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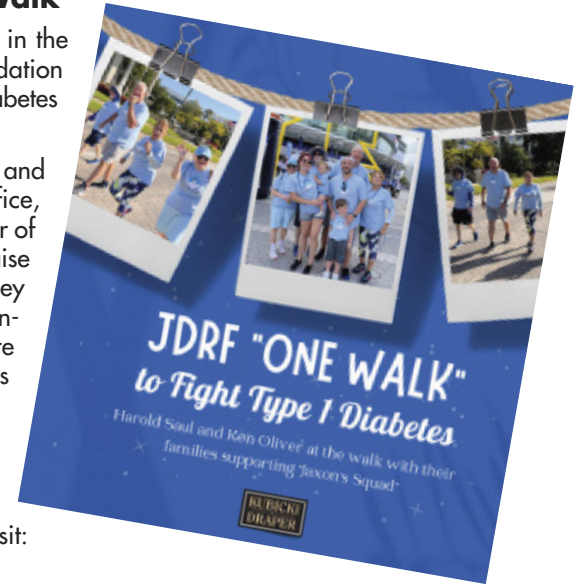
KD in the community

KD Participates in Juvenile Diabetes Research Foundation (JDRF) "One Walk"

Some of our KD family participated in the Juvenile Diabetes Research Foundation (JDRF) "One Walk" to fight type 1 diabetes (T1D), in Winter Park, Florida.

Harold Saul, of our Tampa office and **Ken Oliver**, of our Ft. Myers office, walked with "Jaxon's Squad" in honor of Ken's grandson, Jaxon, and helped raise over \$2,000 for the cause. The money raised helps power more research, enable more advocacy and fund more support for the 1.6 million Americans living with T1D.

To read more about Jaxon's story please visit: <https://lnkd.in/ewtRaNb5>, or to learn / donate to JDRF please visit: <https://lnkd.in/eunzbwCQ>.



KD Offers Resources During Mental Health Awareness Month

May was Mental Health Awareness Month, and in honor of its great importance, KD invited the team to participate in various awareness activities throughout the month aimed to create positive habits that support mental health. From meditation to live trainings by licensed medical providers, the program emphasized that mental health is an incredibly important part of our overall health.

We encourage everyone to pause and take time to do things that help you live well and improve both your physical health and mental health. For helpful resources on mental health awareness, please visit: <https://lnkd.in/edEcKAg> and <https://lnkd.in/gpecAed>.

KD's Own Audra Martinez Retires from U.S. Air Force

Congratulations to **Audra Martinez**, paralegal from our Ft. Lauderdale office, who recently retired from the United States Air Force after proudly serving our country for 24 years. On behalf of the KD family, we thank Audra for her service and dedication.



Thank you for your service!
Audra Martinez
(pictured center)

more **KD** in the community

Miami Carol City High School Law Magnet Program's Spring Mock Trial Competition

Lisandra Guerrero, Isabella Caproni, Danielle Capitini, Jonathan Aihie, Maziel Sodre, and Sha-Mekeyia Davis, recently participated in the Miami Carol City High School Law Magnet Program's Spring Mock Trial Competition. It was a great success and our team is excited about future mentoring opportunities with Miami Carol City High and other local high schools. Mentoring is important to KD both in-house and out in our communities. We are proud of our team for stepping up and guiding our future leaders.

In Loving Memory of Patricia MacNeil



In 2017, Kubicki Draper launched the **KD Cares, Dress Down Day** initiative. Designed with our employees in mind, **KD Cares** provides a way for the firm to give back to local communities, while also supporting non-profit organizations important to our team. One of the organizations from the inaugural year of **KD Cares** was **HOPE Hospice**, submitted by **Patricia (Patty) MacNeil**, Ft. Myers office. Patty was the receptionist and word processor in Ft. Myers for nine years (2012 – 2021). Patty passed away on June 23, 2022 at age 64. As life came full circle for Patty, she spent her final days at HOPE Hospice, the very organization she volunteered with for years with her therapy dog, Dolly. Patty and Dolly cared for so many during their final days, and it was only fitting that Dolly was brought to Hope Hospice by Patty's husband, to bring the same comfort and love to her, in her final season of life. Our employees and firm collected \$3,820 that went to Hope Hospice in honor of Patty.

"Patty was a dedicated and endearing assistant in our office," said Ken Oliver, of our Ft. Myers office "She was an asset..., but more importantly a terrific person who loved and took care of her family first, which meant that we were not able to hold on to her as much as we would have wanted."

KD congratulates...



Peter Baumberger and Rebecca Brock Featured in Florida Trend Magazine's "Florida Legal Elite"

Congratulations to **Peter Baumberger** and **Rebecca Leigh Brock** who were selected for inclusion in Florida Trend Magazine's 2022 "Florida Legal Elite" list! Florida Legal Elite presents a prestigious roster of attorneys chosen for recognition by their peers each year. Less than 2% of active Florida Bar members practicing in Florida appear among the exclusive Florida Legal Elite.

What to Cover When Coverage Issues Arise: 5 Tips for Determining If You Need An EUO and, If So, What Questions to Ask

By KD's Appellate and Coverage Practice Group

Our team recently presented several webinars on how to use examinations under oath ("EUOs") effectively, particularly in attempting to resolve coverage questions surrounding residency and regular use of vehicles. Here are five takeaways from the presentations to help you determine whether an EUO is appropriate and, if so, what questions should be asked:

1. If it seems like a tough coverage question, it's best to obtain an EUO

Recorded statements are almost always a good idea, so if you can obtain one, go for it. But when the facts present a more difficult coverage question, it's best to seek an EUO where an experienced lawyer can help you navigate the legal nuances involved. Whether it's a golf cart, a kit car, a work vehicle, a young driver away at school, or an event that just doesn't seem to arise out of the ownership, maintenance, or use of the vehicle (e.g., tailgating-related accident, injuries from a fist-fight inside the vehicle, or injuries from using mobile gym equipment mounted to a vehicle), we can help you.

