



While it was impossible to share the countless memorable figures and events that make up the expansive and growing Black history in a month's time, KD honored Black History Month this February by celebrating some of the lesser known facts, legends, leaders, trailblazers, innovators and heroes in Black history. To read more about our celebration, please visit: <https://www.kubickidraper.com/news>

In addition to celebrating Black History Month, we recognized Women's History Month in March and celebrated the many remarkable women around us. We also celebrated International Women's Day (IWD) on March 8. Each year, the IWD website announces a theme to celebrate the day, and this year's was: #ChooseToChallenge. The theme challenges all to call out gender bias and inequality, to celebrate women's achievements and collectively, help create an inclusive world.



At left, **Rebecca Brock**, of our West Palm Beach office, and her daughter partaking in this year's #ChoosetoChallenge.

When asked if she could meet any woman, alive or dead here's what Rebecca said: "I wish I'd had the opportunity to meet Ruth Bader Ginsburg to thank her for her dedication to gender equality, and for the access she provided to women, professionally and personally."

"The strongest women I know were raised by even stronger women - women like my mother who make it appear effortless to meld intelligence, compassion, integrity, wit, and self-sufficiency."

– Rebecca Brock

EDITOR: Raquel L. Loret de Mola IN THIS ISSUE

2

KD in the Community
News | Announcements

3

Meet Our Newest Shareholders
New Team Members

4

Spotlight on Anthony G. Atala
More KD News

5

Dram Shop Liability for Open and
Closed Container Service

6-7

Battling Unsavory Foodborne
Illness Claims:
Understanding the
Potential Causes of Action
and Attacking the Use of
Circumstantial Evidence

8

Florida Adopts the
Federal Summary
Judgment Standard:
A Summary

9-11

Recent Results:
Appellate
Trials, Motions, Mediations

12

Presentations
Speaking Engagements

13

Save the Date:
KD's Construction Conference
Set for October 15

KD in the community



October is Breast Cancer Awareness Month and we wanted to spread awareness and promote the importance of annual screenings and mammograms. Early detection is still the best protection. In 2020, an estimated 276,480 new cases of invasive breast cancer are expected to be diagnosed in women in the U.S., along with 48,530 new cases of non-invasive breast cancer. In recognition of Breast Cancer Awareness Month, our team set out to collect 250 new scarves and hats. Due to chemotherapy treatments, cancer patients usually experience hair loss. So scarves and hats are a much needed item. We are so happy that our team came together and surpassed our goals, collecting 338 new scarves and hats! The scarves and hats went to Innovative Cancer Institute, Miami and to Tampa General Hospital Foundation.

Our KD family comes together every quarter to make a difference in our local communities. An organization is selected from multiple entries made by staff, and funds are raised by paying to dress down – December 2020 was a virtual dress down and ugly sweater contest. The organizations recently featured were Bunchy's Annual Holiday Toy Drive (*Citrus Health Network*) benefiting children and young adults within the foster care system, submitted by **Jessie Fresco** in our Miami office and The Salvation Army of Ft. Myers which provides meals, toys, shelter and much more to the community it serves, submitted by **Donna Rizzo** in our Ft. Myers office. The donations totaled over \$3,500, we are so proud of our employees and firm for coming together for such great organizations.

news | announcements

We can't say enough about how proud we are of **Charles Watkins** and his passion for diversity and inclusion initiatives in our community!

Charles, founding member and treasurer of NAAIA Florida Chapter, along with fellow founding member Maria Abate of Colodny Fass, are the driving forces behind the recently established NAAIA Florida Endowed Scholarship in Risk Management/Insurance at the Florida State University (FSU) College of Business. This endowment is part of the newly formed NAAIA Florida Scholarship Program which aims to provide scholarship and job opportunities to African-American and minority students in the risk management profession.

For more information, or to donate to the program please contact Charles Watkins at cw@kubickidraper.com.

Congratulations to **Alvis L. Horne**, of our Tampa office, for being recognized as The Top 40 Under 40 in Florida by The National Black Lawyers. The National Black Lawyers is an invitation-only organization comprised of attorneys recognized for their superior qualifications, legal results and professional leadership.

We are pleased to announce, **Kenneth "Jayme" Idle**, of our Orlando office, has become Board Certified in Construction Law by The Florida Bar. This certification identifies those lawyers who practice construction law and have the special knowledge, skills, proficiency, character, ethics, and reputation for professionalism to be properly identified to the public as Board Certified in Construction Law. Jayme, a member of Kubicki Draper's Construction Practice Group, primarily focuses his practice on construction litigation. Congratulations on this great accomplishment, Jayme!

Kubicki Draper is happy to have been a returning sponsor for The Florida Supreme Court Historical Society's Annual Supreme Evening that took place on January 28, 2021. The keynote speaker for the Supreme Evening 2021 was Jon Meacham, Pulitzer Prize-winning author and historian, who discussed Professionalism and Leadership.

We are proud to announce **Kenneth M. Oliver**, of our Ft. Myers office, is the new President of the Southwest Florida Chapter of American Board of Trial Advocates (ABOTA).

For more information about ABOTA, visit: <https://lnkd.in/eSdXwQY>



Congratulations

We are excited to introduce our newest Shareholders!



