JOURNAL

Florida Justice Association® • March/April 2020 • #619

Florida Justice Association 2.0

Advancing and Optimizing Digital Platforms

Client Legal Funding
4282-19

45 YEARS OF COLLABORATION

Since 1976, we've dedicated all our resources, experience and drive to ensuring your client's case is ready for trial. We know you have a choice when it comes to referrals and we are proud to have stood together as co-counsel in the courtroom for the past 45 years.

Your faith. Our fight. Thank you for trusting Coker Law.

Skilled, 21-attorney team

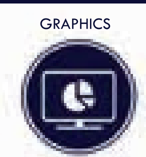
9 Florida Bar Board-Certified Lawyers

Named one of the "Best Law Firms" in Florida by U.S. News – Best Lawyers in 2016 - 2021

10 attorneys with Martindale-Hubbell AV Preeminent rating

COKERLAW.COM | 904.356.6071

OFFICES-JACKSONVILLE



TRIAL SUPPORT & GRAPHICS

We continue the seamless presentation of exhibits and materials for hearings, arbitration, mediation, and trial. Most proceedings are taking place remotely, but our trial team is poised for court openings as they occur.

NEXT LEVEL CONFERENCE ROOMS

Anticipating the need for in-person meetings or live recordings, we have outfitted two conference rooms in our building adjacent to the Palm Beach County Courthouse. Each are equipped for establishing remote connections and recordings without compromising the safety of the attendee(s). Available now for videoconferences, depositions, mediations, trial, interviews, and marketing content shoots.

LAPTOP PROGRAM

Our fleet of laptops is designed to ensure your clients or witnesses can safely participate in meetings, depositions, or mediation. This also secures a reliable high-quality connection and recording when needed.

VIDEO

Whether maintaining safe social distance or utilizing remote technologies, our protocols and equipment enable us to continue producing powerful Day in the Life and Settlement videos.

New CLE Available

"NAVIGATING THE REMOTE PRESENCE ATMOSPHERE"

Certified for 1 General and 1 Technology Credit

561-655-2855

OFFICE@VISUALEVIDENCE.COM

WWW.VISUALEVIDENCE.COM

MARCH/APRIL 2021–NO. 619

CONTENTS

FLORIDA JUSTICE ASSOCIATION 2.0 **pg 9**
Advancing and Optimizing Digital Platforms

Medical Malpractice **pg 30**
What the @#%! is the "Same Specialty"?

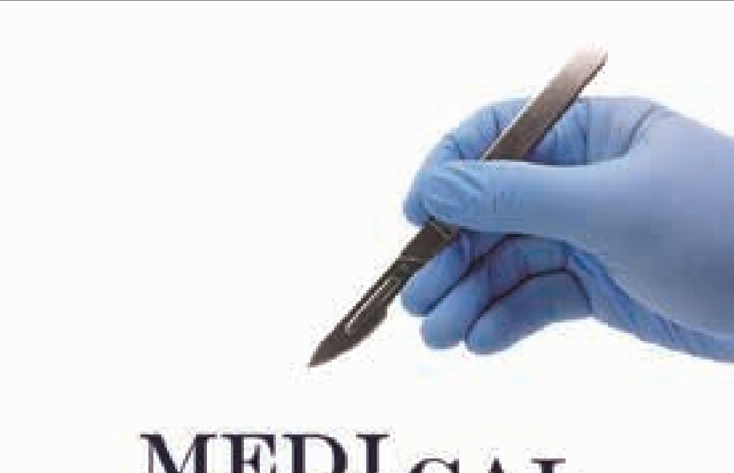
Evidence **pg 60**
Admissibility of Cell Phone Videos

HIGHLIGHTS

26 Understanding the Basics of Mass Torts
36 Using Title IX Civil Rights Actions to Get Justice for Sex Abuse Victims
40 Preventing Joinder of *Fabre* Defendants in Product Liability Actions
56 Dealing With Judges Who Refuse to Follow the Law
62 Persuasive Authority for Recognizing a Living Constitution

IN THIS ISSUE

10 President's Message – Eric Romano
11 Executive Director's Message – Paul Jess
12 Cases and Commentaries – Julie H. Littky-Rubin
16 Tips for Auto Practitioners – Dale M. Swope
22 Insurance – Matthew T. Christ
26 Mass Torts – Madeline Pendley
30 Medical Malpractice – J. Clancey Bounds
36 Premises Liability – Pedro P. Echarte III
40 Products Liability – Michael Hamilton Kugler and Shannon Baer
44 Workers' Compensation – Mark A. Touby and Richard E. Chait
48 Roy's Trial Law Tips – Roy D. Wasson
52 Civil Procedure – Bard D. Rockenbach
56 FJA Appellate Practice Section – Jed Kurzban and Lauren Gallagher
60 Evidence
62 Constitutional Corner – Judge Milton Hirsch
64 FJA Young Lawyers Section – Joshua Harris
66 Small Firm – Salesia V. Smith-Gordon
68 CLE
69 Past Presidents – Stephen F. Rossman
70 FJA REF
73 EAGLE Spotlight
74 Index



MEDICAL MALPRACTICE

Co-Counsel opportunities available.

Contact us for your litigation matters across the state of Florida.

LCTRlegal.com
954.761.2425
Office in Fort Lauderdale

2020-2021 FJA® OFFICERS, EXECUTIVE COMMITTEE AND BOARD OF DIRECTORS

PRESIDENT
Eric Romano

PRESIDENT-ELECT
Tiffany M. Faddis

TREASURER
Curry G. Pajcic

SECRETARY
Stephen F. Cain

IMMEDIATE PAST PRESIDENT
Leslie Mitchell Kroeger

EXECUTIVE DIRECTOR
Paul Jess

EXECUTIVE COMMITTEE
Laurie J. Briggs
Richard E. Chait
Jason F. Lamoureux
Christopher N. Ligori
Todd J. Michaels

DIRECTORS 2019-2021
Hubert R. Brown
Thomas W. Carey
Clifton C. Curry, Jr.
Julie A. Fine
Matthew E. Kaplan
Jason F. Lamoureux
Christopher N. Ligori
Damian B. Mallard
J. Alistair McKenzie
Todd J. Michaels
Waylon Thompson
Hendrik Uiterwyk (May 6, 1946-Dec. 10, 2020)*

DIRECTORS 2020-2022
Brent Bradley
Michelle N. DeLong
Beth Walker Finizio
Allison McMillen
Michal Meiler
Anthony Quackenbush
Eric C. Ragatz
Carter Scott
Barry M. Snyder
Anthony J. Soto
Eric Tinstman
Ben J. Whitman

DIRECTORS AT LARGE
Vanessa Brice
David Dismuke
Andrew A. Harris
James L. Magazine
Matthew N. Posgay
Kerri C. Smith
Stephen Watrel

AMICUS CURIAE COMMITTEE
Bryan Scott Gowdy

APPELLATE PRACTICE SECTION
Maegen Peek Luka

MINORITY CAUCUS
Nicholas C. Johnson

PROPERTY INSURANCE SECTION
Amy D. Boggs

SOLO/SMALL FIRM SECTION
Waylon Thompson

WOMEN'S CAUCUS
Olivia D. Liggio
Molli McGuire

WORKERS' COMPENSATION SECTION
Richard E. Chait

YOUNG LAWYERS SECTION
Amanda Dunn
Jason McIntosh

LOCAL TLA REPRESENTATIVES
BCJA Elizabeth Finizio
CCJA Jaeson Homola
CFTLA P. Alexander Gillen
JJA Lindsay L. Tygart
MTLA Bernard F. Walsh
MDTLA Philip A. Gold
PBCJA Peter Hunt
TBTLA James W. Guarnieri, Jr.
TCJA Gloria Seidule

AAJ OFFICER
Sean C. Domnick (2021)

AAJ BOARD OF GOVERNORS
Brenda Fulmer (2023)
Rodney G. Gregory (2022)
James R. Holland (2021)
Jennifer M. Lipinski (2022)
Ricardo Martinez-Cid (2021)
Troy Rafferty (2023)
Herman J. Russomanno (2023)
Jeanmarie Whalen (2023)
Laura V. Yaeger (2022)
Edward H. Zebersky (2022)

AAJ STATE DELEGATES
Lea P. Bucciero (2022)
Jack Hickey (2021)
Nicholas C. Johnson (2021)

** Editor's Note: Board member Hendrik "Henk" Uiterwyk died on Dec. 10, 2020, at the age of 74.*

JOURNAL STAFF

EDITOR-IN-CHIEF
Roy D. Wasson

COMMUNICATIONS SPECIALIST
Alyssa Davenport

Journal is published by Innovative Publishing for FJA®. Innovative Publishing specializes in association communications and messaging.

Please direct inquiries to Aran Jackson at aran@innovativepublishing.com.
www.innovativepublishing.com

Volume 4, Issue 2

Structured Settlements. Financial Planning.
Special Needs Trusts. Settlement Preservation Trusts.
Medicare Set-Aside Trusts. Settlement Consulting.
Qualified Settlement Funds.

MICHAEL W. GOODMAN, ESQ.
Certified Structured Settlement Consultant

- 23 Years of Experience in Structured Settlements, Insurance and Financial Services
- #1 Structured Settlement Producer Nationally for Last 10 Consecutive Years
- Nationally Prominent and a Leading Authority in the Field
- Highly Creative, Responsive and Professional Industry Leader
- NFP is ranked by Business Insurance as the 5th largest global benefits broker by revenue, and the 4th largest US-based privately owned broker
- Past President (2015) and President-Elect (2020) of the National Structured Settlement Trade Association

Passionate Advocates. Proven Approach.

800-229-2228 www.NFPStructures.com

Boca Raton Charleston, SC Charleston, WV Cleveland
Culver City Orlando Pittsburgh Tampa

REDWOOD FUNDING GROUP

UNBEATABLE PLAINTIFF FUNDING

No Fees • No Compounding • 15% Fixed Every 6 Mos.

Advance	0-6 mo.	6-12 mo.	12-18 mo.	18-24 mo.	24-30 mo.
$1,000	$1,150	$1,300	$1,450	$1,600	$1,750
$2,000	$2,300	$2,600	$2,900	$3,200	$3,500
$2,500	$2,875	$3,250	$3,625	$4,000	$4,375
$3,000	$3,450	$3,990	$4,350	$4,800	$5,250
$3,500	$4,025	$4,550	$5,075	$5,600	$6,125
$5,000	$5,750	$6,500	$7,250	$8,000	$8,750
$7,500	$8,625	$9,750	$10,875	$12,000	$13,125
$10,000	$11,500	$13,000	$14,500	$16,000	$17,500
$15,000	$17,250	$19,500	$21,750	$24,000	$26,250
$100,000	$115,000	$130,000	$145,000	$160,000	$175,000

The amount owed continues beyond 30 months at the same fixed rate for each additional 6 month period.

Redwood Funding Group is not afraid to show you our unbeatable guaranteed repayment schedule. We challenge you to call the competition and see if they guarantee you the unbeatable rates listed above. If they don't give you a straight answer, they probably have something to hide! Redwood Funding Group loves and supports the Florida Justice Association and we are here to guarantee you these great deals!

PLAINTIFF'S SAVE TONS OF MONEY

The Client should fill out an Application at: RedwoodFundingGroup.com

Ph: (212) 349-2844 Email: info@RedwoodFundingGroup.com

FAST • CHEAP • EASY

An attorney should not discuss non-recourse advance funding with a client unless it is done in compliance with Florida Bar Ethics Opinion 00-3. The Florida Bar discourages the use of non-recourse advance funding companies. An attorney may provide a client with information about companies that offer non-recourse advance funding if it is in the client's interest and done in compliance with Florida Bar Ethics Opinion 00-3. The individual lawyer is responsible for ensuring that his or her conduct is in compliance with the Rules Regulating The Florida Bar and comports with Florida Ethics Opinion 00-03. The Florida Justice Association recommends that attorneys who do provide names of non-recourse advance funding companies to clients should provide only names of companies that are in conformity with the guidelines contained in the agreement between the New York Attorney General and certain companies dated Feb. 17, 2005. The Florida Justice Association makes no determination or representation as to whether any particular non-recourse advance funding company is in conformity with Florida Bar rules or opinions, or any other guidelines.

TLEL™

A POWERFUL WAY TO CONNECT

The Trial Lawyers Email List (TLEL) provides access to the ideas, experience and wisdom of hundreds of fellow civil justice attorneys inlcuding some of the FJA's most experienced practitioners and appellate litigators.

FOR MORE INFORMATION on TLEL and how to apply for participation

GO ONLINE at floridajusticeassociation.org • **CALL** (850) 521-1093

FLORIDA JUSTICE ASSOCIATION — *ADVOCACY IN ACTION*

by 2020-21 FJA® President Eric Romano

While Florida's legislative session officially began on March 2, 2021, the Florida Justice Association legislative affairs team, along with your FJA officers and several of our members, have been hard at work for months. Together, we have been preparing our legislative agenda, meeting with legislators, defending against legislative proposals that would limit our clients' access to justice and threaten our practices, as well as spending time in Tallahassee throughout January and February during the interim committee weeks.

Several big issues have come to the forefront this session, including ensuring citizens' protections while also fighting for responsible reopening amidst the COVID-19 pandemic and bringing Florida in line with the 48 other states that have responsibility-based auto insurance systems.

For the next 60 days, FJA will be working to pass our proactive legislative agenda while also continuing to defend against legislation that erodes our civil justice system. Prior to the 2021 legislative session, FJA released our 2021 Issues Book, which provides an overview of legislation we are championing as well as legislative proposals we must defend against. A downloadable version of the Issues Book can be found at www.myfja.org/legislative-issues.

Continued concerns related to the COVID-19 pandemic have made the session a bit more challenging than in previous years. The Senate will have no more than three committees meeting at a time in large rooms redesigned to allow for social distancing. In-person attendance is limited to members, staff, and invited presenters. The public may only provide testimony to Senate committees from the Leon County Civic Center, which is connected via video conference to the committee room. Both chambers strongly discourage in-person meetings in legislative offices.

These new obstacles have not slowed down our FJA legislative team. We have started the session with multiple FJA members coming to Tallahassee to give testimony on key issues during committee weeks. FJA's Research and Education Foundation commissioned an actuarial analysis on the repeal and release of Florida's no-fault insurance. This study, released in January, has been instrumental in educating legislators about the benefits of returning to responsibility-based auto insurance, leading to a reduction in auto insurance costs for consumers. This is what advocacy in action is all about — producing data-driven research to inform sound public policy — and FJA is leading the charge.

As a reminder, even if you can't come to Tallahassee to help at the Capitol or can't contribute at this time to EAGLE or FJ PAC, you can help by joining an FJA legislative committee. We rely on FJA legislative committees to review and draft bills and amendments, to develop talking points, and to help us prepare for legislative meetings. Our legislative committees also provide FJA members a voice on behalf of your clients to advocate for needed change or oppose harmful legislation. If you would like to serve on an FJA legislative committee, please contact FJA Deputy Legislative Director Lynn McCartney at lmccartney@myfja.org or (850) 521-1030.

When the hanky drops marking the official end of session on April 30, 2021, I'm confident that FJA will have made significant progress in protecting the civil justice system and integrity of our profession. The wins and successes will only be possible because of your commitment to the battle for justice and dedication to giving the power back to the people of Florida. J

ERIC ROMANO
is the Florida Justice Association's 2020-21 president. Mr. Romano is a Florida board-certified criminal trial lawyer and partner at Romano Law Group. He has been effectively representing clients in civil and criminal matters, including personal injury and wrongful death, criminal defense, and commercial litigation for 15 years. During his career, Eric has gone to verdict in more than 100 criminal and civil trials. He is an EAGLE Founder member.

FLORIDA JUSTICE ASSOCIATION 2.0

by Paul Jess, Executive Director

Over the past 18 months, the Florida Justice Association (FJA) has been working hard on one of my top priorities — advancing and optimizing our digital platforms and tools. Early in 2020, we set a goal to upgrade our technology and provide our members with an enhanced online experience.

In January, as the new year began, we officially launched the brand new website, MYFJA.org, as well as new association management software.

The result: every interaction our members and the public have with FJA has been upgraded.

All the benefits that come with an FJA membership are now *easier* and *faster* — from registering for events to renewing membership, browsing resources, accessing staff, reviewing advocacy information and legislative updates, and utilizing FJA training and tools.

If you haven't logged into the new **MyFJA.org** site yet, there are a few important things you need to know:

- **Username and passwords:** Your username will stay the same, but for your protection, you will be asked to update your password when you initially sign in to the new website.
- **Membership autopay method:** Beginning January 2021, the FJA offers a 5 percent discount if you use autopay to renew your FJA membership! For security, existing autopay members will need to update their saved payment method to take advantage of the new 5 percent discount and to continue using the service.

When you go to the new site for the first time you should utilize the *"First Time User Instructions"* for a step-by-step guide to the new website and to ensure you have full access to the site and all its features.

After logging in for the first time, we recommend you update any browser bookmarks or saved information to the new domain name, and note that all FJA staff email addresses now end in "@myfja.org."

For questions about our new website, email our support team at websitehelp@myfja.org, or contact us at (850) 224-9403.

I would like to publicly thank all FJA staff members who contributed to the development and implementation of our new association management software. Special thanks to FJA Chief Information Officer Jeremy Hayes, FJA Chief Financial Officer Michelle Eagen, and FJA Executive Administrator Michelle Crumbliss, all of whom spent countless hours in the labor-intensive work of data conversion, testing and implementation of the new software.

As part of these updates, we are also working on providing a personalized FJA membership experience. However, as with any technology, there will be some challenges. We ask everyone to please be patient and communicate with the FJA team about any input you have as we make this transition and upgrades.

We are excited to bring you these updates, and hope that for our members these improvements give you greater accessibility to all the communications, programs, and services the FJA has to offer!

Our goal is always to be a resource to our members and provide the tools and technology that support your practices and your clients as we all work to strengthen Florida's civil justice system and protect the rights of Florida's citizens and consumers.

PAUL JESS
is executive director of FJA.

In Brief

by Julie H. Littky-Rubin

Beware of unwitting legal malpractice in legal malpractice case. *Morgan & Morgan v. Roc Pollock,* 45 Fla. L. Weekly D2499 (Fla. 2nd DCA Nov. 6, 2020):

Following a jury trial on a legal malpractice case based on mishandling a medical malpractice case, the jury awarded the plaintiffs $5,000,000. However, because the underlying plaintiffs introduced evidence establishing that only $250,000 would have been collectable against the health care providers, the court reversed and remanded for judgment in that amount.

The plaintiffs retained Morgan & Morgan to pursue their medical negligence claims in this brain damaged baby case. The plaintiffs' attorney served the notice of intent upon the defendants as required by § 766.106(2)(a), but stated that it was being served only on the baby's behalf, saying nothing about the mother (who had suffered significant injuries in her own right during delivery).

When the plaintiffs filed their lawsuit in the circuit court, defendants raised NICA. The plaintiffs did not seek to sever or bifurcate the mother's individual medical negligence claim. While the NICA proceeding was pending, the plaintiffs and their attorneys experienced irreconcilable differences, plaintiffs' counsel withdrew, and the statute of limitations on the mothers' claim expired.

Plaintiffs sued for legal malpractice alleging that their attorneys failed to perform a proper pre-suit investigation, failed to obtain a proper corroborating opinion, failed to draft and serve a proper notice of intent, and negligently stipulated to abatement of the civil case.

The jury found for the plaintiffs in the legal malpractice case, finding damages of $5 million ($4 million to the mother and $1 million to the father) and finding that $4,500,000 of that would have been recoverable from the medical providers. However, the Morgan & Morgan lawyers argued that the jury's verdict had to be remitted to $250,000, which was the amount of the medical group's insurance coverage. In support, Morgan & Morgan argued that plaintiffs failed to put on any evidence that they "could have collected" any money from the various defendants individually.

In a legal malpractice case, the plaintiff must prove two things: (1) that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and (2) that, any judgment would be collectable (FSJI) 402.12(a).

The only evidence of collectability that the plaintiffs presented at trial was the existence of the OB GYN group's insurance policy of $250,000. There was no other evidence regarding financial status, solvency, interest in property or other assets, income or profits.

While the plaintiffs offered expert testimony that a medical practice with four doctors and three midwives must be worth more than $250,000 and that members of the practice should have the ability to pay any judgment in excess of the policy limits, such speculation did not amount to evidence of collectability.

In addition to granting the remittitur, the court also rejected the plaintiffs' request that the court adopt decisions from other jurisdictions which would shift the burden of non-collectability to legal malpractice defendants. Florida courts have weighed the equities in legal malpractice and have shifted the burden to the attorney only in cases where the attorney's negligence has made it impossible to prove the collectability of a claim.

In this case, the plaintiffs never contended that the attorney's negligence made it impossible for them to prove collectability as to the group, and at the charge conference, they concluded proving collectability was on them. Failing in that burden, the judgment that would have been for $4.5 million was reduced to $250,000.

Court finds award of attorneys' fees excessive — also rules that court misapplied multiplier. *Universal Prop. and Cas. Ins. Co. v. Deshpande,* 45 Fla. L. Weekly D2511 (Fla. 3rd DCA Nov. 12, 2020):

The insured plaintiff suffered water damage to his home. After Universal denied coverage, he spent $23,000 out of his pocket to perform repairs. He then hired counsel to file suit.

The parties engaged in minimal discovery and only two depositions were taken. Neither party filed any substantive motions or expert reports. There was no trial.

Eighteen months from the time he reported the claim, Universal served a proposal for settlement for $25,000 excluding attorneys' fees and costs, which the plaintiff accepted.

In support of his fee claim, Plaintiff's counsel produced invoices reflecting billings of 469 hours for five attorneys and one paralegal in preparation of the case.

Universal's fee expert provided a line-item response detailing his objections for the entries he deemed were excessive for the nature of the task, were vague, contained duplicate work, or reflected billings for secretarial or ministerial tasks.

Plaintiff's fee expert testified that the hourly rates were reasonable. However, he did not prepare a line-item analysis of the firm's time entries. Instead, to accomplish a "conservative" estimate, he applied a 10 percent across the board hourly reduction reducing the number of billed hours to 422 hours, but did not explain why that reduction represented a reasonable amount of time to prepare the case. The fee expert also opined that a 2.0 multiplier was appropriate based on the favorable outcome achieved, and the likelihood of recovery at the outset.

The defendant's fee expert opined that the number of hours billed should be reduced from 469 to 101, and testified regarding objections to specific itemized entries. The defendant's fee expert also testified that the relevant market is saturated with firms practicing first- party insurance who would have taken the case on a contingent basis, and that the market did not require a multiplier to obtain competent counsel.

The trial court accepted plaintiff's fee expert's conclusions in every respect, and awarded a lodestar of $206,090 in attorneys' fees, and a 2.0 multiplier. The court also awarded over $12,000 in costs, and $13,000 to plaintiff's fee expert.

In determining the lodestar, the trial court properly found a reasonable hourly rate for all five attorneys. However, the record did not contain any competent and substantial evidence that 469 hours were reasonably expended in the case.

The court explained that the plaintiff's counsel failed to present evidence that it was reasonable for five attorneys to spend 469 hours in this first-party property insurance case, that settled after minimal discovery was done, and in which no significant motions were litigated. It found the amount of fees were excessive in relation to the results obtained, and that in a relatively simple and straightforward matter, such a fee claim seemed "disingenuous." The court admonished against attorneys' duplicating work, and essentially fabricating fees.

In determining the appropriateness of a multiplier, the rationale of the first point of *Quanstrom* — the relevant market factor — is to assess not just whether there are attorneys in any given area to handle the case, but specifically whether there are attorneys in the relevant market who have both the skills to handle the case effectively, and who would have taken the case absent the availability of a contingency fee multiplier.

While there was testimony that plaintiff's counsel had expertise in first-party insurance cases and that counsel obtained a favorable result, the record contained no evidence that the plaintiff could not have obtained other competent counsel in the market, absent the availability of a contingency fee multiplier.

The plaintiff's fee expert failed to testify that plaintiff's counsel was the only competent attorney in the relevant market, or that other counsel would **not** have taken the case on a simple contingency fee without a multiplier. Without evidence of the relevant market requiring a contingency fee multiplier for competent counsel, the court ruled to reverse on that issue too.

The court then reversed the costs awarded to the plaintiff's expert who never testified at trial and who was never deposed. Generally, it is not appropriate to tax as costs the fees of witnesses who are neither qualified as experts by the court, nor those who do not testify at trial.

While under certain circumstances, a court may tax costs of an expert reasonably incurred in preparing testimony — even if the

testimony proves unnecessary — it is incumbent upon the trial court to determine exactly which expenses would be reasonably necessary for an actual trial, which would include expert witness preparation costs.

No error when trial court ruled to limit plaintiff's evidence of *past* medical expenses to the amount of the Medicare bills, even though *Joerg* prohibits this kind of limitation as applied to *future* medical expenses — question certified. *Dial v. Calusa Palms Master Ass'n*, 45 Fla. L. Weekly D2783 (Fla. 2nd DCA Dec. 11, 2020):

The plaintiff in this slip and fall case urged the trial court to refrain from limiting the evidence of the plaintiff's past medical expenses to the amount of Medicare bills (that were indisputably tendered and paid), based on the Second District's decision in *Cooperative Leasing, Inc* v. *Johnson.*[1]

The court noted that the Florida Supreme Court had cited *Cooperative Leasing* favorably in *Joerg*[2] for certain propositions, therefore undermining plaintiff's argument that the Supreme Court had implicitly overruled that decision.

Because the evidentiary issue raised by the plaintiff was one that frequently arises in negligence cases, and because the court acknowledged the ongoing tension between the competing policies implicated by the issue (the balance needed between limiting evidence of collateral sources to avoid jury confusion and windfall to the plaintiff and the need for litigants to be able to present relevant evidence to aid the jury in determining the reasonable value for full compensation and future medical expenses), it certified the question (*i.e.*, whether *Joerg* applies to govern the admissibility of past medical expenses, in the same manner as it does future medical expenses). [Editor's Note: At the time of this writing the case was pending before the Florida Supreme Court on jurisdictional briefs in case no. SC21-43.]

Much easier to show award for past damages was inadequate — future damages are inherently more uncertain. *Cabrera v. Wal-Mart*, 45 Fla. L Weekly D2812 (Fla. 3rd DCA Dec. 16, 2020).

The plaintiff fell in a puddle of water at Wal-Mart, and experienced right knee and lower back pain, as well as tingling into her extremities. Her physician confirmed that she suffered a lumbar spine herniation as well as a misaligned patella, but due to her other medical limitations, was not a candidate for surgery.

While plaintiff's physician testified that she had suffered from trauma-induced pain as a result of the fall, and Wal-Mart did not present an expert, Wal-Mart suggested during cross, that the pain was attributable in part to co-existing medical conditions, including arthritis and corpulence.

During closing, Wal-Mart's attorney conceded that the plaintiff was indeed "hurt" by the fall, but contended that her asserted levels of pain were exaggerated. The jury awarded plaintiff the entirety of her past medical expenses but nothing for either pain and suffering or for future damages. The trial judge denied both plaintiff's motion for new trial and for additur.

A motion for additur requires the court to determine whether the amount of damages the jury awarded is "inadequate in light of the facts and circumstances which were presented to the trier fact." If the amount awarded is deemed inadequate, the court is charged with ordering an additur under § 768.74(2).

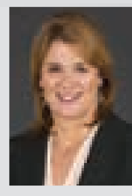
Courts have distinguished between past and future damages in cases where inadequate damages are involved. Past damages allow for a record that gives the trier fact an opportunity to closely scrutinize what has already happened. However, when it comes to future losses, the finder of fact necessarily requires — and is afforded — much more discretion.

In this case, the need for future damages remained in contention throughout the trial, particularly in light of the plaintiff's inability to obtain medical clearance for surgery, and her failure to consistently treat with her doctor. Therefore, the court found that the jury's failure to award future damages was supported by the evidence.

However, when the evidence of the existence of noneconomic damages is substantially undisputed, and when the jury finds that the plaintiff suffered injuries that required treatment as evidenced by an award of past medical expenses, a verdict devoid of any past noneconomic damages is inadequate as a matter of law.

Here, the physician was the sole testifying expert, and established that the plaintiff suffered from trauma-induced pain along with permanent injuries as a result of her fall. Wal-Mart conceded that the plaintiff experienced pain from the fall, and the jury awarded all of her past medical expenses. The evidence was also substantially undisputed that the plaintiff suffered noneconomic damages with respect to these injuries.

Under those circumstances, the jury's failure to award even nominal past noneconomic damages was **not** supported by the weight of the evidence, and it was error for the trial court to deny the motion for additur and/or new trial on that basis. J



JULIE H. LITTKY-RUBIN
is board certified in appellate practice, and a partner in the law firm of Clark, Fountain, La Vista, Prather & Littky-Rubin. She attended Brown University and the University of Florida College of Law. She has been named in the *Best Lawyers in America*, Florida Trend's Legal Elite, and as one of the top 50 women attorneys in Florida, by Florida Super Lawyers. She has received the FJA's S. Victor Tipton Award for Superior Achievement in Legal Writing, as well as the Florida Bar President's Pro Bono Service Award for a series of appeals she handled on behalf of two little boys who were ultimately adopted. She authors the much read weekly blog, *The Week in Torts*, a summary of recent case law relevant to the practice of personal injury and wrongful death. One may subscribe to the *Week in Torts* by going to that tab on her firm's website, www.clarkfountain.com.

