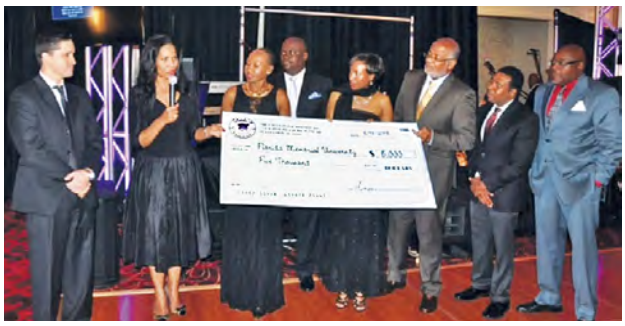
KUBICKI DRAPER

# THE KD QUARTERLY

WINTER 2016


# KD *in the Community*

**Charles H. Watkins**, of the Miami office, attended the Galleon Foundation Charity Gala and Awards Dinner. The Galleon Foundation's mission is to provide assistance to financially disadvantaged children at schools in the Caribbean and USA through scholarship and mentorship programs. Charles awarded a scholarship to the Florida Memorial University from his mother's endowed Scholarship Fund -- Kathleen B. Watkins Scholarship Fund.



**Peter S. Baumberger**, of the Miami office, for the fourth consecutive year, participated in the annual "Teachers Law School" at Miami Dade College. The American Board of Trial Advocates (ABOTA) sponsors these events across the country to advance civics education. This year, Judge Scola, Judge Cueto, and Judge Sayfie of the Southern District, presented to Miami Dade County public school teachers about civics and law. The event was a great success.

**Charles H. Watkins, Valerie A. Dondero, Michael F. Suarez, Nicole M. Ellis**, and **Brad J. McCormick**, of the Miami office, attended the Spain-US Chamber of Commerce 2015 Annual Gala Dinner. The firm is proud to support diversity among business owners in the community, locally and internationally.

**Jason S. Stewart**, of the Ft. Lauderdale office, recently participated in the Florida Bar's "Practicing with Professionalism" Seminar. Jason was on the young lawyers' panel lending his words of wisdom, advice and real-life situations of ethical issues.

Kubicki Draper, along with **Michael J. Carney**, of the Ft. Lauderdale office, are proud sponsors of the Carol City Chiefs Law Magnet Program at Miami Carol City Senior High.



**Brad J. McCormick**, of the Miami office, along with his son Brad Jr., participated in the National Parkinson Foundation's Moving Day – Miami Kickoff Event. The event raises funds to support NPF's mission to make life better for people with Parkinson's through expert care and research.

EDITOR
*Jill L. Aberbach*

## IN THIS ISSUE



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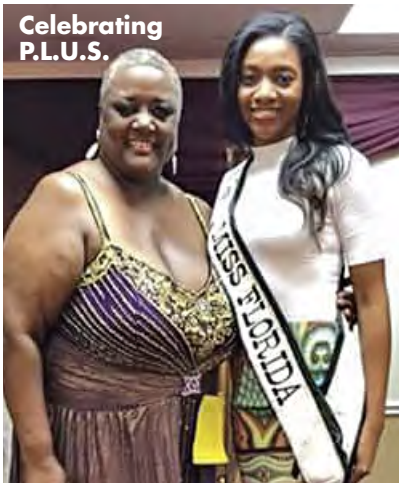
# more KD in the Community

For the eighth consecutive year, several team members participated in the Walk for PKD. **Harold A. Saul**, of the Tampa office, once again captained "Ivan's Investors for a PKD Cure." The team, named in honor and memory of Harold's father, helped raise money to support the Polycystic Kidney Disease Foundation's search for a cure for this disease.

Walk for PKD

**Radia Turay**, of the Miami office, attended the Gwen S. Cherry Black Women Lawyer Association's Annual Gala, to help raise funds for the organization's fellowship at Legal Services of Greater Miami, Inc. The firm is proud to support and participate in the GSCBWLA's great work in our community.



Celebrating P.L.U.S.

**Claudette S. Armbrister,** the Miami office receptionist, frequently participates in plus size pageants, and she is presently Ms. Miami Plus America 2016. Claudette founded P.L.U.S. US, Inc. (Positive, Liberated, United, Sisters), a social organization supporting professional full figured women. The goal of the organization is to promote sisterhood through the mentorship of plus size teens and to be a thriving force in the lives of teens who don't believe they belong because of their size. In addition to P.L.U.S., Claudette serves our community in many other ways throughout the year, and we are proud to have her as part of our team.

