KUBICKI DRAPER

THE KD QUARTERLY

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KD in the community

EDITOR: *Ryan D. Elias*

IN THIS ISSUE

KD Celebrates Diversity Month

KD is committed to fostering an environment of equal opportunity for success and believes a diverse law firm is a stronger, more vibrant one.

Each year, Diversity Month, which is the month of April, gives us another opportunity to recognize and highlight some programs and organizations that are important to us and that we wholeheartedly champion.

Miami-Dade Florida Association for Women Lawyers (MDFAWL) Scholarship Program

NAAIA Florida Scholarship Program

Miami Carol City Law Magnet Program

Miami-Dade Public School's Black History Guided Lessons

The Holocaust Memorial Resource and Education Center of Florida

Greg Prusak, Helen Greenspun and Toni Turocy at the White Rose Tribute Event.

KD sponsored The Holocaust Memorial Resource and Education Center of Florida's White Rose Tribute Event

Toni Turocy, in the Orlando office, is doing amazing work as a board member of The Holocaust Memorial Resource and Education Center of Florida. In support of Toni and the organization, KD sponsored the White Rose Tribute Event honoring Dr. Rita Bornstein with the Tess Wise White Rose Award for her legacy of leadership. Toni attended the event with **Greg Prusak** also of our Orlando office, and Toni's husband's grandmother, Helen Greenspun, a local Holocaust survivor.

Celebrating Black History Month: KD Supports NAAIA Florida's Endowed Scholarship in Risk Management/Insurance

Kubicki Draper knows the importance of engaging in diversity, equity, and inclusion solutions for the future, not just within the firm, but also with others in the legal and insurance/risk management arenas. In this spirit, we take another opportunity to highlight our support for the National African-American Insurance Association (NAAIA) and our very own **Charles H. Watkins** who is an Equity Partner and Chief Diversity, Equity, and Inclusion Officer of the firm, as well as founding member and treasurer of NAAIA's Florida Chapter.

Charles is also one of the driving forces behind NAAIA Florida's scholarship program created to address the talent crisis and diversity gap in the insurance industry. The scholarship aims to afford outstanding African-American students the opportunity to engage in undergraduate studies in risk management at Florida State University ("FSU") or via FSU's Co-Op with Florida Agricultural and Mechanical University ("FAMU"). We are proud to be part of this endeavor and welcome insurance carriers and other organizations to join us in supporting this important cause.

more KD in the community

KD Donates Over 50 Articles of Clothing to "Dress for Success"

We are so proud of **Claudette Armbrister**, the firm's receptionist, who took the initiative to coordinate efforts in our Miami office and collect over fifty articles of clothing from our team for Dress for Success Miami. The organization is a not-for-profit that provides a network of support, professional attire, and the development tools to help people thrive in work and in life. A big thank you to Claudette and the rest of the KD family for contributing to important causes in our community. For more information, please visit: **www.suitedforsuccess.org**.

Firm Sponsors ChildNet Care Luncheon

We commend **Rebecca L. Brock**, of our West Palm Beach office, and the great work she is doing as a board member of ChildNet Care for Kids. In support of Rebecca and ChildNet Care, the firm sponsored a luncheon to raise awareness and funds to help abused, neglected, and abandoned children in Palm Beach County and Broward County. For more information on how you can help, please visit: **https://www.childnet.us/**.

KD Celebrates International Women's Day

March 8th was International Women's Day (IWD), and in recognition of it and Women's History Month (March), we proudly celebrated some of the many accomplished and inspirational women that make up over 70% of our firm. We asked our team to contribute quotes, advice, and/or share about barriers they have broken, and we put together a brief video **https://www.canva.com/design/DAE593L3tTc/20b4qbJuFQo6cUCwjJTsGw/watch?utm_content=DAE593L3tTc&utm_campaign=designshare&utm_medium=link&utm_source=publishsharelink**. To women and little girls everywhere: there is no limit to who you are, to what you can do, or to who you become, and we wish you happiness and success in all that you set out to do.

MDFAWL's Annual Woman Making History Award & Scholarship Reception

We are proud to have once again sponsored a scholarship for the Miami-Dade Florida Association for Women Lawyers ("MDFAWL") Scholarship Program. **Caryn L. Bellus, Alexandra C. Caraballo, Samantha M. Joseph**, and **Karenny Montan**, of our Miami office, attended MDFAWL's Annual Women Making History Award and Scholarship Reception. Caryn, an Equity Partner who has been with the firm for over 27 years, presented the scholarship to the recipient, Amanda Souto, and spoke about the opportunities for women at KD. For more information about MDFAWL and the scholarship program, please visit: **https://www.mdfawl.org/**.

Leslie Nunez Participates in Mater Bay Academy's Career Day Program

Leslie Nunez, a paralegal from the Miami office, participated in Mater Bay Academy's Career Day program. Leslie presented to students in second grade about careers in the legal field and specifically, about the responsibilities of a paralegal. We are proud of Leslie and her involvement in the community.

Leslie Nunez presents legal career opportunities to students at Mater Bay Academy.

A Game Changer: Recent Rule Change Allows for Immediate Appellate Review of Orders Permitting or Denying Punitive Damages

By Sharon C. Degnan, of our Orlando office

In January, the Florida Supreme Court adopted a rule change to Florida Rule of Appellate Procedure 9.130 that allows parties to seek immediate appellate review of non-final orders granting or denying motions for leave to assert claims for punitive damages. The rule amendment became effective on April 1, 2022. ***See In re Amendment to Fla. R. App. P. 9.130***, 2022 WL 57943 (Fla. Jan. 6, 2022).

Prior to this amendment, parties could only seek review of an order granting leave to assert a punitive damages claim through a petition for a writ of certiorari, which limited appellate courts to reviewing only whether the trial court complied with the procedural requirements for making a punitive damages claim. Due to the amendment, Florida appellate courts will now be able to immediately review trial court orders granting or denying punitive damages claims on the merits, including testing the sufficiency of the evidence or proffer submitted by a plaintiff to justify a punitive damages claim being allowed.