---

1 Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956 (Fla. 2nd DCA. 2004)

2 Joerg v. State Farm Mut. Auto. Ins. Co., 176 So. 3d 1247 (Fla. 2015)

Cohen Milstein named *Law360's* Environmental Group of the Year

Cohen Milstein's Environmental Toxic Tort group, co-led by Theodore J. Leopold and Leslie M. Kroeger, was named *Law360's* **2020 Environmental Group of the Year** for their groundbreaking work in the Flint Water Crisis – one of the most significant and "conscious shocking" environmental toxic tort litigations in U.S. history.

Theodore J. Leopold

COHENMILSTEIN

Powerful Advocates. Meaningful Results.

877.515.7955 | cohenmilstein.com

11780 U.S. Highway One, Suite N500
Palm Beach Gardens, FL 33408

Leslie M. Kroeger

Antitrust | Civil Rights & Employment | Complex Tort Litigation | Consumer Protection
Employee Benefits / ERISA | Ethics and Fiduciary Counseling | Human Rights
Public Client | Securities Litigation & Investor Protection | Whistleblower / False Claims Act

THE ASSAULT ON THE JURY TRIAL CONTINUES

by Dale M. Swope

James Madison — the "Father of the Constitution" and later fourth president of the United States — is revered by most, but no more so than by the Federalist Society. The society logo features his silhouette,[1] and his portrait is prominently displayed at the bottom of the organization's official website.[2] They even have the "James Madison Club" for "major donors" ($1,000 annual contribution and up).[3]

> It should come as no surprise that Madison, the principal drafter of the Seventh Amendment, was a big proponent of the jury trial. In a June 8, 1789, speech before Congress, he said:

In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate. . . Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. [4]

It is also no secret that the Federalist Society has become extremely influential in the selection and ascension of appellate judges, including to the Florida Supreme Court.[5] And yet, over the past few decades, Federalist Society members-turned-judges have repeatedly issued decisions that impede or outright deny that "essential" right which, as Madison said, "ought to remain inviolate."

Enforcement of adhesion contracts containing jury trial waivers, arbitration agreements, and class action waivers. Mandatory non-binding arbitrations in every civil case. Heightened pleading requirements. Stringent medmal presuit procedures. Limitations on discovery, particularly from powerful corporations. Unreasonable time limits on voir dire and prohibition of internet research on venire members. The list goes on.

Well, on New Year's Eve, the Florida Supreme Court erected yet another hurdle to our clients' right to a jury trial: adoption of the federal summary judgment standard.

Wilsonart, LLC v. Lopez[6]

You may have already heard this story, but this massive rule change arose out of a fatal auto accident case. A pickup truck driver was killed after rear-ending a freightliner. The decedent's estate argued the collision was caused by the freightliner's sudden lane change just prior to impact, based almost exclusively on the testimony of an independent eyewitness.

However, the freightliner's dashcam video told a different story: the freightliner had *not* changed lanes immediately before impact, but rather was gradually coming to a full stop at a red light at the time of the collision. There was no suggestion the video was doctored, and it clearly rebutted the plaintiff's theory of liability. The trial court granted summary judgment on that basis.

On appeal, the Fifth District reversed.[7] The court held the eyewitness's testimony created a genuine issue of material fact, reaffirming the oft-repeated rule that a trial court may not adjudge the witness's credibility nor weigh the evidence when ruling on summary judgment. However, the court suggested the outcome would be different under the far less restrictive federal summary judgment standard, and certified a question of great public importance to the Supreme Court — essentially, should there be an exception to Florida's summary judgment standard when the movant's video is authentic and "completely negates or refutes any conflicting evidence" from the non-moving party?

But instead of just declining to invoke discretionary jurisdiction or answering the certified question asked of it, the Florida Supreme Court *sua sponte* asked the parties to brief whether it should adopt the federal summary judgment standard.[8]

After receiving the parties' briefs and 10 amicus briefs, the Florida Supreme Court delivered what William Large, president of the Florida Justice Reform Institute, called "the Holy Grail of lawsuit reform in Florida."[9] Happy New Year!

Although the Florida Supreme Court answered the Fifth District's certified question in the negative (declining to create any special exception to the current summary judgment rule), it issued a separate opinion the same day adopting the federal summary judgment standard, effective May 1, 2021.

In re Amendments to Florida Rule of Civil Procedure 1.510[10]
In the separate opinion, Rule 1.510 was amended to explicitly

adopt the federal summary judgment standard. The court identified three "consequential differences" between the existing and new rule.

First, the new summary judgment standard will effectively "mirror" the standard for a directed verdict "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[11]

Second, the movant is no longer required to conclusively disprove the nonmovant's theory, but rather may merely point out the "absence of evidence to support the nonmoving party's case."[12]

Third, under the existing standard, any competent evidence or reasonable inference therefrom can create a genuine issue of material fact. Under the new standard, however, a dispute about a material fact is only "genuine" if "the evidence is such that a *reasonable jury* could return a verdict for the nonmoving party."[13]

The court explained its "goals are simply to improve the fairness and efficiency of Florida's civil justice system, to relieve parties from the expense and burdens of meritless litigation, and to save the work of juries for cases where there are real factual disputes that need resolution."[14]

But who gets to decide what is "meritless" to save "the parties" (meaning defendants/insurance companies) from the "expense and burdens" of lawsuits filed by those greedy trial lawyers? The trial judge, or the district court on *de novo* review.

Justice Labarga was the sole dissenter, arguing that concerns about the efficiency of the court system should not "infringe[] upon the jury's sacred role."[15] Madison would likely agree.

How Will This Affect Auto Practitioners?

At this point, you may be feeling like the Black Knight from Monty Python and the Holy Grail. But is it *possible* this new standard "Tis but a scratch" to auto practitioners? Totally.

Directed verdicts are pretty uncommon in auto negligence cases. It logically follows that summary judgments will remain the exception, not the rule.

That said, here are our top 3 ways the new SJ standard is likely to affect auto practitioners:

1. Permanency and causation disputes

In *Wald v. Grainger,* 64 So. 3d 1202 (Fla. 2011), the Florida Supreme Court held that once the plaintiff introduces competent medical testimony that the wreck caused a permanent injury, she is entitled to a directed verdict unless the defendant:

1. Introduces countervailing medical testimony (usually from a CME doctor)
2. "Severely impeaches" the plaintiff's expert, or
3. Presents other evidence that creates a "direct conflict" with the plaintiff's evidence.[16]

Although more recent cases have taken an expansive view of what qualifies for those second and third categories,[17] *Wald* remains good law.

That means the new standard should dramatically increase your ability to get partial SJ on permanency and/or causation. At a minimum, such a motion will require the defense to tip their hand early.

2. Rear-end collisions

When the Supreme Court issued *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012), it severely weakened the rebuttable presumption of negligence that attaches to the driver of a rear-ending vehicle (the "rear-end presumption"). *Birge* held the presumption only applies "where there is an absence of evidence creating a jury question on the legal cause of a rear-end collision other than the presumed negligence of the rear driver."[18]

Because any evidence of the lead driver's comparative fault would rebut the presumption, after *Birge*, it became difficult for the lead vehicle to get summary judgment on liability.[19]

But now that the trial judge gets to weigh the evidence to decide what a "reasonable jury" would conclude, it seems like the rear-end presumption has been given new life. That may be good or bad for your clients, depending on whether they were driving the lead or rear-ending vehicle.

3. Insurance bad faith

Loyal readers of this column know full well that over the past decade, federal courts have been less hospitable than state courts to plaintiffs bringing bad faith claims arising from auto accidents.

Although some of the federal courts' summary judgments can be explained by the judiciary's attempt to create their own common law (in violation of the *Erie* doctrine), that is not the entire story. State courts also placed a "higher burden on a party moving for summary judgment."[20]

No doubt, state court trial judges will now have far greater discretion to declare "no bad faith" as a matter of law on summary judgment. But auto practitioners should take solace that even under the more liberal summary judgment standard, federal courts frequently deny the insurer summary judgment.[21]

The question in a bad faith case remains "whether, under all of the circumstances, the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly toward its insured and with due regard for his interests," with the focus on the conduct of the insurer rather than the injured claimant.[22] Most often, that will present a jury question under either summary judgment standard.[23]

So, What's Next for the Florida Supreme Court?

We already know *Worley* is in danger.[24] But a recent ruling and certified question from the Second District indicates that *Joerg* may be waiting on deck.

Joerg in Jeopardy?

In *Dial v. Calusa Palms*, 45 Fla. L. Weekly D2783a, 2020 WL 7310767 (Fla. 2nd DCA Dec. 11, 2020), the Second District delivered a severe blow to plaintiffs whose past medical bills have been paid by Medicare. In short, the court held plaintiffs are limited to presenting their post-Medicare-reduction bills to the jury.[25]

But didn't the supreme court *just* decide this issue in *Joerg*?[26] To understand the legal gymnastics employed by the Second District to resurrect bad law that should have been dead and buried, we need to take a quick look back at the development of the evidentiary collateral source rule in Florida.

Let's start with a basic premise: under the common law evidentiary collateral source rule, "payments from collateral source benefits are not admissible because such evidence may confuse the jury with respect to both liability and damages."[27] Seems simple enough — the jury doesn't get to hear about collateral sources. We even have a standard jury instruction in case someone slips up at trial and collateral source evidence sneaks in (and that instruction tells the jury they should *not* reduce the plaintiff's damages due to collateral sources and that the court will handle all that post-trial).[28] It's a simple rule. It's a clean rule. Of course, Florida courts were going to find a way to mess it up.

In 1984, the Florida Supreme Court created an exception to the evidentiary collateral source rule in a case called *Stanley*, holding that evidence of "[g]overnmental or charitable benefits available to all citizens, regardless of wealth or status," should be admissible for the jury to consider in determining the reasonable costs of future care.[29]

Courts struggled to apply *Stanley* in the years that followed, with most limiting its "exception" to its unique facts.[30] But in 2004, the Second District in *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956, took a different approach. Rather than limiting *Stanley*, *Cooperative Leasing* expanded the exception to the common law collateral source rule. Specifically, the court held it was error to allow the plaintiff to present evidence of the full amount of her medical bills, and that the trial court should have only allowed the jury to see bills as reduced by Medicare.

In the years following *Cooperative Leasing*, we all became too familiar with the pre-trial battle over whether our clients could board their full medicals in front of the jury.

Finally, the Florida Supreme Court took up the issue in 2015 in *Joerg v. State Farm*. In *Joerg*, the supreme court was reviewing another Second District opinion which (again relying on *Stanley*) had created *another* exception to the common law collateral source rule — this time holding that evidence of a plaintiff's *future* Medicare benefits was admissible at trial.[31] In quashing the Second District's opinion, the *Joerg* court expressly "recede[d] from *Stanley* to the extent it supported the admission of social legislation benefits as an exception to the evidentiary collateral source rule."[32]

And although *Joerg* did not expressly state that it was overruling *Cooperative Leasing*, it did cite (with seeming approval) *Winston Towers 100 Ass'n, Inc. v. De Carlo*, 481 So. 2d 1261 (Fla. 3rd DCA 1986). There, the Third District expressly held that under *Stanley*, the collateral source rule applied to *exclude* evidence of past Medicare benefits from the jury's consideration of damages (*the exact opposite* of the Second District's evidentiary holding in *Cooperative Leasing*).

With the *Joerg* opinion in hand, we thought the pre-trial battles about boardable meds were finally over — and that injured plaintiffs had won. But over the course of the last five years, the defense bar perpetuated the idea that *Joerg* did not overrule *Cooperative Leasing*.

At first, we laughed off the argument. *Cooperative Leasing* relied exclusively on *Stanley*. *Joerg* overruled *Stanley*. How could a case that relied exclusively on an overruled case still be good law? However ludicrous it seemed, the argument gained traction with several trial judges across the state. What we needed was a post-*Joerg* appellate opinion to finally set the record straight.

Well, the Second District gave us that opinion last December, but it was not the news we were hoping for: *Cooperative Leasing* lives.

In *Dial*, the Second District affirmed a trial court's order prohibiting the plaintiff from presenting her full medical bills paid by Medicare to the jury. The court held that *Cooperative Leasing* was not overruled by *Joerg*, and that the past medical bills exception to the collateral source rule (*which was born out of the very case* Joerg *expressly overruled*) persists.[33]

The *Dial* court primarily based its holding on the belief that "the *Joerg* court very clearly set the scope of its holding to evidence concerning future Medicare benefits."[34] The court then cherry-picked several lines from *Joerg* that specifically discussed future benefits, while ignoring or summarily dismissing other lines that did not "set the scope" of its holding so narrowly.[35]

The *Dial* decision drew both a certified question[36] and a special concurrence. In the concurrence, Judge Rothstein-Youakim stated: "the rationale in *Joerg* compels the conclusion that our evidentiary holding in *Cooperative Leasing* was incorrect."[37] Nevertheless, she agreed in the result because *Joerg* had not expressly indicated that it was overruling *Cooperative Leasing*.[38]

As the steam billows from your ears, time for a couple sidenotes:

Sidenote 1: The trial court in *Joerg* (relying on *Cooperative Leasing*) held that "evidence of *past* medical expenses must reflect the lower Medicare reimbursement."[39] Unfortunately, the plaintiff in *Joerg* never appealed that ruling. In turn, the supreme court was only reviewing the issue of *future* Medicare benefits. Hindsight is 20/20, but if the plaintiff had cross-appealed the trial court's ruling on past benefits, the supreme court hinted it found the distinction between past and future Medicare benefits to be irrelevant, and thus could have explicitly held that evidence of Medicare reductions for past benefits is likewise inadmissible under the common law evidentiary collateral source rule.[40]

Sidenote 2: If you want to play the "what could have been" game a little more, three of the justices in the *Joerg* majority had voted back in 2004 to accept jurisdiction to review *Cooperative Leasing* based on express and direct conflict with *Respess v. Carter*, 585 So. 2d 987 (Fla. 5th DCA 1991).[41] *Respess* had held that "[t]he collateral source doctrine allows an injured party to collect full damages, irrespective of coverage or payment for any element of the damages by any source other than the tortfeasor," and that "it is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong."[42] However, after initially accepting jurisdiction to review the conflict, the other members of the court elected to discharge jurisdiction.[43]

So where does *Dial* leave us? Only a single justice from the *Joerg* majority remains on the Court, with the rest replaced by newly appointed "conservative" jurists.[44] While the *Dial* court's certified question *should* be an opportunity to reign in *Cooperative Leasing's* zombie exception to the common law evidentiary collateral source rule, the unfortunate reality is that it is more likely to serve as a teed up opportunity for our new supreme court to begin its recession from *Joerg* (and the common law evidentiary collateral source rule in general).

Oh, and by the way, if you are wondering about the *Dial/Joerg/Cooperative Leasing* implications on post-trial setoffs under § 768.76, that's another 2,000 words – and another glass of bourbon – for another day.

Play With Fire and You'll Eventually Get Burned

In cases such as those with DUI or reckless driving, where punitive damages are plead, the trial is almost always bifurcated.

The first phase is to decide, in part, whether the defendant's conduct is so bad that it merits punishment. One would think that, in those situations, the rules of closing arguments might be modified somewhat to accommodate the need to explain why punitives are appropriate.

For example, the requests to "send a message" or to be the "conscience of the community" are appropriate in punitive damage closings, but not in compensatory-only cases.

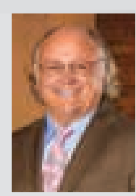
According to the Fourth District, in the blended phase one of a punitive damage case, those same limiting rules apply.

In a recent *Engle*-progeny case, plaintiff's counsel's closing argument during phase one purportedly analogized Big Tobacco to

Nazis and the "torturous authoritarian regime" from Orwell's *1984*, all over Tobacco's timely objection.[45] The Fourth District wrote at length to "condemn" these "grossly improper" arguments, but ultimately affirmed the trial court's denial of Tobacco's motions for mistrial and new trial.

What is most noteworthy about the decision is the court's "emphatic reemphasis" about the need for the trial judge to curb argument "solely designed to inflame the passions of the jury." The court suggested that future "rebukes should be in front of the jury" and even "remind[ed] trial judges of the option of using indirect civil contempt monetary sanctions for repeated violations of court rulings."[46]

You can practically hear the judges yelling through their bolded text. As Judge Klingensmith stated in his concurrence: "We have made our expectations clear, and our tolerance should not be expected in the future."[47] Tread lightly, my friends.



DALE M. SWOPE
is the head of the Swope, Rodante firm in Tampa, where the focus is on insurance, bad faith, and catastrophic injury claims. He is a former president of the FJA, the incorporator of the TBTLA and served two-and-a-half years as its president. He is a member of the American Law Institute, ABOTA, and holds the highest ranking from all major attorney credentialing organizations. He has been awarded the Mickey Smiley award for Mentorship, the S. Victor Tipton Award for Legal Writing, and is an EAGLE® Founder.

---

1 https://en.wikipedia.org/wiki/Federalist_Society.
2 https://fedsoc.org/.
3 https://fedsoc.org/the-james-madison-club.
4 Cong. Register, I, 423–37, available at: https://founders.archives.gov/documents/Madison/01-12-02-0126.
5 *E.g.,* Skyler Swisher, *Barbara Lagoa's rise to Trump's Supreme Court short list showcases conservative Federalist Society's sway in Florida,* South Florida Sun Sentinel, Sept. 24, 2020, https://www.sun-sentinel.com/news/politics/fl-ne-federalist-society-changing-courts-20200924-3owcqcirnnf7vi5tu4mntysium-story.html; Lawrence Mower, *DeSantis is reshaping Florida's courts — with the Federalist Society's help*, Tampa Bay Times, Nov. 29, 2019, https://www.tampabay.com/florida-politics/buzz/2019/11/29/desantis-is-reshaping-floridas-courts-with-the-federalist-societys-help/.
6 *Wilsonart, LLC v. Lopez*, 46 Fla. L. Weekly S2, 2020 WL 7778226 (Fla. Dec. 31, 2020).
7 *Lopez v. Wilsonart, LLC,* 275 So. 3d 831, 834 (Fla. 5th DCA 2019).
8 *Wilsonart, LLC v. Lopez*, SC19-1336, 2019 WL 5188546, at *1 (Fla. Oct. 15, 2019).
9 Jim Saunders, *Florida Supreme Court delivers the 'Holy Grail of lawsuit reform' in Thursday ruling,* Miami Herald, Dec. 31, 2020, https://www.miamiherald.com/news/politics-government/state-politics/article248209085.html.
10 *In re Amendments to Florida Rule of Civil Procedure 1.510,* 46 Fla. L. Weekly S6, 2020 WL 7778179 (Fla. Dec. 31, 2020).
11 *Id.* at *1 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).
12 *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).
13 *Id.* (quoting *Anderson*, 477 U.S. at 248) (emphasis added).
14 *Id.* at *2.
15 *Id.* at *4 (Labarga, J., dissenting).
16 *Wald*, 64 So. 3d at 1204.
17 *I.e.*, *United Services Auto. Ass'n v. Rey*, 45 Fla. L. Weekly D1855, 2020 WL 4492304 (Fla. 2d DCA Aug. 5, 2020); *Brown v. Lunskis*, 128 So. 3d 77, 81 (Fla. 2d DCA 2013); *Smith v. Llamas*, 109 So. 3d 1185, 1188 (Fla. 2d DCA 2013).
18 107 So. 3d at 362.
19 *See, e.g., Restal v. Nocera*, 268 So. 3d 270 (Fla. 5th DCA 2019).
20 *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 10 (Fla. 2018).
21 *See Tips for Auto Practitioners,* FJA Journal, Jan/Feb 2021.
22 *Brink v. Direct Gen. Ins. Co.,* 8:19-CV-2844-30AEP, 2021 WL 129931, at *4-5 (M.D. Fla. Jan. 14, 2021).
23 *See Aldana v. Progressive Am. Ins. Co.*, 828 Fed. Appx. 663, 673 (11th Cir. 2020).
24 *See Tips for Auto Practitioners,* FJA Journal, May/June 2019.
25 *See Dial v. Calusa Palms*, 45 Fla. L. Weekly D2783a (Fla. 2d DCA Dec. 11, 2020).
26 *ee Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247 (Fla. 2015).
27 *d.* at 1249.
28 *See* Fla. Std. Jury Instr. (Civ.) 501.8.
29 *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514, 515 (Fla. 1984). The *Stanley* court had relied on a lone decision from the Illinois supreme court – a decision which itself was eventually overruled. *See Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 392 N.E.2d 1 (1979), *overruled by Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008).
30 *See Joerg*, 176 So. 3d at 1251.
31 *See State Farm Mut. Auto. Ins. Co. v. Joerg*, 188 So. 3d 852 (Fla. 2d DCA 2013), *decision quashed*, 176 So. 3d 1247 (Fla. 2015).
32 *Joerg*, 176 So. 3d at 1256.
33 *See Dial*, 2020 WL 7310767, at *1.
34 *Id.*
35 *See, e.g., Joerg*, 176 So. 3d at 1256 ("[T]he tortfeasor should not benefit from collateral funds that are available to the injured party and wholly independent of the tortfeasor. Therefore, we recede from *Stanley* to the extent that it supported the admission of social legislation benefits as an exception to the evidentiary collateral source rule." (internal citation omitted)).
36 The court certified the following question to the supreme court: "Does the holding in *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015), prohibiting the introduction of evidence of Medicare benefits in a personal injury case for purposes of a jury's consideration of future medical expenses also apply to past medical expenses?"
37 *See Dial*, 2020 WL 7310767, at *2 (Rothstein-Youakim, J., concurring).
38 *Id.*
39 *State Farm Mut. Auto. Ins. Co. v. Joerg*, 188 So. 3d at 853.
40 *See Joerg*, 176 So. 3d at 1257 n.7 (Fla. 2015) ("Like *Peterson,* the Illinois Supreme Court in *Wills* also considered the admissibility of past Medicare benefits, not the future benefits at issue here. Given our agreement with the policy pronouncement in *Wills,* we do not consider this factual distinction relevant." (internal citation omitted)).
41 *See Johnson v. Coop. Leasing, Inc.*, 905 So. 2d 76 (Fla. 2005).
42 585 So. 2d at 988-90.
43 *See Johnson*, 905 So. 2d at 76. Of course, the express and direct conflict should have been with *Winston Towers 100 Ass'n, Inc. v. De Carlo*, 481 So. 2d 1261 (Fla. 3d DCA 1986), which (as noted above) came to the exact opposite conclusion as *Coop. Leasing*.
44 *See* Noreen Marcus, *Conservatives Note That Ron DeSantis Has Turned Florida Into 1 of the Most Conservative Courts in America*, U.S. News & World Rep., Sept. 8, 2020, https://www.usnews.com/news/best-states/articles/2020-09-08/conservatives-note-that-ron-desantis-has-turned-florida-into-the-most-conservative-court-in-america.
45 *R.J. Reynolds Tobacco Co. v. Kaplan*, 45 Fla. L. Weekly D2728a, 2020 WL 7239575, at *6 (Fla. 4th DCA Dec. 9, 2020). During phase one, the jury was being asked not only to decide compensatory damages, but also whether the plaintiff had demonstrated, by clear and convincing evidence, that punitive damages were warranted against Big Tobacco.
46 *Id.* at *7.
47 *Id.* at *8 (Klingensmith, J., concurring).

Yes, we treat that.

TBI
Traumatic Brain Injury

ABI
Anoxic Brain Injury

Stroke

Spinal Cord Injury

Multiple Trauma

Neurological Disorders

Complex Orthopedic

Joint Replacements

Amputations

NeuLife™ Rehab

We accept most health insurance plans, workers' compensation carriers and discount networks.
Accepting patients 15 & up for treatment

Agreement to Delay Payment Available
for Qualified Litigation Cases.

Call today to learn more 800.626.3876
NeuLifeRehab.com

TL70090977 | AL12406

CURRENT CASES IN INSURANCE PRACTICE

by Matthew T. Christ

Insurer Not Relieved of Duty to Defend After Exhausting Policy Limits on One Claim in Multiple Claimant Scenario

In *Great West Cas. Co. v. Panebianco*, Case No. 5:18-cv-392-Oc-30PRL, 2020 WL 8254231 (M.D. Fla. Nov. 19, 2020), Judge James Moody of the United States District Court for the Middle District of Florida denied Great West Insurance Company's motion for partial summary judgment on the issue of whether it avoided its duty to defend its insured after exhausting its policy limits on one claimant in a multiple claimant accident its insured caused. The bad faith action arose from a three-vehicle accident that occurred in January 2017, involving a tractor-trailer owned by C&W Logistics, Inc., and operated by Michael Oldaker. The two other vehicles involved in the crash were owned by Joseph Amaral and Rebecca Demari. Mr. Amaral died in the crash. Karen Dhelsy Nichols was operating Mr. Amaral's vehicle at the time of the crash and also sustained injuries. The crash resulted in multiple liability claims against C&W and Mr. Oldaker. Great West insured C&W for $1 million.

Great West received timely notice of the crash and acknowledged that liability was both clear and likely to exceed the available policy limits, and invited the claimants to participate in a global settlement conference on May 9, 2017. The claimants were unable to resolve all claims at the settlement conference, and on May 30, 2018, Karen Dhelsy Nichols and the Estate of Joseph Amaral offered to settle their claims against Oldaker for the $1 million Great West policy in exchange for a partial release of Oldaker. C&W objected to the extent that the settlement offer was directed at only the driver, Oldaker. Great West rejected C&W's objection to the partial release and tendered the $1 million policy limits to Nichols and the Amaral Estate on June 16, 2017, hanging C&W out to dry.

Nearly a year later, Nichols and the Amaral Estate initiated a personal injury/wrongful death action in state court against C&W. In response, C&W filed a third-party complaint against Oldaker. Great West defended C&W under a reservation of rights and filed a declaratory action in the Middle District of Florida seeking a determination that it had no duty to defend or indemnify C&W in the personal injury/wrongful death action because it had exhausted its policy limits. In response, C&W counterclaimed for statutory and common law bad faith, alleging that C&W breached its duty of good faith when it settled the direct claim against Oldaker for the policy limits and exposed C&W to an excess judgment for all remaining claims. Additionally, C&W claimed that Great West exposed Oldaker to the full value of the claims identified in the Nichols and Amaral Estate release by requiring Oldaker to indemnify C&W for all damages specified in the release.

Great West moved for summary judgment on its claim that once it exhausted the full policy limits to obtain a partial release on behalf of Oldaker, its duty to defend C&W against claims arising from the crash expired. In support of its position, Great West relied on *Underwriters Guar. Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 578 So. 2d 34 (Fla. 4th DCA 1991) and its policy language, which stated: "Our duty to defend or settle ends when the Covered Autos Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements." Judge Moody denied Great West's motion based on the same *Underwriters* decision on which Great West had staked its hopes. In *Underwriters*, the Fourth District held that an insurer is relieved of its duty to defend once it exhausts its policy limits *unless* there is a dispute over whether the settlement was reached in good faith. Because C&W argued that Great West should have declined the settlement offer as it exposed C&W to litigation, potential liability for Oldaker's negligence, and did not even fully protect Oldaker as he was still liable to C&W for his negligence, a jury could conclude that Great West's decision to exhaust its policy limits without obtaining adequate proception for either

insured was not made in good faith. Accordingly, Great West was not relieved of its duty to defend C&W.

Insurer's Anti-Assignment Clause Stricken, Despite Insurer's Claim that Parties Negotiated Terms of Anti-Assignment Clause

Lloyds of London failed to convince the Third District Court of Appeal in *Extreme Emergency Fire & Water Restoration, LLC v. Certain Underwriters at Lloyd's of London*, No. 3D20-5, 45 Fla. L. Weekly D2811a (Fla. 3d DCA Dec. 16, 2020) that an anti-assignment clause in its homeowner's insurance policy was not void under Florida law. The issue arose after Julio and Nora Lugones suffered damage to their home, which was covered by a homeowner's insurance policy with Lloyd's. The Lugones hired Extreme Emergency Fire & Water Restoration, LLC to repair and mitigate the damage. The Lugones assigned to Extreme their rights to payment for the claim under their Lloyd's policy. Extreme sought payment from Lloyd's for the $18,458.39 it spent repairing the Lugones's home, but Lloyds refused to pay.

After Extreme filed a breach of contract action against Lloyds, Lloyds asserted as an affirmative defense the anti-assignment clause in the Lugones's insurance application, which provided as follows:

> In consideration of the premium paid, it is hereby agreed and understood that rights, benefits and duties under the policy for which I am applying may not be assigned and/or transferred, either before or after a loss, without the written consent of the company, except in the case of death of an individual named insured.

Lloyd's moved for summary judgment on the basis of this clause. Extreme responded by arguing that the anti-assignment clause was contrary to well-settled Florida law that an insured need not obtain the insurer's consent before making a post-loss assignment of its right to payment of a claim under the policy. The trial court granted Lloyd's summary judgment motion.

On appeal before the Third District, Lloyd's argued the anti-assignment clause in its insurance application did not violate Florida's long-held rule that an insured may assign a post-loss claim even when an insurance policy contains a provision stating otherwise. Lloyd's contended that because the anti-assignment clause was contained in the insurance application, the parties voluntarily negotiated the anti-assignment clause, and the prohibition on anti-assignment bans did not apply to the policy at issue. (Note that in 2019 the Florida Legislature enacted section 627.7153, Florida Statutes, authorizing insurance companies in certain circumstances to include enforceable anti-assignment clauses in residential or commercial property insurance policies). The Third District concluded that this was a distinction without a difference, as the insurance application and the insurance policy *together* constitute the insurance contract under section 627.419(1), Fla. Stat. (providing: "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto").

