KUBICKI DRAPER

THE KD QUARTERLY

SUMMER 2015

KD *in the Community*

Attorneys from Kubicki Draper's Tampa office attended "Cocktails for a Cause," the fifth annual fundraiser for the Lawyers' Autism Awareness Foundation (LAAF). LAAF raises money to fund grants for autism therapies for needy individual families throughout the Tampa Bay region. The foundation was co-founded in 2011 by Tampa shareholder **Jorge Santeiro, Jr.**, who has a son on the autism spectrum. Kubicki Draper has been a steadfast supporter, sponsoring LAAF each year since its inception.

Harold Saul, of the Tampa office, was a delegate to the third annual Stakeholders meeting of the Kidney Health Initiative (KHI). The mission of the KHI is to advance scientific understanding of the kidney health and patient safety implications of new and existing medical products and to foster development of therapies for diseases that affect the kidney by creating a collaborative environment in which FDA and the greater nephrology community can interact to optimize evaluation of drugs, devices, biologics, and food products.

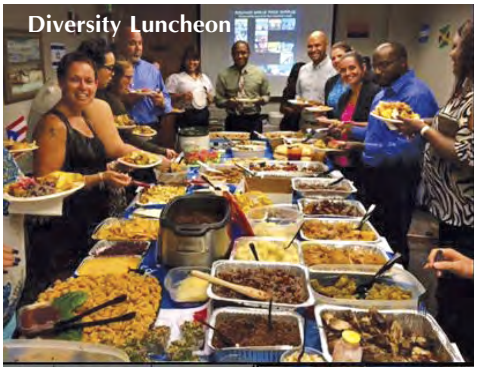

Supporting GSCBWLA

Kubicki Draper sponsored and participated in the Gwen S. Cherry Black Women Lawyer Association's "Fancy Hat Day at the Races," to help raise funds for the organization's fellowship at Legal Services of Greater Miami, Inc. The event was held at Gulfstream Park in Hallandale Beach. Most recently, the firm was honored to receive the Gwen S. Cherry Black Women Lawyer Association's "Corporate Sponsor of the Year" award at the association's annual installation reception. Attorneys **Charles Watkins, Nicole Ellis** and **Radia Turay** attended the reception along with KD team members, **Claudette Armbrister** and **Jeremy Thompson** to accept the award on the firm's behalf. The firm is proud to support the GSCBWLA and its great work in our community.

BBQ Bands & Brews

Michelle Krone and **Brian Orsborn**, of the Ft. Myers/Naples office, participated in this year's BBQ Bands & Brews, an event to benefit Lee Builders Care, a non-profit arm of the Lee County Building Industry Association. Michelle was the raffle chair and Brian assisted with various activities throughout the day. The event helped raise more than $61,000 for Lee Builders Care which provides emergency construction services to elderly and disabled Lee County homeowners.

Kubicki Draper's employees recently gathered to celebrate the firm's diversity by holding a potluck luncheon. Employees brought a dish that represented their ethnic or regional background and shared a little information about the dish they contributed. The event was a great success and provided a great opportunity to get together, enjoy delicious food and learn more about each other and our backgrounds.


Diversity Luncheon

EDITOR
Bretton Albrecht

IN THIS ISSUE

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CASE LAW UPDATE

Florida Supreme Court Case Holds Citizens is not Subject to Statutory Bad Faith Action

By Michael Balducci on behalf of the First Party Practice Group

Recently, in ***Citizens Property Insurance Corp. v. Perdido Sun Condo. Ass'n, Inc.***, 40 Fla. L. Weekly S265 (Fla. May 14, 2015), the Florida Supreme Court held that Citizens, as a state-created insurer, was immune from liability for a statutory first-party bad faith claim brought pursuant to §624.155(1)(b), Fla. Stat.

The Florida Supreme Court's decision resolved a conflict between the First District and the Fifth District on this issue. The First District, in ***Perdido Sun Condominium Ass'n v. Citizens Property Insurance Corp.***, 129 So. 3d 1210 (Fla. 1st DCA 2014), the underlying decision on review, had held that Citizens could be subject to a first-party bad faith claim. The First District reasoned that one of the limited exceptions to Citizens' statutory immunity, contained in §627.351(6)(s)1.a., Fla. Stat., for "any willful tort," applied to allow such an action to stand.

However, in an earlier decision, ***Citizens Property Insurance Corp. v. Garfinkel***, 25 So. 3d 62 (Fla. 5th DCA 2009), the Fifth District held that, on the contrary, the "willful tort" exception to Citizens' immunity in §627.351(6)(s)1.a., Fla. Stat., was inapplicable, and, thus, that Citizens could not be subject to a statutory first party bad faith claim. The Fifth District reasoned, for example, that statutory first party bad faith actions "now exist in Florida not because they are torts, but because they are a statutory cause of action. Accordingly, a first party bad faith claim cannot be wedged into the statutory exception for willful torts because it is not a tort of any variety." *Id.* at 68-69.

The Florida Supreme Court, persuaded by the Fifth District's reasoning, approved the Fifth District's decision in ***Garfinkel*** on this issue and quashed the First District's decision in ***Perdido Sun***. Accordingly, the Florida Supreme Court held that the trial court in ***Perdido Sun*** had properly dismissed Plaintiff's complaint against Citizens, which only contained a statutory bad faith claim under §624.155, Fla. Stat., for which Citizens was immune, and which did not allege a separate willful tort.

