BUTLER Quarterly

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ABOUT

BUTLER is a civil litigation firm. We are unique because our practice is devoted entirely to defense and insurance litigation. Our clients are corporations, insurance companies, and insured individuals. Our representation has taken us across the United States, to Canada, Mexico, Europe and the Caribbean. We aspire to provide the highest quality counsel while, at the same time, meeting the administrative demands of our clients. After 37 years, our record speaks for itself.

At Butler, service, teamwork and principles are not mere words. They're who we are and what we do. Service is what we bring to our clients, to one another, and to the community at large. Teamwork, too, describes the way we interact with one another. And our guiding principles define how we serve, and how we work together, 100% of the time.

Community is important. How do we define the Butler community? It isn't a way of speaking or dressing. Nor is it a boundary or location. Our community, is defined by common principles, common goals and common purposes. And, our focus is on integrity. Our goal is fulfilling the legal needs of our clients. Our purpose is building and sustaining a professional practice at the highest level. Moreover, the Butler community includes receptionists, bookkeepers, assistants, paralegals and our entire administrative staff. And best of all, the Butler community includes our clients.

Butler embraces diversity in our nation, in our communities, and in our hiring practices. Why is diversity important in the workplace? Why do we embrace it as a fundamental objective? Why is it inherently good for people from varying backgrounds to work together? We believe when people who are diverse work together, their shared tasks become the things that bind them. The work at hand, and the collaboration of bringing it to a successful end, creates an improved community and a higher quality work product for our clients. In that sense, diversity dissolves differences. And, in the process, it enriches our lives and opens our minds.

Butler is also committed to charitable giving and aiding others who need our support. This is more than charity, more than philanthropy. It requires some measure of personal sacrifice – sharing one's time and energy to benefit others and, ultimately, to benefit all. That's why we encourage our lawyers and staff to be leaders and volunteers in community projects and professional organizations. We also believe that our participation provides a demonstrable benefit to our clients.

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THE P AFFECTING ADMISSION OF EXPERT BAD FAITH TESTIMONY UNDER DAUBERT

by Ryan K. Hilton and Steve Rawls

This article originally appeared in Claims Management, a publication of the Claims & Litigation Management Alliance (CLM). Legal opinions may vary when based on subtle factual differences. All rights reserved.

Two recent federal cases highlight the challenges practitioners face in presenting expert claims handling testimony in bad faith litigation under the Daubert standard.[1] In the first case, a court excluded such expert testimony on behalf of the insurer. In the second, the same court excluded and restricted such testimony on behalf of the insured.

In the first case, *Lopez v. Allstate Fire and Casualty Insurance Company*,[2] the plaintiffs sued Allstate for bad faith, claiming Allstate's unreasonable failure to settle claims made against Allstate's insured resulted in an excess judgment.

Allstate sought expert testimony from James Kadyk, an attorney with 36 years of experience in casualty insurance law. Kadyk opined that Allstate properly handled the claims. The plaintiffs moved to exclude Kadyk's opinions.

> "Less than a year later...the same court excluded and restricted the insured's expert testimony in another third-party bad faith case."

The court granted the plaintiffs' motion on three grounds. First, Kadyk was not qualified to render opinions about claims handling because he had never represented a party in a bad faith case and he had never worked for an insurance company. Kadyk's experience was "insufficient to render him qualified to provide expert testimony as to the proper claims handling processes for insurers."

Second, the court found that Kadyk's opinions were not based on any reliable methodology. A reliable methodology requires the witness to explain how his experience leads to the conclusion reached, why that experience is a sufficient basis of the opinion and how that experience is reliably applied to the facts of the case. In light of the court's determination that he was unqualified, Kadyk could not do so.

Third, the court found that Kadyk's opinions did not help the jury because Mr. Kadyk simply applied the facts of the case to Florida law, which is the jury's role.

Less than a year later, in *Arroyo v. Infinity Indemnity Insurance Co.*,[3] the same court excluded and restricted the insured's expert testimony in another third-party bad faith case.

In *Arroyo*, the defendant insurer moved to exclude claims handling and damages testimony from plaintiff's experts.

The plaintiff's first expert was attorney Lewis Jack, who had 40 years of insurance law experience. The *Arroyo* court found Jack was not qualified because he lacked claims adjusting experience.

The court also did not admit Jack's opinions on the credibility of witnesses and on damages. The opinions were forbidden because an expert cannot asses a witness' credibility. Jack's opinions on damages were unreliable because they were not based upon the facts in the case. Thus, the court excluded Jack's opinions.

Plaintiff's second expert was James Schratz, an attorney and a former licensed insurance adjuster with minimal Florida claims handling experience. The court permitted Schratz's opinions with restrictions. The court observed that Schratz was not addressing the insurer's compliance with Florida law, and that he was qualified to render opinions on national industry standards of claims handling and investigation processes and whether the insurer reasonably applied them in the case. The defendant could cross-examine him or offer contrary evidence.

The court also permitted Schratz's testimony about the effect of the insurer's omission of a reservation of rights as long as Schratz did not proffer the law concerning the issuance of a reservation of rights. The court found that Schratz's opinions were sufficiently reliable based upon his 30 years of experience in insurance claims handling and his review of substantial portions of the record in the case, and that his opinions would assist a jury. However, the court excluded Schratz's opinions that touched upon legal conclusions and those regarding the states of mind of other parties in the litigation.

These cases illustrate some of the issues attending the use of claims handling experts under Daubert. Practitioners should carefully consider Daubert's limitations to such testimony. Courts will exclude or restrict expert claims handling testimony that does not meet the Daubert criteria.

[1] Under Daubert v. Merrell Down Pharmaceuticals, Inc., 509 U.S. 579 (1993), The Trial Court Serves as a Gatekeeper to Exclude Unreliable Expert Testimony.
[2] 2015 WL 5584898 (S.D. Fla. Sept. 23, 2015).
[3] 2016 WL 4506991 (S.D. Fla. Aug. 29, 2016).

TRIAL COURT SLIPS AND FALLS IN GRANTING MOTION FOR NEW TRIAL

By Troy Vuurens

On October 21, 2016, Florida's Second DCA issued a decision in a slip-and-fall case against Wal-Mart that found the trial court erred when it set aside the jury verdict and granted Plaintiff's motion for new trial on the basis that Wal-Mart's failure to follow its own safety policy clearly demonstrated a finding of negligence. Wal-Mart Stores, Inc. v. Wittke, 2016 WL 6137357.[1]

The plaintiff filed suit against Wal-Mart alleging negligence for injuries sustained in a slip-and-fall accident that occurred in December 2009. The case was ultimately tried in June 2015 and the jury returned a verdict in favor of Wal-Mart. The plaintiff moved for a new trial which the trial court granted, setting aside the jury verdict on the basis that, "the evidence presented to the jury during trial clearly demonstrated that [plaintiff's] injuries were the result of [Wal-Mart's] failure to follow its own safety policies and procedures." Wal-Mart appealed.

The Second DCA reversed on appeal, holding that the trial court improperly equated the standard of care with compliance with internal policies and procedures, "effectively determining that a breach of policies and procedures is a per se breach of the standard of care."

In citing to prior case law the court held that internal safety policies do not themselves establish the standard of care owed to the plaintiff. The court reasoned that a written policy may be instructive in determining whether the defendant acted negligently, and may be admissible if deemed relevant to the standard of care.