Summary Judgment Denied in Insurance Bad Faith Action Brought in Federal Court

In *Brink v. Direct Gen. Ins. Co.*, No.: 8:19-cv-2844-30AEP, 2021 WL 129931 (M.D. Fla. Jan. 14, 2021), Judge James Moody of the Middle District of Florida denied Direct General Insurance Company's motion for summary judgment on a set of both tragic and egregious facts. On April 5, 2008, Pereles was driving a vehicle owned by his father, De Los Santos, when he collided into a motorcycle Dustin Brink was driving. Brink was seriously injured. Pereles and De Los Santos (the "insureds") were insured by Direct General Insurance Company in the amount of $10,000 per person and $20,000 per occurrence for bodily injury liability. Direct General was notified of the crash on April 28, 2008, and spoke with its insured that same day, although the claims representative had difficulty understanding the insureds and noted they were not fluent English speakers. By April 30, 2008, Direct General was aware that Brink was in a coma as a result of the crash. Direct General noted in its claims log that the potential exposure to the insured was in excess of the policy limits and that liability was a non-issue.

On August 4, 2009, attorney (and FJA past-president) Alexander Clem sent Direct General a letter notifying the insurer of his representation of Brink in his claims against Direct General's insureds, and requested Direct General provide him a statement of the insureds or their agent. On August 18, 2008, Direct General sent a letter in English to De Los Santos requesting that he directly contact Clem and provide him with the requested statement. The letter failed to notify De Los Santos that Brink's claims likely exceeded his policy limits, or that he would be responsible for any amounts in excess of the policy limits should the claim not settle. *This was the only letter Direct General wrote to their insureds for over 19 months*. Direct General responded to Clem's August 4th letter with a copy of its August 18th letter it had sent to De Los Santos, but failed to provide a statement from its insureds or their agents as requested in Clem's letter. On August 19, 2008, Direct General decided to pay the available bodily injury policy limits to settle Brink's claim, yet still failed to actually tender the policy limits until November 21, 2008, when it wrote to Clem and enclosed a copy of the policy limits check. In between August 19th and November 21st, Direct General claims representatives called Clem numerous times to allegedly discuss Direct General's willingness to settle for the policy limits, but Clem never returned these calls or spoke to anyone at Direct General. On June 26, 2009, Clem sent Direct General a letter alerting it that he "still [did] not have all the requested information in order to verify the amount of liability coverage available to [Direct General's] insureds." Direct General responded by forwarding Clem the same disclosure it had sent on August 18, 2008, which Clem had already indicated was deficient.

On February 19, 2010, Clem sent a demand to Direct General advising that Brink was "now ready to resolve his claims" within the policy limits if Direct General provided the insurance proceeds, the release, and the requested insurance disclosure "in the next couple

of weeks." Clem noted in the demand letter that he had still not received a statement from Direct General's insureds regarding other insurance. A few days later, the adjuster assigned to the Brink claim, Sheila Moore, instructed the correspondence unit at Direct General not to prepare an insurance disclosure letter as requested in Clem's demand. After three weeks passed from the date Clem sent his February 19, 2010 demand, Clem mailed another letter to Direct General inquiring why Direct General had not responded to his demand or provided the requested information. Clem informed Direct General that he had filed suit against its insureds, but provided Direct General an opportunity to provide requested explanation "sometime next week." Rather than respond to Clem's letters, Direct General wrote to its insureds that "Brink and his counsel have been unwilling to settle" the claims against them. The letter did not reference Clem's demand and did not include any copies of the various letters Clem had mailed to Direct General. Finally, five weeks after Clem's initial demand, Direct General responded to Clem with the same insurance disclosure package Clem had twice previously indicated was insufficient. Ultimately, Brink's personal injury action against Direct General's insureds proceeded to trial and resulted in a $12,079,837.17 judgment entered in favor of Brink and against Perales, and a $600,000.00 judgment entered against De Los Santos and in favor of Brink.

In the bad faith action that followed, Direct General moved for summary judgment on the theory that the claim could not have settled, and focused on Clem's multiple failures to respond to Direct General's communications prior to his February 2010 settlement demand. Following *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1 (Fla. 2018) and the *Aldana v. Progressive Am. Ins. Co.*, 828 Fed. App'x 663 (11th Cir 2020), the district court easily dismissed Direct General's argument, based on well-settled principle that the focus in a bad faith case is not on the actions of the claimant, but the insurer. Further, the district court concluded that a jury could find that Direct General's failure to timely respond to Clem's demand and failure to adequately advise its insureds of the risk of the demand and risk of an excess judgment rose to the level of bad faith claims handling.

Florida Law Doesn't Allow Citizens Property Insureds to Recover Extra-Contractual, Consequential Damages

In *Citizens Prop. Ins. Corp. v. Manor House, LLC, et al.*, No. SC19-1394 (Fla. Jan. 21, 2021), the Supreme Court of Florida unanimously held that Florida law does not allow an insured to recover extra-contractual, consequential damages in a first-party breach of insurance contract action not involving suit under section 624.155, Florida Statutes. Manor House, LLC, brought the first-party breach of insurance contract claim against its insurer Citizens Property Insurance Corporation ("Citizens"), for extra-contractual, consequential damages arising from lost rental income totaling approximately $2.5 million.

Manor House's claim for lost rental income stemmed from Citizen's alleged failure to timely adjust significant property damage loss to an apartment complex Manor House owned, as well as its wrongful denial of Manor House's claim. The Supreme Court of Florida held that section 624.155, Florida Statutes, is the appropriate avenue for the recovery of extra-contractual damages against an insurer. Because Citizens is statutorily immune from first-party bad faith claims, the extra-contractual damages sought by Manor House were not recoverable against Citizens.

MATTHEW CHRIST
is an associate attorney at Domnick Cunningham & Whalen in Palm Beach Gardens, Florida. He devotes his practice to representing the victims of catastrophic personal injury, wrongful death, and insurance bad faith. Prior to entering private practice Mr. Christ served as a staff attorney to the Honorable Barbara J. Pariente of the Supreme Court of Florida. Mr. Christ is an executive board member of the Young Lawyer's Board of the Palm Beach County Justice Association and the South Florida lawyer chapter of the American Constitution Society. He is an EAGLE associate member.

Priority Responsible Funding, LLC
4282-12

UNDERSTANDING THE BASICS OF MASS TORTS

by Madeline Pendley

Mass tort litigation can be complex and many lawyers have little to no experience dealing with these cases. Like any other specialty area of the law, there are important things you should know about mass torts before you assess, and certainly before you file, a mass tort case. Therefore, this article is intended to serve as a basic primer on mass tort cases and also addresses some common misperceptions about this area of the law.

Mass Torts v. Class Action

There is often confusion about the similarities, and more importantly, the differences between mass torts and class actions. Mass torts and class actions are similar in that they both involve a group of plaintiffs who are suing the same defendants for similar harm they have suffered. However, that is largely where the similarities between these two types of cases end and the significant differences begin.

Mass torts typically involve an act or omission that results in personal injuries on a mass scale.[1] While the term "mass" is used to describe these cases, there is no particular number of plaintiffs required in order for a group of cases to be considered a mass tort. The injury or harm to each plaintiff must be similar, but it does not have to be identical.

This personal injury component of mass tort cases is the first key distinction between mass torts and class actions. Class actions typically involve economic injury and personal injury cases are generally not subject to litigation in the class action setting.[2] Thus, in deciding whether you are dealing with a mass tort or a class action, the first issue to be assessed is whether you client suffered a personal injury or purely an economic injury.

The next major distinction between a mass tort and a class action is the way in which they are litigated. Mass tort cases are still individual personal injury cases and are litigated as such. Thus, each mass tort plaintiff is entitled to a trial on the merits of his or her case alone and the resolution of claims involving other plaintiffs in the same mass tort litigation will not have any preclusive effect on remaining plaintiffs. However, in a class action, a representative suit proceeds on behalf of all other plaintiffs and all plaintiffs are joined "in a single massive suit" which merges the parties' procedural rights.[3] Thus, one trial can and usually does occur, which adjudicates the claims of all members of the class.

Multi-District Litigation

Mass torts are often managed and litigated via multi-district litigation (MDL). An MDL is a statutory creation that allows cases that have "one or more common questions of fact" to be consolidated in, and transferred to, one district court for pretrial proceedings.[4] Some examples of active MDLs include *In Re: Valsartan, Losartan, and Irbesartan Products Liability Litigation* (MDL 2875), and *In Re: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation* (MDL 2846).

MDLs are created by the Judicial Panel on Multi-District Litigation (JPML).[5] In determining whether or not to grant consolidation and create an MDL, the JPML considers whether transfer and consolidation is convenient for the parties and witnesses and whether consolidation would promote judicial efficiency. The JPML may also consider the number of defendants involved and the solvency of those defendants.[6] Ultimately, the central inquiry is whether the group of claims at issue requires special management due to their size and would otherwise result in repetitive litigation involving a similar product or device if consolidation is not granted.[7] The panel can consolidate cases in response to a motion "by any party in action in which transfer" may be appropriate or it can choose to consolidate "upon its own initiative"[8] and transfer the cases without the consent of the parties.[9]

If the panel finds that centralization is appropriate, the cases will be transferred to a federal district court of the panel's choosing, though it often considers recommendations by both parties in making this determination. The panel is not bound by personal jurisdiction or venue requirements when selecting the court that will preside over the cases.[10] The panel issues a transfer order that "designates the transferee court, assigns a title and [case] number to the MDL, and identifies the related actions currently pending in federal districts outside of the selected" forum that must be transferred to the MDL.[11] Any cases that are later filed or that the court later learns of (referred to as "tag-a-long" cases), will be consolidated into the MDL via a transfer order.

The federal district judge selected by the JPML will preside over all pretrial matters. This ensures that all cases proceed in a uniform manner. From there, the future of the MDL largely depends on the judge. However, due to the large number of attorneys involved in these litigations, most MDL judges appoint a leadership structure, which usually takes the form of an executive committee that has fiduciary responsibilities to all plaintiffs consolidated into the MDL. This lead-

ership group oversees many components of the litigation (such as case scheduling, expert preparation, and general discovery matters) and otherwise ensures that all parties are apprised of important deadlines and developments in the litigation. These are also the attorneys who will typically communicate directly with the court at hearings and case management conferences.[12]

The Bellwether Process

To assist in the global resolution of MDLs, many presiding judges also conduct one or more bellwether trials before remanding individual MDL cases back to their home jurisdiction. In this respect bellwether trials are a unique feature of the MDL process.[13] Rather than having each of the hundreds, if not thousands of cases in an MDL proceed to trial, only a select few are tried in the MDL court. The goal is for the selected cases to act as representative samples of all cases filed in the MDL.

The overarching purpose of the bellwether process is to "provide information to the parties and court about the strengths and weaknesses of the cases in order to help the parties create a framework for a global settlement of the matter."[14] In short, these bellwether cases drive settlement values and should provide a guide as to the value of the cases that remain in the MDL. However, bellwether verdicts are not binding on other plaintiffs. If the bellwether process does not result in a global settlement of the remaining cases, MDL courts typically remand the remaining cases to the courts of proper jurisdiction for trial.

Common Benefit

The concept of common benefit work is also featured prominently in mass tort MDLs. In order to propel litigation towards resolution, attorneys serving on plaintiffs' leadership positions must devote significant hours and perform a substantial amount of work that ultimately benefits every plaintiff in the litigation, including many plaintiffs they do not otherwise represent. This is known as common benefit work, which typically encompasses taking depositions, managing discovery, trial preparation, and negotiating settlements.[15]

In order to ensure these attorneys are compensated for doing this work and to ensure the work is actually done, MDLs typically utilize common benefit funds. These funds are established through assessments that are made by the court against each plaintiff in the MDL upon settlement. These assessments can range from four to twenty percent or more depending on many factors. The MDL court must determine and specify the total amount of common benefit fees and specify a procedure for allocating them. The total common benefit fee amount should be reasonable and it should be fairly and transparently distributed.[16] In order to receive common benefit fees, counsel must submit their time along with a summary of the work conducted to the court for examination and ultimately approval.

Conclusion

In sum, mass torts are a unique yet pervasive type of case litigated in courts across the country. While sharing some characteristics of a class action, mass torts differ in that they typically deal with individual personal injury actions on a large scale. MDLs are frequently utilized to manage and resolve mass tort cases in a just and efficient manner. While this remains a niche area of law, understanding how mass torts work may be of significant benefit to you in your ongoing practice. J

MADELINE PENDLEY
Bio

---

1 Advisory Comm. on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation 10 (Feb. 15, 1999), reprinted without appendices in 187 F.R.D. 293, 300 (hereinafter, Working Group Report).

2 *See Generally* Anthony Vale and Charles H. Carpenter, *Class Actions in Personal Injury Litigation: At A Crossroads,* 30 Gonz. L. Rev. 599 (1995).

3 Charles Silver, *Comparing Class Actions and Consolidations*, 10 Rev. Litig. 495, 497 (1991).

4 28 U.S.C. **§ 1407.**

5 28 U.S.C. **§ 1407(d).** The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.

6 Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. Pa. L. Rev. 2225, 2257-58 (2000).

7 Working Group Report, *supra* note 1.

8 28 U.S.C. **§ 1407(c)(i) and (ii).**

9 28 U.S.C. **§ 1407(h)**

10 *See In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

11 Eldon E. Fallon, *Common Benefit Fees in Multi-District Litigation*, 74 La. L. Rev. 371 (2014).

12 *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, at 2-4 (E.D. La. July 27, 2009) (pretrial order appointing Defendants' Steering Committee), available at http:// www.laed.uscourts.gov/Drywall/Orders/Orders.htm (follow "Pretrial Order 7" hyperlink); *In re Vioxx, 2005 WL 850963, at *1-9*; In re Vioxx, 2005 WL 850962, at *1-2.

13 *In re Chevron U.S.A., Inc.,* 109 F.3d 1016, 1019, 133 Lab. Cas. (CCH) P 1890, 27 Envtl. L. Rep. 21060 (5th Cir. 1997) ("The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.").

14 William B. Rubenstein, 4 Newberg on Class Actions § 11:12 (5th ed.).

15 The principles for the Common Benefit Doctrine are derived from *Trustees v. Greenough*, 105 U.S. 527 (1881); refined in, inter alia, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in inter alia, *In re Air Crash Disaster at Florida Everglades* on December 29, 1972, 549 F.2d 1006, 1019-21 (5th Cir. 1977); *In re MGM Grand Hotel Fire Litigation*, 660 F.Supp. 522, 525-29 (D. Nev. 1987); *In re Zyprexa Prods. Liab*., 594 F.3d 113 (2d Cir. 2010); and several others.

16 Elton, *supra* note 13 at 381.

CDC Stats Show

23%

Of People Hurt In MVCs Have A Brain Injury

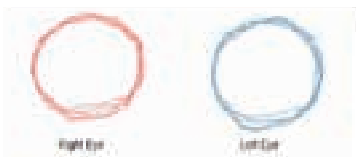
NEUROLOGY • TBI DIAGNOSTIC TESTING • TBI REHAB

Ethos Health Group Has 24 Locations Across Florida Offering:

Board Certified Neurologists and Physiatrists to assess TBI patients across the state via telemedicine

Objective functional diagnostic testing to confirm TBI diagnosis and guide treatment:

- Video Nystagmography (VNG)
- Oculomotor Tracking
- EEG with Event Related Potentials
- Computerized Balance Testing



Normal Eye Movement Tracking

Cutting edge TBI rehab and treatment options like alpha stim, neurofeedback, vagus nerve stimulation, vestibular rehab, and cognitive rehab

Post TBI Eye Movement Tracking

EthosTBI.com

844-693-6163

Momentum Funding
4282-14

WHAT THE @#%! IS THE SAME SPECIALTY?

FLORIDA STATUTE SECTION 766.102(5)

by J. Clancey Bounds

How fun was the legislative session in 2013? I remember it like it was yesterday. The Florida spring sky was blue, the air in Tallahassee was crisp and the Honorable Gary Michael Farmer Jr. was the Florida Justice Association's fearless leader. Me, I schlepped up to Tallahassee a good bit that year, for all sorts of medical malpractice legislation that was on the agenda. A couple of articles and practice pointers could be written concerning the legislative changes to Fla. Stat. section766 that session, but I will limit myself to just the "strike outs" contained in Fla. Stat. section 766.102(5). A little late to the party? Probably. However, it seems, as of late, many practitioners are facing challenges to experts along these lines and many more, including myself, have questions about just how particular is the "same specialty" requirement.

The changes to Fla.. Stat. section 766.102(5), came about through the usual practice of Senate Bills with House companion bills. The guilty party here? S.B. No. 1792. S.B. No. 1792, in addition to other things, had the effect of striking out various sentences contained in the previous version of. Fla. Stat. section 766.102(5). It looked, in relevant part, like this:

> **766.102 Medical negligence; standards of recovery; expert witness**
> (5) A person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria:
>
> (a) If the health care provider against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> 1. Specialize in the same specialty as the health care provider against whom or on whose behalf the testimony is offered; ~~or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;~~ and
>
> 2. Have devoted professional time during the 3 years immediately preceding the date of the occurrence that is the basis for the action to:
>
> a. The active clinical practice of, or consulting with respect to, the same ~~or similar~~ specialty ~~that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients;~~
>
> b. Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same ~~or similar~~ specialty; or
>
> c. A clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same ~~or similar~~ specialty.
>
> ~~(14) This section does not limit the power of the trial court to disqualify or qualify an expert witness on grounds other than the qualifications of this section.~~

The strikethroughs had a single effect, that being to require an expert who was to give expert testimony or sign a presuit affidavit[1] to specialize in the "*same specialty*" as the health care provider he or she was criticizing. No longer would an expert who specialized in a *similar* specialty be allowed. The changes also took away the trial court's discretion to provide litigants with any leeway when it comes to expert qualifications.

One continuing concern about the effect of these strikethroughs was predicted, in part by the Fourth District Court of Appeals when it ruled on *Weiss v. Pratt,* 53 So. 3d 395 (Fla. 4th DCA 2011). The issue in *Weiss* was whether or not an emergency physician could give an opinion about an orthopedic physician within a limited set of facts. The Court in *Weiss* noted that "[w]hat is clear is that nothing is clear about 'similar specialty.'" More prophetically, and clearly indicative of our current situation, the court further noted: "It would certainly be easier to require the precise area of specialization, but then that requirement might devolve into sub-specialty, sub-sub specialty until there was no one with the same sub-sub-sub specialty. The statute as written allows for sufficient expertise to ensure fairness. It does that by requiring either the same specialty or an expert with sufficient experience to testify." Now, of course, *Weiss* is no longer good law, having

been superseded by the 2013 statute. However, its language, cited above, may provide cover or argument, at least, on some case in the future where a defense lawyer says, "your expert was not precisely the same." The statute does not contemplate sub-sub-sub specialties.

Prior to the 2013 changes, which took effect in July of that year, plaintiffs' attorneys had some sense and security as to what expert was proper, because of the greater breadth of experts that were allowed. The language, since stricken, "*or specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients,*"[2] gave advice and structure as to what a proper expert might be; *i.e.,* one that evaluated, diagnosed, or treated the medical condition at issue.

As *Weiss* predicted, the legislative changes in 2013 did nothing whatsoever to make any clearer what was already unclear to anyone who practices in the area of medical negligence litigation about "same specialty." By reverting to the single test of "same specialty" without defining it, the legislature actually created ambiguity, where before, the ambiguity was circumvented by the safety valve of "similar specialty" to allow for the very "fairness" noted by the Court in *Weiss.*

So in the new, post-2013 world, we are left with the requirement to use an expert in the "same specialty" as the defendant, with no statutory guidance as to what a "same specialty" actually is. On the surface, this seems easy enough. If the potential defendant is a family practice physician, you go and hire a family practice physician. If the potential defendant is an ophthalmologist, you hire an ophthalmologist. To be sure, in many cases this is easy and clear. That is, until you are confronted with an occurrence of the *Weiss* prophecy and find yourself looking for an expert in a case involving an osteopathic (D.O) pediatric orthopedic hand surgeon. Does "same specialty" mean you need another osteopathic pediatric orthopedic hand surgeon, or will an allopathic pediatric orthopedic hand surgeon do? What about an adult orthopedic hand surgeon who does pediatrics? These are the questions that are regularly asked among those of us who do this work and which were predicted by the Court in *Weiss*. What does "same specialty" mean and how far can it be taken by Mr. or Ms. Defense lawyer? Now *that* is the question, isn't it?

In looking for these answers myself, the logical starting point was the definition section in Chapter 766. That section, 766.202, has a myriad of definitions, including what a "health care provider" is and what a "medical expert" is. Section 766.202(4) defines a health care provider as:

> any hospital or ambulatory surgical center as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, part XIV of chapter 468, or chapter 486; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers.

Section 766.202(6) defines a medical expert as: "a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102." Neither definition is helpful in our quest for an answer as to the meaning of "same specialty," so we must look further.

One might logically think that a secondary source like Florida Jurisprudence would be helpful in understanding same specialty requirements. The applicable section, 36 Fla. Jur 2d Medical Malpractice § 67: "Qualification of medical expert for pre-suit corroboration in medical malpractice action; same specialty requirement," fails to define "same specialty" other than to cite to various case examples where rulings were made on specific fact questions concerning expert qualifications. Thus, while it points the practitioner to a research starting point, Florida Jurisprudence provides no definition.

It is well established that the legislature's intent for a statute must be determined primarily from the language of the statute. *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000). When the language of the statute is clear and unambiguous and the language conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation or construction and the statute must be given its plain and obvious meaning. *Id.* If, however, reasonable persons can find different meanings in the same language, the statute may be found to be ambiguous.[3] When a term is undefined by a statute, statutory construction requires a definition according to the term's plain and ordinary meaning.[4] When necessary, the plain and ordinary meaning of a statute can be ascertained by reference to a dictionary.[5] When statutory language is clear, legislative history cannot be used to alter the plain meaning.[6] However, when language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent.[7]

If one argues that the meaning of "specialty" as used in the statute is ambiguous, one could turn to the dictionary as well as the legislative history for meaning.[8] Merriam-Webster defines "specialty," in this sense as a "*special aptitude or skill*." The word "specialize" also appears in section 766.102(5)(a)(1). The intransitive definition of specialize, according to Merriam-Webster, is "*to concentrate one's efforts in a special activity, field or practice*." The term "field," in this context means, according to Merriam-Webster, "*an area or division of an activity, subject, or profession*." Ok, I'll admit, these definitions don't seem to be very helpful either. One could argue that they would actually allow for similar health care providers to give testimony, as long as those similar health care providers had the same "*special aptitude or skill.*" This argument does not seem to have been made in the case law discussed below and would likely be rejected in any future arguments. Thus, again, without

definitions in the statute, even statutory construction at the definitional level may not assist us.

A review of Senate Bill No. 1792's legislative history takes us to the Bill Analysis and Fiscal Impact Statement for S.B. 1792, Judiciary Committee, March 20, 2013. The *Medical Specialists as Expert Witness* section begins on page 5. Here, the very first sentence states: "*The Florida Statutes do not directly define who is a specialist or what specialties exist*." So the legislature knew on day one that the statute, with proposed changes, would not define the critical term. The analysis thereafter appears to try to define what a specialty is. It does so by looking to statutes and advertising regulations which prohibit a physician from holding him- or herself out as a board-certified specialist, unless "*that physician was recognized as a specialist by the American Board of Medical Specialties or other recognized agency that has been approved by the Board of Medicine*." §458.3312, Fla. Stat.[9] At the time of the Bill Analysis, the additional recognized agencies included: the American Board of Facial Plastic & Reconstructive Surgery, Inc.; the American Board of Pain Medicine; the American Association of Physician Specialists, Inc./ American Board of Physician Specialties; and the American Board of Interventional Pain Physicians.[10] The impact statement further noted that osteopathic physicians could not hold themselves out as board certified specialist unless the physician was certified by the American Osteopathic Association or the Graduate Council on Medical Education and was certified as a specialist by an agency approved by the Board of Osteopathic Medicine.[11] The approved, recognized agencies at that time were the American Association of Physician Specialists, Inc., and the American Board of Interventional Pain Physicians.[12] The Association of American Medical Colleges lists 135 specialties and subspecialties in the United States and 40 in Canada.[13] Those specialties can then be viewed in terms of the individual "specialties" pathway.

Do these sections provide guidance on what a same specialty is? The Bill Analysis doesn't specifically state, but as a practice pointer, you should look at the board certification status of the defendant and assure yourself that your expert has the same certification status, by the same organization, in anticipation of an argument by an enterprising defense lawyer. Does this mean that you need a D.O. to criticize a D.O.? That could certainly be argued, if an argument regarding ambiguity were advanced to the point of allowing one to look at the legislative history. So, be careful what you ask for.

This all begs the question as to whether or not osteopathic medicine and allopathic medicine are "specialties." According to the American Association of Colleges of Osteopathic Medicine,

> Osteopathic medicine is a distinct pathway to medical practice in the United States. Osteopathic medicine provides all of the benefits of modern medicine including prescription drugs, surgery, and the use of technology to diagnose disease and evaluate injury. It also offers the added benefit of hands-on diagnosis and treatment through a system of treatment known as osteopathic manipulative medicine. Osteopathic medicine emphasizes helping each person achieve a high level of wellness by focusing on health promotion and disease prevention."

Merriam-Webster defines "osteopathy" as "a system of medical practice based on a theory that diseases are due chiefly to loss of structural integrity which can be restored by manipulation of the parts supplemented by therapeutic measures (such as use of drugs or surgery)." The definition of allopathy is "a system of medical practice that aims to combat disease by use of remedies (as drugs or surgery) producing effects different from or incompatible with those produced by the disease being treated." Based upon definitions alone, the difference between the two seems to be some basic beliefs as opposed to a scientific difference. More important and instructive is the fact that in July of 2020 the American Osteopathic Association merged with allopathic programs to form a single and unified Accreditation Counsel for Graduate Medical Education (ACGME). This means that D.O. medical students and M.D. medical students now use the same process to apply for residencies and post-graduate medical education. Before this merger, M.D. students could only apply to M.D. residencies, whereas D.O. students could apply to either M.D. or D.O. residencies. These days, the difference between the two systems seems to be by way of medical education pathways and seems not to differentiate the two as different specialties, particularly when, specializing, graduate medical education mixes both pathways.

The Florida Statutes separate out "medical practice" and "osteopathic practice" in Chapters 458 and 459, respectively. Section 458.305(3) defines the "practice of medicine" as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." Section 59.003(3) defines the "practice of osteopathic medicine" as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition, which practice is based in part upon educational standards and requirements which emphasize the importance of the musculoskeletal structure and manipulative therapy in the maintenance and restoration of health." While there are obvious differences between the two definitions, neither definition seems to indicate a real difference in "specialty" between the two professions. The common meaning of specialty would not seem to parse out any difference that would be relevant to the two practice definitions or pathways to the practice of medicine.

So what does current law tell us about all of this? At the time of writing, a search for cases relating to section766.102(5), beginning July 2013, reveals few relevant cases. The first to address the issue of "same specialty" is *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017). In *Clare*, Plaintiff utilized a board-certified podiatrist to comment, via presuit affidavit, on a foot and ankle surgery performed by a board-certified orthopedic surgeon. The argument by the defense was simply that the plaintiff's expert was not in the same specialty as the defendant. The argument by plaintiff was that plaintiff's expert focused his practice on foot and ankle surgery just like the defendant, and thus both practiced the same specialty. The Court rejected plaintiff's argument, citing to the 2013 changes to the statute striking the "similar specialties"

language. The Court ruled that "while both doctors' practices focus primarily on foot and ankle surgery, these two doctors have different training and practice in different specialties." The Court further ruled, "it is clear that the legislature intended that specialists from the 'same specialty' be required as corroborating experts in medical malpractice litigation." The Court did not define "specialty" directly. The Court did not say that plaintiff needed a board-certified orthopedic surgeon trained as a M.D. or D.O. It just left it at "training" and "specialties." So here, we have a case that defines the basics for malpractice lawyers. If the defendant is an orthopedic surgeon, you had better get an orthopedic surgeon.

While not a malpractice case, *Myers v. Pasco County School Board,* 246 So. 3d 1278 (Fla. 1st DCA 2018), addressed "same specialty" in the workers' compensation context, as used in section 440.13(2)(f), Florida Statutes. In *Myers,* the compensation claimant requested the permitted one-time change in her treating physician. The original treating physician was an orthopedic surgeon. In response to the request for change, the compensation carrier authorized a neurosurgeon. The claimant objected, stating that she was entitled to a physician in the "same specialty." The comp carrier stated that "specialty" was broader than the "specialty" of the physician and that "specialty" should extend to the types of condition the physician treats. The Court disagreed, holding that "[a] physician who provides similar services in a different specialty does not qualify as a doctor in the 'same specialty' because — quite simply — 'same' is different than 'similar.'" *Id.* Here again, we have an example of what is and what is not a "same specialty." This time, however, the opinion and the facts related to it are narrower. Now, instead of a podiatrist, who clearly has different training than an orthopedic surgeon, we have two medical doctors, a neurosurgeon and an orthopedic surgeon, who were declared to not be in the "same specialty."

Davis v. Karr, 264 So. 3d 279 (Fla. 5th DCA 2019) held specifically that the "same specialty" requirement for testifying experts applies equally to presuit affidavits and to experts at trial.

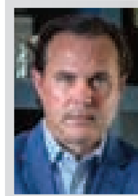
In *Davis*, the plaintiff used several different health care providers to sign presuit affidavits against an orthopedic surgeon. The Fifth District held that any distinction between a presuit affidavit and expert testimony at trial had been eliminated by statutory change in 2003 and as such, presuit expert qualifications were the same as trial expert qualifications and the "same specialty" requirement applies to both.

