HURLEY ROGNER
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# CASE NOTES
## CASE LAW SUMMARY
## June 2013

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. (rturner@hrmcw.com) or Matthew Troy (mtroy@hrmcw.com)

**Lacaretta Restaurant/Zenith Ins. Co. v. Zepeda (Fla.1st DCA 6/24/2013)**
**Discovery/ Attorney Client Privilege/Irreparable Harm**

The DCA granted HRMCWW's Petition for a Writ of Certiorari, which was filed in response to the JCC's Order that the E/C produce "Note A" (*note in adjuster log re. communication with in-house counsel*) and "Note B" (*note in adjuster log made by in-house counsel herself*). The E/C asserted both were not discoverable, as they were attorney client and work product privileged communications. To invoke certiorari jurisdiction, the court noted there must be "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on post judgment appeal. The court found both Note A and Note B clearly constituted or memorialized communication from the attorney to the E/C made in the rendition of legal services. They further held that ordering the E/C to turn over these communications rose to the level of inherent illegality, which would result in a gross miscarriage of justice were the order to stand, as would have a chilling effect on communications between attorneys and clients. As the DCA found the communications qualified under attorney/client privilege, they did not analyze the work product nature of the communications. This opinion offers clear guidance to claims handlers in protecting privileged communications with counsel that are memorialized in adjuster note pads and files. **Click here to view Order**



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**American Woodmark Co./dba/Timberlake Cabinet Co./Broadspire v. Sipe**
**(Fla.1st DCA 6/18/13)**
**Res Judicata/Two Dismissal Rule**

In a very short opinion, the First DCA reversed the JCC's award of PTD, agreeing with the E/C that the claim should have been barred by res judicata under the two dismissal rule. 60Q-6.116(2) provides that a second notice of dismissal shall operate as an adjudication of denial of any claim or PFB previously the subject of a voluntary dismissal. The case does not mention the 2008 Myers vs. Hillsborough County case, in which the DCA held that a prior order denying PTD benefits did not bar as res judicata the filing of a subsequent PFB seeking PTD. Prior to Myers, the general consensus was that the only way around an order denying PTD was for the claimant to file a subsequent Petition to Modify, alleging a change in condition. The Myers court, however, held that the claimant's PFB filed subsequent to the prior denial for PTD sought PTD "for a new period of time", and thus was not subject to res judicata. Carriers viewed Myers with disdain, as it appeared to somehow characterize a claim for PTD as something other than a claim for "permanent" ongoing benefits. Since Myers, denials of PTD became somewhat pyrrhic victories, as the claimant could still seek PTD for a "new period", and create additional exposure.

A review of the DOAH website and PFBs filed in that case shows that all PTD benefits were sought going forward. It would certainly have been preferable for the court to mention this opinion's impact on Myers, and whether a petition to modify should be the only route available to a claimant attempting to re-litigate PTD. **Click here to view Order.**

**Wood v. Southern Crane Service, Inc.** **(Fla.1st DCA 6/18/13)**
**Workers' Compensation Immunity/Definition of "Construction Industry"**

The injured plaintiff appealed a finding of summary judgment in favor of a crane operator. The lengthy opinion cites to multiple sections of Chapter 440 involving immunity and the responsibilities of employers to obtain coverage based upon their classifications. The main issue, however, was whether a material issue of fact existed as to whether the crane operator was entitled to immunity from suit, based upon the presence of a forty-ton mobile crane brought in by the contractor to assist in the removal of a massive oak tree on residential property. The argument was that this converted the otherwise non-construction tree removal operation to a construction project. The court considered F.S. s. 440.02(8), and the crane operator's position that the presence of the crane contemplated "clearing" or "substantial improvement in the appearance of land" which would theoretically make the work in question a construction project. Arbor Pro, the tree company who contracted with plaintiff, argued they were not properly a statutory employer. The DCA considered multiple job classification's in the NCCI SCOPES manual, and found that Arbor Pro was not acting as a construction contractor. Therefore, they had no obligation under section 440.10 to secure workers' compensation for the plaintiff, who could not be considered as a statutory employee. Based upon that finding, Southern Crane, as the subcontractor, could not claim the "exclusiveness-of-liability" benefit conferred by section 440.10(1)(e), 11 which, by its plain language, requires there to be injury to an "employee . . . of the contractor. **Click here to view Order**

