QUARTERLY

Newsletter

COLE, SCOTT & KISSANE, P.A. | WINTER 2015 -2016

Proposals for Settlement and the New Breed of Strict Construction

Does Your Exculpatory Contract Say the Magic Words?

Defending the Insured under a Reservation of Rights

The Legal Implications of Cell Phone Use While Driving

FROM THE OFFICES OF COLE, SCOTT & KISSANE, P.A.

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Bonita Springs

TRUE

Trivia Question

FALSE

For an exculpatory contract to be enforceable, it must contain the following language:

"I hereby release X from all liability, whether caused by X's own negligence or otherwise."

» The first ten readers to respond correctly will receive a $10.00 Starbucks gift certificate.
» Please respond by e-mail to Quarterly.Trivia@csklegal.com.
» Please remember to include your name and address with your entry.
» The contest deadline is March 30, 2016.
» See the last page for Official Contest Rules.

A Note from the Editors

Dear Readers:

Thank you for your continued interest in our Quarterly. It is with great pleasure that we present to you our Winter 2015-2016 Edition. This issue is especially exciting as it is the first issue in which we will serve as your Editors. It is our hope and our goal to continue to deliver a superb publication of the quality it has successfully maintained over the past 18 years.

The Quarterly truly is the result of a firm-wide effort, drawing upon the combined legal experience of over 300 exceptional lawyers. It gives the CSK team the opportunity to share our wealth of knowledge and experience in current litigation trends with our valued clients and colleagues, as well as prospective clients. This Edition in particular covers a variety of topics. Our attorneys have provided insight into a recent Florida Supreme Court decision involving exculpatory contracts, the current trend in case law requiring strict construction of proposals for settlement, the legal implications of cell phone use while driving, and defending the insured under a reservation of rights.

We are always looking for ways to improve our publication. If you have any comments or suggestions, please let us know. We greatly value your feedback. Also, congratulations to the winners of our last Quarterly Trivia Contest. We encourage you all to participate in this Edition's Trivia Contest for your chance to win.

We look forward to hearing from you and wish you a safe and wonderful New Year.

Sincerely,

Linda C. Sweeting and Lissette Gonzalez

Linda C. Sweeting, Esq., Editor - **Lissette Gonzalez, Esq.**, Editor - **Angelica Velez,** Design Editor

PROPOSALS FOR SETTLEMENT AND THE NEW BREED OF STRICT CONSTRUCTION

By Kathryn L. Ender, Esq.

Proposals for settlement have become common-place in litigation as a strategic means to engage settlement, and as a fee-shifting mechanism in the event settlement reaches impasse. Florida Rule of Civil Procedure 1.442 governs the content of proposals for settlement. Although a rule of procedure, the Florida Supreme Court has definitively held that it must be strictly construed due to its penal implications.[1] However, what used to be strict construction based upon a reasonable interpretation of the statute has morphed into an imbalanced treatment of the rule's provisions at the behest of strict construction.[2] The result is inconsistent application of the rule's provisions by the Florida courts; thereby invalidating otherwise unambiguous proposals for settlement, and leaving counsel and claims professionals to speculate as to what is sufficient to satisfy the rule's requirements.

The Florida Supreme Court has recently accepted jurisdiction over this issue to determine whether a proposal for settlement can satisfy the requirements of Rule 1.442(c)(2)(F) when it does not directly "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim."[3] Until now, finding the legally-correct answer to this question has created a conflict in Florida in cases where attorneys' fees are not explicitly part of the plaintiff's legal claim. Specifically, the Third and Fourth District Courts of Appeal have upheld proposals that do not precisely adhere to the language of Rule 1.442(c)(2)(F), concluding that no ambiguity existed and that the terms were sufficient for the party to make an informed decision.[4] Whereas, the First District has rejected this approach, concluding that "the test is strict compliance, not the absence of ambiguity."[5]

Notably, the impact of this yet-to-be resolved conflict is that there are likely many pending proposals for settlement that would be unenforceable if the Florida Supreme Court adopts the First District Court of Appeal's analysis. Given this present legal conflict, it is prudent for counsel and claims professionals to be mindful of the Florida courts' ever-increasing scrutiny, and strictly adhere to the rule's requirements.

The case recently certified to the Florida Supreme Court is that of *Borden Dairy Company of Alabama, LLC and Major O. Greenrock v. Susanne L. Kuhajda*.[6] The particular issue certified is whether, in cases where a complaint does not make a claim for attorneys' fees, a proposal for settlement can satisfy the requirements of Rule 1.442 when it does not explicitly "state whether the proposal includes attorneys' fees" and "whether attorneys' fees are part of the legal claim."[7]

In *Kuhajda*, no legal claim for attorneys' fees was made in the complaint.[8] The proposals stated that they included "costs, interest, and all damages or monies recoverable under the complaint by law," but did not include the specific fee language set forth in Rule 1.442(c)(2)(F).[9] The defendants argued that the proposals were ambiguous because they did not include the specific fee language of Rule 1.442(c)(2)(F) and, therefore, did not strictly follow the rule's requirements.[10] The trial court disagreed and found that the failure to include the attorneys' fee language did not create an ambiguity because the plaintiff never sought attorneys' fees in the complaint.[11] On appeal, the First District Court of Appeal reversed, concluding that "the supreme court has made the test strict compliance, not the absence of ambiguity."[12]

This holding is directly contrary to that of the earlier Fourth District Court of Appeal decision in *Bennett*.[13] In *Bennett*, the Fourth District Court of Appeal considered a substantially similar issue and upheld the validity of a proposal for settlement, calling the fee

language "mere surplussage" when there is no claim for attorneys' fees made in the complaint.[14] As the Fourth District Court of Appeal explained, the purpose of Rule 1.442 is to "provide an efficient mechanism to convey an offer of settlement to the opposing party free from ambiguities so that the recipient can fully evaluate its terms and conditions."[15] Thus, although the provisions of Rule 1.442 are to be strictly construed, "this rule of construction should not eviscerate the legislature's policy choice. When reviewing offers of judgment courts should use reason and common sense and interpret the offer as a whole to avoid unreasonable results."[16]

In spite of the Florida District Courts' inconsistent treatment of what constitutes "strict construction," the Florida Supreme Court has determined that the most critical characteristics of a proposal are that it: (1) follow the technical requirements of Rule 1.442; and (2) not be ambiguous.[17] Thus, the key is clarity. As the Fourth District Court of Appeal has commented, the parties should not "nit-pick" the validity of a proposal for settlement based upon allegations of ambiguity unless the asserted ambiguity could "reasonably affect the offeree's decision on whether to accept the proposal for settlement."[18]

Practically, just as it is inequitable to allow parties to be subject to attorneys' fees when they cannot reasonably evaluate the terms and conditions of a proposal due to ambiguities, so too would it be inequitable for a party to benefit from the Florida courts' reliance on strict construction to create ambiguities that do not otherwise exist. One example of a so-called ambiguity appears in the argument made in *Kuhajda*, where there was no legal right to fees, yet liability for fees was circumvented as a result of an ambiguity that was allegedly created by not formally referencing the fee provision of Rule 1.442(c)(2)(F). Similar concerns may result where no legal claim for fees is made, yet the proposal purports to "include" attorneys' fees in an effort to satisfy the rule's requirements. A further practical concern arises when parties argue that strict construction equates to "verbatim recitation" of the rule, because anything less could be deemed an "ambiguity."[19]

The Florida Supreme Court's consideration of this issue is necessary in order for Rule 1.442 to maintain its utility. While we await the outcome of the Florida Supreme Court's decision on the certified question in *Kuhajda*, counsel and claims professionals should remain cognizant of this conflict in the law and ensure their proposals comply with the First District Court of Appeal's more-strict interpretation of Rule 1.442's requirements. Additionally, a renewed evaluation of pending proposals for settlement may help ensure litigation goals are reached by confirming the proposals satisfy the rule's requirements, and by allowing new proposals to be served in cases where they do not.

