KUBICKI DRAPER

THE KD QUARTERLY

FALL 2015

KD *in the Community*

KD Supports the Muscular Dystrophy Association (MDA)

Michael Balducci, of the West Palm Beach office, organized a fundraising campaign in support of the MDA Muscle Walk in Jupiter to raise monies for people affected with muscular dystrophy. Over $3,300 was raised and firm members and their families came out to walk to support this great cause. **J. Scott McMahon**, of the Tampa office, participated in the Tampa Executive Lock-Up event to benefit the Muscular Dystrophy Association. Scott was bailed out by paying his bail of $3,500, which will assist families living in the Tampa Bay area.

Joshua E. Polsky, of the Ft. Lauderdale office, was recently appointed to serve on the strategic planning committee for the Covenant House's "Night of Broadway Stars" event scheduled for early Spring 2016 at the Broward Center for Performing Arts. One of the most unique gala events in South Florida, *Night of Broadway Stars* supports one of our most compelling causes in the local area. For 30 years, Covenant House Florida has been a go-to safe haven for homeless youth and young adults, including teen mothers and their babies. Kubicki Draper is a proud sponsor of Covenant House Florida, which currently reaches more than 200 teens and young adults each day via street outreach, crisis shelters, transitional housing and walk-in services.

Michael J. Carney, of the Ft. Lauderdale office, was asked by the Miami-Dade County Ethics Commission to speak to local high school seniors about the Bill of Rights during its annual "Ethical Governance Day." He also continues to serve as the volunteer mock trial team coach for the Miami Carol City HS Law Magnet Program.

KD Joins the Fight Against Breast Cancer

As part of KD's Wellness Program, during National Breast Cancer Awareness Month, the firm distributed information and resources to its staff in an effort to educate, encourage and support the fight against breast cancer. Several events were organized including a live presentation about the preventative measures that can be taken to detect the disease. KD staff members were inspired and showed their support for everyone facing this fight by wearing pink.

EDITOR
Bretton Albrecht

IN THIS ISSUE

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BROKERAGE VICTORY:
"Negligent Retention" of Motor Carrier Claim *Dismissed for Failure to State a Claim*

By Scott McMahon on behalf of KD's Transportation, Trucking and Logistics Practice Group

In a recent decision from the Southern District of Florida, the federal District Court dismissed, at the pleading stage, a "negligent hiring and retention of claim" against a transportation broker arising from a cargo theft. ***Mega International Trade Group v A-Link et al***, Case No. 14-24757 (U.S. Dist Ct. June 19, 2015). Although this is technically an unpublished decision and (for now) not appealable as an interlocutory decision, the ***Mega*** decision provides persuasive precedent and guidance by using the elevated federal pleading standards under ***Twombly and Ashcroft*** decisions to attack ***Schramm*** oriented negligent motor carrier selection claims. Those of us defending brokerage operations from the onslaught of negligent hiring claims will have added ammunition to attack the pleadings up front, as opposed to enduring years of costly discovery before prevailing at the summary judgment stage.

The facts in ***Mega*** arise from a stolen shipment of Sony camcorders in transit to the United Arab Emirates. The camcorders never made it out of the United States. The plaintiff/shipper sued no less than eight defendants involved in warehousing, brokering and transporting the cargo. For purposes of this article, the focus is on the brokerage component of this transaction. Mega International ("Mega") retained A-Link Freight to "coordinate the international transportation", with A-Link hiring Trade and Traffic ("T&T") as the NVOCC to consummate the inland portion of the delivery. T&T then retained TTSI as a drayage carrier to deliver the containerized freight from the shipper's Miami Port facility. Immediately after the carrier took possession, mysterious forces removed the freight from the container. Presumably, and as the ***Mega*** decision suggests, TTSI driver may have complicity played a role. Mega's amended pleading (as the shipper/owner of the stolen freight) brought a common law negligent retention and hiring claim against T&T, alleging it negligently selected TTSI given T&T's assumed suspicion and/or general knowledge of the following: (1) That it was known TTSI's owner had theft problems while working for a prior motor carrier; (2) The TTSI driver selected was "untrustworthy and dishonest"; (3) That TTSI's "safety ratings were below average, and its out of service rate twice the national average"; *and* (4) That TTSI only carried cargo loss insurance of $100,000.00, despite the freight's value known to be in excess of $1 million.