PEDRO LOPEZ | JEREMY CHEVRES | MARTIN BLAYA | SCOTT SIMON | RAQUEL LORET DE MOLA
MIAMI



WILLIAM BACKER | KIMBERLY BECKWITH | PAULETTE BROWN
TAMPA



MELODY KITCHEN | SEAN O'NEIL
JACKSONVILLE



ALLYSON JENKS | SEBASTIAN MEJIA | TERESA CUMMINGS
FT. LAUDERDALE ORLANDO PENSACOLA

new additions

We are pleased to introduce our new team members:

- FT. MYERS Shareholder: **Aaron A. Haak**
- JACKSONVILLE Associates: **Jose R. Rosado, Richard Mercure, Carey E. Taylor**
- MIAMI Associates: **Kristine T. DeSoiza, Jessica M. Sanchez, Andrea Mathwich, Danielle K. DeMahy, Monique M. Yenke, Alexandra D. Valdes, Shawn L. Hairston, Dorian A. Brown, Jorge A. Perez**
- Shareholder: **Jack R. Simmons**
- ORLANDO Associates: **Enyinnaya F. Uche, Lissette Chacon, Tara B. Ratanun**
- TAMPA Associates: **Kerry L. Adams, Lauren M. Schroeder, Marie E. Laur, Mourama S. Saint Fleur**
- WEST PALM Associates: **William P. Sewell, Selene C. Vazquez, Danielle K. Capatini, Lily S. Hutchinson**

SPOTLIGHT ON **Anthony G. Atala**

Anthony Atala is a Shareholder in Kubicki Draper's Miami office. Upon graduating from law school at Florida A&M University, Anthony opened his own firm in Orlando where he handled an array of practice areas, including family law, real estate and personal injury. Anthony is also a licensed real estate broker in Florida, which gave him an edge in his practice of real estate law. However, he was surprised by how much he was drawn to personal injury law and quickly decided to focus his practice on this area of law. After a couple of years, Anthony decided to move back home to Miami, where he continued to handle personal injury matters as well as Plaintiff's PIP cases. He then joined a well-known South Florida insurance defense firm where he started handling special investigation matters. Throughout the years, Anthony worked with many Kubicki Draper attorneys whose professionalism and tenacity led him to be intrigued about the firm. After admiring it from afar for several years, when an opportunity arose for Anthony to join Kubicki Draper, he did not think twice. Anthony's current practice at our firm includes a wide range of practice areas, such as first party homeowner's cases, automobile negligence/bodily injury cases, PIP cases, Examinations Under Oath, and working with Special Investigation Units on fraud claims.

A first-generation Cuban-American, Anthony developed a drive to succeed early on by watching and learning from his parents who immigrated to this country and instilled the values of hard work and education in their only child. Anthony's mother, a teacher, received a grant from the state to obtain her Master's degree in Reading Education and always emphasized to Anthony the importance of reading. With his deep seated value of hard work from his father, and passion for education and reading, law school was Anthony's chosen path. This skillset further paved Anthony's way to run a successful and prosperous practice here at Kubicki Draper.

In looking back at what has been the catalyst for his many achievements over his past seven years at Kubicki Draper, one attribute stands out in particular: Anthony's dedication to preparation.

According to Anthony, "there is no substitute for preparation" and he lives by the mantra, "loaded for bear."



Specifically, Anthony over prepares for hearings and depositions – he analyzes every aspect of his argument and the other side's arguments as well as the applicable law such that he "knows the case better than anyone else in the room." Anthony preaches this principle to the attorneys on his team and believes their commitment to preparation has led to his team's multitude of great results for their clients.

When Anthony is not pondering every facet of his opposition's summary judgment argument for an upcoming hearing, he may be volunteering with high school students as a Youth Minister or serving as a judge or juror at trials and oral arguments for high school students or at a local law school. In his down time, you can find Anthony and his wife enjoying a glass of wine on the couch squeezed in between their three dogs. Self-proclaimed wine enthusiasts, Anthony and his wife Yazmin – who appropriately married in Napa Valley – have bottled two wine vintages in their name for family and friends and have even helped harvest grapes for friends in Napa Valley. Anthony recognizes that taking time for himself and these personal passions is necessary for him to keep doing his best work advocating on behalf of his clients while at the office or in the courtroom. Clearly, Anthony has it figured out – keep up the great work!

moreKDnews

Congratulations to **Jennifer L. Feld**, of our Tampa office, for being featured in the KNOW Tampa. The KNOW features women who are leaders, creators, and entrepreneurs in their industries and in the community. We are so proud of Jennifer and her many accomplishments. There is no doubt we'll see much more from her -- she is unstoppable!

https://issuu.com/knowpublications/docs/2020_tampa_st_pete_issuu/54

Shirlarian N. Williams, of our Ft. Myers office, has been named President of Lee County Bar Association's Young Lawyers Division. We are very proud of Shirlarian's well-deserved appointment and know she will be a great leader!

Kubicki Draper is honored to have been selected as a Tier 1 Metropolitan firm in the U.S. News and Best Lawyers 2021 Edition of "Best Law Firms". The Tier 1 recognition is reserved for the highest scoring firms during the annual review process.

For more information, please visit: <https://lnkd.in/gXaXxzQ>



Dram Shop Liability for Open and Closed Container Service

Brian E. Chojnowski | Tallahassee

on behalf of KD's Hospitality, Retail, and Premises Practice Group

Florida's dram shop law is chock-full of terms of art that need to be carefully parsed to evaluate a vendor's exposure to liability. One important distinction is the type of sale and the class of person to whom the alcohol is sold. Florida's dram shop act exposes a vendor to liability only when the vendor "willfully and unlawfully **sells** or **furnishes** alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages...." "**Sells**", "**furnishes**", and "**serves**" are important terms that create different liability scenarios for alcohol vendors.

Selling alcohol to a minor means the obvious quid pro quo transaction, but applies to both the sale of open containers (for example, at a bar or restaurant meant to be consumed on the premises) and the sale of closed containers (for example, by a retail establishment, such as a liquor store, grocery store, convenience store, etc. meant to be consumed off of the premises).

Furnishing alcohol to a minor means the vendor gave the alcohol to a minor regardless of compensation. This encompasses scenarios such as open bars, unlimited drinks for paying a coverage charge (e.g. "ladies drink free!"), as well as selling alcohol to a person of lawful drinking age with knowledge that the alcohol is destined to be consumed by a minor.

