

## KD news and announcements

**Charles H. Watkins**, the firm's Chief Diversity Officer and Equity Partner, and **Wallace L. Richardson**, of our Orlando office, were recognized as the "Top 100" in Florida by The National Black Lawyers. The National Black Lawyers Top 100 is an elite network of legal experts. The organization selects highly successful and influential lawyers with reputations for providing excellent legal representation in their respective practice areas.

Congratulations to the following KD attorneys for being recognized as 2021 "Best Lawyers in America," by the highly-respected Best Lawyers peer review guide. **Caryn L. Bellus**, **Angela C. Flowers** and **Betsy Gallagher** were recognized in Appellate Practice. **Brad J. McCormick** was recognized in Personal Injury Litigation - Defendants and Commercial Litigation, **Michael J. Carney** in Litigation - Insurance, **Jane C. Rankin** in Real Estate Law, and **Laurie Adams** in Personal Injury Litigation - Defendants. We are so proud of our KD team!

### 2021 Best Lawyers in America



Caryn Bellus

Angela Flowers

Betsy Gallagher

Brad McCormick

Michael Carney

Jane Rankin

Laurie Adams

Kubicki Draper made South Florida Business Journal's "South Florida Law Firm 1-100 List!" The South Florida Business Journal is the leading source for business news, data, and networking for Broward, Miami-Dade, and Palm Beach counties. To create the 1-100 List, the journal takes into account the number of partners, staff, and services offered by South Florida firms to finalize rankings.

**Florence Upton**, of our Ft. Myers office, was voted in as a member of The American Board of Trial Advocates (ABOTA) by its National Board. ABOTA's general purpose is to foster improvement in the ethical and technical standards of practice in the field of advocacy to the end that individual litigants may receive more effective representation and the general public be benefited by more efficient administration of justice consistent with time-tested and traditional principles of litigation.

**Laurie Adams**, of our West Palm Beach office, and **Brad J. McCormick** of our Miami office, were recognized in the 2021 Best Lawyers "Litigation Issue" Business Edition.

EDITOR: *Raquel L. Loret de Mola*

### IN THIS ISSUE

**2**

Spotlight on: Kara K. Cosse

More KD News

New Additions

**3**

2020 Florida Super Lawyers and Rising Stars

**4**

Glass House or Brick Wall:  
Using Policy Condition Violations  
Realistically to Defend a Claim

**5**

Anti-concurrent Cause:  
A Shield, a Sword,  
or Both? You Decide.

Join Us on LinkedIn

**6-7**

Can I Get a Lime With My Corona?  
I Caught Covid at Your Place

**8-9**

Landlords and Lenders  
COVID-19 Reality Check:  
Is that check in the mail?

**10**

Recent Results:  
Appellate

**11-13**

Recent Results:  
Trials, Motions, Mediations

**14**

Presentations & Speaking  
Engagements

**15**

Perspectives:  
KD Attorneys Reflect  
on their Experiences  
with Racism and Their Hopes  
for the Future

## SPOTLIGHT ON **Kara K. Cosse**



Kara K. Cosse is a Shareholder in Kubicki Draper's Jacksonville office. Kara's career began as a PIP insurance defense attorney before joining our team at Kubicki Draper to pursue an opportunity to head the PIP division in our Jacksonville office. Over time, Kara's practice shifted focus and today, Kara practices almost exclusively in First Party Property, which is her passion. However, Kara has experience in other practice areas, including auto accident cases, hospitality/retail liability, and premises liability.

Kara's passion to perform before an audience developed at an early age – and ultimately served her well in her future career as an attorney – Kara has been a member of the Screen Actor's Guild since childhood, appearing in more than 13 national television commercials and mini-movies between the ages of 7 and 13. Of course, her childhood experience with memorizing lines, public speaking, journaling, and a strong work ethic laid the foundation for Kara to complete her undergraduate education at the University of Florida with a double major in English and Public Relations enabling her to further polish her communication and writing skills with an eye towards law school. Expectedly, Kara proceeded to obtain her Juris Doctorate Degree from Florida Coastal School

of Law while co-founding the Family Law Society and serving as a member of the Student Bar Association and Moot Court Honor Board.

Kara's already well-established talents quickly paved the way for a successful first party practice at Kubicki Draper. When asked to describe the key to her success,

***Kara jokes that she thinks she "may have been born with an extra positive bone in her body." In all seriousness, Kara attributes her success to always striving to maintain a positive attitude – "it's the law of attraction, you attract what you put out."***

Whether that mentality is applied to resolving a potentially contentious issue with opposing counsel; leading her team through a difficult and complex situation; or maintaining an open, honest, and caring relationship with her clients, "recognizing that there is an element of humanity in working with and connecting with others" is the real secret to Kara's success.

Kara lives in Ponte Vedra Beach with her two little girls. The trio enjoys hunting for shark teeth along the beach, riding bikes, and attending the girls' gymnastics practices. In her personal time, Kara unwinds by running along the beach and practicing yoga, and she says that taking these little breaks helps her to be more productive once she is back in the office, where she is ready to take on litigating the next case that comes across her desk. Whatever you're doing, Kara, keep doing it, as it is clearly empowering your successful career at Kubicki Draper!

# moreKDnews

**Nahid S. Noori**, of our Miami office, was selected by Dare to Run, Inc., to join their virtual cohort. Dare to Run's mission is to teach women the skills necessary to run for public office at the local, state and national level of government. The organization offers female college graduates the chance to participate in a two year certificate program in pursuit of a career path in public service.

**Rebecca Leigh Brock**, of our West Palm Beach office, is the new Statewide Membership Chair for Florida Chapters American Board of Trial Advocates (FLABOTA)! Rebecca is near the end of her term as the President of the Palm Beach Chapter of ABOTA. In her new role as Statewide Membership Chair, she will have the opportunity to work with FLABOTA chapters to increase statewide membership.

**Steffen M. LoCascio**, of our Tampa office, was recognized in the 2021 Best Lawyers: "Ones to Watch" list. This recognition is awarded to attorneys who have typically been in practice for 5-9 years and have shown outstanding professional excellence.

## new additions

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

### TAMPA:

Associates – **Steffen M. LoCascio**,  
**Joseph G. Monte**, **William Dennis**,  
**Jacob W. Pillsbury**

### OCALA:

Of Counsel – **Raul Carreras, Jr.**

### JACKSONVILLE:

Associates – **Christopher M. DelBene**,  
**Toni L. Fleming**, **Victoria B. Kroell**,  
**Ashley J. Johns**

### FT. MYERS:

Associates – **Craig T. Van Scoy**,  
**Kathryn E. Thomson**

### MIAMI:

Associates – **Austin J. Jones**,  
**Erika Cordovi**

### ORLANDO:

Associate – **Amanda C. O'Dell**

### TALLAHASSEE:

Shareholder – **Jared R. Brownfield**

### FT. LAUDERDALE:

Associate – **Justin M. Schneider**

### WEST PALM:

Associate – **Ananta A. Rampersad**



## FLORIDA SUPER LAWYERS

# 2020

LAW OFFICES

**KUBICKI  
DRAPER**

## SUPER LAWYERS



Peter S. Baumberger  
MIAMI



Caryn L. Bellus  
MIAMI



Angela C. Flowers  
OCALA



Betsy E. Gallagher  
TAMPA

## RISING STARS



Bretton C. Albrecht  
FORT LAUDERDALE



Jennifer L. Feld  
TAMPA



Alicia A. George  
WEST PALM BEACH



Michael F. Suarez  
MIAMI



Nicole L. Wulwick  
MIAMI

Super Lawyers®

2020

Super Lawyers®

RISING STARS 2020

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



# Glass House or Brick Wall: Using Policy Condition Violations Realistically to Defend a Claim

By William A. Sabinson,  
on behalf of KD's First Party Property Practice Group

Every property insurance claim involves a “give-and-take” between the insured and the insurance carrier regarding their respective obligations under the insurance policy. For instance, upon discovery of the loss, the insured needs to act diligently in protecting the property against further damage, e.g., turn off the water supply, perform moisture remediation, tarp a leaking roof, etc. They must also report the loss promptly to their insurance company or agent and, among other things, keep an accurate record of repair expenses. The carrier, then, must do its job in responding promptly to communications from the insured, conducting a diligent investigation and adjustment of the loss, pay or deny the claim within 90 days (unless due to factors beyond its control), and attempt in good faith to settle the claim. See § 627.70131, Fla. Stat. And, above all, the insured and carrier must be truthful to one another. See, e.g., **200 Leslie Condo. Ass'n v. QBE Ins. Corp.**, 965 F. Supp. 2d 1386, 1403-04 (S.D. Fla. 2013); see also § 626.9541, Fla. Stat.

