QUARTERLY
Newsletter

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SPECIAL FEDERAL PRACTICE EDITION

A Daubert Discussion:
Closing the Gate to Unreliable Expert Testimony

The Offer of Judgment:
Recovering Fees and Costs in Federal Court

The Limitation of Liability Act:
A Vessel Owner's First Line of Defense after a Maritime Accident Occurs

The Right Place At The Right Time:
How And When To Remove To Federal Court

PRACTICE AREAS

Accounting Malpractice
Admiralty/Maritime
Aviation
Appellate
Arbitration, Alternative Dispute Resolution and Mediation
Architects and Engineers
Bad Faith and Extra-Contractual Liability
Banking and Financial
Business/Commercial Law
Civil Rights Law
Class Actions
Commercial Litigation
Condominium Law
Construction Law
Corporate, Transactional & Real Estate
Directors and Officers
Education Law
Employment & Labor
Environmental
Federal Practice
Fidelity and Surety Litigation & Counsel
First Party Property Defense
Fraud Litigation
General Civil Litigation
Government Relations
Homeowners' Association
Hospitality Industry Defense
Insurance Coverage & Carrier Representation
Intellectual Property
Land Use Litigation and Real Property Disputes
Legal Malpractice
Liquor Liability Defense
Medicare Secondary Payer Compliance
Nursing Home/Health Care
Nursing Malpractice
Physician's Malpractice
Premises Liability
Product Liability
Professional Liability
Residential Homeowner Defense
Securities
SIU Insurance Fraud Defense
Trucking Accident Defense
Vehicle Negligence
Workers' Compensation

IN THIS ISSUE

A Note From the Editor

Dear Readers,

Thank you again for your interest in our Quarterly. It is truly a firm-wide effort. Our attorneys take pride in providing you with thoughtful insights into relevant legal topics. Our diversity, as a firm, enables us to deliver in-depth analyses of an array of issues spanning more than fifty practice areas. This Edition focuses on federal practice and CSK is privileged to have some of the finest federal litigators and appellate attorneys in our State.

I would also like to congratulate the lucky Winners of our Winter Quarterly Trivia Contest. The correct answer was "C. 80%." Each of our Winners received a CSK Backpack. Please be sure to respond to this Edition's Trivia Contest for your chance to win.

Last, but not least, I want to thank each of our Readers who took time to provide us with feedback on the Quarterly. We appreciate your comments and are always looking for ways to improve our publication. If you have any questions or suggestions, you are always welcome to call or e-mail us. Until then, I remain,

Yours truly,

Eric T. Rieger

QUARTERLY TRIVIA CONTEST

Q: What is the minimum amount in controversy that the parties must exceed in order to invoke federal court jurisdiction based upon "diversity?"

A. $50,000

B. $75,000

C. $100,000

D. None of the above.

The first ten readers to respond correctly will receive a free CSK coffee mug. Please respond by e-mail to Quarterly.Trivia@cskegal.com. Please remember to include your name and address with your entry.

See Page 24 For Official Rules

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A Daubert Discussion: Closing the Gate to Unreliable Expert Testimony


Paula J. Parisi, Esq.

A "battle of the experts" is often the reality in civil litigation. A case may be won or lost based on expert testimony and this is equally true in the context of federal practice. As a result, keeping a plaintiff's questionable and over-reaching expert testimony out of the courtroom becomes key. On July 1, 2013, the Florida Legislature adopted *Daubert* through passage of Florida Statute § 90.702.[1] Florida's adoption of the federal *Daubert*[2] standard profoundly changes the realm of expert testimony, keeping suspect expert testimony from juries. This article discusses the adoption and progression of *Daubert* within federal courts, specifically successful *Daubert* challenges within the Eleventh Circuit Court of Appeals. *Daubert* challenges may now be used within Florida courts, with trial courts being more receptive to persuasive federal authority for the first time.

PRE DAUBERT DECISION

Prior to the adoption of *Daubert*, federal judges admitted a vast amount of expert testimony without the present level of regard for the scientific reliability of such testimony. A similar standard has applied in Florida under *Frye*. *Frye v. U.S.* focused on "general acceptance" of the expert's testimony within his or her respective field.[3] One of the best indicators of *Frye's* failure was seen in *Wells v. Ortho Pharmaceutical Corporation.*[4] In *Wells*, the court upheld a $5.1 million dollar verdict for the plaintiff alleging common spermicide caused birth defects, despite the lack of statistically significant studies supporting causation and damages.[5] In so holding, the court observed that "[I]t does not matter in terms of deciding the case that the medical community might require more research and evidence before conclusively resolving the question. What matters is that this particular fact finder found sufficient evidence of causation in a legal sense."[6] Historically, federal courts had been divided on the proper standard for admission expert testimony.[7]

EVOLUTION OF THE DAUBERT DECISION

In *Daubert,* the plaintiffs sought damages for birth defects caused by the drug Benedectin, which was prescribed to pregnant women for nausea.[8] The defendant moved for summary judgment contending that the plaintiffs did not have admissible evidence demonstrating Benedectin caused defects in humans.[9] The trial court granted the defendant's motion based on an expert affidavit, which concluded scientific literature did not correlate the drug with human birth defects.[10] The plaintiffs' experts relied on animal studies linking birth defects to Benedectin.[11] The trial court applied the *Frye* standard of general acceptance to the expert's testimony and rejected the Plaintiffs' studies valuing epidemiological data over animal studies.[12]

The U.S. Supreme Court vacated the trial court's decision, rejecting the *Frye* standard as "rigid" and "at odds with the liberal thrust of the Federal Rules."[13] The initial determination to be made by a trial judge was whether the qualified expert was offering scientific testimony that would assist the trier of fact.[14] The expert had to be qualified by knowledge, skill, experience, training, or education.[15] The Court delineated new, non-exhaustive requirements for determining reliability of expert testimony: 1) methodology; 2) whether the theory or technique has been subjected to peer review and publication; 3) potential rate of error; and, 4) general acceptance within the relevant scientific community.[16] The Court was "confident that federal judges possess[ed] the capacity to undertake this review.[17]

The Court did, however, acknowledge concerns raised by both parties in *Daubert*. *Daubert* would not keep all evidence out of the courtroom; however, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" would remain the traditional and appropriate means of attacking shaky but admissible evidence.[18] Moreover, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably would prevent the jury from learning authentic insights and innovations.[19] In other words, *Daubert* would sometimes keep new scientific hypotheses and theories from the jury because law, unlike science "must resolve disputes finally and quickly."[20]

In *Kumho Tire Co., Ltd. v. Carmichael*, the U.S. Supreme Court extended *Daubert* to all types of expert testimony, not just scientific evidence.[21] Regardless of the field, expert testimony would greatly benefit from the intellectual rigor and methods employed by those practicing within the expert's discipline.[22] *Kumho* gave trial court judges a great amount of discretion in determining whether *Daubert* should apply and the necessity of hearings to determine reliability.[23] The Court further noted there would be instances where an expert's testimony may be presumed reliable, thus avoiding any "unjustifiable expense and delay" associated with *Daubert* motions.[24]

CONSEQUENCES OF DAUBERT

While the U.S. Supreme Court stressed the "flexibility" of *Daubert*, many believe the standard is too strict and unfairly beneficial to the defense.[25] "This standard makes the expert evidence terrain steeper and more treacherous for plaintiffs." [26] Empirical studies taken after the adoption of *Daubert* show more parties challenging the admissibility of evidence and more judges excluding a greater proportion of testimony.[27] In addition, "*Daubert* has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries." [28]

The adoption of *Daubert* in Florida state courts is certainly an advantage for the defense. A successful *Daubert* challenge can lead to the exclusion of evidence required by plaintiffs to prove elements of the case, thereby increasing chances of succeeding on summary judgment. Even if summary judgment is not the ultimate outcome, a court may grant motions in limine based on a *Daubert* hearing.

Most importantly, *Daubert* stressed that the factors delineated in its analysis are "non-exhaustive,"[29] which allows for creative lawyering in drafting *Daubert* motions based on the idiosyncrasies of each discipline and field of expert testimony.

PERSUASIVE ELEVENTH CIRCUIT'S APPLICATION OF DAUBERT

The Eleventh Circuit, which will be persuasive to our state court judges, has given great deference to *Daubert* challenges. The following is a summary of relevant cases decided by the Eleventh Circuit:

Cooper v. Marten Transport, Ltd,* 539 Fed. App'x. 963 (11th Cir. 2013)*: Upheld the trial court's exclusion of testimony from a biomechanical engineer and treating physicians in an auto negligence case. First, the biomechanical engineer's conclusion regarding the source of injury was not the product of a scientifically reliable method or testing. His testimony amounted to asking the court to "tak[e] the expert's word for it." Second, the plaintiff's treating physicians' testimony regarding causation was unreliable because they failed to show systematic and scientific exclusion of other diagnoses[30] until the final cause remained. Instead, they simply reviewed the records and examined the Plaintiff to decide whether the accident caused the alleged injury, relying instead on a "temporal relationship."

***Goldstein v. Centocor, Inc.*, 310 F. App'x 331 (11th Cir. 2009):** Expert testimony linking a medication (Remicade) to pulmonary fibrosis was unreliable because the expert did not rely on any epidemiological studies. "This is not fatal, but makes his task to show general causation more difficult." The expert also relied on studies made without medical controls or scientific assessment.[31]

***Jazairi v. Royal Oaks Apartment Associates, L.P.*, 217 F. App'x 895, 896 (11th Cir. 2007):** The plaintiff sought damages against her apartment complex for growth of mold, alleging it caused coughing, chest pain and shortness of breath. Although the expert produced medical and scientific journals describing a certain type of bacteria (found in air conditioners and humidifiers) could cause the plaintiff's symptoms, the expert never produced evidence linking the bacteria to the mold in the plaintiff's apartment. The court held that even when an expert is using reliable methods and principles, "there cannot be an analytical gap between the data and proffered opinion."

***Motor Co., Inc.*, 238 F. App'x 537, 540 (11th Cir. 2007):** Product liability suit, where the plaintiff alleged high temperatures inside the footwells of his ATV made the vehicle unreasonably dangerous and caused injury. The olaintiff's expert in ATV design and safety conducted tests using a dummy with temperature probes on its ankles. The expert concluded the ATV was unreasonably dangerous and could cause burns. The court excluded the testimony under *Daubert* due to unreliable methodology. The expert "produced no data showing that the conductive and heat-retentive properties of the dummy's foot were similar to those of a human foot. Nor did he

DAUBERT BASICS AND PRACTICE TIPS

- *Daubert* is a literature/study guided application. Do the research early and ensure your own experts agree and rely on it.
- Literature/studies should be peer-reviewed.
- Cutting edge or new procedures, diagnoses, tests or technology. are vulnerable to a *Daubert* challenge because there may not be any reliable or accumulated data available.
- "*Daubert* hearings are not required, but may be helpful in 'complicated cases involving multiple expert witnesses.'" *Tuscaloosa v. Harcros Chems., Inc.,* 158 F.3d 548, 564 n. 21 (11th Cir. 1998). Court may find arguments through legal memorandum and affidavits are sufficient. *Placida Prof'l Ctr., LLC v. F.D.I.C.*, 512 F. App'x 938, 954 (11th Cir. 2013).
- "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion...." *United States v. Frazier,* 387 F.3d 1244, 1260 (11th Cir. 2004).
- *Daubert* motions should be supported by "conflicting medical literature and expert testimony." *U.S. v. Hansen*, 262 F. 3d 1217, 1233 (11th Cir. 2001).
- Requests for *Daubert* hearings should be detailed, identifying the "source, substance, or methodology of the challenged testimony." *U.S. v. Hansen,* 262 F. 3d 1217, 1233 (11th Cir. 2001).
- Learn the science or practical principles involved and find a simple way to explain them to the court. Use demonstrative aids, if necessary.
- Use your retained experts as a resource to identify methodologies and peer review practices within their discipline. Request their assistance in identifying reliability and methodological shortcomings raised by Plaintiff's expert testimony. Ask your retained experts for any scientific or scholarly publications which support their testimony.
- "A *Daubert* objection not raised before trial may be rejected as untimely. But a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial." *Club Car, Inc. v. Club Car (Quebec) Imp., Inc.*, 362 F.3d 775, 780 (11th Cir. 2004).
- The court may choose to "unpack" an expert's testimony, permitting what is admissible under *Daubert* while excluding any unreliable testimony. *United States v. Reddy*, 534 F. App'x 866, 871 (11th Cir. 2013); *City of Tuscaloosa v. Harcros Chemicals, Inc.,* 158 F.3d 548, 564 (11th Cir. 1998).
- On appeal, the standard of review for *Daubert* findings made by the trial court is abuse of discretion. *General Elec. Co. v. Joiner,* 522 U.S. 136, 138–39 (1997).

show a reliable way to extrapolate from the temperature readings on the dummy's foot to the comparable temperatures on a human foot." Th court also highlighted that varying testing conditions used by the expert also jeopardized reliability. Summary judgment affirmed due to the plaintiff's inability to prove a safer, alternative design.