2. Whether you obtain an EUO or simply take a recorded statement, be prepared to ask the right questions

In preparation for conducting an EUO or a recorded statement, review the claim file and think through what issues need to be resolved. This will help guide you in formulating the right list of questions to ask. Be sure to listen carefully to the insured's responses, and ask the proper follow-up questions. For example, if an insured tells you she was traveling to a job site or work meeting at the time of the accident, follow up with questions to confirm whether she was on the clock, how often she uses her vehicle in the course and scope of her employment, and so on.

3. Be on the lookout for potential issues relating to "regular use"

Some of the most common examples of situations where a vehicle's regular use may need to be fleshed out include: (1) occasional or incidental use versus frequent or regular use; (2) vehicles not owned by the named insured but instead owned by a family member living in the named insured's household; (3) vehicles used for work; and (4) repairs and total losses. In these instances, be sure to ask questions such as who the primary driver of the vehicle is, who maintains keys to the vehicle, whether permission is needed to drive the vehicle, who oversees vehicle maintenance and costs, and so on.

4. There are several factors to consider in determining a person's residence

Under Florida law, a person's residence is their place of abode (i.e., typically where they sleep each night) and can be permanent or temporary; and a resident is generally a person who lives at a place with no present intention of removing themselves from that place (i.e., no plans to permanently move elsewhere or leave the household altogether). When this issue arises, try to determine where the person receives mail, the longest amount of consecutive nights the person has stayed overnight at the location, whether the person has his/her/their own bedroom at the location, whether he/she/they have any intention of moving and when, etcetera.

5. When determining residency, you also need to consider whether the alleged resident is a member of the named insured's "household"

Florida courts have established that aside from living under the same roof as a named insured, a person must also meet other requirements in order to be considered a resident of the named insured's household. This includes: (1) having close ties of kinship with the named insured; (2) living in a fixed dwelling unit; and (3) having enjoyment of each part of the living facilities that the named insured also enjoys. Here, consider questions regarding whether all of the residents do any activities together (e.g., eat meals, grocery shop, watch television), whether the insured has full access to the entire house or only certain rooms/areas, and whether the insured freely allows others to enter into his/her/their part of the residence.

For more information,
please contact our
Appellate and Coverage Practice Group at
appellateandcoverage@kubickidraper.com.

SPOTLIGHT ON SHAREHOLDER

Jason Friedman



Competitiveness is not all that uncommon. Whether it's competing against others by trouncing opponents in a board game or basketball game, or maybe it's competing against yourself by walking a few steps more today than you did the day before. Most people arguably get a little competitive from time to time. But there are some people who take competition to a whole new level. Professionally, they embrace careers that allow them to constantly compete against others, and they work tirelessly to win each time. And personally, they push themselves to their limits by doing wildly adventurous things like, say, climbing to the summit of Mount Kilimanjaro. Enter **Jason Friedman**, Shareholder and self-described die-hard competitor from our Ft. Lauderdale office.

Jason has been a part of the KD family for a little over five years, but his competitive nature goes way back. He's played sports for as long as he can remember, and he continues to stay active, working out frequently, practicing jiu jitsu, and coaching his son in basketball and flag football. When he first enrolled at the University of Florida to earn his bachelor's degree, he originally thought about pursuing accounting like others in his family before him. But he got an itch for politics, a field better suited for his competitive nature, so he majored in political science. Upon graduating from U.F., he enrolled in law school at Nova Southeastern University. There, he discovered early on that litigation was right up his alley. Comparing it to "mortal combat," Jason says litigation gets his "creative juices flowing."

While in law school, Jason was selected to represent Nova at the International Moot Court Competition in Vienna, Austria, which he says was an incredible experience. Perhaps the best thing to happen to Jason during law school though was meeting his wife. They met right in the middle of finals, so he had to push back their first date until just after his last final was completed. He jokes that this helped condition his wife for his hectic law career.

Since graduating from law school, Jason has practiced in the areas of premises liability, auto liability, products liability, legal malpractice, and has been instrumental in helping KD expand into the area of nursing home negligence defense.

Jason approaches every case with the same mantra: "be objective from the beginning and conduct a thorough investigation." The goal is always to give his client "the good, the bad, and the ugly about the case," withholding nothing and always keeping his client's best interest in mind. "Client communication is key!" This has served Jason, and our clients, well over the years.

One of Jason's favorite aspects of his job is training and working with young lawyers. He wishes he had received more training when he was a young attorney before making his way to KD, so he strives to be a resource and mentor for his

team members and peers. Jason notes that learning is a two-way street, explaining that even in a trainer or mentor role, he has often learned new and helpful things from his mentees. It's important to take an interest in the people you work with and to help each other as much as you can. In fact, this was one of the things that brought Jason to the KD family in the first place.

Jason has been an attorney for almost fifteen years and has had the opportunity to work at other firms. Before coming to KD, Jason crossed paths with some of KD's finest, including Shareholder Michael J. Carney. Jason remembers meeting Mike and some other KD attorneys and "clicking personality-wise" with them. He started doing his homework and noticed how many long-term employees KD had and noted in his own interactions with them that they seemed to get along and care about each other. Jason knew then that this firm was for him.

