KUBICKI DRAPER

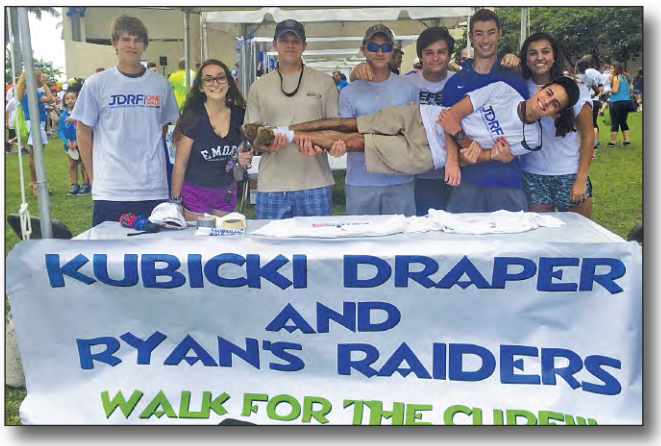
THE KD QUARTERLY

SPRING 2015

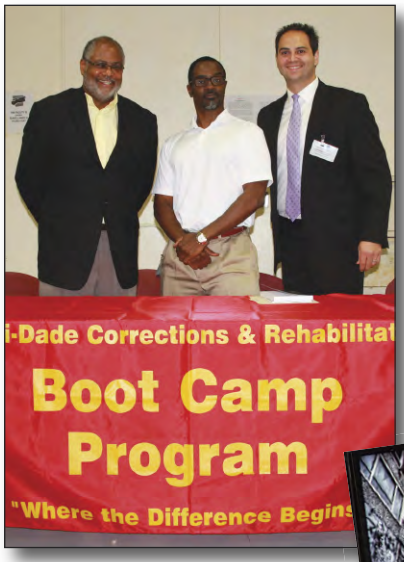
KD *in the Community*

Josh Polsky, of the Fort Lauderdale office, recently participated in the "Title I: Real Men Read" mentoring event at Thurgood Marshall Elementary in Fort Lauderdale. Josh also recently led the Kubicki Draper Fort Lauderdale office in a community outreach project with Covenant House Florida. They collectively raised and supplied over $15,000.00 worth of clothing and household items to the agency's runaway, homeless, and at-risk youth under the age of 21, including teen parents and their infant children.

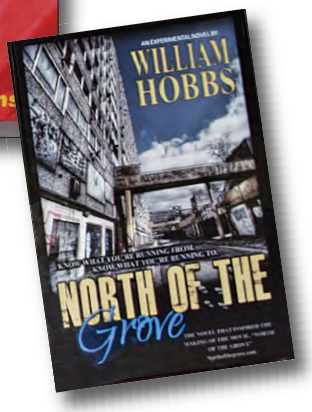
As a board member of HR Martin County, **Christin M. Russell**, of the West Palm Beach office, volunteered to present interview tips to students at the Martin Youth "LEADERship" Career Day Fair. The Career Day program provides students with a myriad of skill building workshops on resume writing, interviewing, social media branding, "dressing for success" and budgeting.



Laurie Adams, of the West Palm Beach office, and her son Ryan Martino, co-captains of Ryan's Raiders, were again among the top fundraising teams in the Walk to Cure Diabetes in West Palm Beach. Because of generous help from family and friends, and the corporate sponsorship of Kubicki Draper, Ryan's Raiders' donation will assist JDRF in their extensive search for a cure and for more effective treatments for Type 1 Diabetes.



Charles Watkins, of the Miami office, and **Josh Polsky**, of the Ft. Lauderdale office, presented 35 copies of Professor William Hobbs' book "North of the Grove," along with Professor Hobbs, to the Miami-Dade Correctional Facility for Juveniles. The books were purchased and donated by KD to help support the Boot Camp Program and kick off the "Literacy through Literature" program at the facility.



EDITOR
Bretton Albrecht

IN THIS ISSUE

www.kubickidraper.com

The Motor Carrier's Duty to Preserve "Non-existent" Electronic Evidence

By Scott McMahon on behalf of the Transportation, Trucking and Logistics Practice Group

The last two decades have witnessed an explosion of sophisticated technology employed by the interstate motor carrier industry to leverage capacity and maximize profits. GPS data, electronic on-board recorders ("EOBR's"), direct e-mail links, scanners, paperless log systems and live camera feeds from the driver dashboard are some of the things being used. All provide the motor carrier with precision data on driver performance, vehicle maintenance and diagnostics, as well as data on driver hours of service compliance mandated under the Code of Federal Regulations, 49 C.F.R. § 395. These technologies are in a constant state of flux, yet their impact on a jury is undeniable. Of particular interest, at least in defending motor carriers and their drivers in catastrophic bodily injury claims, are the myriad GPS, satellite and computer technologies encapsulating evidence regarding vehicle operation, speed and driver performance in the immediate "pre-collision" time-frame. By now, most all know this data is normally temporarily stored in EOBR's or with other third party vendors. Most importantly, updated and technologically accurate data usually provides a wealth of evidence that may exonerate the driver from fault. Capturing this evidence in the immediate aftermath of a collision can help make the motor carrier's case.

