KUBICKI DRAPER

THE KD QUARTERLY

FALL 2016

KD in the Community

For the ninth consecutive year, our attorneys and staff participated in the Walk for PKD. **Harold Saul**, of the Tampa office, captained "Ivan's Investors for a PKD Cure." The team, named in honor and memory of Harold's father, raised money to help the Polycystic Kidney Disease Foundation seek a cure for this disease. Ivan's Investors took the prize for the most funds raised by a team and Harold was the individual who raised the most. Thank you to everyone who supported this great cause!

Walk for PKD

Chelsea Winicki, of the Jacksonville office, presented the first two scholarships awarded for the Christian K. Winicki Memorial Scholarship. The scholarship is awarded to a Florida Coastal School of Law student, with preference given to military/veteran students or those with a demonstrated interest or background in athletic endeavors. Christian is the late husband of Chelsea. He passed away in 2015, after a 2 ½ year battle with sweat gland cancer. Kubicki Draper supported the event to award the scholarships as a platinum sponsor. Pictured at the far left are Chelsea and her daughter, Kiely Winicki.

Winners of the Christian K. Winicki Memorial Scholarship

Kubicki Draper is a proud sponsor of the Miami Northwestern Booster Club which raises money to take high school seniors on college trips through the southeast.

EDITOR
Jill L. Aberbach

IN THIS ISSUE

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NEW ADDITIONS

We are pleased to introduce our new team members:

Stephen J. Stefanik, Associate Attorney - Ft. Myers
Silvia Amador, Associate Attorney - Tampa
Janelle M. Vega, Associate Attorney - Miami
Jason Byrd, Associate Attorney - Tallahassee
Blake H. Fiery, Shareholder - Ft. Lauderdale
Shuntal S. Dean, Associate Attorney - Ft. Lauderdale

SPOTLIGHT ON :

Douglas F. Miller

Douglas Miller, is a shareholder in the Pensacola office who grew up in the Florida Panhandle. Doug attended the University of Florida for his undergraduate degree and after graduation, worked in the restaurant business for his father. During that time, Doug enjoyed one of his passions, water skiing, while indulging in lots of pizza from his father's Pizza Huts. After working in the family business for two years, Doug decided it was time to begin his journey into the legal profession and attended Cumberland School of Law in Birmingham, Alabama.

After graduating from law school in 1983, Doug began practicing workers' compensation law which remained his practice focus until 2003. Doug then transitioned his practice areas to concentrate on liability defense work; primarily, construction defect and first-party law, while maintaining a small workers' compensation caseload. Doug has first chaired over 100 bench and jury trials and recently brought his expertise to Kubicki Draper in June.

Doug has shared his belief with his oldest son who is also an attorney, that the key to being an effective trial lawyer is to be curious, pay attention and understand that you cannot help your client if you do not listen.

An important part of Doug's career has been his active participation in the legal community. This can be seen through his involvement as a Master of Inns of Court. In 1989, he was a member of the first class of legal professionals to be board certified in workers' compensation. Doug is also a member of several bar associations and has been selected by his peers to join the American Board of Trial Advocates (ABOTA), a select organization where members' eligibility is based upon moral character, reputation in the community, and legal expertise. Additionally, Doug is a certified continuing education instructor in Florida and has earned an "AV Preeminent" rating by Martindale-Hubbell.

Doug credits his legal success to his attention to detail and competitive nature. Growing up as an athlete, he credits his involvement in sports for his ability to problem solve in a creative way. He is a father of three boys, one of whom is a practicing attorney. His wife is also an attorney. Doug's ability to practice what he preaches is well recognized in the legal community and by his clients who continue to trust Doug with their legal matters.

When Doug is not in the courtroom or counseling his clients, he enjoys spending time outdoors, salt water fishing and bird hunting.

