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NEWSLETTER

SUMMER 2012

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DEFENDING A CLAIM UNDER FLORIDA'S DRAM SHOP ACT



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IS CONTRIBUTION “OBSOLETE” IN FLORIDA?



By: David Caballero

Contribution is the legal doctrine that allows a tortfeasor to collect from others responsible for the same tort after the tortfeasor has paid more than his or her pro rata share, wherein the shares represent the percentage of fault attributable to each of the tortfeasors.¹ Therefore, a cause of action for contribution lies between joint tortfeasors when one tortfeasor has settled with the injured party, and the remaining tortfeasor has not, and the amount of contribution is contingent on the percentage of fault of each joint tortfeasor.²

In Florida, contribution among joint tortfeasors is a right that inures only by statute as there is no common law claim for contribution among joint tortfeasors.³ Section 768.31 of the Florida Statutes, which is entitled “Contribution Among Tortfeasors,” provides that the right of contribution exists where “two or more persons become jointly or severally liable in tort for the same injury.”⁴

Abolition of Joint and Several Liability – Effect On Contribution Claims

Joint and several liability exists where joint tortfeasors contribute to the injury of another by their separate acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable.⁵ Therefore, under the theory of joint and several liability, an injured party can seek full compensation from a single joint tortfeasor. The paying joint tortfeasor must then resort to the contribution doctrine in order to obtain relief from the non-paying joint tortfeasor. However, joint and several liability was abolished in Florida in 2006 with the codification of section 768.81, Florida Statutes, Florida’s comparative fault statute (hereinafter the “Comparative Fault Statute”).⁶ Subsection (3) of the Comparative Fault Statute provides that in negligence cases “the court shall enter judgment against each party liable on the

basis of such party’s percentage of fault and not on the basis of joint and several liability.”⁷ To allocate fault to a non-party, “a defendant must affirmatively plead this fault and prove it at trial ‘by a preponderance of the evidence.’”⁸

Section 768.81 provides that all at-fault parties are liable only for their pro rata share of liability to be determined by an itemized verdict form.⁹ Further, a tortfeasor will never be compelled to make contribution beyond his or her own pro rata share of total liability.¹⁰

In contrast, section 768.31 states that contribution can only exist when a tortfeasor has paid more than his “pro rata share of the common liability, and the tortfeasor’s total recovery is limited to the amount paid by her or him in excess of her or his pro rata share.”¹¹ Therefore, section 768.31 and Florida’s Comparative Fault Statute, section 768.81, were in direct conflict because the latter restricted a tortfeasor’s contribution beyond his own pro rata share of the entire liability.

The Second District Court of Appeal, in *T&S Enterprises Handicap Accessibility, Inc. v. Wink Indus. Maintenance & Repair, Inc.*, 11 So. 3d 411 (Fla. 2d DCA 2009), held that the abolition of joint and several liability acts to defeat all third party causes of action for contribution. The Court reasoned that because judgment is now entered purely on a pro rata finding of fault, there is no longer a need to seek recovery from a non-party joint tortfeasor.¹² Instead, a defendant who intends to place fault on a non-party joint tortfeasor is required to plead such as an affirmative defense and prove the fault of that non-party as a *Fabre* Defendant pursuant to §768.81(3).¹³

In *Zazula v. Kimpton Hotels and Restaurants, L.L.C.*, No. 10–21381–CIV, 2011 WL 1657872 (S.D. Fla. 2011), the plaintiffs initiated suit against several Defendants, alleging injuries caused by a water filtration system. One defendant, Culligan, filed a cross-claim for contribution against a number of the co-defendants in

the original lawsuit.¹⁴ The United States District Court for the Southern District of Florida, relying on the *Wink* decision, dismissed Culligan’s contribution-related claims and once again reasoned that Florida’s comparative negligence statute has in essence rendered contribution claims “obsolete.”¹⁵

The United States District Court for the Middle District of Florida, in *Mendez-Garcia v. Galaxie Corporation*, No. 8:10–cv–788–T–24 EAJ, 2011 WL 5358658 (M.D. Fla. 2011), addressed a trend recently observed in Florida courts with respect to claims for contribution in negligence cases.¹⁶ In *Mendez-Garcia*, the plaintiff brought suit against Galaxie Corporation, a company that buys and sells used steel processing and soil handling equipment, for injuries suffered while operating a Galaxie product. Galaxie filed a third-party claim against the plaintiff’s employer, Nanotec Metals, Inc., for breach of contract, negligence, common law indemnification and contribution. In light of Florida’s Comparative Fault Statute, the Court held that common law contribution was procedurally improper in light of the availability of comparative fault arguments. Further, the Court held that “a defendant’s allegations of a non-party’s negligence should be pled in the form of an affirmative defense, and not alleged separately in a third-party complaint.”¹⁷ The Court then once again identified the extinction of the “Contribution Doctrine” and stated that “[t]hird-party claims for contribution are now essentially obsolete.”¹⁸

Conclusion

In sum, the principles outlined in the *Wink* decision and its progeny clearly mark the end of the Contribution Doctrine in Florida in negligence cases (for now). The extinction of joint and several liability as a result of Florida’s Comparative Fault statute renders the Contribution Doctrine “obsolete” given that judgments are now entered purely on a pro rata finding of fault. Therefore, there is no longer a need or a right to seek contribution from a joint tortfeasor.

THE COST OF EXAMINATION:

Which Party Is Responsible for a Non-Resident Plaintiff's Travel Expenses to Attend a Local Compulsory Medical Examination?



By: Alyson M. Innes

(Endnotes)

- 1 *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 138 (U.S. 2007).
- 2 *Sol v. City of Miami*, 776 F. Supp. 2d 1375 (S.D. Fla. 2011).
- 3 *Fla. Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co.*, 559 So. 2d 195, 197 (Fla. 1990).
- 4 Fla. Stat. § 768.31(2)(a) (2010).
- 5 *Albertson's, Inc. v. Adams*, 473 So. 2d 231, 233 (Fla. 2d DCA 1985).
- 6 See Fla. Stat. § 768.81 (2006).
- 7 Fla. Stat. § 768.81(3).
- 8 Fla. Stat. § 768.81(3)(a)(2).
- 9 See *Burns Intern. Sec. Services of Fla. v. Philadelphia Indem. Ins. Co.*, 899 So. 2d 361 (Fla. 4th DCA 2005).
- 10 *Id.*
- 11 Fla. Stat. § 768.31.
- 12 See *T&S Enterprises Handicap Accessibility, Inc. v. Wink Indus. Maintenance & Repair, Inc.*, 11 So. 3d 411 (Fla. 2d DCA 2009).
- 13 *Id.* at 412-13; see also *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).
- 14 Culligan initially filed a third-party complaint, however the defendants named in the third-party complaint were subsequently included in the original action by the injured plaintiffs. Therefore, the Court recognized that Culligan had filed a cross-claim for contribution against several co-defendants.
- 15 *Zazula v. Kimpton Hotels and Restaurants, L.L.C.*, No. 10-21381-CIV, 2011 WL 1657872, at *2 (S.D. Fla. 2011).
- 16 Several Florida courts have followed *Wink* and dismissed contribution claims. See, e.g., *Mendez-Garcia v. Galaxie Corporation*, No. 8:10-cv-788-T-24 EAJ, 2011 WL 5358658 (M.D. Fla. 2011); *Zazula*, 2011 WL 1657872; *Maguire v. Demos*, 2012 WL 859605 (M.D. Fla. 2012).
- 17 *Mendez-Garcia*, 2011 WL 5358658, at *4.
- 18 *Id.*

At some point in defending a bodily injury claim, one must determine whether to retain an expert to conduct a medical examination of the plaintiff.¹ Florida law is clear that the party seeking the compulsory medical examination ("CME") is responsible for payment of the retained expert's services, including the review of the medical records, the examination of the injured party, and composing the report² of the expert's findings.

