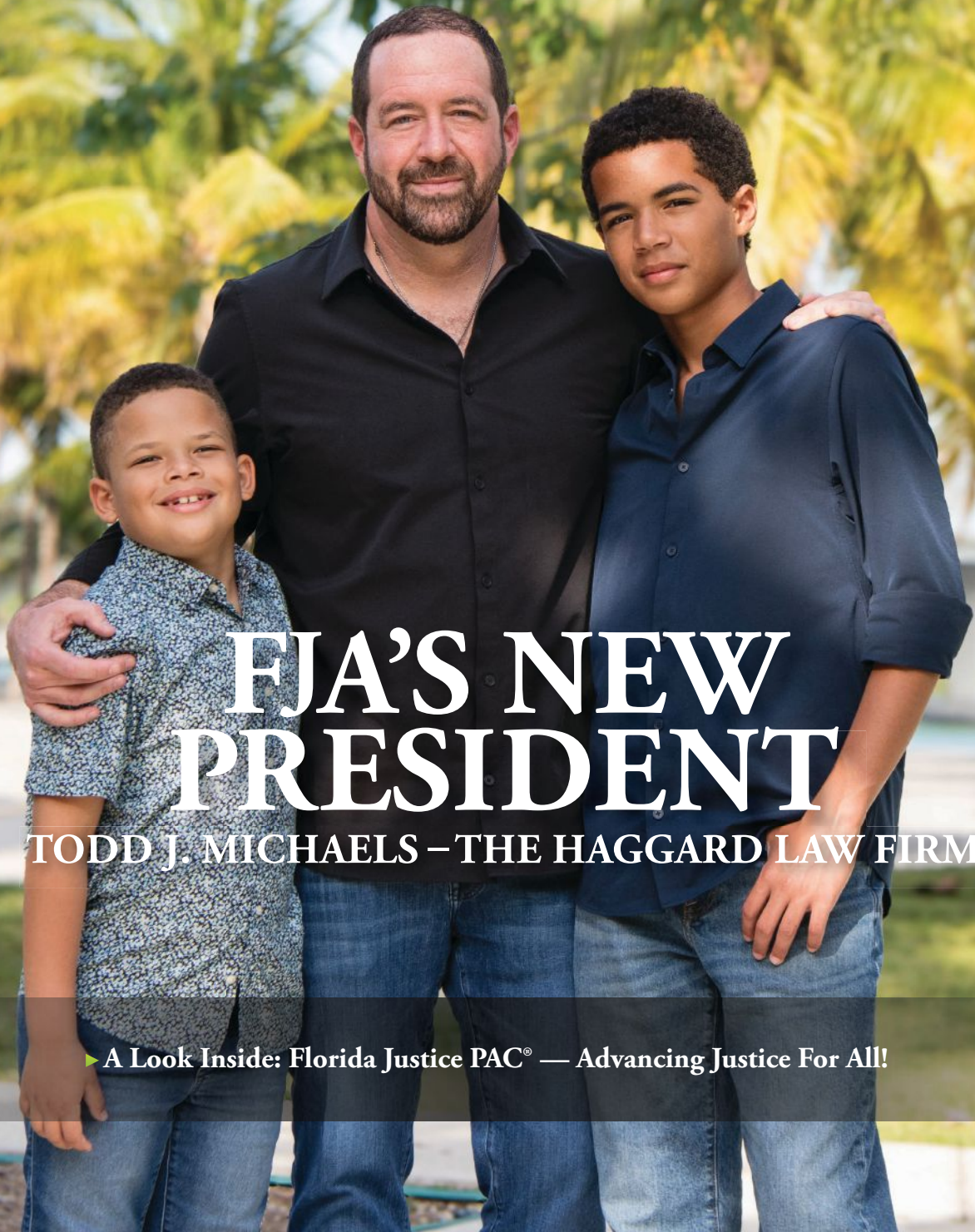


# JOURNAL<sup>®</sup>

*Florida Justice Association<sup>®</sup> • July/August 2024 • #640*



## FJA'S NEW PRESIDENT

TODD J. MICHAELS – THE HAGGARD LAW FIRM

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**Correction Notice:** FJA Journal, March/April 2024 #638

We apologize for an omission in the Sovereign Immunity article published on page 54; Alex A. Arteaga-Gomez should have been listed as co-author along with Latoya Harridon-Lodge.

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# TURNING THE TIDE TOWARD JUSTICE FOR ALL

by Todd J. Michaels, FJA 2024-2025 President



The Florida Justice Association is entering a new era. An era that will be marked by the awareness that our enemies will continue to be relentless in their attacks on the courts and access to justice for all, and our ability to fortify and defend against those attacks.

This is our time. This is our call to action, and this will be my mission during my tenure as chair of the FJ PAC\* and president of the FJA\*.

As members of the FJA, we must recognize our shared responsibility to uphold the principles of justice and equality that underpin our profession. It's not enough to merely weather the storm; we must actively engage in shaping the future we envision — one where justice is not a privilege but a fundamental right for all.

Big insurance companies and other corporate interests continue to try and erode this system with more tort reform proposals like HB 837 passed during the 2023 session.

We have a Seventh Amendment in this country which is sacrosanct. We have a civil justice system which is the ultimate arbiter of fairness. In this country, we believe in personal responsibility and accountability. When someone takes from someone else, when they injure them, or in the worst case, cause the death of a loved one, our system ensures that everyday citizens — a jury of our peers — decide what compensation is reasonable and just.

As trial attorneys we don't just pass injured people off to big government programs to provide substandard care; we ensure that the wrongdoer is held accountable, and is held responsible. Our system isn't guided by government regulation. We give individuals freedom, and we trust that they will use that freedom responsibly, and in a safe manner that won't hurt others. When they violate that trust, our civil justice system is what we rely on to hold them accountable. This is what

we are promised by our Constitution. It is our freedom. It is what we must fight to defend.

Now, we have an opportunity with the 2024 elections to influence and select the jury. This is our opportunity to support and elect pro-civil justice candidates to the Florida Legislature who are going to be advocates for the rights of Floridians and who will ardently protect access to the courts. We will support those who support justice and hold those who do not accountable.

HB 837 was a huge step backward, and this election cycle is our opportunity to right that wrong and elect candidates who can help us move forward with lawmakers who will protect a vibrant civil justice system, lawmakers who understand that a civil justice system that values justice, fairness, and access are vital to our democracy. It is time to break the grip that big insurance has on the Florida Legislature and elect lawmakers who are principled and focused on doing what is best for Floridians.

Coming out of HB 837, we have various opportunities to leverage not just this year's elections but also the success of the 2024 session, when we defeated a slate of new tort reforms that sought to build on HB 837.

The 2024 session was a show of force by the FJA and a reminder that there are legislators who understand the value of protecting the Seventh Amendment. What's more, a year later (as well as four years after various other pro-insurance tort reform bills) as insurance costs continue to rise, various lawmakers have become suspect of the impact of the reforms.

The 2024 session was a solid reminder that there are pro-civil justice lawmakers in the Capitol; now we can bolster the support we already have and grow our bench.

Your ongoing engagement is a testament to our collective determination to leave a lasting legacy rooted in our steadfast commitment to preserving justice for all. By standing shoulder to shoulder, we affirm our commitment to each other, to our clients, to our practices, and to the noble pursuit of justice.

I have been fortunate to work closely with great leaders like Michael Haggard, Curry Pajcic, and Steve Cain, to learn from them, and to fight next to them. I hope to serve this organization well, as they have. What I am particularly excited about is that I get to serve alongside a new group of powerful young leaders who are up-and-coming in this organization and bring fresh energy and fresh perspective to the fights ahead.

The road ahead will not be easy. Every year we have to be prepared to fight to protect the justice system. The fight can feel thankless, exhausting, and endless. But as I have said time and again, “rocks don’t roll uphill.” That’s why we cannot ever afford to let our guards down, to get complacent, or lazy. That is why at times we cannot compromise. Once a right is gone it is never coming back, so we have to fight every fight. The only thing that we can rely on is us.

We have the talent, the energy, and the planning to win the battles ahead, but most importantly, we have something else on our side: justice, and simply standing for the right thing. ▣

Kadima,  
 Todd J. Michaels  
 FJA 2024-2025 President



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# LEADING THROUGH WAR

by Jeff Porter, FJA Executive Director



As you read this, we have all just returned from FJA's 2024 Annual Convention. It was another great Convention, a time for Florida Justice Association (FJA) members to come together and reflect on the past year, the challenges we faced and conquered, and those that still lie ahead.

First, I want to recognize the steadfast leadership and relentless determination that was the hallmark of Stephen Cain's leadership of this organization. From the defense that he helped Curry Pajcic mount against HB 837 during the 2023 legislative session, to the mantra of "kill, kill, kill" that became the rallying cry of the 2024 legislative session, Cain's leadership was one for the ages. Cain's leadership was forged in his knowledge of past FJA battles and inspired by his dedication to leaving the FJA "better than how he found it." He has done just that, while bravely launching us into the 2024 election cycle with historic goals in mind.

The battles we've faced, the challenges we've overcome — they have all been met with courage and determination, thanks to the guidance and support of many of our past leaders. Their legacy of leadership, marked by a steadfast commitment and resolve, has paved the way forward.

We have been through the battle, but now we are at war. That is both the challenge and opportunity that the 2024 election year presents us with, and it is one that I believe we can win.

As we stand on the other side of the passage of HB 837, ongoing threats to access to justice and the 2024 elections, the call to action for FJA members has never been more profound.

It will take all of us coming together as a united front, rallying behind our new FJA President, Todd Michaels, as our "wartime" president to safeguard justice for all Floridians and protect your practices.

I use "wartime" president because Michaels is a president who finds himself leading the organization during an election year. It requires the double-headed talents of being both the FJ PAC Chair and FJA President while balancing the maintenance of a successful law practice and family. It is an enormous effort to take all of that on;

however, as you will read in the Special Focus feature — as a "multi-tasker in chief," Michaels, I believe, is up for it.

What is critical about Michaels' election year is that it is the cycle for our response to the Florida Legislature's passage of HB 837 during the 2023 session.

As such, it has greater importance than a typical election cycle because of the enormous goals that we as an organization have set. This is going to be one for the record books, and Michaels is more excited than anyone to be at the helm at this unique time we find ourselves in.

The multifaceted role our new president is faced with demands not just his resilience but our collective resilience. As he shoulders the weight of leadership, balancing the various responsibilities at this critical time, it falls upon all FJA members to take an active role to bolster his efforts with unwavering support and solidarity.

Preserving justice for all Floridians requires more than practicing law; it demands ongoing investments of time, resources, and advocacy. These times present us with a pivotal opportunity to fortify your commitment to the FJA, and to reaffirm your dedication to protecting the rights of the vulnerable, and to ensuring access to justice remains sacrosanct.

I cannot express enough how critical this election cycle will be for the association, and how important your investments and input will be to ensure our adversaries are held accountable and the election of pro-civil justice candidates.

This election year holds exceptional significance as we gear up to respond to the ramifications of HB 837 passed in the 2023 session, as well as the ongoing attacks we defended against during the 2024 session. This is a crucial time for our organization, with monumental goals on the horizon. This is a defining moment, and your FJA leadership and staff stand poised and enthusiastic to lead us through this unprecedented juncture.

Together we stand poised to make history and usher in a new era to protect and advance the civil justice system. ■

Onward!

# 2024: A Generational Election Advancing Justice for All!



**Historic Tort Reform** In the years leading up to the 2023 session, we frequently invoked the phrase “Winter is Coming” to describe the legislative leadership environment that would preside over the 2023-2024 Florida legislature. While we could predict that it would be a dangerous two year period for the civil justice system, no one could predict the comprehensive nature of HB 837, the pace at which it barreled through the legislature with such minimal, though significant, changes allowed to it.

**Historic Opportunity** The 2024 election cycle represents an opportunity not just to elect a new set of legislative leaders that will protect Florida’s civil justice system. It also represents an opportunity to send a message to those who try to limit access to justice: there are consequences to attacking our practices and hurting our clients.

With your help, the Florida Justice PAC will make this election cycle our electoral response to HB 837. We will identify and support pro-justice candidates on both sides of the aisle throughout Florida and ensure they have the resources they need to win. Equally important, we will identify enemies of access to our courts and marshal our resources to prevent them from ever reaching Tallahassee.