Presentations & Speaking Engagements

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

Below are some of the topics presented by our team in the last few months:

- Proposals for Settlement
- Florida 5 Hour Law and Ethics Update
- Early Case Resolution
- PIP Hot Topics and Trends
- UM/UIM
- Good Faith Handling
- Presumption of Negligence
- Arbitration Tips and Strategies and Subcontractor Involvement
- Florida IME PIP Statute
- Property Damage from High Winds
- Bad Faith Prevention
- Alcohol, Cell Phones, and The Law
- Material Misrepresentation and Low Limits
- Multiple Claimants Low Limits Solutions
- Defending Automobile Negligence
- Sharing the Misery: The Defects with Construction Defect Coverage in Insurance Policies
- Handling Construction Roadway Claims

Negligent Security in the Age of Terror

By Gregory Prusak and Nicole Wulwick
on behalf of the Hospitality and Retail Practice Group

As we are all aware, our Nation recently acknowledged the 15 year anniversary of the September 11, 2001 terror attack on New York City and Washington, DC when planes were hijacked by an Al-Qaeda terror group, flown into buildings, thus killing over 3,000 Americans.

In addition to this high-profile act of terror, Americans have observed numerous mass shootings in the past few years from the theatre shooting in Aurora, Colorado to a school shooting at Sandy Hook Elementary and more recently the Pulse Nightclub Shooting in Orlando, Florida which killed 49 bar patrons. All of these acts of violence could be construed as terrorism. However, the shooter in the Pulse Nightclub incident actually claimed he was inspired by the terror ground, ISIS. So what do businesses, public facilities and insurers do in response to these unpredictable, yet foreseeable acts of terror that seem to be happening with great frequency around America?

Some of the answers to these issues were addressed at a recent security conference in Orlando, Florida held by the ASIS organization. This seminar contained a consortium of local business leaders, law enforcement professionals, security experts and military experts who discussed not only the Pulse Nightclub shooting, but also the threat that terror poses to "soft targets" such as schools, shopping malls and yes, hotels and resorts.

Military experts have been studying the countries in the Middle East for a number of years to determine how the local governments address and protect large public areas from acts of terror. The strategies involve eliminating direct routes into buildings, the use of large fountains and other architectural devices to protect entrance ways and the use of limited entry points to facilities which also contain surveillance cameras.

Features of this sort are not typically found at your standard hotel, theme park or resort. While most theme parks in Florida employ metal detection and other security procedures at the direct entry point to the venue, there are large parking areas and shuttle embarkation sections which are simply unprotected from an evil doer who would want to commit a mass casualty event.

Other security experts at the ASIS convention opined that employees of soft targets need to be trained in counter-terrorism procedures to try and re-direct invitees in places of safety in the event of an attack which takes out the administration or management group of the facility.

The bigger question is whether an act of terror is also a crime to which Florida's legal authority regarding negligent security would apply. When it comes to negligent security, Florida has a very inconsistent body of law regarding when a legal duty of care arises to protect business invitees from "foreseeable criminal activity". Indeed, in the 1st and 3rd DCA, the general law indicates that a crime is not foreseeable to a business owner unless a prior similar crime was previously committed on the premises.[See: ***Ameijeiras v. Metro. Dade County***, 534 So. 2d 812 (Fla. 3d DCA 1988); and ***Menendez v. Palms***, 736 So. 2d 58, 61 (Fla. 1st DCA 1999)].

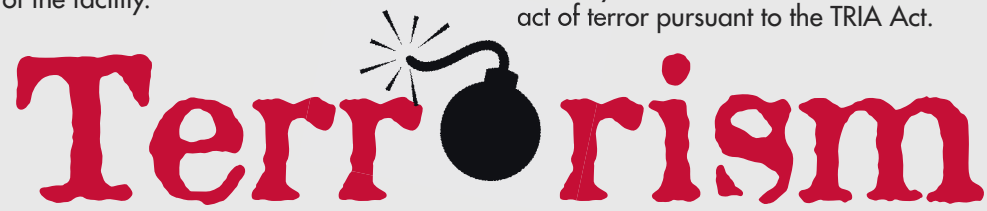
However, the 2nd, 4th and 5th DCA's apply a looser standard and find that a legal duty of care can arise if crime occurs on adjacent property or even if there is dissimilar crime on the premises. [See: DCA case, ***Foster v. Po Folks***, 674 So. 2d 843 (Fla. 5 DCA 1996); and ***ERP v. Sanders***, 157 So. 3d 273 (Fla. 2015)].