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1 *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So.2d 276 (Fla. 2003).

2 *Cf. State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1070 (Fla.2006) (requiring a proposal merely to be "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification"); *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 377-78 (Fla. 2013) (holding that, under the facts of that case, the party's failure to include a provision of rule 1.442 created an ambiguity by omission). *Compare Bennett v. American Learning Systems of Boca Delray, Inc.*, 857 So.2d 986 (Fla. 4th DCA 2003) (hereinafter "*Bennett*") ("The purpose of the rule is to provide an efficient mechanism to convey an offer of settlement to the opposing party free from ambiguities so that the recipient can fully evaluate its terms and conditions."), *and Three Lions Construction, Inc. v. The Namm Group, Inc.*, 2015 WL 4464494, at *1 (Fla. 3d DCA July 22, 2015) (hereinafter "*Three Lions*") (holding that a proposal satisfied the requirements of *Diamond Aircraft* even though it did not track the language of Rule 1.442(c)(2)(F)), *with Borden Dairy Company of Alabama, LLC and Major O. Greenrock v. Susanne L. Kuhajda*, 171 So.3d 242, at 243 (Fla. 1st DCA 2015) (hereinafter "*Kuhajda*") (concluding that the test is "strict compliance, not the absence of ambiguity").

3 *Suzanne L. Kuhajda v. Borden Dairy Co. of Alabama, LLC and Major O. Greenrock*, 2015 WL 8204268, SC15-1682 (Fla. Nov. 30, 2015); *see also Colvin v. Clements and Ashmore, P.A. d/b/a North Florida Women's Care*, 2015 WL 167010 (Fla. 1st DCA Jan. 15, 2016) (relying on *Kuhajda* to find a proposal unenforceable and certifying same conflict to Florida Supreme Court).

4 *Bennett*, 857 So.2d at 986; *Three Lions*, 2015 WL 4464494, at *1.

5 *Compare Bennett*, 857 So.2d at 986 (holding that the proposal does not have to state whether it "includes attorneys' fees and whether attorneys' fees are part of the legal claim" in a case in which the plaintiff's complaint did not contain a plea for attorneys' fees), *with Kuhajda*, 171 So.3d at 243 (holding that the proposal does have to state whether it "includes attorneys' fees and whether attorneys' fees are part of the legal claim" in a case in which the plaintiff's complaint does not contain a plea for attorneys' fees, and certifying the issue as a conflict for determination by the Florida Supreme Court).

6 *Kuhajda*, 171 So.3d at 243.

7 Fla. R. Civ. P. 1.442(c)(2)(F).

8 *Kuhajda*, 171 So.3d at 242.

9 *Id.* at 242-43.

10 *Id.* at 243.

11 *Id.* at 243.

12 *Id.* (quoting *R.J. Reynolds Tobacco v. Ward*, 141 So.3d 236, 238 (Fla. 1st DCA 2014)).

13 *Id.* (certifying conflict with *Bennett*).

14 *Bennett*, 857 So.2d at 988.

15 *Id.*

16 *Jacksonville Golfair, Inc. v. Grover*, 988 So.2d 1225, 1227 (Fla. 1st DCA 2008).

17 *Nichols*, 932 So.2d at 1078.

18 *Alamo Financing, L.P. v. Mazoff*, 112 So.3d 626, 629 (Fla. 4th DCA 2013) (quoting *Carey-All Transp., Inc. v. Newby*, 989 So.2d 1201, 1206 (Fla. 2d DCA 2008)).

19 *Cf. Miley v. Nash*, 171 So.2d 145 (Fla. 2d DCA 2015) (holding that a proposal resolving "all claims" sufficiently identified the claims to be resolved without specifically identifying the consortium claim, and explaining that "[t]he wording of these conditions does not create any ambiguity as to what the effect of accepting the proposal will be."), *cert. denied* 2015 WL 9306766 (Fla. Dec. 18, 2015); *Three Lions*, 2015 WL 4464494, at *1 (observing that a proposal for settlement satisfied the requirements of *Diamond Aircraft* where it simply stated that the "proposal includes any attorney fee claim [the offeree] may have against [the offeror]" and did not track the language of Rule 1.442(c)(2)(F)).

Cole, Scott, & Kissane P.A.
is pleased to announce its new Partners:

Kristyne Kennedy

of Orlando

Tawna Schilling ~ Stephen Stukey

of Tampa

Lara Dabdoub ~ Sarah Egan ~ Kathryn L. Ender

Benjamin Fernandez, IV ~ Joseph Goldberg

Rochelle Nunez

of Miami

Joshua Goldstein ~ Daniel Levin ~ Alan St. Louis

of West Palm Beach

Blake Cole

of Jacksonville

COLE, SCOTT & KISSANE, P.A. CSK ATTORNEYS AT LAW

DOES YOUR EXCULPATORY CONTRACT SAY THE MAGIC WORDS?

By Eric T. Rieger, Esq.

Cole, Scott & Kissane has highly trained attorneys who focus on the defense of the fitness, travel and entertainment industries. Quite often, these industries offer facilities or services to the public or to private members that involve a heightened risk of sustaining personal injuries. As a means of reducing potential exposure to personal injury claims, our clients often require patrons or guests to sign membership contracts or release agreements that contain exculpatory clauses purporting to limit liability for personal injuries sustained by the patron or guest.

These defenses are rarely ironclad. In fact, Florida law imposes very stringent requirements on exculpatory clause defenses because public policy disfavors them. Exculpatory contracts are not favored because they attempt to relieve a party of the duty to exercise due care while simultaneously shifting the risk of injury to a party who is perhaps less equipped to take the necessary precautions to avoid the risk of injury or to bear the risk of loss.[1] Of course, there is a countervailing public policy—that which favors the enforcement of contracts.[2]

In order to strike a balance between these competing public policies, Florida courts have limited the enforcement of exculpatory contracts to instances where such agreements were unambiguous and the intention to be relieved from liability was clear, unequivocal and so understandable that an ordinary and knowledgeable person would know what he or she is contracting away.[3] For decades, our District Courts of Appeal have interpreted these requirements to mean that an exculpatory clause was only effective to bar a negligence action if it expressly stated that it released a party from liability for its own negligence.[4] This rule required an exculpatory clause to make reference to the terms "negligence" or "negligent acts" as a predicate to its enforcement.[5]

When analyzing an exculpatory clause defense, our trial courts typically ask at least four questions:

> Did the plaintiff personally sign the contract containing the exculpatory clause?
>
> Was it signed before the injury occurred?

> Was the plaintiff over the age of 18 when he or she signed it? And,
>
> Did the exculpatory clause contain the magic language? (e.g. "I hereby release X from all liability, whether caused by X's own negligence or otherwise.")

If the answer to any one of those questions was "no," then the likelihood of prevailing on such a defense was, in most circumstances, practically nil.

However, in 2015, the Florida Supreme Court in *Sanislo v. Give Kids the World, Inc.* may have changed that analysis, at least as it pertains to the magic language requirement.[6] Give Kids the World, Inc. was a non-profit organization that provided free "storybook" vacations to seriously ill children at its resort village.[7] Ms. Sanislo's child received one such vacation package.[8] As part of her application, and again upon arriving at the resort, Ms. Sanislo signed a release, which read, in pertinent part:

> I/we hereby release Give Kids the World, Inc. and all of its agents, officers, directors, servants, and employees **from any liability whatsoever** in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other participants.

> The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind . . .
>
> I/we further agree to hold harmless and to release Give Kids the World, Inc. from and against any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us . . . [9]

(Emphasis added.) While at the resort, Ms. Sanislo stepped onto a wheelchair lift that malfunctioned, causing her to fall and sustain injuries to her hip and back.[10] Ms. Sanislo filed suit.

