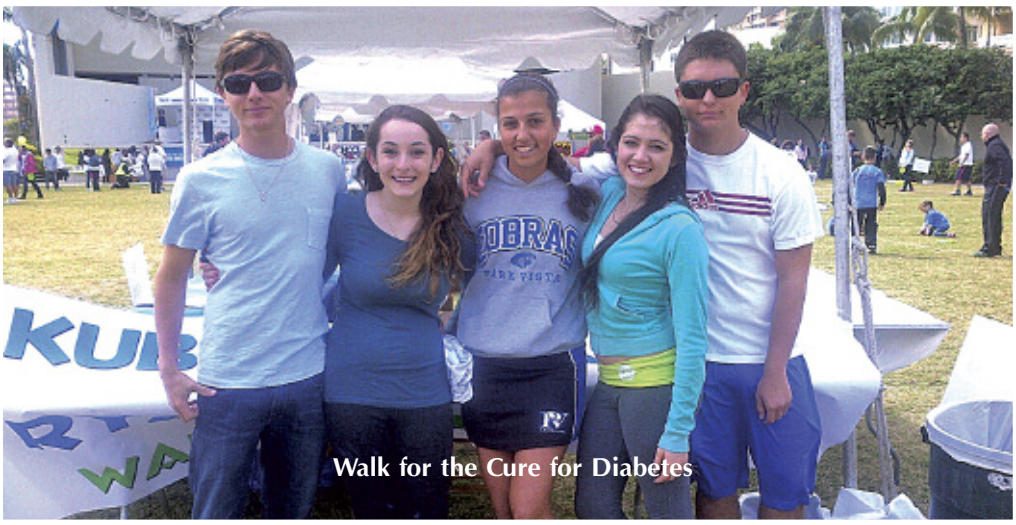
KUBICKI DRAPER

THE KD QUARTERLY

SPRING 2013

KD in the Community

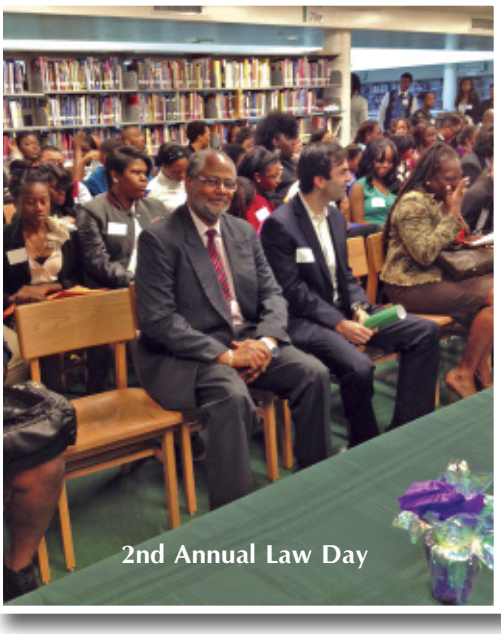


Walk for the Cure for Diabetes

Laurie Adams, of the West Palm Beach office, cheered on her son, Ryan Martino, as he led "Ryan's Raiders" in another successful year of Juvenile Diabetes Research Foundation (JDRF) fundrasing with the assistance and sponsorship of Kubicki Draper. As a Type 1 diabetic for four years, Ryan knows first-hand the importance of a cure. For a third year, Ryan's team raised $4,000.00, to assist research and development for Type 1 diabetes.

Michael Carney, of the Fort Lauderdale office, and **Charles Watkins**, of the Miami office, participated in the Second Annual Law Day at Miami Central High School. Law Day is designed to motivate and encourage students to look beyond their present circumstances toward a brighter future.

Miami and Fort Lauderdale KD members laced up their sneakers after work to join over 20,000 others in the Miami Corporate Run. The purpose of the run is to promote running and walking as a means to a fit, healthy lifestyle.



2nd Annual Law Day

Staying Fit at the Miami Corporate Run

EDITOR
Bretton Albrecht

IN THIS ISSUE

PREMISES LIABILITY UPDATE: The Slippery Transitory Substance Statute

By Nicole Wulwick

In The Florida Third District Court of Appeal's recent decision in **Kenz v. Miami-Dade County and Unicco Service Company**, 3D12-571, 2013 WL 1748954 (Fla. 3d DCA April 24, 2013), has effectively expanded the applicability of Florida's 2010 Slip and Fall Statute, §768.0755, Fla. Stat. The Court held that the 2010 Slip and Fall Statute is procedural rather than substantive in nature and, thus, it can be applied to lawsuits arising out of slip and falls occurring before July 1, 2010. For pending cases to which this new law applies, preservation of this issue is of utmost importance.

Florida law pertaining to slip and fall actions in the past 15 years has been a wavy ride. Before the landmark case, **Owens v. Publix Supermarkets, Inc.**, 802 So. 2d 315 (Fla. 2001), a person who slipped and fell on a transitory foreign substance in a business establishment had to prove that the establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. This high burden for plaintiffs in slip and fall cases is precisely the same burden of proof that the current 2010 Slip and Fall Statute dictates, making the possibility of summary judgment more feasible.

