

KD in the Community

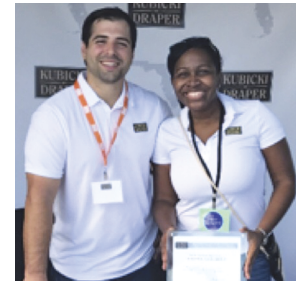
Kubicki Draper proudly sponsored and participated in the 13th Annual Kozyak Minority Mentoring Picnic at Amelia Earhart Park. The picnic was well attended by many judges and lawyers and provided networking opportunities to minority and women law students from every school in Florida. Our team met with dozens of students, giving them career advice, providing them information about our practices and directing them to our internship program.

Kozyak Minority Mentoring Foundation was created with the vision of building an effective pathway to diversity in the legal profession by providing opportunities and support to minority and women law students through mentoring programs, networking and fellowships. The Foundation has close ties to the Cuban-American Bar Association ("CABA"), the Florida Association of Women Lawyers ("FAWL"), Haitian Lawyers, Caribbean Lawyers Association, the Gay and Lesbian Lawyers Association, Florida Muslim Lawyers, the National Hispanic Bar Association and many other voluntary bar associations.

Jennifer L. Feld, of the West Palm Beach office, spoke on a panel of practitioners at the Palm Beach County New Attorney Breakfast along with Judges Cox, Blanc, and Weiss. The panel of speakers provided key advice to assist new attorneys with practicing law in Palm Beach County. Specifically, Jennifer discussed navigating a new area of practice, mistakes to avoid in the courtroom, and professional organizations that help establish a successful legal career. During the breakfast, **Alexandra Paez**, of the West Palm Beach office, promoted the Young Lawyers session for the Palm Beach County Bench Bar Conference.



Charles Watkins, Sarah Goldberg, Charles Kondla, Jennifer Remy-Estorino and Brad McCormick



Charles Kondla and Samantha Ketant



Raymond Miller, Jim Nosich, President Malou Harrison, Dr. Sherrilyn Scott, Jeff Davis, Dan Dolan, Peter S. Baumberger

Peter S. Baumberger, of the Miami office, for the fourth consecutive year, moderated the annual Teachers Law School at Miami Dade College. The American Board of Trial Advocates (ABOTA), sponsors these events across the country to advance civics education. This year, Peter recruited Miami-Dade Circuit Court Judges, William Thomas, Lisa Walsh, and recently retired Judge Stanford Blake. The event was a great success, with over 100 Miami-Dade teachers in attendance.



Jennifer L. Feld, of the West Palm Beach office, co-chaired the Anti-Defamation League's (ADL) ArtWorks 2016 art exhibition and fundraiser featuring two local artists. Kubicki Draper showed their support for the arts and the community by sponsoring the event. The goal of ArtWorks is to engage, empower, and educate the local community about the mission and impact of ADL through art. ArtWorks raised funds to support

ADL's mission to protect civil rights for all, while fighting bigotry, hate crimes, bullying in schools, racial, homophobic, and anti-Semitic activity.

EDITOR
Jill L. Aberbach
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The Evolution of Early Resolution and Cost Containment

By David M. Drahos



Personal injury attorneys often describe the practice of law as the search for justice whereas defense attorneys describe the practice of law as the search for truth. In most cases, both sides can agree the search for justice and the search for truth through prolonged and expensive litigation, does not serve the best interests of their clients. Certainly there are specific cases that cannot be evaluated without discovering all of the facts and thoroughly investigating the evidence. However, given the overwhelming odds that cases will be resolved by agreement rather than by a jury, as outlined below, it is advantageous for both sides to investigate their settlement options as early as possible, before engaging in prolonged and expensive litigation.

The Florida Office of the State Courts Administrator keeps track of statistics on the state court system. The most recent data indicates there were 263,808 civil case dispositions in Florida during the 2014 to 2015 fiscal year. Of those civil case dispositions, only 696 were disposed by a jury. That means that **less than 0.3% of all civil cases disposed throughout the state of Florida during the 2014 to 2015 fiscal year were decided by a jury.** Broward County had the highest civil jury trial rates with 115 disposed by jury, Miami-Dade having the second highest with 112 disposed by jury, and Palm Beach having the third highest in the state with 81 disposed by jury. The most experienced trial attorneys know that in reality, the outcome of most civil cases will not be obtained through a jury, but rather, through settlement, which can benefit both sides if conducted early in the litigation process. Superior knowledge through early investigation of the facts equals greater leverage, and negotiating with greater leverage results in a more favorable outcome.

Of course, not all cases can be resolved without the tactical benefits of formal discovery provided through litigation. However, it is in the best interest of the defense to use any and all pre-suit investigative strategies to obtain superior knowledge, which in turn will allow for greater leverage and more favorable results.

Examinations Under Oath

Almost 135 years ago, the United States Supreme Court defined the purpose of an examination under oath in **Clafin v. Commonwealth Insurance Company**, 110 U.S. 81 (1884). The Supreme Court explained that an examination under oath enables an insurer to obtain both claim information and documents in the possession and control of the insured:

- (1) for a proper and fair claim evaluation;
- (2) to help an insurance company determine its own policy obligations; and
- (3) to enable the insurer to protect itself against fraudulent claims.

The purpose of an examination under oath is to obtain information to make accurate claims decisions. All too often claimants and their attorneys do not respond to written or oral requests for information. An examination under oath can serve as a more efficient method to formally interview the claimant with respect to particular aspects of their claim. It is also an opportunity for the claimant to explain, in their own words, the basis of their claim. This type of examination effectively conducted, is a practical and swift method of investigating the various critical components of a claim, but most importantly, it allows for the opportunity to obtain a visual impression of the claimant to determine if the claimant will serve as a favorable witness in front of the jury, whether the claimant is seemingly honest and truthful, and whether the claimant is visibly injured or malingering. An examination under oath provides the defense with an early analysis of the claim which in turn, will provide a more accurate and effective resolution plan. It also is an opportunity to obtain impeachment information to help resolve the claim early, or to later discredit the claimant, should the claim enter litigation.