Accordingly, the appellate court reversed the trial court's order granting the motion for new trial and remanded with instructions to reinstate the jury verdict in favor of the defendant.

ANALYSIS:

Under Florida law the property owner or occupant owes a duty to its business invitees: 1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and 2) to use ordinary care to maintain its premises in a reasonably safe condition. The recent decision in Wittke is consistent with existing Florida common law which has long held that internal safety policies do not establish the standard of care owed to business invitees. While safety policies may be relevant to the duty of care in a premises liability scenario, they do not replace the "true" duty of care.

Of course, a loss may still occur despite the existence of safety policies. To this end, Wittke could prove useful to practitioners who defend businesses in the event a plaintiff (or, as in this case, the trial judge) uses the defendant's own safety policy as the benchmark for establishing the requisite duty of care.

[1] This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

JOHN GARAFFA EARNS VETERANS NETWORK MERITORIOUS SERVICE AWARD!

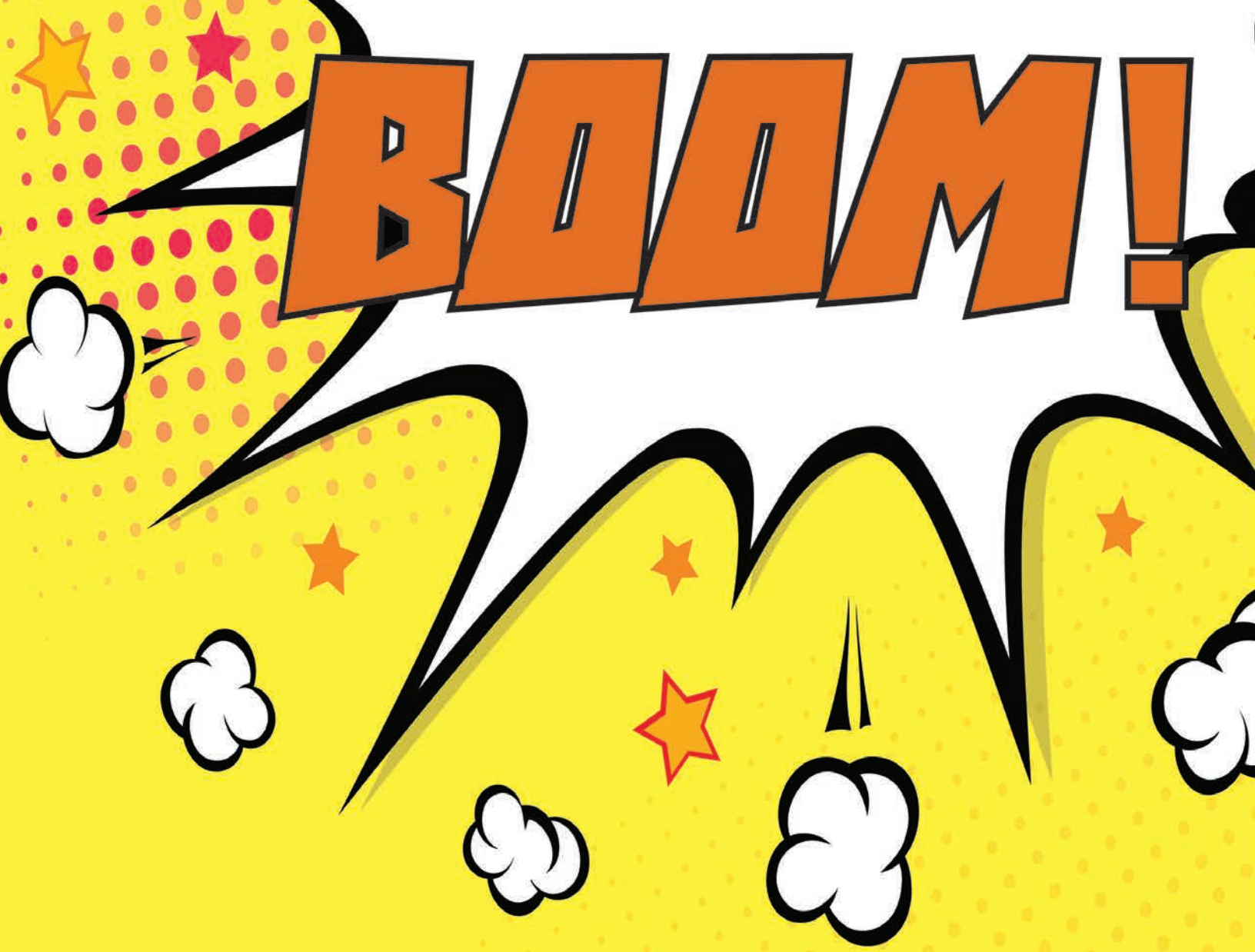
At their Annual Meeting each year, the Defense Research Institute (DRI) selects a recipient for the Veterans Network Meritorious Service Award. The recipient must be a DRI member who has served honorably as a member of the United States Armed Forces or the United States Coastguard and has distinguished him or herself by exemplary service to other veterans, their country, foreign jurisdictions or in the legal profession. Butler Weihmuller Katz Craig is proud to announce that Partner John Garaffa earned this prestigious award for his active duty service and post-service pro bono legal work on behalf of veterans.

During his 21 years John served on active duty as a member of the Judge Advocate General's Corp, United States Navy. Among other assignments, Mr. Garaffa served as the Deputy Assistant Judge Advocate General (Civil Affairs), Deputy Assistant Judge Advocate General (Information Resources)/CIO and, during his last four years of military service, the senior criminal court trial judge of the Southeast Judicial Circuit of the Navy-Marine Corps Trial Judiciary.

After leaving active duty, John continued to help fellow veterans while at Butler. One of John's pro bono cases involved a Marine who had service-connected hearing loss. John prevailed in having the decision of the Board of Veterans Appeals reversed. The Court of Appeals for Veteran's Claims found the Marine's disability to be service connected resulted in increased disability payments and a check for back pay. John's pro bono work has resulted in a number of decisions that have had a positive impact on both his client's and other veterans.

In explaining the importance of pro bono work John advised, "I think as lawyers we enjoy a great deal of success. No one is a truly self-made person. We all depend on the work of everyone else in society. That society is what these veterans have worked so hard to preserve for all of us. When some of these veterans now find themselves unable to defend themselves, it is our obligation to do so."

John Garaffa received the Veterans Network Meritorious Service Award while on stage at DRI's Annual Meeting in Boston, Massachusetts in front of many colleagues, clients and friends. John's continuing contribution as a veteran and to veterans reflects the highest traditions of both the Navy and the Firm.



MAXIMIZING RECOVERIES IN CATASTROPHIC EXPLOSIONS

by Dean S. Rauchwerger

Boom! An explosion occurs. What results is a crisis – a catastrophe for the property owner, their employees, the local community, and all stakeholders in the explosion event. Everyone connected to the explosion is touched in their business and economic interests, by insurance consequences, and by those suffering bodily injuries or fatalities. Needless to say, an explosion is an extraordinary event that forever changes the psyche of those affected. The bigger the scale of the explosion, the bigger the challenges are to move forward and to develop viable recovery claims. It is a dilemma that requires sophisticated leadership and seasoned subrogation counsel, forensic consultants, and loss adjusters.