Give Kids the World, Inc. filed a motion for summary judgment based upon the language of the exculpatory clause, which the trial court denied.[11] The Sanislos prevailed at the trial court level and Give Kids the World, Inc. appealed.[12] The Fifth District Court of Appeal, rejecting decades of jurisprudence from Florida's other District Courts of Appeal, reversed the trial court's denial of the defendant's motion for summary judgment and found that the language of the exculpatory clause was unambiguous and enforceable, despite the lack of any reference to the terms "negligence" or "negligent acts."[13] This presented a conflict among the District Courts of Appeal on an important issue of law.

In a landmark 4-3 decision, the Florida Supreme Court held that the absence of the words "negligence" or "negligent acts" in the exculpatory clause did not render the agreement per se ineffective to bar a negligence claim. In so holding, the Court reasoned that the term "liability" was more readily understandable than "negligence" to an ordinary and knowledgeable person.[14] Thus, an agreement that expressly relieved a party from "any liability whatsoever" and which also provided that the scope of the exculpatory agreement included "damages or losses or injuries" could be enforceable even though it did not reference the term "negligence."[15]

Although *Sanislo* appears on its face to broaden the enforceability of pre-injury releases, the fact remains that exculpatory clauses are in derogation of common law and public policy and will, therefore, continue to be strictly construed by our courts. In fact, the United States District Court for the Southern District of Florida has already observed that *Sanislo* may have limited applicability based upon the Florida Supreme Court's note that it was important to its decision that the activities at issue in the *Sanislo* case "were not inherently dangerous."[16] Nonetheless, *Sanislo* represents a significant and perhaps promising departure from decades of jurisprudence that could have a positive impact on the fitness, travel and entertainment industries' abilities to limit potential exposure to personal injury claims.

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1 *Applegate v. Cable Water Ski, L.C.*, 974 So.2d 1112, 1114 (Fla. 5th DCA 2008).
2 *Ivey Plants, Inc. v. FMC Corp.*, 282 So.2d 205, 208 (Fla. 4th DCA 1973).
3 *Cain v. Banka*, 932 So.2d 575, 578 (Fla. 5th DCA 2006).
4 *Levine v. A. Madley Corp.*, 516 So.2d 1101 (Fla. 1st DCA 1987); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So.2d 318 (Fla. 4th DCA 1984); *Goyings v. Jack & Ruth Eckerd Found.*, 403 So.2d 1144 (Fla. 2d DCA 1981).
5 *Id.*
6 *Sanislo v. Give Kids the World, Inc.*, 157 So.3d 256 (Fla. 2015).
7 *Id.* at 258.
8 *Id.*
9 *Id.* at 259.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at 260.
15 *Id.* at 270.
16 *Salas v. Schachter*, 2015 WL 7007803, at *2 (S.D. Fla. 2015) *quoting Sanislo*, 157 So.3d at 271.

F.A.W.L.

(Florida Association for Women Lawyers)

Event

Miami Partners (from left to right) Sheila Gonzales-Jonasz, Temys Diaz, Mindy Thornton, and Jennifer Ruiz attended the Reception on behalf of CSK.

CSK was a proud sponsor of the Annual Judicial Reception hosted by the Miami-Dade Chapter of the Florida Association of Women Lawyers.

CSK HELPS WITH
Clean Water Projects

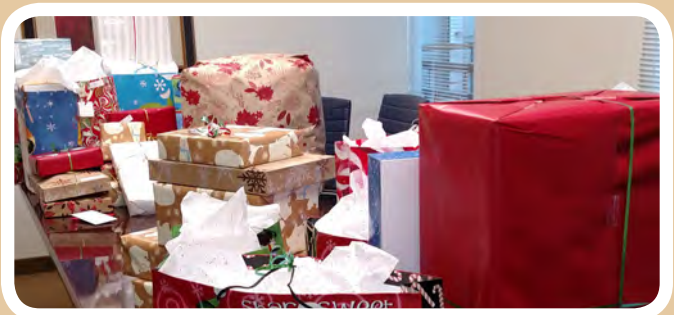
Pictured: Daniel A. Perez, Esq. and Gene P. Kissane, Esq.

Did you know that 748 million people do not have access to clean water? BLUE Missions Group combats this crisis throughout the world by building aqueducts in remote towns that do not have access to clean water. Daniel A. Perez, an Associate Attorney at CSK, has participated in these mission trips, digging trenches and laying water pipes. CSK recently participated in BLUE's annual gala to help raise $50,000.00 in donations for water projects that BLUE has underway in the Dominican Republic. If you are interested in supporting this effort to provide clean water to people worldwide, please join BLUE and CSK by visiting http://www.bluemissions.org for more information.

CSK's Miami Office
Sponsored 142 Foster Children This Holiday Season

This holiday season the Miami office's foster care toy drive was an astounding success. Through the generosity of many volunteers, CSK sponsored 142 foster children, which nearly doubled the number of children sponsored in the previous year. The firm delivered the gifts to the holiday party held for the over 5,300 children who have been placed in foster care. CSK will be recognized locally as one of the top corporate donors for this toy drive.

CSK's West Palm Beach Office
Supports the Children's Home Society of Florida



Thanks to generous donations from attorneys and staff, which CSK matched, the West Palm Beach office collected more than $1,700 this holiday season for the Children's Home Society of Florida. Through these efforts, CSK supported two at-risk families by providing the most basic necessities, such as diapers, toiletries, and clothing. CSK also purchased toys for the children to help make their holidays especially joyful and bright.

DEFENDING THE INSURED UNDER A RESERVATION OF RIGHTS

By David S. Harrigan, Esq.

Insurers providing coverage under a standard CG 00 01 insuring agreement obligate themselves to "pay those sums that the insured becomes obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies." In doing so, insurers assert the "right and duty to defend the insured against any 'suit' seeking those damages." Invariably, when claims are made for damages that may be covered under the insuring agreement, questions arise as to whether a duty to defend has arisen, and if so, whether the insured has a right to "mutually agreeable counsel."

The Duty to Defend

A standard CG 00 01 insuring agreement generally defines a "suit" as follows:

> …a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.[1]

Florida law requires courts to construe insurance contracts "in accordance with the plain language of the policies as bargained for by the parties."[2] Where the policy language is plain and unambiguous, no special rule of construction or interpretation applies; and the court should give the plain language in the contract the meaning it clearly expresses.[3]

The United States District Court for the Southern District of Florida, in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, recently discussed the duty to defend under a standard CG 00 01 insuring agreement. Specifically, the Court analyzed what constitutes a "suit" under a standard CG 00 01 policy, thereby giving rise to the insurer's right and duty to defend.[4]

In deciding whether a Notice of Claim served pursuant to Chapter 558, Florida Statutes, constituted a "suit," the Court relied upon the *Black's Law Dictionary* definition of the phrase "civil proceeding" contained in the policy's definition of the term. A civil proceeding is defined as "a judicial hearing, session or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in a dispute between litigants in a matter relating to torts, contracts, property, or family law."[5] The Court also considered the Florida Supreme Court's "reasoned analysis" in determining that the collective meaning of "civil action" and "proceeding" includes "[a] procedural means for seeking redress from a tribunal or agency."[6]

Ultimately, the Court declined to expand the definition of the term "suit" to include a Notice of Claim served pursuant to Chapter 558, Florida Statutes.[7] Since the term "suit" is clearly and unambiguously defined within the policy, the Southern District held that the "right and duty to defend" under a CG 00 01 insuring agreement arises when the insured is faced with a "suit".[8]

The Right to "Mutually Agreeable Counsel"

Once a determination is made that the "right and duty to defend the insured against any "suit" exists under the policy, the question becomes whether the insured is entitled to counsel of its choice, or at least "mutually agreeable counsel." Strictly speaking, within the

confines of the standard CG 00 01 insuring agreement, the answer is "NO". The standard CGL policy provides no entitlement for an insured to hire legal counsel of its choosing at the expense of the insurer.