As attorneys, we commonly take on cases that feature failures on the part of both the insured and carrier to do what they are supposed to under the policy and Florida law. In addition to evaluating the substance of the claim itself; was the coverage decision appropriate? Did the carrier pay enough? Identifying each and every policy obligation breach arguably committed by either side is a vital task in defending an insurance company against a lawsuit brought by the insured. In every case, you must make it a priority to firmly understand where your client may have erred. That way, you know exactly how much “glass” our house consists of before we begin slinging stones out the window at the insured. I then pick out each and every instance where the insured, their public adjuster and/or attorney, may have run afoul of their own duties under the policy. If a violation is egregious enough, certain failures may serve to bar the insured's lawsuit and, possibly, discharge coverage in its entirety. This is especially the case in the instance of fraud. See **Wong Ken v. State Farm Fire and Cas. Co.**, 685 So. 2d 1002 (Fla. 3d DCA 1997). Since “Florida law ‘abhors’ forfeiture of insurance coverage”, disposing of a case in this fashion is not exactly commonplace. **American Integrity Ins. Co. v. Estrada**, 276 So. 3d 905 (Fla. 3d DCA 2019) (citations omitted).

However, “prevailing” in a lawsuit does not always mean winning via a motion to dismiss, a motion for summary judgment, or at trial. Realistically, this most often involves negotiating a favorable and timely resolution on behalf of the client. To achieve this goal most consistently, whether on behalf of an insurance company or the insured, the attorney must approach every case as if it is going to trial. Since most cases do not contain a “smoking gun”, a good lawyer must build their case brick-by-brick. Constructing this type of defense based on policy-condition violations, even if any particular one is not severe, can leverage a favorable settlement, sway the jury at trial or, in some cases, obtain a voluntary dismissal. This approach comes in especially handy where issues of coverage and damages are detrimental to the carrier.

The first thing to do when evaluating a new case is to create a chronology of the entire claim, from first notice of loss to the date suit was filed. As part of this, it is imperative to note the date the loss was reported in relation to the when it occurred, and whether the insured took timely steps to mitigate further damage and make the property available for inspection. It is also important to document each and every request the carrier made to the insured, public adjuster, and/or lawyer, and exactly what was provided in response and when. Again, a late proof of loss or any one particular policy violation is not likely to carry the day for the insurance company. However, it is a tough sell for an insured to commit multiple failures of its contracted policy obligations, and then expect the carrier (and a jury) to disregard these failures and issue full payment on the claim. If a nicely-bundled package of multiple policy violations is presented during mediation or negotiations, the insured may face a difficult decision in turning down a reasonable settlement offer in lieu of marching forward and allowing the jury to learn of various policy compliance shortcomings.

To maintain credibility, it is also crucial for the carrier to show that it was responsive to the insured's communications, inspected promptly, conducted a thorough investigation, and reached a timely claim decision. This is why, during the claims handling phase, documenting not only the insured's policy condition violations, but the carrier's own compliance and diligence, is paramount to preserving any policy-based arguments that may be available down the road. Simply memorializing telephone requests for an examination under oath, recorded statement, documents or information, by documenting them in the claim notes may not work. As many a young attorney and inexperienced adjuster often learns the hard way, if it cannot be evidenced in writing, it did not happen. To effectively lean on a policy condition violation as a defense during litigation, the carrier should be able to show any requests were made in writing and sent to the correct physical and/or email address. Any requests should also be clear and specific enough to allow the insured to understand what is asked for and respond appropriately.

Every case has its problems. However, it is rare we cannot find some issue to talk about in defending a first-party property claim. Often, this comes in the form of policy condition violations, which are all-too-commonly ignored in the face of coverage and damages defenses. In most instances, however, some diligent and thorough claim handling in conjunction with good lawyering can help resolve an otherwise dangerous claim before it turns into a lengthy and costly court battle.

*William's primary area of practice is first party property insurance litigation, both residential and commercial. He has significant experience in defending motor vehicle and premises liability injury claims, as well as third party property damage claims. Additionally, William is a member of KD's First Party Practice Group comprised of attorneys from all firm locations who practice in first party insurance-related matters.*





## Anti-concurrent Cause: A Shield, a Sword, or Both? You Decide.

By Jessica L. Murray,  
on behalf of KD's First Party Property Practice Group



In **Sebo v. American Assurance Co., Inc.**, 208 So. 3d 694 (Fla. 2016), the Supreme Court found that when two or more perils converge to cause a loss and at least one of the perils is excluded from coverage under an "all-risk" policy, the insurance carrier is required to cover all of the damage because "there is no reasonable way to distinguish the proximate cause of [the] property loss." **Sebo**, at 699. This is known as the Concurrent Cause Doctrine. The Supreme Court clarified, however, that the Concurrent Cause Doctrine does not otherwise nullify all exclusionary language and that a policy can be written to avoid such a result. Known as an "anti-concurrent clause," such language acts as a shield to preclude coverage when a covered loss and a non-covered loss converge to produce damage.

Recently, Florida's Third District Court of Appeals, in **Security First Insurance Company v. Czelusniak**, ---So.3d--- 2020 WL2463762, at \*1 (Fla. Dist. Ct. App. May 13, 2020), reiterated the application of the anti-concurrent clause as a complete bar to coverage. In **Czelusniak**, the claimed loss was caused by water entering a home. In entering a directed verdict in favor of the insured despite the existence of an anti-concurrent cause, the trial court reasoned that although water entering through a door was not expressly excluded under the policy, the jury would be unable to separate the water that came in through the door (non-excluded cause) from water that came in through the walls and windows (excluded causes).

The appellate court reversed the directed verdict and held that the entire loss was excluded from coverage due to the anti-concurrent cause provision. In accordance with **Sebo**, the Third District Court of Appeal stated that, "when the insurer explicitly avoids the application of the concurring-cause doctrine with an anti-concurrent cause provision, the plain language of the policy precludes recovery."

The Third District's ruling in **Czelusniak** solidifies the protection afforded to insurers under an anti-concurrent clause and can be used as a shield against the plaintiff's bar, who has used the concurrent cause doctrine as a sword to pressure insurance companies to pay for the complete replacement of roofs that are old and deteriorated, where there is minimal damage from wind or other covered loss.