Kubicki Draper's employees gathered to celebrate Thanksgiving by participating in 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 an opportunity to get together, enjoy delicious food, and give thanks.



Thanksgiving Feast

## NEW ADDITIONS

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

**Samantha M. Ketant** and **Pedro A. Lopez**, Associate Attorney – Miami

**Leilani Sorogon** and **Lucas G. Parsons**, Associate Attorneys – Ft. Lauderdale

**Sebastian C. Mejia**, Associate Attorney – Orlando

**Eric A. Fluharty**, Associate Attorney – Ft. Myers

# How The Florida Supreme Court May Have Increased Exposure in Medicare Beneficiary Cases

*By Karina I. Perez and Scott B.Tankel*

A recent decision from the Florida Supreme Court may increase exposure evaluations in claims involving future damages and Medicare beneficiaries. In ***Joerg v. State Farm Mutual Automobile Insurance Co.***, the Court held that defendants may not present evidence of a claimant's entitlement to future free or low cost benefits including Medicare, Medicaid, and other social legislation in an effort to reduce future medical damages. 176 So. 3d 1247, 1257 (Fla. 2015). The lengthy opinion clarifies prior case law on collateral sources and reminds practitioners of the many pitfalls in handling cases involving Medicare beneficiaries.

## Medicare is Not Free, to Anyone

Typically, Florida's collateral source rule prevents juries from hearing evidence of a claimant's receipt of payments from third-party payers, such as health and disability insurance. However, a narrow exception created in a 1984 Florida Supreme Court decision, created confusion among courts regarding the presentation of future benefits such as Medicare and Medicaid. In ***Florida Physician's Insurance Reciprocal v. Stanley***, the Florida Supreme Court held that "free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible." 452 So. 2d 514, 515 (Fla. 1984).

## *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514, 515 (Fla. 1984)

In ***Joerg***, the uninsured motorist carrier, State Farm, seized upon the exception announced in ***Stanley***, to argue that because Mr. Joerg was developmentally disabled and had never worked, his future Medicare benefits were "free" to him and thus, should not be excluded from evidence by the collateral source rule. 176 So. 3d at 1252-53. State Farm appealed after the trial court did not permit the jury to hear evidence regarding Mr. Joerg's future entitlement to Medicare benefits relative to his claim for future damages. *Id.*

The Florida Supreme Court stated that the introduction of future Medicare benefits was improper because they were not truly "free" to Mr. Joerg. *Id.* at 1253. Specifically, Justice Lewis explained the Medicare Secondary Payer Act allows the Centers for Medicare and Medicaid Services (CMS) to seek reimbursement from any primary payers and any beneficiaries who may have received payments from a primary payer. *Id.* In that sense, Justice Lewis reasoned where Medicare benefits subjects beneficiaries to CMS' enforcement tools, including demands for reimbursement, receiving Medicare constitutes a "serious liability." *Id.* at 1254. Even for someone who has never paid into the Medicare system, like Mr. Joerg, Medicare is not truly "free." *Id.*

## The Future of Medicare is Not Guaranteed

The Florida Supreme Court also found future Medicare benefits to be too speculative to serve as a basis to reduce a plaintiff's future medical damages. *Id.* at 1251. The Court echoed the reasoning of Justice Shaw in a prior opinion where he stated "'[t]here is simply no assurance that public assistance will continue, that the injured victim will continue to be eligible for such assistance if it continues, or that the assistance, if it continues, will continue at the same level.'" *Id.* at 1251 (quoting ***Stanley***, 452 So. 2d at 517). Future Medicare benefits become even more speculative when a primary payer is involved – such as a tortfeasor's insurance carrier. *Id.* at 1256.

## Public Policy

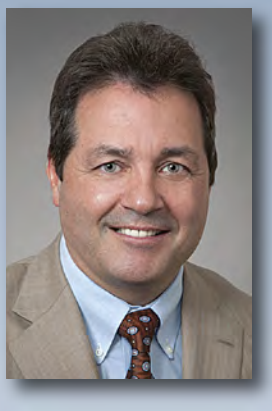
Finally, the opinion also finds support in the resurging public policy against allowing tortfeasors to benefit from the plaintiff's collateral sources. *Id.* at 1251. "'I cannot agree that an injured victim should be required to seek charity or public aid, or that the compassion of charitable contributors and taxpayers should become a device for reducing the legal liability of a tortfeasor.'" *Id.* (quoting Stanley, 452 So. 2d at 517). Moreover, the Court noted there was an inherent prejudicial effect to informing a jury the plaintiff is a beneficiary of government assistance. *Id.*