Relying on the elevated notice pleading standards enunciated in ***Bell v. Twombly***, 550 U.S. 544 (2007), the ***Mega*** court granted T&T's motion to dismiss the negligent hiring claim, finding "mere conclusions, speculation and formulaic recitations could not state a plausible claim for relief." The grounds for the court's dismissal included:

"The Untrustworthy Driver and Carrier"

In dismissing the negligent selection claim, the ***Mega*** court first riveted on the common law elements of the same under Florida law, standards common to nearly every state. Foremost, requiring the plaintiff plead the transportation broker "knew or reasonably should have known of a specific incompetence/unfitness that proximately caused the theft." With this in mind, the ***Mega*** court brushed aside generalized allegations the broker was aware of rumors and/or innuendo regarding prior bad acts, reputation or dishonesty involving the driver or carrier's owner, even if those rumors focused on prior cargo thefts. The ***Mega*** court held the issue was whether "...by diligent inquiry the broker could have discovered a carrier's specific unfitness precluding retention of that carrier." Hence, allegations the broker knew of rumors, unsavory industry character, or even of an untrustworthy and dishonest propensity, are patently deficient to support a negligent hiring claim. Per ***Mega***, these are the type of speculative pleading allegations that no longer preclude dismissal at the pleading stage.

Finally, and by way of example, to sustain a negligent retention claim, the ***Mega*** court surmised a plaintiff may theoretically allege the broker knew or could have known of an actual specific prior cargo theft related arrest or investigation, thus triggering the broker's duty to follow up. In this case, however, no specific cargo theft related prior incidents or acts could be alleged. Simply knowing the carrier or driver retained is not up for "Citizen of the Year" is not enough to impute a duty to further investigate or dig deep.

Deficient Safety Ratings

Next, the plaintiff claimed T&T should have know the carrier had "a questionable or less than commendable safety compliance record, and should not have arranged to transport these high value cargo shipments given concerns about cargo theft and carrier safety ratings." Interestingly, the ***Mega*** decision itself does not reference which particular "safety ratings, scores and/or records" were at issue. However, the author has learned (off the record, of course) the plaintiff adduced CSA data showing the carrier had a smattering of prior maintenance issues involving bad headlights, worn tire-treads, and several driver fitness citations. None of which, per ***Mega***, had anything to do with cargo

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Presentations and Speaking Engagements

Harold A. Saul, Karina I. Perez, Jorge Santeiro, Jr., and **Bryan M. Krasinski**, of the Tampa office, partnered with RIMKUS Consulting Group to present a 5 hour Law and Ethics Update course, at their 12th Annual Continuing Education Seminar.

Christin Marie Russell, of the West Palm Beach office, was a featured speaker at HR Martin County's second annual "Employment Law 101," for Supervisors and Small Businesses. Christin presented on Employment Law Basics, Managing Time & Attendance and the Dos and Don'ts of Hiring. The half-day program was attended by approximately 120 individuals from Martin County and the surrounding areas.

Several of our attorneys presented at FIFEC's Annual Conference. **Jarred S. Dichek, Joseph W. Carey, Rebecca Cooperman Kay, Michael S. Walsh, Kara M. Carper, Michael J. Carney** and **Anthony Atala**, teamed up to present Corporate Representative Depositions - Understanding Scope of 1.310(b)(6), **Karina I. Perez** presented on Defending Against Fraud: Pre-Suit Investigations and **Valerie A. Dondero** and **Scott M. Rosso** presented on Defending Against Fraud: Litigation Strategies. **Jarred S. Dichek**, who is a FIFEC Subcommittee member, also participated in the FIFEC awards ceremony held during the conference.

Several other topics were presented by our team in the last few months and the topics include:

- Material Misrepresentation
- Medical Coding – Special Investigation Unit
- PIP Hot Topics & Bad Faith: Top Ten Pitfalls
- 5 Hour Law & Ethics Update
- Bad Faith
- PIP Lawsuits
- First Party First Rate Defense
- Borderline Injury Cases, Proposals for Settlement, Rental Vehicle Coverage
- Premises Liability, Early Case Resolution and Bad Faith
- Corporate Representative Depositions, Construction Litigation Hot Topics and Coverage and Appellate Hot Topics
- Balcony Collapse: Understanding the Pitfalls and Limiting Exposure

We welcome the opportunity to host a complimentary seminar at your office or event, on the 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

Brokerage Victory *continued from page 3*

loss or theft issues. Focusing again on the suspect allegations in the complaint, the ***Mega*** court held the plaintiff failed to specifically allege the broker "...knew of should have reasonably known that the particular incompetency or unfitness" alleged caused the (cargo theft) loss.