***McDowell v. Brown*, 392 F.3d 1283, 1300 (11th Cir. 2004):** Expert claimed delay in treatment of a spinal epidural abscess caused or worsened the plaintiff's condition. He based his opinion on common sense that earlier treatment is preferable to later intervention. He also used a study that analyzed the effects of 48 hours of delay in treatment; however, the court concluded the study should not be applied to the 24 hour delay in that case. The expert's theory should not "leap" from an accepted scientific premise to an unsupported one.

The Eleventh Circuit's willingness to consider *Daubert* challenges in many different disciplines of law is certainly an advantage for future state court challenges. In order to seize such an advantage, it is important for counsel to proactively set-up a *Daubert* challenge and plan for one prior to taking expert depositions.

Endnotes

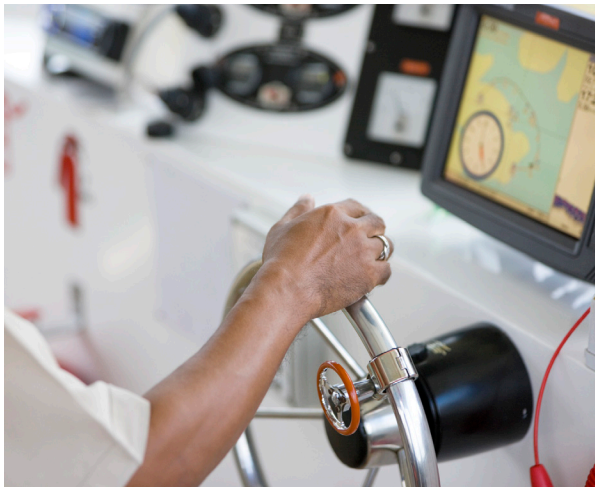
1 Fl. State Stat. § 90.702 (2013).
2 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 585 (1993)
3 *See*, *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
4 788 F. 2d 741 (11th Cir. 1986)
5 *Id.* at 745.
6 *Id.*
7 *See*, *Daubert,* 509 U.S. at 585.
8 *Id.* at 582.
9 *Id.* at 583.
10 *Id.*
11 *Id.*
12 *Id. at 584.*
13 *Id.* at 579, 589.
14 *Id.* at 593.
15 Id. at 588.
16 *Id.* at 593-94. Note, the *Daubert* standard is codified in Federal Rule of Evidence 702.
17 *Id.* at 593.
18 *Id.* at 596.
19 *Id.* at 597.
20 *Id.*
21 526 U.S. 137, 138 (1999).
22 *Id.* at 152.
23 *Id.* at 152-153.
24 *Id.* at 152.
25 *See*, *Daubert*, 509 U.S.at 580 ("The [*Daubert*] inquiry is a flexible one. . . .").
26 American Trial Lawyers *of America, Living with Daubert-Learn the Science and Leave the Checklists Behind*, 2 Ann.2002 ATLA-CLE 2595 (2002).
27 A. Leah Vickers, *Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert*, 40 U.S.F. L. Rev. 109, 110 (2005).
28 Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472-73 (2005).
29 See, Kumho, 526 U.S. at 158 (""*Daubert* was intended neither to be exhaustive nor to apply in every case.").
30 This is a great case for medical malpractice based Daubert challenges. This holding gives great importance to a differential diagnoses.
31 This case sets the standard for use of medical literature with less emphasis or importance of someone agreeing to whether it is "authoritative." *Daubert* makes use of medical literature essential.

The Limitation of Liability Act:

A Vessel Owner's First Line of Defense After a Maritime Accident Occurs

Melissa Button, Esq.

Maritime law, also referred to as admiralty law, is the body of law that governs navigation and shipping. It is a unique area of law that differs from common law and is applied uniformly throughout the country. Maritime law provides a legal framework for issues and accidents that take place on domestic, territorial and international waters. In light of the complexity of maritime laws, the number of law firms and attorneys with the requisite experience and knowledge of maritime law issues is limited. Therefore, as the number of maritime accidents involving personal watercraft and boats continues to rise, the necessity of understanding the rights and remedies available under maritime law for vessel owners has become more important than ever. CSK has been at the forefront of this ever-developing field of law.



LIMITATION OF LIABILITY ACT

One unique aspect of maritime law is the ability of a vessel owner to limit her liability after a maritime accident occurs pursuant to the Limitation of Liability Act ("Limitation Act").[1] The Limitation Act was originally enacted in 1851 by Congress to promote the development of the American merchant marine and to put American shipowners on footing equal to shipowners hailing from other commercial seafaring nations.[2] Under the Limitation Act, vessel owners have the opportunity to limit their liability to the post loss value of the vessels for a marine casualty. [3] The Limitation Act applies to "seagoing vessels and . . . all vessels used on lakes or rivers or in inland navigation."[4] Claims arising from personal injuries, deaths, fire, collisions/allisions, sinking, salvage and lost cargo have all been held by courts as being subject to the Limitation Act. In addition to the potential for limiting liability, Limitation actions can be extremely useful as a tool to stay any pending lawsuits and to bring all claims together in concursus before a Federal District Court in Admiralty. Notwithstanding that a vessel owner is the party commencing the action, a Limitation action is a defense proceeding because the claimants are seeking damages from the vessel owner.[5]

FILING A LIMITATION OF LIABILITY ACTION

In order to invoke the protections of the Limitation Act, a vessel owner must bring a civil action in Federal District Court by filing a Complaint seeking Exoneration and/or Limitation of Liability.[6] Venue is proper in any district where the vessel has been attached or arrested, or if there has been no attachment or arrest, in the district where the vessel owner has been sued. If suit has not yet been commenced against the vessel owner by a claimant, the Limitation complaint may be filed in any district where the vessel is physically present.[7]

The Complaint must be filed within six months of the vessel owner and/or the vessel owner's agent receiving written notice of a potential claim for damages.[8] The six month statute of limitations period is strictly enforced by the Admiralty courts and will result in the dismissal of a Limitation action if the Complaint is filed outside of this time period. The Complaint must "set forth the facts on the basis of which the right to limit liability is asserted."[9] It is not enough for the Complaint to state only general

allegations related to the underlying accident.[10] Rather, the Complaint must elaborate on the voyage on which the casualty arose from which the vessel owner seeks limitation or exoneration or liability occurred and state with particularity the facts or the casualty.[11]

In addition to specifying the location of the underlying incident, the Complaint must also set out the date and place of the termination of the voyage on which the casualty occurred, and state with particularly all known outstanding claims related to the voyage and their type.[12] The Complaint must also state with particularity the post loss value of the vessel and pending freight, if any, where the vessel currently is located and in whose possession the vessel may be found.

In addition to filing the Complaint, the vessel owner must also deposit with the District Court, for the benefits of claims, a sum equal to the amount or value of her interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security thereof, as the court may from time to time fix as necessary ("limitation fund").[13] Once the security is deposited, the District Court will enter an injunction staying the further prosecution of claims brought against the vessel owners arising from the subject casualty.[14]

The District Court will also establish a "monition" period during which all claimants must file their respective claims against the vessel owner in the limitation action within a specific time under the potential of default.[15] This "concursus" of claims allows all actions rising out of the underlying accident to be adjudicated in a single proceeding. Such a concursus provides a great benefit to the vessel owner by requiring all potential litigants in a singular federal forum as opposing to defending multiple claims in several jurisdictions.[16]

Once the stay and monition period have been ordered, the vessel owner must provide notice of the stay and monition to all potential claimants.[17] Notification is accomplished by publishing the stay and monition order in a newspaper of general circulation in the area where the action was filed.[18] The notice must appear in the publication once a week for four (4) consecutive weeks prior to the date fixed for the filing of the claims in the limitation proceedings.[19] Further, the notice must be mailed to each person known to have made a claim against the vessel or owner arising from the subject voyage no later than the day of second publication.

In the case of death, notice must be mailed to the decedent at the decedent's last known address and also to any person who is known to have made any claim on account of such death.[20] After the completion of the four weeks, the vessel owner must obtain an affidavit of publication from the newspaper and file a notice of publication with the District Court. In addition, within thirty (30) days after the expiration of the monition period the vessel owner must mail a notice to each claimant who filed claims in the limitation proceedings advising them of: (1) the name of each claimant, (2) the name and address of the claimant's attorney (if the claimant has an attorney), (3) the nature of each claim brought in the proceedings, and the (4) amount of each claim.[21]

LIMITATION OF LIABILITY ACTION: BURDEN OF PROOF

The burden of proof in a Limitation action is a bifurcated two-step analysis that is divided between the vessel owner and the claimants.[22] The Eleventh Circuit has held that the determination of whether the owner of a vessel is entitled to limitation of liability requires the following analysis: (1) "the court must determine what acts of negligence or conditions of unseaworthiness caused the accident;" and (2) "the court must determine whether the ship owner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness."[23]

The claimants bear the initial burden of establishing that the destruction or loss was caused by acts of negligence or by the unseaworthiness of the vessel.[24] If the claimants are unable to meet this initial burden, the vessel owner will exonerated from liability.[25] However, if the claimants are able to meet their burden, the burden then shifts to the vessel owner to prove a lack of privity or knowledge of the negligence or unseaworthy condition which caused the accident.[26]

If the Limitation action is granted and the court determines that the act of negligence or unseaworthy condition which caused the underlying loss was not within the vessel owner's privity or knowledge, the court will then distribute the limitation fund to the affected claimant(s). If the claims together exceed the limitation fund, the court must provide for the distribution of the funds "pro rata subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priorities to which they may be legally entitled."[27]

Overall, despite the procedural complexity of bringing a Limitation action, the opportunity of limiting a vessel owner's liability to the value of their vessel can serve as a powerful defense to claims stemming from personal injury or death. CSK's unique and extensive experience in this highly specialized field of law enables us to provide clients with the requisite insights and competent representation throughout all phases of such litigation.