In many cases, the injured party plaintiff resides in the same venue as the court in which the claim is filed. Yet, there are other cases where the injured plaintiff resides, from the inception of the case, in another county or a different state altogether,³ thus, raising the issue of which party should be responsible for the non-resident plaintiff's travel expenses to attend a CME in the venue in which the action was brought. In other cases, however, an injured party plaintiff residing in the same venue as the court in which the claim is filed may later move to a new venue after the institution of litigation, again raising the same issue.⁴ Whatever the type of non-resident plaintiff,⁵ it remains a question under Florida law as to which party must pay for the travel expenses of the non-resident plaintiff to attend and participate in a local CME.

Rule 1.360 of the Florida Rules of Civil Procedure allows any party to request another party to submit to an examination of a qualified legal expert when the subject of the requested examination is in controversy.⁶ For example, if a plaintiff is claiming a

specific injury as a result of the allegations set forth in the complaint, then the defendant may request a plaintiff to submit himself to an examination of a medical professional who specializes in the area of the claimed injury. More specifically, if a plaintiff is claiming a shoulder injury, then an orthopedist or orthopedic surgeon may be the appropriate expert to evaluate the plaintiff. Though the rule generally provides for how, when, and where⁷ an examination may be conducted, as well as when the expert's report⁸ must be completed, it is silent as to who is responsible for the travel expenses of a non-resident plaintiff to attend the CME.

In considering possible locations to conduct a CME, Florida courts have allowed the CME to be conducted in the county of the non-resident plaintiff's home, the county of the court's jurisdiction, the county where the accident occurred,⁹ and in adjacent or geographically close counties to a plaintiff's residence.¹⁰ The courts have maintained that an adjacent county is considered "reasonable" within the meaning of Rule 1.360(a)(1)(A) of the Florida Rules of Civil Procedure, and that a plaintiff must appear at a CME¹¹ scheduled there. Still, in those cases requiring appearance in an adjacent or geographically close county, there is no specific mention about who bears the cost for travel expenses for the non-resident's attendance at the CME.



The first court to address the issue of travel expense for a non-resident, out-of-state plaintiff is *Tsutras v. Duhe and Alamo Rent-A-Car, Inc.*, 685 So. 2d 979 (Fla. 5th DCA 1997). In *Tsutras*, the appellate court considered which party was responsible for the travel expenses of a non-resident plaintiff to attend a CME where the expert was located in the same county and state as the trial court. The plaintiff had lived in the same county as the trial court at the commencement of litigation, but then relocated to another state. The Fifth District Court of Appeal held that it was unreasonable for the trial court to require plaintiff to submit to a CME in Florida, at his own expense, after he had already come to Florida for his deposition. The pivotal fact in this case was that the plaintiff has already once traveled to Florida for his deposition and was thereafter being requested to return for a CME on his own dime. The Fifth District suggested in a subsequent decision¹² that its ruling would have been different if the CME had been scheduled at the same time as the subsequent deposition, so as to limit the travel costs and expenses.

Thus, argument has been made – and rejected by the Fifth District – that just as a non-resident plaintiff seeking affirmative relief must submit to a deposition in the court’s venue, so must a non-resident plaintiff seeking affirmative relief submit to a CME at a location within the court’s venue.¹³ The Fifth District has maintained that depositions and CMEs are not the same – noting that the requirement that a deposition be conducted within the court’s venue is not without limits and is usually ordered to be set a short time before trial.¹⁴ Furthermore, unlike the deposition rules, the CME rule only requires that the examination be set at a “reasonable . . . place.”¹⁵

To date, however, Florida courts have not specifically addressed the issue concerning which party is responsible to pay for the travel expenses of a non-resident plaintiff. However, when deciding whether a CME location is reasonable, the courts have looked to see whether a plaintiff is already scheduled to attend a deposition in the court’s venue at or near the same time and whether the parties have agreed to share the travel expenses. Unfortunately, the decisions do not specify how much or what percentage was paid by the defense, leaving this another remaining question.

For now, if a party intends to request a non-resident plaintiff who lives farther than an adjacent or geographically close county away from the court’s venue to submit to a CME at a location within the court’s venue, then the party must consider the reasonableness of the location request and the accommodations the parties are willing to make, including the tandem coordination of a mandatory appearance deposition or mediation¹⁶ with the CME. In addition, the party may consider sharing a portion of the payment for some part of the non-resident plaintiff’s travel expenses. While there may be arguments against a defendant sharing in the cost of the plaintiff’s travel expenses, to not do so may, in the long run, cost the client additional, and potentially unnecessary attorney’s fees, as well as risk a possible court order for an amount more than the client was willing to put towards the travel expenses in the first instance. In the end, it all boils down to the “C” word – not compulsory, but rather compromise.

(Endnotes)

- 1 Plaintiffs’ attorneys usually refer to these examinations as “compulsory” medical examinations, and defense attorneys usually call them “independent” medical examinations. Neither adjective is contained in the rule. *Graham v. Dacheikh*, 991 So. 2d 932, 993 n.1 (Fla. 2d DCA 2008). However, some plaintiffs’ attorneys have argued that the exam is indeed compulsory pursuant to the dicta in *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995-96 n.4 (Fla. 1999), observing that an expert is not independent, but rather an expert hired by a particular party for a specific purpose.
- 2 Rule 1.360(b) of the Florida Rules of Civil Procedure requires that a report setting out the examiner’s findings, including results of all tests made, diagnosis, and conclusions, must be completed for all CMEs conducted by an examiner.
- 3 *Tsutras v. Duhe*, 685 So. 2d 979 (Fla. 5th DCA 1997) (holding that court could either set CME at location which had appropriate medical specialties and was convenient for plaintiff, or could require that defense cover expenses of trip).
- 4 *Id.*
- 5 For the purpose of this article, anyone who resides outside the trial court’s venue where the litigation was filed is considered a “non-resident.”
- 6 Fla. R. Civ. P. 1.360(a)(1).
- 7 Rule 1.360(a)(1)(A), Florida Rules of Civil Procedure, states that the request for examination “shall specify a reasonable time, place” Rule 1.360 does not restrict where examination is to be performed, but states that it must be reasonable. Some reasonable places include the same venue as the trial court, or the state and county as the plaintiff’s residence.
- 8 Fla. R. Civ. P. 1.360.
- 9 *McKenney v. Airport Rent-A-Car, Inc.*, 686 So. 2d 771 (Fla. 4th DCA 1997) (explaining that the question of location is a matter for the trial court’s discretion, and holding that requiring a plaintiff in a personal injury action to submit to CME in the county where the accident occurred, rather than county in which he resided was not abuse of discretion). In *McKenney*, the Fourth District Court of Appeal considered several factors, including: the nature of the injuries; the fact that plaintiff’s treating neurologist, who would be testifying at trial, practiced in county other than county where plaintiff resided; and the fact that trial would be held in the county in which accident occurred.
- 10 *Scales v. Swill*, 715 So. 2d 1059 (Fla. 5th DCA 1998) (holding that the plaintiff had to submit himself to a CME in an adjacent, geographically close county; however, there is no mention of who is responsible for the travel expenses); see also *Blagrove v. Smith*, 701 So. 2d 584 (Fla. 5th DCA 1997) (concluding that the trial court did not abuse its discretion in determining that a plaintiff must travel from Hernando County to Tampa in Hillsborough County for a CME, even though the plaintiff had filed suit in Hernando County and treated in Hernando County, because the counties were “geographically close” and “adjacent” even though separated by another county).
- 11 *Scales*, 715 So. 2d 1059; see also *Blagrove*, 701 So. 2d 584.
- 12 *Goeddel v. Davis*, 993 So. 2d 99, 100 (Fla. 5th DCA 2008) (holding that an out-of-state plaintiff was properly ordered to appear in Florida for a second deposition and submit to a CME during the same trip, particularly since the defendant was ordered to contribute to the cost of the trip, and further noting that there was no authority for the position that the non-resident plaintiff should have to bear his own travel expenses to attend a CME at a location within the court’s venue).
- 13 *Tsutras*, 685 So. 2d at 981.
- 14 See *Les Violins, Inc. v. Alzamora*, 541 So. 2d 1353 (Fla. 3d DCA 1989). See also *City of Miami Beach v. Wolfe*, 83 So. 2d 774, 775 (Fla. 1955) (holding that an order requiring plaintiff’s deposition be taken in the locality of her residence in New York or that she be examined in the same county as the trial court one week before the scheduled trial was appropriate).
- 15 Fla. R. Civ. P. 1.360(a)(1)(A).
- 16 Fla. R. Civ. P. 1.720.