Insufficient Cargo Insurance

As to the claim the broker retained an uninsured carrier, most of us know that the courts, in different contexts, have rejected this as the basis of a tort theory of recovery against brokers. The ***Mega*** court likewise batted away this claim, concluding "...there was no proof that T&T had knowledge of insufficient coverage, nor was there a causal nexus between insufficient insurance coverage and the cargo theft itself".

No Proximate Causation

Finally, not to be over-looked is the ***Mega*** court's "slam the door shut" ruling also finding no proximate causation, as a matter of law. The court surmised even if there was proven that a "dishonest, suspect and/or shady motor carrier and driver" were retained by the broker, as a matter of law this "bad reputation claim" affords a legally deficient nexus with the ultimate cargo theft at issue. In other words, T&T's alleged failure to investigate a motor carrier or driver's nefarious past was not a proximate cause of the underlying cargo theft.

For practitioners representing transportation brokers in common law negligent hiring or selection claims in a BI or cargo loss related incident, the ***Mega*** case affords precedent to defeat spurious "shot gun pleading" complaints that are bereft of facts linking alleged negligence to the cargo theft at issue. When proper, a Rule 12(b) (6) motion to dismiss questionable broker negligent hiring claims should force the plaintiff to re-pled with the requisite factual specificity, particularly on claims raising CSA Safety Fitness rankings, alerts, percentiles or scores with no logical relationship (i.e. no proximate causation) to the underlying loss.

SPOTLIGHT ON:

Kendra Therrell

Finding the truth and presenting it persuasively and passionately to a jury is one of Kendra's core strengths and unique skills in the courtroom.

Kendra Therrell, a shareholder in the Fort Myers/Naples office, is relentless and fearless in her pursuit of truth. She is known for being able to dig through the minute details of a plaintiff's medical records, social media, and other discovery and witness testimony, to find any contradictions between a plaintiff's claims and reality. When she finds cracks and contradictions, she uses them skillfully in cross-examination for impeachment.

This is just one of the many reasons clients, over and over again, send Kendra the cases they know will likely go to trial. Another reason is her extensive trial experience. Kendra has tried more than 60 jury cases to verdict, and she averages about 3 jury trials per year. For Kendra, this is more than a career, it's a calling. Even as a child, she wanted to be a lawyer to help people. Helping people is another core passion for Kendra. It's one reason she majored in psychology at Wesleyan College, and it's why she went to work for the State Attorney's office in Orlando after graduating from the University of Florida, Levin College of Law. In her years as an Assistant State Attorney, she focused on prosecuting domestic violence, sex crimes, and child abuse cases. She later went to work for Florida's Department of Children and Families, where she served as a Senior Attorney. The Chief Judge of the 7th Judicial Circuit later appointed Kendra to the position of Hearing Officer, where she presided over Title IV-D Child Support cases.

When she joined Kubicki Draper, she found that defense litigation was another way she could use her skills as a lawyer to help people. She is able to work with her clients, to help guide them through the litigation process and help them find the strategy or solutions best suited to their needs and goals, whether that means going to trial or negotiating a settlement. Kendra's practice covers virtually all areas of defense, with a focus on automobile negligence cases, UM/UIM, premises liability, and property damage cases.

She also works with SIU special investigations to help investigate and uncover fraudulent claims. In addition, Kendra is a certified continuing education instructor, and she has been a frequent presenter on topics ranging from SIU strategies, to claims ethics, early case resolution, evidentiary issues, collateral source set offs, and Medicare reporting, liens, and set asides, to name a few. She is actively involved in the American Board of Trial Advocates (ABOTA), serving as the Southwest Florida Chapter's treasurer for 2015-2016; the Florida Defense Lawyers Association (FDLA), including the women lawyers' committee; and the Florida Association of Women Lawyers (FAWL), Lee County Chapter. She is also rated "AV Preeminent," the highest peer review rating from Martindale-Hubble.

Kendra's passion for helping people extends beyond the courtroom. Kendra is also a pastor's wife; she wears both hats well. Her husband, Jay Therrell, is the Senior Pastor at Cape Coral First United Methodist Church. Before being called into the ministry, Jay, who is also a lawyer, worked at a large law firm in the Orlando area. After Jay and Kendra relocated to Cape Coral, and Jay was appointed Senior Pastor, Kendra found another way she could help others. She started a ministry called Operation Love Your Neighbor (OLYN). It's an outreach she organizes each year, where the church congregation takes to the streets one Saturday a year to do community service projects, ranging from nursing home visits, to a free car wash, to picking up trash. The 2015 OLYN drew over 300 volunteers, who divided up and took part in service projects at over 3 dozen locations throughout Lee County. When she's not in the courtroom or organizing community outreaches, Kendra enjoys spending time with her family. She and Jay have an 11-year old son, Paul, who loves to read and enjoys sailing. Since all three are also avid Disney fans, family time includes frequent trips to the Disney parks in Orlando.

