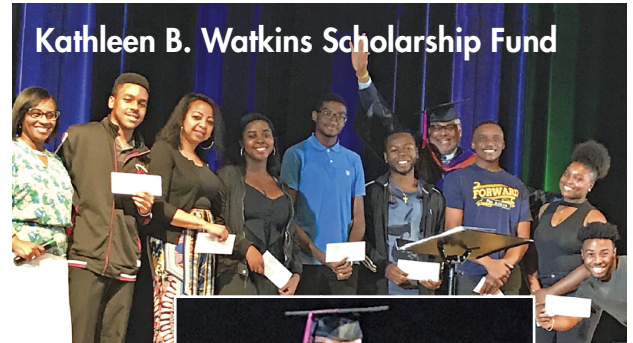


# KD in the Community

**Charles H. Watkins** of our Miami office proudly awarded \$10,900 in scholarship funds to worthy students during Pioneer Community Church's annual celebration honoring graduates. As the Chair of the Kathleen B. Watkins Scholarship Fund, every year, Charles continues his mother's legacy and awards qualified students funds to assist them in obtaining a college degree. Charles, who is also an Equity Partner and the Chief Diversity Officer of our firm, strongly believes in giving back to the communities in which we live and work, and this event is just one of the many ways in which he commits to do so.

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. With KD's support, they raised more funds than ever.

**Harold A. Saul**, of our Tampa office, attended the 8th Annual PKD Kidney Casino for a Cure. Their mission is to give hope by funding research, supporting patients and building a community for all affected by polycystic kidney disease (PKD).



Kathleen B. Watkins Scholarship Fund



Ryan's Raiders



Several KD team members participated in this year's Mercedes-Benz Corporate Run in Miami, one of the largest 5K races in the nation. The Corporate Run promotes running and walking as a means to a fit, healthy lifestyle for people from all walks of corporate life.

Mercedes-Benz Corporate Run



EDITOR  
*Sebastian C. Mejia*  
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## SPOTLIGHT ON Michael C. Clarke

Michael Clarke is a shareholder in Kubicki Draper's Tampa office and has been with the Firm for thirteen of his twenty-four years of practice. Born in Albany, New York, Michael attended the State University of New York

at Plattsburgh, beginning his career in the law immediately upon graduation as an examiner with the New York Legislative Bill Drafting Commission. While at the LBDC, Michael worked assisting members of the New York State Legislature in drafting legislation to maintain a consistent and constitutional statutory approach with existing New York law.

With all respect to Mark Twain and his quip that "People who love sausage and respect the law should never watch either one being made," Michael's experience in the legislative process was different. He decided to attend Stetson University School of Law as a change in scenery after a lifetime in Upstate New York was a necessity.

While at Stetson, Michael's interest and admiration for the organic process by which the law evolves continued. During law school, he began to focus on the appellate process and a court's role in establishing the law. As effective (and concise) legal writing is a large part of any successful appellate practitioner, Michael "wrote on" to the Stetson Law Review and in 1993 graduated cum laude.

Upon graduation, after a thankfully short period of searching for what was then an elusive first job, Michael began his practice on the plaintiffs' side. In addition to writing briefs from day one, he gained immediate trial practice exposure and experience in a civil courtroom setting.

Michael appreciates the law as a living entity believing in the ability to forecast the future based upon precedent and observable history.

The same holds true in life.

Participating in trials ranging from premises liability to complex medical malpractice actions, it became apparent that evaluating how "six people in a box" would communally decide a case presented a challenge to every professional with a stake in determining the likelihood of success of their positions and arguments. He also learned the only effective way to help control the ultimate outcome results from proper evaluation, preparation, and preservation. Objectivity is always key. Taking a long game approach developed Michael into a lawyer who appreciates all aspects of claims evaluation, pre-trial practice, trial and appeals, keeping him grounded outside of the Ivory Tower and firmly within the realities produced by the legal marketplace and a client's bottom line.

Now, with a focus on defense and appellate practice, Michael's interests include helping his clients coordinate statewide litigation and appellate strategies, providing trial support and trying a case as required. Of particular interest is the pursuit or the defense of attorney's fees claims both for his clients and as an expert witness. He intends to continue his practice well into the future as his engagement and enthusiasm in becoming the best lawyer possible has not waned.

Michael resides in St. Petersburg spending his free time enjoying everything Florida has to offer – particularly in the Tampa Bay area – and is excited about the opportunities that the growing region presents. His current goal is to create or recognize one near-perfect thing each day. Whether a grill-marked steak prepared to his guest's exact taste or an artistic recognition of the Steadicam work of Stanley Kubrick, he derives his primary satisfaction from a job well done. If you appreciate his approach to practice with professionalism, feel free to give him a call.