Presentations & Speaking Engagements

We welcome the opportunity to host a complimentary seminar at your office or event, on the topic(s) of your choice. All presentations are approved for continuing education credits. Some of the topics our attorneys presented during the last quarter include:

- Material Misrepresentation Update
- Proving Fraud
- Ethics for the Claims Professional
- Bad Faith Hot Topics
- Medicare Liens and Set Asides
- Defending Difficult Medical Claims
- 5 Hour Law and Ethics Update
- The Key Ingredients for a Proper Assessment, Strong Defense and Favorable Resolution of a Construction Defect Case

For more information, please contact

Aileen Diaz
305.982.6621
ad@kubickidraper.com

SPOTLIGHT ON:

Chelsea Winicki

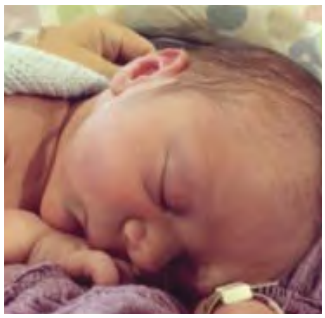
Chelsea Winicki, a shareholder in our Jacksonville office, knew from an early age she wanted to be an attorney. In middle school, she was asked to play the role of an attorney for an acting assignment and found it to be a natural fit. Chelsea, who was also active in ballet while she was growing up, says she found she was happiest when she was on stage. But, for Chelsea, being an attorney is not just another stage where she can shine, it's a platform where she can make a real difference by using her legal knowledge and skills to advocate effectively and persuasively on behalf of her clients before both the court and the jury. Chelsea says that another aspect of being an attorney she finds rewarding is working with the client as a team to pursue a favorable outcome. She believes client involvement is vital in every case. She explains that an attorney must first understand what the client's goals and objectives are, and then work with the client to find the best strategy for pursuing a favorable resolution, whether that means negotiating a settlement or duking it out at trial.

Chelsea's moot court experience taught her how to look at a case from every angle and to think "outside the box" to find innovative solutions and creative arguments to complex legal problems.

Chelsea, born and raised in North Carolina, earned her undergraduate degree at the University of North Carolina in Chapel Hill, before attending Florida Coastal School of Law in Jacksonville, Florida, where she graduated with honors. Among other awards and honors, Chelsea was selected by her fellow law students to receive the "Founder's Award," in recognition of her significant contributions to the ideals and objectives of Florida Coastal. Chelsea's emphasis on teamwork was fostered in a lot of ways in law school at Florida Coastal, where she was an instrumental part of building the school's budding moot court program into a nationally recognized team. The summer after her second year of law school, her team won the Robert Orseck Memorial Moot Court Competition, held before a panel of Florida Supreme Court Justices at The Florida Bar's annual meetings. Later that year, Chelsea's moot court team also competed in the Jessup International Law Moot Court Competition, winning regionals in Mississippi and advancing to the international rounds in Washington, D.C. While in D.C., she and her team advanced to the out-rounds, making it to the top 25 in the international rounds, where her team competed against others from around the world and where Chelsea was recognized as one of the top oralists.

Before joining Kubicki Draper, Chelsea served as an Assistant State Attorney with the State Attorney's Office in Jacksonville. She was quickly promoted to the felony division, and then to the specialized repeat offender division, where she prosecuted only repeat felony offenders. While a prosecutor, Chelsea became known for her passion and success in the courtroom, especially in front of the jury. She tried 29 jury trials to verdict, in addition to her non-jury trials and other cases. Chelsea's passion and tenacity in the courtroom made her a natural fit with Kubicki Draper, where her practice has developed and expanded over the past several years to include virtually all areas of civil defense litigation and practice. Chelsea is experienced in handling all aspects of the defense in cases ranging from automobile liability, to premises liability, negligent security, products liability, construction defects, transportation and trucking, insurance coverage, bad faith, and PIP defense, in addition to defending police liability claims, including §1983 claims and malicious prosecution claims. She has presented numerous seminars to our clients on these and other legal topics.

Outside of the courtroom, Chelsea's top priority is her family. She and her husband, Christian (also an attorney and U.S. Naval Reserve officer), are often busy taking their active little girl, Kiely, to dance lessons, soccer, or basketball. They'll be even busier now that they recently welcomed a little boy into the world, Christian Jack ("C.J."). Even with their busy schedules, Chelsea and Christian have made sure to have regular "date nights." They love the outdoors, and enjoy going on "surfing dates" together. Chelsea says they have learned that, however busy their schedules get, it is truly important to make time for family time and to treasure each moment together.

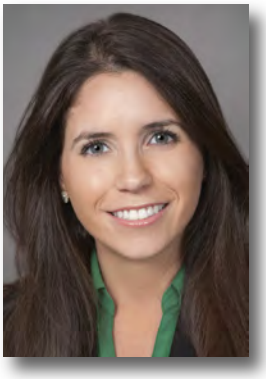


Baby "C.J."

