KUBICKI DRAPER

THE KD QUARTERLY

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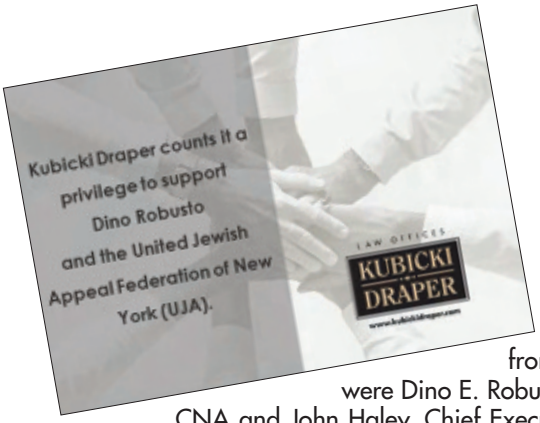
KD in the Community



Kubicki Draper is a proud sponsor of the UJA-Federation of New York Annual General Insurance Event. UJA helps individuals and families gain access to resources and support through a network of nonprofits from around the world. This year's honorees were Dino E. Robusto, Chairman & Chief Executive Officer of CNA and John Haley, Chief Executive Officer and Director of Willis Towers Watson. For more information, or to donate, please visit: https://www.ujafedny.org/.

Jennifer L. Feld, of the Tampa office, is greatly involved in community efforts. She was recently appointed as a Board Member of Tampa Jewish Family Services (TJFS). TJFS provides a community food bank, support services, financial assistance, educational assessments, senior care management, psychological and social wellness services to those in need. Jennifer also participated in the Western Michigan University Cooley Law School Career Week. Throughout the week, legal professionals from the Tampa Bay area spoke with law students about careers in law. Jennifer presented on leadership, career path, and work/life balance.

Western Michigan University Cooley Law School Career Week

Toni Turocy, of the Orlando office, has been selected as a Board Member for the Holocaust Memorial Resource & Education Center of Florida. Their Board of Directors represent a broad diversity of religions, interests, and backgrounds. The Holocaust Memorial Resource and Education Center of Florida is an organization dedicated to combating antisemitism, racism, and prejudice with the ultimate goal of developing a moral and just community through its extensive outreach of educational and cultural programs. We are proud of Toni's commitment to the community and we look forward to supporting her new role. For more information, please visit: https://www.holocaustedu.org/

Kubicki Draper joined Ryan's Raiders for the Juvenile Diabetes Research Foundation's Walk to Cure Diabetes. The annual walk raises awareness and funds to find a cure and for more effective treatments for Type 1 Diabetes. **Laurie J. Adams**, of the West Palm Beach office, and her son, Ryan, co-captained Ryan's Raiders.

Ryan's Raiders Walk to Cure Diabetes

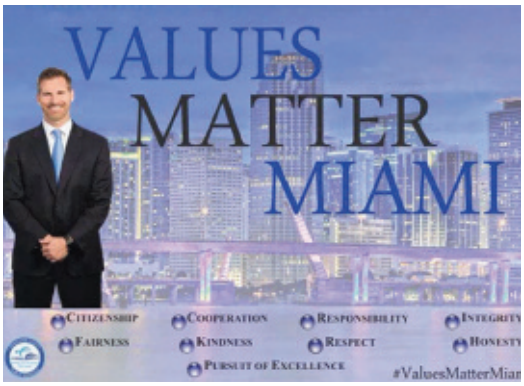
EDITOR
Sebastian C. Mejia

IN THIS ISSUE

more KD in the Community

Future Lawyers Program

Cassandra Smith, of the Jacksonville office, has served as the co-chair of Jean Ribault High School's Future Lawyers Program for the last 3 years and has also served as a mentor for 4 years. Ribault High is a school in Jacksonville where many students face hardships, yet are among the best and brightest. The Future Lawyers Program matches each student with a local attorney or judge and at the end of the school year, students put on a mock trial. This year's mock trial involved a wrongful death and went before the Honorable Brian Davis, US District Judge in the Middle District of Florida. The students did such an outstanding job; the outcome was a hung jury!



Michael Carney, of the Ft. Lauderdale office, was selected as a recipient of the Miami-Dade County Public Schools Values Matter Miami Award. Mike was nominated as a valued partner by a Miami-Dade County Public School staff member and was selected as one of nine award recipients from over 200 community partner nominations. We are proud of Mike's initiatives, and we look forward to continuing to support him and the Miami-Dade County Public School system.

Our KD family comes together every quarter to make a difference in our local communities. An organization is selected from multiple entries made by staff, and funds are raised by paying to dress down. The organization featured recently was **Navy-Marine Corps Relief Society**, submitted by **Hillary H. Lovelady**, an Associate in our Jacksonville office.

The **Navy-Marine Corps Relief Society (NMCRS)** provides support to active duty and retired Sailors and Marines, their eligible family members, widows, and survivors. With offices around the world, NMCRS is dedicated to improving the lives of Sailors and Marines both at home and abroad. Through a team of volunteers, administrative staff and offices, NMCRS provides financial support, emergency travel assistance, education, health education and post-combat support, visiting nurse assistance and much more.

Supporting the Navy-Marine Corps Relief Society

Hillary's husband is an active duty Naval Flight Officer who was deployed when their third child was born. The NMCRS provided regular support to her and her family to include in-home visits, regular phone calls and more. Over the years, she has seen first hand the benefits that the NMCRS has brought to the junior enlisted sailors in the commands her husband and family are a part of. The NMCRS not only plays a major support role for Hillary's family, but to the many enlisted sailors, veterans as well as their families who protect and serve our nation. Together our team donated $1,466.00 to this great organization.