However, the manner in which the insurer acts upon this duty to defend may alter the parties' obligations and unwittingly create new rights and obligations in both the insurer and the insured. This is particularly true where the insurer provides notice that the defense will be provided under a "Reservation of Rights" - a notification to an insured that coverage for a claim may not apply.[9] This notification allows an insurer to investigate, or even defend, a claim to determine if coverage applies, without waiving its right to later deny coverage based on information revealed during the investigation.[10] The entitlement of an insurer to defend under a Reservation of Rights does not arise from the language of the policy itself. Rather, the insurer's entitlement to defend must arise by operation of statute or a contractual relationship independent of the insuring agreement.

Florida Claims Administration Statute

Florida Statutes provide that an insurer must provide written notice of a Reservation of Rights to the insured or those rights are otherwise waived. Florida's Claims Administration Statute, in particular, provides that "a liability insurer shall not be permitted to deny coverage *based on any particular coverage defense*" unless the insurer gives written notice of Reservation of Rights to the named insured within thirty days after the liability insurer knew or should have known of the coverage defense.[11]

A "coverage defense" is "a defense to coverage that otherwise exists,"[12] examples of which include a failure to cooperate or a failure to provide timely notice of claims. However, coverage defenses *do not* include a disclaimer of liability based upon an express exclusion in the policy.[13] It follows, then, that an insurer is not statutorily obligated under the Claims Administration Statute to issue a Reservation of Rights where coverage may simply be excluded by the terms of the insuring agreement.

If a coverage defense is available and the insurer provides a statutory Reservation of Rights, the Claims Administration Statute will trigger an obligation for the insurer to retain "*independent counsel which is mutually agreeable to the parties.*"[14] Therefore, the insurer must ensure that there is mutual assent between the insurer and the insured. If the insurer unilaterally retains counsel, it is the literal antithesis of the concept of mutual selection and constitutes the insurer's failure to comply with its statutory obligations.[15] The consequence of such a failure to comply will result in an insurer's inability to deny coverage, and the insured may then proceed independently toward settlement and bind the insurer to its bargain.[16]

An example of the insurer's obligation to obtain mutual assent is found in *American Empire Surplus Lines Ins. Co. v. Gold Coast Elevator, Inc.*, in which the insurer belatedly learned of a lawsuit served upon its insured.[17] As a result, the trial court entered a default against the insured.[18] Once the insurer received notice of the lawsuit, it promptly assigned counsel to provide a defense. Although the counsel assigned had not been mutually selected, the insured voiced no objection.[19] Nonetheless, the Court declined to interpret the insured's silence as acquiescence, which would have lead to deeming the selection of counsel as mutually agreeable.[20] Instead, the Court determined that the insurer's failure to affirmatively obtain assent from the insured constituted a violation of its statutory duty to assign mutually agreeable counsel, and thus, its conduct was tantamount to a refusal to defend under the policy.[21] The Court held that the insured was free to settle the claims without the consent of the insurer and could thereafter seek reimbursement from the insurer.[22]

Reservation of Rights Issued as Disclaimer of Terms in the Insuring Agreement

Insurers often provide notice that a defense will be provided pursuant to a Reservation of Rights despite the absence of any correlation with an asserted "coverage defense" under the Claims Administration Statute. In such cases, the Reservation of Rights does not fall within the framework of Claims Administration Statute, and by its express terms should not implicate the insured's statutory right to "mutually agreeable counsel." Instead, the Reservation of Rights operates more so as a reminder to the insured that the duty to defend is honored, but subject to the terms, conditions and exclusions set forth in the policy. Nevertheless, insurers should be cautious because this approach could still bind the parties to the insuring agreement to new and previously uncontemplated rights and obligations.

For example, in *Colony Ins. Co. v. G & E Tires & Service, Inc.*, the insured requested a defense on numerous occasions, but each time was denied a defense due to the applicability of policy exclusions.[23] Although the insurer did not assert a coverage defense and had no statutory duty to issue a Reservation of Rights or assign mutually agreeable counsel, the insurer nevertheless tendered a

Reservation of Rights, stating that:

> This letter is to serve as a reservation of Colony's rights to deny coverage and/or defense under the Policy and/or applicable law and further, with respect to defense costs incurred or to be incurred in the future, *to be reimbursed and/or obtain an allocation of attorney's fees and expenses if it is determined that there is no coverage*.[24]

The insured accepted the defense under this express Reservation of Rights. However, the lower court ultimately determined that the substance of the suit was unequivocally excluded from coverage under the policy.[25] Thereafter, the First District found that the insured had accepted the tendered performance and could not thereafter materially alter the terms of its agreement to accept the defense on a Reservation of Rights. Under those circumstances, the Reservation of Rights created independent contractual obligations, and once the lower court adjudicated that coverage under the policy did not exist for the underlying claims, the insured was required to reimburse Colony for the attorney's fees and expenses incurred in the defense.[26]

A Reservation of Rights in such circumstances is not provided pursuant to any statutory requirement or a requirement of the policy. Therefore, a separate contractual relationship with entirely new obligations might arise; and an insured's right to mutually agreeable counsel could ultimately be grounded in these new contractual terms. Thus, the insurer must be careful to ensure that all terms contained in the Reservation of Rights are clearly stated, and that both the insured and the insurer have a clear understanding of all terms.

Even under circumstances where there is no statutory obligation to issue a Reservation of Rights, if there is any doubt regarding whether coverage exists for the damages claimed, the insurer may wish to provide this notice to the insured in an abundance of caution once the duty to defend is triggered. Although the doctrines of waiver and estoppel do not operate to create coverage where none originally existed, "when an insurance company assumes the defense of an action, with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage."[27]

Conclusion

Where a duty to defend is triggered, no right exists under a standard CG 00 01 insuring agreement for an insured to select counsel of its choice, or otherwise insist on the selection of "mutually agreeable counsel." Rather, the Legislature created the insured's right to select counsel under the strict and limited circumstances that arise under Florida's Claims Administration Statute. However, Florida Courts continue to generate an ever-expanding minefield of ambiguity and uncertainty where insurers tender Reservations of Rights outside the context of an insurer's statutory obligations. It is, therefore, vital that adjusters, attorneys and insurers understand and properly consider the possible implications of electing to provide a Reservation of Rights as a "reminder" to the insured as to the terms, conditions and exclusions under the policy, or of deciding to forego a Reservation of Rights notice to the insured.

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1 *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 13-80831-CIV, 2015 WL 3539755 (S.D. Fla. June 4, 2015).
2 *Auto–Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).
3 *See Fla. Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310, 312 (Fla. 2d DCA 1994) (Parker, A.C.J., dissenting) (citing *Jefferson Ins. Co. of N.Y. v. Sea World of Fla. Inc.*, 586 So. 2d 95 (Fla. 5th DCA 1991)); *U.S. Liab. Ins. Co. v. Bove*, 347 So. 2d 678 (Fla. 3d DCA 1977).
4 *Altman Contractors, Inc.*, No. 13-80831-CIV, 2015 WL 3539755.
5 *See Black's Law Dictionary* 300 (10th ed. 2014).
6 *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013).
7 *Altman Contractors, Inc.*, 2015 WL 3539755.
8 *Id.; see also North Pointe Cas. Ins. Co. v. M&S Tractor Services, Inc.*, 62 So. 3d 1281, 1282-83 (Fla. 2d DCA 2011) (noting that only if the relevant policy language is susceptible to more than one reasonable interpretation - one providing coverage and the other limiting coverage – is the insurance policy considered ambiguous).
9 *See Glossary of Insurance Management Terms* (9th ed.).
10 *Id.*
11 Fla. Stat. §627.426(2)(a) (2014) (emphasis added).
12 *See AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 1000 (Fla. 1989).
13 *See Travelers Indemn. Co. of Ill. V. Royal Oaks Enter., Inc.*, 344 F.Supp. 2d 1358, 1369-70 (M.D. Fla. 2004).
14 Fla. Stat. § 627.426(2)(b) (emphasis added).
15 *See Int'l Risk Management Institute* (2004); *see also American Empire Surplus Lines Ins. Co. v. Gold Coast Elevator, Inc.*, 701 So. 2d 904, 906 (Fla. 4th DCA 1997).
16 *American Empire Surplus Lines Ins. Co.*, 701 So. 2d at 906.
17 *Id*.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* (citing *Steil v. Florida Physicians Ins. Reciprocal*, 448 So. 2d 589 (Fla. 2d DCA 1989)).
23 777 So. 2d 1034 (Fla. 1st DCA 2000).
24 *Id.* at 1036. (emphasis added).
25 *Id*. (emphasis added).
26 *Id*.
27 *Cigarette Racing Team, Inc. v*. Parliament Ins. Co., 395 So. 2d 1238, 1239-40 (Fla. 4th DCA 1981).

