



QUARTERLY

NEWSLETTER

SUMMER 2013

COLE, SCOTT & KISSANE, P.A.



Accountants: Do Not Let Your Best Marketing Tool Become Your Worst Nightmare in Litigation



Financial Regulation Since the 2008 Financial Crisis



Workers' Compensation: Not Always an Employee's Exclusive Remedy



Retroactivity of Section 768.0755, Florida Statutes

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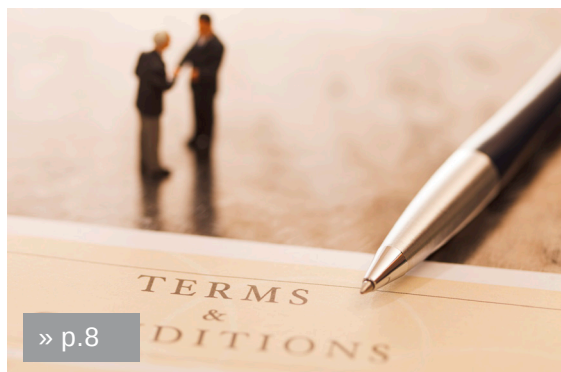


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ACCOUNTANTS:

DO NOT LET YOUR BEST MARKETING TOOL BECOME YOUR WORST NIGHTMARE IN LITIGATION

BY: BARRY POSTMAN, BLAKE SANDO, AND CODY GERMAN



In this digital age, almost every accounting firm has an attractive website which touts the firm's expertise and experience in a wide range of services. Accounting firms recognize that an impressive website can be an effective marketing tool to prospective clients, and can also assist current clients in determining additional services which the client may find of interest. However, in the unfortunate event that a legal claim is brought against your accounting firm, you should be aware that the firm website may often serve as Exhibit "A" in support of the claim.

In particular, a professional services website often includes marketing words and phrases that are directed at putting the firm in the best light possible to its current and potential clients. Undeniably, this is a goal of the website. Yet, it is also undeniable that professional services websites are known to include "fluff" statements pertaining to the firm's capabilities and services. While your firm's marketing agency may extol the marketing benefits of such statements, your firm's lawyer would likely advise

against such statements — for good reason. You cannot anticipate that a jury will be capable of deciphering the differences between a marketing tool and reality.

In order to reduce your firm's exposure in the event of a claim, it would be prudent to consider the following items with respect to your firm's website:

1. Does your website accurately reflect the services that your firm is capable and qualified to provide to its clients? For example, many accounting firm websites state the fact that the firm provides financial advisement to its clients. Quite simply, unless your firm is truly capable of providing financial advisement to its clients, and in fact does so, your website should not include such a statement. Otherwise, when a client's investment portfolio takes a hit, you may be sued for the investment decisions your client made without your guidance or input. In this case, your

website will almost certainly be used against you.

2. If you are solely a tax accountant, do not include words such as "analysis," "scrutinize," or "examine," with respect to the services you provide to your clients. The preparation of tax returns generally permits an accountant to rely upon the supporting documentation provided by the client. Thus, an accountant would not be analyzing, scrutinizing, or examining the supporting documentation. In the event a client's investment performs poorly, you do not want to be accused of being responsible for analyzing financial documentation provided by your client when preparing tax returns. Importantly, this point also applies to invoices related to the preparation of tax returns.
3. Keep your website updated. If an accountant's qualifications or scope of services provided to clients changes, make sure the website reflects the same. If an accountant leaves the firm, make sure to promptly remove the accountant's biography from the website. An outdated or inaccurate website may unnecessarily lead to trouble in litigation.

PRACTICE AREAS

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Aviation
Appellate
Arbitration, Alternative Dispute Resolution
and Mediation
Architects and Engineers
Bad Faith and Extra-Contractual Liability
Banking and Finance
Business/Commercial Law
Civil Rights Law
Class Actions
Commercial Litigation
Condominium Law
Construction Law
Corporate, Transactional & Real Estate
Dental Malpractice
Directors and Officers
Education Law
Employment & Labor
Environmental
Federal Practice
Fidelity and Surety Litigation & Counsel
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Government Relations
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Nursing Home/Health Care
Nursing Malpractice
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Premises Liability
Product Liability
Professional Liability
Residential Homeowner
Securities
SIU Insurance Fraud
Trucking Accident
Vehicle Negligence
Workers' Compensation

FINANCIAL REGULATION SINCE THE 2008 FINANCIAL CRISIS

BY: MATTHEW SCHWARTZ



FINRA, the largest independent regulator for securities firms doing business in the United States, has significantly increased enforcement actions and fines since the Financial Crisis in 2008. FINRA levied \$68 million in fines in 1,541 cases against firms and registered individuals in 2012, up from \$28 million in fines in 1,073 cases in 2008. That is a 59-percent increase in fines and a 30-percent increase

in actions over this four-year period. The good news for firms: investor-related litigation has dropped from its peak in 2009, after the financial crisis. In 2009, 7,137 arbitration claims were filed with FINRA Dispute Resolution, compared to 4,299 in 2012. This is a 40-percent decrease over a three-year period. We anticipate these litigation trends will continue until the stock market shows reduced returns or there is another significant economic slowdown.

School of Claims Seminar by Cole, Scott, & Kissane, P.A. *April 2013 - Orlando, Florida*



From Left to right:

Gene P. Kissane, Thomas E. Scott, Richard P. Cole, Daniel Kissane, Joseph Kissane

WORKERS' COMPENSATION: NOT ALWAYS AN EMPLOYEE'S EXCLUSIVE REMEDY

BY: JUSTIN SAAR



Contrary to popular belief, Florida's Workers' Compensation law is not always a complete bar to employee litigation. Florida's Workers' Compensation law is codified in chapter 440, Florida Statutes (2013). The statute is intended to provide a "quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."¹ Essentially, under this no-fault system, the employee gives up a right to a common-law action for negligence in exchange for strict liability and the rapid recovery of benefits.² For employees within the statute's reach, workers' compensation is the exclusive remedy for "accidental injury or death arising out of work performed in the course and the scope of employment."³ While providing employees with benefits on a no-fault basis, the flip side of this scheme is its provision for immunity from common-law negligence suits for employers covered by the statute, commonly referred to as "workers' compensation immunity."⁴

However, under certain circumstances, Florida law allows employees to pursue a general liability claim against an employer and an employee can sue his employer for an intentional tort.

An employer is not entitled to workers' compensation if the employer causes the employee to fail to timely file a claim.

