

KD *in the Community*

Joshua E. Polsky, of the Ft. Lauderdale office, co-chaired the "Night of Broadway Stars" gala which featured a one-of-a-kind musical showcase of Broadway's top talent that raised over \$100,000 for Covenant House Florida. Kubicki Draper supported this incredible event as a featured sponsor. Covenant House Florida provides shelter and services to homeless youth and young adults, including teen mothers and their infant children. The organization currently reaches more than 200 teens and young adults each day via street outreach, crisis shelters, transitional housing projects, and walk-in services. Josh has become a member of Covenant House Florida's Board of Directors and continues to furnish his efforts for the homeless youth of Broward County.

Harold Saul, of the Tampa office, along with numerous Kidney patients, family members, and advocates, participated in a two-day lobbying effort, in Washington, D.C., to promote and support several issues related to kidneys and transplantation. This effort was spearheaded by the National Kidney Foundation and the PKD Foundation. Harold met with key staff members from the offices of Senator Bill Nelson, and House Representatives, Lois Frankel, Kathy Castor, and Gus Bilirakis.



"Broadway Stars" take center stage



Night of Broadway Stars



In Jacob's Shoes Event

Alexandra Paez and **Jennifer Feld**, of the West Palm Beach office, and **Scott Rosso** and **Joshua E. Polsky**, of the Ft. Lauderdale office, attended the Annual Celebration of In Jacob's Shoes "Every Sole Counts." The mission of In Jacob's Shoes® is to provide new and gently used shoes, school supplies, and athletic equipment to children in need. Grants and scholarships are also awarded for camp, sports, and enrichment programs.



Mercedes-Benz Corporate Run

Several KD team members participated in this year's Mercedes-Benz Corporate Run, one of the largest 5K races in the nation. The purpose of the Corporate Run is to promote running and walking as a means to a fit, healthy lifestyle for people from all walks of corporate life.

EDITOR

Jill L. Aberbach

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News & Announcements

Scott Tankel, of the Tampa office, was recently featured on the University of Florida Law Blog. Read "Meet UF Law Alumnus Scott Tankel" by *clicking on this link*: <http://www.law.ufl.edu/admissions-blog/name-uf-law-graduation-year-scott-tankel-2015>



The Statutory Advantage in Medical Malpractice Actions

By Joshua E. Polsky

CAUTION
Medical Malpractice

Florida medical malpractice claims are often feared due the myriad of intricacies that impact the prosecution and defense of each claim. This complex set of rules, once fully mastered, can be used as a sword and shield in the mêlée of medical malpractice litigation. Malpractice actions tick at a faster pace than most claims as Florida Statute § 95.11(4)(b) mandates that all lawsuits based in medical negligence must commence within two years from the incident giving rise to the action or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence.

Prior to the commencement of litigation, the prospective parties must complete a pre-suit investigation pursuant to Fla. Stat. § 766.203. Pre-suit notices of intent must strictly comply with Fla. Stat. § 766.106. Furthermore, the prospective claimant is required to notify each prospective defendant by certified mail, return receipt, of their intent to initiate litigation for medical negligence before any action may be filed. See Fla. Stat. § 766.106(2)(a). Proper statutory notices must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the two-year period prior to the alleged act of negligence who treated or evaluated the claimant, copies of all of the medical records relied upon by the Plaintiff's expert who signed the required affidavit, and the executed authorization form provided in § 766.1065. See Fla. Stat. § 766.106(2)(b).

A party's failure to strictly comply with each and every requirement of § 766.106, presents grounds for a determination of inadequacy. If the notice of intent fails to comport to the statute, then any complaint filed thereafter is arguably flawed, as filing a complaint prior to service of the notice of intent is grounds for dismissal of the action. **Bove v. Naples HMA, LLC**, et al., 41 Fla. L. Weekly D827f (2016); see also **Kukral v. D. Mekras, M.D.**, 679 So. 2d 278, 284-85 (Fla. 1996). Of course, a flaw in the notice of intent is only fatal if it cannot be cured prior to the expiration of the statute of limitations. **Stein v. Feingold**, 629, So. 2d 998, 999 (Fla. 3d DCA 1993). While the majority of motions to dismiss are not dispositive, filing such a motion can be extremely effective in proffering to the bench what will eventually be the basis of a Motion for Summary Judgment. The strategic timing of these preliminary motions can be cost effective as it may result in the dismissal of the entire claim if the shorter statute of limitations has expired.