New Additions to the Firm

We are pleased to welcome new members to our team:

Sarah R. Goldberg – Associate, Miami
Cheryl A. Ledoux – Associate, Ft. Myers/Naples
Angela C. Agostino – Associate, Ft. Myers/Naples
Daniel Miller – Shareholder, West Palm Beach
Hannah E. McCullin – Associate, Pensacola



"Trust Me, I'm a Doctor," Great for T-Shirts… Not for the Admissibility of Expert Testimony.[1]

By Katherine McGovern and Michael J. Carney

Two years ago, the Florida Legislature adopted the ***Daubert***[2] standard to govern the admissibility of expert testimony at trial. An expert witness is someone qualified by virtue of education, training or experience to render opinions that help a jury understand an issue generally thought to be beyond the knowledge of the average layperson. Under the prior standard, before the adoption of ***Daubert***, an expert witness was typically permitted to express opinions at trial largely on the basis of the expert's "say so."

The ***Daubert*** standard raises the bar for admissibility and requires the Court to consider the soundness of the principles and methods employed by the expert, and to evaluate whether the expert can apply them reliably to the facts of the particular case. This imposes a "gatekeeping role" on judges and requires them to exclude an expert's testimony when it is not supported by sound methods and principles applied reliably to the case.

In Florida, the ***Daubert*** standard is now codified at §90.702, Fla. Stat., which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case. §90.702, Fla. Stat. (2015).

Thus, ***Daubert*** and §90.702, Fla. Stat., together provide that a qualified expert may offer opinion testimony if it will assist the jury, is based on sufficient facts or data, and is the product of reliable principles and methods, applied reliably to the case. See §90.702, Fla. Stat.; ***Daubert***, 509 U.S. at 589-95; *see also* ***Adams v. Lab. Corp. of Am.***, 760 F.3d 1322, 1326-29 (11th Cir. 2014).

This ***Daubert*** standard applies to all expert testimony, and is not limited to only scientific or medical testimony. If an expert's opinions do not meet the ***Daubert*** test, the expert should be stricken through a motion in limine or motion to strike filed prior to trial. However, it seems that even seasoned trial judges are grappling with applying ***Daubert*** and determining where exactly to draw the line for admissibility, especially when addressing motions to strike experts offering opinions that, for years, passed evidentiary muster.

The following is a short scorecard on how a few Florida trial courts have dealt with the issue of applying ***Daubert*** at the trial level:

1. In ***Yampol v. Schindler Elevator Corp.***, 2014 WL 7337779 (Fla. 11th Cir. Ct. 2014), a Miami-Dade county circuit court case, a resident sued both his condominium association and its elevator contractor, claiming the elevator was creating noise and structural vibrations within the building, disturbing his ability to peaceably enjoy his unit. Plaintiff identified an expert to express opinions about the potential causes. The Court found the expert's testimony to be inadmissible under § 90.702, Fla. Stat., because it was "based on his pure opinion, and not based on sufficient facts or data, let alone reliable principles or methods that were reliably applied to the facts of this case." The Court concluded that there was no reliable scientific support for the expert's opinion and that "pure opinion or ipse dixit expert testimony is not admissible" under §90.702, Fla. Stat."

2. The case of ***Cruz v. City of Tampa***, 2014 WL 4473497 (Fla. 13th Cir. Ct. 2014), involved a motor vehicle negligence action in which Plaintiff's expert, a chiropractor, testified that a low speed accident caused injuries to Plaintiff's cervical spine. Defendant moved for an order excluding this testimony under the ***Daubert*** standard, and the court held an evidentiary hearing. The Court concluded that, although the chiropractor might be qualified to testify in other circumstances, his opinions in the instant case were inadmissible under ***Daubert*** because they were not based on sound methodology and, indeed, were "scientifically irresponsible." The court pointed out that both parties had erroneously focused on the bare credentials of the witnesses and the Plaintiff was looking to introduce pure, unsubstantiated opinion testimony. That might have been okay under the old standard, the Court reasoned, but not under ***Daubert***, which was intended "to prohibit in the courts of this state pure opinion testimony...." Thus, no matter how well-credentialed a witness, the Court said, it must evaluate whether "the testimony is based upon sufficient facts or data," and whether "the testimony is the product of reliable principles and methods."

[1] Actually, the authors think said slogan is only "so-so" for t-shirts.

[2] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

continued on page 5

Admissibility of Expert Testimony

continued from page 4

3. In ***Warehouse 1050 Corp. v. Florida Sol Corp.***, 2014 WL 7715562 (Fla. 11th Cir. Ct. 2014), the Plaintiffs sued for trespass and negligence, alleging that a cable owned by one of the Defendants and installed by another caused roof damage, water leaks, and interior damage to their home. To support their claim, the Plaintiffs hired a certified roofing contractor as their expert witness. This expert had 49 years' experience in the roofing business and was prepared to testify that the damage to the roof was caused by the improperly installed cable, to the exclusion of any other possibilities. The trial court analyzed all three subsections of § 90.702, Fla. Stat., and excluded the expert's testimony. The court reasoned that the expert never applied any formula or method to the facts of the case. Additionally, the Court found that although the expert was a qualified roofer, he lacked the expertise to opine as to the cause of the roof damage. In reaching its decision, the court emphasized: "The question for the court, as gatekeeper, is whether the expert reliably applied the principles and methods to the facts of the case. In this case, [his] 'expert' opinion is nothing more than his opinion of the evidence that the jury will be hearing. His opinion is not based on any facts or data and he never applied any principles or methods to the facts in this case. It appears that in reaching his opinion, [the expert] did nothing more than what the jurors will be doing: considering the testimony and evidence. However, unlike the jurors, [he] is being paid for his opinion. And the danger of allowing him to share his conclusion with the jury is that it will be couched in the cloak of an 'expert opinion.'" Therefore, the court granted the defense motion in limine to exclude the expert.

