# COLE, SCOTT & KISSANE, P.A.

CSK QUARTERLY • FALL 2010

## COLE, SCOTT & KISSANE, P.A. TAKING CASES TO TRIAL AND WINNING!

COMPLETE DEFENSE VERDICT

**AUTO NEGLIGENCE**

JAMES SPARKMAN

COMPLETE DEFENSE VERDICT

**MEDICAL MALPRACTICE**

DAN SHAPIRO

BRYAN ROTELLA

COMPLETE DEFENSE VERDICT

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# COLE, SCOTT & KISSANE, P.A. TRIAL VICTORIES

At Cole, Scott & Kissane, we have assembled a talented and experienced group of attorneys who routinely try and win trials, many by way of complete defense verdicts, throughout the State of Florida. The following is a sampling of verdicts obtained in the past three months:

**Kip Lassner** secured a complete defense verdict in favor of a employer/carrier in a vigorously litigated misrepresentation claim. The claimant submitted a fake social security number to the carrier. Kip was able to prove that the claimant submitted this fake social security number for the specific purpose of obtaining workers' compensation benefits. The claimant unsuccessfully argued that the fake social security number was used in an attempt to keep his job as opposed to obtain workers' compensation benefits.

**Dan Shapiro and Bryan Rotella** obtained a complete defense verdict after a week-long trial in a complicated medical malpractice case in Pinellas County, Florida. Dan and Bryan represented a nurse anesthetist who was alleged to have deviated from the standard of care in her care of a 65-year old woman who was having a cyst removed from her wrist at a local outpatient surgery center when complications arose intra-operatively, a code was called and the patient ended up in a persistent vegetative state. The plaintiff's standard of care expert alleged that the nurse anesthetist did not observe signs during the 6-minute procedure that the patient had become hypoxic, and this delay, along with her failure to request the timely assistance of the supervising anesthesiologist, caused the outcome. Dan and Bryan convinced the jury, through the testimony of their client and the supervising anesthesiologist, that the nurse anesthetist acted appropriately relative to her care of the patient during the brief procedure. Additionally, a retained cardiologist persuaded the jury that the cause of the outcome was due to the patient having an intra-operative focal ischemic heart attack that was due to an underlying coronary heart disease that had not been disclosed prior to the surgery.

**Dan Shapiro and Sally Slaybaugh** obtained a complete defense verdict in a nursing home case involving a resident that was alleged to have sustained renal failure due to dehydration. Plaintiff contended that severe dehydration resulted in acute renal failure which caused the resident's death. Plaintiff argued for punitive damages and asked the jury for an award of $3,000,000. Dan and Sally named the treating physician as a *Fabre* Defendant and explained to the jury that the doctor's medical plan for the resident was a fatal one. Furthermore, in response to the allegation that the resident was denied fluids, Dan and Sally demonstrated, by way of testimony, that if sufficient fluids had been denied to the resident for a month, she would have exhibited signs or symptoms of dehydration well before the final date of her residency. The jury deliberated for less than 2 hours before determining that our client did not violate the resident's rights and was not negligent.

**Dan Shapiro and Vince Gannuscio** received a complete defense verdict in a slip and fall case. The plaintiff sustained a hip fracture and underwent a complete hip replacement. The plaintiff's counsel asked the jury for $150,000 and the jury returned a verdict for the defense.

**James Sparkman** obtained a complete defense verdict in a Palm Beach County case. The plaintiff, a 32-year old female house painter, was struck by our client's flatbed tow truck as the pair were executing a u-turn. The truck driver could not complete the turn, stopped and backed up into the plaintiff's car. The plaintiff incurred medical bills, and her orthopedic spine surgeon recommended neck and back surgery. Furthermore, her physiatrist created a continuation of care plan. The plaintiff testified that she could no longer work and advanced a past and future wage loss claim. The plaintiff's total claim exceeded $500,000. The defense admitted liability but contested causation. The jury deliberated for an hour and returned a verdict of no causation.

**Michael Brand and Jennifer Ruiz** received a complete defense verdict on behalf of their client, a prominent local criminal defense attorney, on a replevin claim brought by former clients. The plaintiffs claimed that because our client had refused to return their files, they were unable to pursue their right to over $150,000 in assets seized by the federal government. **Scott Bassman** and **Jennifer Ruiz** already obtained summary judgment on behalf of our client for the legal malpractice claims. After just 30 minutes of deliberation, the jury returned a defense verdict.

**Barry Postman and Claire Hurley** won a complete defense verdict in a Palm Beach County employment/breach of contract case. Plaintiff sued over a written contact which purportedly required our client to pay a salary – which he never did. Barry and Claire convinced the jury that the contract had a mistake. The plaintiff asked the jury for over $150,000. David Kirsch was also instrumental in preparing the case for trial.

**Michael Brand** obtained a complete defense verdict on behalf of our client, a condominium association, in a slip and fall case. Plaintiff alleged through their expert that the subject ramp was too steep and failed all building codes from 1950 forward. As a result of the incident, the plaintiff suffered a tri-malleolar ankle fracture and has had five surgeries to date. Her doctor testified that she would need full arch reconstruction and, as a result, had suffered a 40% whole body impairment. The defense did not call a doctor to rebut the injuries but presented their own expert to counter plaintiff's building code allegations. The plaintiff asked the jury for $1,200,000. The jury returned a defense verdict in just over an hour. **Sheila Gonzales-Jonasz** was instrumental in preparing the case for trial.

**James Sparkman** obtained a complete defense verdict arising out of a Miami automobile accident. The plaintiff was a passenger in a car driven by her boyfriend, whom she subsequently married. Both the boyfriend and the insured, a teen, contended that they had the green light. The plaintiff also agreed that the boyfriend had the green light. The plaintiff testified that she believed that her boyfriend was not negligent. The plaintiff alleged suffered soft tissue injuries to the neck and back, and an A/C joint impingement. The medical bills were $25,000, plus alleged wage losses. The defense filed a proposal for settlement and is entitled to fees and costs.