Due to the number of pre-suit requirements buried within the rules, compliance with the statute of limitations can often times be a bit trickier than expected. While the notice of intent to initiate litigation must be served within the time parameters set forth in Fla. Stat. § 95.11, for 90 days after the notice is filed, the statute of limitations is tolled as to all potential defendants. Pursuant to Florida Rules of Civil Procedure 1.650(b)(1), this notice serves not only as notice to the party directly served but also to any other prospective defendant "who bears a legal relationship" to that party or medical practice. **Kukral**, 679 So. 2d at 285 (holding that the employer was in a legal relationship with the physician and accordingly, notice to the physician operated as notice to the employer under rule 1.650). In the context of an employee/employer relationship, or even that of an independent contractor or placement agency scenario, it is common for notice to be served on the physician only, especially in cases where placement agencies are used to originate the relationship between the hospital or medical practice and physician.

It is the plaintiff's obligation to investigate, determine, notify, and be aware of those with whom a potential defendant may have a legal relationship. Keep in mind, this "up-the-chain" notice only applies to those who "bear a legal relationship" to their superior agency at the time of service of the notice. Where a prospective defendant is no longer in a legal relationship with the party served, the notice to the original party does not operate as notice to the third-party defendant. **Goldfarb v. Urcioli**, 858 So. 2d 397, 398-399 (Fla. 1st DCA 2003). The key is the relationship at the time of the service of the notice of intent to initiate litigation, not a prior relationship at the time of the alleged malpractice. *Id.*

A seemingly insignificant detail such as the return receipt on a notice of intent to sue or in cases of alleged liability under the doctrine of respondeat superior, the date upon which the physician and medical agency terminated their relationship after the date of alleged malpractice, can be the difference in obtaining a dismissal of a medical malpractice claim, to the tune of several million dollars in many circumstances.

Joshua E. Polsky, Esq. is a shareholder in Kubicki Draper's Fort Lauderdale office specializing in medical malpractice defense litigation throughout the State of Florida.

Presentations and Speaking Engagements



The Music of Property Claims

earth, wind and fire

Thank you to all who attended
KD's First Party Practice Group's
Music of Property Claims
Seminar in Tampa.

We hope you enjoyed it as much as we enjoyed presenting.
Below are some of the topics that were covered at the seminar:

- Thriller! – When Old Claims Rise from the Dead:
William “Billy” Sabinson, of the West Palm Beach office
and **Scott M. Rosso**, of the Ft. Lauderdale office.
- Raindrops Keep Falling On My Head: Who, What, Where
& How To Handle Wind & Water Damage:
Dr. Ralph Moon of GHD, **Nicole M. Ellis** of the Miami
office and **Karina I. Perez** of the Tampa office.
- War! What Is It Good For? (Other Than Attorney’s Fees):
Attorney’s Fees Mock Hearing by: **Michael Balducci**, of
the West Palm Beach office, **Joseph W. Carey**, of the
Orlando office, and **Michael S. Walsh**, of the Ft.
Lauderdale office.
- Clean Up Woman: Understanding Fire Damage Mitigation:
Raul Paredes of Clear Restoration, **Anthony G. Atala**,
Jarred S. Dichek, and **Charles H. Watkins**, of
the Miami office.
- Burning Down The House: Fire Origins & Burn Stages
Explained: Timothy York of NEFCO,
Stefanie D.Capps, of the Ft. Myers office,
Valerie A. Dondero of the Miami office, and
Kendra B. Therrell, of the Jacksonville office.

If you were unable to join us, but are interested in a
presentation on any of these topics, please e-mail us at
ad@kubickidraper.com.



In addition to the presentations at our First Party Conference,
several other presentations took place in the last few months.
Some of the topics presented are below.