The most recent case on the issue of "same specialty" is *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019). *Riggenbach* demonstrates a small evolution in the analysis of "same specialty" by including a statement that the statutory language at issue is clear.[14] In *Riggenbach*, the court held that a hand surgeon with plastic surgery training was not qualified to testify against a hand surgeon with orthopedic surgery training.

"Specialty" in all of these cases seems to be the basic, underlying specialty of the potential defendant, as no case that has ruled on this issue thus far has strayed from the basic idea that "same specialty" means that plaintiff's expert must match the underlying "specialty" of the defendant. In each case, the courts seem to have taken the term "specialty" to be that nomenclature associated with the defendant's post-medical graduate training. They have not gone on to use the term "sub-specialty," or "sub-sub specialty." The cases have not latched onto the issue of Board Certification or of fellowship training. The courts have also not made any distinction, thus far, between allopathic physicians (M.D.s) and osteopathic physicians (D.O.s)

For now, until more guidance comes from the courts, it would be the best practice, to the extent possible, to simply always match your expert with that training of the defendant, to eliminate any possibility of objection. To the extent that the potential defendant is a rare bird, a sub-sub-sub specialist, the case law does not yet parse out these distinctions. Good arguments could be made that a court should put a logical limit on "same specialty", however, as it has not been presented to the Courts thus far, we have no case law guidance as to how far down the road "same specialty" could go or be logically taken. Because of this, the best advice is to do what you can to get an expert that matches the potential defendant in training, specifically the training he or she was utilizing, in caring for your client. If you can match DO vs. MD, it is advisable as a "belt and suspenders tactic," but no case, to date has even mentioned the issue. If DO vs. MD comes up, the analysis above should assist any court to determine that there is no training difference at the "specialty" level and therefore DO and MD are simply pathways of medical education and not, in and of themselves, "specialties."

Good luck… J



J. CLANCEY BOUNDS
graduated from the University of Florida with a bachelor's in political science in 1990 and thereafter obtained his Juris Doctorate Degree from Stetson University College of Law in 1993. Bounds is the founder and principle of Bounds Law Group, which limits its practice to medical negligence litigation throughout the country. Bounds is a member of the California, Arizona, Texas, District of Columbia Bar and Florida Bars. Bounds is a member of multiple legal associations including ABOTA, the American Association for Justice and the Florida Justice Association®, where he maintains Benefactor, EAGLE® status.

1 *Davis v. Karr,* 254 So. 2d 279 (Fla. 5th DCA 2019).
2 § 766.102(5), Fla. Stat. (2012)
3 *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452 (Fla. 1992).
4 *Green v. State*, 604 So. 2d 471 (Fla. 1992).
5 *State v. Mitro*, 700 So. 2d 643 (Fla. 1997).
6 *Aetna Cas & Sur. Co. v. Huntington*, 609 So. 2d at 1315 (Fla. 1992).
7 *Magaw v. State*, 537 So. 2d 564 (Fla.1989).
8 *State v. Mitro*, 700 So. 2d 643 (Fla. 1997).
9 Bill Analysis and Fiscal Impact Statement, S.B. 1992, Committee on Judiciary, March 20, 2013.
10 Rule 64B8-11001, F.A.C.
11 §459.0152, Fla. Stat.
12 64B15-14.001, F.A.C.
13 https://www.aamc.org/cim/explore-options/specialty-profiles
14 *Riggenbach v. Rhodes*, 267 So. 3d 551, 554 (Fla. 5th DCA 2019).

Water cuts through rock not because of its strength, but because of its persistence.
Best Lawyers
BEST LAW FIRMS
U.S.News
PERSONAL INJURY LITIGATION - PLAINTIFFS - TIER 1
WEST PALM BEACH
2021
persistence
As your co-counsel, it is our commitment to build authentic relationships through the prioritization of people—creating a genuine, trusted partnership with you and your client.
With ethics, integrity, and purpose at our core, it's our promise to represent your clients as if they were our own.
ROMANO Law Group
ERIC ROMANO
Board Certified Criminal Trial Lawyer
TODD ROMANO
Attorney at Law
JOHN F. ROMANO
Board Certified Civil Trial Lawyer
Palm Beach International Towers • 1601 Belvedere Rd., Ste. 500-S • West Palm Beach, FL 33406 • 561.533.6700 • romanolawgroup.com

Diverse Solutions for a Brighter Financial Future

Balancing safety and growth potential has never been more important.

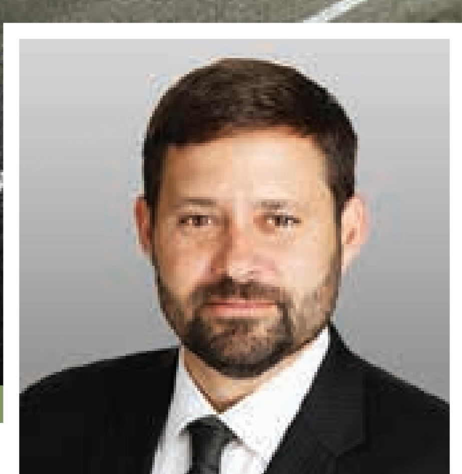
Sage offers a full range of income tax-free and income tax-deferred financial solutions.

Insurance-Based Options:
- Structured Settlement Annuity
- Fixed Indexed Annuity

Market-Based Options:
- Settlements Plus™
- Fee Structure Plus®
- Investment Accounts

Trust Solutions:
- Special Needs Trusts
- Pooled Trusts
- Minors' Trusts
- Settlement Preservation Trusts

FLORIDA JUSTICE ASSOCIATION
BUSINESS FRIEND OF EAGLE
2021



Start Planning Today.

Jay Scarola, CSSC
Settlement Planner
(561) 629-4992
jscarola@sagesettlements.com

PROUD FJA FOUNDER LEVEL BUSINESS FRIENDS OF EAGLE SPONSOR

TITLE IX CIVIL RIGHTS ACTIONS AS A MEANS FOR JUSTICE FOR SEX ABUSE VICTIMS

by Pedro P. Echarte III

Title IX of the Education Amendments of 1972, provides in pertinent part that a person cannot "be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This often-overlooked federal statute can, under the right circumstances, serve as an invaluable tool when representing sex abuse victims in cases stemming from abuse that occurred at or in connection with a school. While there can be benefits to bringing a Title IX claim against a private entity as noted in endnote 2 below, the primary benefit of a Title IX claim is that when suing a public entity your client isn't subject to the sovereign immunity caps set forth in Florida Statute section 768.28(5).

We recently represented five sex abuse victims in a case against the Miami-Dade County School Board (MDCSB). The case arose after a middle school teacher, who had been accused on several prior occasions of misconduct, groomed and sexually abused our clients while they were minors and students at Brownsville Middle School. If we had only pursued negligence claims against the MDCSB, our clients would have been subject to Florida's sovereign immunity caps. And, if we wanted to pursue recoveries in excess of those caps, we would have had to go through the claims bill process. However, by bringing and proving Title IX claims, we were able to recover far in excess of those caps for each of the victims and get them the justice the very much deserved.[1] This article sets forth the facts of the case, the applicable law, and issues to consider when pursuing these claims in the context of our case against the MDCSB.

The Facts

In 1998, the MDCSB hired Wendell Nibbs as a substitute teacher. Fifteen years later, in 2013, he was hired as a full-time teacher at Brownsville Middle School, which is a public school operated by the MDCSB. Nibbs remained at Brownsville Middle School until he was ultimately arrested for sexually abusing our clients in 2017.

Almost immediately after being hired on a full-time basis, allegations of misconduct by Nibbs began to arise. In May 2004, a female student reported that Nibbs asked her if she was having sex. After she told him "no," he said "that's good" and asked if he could perform oral sex on her. A day later, another female student reported that Nibbs grabbed her around the waist and told her "one day you're going to be mine." In March, 2006, another female student reported that Nibbs asked her for a kiss. In 2013, another female student reported that Nibbs showed her a photo of a woman's pierced vagina on his cellphone, touched her legs, and made comments about her "developing body." In 2015, a female teacher reported that Nibbs inappropriately touched her buttocks in the school hallway. In addition to the foregoing acts of sexual misconduct, Nibbs was also accused by two male students of physically assaulting them during that same time frame. Despite this clear pattern of inappropriate sexual (and other) misconduct, the MDCSB concluded that each of these allegations were unsupported by "probable cause" or "unsubstantiated." As a result, Nibbs was allowed to continue teaching at the school. In fact, he was even made the coach of the girl's track team and had an office that opened directly into the girl's locker room.

Not surprisingly, after repeatedly avoiding repercussions, Nibbs became emboldened. He began grooming young girls, especially those particularly susceptible to predatory behavior. This included young girls from lower socioeconomic backgrounds, young girls that had a history of being bullied, young girls that had poor grades, and young girls that had instable family and home backgrounds. Ultimately, he began molesting and raping them. We, along with our co-counsel Aaron Karger of The Law Offices of Aaron A. Karger, P.A., had the privilege of representing five of his victims that were all sexually abused by Nibbs between 2013 and 2017, when he was ultimately arrested.[2]

The severity of the trauma our clients endured as young children cannot be understated. Four of our clients were raped by Nibbs – three of them on multiple occasions. The majority of the abuse occurred at school in Nibbs' office that connected with the girl's locker room. Our fifth client was forced to endure horrific sexual harassment by Nibbs. In addition to making numerous comments about the shape of her body and the type of underwear she wore, he also made disgusting comments about her sexual orientation. The latter centered on graphically telling her that if she experienced male genitalia, she would change her sexual orientation. Each of our clients were particularly vulnerable to abuse for various reasons. And, each of these victims had severe and lasting effects from the trauma they endured. No amount of money could ever compensate them for the abuse they endured, but had they been subject to Florida's sovereign immunity caps, their recoveries would have only exacerbated the injustices inflicted upon them. Thankfully, there was a better path to justice for them.

Title IX History, Framework and Application

In 1972, Congress passed what is now commonly referred to as Title IX, which prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance.[3] The right to a private cause of action for violating the provisions were not addressed in the statute. However, a few years after its passage, in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), the United States Supreme Court recognized the existence of a private cause of action under Title IX. Then, in *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992), the United States Supreme Court held that money damages were available as a remedy to an educational institution's violation of Title IX.

Over the years Title IX has been used by victims to obtain justice for different forms of sex discrimination. These include employee-on-student sexual misconduct, student-on-student sexual misconduct, failure to properly investigate allegations of sexual misconduct,[4] and unequal access to educational programming (*e.g.*, the failure to provide equal access to sports programs). Each of these different types of cases have different standards and burdens. The focus of this article is the framework and elements of proving an employee-on-student sexual misconduct case.

The first two elements common to all Title IX cases is expressly set forth in the statute itself. First, the discrimination must be based on sex. It cannot be based on anything else (*e.g.*, disability, age, etc.). Second, the defendant must be a recipient of federal funds. This does not mean that the educational institution needs to be fully or even substantially funded by the Federal government, but rather only that they receive **some** form of federal financial assistance. Notably, most public school districts and public universities receive some form of federal funding, and therefore are subject to Title IX.

In *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 275 (1998), the United States Supreme Court set forth the elements that must be established to prove a Title IX claim based on sexual misconduct. Each of these will be taken in turn and discussed in more detail below. First, the educational institution must have "**actual notice**" of the sexual harassment or discrimination. Constructive notice is not sufficient. Second, an "appropriate person" must have received the actual notice of sexual harassment or discrimination. This is generally defined as someone that has authority to take corrective action to end the discriminatory behavior. Third, the response to the information must amount to "deliberate indifference," which is an exacting standard and a far more difficult burden to meet than the burden to establish a general negligence claim.

Regarding the notice element, one of the biggest issues that arises in these cases is whether the actual notice was sufficient to meet the requirement set forth in *Gebser*. Courts typically look at whether the notice of prior misconduct was sufficient to put the educational institution on notice that the subsequent harassment is likely to occur.[5] Indeed, in *Gebser*, the Court held that the element of actual notice was not met. In that case, the plaintiff, a high school student who had a sexual relationship with her teacher, based her Title IX claim upon complaints previously made by parents to the school principal about inappropriate comments the teacher made in class. Without describing the specific nature of the comments other than to say they were sexually suggestive, the Court held that the prior reported comments alone were insufficient to alert the principal to the possibility that the teacher was or would be engaged in a sexual relationship with a student, and affirmed summary judgment in favor of the defendant.

Since then, courts have looked to the various factors to determine whether prior allegations are sufficient to meet the actual notice requirement. These factors have included looking at the similarity between the prior reported allegations of misconduct and the abuse endured by the plaintiff, the severity of the prior allegations, the frequency of the prior allegations, and the temporal proximity of the prior allegations to both other prior allegations as well as the plaintiff's abuse. When the prior allegations of misconduct are not exactly similar to what your client endured, you must attempt to draw as many similarities between your client's abuse and the prior reports of misconduct. In addition, building up the severity the prior allegations can assist in establishing this element. Keep in mind that you do not need to (and shouldn't) rely only on the school's records or its own employees' testimony concerning the nature of the prior allegations, which is typically downplayed for obvious reasons. Rather, it is imperative to reach out to the prior victims themselves and see what they experienced and, just as important, what they specifically reported, which can vary greatly from what was memorialized.

In our recent cases against the MDCSB, while we could not establish that any MDCSB official was given information that Nibbs had engaged in a sexual relationship with a student prior to our clients' abuse, we relied heavily on drawing similarities between the past allegations and our clients' abuse. This included Nibbs' expressed desire to engage in sexual acts with young girls (*e.g.*, telling a young female student that he wanted to perform oral sex on her and asking another for a kiss), his inappropriate touching of some of the victims (*e.g.*, grabbing a young female student by the waist and touching a teacher inappropriately), the frequency of the allegations, and finally the fact that the allegations were ongoing up and through the time that our clients fell victim to his predatory behavior. And, while they had not yet testified at the time of settlement, we made contact with several of the prior victims, who were prepared to discuss, *inter alia*, their actual harassment and the specific details of what they reported to school officials. Although the case resolved before summary judgment, we were confident we would have prevailed on this element.

Regarding the appropriate person element, the person receiving the notice must have authority to take corrective action to end the discrimination. This does not necessarily mean that the person must have the ability to terminate the employee causing the abuse. Rather, the person must have authority to take some type of disciplinary action against the employee and must be high enough within the educational institution for the individual's actions to be considered an official decision by that institution. School principals are

generally presumed to be such officials, but that doesn't mean that other individuals, including lower ranking individuals at the school, wouldn't qualify. The key here is to understand this requirement, the parameters of the case law, and come with a discovery plan and strategy to get admissions that the persons that received the knowledge had authority to take **some** action (*e.g.*, reassigning the employee to different position, relocating the employee to a different school, classroom, or area of the school, or to institute additional monitoring of the employee). The more the individual with notice can do, the more likely a court will find that the element was met.

Finally, with respect to the element of "deliberate indifference," courts have strictly interpreted the standard and indicated that administrators will only be deemed to be deliberately indifferent if their response (or lack thereof) to the harassment was clearly unreasonable in light of the known circumstances. This is not an easy burden to meet and many Title IX cases are lost on summary judgment for failing to create an issue of material fact concerning the element of deliberate indifference. The difficulty does not arise in cases where an educational institution fails to take any action in response to an allegation of misconduct as courts have little difficulty in finding deliberate indifference in such circumstances. Rather, the challenge arises when, like in our case against the MDCSB, the educational institution conducts some form of investigation into allegations of misconduct. Because of the parameters set forth by lower federal courts, we attacked the MDCSB on several different grounds to ensure we would get to a jury. These areas included:

- The reasonableness and thoroughness of the prior investigations into prior allegations of misconduct;
- Whether investigators knew of prior allegations of misconduct when investigating subsequent ones and how they utilized the information;
- Irregularities in the investigative process and differences in the manner in which different allegations of sexual misconduct were investigated;
- The evidentiary standard used by the educational institution when investigating allegations and how they applied and interpreted it;
- The timing of the response to the allegations of misconduct;
- The disciplinary action taken, if any, against the assailant;
- Steps taken to the protect victims from the accused (regardless of the outcome of the investigations);
- Steps taken to protect similarly situated potential victims from the accused.

Because the evidentiary burden is so high, the key is to attack the defendant on all fronts and establish numerous failures and inconsistencies in their response to allegations of sexual misconduct. Absent an admission by a defendant that they knew of misconduct and did nothing in response, the task is not easy. Notwithstanding, a detailed discovery plan can assist in developing the evidence needed to get to a jury.

Conclusion

Title IX can be an invaluable path to obtaining justice for your clients when caps or other impediments arise. It is important to understand the law surrounding these claims and devise a plan of attack well in advance of filing your complaint. The more preparation that is done up front, the better chance you will have in prevailing on these types of claims and making meaningful recoveries for your clients. J

PEDRO P. ECHARTE III

Pedro P. Echarte III is a partner at The Haggard Law Firm. Mr. Echarte handles an array of cases for the firm, including negligent security, fire, drowning and other catastrophic personal injury cases. He also handles Title IX cases and other cases stemming from the sexual battery, harassment, and discrimination of victims.

---

[1] Pursuant to the terms of the settlement agreements, neither the plaintiffs nor their counsel can directly disclose the amounts of the settlements. However, because the agreements were a matter of public record, several media outlets obtained the settlement agreements and published the amounts of the settlements. The amount of the settlements can be found with quick internet searches or using the link below:
https://miami.cbslocal.com/2020/11/12/miami-dade-school-board-settles-with-families-of-sexual-assault-victims-for-nearly-9-million/

In addition, upon reading the agreements themselves, several media outlets reported on the confidentiality and non-displacement provisions contained within:
https://www.wlrn.org/local-news/2020-12-30/miami-schools-paid-9m-to-5-students-raped-by-ex-teacher-then-tried-to-keep-it-quiet

https://www.miamiherald.com/news/local/education/article247606095.html

https://www.miamiherald.com/opinion/editorials/article248195070.html

[2] Nibbs was criminally prosecuted. He eventually pled guilty and is currently serving a lengthy prison sentence.

[3] 20 U.S.C. § 1681(a).

[4] Although beyond the scope of this article, it should be noted that there are occasions when it may benefit your client to bring a claim under Title IX against private institutions. For example, if a private educational institution fails to properly or thoroughly respond to and investigate allegations of misconduct there may be a Title IX claim to pursue, even where there isn't a viable negligence claim because, for example, there were no warning signs surrounding the perpetrator that the institution should or could have known about prior to the abuse that forms the basis of your clients' claims. The key in this type of case is establishing that the institution's response to the allegations failed to comply with Title IX and caused the client to be deprived of the benefits of an educational program on the basis of sex (*e.g.*, having to switch schools, feeling uncomfortable around accuser that remained in school, etc.).

[5] This standard is generally applied in cases brought wherein the victim is relying upon the educational institution's deliberate indifference towards past allegations of misconduct. In contrast, where the victim themselves allege discriminatory behavior that the educational institution is deliberately indifferent towards and the discrimination continues, courts are more inclined to the find the notice requirement is met. This is true even where the subsequent discriminatory behavior is more severe or of a different nature than initially reported.

THE TRUCK ACCIDENT LAW FIRM

TRUCKING TRIAL ATTORNEYS

www.TruckCrashLaw.com

Our Firm specializes in catastrophic trucking, bus & CMV crash cases.

- Hidden Motor Carriers
- Broker Liability
- Shipper Liability
- Double Brokered Loads
- Trailer Coverage
- Interchange Coverage
- Negligent Selection
- Agency & Control
- Excess/Umbrella Coverage

We know where to look to find all potential parties and commercial insurance policies.

Michael J. Leizerman
IL, OH, MI, NY & TN Only

Joseph A. Fried
GA, FL, TX, NY & TN

Joseph V. Camerlengo
Florida

Gregg J. Anderson
Florida

Let us help you make a difference for your clients!

We pay permissible referral & co-counsel fees.

WE LOOK FORWARD TO CO-COUNSELING WITH YOU

888-511-TRUCK

JACKSONVILLE | MIAMI

Main Office | *Available for Consultation*

FABRE DEFENDANTS IN A PRODUCT LIABILITY ACTION

by Michael Hamilton Kugler and Shannon Baer

In 2011, the Florida Legislature amended Florida's comparative fault statute, Fla. Stat. § 768.81, to overrule the Florida Supreme Court's holding in *D'Amario v. Ford Motor Co.,* 806 So. 2d 424, 426 (Fla. 2001), in which the court held that in "crashworthiness" or "enhanced injury" cases, a product liability defendant may not apportion fault to the person or entity causing the initial crash or injuries. In amending § 768.81, the Legislature attempted to make clear that Florida's comparative fault scheme should apply to any action, including enhanced injury cases, in which negligence is alleged to have contributed to an accident or injury. In so doing, the Legislature added definitions to the statute, which rather than clarifying matters, actually muddied the waters. The statute defines a "negligence action" as:

> "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.[1]

The statute further defines "Product liability action" as:

> "Products liability action" means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product. The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.[2]

Does the 2011 legislative change to Florida Statute § 768.81 require that a defendant in a product liability case can apportion fault to other persons or entities in the chain of distribution under any circumstance? No. Despite the statute's inclusion of strict liability within the definition of "negligence action," there is simply no legitimate basis upon which fault can be apportioned to persons or entities who are subject to strict liability. In *West v. Caterpillar Tractor Company*, 336 So.2d 80, 92 (Fla. 1976), the Florida Supreme Court adopted the doctrine of strict liability as set forth in section 402A of the Restatement (Second) of Torts. Recently, in *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 510-512 (Fla. 2015), the Florida Supreme Court reiterated that the Restatement (Second) of Torts applies to strict liability cases in Florida. In a claim of strict product liability, a seller, manufacturer, designer, or distributor of a defective product is liable whenever the defect causes an injury, even if they are free of fault.[3] The rationale for the doctrine is that those entities within a product's distributive chain who profit from the sale or distribution, rather than an innocent injured person, should bear the financial burden of even an undetectable product defect.[4] Because strict liability is a form of liability without fault, it is inappropriate to apportion fault between defendants under § 768.81, in cases based upon strict liability.[5]

Indeed, Florida Courts have routinely held that a defendant cannot apportion fault to a nonparty, where the defendant is vicariously liable for the nonparty. In *Grobman v Posey,* 863 So. 2d 1230, 1235-36 (Fla. 4th DCA 2003), the Court considered the issue of whether an HMO could or should have been listed on the verdict form as a *Fabre* defendant. With respect to the vicarious liability claim against the HMO for the actions of physicians, the Court noted that the HMO would not have been a proper *Fabre* defendant because apportionment of fault is not appropriate where a defendant's liability is only vicarious.[6] This is so because the vicariously liable party is responsible to the plaintiff to the same extent as the primary actor; both are jointly liable for all the harm that the primary actor has caused.[7]

In Florida, a party in the chain of distribution is essentially vicariously liable for a product defect that is present based on the conduct of the product's manufacturer.[8] Similarly, a manufacturer is vicariously liable for a defect which exists because of the conduct of a component part manufacturer.[9] Thus, in cases of strict liability, apportionment should not apply to those parties who are in the chain of distribution, all of whom are strictly liable for the conduct of the manufacturer or component part manufacturer.[10]

Consider a case where a retailer, such as Lowe's, is sued for damages resulting from a barbecue grill explosion where the grill was designed and manufactured by a third-party, then sold to the

customer by Lowe's. Plaintiff brings a strict liability claim against Lowe's only alleging that Lowe's sold a third-party's grill that was defectively designed or manufactured. Under *West*, Lowe's is liable to the Plaintiff for the damages suffered as "one who sells any product in a defective condition unreasonably dangerous to the user or consumer..."[11] However, if Lowe's is permitted to apportion fault to the third party manufacturer (who is the only entity responsible for the defect), then Lowe's would completely avoid liability, effectively abolishing strict liability in Florida.

Nevertheless, defendants may attempt to argue that apportionment applies carte blanche to all products liability actions, even those based solely on strict liability, because of the 2011 amendment to the comparative fault statute as noted above.[12] Such an argument should be rejected because the expressed and sole purpose of the amendment was to overrule the Florida Supreme Court's decision in *D'Amario, supra,* in which the Court held that fault in an enhanced injury, crashworthiness products liability claim could not be allocated to someone causing the initial accident. The bill itself states:

> The Legislature intends that this act be applied retroactively and overrule *D'Amario v. Ford Motor Co*., 806 So. 2d 424 (Fla. 2001), which adopted what the Florida Supreme Court acknowledged to be a minority view. That minority view fails to apportion fault for damages consistent with Florida's statutory comparative fault system, codified in s. 768.81, Florida Statutes, and leads to inequitable and unfair results, regardless of the damages sought in the litigation.[13]

Similarly, the senate staff analysis summarizes the bill as follows:

> CS/SB 142 changes the apportionment of damages in products liability cases in which a plaintiff alleges an additional or enhanced injury (e.g., crashworthiness cases). More specifically, the fact finder in these cases must consider the fault of all persons who contributed to the accident when apportioning fault among the parties who contributed to the accident. … The bill contains intent language and legislative findings that the provisions in the bill are intended to be applied retroactively and overrule D'Amario v. Ford Motor Co.[14]

The amended statute itself appears to limit the application of comparative fault principles only to those product liability cases involving enhanced injuries (whether based on negligence or strict liability), by expressly providing:

> In a products liability action alleging that injuries received by a claimant in an accident were enhanced by a defective product, the trier of fact shall consider the fault of all persons who contributed to the accident when apportioning fault between or among them. The jury shall be appropriately instructed by the trial judge on the apportionment of fault in products liability actions where there are allegations that the injuries received by the claimant in an accident were enhanced by a defective product.[15]

There is absolutely no indication that the 2011 amendment was intended by the legislature to eliminate strict liability or overrule *West* and its progeny.[16] If so, this would certainly be news to the Florida Supreme Court who just recently reaffirmed its commitment to *West*.[17] Indeed, in construing § 768.81, courts have repeatedly held that because the apportionment statute is in derogation of common law, it must be strictly construed in favor of the common law, and should not be interpreted to change common law any more than is clearly and unequivocally necessary.[18]

Conclusion

In most strict liability cases, a Plaintiff files both strict liability and negligence counts against each defendant in the chain of distribution. Proceeding to jury on both strict liability and negligence claims complicates the issue of whether a defendant can successfully place another entity within the chain of distribution on the verdict form for purposes of apportioning fault. When a defendant's negligence results in a design or manufacturing defect, it is possible for a jury to consider the fault of others as compared to the fault of the negligent defendant. In other words, in deciding the negligence of any defendant, fault is a relevant consideration for the jury.

However, when a jury is only considering a strict liability claim against an entity in the chain of distribution, fault is irrelevant.[19] The relevant consideration for the jury is whether the product was "in a defective condition unreasonably dangerous to the user or consumer…[and] it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[20]

The conclusion above is consistent with a long line of cases from the Florida Supreme Court. In *Hoffman v. Jones* in 1973, the Florida Supreme Court first receded from the contributory negligence stating:

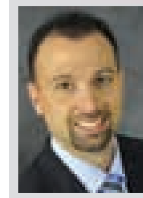
> If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.[21]

Following *Hoffman*, the Florida Supreme Court in *Lincenberg v. Issen* eliminated the rule requiring contribution among joint tortfeasors because "it would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault.[22] In 1986, the Florida Legislature enacted § 768.81 abolishing joint and several liability except in certain circumstances.[23] Finally, in 2006, the Florida Legislature abolished joint and several liability in Florida.[24]

The shift in Florida law from a contributory negligence jurisdiction to a pure comparative fault jurisdiction, lead to what is now known as the *Fabre* Defendant. In *Fabre v. Marin*, the Florida Supreme Court went further to clarify the integral role of fault, particularly in light of the enactment of § 786.81.[25] The Court concluded that

the plain language of § 768.81 was unambiguous and "the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident…"[26]

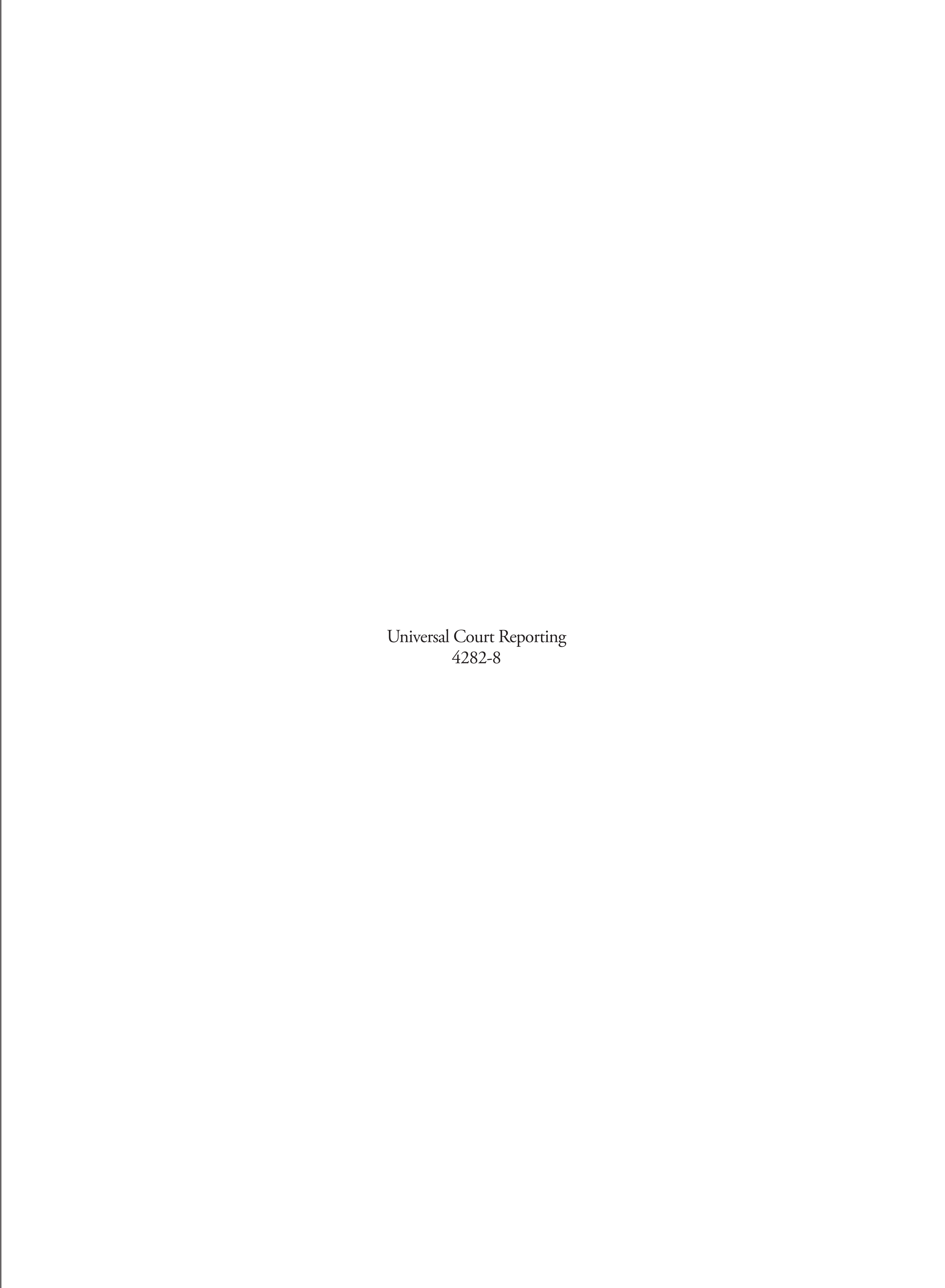
Strict liability is liability without fault. Therefore, when filing and litigating product liability cases, practitioners should be mindful that there are circumstances where pursing only strict liability claims may be the more advantageous for the client and the client's cause, with respect to potential apportionment issues. This is especially true in circumstances where a party within the distributive chain is overseas or has filed for bankruptcy protection.