**Barry Postman and W Scott Mason** obtained a complete defense outcome in binding arbitration. The case involved allegations by the parents of a deceased nursing home resident that our client had failed to develop adequate care plans for resident's risk of bowel compromise and further failed to monitor the resident's bowel functioning. As a result of the alleged negligence, petitioners asserted that the resident died from complications related to a bowel perforation two weeks after discharge to hospital. Ultimately, Barry and W convinced the arbitrator to award nothing to the petitioners.

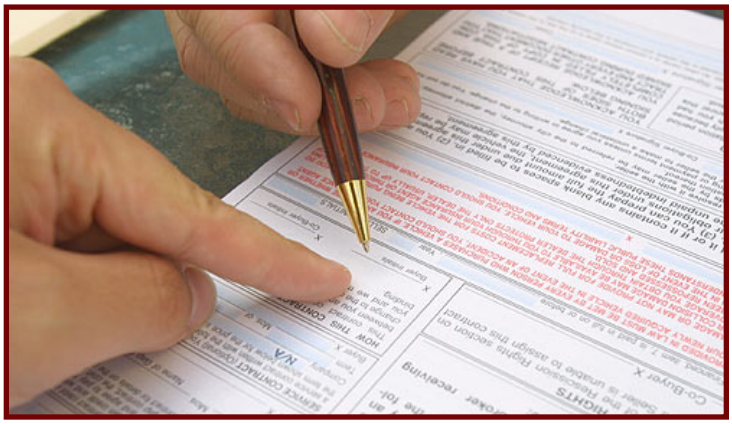
**Henry Salas** obtained an outstanding verdict following a five week trial in Southern California of an asbestos case. Henry represented an American automobile manufacturer in a case where the plaintiff asked the jury for $20,000,000. Henry obtained a defense verdict for our client on their punitive damages claim. In total, the jury only awarded 1.5% of his requested damages.

**Dan Shapiro and Howard Scholl** obtained a very favorable result in a Pinellas County case concerning claims against an automobile carrier for Uninsured/Underinsured motorist benefits. While the sole defendant at the table was the insurance carrier, and liability for the accident was admitted, the issues of causation and reasonableness of medical bills remained contested. Based upon substantial and competent evidence, including a 10-year history of prior complaints and multiple gaps in treatment spanning up to 17 months, the jury concluded plaintiff had not sustained a permanent injury despite the fact that her car sustained nearly $10,000 in damage and she underwent cervical surgery which both her neurologist and orthopedic surgeon causally related to the accident. Plaintiff, a 50-year old female accumulated nearly $80,000 in medical expenses, presented claims of future medical expenses in excess of $100,000 and sought total damages of $1.25 Million Dollars. However, after less than 2 hours of jury deliberation, the jury awarded plaintiff $10,000 in past medical expenses and $270 in lost wages.

**James Sparkman and Lonni Tessler** received a favorable jury verdict at trial in defending a landlord whose tenant alleged that she fell through the floor in the rental home's only bathroom. Approximately one week prior to the fall, a water leak developed behind the toilet and the insured inspected the bathroom noting water damage to the floor. While the tenant claimed that he called a plumber, the plaintiff claimed that the landlord did not take any immediate action whatsoever and no one came to the home to remedy the problem. The plaintiff alleged that a week after she notified the landlord of the water leak, she was brushing her teeth and the floor in the bathroom caved in and she had to be extracted from the floor. At trial, the plaintiff asked for over $200,000 in damages. The jury rendered a verdict of approximately $11,100 with 40% comparative negligence assessed on the plaintiff resulting in an ultimate award of only $6,800, which did not exceed a proposal for settlement made earlier in the case.

# Recent Amendments to the Condominium Act and the Homeowners' Association Act

By Ron Campbell



On June 1, 2010, combined Florida Senate Bills 1196 and 1222 were signed by Governor Charlie Crist. The combined Bill includes significant amendments to Florida Statutes Chapter 718, the Condominium Act, and Florida Statutes Chapter 720, the Homeowners' Association Act, and became effective July 1, 2010. This article examines the foreseeable impact of these Amendments on the liability exposure of community associations in the Directors and Officers ("D&O") context.

Amendments were made to the portion of the Condominium Act that formerly obligated a condominium association to require each owner to provide proof of a currently effective policy of hazard and liability insurance.[1] The bill also deleted the association's former option of purchasing a policy of insurance on behalf of an owner, if the owner failed to provide a certificate of insurance within 30 days after a written request for such certificate was delivered. This relieves associations of some D&O liability, however, because a plaintiff may no longer claim that the association acted unreasonably in failing to procure a policy of insurance on behalf of an owner where the owner failed to provide proof of a currently effective insurance policy.

Both the Condominium Act and the Homeowners' Association Act now require a tenant in a unit owned by a person who is late on their rent to the association up to the amount of future monetary obligations. The amendment also authorizes the association to sue a tenant who fails to pay rent for eviction.[2] These amendments have been promoted by some as powerful tools for the collection of past due assessments. However, we also foresee claims arising from increasingly aggressive approaches to assessment collection. More eviction complaints will lead

to more counterclaims for wrongful eviction. The association will be held to some of the procedural requirements of Florida's Landlord-Tenant laws, and we foresee some growing pains as association attorneys adapt to what may be a new area of the law.

Other changes include an amended section 718.303, which now authorizes a condominium association to suspend, for a reasonable time, the right of a unit owner or the unit's occupant, licensee, or invitee to use certain common elements if the unit owner is delinquent in the payment of any monetary obligation for more than 90 days until the obligation is paid. This section was also amended to allow for the suspension of voting rights if a unit owner is delinquent in the payment of any monetary obligation for more than 90 days until the obligation is paid.

Similarly, in the homeowners' association context, section 720.305 was amended to authorize a homeowners' association to suspend, for a reasonable time, the right of a member or member's tenant, guest, or invitee to use certain common areas and facilities if a unit owner is delinquent in the payment of any monetary obligation for more than 90 days until the obligation is paid. This deleted the requirement that the governing documents provide for such suspension. The suspension process requires 14 days notice and an opportunity for a hearing.