Late last year, the Third District Court of Appeal allowed an employee to file a general negligence claim against his employer for a work-related injury because the employer had concluded that the injury was not incurred during the course and scope of employment, and had failed to timely report the injury to the carrier, resulting in a denial of the claim. When the employee made a claim against the employer for general negligence, the employer asserted that it was entitled to immunity under the workers' compensation laws and filed a motion for summary judgment, which the trial court denied. On appeal, the appellate court affirmed, stating that "it would be inequitable for the employer, through its insurance carrier, to take the position that there were no work-related injuries and hence no workers' compensation coverage, and then later, when the employee brings a tort action against the employer, to assert as a defense at law that there was workers' compensation coverage entitling the employer to immunity from suit. As the employer may not separate itself from its compensation carrier's determination that the employee's injuries did not occur during the course and scope of employment, the employer is estopped from taking the totally inconsistent position that the injuries did occur during the



course and scope of employment and claim worker's compensation immunity when sued in tort." *Ocean Reef Club, Inc. v. Wilczewski*, 99 So. 3d 1 (Fla. 3d DCA 2012), *reh'g denied* (Oct. 16, 2012).

Accordingly, when evaluating an employee's general liability claim against an employer, it is necessary to investigate the existence of workers' compensation insurance, whether a claim was made to the workers' compensation carrier and, if the claim was denied, whether the employer's representations to the workers' compensation carrier were inconsistent with those made during litigation.

Workers' compensation immunity does not always preclude an employee's intentional tort claim.

Under the current workers' compensation statute, which was amended in 2003, no cases have satisfied the required elements to make a claim for an intentional tort.

Pursuant to section 440.011(1)(b), Florida Statutes, in order for an employee to successfully prove an intentional tort as an exception to the exclusive remedy

of workers' compensation, the employee must prove, with clear and convincing evidence⁵, the below-required elements of an intentional tort:

1. The employer deliberately intended to injury the employee, or,
2. The employer,
 - a. Engaged in conduct that it knew, based upon explicit warnings specifically identifying a known danger, was virtually certain to result in death or injury to the employee and,
 - b. The employee was not aware of the risk because the danger was not apparent and,
 - c. The employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising an informed judgment and
 - d. The conduct was a legal cause of the employees' injury or death.

Two recent cases which specifically discuss the elements of an intentional tort as defined within the 2003 statute include *List Indus., Inc. v. Phiteau Dalien*, 107 So. 3d 470 (Fla. 4th DCA 2013), and *Gorham v. Zachry Industrial, Inc.*, 105 So. 3d 629 (Fla. 4th DCA 2013).

In *List Industries*, the Fourth District overturned a \$2.7 million verdict for the plaintiff and granted the employer's motion for directed verdict because the employee failed to present "clear and convincing evidence" of each of the three indispensable elements in section 440.11(1)(b)(2), Florida Statutes (2005).

The appellate court recognized the 2003 change to the workers' compensation statute and noted that the change from substantial certainty to virtually certain was an extremely different and a manifestly more difficult standard to meet. It would mean that a plaintiff must show that a given danger will result in an accident every -- or almost every -- time. The court also commented that, given the stringent standard required to overcome an employer's statutory immunity, the case was amenable to being decided on summary judgment.

As Judge Altenbernd has observed:

The history of the workers' compensation system demonstrates that the legislature intended to give coworkers and employers immunity from suit except in extraordinary situations. Such immunity not only limits the expense of doing business in Florida over and above the admittedly significant expenses of the workers' compensation no-fault system, but also helps maintain a better work environment in which coworkers are not constantly in fear of being sued by their fellow employees. The legislature has thus created an exclusive, administrative, no-fault remedy that is unaffected by comparative negligence in exchange for broad immunity from lawsuits for employers and coworkers. *The goal of this*

policy is to avoid lawsuits at the outset, not simply to prevent adverse verdicts against employers and coworkers at the end of lengthy litigation. If the trial courts are to foster these legislative policies, they must serve as gatekeepers at the initial stages of litigation. Id. at 473-74.

In *Gorham*, meanwhile, the Fourth District upheld the trial court's order granting the employer's motion for summary judgment stating, "we agree with the trial court that, based upon the narrow exception adopted by the Legislature, an employer must *know* that its conduct is *virtually certain* to cause injury, or the employer is entitled to immunity." The appellate court recognized that the newly enacted virtual certainty standard was even more stringent than substantial certainty. *Id.* at 633-34.

Mr. Gorham was working as a rigger on the FPL power plant construction site when he was injured. On the day of the accident, the crew was attempting to lift and place a nine-ton wall. Two cranes were available to lift the large pre-fabricated wall into place. A tag line to keep the wall from swaying as the crane lifted the wall was attached to the wall, and because of the danger of swaying, attention to the wind speed was very important. On the day before the incident, the general foreman cancelled this lift because the winds were over 20 miles per hour. The foreman testified that a lift would not occur if the winds exceeded 18 miles per hour. At the time Mr. Gorham was injured, he relied upon his foreman to decide whether to proceed with setting the wall and, based upon the foreman's decision to move forward, believed that the wind was fine; however, it seemed to Mr. Gorham that the wind was blowing at

approximately 30 mph.

In determining that summary judgment was appropriate, the court reasoned that there must be evidence that Zachry, through its foreman, *knew* that the wind speed was in excess of what was safe to perform the lift and that lifting in that condition would with *virtual certainty* produce injury or death. While there was a dispute as to whether the foreman even took wind readings, taking the evidence in favor of Gorham, it could be said that the foreman did not take the wind readings and allowed the lift to occur not knowing what the wind speed was; however, there was no evidence that such a lift would with *virtual certainty* cause injury. That afternoon the lift was performed without any injuries, even in increasing wind speeds. The court reasoned that the employer's conduct may have been grossly negligent, but it was not intentional.

Dalien and *Gorham* were examined in the recent Fourth District case of *Boston ex rel. Estate of Jackson v. Publix Super Markets, Inc.*, 112 So.3d 654 (Fla.4th DCA 2013) the Fourth District affirmed a summary judgment in favor of the employer supermarket on the basis of *Dalien* and *Gorham*, finding that the plain-

tiff had not met the burden placed on him by the statute to show that "a given danger will result in an accident every—or almost every—time." *Boston*, 112 So.3d at 657.

Even more recently, the Third District affirmed summary judgments entered on behalf of two employing companies, in a case handled by Cole, Scott, & Kissane P.A., *Vallejos v. Lan Cargo, S.A.*, 116 So.3d 545 (Fla.3d DCA 2013). In *Vallejos*, the Third District also examined—among other cases—*Dalien*, and, in affirming summary judgment for the statutory employers, reiterated the rule that "‘virtually certain’ means that a plaintiff must show that a given danger will result in an accident every—or almost every—time." *Vallejos*, 116 So.3d at 555

Based upon recent case law, if an employee makes a claim for an intentional tort, the employer should mount an immediate and aggressive response as Florida courts—especially the Fourth District and the Third District—have clearly identified that there is a very narrow exception to the protection of workers' compensation immunity.