Fighting Attorneys Fees Following Appraisal

By Hillary Lovelady and Kara Cosse
on behalf of KD's First Party Practice Group

The ink is not even dry on your appraisal award and the insurer has been served with a Motion for Entitlement to Attorneys Fees and Costs in a case where the insurer did not even know there was a disputed price and scope of the estimate until suit was filed.

Should you pay the attorneys fees and costs or fight the entitlement?

What if a Plaintiff offers to dismiss a lawsuit in exchange for participation in appraisal if you agree to pay his, or her, nominal attorney's fees and costs to date?

Should you pay the attorneys fees and costs, or fight the entitlement?

In a post-*Cammarata* world our instinct is to immediately settle the attorneys fees and obtain a full and final Release, in order to avoid even the whisper of a bad faith claim. However, a bad faith suit is also predicated upon a tolled civil remedy notice and actual bad faith handling of the claim.

If after review of the claim, the handling reveals that the handling was good, meaning notices were sent at the right time, correspondence was followed up on, telephone calls were returned, etc., consideration should be given to fighting the entitlement to attorneys fees and costs. This is especially true when the policy has an appraisal provision that states each party shall bear its own costs, that no attorneys fees will be awarded, or that the appraisal award is not subject to entry by a court.

Even if the policy does not include language precluding attorneys fees, the argument can be made that payment of an appraisal award while in suit, is not the functional equivalent of a confession of judgment that triggers Plaintiff's entitlement to fees and costs under F.S. 627.428. The confession of judgment doctrine applies only to penalize an insurance company that wrongfully causes an insured to resort to litigation in order to resolve a conflict, when it was within the insurer's power to resolve the matter without litigation. ***State Farm Florida Ins. Co. v. Lorenzo***, 969 So. 2d 393, 397 (Fla. 5th DCA 2007). "It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually taking steps that breach the contract, that the insured may be entitled to an award of fees under section 627.428, Florida Statutes." ***Goldman v. United Services Auto. Ass'n***, 244 So. 3d 310, 311 (Fla. 4th DCA 2018).

If the insurer is unaware of the disagreement of the damage evaluation until the filing of the Complaint, and the insurer demands appraisal once in suit, Goldman stands for the proposition that there was "never a breakdown in the claims adjusting or communication process, nor was there a refusal to pay the claim," that triggered the lawsuit and the attorneys fees that follows. Id.

There is certainly negative case law that stands for the proposition that attorneys fees should be awarded when an appraisal award is paid mid-suit; however, a close reading of these cases reveals that most negative case law is easily distinguishable based on the insurer's actions, or inactions, pre-suit. Therefore, if review of the claims handling in your file shows that correspondence and telephone calls were responded to, and there was no reason to suggest disagreement of price and scope pre-suit – you may just have a case worth fighting Plaintiff's entitlement to fees.

New AOB Law

Are you reviewing a case or a claim alongside the 16-page new AOB legislation?
We created a one-page guide to help you!

For more information,
e-mail us at firstpartyproperty@kubickidraper.com

SPOTLIGHT ON

Michael Suarez

Michael Suarez is a Shareholder in Kubicki Draper's Miami Office. He has spent his entire career as an attorney working at Kubicki Draper, starting in the West Palm Beach office before moving back to the Miami area.

Michael obtained his undergraduate degree in Psychology from Florida International University, with the hope of helping others as a counselor. While the work was fulfilling, Michael always believed his talents could be used in a better way, which led him to begin his legal career at St.Thomas University, College of Law. Michael's background in Psychology has been instrumental in his role as a counselor at law, and he has found that this background, when combined with his passion for problem-solving, provides a uniquely effective approach to every legal representation, no matter the complexity.

Michael's problem-solving skills help him defend cases in a wide variety of practice areas including class action defense, construction defect litigation, premises liability, and commercial litigation. He thrives on the new challenges and issues presented by every matter he handles while keeping focused on helping his clients navigate the often-stressful process of litigation. Michael has also been selected as one of the Florida Super Lawyers Rising Stars from 2014-2019.

When he is not handling matters in the courtroom, Michael enjoys following sports, history, and traveling with his wife—he has been fortunate enough to visit more than fifteen countries. For Michael, "life is not measured by the breaths we take, but by the moments that take your breathaway." He is motivated by the uncertainty of life and believes that you have to spend as much time as possible doing what you love with the people that you love.

When asked what the best advice ever given to him was, Michael said
"give it your best and everything will fall into place."
We couldn't agree more.

new additions

WE ARE PLEASED TO INTRODUCE OUR NEW TEAM MEMBERS:

FT. LAUDERDALE:	Associates – **Calvin M. Fox, Jose Leonardo Gomez Vargas**
FT. MYERS:	Shareholder – **Colleen A. Kerins**
JACKSONVILLE:	Associates – **Melody W. Kitchen, Ryan I. Saltz**
MIAMI:	Associates – **Jonathan Alvarez, John C. Acosta, Adam Benna, Erin L. Haney, Shannon McGee** Shareholders - **Donna Joy Hunter, Carmela D. Jackson**
ORLANDO:	Associates - **Cristina Diaz, Ryan D. Elias**
TALLAHASSEE:	Associates – **Samuel Gilot, Sharnett D. Love Moore**
TAMPA:	Associates – **Alvis L. Horne, Christos Pavlidis, Sarah E. Pavlock, Teodora Siderova, Starlene D. McGory, Kimberly A. Matot**
PENSACOLA:	Associates - **Barbara J. Glas, Courtney F. Smith**
WEST PALM BEACH:	Associates – **Benjamin C. Bourdon, Eric M. Katz, Matthew J. Wildner**

FYI articles of interest

Hurricane Season is here! What are you doing to prepare?