**Tsafatino/Sigma TAF Mgmt. v. Family Dollar Stores of Fl/Sugas**
**(Fla.2d DCA 2013)**
**Third Party Complaints/Workers' Compensation Immunity**

Sugas was injured while working for Family Dollar and began receiving WC benefits. Sugas and his wife filed a negligence action against Tsafatino (the owner of the property leased to Family Dollar) and Sigma (who maintained the property). Tsafatino then filed a third party complaint against Family Dollar, seeking indemnification and alleging that Family Dollar breached its contract by failing to list Tsafatino as an additional insured on their policy. The trial court dismissed the third party complaint with prejudice. The DCA analyzed various issues, including breach of contract and indemnification. The court noted that the third party claim was not barred by Workers' Compensation Immunity, citing the Florida Supreme Court's 1975 Sunspan Engineering case. Sunspan held the exclusive remedy provision of the Workers' Compensation Law was unconstitutional as applied to bar a third-party plaintiff's common law action for indemnification against a negligent employer who paid its injured employee workers' compensation benefits. The 1985 City of Clearwater v. L.M. Duncan and Sons case further held that F.S. s 440.11(1)'s immunity provision were unconstitutional as applied and could not function to immunize an employer from liability to a third party where the employer contracted to indemnify the third party for losses resulting from its negligence. The DCA affirmed the dismissal with prejudice of the claim for common law indemnification and affirmed the dismissal of the claim for breach of contract. However, they reversed the dismissal of the breach of contract claim to the extent that such dismissal is with prejudice, noting it be brought again in a separate action. **Click here to view Order**

**Jacobson v. Southeast Personnel Leasing/Packard Claims (Fla. 1st DCA 6/5/2013)**
**Claimant Paid Attorney Fees/Benefits Secured**

**THIS CASE DOES NOT IMPLICATE CARRIER PAID FEES & APPLIES ONLY TO CLAIMANT PAID FEES IN PREVAILING PARTY COST PROCEDINGS**

The First DCA ruled that the provisions of Chapter 440 prohibiting claimants from retaining their own counsel are unconstitutional "as applied," only as to the claimant's request to pay his attorney a fee for defending a costs judgment proceeding. As with the Westphal decision, a finding of unconstitutionality "as applied" greatly limits the applicability of the ruling. Carriers should also keep in mind that the court specifically limited their opinion to claimant/claimant attorney retainer agreements for representation in prevailing party cost proceedings. The claimant in this case had a compensable accident with surgery. He subsequently was represented at a merits hearing, where PTD and compensability were denied. His attorney up until that decision withdrew, finding he could not represent the claimant in the E/C's hearing to obtain over $17,000 in prevailing party costs, as there was no expectation of payment. The claimant subsequently retained a second attorney, who sought to have the JCC approve a retainer agreement with the claimant, where the claimant would pay him an hourly fee. The JCC denied this request to approve this retainer agreement, as the statute specifically prohibited such fees. The second attorney then withdrew. The claimant attended the cost hearing pro se, lost, and then appealed the imposition of costs post hearing. The second attorney then reappeared to represent the claimant on appeal.

The First DCA held the Statute's prohibition against claimant paid fees to be unconstitutional, as it violated First Amendment freedom of speech rights, and did not satisfy a compelling state interest.

The court declined to accept the claimant's invitation to invalidate the entire fee statute. The concurring opinion noted that even a successful defense of an action to tax costs does not result in a "benefit" to the claimant. This language forecloses arguments made by claimant attorneys in the past that their efforts in reducing costs asserted by E/C's is a benefit, for which a statutory guideline fee could be obtained. The concurring opinion clearly limits the scope of the ruling to the specific instance noted above, and notes the decision does not render the fee statute unconstitutional in other circumstances. **Click here to view Order**