Moreover, a business owner can face liability in a negligent security claim in Florida even when there is no prior crime if the business owner has undertaken a duty of care by providing security to the premises. [See: ***Vazquez v. Lago Grande Homeowners Ass'n***, 900 So. 2d 587 (Fla. 3d DCA 2005)]

In short, "soft targets" like hotels and resorts can be victimized by acts of terror and due to Florida's liberal standards regarding foreseeability, it is difficult for a Defendant to prevail by summary judgment. As a result, litigation regarding these types of events may very well go to a jury with a mountain of emotional damage evidence. On the other hand, acts of terror do not typically follow the pattern of a criminal act wherein a security expert would argue that the criminal was simply looking for an easy target or a crime of opportunity. Instead, acts of terror are motivated by factors related to mental health and in some cases, dogmatic religious fervor.

So what should a business do? Should security personnel and security measures be developed and employed to try to lessen the risk of acts of terror against invitees? There are no easy answers to these important questions. Moreover, the first question that needs to be answered is whether the mass shooting event or bombing constitutes a criminal act or an act of terror. As will be discussed in the next section, Congress has the sole authority to determine whether an act is criminal in nature or an act of terror pursuant to the TRIA Act.

continued on page 4



That being said, it is probably a good idea for businesses, including hotels and resorts, to err on the side of providing smart and strategic security measures even if said measures allow the Plaintiff to prove foreseeability. Indeed, in a mass shooting event, the jury will certainly want to know what the business did to try to lessen the risk or to protect its invitees from such an act. A fair-minded jury may be more inclined to render a reasonable verdict or even a defense verdict if it finds that a business tried to prevent an act of terror, but were unsuccessful due to the ingenuity or passion of the terrorist.

The next section of this Article will address whether or not acts of terror can be covered or excluded in an insurance policy issued to a hotel, resort or other soft target business establishment.

Can Acts of Terror Be Excluded in a Policy?

Prior to 9/11, standard commercial insurance policies included terrorism coverage without any additional premium. Commercial policies typically contained exclusions for "war" and "war-related perils," but they were difficult to comprehend or not clearly defined. War risk exclusions reflected the realization that damages incurred from a war are essentially uninsurable and do not require a declaration of war from Congress.

After 2001, the expectation of international terrorism on American soil changed dramatically. However, it did not automatically trigger the sudden insurability of the terrorism risk. Today, exclusions for "acts of terrorism" in all-risk commercial insurance policies are the norm due to the costly expense of covering potential terrorism losses. Terrorism losses are potentially widespread, costly, unpredictable and impossible to calculate. Although the war and terrorism exclusions may appear to be similar and possibly overlapping, they are in fact two separate exclusions that need to be clearly understood to further protect your business.

In order to qualify as "terrorism," the act must meet the definition authored by Congress in the Terrorism Risk Insurance Act of 2002 (TRIA). TRIA has been reauthorized three times since its inception, most recently in 2015, where it was reauthorized through 2020 in the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA 2015).

TRIPRA requires insurers, including commercial property and casualty insurers, to offer coverage for loss resulting from defined terrorism by quoting a premium that an insured can decide to accept or reject. Insurers must give notice of this offer for coverage. A commercial terrorism policy covers damaged or destroyed property including buildings, equipment, furnishings and inventory. It may also cover losses associated with the interruption of the business or liability claims against a business associated with a terrorist attack.

As an incentive to insurers to stay in the market, the federal government provides money to insurers for the payment of terrorism losses that exceed $5 million. Prices for terrorism risk insurance have also steadily dropped over the years as a result of the federal program and due to improved terrorism risk modeling capabilities.

The Act specifically defines an "act of terrorism" as a violent act that is dangerous to human life, property or infrastructure. It must result in damage within the United States (or a U.S. flagged air carrier or vessel outside the United States) and it must have been committed by an individual(s) acting on behalf of any foreign person or interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion. The "act of terrorism" must be certified by the Secretary of the Treasury, the Secretary of Homeland Security and the U.S. Attorney General to qualify under the Act.

