KUBICKI DRAPER

THE KD QUARTERLY

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KD in the Community

Ryan's Raiders and Kubicki Draper came together for the Juvenile Diabetes Research Foundation's Walk to Cure Diabetes. The annual walk raises awareness and funds to find a cure and for more effective treatments for Type 1 Diabetes. **Laurie J. Adams**, of the West Palm Beach office, and her son, Ryan, co-captained Ryan's Raiders. With KD's support, they raised more funds than ever and received the Golden Sneaker Award for their successful fund-raising efforts.

Danielle L. Snyder, of the Miami office, participated as a volunteer to judge the 2017 District High School Mock Trial Competition. The Miami Dade District High School Mock Trial Competition is an academic competition in which a team of six to eight students simulate the roles of both attorneys and witnesses in a fictional trial situation. Students have approximately three months to prepare for their roles.

Peter S. Baumberger, of the Miami office, recently presented to a group of JROTC high school teachers in Miami on "The Importance of the Right to Trial by Jury." This program was presented on behalf of the American Board of Trial Advocates ("ABOTA"), which is an elite attorney organization that several Kubicki Draper partners are members of. ABOTA's mission is to promote the right to trial by jury and to promote civic education.

Kubicki Draper sponsored the Judicial Appreciation Picnic held by the Palm Beach Chapter of the American Board of Trial Advocates ("ABOTA"). Over 100 members and supporters of the legal community attended, including 17 Palm Beach County judges and their families. **Laurie J. Adams**, of the West Palm Beach office, is the current President of the Palm Beach Chapter of ABOTA which is a bipartisan group of experienced trial lawyers dedicated to civics education, judicial independence, and the preservation of the jury trial system.

Our KD family is coming together to give back and make a difference in our local communities. We dress down to lift up! Each quarter an organization is selected from multiple entries made by staff and funds are raised by paying to dress down. The first organization featured, New Heights, was submitted by **Deborah ("Debbie") Eiserman**, of the Jacksonville office. Debbie's son, Nicky, attends the programs put on by New Heights whose mission is to enrich the lives of persons with disabilities and their families and empower their independence and lifelong growth through quality services.

"No words can express how grateful I am for the generosity and kindness of this wonderful KD family. When I initially received the email that New Heights was chosen for the Dress Down to Lift Up Fundraiser, I literally sat at my desk in tears. New Heights means the world to me. I don't know what I would do without them. Nicky loves attending this program during the week. New Heights has been hosting different fundraising events (garage sales, bake sales, etc.) in order to raise money for a handicap accessible van so when they go on outings, ALL the clients can ride together. I will be forever grateful. Thank you from the bottom of my heart." Debbie

We are very proud of having come together for Debbie and New Heights and we look forward to supporting the next great organization selected.

EDITOR
Jill L. Aberbach

IN THIS ISSUE

Navigating Workers' Compensation Immunity in Florida's Construction Industry

By Jason S. Stewart and Benjamin Cohen
on behalf of Kubicki Draper's Construction Practice Group

Introduction

Following the "real estate bubble" burst, Florida has realized a resurgence of its real estate and construction industries. This renaissance has led to an uptick in job-related accidents, which are an inherent danger on construction sites. Employers look to Florida's workers' compensation statutes which, aside from certain exceptions, provide the ***exclusive*** remedies for work accidents.

Florida's workers' compensation system is designed "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate a worker's return to gainful reemployment at a reasonable cost to the employer."[1] In exchange for access to workers' compensation benefits, injured workers give up their right to sue their employers for damages arising from job-related injuries.

An employer becomes immune to tort claims by an injured employee if it secures appropriate workers' compensation coverage. The legislature's intent was to give employers immunity from tort suits "except in the most egregious circumstances."[2] The focus of this article is to provide an outline of the complex interplay between workers' compensation immunity and Florida's construction industry.

Applying Workers' Compensation Immunity to Contractors and Subcontractors

The application of workers' compensation immunity to lawsuits arising from construction-related injuries becomes complicated by common industry practices and statutes which expand the scope of immunity. These complexities, in large part, are a byproduct of the web of contractual relationships present on a construction site. The statutory concepts of "vertical immunity" and "horizontal immunity" delineate, to some extent, which persons or entities can claim immunity in addition to an injured employee's direct employer.

Vertical Immunity

A "statutory employer" is entitled to vertical immunity. A vertical relationship exists when a contractor sublets any part(s) of its contracted work to a subcontractor. The contractor is deemed the "statutory employer" of the employees of the subcontractors involved in such work.[3] As a result of vertical immunity, a statutory employer is immune from claims by injured employees of its subcontractors and sub-subcontractors.

To qualify as a statutory employer, a contractor must ensure that workers' compensation coverage is maintained for its subcontractor's employees, whether through coverage obtained by the contractor or by its subcontractor.[4] A statutory employer has no obligation to make the actual payment of workers' compensation benefits to be able to assert immunity, as long as coverage is obtained.[5]

A contractor, in order to be deemed a statutory employer, must also have a contractual obligation which it then passes to another to perform. Considering this, courts in some cases have held that an owner/developer that builds structures as a commercial business venture and not as a result of any contractual obligations to a third-party, is not a statutory employer.[6]

An injured employee must satisfy a stringent exception to pierce a statutory employer's vertical immunity. Courts have narrowly construed the applicability of this "intentional tort exception" to only the rarest, most outrageous of cases.[7] This stringent burden of proof is the same standard which an injured employee must meet to bring a viable tort action against his or her direct employer.

To pierce vertical immunity, an injured employee must establish by "clear and convincing evidence" that the statutory employer deliberately intended to injure the employee or that the statutory employer's conduct which was "virtually certain" to result in injury or death of the employee.[8] An injured employee's evidence of a non-intentional tort or negligence is not sufficient to circumvent vertical immunity.

Horizontal Immunity

Horizontal immunity is "the statutory immunity for claims brought by an injured employee of one subcontractor against **another** subcontractor."[9] A horizontal relationship exists between subcontractors "employed within one and the same business or establishment,"[10] but under different subcontracts, outside the vertical chain of a contractor to subcontractor.

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[1] Fla. Stat. § 440.015 (2012).

[2] ***Bakerman v. The Bombay Co.***, 961 So. 2d 259, 262 (Fla. 2007).

[3] Fla. Stat. § 440.10(1)(b)-(e) (2003).

[4] ***Fred G. Wright, Inc. v. Edwards***, 642 So. 2d 808, 809 (Fla. 2d DCA 1994) (holding that a general contractor is entitled to vertical immunity if its subcontractor provides workers' compensation benefits to the subcontractor's injured employee).

[5] *See* ***VMS, Inc. v. Alfonso***, 147 So. 3d 1071 (Fla. 3d DCA 2014).

[6] *See* ***Cuero v. Ryland Grp., Inc.***, 849 So. 2d 326, 328 (Fla. 2d DCA 2003).