The rule amendment was initiated, at the direction of the Florida Supreme Court, by the Florida Bar's Appellate Court Rules Committee. Prior to this occurring, various Florida appellate courts had commented on the need for immediate review of orders granting or denying motions for leave to assert punitive damages claims and, in various opinions over the years, noted the constraints the appellate courts were under due to the very limited review standard, which often resulted in punitive damages claims being allowed to proceed, even if they did not appear to be substantively proper or supported by a sufficient evidentiary showing. The courts observed that an order granting the plaintiff leave to assert a punitive damages claim can be a "game changer" in litigation, since it can expose the defendant to intrusive financial-worth discovery and to potentially large verdicts, which may not be covered by liability insurance.

The Florida Defense Lawyers Association (FDLA) supported the rule amendment, seeing it as a strong step towards preserving the privacy of a defendant's financial information, which is protected by the Florida Constitution. Before the amendment, a defendant had to wait until after entry of final judgment to appeal the substance of a plaintiff's punitive damages claim and, by that time, the defendant's private financial information was already subject to discovery. Now, such discovery can be guarded until the interlocutory appeal is decided. Further, FDLA recognized that the rule change gave teeth to Florida's statutory mandate that plaintiffs show through record evidence or proffer a reasonable evidentiary basis to justify punitive damages. Under the new rule, defendants have an earlier opportunity to test the sufficiency of the evidence or proffer submitted by a plaintiff.

Not all commenters supported the amendment. Some expressed concern that it would increase case delays and appellate caseloads. In his dissent, Justice Jorge Labarga believed it was reasonable to anticipate delays in civil cases with punitive damages claims, which could lead some claimants to "reluctantly forgo meritorious claims for punitive damages."

Given that a trial court ruling granting or denying a plaintiff leave to assert a claim for punitive damages can be a "game changer" in the litigation, the new rule amendment seems appropriate and is certainly an important development in Florida law.

If you have any questions, please contact our Appellate and Coverage Practice Group at ***appellateandcoverage@kubickidraper.com***

Our Ocala office has officially relocated!

The new address is:
1396 NE 20th Avenue, Suite #500,
Ocala, Florida 34470

CONSTRUCTION ZONE

Presented by KD's Construction Practice Group

Insuring a Subcontractor? Four Factors to Consider in Evaluating a Tender Demand from a General Contractor

As it becomes more commonplace to receive tender demands from general contractors ("GCs"), the analysis required continues to evolve. Gauging the strength (or validity) of one requires assessing a variety of factors. Below is a short, but by no means exhaustive, checklist of factors to assess when you analyze a GC's tender demand:

Is the Tender Demand Based on a Contractual Indemnity Provision?

The world of construction contracts is as much of a mosaic as the various projects you see going up across Florida. Many times you will receive a tender demand quoting directly an obvious indemnification provision from a contract. However, oftentimes the contracts either do not contain these provisions at all, or the "contract" is simply a signoff on a bid. The latter situation may create no contract-based indemnity obligation at all (instead leaving only common law indemnity as an option). Conversely, if there is a contract-based indemnity provision, a close review of its language is key.[1]

What Does the Indemnification Provision Say?

A close reading of the provision will generally tell you everything you need to know. It will set forth:

Who is an indemnitee?

What constitutes an indemnification trigger (i.e., claims "arising from" or "caused by" the subcontractor in the performance of the work)?

Whether the indemnification provision may encompass indemnity for an indemnitee's own negligence (e.g., the GC self-performed some defective work and now wants the subcontractor to indemnify them for their own fault (which gives rise to a separate analysis under section 725.06, Florida Statutes).

Why Is the Indemnitee Seeking Indemnity?

This is a more nuanced inquiry that is extremely important. For example, assume that an indemnity provision clearly does not encompass indemnity for the indemnitee's own negligence. Further presume the underlying allegations against a general contractor are restricted solely to a GC-specific duty (such as coordination of trades).

Is the indemnity provision at issue triggered by this claim?

Similarly, consider the same scenario but the indemnity alters the provision to *arguably* encompass indemnity for the indemnitee's own negligence. Have you run the provision against the factors outlined in section 725.06, Florida Statutes? Does it hold up?

Is the tender premature?

Consider a situation where the provision appears to hold up under any analysis. What is its *timing* component? As noted above, many provisions require that the claims or damages be "caused by" or "arise from" the specific subcontractor's acts or omissions. The inquiry here is whether, by virtue of the language, the obligation itself is not triggered until there is a factual determination (i.e., a judgment of fault). Depending on the language, the indemnification demand may simply be premature until trial. *However*, an extremely careful review of the provision is necessary since many are arranged to be triggered far sooner than an actual judgment.

The tips set out above are but a few grains of sand in the vast world of indemnification in construction, but we are here to help you navigate it all.

For more information, contact
construction@kubickidraper.com.

By Michael F. Suarez, of our Miami office

[1]This differs slightly from Additional Insured rights, which may exist on a policy endorsement whether there is a formal construction contract or not.

SPOTLIGHT ON EQUITY PARTNER & EXECUTIVE BOARD MEMBER

Laurie Adams

Have you ever wondered what compels a person to become a lawyer? After all, the hours are long, the stakes can be high, and the stress is real. Maybe it's the money, or perhaps the notoriety that may come with working a big case. To each, their own. For KD's Equity Partner and Executive Board Member, Laurie Adams, it was a passion for solving problems and, as she puts it, "getting to the bottom of it all."

Laurie grew up in the small town of Clarksburg, West Virginia, with her sister and was raised by a working-class single mom, who unfortunately endured several health problems while Laurie was a child. Laurie recalls feeling powerless back then, wanting to help her mom but not quite knowing how. She felt that her family members' lives were controlled by large institutions, and she recognized that "you have to understand the fine print and the rules, otherwise bad things will happen." This caused something to sort of click inside of her: if she could devour as much knowledge as possible and learn how the world works, then maybe she would find herself in a better position to resolve some of these big challenges she and her family faced. So, that's exactly what she did. Through many years of night school, she absorbed as much information as she could, including reading multiple newspapers daily — which she still loves doing. She started applying this knowledge for herself and her family, and still does. In high school, she even fought a traffic ticket, with poster board and drawings in tow to prove her case.

In her thirty years at KD, Laurie has "basically worked every job in the law firm with the exception of the mail room."