MICHAEL HAMILTON KUGLER
Michael Hamilton Kugler is an associate with Searcy Denney Scarola Barnhart & Shipley, P.A. in the firm's West Palm Beach office. He has spent his career fighting for victims of injustice both inside and outside of the courtroom. He practices in all areas of personal injury litigation with a special focus on product liability and catastrophic injury cases. He is an EAGLE member.

SHANNON BAER
Bio

1. Fla. Stat. § 768.81(1)(c).
2. Fla. Stat. § 768.81(1)(d).
3. *See* Restatement (Second) of Torts § 402A(2): "The rule stated in subsection (1) applies although, (a) the seller has exercised all possible care in the preparation and sale of his product…"
4. *See Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, 1068 (Fla. 1994).
5. The *West* Court acknowledged that the comparative negligence of the plaintiff may be a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.,* 336 So. 2d 80, 92 (Fla. 1976).
6. *Id.* at 1235.
7. *Id.; see also, Nash v. Wells Fargo Guard Services, Inc.,* 678 So. 2d 1262, 1263-64 (Fla. 1996)(a named defendant cannot apportion fault to a nonparty who is vicariously liable); *J.R. Brooks & Son, Inc., v. Ouiroz,* 707 So. 2d 861, 863 (Fla. 3d DCA 1998)(§ 768.81 did not apply to party whose fault was solely vicarious); *Suarez v. Gonzalez*, 820 So. 2d 342 (2002)(excluding unnamed independent contractor hired by landlord from verdict form because the case involved liability that was vicarious in nature (nondelegable duty), rendering § 768.81 inapplicable).
8. *Costco Wholesale Corp. v. Tampa Wholesale Liquor*, 573 So.2d 347 (Fla. 2nd DCA 1991); *Julien Benjamin Equip. Co. v. Blackwell Burner Co.,* 450 So.2d 901 (Fla. 3rd DCA 1984); *K-Mart Corporation v. Chairs*, 506 So.2d 7 (Fla. 5th DCA 1987); *Barnes v. Kellogg,* 846 So.2d 568, 571-2 (Fla. 2d DCA 2003), disapproved on other grounds by 906 So.2d 1037 (although the strict liability of a retailer for a manufacturer's product is not usually described as a form of "vicarious" liability, it is a form of liability without fault. There is no rational method to apportion fault between the strictly liable retailer, who has committed no negligent act, and the manufacturer who produced a product with a hidden defect. In such a case, where the retailer's liability is not based on fault, § 768.81(3), does not allow the defendants to apportion damages between themselves. They are jointly and severally liable for all damages).
9. *Houdile Industries v. Edwards*, 374 So.2d 490, 493, n.3 (Fla. 1979).
10. The author is aware of *Am. Aerial Lift, Inc. v. Perez*, 629 So. 2d 169, 170 (Fla. 3d DCA 1993) in which the court held that the liability of other entities in the distribution chain must be considered when assessing the liability of a commercial lessor of an allegedly defective product, even if other entities are not parties to suit. While it is unclear at best, a close reading of *Perez* suggests that it involved both claims of strict liability and negligence. Indeed, the *Perez* Court expressly notes that the commercial lessor, who was the named defendant, had argued below that "*if it were negligently or strictly liable for the defect*, any or all of the other entities in the distributive chain—manufacturer, distributor, and previous owner—might also be similarly responsible." *Id.* (emphasis added). The verdict form in the underlying case confirms that the jury was presented with the issue of negligence and not soley strict liability. Additionally, *Perez* has not been subsequently cited for the proposition that parties within the distributive chain may apportion fault to each other in cases that are based solely on allegations of strict liability.
11. *See* Restatement (Second) of Torts § 402A.
12. *See* Fla. Stat. § 768.81(1)(c).
13. 2011 Fla. Sess. Law Serv. Ch. 2011-215 (C.S.S.B. 142) (WEST)
14. Florida Staff Analysis, S.B. 142, 2/10/2011
15. *See* § 768.81(3)(a)(2), Florida Statutes.
16. Only one Florida Court has considered such an argument in a products liability action and has found it to be so wholly unpersuasive that it issued a per curium opinion affirming the trial court's decision to strike a *Fabre* affirmative defense asserted against a nonparty in the distributive chain who had manufactured a component incorporated into a motorcycle. *See V-8 Choppers LLC v. McCudden*, 177 So. 3d 618 (Fla. 2d DCA 2015). The parties' briefs on the issue are instructive. *See* 2014 WL 9954081(initial brief) and 2014 WL 9911558 (answer brief).
17. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 510-512 (Fla. 2015).
18. *See Merrill Crossings Associates v. McDonald*, 705 So.2d 560, 562 (Fla. 1977); *R.J. Reynolds Tobacco Co. v. Sury*, 118 So.3d 849, 852-3 (Fla. 1st DCA 2013).
19. Caution: Federal Courts in Florida have indicated that they may be amenable to apportioning fault in strict liability cases. For example, in *Sorvillo v. Ace Hardware Corp.,* No. 2:13-CV-629-FTM-29, 2014 WL 3611147 (M.D. Fla. July 22, 2014), the court entered an order at the motion to dismiss stage striking a prayer for relief which requested that a manufacturer and retailer be held jointly and severally liable for plaintiff's strict liability claims, after noting that § 768.81's definition of negligence claim included strict liability. It is important to note that *Sorvillo* also included negligence counts and could be distinguished on that basis for cases in which a plaintiff is only pursuing strict liability claims. In *Gutierrez v. Imt Integral Medizintechnik AG*, No. 3:14CV271/MCR/CJK, 2014 WL 11512206 (N.D. Fla. Dec. 29, 2014), the plaintiff filed a motion to strike defendants' apportionment affirmative defense in a case involving strict liability claims against a product manufacturer and seller for injuries the plaintiff sustained during a hip replacement surgery. The defendants argued that Florida's apportionment statute specifically provides for apportionment of damages in strict liability cases without regard to the nature of the relationship between the potentially liable parties. The Court denied the motion to strike on the basis that it could not conclude that the defense was patently frivolous on the face of the pleadings or "clearly invalid as a matter of law." *Id.* at *3. However, it should be noted that the court did not entirely reject the defendants' argument that apportionment would be appropriate regardless of the nature of the relationship between the potentially liable parties. Specifically, the court cited § 768.81's inclusion of strict liability within the definition of negligence action and also noted that Florida cases allow apportionment with respect to the comparative negligence of the plaintiff in strict liability cases depending on the circumstances. *Id.*
20. Restatement (Second) of Torts 402A(1). *See also*: Fla. Standard Jury Instruction 403.7.
21. *Hoffman v. Jones*, 280 So.2d 431, 436 (Fla. 1973)
22. 318 So.2d 386, 391 (Fla. 1975)
23. 1986 Fla. Sess. Law Serv. Ch. 86-106.
24. 2006 Fla. Sess. Law Serv. Ch. 2006-6.
25. *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993)
26. *Id.*


Universal Court Reporting
4282-8

DAUBERT AND THE EMA: TWO WRONGS...

by Mark A. Touby and Richard E. Chait

On December 31st, just before we all said goodbye to 2020, the First DCA issued an opinion in *Cristin v. Everglades Corr. Inst.*, 1D19-1245 (Fla. 1st DCA 2020); 2020 Fla. App LEXIS 18686[1] that may impact the process of appointing an Expert Medical Advisor (EMA).

An EMA[2] is appointed by the judge of compensation claims (JCC) "[i]f there is disagreement in the opinions of the health care providers, if two health care providers disagree on medical evidence supporting the employee's complaints or the need for additional medical treatment, or if two health care providers disagree that the employee is able to return to work." Fla. Stat. § 440.13(9).

In *Cristin*, the claimant fell at work and sustained a serious head injury. On the way to the hospital, he suffered a seizure. *Cristin* at 2. His diagnosis included right cerebral contusion with associated seizure disorder. *Id.*, at 3. Following his discharge from the hospital, he did not return to work for several months. *Id*. About six months later, and after his anti-seizure medication was discontinued, he had a seizure at home and was taken to the emergency room. *Id.*

The cause of the original fall at work was contested. The claimant argued that the fall resulted from an unknown syncopal episode, and because he was in the course and scope of his employment at the time of the fall, the accident is presumed compensable. *Id*. The defense argued that the fall resulted from treatment for a pre-existing condition that was unrelated to work. Ibid. The Independent Medical Examiner (IME) for each side testified consistent with the respective position of each party. *Id.,* at 5. At the deposition of the IME for the Employer/Carrier (E/C), the claimant's attorney asserted a *Daubert*[3] objection and subsequently filed an amendment to the pretrial stipulation objecting to the IME physician's testimony. *Id.*, at 6. Based on the conflicting medical opinions, the attorney for the E/C filed a motion for appointment of an EMA, and the attorney for the Claimant filed a motion to strike the testimony of the E/C's IME

as pure opinion. Id., at 7. The JCC[4] denied the motion to strike indicating, it is "not literally possible" to exclude the testimony because the JCC is the trier of the fact and the arbiter of admissible evidence and appointed an EMA. *Id.*, at 7-8.

The EMA's opinion was consistent with that of the E/C's IME. *Id.*, at 8. At the final hearing, the claimant's attorney renewed the *Daubert* objections, and the JCC found that there was no clear and convincing evidence to reject the EMA's presumptively correct opinion and denied all benefits. *Id.*, at 8-9.

In *Cristin*, the First DCA reversed and remanded with instructions to the JCC to analyze and rule on the *Daubert* objection in accordance with *Booker v. Sumter Cnty. Sheriff's Office/N. Am. Risk Servs.*, 166 So. 3d 189, 193-195 (Fla. 1st DCA 2015). *Id.*, at 17. The Court explained that the original JCC erred as a matter of law by failing to address the claimant's *Daubert* objection, and the successor JCC erred by not applying the *Daubert* analysis when the objection was renewed. Id., at 13.

The Court explained that the JCC failed to perform the essential gatekeeping function to determine whether there was admissible evidence to support the appointment of an EMA. The First DCA had previously reversed the appointment of an EMA when the JCC failed to rule on the admissibility of the medical opinion of a physician prior to determining if the physician was an authorized treating provider, an IME or an EMA. *Miller Elec. Co. v. Oursler*, 113 So. 3d 1004, 1007-08 (Fla. 1st DCA 2013).

So how does the First DCA's opinion in *Cristin* change the current practice?

> If there is disagreement in the opinions of the health care providers, if two health care providers disagree on medical evidence supporting the employee's complaints or the need for additional medical treatment, or if two health care providers disagree that the employee is able to return to work, the department may, and the judge of compensation claims shall, upon his or her own motion or within 15 days after receipt of a written request by either the injured employee, the employer, or the carrier, order the injured employee to be evaluated by an expert medical advisor. The injured employee and the employer or carrier may agree on the health care provider to serve as an expert medical advisor. If the parties do not agree, the judge of compensation claims shall select an expert medical advisor from the department's list of certified expert medical advisors. If a certified medical advisor within the relevant medical specialty is unavailable, the judge of compensation claims shall appoint any otherwise qualified health care provider to serve as an expert medical advisor without obtaining the department's certification. The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims. *The expert medical advisor appointed to conduct the evaluation shall have free and complete access to the medical records of the employee . . . .*

Fla. Stat. § 440.13(9)(c) (emphasis added)

The EMA has "free and complete access to the medical records of the employee." This would include inadmissible medical records. It is not uncommon in the practice for the medical records of physicians to be attached to a motion to appoint an EMA without the doctors being deposed or any other steps taken to make the records admissible. This may now change because of *Cristin*. Medical opinions must now be admissible in order to create a conflict necessitating the appointment of an EMA; even though the records available for the EMA to review and consider in making opinions need not be admissible, at least for now.

According to Fla. Stat. section 440.13(5)(e), "No medical opinion other than the opinion of a medical advisor appointed by the judge of compensation claims or the department, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the judges of compensation claims." The JCC will need to perform the gatekeeping function to determine which of the following three categories applies to the medical records.

First, the medical records and opinions of the authorized treating health care provider are admissible pursuant to Fla. Stat. section 440.29(4), "All medical reports of authorized treating health care providers relating to the claimant and the subject accident shall be received into evidence by the judge of compensation claims upon proper motion. However, such records must be served on the opposing party at least 30 days before the final hearing. *This section does not limit any right to further discovery, including, but not limited to, depositions.*" (emphasis added). So even though the statute permits the records into evidence and the opinions are admissible, either party may utilize the deposition of the healthcare provider to establish a basis for the gatekeeper to consider.

Second, the IME physicians' opinions in the medical records are hearsay. Fla. Stat. § 90.801(2)(c). They also require authentication. Fla. Stat. section 90.901. This can be accomplished by deposition or agreement of the parties. Deposing the doctor will provide the opportunity for *Daubert* objections as well as any other evidentiary objections.

Third, the opinions of health care providers that are not authorized by the E/C and not designated as an IME are inadmissible and will not provide an evidentiary basis for the JCC to appoint an EMA. However, there are some limited exceptions that would allow these opinions to be considered; for example, agreement of the parties or a prior determination that the opinions were rendered for emergency care.

The result of the *Cristin* case may lead to delays in the resolution of some of these issues. Due to the 210-day time restriction imposed by statute to bring an issue to final hearing from the date the Petition for Benefits (PFB) is filed, and considering the EMA is usually appointed close in time to the final hearing, it will be more difficult to complete all discovery needed to determine the need for an EMA, schedule the EMA, receive the report and then depose the EMA. How this affects the overall timeliness of proceeding will depend on how well litigants and JCCs manage the changes.

There are two other noteworthy issues that are mentioned in the *Cristin* case.

In dicta, the Court discussed the error and why it is not a harmless error despite the fact that the EMA is an admissible opinion. In doing so, the Court reiterated that the EMA's "opinions intended to carry the presumption of correctness are *only* those that address already identified disagreements in medical opinions; all other medical opinions expressed by the EMA carry the same weight as that of an independent medical examiner or an authorized treating physician." *Cristin* at 16 (citing *Lowe's Home Centers, Inc. v. Beekman*, 187 So. 3d 318, 322 (Fla. 1st DCA 2016)). This raises the question, if the EMA doesn't agree with any of the medical opinions, but has another opinion not previously presented, does it have the presumption of correctness?

Second, the underlying issue of the cause of the syncopal fall is discussed, but not decided to be the determinative legal question for this appeal. Considering the claimant's position is that the fall is unexplained, and the E/C's position is that the fall is explained by a pre-existing condition, the Court has signaled that the claimant's position provides adequate legal basis for determining if the fall is compensable. This would quell the concern predicted by Judge Bilbrey's dissent in the en banc decision *Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133 (Fla. 1st DCA 2019) which addressed the "arising out of" requirement for accidents at home.[5]

> The majority incorrectly cites the exception applicable to idiopathic conditions mentioned in *Golly* as if it was the rule. Majority op. at 4. But in *Walker* we recognized that only if a personal or idiopathic condition is involved is it necessary for "claimants to establish that 'the employment itself created the hazard of the risk.'" 95 So. 3d at 943 (quoting *Hernando Cty. v. Dokoupil*, 667 So. 2d 275, 276 (Fla. 1st DCA 1995)). If an idiopathic or preexisting injury is not involved, then it does not matter that the injury could have also occurred had the employee not been at work. "Only if the employer and carrier have satisfied that burden of proof [that an idiopathic or preexisting condition was involved] is it appropriate for the JCC to hold the claimant to the more stringent standard for compensability . . . to establish that the employment exposed the claimant to risk of injury greater than the employee would normally encounter in non-employment life." *Bryant v. David Lawrence Mental Health Ctr.*, 672 So. 2d 629, 631 (Fla. 1st DCA 1996). The majority opinion discards this well-stated holding from *Bryant*.

Valcourt, supra, at 1146.

If the line of cases that unexplained falls are presumed compensable had been overruled by *Valcourt*, then there would have been no reason to reverse and remand *Cristin*. This lends support to Judge Bilbrey's observations in his dissent in *Valcourt:* "I think these doctrines survive since they spring from the Florida Supreme Court; but how should the majority's narrow interpretation of occupational causation be seen by a claimant, employer, claim's adjuster, attorney, or JCC? Markets crave certainty, and the Florida workers' compensation system is a huge market. By the majority's opinion, we have injected substantial uncertainty in the multibillion-dollar Florida workers' compensation marketplace." *Valcourt*, *supra,* at 1147 (Fla. 1st DCA 2019).

This predicted uncertainty has been borne out. In recent JCC orders, there has been a divergence in the interpretation of an unexplained fall at the workplace following the *Valcourt* decision. Some of these orders will be making their way to the First DCA soon, so watch this space. ■

MARK A. TOUBY is the managing partner of Touby, Chait & Sicking, PL. He has been a Board Certified Workers' Compensation Lawyer since 2011. His practice focuses on workers' compensation and public employee benefits. He has served as president of Florida Workers' Advocates (FWA), chair of the Workers' Compensation Rules advisory committee and as a member of the Executive Council of the Workers' Compensation Section of The Florida Bar. He is AV rated by Martindale-Hubbell and is a recipient of the Jon E. Kupnick Award.

RICHARD E. CHAIT is a shareholder and partner with the law firm of Touby, Chait & Sicking, PL. He currently serves on the FJA® Board of Directors – Executive Committee and is the chair of the FJA® Workers' Compensation Section. He is a past chair of The Florida Bar Workers' Compensation Section and past president of the Florida Workers' Advocates (FWA). Throughout his career, he has maintained a vital role in Florida's political, legislative and leadership process on behalf of Florida's injured workers and the Workers' Compensation System. He is a recipient of the FJA® Jon E. Krupnick Award, Cornerstone Award and Silver Eagle Award (2017, 2018); the inaugural recipient of the David H. Levine Outstanding Leadership Award and Stewart L. Colling Legislative Leadership Award (FWA) and the Frierson-Colling Professionalism Award (Workers' Comp Section).

---

1 At the time this article was written, the opinion was not final pending any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

2 For a more detailed explanation of the history and role of the EMA see How to Turn an Opinion into Fact: Enter the EMA by Richard E. Chait and Mark A. Touby, FJA Journal Vol. No. 609, p.46.

3 *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)

4 The JCC who was assigned the case subsequently retired and the case was reassigned to another JCC.

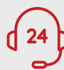
5 For a more detailed explanation of the opinion in *Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133 (Fla. 1st DCA 2019) see Birth of the Home Workplace Doctrine by Richard E. Chait and Mark A. Touby, FJA Journal Vol. No. 608, p.46.

LEGAL INTAKE DONE RIGHT

WE ARE THE LEADER IN CALL, INTAKE & RETAINER SERVICES FOR LAW FIRMS

Alert Communications is a US-based, legal only call center that handles leads, current clients and intake for attorneys in every practice type.

We customize calls and intakes and are open 24/7/365 acting as an extension to all law firms, resulting in the highest client satisfaction and lowest lead loss possible.



Call Services

Customized, bilingual call answering services that include message taking, call forwarding, appointment scheduling and more.

Intake Services

We screen new clients based on your preferences and determine if they are qualified or need to be referred elsewhere.

Retainer Services

Experienced legal intake specialists take leads from initial contact to an e-signed contract and that is posted directly to your CRM or CMS.

CAPTURE MORE CLIENTS WITH ALERT

CALL US AT **800.289.4658** OR VISIT US ONLINE AT **ALERTCOMMUNICATIONS.COM**

ROY'S TRIAL LAW TIPS

by Roy D. Wasson

This issue's Civil Procedure column by Bard Rockenbach deals with properly framing claims in the pleadings. My "Tips" this issue offer advice on pleading as well, with Tip No. 13[1] dealing with amendments to the pleadings sometimes necessitated by not following Bard's advice to study the elements of your claim before drafting the complaint. My second Tip, No. 50, addresses whether or not to plead *res ipsa loquitur* as a separate count in your complaint.

Tip No. 13

Amendments to Pleadings to Defeat Summary Judgment – Never Too Late

It is ***never*** too late to amend your complaint or another pleading in order to defeat a motion for summary judgment. I personally have set the record for last-minute motions to amend, so I can tell you from experience to never, never, never give up.

Although it was almost 40 years ago, I'll always recall that hangdog look on the face of my co-counsel as he shuffled toward the lobby past my office. "What's wrong, Paul?" I asked him. He had that look on his face the associates in our firm wore when snagged by a partner to cover a doctor's depo. set to start at 4:00 p.m. on a Friday at some Hialeah hospital. But Paul was on his way to Key West for a summary judgment hearing (assumedly followed by a weekend of fun). Why so glum?

"I'm gonna lose this [bleeping] summary judgment hearing," Paul lamented. "It's on insurance coverage, and the policy is clearly against me." Paul explained that a key coverage provision which his client thought said one thing had been entered differently on the dec sheet. There was no ambiguity, just a policy which said the opposite of what the client expected.

"Reform the policy," I counseled. "It probably was just a scrivener's error on the part of whoever keyed-in the information on the declarations page." "Too late now," Paul said resignedly. "The hearing has been set for a month and it's tomorrow morning; I'm going to the Keys this afternoon."

"Never too late," I promised, grabbing the file from Paul to copy the case style from some pleading. It was lunchtime and no secretary was in sight, so I rolled a sheet of 14-inch long legal paper into the nearest IBM Selectric typewriter, and started tapping away with both index fingers: "Motion to Amend Pleadings."

Paul looked at me like I was trying to resuscitate a cardiac arrest patient with a Band-Aid. He accepted my feeble typing effort, but still was resigned to losing, predicting: "Judge Lester never is going to grant this, on the day of the hearing."

As feared, the judge denied the motion. But we reversed him on appeal, and I take special personal pride in one sentence from the opinion: "Leave to amend should be freely given when justice so requires, Fla. R. Civ. P. 1.190(a), *the more so when a party seeks such a privilege at or before a hearing on a motion for summary judgment.*"[2]

Check your complaint before the hearing on a defense motion for summary judgment, to see if there is a cause of action you could have pled but did not. Amend your pleadings now to defeat the summary judgment motion.

"But I'm already on my Third Amended Complaint," you insist. "The judge never will allow another amendment." Wrong. The Courthouse Legend of a "three strikes" rule of pleading should not be a barrier. *See Alvarado v. Manro, Inc.,* 550 So. 2d 1174, 1175 (Fla. 3d DCA 1989), which cited my *Old Republic v. Wilson* case in reversing a summary judgment based on the trial court's denial of a motion for leave to further amend the *Fourth Amended Complaint!*

As the facts of your lawsuit evolve, so must (or should) your pleaded theories of liability and avoidances to defenses. Take a minute or two to review the operative pleadings (including the defendant's answer) in your cases. Then envision how you would have pled your claims if you knew then what you know now and amend.

Tip No. 50

Pleading *Res Ipsa Loquitur* as a Separate Count

A. Introduction:

Any time a trial lawyer has a case which might be appropriate for a *res ipsa loquitur* instruction, the question comes up whether to plead that as a separate count in the complaint. The defense will almost always move to dismiss such a count using the cases which hold that *res ipsa* is an evidentiary doctrine, not a separate legal theory. Some defense attorneys are just trying to bill the file on a minor motion which will make no real difference to them in the outcome of the case. Others seem Hell-bent on striking your *res ipsa* count, even if you will be entitled to an instruction on that theory at the end of trial.

I recommend that trial lawyers continue to plead *res ipsa* as a separate count for two reasons: First is because I have seen trial judges become confused at the charge conference when the plaintiff asks for a *res ipsa* instruction and the defense pulls the cheap tactic of arguing "that plaintiff did not plead *res ipsa*, so no instruction should be given on that theory." Second, when you plead a count for *res ipsa*, the defendant's adjuster will be asking defense counsel about that theory and you will be getting the point across from the start of the case that you can win at trial without direct evidence of negligence.

There is no Florida case which forbids pleading *res ipsa* as a separate count. Here is some ammunition to defeat a motion to dismiss such a count.

B. Distinguishing Defendant's Cases:
Defense attorneys sometimes support motions to dismiss *res ipsa* counts with cases that do not disapprove of pleading such counts at all. Instead, some such cases reverse dismissals of complaints which had been based on the failure of plaintiffs to plead basic facts amounting to negligence or to plead that such evidence is not needed under *res ipsa.* One such case is *LaMack v. Fountainbleu Hotel Corp*.[3] That decision merely establishes that a complaint should not be dismissed for failure to allege the elements of *res ipsa loquitur*. But just because a plaintiff can get to the jury on *res ipsa* without having pled that theory does not equal the holding that pleading the theory is improper.

Another defense tactic is to move to dismiss based on case law which discusses in general terms the limited applicability of the *res ipsa* doctrine, but which do not involve the propriety of pleading such a count. One such case is *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*[4] which does not involve any question of pleading, much less disapproves the practice of separating *res ipsa* into a separate count. Those cases which hold that given evidence is not enough to get to the jury under *res ipsa* do not support dismissal where you have pled the elements of a *res ipsa* case.

C. Cases Supporting Pleading Res Ipsa as Separate Count:
The few cases which expressly involve the situation of a plaintiff pleading separate counts for negligence and *res ipsa* do not disapprove of that practice, and tacitly recognize the appropriateness of separating such claims into separate causes of action. Those cases include decisions in which the dismissal or summary judgment in favor of the defendant on one count is affirmed, but the trial court's ruling on the other count is reversed, signifying the propriety of pleading separate counts.

In *Cheung v. Ryder Truck Rental, Inc*.[5] The plaintiff sued three defendants in a five-count complaint. Count one was against John Slein for negligently failing to maintain and inspect the rear wheel of the Toyota during transit. Count two was filed against the owner of the Toyota "James Slein for negligently for failing to maintain and inspect the wheel of the Toyota prior to permitting the towing of the vehicle." Count three was a claim against "Ryder for negligence in failing to properly warn of danger and properly instruct in the proper use of the towing apparatus." Count four was against "John and James Slein for unspecified negligence under the theory of res ipsa loquitur." Count five was a claim against three defendants "under the dangerous instrumentality doctrine."

Significantly, the Fifth District in *Cheung* affirmed the summary judgments entered for the defendants on all three of the active negligence counts, count one, count two, and count three. Although it affirmed the trial court as to count four (*res ipsa*) as it applied to one of the defendants, James Slein, the court held: "We reverse the summary judgment entered in favor of John, however, because we find that *res ipsa loquitur* is particularly applicable in wayward wheel cases."[6] Thus, the court noted that there were different elements in the count for ordinary negligence than in the count for *res ipsa* and treated them as if they were properly pled separately.

The Supreme Court decided a case in which separate counts were set forth for negligence and *res ipsa* , without disapproving of the practice, in *Unicare Health Facilities v. Mort.*[7] In that case, the Supreme Court noted:

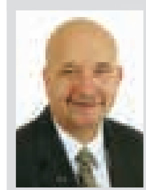
> Following several motions to dismiss and strike, Hoak filed an amended complaint on February 5, 1987. *Count one sought compensatory damages and costs based on the negligence theory of res ipsa loquitur*; count two sought compensatory damages, punitive damages and costs based upon alleged intentional, grossly negligent, or negligent, acts of the nursing home staff; and count three sought compensatory damages, punitive damages, costs, and attorney's fees, based upon Unicare's alleged violation of sections 400.022-.023 of the Florida Statutes (1983)[8].

Although not involving the propriety of the pleading issue, the case tacitly condones the practice of separating *res ipsa* into a separate count.