Recent discussions have arisen as to whether an examination under oath has any evidentiary value in a trial. In **Royal Bahamian Ass'n, Inc v. QBE Ins. Corp.**, the Southern District Court of Florida, denied the policyholder's motion in limine to preclude the examination under oath testimony of its corporate representative at trial, classifying the examination under oath testimony as a party admission under Federal Rules of Evidence 801(d)(2). No. 10-21511, 2010 WL 4123989 (S.D. Fla. Oct. 20, 2010). The court therefore ruled the examination under oath could be used as evidence and for impeachment purposes at trial.

Unfortunately, pre-suit examinations under oath are usually reserved for first-party cases and are not available in third-party civil cases. However, when retained pre-suit in third-party cases, we have found success in requesting an informal meeting with the claimant and the claimant's counsel prior to filing suit. When attending the informal meeting we have been able to accomplish many of the goals of an examination under oath, as we are able to investigate, informally, the basis for the claims, and can make a visual impression of the claimant's credibility and alleged injuries.

Pre-Suit/Early Mediation

Lawyers and sophisticated clients are seeing and utilizing the advantages of pre-suit and early mediation. Given the overwhelming statistics indicating that lawsuits will be resolved by agreement rather than a jury, it is best for both sides to investigate their settlement options before engaging in prolonged litigation. The further litigation proceeds, the more the parties are invested



SPOTLIGHT ON :

Francesca Ippolito-Craven

Francesca A. Ippolito-Craven, a shareholder in the Miami office, grew up in Tampa, Florida and went to Florida State University for college where she majored in English with an emphasis in business. Francesca's parents are Italian, and her roots brought her to study abroad in Florence, Italy for a semester. After graduating, Francesca worked as a freelance sports journalist prior to attending law school.

Francesca's family valued the importance of education as most of the members of her family are doctors, lawyers and teachers, both in the United States and in Italy. After realizing her interest in law trumped that of becoming a doctor, she attended Stetson University College of Law to obtain her juris doctor degree. While in law school, Francesca's interest and research in human rights developed into summer legal internships with the United Nations High Commissioner for Refugees and the International Committee of the Red Cross Henry Dunant Institute in Geneva, Switzerland.

Following law school, Francesca worked two years in the public defenders office, followed by six years in private practice before joining Kubicki Draper. Throughout her eleven years at Kubicki Draper, Francesca's practice has focused on the

hospitality industry, which includes operations, contracts, risk management, construction and development, and litigation. Francesca describes her experience at Kubicki Draper as an extension of her home. The firm's culture has cultivated a positive working environment that has allowed Francesca to develop and fine tune her legal skills through writing, litigation, and advocating for her clients through all legal issues.

Francesca believes one of the most rewarding aspects of practicing law is the stimulating and dynamic learning experiences that come from each and every case.

Her writing skills and ability to analyze key legal issues allow Francesca to provide exceptional service to her clients. This client experience is also enhanced by her active participation in the legal community as she is a member of various hospitality associations and is on the board of the Academy of Hospitality Industry Attorneys (AHIA). Francesca is also published in the Hotel Business Review and Tort Law Desk Reference A Fifty-State Compendium.

On a personal level, Francesca's husband is a maritime attorney and her two daughters are both in the student division of the Miami City Ballet. In her free time, Francesca loves to travel, enjoys food, wine, and going to the ballet.

THE EVOLUTION OF EARLY RESOLUTION AND COST CONTAINMENT *continued from page 2*

financially and emotionally in the dispute. Pre-suit and early mediations can often times assist the parties in considering the effect further litigation will have on their outcome and to consider whether it is worth spending time and money to battle for a better outcome. Pre-suit mediation is also excellent cost containment for both sides.

Although pre-suit mediation is becoming more common, not all cases end in settlement. However, pre-suit mediation allows parties the opportunity to present their arguments to the other side early in the process, to explore alternatives, and to make an informed decision prior to proceeding with a lawsuit or prolonged litigation. From a defense perspective, it allows the opportunity to make arguments directly to the claimant as opposed to filtering arguments through claimant's counsel, who may or may not be providing their client the information. Pre-suit mediation also provides an opportunity to explain to the claimant that their case can end now as opposed to dragging on for several years.

If the case does not resolve at a pre-suit mediation, defense counsel is able to narrow and focus further investigation and discovery, on specific aspects of the claim to assist in moving the claim towards a resolution. More importantly, it allows another opportunity to evaluate the claimant's jury appeal and to learn what the claimant is willing to accept.

Some personal injury attorney's believe attending a pre-suit or early mediation is a sign of weakness. All too often we hear personal injury attorney's say they will not agree to a pre-suit mediation because they want the entire policy limits to resolve the case, and will take nothing less. In these scenarios it may be beneficial, of course depending on the specific facts of the case, to prepare a written detailed offer to the claimant outlining the arguments which would otherwise be made during a pre-suit mediation opening statement. This method accomplishes the goal of presenting the claimant with both sides of the case sooner rather than later, and allows the claimant to make an informed decision prior to entering into litigation, or if in suit, prolonging litigation unnecessarily.

Conclusion

Most civil cases, 99.7%, are resolved through negotiation. The cost of a pre-suit examination under oath, an informal meeting with the claimant, or a pre-suit mediation will likely be less than the first deposition once litigation commences. It should be noted that if suit is filed, the case will be sent to a court ordered mediation prior to trial. Thus, It is becoming more and more evident to both sides, that the earlier the parties investigate their settlement options, and the earlier the defense obtains the information necessary to properly evaluate the claim, the better the prospect for an early and cost effective resolution which benefits both the justice and truth seeker.