In the 1980s, Laurie relocated to the Washington, D.C. area and earned her paralegal certification. She eventually made her way to Florida, first settling in the Miami area, which is when she began working at KD, starting off as a paralegal focusing on medical malpractice, a subject near and dear to her. The subject of healthcare generally would become that much more important to Laurie following the birth of her son, who as a child was diagnosed with Type 1 Diabetes. Laurie has become a strong advocate for her son and so many others with Type 1 Diabetes through the Juvenile Diabetes Research Foundation ("JDRF"), fighting to ensure everyone has access to the proper care and supplies and that people remain educated on this issue.

In addition to her medical malpractice paralegal responsibilities, she helped with accounts receivable and administrative items. She realized early on that as much as she enjoyed being a paralegal, it seemed she would enjoy being a lawyer even more, feeding into her mission of helping resolve problems. So, she enrolled full time in law school at the University of Miami, working at KD, and singing in a wedding band. After graduating with honors and passing the bar exam, Laurie jokes that she "pulled a George Costanza and just kept coming in each day," eventually scoring her a promotion from paralegal to attorney.

In the mid-1990s, Gene Kubicki, the founder of KD, approached Laurie and asked her if she would consider relocating from Miami to the firm's West Palm Beach office. He told her, "Those boys could use some help up there." She agreed and was the only female attorney at the West Palm Beach office at that time. This was at a time when staff counsel had not been widely established, so the number of cases that went to trial was high. In fact, she tried her first case within just a few months after being admitted to the bar. This was certainly difficult, but absolutely invaluable. She learned so much about how to be a good trial lawyer by observing her peers in their trials, aiming to never miss one since it was such an effective way to learn.

Nearly thirteen years ago, Gene Kubicki retired from the firm, naming four attorneys to the Executive Board to replace him, including Laurie. At that time, the firm had approximately fifty attorneys; since then, it has grown to around two hundred. Laurie's role on the Board includes overseeing the legal training of the firm's attorneys, which aligns perfectly with her background and her lifelong passion for learning in order to become an effective problem solver.

Over the years, Laurie's practice has extended well beyond medical malpractice and now includes complex personal injury claims, bad faith litigation, and insurance coverage disputes. Her goal is generally to resolve claims pre-suit if at all possible, noting it's often better and more cost-effective for all parties involved when pre-suit settlement agreements can be reached.

In the limited spare time she has, Laurie enjoys gardening, hanging out with family and friends, jet skiing, and traveling, particularly to areas where she can learn about history, food, and music of the area. Over her thirty years as part of the KD family, Laurie has accomplished too many amazing results to count, but in her opinion, her greatest accomplishment is landing a job that she loves while simultaneously managing to have a great family life. She noted everyone knows that it can be tough to strike a work-life balance with a very demanding job and a young child, especially one with health issues (who is now a thriving 25 year old). With determination and focus, she's managed to keep her son (and the rest of her family) healthy, all while providing excellent service to our clients.

Laurie is an amazing resource for our firm and our clients. If you're stuck with a pre-suit or litigation problem, reach out to Laurie and her skilled and knowledgeable team, – ***la@kubickidraper.com***.

presentations | speaking engagements

Our team presents continuing education seminars on a variety of topics throughout the year. Below are some of the topics presented recently.

- Zen and the Art of Case Management
- Appraisal: An Alternative Modern Approach to Resolving First Party Claims
- Florida Case Law Update: From a Claims Handling Perspective
- Independent Medial Examinations in Personal Injury Protection
- Construction Defect Coverage Issues
- Experts in Construction Related Cases - Selection, Direction and Protection
- Warranty Claims in Construction Cases
- Construction Defect Claims: Overview and Current Trends on Indemnity Law
- Effective Construction Defect Case Resolution
- Dram Shop Law and Alcohol Vendor Liability
- What's New with You Florida's Amended Summary Judgment Standard
- Sink or Swim – Charting the right Course in Admiralty Jurisdiction
- Civil Remedy: Protocols and Procedures
- Effective Case Resolution: Thinking One Step Ahead
- Attractive Nuisances, Swimming Pool Liability, and Open and Obvious Conditions
- Identifying and Defending Against Reptilian Tactics
- The More the Merrier: Risk Transfer
- Effect of COVID-19 Emergency on Property Owners, Lenders and Tenants
- Florida 4-Hour Law and Ethics Update
- Plaintiff Dismisses Your Case, Now What? - A Guide to Recovering Fees and Costs
- PIP 2022 - What's Trending?
- Prejudice Resulting from Late Reporting: Understanding the Two Step Analysis
- SB-76 Became Effective July 1, 2021, What Now?
- Uncovering Fraud in an SIU Investigation to Preserve for a Civil Trial
- Negotiating Low Limits Single and Multiple Claimants
- Demand Letter Defense and Obtaining Summary Judgment
- Electronic Scooters: Rolling Your Way Into Litigation
- How to Use EUOs Effectively - Properly Investigating Residency, Regular Use, and Other Issues
- Navigating Chapter 558 In Florida - From the Basics and Beyond
- Early Construction Case Resolution - Is it Possible?
- Social Media in the Evaluation of Insurance Claims
- Weathering the Storm of a Hurricane Claim

We welcome the opportunity to host a complimentary webinar for you and your team 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.

Charles Watkins Presents at CLM Annual Conference

Charles H. Watkins, Equity Partner and Chief Diversity, Equity, and Inclusion Officer, presented on a panel at the 2022 Claims and Litigation Management ("CLM") Alliance Annual Conference on March 24th in Palm Desert, California. Charles presented "Actions Speak Louder Than Words: Addressing the Insurance Talent and Diversity Gap," along with Maria Elena Abate of Colodny Fass, Mariela Perez-Pennock of Assurant, and Trelvis Randolph of Quintairos, Prieto, Wood & Boyer.