Endnotes

- 1 Fla. Stat. § 440.015 (2013).
- 2 See *United Parcel Service v. Welsh*, 659 So. 2d 1234, 1235 (Fla. 5th DCA 1995); 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation* § 65.10 (Desk ed. 1999).
- 3 Fla. Stat. § 440.09(1) (2013); see also Fla. Stat. § 440.11 (2013).
- 4 *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000), *superseded by statute*, Fla. § Stat 440.11 (2003), as recognized in *Gorham v. Zachry Indus., Inc.* 105 So. 3d 629 (Fla. 4th DCA 2013) (this paper discusses, among other changes, the intentional tort exception change of standard from "substantially certain" to "virtually certain"; however, the overall scheme of immunity from common-law negligence remains in effect).
- 5 "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Cole, Scott, & Kissane P.A.

attorneys from the West Palm Beach office join the Mercedes-Benz Corporate Run to promote health and fitness in the workplace.



RETROACTIVITY OF SECTION 768.0755, FLORIDA STATUTES

BY: ANNE SULLIVAN MAGNELLI



Florida business owners received a helpful ruling from the Third District Court of Appeal in *Kenz v. Miami-Dade County*, 116 So.3d 461 (Fla. 3d DCA 2013). This case was the first opinion from a Florida District Court of Appeal to address head-on whether section 768.0755, Florida Statutes, may be applied retroactively, as a procedural statute, to cases pending when it was enacted. The case held that “section 768.0755 is procedural in nature, and applies retroactively.” The Third District therefore affirmed the grant of a summary judgment in favor of the county, in a case where the plaintiff had fallen at Miami International Airport. The court found that section 768.0755 returned Florida law to its status pre- *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001), “and provides that a person who slips and falls on a transitory foreign substance in a business establishment¹ must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it.” *Kenz*, 116 So. 3d at 463 (citing Fla. Stat. § 768.0755 (1)).

The Third District opined that the statute superseded section 768.0710, Florida Statutes, even for pending claims. Under that superseded statutory section, actual or constructive knowledge of the

transitory foreign substance or object was not a required element of proof of a plaintiff’s negligence claim. Thus, section 768.0755 will mean that an injured party must show more than that a business “should have” known of the existence of a dangerous condition—a plaintiff will have to show actual (or constructive) knowledge.

The same day it issued its *Kenz* opinion, the Third District also issued a *per curiam* affirmance in another case dealing with section 768.0755, in *Publix Supermarkets, Inc. v. Cuervos*, 112 So. 3d 643 (Fla. 3d DCA 2013). While in that case the affirmance was in favor of a patron injured in grocery store slip-and-fall, the case appeared to suggest—by citation to another opinion involving the sufficiency of the record—that the Third District was only affirming the jury verdict in favor of the plaintiff and against the store because the store had failed to present an adequate record on appeal.¹ The *Cuervos per curiam* affirmance will have no persuasive or controlling value, while the favorable *Kenz* opinion will be controlling on the Circuit Courts of Miami-Dade and Monroe Counties, and persuasive in counties under other District Courts of Appeal. Indeed, if the District Court in a trial court’s District has not spoken on the issue, the trial courts in all Districts will be required to follow the *Kenz* decision and it will be controlling precedent until the District Court in that District decides the issue. Currently, no District Court of Appeal other than the Third has decided this issue.²

However, Cole, Scott, & Kissane P.A., is currently involved in an appeal of the same issue, in a condominium slip-and-fall case in which an appeal of a jury verdict is pending in the Fifth District. There are two primary issues raised in the Initial Brief filed on behalf of the condominium client: (i) whether

section 768.0755 should or may be applied retroactively and (ii) what standard of proof/burden of proof does it require a plaintiff to meet at trial? A sub-issue is whether section 768.0755 (which repealed section 768.0710) is procedural or substantive in nature. The Initial Brief has been filed, but the Answer Brief has yet to be filed.

Endnotes

- 1 In fact, the Third District later issued a *per curiam* affirmance citation opinion, in *Garland v. TJX Companies, Inc.*, 114 So. 3d 298 (Fla. 3d DCA 2013), affirming a summary judgment in favor of a business defendant, and affirming an order denying leave to amend the plaintiff’s complaint, citing to *Kenz*.
- 2 In a recent order granting summary judgment, the Middle District of Florida (Trial Court) in May adroitly evaded the issue of which version of the statute would apply. See *Oken ex rel. J.O. v. CBOCS, Inc.*, 8:12-CV-782-T-33MAP, 2013 WL 2154848 (M.D. Fla. May 17, 2013) (“This Court need not determine which statute applies in the instant case, in which the cause of action accrued before the repeal of section 768.0710, because the Court finds that Cracker Barrel’s Motion for Summary Judgment is due to be granted regardless of which burden is imposed upon Oken in this negligence action. Specifically, summary judgment is appropriate because the record is undisputed that Cracker Barrel did not breach its duty to Oken”).

CSK SUCCESS STORIES

TRIAL AND OTHER WINS

Dixon v. Ford Motor Company | Venue: Miami-Dade County

Henry Salas and **Clarke Sturge** of Cole, Scott & Kissane's Miami office obtained a complete defense verdict on behalf of Ford Motor Company in this toxic tort/asbestos case.

The case involved a non-smoking lung cancer Plaintiff with alleged exposure to chrysotile asbestos stemming from his work as a ten year auto-mechanic with the City of Miami's Motor Pool. Plaintiff primarily performed brake jobs and rebuilt transmissions on police vehicles which were almost exclusively manufactured by Ford Motor Company. The Plaintiff estimated that he performed 600 transmission jobs and 100 brake jobs on Ford vehicles.

The Plaintiff argued that his lung cancer was caused by the release of respirable

asbestos fibers resulting from the work that he performed at the motor pool. Plaintiff also argued that Ford knew of the potential health hazards associated with inhaling asbestos fibers, and that Ford failed to adequately warn Plaintiff of those hazards.

The Plaintiff alleged that his exposure to Ford vehicles, brakes and transmission components caused his terminal, stage IV lung cancer.

The Plaintiff put seasoned asbestos experts on the stand in support of Plaintiff's case against Ford. Plaintiff's experts argued that Plaintiff's employment history, coupled with his radiology and pathology results were sufficient evidence to find within a reasonable degree of medical certainty that Plaintiff's exposure to Ford's products,

more likely than not, caused his lung cancer.

Ford argued that Plaintiff's lung cancer could not have resulted from his exposure to its products because his exposure to asbestos (or dose) from Ford's products was insignificant. Ford also put on an expert pulmonologist who opined that the Plaintiff, more likely than not, has a unique gene mutation that made him susceptible to and which eventually led to his diagnosis of lung cancer.

The Plaintiff asked the jury for \$30 million in damages. After one hour and forty-five minutes, the jury returned a complete defense verdict.