From Hurricane Matthew in 2016, to Irma in 2017, and then Michael in 2018, there is no doubt the last few storm seasons have been rough on the hurricane-prone regions. The good news is the first couple of early forecasts for the 2019 Hurricane Season predict lower chances of destructive storms. That said, those of us in areas prone to hurricanes know, it only takes one.

Start preparing before any threat is imminent.

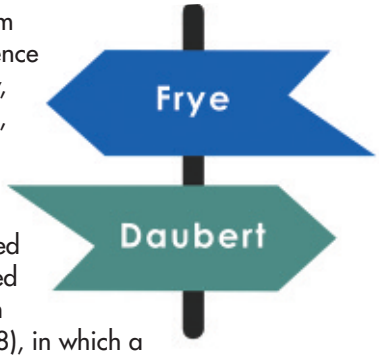
- Build an emergency kit: https://www.ready.gov/build-a-kit
- Know your zone so you know when to evacuate, if necessary: https://www.floridadisaster.org/knowyourzone/
- Plan your evacuation route
- Take inventory of your personal property and review your insurance policies
- Take steps to protect your home and business

If you are an insurance adjuster, it is important to make sure you have met all of your CE requirements to ensure your license is in good standing and is active. If you are in need of Florida Adjuster CE credit(s) and would like to schedule a complimentary CE presentation at your office, please do not hesitate to contact **Aileen Diaz at 305.982.6621/ad@kubickidraper.com.**

Florida General Contractors Will Soon Have a Statutory Right to Recovery of Attorney Fees Against a Defaulted Subcontractor's Surety.

For decades, the Florida Statute by which legal fees may be recovered, provided this right to owners, subcontractors, laborers and materialmen, but did not include contractors. Historically, contractors could only pursue fees where provided for in a bond or under certain circumstances. Effective October 1, 2019, the new version of Florida Statutes § 627.756(1) adds contractors, giving them the right to recover attorney fees incurred in asserting claims against a surety when a subcontractor defaults. For more information, please contact us at: **construction@kubickidraper.com.**

Effective immediately, the Florida Supreme Court recedes from Frye and adopts the Daubert amendment set forth in 90.702 as a procedural rule of evidence.



The Florida Supreme Court has issued a per curiam decision, In re: Amendments to the Florida Evidence Code, SC19-107 (May 23, 2019) (Justices Canady, Polston, Lawson, Lagoa, and Muñiz, concurring), adopting the 2013 amendments to 90.702, Fla. Stat., which codified the Daubert standard for admissibility of expert testimony. The majority includes two of the three recently-appointed Justices. In explaining its decision, the Court declined to readdress the correctness of the recent opinion in ***DeLisle v. Crane Co.***, 258 So. 3d 1221 (Fla. 2018), in which a majority of the Court (Justices Quince, Pariente, Lewis, and Labarga) had determined that the Frye test previously adopted by the Court was the proper standard and held the 2013 amendments to 90.702 to be unconstitutional, essentially in violation of the Court's exclusive rule-making authority. Justices Quince, Pariente, and Lewis have since retired from the Court. In effect, the new In re: Amendments decision seems to reject the constitutional deficiency found in DeLisle and implements once again the Daubert test by adopting the 2013 amendments to 90.702 and 90.704 "effective immediately." For more information, please contact us at **info@kubickidraper.com**

APPELLATE

Slip-and-fall Summary Judgment on Liability Affirmed and Motion for Appellate Attorney's Fees Granted.

Sharon C. Degnan, of the Orlando office, won an appeal in the Fourth District Court of Appeal wherein she successfully defended a summary judgment in favor of a grocery store in a transitory foreign substance case in ***Guevara v. Winn-Dixie Stores, Inc.***, No. 4D18-936 (Fla. 4th DCA Apr. 4, 2019). The plaintiff had argued that there was an issue of fact for the jury as to whether the defendant had constructive notice of the existence of water on the floor of the produce department, which allegedly caused Plaintiff to slip and fall. In affirming the summary judgment, the appellate court was persuaded by Sharon's argument that the plaintiff's theory as to how the water got onto the floor and the length of time that it was there was completely speculative and, in order to be accepted, required improper inference stacking and disregard for the plaintiff's prior testimony. Based on the appellate court's affirmance, the defendant's motion for appellate attorney's fees was granted.

Reversal of Attorney's Fees Award Arising Out of Denial of Requests for Admissions.

Sharon C. Degnan, of the Orlando office, won an appeal in the Fifth District Court of Appeal wherein she obtained a reversal of an attorney's fee award against her client and the client's insurance carrier in ***Sentz v. Tracy***, 266 So. 3d 1279 (Fla. 5th DCA 2019). The attorney's fee award was originally entered as a sanction for the defendant's failure to admit certain requests for admission. The appellate court held that an award of attorney's fees pursuant to Fla. R. Civ. P. 1.380(c), which authorizes such an award against a party who fails to admit a request for admission, was inapplicable to the defendant's denial of requests to admit that she was negligent and the legal cause of damage to the plaintiff, which issues were hotly disputed at trial. The appellate court agreed with Sharon's argument that to allow a fee award in such a circumstance would improperly turn Fla. R. Civ. P. 1.380(c) into a prevailing party fee provision, which it is not intended to be.

Defense Summary Judgment in PIP Dispute Affirmed.

Caryn L. Bellus, Bretton C. Albrecht, and **Barbara Fox**, of the Miami office, prevailed in obtaining an affirmance of the defense summary judgment entered in favor of a PIP carrier, in a county to circuit appeal, where the carrier defended based on a material misrepresentation defense.