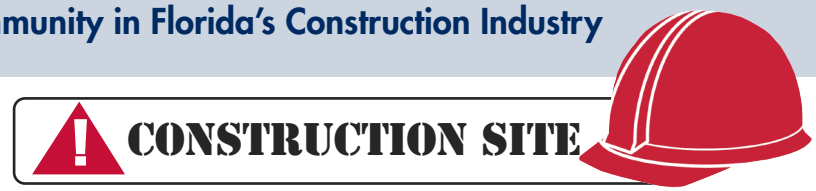
[7] *See*, e.g., ***R.L. Haines Const., LLC v. Santamaria***, 161 So. 3d 528, 530 (Fla. 5th DCA 2014); ***Bakerman***, 961 So. 2d at 262.

[8] ***List Indus., Inc. v. Dalien***, 107 So. 3d 470 (Fla. 4th DCA 2013); Fla. Stat. § 440.11(1)(b) (2013) (delineating what is needed to satisfy the intentional tort exception).

[9] ***Ramcharitar v. Derosins***, 35 So. 3d 94, 95 (Fla. 3d DCA 2010).

[10] ***Ciceron v. Sunbelt Rentals, Inc.*** 163 So. 3d 609, 611 (Fla. 4th DCA 2015) (holding that an equipment rental company did not qualify as a "subcontractor" entitled to horizontal immunity because no subcontractor on the job sublet to it any work which a subcontractor had contracted with the general contractor to perform).

continued on page 3



continued from page 2

A subcontractor is entitled to horizontal immunity from claims by another subcontractor's employee upon a finding that: (1) the subcontractor has secured workers' compensation insurance for its employees or the general contractor has secured such insurance on the subcontractor's behalf; (2) all of the employees of such general contractor and subcontractor(s) are providing services on the same project or contract work; and (3) the subcontractor's own **gross negligence** is not the major contributing cause of the injury.[11]

When the preceding three requirements are established, a subcontractor also has immunity against claims by injured employees of a general contractor. This immunity will insulate a subcontractor from liability unless the injured employee can establish the subcontractor's gross negligence[12] or an absence of either of the two remaining statutory requirements. Although the relationship between an injured employee of a general contractor and a subcontractor does not, on the surface, appear to be horizontal in the same way that the relationship between fellow subcontractors working on the same project is, the statute nonetheless treats the relationship as horizontal. This statutory distinction makes sense when considering that a subcontractor is not obligated to ensure that employees of a fellow subcontractor or employees of the general contractor are provided with workers' compensation coverage.

The gross negligence standard is difficult to satisfy; however, it is less stringent than an injured worker's burden for the intentional tort exception. To prove a subcontractor's gross negligence, an injured worker must show: (1) circumstances presenting an imminent or clear and present danger amounting to a more than normal or usual peril; (2) the subcontractor's knowledge or awareness of the imminent danger; (3) an act or omission by the subcontractor that evidences a conscious disregard of the consequences."[13]

Applying Workers' Compensation Immunity to Corporate Supervisor and Design Professionals

If an employer has immunity, the employer's corporate officers and supervisors are immune from an injured employee's claims. The same immunity provisions enjoyed by an employer extend to "any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment…"[14]

A corporate supervisor will be immune from suits resulting from work injuries unless it can be shown that the supervisor's negligence was tantamount to "culpable negligence."[15] Courts have defined culpable negligence as conduct characterized by "a gross and flagrant character which evinces a reckless disregard for the safety of others," and constituting "an entire want of care which raises a presumption of indifference to consequences."[16]

Architects, professional engineers, landscape architects, and other construction design professionals have immunity from claims by injured construction workers in specific circumstances. A construction design professional has immunity from liability for an employee's injuries resulting from an employer's non-compliance with safety standards on the construction project; however, this immunity will not apply if the construction design professional contractually assumed the responsibility for safety practices.[17] This statutory immunity does not shield a construction design professional from claims resulting from a construction design professional's negligent preparation of design plans or specifications.[18]

Conclusion

An application of Florida's workers' compensation immunity to construction-related accidents can be difficult to navigate. Still, the legislature's intent is abundantly clear. If an employer fulfills its obligations to secure coverage, worker's compensation benefits become an injured worker's exclusive remedy with only limited statutory exceptions.

An immunity defense can be a potent strategy in litigation. If an immunity defense is clear upon a review of a complaint, the defense may be raised by a motion to dismiss at the pleading stage.[19] However, an immunity defense is generally better suited for a motion for summary judgment, as an employer will likely need to submit facts and evidence outside of the pleadings. An order denying a motion for summary judgment based on worker's compensation immunity is immediately appealable if the order is based on a finding that the defendant is not entitled to assert a workers' compensation immunity defense as a matter of law; however, the order is not immediately appealable if the trial court denies the motion for summary judgment because the facts supporting the immunity defense are in dispute.[20]

A defensive strategy for asserting a workers' compensation immunity defense should be addressed and developed early in litigation. To do so, an understanding of the laws governing this immunity is needed to evaluate the particular factual circumstances of an accident and improve the efficacy of an immunity defense.

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[11] Fla. Stat. §440.10(1)(e) (2003); See generally, ***Amorin v. Gordon***, 996 So. 2d 913 (Fla. 4th DCA 2008).

[12] ***Mordadiellos v. Gerelco Traffic Controls, Inc.***, 176 So. 3d 329 (Fla. 3d DCA 2015) (affirming a summary judgment in favor of a subcontractor sued by an employee of a general contractor based on language of Fla. Stat. § 440.10(1)(e)).

[13] ***Vallejos v. Lan Cargo***, 116 So. 3d 545 (Fla. 3d DCA 2013).

[14] Fla. Stat. § 440.11(1)(b) (2013).

[15] ***Florida Dep't of Transp. v. Juliano***, 864 So. 2d 11, 16 (Fla. 3d DCA 2003).

[16] ***Emergency One, Inc. v. Keffer***, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995); see Killingsworth v. State, 584 So. 2d 647, 648 (Fla. 1st DCA 1991).

[17] Fla. Stat. § 440.09(6) (2003); *see* ***Williams, Hatfield & Stoner, Inc. v. Malcolm***, 687 So. 2d 295, 296 (Fla. 4th DCA 1997).

[18] *Id.*

[19] *See generally*, ***Gen. Cinema Beverages of Miami, Inc. v. Mortimer***, 689 So. 2d 276, 277 (Fla. 3d DCA 1995).

[20] ***Pensacola Christian Coll. v. Bruhn***, 80 So. 3d 1046, 1049 (Fla. 1st DCA 2011).

SPOTLIGHT ON:
Stuart C. Poage

Stuart C. Poage, is a shareholder in the Tallahassee office, and is originally from Salem, Ohio. Stuart graduated from University of Kentucky with a degree in finance and management. Following his undergraduate education, Stuart began contemplating his next step in life. After crossing medical school off his list, he traveled to Tallahassee and began his law school career at Florida State University.

While in law school, Stuart thought his focus was going to be transactional law until he interned for a local law firm. During this internship, Stuart had the opportunity to participate in a trial and his career path was forever changed. Following this, in an externship, Stuart assisted and learned from Justice Wells at the Florida Supreme Court. From these experiences, Stuart's love for litigation emerged.