## The Florida Justice PAC is fundraising to usher in a new era – at the ballot box and at the Capitol.

- ✓ **Protecting Your Clients Together** We take on powerful insurance companies and other corporate special interests that spend millions lobbying in Tallahassee against you, your clients, and the integrity of the judiciary.
- ✓ **Advancing the Civil Justice System in Tallahassee** We will ensure Florida’s leaders will once again champion the civil justice system and reopen the courthouse doors for everyday Floridians.
- ✓ **Field the Right Team** We have a history of winning races through strong, member-powered field programs, and this year will be no exception. The Justice Strike Force is fired up and ready to launch across the state, where it will have hundreds of thousands of conversations at the doors of Florida homes on behalf of FJ PAC-supported candidates.

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If so, you too can become a FJA Key Contact. Developing and fostering these relationships is not a one-shot deal! These contacts must be made year-round to ensure access to legislators at critical times. FJA encourages members to begin to develop a relationship with a legislator or candidate by working on his or her campaign. Our key contact program is a vitally important component of our program for future legislative successes.

**Contact Ami Wheeler or Lydia Claire Brooks** by email at [awheeler@myfja.org](mailto:awheeler@myfja.org) and [lcbrooks@myfja.org](mailto:lcbrooks@myfja.org) or call **(850) 521-1039** for more information on how to be a part of this important cause.

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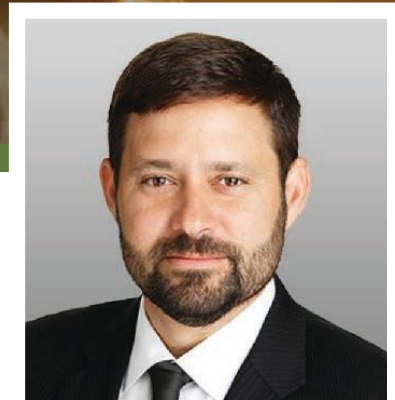
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# FJA'S NEW PRESIDENT: TODD J. MICHAELS – FIGHTING TO MAKE THE WORLD A BETTER PLACE

by John E. Simmons



Todd J. Michaels and his two sons, Ashton Paul Michaels and Jackson Alexander Michaels.

“There couldn’t be a guy that’s better for the job of president right now,” said FJA Past President Mike Haggard, managing partner of The Haggard Law Firm in Coral Gables. “Todd Michaels has been a rock star for a long time.”

Michaels had a very diverse upbringing in Miami, but after high school found himself heading north to continue his education at the University of Michigan.

“It was a combination of never having lived in a cold weather state and an admiration for the basketball team,” said Michaels. The Fab Five, as they were called, was the 1991 recruiting class that’s regarded as one of the greatest basketball recruiting classes of all time.

After graduating with a Bachelor of Arts degree, he returned home to the University of Miami School of Law to earn his Juris Doctorate.

Michaels was inspired to enter the practice of law by a friend of his parents, David Lipman. Lipman graduated from the Duquesne University School of Law in his hometown of Pittsburgh, Pennsylvania, and then made his way to Mississippi to work for civil rights. He worked for North Mississippi Rural Legal Services, the Mississippi Prisoners’ Defense Committee, and many others.

“He got his law degree and headed south to the Mississippi Delta and did civil rights work at great personal risk and personal cost. He and his wife worked on all kinds of cases, voting rights, equal services, education, prison reform, things of that nature,” said Michaels. He continued that Lipman and his wife “did what they thought was right, and they went down [to Mississippi] and fought. To me, they were good family friends, and they were real heroes, but they were people who actually made the world a better place.”

After law school, Michaels continued to work to make the world a better place by serving as an assistant public defender in the 11th Judicial Circuit of Florida for five years. He worked as a felony training attorney supervising other trial lawyers. He also worked as a federal public defender and as a private criminal defense practitioner. He credits that work with helping him understand the problems and needs of people.

He joined The Haggard Law Firm in 2009 as an associate and was named partner in 2014. These days he handles a variety of cases involving wrongful death and catastrophic personal injury.

His practice also includes negligent security cases throughout Florida and across the country. He was lead counsel in the Florida case of *Snell v. Family Food Saver*. The trial resulted in a verdict of \$5.7 million and was the largest premises liability



Todd Michaels presenting on “The Handling, Litigation, and Trial of a Negligent Security Case” at FJA’s 2024 John Romano Workhorse Seminar.

verdict in Florida for the year. Michaels has been a frequent speaker on various aspects of negligent security law and has spoken to legal groups and industry associations in addition to publishing articles related to negligent security cases.

Michaels also tries medical malpractice and wrongful death cases. In one case, he was co-counsel for Rodolfo Torres, whose wife Lilia died from avoidable complications during childbirth. Lilia was the mother of four children and had a condition that the medical team was aware of and that contributed to the complications and her untimely death. The trial in Broward County resulted in a \$24.5 million verdict for her family.

“This is something that’s guaranteed in the Constitution, something that makes this country so unique. Someone caused harm to someone else, and we can step in to take care of that person. We make sure that there’s personal responsibility, that the wrongdoers are held responsible, and we make the person injured, either physically or otherwise, whole,” said Michaels.

While his legal practice is important, his two sons, Ashton (13) and Jackson (7), are his everything.

“My sons are my entire world. They really grew me up, and made me improve myself,” said Michaels. “I want to give them a better world to live in, to try to provide them with opportunities and education as well as love and support. They are my reason for existence.”

Despite his busy work schedule, he always makes time for Ashton’s basketball and water polo games, and Jackson’s flag football and basketball games. He devotes all this time to his children despite maintaining one of the most complicated of law practices.

Haggard sees the relationship between father and sons. “He really shows you that you can be a great dad, and you can be a



Todd J. Michaels and his two sons, Jackson Alexander Michaels and Ashton Paul Michaels.

great trial lawyer, a great volunteer, and help the community as well. You can do all those things. And the boys see him doing it. They get to see how much he cares for his clients and his community.”

“Todd Michaels wakes up every day trying to do better — for his firm, his two sons, and the civil justice system,” said Jeff Porter, Executive Director of the FJA.

### **A Leader in The Community**

Michaels’ work ethic and effectiveness have brought broad recognition from professional organizations. He has been twice named Most Effective Lawyer by the Daily Business Review and has been named to the Best Lawyers in America and Super Lawyers lists several times.

He was recognized as a Bronze EAGLE® Award winner by the FJA in 2019. The honor is bestowed on those who have shown

an extraordinary contribution to the FJA EAGLE Program, whose members provide extra financial support to help the FJA in its mission. Among other positions, he has served as an FJA Board member, Fellow, and Executive Committee member. He also chaired the FJA committee that awarded Benjamin Crump this year's Justice Barbara Pariente Award.

In 2018, Michaels was selected to become one of the distinguished and exclusive Fellows of The Academy of Florida Trial Lawyers, and the National Trial Lawyers Top 40 Under 40. He is also a member of the American Board of Trial Advocates.

Volunteering is also an important part of making the world a better place for Michaels. He has volunteered for various organizations including the Redemption Project, Community Partnership for the Homeless, and the 5000 Role Models of Excellence Program, and has been a Board member of the Carma Haiti Foundation and Scholars Today Leaders Tomorrow.

"I've always thought you can stand on the sidelines or you can get involved, and I try to get involved in various organizations," he added. "But in recent years, most of my time and most of my effort goes to the FJA. When I was first starting (at The Haggard Firm) back in 2009, my partner, Mike Haggard, was the incoming president of the FJA, and I got to learn about the organization through that experience, through seeing the things people were doing."



Todd Michaels pictured with Partner Michael Haggard and Associate Kimberly Wald at the Miami-Dade Trial Lawyers Association Installation of Officers event on February 17, 2024.

"Todd has epitomized what it is to live up to the redefined role of 'trial lawyer' in Florida," said Porter. "In helping to redefine what it is to be a trial lawyer in this era, he has preached that it isn't just about jury trials and working your case files, but it is moreover an engagement of civic leadership at the heart of the calling. That has meant knowing and befriending legislators, being a part of his local community, being highly engaged with his beloved children and their school, and playing a role in political campaigns."

### **Working to Protect Florida's Civil Justice System**

Politics plays an increasingly important role in seeing that injured Floridians can recover, particularly since the passage last year of House Bill 837, which, among other things, changed the one-way attorney fee statute in most insurance litigation, and changed the way contributory negligence is measured.

"2023 was a very tough year for us with very bad tort reform. It was the largest transfer of rights, money, and power from Floridians to insurance companies and big corporations," said Michaels.

He went on to point out the necessity of being bipartisan when talking to members of the Florida Legislature.

"You've got people from all walks of life. You've got truck drivers, you've got farmers, doctors, you've got business-people, you've got workers, you've got all the people that come together to form the legislature. These issues are issues that we are thinking about every day, but for a lot of people they are new."

Michaels said you must tell the story to get the truth out and help legislators understand the importance of access to justice and righteousness.

Porter said this upcoming year is very important for all Floridians.

"What is critical about Todd's election this year is that it is the cycle for our response to the legislature's passage of HB 837 in the 2023 session. It has greater importance than a regular election cycle because of the enormous goals that we have set. This is going to be one for the record books, and Todd is more excited than anyone to be at the helm at this unique time we find ourselves in," Porter said.

"From a policy and legislative perspective, I think we are going to see the pendulum begin to swing back to consumers during Todd's presidency. While it is exciting, there is also an enormous expectation from our membership to achieve some great things in the 2025 (March) session, which will be



Todd Michaels pictured with FJA Past Presidents Stephen F. Cain (2023-2024) and Curry G. Pajic (2022-2023).

Todd's session as President," he added. "Todd is inclined to be very politically engaged for the right reasons — that he can make a difference by getting the right people elected at the local, state, and federal levels."

Haggard said Michaels has a keen understanding of the history of the organization. "I think he'll put us on a solid path forward, focusing on the future of the organization. He's someone who understands our past and has a great vision, not just for this year, but for the future."

"I fully expect that he will continue his mantra of, 'we can do it,'" Porter added. He doesn't have hesitations when it comes to fulfilling important needs of the organization. In fact, the only thing that holds him back, as he would profess, is making sure that every meeting, planning session, fundraising task, or myriad of speeches we ask him to make has found its way to his calendar. He wants to do it all, and he makes it look easy with his calm demeanor. It is rare to see the word 'no,' exit his lips."

FJA's Executive Director went on to express extreme confidence in Michaels' ability to handle the tasks ahead.

"The issues Todd will face are those that are consistent with many 'wartime' presidents, which is a president that finds himself leading the organization in an election year. It is the multi-tasking of being both the PAC Chair and the President and balancing that while also maintaining a successful law

practice and family that is a great challenge. It is an enormous effort to take all of that on, but as 'multitasker-in-chief,' he's up for it."

As FJA President, Michaels is working for clients, the community, and the people of Florida. Haggard believes Michaels will keep a careful eye on future legislation. "Future laws affect somebody who has no idea they're going to need it. Because nobody plans for tragedy, they can't plan for that."

Ultimately, it all comes back to caring deeply about people.

"He's a tried-and-true trial lawyer. And he is incredibly passionate about his clients, and his clients truly become lifelong friends. He really feels what they go through and has a tremendous empathy and understanding of his client's needs and what they've experienced during the tragedy that they've suffered," said Haggard.

"He has made it his life's work to protect those victims and give them a better chance to recover and live a normal life after a horrific event. His advocacy for his clients and his non-client victims in Tallahassee will amount to an overall reduction in crime in our state. He is proud of that, just as are all who are inspired by him," said Porter.

"Todd is one of those people who truly put other people in front of himself. If he sees a cause, he's always the first one to help. He wants this world to be a better place after he's left it. And I don't say that lightly," said Haggard.

Remembering his mentor, David Lipman, Michaels continues the fight. He said he wants to be sure there are no future attempts to chip away at the rights of Floridians, particularly trials by jury.

"We get everyday people from off the streets, let them hear the righteousness of the cause, and let them decide what the proper result is. That's something that makes this country unique even among other Western liberal democracies, and it's something that we have — that right to jury trial."

Haggard added, "People don't know that some tragedy might occur to them. They have no way of knowing how lucky they are that Todd Michaels is going to be FJA's next president." ■



### JOHN E. SIMMONS

is an award-winning journalist writing for television stations and newspapers around the Southeast. He has also spent the past 20 years writing settlement documentaries for Video Law Services in Jacksonville. He received his J.D. degree from the Woodrow Wilson College of Law in 1976.



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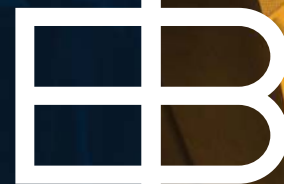
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Benjamin L. Crump joins Vice President Kamala Harris, Al Sharpton, and others in a walk across the infamous Edmund Pettus Bridge in Selma, Alabama. The March 2024 event was held to commemorate the 59th anniversary of the Bloody Sunday voting rights march in 1965.