Charles Dannewitz as the PR of Florene Dannewitz v. Brandywine Financial Services Corp. & Northwood Oaks, LLC | Venue: Pinellas County

Daniel Shapiro and **Justin Saar** of Cole, Scott & Kissane's Tampa office obtained a favorable verdict in a wrongful death trip and fall case. The Plaintiff, though 88 years old, was relatively stable with respect to her health conditions on the night she visited our client's property. When leaving, the Plaintiff encountered an abrupt change in elevation, fell and fractured her

right femur. The decedent died the very next day due to complications associated with the fall and fracture.

The Plaintiff contended that the property was unreasonably dangerous for multiple reasons including the elevation change. In response, and among other arguments, we contended that the property was compliant

with the building code and that the condition was an open and obvious one.

The Plaintiff's non-negotiable pretrial demand was \$300,000.00. After approximately two and a half hours of deliberation the jury returned a verdict of \$117,800.00, and placed 50% of the fault on the Plaintiff. The total verdict was \$58,000.00.

Gil Soto v. Royal Plumbing | Venue: Miami-Dade County

Michael Brand and **Nina Conte** of Cole, Scott & Kissane's Miami office obtained a favorable verdict in an injury case. The Plaintiff was working at a construction site and, during the course of his employment duties, fell in a hole that was present on the construction site. Our client was a plumbing contractor that had been working

in the hole prior to the subject accident. The Plaintiff contended, among other things, that our client should have covered the hole after it had concluded its plumbing work. We contended, among other things, that our client was not obligated to cover the hole and the Plaintiff was well aware of the hole's existence. The Plaintiff sustained a signifi-

cant arm injury which required, two surgeries. The Plaintiff sought both economic and non-economic damages. The jury found the Plaintiff 40% at fault and returned a verdict that was less than our client's last offer prior to the commencement of trial.

Lopez-Hernandez v. Crystal Associates | Venue: Orange County

Robert Swift and **Derek Metts** of Cole, Scott & Kissane's Orlando office obtained a very favorable verdict in this negligent security stabbing case. The plaintiff was stabbed multiple times while speaking with his wife on the telephone in a common area of the client's motel property. In addition to losing significant amounts of blood

from an abdominal stab wound, the plaintiff, a construction worker, had an 80% permanent loss of use of his non-dominant hand from defensive wounds. Evidence showed that over 580 calls to the police were placed from the property within two years of the incident, over 150 of which required police investigation.

The Plaintiff asked the jury for over \$800,000.00 The jury awarded less than \$80,000.00 and also found that the Plaintiff was 35% negligent, reducing the award to just over \$50,000.00

Belinda Jenkins v. Solomon Myers | Venue: Duval County

Joe Kissane and **Brian Aull** of Cole, Scott & Kissane's Jacksonville office obtained a complete defense verdict in this premises liability case. The trial centered on a claim that the Plaintiff suffered a fractured back after falling on the porch steps of a building owned by the Defendant. The

Plaintiff argued that the top step was not in compliance with the Florida Building Code, and that the slope of the step represented a known dangerous hazard. Although the Plaintiff asked the jury to award damages in excess of \$200,000.00 the defense was able to successfully convince the jury that

there was no negligence on the part of the property owner, and that the Plaintiff's own carelessness was the proximate cause of her injury.

The jury returned a complete defense verdict in favor of our client.

Maria del Mar grajales v. Rex Discount, Inc. | Venue: Miami-Dade County

Barry Postman and **Jessica Arbour** of Cole, Scott & Kissane's West Palm Beach and Miami offices, respectively, obtained a complete defense verdict in an eight day trial. The Plaintiff claimed that a restaurant supply warehouse store in the Miami area was liable for injuries she sustained when she dropped a case of Corona beer during a shopping trip. The Plaintiff alleged that the

box was damaged and soaking wet such that the bottom fell out, causing the bottles to fall to the ground and injure her as she attempted to jump out of the way. The Plaintiff claimed permanent physical injuries following two ankle surgeries and a loss of quality of life.

Barry and Jessica presented evidence regarding the regular and repeated visual

inspections done of the beer between the time it arrives at the warehouse and the time it is sold, arguing that such a defect likely would have been seen and immediately remedied.

The Plaintiff asked the jury for approximately \$200,000.00 in closing argument. The jury returned a verdict on behalf of our client in just under two hours.

**Sandra Sierra v. Ameri-Tech Property Management and The Landings of Tampa Condominium Association
Venue: Hillsborough County**

Daniel Shapiro and **Brooke Boltz** of Cole, Scott & Kissane's Tampa office obtained a defense verdict in this slip and fall case. Plaintiff alleged that Defendants negligently maintained a sidewalk causing her to slip and fall. Plaintiff alleged an injury to her right hip which required arthroscopic surgery followed by a total hip replacement. The defense demonstrated that Plaintiff's family members who lived in the apartment

complex and walked on the subject sidewalk routinely had never reported or complained that the subject sidewalk was slippery prior to Plaintiff's fall. Accordingly, Defendants had no actual or constructive knowledge that the sidewalk was slippery.

Defendants argued that Plaintiff's fall was not caused by the subject sidewalk, but weakness and instability of her knee due to

prior knee complaints and a knee surgery eight months prior to Plaintiff's fall. With respect to causation, Defendants argued that Plaintiff's hip surgeries were related to degenerative osteoarthritis as opposed to the subject incident.

The jury returned a complete defense verdict in favor of our client.

Estate of Sol Klein v. Leila Shehebar | Venue: Miami-Dade County

Michael Brand and **Trelvis Randolph** of Cole, Scott & Kissane's Miami office obtained a highly favorable verdict after a six-day trial in Miami, Florida.

The case involved our client, an elderly driver, who struck an 85-year-old pedestrian. The accident occurred in an intersection as the pedestrian was walking in a crosswalk. The driver made a left turn and hit the pedestrian, causing him to roll over the hood of the vehicle and onto the windshield before tumbling to the ground.

His injuries included a broken pelvis

and lacerations to his head, back and legs. The pedestrian lingered for 10 days in the hospital before succumbing to his injuries. The Plaintiff representative, the widow of the pedestrian, asserted that the pedestrian had the right of way as he was crossing the street in a marked crosswalk. Our client maintained that she had a green turn light for her vehicle and that the pedestrian was crossing the street against a red pedestrian walk-light.

At trial, the jury also heard testimony that at the time of the accident, the de-

ceased pedestrian was suffering from dementia and was under a doctor's care and treatment. The 58-year-old son of the deceased also asked the jury for damages for loss of support.