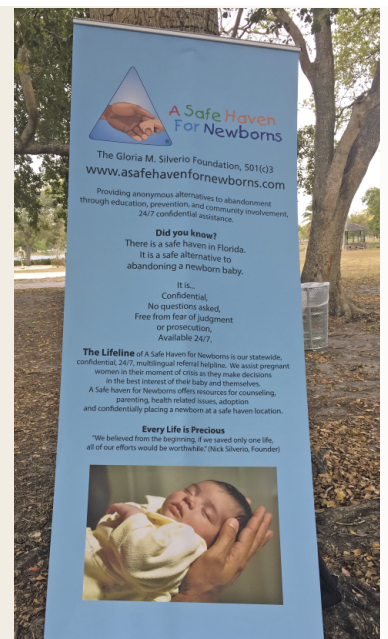
## more KD in the Community

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 A Safe Haven for Newborns, submitted by **Amanda Quesada**, a paralegal in our Miami office.

A Safe Haven for Newborns is dedicated to saving the lives of newborns from the dangers of abandonment and assisting pregnant girls/women in crisis.

Amanda and her mom are passionate about this cause and have been volunteers for the last three years. Amanda's mother is also an ambassador for this amazing organization.

We are very proud of our team's efforts to contribute to A Safe Haven for Newborns, and we look forward to supporting the next great organization selected.



A Safe Haven for Newborns



# Allocation of the Burden of Proof at Trial Under a Special Form Homeowners Insurance Policy



By Sarah R. Goldberg

The Fourth District Court of Appeal issued an opinion in the case, **Jones v. Federated National Insurance Company**, 235 So. 3d 936 (Fla. 4th DCA 2018). This opinion clarifies and limits the extent to which **Sebo v. American Home Assurance Co.**, 208 So. 3d 694 (Fla. 2016) ("Sebo II") should be applied.

The Plaintiff's bar is quick to turn to **Sebo II**, to argue that concurrent causation applies to virtually all questions of coverage when the homeowners insurer has denied a water loss claim. In **Sebo II**, the Court held that when multiple perils combine to cause a loss, some of which are covered, and some of which are excluded, concurrent causation applies to the loss. Under a concurrent causation analysis, when covered perils and non-covered perils combine to cause a loss, coverage exists for the loss.

With this analysis in mind, the insured is likely to prevail at trial because exclusionary provisions are essentially rendered meaningless unless the insurer can prove the exclusion was the sole cause of the loss—which is often difficult or near impossible—when the policy sued on does not contain any anti-concurrent causation language like in **Sebo II**. However, many policies contain anti-concurrent causation language. Jones clarifies that where anti-concurrent causation language falls in the policy is particularly important to analyzing the correct burden of proof for trial.

Standard Special Form policies typically contain anti-concurrent causation language under the "General Exclusions" portion of the policy such as the following language:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

In **Sebo v. American Home Assurance Co, Inc.**, 141 So. 3d 195 (Fla. 2d DCA 2013) (**Sebo I**), (quashed by **Sebo II**), the Court analyzed situations where multiple perils combine to cover a loss, some covered and some excluded, using the efficient proximate causation doctrine. Under the efficient proximate causation doctrine, "where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable." This analysis is obviously more favorable to the insurer, because it allows the insurer to present arguments that wear and tear, an excluded cause under the policy, are really what set a loss into motion rather than an accidental peril which occurred on the reported date of loss.

In **Jones**, the Appellate Court considered a common All-Risk policy that does in fact contain anti-concurrent causation language (unlike the policy in **Sebo II**). The trial court gave the following jury instruction:

Did the Plaintiffs prove by the greater weight of the evidence that they sustained a direct physical loss to their roof as a result of the hailstorm on April 20, 2012 which was the most substantial or responsible cause of the damage to the roof?

This instruction was an application of the efficient proximate causation doctrine as set forth in **Sebo I**. On Appeal, the Court found that the instruction was improper. It noted that the insured's only initial burden of proof under an All-Risk policy is to establish that a direct, physical loss occurred within the policy period.

The burden of proof then shifts to the insurer to prove an exclusion to coverage. Clearly, if the Defendant proves that an excluded cause of loss is the sole cause of loss, Defendant prevails at trial.

The more likely scenario is a situation where a sudden occurrence (a covered event) combines with damage that appears to be due to an excluded cause of loss such as wear and tear. In this scenario, where there is anti-concurrent causation language that applies to the exclusion that is relied upon by the insurer, Jones states that the insurer has the burden to prove that the excluded cause of loss is the efficient proximate cause of the loss. However, if the exclusion is not covered by anti-concurrent causation language, efficient proximate causation cannot be used and the insured prevails at trial.

The **Jones** case dealt with one of the most common first party property claims, a roof leak claim. Federated National denied the insured's roof leak claim based on a variety of exclusions including exclusions for "wear, tear, marring and deterioration"; "faulty inadequate or defective design"; "neglect"; "existing damage"; or "weather conditions." Where these exclusions fall in the policy are important to the analysis of which causation doctrine applies where there are multiple perils that cause a loss.