Endnotes

1 46 U.S.C. §§30501-30512.
2 *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957).
3 *Id.*
4 46 U.S.C. §30502
5 3 BENEDICT ON ADMIRALTY, supra note 42, § 11, at 2-5.
6 46 U.S.C. §30511
7 Fed.R.Civ.P.Supp. F(9), Supp. Adm. R.
8 *Rodriguez Morira v. Lemay*, 659 F. Supp. 89 (S.D.Fla. 1987).
9 Fed.R.Civ.P.Supp F(2).
10 *In re M/V Sunshine, II*, 808 F.2d 762 (11th Cir. 1987).
11 Fed.R.Civ.P.Supp. F(2).
12 *Id.*
13 Fed.R.Civ.P.Supp. F(1) .
14 Fed.R.Civ.P.Supp. F(3).
15 *Pickle v. Char Lee Seafood, Inc.,* 174 F.3d 444 (4th Cir. 1999).
16 46 U.S.C. §30505, Fed.R.Civ.P.Supp. F(3) and F(4); *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979).
17 Fed.R.Civ.P.Supp. F(4).
18 *Id.*
19 *Id.*
20 *Id.*
21 Fed.R.Civ.P.Supp. F(6)
22 *Carr v. PMS Fishing Corp.*, 191 F. 3d 1, 4 (1st Cir. 1999).
23 *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990) (citing *Farrell Lines Inc., Jones*, 530 F.2d 7, 10 (5th Cir. 1976).
24 *In re Marine Sulphur Queen*, 460 F.2d 89, 104 (2d Cir. 1972).
25 *In re Complaint of Messina*, 574 F.3d 119, 126-27 (2d Cir. 2009).
26 *Id.*
27 Fed.R.Civ.P.Supp. F(8).

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The Offer of Judgment:
Recovering Fees and Costs in Federal Court

Shelby Serig, Esq.

The rigors and pace of federal litigation can drive-up the costs of defense. A prudent litigator should seek ways to recover fees and costs, where possible, for the benefit of his or her client. One means of recovering fees and costs in your federal case is pursuant to a proposal for settlement, also referred to as an offer of judgment. Two mechanisms, Fla. Stat. § 768.79 and Federal Rule of Civil Procedure 68, are available for shifting fees pursuant to a proposal for settlement in federal courts that are located within the State of Florida. While similar in some ways, these two sources of law also differ in a number of key respects.

To ensure the validity and enforceability of proposals for settlement in federal court, one must carefully consider a number of factors. These factors include the nature of the jurisdiction being exercised by the court, whether the suit stems from a federal question or alleged violation of a Florida statute and whether the underlying statute specifically provides for recovery of attorneys' fees. The terms "offer of judgment" and "proposal for settlement" are often used interchangeably.

RECOVERING FEES AND COSTS UNDER FLA. STAT. § 768.79, FLORIDA'S PROPOSAL FOR SETTLEMENT STATUTE

Proposals for settlement in Florida are a frequently used litigation tactic. Such proposals provide a means for recovering attorney's fees in cases where recovery of fees would otherwise not be possible. Fla. Stat. § 768.79 permits a defendant to recover attorneys' fees if he or she served an offer of judgment which was rejected by the plaintiff and the plaintiff is ultimately awarded an amount at least 25 percent less than the sum offered by the defendant. The spirit of § 768.79 is to encourage litigants to resolve cases early to avoid incurring substantial court costs and attorney›s fees. The statute serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits.[1]

At the outset, it is critical to note that fees can only be recouped in federal court pursuant to § 768.79 in cases where the court is exercising diversity or supplemental jurisdiction and is applying Florida substantive law.[2] In a diversity action, the court looks to the substantive law which creates the cause of action.[3]

In *Design Pallets v. Gray Robinson, P.A.*[4], the court noted that "a federal judge whose jurisdiction is founded solely on a federal question would not apply § 768.79 to the resolution of federal claims inasmuch as §768.79 is preempted by federal law."[5] The court further held that "§ 768.79 applies only to state law claims."[6] Where a federal court has "both a federal question and supplemental or diversity jurisdiction over Florida claims, § 768.79 applies only to the Florida claims."[7] Federal courts have further limited the enforcement of proposals made pursuant to § 768.79 to cases pending in federal courts that are physically located within the State of Florida.[8]

Determining the nature of the court's jurisdiction and ensuring that the court is applying Florida law are not the only steps that one must take to ensure that their § 768.79 proposal is valid. If one wishes to enforce the fee-shifting provisions of § 768.79 in the future, it is critical to comply with all statutory precepts as well as the requirements of Rule 1.442 of the Florida Rules of Civil Procedure at the time of serving your proposal.

Rule 1.442 outlines the procedural requirements for submitting and accepting offers of judgment, as well as moving for attorneys› fees after the case concludes. The Eleventh Circuit has held that Rule 1.442 is considered substantive law to be followed in cases where claims based upon Florida law are brought in federal court pursuant to diversity or supplemental jurisdiction.[9]

To illustrate the importance of complying with the procedural requirements of Rule 1.442, we turn to *JES Properties, Inc. v. USA Equestrian, Inc.*[10] In *JES Properties*, the defendants sought fees under § 768.79 and an offer of judgment. The plaintiff argued that the defendants' motions for fees should be denied, *inter alia*, because the offers of judgment were facially invalid, non-compliant with Rule 1.442 and made in bad faith. Unfortunately for the defendants, the *JES Properties* court agreed.

In *JES Properties*, the plaintiff sought both damages and injunctive relief. The defendants' offers of judgment were deemed ambiguous and invalid because they did not state whether the defendants agreed to the requested injunctive relief; rather the offers of judgment stated only that they were "intended to resolve all claims of relief."[11] The overly broad language of the proposal created a scenario where, if the plaintiff had accepted the offers, the plaintiff may still have been forced to continue to litigate the claims for injunctive relief.[12] The court noted that the "purposes of section 768.79 include the early termination of litigation. An offer of judgment that would not allow immediate enforcement on acceptance is invalid."[13]

Additionally, the *JES Properties* court found that the defendants' proposals did not comply with Rule 1.442, thereby invalidating the proposals. Rule 1.442(c)(2)(D) states that the proposal shall "state the total amount of the proposal and state with particularity all non-monetary terms of the proposal." In *JES Properties*, the defendants' proposals did not address non-monetary terms.[14] Furthermore, the offers of judgment failed to specify whether the claims would be resolved "by a release (full or partial), a dismissal, or any other means" so that the plaintiffs could "fully evaluate its terms and conditions."[15] Based on the foregoing, the court found that the offers of judgment were legally insufficient and could not support an award of attorneys' pursuant to Fla. Stat. § 768.79.[16]

Interestingly, the *JES Properties* court found that even if the offers of judgment complied with Rule 1.442's requirements, the court still would have refused to award attorney's fees on the grounds that the offers of judgment were made in bad faith. Typically, once the statutory requisites have been met, an award of attorneys' fees and costs pursuant to an offer of judgment is mandatory.[17] However, § 768.79(7)(a) allows a court to refuse to award attorneys' fees if an offer of judgment is not made in good faith.

In determining if an offer was made in good faith, the courts consider whether the offer or proposal bears a reasonable relationship to the amount of damages suffered by the plaintiff and if it realistically assessed liability.[18] Even a minimal offer can be made in good faith if the evidence demonstrates that, at the time of serving the offer, the offeror had a reasonable basis to conclude that its exposure was nominal.[19]

The court in *Stouffer Hotel Co. v. Teachers Ins.*[20] succinctly described the "good faith" analysis as follows:

> An offer of judgment ought to fairly account for the risks of litigation, the costs and fees at stake, and the other components of uncertainty that sophisticated persons assay when deciding whether to settle…A bona fide offer of judgment should be sufficient to cause a temperate and knowledgeable attorney to pause and carefully evaluate his client's stance…The range of potential recovery, the clarity of the law, the extent of invested effort, and other considerations necessarily affect the balance.[21]

In *JES Properties*, the court found that given the novelty and difficulty of the issues in the case and the timing and amount of the defendants' offers of judgment, the offers of judgment were not in good faith.[22] Accordingly, the court declined to award the defendants attorneys' fees pursuant to § 768.79.[23]

RECOVERING FEES AND COSTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 68

Federal Rule of Civil Procedure 68 provides a federal mechanism for tendering an offer of judgment. This is the procedure that is to be utilized when one is defending an action in federal court which is based on a federal question.

While Florida's proposal for settlement law is modeled after Rule 68 of the Federal Rules of Civil Procedure, the two rules differ in significant respects. Generally, Rule 68 allows a defendant to serve an offer of judgment for a specified amount, which includes the costs accrued to date. If the plaintiff accepts the proposal in writing within 14 days of service, the clerk must then enter judgment against the defendant in the agreed upon amount. If the plaintiff rejects the offer and the result obtained is less than the amount of the rejected offer, the plaintiff must reimburse all costs incurred after the offer was made.

Rule 68 typically only shifts the *costs*, not attorneys' fees, incurred during the litigation to the plaintiff if he or she fails to accept a proper offer of judgment. Indeed, the sole constraint Rule 68 places on offers of judgment is its mandate that an offer include "costs then accrued."[24] Thus, as long as an offer does not explicitly exclude costs, it is proper under the Rule.[25] When a Rule 68 offer is silent regarding the amount of costs, the court must award an appropriate amount for costs in addition to the specified sum. The authority to determine and award costs arises from the phrase "with costs then accrued" in Rule 68.[26]

That said, under certain circumstances, Rule 68 can shift attorneys' fees, as well as costs, to the plaintiff. In *Marek v. Chesny*, the Supreme Court held that the term "costs" in Rule 68 "was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."[27] When the underlying statute defines "costs" to include attorney's fees, such fees can be recovered pursuant to a Rule 68 offer of judgment.[28] Although attorneys' fees are generally not recoverable as costs under what is known as the "American Rule," the Supreme Court held that where the relevant authority defined attorneys' fees as part of the "costs," fees were subject to the cost-shifting provision of Rule 68.[29]

In order to recoup fees under Rule 68, it is critical that the underlying statute unequivocally provides for fees to be paid to the prevailing party. For example, *Marek* involved the recovery of attorneys' fees under section 407 of the Communications Act of 1934, which stated that "if the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." Conversely, attorneys' fees are not categorized as costs where the underlying statute merely speaks of "costs" in the context of damages.

The requirement of clear statutory language supporting an award of fees was succinctly set forth in *Oates v. Oates*[30]. There, the court stated that "in the absence of unambiguous statutory language defining attorney's fees as an additional component of costs, and a clear expression by Congress of an intent to carve out an exception to the American Rule… attorney's fees are not 'costs' for purposes of Rule 68." [31]

Lastly, a contractual provision entitling a defendant to fees can also serve as a basis for fee recovery pursuant to a Rule 68 offer of judgment. The *Marek* court noted that the Supreme Court determined that the term "costs" in Rule 68 "was intended to refer to all costs properly awardable under the relevant substantive statute or *other authority.*"[32] The court in *Utility Automation 2000 v. Choctawhatchee Elec.*[33] found that, for Rule 68 purposes, this reference to "other authority" encompassed contractual provisions awarding fees. Again, the relevant contractual provisions must unequivocally award fees to the prevailing party and not be subject to varying interpretations. [34]

When litigating in federal court, a prudent defense strategy should, from the outset, consider fee-shifting mechanisms as a means of leveraging a prompt and favorable resolution. The above-referenced authorities are among the most valuable tools that can be employed by defense counsel for such purposes.

Endnotes

1 *Eagleman v. Eagleman,* 673 So.2d 946, 947 (Fla. 4th DCA 1996)
2 *Design Pallets v. Gray Robinson*, *P.A.*, 583 F. Supp. 2d 1282 (M.D. Fla. 2008)
3 *James v. Wash Depot Holdings, Inc.*, 489 F.Supp.2d 1336 (S.D.Fla. 2007)
4 583 F. Supp. 2d 1282 (M.D. Fla. 2008)
5 *Id.* at 1285
6 *Id.* at 1287
7 *Id.* at 1287
8 *Menchise v. Akerman Senterfitt*, 532 F.3d 1146 (11th Cir. 2008)
9 *Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1258 (11th Cir. 2011)
10 432 F.Supp.2d 1283 (M.D. Fla. 2006)
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Vines v. Mathis,* 867 So.2d 548, 549 (Fla. 1st DCA 2004)
18 *Evans v. Piotraczk,* 724 So.2d 1210 (Fla. 5th DCA 1998)
19 *Id.*
20 944 F.Supp. 874, 875 (M.D.Fla.1995)
21 *Id.*
22 *Id.*
23 *Id.*
24 *Marek v. Chesny*, 473 U.S. 1 (1985)
25 Id.
26 *Arencibia v. Miami Shoes,* 113 F. 3d 1212, 1214 (11th Cir. 1997)
27 *Marek* at 9
28 *Id.*
29 *Id.*
30 866 F.2d 203 (6th Cir.1989)
31 *Id.*
32 *Marek* at 9 (emphasis added).
33 298 F.3d 1238 (11th Cir. 2002)
34 *Id.*

The Right Place at The Right Time:
How and When To Remove to Federal Court

Steven Safra, Esq.