At the trial level, the carrier's staff counsel won a defense summary judgment holding it was entitled to rescind the policy and deny coverage for the Plaintiff's medical provider's PIP claim based on the named insured's material misrepresentation in failing to disclose her college-age son in the policy application. The accident had occurred while the son was driving one of the insured vehicles just a couple months after the policy was purchased without ever disclosing that he existed.

In the appeal, Plaintiff argued material misrepresentation was a disputed question of fact for a jury, including because there was evidence the insurance agent failed to ask the insured about other household residents and there was no evidence from the insurance agent about what was asked. As to materiality, Plaintiff argued it was unknown whether the son had a drivers' license at the time of the policy application and further asserted that if the son was unlicensed he could not be considered a 'driver,' which the policy did not specifically define. Plaintiff raised several other similar arguments in an attempt to muddle the facts and issues.

In response, Caryn, Barbara, and Bretton emphasized that the insured had testified in deposition that the agent did not ask her 'anything.' She also admitted for example that: (a) her son was over the age of 15, (b) he had always lived with her, including at the time of the policy application, (c) she in fact signed the policy application, and (d) she did not disclose her son in the policy application. Her only 'excuse' was that the insurance agent allegedly did not ask her "any" of the questions on the application. Notably, however, she did not testify that she had any issues reading or understanding the application or that the agent in any way prevented her from reading the application or misrepresented its contents. At oral argument, Bretton argued that undisputed facts such as these readily distinguish this case from those relied upon by Plaintiff. She further argued and emphasized that the insured had a duty to read the policy application and to ensure the information in it was true and correct before signing. In contrast, the agent had no duty to read the whole policy application to the insured.

With regard to the materiality of the misrepresentation, they explained that subject policy application clearly required disclosure of all household residents age 15 or older, licensed or not. Then there were only two options—they must be listed as either a covered or excluded driver on the policy—and an additional premium would be charged either way.

After oral argument, the appellate panel of the 11th judicial circuit agreed and per curiam affirmed the defense summary judgment. It also granted our motion for appellate attorney's fees.

APPELLATE

Affirmance of Summary Judgment in Wrongful Death Case.

Bill Bissett obtained an appellate victory in a wrongful death case in which our client obtained a summary final judgment on the basis of the so-called Slavin doctrine. The summary judgment in the case was initially appealed to the Third District Court of Appeal and resulted in an affirmance, as to which the personal representative then unsuccessfully sought further review in the Florida Supreme Court. ***Valiente v. R. J. Behar & Co., et al***, 254 So. 3d 544 (Fla. 3d DCA 2018), review denied to Valiente in Florida Supreme Court, April 8, 2019, Case #SC2018-1756.

This wrongful death case arose out of the decedent/motorcyclist colliding with another vehicle at an intersection in Hialeah, Florida. Prior to the accident, this intersection had undergone significant roadway and landscaping improvements. The personal representative thereafter filed a lawsuit against not only the person driving the auto, but also against the City of Hialeah, against the roadway contractor, against the consulting engineers, and against our client, who was hired to install certain landscaping as part of the improvement project.

The plaintiff alleged our client and the other defendants negligently created and allowed to thereafter exist a "visual obstruction" at the intersection and this negligence was a contributing legal cause of the accident. Three of the defendants moved for summary judgment based on the Slavin doctrine, which relieves a contractor of liability for injuries to third parties when it is established: (a) that the contractor's work was completed; (b) that the owner of the property (in this case, the City) accepted the work; and (c) that the alleged defect/dangerous condition allegedly causing the injury later in time (here, 2 years) was "patent" at the time the owner accepted the work.

These types of cases frequently end up being tried, with the jury determining whether the alleged defect/dangerous condition was "patent" or "latent." Bill argued the appeal in June, 2016, and on June 6, 2018, the Third District rendered its 31 page (2-1) opinion agreeing with the arguments Bill and the other defense counsel presented in their briefs and at oral argument. ***Valiente v. R. J. Behar & Co., et al***, 254 So. 3d 544 (Fla. 3d DCA 2018). Since the appellate court had consolidated all three appeals as to the summary judgments obtained by Melrose and the engineers and the roadway contractor, Bill ended up primarily presenting oral argument on the Slavin issue, with the other two defendants presenting their own separate, independent arguments.

It was essentially claimed that our client initially created the "visual obstruction" in planting Jatropha Hastata shrubs in the swale area of the intersection where the accident occurred and that the specific placement of the shrubs and their height at the time violated various codes and regulations. In ruling in our favor, the majority opinion applied the standard that the property owner is required to have made a "reasonably careful inspection" of the contractor's work prior to accepting it as completed, and further stating that "the liability of a contractor is cut off after the owner has accepted the work performed if the alleged defect is a "patent" defect which the **owner could have discovered and remedied**." ***Valiente***, 254 So. 3d at 546-52.

Reversal of Final Judgment Due to Improper Summary Judgment on Liability in Auto Negligence Case.

Angela C. Flowers, of the Ocala office, and **Bretton Albrecht**, of the Miami office, obtained a reversal of a Final Judgment on damages entered following a jury trial in an automobile negligence case. The appellate court agreed with Defendant that the trial court improperly granted summary judgment on liability, thereby depriving Defendant of his comparative negligence defense.

The decision clarifies the limitations of Florida's existing common law rule imposing a rebuttable presumption of sole negligence on the driver of a rear-following vehicle involved in a rear-end collision. The court clarified that the presumption does not completely insulate a negligent lead driver from liability for comparative negligence as a matter of law. Rather, where issues of disputed fact exist regarding the lead driver's fault, negligence and causation are jury questions. On remand, the case will be retried on the issues of both comparative negligence and damages.