*Jessica focuses her practice on first party property, construction, automobile, windshield, and environmental matters. Jessica has handled cases ranging from small claims to multi-party, multi-million dollar federal cases, involving contractual, commercial, corporate, environmental, discrimination, and property damage issues. Jessica is also a member of KD's First Party Practice Group.*



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# Can I Get a Lime With My Corona? I Caught Covid at Your Place

By Maegan Bridwell and Katherine N. Kmiec,  
on behalf of KD's Hospitality, Retail, and Premises Practice Group

## Liability for a Patron's Exposure to COVID-19

### Can a Plaintiff really sue us if they caught COVID-19 at our business?

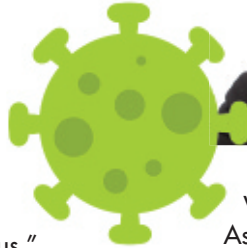
Even though COVID-19 is the "novel coronavirus," attempting to hold a landowner/occupier liable in negligence where a Plaintiff claimed they contracted a communicable disease on their premises is nothing new. In a 1906 Washington State case, a daughter sued the Canadian Pacific Railroad because both she and her mother contracted scarlet fever or "malignant measles" on a dirty and overcrowded rail car. *Hanstad v. Canadian Pac. Ry. Co.*, 44 Wash. 505, 506, 87 P. 832, 833 (1906). In 1910, *Melody v. Missouri, K. & T. Ry. Co. of Texas*, 124 S.W. 702, 702 (Tex. Civ. App. 1910), a railroad employee sued the railroad for becoming blind after contracting smallpox from a child of another railroad employee. Although the concept of a lawsuit arising out of a situation where an individual claims to have contracted some type of illness from an alleged exposure is not new, these lawsuits have not always been successful from a causation standpoint; nonetheless, we see these types of lawsuits in a variety of contexts, and not surprisingly, we anticipate seeing more of them in the wake of COVID-19 despite causation defenses.

### How could my business be found negligent?

While the Plaintiff's inability to prove they contracted COVID-19 at a property will continue to be a prevalent, and perhaps, strong defense for any such claims, health data and contact tracing could provide circumstantial evidence to show that a Plaintiff was exposed to COVID-19 at a particular location. However, before we ever get to the question of whether or not a Plaintiff contracted COVID-19 from an alleged exposure at a particular premises, the question of whether a premises owner owed a duty and breached that duty must first be addressed. It is well settled in Florida that a party that controls a premises can be held liable in negligence to a business invitee where either 1) that party failed to maintain its premises in a reasonably safe condition, or 2) if it failed to warn the Plaintiff of a concealed peril that the party knew or should have known about and which could not be discovered by the Plaintiff through the exercise of ordinary care.

### What is the premises owner's duty to a third party in a time of pandemic?

We anticipate Plaintiffs will find creative ways to argue that a premises owner breached a duty to maintain its premises in a reasonably safe condition, thereby creating (or failing to prevent) exposure of its patrons to COVID-19. To illustrate, a Plaintiff may allege and might be able to prove that a landowner/occupier failed to follow reasonable CDC recommendations for social distancing. A Plaintiff may be able to allege and prove that a landowner/occupier failed to follow sanitization and cleaning guidelines. Consider the recent news article on CNN: <https://protect-us.mimecast.com/s/1DZ8CpY754Tzx6YiDkxdg?domain=cnn.com>



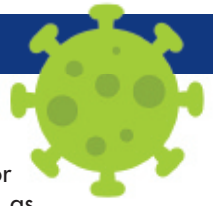
Wal-Mart will still serve customers who refuse to wear masks. As explained in this CNN article, Wal-Mart and other retailers have decided they will not require their employees to enforce their mask policy for patrons who refuse to wear masks, in order to avoid violent or otherwise uncomfortable confrontations. Accordingly, failure to enforce a mask policy may be yet another way that a Plaintiff can show that a landowner/occupier failed in its duty to the Plaintiff to maintain its premises in a reasonably safe condition.

Of course, even if a Plaintiff is able to prove that either (1) a landowner/occupier knew an invitee and/or employee was actively infected with COVID-19 and it was transmittable, or (2) the landowner/occupier failed to follow CDC recommendations for social distancing, cleaning, face coverings, etc., a Plaintiff still has an uphill battle in proving that these breaches in duty caused the Plaintiff's contraction of COVID-19, or that Plaintiff even contracted COVID-19 while on the particular premises. Moreover, a Plaintiff will inevitably face difficulties prevailing under a theory that the landowner/occupier failed to warn the Plaintiff of a concealed peril, especially in light of the fact that COVID-19 has been deemed a global pandemic, with national and local media attention, making the potential exposure to COVID-19 (arguably) well-known to anyone who has access to a television, radio, internet access, or a casual conversation. Consequently, we find it unlikely that a Plaintiff will be able to prevail on a theory that the landowner/occupier failed to warn the Plaintiff of a concealed peril - though, as we know, this does not prevent or bar a Plaintiff from filing the lawsuit or asserting a claim, which necessitates an open conversation about liability and ways to mitigate same.

To no surprise, one of the primary concerns for business and premises owners as they reopen or continue to operate their respective establishments is simply this: "What can I do to **eliminate** the risk of liability to patrons for exposure to COVID-19?" While it would be seemingly impossible to eliminate the risk altogether, we would suggest that, from the perspective of litigation attorneys who defend premises liability cases as part of their practice, the question should really be: "What can I do to **minimize** the risk of liability to patrons for exposure to COVID-19, and how do I do it?"

- Is it a conspicuous sign out front that says **ENTER AT YOUR OWN RISK**?
- Is it an iPad at the front desk that requires all patrons to agree to waive any claim for liability should the patron contract COVID-19?
- Is it extra language at the bottom of the menu that says that the restaurant is not responsible if a patron contracts COVID-19?
- More importantly, are these mechanisms which attempt to minimize liability enforceable in a court of law?

continued on page 7



While it is customary in our society for patrons to sign liability waivers when they visit locations such as rock climbing gyms, go-kart race tracks, shooting ranges, gymnastic studios, etc., it is unusual (and unanticipated) to see a waiver requirement (or request) at our favorite restaurants, bars, shopping malls, or our neighborhood grocery store. Accordingly, in order to analyze whether COVID-19 related waivers could be effective and enforceable, we have turned to case law governing waivers and their enforceability in the context of other types of establishments for guidance as we navigate uncharted territory arising from the “novel coronavirus.”

A waiver -- stated simply -- is the knowing relinquishment of a right. Florida courts have held that waivers and other exculpatory clauses are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal. *Banfield v. Louis*, 589 So. 2d 441, 444 (Fla. 4th DCA 1991); *L. Luria & Sons, Inc. v. Alarmtec Int'l Corp.*, 384 So. 2d 947 (Fla. 4th DCA 1980). The test for whether waivers or exculpatory clauses are sufficiently clear is whether the wording is so clear and understandable “that an ordinary and knowledgeable party will know what he contracting away.” *Hinely v. Florida Motorcycle Training, Inc.*, 2011 WL 1815145 (Fla. 1st DCA 2011); *Southworth v. McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 634 (Fla. 1st DCA 1991).

Generally speaking, it is an arduous task to create a fool-proof waiver for a patron to sign which would minimize a premises owner’s liability for a patron’s exposure to COVID-19 because clauses or waivers that seek to deny an injured party the right to recover damages from another who negligently causes injury are strictly construed **against** the party seeking to be relieved of liability. In other words, any written waiver that seeks to deny a patron that contracts COVID-19 while at their premises the right to recover damages from the restaurant will be interpreted in a light most favorable to the patron and **against** the drafter - the business seeking to avoid liability.

### **What does this mean for premises and business owners?**

In simplest of terms, it means that premises and business owners who wish to use waivers to reduce the risk of liability must go to great lengths to ensure that the language of their waivers are clearly written so that the patron understands exactly what rights they are relinquishing.

### **How is this accomplished in the current climate that is created by COVID-19?**

- Make sure the waiver is provided to all patrons before they enter the premises (whether it requires a signature or is simply posted for all guests to read).
- Use language that is simple and void of overly complicated legal terms and overly dense sentences.
- Spell out all of the steps and precautions that your business is taking to ensure the safety of its guests.

While these suggestions do not guarantee the enforceability of a waiver, they do provide some guidance as to how to make your guests feel comfortable and secure in executing waivers, which may ultimately discourage them from asserting a claim should they contract COVID-19 while at your establishment.

In addition to the cursory obstacles associated with ensuring that a waiver can be enforced based on the clear and unequivocal nature of the language used, there are also public policy concerns that

create additional hurdles when it comes to enforcing a waiver or exculpatory clause.