How Hotels Can Minimize the Bite of the Zika Virus



By Francesca-Ippolito-Craven

on behalf of the Hospitality and Retail Practice Group

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The Zika virus has created a potential myriad of legal issues that should be considered by hotel owners and operators in the United States and its territories, particularly in light of the fact that the World Health Organization (WHO) has declared that the Zika virus infection and its associated congenital and other neurological disorders continues to be a "public health emergency of international concern." The U.S. Centers for Disease Control and Prevention (CDC) has also advised that pregnant women should consider postponing non-essential travel to locales that have been zoned areas of active transmission. Hotel owners and operators may potentially face exposure to workers' compensation claims and personal injury lawsuits if a guest or employee can prove that he or she contracted a Zika infection when bitten by a Zika infected mosquito on a hotel's premises, developed a Zika linked illness or disease, and that the hotel failed to take reasonable measures to control mosquitos to provide for the safety of their guests. Additionally, hotels may be faced with attempts, some disingenuous, to terminate or cancel future scheduled group events, such as weddings, conferences and meetings, on the basis that attendees potentially may be exposed to the Zika virus. Hotels must consider the health and safety of their guests and employees, while at the same time, preserve and promote guest occupancy and attendance at events.

History of Zika

According to the WHO, the Zika Virus was first isolated from a rhesus monkey in the Zika forest of Uganda in 1947. The first reported cases of humans infected with Zika were in Uganda and the United Republic of Tanzania in 1952. From the 1960s through the 1980s, human infections were found across Africa and Asia and were typically accompanied by mild illness. The first large outbreak of disease caused by Zika infection was reported on Yap Island, Federated States of Micronesia in 2007. In July, 2015 Brazil reported an association between the Zika virus infection and Guillain-Barré Syndrome (GBS). In October, 2015 Brazil reported an association between Zika virus infection and microcephaly in infants.

Current Zika Virus Outbreaks

The CDC has reported there are currently Zika virus outbreaks occurring in 48 countries in the Americas (including the United States), three United States Territories, eight Oceania/Pacific Islands, Cape Verde (Africa), and Singapore (Asia). As of November 16, 2016, the CDC has advised there are 139 locally acquired mosquito-borne cases reported in Florida, and 4,115 travel-associated cases reported throughout the United States. Of the reported locally acquired cases in the United States Territories, there are 31,294 in Puerto Rico, 603 in the U.S. Virgin Islands, and 54 in American Samoa. Of the reported travel-associated cases in the U.S. Territories, there are 115 in Puerto Rico, two in the U.S. Virgin Islands, and zero in American Samoa.

An area of Miami Beach, Florida has recently been declared by the CDC a zone of active Zika transmission. This has prompted a rapid response by governmental agencies, which has included aerial spraying to eradicate or control mosquitos.

Modes of Transmission

According to the CDC, the Zika virus is transmitted to humans primarily through the bite of an infected Aedes species mosquito. This species includes the Aedes Eegypti ("Yellow Fever Mosquito") and the Aedes Albopictus ("Asian Tiger Mosquito"). Other modes of transmission include from pregnant mother to her fetus (intrauterine and perinatal transmission), or through sex, blood transfusion or laboratory exposure. Fortunately, once a person has been infected, he or she is likely to be protected from future infections.

Symptoms and Illnesses Potentially Resulting from a Zika Infection

The CDC has advised that many people infected with the Zika virus won't have any, or will only have very mild, symptoms. The most common symptoms are fever, rash, joint pain and conjunctivitis. Other symptoms include muscle pain and headaches. These symptoms may last several days to a week. People usually don't get sick enough to go to the hospital, and very rarely die. Thus, many people do not even realize they have been infected.

If a pregnant mother is infected with Zika she may pass it to her fetus and it may cause microcephaly and other birth defects. Microcephaly is a birth defect where a baby's head is smaller than expected when compared to babies the same sex and age. Often, babies with microcephaly have smaller brains that might not have developed properly. Other problems may include eye defects, hearing loss and impaired growth in infants. A Zika infection should not affect future pregnancies, as long as a mother does not become pregnant for at least eight weeks after potential exposure or symptoms start.

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Zika may cause a rare sickness of the nervous system known as Guillain-Barre syndrome (GBS). GBS causes a person's own immune system to damage nerve cells, which may lead to muscle weakness and sometimes paralysis. Fortunately, only a very small proportion of people with a recent Zika virus infection contract GBS.

Presently, there is no specific treatment for the Zika virus. In the United States, significant resources recently are being expended to develop a vaccination.

Prevention of Claims and Lawsuits Based Upon Zika

While hotel employees and guests may attempt to pursue claims or lawsuits based on personal injury to themselves or their infants, it may be very difficult to prove liability on the part of the hotel. The employee or guest would have to prove that he or she was bitten by a Zika infected mosquito on the premises of the hotel. This likely would be difficult, particularly since mosquitos are transient, and symptoms in humans are not instantaneous and usually develop two to seven days after exposure.

Hotels can make reasonable efforts to prevent their employees and guests from being bitten by Zika infected mosquitos. The CDC, WHO, health departments for various states and Occupational Safety and Health Administration (OSHA) have guidelines that can be considered. Efforts can be made to prevent and control mosquitos by using larvicides or insecticides, removing standing water, removing plants that retain large amounts of water, using screens and air conditioning, sealing and avoiding build up of garbage, and making sure doors and windows remain closed to the outdoors. Environmental Protection Agency (EPA) registered mosquito repellants can be made freely available to employees and guests for use. Bottles of repellant can be placed in indoor and outdoor common areas, near exit doors, at the reception area, in break areas and in guest rooms. Guests and employees could be encouraged to wear protective clothing. Clear and visible signs can be posted advising guests and employees of measures that should be considered to protect themselves against mosquito bites.

Group Event Cancellations

Meeting and event planners and hosts may attempt to cancel or terminate future events, or substantially reduce room blocks, due to the Zika virus in zones of active Zika transmission. The success of termination or cancellation of an event, or reductions in room blocks, likely depends, however, on the particular wording of the termination, cancellation and/or attrition clauses in the event contract.