Denial of Motion for New Trial Affirmed.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, obtained a hard fought victory for the Ranching and Agriculture industry in ***Carnahan v. Norvell***, 2019 WL 1781647 (Fla. 4th DCA Apr. 24, 2019). Following a jury trial handled by outside counsel, the jury returned a complete defense verdict of no liability in favor of a cattle owner whose animals strayed onto public road and caused an automobile accident. The Plaintiff sought a new trial and after its denial, appealed. In a rare written opinion affirming the lower court denial of a new trial, the Fourth District Court of Appeal affirmed.

For the first time in many years, the Fourth District Court addressed Florida's Warren Act, Section 588.15, Florida Statutes, and affirmed that it does not impose strict liability on an owner for accidents caused by straying livestock, absent a showing that injuries are due to the owner's intentional, willful, careless or negligent actions in permitting the livestock to 'stray upon' public roads. Specifically, the court held that the mere incidence of livestock on public roads was insufficient to demonstrate the required negligence. Of equal legal import, the Fourth District held that to demonstrate such negligence, not all incidents of cattle straying from the premises are admissible but rather only incidents which are substantially similar. Further, in a holding which has far reaching implications across the board, the Court held that in order for a party to properly preserve error as to the exclusion of evidence, it must proffer to the court the specific evidence which it seeks to introduce and cannot later rely on evidence which was found in record but not specifically referenced before the trial court.

TRIALS, MOTIONS, MEDIATIONS

Defense Verdict in Bicyclist vs. Automobile Collision Case.

Stefanie D. Capps and **Kristin L. Stocks**, of the Ft. Myers office, obtained a defense verdict on liability after 17 minutes of deliberations in a bicyclist/auto accident case where the plaintiff had back surgery, $102,000.00 in medical bills, and a recommendation for neck surgery that could not occur due to a risk of blood clots. Plaintiff was attempted to be portrayed as sympathetic due to his Dementia which had progressed since his deposition was taken and was an alleged reason for his many inconsistencies that Stefanie skillfully and softly brought out during closing to avoid the risk of resentment by the jury for hammering a poor soul.

Defense Verdict for Construction Company in Automobile vs. Electric Wheelchair Case.

Earleen H. Cote and **Jason R. Friedman**, of the Ft. Lauderdale office, obtained a defense verdict in a car versus electric wheelchair accident. The Plaintiff was riding her electric wheelchair on the street when she was hit by the tortfeasor. The area where the accident occurred was under construction by our client in accordance with Broward County's plans.

Although the road leading up to trial was difficult and contentious, Earleen and Jason seamlessly showed the jury that our client did not contribute to the Plaintiff's accident. As Earleen so artfully explained in closing, playing a real life game of Frogger has its consequences. The jury found no liability for our client, but did find the driver to be 25% at fault. The jury found no permanent injury even though the Plaintiff suffered a fractured ankle because her attorney failed to provide expert testimony as to permanency.

Defense Verdict in Bifurcated DUI/Punitive Damages Trial.

Ken M. Oliver, of the Ft. Myers office, obtained a defense verdict in Collier County where the client pled no contest to DUI, leaving the scene, and resisting arrest. As a result, punitive damages were sought. The first of many battles was to convince the Court to bifurcate the compensatory and punitive stages. Then, he fought and was successful in keeping out any reference to the bad acts of the client during every portion of the compensatory stage, including jury selection. Settlement efforts were in vein due to extreme costs incurred by Plaintiff's counsel. Ken was able to show the jury the litigious nature of the Plaintiff, which included a Letter of Protection signed by Plaintiff counsel the day after the accident. There was also favorable surveillance that revealed Plaintiff's ability to exercise after painting a very different picture for her treating doctors.

After four days of trial and a demand to the jury of over $700,000, they awarded only past medicals of $35,000, the amount suggested in closing. After set-offs and collateral sources, the next verdict was 25% less than the proposal for settlement filed, creating exposure to attorney's fees and costs. The trial then turned to the punitive damages portion where our client, who had since completely turned her life around, was completely humiliated by the attacking of her past mistakes and personal medical history. As a result of all of the above, the parties agreed to settle the case for net, unpaid medicals of $23,000, walking away from all other claims and appeals.

Defense Verdict in Two Day PIP Trial.

Michael S. Walsh, of the Ft. Lauderdale office, obtained a huge win for a PIP carrier at trial. The issue at hand involved a Plaintiff medical provider who has both a chiropractic license and a physician assistant license. According to the PIP statute, PA's are paid at 85% of what a chiropractor gets paid for providing the same service. The Plaintiff alleged that he performed certain services as a PA and certain services as chiropractor, and that he should be reimbursed at the chiropractor rate (the higher rate) for those specific services even though the medical records and the bill only listed him as a PA. For the entirety of the trial Plaintiff's counsel was literally trying to force a mistrial in hopes that dragging our client through the expense of another trial would get them to resolve it. Due to Mike's timely objections on more than 3 occasions, Plaintiff's counsel wasn't even able to get out his full sentence when he tried to ask questions that were already ruled upon as being excluded.

The defense verdict had a large effect on a number of cases in Broward County that dealt with the same issue, and the carrier was thrilled with the result.

Summary Judgment in PIP Case.

Anthony G. Atala, of the Miami office, won a final summary judgment of first impression for a PIP carrier. In 2013, the carrier amended their policy including specific language that the insurer would limit reimbursement to the Schedule of Maximum Charges as defined by Florida Statute s. 627.736(5)(a)1. Plaintiff was taking the position that a particular modality, which was not included in the initial Medical Bill, was included and compensable, although the CPT code was not compensable by either the Medicare or Worker's Compensation Fee Schedule. Ultimately, having no evidence to refute the carrier's position, the Court granted Summary Final Judgment in favor of the insurer.

PIP Summary Judgment Where Benefits Were Exhausted.