Not surprisingly, one of Jason's other favorite aspects of his job is going to trial with his trial partner, Earleen H. Cote, which he describes as an absolutely invaluable experience. Jason is adamant that he learned more from Earleen in his first few months at KD than he did in all of his combined prior years of practice. Trial is like the championship game of litigation. It's the culmination of all of the work that has gone into a case, and it's the point where that work gets put to the test. Jason compares it to climbing a mountain: "you either make it to the top or you don't."

And if anyone knows about climbing a mountain, it's Jason. That Kilimanjaro story; it's true! In 2016, Jason traveled with seven others to Tanzania where the group hiked Mount Kilimanjaro. After six-and-a-half days, Jason and only one other member of his group made it to the summit. It then took two-and-a-half days to head back down, where he met up with the others from his group along the way. It's one of his proudest achievements. Talk about tenacity!

If you are in need of a tenacious attorney and an all-around excellent resource, contact Jason and his very capable team – jrf@kubickidrapr.com.

news | announcements



KD Team Members Recognized in Best Lawyers in America

We are thrilled to share the KD attorneys above have been recognized as 2023 “Best Lawyers in America,” by the highly-respected Best Lawyers peer review guide. The 29th edition of The Best Lawyers in America recognizes only the top 5.3% of elite lawyers in the nation across 150 practice areas.

KD Ranks #1 in Law 360’s Annual Diversity Survey

We are beyond proud to have earned the #1 spot in Law 360’s Annual Diversity Survey among firms with 101-250 attorneys!

This recognition is a testament to our belief that strength comes from diversity. We look forward to continuing our efforts and making our team even stronger.

KD Ranks Top 3 on The National Law Journal’s (NLJ) Women in Law Scorecard

We are extremely proud to be one of the top 3 law firms on The National Law Journal’s (NLJ) Women in Law Scorecard for 2022! The scorecard ranks 350 of the largest law firms in the country by their percentage of female attorneys and partners, and we are honored to be a part of it!

This ranking is a testament to our continued commitment of fostering an equal opportunity environment.

Marsha Moses and Ryan Elias Appointed to Florida Bar’s Diversity and Inclusion Committee

KD is committed to diversity, equity, and inclusion and is dedicated to embracing and celebrating the unique experiences, perspectives, and cultural backgrounds of its employees and creating an inclusive work environment for everyone. Therefore, we are proud to announce that Shareholder **Marsha Moses** of our Tampa office and Associate **Ryan Elias** of our Orlando office were recently appointed to the Florida Bar’s Diversity and Inclusion Committee.

Michelle Krone Selected To Florida Bar Construction Law Committee

Michelle Krone was selected as a 2022-2023 Florida Bar committee member and was appointed to serve on the Construction Law Certification Committee.



CONGRATULATIONS

to our 2022 Florida Super Lawyers

Super Lawyers

Super Lawyers[®]

2022



Peter Baumberger

Miami

Caryn Bellus

Miami

Brad McCormick

Miami

Angela Flowers

Ocala

Rising Star

Super Lawyers[®]

RISING STARS 2022

Nicole Wulwick

Miami



Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. Super Lawyers selects attorneys using peer nominations and evaluations combined with independent research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis. The objective is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel. Since Super Lawyers is intended to be used as an aid in selecting a lawyer, we limit the lawyer ratings to those who can be hired and retained by the public, i.e., lawyers in private practice and Legal Aid attorneys. www.kubickidrapers.com

The Ins and Outs of Florida Deceptive & Unfair Trade Practices Act Claims: What They Are, What Considerations Are Needed, and How to Defend Them

By Eric Fluharty | Ft. Myers
on behalf of KD's Construction Practice Group



Occasionally, product manufacturers find themselves defending the often overly-pleaded and rarely-proven fraud-based claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). FDUTPA claims are typically pleaded in an effort to leverage exposure to attorneys' fees. With the right tools, FDUTPA claims may be disposed of in the product manufacturers' favor. Under FDUTPA, "discretionary" attorneys' fees are available to the defendant when the plaintiff is unsuccessful. When you are presented with an FDUTPA claim, consider the following:

(1) What constitutes an FDUTPA violation?

FDUTPA provides an avenue to punish a wrongdoer for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204, Fla. Stat. An FDUTPA violation may be based on any law or statute that "proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." § 501.203(3)(c), Fla. Stat. In order to establish a consumer claim under FDUTPA, a plaintiff must plead and prove: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." See *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008).

(2) FDUTPA violations are measured objectively

Florida courts use an objective test to determine whether the purported act is deceptive. The plaintiff must show that the "alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016) (quoting *State, Office of Att'y Gen. v. Commerce Commercial Leasing, LLC*, 946 So. 2d 1253, 1258 (Fla. 1st DCA 2007)). Next, the plaintiff must establish that the purported act is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (quoting *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)). This is obviously a tough standard for a plaintiff to meet, and a product that lives up to its warranty or intended purpose as designed would likely fall short of this rigorous objective standard.

(3) No Damages = No FDUTPA Claim

Failure to plead actual damages precludes an FDUTPA claim from going forward. See, e.g., *Rollins, Inc. v. Butland*, 951 So. 2d 860, 873 (Fla. 2d DCA 2006) ("The members of the putative class who experienced no actual loss have no claim for damages under FDUTPA."). Similarly, FDUTPA "does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment." *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008) (quoting *Butland*, 951 So. 2d at 873).

(4) The safe harbor provision likely covers most construction products

The safe harbor provision provides that FDUTPA does not apply to "[a]n act or practice required or specifically permitted by federal or state law." *Marrache v. Bacardi, U.S.A., Inc.*, 17 F.4th 1084, 1098-99 (11th Cir. 2021) (quoting § 501.212, Fla. Stat.). In a construction context, it appears unfathomable that a scenario would exist where a building product would not trigger the safe harbor provision. It's doubtful that a mechanical pump, stucco mix, HVAC system, or the like would fall into any category other than specifically permitted under state or federal law.