While it will likely take time before we see how Florida's appellate court's apply ***Daubert*** to particular types of experts and admissibility issues, it is already clear from recent appellate decisions that the District Courts of Appeal likewise will no longer tolerate pure opinion testimony under ***Daubert***. *See, e.g.,* ***Giaimo v. Florida Autosport, Inc.***, 154 So. 3d 385, 387 (Fla. 1st DCA 2014) (holding medical opinion testimony did not meet ***Daubert*** standard, where expert witness, when asked how he arrived at his opinions, explained that, "when I was asked and thought about it, that is the answer that I came up with," and provided no insight into what principles or methods he used to reach his conclusions); ***Perez v. Bell S. Telecommunications, Inc.***, 138 So. 3d 492 (Fla. 3d DCA 2014) (affirming order striking opinion of mother's treating physician, who provided the only causal link between workplace stress and the premature birth, as proposed testimony was pure opinion and did not meet requirements of ***Daubert*** test).

So what is the lesson here? In every case, with each proffered expert, it is important to be asking at the earliest stages of litigation questions such as: What methodology or study backs up the expert's opinion? And was that methodology fairly applied to the facts of the case? It is important to evaluate and develop potential ***Daubert*** challenges early in the case, through targeted discovery calculated to bring these issues to the court's attention. The earlier you start, the better, because you'll need enough time to gather discovery, prepare a ***Daubert*** motion, and allow for a ***Daubert*** evidentiary hearing.

Super Lawyers

2015

Congratulations

to the following KD team members who were selected for inclusion to the 2015 Florida Super Lawyers and Florida Rising Stars lists.

FLORIDA SUPER LAWYERS

MIAMI OFFICE:
Caryn L. Bellus and
Brad J. McCormick

FT. LAUDERDALE OFFICE:
Sharon C. Degnan

OCALA OFFICE:
Angela C. Flowers

ORLANDO OFFICE:
Carey N. Bos

TAMPA OFFICE:
Betsy E. Gallagher

FLORIDA RISING STARS

MIAMI OFFICE:
Bretton C. Albrecht
Steven W. Cornman
Nicole M. Ellis
Michael F. Suarez
Nicole L. Wulwick

FT. LAUDERDALE OFFICE:
Joshua E. Polsky

ORLANDO OFFICE:
Kenneth "Jayme" Idle

TALLAHASSEE OFFICE:
Stuart C. Poage

WEST PALM BEACH OFFICE:
Frank Delia
David M. Drahos
Christin M. Russell

POST-TRIAL MOTIONS AND APPEALS

Petition for writ of certiorari granted to quash discovery order.

Caryn Bellus, of the Miami office, obtained a writ of certiorari from the Fourth District, quashing the trial court's order denying Defendant's objections to Plaintiff's notice of deposition duces tecum and motion for protective order. Caryn argued that the order violated the rules of civil procedure and controlling Florida Supreme Court precedent defining the scope of permissible expert discovery. She further argued the order erroneously compelled discovery of the defense expert's financial and business records absent "unusual and compelling" circumstances, and it contravened Florida Statutes by requiring disclosure of confidential patient information related to non-party CME or IMEs. Certiorari is an extraordinary remedy and requires a showing that the non-final order materially departs from the essential requirements of law and results in irreparable harm that cannot be adequately remedied on final appeal. Caryn persuaded the Fourth District that this high standard was met here, and the appellate court quashed the trial court's order.

Successful appeal of order compelling appraisal in sinkhole case.

G. William "Bill" Bissett, of the Miami office, recently obtained victory on appeal in a FIGA sinkhole case, ***Florida Ins. Guar. v. Monaghan***, 5D13-4503 (Fla. 5th DCA, June 26, 2015). Bill, on behalf of FIGA, appealed the trial court's non-final order compelling it to participate in appraisal to determine the amount of the insureds' loss due to sinkhole activity on their property. Bill argued that reversal of the order compelling appraisal was required, inter alia, because the insureds waived any right to appraisal by delaying their demand for appraisal and actively litigating the case. The Fifth District, persuaded by Bill's arguments, agreed that the insureds had waived any right appraisal by actively litigating the case, and the court therefore reversed the order compelling appraisal.

Post-trial motion for remittitur granted.

Caryn Bellus and **Bretton Albrecht**, of the Miami office, were retained post-trial in an auto negligence case to draft post-trial motions following an excess jury verdict in the amount of about $1.9 million, which included an award of over $1.3 in future pain and suffering, in a case tried by outside trial counsel. Caryn and Bretton drafted a persuasive motion for new trial and/or remittitur. Recently, based on the written motion and without even needing a hearing, the trial court entered an order remitting the future pain and suffering award from $1.3 million to $250,000.00, although the court denied their request for a full new trial. Both sides have appealed, with the defense seeking a full new trial.

Dismissal with prejudice affirmed on appeal.