All of the above factors must be present for the act to be certified and thus covered under a commercial policy if the insurer elects terrorism coverage. The final element (i.e. individuals acting on behalf of a foreign person or interest to coerce the civilian population) has created the most issues in circumstances where the terrorist either commits suicide or is never identified. Certification of an "act of terrorism" cannot be given if the act is committed in the course of a declared war. Insurers have also carved out exclusions from "terrorism" coverage for terrorism acts involving nuclear, biological, chemical and radiological events as well as electrical terrorism and cyber-terrorism.

The definition and ultimate certification of an "act of terrorism" to trigger coverage is fraught with ambiguity giving rise to extended coverage litigation that relies upon a political issue, not a legal analysis. While an act of terror may fit into TRIPRA's definition of "terrorism," if the act is not certified by the appropriate governmental authorities, coverage will not be triggered.

Accordingly, when renewing your commercial insurance policy, it is important to inquire into the terms and cost of the premium for terrorism coverage based upon the location of your business. Terrorism insurance is offered as an "endorsement" or "rider" to your standard commercial property insurance policy. There are also options for stand-alone terrorism coverage. Keep in mind that some mortgage companies require terrorism coverage as a prerequisite in high-risk areas.

2016 JASTA ACT

In October 2016, the US Congress passed the JASTA Act [Justice Against Sponsors of Terrorism Act] and defeated President Obama's veto of the Act. The Bill was designed to allow victims of 9/11 to sue Saudi Arabia for damages sustained by the families of the victims killed in the terror act.

As drafted, the JASTA Act would allow terror victims to potentially sue any country that aided the perpetrators of terrorism who kill or maim Americans. It is unclear if this new Act will serve as the first option for Plaintiffs who seek to recover for the loss of loved ones due to acts of terror.

Moreover, critics of the JASTA Act note that other countries may pass reciprocal laws which allow their citizens to sue American corporations connected with alleged "acts of terror "committed by Americans. Here, the foreseeable target could be corporations connected with U.S. military operations which accidentally kill civilians abroad.

It is unclear if such reciprocal laws will trigger exposure to American insurers who issue policies to U.S. companies who also do business and have insured entities abroad.

In the age of terror, the answers to these inquiries are still being developed.

APPELLATE

Affirmance of Trial Verdict Regarding Recoverability of Attorneys' Fees.

G. William Bissett, of the Miami office, obtained a nine page opinion from the Second District Court of Appeals, ruling in FIGA's favor. See ***Miller v. Florida Ins. Guar. Ass'n, Inc.***, No. 2D15-1350, 2016 WL 3766630 (Fla. 2d DCA July 15, 2016). The appeal raised a previously unanswered question regarding recoverability of attorneys' fees under the FIGA Act in the context of a sinkhole case.

The Court had to reconcile two separate sections of the FIGA Act dealing with the recoverability of attorney's fees. One section states that attorney's fees may not be paid by FIGA in connection with a sinkhole loss, while another section of the Act states that FIGA has to pay fees if it denies a claim by affirmative action.

Although the trial court denied fees on the basis of the language of the 2011 amendment seemingly denying fees in sinkhole claims, the trial court also held that FIGA had "denied the insured's claim by affirmative action," arguably allowing fees under the other section of the FIGA Act. On appeal, the Insured argued that the 2011 amendment did not apply, but more importantly that the general section on fees controlled over the sinkhole section when FIGA denied a claim by affirmative action.

This particular issue and the arguments raised were of first impression. In his brief, Bill argued that the 2011 amendment applied and that was sufficient to support the trial court's ruling. As to the Insured's second argument, Bill asserted that notwithstanding the trial court's conclusion FIGA had denied the claim by affirmative action, the trial court was simply wrong based on the facts in the record, and therefore under the "tipsy coachman" doctrine, the order on appeal had to be affirmed. As a result, the Court ruled in favor of FIGA.

TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal in Workers' Compensation Immunity Case.