Serving a person habitually addicted to alcohol, in the context of Florida's dram shop law, means to "place food or drink before" someone. **Persen v. Southland Corp.**, 656 So. 2d 453, 455 (Fla. 1995). The dram shop law "did not intend liability to be extended to vendors who sell alcoholic beverages in closed containers to adults for off-premises consumption." *Id.* The Florida Supreme Court in **Persen** recognized that Florida's dram shop law is meant to limit — not expand — a vendor's liability. The language of the dram shop law, therefore, has to be interpreted narrowly.

The COVID-19 pandemic has added a potential twist to open and closed container liability.

On June 26, 2020, Governor Ron DeSantis issued Executive Order No. 20-71 suspending on-premises consumption of alcohol to limit opportunities for COVID-19 transmission amongst bar and restaurant patrons. The executive order also permitted service of alcohol in sealed containers intended to be consumed off-premises. This

means that bars, restaurants, and other vendors that "serve" alcohol can provide mixed drinks, wine, draft beer, and other types of beverages to patrons so long as the container is sealed and the drink is consumed off-premises.

However, "sealed" is not a clearly defined term in the Executive Order or Florida's statutes regulating alcoholic beverages. Vendors have taken varying approaches to what is a proper "seal" — whether it is the alcohol's original packaging, a heat-shrunk plastic seal, or merely a lid. An insufficient seal could muddle the line between what constitutes "serving" and "selling" alcoholic beverages, and potentially expose vendors to greater liability when such service is made to a person habitually addicted to alcohol who then becomes intoxicated and injures themselves or others.

A plain reading of **Persen** suggests that the dram shop act did not intend to expose vendors for liability when sealed containers are sold to adults for off-premises consumption. However, the Florida

Supreme Court, when deciding **Persen**, was addressing a convenience store's sale of a case of beer in its original factory packaging. The Florida Supreme Court has not been faced with a scenario where a vendor that usually serves open containers beverages simply repackages those beverages in a "sealed" container — nor has any Florida appellate court.

While the shelf life of this issue may seem limited, Governor DeSantis recently announced his support of continuing such sales of alcohol during

a September 2020 speech to restaurant owners in Ft. Myers. Such regulatory changes would require amendment of both Florida statutes and sections of the Florida Administrative Code, but this may be on the horizon. Bars, restaurants, and other traditional vendors of open container alcohol should approach off-premises sales with caution.



About author: Most people do not associate the legal profession with creativity, but Brian enjoys finding unique solutions and fresh perspectives. Whether he's in the courtroom or advising his clients, Brian finds new and innovative ways to communicate and explain complex legal issues to others. Brian has honed his courtroom skills through years of trial practice, giving his clients confidence that their cases will be adeptly handled. Each case has a unique definition of "success" and Brian has the knowledge and experience to guide his clients to a successful outcome.



Battling Unsavory Foodborne Illness Claims: Understanding the Potential Causes of Action and Attacking the Use of Circumstantial Evidence

Lisandra Guerrero | Miami

on behalf of KD's Hospitality, Retail, and Premises Practice Group

Introduction

The duty owed and potential theories of liability that may be asserted.

There are few who do not remember the infamous 1993 Jack in the Box E. coli outbreak. The popular fast food chain nearly went under after its hamburger meat, contaminated with E. coli, tragically killed four people and sickened hundreds across four states, some of whom were left with permanent injuries, such as kidney and brain damage. The company's ironic slogan for the "Monster Burger" – "So good it's scary!" – did not help the negative media onslaught and wide public perception that its food was unsafe. The restaurant responded by enacting a comprehensive food safety program, for which it has received numerous accolades in the food industry. Nevertheless, to this day, a Google search for "Jack in the Box" auto fills with the words "food poisoning." Unfortunately, the Jack in the Box outbreak has not been the last. The United States has seen subsequent, deadlier outbreaks linked to nearly all types of food, including peanuts, lettuce, spinach, cantaloupe, eggs, ice cream, and hot dogs.

It is safe to say that most people have experienced symptoms of food poisoning at one point. They are considered fairly common, and may include vomiting, diarrhea, stomach cramps, fever, body aches, and fatigue. The Centers for Disease Control estimates that roughly 48 million people become sick due to a foodborne illness annually, of which 128,000 are hospitalized and 3,000 die. The incidence of foodborne illness has gradually increased, likely due to the identification of more than 250 foodborne diseases. Most foodborne ailments are infections caused by bacteria, viruses, and parasites, but some are also caused by toxins and chemicals in the food consumed. The majority of people get better without medical treatment. Some people may require hospitalization, after which they are able to recover. However, some people develop severe, long-term medical conditions, such as chronic arthritis, brain and nerve damage, and Hemolytic uremic syndrome (HUS) resulting in kidney failure.

Lawsuits regarding foodborne illness have increasingly alleged these and other serious conditions, and demand substantial damages. For instance, in 2018, a Florida couple was awarded \$6.7 million dollars on their claim that raw oysters they ate at a restaurant led the husband to develop Gullain-Barré syndrome, a rare disorder in which the immune system attacks the nerves, resulting in lingering pain, sensory problems, and neurological defects for the rest of his life. In 2015, a couple obtained an \$11.3 million-dollar verdict against a Wyoming restaurant on their claim that Salmonella poisoning resulted in the husband's brain injury, rendering him unable to control eye movements, balance, arm and leg movements, respiration, emotions, and speech. Given the potentially devastating impact food poisoning can have on those afflicted and, consequently, the amplified liability exposure resulting from such claims, a proper defense is crucial.

As an initial matter, under Florida law, a person who contracts a foodborne illness may bring a civil cause of action against the food service establishment they believe caused it. Such establishments owe patrons a duty to use reasonable care in their preparation and sale of food. **Zabner v. Howard Johnson's Incorporated**, 201 So. 2d 824 (Fla. 4th DCA 1967). A "public food service establishment" is defined as "any building, vehicle, place, or structure or any room or division [within same] where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption." Fla. Stat. §509.013(5)(a) (2019). In Florida, the duty imposed on a restaurant owner is the same as that allotted upon a manufacturer of the food or item and applies regardless of whether the food is ingested on or away from the retailer's premises. **Cliett v. Lauderdale Biltmore Corp.**, 39 So. 2d 476 (Fla. 1949).