The 2001 **Owens** decision shifted the burden back to the premises owner or operator. Importantly, **Owens** required the owner or operator to establish by the greater weight of the evidence that it exercised reasonable care in maintaining its premises in a safe condition. Owens also eliminated the requirement that the plaintiff must establish that the premises owner had constructive knowledge of the existence of the transitory foreign substance.

In response to the **Owens** decision, in 2002 the Florida Legislature enacted §768.0710, Fla. Stat., which countered **Owens** by placing the burden of proof back on the plaintiff. However, it also codified part of **Owens**, eliminating the requirement that the plaintiff must establish that the store had constructive knowledge of the existence of the transitory foreign substance. Based on this initial legislative change, summary judgments and directed verdicts were still possible, but rare.

On July 1, 2010, Florida's "slip and fall" law changed once again in accordance with §768.0755, which repealed §768.0710. Section 768.0755 contains language that essentially tracks the original common law burdens of proof and duties of care that were utilized by the courts before the **Owens** decision. When the new statute came into effect, the key question arose: did §768.0755 apply retroactively to pending slip and fall claims or only to slip and fall claims that accrued after July 1, 2010?

Kenz finally gave us an answer. The **Kenz** case arose out of a slip and fall at Miami International Airport on May 13, 2008, when the former law, §768.0710, was in effect. After **Kenz** filed suit, but before her trial commenced, §768.0710 was repealed and was superseded by §768.0755. In the trial court, the defendants sought retroactive application of the new statute, which the trial court allowed. As a result, their summary judgment motion, which was based upon Kenz's failure to provide any evidence that the premises owner and operator had actual or constructive knowledge of the dangerous condition, as required by §768.0755, was granted.

Kenz appealed, arguing that §768.0755 could not be applied retroactively. This issue turned on whether §768.0755 was substantive or procedural, as the Florida Supreme Court has held that only procedural statutes can be applied retroactively, absent an express statement from the Legislature on the matter. *See, e.g.,* **Smiley v. State**, 966 So. 2d 330, 334 (Fla. 2007). Generally, substantive statutes or amendments prescribe the rights and duties of a party, while procedural ones dictate the methods and means of enforcing those rights and duties. *See, e.g., id.*

In **Kenz**, the Third District Court of Appeal opined that by requiring a plaintiff to prove actual or constructive knowledge of the premises owner or operator, §768.0755 does not create or add any new element to a cause of action for negligence; rather, it merely codifies the ***"means and method"*** by which a plaintiff must show that the defendant breached its duty of care. The Court concluded that this change in the plaintiff's burden of proof is procedural rather than substantive in nature and, therefore, applies retroactively to Kenz's claim. Accordingly, the Court affirmed the summary judgment. Since **Kenz** is the first and only Florida appellate opinion directly addressing this issue, it is currently the law statewide until another district court or the Florida Supreme Court weighs in or holds otherwise.

Just days after the **Kenz** decision, the Third District Court of Appeal affirmed an order of summary judgment in the slip and fall case of **Garland v. The TJX Companies, Inc.**, 3D12-390 (Fla. 3d DCA May 1, 2013). The court issued its decision in **Garland** as a per curiam affirmance with a citation to **Kenz**. (Bill Bissett of the Miami office represented the appellee/defendant in Garland and obtained the affirmance shortly after supplementing his brief with the recent **Kenz** decision).

SPOTLIGHT ON:

Sharon C. Degnan

SHARON C. DEGNAN, A SHAREHOLDER IN THE FORT LAUDERDALE OFFICE, IS ON A ROLL.

At a time when the trend in the courts seems to be generally unfavorable toward the defense, and especially toward insurance companies, Ms. Degnan has managed to consistently obtain favorable results for her clients. She is a board certified appellate attorney who brings her expertise to bear in all aspects of civil litigation, including appeals, complex trial support, and insurance coverage disputes. Ms. Degnan regularly appears before all of Florida's state appellate courts, the United States Court of Appeals for the Eleventh Circuit, and numerous Florida trial courts. She litigates at both the trial and appellate levels against Florida's top appellate practitioners and has many published opinions spanning all areas of civil litigation. Ms. Degnan is also frequently asked to provide insurance coverage analysis to her clients and litigates all aspects of policy interpretation and coverage disputes.