Harold Saul Discusses Interviewing Tips with FSU Students

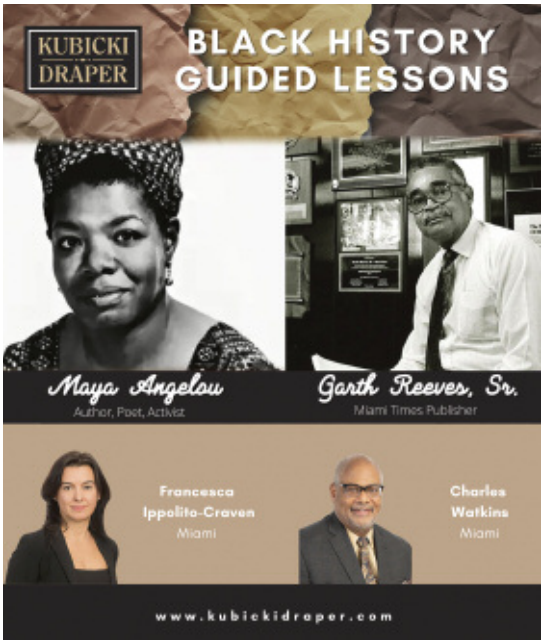
Harold A. Saul, Equity Partner and Executive Board Member, recently presented at his alma mater, Florida State University ("FSU") Law School. FSU's Cuban American Bar Association ("CABA") and American Civil Liberties Union ("ACLU") chapters invited Harold to provide students tips for interviewing and job hunting.

Gregory Prusak, Michael Carney and Kara Cosse at Orlando Claims Seminar.

presentations
speaking engagements

KD Presents at Orlando Claims Association

Gregory J. Prusak, Michael J. Carney and **Kara K. Cosse** presented the Florida 4-Hour Law & Ethics Update at the 10th Annual Orlando Claims Association CE Seminar and Cook-Off in Maitland, FL. Attendees not only got the required course taken care of, they had some fun after the presentation trying all of the great ribs, chicken and side dishes, 15 teams cooked up! For more information about the Orlando Claims Association, please visit: **https://orlandoclaimsassoc.com/index.php** or for information about a complimentary webinar for you and your team, contact us at: ***info@kubickidraper.com.***



KD Participates in Miami-Dade Public Schools' Black History Guided Lessons Program

Francesca A. Ippolito-Craven and **Charles H. Watkins**, both of our Miami office, participated in Miami-Dade Public Schools' Black History Guided Lessons program organized by Judge William Thomas. Francesca presented to an 8th grade class at Everglades K-8 Center, who enjoyed sharing their interpretations of Maya Angelou's poems and quotes. Charles presented to a 7th grade class at Air Base K-8 Center, who asked several questions about Garth Reeves, Sr., and his accomplishments. We are proud of our team and the time they make to do good work in our communities.

Kubicki Draper Participates in Miami Carol City High School Mock Trial

Barbara Fox, Lisandra Guerrero, and **Dorian A. Brown**, of our Miami office, and **Michael J. Carney** and **Sha-Mekeyia N. Davis**, of our Ft. Lauderdale office participated in the Miami Carol City High School Law Magnet Program's Mock Trial Competition. Our team judged the in-house competition, which involved six impressive teams —10th grade versus 11th grade. When asked how it went, Michael Carney, who has participated in this program for over a decade, said: "I can't wait for the day when I interview a young lawyer who went through the MCHS program." Mentoring matters to KD, in-house and out in our community. We are proud to have team members that step up for important events like these that influence and help future stars.

Mock Trial participants at Miami Carol City High School.

Charles Watkins Participates As Co-Panelist at FSU's Diversity in Leadership Week

Charles H. Watkins, Equity Partner and Chief Diversity, Equity and Inclusion Officer, participated in a panel discussion during Florida State University's ("FSU") "Diversity in Leadership Week." The week is hosted by the college's Diversity, Equity and Inclusion Committee to provide students an opportunity to connect with peers who have successfully leveraged the college's diversity resources.

Charles, a co-founder and the treasurer of the National African American Insurance Association ("NAAIA") Florida Chapter, joined fellow NAAIA members to talk to students about careers in risk management and insurance, and how NAAIA and FSU are working together to help students attain these careers. KD proudly supports Charles and NAAIA's efforts and was honored to have co-sponsored the networking reception that took place after the presentation. For more information about NAAIA and FSU's efforts to address the insurance talent crisis and diversity gap, visit **https://www.naaiafl.org/scholarship.**

FIRST PARTY PROPERTY GROUP PRESENTS:

Appraisal: The Secret Weapon You May Want to Consider for Your Claim

By Lindsey N. Ortiz, of our Orlando office

More and more insureds (and their assignees) are suing over disputes involving the dollar amount of damage, the scope of damage, and/or partial denials of claims. This can lead to insurers incurring significant litigation expenses, including defense fees and costs, plaintiff's counsel's fees and costs, and the costs of retaining experts. One tool for limiting such exposure is appraisal.

When should appraisal be considered?

Examine the following:

- Has coverage been afforded or partially afforded?
- Have you received a pre-suit estimate disputing either the amount paid/payable and/or the scope of damage covered by the policy?
- Is the insured/assignee represented by a public adjuster or by counsel?
- Do you think a lawsuit is looming?
  Society is litigious, and appraisal may be a cheaper and more effective option than litigation. If appraisal is demanded timely and according to the terms of the applicable policy, fee exposure may be curtailed.

What should you do?

- Demand appraisal according to the terms of the policy (i.e., if the policy requires a written demand of appraisal, then do so in writing, and submit it to the insured/assignee via mail, certified mail, email, verbally, or in the manner articulated by the policy).
- Before making the demand, be sure all prerequisites are met (i.e., send any letters detailing the differences between insured's/assignee's estimate(s) and the insurer's estimate(s) that are disputed).
- Follow the timing requirements, if any, for demanding appraisal (i.e., this includes following any timing requirements laid out in the policy and also ensuring that appraisal is demanded before the insured/assignee sues).
- If applicable, ensure that the Homeowner Claims Bill of Rights Letter and Department of Financial Services Mediation Letter are sent timely or appraisal rights may be waived.
- Once appraisal is demanded, ensure other deadlines according to the policy are adhered to such as electing your appraiser, conducing the appraisal, and conclusion of the appraisal process.

If an insured/assignee sues despite the pre-suit appraisal or demand for appraisal, don't worry; immediately assign the case to defense counsel and flag the file as an appraisal file in the initial assignment so counsel, can raise the appropriate defenses and litigate the case accordingly. Even if appraisal was not demanded pre-suit, there may still be time to demand appraisal in response to the complaint.

