KUBICKI DRAPER

THE KD QUARTERLY

www.kubickidraper.com SUMMER/FALL 2017

KD in the Community

Our KD family once again came 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 organization featured this time was Captains for Kids, submitted by **Terri Adams**, of the Pensacola office. Terri's nephew, Neil Nash, gets to enjoy a great event put on by Captains for Kids, whose mission is to provide children with special needs and illnesses a chance to enjoy the water and feel the excitement of being on a boat. The organization offers a free fun day on the water by providing: fishing charters, sailing excursions, parasailing rides, dolphin cruises and water banana rides.

Captains for Kids Event

"I am so grateful to work at a company that supports their employees in matters that are important to them personally and gets everyone involved. Thank you everyone for your support of Captains for Kids. I know the participants will appreciate it as well. Hundreds of kiddos will have a great big smile on their face that day! "

Terri Adams

We are very proud of having come together for Terri and Captains for Kids, and we look forward to supporting the next great organization selected.

Kubicki Draper is a proud sponsor of the Fix Georgia Pets organization. Georgia has a pet over-population crisis. Fix Georgia Pets works in the highest need communities across the state to end pet overpopulation and stop senseless euthanasia. They strive to help every community in Georgia.

Charles Watkins, of the Miami office, participated on a panel during the James T. Otis Lecture Series sponsored by American Board of Trial Advocates (ABOTA). During this lecture, the United States Constitution is discussed around issues of the law. Charles participated in answering questions of more than 200 High School students. These students were well prepared, exhibiting an awareness of the constitution and how the issues of the day exposed the tensions in the law.

Jacksonville Team at work

Members of our Jacksonville office teamed up to assist the Swaim United Methodist Church after the church's provisions for the homeless ministry were wiped out from flooding due to Hurricane Irma. Our Jacksonville team worked together to collect food, snacks, and desserts to pack into care bags that were distributed to 25-30 people. Stories were shared and a nice time was had by all assisting the local community.

EDITOR
Jill L. Aberbach

IN THIS ISSUE

Attorney's Fees: Assessing the Risk v. Reward in First Party Claims

By: Michael Balducci
on behalf of Kubicki Draper's First Party Practice Group

I. Introduction

First party claims are simply claims between an insured and his/her insurer. Even if these claims are eventually settled, they may result in lengthy litigation and costly attorney's fees. Attorney's fees are granted upon the rendition of a judgment or decree by any Florida court against an insurer and in favor of the insured or beneficiary.[1] In Florida, any time a judgment or decree is issued in favor of the insured or beneficiary and against an insurer, the insurer **must** compensate the insured or beneficiary in the form of attorney's fees. However, this statutory requirement is one-sided, meaning that if the insurer prevails on the claim, the insured or beneficiary is not required to pay attorney's fees to the insurer. Further, once an insurer settles with the insured/claimant for even a nominal amount, the insured is considered the "prevailing party," and as such, is entitled to fees. To effectively evaluate the risk of pursuing litigation, it is important to understand how courts assign attorney's fees.

II. What to Anticipate When Paying Attorney's Fees

There are several factors courts use when deciding the amount to award an insured in attorney's fees.

Dependent upon the type of claim filed, different factors are used to determine reasonable attorney's fees. First, courts use the Federal Lodestar approach, meaning, that the courts: (1) determine the number of hours expended on the litigation; and then (2) determine a reasonable hourly rate for the services of the prevailing party's attorney.[2] The longer the claimant attorney has been in practice, especially in the field of first party litigation, the greater the hourly rate will be. Once the lodestar figure is reached, the court may add or subtract from the fee based upon the "contingency risk factor" and "results obtained." The contingency risk factor arises when the insured's attorney is working under a contingency fee contract and would receive no compensation if his/her client did not prevail. The contract does not control the specific fee award because it would be unfair to the party paying the fee, as that party had not participated in the fee arrangement.[3] However, most contingency fee retainers allow the claimant attorney to be paid at the contingency rate or what the court awards, whichever is greater.

Next, the court will determine whether a multiplier is appropriate or not. In torts and contract cases, which are the bulk of first party claims, the Court must consider the following three factors to conclude if a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the eight factors set forth in Rowe are applicable, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and his/her client.[4]

The Rowe factors are: (1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature; (4) the significance of, or amount involved in, the subject matter of the representation, and the results obtained; (5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and (8) whether the fee is fixed or contingent, and if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

III. Multipliers: What Amount is Applied?

Trial courts may apply a multiplier when setting an attorney's fee.[5] These multipliers range from 1 through 2.5 and are based upon the likelihood of success. If the trial court determines that success was more likely than not, it may apply a multiplier of 1 to 1.5. If the trial court determines that success was approximately even at the outset, it may apply a multiplier of 1.5 to 2.0. If the trial court determines that ***success was unlikely*** at the outset of the case, it may apply a multiplier of 2.0 to 2.5. The multiplier serves as incentive for an attorney to pursue a claim when the insured's possibility of prevailing is slim.

IV. Do We Settle or Move Forward with Litigation?

With the likelihood of having to pay attorney's fees weighing heavily on one's mind, there are multiple factors to consider before moving forward with litigation. In evaluating the exposure of risk, the insurer must determine the risk and benefits of both, settlement and litigation.

Settlement provides the benefit of an agreed upon resolution and ends future litigation on the matter. If a case is settled early on, the attorney's fees for both parties would be minimal compared to the amount at the end of litigation. However, the insurer may be settling a claim they could prevail on in court. The claims representative and his/her defense counsel should evaluate the case early on in terms of whether the case is a good candidate for trial, or should be resolved early for the right price.

The discovery period of litigation can take time which is both a risk and benefit. While the discovery period is time consuming and results in attorney's fees, it can provide the insurer greater insight into the insured's likelihood of prevailing on the claim.