(5) A defendant may move to require plaintiff to obtain a bond

When a defendant believes the FDUTPA action brought against it lacks legal or factual merit or is harassing in nature, it may move to require plaintiff to obtain a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorneys' fees. See § 501.211(3), Fla. Stat. "The purpose of requiring a bond is to provide defendants an opportunity for redress for harassment rather than to discourage plaintiffs from seeking access to the courts." *Hamilton v. Palm Chevrolet-Oldsmobile, Inc.*, 366 So. 2d 1233, 1234 (Fla. 2d DCA 1979). Oftentimes in the construction context, a plaintiff's FDUTPA claim is nothing more than a leverage play, and moving for a bond may keep the parties honest and make the plaintiff think twice about further pursuing a frivolous claim.

(6) Factors to consider in determining the prevailing party's attorneys' fees entitlement

Florida's Fourth District Court of Appeal recently clarified the issue of entitlement to a prevailing party's attorneys' fees under FDUTPA. The trial court has the discretion to award or not award attorneys' fees to the prevailing party. In order for the trial court to exercise its discretion, an evidentiary hearing on fees must be conducted. See *Forte v. All Cty. Towing Inc.*, 336 So. 3d 316, 319 (Fla. 4th DCA 2022). At the fee hearing, the trial court will consider various factors which may include, but are not limited to: (1) the scope and history of litigation; (2) the ability of the opposing party to satisfy a fee award; (3) whether a fee award would deter others from acting in similar circumstances; (4) the merits of the respective positions, including the degree of the opposing party's culpability or bad faith; (5) whether the claim brought was frivolous, unreasonable, or groundless; (6) whether the defense raised a defense mainly to frustrate or stall; and (7) whether the claim was brought to resolve a significant legal question under FDUTPA. See *id.*, at

continued on page 8



Under Construction: A Quick How-To for Investigating & Analyzing Roadway Claims Occurring in or Near Construction Zones

By Jeremy Chevres | Miami and Ft. Myers
on behalf of KD's Construction Practice Group

With the increase in roadway construction comes an increase in roadway claims. Whether you are dealing with a pedestrian injured in or near a construction site or a vehicle that bulldozed its way into a bulldozer, there are many key pieces of evidence that you should obtain as soon as possible before the evidence is lost.

Below is a non-exhaustive checklist of key evidence to obtain to properly evaluate your roadway claim as soon as possible: police report, EMS records, 911 recordings, homicide report, toxicology report, accident reconstructionist report, police body camera footage, or any other relevant governmental report.

Oftentimes a governmental agency will be involved with the initial investigation, fact gathering, and fault determination. Police reports should list all witnesses and their contact information. Police body camera footage may provide a view of the incident area that cannot be reproduced later and could have witnesses' real time statements. Obtaining these records early is critical to establishing your initial liability evaluation.

Maintenance of Traffic ("MOT") Plan, Certified Engineering Inspector ("CEI") report, and Florida Department of Transportation ("FDOT") Meeting Minutes

Roadway contractors have a MOT plan that governs pedestrian access, speed limits, lane closures, and maintaining safe vehicular traffic near the construction site. It is critical to obtain the MOT plan for the particular phase of construction and ensure it was properly implemented at the time of the incident. Oftentimes, a CEI will be appointed to oversee the construction. CEIs will likely draft a post-incident report with their evaluation of the MOT and other key items that could affect liability. Lastly, if the project involves FDOT, there will likely be post-incident meeting minutes, which could contain valuable information.

Witness Photos, Employee Photos, Google Earth Photos, and Google Street View Photos

Obtaining and preserving photographs of the incident scene from witnesses and employees at the outset is critical to establishing what the scene looked like, and what MOT was in place. If no photographs are available, Google's Earth and Street View tools are excellent to show the incident area on a particular date. Note that construction activities could change the appearance of a particular area on a daily basis; however, the Google tools are still useful to establish the locations of landmarks, crosswalks, street lights, and to determine distances.

Video Surveillance

Given how pervasive surveillance cameras have become on the front of homes, businesses, and dashboard cameras, there is a chance that your incident was captured from one or more angles. Use Google maps to search for adjacent businesses and ask if they have cameras facing the incident area. Note that most video recordings are deleted after 30 days, so time is of the essence.

Witness Statements, Employee Statements, and Incident Reports

Memories fade with time, so obtaining witness and employee statements as early as possible is ideal. If your client has a practice of drafting incident reports, obtain them early, and contact everyone listed on the report before their memory fades.

There are certainly other important items of evidence; however, with the above items, you are well on your way to establishing a proper liability evaluation.

If you have any questions, please contact
construction@kubickidraper.com.

The Ins and Outs of Florida Deceptive & Unfair Trade Practices Act Claim *continued from page 7*

321 (quoting *Humane Soc'y of Broward Cty., Inc. v. Fla. Humane Soc'y*, 951 So. 2d 966, 971 (Fla. 4th DCA 2007)). A trial court's determination of discretionary attorneys' fees will be upheld as long as the award is supported by competent substantial evidence. See *Forté*, 335 So. 3d at 321.

Defending FDUTPA claims may be stressful for product suppliers considering that a successful FDUTPA claim tried to verdict can damage product reputation, impact revenue streams, and is typically not covered by insurance. It is absolutely necessary when faced with an FDUTPA claim to engage an experienced construction lawyer. A well-thought-out defense must start immediately,

including asserting the appropriate arguments at a motion to dismiss, attacking the lack of actual damages, triggering the safe harbor provision, and moving to require the plaintiff to post a bond to reasonably indemnify the defendant for damages incurred. Once the plaintiff dismisses the FDUTPA claim, the successful defendant may be entitled to cost and reasonable attorneys' fees from the non-prevailing plaintiff.