The causes of action asserted may sound in strict liability, negligence, or breach of the implied warranty of merchantability and fitness. In a strict liability cause of action, one who sells a defective product that is thereby rendered unreasonably dangerous to consumers is subject to liability if the consumer can show that the establishment was engaged in the business of selling such product, and the product reached the consumer without substantial change in the condition in which it was sold. **West v. Caterpillar Tractor Co., Inc.**, 336 So. 2d 80 (Fla. 1976) (adopting the doctrine of strict liability set forth in the Restatement (Second) of Torts, § 402A (1965)). The phrase "unreasonably dangerous" is defined as a condition that is "dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." **Gibbs v. Republic Tobacco, L.P.**, 119 F. Supp. 2d 1288, 1295 (M.D. Fla. 2000) (citing Restatement (Second) of Torts § 402A cmt. i (1965)).

In an action for negligence, as in any other negligence cause of action, a plaintiff making a foodborne illness claim must prove the existence of a duty of care, breach of that duty and a cognizable injury proximately caused by the breach. Finally, a claim of breach of the implied warranty of merchantability and fitness is premised on the notion that "when a patron orders and pays for a meal or food at a public restaurant, there is a sale of such food, and there exists an implied warranty that the food sold is reasonably fit for human consumption." **Zabner**, 201 So. 2d at 827. Therefore, by ordering food, a patron of a restaurant makes known to the seller the particular purpose for which the food is required and, by that act, relies on the seller's skill and judgment in preparing the food. *Id.* The failure of the product to conform to that warranty establishes liability. *Id.*

continued on page 7

The use of circumstantial evidence to prove contamination and causation.

Regardless of the theory of liability, to establish a cause of action for damages resulting from a foodborne illness, the plaintiff must prove that the food consumed was contaminated in the first place and that the food's condition caused the injury complained of. While the only means of definitively meeting this burden is to chemically analyze the food and the plaintiff's stool, such claims may survive when sufficient circumstantial evidence is presented. ***Gant v. Lucy Ho's Bamboo Garden, Inc.***, 460 So. 2d 499, 501-502 (Fla. 1st Dist. 1984).

There are a number of reasons why food may be considered contaminated, including when it is infested with a pathogen, polluted with a foreign substance or chemical, or when it contains a physical object. Oftentimes, the allegedly contaminated food is unavailable for testing because it has been consumed or discarded by the time symptoms emerge. Moreover, oftentimes, there was no laboratory testing of the plaintiff's stool confirming the existence of a pathogen. To overcome this problem, the plaintiff must point to sufficient circumstantial evidence.

The effect the allegedly contaminated food had on others may be a vital piece of circumstantial evidence tending to prove the plaintiff's case. In ***Gant***, 460 So. 2d at 502, expert testimony compiled with evidence that the plaintiff became ill after eating one egg roll, her sister became ill after eating half of an egg roll, and her mother, who did not eat any egg rolls and did not become ill, was sufficient to establish an inference that the egg rolls were the most probable cause of plaintiff's injury.

Plaintiffs may also use the discovery process to uncover potentially valuable evidence to prove improper food production or service procedures led to food contamination. This may include reports of prior incidents, prior complaints of food contamination, or a history of failed health inspections. For instance, in the Jack in the Box case, the plaintiffs' attorneys uncovered a pre-incident "suggestion box" document from an employee citing customer complaints that the hamburger patties were not fully cooked. Responsive correspondence reflected that Jack in Box determined a cook time of two minutes was appropriate, since the patties became tough when cooked longer. While such telling evidence likely does not exist in every case, a plaintiff can point to flaws in cooking procedures or improper storage, resulting in cross-contamination.

Poking holes at unreasonable inferences.

Obviously, the best defense to a potential foodborne illness lawsuit is avoiding conditions that lead to food contamination and carefully abiding by safe-food practices. Unfortunately, even the best-run places can become the target of a foodborne-illness claim because many consumers unreasonably assume that the last meal they ate was the culprit of their indigestion. Nevertheless, the fact that a restaurant patron became ill shortly after consuming food at the restaurant, standing alone, is insufficient to demonstrate negligence on the part of the restaurant. Defenses to foodborne illness claims generally include proving that the food consumed was never in fact contaminated, or that the consumer became ill due to other causes.

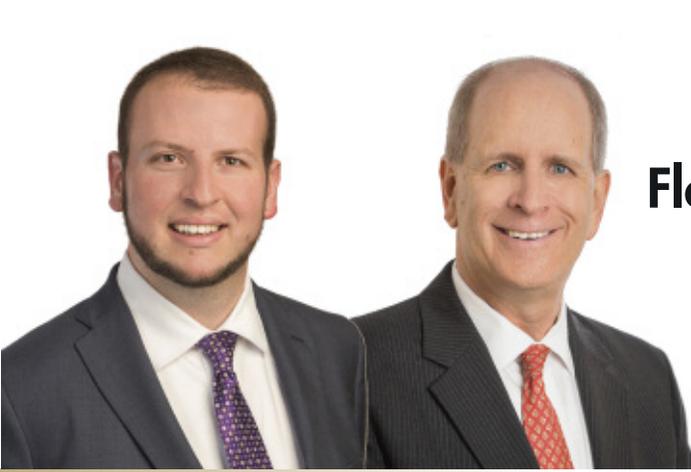


Certainly, the lack of any evidence that the food was contaminated and/or the lack of any formal diagnosis of food poisoning is useful, especially when dealing with an isolated case as opposed to an outbreak involving multiple people. Evidence of other causes of the plaintiff's symptoms may prove helpful. For instance, a plaintiff with a medical history of gastrointestinal issues may be prone to developing symptoms of food poisoning without ever having eaten contaminated food.

