KUBICKI DRAPER

THE KD QUARTERLY

WINTER 2013

1963 - 2013

50 Years of Excellence

Dear Friends and Clients,

We are proud to be celebrating our 50th year.

Much has happened since 1963 -- the firm has grown, expanded and become proficient in many specialized areas of the law, however, we have never lost our goals of providing excellent service and good results.

As we move into the new year, the firm's growth continues and so does our commitment to providing our clients with the finest legal counsel and professional service available.

We thank you for your friendship and continued support, and we look forward to serving you in the future.

Best wishes from the KD Team

EDITOR
Bretton Albrecht

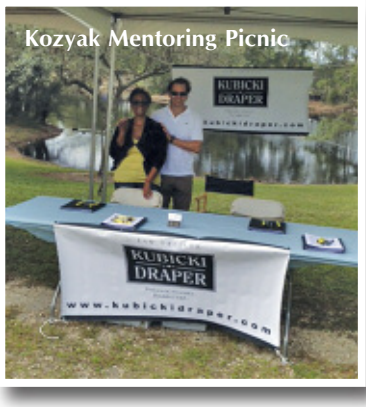
IN THIS ISSUE

KD In the Community...

Michael J. Carney, of the Ft. Lauderdale office, recently participated in a presentation for the Pre-Law Program at Miami Central High School in Miami, Florida, which included teaching students about the law and closing arguments.

Walk for PKD

Tampa's Kubicki Draper office, along with many attorneys and staff from other KD offices participated in the Walk for PKD for the fifth consecutive year this past October. The team, named "Ivan's Investors for a PKD Cure," was captained by **Harold Saul**, of KD's Tampa office. The team, which is named in honor and memory of Harold's father, raised over $20,000 for the event, and received an award for raising the most funds for this event, the proceeds of which go to help the Polycystic Kidney Disease Foundation.



Kozyak Mentoring Picnic

Kubicki Draper once again proudly co-sponsored and hosted the Annual Kozyak Minority Mentoring Picnic. Miami attorneys: **Charles Watkins, Pushkar Singh, LeVale Simpson, Peter Baumberger** and **Nicole Ellis**, participated in the event and spent time guiding and mentoring many law students and recent graduates from all around the State of Florida.

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KD In the Community...

Jorge Santeiro, Jr., of our Tampa office, co-founded Lawyers Autism Awareness Foundation (LAAF) in 2011. Last December, LAAF held its second annual Sensory Friendly Santa Event. Many children on the Autism Spectrum suffer from Sensory Processing Disorders, which makes it difficult for them to enjoy a visit with Santa during the holidays. The event, once again, allowed children and their families to experience Santa, many for the first time, in an environment free from distractions that cause them anxiety.

Thanks to the support of the Tampa legal and business community, LAAF has raised thousands of dollars to fund events like Sensory Friendly Santa and need-based scholarships for kids in need of therapy.

Below is an excerpt of an article and photo published in the *Tampa Tribune* regarding the LAAF.

TAMPA -- A photo op with Santa, as innocent as it sounds, can be an intimidating experience for any child, a child with autism, it can be downright miserable.

Endless lines. A fat bearded guy in a red suit booming out "Ho, ho, ho!" And all the ambient noise of a crowded mall going on in the background.

"When your child starts screaming or flapping his arms and everyone is staring at you, suddenly the Santa picture isn't so important anymore," says Tampa attorney Jorge Santeiro. "You take it for granted that your child can enjoy the holidays, but that isn't always the case."

So Santeiro and fellow lawyer Luis Viero, co-founders of the nonprofit Lawyers Autism Awareness Foundation (LAAF), came up with an alternative to put a little joy back into the hectic holidays: the Sensory Friendly Santa event.

Sandy Santeiro distracts son William as he plays Wii with his father, Jorge Santeiro, at the family's home. Jorge Santeiro is a co-founder of a support group for families with autistic children.

Both men are parents of children who have been diagnosed as being on the autism spectrum. And both understand that the condition, depending on the severity, can cause extreme reactions or odd behavior at inopportune times. It's common for children with autism to be ultra-sensitive to light, touch or sounds.Unfamiliar situations can cause severe anxiety or stress.

"We know what to expect. But unless you've lived with it, it can put some people off," says Sandy Santeiro, Jorge's wife. Their son, 14-year-old William, has Asperger's syndrome, an autism spectrum disorder considered to be on the "high functioning" end of the spectrum. It affects his manual dexterity and requires an individual educational plan at Tampa Charter School.

"When you're around people who care and understand, it can make all the difference in the world," she says.