Kristin F. Wood, of the Tampa office, obtained a dismissal from Plaintiff's counsel prior to a hearing on her Motion for Summary Judgment. The case involved a Plaintiff who was struck by a motor vehicle while working at our client's golf course, sustaining significant injuries. Kristin raised a Workers' Compensation immunity defense. After Plaintiff settled his Workers' Compensation claim, the release contained language which indicted he had "elected his remedy" to pursue Workers' Compensation. Thus, Kristin drafted a Motion for Summary Judgment based on the Election of Remedies Doctrine.

In response, opposing counsel indicated that he needed to take significant discovery before the Motion for Summary Judgment could be heard. Kristin advised opposing counsel there was no discovery necessary for this motion. Within a few days, Kristin received a voluntary dismissal without prejudice. Since the statute of limitations had already run, the dismissal was akin to being with prejudice.

Favorable Jury Verdict in Slip and Fall Case.

Peter S. Baumberger and **Christopher M. Utrera**, of the Miami office, received a favorable jury verdict in an action brought against the owner/operator of a shopping center in Miami, Florida, as well as the janitorial service retained for cleaning services at the premises. The Plaintiff contended that the Defendants failed to safely maintain a walkway leading into a store, causing her to slip and fall. The Defendants denied negligence and argued that employees were in the process of cleaning the walkway and that the Plaintiff was warned the surface may be slippery.

The Plaintiff's fall was captured on a video surveillance camera and viewed by the jury. The defense argued that the video showed an employee of the Defendant janitorial company in the process of cleaning the walkway area at the time of the fall near a cleaning cart and a yellow "wet-floor" sign was posted. The Plaintiff argued that the video demonstrated the Defendants did not properly barricade the area where the spill occurred, which was in a high-traffic area.

The employee who was cleaning the floor at the time testified that he verbally warned the Plaintiff to be careful because the area was slippery. The defense additionally argued that the Plaintiff had pre-existing degenerative conditions.

After a four-day trial, the jury found the Defendant mall owner/operator 2% negligent, the Defendant janitorial service 3% negligent and the Plaintiff 95% comparatively negligent. Plaintiff was awarded $30,000 in total damages, reduced accordingly and the jury declined to award the Plaintiff future damages.

Final Summary Judgment in Underinsured/Uninsured Coverage Case.

Valerie A. Dondero, of the Miami office, obtained a Final Summary Judgment in an uninsured motorist coverage claim.

The case stemmed from a 2011 bicycle/automobile accident where a minor was seriously injured. The Plaintiff sought uninsured motorist coverage under the Commercial Auto Insurance Policy issued to the minor's father's company which was challenged by Valerie in a Declaratory Action. In the oral argument, Valerie argued that the minor son did not qualify as an "insured" as defined in the Commercial Policy and UM endorsement.

The Court wrote a detailed opinion in Valerie's favor finding that the language of the Policy and endorsement were unambiguous and there was no UM coverage under the Commercial Auto Policy issued to the father's corporation because the minor son did not fall within the definition of "insured."

Dismissal with Prejudice based on the Economic Loss Doctrine.

Jennifer Remy-Estorino and **Pedro A. Lopez**, of the Miami office, received a dismissal with prejudice based on the Economic Loss Doctrine in a case involving the supply/sale and installation of doors at a hotel on Miami Beach. The complaint asserted breach of contract counts against our client, the door supplier, and our other client, the door installer, alleging that the doors began weeping moisture, and that the installation was sub-par and incomplete. Plaintiff tried to circumvent the Economic Loss Doctrine by arguing the professional negligence exception. However, the Court agreed with the Defense that this case did not involve a "profession." In Florida a "profession" is one which requires at least a four year degree for licensure, and our client was a General Contractor which does not require a four year degree.

Pedro wrote the Motion and Jennifer argued it.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in a Personal Injury Protection Case on Reasonableness of Charges.