Conversely, losing electronic data will often lead to a damaging spoliation of evidence claim or jury instruction, allowing the jury to punish the motor carrier for not preserving electronic data presumed to favor the Plaintiff's case. *See* ***Martino v. Walmart Stores Inc.***, 908 So. 2d 342 (Fla. 2005). The risk of losing electronic data is even more acute given the wealth of recent FMCSA and FHWA Regulations requiring minimum retention periods for (among other things) electronic or manual driver logs, maintenance records and pre and post trip inspections. *See, e.g.*, 49 C.F.R. § 395.8, 395.15. Knowing what technologies your motor carrier client has installed on its vehicles, what data is retained under that technology, for how long, and the motor carrier's business custom and practice on data retention, are all pre-requisites for counsel representing truckers in catastrophic accident litigation -- this much is obvious.

However, and as a logical extension of issues encompassed by spoliation of new electronic data, a looming issue is whether a spoliation of evidence claim is proper where the trucking company and/or its driver fail to create a record (electronic or otherwise) that is otherwise statutorily mandated. In other words, what if the tractor-trailer EOBR is not properly installed, not engaged on purchase, malfunctions due to wear and tear, and/or does not create electronic data to "discard or spoliate"? Likewise, what if the driver fails to generate electronic hours of service logs and report to his employer accordingly for purposes of compliance with duty status hours? A fairly recent Federal District Court Decision provides favorable guidance.

In ***Dixon v. Greyhound Lines, Inc.***, 2014 WL 6087226 (M.D. La., Nov. 13, 2014), the Plaintiff claimed he sustained injuries from a tire blowout that occurred while he was on a Greyhound Bus. Whether the Plaintiff reported injuries to the Greyhound driver was a contested fact issue. The Greyhound driver claimed no injury was reported at the scene, and therefore no Greyhound "C-4 Incident Reporting Form" was generated in the first instance. The driver generated several "post trip vehicle inspection records" per FMCSA Regulation 49 C.F.R. § 396.11. However, those inspection records were discarded within three months of the incident under Greyhound's records retention policy, which policy comported with the Code of Federal Regulations. After filing suit, and discovering Greyhound had created no C-4 Incident Report, the Plaintiff brought a Motion for Spoliation and for Sanctions, arguing Greyhound "intentionally destroyed evidence by not creating a report it should have generated." The spoliation remedy sought from the District Court for failing to generate an accident report record was "…to strike Greyhound's defenses and impose a final judgment that included punitive damages."

continued on page 3

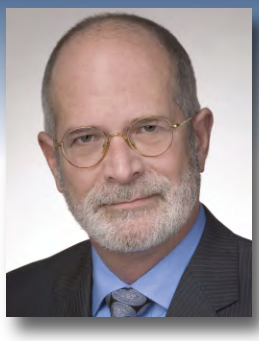
The KD Transportation, Trucking, Transportation and Logistics Group advises our motor carrier, broker and freight forwarder clients in all manner of spoliation of evidence and other data retention and regulatory issues impacting the same. If you have any questions, or require our legal counsel on any issues relating to the Trucking, Transportation or Logistics Industries,

please contact:

SCOTT MCMAHON

HYPERLINK "mailto:jsm@kubickidraper.com" jsm@kubickidraper.com

(813) 314-1129.



Recent Case Law Regarding the Retroactivity of the 2010 Slip-and-Fall Statute

By G. William Bissett, Jr.

The 2010 slip-and-fall statute, §768.0755, Fla. Stat., heightened the burden on Plaintiffs by requiring them to prove "actual or constructive knowledge" of the alleged dangerous condition or transitory foreign substance. Since then, only a few decisions have directly addressed the retroactivity of the statute, and whether the heightened standard applies to accidents that occurred before the 2010 amendment.

For example, in ***Kenz v. Miami-Dade County***, 116 So. 3d 461 (Fla. 3d DCA 2013), the Third District held that the statute could be applied retroactively, finding that §768.0755, Fla. Stat., did not create any new element for a negligence cause of action, but, rather, simply codified the means by which a plaintiff must prove a Defendant property owner breached its duty of care. In contrast, in ***Pembroke Lakes Mall Ltd. v. McGruder***, 137 So. 3d 418 (Fla. 4th DCA 2014), the Fourth District held, contrary to the Third in ***Kenz***, that the statute does not apply retroactively, and, thus, cannot be applied to accidents occurring before the 2010 amendment. The court in ***McGruder*** explained, "Respectfully, we disagree with the ***Kenz*** court's conclusion because the 2010 statute, section 768.0755, reinserts the... knowledge element into slip and fall claims." *Id*. at 426.