In the past year, her work has garnered several favorable decisions, especially from Florida's appellate courts, at a time when few others have been as successful in advocating for the defense. Most recently, in **List Industries, Inc. v. Dalien**, 107 So. 3d 470 (Fla. 4th DCA 2013), she obtained the reversal of a $2.7 million jury verdict and final judgment against an employer-defendant and in favor of an employee-plaintiff who had suffered an amputation of a significant portion of his dominant hand while operating a piece of machinery. Ms. Degnan argued the trial court erred in denying the defense motion for directed verdict at trial based on the workers' compensation immunity defense. The appellate court agreed and reversed and remanded with directions to enter a directed verdict for the defendant. The court emphasized: "The case before us demonstrates how the 'quick and efficient' intention of the statute is subverted when the immunity issue was allowed to avoid early determination by the trial court." Id. at 474. The plaintiff, discontent with this decision, is seeking further review with the Florida Supreme Court, and Ms. Degnan recently filed a jurisdictional brief in opposition to the appeal with the Florida Supreme Court (which the court has not yet decided at this time).

The same day the Dalien decision was released by the Fourth District, the Third District issued its opinion in **Balmoral Condo. Ass'n v. Grimaldi,** 107 So. 3d 1149 (Fla. 3d DCA 2013), reversing a trial court's decision vacating a default summary judgment in favor of Ms. Degnan's client. In that case, Ms. Degnan explained to the appellate court that the trial court erred in vacating the default in favor of her client because the trial court lacked jurisdiction to entertain a successive motion for rehearing, which was not authorized under the rules of procedure. Hence, the appellate court ruled that the final judgment in favor of Ms. Degan's client must stand.

Also recently, in **Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.**, 103 So. 3d 200 (Fla. 4th DCA 2012) (reh'g denied Jan. 18, 2013), Ms. Degnan successfully argued to the appellate court that the defendant in personal injury litigation should be permitted to conduct discovery aimed at uncovering the existence of biases or a referral relationship between a plaintiff's attorney and treating physicians, who are expected to testify at trial (commonly known as a "hybrid witness"), and that, if a referral relationship is shown to exist, the defendant should be able to conduct additional discovery regarding the extent of the financial relationship. Although the appellate court ultimately concluded that the trial court's discovery order was premature since the record did not conclusively establish the existence of a referral relationship, it held that the medical providers were required to provide financial bias discovery like that permitted by Fla. R. Civ. P. 1.280(b)(5)(A)(iii), as well as any history of referrals between the medical providers and the plaintiff's law firm. Moreover, the court held that if the defendant could establish that the law firm or medical providers referred plaintiff to the other, then more extensive financial bias discovery from both of them may be appropriate.

A few months before the **Steinger** case, Ms. Degnan received a favorable decision in **Madden v. Kutner**, 110 So. 3d 464 (Fla. 4th DCA 2012), where she successfully persuaded the Fourth District Court of Appeal that it should affirm the trial court's order denying the plaintiff's motion for attorney's fees because the plaintiff's proposal for settlement was ambiguous and, therefore, invalid.

Although appellate results, as with any litigation results, obviously can never be predicted with certainty, Ms. Degnan has been successful time and again in persuading the appellate courts to side with the defense. She believes one of her most valuable skills that makes her so successful, especially on the appellate and coverage fronts, is her ability to present complex legal issues in a straightforward manner that helps the court view the case from a different perspective. Ms. Degnan is passionate about advocating for her clients and presenting her client's position in the best possible light to the court.

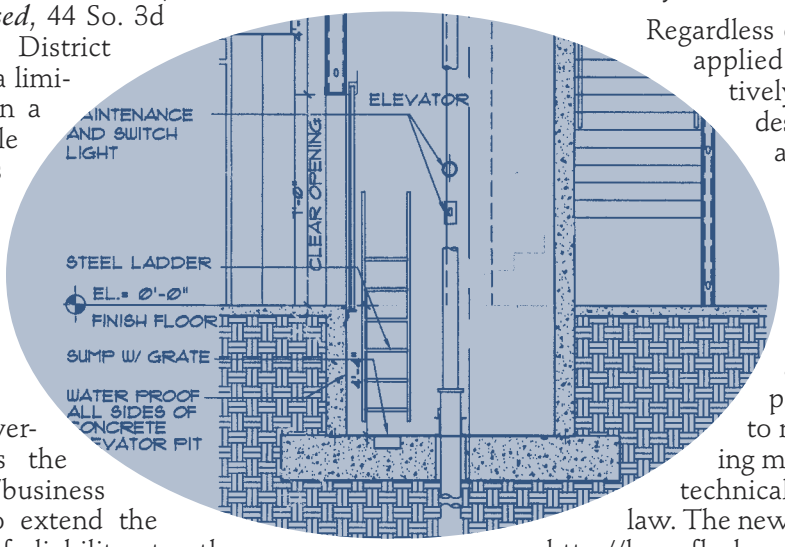
Ms. Degnan was born and raised near Philadelphia, Pennsylvania. She knew from an early age that she wanted to be an attorney. She attended college at William Smith College in Geneva, New York, where she earned her B.A. in Political Science, with honors. She earned her J.D. from the University of Miami School of Law, also with honors. Law school is also where she met her husband, Michael, who is a securities lawyer. Their little boy, Liam, is seven years' old, and their little girl, Lacey, is four.