Kubicki Draper is a proud sponsor of the Bull's Scholarship Booster Club at Miami Northwestern Senior High School. The club provides bus tours for rising seniors to visit schools in Atlanta and Northern parts of Florida.

BULLS BOOSTER CLUB

NEW ADDITIONS

We are pleased to introduce our new team members:

Alexander D. Thorlton – Associate Attorney, Fort Myers

Scott Benjamin Tankel – Associate Attorney, Tampa

Alexandra V. Paez – Associate Attorney, West Palm Beach

To meet the increasing demand for services and solutions in the southern part of Alabama, we are pleased to announce Kubicki Draper has opened an office in Mobile, Alabama.

This new office allows us to expand on the quality and personal service we continually strive to provide our clients.

Kubicki Draper
11 North Water Street, Suite 10290
Mobile, Alabama 36602
Main: 251-308-3351
Fax: 251-308-3352

With offices strategically placed throughout Florida and in Alabama, the firm covers the entire State of Florida and the Southern parts of Georgia, Alabama and Mississippi

APPELLATE

Affirmance of Summary Judgment in Workers' Compensation Immunity Case.

Bretton C. Albrecht and **Caryn L. Bellus**, of the Miami office, recently obtained an affirmance of a defense summary judgment, which was entered based on the workers' compensation immunity defense. *See* ***Fernandez v. Florida A & G Co., Inc.***, 3D14-129 (Fla. 3d DCA 2015). The case at the trial level was handled by **Peter H. Murphy** and **Radia Turay**, who developed the discovery evidence needed to move for summary judgment. Bretton C. Albrecht prepared the summary judgment motion at the trial level, which the trial court granted. On appeal, Plaintiff continued to argue that the trial court erred in entering summary judgment for the defense. In response, Bretton and Caryn argued that, on the contrary, Plaintiff could not meet the intentional tort exception to the defendant employer's workers' compensation immunity as a matter of law under the undisputed facts. For example, it was undisputed, and even Plaintiff admitted, that the accident occurred after Plaintiff and his coworkers had been using the subject precision saw with the same procedures - without incident and without accident - for over 5 or 6 hours before the accident occurred. Plaintiff also admitted that he had experience in using other saws at the plant in the 2 or 3 years before the accident, also without incident until the date of the subject accident. Bretton and Caryn argued that, therefore, as a matter of law, the accident was not "virtually certain," as would be required to overcome the employers' statutory immunity. They further explained that Plaintiff also could not meet the other elements of the intentional tort exception. Following an oral argument, the appellate court affirmed the defense summary judgment.

Reversal of Order Compelling Appraisal in Sinkhole Loss Case.

The KD Appellate Division has secured another victory on behalf of a client. The Fifth District Court of Appeal recently issued a five page decision and opinion in ***Florida Ins. Guar. v. Monaghan***, 167 So. 3d 511 (Fla. 5th DCA 2015), reversing an order entered by the trial court compelling FIGA to proceed to appraisal of a sinkhole loss claim. The appeal, handled by **G. William Bissett**, of the Miami office, successfully argued that the insured had "waived" the policy's right to appraisal by taking significant litigation activities over an extended period of time after a concession of coverage and the eventual request for appraisal. The appellate court agreed with Bill and held the insured's litigation activities were inconsistent with the insured's right to appraisal.

This victory joins the four other appellate victories Bill has secured over the last year for FIGA. Later this year, or in early 2016, Bill will be arguing in the Florida Supreme Court on behalf of FIGA in the ***FIGA v. De La Fuente*** case, which he won in the Second District earlier this year, but which certified two questions of great public importance to the high court.

TRIALS, MOTIONS, MEDIATIONS

Defense Verdict of No Damages in Admitted Liability Auto Accident Case.

