KUBICKI DRAPER

THE KD QUARTERLY

SUMMER 2023

60 YEARS OF EXCELLENCE
1963 - 2023

# LEGAL UPDATES

## Florida Tort Reform is Here!

Governor Ron DeSantis signed House Bill 837 into law on March 24, 2023, enacting sweeping changes to civil litigation in the state. For evidence of the impact these changes are expected to have, one need look no further than new case filings across the state. In the weeks leading up to the law's passage, approximately 100,000 new suits were filed, which is over three-quarters of the number of filings since the first of the year. We have been monitoring the progress of this law closely, and summarize the major changes and their potential impacts below.

### Newsletter Highlights

### IN THIS ISSUE:

## Florida Tort Reform is Here! *continued...*

### Fees, fees, fees.

Perhaps no issue received more attention as the bill progressed through the legislature than its effect on attorney's fees claims. Florida has long been known for its "one way" attorneys' fees statutes, which required courts to award attorney's fees to an insured when they prevailed in an action against their insurer. Fee claims are much more limited under the new law, as it repeals these statutes, §627.428 and §626.9373, in their entirety. However, the law also creates a new statute providing that the Offer of Judgment statute, §768.79, applies in civil actions involving insurance contracts. And, it adds a provision to Florida's Declaratory Judgment Act, providing for an award of fees to an insured who obtains a declaratory judgment determining coverage in their favor, but only when the insurer has totally denied coverage. Importantly, a defense offered under a reservation of rights is not considered a denial, the fee claim is non-transferable, and the statute does not apply to actions arising under residential or commercial property insurance policies. Several other statutes were amended to reflect the repeal of §627.428 and §626.9373, most notably §627.756, which addresses attorney's fees claims in certain construction disputes. That statute now independently provides for an award of fees against surety insurers in actions brought by owners, contractors, subcontractors, laborers, or material men under payment or performance bonds.

The law also changes the way attorney's fees awards are calculated in contingency fee cases. Previously, Florida courts have applied "contingency fee multipliers" based on the likelihood of success at the outset of the case. Under the new law, there is a "strong presumption" that the lodestar fee—which is based on the number of attorney hours reasonably expended on the matter multiplied by the reasonably hourly rate—is a sufficient and reasonable award. Multipliers are now limited to "rare and exception circumstances" where competent counsel could not be otherwise retained.

## Florida Tort Reform is Here! *continued...*

**New rules for negligence claims.**
Previously, under Florida's "pure" comparative negligence scheme, defendants were required to pay damages based on their percentage of fault in causing harm to the plaintiff. The new law institutes a "modified" comparative negligence standard, which bars recovery if a plaintiff is found to be more than fifty-percent negligent. This provision is expected to reduce the number of cases brought in which the plaintiff was a significant contributor to their own injuries.


The law also creates new liability standards for certain negligence cases. One important change is in premises liability actions where the plaintiff was harmed by the criminal act of a third party. Previously, third parties could only be placed on the verdict form for apportionment of fault if their action constituted negligence. Thus, a third party criminal who injured or killed an invitee, guest, or tenant on a landowner's property could not be deemed "at fault" in a resulting civil negligence action. Under the new law, the fact finder will be required to consider the fault of all parties who contributed to the injury, including the criminal themselves. This means the criminal third party can be apportioned a percentage of fault as a Fabre or third party defendant, or even potentially defaulted on liability.

In negligent security claims, the new law creates a presumption against liability for the owner or operator of a "multifamily residential property" in connection with criminal acts committed on the property by third parties, if the owner or operator demonstrates "substantial compliance" with certain security measures designated by the statute. These measures include periodic crime assessments and crime and safety training for employees, as well as equipping the property with security cameras, lighted parking lots and other common areas, deadbolts and locking devices on dwelling doors and windows, peepholes, and locked gates along pool fence areas. This change will provide a potent defense where the property owner can demonstrate their compliance with the statute.

Finally, the law shortens the statute of limitations for negligence actions from four years to two years. This shortened timeline is expected to cause plaintiffs to evaluate and file their claims sooner, increase the ability to obtain evidence and testimony, and create incentive to settle where liability is contested.

**Medical expenses and letters of protection.**
Several recent cases, including from the Florida Supreme Court, have addressed the issue of the proper measure of a plaintiff's recovery for past and future medical expenses where full amount of the plaintiff's bills were satisfied for a lesser amount.

LAW OFFICES K:D

## Florida Tort Reform is Here! *continued...*

Until now, plaintiffs were generally permitted to introduce the full amount of their medical bills into evidence, without consideration of what was actually paid. Adjustments or reductions were addressed via post-trial set-offs, except in cases involving Medicare or Medicaid, in which only the amount actually paid to the medical provider was admissible. Some opinions expressed discomfort with this system, finding it incompatible with the principal that compensatory damages should address losses the plaintiff actually sustained.

Under HB 837, plaintiffs will be limited to introducing evidence of the amount actually paid to satisfy their medical bills, regardless of who paid. If the plaintiff has health coverage, evidence of the amount that the insurer paid the provider will be admissible. If the plaintiff has health coverage but opts to obtain treatment under a letter of protection, evidence of the amount the plaintiff's insurer would have paid is admissible, plus reasonable amounts billed to the plaintiff for medically-necessary treatment. If the plaintiff does not have health coverage, or has coverage through Medicare or Medicaid, evidence of 120% of the applicable Medicare rate is admissible. And, if there is no applicable Medicare rate, evidence of 170% of the state Medicaid rate is admissible.