THE AFTERMATH

Immediately, many questions arise: How did it happen? Was it avoidable? Could it happen again? How will the entities harmed overcome the many difficult challenges to stay robust and engaged in their regular course of business? Will it devastate the enterprise? Who is at fault? Who should compensate the victims? Are there legally viable recovery claims to pursue against third parties? How are those tortfeasors identified? Can sufficient evidentiary proof be established? How should the media be addressed? The government? Where do we begin? These are just a few of the many challenges inherent in the explosion crisis that must be managed and overcome to maximize the recovery opportunities of the property insurers and their insured.

The scope and depth of the recovery investigation depends on the dollars at stake, the severity of the property damages and business interruption, the complexity of determining the root cause, the loss site conditions, and the interests of government agencies and third parties. Managing the recovery investigation and pursuit requires developing near- and long-term objectives and a practical plan of action (POA) to make the recovery opportunity a tangible reality. The recovery team must be proactively energized and engaged. After all, ultimately, the jury seeks to know: 1) What caused the explosion? 2) How do we know that was the explosion cause? 3) Are alternative failure modes credibly eliminated? In short, the "but for" causation analysis remains alive and kicking.

Navigating the complex challenges and honing in on practical strategies for effectively developing viable recovery claims from a catastrophic explosion are challenging. It is a treacherous sea to sail. The fog of the crisis creates great pressures and dangers. While every crisis is an opportunity, every crisis also is, by its very nature, a time of uncertainty. The crisis must be addressed upfront for what it is – a crisis. Embrace it. The damages are likely severe and the insurance exposure big.

SUBROGATION

The $64,000 question is to subrogate or not. An effective, efficient, and strategically focused recovery investigation is vital to determine a plan of action. A provable claim needs to be developed, based on facts, credible witnesses, and good science. The subrogation team needs to avoid jumping to quick causation theories. The root cause must be thoughtfully investigated. Expect a long haul. Getting through the eye of the storm is neither easy nor quick. The recovery team needs to get in the mud, perform its dig-out, and then step back, and thoughtfully analyze the evidence.

Subrogators must explain to the insured what's involved, the importance of their support, and that the subrogation team is committed to finding out what happened. With strong, confident leadership, the recovery team will be able to navigate the explosion crisis to calm waters, and hopefully a recovery from the wrongdoers.

CRISIS MANAGEMENT

What do you do? Who do you immediately inform? Notification of interested stakeholders is critical.

These stakeholders should be considered for prompt notification:

- Risk Manager
- Insurers
- Corporate Executives and Officers
- Corporate Spokespersons
- Relevant Government Agencies

Engaging legal counsel quickly during a crisis is imperative. Choosing the right counsel is key. Confirm counsel's competence in large loss events and complex subrogation. Counsel should effectively manage a crisis to the desired outcome. Of course, counsel should be an effective communicator, capable of wearing varied hats, as needed throughout the crisis and its aftermath.

When hiring counsel, serious consideration should be given to how counsel will treat you as a client. Counsel should agree to follow your policies and guidelines, and then actually do so. As a client, you should expect and receive frequent and timely communications. You should be comfortable asking questions of counsel and expect to receive straightforward answers. Counsel should be effective at managing budgets diligently.

Although many clients "hire the attorney and not the firm," the firm supporting the attorney is important. Inevitably, the attorney you hire will require support of fellow attorneys and the firm's staff. Be sure to consider whether the support is adequate for the task.

CHOOSING EXPERTS

When choosing experts, a vital concern is whether they are qualified. Generally, in fire and explosion matters, both a cause and origin expert and one or more forensic experts may be necessary. A damages expert will likely be necessary as well. Beyond being qualified, other intangibles should be considered:

- Will the expert play well in the local community?
- Does the expert speak clearly?
- Is the expert trustworthy and credible?
- Is the expert confident in manner and in the position asserted?
- Is the expert overconfident?
- Can the expert withstand cross-examination?
- Does the expert understand that his or her role is not to litigate the case?
- Do you get along with the expert?
- Is the expert someone with whom you can spend hours in a closed room or on the phone?
- Would the expert boost the credibility of your team?

- Can the expert simplify complicated concepts for a lay jury?
- Does the expert write well, so that reports are clear and concise?
- How well does the expert understand and embrace the legal goals?
- Does the expert exhibit bias toward certain positions or unsettled theories?
- Does the expert have conflicts of interest?
- Does the expert testify for only the plaintiff's side/defense side?
- Is the expert cost-sensitive?
- Does the expert set a budget at reasonable and appropriate rates by anticipating costs and expenses, and stick to it?
- What experiences have others had with the expert?

RECOVERY THEORIES

During the investigation, experts will develop and test hypotheses for the explosion based on the available information. These hypotheses will aim to explain how an explosion's fuel and ignition source came together and how the initial explosion propagated to create the damages.

During this process, the expert will use several tools and approaches to develop and test hypotheses, combining the physical evidence with fire and explosion science (i.e., blast overpressure/wave properties, combustion chemistry, and/or fluid dynamics).

The expert will also consider several different types of explosions as part of the investigation, such as mechanical explosions, boiling liquid expanding vapor explosions (BLEVEs), chemical explosions, combustion explosions, and electrical explosions, as well as flash fires. The effects of these types of incidents will be combined with the damage and the available information regarding the system prior to the explosion (fuels, ignition sources, confinement/geometry, venting/protection systems, and blast dynamics) to rule in or to rule out various hypotheses and to determine an origin and ignition scenario for the incident.

CAUSATION CONSIDERATIONS

Operator Error or Misuse – A wide variety of incidents occur as a result of operator error or equipment misuse. If human error is a possible cause and contributing factor, investigative efforts must be tailored accordingly.

Spills or Leaks – If there is evidence of a spill or a leak that caused the explosion, investigation inquiries include the type of spill and the type of release. Whether the release was sudden or long-term must be determined.

Design Defects – Design defects should be considered when an equipment failure is involved in the explosion.

Product designers need to account for all foreseeable users and uses/misuses to which the users might put the product.

Manufacturing Defect – Manufacturing defects occur when the product is made in a way that deviates from its intended design. No matter how careful the manufacturer was when designing the product, choosing materials, creating the assembly line, and issuing quality assurance, the manufacturer may be liable for deviations.

Improper Packaging/Inspection – Improper packaging is a subset of design and manufacturing defects.

Failures to Warn – Sellers and manufacturers have a duty to warn consumers when their products or equipment pose reasonably foreseeable risks of harm..

Implied Warranties – Warranty claims are contract based. There are two types of implied warranties: warranties of fitness and warranties of merchantability.

Express Warranties – An express warranty is any affirmation of fact or promise the seller makes to the buyer, relating to the goods that becomes part of the basis for the bargain.

Protection/Suppression System Failures – Automatic fire suppression systems (wet or dry) are some of the most effective means of preventing fire damage. Explosion relief systems also mitigate the blast impact. A fire suppression or explosion relief system can be design-specific and engineered for the specific application. Failure of the system should be considered at the outset of every fire and explosion investigation. Design documentation regarding the particular system or component of interest should be obtained. Installation documentation, invoices, contracts, service providers, alarm activation history, product literature, and maintenance records should all be examined.