For more information contact, ***firstpartyproperty@kubickidraper.com***.

On the Hook for a Prevailing Party's Attorney's Fees? Here's What to Know About Contingency Fee Multipliers

By Valerie A. Dondero, our of Miami office and Caitlin A. Polly, of our Jacksonville office

With so much litigation in the first party property arena, courts are taking a stronger, more conservative look at a prevailing party's attorneys' fees pursuant to section 627.428, Florida Statutes, and whether those claims entitle counsel to a contingency fee multiplier.

Under section 627.428, a prevailing insured is entitled to recover fees from the insurer in a first party claim. The statute's limitation, however, is that the court "shall" determine "a reasonable sum as fees or compensation" for the insured's prosecuting of the suit, section 627.428, Florida Statutes. Courts are quite familiar with the various factors required to be considered under ***Florida Patient's Compensation Fund v. Rowe***, 472 So. 2d 1145, 1150-51 (Fla. 1985), in order to determine a reasonable fee. The court must assess both an hourly rate for the attorney seeking fees, as well as a reasonable numbers of hours for the work performed.

Many courts are faced with deciding not only the reasonable number of hours spent litigating, but also whether the prevailing party's attorney is entitled to a "contingency fee multiplier," which can double and sometimes triple the hourly rates demanded. Florida has a three-pronged approach to assist in determining whether the award of a contingency fee multiplier is proper. Specifically, trial courts must determine, based on **competent** and **substantial** evidence: "(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 factors set forth in ***Rowe*** are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and [the attorney's] client." ***Std. Guar. Ins. Co. v. Quanstrom***, 555 So. 2d 828, 834 (Fla. 1990).

Though all factors are equally-assessed, more recent decisions highlight a deficiency in the presentation of competent, substantial evidence to overcome the first prong—**relevant market factor** and alternate competent counsel. The purpose of the relevant market factor is "to assess, not just whether there are attorneys in any given area, but specifically whether there are attorneys in the relevant market who both have the skills to handle the case effectively and who would have taken the case absent the availability of a contingency fee multiplier." ***Joyce v. Federated Nat'l Ins. Co.***, 228 So. 3d 1122, 1135 (Fla. 2017). Recently, the Third District Court of Appeal reversed the portion of a fee award applying a contingency fee multiplier, holding that Plaintiff "failed to present any evidence [] that the relevant market required a contingency fee multiplier to obtain competent counsel . . . ." ***Impex Caribe Corp. v. Carl Levin P.A.***, 2022 WL 610157 (Fla. 3d DCA Mar. 2, 2022). The court likened the case to ***Universal Property & Casualty Ins. Co. v. Deshpande***, 314 So. 3d 416, 420 (Fla. 3d DCA 2020), where the court reversed a contingency fee multiplier because Plaintiff's fee expert failed to testify that, while there was other competent counsel available in the relevant market, they would not have taken the case on a simple contingency fee and would have done so only if the multiplier was available.

In an effort to thwart contingency fee multipliers, defense counsel must be prepared to highlight the extent of available competent counsel in the relevant market, and to present expert testimony outlining the plethora of competent, first-party claim-handling attorneys from which the insured could have chosen as counsel. Defense counsel should also be prepared to advise the court of other competent counsel in the market that would have taken the case on a simple contingency fee. "If there is no evidence that the relevant market **required** a contingency fee multiplier to obtain competent counsel, then a multiplier should not be awarded." ***See USAA Cas. Ins. Co. v. Prime Care Chiropractic Ctrs., P.A.***, 93 So. 3d 345, 347 (Fla. 2d DCA 2012).

Given the number of first party cases flooding Florida's court system, contingency fee multipliers are increasingly being denied when there is no competent, substantial evidence that the multiplier is "required" in order to obtain competent counsel.

For more information, please contact ***firstpartyproperty@kubickidraper.com***.

APPELLATE

What's 4.25% of 0? Fifth District Court Finds Insured Not Entitled to Prejudgment Interest If She Did Not Recover a Judgment Awarding Her Any Damages.

Caryn L. Bellus, of our Miami office, and **Angela C. Flowers**, of our Ocala office, worked together to obtain a reversal of an award of prejudgment interest entered by the trial court against our client, ***Federated National ("FedNat"). In Federated National Ins. Co.v. Bocinsky***, 334 So. 3d 384 (Fla. 5th DCA 2022), the jury found that FedNat owed no more damages than it had already paid its insured. Despite this, the trial court entered an order concluding that the insured, although not entitled to additional damages, was entitled to prejudgment interest. On appeal, the Fifth District reversed, finding prejudgment interest is only awardable when a verdict fixes an amount of damages. Since the insured recovered no damages, she was not entitled to prejudgment interest.

It Ain't Over Till It's Over: Second District Holds Defendant Not Required to Begin Paying Damages Until Final, Appealable Order Issued By Trial Court.

Thanks to **Sharon C. Degnan** and **Sebastian C. Mejia**, of our Orlando office, the Second District Court of Appeal quashed a trial court's order granting partial final summary judgment that required our client to make an interim payment to the plaintiff despite the fact that unresolved factual matters remained in dispute. In ***Mohler v. Elliott***, 332 So. 3d 1120 (Fla. 2d DCA 2022), the defendant disputed the reasonableness of all of the plaintiff's medical bills. Nonetheless, the trial court entered a partial final summary judgment in favor of the plaintiff, awarding damages and permitting execution (i.e., payment of those damages) on certain medical bills, but left the reasonableness of the remaining medical bills for the jury to decide. The defendant filed a writ of certiorari and, upon review, the Second District reversed, holding that it is well-established under Florida law that it is legally prohibited to allow execution on the judgment prior to the entry of a final, appealable order.

New Trial Awarded to Defendant in Dram Shop Case.

Angela C. Flowers, of our Ocala office, prevailed in ***Main Street Entertainment, Inc. v. Guardianship of Faircloth***, 2022 WL 390775 (Fla. 1st DCA Feb. 9, 2022), andsucceeded in obtaining a new trial for our client. The case arose out of an auto accident wherein the plaintiff, an underage pedestrian who had been served alcohol at a bar, was struck by an underage driver who had been served alcohol at a different bar. The plaintiff alleged both bars were liable for the accident, and she sued both establishments. A trial was held, with the trial court prohibiting one of the bars from asserting a comparative fault defense under section 768.81, Florida Statutes, and an "alcohol defense" under section 768.36(2), Florida Statutes. The First District reversed holding that such defenses should have been allowed, and remanded for a new trial.