We have already seen litigation arise over homeowners' and condominium associations' alleged failure to comply with procedural requirements. Now that every association has been extended the legal right to suspend, we foresee increasing litigation over this issue.

Furthermore, while there are now new tools for community associations in their struggle to cope with the current economic climate, the period of adaptation may be significant. Nevertheless, the new provisions clarify existing law and provide a more detailed roadmap for community associations in their enforcement of their governing documents. Accordingly, we believe that the long term impact will have the positive effect of decreasing and simplifying new claims.

Endnotes

1 Fla. Stat. § 718.111 (2010).

2 Fla. Stat. §§ 718.116, 720.3085, Fla. Stat. (2010).

# *Hollywood Towers Condominium Association v. Hampton:* An Association-Friendly Decision by the Fourth District Court of Appeal

By Wesley Sherman

Like corporate boards of directors, condominium association boards have meetings, hold votes, and make decisions about the direction that their organizations will take. Unlike typical corporate boards, however, association boards are often comprised of lay volunteers tasked with making decisions outside of their areas of expertise. Despite this distinction, many condominium residents would like to hold their association board members to standards which can, at times, be unrealistic. When those standards are not met, or a resident simply disagrees with a board decision, the disgruntled association member often seeks legal recourse. In pursuing an injunction or damages from the courts, the plaintiffs in association cases are effectively saying, "I disagree with a decision that the board made; the decision caused me harm; tell them they were wrong." If a mere shareholder disagreement with a board decision was grounds for a lawsuit, however, companies would drown in litigation. As a result, courts have adopted the business judgment rule, which insulates boards of directors from liability for decisions they make so long as the board acted in a reasonable manner. The clear application of this rule to association boards would go a long way to diminish lawsuits against associations, saving them time, money, and headaches.

In Florida, it is well established that absent fraud, self-dealing and betrayal of trust, directors of condominium associations are not personally liable for the decisions they make in their capacity as directors.[1] The standard by which a trial court should review the decisions of a condominium association's board of directors has not been as well established. As a result, on June 23, 2010, the Fourth District Court of Appeal for the State of Florida ("Fourth DCA") adopted a test articulated by the California Supreme Court[2] and held that "courts must give deference to a condominium association's decision if that decision is within

the scope of the association's authority and is reasonable – that is, not arbitrary, capricious, or in bad faith."[3]

In *Hollywood Towers Condominium Association, Inc. v. Hampton,* case, the board determined that a number of the unit owners' balconies needed structural repairs that required work be done inside of each unit. Pursuant to the declaration of condominium, owners were required to permit the board and its agents to enter their units for the purpose of maintenance, inspections, repair, or replacement. The unit owner plaintiff, however, refused the association access and retained an engineer who said the balcony was structurally sound after only the exterior repairs were performed. As a result, the association requested injunctive relief from the court. The trial court ruled in favor of the unit owner, finding that the association did not meet its burden of showing irreparable harm because there was a question as to whether the additional work was necessary. On appeal, however, the Fourth DCA held that, on remand, the trial court must perform the *Lamden* test and determine whether the association had the authority to access the unit to repair the balcony, and, if so, whether it acted reasonably.

Based upon the court's holding in *Hollywood Towers*, the Fourth DCA has unequivocally extended the business judgment rule to association board decisions. As such, a board decision should not be reviewed by a court so long as the board's decision was within the scope of its authority, and it was reasonable. While this ruling is favorable to condominium associations, it remains important for association boards to review their governing documents and Florida's Condominium Act prior to making any decisions affecting the unit owners in order to ensure that their decisions are within their authority under the governing declaration and by-laws.

In *Hollywood Towers*, the association's decision related to the renovation of the building's balconies, which, pursuant to the governing documents, were the responsibility of the association. Therefore, it is likely that the trial court will now find that the decision was within the association's authority, and the outcome will then be left to the finder of fact to determine whether the board's decision was reasonable. Boards must be wary, however, when making decisions relating to elements for which the unit owners are responsible, as it still appears to be an open question whether the same deference will be extended to associations in those instances. Moreover, issues can become even more complicated when associations make decisions relating to elements for which the unit owners are financially responsible, but the association has the responsibility to insure. Therefore, it is likely that the limits of this association-friendly decision will be revisited and clarified through future cases arising under those circumstances.

Endnotes

1 *Sonny Boy, L.L.C. v. Asnani*, 879 So. 2d 25, 27 (Fla. 5th DCA 2004).
2 *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 942 (Cal. 1999).
3 *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784 (Fla. 4th DCA 2010).

# THE IMPACT OF *LEWIS v. CITY OF CHICAGO*: WILL IT EXPAND THE STATUTE OF LIMITATIONS PERIOD IN FILING EMPLOYMENT DISCRIMINATION MATTERS?

By Joshua A. Goldstein

Under the Equal Employment Opportunities section of the Civil Rights Act of 1964, more commonly known as "Title VII," an employee must generally file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful employment practice being challenged.[1] The time period to file a charge of discrimination is extended to 300 days if the employment practice occurs in a state with an agency that shares the investigatory work with the EEOC.[2] In Florida, the Florida Commission on Human Rights ("FCHR"), and other county agencies, share work with the EEOC in conducting the investigations.[3]

Recently, in *Lewis v. City of Chicago*,[4] the United States Supreme Court unanimously concluded that a group of African-American firefighter applicants had timely filed a charge for discrimination against the City of Chicago.[5] In January 1996, the City of Chicago announced the results of a July 1995 written examination administered to approximately 26,000 applicants who were seeking to serve in the Chicago Fire Department.[6] At the same time, the City issued a press release stating that "it would begin drawing randomly from the top tier scorers, *i.e.*, those who scored 89 or above (out of 100), whom the City called 'well qualified.'"[7] However, a score of 65 or greater was considered passing, wherein the City rated those applicants who scored between 65 and 88 as "qualified." Those applicants who were rated as "qualified" were subsequently notified that due to the number of "well qualified" applicants, it was unlikely that they would be contacted for further processing.[8]