SUCCESSFUL RECOVERY

The key to a successful recovery pursuit is having the right team of professionals in place. The investigation and any recovery litigation must be based on credible evidence and good science. The critical gist: facts and proof make all the difference! The recovery team should be effective, efficient, and strategic in its efforts. While an explosion crisis is severe and chaotic, a strong, focused and thorough forensic investigation, with skilled leadership, affords the potential for maximizing recovery opportunities arising out of all catastrophic losses, including explosions, fires and other major calamities.

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BUTLER RAISES OVER $7,000 FOR UNITED WAY

Making a difference in the community is part of a valued principle that Butler Weihmuller Katz Craig firmly believes in: Service to their community. The Butler team participates in the United Way campaign every year, and their 2016 contribution is record breaking! Butler employees donated over $7,300 to United Way, shattering the original goal of $6,000.

"When you are part of a community you have to be a part of the give and take. That's what community is for: helping one another. I am so amazed and grateful that we are able to make such a difference," said Caroline Adams, Of Counsel, who has coordinated the United Way donations for Butler over several years.

United Way is an organization that focuses on bettering communities through helping students with education, training people to obtain stable jobs and teaching citizens about health risks. The contributions collected are used to improve lives throughout the Tampa Bay, supporting members in the community.

"I've been donating for 3 years. I love to participate because I know it's going to a good cause. United way gives back to local charities in a big way," said Patrick Malley, an IT help desk assistant at Butler.

Butler employees know how integral community is. Whether it's giving a one-time donation or enrolling in a reoccurring amount monthly, they know every dollar counts. Caroline and the rest of the employees look forward to being a part of the community in this way every year and are excited about the record breaking year.

> *"It's too easy to forget to give back, but when we can all unite amazing things happen."*
> Caroline Adams

BUTLER WOULD LIKE TO THANK THE FOLLOWING COMPANIES FOR THEIR GRACIOUS DONATIONS:

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IF YOU INVADE SOMEONE'S PRIVACY WITH A DRONE, YOUR INSURANCE MIGHT NOT COVER IT

by Ryan K. Hilton and James Michael Shaw, Jr.

This article was originally published on Property Casualty 360.com

Drones, also known as unmanned aerial vehicles or unmanned aerial systems, can be equipped with cameras, thermal scanners, license plate readers and facial-recognition software.

Able to accomplish feats that manned aircraft and even traditional remote-controlled airplanes cannot, they can get within close proximity of a person or property, unnoticed, and take audio-video recordings and photographs.

They can also provide streaming video to an audience over a small personal device like a smartphone. Given their technology and capabilities, drones allow for new forms of privacy invasion.

Drones have become increasingly popular as the technology has advanced and prices have gone down. The Federal Aviation Administration estimated that at least 1.6 million drones were sold in 2015.

Commercial and private aircraft flying legally over private property in the navigable airspace established by the FAA have always enjoyed freedom from claims of invasion of privacy.

However, drones can operate in extremely confined spaces at low altitudes, and the FAA has limited their recreational use to an altitude below 400 feet. Drones flying over a person or backyard would be lower than 400 feet, creating conditions for a forthcoming storm of invasion-of-privacy claims arising out of drone surveillance.

Common-law invasion of privacy

There are two forms of common law invasion of privacy: Intrusion upon seclusion and publication of private facts.

1. Intrusion upon seclusion

A leading treatise defines intrusion upon seclusion as a tort in which one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Intrusion upon seclusion must be intentional; there is no such tort as negligent intrusion upon seclusion.

Intrusion on seclusion means intrusion into a private space. Observation of a person in public generally does not amount to liability for intrusion upon seclusion. For example, using a drone to hover outside someone's home while using the drone's mounted camera to peer into a window without that person's permission could subject the drone operator to liability for common-law intrusion upon seclusion.

2. Publication of private facts

The second form of common-law invasion of privacy is publication of private facts. The elements of this tort are the publication of private facts that are offensive and are of no public concern.

The tort addresses the public dissemination of private information rather than the mere gathering of the information itself. Accordingly, a person who gathers the private information, but then does not publicly disseminate it, is not liable for this tort. Disseminating the private facts presupposes intent by the actor.

States taking action

Many states have passed laws directed at drones in light of growing invasion-of-privacy concerns.

States such as Florida, Idaho, North Carolina, Oregon, Tennessee and Texas have passed laws that address the use of drones by private parties. For instance, Florida's Freedom from Unwarranted Surveillance Act prohibits the use of a drone "to record an image of privately owned real property or of the owner, tenant, occupant, invitee or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent."

> *"Drone usage is creating two new invasion of privacy claims: intrusion upon seclusion and publication of private facts."*

Under the statute, "a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone." The prevailing plaintiff is entitled to compensatory damages and injunctive relief to prevent future violations against the offender, plus reasonable attorney's fees. A fee multiplier is not allowed unless the case is tried to a verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded. Punitive damages may also be awarded subject to other requirements and limitations under the law.

Some states have had stalking statutes in place for years. California, for example, passed a stalking statute a few years ago to deal, in particular, with paparazzi stalking celebrities. Stalking statutes create a private cause of action against anyone who engages in a pattern of conduct with the intent to follow, alarm, place under surveillance or harass the plaintiff, and which causes fear for safety or emotional distress. A drone can follow and hover over someone and cause considerable emotional alarm. Many news stories have reported on these types of incidents.

The courts would almost certainly be willing to permit a victim of drone-stalking to pursue a civil action under state civil-stalking statutes.

Insurance policies and privacy-invading drones

As privacy-tort claims against drone-operating policyholders begin to materialize, insurers need to be ready to make coverage determinations. The type of insurance policy issued to the drone operator may determine whether the policy will potentially cover the claim. A typical homeowners policy and a commercial general liability policy would, more than likely, not cover an insured who used a drone to violate someone's privacy, as explained below.

Homeowner policies

Coverage E under a typical homeowners policy provides comprehensive personal liability coverage. This type of coverage protects the insured against claims arising out of accidents that cause injuries or damage to others on property the insured owns or rents. A homeowners policy also follows the insured wherever he or she goes in the coverage territory, unless the accident involves an automobile, boat or aircraft (that is, an auto, boat or aircraft exclusion may apply). Coverage E applies only to accidents, though. The insuring language requires an accident that caused the injury or damage. In addition, Coverage E usually has an intentional-or-expected injury exclusion. A standard home owner's policy does not cover personal injury claims that may include invasion of privacy.

If a homeowner uses a drone to spy on her neighbor and the neighbor sues, there may not be coverage under the homeowners policy for a few reasons. First, there is no such as thing as negligent intrusion upon seclusion, as discussed above, so the insuring clause language may not be met. Second, an intentional-or-expected injury exclusion may apply, assuming the insuring language is even met. Third, an aircraft exclusion may also apply, depending upon how the policy defines "aircraft."

CGL policies

All kinds of businesses purchase commercial general liability policies. The guiding principle behind general liability insurance is that it does not cover intended or expected injuries. Along those lines, the insuring language under Coverage A requires an accident that causes injury or damage.

A small-business owner who spies on an individual could cause her "bodily injury." Some commercial general liability policies under Coverage A define "bodily injury" to include mental anguish, mental injury, shock and fright. Although the definition of "bodily injury" may be met, an invasion-of-privacy tort requires intent. Thus, the insuring language that requires an accident will not be met.