- Deposition and Courtroom Testimony and
Common Types of Claims Against
Lodging Establishments
- Alcohol, Cell Phones, and The Law;
Florida Case Law Update
- The Verdict: Was it Arson or
Was it an Accident?
- Water Mitigation Defense Strategies
- Daubert v. Frye Debate
- Bad Faith Prevention

We welcome the opportunity to host a complimentary seminar
at your office or event on any of these topics or any other
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.



Are Reductions for Medicare Adjustments for Past Medical Expenses a *Thing of the Past?*

By Harold Saul



In the Winter 2016 of the KD Quarterly, we reported on the Florida Supreme Court's decision in **Joerg v. State Farm Mutual Automobile Insurance Company**, 176 So.3d 1247 (Fla 2015) where the Florida Supreme Court held that Defendants may not present evidence of a Claimant's entitlement to future free or low cost benefits, including Medicare, Medicaid and other Social Legislation in an effort to reduce future medical damages. More recently, Plaintiff attorneys have been citing to **Joerg** to defeat Defense counsel's efforts to limit the presentation of past medical bills to the amount actually reimbursed by Medicare.

In **Joerg**, the Court held defendants *may not* present evidence of a claimant's entitlement to future free or low cost benefits including Medicare, Medicaid, and other social legislation in an effort to reduce future medical damages. The lengthy opinion clarifies prior case law on collateral sources and reminds practitioners of the many pitfalls in handling cases involving Medicare beneficiaries.

Typically, Florida's collateral source rule prevents juries from hearing evidence of a claimant's receipt of payments from third-party payers, such as health and disability insurance. However, the Florida Supreme Court in **Florida Physician's Insurance Reciprocal v. Stanley**, 452 So. 2d 514, 515 (Fla. 1984), held "free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible." This left open the issue of whether it applies to both past and future benefits.

The Florida Supreme Court in **Joerg** made several statements but its main holding was that future Medicare benefits are too speculative to serve as a basis to reduce a Plaintiff's future medical damages. This clarified its statement in **Stanley**. **Joerg** also reiterated public policy consideration against allowing tortfeasors to benefit from the Plaintiff's collateral sources. The Court noted informing a jury the Plaintiff is a beneficiary of government assistance "is highly prejudicial and constitutes reversible error".

While **Joerg** does not pertain to past medical damages, the opinion reminds us of the importance of pre-trial motions to limit the presentation of past medical damages to the amount Medicare reimbursed. Specifically, **Joerg** re-affirms Medicare is excluded from Florida's collateral source statute, §768.76. Because the collateral source statute does not apply to Medicare benefits, there is no basis for a post verdict set-off for amounts adjusted by medical providers upon acceptance of Medicare benefits. See, **Thyssenkrupp v. Lasky**, 868 So. 2d 547 (Fla. 4th DCA 2004). Instead, a Plaintiff must be prevented from

presenting evidence of the gross, past medical damages beyond the Medicare reimbursement amount accepted by the provider or else the defendant may be responsible for the wind-fall without any post verdict remedies.

Handling Past Medical Expenses Pretrial

In trials where Medicare has paid some or all of the medical bills, defense counsel typically files a Motion in Limine limiting the presentation of past medical expenses to those actually paid by Medicare, as opposed to what was billed. These motions typically cite since Medicare is not a collateral source, there is no basis to set off any reductions post verdict, rather, the jury should only be presented the amounts actually paid. Although **Joerg** does not address past medical damages, the opinion reinforces the necessity to file such pre-trial motions to limit the presentation of past medical damages to the amount Medicare reimbursed.

Specifically, **Joerg** re-affirms Medicare is excluded from Florida's collateral source statute, §768.76. Because the collateral source statute does not apply to Medicare benefits, there is no basis for a post verdict set-off for amounts adjusted by medical providers upon acceptance of Medicare benefits. See, **Thyssenkrupp v. Lasky**, 868 So. 2d 547 (Fla. 4th DCA 2004).