After graduation, Stuart began working at a firm that focused on workers' compensation and social security disability claims. From there, Stuart moved back to Kentucky for a short period of time and defended workers' compensation and black lung claims. Stuart quickly realized that he missed the Florida sun and moved to Pensacola where he practiced civil litigation.

In 2005, Stuart was involved in a case with a Kubicki Draper attorney who was so impressed with Stuart's work that he told him that the Tallahassee office needed help and insisted that he meet with Gene Kubicki. Stuart quickly became the go to associate for Kubicki Draper in the North Florida region and covered all of the litigation work in the Panhandle before the Pensacola office was opened. Now, Stuart is a shareholder with the firm.

Stuart's success can be attributed to his chess like approach to all of his cases. This allows him to look several steps ahead, anticipate opposing counsel's next move, and to go on offense rather than be reactionary.

Being proactive in his approach to litigation enables Stuart to analyze the plaintiff's injuries, the value of the case, and put the pieces together to determine which strategy works best and is the most practical for the client.

Additionally, Stuart focuses on a wide variety of legal fields such as products liability, auto negligence, premises liability, first party property, and many others. He is also a board certified construction attorney and has recently become a Florida Supreme Court Qualified Arbitrator. Stuart has an AV Preeminent rating by Martindale-Hubbell and was named Florida's "Rising Star" by Florida Super Lawyers Magazine.

Stuart is married to his wife Stacey and they have two children, Alexa who is 13 years old and Ryan who is 11. He loves participating in the travel soccer team for his children and shares a love for marathons with his wife. Stuart has participated in seven marathons including twice completing the New York City marathon and recently, participating in a half marathon with his wife in California.

congratulations

Charles Kondla with fellow HBNA award recipient, Karim Batista

Charles F. Kondla, of the Miami office, has been selected by the Hispanic National Bar Association ("HNBA") as one of the "Top Lawyers Under 40." Charles was selected from a large pool of highly qualified candidates across the country. The award signifies outstanding professional achievements combined with exceptional commitment to service.

The Hispanic National Bar Association is a nonprofit, nonpartisan, national membership organization founded in 1972 that represents the interests of Hispanic legal professionals in the United States and its territories. Charles accepted this award on March 31, 2017, at the HNBA Corporate Counsel Conference.

Using Pure Bills of Discovery in Florida Courts

By Eric V. Tourian

It is a common misconception that a corporation and other entity can only engage in discovery to find out facts after a lawsuit has been filed. However, in Florida (as in many other states) a person or corporation can in fact file a pleading called a "pure bill of discovery" for the sole purpose of seeking information and/or documents from another person or entity.

What's A Pure Bill Of Discovery And Why Would I Want To File One?

Put simply, a Pure Bill[21] of Discovery is an underutilized pleading which can be used to petition a county court or a circuit court for an order for a person or entity to produce documents or to disclose facts which may be used as a claim or a defense in an expected lawsuit. In the context of insurance fraud investigations, pure bills of discovery can be used to uncover evidence of fraud which may then be used by an insurer in a later suit to recover benefits fraudulently obtained by a healthcare provider or to determine if a fraud defense exists against a future possible lawsuit by a provider or to assist in a presuit SIU investigation.[22]

The Pure Bill of Discovery is an "equity" pleading which is granted pursuant to the Court's "auxiliary jurisdiction."[23] A Court's jurisdiction usually consists of the right to decide a case or controversy between parties; however, Florida Courts also have the auxiliary power and jurisdiction to enter orders that a person or organization provide documents, submit to depositions or to otherwise comply with the Florida Rules of Civil Procedure presuit.

So to answer the question posed at the heading of this paragraph, a Pure Bill of Discovery is a court action which can be filed as a way to gather "evidence" which can be used to prosecute or defend a future lawsuit. Pure Bills can be used to investigate insurance fraud (especially in the context of No Fault claims), Pure Bills can be used to investigate auto accidents prior to any suit ever being filed, and Pure Bills can be filed in order to force a person or corporation to preserve evidence or for any of a host of other reasons. (See my discussion below). The scope of the documents requested by a Pure Bill of Discovery is really only limited to the creativity of the attorney filing the Bill. If you need documents or information which you have otherwise been unable to obtain, then you may wish to file a Pure Bill of Discovery.

[21] Howard L. Oleck, *Historical Nature of Equity Jurisprudence* 20 Fordham Law Review, 40 (1951)("the plaintiff set forth his cause in a 'bill'.")

[22] ***Mesia v. Florida Agr. and Mechanical University School of Law***, 605 F. Supp. 2d 1230 (M.D. Fla. 2009), ***Hernandez Perez v. Citibank***, N.A., 328 F. Supp. 2d 1374 (S.D. Fla. 2004), ***Gill v. Smith***, 157 So. 657 (Fla. 1934), *See*, Chapter VLVII, "Bills of Discovery, And Bills To Preserve And Perpetuate Evidence," in Volume II of Joseph Story, LLD., *Commentaries on Equity Jurisprudence As Administered In England And America*, 13th Edition, Fred B. Rothman & Co., Littleton, Colorado, 1988 (Originally published by Little Brown And Company, Boston, 1988), *See also*, ***Liberty Mutual v. Henriot Brumaire***, note 33 *infra*.

[23] John Norton Pomeroy, LL.D, *Pomeroy's Equity Jurisprudence*, 5 vols, Edited by Spencer W. Symons, The Lawbook Exchange, Ltd., 2012, volume I, pg 273-276, especially footnote no. 7, pg 276.

The remainder of this article will discuss the history behind the Pure Bill of Discovery in addition to discussing the nuts and bolts of how to file and prosecute a Pure Bill.

Overview of the Concept of Equity Jurisdiction[24]

Auxiliary jurisdiction in general, and presuit discovery in particular, can be traced from the ancient Roman procedure of "actiones interrogatoriae by which defendants were obliged to make an answer under oath to questions propounded, and actiones ad exhibendum in which the decree compelled the defendant to produce some specific thing."[25] The Roman concepts of law and equity became united into one court around the year A.D. 300.[26] After the Emperor Claudius conquered Britain,[27] the Island eventually benefitted from the influence of several aspects of Roman law.[28] The Norman Conquest of 1066 imported the concept of "common law" to Britain.[29]

By the fourteenth century, the British legal system had become quite rigid with all forms of action being prescribed by a particular "bill" that had to be filed with the Court.[30] Eventually, the British legal system came to be softened and expanded by the concept of equity.[31] The gradual adoption of equity by British canonical courts helped to lessen the rigor of the common law.[32] Once again, Roman law provided the "legal architecture" for this later development of British equity jurisprudence[33] and it received its actual manifestation in the form of the British Courts of Chancery.[34]

[24] Admittedly, my very brief discussion of the origins of equity jurisdiction is a gross simplification of an extremely diverse and historically broad topic; however, the summary should hopefully be enlightening.

[25] **Pomeroy,** *supra at* 281.