Michael Clarke, of the Tampa office, obtained a per curiam affirmance from the Fifth District of an order dismissing Plaintiff's case with prejudice in a personal injury case. In the trial proceedings, **Gregory J. Prusak**, of the Orlando office, had obtained the dismissal based on Plaintiff's counsel's failure to timely substitute a party representative after Plaintiff died during the litigation. On appeal, Michael successfully defended the dismissal, arguing this somewhat novel legal issue should be treated under the same standard as vacating a default. Following a persuasive brief and oral argument by Michael, the Fifth District affirmed the dismissal.

Order striking Plaintiff's proposal for settlement affirmed on appeal.

Sharon Degnan, of the Ft. Lauderdale office, obtained a per curiam affirmance from the Fifth District of a trial court's order striking a Plaintiff's proposal for settlement. At the trial level, **Laurie Adams** and **Melonie Bueno**, of the West Palm Beach office, had successfully moved to strike Plaintiff's proposal, arguing it could not serve as a basis for awarding Plaintiff attorney's fees, as it was impermissibly ambiguous. Sharon successfully defended the appeal. She argued the trial court correctly held the proposal was fatally ambiguous because, for example, it said in one paragraph it would extinguish all claims "in the complaint," whereas another paragraph said it would extinguish "all claims." Sharon successfully argued that this rendered the proposal invalid, as it was unclear whether acceptance of the proposal would prevent Plaintiff from later bringing a purported bad faith case based on Plaintiff's previously-filed CRN, which had already expired. After a persuasive brief and oral argument, the Fifth District affirmed the trial court's order striking the Plaintiff's proposal and holding it invalid as a basis for attorney's fees.

Plaintiff's post-trial motion for additur defeated.

Caryn Bellus and **Bretton Albrecht**, of the Miami office, drafted a response in opposition to a Plaintiff's motion seeking an additur to increase the verdict or a new trial on damages. The case was tried by **Stephen M. Cozart,** of the Pensacola office, who obtained a verdict awarding Plaintiff $0 in future pain and suffering, although the jury did award damages for past and future medical expenses and past pain and suffering. Plaintiff argued that the $0 award was inconsistent with the rest of the verdict as a matter of law. In their response in opposition, Caryn and Bretton persuasively argued that simply was not the case. Rather, this was a low-speed collision, and there was competent substantial evidence, including expert testimony, from which the jury could find that Plaintiff had substantially recovered from her alleged injuries and was not entitled to any damages for future pain and suffering. The trial court agreed and denied Plaintiff any additur or new trial.

TRIALS, MOTIONS AND MEDIATIONS

Voluntary dismissal with prejudice in UM case involving electronic signature challenge.

Valerie Dondero, of the Miami office, obtained a voluntary dismissal with prejudice in a UM case where the Plaintiff was challenging the validity of the UM rejection form based on the insurer's online application processes and electronic signature. The Plaintiff was the daughter of the named insured who was injured in an auto accident. The Plaintiff sued the insurer for UM coverage, alleging that her mother's electronically-signed Application for Insurance and Rejection of UM Coverage was not a valid and enforceable "written" signature, as required under the UM statute. The Plaintiff also brought a count for purported "bad faith," which Valerie was successful in having dismissed, rather than just abated, in Palm Beach County. Then, during the deposition of the named insured, Valerie was able to produce documentation of the electronic signatures, emails from the insurer to the insured confirming online signatures, passwords for online use and policy coverages purchased with an indication that UM had been rejected. After an hour conferencing with Plaintiff's counsel on the coverage issues and the applicability of the Uniform Electronic Transaction Act, Plaintiff advised he would voluntarily dismiss the UM action against the insurer, with prejudice.

Dismissal of wrongful death case based on Florida's "stand your ground law" defense.

Peter H. Murphy and **G. William "Bill" Bissett**, of the Miami office, obtained a complete dismissal of a Plaintiff's wrongful death claim. Pete and Bill moved to dismiss the case based on Florida's "stand your ground law" immunity/defense. This was a hard-fought case that had been litigated since 2011. Plaintiff's decedent was a teenager who was shot while stealing a jet ski from the home/yard of the Defendants, a prominent Plaintiff's attorney and his wife. The Defendant's wife happened upon the Plaintiffs' teenage son trespassing in the back yard, eventually yelled for her minor son to get his father's shotgun as her fear was escalating. The decedent would not respond to the wife's frantic screaming to leave the property and she noticed he was holding a black object in his hand which she thought was a gun. Unbeknownst to the wife and her son, the decedent/criminal was deaf and could not hear the warnings. The individual lifted the 500+ pound Jet Ski off of the davit on the seawall and pushed it into Biscayne Bay right next to the seawall. There was also another jet ski circling just off shore. The criminal had thrown the black object into the front compartment and continued to reach into the front compartment. When the decedent got the Jet Ski started (using the black object), he circled directly below them in an idle speed instead of speeding away. After a menacing eye contact was made, the wife/mother told her son to "shoot" and 3 seconds later the firing of the Mossberg shotgun was heard on the 911 call. By that time, the Jet Ski had rotated more, thus changing the position of the decedent's body and two pellets struck him in the head from a side/rear trajectory.