On May 16, 1996, and on ten additional dates spanning a six-year period, the City ran a lottery to select applicants from the "well qualified" scorers of the July 1995 exam. During the final round of selections, the City exhausted the pool of "well qualified" applicants and for the first and only time, selected applicants from those rated as "qualified" to fill the remaining slots.[9] On March 31, 1997, some 430 days after the City's January 1996 announcement, Crawford M. Smith, an African-American applicant who scored in the "qualified" range, filed a charge of discrimination with the EEOC. Subsequently, five other individuals followed suit. On July 28, 1998, the EEOC issued all six individuals "right-to-sue" letters. Several months later, the individuals filed a civil action against the City alleging that its practice of only selecting "well qualified" applicants caused a disparate impact on African-Americans in violation of Title VII.[10]

Following the District Court's class-certification, which consisted of more than 6,000 African-American applicants who fell within the "qualified" range, the City moved for summary judgment. The City asserted that the applicants had failed to file charges with the EEOC within the required 300 days after their claim had accrued. The motion was denied by the District Court, which reasoned that the City's ongoing use of the 1995 test results constituted a continuing violation of Title VII. On appeal, the Seventh Circuit held that the EEOC charge was not timely filed, as the only discriminatory act was the sorting of the scored into the "well qualified," "qualified" and "not qualified" categories. The Seventh Circuit further held that the eleven subsequent hiring decisions were immaterial because the hiring of only "well qualified" applicants was "'the automatic consequence[] of the test scores, rather than the product of a fresh act of discrimination."[11]

In reversing the Seventh Circuit's decision, the U.S. Supreme Court held that each of the eleven times the City selected a class of applicants from those who tested in the "well qualified" range, the City "used" a practice that produced a disparate impact. The Court's reasoning however, was not premised on the "continuing violations" doctrine, a theory which would treat the adoption and application of the cutoff score as a single, ongoing wrong.[12] Moreover, the Court has previously rejected the "continuing violations" doctrine, finding that "unlawful employment practices" include "numerous discrete acts, holding that "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing."[13] Rather, the Court focused on whether the City only used the discriminatory practice when it first announced the results and created the list of applicants, or whether the City used the discriminatory practice each of the eleven times it selected applicants from the list to fill open positions.[14]

The Court held that the City created a disparate-impact each time it selected applicants from the "well qualified" pool, and thus, the plaintiffs had timely filed a disparate-impact claim. The Court's holding allows for a plaintiff who did not timely file a charge challenging the implementation of a practice to timely assert a charge for disparate-impact based upon the employer's subsequent application of that practice if that party properly alleges the elements of a disparate-impact claim.[15] Specifically, the Court notes that a Title VII employee must show a "present violation" within the statute of limitations period.

Consequently, an employer who regularly uses a practice implemented years prior may now be subject to new disparate-impact suits.[16] In addition, the Court's holding in *Lewis* may potentially subject employers to charges of discrimination filed outside the statute of limitations period of 300 days if an employee can show that the employer discriminated against the employee each time the employer made a decision based upon that practice. In that regard, pursuant to Title VII, the employee must show a "present violation" within the statute of limitations period.

Nonetheless, an argument can be made that the Court's holding in *Lewis* is limited to those discrimination claims, such as disparate-impact, which do not require proof of discriminatory intent.[17] Specifically, the Court noted the common requirement that the complaining party show discriminatory intent within the statute of limitations period. Stated differently, the employee must show the present effects of present discrimination and not the present effects of past discrimination outside the statute of limitations period.[18] Where there is no requirement for discriminatory intent, a party can show a "present violation" of past discriminatory intent.

Although the full scope and reach of the Supreme Court's holding in *Lewis* is presently unknown, employers should continuously review and revise their day to day employment practices and policies in order to avoid potential future claims, despite those claims appearing on their face to be filed outside the statute of limitations period.

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Endnotes

1 42 U.S.C. § 2000e-5(e)(1).
2 *Id*.
3 § 760.03, Fla. Stat. (2010); § 760.04, Fla. Stat. (2010).
4 *Lewis v. City of Chicago, Illinois*, __ U.S. __, 130 S.Ct. 2191 (2010).
5 *Id*. at 2200
6 *Id*. at 2195.
7 *Id*.
8 *Id*. at 2196.
9 *Id*.
10 *Id*.
11 *Id*. *quoting Lewis v. City of Chicago, Illinois*, 528 F.3d 488, 491 (7th Cir. 2008)
12 *Id*. at 2200.
13 *National R.R. Passenger Corp. v, Morgan*, 536 U.S. 101, 111 (2002); 42 U.S.C. § 2000e-6(a); 42 U.S.C. § 2000e-2.
14 *Lewis*, 130 S.Ct. at 2199.
15 *Id*. at 2199-2200.
16 *Id*.
17 *See e.g. Malone v. Lockheed Martin Corp.*, 2010 WL 2541176, n. 9 (1st Cir. June 25, 2010) (declining to extend the scope of *Lewis* beyond the context of disparate-impact matters.).
18 *Lewis*, 130 S.Ct. at 2199-2200.

# Bridging the Gap: Fla. Stat. § 768.0755 Eliminates the Ten-Year Old Standard Governing Foreign Transitory Substances in Slip-and-Fall Cases Articulated in *Owens v. Publix Supermarkets, Inc.* and Returns the Law to its pre-*Owens* State.

By Sam Harden and George Hooker

This Spring, Governor Charlie Crist signed into law House Bill 689, which significantly changed the "Publix" slip-and-fall law in Florida. This bill repealed the current premises liability statute, section 768.0710, Florida Statutes, and created section 768.0755. Section 768.0755 states that "if a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition." The statute further states that actual or constructive notice can be shown by demonstrating that the condition existed for a sufficient length of time or that the condition occurred with regularity. As amended, the new law will place a higher burden on plaintiffs in slip-and-fall cases by eliminating the burden-shifting scheme created by *Owens v. Publix Supermarkets, Inc.*[1] This will benefit business owners and operators by placing the burden of proof on the plaintiff at all stages of the case.

