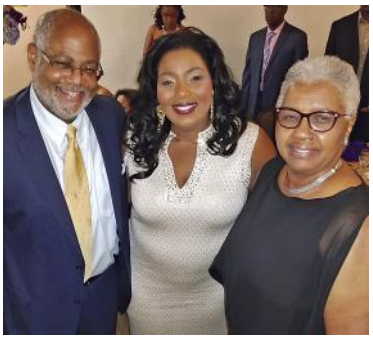
KUBICKI DRAPER

THE KD QUARTERLY

www.kubickidraper.com WINTER 2018

KD *in the Community*

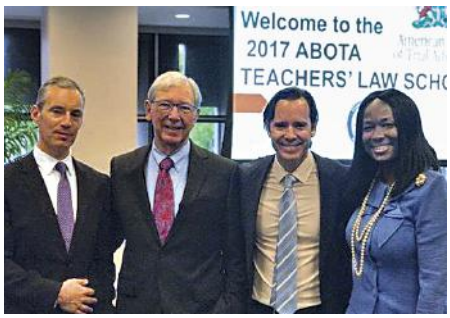
For the 10th consecutive year, **Harold A. Saul**, of the Tampa office, captained "Ivan's Investors for a PKD Cure" at the annual PKD Walk. The team, named in honor and memory of Harold's father, helps raise money to support the Polycystic Kidney Disease Foundation's search for a cure for this disease. A large number of KD attorneys and staff participated in the walk and contributed to the team's fundraising efforts, helping it finish number three in the nation.



Galleon Foundation Gala

Charles H. Watkins, of the Miami office, attended the Galleon Foundation Charity Gala and Awards Dinner. The Galleon Foundation's mission is to provide assistance to financially disadvantaged children at schools in the Caribbean and USA through scholarship and mentorship programs. At the gala, Charles awarded a joint scholarship to the Florida Memorial University from Kubicki Draper and his mother's endowed Scholarship Fund -- Kathleen B. Watkins Scholarship Fund. He also presented The Galleon Foundation's Distinguished-Community Service Award to Juliet Roulhac, Regional Manager for Florida Power & Light Company.

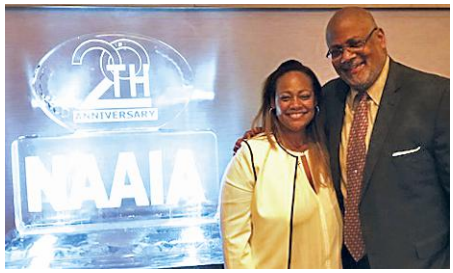
Peter S. Baumberger, of the Miami office, moderated the American Board of Trial Advocate's annual Teachers Law School at Miami Dade College on November 20th. The American Board of Trial Advocates (ABOTA), sponsors these events in many cities across the country to advance civics education and the right to trial by jury. Several ABOTA members, along with five Miami-Dade State Court Judges presented to over 50 high school and middle school teachers, covering a whole host of legal and civic issues including the importance of jury service, burdens of proof in civil and criminal cases, and jury selection.



ABOTA annual Teachers Law School

Charles H. Watkins and **Nicole Ellis**, of the Miami office, attended the National African American Insurance Association (NAAIA) Conference and Empowerment Summit in Atlanta.

The National African American Insurance Association (NAAIA) was organized to create a network among minorities who pursue careers in the Insurance Industry. Pooling this wealth of talent contributes to the growth of the association and its members through sharing of professional experience, knowledge, and information. KD proudly supports NAAIA's work in our community.



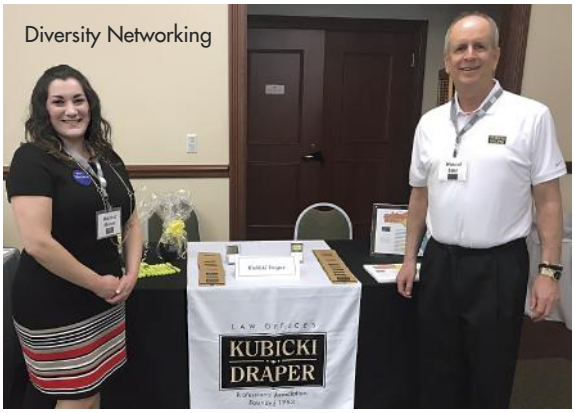
NAAIA Conference and Empowerment Summit

EDITOR
Jill L. Aberbach

IN THIS ISSUE

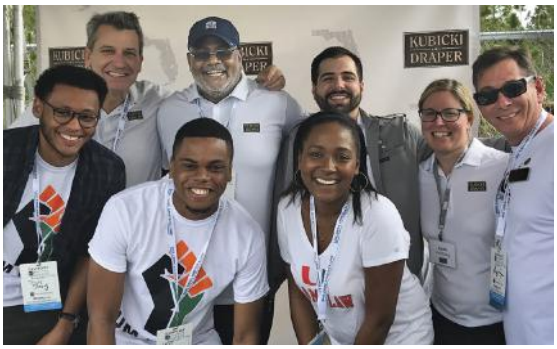
more KD in the Community

Harold A. Saul and **Marsha M. Moses**, of the Tampa office, participated in the Hillsborough County Bar Association's Diversity Networking event at the Chester H. Ferguson Law Center. The event helps connect minority law students with attorneys, judges and members of local legal organizations in a casual, friendly and low-pressure environment. Harold and Marsha were able to meet several eager law students, many local judges, and special guest Florida Supreme Court Justice C. Alan Lawson. Kubicki Draper is proud to be a sponsor of this great event centered on diversity.



Diversity Networking

Once again, we were very happy to sponsor and have many of our attorneys attend the Annual Kozyak Minority Mentoring Picnic at Metro Zoo. As always, the picnic was well attended by many judges and lawyers and provided networking opportunities to minority and women law students from every school in Florida. Our team met with dozens of students, giving them career advice, providing them information about our practices and directing them to our internship program.



(back row from left) Brad McCormick, Charles Watkins, Charles Kondla and Sarah Goldberg, with students at the Annual Kozyak Mentoring Picnic. Not photographed but also in attendance were KD members Jennifer Remy-Estorino and Pete Baumberger.

Kozyak Minority Mentoring Foundation was created with the vision of building an effective pathway to diversity in the legal profession by providing opportunities and support to minority and women law students through mentoring programs, networking and fellowships. The Foundation has close ties to the Cuban-American Bar Association ("CABA"), the Florida Association of Women Lawyers ("FAWL"), Haitian Lawyers, Caribbean Lawyers Association, the Gay and Lesbian Lawyers Association, Florida Muslim Lawyers, the National Hispanic Bar Association and many other voluntary bar associations.

Our KD family came together to give back and make a difference in our local communities. We dress down to lift up! Each quarter an organization is selected from multiple entries made by staff and funds are raised by paying to dress down. The organizations featured this time around were Hope Hospice of Ft. Myers, submitted by **Patricia Macneil**, of the Ft. Myers office, and South Lake Animal League, submitted by **Stephanie Lillie**, of the Orlando office.


Patricia (Patty) Macneil (right), along with her therapy dog Dolly, and another Hope Hospice volunteer (left)

The Hope Hospice organization was created to improve the quality of life for every person experiencing serious illness by providing exceptional, comforting care and choices that give hope and meaning to every moment. Their vision is to transform the experiences of illness, aging, and dying into opportunities to live well. Patricia and her dog Dolly volunteer weekly at Hope Hospice bringing comfort to those in their final season of life.

The South Lake Animal League's mission, is to enhance the lives of animals and people in our communities through education, awareness, adoption, and compassion. The Animal League is a registered 501(c)(3) non-profit charitable organization. They receive no federal or state funding and rely on the generosity of the community to help care for abused, abandoned, and neglected dogs and cats. Stephanie not only volunteers her time with this wonderful organization, but she has also adopted from them as well.

We are very proud of having come together for these wonderful causes, and we look forward to supporting the next great organization selected.

NEW ADDITIONS

We are pleased to introduce our new team members

ORLANDO:	**Dina O. Piedra**, Shareholder
JACKSONVILLE:	**Sean M. O'Neil**, Associate
FT. MYERS:	**Kristin L. Stocks**, Associate
TAMPA:	**Tera L. Radigan**, Shareholder **Jessica L. Murray, Nicholas J. Thompson**, Associates
FT. LAUDERDALE:	**Travis J. Beal** and **Sha-Mekeyia N. Davis**, Associates
MIAMI:	**Katherine S. Moon**, Shareholder **Raquel L. Loret de Mola, Jonathan O. Aihie** and **Michael J. Krzywicki**, Associates

The Recent Development of Letters of Protection

By Michelle A. Diaz and Nicole L. Wulwick

What is a Letter of Protection?