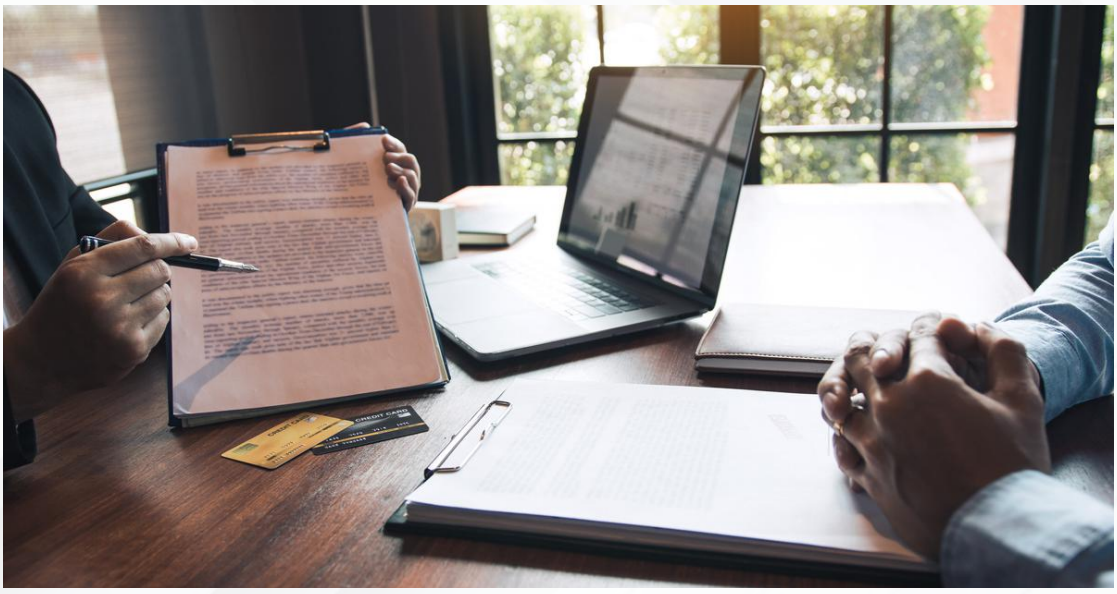

Future medical expenses will also factor in the plaintiff's available health coverage. If the plaintiff has coverage other than Medicare or Medicaid, evidence of the amount the insurer would pay for future treatment, plus the plaintiff's reasonable share, is admissible. If the plaintiff does not have health coverage, or has Medicare or Medicaid, evidence of 120% of the applicable Medicare rate is admissible. And, if there is no applicable Medicare rate, evidence of 170% of the state Medicaid is admissible.

On a related point, where a plaintiff receives treatment under a letter of protection, the letter must be disclosed, as must all bills for medical expenses. The bills must be itemized and coded according to whether the provider is billing at a provider level, a facility level in a clinical or outpatient setting, or a facility level in an inpatient setting. The sale of a plaintiff's account to a third party must also be disclosed, including the dollar amount. Most notably, where the plaintiff is referred by their attorney for treatment under a letter of protection, that referral must be disclosed, along with the relationship between the attorney and the medical provider, as relevant to the issue of bias of the provider. This provision overturns the Florida Supreme Court's decision in *Worley v. Central Florida Young Men's Christian Association, Inc.*, 228 So. 3d 18 (Fla. 2017), under which the referral relationship between plaintiff's attorneys and providers was protected by attorney-client privilege.

## Florida Tort Reform is Here! *continued...*

**New standards for bad faith claims.**
Last, but certainly not least, HB 837 makes multiple changes to Florida's bad faith law. The law creates a safe harbor for bad faith liability where a liability insurer tenders the lesser of its policy limits or the amount demanded by the claimant within 90 days of receiving actual notice of the claim and sufficient evidence to support the amount of the claim. The existence of this safe harbor period is inadmissible in an action seeking to establish bad faith, and, if the insurer does not tender in that time period, the statute of limitations is extended for 90 days.

Next, the law establishes that an insurer's negligence alone is insufficient to establish bad faith. And, the law imposes a duty on the insured, claimant, and any representative to act in good faith in furnishing information, making demands of an insurer, setting deadlines, and attempting to settle a claim. The fact finder will now be able to consider any bad faith conduct of the insured, claimant, or their representatives in assessing bad faith damages.



Where an insurer faces competing demands from multiple third parties arising from a single occurrence which in total exceed policy limits, the insurer can insulate itself from bad faith liability by filing an interpleader action or arbitration. In an interpleader action, if the third-party claims are found to be in excess of the policy limits, the claimants are entitled to a prorated share of the limits as determined by the trier of fact. Importantly, the filing of an interpleader action does not alter the insurer's duty to defend. Similarly, in an arbitration, the insurer is required to make the full policy limits available for payment to the competing claimants, who would have their claims determined by a qualified arbitrator based on the comparative fault, if any, of the claimants, and the total likely outcome at trial based on the total of economic and non-economic damages.

The implications of the new law are far reaching. Many of the issues touched upon here will undoubtedly result in litigation and appeals.

For more information or discussion, do not hesitate to contact us at **appellateandcoverage@kubickidraper.com**.

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# Wild Rides: The Roller Coaster in Theme Park Claims
## 6 Things to Remember When Handling Theme Park Claims

KD's Hospitality, Retail and Premises Practice Group recently presented a seminar on theme park liability. The presentation focused on the duties owed to guests, the potential tort claims that may arise and the potential defenses that may be available. Below are some quick tips to remember when handling theme park claims.

- Start the investigation early - it may be difficult to track down key witnesses years later. Even if you are unable to secure surveillance footage of the incident, someone may have captured footage on a cell phone video which could be critical to your defense!
- Check on plaintiff's legal status at the time of the incident. Plaintiff's legal status dictates the duty owed to them by the theme park.
- Courts have moved away from applying a heightened duty onto theme parks; duty should be assessed the same way in these factual scenarios as it is assessed in any other premises liability cases.
- When a lawsuit involves a theme park ride, the courts in Florida dive into each case's individual facts and analyze the nature, construction, and operation of the ride itself that allegedly caused the injury.
- The courts have consistently held that the care required by a park must correspond with the risk involved.
- Whether reasonable care was exercised, is a question of fact for the jury.

If you have any questions about this presentation and/or would like to discuss a specific theme park claim issue, our team is ready to assist: **premises@kubickidraper.com**.

*From Our Appellate & Coverage Practice Group:*

# New Sixth District Court of Appeal Up and Running

It's official. The newly-established Florida Sixth District Court of Appeal has arrived (effective January 1, 2023). Members of KD's Appellate and Coverage Practice Group attended a webinar put on by the Workgroup created by the Florida Supreme Court to establish the new Sixth District Court of Appeals titled – An Introduction to the Sixth District Court of Appeal.

The Sixth District Court of Appeal is based out of Lakeland, and, with the exception of the Third and Fourth DCAs, affects all the Florida DCAs. The Sixth DCA absorbed the following judicial circuits: Ninth (Orange and Osceola Counties); Tenth (Hardee, Highlands, and Polk Counties); and Twentieth (Charlotte, Collier, Glades, Hendry, and Lee Counties).