[1] Fla. Stat. § 627.428(1).
[2] ***Florida Patient's Compensation Fund v. Rowe***, 472 So. 2d 1145, 1151-52 (Fla. 1985).
[3] *Id.* at 1151.
[4] ***Standard Guaranty Ins. Co. v. Quanstrom***, 555 So. 2d 828, 834 (Fla. 1990).
[5] *Id*

continued on page 3

ATTORNEY'S FEES: ASSESSING THE RISK V. REWARD IN FIRST PARTY CLAIMS

continued from page 2

If the likelihood of the insured prevailing is low, then moving forward with litigation may seem to be the best option. However, there is still the risk that if the insured prevails on a claim that had a low likelihood of success, a multiplier of 2.0 to 2.5 could be applied when attorney's fees are awarded.

V. Examples

When an insured has any type of damage, such as a roof leak, mold, water damage, or medical expenses as part of their PIP coverage and the insurer does not pay in time or pay the correct amount, the contractor or physician hired by the insured may take an assignment of benefits from the insured and may now sue on his/her behalf. This introduces a third party to the claim but it is still a first party claim. If the third party is suing on behalf of the insured and prevails, that third party will be entitled to reasonable attorney's fees.

VI. If Attorney's Fees are Awarded, Things to Further Consider

If you do not prevail on the claim and are required to compensate the insured with reasonable attorney's fees, how do you ensure that you are paying the most reasonable amount? The following categories of objections are effective to mitigate the costs: (1) Block Billing (combining different tasks in one billing entry) is Improper; (2) Excessive Time/Multiple Attorneys Billing the Same Task; (3) Clerical Tasks Are Not Compensable; (4) Travel Time is Generally Not Compensable; (5) Time to Prove Amount of Fees is Not Compensable; and (6) Hourly Rate is Not Comparable to the Prevailing Market Rate and is Not Reasonable.

The burden of proving reasonable attorney's fees falls on the attorney seeking the fees. Note, that if the insurer objects to Plaintiff counsel's requested fees, a fee hearing will be required, and the insurer will have to hire an expert to opine Plaintiff's claimed fees. It is important to know your Judge's reputation as to these types of fee claims as well.

VII. Conclusion

Any time a Plaintiff/Insured "prevails" in a first party case by way of verdict or settlement, the insurer is statutorily required to pay attorney's fees to the insured. The decision to settle or pursue litigation is not an easy one to make. It involves evaluating the risks and considering all factors involved. Therefore, it is best for the claims professional to get with their defense counsel early in the litigation to assess the benefits/risks of moving forward with the litigation.

SPOTLIGHT ON:
Blake H. Fiery

Blake H. Fiery, is a shareholder in the Ft. Lauderdale office. Blake chose South Florida and the University of Miami initially because it had a bit of a "wild west" reputation in terms of its litigation culture, and her earliest years didn't disappoint. Blake began in a small but busy boutique litigation firm where she was quickly exposed to a high volume of complex cases to defend. It was trial by fire. She spent the first several years of her career defending tough cases and learned by doing and also by watching, both her adversaries and co-defense counsel.

After this "apprenticeship," Blake arrived at Kubicki Draper last year toting an S&P 500 client and a specialty in negligent security and premises liability. Properly defending negligent security cases requires a certain level of expertise derived only in the trenches, and Blake has been involved in a great number of very significant such cases.

Blake's negligent security cases run the gamut from HUD subsidized properties to high-end luxury residences.

There is a trend in the area of negligent security where certain potentially damaging information obtained in key manager depositions can be recycled and shared among plaintiff firms, and then used to the detriment of institutional property owners elsewhere. Accordingly, Blake believes that every deposition matters in these cases as each has potentially wider ramifications.

Blake cares deeply, not just about the result in a given case, but also how a high-stakes litigation experience might affect a business or an insurance carrier. She takes her cases and her clients very seriously and personally.

One lawyer in our firm was struck recently listening to Blake during a mediation presentation. After listening to opposing counsel portray his client as the "sympathetic plaintiff" against a corporation, Blake deftly put a human face on the defendant corporation. She talked about how that corporation was comprised of people, and was the product of the dreams of successful individuals trying to provide a good service but also trying to do things safely. And she emphasized that her clients should be afforded the same level of respect and compassion as the plaintiff.

Knowing how important compassion can be to decision makers, Blake believes this is a big part of her job as a case approaches trial.

Blake's clients know they can call her at any time for her assistance. She strongly believes that the key to a successful relationship with her clients starts with excellent customer service. Clients hire her because she makes them believe she will be "all in" with every case she handles.

Blake has learned to never underestimate an issue, or a lawyer, or the impact any piece of evidence might have at trial.

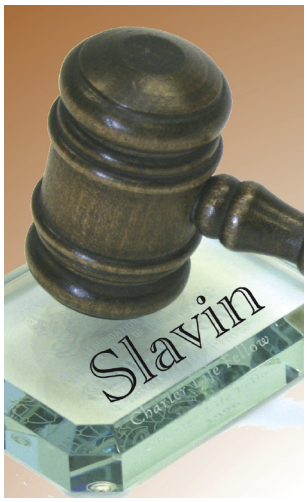
Blake still believes strongly in our jury system, and reminds her clients that - even in the "Wild West" of Southeast Florida - the Plaintiff bears the burden of proof so that, approached correctly, Defendants should remain confident to push forward to a trial absent the ability to reach some other satisfactory result.

With No Early Retirement in Sight, the *Slavin* Doctrine Continues On...