Recently, in ***Glaze v. Worley***, 40 Fla. L. Weekly D555 (Fla. 1st DCA Mar. 3, 2015), the First District sided with the Fourth District's ***McGruder*** decision and disagreed with the Third District's decision in ***Kenz*** regarding the retroactivity issue. Thus, the First District, like the Fourth, holds that §768.0755, Fla. Stat., does not apply to accidents that occurred prior to the 2010 amendment. Rather, the earlier statute, §768.0710, Fla. Stat., which provides that actual or constructive knowledge of the transitory substance is not a required element of proof, applies to such claims.

If ***Glaze*** and ***McGruder*** are any indication, it appears there may be a trend among the appellate courts toward holding that the heightened slip-and-fall statute, §768.0755, Fla. Stat., effective July 1, 2010, does not apply retroactively to accidents occurring before that date. Nevertheless, the Second District and Fifth District do not appear to have directly addressed the issue yet. And, at least in the Third District, the statute will remain retroactive, under ***Kenz***, unless or until the Florida Supreme Court decides the issue.

Motor Carrier's Duty continued

The ***Dixon*** court initially engaged in a typical "spoliation of evidence" analysis by addressing the threshold issues of "duty to preserve, relevancy of the lost or destroyed evidence, and whether the Defendant acted in bad faith in not creating records it should have created." According to ***Dixon***, the threshold problem (for the Plaintiff) was a typical spoliation analysis "does not fit" where a party fails to generate the "spoliated" evidence. Concluding there was no duty to preserve that which did not exist, the ***Dixon*** court summarily rejected the Plaintiff's spoliation arguments and denied the Motion for Sanctions. On Greyhound's specific failure to generate a document/the C-4 form, the District Court ruled: ***"…Defendant had no duty to preserve any C–4 incident form relevant to Plaintiff's alleged injury, where no C–4 form was actually created. In other words, Defendant could not have a duty to preserve something that does not exist."*** *Id.* (emphasis added). As of the date of this article, it does not appear that this ruling has been appealed to the Fifth Circuit.

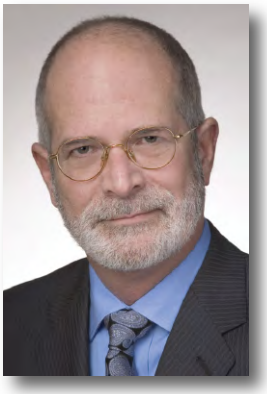
"Takeaways" and Precautions Based on the Dixon Ruling:

Where the Plaintiff argues the motor carrier failed to generate GPS, computer or any electronic data, the ***Dixon*** decision appears to be the most recent published Federal decision (in a CMV context) holding there is no duty to preserve evidence/records that do not exist;

However, it should be cautioned that, given the Code of Federal Regulations requirements mandating the creation and preservation of certain records for minimal periods of time (i.e. driver logs for at least 6 months under Section 395), and public safety implications underlying those requirements, other courts may see things differently from ***Dixon***, especially at the State Court level, where Judges may apply their own standards of fairness regarding proper spoliation remedies for not generating data otherwise mandated;

We thus suggest that ***Dixon*** will likely not protect a carrier from a failure to generate data whose creation and retention is mandated by carrier guidelines and/or under the Code of Federal Regulations; and

That aside, generally speaking we believe best litigation practices are to avoid being in the risky position of defending a spoliation claim in the first instance. To avoid this, motor carriers and their counsel should understand the parameters and limitations of all on board technology ahead of time, and before an accident occurs. It may even be advisable to employ a competent expert who is on-call and knows these waters well.



SPOTLIGHT ON:

G. William Bissett, Jr.

Bill Bissett, a shareholder in the Miami office, has more than 35 years' experience as a litigator and appellate practitioner. He has handled countless trials and appeals in Florida's state and federal courts, and he has a wealth of experience in virtually all areas of defense and coverage litigation. Bill has presented numerous seminars on topics ranging from construction defects, to premises liability, to coverage issues, and many other areas in between. In addition, for over 15 years, Bill has authored the Florida Law Section of the nationally published, Tort Law Desk Reference: A Fifty State Compendium.

Bill has a unique ability to present complex legal issues and arguments in a straightforward, practical, and easy-to-understand way.

He is skilled at providing clients with early case evaluation and crafting practical solutions to difficult problems.