A "mini-trial" on the "stand your ground law" defense was held earlier this year. In lengthy, complex motions, and at the hearing, Pete and Bill successfully argued that Defendants' son acted reasonably under the circumstances in fear for the safety of himself and the others in his home, and had no duty to "retreat" before using deadly force to protect himself and his mother from the imminent danger they felt was posed by the thief on their property who was not responding to repeated verbal warnings to leave. Pete questioned the witnesses and presented an opening and closing argument to the judge. Bill argued most of the hearings leading up to the minitrial as well as taking a few depositions and drafting all the motions, memoranda and proposed order granting the motion to dismiss. The trial judge finally issued an 8-page order agreeing with Pete and Bill's arguments and dismissing Plaintiff's claims.

Voluntary dismissal with prejudice in UM case involving electronic signature challenge.

Deborah Bergin, of the Orlando office, and **Valerie Dondero**, of the Miami office, teamed up to obtain a voluntary dismissal with prejudice in favor of the insurer in a case where the Plaintiff was challenging the enforcement of his electronic signature on his UM Rejection form. The Plaintiff's wife alleged severe permanent injuries as a result of an auto accident and claimed her husband's electronic signature on the UM Rejection form was invalid. The named insured's deposition was suspended after several hours of questioning and the parties subsequently agreed the insurer would accept the Plaintiff's voluntary dismissal with prejudice.

Defense summary judgment in trip and fall case.

Gregory J. Prusak, of the Orlando office, prevailed in obtaining a defense summary judgment in a trip and fall case. The Plaintiff sued our client, a cable company, after falling, allegedly, as a result of a hole or tripping hazard created by an independent contractor's work for a cable installation job at the apartment complex where the Plaintiff lived. The Plaintiff was claiming severe permanent back injuries from the fall, with multiple past surgeries and alleged medical expenses of over $500,000.00. However, all work related to the cable installation was done per the contract by the independent contractor, and no work was done by our client, whose sole role was to inspect the job after it was done, and to pay the independent contractor. Because Plaintiff failed to timely sue the independent contractor, he tried to argue that our client was the employer and vicariously liable for the negligence of the independent contractor. Greg moved for summary judgment, arguing that a cable company or general contractor cannot be vicariously liable for the alleged negligence of an independent contractor or subcontractor where it has no control over the job and where the contract defines the "sub" as an independent contractor. The trial court agreed and granted the defense motion for summary judgment.

Voluntary dismissal of UM coverage case involving resident relative status.

Valerie Dondero, of the Miami office, obtained a voluntary dismissal, with prejudice, during Plaintiff's deposition. Plaintiff alleged significant personal injuries and entitlement to primary UM coverage under his parent's auto policy, claiming he was a resident of his parent's household at the time of the loss. However, when pressed by Valerie during his deposition, and when faced with inconsistencies in his testimony and documentary evidence, which contradicted his claim of residency, Plaintiff eventually announced a voluntary dismissal with prejudice in favor of the insurer rather than concluding the Plaintiff's deposition.

TRIALS, MOTIONS AND MEDIATIONS

Complete defense verdict in auto negligence case.

Stefanie Capps and **Ken Oliver**, of the Ft. Myers/Naples office, obtained a complete defense verdict in an automobile negligence case involving a rear-end collision. Although the defense admitted liability, they denied causation of Plaintiff's alleged damages. Plaintiff was claiming over $550,000.00 in past medical expenses for multiple past neck surgeries and asked the jury to award approximately $4 million in damages. Ken and Stefanie masterfully pieced together medical records to point out discrepancies that contradicted Plaintiff's claim that he had no prior back or neck pain, when, in reality, he had given at least 4 different histories to different treating providers of neck and back pain related to either at least one or more prior car accidents in the past. After a hard fought, 3-day trial, the jury returned a total defense verdict, finding no causation of Plaintiff's alleged damages. Adding to the victory, Plaintiff had rejected the defense proposal for settlement, which should entitle Defendant to attorney's fees and costs.

Defense summary judgment in UM coverage case.

Gregory J. Prusak, of the Orlando office, prevailed on a Motion for Summary Judgment involving the amount of available UM Coverage and the validity of the UM selection form. The insurer had actually tendered the UM policy limits and defended on the basis of the pre-suit settlement. Conversely, the Plaintiff was trying to argue that the selection form was invalid, that the insurer misrepresented the amount of the UM coverage limits, and that the settlement should be rescinded. More specifically, Plaintiff claimed she was entitled to $100,000.00 in UM benefits, equal to the bodily injury liability limits, not the $10,000.00 limits shown on the face of the policy and UM selection form. Greg moved for summary judgment, arguing the selection form was valid since it was signed and dated by the insured's husband, and that the lower UM limits of "10/20" were written on the form, and were likewise listed on the DEC page, which was part of the same application. Therefore, he contended the insurer was entitled to summary judgment, as the $10,000.00 UM limits had already been tendered. The trial court agreed and entered summary judgment in favor of the insurer.

Favorable settlement in UM case for nominal amount.

Valerie Dondero, of the Miami office, convinced a Plaintiff to accept a nuisance value settlement on the eve of the insurer's Motion for Summary Final Judgment. Plaintiff had alleged entitlement to stacked UM coverage by claiming her electronic signature on her signed UM Selection form was not committed by her and did not reflect her true intent. The evening before the hearing on Valerie's extensive Motion for Summary Judgment, the Plaintiff's counsel accepted a small settlement to avoid the hearing.