Katherine S. Moon, of the Miami office, won a final summary judgment on a PIP claim where benefits were exhausted. The Plaintiff tried to allege that the benefits were not properly exhausted and that the carrier made voluntary payments when they paid the MRI provider at the limiting charge (which is a few dollars more) then the Medicare Fee Schedule charge.

Motion to Quash Service of Process in Construction Defect Claim Granted.

Kimberly A. Beckwith, of the Tampa office, argued a Motion to Quash Service of Process in a construction defect case where our client, an out-of-business stucco contractor, was allegedly served through the Secretary of State. After Kim walked the judge through the statute and the Plaintiff's filing to show the non compliance, opposing counsel tried to convince the judge to overrule our motion. However, the Judge was not buying it and granted the motion. After the hearing, opposing counsel indicated they were going to just dismiss our client rather then spend the time trying to get them properly served.

TRIALS, MOTIONS, MEDIATIONS

Denial of Plaintiff's Motion for Summary Judgment Resulting in Voluntary Dismissal in First Party Action.

Stephanie A. Seligman, of the Ft. Lauderdale office, was asked to litigate a case which was already in appraisal. Appraisal had taken almost a year because the original appraiser left his job and didn't leave his estimate behind, requiring the carrier to start the process over. Plaintiff's counsel filed a Complaint for breach of contract with no mention of appraisal and then filed a motion for summary judgment contending that the carrier took too long in appraisal which forced his clients to file suit and further, that the payment of the appraisal award was a confession of judgment, triggering the fee statute. Stephanie filed a strong responsive motion to plaintiff's Motion for Summary Judgment. Following a hearing on the Motion, the judge denied Plaintiffs' motion for summary judgment. Plaintiff's counsel was left with no choice but to file a notice of voluntary dismissal 3 weeks later.

Summary Judgment in PIP Case.

Paul M. Gabe, of the Miami office, won a summary judgment in a PIP case regarding policy language establishing that the carrier elected to pay at the Medicare Fee Schedule Rates and thus properly paid.

Favorable Settlement in Water Leakage Case.

Jarred S. Dichek, of the Miami office, got a great settlement result in a water leak case, where the Plaintiff alleged a broken shower diverter caused significant damage to the entire home and an extensive list of personal property. Some of the items claimed by the homeowner were 3 Apple laptops, an iPad, and a rare $25,000 Chinese painting (which was appraised as a copy and valued at no more than $500.00). The homeowner claimed water shot out of the wall like a fire hydrant. This claim was suspicious from the beginning. There was also overlapping damage with a Hurricane Irma claim two weeks before, and the insurer's plumber found no evidence of a leak upon his inspection. Further, the Plaintiff told two different versions of how she discovered the leak. A second inspection took place following the receipt of a plumbing invoice dated after our plumber's initial inspection. This new plumbing invoice identified the broken shower diverter as the cause of the flood. At the second inspection, the broken shower diverter was produced by the Plaintiff to our plumber. The part produced did not match the part in the pictures from our plumber's first inspection. Further, if that part had shot out of the wall, half the wall would have come with it from the pressure needed for that to happen.

An EUO of the homeowner was taken, and the homeowner was locked into her version of the events and the chain of custody of the shower diverter she produced. Ultimately, she blamed her plumber for giving her the wrong part, and the public adjuster for duplicate damages claimed.

Plaintiff's attorney was highly litigious and very difficult, making high demands in the six figure range. The attorney kept saying no jury would find her client participated in the fraud and her plan was to accuse their plumber as the bad actor. Jarred discussed with the Plaintiff's plumber and his attorney what the Plaintiff was trying to allege, which turned the Plaintiff's plumber into a key witness for the defense. The case ultimately settled for $10,000.00.

Summary Judgment Granted in Defamation and Tortious Interference Case.

Jennifer Remy-Estorino, of the Miami office, and **Benjamin Cohen**, of the Ft. Lauderdale office, obtained two final summary judgments in an extremely contested and contentious case involving defamation per se and tortious interference with advantageous business relationships and/or contractual relationships. The underlying dispute arose out of a failed general contractor/homebuilder contractual relationship between the parties concerning the construction of a brand new, single-family residential home. The Plaintiff's GC was claiming in excess of $2 million in associated damages as a result of our client's behavior. The case was made all the more complex and convoluted given the nature and tenor of our client's communications with the GC, many of which included racially charged or egregious statements by the client.

After 2 years of heated litigation and what seemed to be endless discovery (in excess of 25 depositions to date), Jenny and Ben methodically and meticulously set up Plaintiffs' tortious interference claim for final summary judgment which was granted a 2 hour long heavily contested. The Court ruled that there was no genuine issue of material fact as to the causal connection between our client's alleged tortious behavior and Plaintiffs' damages, over Plaintiffs' objections to the contrary. Ben also successfully argued that summary judgment was not premature at this stage in the litigation over Plaintiffs' contention that significant discovery was still pending. The ruling was crucial as it effectively eliminated 99% of the damages that Plaintiff intended to board at trial, and totally reversed the tenor of the case in favor of our client.

Voluntary Dismissal with Prejudice of Lien Impairment Action.

Alexandra V. Paez, of the West Palm Beach office, obtained a voluntary dismissal with prejudice in a lien impairment action against an auto carrier filed by a hospital. After receiving Alex's second Motion to Dismiss and a call explaining why their case was weak, the hospital dismissed its claim with prejudice so that their lien statute would not be appealed. In addition, the hospital waived its fees and costs.

Summary Judgment in Roof and Water Damage First Party Claim.