Defending a Claim Under Florida's Dram Shop Act



By: Jami Gursky and Marissa Mofsen

The traditional common law dram shop rule provides that a person or vendor who sells or furnishes alcohol to a person shall not be held liable for injury or damage resulting from that person's intoxication. In 1980, Florida narrowed the scope of this common law rule substantially with the creation of section 768.125 of the Florida Statutes, also known as "Florida's Dram Shop Act," which states:

Liability for injury or damage resulting from intoxication - A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.¹

Florida's Dram Shop Act carves out two limited exceptions to the common law rule in restricting liability of an alcoholic beverage vendor to situations where alcohol is furnished to a minor or when alcohol is furnished to a habitual drunkard.

Distinguishing Florida Statute § 768.125 from Common Law Negligence

In defending a claim against an establishment alleging service of alcohol to minors or habitual drunkards, it is important to distinguish a cause of action under section 768.125 from one for common law negligence. In order to prevail

under a theory of negligence, a plaintiff must prove: 1) a duty of reasonable care; 2) breach of that duty; 3) injury as a result of the breach; and, 4) the negligence was the proximate cause of the claimed injury. However, Florida law does not recognize a cause of action for the negligent sale of alcohol following the abrogation of the common law dram shop act, and instead provides a cause of action under section 768.125.² A claim of negligence for service of alcohol to a minor or a habitual drunkard should be dismissed for failure to state a cause of action.

Furnishing Alcohol to Minors

In order to establish a cause of action alleging liability for service of alcohol to a minor, a plaintiff must prove: 1) service of alcohol to a person who became intoxicated; 2) that the intoxicated patron was not of lawful drinking age; and, 3) that the vendor served the intoxicated minor *willfully*.

When bringing a claim under section 768.125 regarding service of alcohol to a minor, a plaintiff's burden of proof is to establish that a sale of alcohol to a minor took place, and that same was done *willfully*. The "willful" sale of alcohol requires knowledge that the patron is *not* of lawful drinking age. Florida courts allow knowledge of a person's age to be established by circumstantial evidence.³ The Florida Supreme Court, in *Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984), determined that circumstantial evidence of knowledge of a person's age may include: facts relating to the "apparent" age of a person and the person's appearance; the salesperson's state of mind when furnishing the alcoholic beverage; whether or not

the minor had purchased alcohol at that establishment previously; and, whether or not the vendor had requested to check the minor's identification at the time of the sale to determine the minor's age.⁴ Ultimately, whether a vendor is able to ascertain the age of a person by circumstantial evidence is a question of fact for a jury to determine.⁵

Moreover, under Florida's Dram Shop Act, a plaintiff must prove a causal link between a minor's purchase of alcohol and the damages alleged. It therefore must be established that: 1) the injuries complained of resulted from the consumption of alcohol by the purchasing minor; *or*, 2) that the vendor/establishment should have foreseen that the allegedly sold alcohol was likely to be consumed by the minor whose impaired condition caused the injuries in question.⁶

If a vendor sells alcohol to a minor and it can be established that the vendor was on notice that the minor will furnish the alcohol to a second minor, then the vendor is deemed to have "sold or furnished" alcohol to the second minor for purposes of liability under section 768.125.⁷ However, if the minor did not cause the damages being alleged, or there are no facts establishing that the minor furnished or would have furnished the second minor with alcohol yet the second minor caused the damages alleged, then liability would not be imposed on the vendor.⁸

However, a vendor may have a complete defense to any civil action based on the sale of alcoholic beverages to a minor if, at the time the alcoholic beverage is furnished: 1) the minor provided false evidence that he was of legal age to purchase





or consume the alcoholic beverage; 2) the appearance of the minor was such that an ordinarily prudent person would believe him/her to be of legal age to purchase or consume the beverage; 3) the vendor checked the minor's driver's license, identification card, or his/her passport; and, 4) the vendor acted in good faith and relied upon the appearance of the minor in the belief that the minor was of legal age to purchase or consume alcohol.⁹

Furnishing Alcohol to Habitual Drunkards

In order to establish a cause of action under Florida's Dram Shop Act alleging liability for service of alcohol to a habitual drunkard, a plaintiff must prove: 1) service of alcohol to a person who became intoxicated; 2) that the intoxicated patron was habitually addicted to alcohol; and, 3) that the vendor served the intoxicated patron **with knowledge** (actual or constructive) that he/she was habitually addicted to alcohol.

Interestingly, the statute does not prohibit the furnishing of alcohol to an intoxicated person, so long as the intoxicated person is not **known** to be or should have been known to be a habitual drunkard.¹⁰ In this manner, Florida's Dram Shop Act is much more limited as compared to the dram shop laws of other states.¹¹

Florida's Dram Shop Act also differs from its criminal counterpart for sale of alcohol to a habitual drunkard, which requires the additional proof of "willful" and "unlawful" furnishing of alcohol, and a

vendor to have had prior written notice that the patron was a habitual drunkard (written notice is not required in a civil action).¹²

In proving a cause of action under section 768.125 regarding service of alcohol to a habitual drunkard, Florida courts have determined that the "knowledge" element can be established by circumstantial evidence.¹³ In *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991), the Florida Supreme Court held that while serving an individual multiple drinks on one occasion would be insufficient to establish the knowledge requirement, serving an individual a substantial amount of drinks on multiple occasions would be sufficient for a jury to consider whether a vendor had knowledge.

In *Peoples Restaurant v. Sabo*, 591 So. 2d 907 (Fla. 1991), the Florida Supreme Court permitted a jury to determine whether the bar had knowledge of the plaintiff's habitual drunkenness, where the evidence showed that the plaintiff drank a case of beer everyday at work, went to the defendant's establishment at least twice a week and would get drunk each time, and the bartenders never refused to serve him despite his drunk appearance and behavior.

In 2001, the Fourth District Court of Appeal, in *Fleuridor v. Surf Café*, 755 So. 2d 411 (Fla. 4th DCA 2001), granted summary judgment in favor of a bar owner. The court found insufficient proof of knowledge that the patron was habitually addicted to alcohol, wherein the evidence showed that: the patron did not drink during the week and only drank three Saturdays a month; the patron testified that the last time he drank he only consumed one beer; the patron never underwent alcohol-related counseling nor was requested by anyone to do so; he had only been to one bar two or three times in the six months preceding the accident; and, the patron did not know any of the bartenders by name.¹⁴

Comparative Fault Issues

Plaintiffs will likely move to preclude comparative fault as a defense to claims brought under Florida's Dram Shop Act, arguing that the damages being alleged are the same type of harm the statute was designed to protect. While the law is clear that comparative fault cannot apply in cases involving service of alcohol to minors, applying comparative fault in claims involving habitual drunkards has not been

widely addressed by Florida courts.