Similarly, other appellate courts in Florida have dealt with cases in which *res ipsa* was pleaded as a separate count, without disapproving of the practice. *See Farrington v. McConnell*,[9] in which the court held: "the complaint was founded on three counts. . . . The third count is based upon a theory of *res ipsa loquitur*." *See also, e.g., Donner v. Morse Auto Rentals, Inc*.[10], in which the court noted: "the second amended complaint consisted of seven alleged causes of action. . . .The seventh cause of action was based upon the doctrine of *res ipsa loquitur*." *See also* 65A C.J.S., Negligence §187 [12] at 366 (1966)("Separate counts, one alleging specific acts of negligence and the other relying on the *res ipsa loquitur* doctrine may be proper."

D. Conclusion:
It makes common sense to keep the counts for negligence and *res ipsa* separate, because they are based upon different evidence. The Florida Rules of Civil Procedure expressly permit pleading in the alternative. Therefore, a count for negligence which pleads specific acts and a count for res ipsa can be raised in the alternative. There is nothing improper or misleading about the way such counts are pled in the typical complaint. Such motions to dismiss should be denied. But even if granted, the judge should not deny your right to an instruction on that doctrine at the end of the case.

Keep tryin'!



ROY D. WASSON
is board certified in appellate practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases. He is an EAGLE® patron, a former member of the FJA® Board of Directors, a fellow of the Academy of Florida Trial Lawyers, a past chairman of the FJA® Appellate Practice Section, and a member and past chair of the Amicus Curiae Committee. Wasson is a recipient of the FJA® Gold EAGLE®, Silver EAGLE® and Bronze EAGLE® awards, the Legislative Leadership Shoe Leather Award, and the S. Victor Tipton Award for Legal Writing. He has served as chair of The Florida Bar Appellate Court Rules Committee, its Appellate Certification Committee, and its Appellate Practice Section.

---

1 For our new readers, my Tips are numbered consistently with their online publication on the TLEL listserve

2 *Old Republic Ins. Co. v. Wilson*, 449 So. 2d 421, 422 (Fla. 3d DCA 1984) (emphasis added).

3 186 So. 2d 31 (Fla. 3d DCA 1966)

4 358 So. 2d 1339 (Fla. 1978).

5 595 So. 2d 82 (Fla. 5th DCA 1982).

6 *Id.* at 883.

7 553 So. 2d 159 (Fla. 1989).

8 *Id.* at 160 (emphasis added).

9 183 So. 2d 585, 586 (Fla. 2nd DCA 1966),

10 147 So. 2d 577, 579 (Fla. 3d DCA 1963).

Call For Nominations: FJA Officers and Directors and PAC Trustees

The FJA/FJ PAC Nominating Committee is seeking nominations for FJA Officer Positions of President-Elect, Treasurer and Secretary and 12 vacancies on the FJA Board of Directors. The FJ PAC is seeking nominations for District 2 Board of Trustees vacancy.

The committee will present a slate of nominees to the membership for consideration at the FJA General Membership Meeting at 1:15 p.m. on Wednesday, June 9, 2021. The Annual General Membership Meeting is held in conjunction with the Florida Justice Association's Annual Convention, June 9-12, 2021, at the Four Seasons, Orlando. Nominations will also be accepted from the floor at that meeting. Elections for these FJA/FJ PAC positions will take place on Thursday, June 10, 2021, from 3:30 p.m.-5 p.m.

If you are interested and would like further information about FJA Officer and Board of Director positions, please contact Michelle Crumbliss by May 7, 2021 at (850) 521-1028 or mcrumbliss@myfja.org.

Producing Results since 1985

800-526-5643 or 904-399-8825

www.videolawservices.com

- **100% Admissibility Record**
- **Award Winning Team of Former Journalists**
- **We Produce Results -** Let us tell your client's story in a clear, compelling manner.
- **Settlement Documentaries Day in the Life Documentaries**

Michaela Miller
President/CEO

Fast Funds

PRE-SETTLEMENT CASH FOR YOUR CLIENTS WITHOUT FEES OR INTEREST

Fast Funds eliminates the pressure to accept a lower settlement.
Take the time you need to settle your client's case for its maximum value.

Our program is the fairest in the non-recourse funding industry. Unlike other companies, we have no fees or charges. And, we do not charge interest, no matter how long it takes for the case to resolve.

Don't *Settle* For Less

We fund all types of personal injury cases.

We comply with all state laws and ethical rules.

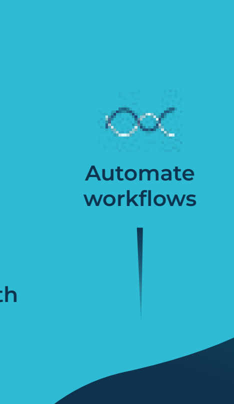
We only get paid if the case is won.

Disclaimer: An attorney should not discuss non-recourse advance funding with a client unless it is done in compliance with Florida Bar Ethics Opinion 00- 3. The Florida Bar discourages the use of non- recourse advance funding companies. An attorney may provide a client with information about companies that offer non- recourse advance funding if it is in the client's interest and done in compliance with Florida Bar Ethics Opinion 00-3. The individual lawyer is responsible for ensuring that his or her conduct is in compliance with the Rules Regulating The Florida Bar and comports with Florida Ethics Opinion 00-03. The Florida Justice Association recommends that attorneys who do provide names of non- recourse advance funding companies to clients should provide only names of companies that are in conformity with the guidelines contained in the agreement between the New York Attorney General and certain companies dated Feb. 17, 2005. The Florida Justice Association makes no determination or representation as to whether any particular non-recourse advance funding company is in conformity with Florida Bar rules or opinions, or any other guidelines.

New Address: 2727 Bruce Terrace, Hollywood, Florida 33020
Phone: 954-927-4376 • Fax: 954-927-4374 • Email: money@fastfunds4you.com • www.FastFundsForYou.com

"Litify is, by far, the best product on the market that does what it does."

Robert Rubenstein
CEO, President



The legal platform trusted by
Florida's top law firms.

BUILDING A PROPER FOUNDATION FOR YOUR LAWSUIT

by Bard D. Rockenbach

Just as every building needs to have a strong foundation, every lawsuit must begin with a proper complaint. The complaint is the foundation of the claim. It sets the stage for everything that follows. Obtaining discovery will be impossible if the claims are not properly stated and explained. The trial court has to know why discovery is relevant, and it will look to the complaint for that determination. More importantly, the complaint acts as a constraint at trial, limiting the evidence presented to the allegation and claims presented in the complaint. I have seen dramatic events unfold at trial when defense counsel points out that the complaint's allegations are too narrow to allow certain evidence or claims at trial.

In a previous article, I discussed the "statement of ultimate facts" necessary to support a cause of action required by Rule 1.110, Florida Rules of Civil Procedure. The bottom line of the discussion was that the complaint must contain sufficient ultimate facts, but not detailed facts. A related rule, Rule 1.120 Pleading Special Matters, sets out what is required — and not required — when pleading certain matters that fall outside of the "general" category. The Florida rule is similar to Rule 9(a)(1)(C) Federal Rules of Civil Procedure. In this same category is another related rule, Rule 1.130 Attaching Copy of Cause of Action and Exhibits.

General Pleading to State a Claim

Before drafting a complaint, it is important to know the elements of the causes of action you intend to plead. While many causes of action can be stated by alleging 1) duty, 2) breach of duty, 3) causation, and 4) damages, that is only the start of your task. Many causes of action have different elements and specific allegations of fact which must exist in addition to, or instead of, the basic elements above. The best practice is to spend a few minutes performing some research or consulting with your favorite appellate specialist. There are many texts that provide the information as well, and it is a good investment to have one handy. Pleading the claim properly will save time and energy later in the litigation if the complaint clearly and accurately states the causes of action. It is critical to the litigation that you know the elements of each cause of action and have them properly stated. After that, discovery is simply the process of gathering all the evidence available to prove the claims while trial is the process of presenting the evidence. The weekend before trial is not the time to figure out the elements of the causes of action.

But the general pleading rules in Rule 1.110 are only the start. From that point you must add the special pleading rules, and then the extra-special pleading rules.

Allegations of Capacity, Authority or Legal Existence

The first paragraph of Rule 1.120 sets out what is *not* required, "It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent necessary to show the jurisdiction of the court." It isn't necessary to allege that a person is an adult and *sui juris*, or that the personal representative was appointed by the court on a certain date. But the rule further states that the age of a minor *must* be alleged.

Note that the rule does not excuse the need to allege sufficient ultimate facts to support *standing*, which is different from *capacity*.[1] Capacity refers to the absence of a legal disability to being a party, whereas standing requires the party to have sufficient interest in the action.[2] This rule puts the burden on the party challenging capacity, authority or legal existence of the plaintiff on the defendant. The plaintiff can allege capacity, authority and legal existence generally but the defendant must challenge that allegation "by specific negative averment" in the answer, including all the particular facts known to the defendant.

The phrase "organized association of persons" does not mean a corporation. An organized association of persons can be any unincorporated group of people, such as a fraternity, sorority, or a labor union.[3] However, applying this rule to most unincorporated entities is problematic. While the rule provides that an "organized association of persons" can be made a party, the Third District has held that voluntary unincorporated associations cannot be sued except by suing and serving all its members.[4] The court wrote that the legislature would have to create an enabling statute for unincorporated associations to be a party to a lawsuit. Such a statute exists in Florida with regard to labor organizations, but not other types.[5]

Allegations of Fraud or Mistake

Subsection (b) requires that allegations of fraud and mistake be made with specificity. This subsection has been the bane of many attorneys because opposing counsel, and some judges, seem to have an insatiable need for specificity. It applies to both the complaint and defenses raised.[6] In general, the specificity requirement means the pleader must plead all elements of fraud, and identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading.[7] The specificity requirement also applies to negligent misrepresentation.[8]

Of course, making specific allegations related to an omission, as opposed to a statement of fact, is much more difficult. By its nature, an omission is a statement which is never made, so alleging when it was made and under what circumstances it was made is an impossibility. An allegation that the plaintiff did not have an equal opportunity to be aware of the facts may be sufficient to avoid that issue.[9]

Special Damages

The final major requirement of the rule is to plead all elements of special damage. There are two types of damages recoverable in a lawsuit, general and special. Knowing what constitutes special damage is not always easy. "General damages" are commonly defined as those damages which are the direct, natural, logical and necessary consequences of the injury.[10] "Special damages" consist of items of loss which are peculiar to the plaintiff but do not necessarily naturally flow.[11] The purpose of the pleading rule is to prevent surprise at trial.[12]

In a personal injury case, pain and suffering are considered general damages, while loss of earnings, lost earning capacity and medical expenses are special damages.[13] Other special damages could be almost anything, depending on the cause of action and the circumstances of the claim. For instance, although attorney's fees are not generally recoverable as special damages, there is an exception under the wrongful act doctrine. The wrongful act doctrine allows a plaintiff to recover attorney's fees as special damage when a defendant's wrongful act caused the plaintiff to litigate with a third party.[14] Liabilities to third parties caused as a result of the defendant's conduct would also be special damages.[15] In general, special damages can be any economic consequence of an event or breach of contract, as long as the plaintiff can satisfy the requirement of causation.

Of special note are causes of action where pleading and proving special damages is an element of the claim. Such is the case for Slander of Title, where a person makes a false statement related to real property, such as filing a Notice of Interest or a Lis Pendens, or a lien, which has no basis in fact.[16] There are no general damages that can flow from the claim, so special damages must be alleged. A direct lawsuit by a shareholder against a corporation also requires the existence of some special injury to the shareholder that is separate and distinct from injuries to all other shareholders.[17] Damages are also an essential element for claims of fraud and fraudulent concealment.[18]

I personally find decisions holding that damages are "an essential element" of a fraud claim a bit confusing because damages are an essential element of every tort claim. A person can be extremely negligent by speeding while drunk and blindfolded, but there is no cause of action for even simple negligence unless that negligence causes damages. Without a negative consequence there is no cause of action.

Attaching Exhibits

The final related rule of pleading is Rule 1.130, which concerns attaching exhibits. That rule provides:

"All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading."

Obviously, for a breach of contract action, a copy of the contract (or the material portion of the contract), note or insurance policy must be attached. The same is true for any cause of action based on a document. Less obvious is when a tort cause of action relies on a document, such as when a duty is created by a contract.[19] Under those circumstances the supreme court has said the contract creating the duty to third parties must be attached, and the complaint should be dismissed with leave to amend if the contract us not attached.[20] In *Conklin*, the plaintiff sued an architect for wrongful death of a worker on the construction site. The court held that the architect's contract should have been attached to establish whether the architect's relationship to the building project created a duty to third parties.

But this rule clearly does not require that the entire document must be attached, only a "copy of the portions thereof material to the pleadings."[21] There is a good reason not to attach an entire document if it isn't necessary. Any exhibit attached to a pleading is part of the pleading, and if an attached document negates the cause of action, the plain language of the document controls and may be the basis for a motion to dismiss.[22] All the extra provisions of a contract can be a playground for defense counsel, and amending to remove the negative material is generally not persuasive with the trial court.

That is not to say all the evidence proving the allegations must be attached. This rule only requires the plaintiff to attach a document on which the action is brought.[23] There is no need to prove the entire case by attaching documents. In fact, Rule 1.130 prohibits "unnecessary" documents from being attached.

All lawsuits need a proper foundation to be successful. Taking the time to research and decide on a successful strategy is the first step. Making sure the strategy is then implemented properly in the complaint is crucial. Perhaps an old expression from the construction industry is applicable here: "Measure twice, cut once." J

BARD D. ROCKENBACH
is a board-certified appellate practitioner at Burlington & Rockenbach, P.A., in West Palm Beach. With fellow shareholder, Phil Burlington, and Associates, Nichole Johnston Segal, Adam Richardson, and Jeffrey Mansell, the firm provides appellate and trial support services in civil cases throughout Florida. Rockenbach has handled cases in trial courts and the appellate courts since 1988 which have been concentrated in the areas of tobacco litigation, medical negligence, trucking negligence, insurer bad faith and insurance coverage. Rockenbach is an FJA EAGLE® Patron.

---

1 *Llano Fin. Group, LLC v. Yespy*, 228 So. 3d 108, 111 (Fla. 4th DCA 2017).
2 *Keehn v. Joseph C. Mackey & Co.*, 420 So. 2d 398, 400 fn 1 (Fla. 4th DCA 1982).
3 *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So. 2d 889, 892 (Miss. 1992).
4 *Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B.*, 770 So.2d 1267, 1269 n. 3 (Fla. 3d DCA 2000); *Johnston v. Meredith*, 840 So. 2d 315, 316 (Fla. 3d DCA 2003).
5 § 447.11, Fla. Stat. Actions and suits; labor organizations as parties
6 *Cady v. Chevy Chase Savings & Loan, Inc.*, 528 So.2d 136 (Fla. 4th DCA 1988); *Thompson v. Bank of New York*, 862 So. 2d 768, 771 (Fla. 4th DCA 2003).
7 *Robertson v. PHF Life Ins. Co.*, 702 So. 2d 555, 556 (Fla. 1st DCA 1997); *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009). *See Schryburt v. Olesen*, 475 So. 2d 715, 717 (Fla. 2d DCA 1985)(holding it was not necessary to allege the fraud was conducted through agents)
8 *Morgan v. W.R. Grace & Co.--Conn.*, 779 So. 2d 503 (Fla. 2d DCA 2000).
9 *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994).
10 *Keystone Airpark Auth. v. Pipeline Contractors, Inc.*, 266 So. 3d 1219, 1222 (Fla. 1st DCA 2019).
11 *Ephrem v. Phillips*, 99 So. 2d 257, 260 (Fla. 1st DCA 1957)
12 *Land Title of Cent. Florida, LLC v. Jimenez*, 946 So. 2d 90, 93 (Fla. 5th DCA 2006).
13 *MGH Enterprises, Inc. v. Nunnally*, 536 So. 2d 317, 319 (Fla. 3d DCA 1988).
14 *Rayburn v. Bright*, 163 So. 3d 735, 736–37 (Fla. 5th DCA 2015); *Cinco v. Coquina Palms Homeowners Assoc., Inc.*, 45 Fla. L. Weekly D2004 (Fla. 5th DCA Aug. 21, 2020).
15 *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1292 (Fla. 4th DCA 2002).
16 *Trigeorgis v. Trigeorgis*, 240 So. 3d 772, 775 (Fla. 4th DCA 2018).
17 *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731, 739 (Fla. 3d DCA 2014).
18 *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)
19 *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003).
20 *Conklin v. Cohen*, 287 So. 2d 56, 60 (Fla. 1973).
21 *Nat'l Collegiate Student Loan Tr. 2006-4 v. Meyer*, 265 So. 3d 715, 720 (Fla. 2d DCA 2019) (holding that only the relevant pages of the contract need to be attached).
22 *Southeast Med. Products, Inc. v. Williams*, 718 So. 2d 306, 307 (Fla. 2d DCA 1998).
23 *Fed. Nat. Mortg. Ass'n v. Legacy Parc Condo. Ass'n, Inc.*, 177 So. 3d 92, 93 (Fla. 5th DCA 2015)(reversing dismissal where the trial court required plaintiff to attach documents to prove it had standing to sue).

Robson Forensic, Inc.
4282-29

If your law firm has a client with a mass tort case, contact the law firm of Levin Papantonio to discuss a referral or co-counsel relationship.

LEVIN PAPANTONIO

Thomas | Mitchell | Rafferty | Proctor | P.A.

316 SOUTH BAYLEN STREET SUITE 400 | PENSACOLA, FL 32502 | 850.435.7000

Maximize Your Recovery With A Settlement Documentary

"Settled for eighteen times the policy limits! Family is very happy and relieved.
-Steve Barnes, Barnes Trial Group
Tampa, FL"

"Well worth the investment!
-Dan Chamberlain, Cohen & Malad, LLP
Indianapolis, IN"

"The final product was a high quality production, well edited and did a good job of presenting the case.
-Andrew Wozniak, Greco & Wozniak, PA
Tampa, FL"

"Five Stars!!!
-Scott Jeeves, Jeeves Law Group
Tampa, FL"

"The value they added to the case is immeasurable!
-Vanessa Cantley
Bahe Cook Cantley & Nefzger
Louisville, KY"

"The best money I ever spent on a case!
-Mindy Miller, Swope Rodante P.A.
Tampa, FL"

image resources, inc.
AMERICA'S LEGAL VIDEO EXPERTS®

813.618.3108 tampabay@i-r.com www.i-r.com

WHAT TO DO WHEN YOUR JUDGE DOES NOT FOLLOW THE LAW?

by Jed Kurzban and Lauren Gallagher

A judge's duty is to ensure that the law is followed. But what are your options when the judge assigned to your case just does not follow the law?

As judges continue to interpret law and make decisions, we have seen a sharp decline in the doctrine of stare decisis. And while the legal system is still an imperfect institution, the doctrine of stare decisis should provide uniformity and consistency as courts look to past, similar issues to guide their decisions.

The principle of stare decisis, requires lower courts to take account of and follow the decisions made by the higher courts where the material facts are the same. As a general rule, courts should follow earlier decisions of themselves or of other courts of the same level or a higher level. This principle is essential to the rule of law because it guides judges and creates consistency.[1] This establishes trust in the courts and ensures political pressures do not affect the impact of justice.[2]

However, what relief options are available if the trial judge assigned to your case does not take account of and follow the decisions made by these courts. Unfortunately, in some cases, nothing other than the appellate process can address the merits of your judge's decision. And while a timelier process to review district court decisions would be ideal and ensure justice is not delayed, an overhaul of the system is likely not in the cards. However, a more attainable option to hold judges responsible for their errors would include a mix of better training, accountability, and oversight. In the meantime, what do you do when the law is not followed?

I. Available Relief

a. Final Orders

Under the provisions of Article V, section 4(b)(1) of the Florida Constitution, the district courts of appeal have jurisdiction to hear appeals from final judgments and orders of trial courts that are not appealable to the supreme court or to a circuit court.[3] A final judgment or order is one that disposes of the cause on its merits leaving no question open for further judicial action except for the matter of enforcement. The traditional test as explained by the Florida Supreme Court in determining the issue of finality is "whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the causes between the parties directly affected."[4]

b. Nonfinal Orders

If an order is nonfinal, it is only immediately appealable if it falls within one of the categories identified in Rule 9.130 which include orders that:

> (A) concern venue; (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions; (C) determine: (i) the jurisdiction of the person; (ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve, or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment; (iii) in family law matters: a. the right to immediate monetary relief; b. the rights or obligations of a party regarding child custody or time-sharing under a parenting plan; or c. that a marital agreement is invalid in its entirety; (iv) the entitlement of a party to arbitration, or to an appraisal under an insurance policy; (v) that, as a matter of law, a party is not entitled to workers' compensation immunity; (vi) whether to certify a class; (vii) that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes; (viii) the issue of forum non conveniens; (ix) that, as a matter of law, a settlement agreement is unenforceable, is set aside, or never existed; or (x) that a permanent guardianship shall be established for a dependent child pursuant to section 39.6221, Florida Statutes. (D) grant or deny the appointment of a receiver, or terminate or refuse to terminate a receivership; or (E) grant or deny a motion to disqualify counsel. (F) deny a motion that: (i) asserts entitlement to absolute or qualified immunity in a civil rights claim arising under federal law; (ii) asserts entitlement to immunity under section 768.28(9), Florida Statutes; or (iii) asserts entitlement to sovereign immunity.[5]

An appeal of such orders would be considered an interlocutory appeal. The rule is strictly construed, and it does not authorize an appeal from any order other than those listed.

A nonfinal order for which no appeal is provided by Rule 9.130 is reviewable by certiorari in limited circumstances. A common law writ of certiorari is a form of extraordinary relief which allows for review of nonfinal orders of lower tribunals that are not subject to interlocutory appeal under Rule 9.130. An appellate court may review such an order by certiorari if there is no other adequate remedy, and if it can be shown that the order to be reviewed constitutes a departure from the essential requirements of

law.[6] Essentially, the order must cause an injury that could not be corrected on appeal from the final judgment. For example, "cat out of the bag" discovery rulings or decisions evidencing a trial court's departure from essential procedural requirements set by law are cases in which certiorari may be appropriate.[7]

However, many civil nonfinal orders do not fall under any of the above exceptions. For example, certiorari is not available to prevent broad discovery that is not otherwise protected by a legal privilege.[8] In such a case, the order is nonfinal and nothing other than the appellate process, initiated post judgment, is available.

II. **Decisions Against Precedent**

Your client in a medical malpractice action seeks economic damages arising from his lost wages and lost earning capacity. To assist the factfinder in determining the lifelong damages your client has suffered, you offer expert testimony from an extremely well-qualified economist. However, the judge assigned to your case grants the defendant's motion to exclude your expert's lost earning capacity testimony and evidence. What are your options?

a. **Lost Wages vs. Lost Earning Capacity**

It is well settled precedent that the Florida Supreme Court articulated the standard by which future economic damages are measured stating that "the appropriate test is to permit the recovery of future economic damages when such damages are established with reasonable certainty."[9] For lost earning capacity, you know that "[a]ll that is required to justify the instruction is that there be reasonably certain evidence that the capacity to labor has been diminished and that there is a monetary standard against which the jury can measure any future loss."[10] You also know that even housewives have a loss of earning capacity claim.[11] Your client has a clear monetary standard to measure future loss, including incorporation of his business, invoices, receipts, etc. documenting payments for materials and products, and prior taxable earnings which should be considered by the jury. Therefore, how can the judge assigned to your case decide that your client has no lost earning capacity or diminution of earning capacity as clearly established by precedent?

Unfortunately, you also know that the judge's order excluding your lost earning capacity claim is a non-final order. As such, it is only immediately appealable if it falls within one of the categories identified in Rule 9.130. Regrettably, this type of order does not fall into one of those categories. Nor does this order qualify for review under the strict standards of certiorari. Unfortunately, the appellate rules indicate that an appeal at the end of your case is an adequate remedy in this circumstance. What can you do?

The judge assigned to your case clearly did not ensure that the law was followed. The judge simply ruled in a manner that was incorrect under the applicable law. In this instance the judge's misunderstanding or misapplication of the law is material. Expert witness testimony is essential to your case and the inability to immediately appeal the judge's bad decision is an injustice. However, the merits of your judge's decision can only be addressed through the appellate process which could take years, not to mention the time and money needed to try your initial case knowing it will need to be retried. Justice for your client is significantly delayed.

III. **The Need for a Better Review Process**

In the above example, a timelier process to review your judge's decision would be ideal and ensure justice for your client is not delayed. Making a mistake when applying the law does not make a judgment wrongful, but judges make mistakes – they are human. Unfortunately, your client is set to suffer. Delays in obtaining legitimate verdicts can have huge consequences. Often justice delayed is justice denied.

a. **Expand the Review**

Even the best efforts can lead to incorrect conclusions. But, as discussed, nonfinal orders are only reviewable under narrow circumstances. And only the Florida Supreme Court is empowered to grant interlocutory jurisdiction to the district courts of appeal. The Florida Supreme Court needs to incorporate statutory language into the appellate rules to broaden the categories of appellate jurisdiction. An overhaul of the system is needed and a broadening of the nonfinal order categories would accomplish this. Unfortunately, an overhaul by the Florida Supreme Court is unlikely. As such, a better system may be a more localized plan in which more judges are held responsible for their errors through better training, accountability, and oversight.

b. **Better Training**

Currently, the Florida Rule of Judicial Administration 2.320(b)(2) establishes education requirements for judges new to a level of trial court.[12] The Florida Judicial College operates these programs which include a trial skills workshop and orientation program, a curriculum focusing on complex substantive and procedural matters, and a year-long mentor program.[13] All judges new to the bench are required to complete the Florida Judicial College program during their first year of judicial service following selection to the bench.

This orientation program includes a mock trial experience and an in-depth trial skills workshop. In addition, the mentor program helps provide new trial court judges regular one-to-one guidance from experienced judges.[14] The mentor program also ensures new judges have access to critical information, court resources, and one-to-one guidance. The new judge may be afforded an opportunity to observe other judges handling matters over which he or she will later be expected to preside. Though not an exclusive resource, mentors are a primary contact for new judges during their first full year in office.[15]

While this program helps educate and guide new judges, it more so helps new judges address their new judicial responsibilities, rather than substantive training. Florida judges may all be attorneys, but they need additional training beyond law school and their prior experience in a specialized practice area. New judges should also be subject to continued training similar to and in addition to continuing legal education mandated by state bars for lawyers. There should also be training as many judges may not have the trial experience needed in more difficult cases. Such training can inform and educate judges as to the substantive law apt to the division they are presiding. This will ensure more educated and responsible judges.

c. **Accountability**

Judges can also be held responsible for their errors through more accountability. Judges should be accountable to the law and not to public opinion. This is why elected judges are thought to promote judicial accountability while appointed judges are thought to promote judicial independence.

As Americans, we believe that the best form of government is one that we elect and participate in. Citizens participate by voting. However, electing a judge is very different from electing other state officials because judges must be impartial. Electing judges makes intuitive sense in a democracy. But, when judges are elected in the same way politicians are elected, they

tend to act like politicians. As such, when judges are elected based purely on their party affiliation the result is political advocacy from the bench. That is the opposite of an independent judiciary. We are currently seeing unprecedented politicization of all matters and we need to insulate judges from acting as the legislature.

Often the judicial system becomes more political through judicial appointments. Unfortunately, the appointment method of judge selection is even more so dominated by special interests. When a judge is appointed, the individual(s) in charge of appointment will look at the entire record of the potential judge. Although this is a more in-depth consideration of a judge rather than just checking their party affiliation, it tends to appoint judges who will implement a particular party's platform. And while in theory judicial appointment should allow judges to make decisions regardless of whether voters agree, we cannot always trust that our elected officials will appoint only the most qualified candidates to the bench rather than a candidate that will blindly execute a particular party's platform.

Judges should be selected with the intention of being objective and non-partisan because they are expected to make decisions, even when unpopular. Their decisions should be independent of special interests and the popular political climate. However, this is typically not the case for appointed judges.

Instead of following the law, these judges often attempt to back their personal decisions into legal rules and precedents – the exact opposite of stare decisis. Lack of accountability allows for this corruption of values. Who sits on the bench has high stakes as justice in America is typically delivered first through the state courts. It should be impartial, and judges should be held accountable for their errors, ignorance, or malpractice. Voting judges out of office keeps them accountable to ensure that justice is served in our courts, not political advocacy.

d. **Oversight**

Judges are meant to serve the public. However, in many cases, nothing other than the appellate process addresses the merits of a judges' decisions. When this happens, the public directly suffers for the lack of adherence to the rule of law. As such, more oversight is necessary at the lower level in order to remedy the problem in a timelier manner. The public should not have to suffer for a judge's lack of training or impartiality without some insight as to how often they are removed or overturned or disciplined.

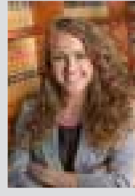
Judges in the district court should be reviewed by peers, appellate panels, and practitioners on a yearly basis. When a judge's decisions are being overturned on appeal with enough frequency, they should be called into account. This can be done through a combination of monetary penalties, suspensions, and/or continuing education and training programs.

While it is not favorable to constrain a judge's autonomy, such oversight would make sure that when judges fail, they are held accountable. Because when judges fail the public suffers not only on an individual level but also by making our legal system less reliable.