Yet Another Nominal Proposal for Settlement Upheld on Appeal.

Michael C. Clarke and **Jennifer L. Emerson**, of our Tampa office, prevailed in ***Progressive Select Ins.Co. v. Kagan Jugan & Associates, P.A.***, 2022 WL 609447 (Fla. 2dDCA Mar. 2, 2022), where the Second District reversed a trial court order finding that a PIP insurer's nominal proposal for settlement ("PFS") was not made in good faith. The court reaffirmed the well-established rule that a trial court is governed by binding precedent, including district court opinions that have previously decided the relevant issue in dispute. The Second District had previously established that a PIP insurer's notice and election of the fee schedule reimbursement methodology was valid and, therefore, no longer unsettled, despite the Florida Supreme Court's recent acceptance of discretionary jurisdiction to review the same. Applying this rule, the court held that a PFS is made in good faith when the offeror had a reasonable foundation to make the offer with an intent to settle. Progressive had relied on a nearly factually-identical case from the Second District to make the nominal offer in its evaluation of its contractual exposure and, therefore, acted in good faith, As a result, the court held Progressive's PFS should be enforced.

Fifth District Affirms Collateral Source Setoff of Jury Verdict, Resulting in Net Judgment for Defendant.

In ***Williams v. Nono***, 333 So. 3d 1128 (Fla. 5th DCA 2022), **Angela C. Flowers**, of our Ocala office, received a decision in an auto liability case affirming the application of both sections 627.736(3) and 768.76(1), Fla. Stats., to reduce the gross verdict. Both statutes support the reduction of a verdict post-trial by setting off all Personal Injury Protection ("PIP") payments made as well as for any balance billing that occurred that is not owed pursuant to the terms of any contractual/policy language. At trial, the jury received an agreed-upon medical bill summary reflecting the total unreduced charges for past medical treatments and made a partial award. Angela successfully argued that the two collateral source statutes operate in tandem to prevent an impermissible windfall by way of double recovery. The setoff resulted in a net judgment in favor of the defendant, who was entitled to attorney's fees based on a successful proposal for settlement.

Summary Judgments Entered in Favor of Defendant Affirmed in Four Combined Appeals.

Caryn L. Bellus, of our Miami office, and **Jacqueline M. Bertelsen**, of our Orlando office, obtained an affirmance of summary judgments entered in four cases (combined on appeal) involving claims of toxic torts. In ***Fauteux v. Country Club*** at Woodfield, Inc., 2022 WL 481425, 2022 WL 480959 (Fla. 4th DCA Feb. 17, 2022) and ***Desroches v. Country Club at Woodfield, Inc.***, 2022 WL 480962, 2022 WL 480950 (Fla. 4th DCA Feb. 17, 2022), the plaintiffs sued our client, the owner of a spa and the employer of the plaintiffs, and its contractor for damages allegedly suffered from the inhalation of toxic fumes during remodeling of the spa facility. The trial court excluded the plaintiffs' expert, a toxicologist, as the expert's testimony failed to meet the requirements of ***Daubert***, and entered summary judgment for the defendants, leading to the plaintiffs' unsuccessful appeal.

APPELLATE

Ask Not and Ye Shall Not Receive: Summary Judgment for Insurer Affirmed Where Insured Sued Before Submitting Its Supplemental Claim for Damages.

Bretton C. Albrecht, of our Ft. Lauderdale office, obtained an affirmance in ***Apex Roofing & Restoration, LLC a/a/o Mark Shapiro v. United Prop. & Cas. Ins. Co.***, 2022 WL 1021914 (Fla. 2d DCA 2022). The case stemmed from property damage arising out of Hurricane Irma. The insureds submitted their claim, which UPC promptly investigated and paid. The insureds submitted nothing in writing — despite the policy's requirement to do so — to protest the amount paid and also never submitted any competing estimates or supplemental claims. Over a year later, a roofing company, on behalf of the insureds, sued UPC for additional damages not addressed in the original claim. The trial court entered summary judgment for UPC, which was affirmed on appeal.

TRIALS & MOTIONS

The Proof Is in the Pudding Weather Records: Court Rejects Wind Damage Claim Due to Negligible Wind Speeds on Purported Date of Loss.

Sarah R. Goldberg, of our Miami office, prevailed on a summary judgment motion for our client, a homeowners' insurer. The insured sued the insurer for alleged wind damage sustained to his roof that, according to his complaint, occurred on August 7, 2018. During discovery, the plaintiff and his public adjuster explained that the date of loss was actually March 20, 2018. The insurer retained an engineer who found that there were negligible wind speeds for both of those purported dates of loss and that such wind speeds were insufficient to cause roof damage. In opposing the motion for summary judgment, the insured's public adjuster argued simply that the roof damage was wind-related but failed to mention anything about the weather conditions on the purported dates of loss. The court rejected the public adjuster's affidavit as it made nothing more than unfounded conclusory statements, and granted summary judgment in favor of the insurer.

Summary Judgment for Insurer Granted in Hurricane Irma Claim.

Kathryn E. Thomson, of our Ft. Myers office, obtained summary judgment in favor of our client, a homeowner's insurer in a Hurricane Irma property damage lawsuit. The insured reported the loss in 2020, three years after the storm, and thus after the allotted time to report the claim. Additionally, the insured had also signed an assignment of benefits agreement with a roofing contractor, which was never rescinded. Nonetheless, the insured still brought suit demanding payment. Katie raised both of these is- sues on summary judgment, arguing that the insured lacked standing to sue (since he had assigned his benefits over to the roofing company) and that even if the insured had standing, this action was time barred. The court agreed, granting summary judgment against the insured.

Assignment of Benefits Rejected Since Entity Listed Was Not an Active Corporation and Thus Had No Standing to Sue Insurer.