Generally speaking, Florida courts disfavor exculpatory contracts commonly referred to as waivers or releases based upon public policy grounds as they shift the risk of injury to the party presumably least equipped to avoid an injury. *Sanislo v. Give Kids the World, Inc.*, 157 So. 2d 256, 260 (Fla. 2015). However, Florida courts recognize the countervailing public policy argument founded in the freedom to contract and will uphold exculpatory clauses when unambiguous and not in contravention of public policy. **Id. Perhaps most important in the context of COVID-19**, public policy precludes a party from absolving itself from liability via an exculpatory clause when a party commits an intentional tort<sup>[1]</sup>, or fraud, or is required to perform pursuant to a positive statutory duty<sup>[2]</sup>, or the Florida Building Code, and fails to do so. **Why is this so important in the context of COVID-19?** Premises or business owners cannot absolve themselves of liability via the use of waivers/exculpatory clauses if those premises or business owners are not operating their establishments pursuant to guidelines mandated by local ordinances, statutes, or administrative orders. Consequently, if a restaurant or business owner seeks to one day absolve themselves of liability for a patron who allegedly contracts COVID-19 while at a particular establishment, the manner in which the establishment was operating will be an area of great scrutiny. Therefore, if business or premises owners seek to utilize waivers to reduce the risk of liability, it is important that the business and/or premises owners, and their employees, are abiding by all mandates, including but not limited to complying with capacity restrictions, abiding by sanitization requirements, enforcing social distance guidelines, requiring face coverings, and operating only within those permitted hours.

In short, although steps can be taken to reduce risk for liability to patrons who claim that they contracted COVID-19 while at a particular establishment, it is important to remember there are inherent and unavoidable risks associated with operating a business during a health pandemic. Moreover, although waivers are an excellent tool that business and premises owners can utilize to reduce risk of liability, waivers should not be blindly relied upon as a complete insulation from liability. This is not to say waivers should not be used; but rather, this message serves a metaphorical “Proceed with Caution” sign for business and premises owners to not fall prey to the false sense of security that an all encompassing waiver might provide.

The Kubicki Draper team is available to discuss and assist you with these issues.

Maegan Bridwell represents clients in a wide variety of cases, including but not limited to construction defect, premises liability, automobile accidents, intellectual property, and products liability. As part of her practice, Maegan focuses on maintaining a relationship with clients based on trust, communication, and excellent customer service. Maegan is also a member of Kubicki Draper’s Hospitality, Retail, and Premises Practice Group.

Katherine Kniec handles matters involving first and third party general liability cases including automobile and motorized vehicles and premises, as well as statutory breach of contract cases from pre-suit up through appeal. Katherine is also a member of Kubicki Draper’s Hospitality, Retail, and Premises Practice Group.

<sup>[1]</sup> See *Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. 5th DCA 1985)

<sup>[2]</sup> See *John’s Pass Seafood Co. v. Weber*, 369 So.2d 616 (Fla. 2d DCA 1979)





# Landlords and Lenders COVID-19 Reality Check: *Is that check in the mail?*

By Jane C. Rankin and Raul Carreras,  
on behalf of KD's Hospitality, Retail, and Premises Practice Group



*This article outlines the many issues and considerations that landlords and lenders will face in dealing with the effect of the COVID-19 Pandemic on their borrowers, tenants and properties.*

## Evictions & Foreclosures

There are currently no moratoria on commercial evictions in effect under either federal or Florida law.

The federal moratorium on residential mortgage foreclosures and evictions expired on Friday, July 24, 2020. The federal moratorium, while in existence, was limited in scope. It only applied to residences where the landlord is receiving a federal subsidy (such as Section 8 housing and VA programs), or properties that have a mortgage which was made, insured, guaranteed, purchased or securitized by any federal agency (HUD, VA, Department of Agriculture) or any of the various Government Sponsored Enterprises such as FNMA, FMAC, GNMA, etc.

The GOP proposed next round of coronavirus relief would extend the federal moratorium. Furthermore, various administration officials making the "Sunday Shows" rounds last week stated that the new relief bill would include extension of the federal moratorium. As we know, negotiations over the new relief bill broke down and President Trump issued four executive orders on various subjects, none of which reinstated the federal residential foreclosure and evictions moratorium. One of the executive orders directs various federal agencies to make funds available as temporary financial relief to renters and homeowners facing eviction or foreclosure caused by COVID-19. The order further directs the Department of Health and Human Services, and the Centers for Disease Control to consider whether measures to halt residential evictions for failure to pay rent are reasonably necessary to prevent the spread of the virus from one state to another. To say that there is a lack of clarity and guidance from the federal government on this issue would be a big understatement.

Meanwhile, the moratorium on residential evictions in Florida continues, "solely as it relates to non-payment of any rent by residential tenants due to the COVID-19 emergency." Fla. Exec. Order No. 20-94 (Apr. 2, 2020). The moratorium has been extended various times, most recently on July 29, 2020 and is now in effect until September 1, 2020.

The latest Executive Order on this issue, Fla. Exec. Order No. 20-180 (Jul. 29, 2020), defines what "affected by the COVID-19 emergency" means. It is "loss of employment, diminished wages or business income, or other monetary loss realized during the Florida State of Emergency directly impacting the ability of a single family mortgagor or a residential tenant to make mortgage payments or rent payments."

While there is no moratorium on commercial evictions, until June 30, 2020, Sheriffs in the entire state were not allowed to serve Writs of Possession pursuant to an Administrative Order of the Florida

Supreme Court. However, on July 2, 2020, the Supreme Court ended this prohibition by administrative order. This leaves the issue to be controlled by the Governor's Executive Order No. 20-94, as amended and extended. Certain circuits have supplemented the Supreme Court's order with administrative orders of their own. For example, in the Fifth Judicial Circuit of Florida, the Chief Judge issued Administrative Order No. A-2020-15-D, which prohibits the Sheriffs from posting and executing Writs of Possession in evictions which come within the limited scope of the Governor's Executive Order No. 20-94, as amended and extended.

Due to the constantly changing landscape, landlords should seek advice as to whether or not their properties are located in jurisdictions that permit some Writs of Possession to be issued and enforced.

## Best course of action – Residential Tenancies

Due to the fact that landlords cannot obtain writs in those cases within the scope of the Governor's Executive Orders, a landlord's best, and perhaps only alternative, is to find creative solutions with their tenants. Since no one knows when and for how long the moratoria may be extended, innovative solutions for landlords and tenants are in order such as:

- Reduce rent or defer rent to be paid over time during the remaining term of the lease;
- Disburse any prepaid rents (for example, last month's rent) and security deposits to satisfy the outstanding and future rents;
- If the property is financed, landlords should request a loan modification from the lender to defer principal payments for a specific period or increase the principal amortization term, both of which will result in a reduced monthly mortgage payment; or
- If the lease is guaranteed, landlords should demand rent payment from any additional obligors under the lease.

## Best course of action – Commercial Tenancies

Although commercial landlords have the option of enforcing their leases due to the lack of moratoria, working things out with the tenants may still be the best alternative.

As with residential tenancies, offer the tenants abatement, forgiveness and reduction. Try to keep the tenant in the properties. Commercial landlords should take the following into account:

- Assuming that the landlord can obtain legal possession of the premises, will there be replacement tenants? This evaluation is fact driven and location specific, but the landlord should know the type of industries that would be most attracted to the property and how much they may be affected (both short and long term) by the COVID-19 Pandemic.