Termination of the event based upon "force majeure" may prove to be difficult to the planner or host. "Force majeure" is typically considered events beyond the nonperforming party's control, such as acts of God, natural disasters or government actions, that the parties agree should excuse contractual nonperformance. To a hotel, "force majeure" may mean it is totally impossible for the meeting or event to be held or for the hotel to provide its facilities or services. A planner or host may attempt to interpret "force majeure" as an act or event outside the contract that materially affects the event or makes it substantially more difficult to stage the meeting as planned or attract the previously anticipated number of attendees.

A contract is canceled when one party decides not to perform for reasons other than "force-majeure." As stated above, success of cancellation will depend on the wording of the contract.

Hotels in zones of active Zika transmission should anticipate event planners and hosts negotiating future events with Zika in mind. Thus, careful attention must be given to the specific wording of the above-mentioned clauses to make sure there is a meeting of the minds between the parties and to avoid the potential of future disputes.

Insurance Considerations

Hotels may have difficulty securing coverage and indemnification for incurred damages due to Zika. Insurance companies may require a significant premium, or specifically exclude coverage for, workers' compensation, personal injury, or cancellation of events due to the Zika virus. Insurers may seek to deny coverage if it has a blanket exclusion for communicable diseases (those which are spread between people or from animals to humans). It is questionable, however, if Zika fits within the definition of communicable disease.

Conclusion

As discussed above, the Zika virus certainly and potentially creates numerous legal issues that should be kept in mind by hotel owners and operators. Of course, hotels must always consider the health and safety of their guests and employees first. At the same time, however, efforts must be made to preserve and promote event occupancy. Consideration must be given to the current and future wording and specificity of cancellation, termination and attrition clauses to prevent cancellation or termination of upcoming and future events.

WE ARE PLEASED TO INTRODUCE OUR NEW ASSOCIATES:

MIAMI

**Jeremy Chevres, Benjamin Cohen, Courtney M. Drew
Brian L. Ellison, Barbara Fox, Mitchell Schermer**

FT. LAUDERDALE

Jacqueline Zewski

FT. MYERS

Brittany D. Ligan

APPELLATE

Per Curiam Affirmance in Stand Your Ground Case.

G. William Bissett, of the Miami office, obtained a per curiam affirmance from the Third District Court of Appeal on the trial court's order of complete dismissal based on the "stand your ground law" immunity/defense. **Munoz v. Davis**, 3D15-1431 (Fla. 3d DCA Nov. 9, 2016). This case, which had been litigated since 2011, involved a teenager who was shot and killed while stealing a jet ski from the home/yard of the Defendants, a prominent Plaintiff's attorney and his wife. The Defendants' wife happened upon the Plaintiffs' teenage son trespassing in the backyard. She yelled for her minor son to get his father's shotgun as her fear was escalating. The decedent failed to respond to the wife's frantic shouts to leave the property. She also saw that the decedent was holding a black object which she thought was a gun. Unbeknownst to the wife and her son, the decedent/criminal was deaf. The decedent lifted the 500+ pound Jet Ski off of the davit on the seawall and pushed it into Biscayne Bay. The criminal had thrown the black object into the front compartment and was still reaching into the front compartment. When the decedent got the Jet Ski started (using the black object), he circled directly below them in an idle speed instead of speeding away. After a menacing eye contact was made, the wife/mother told her son to "shoot" and 3 seconds later the firing of the Mossberg shotgun was heard on the 911 call. By that time, the Jet Ski had rotated, changing decedent's position such that two pellets struck him in the head from a side/rear trajectory.

In May 2015, Bill and **Peter Murphy**, of the Ft. Myers office, obtained the dismissal in the trial court following a "mini-trial" on the "stand your ground law" defense. In lengthy, complex motions, and at the hearing, Pete and Bill successfully argued that the Defendants' son acted reasonably under the circumstances in fear for the safety of himself and the others in his home, and had no duty to retreat before using deadly force to protect himself and his mother from the imminent danger they felt was posed by the thief on their property who was not responding to repeated verbal warnings to leave. Bill raised similar arguments in opposing Plaintiff's appeal, and ultimately persuaded the appellate court to affirm the trial court's decision to dismiss based on the stand your ground law immunity/defense.

Reversal of Judgment in Workers' Compensation Immunity Case.

Sharon C. Degnan, of the Orlando office, was successful in obtaining the reversal of a judgment in excess of \$2 million dollars. **Wert v. Camacho**, 41 Fla. L. Weekly D2042 (Fla. Sept. 2, 2016). The Second District Court of Appeal held that the "Unrelated Works" exception did not apply in a horizontal workers' compensation immunity scenario which precludes an employee and his employer from asserting an immunity defense in a case brought by an employee of an independent horizontal subcontractor. The court clarified that where two subcontractors are working on a project with a contractor under separate contracts and thus, are not engaged in a vertical relationship, the "Unrelated Works" exception is inapplicable since the Plaintiff and the alleged tortfeasor cannot be deemed to work for the same employer, which is necessary for the "Unrelated Works" doctrine to apply.

Per Curiam Affirmance in a Post-Verdict Set Off.

Sharon C. Degnan, of the Orlando office, obtained a per curiam affirmance by the Fourth District Court of Appeal, of a final judgment. **Bhoorasingh v. Dennis**, 197 So. 3d 1211 (Fla. 4th DCA 2016). In the appeal, the Plaintiff had tried to set aside a post-verdict set off that was applied to the judgment in an amount in excess of \$274,000.00, which was approximately a 50% reduction of the damages award in an auto negligence case. Plaintiff had argued on appeal that there should only have been a 25% reduction of damages taken as a set off. In rejecting Plaintiff's argument on appeal, the court agreed that Plaintiff had failed to properly preserve any of the issues for appellate review.

Affirmance in Sinkhole Loss by The Florida Supreme Court.

G. William Bissett, of the Miami office, obtained a ruling by The Florida Supreme Court, in favor of FIGA. **De La Fuente v. FIGA**, SC15-519 (Fla. Oct. 20, 2016). The Court approved the Second District's decision in all respects, and answered both certified questions in the affirmative. This is a case with enormous statewide importance and a far-reaching impact.