This new section reverses of the Florida Supreme Court's decision in *Owens*, which held that once a plaintiff demonstrates that she slipped on a foreign transitory substance, the burden of proof is shifted to business owners to show that they exercised reasonable care, and appears to return substantially to the standard used before *Owens*. It appears that, in Florida, the ten years spent under the *Owens*[2] standard and section 768.0710, Florida Statutes were an intermission between spans of two nearly-identical premises liability standards.

In 2001, the Florida Supreme Court decided *Owens,* and eliminated the requirement that a plaintiff prove that the premises owner or operator have actual or constructive knowledge of a transitory foreign substance. The Court held that once a plaintiff established that he or she slipped on a foreign transitory substance, there is a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition, and eliminated the notice requirement.

In reaction to the Supreme Court's decision, the Legislature adopted section 786.0710, Florida Statutes.[2] This section enacted a three-part standard for slip-and-fall cases, and shifted the burden back to plaintiffs to prove that "[t]he business acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises." In an acknowledgement of the Supreme Court's decision in *Owens*, the legislature added that "actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim."

In order to discern the impact House Bill 689 and the new section of the Florida Statutes will have on slip-and-fall cases, it would be helpful to look at case law predating *Owens*. Before *Owens*, the law in Florida regarding premises liability suits favored business owners, by requiring that Plaintiffs prove that the business owner have actual or constructive knowledge of the transitory foreign substance. Furthermore, it appears that, in creating the new premises liability law, the Legislature intended to return to this pre-*Owens* standard. The Legislature used language substantially similar to the pre-*Owens* case law, in setting forth how constructive notice can be established. Under the new law, just like the pre-*Owens* case law, constructive notice can be established by a plaintiff through demonstrating that the dangerous condition existed for such a length of time that the premises owner should have known of the condition or that the condition occurred with regularity and was therefore foreseeable.

As mentioned above, constructive notice can be imputed from the length of time that the dangerous condition existed. In a large amount of cases, courts have been willing to allow evidence of the condition of the transitory substance to be used to preclude summary judgment for premises owners. Methods for proving length of time have included lumps in butter,[4] skid or scuff marks,[5] and thawing.[6] However, even if the substance appears that it was there for a sufficient amount of time, the defendant may still prevail if the plaintiff cannot demonstrate that the characteristics being used to prove constructive notice were acquired while on the floor of the premises. This is vividly illustrated in the lower court decision reviewed in *Owens*. In the case below, it was alleged that the plaintiff slipped on a discolored banana peel. The lower court found that summary judgment for the defendant was appropriate, because the plaintiff was unable to present evidence that the discoloration occurred on the floor, and that the banana was not already discolored when it was dropped.[7] Also, plaintiffs will be able to establish constructive notice when the condition occurred with regularity and was therefore foreseeable. In this category, evidence of recurring or ongoing problems that resulted from operational negligence or negligent maintenance becomes relevant. In the pre-*Owens* case of *Wal-Mart Stores, Inc. v. Reggie*, the plaintiff alleged that liquid that had seeped out of an overflowing trash can caused a slip-and-fall accident.[8] The plaintiff successfully presented evidence that the trash can in question would overflow regularly, and that the Wal-Mart staff would always be notified, and would clean it within 30 minutes to an hour-and-a-half. The court held there was sufficient evidence of foreseeability, due in part to the testimony that this seepage would occur regularly.


Allowing constructive notice to be established by showing the event occurred with regularity could portend some changes in how business owners protect themselves from liability. As discussed above, under the post-2001 and pre-2010 *Owens* framework, as soon as the plaintiff established that he slipped and fell on a transitory foreign substance on the premises, the defendant bore the burden of establishing that the premises were maintained in a reasonably safe condition. Therefore, premises owners found it necessary to maintain detailed records of maintenance, such as "cleaning logs," "sweep sheets" and "wet spill entries" that document how often everything is cleaned and how quickly they clean up spills.

Under the new law, business owners may wish to take a more nuanced approach to record-keeping as business owners could also face a hidden danger in these records, as they could be used to demonstrate that they had constructive notice of the transitory foreign substance as the records could potentially demonstrate that the condition at issue occurred with regularity. This is especially true with "wet spill logs," which chronicle every previous wet spill and when they were cleaned up as plaintiffs will use prior wet spills to argue that the business owner had constructive notice. Keeping maintenance logs and other records of cleanings and maintenance would not pose this same risk as they would not demonstrate that the condition occurred with regularity. However, it would be important to note that the less evidence a business owner keeps of cleaning procedures, the less evidence the business owner would have to rebut any potential claims. Nevertheless, it is likely that some premises owners will rethink their maintenance recordkeeping in light of the constructive notice requirement being added.

Finally, it appears that the initial judicial reaction is that this law is not retroactive.[9] The first inquiry in determining if a statute is retroactive is whether the legislature evinces an intent to have the law apply retroactively.[10] In this case, there is no indication either way in the statutory language. Therefore, the subsequent inquiry is whether the statute affects procedural or substantive rights. In cases affecting procedural rights, retroactivity is presumed, while the opposite is true in cases affecting substantive rights.[11] In the case of section 768.0755, the United States District Court for the Middle District of Florida has recently decided a case concerning this issue and held that the statute as amended did not affect the burden of proof, but instead added a new substantive element that plaintiffs are required to prove, thereby precluding the statute from having a retroactive effect.[12] At this time, no other courts have addressed this issue and no binding appellate rulings exist either; however, assuming that other courts adopt the same reasoning, it appears that section 768.0755 will be applicable only to cases filed after July 1, 2010.

The new law is yet untested, and so we cannot say with absolute certainty how the courts will view and enforce the new premises liability standard. However, because the new law is such a close approximation to the pre-*Owens* standard, it is safe to say that the premises liability landscape will likely approximate the standards and holdings before 2001.