*continued on page 9*





- Keep in mind the effect on other tenants of a rapidly emptying shopping center or office building. Obviously, the departure of anchor tenants has a huge impact on the culture of the property, its visual desirability and viable market rent. Moreover, the departure of non-anchor tenants may have a profound economic effect on other tenants due to customer and business type synergy as well as cross-marketing agreements.
- Landlords can administratively appeal their real estate tax assessment based on the actual reduction in the value of the real estate caused by reduced rents, increased vacancy rate, etc.
- Commercial leases are regularly provided to entities which have few assets other than the cash flow from the business operation. This makes the credit based portion of tenant approval highly important. Often the guarantees of the principals, affiliates or parent companies of the tenant are required to fill that gap. Demand for rent payment should be promptly made to each guarantor who may have motivation to pay to avoid eviction and suit for damages against the tenant and guarantors.
- A business interruption insurance claim may be made by the tenant to its insurer notwithstanding that most policies require physical damage to support the claim and may exclude viral outbreaks.
- The lease may contain “co-tenancy” provisions which permit a tenant to terminate its lease unilaterally if a certain percentage of the tenant spaces in a shopping center become vacant or if the anchor tenant closes its business.
- The lease may contain a provision permitting the tenant to “go dark” so long as the rent is paid when due. If this cost saving option is exercised by the tenant, the visual element of the premises’ viability will be impaired so landlords should consider concessions to keep the lights on at the premises.
- Most commercial leases contain a force majeure clause which should be carefully reviewed by counsel for application to COVID-19 related effects on landlord and tenant performance obligations. Be aware that most force majeure clauses do not excuse the tenant from their financial obligations of paying rent, maintaining insurance, etc. or permit either party to be excused from payment and performance based on economic conditions.

Commercial leases have unique lender issues which are triggered upon tenants failing to perform under their leases, closing business operation or vacating the property such as:

- If the landlord faces an upcoming mortgage loan maturity or other need to refinance, vacant units will reduce the appraised value of the property resulting in potential failure of the landlord’s real estate collateral to support the necessary loan amount.
- Commercial mortgages generally contain covenants which prohibit the landlord/borrower from materially modifying any lease without the written consent of the lender.
- Commercial loan agreements customarily contain a “debt service coverage ratio” covenant which requires the income generated from the property be greater (for example 1.2:1.0) than the debt service to the lender – with the effect that any abatement, deferral or reduction in rents can place the landlord/borrower in default under this covenant.

This check-list of actions to consider is not comprehensive. It is intensely fact driven by the type of property, target tenants, and, as is always the case in real estate: location, location, location.

We are available to discuss and assist you with these issues.

*Jane Rankin concentrates in the area of real property and business transactions providing representation in acquisitions, dispositions and financing together with commercial leasing, 1031 exchanges and the formation and representation of businesses for statewide and national businesses. She handles complex title and survey matters and issues title insurance for owners and lenders with the firm being an agent for national title underwriters. She provides representation in the hospitality area for restaurants, hotels and service stations.*



*Raul Carreras is both a litigation and transactional lawyer who is Board Certified in Real Estate. His transactional practice includes all areas of real estate, both commercial and residential, as well as business transactions. He also specializes in commercial and residential leasing, private and institutional lending, loan work-outs, negotiation and drafting of purchase and sale documents for businesses and real estate owners. He issues title insurance for owners and lenders through the various underwriters for which the firm is an agent. His litigation practice encompasses quiet title, easement and access disputes, landlord/tenant matters and real estate and UCC foreclosures.*

## APPELLATE

**Summary Judgment Based on § 440.10(1)(e), Fla. Stat., Affirmed.**

**Sharon Degnan**, of our Orlando office, obtained an affirmance of a Motion for Summary Judgment in *Camacho v. Wert & Rubber Applications, Inc.*, Case No. 2D18-3583 (Fla. 2d DCA 2020), which has been pending for nine years with one trial and two appeals. As background, the defense asserted the workers compensation immunity defense at trial, but ultimately, the trial resulted in a jury verdict of \$1,870,484.40 for Plaintiff and \$432,043.20 for Plaintiff's spouse. Sharon handled the initial appeal and the case was reversed and remanded for "further proceedings on the [Plaintiffs'] complaint for negligence and vicarious liability in which [Defendants] may assert their defense of horizontal immunity under § 440.10(1)(e)." Based upon this language, Sharon filed a motion for summary judgment, and successfully argued it before a new judge who did not preside over the original trial. Plaintiffs appealed, but the appellate court agreed that the defense was entitled to summary judgment. To top it all off, proposals for settlements were filed as to both Plaintiffs in July 2013, so the Fee Judgment, if pursued, should be substantial.

**Summary Judgment Upheld Where Insured Failed to Comply with Post-Loss Obligations Notwithstanding No Prejudice.**

**Bretton Albrecht** and **Caryn L. Bellus**, of our Miami office, persuaded the Fourth District Court of Appeal to uphold a summary judgment in favor of an insurer in a first-party property loss. In *Branford v. American Integrity Insurance Co. of Florida*, 297 So. 3d 551 (Fla. 4th DCA 2020), the Fourth District Court of Appeal agreed that the insured's failure to comply with multiple post-loss obligations in connection with her water loss claim, as well as her prior similar water loss claim with a different carrier, required judgment for the insurer despite the insured's argument that the insurer was required, but failed to prove, that it was prejudiced by the noncompliance.

**Affirmance of Carrier's Entitlement to Set Off of Jury Verdict for Sums Paid Pursuant to Proposal for Settlement.**

**Caryn L. Bellus** and **Angela C. Flowers**, of our Miami and Ocala offices, respectively, successfully convinced the Fifth District Court of Appeal to affirm a final judgment for the insurer in a Hurricane Matthew property loss. In *Pelecki v. Federated National Insurance Company*, 2020 WL 4915804 (Fla. 5th DCA 2020), the appellate court found that the insurance company was entitled to a set off from the jury verdict for sums paid to a co-owner of the home pursuant to a proposal for settlement accepted during the lawsuit, resulting in a defense judgment. On appeal, Plaintiff also challenged an adverse directed verdict on a mold claim, the striking of her surprise expert testimony concerning mold, the admission of field adjuster photos, and a variety of other so-called evidentiary errors. Plaintiff further claimed that the trial court erred in refusing to give a concurring cause instruction and to shift the burden to the insurance company to prove the method by which water penetrated the house. The appellate court rejected all of Plaintiff's arguments and affirmed the judgment in favor of the insurance company.

**Exclusion of Undisclosed Opinions of Plaintiff's Physician Affirmed.**

**Sharon Degnan**, of our Orlando office, successfully defended an appeal in *Krysiak v. Dawson/H & J Contracting, Inc.*, Case No. 4D19-1532, 2020 WL 3833077 (Fla. 4th DCA 2020). The case was tried by Earleen Cote and Jason Friedman, of our Ft. Lauderdale office, who obtained a defense verdict at trial. By way of background, Plaintiff was struck by a car while crossing the road in her electric wheelchair near a construction zone managed by our client. At deposition, Plaintiff's treating psychiatrist testified that Plaintiff had not been assessed for PTSD; rather, she was treated for major depression and anxiety. The day before trial, Plaintiff's counsel notified the defense that Plaintiff's treating psychiatrist performed a PTSD evaluation after the deposition and concluded that Plaintiff was suffering from PTSD. The defense successfully moved *in limine* to preclude the new PTSD diagnosis, which was subsequently appealed. The Fourth District Court of Appeal affirmed the decision concluding that the trial court correctly precluded Plaintiff's treating psychiatrist's PTSD diagnosis. Articles regarding the case have appeared in Law360 and the Daily Business Review. The opinion has some very useful language addressing undisclosed opinions and diagnoses by treating physicians, including "[c]ivil trials are not the Wild West, where one side ambushes the other at trial."