CONSTRUCTION LAW UPDATE:
New Law Allows Design Professionals to Contractually Limit Liability

By Michael Milne and Jeffrey DeFelice

On April 24, 2013, Governor Rick Scott signed into law Senate Bill 286. *See* Ch. 2013-28, Laws of Florida (creating §558.0035, Fla. Stat., and amending related provisions). The new law generally allows business entities that employ design professionals, such as architects and engineers, to contractually limit the liability of such individual employees or agents for negligence arising from the performance of professional services under a contract, provided that the contract and circumstances meet the requirements set forth by the statute.

Florida courts have generally held that limitation of liability clauses in contracts involving professional services or design professionals are enforceable. However, the courts do not appear to have extended the contractual limitations of liability to individual professionals performing the contracted services on behalf of the professional association/business entity. In fact, in **Witt v. La Gorce Country Club, Inc.**, 35 So. 3d 1033 (Fla. 3d DCA 2010), *review dismissed*, 44 So. 3d 108 (Fla. 2010), the Third District Court of Appeal held that a limitation of liability clause in a contract was unenforceable as to a licensed geologist. As a result, the geologist was held individually liable for over $4,000,000.00 in damages, even though his employer's contract included a limitation of liability clause.



The new law effectively overrules **Witt** and provides the professional association/business entity with the ability to extend the contractual limitations of liability to the individual design professionals it employs. The law takes effect July 1, 2013. The Legislature did not expressly state whether the law will apply retroactively. Accordingly, the law will not apply retroactively unless the courts hold that it is procedural, rather than substantive, in nature.

However, even if the courts were to hold the statute is procedural (and thus, retroactive), which seems unlikely, contracts drafted/executed prior to the new law still probably would not receive the benefits of the new law unless they happen to already comply with the new technical requirements. While some of the technical requirements contained in the new law may already be present in some boilerplate design contracts, others likely are not. For example, among other things, the new law requires that any contract seeking to limit an individual design professional's liability must include "a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an individual employee or agent may not be held individually liable for negligence."

Regardless of whether the new law is applied retroactively, or prospectively only, it is important for design professionals - including architects, interior designers, landscape architects, engineers, surveyors, and geologists - and their related business entities to become familiar with this new law. It also seems advisable, and in a design professional's best interest, to make sure that, as an ongoing matter, all contracts meet the technical requirements of the new law. The new chapter law is available at: http://laws.flrules.org/files/Ch_2013_028.pdf. Additional information about the new law can also be found on Florida Senate's website, http://www.flsenate.gov.

NEW ADDITIONS TO THE FIRM

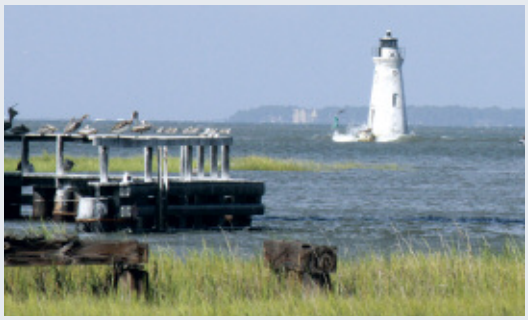
We are pleased to announce the arrival of two new associates.
Kara M. Carper has joined Jarred Dichek in the PIP/SIU Division in the Miami office, and **Michael A. Valverde** has joined Michelle Krone's construction group in the Ft. Myers/Naples office.

MARITIME UPDATE

Navigating the Waters of Admiralty Jurisdiction

By Marcus Mahfood

In the last KD Quarterly, we examined the United States Supreme Court's decision in **Lozman v. City of Riviera Beach**, which limited the scope of admiralty jurisdiction by refining what may be classified as a vessel. It is only fitting to now discuss the Eleventh Circuit's recent decision in **Aqua Log, Inc. v. Lost and Abandoned Pre-Cut Logs and Rafts of Logs**, 709 F.3d 1055 (11th Cir. 2013), where the court answered "a question almost as old as the doctrine of admiralty jurisdiction itself," namely: What are navigable waters?



In **Aqua Log**, the Eleventh Circuit simplified the test for and expanded the breadth of admiralty jurisdiction. The case addresses portions of Flint River and Spring Creek, two Georgia waterways supporting interstate commerce for only part of the year. Aqua Log, a company that locates and sells submerged logs, filed an in rem admiralty proceeding to obtain a salvage award or title to certain valuable logs found in each river. Because Aqua Log's claims were unique to maritime law, they could only be resolved by a Court sitting in admiralty. The two-prong test for admiralty tort jurisdiction requires: (1) a significant relationship between the alleged wrong and traditional maritime activity (a nexus); and (2) the tort must have occurred on navigable waters (location). A century of law has established that the body of water in question must be navigable for *purposes of interstate commerce* for admiralty jurisdiction to exist.