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Endnotes

1 802 So. 2d 315 (Fla. 2001).
2 *Id.*
3 § 768.0755, Fla. Stat. (2002).
4 *Ramey v. Winn Dixie Montgomery, Inc.*, 710 So. 2d 191, 192-93 (Fla. 1st DCA 1998) (partially melted butter with lumps in it).
5 *Woods v. Winn Dixie Stores, Inc.*, 621 So. 2d 710, 711 (Fla. 3d DCA 1993) (unidentified substance described as "very dirty," "trampled," "containing skid marks, scuff marks," and "chewed up").
6 *Camina v. Parliament Ins. Co*., 417 So. 2d 1093, 1094 (Fla. 3d DCA 1982) (ice cream was thawed, dirty, and splattered)
7 *Owens v. Publix Supermarkets, Inc*., 729 So. 2d 449 (Fla. 5th DCA 1999).
8 714 So. 2d 601 (Fla. 4th DCA 1998)
9 *See* e.g. *Armiger v. Associated Outdoor Clubs, Inc*., 35 Fla. L. Weekly D2194 (Fla.2d DCA 2010).
10 *Basel v. McFarland & Sons, Inc.,* 815 So. 2d 687 (Fla. 5th DCA 2002).
11 *Id.* at 692.
12 *Kelso v. Big Lots Stores, Inc.,* No. 8:09-cv-01286-T, 2010 WL 2889882 (M.D. Fla. July 21, 2010).

# The Wrongful Act Doctrine: An Exception to the "American Rule"

By Justin D. Siegwald

If a hundred people were asked to name their ten most pleasurable experiences, it is probably a safe bet that not a single list would contain the word "litigation." For many, litigation is a synonym for stress, time, and expense. There is also the potential cost of losing a case. To make that prospect worse, if certain factors apply, there is the additional hurt of being forced to pay the winning party's attorney's fees and costs, on top of any adverse money judgment.

The "American Rule,"[1] as it has come to be called, provides for "certain factors" when the losing party in a legal dispute may be required to pay the prevailing party's attorney's fees and costs. Generally, fees and costs cannot be recovered unless that recovery is authorized by a contract or statute.[2] For example, Florida statutory law provides that the prevailing party in a claim for unpaid wages may recover costs and reasonable attorney's fees.[3]

Of course, the American Rule, like many rules, has exceptions. One such exception is the Wrongful Act Doctrine. Under the doctrine, a "wrongful actor" can be compelled to pay certain of a party's reasonable attorney's fees and costs even in the absence of a contract or statute. "Where a defendant has committed a wrong toward the plaintiff, and the wrongful act has caused the plaintiff to litigate with third persons, the wrongful act doctrine permits the plaintiff to recover, *as an additional element of damages*, plaintiff's third party *litigation* expense."[4]

The doctrine often springs its head when allegations of professional malpractice are in the air. One example of where this doctrine has arisen is in the context of a law firm's handling of a probate matter.[5] When the firm's handling of the matter caused the administration of the estate to be more expensive than it should have been, the plaintiffs sued both the firm and the company procured by the firm to be the estate's corporate fiduciary.[6] After the plaintiffs settled with the fiduciary, they proceeded against the firm, seeking recompense for "avoidable probate expenses" and a return of the fees already paid to the firm.[7] When all was said and done, a portion of the total damages the firm had to pay were the legal expenses the plaintiffs incurred in their litigation against the corporate fiduciary, pursuant to the Wrongful Act Doctrine.[8]

However, professional malpractice is not required in order to make a claim under the doctrine. An insurer, believing it had title to an automobile, brought an action against the vehicle's current owner to repossess the automobile, which had been purchased with a forged check and then resold numerous times, eventually ending up in the hands of its current owner.[9] The current owner, in turn, brought a third party action against the car dealer who sold him the subject vehicle.[10] The dealer asserted claims against the insurer for negligence, malicious prosecution, and, among other damage claims, and attorney's fees.[11] While the court determined that the negligence and malicious prosecution claims were without merit, it did find that the dealer could seek recovery of the attorney's fees it incurred in defending against the owner's claim.[12]

The *Auto-Owners* case provides additional guidance, as well. Importantly, a party seeking damages pursuant to the Wrongful Act Doctrine is only entitled to recover fees to the extent they were incurred in litigation with a third party in connection with that particular dispute.[13] In other words, the dealer was entitled to recover from the insurer the fees the dealer incurred in defending against the owner's claim. The dealer was *not* entitled, however, to recover the fees it incurred in litigating the negligence and malicious prosecution claims against the insurer.

The distinction is an important one. In some professional negligence cases, claimant's seek recovery for damages under the Wrongful Act Doctrine for all its legal fees, including those it was incurring in the instant litigation. That is not the Wrongful Act Doctrine; it is simply an attempted end-around the American Rule. Rather, the defendant must have caused the claimant to litigate with a third party. The claimant may then seek to recover from the defendant any fees connected to the litigation with the third party. The claimant may not seek to have the defendant pay the fees the claimant incurs in its suit against the defendant. Such a claim is no different than asking a defendant to finance litigation against itself.

Another important rule regarding the Wrongful Act Doctrine is that it is not an independent cause of action.[14] It is, on the other hand, "a claim for attorney's fees as *special damages*."[15] Thus, the doctrine cannot stand alone as a count in a complaint;

the fees under the doctrine must be sought as damages under an independent cause of action such as professional negligence. Further, because the wrongful act damages are "special damages," they must be specifically pled.[16] The claimant must plead entitlement to fees under the doctrine; otherwise, the claim is waived.[17]

We all know litigation can be an unpleasant experience. An application of the Wrongful Act Doctrine could certainly contribute to the burden litigation can have on expenses, and thus add to the displeasure that often comes with being a party in a legal dispute. It is therefore important to understand that, in applicable circumstances, a claimant can seek payment of certain of its attorney's fees even in the absence of a contract or statute.