## BENJAMIN L. CRUMP: DEFENDER OF JUSTICE AND EQUALITY ACROSS AMERICA

by John E. Simmons

The Justice Barbara Pariente Award was first presented to Justice Barbara Pariente on June 16, 2022, and recognizes an outstanding individual who has demonstrated their enduring commitment to ensuring that Floridians have access to equal justice under the law. This year's award was presented to Benjamin L. Crump by Justice Pariente at the Florida Justice Association's Justice Luncheon at the Annual Convention on June 13.

"I believe in justice for all, especially for those without a voice who need our help most of all," is a quote that defines Benjamin L. Crump. A graduate of the Florida State University College of Law, Crump is an internationally known attorney whose law firm is in Tallahassee and other cities throughout the United States.

Early on in his career, Crump made an impression. Daryl Parks is an attorney in Tallahassee who has known Crump since they were involved in undergraduate student politics, he at Florida A&M University and Crump at Florida State University. He calls Crump a good example for trial lawyers.

"He's willing to help people who might not have access to the judicial system," said Parks. He particularly points to the Trayvon Martin case, a case of national notoriety. "He was ensuring there was fairness and transparency in the things that were done by law enforcement."

### Becoming a Voice for Others

Justice Pariente first met Crump when he was a trial lawyer in Tallahassee, while she was serving on Florida's Supreme Court. "I watched with pride as he became a champion of justice in the truest sense of the word. Ben to this day is a voice for those Black men and women who had been the victims of police abuse of the cruelest kind — often and tragically dying as a result of a minor traffic offense or misdemeanor — and for those profiled just because they were Black, as exemplified by the tragedy of Trayvon Martin."

"Ben is the most deserving person for the Justice Barbara Pariente Award because of his history. He was fighting for justice long before he was a national figure," said Talley Kaleko, friend of Crump and 20-year trial attorney and president of The Law Cite, a trial consulting firm. "He talks about how we're not just fighting for justice in individual cases. We're fighting for justice in the overall world."

Crump has worked on hundreds of police brutality cases, representing families of victims such as Martin, as well as George Floyd, Breonna Taylor, Michael Brown, Tyre Nichols, Ahmaud Arbery, Daunte Wright, Jacob Blake, and many more.

The British Broadcasting Corporation called Crump "America's go-to police brutality lawyer." Time Magazine put him on



Benjamin L. Crump speaks to the public at the LaShawn Thompson Press Conference in Fulton County.



Benjamin L. Crump meets with Fulton County Sheriff Patrick Labat for the LaShawn Thompson Press Conference.

its cover and said he is on a quest to raise the value of Black life in America. CNN pointed to his tenacity by saying he can't slow down.

"He was an early believer in getting the news involved and making sure society knew what was happening," said Kaleko.

"Ben is thought of as Black America's Attorney General," said Wayne Hogan, an FJA EAGLE® member and a partner with



Benjamin L. Crump is present with activists at the Georgia State Capitol in Atlanta to support the Brianna Grier case.

the Terrell Hogan firm in Jacksonville. "You can go across the United States and find people who look to Benjamin Crump to protect them when they are seeking justice, whether it's in Florida, Georgia, Kentucky, Tennessee, Ohio, Minnesota, Michigan, California, or Texas. These are places where wrongs were done, and Ben stepped up to help people find justice."

Crump takes on "the tough challenge of insisting that this nation, and the states and their communities, do what is right. And he does that, not only on behalf of those unlawfully harmed in police encounters, but also to prevent those tragedies in the future, by persistently innovating to improve how law enforcement agencies recruit and train officers and to cause them to revamp their systems to achieve better patterns and practices of protecting and serving."

Hogan added that Crump is humble despite his international fame. "He is constantly concerned about the people he is helping. It is not about Benjamin Crump, and it never has been."

Kaleko agrees. "He is the first to give credit where credit is due, as opposed to taking it all for himself. He always says he has the best people around him."

Hogan remembers Dr. Martin Luther King's visit to St. Augustine in 1964 and the racial turmoil that followed. "Dr. King said that the arc of the moral universe is long, but it bends towards justice. And Ben Crump is the lawyer who puts his shoulder to the arc to bend it towards justice."

Crump is admired by many for his tenacity, grit, and ability to overcome adversity in the legal profession. Crump demonstrates "exceptional legal skills, compassion, and a deep understanding of the challenges faced by Floridians seeking justice," said Michal

Meiler, immediate past chair of the FJA Women’s Caucus. “He has played a pivotal role in high-profile cases that have garnered national attention, shedding light on issues of systemic injustice.”

“Ben would take on cases where the initial law enforcement, state attorney, or medical personnel, chose not to treat people in the best way,” added Parks. He said the system responds differently depending on who is asking questions. “He has become a person that asks questions that get better answers than others would normally get. That’s commitment, being steadfast, and being sure people respond. That’s caring.”

In addition to his legal work, Crump’s accomplishments, accolades, and leadership roles are too numerous to count in one article. He has served as president of the National Bar Association, president of the National Civil Rights Trial Lawyers Association, and is the first African American to chair the Florida State University College of Law Board of Directors. He is also a recipient of the NAACP Thurgood Marshall Award, the Southern Christian Leadership Conference (SCLC) Martin Luther King Servant Leader Award, and the American Association for Justice Johnnie Cochran Award, to name a few.

**Giving Back to the Community**

Crump is also the namesake for the Benjamin L. Crump College of Law at St. Thomas University in Miami Gardens. This milestone marks the first law school to be named after a practicing Black attorney in American history. The school serves as a hub for educating the next generation of male and female lawyers of diverse backgrounds who will act as social justice engineers.

**Putting Family First**

Family is very special to Crump. Dr. Genae Crump, his wife of more than two decades, respects his qualities. “It’s his honesty, persistence, and especially his integrity,” she said. She also said he’s a great father to their 11-year-old daughter, Brooklyn. The young girl spent a lot of time in the Crump law office, and her father made sure he picked her up at preschool at least a couple of days a week. The family also

took in two nephews when the boys’ mothers were having problems. Both have grown up to be excellent young men. He also keeps a close relationship with his mother and siblings. Kaleko said about half of the people in Crump’s Tallahassee office are relatives.

Dr. Crump worked for many years in the Leon County Schools system and now owns her own consulting business in Tallahassee. She said her husband is away from home a lot but that he’s doing important work.

**Sharing Powerful Stories**

While he’s away, Crump is frequently taking notes and working with editors on a new endeavor — novels. He has recently signed a contract with Bantam Books for a series about Beau Lee Cooper, a civil rights attorney from Texas. Crump said Cooper is a family man — a common person who walks with kings but never loses the common touch. He has previously written a nonfiction book — *Open Season: Legalized Genocide of Colored People*, which focuses on landmark cases he has battled.

Kaleko has known about his writing career for some time and is excited about it. “I think his story and what he has to share is so powerful. It’s something we all need to hear because it helps us recognize our common humanity. And when we recognize our common humanity, that’s how we get justice for our victims.”

The award’s namesake, Justice Barbara Pariente, said it best: “Benjamin L. Crump exemplifies all that the Justice Pariente Award was meant to recognize and honor.” ■



**JOHN E. SIMMONS**

is an award-winning journalist writing for television stations and newspapers around the Southeast. He has also spent the past 20 years writing settlement documentaries for Video Law Services in Jacksonville. He received his J.D. degree from the Woodrow Wilson College of Law in 1976.



Actor Will Smith, Benjamin L. Crump, and David A. Armstrong, president of St. Thomas University, during the name dedication ceremony for the Benjamin L. Crump College of Law at St. Thomas University.



Benjamin L. Crump, center, with his wife Dr. Genae Crump, left, and daughter Brooklyn, right, at the 2023 Griot Awards.

# CDC Stats Show

23%

## Of People Hurt In MVCs Have A Brain Injury

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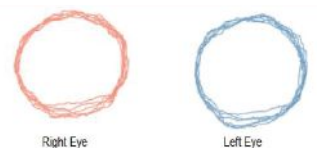
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Normal Eye Movement Tracking



Post TBI Eye Movement Tracking

# In Brief

by Julie H. Littky-Rubin

**The Supreme Court potentially upends the exceptions to the Dram Shop Act — rules that the comparative fault of the underage drinker may be considered in an action against the defendant bar because Section 768.125 is a negligence action.** *Faircloth v. Main Street Entertainment*, 49 Fla. L. Weekly S47 (Fla. Mar. 7, 2024):

An 18-year-old was hit by a speeding pickup truck as she crossed the street on foot. Both the driver of the truck and the victim were intoxicated at the time of the collision. The victim suffered catastrophic and permanent injuries.

The plaintiff's guardianship sued two Tallahassee bars, seeking money damages and asserting that the bars had acted "willfully and unlawfully" in serving alcoholic beverages to both the driver and the victim. The complaint alleged that each of the underage drinkers became intoxicated and their intoxication caused the accident.

One of the bars raised a comparative fault defense, arguing that any fault attributable to the victim should reduce the bar's liability. However, the trial court decided that since Section 768.125 requires willful misconduct, the plaintiff's lawsuit was not a "negligence" action for purposes of comparative fault, ruling instead that the statutory violation amounted to an intentional tort.

The defendant bar stipulated that it had willfully and unlawfully served alcoholic beverages to the driver. The bar's defense focused on the causation element of the plaintiff's claim. The bar argued that the defendant driver was not intoxicated at the time of the accident, and even if he were, his intoxication did not cause the collision. The bar maintained that the accident was unavoidable once the victim darted in front of the driver's oncoming truck.

The First District reversed the substantial judgment for the plaintiff, finding that the trial court should have allowed the bar to assert a comparative fault defense. After reviewing the background of Section 768.125, and Supreme Court precedent, the district court concluded that the statute requires that the selling or furnishing of

alcohol to a minor must be done *willfully* for the vendor to be liable, but the vendor is liable in negligence, not intentional tort.

The Supreme Court tracked the evolution of the statute. It used to be that a commercial vendor of alcoholic beverages could not be liable for the sale of those beverages when either the purchaser or a third person was injured because of consumption. The Legislature enacted Section 768.125, effectively codifying the original common law rule absolving vendors from liability for sales, subject to the two exceptions specified in the statute (underage and habitual drunkards), which amounted to negligence per se.

Section 768.125 did not modify the common law by limiting liability to situations where the sale to an underage patron is done both willfully and unlawfully. The "unlawful" requirement brought nothing new, as the negligence per se-based cases already required proof that the alcohol provider had violated Section 562.11. The term willfully, as used in Section 768.125, simply meant that the alcohol provider knew that the recipient was under 21.

Section 768.125's willfulness requirement means that the plaintiff must prove that the defendant knew the purchaser was underage. To that extent, the defendant's misconduct is intentional, but it is different than the type of intent that takes the conduct out of the negligence realm and puts it into the intentional tort realm.

Viewed against the common law baseline, the willfulness requirement in section 768.125 does not change the basic relationship between the defendant seller's conduct and the plaintiff's injury. Instead, the statute merely limits liability to a subset of actors who could be found liable under the preexisting negligence per se doctrine.

The plaintiff did not allege that the bar intended harm to someone in the young woman's position or that the bar knew such harm was substantially certain to occur. Thus, the court concluded that section 768.125 is a negligence action and that defendants may use section 768.81 to compare the fault of the plaintiff victim.

The court specifically ruled that it was not approving or disapproving the district court's derivative liability analysis and its conclusion that liability cannot be apportioned between a selling bar and the underage drinker who becomes intoxicated and injures himself or others. It simply ruled that the comparative fault statute may apply because section 768.125 is a negligence action and not an intentional tort action. Time will tell just how much damage this decision will do to the protective nature of the statute.

**Trial court properly allowed plaintiff to amend his complaint to state a claim for punitive damages on the basis that the driver was intoxicated.** *Gattorno v. Souto*, 49 Fla. L. Weekly D678 (Fla. 3rd DCA Mar. 27, 2024):

In what seems to be the first personal injury case allowing a punitive damages proffer since the Florida Supreme Court amended the nonfinal appeal rule to allow these appeals, the court affirmed the trial court's ruling because the defendant driver was intoxicated when she struck the plaintiff with her car.

The proffer included deposition testimony from four people and addressed how the driver was at a bar until 2 a.m. before the crash. It also contained various snippets of testimony about the number of drinks that the driver had.

The court found that the record confirmed that the trial court considered and weighed the evidence offered by the parties, acted as a fact-finder, and performed its gatekeeping role before ruling that the plaintiff *could* seek punitive damages. It rejected the defendants' suggestion that evidence of intoxication while driving does not provide the requisite "reasonable basis" for recovery of punitive damages and affirmed that the proffered evidence supported that conclusion.