Coverage A typically also has an expected-or-intentional injury exclusion that will be triggered. Coverage A under a commercial general liability policy would therefore probably not respond to an invasion-of-privacy claim because of its intentional nature.

Coverage B under a commercial general liability policy covers "personal and advertising injury," so the drone operator facing an invasion-of-privacy claim should look under that coverage part for potential coverage. Coverage B's insuring clause typically provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." The typical policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury,' arising out of … Oral or written publication, in any manner, of material that violates a person's right of privacy." Thus, if a lawsuit alleges a violation of the right of privacy, a commercial general liability policy's Coverage B may be implicated.

The "Knowing Violation of Rights of Another" exclusion in Coverage B may likely apply, however. The exclusion precludes advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury." This exclusion may therefore preclude coverage under Coverage B for a drone invading someone's privacy.

While drones are relatively new, invasion-of-privacy claims are not. Drones simply provide a new vehicle for voyeurs and other ill-intentioned actors to invade a person's privacy.

As drone technology continues to advance, it will allow people to invade someone's privacy with more ease, so inevitably, more people will do it.

Tort law and insurance coverage issues surrounding drones may not be so different than cases involving a different and more traditional vehicle or instrument such as an automobile, model airplane and the like. Most tort laws protect against negligence and so liability policies cover negligence claims. However, invasion-of-privacy claims are intentional in nature and typical liability insurance will not cover them.

BUTLER ON DRONES

Look for Butler's Twitter feed dedicated to drones!

BUTLER DONATES OVER 80 TOYS TO STUDENTS

Tis the season for giving, and Butler Weihmuller Katz Craig continued their holiday tradition of serving the community through Tampa Bay schools. This year, two schools were selected to receive gift donations from the Butler staff.

The Patricia J. Sullivan Partnership School, which houses students from kindergarten all the way through 5th grade, welcomed Butler to participate in their annual toy drive. The Butler team banded together to sponsor 64 of the school's students, bringing in over 80 colorfully wrapped presents for these children. Butler had the presents delivered to the elementary school by Santa himself.

> "...helping people in the community makes you realize that what you're dealing with in life may be small in comparison."

Denise Marquith, a secretary at Butler, brought in several gifts for these students. "We get a lot, and I think it is important to give back to those who are truly in need," she said.

At Giunta Middle School, Butler employees delivered presents for two students. The girls, who are in 6th and 8th grade, submitted their holiday wish list which contained clothing, books and basic hygiene necessities. Employees provided the girls with these items as well as activity sets, so that the students would have a chance to partake in the holidays.

"Their lists weren't trivial. It was basic life necessities. ..It's important to put things in perspective when you can, and helping people in the community makes you realize that what you're dealing with in life may be small in comparison," said Caren Wofford, a paralegal at Butler.

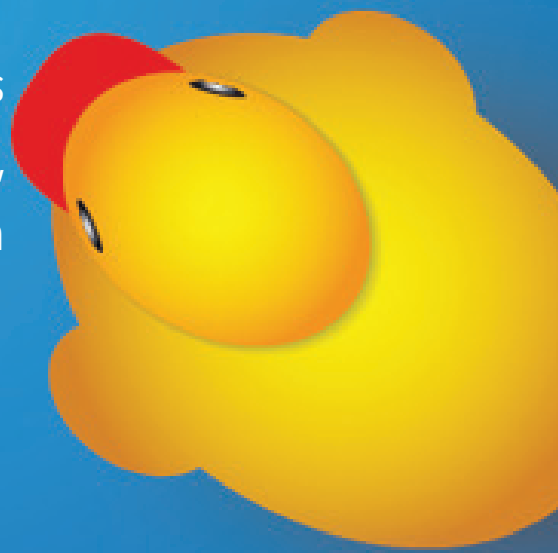
Through teamwork, service and upholding high principals, Butler employees were able to make a difference in several lives. Tom Keller, a Partner, contributed to the toy drive and was thankful for the opportunity. "We should always set an example for others and try to make the community a better place."

AWASH IN AOBS

by Timothy R. Engelbrecht

Hurricane Matthew lashed Florida's eastern coast in early October causing significant damage to both residential and commercial property. While Hurricane Matthew is gone, Florida insurers are now bracing for another type of storm, namely a flood of assigned insurance claims in the wake of Hurricane Matthew's destruction. Over the past few years, assigned insurance claims – often referred to assignments of benefits or AOBs – have been particularly challenging for first-party property insurers in Florida. AOBs raise unique issues, including fraud concerns.

Let's take a look at the history of AOBs, discuss how AOBs impact the resolution process including fraud concerns, and highlight some of the legal issues that are present with AOBs.



A Brief History of AOBs and Fraud Concerns

The typical AOB situation arises when an insured has a property loss. The loss is oftentimes a water loss due to a leaky roof, a broken pipe, or a plumbing malfunction. The insured hires a contractor to either prevent further damage or to make emergency repairs. The contractor requests the insured execute an AOB, which assigns the insured's insurance rights to the contractor in return for the contractor's services. Then, after providing the services, the contractor makes a claim directly to the insurer for payment using those assigned rights.

For nearly 100 years, Florida law has recognized that an insured may freely assign post-loss insurance benefits to another even without the insurer's consent. The seminal case on the issue is W. Fla. Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 210-11 (Fla. 1917). Citing Sec. First Ins. Co. v. State, Office of Ins. Regulation, 177 So. 3d 627, 628 (Fla. 1st DCA 2015). Florida's First District Court of Appeal ("1DCA") recently cited Teutonia in an opinion regarding the free assignability of post-loss insurance claims. The 1DCA stated "[o]n this point, we find an unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent."

However, with the increased use of AOBs in first-party property claims over the last few years, there have been concerns that some of these AOB claims are fraudulent. In fact, in the Security First case cited above, the 1DCA acknowledged in its opinion that "[the Court is] not unmindful of the concerns that Security First expressed in support of its policy change, providing evidence that inflated or fraudulent post-loss claims filed by remediation companies exceeded by thirty percent comparable services; that policyholders may sign away their rights without understanding the implications; and that a cottage industry of vendors, contractors, and attorneys exists that use the assignments of benefits and the threat of litigation to extract higher payments from insurers."

Despite that observation, the 1DCA stated that those "policy arguments and evidentiary basis for them put forth by Security First are more properly addressed to the Legislature." In fact, over the past few legislative sessions, Florida lawmakers have considered bills that would affect or limit the way AOBs are used in first-party property claims. However, to date, none of those bills have become law.

Citizens Property Insurance Corporation (Citizens) is the largest insurer in the State of Florida. In September of this year, Citizens' Consumer Services Committee published a comprehensive report showing the impact of AOBs on claims and litigation. The data for the report came from claims closed between 2011 and 2016. In a nutshell, the report shows that assigned claims took significantly longer to settle than non-assigned claims. Moreover, the report shows that an assigned claim is more than four times more likely to end up going into litigation than a non-assigned claim.

In late October of this year, ABC Action News Tampa Bay published a report stating that a roofing contractor was arrested and accused of defrauding approximately 90 homeowners out of insurance proceeds. According to the report, the contractor went door-to-door in Florida's Citrus County after a hail storm struck the area in 2014.