Recent Court Rulings

More recently, several Circuit Court Judges have ruled against Defense counsel's Motions in Limine to prohibit Plaintiffs from submitting to the jury the actual amount of medical bills incurred. These opinions do not cite any specific reasons but Plaintiff's counsel has been focusing on the language in **Joerg**, where the Court noted the inherent prejudice of informing a jury the Plaintiff has obtained government assistance. They argue the jury has to know why or how the bills were reduced if the Court is going to allow only the amounts paid, and this is prejudicial. In cases where the bills are not going to be contested, defense counsel can stipulate to the amounts and thus the need for informing the jury of any cuts is unnecessary and irrelevant. However, if there is a strong causation defense for some or all of the medical treatment and defense counsel has to argue some bills are not related to the accident, it may be difficult to convince a court to only allow the amounts paid to go to the jury.

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From Trial Support To Coverage Services, Kubicki Draper's Appellate and Coverage Division Has You Covered.



Bretton Albrecht



Caryn Bellus



G. William Bissett



Betsy Gallagher



Michael Clarke



Sharon Degnan



Angela Flowers

Since the firm's founding in 1963, we have taken great pride in the services provided by our appellate and insurance coverage division. This group of specialists offers our clients over 175 years of combined appellate experience and the legal insight gained through thousands of appeals and involvement in hundreds of insurance coverage disputes.

Kubicki Draper's appellate and coverage division includes seven shareholders, three of whom are Board Certified by The Florida Bar in Appellate Practice and each of whom is a seasoned and well-respected appellate attorney. Our attorneys in this division have been involved in creating and shaping Florida law through their involvement in precedent-setting cases.

Our appellate and coverage division also provides extensive trial support, both to the firm's trial lawyers and to counsel outside the firm. We offer a wide range of trial support services at every phase of litigation, from pre-trial through post-trial litigation, in addition to appeals. This includes overseeing the careful development and preservation of the appellate record through pre-trial motion practice, attendance at trial as appellate counsel, and drafting jury instructions and verdict forms in anticipation of trial. The appellate and coverage division often

assists trial counsel in the preparation of legal memoranda in cases involving complex or novel legal issues, as well as preparation of post-trial motions, and routinely provides appellate evaluations in the aftermath of trial.

We also offer our clients a full range of insurance coverage services, including prosecuting or defending declaratory judgment coverage suits in Florida's state and federal courts. Our appellate and coverage attorneys provide our clients with in-depth coverage analysis involving a multitude of different issues pertinent to the insurance industry and routinely prepare written coverage opinions as well as reservation of rights and claim denial letters and assist with responding to civil remedy notices. The same legal writing and analytical skills from which our appellate successes derive allow us to provide efficient and superior service to our insurance clients, whether in the context of coverage analysis or coverage litigation.

Finally, our appellate and coverage division offers extensive seminar services to the firm's clients on a wide range of topics, including virtually all areas of tort litigation, appellate practice, and insurance coverage.

For more information, please e-mail us at info@kubickidraper.com.

Reductions for Medicare Adjustments *continued from page 4*

In a recent trial where our client struck the Plaintiff who was on his motorcycle, we filed a Motion in Limine as the Plaintiff was a Medicare recipient and his total medical bills were over \$700,000 but Medicare paid only \$120,000. We filed the appropriate Motion in Limine and Plaintiff's counsel used the language in **Joerg** in an effort to allow him to present to the jury the entire \$700,000. In addition, they cited to several Circuit Court decisions, two from the 15th Judicial Circuit (Palm Beach) and one from the 6th Judicial Circuit (Pinellas) where trial judges held **Joerg** required the jury receive the full medical

bills as opposed to the reduced amounts. After briefing on the issue and extensive arguments, the trial court agreed with our position and only allowed the Plaintiff to present to the jury past medical expenses of \$120,000.

I do not believe we will see many appellate decisions on this issue, as a ruling either way seems to be harmless error. The appellate courts are likely to find the jury receiving either the full medical bills or the paid amounts to be prejudicial or any other basis for reversal. Thus, we are likely to be bound by the trial court's decision.

Brian Chojnowski



Brian Chojnowski, a shareholder in the Tallahassee office, grew up in a military family and moved around the United States while his father was in the U.S. Navy. Brian's family eventually settled in Ohio where he graduated high school summa cum laude and enrolled at Kent State University. Brian graduated college with a degree in Health Care Administration and considered applying to medical school before moving to Florida to attend law school at Florida State University.