The Plaintiff asked the jury for \$1.1 million in damages. Instead the jury found the pedestrian 40% at fault for the accident. The jury awarded only his medical bills of \$100,000.00, \$25,000.00 in pain and suffering to his spouse, \$75,000.00 in lost support and nothing to the decedent's son for a total award of \$120,000.00

Jones v. Hollybrook and Bill Kirchner | Venue: Southern District of Florida-Federal Court

Barry Postman and **Jessica Anderson** of Cole, Scott & Kissane's West Palm Beach office received a complete defense verdict in a civil rights/employment discrimination case that was tried in the U.S. District Court, Southern District of Florida. The Plaintiff was an employee of the Defendant

for 23 years and had a stellar employment record. He was terminated and replaced by another individual. The Plaintiff argued that the termination was part of a systematic effort by the new President of the Defendant company to eliminate minority employees. The Plaintiff was able to cite two

other examples of minorities that were fired at or around the same time as the Plaintiff's termination.

The Defendant argued that the termination was a business decision that had nothing to do with race or ethnicity. The De-

fendant was able to demonstrate other minority employees who retained their jobs as a result of the business restructuring.

The judge allowed the issue of punitive damages to go to the jury. Further, the Plaintiff requested highly significant compensatory damages in addition to punitive damages.

The deliberations lasted approximately thirty minutes and, as indicated above, a complete defense verdict was returned by the jury.

Phyllis Persuade v. Haimchand and Savitree Sookram | Venue: Broward County

Jami Gursky and **Genevieve Rupelli** of Cole Scott & Kissane's Ft. Lauderdale West office obtained a complete defense verdict in Broward County, Florida. The Plaintiff, our client's tenant, slipped and fell due to a leaking refrigerator that she claimed the Defendants did not repair after multiple complaints. The Plaintiff argued that our client was on notice of the alleged problem and simply chose to ignore the condition as

opposed to remedying it.

As a result of this accident, the Plaintiff underwent a lumbar fusion. As a consequence of her injuries, the Plaintiff walks with a cane and allegedly has very significant physical restrictions. Further, the Plaintiff offered expert testimony that a second fusion would be necessary in the future.

The Plaintiff asked the jury for a verdict in the amount of \$620,000.00. The jury returned a complete defense verdict after approximately twenty minutes of deliberation. In addition, the defense prevailed on its Proposal for Settlement. Consequently, we are presently in the process of recovering our client's attorney's fees and costs.

Michael Piazza M.D. v. Miguel Hernandez, et al. | Venue: Pinellas County

Vincent Gannuscio of Cole, Scott & Kissane's Tampa office obtained a defense verdict in a personal injury case brought against our client who was the Plaintiff's Uninsured Motorist/Underinsured Motorist/Insurer.

Dr. Piazza, an orthopedic surgeon, claimed that as a result of an automobile accident he required a shoulder surgery which rendered him unable to perform surgical procedures. Dr. Piazza claimed more than

\$3 million in future lost earning capacity, and his attorney asked for "millions" more in pain and suffering, inconvenience, and loss of capacity for enjoyment of life. While Mr. Gannuscio admitted the Defendant's fault for causing the accident, he was able to demonstrate through expert testimony that Dr. Piazza's complaints were due to pre-existing arthritis, and that the lost earning capacity claim was not supported by Plaintiff's payroll and tax records.

The jury awarded the Plaintiff less than \$30,000 for medical expenses and \$62,000 for documented lost surgeries – amounts to which Mr. Gannuscio told the jury the Plaintiff was entitled. The jury completely rejected the lost earning capacity claim. Since the amount of the verdict was within the tortfeasor's policy limits, Mr. Gannuscio's client was not required to pay the Plaintiff anything, and will have a judgment entered in its favor, entitling it to seek attorney's fees and costs.

Taylor v. Sarup, Inc. | Venue: Indian River County

Barry Postman and **Jessica Anderson** of Cole, Scott & Kissane's West Palm Beach office obtained a complete defense verdict in Indian River County. The Plaintiff claimed that she slipped and fell due to a wet surface in our client's convenience store. The Plaintiff argued that our client

was on notice of the wet surface and failed to remedy it and, as a consequence, the Plaintiff was injured.

Our client argued that the store's surveillance video captured the entire incident and while it showed a slip and fall occurring – it further showed that the Plaintiff

was not injured. The Plaintiff claimed over \$200,000.00 in medical expenses. The Plaintiff further claimed non-economic damages as a result of her multiple injuries.

The jury deliberated for thirty minutes and returned a full defense verdict in favor of our client.

Gregory Stoddard v. Meadows Group, LLC d/b/a Green Meadows Mobile Home Park | Venue: Pinellas County

Daniel Shapiro and **Sarah Egan** of Cole, Scott & Kissane's Tampa office obtained a favorable verdict on behalf of Meadows Group LLC in a premises liability case. The case involved a Plaintiff who stepped through the floor of his rented mobile home due to a water leak. The Plaintiff argued that this leak was not repaired after the Plaintiff provided the Defendant with multiple notices of the water leak. The Defendant admitted negligence for the subject accident, but contested of causation and damages.

The Plaintiff alleged that as a result of this accident he sustained torn menisci in his left knee and further aggravated pre-existing knee conditions. As a result, the Plaintiff underwent a total left knee replacement. The Plaintiff's surgeon related the total knee replacement to this accident based upon the lack of any knee problems during the past five years.

In its defense, the Defendant presented two expert witnesses, a radiologist and an orthopedic surgeon, to opine on causa-

tion. The radiologist opined that the results of the radiological films were degenerative in nature. The orthopedic surgeon opined that the Plaintiff may have sustained a left knee sprain as a result of falling through the floor of his mobile home, which would require 90 days of therapy.

At the conclusion of the evidence, the Plaintiff asked the jury to award \$750,000.00. The jury awarded the Plaintiff \$125,000.00 which was \$25,000.00 less than the medical bills.

Soadie Dones v. Mercury Insurance Group, Inc. and Thomas O'Hara | Venue: Pinellas County

Daniel Shapiro of Cole, Scott & Kissane's Tampa office obtained a favorable verdict in this case. The Plaintiff, Soadie

Dones was a 24-year-old female who suffered a labral tear as a result of the motor vehicle accident. Although liability appeared

to be clear against the Defendants, the jury apportioned 25% of fault to the Plaintiff. During trial, there was testimony that the

Plaintiff incurred \$87,478.65 in past medical expenses and would require \$4,000.00 yearly in medical care for the rest of her 52 years of life (per mortality tables). Further, many of the Plaintiff's doctors testified that she had incurred a permanent injury and, as a consequence, she would be in pain for the

rest of her life.

The Plaintiff's counsel asked the jury to award the Plaintiff \$705,000.00 in damages. After four days of trial and six hours of deliberation, the jury only awarded the Plaintiff a total of \$194,933.65, with a net verdict of

\$136,200.24 after applying the appropriate set-offs. Furthermore, even though the Jury found that the Plaintiff did suffer a permanent injury, she was only awarded \$800.00 in past pain and suffering and \$0 in future pain and suffering.