A Letter of Protection ("LOP") serves as a lien for medical treatment in exchange for a promise to pay for the services directly out of a settlement or judgment. Usually, an injured party will pay for medical treatment either out of pocket or by health insurance. However, when insurance is unavailable or the injured party cannot afford the medical treatment out of pocket, they turn to a LOP. The trend to use LOPs creates potential conflicts for the insurance industry as they typically inflate the value in a plaintiff's damages claim.

In a Letter of Protection, the attorney representing the injured party enters into an agreement with the plaintiff's medical provider that guarantees payment in the future for medical expenses as a result of a pending lawsuit or settlement. The contract is only between the injured party and the medical provider. In the event that the lawsuit is not settled or the injured party does not obtain a favorable verdict, the medical provider may still pursue the expenses from the injured party as an individual. However, as a result of issuing a "promise to pay," the treating physician develops an interest in the litigation. Both the plaintiff and the medical provider have an underlying motive to increase medical expenses in order to inflate the value of their claim. Therefore, medical providers have an incentive to increase the cost of their services or perform medical treatments that are not necessary. Additionally, plaintiff attorneys may often create an ongoing referral system to the same medical providers that ultimately creates a biased relationship.

The Development of LOPs in Bias and Impeachment

Florida Statute § 90.608(2) states that "any party can attack the credibility of a witness by exposing potential bias." The Florida Supreme Court has recently created a broader scope of discovery in the admissibility of LOPs during both discovery and at trial. A LOP between the plaintiff and her treating physician when the treating physician testifies as an expert on plaintiff's behalf is relevant to show potential bias. In ***Allstate Ins. Co. v. Boecher***, the Florida Supreme Court held, "the more extensive the financial relationship between a party and a witness, the more likely that the witness has a vested interest in that financially beneficial relationship between the party and the witness." 733 So. 2d 993, 997 (Fla. 1999).

In ***Carnival Corp. v. Jimenez***, the defense repeatedly mentioned to jurors the letter of protection that existed between the surgical center and the plaintiff. 112 So. 3d 513 (Fla. 2d DCA 2013). The Second District Court of Appeals ruled that a jury is entitled to know the extent of the financial relationship between the party and the witness and that "undeniably, the existence of the letter of protection gave Dr.Smith a financial interest at trial." *Id.* at 520. ***Boecher***, unlike ***Jimenez***, addressed the scope of LOPs in discovery rather than at trial. The court also addressed that in absence of a contrary decision by the Florida Supreme Court, the Second District's decision towards the admissibility of LOPs during discovery is given persuasive weight in their admissibility at trial for impeachment purposes.

Are Letters of Protection Considered Collateral Sources?

The Florida legislature enacted Florida Statutes, Section 768.76, which offsets any damage award given to the injured party by verdict or settlement. In ***Smith v. Geico***, the Court ruled that LOPs were not considered collateral sources because the payment is not made by a third party and the fee is only created after the jury determines the final amount to award, rather than have the amount be determined prior to the jury verdict. 127 So. 3d 808, 813 (Fla. 2d DCA 2013). The Second District Court of Appeal ruled that because LOPs do not classify as collateral sources, the trial court did not abuse its discretion in allowing Geico to question Mr. Smith's treating doctors about the fee reducing agreements. *Id.* at 813.

Letters of Protection and Bias in Courts

Courts tend to be more lenient in allowing LOPs for impeachment purposes when the treating physician is the expert witness or in physician-lawyer referral scenarios. In ***Brown v. Mittleman***, the plaintiff in an automobile negligence case obtained a letter of protection from the treating physician, Dr. Brown. 152 So. 3d 602 (Fla. 4th DCA 2014). The defendant issued a subpoena duces tecum seeking documents relating to the relationship between the plaintiff's treating physician and the plaintiff counsel's law firm. *Id.* The court emphasized that trial courts generally have a broad discretion in balancing interests involved and generally do not permit extensive discovery of the treating physician's finances, as this could potentially have a chilling effect the availability of expert witnesses. However, an exception exists when there is evidence of a referral relationship between the law firm and doctor.

The Impact of *Worley* Upon Financial Discovery in Litigation Today

The Florida Supreme Court has made a recent decision that affects the admissibility of LOPs in court for impeachment purposes. In ***Worley v. Cent. Fla. Young Men's Christian Ass'n***, a pedestrian brought a negligence action against the YMCA for an alleged slip in fall in the organization's parking lot. No. Sc15-1086, 2017 WL 1366126 (Fla. Apr. 13, 2017). At issue was whether a referral and letter of protection implicated a confidential communication between the attorney and client.

continued on page 4

Letters of Protection *continued from page 3*

The plaintiff in ***Worley*** went to the Florida Hospital East emergency room twice. However, he could not pursue additional medical care due to his limited financial resources. Instead, the plaintiff retained the law firm of Morgan and Morgan. During discovery, the defendants sought to discover the relationship between the Morgan and Morgan and the treating physicians.

At the plaintiff's deposition, defense counsel asked whether plaintiff was referred to her physician by her attorney, based on the amounts of the plaintiff's medical bills. Plaintiff's counsel objected based upon the attorney-client privilege. However, the trial court permitted plaintiff to not disclose whether she was referred to the doctors by her attorneys.

When the matter was appealed, Florida Supreme Court held that the financial relationship between a plaintiff's law firm and the treating physician is not discoverable. It distinguished prior district court rulings on the admissibility of a referral relationship to demonstrate bias, such as the ruling in ***Boecher*** that allowed discovery to determine the financial relationship because it only pertained to expert witnesses. The Supreme Court reasoned that when the relationship only pertains to expert witnesses, the balance of the interest shifts towards permitting discovery. In its opinion, the Supreme Court also referred to the ruling in ***Brown*** and emphasized that the relationship between a law firm and a plaintiff's treating physician is not the equivalent to the relationship between a party and the retained expert because a law firm is not a party to the litigation.

The Court acknowledged that bias on part of the treating physician is discoverable on the basis of bias and that bias can be proved by providing evidence of LOPs, "which may demonstrate that the physician has an interest in the outcome of the litigation [. . .] bias may also be established by providing evidence that the physician's practice was based entirely on patients treated pursuant to LOPs." ***Worley***, 2017 WL 1366126 at 4. The treating physician's practice in ***Worley*** was based entirely on patients being treated pursuant to LOPs.

Notably, the Florida Supreme Court emphasized that any further discovery into a possible relationship, absent LOPs or any other evidence that may indicate signs of bias, would not be sufficient to allow discovery in the relationship between a physician and plaintiff's law firm because it could potentially uncover privileged communications. Even when the defendants reasoned that the need for the information was based on necessity, the Florida Supreme Court upheld that the relationship was protected by the attorney-client privilege and therefore, was not discoverable.

In conclusion, while LOPs may be useful tools for plaintiffs, an LOP can also serve as a mechanism for defendants to prove that a provider's excessive medical bills amount may be inflated and inaccurate. A proper use of LOPs as an impeachment method can demonstrate inaccurate damages due to the bias created when an interest in the litigation exists. The ***Worley*** opinion has clarified that a court will be reluctant to allow discovery into a plaintiff's law firm and treating physician absent letters of protection or other forms of evidence that display a biased relationship. Currently, courts are concerned that allowing such discovery would have a chilling effect on treating physicians out of the fear of being entangled in litigation. Courts also reason that such broad discovery orders may deny plaintiffs access to the courts and potentially increase the costs of litigation. Therefore, learning how to properly use letters of protection as a tool for impeachment is important in attacking the validity of alleged damages.

What to Do When Your Case has Letters of Protection

When you are defending a personal injury lawsuit involving LOPs, it is important to serve specific discovery for each medical provider's complete file to include the LOP agreement with the attorney. You may also want to consider serving specific discovery and deposing the treating physician to help establish the referral relationship between the plaintiff's law firm and treating physician. It is also crucial to consider the impact of a LOP and a plaintiff's total medical bills when evaluating exposure and settlement valuations.

South Florida Legal Guide Recognizes KD as a Top Law Firm and Six of the Firm's Attorneys as Top Lawyers.