Some of the key takeaways from the webinar are:

1. **Change is coming** – The Workgroup emphasized how important this opportunity is for them, and the legal community at large, a new court with new procedures is being established. The Workgroup focused on soliciting feedback from other judges as well as practitioners in order to make the Sixth DCA as efficient and effective as possible. Much of this input has gone into several of the new Administrative Orders issued by the Court, including Orders addressing briefing requirements, agreed extensions of time for briefs, and continuances of oral argument.
2. **Mandatory mediation?** – Pursuant to the recently issued Administrative Order 23-07, the Sixth DCA will not require mandatory appellate mediation. Given that much of the newly-formed Sixth DCA is comprised of territory that was previously included in the Fifth DCA, many appellate practitioners wondered whether the Sixth DCA would adopt the Fifth DCA's unique mandatory appellate mediation requirement (the only DCA to have such a requirement). Wonder no more!
3. **What law governs?** – The biggest question on appellate practitioners' minds at the moment is what law will govern in the Sixth DCA, as it has taken on circuits from multiple districts. While no definitive decision has been made, the Judges on the Workgroup indicated that the formation of the new Court would provide appellate advocates with the opportunity to present arguments as to why the Sixth DCA should deviate from established precedents from the First, Second, and Fifth DCAs. While the Court did not commit either way, it appears the judges will be receptive to reexamining current precedents from their respective circuits.

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

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# KD IN THE COMMUNITY

## KD Participates In Miami Carol City High School Law Magnet Program

Jonathan Aihie, Erika Cordovi, Greg Prusak, Anthony Atala, Barbara Fox, Yvette Pace, and Michael Carney recently helped judge Miami Carol City Senior High School Law Magnet Program's mock trials. For several years now, the KD team has enjoyed assisting the students and providing tips on how to succeed in the legal profession. Mentoring matters to us in-house and out in our community -- we are proud to have team members that step up for important events like these that influence and help future stars.

## KD Sponsors AJC's Learned Hand Award Dinner

KD was pleased to support the American Jewish Committee (AJC) and co-sponsor its Judge Learned Hand Award Dinner on May 18, honoring Richard P. Cole. AJC is a global advocacy organization that works to create a brighter future for the Jewish community with global diplomacy and coalition building.

## Jacksonville Chili Cook Off

KD's Jacksonville office cooked their hearts out again at this year's Jacksonville Bar Association's Chili Cook-Off. The event has been hosted by the Young Lawyers Section since 2009 and each year, raises thousands of dollars for charity. This year, the cook-off benefited The Laundry Project, a not-for-profit that assists lower-income families with meeting the basic need of washing clothes and linens.

## Earth Day

Our Miami office celebrated Earth Day with Miami-Dade County Parks, Recreation and Open Spaces. The team helped clean up Kendall Indian Hammocks Park and helped remove invasive vines growing throughout the park.

# Spotlight on Earleen H. Cote

There's an old saying that goes something like, "We are not a team because we work together; we are a team because we respect, trust, and care for each other." While we are fortunate at Kubicki Draper to have a number of attorneys who subscribe to this philosophy, it has truly become the mantra of Equity Partner, Executive Board Member, and Diversity, Equity, and Inclusion Co-Chair **Earleen H. Cote** of the Fort Lauderdale office.

Earleen is a South Florida native, born in Homestead and eventually living most of her life in Broward County. The importance of family and friends has kept her firmly rooted there (plus what's not to love about South Florida?). She graduated from Florida Atlantic University with her bachelor's degree in three years. While in college, a professor encouraged her to take the Law School Admission Test ("LSAT"), so she went for it. She attended Nova Southeastern University Law School, graduating in just two-and-a-half years.

For about 13 years after graduating from law school, she worked in total at two different firms, including an in-house insurance defense firm, handling several trials and earning a promotion to managing partner. But, after being hit hard by the financial burden of Hurricane Andrew, the insurance company she worked for closed all staff counsel offices, leaving Earleen to find a new workplace -- enter Kubicki Draper.

Earleen reached out to one of her old law clerks, Ken Oliver, who had since become an attorney at Kubicki Draper. Ken put Earleen in touch with Gene Kubicki, the now-retired founder of the firm. It didn't take much arm twisting to get her in the door. Earleen did have one request though: in addition to hiring her, and because her team was so important to her, she wanted to bring a couple of her fellow attorneys and some staff members with her, including attorney, Harold Saul. Gene agreed and, over the years, Earleen, Ken, and Harold each became equity partners at Kubicki Draper.

Her relationships with Ken, Harold, and many other attorneys here at the firm only strengthened as they tried "tons of cases" simultaneously. Over the course of her career, she estimates she's handled about 150-200 trials. She has worked with many others over the years as well, including equity partner, Michael J. Carney, and shareholder, Jason R. Friedman, who both started out as associates working directly for Earleen.

Earleen takes a genuine interest in the people with whom she works, trying her hardest to be the best resource she can be for them. In fact, one of her proudest accomplishments, is knowing she has made—and continues to make—a difference in the lives of her fellow Kubicki Draper employees. She enjoys guiding them and assisting them in their development, and many have become excellent trial lawyers.

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# Spotlight on Earleen H. Cote

*continued...*

Relatively early on in her career at Kubicki Draper, Earleen was identified as sort of a talent whisperer. Specifically, she has a knack for always hiring amazing people, which not only has made the firm stronger, but also has made the work environment more enjoyable. She was tapped by Gene Kubicki to help him hire new attorneys, and since then, she has been involved in the hiring process of every attorney at the firm.

So, what is her secret in locating and hiring such great talent? Simply put, Earleen says, "You have to care about these people and want to be around them." In other words, it is important to get to know the folks you work with and take a genuine interest in them. Let them know during the interview about the firm's culture, but also find out what is important to them, and ultimately help them achieve success. This phiolosophy fosters a happy, productive work environment, and everyone—including our clients—reaps the rewards. As Earleen explains, this is all part of keeping the big picture in mind. She notes she won't be around forever, so it's important to develop the next generation of attorneys and staffers who can pick up the baton and help the firm continue to succeed.