IV. **Conclusion**

In conclusion, as judges continue to interpret law and make decisions, we have seen a sharp decline in the uniformity and consistency of courts. This is a result of poor training, continued political pressures, and lack of local oversight. The public suffers when there is nothing other than the appellate process to address a trial judge who does not take account of and follow the decisions made by higher courts. A timelier process to review district court decisions would be ideal and ensure justice is not delayed. However, an overhaul of the system is unlikely. Nevertheless, a more attainable option is to hold judges responsible for their errors through better training, accountability, and oversight. Perhaps a program with the Florida Bar can help protect our profession and the citizens of Florida. As the Florida Bar regulates attorneys, perhaps a collaboration with the Florida Judicial Qualifications Commission can help bring back some stability to the courts and the predictability of the law. J

JED KURZBAN
Bio



LAUREN GALLAGHER
Bio

[1] Lewis F. Jr. Powell, *Stare Decisis and Judicial Restraint*, 1991 J. Sup. Ct. Hist. 13 (1991).
[2] Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 Const. Comment. 271 (2005).
[3] Art. V, § 4, Fla. Const.
[4] *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97 (Fla. 1974).
[5] Fla. R. App. P. 9.130.
[6] *Jaye v. Royal Saxon, Inc.,* 720 So. 2d 214, 215 (Fla. 1998).
[7] *Tyco Products, L.P. v. 2711 Hollywood Beach Condo. Ass'n, Inc.*, 207 So. 3d 299 (Fla. 3d DCA 2016).
[8] *Board of Trustees v. Am. Educ. Enter., LLC*, 99 So. 3d 450 (Fla. 2012).
[9] *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995).
[10] *Long v. Publix Super Markets, Inc.*, 458 So. 2d 393, 394 (Fla. 1st DCA 1984).
[11] *Goldstein v. Walters*, 126 So. 2d 759 (Fla. 2d DCA 1961); *Grant v. Hoffman*, 151 So. 2d 287, 288 (Fla. 2d DCA 1963); *See also North Broward Hosp. Dist v. Johnson*, 538 So. 2d 871 (Fla. 4th DCA 1988).
[12] https://www.floridasupremecourt.org/content/download/543657/6126032/AOSC19-75.pdf
[13] *Id.*
[14] https://www.flcourts.org/Resources-Services/Judiciary-Education/Information-for-New-Judges
[15] *Id.*

DAMAGES

Personal injury
Wrongful termination
Intellectual property
Commercial damages/lost profits
Business valuations

When you need a number
call our number

214.665.9458

Thomas Roney LLC
Economic Consulting

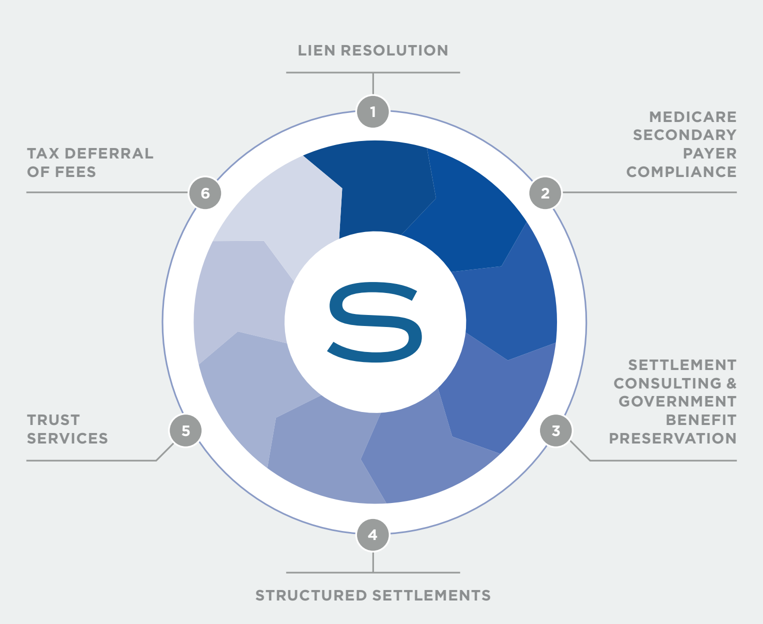
DALLAS • HOUSTON • ATLANTA

WWW.THOMASRONEYLLC.COM

Comprehensive Settlement Solutions

Synergy allows trial lawyers to focus on what they do best by handling the difficult issues at settlement such as lien resolution, Medicare compliance, public benefit preservation, settlement planning techniques and tax deferral mechanisms for contingent legal fees. Take full advantage of all that we have to offer.

See how we can help. **Call (877) 321-0483**



ASSET MANAGEMENT SERVICES FOR INJURY VICTIMS ▪ ATTORNEY FEE DEFERRAL ▪ HEALTHCARE LIEN RESOLUTION SERVICES
MEDICARE SET-ASIDES ▪ POOLED SPECIAL NEEDS TRUST SERVICES ▪ SETTLEMENT PLANNING & CONSULTING

synergysettlements.com

CELL PHONE VIDEOS ARE UBIQUITOUS, BUT ARE THEY ADMISSIBLE?

by Stuart Ratzan

If the past year has taught us anything, it's that when something historic happens, it *will* be captured on camera. Whether on a cellphone, a GoPro, or a webcam, someone, someway, *will* record it and *will* post it online. Just in the past year we've witnessed historic instances of police brutality, an insurrection on our nation's Capitol, and even a career-ending Zoom debacle — all recorded on personal devices and published online for the world to see.

As trial lawyers, the question for us becomes, how do we use these videos at trial? How do we authenticate them? How do we get them admitted? How do we make sure that the evidence holds up on appeal? And what happens if the video was surreptitiously recorded? Well, that's what we're here for.

Social Media Videos

Let's start with a straight-forward scenario. A defendant or a witness in your case posts a damning video on social media — on Instagram, Facebook, Twitter, TikTok, Snapchat, or some platform that doesn't even exist yet. You know this video, if played to the jury, will blow the case wide open. So how do we turn that video into our smoking-gun evidence at trial? Luckily, the Fourth District Court of Appeal told us exactly how in *Lamb v. State*, 246 So. 3d 400 (Fla. 4th DCA 2018).

In *Lamb*, a criminal defendant recorded a video of himself flaunting a stolen car, jewelry and cash on his Facebook account. The prosecution, as expected, played the video for the jury and made it their star piece of evidence at trial. The Fourth District held that the prosecution properly authenticated the video and admitted it into evidence — allowing the prosecutor to obtain an affirmance of the conviction on appeal.

The prosecution authenticated and admitted the video through the police department's digital forensic investigator. The investigator testified about his experience in digital forensics, his certifications, his training, and his experience, including in particular downloading videos from Facebook. The forensic investigator testified about his familiarity with Facebook and its livestreaming feature — "Facebook Live." The investigator explained exactly *how* he obtained the video from Facebook. He described accessing the defendant's Facebook page, identifying videos uploaded to the defendant's Facebook "wall" around the time the carjacking occurred, and finding a video the defendant posted of himself inside the stolen car, flashing the victim's stolen jewelry. The investigator described how he downloaded the video and then confirmed, after downloading the video, that it was identical to the video on the defendant's Facebook page. The investigator also took screenshots of the video on the defendant's Facebook wall to show the jury how it appeared at the time.

This, according to the Fourth DCA, was enough to authenticate the video for use at trial. Despite the defendant's objections, the prosecution did not have to "provide testimony from the defendant, codefendants, or other witnesses who appear in the video, or from someone who recorded the video."[1] Those extra steps, the *Lamb* court said, would "set[] the burden too high."[2]

In issuing the *Lamb* ruling, the Fourth DCA expressly adopted the Eleventh Circuit Court of Appeals' standard for the admission of social media videos. That is, so long as there is "sufficient evidence that the video depicts what the [party] claims," it is admissible.[3] The Eleventh Circuit held that the party moving the social media video into evidence does not need to: "(1) call the creator of the videos; (2) search the device which was used to create the videos; or (3) obtain information directly from the social media website."[4]

The *Lamb* decision also gives us certain tips to help ensure the proper authentication of our smoking-gun-social-media-videos. For example: (1) be sure that the recordings are "unbroken visual recordings of the defendant for an extended period of time[;]" (2) direct the trial court to "the videos' distinctive characteristics and content" which support your authenticity showing; and (3) to ensure a preserved record, be sure to describe the video's "appearance, content, substance, internal patterns, and other distinctive characteristics" which, "taken in conjunction with the circumstances[,]" validate the authenticity of your video.[5]

The video of the car jacker flashing his stolen wares on Facebook earned the prosecutor in *Lamb* a conviction. As the appellate court noted: "But for the defendant's participation in the Facebook video showing off the bounty from that night's escapade, the state may not have had sufficient evidence to convict the defendant as a participant in these crimes. However, the Facebook video existed, and made the state's case."[6]

So, in sum, follow the *Lamb* court's guidance when you want to introduce your damning social media video into evidence: hire an experienced and qualified digital forensic expert; have that digital forensic expert download and preserve the video and take screenshots of how the video appeared on social media for use at trial; and finally, when in trial, have the expert describe each and every step she took in finding, downloading, and preserving the video.

There is also a process by which you can obtain certificates of authenticity from Facebook and YouTube in order to guarantee the authenticity of the videos at trial.[7] But those requests may require you to have a California court approve the request,[8] will likely be met with objections and/or motions to quash, and, even if you are successful, these avenues will soak up valuable time and resources. In the time it takes you to obtain a certificate of authenticity from one of the social media giants, your defendant or witness may take the video down, leaving you holding an empty bag. And even with the certificate of authenticity, you will still need to introduce the video at trial through *some* witness. Why not hire your own digital forensic investigator who will advocate for your position (and can describe what is in the video), rather than a disinterested representative from Facebook or Google?

Surreptitiously Recorded Videos

Next, let's discuss what happens when your client surreptitiously records a defendant or a witness. The video is crushing and we want to use it at trial, but we're afraid that the recording is inadmissible (and the client may have committed a crime) because, under Florida law, a party has to consent to being recorded.[9] However, there are two big loopholes that we can use to get the recording into evidence.

The first and most obvious path around the wiretapping statute is the fact that it only applies to recordings made in a time, place, and manner where the other party has a reasonable expectation of privacy.[10] As always, the facts surrounding the recording will play an important part in poking holes in the reasonable expectation of privacy argument — where was the recording made, how was your client holding the recording device, was it hidden, were other people present, and what was said in the communication, etc.[11] For example, if your client was holding their cellphone in their hand where the other party could see it, or even better, if the other party acknowledges the fact that they are being reported, then that may eliminate their reasonable expectation of privacy.[12]

The second and less apparent path around the wiretapping statute derives from the law's technological antiquity. The wiretapping statute was first enacted in 1969, long before cell phones were even invented, let alone before the invention of the smart phone and cellphone cameras becoming culturally ubiquitous. As such, the wiretapping statute does not mention *video* recordings at all; it *only* references *audio* recordings.[13]

The First District Court of Appeal (apparently, the test lab for surreptitious video recording evidence decisions) acknowledged this shortcoming in the law in a recent concurring opinion in *K.J. v. Dep't of Children and Families*, 297 So. 3d 707 (Fla. 1st DCA 2020). In *K.J.*, a termination of parental rights case, the Department used a video recording of a mother hitting her children as evidence of abuse. The video was recorded by the children's father without the mother's consent, in her home. The mother objected to the video being introduced at trial, citing Florida's wiretapping statute, a lack of consent, and a reasonable expectation of privacy. The trial court admitted the video over objection and, of course, the parties argued about the admissibility of the video on appeal.

Although the majority in *K.J.* punted on the issue of whether the video recording violated Florida's wiretapping statute, Judge Ross L. Bilbrey wrote a thoughtful concurring opinion where he addressed the law's shortcomings:

> No doubt, cellphone recordings play an ever-increasing part in civil and criminal cases, and therefore, interesting questions are raised by the application of chapter 934, Florida Statutes, to cellphone recordings. Such recordings generally contain a visual as well as audio portion, but by its explicit terms, section 934.06 applies only to an oral communication (i.e., something "uttered") or a wire transmission (i.e., "aural transfer") … Further, while one may question whether a person engaging in criminal or abusive conduct on a minor has a legitimate expectation of privacy so as to invoke the protection of chapter 934 … these and a myriad of related issues need not be addressed here.[14]

This gives us another potential opening to get our video evidence admitted — we can exclude the audio portion of the recording (which is covered by the wiretapping statute) and seek to only admit the visual portion of the recording. Although the appellate courts will inevitably have to face this legal issue head-on, for now the door remains cracked open. ■

STUART RATZAN
As founder of trial law firm Ratzan Weissman & Boldt, Stuart Ratzan has successfully tried and resolved some of the most significant cases heard in state and federal courtrooms, both in Florida and throughout the U.S. He has extensive experience in handling catastrophic injury and medical malpractice cases, having secured multi-million dollar judgments and settlements on behalf of his clients, including five of the nation's top-100 verdicts within the past five years. Additionally, he serves as Chair of the American Board of Trial Advocates Miami COVID19 Jury Trial Task Force and as President of Temple Beth Am in Pinecrest, Florida.

---

1 *Lamb* at 409.
2 *Id.* (citing *U.S. v. Broomfield*, 591 Fed. Appx. 847, 852 (11th Cir. 2014)
3 *Id.*
4 *Id.*
5 *Id.* at 408 and 409.
6 *Id.* at 413.
7 *See U.S. v. Hassan*, 724 F.3d 104 (4th Cir. 2014); *People v. Franzese*, 154 A.D. 3d 706, 61 (Sup. Ct. 2017).
8 https://support.google.com/faqs/answer/6151275?hl=en
9 *See* Fla. Stat. §§ 934.02, 934.03, 934.06.
10 *Id. See also Smiley v. State*, 279 So. 3d 262 (Fla. 1st DCA 2019).
11 *See Woliner v. Summers*, 796 Fed. Appx. 649, 651 (11th Cir. 2019) (unpublished) ("Florida law suggests that these factors help guide whether an expectation of privacy was objectively reasonable: (1) the location where the communication took place; (2) the manner in which the communication was made; (3) the nature of the communication; (4) the intent of the speaker asserting Chapter 934 protection at the time the communication was made; (5) the purpose of the communication; (6) the conduct of the speaker; (7) the number of people present; and (8) the contents of the communication.") (citing *Brugmann v. State*, 117 So. 3d 39, 49 (Fla. 3d DCA 2013) (Rothenberg, J., dissenting from denial of rehearing *en banc*).) Woliner v. Summers, 796 Fed. Appx. 649, 651 (11th Cir. 2019)
12 *See Smiley v. State*, 279 So. 3d 262 (Fla. 1st DCA 2019) ("…Smiley did not have a subjective expectation of privacy in his statements when he saw the cell phone in the victim's hand and knew he was being recorded.").
13 *Id.*
14 *Id.* at 709

PERSUASIVE AUTHORITY FOR RECOGNIZING A LIVING CONSTITUTION

by Judge Milton Hirsch

On March 15, 1954, Justice Robert Jackson completed a draft of a concurring opinion in *Brown v. Topeka Board of Education*. He never published it. That was a good thing, and a bad thing.

It was a good thing because, as Jackson realized, the most important feature of Chief Justice Warren's opinion in *Brown* was not its scholarship or its prose style, but that it spoke for a unanimous Court. Securing that unanimity was something for which both Jackson and Warren were willing to pay the heavy price of leaving unpublished a brilliant concurrence.

It was a bad thing because Jackson's draft concurrence was a magnificent state document. Extending over twenty-three typed pages, it cited no law whatever. It discussed history. It discussed America. It discussed what America was supposed to stand for, and what the role of the judiciary was in enabling America to stand for those things. (I suppose it's possible that Jackson envisioned a final draft in which he, or his law clerks, would plug in some legal citations. I doubt that very much, but we'll never know.)

It would be impossible to provide the entire 23-page opinion as a "Constitutional Calendar" item. Excerpts — which cannot do complete justice to the force of the opinion and the superb quality of Jackson's writing — follow:

> Since the close of the Civil War, the United States has been "hesitating between two worlds — one dead, the other powerless to be born." Constitutions are easier amended than social customs, and even the North never fully conformed its racial practices to its professions.
>
> * * *
>
> Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so. But it is not only established in the law of seventeen states and the national capital; it is deeply imbedded in social customs in a large part of this country. Its eradication involves nothing less than a substantial reconstruction of legal institution and of society. It persists because of fears, prides and prejudices which this Court cannot eradicate, which even in the North are latent, and occasionally ignite where the ratio of colored population to white passes a point where the latter vaguely, and perhaps unreasonably, feel themselves insecure.
>
> * * *
>
> Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved.
>
> * * *
>
> It is customary to turn to the original will and purpose of those responsible for adoption of a constitutional document as a basis for its subsequent interpretation. So much is implied by the questions we have asked of counsel. Their exhaustive research to uncover the original will and purpose expressed in the Fourteenth Amendment yield for me only one sure conclusion: it was a passionate, confused, and deplorable era. Like most legislative history, that of the Amendment is misleading because its sponsors played down its consequences in order to quiet fears which might cause opposition, while its opponents exaggerated the consequences to frighten away support. Among its supporters may be found a few who hoped that it would bring about complete social equality and early assimilation of the liberated Negro into an amalgamated population. But I am unable to find any indication that their support was decision, and certainly their view had no support from the great Emancipator himself. The majority was composed of more moderate men who appeared to be thinking in terms of ending all questions as to constitutionality of the contemporaneous statutes conferring upon the freed man certain limited civil rights. It is hard to find an indication that any influential body of the movement that carried the Civil War Amendments had reached the point of thinking about either segregation or education of the Negro as a current problem, and harder still to find that the Amendments were designed to be a solution.
>
> * * *
>
> If we look to see how judicial precedent squares with the practice of legislators and

administrators, we find that state courts of the North and this Court, where Northern men have predominated, have shared the understanding that these clauses of their own force do not prohibit the states from deciding that each race must obtain its education apart rather than by commingling. Almost a century of decisional law rendered by judges, many of whom risked their lives for the cause that produced these Amendments, is almost unanimous in the view that the Amendment tolerated segregation by state action, at least in the absence of congressional action to the contrary.

* * *

Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the Fourteenth Amendment.

* * *

The Fourteenth Amendment does not attempt to say the last word on the concrete application of its pregnant generalities. It declares that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." It thus makes provision for giving effect from time to time to the changes of conditions and public opinion always to be anticipated in a developing society. A policy which it outlines only comprehensively it authorizes Congress to complete in detail.

* * *

Until today Congress has been justified in believing that segregation does not offend the Constitution. In view of the deference habitually paid by other branches of the Government to this Court's interpretation of the Constitution, it is not unlikely that a considerable part of the inertia of Congress, if not of the country, has been due to the belief that the existing system is constitutional.

* * *

It is not, in my opinion, necessary or true to say that . . . earlier judges, many of whom were as sensitive to human values as any of us, were wrong in their own times. With their fundamental premise that the requirement of equal protection does not disable the state from making reasonable classifications of its inhabitants nor impose the obligation to accord identical treatment to all, there can be no quarrel. We still agree that it only requires that the classifications of different groups rest upon real and not upon feigned distinctions, that the distinction have some rational relation to the subject matter for which the classification is adopted, and that the differences in treatment between classes shall not go beyond what is reasonable in the light of the relevant differences. These legal premises are not being changed today.

But the second step in their reasoning, sometimes in reliance on precedents from slave days, sometimes from experience in their own time, was not a legal so much as a factual assumption. It was that there were differences between the Negro and the white race, viewed as a whole, such as to warrant separate classification and discrimination not only for their educational facilities but also for marriage, for access to public places of recreation, amusement or service and as passengers on common carriers and as the right to buy and own real estate.

Whether these early judges were right or wrong in their times I do not know.

* * *

It is neither novel nor radical doctrine that statutes once held constitutional may become invalid by reason of changing conditions, and those held to be good in one state of facts may be held to be bad in another. A multitude of cases, going back far into judicial history, attest to this doctrine.

* * *

I am convinced that *present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment* in matters of education based solely on possession of colored blood.

(Emphasis added).

[Editor's Note: If Justice Jackson's unpublished concurrence is not persuasive evidence that we have a living constitution, nothing is. Thanks to Judge Hirsch for sharing this rare glimpse into constitutional history.]

JUDGE MILTON HIRSCH
(J.D., Georgetown University), is a Miami-Dade circuit judge and adjunct professor at the University of Miami School of Law. A former assistant chief of narcotics prosecution in Miami, he entered private practice in 1987, earning honors including *Best Lawyers in America*, Florida Super Lawyers, Top 250 Criminal Lawyers in South Florida; the Gerald Kogan Judicial Distinction Award, from the Miami Chapter of the FACDL; the Theodore Klein Award from the Miami Chapter of FAWL; the DCBA's Criminal Justice Award; the Miami Jewish Legal Society Shofet Tzedek ("righteous judge") award; and the Jay and Marilyn Weinberg Rule of Law Award at the Project Nuremberg event.. He authored *Hirsch's Florida Criminal Trial Procedure*, co-authored the *Criminal Bench Guide for Florida Circuit Judges*, and published numerous law review articles and three novels. To receive his monthly "Constitutional Calendar" emails, sign up at https://groups.google.com/forum/#!forum/Milt Hirsch constitutionl calendar/join.

AS TIME ZOOMS BY: LITIGATING IN A VIRTUAL WORLD

by Joshua Harris

Last year, the coronavirus pandemic wreaked havoc across the world and our state certainly felt its effects in equal force. As legal professionals, we were forced to adapt and develop new and creative ways to ensure our clients continued to get the best representation despite the obstacles our profession faced. Early in 2020, the Florida Supreme Court suspended the activities of courts across the state in an effort to "mitigate the effects of coronavirus on the courts and court participants."[1] With optimism and without a full understanding of the effects of this virus, the administrative order was intended to last for only a few weeks until the effects of the March outbreak subsided.[2]

Fast forward to 2021; courts are still restricted or closed all together, offices are not open, and many lawyers now litigate from their living rooms. While there were plenty of missteps and miscues along the way, the legal community came together and created new ways to keep our profession alive and moving forward. The most significant of these changes came in the form of videoconferencing, generally through the Zoom platform.[3] After having a year of practice and smoothing out the edges, it is important to step back and see how the legal field has moved forward to where we are today, the challenges we overcame, and lessons for success in the future.

Can You Even Do That?

Before the impact of coronavirus, the rules of procedure limited the ability of attorneys to use remote video technology to administer oaths to witnesses or deponents.[4] Surely, with coronavirus being highly contagious, attorneys, witnesses, and courts were reluctant to subject themselves or each other to the risks of becoming infected. With hopeful optimism, most cases were delayed in order to let coronavirus run its course and subside. As time would soon tell, that was not a realistic option. Courts, while cognizant of the risks associated with coronavirus, remained flexible but soon decided that the virus could serve as grounds for an indefinite delay.[5] Lawyers and clients alike wanted to have their cases progress in the safest possible way rather than sitting and growing stagnant. To help further this goal, the Florida Supreme Court enacted additional administrative orders to ensure parties were able to adapt to these quickly changing times. One such administrative order affirmatively suspended the rules of procedure, court orders, and applicable opinions concerning remote testimony, depositions, and other legal authority that could be interpreted to "limit or prohibit the use of audio-video communications equipment to administer oaths remotely."[6]

Federal courts have also taken similar positions in allowing flexibility for attorneys to depose witnesses remotely. In fact, the Federal Rules of Civil Procedure had pre-existing provisions which allow for depositions to be taken by remote means or upon stipulation by the parties.[7]

Federal courts have, however, implemented safeguards to protect parties still adapting to these changes in taking depositions. For example, one court held that an uncertified video recording could not be used in conjunction with, or in place of, a deposition transcript because allowing this would effectively bypass the federal rules and could compromise the integrity of video depositions.[8]

With rules and safeguards in place, attorneys were able to resume their practices in the face of these new and extreme challenges. Like any other aspect of our field, there was, and remains to be, a level of strategic maneuvering involved in this new landscape.

Manipulating the Mayhem

It should come as no surprise to anyone reading this that many lawyers, often our counterparts, desired to use coronavirus as a reason to further delay the resolution of cases. To overcome this obfuscation, many of us have had to litigate issues related to remote depositions or hearings in our state and beyond. One new tool that we learned to wield early on in the days of coronavirus was developing some form of remote deposition protocol or guidelines on how remote depositions would be taken. In many cases, these protocols were not required, but instead were used to help the parties define what would be required and expected during virtual depositions. It was not long before defendants attempted to use the lack of a remote deposition agreement as a method to delay litigation even more. Luckily, courts have urged parties to work together to establish agreed-upon logistics in order to proceed forward with their cases.[9]

On the other side of the COVID coin, courts have also been cautious to protect deponents, attorneys, court reporters, and other personnel often present during depositions. In fact, courts have affirmatively held that an attorney travelling from one state to another, especially a state under a fourteen-day quarantine requirement, could be grounds to deny a motion to compel in-person depositions.[10] In doing so, these courts have held that remote depositions are the "new normal" and that parties need to adapt in order to avoid the risks associated with an in-person deposition or hearing.[11] Other courts have found that attorneys and litigants across the country are adapting to a new way of practicing law including preparing for and conducting remote depositions and hearings.[12]

Many courts remain closed while others are open with limited capacity which will result in many hearings and trials, especially in civil suits, being delayed. While our profession has overcome many hurdles to get us where we are now, it remains to be seen what might be thrown at us in the future. As more vaccinations become available, the likelihood of cases resuming to

"business as usual" increases, but until that point, we'll continue to adapt and develop new techniques to move forward.

Trial and Error

Having had a year of successes and failures in this new frontier, it's time we share some practice pointers we have learned along the way. While this is not a comprehensive list of everything to keep in mind when conducting a video deposition, hearing, or trial, it is certainly a good start.

- **Learn Your Platform:** Many court reporting services have transitioned into videoconferencing and provide resources to help remote depositions go smoothly. When choosing a service, make sure to inquire as what technology they have that could make your recorded proceeding go smoothly. For example, some services have a dedicated videographer that will handle all of the recording needs and bundle it up for you at the end. On the other hand, many of these services give you access to the tools you need to record and can even provide training for you, your paralegal, or any other co-counsel/staff member that may be assisting you.
- **Have A Backup:** Similar to the last pointer, make sure you have a contingency plan if something goes wrong. In addition to knowing the location of the witness for purposes of administering the oath, try to find out what their technology is like to make sure you have what you need for a smooth deposition. We've all experienced (or maybe have seen) that one attendee with an unstable connection to the point the video or audio keeps cutting in and out. In a deposition, this can eat into valuable time trying to ask and answer questions because someone is forced to continuously repeat their last statement. If you find out ahead of time that a deponent or other participant does not have the necessary technology, many court reporting services are able to send a tech package to the witness to seamlessly get through the recorded proceeding.
- **Prepare Your Workspace:** With a large number of law offices closed, numerous attorneys are working from home and conducting their practice from a home office or other area inside the house. It is a smart practice to test the platform you are using well in advance of your proceeding. This allows you a chance to make sure you are able to login timely and without issue. Additionally, before attending a recorded deposition or a court hearing, make sure you have a clean and orderly workspace. The camera picks up not only you, but also your surrounding office space. Make sure your area is clean and orderly to give the best impression possible since you are not able to make one in person!
- **Limit Your Distractions**: While not always possible, it is important to try to reduce the distractions around you. This could mean making sure that doors are closed as to not pick up noise from another room. We all remember the infamous BBC interview where Professor Robert Kelly's children snuck in behind him during the live show and, ultimately, went viral. Certainly, the guest appearance was unplanned but the show moved on. In the event of children or animals making an unexpected cameo, there isn't a need for panic, rather, calmly handle the situation and, if needed, ask for a brief recess.
- **Make An Appearance:** Make sure you have your own equipment set up! If you are using the camera on your laptop or if you have an external camera, make sure you are squarely in your frame with the camera at eye-level. You don't want the camera looking up at your nose the entire time. In conjunction with having a clean workspace, make sure you have a clean appearance. You will appear in a large box on everyone's screens when you are the speaker in a hearing so they will be able to see you. Make sure you are dressed appropriately, especially if appearing in front of a court. If you are using external cameras or microphones, make sure you have the proper settings applied ahead of time. You don't want to be fiddling with these settings and delaying a proceeding as a result.

We all likely know or have been the subject of a Zoom fail story. Certainly, colleagues across the country have shared their stories about "that one Zoom hearing" that went wrong.[13] There remains a myriad of resources available for litigants to utilize to learn the best tips and tricks for using these video platforms in the most efficient way. With a little preparation and forethought, you can ensure that your videoconferencing session goes off without any missteps, or at least fewer of them.

Looking Ahead

The coronavirus pandemic has had a profound effect on all of our lives and each of our practices. We have endured and overcome numerous obstacles to work through the pandemic. As the battle against this virus continues, so will our innovation. We have an ethical obligation to our clients to make sure they receive the best representation possible regardless of the circumstances. Each of you deserves a round of applause for all of your efforts in upholding this honorable duty. As the world presses forward, so shall we, in person or remotely, even if there are a few more "you're on mute!" moments ahead.

JOSHUA HARRIS
Joshua Harris is an attorney at Levin, Papantonio, Rafferty, Proctor, Buchanan, O'Brien, Barr, and Mougey, P.A. His practice focuses on mass tort litigation. Mr. Harris is currently involved in the national opioid litigation against opioid distributors and manufacturers as well as national pharmacies that distributed and dispensed opioids. He also represents a world famous beach bar in a trademark infringement lawsuit against ViacomCBS. Mr. Harris is an EAGLE Associate and serves on the FJA Young Lawyers Section Board of Governors.

---

1 *In Re: COVID-19 Emergency Procedures in the Florida State Courts*, Fla. Admin. Order No. AOSC20-13 (March 13, 2020).

2 *Id.*

3 In April 2020, daily Zoom users grew from 10 million a day to more than 200 million. https://venturebeat.com/2020/04/02/zooms-daily-active-users-jumped-from-10-million-to-over-200-million-in-3-months/ Accessed February 3, 2021.