Often times, a defendant is sued in state court and presented with the option to remove the matter to federal court. Differences between federal and state procedural rules, as well as judicial efficiency factors that may allow for timely and early resolution of a matter, are typically primary considerations in making the determination whether to remove. If a case warrants removal, it is axiomatic that a party seeking to remove must strictly comply with the statutory procedure for removal. *Winters Gov't Securities v. NAFI Employees Credit Union*, 449 F. Supp. 239, 241 (S.D. Fla. 1978). Federal statutes in general require strict compliance. In the context of removal, however, compliance is case specific and time sensitive, with numerous ins and outs, warranting careful analysis and clear understanding.

> Removal jurisdiction exists over an action originally filed in state court only where the federal court would have had original jurisdiction over the action. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 592 (2004). Federal courts have original jurisdiction over matters that constitute a federal question or where diversity jurisdiction exists. When removal is based on diversity jurisdiction, the defendant must make "an affirmative showing … of all requisite factors of diversity jurisdiction, including amount in controversy, at the time removal is attempted." *Ragbir v. Imagine Schools of Delaware, Inc.*, No. 6:09-cv-321-Orl-19DAB, 2009 WL 2423105, *2 (M.D. Fla. Aug. 4, 2009) (*quoting Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F. 2d 252, 255 (5th Cir. 1961)).[1]

Section 1441(a) authorizes a defendant to seek removal of a suit originally brought in state court when the federal court has diversity jurisdiction over the cause of action. 28 U.S.C. § 1441(a). Section 1446 describes the appropriate removal procedure to invoke federal jurisdiction and, in short, requires the defendant seeking removal to file a timely notice of removal stating the grounds for removal with the appropriate federal district court. 28 U.S.C. § 1446(a). In order to be timely,

> [t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through **service or otherwise**, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based …

§ 1446(b) (emphasis added). The time-window "is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999); *See also Romero v. Randle Eastern Ambulance Service, Inc.*, No. 08-23179-CIV, 2009 WL 347412 (S.D. Fla. 2009) (defendant's receipt of an e-mail attaching a non-conformed copy of the complaint does not trigger the thirty day period under § 1446(b)); *Sims v. Aropi, Inc.*, 8 F. Supp. 2d 1367, 1369 (S.D. Fla. 1997) (holding defendant's receipt of non-conformed copy of complaint, which contained neither a court file stamp nor a civil action number, did not commence 30-day removal period). As the Supreme Court in *Murphy Brothers* aptly put, "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Id.* at 348. Thus, a defendant is required to act, and is bound by the thirty day time-window, "only upon service of a summons or other authority – asserting measure stating the time within which the party served must appear and defend." *Id.* at 345.

The statutory language of § 1446(b) though only contemplates one defendant and does not account for actions where multiple defendants are present and receipt by each defendant, "through service or otherwise," of a copy of the initial pleading is not simultaneous. *See Bailey v. Janssen Pharmaceutica, Inc., et al.*, 536 F. 3d 1202, 1205 (11th Cir. 2008) (*citing Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F. 3d 527 (6th Cir. 1999)). This is an important distinction, as unanimity among defendants is required for removal. *See Russell Corp. v. Am. Home Assur. Co.*, 264 F. 3d 1040, 1050 (11th Cir. 2001) (the unanimity rule requires that all defendants consent to and join a notice of removal in order for it to be effective). Indeed, a question arises as to how to calculate the timing for removal in the event multiple defendants are served at different times – especially if one or more of them is served outside the original 30-day period. *Bailey*, 536 F. 3d at 1205.

The Eleventh Circuit recognizes in this instance the last-served defendant rule, meaning each defendant is permitted thirty days in which to seek removal. *Id.* In so doing, the Eleventh Circuit rejects what other courts recognize as the "first-served rule", which in application, the thirty day time-window for removal is triggered as of the date of service on the first defendant. *See, e.g., Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F. 2d 1254, 1262-63 (5th Cir. 1988). As a result, a defendant who otherwise waived the right to seek removal through its own non-adherence with § 1446(b) may have a second opportunity to remove a matter to federal court at such time that a last-served defendant elects to do the same, through joinder. *See Bailey*, 536 F. 3d at 1205; *Russell Corp.*, 264 F. 3d at 1050 (requiring unanimity).

With regard to the actual document(s) by way of which the time-window for removal may be triggered, "a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements." *Lowery v. Ala. Power Co.*, 483 F. 3d 1184, 1215 n. 63 (11th Cir. 2007). With diversity jurisdic-

tion, actual knowledge by a defendant is not required and mere notice in the complaint of the potential that plaintiff's claims meet the requirements of diversity, as alleged, is sufficient.

As courts in Florida have stated: "[adding an actual knowledge limitation would complicate an otherwise straightforward statutory provision [(§ 1446(b)], adding a cloud of uncertainty over removal actions, and requiring courts to engage in the difficult and uncertain task of determining whether a particular communication could have (or should have) provided adequate notice to a defendant of a plaintiff's claimed damages." *Ragbir*, 2009 WL 2423105 at 5 (*quoting Callahan v. Countrywide Home Loans, Inc.*, No. 3:06-cv-105, 2006 WL 1776747, at 4 (N.D. Fla. June 26, 2006)). Therefore, it is a bright-line rule that actual knowledge by a defendant is not required so as to "promote certainty and judicial efficiency by not requiring courts to inquire into what a particular defendant may or may not subjectively know." *Id.* (*quoting Chapman v. Powermatic, Inc.*, 969 F. 2d 160, 163 (5th Cir. 1992)).

Of course, instances where a federal court would have had original jurisdiction over the action may not necessarily exist at the time of and/or in an initial pleading, or complaint. If an amended complaint by happenstance is the first document by way of which a defendant may first ascertain that federal jurisdiction exists, the thirty-day time-window under § 1446(b) would be triggered then. *See Lowery*, 483 F. 3d at 1215 n. 63 (thirty-day time limit does not begin to run until a defendant receives an unambiguous statement from the plaintiff which clearly establishes federal jurisdiction). When not readily ascertainable from the complaint, this statement may come from any "other paper" from the plaintiff, including deposition testimony, subsequently obtained. *Id*. at 1212 n. 62. Evidence independently gathered by the defendant "from outside sources … is not of the sort contemplated by § 1446(b)." *Id*. at 1221. A problem may arise though if the "other paper" arguably is in the form of a pre-suit document. A pre-suit document may or may not trigger the time-window; it is again a matter of circumstance and case specific. *See Village Square Condominium of Orlando, Inc. v. Nationwide Mutual Fire Ins. Co.*, No. 6:09-cv-1711-Orl-31DAB, 2009 WL 4855700, at 2 (M.D. Fla. Dec. 10, 2009).

With diversity jurisdiction, the elemental status of citizenship of the parties is not necessarily something that is in dispute and is something that may not be divested by subsequent events. *See Village Square Condominium*, 2009 WL 4855700 at 2. As a result, pre-suit documents that notify a defendant of complete diversity of the parties as to citizenship can – together with a later filing of an initial pleading that otherwise puts a defendant on notice of satisfaction of all other requirements for diversity jurisdiction – trigger the thirty day time-window for removal. *See Id*. (internal citations omitted).

To the extent citizenship is not clearly set forth in an initial pleading and the only notice of such is in a pre-suit document, the time window for removal still commences at the time of initial filing and/or ascertainment by a defendant of an opportunity to remove – separate and apart therefrom. *Id.* Courts do not view citizenship in an "other paper" as an exception, tolling time. On the other hand, pre-suit documents that pertain solely to the amount in controversy requirement for diversity jurisdiction do not necessarily work the same way. If a defendant is put on notice pre-suit of damages exceeding the amount in controversy requirement for diversity jurisdiction, there exists no certainty that the amount of damages claimed will remain the same through the time of filing of a formal lawsuit. *Id.* So, if the amount in controversy is not specifically alleged in the initial pleading, "defendants often must rely on demand letters, medical bills, affidavits from experts and carefully worded (if not deliberately evasive) responses to discovery requests – each of which may have a bearing on a plaintiff's damages only a particular point in time." *Id*.

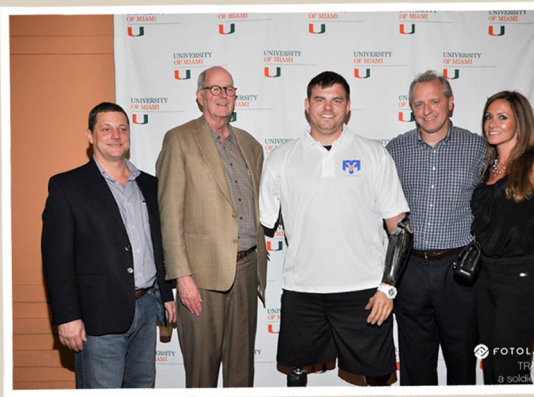
Until such information is obtained and/or confirmed, a defendant cannot ascertain or, through an initial pleading, learn that a federal court would have original jurisdiction over the action and cannot remove. *See Grupo Dataflux*, 541 U.S. at 592. "By its plain terms the statute requires that if an 'other paper' is to trigger the thirty-day time period of the second paragraph of § 1446(b), the defendant must receive the 'other paper' only after [the defendant] receives the initial pleading." *Armstrong v. Sears, Roebuck and Co.*, No. 8:09-cv-2297-T-23-TGW, 2009 WL 4015563, at 1 (M.D. Fla. Nov. 19, 2009) (*quoting Chapman*, 969 F. 2d at 164).

In sum, in order for a defendant to meet his or her burden of showing removal as appropriate in a matter, a defendant must meet the requirements for diversity jurisdiction at the time of removal. *See Village Square Condominium*, 2009 WL 4855700 at 2 (citing, e.g., *Lowery*, 483 F. 3d at 1208; *Gaitor*, 287 F. 2d at 255). That said, even if a matter is ripe for removal, removal to federal court is not always a prudent strategy. Clients should confer with counsel to discuss the potential benefits and consequences of litigating in federal court, some of which are described in other articles in this Quarterly.

Endnotes

1 Diversity jurisdiction requires that all plaintiffs be diverse from all defendants and that the amount in controversy exceed $75,000. 28 U.S.C. § 1332(a)-(b) (2006).

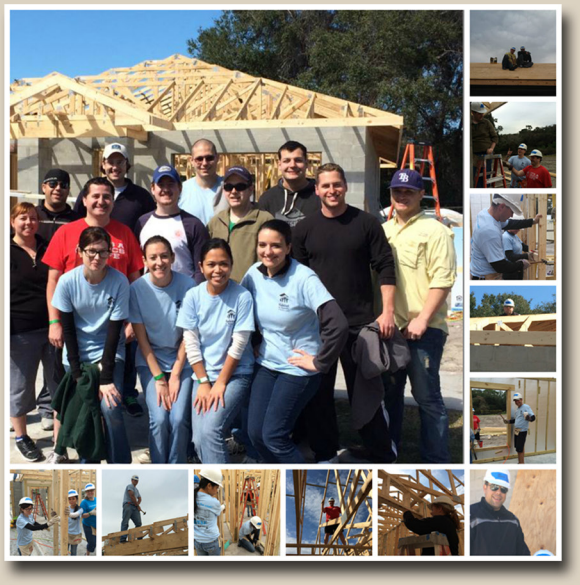
A SOLDIER'S Story



On March 3, 2014, George Truitt, Richard Cole, Scott Cole, and Sarah Egan attended the viewing of Travis: A Soldier's Story in support of United States Army Staff Sergeant Travis Mills, which was hosted by the Miami Wounded Warrior Host Committee. Travis: A Soldier's Story is a documentary featuring the inspiring true story of United States Army Staff Sergeant Mills of the 82nd Airborne. Staff Sergeant Mills lost portions of both arms and legs as the result of an improvised explosive device on April 10, 2012 while on patrol during his third tour of duty in Afghanistan. He is one of just five quadruple-amputees from the wars in Iraq and Afghanistan to survive their injuries.