Close examination of the typical All-Risk policy reveals that the typical "wear, tear and deterioration" exclusion falls under the "Perils Insured Against" section of an All-Risk policy which starts out with the following language:

1. We insure against direct loss to property described in Coverages A and B only if that loss is a physical loss to property.
2. We do not insure, however, for loss:
  - b. Caused by:

This portion of the policy contains no anti-concurrent causation language. In **Jones**, the Court found that because only some of the exclusionary provisions the insurer relied upon fell under a portion of the policy that applies anti-concurrent causation language, and others did not (like wear, tear and deterioration), "the trial court erred by uniformly applying the efficient proximate cause doctrine in its jury instruction."

The **Jones** opinion, therefore, allows for the application of the efficient proximate causation doctrine when the exclusion relied upon by the insurer falls under anti-concurrent causation language in the policy, thereby limiting the application of the holding in **Sebo II**.

# Presentations & Speaking Engagements

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.

- Material Misrepresentation
- Florida 5-Hour Law and Ethics Update
- Negotiating Low Limit Claims
- Proposals for Settlement
- How to Handle Wind and Water Damage
- When Old Claims Rise from the Dead
- Fire Origins and Cause Basics
- Most Frequent Claims and How to Prevent Them
- Bad Faith Hot Topics
- Mitigation Inflation - Challenging Mitigation Abuses with Scientific Industry Standards
- Construction Indemnity Contracts and Florida Statute 725.06
- Chapter 558: Purpose, Procedures, Effectiveness and The Altman Decision
- Arbitration and Transferring Risk in Construction Defect Cases
- Diminished Value
- Claims, SIU and Legal Issues Attendant to Auto Total Loss Claims in Catastrophic Events
- Comparative Negligence
- Managing the Catastrophic/Complex Case from Coverage to Conclusion
- Reservation for Exploitation: Recognizing, Preventing, and Confronting Human Trafficking in the Hospitality Industry
- Litigating Fraudulent Tile Claims and/or Non-Covered Tile Claims And How To Conduct A Pre-Suit Investigation
- Premises Liability
- Dispositive Motions & Attorneys Fees

At right:  
Barbara Fox, Charles Watkins  
and Caryn Bellus.

A MONKEY'S UNCLE:  
HOMEOWNERS' CLAIMS  
SUIT INVOLVING AIRBNB  
SHARING ARRANGEMENTS

Caryn Bellus  
Barbara Fox  
Charles Watkins



Nicole Wolwick, Ryon Plancer, Aaron Duba, Scott Rosso  
and Valerie Dondero.



Above: Anthony Atala, Kara Cosse, Jennifer Newell, Ruth Molina, Jarred Dichek and Michael Walsh.

At left:  
Michael Walsh presents at the FIFEC Conference.



Jarred Dichek and Charles Watkins.

It was a pleasure teaming up with Sdii Global Corporation and American Technologies, Inc. to put on Flood House – a seminar focusing on flood claims handling. **Charles H. Watkins** and **Jarred S. Dichek** of our Miami office presented "Who, What, Where and How to Handle Wind and Water Damage." There were several other great presentations including a live flood demonstration.

We are proud to have once again sponsored and participated in Florida Insurance Fraud Education Committee's (FIFEC) Annual Conference in Orlando, Florida. Several of our attorneys presented alongside insurance industry professionals and law enforcement members in an effort to continue the ongoing fight against all forms of insurance fraud. Our team's topics were:

### "Solicitation and Brokering"

presented by **Anthony G. Atala, Kara Kennedy Cosse, Jarred S. Dichek, Michael S. Walsh** and co-presenters, Jennifer Newell, CIFI from Federated National Insurance, Ruth Molina, PhD(c), CFLS and Lieutenant Frank Gonzalez from the Department of Financial Services, Bureau of Insurance Fraud.

### "Fraud in Hurricane Irma Roof Leak Claims"

presented by **Valerie A. Dondero, Scott M. Rosso, Nicole L. Wolwick** and co-presenters from Haag Engineering, Aaron Duba and Ryon Plancer, P.E.

### "How to Know a Real House Guest from a Monkey's Uncle: Assessing Homeowners' Claims for Fraud Involving Airbnb or Home-Sharing Arrangements"

presented by **Caryn L. Bellus, Barbara Fox** and **Charles H. Watkins.**

We look forward to participating in, and hopefully, seeing you at this great event next year!

We welcome the opportunity to host a complimentary presentation at your office or event, on any topic(s) of your choice. All presentations are submitted for approval of continuing education credits. For more information, please contact Aileen Diaz at 305.982.6621/ad@kubickidraper.com.