Earleen attributes much of her success as both a managing partner and trial attorney to her upbringing. She came from very humble means, which helps her to relate to others who lack resources or who have never been attorney represented. It has also been instilled in her over the years to be as prepared as possible for anything that may be thrown at her. She reads nearly everything she can get her hands on and works tirelessly to know her files forwards and backwards. She notes that this is part of what makes a trial lawyer credible, and credibility is critical in winning over jurors. You have to appeal to the common sense of six total strangers and empower them—rather than demand them—to decide the case a certain way. In other words, if you want to win at trial, you have to know how to relate to people, which is definitely one of Earleen's strengths.

In her personal life, Earleen has been married to her husband since 1981, and they have two sons, one of whom works in sports podcasting and the other who works at Kubicki Draper. She enjoys spending time with her family and traveling, noting that some of her best vacations have included family cruises. She's eyeing a trip to Ireland and Scotland in the future. And proving just how relatable she truly is, she also admits to being a "terrible binge-watcher," getting hooked on all sorts of shows.

Earleen and her team are eager to assist our clients in any way possible. If you are in need of a well-prepared, caring attorney who understands the importance of relatability and credibility, contact Earleen and her excellent team: ehc@kubickidraper.com.

# News + Announcements

**Rebecca Brock Appointed as Treasurer of FLABOTA**

Congratulations to Rebecca L. 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.

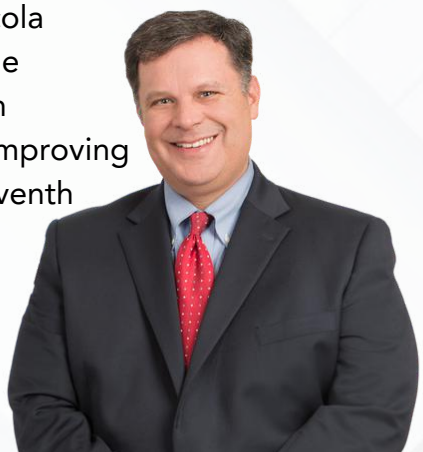
FLABOTA has over 800 members throughout the State of Florida. Its general purpose is to foster improvement in the ethical and technical standards of practice in the field of advocacy. To learn more, please visit: https://www.flabota.org/


**Jane Rankin Rated AV Preeminent for 25 Consecutive Years**

Congratulations to Jane Rankin, who has continuously earned Martindale-Hubbell's AV Preeminent Rating for the past 25 years! This rating is awarded to attorneys who are ranked at the highest level of professional excellence for their legal expertise, communication skills, and ethical standards by their peers. For more information about Martindale-Hubbell and its ratings, visit: https://lnkd.in/eVpXZQF.

**Steve Cozart Voted Into ABOTA's Northwest Chapter**

We are proud to announce Stephen Cozart, of our Pensacola office, was voted into the Northwest Florida Chapter of the American Board of Trial Advocates (ABOTA). ABOTA is an invitation-only organization dedicated to promoting and improving the American civil justice system and to preserving the Seventh Amendment right to civil jury trial. We are happy to have yet another KD member join this important group. Congratulations, Steve!



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# News + Announcements


## Congratulations to KD's 2023 Florida Super Lawyers and Rising Stars!

We are pleased to congratulate this year's Florida Super Lawyers and Rising Stars!

Super Lawyers is a rating service of outstanding lawyers who have attained a high-degree of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis and to be selected, peer nominations and evaluations are reviewed and combined with independent research. To learn more, visit: https://lnkd.in/dMSmHrS

## KD Sponsors MDFAWL Scholarship Program

KD is proud to have once again sponsored a scholarship for the Miami Dade Florida Association Women Lawyers (MDFAWL) Scholarship Program. Alexandra Caraballo, Samantha Joseph, Karenny Montan, and Nicole Wulwick of our Miami office, recently attended MDFAWL's Women Making History Award and Scholarship Reception in support of KD's recipient this year: Amanda Hernandez, a 2nd year law student at St. Thomas University in Miami, Florida. Additionally, sponsored and attended the Miami-Dade Florida Association for Women Lawyers (MDFAWL) 43rd Annual Installation & Awards Reception on June 8.


Left to Right: Alexandra Caraballo, Samantha Joseph, Amanda Hernandez, Nicole Wulwick, and Karenny Montan

# News + Announcements


## We are proud to be recognized in the South Florida Business Journal "Top Law Firms in South Florida" list for 2023!

The list ranks South Florida law firms by number of lawyers, partners and total staff.


## KD and Charles Watkins Proud to Support the Kozyak Minority Mentoring Foundation

KD is proud to support the Kozyak Minority Mentoring Foundation ("KMMF") and its commitment to diversity, inclusion and mentoring in the legal profession. We are honored to have our very own, Charles Watkins, included in KMMF's Circle of 100 which recognizes mentors, supporters and donors.

## Michelle Krone Presents at St. Thomas University Law School

Michelle Krone presented to her alma mater, St. Thomas University Law School, on April 20 about the practice of construction law.

## Yvette Pace Participates in Florida Bar Trial Section's Advance Trial Advocacy Course As Faculty

Yvette Pace, of our Orlando office, participated as a faculty member in the Florida Bar Trial Section's Advanced Trial Advocacy Course at the UF Levin College of Law. The course is an intense, hands-on trial skills training in an interactive format with presentations and demonstrations by judges and trial attorneys from across the State of Florida.

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# KD to Sponsor and Participate in FIFEC

We are honored to once again sponsor and participate in the Florida Institute Fraud Education Committee (FIFEC) Annual Conference. Join our team in Orlando, Florida from July 12 - 14, 2023 and attend the many CE topics we are slated to present. For more information, visit the FIFEC.org website.