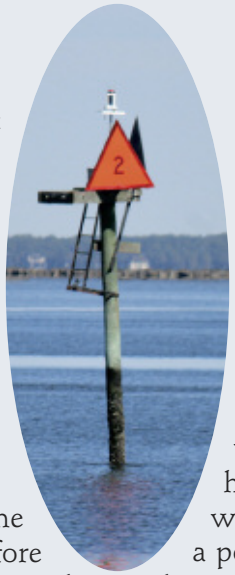
By MICHELLE BEARDEN | The Tampa Tribune | Published: December 02, 2012
Excerpt reprinted with permission of the Tampa Tribune

The full article can be viewed online at:
http://www2.tbo.com/lifestyles/holidays/2012/dec/02/volunteers-give-sensory-friendly-santa-to-kids-wit-ar-578754/

For more information about LAAF or to learn how you can help, visit: http://thelaaf.org/

MARITIME UPDATE

By Valerie Dondero and Marcus Mahfood



The United States Supreme Court's recent decision in **Lozman v. City of Riviera Beach**, 133 S.Ct. 735 (2013), has limited the scope of admiralty jurisdiction and the application of federal maritime law. The Court held a permanently moored floating home was not a "vessel" as defined by the Rules of Construction Act, 1 U.S.C. § 3. Only time will tell the true magnitude of the decision, but the gaming, insurance, and finance industries will feel an immediate impact.

Lozman lived aboard his houseboat docked at the City of Riviera Beach Marina for three years before the City filed an ***in rem*** admiralty claim and arrested his houseboat for failure to pay dockage fees and failure to comply with the marina's newly-enacted insurance and vessel registration rules. Both the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit found the houseboat to be a vessel for purposes of admiralty jurisdiction and held the City's arrest and ultimate sale of the houseboat was proper.

The Supreme Court granted certiorari last February and oral argument was held in October. The City's argument focused on the phrase "capable of being used" included in the definition of vessel. The City supported its position that the houseboat was "capable of being used" with evidence showing the houseboat was in fact moved considerable distances (over 60 nautical miles) under tow. In response, Lozman argued a practical view precluded a finding that his houseboat was subject to admiralty jurisdiction because it lacked all the typical characteristics of a vessel such as steering or propulsion capabilities, and it was wholly dependant on land to function as a floating home, permanently affixed to the dock.

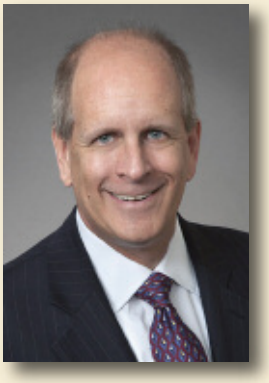
The Supreme Court blended the two arguments, applying a practical interpretation of whether the floating home was "capable of being used, as a means of transportation on water." Guided by past Supreme Court rationale in wharfboat and dredge cases, the Court held a structure is not a vessel unless "a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." *Id.* at 741.

In the end, Lozman's floating home was not a vessel. The Supreme Court's holding resolved a conflict among the Circuit Courts and did away with the "anything that floats" approach. The holding is also consistent with some state laws which already define floating homes as non-vessels, a point the Court found important to simplify the law.

The decision was an outright victory for the gaming industry. Dockside casinos escaped the grasp of admiralty jurisdiction and avoided exposure to federal maritime laws, including expanded employee rights and benefits allotted to seaman. Similarly, the restricted interpretation relieved the United States Coast Guard from additional vessel regulation compliance inspections and obligations. Marinas will likely aim to revise their rules and contracts to adapt to and protect themselves from **Lozman**.

There will be an effect on the marine insurance and finance industries as well. For one, a floating structure deemed a non-vessel need not comply with express and implied warranties of seaworthiness. The same structure, however, may no longer utilize the Limitation of Liability Act. Marine lenders will also be more cautious as the secure nature of a preferred ships mortgage does not apply to non-vessels, thereby exposing banks to greater risk; gone are the protections and enforcement of maritime liens available via ***in rem*** admiralty proceedings.

The Court acknowledged the standard is not perfect, but hoped its "workable" method would offer guidance in borderline cases. One thing is for certain, the Supreme Court has shifted the line in a very specific direction.



SPOTLIGHT ON:

Harold A. Saul

Impassioned excellence. Bold determination. Relentless courage. Steadfast perseverance.