Pictured from left

Laurie J. Adams – Civil Litigation

Peter S. Baumberger – Professional Liability; Defense, Corporate and Business Litigation

Caryn L. Bellus – Appellate, Insurance

Michael J. Carney – Civil Litigation

Daniel A. Miller – Bankruptcy, Corporate and Business Litigation

Scott M. Rosso – Corporate and Business Litigation, Insurance Litigation – Defense

South Florida Legal Guide's Top Lawyers and Top Law Firms are published annually and are based on peer nominations. Each lawyer's standing with the Florida Bar, accomplishments and other individual credentials are taken into consideration by the publication's editorial department prior to being added to the list.

A Painless Guide to Settling the Claims of Minors in Florida

By Eric V. Tourian

Whenever a minor child receives an insurance settlement, the settlement must comply with Florida Statutes and Probate Rules. Many times, the settlement will need to be placed into a guardianship supervised by a circuit court.

If statutes and probate rules are not closely followed, the settlement is subject to being voided[1] as seen in ***Allen v. Montalvan***, where Florida's Fourth District Court of Appeal recently set aside a $50,000.00 minor settlement. 201 So. 3d 705 (Fla. 4th DCA 2016).

Before settling any minor claims, be sure to retain experienced counsel to determine if it is necessary to petition a circuit court to approve the minor's settlement, to petition the court to appoint a guardian of the minor's property, to select a guardian ad litem, and/or to make certain that the settlement monies are properly placed in a guardianship.

When Does A Minor Settlement Have To Be Approved By A Court?

Natural guardians can settle a pre-suit claim where a minor receives a net settlement amount of up to $15,000.00. Such settlements do not require Court approval.[2]

Natural guardians can – if they choose to – petition the Court for approval of pre-suit settlements where the minor receives a net settlement up to $15,000.00. If the Court approves such a settlement, the natural guardian will be absolved from all further liability in connection with the settlement.[3]

In no instance can a guardian use a minor's settlement proceeds for the guardian's own benefit, nor can a guardian use the settlement money to pay for their usual support obligations for the minor.[4]

If a minor receives a settlement in a court case where the minor is a party, then the settlement must be approved by the Court, even if the settlement amount is less than or equal to $15,000.00.[5]

If a minor receives any settlement amount in a wrongful death action, then the settlement must be approved by the Court, even if the settlement amount is less than or equal to $15,000.00 and the minor is not a party.[6]

When Is A Guardianship Required?

In almost all other cases, when a minor settlement exceeds a net amount of $15,000.00, the settlement must be approved by a Circuit Court,[7] and a minor guardianship established.[8]

Who Is A Minor?

Any person under the age of 18 who has never been married or legally emancipated.[9]

Who Is A Natural Guardian/Guardian Of The Property?

Parents are the natural guardians of their minor children. Guardians of the Property are appointed by the Court. Once appointed, the Court will have personal jurisdiction over the Guardian(s) of the Property for the duration of the guardianship.[10]

If a minor receives a settlement in connection with a wrongful death action, the personal representative of the decedent's estate will still need to seek and receive a separate appointment as the Guardian of the Property of the Minor because the powers of the personal representative do not extend the settlement of minor settlements which are over $15,000.00.[11]

Which Court Administers The Minor's Settlement And/Or Guardianship?

The minor settlement and/or guardianship will be superintended by a Florida Circuit Court.[12]

If a minor settlement is reached in a case which has already been filed with the Court, then the settlement and/or guardianship will be handled by the Judge before whom the case is pending.[13]

---

[1] ***Savage v. Rowell Distributing Corp.***, 95 So. 2d 415 (Fla. 1957); ***Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust***, 570 So. 2d 1362 (Fla. 4th DCA 1990); ***Lopez v. Variety Children's Hospital***, 600 So. 2d 506 (Fla. 3d DCA 1992); ***Monique Raiford Small v. Palm Beach County School District***, CL00-3985-AB, Palm Beach County Court, Judge Peter D. Blanc, April 14, 2004.

[2] Fla. Stat. §744.301(2).

[3] Fla. Stat. §744.387(1).

[4] Fla. Stat. §§744.301(4), 744.397(3); ***Ash v. Coconut Grove Bank***, 443 So. 2d 437 (Fla. 3d DCA1984).

[5] Fla. Stat. §744.387(3)(a).

[6] ***Nixon v. Bryson***, 488 So. 2d 607 (Fla. 3d DCA 1986).

[7] ***Bookman v. Davidson***, 136 So. 3d 1276 (Fla. 1st DCA 2014) (holding that all circuit courts can hear and rule on probate matters).

[8] Fla. Stat. §744.387(2); **See generally *Global Travel Marketing Inc. v. Shea***, 908 So. 2d 392 (Fla. 2005). Of course, there are exceptions. If the minor's guardianship monies are placed into an annuity, then the court would still need to approve a settlement over $15,000.00, but the Court may find that the annuity is not subject to guardianship. **See** Part III, Sec. B., Subsection (a) of Orange County Administrative Order 07-93-43-02, "Amended Administrative Order Re: Standards And Procedures For The Protection Of Minors In The Settlement Of Personal Injury, Wrongful Death and Medical Malpractice Claims" at **https://www.ninthcircuit.org/sites/default/files/07-93-43-02%20Minors%20settlements.pdf**

[9] Fla. Stat. §§744.102(13) & 743.015

[10] ***Burden v. Dickman***, 547 So. 2d 170 (Fla. 3d DCA 1989).

[11] ***Wisekal v. Laboratory Corporation of America Holdings***, 182 F. Supp. 3d 1296 (S.D. Fla. 2016).

[12] ***Cone v. Cone***, 62 So. 2d 907 (Fla. 1953); ***Phillips v. Nationwide Mut. Ins. Co.***, 347 So. 2d 465 (Fla. 2d DCA 1977); ***Groover v. Groover***, 383 So. 2d 280 (Fla. 5th DCA 1980); ***State, Dept. of Health & Rehabilitative Services v. Hollis***, 439 So. 2d 947 (Fla. 1st DCA 1983); ***Comas v. Southern Bell Tel. & Tel. Co***, 657 F. Supp. 117 (S.D. Fla. 1987); ***Waters v. Waters***, 578 So. 2d 874 (Fla. 2d DCA 1991).

[13] ***Maugeri v. Plourde***, 396 So. 2d 1215 (Fla. 3d DCA 1981).

continued on page 6

If the minor settlement/guardianship is an original action, then it is filed in the Probate Division of the County in which the minor is domiciled.[14]

When Does A Guardian Ad Litem Need To Be Appointed For The Minor?

The appointment of a Guardian Ad Litem for a Minor is a matter for the Court's discretion when the gross amount of the settlement payable to all parties is less than $50,000.[15]

However, a Guardian Ad Litem must be appointed by the Court when the gross amount of the settlement payable to all parties is more than $50,000 and 1) there is no court-appointed guardian of the minor; 2) the court-appointed guardian may have an interest adverse to the minor OR 3) if the court determines that representation of the minor's interest is otherwise inadequate.[16]

General Considerations To Keep In Mind.

The guardian of a minor must be represented by an attorney throughout the entire guardianship process.[17] Any attorney undertaking a guardianship should understand that by agreeing to such representation the Court may require the attorney to represent the guardian throughout the life of the guardianship. This can be problematic if the guardianship is filed on behalf of a young child who will not reach the age of 18 for several years.

Knowing what motions to file when, and in what order to file them, in a Minor Guardianship action can sometimes be tricky. For this reason, the following procedural check-list is provided. Hopefully, the checklist will help guide you through the minor guardianship process. However, if you still have questions please contact Eric Tourian at **evt@kubickidraper.com** or (407) 419-3815. Your local Clerk of Probate Court is also a great resource.

Procedural Checklist for Filing, Maintaining and Successfully Completing a Minor Guardianship in Florida

❏ File Application of Guardian (filed and served prior to hearing on petition to appoint guardian of the property).[18]

❏ File completed credit history investigation and level 2 background check for all prospective guardians of the property (this is at the applicant's expense and requires fingerprints).[19]

❏ File address designation of guardian.[20]

❏ File Designation of Resident Agent.[21]

❏ File Acceptance of Designation of Resident Agent.[22]

❏ File Verified Petition to Appoint Guardian of the Property.[23]

❏ File Notices of Confidential Information Within Court Filing as appropriate.[24]

❏ Serve Verified Petition to Appoint Guardian of the Property on a parent who is not a petitioner; if there is no parent, then serve Verified Petition on the person(s) with whom the minor resides and any other persons as directed by the Court.[25]

❏ Set hearing on Petition to Appoint Guardian of the Property of the Minor.