Michael S. Walsh and **Ava G. Mahmoudi**, of the Ft. Lauderdale office, successfully defended a Motion for Summary Judgment regarding the reasonableness of the Plaintiff's medical provider's charges in a lawsuit filed against the Insurer. Due to binding rulings in the 17th Judicial Circuit and a long standing history of Judges in Broward County striking defense experts on issues pertaining to reasonableness of charges, the defense faced an uphill battle. Michael and Ava's strategy included retaining an expert affidavit from a physician to testify as to the reasonableness of the charges and impeach the Plaintiff's expert with deposition testimony obtained early on in the case. As a result, the defense was able to convince the Judge that it was in fact the Plaintiff that did not meet the correct standard regarding expert testimony. Furthermore, the Judge's ruling was also based on the defenses' ability to discredit the Plaintiff's expert with prior deposition testimony.

Summary Judgment in Wrongful Death Case.

Michael F. Suarez, **Peter S. Baumberger**, and **Pedro Lopez** of the Miami office, obtained a Summary Judgment in a wrongful death case where the decedent allegedly died due to electrical work that was performed by our client's employee. Michael and Peter took the position that the employee acted outside the scope of his employment and could not be considered an agent of our client for the defective work he allegedly performed. Michael and Pedro wrote, and Michael argued, the prevailing Motion. A Proposal for Settlement was also been filed in this case.

Summary Judgment on Fee Schedule Election Case.

Chelsea R. Winicki and **Kara K. Cosse**, of the Jacksonville office, were selected by the Insurer to be the first to defend a case on the client's 1-13 Policy with regard to fee schedule election. Escambia County is known for being an extremely challenging jurisdiction for the defense to prevail, however, here, the Judge granted the Insurer's Motion for Final Summary Judgment and found the 1-13 Policy clearly and unambiguously notified the Insured of the intended payment methodology of 200% of Medicare.

Favorable Jury Verdict in an Admitted Liability Auto Accident.

Chelsea R. Winicki and **Kendra Therrell**, of the Jacksonville office, secured a net defense verdict in an admitted liability truck/auto accident action. This case was a retrial of a prior mistrial before verdict. Plaintiff had $54,000.00 in gross medicals and injections and claimed several herniations. Future medicals sought were $10,000.00 to $14,000.00 per year for 20 years. The Jury found no permanency and awarded $18,000.00 in past medicals after a two hour deliberation.

The information provided about the law is not intended as legal advice. Although we go to great lengths to make sure our information is accurate and useful, we encourage and strongly recommend that you consult an attorney to review and evaluate the particular circumstances of your situation.

Summary Judgment Based on an Invalid Demand Letter.

Anthony G. Atala, of the Miami Office, prevailed on a Motion for Summary Judgment regarding an invalid demand letter. The Plaintiff filed a Motion for Rehearing and to Vacate the Order, alleging that the Judge who entered the Order purposely ruled against him because he was not supporting her re-election judicial campaign. Plaintiff's Motion also alleged that he had text messages to support his position and stated that he was considering filing a bar complaint against the Judge.

During the hearing, Anthony argued that Plaintiff's counsel was making arguments of a "conspiracy theory" against him, and that he offered no evidence. Anthony requested that the newly assigned judge hold an evidentiary hearing regarding the allegations and give the former judge a chance to defend herself against these allegations. In response, the Judge denied the Plaintiff's Motion. In addition, a Proposal for Settlement was filed which Anthony is pursuing.

Summary Judgment in Construction Defect Case.

Peter S. Baumberger and **Christopher M. Utrera**, of the Miami office, prevailed in an evidentiary Summary Judgment hearing wherein the Court had to determine if a release of a predecessor apartment owner barred numerous claims of a subsequent owner, who was two steps removed from the original owner.

The argument was complicated due to the amount of case law and documentation from complex ownership transfers that Peter and Christopher had to analyze. What was even more complex was demonstrating which defect claims were either cited as being released in the agreement or were "known," since the release only barred claims that were identified in the agreement or that were "known" to the parties.

Bretton Albrecht, of the Miami Office, drafted the initial Motion for Summary Judgment on the applicability of the release, **Maegan Bridwell**, of the Miami Office, assisted with research and investigation.