Sarah R. Goldberg, of our Miami office, and **Sameer N. Islam**, of our Ft. Myers office, argued a motion for summary judgment asserting that the corporate entity-plaintiff listed on the complaint had no standing to sue the insurer-defendant since the plaintiff entity was not an active corporation at the time the suit was filed as well as when the assignment of benefits was executed. The court agreed and granted final summary judgment in favor of defendant, dismissing the suit for lack of standing.

Jury Rejects Plaintiff's Demand for Uninsured Motorist Coverage Limits; Judgment Entered in Favor of UM Insurer-Defendant.

Jared R. Brownfield, of our Tallahassee office, secured a trial win in an Uninsured Motorist ("UM") coverage case. The plaintiff was attending a driver safety class in Atlanta when the vehicle he was driving was rear-ended. Throughout litigation, including during the trial, plaintiff's counsel demanded the full $500,000 in UM limits. After four hours of deliberation, the jury awarded the plaintiff a total of $17,000. Following a setoff for the $25,000 paid by the at-fault driver's liability insurer, this will result in a defense judgment.

New Summary Judgment Standard Helps Score Victory for Insurer.

Valerie A. Dondero, of our Miami office, has finally put to rest a 2011 case, with some help from Florida's updated summary judgment standard. The plaintiff, was the at-fault driver in a 2011 auto accident. His insurer denied coverage for the accident, asserting that it had no duty to defend the insured since he had failed to purchase bodily injury ("BI") liability coverage. A prior motion for summary judgment was filed on behalf of the insurer in 2015 under the old summary judgment standard. The court denied the motion at that time based upon the plaintiff's testimony that he thought he had purchased BI coverage prior to the date of loss. In May of 2021, the Florida Supreme Court updated Florida Rule of Civil Procedure 1.510 governing the review of motions for summary judgment, aligning the rule with its federal rule counterpart and encouraging litigants who had previously filed for summary judgment under the old rule to file renewed motions. Following a renewed motion for summary judgment, the court granted the insurer's motion for summary judgment.

Summary Judgment Granted in Homeowners' Case Involving "Faulty Workmanship" Policy Provision.

Kameron D. Romaelle, of our Ft. Lauderdale office, prevailed in a case involving cross-summary judgments. The plaintiff alleged her tile shower was damaged as the result of a company hired to polish the bathroom tile and filed a claim under her homeowners' policy. The insurer denied the claim under the "faulty workmanship" provision of the policy. Both parties filed motions for summary judgment, with the insured arguing that this provision was inapplicable because the area where the damage occurred was not the specific area polished by the contractor. The court rejected the plaintiff-insured's argument, denied her motion for summary judgment, and partially granted the defendant's motion for summary judgment. This led to the plaintiff dismissing the case with prejudice shortly after the hearing.

TRIALS & MOTIONS

Summary Judgment Granted for Defendant in Auto Accident Case.

Melonie Bueno, and **Danielle K. Capitini**, of our West Palm Beach office, obtained summary judgment in favor of the defendant in an auto accident case. The plaintiff's vehicle stalled on the highway, and the defendant traveling in the lane where the plaintiff's vehicle was located swerved to miss plaintiff's vehicle, causing him to strike a tractor trailer carrying heavy equipment. Upon impact, the heavy equipment rolled off of the trailer and crushed part of the plaintiff's vehicle. The plaintiff sustained a severely fractured ankle, underwent multiple surgeries, and subsequently sued the defendant to recover for her injuries. The defendant filed a motion for summary judgment asserting that because what transpired was not reasonably foreseeable, the plaintiff failed to establish negligence on the part of the defendant as a matter of law. The court agreed, granting summary judgment for the defendant.

Defense Verdict Returned in Trip & Fall Case.

David M. Drahos and **Victor J. Genchi**, of our West Palm Beach office, obtained a full defense verdict in a Palm Beach County trip and fall case. The plaintiff sued the defendant homeowner after he missed a step down into a sunken living room area, resulting in him tripping and falling and sustaining injuries. The jury ultimately returned a verdict for the defendant. This is a good reminder for all that just because a person was injured in an accident on someone else's property does not mean that the property owner was negligent in any way.

Summary Judgment Granted in Graves Amendment Case.

William A. Backer, of our Tampa office, obtained a final summary judgment in favor of our client, a car dealership, based upon the Graves Amendment, a federal law restricting the vicarious liability of certain vehicle owners such as car dealerships and vehicle rental agencies for damages arising out of motor vehicle accidents. The plaintiff sustained injuries after she was struck by a vehicle driven by one of the car dealership's customers who was driving the rental vehicle, owned by the dealership, while his own car was being repaired. A motion for summary judgment had previously been filed on behalf of the car dealership under Florida's prior summary judgment standard, which was denied. A renewed motion was filed, applying the new summary judgment standard and arguing the legal intricacies of the Graves Amendment and how the law applied to the facts in this case. The trial court agreed and granted the motion.

Defense Verdict for Our Client in Vehicle-Pedestrian Accident.

Kendra B. Therrell, and **Erin R. Johnston**, of our Jacksonville office, succeeded in obtaining a defense verdict for our client, an insured who struck a pedestrian in the drive-thru of a coffee shop. A nearly $9 million verdict was entered against the coffee shop but absolved the insured driver of any negligence.

Defamation/Slander Per Se Case Against Insurer Thrown Out By Court.

Caryn L. Bellus, of our Miami office, obtained a dismissal with prejudice in a lawsuit filed against an automobile insurer. The lawsuit was brought by the attorney of an insured. The attorney alleged that the insurer and its claims adjuster had slandered and defamed him in a pre-suit reservation of rights letter sent to the insured, wherein the insurer advised the insured that the attorney had not provided various types of documentation to support the insured's claim. Caryn successfully moved to dismiss the lawsuit. Such dismissals are no easy feat as the court's standard of review on motions to dismiss is considerably high, giving much latitude to the plaintiff.

Jury Verdict Finds Plaintiff 75% Comparatively Negligent for Her Trip-&-Fall Related Injuries.