In most instances, the contractor offered to replace the home owner's roof in exchange for the homeowner executing an AOB to the contractor. It is alleged that the contractor received over $950,000 of insurance proceeds, but never replaced the roofs.

Guarding Against Fraud

One of the best ways for insurers to guard against suspected fraud is to gather as much information about the claim as possible. Most insurance policies contain post-loss conditions that obligate the insured to provide a sworn statement in proof of loss, or submit to an examination under oath, or provide documents to the insurer. These conditions provide the insurer with an opportunity to fully investigate the claim, which greatly reduces the chance of a fraudulent claim being paid.

In addition to those options, many insurers take recorded statements from their insureds following the first notice of the loss. A recorded statement is a convenient way for the insurer to confirm the facts of the loss and also determine if a contractor is involved. If a contractor is involved, the recorded statement allows the insurer to learn what work was actually performed and what equipment was used. Having that information early allows the insurer to be on guard for over billing when the assignee contractor submits its claim. Having a cooperatoive insured assisting the insured is one of the best ways for the insurer to guard against potential fraud.

Having a cooperative insured, especially in the AOB context, is helpful because an insurer usually does not have the ability to require an assignee contractor to comply with the post-loss conditions with which the insured has to comply with the post-loss conditions with which the insured has to comply. That is because, when an insured assigns insurance rights to a contractor, the contractor does not assume the duties and obligations of the insurance policy. Shaw v. State Farm Fire & Cas. Co., 37 So. 3d 329, 333 (Fla. 5th DCA 2010) disapproved of on other grounds by Nunez v. Geico Gen. Ins. Co., 117 So. 3d 388 (Fla. 2013).

That said, an insurer can still request that its insured fulfill those post-loss obligations even if the insured has assigned her claim to a contractor. If the insured fails or refuses to fulfill those post-loss obligations, that failure on the part of the insured may bar the assignee contractor's claim, as further noted in Shaw: "If the assignor is entitled to be paid, the assignee is entitled to be paid, but if the assignor is not entitled to be paid because of some failure of performance on the part of the assignor, then the assignee is not entitled to be paid either."

Another way insurers can guard against fraud and the inflated value of claims is by using the insurance policy's appraisal provision. Most insurance policy appraisal provisions state that, if the parties disagree on the amount of money owed under the insurance policy, either party can request appraisal.

Once appraisal is requested, each party names an appraiser, and each appraiser then estimates the value of the claim. If the appraisers agree, that sets the amount of money owed. If the appraisers disagree, then the appraisers select an umpire, and the agreement of any two of those people sets the amount of money owed.

However, some assignee contractors have tried to resist participating in the appraisal process. Some contractors argue that they only provide an emergency service (rather than actual repair to the damaged property), and the costs of such services are not subject to the insurance policy's appraisal provision. Other contractors argue that the appraisal process is a duty or obligation of the insurance policy and, along the same lines as the Shaw case discussed above, the assignee contractor cannot be compelled to perform such duties and obligations.

That issue was addressed in the recent case of Certified Priority Restoration v. State Farm Fla. Ins. Co., 191 So. 3d 961, 962 (Fla. 4th DCA 2016). In that case, Florida's Fourth District Court of Appeal ("4DCA") affirmed the trial court's ruling that compelled an appraisal that was requested by the insurer despite the fact the insured assigned her claim to a contractor. The 4DCA cited to the Shaw case discussed above and held that participation the insurance policy's appraisal process is not one of the non-delegable duties that must be performed solely by the insured. Thus, the 4DCA held that the trial court did not err in compelling the appraisal.

Some contractors try to avoid appraisal because they would rather litigate the dispute. Part of the reason some contractors prefer litigation over appraisal is because the contractor has a close relationship with an attorney, and because Florida has an attorney fee shifting statute that applies to first-party insurance disputes. In a nutshell, Florida Statute § 627.428 provides that, if an insured is required to resort to litigation and is successful against her insurer, the insured will be entitled to recover her attorney fees from her insurer. In the case of Continental Cas. Co. v. Ryan Inc. E., 974 So. 2d 368, 377 (Fla. 2008), the Florida Supreme Court held that the statute also applies to assignees of insurance benefits. That means, if an assignee contractor is required to resort to litigation against an insurer and is successful, the assignee contractor will be entitled to recover its attorney fees from the insurer as well.

Because of Florida's attorney fee shifting statute, many lawyers are eager to represent assignee contractors in litigation, especially when the loss is covered and the only dispute is over the amount of money owed. In fact, AOB work has become so coveted by lawyers in Florida that one law firm in Orlando periodically hosts what it calls an "insider secrets workshop" for contractors. The workshop promises to show contractors "the insider secrets the insurance companies don't want [them] to know." The workshop teaches contractors how to use AOBs, work authorizations, and demand letters in order to collect money from insurance companies. Contractors who attend the workshop are given a flashdrive with documents as well as a PowerPoint presentation that explains the AOB process from the perspective of the contractor and the law firm.

Moving forward

There is no doubt Florida insurers will be dealing with insurance claims
spawned by the destruction left in the wake of Hurricane Matthew and other storms for many months, if not years, to come. It is equally certain that some, if not many, of those claims will come in the form of AOB claims. By using some of the approaches discussed above, insurers can guard against fraud concerns while, at the same time, fulfilling their obligations under the insurance policy.

BUTLER *PODCAST*

Look for Timothy Engelbrecht's podcast regarding AOBs on Apple iTunes, GooglePlay or YouTube!

Available on iTunes

GET IT ON Google Play

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BUTLER 4 BOOKS

Reading is a cornerstone of education, and Butler Weihmuller Katz Craig values their community's children and their learning. That is why they launched the Butler 4 Books program. Eight schools in each of Butler's home cities were selected to received a monetary donation to improve their school's library resources.

"Our students have inquisitive minds and enjoy reading…These resources will help further our students' education and increase their love of reading," said Amy Kell, the media specialist at the John G. Riley Elementary School in Tallahassee.

In the North Dallas High School newsletter, the media specialist announced that the donation would help build the library's print and non-print novel collections.

"With school budgets being cut, libraries are lacking resources now more than ever. To be a part of a company who cares so much about their community and education makes me proud. Instead of reading books that are out dated and falling apart, these children now have brand new novels to give them a spark to reading," said Brittney Bagiardi, marketing coordinator at Butler.

Below are the following schools selected for the Butler 4 Books program:

Charlotte- West Charlotte High School
Chicago- Marcus Garvey Elementary School
Dallas- North Dallas High School
Miami- North Miami Beach High School
Mobile- Anna Booth Elementary
Philadelphia- William H. Hunter Elementary School
Tampa- Don Giunta Middle School
Tallahassee- John G. Riley Elementary School

DON'T WIN THE BATTLE AND LOSE THE WAR: PRESERVING ERROR FOR APPEAL (AND WHY YOU NEED AN APPELLATE LAWYER)

by Carol M. Rooney

This article was originally published in ABA's Committee News, Fall/Winter 2016

INTRODUCTION

Errors will happen during litigation and at trial. They are simply inevitable. Many of them will be harmless. But when the error is harmful, a trial lawyer's nightmare is finding out (too late) that the error was not preserved for appeal. This is the first of a two-part article to assist trial lawyers and corporate clients with common preservation issues and pitfalls to avoid. The first part will cover preservation of error issues and principals that are generally applicable to most jurisdictions. More importantly, how an appellate specialist can assist trial lawyers at every stage of the proceedings including preserving errors for appeal. Your appeal truly does begin the moment a lawsuit is filed. And this brings us to part two. The second part will cover the selection of appellate counsel. Many clients know what they are looking for in their litigators and trial counsel. But how do you choose an appellate lawyer? Management and corporate counsel will share their insight and tips on selecting appellate counsel and creating a synergetic team with trial counsel. Candid interviewees will discuss the timing and other factors in determining when, why and how they chose to engage appellate counsel.