Kendra Therrell and **Cheryl Ann LeDoux** obtained a total defense verdict in an admitted liability rear-end motor vehicle accident. This moderate impact accident happened during rush hour on a major roadway. Plaintiff treated at an emergency room with complaints of neck and left shoulder/arm pain. Treatment was consistent and frequent within the first few weeks, including with an orthopedic surgeon and a neurosurgeon. She reported extreme, debilitating pain which limited all activities of daily living. The neurosurgeon recommended a cervical fusion within 3 weeks of the accident because of the extreme radicular complaints, although the MRI study raised questions of causation. Within 3 months of the car accident, a well respected local surgeon performed a shoulder arthroscopy for a suspected rotator cuff tear, but the surgery failed to resolve the complaints. Four months later Plaintiff underwent a single level cervical fusion, which resolves the radicular complaints but not the shoulder/upper arm complaints. For the next 2 years, Plaintiff continued treatment for extreme pain, including acupuncture, pain management, and use of a TENS unit. Her total past medical bills exceeded $145,000, and she asked for damages in the "mid six figures."

Plaintiff had filed a Proposal for Settlement in the amount of $250,000, and had refused a defense offer of $100,000. Plaintiff was tearful during most of the trial and wore her TENS unit to court each day. (After the jury retired to deliberate, defense counsel found it interesting to watch Plaintiff remove the TENS unit and stow it neatly in her bag.) A vigorous investigation into Plaintiff's prior medical treatment turned up a prior cervical MRI from 3 years before the crash with complaints of cervical discomfort, which Plaintiff failed to recall at all until confronted with the information by the defense. The jury rejected Plaintiff's claims and returned a $0 verdict, in favor of our client.

Dismissal in Premises Liability Case.

David M. Drahos, of the West Palm Beach office, obtained a dismissal in a premises liability case wherein the plaintiff claimed she tripped over a speed bump our client had not painted yellow, which caused her to fracture her right wrist. She then began treating with an orthopedic, who administered lumbar and cervical epidural injections and later recommended multi-level fusions. The Plaintiff also alleged a knee injury, received injections into the knee, and later a surgical recommendation. During the initial discovery and investigation, David learned the Plaintiff had been involved in nine different prior motor vehicle accidents while living in Puerto Rico. The Plaintiff initially failed to disclose any of the prior accidents during her deposition. After the deposition, David confronted her about the prior accidents, and asked why we should not move to dismiss for fraud on the court. Soon after that, Plaintiff sent a letter saying she wanted to "cancel" her case, Plaintiff's counsel moved to withdraw, and David moved to dismiss the case and the Court granted the motion.

Summary Judgment in Property Boundary Dispute Case.

Carey N. Bos and **Kenneth "Jayme" Idle**, of the Orlando office, obtained a summary judgment in a bitterly contested property boundary dispute case. Plaintiffs sued our client, a land surveyor, for negligent misrepresentation and professional malpractice. Plaintiffs claimed our client's land survey was defective and they detrimentally relied on it when they purchased their home in 2004. Essentially, Plaintiffs said they believed they were purchasing a 2 acre lot, when if fact the lot was only 1 acre. Our client's summary judgment argument was two fold. First, Plaintiffs failed to bring their action against our client until 2013. We argued Florida's applicable statutes of limitation time barred Plaintiffs' claims. Second, we argued the land survey provided by our client to the Plaintiffs in 2004 was, in fact, an "As-Built Survey," as opposed to a "Boundary Survey." The purpose of the As-Built Survey, which is defined in Florida's Administrative Code, was to depict structures on the land, and not to depict property boundary lines. Thus, the disputed land survey was not defective. Despite vehement opposition and argument from Plaintiffs' counsel at the hearing, the trial court granted the defense motion for summary judgment.

Dismissal in Auto Accident Case.

Karina I. Perez, of the Tampa office, recently prevailed on a motion to dismiss for fraud on the court, with prejudice. The case involved a moderate impact rear end collision with clear liability for causing the accident. Plaintiff was diagnosed with bulging and herniated discs and had racked up significant past medical bills plus a future surgical recommendation. On the eve of mediation, the defense discovered a prior PIP claim brought by a medical provider, as assignee of the Plaintiff, which suggested a prior accident and injuries which had not been disclosed in discovery. At Plaintiff's deposition, Karina pinned Plaintiff down as to whether he had any prior claims or injuries, which he repeatedly and emphatically denied. At the hearing on the motion to dismiss for fraud, Plaintiff's counsel tried to minimize the non-disclosures of three prior accidents and six medical providers as forgetfulness but the Court was not convinced. The client has asked us to proceed to seek fees under a proposal for settlement.

Favorable Settlement in Auto Accident-Pedestrian Case.