Favorable arbitration result in PIP case.

Ava Mahmoudi, of the Ft. Lauderdale office, obtained a favorable decision in an arbitration in a PIP case involving multiple issues, including pricing, IME cut off, and CPT coding irregularities. Obtaining a favorable decision for an insurer in such an arbitration is rare, especially in a PIP case. However, Ava went in fully prepared, presented her arguments, and prevailed in obtaining a favorable decision.

Defense summary judgment in complex products liability case.

Steve W. Cornman, of the Miami office, the week before a lengthy, complex products liability trial was scheduled to commence in U.S. District Court for the Southern District of Florida, the district judge entered a twelve page order granting the defense motion for summary judgment Steve had filed. The Plaintiff was the roofing contractor who had purchased various roofing materials from Steve's clients, including an adhesive which was alleged to have been defective and to have been the primary cause of the premature detachment of portions of the membrane of the roofing system the contractor repaired. The roofing contractor sued Steve's client seeking millions of dollars in damages for labor, materials, and other expenses allegedly incurred. The complaint included counts for breach of implied warranty of merchantability and of fitness for a particular use, as well as counts for breach of express warranty and for violation of Florida's Deceptive and Unfair Trade Practices Act.

Steve's team filed a motion for summary judgment fully utilizing the summary judgment standard applied by the federal courts, which allows (and invites) a Defendant to move for summary judgment if, after adequate time for discovery, the Defendant can affirmatively establish that the Plaintiff is without competent proof to establish the necessary elements of the causes of action alleged. In this case, Steve took the position that to establish that his clients' adhesive product was "defective" and was the cause of the Plaintiff's damages, Plaintiff must, as a matter of law, present expert testimony. Therefore, he argued the defense was entitled to summary judgment since Plaintiff was electing to pursue the case without an expert to support the claims. The district judge agreed with Steve, and therefore granted the defense summary judgment.

Plaintiff's motion to amend successfully opposed.

Valerie Dondero, of the Miami office, successfully opposed a Plaintiff's motion to amend her complaint to add a purported bad faith claim in a first-party UM case. Valerie argued entitlement to dismissal, rather than a stay, of a bad faith claim was appropriate when there had been no determination of coverage nor damages in the underlying claim. The trial court agreed, and therefore denied the Plaintiff's motion to amend to add the bad faith count.

Defense summary judgment in motorcycle accident case.

Sia Nejad, of the Ft. Lauderdale office, prevailed in obtaining a defense summary judgment in a motorcycle accident case where the Plaintiff was claiming brain injuries. The Plaintiff had lost control of his motorcycle, causing the collision. He filed suit against multiple Defendants, including our client, alleging that road construction, speed bumps, and other traffic control decisions in the vicinity had caused the accident. Sia moved for summary judgment for our client, who had done only limited work in the area. He persuaded the trial court that our client's connection to the area where the accident occurred was simply too remote and attenuated to support any potential liability. The trial court agreed and granted summary judgment in favor of our client.

TRIALS, MOTIONS AND MEDIATIONS

Dismissal of alleged §1983 case based on failure to state a claim and lack of jurisdiction.

Ariella Gutman and **G. William "Bill" Bissett**, of the Miami office, obtained a dismissal of Plaintiff's claims, brought in federal court, alleging a §1983 claim and various other counts against our client, a nationally recognized law firm. The Plaintiff's claims arose from alleged injuries and various constitutional violations he claimed he suffered when he was escorted away from the law firm's lobby by building security. Ariella and Bill's motion to dismiss argued that Plaintiff's allegations were insufficient to invoke the court's jurisdiction. They further argued that, even taken as true, all of the allegations in Plaintiff's complaint failed to adequately allege that the Defendant, our client, had deprived the Plaintiff of any constitutionally protected right "under color of state law." The district judge agreed and ordered dismissal, finding that cooperating with and assisting police does not convert a private citizen or law firm, such as our client, into a "state actor," as required for a §1983 claim. Without a basis for federal subject matter jurisdiction, Plaintiff was left with only diversity jurisdiction, which he similarly failed to properly allege. Having no independent federal jurisdiction, the court was prevented from exercising supplemental jurisdiction on the remaining common law negligence cause of action. Although the dismissal of Plaintiff's complaint was without prejudice, the case cannot be re-filled in federal court. Further, since Plaintiff failed to timely re-file the case in state court, his claims will likely be barred if he later tries to refile.

Dismissal with prejudice of medical malpractice case.

Joshua E. Polsky, of the Ft. Lauderdale office, prevailed in dismissing a medical malpractice case. Josh moved to dismiss based on the statute of limitations and on Plaintiff's failure to properly comply with all pre-suit requirements. The trial court agreed the claim was barred, and granted dismissal with prejudice.

Dismissal of negligent training and supervision claims in trucking liability case.

Valerie Dondero, of the Miami office, obtained a dismissal with prejudice in favor of an interstate trucking company on claims of negligent training and supervision of its driver. Valerie argued the Clooney doctrine and its progeny, which allows a Court to dismiss multiple theories of liability against a trucking company where the additional claims do not result in additional liability against the company. Here, the Company had agreed the driver was within the course and scope of his employment at the time of the accident and the Company, therefore, was vicariously liable for the driver's actions. The court determined that the additional theories of negligent hiring and supervision would not result in additional liability against the Company, and therefore, dismissed those claims with prejudice.