All of these words describe Harold A. Saul, shareholder in Kubicki Draper's Tampa office. Yet none of these words can adequately convey Harold's dedication and diligence as an advocate in law and in life. Harold is a man who will not let anything stop him or slow him down - not even his battle with polycystic kidney disease (PKD). Although he was not diagnosed until 1993, Harold always knew he had a 50% chance of inheriting the genetic disorder from his father. However, seeing his father's example in fighting and eventually overcoming the disease gave Harold hope. Harold's father, Ivan Saul, had a kidney transplant in 1983 and led a full life until he passed away in 2007, from unrelated causes.

Harold's father was a passionate advocate in the fight against PKD. It is not surprising that Harold has followed in his footsteps. Harold has been actively involved in both the Polycystic Kidney Disease Foundation and the National Kidney Foundation for almost 25 years. Both organizations are dedicated to raising education and awareness, as well as funding research for better treatments and, eventually, a cure for kidney diseases. Harold is the only person to have served simultaneously on the National Board for both organizations, and he has taken several other active leadership roles over the years.

In recent years, Harold's involvement has been more focused on the PKD Foundation, which is devoted to funding research to find a cure for PKD, the specific disease Harold and his family have battled for generations. He also wants to help raise awareness about the importance of organ donation. For the past several years, Harold has captained a Walk for PKD team composed of Kubicki Draper attorneys, staff, friends, and family members, which is routinely the top fundraising team. The team is aptly named, "Ivan's Investors for a PKD Cure," in honor of Harold's father. The team name originated from the 2007 Walk for PKD, at which the Tampa Bay Chapter of the PKD Foundation honored the life of Ivan Saul and his dedicated service as a PKD advocate. An award is given every year in honor of Ivan Saul to the highest fundraising team.

This years' Walk for PKD, in October 2012, was a memorable one for Harold, as it was his first since his own kidney transplant in June 2012. Harold had been placed on the transplant list in May 2010, and started dialysis about 6 months later, in December 2010. While he was on dialysis, it was his father's example, family, friends, and the hope of a transplant that fueled his determination that he would not let the disease slow him down. He even continued to travel and snow ski.

Anyone who knows Harold knows his single greatest passion is being an excellent defense litigator and a passionate advocate for his clients. His fight with PKD, and even dialysis could not diminish that. For awhile, his life became dialysis and work. He also had to undergo multiple surgeries in the 2 years he was on dialysis, including surgery to remove both kidneys, which had become so loaded with the cysts that characterize the disease that, together, they weighed a total of 50 pounds. But even when Harold had to take "time off" for the surgeries, he was always still actively supervising his cases from home or the hospital. While it was hard for Harold to be less "hands on" in his cases for awhile, it was reassuring for him to know he had a strong team of Kubicki Draper attorneys and staff he could rely on, especially during this time.

Harold says now that he has fully recovered from his transplant, he feels like he has a new lease on life. He looks forward to continuing his tireless efforts as an advocate and trusted advisor for his clients, which is his true calling and greatest passion. Harold, who has been a defense litigator for almost 25 years and has tried over 100 cases to verdict, says the key to his success is his tenacity and preparation—he makes sure he always knows his cases better than anyone else, especially the other side. Nothing makes Harold happier than applying his relentless determination and diligent efforts to achieve a favorable result for his clients. The only thing better is when he gets a complete defense verdict. So plaintiffs' lawyers beware, Harold Saul is back, better and stronger than ever.

ELECTRONIC SIGNATURE CHALLENGES

By Valerie Dondero

Automobile insurers in Florida are facing increasing challenges to their online application and electronic signature processes, especially with respect to the execution of the Uninsured Motorist Selection/Rejection form.

Under §627.727, Fla. Stat., a "signed" rejection of Uninsured Motorist coverage or selection of lower limits grants the insurer a presumption that the rejection (or selection) was a valid and knowing waiver of coverage. However, insureds have been filing lawsuits claiming entitlement to Uninsured Motorist coverage by alleging that the electronically-signed application for insurance and rejection/selection form for Uninsured Motorist coverage does not contain a true written signature and that the form is therefore invalid, thus creating stacked Uninsured Motorist coverage under the policy. Insureds have been alleging that the plain meaning of the Uninsured Motorist statute requires a "written signature" on the Rejection/Selection form in order to be valid. They have also been arguing that the insurer cannot guarantee an insured is viewing the online form in its maximized screen version so that the 12- point font requirement of the form is met.