THE LEGAL IMPLICATIONS OF CELL PHONE USE WHILE DRIVING

By Melissa D. Crowley, Esq.

As the prevalence of sending emails, texting, posting on social networks, and making calls from smartphones while driving has increased, the legal implications for doing so has increased as well. One government study found that more than two-thirds of adult drivers in the United States reported talking on their cell phones while driving and nearly one-third of United States adult drivers sent or read a text or email while driving in the preceding thirty days.[1] In 2014, the National Safety Council reported that cell phone use while driving causes distractions that result in over 1 in 4 car accidents in the United States.[2] Not surprisingly, a simple internet search reveals a number of plaintiff's attorneys who advertise that it may be possible in some cases to make a punitive damages claim against a driver when use of a cellular device at the time an accident becomes evident.

Florida's Criteria for Making a Punitive Damage Claim

In 1994, the Florida Supreme Court held that punitive damages are only appropriate when a defendant engages in conduct that is "fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others."[3] Later, in 1997, Florida's Legislature set forth the criteria necessary to plead a punitive damages claim and the pertinent burden of proof in civil cases. These are found in Section 768.72(1) & (2), Florida Statutes.

In order to state a claim for punitive damages, the plaintiff must first seek leave of court in accordance with the statute. Section 768.72(1), Florida Statutes. When considering whether or not to grant leave to amend, our courts must first ask whether the plaintiff has demonstrated "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." *Id.* Thereafter, if the court permits the punitive damages claim, then the trier of fact must find the defendant driver personally guilty by clear and convincing evidence of "intentional misconduct" or "gross negligence" in order to warrant an award of punitive damages.[4] Section 768.72(2), Florida Statutes. Then, after the plaintiff proves entitlement to a punitive damages award, the jury must apply the "greater weight of the evidence" burden of proof in determining the amount of the punitive damages award. Section 768.725, Florida Statutes (1999).

The Case Law

In 2011, a trial court in Collier County, in Florida's Twentieth Judicial Circuit, allowed a punitive damages claim against a defendant whose conduct, i.e. texting while driving, allegedly resulted in a death.[5] Although the defendant denied that he was texting, the plaintiff relied on cellular data, which revealed that the defendant had checked his voicemail and sent a text message within one minute of the accident.[6] News reports at the time indicated that this ruling was possibly a case of first impression. Clearly, Florida courts need to address the question of whether the use of cellular devices while driving constitutes punitive damages where evidence exists that a driver was using a cellular device at or near the time of an accident.[7] However, to date no Florida appellate court has addressed whether a punitive damages claim can be made against an at-fault driver where there is evidence of cell phone use. In addition, several appellate courts in other states

have considered the issue and have declined to impose punitive damages in this context, including the following:

- *Lindsey v. Clinch County Glass, Inc.*, 718 S.E. 2d 806 (Ga. Ct. App. 2011): holding an injured driver could not recover punitive damages against an at-fault driver who caused an accident even after the driver admitted he was distracted while looking up a number on his mobile phone at time of accident.

- *Thompson v. Cooper*, 290 P.3d 393 (Alaska 2012): disallowed punitive damages despite evidence showing the at-fault driver was speeding, talking on his phone, impaired by Parkinson's disease, under the influence of medication, and failed to use required eye-wear at time of accident.

- *Southard v. Belanger*, 966 F. Supp. 2d 727, 739 (W.D. Ky. 2013): denying plaintiff's claim for punitive damages despite allegations the defendant was talking while using a hands free device at time of impact.

- *Ellis v. Old Bridge Transp., LLC*, 4:11-CV-78 CDL, 2012 WL 6569274 (M.D. Ga. 2012): precluding a claim for punitive damages for talking on the phone and driving because clear and convincing evidence showing a pattern or policy of dangerous driving was not found.

- *Sipler v. Trans Am Trucking, Inc.*, CIV. 10-3550 DRD, 2010 WL 4929393 (D.N.J. 2010): granting defendant's motion for summary judgment on plaintiff's claims for punitive damages based on allegations that defendant was talking on a hands-free cell phone at time of accident.

- *Anderson v. Foglesong*, A09-453, 2009 WL 4910489 (Minn. Ct. App. 2009): denying plaintiff's motion to amend to add punitive damages based on an allegation the defendant admitted to reaching for her cell phone at time of accident.

Opposing the Punitive Damages Claim

Even though the fact that Florida's appellate courts have yet to decide whether a claim for punitive damages based upon a driver's cell phone is viable, there is certainly increased awareness, research, and reports of such drivers causing accidents that result in damages and injuries. Therefore, until Florida's law is clear, we should anticipate that plaintiff's attorneys and their experts will likely request leave to plead punitive damages in cases where there is evidence of unlawful cell phone use while driving with catastrophic injuries. Counsel and their experts will analogize cell phone use while driving to that of driving under the influence of alcohol, for which Florida law does allow the imposition of punitive damages.[8] Experts can easily support the analogy since, according to the National Highway Traffic Safety Administration, driving a vehicle while texting is six times more dangerous than driving while intoxicated.

For example, in *Ingram v. Pettit*, the Florida Supreme Court held that a defendant driver, whose blood alcohol level exceeded the legal limit, could be subjected to an award of punitive damages. The Court reasoned that the defendant's level of intoxication was equivalent to that required to establish criminal manslaughter.[9] Notably, the nature of the offense in cases such as *Ingram*, allowing a punitive damages claim for driving under the influence of alcohol, differs from that of cases involving cell phone usage while driving.[10] Specifically, while it is a criminal offense to drive when a "person's normal faculties are impaired" in Florida, it is not a criminal offense to use a cell phone while driving.[11] However, defense counsel should remain cognizant of the fact that the evidence of "intentional misconduct" or "gross negligence" required to establish entitlement to a punitive damages claim does not have to constitute a criminal act.[12]

Florida's Ban on the Use of Certain Cell Phone Features While Driving

While there is currently no law in Florida that makes cell phone use while driving a criminal act, the Florida Legislature did enact the Florida Ban on Texting While Driving Law in 2013.[13] Section 316.305, Florida Statutes, forbids the operator of a motor vehicle from "manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device or while sending or reading data on such a device for the purpose of non-voice interpersonal communication, including, but not limited to, communication methods known as texting, e-mailing, and instant messaging."[14] Violation of this statute constitutes a traffic infraction, not a criminal offense.[15] However, in asserting a claim for an award of punitive damages, plaintiff's attorneys will likely argue that violation of Section 316.305, Florida Statutes, or the unlawful use of a cell phone, is evidence of intentional misconduct or gross negligence.

The Implications

The law in Florida as to whether a plaintiff may assert a punitive damages claim where evidence exists of the defendant driver's unlawful cell phone use at or about the time of accident, therefore, remains uncertain. Attorneys and insurers should anticipate that plaintiff's counsel will sometimes seek leave to plead a punitive damages claim where there is evidence of unlawful cell phone use. In evaluating and defending these claims, it would be wise to gather information that relates to cell phone use early during the investigation phase of a claim.