Kendra Therrell, of the Fort Myers/Naples office, achieved a favorable settlement in a case involving an automobile accident with a pedestrian, who was seriously injured. The plaintiff pedestrian was intoxicated when he walked out into the path of a car driven by Kendra's client. As a result of an early scene inspection with our client, and an accident reconstruction expert, we were able to locate two nearby witnesses. These witnesses were a surprise to Plaintiff, because he had no memory of the accident or of how much alcohol he had consumed prior to the accident. The witnesses included a convenience store clerk who sold the plaintiff groceries within 30 minutes of the accident and observed him to be so impaired that he could not speak and was unsteady on his feet, and a customer at the store who observed the pedestrian walk into the roadway without looking for or observing the oncoming traffic. Plaintiff's injuries were severe, including a leg amputation and blindness, with past medical bills exceeding $1.5 million. Suit was filed within 4 months of the accident. After an aggressive early defense by Kendra and quick representation and investigation by our team, the Plaintiff accepted $100,000 to settle the case.

TRIALS, MOTIONS, MEDIATIONS

Directed Verdict in Veterinary Malpractice Case.

Karl Wayne Labertew, of the Pensacola office, succeeded in getting a directed verdict in a veterinarian malpractice case. In this case, the plaintiff had her dog, an American Kennel Club "AKC" registered Toy Poodle, bred to sell puppies. She took the dog to Karl's client and requested an ultrasound to determine the number of puppies. Instead of an ultrasound, Karl's client performed an x-ray which the plaintiff claimed caused all the puppies to be stillborn. The plaintiff tried to phrase her complaint in terms of a breach of contract, as she claimed that she had not asked for x-rays, and her argument was as she already had contracts in place for the puppies, her damages were the value of the lost pups, along with costs. Karl was able, through cross-examination of the plaintiff, to show that the breach of contract claim was purely a pre-text to avoid the necessity of proving malpractice. Having changed the playing field to be more favorable, Karl was then able to show the Court that the plaintiff's expert testimony was insufficient to prove malpractice and the Court granted the directed verdict. This result was especially sweet in light of the fact that the presiding judge is known to be an animal rights proponent and runs an animal rescue clinic.

Favorable Settlement in Property Damage Case.

Stuart C. Poage, of the Tallahassee office, obtained a favorable settlement in a case involving claims for alleged property damage related to a major renovation. Our client performed the renovation to Plaintiff's home, which was originally built in the 1940's. Our client, in turn, retained a subcontractor for part of the work. The subcontractor designed and installed an HVAC system for the two-level house. Because of the age of the home, the design limitations, and Plaintiff's unwillingness to be flexible in the renovation, several issues arose as a result of the renovation and installation of the HVAC system. Areas of condensation and excess moisture appeared which allegedly caused damage to interior portions of the home. Plaintiff spent significant money making betterment-style repairs, and was prepared to argue entitlement to these damages and additional loss of use claims at trial. The matter was settled right before trial for a mere fraction from each Defendant, thereby limiting our client's liability and avoiding the costs and risks associated with taking the case to trial.

Defense Verdict from Court-Appointed Arbitrator in Homeowner's Property Loss Case.

Scott M. Rosso, of the Ft. Lauderdale office, obtained a defense verdict from the Court appointed Arbitrator in a Homeowner's property loss case based principally on a defense that the subject policy did not provide coverage for the roof leaks at issue.

Summary Judgment in Wrongful Death Case.

Christopher M. Utrera, of the Miami office, obtained a defense summary judgment in a wrongful death case. Our client struck a young girl who was riding her bicycle at night. She died several days later. After securing favorable deposition testimony from the police officers and our client based primarily on the available ambient lighting, Chris moved for summary judgment arguing that no witness could rebut our client's testimony that the Plaintiff had crossed in front of him essentially out of nowhere, giving him no time to react. Plaintiff's counsel took the position that a jury could infer from the evidence that our client should have seen the decedent and somehow avoided the impact.

Partial Summary Judgment and Partial Dismissal With Prejudice, in Premises Liability Case.

Nicole M. Ellis and **Charles Handel Watkins**, of the Miami office, obtained a partial summary judgment and a partial dismissal in a multi-defendant premises liability case. The case involved both negligence claims by Plaintiff, and indemnity-related claims between the co-defendants. The partial summary judgment determined, on the eve of trial in the negligence case, that our client, one of three co-defendants, was an independent contractor. The partial summary judgment, together with Nicole's skillful opening statements and cross-examination of Plaintiff's physician, paved the way for Plaintiff asking to voluntarily dismiss her negligence claims against our client with prejudice. After a co-defendant subcontractor obtained a directed verdict, the jury returned a verdict assigning 100% liability to the premises owner on plaintiff's negligence claims. Although the premises owner is expected to appeal, the partial summary judgment, voluntary dismissal of our client with prejudice, and directed verdict for the subcontractor (all in the negligence case) have laid a solid foundation for Nicole to renew her summary judgment motion on liability regarding the related indemnity claims with the co-defendants, as the remaining litigation on those claims proceeds.