Reguiero v. Honey Lake | Venue: Broward County

James Sparkman and Jessica Anderson of Cole, Scott & Kissane's West Palm Beach office obtained a favorable verdict in a multi-count trial (tortious interference with a contract, defamation, breach of fiduciary duty and intentional infliction of emotional distress) in Broward County, Florida.

The Plaintiffs alleged that the Defendant Homeowners' Association and Defendant President of the Association delayed the sale of their home by fraudulently claiming that the fence on the Plaintiffs' property

was in violation of the Association rules and regulations. Further, the Plaintiffs included claims for intentional infliction of emotional distress, breach of fiduciary duty and defamation.

The Defendants argued that the fence was indeed in violation of the Association rules and regulations. Consequently, the Defendants contended that the Plaintiffs were responsible for all of the issues about which they complained.

The Plaintiffs alleged that the Defendants' actions caused multiple damages including the Plaintiffs' inability to sell their home, inability to purchase a new home and the loss of the Plaintiffs' mobile mechanic business. Further, these events occurred at the same time that the Plaintiffs' son suffered catastrophic injuries in an automobile accident. The Plaintiffs sought more than \$600,000.00 in damages. The jury returned a verdict awarding only \$20,000.00 which was well below the amount offered to Plaintiffs prior to trial.

Daniels, Michelle, Maitland, Joann, and White, Annette v. Education Affiliates, Inc. d/b/a MedVance Institute Venue: Palm Beach County

Jonathan Vine and Alan St. Louis of Cole, Scott & Kissane's West Palm Beach office obtained three favorable arbitration awards in favor of Education Affiliates, Inc. ("MedVance") and against the Plaintiffs in this dispute between a for-profit school and former students. The Plaintiffs filed suit against MedVance alleging that misrepresentations and promises were made to induce them to enroll into the school's medical billing and coding program. The alleged statements ranged from future job prospects to salary potential. The Plaintiffs also alleged that the school failed to provide

proper education and training. They claimed that they suffered damages because they were unable to secure employment within their career field upon graduating.

The Plaintiffs brought six claims for breach of contract, breach of good faith and fair dealing, fraud in the inducement, fraudulent misrepresentation, misleading advertising, and violation of Florida's Unfair or Deceptive Trade Practices Act. The student-Plaintiffs sought reimbursement of their tuition costs plus attorney's fees.

Due to a binding arbitration provision

within the Enrollment Agreement between each student and the school, the trial court compelled each Plaintiff to individually demand arbitration. At the final hearings we successfully argued that no misrepresentations were made to the students nor were any contractual duties breached. We were also successful in arguing that the students did not incur any damages that were actually caused by our client. As such, the arbitrators in all three individual proceedings issued awards in favor of MedVance, and against the students, on all claims.

Perlman v. Smith Dairy East Maintenance Association, Inc. | Venue: Palm Beach County

Ron Campbell and Julie Kornfield of Cole, Scott & Kissane's Bonita Springs and West Palm Beach offices, respectively, obtained a directed verdict at the jury trial of this homeowners' association case.

The Plaintiff alleged that the homeowners' association breached its declaration of covenants by unreasonably withholding approval of the Plaintiff's prospective tenant. As a consequence, the Plaintiff sought various damages. We focused our trial strategy

upon the Plaintiff's inability to prove actual damages. During trial, we were successful in demonstrating that the Plaintiff suffered no damages. Consequently the trial court granted our client's motion for a directed verdict.

Richard Mead et. al. v. Buttonwood Bay Condominium Association, Inc. | Venue: Monroe County

Benjamin M. Esco and Joe Goldberg of Cole, Scott & Kissane's Miami office obtained a complete defense verdict after a seven-day trial in Plantation Key, Florida.

The Plaintiffs were five unit owners who brought suit against their condominium association Board of Directors, alleging that the Board improperly assessed the unit owners without a unit owner vote in violation

of Florida law and the condominium declaration, when the Board spent approximately \$3,000,000.00 to repair their 40-year-old marina. The Plaintiffs sought extensive Equitable Relief, in terms of adding and re-positioning of several components in the marina, and an additional six figures in monetary damages. If the jury had found for the Plaintiffs, there were another 30 or 40 homeowners who would have also filed sim-

ilar suit. Plaintiffs' Counsel was also seeking over \$500,000.00 in attorney's fees and \$50,000.00 in expert costs, which is awardable to the prevailing party by law. The jury determined that the Board's decision was reasonable and protected, as a necessary repair and maintenance. The jury deliberated for close to three hours and returned a complete defense verdict in favor of our client, The Association.

Scott A. Shelton and **James Sparkman** of Cole, Scott & Kissane's Naples/Bonita Springs and West Palm Beach offices, respectively, obtained a full defense verdict in this trip-and-fall case.

This case concerned a Lee County employee who claimed that she tripped and fell over a piece of construction debris in her employer's parking garage. Our client performed services as a remediation contractor on the garage before the incident. The Plaintiff alleged that while our client was

conducting its work, it left behind debris in the garage that caused the Plaintiff to fall. Our client denied the allegation.

The Plaintiff sustained multiple injuries, including a rupture of her Achilles tendon. She underwent surgery and her physician opined that she would need future surgery. Her past medical expenses exceeded \$90,000.00 and her lawyers asked the jury for approximately \$400,000.00. The defense focused on Defendant's scope and location of work as well. The defense also presented

evidence that the Plaintiff's allegations were based on nothing but speculation. The defense also called into question the Plaintiff's injuries without needing testimony from its physician.

The jury returned a complete defense verdict in favor of CSK's client, who has since moved for attorney's fees and costs based on a previously rejected Proposal for Settlement.

Christopher Short v. Douglas and Elsa Richards | Venue: Highlands County

Daniel Shapiro and **Sarah Egan** of Cole, Scott & Kissane's Tampa office obtained a very favorable result in this premises liability case. The Plaintiff, a 37-year-old independent contractor for Comcast cable, stepped into a drainage trench on our client's property, and sustained a synovitis injury and avulsion fracture. He was subsequently diagnosed with Complex Regional Pain Syndrome ("CRPS") by Dr. Anthony Kirkpatrick, neurologist. Dr. Kirkpatrick administered lumbar sympathetic blocks and estimated that the Plaintiff would

likely require some \$500,000.00 in future medical expenses to treat his CRPS, which would include a spinal cord stimulator and ketamine infusions. Additionally, two of the Plaintiff's other physicians opined that his past and future medical expenses would include an additional \$250,000.00 – for a total medical expense of approximately \$750,000.00

We argued that the Plaintiff was a discovered trespasser and was not authorized to be on the property at the time of the inci-

dent. In short, we argued that the accident was the Plaintiff's own fault and that our client owed a very minimal duty to the Plaintiff.