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2018

# SUPER LAWYERS



# RISING STARS



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## APPELLATE

### ***Fifth DCA Final Judgment Granting Full Collateral Source Set-offs Affirmed.***

**Sharon C. Degnan**, of the Orlando office, prevailed in an appeal before the Fifth District Court of Appeal in a case involving collateral source set-offs. Following a jury trial in a personal injury case, where the jury did not award Plaintiff all of his past medical expenses, Defendant filed a motion requesting a setoff in the full amount of the contractual adjustments to Plaintiff's medical bills, which were written off by Plaintiff's health insurer. After the trial court granted Defendant's set-off motion, Plaintiff appealed and argued that the Defendant could not meet his burden to show entitlement to a set-off because it was unclear what bills had been awarded by the jury and thus no set-off should be given. Plaintiff also argued that if any set-off was appropriate, it should be a pro-rata set-off based on the percentage of the bills that were awarded. Following oral argument, the Fifth District issued a per curiam affirmance of the trial court's decision and agreed with Sharon's argument that the plain language of \$768.76 mandated that the collateral source set-off be given for the full amount of the contractual adjustments and there was no legal basis to justify a pro-rata set-off.

### ***Fifth DCA Reversal of Order Granting New Trial Following Defense Verdict.***

**Angela C. Flowers**, of the Ocala office, recently obtained a reversal of the trial court's order granting Plaintiff a new trial based on allegedly improper—but unobjected to—defense closing arguments of outside trial counsel. This case arose from a slip-and-fall at an amusement park where the jury returned a complete defense verdict. That victory was initially wiped out by the trial court's order granting a new trial. As Angela explained in her briefs in the appeal, one thing that made this case unusual is that, within 3 days after the fall, Plaintiff began treating with a chronic pain management specialist even before seeing his primary doctor, and each of his treating physicians acquired an immediate, direct financial interest in the litigation. At trial, Plaintiff's counsel made a tactical decision to preemptively explain and elicit that he referred Plaintiff to the pain doctor, and, in closing argument, he offered what amounted to unsworn explanations for his referral relationship with the treating doctors. The trial court deemed comments made by defense counsel in closing arguments on the subject to be fundamental error. On appeal, Angela persuaded the appellate court to reverse and reinstate the defense verdict. Although the appellate court found that certain defense arguments were improper, the court was persuaded that the unobjected-to comments did not rise to the level of fundamental error. Specifically, had Plaintiff objected to the closing arguments, they could have been cured by a timely objection, after which the trial court could have issued a curative instruction to the jury. Accordingly, the court reversed and remanded to reinstate the jury's defense verdict.

### ***Dismissal of First-Party Bad Faith Case in UM Action.***

**Laurie J. Adams** and **Melonie Bueno**, of the West Palm Beach office, successfully dismissed a bad faith case in trial court in the Second DCA, arguing that ***Fridman v. Safeco*** does not prevent dismissal of first party bad faith counts brought at the same time as the underlying UM count. While abatement is preferred in some venues, particularly, the Fourth DCA, dismissal is a viable option for the court, especially when it does not promote judicial economy.

### ***Second DCA Summary Judgment Affirmed – First Party Motorcycle Coverage Claim.***

**Sharon C. Degnan**, of the Orlando office, prevailed in an appeal before the Second District Court of Appeal in an insurance coverage case where the insureds sought coverage for damages sustained to their motorcycle, when they were required to lay the motorcycle down on the highway after a tire failure. The insureds motorcycle policy did not carry collision coverage, therefore they tried to argue that coverage was available under the policy's comprehensive coverage provision. After the trial court granted the insurer's summary judgment motion, which was drafted and argued by Sharon and **Angela C. Agostino**, of the Fort Myers office, the insureds appealed. The appellate court affirmed the entry of summary judgment and agreed that no insurance coverage was available for the loss under the motorcycle policy's comprehensive coverage.

## TRIALS, MOTIONS, MEDIATIONS

### ***Dismissal of Gross Negligence Count.***

**Laurie J. Adams** and **Melonie Bueno**, of the West Palm Beach office, dismissed a gross negligence count in Palm Beach County trial court, arguing that Plaintiff failed to plead with specificity the elements to assert this claim. Plaintiff argued that the 92-year old Defendant with a dropped foot, who used a scooter to ambulate and drove a handicapped van while on various prescription medications, was equivalent to gross negligence or reckless disregard for human life. Laurie and Melonie successfully argued that age and disability do not rise to the level of gross negligence.

### ***Voluntary Dismissal with Prejudice in First-Party Property Case.***

**Nicole L. Wulwick**, of the Miami office, obtained a Voluntary Dismissal with Prejudice in a first party property damage case, where a roof leak claim was denied by an insurer. The dismissal by the Plaintiff was received on the eve of a Summary Judgment hearing. This case was highly contested and involved several legal issues involving coverage to a detached rental unit on the property.

### ***Voluntary Dismissal Following Filing of Motion for Summary Judgment – First Party-Property Water Damage Claim.***

**Jonathan O. Aihie**, of the Miami office, obtained a summary judgment in a first-party property case where the plaintiffs contended that they suffered a covered loss stemming from an AC leak. Jonathan requested a re-inspection with an engineering expert to determine the cause and origin of the claimed damage. The expert determined that the damage was long-term and not from a sudden accident. Jonathan then requested the plaintiffs' depositions to see if he could obtain helpful testimony to put the case in a dispositive position. Plaintiffs said during their depositions that the dark water stains developed over months. Jonathan now had what he needed and drafted a motion for summary judgment based on plaintiffs' testimony and the expert opinion, showing that the claimed damage was excluded under the policy because it was long term. Plaintiffs' counsel called immediately after the hearing for the motion for summary judgment was scheduled to inform Jonathan of his intention to file a voluntarily dismissal even though the case had been ongoing for months.