Insurers must be ready to defend their online processes and electronic signatures incorporated therein. In 2000, the Florida Legislature passed the Uniform Electronic Transaction Act (UETA), which allows an electronic signature to be used to sign a writing and grants the same force and legal effect to an electronic signature when certain conditions have been met. Section 668.50, Fla. Stat., provides that a signature may not be denied its legal effect or enforceability solely because the signature is in an electronic form. Significant arguments can be made that UETA is applicable, even to UM Rejection/Selection forms, as the legislature specified the types of transactions that are excluded from UETA's applicability, and insurance is not one of them. In fact, the Federal E-SIGN Act, which UETA follows, specifically applies to insurance. Insurers must ensure that their online processes comply with UETA, as well as Florida's Insurance statutes. Shareholder Valerie Dondero has had statewide success in defending challenges to the validity of the electronic signature in several auto insurance claims.

EVENTS & SPEAKING ENGAGEMENTS

Stephen Cozart, of the Pensacola office, presented at two seminars hosted by Rimkus. The topics were "Tips and Tactics for Discovering and Preserving Evidence of Fraudulent Claims" and "Ethics for the Claims Professional."

Kubicki Draper hosted a PIP/SIU Seminar and Open Forum in Miami in November 2012. The seminar addressed the significant changes made to the PIP statutes and the various changes carriers would have to make in their claims handling.

Francesca Ippolito-Craven and **Peter Murphy**, of the Miami office, recently presented a seminar to Grand Beach Hotel regarding legal issues faced by Florida hotels.

TRIALS & MOTIONS

Auto Negligence

Brian E. Chojnowski, of the Tallahassee office, recently obtained a favorable result after mediation in an automobile negligence case involving a rear-end accident and clear liability against the insured. The plaintiff claimed extensive knee and back injuries requiring multiple past lumbar spine surgeries, future total knee replacement, and continuing cervical spine treatment. The past medical bills had already topped $300,000.00 and plaintiff was demanding $1.8 million in damages. After a strong presentation at mediation that highlighted numerous prior inconsistent statements by plaintiff regarding the severity of his injuries as well as the differing opinions of plaintiff's own treating physicians regarding the cause and treatment of his injuries, Mr. Chojnowski negotiated a $195,000.00 settlement to resolve the matter early in the litigation proceedings.

Accord and Satisfaction/Settlement Defense

Greg Prusak, from the Orlando office, and **Dave Anderson**, from the Jacksonville office, obtained a ***defense verdict*** at a very difficult trial involving an accord and satisfaction/settlement defense.

The Plaintiff, suffered significant spinal injuries in a rear-end collision on July 22, 2009, in Jacksonville. Plaintiff's counsel made a time-limited demand for our client's $25,000.00 policy limits in April 2010. The adjuster made a timely acceptance, but the computerized check-writing system issued a check for $18,000.00 rather than $25,000.00. The Plaintiff's attorney gave our client five days to send a corrected check, which was not possible since the nature of the computer error regarding the check writing system had not been solved. The Plaintiff filed suit and the client tendered the $25,000.00 check eight days later after it solved the problem.

After receiving the file from staff counsel, Kubicki Draper filed a counterclaim based on accord and satisfaction, which was ultimately bifurcated by the Court for a two-day trial. At trial, the jury accepted defense counsel's arguments that a valid settlement agreement had been reached prior to its withdrawal by Plaintiff's counsel, and it therefore rendered a verdict in favor of our client and its insured on the accord and satisfaction defense/counterclaim. Plaintiff's claim had value in excess of $1,000,000.00 on a $25,000.00 policy. Needless to say, this was a great result!

Trucking Defense Verdict

Michael J. Carney, of the Ft. Lauderdale office, obtained a ***complete defense verdict*** in Indian River County, Florida, on behalf of an interstate trucking client. The defendant driver, operating an 18-wheel semi-truck, struck the rear of a work van. Plaintiff, a 28 year-old painter, claimed he sustained spinal injuries, requiring a number of injections. He asked the jury to award past and future medical expenses and requested a significant amount for his claimed lost earning capacity. He also had a surgical recommendation. Liability was admitted at trial and the case was tried on causation and damages. Plaintiff had no documented prior accidents or injuries and the Defense IME doctor asserted at trial that he believed that while Plaintiff did sustain an injury causally related to the accident, the injury was not permanent. Notwithstanding this, the jury returned a complete defense verdict, finding that there were no injuries or damages causally related to the accident. The Court has denied Plaintiff's post-trial motions for directed verdict and new trial.