By Maegan Bridwell and Sean-Kelly Xenakis
on behalf of the Hospitality & Retail Practice Group

The ***Slavin*** Doctrine might be approaching sixty years old, but it is certainly not ready for retirement. The Florida Supreme Court's decision in ***Slavin v. Kay***, has been and continues to be, a staple in certain negligence actions, providing a reasonable limitation on the liability of contractors, architects and engineers. 108 So. 2d 462 (Fla. 1959).

The Slavin Doctrine stands for the proposition that a contractor cannot be held liable for injuries sustained by third parties when the injuries occur after the contractor completed its work, the owner of the property accepted the contractor's work, and the defects causing the injury were patent. *Id.* at 467; ***Plaza v. Fisher Development, Inc.***, 971 So. 2d 918, 924 (Fla. 3d DCA 2007). The reason for this rule, stated most simply, is to prevent a contractor who performs work from owing a duty to the entire world. Otherwise, without this rule, the extent of a contractor's responsibility would be difficult to measure and would consequently discourage a sensible person from undertaking and performing work under such conditions. ***Slavin***, 108 So. 2d at 467.



This Doctrine has been applied in a number of different scenarios throughout its inception 60 years ago, such as cases involving premises liability, roadway construction, and roadway design, though more recent case law has provided further clarification as to the different elements of the Doctrine. For instance, in ***McIntosh v. Progressive Design and Engineering, Inc.***, the Fourth District Court of Appeals further expanded what constitutes a "patent" defect, and also the "acceptance" requirement, which have not always been and still fail to be, crystal clear. 166 So. 3d 823 (Fla. 4th DCA 2015). Although often a question for a jury, the test for patency is not whether or not the dangerous condition was obvious to the owner, but whether or not the dangerousness of the condition was obvious had the owner exercised reasonable care. The court in ***McIntosh*** also suggested that the test for patency takes into consideration the relative knowledge of the owner and the relevant sophistication of the owner, which makes the test more subjective when trying to establish that an owner should have known of the alleged condition. This standard for patency seems to fair more favorable to contractors, as it prevents an owner from making a blanket assertion that they did not have knowledge of a particular dangerous condition.

With respect to the second requirement, which is "acceptance" of the work, this, too, becomes a difficult question when determining whether the ***Slavin*** Doctrine applies as a defense to liability. The Fourth District Court of Appeals, in ***McIntosh*** shed some light on the "acceptance" requirement of the Doctrine, explaining that the reason for this requirement is that at some point, a contractor loses control of the work, and concomitantly loses the ability to alter or change it. The court reiterated that if the defect is in fact patent, the owner is charged with knowledge of it, and the contractor is relieved of liability because it is the owner's intervening negligence in not correcting it which is the proximate cause of the injury. However, the court in ***McIntosh*** provided further explanation to the "acceptance" requirement by clarifying that the responsibility for a patent defect rests with the entity in control and with the ability to correct, rather than the arbitrary "owner" of the premises.

An understanding of this long-standing doctrine is important both from the standpoint of the premises owner when attempting to prevent a contractor from being relieved of any liability based on the ***Slavin*** Doctrine, and from the standpoint of a contractor when attempting to shift liability to an owner, both scenarios of which are common to any defense practice that represents a variety of clients.

Interestingly, the ***Slavin*** Doctrine, despite its age, has continued to be "good law" even with the abolishment of joint and several liability in Florida and the adoption of comparative negligence. However, it is important to recognize that the majority of other states employ the "foreseeability doctrine" or the "modern rule," which provides that a contractor is liable for injury or damage to a third person as a result of the condition of the work where it is reasonably foreseeable that a third person would be injured by such work due to the contractor's negligence or failure to disclose a known dangerous condition, despite completion of the work and acceptance by the owner. This "foreseeability" or "modern" rule expands the limits of liability on behalf of a contractor, and provides for an assessment of contractor liability in accordance with general negligence principles, which is directly contrary to the purpose and very reason that Florida applies the ***Slavin*** Doctrine. Notwithstanding the fact that other states have abandoned the ***Slavin*** Doctrine based on the assertion that the underpinnings of the ***Slavin*** Doctrine or "acceptance doctrine" have been eroded, the vitality of the ***Slavin*** Doctrine continues to thrive in Florida, and Florida courts continue to maintain that the ***Slavin*** Doctrine is necessary to place the burden of responsibility upon the entity that controls the environment.

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.

- Best Practices to Prevent E&O Claims
- Alcohol Liability, Marijuana, Security
- Zika
- Food Service Issues
- Insurance and Additional Insured Coverage
- Material Misrepresentation in the Application
- SIU: Tips & Tactics
- Post Trial Issues (Post Verdict Motions and Post Verdict Motions from an Appellate Perspective)
- Social Media, Technology, and its Utilization in the Evaluation of Insurance Claims
- The Fine Line Between Fraud and Claim Denial in Plumbing Water Losses
- Florida 5 Hour Law and Ethics Update
- Corporate Representative Depositions
- Handling Traffic, Roadway and MOT Claims
- Arbitrating a Construction Defect Case
- UM/UIM and Bad Faith
- Traumatic Brain Injury and Trends in Microsurgery
- Auto Property Damage
- EUO/IMEs

Caryn Bellus *(far right)* presented at the 2017 Florida Bar Appellate Law Seminar

Several of our attorneys participated in speaking engagements across the country.

Caryn L. Bellus, of the Miami office, co-presented "Let the Wookie Write: Friend-of-the-Court Briefs" at the 2017 Florida Bar Appellate Law Seminar.

KD team members presented at FIFEC's Annual Conference. **Anthony G. Atala** presented on Social Media, Technology, and its Utilization in the Evaluation of Insurance Claims, **Sarah R. Goldberg**, **Scott M. Rosso**, **Charles Watkins** and **Nicole L. Wulwick** teamed up to present The Fine Line Between Fraud and Claim Denial in Plumbing Water Losses, and **William A. Sabinson** and **Michael Balducci** presented on The Truth Lies in the Words.