**Defense Verdict Affirmed in Nursing Home Wrongful Death Case.**

**Caryn L. Bellus**, of our Miami office, **Angela C. Flowers**, of our Ocala office, and **Barbara Fox**, of our Miami office, prevailed in upholding a defense verdict in a nursing home wrongful death case in *Jones v. Palm Garden of West Palm Beach, LLC*, 2020 WL 5846434 (Fla. 4th DCA 2020). Our appellate team convinced the court to affirm a final judgment entered following a defense verdict finding that Defendant (the nursing home) was not responsible for the decedent's death during his stay at the facility. Plaintiff's claims sounded in negligence and statutory breach of the decedent's rights as a nursing home resident, asserting that the nursing home failed to secure the facility and prevent the decedent from eloping despite allegedly knowing he was mentally impaired and at risk for escaping. On appeal, Plaintiff sought a new trial alleging various evidentiary errors, including her objection to the admission of evidence that the decedent died as a result of suicide. Our appellate team successfully argued that Plaintiff was competent and intentionally departed the property to commit suicide, evidence of which evidence was properly admitted at trial.

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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 you consult an attorney to review and evaluate the particular circumstances of your situation.

# TRIALS, MOTIONS, MEDIATIONS

## ***Reversal of Prior Ruling and Denial of Plaintiff's Motion for Summary Judgment on Hotly-Contested "Billed Amount" PIP Issue.***

**Michael S. Walsh**, of our Ft. Lauderdale office, obtained a very important denial of Plaintiff's motion for summary judgment on the "billed amount" issue, a critical issue in PIP litigation. Specifically, Plaintiff filed a motion for summary judgment alleging underpayment and arguing that the insurer was required by 627.735 (5)(a)(5), Fla. Stat., to pay one hundred percent of the charges as opposed to eighty percent, even though the policy had no Medical Payment Coverage relying on *Geico Indem. Co. v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry*, 290 So. 3d 980 (Fla. 5th DCA 2019). Though the Judge previously ruled in favor of Plaintiff on the "billed amount," Mike was able to distinguish the Fifth District Court of Appeal case as well as § 627.736 (5)(a)(5), by focusing on the permissive language of "may" versus the mandatory language of "shall," and successfully convinced the judge to reverse his prior ruling. Mike also pointed out that for the in question, Plaintiff always demanded eighty percent of the charges, but years later, sought more.

## ***Motion for Summary Judgment Granted Denying Plaintiff's Post-Appraisal Claim for Mold Damages.***

**Sarah R. Goldberg**, of our Miami office, successfully argued a motion for summary judgment on a Hurricane Irma claim. Plaintiff entered into an agreed order moving the case to an appraisal. The carrier paid the appraisal award timely. After the appraisal award was paid, Plaintiff alleged that not all claims had not been resolved by the appraisal and requested supplemental payments for alleged mold damages. Ultimately, the judge was persuaded by Sarah's argument that Plaintiff cannot bring a supplemental claim for mold damages post-appraisal because Plaintiff signed an assignment agreement whereby Plaintiff's right to damages for mold remediation were fully assigned to a mold remediation company. The court did not give any weight to Plaintiff's arguments that the assignment agreement to the mold remediator was invalid as the mold remediation company had been paid in full and had executed a release for claims of mold remediation. The victory was sweetened by the fact that Plaintiff filed a sanctions motion against the carrier and Sarah in order to get them to withdraw the motion for summary judgment the week prior to the hearing.

## ***Great Resolution in First Party Property Case With an Inflated Public Adjuster's Estimate.***

**Carmela D. Jackson**, of our Miami office, achieved a great settlement in a first party property case where Plaintiff's public adjuster's estimate alone was \$20,000. Carmela took a deep dive into the problems with the estimate, and after a few telephone conferences with the opposing counsel (no discovery responses were filed, which kept the attorneys fees low), Carmela was able to establish that the public adjuster's estimate was inflated and included damages that pre-existed the claim. Carmela got the case resolved for \$13,000 inclusive of fees.

## ***Entitlement for Fees and Costs Granted Where "the Proposal for Settlement and Attached Release Must Be Read as One Document."***

**Bretton Albrecht**, of our Miami office, prevailed in a very important "test" case regarding and insurer's entitlement to attorney fees and costs pursuant to a proposal for settlement. Seemingly an uphill battle from the outset, Plaintiff filed a sanction's motion under § 57.105, Fla. Stat., along with their response to the insurer's fee motion.

At the hearing, Bretton repeated the same line time and time again: the entire proposal for settlement, which had the release attached, must be read as one; not as two separate documents. The judge was clearly persuaded by Bretton's arguments and granted the insurer entitlement to fees and costs..

## ***Voluntary Dismissal on Fraudulent Hurricane Irma Roof Claim.***

**Sarah R. Goldberg**, of our Miami office, obtained a voluntary dismissal on a denied Hurricane Irma claim. Plaintiff testified at his deposition that he placed a tarp on his roof following Hurricane Irma to mitigate his damages. Sarah researched historical, aerial photographs of the property, which showed that a tarp was placed on the roof for at least one year prior to Hurricane Irma. A motion for summary judgment was filed, with support of an engineer's affidavit, setting forth that the tarp was on the roof prior to the storm and that the interior leaks pre-dated Irma. Plaintiff folded under the pressure and leverage filing a voluntary dismissal just a few days prior to the hearing on the summary judgment and the night before the public adjuster's deposition.

## ***Aggressive Defense of PIP Claim Based On Delayed Medical Treatment Results in Voluntary Dismissal.***

**Scott Simon**, of our Miami office, obtained a voluntary dismissal in a PIP case. Scott deposed Plaintiff's corporate representative who admitted there was no evidence to demonstrate that Plaintiff treated within 14 days of the accident. Scott asked for a dismissal, and plaintiff refused. Scott filed a motion for summary judgment and unilaterally set it for hearing after opposing counsel refused to cooperate. Unsurprisingly, Plaintiff moved to continue the summary judgment hearing, claiming they had an affidavit from someone who would provide sworn testimony that treatment took place within 14 days. Scott fought the continuance arguing that Plaintiff had months to obtain this alleged affidavit, and although the judge granted the continuance (due to Plaintiff's questionable COVID-19 arguments), Scott convinced the judge to require Plaintiff to identify the alleged witness and the content of the affidavit at the continuance hearing, and Scott set the witness for deposition promptly thereafter. Opposing counsel refused to provide the necessary information to serve the witness, but Scott did not relent – he tracked her down and had her served while simultaneously pressuring opposing counsel with his motion for summary judgment. After six years of litigation, Plaintiff dismissed the case with prejudice.



## **Great Resolution in Fraudulent Roof-Leak Claim.**

**Sarah R. Goldberg**, of our Miami office, settled a denied roof leak claim recently at mediation for \$1,000.00 inclusive of attorney's fees and costs. Plaintiff's opening demand was \$55,000.00. At mediation, Sarah demonstrated that Plaintiff's roof leaks had been ongoing for a period of more than five years. Specifically, Sarah presented photographs depicting the locations of the stains on the ceiling when Plaintiff made a claim in 2014 and a comparison to the subject claim in 2019: the locations were identical. Further, Plaintiff claimed that the roof had been recently replaced, but Sarah presented the permit history showing no permits were pulled for replacement of the roof in the recent past. What's more, Sarah showed opposing counsel that his client manufactured the invoices produced in this case claiming that repairs had been made to the roof and that it had been replaced (Plaintiff actually put her phone number and e-mail address on all the "repair invoices" misrepresenting her contact information as the repair person's contact information). Our client did not want to pursue a motion to dismiss for fraud, which Sarah recommended, but was ecstatic about settling the case for a nominal amount.