Habitat for Humanity

On Saturday, February 15, 2014, CSK Tampa helped make home ownership a reality for two deserving families in Pinellas County, Florida, by participating in the 2014 Blitz Build. During a Blitz Build, Habitat will build a home from start to finish in seven days, with over three hundred volunteers lending a hand. This year, two homes were completed in just one week, in a neighborhood comprised solely of Habitat homes! The CSK Tampa team, headed by Elizabeth Tosh, consisted of fifteen lawyers, including Zarra Elias, Saray Noda, Jennifer Lulgjuraj, Michelle Bartels, Nick LeRoy, Andrew Bickford, Ryan Rivas, Ben Deninger, Thomas Hodges, Justin Saar, Carlos Morales, Chris Donegan, Elizabeth Tosh, Steve Richardson, and Managing Partner of the Tampa office, Dan Shapiro. The CSK Tampa team focused on securing roof trusses, sheathing roofs, installing framed walls, and blocking the framing walls to ready interior walls for drywall/other interior applications.



Habitat for Humanity requires prospective homeowners to put in “sweat equity” hours (up to 350 hours per homeowner) qualify and obtain a mortgage, and participate in at least fifteen classes focused on home ownership to make certain that prospective owners are prepared for the future impacts of ownership. Habitat homes are built using donated land and materials, along with volunteer labor, to help qualifying families afford safe and quality housing. To learn more about Habitat for Humanity and how you can help, please visit: www.habitat.org.

Ronald McDonald House

On April 25, 2014, the Tampa office of Cole, Scott, & Kissane P.A., headed up by Elizabeth Tosh, volunteered time by cooking dinner for the residents of the Ronald McDonald House in Tampa, Florida. Tampa lawyers Aram Megerian, Brooke Boltz, Saray Noda, Carlos Morales, Rhonda Beesing, Kelly Cook and Michelle Bartels, along with Elizabeth, put together a Mexican themed dinner buffet. The Ronald McDonald House of Tampa Bay provides a home awa from home for families of pediatric patients in local area hospitals. Since opening in 1980, the Tampa House has provided care for over 46,000 families and continues to play a critical role in assisting those in need.

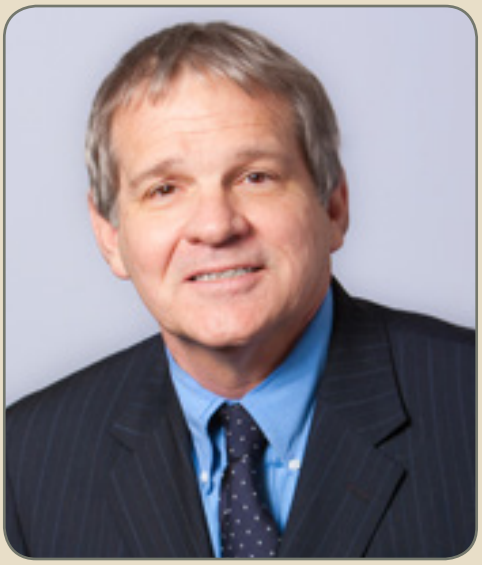
A View From the Bench:

New Challenges In Federal Practice

Thomas E. Scott, Esq.  *Eric T. Rieger, Esq.*  *Brian Dominguez, Esq.*

Brian Dominguez, an Associate from CSK's Miami office, sat down recently with one of our firm's distinguished Partners, Thomas Scott, to talk about the practical challenges of litigating in federal court.

His perspective is unique. Mr. Scott was appointed and formerly served as a United States Florida State Circuit Court Judge and District Court Judge for the Southern District of Florida from 1985 to 1990. After leaving the bench, Mr. Scott earned the honor of serving as United States Attorney, again for the Southern District, from 1997-2000.



His years of experience and profound passion for jurisprudence serve as an asset to our firm and particularly to our younger lawyers as part of CSK's commitment to quality training and mentorship.

Mr. Scott and Mr. Dominguez focused their discussion on the upcoming challenges our clients will face in federal proceedings and how these challenges will affect the way that claims should be handled.

Brian: Good morning, Judge Scott. Thanks for taking time to meet today.

Tom: Always a pleasure, Brian.

Brian: Let me begin with a simple question. What advice do you have for claims handlers who are adjusting matters in federal litigation?

Tom: First and foremost, the most important advice I would give claims handlers is to obtain a lawyer that has experience litigating cases in federal court. Second, I think claims handlers should be aware that cases tend to move much more quickly in federal court than they do at the state level. Finally, claims handlers should be aware that matters in federal court will typically require more time spent by the attorneys handling the case in researching and drafting legal memoranda, as many of the motions filed in federal court will require memoranda of law.

Brian: And what would you say is the most common pitfall for claims handlers who are overseeing matters in federal court?

Tom: I think you raise a very important question. The most common pitfall I see is the assumption that the case will move along in the same manner as a case in state court. Typically, cases in federal court will move along much more quickly. The assumption that a case filed in federal court will proceed at the same pace as a case filed in state court can lead to a claims handler and the attorney retained to defend the case getting into trouble by making a crucial mistake early in the case. These mistakes are usually compounded by the fact that extensions of time are typically more difficult to obtain in federal court.

Brian: I'm sure clients sometimes have misconceptions about the risks and benefits of federal proceedings. Tell me, what do you think is the biggest misconception about matters pending in federal court versus matters pending in Florida state court?

Tom: Well Brian, I think the biggest misconception is that cases in federal court will last longer than cases filed in state court. Although cases filed in federal court can potentially move along slowly to start, once a scheduling order is entered by the judge, the cases will typically move along very quickly, with fast approaching deadlines. These fast approaching deadlines will usually lead to a case being completed in 12 to16 months.

Brian: I'm sure there are advantages and disadvantages as well.

Tom: Of course. The biggest advan-

tage is that generally the case will be handled by a judge with more time and resources to devote to the case. This is usually a result of the lighter case load for most federal judges compared to state court judges. In addition, federal judges typically have two law clerks that can help the judge apportion more time to a given case or issue. This situation usually leads to more thorough consideration being given to major case decisions. Finally, the same is usually true of appellate review in federal court.

Brian: And how about some of the disadvantages?

Tom: The key disadvantage is typically the speed with which the case will move forward. Again, once a scheduling order is entered, both the claims handler and the attorney will need to be ready and available to spend a considerable amount of time on the case. It has been my experience that if time and consideration is not given early on to the needs of a particular case, the involved parties may need to work to slow down the federal court's fast moving schedule. This is typically easier early on in a case. It is much more difficult to have a federal judge make changes to a schedule once a significant amount of time and energy has been spent on a given case and a major deadline is fast approaching.

Brian: Let's talk for a moment about new challenges. What new discovery challenges will carriers face in federal cases in 2014?

Tom: Great question, Brian. As you know, on December 1, 2013 amendments to Federal Rule of Civil Procedure 45 took effect. These changes were designed to clarify and simplify the rules with respect to the issuance and compliance with subpoenas. Notably, subpoenas may now be served nationwide. Previously, courts were limited to a particular geographic area in serving and enforcing subpoenas. In addition, the amendments also require and clarify that prior notice, along with a copy of the subpoena, must be served prior to issuance of the subpoena.

Also relevant, although not yet in effect, several changes have been proposed to the Federal Rules of Civil Procedure. Specifically, changes have been proposed to Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, and 84. These proposed changes claim to modernize and streamline the federal rules in order to expedite litigation. As part of these changes, the proposed rules expedite the early stages of federal litigation, create more cooperation, and lead to more efficient discovery. For example, some of the proposed changes involve a reduction in time to serve complaints, a reduction in time for judges to issue scheduling orders, presumed limits on the number of depositions and discovery requests, and changes to Rule 37 on the availability of sanctions for the failure to preserve electronically stored information.

Brian: And what impact will these new challenges have?

Tom: The biggest impact that the amendments will have is that they will simplify the process for issuing subpoenas. Relevantly, however, carriers should pay special attention to the additional proposed changes to the Federal Rules of Civil Procedure, as many of these changes will have a drastic impact on discovery in federal court and the speed with which cases move through the system.

Brian: What advice would you give to carriers in choosing counsel to handle matters in federal court?

Tom: Well, the most important consideration is obtaining counsel that has a considerable amount of experience in federal court. This experience with the federal system will serve both the claims handler and the client well because the attorney will be able to ensure that the case moves forward at an appropriate speed and that ample time is devoted to complying the court deadlines and requirements. Experienced federal practitioners will also be familiar with the various district and magistrate judges. This knowledge will prove invaluable to claims handlers who will typically be able to receive better instruction for what is happening and what will happen in a given case.

Brian: By the same token, what would you say are the dangers of obtaining counsel inexperienced with federal matters?

Tom: Where to begin? I think it's fair to say that obtaining counsel with little or no experience in federal matters can create a wide variety of dangers and pitfalls for both claims handlers and insureds. First, counsel inexperienced with federal matters will typically be surprised by the speed at which the case will eventually move. This can lead to mistakes being made either because a deadline is missed or work product is turned around in a short amount of time that has not been give the time and consideration necessary. Second, inexperienced counsel will have a more difficult time explaining to the claims handler and insured what should be expected. Whereas an experienced federal practitioner will be in a position to better evaluate a case and provide a more realistic evaluation, an attorney with little or no experience in a federal court will have a difficult time explaining what a judge is likely to do or how a particular argument or strategy will be received by the federal courts.

Brian: Just one more question before we wrap this up. Why is CSK uniquely equipped to handle federal matters?

Tom: Well Brian, I think it's fair to say that we are uniquely equipped because CSK employs a large number of attorneys who are not only extremely bright and effective advocates, but who also have a wealth of experience in federal court. This federal experience, as I've mentioned, will serve both the claims handler and the insureds well in being able to receive a greater understanding for the federal court process and the thought processes of its very qualified judges.

SUCCESS STORIES

Cole, Scott, & Kissane P.A. is proud to report that our attorneys closed out an astonishing 996 cases during the last Quarter. Here are the highlights of just a few of our successes. It is no wonder why CSK is now the fifth largest firm in Florida, according to a recent article in the Daily Business Review, and the largest Insurance Defense firm in the State.

Miami

Edward Polk obtained a complete dismissal with prejudice in a case involving allegations of sexual exploitation of an inmate by a prison staff supervisor. CSK represented the accused supervisor and moved to dismiss on various procedural grounds, including the expiration of the statute of limitation and the failure to exhaust all administrative remedies. The federal court agreed and dismissed the inmate's action with prejudice.

George Truitt and **Sam Padua** obtained final summary judgment in favor of a civil engineer on a professional malpractice claim relative to the construction of a service station. CSK argued that Plaintiff's claim for professional malpractice was barred by the statute of limitations because the suit was filed more than four (4) years after the Certificate of Occupancy for the service station was issued. Accordingly, CSK argued the developer knew that the actual infrastructure costs exceeded the engineering estimate and that it had not delivered the improvements by the date required in the contract with the buyer.

An expired proposal for settlement to the Plaintiff should allow the client to recover defense fees and costs from this solvent developer.