## Past Medical Damages

While the ***Joerg*** case does not pertain to past medical damages, the opinion reminds us of the importance of pretrial motions to limit the presentation of past medical damages to the amount Medicare has reimbursed. Specifically, ***Joerg*** re-affirms that Medicare is excluded from Florida's collateral source statute, § 768.76, and because the collateral source statute does not apply to Medicare benefits, there is no basis for a post verdict setoff for amounts adjusted by medical providers upon acceptance of Medicare benefits. *See* ***Thyssenkrupp Elevator Corp. v. Lasky***, 868 So. 2d 547, 548-49 (Fla. 4th DCA 2004). Instead, plaintiffs must be prevented from presenting evidence of the gross, past medical damages beyond the Medicare reimbursement amount accepted by the provider or else the defendant may be responsible for the windfall without any post verdict remedies.

## Conclusion

The importance of ***Joerg***, is that it impacts the ability to curtail a claimant's future damages and thus, should be taken into account during initial case evaluation. However, reducing a plaintiff's presentation of past medical damages to the Medicare reimbursement amount may facilitate an argument for reduced future medical damages proportionately.



## SPOTLIGHT ON: Gregory J. Prusak

**Gregory J. Prusak**, a shareholder in the Orlando office, was born and raised in Western New York and is one of five children. He attended college at State University of New York, Buffalo, with an interest in the arts. However, this all changed when he was elected to the SUCB College Government as a Senator and was given the opportunity to become part of the Legal Committee which engaged in legal matters that directly affected the College and its students. Greg was also recognized in the "Who's Who in American Universities and Colleges," twice while at Buffalo State College! After graduating from college with a degree in marketing, Greg attended law school in Miami, Florida and was the first person in his family to obtain a professional degree. Soon, Greg realized he preferred sand to snow and began his legal career in South Florida.

After law school, Greg was hired by a local Coral Gables defense firm where he focused his legal efforts on premises liability cases, and he began to develop his trial skills. Eleven years into his practice, Greg received a phone call from Gene Kubicki, who offered him a position in the Miami office. Greg worked in Miami for six years before moving to help develop the firm's Orlando office where he has practiced for nine years. During this time, he continued to fine tune his litigation and trial skills, and after only four years in Orlando, was sponsored by a fellow attorney to become a member of the exclusive, invitation only, American Board of Trial Advocates (ABOTA). Greg is particularly honored to be a part of the ABOTA organization as the group consists of highly accomplished trial attorneys serving their communities.

Greg is able to handle a high volume of cases and effectively develop winning defense strategies through case law and evidentiary support. Therefore, it comes as no surprise that he has brought over 75 cases to a jury verdict.

Greg views each case as a chess match and has the ability to gain the upper hand on his opponents through his defense strategies, aggressive approach as a litigator, and passion for the law.

These are some of the many reasons why clients trust and continue to send Greg their complex litigation cases. Greg also uses his extensive knowledge and trial background to present seminars which include topics related to premises liability, products liability, and general negligence.

Greg is married to Therese and has two children, Ryan and Kayla. Greg is an active coach and supporter of his son's football, basketball, and soccer teams. He also supports his daughter by attending her gymnastics and ballet practices and competitions. Greg is actively involved as a youth coach with the YMCA and the Boy Scouts of America, wherein Greg's son, Ryan, is on the path to soon becoming an Eagle Scout. Importantly, Greg believes his greatest personal achievement is being able to balance his legal career and his family. As a former rugby player, it is no surprise Greg firmly believes that to succeed in the legal profession, you have to fight hard and be fair.

## Presentations and 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 submitted for approval of continuing education credits.

*For more information, please contact Aileen Diaz at*

305.982.6621 / ad@kubickidraper.com.

**Stephen M. Cozart**, of the Pensacola office, recently presented a seminar on adjusting claims resulting from a balcony collapse at the Property & Liability Resource Bureau (PLRB) Large Loss Conference in Washington, DC. This conference was attended by almost 1,000 insurance industry professionals from across the country.

*Other topics presented in the last few months by team members include:*

- Understanding the Civil Litigation Process: What Every Loss Prevention Officer Should Know From Pre- Suit Investigation to Litigation
- Bad Faith: Top Ten Pitfalls
- Corporate Representative Depositions
- Premises Liability
- Early Case Resolution Strategies
- Staged Accidents
- Bad Faith Hot Topics
- Negotiating Small Limits
- Indemnity Clauses
- Coverage and Additional Insureds
- Restaurant and Fast Food Requirements

# The Joint Defense Agreement

*By Michelle M. Krone*
on Behalf of KD's Construction Practice Group,
with special thanks to Co-Authors and Friends,
Wendy Wilcox of Skane Wilcox and Lisa Unger of Markel

Defense parties have worked with joint defense agreements (JDAs) for years on a variety of cases ranging from product liability cases, to toxic tort cases, to construction defect cases. However, have JDAs worked for them? Comprehensive JDAs can work well for everyone involved with the right timing, the right case and the right counsel. When parties cooperate and work together, everyone can ultimately benefit from the parties' collaboration.