- The hearing must be recorded.[26]
- All guardianship hearings are open to the public unless the minor elects to have the hearing closed.[27]
- The minor does not need to attend the hearing.[28]

❏ Court enters Order appointing Guardian(s) of the Property of the minor.

❏ Court issues Letters of Guardianship.[29]

❏ Complete a "Tort Information Form" for Florida's Medicaid Casualty Recovery Program http://flmedicaidtplrecovery.com/tortcasualty/ and submit along with signed Letters of Guardianship in order to determine if there are any Medicaid liens that need to be satisfied.

❏ File a Petition to Appoint Guardian Ad Litem.[30]

- Guardian Ad Litem is discretionary when the gross amount of the settlement payable to all parties is less than $50,000.
- A Guardian Ad Litem is required if the gross amount of the settlement payable to all parties is more than $50,000 and 1) there is no court-appointed guardian of the minor; 2) the court-appointed guardian may have an interest adverse to the minor or 3) if the court determines that representation of the minor's interest is otherwise inadequate. [31]
- The Court awards reasonable fees and costs to the Guardian Ad Litem out of the gross proceeds of the settlement.[32]

❏ Court enters Order appointing Guardian Ad Litem.

- The Guardian Ad Litem may help with the settlement negotiations if necessary.[33]

❏ Guardian Ad Litem must file his/her report no later than 5 days prior to the hearing on the Petition to Authorize Settlement.[34]

[14] **See** Committee Notes to Fla. Prob. R. 5.636 and e.g., Part I of "Amended Administrative Order, Re: Standards And Procedures For The Protection Of Minors In The Settlement Of Personal Injury, Wrongful Death And Medical Malpractice Lawsuits And Claims," **supra**.

[15] Fla. Prob. R. 5.636(d), (e) and the Committee Notes to Fla. Prob. R. 5.636.

[16] Fla. Prob. R. 5.636(d), (e).

[17] Fla. Prob. R. 5.030.

[18] Fla. Prob. R. 5.590; Fla. Stat. §§744.3125, 744.309, 744.342.

[19] Fla. Stat. §§435.04, 744.3135.

[20] Fla. Prob. R. 5.110(a).

[21] Fla. Prob. R. 5.110(b).

[22] Fla. Prob. R. 5.110(c).

[23] Fla. Prob. R. 5.555(b); Fla. Stat. §744.344(1).

[24] Fla. R. Jud. Admin. 2.2420.

[25] Fla. Prob. R. 5.555(d); Fla. Stat. §744.3371(2).

[26] Fla. Prob. R. 5.541; Fla. Stat. §744.109.

[27] Fla. Prob. R. 5.540; Fla. Stat. §744.1095(6).

[28] Fla. Stat. §744.3021(2).

[29] Fla. Stat. §744.345.

[30] Fla. Prob. R. 5.120 & 5.636; Fla. Stat. §733.308.

[31] Fla. Prob. R. 5.636(d), (e).

[32] Fla. Stat. §744.3025(2).

[33] ***John Shahbas, et. al. v. Morton Plant Hospital, et. al.***, 15 Fla. L. Weekly Supp. 697a (6th Cir. Ct.,Judge Karen E. Terry, March 3, 2008).

[34] Fla. Prob. R. 5.636(f).

continued on page 7

Settling the Claims of Minors in Florida

continued from page 6

- Guardian Ad Litem's report must be served on 1) the court-appointed guardian(s) of the minor, 2) the natural guardians of the minor, 3) other person(s) with legal custody of the minor, 4) the minor, if the minor is age 14 or older, and 5) the minor's next of kin if required by the Court.[35]
- The Guardian Ad Litem should justify the amount of the settlement or else the Court may reject the settlement.[36]

❑ File Verified Inventory within 60 days of the date that the Letters of Guardianship are issued.[37]

- Requires payment of a "Verified Inventory Audit Fee" to the Clerk of Court when the value of the minor's property exceeds $25,000. The Clerk may charge up to $85.00 for this fee. If the value of the property is less than $25,000, then no audit fee is chargeable.[38]
- The Court can waive the Verified Inventory Audit Fee.[39]
- The Guardian of the Property must maintain (for 3 years) records which support the initial verified inventory. These records must also identify by name, address and occupation any witnesses who were present during the initial inventory of the minor's property.[40]
- A supplemental verified inventory must be filed within 30 days of the discovery of additional property that was not accounted in a prior inventory.[41]

❑ File Petition To Waive Guardian Education Requirements or otherwise fulfill educational requirements.[42]

- Guardian Education Requirements must be completed within 4 months of the date that the Guardian of the Property is appointed.[43]
- File Verified Notice of Completion of Guardian Education Requirement.[44]

❑ Guardian must purchase a bond unless this requirement is waived by the court.[45]

❑ If Guardianship assets are liquid (i.e. money) then file a Petition to Designate Depository in Lieu of Bond in order to place guardianship assets in a restricted bank account that bears market rate interest and from which no withdrawals are allowed without a court order.[46]

❑ If liquid guardianship assets are over $250,000.00, then divide assets among financial institutions to make certain that FDIC insurance will cover in case of a bank failure.[47]

❑ File Acceptance of Designation As Depository for bank or financial institution.[48]

❑ File Petition To Approve Minor Settlement. Proposed Settlement Agreements and/or Releases should also be attached to the Petition.[49]

❑ Serve Notice of Hearing Re: Petition To Approve Minor Settlement on 1) the courtappointed Guardian(s) of the Property of the minor, 2) the natural guardian(s) of the minor, 3) other person(s) with legal custody of the minor, 4) the minor (if the minor is age 14 or older) and 5) the minor's next of kin if required by the court.[50]

❑ Entrance of Order approving Minor settlement.

❑ After the Order approving Minor settlement is entered, disburse the settlement monies to the Guardian.

❑ File Motion to Discharge Guardian Ad Litem.

❑ Deposit liquid assets in a restricted bank account.

❑ File Second Verified Inventory/Alternatively First Annual Accounting with a receipt from financial institution or bank showing that guardianship monies were deposited in a restricted account.[51]

❑ Guardian of the Property files a Verified Annual Accounting, on or before, April 1 of each year for the life of the guardianship.[52]

- In some cases, a Simplified Annual Accounting may be filed.53 A Simplified Annual Accounting does not need to be prepared or submitted by an attorney.[54]
- All annual accountings must be served on the minor ward.[55]
- All annual accounting are reviewed by the Clerk of Court.[56]
- All annual accountings are reviewed by the Judge.[57]
- The Court may require the guardian of the property to appear before it when the annual accounting is filed.[58]
- Annual accountings also include the payment of audit fees, but these fees may be waived by the Court.[59]

❑ File a Motion To Transfer Guardianship if minor moves to another county within Florida. (However, Court approval is required before the minor actually moves to a domicile in another county.)[60]

❑ File Petition for Discharge and Final Report when 1) the minor turns 18, 2) the property subject to guardianship is exhausted, 3) the minor dies, or 4) the minor moves to another state.[61]

❑ If the guardianship assets are held in an account at a financial institution, then upon reaching the age of 18, the minor will have full access. However, structured settlements that provide for periodic payments after the minor reaches the age of 18 are also allowed.[62]

---

[35] Fla. Prob. R. 5.636(c), (f).

[36] ***Falco v. Bridgestone/Firestone North America Tire, LLC***, 935 So. 2d 53 (Fla. 1st DCA 2006).

[37] Fla. Prob. R. 5.620; Fla. Stat. §§744.362(1), 744.365.

[38] Fla. Stat. §744.365(6)(a).

[39] Fla. Stat. §744.365(6)(a).

[40] Fla. Prob. R. 5.620(c); Fla. Stat. §744.365(5)(a), (b).

[41] Fla. Prob. R. 5.620(b); Fla. Stat. §744.384.

[42] Fla. Prob. R. 5.625; Fla. Stat. §744.3145(6).

[43] Fla. Stat. §744.3145(4).

[44] Fla. Prob. R. 5.625.

[45] Fla. Stat. §744.351(1).

[46] Fla. Stat. §§69.031, 744.351(1)&(6), 744.402(4).

[47] "Deposit Insurance FAQs" at **http://www.fdic.gov/deposit/deposits/faq.html; See also**, "Florida Guardianship Law And Information, Eighteenth Judicial Circuit Seminole County FL" 1/2007 at **https://umshare.miami.edu/web/wda/ethics/gurardianship_rev 1-07.pdf**.

[48] Fla. Stat. §69.031(4).