Michael Brand and **Jonathan Weiss** obtained a defense verdict in a traumatic brain injury trial. Our client, a 90-year old, allegedly struck the Plaintiff, a pedestrian, with her car, putting her into a coma which required a hospitalization of over 1½ months. Additionally, video from the parking garage where the accident occurred seemed to suggest that the defendant did not stop at the stop sign immediately prior

to the accident.

All experts agreed that the Plaintiff had significant frontal lobe damage and a traumatic brain injury, with the only question as to its ongoing impact. The Plaintiff incurred $300,000 in boardable medical bills and counsel asked the jury to return a verdict of $4.3 million on behalf of the Plaintiff and her husband.

Congratulations to **Joseph Goldberg**, who recently passed the Virgin Islands Bar Exam. Joe will be sworn in as a Member of the Virgin Islands Bar on May 28th and will be able to handle any cases venued in St. Thomas, St. Croix or St. John.

Brandon G. Waas and **Kelly G. Dunberg** obtained a final summary judgment in a personal injury action. A former housekeeper had sued our clients alleging negligence and failure to provide a safe working area. Despite unequivocally receiving notice of a water leak at the clients' house, that arose through no fault of the clients, and despite the Plaintiff voluntarily agreeing to assist the clients in the clean-up of the water, the Plaintiff alleged that she was injured as a result of her bending down to clean up the clients' floors, a task that she testified was part of her job as our clients' housekeeper. CSK argued that the record evidence conclusively established that the Plaintiff's alleged injury occurred as a result of a condition the Plaintiff was on notice of and engaged to correct as the housekeeper. Moreover, we argued that the record was devoid of any evidence, either direct or circumstantial, of our clients' negligence to support the Plaintiff's claims. The court agreed, granting final summary judgment in favor of our clients.

Edward Polk obtained a voluntary dismissal with prejudice in a wrongful death case. The Plaintiff alleged that her daughter died of an allergic reaction to seafood after consuming jambalaya at resort in Jamaica. CSK moved to dismiss on the grounds of jurisdiction, forum non conveniens, and other bases. The Plaintiff opted to voluntarily dismiss the matter with prejudice as to three of the four entities represented by CSK and without prejudice as to the fourth.

Eric Rieger forced a Plaintiff's attorney to voluntarily dismiss a case within two weeks of the matter being filed. The first-party property case concerned a water mitigation company that obtained a partial Assignment of a covered claim from an insured who allegedly underpaid the water mitigation company after receiving the insurance proceeds. The water mitigation company sued the homeowner's insurance carrier alleging breach of contract.

Upon receiving the file, we discovered deficiencies in the Assignment that appeared to void any claim that the water mitigation company might have had against the carrier. Nonetheless, the Plaintiff refused to withdraw the claim and continued to threaten vexatious litigation. Accordingly, CSK served a motion for sanctions under Section 57.105 of the Florida Statutes. Within a few days of serving the motion, the matter was voluntarily dismissed and the file was closed.

Steven Befera and **Ryan Avery** obtained a dismissal with prejudice in defense of a third-party property damage claim brought by a condominium unit owner against our client, the condominium association, and the property management company.

The Plaintiff alleged that our client and the management company failed to investigate and repair a water leak in walls of the unit, which ultimately caused the plaintiff to vacate her unit due to persistent mold and mildew problems. After successfully moving to dismiss the complaint three times for failure to state a cause of action, the Court gave plaintiff one last chance to file a legally sufficient complaint. After we determined Plaintiff's Third Amended Complaint had the same legal deficiencies as the previous complaints, CSK moved to dismiss with prejudice and the court granted our motion.

Cody German obtained a dismissal with prejudice in favor of a German-based engineering company that was being sued for $623,000 by the bankruptcy trustee in Florida's largest Ponzi scheme of record. Mr. German was able to successfully convince the bankruptcy trustee to dismiss the fraudulent transfer action against our client in light of legal and factual defenses that would arguably prevent the Trustee from prevailing in the case. The Trustee alleged that our client received a $623,000 payment from the debtor without the debtor re-

ceiving a proper benefit for the payment. Mr. German was able to successfully demonstrate to the Trustee that the Bankruptcy Court would not likely have jurisdiction over the foreign company, and that the Trustee would have a difficult time collecting any judgment against the foreign company. The case was dismissed within two months of our retention, and our client received a substantial refund of its retainer in light of the early dismissal.

Daniel Klein obtained final summary judgment in favor of their client in a personal injury case in Miami-Dade Circuit Court. The Plaintiff specifically alleged that our client's alleged negligence caused the Plaintiff to slip and fall on an unknown liquid substance, seriously injuring his ankle and back. The Plaintiff claimed lost wages and loss of future earning capacity. CSK successfully moved for final summary judgment on grounds that the Plaintiff could not prove that he fell on our client's property and that there were medical records and documents suggesting that he may have fallen from a balcony at work.

West Palm Beach

Nicole Wall obtained a final summary judgment in an Americans with Disabilities Act (ADA) case. The Plaintiff claimed that he was discriminated against based on his disability because certain elements of local restaurant were not ADA compliant and that he was therefore denied the opportunity to enjoy the same goods and services provided by the restaurant to non-disabled individuals. CSK was successful in establishing that our client did not own, lease, or control the subject restaurant and, therefore, lacked authority to make any repairs or modifications to the restaurant to comply with the ADA.

Katie Merwin and **Joseph Valdivia** obtained a dismissal with prejudice of a claim against a homeowners association arising from negligence and intentional infliction of emotional distress. The former homeowner presented several claims related to our client's efforts to collect past due assessments, which she claimed were improper and caused severe emotional distress. CSK was able to obtain a dismissal of all claims raised by the former homeowner based on the expiration of the applicable Statute of Limitations.

Rachel Beige and **Katie Merwin** obtained a summary judgment regarding the interpretation of a severance provision in an employment contract. The Plaintiff took the position that his severance should be calculated based on the amount of total income he received while employed, which included commissions and bonuses. CSK successfully argued that the severance provision included only the base salary amount paid, excluding all commissions and bonuses. Ultimately the court agreed and granted summary judgment.

Sherry Schwartz and **Nicole Zakarin** recently obtained four defense verdicts arising out of separate petitions for stalking and repeat violence injunctions lodged against our client's condominium association Board Members and employees. For years, the Plaintiff had been threatening and bullying the Board of Directors and maintenance workers every time they tried to enforce the regulations. Late last year, the Plaintiff and her boyfriend followed through on their threats by filing four petitions against various Members of the Board and a maintenance worker employed by the association. One of the petitions arose out an incident where the maintenance working ended up allegedly "stabbing" the boyfriend with a screw driver during an altercation – the police were called and the state attorney was notified. After three days of hearing testimony from over 10 witnesses, including the Officer responding to the "stabbing incident", the judge denied all four petitions.

Sherry Schwartz and **Nicole Zakarin** recently obtained a defense verdict arising out of a petition for injunction order, in which the Petitioner alleged that the President of our client's homeowner's association engaged in stalking. The Petitioner was a former law enforcement officer who was conducting combat training on association common property, in violation of the association's governing documents. Following the association's initiation of legal action to put an end to Petitioner's violations, the Petitioner filed for an injunction against stalking, setting forth unsubstantiated allegations against the association's President. Upon the defense presenting evidence to the judge that the Petitioner's allegations were noth-

ing more than a retaliation tactic, the judge quickly denied the Petition for injunction order, further admonishing the Petitioner for utilizing the judicial system as an avenue to retaliate against the association relative to the pending civil matter.

Lee Cohen and **Ryan Fogg** obtained a defense verdict in a slip-and-fall case against our client, a condominium association. The fall caused the Plaintiff to lose consciousness and also suffer multiple cervical disc herniations. The Plaintiff proceeded to have a triple cervical disc fusion surgery and claimed to be permanently impaired from the injury. His total medical bills were approximately $300,000 which were all covered by letters of protection.

At trial, the Plaintiff argued that the stairs had not been cleaned or maintained for almost 5 years and that, as a result, mold had grown on the stairs which caused the Plaintiff to fall. The Plaintiff's case was aided by the fact that a few days after his fall he travelled back to the complex with his best friend to take almost 200 pictures of the stairs which clearly showed the dirty condition.

After closing arguments the jury deliberated for 45 minutes and found that our client was not negligent. Ryan and Lee were able to argue at trial that the Plaintiff had previously lived at the complex and had walked up and down the stairs multiple times before and knew about their condition.

Nicole Wall obtained a dismissal in a Florida Fair Housing Act (FHA) case brought by the Attorney General's Office on behalf of a resident. The Plaintiff claimed that our client, a homeowners association, discriminated against her based on her disability by not allowing her to keep an emotional support animal at her home. CSK successfully argued that the action was barred by collateral estoppel based on a prior lawsuit that our client had filed against the resident for violating its no pet rule and that the Plaintiff's lawsuit was an improper attempt to appeal the prior court's ruling on the issue.

Ivan Tarasuk obtained final summary judgment in favor of our client in a first-party property insurance case before Judge Antonio Arzola in Miami. CSK moved for summary judgment based upon the Statute of Limitations and the statutory deadline in Section 631.68 of the Florida Statutes. Despite some last ditch efforts by the Plaintiff's counsel to establish genuine issues of fact, the court agreed with us and granted the motion for final summary judgment. Due to an expired offer of judgment, our client now has a claim for fees and costs against the Plaintiff.

Claire Hurley and **Lauren McEndree** obtained a voluntary dismissal with prejudice following the Plaintiff's deposition in a premises liability claim. The Plaintiff alleged she slipped and fell in her own kitchen as a result of a leak in the above condominium owned by our client. As a result of the alleged incident, the Plaintiff reportedly suffered from constant, globalized pain. During the Plaintiff's deposition, CSK established that the Plaintiff lacked evidentiary support for her allegations. The Plaintiff had been previously treating with a chiropractor for the same complaints of pain as those alleged in her Complaint without any evidence to suggest aggravation of her preexisting condition. The following business day, Plaintiff's counsel agreed to voluntarily dismiss the case with prejudice based on the deposition transcript.

Barry Postman and **Stephen Harber** answered by way of a trial victory the long debated question of whether or not a Chevrolet Avalanche is an SUV or a pickup truck. CSK represented a community association that had passed a rule restricting the parking of certain classifications of vehicles, including pickup trucks. The Plaintiff purchased a Chevy Avalanche and held throughout the litigation that his vehicle was not a pickup truck. The Plaintiff's attorneys were two shareholders from one of the country's largest law firms, who vigorously litigated this case, demanding $150,000 in fees prior to trial and refused to negotiate.

After the Plaintiff's attorneys finished putting on their evidence, the Court granted a motion for involuntary dismissal (directed verdict) and found that the Chevy Avalanche is a pickup truck. CSK is now seeking its fees and costs expended in this matter.

James Sparkman obtained a defense verdict in a low impact, rear end automobile case. There was

$800 damage to the Plaintiff's Escalade and $4,500 to the defendant's Mercedes. The Plaintiff, a 46-year-old secretary, required EMS and ER evaluation. The Plaintiff underwent pain management treatment up until one week before the accident, including narcotic pain medication and Botox injections. Her past medical expenses were $44,000; the Plaintiff asked the jury for $160,000 for future medical treatment.

Fortunately, the jury rendered a verdict in favor of our client, despite this accident consisting of a rear-end collision.

Ivan Tarasuk obtained a final order of dismissal with prejudice in a property insurance case before Judge Stanford Blake in Miami. The case involved a property insurer that became insolvent and was ordered into receivership. After the insolvency, the Plaintiff sued the insurer for breach of contract and damages for his Hurricane Wilma claim. Due to the insolvency, however, the Plaintiff never obtained proper service on the insurer. Subsequently, and after the statute of limitations had run, the Plaintiff moved to substitute our client as the defendant in the case. The court granted the substitution. The Plaintiff then served our client with an amended complaint for breach of contract and damages for the claim.