The concept behind the JDA, confidentiality of communications between co-parties, was first recognized in 1871 in the context of communications between criminal co-defendants and their respective counsel, which were found to fall under the attorney-client privilege. The joint defense privilege entered civil practice in 1942 and was recognized by federal courts in 1967 as the "Joint Defense Doctrine" or the "Common Interest Doctrine."

## Common Interests

A JDA is created by co-parties with common interests to coordinate strategies, pool resources, exchange information, reduce costs and maintain a unified front while preserving the attorney-client and work product privileges. It is a written agreement, although in some states it does not appear to be an absolute requirement for enforcing a JDA. Many states recognize the important public policy benefits of extending the privilege among a group by allowing clients to communicate freely and in confidence when seeking legal advice. It can be the best protection against the undesirable risks such as the waiver of privileged information, finger-pointing, exorbitant costs, and excessive time.

A JDA can be narrow and among a couple of defendants or broad and among all defendants. It does not need to include all defendants to benefit everyone. For example, in a construction defect case, the parties can execute a JDA among just the subcontractors or a subset of subcontractors. Or in a construction site accident case, the JDA can be executed among all defendants other than the property owner. It depends on the issues in the case and the strategies of the defendants, their counsel and the insurer. But either way — narrow or broad — the JDA can work to facilitate discovery, present consistent defenses, and considerably cut the cost of litigation while not helping the plaintiff establish their case.

## JDA Requirements

Depending on the state, there are some requirements that should be satisfied before entering into a JDA. For instance, in Florida, the parties must be "potential or actual parties" in "ongoing or contemplated" litigation, share a common defense interest and a meeting of the minds as with the formation of any contract on maintaining confidentiality and the scope of the information being protected. One real danger of entering a JDA is the risk of a conflict of interest arising after privileged information is shared and one or more of the members of the JDA has been disqualified. Counsel must remember that because the JDA gives rise to an implied attorney-client relationship with all members of the JDA, former and future representation could be affected. Therefore, it is important that a conflict check is conducted among all counsel before the JDA is executed.

It is helpful to keep several issues in mind while navigating through the case with a JDA. Timing is always an issue regarding when to execute the JDA. The JDA should be executed early on so there is enough time to coordinate efforts, divide the labor and start sharing costs. Also, the sooner the JDA is executed, the sooner JDA members can take advantage of sharing privileged information.

## Drafting a JDA

The basic JDA should include at least the following six general terms:

- Identification of the JDA members — parties, counsel, litigation staff, experts, consultants, insurers (and anyone working on the defense side);
- Any privilege as to any communication among the JDA members or work product of defense counsel cannot be waived;
- JDA members cannot share information with anyone outside the members of the JDA
- Any claims by and among JDA members relating to the case are specifically reserved as necessary (until after the case is over);
- JDA members will not offer any opinions, conclusion, and/or testimony adverse or otherwise critical of any other member and agree to refrain from asking any questions or soliciting any opinions, conclusions or testimony adverse or critical of any other member;
- Any withdrawal of a JDA member must be made in writing to all members

With respect to the provision regarding holding back on claims by and among JDA members until after the case is over, if there are cross-claims among the defendants, the defense parties can save time and money by either bifurcating or dismissing these claims (with reservations to litigate or simply mediate these claims if necessary after the case is settled with the plaintiff or tried).

If the JDA includes the provision where JDA members are prohibited from offering opinions, conclusions, etc., everyone saves time because the experts and witnesses are refrained from finger-pointing, which only leads to arguments, meet and confer discussions, motions, further depositions, etc. This is a very effective tool for depositions and trial. It also makes it easier for defense witnesses because they only have to be prepared to answer questions from the plaintiff's lawyer. With fewer lawyers questioning witnesses, the trial tends to be shorter, which is appreciated by everyone, particularly judges and juries. This strategy at trial must be thoroughly discussed prior to trial and works in cases where the plaintiff has galvanized the defendants and this galvanization is part of the plaintiff's theme or theory of the case. It does not necessarily work in every case.