**Trial court properly enforced a settlement agreement and dismissed the plaintiff's case — emails between attorneys can constitute an enforceable settlement agreement — also, plaintiff waived the attorney-client privilege by discussing confidential communications with his former counsel during his testimony.** *Portner v. Koppel*, 49 Fla. L. Weekly D599 (Fla. 4th DCA Mar. 13, 2024):

The plaintiff filed an action against the defendants for a wrist injury he sustained when the defendant's dogs charged at him in their home. The parties negotiated a settlement agreement arising out of those injuries. However, the plaintiff claimed there was not a settlement agreement because he wanted a "net" settlement of \$100,000 instead of the "gross" settlement of \$100,000 negotiated by his former attorney.

The defendant's attorney testified regarding text messages and emails exchanged between himself and the plaintiff's former attorney. The correspondence showed that the defendant's counsel said he was authorized to settle for \$100,000 and provided a draft settlement agreement.

The plaintiff testified that he told his former attorney's associate that he would settle for a net amount of \$100,000. When the associate informed the plaintiff of the \$100,000 offer, the plaintiff testified he was not clear if it was net, and testified he did not accept the \$100,000 because the "net" was much less. The plaintiff's former attorney testified that the plaintiff had unambiguously authorized him to settle for \$100,000.

The appellate court found the plaintiff was not credible. It further found that competent, substantial evidence supported the trial court's findings that the parties had agreed to all essential terms that were incorporated into the final settlement agreement. There was also no abuse of discretion in allowing testimony about once privileged communications because the plaintiff waived the privilege by claiming that his former counsel lacked the authority to settle his case.

**Trial court departed from essential requirements of law by authorizing defendants to issue subpoenas for "any and all" medical records "for the last ten years," without limiting the scope or conducting an in camera inspection — plaintiff maintains a right to privacy in medical records that are irrelevant.** *Dominguez v. Omana*, 49 Fla. L. Weekly D617 (Fla. 6th DCA Mar. 15, 2024):

The plaintiff sued the defendant for medical malpractice for damaging nerves in her arm while performing a procedure to remove a nodule from her armpit. The defendants gave notice of their intent to serve subpoenas on several nonparties to request the production of the plaintiff's medical records. The subpoena sought "any and all" records "for the last ten years" that pertained to the plaintiff. The plaintiff filed objections, and the defendants moved to overrule.

Plaintiffs argued the subpoenas were overbroad and invaded her constitutional right to privacy because it was highly probable that irrelevant medical records would be produced.

She asked the trial court to sustain her objections or, alternatively, to conduct an in camera inspection. The trial court found that the plaintiff waived her right to privacy by putting her physical condition at issue, and that the subpoenas were likely to lead to the discovery of admissible evidence. The court also denied her request for an in camera inspection.

While the court found that the records could be calculated to lead to the discovery of admissible evidence, it agreed with the plaintiff that it was highly probable that irrelevant medical records would accompany the relevant ones under the breadth of the subpoenas, requiring the trial court to limit the scope or to conduct an in camera inspection. The court expressed its understanding about the burden that in camera inspections could put on busy trial judges but wrote that such a burden may be necessary to protect privacy rights.

**To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged and ask the trial court to re-instruct and send the jury back for further deliberations.** *Chiarella v. Ford*, 49 Fla. L. Weekly D409 (Fla. 4th DCA Feb. 21, 2024):

In this automobile accident case, the 35-year-old plaintiff suffered spinal injuries (bulges and tears, but no acute compression) after being rear-ended and pushed into the vehicle in front of him. He ultimately had surgery. There was also evidence that the plaintiff had preexisting injuries from working out at the gym, for which he sought medical treatment.

The plaintiff introduced a medical bill index reflecting a total of nearly \$350,000.00 in past medical expenses as well as evidence of future medical expenses that would total over \$1.1 million.

The jury returned a verdict of \$150,000.00, concluding the plaintiff had not sustained a permanent injury. The plaintiff argued that the verdict was inconsistent because the amount of the award necessarily had to include some degree of invasive care, which would have included the surgery. However, the plaintiff did not specifically ask the trial court to re-instruct the jury or send the case back for further deliberations.

The appellate court found that the plaintiff failed to preserve the issue of the inconsistent verdict, because to do so requires the raising of the issue before the jury is discharged and requires the party to ask the trial court to re-instruct the jury and send it back for further deliberations. Litigants must assert clear and specific objections under the law to preserve issues for appeal.

**Trial court erred in granting the defendant's motion to sever and transfer portion of the plaintiff's complaint in a case where the plaintiff had been injured in two successive accidents, even though they arose in different counties and involved different parties and different treatments, because they were still sufficiently intertwined.** *Pereira v. Jones*, 49 Fla. L. Weekly D648 (Fla. 5th CA Mar. 22, 2024):

The plaintiff was involved in two successive car accidents, one in Lake County and one in Orange County. The plaintiff sued for both accidents in Lake County, asserting that Florida law allows a plaintiff to try two cases together that result in injuries that are difficult or impossible to apportion.

The defendant insurance company argued that the two accidents were not sufficiently intertwined and could be severed because they were in different counties, with different parties and different patient treatments, and occurred more than three years apart.

When a plaintiff is injured in two successive accidents, he or she may bring a suit where the accidents cause the same or similar

injuries, or where it is difficult or impossible to apportion the injuries between the two tortfeasors. However, the plaintiff must allege that the injuries are unapportionable. Here, the plaintiff had not so alleged, and the trial court denied him leave to amend.

It is error to sever and transfer one case when two successive actions cause the same or similar injuries, provided the injuries are indivisible, impossible, or very difficult to apportion. The court ruled that the plaintiff should have been allowed to amend her complaint, which would have allowed him to keep both cases in the county in which he filed it.

**Trial court erred in admitting harmful hearsay testimony from the decedent's sons in a tobacco trial.** *Philip Morris v. Jordan*, 49 Fla. L. Weekly D670 (Fla. 3rd DCA Mar. 27, 2024):

The decedent's children filed a wrongful death suit after she died from lung cancer. During trial and over objection, one of the sons relayed a conversation he had had with his mother, where she expressed how angry and upset she was with the defendant tobacco company. As he relayed, she was upset because the company had long represented that smoking filtered cigarettes would filter out the "bad stuff" and keep her safe. The son also testified that she was angry both because the tobacco company had lied to her, and because she was dying.

On appeal, the defendant asserted those statements were inadmissible hearsay, because they were backward-looking, and not offered for the purpose of showing the decedent's state of mind.

Section 90.803(3)(a) says that statements of a declarant's then-existing state of mind are admissible to prove or explain the declarant's subsequent conduct or to prove the declarant's state of mind at the time that the statement was made or at any other time, *but only when such a state is at issue* in the action. There is an exception for after-the-fact statements, but only if those *statements recount observations made previously*.

The statements here were not offered to establish *why* the decedent was smoking filtered cigarettes or her reasoning for continuing to do so. Instead, they were "after-the-fact" statements about why she had smoked in the past — not statements to explain her existing state of mind or subsequent conduct. It was therefore error to admit them, and as the plaintiff could not show that there was no reasonable possibility that the error complained of did not contribute to the verdict, the court could not say the error was harmless.

**Trial court erred by adopting the proposed attorney's fees award, which included the expert's flat reduction of counsel's hours, without making specific findings as to the reasonableness of the rates or evaluating the billing records proffered.**

*Universal Property and Casualty Ins. Co. v. Santos*, 49 Fla. L. Weekly D871 (Fla. 3rd DCA Apr. 17, 2024):

After a short evidentiary hearing where the parties proffered competing expert testimony as to the reasonableness of the hourly rates and billable hours, the court accepted the insured’s proposed award, which included a general 30-hour reduction.

The appellate court found that the expert’s use of a “10-hour per lawyer cut” that was untethered to the record was arbitrary.

**Error to apply a multiplier without evidence that the relevant market required it.** *Foot & Ankle Center of Florida, LLC v. Vargas*, 49 Fla. L. Weekly D887 (Fla. 6th DCA Apr. 19, 2024):

According to the Florida Supreme Court, in order to justify a multiplier, the moving party must present evidence of three factors: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable,

especially the amount involved, the results obtained, and the type of fee arrangement.

The purpose of the relevant market factor is to assess not just whether there are attorneys in any given area, but specifically whether they have the skill to handle the case effectively and would not have taken the case absent the availability of a multiplier.

Here, there was no such evidence introduced, necessitating reversal of the multiplier awarded by the trial court. ■



**JULIE H. LITTKY-RUBIN**

is board-certified in appellate practice and a partner in the law firm of Clark, Fountain, La Vista, Littky-Rubin & Whitman. 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](http://www.clarkfountain.com).

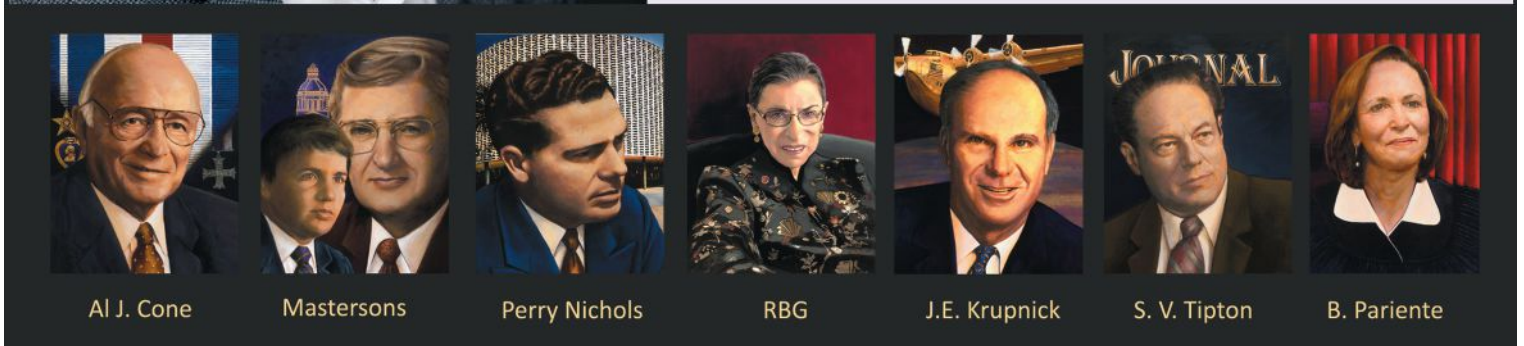


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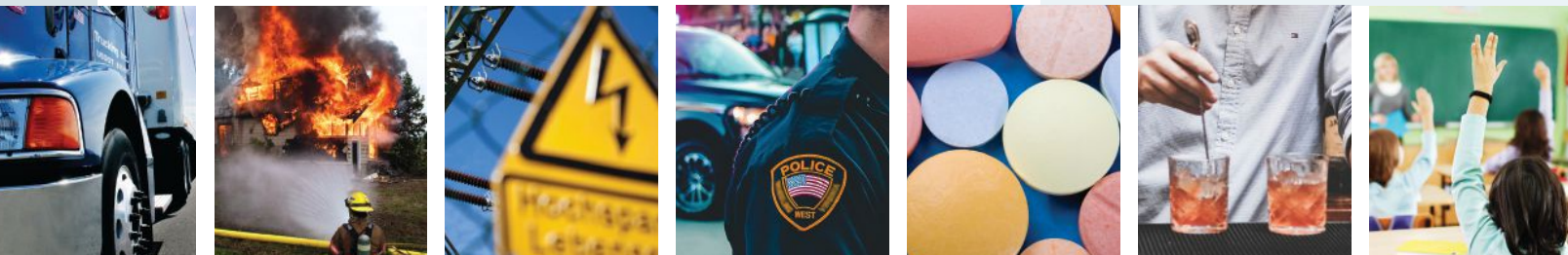


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# THE EXPERTS Robson Forensic



# LONG-TERM CARE INSURANCE FRAUD – THE NEXT FRONTIER

by Richard Benrubi

Paying for long-term care (“LTC”) continues to be one of the great financial risks facing Americans during retirement. Current estimates suggest that the annual costs of care in a nursing home are roughly \$100,000 and that home health care can cost upward of \$50,000 per year.<sup>1</sup> Given that one-in-five individuals can expect to spend more than two years in need of care, this represents a significant financial risk. For the most part, such care is provided and paid for by families, whereas the largest public payer of LTC services is the Medicaid program, which pays more than 40 percent of costs. Medicaid is one of the fastest-growing health programs in the country and is creating significant budgetary pressures on the states. Private insurance covers a small — less than 10 percent — but growing share of LTC expenses.<sup>2</sup>

Throughout the 1980s and 1990s, a growing number of private insurers began providing insurance for LTC, as an alternative to public coverage (i.e., Medicaid) or to out-of-pocket payments by the elderly and their families. At first, such insurance policies covered care provided only in a nursing home. Gradually, coverage expanded to include payments for home care services, assisted living, adult day care, and other community options. By the mid-to-late 1990s, more than 100 companies were selling policies to individuals and to individuals in group markets (i.e., employer settings).<sup>3</sup> Moreover, annual sales increased almost every year throughout the decade. In 1990, 380,000 individual policies were sold; by 2002, 755,000 policies were sold in that year.<sup>4</sup>

It is no secret that the industry has taken a financial beating since it began offering this product some 30 years ago. Simply put, the industry offered these policies at premium rates far lower than that required to achieve profitability. Beleaguered by faulty actuarial assumptions regarding market conditions and life expectancy, insurers sustained significant losses, most stopped writing these policies, and the ability of some insurers to maintain adequate reserves to satisfy future claims was put in jeopardy.<sup>5</sup>

Unable to generate a profit from underwriting the policies, insurers began cutting costs on the claims side by manufacturing

ways to deny or terminate legitimate, expensive claims. As part of their effort, an emerging trend has seen insurers accusing their policyholders of fraudulent claims submissions. The industry is ripe for fraud, as LTC policies provide federal income tax-free benefits to insureds with a “Chronic Illness or Disability.”<sup>6</sup> However, a reasonable argument can be made that the industry brought this upon themselves. In their fervor to market and sell these products, carriers offered a “Cash Option” rider at an additional premium. This rider pays a fixed monthly benefit for one who is certified by a physician to be “Chronically Ill,” without requiring any proof that the caregiver expenses were actually incurred.