The tips set forth are a snapshot of the effective tools that can be used in defending a construction-based FDUTPA claim. If you have any questions or concerns or have a claim you need assistance with, please contact KD's Construction Practice Group at:
construction@kubickidraper.com.



Jonathan Aihie Voted Vice President of NAAIA Florida

It is no surprise **Jonathan Aihie**, of our Miami office, was unanimously voted Vice President of the National African-American Insurance Association's Florida Chapter (NAAIA). His hard work and dedication are second to none, and we know we will see great things from Jonathan in his new role with NAAIA Florida.

NAAIA is dedicated to empowering African American insurance professionals, celebrating their accomplishments and attracting new talented individuals to the insurance industry.

Michelle Krone Joins Construction Lawyers Society of America

Michelle Krone was invited to join the Construction Lawyers Society of America (CLSA)! CLSA is an invitation-only membership to an international association of the world's best construction lawyers. The composition of the CLSA is aggressively diverse, with recognition of deserving, experienced and highly qualified lawyers across all practices relating to the construction industry.



Rebecca Brock Becomes Treasurer of FLABOTA

Congratulations to **Rebecca Leigh Brock**, of our West Palm Beach office, who was sworn in as Treasurer of the Florida Chapters of American Board of Trial Advocates (FLABOTA). KD proudly sponsored the FLABOTA 24th Annual Convention and CLE Program where Rebecca was sworn in and accompanied by fellow FLABOTA member, **Ken Oliver**, of our Ft. Myers office.

FLABOTA has over 800 members throughout the State of Florida. Its general purpose is to foster improvement in the ethical and technical standards of practice in the field of advocacy.



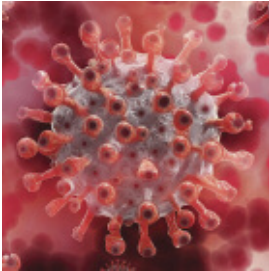
Caryn Bellus and Angela Flowers

KD Sponsors the Florida Bar Appellate Practice Section's Dessert Reception

Kubicki Draper proudly sponsored the Florida Bar Appellate Practice Section's Dessert Reception in Orlando, Florida at the Annual Florida Bar Convention. And, our very own, **Angela Flowers** and **Caryn Bellus**, both of whom are Executive Council members and past Chairs of the Appellate Practice Section, represented KD at the event. The Appellate Practice Section of The Florida Bar is a 1,500+ member organization devoted to promoting excellence in Florida's state and federal appellate courts.

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.



- Taking the Fraud Out of the Public Adjuster's Estimate
- PIP 2022 - What's Trending?
- Advanced PIP litigation
- Construction Defect Claims: Overview and Current Trends on Indemnity Law
- A COVID Year in Review for First Party Claims
- Early Construction Case Resolution – Is It Possible?
- Florida 4-Hour Law and Ethics Update
- The Story of a Bartender, a Local Radio Celebrity and a Fraudulent Accident
- How to Keep Everyone Happy: Tips and Strategies in Handling Multi-Claimant Pre-Suit Settlements
- Immunities Available to Florida's Construction Industry Under Florida's Workers' Compensation Law
- Demand Letter Defense and Obtaining Summary Judgment
- Are You High? Dealing with the Implications of Marijuana Use in Personal Injury Litigation
- Preserving the Record on Appeal: Objecting During Litigation
- Investigating Mechanical Damage in Homeowner Wind Claims and How to Identify and Handle Fraudulent Claim Activity
- When Life Throws You a Curve, Lean Into It: Reconstructing Motorcycle Operation and Dynamics for the Courtroom
- Defending Against Inflated Estimates for First Party Homeowners Claims
- Conducting Expert Building Investigations
- The ABCs of Coverage, Bad Faith, and Civil Remedies
- Reducing Legal Risks and Costs
- Basic Appellate Principles and Applications in Personal Injury Protection Litigation
- Florida Case Law Update: Notable Decisions 2022
- Assignment of Benefits: Defense Against Water Mitigation and Current Legal Issues Involving the Concurrent Cause Doctrine
- The Limitation of Liability Act: Still Making Waves on Plaintiffs' Claims
- How to Use EUOs Effectively - Properly Investigating Residency, Regular Use, and Other Issues
- Identifying and Defending Against Reptilian Litigation Tactics
- Combating Fraudulent and/or Excessive Attorney's Fee Demands and Post-Trial Motions and Dispositive Motion
- Making Auto Glass Litigation Transparent
- Gathering Extrapolatable Data Using Representative Selection
- Alcohol, Cell Phones & The Law
- An Overview of Punitive Damage Claims in Florida
- A Legal Juggernaut: Cast Iron Litigation

Michelle Krone and Christopher Thompkins Present at Southwest Florida Claims Association Conference

Michelle Krone and **Christopher Thompkins**, of our Ft. Myers office, presented at Southwest Florida Claims Association event on June 2, 2022 in Ft. Myers, Florida. They presented "Construction Defect Claims Overview and Current Trends on Indemnity Law," a general overview of indemnity law and varying perspectives of its application.

Jarred Dichek and Ken Oliver Present at 17th Annual Claims Education Conference

KD was honored to be a sponsor of the 17th Annual Claims Education Conference coordinated by the American Educational Institute, International Insurance Institute, and Society of Claim Law Associates. **Ken Oliver**, of our Ft. Myers office, and **Jarred Dichek**, of our Miami office, presented "Social Media in the Evaluation of Insurance Claims." The presentation provided tips and real life examples for using social media to investigate claims, and it also provided case law and pitfalls to avoid.