# TRIALS, MOTIONS, MEDIATIONS

## ***Defense Verdict in Commercial UM Claim in Brevard County.***

**Greg J. Prusak** and **Toni M. Turocy**, of the Orlando office, obtained a defense verdict in Brevard County in a UM claim involving a drunk driver who struck the rear of a utility truck while the Plaintiff was 45 feet in the air in a bucket lift changing a street light. KD represented the UM carrier for the Plaintiff's employer.

The Plaintiff went on to have a lumbar fusion and two cervical fusions. Through discovery, Greg and Toni learned that the Plaintiff had been involved in a prior MVA three years earlier where he claimed the exact same injuries and exact same symptoms as he was claiming in the underlying litigation. However, Plaintiff never disclosed this prior MVA to any of his treating providers.

During the defense's vocational rehab evaluation in December 2017, Plaintiff claimed he couldn't lift his arms above his head, had trouble with balance and walking, couldn't stoop, couldn't bend, etc. Plaintiff's counsel retained the dynamic duo of Drs. Craig Lichtblau and Bernard Pettingill, who presented a future life care plan valued at over \$2 million.

The UM carrier set up remote surveillance in January 2018 upon learning that the Plaintiff had moved from WPB to Cocoa. The surveillance footage, comprised of 5 consecutive days, showed the Plaintiff on a ladder reaching over his head to take down Christmas lights, bending, stooping, and even using post hole diggers to plant two palm trees in his front yard.

They also found Facebook posts that the Plaintiff was the proud new owner of a boat. At trial, Plaintiff argued that the boat was registered in his Dad's name, and he was just storing it for him in Florida. However, a look at Dad's Facebook page revealed a similar post by Plaintiff's Dad which said "delivering a beautiful boat to my son."

Greg got Dr. Lichtblau to testify on the stand that while it was his opinion the Plaintiff, a 39-year-old man, was totally disabled and could never work again, it was perfectly fine for him to go boating and fishing. The total medical bills Plaintiff incurred were over \$481,000.00.

At the conclusion of trial, Plaintiff and his wife made a \$5.3 million demand to the jury. In response, the defense conceded that Plaintiff likely suffered a sprain/strain of his cervical and lumbar spine and asked the jury only to pay for the reasonable medical expenses related to that post-accident treatment (i.e., \$82,000.00).

After only one hour of deliberation, the jury returned a verdict in the amount of \$251,000.00. They awarded past medical expenses in the amount of \$87,000.00, lost earnings in the past of \$78,000.00, and future lost earnings in the amount of \$86,000.00.

The jury found Plaintiff did not suffer a permanent injury as a result of the subject accident and awarded no past or future non-economic damages and awarded \$0 consortium damages.

The UM carrier had previously filed a PFS to both Plaintiffs for the total amount of \$500,000.00, which was not accepted. Moreover, at mediation the UM carrier offered Plaintiffs \$525,000.00, which was also rejected.

After set-offs from the tortfeasor and collateral sources (including significant payments made through Worker's Comp), the net verdict for KD's client would likely have been \$0. Plaintiff has elected to walk away from an appeal in exchange for a nominal settlement and not having an attorney's fee judgment against him.

## ***Motion For Summary Judgment Granted in Dram Shop Claim.***

**Blake H. Fiery**, of the Ft. Lauderdale office, prevailed on a Motion for Summary Judgment in Okeechobee County in a wrongful death, motor vehicle accident, dram shop claim brought against a bar, which employed a 20-year-old bar manager, who was alleged to have supplied alcohol to minors before the crash occurred.

Blake established, through a long procession of depositions, that the bar kept close tabs on its alcohol, in this case, Hennessy (a tweet shortly before the accident announced it was "almost Hen-thirty"). Nobody could pinpoint who supplied the alcohol absent an impermissible level of speculation.

The plaintiff attorney filed opposing affidavits that made it appear quite unlikely the court would even consider granting the motion. Blake, however, essentially sidestepped their affidavits and argued that even if the court were to accept the argument that this 20-year-old stole alcohol from the bar before leaving work that night, it would not qualify as the bar "furnishing" alcohol under the statute.