After graduating from the University of Florida, where he majored in Political Science with a minor in History, Bill moved to Miami with his wife Lynn, to attend the University of Miami School of Law. For much of law school, he worked during the day as a bailiff for Judge James Kehoe and attended law school in the evenings. Bill's daily exposure to the courtroom during law school gave him an edge, as he began his practice with a well known insurance defense firm following his graduation. Bill, who has a passion for research, analysis, and persuasive writing, quickly became the go-to person for the firm's appeals, and he was writing briefs and presenting oral arguments within a few months of joining the firm. He also quickly gained experience as a trial litigator. Bill says that one of the first and most important lessons he learned is that it is vital to fully research and analyze the legal issues in the case at the outset, in order to pinpoint what the case turns on and to frame up the issues and evidence in the case for discovery, trial, and any appeal.

About 10 years after he started practicing, Bill and another lawyer formed their own firm, where they specialized in defending cutting-edge massive liability tort cases, with notable clients that included Bridgestone-Firestone. During that time, Bill also developed a specialty in defending complex products liability and construction defects cases, in addition to premises liability and homeowners' association cases. Around 2001, Bill decided to step out on his own, with the law firm of G. William Bissett, P.A., where he continued developing his practice in virtually all areas of defense litigation, insurance coverage, and appeals, in addition to becoming a certified circuit civil mediator and doing some mediation work with Upchurch Watson. In addition, throughout his practice, since 1980, Bill has also continued to be one of the select attorneys FIGA has consistently relied on for trial support and appeals. Bill joined Kubicki Draper in 2006, bringing with him his wealth of knowledge and experience, his commitment to excellence, passion for the law, and dedication to clients.

Bill's biggest passion outside the law is his family. Bill and his wife Lynn have two grown children.Their son, William, works in computer programing, and their daughter, Cassie, is a police officer, as is her fiancé. Bill also loves the outdoors, and, as a young man even attained the honor of Eagle Scout, Order of the Arrow. He enjoys boating, fishing, and jet skiing with his family. Bill is also a history buff. In fact, as a native of Saint Augustine, the summer before he started college, Bill served in the National Park Service as a Ranger at the Castillo De San Marcos National Monument, the oldest masonry fort in the continental United States. A National Geographic article written about the fort around that time featured Bill and a few other park rangers, dressed in original British Redcoat uniforms. Another highlight of his duties, in addition to leading tours of the fort, was getting to fire the fort's cannons for demonstrations. Suffice it to say that on the days Bill was in charge of how much black powder to load, the cannons had quite a bit more than their usual kick.

Florida Legislature Considering Crackdown on Post-Loss Assignments of Benefits of Homeowner Policy Claims to Contractors

By Jorge Santeiro, Jr., on behalf of the First-Party Practice Group

Consumer protection bills are being considered in the Florida House and Senate to stop what is reportedly becoming the next great insurance crisis in Florida. The bills aim to crack down on contractors and remediation companies that agree to perform emergency repairs only if a homeowner assigns his or her rights to benefits under their homeowners' insurance policy. An assignment of benefits (AOB) is a well-known and accepted means of allowing vendors, such as water remediation companies and roofers, to secure their right to payment for home emergency repairs without requiring up-front payment from the insured homeowner. The homeowner traditionally benefitted by obtaining immediate home repairs without having to pay the contractor first and then having to file an insurance claim to recuperate their money.

However, the mounting concern over AOB claims results from a reported 1,000 percent increase in the number of AOB claims from 2006 to 2014. Many carriers are also concerned that AOB claims artificially inflate costs with expensive and sometimes unnecessary repairs. On many occasions, homeowners are not even made aware they are assigning benefits under their insurance policy and are surprised about any resulting litigation. To make matters worse, some contractors have reportedly filed liens against homeowners when they do not obtain the settlement they believe they deserve from the carrier. Over time, a cottage industry of AOB litigation has arisen resulting in a mushrooming of claims and litigation costs; driven in no small part by the mandatory attorneys' fees provision of Section 627.428, Florida Statutes. Some law firms are reportedly putting on large seminars for contractors to attract AOB business.

The pending bills would seek to limit AOB claim abuse, in part, by allowing carriers to sell home and auto insurance policies that prevent most post-loss AOBs and by including a provision that an insurable interest does not survive an assignment except to a subsequent purchaser of the property who acquires an insurable interest following a loss. The latter provision is aimed at preventing the recovery of attorney's fees in cases brought by vendors under an AOB rather than an insured policyholder, since the vendor as a purported assignee would not have an insurable interest under the attorneys fees statue, Section 627.428.