At the hearing, Peter argued the applicability of the release and Christopher argued which claims should be dismissed, assuming the release applied. After three months, the Court ruled and found that the release applied and dismissed almost all of the defect claims.

Post-Trial Reduction of Damages Awarded in a Motor Vehicle Accident Case.

Karina I. Perez, of the Tampa office, prevailed in reducing the Jury's medical damages award to the Plaintiff by nearly $80,000.00, in post trial motion practice on collateral sources from a motor vehicle accident. Plaintiff vehemently opposed the Motion arguing that because the Jury awarded less than the Plaintiff's full medical damages at trial, it would be inequitable to allow a further reduction by the amount of Plaintiff's contractual discounts on medical bills which were not awarded by the jury. Karina was able to convince the Court that Florida's collateral source statute mandates the discounts set-off the Jury award whether or not Plaintiff was awarded full medical damages. The enormous reduction in damages has positioned her client to enforce their Proposal for Settlement in order to recover defense attorneys' fees and costs.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Personal Injury Protection Case.

Anthony Atala, of the Miami office, and **Michael Walsh**, of the Ft. Lauderdale office, obtained a Summary Judgment on a policy language Personal Injury Protection case. In 2012, with the change of the statutory language, the Insurer changed their policy to mirror the new statute. The Plaintiff argued that the policy was a "hybrid" that did not properly elect the fee schedule. The Court, after reviewing numerous cases for and against the policy ruled in favor of the Insurer indicating that its policy was not ambiguous and properly elected the fee schedule. Thus, Final Summary Judgment was entered favor of the Insurer and subsequently awarded costs.

Dismissal of a Writ of Mandamus Based on a Contractual Waiver.

Caryn L. Bellus and **Bretton C. Albrecht**, of the Miami office, obtained a dismissal of a writ of mandamus pertaining to the trial court's order striking the underlying Defendant/tenant's demand for jury trial based on a contractual waiver. The commercial landlord/tenant dispute, with claims of conspiracy and trespass, arose from a commercial tenant's refusal to allow the landlord and/or its contractors reasonable access to the floor in connection with certain repairs/renovations to the building and fire alarm system. Caryn and Bretton represented the general contractor who was hired to perform the renovations at the subject's building and who was named as a Third-Party Defendant.

The lease agreement between the landlord and the tenant contained a jury trial waiver which caused Caryn and Bretton to seek that the jury demand be struck and have the case tried as a bench trial. After the trial court struck the jury trial demand, the Defendant/tenant then sought appellate review of the trial court's order by way of writ of mandamus.

Caryn and Bretton filed a response to the writ, arguing that the Third District Court of Appeals should not even reach the merits of the case because mandamus is not a proper vehicle to review the trial court's discretionary decision to enforce the tenant's contractual waiver of its right to demand a jury trial because such a ruling is a non-final, non-appealable order. The appellate court agreed and dismissed the tenant's writ of mandamus.

Summary Judgment in Veterinary Malpractice Claim.

Teresa F. Cummings, of the Pensacola office, prevailed on a Motion for Summary Judgment in a veterinary malpractice case in Escambia County.

In this case, the Plaintiff took her dog, to our client's veterinary clinic to be boarded for a week. The dog was otherwise healthy but mysteriously died four days into the boarding. The Plaintiff alleged that it was because our clinic staff left the dog outside for two hours.

Throughout discovery, Teresa requested that Plaintiff identify their expert that was going to establish the veterinary standard of care and what our clinic did to violate that. However, Plaintiff's attorney steadfastly took the position that they did not need such an expert.

Knowing this Judge is a huge dog lover, Teresa made her argument very respectful of the dog and the Plaintiff's loss. The Judge visibly scowled when Plaintiff's counsel argued that the dog was just a chattel and granted Teresa's Motion for Summary Judgment.

Denial of Plaintiffs' Motion to Compel in a Class-Action Lawsuit.