The State of Georgia opposed **Aqua Log** claiming ownership of the logs and moved for Summary Judgment. Georgia argued subject matter jurisdiction was lacking because there was no present or potential commercial activity on either waterway. The District Court granted Summary Judgment for Georgia, as Aqua Log offered no evidence of planned commerce.

The Eleventh Circuit reversed in light of controlling pre-1981 Fifth Circuit precedent. Noting the navigability requirement applied equally to tort and salvage cases alike, the Eleventh Circuit held that "a waterway is navigable for admiralty jurisdiction purposes, if, in its present state, it is capable of supporting commercial activity." The Court's ruling was consistent with the First, Second, Fourth and Seventh Circuits, all of which apply a *capability* test. The Court reasoned a test requiring *actual* commercial activity would unnecessarily involve the presentation of evidence. Ultimately, this would undermine the predictability that encourages maritime commerce, the primary purpose of maritime law.

While the Supreme Court in **Lozman** limited the scope of admiralty jurisdiction, **Aqua Log**, at least in the Eleventh Circuit, has conversely broadened the sphere with its expansion of navigable waters. The Court expressly stated the test "may expand admiralty jurisdiction into waterways that may never be used for commercial maritime activities." Like most salty Supreme Court and Circuit Court decisions, **Aqua Log** advanced the federal interests of uniformity in admiralty law in hopes of simplifying and better protecting maritime commercial activity.

APPELLATE RESULTS

Defense Judgment Affirmed in Auto Negligence Case.

Betsy E. Gallagher and **Michael C. Clarke** (Tampa) obtained an affirmance of a final defense judgment entered pursuant to a jury verdict finding "no negligence" in causing an accident. Plaintiff/Appellant asserted that the trial court erred in admitting into evidence Plaintiff's prescription drug use, including methadone and hydrocodone, where there was no evidence relating the drug use to fault. Ms. Gallagher argued that the evidence of drug use was properly admitted as impeachment. Furthermore, even if admission of the evidence was error, it was harmless error at best because the Plaintiff's overall testimony lacked any credibility and would have been rejected by the jury even without the admission of Plaintiff's drug use. The Second District found no reversible error and per curiam affirmed. *See* **Reyes v. Pinkney**, 107 So. 3d 415 (Fla. 2d DCA 2013).

Order Denying Plaintiff's Motion for Attorney's Fees Affirmed.

Michael Clarke and **Betsy Gallagher** (Tampa) obtained an affirmance, over a dissent, of a trial court's order denying plaintiff's motion for attorney's fees under two proposals for settlement made to the defendants, a driver and vehicle owner. The Second District agreed that the subject proposals were ambiguous and, thus, invalid, where each proposal stated that the claims against the named defendant would be dismissed but were silent as to the other defendant, whereas the proposed notice of voluntary dismissal attached to each proposal indicated plaintiff would dismiss her claims against both defendants if either one of them accepted. *See* **Tran v. Anvil Iron Works, Inc.**, 2D11- 2819, 38 Fla. L. Weekly D366 (Fla. 2d DCA Feb. 15, 2013) (rehearing *en banc* denied by order dated April 10, 2013).

Order Dismissing Plaintiff's Declaratory Judgment Action for PIP Coverage Affirmed.

In **Soares v. Progressive American Ins. Co.**, 5D12-649 (Fla. 5th DCA April 16, 2013), **Betsy Gallagher** and **Michael Clarke** (Tampa) obtained an affirmance of a circuit court's final order dismissing a declaratory judgment action to determine eligibility for PIP benefits. Plaintiffs had alleged that they were in "doubt" as to the status of their coverage and were therefore entitled to a declaratory judgment and attorney's fees where the insurer had notified them it was conducting an investigation before determining the issue of coverage. Because there had been no written or verbal denial of coverage, the circuit court found there was no actual controversy to support a claim for declaratory relief, and the Fifth District per curiam affirmed on appeal.

Plaintiff's Motion for Class Certification Defeated.

Peter Baumberger and **Michael F. Suarez** (Miami), recently defeated a Plaintiffs' motion to certify a massive class action suit against multiple defendants, following more than a year of intense litigation, over a hundred pages of legal briefings by all parties, and a two-day evidentiary class-certification hearing where the KD attorneys led the way for the defense. The Plaintiffs, a septic tank contractor and two property owners, sought to serve as class representatives for a "contractor class" and a "property owner class" in a septic tank products liability case involving numerous defendants, including Mr. Baumberger and Mr. Suarez's client, the septic tank manufacturer.

Plaintiffs, who were represented by one of Palm Beach's most prominent plaintiff's law firms, asserted claims for implied warranties, negligence, strict products liability, and violations of the Florida Deceptive and Unfair Trade Practices Act. As part of their claims, Plaintiffs originally sought to include every single tank ever manufactured since the 1970s. Needless to say, the Plaintiffs' claims encompassed thousands of tanks in every Florida county, and thousands of potential class members. Minor note - Plaintiff's counsel valued their claim in excess of $30 million, and our client was the main target.