*continued on page 6*

## Joint Defense Agreement *ct'd from page 5*

### Money-Saver

Defense counsel should ensure they have authority from the insurers that retained them to represent the defendant-insureds before they execute a JDA. Many claims professionals want to review the JDA and strategize with counsel regarding the pros and cons. The JDA can cut down litigation fees and costs for insurers in least three ways:

- Defense counsel can divide up the tasks required to defend the defendant-insured (rather than perform all tasks);
- Insurers typically have more settlement options (they can contribute together with all defendants or a subset of defendants to make an offer to the plaintiff);
- Expenses for experts can be shared among insurers for jointly retained experts. In addition, since the defense parties are sharing information, they save on the time and expense they would otherwise have to spend to obtain this information from other defense parties, which can also further save costs for insurers.

### A Successful JDA

To help ensure the JDA benefits everyone, defense counsel should check their egos at the proverbial door. They should also take advantage of each member's skillset and take leadership in dividing up the labor. For example, in a construction defect case, counsel who is representing the framer should take lead in deposing and examining those witnesses at trial who testify regarding the framing (rather than have all counsel prepare for these witnesses). Coordinating efforts in this way also helps to prevent the "jack of all trades, master of none" approach too often seen by counsel who do not take advantage of the skillset of their esteemed and aligned colleagues.

Defense counsel can also divide up the labor by designating certain counsel to file particular discovery or pretrial motions (and all other parties join the motions rather than write their own). Further, experienced trial counsel should take lead to assist other counsel in preparing for trial and at trial. A JDA does not work well when counsel is inexperienced, lacks leadership, or when the defense cannot coordinate efforts to effectively divide the labor. Therefore, counsel should discuss their experience and skillsets soon after the JDA is executed and before the discovery phase begins.

### Coordinated Effort

A coordinated effort by the defense from the outset of the case, through discovery, pre-trial motions, and trial, benefits everyone because the more parties involved in the JDA, the less time it takes for the defense to put on its case. Counsel can and should aggressively defend the client at the micro level while simultaneously working with the JDA members at the macro level to coordinate efforts and share costs. It defeats the purpose of the JDA for defense counsel to focus solely on their client's individual position in the case rather than working together as a team to achieve a common goal — a defense verdict. As such, the alignment of the parties can be very effective in preventing the plaintiff from proving liability or establishing damages.

The JDA can also help the defense parties with respect to mediation for at least two reasons. One, the mediator has built-in groups aligned to provide joint offers to the plaintiff and two, the more the defense is aligned, the less in-fighting among the defense. This helps the insurers for at least three reasons. First, if a subset of defendants can make joint offers together or all defendants can make a joint offer together to the plaintiff, each party's contribution toward the offer is less than if each defendant was pitted against one another making individual offers to the plaintiff. Second, if the defense parties are working to make a joint offer together, this saves the insurer fees and costs expended for their retained counsel because counsel is not focused on strategizing their own client's individual position at mediation (which can lead to the in-fighting). Third, this coordinated effort typically leads to fewer mediations because the defense is a unified group offering an amount to the plaintiff.

A JDA is not necessarily the right tool for every case, but it can be a very effective tool for any case where there are multiple defendants, an alignment of the defense on at least one issue, and involves counsel who are willing to take lead and share their experience, skillsets, and the tasks at hand to work towards the ultimate goals in the case — saving time and expenses and defeating the plaintiff's case.

Martindale-Hubbell® was asked to research their comprehensive database of over 1.2 million lawyers and firms in over 160 countries and identify U.S. law firms of 10 or more attorneys, where at least one out of three of their lawyers achieved the AV Preeminent® Peer Review Rating. This rating indicates the rated lawyer has been deemed by his or her peers to have demonstrated the highest level of ethical standards and legal ability.

**Kubicki Draper is honored to be included on the 2015 list of Top Ranked Law Firms in the Southeast.**

## South Florida Legal Guide Names KD a Top Law Firm and Several Attorneys Recognized.

The Top Law Firms and Top Lawyers listings are published annually and are based on peer nominations. Nominees then are evaluated on accomplishments and individual credentials prior to being named to the list.

***The following KD attorneys were included in the 2015 edition of South Florida Legal Guide's Top Lawyers:***

**Laurie J. Adams** - Civil Litigation
**Peter S. Baumberger** - Professional Liability - Defense, Corporate and Business Litigation
**Caryn L. Bellus** - Appellate, Insurance
**Michael J. Carney** - Civil Litigation
**Brad J. McCormick** - Insurance Litigation - Defense
**Daniel A. Miller** - Bankruptcy, Corporate and Business Litigation
**Scott M. Rosso** - Corporate and Business Litigation, Insurance Litigation - Defense
**Jeremy E. Slusher** - Corporate and Business Litigation, Construction Litigation

***Also, congratulations to our 2015 Top Rated Lawyers:***

**Harold A. Saul** and **Betsy E. Gallagher** were recognized in the Tampa Tribune.
**Melonie Bueno, Daniel Draper, Jr.**, and **Michael S. Walsh** were recognized in The Daily Business Review.