Ken Oliver Presented at FDLA's 25th Annual Florida Liability Claims Conference

Ken Oliver, of our Ft. Myers office, presented at the Florida Defense Lawyers Association (FDLA) 25th Annual Florida Liability Claims Conference on June 17 in Orlando, Florida. Ken co-presented "When Life Throws You a Curve...Lean Into It – Reconstructing Motorcycle Operation and Dynamics for the Courtroom" along with Bill Fischer, President - Fischer Forensic Engineering. They discussed mechanical and mental aspects of motorcycle operation with respect to available training literature and operator situational awareness, as it relates to reconstructing an accident and informing a jury.

Charles Watkins Participates in "Including You" Podcast with Amy Waninger

Charles Watkins, of our Miami office, participated as a guest on #IncludingYou with Amy C. Waninger where they discussed talent pipelines and how Kubicki Draper is strengthening its talent pipeline by investing in Black college students. Check out the podcast recording here: <https://lnkd.in/guzktMZv>

KD Sponsors 2022 Florida Institute Fraud Education Committee (FIFEC) Annual Conference

KD was a proud sponsor of the 2022 Florida Institute Fraud Education Committee (FIFEC) Annual Conference that took place from June 8-10 in Orlando, Florida. Our team presented several topics!

The Story of a Bartender, A Local Radio Celebrity and a Fraudulent Accident

Jarred Dichek (KD), Nancy Fajardo-Sanches (Progressive), Kelvin Gomez (Metlife-Farmers)

Florida 4-hour Law & Ethics Update

Caryn Bellus, Michael Carney, Gregory Prusak, Michael Walsh

A COVID Year in Review for First Party Claims

Anthony Atala (KD), **Erika Cordovi** (KD), **Barbara Fox** (KD), Carl Nemeth (Tower Hill), Jennifer Newell (FedNat)

Investigating Mechanical Damage in Homeowner Wind Claims and How to Identify and Handle Fraudulent Activity

Stefanie Capps (KD), Marc Leonard (Rimkus Consulting Group)

Combating Fraudulent and/or Excessive Attorneys' Fee Demands

Jarred Dichek (KD), Sara Engel (The Engel Firm), Allison Harke, (Allison Clasby Harke P.A.)

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.

APPELLATE

Battle of the Experts: Second DCA Affirms Defense Verdict & Exclusion of Plaintiff's Expert's Testimony.

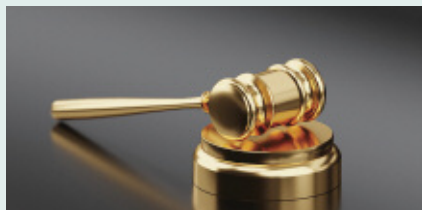
Sharon Degnan, of our Orlando office, obtained an affirmance in *Branch v. Rodrigues*, 336 So. 3d 722 (Fla. 2d DCA 2022). The case involved a relatively minor accident where the plaintiff, a garage door installer who frequently had to strain his arms and neck in his job, reported that he injured his arms and neck in the accident. **Stefanie Capps**, of our Ft. Myers office, tried the case originally, obtaining a total defense verdict and was also successful in securing orders to exclude the plaintiff's biomechanical/accident reconstruction expert from testifying at trial and permitting the defendant's biomechanical/accident reconstruction experts to testify. The plaintiff appealed, arguing that the trial court erred in striking his expert and in allowing ours to testify and further argued that our experts' testimony improperly pyramided inferences. Sharon highlighted the fact that the plaintiff's biomechanical expert used an unreliable methodology and lacked familiarity with the simulation software discussed in his report. She also laid out the incredibly detailed, step-by-step analysis used by the defense experts and explained that not only were they qualified to testify, their methodology was reliable and did not improperly stack inferences. The Second District Court agreed.

Subject-Matter Jurisdiction Gets Appraisal Award Rulings Kicked to the Curb.

Bretton Albrecht, of our Ft. Lauderdale office, recently prevailed in getting four trial court orders confirming appraisal awards in four related cases overturned. In *State Farm Florida Insurance Company v. Roof Pros Storm Division, Inc. a/a/o Jesse Scott*, 2022 WL 2374147 (Fla. 5th DCA July 1, 2022), four separate homeowners insured with State Farm filed claims for storm-related roof damage. Each homeowner assigned his/her/their policy rights over to Roof Pros, and in each claim, appraisal was sought after State Farm and Roof Pros could not agree on the amount of damages. The appraisal clause in each applicable State Farm policy stated that each party may select its own appraiser, the appraisers then must agree on an umpire, and if they cannot, then they may ask a judge to select the umpire. The parties could not agree as to an umpire, so petitions were filed for each claim in the lower courts, asking the courts to appoint an umpire in each matter. The lower courts ultimately entered final judgments confirming appraisal awards in each claim, and State Farm timely appealed. On appeal, State Farm took the position that the lower courts lacked subject-matter jurisdiction to hear these cases as pleaded and to enter a final judgment because these actions did not seek damages, alleged no jurisdictional amount in controversy, and lacked the essential allegations to support a declaratory judgment or breach of contract action. The Fifth District Court of Appeal agreed, reversing the lower courts' rulings.

Product Manufacturers, Distributors, & Retailers Everywhere Breathe Sigh of Relief: Products Liability Judgment Affirmed in Huffing Case.