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.

Congratulations

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

2018 BEST LAWYERS IN AMERICA

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

Caryn L. Bellus, **Angela C. Flowers** and **Betsy E. Gallagher** were recognized in Appellate Practice, **Brad J. McCormick** in Commercial Litigation, **Laurie J. Adams** in Personal Injury Defense Litigation and **Jane Carlene Rankin** in Real Estate Law.

CONGRATULATIONS TO ALL!

Concurrent Cause: Shifting Sands in the Florida Landscape

By Nicole Ellis and Amy L. Melia
on behalf of the First Party Property Practice Group

Since the Florida's Supreme Court issued their opinion late last year in ***Sebo v. American Home Assurance Co.***, many insurers have faced serious and often case-fatal issues involving what the insureds need to prove to establish a prima facie case for breach of contract in homeowners cases. 208 So. 3d 694 (Fla. 2016).

First, one should consider who has the burden of proof in a claim under an all-risk policy. To prove a breach of contract claim under an all-risk policy, Florida courts have held that once the insured has established a loss "within the terms of an all 'risks policy,' the burden shifts to the insurer to prove that the loss arose from a cause which is excepted." ***Hudson v. Prudential Prop. & Cas. Ins. Co.***, 450 So. 2d 565, 568 (Fla. 2d DCA 1984) (citing ***Jewelers Mut. Ins. Co. v. Balough***, 272 F.2d 889 (5th Cir. 1959); ***Phoenix Ins. Co. v Branch***, 234 So. 2d 396, 398 (Fla. 4th DCA 1970); ***Oaks Unit III Condo. Inc. v Allstate Ins. Co.***, 8:10 CV-309-T-26TBM, 2011 WL 67971 (M.D. Fla. Jan. 4, 2011).

Although several courts have rendered opinions that seem to impose a less stringent burden on the plaintiff, such as requiring the insured to prove only the loss or damage to their property occurred while the policy was in effect, the loss still must fall within the policy's coverage before the insurer is obligated to prove that an exclusion under the policy applies. See ***Mejia v. Citizens Prop. Ins. Corp.***, 161 So. 3d 576, 578 (Fla. 2d DCA 2014), ***Citizens Prop. Ins. Corp. v. Munoz***, 158 So. 3d 671,674 (Fla. 2d DCA 2014).

Other courts have been more precise in articulating this type of qualifying language. *See* ***W. Best, Inc. v. Underwriters at Lloyds, London***, 655 So. 2d 1213 (Fla. 4th DCA 1995) (stating "[s]ince in the instant case it was undisputed that the loss of the ring apparently fell within the terms of the all-risk policy, appellee bore the burden as insurer to establish that the circumstances of the loss fell within an exclusionary provision"); ***Banco Nacional De Nicaragua v. Argonaut Ins. Co.***, 681 F.2d 1337. 1339-40 (11th Cir. 1982)(holding that "[t]he plaintiff in a suit under an all-risks insurance policy must show a relevant loss in order to invoke the policy, and proof that the loss occurred within the policy period is part and parcel of that showing of a loss"). Therefore, until the insured demonstrates at least a prima facie claim of loss under the policy, the burden does not shift to the insurance carrier to prove that the loss in question is otherwise excluded.

Relation to Sebo:

In many cases, it appears that the loss for which the claim is made was caused, in part, by an insured peril, and, in part, by an uninsured peril. In such cases the burden is upon the insured to show how much of the loss resulted from the covered peril. If the insured is unable to meet this burden, he or she will not be entitled to recover under the policy.

It has been argued that when an insured peril combines with an uninsured peril to produce a loss, the insured is entitled to recover under the policy. However, it has also been held that when the proximate cause of the loss is not a covered peril, then there can be no recovery under the policy.

In ***Sebo v. American Home Assurance Co.***, the court interpreted a policy that lacked anti-concurrent cause language, rather than a standard form homeowners insurance policy. 208 So. 3d 694 (Fla. 2016). The court made clear that anti-concurrent cause language is enforceable, thereby limiting the opinion's application to standard form homeowners policies which typically contain such language.

In other words, the opinion in ***Sebo***, is limited to cases where the insurance carrier does not specifically avoid the application of the concurrent cause doctrine in the plain language of the policy and in cases when there is no dispute as to the multiple causes of the loss.

In many other cases with the standard homeowners form, the policy specifically avoids the application of the concurrent cause doctrine under the exclusion section. The Section 1- Exclusions portion of the policy states in part:

> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

The opinion clearly distinguishes between policies which include this language as noted above and those that do not, such as the policy in the ***Sebo***, case.

Additionally, in many other cases, unlike ***Sebo***, the parties are disputing the cause of loss. In those cases, the plaintiff will try and argue that all damage to the property was the result of "a peril created opening," while the insurer will argue that the damage was the result of wear and tear, deterioration, long term, and a pre-existing condition.