This case involved a sinkhole loss in which the trial court had compelled FIGA to participate in appraisal and then entered a final judgment confirming the appraisal award in favor of the Insureds. On appeal to the Second District Court, Bill argued reversal was required. The Second District Court agreed, and, in reversing, certified two questions of great public importance.

The Florida Supreme Court's analysis focused on the following two certified questions:

I. DOES THE DEFINITION OF "COVERED CLAIM" IN SECTION 631.54(3), FLORIDA STATUTES, EFFECTIVE MAY 17, 2011, APPLY TO A SINKHOLE LOSS UNDER A HOMEOWNERS' POLICY THAT WAS ISSUED BY AN INSURER BEFORE THE EFFECTIVE DATE OF THE NEW DEFINITION WHEN THE INSURER WAS ADJUDICATED TO BE INSOLVENT AFTER THE EFFECTIVE DATE OF THE NEW DEFINITION?

II. DOES THE STATUTORY PROVISION LIMITING FIGA'S MONETARY OBLIGATION TO THE AMOUNT OF ACTUAL REPAIRS FOR A SINKHOLE LOSS PRECLUDE AN INSURED FROM OBTAINING AN APPRAISAL AWARD DETERMINING THE "AMOUNT OF LOSS" IN ACCORDANCE WITH THE TERMS OF THE HOMEOWNERS' POLICY OF INSURANCE?

The Court held that both questions should be answered in the affirmative and approved the Second District Court's decision in all respects.

Per Curiam Affirmance in Fatal Accident with Pedestrian.

Bretton C. Albrecht, of the Miami office, obtained a per curiam affirmance and order granting our appellate fees. This case involved a fatal car accident in which a pedestrian was killed after being struck by a car driven by our client. **Peter S. Baumberger**, of the Miami office, deposed all the investigating officers who supported the position that the client could not have seen the young pedestrian, who was crossing the street when she was hit. **Christopher M. Utrera**, of the Miami office, drafted the motion, argued it in front of the trial court and won. The Plaintiff appealed the lower court's ruling and lost.

TRIALS, MOTIONS, MEDIATIONS

Denial of Entitlement to Attorney Fees in Personal Injury Protection Case.

Anthony G. Atala, of the Miami office, obtained a court ruling that denied Plaintiff's entitlement to attorney fees. In this case, the insurance company paid the medical benefits due pursuant to a demand letter. However, in PIP, when the medical benefits are not paid within 30 days of receipt of the bills, the statutory punishment is that the insurer owes interest, postage incurred in sending out a demand letter, and a 10% penalty up to \$250.00.

In this case, while the Insurer paid the interest, they forgot to pay the postage and penalty which amounted to approximately \$207.00. Rather than contacting the insurance company to ask for the additional money, the medical provider filed a lawsuit. As soon as it was received, Anthony had the Insurer confess judgment and disputed the Plaintiff's entitlement to attorney fees. Anthony argued that the Plaintiff and not the Insurer gave rise to the need for a lawsuit and the statutory attorney fee provision did not apply. The court agreed with Anthony and denied the Plaintiff's entitlement to attorney fees. This is the first ruling in Miami-Dade County.

Final Summary Judgment in Workers' Compensation Immunity Case.

Deborah J. Bergin and **Sebastian C. Mejia**, of the Orlando office, obtained a Final Summary Judgment in a Workers' Compensation Immunity defense in a wrongful death case. The case arose from an industrial accident where a worker was cleaning a mixing box used to combine cement, soil, and water to make road-base material. The cleaning process required the worker to climb inside the mixing box and "chip away" at the accumulated cementitious material that bound to the mixing augers and sides over the course of the day. After the employees finished cleaning the machine, it needed to be turned on to remove any loose debris. The operator of the plant turned the mixer on without knowing the worker was inside, which led to the worker being killed.

The Plaintiff's estate brought a wrongful death claim against both the employer and the fellow employee who energized the machine. Deborah drafted the original Motion for Summary Judgment and for nearly two years Plaintiff's counsel delayed the hearing on the Motion by claiming he needed more time for discovery. After more than 30 depositions and hundreds of discovery requests, Sebastian drafted a Reply Brief addressing the various issues raised during discovery, arguing that the Plaintiff was still unable to meet his burden as outlined by Florida Statute § 440.11.

After a contested hearing, the Judge granted Final Summary Judgment in favor of both the employer and the employee because the court found that the employer's acts were not virtually certain to result in serious bodily injury or death, and because the fellow employee's acts did not rise to the gross negligence standard.

Summary Judgment in Personal Injury Protection Case.

Michael S. Walsh, of the Ft. Lauderdale office, obtained an order granting Summary Judgment in favor of one of the Client's specific policy endorsements. The Client has multiple policies and in 2012, amended their old policy with an endorsement that modified policy language that did not elect payment at the fee schedule. This was a matter of first impression for the Miami-Dade County Judge presiding over this case. The Judge ultimately ruled favorably for the Client's policy endorsement.

Defense Verdict in Uninsured/Underinsured Motorist Coverage Case.

Stefanie D. Capps, of the Ft. Myers office, obtained a "no causation" defense verdict in an uninsured/underinsured motorist coverage case. The Plaintiff alleged he sustained a life altering and permanent injury to his low back during an auto accident with relatively minor property damage. The 70 year old Plaintiff sought half a million dollars in past and future medical damages and pain and suffering. The defense presented evidence that the Plaintiff had ongoing degenerative and preexisting changes to his low back and that he suffered no injury related to the subject accident, to which the jury agreed.

Voluntary Dismissal in Property Case.