[26] **Oleck,** *supra at* 31 (1951).

[27] Thomas Edward Scrutton, *The Influence Of The Roman Law On The Law Of England*, Cambridge University Press, 1885, pg. 1 and following. This book can be found at: https://archive.org/stream/influenceofroman00scru#page/n19/mode/2up

[28] *Id.*; See also, Sir William Blackstone, *Commentaries On The Laws Of England; In Four Books*, George Chase, LLB, Ed. 3rd Edition, New York, Banks & Brothers Law Publishers, 1895, pg. 46-48.

[29] George Burton Adams, *The Origin of English Equity*, 16 Columbia Law Review, No. 2, February 1916, Pg. 87; for a useful timeline, see George Burton Adams, *The Continuity Of English Equity*, 26 Yale Law Journal 1917, pg 554; for a general discussion of the topic of Roman law and its reception into British law *see*, Harold Dexter Hazeltine, LittD, "Roman and Canon Law In The Middle Ages" Chapter XXI, pp. 697-764 in *The Cambridge Medieval History, Volume V: Conquest Of Empire And Papacy*, New York, the MacMillan Company, 1926; Chapter 44 of Edward Gibbon's, *The Decline And Fall Of the Roman Empire in Great Books of the Western World*, Edited by Robert Maynard Hutchins, Chicago, Encyclopedia Britannica, Inc., 1952; and Robert Tombs, *The English And Their History*, New York: Alfred A Knopf, 2015, especially pages 67-68, 99-100 and 207-208.

[30] **Oleck**, *supra at* 36.

[31] **Oleck**, *supra at* 20.

[32] Edward D. Re, *The Roman Contribution To The Common Law*, 29 Fordham Law Review, 447, 481 (1961).

[33] *Id.* at 493.

[34] John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 Cath. U. L. Rev. 59-61 (1961).

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PURE BILLS OF DISCOVERY

continued from page 5

Equity was the result rather than the cause of the powers of the British Courts of Chancery, and for this reason the history of post-Roman equity jurisprudence is fragmentary.[35] After Charles II was restored to the British throne in 1660, British equity jurisprudence became more systematic[36] and was eventually imported into the United States legal system.[37]

While Florida Courts at one time were divided into law courts and equity courts, each with its own set of procedural rules and jurisdiction, the two courts were merged in 1954 and now have a unified rule of procedure;[38] however, it is important to bear in mind that the distinctions between law and equity still matter and will influence how one goes about prosecuting a pure bill of discovery.[39]

Mechanics Of A Pure Bill Of Discovery

Florida Courts have granted Pure Bills Of Discovery in the following instances, 1) to allow drilling on land to determine if merchantable phosphate was present on the property,[40] 2) to uncover assets related to a multimillion dollar settlement agreement in a lawsuit filed in Switzerland,[41] 3) to order a health care provider to provide copies of its property lease agreement to an insurer,[42] 4) to discover items related to a fraud investigation (raw data, photos, clinic licensures, historical billing for certain CPT codes, how usual and customary charges were determined, copy of health care provider's fee schedule, guidelines for clinic's billing clerk, payments from the clinic to the assignees and intake sheets),[43] 5) for the inspection and preservation of a dock from which a person fell and was so badly injured that he could not communicate, and 6) for an injunction ordering that phone records be preserved by T-Mobile in addition to an order that T-Mobile produce the records in conjunction with a presuit fraud (SIU) investigation.[45]

Simply put, a Pure Bill Of Discovery can generally be utilized whenever a person or entity seeks information from another party when that information may be used as a claim or a defense in a potential future lawsuit.[46]

As a general rule, the only relief that can be given in a Complaint for Pure Bill Of Discovery is for the requested information or documents to be provided and the underlying controversy giving rise to the bill should not be adjudicated.[47] Such discovery is also not reciprocal – i.e. the discovery is only taken by the party who requests it in the Pure Bill of Discovery[48] – but Florida Courts nevertheless do have the power to order that such discovery be provided presuit.

A Pure Bill Of Discovery does not need to be sworn to[49] but a request for presuit discovery brought in a PIP suit pursuant to the mechanism of Fla. Stat. §627.736(6)(c) will need to be verified. It is also important to note that even though a party could obtain presuit discovery in a PIP suit pursuant to the statutory method allowed by Fla. Stat. §627.736(6)(c), an insurer can still use a Pure Bill Of Discovery to obtain the same information.[50] The presuit discovery allowed by Fla. Stat. §627.736(6)(c) will also be more limited[51]; therefore, the careful practitioner should use a Pure Bill of Discovery since it can ask for more expansive discovery.

If one does file a Complaint for Pure Bill Of Discovery, then one will undoubtedly encounter the objection that such complaints are "antiquated,[52]" "dinosaurs,[53]" or otherwise overly-burdensome on the court system[54]. These objections are unwarranted and should be overcome by the competent practitioner.

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[35] Theodore F. T. Plucknett, *A Concise History of the Common Law,* Liberty Fund, Inc., 2010, pg 677.

[36] *Id.* at 692; see generally, Charles P. Sherman, *Romanization Of English Law*, Yale Law Journal 1914 *and* Hessel E. Yntema, *Roman Law And Its Influence On Western Civilization*, 35 Cornell Law Review, 77 (1949).

[37] *See generally*, Fla. Stat. §2.01 "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state."

[38] Judge Cowart's dissent in ***Hutchens v. Maxicenters***, USA, 541 So. 2d 618, 623 (Fla. 5th DCA 1988).

[39] *See generally*, Richard V. Falcon and Robert C. Parker, Jr., *Merger Of Law And Equity In Florida – Problems And Proposals*, 20 U. of Fla. L. Rev., 173 (1968).

[40] ***Phiel v. Williams***, 59 So. 897 (Fla. 1912).

[41] ***Otto's Heirs v. Kramer***, 797 So. 2d 594 (Fla. 3rd DCA 2001).

[42] ***MRI Services, Inc. v. State Farm Mut. Auto Ins. Co.***, 807 So. 2d 783 (Fla. 2nd DCA 2002).

[43] ***State Farm Fire & Cas. Auto Ins. Co.* in re: *Aderson Aguy et. al. v. West Coast Medical Management***, 13 Fla. L. Weekly Supp. 472b (13th Cir. Ct. Judge Rex M. Barbas, January 2, 2006).

[44] ***Lewis v. Weaver***, 969 So. 2d 586 (Fla. 4th DCA 2007).

[45] Order On Plaintiff Liberty Mutual's Second Amended Motion For Leave To File Amended Complaint And For Pure Bill Of Discovery And For Temporary Injunction, ***Liberty Mutual Insurance Company v. Henriot Brumaire, et. al.*** 2013-15894-CC-23, 11th Cir. Ct., Judge Jason Emilio Dimitris, November 18, 2013.