continued on page 7

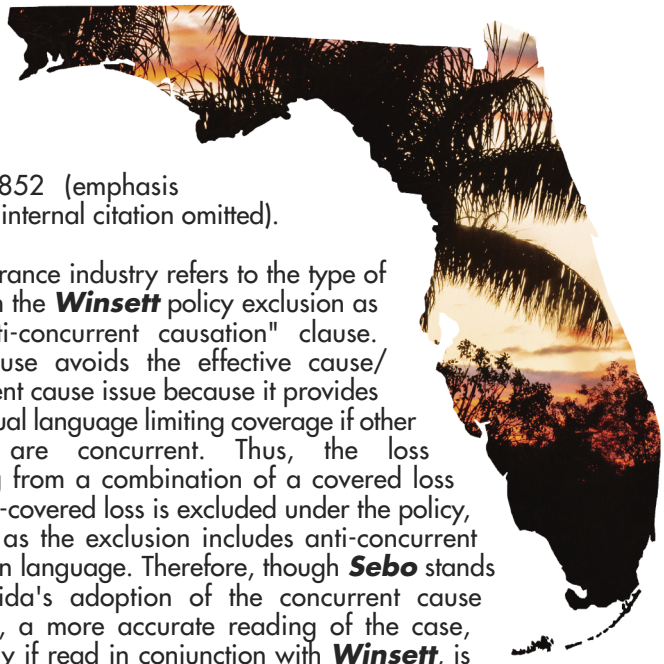
In ***Sebo***, the jury was asked to determine whether there was coverage for the insured's loss under the policy, given the multiple causes of loss and stated the following:

> Also not in dispute is that the rainwater and hurricane winds combined with the defective construction to cause the damage to Sebo's property. As in ***Partridge***, there is no reasonable way to distinguish the proximate cause of Sebo's property loss—the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the EPC doctrine because no efficient cause can be determined. As stated in ***Wallach***, "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." ***Wallach***, 527 So.2d at 1388. Furthermore, we disagree with the Second District's statement that the CCD nullifies all exclusionary language and note that AHAC explicitly wrote other sections of Sebo's policy to avoid applying the CCD. **Because AHAC did not explicitly avoid applying the CCD**, we find that the plain language of the policy does not preclude recovery in this case."

Id. at 700 (emphasis added).

The importance of policy language which Florida law demands be construed strictly, cannot be understated in cases involving more than one cause of loss. This notion is exemplified in ***Empire Indem. Insurance Co. v. Winsett***, where applying Florida insurance law, overturned the lower court's decision and relied on the efficient cause doctrine. 325 F. App'x 849 (11th Cir. 2009). It did so, however, due to the policy language and not in order to apply the concurrent cause doctrine. On appeal, the 11th Circuit Court found the application of the efficient cause doctrine erroneous. Specifically, the court found that "'the efficient cause doctrine cannot be incorporated into an insurance policy if doing so would render part of the policy meaningless.'" *Id.* at 851 (citing ***Arawak Aviation Inc. v. Indem. Ins. Co. of N. Am.***, 285 F.3d 954, 958 (11th Cir.2002)). As a result, the court reversed the decision that held the insurer liable for coverage, finding that the district court had overlooked the unambiguous policy language when it applied the efficient cause doctrine. Furthermore, the court explained that:

> The policy plainly excludes coverage for mold 'regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.' **By the plain language "in any sequence," the policy was written to exclude applying the efficient proximate cause doctrine.** Overlooking that plain language, the district court erroneously concluded that the efficient proximate cause doctrine applies and triggers Empire's duty to defend and indemnify Preserve.



Id. at 852 (emphasis added) (internal citation omitted).

The insurance industry refers to the type of clause in the ***Winsett*** policy exclusion as an "anti-concurrent causation" clause. This clause avoids the effective cause/concurrent cause issue because it provides contractual language limiting coverage if other causes are concurrent. Thus, the loss resulting from a combination of a covered loss and non-covered loss is excluded under the policy, as long as the exclusion includes anti-concurrent causation language. Therefore, though ***Sebo*** stands for Florida's adoption of the concurrent cause doctrine, a more accurate reading of the case, especially if read in conjunction with ***Winsett***, is that it stands for the adoption of the concurrent cause doctrine if there is no anti-concurrent causation language in the policy.

As a result of the ***Sebo*** case, as it pertains to burdens of proof, a jury will have to apply the efficient proximate cause doctrine to determine which peril was the most substantial and reasonable factor in the loss. The insured then has the burden to prove a covered peril was the efficient proximate cause and the insurer must prove an excluded or excepted peril was the efficient proximate cause. ***Citizens Prop. Ins. Corp. v. Salkey***, 190 So. 3d 1092 (Fla. 2d DCA 2016); ***Wallach v. Rosenberg***, 527 So. 2d 1386, (Fla. 3d DCA 1988).

If there is no anti-concurrent language in the policy and the concurrent cause doctrine applies, a jury may find coverage for a multiple loss regardless of exclusion or exception from coverage. The insured then must show that any of the independent perils is the cause of the loss. The insurer essentially has the burden to show that none of the independent perils caused the loss.

As a result of recent case law, as noted above, whether coverage exists must begin with the language of the policy. Insurers should use Motions for Summary Judgment or Declaratory Action, to establish the nature of the perils and the presence of anti-concurrent policy language, should the nature of the suit call for application of the concurrent cause doctrine.

New Additions

WE ARE PLEASED TO INTRODUCE OUR NEW MEMBERS:

West Palm Beach: Shareholder, **Rebecca L. Brock** and Associate, **Andrew Robeson**

Tampa: Shareholder, **Marsha M. Moses** and Associates, **Steffen M. LoCascio**, **Danielle Lutyk** and **William A. Backer**

Ft. Myers: Associate, **Thomas B. DeMinico**

Miami: Associates, **Kavita P. Ramkissoon**, **Michelle A. Diaz** and **Allison N. Henry**

Orlando: Shareholder, **Michelle Davis**

APPELLATE

New Trial on Punitive Damages.

Angela C. Flowers, of the Ocala office, obtained a new trial in a case where the jury awarded $1.25 million for punitive damages. The Fifth District Court of Appeals issued an opinion reversing the trial court's decision and agreed with Angela, holding that the trial court abused its discretion by refusing to read a jury instruction about the award of punitive damages. The instruction that should have been read was that a jury may not award an amount of punitive damages that would financially destroy the defendant.

Affirmative in Denying Plaintiff's Motion for Attorney's Fees.