## **Motion for Summary Judgment Granted in Novel Graves Amendment-Related Case.**

**Sebastian C. Mejia** and **Ryan D. Elias**, of our Orlando office, won a motion for summary judgment in favor of an auto dealership in a vicarious liability case. By way of background, a motor vehicle accident occurred while the tortfeasor was driving a complimentary loaner vehicle provided by our client. Under the loaner agreement, the vehicle was provided free of charge while his car was serviced. Plaintiff filed suit against the tortfeasor, and after settling, sued the dealership, who raised the Graves Amendment and § 324.021(9)(b)(2) Fla. Stat.,—the statutory cap on liability for a vicariously liable owner—as affirmative defenses. The court initially denied the motion for summary judgment because the vehicle was not "rented" or "leased." A new judge was assigned, and Plaintiff filed a motion for summary judgment on the Graves Amendment defense. Prior to the hearing on the motion, the Fourth District Court of Appeal issued its opinion in *Collins v. Auto Partners*, 276 So. 3d 817 (Fla. 4th DCA 2019), holding a loaner vehicle dealer providing a complimentary/ temporary loaner vehicle to a customer receiving service qualifies for protections under the Graves Amendment so long as (1) the vehicle owner is engaged in renting or leasing vehicles; (2) the owner rented or leased the vehicle to a person; and (3) the owner was neither negligent nor committed any criminal wrongdoing. Ryan prepared a cross-motion for summary judgment raising *Collins*, and at the hearing, Sebastian argued *Collins* controlled as the only Florida District Court of Appeal case addressing the issue. The trial court granted the auto dealership's motion, based on the Graves Amendment and *Collins*.

## **Order Denying Expert Deposition Fee to Notorious Plaintiff's Treating Physician.**

**Erin L. Haney**, of our Miami office, successfully argued a motion for protective order regarding the deposition fee of Plaintiff's treating physician. As background, Dr. Canizars is a treating physician at Miami's Ceda Orthopedics clinic, yet courts have historically awarded him an expert fee for testifying as the treating physician in litigation matters. In Erin's case, the doctor asked for \$400 per hour for his deposition. Erin's meticulous preparation paid off, and the judge had no choice but to rule against Plaintiff.

## TRIALS, MOTIONS, MEDIATIONS

### **Complete Defense Verdict in Arbitration Following "Battle of the Experts."**

**Eli M. Marger**, of our Tampa office, obtained a defense verdict in a case involving an alleged "sudden event" water loss. Eli's defense was that the water loss was not a sudden event. Rather, it was an accumulation over weeks or months, and thus, the loss was not covered under the policy. Plaintiff presented an expert, who Eli moved to exclude pursuant to *Daubert*, to support her claim that this was a "sudden event." Eli also used his own expert's testimony and the testimony of the policy holder as evidence that this was a long-standing problem. While the arbitrator did not strike Plaintiff's expert's testimony under *Daubert*, he found the defense expert's opinions to be more creditable and found that two exclusions applied: the anti-concurrent clause and the one time event exclusion..

### **Voluntary Dismissal Filed When Plaintiff's Coverage Argument Proved to be Baseless.**

**Barbara J. Glas**, of our Pensacola office, obtained a voluntary dismissal in a Hurricane Michael case. Plaintiff, an engineering firm that took an assignment of benefits, from the insured and provided a list of needed repairs, but failed to submit their invoice for payment until after the insurer paid out its full policy limits. Plaintiff argued it was entitled to be paid under the extra expense provisions of the policy's Business Income coverage. Barbara filed a motion for summary judgment, and opposing counsel demanded the carrier's corporate representative deposition. Barbara did a fantastic job of preparing the corporate representative and was able to show that the insured did not even purchase Business Income coverage – so, the extra expense provision was not at issue. Even after the deposition, counsel kept urging Barbara to settle, but Barbara refused to back down, and ultimately, opposing counsel filed a voluntary dismissal.

### **Motion for Summary Judgment Granted Based on No-Peril Created Opening Defense in Roof-Leak Case.**

**Jessica L. Murray**, of our Tampa office, prevailed on a motion for summary judgment for the insurer in a Hurricane Irma claim, arguing the no-peril created opening defense. Jessica took Plaintiff's deposition during which she testified she witnessed water "pouring" into her home during the storm to the point she needed buckets to catch the water (meanwhile, the carrier's engineer who inspected the property ten days after the alleged loss found no evidence of water damage or even elevated moisture). Plaintiff's roofer—who never stepped foot on the property—also alleged the roof had suffered catastrophic damage. Jessica also deposed the roofer and secured testimony establishing that he had no personal knowledge of the condition of the home other than his review of photographs, which were blurry and obscure. Plaintiff filed two affidavits in opposition to the motion: Plaintiff, attesting to the alleged buckets inside the home, and the roofer, attesting to the "wind damage" on the roof. Jessica successfully struck the roofer's affidavit prior to the hearing so the only evidence Plaintiff had to rely on was her bucket allegation. While Plaintiff's counsel attempted to create an issue of fact with the alleged buckets of water, Jessica successfully framed the essential issue as the condition of the roof—not the alleged water entering the home. The court agreed and granted summary judgment for the defense.

## TRIALS, MOTIONS, MEDIATIONS

**Voluntary Dismissal Entered in PIP Case Regarding Novel Issue Related to Insured's Failure to Submit to an IME.**

**Anthony Atala**, of our Miami office, received a voluntary dismissal in a PIP after three years of litigating. In this case, the carrier denied Plaintiff's services due to the insured's failure to submit to an independent medical examination, which was requested the day after the claim was reported, and less than 48 hours after the actual accident. This was a case of first impression for many carriers, as there is no binding caselaw regarding § 627.736(7) Fla. Stat., (2013), and most insurers amended their policy to mirror the statute that same year, as did the carrier here. Anthony drafted the motion for summary judgment in June 2019, with accompanying affidavits from the adjuster, independent-medical-examination doctor, and independent-medical-examination company. Plaintiff pushed the summary judgment hearing off for months, and then, two hours before it was to be heard, Plaintiff filed an emergency motion to continue the hearing claiming new documents were produced in the corporate representative's deposition; discovery objections; depositions needed; that a secretary failed to properly note the hearing on her calendar; and a number of other excuses. The judge, reluctant to grant an extension, ruled "against her better judgment," she would grant a one-day extension to allow her to review the documents produced at deposition. The court also advised Plaintiff that she would not allow her to rely on any evidence not already filed. Ultimately, Anthony, brokered a dismissal with prejudice with each party bearing their own fees and costs.

**Summary Judgment in No Peril Created Opening Case Leads to Acceptance of Nominal Proposal for Settlement in Corresponding Assignment-of-Benefits Matter.**

**Anthony Atala**, of our Miami office, successfully argued a motion for summary judgment in a No Peril created opening roof matter. After taking a very detailed deposition of both the insured and the insured's public adjuster, and Plaintiff not having any other evidence to support that the loss was covered by a peril created opening, the judge granted final summary judgment in favor of the insurer, and they were able to recover over \$2,000 in costs. Notably, the water mitigation/tarp company filed suit as well. Anthony waited until the summary judgment was entered in the insured's suit and the time for re-hearing had expired. After the insured paid the insurer its costs, Anthony went full throttle on the assignment-of-benefits case filing the summary judgment orders from the underlying case as well as a motion for summary judgment. Anthony suggested that a nominal proposal for settlement of \$250 be filed to see if Plaintiff would accept it – eight days later, they did.

**Summary Judgment Granted Irrespective of Plaintiff's Revised Argument on Critical PIP Issue.**

**Michael S. Walsh**, of our Ft. Lauderdale office, won a motion for summary judgment involving CPT 97039, which is one of the biggest issues statewide in PIP litigation. Mike previously won the issue before the same judge, but opposing counsel tried to get creative and filed a revised summary judgment claiming a "new" argument. The judge denied Plaintiff's motion.

**Granting Motion to Allow Deposition of Plaintiff's "Consulting" Plumbing Expert.**

**Kara K. Cosse**, of our Jacksonville office, won a discovery motion permitting the deposition of the opposition's plumbing "expert" to go forward, notwithstanding Plaintiff's objection that they were a consulting expert and protected by the work-product privilege, which has routinely been upheld by other courts. Big win for insurers!

**Summary Judgment Granted Where Parking Lot Design was Code Compliant.**

**Angela L. Trawick**, of our Pensacola office, won a motion for summary judgment in a case where Plaintiff was hit by a truck in a Piggly Wiggly parking lot. We represented the owner of the shopping center. Plaintiff alleged the design of the parking lot caused the truck to hit her. Angela used the Alabama adaptation of the Manual on Uniform Traffic Control Devices to show that the parking lot design was in full compliance with the codes and regulations, and that there was no evidence to support Plaintiff's claim.