[46] The best definition of a Pure Bill of Discovery was perhaps given by Josiah W. Smith,

> Every bill may properly be deemed a bill of discovery. But that which in Equity is emphatically called a bill of discovery is a bill which asks for no relief, but simply seeks a discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it, in some suit or proceeding in another court. Pg. 398

Josiah W. Smith, *A Manual of Equity Jurisprudence, Founded on Story's Commentaries And Spence's Equitable Jurisdiction*, 5th ed., London: V & R Stevens And G. S. Norton, 1856. This book and particular page can be found at: https://archive.org/stream/manualofequityj00smit#page/398/mode/2up; *see also* the following news articles: CBS Miami, "Exclusive: Marcos Barrios Speaks About Deadly Police-Involved Accident," November 19, 2012, http://miami.cbslocal.com/2012/11/19/exclusive-marcos-barrios-speaks-about-deadly-police-involved-accident/ the video of this report can be viewed at: http://miami.cbslocal.com/video/7978016-exclusive-marcos-barrios-speaks-about-deadly-police-involved-accident/; Izzy Kapnick, "Marvel CEO Faces New York Subpoena Battle," Courthouse News Service, December 4, 2015, http://www.courthousenews.com/2015/12/04/marvel-ceo-faces-new-york-subpoena-battle.htm, "Parents of missing teen boaters head back to court," http://www.wpbf.com/article/parents-of-missing-teen-boaters-head-back-to-court/8380460, and Alyssa Hyman "Perry Cohen's father looks into the possibility of a wrongful death suit," November 30, 2016, http://www.wptv.com/news/region-n-palm-beach-county/jupiter/perry-cohens-father-looks-into-the-possiblity-of-a-wrongful-death-suit

[47] ***Williams v. Phiel***, 63 So. 658 (Fla. 1913).

[48] *Id.*

[49] ***Campbell v. Knight***, 109 So. 577, 579 (Fla. 1926).

[50] ***First Nat. Bank of Miami v. Dade-Broward Co.***, 171 So. 510 (Fla. 1937).

[51] ***State Farm Mutual Automobile Insurance Company v. Shands Jacksonville Medical Center, Inc.***, - - So. 3d - - 2017WL633768 (Fla. 2017).

[52] Ross Chafin, "Trolls and Pure Bills: Antiquated Florida Discovery Law Creates a Perverse Incentive for the Filing of Frivolous Infringement Lawsuits," *University Of Miami Law Review*, November 7, 2012, can be found at http://lawreview.law.miami.edu/trolls-pure-bills-antiquated-florida-discovery-law-creates-perverse-incentive-filing-frivolous-infringement-lawsuits/

[53] Daniel Morman, "The Complaint for a Pure Bill of Discovery - - A Living, Breathing Modern Day Dinosaur?" *The Florida Bar Journal*, March 2004, Volume 78, No. 3, pg. 50ff; see also "When Diplomacy Fails" http://files.ali-cle.org/thumbs/datastorage/skoob/articles/BK38-CH12_thumb.pdf

[54] ***National Car Rental v. Sanchez***, 349 So. 2d 829 (Fla. 3rd DCA 1977).

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PURE BILLS OF DISCOVERY

continued from page 6

Neither Article V §3 of the Florida Constitution or the Florida Rules of Civil Procedure prohibit Pure Bills Of Discovery. As such, there is no legal bar to such a bill.[55] The Florida Rules of Civil Procedure do not abrogate or abolish the traditional right of a court to entertain Pure Bills Of Discovery.[56]

Pure Bills Of Discovery are often utilized in the context of medical malpractice suits and Florida's medical malpractice statutes do not prevent a court from granting Pure Bills Of Discovery in the "med-mal" context.[57] Since Pure Bills Of Discovery are equity pleadings they can be filed in either county court or circuit court. County courts have equity jurisdiction up to $15,000.00 for the amount in controversy, but circuit courts are courts of plenary equity jurisdiction, so a party can file a Complaint For Pure Bill Of Discovery in a circuit court even if the amount in controversy is less than $15,000.00.[58]

A suit for discovery is initiated by a party filing a "Complaint For Pure Bill Of Discovery"[59] with either the county or circuit court as appropriate. The complaint should "show" the following: 1) the matters concerning which the discovery asked for is sought, 2) the interests of the several parties in the subject of the inquiry, 3) the complainant's right to have the relief prayed, its title and interest and what the relationship of same is to the discovery claimed, and that the discovery so attempted to be had is material to the complainant's rights that have been duly brought into litigation on the common-law side of the court under circumstances that entitle the complainant to a disclosure of what is necessary to maintain its own claim in that litigation, and not that of the defendant in the case.[60]

Put more simply, a Pure Bill Of Discovery cannot be used as a "fishing expedition" to see if a cause of action exists[61] nor can a Pure Bill Of Discovery be filed if a lawsuit concerning the same controversy has already been filed.[62] A Pure Bill Of Discovery cannot be filed solely to see if a potential lawsuit would be frivolous.[63]

If the Complaint is granted, then the "plaintiff" can ask the court for leave to conduct discovery using any of the methods allowed by the Florida Rules of Civil Procedure.[64] The Complaint can also ask for an injunction to preserve records so that such records will not be destroyed before the plaintiff has an opportunity to examine them.[65] If the Complaint for Pure Bill Of Discovery is granted, then the Complaint can later be amended to state a cause of action and an actual lawsuit can be commenced in the form of an Amended Complaint which asks for legal relief, equitable relief or both.[66]

Since a Pure Bill of Discovery is an "equity" action, one presumes that a court would not award attorney's fees since the complainant does not recover money damages if the Complaint is granted.[67] However, at least one court has held that an analogous action brought pursuant to Fla. Stat. §627.736(6)(c) can result in an award of fees.[68]

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[55] ***Polling v. Petroleum Carrier Corp.***, 194 So. 2d 925 (Fla. 1st DCA 1967).

[56] ***Carner v. Ratner***, 207 So. 2d 310 (Fla. 3rd DCA 1968); *See*, ***Christopher L. James v. Barnett Bank of Palm Beach County, etc., et. al.***, 4 Florida Law Weekly Supp. 458a (15th Cir. Ct., Judge Kenneth A. Marra, June 14, 1996).

[57] ***Adventist Health System/Sunbelt, Inc. v. Hegwood***, 569 So. 2d 1295 (Fla. 5th DCA 1990); *See*, ***Cardiovascular Surgeons, P.A. v. Anthony***, 773 So. 2d 633 (Fla. 5th DCA 2000).

[58] ***Millennium Diagnostic Imaging Center, Inc. v. State Farm Mut. Auto Ins. Co.***, 129 So. 3d 1086 (Fla. 3rd DCA 2013).