The court granted CSK's motion to dismiss specifically found that the lawsuit against our client was filed after the Statute of Limitations and did not relate back. The court also agreed it did not have jurisdiction to substitute our client in the case. Due to an expired offer of judgment, our client now has a claim for fees and costs against the Plaintiff.

Lee Cohen and **Julie Kornfield**, along with **Ron Campbell** of CSK's Bonita Springs office, obtained a defense verdict in a Fair Housing Act case. This jury trial lasted two weeks in Stuart, Florida. The Plaintiff claimed that she needed two Doberman service/therapy dogs because she was a survivor of breast cancer and to ameliorate the effects of her hypertension, anxiety, and PTSD. The Plaintiff requested an exception to the defendant homeowners' associations' pet rule, which prohibited Dobermans.

CSK successfully demonstrated that the Plaintiff was not disabled and did not need these animals to use and enjoy the property. Consequently, the jury returned a verdict in favor of our client.

Jacksonville

Daniel Kissane and **James Simmons** obtained a voluntary dismissal with prejudice in a trip-and-fall case. According to the Complaint, the Plaintiff allegedly fell through the floor board of his mobile home, which resulted in a broken ankle. The Plaintiff's alleged theory was that the floor boards were weakened due to a leak in the mobile home and that our client failed to repair the area.

Through aggressive discovery, CSK found an eyewitness who gave a recorded statement indicating that the Plaintiff had consumed two cases of beer prior to the alleged fall and was headed out of the mobile home to buy crack cocaine when the incident occurred. Rather than falling through the floor boards, he was "so drunk" that he actually stumbled past the first three steps leading down from his mobile home and fractured his ankle when he landed. The Plaintiff then smoked crack cocaine to alleviate the pain. The eyewitness also confirmed that a friend "came over and stomped a hole" in the floor of the mobile home stating, "this is where you actually hurt yourself."

After CSK threatened sanctions, the Plaintiff's counsel filed a Notice of Voluntary Dismissal with Prejudice, thereby relieving our client of any liability for the Plaintiff's fraudulent claim.

Gregory Lower obtained a denial of benefits in a workers' compensation case. The Claimant was a long time employee of our client. On June 3, 2011, while working as a Maintenance Mechanic, the Claimant slipped and fell in a puddle of oil or grease injuring his neck, back and right hip. The employer/carrier initially accepted the claim as compensable and authorized medical treatment and paid disability benefits.

It was later discovered that the Claimant had a significant pre-existing lower back condition including prior surgery. Based on the newly discovered evidence, the authorized physicians opined that the pre-existing conditions were now the major contributing cause of the claimant's need for treatment and disability.

The claim for disability was tried before the Judge of Compensation Claims and based on the medical opinions and testimony of several doctors, the JCC denied the claim and Petition for disability benefits.

Bonita Springs

Scott Shelton and **Brooke Beebe** obtained a dismissal with prejudice in favor of our clients in a motor vehicle versus pedestrian case. The Plaintiff, a disabled woman, was crossing a busy road in her wheelchair when she was struck by our client. The Plaintiff sustained broken ribs, a punctured lung, and soft tissue injuries with medical bills totaling $60,000. The Plaintiff was cited for failing to yield to traffic. After aggressive discovery, we offered a nuisance value amount to settle this matter. In response, Plaintiff rejected our offer and filed a dismissal with prejudice.

Scott Shelton and **James Sparkman** obtained a defense verdict in a premises liability case. The Plaintiff allegedly slipped and fell outside her place of employment, shattering her knee-cap into twelve pieces. CSK defended the Condo Association, Property Manager, and landlord of the building.

The Plaintiff introduced photos showing mold and algae on the sidewalk. The Plaintiff also introduced evidence that the Defendants were aware of the condition, but did nothing to correct it. Over our objection, the Plaintiff also used excerpts of our withdrawn IME expert to testify about the Plaintiff›s need for a future knee replacement. CSK argued, among other things, that the sidewalk was, in fact, not a dangerous condition and that it was open/obvious. We also showed that neither the Plaintiff nor her co-workers complained about the sidewalk prior to the incident, despite traversing it approximately 5,000 times.

The Plaintiff asked the jury to return a verdict of over $700,000.00. After approximately one hour of deliberations, the jury returned with a defense verdict finding no negligence on behalf of our clients. Our motion to tax fees/costs, filed pursuant to a proposal for settlement, is pending.

Scott Shelton and **Brooke Beebe** obtained a final summary judgment in favor of our client in a premises liability trip-and-fall case. The Plaintiff was exiting her mother's house carrying a large urn when she tripped and fell on a raised concrete panel in the driveway. As a result of fall, she ruptured her spleen requiring surgery and a lengthy hospitalization stay. The Plaintiff alleged her own mother negligently allowed a dangerous condition to exist on the property and failed to warn her of the dangerous condition. Through discovery, CSK learned that the Plaintiff co-owned the property where the incident occurred. Additionally, she admitted she regularly visited the property. Accordingly, we were able to demonstrate to the court that the Plaintiff was not a social guest on the property since she was a co-owner and no duty was owed to the Plaintiff to warn her of the raised concrete panel.

Ft. Lauderdale East

Scott Bassman and **Tracy Mitchell** obtained summary judgment in favor of a condominium association on a claim of breach of contract, alleging that the Association breached the terms of a contract with a computer services company by contracting with other companies to provide the Association with satellite television, internet, video surveillance, phone access, and intercom systems. The court found that our client was entitled to summary judgment because the Association properly cancelled the contract pursuant to (and in the manner proscribed by) Florida's Condominium Act, which permits associations to cancel contracts entered into by a developer prior to turnover if the requisite number of unit owners vote to cancel the contract after the association has been turned over by a developer.

Craig Minko obtained the dismissal of four separate Florida Commission on Ethics Complaints filed against three Board Members and the Executive Director of a South Florida housing authority, after providing comprehensive written submissions to the Commission and a lengthy oral argument. In addition, Craig obtained the dismissal of a related Ethics Complaint filed against yet another Director of the housing authority, after the Complaint proceeded to a bench trial.

Jami L. Gursky and **Jennifer J. Smith** obtained a defense verdict in a jury trial for a breach of contract case involving insurance coverage and property damage.

The Plaintiff claimed that his roof leaked as a result of wind driven rain; however, CSK discovered that the Plaintiff was placing an extension on his home and re-roofing the property when he obtained his insurance and made several misstatements on the insurance application.

The jury decided that Plaintiff did not meet his burden of proof to show that the damage occurred within the policy period, returning a complete defense verdict.

Scott Bassman and **Craig Minko** obtained a final summary judgment on behalf of a condominium association on complex breach of contract claims, involving a guest of a unit owner who had resided within the association for several years without the unit owner present, without association approval, while committing several disruptive and inappropriate acts throughout the association, and refusing to submit to a background check. Scott and Craig successfully argued that the unit owner's guest was subject to the association's screening requirements pursuant to the association's governing documents and, due to the guest's outrageous conduct, obtained a permanent injunction barring the guest from residing within the association. After obtaining final summary judgment, Scott and Craig also successfully obtained entitlement to fees and costs on behalf of the association.

Ft. Lauderdale West

Lonni Tessler obtained a final summary judgment on behalf of a client whose property abutted a sidewalk which was alleged to be poorly maintained, causing the Plaintiff to trip and fall and sustain injuries. The Plaintiff relied upon a municipal ordinance requiring a property owner to repair sidewalks abutting their property; however, CSK argued that the ordinance did not impose civil liability upon the abutting property owner, but was merely a provision to secure the safety or welfare of the public as an entity. The court agreed with our arguments and awarded summary judgment in favor of our client.

Omar Giraldo obtained a directed verdict during a non-jury trial for our client, an automotive repair shop. A customer sued our client for damage done to his vehicle during an oil change. The Plaintiff alleged that our client had negligently serviced his vehicle and stripped the threading off his oil plug, causing a leak. The Plaintiff took his vehicle to his local car dealership who opined that our client improperly used an industrial strength adhesive on the drain plug and destroyed the oil pan, requiring complete replacement. After an investigation, we determined the oil change was completed appropriately and the allegations from the dealership were unfounded. At trial, the Plaintiff presented two lay witnesses and a Master ASE Certified Automotive Technician as an expert. Through cross examination Omar had one witness stricken and was able to discredit the testimony of the expert. CSK moved for a directed verdict after the Plaintiff rested his case and the court granted the motion.

Gregory J. Willis and **Sanaz Alempour** obtained a final order of dismissal after arguing a motion to dismiss for fraud upon the court. The court not only granted the dismissal but also granted our motion for sanctions entitling our client to attorney's fees and costs incurred in defending this lawsuit from its inception. The court agreed that the Plaintiff had set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate the case by providing false and misleading testimony in two separate matters directly related to Plaintiff's claim on legal causation and damages.

Tampa

Dan Shapiro and **Elizabeth Tosh** obtained a very favorable verdict in a week long premises liability trial. The Plaintiff alleged that she tripped and fell on an asphalt ramp that was the same color of the parking lot, without any identifying features, such as yellow paint or hatching. As a consequence of the fall, she fractured her ankle which required surgery. She claimed $82,000 in past medical expenses and approximately $20,000 in lost wages. She further alleged that she would not be able to work in the future as a nurse, due to physical limitations. The Plaintiff asked the jury to return a verdict of $1.4 million dollars. The jury, after deliberating for almost four hours, returned a verdict of only $59,000, with 25% comparative fault attributed to plaintiff, which was significantly less than the settlement offer extended pre-trial. The jury

did not award any future medical expenses or damages for loss of future earning capacity.

Attorney **Maja Lacevic** who just recently joined the firm, was asked by a Federal Court Judge to give a presentation at the Naturalization Ceremony at the Federal Courthouse in Tampa.

Aram Megerian and **Elizabeth Tosh** obtained a dismissal with prejudice in federal court on a legal malpractice lawsuit. The Plaintiff alleged claimed damages in excess of $1 million, as well as a violation of Section 1983 of the Civil Rights Act. Through successful and targeted motion practice, the suit was dismissed with prejudice as to CSK's client. Further, a motion to tax fees and costs was filed and recently granted. As such, CSK's client will be entitled to a judgment awarding all attorney's fees and costs incurred in the defense of the claim.

Paula Parisi and **Robert Murphy** obtained a final summary judgment in a wrongful death case. The Plaintiff claimed the decedent had suffered a laceration of the vena cava causing her death during surgery to remove an abdominal tumor at our client's hospital. The Plaintiff's complaint alleged medical negligence on the part of the hospital under theories of agency, apparent agency and non-delegable duty, and argued that the surgeons were agents of the hospital, the hospital failed to properly notify the patient of its delegation of duties and responsibilities of the surgical services to the surgeons, and the hospital had both a contractual and federal obligation to provide non-negligent surgical medical services to the decedent. CSK filed a motion for summary judgment on all counts, relying on Florida Statute Section 1012.965 for the agency claims and *Tarpon Springs Hospital Foundation v. Reth* for the non-delegable duty claims. The court granted the motion as to all counts against the hospital following a two hour hearing.

Howard Scholl obtained a defense verdict in a premises liability case arising from an incident when a pit bull owned by a Co-Defendant attacked an 8 year-old girl who lived next door, causing substantial scarring. The Co-Defendant had rented a home from our clients and contended that they had knowledge of the pit bull and the danger it presented prior to the attack. In support of this position, the Plaintiff presented evidence that the Co-Defendant had lived in another home managed by our client several months before the attack, and testimony from multiple persons concerning the behaviors exhibited by the animals at that other home. The Plaintiff also presented substantial evidence concerning the nature of the underlying attack and injuries to the minor.