Sharon Degnan, of our Orlando office, prevailed on appeal in the products liability case of *Grieco v. Daiho Sangyo, Inc.*, 2022 WL 2136932 (Fla. 4th DCA June 15, 2022), where the underlying plaintiff sustained injuries after he was struck by a vehicle driven by a young woman whom had been "huffing" computer duster spray, which she had just purchased at a nearby Wal-Mart. The plaintiff sued Wal-Mart along with the duster spray manufacturer and distributor under strict liability and negligence theories. The trial court below granted final summary judgment for Wal-Mart, the manufacturer, and the distributor, and the plaintiff appealed. Sharon argued as lead counsel on behalf of all three appellees. In an 18-page opinion, the Fourth District Court of Appeal agreed with Sharon that, with respect to strict liability for the alleged design defect of the duster spray, the proper scope of inquiry is to consider the reasonable expectations of the consumer. In this case, the consumer was the tortfeasor, and no inference could be made that she had an ordinary expectation of the product performing safely because she had no intention of using it for its customary use. The court further re-affirmed the line of cases that holds that the manufacturer, distributor, and seller of a product cannot be held strictly liable when a third party's injuries result from a consumer's unintended and illegal use of a product. Regarding the plaintiff's argument as to strict liability for the appellees' alleged failure to warn due to a deficient warning label, the court rejected this, noting that the label stated that inhaling the product could be harmful or fatal, and explained that a bitterant was added to deter inhalation of the product. No additional warnings were needed with respect to the dangers of specifically driving while inhaling the product, as the plaintiff had argued. The last point the court addressed was the common law negligence count, which the lower court granted summary judgment on by finding that the intoxicated driver's conduct was the sole superseding cause of the accident and injuries. The court wrote an in-depth analysis of foreseeability in the context of duty and proximate causation, and further reiterated that in some scenarios the question of proximate cause – normally one for the jury – can be a question to be resolved for the court, especially in the context of intervening negligence. The court also noted that the question of duty is not one to "the world at large" but arises out of the relationship between the specific parties, which is a more narrow inquiry, especially in cases involving the negligence of a third party.



TRIALS & MOTIONS

Defense Verdict Awarded in Volusia County.

Kara Cosse, of our Jacksonville office, and **Michael Carney**, of our Ft. Lauderdale office, obtained a defense verdict in a cast iron pipe trial against Mark Nation of Nation Law Firm. The insured filed a lawsuit alleging accidental resulting damage to his bathroom floor and connecting hallway from sewage that backed up out of a toilet due to deteriorated, collapsed, 52-year-old cast iron pipes. The insured claimed he was working on the date of loss and that his sister called him to come home from work to help clean up sewage on the floor. The carrier initially paid the resulting damage to the floor and hallway based on representations by the insured that the damages were accidental, but denied replacement of the pipes because they were deteriorated and specifically excluded in the policy. The insured sued the carrier, requested trenching of his home to replace the cast iron pipes.

Kara and Michael successfully argued to the jury that payment should never have been made in the first place, as the loss was not accidental based on the insured's prior claim history and because a billboard was the impetus for the lawsuit, not a physical loss. The insured had four (4) prior claims that depicted the property's general unkempt condition over a span of 10 years, and photographs of the unrelated claims depicted two (2) prior PVC plumbing re-routes in the kitchen and laundry room. The insured reported all four (4) prior claims immediately, and the claim in dispute was reported three (3) months late. Critically, the insured admitted he saw billboard advertisements for cast iron pipes prior to the loss and actually changed the date of loss on the stand when Michael confirmed with him that he was a government employee who would not have been working on November 22, 2018, as he swore to, because November 22, 2018 was Thanksgiving when federal employees do not work. Kara and Michael took the position that the insured knew or should have known that plumbing overflows were imminent at the property based on the prior PVC re-routes and that the insured should have expected losses like this to occur with the remaining cast iron pipe lines at the house. They also argued that the reason why the loss was not timely reported, like all of the other losses, was because the billboard advertisement was the impetus to the lawsuit, not an accidental loss on a date the insured recanted on the stand. The jury was out for just over an hour and came back with a complete defense verdict, and a proposal for settlement was filed more than two (2) years before trial, which should allow for recovery of defense fees and costs.

You Snooze, You Lose: Dismissal Obtained for Plaintiff's Failure to Effectuate Timely Service.

Erika Cordovi, of our Miami office, obtained an order of dismissal in a Personal Injury Protection ("PIP") suit due to the plaintiff's failure to effectuate timely service of process on our client. The plaintiff exceeded the 120-day service requirement by one week and failed to request an extension of time or show good cause for the delay. With case law supporting her argument, Erika convinced the court to dismiss the plaintiff's action against our client.

Summary Judgment Granted for Insurer, Dismissing Suit and Compelling Appraisal.

Kara Cosse, of our Jacksonville office, prevailed on summary judgment in a first-party property damage dispute. The defendant-insurer invoked its right to appraisal prior to plaintiff filing suit. Once suit was filed, several motions were filed and argued, including a motion disputing the venue of the case, a motion pertaining to untimely service of process, and a motion requesting to stay the case pending a criminal investigation against the plaintiff. The plaintiff argued the insurer waived its right to appraisal by litigating the case and participating in these various motions. Kara argued, and the court agreed, that the insurer properly demanded appraisal and that the litigation the insurer had participated in to date was administrative in nature, and thus the insurer did not act inconsistently with its right to appraisal.

Arbitration Award for Insurer Obtained in Tropical Storm Gordon Claim.

Emily Huang of our Ft. Myers office, helped our insurer-client obtain a binding arbitration award in its favor. The insureds filed a property damage claim allegedly arising from Tropical Storm Gordon; however, the insurer denied the claim because the damage appeared to have resulted from Hurricane Irma at a time prior to when the insureds owned the home. The arbitrator found that, based upon the evidence, the denial was proper.