After only two hours of deliberation, the jury awarded the Plaintiff his emergency room bill of \$1,349.33 but found him 75% at fault. Thus, Plaintiff's total verdict was \$337.34 Plaintiff's pretrial demand was \$450,000.00 and we had served a Proposal for Settlement of \$20,000.00 We are in the process of recovering our client's attorney's fees and costs.

Candy v. Geico | Venue: Monroe County

Henry Salas and **Michael Brand** of Cole, Scott & Kissane's Miami office obtained a favorable verdict in this admitted liability case. The Plaintiff sued her UM carrier in relation to a cervical spinal fusion with \$140,000.00 in medical bills.

The defense admitted fault for the accident, but argued causation issues in terms of the medical treatment that the Plaintiff received.

At trial, the jury awarded the Plaintiff less

than half of the money she asked for despite the admission of liability. Additionally, CSK was brought in to try the case less than a month before trial.

SIGNIFICANT SUMMARY JUDGMENTS

Arvizu, etc. v. Heights Roofing, Inc., et al. | Venue: Miami-Dade County

Daniel Klein, Brad Sturges and **Katie Smith**, of Cole, Scott & Kissane's Miami office obtained an order granting final summary judgment in favor of both the corporate and individual Defendants in a wrongful death matter, where the decedent left behind a wife and three children. Summary judgment was sought on the grounds that the Defendants were protected by workers' compen-

sation immunity under section 440.11, Florida Statutes. The case was heavily litigated for two years. Plaintiff argued that the Defendants were not entitled to such immunity due to their culpable negligence, which abrogates immunity under the "intentional tort" and "criminal acts" exceptions of the statute. Ultimately, the trial court found in favor of all Defendants, concluding that the Plaintiff had

not established a genuine issue of material fact that the employer Defendant's conduct rose to the level required by law to abrogate its immunity and, the corporate officer Defendants' alleged behavior did not rise to the level of culpable negligence.

Ricky Staten v. Jacques Phillip Lamour Secretary, Florida Department of Corrections Venue: U.S. District Court Middle District of Florida

Rhonda Beesing and **Justin Saar** of Cole, Scott & Kissane's Tampa office obtained an Order granting Final Summary Judgment on behalf of defendant physician in the United States District Court, Middle District of Florida, Ft. Myers Division. The Plaintiff claimed that the physician violated his Eighth Amendment Right to receive adequate medical care related to Plaintiff's

complaint that a foreign body remained in his abdomen following an abdominal surgery, which was performed prior to entering the physician's facility. Specifically, Plaintiff claimed there was a two-month delay in receiving medical care, the physician performed surgery without anesthesia to remove the foreign object, and defendant physician failed to provide any further

medical care. The Court found there was no evidence that the physician was deliberately indifferent to Plaintiff's medical needs or that the physician caused Plaintiff any injury based on medical records that conclusively refuted all of Plaintiff's allegations. The Court granted Summary Judgment for the insured physician.

De Angeles v. Universal Property and Casualty Insurance Company | Venue: Palm Beach County

J. Chris Bristow of Cole, Scott & Kissane's West Palm Beach office obtained a Final Summary Judgment in a hotly contested first party breach of contract action relating to a water damage claim. The lawsuit involved a homeowner's policy that was re-

scinded due to a material misrepresentation in the application for insurance. Chris successfully argued that the policy was properly rescinded as a matter of law and Plaintiffs' material misrepresentation prevented recovery under the policy. The Court issued a

detailed five page Order that addressed and dismissed each one of Plaintiffs arguments, including waiver, post claim underwriting, and the innocent insured doctrine. A claim for attorney's fees is now pending against Plaintiffs and their attorney.

**Indoor Environmental Services, Inc. a/a/o Hugo Peniche v. Citizens Property Insurance Corporation
Venue: Palm Beach County**

J. Chris Bristow of Cole, Scott & Kissane's West Palm Beach office obtained a Final Summary Judgment in a water damage claim that involved an assignment of benefits. Plaintiff obtained an assignment of benefits from the insured, Hugo Peniche. Prior to the assignment, Citizens accepted

coverage and tendered payment directly to the Hugo Peniche. Indoor Environmental performed services, obtained an assignment of benefits, and submitted an invoice to Citizens. Without contacting the insured or Citizens, Indoor Environmental filed suit alleging breach of contract as the assignee

for the insured. Chris successfully argued that Citizens indemnified its insured prior to Indoor Environmental's assignment and thus, there was no evidence to support a breach of contract. There is a motion for attorney's fees pending against Indoor Environmental's counsel.

**Smith, Robert E., et al., v. Ironhorse Property Owners Association, Inc., etc.
Venue: Palm Beach County**

Jonathan Vine and **Alan St. Louis** of Cole, Scott & Kissane's West Palm Beach office obtained a favorable summary judgment in this property-owners' association case. At issue was a 2003 amendment to the association's governing documents that required membership in the community's country club. Pursuant to the amendment, club dues were collected from the association's members until 2008. In 2011, eighteen residential homeowners brought suit against the association for restitution of over

\$165,647. paid in club dues, and a statutory award of attorney's fees. Their action was based upon a prior lawsuit, commenced in 2005, and handled by a different law firm, in which ten unrelated homeowners prevailed in recouping their club due payments -- due to the court's determination that the mandatory membership was "invalid, unenforceable, and void ab initio" because it destroyed the common scheme of the community as initially intended by the developer. In the instant case, the firm successfully ar-

gued to the court that the claims accrued at the time of the amendment in 2003. As such, the plaintiffs' commencement of the subject lawsuit, eight years later, was time-barred under the statute of limitations. Accordingly, the court granted summary judgment in the association's favor and against the plaintiffs. Without this ruling, the association could potentially have been held liable for damages in excess of \$3,000,000.00 from future plaintiff-members.

FINAL DISMISSALS

**Larry S. and Lisa S., as parents and Natural Guardians of Jane Doe, a Minor, v. Robert Cummings, et al
Venue: Palm Beach County**

Benjamin M. Esco and **Geoffrey M. Schuessler** of Cole, Scott, & Kissane's Miami office obtained a dismissal with prejudice following summary judgment arguments in this case. The Plaintiff filed suit, arguing that our insured, a homeowner, failed to adequately supervise and guard against

alcohol consumption by minors at their residence. Defense counsel argued that our insured was not liable because alcohol consumption was not permitted at the residence, and if alcohol was consumed, the insured had no knowledge of its consumption by minors. Defense counsel further argued

that there was no evidence that the injuries sustained by the Plaintiff occurred at the insured's residence. The Court agreed and granted summary judgment, which disposed of the case entirely.