To the extent a foodborne illness is diagnosed or a specific pathogen is identified, an attack on causation often requires expert testimony regarding the applicable incubation period and other sources by which a person may come in contact with the pathogen. A case in which a person claims to become ill immediately after consuming a meal or within one hour of leaving the restaurant is immediately suspect. For instance, the typical incubation period of *E. coli* is three to four days, which would rule out a meal eaten immediately before the onset of symptoms. This argument was successful in the case of ***Colson v. Tampa Hotel-VEF IV Operator, Inc.***, 2011 WL 5553840 (M.D. Fla. Nov. 15, 2011), where the court held that the timing of the plaintiff's symptoms was crucially important to her entirely circumstantial case. Since the plaintiff had become sick less than one day of ingesting the defendant's meal, the court found it was unlikely the meal was the culprit. *Id.* at *5. The court also noted the multiple other sources of *E. coli*, which included "(1) eating, undercooked ground beef, lettuce, fruit, nuts, and unpasteurized milk, cheese and juice; (2) consuming any type of food cross-contaminated with *E. coli*; (3) drinking impure water; (3) person to person contact; and (4) inadequate hand washing." *Id.*

In conclusion, although rare, foodborne illnesses can have a devastating impact on their victims. Likewise, they can have a devastating impact on the establishment charged with having produced the deleterious food. Since it is oftentimes difficult to pinpoint the exact source of contamination, a well-determined strategy is needed to navigate the intricacies of such claims and develop effective defenses.

About author: *Lisandra Guerrero is in the firm's Miami office and is part of the Hospitality, Retail and Premises Practice Group. She focuses her practice on the defense of hospitality and retail-related establishments in both Federal and State courts concerning a wide variety of legal matters. She is experienced in handling matters involving commercial disputes, premises liability, products liability, environmental and toxic torts, construction accidents and defects, toxic torts, and wrongful death.*



Florida Adopts the Federal Summary Judgment Standard: A Summary

Eli M. Marger and Harold A. Saul | Tampa

The *Celotex* Standard

Following the December 31, 2020 decision in *Wilsonart, LLC v. Lopez* and prospective change to the Florida Rules of Civil Procedure by Florida's Supreme Court, Florida became the 39th state to adopt the federal standard for summary judgment, colloquially known as the *Celotex* standard. The Florida Supreme Court amended Rule of Civil Procedure 1.510, adding the following language:

The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

While the text of the summary judgment rule in both the Florida (Rule 1.510) and federal rules of procedure (Rule 56) is virtually identical, Florida courts have traditionally applied a more stringent standard to summary judgment. The crucial difference is how courts evaluate factual disputes: under Florida's jurisprudence, the existence of any factual dispute, no matter how trivial, is sufficient to defeat summary judgment; under the *Celotex* standard, the court instead focuses on whether a reasonable jury could return a verdict for the nonmoving party despite the factual dispute. In other words, a factual dispute under *Celotex* may not be fatal to a motion for summary judgment if the underlying fact in dispute would not change a jury's verdict.

In the *Wilsonart* decision, the Florida Supreme Court did not actually invalidate or re-interpret existing law; instead, it merely approved of adopting the *Celotex* standard. Therefore, practitioners should be prepared for "growing pains" among judges at the trial court level and in the district courts of appeal in navigating this new standard and making decisions accordingly in summary judgment proceedings, until a more concrete standard is created, applied, and trickles down through the Florida court system.

The amended Rule 1.510 takes effect on May 1, 2021, allowing practitioners and interested parties a chance to publicly comment on the proposed rule change. Because the new rule language as presently proposed is broad, the possibility exists the language will be refined to further clarify the precise standard for summary judgment. In the interim, Florida's summary judgment jurisprudence remains in effect.

In the short term, parties should focus in applicable cases on having previously-denied Motions for Summary Judgment reconsidered after May 1. However, the costs and benefits of doing so should be weighed on a case-by-case basis, keeping in mind the true magnitude of this decision is highly dependent on how Florida appellate courts apply *Celotex*. As a result, months or more may elapse before defense lawyers are able to fully evaluate how this new standard will affect case strategy moving forward.

Kubicki Draper's Angela Flowers wrote an amicus brief in support of the adoption of *Celotex* on behalf of the Federation of Defense and Corporate Counsel. The attorneys at Kubicki Draper are prepared to discuss this noteworthy development and answer questions about how it may impact case handling and strategy after May 1, 2021.

About authors:

Since joining the Tampa office of Kubicki Draper in 2017, Eli Marger has established himself as a versatile, aggressive, and effective litigator. Eli has experience defending insured and corporate entities involving construction defects, property damage, and bodily injury arising from automobile, premises, or product liability. Utilizing a collaborative approach with his clients, Eli executes carefully-tailored, forward-thinking strategies to ensure favorable case outcomes in line with client expectations.

Harold Saul has aggressively handled extensive personal injury claims, including traumatic brain injuries, significant injuries to property or business and wrongful death claims in both State and Federal Court. More recently, Harold has developed a specialty in Construction Defect cases, handling these complex claims in presuit, state court and arbitration.

APPELLATE

Second DCA Affirms Summary Judgment Where No Evidence of Notice of Spill.

Caryn L. Bellus and **Sorraya M. Solages-Jones**, of our Miami office, prevailed in upholding a final summary judgment in a premises liability case obtained at the trial level by **Charles F. Kondla**, also of our Miami office. In *Griffis v. Regal Cinemas, Inc.*, No. 2D19-1856, 2020 WL 6537806 (Fla. 2d DCA Nov. 6, 2020), the Second District Court of Appeal affirmed the final summary judgment determining that Plaintiff failed to meet his burden of proof by showing circumstantial evidence that Regal Cinemas had actual or constructive notice under §768.0755, Florida Statutes. On appeal, Plaintiff argued there were genuine issues of material fact concerning constructive knowledge of a substance on the floor outside the theater's box office. The Second District rejected Plaintiff's arguments and affirmed the judgment in favor of Regal Cinemas finding that Plaintiff failed to present evidence that the substance existed for a sufficient length of time such that Regal Cinemas knew or should have known of it and that Plaintiff further failed to plead that the condition occurred with regularity, and was therefore, foreseeable.