While at Florida State University, Brian became interested in criminal law and interned at the State Attorney's Office, Second Judicial Circuit while in his second and third years of law school. Upon graduation in 2008, Brian joined the State Attorney's Office and tried cases in the juvenile, traffic, misdemeanor, and felony divisions. Brian worked at the State Attorney's office for two and a half years, tried more than 26 cases in his last year alone, and in 2010, had the most trials in the Second Judicial Circuit. Although Brian thought his interest in criminal law would dominate his legal career, he began to seek more complex cases outside of the criminal law world. This interest led Brian to join Kubicki Draper in 2011 as an associate in the Tallahassee office.

Brian believes that communication is one of the most important skills an attorney can possess and that his ability to effectively communicate a legal defense leads to positive jury verdicts.

Brian's competitive nature and his desire to help people is what he enjoys most about being an attorney. Specifically, he believes that in order to provide quality representation to his clients, he must minimize the clients stress, protect their interests, and make sure that he communicates a legal strategy and defense in a way that is relatable. Brian's past trial experience has allowed him to move from criminal cases where strict guidelines and elements must be met in order to win a case, to civil law, where he must present information creatively on behalf of his clients and convince a jury what is fair when no guidelines are available. To do this, Brian pulls out the issues and facts that are unique to each case and explains them to the jury in a simple and relatable manner. This strategy is why Brian's clients trust and continue to ask him to represent them.

Brian's approach to success when litigating and defending a case is in the details. A focus on key facts and a familiarity of the nuances of each case is what allows Brian to stand out from the mass of attorneys in Florida today. Brian's attention to detail in each of his cases instills confidence in his clients and leads to them returning for his legal advice and support.

When Brian is not at the office, he enjoys woodworking and home improvement projects. He also loves spending time with his wife of four years and his miniature schnauzer Ralph, who may be 10 years old, but is still a puppy at heart.

APPELLATE

Favorable Opinion Regarding Trial Court's Abuse of Discretion.

Caryn Bellus and **Bretton Albrecht**, of the Miami office, received a favorable opinion from the First District Court of Appeals. In a lengthy opinion, the appellate court concluded that, although it was harmless because substantial portions of the expert's opinion were conveyed to the jury, the trial court abused its discretion in refusing to allow a defense biomechanical engineer, who was also a medical doctor, to render an opinion as to the specific causation of the Plaintiff's injury. The opinion provided an analysis of biomechanical engineering opinions under the accepted standard of review. In addition, the court reversed an attorney's fee award to the Plaintiff finding her Proposal for Settlement to be patently ambiguous.

Affirmance of Summary Judgment in Premises Liability Case.

Sharon C. Degan, of the Ft. Lauderdale office, was successful in defending an appeal in the Second District Court of Appeals of a final summary judgment entered in favor of her client, a landscaping maintenance company. The lawsuit was brought by a Plaintiff, who, rather than walking on a paved walkway to get to her car took a short cut through a grassy median area in a parking lot and fell in a hole allegedly left by a missing irrigation system lid. Following an oral argument where the court indicated a disagreement with Plaintiff's pursuit of a premises liability theory against the landscaping company, who did not own or control the premises, a per curiam affirmance of the final summary judgment was entered.

Affirmance of Trial Verdict Regarding Direction of Payments to Contractors.

G. William Bissett, of the Miami office, argued an appeal in the Second District Court of Appeals involving new and novel arguments presented by the Plaintiff's appellate attorney. The case raised issues not previously addressed in Florida law, prompting Plaintiff's counsel to include a request that if the appellate court ruled against, then the question should be certified to the Florida Supreme Court.

The Appellate Court did not certify any new question to the Supreme Court, as Plaintiff's counsel had requested. See **Szrajer v. Florida Ins. Guar. Ass'n, Inc.**, No. 2D15-142, 2016 WL 1602706 (Fla. 2d DCA Apr. 22, 2016). Rather, the Court affirmed, per curiam, the decision in a jury trial which included the form of final judgment entered by our client which enforced the 2011 amendment to the FIGA statute. This statute directs that FIGA cannot pay the policyholder and can only pay contractors to perform actual repairs.