## ***Motion for Summary Judgment Granted in Favor of the Insurance Carrier on a Denied Roof Leak Claims.***

**Sarah R. Goldberg**, of the Miami office, obtained a summary judgment in an insurance carrier's favor, following 14 months of the Plaintiff delaying the case and aggressive discovery and Motion Practice on Sarah's part. Plaintiff was seeking replacement of a roof and the full interior of both the main house and detached efficiency of the property. Plaintiff's counsel continually refused to respond to discovery, failed to have their witnesses appear for depositions and continually requested continuances on Sarah's motion for summary judgment hearing. Sarah convinced the Court to strike the Plaintiff's first expert after he refused to appear for deposition and was successful in having the court strike the Plaintiff's second expert due to untimely disclosure. Sarah then convinced the court not only to deny the continuance of the hearing on the Motion for Summary Judgment once again, but to grant the motion in Sarah's client's favor. Plaintiff then moved for rehearing claiming "excusable neglect" for untimely disclosure of the second expert. The Court denied Plaintiff's motion for rehearing based on Sarah's written memorandum which set forth in detail Plaintiff's numerous discovery violations in the case, showing willful failure to prosecute, not "excusable neglect."

## ***Dismissal of First-Party Bad Faith Case in UM Action and Attorney's Fees Claim.***

**Laurie J. Adams** and **Alexandra V. Paez**, of the West Palm Beach office, successfully dismissed a bad faith case within a UM complaint, in Dade County. Although the trend has been abatement in some jurisdictions, there are still viable reasons a case can and should be dismissed, especially considering the posture of the case and its effect on judicial economy. The Court also granted the carrier's motion for protective order as to bad faith discovery, struck the attorney's fee claim as there was no denial of coverage, and granted our motion striking improper breach of contract allegations within the UM complaint. It is now pared down into the straight UM claim it should have been from the beginning.

# TRIALS, MOTIONS, MEDIATIONS

## ***Partial Summary Judgment Granted in Construction Defect Claim Due to Lack of Standing.***

**Christopher M. Utrera**, of the Miami office, obtained Partial Summary Judgment in favor of a developer client. Plaintiff, a condominium association, brought suit against multiple parties for a myriad of construction defects at the subject property. The property is a mixed-use development consisting of a marina, commercial space, plus a hotel and condominium units within a single high-rise structure. The Plaintiff raised defect claims for most areas of the property, including, but not limited to, the structural components, roof, mechanical and electrical systems, stucco, glazing, parking areas, and interior finishes. Though no official damage estimates were provided, the type of claimed damages are typically in excess of several millions of dollars.

Summary judgment was filed based upon the Plaintiff's lack of standing to pursue certain alleged claims, as the governing covenants and condominium declarations state that the hotel (not the condominium association) is responsible for the maintenance and repair of what is called the 'Shared Facilities.' The Shared Facilities are, in essence, defined as those areas typically part of a condominium's common elements, such as the structural components, roof, mechanical and electrical systems, stucco, glazing, parking areas, etc. Because the governing documents described the Shared Facilities as being solely the property of the hotel, and subject to the hotel's discretion for maintenance and repair, Chris argued the Plaintiff association lacked standing and was not the real party in interest to pursue the subject causes of action. The Plaintiff association responded by arguing that its unit owners still had a common interest in ensuring the alleged defects were remediated. Furthermore, the association claimed it was responsible for reimbursing the hotel for half of the repair costs associated with the defects, thereby allowing them to pursue the lawsuit against the defendants. Extensive motions and responses were filed, and following a lengthy hearing on the summary judgment motion, the Court ultimately sided with Chris' argument that the condominium association did not have the requisite standing to pursue claims related to the Shared Facilities. Just recently, the Court upheld its own ruling following two separate motions for rehearing filed by the Plaintiff.

## ***Dismissals Obtained on Denied Roof Leak Claims.***

**Sarah R. Goldberg**, of the Miami office, received voluntary dismissals in 2 cases involving pre-Hurricane Irma roof claims. In the first claim, the mold remediation company pursued a claim from a roof leak. Through aggressive discovery by Sarah, including setting several depositions close in time to the hearing on the Motion for Summary Judgment Sarah filed, the plaintiff voluntarily dismissed the claim on the eve of the hearing on the motion for summary judgment.

On the second claim, Sarah, early on, identified the lack of evidence of any cause of the alleged loss and tailored her discovery to depose the homeowner and her representatives who could not provide a cause for the loss. After these depositions were completed, Sarah filed a Motion for Summary Judgment, which caused the plaintiff to dismiss the case two days prior to the hearing on the motion for summary judgment.

## ***Summary Judgment Granted in Northern District of Florida in Civil Rights Violation Case.***

**Chelsea R. Winicki**, of the Jacksonville office, obtained an order granting her Motion for Final Summary Judgment in a high profile case that has gained national attention. Chelsea filed the Motion for Summary Judgment on behalf of her client, Rusty Rodgers, a Special Agent with the Florida Department of Law Enforcement. In the matter, Plaintiff, Jeremy Banks, a law enforcement officer with the St. Johns County Sheriff's Office, alleged civil rights violations under Federal Statute 1983, as well as intentional infliction of emotional distress, against Special Agent Rodgers.

The case arises out of the death of Michelle O'Connell, the then-girlfriend of Deputy Banks. On September 2, 2010, Michelle O'Connell was found dead in the home that she shared with Deputy Banks. The cause of death was a gunshot wound to the head and the weapon used was the duty weapon of Deputy Banks. St. Johns County Sheriff's Office arrived on scene, commenced an investigation, and deemed the death a suicide.