Fourth DCA Affirms Summary Judgment for Franchisor in Shooting Case.

Sharon Degnan, of our Orlando office, recently prevailed in upholding a final summary judgment obtained at the trial level by **David Drahos**, of our West Palm Beach office. In *Ferrer v. Jewelry Repair Enterprises, Inc.*, No. 4D19-2747, 2021 WL 191464 (Fla. 4th DCA January 21, 2021). Our client, a franchisor with storefronts and kiosks located throughout several states, was sued by a former employee of one of its franchisees. The franchisee employee suffered serious injuries after being shot by the franchisee's owner, who then turned the gun on himself in an attempted murder/suicide occurring in the franchisee's store. The main argument pursued by the franchisee employee was that our client maintained control over the franchisee and failed to recognize the risk to employees and fire the franchisee's owner before the shooting. However, both the trial court and the Fourth DCA determined that, pursuant to the clear language in the Franchise Agreement governing the relationship between the parties, the franchisor did not maintain any substantial control over the franchisee's day-to-day operations or its owner and that the franchisor's control was limited to the uniform standardization of products and services and providing regular and ongoing support for its franchisees. Sharon argued on appeal — and the Fourth DCA agreed — that the franchisee operated independently of the franchisor, with our client having no authority to hire and fire its franchisee's employees. The court recognized that these types of franchise agreements are common throughout Florida and often contain similar language limiting the franchisor's control over its franchisees.

TRIALS, MOTIONS,
MEDIATIONS***Summary Judgment Granted Where Plaintiff's Baseless Mold Claim Had Already Been Assigned to the Mold Remediation Company.***

Sarah R. Goldberg, of our Miami office, won summary judgment on a Hurricane Irma claim. Plaintiff entered into an agreed order moving this case to an appraisal, and the carrier timely paid the appraisal award. After the appraisal award was paid, Plaintiff argued that not all claims had not been resolved by the appraisal and requested supplemental payments for alleged mold damages. The trial judge heard arguments for over an hour and ultimately agreed with Sarah that Plaintiff cannot bring a supplemental claim for mold damages post-appraisal because Plaintiff signed an assignment agreement for mold remediation services to a mold remediation company. The mold remediation company was paid in full for their services and executed a Release for claims of mold remediation. The Court did not give any weight to Plaintiff's last-ditch efforts to argue that the assignment agreement was invalid.

Complete Defense Verdict in Property Damage Case Where Plaintiff Unsuccessfully Tried to Bring Lost Wages and Mental Anguish Claims.

Kimberly A. Beckwith, of our Tampa office, obtained a defense verdict in a case for property damage, lost wages, and mental anguish. The client drove off the road and crashed through Plaintiff's fence, garden, truck, and landed squarely in the middle of Plaintiff's mobile home. Luckily, no one was hurt, but our client was arrested for DUI. Plaintiff sued Defendant in small claims court claiming property damage, mental anguish, and lost wages. Kim filed a motion to dismiss outlining the numerous deficiencies with Plaintiff's claims, including that 1) since he was not injured, his claim for mental anguish is barred, and 2) his claim for 6 weeks of lost wages was without support. Kim persuasively argued that Plaintiff voluntarily took off from work to repair some of the damage, that a hand-written letter from his employer regarding Plaintiff's pay rate was inadequate to establish damages. At trial, Plaintiff attempted to add to his damages by claiming additional losses of personal property to which Kim quickly shot down by pointing out that he previously signed a property damage release. The Judge gently explained to Plaintiff that his case was flawed and ruled in favor of our client, entering a complete defense verdict.



TRIALS, MOTIONS, MEDIATIONS

Successful Defense of 57.105 Motion for Sanctions Following Contentious Evidentiary Hearing.

Benjamin Cohen, of our Ft. Lauderdale office, was retained to defend a law firm and two of its attorneys, individually, against a motion for sanctions under § 57.105, Fla. Stat. brought by a commercial attorney that the firm had sued for defamation. The attorney sought six figures in fees from the law firm and its attorneys claiming that there was no legal basis for bringing the claim. The case involved allegations of tortious interference, defamation, and other causes of action and the Defendant lawyer was asserting that his publications, if any, were subject to and protected by the absolute litigation privilege as they were made to clients or prospective clients within the course and scope of his actual or prospective representation. At a contentious evidentiary hearing on the issue, Ben was able to convince the Judge that the published communications were not made within the course and scope of the Defendant attorney's actual or prospective representation, and thus, the communications were not subject to the litigation privilege.

Summary Judgment Granted in First Party Property Case Brought by Engineering Firm Where Carrier did Not Request Their Inspection.

Sarah R. Goldberg, of our Miami office, successfully argued a Motion for Summary Judgment in a first party property case. An expert engineering firm filed suit (through an assignment of benefits) against the carrier for an expert inspection conducted by an engineer stating that the damages to the insured's property were caused by Hurricane Irma. Sarah persuaded the Judge that Plaintiff's services were not requested by the insurer and that it was just a way for Plaintiff to get paid (and collect attorneys' fees) for the expert's inspection – in other words, they were trying to get the carrier to pay for the insured's expert while the insured is in suit for the same loss. We also have an expired Proposal for Settlement!

Dismissal of Declaratory Relief Action Regarding Application of the Deductible.