As of the writing of this Note on March 26, 2015, Senate Bill 1064 has passed the Senate Banking and Insurance Committee and House Bill 669 has passed the House Civil Justice Subcommittee. If you would like to track the bills' progress, follow the following links:

Senate Bill 1064: https://www.flsenate.gov/Session/Bill/2015/1064
House Bill 669: https://www.flsenate.gov/Session/Bill/2015/0669

APPELLATE

Affirmance of Final Judgment for Insurer in UM Selection/Rejection Form Case.

Angela Flowers, recently obtained a *per curiam* affirmance of a final summary judgment entered in favor of the insurer, in ***Rodriguez v. Geico Gen. Ins. Co.***, 5D12-4580 (Fla. 5th DCA, March 10, 2015). On appeal, the insured admitted he signed a UM selection rejection form in which he rejected UM coverage. However, he asserted the form was invalid because, in the heading, the term "bodily injury liability limits" was abbreviated to "bodily injury limits." The insured therefore claimed he was entitled to UM coverage, or at least a trial on the issue of whether he made a knowing and informed rejection. Angela successfully opposed the insured's arguments. She emphasized, that the form the insured signed had been approved by the Department of Insurance since 1996. Further, the challenged abbreviation was only used in the heading, and, thus, the insured could not reasonably claim confusion, especially since he completely rejected all UM coverage. The appellate court, agreeing with Angela's arguments, affirmed the summary judgment in favor of the insurer.

Successful Appeal of Order Compelling Appraisal in Sinkhole Case.

G. William Bissett, Jr., successfully appealed an order compelling appraisal in a sinkhole case, ***Florida Ins. Guar. Ass'n v. Waters***, 2D13-4455, 40 Fla. L. Weekly D354 (Fla. 2d DCA Feb. 6, 2015). The decision ruled in FIGA's favor on two key issues which are being actively litigated in hundreds of pending sinkhole cases brought against FIGA after the liquidation of HomeWise Preferred Insurance Company in November 2011. The appellate court first ruled that a 2011 amendment to the FIGA Act's definition of what constitutes a "covered claim" as to sinkhole losses applied to a claim arising prior to the effective date of the amendment. This ruling impacts millions of dollars of exposure to FIGA, as the 2011 amendment restricted FIGA's payment obligation solely to payment of the "actual costs" of the repairs, and prohibited payment directly to the policyholder, and further prohibited payment of attorney's fees and public adjuster fees. The appellate court secondly agreed with FIGA that even if the insured was entitled to appraisal, the insured had waived that right by taking actions in the litigation that were inconsistent with the right to appraisal. The Second District relied in part upon its decision in a prior appeal in which Bill prevailed a few months ago, ***FIGA v. De La Fuente***, 40 Fla. L. Weekly D123 (Fla. 2d DCA Jan. 7, 2015). In the ***De La Fuente*** appeal, the Second District certified to the Supreme Court two questions arising by virtue of the 2011 amendment as being of great public importance.

TRIALS, MOTIONS, MEDIATIONS

Complete Defense Verdict of No Liability in Trial of Automobile Negligence Case.

Kendra Therrell, of the Fort Myers office, recently obtained a complete defense verdict of no liability in an automobile negligence case. This was a true "he said/she said" case with disputed liability and vastly different versions of events in an accident involving a Defendant driver and Plaintiff bicyclist. Kendra's client, the Defendant, was making a right hand turn at a busy intersection. He stopped at the stop bar, then inched up to gain better visibility to his left, at oncoming traffic. When first looking to the right, the Defendant observed the Plaintiff bicyclist a good distance away. Upon a second look to his right while waiting on traffic to clear, the Plaintiff bicyclist was closer, but still not close to the crosswalk. The Plaintiff bicyclist was talking on a cell phone and motioned with her hand and head for the Defendant to proceed. Then, unexpectedly, Plaintiff continued forward and collided with Defendant's car. Plaintiff disputed all of this, contending the accident was Defendant's fault. Over the course of 28 months, Plaintiff treated with chiropractic care and pain medication for alleged cervical bulges and a lumbar protrusion and testified at trial that she has constant neck and back pain related to the accident, which limits her activity. In closing, Plaintiff asked the jury for approximately $75,000.00 in total damages. However, during the defense closing, Kendra emphasized Plaintiff's inconsistent testimony and the many areas in which she had impeached Plaintiff on cross-examination. Kendra argued that the Plaintiff simply failed to meet her burden to prove her claims by the greater weight of the evidence. The jury agreed and quickly returned a complete defense verdict finding no liability on the Defendant. Kendra plans to seek fees and costs based on a pre-trial proposal for settlement.

Favorable Result in Trial of Personal Injury Case Involving Roofing Contractor.