However, the family of Michelle O'Connell was not convinced that Michelle committed suicide. Several months later, Florida Department of Law Enforcement was brought in to investigate the matter and Special Agent Rusty Rodgers was assigned the case. Through Special Agent Rodgers' investigation, additional evidence was uncovered and turned over to the State Attorney's Office. However, Deputy Banks was not charged with the crime.

Deputy Banks first filed his lawsuit against Special Agent Rodgers in January of 2014, alleging that Special Agent Rodgers, during his investigation of the case, committed civil rights violations under Federal Statute 1983 and intentional infliction of emotional distress. Chelsea represented Special Agent Rodgers since the initial Complaint was filed with the continued intention of seeking a dismissal of the case against Agent Rodgers through a Motion for Summary Judgment. Years of litigation ensued, with the depositions of high profile members of the legal and law enforcement community including numerous law enforcement officers, the Sheriff of St. Johns County, State Attorneys, and a Judge.

Chelsea filed the Motion for Summary Judgment in March of 2017. The ruling from the Federal Court, granting the Motion for Summary Judgment, and dismissing Chelsea's client, came out in March of 2018, which was reported on in local news publications. Since the death of Michelle O'Connell, the case has gained national attention and has been the subject of a documentary on Frontline, Dateline, 20/20, and three New York Times articles, including a front page story in June of 2017. Plaintiff has elected not to appeal the decision.

<https://www.firstcoastnews.com/article/news/crime/judge-dismisses-civil-case-against-lead-fdle-investigator-for-michelle-oconnell-death/77-533682705>

<https://www.nytimes.com/2017/06/17/us/michelle-oconnell-jeremy-banks.html>



## TRIALS, MOTIONS, MEDIATIONS

### **Voluntary Dismissal in Case Regarding Fraudulent Assignment of Benefits.**

**Sarah R. Goldberg**, of the Miami office, obtained a Voluntary Dismissal in a lawsuit filed by a water mitigation company based on an assignment agreement against the homeowner's insurance carrier. At the deposition of the homeowner, Sarah got the homeowner to admit he did not execute the assignment agreement nor did the mitigation company complete the services identified on their invoice. Following the deposition, Sarah obtained an affidavit from the homeowner's wife also indicating she did not execute the assignment agreement. Sarah then filed a Motion for Sanctions under 57.105 for a frivolous lawsuit, which resulted in the water mitigation company filing a voluntary dismissal shortly after the motion was filed.

### **Motion for Summary Judgment in Favor of Insurance Carrier in First Party Property/Bad Faith Claim.**

**Valerie A. Dondero**, of the Miami office, obtained a summary judgment in an insurance coverage case. This case was transferred from prior defense counsel who recommended immediate settlement of the claim and told the carrier that they could not prevail. A breach of contract and bad faith claim were filed by a lienholder who alleged it was not protected on a check issued solely to the insured for repairs to the vehicle. The Insured was in a single vehicle accident in a newly acquired Ferrari and reported the loss to the carrier that day. The carrier assessed the damage to the vehicle and determined that it was repairable rather than a total loss. The insured convinced the carrier to issue a six-figure repair draft solely to him. The lienholder and the repair facility were not placed on the repair draft. The insured never paid for the repairs that were performed. The Insured also stopped paying on the financing agreement with the lienholder as well.

The lienholder asserted the insured converted the funds, which is specifically excluded under the Loss Payable Clause of the Policy. Val argued that the policy only required the lienholder to be added to a draft when the vehicle was a total loss, rather than repairable. Val also argued that the lienholder had not perfected his status with DMV until well after the accident at issue and the payment of the claim.

Plaintiff demanded the cost of repair in damages, plus interest, attorneys fees and costs and bad faith damages, that amounted to a significant exposure. The trial court found the insurance policy was unambiguous and granted judgment in favor of the carrier on the lienholder's claims.

### **Voluntary Dismissal with Prejudice in Electronic Signature Challenge.**

**Valerie A. Dondero**, of the Miami office, obtained a Voluntary Dismissal with Prejudice in favor of an insurance carrier on an electronic signature challenge in Vero Beach, Florida. The Plaintiff alleged he had not "signed" the application for insurance and had not "signed" the rejection of UM coverage form. Plaintiff also asserted a fraud count against his insurance agent who he claimed electronically signed the documents without the plaintiff's knowledge or permission. The Agent denied these allegations. Through the carrier's underwriting documents and electronically stored documentation on its e-signature processes, Valerie convinced the Plaintiff and his high profile counsel there was no claim and that a FS 57.105 would likely be filed if a dismissal was not forthcoming. Valerie continues to be the only statewide coverage counsel for the carrier's electronic signature processes.