4 *See* Florida Rules of Civil Procedure 1.310(c) ("The officer before whom the deposition is to be taken must put the witness on oath and must personally . . . record the testimony of the witness.")

5 *See Willis Electric Co. Ltd. v. Polygroup Trading Ltd.,* No. 15-cv-03443 (D. Minn.); *see also In re Zantac (Ranitidine) Products Liability Litigation*, 2020 WIL 1669444 (S.D. Fla. Apr. 3, 2020).

6 *In Re: COVID-19 Emergency Procedures in the Florida State Courts*, Fla. Admin. Order No. AOSC20-16 (March 18, 2020).

7 *See* Fed. R. Civ. P. 30(b)(4); *see also* Fed. R. Civ. P. 29.

8 *Alcorn v. City of Chicago*, 2020 WL 4904567 (N.D. Il. August 20, 2020).

9 *See Elite Mitigation Servs, LLC v. Westchester Surplus Lines Ins. Co.*, 2020 WL 6122557 (N.D. Fla. May 4, 2020) (denying defendant's motion for protective order with respect to the 30(b)(6) deposition of a corporate representative because the parties had not agreed to the "logistics" of conducting a remote deposition).

10 *Rouviere v. DePuy Orthopaaedics Inc.*, 2020 WL 3967665 (S.D.N.Y. Jul. 11, 2020).

11 *Id.*

12 *See Grano v. Sodexo Magmt, Inc.*, 335 F.R.D. 411 (S.D. Cal. Apr. 24, 2020).

13 *See* Cueto, Emma, *Dogs, Babies, Tech Flops: Attys Share Zoom Fails and Tips*, Law360 (October 28. 2020).

REFLECTIONS FROM A SOLO: PASSION, PURPOSE OF THE COUNSELOR & ATTORNEY-AT-LAW

by Salesia V. Smith-Gordon

I wonder if 2020 could be designated a leap year. For some odd reason, I thought that when the clock struck 12:01 a.m. on January 1, 2021, after singing Auld Lang Syne the willies of 2020 would magically disappear. It was hopeful thinking. As a solo practitioner the year was filled with great turmoil to bear for clients, the firm, family, and self.

Solo practitioners are not only attorneys-at-law and business owners but also counselors-at-law. A counselor at law is often used interchangeably with attorney. However, it differs in that the counselor deals with various issues, often outside the context of the legal profession.[1] Solo practitioners are community and civic leaders with their finger on the pulse of issues impacting the communities in which they live and work handling client matter.

According to The Florida Bar thirty percent of lawyers are members of solo and small firms. The Florida Bar does not separate solo practitioners from small firms which comprise five or fewer lawyers. There is quite a difference being a solo. Although we may perform the same or similar work as personal injury attorneys, the solo is alone. There is no hiding. Solo practitioners make the decisions singularly. Yes, they receive the rewards and set the pace, but they shoulder all the responsibility for: staff, computers, IT, desks, mortgage/rent, phones, internet, benefits and a host of insurances: liability, health, malpractice, content, etc. The name is the brand.

The responsibilities of running the business and the law practice are accepted as a must. With approximately 110,000 lawyers in Florida, people who choose a solo practitioner often do so because of the "extra" they anticipate. What's the "extra"? Being there! Genuinely caring about them not just as a client but as a person.

Extras often include relationship building and personal connection. Clients are made to feel they are more than a number and a person who the solo will understand and handle differently. Clients may be fellow parishioners, person known within the community, or former clients. Clients seek the sense of trust and feeling that "I'm more than just a case." It is not always about race or gender, but rather about time, approachability, and relativity. *Extra* time is extended to be supportive to the client and often to their family members and even their pets i.e. during a home visit sometimes there is a need to walk the dog or bend down to feed the cat. Pre-COVID, supporting Little League, attending performances, debutante balls, oratorical contests of existing and of former client children often were the norm. Solos really try to be "the good neighbor" and "good hands" advocate.

Extra is acknowledging that the burden of the coronavirus adds an additional layer on the injured client of uncertainty, anxiety, and the emotional impact of being during quarantine. Depression becomes a huge concern particularly for senior citizens and immobile clients. Fear of catching the coronavirus. Fear of going to a doctor. Fear of going to a hospital. Now, fear of the vaccine. The counselor-at-law frequently takes center stage to the attorney-at-law to anticipate and navigate these issues in a quest to calm and protect the client. For a boutique personal injury practice, the counselor brings in *not* one dollar, but the goodwill brings appreciation and joy. The burgeoning authentic relationship over-time can lead to a positive reputation and referrals of clients' friend and family.

Although I jokingly say that God granted me 27 hours a day not 24; in truth the "extra" is a balancing act. With a dual background in pharmacy and law, I recognize that the prescription for success is in choosing the correct cases and clients. I also realize that isolation is not healthy. The human condition craves connection, and the power of the touch can be healing.

A journalist asked what was my most impactful case of 2020. After some thought, I realized my biggest impact was again in the role of counsel-at-law. My answer was having opened-up a new world

through technology not for one but for many of my clients who had not used video as a means of communications and as such were shielded from the rest of the world. Many of my clients are older, used a flip phone and had no email address. Yes, wow! As I embraced the new normal, I took time to lure them into ordering a newer phone and turning on a computer, if it had a camera. To see the change in them has been an enormous joy. Not only can they see me and prepare for depositions, but they can have tele-med doctor visits and see their grandchildren and friends. Zoom, Facetime, Duo, WhatsApp, Hangout, or the like opened a new world for many clients during COVID-19. The visual connection through use of technology has been the medication of choice to help ward off depression of isolation.

It is not easy being a solo practitioner. It is a choice. *Solo* does not necessarily mean being alone nor does not mean lonely. Some solos have experienced staff. Yes, the solo is the boss; but I know of nothing successfully accomplished alone. I must give recognition to my team for working not just for me but with me. Solos with staff are also responsible for their livelihood and well-being. Staff are also plagued with concerns of coronavirus and experience fear and death of loved ones. The "boss" has to also be strong, flexible and care for them. Staff also have concerns of brutality and injustices. Recognizing their angst and taking time to listen, talk, console and encourage is equally important.

So often, my breath was snatched in 2020 as if I could not breathe from the repeated emotional impact of the injustices learned from the news and witnessed. Police Reform, Judicial Reform. Criminal Justice Reform. Health Reform. Reform seemingly became a sad refrain as if from a Tchaikovsky concerto. I recall poet Laureate Maya Angelou stating that "people won't remember what you said but will remember how you made them feel." Though only a brief meeting, being in her presence some 10 years ago made me re-consider my purpose, passions, and voice. Recently, I read her book autobiography[2] and again took an introspective inventory personally and professionally as a solo practitioner they are inextricably intertwined.

Rules to be governed by should be fairly and equality distributed. I brace myself when reviewing the Bar's disciplinary action report as part of the Florida Bar News. As former Chair of the Florida Bar Grievance Committee, the disciplinary report is a necessary review, if for no other reason than to learn what not to do. Curiously and frighteningly so, solo practitioners are often listed. It is exhausting trying to be perfect and to cover every rule base that a larger firm has others to manage. I am not talking about intentionally commingling of funds or of theft, but of simpler matters such as the method of record keeping or official designation of another lawyer if incapacitated. Sometimes, mistakes happen. Often, the one who is judging finds fault under pretexts for which they themselves are protected in a large firm and under the assumption that the manner and method of their larger firm is the most proper, best way or only way. It is easier to pick-on the little guy. I try to find positives amidst the malarky. To help educate and protect solos, the formation of groups such as FJA Solo and Small Firm[3], The Florida Bar Solo Practitioner Section[4] and county bar associations can be great assets in forging trustful relationships with other lawyers to serve as a sounding board and backup.

I acknowledge that things at times have not been alright. Shouldering the burdens of others, trying to console, encourage, uplift while handling the daily battles against insurance companies and big businesses, while finding a balance at home can be more than a notion. I acknowledge the plight of things I cannot nor care to change: being a woman and Black. Couple those with being a solo practitioner there is a triple whammy, or I prefer to think of it as a trifecta. There is a dis-ease of some who consider each and all three as *less than*. As if being a solo practitioner means there was no other choice. Hope springs eternal that the times and hearts of men are changing. Some still believe that the *successful* practice of law is not for women or Blacks. Wrong. Wrong. Wrong. We are here and not going anywhere other than upward and onward for the good of others and ourselves.

Whether in the courtroom or boardroom the voice of the solo practitioner and particularly one who is female and Black adds commentary that is unique. The voice provides information from a different perspective and experiences. Some, using various tactics, try to silence our voices and diminish our experiences. Chimamanda Ngozi Adichie said it well, for women "In our world a man is confident, but a woman is arrogant. A man is uncompromising, but a woman is a ballbreaker. A man is assertive, a woman is aggressive. A man is strategic, a woman is manipulative. A man is a leader, a woman is controlling. A man is authoritative, a woman is annoying. The characteristic or behavior is the same, what is different is the sex. And based on the sex, the world makes assumptions, and the world treats us differently."[5] This should not be, yet unfortunately it often is.

I say remain encouraged. Take heart that your time and voice matter to a lot of people. Do not allow others to relegate you to a "single story"[6] when you offer much more . . . *extra*. Remain vigilant and passionate in good works. When exhausted, step back introspectively. Remember the good. Inhale and find strength to keep moving forward.

SALESIA V. SMITH-GORDON

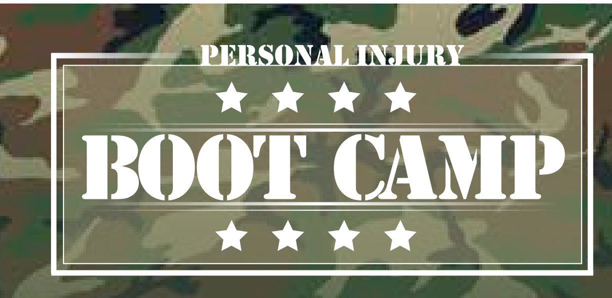
Salesia V. Smith-Gordon is founder of the Law Office of Salesia V. Smith-Gordon and has been a solo practitioner for her entire legal career. As a pharmacist and lawyer, Salesia's boutique firm concentrates handles trucking, prescription errors, automobile and catastrophic injury cases. Salesia's professional and community works are often honored including 2020 FAWL Legal Legend, 2019 & 2020 Lawyer of Distinction, 2019 Justice Award by Eti Phi Beta. Active in pharmacy, law and politics, Salesia serves on the FSU College of Law Alumni Board and President its Black Alumni Network. Salesia is an FJA Eagle Associate Member and served on the Women's Caucus Board. Her other memberships include PBCJA, PBCBA, NBA, and FPA. Salesia and her husband Lawrence Gordon reside with their two rescued felines in Haverhill, FL.

---

1 Wikipedia: Counsel
2 *Maya Angelou: The Heart of A Woman*
3 FJA https://www.myfja.org/solo-small-firm/
4 https://www.flsolosmallfirm.org
5 Chimamanda Ngozi Adichie: at ChathamHouse London Conference-2018
6 *The Dangers of A Single Story* by Chimamanda Ngozi Adichie: A Ted Talk

CLE EVENT CALENDAR

FEATURED EVENTS



MARCH 24 - MAY 12, 2021

For Young Lawyers, Lawyers New To the Practice & Anyone Wanting To Re-Boot Their Legal Basics

A 8-part series will give you the practical tips and step by step instruction you need to succeed. The Boot Camp Webinar Series is designed and presented by young attorneys who were in your "boots" not long ago.

SAVE THE DATES
Registration Opening Soon

ANNUAL CONVENTION

FOUR SEASONS RESORT, ORLANDO
JUNE 2021

SAVE THE DATE
Registration Opening Soon

DATES TO REMEMBER

MARCH 2021
March 24 – Boot Camp Webinar #1
March 31 – Boot Camp Webinar #2

APRIL 2021
April 07 – Boot Camp Webinar #3
April 14 – Boot Camp Webinar #4
April 16 – 30(b)(6) Seminar, Aloft Orlando Downtown
April 21 – Boot Camp Webinar #5
April 23 – Rule 1.150 Webinar
April 28 – Boot Camp Webinar #6

MAY 2021
May 05 – Boot Camp Webinar #7
May 12 – Boot Camp Webinar #8

JUNE 2021
June 9-12 – Annual Convention
Four Seasons Resort, Orlando

JULY 2021
July 24-28 – Leadership Retreat
San Juan, Puerto Rico

SEPTEMBER 2021
September 22-24 – Masters of Justice
The Ritz Carlton Sarasota

OCTOBER 2021
October 18-20 – Christian D. Searcy
Voir Dire Institute, Orlando
Renaissance SeaWorld

October 20-22 – Al J. Cone Trial Advocacy
Institute, Orlando
Renaissance SeaWorld

NOVEMBER 2021
November 19 – Learn From the Legends Seminar
Grand Bohemian, Orlando

REFLECTING ON THE PAST 40 YEARS

by Stephen F. Rossman

It is hard to believe that it's been 40 years since I had the privilege of serving as President of the Academy of Florida Trial Lawyers, now known as the Florida Justice Association (FJA).

I first learned about the Academy from my mentors, Bill Colson and Bill Hicks, who hired me as their first associate for their new firm, Colson & Hicks. Both Bills had been partners in the acclaimed Plaintiff's trial firm Nichols, Gaither, Beckham, Colson, Spence & Hicks which dissolved in March 1967. When Chuck Baumberger and I decided to start out own firm in 1974, we also committed to getting actively involved with the Academy.

A lot has happened since I was a young lawyer carrying Bill Colson's briefcase and having the opportunity to witness greatness in a Dade County courtroom watching the trial of *Holl v. Talcott*.

Ellen Morgan Holl had sustained catastrophic brain damage as a result of medical negligence in a Miami-Dade County hospital. Despite an expert's affidavit establishing negligence, the trial judge granted a summary judgment in favor of the defendant hospital and doctors. The case eventually went to the Florida Supreme Court who reversed the trial judge and entered a landmark opinion regarding summary judgments. The appeal was briefed and argued by a great appellate lawyer, Bobby Orseck, for whom the FJA building in Tallahassee is named.

The case went to trial with Bill Colson and his former Nichols Gaither partner, the late J.B. Spence, representing the plaintiffs and some of the very best defense attorneys in Miami representing the defendants. The jury eventually found for the plaintiff and rendered a verdict of $1,500,000. It was the first seven figure verdict in the State of Florida and it changed the personal injury/medical negligence practice in Florida forever.

Over the years there have been tremendous changes in the law. When I was a brand new lawyer contributory negligence of the plaintiff was a bar to recovery, but in the early 1970's in the case of *Hoffman v. Jones*, handled by former FJA President, Sammy Cacciatore the Florida Supreme Court by judicial fiat replaced contributory negligence with pure form comparative fault. While doing away with contributory negligence as a bar helped many plaintiffs obtain a recovery from negligent tortfeasors, we didn't realize that comparative fault would eventually lead to the abolition of joint and several liability and the allocation of fault to non-parties on the verdict.

At Colson & Hicks, I learned about the Academy and why it was important to win in Tallahassee as well as in the courthouse. During those early years there wasn't as much partisanship with regard to our issues; i.e. there was bipartisan support both for and against us on our issues. Some of our strongest allies were conservatives and some were liberals.

Our toughest opponent was Senator Dempsey Barron of Panama City, a president of the Florida Senate who was originally a conservative Democrat until he switched and became a Republican. He was very powerful and was a leader of the North Florida "pork chop gang." He was eventually defeated for re-election and life in Tallahassee became a little easier for a while.

Perhaps the area of the law that has changed the most over the years is medical malpractice. Always a difficult area because juries were and still are reluctant to find healthcare providers negligent; legislative changes designed to help the healthcare industry have made the practice even more challenging. Over the years, we have seen caps on damages, presuit requirements, and the like. We have survived constitutional amendment attacks. Many survivors of medical malpractice wrongful death victims do not have the same right to recovery as do other wrongful death survivors in non-medical malpractice cases. Nevertheless, we have withstood the onslaught, remained standing and still help many victims of medical negligence. That is because the trial bar in Florida is still one of the finest trial bars in the country. This was true when I started practicing and is true today. The FJA has played a major role in helping us to maintain those high standards. We were also blessed to have for many years an outstanding Florida Supreme Court that was dedicated to the protection of citizens rights to access to the courts and justice. The judicial legacy of retired Florida Supreme Court justices Barbara Pariente, Fred Lewis and Peggy Quince is exemplary.

Through it all the FJA has remained steadfast; well organized and highly respected by the leadership of both political parties, while continuing to fight for the rights of the clients we represent. I suspect they'll be doing that for at least the next 40 years. ■

STEPHEN F. ROSSMAN

In addition to serving as president of the Academy of Florida Trial Lawyers (1981-82), Mr. Rossman served fifteen years as a member of the AFTL Board of Directors. He was president of the Dade County Trial Lawyers Association (now MDTLA) (1983-84), on the Board of Governors of the Association of Trial Lawyers of American (now AAJ)(1983-90); served in leadership positions with The Florida Bar and the Dade County Bar Association; and is a Fellow of the American College of Trial Lawyers. He remains a regular member of the FJA. He has been board certified in Civil Trial Law since 1983.

[1] *Holl v. Talcott*, 191 So. 2d 40 (Fla 1966)

[2] 272 So. 2d 529 (Fla 1973)

A STRONG START FOR FJA REF IN 2021

The Florida Justice Association's Research and Education Foundation began 2021 with a strong start! The Foundation's efforts promote the study and understanding of Florida's civil justice system and the ways preserving this system benefits consumers, victims, and all Floridians.

Titans of Trial Series

We kicked off this virtual series in early January with keynote speaker, Christian Searcy.

Law students in attendance heard riveting personal and professional accounts from one of Florida's leading trial attorneys as he shared the mental and physical preparations involved for his first trial and how that launched a 46-year legal career.

At age 29, he had the distinction of being the youngest lawyer in the United States to achieve a verdict of $1 million for a single personal injury lawsuit. For 46 years, he litigated cases primarily involving catastrophic injury and death in venues throughout Florida, as well as other states. In 2006, Mr. Searcy was one of only two lawyers in the country to receive the "War Horse Award" from the Southern Trial Lawyers Association, honoring his outstanding skill as a trial advocate and his extraordinary contributions to the cause of justice.

Thanks to the Law School Outreach Co-Chairs, Molli McGuire and Jennifer Lipinski, for planning dynamic and educational trainings this year!

Actuarial Analysis

The FJA Research and Education Foundation has a straightforward mandate — promote the study and understanding of Florida's justice system and the ways preserving this system benefits consumers, victims, and all Floridians.

The Foundation is developing an exemplary series of educational programs to make trial lawyers better at what they do and make Floridians more knowledgeable about what they can — and should — expect us to do on their behalf.

By commissioning independent, objective research on key legal issues and their impact on Floridians, the Foundation works constantly to foster and improve an understanding of the justice system and each Floridian's role in the system.

FJA's Research and Education foundation commissioned an actuarial analysis on the repeal and replace of Florida no-fault insurance. Released in mid-January and conducted by Stephen A. Alexander MBA, FCAS, FSA, MAA, the study affirms moving to responsibility-based auto insurance can help replace the state's obsolete auto liability environment and reduce auto insurance rates for all Florida drivers.

With nearly 1 in 4 drivers uninsured, Florida is consistently ranked among the states with the highest rates of uninsured drivers in the country. Additionally, Floridians pay 81 percent more than the national average for auto insurance. Florida is one of only two states in the nation that do not require drivers to carry liability insurance for injuries they cause others. The reality is, Florida is far behind the rest of the country when it comes to protecting its citizens from staggering economic losses and higher insurance costs for all drivers — meaning we all pay higher auto insurance rates.

Armed with this new study, FJA members and staff took to the Capitol at the end of January to educate lawmakers about the importance of putting Florida on the path to responsibility-based roadways. Proposed legislation would allow Florida to join the 48 other states that require all motorists to have a reasonable amount of bodily injury liability insurance, marking a return to responsible roadways in Florida and a reduction in auto insurance costs for consumers.

This is the crucial work of the Research and Education Foundation: using sound data and research to inform public option and perception. To read the full analysis, visit: https://fjaref.org/actuarial-analysis-on-no-fault-insurance/

The Justice Network

Guided by the FJA Research and Education Foundation, law school students throughout Florida now have the opportunity to become more informed and better educated about the specialty practice and the purpose of the Florida Justice Association.

The Justice Network (TJN), formerly Law School Outreach, initiative shows students the kind of programs FJA offers for members. Most importantly, the TJN effort provides an opportunity for students to network with and meet many diverse FJA members from throughout the state. Individual students who may want to become more involved or attend an FJA educational event will be welcomed to do so.

This Outreach initiative will now be administered by the Foundation, with the support of FJA staff, and will focus on arranging Outreach events such as lunch presentations and programs or happy hour networking events.

The Research and Education Foundation plans to encourage

senior professionals active in the FJA to sponsor the TJN events, either by hosting a named event at a law school of their choosing or by making a general financial investment in the Foundation to be dedicated to The Justice Network program each year.

Experience is the best teacher. Front-line experience can be one of the best predictors of future success in the legal profession. Each year, the FJA Research and Education Foundation sponsors The Honorable E. Earle Zehmer Memorial Mock Trial Competition, bringing together students from Florida's leading law schools. Hosted by the FJA Young Lawyers' Section, this competition features carefully selected teams of the brightest law students from across the state for an innovative, hands-on opportunity to demonstrate their trial skills.

This year's FJA's annual Mock Trial Competition took place on February 20-21, 202 and students competed for scholarships and winner's accolades. The Foundation provides financial support for each team, committing up to $20,000 per year for this initiative. The Foundation plans to include more Florida law schools in the competition and provide a modest travel stipend to each law school's team.

For information about the Mock Trial Competition, sponsorship opportunities or to volunteer as a judge for this event, please visit fjaref.org. All sponsorship contributions made to the FJA Research and Education Foundation are tax-deductible, as provided by law. Your name or your firm's name will be recognized at the event, in the Mock Trial program, on the FJA Foundation website and in the FJA Journal.

Upcoming Events

We are excited about our strategic plans and events for the remainder of 2021 as work to foster an understanding of the justice system and each Floridian's role in the system and advocate for justice and fairness for victims, consumers, and all Floridians. To learn more or participate in upcoming events, please contact us at info@fjaref.org or call 850-688-0521. J

2021 Essay Contest

Are you a second or third year law student in Florida? Here is your chance to be published and have your bar prep expenses paid!

As part of the Research & Education Foundation's mission to promote a better understanding of Florida's civil justice system, we are seeking essays in response to the following prompt:

The United States is one of only a few nations that continues to preserve the right to civil jury trials. For this essay, please discuss the historical and continued importance of having access to a jury to render decisions in civil cases, why the right to a civil jury trial has become increasingly controversial, and what can be done to preserve it.

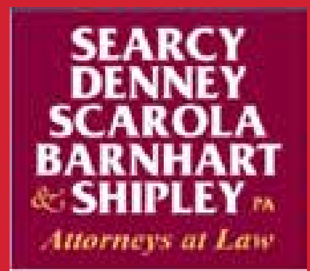
How to participate:

- Submissions should be no more than 1000 words
- Submit essays in Word or PDF format via email to info@fjaref.org by 11:59 pm on March 31, 2021
- Winners will be announced on May 15, 2021.
- See the *official rules* for more details.

Prizes:

- *First Place*: $3,000 for Bar Prep, publication of essay in the *FJA Journal*
- *Top 3 Essays:* Free FJA Attorney Membership ($199 value)
- *All Entrants:* Free FJA Law Student Membership ($50 value)

Thank you to our 2021 Justice Network Titan Sponsors!
Their support allows us to continue our mission of preserving access to justice.

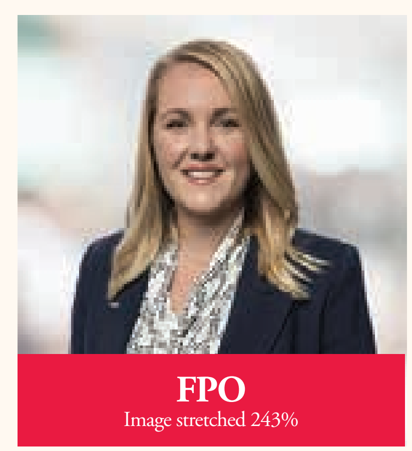


**The FJA Research and Education Foundation is designated by the Internal Revenue Service as a 501(c)(3) non-profit charitable organization to which tax-deductible contributions may be made, as provided by law.*

Thank You, EAGLEs

In recognition for unwavering commitment to the EAGLE® program, we recognize the following upgraded, new or returning EAGLE® members.

PATRON – $5,000



Sara Papantonio
Recruited by Troy Rafferty

2020-2021 EAGLE® RECRUITING CHAMPIONS BEGINNING FEBRUARY 5, 2021

Recruiter Name	Recruiting Value	# of Recruits
Eric Romano	$51,500	5
Curry G. Pajcic	$48,000	12
William F. Merlin, Jr.	$35,000	4
James Lawrence Magazine	$25,000	1
Robert Mayer Rubenstein	$20,000	4
Troy Rafferty	$17,250	4
Tiffany M. Faddis	$16,500	12
Christopher Ligori	$15,000	5
Steven R. Maher	$13,500	2
Tag B. Feld	$10,000	1
H. L. (Larry) Perry	$10,000	1
Craig M. Goldenfarb	$9,000	6
Jason D. Weisser	$9,000	5
Waylon Thompson	$7,500	3
David Corey Dismuke	$6,500	2
James W. Guarnieri, Jr.	$5,750	2
Julie Aleve Fine	$4,500	3
Paul P. Terry, Jr.	$4,500	3
Patrick W. Harland, Jr.	$3,000	1
Paul D. Jess	$3,000	1
Lake H. Lytal, III	$3,000	2
Todd Jordan Michaels	$3,000	2
Stephen A. Barnes	$1,500	1
Nathan P. Carter	$1,500	1
Clifton C. Curry, Jr.	$1,500	1
C. J. Czaia	$1,500	1
John S. Mills	$1,500	1
David J. Zappitell	$1,500	1
Nicole T. Armstrong	$750	1
Drew Gordy Bruner	$750	1
Betsey T. Herd	$750	1
Damian B. Mallard	$750	1
Bernard F. Walsh	$750	1

As of February ??, 2021

Index

Appellate Practice
Dealing with Judges Who Do Not Follow the Law ....

Attorneys' Fees
Court Finds Award of Attorneys' Fees Excessive ....
Court Misapplies Contingency Risk Multiplier ....

Auto
Dealing with New Summary Judgment Standard in Auto Cases ....

Civil Procedure
Amendments to Pleadings to Defeat Summary Judgment ....
Building a Proper Foundation for Your Lawsuit in the Pleadings ....
Pleading Res Ipsa Loquitur as a Separate Count ....

Constitutional Law
Justice Robert Jackson's Unpublished Concurrence
Recognizes Living Constitution ....

Evidence
Admissibility of Cell Phone Videos ....

FJA
Advocacy in Action in Florida Legislature ....
FJA Advances and Optimizes Digital Platforms and Tools ....
Past President Stephen Rossman Reflects on FJA's History ....

Insurance
Insurer's Duty to Defend After Exhaustion of
Policy Limits in Multiple-Claimant Situation ....

Legal Malpractice
Avoiding Committing Malpractice in Handling Legal Malpractice Cases ....

Mass Torts
Understanding the Basics of Mass Torts ....

Medical Malpractice
Complying with Same Specialty Requirement for Expert Witnesses ....

Premises Liability
Using Title IX to Get Justice in Sexual Abuse Cases ....

Product Liability
Fabre Defendants in Product Liability Actions ....

Solo/Small Firm Practice
Reflections from a Solo on Passion and Purpose of
Counselors and Attorneys ....

Workers' Compensation
Daubert Challenges to Expert Medical Advisors ....

Young Lawyers' Section
Navigating a Virtual World ....

Advertisers Index

ADR SERVICES
Upchurch, Watson, White & Max .... inside back cover

ATTORNEY ADVERTISING
Cohen Milstein 15
Coker Law 3
Elizabeth Munro, Esq. 71
Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. 55
Liberman Cabrera Thompson & Reitman, PLLC 6
Romano Law Group 34
Truck Accident Law Firm, L.P. 38

CALL SERVICES
Alert Communications 47

CONSULTING
Robson Forensic 54
Thomas Roney LLC 59

COURT REPORTING
Universal Court Reporting 43

FUNDING
Client Legal Funding .... inside front cover
Fast Funds 51
Momentum Funding 29
Priority Responsible Funding 24
Redwood Funding Group 8
Sage Settlement Consulting 35

MEDICAL
Ethos Health Group 28
NeuLife Rehab 20
Physician Life Care Planning 54

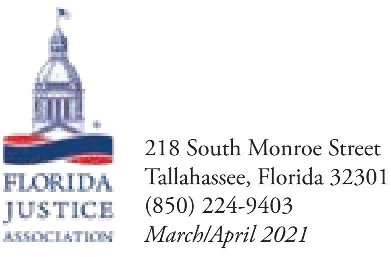
RESEARCH
LawCite 71

SETTLEMENT SERVICES
NFP Structured Settlements 7
Synergy Settlement Services 59

SOFTWARE
FileVine .... back cover
Litify 51

VIDEO SERVICES
Image Resources Inc. 55
Video Law Services 50
Visual Evidence 4

Upchurch, Watson, White & Max
4282-7



218 South Monroe Street
Tallahassee, Florida 32301
(850) 224-9403
March/April 2021

Change Service Requested

PRSRT STD
U.S. Postage
PAID
Montezuma, IA
Permit #30

FileVine
4282-24