Valerie A. Dondero and **Nicole Lauren Wulwick**, of the Miami office, obtained a voluntary dismissal in a property damage case that was set for trial. Upon receipt and review of the case from prior counsel, Valerie and Nicole quickly determined that Plaintiff's counsel failed to file witness and exhibit lists, failed to file discovery responses, and failed to comply with other court orders. More importantly, Valerie and Nicole, discovered that the Plaintiff's public adjuster had prepared two identical estimates for two separate losses to the property and submitted them both to the Insurer. Valerie and Nicole immediately filed an emergency Motion to Continue the Trial in order to file a Motion for Summary Judgment and Motion for Sanctions against Plaintiff's counsel. Plaintiff's initial demand was \$85,000.00, plus attorneys' fees of close to \$75,000.00. After advising Plaintiff's counsel of the fraud issues in the case, Plaintiff asked for \$4,000.00, in global settlement, but the client refused and demanded a voluntary dismissal be filed in the action. Based on their defense of the case, Valerie and Nicole were able to successfully obtain the voluntary dismissal.

Defense Verdict in Bodily Injury Case.

Angela C. Agostino, of the Ft. Myers office, received a defense verdict in a case for a self insured beer distributor. Plaintiff, a bartender, suffered a smashed toe and foot injury resulting in permanent nerve damage and toe clawing when a full keg of beer fell on her while she was in the process of changing taps. Plaintiff alleged that the kegs were improperly double stacked by the beer delivery person. Angela skillfully attacked the credibility of Plaintiff and her witnesses and artfully argued that the burden of proof had not been met. A Proposal for Settlement was filed, entitling our Client to fees and costs.

Dismissal in Personal Injury Protection Case.

Anthony G. Atala, of the Miami Office, obtained a dismissal in a Personal Injury Protection case due to a defective assignment of benefits agreement. After the Insurer issued payment, a Motion to Dismiss was filed stating that there were two defects in the assignment of benefits. First, the assignment was to the claimant's doctor, and not to the doctor's clinic; and second, the assignment of benefits was merely a direction to pay, and not an actual assignment of benefits, allowing the Plaintiff to file suit on this matter. The court stated that the case law contained in the memorandum of law correctly indicated that the Plaintiff was not the proper party to bring the suit and that the executed agreement was a direction to pay, not allowing the Plaintiff to maintain the lawsuit.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Bodily Injury Case.

Gregory J. Prusak, of the Orlando office, obtained a Final Summary Judgment involving a claim for bodily injury arising out of an alleged negligent installation of underground cable at an apartment complex.

Greg previously obtained a Summary Judgment in 2015, in favor of the Client against the Plaintiff. In response to the prior Motion for Summary Judgment, Co-Defendant filed a Third-Party Complaint for common law indemnity against the subcontractor/Insured. In the Insured's Motion for Summary Judgment, it was argued that the common law indemnity claim was invalid because it had no special relationship with the apartment complex, as they were a hired subcontractor and the apartment complex would not be vicariously liable for the negligence of an independent contractor pursuant to Florida law. The court agreed and entered summary judgment.

In its decision, the court noted that the apartment complex could have filed a Third-Party Complaint against the subcontractor for negligence and/or contribution, but failed to file the suit before the four year statute of limitations expired.

Summary Judgment in Slip and Fall Case.

Angela Agostino and **Stefanie D. Capps**, of the Ft. Myers office, obtained a Summary Judgment in a slip and fall case where the Plaintiff fell in a parking lot resulting in the Plaintiff needing an arthroscopic knee surgery. Angela and Stefanie represented the striping contractor and demonstrated a "lack of a dangerous condition." The condition was one found in every parking lot which was white striping showing the pedestrian path to the front entrance of the store. The Plaintiff alleged this striping did not have the anti-slip additive required to make it slip resistant. The Plaintiff slipped while walking in a Florida summer rainstorm and wearing flip flops. Defendants are seeking attorneys' fees and costs, pursuant to a proposal for settlement served on, and rejected by, the Plaintiff.

Motion for Partial Summary Judgment in Consortium Claim.

Jennifer L. Feld, of the West Palm Beach office, prevailed on a Motion for Partial Summary Judgment as to the consortium claim of a minor child with severe Down Syndrome, in a potentially high exposure premise liability case. The Plaintiff allegedly suffered injuries to her back, neck, left shoulder, and left ankle/foot because of a slip and fall on a piece of rebar in the median outside of a retail establishment. As a result, she had multiple surgeries and injections which she claims affected her ability to care for her child. Jennifer successfully argued that the Plaintiff was not permanently and totally disabled, as she was still able to care for her disabled child, and the parent-child relationship had not been affected to a serious degree. As such, the child was not deprived of his mother's loss of services, comfort, companionship, and society under Florida Statute § 768.0415.

Summary Judgment in Personal Injury Protection Case.

Michael S. Walsh, of the Ft. Lauderdale office, won a Motion for Summary Judgment in Broward County on the Client's new policy. The Judge found that the policy was not ambiguous and elected the schedule of maximum charges. Specifically, the Judge's ruling held that there was unequivocally only one payment option under the Statute and that it was reasonable and complied with the Personal Injury Protection Statutes.

Summary Judgment in Workers' Compensation Immunity Case.

Chelsea Winicki, of the Jacksonville office, **Jason Byrd**, and **Stuart Poage**, of the Tallahassee office, obtained a final summary judgment in a case involving Workers' Compensation Immunity. The Plaintiff alleged that he fell down the stairs of a construction trailer leased by our Client, the project's general contractor. Plaintiff was a subcontractor's employee who was familiar with the site and admitted during his deposition that our Client failed to do anything to intentionally harm him. The trial judge granted summary judgment in our Client's favor, finding that our Client was a statutory employer within the vertical chain of employment and entitled to Workers' Compensation Immunity.

Summary Judgment in Personal Injury Protection Case.

Anthony G. Atala, of the Miami Office, obtained a Summary Judgment in favor in a personal injury protection case, on a Benefits Exhausted Case. In this case, the insurance carrier paid \$10,000.00, in medical benefits to the Insured's various medical providers. The Plaintiff filed affidavits that the Insurer paid the wrong fee schedule and stated that the Plaintiff did not receive the actual checks exhausting the benefits. The Plaintiff also attempted to strike the adjuster's affidavit in an attempt to get the copies of the cashed checks out of consideration. The court ruled in favor of the Insurer finding that it acted in good faith and did not make any gratuitous payments or over payments, to any of the medical providers.