## JOIN KD AT FIFEC JULY 12-14 2023

Proud Sponsor

**JULY 12**

**1:20 pm – 3:10 pm The Plumbing Juggernaut – How Cast Iron and Other Plumbing Losses Quickly Became the Claim Fad of the 21st Century**
Anthony Atala – KD | Jeffrey Wilemon – NV5

**3:30 pm – 5:20 pm Was That Important? Material Misrepresentation in the Application for Automobile, Glass, and Homeowner Insurance Policies**
Jarred Dichek – KD | Narcy Fajardo – Progressive Insurance | Olga Acosta Farmer – Farmers Insurance | George Shirejian – Mercury Insurance

**3:30 pm – 5:20 pm Flushing Out the Facts of a Water Loss**
Erika Cordovi – KD | Jeremy Beagle – SDii Global | Charles Beall – Citizens Insurance

**JULY 13**

**10:10 am - 12:00 pm Conditions Precedent and Lack of Coverage**
Teodora Siderova, Michael Clarke, Rebecca Cooperman Kay, Joseph Monte, Marsha Moses – KD

**10:10 am - 12:00 pm OSHA: Investigation, Findings, Application & Detection of Fraud in First Party Property Damage Estimates & Admissibility of OSHA Requirements at Trial**
Sarah Goldberg, Barbara Fox – KD

**1:30 pm - 3:20 pm What's in a Code? An Analysis on Personal Injury Protection Coding Denials**
Teodora Siderova, Hillary Lovelady, Ava Mahmoudi, Marsha Moses, Michael Walsh – KD | Denisha Lich – Torres-Lich & Associates

**JULY 14**

**10:10 am - 12:00 pm Fighting Fraud in Late Reported Homeowners Claims**
Valerie Dondero, Kara Cosse Byrnes – KD | Aaron Duba – Haag Engineering | Thomas Shell – Tom Shell Plumbing, Inc.

**10:10 am - 12:00 pm Combating Fraudulent and/or Excessive Attorneys' Fee Demands**
Jarred Dichek – KD | Sarah Clasby Engel – The Engel Firm | Alison Clasby Harke – Alison Clasby Harke, P.A.

Dichek | Walsh | Atala | Cordovi | Fox | Dondero | Cooperman Kay | Moses
Siderova | Lovelady | Goldberg | Clarke| Monte | Mahmoudi | Cosse Byrnes

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

- 4-Hour Law and Ethics Update
- ABC's and XYZ's Regarding EUO's
- Assignment of Benefits: Defense Against Water Mitigation
- Collateral Sources, Set Offs & Liens
- Combating Fraudulent and/or Excessive Attorneys' Fee Demands
- Defending Against Fraud
- Florida Tort Reform and PIP Litigation – What Changed?
- Florida Tort Reform: Practical Considerations for the Claims Professional
- Getting Real About Realtors' Liabilities
- Legal Refresher for Engineers
- Loss of Use and Diminution of Value Property Claims
- Material Misrepresentation in the Application
- Negotiating Low Limits Single & Multiple Claimants
- Practical Tips For Effective Deposition and Trial Testimony
- Premises Liability Update
- Seeing Through Fraud in Auto Glass Litigation
- Top 10 ways Appellate Lawyers Can Help You
- Traumatic Brain Injury Litigation
- We Got Your Back! -- Examining and Defeating Spinal Injury Claims

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. You can also follow our social media accounts to learn about upcoming webinars!
For more information, please contact Aileen Diaz
(305) 982-6621 | ad@kubickidraper.com.

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# RECENT RESULTS

**Voluntary Dismissal In a Cast Iron Backup Claim**
**Nicole Wulwick** received a voluntary dismissal with prejudice on the eve of her Motion for Summary Judgment hearing and one month before trial on a cast iron backup claim. Plaintiff had reported two losses on the same day, a cast iron backup and a p-trap leak, both originating from the kitchen. The carrier opened coverage for the p-trap claim but denied the cast iron backup since the cast iron was significantly removed before notification of the claim. Nicole's summary judgment on "no direct physical loss to the property" and "no coverage for backups," was strongly opposed by the Plaintiff and was followed up by Plaintiff doubling her demand at mediation. Plaintiff filed a response in opposition to the summary judgment with an engineer report, claiming damages from the loss and evidence supporting a covered claim. However, Nicole quickly noticed Plaintiff forgot about the covered p-trap leak and the expert report misrepresented that damages from the covered p-trap claim were associated with the cast iron backup claim. Nicole moved to strike Plaintiff's summary judgment response based upon Plaintiff's attempt to comingle the two claims and obtain relief from summary judgment for a claim that was never pled. Shortly after the Motion to Strike was filed, the Plaintiff dismissed the claim with prejudice.

**Summary Judgment In Out of State UM Coverage Matter**
**Yvette Pace** prevailed on a summary judgment regarding an insurance policy issued to the Plaintiff/Insured in Massachusetts. As a result of where the UM policy was issued, Yvette determine that Massachusetts law applied. She argued that the operative law in the State of Massachusetts barred the Plaintiff's UM claim because under Massachusetts law, there is no UM coverage for a Plaintiff if the tortfeasor's insurance policy limits exceed Plaintiff's own UM policy limits.

**Significant Victory in TBI Trial**
**Jeremy Chevres** and **Ken Oliver** were successful in a multi-million dollar traumatic brain injury trial in Sarasota County. This was a hotly contested liability and damages case involving a 14-year-old Plaintiff who claimed he sustained a brain injury as a result of a motor vehicle accident. Plaintiff claimed he was unable to complete high school as a result of his injuries and ultimately dropped out. Extensive work went into hiring the right experts, securing over a dozen depositions, and ultimately convincing the jury of the defense's position. The jury was even taken to the court parking lot to view the Defendant's vehicle in person to opine for themselves on the severity—or lack thereof—of the impact. After five days of trial, and with the writing on the wall, Plaintiff accepted a defense favorable settlement right before closing arguments.

**Summary Judgment in a Denial of Coverage Action**
**Valerie Dondero** prevailed on a Motion for Summary Judgment on a coverage question and the Court entered a 26 page order which followed most of Valarie's proposed order. Since that time, Plaintiff's counsel tried to have the trial judge disqualified, filed a Writ of Prohibition with the 4th DCA, which was denied without a written opinion and appealed the Motion for Summary Judgment. Valarie responded with a phenomenal appellee answer brief. It was not long after that the 4th DCA dispensed with oral argument and entered a PCA opinion affirming the Summary Final Judgment in favor of the Carrier. This win follows a large verdict in the underlying action where the insured was found at fault for the plaintiff's injuries and a $13M verdict was entered against him. Valerie will now return to the trial court for prevailing party taxable costs, which are substantial.

# RECENT RESULTS

**Dismissal with Prejudice In a Rescission Provision Matter**

**Lindsey Hinton** prevailed on a Motion to Dismiss against a contractor regarding their rescission provision, as well as, the penalty or fee for rescission issue. The contractor attached their initial invoice to the AOB and the court determined it was a good faith estimate. Lindsey smartly focused her arguments on the rescission language within the AOB that stated the contractor was deemed to have completed substantial work once it begun its visual inspection and thus such language effectively changed the statutory allowable time for the insured to rescind. Further, the invoice was determined immediately due and owed if rescinded during the statutory period. As the invoice contained a late charge and flat fee, Lindsey argued this was effectively a fee for rescission. For these two reasons, Lindsey argued the AOB was invalid under the statute and required a dismissal with prejudice. The court agreed.