Endnotes

1 As opposed to the "English Rule." *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1147-48 (Fla. 1985) (discussing the differences between the "American" and "English" Rules.
2 The "English Rule" awards fees and costs to the prevailing party regardless as to whether recovery of the fees and costs is provided for by statute or contract. See id.
3 *See* § 448.08, Fla. Stat. (2010).
4 *State Farm Fire & Casualty Co. v. Pritcher*, 546 So. 2d 1060, 1061 (Fla. 3d DCA 1989) (emphasis added).
5 *Gunster, Yoakley &Stewart, P.A. v. McAdam*, 965 So. 2d 182 (Fla. 4th DCA 2007).
6 *Id.* at 183.
7 *Id.*
8 *Id.*
9 *Auto-Owners Ins. Co. v. Hooks*, 463 So. 2d 468 (Fla. 1st DCA 1985).
10 *Id.* at 471.
11 *Id.*
12 *Id.* at 478-79.
13 *Id.* at 478.
14 *See Pritcher*, 546 So. 2d at 1061 (emphasis added).
15 *Id.*
16 *See* Fla. R. Civ. P. 1.*120(g); Robbins v. McGrath*, 955 So. 2d 633, 634 (Fla. 1st DCA 2007); *Winselmann v. Reynolds*, 690 So. 2d 1325, 1328 (Fla. 3d DCA 1997).
17 *See Robbins*, 955 So. 2d at 634.

# CSK's "Kid's Day" on Labor Day Weekend

Whether it was **Tullio Iacono's (Miami)** slick curveball pitch during the baseball game, **Jim Sparkman's (Ft. Lauderdale)** superb grilling technique at lunch, or **Erin Hantman's (Miami)** meticulous bank shots on the basketball court, the children at Kids In Distress were thrilled with the talent CSK provided to them during the firm's annual "Kids Day" party held this Labor Day weekend in Wilton Manors. Attorneys and staff members from the firm's Ft. Lauderdade, West Palm Beach, and Miami offices combined to host the gala to bring cheer to these special children who through no fault of their own have found themselves and the foster care system living without family members at this wonderful facility. The children, ages 5 to 12, participated in the festivities. Two infants were strollered by to watch the fun.

First thing in the morning, the Fort Lauderdale Fire Department stopped by and allowed the kids to tour their fire truck while teaching them fire safety tips. From there, the kids grabbed their fishing poles and "fished for toys" with **Janeena Lluy (Miami staff member) and Sharlene Boothe (Ft. Lauderdale),** while scarfing down handfuls of popcorn and cotton candy and getting their faces painted by volunteer Beatriz Domech.

Then it was off to the parking lot with **Marco Commisso (West Palm Beach)** for some riding time on Star, a very sweet and patient pony, while her handlers taught the kids the basics of horseback riding. Hat's off to Bonnie Fournier, Dade staff member, for her participation in this event.

After that, it was off to the playground, where the kids danced and sang with Maria, a musical clown, who donated her time, with a bag full of tricks, dance, and song with a Latin flair. Kid's Day fell on the birthday of a red haired 12 year old, and Maria made it a special birthday for this youngster and her two brothers. Picnic lunch on grilled burgers and hot dogs followed.

Finally, as the thermometer exceeded a steamy 95 degrees, the kids were escorted to a giant bounce house and water slide donated generously by **Yusimi Valdesuso, (Miami staff member),** to cool off. Overall, the appreciation on the kids' faces shined brighter than the sun and it was difficult for most volunteers to leave young ones when the party ended.

Kids In Distress is a community-supported agency providing services for the prevention and treatment of child abuse in South Florida. KID's programs offer care and services to child victims and children and families at risk for abuse and neglect. They are a local agency open 24 hours a day, 7 days a week, to help children and families in crisis with emergency shelters, and counseling. Their services include crisis intervention, foster care and adoption, therapeutic preschool, complete behavioral health services, intensive in-home family preservation services, parent education, domestic violence services, substance abuse treatment, kinship support, supervised visitation, access to medical care and rehabilitative therapies.

Donations for the kids are always welcome at www.kidsindistress.org.

# Cole, Scott & Kissane, P.A. Success Stories

**Scott Bassman and Alex Perez** obtained an appellate win by securing an affirmance of the trial court's entry of final summary judgment on behalf of a condominium association in an action involving a dispute over the sale of the right to use a limited common element on condominium property. The Third District Court of Appeal also awarded attorney's fees to the condominium association.

**Alex Perez** obtained an appellate win in a personal injury case by obtaining a reversal of the trial court's: (1) denial of a motion for new trial based on prejudicial comments by plaintiff's counsel: and (2) denial of a motion for directed verdict on the issue of future medical expenses. On remand, the trial court is now limited solely to retrying the past medical expenses and pain and suffering (past and future) and is instructed to direct a verdict for our client on future medical expenses. Overall, this case was a team effort, as **Michael Brand** and **Daniel Klein** got a great result at the trial level (in a alleged brain injury case), and are in a great position to retry the limited remaining issues due to the appellate victory.

**Robert Swift and Tara Tamoney** obtained a directed verdict on a breach of fiduciary duty claim against our client, a homeowners' association, where the plaintiff was alleging selective enforcements, conspiracy, and failure to comply with the association's by-laws and regulations.

**Valerie Jackson** was granted summary judgment in a first party property action where the plaintiff tendered its first notice of the claim to the insurance carrier 3-1/2 years after the alleged date of loss. The court found the insurance carrier was prejudiced by the plaintiff's failure to timely submit the claim. The insured was seeking in excess of $100,000 in damages allegedly as a result of Hurricane Wilma.

**Jana Leichter and Andy Lowenstein** were granted summary judgment in a Southern District of Florida age discrimination case. The 61-year old computer programmer plaintiff was replaced by a 55-year old computer programmer. **Jana** and **Andy** asserted, among other things, that the plaintiff could show nothing beyond the fact that he was replaced by a slightly younger individual, and he was terminated because he failed to meet performance guidelines that he had set for himself with respect to


the installation of a new software package. The demand at mediation was over $ 1 Million.

