreasonable refusal to settle; limits insurer liability for failure to pay policy limits; authorizes parties to request court orders relating to unnecessary delay; provides requirements for amending witness lists; limits admissibility of evidence; provides considerations for triers of fact in specified actions; and provides construction relating to assigning causes of action.

There has been no further action taken by the legislature subsequent to the March 4th reading. As of this date, the House has yet to issue any interim project report or evaluate the advantages and disadvantages of the proposed amendments and additions. We will continue to monitor the emerging developments of this Bill which undoubtedly will be of great interest to all concerned.

Defense Verdicts

Trip & Fall. Schwartz v. Pena (Broward County). Daniel J. Santaniello, Managing Partner and Carl W. Christy, Associate received a defense verdict in an alleged trip and fall incident where Plaintiff demanded **$97,500**. Plaintiff alleged that while walking her dog on the sidewalk located in front of the Defendants' residence, she tripped and fell on an uneven, elevated sidewalk. Plaintiff alleged that Defendants breached their duties owed to the Plaintiff by: (1) negligently failing to maintain the sidewalk in a reasonably safe condition, (2) negligently creating a tripping hazard, (3) negligently failing to inspect the sidewalk, (4) negligently failing to warn Plaintiff of the dangerous and hazardous condition on the sidewalk, (5) negligently planting trees close to the sidewalk causing the trees' root system to lift the sidewalk and (6) failing to repair the sidewalk which they knew or should have known required repairs.

The Defendants denied the allegations, contending that the Plaintiff did not trip where she alleged, a distance of some twenty-five-feet from where she ultimately landed and that she, in fact, tripped over her own feet as she admitted to a neighbor who offered assistance immediately after the fall. Defendants further argued that the elevated sidewalk condition was open and obvious and known to the Plaintiff who lived in the subject subdivision for fifteen years.

Plaintiff had comminuted fracture of mid-shaft of left humerus accompanied by separation of humeral head. Surgical repair resulted in placement of intramedullary rod and five screws. Plaintiff incurred **$38K** in medical treatment expenses reduced by health insurance payments to $10,100. Plaintiff made no claim for lost earnings or earning capacity.

Defense Verdicts cont

Slip & Fall. Hunt v. Honaker and Camelot Care Centers, Inc. (Hillsborough County).

Anthony Petrillo, Tampa Managing Partner and Matthew Evans, Associate obtained a defense verdict on February 26, 2008 in a slip and fall incident. Plaintiff was seeking **7 figure economic losses** after slipping on gravy in Defendant's kitchen. The trial was bifurcated. Defense represented the Florida Division of Children and Families, Camelot Care Centers, Inc. and Janet Honaker. Honaker was a therapeutic foster parent of a bipolar foster child. The child had thrown a tantrum and flung gravy and glassware about the house and kitchen and ran to her room with a bottle of pills threatening suicide. Honaker called 911. Plaintiff was one of the responding officers. Plaintiff sued under a negligence theory and failure to warn. Plaintiff's alleged Honaker caused the dangerous condition and negligently failed to correct it or adequately warn of it. Plaintiff has been unable to work since Oct. of 2000 and had a very significant lost wage claim. Plaintiff had 2 back surgeries and is set to have another. Plaintiff past economic specials approximated **$800K.**

Vehicular Liability. Piloto v. Reyes (Miami-Dade County).

Paul S. Jones, Orlando Managing Partner and William J. Peterfriend, Associate received a defense verdict on February 27, 2008 when the jury found no liability and that Plaintiff's alleged injuries were not related to the motor vehicle accident in question. Defendant and a vehicle driven by Non-Party Defendant Kirenia Piloto, were traveling on SW 1st Ave. Defendant testified that the Piloto vehicle was directly behind her. Defendant put on her turn signal to move into the left-hand lane, when the Piloto vehicle grew impatient, sped up and attempted to overtake Defendant's vehicle in the left-hand lane. The front driver's side of Defendant's vehicle collided with the front passenger side of the Piloto vehicle. Plaintiff was seated in the front passenger side of the Piloto vehicle. Plaintiff claimed that as a result of the subject accident, she sustained injuries to her neck, right shoulder, back and left knee. Plaintiff admitted to treating with Florida Institute of Pain for neck, right shoulder and back problems stemming from a 2002 Motor Vehicle accident. Her treating physician from the 2002 MVA opined that she had an 8% permanent impairment rating as a result. Plaintiff underwent an MRI for both the 2002 and 2005 accidents. The MRI showed cervical bulges at C5-6. Plaintiff requested payment for past pain and suffering, future pain and suffering, and future medical care and treatment. Plaintiff did not submit a number for the aforementioned to the jury. Defendant's expert, Dr. Salvador Ramirez, a board certified orthopedic surgeon, testified that Plaintiff had no objective findings to substantiate her subjective complaints. He did testify that her hospital bills and treatment provided by Florida Institute of Pain were reasonable and related to the 2005 accident. Dr. Ramirez testified that Plaintiff did not suffer a permanent injury.

A.M. Best Insurance Law Pod Cast Episode 15

Daniel Santaniello and Paul Jones were the guest speakers on A.M. Best Company's Insurance Law Pod Cast Episode 15. The Pod Cast was posted Feb. 26, 2008 and can be heard at http://feeds.feedburner.com/InsuranceLaw).

The Luks, Santaniello, Perez, Petrillo & Gold

LEGAL UPDATE

Luks, Santaniello, Perez,
Petrillo & Gold

515 East Las Olas Blvd.
Suite 1100
Ft. Lauderdale, FL 33301

T: 954.761.9900
F: 954.761.9940

Visit us on the Web at
www.LS-LAW.com