**Summary Judgment In Homeowner's Late Reporting Matter**

**Jill Aberbach** won a final summary judgment based upon prejudice on a 2 year delay, late reported Hurricane Irma claim. Jill elicited testimony from the Plaintiff during the deposition that: 2 to 3 days after Hurricane Irma, they had a leak in the kitchen from the roof, they had repairs completed and did not take any photos or retain any documents. The Plaintiff also testified they had another repair completed due to a prior roof leak with no photos of what the condition of the roof was prior to the repair. Plaintiff's expert also did not take or review any photos of the prior repairs to the roof. He also testified he was not able to opine as to the cause of loss for the areas where the repairs occurred. At the hearing, Jill argued the carrier was prejudiced and the Plaintiff's expert's report, affidavit, and testimony did not create a genuine issue of material fact. Plaintiff's counsel tried to focus on the carrier's denial letter as it did not specifically deny the case for prejudice. However, this was not persuasive and the judge granted the Motion for Summary Judgment.

**Voluntary Dismissal In Mold Testing Invoice Matter**

**Sarah Goldberg** received a voluntary dismissal in a case involving the recovery of a mold testing invoice related to an alleged drain line leak. When the carrier inspected the property, the entire house was under renovation and nearly every finish had been removed, including flooring, cabinets, and walls. The claim was denied for prejudice after the insured produced no pictures of the property before the renovation. At mediation, Plaintiff refused to dismiss the case stating they had secured an expert opinion from a well known expert. Despite the representation, an opinion was never provided. Plaintiff attempted to avoid the summary judgment hearing by moving to amend his complaint less then a week before the hearing date. Sarah argued the amendment was futile and the judge agreed, finding the amendment was unrelated to the issues in the case and was filed a year after Sarah moved for summary judgment. After the ruling denying their Motion to Amend, the Plaintiff dismissed the case.

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# RECENT RESULTS

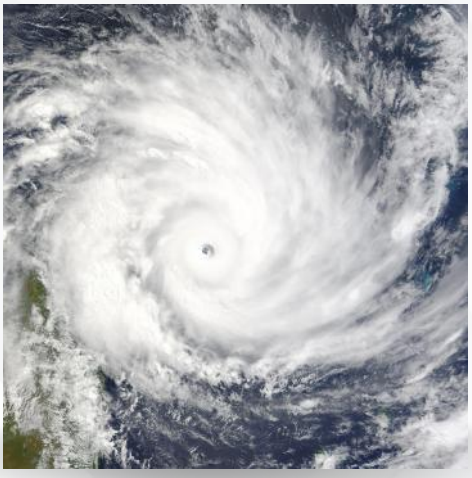

**Dismissal In Foreign Transitory Substance Matter**

**Charlie Kondla** prevailed on a motion to dismiss and/or strike on a foreign transitory substance case with a prominent Plaintiff's firm. The Plaintiff firm has continued to include various mode of operation allegations in their pleadings on slip-and-fall cases, including recent allegations claiming business establishments should have employees whose sole responsibility should be to observe the establishment's floors, in light of the fact the same establishments designated employees to sanitize carts during COVID. Although many judges have agreed negligent mode of operation is no longer a viable theory of recovery in slip-and-fall cases since Fla. Stat. § 768.0755 became the law in Florida in July 1, 2010, a number of judges have been hesitant to disallow this theory of recovery, and firms continue to include these allegations in their pleadings. Following a recent decision in the 3rd DCA on a discovery issue involving interpretation of Fla. Stat. § 768.0755, Charlie included the dicta from the opinion in his motion and argued the 3rd DCA had unequivocally stated negligent mode of operation is no longer a viable theory of recovery in slip and fall cases, and therefore, any allegations including mode of operation should be dismissed and/or stricken from Plaintiff's complaint. After hearing arguments from both parties, the judge agreed with Charlie and struck the allegations of negligent mode of operation.

**Motion for Summary Judgment in AOB Matter**

**Kameron Romaelle** prevailed on a Motion for Summary Judgment in a case where the Plaintiff provided tarp services to the insured's property on a covered Tropical Storm Eta loss. The insured executed an assignment of benefits agreement with the Plaintiff, and they provided the carrier with an estimate for services totaling $3,777.35. Based on the fact the underlying claim was a covered loss which was finalized through appraisal, the carrier provided the Plaintiff with payment for their services totaling $3,000.00, in compliance with Florida Statute § 627.7152(2)(a)(7)(c), which they cashed. Plaintiff then filed suit for the remainder of their invoice and a demand for attorney's fees and costs. In response, Kameron prepared a Motion for Summary Judgment arguing that carrier issued payment to the Plaintiff for services totaling $3,000.00 per the policy and Florida Statute § 627.7152(2)(a)(7)(c). Thus, statutory limits were exhausted and that the Defendant was in full compliance with Florida Law. Kameron argued the carrier was in compliance with the AOB Statute, limits have been paid and exhausted, and that there was no issue of material fact. Plaintiff's counsel tried to make the argument the Plaintiff's services did not fall under the 3k cap in the AOB Statute as they were not emergency services. Kameron quickly showed the judge the invoice from the Plaintiff provided a charge for an emergency call. Counsel tried to argue the rest of the charges were not considered emergency services, but the judge disregarded these arguments and granted Kameron's Motion for Summary Judgment.

# RECENT RESULTS



**Summary Judgment On A Late Reported Hurricane Irma Claim**
**Anthony Atala** obtained a summary judgment on a late reported Hurricane Irma case. In this case, the insured testified she observed roof debris shortly after storm and had a series of repairs performed to the roof and interior. Plaintiff waited 2 years and 10 months to report the loss. The field adjuster and corporate representative both testified the carrier was prejudiced in its investigation due to the delay. Plaintiff tried to pull every stop to try to get the Court to side with the (non-binding) 4th DCA court ruling as opposed to the (binding) 3rd DCA ruling in *Perez vs. Citizens* on prejudice. The trial judge announced her ruling in open court today and complimented Anthony on bringing to her attention the new *Navarro* case out of the 3rd DCA, as she found it similar to the facts in this case. The judge also agreed with Anthony's position that Plaintiff's expert did not rebut the presumption of prejudice that would create a material issue of fact for a jury.