[49] Fla. Prob. R. 5.636; Fla. Stat. §744.387; **See e.g.**, ***Lincoln Nat. Ins. Co. v. Ragan***, 2015WL4756747 (M.D. Fla. 2015).

[50] Fla. Prob. R. 5.636(c).

[51] Fla. Prob. R. 5.150, 5.555(e)(1).

[52] Fla. Prob. R. 5.695(2), 5.696; Fla. Stat. §§744.367(2), 744.3678.

[53] Fla. Stat. §744.3679.

[54] Fla. Stat. §744.3679(3).

[55] Fla. Prob. R. 5.695(b).

[56] Fla. Stat. §744.368(2)-(6).

[57] Fla. Stat. §744.369.

[58] Fla. Stat. §744.3735.

[59] Fla. Stat. §744.3678(4).

[60] Fla. Prob. R. 5.050; Fla. Stat. §744.1098.

[61] Fla. Prob. R. 5.670, 5.680; Fla. Stat. §§744.521, 744.524744.527, 744.528, 744.531, 744.534.

[62] ***Hancock v. Share***, 67 So. 3d 1075 (Fla. 5th DCA 2011).

APPELLATE

Set Aside of Final Judgment in Personal Injury Case.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, prevailed in a case before the First District Appeal, regarding a personal injury action. The Plaintiff obtained a default final judgment against the Defendants for an amount in excess of one million dollars. After the trial court set aside the million-dollar judgment based on excusable neglect, Plaintiff's counsel appealed the order, making hyper-technical arguments that the Defendants were represented by counsel when judgment was entered, barring those Defendants from having the judgment set aside. Ultimately, however, the First District agreed with the trial court and affirmed that the final judgment should be set aside.

Affirmance of Summary Judgment in Indemnification Case.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, obtained an affirmance of a Summary Judgment in favor of the Third-Party Defendant on the claims against it for indemnification. In order to obtain an affirmance in this case, Caryn and Barbara had to convince the Appellate Court not only that Summary Judgment on the indemnification claim was properly entered, but also that the trial court properly granted a directed verdict in favor of their co-defendant and properly severed the third party claim from the underlying case. **David M. Drahos**, of the West Palm Beach office, successfully obtained the Summary Judgment at the trial level.

Affirmance of Motion for Summary Judgment.

Valerie A. Dondero, of the Miami office, won an affirmance from the Second District Court of Appeals, on a Motion for Summary Judgment, declaring the Lee Memorial Hospital's lien impairment statute unconstitutional. The Court confirmed that the statute was an unconstitutional special law that created a lien based on a private contract and further found that the statute impaired the insurance contract between the insurance company and its insured.

Affirmance of Summary Judgment in Premises Liability Case.

Sharon C. Degnan, of the Orlando office, successfully obtained an affirmance of Summary Judgment in the Fourth District Court of Appeal. In this premises liability case, the Plaintiff was seriously injured when he rode his dirt bike over a hidden tree stump located on a swale which was controlled by the City of Hollywood. The Plaintiff alleged claims of negligence against the City, as well as Sharon's client, a condominium association whose property abutted the swale. As to the association, the Plaintiff argued that a city ordinance imposed a duty on the abutting property owner to maintain the swale with reasonable care. Despite evidence that people were on the swale because it was commonly used to park cars, the Appellate Court was persuaded by Sharon's argument that Plaintiff was not an invitee on the property while using it for an unintended purpose. Thus, in affirming the Summary Judgment, the court recognized that the association did not owe the Plaintiff a duty of reasonable care to maintain the swale so that it was safe for dirt bike riding.

Reverse and Remand for New Trial in Auto Negligence Case.

Angela C. Flowers, of the Ocala office, prevailed on appeal, where the Fifth District Court reversed and remanded for a new trial or remittitur on the issue of damages for Plaintiff's future loss of earning capacity. This is an appeal from a Plaintiff's verdict in an admitted liability, automobile negligence case. The jury awarded Plaintiff almost $1.5 million in total damages. On appeal, Angela sought reversal of the extravagant awards for Plaintiff's future loss of earning capacity and future medical expenses claims which together comprised about 1/3 of the verdict. The Fifth District was persuaded by Angela's arguments that the evidence of Plaintiff's alleged future loss of earning capacity was insufficient, as the evidence was essentially that Plaintiff feared losing her job, rather than any real diminished capacity to continue her employment. The Court concluded that such "fear" is speculative and cannot serve as a proper basis for the award.

Per Curiam in Final Summary Judgment in Underinsured/Uninsured Motorist Case.

Valerie A. Dondero, of the Miami office, obtained a per curiam Final Summary Judgment in favor of the Insurer on a claim for under-insured/uninsured motorist coverage under a commercial auto policy.

The Plaintiff sued the Insurer alleging entitlement to UM co erage under his commercial auto policy for injuries sustained by his son who was stuck by an uninsured motor vehicle while riding his bicycle. The Insurer denied coverage and argued that a policy which was issued to a corporation only provided UM coverage to an occupant of a covered auto. Plaintiff attempted to create UM coverage by arguing that the policy should have been a personal auto policy because some of the insured vehicles were used for personal, rather than company business. Plaintiff also asserted that the policy did not provide the requisite amount in commercial liability coverage, and therefore, there was a mutual mistake on the policy and it should be reformed to reflect a personal auto policy, which would have provided coverage for the son's injuries.

At the hearing, Plaintiff brought appellate counsel to further argue an ambiguity in the policy and an ambiguity in the Insurer's response to the Plaintiff's Insurance Disclosure in an attempt to create coverage. None of Plaintiff's arguments succeeded and the Judge granted the Insurer's Motion for Summary Judgment.

On Appeal, the Court dispensed with oral argument after all briefing and affirmed the Summary Judgment.

Reverse of Final Judgment in Indemnity Case.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, prevailed in ***Blok Builders, LLC v. Mastec, BellSouth, et al***, 4D16-1811 (Fla. 4th DCA 2018), when the Court overturned the final judgment which required our Client to defend and indemnify BellSouth and awarded BellSouth attorneys' fees. Although the Court affirmed the same judgment to the extent that it required our Client to defend and indemnify Mastec and awarded Mastec fees, the reversal as to BellSouth means that the entire fee award is eradicated for now as fees were awarded to Mastec and BellSouth in one lump sum in the same judgment.

APPELLATE

Affirmance of Dismissal with Prejudice Regarding the Anti-SLAPP Statute.

Appellate attorneys **Caryn L. Bellus** and **Barbara Fox**, prevailed in a complex and high-profile case before the Third District Court of Appeal. In its opinion, the Court affirmed a dismissal with prejudice in favor of two (of several) homeowners who had been sued for $30,000,000 by the developers of luxury high-rise condominiums. The developers claimed that by opposing an easement through their property, the homeowners violated an agreement which was entered into between the developers and the clients' homeowners' association. The circuit court judge had ruled that the agreement did not bind the homeowners, and that they were protected under the litigation privilege, as well as Florida's Anti-SLAPP law, which makes it illegal for a meritless lawsuit to be brought against a party who asserts a constitutional right. The Third District interpreted the Anti-SLAPP statute for the first time in Florida case law and ruled that it barred the developers' claims. The Third District further held that the two homeowners could not have breached the easement agreement because they were not parties to it. Finally, the Court granted appellate fees based on the anti-SLAPP statute. The Third District's opinion may be accessed by visiting:

http://www.3dca.flcourts.org/opinions/3D16-0388.pdf
Two Islands Dev. Corp., et al. v. Clarke, et al., 3D16-0388 (Fla. 3d DCA Jan. 24, 2018)

Affirmance of Summary Judgment in Slip and Fall Case.

Caryn L. Bellus of the Miami office, prevailed in obtaining an affirmance of a defense Motion for Summary Judgment in a slip-and-fall case. Plaintiff, who fell in a parking lot, claimed that the parking stripes were a dangerous condition because the paint used by our Client, the contractor who painted the lines, allegedly lacked an additive, the absence of which Plaintiff claimed made the parking lot lines unreasonably slippery and dangerous. At the trial level, **Angela C. Agostino** and **Stefanie D. Capps**, of the Ft. Myers office, obtained a defense Motion for Summary Judgment. Caryn defended the case at the appellate level, where we again prevailed in upholding the defense Summary Judgment, arguing that, as a matter of law, Plaintiff could not prevail on her claim that the stripes were a dangerous condition.

Affirmance in Florida Constitution Case.