Starting at the early stages of the case, Mr. Baumberger and Mr. Suarez focused directly on establishing through the thousands of pages of testimony and the 100,000-plus documents produced, why the required class action elements of "numerosity," "typicality," "commonality," "adequacy of representation," and "predominance" where simply not met in this case. They picked apart each and every potential class member, establishing how these elements were not common among them; while also discrediting the findings of the Plaintiff's experts through their intense research and testing. In the end, and after what was essentially a very intense two-day trial, the Court issued a 21-page Order Denying the Plaintiffs' Motion for Class Certification, ruling that the elements needed for class certification were not met by the Plaintiffs. Although Plaintiff will likely appeal, this is an enormous victory, and the clients are thrilled with the result.

Voluntary Dismissal of Plaintiff's Claims for Liability Coverage.

Valerie Dondero (Miami) obtained a Voluntary Dismissal of a plaintiff's claims against an insurer in a lawsuit for bodily injury arising from an auto accident. The injured plaintiff had obtained a judgment against an insured and thereafter sought to add the liability insurer to the judgment. Ms. Dondero successfully argued that there was no liability coverage available under the policy because the driver of the vehicle at the time of the loss was specifically excluded from operating the vehicle. Ms. Dondero was also able to show that the driver had taken the vehicle without the knowledge or permission of the owner. When presented with this evidence, the Plaintiff voluntarily dismissed its claims against the insurer.

Voluntary Dismissal of Plaintiff's Action for Construction/Design Negligence.

Michael Milne and **Jeffrey Defelice** (Orlando) successfully defended an infrastructure civil engineer who was sued for alleged negligent engineering/design of a restaurant after the Plaintiff was allegedly injured while exiting the restaurant. Mr. Milne and Mr. Defelice established through discovery that the defendant-engineer was not involved in the design or construction of the restaurant; rather he was only involved in the civil design of the shopping plaza where restaurant was located and merely issued the civil surveys. Based on this evidence, Mr. Milne and Mr. Defelice strategically served 57.105 notices and motions for sanctions against the Plaintiff and a designer codefendant for frivolous claims that our client was involved in the design of the restaurant. The Plaintiff and codefendant quickly conceded by agreeing to withdraw their claims and dismiss the suit against our client.

Multiple Favorable Settlements.

LeVale Simpson (Miami), with hard work and a dogged-focus has developed an ability to effect great results in settlements. In a recent case in which KD was substituted as counsel, Mr. Simpson successfully persuaded the opposition, despite much bluster and positioning on their part, to accept a final offer of settlement below the initial excess policy demand. A key element in the successful settlement was Mr. Simpson's hard work in getting this case into trial shape in record time. KD received the file just six weeks before the trial period, at which time CME's had not been done, liability and medical theories of defense were lacking, and plaintiff's motions to strike and for sanctions were already pending. To make matters worse, the main plaintiff had already received epidural injections and was a candidate for surgery, and the secondary plaintiff, a 14-year-old girl, had confirmed bulges in her lumbosacral spine at two levels. Both had no prior history of back complaints. Mr. Simpson threw himself into the file, and with the able help of paralegal Stephanie Bott, completed compelling CMEs that developed and supported a defense of lack of causation. This strategy compelled the plaintiff to come off their excess policy-limits demands and accept the final offer which was well within the policy limit.

In two other cases involving property damages and exposure to pre-judgment interest Mr. Simpson, again by early value determination and intervention, was able to convince the opposing side that drawn-out litigation would not be economically feasible and the best deal considering the time value of money was on the table, thereby achieving two additional favorable settlements.

Voluntary Dismissal with Prejudice of Action Challenging Insurer's Electronic Signature Process.

Valerie Dondero (Miami) obtained a Voluntary Dismissal with Prejudice of a lawsuit challenging an insurer's online electronic signature processes. The Plaintiff claimed he did not electronically sign the policy documents and further argued that his electronic signature on the UM Selection/Rejection form was invalid under Florida's Uninsured Motorist statute. Ms. Dondero was able to present evidence that the Plaintiff had given the insurer his email address, and had gone online to the insurer's website to change his password prior to signing the policy documents. The Plaintiff admitted the password change and acknowledged that his signature was placed on the application, UM Selection/Rejection form and other policy documents in order to bind the coverage.

Summary Judgment Enforcing Pre-suit Settlement in Catastrophic Injury Case.

Karina Perez (Tampa) obtained final summary judgment enforcing a pre-suit settlement in a negligence case involving a multiple vehicles, a mobile crane, a dump truck, a loaded public bus, and an on-duty Hillsborough County Sheriff's Officer. The accident allegedly occurred when the top mattress on a loaded trailer flew off and started a chain reaction. Although there were catastrophic injuries to the claimant/plaintiff, and some 20 other claimants, Ms. Perez was able settle the case as to her client for her client's 10/20 policy limits. Thereafter, Plaintiff sued our client (along with other alleged tortfeasors), and he challenged the settlement, arguing there were additional coverages available of which he was unaware at the time of the settlement, such as

potential coverages from the trailer-owner. Ms. Perez anticipated this argument and presented evidence at the summary judgment hearing proving that Plaintiff's counsel did know about the other potential coverages. The Court entered summary judgment in favor of our client-defendant and enforced the pre-suit settlement.