Importantly, the industry’s effort to recoup benefits allegedly obtained by fraud has been somewhat hamstrung due to their failure to include in their policies a standard “Fraud or Concealment” provision, which would contractually permit it to deny a claim or void coverage for fraudulently submitted claims.<sup>7</sup> Apparently emboldened by the recent decision in *Lincoln Benefit Life v. Dallal*, 520 F. Supp. 3d 1237 (C.D. Cal. Feb. 17, 2021); *aff’d*, 2022 WL 605709 (9th Cir. 2022), insurers have aggressively ramped up their fraud units to uncover fraudulent claims and have begun to sue policyholders (mostly elderly) in an effort to claw back benefits they paid over the life of the claim, primarily under the theory of equitable fraud.<sup>8</sup> Recognizing that its policy did not contain a “Fraud and Concealment” provision, Lincoln Benefit Life (“Lincoln”) brought multiple tort-based causes of action against the Dallals, including a count for equitable fraud. Lincoln sought restitution, punitive damages and to have the policy declared void.

A Southern California federal jury found in Lincoln’s favor and awarded nearly a million dollars in fraud and punitive damages against the Dallals, who the jury found to have engaged in a 12-year scheme to defraud Lincoln out of benefits. Thereafter, the Court issued equitable rulings in Lincoln’s favor by finding: (1) Mr. Dallal had not been entitled to LTC benefits since 2004, and (2) the joint LTC policy under which the Dallals had fraudulently procured benefits should be voided as of July 29, 2016. The Court reasoned:

“[E]quity is, peculiarly, a forum of conscience.” *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 180, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000). Indeed, “the absence of an adequate remedy at law is a reason for the exercise of equity jurisdiction.” 13 Witkin, *Summary of California Law* (11th Ed. 2020) Equity, § 3 Adequacy of Legal Remedy (citing cases). Accordingly, “equitable relief is flexible and expanding, and the theory that ‘for every wrong there is a remedy’ may be invoked by equity courts to justify the invention of new methods of relief for new types of wrongs.” *Id.* (quoting Cal. Civ. Code § 3523) (internal citations omitted).

Where a defendant has committed fraud, courts fashioning equitable relief “are not so much concerned with decreeing that defendant receive back the identical property with which he parted as they are in declaring that his nefarious practices shall result in no damage to the plaintiff.” *Farina v. Bevilacqua*, 192 Cal. App. 2d 681, 685, 13 Cal. Rptr. 791 (1961) (general rescission rule requiring plaintiff to restore the other party to the status quo does not apply where plaintiff seeks to recover for other party’s fraud rather than to keep benefits while unjustly shedding obligations) (citation and internal alterations omitted). ...

The Court agrees with Lincoln that the Policy with respect to both Mr. and Mrs. Dallal must be voided on equitable grounds. It would be manifestly unjust to force Lincoln to continue to insure two people who deceitfully and systematically cheated it out of hundreds of thousands of dollars in a several-years-long scheme. The jury’s damages award does not compensate Lincoln for the future harm it will suffer if it is forced to provide coverage after Lincoln’s trust in the Dallals has been so irreparably damaged. Because the Policy lacked an express fraud provision, it does not appear that an adequate remedy 1247\*1247 at law exists to void the Policy. Although, notably, no statute expressly forbids a court from voiding an insurance policy under these circumstances. See *Timberline, Inc. v. Jaisinghani*, 54 Cal. App. 4th 1361, 1369 n.5, 64 Cal. Rptr. 2d 4 (1997) (explaining that

a court’s equitable power cannot be used to compel an outcome that statute or policy expressly forbid).

Moreover, as a practical matter, how could Lincoln be expected to respond to future claims made by the Dallals, knowing of their unwavering willingness to lie and falsify documents? Lincoln, reasonably, will never trust anything they do or say. So, would Lincoln be required to launch a comprehensive investigation for each and every future claim that the Dallals make, as to ensure that it is not defrauded once again? The Court will not aid the Dallals in putting Lincoln in such a vulnerable position.

*Lincoln Ben. Life Co. v. Dallal*, 520 F. Supp. 3d 1236, 1246-47 (C.D. Cal. 2021).

The Ninth Circuit affirmed both the jury’s verdict and the trial court’s equitable findings. *Dallal*, 2022 WL 605709 (9th Cir. 2022). Florida courts have yet to directly address the issues presented in *Dallal*. Accordingly, the question which arises is how an insured, other than factually proving its innocence, defends against the monolithic insurance companies and their stable of high-priced attorneys. The answer lies in the Economic Loss Rule (“ELR”) and/or the Independent Tort Rule, depending upon the jurisdiction.

Florida’s Independent Tort Rule (“ITR”) prohibits tort actions between parties to a contract where the plaintiff cannot assert a tort claim independent of a claim for breach of contract. The rule serves to bar a tort claim where the allegedly offending party has not committed a breach of duty independent from a breach of contractual obligations. In other words, when the relationship between parties is defined by a contract, a party’s sole remedy for behaving contrary to that relationship



is through a claim for breach of contract; the party cannot recover under tort theories.” *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1032 (N.D. Cal. 2012).

The Florida Supreme Court reiterated the continued viability of Florida’s Independent Tort Rule in *Tiara Condo. Ass’n v. Marsh & McClellan Cos.*, 110 So. 3d 399 (Fla. 2013). In *Tiara*, the seminal case regarding the ITR, the Court explained that the rule permits a party to a contract to recover economic loss in tort against the other contracting party only when there is additional, wrongful conduct chargeable to that party which amounts to a tort independent and separate from the claimed contract breach. See, e.g., *Southern Bell Tel. & Tel. Co. V. Hanft*, 436 So. 2d 40 (Fla. 1983); *Monroe v. Sarasota Cnty. Sch. Bd.*, 746 So. 2d 530 (Fla. 2nd DCA 1999) (existence of contract bars a tort claim relating to economic risks that were subject of contract absent a separate independent tort, because any other rule would unfairly shift economic risk that parties could have shifted through bargaining). The Court explained that the rule is designed to:

Prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. When the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have or could have, addressed through their contractual agreement\*. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.

110 So. 3d at 412.

It appears the Dallals did not raise the ELR or ITR as a defense, as the opinion is absent for any discussion of those doctrines. The *Dallal* opinion is likewise absent for any discussion regarding the principle that an action for equitable fraud requires that a special relationship exist between the parties which creates a duty of disclosure. The Court in *Trust Robin, Inc. v. Tissue Analytics, Inc.*, Case No. 2021-0806 SG (Del. Ch. Sept. 29, 2022), summarizes the difference between equitable and legal fraud and the essential element of a special relationship which creates a duty to disclose:

Equitable fraud is a creature purely of equity. Legal fraud, also alleged in the complaint, requires a plaintiff to show a false representation made by a defendant, the defendant’s knowledge of (or reckless indifference to) the fact that the representation was false, an intent to induce the plaintiff’s action (or omission), to plaintiff’s detriment, and

resulting damages. The gravamen of a legal fraud complaint is the scienter required of the defendant’s action. By contrast, equitable fraud does away with the scienter requirement — in this sense it is much broader than legal fraud. In another sense, it is much narrower, because the gravamen of equitable fraud is the equitable relationship between the parties: only where such a special relationship exists (or under similarly compelling equities) will this court impose what amounts to a kind of strict liability for false representations on defendants.

*Id.* at \*8.

In a case recently handled by this author, a federal district judge precluded similar claims based on the ELR. *Kuber v. Berkshire Life Ins. Co. of America*. Although *Kuber* involved a disability insurance policy, it is nevertheless persuasive precedent as applied to LTC policies. In *Kuber*, Douglas Kuber filed a claim for disability benefits with Berkshire which was initially approved. Kuber filed suit when Berkshire improperly terminated the payment of further policy benefits. Berkshire brought several tort-based counterclaims<sup>9</sup> against Kuber and his wife, alleging they made a variety of misrepresentations and omissions regarding the cause of his disability and ability to work. Though not in contractual privity, Berkshire alleged that Kuber’s wife had made misrepresentations and otherwise assisted Kuber in defrauding Berkshire. Kuber moved to dismiss the counterclaims based on the Economic Loss Rule, among other grounds. The Hon. Judge Middlebrooks dismissed all of Berkshire’s counterclaims pursuant to the Economic Loss Rule:<sup>10</sup>

Berkshire clearly alleges it is in privity of contract with Douglas. Therefore, their relationship is covered by the contract, triggering the economic loss rule. Berkshire alleges Douglas made misrepresentations under the contract. Even assuming the truth of these allegations, the allegations essentially amount to a claim for breach of contract. The United States Supreme Court has established that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.” *Alabama v. North Carolina*, 560 U.S. 330,351 (2010) (quoting Restatement § 205). The California Court of Appeals echoed this rule, stating that “[i]t has long been recognized in California that ‘[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the

benefits of the agreement.” *Kransco v. Am, Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400, 2 P.3d 1, 8 (2000).

Here, Berkshire stood to benefit under the terms of its contract with Douglas by accepting premiums from him and avoiding an obligation to pay out benefits to him, so long as he did not qualify for benefits under the terms of the policy. If Douglas made misrepresentations to obtain benefits under the policy, then he breached his contract with Berkshire, thereby injuring Berkshire’s right to receive the benefit of its contractual bargain with Douglas. Accordingly, Berkshire’s remedy lies in breach of contract and any claim in tort is foreclosed by the ELR.

*Kuber v. Berkshire Life. Ins. Co.*, Case No. 19-80211 (S.D. Fla. Jan. 27, 2020).

In conclusion, insurers will have a rocky road recovering benefits paid to their insured under allegedly false pretenses, particularly in those jurisdictions which faithfully enforce the aforementioned legal doctrines. I will be sure to furnish an update should this insidious trend find its way to Florida courts. ■



#### RICHARD M. BENRUBI

is the founding partner of The Law Office of Richard M. Benrubi, P.A. and of counsel to Rosenthal, Levy, Simon & Ryles in West Palm Beach, and has over 25 years of experience representing and counseling individual and corporate clients in the areas of insurance coverage, insurance bad faith, personal injury and wrongful death. He has been a Board Certified Civil Trial Lawyer since 1995 and has been named a Top Florida Lawyer annually since 2005.

