

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.
ATTORNEYS AT LAW**

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK
JOHN P. DALY

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

709 SEBASTIAN BOULEVARD
SUITE B
SEBASTIAN, FLORIDA 32958
TELEPHONE (772) 228-3228
TELECOPIER (772) 228-3229
SEBASTIAN@RISSMAN.COM

WWW.RISSMAN.COM

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Torts - Workers' Compensation Immunity

Ocean Reef Club, Inc. v. Cherrye Wilczewksi and Laura Leon, 37
Fla. L. Weekly D964 (Fla. 1st DCA March 30, 2012)

Plaintiffs worked at a beauty salon owned by Ocean Reef Club. Both alleged injurious exposure to chemical fumes during the course and scope of their employment. Both plaintiffs notified their employer of their health issues, but neither the employer nor the plaintiffs notified Ocean Reef Club's workers' compensation insurance carrier of the injuries until after plaintiff's employment ended. Specifically, Ocean Reef did not notify its carrier of the claims until plaintiffs brought suit against Ocean Reef in civil court. The carrier denied the claims, asserting that the illnesses did not occur in the course and scope of employment and that the statute of limitations had run.

AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
JAMES E. FAVERO III
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
ERIC F. OCHOTORENA
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
D. BLAKE REHBERG
KELLEY A. RICHARDS
RICHARD B. ROBBINS
JUAN A. RUIZ
GREG R. SCHMITZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
MEGHAN C. WHISENHUNT
CHRISTINE V. ZHAROVA

Ocean Reef moved for summary judgment in the civil action, contending that the injuries were work-related, so workers' compensation immunity applied. Ocean Reef conceded during summary judgment that plaintiffs properly reported their injuries to a supervisor at work and that Ocean Reef had "actual notice" of the injuries. Ocean Reef argued that plaintiffs had the burden filing their claims with the carrier, and that because they did not do so, Ocean Reef could assert immunity because it was relieved of its burden to report the injuries to the carrier.

The trial court denied summary judgment, and the First District agreed with the denial. Citing Timmeny v. Tropical Botanicals Corp., 615 So. 2d 811, 814 (Fla. 1st DCA 1993), the First DCA held that because Ocean Reef had knowledge of the claimant and failed to report them to its carrier, it could not claim it was entitled to workers' compensation tort immunity on the grounds that plaintiffs failed to file a claim for benefits with the carrier for their illnesses. The Court noted, "it would be inequitable to allow the employer to shirk its responsibilities...then assert that the claimant's untimely claim for benefits is barred by the statute of limitations."

Furthermore, the carrier's denial of coverage on the basis that there were no work-related injuries sustained was imputed to the employer for purposes of the civil suit. An employer cannot separate itself from its carrier's determination that there was no injury in the course and scope of employment. Therefore, Ocean Reef was estopped from arguing workers' compensation immunity in civil court. Affirmed.

Dissent: Judge Shepherd wrote a lengthy dissenting opinion. He argued that the employer is only required to place employees on notice of the requirements by which the employee may seek benefits from the carrier. Ocean Reef placed both plaintiffs on notice of such requirements, but neither plaintiff filed a claim for benefits until well after their employment ended. Judge Shepherd opined that neither plaintiff protected their rights, so judicial estoppel should not apply.

Workers' Compensation - Expert Medical Advisors

Arlotta v. City of West Palm Beach, 37 Fla. L. Weekly D718 (Fla. 1st DCA March 30, 2012)

Claimant was a police officer who suffered bilateral knee injuries which were accepted as compensable. He received anti-inflammatories during his treatment, and Zantac was prescribed to combat their side effects. The claimant filed a Petition for Benefits requesting compensability of his gynecomastia, an excessive development of the male mammary glands. The claimant was evaluated by Dr. Vidalon and then underwent an E/C IME with Dr. Cohen. After these evaluations, the E/C denied compensability of the claimant's gynecomastia.

The claimant notified the JCC of a conflict in the opinions of Drs. Vidalon and Cohen. The JCC agreed there was a conflict and appointed an EMA to address 1) whether the claimant had gynecomastia 2) the cause of it, and 3) the treatment recommended. The claimant did not initially appear for the EMA, so it was rescheduled. Prior to the rescheduled appointment, the claimant filed a motion to submit the medical records of Dr. Masse to the EMA, explaining that Dr. Masse already did surgery to address the gynecomastia. E/C objected.

The JCC found that the claimant, by undergoing surgery, had altered his condition to the extent that evaluation by the EMA was futile. The JCC also found that the claimant had rendered his claims moot because the only way to determine whether he had gynecomastia was excision of the breast tissue, which had already happened, and that the claimant had already availed himself of the only available treatment option, surgery. The JCC denied the claimant's Petition because he had failed to meet his burden of proof.

The First District disagreed. Section 440.13(9)(c) mandates the appointment of an EMA if there is a disagreement among healthcare providers. The claimant's decision to move forward with surgery could not justify withdrawal of the EMA order, as the JCC's findings that it would be "futile" to have the claimant examined by the EMA were not supported by medical

evidence. Furthermore, the records of Dr. Masse were admissible for history purposes. The JCC abused her discretion by cancelling the EMA evaluation and deciding the claims without the benefit of the EMA's opinion. Reversed and remanded.