Favorable Settlement in Suit Against Electrical Contractor.

Stuart C. Poage, of the Tallahassee office, achieved a favorable settlement in a case involving a lawsuit against an electrical contractor, Stuart's client. The case arose from the construction of an experimental solar farm comprised of "solar sausages." Each solar sausage was a 54'x5' multi-chamber inflatable balloon with a solar cell unit attached to the top to collect the reflected sunlight and mounted side-by-side to wooden hitching posts. Plaintiff, and a combination of three other non-party companies, had a total of $30 million in small business loans and grants for construction of balloons, solar cells, and multiple development sites which have never been completed. During construction, unidentified issues arose causing damage to most of the prematurely installed balloons at the third development site. Plaintiff and the general contractor both filed suit against our client, the electrical contractor, and its subcontractor. They claimed that the improper brand of equipment was installed which may have caused the loss to the balloons. They originally demanded a total of $8.6 million in damages to "solar sausages." Following a two-year investigation and discovery into the project financing and multiple potential causes of the sausage damage, Stuart was able to negotiate a settlement of all claims of both plaintiffs against our client, the electrical contractor, for a combined total of $112,500. Plaintiffs' claims against the electrical subcontractor remain pending.

Favorable PIP Settlement.

Ava G. Mahmoudi, of the Ft. Lauderdale office, recently achieved favorable settlements in three PIP cases on behalf of her client, the insurance carrier in all three cases, which have been in litigation since 2012. The claims in each case were denied for billing for services not rendered (fraud). The exposure in these cases was in the thousands in just the medical bills, plus more than $25,000 in attorney's fees. Ava persuaded the judge to allow her to depose the owner of the medical clinic at issue in each of the three cases (not often granted). After Ava obtained the order compelling the clinic owner's deposition, she was able to negotiate a settlement of all three cases for $750 per case.

TRIALS, MOTIONS, MEDIATIONS

Partial Summary Judgment in Property Damage Case.

Nicole M. Ellis, of the Miami office, obtained a partial summary judgment in a case involving claims for property damage against an insurance carrier. Plaintiff filed a Declaratory Action and Breach of Contract claim with the clear intent to multiply fees. Nicole moved for partial summary judgment as to the declaratory action, arguing there never was any dispute over coverage for the event and that the dispute was squarely only for the value of the claimed damages. The court agreed and entered partial summary judgment in favor of Nicole's client on the declaratory claim, leaving only the breach of contract claim at issue.

Dismissal With Prejudice in Workers' Compensation Case.

Michael S. Walsh, of the Ft. Lauderdale office, recently obtained a dismissal with prejudice in favor of his client, a general contractor, at a bench trial in a workers' compensation case. The critical issue was over the identity of the employer and whether that employer was liable for the payment of workers' compensation benefits. Mike argued that the subcontractor, and not his client, was the actual employer and was the entity responsible for workers' compensation benefits. The trial court agreed and dismissed all claims against Mike's client with prejudice.

Favorable Verdict in Auto Accident Case.

Brian E. Chojnowski and **Stuart C. Poage**, of the Tallahassee office, recently obtained a favorable verdict following a jury trial in an auto accident case. Plaintiff claimed that as a result of the accident, she required a two level cervical fusion surgery. The main defense was that a non-party (***Fabre*** defendant) was partially liable for failing to observe Defendant's vehicle, which contributed to the collision.

At trial, Brian skillfully cross-examined Plaintiff's chiropractor, radiologist, and life care plan expert. Brian used details such as the chiropractor's weblog and Amazon.com prices for TENS unit supplies to impeach the credibility of Plaintiff's experts. One future damages item suggested was the need for a maid for the rest of Plaintiff's life to the tune of $198,000.00. Brian got the plaintiff to concede on cross that she did not really need the maid suggested by her expert witness. In closing, Plaintiff's attorney asked for $805,377.58. Brian asked the jury to apportion 60/40 liability between our client and the ***Fabre*** defendant and to award only $3,419.38 for past medical expenses and lost wages for the two symptoms (knee contusion and chest contusion) alleged by plaintiff at the ER on the day of the accident. He emphasized that she did not report any neck complaints until she saw a chiropractor 10 days after the accident. The jury returned a verdict with 50/50 liability, no permanency, and only $3,419.38 in damages.