Harold A. Saul, of the Tampa office, obtained a favorable result after a 4-day trial. The Plaintiff claimed the Defendant roofing contractor was negligent and violated its agreement by leaving behind nails after re-roofing Plaintiff's house. The contract and verbal agreement, as well as the Defendant's brochures, indicated they would remove all debris, and the Defendant's employees acknowledged no nails should have been left behind. The Plaintiff, a diabetic who was out in his yard pulling weeds, stepped on a nail left behind by the Defendant, which was one of only 7 nails found. As a result of the nail puncturing the bottom of the Plaintiff's foot and his diabetic condition, the foot became infected, and after 4 surgeries, the Plaintiff had 90% of his Plantar fascia removed, as well as undergoing a significant amount of intravenous and oral antibiotics with an infectious disease physician. The treating surgeon indicated Plaintiff would be limited in his activities and would have to use a cane for the remainder of his life. The Medicare reduced medical bills were still over $35,000. On behalf of the Defendant, Harold argued that leaving 7 nails behind for such a large roof was reasonable, and they emphasized the extraordinary efforts their client undertook to remove all debris. In addition, they argued the Plaintiff, with his known diabetic condition, should have worn more protective shoes and should have sought more immediate and consistent medical treatment. The Plaintiff never demanded less then $250,000. After about 90 minutes of deliberations, the jury found the Defendant 40% negligent, the Plaintiff 60% negligent and awarded a net verdict of just over $22,000.

Favorable Fact-Finding from Arbitrator.

Karl Labertew, of the Pensacola office, handles most of the Florida work for an international company that imports, among other things, toilet supply lines. The cases typically arise from property damage claims, such as where a toilet supply line or some part allegedly fails and floods a room or house. However, the client company is simply the middleman distributor, not the original manufacturer. Karl has probably handled more than 20 of these claims in Florida in the last few years, and he personally developed what ended up becoming the national litigation strategy for the client's cases all over the country. As Karl has become more and more familiar with the supply and distribution chain, identifying the different manufacturers, designers, and distributors, and understanding national and international (primarily IAPMO) regulations, he has been able to refine his arguments and settle claims for increasingly smaller and smaller amounts. Recently, Karl persuaded the client to let one of the cases go to the fact-finder via arbitration, and the arbitrator in that case issued a complete defense verdict for the Defendant company.

Defense Summary Judgment in Automobile Negligence Case.

Stefanie Capps, of the Fort Myers office, recently prevailed in obtaining a defense summary judgment in an automobile vs. pedestrian negligence case. The Plaintiff was a 15 year-old who admitted she was crossing a major roadway against a "do not walk" sign. The Plaintiff alleged extensive permanent injuries including orthopedic injuries to her ankle, neck, back as well as a head injury. Plaintiff argued that the Defendant driver should have seen the Plaintiff crossing the road but failed to because he was focused on the car in front of him and not scanning the roadway at an intersection as a reasonable driver should. Stefanie successfully persuaded the trial court that the facts of the case warranted summary judgment based on the "darting pedestrian" line of cases.

Voluntary Dismissal of PIP Suit.

Kara Cosse, of the Jacksonville office, recently obtained a voluntary dismissal in a PIP suit. The Plaintiff's medical provider had initiated a declaratory judgment action regarding the proper insurance company to provide coverage for the treatment rendered to the assignee. However, Kara determined there was a lack of evidence to support timely submission of the bills for treatment. After presenting the same to Plaintiff's counsel, Plaintiff's counsel agreed to completely dismiss the case.

Favorable Verdict for the Defense in Trial of UM Case

Stefanie Capps and **Ken Oliver**, of the Fort Myers office, obtained a favorable verdict for the Defendant insurer in a UM case. The case involved a 3-car collision in which the tortfeasor rear-ended another vehicle, pushing that vehicle into the Plaintiff's car. The Plaintiff had treated the same day as the accident and had a surgical recommendation. The Plaintiff settled with the tortfeasor before trial, leaving only the UM claim against the insurer. At trial, after 3 days of testimony, Plaintiff in closing asked for $600,000. Ken asserted that, at most, the jury should only award Plaintiff the past medical bills, knowing with the setoffs, they would obtain a defense judgment. The jury followed Ken's recommendation and awarded only the past medical bills, which, after setoffs, will result in a defense judgment. The defense intends to pursue fees and costs based on a pre-trial proposal for settlement.

continued on page 7

TRIALS, MOTIONS, MEDIATIONS

Final Summary Judgment in Carmack Amendment Case.