The appellate department handled the appeal in ***Lee Memorial Health System v. Victoria Select Ins. Co.***, which concerned the constitutional validity of a special law that allowed a public hospital to attach liens to the proceeds of insurance settlements between a patient and the tortfeasor's insurer. The trial court determined that such laws were invalid as a violation of Article III, section 11(a)(9) of the Florida Constitution. This provision prohibits special laws from creating liens that arise from private contracts. Here, the hospital argued that the special law authorizing a lien did not violate the constitution since it was a public hospital, and its contracts were not "private" for the purposes of Article III. Conversely, the Insurer contended that despite the hospital's status as a public institution, the lien arose from a contract between a private individual and the hospital, making the contract "private," and precluding the attachment of liens to settlement proceeds. On appeal, the Second District agreed and affirmed, upholding the trial court's determination that the special law is invalid and cited to **Valerie A. Dondero**, of the Miami office's, recent affirmance in a related case.

Affirmance of Summary Judgment in Motor Vehicle Case.

Bretton C. Albrecht and **Caryn L. Bellus**, of the Miami office, obtained a Summary Judgment in a relatively low impact collision where Plaintiff was claiming serious injuries. Prior counsel unsuccessfully moved for Summary Judgment based on a pre-suit settlement. Once Kubicki Draper stepped in as defense counsel, Bretton and Caryn were asked to revaluate the Summary Judgment issues. They found that there were, in fact, additional grounds supporting the pre-suit settlement defense, and prepared a renewed supplemental Motion for Summary Judgment which Bretton argued in the Trial Court and prevailed in obtaining the defense Summary Judgment, and Plaintiff appealed.

In the trial court, Plaintiff's arguments focused on asserting that additional affidavits were required from Defendants as a condition of the settlement. As an apparent afterthought, Plaintiff also argued that she did not authorize her attorney to make the offer without requiring additional affidavits as a term of the offer. In contrast, in the appeal, Plaintiff's arguments focused almost exclusively on the lack of authority issue, likely because Bretton and Caryn had clearly demonstrated through the documentary evidence in seeking Summary Judgment that the exact terms of the unilateral offer were complied with, including providing the affidavits described by the offer.

In responding to Plaintiff's new focus in the appeal on the lack of authority arguments, Bretton and Caryn first emphasized that a binding pre-suit settlement was reached the moment Plaintiff made a unilateral offer which was accepted by the defense on the exact same terms, and even fully performed. The appellate team assisted in supporting such arguments in the briefing which included a line of research regarding principles of implied ratification by silence, waiver and estoppel. Bretton and Caryn also emphasized that Plaintiff never argued that she did not give her attorney authority to make the settlement offer; rather, she only argued that she did not give him authority to make the offer absent the additional terms. Bretton and Caryn argued that the evidence conclusively established as a matter of law that a binding, enforceable pre-suit settlement was reached and that the appellate court should reject outright Plaintiff's supposed lack of authority arguments. The Appellate Court agreed and issued their decision affirming the defense Summary Judgment.

TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal in Motor Vehicle Case.

Chelsea R. Winicki and **Kara K. Cosse**, of the Jacksonville office, obtained a voluntary dismissal in a bodily injury automobile accident case. The case was transferred to Kubicki Draper about two months prior to the start of trial. In reviewing the file upon receipt, Chelsea and Kara identified numerous providers that were not previously subpoenaed. They immediately filed a Notice of Intent to issue subpoenas, served the subpoenas, and started to receive records. The records revealed prior complaints of the same injuries that had not previously been disclosed, as well as a subsequent accident. After serving the Notice of Intent to issue additional subpoenas, Plaintiff's counsel advised that he was requesting a continuance and expected Chelsea and Kara to agree to the same as they had only recently taken over the case. However, Chelsea and Kara advised Plaintiff's counsel that they would be objecting to the continuance and that they were ready to proceed to trial. A week later, Plaintiff's counsel filed a Notice of Voluntary Dismissal.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Uninsured/ Underinsured Motorist Coverage.

Valerie A. Dondero, of the Miami office, obtained a Summary Judgment in favor of the Insurer on a denial of uninsured/underinsured motorist coverage.

The Plaintiff claimed entitlement to uninsured/underinsured coverage under a commercial auto policy issued to her husband's corporation. The Plaintiff first alleged that she was entitled to uninsured/underinsured coverage because the Insurer failed to advise her of her right to purchase matching uninsured/underinsured when she increased the bodily injury coverage. Plaintiff then argued that a refrigerated box truck insured on the policy had broken down on the side of the road, and Plaintiff was required to travel from Palm Beach to Miami to rent a substitute box truck. On the way back to Palm Beach, she was involved in an accident. The Plaintiff was driving her personally owned vehicle which was not insured on the policy. She attempted to claim that she was driving her vehicle as another temporary substitute vehicle for the broken down box truck and that Progressive's UM insuring provisions were ambiguous. Cross Motions for Summary Judgment were filed and the court determined that the Plaintiff was not an "insured" under the commercial auto policy because she was not occupying an insured auto or a temporary substitute auto at the time of the accident. The court further found that even if the personally owned vehicle was considered a substitute for the disabled box truck, it still did not fall within the definition of "temporary substitute auto" because the personally owned vehicle was owned by an employee of the corporation and also available for the regular use of the Plaintiff; two exclusions contained within the policy.

Defense Verdict in Negligence Case.

Earleen H. Cote and **Scott M. Rosso**, of the Ft. Lauderdale office, received a defense verdict in a negligence case. The Plaintiff was a 23 year old woman injured in a DUI automobile accident where the intoxicated driver stole his mother's car without her permission. Plaintiff underwent a cervical fusion as a result of the accident, and had previously rejected a Proposal for Settlement. Thus, Plaintiff's counsel was setting the case up to pursue a bad faith claim against the Insurer. After being successful on a Motion for Summary Judgment as to permissive use, Plaintiff's counsel got creative and amended the complaint to allege negligence against the driver's mother for not taking proper precaution in securing her keys so that her son could not steal the vehicle. Plaintiff argued that the Defendant's son's troubled past, involving drugs, alcohol, "mental illness," and stealing from family members, should have warranted a higher than reasonable standard of care in her hiding the keys and preventing such an act from occurring. Even though Defendant hid the keys wrapped up in her husband's dresser drawer, Plaintiff's counsel tried to argue that the drawer was an expected hiding place, and an insufficient attempt by Defendant to prevent her son from taking the car.

Earleen and Scott were able to successfully convince the jury that even with his troubled past, the Defendant's son had never before acted in any way demonstrating a propensity to steal his mother's car, and therefore, the Defendant went above and beyond what was reasonable by hiding the keys to the extent she had.

Summary Judgment in Negligent Security Case.

Steve W. Cornman, of the Miami office, obtained a Summary Judgment in a negligent security case. Plaintiff, an IRS employee, was at the South Miami Metro Station parking garage, owned by Miami-Dade County, heading home around 8pm, when she was robbed, and viciously beaten by two assailants who were later arrested, and convicted in Federal Court. The injuries were extensive and there were allegations of PTSD and other psychological conditions. The Plaintiff's husband also brought a Consortium Claim.

Our client was contracted by Miami-Dade County to provide security in the parking garage from 7am-7pm. Plaintiff's counsel attempted to read additional duties into the contract, such as providing recommendations to the County regarding the number of security guards, and the hours of patrol, despite the contract not containing this language. Steve conducted discovery from Miami-Dade County employees, including the Chief of Safety and Security for Miami-Dade Transit to establish that the Client complied with the contract and that decisions regarding personnel and hours was the responsibility of the County. Ultimately, Plaintiff brought Miami-Dade County into the lawsuit. After a hearing on our Motion for Summary Judgment, the Judge granted the Motion.

Summary Judgment in Uninsured Motorist Vehicle Claim.

Laurie Adams and **Melonie Bueno**, of the West Palm Beach office, and **Sharon C. Degnan**, of the Orlando office, obtained a Summary Judgment in a case where the Plaintiff, who was represented by her mother who is an attorney, was receiving training from a personal trainer in a van/mobile gym. The trainer allegedly used weights that were too strong for the then 16 year old Plaintiff which resulted in a complete loss of knee cartilage and several complex knee surgeries performed by specialists in Boston.

After the trainer's auto carrier provided coverage for the claim, Plaintiff made an underinsured/uninsured claim, alleging that the mobile van was an uninsured motor vehicle. At the Motion for Summary Judgment hearing, Laurie argued that the uninsured motorist coverage was precluded because the van was being used as a premises and not an auto. Therefore, it fell in a definitional exclusion based on the policy language of what was and was not an uninsured motorist vehicle. The Judge agreed and granted the Motion. Sharon prepared the Motion and Melonie managed the discovery portion of this case.