Comparative Fault in Claims Involving Minors

In *Booth v. Abbey Road Beef & Booze, Inc.*, 532 So. 2d 1288 (Fla. 4th DCA 1988), the Fourth District Court of Appeal held that the trial court erred in reducing a verdict due to the contributory negligence of a minor passenger who was injured in a vehicle driven by an alcohol-impaired minor. The court found that because the injured minor passenger was a member of the class of persons that section 562.11 of the Florida Statutes (a criminal statute prohibiting the sale of alcohol to minors) was enacted to protect, the alcohol-impaired, injured minor could not be held liable under same.¹⁵

Similarly, but potentially more damaging, in *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064 (Fla. 5th DCA 1995), it was alleged that Publix willfully sold alcohol to a minor who, in turn, negligently operated a truck while intoxicated, causing a collision with a motorcyclist. The jury found that Publix was responsible for willfully and unlawfully selling alcohol to the driver, and allocated fault between both the driver and Publix.¹⁶ The injured motorcyclist appealed the final judgment, arguing that the trial court had erred in applying the doctrine of comparative negligence.¹⁷ The Fifth District Court of Appeal agreed with the injured motorcyclist, holding that section "768.125 indicates that the vendor becomes vicariously liable for the damages caused by the intoxicated tortfeasor (if the sale to a minor is willful). There is no logical way for a jury to balance the wrongdoing of the willful vendor and the intoxicated tortfeasor."¹⁸

While there is no case law directly on point, it would appear as though the same rationale would apply to claims involving known habitual drunkards. Therefore, in an attempt to bootstrap comparative fault principles, the defense should raise the applicability of the drug and alcohol defense.

The Drug and Alcohol Defense

Section 768.36(2) of the Florida Statutes, which is commonly referred to as the "drug and alcohol defense," provides:

In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

- (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or high; and
- (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.¹⁹

The applicability of the drug and alcohol defense is a jury determination, but may serve to completely bar a plaintiff's claim. However, this issue has not been widely addressed by Florida courts to date and plaintiffs will likely argue that this statute (in conjunction with principles of comparative fault) is not applicable to a claim under Florida's Dram Shop Act.

Overall, in defending a claim brought under Florida's Dram Shop Act, thorough fact investigation is necessary to overcome a plaintiff's presentation of circumstantial evidence. For a claim alleging service of alcohol to a habitual drunkard, it is necessary to ascertain the claimed "drunkard's" drinking habits, the frequency with which the patron consumed alcohol at the defendant establishment, whether the patron had consumed alcohol at other establishments on the night of the accident in question, the patron's behavior and appearance when drinking, and bartenders' and servers' knowledge of the patron (amongst other things) in attempt minimize the claimant's attempt to impute knowledge to the vendor. In the instance of defending a claim brought for the willful furnishing of alcohol to a minor, factual investigation should include the minor's appearance in reference to his/her age, the server/vendor's knowledge and ability to distinguish and interpret the age of a person based on physical appearance, and the server/vendor's frame of mind during the time of the sale.

(Endnotes)

- 1 Fla. Stat. § 768.125 (1980).
- 2 *Kitchen v. K-Mart Corporation*, 697 So. 2d 1200, 1203 (Fla. 1997).
- 3 *Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984).
- 4 *See Gorman v. Alberston's, Inc.*, 519 So. 2d 1119 (Fla. 2d DCA 1988).
- 5 *Armstrong*, 451 So. 2d 480.
- 6 *Dixon v. Saunders*, 565 So. 2d 802 (Fla. 2d DCA 1990); *O'Neale v. Hershoff*, 634 So. 2d 644 (Fla. 5th DCA 1995).
- 7 *O'Neale*, 634 So. 2d 644.
- 8 *Id.*
- 9 *French v. City of West Palm Beach*, 513 So. 2d 1356 (Fla. 4th DCA 1987).
- 10 *Lonestar Florida, Inc. v. Cooper*, 408 So. 2d 758 (Fla. 4th DCA 1982).
- 11 *See Aguila v. Hilton, Inc.*, 878 So. 2d 392 (Fla. 1st DCA 2004) (citing
- Preferred Nat'l. Ins. V. Fat Investors, Inc.*, 842 So. 2d 1068 (Fla. 4th DCA 2003)).
- 12 *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla.1991). *See also* Fla. Stat. § 562.50 (which also requires prior written notice to the server that the person served is a habitual drunk).
- 13 *Id.*; *Pritchard v. Jax Liquors, Inc.*, 499 So. 2d 926 (Fla. 1st DCA 1986).
- 14 *Fleuridor v. Surf Café*, 755 So. 2d 411 (Fla. 4th DCA 2001).
- 15 *Booth v. Abbey Road Beef & Booze, Inc.*, 532 So. 2d 1288 (Fla. 4th DCA 1988).
- 16 *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064 (Fla. 5th DCA 1995).
- 17 *Id.*
- 18 *Id.*
- 19 Fla. Stat. § 768.36(2) (1999).

Meet one of our Attorneys

Trevor Hawes is a partner in the Cole Scott & Kissane's Jacksonville office. He has a civil trial practice that encompasses commercial litigation, insurance coverage matters, and liability defense with an emphasis in the hospitality industry. He represents banks, insurance carriers, hotels, casinos, restaurants, bars and clubs. Mr. Hawes' practice is statewide and he has appeared in numerous jurisdictions around Florida. He has handled numerous cases through verdict and judgment along with appeals both at the State and Federal level.

Mr. Hawes completed his undergraduate studies at the Florida State University in 1997. He attended law school at Nova Southeastern University and obtained his juris doctorate in 2001. Mr. Hawes was admitted to the Florida Bar in 2001.

Mr. Hawes is att to practice in all jurisdictions in the state court system for the State of Florida. He is also admitted and regularly practices in all of the federal court jurisdictions and bankruptcy courts in the State. He is also admitted to practice before the 11th Circuit Court of Appeals. Additionally, Mr. Hawes is an active member of the Florida and Jacksonville Bar Associations.



OBSERVATIONS ON THE SUPREME COURT'S CHANGE TO THE AUTO NEGLIGENCE VERDICT FORM



By: James T. Sparkman and Daniel A. Kirschner

Attorneys and claims representatives who handle automobile negligence cases should be aware of the Florida Supreme Court's change in the standard verdict form questions pertaining to a plaintiff's recovery of damages for permanent injuries. Although the change became effective on March 4, 2010,¹ many attorneys – both plaintiffs and defense attorneys alike – are not aware of the change or its impact on a jury's determination as to the permanency of a plaintiff's injuries in automobile negligence cases.² The change is subtle, but significant – especially as it relates to the defense.

Changes to the Model Verdict Form Relating to Permanent Injuries

Prior to the 2010 change, the verdict form question pertaining to a plaintiff's recovery of damages for permanent injuries stated, in relevant part, as follows:

3. Do you find that the Plaintiff, John Doe, suffered a permanent injury within a reasonable degree of medical probability as a result of the accident in question?

YES _____ NO _____

If your answer to question 3 is no, you should not proceed further except to date and sign the verdict and return it to the courtroom. If, however, your answer to question 3 is yes, please answer question 4.

4. What is the total amount of the Plaintiff's damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future.

A. PAST _____
B. FUTURE _____

As such, the jury is no longer required to designate its decision on the issue of whether the plaintiff sustained a permanent injury on the verdict form. The significant danger arising from this subtle change is that the jury may not specifically scrutinize or decide the issue of whether the plaintiff sustained a permanent injury because it is not required to render a decision on this issue on the verdict form. This may – in some cases – result in a jury decision that is not entirely unanimous.

With the wording of the new verdict form, it makes it difficult to determine from a cursory review of the jury's verdict whether the jurors affirmatively considered the permanent injury question and unanimously voted on it. This would seem to be denial of the defendant's right to due process. In order to preserve this issue for appellate review, it is suggested that the defendant submit the old verdict form to the court during the charge conference in order to bring this concern to light to appellate court if necessary.⁴

Changes to the Standard Jury Instruction Relating to Permanent Injuries

Along with the change in the verdict form question, the standard jury instruction pertaining to a plaintiff's recovery of damages for permanent injuries, standard instruction 501.4, was amended to address the issue. In this regard, standard instruction 501.4 states as follows:

You must next decide whether John Doe's injury, resulting from the incident in this case, is permanent. An injury is permanent if it, in whole or in part, consists of:

- (1) A significant and permanent loss of important bodily function; or
- (2) A significant and permanent scarring or disfigurement; or

- (3) **An injury that the evidence shows is permanent to a reasonable degree of medical probability.**

If the greater weight of the evidence does not establish that John Doe's injury is permanent, then your verdict is complete (emphasis added). If, however, the greater weight of the evidence shows that John Doe's injury is permanent, you should also award damages for these additional elements of damages:

Any bodily injury sustained by John Doe . . . (standard non economic damages).⁵

Although the additional instructions set forth the specific considerations relating to the issue of whether the plaintiff sustained a permanent injury, conservatively-speaking, they require approximately forty minutes to present to the jurors - who at this stage in the trial are anxiously awaiting the opportunity to discuss their views on the case with their fellow jurors. Therefore, it is improbable that this instruction will be absorbed by the average juror when the permanent injury issue on the verdict form is discussed during deliberation - indeed, if discussed at all.