Our defense focused on a lack of knowledge regarding the presence of the animal on the property at issue and the actions of the Co-Defendant for failing to disclose the presence of the animal in violation of the terms of her lease. The jury rendered a verdict in favor of our client; but found the Co-Defendant liable and awarded total damages of $268,000.

Congratulations to **Paula Parisi**, who was asked to speak at the Practice Management Council Meeting at Florida Hospital Tampa on May 22, 2014. The presentation, sponsored by a local insurance company and hospital, will discuss medical documentation in the new age of EMR and how errors, omissions, and late entries create lawsuits. Hillsborough County physicians, practice administrators and office managers will be in attendance.

Daniel Shapiro and **Howard Scholl** obtained a defense verdict in a rear-end collision with admitted liability. The Plaintiff, the restrained driver of an SUV, was struck from behind by a truck owned by our client and driven by its employee.

As a result of this accident, the Plaintiff asserted claims for injury to her neck, back and shoulder including need for arthroscopic shoulder. In addition to presenting gaps in treatment, Dan and Howard effectively cross examined the Plaintiff, her treating providers and the Plaintiff's father, a semi-retired chiropractor. In addition to the driver, the defense presented testimony from an orthopedist and biomechanical expert.

The jury concluded that the Plaintiff did not sustain an injury related to the accident and, consequently, a verdict was rendered in favor of our client.

Orlando

Cathi Carson-Freymann won a contested motion for final default judgment on a cross-claim where the

court ordered the Cross-Defendant to pay our client $59,870.14, which included all attorneys' fees and settlement costs. The Plaintiff alleged that she slipped and fell on a wet floor at her place of employment, which was cleaned by the Co-Defendant, who subcontracted to our client. Our client prudently settled the claim with the Plaintiff and sought indemnity from the Cross-Defendant. After a default was entered, the Cross-Defendant unsuccessfully tried to argue there was no indemnity agreement between the parties. The court disagreed and awarded our client the settlement costs, as well as the $34,870.14 paid in attorneys' fees and costs.

Greg Ackerman obtained summary judgment in favor of a large medical center located in Daytona Beach in a civil rights case litigated in federal court. The three plaintiffs contended that the medical center failed to provide them with live sign language interpreters during their admissions in violation of the Americans with Disabilities Act, Rehabilitation Act, and Florida Civil Rights Act. The court found that the plaintiffs failed to raise a genuine issue of material fact as to any violation of ADA or the Rehabilitation Act, granted the medical center's motion for summary judgment as to all counts and entered judgment against the plaintiffs.

David Harrigan obtained a defense verdict in a first-party property case. The Plaintiffs claimed that they were away from their seasonal home when a neighbor monitoring the home discovered water on the kitchen floor, saturated kitchen rugs and carpeting in an adjacent living and dining area, as well as significant damage to kitchen cabinetry.

After the Plaintiffs returned to their home, they contacted their homeowner's insurance carrier to assert a claim for water loss. An engineering evaluation was unable to identify the cause and origin of the alleged loss, as the Plaintiffs had already removed and disposed of all plumbing fixtures from the kitchen sink. The carrier denied the Plaintiffs' claim, as it was apparent from the investigation that damage to the cabinetry occurred due to constant and repeated seepage of water for a period of at least 8 weeks. The Plaintiffs claimed breach of contract against the carrier for failure to pay for damages caused by an alleged sudden and accidental release of water. CSK defended the claims on the basis that this was a non-covered peril due to the long-term seepage and exposure to water for a period of at least 14 days, as well as the Plaintiffs' failure to promptly notify the carrier of the claim and take reasonable measures to protect the property.

During the trial, CSK elicited testimony from the Plaintiff's own expert that some of the observed mold and damage to adjacent cabinetry was caused by trapped condensation due to the original installation of kitchen cabinets using "faced" particle board that inhibited the breathability of the building envelope. The jury returned a verdict in favor of the carrier, finding that the Plaintiffs failed to establish by the greater weight of the evidence that the alleged damaged was caused by a sudden and accidental release of water that occurred during the policy period.

CSK's Appellate Victories

Ross Dress for Less VA, Inc., etc. v. Castro, et al., in the Third District Court of Appeal, where Scott Cole obtained a writ of certiorari quashing several trial court orders in their entirety. The case involved claims for false imprisonment, malicious prosecution and slander. At the trial level, the plaintiff/respondent alleged that the defendant/petitioner and their former-law firm failed to produce a number of documents during discovery. Although the defendant/petitioner argued that it had already produced all responsive documents, the plaintiff/respondent proceeded to file several motions seeking to compel further production, and further seeking contempt and "severe sanctions" against the defendant/petitioner. Ultimately, the trial court granted the plaintiff/respondent's motion, struck the defendant/petitioner's pleadings, entered default against them, permitted the complaint be amended to seek punitive damages, and assessed a $200 per day fine against them until they produced all documents purportedly in their possession. In a thoughtful and well-analyzed opinion, the Third District quashed the trial court's order finding that they departed from the essential requirements of the law, causing material injury that cannot be remedied on appeal. The Third District held that the record does not

support the "Numerous scandalous accusations" made by the plaintiff/respondent. In a concurring opinion, Judge Shepherd further admonished the actions of the plaintiff/respondent: "Courts are not fact-free zones. Tactics of the type exhibited in this case are corrosive to the rule of law."

Highsmith, etc. v. ECAA, LLC, etc, et al., in the First District Court of Appeal, where Robert O'Quinn and Katie Smith obtained a partial affirmance of a final summary judgment in favor of the defendants/appellees determining that, as a matter of law, the plaintiff/appellant suffered no recoverable damages in connection with their claims against the defendants for fraudulent concealment and breach of fiduciary duty, arising out of alleged misrepresentations during a real estate transaction. Although the district court reversed finding that a question of fact existed as to whether the plaintiff/appellee suffered any nominal damages on their claim for breach of fiduciary duty, the district court's opinion precludes an award of any substantive or punitive damages on the plaintiffs/appellants' claims.

Per Curiam Affirmances

Devoe v. The Pantry, Inc., etc. et al., in the First District Court of Appeal, affirming an order transferring venue to an adjacent county. The underlying action arose out of several allegations of negligence against the defendants/appellees. The defendants/appellees moved to transfer venue due to the fact that the incident occurred in, and several witnesses resided in, St. Johns County, thereby making it an inconvenience and hardship to litigate in Duval County. In the interest of justice and convenience to the parties and witnesses, the trial court transferred venue from Duval County to St. Johns County. The appellate court affirmed, per curiam, without a written opinion.

Hadfeg v. Hialeah Rey Pizza, Inc., in the Third District Court of Appeal, affirming an order of dismissal, with prejudice, due to the plaintiff/appellant's false statements and omissions made during her deposition concerning her medical care and injuries.

The Estate of Walter S. Lewandowski, et al. v. Heartland of Boca Raton Fl, LLC, et al., and **The Estate of Seyed Abbass Daneshmayeh, et al. v. Heartland of Boynton Beach Fl, LLC, et al**., both in the Fourth District Court of Appeal, affirming an order compelling arbitration under a legally enforceable arbitration agreement and durable health care power of attorney which were executed on behalf of the decedents. The actions arose out of claims against the defendants/appellees for nursing home negligence. On appeal, the plaintiff/appellant argued that the trial court erred in finding valid agreements to arbitrate because the arbitration agreements' cost-splitting provisions violate Florida's public policy and was prohibitive of arbitration. The trial court's order compelling arbitration was per curiam affirmed, without a written opinion.

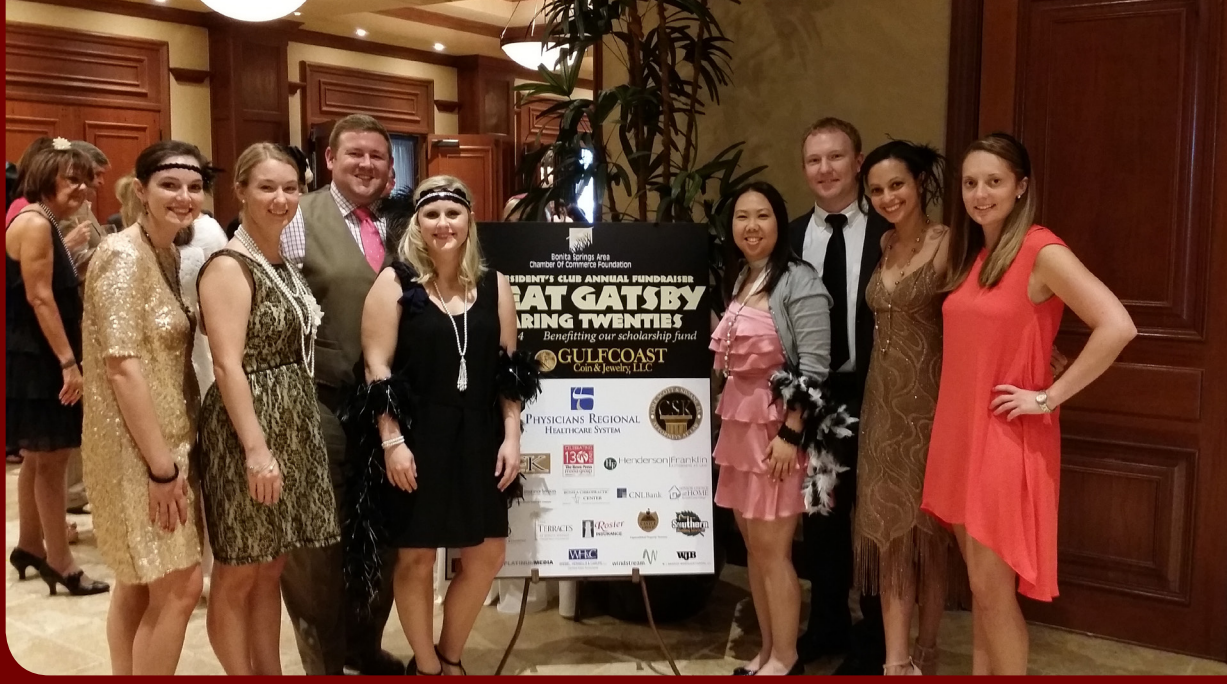
Gutierrez v. Metro Muscle, et al., in the Fifth District Court of Appeal, affirming a final judgment after a jury trial for alleged negligence due to injuries sustained by the plaintiff/appellant when she fell off a treadmill at a gym.

For more information about our Appellate Group, please contact Scott Cole, scott.cole@csklegal.com.

Seminars

On April 16, 2014, **Gene Kissane**, **Aram Megerian** and **Katie Smith** presented a 5-hour, interactive continuing insurance and legal education program on proposals for settlement, entitled: "Fee-Shifting Essentials and Safeguarding Entitlement." The program was a huge success, and provided the participants with a detailed overview of current Florida law relevant to proposals for settlement, and strategic tips and practice points to assist decisions of whether to accept served proposals, and with drafting valid and enforceable proposals that withstand the strict requirements of Rule 1.442 and section 768.79, Florida Statutes. For more information on proposals for settlement, please contact Gene Kissane, gene.kissane@csklegal.com or Aram Megerian, aram.megerian@csklegal.com.

SCHOLARSHIP FUNDRAISER



Several of the attorneys from the Bonita Springs office recently attended a scholarship fundraiser hosted by the Bonita Springs Chamber of Commerce's President's Club. Attorney Patrick Boland helped organize the firm's involvement. The President's Club is a group of high level executives from the area dedicated to promoting economic growth in the community and they hold an annual fundraiser to raise money for local scholarships. The CSK Bonita Springs Office has been actively involved in the local community for some time and is always looking for ways to contribute to worthy causes such as this event.

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 August 1, 2014. Entries must be received by 12:00 p.m. (EST) on August 30, 2014. 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 September 1, 2014 and notified via e-mail by September 5, 2014. 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 September 6, 2014 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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