# APPELLATE

### *Reversal and Remand in Auto Negligence Case.*

**Caryn L. Bellus** and **Bretton C. Albrecht**, of the Miami office, recently obtained a reversal and remand for a new trial in an auto negligence case on grounds that the trial court erred in excluding evidence of a subsequent drunken golf cart accident in which the Plaintiff was involved (which resulted in his arrest) a month after the auto accident. The Third District Court of Appeals found that such evidence was significantly probative, was not unfairly prejudicial, and went to the plaintiff's credibility and the issue of causation. The court concluded that under the new test announced by the Florida Supreme Court in ***Special v. W. Boca Med. Ctr.***, 160 So. 3d 1251 (Fla. 2014), the error was not harmless.

### *Overturned Plaintiff's Motion for Summary Judgment.*

**Sharon C. Degnan**, of the Ft. Lauderdale office, successfully struck a co-defendant UM carrier's motion for summary judgment in a priority of coverage declaratory judgment action against her PIP carrier client. As a result, the trial court entered judgment in favor of Sharon's client. The co-defendant claimed the PIP carrier's coverage claim first, but there was a gap in the underlying coverage which made the tortfeasor insured, underinsured. Therefore, the UM coverage dropped down and covered the gap, making their coverage first.

### *Reversal and New Trial in Personal Injury Case.*

**Angela C. Flowers**, of the Ocala office, obtained a reversal and new trial in a personal injury case in the First District Court of Appeals. On appeal, it was determined the trial court had abused its discretion in excluding a defense expert in biomedical engineering, whose testimony was relevant to the issue of causation. In the opinion, the appellate court was critical of the trial court for inexplicably ignoring binding precedent finding such testimony to be relevant and reversed the trial courts ruling.

### *Affirmance of Summary Judgment.*

**Eric Tourian** and **Michael C. Clarke**, of the Tampa office, obtained an affirmance of a defense summary judgment in our client's favor. Eric handled the summary judgment motion at the trial level which was granted, and Michael handled the appeal.

The carrier denied the Plaintiff's claim because the Plaintiff was a passenger in a vehicle he did not own and was insured and registered in Georgia. Therefore, the insured did not have PIP or MedPay coverage. After the Plaintiff filed a declaratory judgment action, Eric argued that the Plaintiff was not covered under the carrier's policy and the policy was unambiguous. Eric pointed out that while the Plaintiff was a "listed driver" on his grandparents' policy (that provided PIP/Med Pay), he did not live with his grandparents at the time of the accident, was not occupying any vehicles covered under his grandparents' policy, did not own a car, and he was not listed on any other policy of insurance. The Plaintiff argued that the policy was ambiguous and that the Plaintiff must be provided all coverage, including PIP/Med Pay) as a named insured.

The summary judgment hearing took place in August 2014, and the Judge ruled that the policy was unambiguous and that the policy did not provide coverage for the Plaintiff. On appeal, after extensive briefing, the three judge panel in the Ninth Circuit, affirmed the trial court's ruling.

### *Reversal of Summary Judgment in Declaratory Judgment Claim.*

**Sharon C. Degnan**, of the Ft. Lauderdale office, **Laurie J. Adams** and **Christin Marie Russell**, of the West Palm Beach office, previously prevailed against this same co-defendant on a statute of limitations argument, when the co-defendant UM carrier attempted to sue their excess carrier client for coverage, claiming that the excess carrier owed indemnity to the tortfeasor/insured against whom the statute of limitations had passed. The co-defendant UM carrier then wrongfully claimed to be the prevailing party in a priority of coverage dispute after losing a Fourth District Court of Appeal coverage battle. Sharon Degnan handled another appeal to the Fourth District Court of Appeal regarding these issues and prevailed with a finding that a party cannot be the prevailing party when the relief granted by the court is different from the relief sought by a party in its pleadings and motion for summary judgment.

# TRIALS, MOTIONS, MEDIATIONS

### *Proposal for Settlement.*

**Laurie J. Adams** and **Melonie Bueno**, of the West Palm Beach office, successfully struck Plaintiff's proposal for settlement which saved their client from over 100K in attorney fees. After the UM case had been tried by other counsel, Laurie and Melonie were retained to respond to Plaintiff's attempts to avoid collateral source set offs, to which the client was due.