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.

Summary Judgment in a "Spider Bite" Premises Liability Case

Jennifer Feld, of the West Palm Beach office, obtained a Final Summary Judgment for the defense in a premises liability case. The Plaintiff was claiming injuries resulting from a brown recluse spider bite, claiming the spider had laid eggs in his leg. In moving for summary judgment, Jennifer argued that as a matter of law in Florida, an owner, possessor, or party responsible for maintaining land is not required to anticipate the presence of harm or guard an invitee against harm from animals Ferae Naturae, unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality. Ferae Naturae is a legal doctrine limiting liability for ownership of wild animals. Specifically, the facts were similar to the case ***St. Joseph's Hospital v. Cowart***, 891 So.2d 1039 (Fla.2d DCA 2004), where the Court held that a hospital did not breach any duty of exercising ordinary care to maintain its premises in reasonably safe condition after a patient was bitten by black widow spider in an emergency room. In that case, the pest control efforts at hospital were sufficient, reasonable, and similar to programs at other hospitals, and the hospital did not have black widow infestation. *Id.* at 1041. The evidence failed to demonstrate that the hospital breached its duties of ordinary care. *Id.*

This case involved an analogous situation. There was no evidence that the Defendant knew a spider was on the premises, and there was no evidence that a spider was ever on the premises at all. Prior to the complaint from the Plaintiff, the Defendant had no prior complaints or indications of any problems with spiders. The pest control efforts were consistent, reasonable, and sufficient, and the premise was maintained in a reasonably safe manner. In addition to these numerous liability defenses, Jennifer also found a discrepancy in the Plaintiff's medical records, where the alleged spider bite was diagnosed as red ant bites. The Plaintiff subsequently requested that the medical records be amended to reflect a "spider bite" following the filing of his lawsuit. The Court found that there was no genuine issue of material fact, that the Defendant did not breach any duty of care owed to the Plaintiff during the time that he was a business invitee. Accordingly, our Motion for Final Summary Judgment was granted.

Defense Verdict in a Products Liability Case.

Valerie Dondero and **Nicole Wulwick**, of the Miami office, obtained a defense verdict in a heavily litigated two week products liability trial against a prominent plaintiff's counsel. Plaintiff filed a multi-count complaint asserting theories of strict liability, failure to warn of latent defects, breach of contract, negligence and violations of various State and Federal statutes. Plaintiff alleged the Defendant sold it a toxic wood preservative treatment without the required Restricted Use Pesticide license and Plaintiff's 10,000 square foot resort required a complete demolition and rebuild caused by application of the pesticide to wood used in the construction of the resort. Valerie and Nicole successfully obtained a directed verdict on the strict liability and failure to warn counts and presented evidence through their toxicologist expert that no actual harm to the resort had occurred. Valerie and Nicole also obtained a significant limitation on the Plaintiff's expert toxicologist's scope of testimony in a pre-trial Daubert challenge and had many of Plaintiff's damages claims limited or struck during trial. In less than two hours, the jury returned a complete defense verdict on the remaining counts.

Announcements & News

We are pleased to announce the following KD attorneys have been recognized as 2016 "Best Lawyers in America," by the highly-respected "Best Lawyers" peer review guide:

Fort Lauderdale: **Jane Carlene Rankin**, Real Estate Law
Miami: **Caryn L. Bellus**, Appellate Practice and **Brad J. McCormick**, Commercial Litigation
Tampa: **Betsy E. Gallagher**, Appellate Practice
West Palm Beach: **Laurie J. Adams**, Personal Injury Litigation and **Jeremy E. Slusher**, Litigation - Real Estate

We are proud to have been selected as a Tier 1 firm in the 2016 Edition of "Best Law Firms" by U.S. News and Best Lawyers.

Congratulations to the following lawyers for receiving a Martindale-Hubbell® Peer Review Rating of "AV Preeminent":

Miami: **Jarred S. Dichek** and **Steve Cornman**
Fort Lauderdale: **Joshua Polsky**
Pensacola: **Karl Wayne Labertew**
Tallahassee: **Brian E. Chojnowski**
West Palm Beach: **Daniel Miller**

Congratulations to **Caryn L. Bellus** of the Miami office, on receiving a Martindale-Hubbell® Top Rated Lawyer™ Award, one of the most prestigious distinctions in the country.

Congratulations to **David M. Drahos**, of the West Palm Beach office, and his wife on the birth of their baby boy, Luke Drahos.

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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 that 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.

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