Michael F. Suarez, of the Miami office, prevailed when the Judge denied Plaintiff's Motion to Compel in a "fax blasting" class-action lawsuit against a health insurance company. In this case, the Plaintiff class representatives were expected to seek hundreds of thousands, if not millions of dollars for an illegal "fax blasting" campaign that one of the client's agents was involved in. Plaintiffs were attempting to certify a nationwide class which is regularly permitted in TCPA "fax blasting" cases, so long as the class members can be reasonably identified. The Federal penalty for illegal fax blasting is $500.00 per fax which can be tripled if intent is proven.

Mike prevailed on a very complex and involved Motion to Compel our client to provide nationwide discovery which was sought by the Plaintiffs to assist them in trying to identify class members. Mike's response to the Motion to Compel justifiably convinced the Federal Judge that these requests were unduly burdensome and amounted to a true fishing expedition. After the ruling was issued in our favor, the case settled for a nominal amount because the Plaintiffs' attorney realized that they would have a extremely difficult time achieving class certification following the ruling.

We are pleased to announce the following KD attorneys have been recognized as

2017 "BEST LAWYERS IN AMERICA"

by the highly-respected "Best Lawyers" peer review guide:

Miami: **Caryn L. Bellus**, Appellate Practice; **Brad J. McCormick**, Commercial Litigation
Ft. Lauderdale: **Jane Carlene Rankin**, Real Estate Law
Tampa: **Betsy E. Gallagher**, Appellate Practice
West Palm Beach: **Laurie J. Adams**, Personal Injury Litigation – Defendants

We are proud to have been selected as a Tier 1 firm in U.S. News-Best Lawyers' 2017 Edition of "Best Law Firms". The rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

Announcements & News

Harold Saul, of our Tampa office, was recognized by the Florida State University Law School for his continuous financial support of the law school, including supporting student scholarships, faculty incentives, general discretionary dollars and funding for co-curricular activities.

Congratulations to **Ken Oliver**, of the Ft. Myers office, for being recognized as Attorney of the Year by the American Board of Trial Advocates (ABOTA), Southwest Florida Chapter. The American Board of Trial Advocates (ABOTA) is an organization dedicated to the preservation of a fair and impartial judiciary and right to trial by jury.

We are pleased to announce **Sharon Degnan**, of our Orlando office, is the recipient of Florida Defense Lawyers Association's 2016 Amicus Award. Each year, the award is presented to the appellate attorney who makes significant contributions to the defense bar and FDLA amicus committee.

Betsy E. Gallagher, **Sean-Kelly Xenakis**, of the Tampa office, and **Steve W. Cornman** of the Miami office, have been recognized as Florida Trend's 2016 Legal Elite. Betsy was recognized in the Appellate Practice area and Sean-Kelly and Steve in the Civil Trial area. Corporate America's Dispute Distinction Awards.

Congratulations to **Christopher M. Utrera**, of the Miami office, on becoming Board Certified as a Construction Law Attorney.

Angela C. Agostino, of the Ft. Myers office, was featured in the July/August edition of the Lee County Bar Association Magazine.

Congratulations to **G. William Bissett**, of the Miami office, on being rated AV Preeminent Attorney, 2016 by Martindale Hubbell.

Congratulations to **Lisandra Guerrero**, of the Miami office, and her husband on the birth of their baby girl, Coral Guerrero.

Congratulations to **Brad Eubanks**, of the Jacksonville office, and his wife Kelly on the birth of their baby girl, Ally Gail Eubanks.

GO KD TEAM!

Congratulations

Caryn L. Bellus, of the Miami office, and **Stuart C. Poage**, of the Tallahassee office, participated on panels in two sessions at the 2016 CLM National Construction Claims Conference that took place in San Diego, California. Caryn presented "Sharing the Misery: Defects with Construction Defect Coverage" and Stuart presented "The Long Road Ahead – Handling Construction Roadway Claims" with Michael McDonnell of Kutak Rock and Paul Stuart of Old Republic Construction Program Group.

Caryn Bellus, of the Miami office, and **Angela Flowers**, of the Ocala office, both former chairs of the Appellate Practice Section of the Florida Bar, attended the section's long range planning retreat, helping to foster the professionalism and growth of appellate lawyers in Florida.

YOUR OPINION MATTERS TO US.

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

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