Negligent Security Dismissal

Peter H. Murphy and **William G. Bissett**, of our Miami office, recently secured the dismissal of a lawsuit brought against a general contractor by the parent of a teenager who was severely beaten and raped after being abducted while in the process of attempting to return a book at a public library using the external after-hours book drop. The lawsuit did not name the county who owned and operated the library as a defendant, but instead, named the general contractor and the architects as defendants. The incident in question occurred some three years after the library first opened. It was alleged in the complaint that various design features of the library's after-hours book drop contained "latent defects and inherently dangerous elements which exposed foreseeable Library patrons to serious risk of injury." Plaintiff alleged that the design and construction violated a Florida law which incorporated certain design standards and concepts known as "Crime Prevention Through Environmental Design." In essence, the lawsuit claimed that the building was designed and constructed in such a fashion that it allowed for criminal acts to be committed outside of public view and in an area of poor illumination. The plaintiffs claimed that due to the design of the building and book drop, patrons would likely become foreseeable victims because their attackers could lie in wait in a shielded area and go undetected. Mr. Bissett drafted the motion to dismiss the plaintiff's amended complaint, and Mr. Murphy argued it. The trial judge

agreed with the defendant's arguments based on a lack of duty and foreseeability and the Slavin doctrine, and it dismissed the complaint with prejudice. The court recognized that imposing liability on a contractor for injuries caused to invitees by criminal acts committed years later, on premises owned and controlled by others, stretches the concept of duty too far and would be an unreasonable burden on the construction industry and a seemingly boundless theory of liability. The decision has been appealed by the plaintiff.

APPELLATE

Proposal for Settlement

Sharon C. Degnan, of our Ft. Lauderdale office, prevailed on appeal in the case of **Madden v. Kutner**, 2012 WL 5259122 (Fla. 4th DCA October 24, 2012). Ms. Degnan persuaded the Fourth District Court of Appeal that it should affirm the trial court's order denying the plaintiff attorney's fees because the plaintiff's proposal for settlement (PFS) was invalid. At the trial level, Ms. Degnan and **Earleen Cote**, also of the Ft. Lauderdale office, successfully argued that the plaintiff's PFS, which formed the basis for plaintiff's motion seeking more than $230,000 in attorney's fees, was ambiguous, because the non-monetary terms and conditions required that part of the proposed settlement be for punitive damages, that the settlement check come from the defendant's liability insurer, and that the claims must be settled as a whole and not separately. The appellate court agreed that the PFS was ambiguous and, thus, invalid. For example, it is against Florida public policy for a liability insurer to insure against punitive damages, and it was unclear from the PFS if this problem could be remedied by the defendant tendering two separate checks, one from the carrier for compensatory damages and the other from the defendant directly for the punitive damages. Since the PFS was uncertain and would have required clarification, it was ambiguous and therefore invalid.

Referral Relationship Between Plaintiff's Attorney and Treating Physicians

Sharon C. Degnan, of our Ft. Lauderdale office, obtained a significant decision from the Fourth District Court of Appeal in the case of **Steinger, Iscoe & Greene, P.A. v. GEICO General Insurance Co.**, 37 Fla. L. Weekly D2688 (Fla. 4th DCA November 21, 2012). 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.

In its opinion, the appellate court recognized that, as argued by Ms. Degnan, fairness requires that when a plaintiff's attorney (or the attorney's law firm) maintains an ongoing relationship with a treating physician, the defendant should be entitled to delve deeper into that relationship, just as the plaintiff is permitted to do with respect to the relationship between the defendants and defense counsel and their experts. The appellate court further agreed defendants should be able to argue to the jury that a witness may be more likely to testify favorably on behalf of the party because of the witness's incentive to continue a financially advantageous relationship. Thus, 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 between the plaintiff's lawyers and her treating physicians, 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.

KUBICKI DRAPER

Announcements

Bretton C. Albrecht, of the Miami office, recently published an article in The Florida Bar Journal about appellate attorney's fees and costs. The article is available on The Florida Bar's Website (http://www.floridabar.org). See Bretton C. Albrecht, *Fee Simple: A Procedural Primer on Appellate Attorneys' Fees and Costs*, 87 Fla. Bar Jour. 24 (February 2013).

Michael S. Walsh, of the Ft. Lauderdale office and **Bretton C. Albrecht**, of the Miami office, recently received an "AV Preeminent" rating, the highest available, from Martindale-Hubbell®. The Martindale-Hubbell® Peer Review Ratings are an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations of lawyers by other members of the bar and the judiciary.

Jane Rankin, of the Ft. Lauderdale office, was selected by peers for inclusion in The Best Lawyers in America®. The list was launched all over Florida in major newspapers such as: The Miami Herald, The Tampa Tribune, The Orlando Sentinel and The Wall Street Journal. She was also selected for inclusion in Florida's Best Lawyers.

New Additions to the Firm

We are pleased to welcome two new associates:
Sam Itayim in Ft. Lauderdale and **Kenneth "Jayme" Idle** in Orlando.

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