Caryn L. Bellus and **Barbara Fox**, of the Miami office, prevailed in obtaining an affirmance of an order denying Plaintiff's Motion for Attorney's Fees. This was an underinsured/uninsured motorist case in which the Insurer, denied coverage but later tendered the policy limits in response to Plaintiff's Civil Remedy notice. Plaintiff then moved for fees in the trial court, claiming it was a confession of judgment. **Valerie A. Dondero**, of the Miami office, successfully opposed Plaintiff's fees motion. On appeal, Plaintiff claimed it was error to deny fees, again asserting that the carrier confessed judgment by paying the policy limits. However, Caryn and Barbara successfully opposed these arguments and explained to the appellate court that the payment in response to the Civil Remedy Notice was a complete cure, not a "confession" of judgment.

TRIALS, MOTIONS, MEDIATIONS

Partial Summary Judgment in Wrongful Death Case.

Angela C. Agostino, of the Ft. Myers office, obtained a Partial Summary Judgment in a Wrongful Death claim. The Plaintiff sued our client claiming her husband passed away on November 22, 2013, as the result of an accident that occurred on September 4, 2013. According to the medical examiner, the death was caused by coronary artery disease and diabetes. Despite extensive cardiac history, Plaintiff testified her husband had no issues with his heart prior to the accident. She claimed that the pain and anxiety of the accident caused his heart to fail. The decedent's cardiologist did not believe that the decedent's coronary artery disease was the likely cause of death, but agreed it could not be caused by an auto accident. Plaintiff's counsel argued that the wife's testimony was enough to create a material fact at issue and that additional time was needed to retain an expert even though the Complaint was filed November 19, 2015. The Judge granted Summary Judgment and did not allow Plaintiff the requested time and agreed that there was no reasonable basis to conclude the negligence of our client was the legal cause of Plaintiff's husband's death. There is a pending Motion for Fees and Costs based on a Proposal for Settlement directed solely to the Wrongful Death claim.

Final Summary Judgment in Slip and Fall Case.

Michael Balducci and **Jennifer L. Feld**, of the West Palm Beach office, obtained a Final Summary Judgment in a slip and fall case where the Plaintiff tripped on palm frond seeds while walking her dog in her neighborhood. Michael and Jennifer represented the community homeowners' association and the supervising management company. Relying on current Florida case law and the Plaintiff's own sworn testimony, Michael and Jennifer demonstrated that the Defendants did not have actual or constructive notice of the alleged condition, and the alleged dangerous condition was open and obvious. The Court ruled that there were no material issues of fact, and granted Final Summary Judgment as to both Defendants.

Favorable Defense Verdict in Motor Vehicle Accident Case.

Earleen H. Cote and **Mark A. Gaeta**, of the Ft. Lauderdale office, received a favorable verdict involving a motor vehicle accident where the Insured was heading the wrong way down a one-way street. The Plaintiff alleged the Insured was going the wrong way when he crashed into him "head-on." Earleen and Mark were able to show the Insured had been pulled over to the side of the road at the time of impact and that Plaintiff was either intentionally or carelessly the primary cause of the accident. As a result, the jury found the Plaintiff 75% liable and the Defendant only 25%. Plaintiff was seeking an excess of $100,000.00 for past and future medicals and pain and suffering. However, the jury awarded only a small portion of the Plaintiff's past medical expenses, as well as past pain and suffering, totaling only $3,800.00 after the fault apportionment.

Voluntary Dismissal in Food Poisoning Case.

Francesca A. Ippolito-Craven and **Lisandra Guerrero**, of the Miami office, obtained a complete voluntary dismissal with prejudice in a food poisoning case involving a Plaintiff who claimed a series of impairments and accidents were the result of a meal she consumed at the Defendant's restaurant. These included ruptures to both Achilles tendons which required three surgeries, and several falls wherein she injured her knee and pelvis. Francesca and Lisandra filed both a Motion for Summary Judgment and a Motion to Dismiss for Fraud on the Court.

The Motion for Summary Judgment argued the Plaintiff could not establish any breach of duty on the Defendant's part or that her alleged food poisoning and subsequent damages were caused by the meal in question. The Plaintiff could not prove the food she ate was contaminated through either direct or circumstantial evidence, or that it became contaminated as a result of the Defendant's operations.

Moreover, Francesca and Lisandra presented the affidavit of an expert witness who opined that, due to an average incubation period of 24 hours, the Plaintiff's symptoms and damages could not have been caused by the meal in question. Instead, her illness could have been caused by anything she ate in the nine days prior to the subject meal, thus leaving the jury to speculate as to causation.

The Motion to Dismiss for Fraud on the Court was based on misrepresentations made by the Plaintiff during her deposition that she never experienced any issues whatsoever with her Achilles tendons, ankles, feet, or her gait and balance. However, her medical records evidenced her testimony was false since she had multiple pre-existing health conditions in these areas. Shortly after receiving both Motions, opposing counsel called to advise he would be dismissing the case in its entirety with prejudice.

TRIALS, MOTIONS, MEDIATIONS

Summary Judgment in Premises Liability Case.

Francesca A. Ippolito-Craven, **G. William Bissett**, and **Lisandra Guerrero**, of the Miami office, obtained a Summary Judgment in a premises liability case where a Plaintiff alleged that a 15 pound ball mount joint fell on him, causing him to sustain bilateral knee and back injuries. In their Motion, they argued the Plaintiff could not prove the elements of his negligence claim since he testified he did not see the object that struck him prior, during, or immediately after the incident, and he did not know where it came from, or why it fell. They also argued the Plaintiff's version of events was physically impossible and presented an expert witness' affidavit to that effect.