How to Reduce the Jury's Potential to Overlook the Issue of Whether the Plaintiff Sustained a Permanent Injury

To alleviate some of these concerns, it is recommended that defense counsel show a blown-up version of this section of the verdict form to the jury during closing argument, specifically highlighting the paragraph regarding the jury's considerations pertaining to the permanent injury question. It might also be beneficial to similarly show the jury a blown-up version of the actual jury instruction, highlighting the portion of the instruction that states that, "[i]f the greater weight of the evidence does not establish that John Doe's injury is permanent, **then your verdict is complete.**"⁶ Closing argument is the best time to address these issues because it is at that time that defense counsel will have the full attention of the jurors.

In addition, defense counsel should take special care to reserve time to explain to the jury that, just as with every question it is asked to decide, each juror's input must be voiced and a consensus made before determining whether to award non-economic damages. The jury should also be reminded that its decision on the permanent injury question must be unanimous - as with the other questions - and that if even **one** person disagrees on the issue of whether the plaintiff sustained

a permanent injury, then the damage portion of the verdict form cannot be completed.

Effect of the Changes to the Model Verdict Form Relating to Permanent Injuries on a Claims Representative's Evaluation of the Case

The effect of the changes to the verdict form relating to permanent injuries on a claims representative's evaluation of the case is probably little to none. Jurors typically frown upon awards of non-economic damages when asked to consider them.⁷ However, with proper discussion in closing and suitable demonstrative aids, we can continue to expect favorable results on the permanency issue, but perhaps not to the same extent with the amended verdict form.

(Endnotes)

- 1 *In re Standard Jury Instructions in Civil Cases, Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666 (Fla. Mar. 4, 2010).
- 2 A defense colleague recently confided that he has tried six to eight cases since the effective date of the revised standard jury instructions and neither side was aware of the change!
- 3 *In re Standard Jury Instructions in Civil Cases*, 35 So. 3d at 819.
- 4 We are not aware of any Florida appellate decisions addressing this issue.
- 5 Fla. Std. Jury Instr. 501.4 (eff. Mar. 4, 2010).
- 6 *Id.*
- 7 The same is true for consortium damages.

Seven Seals Award

Cole, Scott & Kissane, P.A. received the Seven Seals Award presented by Employer Support of the Guard and Reserve (a Department of Defense organization) for meritorious leadership and initiative in support of the men and women who serve America in the National Guard and Reserves together with our work to support veterans and military related charities.



CSK was one of only three employers in Florida to receive one of the highest awards presented by the ESGR. Mr. Cole also joined other major Florida employers in signing a statement of support for the Guard and Reserves.

It is our honor to be associated with the men and women of our armed forces who continue to serve this country in the military reserves.

SUCCESS STORIES

Trial Victories

Brian Pita and Jim Sparkman of Cole, Scott & Kissane's West Palm Beach office obtained a favorable trial verdict in this non-economic damages-only trial. This case involved a vehicular accident allegedly resulting in brain injuries to two minor Plaintiffs. CSK had previously tried this matter with liability being apportioned as follows: 70% to the *Fabre* Defendant, who was the deceased driver transporting the two minor Plaintiffs to school; and 30% to CSK's client. The jury previously determined the economic damages. The most recent trial, as mentioned, was for the jury to solely reach a verdict regarding the amount of non-economic damages. During closing, the Plaintiff's attorney asked the jury for \$21,000,000.00 in damages. However, after a two week trial, the jury awarded only \$3,125,000.00 in damages for a traumatic brain injury to one minor, and for a post-traumatic stress injury to the other minor, a brother and sister. This verdict will be reduced by the significant comparative fault of the *Fabre* Defendant to \$937,500.00.

George Truitt and Greg Willis of Cole, Scott & Kissane's Miami and Ft. Lauderdale offices obtained a defense verdict in this wrongful death case arising out of an auto accident at the intersection of US 27 and Johnson Street in rural southwest Broward County, Florida. On August 10, 2004, the 52-year-old Plaintiff was driving through an intersection when his vehicle was struck on the driver's side by a semi-tractor trailer. CSK defended the engineer who designed the intersection. The signals had been operational for only 16 days, and the decedent was traveling through the newly-signalized intersection for the first time. The Plaintiff's counsel contended that the eastbound Johnson approach to the intersection was misleading and dangerous because the near set of signals was out of the driver's range of vision, drawing the driver's attention to the far set of signals which turned green while the near signals were red. The Plaintiff had three live experts testify as to the alleged negligent design by our client. CSK countered that, based upon conflicting eyewitness accounts, the red/green phasing of the lights immediately prior to the crash was speculation and the phasing was necessary to clear traffic through the large median. CSK also argued that the extensive review of CSK's client's plans by FDOT, its peer



review consultant, and Broward County during the design and by FDOT, its CEI, the County, and the contractor during the construction phase was evidence that the design met the applicable standard of care. The decedent lingered in a coma for nine months before he passed away. He left two minor sons, ages 11 and 18, when the accident occurred. By all accounts, the decedent was a good father who was actively involved in his sons' lives. As a result of being poisoned by his babysitter when he was six months old, the 11-year-old had compromised mental and motor skills and was dependent on his parents for support. The accident happened during the first week of the 18-year-old son's senior year of high school, and his father passed two weeks before his graduation. The Plaintiff asked for \$ 7,700,000.00 in damages. After nearly three weeks of trial and more than five hours of deliberation, the jury returned a complete defense verdict in favor of CSK's client.

Dan Shapiro and Brian Rubenstein of Cole, Scott & Kissane's Tampa office obtained a complete defense verdict for CSK's clients, the condominium association and the property management company, in this premises liability case. This lawsuit arose out of a trip and fall accident in which the Plaintiff, a 69-year-old woman, suffered a fractured hip that required total hip replacement surgery the following day. The Plaintiff, who was a guest staying at a rental condominium unit on the property, contended

that the accident was caused by a change in elevation in a doorway leading to a parking garage that was in violation of various building codes. Defendants did not dispute at trial that this elevation change was a code violation. Instead, CSK was able to successfully argue that even though a code violation is evidence of negligence, it was not the legal cause of the Plaintiff's fall and injuries, and, therefore, the Defendants were not liable. It was the Defendants' position that the description of the fall in the incident report filled out by the Plaintiff's fiancé the day after the fall, as well as the Plaintiff's medical records, established that the Plaintiff's fall occurred over an open and obvious yellow sidewalk curb, instead of the change in elevation in the doorway. The Plaintiff's treating physician and expert at trial testified that the Plaintiff's hip fracture was a permanent injury that would continue to cause her to suffer disabilities for the rest of her life. The Plaintiff's life care planning expert testified that the Plaintiff would need physical therapy the rest of her life, a motorized scooter, cortisone injections, two doctor's visits and two x-rays per year, and she would no longer be able to participate in her hobbies such as gardening and bicycle riding. The Plaintiff was represented by very aggressive counsel who contested Defendants on almost every discovery issue in the months leading up to trial, and every evidentiary issue throughout this hard fought, 5-day jury trial. The Plaintiff's counsel attempted during the trial to elicit sympathy from the jury for his client



who presented as a nice soft spoken elderly lady. He aggressively examined Defendants' corporate representative and maintenance supervisor for not addressing the code violation before the fall. The Plaintiff's counsel asked the jury to award his client \$500,000.00, as damages. The jury was out for two and a half hours before returning with a complete defense verdict in favor of CSK's clients.