**Dismissal In AOB Matter**
**Samantha Joseph** obtained an order granting a Motion to Dismiss on an AOB case. Samantha argued the Plaintiff's AOB failed to comply with § 627.7152(2)(a)3, 4, and 5 since it was not provided within 3 business days, rescission language in two places, and failed to have an itemized statement. The argument was nuanced because the insured did provide an estimate, but it was not specific to the items being placed in the insured's property, which was the judge's biggest issue. Samantha argued the per unit cost estimate is required to be precise. Plaintiff argued their estimate and AOB complied. The judge agreed with Sam, but gave Plaintiff leave to amend, but with the admonition if the document he was intending to rely upon was the one Samantha brought up, she would dismiss the suit anyway. With no new evidence, the Court dismissed the action.

**Summary Judgment in Vertical Immunity Case**
**Donovan Lovelock** won a summary judgment in a challenging vertical immunity case. Our client had a contract with FDOT to repair a state road. The Plaintiff was an employee of a subcontractor who got hit by a dump truck driven by one of our clients' employees. The plaintiff argued he was not actually an employee of our subcontractor and argued he was actually an employee of a company related to the subcontractor -- that this took him outside of vertical immunity. Donovan had to sift through the Plaintiff's worker's compensation file to develop discovery, including pay records from the subcontractor, to show Plaintiff's employment status and that Plaintiff's recovery against our client was barred by vertical immunity.

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# RECENT RESULTS

**Voluntary Dismissal in Toxic Tort Benzene Matter**


**Jeremy Chevres** obtained a voluntary dismissal in a toxic tort benzene exposure case against well known litigators on the benzene scene. A common thread with benzene litigation involves Plaintiffs who worked in the automotive industry for decades and are exposed to benzene-containing products that causes Acute Myeloid leukemia (AML). After suit was filed, Plaintiff succumbed to his illness and the personal representative substituted in for the estate. Plaintiff's counsel attempted to use a combination of testimony from prior co-workers along with a lengthy self-serving affidavit to meet Florida's products liability Product ID threshold. Fortunately, Jeremy and his team were able to convince Plaintiff's counsel there was insufficient evidence to satisfy the requisite Product ID threshold, and, that the affidavit would likely be excluded as it did not qualify as a dying declaration in this instance. Counsel ultimately agreed and dismissed the cases.

**Summary Judgment on AOB Matter**


**Kameron Romaelle** and **Sha-Mekeyia Davis** obtained a summary judgment victory in an alleged assignment of benefits agreement which they attached an estimate for services to be rendered that was not compliant with § 627.7152. Sha-Mekeyia wrote the motion and Kameron argued it. Kameron showed the Court Plaintiff's alleged estimate does not comply with the statute as it failed to give a per-unit estimate of services to be rendered and instead was a price list disguised as an estimate. The Court agreed and granted summary judgment in favor of the carrier.

# RECENT RESULTS

**Defense Verdict in a Roof Damage Case**


**Kara Cosse** and **Michael Carney** obtained a complete defense verdict in a property damage case. Plaintiffs were claiming against their property insurer nearly $200K in tile roof and interior damage to their home after a three-day wind and rainstorm in mid-July 2021. Plaintiffs' expert contractor testified extreme wind damage caused all the damage claimed to plaintiffs' residence, which included the lifting of tiles and interior ceiling damage. Through skillful cross-examination of the contractor, Mike and Kara were able to significantly impeach the expert with photographs contradicting his testimony and also attacked his methodology. Additionally, they were able to force the expert to admit he had never spoken with plaintiffs to get any understanding of the claim, and he had an inaccurate timeline of events. Kara and Mike called an expert engineer who testified the winds on the alleged dates of loss were minimal and opined it would take significant winds to lift the tiles and the damages claimed were due to wear and tear, maintenance and repairs performed by non-roofers. As a result of the above, the jury saw through the plaintiffs' evidence and claims and after a short deliberation, rendered a defense verdict.

**Attorneys' Fees Awarded In UM Coverage Matter**

**Valerie Dondero** had a win for her client when a judge awarded attorneys' fees, costs and pre judgment interest under FS 57.105 against the Plaintiff and her counsel for a complete lack of good faith basis to assert entitlement to UM coverage. Plaintiff was the named insured under our client's policy, was involved in an auto accident and claimed entitlement to UM coverage. Plaintiffs had electronically signed her application and UM form specifically rejecting UM coverage more than 2 years before the accident. Valerie deposed the Plaintiff who confirmed her signatures, that she had selected all the coverages reflected on the application and insurance coverage summaries and that she was not challenging the UM form. Valerie sent opposing counsel a 21-day safe harbor letter demanding dismissal in December 2022 but received no response. With trial looming, Valerie set for hearing a motion for sanctions and motion for summary judgment on "no entitlement to UM coverage." A few days before the hearings, Plaintiff filed a voluntary dismissal and requested the Court close the file. Valerie cited the Supreme Court case law that permits the trial court to retain jurisdiction over a pending sanctions motion if it was filed before the voluntary dismissal. The judge rejected all of the Plaintiff's spurious arguments and found in favor of Valerie's client.

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**PIP Provider's Final Judgment Reversed with Insurer Granted Leave**

**Michael Clarke, Jennifer Emerson**, and **Joye Walford** obtained a reversal of a final judgment in *Progressive Select Insurance Company v. The Imaging Center of West Palm Beach a/a/o Erica Prete*, No. 4D21-3074 (4th DCA March 8, 2023). The Fourth District found the trial court erred in denying the insurer leave to amend its answer and affirmative defenses to add new defenses including the invalidity of a pre-suit demand letter and the exhaustion of benefits. The amendments were essential as the Plaintiff had raised a new argument supporting its cause of action after a change in governing law in its favor. The 4th DCA found that the trial court appeared to have denied the motion to amend on the basis that it was untimely but failed to consider that the Plaintiff had not been prejudiced by the proposed amendments and could prepare for the additional affirmative defenses. This was particularly true as the motion to amend had been filed before any summary judgment hearing or trial date had been set.