After a nearly three-year battle, **Jessica L. Murray**, of the Tampa office, prevailed on a Motion for Final Summary Judgment in a case involving alleged roof damage and ensuing interior water damage. Plaintiffs were seeking $65,000.00 in damages, plus fees and costs. However, when the carrier inspected the roof, it found no storm-related damage; only a dead valley, which had been accumulating water on and off over the course of seven or eight years. It was through that valley water had been leaking.

At the hearing, Jessica argued there was simply no evidence of storm damage to the roof, nor any peril created opening which was essential to trigger coverage under the policy.

Plaintiffs counsel argued the home inspection did not show any openings or defects but it was only after the storm that the water entered the residence, thus, there was an issue of fact as to the cause of the water intrusion, thus defeating summary judgment. Jessica turned to the wear and tear provision in the policy and showed it to the Court. The Court ultimately found there was no evidence of storm damage, and that wear and tear is explicitly excluded under the policy.

As a result of a prior Proposal for Settlement, the carrier is entitled to pursue fees and costs.

presentations & speaking engagements

KD's 2019 FIFEC Presenters

Our attorneys present continuing education seminars on a variety of topics throughout the year. Below are some of the topics presented by our team in the last few months:

- 5-Hour Law and Ethics
- Foodborne Illness and Social Media
- Taking the Fraud Out of Public Adjuster's Estimates
- Adjusting and Defending Catastrophic Claims in the 21st Century – A Claim's Professional's Toolbox for the Investigation and Eradication of Fraud in Modern Day Catastrophic Claim
- Chiropractic Treatment: Proper Defenses to Common Coding Issues and 2% Chiropractic Manipulation Reduction
- Defending Bad Faith Claims When Your Insured Isn't Acting in Good Faith
- How to Avoid Extra-Contractual Claims in Handling First Party Claims
- Anatomy of a Lawsuit

We welcome the opportunity to host a complimentary presentation at your office or event, on any topic(s) of your choice. For more information about any of the presentations / topics listed above, or to schedule a seminar for you and your team,

please contact Aileen Diaz at 305.982.6621 / ad@kubickidraper.com.

All presentations are submitted for approval of continuing education credits.

Florida Insurance Fraud Education Committee

The firm proudly sponsored and participated in Florida Insurance Fraud Education Committee's (FIFEC) Annual Conference. Several members of our team presented.

Stephanie A. Seligman and **William A. Sabinson,** "Taking the Fraud Out of Public Adjuster's Estimates" with co-presenters Tony Allogia and David Burns of All Claims Insurance Repairs.

Anthony G. Atala and **Charles H. Watkins,** along with co-presenters Jennifer Newell of Federated National, Carl Nemeth of Tower Hill, and Rachel Keller of Focus Forensics "A Claim's Professional's Toolbox for the Investigation and Eradication of Fraud in Modern Day Catastrophic Claims."

Michael J. Carney, Greg J. Prusak and **Brian E. Chojnowski,** "Florida 5-Hour Law and Ethics Update"

Michael S. Walsh, Sam H. Itayim, Ava G. Mahmoudi and **Marsha M. Moses,** "Chiropractic Treatment - Proper Defenses to Common Coding Issues and 2% Chiropractic Manipulation Reduction."

Barbara Fox, Katherine S. Moon and **Paul M. Gabe**, "Defending Bad Faith Claims When Your Insured Isn't Acting in Good Faith- How to Avoid Extra-Contractual Claims in Handling First Party Claims."

Ken M. Oliver, of the Ft. Myers office, presented at this year's Florida Liability Claims Conference organized by the Florida Defense Lawyers Association. The event took place June 5 - 7 in Orlando, Florida. Ken and co-presenter, William Fischer of Fischer Forensic Engineering, presented "Vehicle Downloads and Other Emerging Technologies." They provided an overview of the legal and engineering processes of currently available technology (from vehicles and other sources) to be utilized in the progression of accident analysis.

Our First Party Property group put on a great all-day event on April 26 in Tampa. Kubicki Draper's First Party Claim Game included the following topics:

Playing Roulette with Policy Conditions

presenters: **Valerie A. Dondero** and **William A. Sabinson**. The session covered an insured's obligations under a property insurance policy after a loss occurs and once the claim is submitted to the carrier, how a failure to comply with those obligations can affect coverage and any subsequent litigation, and why it is important to understand the applicable legal principles at the adjusting level of handling the claim.

Florida Hold 'Em Poker: Evaluating and Defending Attorney Fee Claim

presenters: **Michael Balducci, Caryn L. Bellus, Michael C. Clarke** and **Jarred S. Dichek** provided tips on evaluating and defending attorney fee claims and reviewed procedures and practices including how to assess the hours and rates claimed, determining fee entitlement and contesting the claim presented under the applicable law.

CRAPS – Civil Remedy Anatomy, Protocols, and Solutions

presenters: **Bretton C. Albrecht** and **Stefanie D. Capps**. This was a primer on civil remedy notices of insurer violations (CRNs), under Florida's bad faith statute, §624.155, Fla. Stat. and addressed what they are and why they are important.

Virtual Slots: Technology Solutions for First-Party Coverage and Claims

presenters: **Kara K. Cosse** and **Daniel Mercher**, P.E. of Focus Forensics. They talked about how modern technology is being used to assist property insurers, their insureds, and defense counsel in first-party matters.

Blackjack! – 25% (Not "21") on Litigating Roofing Claims

presenters: **Jonathan O. Aihie, Jessica L. Murray** and **Stephanie A. Seligman**. They provided tips for maneuvering through roofing claims and spotting issues with public adjuster's estimates.

At the End – The House Always Wins: Analyzing & Determining Coverage for Wind & Water Damage Claims

presenters: **Anthony G. Atala, Sarah R. Goldberg** and **Katherine S. Moon**. This session focused on how to properly analyze the cause of damage, particularly for a Hurricane loss, and make an early determination as to coverage.