TRIALS, MOTIONS, MEDIATIONS

Favorable Verdict in a Warehouse Accident.

Charles Watkins, Nicole Ellis, and Sarah Goldberg, of the Miami office, represented a cargo warehouse and forklift driver in an admitted liability case where a 2,000 pound cargo crate fell on the Plaintiff and resulted in multiple injuries and surgeries. These injuries included confirmed post traumatic stress, claims of erectile dysfunction, and over \$800,000 in special economic damages. The Plaintiff also alleged punitive damages which the Judge dismissed during trial.

The accident occurred when the Plaintiff walked around the crate and bent down to help his coworker by moving a piece of wood under the crate. Charles and Nicole argued that the two men caused the unfortunate accident. In closing, Plaintiff's counsel asked for over \$6.5 million and requested the jury place all fault on the warehouse and forklift driver. The verdict found the Plaintiff 33% responsible for the accident and awarded a net \$1.268 million which included his wife who had a significant loss of consortium claim. Additionally, there was an incident where the Plaintiff was alleged to have had improper conversation with a juror. Charles moved for a mistrial after an evidentiary hearing.

Favorable Construction Arbitration Result.

Harold Saul, of the Tampa office, obtained a favorable arbitration result after a six week arbitration proceeding and a two month briefing schedule. Harold represented a stucco contractor who was no longer in business. The case was brought by a large builder against several contractors as a result of significant water intrusion and damage to a 48 unit 4 story condominium building. Harold attacked the Plaintiff's experts on their conclusions, arguing they had no factual basis to support the stucco deficiencies caused any specific damage, as they failed to properly document any causal findings. Harold then utilized his expert to point out areas of the stucco application where it was in compliance with code. Although there was still damage behind the stucco and other areas where the stucco application was not properly applied, there was no damage to further arrive at the lack of causation opinion to the defective stucco application.

Furthermore, with the help of **Michael Clarke**, of the Tampa office, they presented the panel with an 80 page closing statement to support the position Harold had developed over the six weeks of evidence. In the end, the panel determined that the stucco application was defective, but found the Developer was not able to link any of the damage to the improper stucco application. Thus, they awarded only the costs of the stucco application. More importantly, the Panel concluded that neither the Developer nor Harold's client were the prevailing party, thus denying entitlement to the Developer of any fees and costs. Shortly after the proceeding ended, the matter settled for nominal amount.

Final Summary Judgment in a Trip and Fall Case.

Angela Agostino, of the Ft. Myers office, obtained a Final Summary Judgment in a case involving an 81 year old Plaintiff who tripped over a parking stop located in a handicapped area with white and blue lines in a parking lot. The Plaintiff sustained a fractured shoulder and received a total shoulder replacement. In addition, the Plaintiff attempted to defeat the motion by an expert affidavit asserting that there was negligence because the parking stop constituted an "abrupt elevation change" and was ¼ inch shorter than design standards, and violated building codes.

Motion for Summary Judgment in Alleged Premises Case.

Stefanie Capps, of the Ft. Myers office, obtained a summary judgment in a case where the Plaintiff alleged that a large opening on a sidewalk in the City of Bonita Springs, caused him to fall off of his bicycle. As a result, the Plaintiff alleged that he sustained significant injuries to his face and upper extremities. Stefanie represented the contractor who built the sidewalk for the city who had finalized the project the year before the accident occurred.

The Plaintiff alleged that the concrete caulk in the sidewalk expansion/drainage joint was defective and therefore, rotted away and left an opening in the sidewalk. Stefanie's Motion for Summary Judgment argued that this condition was patent and there was not notification from the city of the defective work by the contractor. The Judge agreed the condition was patent and the work had been accepted by the city, thus barring liability against the contractor. As a result of Stefanie's motion being granted, the Plaintiff must now pay attorneys' fees and costs back to the insurance carrier.

Favorable Trial Verdict in a Motor Vehicle Accident.