[59] Examples of such Complaints can be found in the following Florida cases: ***Rayon Payne v. Julia Ruth Beverly***, 2006-CA-003822-O, 9th Cir. Ct., Orange County; ***Rayon Payne v. Tucows, Inc., Julia Ruth Beverly & Host Gator.com, LLC***, 2006-CA-001697-O, 9th Cir. Ct., Orange County; ***Brandon Butzberger, a minor by and through his parent and natural guardian, David Butzberger v. Novartis Pharm Corporation***, a Delaware Corporation, 9:2006-CV-80700, U.S. District Court for the Southern Division of Florida; ***Don Hensarling v. Margaret Dunmire***, 2010-CA-018131-O, 9th Cir. Ct., Orange County; ***Open Mind Solutions, Inc., a foreign corporation v. John Does*** 1-313, 2011-32617-CA-01, 11th Cir. Ct., Miami-Dade County; ***Geico Casualty Ins. Co. v. Columbia Hospital (Palm Beaches, Limited Partnership d/b/a Columbia Hospital)***, 50-2011-CA-019367, 15th Cir. Ct., Palm Beach County; ***Mario Alberto v. Goodwill***, 2012-038344-CA-01, 11th Cir. Ct., Miami-Dade County; ***Liberty Mutual Ins. Co. v. Henriot Brumaire, et. al.***, 2013-015894-CC-23, 11th Cir. Ct., Miami-Dade County. The case of ***Pamela Jill Cohen v. Florida Fish And Wildlife, et. al.*** 50-2016-CA-004569-XXXX-MB, 15th Cir. Ct., Palm Beach County, is interesting reading as it concerns a mother's search for answers regarding her son's loss at sea.

[60] ***Publix Supermarkets, Inc. v. Frazier***, 696 So. 2d 1369, 1370 (Fla. 4th DCA 1997).

[61] ***Mendez v. Cochran***, 700 So. 2d 46 (Fla. 4th DCA 1997).

[62] ***Trak Microwave Corp. v. Culley***, 728 So. 2d 1177 (Fla. 2nd DCA 1998).

[63] ***JM Family Enterprises, Inc. v. Freeman***, 758 So. 2d 1175 (Fla. 4th DCA 2000).

[64] ***State Farm Mut. Auto Ins. Co. v. Goldstein***, 798 So. 2d 807 (Fla. 4th DCA 2001).

[65] ***Waterman Broadcasting Corp. v. Saro, Inc.***, 555 So. 2d 1273 (Fla. 2nd DCA 1989).

[66] ***Surface v. Town of Bay Harbor Islands***, 625 So. 2d 109 (Fla. 3rd DCA 1993) and ***Payne v. Beverly***, 958 So. 2d 1112 (Fla. 5th DCA 2007).

[67] ***State Farm Fire/Aderson***, *supra.*

[68] ***State Farm Mut. Auto Ins. Co. v. Siegfried Holz, M.D., P.A.***, 16 Fla. L. Weekly Supp. 531a (10th Cir Ct., Judge Karla Foreman Wright, March 27, 2009) *but see* ***Millennium Diagnostic v. State Farm***, *supra.*

APPELLATE

Affirmance of Remittitur.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, prevailed in a case before the Fifth District Court of Appeal. ***Thompson v. Avila***, No. 5D15-2152, 2017 WL 1202715 (Fla. 5th DCA Mar. 31, 2017). Here, the jury awarded the Plaintiff $1.3 million for future pain and suffering resulting from an automobile accident. Despite the jury's verdict, the trial court granted a remittitur of $250,000.00, and/or a new trial on damages. Following briefing and oral argument, the Fifth District affirmed that ruling.

Per Curiam Affirmance on Expert Testimony and Inadmissible Evidence.

Angela C. Flowers, of the Ocala office, handled an appeal in front of the First District Court of Appeal regarding a case **Stuart C. Poage** and **Brian Chojnowski**, of the Tallahassee office, tried in October 2015. The main two issues on appeal were the admissibility of the defenses' biomechanical expert's opinions and whether the trial court erred in keeping out evidence of who retained and paid the compulsory medical examination doctor, who was called by Plaintiff at trial based on favorable opinions for the Plaintiff.

Plaintiff's counsel tried to introduce facts outside of the record and unpreserved arguments. However, Angela's brief strategically and clearly set forth the arguments on appeal and as a result, the First District Court of Appeal, denied Plaintiff's arguments and issued a per curiam opinion.

The Court also granted Angela's Motion for Attorney's Fees which will be added to the $76,536.80, attorney's fee judgment obtained against the Plaintiff through the defenses' Proposal for Settlement.

Reversal for a New Trial on Damages.

Caryn L. Bellus and **Bretton C. Albrecht**, of the Miami office, prevailed in getting a $1.6 million judgment reversed for a new trial on damages. ***Haney v. Sloan***, 211 So. 3d 372 (Fla. 1st DCA 2017). This was an admitted liability auto accident case tried by **Steve Cozart**, of the Pensacola office, in which permanency of Plaintiff's neck injury was also admitted. However, the defense disputed Plaintiff's claims related to her alleged back injury and TMJ issues. In addition, the defense maintained that a substantial portion of Plaintiff's claimed medical expenses and alleged damages were caused by a subsequent, unrelated car accident. However, the trial court granted Plaintiff a directed verdict on past medical expenses, over defense objections.

The court then instructed the jury that all of Plaintiff's past medical expenses were caused by the subject accident. Plaintiff's counsel argued in closing that the jury should use the sum determined as a matter of law for the past, $130,577.18, to determine what to award Plaintiff for future medical expenses and pain and suffering. The jury then returned a verdict awarding Plaintiff $1,630.577.18, in total damages. Caryn and Bretton utilized post-trial motions to preserve and set up the issues for the appeal.

On appeal, Caryn and Bretton argued that the trial court erred in directing a verdict on past medical expenses, when there was evidence that a significant portion of Plaintiff's damages were caused by the subsequent, unrelated car accident. They further asserted that the error left the jury with the indelible impression that it had no choice but to award Plaintiff all of her claimed damages – past and future---and that it could not attribute any portion to the subsequent accident. They therefore argued that a new trial on all elements of damages was required. Following oral argument, the 1st District Court of Appeal agreed and reversed for a new trial on damages. In addition, because the judgment on the verdict was reversed, the court also reversed the judgment awarding Plaintiff attorneys' fees and costs under her proposal for settlement.

WOMEN IN THE LAW

We are honored to have four shareholders recognized and selected for inclusion in the 2017 Best Lawyers® "Women in the Law," Spring Business Edition produced in collaboration with the Coalition of Women's Initiatives in Law.

Betsy E. Gallagher | Caryn L. Bellus | Laurie J. Adams | Jane C. Rankin

Betsy E. Gallagher of our Tampa office and **Caryn L. Bellus** of our Miami office were selected for their Appellate work. **Laurie J. Adams** of our West Palm Beach office was recognized for Personal Injury Litigation and **Jane C. Rankin** of our Ft. Lauderdale office was selected for her work in Real Estate Law.

We are extremely proud of their dedication, integrity and commitment to excellence in the work they do.

ABOUT BEST LAWYERS

Best Lawyers is the oldest and most respected attorney ranking service in the world. For more than 30 years, Best Lawyers has assisted those in need of legal services to identify the attorneys best qualified to represent them in distant jurisdictions or unfamiliar specialties. Best Lawyers lists are published in leading local, regional, and national publications across the globe.