**Successful Appellate Outcome in Hail Damage Roof Claim**

**Bretton Albrecht** handled an appeal on a hail damage roof claim. After appraisal, the parties disputed whether the carrier owed the amount set for ordinance and law ("O&L") under the policy's option O&L coverage. Without this coverage, the net award for repairs was under deductible. Plaintiff moved to confirm and the carrier filed a response in opposition. The trial court agreed with Plaintiff's assertion they were entitled to confirmation of the full appraisal award. On appeal, one of Bretton's main arguments was this was essentially an improper default judgment. The appellate court agreed. The 5th DCA explained the trial court erred by summarily entering judgment for the full appraisal award without adjudicating the merits of carrier's objections to paying the amount set for O&L and remanded it to the trial court for reconsideration.

**Summary Judgment In an Indemnity Action**

**Barbara Fox** prevailed on a summary judgment in an indemnity action. Plaintiff claimed she tripped on uneven pavers and sued the property owner for negligence. The property owner, in turn, filed a third party complaint against its contractor, for its work on the pavers. Plaintiff and the property owner settled last July with no contribution from the paver, so the case continued. After a second mediation, the paver's best offer was up to $45,000. Competing motions for summary judgment were filed by the parties. Barbara expertly explained the relevant case law regarding the duty to defend and indemnify and its applicability to vicarious liability claims. The judge agreed with Barbara and ruled the paver had a duty to defend and indemnify the property owner from the inception of the case.

**Successful Outcome In Attorneys' Fees Matter**

This lawsuit was originally filed under one policy but later amended to seek coverage under an entirely different policy. The carrier extended coverage under the subsequent policy and agreed to fees for litigation tied to the second policy and amended complaint. Plaintiff then sought fees for the entire litigation including over 60 hours spent litigating the wrong original policy claiming it related back to the original complaint. **Barbara Fox** argued the fees should be limited to time spent post-amendment regarding the new policy number. The Court agreed with Barbara's legal arguments and denied about half of the fees sought by Plaintiff's counsels.

# NEW ADDITIONS

**FT. LAUDERDALE** **Associates:** Nina L. Zegarra, Marc de Lavalette

**FT. MYERS** **Associate:** Kurtis S. Johnson

**JACKSONVILLE** **Associates:** BeJae Shelton Roberts, Devin R. Connell, Stacie T. Morales, Alain T. Diaz, Brea L. Dearing, Shane E. Carlin

**MIAMI** **Associates:** Fabiola Meo, Jessica M. Del Sol, Luis E. Pereira, Joseph A. Valme, Ritisha K. Khatri, Maria "Alejandra" Angual, Jacobo Landman, Michael J. Brito
**Shareholders:** Holly C. Galinskie, Leeza D. Newman

**ORLANDO** **Associates:** Joseph A. Valme, Duane A. Henry, Samuel T. Lea
**Shareholder:** Leeza D. Newman

**PENSACOLA** **Associates:** Maria "Alejandra" Mangual, Ritisha K. Khatri,

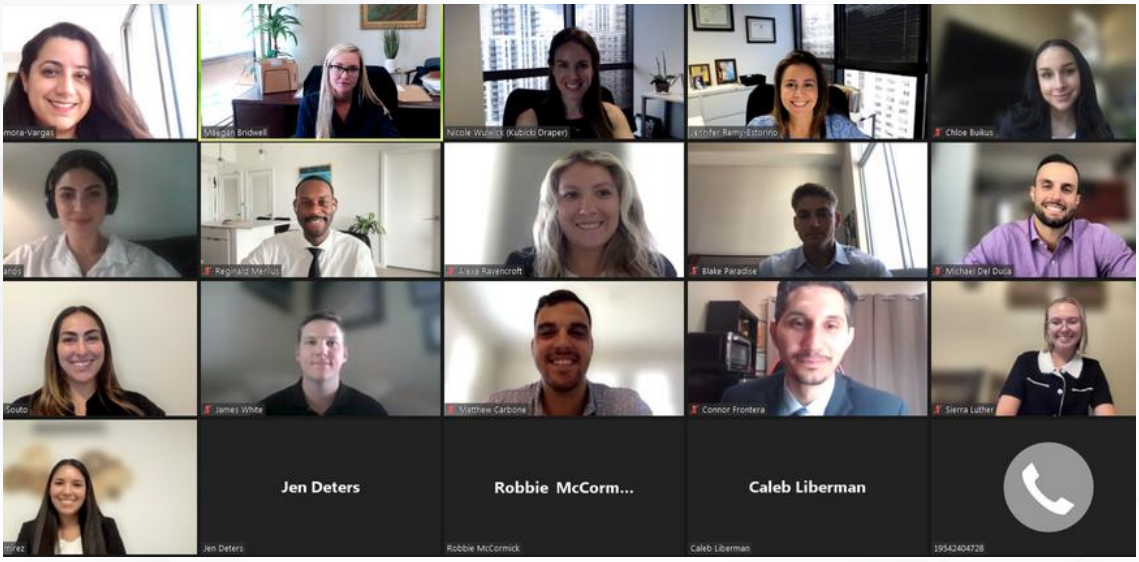
**WEST PALM** **Associates:** Kathleen E. McCarthy, Lauren Lombrado, Elencia Alcius, Natasha A. Dorcent

**TAMPA**

**Associates:** Vanessa Gerlich, Kathleen McCarthy, Ricardo E. De Lucca, Alejandro G. Martinez Maldonado

## 2023 SUMMER LAW CLERKS

**Chloe Buikus**
**Matthew Carbone**
**Jennifer Deters**
**Connor Frontera**
**Caleb Liberman**
**Sierra Luther**
**Reginald Merilus**
**Blake Paradise**
**Alexia Planos**
**Emily A. Ramirez**
**Alexa Taylor Ravencroft**
**Michael Schaum**
**John Shirley**
**Amanda Souto**
**James White**

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# CONTACT INFORMATION

**New Assignments**

| | | |
|---|---|---|
| **Brad McCormick** | 305.982.6707 | bmc@kubickidraper.com |
| **Sharon Christy** | 305.982.6732 | sharon.christy@kubickidraper.com |

**Firm Administrator**

| | | |
|---|---|---|
| **Rosemarie Silva** | 305.982.6619 | rls@kubickidraper.com |

**Seminars/Continuing Education Credits**

| | | |
|---|---|---|
| **Aileen Diaz** | 305.982.6621 | ad@kubickidraper.com |

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