Shirlarian N. Williams, of our Ft. Myers office, obtained a dismissal of a case with no leave to amend. Plaintiff filed a declaratory action asking the Court to interpret its rights under the policy in relation to its belief that the carrier improperly reduced Plaintiff's medical bills and applied the wrong amount to the deductible. Shirlarian argued that a declaratory action was improper as the purpose of such an action is to ask the Court to make a determination regarding a party's rights in regard to a disputed policy provision, and Plaintiff could not cite any policy provision that they were disputing. Shirlarian also argued the policy was clear regarding how claims would be paid. Therefore, there was nothing for the Court to decide, and it dismissed the case.

Summary Judgment Entered on Delayed Hurricane Irma Claim Where Carrier's Prejudice for Inability to Inspect Could Not be Cured.

Cristina M. Paneque, of our Miami office, obtained final summary judgment in favor of the carrier on a Hurricane Irma claim that was reported by the insured over two years after the alleged date of loss. Due to the delay in reporting the loss, the carrier was unable to determine the state of the property after the storm and was further prevented from conducting a proper investigation. The carrier denied the claim based on prejudice. Plaintiff attempted to create an issue of fact prior to the hearing by filing an affidavit and report from an engineer. Cristina argued that the engineer's report and affidavit did not create an issue of fact because it was unclear if the engineer actually inspected the property and the alleged property inspection occurred nearly three years after the date of loss. Cristina further argued that the carrier was still entitled to a presumption of prejudice as a result of the untimely notice and that discovery demonstrated that Plaintiff could not rebut the presumed prejudice. The Court agreed with Cristina's arguments and held that the engineer's inspection did not cure the carrier's prejudice of being precluded from inspecting the property after Hurricane Irma.

No Genuine Issue of Material Fact on No UM Coverage Defense Where Employee Used Company Car Outside Scope of Employer's Consent.

Taylor K. Ligman, of our Ft. Myers office, successfully obtained a final summary judgment on behalf of the carrier arguing there was no Uninsured Motorist coverage when an employee was using a work vehicle outside the scope of his employer's permission. The employee contended that his supervisor gave him permission to leave work and go to a family-member's home instead of going directly home, which is the company's policy. Coverage under the applicable policy is excluded unless there is express permission to use the vehicle for personal use. Despite the "disputed fact" that Plaintiff testified that his supervisor allegedly gave him consent, which the supervisor disputed in an affidavit, Taylor argued that the employee's position, while contested, was an "immaterial fact" since the scope of the permission would have ended, at most, at that point in which the employee reached his family-member's home. Furthermore, it was undisputed that the GPS tracking demonstrated that the employee made five subsequent stops over the course of hours and that he was on his way to some other unauthorized stop at the time of the accident, and consequentially, the Court agreed that summary judgment in the carrier's favor was appropriate.

TRIALS, MOTIONS, MEDIATIONS

Voluntary Dismissal With Prejudice of a Fraudulent Kitchen Water Loss Claim.

Eli M. Marger, of our Tampa office, obtained a voluntary dismissal with prejudice of a kitchen water loss claim brought by the insured's water mitigation vendor. During the carrier's pre-suit investigation, the carrier's expert determined the water damage was clearly long-term in nature. When Eli requested the depositions of the insured and her parents, their counsel vehemently objected on grounds that they had already been deposed in an entirely separate, unrelated matter to which the carrier was not a party. Following a contentious hearing, Eli convinced the Judge to require opposing counsel to provide transcripts from the separate matter at their expense and allow the depositions in this kitchen water loss matter to the extent the other transcripts did not address this kitchen water loss. The transcripts from the separate matter included admissions from the insured's parents about the duration of the kitchen water leak, which were so damaging to the insured that Eli attached them to his Motion for Summary Judgment without having to re-depose the insured or her parents. Two weeks prior to the hearing, opposing counsel approached Eli motivated to settle the case. However, Eli did not offer anything, and instead, he informed counsel that his client would only accept a voluntary dismissal with prejudice. Counsel filed the dismissal shortly thereafter.

Dismissals Obtained Where Aggressive Defense Demonstrated Client Did Not Own Cow Involved in Two Car Accident Cases.

Toni Turocy, of our Orlando office, obtained dismissals in two separate suits involving a car/cow accident in Lake County. Our client was a well-known veterinarian who leased land and kept cattle on the property near where the accident occurred. Initially, law enforcement thought that the cow belonged to our client and placed his name as the owner on the Florida Traffic Crash Report. However, after the client went out to the scene of the accident, he determined that the cow involved was not his cow based on the breed and cattle ID tag. Ultimately, the Crash Report was amended to reflect that the client was not the owner of the cow. Despite the foregoing, Plaintiffs filed two separate suits against the client claiming they had sustained significant injuries. Toni met with the client early on and obtained a sworn Affidavit as to the client's non-ownership of the subject cow and then filed a Motion for Summary Judgment in both lawsuits based on lack of ownership and defenses under Florida's roaming cattle statute, §588.15, Fla. Stat. However, opposing counsel still refused to drop the case and insisted on deposing the insured. After taking the client's deposition, opposing counsel filed Notices of Voluntary Dismissal in both lawsuits.

Favorable Settlement Obtained Following Aggressive Defense of Defamation Case.

Jennifer Remy-Estorino and **Martin P. Blaya**, of our Miami office, obtained a favorable settlement in a defamation case, where their aggressive approach to the defense led to a \$2,500.00 settlement on the eve of Plaintiff's deposition. Plaintiff, a managing director of a large property management company, gave a presentation to the residents and association members of three related condominiums who were accepting bids to change management companies. After the presentation, our client, an attorney and finance committee member of one of the three condominium associations, researched the property management company and Plaintiff's background; drafted an email to an association board member with her findings; and requested that the board member forward the email to the other board members only. The email eventually made its way to Plaintiff.