ABOUT THE COALITION OF WOMEN'S INITIATIVES IN LAW

The Coalition of Women's Initiatives in Law is a nonprofit membership association comprised of representatives of women's initiatives in Chicago and New York offices of law firms and corporations. Its mission is to benefit its member firms and companies and its individual in-house counsel members by providing positive avenues of communication, collaboration and guidance that help members to 1) enhance the recruitment, retention, and promotion of women lawyers and 2) support the building, implementation, and continued relevancy of women's initiatives in law firms and companies.

https://www.bestlawyers.com/Methodology

TRIALS, MOTIONS, MEDIATIONS

Defense Verdict in First Party Property Case Involving a Roof Leak.

Valerie A. Dondero and **Nicole Lauren Wulwick**, of the Miami office, obtained a defense verdict on a property case involving a roof leak. This result was the first defense verdict using the carrier's no peril created opening defense regarding the roof leak.

In this case, the Plaintiff's roof was repaired before the carrier was notified of the loss and the repairs had been made by a roofer who sustained a traumatic brain injury in a recent auto accident and could not testify at trial.

Based on the carrier's expert testimony, Plaintiff's counsel dismissed his "new roof replacement" claim and withdrew his roofing expert. However, he offered a well known architectural engineer, who testified on rebuttal that the Plaintiff's roof was "sucked up" by a sudden windstorm and that there was a "local tropical storm" despite the fact that the wind speeds were calculated at 17 mph and Plaintiff's expert never went up on the roof to check for wind damage.

Valerie and Nicole argued 27 Motions in Limine prior to trial and prevented Plaintiff's counsel from presenting policy interpretation testimony, claims adjusting testimony, conditions precedent to coverage testimony, and curtailed the Plaintiff's rebuttal experts from testifying outside the scope of their untimely reports and deposition testimony. Plaintiff's counsel even attempted to introduce a demonstrative roof shingle which was not on the exhibit list and was not even the correct type of shingle. The court struck the exhibit and the jury returned a complete defense verdict.

Motion for Summary Judgment in Material Misrepresentation Case.

Adam M. Friedman, of the West Palm Beach office and **Michael S. Walsh**, of the Ft. Lauderdale office, obtained a Summary Judgment in a material misrepresentation case. Here, the Insured had provided an inaccurate garaging address and failed to list his girlfriend and her two children on the policy application. Adam and Michael deposed the Insured and his girlfriend, who testified they were living together at the time of the application and that the car was not garaged at the address on the application.

At the Summary Judgment hearing, Michael used case law that showed that it did not matter that the misinformation was unintentional.

Lastly, Michael showed that the omission or concealment would have increased the premiums which had all been returned by the carrier.

Favorable Verdict in Wrongful Death Case.

Earleen H. Cote and **Mark A. Gaeta**, of the Ft. Lauderdale office, got a favorable verdict in a wrongful death action.

The Plaintiff, a girl with cerebral palsy, was 16 years old when her father was killed in an admitted liability accident where he was hit by a motor vehicle while riding a bicycle. While the daughter lived with her mother and not her father at the time of the accident, she visited him when she could, spoke to him twice a week, and spent time with him right before the accident.

The daughter was devastated by the loss and sought counseling for suicidal ideations and cutting. Earleen had to delicately bring out the gaps in the daughter's relationship with her father and the issues that they had during cross examination of the disabled young girl, without angering the jury.

After a short deliberation, the jury returned a verdict of almost half of what Plaintiff's counsel requested.

Defense Verdict in Negligence Case.

Brian E. Chojnowski and **Micah A. Andrews**, of the Tallahassee office, obtained a complete defense verdict in a negligence case. Plaintiff was a store employee who chased a shoplifter from a Family Dollar store. The shoplifter fought back and the employee crashed into the storefront window. The window had been installed in 1969-1970 and was not safety glass. Plaintiff sued the shopping plaza landlord for negligence, arguing that they had prior knowledge the glass windows were not safety glass and did not meet the building code requirements.

The jury deliberated for less than three hours and returned a complete defense verdict.

Summary Judgment in Personal Injury Protection Case.

Michael S. Walsh, of the Ft. Lauderdale office, obtained a Summary Judgment on an issue of first impression in the entire State of Florida. The issue in question was whether the phrase "allowable amount under the applicable schedule of Medicare Part B for 2007" as used in Florida Statute § 627.736(5)(a)(2)(2012), refers to Medicare's "Participating/Non-Participating" Fee Schedule or the "Limiting Charge" amount. As part of the Summary Judgment hearing, Michael was successful in striking the Plaintiff's expert affidavit as it failed to comply with the Daubert Standard.

As it relates to the Summary Judgment, Michael successfully argued that application of the participating/nonparticipating fee schedule was consistent with Florida Personal Injury Protection (PIP) law. Michael argued that the "Limiting Charge" is inconsistent with the PIP Statute as it is premised in the absence of an assignment of benefits; the "Limiting Charge" is a surcharge borne/paid by the Medicare insured; application of the "Limiting Charge" amount is inconsistent with the PIP Statute as it attempts to interchange the obligation of the Medicare insured with that of the Florida PIP insured when an assignment of benefits exists and Legislative history, construction, and intent support the incorporation of the "Participating" fee schedule into Florida Statute Section 627.736(5)(a)(2).

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Workers' Compensation Immunity Case.

Micah A. Andrews and **Stuart C. Poage**, of the Tallahassee office, received an Order Granting Final Summary Judgment on behalf of a plumbing company in a wrongful death case that occurred during construction of an academic building. Plaintiff sued our client, the employer of the deceased, who was crushed by a buck hoist while sitting in an unfinished window during a lunch break.

Summary Judgment was granted based on workers compensation immunity grounds. Plaintiff's counsel alleged our client's actions rose to the level of an intentional tort and that our client concealed or misrepresented the danger present by the buck hoist. Through Micah's skilled drafting of the motion and Stuart's deft oral arguments, the Judge was convinced and granted Summary Judgment.

Favorable Award in Arbitration.

Michelle Krone, of the Ft. Myers Office, received a favorable award in arbitration for a general contractor who was sued for allegedly failing to make payment to a subcontractor on a large construction project. Michelle successfully kept the sureties out of the arbitration and stayed the state court case pending the outcome of arbitration.

After three days and a six figure demand related to outstanding change orders, original contract sums and retainage, the subcontractor was awarded a little over $8,000.00, and minimal interest. Furthermore, our client, the general contractor, was awarded damages in the amount of six figures in its counterclaim. As a result, the state court action involving the sureties was dismissed with prejudice.

No Causation Verdict in Motor Vehicle Accident.

Stefanie D. Capps, of the Ft. Myers office, got a no causation verdict after a five minute jury deliberation in an admitted liability rear end motor vehicle collision where the Plaintiff underwent shoulder surgery, claimed aggravation of a prior lumbar fusion, and new neck injury.

The medical damages in this case were not contested, although causation was.

Aside from credibility issues, it was clear that the jury did not appreciate the Plaintiff taking the stand in rebuttal after Stefanie played surveillance video and claimed that the video was of her daughter and not herself.