**John Penton** won an affirmance in the Second District Court of Appeal of a directed verdict issued in favor of a homeowner's insurer in a claimed hurricane loss. **Aram Megerian** successfully argued during the trial that the insurer should be granted a directed verdict due to fraud. Plaintiffs had inflated their claimed losses from the storm. The Highlands County trial judge granted the directed verdict.

**Michael Brand and Daniel Klein** obtained a Final Order of Dismissal with Prejudice in a nearly decade-long, heavily contested property damage matter. The case was based upon various counterclaims filed by the owner of a condominium unit in a well-known Miami Beach hotel/condominium, against the condominium association for its alleged failure to maintain the common areas, and resulting water damage to his unit that allegedly rendered the unit uninhabitable, and unable to be rented for a period of over nine years. On the first day of jury trial, **Michael** and **Daniel** moved to have the counter-plaintiff's pleadings stricken and the case dismissed with prejudice, based upon the violation of numerous Court Orders, and the counter-plaintiff's unwillingness to proceed with jury trial after the Judge refused to grant a continuance. The counter-plaintiff claimed over $800,000.00 in lost rental income. **Michael** and **Daniel** have filed a Motion for Entitlement to attorneys fees and costs, pursuant to Florida Statute Chapter 718, for over nine years of costly litigation.

**Robert Swift** obtained a final summary judgment in a declaratory judgment action on a multi-million dollar pollution case. A contractor, hired to rid a lake of unwanted vegetation, allegdly used a chemical that killed a golf course's grass when they utilized the lake water to water the greens. **Robert** argued that all claims arose out of pollution and were thus excluded.

**Alex Perez** obtained a *per curiam* affirmance from the Fourth District Court of Appeal in a property insurance matter involving a homeowners' claim where a boat being lowered onto a hitch slipped out of place and fell onto a person's leg. The insured was a homeowner and the plaintiffs/appellants were guests. At the trial level, **Aram Megerian** obtained a summary judgment based on the obvious danger doctrine by arguing that the injured plaintiff was sitting too close to an obvious danger, i.e., a boat being raised off of blocks and lowered onto a hitch.

**Blake Sando and Cody German** obtained a dismissal of a breach of contract and professional negligence action that they removed to federal court. Our clients, a commercial real estate appraisal company and its appraiser, were sued by a national banking institution that alleged that it issued a multi-million dollar loan to a third party based upon the allegedly over-valued and negligent appraisal conducted by our clients. It further alleged that it incurred damages when the third party defaulted on the loan and the proceeds from the foreclosure and sale of the property was several million dollars less than the value of the loan. However, the federal court agreed with **Blake** and **Cody** that the banking institution lacked standing to bring the claim. The potential client exposure was in excess of $5 Million.

**Andrea Chirls** won a summary judgment on a first party property insurance case. Plaintiff submitted a claim for damage due to fire, but while he was paid for the loss the insurer withheld overhead and profit until plaintiff repaired the damage or presented a signed contract for the repairs. Plaintiff moved for summary judgment on the grounds that the withholding of overhead and profit was a breach of the insurance contract. The court granted **Andrea's** motion on the grounds that the loss settlement clause did not require payment of overhead and profit until incurred or until the insured was contractually obligated to make the repairs.

**Jessica Anderson** obtained summary judgment on behalf of a homeowner's association in a declaratory relief case. The plaintiff previously brought an action against the Association and the matter settled. A release was signed releasing any and all claims arising out of that action. The plaintiff then filed a second lawsuit against the Association based almost entirely on the previous matter. **Jessica** moved for summary judgment, arguing that the plaintiff's barred by res judicata. The Court agreed and granted summary judgment in favor of the Association.

**Jami Gursky** obtained final summary judgment motion and prevailed in a case involving a housekeeper who slipped and fell at the defendants' home and alleged that she suffered serious injuries. **Jami** persuaded the Court by arguing that the defendants could not be held liable for an injury that the plaintiff sustained as a result of a condition that she was hired to rectify.

Congratulations to **David Salazar** for the honor of being awarded the James A. Dixon Young Lawyer of the Year Award for 2010 by the Florida Defense Lawyer's Association.

# MEET ONE OF OUR ATTORNEYS:

# Sanjo S. Shatley

Sanjo S. Shatley attended Villanova University, where he received his Bachelor of Arts degree, *cum laude*, in Political Science in 1995. During his four years at Villanova University, he competed on the men's varsity tennis team. Upon graduating from Villanova University, he attended the University of Miami School of Law, where he earned his Juris Doctorate degree, *cum laude*, in 1998.

Throughout his twelve year legal career, Sanjo has practiced civil defense litigation. Since joining Cole, Scott & Kissane, P.A. in 2008, he has continued practicing in all phases of civil defense litigation, including in the areas of construction, medical malpractice, nursing home, assisted living facility, professional malpractice, products liability, and premises liability. In medical malpractice matters, some of his clients have included hospitals, general practitioners, general surgeons, anesthesiologists, otolaryngologists, bariatric surgeons, radiologists, emergency medicine physicians, dentists, nurses, and home health care agencies. In construction matters, some of his clients have included developers, general contractors, structural engineers, professional engineers, architects, surveyors, roofers, concrete-forming companies, HVAC contractors, water-proofing contractors, and payment and performance bond sureties. Sanjo recently obtained a complete defense verdict in an eight-day arbitration in which numerous construction defects in the construction of a multi-story condominium building were alleged by a general contractor against his client, a concrete-forming company. In nursing home matters, some of Sanjo's clients have included family-owned, regional and national nursing home companies.

Sanjo is a partner in the firm's Jacksonville office. He is admitted to practice before all Florida state courts and is a member of The Florida Bar.

Outside of the office, Sanjo enjoys spending time with his wife of twelve years, Tricia, and two daughters, Leah and Lexi. Sanjo is an avid Miami Hurricanes football and Villanova University basketball fan. He also enjoys playing golf and tennis.

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