Summary Judgment in Change in Elevation Case.

Katherine McGovern, of the Ft. Lauderdale office, obtained a Summary Judgment in a change in elevation case. The Plaintiff fell and was injured visiting a model home when she failed to appreciate a step down into a garage converted for use as a temporary sales center. This is typical practice in new construction communities.

Katherine defeated arguments relating to "unusual design" and codes relating to commercial, as opposed to residential, properties along with all the usual optical illusion arguments.

TRIALS, MOTIONS, MEDIATIONS

Favorable Defense Verdict in Traumatic Brain Injury Case.

Gregory J. Prusak, **Deborah J. Bergin**, and **Sebastian C. Mejia** of the Orlando office, received a favorable defense verdict in an auto accident case where Plaintiff was alleging traumatic brain injury.

The Plaintiff rear-ended the Defendant's trailer which was standing on a dark stretch of road in Orange County. Plaintiff alleged that the Defendant's trailer was unlit, making the accident unavoidable. Greg and Debbie presented evidence that the Plaintiff took no actions to avoid the accident, and had he taken any action at all, the accident would have been avoidable.

Not only was liability hotly contested, but the Plaintiff was also complaining of an alleged traumatic brain injury and cervical disc herniation as a result of the accident. Through multiple witnesses, including neuroradiologists and neuropsychologists, the defense team was able to establish that Plaintiff's injury pre-existing the accident, or that he was greatly exaggerating his injuries. Following Plaintiff's case, Sebastian successfully argued a motion for directed verdict as to future medical expenses related to the Plaintiff's cervical disc injury, on the basis that Plaintiff's pain management doctor's testimony was purely speculative. The successful motion eliminated a $300,000.00 future medical damage claim.

After nearly six hours, the jury returned a net verdict that was less than the figures submitted by defense counsel during closing arguments. After comparative fault and PIP set offs, Plaintiff's total recovery was less than half of Plaintiff's past medical expenses and lost wages and the jury assigned 40% comparative fault onto the Plaintiff. The jury demand was $2,100,000.00 and that net verdict, after set-offs was only $50,109.00.

Denial of Plaintiff's Summary Judgment in Personal Injury Protection Case.

Jacqueline A. Zewski, of the Ft. Lauderdale office, defeated a Motion for Summary Judgment in a Personal Injury Protection case, arguing that affidavits proffered by Plaintiff's experts lacked sufficient indicia of trustworthiness to be accepted on their face without cross examination at trial.

Summary Judgment in Construction Defect Case.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, prevailed on a Motion for Summary Judgment, on behalf of a construction defect insurer. Caryn and Barbara sought a declaratory judgment that the Insured, a general contractor, was not entitled to coverage for personal injuries resulting from exposure to construction-related dust. The Insured fought the Summary Judgment motion, arguing in part, that the Insurer was estopped from denying coverage because its agent told the Insured the claim would be covered. However, at the hearing, the trial judge agreed with Caryn and Barbara's argument that the Policy's "pollution exclusion" applied and the trial court ruled that the Insurer had no duty to defend or indemnify its Insured. **Steve W. Cornman**, of the Miami office, assisted in discovery which helped set the stage for Caryn and Barbara's successful motion.

Summary Judgment in Slip and Fall Case.

Francesca A. Ippolito-Craven, and **G. William Bissett**, of the Miami office, obtained a Summary Judgment in favor of the Client. The case involved a slip and fall where the Plaintiff claimed an employee took a leaky garbage bag out the front door dripping grease on the ground on the sidewalk in the front of the store causing her to slip and fall. However, our Client's incident report stated Plaintiff "missed the step" and fell off the sidewalk. Also, the emergency room records from the night of the incident in two separate portions noted Plaintiff, "tripped and fell over a parking bumper." The garbage bag/grease theory came up for the first time in Plaintiff's complaint which was filed two years after the incident and in her deposition.

During Plaintiff's deposition, it was clearly established by Francesca, in three different ways, that Plaintiff never actually saw any substance whatsoever dripping from the garbage bag and did not see any grease on the ground at any point prior to or after her fall and all of the photos taken on the date of the incident showed Plaintiff on the black asphalt laying next to a parking bumper in the parking lot.

Summary Judgment was then filed based upon the improper stacking of inferences. However, in response to the Summary Judgment, Plaintiff argued that she was entitled to an adverse inference or adverse presumption of negligence to defeat the summary judgment. Plaintiff made claims that our client had spoliated evidence because we did not preserve the surveillance camera footage from the night of the incident, although no such request was made until the footage was taped over during the regular course of business. The Court reserved ruling on the Summary Judgment and asked the parties to brief the issue of spoliation and have a hearing on a motion for sanctions Plaintiff filed.

At the second Summary Judgment hearing, Plaintiff again attempted to reargue the spoliation issues and additionally claim there were issues of fact as to our Client's actual and constructive notice. However, the Court granted our summary judgment a Proposal for Settlement was early on in this case.

Favorable Defense Verdict in Motor Vehicle Accident.

Angela C. Agostino and **Kenneth M. Oliver**, of the Ft. Myers office, received a favorable defense verdict, after a three day trial on a policy tender rejection, heavy impact motor vehicle case. The jury awarded Plaintiff exactly what Ken asked them to. Our Client pulled into the path of the oncoming Plaintiff's car, with heavy impact and full airbag deployment. This 52 year old Plaintiff treated at the emergency room the same day and conservatively for the next two months leading up to a family vacation. After the vacation, his back pain with radicular complaints into his leg with numbness led to an emergency L5/S1 microdiscectomy to relieve pressure from a herniation pressing on the nerve root. The Plaintiff did not anticipate that the Ft. Myers team would find out that Plaintiff had prior 2010 and 2013 lumbar complaints that were admitted into evidence, but previously denied throughout discovery and to all treating providers. Ken and Angela used these inconsistencies to discredit Plaintiff's testimony. It should be noted that **Stefanie D. Capps**, of the Ft. Myers office, worked on this case for over a year with Ken and took all the depositions needed for trial.

TRIALS, MOTIONS, MEDIATIONS

Favorable Coverage Opinion in Defamation Case.

Sharon C. Degnan, of the Orlando office, and **Melonie Bueno**, of the West Palm Beach office, received an order from the Southern District Federal Court, granting our motion on a coverage issue in favor of our Client. In a motion written by Sharon and with strong support from Melonie, who managed the entire federal litigation, the Court initially granted oral argument, but then once the Court actually read it, issued an order cancelling oral argument and granted the Motion. This case involved a doctor who worked with an alleged bad actor to build a cardioverter application for iPhones. The doctor promptly lost all his investment money, reported the alleged bad actor to the police, and then got sued for defamation. The doctor then sought a defense and indemnity under his liability umbrella policy.

Sharon argued that it arose out of a business activity, and that the alleged defamation was pleaded as an intentional act and therefore, the Client did not owe a defense or indemnity because there was no coverage which the Court agreed.

Defense Verdict in Negligence Case.

Michael J. Carney and **Blake H. Fiery**, of the Ft. Lauderdale office, obtained a defense verdict in Palm Beach County. Plaintiff was shopping for building supplies in a national home improvement store, loading 70 lb. boxes of slate tile onto a cart, when the plastic strap binding the tiles snapped, causing the product to fall onto and nearly amputate his big toe. Plaintiff claimed that he developed a neuropathy and that his toe remained discolored and painful even two plus years after the accident. In addition, the injury caused Plaintiff to alter his gait such that, over time, he had to walk on the outside of his foot and consequently developed and was treated for a degenerative back condition. Plaintiff alleged that the store failed to provide any warnings that the straps might break, and sued alleging both strict products liability and negligence. In trial, Blake argued and won a directed verdict on the products liability claim, asserting that the Plaintiffs failed to prove their case as they did not have an expert to opine as to the alleged product defect. In closing arguments, Michael argued that despite the absence of any warnings, the jury was free to consider the effect a warning might reasonably have had, whether it would have made any difference, analogizing the case to the dangers inherent in lawnmowers, where the hazard is understood with or without regard to a written warning, or the risk of lifting a hot mug out of a microwave; suggesting that we knowingly undertake degrees of risks every day, that most things we do could be done more safely in retrospect, but that it would be wrong to apply a blanket negligence standard predicated merely on the presence or absence of a written warning in every case without looking at the totality of the facts in light of common sense. After a short deliberation, the jury returned a full defense verdict. It should be noted that Plaintiffs asked the jury to award close to $700,000.00.