- <sup>1</sup> Mature Market Institute (2011). Market Survey of Long-Term Care Costs: The 2011 MetLife Market Survey of Nursing Home, Assisted Living, Adult Day Services, and Home Care Costs. October. Nursing Home Costs and How to Pay | U.S. News.
- <sup>2</sup> O’Shaughnessy, CV. The Basics: National Spending for Long-Term Services and Supports. National Health Policy Forum, 2012. [www.nhpf.org/library/the-basics/Basics\\_LongTermServicesSupports\\_02-23-12.pdf](http://www.nhpf.org/library/the-basics/Basics_LongTermServicesSupports_02-23-12.pdf), Washington, DC.
- <sup>3</sup> America’s Health Insurance Plans (2004). Long-Term Care Insurance in 2002. Research Findings, Washington, DC. June.
- <sup>4</sup> America’s Health Insurance Plans (2004). Long-Term Care Insurance in 2002. Research Findings, Washington, DC. June.
- <sup>5</sup> New York State Dept. of Fin. Servs. - LONG TERM CARE INSURANCE- Looking Back and Thinking Ahead June 7, 2023.
- <sup>6</sup> As such, the policies’ benefit triggers are mandated by federal law. See 26 U.S.C. § 7702B (“Treatment of qualified long-term care insurance.”). Consistent with federal law, the policies contain the following pertinent definitions:

**Chronic Illness or Disability** – An illness or disability in which there is:

- <sup>1</sup> A loss of the ability to perform, without Substantial Assistance, at least two Activities of Daily Living for a period of at least 90 consecutive days; **or**
- <sup>2</sup> A severe Cognitive Impairment, which requires Substantial Supervision to protect you from threats to health or safety.

#### Activities of Daily Living

- **Bathing** – Washing oneself by sponge bath, or in either a tub or shower, including the task of getting into or out of the tub or shower.
- **Continence** – The ability to maintain control of bowel and bladder function, or, when unable to maintain control of bowel or bladder function, the ability to perform associated personal hygiene (including caring for catheter or colostomy bag).
- **Dressing** – Putting on and taking off all items of clothing and any necessary braces, fasteners, or artificial limbs.
- **Eating** – Feeding oneself by getting food into the body from a receptacle (such as a plate, cup, or table) or by feeding tube or intravenously.

- **Toileting** – Getting to and from the toilet, getting on and off the toilet, and performing associated personal hygiene.
- **Transferring** – Sufficient mobility to move into or out of a bed, chair, or wheelchair or to move from place to place, either by walking, using a wheelchair or by other means.

**Cognitive Impairment** – A loss or deterioration in intellectual capacity that is:

- <sup>1</sup> Comparable to and includes Alzheimer’s disease and similar forms of irreversible dementia;
- <sup>2</sup> Measured by clinical evidence and standardized tests that reliably measure impairment in the individual’s:
  - a. Short-term or long-term memory;
  - b. Orientation as to people, places, or time and
  - c. Deductive or abstract reasoning.

**Substantial Supervision** – Continual oversight that may include cuing by verbal prompting, gestures, or other demonstrations by another person, and which is necessary to protect you from threats to your health or safety.

- <sup>7</sup> A typical concealment or fraud provision states: a. The entire policy will be void if, whether before or after a loss, any “insured” has: (1) Intentionally concealed or misrepresented any material fact or circumstance; (2) Engaged in fraudulent conduct; or (3) Made false material statements relating to this insurance.
- <sup>8</sup> Lincoln’s attorney describes *Dallal* as a “high impact holding” for the long-term care industry in a case of first impression. [www.bwslaw.com/news/ninth-circuit-affirms-landmark-victory-for-lincoln-benefit-lifecompany/](http://www.bwslaw.com/news/ninth-circuit-affirms-landmark-victory-for-lincoln-benefit-lifecompany/).
- <sup>9</sup> Berkshire brought eight counterclaims: (1) Common law and Equitable Fraud to Douglas, (2) Common Law and Equitable Fraud as to Rebecca, (3) Aiding and Abetting Common Law and Equitable Fraud as to Douglas and Rebecca, (4) Violations of the New Jersey Insurance Fraud Act, (5) Negligent Misrepresentation as to Douglas, (6) Negligent Misrepresentation as to Rebecca, (7) Civil Conspiracy as to Douglas and Rebecca, and (8) Violations of the Racketeer Influenced and Corrupt Organizations Act.
- <sup>10</sup> Although the *Kuber* decision was based on California’s Economic Loss Rule instead of Florida’s Independent Tort Rule, it is a distinction without a difference. See *Tiara*, supra.



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Dr. Hamburger has been a world-recognized medical expert in cases involved with plaintiff and defense personal injury, disability determination, product liability, civil right cases, board of medicine issues and criminal cases. He is certified in Workers' Compensation, and has testified in both State and Federal Courts. He has served as a defense expert for cases involving the Federal Government and testified as a Medical expert for the Florida Board of Medicine.

He is again available to serve as an Ophthalmology and Neuro-Ophthalmology expert for the review of legal cases, independent medical examinations, written opinions, depositions and court testimony.

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SANDRA ALAMI, MEDICAL LEGAL ASSISTANT

DR. HARRY HAMBURGER

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# SUBOXONE: ADDICTION SOLUTION OR KICK IN THE TEETH?

by Sara Papantonio and Emily McHenry



Hundreds of thousands of pain-stricken Americans were made victims of addiction by opioid manufacturers who deceived the public about the risk of addiction with their products.<sup>1</sup> The addictive nature of opioids leads to widespread misuse and opioid use disorder in unassuming Americans.<sup>2</sup> Unfortunately, as the monopoly centered around creating addicts fell, a new pharmaceutical monopoly focused on treating addicts formed. Now, a new pharmaceutical giant is capitalizing on the opioid epidemic. Indivior, a pharmaceutical company focused on addiction treatment, has monopolized opioid addiction treatments such that until recently generic competition was barred from entry into the market.

While the efforts to abate addiction in the United States are valiant and necessary, Indivior's conduct in the last decade has called into question its true motivations for curbing opioid addiction in this country. Indivior found ways to exploit widespread addiction and despair through the promotion of Suboxone Film. Today, the safety profile of Suboxone Film has been called into question. Recently, the Food and Drug Administration (FDA) found that the use of Suboxone Film to treat addiction may be linked to serious adverse dental events.<sup>3</sup> Now, hundreds of thousands of individuals seeking to recover from addiction are facing a new obstacle: Their teeth are falling out.

## What Is Suboxone Film?

Suboxone is a medication that is predominantly prescribed to treat opioid use disorder.<sup>4</sup> Suboxone is a drug that works with the combination of opioid partial antagonist, buprenorphine, and naloxone.<sup>5</sup> Buprenorphine reduces cravings and acts as an opioid antagonist while naloxone blocks the euphoric effects of opioids.<sup>6</sup> In other words, Suboxone binds to the same receptors in the brain that other opiates do. This tricks the brain into thinking that it's receiving a full dose of an opiate upon ingestion and reduces cravings and dependency. The drug is administered sublingually by placing a thin film under the tongue or inside the cheek.<sup>7</sup> The original label for Suboxone Film contained no warning regarding the risk of damage to the teeth associated with its use as prescribed.<sup>8</sup>

## What Is the Injury?

Recent studies have emerged linking Suboxone Film use to injuries such as tooth loss, tooth fractures, tooth decay, oral surgeries, and tongue and gum injuries.<sup>9</sup> One retrospective cohort study revealed an increasing risk in dental disorders among patients treated with sublingual buprenorphine/naloxone compared to oral naltrexone and transdermal buprenorphine.<sup>10</sup> These reports found that Suboxone is highly acidic, which reduces salivary flow in the mouth.<sup>11</sup>

Subsequently, the FDA released a public safety communication warning users about adverse dental complications caused by dissolvable buprenorphine.<sup>12</sup> Specifically, the data reported from the FDA Adverse Event Reporting System (FAERS) concluded that many cases described severe dental issues in patients with no reported history of dental problems.<sup>13</sup> In response to these studies, the FDA required that Indivior, the manufacturer of Suboxone Film, include a warning to users about the risk of adverse dental effects.<sup>14</sup> Still, hundreds of thousands of Suboxone users and their physicians were unaware of the risk for years because of the company's failure to warn of the serious adverse dental effects that accompany the use of Suboxone.

The mechanism of action for these dental injuries should come as no surprise to the makers of Suboxone Film. It has long been known that acid rots teeth.<sup>15</sup> Suboxone Film contains buprenorphine and naloxone, which are both highly acidic, with a pH of 3.4 when dissolved in water.<sup>16</sup> With this level of acidity, the film alters the oral pH and creates immunosuppressive effects.<sup>17</sup> Suboxone also reduces

salivary flow and buffering capacity in the mouth, which causes damage to the protective enamel and the tooth surfaces.<sup>18</sup> Because of this, the sublingual film contributes to enamel wear, exposing the teeth to alteration, bacteria and decay.<sup>19</sup>

The effects of this acidic drug placed directly near the teeth each day can be devastating for users. These injuries require extensive dental treatment including full denture workups, bone inserts, and extractions. These dental injuries are not only deteriorating to one's confidence and ability to lead a normal life but require extensive dental treatment. As a result, these former addicts who are simply trying to regain control of their lives now face an even harder road to recovery.

## The Monopoly

In 2002, Suboxone was introduced as a medication prescribed to treat opioid use disorder.<sup>20</sup> Prior to Suboxone, addiction treatment traditionally involved medically assisted, in-office therapies to help the individual curb addiction cravings.<sup>21</sup> Suboxone was a groundbreaking treatment because it was introduced in the form of a pill and was the only addiction treatment on the market that could be prescribed to patients for at-home use.<sup>22</sup> At this time, all other opioid addiction therapies, such as methadone, had to be administered under physician supervision.<sup>23</sup>

Initially, Suboxone was granted the FDA's highly lucrative "Orphan Drug" approval on October 8, 2002.<sup>24</sup> By definition, an orphan drug is used to treat, prevent, or diagnose a rare disease or condition that affects less than 200,000 people in the U.S.<sup>25</sup> Orphan drug approval allows pharmaceutical companies to manufacture certain drugs exclusively, precluding any generic competitors from manufacturing a similar product.<sup>26</sup> As the drug grew in popularity, Indivior monopolized the addiction treatment market by executing what is known as a product hop to protect its exclusivity in the market.<sup>27</sup> When the exclusivity for the Suboxone tablet expired in 2009, Indivior petitioned the FDA for an extended exclusivity period for Suboxone and subsequently developed the Suboxone Film.<sup>28</sup> In support of the application for the film, Indivior submitted safety and efficacy studies for the tablets, which were later found to be unsubstantiated.<sup>29</sup> It was later found that the company changed the formulation of the drug from sublingual Suboxone tablets to a sublingual Suboxone Film. This product hop was successful in preventing generic competition from entering the market.<sup>30</sup>

## The Defendant

While Indivior claims to help eliminate the stigma of addiction by concurrently advocating for an effective recovery care model, the extensive legal action that has been taken against Indivior proves the company's claims to be hollow.<sup>31</sup> During Suboxone's time on the market, Indivior and its parent organization, Reckitt Benckiser Group, sought to illegally block access to less expensive generic medications, making it harder for individuals struggling with addiction to access critical medical treatment.<sup>32</sup>

In 2016, 41 states and the District of Columbia sued defendants for antitrust violations related to boxing out competitors from the

opioid-addiction treatment market.<sup>33</sup> That litigation resolved in the summer of 2023, with Indivior agreeing to pay \$102.5 million to resolve the case.<sup>34</sup> Almost concurrently, another antitrust lawsuit was filed by health plans and drug wholesalers claiming Indivior switched to an oral film version of Suboxone from a tablet to extend exclusivity and keep out generic competition.<sup>35</sup> Indivior resolved this lawsuit by paying \$385 million.<sup>36</sup> As victims multiplied, Indivior also pleaded guilty to a one-count felony criminal charge and its entities agreed to pay \$600 million to resolve criminal and civil investigations brought by the United States Department of Justice.<sup>37</sup> Additionally, former Indivior CEO Shaun Thaxter was sentenced to six months in federal prison and criminally charged based on Indivior's false and misleading representations related to Suboxone.<sup>38</sup> In total, Indivior and Reckitt Benckiser agreed to resolve its potential criminal and civil liability based on its marketing of Suboxone for \$1.4 billion.<sup>39</sup>

Although justice was finally served in the antitrust litigation and federal investigation, there are many innocent people who have suffered personal injuries as a result of Indivior's monopolistic practices and failure to warn of the real risks associated with the drug. A new set of lawsuits are being filed against the companies for their failure to warn of the serious adverse dental events associated with Suboxone Film.<sup>40</sup>

## Status of the Litigation

Hundreds, if not thousands, of cases are expected to be filed against the manufacturers of the drug Suboxone in the coming months. As of February 2024, In re: Suboxone (Buprenorphine/Naloxone) Film Products Liability Litigation was accepted as a Multi District Litigation and was assigned to Judge J. Phillip Calabrese in the Northern District of Ohio — the same jurisdiction that the opiate litigation was litigated.<sup>41</sup> Ironically, as one court punishes the manufacturers of opiates for the creation of the opioid epidemic, another court will be addressing the conduct of those companies who capitalized on the resulting opioid epidemic. ■



### SARA PAPANTONIO

Sara Papantonio is an associate attorney at Levin Papantonio and focuses her practice on mass torts. She graduated from the University of North Carolina with a Bachelor of Science in Political Science and Journalism. Ms. Papantonio then received her Juris Doctorate from Stetson University College of Law in 2020, graduating cum laude.