At the Summary Judgment hearing, Lisandra successfully distinguished the case law cited by the Plaintiff's counsel seeking the application of the res ipsa loquitor doctrine. Moreover, she rebutted his argument that it made no difference whether the Plaintiff saw the object prior to the accident by arguing the basis of Plaintiff's claim was that the trailer hitch was improperly stocked. After hearing oral argument from both sides, the Judge held the Plaintiff could not prove the elements of his cause of action and granted Summary Judgment in the Defendant's favor.

Voluntary Dismissal with Prejudice in Property Damage Case.

Valerie A. Dondero and **Nicole L. Wulwick**, of the Miami office, received a Voluntary Dismissal with Prejudice on a homeowner's roof leak claim on the eve of Plaintiffs' depositions. Counsel for Plaintiffs demanded $50,000.00, months prior to dismissing the claim for interior damages to their property.

Defense Verdict in Uninsured Motorist Case.

Valerie A. Dondero, of the Miami office, received a defense verdict in an uninsured motorist coverage trial. The case involved a dispute regarding an oral rejection of uninsured motorist coverage. The Plaintiff alleged that since the Insurer could not find a signed uninsured/underinsured motorist rejection form, then the Insurer had to honor matching uninsured/underinsured limits with the $1 million in coverage to the bodily injury limits. Valerie successfully defended this claim arguing that the oral rejection of coverage in Plaintiff's recorded telephone call when he purchased the coverage was valid. After a bifurcated trial on liability, Valerie received a defense verdict.

Defense Verdict in Wrongful Death Case.

Stephen M. Cozart and **Teresa F. Cummings**, of the Pensacola office, received a complete defense verdict in Panama City. This was a wrongful death motor vehicle accident where the Insured T-boned another vehicle at an intersection. The other driver was 33 years old and on his way to work at 5:30 in the morning when the accident occurred.

The Plaintiff had expert who opined that the Insured did not have both headlights working at the time of the accident. In addition, Plaintiff's expert did an accident reconstruction and came to the opinion that the Insured was speeding. Through pretrial motions, Steve and Teresa were able to limit the expert's opinions down to a description of "hypotheticals." Furthermore, Steve was able to take the witness' methodology completely apart during cross-examination and made the jury realize the problems with Plaintiff's expert's opinions.

Favorable Defense Verdict in Motor Vehicle Accident Case.

Earleen H. Cote and **Mark A. Gaeta**, of the Ft. Lauderdale office, obtained a favorable defense verdict in a case where the Plaintiff with an aspiring NFL career, was a passenger in the Insured's car. The Insured admitted liability and there was evidence of alcohol as it related to both parties. The incident was a single car accident in which the Plaintiff claims was the result of the Insured running a red light for the thrill of it. Plaintiff suffered a spiral fracture to his humerus which he claimed ended his professional football career. At the time of the accident, the Plaintiff had not been signed by any NFL team, but had previously been signed as a practice squad player for several NFL teams.

Earleen was able to convince the jury that the Plaintiff's story of running the red light did not make sense and that Plaintiff had to take responsibility for being in the car in the first place. As it pertained to his football career, there was no evidence other than testimony by the Plaintiff, his mother, agent, and trainer, that he would have ever had a future NFL career or acquire the last playing credit necessary for his NFL pension. However, Plaintiff's counsel tried to make the Plaintiff seem as though he was the next up and coming star that was robbed of his chance to play in the NFL as a result of this accident.

The Plaintiff rejected policy limits of $100,000.00, in an effort to pursue a bad faith claim. However, the Jury found the Plaintiff 40% liable for the accident and awarded past medicals and only $38,000.00, in future medical, $20,000.00, in past lost wages, $0 future wages for his prospective NFL career, $40,000.00, in past pain and suffering, and $20,000.00, in future. The Jury also rejected any award for punitive damages.

Summary Judgment in a Negligent Security Case.

William A. Sabinson and **Michael Balducci**, of the West Palm Beach office, obtained a Final Summary Judgment in a negligent security action on behalf of the owner/landlord of an industrial plaza. The case involved an attack by a third-party assailant on an elderly Plaintiff who, with his wife, leased a commercial unit within the plaza. The assailant was the boyfriend of a woman who owned a beauty supply company that rented space next door to the Plaintiff. During the months leading up to the incident, the landlord received a number of calls from the Co-Defendant, complaining of a baby crying in the Plaintiff's unit. During the days leading up to the incident, the Plaintiff argued with the Co-Defendant about the complaints. Co-Defendant summoned the police the following morning to intervene. Shortly after the police left, the assailant barged in to the Plaintiff's unit and proceeded to assault, choke, and slam the Plaintiff to the ground several times, also threatening to kill him. The assailant was subsequently arrested and convicted on felony assault charges.

At the hearing, William argued to the Court that this attack was not reasonably foreseeable to the landlord, as a matter of law, because a) it was sudden and specifically targeted the Plaintiff, and b) no reasonable juror could conclude that the landlord should have expected a disagreement about noise from a crying baby to escalate to violence. The Judge was persuaded and entered Final Summary Judgment in the landlord's favor.

TRIALS, MOTIONS, MEDIATIONS

Dismissal with Prejudice in Sinkhole Case.

Harold A. Saul, of the Tampa office, obtained a Dismissal with Prejudice in a sinkhole case involving claims for negligence and breach of contract against their client who performed the repairs to the Plaintiffs' property.

Following a 2009 sinkhole claim, Plaintiffs contracted to have their property repaired. They later filed suit alleging repairs to the property were deficient.

Harold prepared a Motion for Summary Judgment arguing that the repairs were performed in accordance with the engineering plans and were exactly what the Plaintiffs contracted for. A hearing on the Motion was never set, however, once the Motion was filed, Plaintiffs' counsel withdrew citing "irreconcilable differences." Plaintiffs then sought representation with a local attorney, who agreed to stipulate to a Dismissal with Prejudice after reviewing the Motion for Summary Judgment.