Voluntary Dismissal in Property Damage Case.

Sarah Goldberg, of the Miami office, successfully secured a voluntary dismissal in a property case involving an assignment of benefits executed by a homeowner to a restoration company. The restoration company filed suit after the policy limits were exhausted by payment to the Insured. The restoration company argued that they were owed money for their services because they were not included on the indemnity payment to the Insured. In response, a Motion for Sanctions was drafted. The Motion cited case law showing that the court had no authority to increase the policy limits and the restoration company was not entitled to payment because there was no coverage left for the mitigation invoice. After the expiration of the 21 day safe harbor letter, the restoration company filed a voluntary dismissal.

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.

South Florida Legal Guide named Kubicki Draper a Top Law Firm and several attorneys as Top Lawyers. The Top Law Firms and Top Lawyers listings are published annually and are based on peer nominations. Nominees then are evaluated on accomplishments and individual credentials prior to being named to the list.

Congratulations

to the following Kubicki Draper attorneys were included in the 2017 edition of *South Florida Legal Guide's Top Lawyers*:



Laurie J. Adams
Civil Litigation

Peter S. Baumberger
*Professional Liability;
Defense, Corporate
and Business Litigation*

Caryn L. Bellus
*Appellate;
Insurance*

Michael J. Carney
Civil Litigation

Daniel A. Miller
*Corporate and
Business Litigation;
Bankruptcy*

Scott M. Rosso
*Insurance
Litigation Defense;
Corporate and
Business Litigation*

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.

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

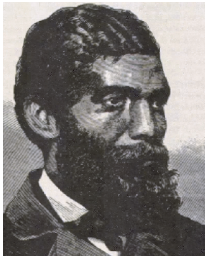
- Defense Strategies for Letters of Protection
- Collateral Sources and Update on Insurance Disclosures
- Effective Mediation Preparation and Strategies
- Trucking Case Law and Regulations Update
- Motor Carrier, Trucking and Cargo Law Developments
- Admissibility and Use of Biomechanical Experts in Personal Injury
- Premises Liability: Potholes, Puddles and Pitfalls: Successfully Navigating and Defending Premises Liability Claims
- Assignment of Benefits
- Material Misrepresentation
- Bad Faith, Trying Cases with Excess Verdict
- "Teaching "Good Faith" to prevent "Bad Faith," Including Practice Advice to Avoid Extra-Contractual Claims in the Claim Handling Process"
- Comparative Negligence
- Defending Automobile Negligence Claims
- Liens and Set Offs
- Negligent Security
- Attorneys' Fee
- UM/UIM and Medicare Liens
- Case Law Update
- Comparative Negligence
- Subcontractor Involvement
- Trying Cases with Risk of an Excess Verdict
- Mock Trial: "The Verdict: Was it Arson or was it an accident?"

Kubicki Draper believes a diverse law firm is a stronger, more vibrant one.

While history cannot be encapsulated in one month, Black History Month is a time to reflect and celebrate the past, present, and future of African American Culture, the diversity of Florida and the country.

We take this time to acknowledge a small cross-section of men and women of color who have achieved outstanding heights in the legal profession.

BLACK History Month



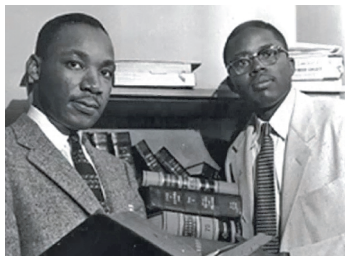
John Rock (1825-1866) was the first African American lawyer to be admitted to the bar of the Supreme Court of the United States, and the first African American man to earn a medical degree. Having mastered several professions, Rock was, in the view of his colleagues, one of the ablest and most educated men of his time.



Charlotte E. Ray (1850-1911) was the first African American female lawyer in the U.S. and the first woman admitted to the D.C. Bar. Due to great racial and gender odds against her, she was unable to attract many clients and was forced to close her practice. She then became a teacher, joined the National Association of Colored Women, and championed a number of social causes, inspiring countless women to reach for their goals.

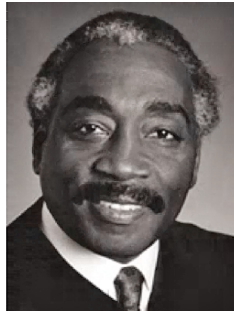


Thurgood Marshall (1908-1993) was the first African American justice of the U.S. Supreme Court. His most famous victory as a lawyer was *Brown v. Board of Education*, a decision that desegregated public schools. Justice Marshall was also the founder and first Director-Counsel of the NAACP Legal Defense and Educational Fund. "In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute."

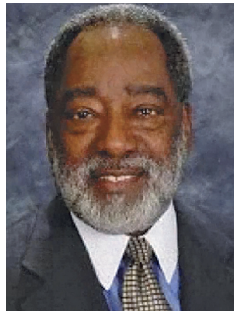


Fred Gray, born in 1930, is a prominent civil rights attorney and the first African American president of the Alabama State Bar. He handled a number of key cases in the Civil Rights Movement, notably defending Rosa Parks and Claudette Colvin against charges of disorderly conduct for refusing to give up their seats during the Montgomery Bus Boycott. Mr. Gray was also instrumental in successfully seeking justice for the victims of the Tuskegee Syphilis Study, a clinical experiment conducted for forty years to study the natural progression of untreated syphilis in African American men who thought they were receiving free health care.

FLORIDA ATTORNEYS:



The Honorable Wilkie D. Ferguson, Jr., born in 1938 to Bahamian immigrants and raised in Miami's Liberty Square public housing project. He attended segregated public schools and graduated in the first graduating class of Northwestern High School in 1956. After graduating from college, Judge Ferguson enlisted in the Army, attaining the rank of second lieutenant. After law school, he was appointed to a presidential panel that investigated the 1968 Liberty City riots. In 1976 Governor Askew elevated him to the Circuit Court bench. He was the first African-American to be appointed to the Dade County Circuit Court. As a trial judge, he made a landmark ruling precluding the systematic exclusion of blacks from juries. That ruling led to important appellate decisions recognizing the impropriety of such discrimination in the court system. Judge Ferguson was appointed to the Third District in December 1980, the first African-American judge to serve on the Court. He was retained in successive elections until President Clinton nominated him to the federal bench in 1993. Judge Ferguson died on June 9, 2003.