While reviewing the post trial materials, it became clear that not only was the client entitled to the set offs, but the Plaintiff's multiple proposals for settlement were also void because of ambiguity. The court granted Laurie and Melonie's motion for collateral source set offs for write downs and PIP. The court also granted Laurie and Melonie's motion and struck plaintiff's first proposal for settlement because it was an undifferentiated offer to two defendants, and it did not meet the requirements of ***Saenz v. Campos***, 967 So. 2d 1114 (Fla. 4th DCA 2007). This was due to the fact that it did not clarify whether it settled only the claims in the UM case, or whether it also settled the bad faith claims enumerated in the previously filed civil remedy notice. Plaintiff then settled the case well within the policy limits.

### *Summary Judgment in Personal Injury Protection Case.*

**Michael S. Walsh** and **Rebecca C. Kay**, of the Ft. Lauderdale office, recently argued a motion for summary judgment that had only been argued four other times in the entire State of Florida, and one time at the Central Courthouse in Broward County. This was an extremely important motion for the client as they presently have approximately 55,000 claims in litigation, and the policy that was being challenged is the main target of all PIP plaintiff attorneys throughout the state.

The main issue was whether the policy clearly and unambiguously elected to utilize the schedule of maximum charges contained in Florida Statutes § 627.736 (5)(a)1. The Judge agreed with Michael and Rebecca's position after a lengthy oral argument and granted summary judgment.

# TRIALS, MOTIONS, MEDIATIONS

## *Dismissal with Prejudice.*

**G. William Bissett** and **Ariella Joselyn Gutman**, of the Miami office, combined to secure an order from the U.S. District Court which dismissed with prejudice Plaintiff's pending amended complaint and denied Plaintiff's pending motion for leave to file a second amended complaint. The Plaintiff alleged in her complaints that an individual she thought was employed by our client, but who was actually employed by an independent contractor, came into her house and after being shown to her bedroom to examine her cable box exposed himself.

After the initial complaint was dismissed, Plaintiff filed an amended complaint and Bill and Ariella filed motions to dismiss which were followed by Plaintiff counsel's opposing memorandum. Before filing our final reply memoranda supporting the motion to dismiss, Bill sent a carefully and strategically worded letter to opposing counsel which included language praising the Judge and his correct legal analysis in dismissing the initial complaint.

Bill proceeded to file the Reply Memorandum on behalf of the client which Ariella, as part of the strategy, then adopted on behalf of the independent contractor who employed the technician. Shortly after Bill filed the Reply Memorandum, Plaintiff's counsel filed a Motion for Leave to Amend the Complaint. Plaintiff's attorneys filed Bill's letter, asserting they had complied with Bill's challenges to their complaint. Bill and Ariella then prepared a memorandum opposing the motion for leave to amend. The Judge issued his order agreeing with Bill and Ariella's position and dismissed the lawsuit with prejudice.

## *Favorable Verdict in Motor Vehicle Accident.*

**Brian E. Chojnowski**, of the Tallahassee, and **Angela C. Flowers**, of the Ocala office, received a favorable verdict after a three day trial. Our client was involved in a motor vehicle accident after rear ending another vehicle with a blood alcohol content level above the legal limit. The client and the insurer agreed to admit liability for the accident, the DUI, and entitlement to punitive damages in order to keep the DUI out of the compensatory phase. The Judge, likely committing reversible error, allowed the evidence to come into the compensatory phase and Plaintiffs' counsel made it the focus of his case. The Plaintiffs suffered non-surgical soft tissue injuries, but demanded the full policy limits. At trial, Plaintiffs asked for $228,000 and $226,500 for each of them. However, the jury returned a verdict of $18,806.22 and $19,665.84 and awarded only $10,000.00 in punitive damages. Is it important to note that each Plaintiff had filed a Proposal for Settlement.

## *Summary Judgment in Products Liability Case.*

**Stephen M. Cozart** and **Hannah E. McCullin**, of the Pensacola office, received a final summary judgment on a products liability case. The Plaintiff claimed the client's anti-corrosion product had caused an explosion on board the Plaintiff's boat and caused significant damage. In the summary judgment motion, Steve and Hannah were able to show the Plaintiff's theory did not meet the ***Daubert*** expert witness threshold to be considered admissible evidence. Thus, the Plaintiff failed to produce evidence to overcome the arguments made in the motion and the court granted the defense motion for summary judgment.