Rules Matter: Summary Judgment Granted Due to Procedural Problems with Plaintiffs' Affidavits.

Eli Marger, of our Tampa office, obtained a summary judgment for our client in a case involving windstorm loss. Eli filed the motion with the court, and counsel for the insureds were late in submitting their response in opposition, which was accompanied by affidavits of the insureds and a general contractor. The court concluded the affidavits were untimely but still considered them. Eli argued that in addition to the affidavits being untimely, they were conclusory and provided no significant factual background, which made them insufficient under Florida law. The court agreed, striking the affidavits as untimely and legally insufficient, and granting summary judgment for the insurer.

Summary Judgment Granted in Untimely-Filed Hurricane Irma Claim.

Nicole Wulwick, of our Miami office, prevailed on summary judgment in a late-notice Hurricane Irma claim. The plaintiffs-insureds admitted that they knew of roof damage as early as October of 2017, had it repaired, but never notified the defendant-insurer until nearly three years later. Additionally, the plaintiffs testified that they noticed moisture in the interior ceilings of several rooms in the home at least one year prior to reporting their claim. Both sides presented expert affidavits, but the court ultimately ruled in favor of the insurer, holding the loss was not covered as a matter of law.

TRIALS & MOTIONS

Insured Gets Caught Up in Contradictions, Costs Her the Case.

William Sabinson, of our West Palm Beach office, secured a summary judgment for our client, a property insurer, in a Hurricane Irma case. The insurer investigated the property damage loss, sent a reservation of rights letter, and paid for the damaged portion of the insured's roof. The insurer requested she submit any estimates she received, but she forwarded nothing and, instead, sued. During her deposition, the insured testified she had no contact with anyone from the insurer during the handling of her claim. However, when the insurer moved for summary judgment, the insured submitted an affidavit arguing that the claims adjuster told her there was additional damage to her roof. Billy moved to have the affidavit stricken given that it contradicted the insured's deposition testimony. The court agreed and ultimately granted summary judgment in favor of the insurer.

Summary Judgment Granted for Insurer in First-Party Property Case.

Nicole Wulwick, of our Miami office, secured yet another summary judgment for an insurer in a first-party property suit. During the claim investigation, the insurer inadvertently issued payment for damage for which coverage was excluded in the policy. The insureds never cashed that check; rather, they sued the insurer, disputing the amount owed. Nicole argued on summary judgment that there was no coverage for the loss and that by not cashing the check or making any of the repairs for which the check was issued, the insureds did not detrimentally rely upon the payment as evidence of coverage; therefore, despite the inadvertent payment by the insurer, the insurer was not estopped from denying the claim. The court agreed and granted summary judgment 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.

Rules Are Rules: Court Grants Summary Judgment Due to Plaintiff's Violation of Assignment of Benefits Requirement.

Jonathan Aihie, of our Miami office, obtained a summary judgment in favor of our client in a first-party property case. The insured entered into an assignment of benefits ("AOB") with a contractor, but the contractor failed to provide the signed AOB to the insurer within three days of its execution as required under section 627.7152(2)(a)3, Florida Statutes. Additionally, the contractor also violated subsection (9)(a) of the same statute by filing a premature notice of intent to litigate. The court held these violations invalidated the claim.

Plaintiff's Strategy Backfires, Resulting in Victory for Defendant.

Martin Blaya, of our Miami office, with the assistance of KD's Appellate and Coverage Practice Group, convinced a court to enforce a settlement previously entered into by the plaintiff. The plaintiff argued that the settlement was invalid for two reasons: (1) she had not yet been named the personal representative of her father's estate when the settlement was entered into in her name on behalf of her father's estate; and (2) she did not authorize her prior attorney to enter into the settlement agreement and, therefore, the prior attorney had no authority to settle the claim. Importantly, regarding this second argument, the plaintiff invoked attorney-client privilege during her deposition, with the court sustaining those objections, making it impossible to discover what exactly the plaintiff may or may not have authorized her prior attorney to do with respect to settling the claim. Fortunately, the plaintiff's prior attorney was not so tight-lipped, and he testified that he had the plaintiff's express authority to settle the claim. At the hearing on the motion to enforce settlement, Martin argued that, under Florida law, the powers of a personal representative relate back in time to validate acts made by the person prior to being officially appointed. And sealing the fate of the plaintiff, Martin lastly argued that because the plaintiff invoked her attorney-client privilege – preventing the discovery of information that went to the heart of this dispute – the court was left to rely solely on the testimony of the plaintiff's prior attorney, which supported the defendant's position. The court agreed and granted the defendant's motion to enforce settlement.

NEW ADDITIONS

We are pleased to introduce our new team members:

FT. LAUDERDALE	Associate:	Maria O. Gerasikova
FT. MYERS	Associate:	Yasser Lakhlifi
JACKSONVILLE	Associates:	Milan "Bo" Samargya, Morgan Moceyunas, Samantha Valley
MIAMI	Shareholder:	Michael Maugans
	Associate:	Aaron Graubert
ORLANDO	Associate:	Jeryis Tadros
PENSACOLA	Associate:	Andrew Abreu
TAMPA	Associates:	Nina Williams, Joye Walford, Tracie Reese
WEST PALM	Associates:	Danitza Morales, Christopher Murphy

congratulations!



to **Dyzhane Bellamy**,
of our Tampa office,
on the birth of
her baby girl, Charisma!



to **Jennifer Emerson**,
of our Tampa office,
on the birth of
her baby boy, Luke!



to **Joseph Spedale**,
of our Tampa office, and
his wife Chelsea on the birth of
their baby boy, Joseph James!

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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