### **Motion to Quash Subpoenas Directed to Insurance Carrier and to Return Inadvertently Disclosed, Privileged Claim Documents in Criminal Proceedings.**

**Laurie J. Adams**, of the West Palm Beach office, and **Caryn L. Bellus**, of the Miami office, with the invaluable assistance of **Bretton C. Albrecht**, of the Miami office, and **Melonie Bueno**, of the West Palm Beach office, teamed up to tackle an urgent situation involving privileged claim investigation materials subpoenaed in a criminal case. Our client, an insurance company, has an insured who is the subject of a criminal prosecution arising from an automobile accident. Long before the criminal trial was at issue, a claim was made under the policy issued by our client insurance company. The insurer retained investigators in anticipation of litigation arising from the auto accident, as a result of which extensive investigative materials were prepared.

More than a year or so later, and on the eve of the criminal trial, the assistant state attorney (ASA) assigned to prosecute the case began subpoenaing the insurer's claim investigators directly, demanding immediate production of the claim investigation materials and threatening to issue search warrants if compliance was not immediately forthcoming. Not surprisingly, prior to our involvement, investigative materials ended up being turned over to the ASA. Our client contacted us to get them back. After multiple lengthy hearings on our motion to quash subpoenas and for the return of the inadvertently produced documents, the trial court finally granted our motion and directed the return of the privileged documents.



*The information provided about the law is not intended as legal advice. Although we go to great lengths to make sure our information is accurate and useful, we encourage and strongly recommend that you consult an attorney to review and evaluate the particular circumstances of your situation.*

# News & Announcements

Kubicki Draper is a proud sponsor of the 25th Anniversary Dinner of The Florida Bar's Appellate Practice Section, and we were honored to have some of our appellate team at the event representing the firm.



Pictured above from left to right: **Bretton C. Albrecht**, **Angela C. Flowers** (former Section Chair), **Caryn L. Bellus** (former Section Chair) and **Sharon C. Degnan**.

Congratulations to **Betsy E. Gallagher**, of the Tampa office, on being selected as a Top Rated Bad Faith Insurance Lawyer in Tampa for 2018 by Super Lawyers.

Congratulations to **Jarred S. Dichek**, of the Miami office, on being nominated to the University of Miami Citizens Board.



**Michael J. Carney**, **Sebastian C. Mejia**, **Greg J. Prusak**, and **Ken M. Oliver** presented the Florida 5-Hour Law and Ethics Update at the Orlando Claims Association Conference.



**Charles H. Watkins**, of the Miami office, co-presented "Claims, SIU and Legal Issues Attendant to Auto Total Loss Claims in Catastrophic Events" at CLM's 2018 Annual Conference. **Caryn L. Bellus**, of the Miami office, also attended the conference.

## NEW ADDITIONS

*We are pleased to introduce our new team members.*

FT. LAUDERDALE:	<b>Francesca Olivier</b> , Associate
JACKSONVILLE:	<b>Cassandra D. Smith</b> , Associate
MIAMI:	<b>Paul M. Gabe</b> , Associate
ORLANDO:	<b>Cassandra M. Hernandez</b> , Associate
TAMPA:	<b>Kimberly A. Beckwith</b> , <b>Amy E. Ray</b> , Associates
WEST PALM BEACH:	<b>Victor J. Genchi</b> , Associate

## ANNOUNCEMENTS

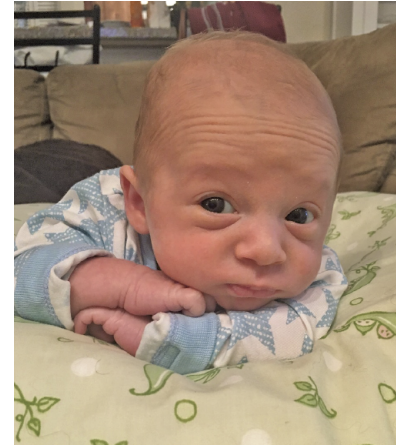
# Congratulations



WE ARE PLEASED TO WELCOME  
NEW BABIES TO THE  
KD FAMILY.

**William A. Sabinson**, of  
the West Palm Beach office,  
and his wife, on the birth  
of their baby girl,  
*Everly Grace*.

**Jill L. Aberbach**, of the  
Ft. Lauderdale office, and  
her husband, on the birth  
of their baby boy,  
*Jeremy Ryan*.



**Jennifer Remy-Estorino**,  
of the Miami office, and  
her husband, on the  
birth of their baby boy,  
*Jacob Jagger*.



**Charles F. Kondla**,  
of the Miami office, and  
his wife, on the birth  
of their baby girl,  
*Mia Amada*.

### 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](mailto:ad@kubickidraper.com) or (305) 982-6621. We look forward to hearing from you.

### CONTACT INFORMATION

LAW OFFICES



Professional Association  
Founded 1963

#### New Assignments

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Aileen Diaz 305.982.6621 .....[ad@kubickidraper.com](mailto:ad@kubickidraper.com)

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Pensacola Tallahassee Tampa West Palm Beach ALABAMA: Mobile

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