Order of incorporation secured for agricultural and wildlife expo.

Betty Marion, of the Ocala office, was recently successful in securing an Order of Incorporation under F.S. Ch. 616, Public Fairs and Expositions, for the Florida Agricultural and Wildlife Expo, Inc., after a contentious one and a half hour public hearing. The Expo, showcasing Florida's agricultural and wildlife interests and diversity, will be November 5-8, 2015. For more information, please contact Betty Marion at bdm@kubickidraper.com.

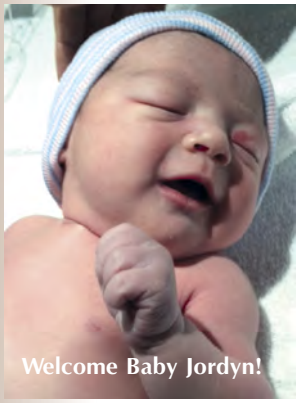
Defense summary judgment based on Slavin doctrine.

Michael Carney, of the Ft. Lauderdale office, prevailed in obtaining a defense summary judgment in a negligence case arising from a motorcycle accident in which the Plaintiff allegedly suffered brain injuries, as a result of which he was claiming millions of dollars in damages. Mike moved for summary judgment, relying on the Slavin doctrine, whereby a contractor ordinarily cannot be held liable for injuries to third parties that occur due to an alleged patent defect after the work has been completed by the contractor and accepted by the property owner. The key to prevailing on summary judgment was distinguishing our client from the rest of the Defendants. In arguing the motion, Mike creatively illustrated his point that our client was different, and, therefore, not liable, by using an analogy from Sesame Street, specifically, the part where the program shows four pictures and children are asked to pick the one that does not belong. Mike argued that, likewise, in this case, one Defendant did not belong, and that was our client. After a deriding comment in response from opposing counsel, the judge interjected that he appreciated the analogy and found it helpful and persuasive. The court then granted a defense summary judgment in favor of our client. This just goes to show that the lessons we learned from Sesame Street are still applicable in every area of our lives, including our work, and sometimes the best strategy to handle the most complicated facts and law in a dispositive motion is to keep it short and simple.

Dismissal of lien impairment case.

Valerie Dondero, of the Miami office, and **Kendra Therrell**, of the Ft. Myers/Naples office, were once again victorious in convincing the trial court to dismiss a pending lien impairment action brought by Lee Memorial against their client insurance carriers. Valerie passionately argued the Constitutional issues, while Kendra approached it from a probate angle as the hospital had already filed a claim against the Estate of the deceased claimant. After a lengthy hearing, the trial court dismissed all claims against all carriers on the basis of one case Kendra cited for her position that the liens were extinguished by the filing of the claim in the probate action.

NEWS & ANNOUNCEMENTS


Welcome Baby Jordyn!

Congratulations to **Joshua E. Polsky** of our Ft. Lauderdale office, and his wife, Jackie, on the birth of their baby girl, Jordyn Olivia Polsky.

Caryn Bellus, of the Miami office, has been appointed to serve on the Appellate Court Rules Committee of The Florida Bar.

Betsy E. Gallagher, Jayme Idle, and **Laurie Adams** have been recognized by Florida Trend Magazine as "Florida Legal Elite". **Betsy** was included in Florida Trend's Hall of Fame for the third consecutive year, and **Jayme** was selected by his peers as an "Up and Comer" for 2015.

Laurie Adams, of the West Palm Beach office, and **Harold Saul** and **Betsy Gallagher** of the Tampa office have been recognized as "Top AV-Rated Lawyers" – Martindale Hubbell's highest legal ability and ethical standards rating.

Melonie Bueno, of the West Palm Beach office, has joined the National Association of Professional Women. NAPW highlights the country's most accomplished professional women in more than 200 industries and professions.

N A P W National Association of Professional Women
THE POWER TO BE YOU

Kubicki Draper is pleased to announce **Michelle Krone, Yvette Pace, Francesca Ippolito-Craven** and **Jarred Dichek** have joined the prestigious Claims and Litigation Management Alliance. The CLM is a nonpartisan alliance comprised of thousands of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Through education and collaboration, the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Select attorneys and law firms are extended membership by invitation only, based on nominations from CLM Fellows. For more information about the CLM, please contact: Susan Wisbey-Smith, susan.wisbey-smith@theclm.org.

Kendra B. Therrell, of the Ft. Myers/Naples office, and **Michael J. Carney**, of the Ft. Lauderdale office, have been selected to join the American Board of Trial Advocates (ABOTA). ABOTA 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.

Christopher Utrera, of the Miami office, recently co-founded The Columbus Builders' Association. The organization supports Christopher Columbus High School in Miami, Florida by serving as a forum for its alumni with professional interests in the construction and real estate industries, while promoting awareness and interest of these industries to future alumni. Its members aim to provide professional mentoring, community service and networking opportunities to the Columbus community. The Association welcomes all alumni directly or indirectly associated with the construction, development and real estate industries. For more information, contact Chris at cmu@kubickidraper.com, (305) 982-6657.

Kubicki Draper's Ocala office has moved to a new location:

New Address:
101 SW 3rd Street
Ocala, FL 34471

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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 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.