Nonetheless, even when the relevant conduct does not rise to the level of intentional misconduct or gross negligence necessary to proceed with a punitive damages claim, the defendant driver may still be found negligent. If a jury determines that the defendant driver was negligent as a result of unlawful cell phone use, an insurer may be obligated to provide coverage for any judgment against its insured that does not exceed the applicable policy limits. Therefore, whenever possible, insurers and defense attorneys should assess to what extent an insured's unlawful cell phone use while driving might result in a determination of negligence. Not only may a jury determine that an insured's unlawful cell phone use while driving constituted negligence, but such proof could possibly also result in a jury's enhancement of a compensatory damages award irrespective of whether the court allows the plaintiff to assert a punitive damages claim.

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1 *See* Gunning, Patrick, *Seeking Punitive Damages against Drivers Distracted by Hand-Held Electronic Devices*, Journal of Consumer Attorneys Association for Southern California Advocate, April 2014 (citing Naumann, Rebecca B. *et al. Mobile Device Use While Driving – United States and Seven European Countries*). In this study, adult drivers are identified as drivers aged 18-64.

2 In 2014, the National Safety Council reported the annual estimate of cell phone crashes for the year 2013. The study shows that more than a quarter of all car crashes in America, or a minimum of 27%, are likely caused by drivers talking and texting on cell phones. The NSC model estimated that 21% of crashes in 2013, or 1.2 million crashes, involved talking on handheld and hands-free cell phones, and an additional 6% or more of crashes in 2013, or a minimum of 341,000 crashes, involved text messaging. *See* nsc.org. *Also see* Distracted Driving: Facts and Statistics at distraction.gov, the official US Government website for distracted driving; *and see* Injury Prevention & Control: Motor Vehicle Safety, Distracted Driving found at cdc.gov, the website for the Centers for Disease Control and Prevention.

3 *See W.R. Grace & Co.-Conn. v. Waters*, 638 So.2d 502, 503 (Fla. 1994).

4 The plaintiff's burden of proof in making a claim for punitive damages must be satisfied by clear and convincing evidence, which is higher than the preponderance of the evidence standard required to prove negligence, but less than the beyond a reasonable doubt standard required in criminal cases.

5 *Margaret S. Caskey, et al. vs Astellas Pharma US, Inc. et al.*, Collier County Case No.: 112010CA0005820001XX (Fla. Collier Cir. Ct. 2011). (Note that the Second District Court of Appeal denied appellants' motion requesting issuance of a written opinion, *Astellas Pharma US, Inc. v. Caskey*, 88 So.3d 157 (Fla. 2DCA 2012)).

6 *Id.*

7 *See* Swift, Aisling, *Collier Judge Allows Enhanced Damages in Suit Alleging Driver was Texting in Fatal Crash*, Naples Daily News, November 6, 2011, *available at http://www.naplesnews.com/news/crime/texting-driving-collier-punitive-damages-fatality.*

8 *Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976).

9 *Id.* at 923-924.

10 *Id.* at 924.

11 Fla. Stat. § 316.193.

12 *Cf. Southstar Equity, LLC v. Lai Chau*, 998 So.2d 625 (Fla. 2d DCA 2008) (upholding a punitive damages award for non-criminal conduct in action involving intentional misrepresentation and gross negligence in providing security).

13 Fla. Stat. § 316.305.

14 *Id.* § 316.305(3)(a).

15 *Id.* § 316.305(4)(a).

16 *Id.* § 768.72(3) (detailing the instances where punitive damages may be imposed against an employer, principal, corporation, or other legal entity for the conduct of an employee or agent).

Pictured in center: Matthew Schwartz, Esq.

CSK RECEIVES "GUARDIAN ANGEL" AWARD FOR SPONSORING EVENT TO SUPPORT CANCER RESEARCH

On behalf of CSK, Matthew Schwartz (Tampa) accepted the 2015 "Guardian Angel" Award at a fundraising event in support of cancer research at the Moffitt Cancer Center in Tampa, Florida. Representatives of the Center presented the award to honor the firm's fifth consecutive year as a sponsor of this highly successful event. Attorney Schwartz, who is a member of one philanthropic organization that attended, also participated in presenting a $210,000.00 donation in support of this vital cause.

Success Stories

Ben Esco and **Joe Goldberg**, of CSK's Miami office, successfully obtained a judgment of minimal liability in a slip and fall action arising out of an incident at the co-defendant's hospital. Our client, a cleaning company, was stripping floors in the outpatient area when the plaintiff entered the facility and slipped and fell. CSK argued the hospital was negligent for not ensuring the area was free of foot traffic; while the hospital argued our client's employee was negligent by unlocking the door to the area after hospital staff locked it. The hospital also correctly asserted that our client had not placed proper warnings and that, at the time, the hospital had a policy that the door was to be locked. CSK's defense was that our client was not legally responsible under the particular circumstances. Following non-jury trial, the court found the hospital 85% negligent and our client 15% negligent.

Jami Gursky, of CSK's Fort Lauderdale East office, successfully obtained a finding of no probable cause in an administrative action initiated by the Department of Health to investigate whether a physician negligently administered an intraocular injection, causing blindness. The no probable cause finding was issued in a wrong-sided surgical site case where liability was admitted. Other successes include unauthorized practice of psychology, surgical perforations, wrong-sided surgical sites, failed root canals, failure to monitor during outpatient detox procedures resulting in death, failure to diagnose and treat, and negligent post-surgical handling, among others.

Michael Brand and **Krystina Machado**, of CSK's Miami office, successfully obtained a voluntary dismissal two days before trial in a medical malpractice lawsuit. The plaintiff brought the lawsuit against our client, an orthopedic surgeon, for allegedly improperly splinting her hand, resulting in stiffness. The plaintiff had sustained four fractures to her right hand as the result of a fall while walking her dog. She underwent a surgical reduction performed by our client to align the fractured bones. Following the procedure, the plaintiff's right hand was placed in a Volar splint at a 180-degree angle for approximately seven weeks. The plaintiff claimed that as a result of our client improperly splinting her hand, she now suffered stiffness in the hand. Just two days prior to jury selection, the plaintiff voluntarily dismissed our client, the only defendant in the case, without receiving any compensation.

Jonathan Vine, Alan St. Louis and **Justin Levine**, of CSK's West Palm Beach office, successfully obtained a dismissal with prejudice on behalf of a law firm defendant in an action for fraud brought by a Venezuelan bank receiver. The plaintiff filed the lawsuit against numerous defendants, alleging the existence of a fraudulent scheme between the borrower and various legal counsel to shield certain assets in which the plaintiff claimed an interest. After significant motion practice and contentious discovery, the court compelled the plaintiff's deposition. When the plaintiff failed to appear, CSK moved for dismissal based on the plaintiff's violation of the court's order, and successfully obtained dismissal of all counts with prejudice.

Brooke Boltz and **Zea McDonnough**, of CSK's Orlando office, successfully obtained final summary judgment in a vehicle negligence action. The plaintiff's new car was rear-ended minutes after the purchase. Liability was uncontested, and the plaintiff was compensated for the highest repair estimate and for diminution in value. However, rather than repair the vehicle, the plaintiff traded it in at a substantial loss and demanded the amount of that loss. The plaintiff also demanded consequential damages incurred in trading in the vehicle. CSK, on behalf of our client, successfully argued that the plaintiff's calculation of damages was not supported by Florida law and the defendant had no duty to compensate for such damages. The court entered final summary judgment in favor of our clients. A Proposal for Settlement was earlier served on the plaintiff, which was rejected. The plaintiff now faces a potential fee award.