Nicole Ellis, of the Miami office, obtained Final Summary Judgment for a global transportation and freight shipping company based upon a rather unique application of the "pre-emption doctrine" and the two year statute of limitations under the Carmack Amendment of the Interstate Commerce Act (49 U.S.C. §14706). Nicole began defending the motor carrier in late 2009 when the Plaintiff, a motorcycle distributer and wholesaler, filed suit asserting state law claims for negligence and seeking third-party beneficiary status regarding motorcycles damaged during multiple interstate shipments. Nicole realized the Carmack Amendment provided the exclusive remedy for the Plaintiff and thus the Plaintiff was pursuing the wrong causes of action. However, in response to the complaint Nicole initially filed a Motion to Dismiss that deftly challenged the state law claims while not bringing the Carmack Amendment and its two year statute of limitations to opposing counsel's attention. The Plaintiff failed to file an amended complaint after the Motion to Dismiss, and the "initial" case was eventually dismissed for lack of prosecution.

Nearly two years later the Plaintiff again filed suit based upon the same facts, this time (correctly) asserting liability under the Carmack Amendment. As Nicole argued, "it was too little too late." After discovery closed, Nicole moved for final summary judgment on the entire case, arguing Carmack applied to any claims arising from the shipment damaged in interstate commerce. Specifically, and even though the initial case was timely filled, the two year statute of limitations under Carmack barred the re-filed claims given the time expiration from the freight shipping company's declination of the Plaintiff's cargo loss claim. The Court agreed and further rejected the Plaintiff's attempts to argue the re-filed claim "related back to the original action that was timely filed," albeit not under Carmack. Nicole also utilized case law to successfully argue that since the statute of limitation is the standard in the industry, a copy of the company's tariff classification specifically mentioning the statute of limitation did not have to be introduced into evidence in order to be relied upon by the Court in entering summary judgment.

Dismissal of Police Liability Case.

Chelsea Winicki, of the Jacksonville office, received an Order Granting her Motion to Dismiss in a police liability case. The case involved 3 different Section 1983 Constitutional claims and 2 state law claims (malicious prosecution and intentional infliction of emotional distress) against an FDLE Special Agent. The Special Agent was investigating the death of a lady in St. Augustine who died as the result of a gunshot wound to her mouth. The gun that was used to shoot her was the duty weapon belonging to her boyfriend who was (and still is) a sheriff's deputy with the St. Johns County Sheriff's Office. St. Johns County Sheriff's Office investigated the case and ruled the case a suicide. After repeated requests from the family, FDLE (Florida Department of Law Enforcement) was brought in to conduct an independent investigation. Our client, Special Agent Rusty Rodgers, spent months conducting the separate investigation, and evidence ultimately demonstrated the death may have been a homicide committed by the boyfriend, rather than a suicide. The death and investigation has gained national attention, including specials on Dateline and Frontline.

The boyfriend subsequently filed suit against the FDLE and against our client, the Special Agent. About a year ago, after removing the case to federal court, Chelsea filed a Motion to Dismiss all allegations against the Special Agent, arguing that Plaintiff failed to state a cause of action against the Special Agent, and, further, that the Special Agent was entitled to qualified immunity on the Section 1983 claims. After a year of waiting for a ruling, the Court's Order was entered dismissing all 5 counts against the Special Agent, based on the Court's finding that Plaintiff failed to state a cause of action for any of the counts. The dismissal was without prejudice, and Plaintiff will have some time to amend their Complaint. However, as the Complaint was dismissed only on the ground that Plaintiff failed to state a cause of action, the Court has not yet considered the qualified immunity argument which permits a dismissal with prejudice.

Dismissal in Post-Loss Assignment of Benefits Case Involving Water Remediation Company.

Karina Perez, of the Tampa office, obtained a dismissal with prejudice and was awarded all defense fees and costs pursuant to 57.105 for our client. The case involved a post-loss assignment of benefits by an insured to a water remediation company for services performed at the insured's residence. Before the Plaintiff remediation company filed suit, our client, the insurance carrier, informed Plaintiff that it had already paid the full amount of the remediation invoice, jointly to the insured and the Plaintiff remediation company. Nevertheless, the remediation company maintained the insurer "violated" the assignment, from the insured, which purportedly required direct payment to the remediation company. However, Karina argued that the insurance carrier was not a party to the assignment, and, further, that payment to one payee constitutes delivery to both. The trial court agreed and dismissed with prejudice, in addition to awarding the defense fees and costs under 57.105.

Motion for New Trial Granted in Part in Automobile Negligence Case.

G. William Bissett, Jr., of the Miami office, with **Earleen Cote** and **Sia Nejad**, of the Fort Lauderdale office, prevailed in obtaining an order granting in part a defense motion for new trial in an automobile negligence case. The jury had returned a Plaintiff's verdict totaling over $1.4 million. The vast majority of that sum, approximately $1 million, was awarded for Plaintiff's future loss of earning capacity claim. The trial court ordered a new trial as to the future loss of earning capacity claim. The trial court agreed with the defense that the court should not have excluded evidence that the plaintiff, a pain doctor, had his license to prescribe narcotic medication revoked by the Drug Enforcement Administration (DEA), and that the error was compounded when plaintiff presented testimony indicating the license was merely suspended. The trial court, concluding this prejudiced the defense of Plaintiff's future loss of earning capacity claim, therefore granted a new trial in part as to that claim. Plaintiff has appealed.