Professor **H.T. Smith** blazed trails in his legal career – as Miami-Dade County's first African-American assistant public defender, and then as the county's first African-American assistant county attorney. He was the founding President of the Black Lawyers Association of Dade County (now known as the Wilkie D. Ferguson, Jr. Bar Association), President of the Virgil Hawkins Florida Chapter of the National Bar Association, and President of the National Bar Association, with a membership of 40,000 strong. In the landmark case of *Aubrey Livingston v. State of Florida*, Professor Smith successfully reversed his client's death sentence by convincing the Florida Supreme Court that it is reversible error for a jury in a capital case to recess once they begin deliberations. Professor Smith was also one of the lead attorneys in the successful effort to block a constitutional amendment that would have outlawed affirmative action in public education, public employment, and public contracting in Florida.

Professor Smith has chaired the Coalition for a Free South Africa, leading the charge to insist that South Florida governmental entities and universities divest their financial interests in companies doing business in apartheid South Africa. He chaired the Declaration of Rights Committee of the Florida Constitution Revision Commission, championing an amendment to make explicit that equal protection of the law is available to women and persons born outside of the United States. He fought for equal rights for people regardless of sexual orientation, when he served as co-chair of the successful "Say No To Discrimination" referendum in Miami-Dade County. In 2003, FIU tapped Professor Smith to become founding Director of the Trial Advocacy Program. Under his leadership, the Program has gained recognition as one of the best among all Florida law schools, and in just 10 years, FIU's Trial Team has won regional and national mock trial competitions.



Attorney **Willie E. Gary** has won some of the largest jury awards and settlements in U.S. history, including cases valued in excess of \$30 billion. Gary's amazing success has earned him national recognition as one of this country's leading trial attorneys. In May 2002, he was featured in *Ebony* magazine as one of the "100 Most Influential Black Americans." *Forbes Magazine* has listed him as one of the "Top 50 attorneys in the U.S." Gary has been featured in many of the nation's most respected media publications, such as *The New York Times*, *The Chicago Tribune*, *The Boston Globe*, *Ebony*, *Jet*, *People*, *Black Enterprise*, *Fortune*, *The New Yorker* and *The National Law Journal*. His remarkable legal career and tireless work on behalf of his clients have been well documented.

Gary was admitted to the Florida Bar in 1974 and opened his hometown's first African American law firm. His practice has since grown and operates out of three offices, one of which is the former Pelican Hotel where Gary worked as a dishwasher during his teenage years.

Known as a businessman, churchman, humanitarian and philanthropist, Gary is deeply involved in charity and civic work. He is committed to enhancing the lives of young people through education and drug prevention. In 1994, he and his wife, Gloria, formed The Gary Foundation which provides scholarships, direction and other resources to youth, so they can realize their dreams of achieving a higher education. In 1991, Gary pledged \$10.1 million to his alma mater Shaw University. He has also donated millions of dollars to dozens of Historically Black Colleges and Universities throughout the U.S.

Our commitment to diversity and inclusion resonates throughout our organization.

Not only do different backgrounds, cultural perspectives, and life experiences reflect the communities in which we practice, but they broaden the talent pool from which we draw. We hope the achievements of the men and women of the law noted here were inspirational. Despite challenges they faced, they lived out the old adage of "what can be conceived can be achieved" and contributed to our communities in special ways.

(materials sourced from 3L+ Law Prep and Wilkie D. Ferguson Jr. Bar Assoc., F.I.U. Educational faculty, and Williegary.com)

ANNOUNCEMENTS & NEWS

On the Move

As some of you may know, **Kendra Therrell** has moved from our Ft. Myers office to our Jacksonville office where she will continue to provide quality and personal service to our clients. If you have not yet had an opportunity to work with Kendra, her practice covers virtually all areas of defense, with a focus on automobile negligence cases, UM/UIM, premises liability, and property damage cases. She also works with Special Investigation Units to help investigate and uncover fraudulent claims. If you should need assistance in Jacksonville or its surrounding areas, please feel free to reach out to Kendra and/or **Chelsea Winicki** who is also in our Jacksonville office.

Together, Kendra and Chelsea have the Northeast corner of Florida well-covered.

Kendra's new information is as follows:

1200 Riverplace Blvd #850
Jacksonville, FL 32207
Phone: 904.348.7522
kbt@kubickidraper.com

Congratulations

Laurie J. Adams, of the West Palm Beach office, was nominated as The American Board of Trial Advocates (ABOTA), President. ABOTA is one of the most prestigious legal organizations in the country, comprised of elite trial lawyers and judges who each had to be nominated and qualify rigorous standards to join the organization. Laurie's nomination as chapter President is a huge honor and accomplishment.

Congratulations to **Jennifer L. Feld**, of the West Palm Beach office, on being rated AV Preeminent Attorney, 2016 by Martindale Hubbell.

As President of ABOTA's Palm Beach Chapter, **Laurie Adams**, of the West Palm Beach office, presented at the investitures of The Honorable Dana Santino, Palm Beach County's newest county court judge, and The Honorable Luis Delgado Jr., circuit judge for the 15th Judicial Circuit. Laurie welcomed both judges to their new positions and offered congratulatory remarks.

Congratulations to our newest Shareholders



Christopher M. Utrera
Miami

Anthony G. Atala
Miami

Michael F. Suarez
Miami

Nicole L. Wulwick
Miami

Michael J.L. Fogarty
Miami

Karina I. Perez
Tampa

Jennifer L. Feld
West Palm Beach

Stefanie D. Capps
Ft. Myers

Jayme Idle
Orlando

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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Pensacola Tallahassee Tampa West Palm Beach ALABAMA: Mobile

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