Brian Chojnowski, of the Tallahassee office, obtained a favorable trial result after a four day trial in Tallahassee. Our client was the third vehicle in a line of motor vehicles whereby a non-party 16-year-old driver may or may not have switched lanes in front of the Plaintiff's car causing the Plaintiff to slam on his brakes. In turn, our client slammed on his brakes, but still hit the back of Plaintiff's pickup truck. The impact was severe enough to bend the frame on the truck bed.

Plaintiff and his attorney thereafter claimed that the Plaintiff developed a traumatic brain injury, vertigo, a permanent neck injury, and had a wage loss claim. In addition, his wife filed a consortium claim. The Judge granted Brian's motions for directed verdict on future lost income and future medical expenses.

Brian strategically asked the jury to award 50/50 liability against our client and the non-party in order to gain the jury's trust and seem more credible as the evidence did not support comparative negligence against the Plaintiff. The jury returned a verdict that found our client 60% at fault and apportioned the other 40% to the non-party. The jury awarded only \$5,689.91 in past medical expenses, \$0 in past lost wages, did not find permanency, and no consortium award.

Final Dismissal with Prejudice in a Medical Malpractice Case Regarding Statute of Limitations.

Joshua E. Polsky, of the Ft. Lauderdale office, obtained a final dismissal with prejudice in a clear liability medical malpractice action after proving to the court after multiple hearings, that the Plaintiff failed to comply with the two-year statute of limitations under Florida Statute § 95.11 and the medical malpractice pre-suit notice requirements which would have tolled the statute of limitations, under Fla. Stat. § 766.106(2)(a). The client's potential exposure exceeded seven figures after the eye surgeon admitted to inserting the wrong diopter lenses and corrective surgery failed, resulting in complete loss of vision.

TRIALS, MOTIONS, MEDIATIONS

Defense Verdict in Motor Vehicle Accident.

Brian Chojnowski and **Stuart Poage**, of the Tallahassee office, in a five day trial, obtained a complete defense verdict in a disputed liability motor vehicle accident case. The Plaintiff was riding in the open bed of a pick up truck that was struck on the side by the Defendant. The case was defended on liability grounds as the defense's theory was that the truck turned into the path of the Defendant's vehicle despite the Defendant having a green light and the right of way. Plaintiff claimed he suffered road rash, torn ligaments, and muscles in his leg resulting in a permanent injury, and a permanent lumbar spine injury and sought significant damages for past and future medical damages, past and future pain and suffering, and future lost earning capacity. After only 25 minutes of deliberations, the jury found the Defendant was not negligent.

Defense Verdict in a Veterinary Malpractice Case.

Stefanie Capps, of the Ft. Myers office, obtained a defense verdict in a veterinary malpractice case. The Plaintiff had an eight year old Labrador Retriever who had terminal cancer. The Defendant, a board certified veterinary surgeon, performed a life saving splenectomy on the dog to stop internal bleeding caused by cancerous tumors in his spleen. The Plaintiff alleged that the surgery caused the dog to suffer a neurological injury to his back right leg and thus, the remainder of the dog's life was marred by the injury. The Plaintiff was seeking reimbursement for the bills to treat the dog's foot condition and \$16,000.00 for the air ambulance.

At trial, the Plaintiff had two treating veterinarians testify, however, during cross examination, both admitted that they could not provide a link between the surgery and the cause of the neurological defect. As a result, the Judge entered a directed verdict in favor of the defense.

Motion for Summary Judgment in First-Party Property Case Regarding Assignment of Benefits.

Scott Rosso, of the Ft. Lauderdale office, obtained a final dismissal in a first-party assignment of benefits case, where a water mitigation company had sued our client. Scott drafted a Motion for Summary Judgment that was based on lack of pre-suit notice, as the claims file and notes were void of any assignment, invoice, or estimate from the Plaintiff. Contrary to this, the Plaintiff argued that such documents had been properly emailed to our client. The Plaintiff filed a response to Scott's motion on the second business day prior to the hearing. Scott argued that the Plaintiff's response was not only untimely as per Florida Statute § 1.150, which required hand-delivery, but that the Plaintiff had also emailed the pre-suit notice to an incorrect email address to the client's adjuster. Although Plaintiff's counsel attempted to argue that this was a question for the jury, the Judge granted Scott's Motion for Summary Judgment.