James Sparkman of Cole, Scott & Kissane's West Palm Beach office obtained a complete defense verdict in this automobile negligence case. This case involved a rear-end, automobile collision accident in which the Plaintiff incurred \$34,565.00 in medical expenses, including pain management. The Plaintiff did not return to work as a home health aide, and advanced a wage loss claim. The Plaintiff's primary expert testified that the Plaintiff would require lumbar fusion surgery. The Defendant admitted liability for the accident, but contested causation. Specifically, the Defendant argued that while it was at fault for the subject accident, it was not responsible for the claimed injuries. The jury returned a complete defense verdict in favor of CSK's client, who has since moved for attorney's fees and costs based upon a previously rejected proposal for settlement.

Vincent Gannuscio of Cole, Scott & Kissane's Tampa office obtained a complete defense verdict this trip-and-fall case. The Plaintiff, a guest at a resort in Clermont, Florida, claimed that he tripped on garbage that had negligently been allowed to accumulate in a stairwell late at night, fracturing his ankle. The defense focused on several misstatements by the Plaintiff as to the time the accident occurred, how the accident occurred, and his own alcohol consumption, as well as the lack of evidence as to any notice or other reasonable basis for the resort to have been inspecting the stairwell late at night. The jury found in favor of the Defendant on all issues after less than an hour of deliberation.

James Sparkman of Cole, Scott & Kissane's West Palm Beach office obtained a complete defense verdict in this automobile negligence case. By way of background, the Plaintiff, a single mom raising two teenage daughters, was operating her vehicle when the vehicle in which she was traveling was sandwiched between a utility truck operated by CSK's client, and a pickup truck. The Plaintiff's vehicle was totaled as a consequence of this accident. CSK's client admitted negligence for causing the subject accident, but denied causing the injuries in question. Following the accident the Plaintiff received extensive medical treatment, including undergoing shoulder surgery. In addition, it was recommended that the Plaintiff undergo neck surgery at a cost of approximately \$75,000.00. The Plaintiff's medical expenses totaled approximately \$60,000.00. The Plaintiff claimed that the injuries were severely debilitating and greatly impacted the quality of her life. The jury returned a verdict awarding the Plaintiff \$3,400.00 in pain and suffering, and reduced her medical expenses to \$34,000.00 for a total award of \$37,400.00.

Barry Postman and Karly Wannos of Cole, Scott & Kissane's West Palm Beach office obtained a complete defense verdict in a hotly contested Florida Whistleblower case. CSK represented a non-profit organization that takes care of disabled children. The Plaintiff, a former employee of CSK's client, sued alleging that he was terminated contrary to the protections afforded by the applicable Whistleblower laws. The defense argued that the Plaintiff was terminated for performance related reasons. Prior to trial, the Plaintiff's last demand exceeded \$100,000.00. The Plaintiff's counsel fought the defense every step of the way on this case. However, the jury returned a complete defense verdict in favor of CSK's client.

Henry Salas and Melissa Button of Cole, Scott & Kissane's Miami office obtained a favorable verdict in a cruise ship passenger case in which the Plaintiff

requested \$2,600,000.00 in damages. The Plaintiff suffered third-degree burns allegedly while in a steam room aboard one of the ships. The defense argued that any injuries were as a consequence of the Plaintiff's own fault. The jury found the Plaintiff to be comparatively at fault. The jury returned a verdict of only \$34,200.00.

Justin Sorel and James Sparkman of Cole, Scott & Kissane's West Palm Beach office obtained a complete defense verdict in Key West, Florida, in which CSK represented a prominent Key West businessman, individually, as well as his company. The Plaintiff was a contractor who had a contract with the FDOT to repair portions of The Overseas Highway following Hurricane Wilma. The job produced significant "fill material." The Plaintiff stored a substantial amount of fill material and other equipment on our clients' land so the Plaintiff did not have to incur the hauling costs between the Florida Keys and Florida City. However, the terms of the verbal agreement were in dispute. It was the defense's position that, in exchange for storing the fill and other materials on the property, CSK's clients could keep the fill for their own purposes. The Plaintiff argued that it had agreed to sell CSK's clients any excess fill that remained at the conclusion of the job. However, CSK's client had spotted approximately thirty dump trucks lined up one morning while driving to work, and when he asked what was going on, was told that all the fill was being removed. CSK's client then called the police and prevented the fill from being removed. The Plaintiff sued CSK's client, individually, as well as his company (the actual landowner) for conversion, unjust enrichment, and tortious interference with the FDOT contract. The Plaintiff sought approximately \$180,000.00 in damages for the value of the fill and replacement costs. The trial resulted in a final judgment in favor of CSK's clients on all counts. Since then, the defense has moved for an award of attorney's fees and costs based upon a previously rejected proposal for settlement.

Robert Swift of Cole, Scott & Kissane's Orlando office obtained a complete defense verdict on behalf of a fitness center after a 3-day trial in Orange County, Florida. The Plaintiff was an 86-year-old female who fell while using one of the fitness center's treadmills, and sustained a fractured humerus, a partial tear of the rotator cuff, and an aggravation of a right knee replacement. The Plaintiff alleged that the treadmill was defective, that the fitness center failed to maintain it, and that there were no written procedures or guidelines for maintenance or guest safety. The trial was complicated by the fact

that the fitness center had closed, its records were mixed together in a storage facility, and the treadmill had been sold. In addition, the operations manager had moved, and was not located until the day before trial. CSK was able to track down the treadmill in Georgia and CSK's expert found it to be in perfect working order. Moreover, contact with the manufacturer revealed that the treadmill was still under warranty. The Plaintiff testified that her entire life went downhill after the fall. She presented \$33,000.00 in medical expenses, and asked the jury for \$320,000.00 in compensatory damages. The jury returned a verdict of no liability.

Aram Megerian and Tawna Schilling of Cole, Scott & Kissane's Tampa office obtained a complete defense verdict in this premises liability case. The subject incident occurred on an exterior wooden staircase, and the Plaintiff presented un-rebutted expert testimony that the staircase was not compliant with the applicable building code. The case went to the jury with an admission by the defense that the subject staircase did not comply with certain of the building codes requirements. Notwithstanding the reality of certain non-compliant aspects of the staircase, CSK argued that the staircase, nonetheless, posed no hazard or danger, and the cause of the incident and the Plaintiff's injuries resulted from her own negligence. The defense presented a trial theme to the jury that the Plaintiff should have been responsible for her own actions and/or inactions. The Plaintiff boarded \$65,000.00 in past medical expenses, and asked for \$5,000.00 per year, for a period of twenty years, in future medical expenses. In addition, the Plaintiff requested a significant award for non-economic damages. The jury returned a complete defense verdict in favor of CSK's client.

Summary Judgment Successes

Jonathan Vine and Alan St. Louis of Cole, Scott & Kissane's West Palm Beach office obtained a favorable summary judgment in this legal malpractice case. In 2007, a negligent driver in a fatal automobile collision received a pre-suit offer, from the victim's estate, to settle a wrongful death claim for \$10,000.00. However, the estate revoked the offer, before it was accepted, and proceeded with filing the underlying lawsuit against the wrongdoer. The wrongdoer unsuccessfully moved for the court to compel enforcement of the offer against the victim's estate. Upon losing the underlying trial, an adverse judgment was entered against the wrongdoer in the amount of \$1,525,000.00. Thereafter, the wrongdoer sued his attorney, in the present action, for legal malpractice

to recover \$1,510,000.00 in damages. The Plaintiff alleged that his former counsel failed to make sufficient arguments to the court to obtain enforcement of the underlying settlement offer, and failed to preserve judicial error for appellate review. Upon moving for summary judgment on behalf of the Defendant attorney, CSK successfully argued that no enforceable contract was ever formed due to, among other things, a lack of mutual assent between the contracting parties, revocation of the offer, and the doctrine of mistake. Therefore, the Plaintiff could not prevail in a "trial within a trial." As a result, the court granted summary judgment in favor of the Defendant attorney. Since then, CSK has sought to recover the fees incurred by the Defendant attorney pursuant to a rejected proposal for settlement which was previously served on the Plaintiff.