Voluntary Dismissal in Property Damage Case.

Sarah R. Goldberg, of the Miami office, obtained a voluntary dismissal in a first party property damage case, where a roof leak claim was denied by the Insurer. This dismissal by Plaintiff's counsel, came on the eve of the Summary Judgment hearing. This case has had extensive discovery that took place over the last one and a half years and over the course of the litigation, Plaintiff was seeking interior damages to the property, the cost of replacement of the roof, and attorneys' fees and costs.

Summary Judgment in Slip and Fall Case.

Earleen H. Cote and **Shuntal Dean**, of the Ft. Lauderdale office, obtained a Summary Judgment in a case where the Plaintiff slipped and fell on water next to a metal bin that contained produce items. Opposing counsel posed a theory that the bin was filled with ice which melted and caused water to leak onto the floor, although no one, including the Plaintiff herself, ever actually saw the bin leaking water. However, the surveillance video did show employees wiping and mopping a sizeable amount of water surrounding the bin and underneath the bin after the incident. Seeking testimony to support his theory regarding the bin, opposing counsel deposed several employees of our Insurer, including a former manager who was not employed at the subject store location at the time of the accident. Counsel also requested a store inspection to examine a produce bin of the same kind which happened to be in disrepair at the time of the inspection and had not been used by the store for several months. Seeing that as an opportunity to advance his theory, opposing counsel argued the broken bin was the exact same bin involved in the incident, and the reason the Insurer must have ceased use of the bin was because it leaked whenever filled with ice. Some of the Insurer's employees actually testified that they only knew of one metal bin ever used in the store for produce displays which seemingly supported counsel's argument, though purely circumstantial.

Shuntal prepared a Motion for Summary Judgment, and in response, opposing counsel filed an opposition arguing, among other things, that whether or not the bin was leaking water is a fact issue sufficient to preclude summary judgment, citing testimony from the Insurer's employees as well as the their actions shown in the video. Following a hearing on our Motion for Summary Judgment which was argued by Earleen, the Judge reserved ruling and ultimately issued an Order Granting Summary Judgment.

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.

Presentations & Speaking Engagements

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.

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.

- Hospitality Legal Issues
- Security Training
- Florida 5-Hour Law and Ethics Update
- Rules and Strategies in defending Construction Defect Cases in Arbitration
- Virtual Technology Solutions for Forensic Construction Litigation
- Indemnification Disputes - What is the Scope and Meaning of the Contractual Clause?
- Bad Faith Hot Topics
- Handling Flood Claims
- Comparative Negligence
- Premises Liability
- Slips, Trips and Falls Overview
- Preparing Field Adjusters for Deposition
- Proving Material Misrepresentation and Fraud in Florida
- Assignment of Benefits
- The Good (Faith), the Bad (Faith), and (How to Avoid), the Ugly… in Claims Handling
- The Two Faces of the Concurrent Cause Doctrine
- Walking Through a Post-Claim Inspection
- Cost Effective Ways of Resolving Plaintiff's Fees and Costs
- Proposals for Settlement

ANNOUNCEMENTS & NEWS

Valerie A. Dondero and **Nicole L. Wulwick**, of the Miami office, joined several Miami-Dade County Judges and young female attorneys at the Florida Association of Women Lawyers Trial Skills Advocacy workshop. During this two day event Nicole sharpened her trial skills working with several judges on opening statements, cross examination of lay and expert witnesses and closing arguments. Valerie was invited to join the Judges panel and provided her experience and perspectives on trying cases, developing the theme to the trial and effective closing arguments. The workshop was a huge success and both Valerie and Nicole were highly complimented by our Miami judiciary.

Congratulations to **Betsy E. Gallagher**, of the Tampa office, for being the recipient of the annual Florida Defense Lawyers Association (FDLA) 2017 Trial Advocate Quarterly Award. This award recognizes Betsy's many years of service as a member of the Trial Advocate Quarterly's Editorial Board. Betsy E. Gallagher, was also recognized as one of the Best Lawyers in the Tampa Bay Area by the Wall Street Journal.

Congratulations to **Brad J. McCormick**, of the Miami office, for being named a 2018 Best Lawyers in South Florida by The Wall Street Journal.

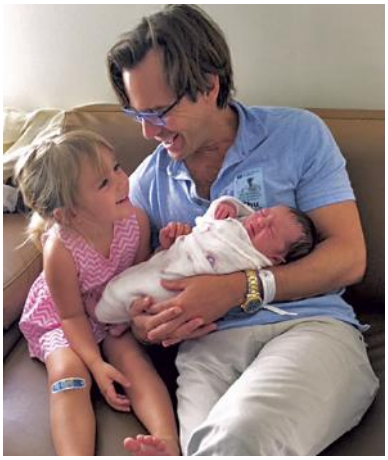
Stephen M. Cozart, of the Pensacola office, was elected as President of the Gulf Coast Association of Insurance Professionals (GCAIP). GCAIP is a professional association for the insurance community in Northwest Florida and South Alabama and focuses on providing opportunities for networking and continuing education for its members.

From left to right...

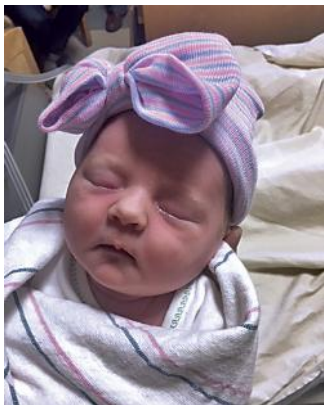
Ariella J. Gutman, **Mitchell A. Schermer**, **Nicole L. Wulwick**, **Benjamin Cohen**, and **Caryn L. Bellus**, of the Miami office, attended the Greater Miami Jewish Federation's 34th Annual Judicial Reception which honored two outstanding jurists, The Honorable Stanford Blake and Burton Young, Esq. The event was well-attended event that brought together numerous members of the Miami Dade legal community including Miami-Dade County Civil and County criminal, civil, and family judges.

Congratulations

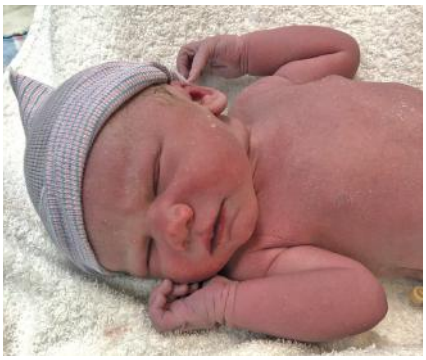
The KD team is growing in and out of the office! We are pleased to welcome new babies to the KD family.



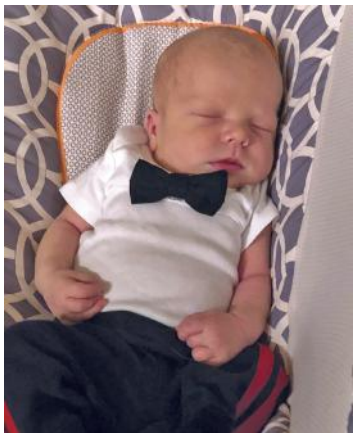
Peter S. Baumberger, of the Miami office, his wife Molly and his daughter Cora, on the birth of their baby girl / little sister, *Lina Baumberger.*



Micah A. Andrews, of the Tallahassee office, and his wife Stephanie on the birth of their baby girl, *Carter Lee Andrews.*



Angela C. Agostino, of the Ft. Myers office, and her husband Nate on the birth of their baby boy, *Brody Blanco.*



Stefanie D. Capps, of the Ft. Myers office, and her husband Chad on the birth of their baby boy, *Cason Capps.*

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

CONTACT INFORMATION

New Assignments

Brad McCormick 305.982.6707 .....bmc@kubickidraper.com
Sharon Christy 305.982.6732 .....sharon.christy@kubickidraper.com

Firm Administrator

Rosemarie Silva 305.982.6619 .....rls@kubickidraper.com

Seminars/Continuing Education Credits

Aileen Diaz 305.982.6621 .....ad@kubickidraper.com

Offices throughout Florida and in Alabama

FLORIDA: Fort Lauderdale Fort Myers/Naples Jacksonville Key West Miami Ocala Orlando Pensacola Tallahassee Tampa West Palm Beach ALABAMA: Mobile

www.kubickidraper.com