## *Subpoena Challenge.*

**Laurie J. Adams, David M. Drahos**, and **Alexandra V. Paez**, of the West Palm Beach office, successfully challenged a surgery center's objections to their lengthy subpoena. They received extraordinary relief from the court including other patients' billing records (with confidential information redacted), all fee schedules of surgeries for litigation patients, non-litigation patients, insurance patients, non-insurance patients, and Medicare and Medicaid patients, as well as all documents regarding materials at the surgery center's cost. After a well written response by Alexandra, and critical deposition testimony and background investigation of the surgery center secured by David, Laurie successfully argued that the material was not only necessary to challenge the reasonableness of the surgery bill, for a two hour surgery (for which the center along charged 140K), but the records were necessary to strike the entire surgery center bill for failure to adhere to the Patient Self Referral Act which requires strict notification to patients when their surgeon is an owner of the surgery center where the surgery is performed.

## *Voluntary Dismissal in Personal Injury Protection Case.*

**Anthony G. Atala**, of the Miami office, received a Voluntary Dismissal with Prejudice in a Personal Injury Protection suit where the mobile x-rays rendered by a diagnostic facility were performed by a Basic Machine Operator. The Plaintiff dismissed the suit when it was proven the Basic Machine Operator was not licensed to perform the services without a supervising practitioner when the services were rendered, and discovered the facility had obtained its state license with a misleading application.

## *Reemployment Assistance Appeal Commission.*

**Christin Marie Russell**, of the West Palm Beach office, successfully argued a case in front of the Reemployment Assistance Appeal Commission (formerly "unemployment compensation"). The hearing involved a former employee who claimed entitlement to benefits after he left his employment following a medical leave of absence and the former employee refused an offer of reemployment. Christin prevailed on this difficult issue which involved tough facts, a prevaricating employee, and opposing counsel who continuously lead her witness.

## *Favorable Verdict in Motor Vehicle Accident Case.*

**Kenneth M. Oliver** and **Stefanie D. Capps**, of the Ft. Myers office, received a verdict favorable to the defense after a four day trial on an admitted liability low-impact rear-end accident. The young Plaintiff had an Anterior Cervical Discectomy and Fusion (ACDF) surgery and large past medical bills and was claiming $2,500,000.00 in damages. The Plaintiff had a prior motor vehicle accident with a well documented history of prior neck pain, frozen shoulder, and radicular symptoms. The jury followed Ken's suggestion and returned a verdict for the defense of $56,000.00. In addition, a Proposal for Settlement had been served in early of 2015 for $150,000.00.

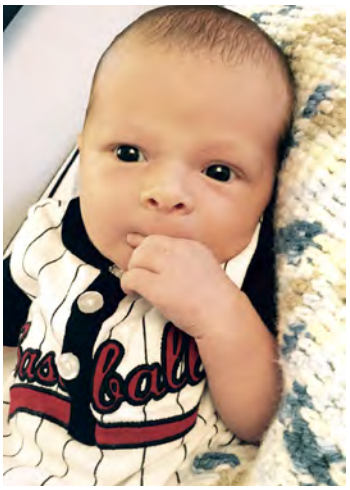
# Announcements & News

*Congratulations to our newest Shareholders:*
**Bretton C. Albrecht** – Miami
**Brian E. Chojnowski** – Tallahassee
**Christin Marie Russell** – West Palm Beach
**Eric Tourian** – Orlando

## *Congratulations*

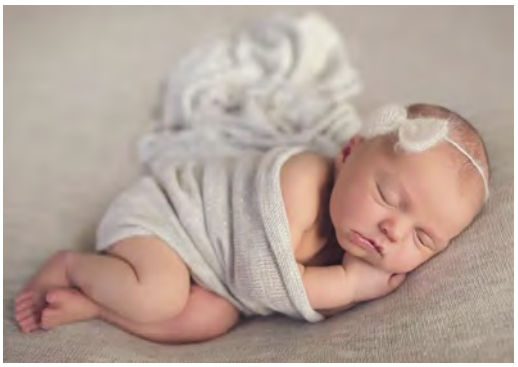
**Rebecca C. Kay**, of the Ft. Lauderdale office, and **Christin Russell**, of the West Palm Beach office, have earned a Martindale-Hubbell® Peer Review Rating of "AV Preeminent."

Congratulations to **Charles Fredrick Kondla**, of the Miami office, and his wife on the birth of their baby boy, Charles Phillip Kondla.



*Welcome Baby Charles...*
*and Baby Sloan!*

Congratulations to **Kara K. Cosse**, of the Jacksonville office, and her husband on the birth of their baby girl, Sloan Marie Cosse.



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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.

## CONTACT INFORMATION

**New Assignments**

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**Firm Administrator**

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

**Seminars/Continuing Education Credits**

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

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