**Turning off the Faucet on Fees.**

**Hillary H. Lovelady**, of our Jacksonville office, obtained orders from both Alachua County and Duval County courts striking assignment-of-benefit holders' right to fees. By way of background, Florida's Legislature took a deciding role last year in the fight against astronomical attorneys' fee demands by assignment-of-benefit holders against insurance companies. Specifically, the Legislature enacted § 627.7152, Fla. Stat., to curb large attorneys' fee claims from assignment-of-benefit holders. The Legislature did this by setting out requirements for what the assignment-of-benefit contract must say, notification to the insurer that there is an assignment of benefits, and that a pre-suit demand letter must be sent to the insurer before filing suit. Because the assignments of benefits failed to comply with the new law, Hillary was able to convince both courts to rule in our clients' favor.

**Summary Judgment Granted Based on Minor Plaintiff's Deposition Testimony.**

**Benjamin Cohen**, of our Ft. Lauderdale office, obtained a final summary judgment in a premises liability case in Miami where Plaintiff, a minor, described the cause of the fall as a "slip" as opposed to a "trip." Ben convinced the judge that the young Plaintiff was aware, knowing, and sentient when she gave this testimony.

**Novel Waiver Argument Pays Off and Summary Judgment Granted.**

**Paul Michael Gabe**, of our Miami office, won summary judgment in a 2014 case. During a deposition handled by prior counsel, the adjuster admitted that they improperly paid the deductible, and thus, underpaid Plaintiff. Opposing counsel, thinking he had a guaranteed winner, immediately set the case for trial and began to bill it up; the carrier was looking at a six-figure attorney fee demand when the case was transferred to our firm. Paul immediately filed an amended motion for summary judgment arguing that Plaintiff never litigated the deductible issue for over six years and should be prohibited from raising a new issue this far into litigation. It was a novel idea and it worked. The judge agreed that Plaintiff waived the argument and ruled for the defense on the sole issue that was litigated throughout the case (election of fee schedule payments). Even better, Paul had a proposal for settlement, and plaintiff is collectible.

# presentations | speaking engagements

**Our attorneys present continuing education seminars on a variety of topics throughout the year. Please see below for some of the topics that have been presented by our team in the last few months:**

- Experts in Construction Related Cases
- COVID-19 and Business Interruptions – What’s Covered
- Ace Your Pre-Suit Investigation
- COVID-19 Claims Will Be Contagious: What’s to Come for the Hospitality Industry?
- Dram Shop Law and Alcohol Vendor Liability
- Bugs, Drugs & Thieves
- You Knew or Should of Known: Slippery Surfaces & Falling Objects
- Negligent Security
- Florida 5-Hour Law and Ethics Update
- Material Misrepresentation in the Application
- PIP: Emergency Medical Conditions
- Early Case Resolution
- Combating Fraudulent and/or Excessive Attorneys Fee Demands
- Out of Line: Evaluating PIP Coverage When a Non-Florida policy, or MVA occurs Outside of Florida
- Tips and Tactics for Company Adjusters in Handling Homeowner’s Claims Involving Public Adjusters and Contractors
- Social Media, Technology, and its Utilization in the Evaluation of Insurance Claims
- Advanced PIP Litigation
- Traumatic Brain Injury
- Contractual Accident Litigation: Pitfalls, Perils, and Trends in the Southeast
- Defending Against Inflated Estimates for First Party Homeowner Claims
- Corporate Representative Deposition
- Introduction to Examinations Under Oath

We welcome the opportunity to host a complimentary webinar for you and your team on any topic(s) of your choice. All presentations are submitted for approval of continuing education credits.

**For more information,**  
please contact Aileen Diaz  
(305)982-6621  
ad@kubickidraper.com

**Charles H. Watkins**, of our Miami office, and co-presenters, Dwight Geddes, of Metro Claims and Risk Management, and Cathy Gicker, of Allstate Insurance Company, recently presented a webinar hosted by CLM Alliance (Claims and Litigation Management Alliance) and NAAIA (National African American Insurance Association). Specifically, the panelists addressed the topic, “The Ethical Defense: Strategies for Defending Claims While Not Crossing the Line into Unfair Claims Handling and Bad Faith,” and examined several actual claims and broke down the claims and litigation choices made. The goal of the presentation was to assist the attendees in becoming more effective and efficient in defending claims and lawsuits across all lines.

**Rebecca Leigh Brock** and **David Drahos**, of our West Palm Beach office, presented a webinar hosted by the Palm Beach County Bar Association. Rebecca, David, and other panelists presented the topic, “Unique Issues in Transportation Cases.” Specifically, Rebecca presented about trucking litigation, and David presented about defending motorcycle cases.

**Jennifer L. Feld**, of our Tampa office, participated as a panelist for the Jacksonville Women Lawyers Association Inc. and co-presented the topic, “The Past, Present, & Future of Parental Leave in the Legal Profession.” The panel discussed the history of parental leave in the legal profession and took a deep dive on the arguments made before the Florida Supreme Court, discussing the effects of the Court’s recent ruling, and shared different strategies and practical affects for parental and caregiver leave in the private and public sectors. In and out of the courtroom, Jennifer is an advocate and pioneer for maternity leave and lactation room awareness. Jennifer Feld also recently participated on the “Paths to Partnership” panel for the Hillsborough Association for Women Lawyers (HAWL). The panel discussed how to become partner and build a book of business.

**Peter S. Baumberger**, of our Miami office, presented at the CLM Alliance (Claims and Litigation Management Alliance) 2020 Construction Conference along with Kenneth Bunn, Matthew Inman, and Jeffrey Keister. The group presented “Construction Accident Litigation: Pitfalls, Perils, and Trends in the Southeast.” For information about the presentation or questions about the topic, please contact: [construction@kubickidraper.com](mailto:construction@kubickidraper.com).





## PERSPECTIVES

### KD Attorneys Reflect on their Experiences with Racism and Their Hopes for the Future

#### **FORWARD** by Kendra Therrell

It was a usual and busy Tuesday afternoon when two colleagues walked into my office and closed the door. Their tear-stained faces alarmed me. It was confusing at first, but they revealed to me how George Floyd's tragic death upset them. They didn't know Mr. Floyd, and yet, they were deeply wounded -- not just by that tragedy, but also the recent incidents involving Ahmaud Arbery, Breonna Taylor and countless others. I too was outraged after witnessing Mr. Floyd's death and the callousness of it.

In the moment of our shared lament, I realized that as a white person, my privilege had shielded me from the depth of their personal experiences. I was sitting in my office that afternoon, working a normal day, carrying on with my daily tasks, being unaware of the deep emotions others in my office were feeling. But when they came into my office, I listened. I mean, I really listened to their personal experiences and descriptions of the injustices they lived. Friends, racism is America's greatest sin. As a society, we haven't done enough to eradicate the atrocities of our past. As an individual, I haven't done enough to change this systemic problem.

That afternoon, I heard the anguish in the voices of my colleagues, and knew I had to speak out. I learned how differently they viewed Mr. Floyd's death than I did. I was affected by watching a human take his last breath but not with the same deep seated emotion of a historical nature as they did. When we stop and listen to one another, we learn why we must all act now to create change. Change starts with one person. We must continue to talk about racism and understand the perspectives of others. Each of us can be the change our community needs that is generations overdue.

In the legal field, we strive for "justice for all." Sadly, we are not there yet. This series of Perspectives was born from the tears and laments from that summer afternoon in a Kubicki Draper office.

It is our hope the raw experiences and truths shared below inspire us to make justice true for all.

*Please read the full article here:*

<https://spark.adobe.com/page/sj14rovEpYa18/>

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#### YOUR OPINION MATTERS TO US.

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

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