Jennifer J. Smith and **Jonathan Diocares**, of CSK's Fort Lauderdale East office, successfully obtained final summary judgment in a breach of contract action. Following Hurricane Wilma, the plaintiffs made a homeowners' insurance claim for damages. After receiving payment, the plaintiffs opened a supplemental claim and funds were provided for those repairs. Approximately three years later, the plaintiffs reported a second supplemental claim based on a public adjuster's estimate. Our client requested certain documentation from the plaintiffs, including a sworn proof of loss. The plaintiffs never provided the documents, instead filing the breach of contract action. CSK successfully argued that the plaintiffs' failure to comply with the policy's post loss obligations and to timely report the supplemental claim relieved our client of liability. The court agreed and granted final summary judgment in favor of our client.

Sarah Egan, of CSK's Miami office, successfully obtained final summary judgment in a landlord/tenant case. The plaintiff tenants brought an action against our clients, the landlords, following an incident at the home that resulted in serious injuries to the plaintiffs' three-year-old son. Specifically, the plaintiffs' son was running to get a ball in the front yard when he fell into a Sylvester Palm Tree,

getting poked in the left eye by one of the needles on the tree. As a result, the child suffered recurring eye infections, had to undergo several eye surgeries at Bascom Palmer and Duke Medical Center, including a mechanical vitrectomy and insertion of a left IOL prosthesis, and has been forced to wear an eye patch. The medical bills were approximately $135,000. The court granted final summary judgment in favor of our clients, finding that they had no duty to warn about bacteria-containing spikes on the palm tree.

Dan Klein and **Brad Sturges**, of CSK's Miami office, successfully obtained final summary judgment in a negligence action. The plaintiff brought an action against our client, a condominium/hotel's leasing agent, for injuries sustained when the Murphy bed in the unit came crashing down on the plaintiff while she was allegedly reaching for bed linens. The plaintiff claimed that she sustained a traumatic brain injury resulting in memory loss and significant cognitive difficulties. While the plaintiff claimed various bases for liability, including our client's status as the condominium/ hotel's exclusive leasing agent, CSK successfully argued that our client did not breach any purported duty to the plaintiff. The court ultimately entered final summary judgment in favor of our client. A Proposal for Settlement was served on the plaintiff early in the case, which was rejected. The plaintiff now faces a potential fee award.

Jonathan Midwall and **Eric Rieger**, of CSK's Miami Office, successfully obtained final summary judgment in a legal malpractice action. The plaintiff alleged that our clients, an attorney and his firm, negligently failed to file the plaintiff's claim against the United States for a slip and fall that occurred in a U.S. Post Office lobby outside normal business hours. Prior to CKS's involvement, our client admitted fault for failing to timely file the plaintiff's claim. CSK moved for summary judgment on the case-within-the-case on the basis that the United States would have been immune from suit under the Discretionary Function Exception to the Federal Tort Claims Act. The court agreed and granted final summary judgment in our client's favor. Prior to the hearing, a Proposal for Settlement was served on the plaintiff, which was rejected. The plaintiff now faces a potential fee award.

Jonathan Midwall and **Lara Dabdoub**, of CSK's Miami Office, successfully obtained a full defense verdict following a 6-day wrongful death/medical malpractice trial. The decedent's husband brought this action against our client, a cardiologist/EP, for negligently failing to clear the patient for gallbladder removal surgery, document the risks, and provide timely cardiac care post-surgery, which led the decedent to develop deadly arrhythmias, resulting in her death. During trial, CSK had to overcome the testimony of the attending doctor, former co-defendant, who said he was expecting our client to provide such post-operative care. In addition, CSK was also unable to provide a causation defense as to the claim that the patient did, indeed, die from an untreated lethal arrhythmia. At trial, the plaintiff sought damages of at least $750,000, but advised the jury that there was no limit with regard to his pain and suffering. The jury ultimately returned a full defense verdict, finding our client acted within the standard of care in treating the decedent.

Keith Lambdin, of CSK's Ft. Lauderdale office, and **Dean Meyers**, of CSK's Miami office, successfully obtained a dismissal with prejudice in a federal action on behalf of our client, a professional consulting services contractor, and RSUI Group, Inc. The plaintiff, a business operator in the city where our client was providing municipal inspection services on behalf of the city, brought the action alleging that our client and the city issued code ordinance violations against the plaintiff that violated its Fourth and Fourteenth Amendment rights. In response, CSK filed a motion to dismiss all the claims against our client on the basis of the plaintiff's failure to state a proper 42 USC § 1983 cause of action. The court summarily dismissed all claims with prejudice and ordered the case closed.

Blake H. Cole, of CSK's Jacksonville office, successfully obtained summary final judgment in a declaratory action pending in the court of Florida. The insured was involved in an auto accident while driving a vehicle that was not listed on the policy. The driver was a named insured under the policy and contended that the vehicle was covered. The court granted summary judgment, finding that the insurer was not obligated to defend or indemnify the insured in the underlying personal injury action because the vehicle being driven by an insured at the time of the accident was not listed as a covered vehicle under the policy.

Joe Kissane and **Daniel Duello**, of CSK's Jacksonville office, successfully obtained an affirmance of a summary judgment in favor of our client before the Eleventh Circuit Court of Appeal. The matter involved bad faith claims against our client, the insurer, stemming from efforts to settle multiple competing claims with low available insurance limits. In affirming the order, the Eleventh Circuit emphasized that in situations involving multiple claims "it is not unusual for settlement negotiations to last several months." The court relied, in part, upon the claimant's failure to advise our client of its refusal to participate in global settlement negotiations. This finding provides further support for the protocol outlined in *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555 (Fla. 4th DCA 2003). Significantly, the court also found that even if an insurance company's communication with its insured is not ideal, it cannot serve as a predicate for a bad faith claim if that did not actually cause the excess judgment.

Joe Kissane and **Daniel Duello**, of CSK's Jacksonville office, successfully obtained a reversal on appeal before the Fifth District Court of Appeal in an insurance coverage case. The matter involved an insured who applied for an excess insurance policy, but failed to inform the insurance company that their adult son had moved into their residence prior to the date of the application. The adult son, who was away from the

residence for a month long visit to Arizona prior to the binding of the policy, returned to Florida, and was immediately involved in an auto accident that injured seven and killed one. The trial court found that the rescission of the insurance policy was not appropriate under the circumstances. However, on appeal, the court reversed and agreed with CSK that the son should have been disclosed in the application for insurance.

Max Messinger, of CSK's Fort Lauderdale East office, successfully obtained a *Daubert* ruling in favor of our client in a first-party action. The plaintiffs claimed their floor tiles de-bonded throughout their property as a result of a kitchen supply line leak and demanded replacement of the entire tile floor as a result. The plaintiffs' expert opined that the floor tiles de-bonded due to a chemical reaction between the water and the concrete slab. CSK challenged the plaintiffs' expert opinion and filed a *Daubert* motion to exclude the opinions at trial. Following the lengthy *Daubert* hearing, the court issued a detailed seven page order wherein it determined that the experts' opinions were not supported by sufficient facts or data and reliable principles or methods. As such, the court excluded the opinions from trial.

Randy Rogers, of CSK's Pensacola office, obtained a dismissal for fraud upon the court in a 2007 automobile case in which plaintiff allegedly suffered significant injuries. However, plaintiff had also been involved in an automobile accident in 1999. During deposition and in responses to interrogatories, plaintiff claimed that his symptoms from the 1999 accident had resolved within one year. Plaintiff denied receiving any medical treatment in the months before the accident. Despite not identifying pertinent medical providers in discovery, CSK located medical records that demonstrated plaintiff had treated for injuries identical to those now alleged, including treatment one month prior to the 2007 accident. The records attributed the treatment to plaintiff's 1999 accident. The court found that plaintiff not only failed to disclose material information concerning his prior injuries and treatment, but that he was also repeatedly untruthful under oath with the intent of inhibiting the defense of the case and subverting the judicial process. The court dismissed the case with prejudice.