However, a quick Google search verified that it was the Plaintiff in the video and not her daughter. Following this, the jury returned a defense verdict on causation.

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 in Personal Injury Protection Case.

Eric V. Tourian and **Joseph W. Carey**, of the Orlando office, obtained Summary Judgment on two personal injury protection cases. Here, the Claimants sought treatment at Advanced 3-D Diagnostic after their auto accidents. Advanced 3-D Diagnostic submitted their bills for the treatment of the Claimants and the Insurer paid both sets of bills from their respective PIP policies. Both Claimants had previously assigned their rights should a dispute arise between Advanced 3-D and the Insurer, and when Advanced 3-D did not receive payment in the amount that it felt it was entitled under the contract, suit was filed in both cases.

The Insurer defended its payments as being allowed by virtue of the schedule of maximum charges found in the Florida PIP Statute. In addition, the Insurer asserted that the contract unambiguously and clearly limited payment based on the schedule of maximum charges.

Advanced 3-D Diagnostic disagreed and took the position that the subject insurance contracts were ambiguous and that they did not clearly and unambiguously limit payment based on such a schedule of maximum charges.

After very spirited and contested hearings, the Judge took the matters under advisement and ultimately ruled that the contract was not ambiguous and that it clearly and unambiguously incorporated the schedule of maximum charges and granted Summary Judgments.

Summary Judgment in Personal Injury Protection Case.

Jarred S. Dichek and **Scott M. Simon**, of the Miami office, were successful in obtaining Final Summary Judgment on three cases. In these cases, Plaintiff's bills were the first received and the total amount billed fell below the deductible amount. The Insurer applied the Medicare fee schedule reductions to the bills submitted from the Plaintiff and then applied them to the deductible. Plaintiff argued that per Florida Statute § 627.736, the Insurer should not have applied any reductions and should have applied 100% of the bill towards the deductible. Plaintiff argued that as a result of the misapplication of the deductible, they could not balance bill the patient for the full amount of their bill and as a result they have been damaged.

Plaintiff relied upon § 627.736(5)(a)(4) which states that a provider is prohibited from balance billing a patient in excess of the allowable amount designated by the insurer. Further, Plaintiff argued that even if the Insurer remedied the allocation at this time, it was too late because the deductible has already been exhausted.

The Insurer's position was that no matter which way the deductible was applied, the Plaintiff would never have been entitled to benefits. Jarred argued that the deductible is extra contractual and the Insurer is only responsible for paying the $10,000.00, in benefits contracted for. Further, he argued that § 627.736(5)(a)(4) did not apply because a deductible can never be considered payment and the narrowly carved out exclusion to the statute applied in this case.

In the end, the court ruled that Plaintiff failed to present any evidence to show how his client was damaged and ruled in the Insurer's favor.

Presentations & Speaking Engagements

Our attorneys give presentations on a variety of topics throughout the year. Below are some of the topics presented by our team in the last few months.

- Social Media
- Good Faith Handling
- Bad Faith Prevention
- Punitive Damages in Alabama
- Florida 5 Hour Law and Ethics Update
- Comparative Negligence
- Multiple Claimants: Low Limits Solutions
- Florida Health Care Clinic Act, Fla. Stat. §§ 400.990-400.995, and how a violation of the Act can serve as a total defense.

In addition, several of our attorneys participated in speaking engagements across the country.

Caryn L. Bellus and **Brad J. McCormick**, of the Miami office, presented at the CLM Annual Conference. Brad participated on a panel that presented "Ideas for the Future: The Corporate and Insurance Client Relationship" and Caryn "Deciding Whether to Jump into The Ring of Fire or Just Walk Away – To Appeal or Not to Appeal?"

Caryn also presented at the Florida Bar's 2017 Hot Topics in Appellate Law Seminar in Orlando, Florida on May 4, 2017. She co- presented "Let the Wookie Write: Friend-of-the-Court Briefs."

Michael Balducci, of the West Palm Beach office, presented at a National Business Institute event on "Uninsured and Motorist Law - Made Simple."

Scott M. Rosso, of the Ft. Lauderdale office, presented "How to Document a Claim from the Perspective of Plaintiff and Defense" at the Windstorm Insurance Network Conference.


Jennifer Remy-Estorino

Blake H. Fiery, **Jason S. Stewart**, and **Michael J. Carney**, of the Ft. Lauderdale office, and **Jennifer Remy-Estorino**, of the Miami office, presented a five hour Law and Ethics Update for Florida League of Cities.

We welcome the opportunity to host a complimentary presentation 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.

Announcements & News

At Left:
Alexandra Paez and Jennifer L. Feld, both of the West Palm Beach Office

Below:
Conference Co-Chairs Amy Borman, General Counsel for the 15th Judicial Circuit and Jennifer L. Feld

Jennifer L. Feld, of the West Palm Beach office, was selected as a Chairperson for the 2017 Palm Beach County Bench Bar Conference, along with Amy Borman, General Counsel for the 15th Judicial Circuit. **Alexandra Paez**, of the West Palm Beach office, co-chaired the Young Lawyer's Division, and **Laurie Adams**, of the West Palm Beach office, was a panelist for the Federal session. The Bench Bar conference is a 40-year tradition, offering a unique forum to discuss pressing issues with the judiciary. This year's conference incorporated new topics, new practice groups, and new sessions. Attorneys who had been practicing law in Florida for over 50 years were honored, and the Diversity and Professionalism awards were presented. While honoring the past, the conference also focused on the future, by assisting attorneys and staff with the latest technological advancements in the legal profession. The event was held on March 10, 2017, and was supported by over 1,100 attorneys, judges, paralegals, and staff. Through their involvement, Kubicki Draper's West Palm Beach attorneys represented the firm as leaders in the community and in the legal profession.

Announcements & News

Stuart C. Poage, of the Tallahassee office, has completed the Florida Supreme Court Approved Training and is available to serve as an arbitrator in binding and non-binding arbitration proceedings.

Stuart is an "AV Preeminent" rated shareholder in the firm's Tallahassee office. He is Board Certified in Construction and licensed to practice in Florida, Georgia, and Kentucky state and federal courts. Stuart's practice areas include construction defects, premises, and products liability, transportation and trucking accidents, as well as complex civil litigation including wrongful death claims and property disputes. For more information, please contact Stuart at sp@kubickidraper.com.

Congratulations to **Jason S. Stewart**, of the Ft. Lauderdale office, for being selected by The National Black Lawyers to be included in the "Top 40 under 40" list in Florida for 2017. The National Black Lawyers promotes excellence in the legal profession for the accomplished black attorneys in the U.S. through advocacy training, marketing, networking and education of lawyers.

Kubicki Draper's Jacksonville Office Has Moved!
New Address:
76 S. Laura Street
Suite 1400
Jacksonville, FL 32202

Congratulations

Congratulations to **Nicole M. Ellis**, of the Miami office, and her husband Malcolm on the birth of their baby boy, Malcolm Ellis-Solomon, Jr.

LAW OFFICES

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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.

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