News & Announcements

Congratulations to Charles Watkins!

Charles Watkins, of the Miami office, has been selected by Legacy Miami Magazine as one of "South Florida's 50 Most Powerful and Influential Black Professionals in Business and Industry for 2015." Established in 2004, *Legacy* is a news/business publication providing Florida's Black professional community with insightful articles and information on business, careers, politics, lifestyle, education, religion, culture and social commentary.

Michelle Krone, of the Fort Myers office, has joined the Claims & Litigation Management Alliance's (CLM) Construction Committee.

Kubicki Draper was a Gold Sponsor for the 2015 Claims & Litigation Management Alliance's (CLM) Annual Conference held in Palm Desert, California in March. Each year, the CLM Annual Conference features more than 80 collaborative educational sessions and keynote presentations designed by industry professionals to help attendees gain the knowledge they need to be on the forefront of the industry.

Jennifer Feld, of the West Palm Beach office, was appointed Co-Chair of the Personal Injury section for the 2015 Palm Beach County Bench Bar Conference. The Bench Bar Conference attracts hundreds of Florida Bar attorneys and offers a unique forum to discuss pressing issues with Palm Beach County's judiciary. Attending the Bench Bar Conference provides an opportunity to both interact with judges and to network with other attorneys with diverse practice areas. Jennifer was also appointed 2015 Chair of the West Palm Beach Anti-Defamation League Glass Leadership Institute. GLI is a ten-month prestigious leadership development program designed to educate and engage professionals about the crucial work of the ADL. ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all. The program is designed to empower participants to become the ADL's next generation of leaders, and to be effective advocates on behalf of the organization in the local community.

Kendra Therrell, of the Fort Myers office, has been selected to join the American Board of Trial Advocates, Southwest Florida Chapter. The American Board of Trial Advocates is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution.

NEW ADDITIONS:

We are pleased to announce **Thasaian Q. Jordan** has joined our team as an Associate in the Miami office.

We are proud to announce the following lawyers were recognized in South Florida's Legal Guide-Top Lawyers 2015.

Congratulations to:

Laurie J. Adams, of the West Palm Beach office
Civil Litigation

Peter S. Baumberger, of the Miami office
Professional Liability Defense, Corporate and Business Litigation

Caryn L. Bellus, of the Miami office
Appellate and Insurance

Michael J. Carney, of the Fort Lauderdale office
Civil Litigation

Brad J. McCormick, of the Miami office
Insurance Litigation

Scott M. Rosso, of the Fort Lauderdale office
Corporate and Business

Jeremy E. Slusher, of the West Palm Beach office
Corporate and Business Litigation, Construction and Litigation

Please note: The authors' names for the two articles published in last quarter's newsletter were inadvertently omitted. "ADA Title III: It's All About the Fees" was written by Christin M. Russell, of the West Palm Beach office on behalf of the firm's Retail & Hospitality Practice Group and Triggering Florida's Statutory Warranty in Condominium Construction Defect Litigation was written by Christopher Utrera and Peter Baumberger of the Miami office on behalf of the firm's Construction Practice Group.

Presentations & Speaking Engagements

Various presentations were given by our attorneys during the last quarter, some of the topics presented include:

- CAT Claims with Multiple Cases of Loss
- Florida 5 Hour Law & Ethics Update
- Premises Liability & Products Liability Update
- Global Settlements
- PPACA/Obama care: What Employers Need to Know
- Material Misrepresentation
- How to Prove Fraud
- Appellate Procedures & Early Case Resolutions
- Strategic Utilizations of Motions
- Daubert Standard
- Construction – Indemnity & 558 Basics
- Production of Documents
- Material Misrepresentation Update
- Employment: Leaves of Absence
- Sexual, Racial and Other Harassment and Discrimination
- Preventing Harassment in Your Workplace Discipline, Discharge and Documentation
- The Rules of Evidence

We welcome the opportunity to host a complimentary seminar at your office or event on the topics of your choice. All presentations are approved for continuing education credits.

For more information on presentations, please contact Aileen Diaz at 305.982.6621 / ad@kubickidraper.com.

LAW OFFICES

KUBICKI DRAPER

Professional Association
Founded 1963

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 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

Statewide Coverage in Florida from 11 Offices

MIAMI KEY WEST FORT LAUDERDALE WEST PALM BEACH NAPLES/FORT MYERS TAMPA
OCALA ORLANDO JACKSONVILLE TALLAHASSEE PENSACOLA

www.kubickidraper.com