Wesley Todd and John Hackworth of Cole, Scott & Kissane's Tampa office recently obtained a summary judgment in favor of CSK's client on the "residence premises" defense. In short, the "residence premises" defense relies on the definition of "residence premises" and requires that, for a claim under an HO-3 policy to be covered, the insured must reside at the property. Importantly, the Plaintiff previously rejected several offers to resolve the matter, including a proposal for settlement.

Wesley Todd and Aram Megerian of Cole, Scott & Kissane's Tampa office recently obtained a summary judgment in favor of CSK's client on the prompt notice policy provision. This case involved an insured's reporting of a claim after repairing and renovating the entire property. Although the insured had taken photographs of some the damage, the presence of the photographs proved to be the main issue as to whether CSK's client was entitled to summary judgment. Specifically, CSK had to overcome recent Florida case law suggesting that the late notice defense is not proper for summary judgment if the insured produces any evidence suggesting he or she might be able to overcome the presumption of prejudice to the insurer. In light of the recent Florida case authority regarding questions of fact in these late notice cases, this was an extremely favorable ruling for CSK's client. The Plaintiff alleged that an adjuster told her the claim was covered and would be forwarding a \$10,000.00 check for ALE and contents. The recent decision in *Stark v. State Farm* suggests that, whether true or not, such a statement is enough to allow the whole case to proceed to a jury. CSK disagreed and asked the court to distinguish the subject case from that case because the subject case involved a much greater amount of preju-

dice - renovations to the majority of the property before filing the claim. Ultimately, the court agreed with CSK's position that this allegation alone was not enough to present the entire case to the jury. As a result of the summary judgment order, the majority of the Plaintiff's claim, which was alleged to be more than \$100,000.00, has been disposed of. The only remaining damages that were photographed include some relatively minor damage to a door frame, sliding glass door, carpeting, and ceilings. Importantly, going forward, CSK's client will still have the presumption that it was prejudiced by the insured's late reporting, even as to those damages that were photographed. Thus, the burden will remain on the insured to show that these photographs were enough to allow CSK's client to fully investigate the claim, a burden they will likely not be able to easily overcome.

Nicole Wall and Jonathan Vine of Cole, Scott & Kissane's West Palm Beach office recently obtained a summary judgment in favor of CSK's client with regard to one Plaintiff's claims in a Fair Labor Standards Act case. In connection with the summary judgment win, CSK successfully argued that the Plaintiff was adequately compensated for all hours worked, despite the Plaintiff's claim that he was required to work many hours "off the clock," for which he was not compensated.

Significant Dismissals

Benjamin Esco and Giancarlo Nicolsi of Cole, Scott & Kissane's Miami office obtained a dismissal for fraud upon the court in this premises liability case. The Plaintiff allegedly suffered an eye injury wherein she claimed to see "floaters" after portions of a fan from our client's premises fell off the wall landing on her head and face. The Plaintiff made a demand for \$500,000.00 and denied any prior history of injuries at her deposition and in her answers to our interrogatories. Through defense counsels' investigative efforts, it was discovered that the Plaintiff had suffered multiple eye injuries and was involved in multiple accidents, all of which were not previously disclosed by the Plaintiff. As such, the Plaintiff had engaged in a pattern of fraudulent and deceitful misconduct designed to improperly bolster her claims and compromise the defenses of CSK's client by providing false information, withholding damaging information, and otherwise misleading the Defendant concerning matters that went directly to the heart of the case. If not for the efforts of the defense, these lies would have remained undiscovered, leading to a distorted presentation of evidence

in this cause. The court agreed and granted the Defendant's motion to dismiss for fraud upon the court.

Nicole Wall and Jonathan Vine of Cole, Scott & Kissane's West Palm Beach office obtained a final order of dismissal in a housing discrimination case following the conclusion of an administrative law trial. The Petitioner claimed that the Respondent, a condominium association, discriminated against her on the basis of race in violation of the Florida Fair Housing Act by refusing to allow her to rent her unit. CSK successfully argued that the Petitioner was not qualified to rent out her unit based on the association's declaration prohibiting owners from renting their units, and that the association did not allow unit owners of races other than that of Petitioner to rent out their units. Although the Petitioner argued that the association allowed a company to purchase and rent out a unit, CSK successfully argued that the subject company was an institutional mortgagee that took title through foreclosure, and was not similarly situated to Petitioner.

Nicole Wall and Bradley Fishberger obtained a dismissal of a federal court lawsuit filed against a homeowners association for violation of the Fair Housing Act, arising out of the association's refusal to allow the Plaintiff to maintain an emotional support animal at her property. CSK successfully argued that the court lacked subject matter jurisdiction over the Plaintiff's claim pursuant to the *Rooker-Feldman* doctrine because of prior rulings in connection with an earlier state court action that the association filed against the Plaintiff for violation of its "no pet rule" that the Plaintiff's dog could not be maintained at her premises and had to be removed.

Nicole Wall of Cole, Scott & Kissane's West Palm Beach office obtained a dismissal with prejudice of a lawsuit filed against an attorney for legal malpractice, breach of fiduciary duty, breach of contract, unjust enrichment, intentional infliction of emotional distress, theft, fraud, civil conspiracy, and spoliation of evidence, arising out of the attorney's representation of the Plaintiff in connection with an appeal. CSK successfully argued that the legal malpractice claim was barred by the statute of limitations; the breach of fiduciary duty and breach of contract claims were grounded in theories of legal malpractice, resulting with said claims being subject to and barred by the shorter statute of limitations applicable to legal malpractice claims; the unjust enrichment claim was barred by the parties' valid contract; the claim for intentional infliction of emotional

distress failed to sufficiently plead a cause of action after two attempts; and the remaining claims were improper based on Plaintiff's failure to seek leave to add them to her pleading, and consisted solely of conclusions unsupported by any facts.

Greg Ackerman and Ryan Rhyce of Cole, Scott & Kissane's Orlando office obtained a voluntary dismissal of a trip and fall action less than 30 days after suit was filed. The alleged accident was captured on a surveillance video which showed that Plaintiff did not fall because of the alleged hazardous condition but solely due to her own fault. A copy of the video was provided to the Plaintiff's counsel, along with a motion for sanctions for pursuing a frivolous claim. The Plaintiff's counsel voluntarily dismissed the action shortly thereafter.

Brandon Waas of Cole, Scott & Kissane's Miami office obtained a dismissal with prejudice on behalf of a high profile professional basketball player who was the Defendant in a motor vehicle negligence matter, which was sensationalized in the local media. After vigorously defending the case based on a lack of factual merit to the claims and by proceeding with a motion for sanctions under Florida Statute § 57.105, the defense was successful in having the court dismiss the matter with prejudice.

Appellate Victories

Scott Cole and Anne Sullivan of Cole, Scott & Kissane's Appellate Group successfully defended an appeal involving a trip-and-fall accident where the main issue raised was an alleged spoliation of evidence. The Plaintiff contended that the trial court erred in denying her requested jury instruction, seeking a rebuttable presumption of negligence because video evidence of the incident was automatically deleted from the store's surveillance cameras and was therefore not available to be discovered. The trial court did not give the requested instruction, and found that there was no spoliation of evidence because the Plaintiff had not asked the Defendant store to preserve the video at any point prior to its destruction (all requests to preserve post-dated the routine destruction/recycling of the tape). On appeal, the Second District Court of Appeal affirmed. It also further held that, if the Defendant liquor store had a duty to preserve the evidence, the appropriate spoliation instruction would have been an adverse inference instruction, not the rebuttable presumption of negligence instruction sought by the Plaintiff. In so holding, the Second District noted that a rebuttable presumption is stronger than an inference.