Ms. Papantonio litigates pharmaceutical, environmental, mass tort and personal injury cases throughout the country. She has considerable experience in Federal Court as an active and central member of several mass tort litigation teams. Ms. Papantonio is an EAGLE Patron member.



### EMILY MCHENRY

Emily McHenry is a legal assistant to Sara Papantonio from Pensacola, Florida. She has a bachelor's in Political Science from Auburn University with a minor in Italian language. Emily plans to pursue a career in law and is in the process of applying to law schools. Instead of directly going to law school right out of undergraduate school, Emily wanted to initially submerge herself in the field of law while gaining hands on experience to solidify her life long desire to pursue a career in the field of law. Working along-side Sara at Levin Papantonio Rafferty has strongly solidified her desire and she plans to attend law school in August if 2025.

- <sup>1</sup> See In Re: National Prescription Opiate Litigation.
- <sup>2</sup> United States Department of Health & Human Services, Determination that a Public Health Emergency Exists (Oct. 26, 2017) (available at <https://aspr.hhs.gov/legal/PHE/Pages/opioids.aspx>) (last accessed Oct. 9, 2023).
- <sup>3</sup> Center for Drug Evaluation and Research (2022), Buprenorphine Dissolved in the Mouth Can Cause Dental Problems, U.S. Food and Drug Administration. Available at: [www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder](http://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder) (accessed May 2, 2024).
- <sup>4</sup> *Suboxone Uses, Addiction Potential & Treatment Costs* (2023), *American Addiction Centers*. Available at <https://americanaddictioncenters.org/suboxone> (accessed Apr. 15 2024).
- <sup>5</sup> *Id.*
- <sup>6</sup> “What Is Buprenorphine?: UAMS Psychiatric Research Institute.” *Psychiatric Research Institute*, <https://psychiatry.uams.edu/clinical-care/outpatient-care/cast/buprenorphine>. Accessed Mar. 28, 2024; “Opioid Overdose Reversal Medications (OORM).” *SAMHSA*, [www.samhsa.gov/medications-substance-use-disorders/medications-counseling-related-conditions/opioid-overdose-reversal-medications#:~:text=It%20is%20an%20opioid%20antagonist,effects%20do%20not%20last%20long](http://www.samhsa.gov/medications-substance-use-disorders/medications-counseling-related-conditions/opioid-overdose-reversal-medications#:~:text=It%20is%20an%20opioid%20antagonist,effects%20do%20not%20last%20long). Accessed Mar. 28, 2024.
- <sup>7</sup> SUBOXONE® (Buprenorphine and Naloxone) Sublingual Film, [www.accessdata.fda.gov/drugsatfda\\_docs/label/2015/022410s020s022lbl.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/label/2015/022410s020s022lbl.pdf) (last visited Mar. 29, 2024).
- <sup>8</sup> Center for Drug Evaluation and Research, Buprenorphine Dissolved in the Mouth Can Cause Dental Problems, U.S. Food and Drug Administration (2022), [www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder#:~:text=FDA%20is%20warning%20that%20dental,disorder%20\(OUD\)%20or%20pain](http://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder#:~:text=FDA%20is%20warning%20that%20dental,disorder%20(OUD)%20or%20pain). (last visited Mar. 29, 2024).
- <sup>9</sup> Etminan, Mahyar, PharmD, Association Between Sublingual Buprenorphine-Naloxone Exposure and Dental Disease, *JAMA* (2022), <https://jamanetwork.com/journals/jama/fullarticle/2799415> (last visited Mar. 29, 2024).
- <sup>10</sup> *Id.*
- <sup>11</sup> Suzuki J, Mittal L, and Woo S., Sublingual Buprenorphine and Dental Problems: A Case Series. *Prim Care Companion CNS Disord.* 2013; 15(5) (Oct. 2, 2013).
- <sup>12</sup> Office of the Commissioner, Buprenorphine: Drug Safety Communication, U.S. Food and Drug Administration (Jan. 12, 2022), [www.fda.gov/safety/medical-product-safety-information/buprenorphine-drug-safety-communication-fda-warns-about-dental-problems-buprenorphine-medicines#:~:text=issue%3a%20the%20fda%20is%20warning,no%20history%20of%20dental%20issues](http://www.fda.gov/safety/medical-product-safety-information/buprenorphine-drug-safety-communication-fda-warns-about-dental-problems-buprenorphine-medicines#:~:text=issue%3a%20the%20fda%20is%20warning,no%20history%20of%20dental%20issues) (last visited Mar. 29, 2024).
- <sup>13</sup> Center for Drug Evaluation and Research, Buprenorphine Dissolved in the Mouth Can Cause Dental Problems, U.S. Food and Drug Administration (2022), [www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder#:~:text=FDA%20is%20warning%20that%20dental,disorder%20\(OUD\)%20or%20pain](http://www.fda.gov/drugs/drug-safety-and-availability/fda-warns-about-dental-problems-buprenorphine-medicines-dissolved-mouth-treat-opioid-use-disorder#:~:text=FDA%20is%20warning%20that%20dental,disorder%20(OUD)%20or%20pain) (last visited Mar. 29, 2024).
- <sup>14</sup> *Id.*; Indivior (2023), [www.indivior.com/admin/resources/dam/id/1073/suboxone\\_pi.pdf](http://www.indivior.com/admin/resources/dam/id/1073/suboxone_pi.pdf) (last visited Mar. 29, 2024).
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- <sup>17</sup> *Id.*
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- <sup>20</sup> Heidbreder, Christian, et al. “History of the Discovery, Development, and FDA-Approval of Buprenorphine Medications for the Treatment of Opioid Use Disorder.” *Drug and Alcohol Dependence Reports*, U.S. National Library of Medicine, Jan. 10, 2023, [www.ncbi.nlm.nih.gov/pmc/articles/pmc10040330](http://www.ncbi.nlm.nih.gov/pmc/articles/pmc10040330).
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- <sup>27</sup> Staff in the Office of Technology (2015), FTC Files Amicus Brief Explaining that Pharmaceutical “Product Hopping” Can Violate the Antitrust laws, Federal Trade Commission. Available at [www.ftc.gov/news-events/news/press-releases/2015/10/ftc-files-amicus-brief-explaining-pharmaceutical-product-hopping-can-violate-antitrust-laws](http://www.ftc.gov/news-events/news/press-releases/2015/10/ftc-files-amicus-brief-explaining-pharmaceutical-product-hopping-can-violate-antitrust-laws) (accessed: May 4, 2024).
- <sup>28</sup> See In re Suboxone (Buprenorphine Hydrochloride and Naloxone Antitrust Litig., MDL No. 2445 (E.D. Pa.)).
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.*
- <sup>31</sup> Global Pharmaceutical Company, Indivior, [www.indivior.com/en](http://www.indivior.com/en) (last visited May 4, 2024); see In re Suboxone (Buprenorphine Hydrochloride and Naloxone Antitrust Litig., MDL No. 2445 (E.D. Pa.); Newsroom, AG Schwab Secures Over \$2.3 Million from Suboxone Maker Accused of Monopolizing Opioid Treatment Drug (2023), <https://oag.dc.gov/release/ag-schwab-secures-over-23-million-suboxone-maker#:~:text=%e2%80%9cin%20pursuit%20of%20higher%20corporate,to%20access%20critical%20treatment%20medication> (last visited Mar. 29, 2024); Justice Department Obtains \$1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History (2020), Office of Public Affairs, United States Department of Justice. Available at [www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case](http://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case) (accessed May 4, 2024).
- <sup>32</sup> *Id.*
- <sup>33</sup> See In re Suboxone (Buprenorphine Hydrochloride and Naloxone Antitrust Litig., MDL No. 2445 (E.D. Pa.)).
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- <sup>35</sup> *Id.*
- <sup>36</sup> *Id.*
- <sup>37</sup> Justice Department Obtains \$1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History (2020), Office of Public Affairs, United States Department of Justice. Available at [www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case](http://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case) (accessed May 4, 2024).
- <sup>38</sup> Former Medical Director of Suboxone Manufacturer Indivior Sentenced in Connection with Drug Safety Claims (2021), Office of Public Affairs, United States Department of Justice, [www.justice.gov/opa/pr/former-medical-director-suboxone-manufacturer-indivior-sentenced-connection-drug-safety](http://www.justice.gov/opa/pr/former-medical-director-suboxone-manufacturer-indivior-sentenced-connection-drug-safety) (last visited Mar. 29, 2024).
- <sup>39</sup> Justice Department Obtains \$1.4 Billion from Reckitt Benckiser Group in Largest Recovery in a Case Concerning an Opioid Drug in United States History (2020), Office of Public Affairs, United States Department of Justice. Available at [www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case](http://www.justice.gov/opa/pr/justice-department-obtains-14-billion-reckitt-benckiser-group-largest-recovery-case) (accessed May 4, 2024).
- <sup>40</sup> See In re: Suboxone (Buprenorphine/Naloxone) Film Products Liability Litigation.
- <sup>41</sup> United States District Court MDL 2804, Northern District of Ohio, United States District Court. Available at [www.ohnd.uscourts.gov/mdl-2804](http://www.ohnd.uscourts.gov/mdl-2804) (accessed Mar. 29, 2024).

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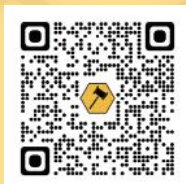
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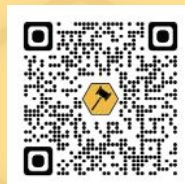


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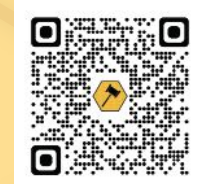
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# YOU HAVE AN OFFER TO ARBITRATE, NOW WHAT?

by Clancey Bounds

Having done medical malpractice litigation for the last 30 years, I cannot think of a single offer to arbitrate made to my clients until our firm first began to receive offers to arbitrate in about 2019. At first, most were from hospital defendants, but as time went on, we would receive offers from physician defendants as well. As I write this article, in April 2024, we have received offers to arbitrate, or threats of arbitration, in six cases, year to date. I am sure we are not the only ones seeing an increase in offers or the threat of the offer to arbitrate, and thus I wanted to share some thoughts on the matter as well as the law and the strategies that may be employed.

## Constitutionality of Section 766.207

Florida Statute section 766.207, titled *Voluntary binding arbitration of medical negligence claims*, has been in force and effect since the 1980s. It has not, since then, been meaningfully amended. There have been attacks on the constitutionality of the arbitration provisions within the statute over the years including *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *HCA Health Services of Florida, Inc. v. Branchesi*, 620 So. 2d 176 (Fla. 1993); *St. Mary's Hospital, Inc. v. Phillippe*, 769 So. 2d 961 (Fla. 2000), and most recently, *Poole, M.D. v. Defranko*, 290 So. 3d 552 (Fla. 3rd DCA 2019), the latter raising the decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) as just cause for declaring section 766.207 unconstitutional as well. None have been successful.

Given the case law cited above, it is doubtful that a constitutional attack or threat of the same will influence the defense in your case to go above or beyond the noneconomic limits of section 766.207. Thoughts about making new law by seeking a declaration by the trial court that the statute is unconstitutional, while appealing and justified, could have major, problematic, unintended consequences, including an ability of health care providers to place draconian arbitration provisions into their patient treatment and consent agreements. Such practices are not allowed presently.<sup>1</sup> However, a declaration that section 766.207 is unconstitutional could open the floodgates to all manner of arbitration provisions when there is no longer a legislative provision (intent).

Along these lines, however, beware of *Palacios v. Lawson*, 49 Fla. L. Weekly D541 (2024). The Fourth District Court of Appeal in *Palacios* held that “an arbitration agreement between patient, who registered to receive clear aligner orthodontic treatment from online company, and company under which parties agreed to arbitrate medical malpractice claims entirely outside Medical Malpractice Act’s (MMA) framework was freely entered into and was thus enforceable as a matter of law, despite the

*waiver of the benefits of arbitration under the MMA.” Id.* The reasoning of the court was that, since neither party was subject to any provision of the MMA, that the contract was not against public policy, because all it required was arbitration and it did not limit either side to those items contained in section 766.207.

## Arguments and Interpretations

In all litigation there are two sides. There are the claimants and there are the defendants. Florida’s medical malpractice arbitration provision does not distinguish between the plaintiff or the defendant as the offeror. In fact, section 766.207 labels both sides “the parties” and allows either party to serve a request for voluntary binding arbitration upon the other.<sup>2</sup> It is not until the statute discusses rejection of the offer by one party to the other’s offer, that a distinction is drawn.