Initially, Plaintiff's counsel sent a pre-suit demand letter to our client demanding retraction of the statements; a formal, written apology; and a large settlement. When the demand was not met, Plaintiff filed suit against our client, alleging defamation, defamation per se, and tortious interference with advantageous business relationship. Plaintiff claimed that the email diminished his worth and value to his employer; threatened his livelihood; resulted in an adverse effect to his career; and negatively affected his earning capacity and reputation. Jennifer and Martin got the count for tortious interference with advantageous business relationship dismissed and forced Plaintiff to amend the Complaint three times. Jennifer and Martin then attacked Plaintiff's discovery responses, and after their Motion to Compel was granted, and Plaintiff still failed to provide better answers, the Court excluded evidence and sanctioned Plaintiff. At the same time, Jennifer and Martin pressured Plaintiff for the depositions of Plaintiff and Plaintiff's employer. As a result of their aggressive approach, Plaintiff accepted \$2,500.00 as full settlement on the eve of his deposition.

Defense Verdict Where Roof Damage Caused by Faulty Installation, Not Wind Damage from Hurricane Irma.

Stefanie D. Capps and **Sameer N. Islam**, of our Ft. Myers office, obtained a defense verdict finding there was no damage from Hurricane Irma. The suit involved a claim on a commercial policy for a condominium development in South Ft. Myers. Plaintiff claimed that the hurricane damaged the roof such that it needed to be completely replaced, and consequentially, 9,000 square feet of concrete tile roof was at issue. The sole question at trial was whether the hurricane caused the extensive cracking, which both parties agreed was present on the roof. Plaintiff argued that wind damage caused several tiles to crack and break and loosened one ridge tile. Stephanie and Sameer proved that the cause of the damage was actually a poorly-ventilated attic and improperly installed tiles – the cracking was due to thermal expansion and contraction. Moreover, the owners of the property first reported the loose ridge tile to the original builder and roofer. Additionally, the building owners did not see any evidence of damage in their initial inspections of the property post storm. Stephanie and Sameer were successful in showing the jury how this supported their position that the damage was from the faulty installation and not wind damage.

presentations | speaking engagements

Our attorneys present continuing education seminars on a variety of topics throughout the year. Below are some of the topics that have been presented by our team in the last few months:



- Diversity Equity & Inclusion: A Call to Action
- Handling A Fire or Explosion Claim
- Social Media, Technology and Its Use in Claims Handling
- Florida 5-Hour Law and Ethics Update
- A Reservation for Exploitation: Human Trafficking in the Hospitality Industry
- Insurance Claims in the Instagram Age: Using Technology and Social Media to Investigate Bodily Injury, Property Damage, and Business Interruption Claims
- Alternative Dispute Resolutions - Non Binding Arbitration and Mediation
- Defending Against Inflated Estimates for First Party Homeowner Claims
- PIP Coverage: Common Issues and Exclusions
- Alternative Defenses in Florida PIP Cases
- Alcohol, Cell Phones and the Law
- Files from the Fraud Side...Ruse, Clues and Do's
- Independent Medical Exams in PIP
- Knew or Should Have Known: Slippery Substances and Falling Objects (Premises Liability Concepts for Commercial Establishments)
- Negligent Security
- Coverage Considerations in Construction Defect Claims
- The General Specifics on Liability for Injuries on Adjacent Properties



In addition to the topics presented by our team, **Charles H. Watkins**, of our Miami office, presented to students at William H. Turner Technical Arts High School. The presentation was part of a Miami-Dade Public Schools program that honors Black Americans. Charles, who has a strong passion for mentoring and educating the leaders of tomorrow, talked to students about The Honorable Justice Thurgood Marshall, the U.S. Supreme Court's first African-American justice.

Charles also co-presented "Danger, Danger Will Robinson: Navigating Fraud in the New AI Terrain" during the CLM Focus: Cannabis, Environmental, Insurance Fraud, Property, Subrogation, Claims and Litigation – a virtual conference coordinated by CLM Alliance (Claims and Litigation Management Alliance). Charles, along with Maria Abate of Colodny Fass, Carl Nemeth of Tower Hill Insurance Group, and Mariela Perez-Pennock of Assurant, talked about the construct of Artificial Intelligence (AI), its application and potential impact on everyday life, and its ability to detect fraud in all aspects of insurance. For more information about this topic, contact cw@kubickidraper.com.

We welcome the opportunity to host a complimentary webinar for you and your team on any topic(s) of your choice. All presentations are submitted for approval of continuing education credits.

For more information, please contact Aileen Diaz
(305) 982-6621
ad@kubickidraper.com



CONSTRUCTION CONFERENCE

FRIDAY, OCTOBER 15, 2021

RENAISSANCE TAMPA INTERNATIONAL PLAZA HOTEL

It is said third time's a charm, and we sure hope so!

We have moved our construction conference once again in the hopes that we can all safely attend in person in October.

Please mark your calendars to join us for the all-day complimentary conference on October 15 in Tampa. The event is designed to provide construction claims professionals with valuable information that will assist them in their claims handling and management.

The program will begin at 8 am and will include lunch. Guests are invited to stay for a cocktail reception immediately following the seminar.

*Registration and Florida CE/CLE information to follow.
Questions? Please e-mail: construction@kubickidraper.com.*

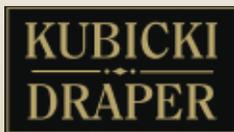
www.kubickidraper.com

YOUR OPINION MATTERS TO US.

We hope you are finding the *KD Quarterly* to be useful and informative and that you look forward to receiving it. Our goal in putting together this newsletter is to provide our clients with information that is pertinent to the issues they regularly face. In order to offer the most useful information in future editions, we welcome your feedback and invite you to provide us with your views and comments, including what we can do to improve the *KD Quarterly* and specific topics you would like to see articles on in the future. Please forward any comments, concerns, or suggestions to Aileen Diaz, who can be reached at: ad@kubickidraper.com or (305) 982-6621. We look forward to hearing from you.

CONTACT INFORMATION

LAW OFFICES



Professional Association
Founded 1963

	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

OFFICE LOCATIONS

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

www.kubickidraper.com