Barry Postman, of CSK's West Palm Beach office, and **Jason Onacki**, of CSK's Pensacola office, both members of the Education Law Practice Group, recently obtained a voluntary dismissal with prejudice of a discrimination action. Our client, a large university, was sued by two former students who alleged racial discrimination by an instructor. The students further alleged the administration failed to properly investigate and take action once notified of the alleged discrimination. The case was particularly notable in that it involved complex discovery disputes concerning information protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (34 C.F.R. § 99). The case was removed from state court to federal court, and then to arbitration. In advance of the final hearing, CSK's strategy included submitting a detailed brief to the arbitrator, which showed that the plaintiffs lacked sufficient evidence to prove their claims, provided a guide for the presentation of evidence at the final hearing, and provided a potential basis for directed judgment. With these arguments, CSK was able to persuade the plaintiffs to voluntarily dismiss the action with prejudice on the eve of the final hearing. In exchange, CSK agreed to forego attorney's fees and costs.

Paula J. Lozano and **Robert Murphy**, of CSK's Tampa office, recently obtained dismissal of all claims in a medical malpractice lawsuit in Hillsborough County. Plaintiffs served a Notice of Intent to Initiate Medical Negligence Litigation alleging that the defendant surgeon negligently performed a laparoscopic appendectomy by leaving behind a three centimeter appendicular stump. CSK aggressively engaged in pre-suit discovery, but plaintiffs' counsel failed to produce her clients for the statutorily required unsworn statements. In addition, plaintiffs' counsel not only failed to respond to written discovery within thirty (30) days as required by Florida Statute §766.106(6)(a)(4), but also failed to provide any responses within the ninety (90) day statutory presuit investigation period. Plaintiffs then attempted to engage in presuit discovery after the presuit deadline. Despite their noncompliance, plaintiffs' counsel served a Complaint. CSK filed a Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with Florida's Presuit Statute. The motion prompted Plaintiffs' counsel to withdraw from the case. Plaintiffs then failed to retain new counsel, and CSK obtained a dismissal of all claims for lack of prosecution.

Scott A. Cole, of CSK's Miami office, and **Daniel M. Schwarz**, of CSK's Plantation office, obtained a per curiam affirmance of a denial of Plaintiff's motion for new trial and for juror interviews in a protracted dispute involving alleged breaches of condominium documents and a violation of the Florida Fair Housing Act. After CSK obtained a full defense verdict in favor of the homeowners' association, Plaintiff discovered that a serving juror had previous involvement in the court system that was not disclosed during voir dire, including prior restraining orders and orders to attend a mental health evaluation with relation to earlier cases. Given case law indicating an attorney is not required to discover a juror's undisclosed prior litigation history before the verdict, the trial court denied Plaintiff's motion for an interview of the juror, finding Plaintiff did not act with due diligence. On appeal, Plaintiff argued that the undisclosed information was concealed and material, and that counsel indeed acted diligently in seeking the information. CSK argued that the juror did not conceal his earlier court involvement, that Plaintiff's questions were insufficiently specific, that the juror's prior cases were not material to the dispute, and that Plaintiff was required to search the court docket before the verdict, in light of the ease of accessing the information. After oral argument, the Fourth District Court of Appeal affirmed the trial court's decision.

Hero Box Event

a Huge Success in Support of Our Troops

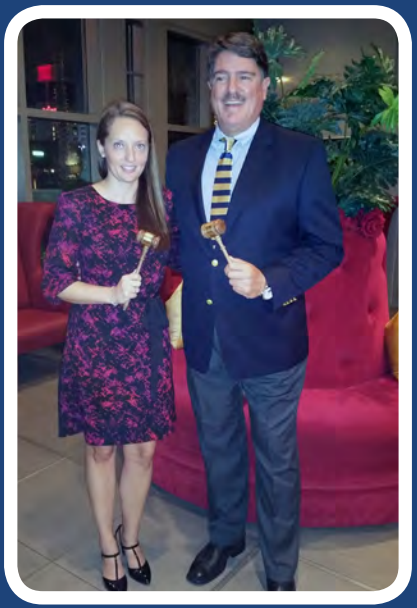
This year the CSK team came out to support our military for the annual Hero Box event. As a result of this initiative, CSK volunteers packed almost 400 boxes of donations for our troops, far exceeding the 300 boxes packed in the previous year's event. These care packages are being distributed to the Army and Navy, with enough left over to send to a third branch of our military.

CSK, Proud Sponsor Of

First Step Champions, Inc

CSK was proud to partner with Wendy's and James Warring of First Step Champions, Inc. in support of our youth. The firm sponsored lunch and provided gift certificates for all participants. Pictured in the back row from left to right are James Warring, who has won world titles in boxing and kickboxing, and CSK Attorneys, Brian Dominguez and Scott Cole.

CSK Attorneys Receive the Golden Gavel Award



Westfield Insurance recently presented CSK attorneys Jim Sparkman (West Palm Beach) and Melissa Crowley (Orlando) with their 2015 Golden Gavel Award for obtaining a defense verdict in a jury trial in Lee County. According to Westfield's representatives, only six (6) attorneys received this award nationwide. At trial, the plaintiff alleged that she sustained injuries to her head, neck, and shoulders as a result of a patio umbrella that struck her after a gust of wind caused it to fall. The plaintiff asked for $2.1 million in damages. The defense did not contest liability but strongly opposed causation. The jury was out for only an hour, with lunch, returning a verdict for the defense.

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Richard P. Cole, Thomas E. Scott, Gene P. Kissane
Michael E. Brand, Joseph T. Kissane, Henry Salas

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Environmental
Family Law
Federal Practice
Fidelity And Surety Litigation And Counsel
Fiduciary Litigation
FINRA Arbitration
First Party Property
Foreign Corrupt Practices Act
Fraud Litigation
General Civil Litigation
Government Relations
Hospitality Industry Defense
Insurance Coverage & Carrier Representation
Intellectual Property
Land Use Litigation
Legal Malpractice
Liquor Liability Defense
Medical Malpractice
Medicare Secondary Payer Compliance
Municipal Finance (Tax Free Bonds)
Nursing Home Health Care
Nursing Malpractice
Personal Injury Protection (PIP)
Physician's Malpractice
Premises Liability
Product Liability
Professional Malpractice
Qui Tam/False Claim/Whistblower Claims
Real Estate And Foreclosures
Securities
SIU Insurance Fraud Defense
Trucking Accident Defense
Vehicle Negligence
Workers' Compensation

TRIVIA OFFICIAL RULES

NO PURCHASE NECESSARY. PURCHASE WILL NOT INCREASE YOUR CHANCES OF WINNING. Void where prohibited. This contest is sponsored by Cole, Scott, & Kissane P.A. A total of 10 prizes available to be awarded. No cash prizes. Each prize is valued at $10.00. Odds of winning will depend upon the number of eligible entries received (estimated odds based upon the number of Quarterly readers: 1 in 1000). Contest is open to anyone in the United States who is 18 years of age or older. Employees of Cole, Scott, & Kissane P.A. are not eligible to participate. Contest begins at 12:01 a.m. (EST) on **January 22, 2016.** Entries must be received by 12:00 p.m. (EST) on **March 30, 2016.** Entries must also include contestant's name and mailing address. Winners will be chosen according to the first 10 eligible responses received that correctly answer the Trivia Question. If less than 10 correct entries are received, remaining prizes will be awarded at random to other participants.

Entries must be e-mailed to Quarterly.Trivia@csklegal.com. Limit of one entry per household. Winners will be selected on **April 6, 2016** and notified via e-mail by **April 13, 2016.** If you do not wish to receive or if you would like to be removed from subsequent mailings, please call, toll free, at 1-888-831-3732. A list of winners can be obtained after **April 20, 2016** via e-mail to: eric.rieger@csklegal.com. Cole, Scott, & Kissane P.A. is not responsible for any lost e-mail or technical problems encountered by contestants in connection with this contest.

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