Maryse Jean Baptiste v. Shahi Enterprises | Venue: Miami-Dade County

Michael Brand and **Nina Conte** of Cole, Scott & Kissane's Miami office obtained a dismissal with prejudice following summary judgment arguments in this motor vehicle/pedestrian premises liability case. The Plaintiff filed suit against our insured,

operator of subject premises, a gas station, for negligence alleging that our insured maintained and controlled the subject premises where the plaintiff was hit by a third party driver in the parking lot. Defense counsel argued that our insured was not liable to the

plaintiff for an unforeseeable event such as being struck by a third party driver that was not under its control and which occurred in the parking lot of the gas station. The court agreed and granted summary judgment which disposed of the case entirely.

APPELLATE VICTORIES

Anthony v. Perez-Abreu & Martin-Lavaille, et. al. | Venue: Third District Court of Appeal

Kristen Tajak of Cole, Scott & Kissane's Appellate Department obtained an appellate victory in the Third District Court of Appeal in a hotly-contested legal malpractice matter. This was the second appeal that stemmed from allegations of a civil conspir-

acy involving the Plaintiff's ex-wife and her divorce attorney, who allegedly conspired to steal confidential records from the Plaintiff's law office during the course of a divorce proceeding. The Plaintiff was so confident that he would prevail on appeal that he stipu-

lated to paying defense attorney's fees if he lost. Shortly after oral argument, the Third District issued a *per curiam* opinion affirming the trial court's dismissal of the action, with prejudice, in favor of our client.

Scott Cole and **Katie Smith** of Cole, Scott & Kissane's Appellate Department obtained an order granting a Petition for Writ of Certiorari in a matter involving alleged negligence of a hospital in the use and inspection of one of its surgical instruments, a "cytology brush." The matter appealed was with regard to the trial court's denial of the Defendant's Motion to Dismiss for failure of the Plaintiffs to comply with the pre-suit requirements of chapter 766, Florida Statutes.

The Plaintiffs/Respondents contend that the matter involved only "simple negligence"

and not medical negligence and, therefore, it was unnecessary to follow the pre-suit requirements.

In a detailed opinion, the Second District Court of Appeal granted the Petition, reversing the trial court's denial of the Defendant's Motion to Dismiss, although permitting the Plaintiffs an opportunity to amend the complaint. The Second District held that, on remand, if the Plaintiffs choose to replead allegations of simple negligence, and the Defendant wishes to contest this matter, a motion to dismiss may be filed with sup-

porting affidavits, and the trial court may hold a limited evidentiary hearing, similar to that used to resolve a jurisdictional dispute.

This opinion is significant for medical malpractice defendants as it reinforces the importance of the pre-suit requirements of chapter 766. Further, medical malpractice defendants must be very careful to ensure that plaintiffs are not attempting to bypass the medical malpractice statutes by claiming simply negligence in what are truly medical malpractice claims.

Carnival Corp. v. Jimenez | Venue: Second District Court of Appeal

Anne Sullivan Magnelli of Cole, Scott, & Kissane's Appellate Department obtained a reversal of the grant of a new trial, following a very favorable verdict in favor of the cruise ship defendant. The Second District

found that errors below had to be analyzed as potential fundamental error. The court found that any alleged error was curable, and thus could not support a grant of new trial. Therefore, the appellate court over-

turned the new trial order and reinstated the judgment, which had been in a nominal amount.

**Vallejos v. Lan Cargo, S.A. and Infinity Cargo Services, Inc.
Venue: Third District Court of Appeal**

Anne Sullivan Magnelli of Cole, Scott & Kissane's Appellate Department successfully defended a grant of summary judgment in favor of a cargo shipping company defendant in a personal injury case which was brought following the settlement of a workers' compensation claim. The appellate court determined summary judgment was appropriately granted and that the plaintiff had failed to establish the existence of

gross, as opposed to regular, negligence, so as to meet an exception to the immunity of workers' compensation coverage. The court also found that there was no intentional tort sufficient to meet any exception, because there was no previous accident, and the intentional tort standard requires an accident every or almost every time an allegedly-dangerous activity is undertaken. The court reiterated the rule that "virtually certain" within

the context of the statute means that a plaintiff must show that a given danger will result in an accident every—or almost every—time." The court also affirmed on the basis that the plaintiff had elected his remedy and pursued his workers' compensation claim to a resolution on the merits, via a "washout" and settlement with release.

WORKERS' COMPENSATION WINS

Romand v. Rosewood Rehabilitation Center | Venue: Office of Compensation Claims

Denise Murray of Cole, Scott & Kissane's Tampa office obtained a complete defense verdict in this workers compensation case. The Claimant, a 53-year-old Certified Nursing Assistant, underwent three surgical procedures for her non-dominant arm and was given permanent work restrictions. The Claimant's settlement demand before the

Final Hearing was \$200,000.00 plus fees and costs that she claimed she could not work in any capacity. The JCC denied all benefits including Permanent Total Disability benefits on the basis that the Claimant was not permanently and totally disabled from a purely physical standpoint, she did not engage in an exhaustive, but unsuccessful

job search and she is vocationally employable.

This was a significant workers' compensation victory for CSK's health care client.

**Clark v. City of Jacksonville
Venue: Office of Judges of Compensation Claims, Jacksonville District**

Gregory Lower of Cole, Scott & Kissane's Jacksonville office obtained a denial of benefits in this workers' compensation case.

The Claimant was a corrections officer with the City of Jacksonville since 1989. She was diagnosed with hypertension in 2000 and was admitted to Baptist Medical Center on July 15, 2008 for left-sided chest pain.

The Claimant filed a Petition for Benefits seeking compensability of her hyperten-

sion pursuant to the Chapter 112.18, Florida Statutes ("heart/lung bill"). That statute presumes heart disease, hypertension or tuberculosis to be accidental and suffered in the line of duty if a law enforcement officer, corrections officer or firefighter with any Florida state, municipal or county government passes a pre-employment physical indicating the disease was not present the Claimant had a covered condition and the condition resulted in disability.

Mr. Lower was successful in arguing that the Claimant failed to establish a disability related to her hypertension and the claim seeking compensability of the hypertension was denied by the Judge of Compensation Claims.

This ruling is significant and should prove highly beneficial for many Workers' Compensation carriers as more and more of these types of claims are being filed against municipalities around the country.

CSK is Pleased to Announce That the Following Members of the Firm Have Been Named Super Lawyers for 2013 by Super Lawyers Magazine



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Florida Community Association Litigation

HOMEOWNERS' ASSOCIATIONS AND CONDOMINIUMS

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Attorney Ron Campbell, one of the managing partners of the Southwest Florida office of Cole, Scott, and Kissane, which is located in Bonita Springs, Florida, recently wrote a book on Florida Community Association Litigation. The book is being published by the Daily Business Review, a division of ALM Media, LLC. This title is available starting August 2013 in both Print and E-Book at <http://www.lawcatalog.com/>

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