Anne Sullivan of Cole, Scott & Kissane's Appellate Group obtained a *per curiam* affirmance of the trial court's award of attorneys' fees and trial costs in favor of CSK's client following a successful trial result. The trial court's attorneys' fees and costs award was based on two proposals for settlement that were served on the same day for a combined amount of \$133,350.00, from an allegedly actively negligent tortfeasor and his co-Defendant, whose alleged negligence was only vicarious (under the Dangerous Instrumentality Doctrine and the Doctrine of Respondeat Superior). For purposes of the fees and costs award, the trial court aggregated the amounts of the two proposals for settlement, each of which had required the acceptance of both proposals as a condition of payment of the (combined) amount proposed to settle the matter. This is a significant ruling as the issue on appeal, concerning the manner in which the proposals for settlement were drafted, has long been hotly debated, and has resulted in considerable confusion by Florida attorneys and judges. In short, the appellate court validated CSK's client's proposals for settlement which required both proposals to be accepted, collectively, as a condition to payment. Therefore, CSK not only secured a favorable jury verdict and trial court ruling awarding CSK's client significant attorneys' fees and costs in this matter, but also secured a complete affirmance in Third District Court of Appeal. After a successful trial, CSK's client also prevailed on its efforts to recover its attorneys' fees and costs.

Kristen Tajak of Cole, Scott & Kissane's Appellate Group successfully obtained a reversal of the trial court's order denying the Defendant's motion for entitlement to attorney's fees pursuant to a proposal for settlement that was served on the 45th day before trial. By way of background, the appellees, who were the Plaintiffs below, sued the Defendant for negligence and loss of consortium after a shelf installed in the Plaintiffs' home by one of the Defendant's employees fell and struck one of them on the head. On the 45th day before the trial start date, the Defendant served a proposal for settlement on the Plaintiffs, which the Plaintiffs not accept. Following a successful trial result in favor of the Defendant, and the trial court entered final judgment for the Defendant. The Defendant then filed a motion for entitlement to attorney's fees and costs pursuant to the proposal for settlement that was never accepted. The trial court denied the Defendant's motion for entitlement to attorney's fees, concluding that the 45th day before trial was one day short of being timely under rule 1.442 of the Florida Rules of Civil Procedure.

Therefore, the trial court decided that the Defendant was not entitled to recover its attorney's fees, although costs were awarded. On appeal of the trial court's denial of the Defendant's motion for attorney's fees, the Fourth District Court of Appeal held, in a 7-page opinion, that the plain and ordinary meaning of rule 1.442 is that the deadline for serving a proposal for settlement is the 45th day before the date set for trial; in other words, the 45 days includes the date of service of the proposal for settlement, but does not include the trial date. Because the Defendant's proposal for settlement was served on the 45th day before the date set for trial, the proposal was timely under rule 1.442, and the Fourth District held that it was reversible error for the trial court to conclude otherwise. This is a significant ruling concerning the application and interpretation of rule 1.442 in that there are no other appellate court decisions addressing this issue.

Scott Cole, Kristen Tajak, and Anne Sullivan of Cole, Scott & Kissane's Appellate Group successfully obtained a reversal of an excessive jury verdict entered against CSK's client, following an unfair and highly prejudicial trial on damages in this pharmaceutical malpractice case. In the underlying action, the Plaintiff contended that CSK's client, the Defendant pharmacy, negligently filled her prescription with the wrong drug. The Defendant admitted liability and the case went to trial solely on the issue of damages. The 92-year-old Plaintiff recovered a verdict of \$1,948,843.50; of this amount, \$1,425,920.00 was for future medical expenses and \$395,000.00 was for future pain and suffering. On appeal, CSK argued that serial improprieties in the Plaintiff's closing argument, when combined with the procedural prejudice of the untimely disclosure of a rehabilitation expert, operated to deny the Defendant pharmacy of its right to a fair trial. In particular, CSK argued that during the closing argument, Plaintiff's attorney made a number of improper comments that switched the focus of the case from proper issues – such as the Plaintiff's life expectancy and past and future damages – to punishing the Defendant pharmacy for the “wrongful conduct” of defending the case in court. In other words, CSK argued that the closing argument shifted the focus of the case from fairly compensating the Plaintiff for her damages, to punishing the Defendant pharmacy for defending the action in court. The Fourth District Court of Appeal held, in a 5-page opinion, that Plaintiff's counsel's arguments improperly suggested that the Defendant pharmacy should be punished for contesting damages at trial and defending the claim in court, and

was designed to inflame the emotions of the jury, rather than prompt a logical analysis of the evidence in light of the applicable law. When viewed together with the untimely disclosure of Plaintiff's rehabilitation expert, which compromised the Defendant pharmacy's ability to defend on the issue of damages, the closing argument urged the jury to punish the Defendant pharmacy for having the temerity to be in court. Therefore, the Fourth District reversed the final judgment and remanded the case for a new trial on damages.

Worker's Compensation Victories

Kristen Tajak of Cole, Scott & Kissane's Appellate Group successfully defended a Claimant's appeal from an order of the Judge of Compensation Claims (the “JCC”), award of reasonable employer/carrier paid attorney's fees pursuant to section 440.34(3), Florida Statutes (2008). The Claimant argued on appeal that the statutory guideline fee contained in section 440.34(1) should be the starting point for determining reasonable fees awardable against an employer/carrier under section 440.34(3), and that the JCC's determination is no longer governed by the reasonableness factors found in rule 4-1.5(b) of the Rules Regulating the Florida Bar, and discussed in *Lee Engineering & Construction Company v. Fellows*, 209 So. 2d 454 (Fla. 1968). The Claimant challenged the JCC's \$25,000.00 fee award (which amounted to an hourly rate of \$312.50 per hour), and sought to recover the statutory guideline fee of \$45,608.91 (which amounted to an hourly rate of \$570.11 per hour). Therefore, the Claimant sought an order from the First District Court of Appeal finding that the employer/carrier was responsible to pay the difference between the \$25,000.00 amount awarded as reasonable by the JCC, and the statutory guideline fee amount of \$45,608.94. On appeal, the employer/carrier argued that the JCC correctly interpreted and applied the applicable 2008-version of the statute, and, therefore, properly relied upon the factors found in rule 4-1.5(b), and discussed in *Lee Engineering*, as a basis for determining the amount of reasonable attorney's fees to be awarded under section 440.34(3). The First District Court of Appeal issued a *per curiam* decision in the employer/carrier's favor, affirming the lower court's ruling in all respects.

Kip Lassner and Michael Beane of Cole, Scott & Kissane's Fort Lauderdale office obtained a defense verdict in this workers' compensation case. The Claimant

requested temporary partial disability benefits from the date he was laid off from work through the date of the trial. The Claimant was on stringent work restrictions per the authorized doctors at the time of his lay-off. In order to be awarded temporary partial disability benefits, the Claimant must simply show some causal connection between the work injury and the loss of wages. This burden may be met with medical evidence or evidence of a good-faith work search. On behalf of the Employer/Carrier, CSK was able to show that the Claimant failed to perform a good faith work search within the work restrictions imposed by the treating physicians. The Judge of Compensation Claims (the “JCC”) also found that the work restrictions did not cause any lost wages. This was a highly favorable ruling for the Employer/Carrier and resulted in a savings of nearly \$20,000.00 in lost wages. The Claimant filed a motion for rehearing, which was also successfully defended by CSK, and was denied by the JCC.



Cole, Scott, & Kissane, P.A.'s commitment to community service is exemplified through its attorneys. Pictured is partner Trelvis D. Randolph, who was recently featured in the newsletter for CCDH. In partnership with people with disabilities and their families, CCDH advocates, coordinates and provides supports and services. Mr. Randolph presented the firm's donation check to Helene J. Good, President and CEO of CCDH. Mr. Randolph is a long-time CCDH supporter, who noted that “We believe that it is both an ethical responsibility as attorneys and a moral obligation as human beings to give back to the communities in which we live and work.” CCDH has recognized Cole, Scott, & Kissane, P.A. as a CCDH Corporate Champion. As Mr. Randolph explained, Cole, Scott & Kissane, P.A. is proud that its “reason for being is to help our clients achieve the resolutions they desire in the most honest, cost-effective and expedient fashion possible.”



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