Peter S. Baumberger and **Raquel L. Loret de Mola**, of our Miami office, earned positive results in a four-day premises liability trial in Daytona Beach. The plaintiff sustained injuries after she came upon a large pile of debris located on a public sidewalk in front of the defendant's house and attempted to walk around it and fell. The plaintiff sued alleging the defendant was negligent, relying largely on a local ordinance that creates a duty for all landowners to keep sidewalks adjacent to their properties clear of debris. The defense argued that the ordinance may only be used as evidence of possible negligence and was not proof positive that the defendant acted negligently. Moreover, evidence was presented that the defendant did not have any knowledge of the debris on the sidewalk at the time of the incident. The jury found the plaintiff to be 75% comparatively negligent. The jury also rejected more than half of the plaintiff's past medical bills and denied all future medicals and pain and suffering, leaving the plaintiff with a minimal net award.

Homeowners' Insurer Obtains Summary Judgment in Late-Filed Hurricane Irma Claim.

Jill L. Aberbach and **Kameron D. Romaelle**, of our Ft. Lauderdale office, obtained summary judgment for our client, a homeowners' insurer, in a Hurricane Irma case. The insureds reported a roof damage claim in 2020, claiming the damage was related to Hurricane Irma—which occurred two years earlier. It was discovered that the insureds made extensive repairs to the roof after Hurricane Irma and prior to the submission of their 2020 claim to the insurer, making it nearly impossible for the defendant to decipher the cause and date of loss. At summary judgment, the defense argued that the insurer was prejudiced by the late reporting of the claim and the major roof repairs. The court agreed, granting summary judgment in favor of the insurer.

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TRIALS & MOTIONS

Defendant Prevails on Summary Judgment in Slip & Fall Case.

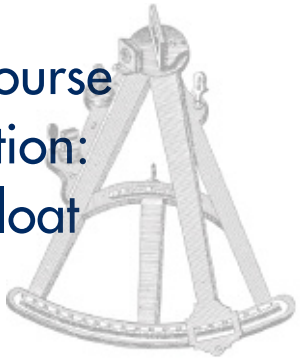
Kimberly A. Beckwith, of our Tampa office, obtained a summary judgment in favor of our client, a hospital cleaning company. The plaintiff was visiting her son at a hospital when she slipped and fell on a floor that had been mopped about 45 minutes earlier by our client. Video footage showed the timeline of events, including several hospital staff members walking in the area without incident prior to the plaintiff's fall. The court granted the motion for summary judgment, concluding there was no genuine fact despite the plaintiff's testimony, which was inconsistent with other record evidence.

Arbitrator Enters Defense Verdict in Hail/Windstorm Homeowners' Suit.

Jonathan O. Aihie, of our Miami office, obtained a complete defense verdict at arbitration. The suit arose from a hail/windstorm where an inspection revealed minimal roof damage that did not exceed the insured's deductible. The insured demanded a total roof replacement, leading to arbitration. Jonathan argued the evidence showed only three damaged shingles and that the wind speeds were relatively low on the date of loss. The arbitrator agreed that the roof damage was not the result of the hail/windstorm and entered a verdict for the insurer.

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 you consult an attorney to review and evaluate the particular circumstances of your situation.

Charting the Right Course in Admiralty Jurisdiction: 5 Tips for Staying Afloat



By KD's Hospitality, Retail and Premises Liability Practice Group

Our team presented a webinar on the importance of understanding the disadvantages and advantages of when maritime law applies to a case as opposed to state law. Here are five takeaways from the presentation to help you navigate these type claims:

(1) Admiralty cases can be brought in state court – Personal injury plaintiffs are permitted to bring an admiralty case in state court under the "Savings to Suitors Clause" in the 1789 Judiciary Act, clause codified at Title 28 of the U.S. Code, section 1331. The main reason they might wish to do so is because there are no jury trials in federal court admiralty cases.

(2) Admiralty jurisdiction depends on the location of the incident and relation to maritime activity – To fall under admiralty law, the tort must have occurred in a location of maritime activity and occur in connection with traditional maritime activity, such as fishing or transportation of goods or people. Pleasure boat and jet ski incidents can also be admiralty cases, depending on where the incident occurred.

(3) Some state court defenses are not available in admiralty cases – An admiralty-based case proceeding in Florida state courts may lose some procedures and defenses that are based on Florida law, such as filing proposals for settlement and attributing fault to non-party Fabre defendants.

(4) Vessel owners can limit their liability – People or companies who have legal title to the vessel may be able to limit their liability to the post-casualty value of the vessel, pursuant to Title 46 of the U.S. Code, section 30501, if the incident occurred in U.S. navigable waters.

(5) Six month deadline to limit liability – A vessel owner only has six months from the date of the loss to seek limitation of liability by filing an action in federal court. ***See*** Fed. R. Civ. P. Supp. Admiralty Maritime Claims Rule F.

For more information, please contact ***premises@kubickidraper.com***.

NEW ADDITIONS

We are pleased to introduce our new team members:

FT. LAUDERDALE	Associate: **Lily Wong**
JACKSONVILLE	Associates: **Cecile F. Cochran, Kelly K. Neufville, Caitlin A. Polly, William Joseph (W.J.) Lee Owen**
MIAMI	Associates: **Jazmine Janine L. Dykes, Jaime A. Garcia Montes, Ajith N. Shetty, Stephanie B. Glickman, Alexandra C. Caraballo, Matthew H. Mackler**
ORLANDO	Associate: **Garvin Persad;** Shareholder: **Yvette M. Pace**
PENSACOLA	Associate: **Cristobal J. Orrantia**
TALLAHASSEE	Associate: **Shanice K. Havers;** Shareholder: **Lisa M. Truckenbrod**
TAMPA	Associates: **Mary A. Joyner, Joseph D. Spedale, Daja S. Craig, Dyzhane J. Bellamy, Zachary T. Udell;** Shareholder: **Franklin John Caldwell Jr.**
WEST PALM	Associates: **Brian R. Von Kaam, Nicholas A. Capitini;** Shareholder: **Mark W. Young**

save the date: **KD's Construction Conference • November 4, 2022 • Tampa, FL**
check for updates on **www.kubickidraper.com**

to **Alexandra V. Paez**, of our Tampa office, and her husband Andrew on the birth of their baby girl, Addison Ruth.

congratulations

to **Stefanie Capps**, of our Ft. Myers office, and her husband Chad on the birth of their twin baby boys, Carter and Camden.

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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