FAILING TO TIMELY OBJECT WAIVES THE ISSUE FOR APPEAL (MOST OF THE TIME)

No matter the jurisdiction, there are some generally applicable principles when it comes to appeals. Appellate courts are error correcting courts. A failure to object almost universally results in an error not being preserved. Sometimes, the failure to object is a tactical decision. But too often the unpreserved error was not a "strategy call," and discovered for the first time only after an adverse judgment is entered. An appellate lawyer can help ensure that this is a deliberate process rather than an unintentional oversight.

An objection may be required at various stages of the litigation to preserve error – the pleading stage, pretrial discovery, motion practice, trial and post-trial. An appellate lawyer can tell you when, how, and why the objection needs to be made. Finally, keep in mind that your jurisdiction may require an actual ruling on the objection to preserve the issue for appeal. An objection may not be sufficient.

For example, at the pleading stage, many jurisdictions require certain defenses be pled in the initial responsive pleading to preserve the issue on appeal.[1] In some jurisdictions, a claim for attorney's fees must be pled in the complaint or answer or it is waived. But if this objection is not raised in opposition to a motion seeking fees, then this objection is waived.[2] A challenge t hat the complaint fails to state a cause of action typically must be presented by a motion to dismiss. Otherwise, it is waived. And the list goes on.

Pretrial discovery can bring its own special challenges and times when an appellate specialist may assist trial counsel. In Florida, discovery orders compelling the production of confidential or privileged information may be immediately challenged by filing a petition for writ of certiorari with the appellate court.[3] Other states have similar remedies.[4] Appellate counsel familiar with the jurisdiction can readily determine if an appellate remedy is available. Some pretrial orders are immediately appealable or can be appealed at the conclusion of the case. Certain orders must be immediately appealed or the right to appeal is forever lost. Again, an appellate specialist can let you know – before it is too late – the orders that need to be appealed immediately.

APPELLATE COUNSEL AT TRIAL – AN INDISPENSIBLE ALLY

The need for an appellate specialist probably becomes most apparent at trial. Seasoned trial counsel often welcome an appellate lawyer to the team at the trial, or even pretrial, stage. Because they know that the pretrial and trial stages are fraught with preservation traps for the unwary (or distracted). By having an appellate lawyer on hand, the trial lawyers can focus on the meat of preparing and winning their case.

At the pretrial stage, appellate lawyers often assist with evidentiary issues and particularly, motions in limine. Once a definitive ruling is obtained on a motion in limine to admit or exclude evidence, some jurisdictions do not require a renewed objection at trial.[5] Others do. Typically, when evidence is excluded, many jurisdictions require that a proffer of the evidence be made in order to preserve the issue for appeal.[6]

Selecting a jury is another area where errors can go unpreserved. Knowing the rules for peremptory and cause challenges is essential. It is not uncommon for jury selection issues to go unpreserved because the required objections to the panel were not made at the appropriate time (or at all). An appellate specialist partnered with trial counsel to select and empanel the jury will ensure that timely and sufficient objections are made.

MAKING A BETTER RECORD (FROM THE APPELLATE COURT'S PERSPECTIVE)

Once the case is on appeal, the appellate record "is what it is." It is a fundamental principle that appellate courts are "error correcting" courts. The appellate court will not consider facts and evidence not in then record. And new arguments on appeal are universally "frowned upon." In some jurisdictions, they are grounds for sanctions. All the more reason to involve appellate counsel sooner rather than later to ensure the record – if there is an appeal – will be the best possible record to support affirming or reversing the final judgment.

WELL, SHOULD YOU APPEAL? AN APPELLATE LAWYER PROVIDES PERSPECTIVE

After a lengthy, exhausting jury trial, the verdict is not in your client's favor (or even close). Of course, the immediate instinct is to appeal, right? But the decision to appeal will need to be evaluated realistically, not emotionally, in consideration of the prospects for a successful appeal. And here is where the appellate specialist may prove most valuable to you and your shared client. He or she will temper the disappointment of the loss with the reality of the appeal. The intricacies and nuances of harmless v. harmful error; the standards of review to be applied; and the nature and significance of the errors will no doubt factor into appellate counsel's evaluation of the likelihood of success. Even where the odds are slim, the decision to appeal may be made. But at least it will be made with a fresh and objective perspective provided by consulting with appellate counsel.

OK, SOUNDS GOOD, BUT WHAT ABOUT THE EXPENSE?

A corporation's litigation budget may be determined by the type of case, the jurisdiction and many other factors. Some budgets already factor in a possible appeal. Other budgets may not include appellate counsel's involvement at the pretrial or motion stage. Each company ultimately decides according to its own particular needs, case load and risk tolerance. The expense of appellate counsel is the ultimate risk/ benefit analysis. Prevailing at trial is not a really a victory if the verdict is reversed on appeal because of harmful error inadvertently made. And neither is an affirmance of a final judgment because of unpreserved error. Can you really afford not to? Interviewees in Part Two will answer this question (and others). Stay tuned...

1 Pennsylvania, Indiana and Florida are just a few of the jurisdictions with such a rule. *See Matthews v. Malloy, 272 A.2d 226 (Pa. Super. Ct. 1970); City of Hammond, Lake Cnty. v. N. Indiana Pub. Serv. Co., 506 N.E.2d 49 (Ind. Ct. App. 1987); Goldberger v. Regency Highland Condo Ass'n, Inc., 452 So. 2d 583 (Fla. Dist. Ct. App. 1984).*

2 This remains the rule in Florida. *See Stockman v. Downs, 573 So. 2d 835 (Fla. 1991).*

3 *See Gosman v. Luzinski, 937 So. 2d 293 (Fla. Dist. Ct. App. 2006)* (finding certiorari review is proper when discovery order compels the production of privileged materials).

4 For example, in Texas, the remedy is via petition for a writ of mandamus. *See D.N.S. v. Schattman, 937 S.W.2d 151 (Tex. App. 1997)* (noting writ of mandamus is proper vehicle to attack order granting or denying discovery).