KD news

Back Row: Mikayla Taylor, Enyinnaya Uche, Daniel Vinas, Adriana Pavon
Front Row: Jennifer Remy-Estorino, Isabella Caproni, William Sewell, Jovani Monexil, Jennifer L. Feld
Not photographed: Nicole Wulwick

Law Clerk Program

Our law clerk program is led by **Jennifer L. Feld**, from the Tampa office, and **Jennifer Remy-Estorino** and **Nicole L. Wulwick** from the Miami office. Each year, our program leaders focus on recruiting a diverse, highly motivated group of law students with top academic credentials. This year's class is enrolled in top law schools throughout the State of Florida. Every participant is paired with a mentor and given the opportunity to work alongside shareholders and associates to draft research assignments, contribute to trial preparation, observe depositions and attend mediations. The goal is to provide guidance and training that will help each student have a better understanding of the practice of law and the importance of providing clients excellent service. Successful summer clerks will be considered for associate positions upon graduation and bar admission.

For more information about our program, please contact:
careers@kubickidraper.com.

For the 16th year, Florida Legal Elite presented a prestigious roster of attorneys chosen for recognition by their peers. We are happy to announce several of our own were selected for inclusion in Florida Trend Magazine's 2019 "Florida Legal Elite" list.

Laurie J. Adams (West Palm Beach) – Civil Trial
Jennifer L. Feld (Tampa) – Insurance
Angela C. Flowers (Ocala) – Appellate Practice
Betsy E. Gallagher (Tampa) – Appellate Practice

These lawyers exemplify a standard of excellence in their profession and by so doing, have garnered the respect and esteem of their colleagues. Congratulations to our team members!

Laurie Adams *Legal Elite* | **Jennifer L. Feld** *Up and Comer* | **Angela C. Flowers** *Legal Elite* | **Betsy Gallagher** *Hall of Famer*

Congratulations to our 2020 Best Lawyers in America!

Caryn Bellus **Angela Flowers** **Betsy Gallagher** **Brad McCormick** **Michael Carney** **Jane Rankin** **Laurie Adams**

We are pleased to announce the following KD attorneys were recognized as 2020 "Best Lawyers in America," by the highly-respected "Best Lawyers" peer review guide.

Caryn L. Bellus, Angela Flowers and **Betsy E. Gallagher** - Appellate Practice
Brad McCormick - Personal Injury Litigation - Defendants and Commercial Litigation
Michael Carney – Litigation - Insurance
Jane Rankin - Real Estate Law
Laurie Adams - Personal Injury Litigation – Defendants

Laurie Adams was also recognized as 2020 "Lawyer of the Year" in the Personal Injury Litigation – Defendants category for the West Palm Beach area. We are extremely proud of Laurie, as only one lawyer in each practice area and community is awarded this honor.

Recognition by Best Lawyers is based entirely on peer review. Their methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area.

Congratulations

TO OUR 2019 FLORIDA SUPER LAWYERS

LAW OFFICES

KUBICKI DRAPER

Super Lawyers

Peter S. Baumberger
MIAMI

Caryn L. Bellus
MIAMI

Steven W. Rich
MIAMI

Brad J. McCormick
MIAMI

Angela C. Flowers
OCALA

Betsy E. Gallagher
TAMPA

Rising Stars

Bretton C. Albrecht
MIAMI

Michael F. Suarez
MIAMI

Nicole L. Wulwick
MIAMI

Jennifer L. Feld
TAMPA

Super Lawyers 2019

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. Super Lawyers selects attorneys using peer nominations and evaluations combined with independent research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis. The objective is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel. Since Super Lawyers is intended to be used as an aid in selecting a lawyer, we limit the lawyer ratings to those who can be hired and retained by the public, i.e., lawyers in private practice and Legal Aid attorneys. **www.kubickidraper.com**

Super Lawyers RISING STARS 2019

news | announcements

Kubicki Draper ranked number 3 in the National Law Journal's 2019 Women in Law Scorecard!

The Women in Law Scorecard ranks the largest law firms in the country by their representation of female attorneys. We are honored to have been recognized and look forward to continuing to foster an environment of equal opportunity for success. Please visit: http://www.abajournal.com/news/article/new-firm-nets-top-spot-for-female-attorney-numbersnlj-says

Rebecca Leigh Brock, of the West Palm Beach office, was elected to join the International Society of Barristers (ISOB) as a Fellow. New Fellows are elected by the Society's Board of Governors on nomination by an existing Fellow and after inquiry as to the nominee's skill as a trial lawyer and personal and professional integrity directed to other Barristers in the nominee's region and to judges before whom the nominee has tried cases. We are proud of Rebecca and her association with this outstanding group that seeks to preserve trial by jury, the adversary system, and independence of the judiciary. To learn more about ISOB, please visit:

https://www.isob.com/about.

Congratulations to

Rebecca Cooperman Kay, of the West Palm Beach office, and her husband, on the birth of their baby boy, Asher Brooks Kay.

YOUR OPINION MATTERS TO US.

We hope you are finding the *KD Quarterly* to be useful and informative and that you look forward to receiving it. Our goal in putting together this newsletter is to provide our clients with information that is pertinent to the issues they regularly face. In order to offer the most useful information in future editions, we welcome your feedback and invite you to provide us with your views and comments, including what we can do to improve the KD Quarterly and specific topics you would like to see articles on in the future. Please forward any comments, concerns, or suggestions to Aileen Diaz, who can be reached at: ad@kubickidraper.com or (305) 982-6621. We look forward to hearing from you.

LAW OFFICES

KUBICKI DRAPER

Professional Association
Founded 1963

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