Dismissal with Prejudice of Third-Party Action Against Insurer's Employees.

Valerie Dondero (Miami) obtained a dismissal with prejudice of a third party action against individual employees of an insurer who were sued for alleged fraud and deceit, violation of Florida's Insurance Disclosure Statute and violation of Florida's Fictitious Name Statute. The Court found the injured plaintiff had no viable cause of action against the individual employees, as the Insurance Disclosure Statute applies only to insurers, insureds and insurance agents. Ms. Dondero also obtained a dismissal, without prejudice, of a counterclaim and another third party action against two separate insurers for the same causes of action alleged against the individual employees. Ms. Dondero successfully argued that an injured plaintiff has no right to bring a counterclaim or third-party action against an insured's alleged liability insurer until such time as the plaintiff has complied with the conditions precedent enumerated in Florida's Non-Joinder Statute and Florida's Insurance Disclosure Statute. The court found the counterclaim and third-party action were both premature as the injured plaintiff could not bring the causes of action without having obtained a judgment or settlement against the insured.

Complex Motion for Injunction in Bankruptcy Case Defeated.

Frank P. Delia (West Palm) successfully opposed and defeated a complex motion for an injunction, to the benefit of his client, a credit business that is pursuing over $700,000 in a bankruptcy proceeding against a debtor-customer. Years ago, the debtor-customer had its sole owner individually sign a credit application. The individual personal guarantor requested injunctive relief to avoid being prosecuted in a pending state court action filed by Mr. Delia's client. The injunction hearing was hotly contested and critical, due to the amount owed and the impact it could have on Mr. Delia's client's credit business in the electrical/construction industry. Mr. Delia, key documents in hand, was able to get the personal guarantor to admit on the record that he had gift-deeded one of his real properties to his daughter while knowing that creditors' claims were pending. Ultimately, the judge denied the injunction. Needless to say, the client is very pleased and is now focused on marching forward with collection/judgment efforts in the state court action.

Voluntary Dismissal with Prejudice in Construction Negligence Case.

Michelle Krone (Ft. Myers/Naples) obtained a Voluntary Dismissal with Prejudice after serving Plaintiff with a 57.105 sanctions notice/motion in a construction negligence case, in which the client-defendant, a concrete-cutting subcontractor, was sued after allegedly hitting an electrical line and allegedly causing six figures worth of damage. Ms. Krone pointed out in her 57.105 notice/motion that the relevant contractual provisions required Plaintiff to voluntarily dismiss, as the subcontract precluded the lawsuit because it made the locations where the cutting was being done the responsibility of another subcontractor. The case was voluntarily dismissed by Plaintiff as to our client-defendant within the 21 days allowed under 57.105, and before any substantial fees and/or costs were incurred by the defense.

Voluntary Dismissal with Prejudice of Claim for Alleged Impairment of Hospital Lien.

Valerie Dondero (Miami) obtained a Voluntary Dismissal with Prejudice in favor of an insurer on a claim that the insurer impaired a hospital lien for medical services provided to the injured Plaintiff. Ms. Dondero successfully persuaded Plaintiff's counsel the lawsuit must be dismissed based on the supreme court's holding in **Mercury Ins. Co. v. Shands**, which held an Alachua County lien law violated the state constitution's provision prohibiting special laws pertaining to liens based on private contracts. As a result, Ms. Dondero obtained a voluntary dismissal from Plaintiff and a full Release and Satisfaction of Lien in behalf of the insurer and its insured.

Favorable Trial Result in Disputed Liability Case.

Kendra B. Therrell (Ft. Myers/Naples) recently obtained a favorable result in a disputed liability case involving a truck vs. bicycle accident. Ms. Therrell's client was the driver of the pickup truck at the time of the accident. He maintained from the beginning that he had stopped for the Plaintiff, when Plaintiff rode his bicycle into the right side of his truck. There were no independent witnesses to the accident. The 29-year-old Plaintiff had no prior complaints and treated the following day with a chiropractor for cervical and lumbar pain. After several months of conservative treatment he came under the care of a neurosurgeon from the east coast of Florida, despite living in Naples, Florida, several hours drive by car. During an aggressive cross-examination of Plaintiff, he testified that he was provided transportation for each doctor visit and for the outpatient lumbar "surgery" that was performed. Total medical bills exceeded $115,000. Skillful use of surveillance video that caught Plaintiff in several impeachable statements contributed to the favorable result in this "he said/ he said" dispute. The jury split liability 50/50.