Motion to Dismiss in Property Damage Case.

Jarred S. Dichek, of the Miami office, prevailed on a Motion to Dismiss for Failure to Include an Indispensable Party in a case which involved a claim for water damage caused by a leak to several areas of the Insured's property. The Insurer accepted coverage for floor, ceiling, and wall coverings only and denied additional coverage based on Florida Statute § 718.11 and the policy.

In part, Florida Statute § 718.111, requires a homeowners association to carry insurance on all portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications and all alterations. In addition, the statute specifies that this insurance must exclude all personal property within the unit or common elements, and floor, wall, and ceiling coverings which are the responsibility of the unit owner and should be insured by the unit owner. If the association had insurance in compliance with Florida law, then the insurer's policy would be excess coverage only for damages to the property, where other coverage existed.

The carrier subpoenaed the homeowners association to determine if they had the required insurance. However, the homeowners association was evasive and refused to comply with the subpoena or advise if they had the required insurance. Jarred requested the Plaintiff bring the homeowners association into the lawsuit, as they would likely be the primary insurer, if they had the required insurance. The Plaintiff refused to do so and as a result, Jarred filed a Motion to Dismiss arguing that the association per their by-laws likely obtained the statutorily required insurance and thus they were the primary insurer and an indispensable party.

Affirmance of Defense Verdict in Products Liability Case.

Valerie A. Dondero, of the Miami office, obtained an affirmative from the Third District Court of Appeal regarding a defense verdict in a products liability case that was tried in October of 2015. Valerie handled both, the trial and appeal.

Successful Administrative Proceeding before Alcoholic Beverages Control Board.

Stephen M. Cozart, of the Mobile, Alabama office, prevailed in an administrative proceeding before the Alabama Alcoholic Beverages Control Board (ABC Board). Steve's client was charged with violating State law in its process of mixing frozen daiquiris. After a two-part evidentiary hearing, the ABC Board found that the client was not guilty of the alleged violation.

Voluntary Dismissal in Slip and Fall Case.

Earleen H. Cote and **Shuntal Dean**, of the Ft. Lauderdale office, obtained a Voluntary Dismissal in a slip and fall case where the Plaintiff fell while stepping down from a booth at a restaurant which she had been sitting while she ate dinner. Relying on current Florida case law and the Plaintiff's own sworn testimony, Earleen and Shuntal demonstrated that the step-down was not a dangerous condition and, even if it was considered a dangerous condition, this particular step-down was an open and obvious condition. It was especially helpful that Earleen and Shuntal were able to elicit testimony from the Plaintiff that she was aware of the step-down and that she had no issue navigating the step when she entered the booth upon her arrival at the restaurant. After the Motion for Summary Judgment was filed, Plaintiff's counsel filed a Notice of Voluntary Dismissal.

Favorable Jury Verdict in Motor Vehicle Accident.

Stephen M. Cozart and **Teresa F. Cummings**, of the Pensacola office, obtained a favorable verdict in a case which involved admitted liability for a rear-end motor vehicle collision. The Plaintiff claimed that she had neck surgery as a result of the accident and that she would need a future low back surgery also related to the accident. The jury found that the Plaintiff did not suffer a permanent injury and awarded her only her past medicals for the first 12 weeks after the accident.

Summary Judgment in Motor Vehicle Accident.

Stuart Poage and **Micah A. Andrews**, of the Tallahassee office, prevailed on a Motion for Summary Final Judgment as a result of a serious automobile accident case. Our clients, who do the construction work on Interstate 10 and the driver of their dump truck, were sued by a man who ran into the back of the dump truck at approximately 70 miles per hour. The dump truck made a U-turn 888 feet before the point of impact. With a great accident reconstruction, Stuart and Micah were able to show the driver of the rear vehicle had sufficient time to recognize the hazard and stop his vehicle before running into the back of our clients' dump truck.

The Court found that the Plaintiff, as driver of the rear vehicle, could not come up with a "substantial and reasonable" explanation for the accident and that there was no record evidence that our client was negligent as the front-most vehicle and granted the Motion.

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.

ANNOUNCEMENTS & NEWS

Congratulations

Congratulations to **Brad J. McCormick**, of the Miami office, for being included in South Florida Business Journal's 2017 Power Leaders in the Law.

Congratulations to **Betsy E. Gallagher**, of the Tampa office, for being recognized as a Top Tampa Attorney in the appellate practice section for Tampa Bay Magazine and on being recognized as a Top Rated Professional Liability Lawyer in Tampa, by Super Lawyers.

Congratulations to **Daniel Miller**, of the West Palm Beach office and **Betsy E. Gallagher**, of the Tampa office, on being recognized as Florida's Legal Elite by Florida Trend Magazine. Daniel was recognized in Commercial Litigation and Betsy in Appellate Practice.

We are pleased to announce **Stefanie D. Capps**, of the Ft. Myers office, has been elected to the American Board of Trial Advocates (ABOTA). ABOTA is widely recognized as one of the most prestigious national organizations for trial lawyers. Membership in ABOTA is by invitation only and is limited to a small number of attorneys. Members must possess a wealth of trial experience and uphold the highest standards of integrity, ethics and civility in the legal profession.

Congratulations to **Pedro A. Lopez**, of the Miami office, and his wife on the birth of their baby girl, *Emma Faith Lopez*.

Congratulations to **Jennifer L. Feld**, of the West Palm Beach office, and her husband Eric on the birth of their baby boy, *Kameron Feld*.

Congratulations to **Eric A. Fluharty**, of the Ft. Myers office, and his wife on the birth of their twins *Peyton and Bryson*!

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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