Directed Verdict in Loss of Use Claim.

Stefanie Capps, of the Ft. Myers office and **Sharon Degan**, of the Ft. Lauderdale office, tried a breach of insurance policy case where the carrier reversed an initial coverage denial of a property damage claim two years later, while the case was in suit, and paid a total loss of a BMW. The Plaintiff continued to pursue a claim for consequential damages and attorney's fees. Stefanie and Sharon were successful in obtaining a directed verdict as to the loss of use claim and although allowing the remainder of the claim to proceed to the jury, the Court noted on the record that it was error because the Plaintiff failed to plead the consequential damages claim properly and gave the Plaintiff the option to amend the complaint, which he declined. Between the directed verdict and the jury's rejection of other portions of the damages sought by Plaintiff, Stefanie and Sharon were successful in defending against the majority of the damages sought by Plaintiff and the jury ultimately returned a verdict consistent with the real damages incurred as a result of the delay in payment of the claim.

The information provided about the law is not intended as legal advice. Although we go to great lengths to make sure our information is accurate and useful, we encourage and strongly recommend that you consult an attorney to review and evaluate the particular circumstances of your situation.



KUBICKI DRAPER congratulates their 2016 Super Lawyers



Caryn L. Bellus
MIAMI



Brad J. McCormick
MIAMI



Sharon C. Degnan
FT. LAUDERDALE



Angela C. Flowers
OCALA



Steven W. Cornman
MIAMI



Betsy E. Gallagher
TAMPA

SUPER LAWYERS



Bretton C. Albrecht
MIAMI

2016 RISING STARS



Christin M. Russell
WEST PALM BEACH



Joshua E. Polsky
FT. LAUDERDALE



Michael F. Suarez
MIAMI



Nicole L. Wulwick
MIAMI



Chelsea R. Winicki
JACKSONVILLE



Kenneth "Jayme" Idle
ORLANDO



David M. Drahos
WEST PALM BEACH

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www.kubickidraper.com

We are pleased to introduce our new team members:

Amy L. Melia – Associate Attorney, Miami

Douglas F. Miller – Shareholder, Pensacola

Micah A. Andrews – Associate Attorney, Tallahassee

Brad McCormick, of the Miami office, has been elected chair of the Florida Association of Managing Partners.

Harold A. Saul and **Betsy E. Gallagher**, of the Tampa office, were recognized in the Tampa Tribune as 2016 Top Rated Lawyers.

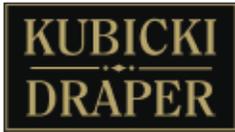
Caryn Bellus, of the Miami office, and **Betsy Gallagher**, of the Tampa office, were recognized in the Spring 2016 Appellate Practice Section of Best Lawyers, Women in the Law.

Brad McCormick, of the Miami office, was recognized in the Law & Accounting Issue of the South Florida Business Journal Power Leaders -- a listing of the region's 100 leading attorneys and accountants.

G. William Bissett, of the Miami office, for over a decade and a half, has authored the Florida Law section of the nationally published Tort Law Desk Reference: A Fifty State Compendium, published by Wolters Kluwer. This valuable publication provides an annual review of existing law on major subjects in tort law on a state by state basis. The publication has proven to be a valuable resource for clients who need to quickly get a general idea of an individual state's law on a given tort law subject. *To see more, click on this link:*

<http://www.wklawbusiness.com/store/products/tort-law-desk-reference-fifty-state-compedium-2016-prod-1454872470/paperback-item-1-1454872470>

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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 that 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.

C O N T A C T I N F O R M A T I O N

New Assignments

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Sharon Christy	305.982.6732 sharon.christy@kubickidraper.com

Firm Administrator

Rosemarie Silva	305.982.6619 rls@kubickidraper.com
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Seminars/Continuing Education Credits

Aileen Diaz	305.982.6621 ad@kubickidraper.com
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Offices throughout Florida and in Alabama

FLORIDA: Fort Lauderdale Fort Myers/Naples Jacksonville Key West Miami Ocala Orlando
Pensacola Tallahassee Tampa West Palm Beach ALABAMA: Mobile

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