Defendant filed a Proposal for Settlement more than two years before the trial for $20,000, against Plaintiff's constant demand for $100,000. Through meticulous discovery and defense depositions of the treating doctors with regard to billing practices, post-trial reductions totalled $106,658.46. The net judgment after reductions would be $11,670.77, but as the prevailing party under the two year old Proposal for Settlement, the judgment amount should be wiped out. Instead, it is anticipated that Plaintiff will owe significant fees and costs to Defendant.

Defense Judgment in Action Alleging Breach of Contract, Fraud and Negligent Misrepresentation.

Francesca A. Ippolito-Craven and **Nicole L. Wulwick** (Miami) obtained a final defense judgment after a tough trial in which Plaintiff alleged claims for breach of contract, fraud, and negligent misrepresentation against the Defendant, a major electronics retailer. Plaintiff's claims were based on allegations that a certain laptop computer was incorrectly advertised on a company website. Various reliance and consequential damages were being sought. Indeed, plaintiff even sought to add new items of damage during trial. Ms. Wulwick took the lead and argued aggressively, yet gracefully, and meticulously presented her proof. She had to master the technicalities of the particular laptop computer, which was at the core of the case, especially since Plaintiff was even a beta tester for the laptop company. Even after the judge refused to grant summary judgment and various key motions in limine, our KD attorneys still prevailed. In the end, the judge in this non-jury trial confined his findings and conclusions to those facts and legal arguments that Ms. Wulwick specifically urged compelled a decision in Defendant's favor. Best of all, due to a pre-trial proposal for settlement they filed early on in the case, the defense will be filing a motion to recover attorney's fees and costs.

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Presentations/Speaking Engagements

Jarred Dichek of the Miami office, **Ken Oliver** of the Ft. Myers/Naples office, and **Michael Walsh** of the Ft. Lauderdale office presented on Changes in the PIP Statute at Assurance America.

Carey Bos of the Orlando office, and **Bill Bissett** and **Brad McCormick** of the Miami office, presented a seminar to Nationwide on Construction Defects, Insurance Coverage Basics and the Slavin Rule.

Several KD attorneys from around the state recently visited GEICO to put on a presentation that covered effective mediation preparation and strategy. KD participants were: **Michael Carney** (Ft. Lauderdale), **Harold Saul** (Tampa), **Chelsea Winicki** (Jacksonville), **Steve Cozart** (Pensacola), **Valerie Dondero** (Miami), **Michael Balducci** (West Palm) and **Ken Oliver** (Ft. Myers).

Significant changes to the Florida PIP Statute were reviewed during a presentation at North American Risk by **Jarred Dichek** and **Charles Watkins** of the Miami office, as well as **Harold Saul** of the Tampa office and **Michael Walsh** of the Ft. Lauderdale office.

Angela Flowers of the Ocala office, presented on Post-trial Issues and Preservation at a Florida Association For Women Lawyers (FAWL) meeting.

Peter Baumberger of the Miami office, **Michael Carney** and **Michael Walsh** of the Ft. Lauderdale office, and **Chelsea Winicki** of the Jacksonville office presented on Significant Changes to the Florida PIP Law & Good Faith Documentation to Florida Farm Bureau.

Michael Milne of the Orlando office and **Jorge Santeiro** of the Tampa office presented on Construction Defects at a Rimkus conference.

Karina Perez and **Michael Clarke**, of the Tampa office, presented to members of the West Coast Claims Association on Strategies in Premises Liability Cases.

Jarred Dichek, Charles Watkins and **Kara Carper** of the Miami office, along with **Michael Clarke** from Tampa, presented on Negotiating Settlements and Basic Appellate Principles to Gainsco.

Betty Marion of the Ocala office and **Greg Prusak** of the Orlando office visited Zurich to present on Veterinary Law and Ethics for the Claims Professional.

Francesca Ippolito-Craven of the Miami office was invited to speak at the Academy of Hospitality Industry Attorneys Conference. She presented on liability issues that lodging establishments face when they offer spa, fitness, health, wellness and cosmetic services.

Peter Baumberger, of the Miami office, presented at the "Teacher's Law School," a program sponsored by the American Board of Trial Advocates (ABOTA), which is geared towards teaching basic law to Miami-Dade County middle and high school civics teachers. The speakers Peter recruited for this event included the Honorable Patricia Seitz (United States District Court Judge for the Southern District of Florida), who spoke about the Role of Courts in Modern Society (with an emphasis of the importance of preserving the independence of the judiciary); Judge Kevin Emas (Appellate Judge for Florida's Third District Court of Appeal), who gave a presentation on the Use of Social Media in the Courts; Professor Scott Fingerhut (of FIU Law School), who spoke about the importance of the 4th Amendment; and Peter's father, Charles Baumberger, a prominent Miami trial lawyer, who spoke about the history of the right to trial by jury. Over 200 teachers came out for the event, and it was so successful, the school board has asked Peter to make this an annual event.

We welcome the opportunity to host a complimentary continuing education seminar at your office or participate as a speaker at your event. For more information, please contact
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