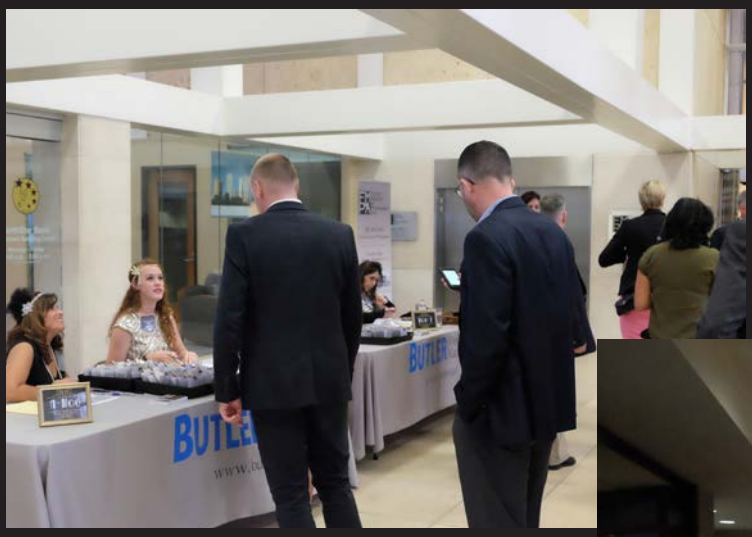
5 This is the law in Florida. *See Powell v. State, 79 So. 3d 921 (Fla. Dist. Ct. App. 2012).*

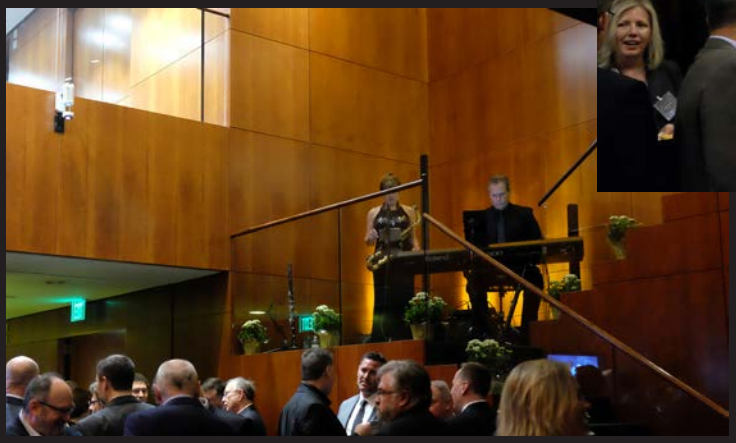
6 Kansas is such a jurisdiction. *See Brunett v. Albrecht, 810 P.2d 276 (Kan. 1991)* (ruling when motion in limine has been granted, it is the responsibility of party being limited to proffer sufficient evidence to trial court to preserve issue for appeal).

ANNUAL COCKTAIL RECEPTION
THE ROARING 20s

On Tuesday, January 24th, the Tampa office was transformed into the Roaring 20s for our annual LEA reception. This year's theme, Puttin' on the Ritz, captured the glitz and glam of the 20's and was complete with Butler employees dressed in flapper outfits, regal elevator staff, a golden-laden table of delicious time-period foods, and plenty of libations for everyone to enjoy. On the Butler TV's, Butler guests were able to view rolling video clips of the time period. The guests arrived at 5:30 and were entertained by good company, musical interludes and a speakeasy where a cigar bar was located for guests.

A special thank you is extended to Jackie Bing who volunteered to lead the planning efforts of this LEA. Debbie Jaye also provided assistance to Jackie and created the Roaring 20s theme. Jeff Warkentien created the Roaring 20s ambience with his artwork and designs that were seen throughout the room. Brittney Bagiardi provided support and assistance in keeping everything on track and organized. Of course, the dedication to Service, Teamwork, Principles was provided by the rest of our Team, to whom we are most appreciative. We wish to also thank James Anderson, Mary Buckmaster, Maleia Crews, Lisa Farrell, Natasha Fernandez, Nicole Forrest, Laura Gonzalez, Bryan Higgins, Dom LeCao, Denise Marquith, Rick Mulder, Kara Reynolds, Carol Serrano, Christine Turner, Tenille Turner and Kelly White – plus the entire Dex Team!






RESTROOMS
SPEAKEASY &
CIGAR BAR
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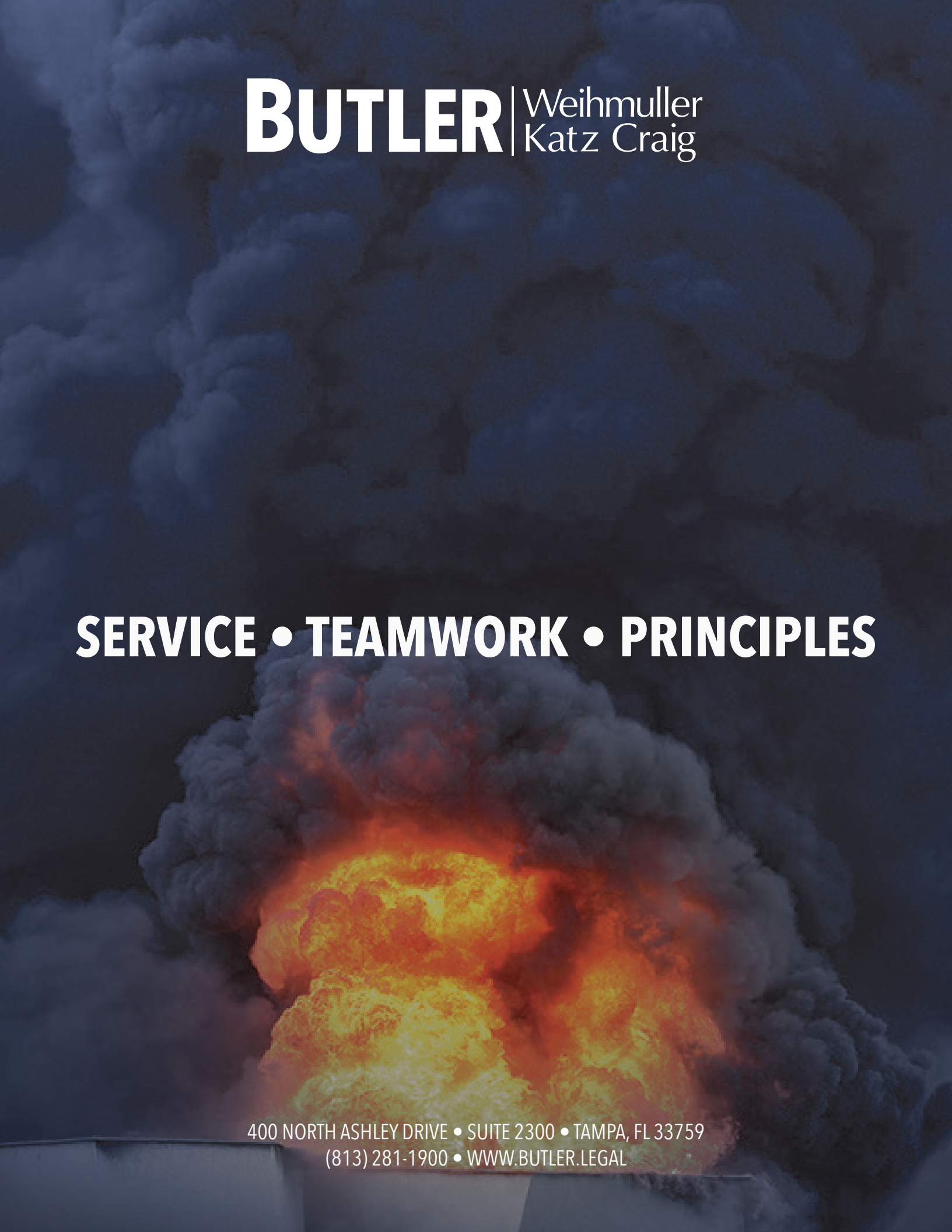
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