Florida Statute, section 766.207(7)(k), first addresses what occurs when the different sides reject the offer to arbitrate, and it is here that a strategy can be formed. Subsection (k)<sup>3</sup> separates what happens when a defendant rejects the claimant’s offer from what happens when a claimant rejects a defendant’s offer. The statute clearly and unambiguously lays out a statutory scheme as to what happens next under these circumstances. When the defendant rejects the plaintiff’s offer, section 766.209(3) applies, and when the plaintiff rejects the defendant’s offer, section 766.209(4) applies.

Subsection (3)(a)<sup>4</sup> applies when a defendant rejects a plaintiff’s offer. First recall that a plaintiff must offer to arbitrate to all defendants in the presuit matter. If one or more rejects the offer, a trial is had and the plaintiff is entitled to recover damages subject to any limitation of 766.118 plus prejudgment interest, plus up to 25 percent of the award in attorney’s fees. Subsection (b) states that a claimant’s award at trial shall be reduced by any damages recovered by the claimant from arbitrating co-defendants following arbitration.<sup>5</sup> The effect of this is that if the plaintiff offers to arbitrate to defendants A, B and C; and B and C reject, but A agrees; whatever award the plaintiff gets from the arbitrators in the arbitration against A is set off from any award, at trial, against B and C. Put succinctly, where there is an offer by the plaintiff to arbitrate to the defendant(s), any nonarbitrating defendant gets to set off any arbitration award from any trial verdict.

Given that setoff is afforded to defendants who reject an offer to arbitrate in the scenario referenced above, it is important to understand the potential consequences to the overall claim should the most culpable defendant agree to arbitration. In other words, should the most liable



defendant accept the offer, thereby capping damages, will the setoff eliminate any real possibility of a recovery from the remaining defendants? In contemplating this issue, one may argue that words matter and the wording of the statute in section 766.209(3)(b), the “award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.” Eliminate the setoff if there is no arbitration. It can be argued under the “plain meaning” doctrine that if there is no actual arbitration, there can be no automatic setoff or reduction for the money you received from a defendant who offered to arbitrate, where no arbitration occurred. For instance, what if you mediated before there was ever an official offer to arbitrate? Would there be a setoff just because there was a threat of arbitration? What if arbitration was offered but the arbitration never occurred — is there any setoff or reduction in damages against those who later tried the case? There are viable arguments that under (3)(a) and (b), that, for there to be a reduction in damages awarded at trial, there must be an actual arbitration against the co-defendant(s). While no case law has yet interpreted this issue, there is an argument to be made.

Section 766.209 (4)(a) applies when a plaintiff rejects a defendant’s offer. Obviously, there can be more than one defendant in any case. In such a situation, there is no requirement under section 766.207 that every defendant offers to arbitrate. The only requirement is that a single defendant who offers to arbitrate must make the offer to all plaintiffs.<sup>6</sup> This gives rise to a situation where there are multiple defendants, and only some offer to arbitrate. For example, a case has defendants A, B and C. Only C offers to arbitrate. The plaintiff can arbitrate with C and file suit against A and B. What almost universally occurs in this case is that A and B will claim setoff from any award or mediation resolution or arbitration award with C. Here, a legitimate question is, do A and B get a setoff from the settlement with C? If the plaintiff arbitrates with C, and tries the case against A and B, there is a compelling argument that there is no setoff or reduction of the award against A and B for what the plaintiff got from C at arbitration. This is so, based upon what must be the intentional deletion of any language of setoff from arbitration awards in section 766. 207(4)(a)(b) or (c) as

compared to the specific language in section 766.207(3)(b). *See also Ham v. Portfolio Recovery Assocs., LLA*, 208 So. 3d 942, 946 (Fla. 2020) (Every word employed in a legal text is to be expounded in its plain, obvious, and commonsense, unless the context furnishes some ground to control, qualify, or enlarge it.); *Winter v. Playa del Sol, Inc.* 353 So. 2d 598, 599 (Fla. 4th DCA 1977) (It is an established principle that where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, courts should not resort to rules of statutory interpretation and construction. The statute must be given its plain and obvious meaning. Construction of a statute which would lead to an absurd result should be avoided.).

Another common example is where the plaintiff presuits A, B and C. A and B offer to arbitrate, and C does not. The plaintiff can accept the offer from A, reject the offer from B and try the case against B and C. In this scenario, the plaintiff has a strong argument that B and C get no automatic setoff from what the plaintiff got from A at arbitration, as there is no provision for setoff or reduction of the trial award by damages recovered in the arbitration when the claimant rejects the defendant’s offer, contained within the statutory framework. B will still have the benefit of \$350,000 noneconomic arbitration caps, but arguably will not be entitled to any setoff from the arbitration result with A. B will argue that B now only owes a maximum of \$100,000 (assuming \$250,000 of noneconomic was received in arbitration) of the capped \$350,000 allowed. However, since setoff or reduction is not part of the statutory scheme under section 766.209(4)(a)(b) or (c), it is arguable that B still could owe a maximum of \$350,000 under the cap called for by the plaintiff’s rejection of the offer to arbitrate. This is reinforced by the fact that the Legislature addressed setoff in subsection (c) but only as to collateral sources and only as to future economic damages. Nowhere does section 766.209(4) address any right to setoff of any arbitration award as section (3)(b) does.

The most interesting of the scenarios is where the plaintiff presuits A and A’s employer AE (for vicarious liability only). A and AE demand arbitration. There is no conditional language within A and AE’s offer

to arbitrate that requires the plaintiff to accept both A and AE's offer to arbitrate. The plaintiff accepts AE's offer to arbitrate but rejects A's offer. A and AE object to an acceptance and rejection and argue both must be accepted or rejected together, arguing that since AE is not independently negligent and is only liable by virtue of its relationship to A, the offer to arbitrate by A must necessarily include AE. In support of that argument, A and AE will likely argue the applicability of *Bombalier v. Lifemark Hosp. of Florida* 661 So. 2d 849 (Fla. 3rd DCA 1995). In that case, a wife had a miscarriage due to negligence. Her claim was therefore "injury to her body." The husband's claim was for loss of consortium and thus only derivative to the wife's claim. In that case, the court held that because the spouse with the loss of consortium claim has an interest in the litigation only in privity, both spouses would be required to either accept arbitration or reject arbitration. A and AE will argue this principle by arguing that since AE is only in the matter for vicarious liability for A, that the plaintiff must accept as to both parties or reject as to both, as the claim as to AE is derivative of the claim against A.

The comparison of vicarious liability of a defendant for its employee's, agent's or apparent agent's actions is wholly different than that of a spouse or child having a claim for his/her own loss that results from (is in privity with) the injury to the spouse and/or parent. One is defined as vicarious liability and the other as a derivative claim. Any comparison of the two as equivalents is in error. For instance, a plaintiff may decide to only sue the "employer" for the acts of the employee, without suing the employee as well, or the plaintiff may elect to file suit as to both the employer and the employee. Both are independently liable under different theories of law. The doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another due to the relationship between the party and the wrongdoer. *American Home Assur. Co. v. National Railroad Passenger Corp.* 908 So. 2d 459 (Fla. 2005). This is distinguishable from the situation where a spouse may only bring a cause of action for loss of consortium against a defendant if the injured spouse has a valid claim against that same defendant. In this situation, the consortium spouse has been harmed; however, that harm is due only to the injury to the spouse. If there is no liability for the damages to the injured spouse, there is likewise no liability for the loss of consortium. This is not true in the case of vicarious liability of employer for employee. Put simply, a derivative claim is different than vicarious liability. A derivative claim must have legitimate liability to the injured person before it can even exist, whereas an entity

that is vicariously liable is independently so based upon its relationship with the primary negligent party, usually because the primarily negligent party is acting for and on behalf of the vicariously liable party. Given these distinctions, the holding in *Bombalier, id.*, should not apply to require the plaintiff to accept as to both A's and AE's requests to arbitrate because where liability is concerned, A and AE are wholly independent parties, each with its own source of liability.

There are several permutations of what can occur in any case related to offers to arbitrate where there are multiple defendants. In addition to that, there are circumstances where, as in *Bombalier, id.*, there may be multiple claims by multiple claimants. *Bombalier, id.*, actually involved two claimants with two separate claims. In that case, Mrs. Bombalier had twins. One twin died in utero and the other lived several days before also passing. In suing the various entities, there were two separate claims presented. One claim was for injury to Mrs. Bombalier for injury to her body (the death of the twin in utero) and for her husband for his loss of consortium with his wife due to her bodily injury. The second claims were independent claims each parent had for the wrongful death of their child. The court held that the parents could accept arbitration as to the bodily injury claim and related consortium claim and reject arbitration as to the wrongful death claims. The court held that even though the claims arose out of the exact same facts, the fact that the claims were separate and distinct allowed for acceptance of one and rejection of the other. *See Bowie v. Reynolds*, 161 So. 2d 882 (Fla 1st DCA 1964). While *Bombalier, id.*, arose from a unique set of tragic facts, the lesson from it, is that one should carefully analyze the actual claims that multiple claimants have and determine if there can be a separation of the claims involved in the facts such that arbitration cannot be forced upon all claimants. Each having the ability to accept or reject the offer separately, could ward off offers to arbitrate or threats of arbitration and allow cases to resolve more favorably without arbitration caps. ■



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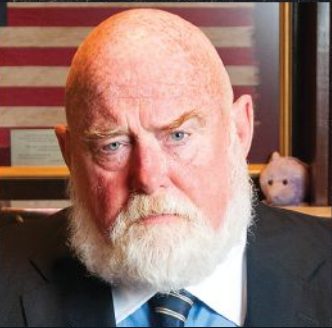
graduated from the University of Florida with a bachelor's in political science in 1990 and thereafter obtained his juris doctorate from Stetson University College of Law in 1993. Bounds is the founder and principle of Bounds Law Group, which limits its practice to medical negligence litigation throughout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

<sup>1</sup> *Franks v. Bowers* 116 So. 3d 1240 (Fla. 2013); *see also Hernandez v. Crespo*, 211 So. 3d 18 (Fla. 2016).  
<sup>2</sup> § 766.207(2), Fla. Stat. (2024).  
<sup>3</sup> § 766.207(7)(k), Fla. Stat. (2024).  
<sup>4</sup> § 766.209(3)(a)(b), Fla. Stat. (2024).

<sup>5</sup> Subsection (7)(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation.  
<sup>6</sup> § 766.207(7)(k), Fla. Stat. (2024).

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# THE LITTLE LEGISLATURE THAT COULDN'T: HB 837 DOES NOT PUT THE CRIMINAL ON THE VERDICT FORM

by Todd J. Michaels

Kevin Durant is a spectacular basketball player. The second pick in the 2007 NBA draft, he has accomplished nearly everything a basketball player can. He is a two-time NBA champion, a two-time finals MVP, a 14-time all-star, an Olympic gold medalist, and he has also won the league MVP and the Rookie of the Year awards. He will certainly go down in history as one of the best players ever to play the game. Somehow, Durant also holds the distinction of being the only player ever to take a game-winning shot, make his shot, and still lose the game. It was the deciding Game 7 of the Eastern Conference Finals in 2021. Durant's Brooklyn Nets were playing the Milwaukee Bucks in a seven-game series. The winner would go on to the NBA Finals. Durant had an incredible series, averaging over 35 points per game. With time remaining for one shot, Durant's Nets were losing 109-107. Durant got the ball just outside of the 3-point line. He took three or four dribbles, turned around, and launched a perfect 3-pointer which swished through the net with just one second left in the game. The Brooklyn crowd went wild. The Nets were up by one and were going to the Finals.

Except they weren't.

Replay showed that the tip of the toe of Durant's very large foot was on the 3-point line, meaning that the shot was only a 2-pointer. Instead of winning, the physically and emotionally exhausted Nets went to overtime where they lost. The Bucks went on to win the title.

Durant took his shot. He made his shot. He lost the game.

The 2023 Florida Legislature and the tort reform industry are Kevin Durant. They took their shot. They made their shot. They lost the game.

Perhaps the only silver lining of House Bill 837, the omnibus tort reform bill of 2023, is that it was written and rammed through by people who neither practice nor understand negligent security law. While they were eager to curtail the rights of injured victims, their excitement to do so led them to make some very basic mistakes. In basketball terms, their toe was on the line.

There is a misconception that HB 837 allows a defendant in a negligent security case to include the intentional criminal as a Fabre defendant.

That belief is wrong.

I want to repeat that HB 837 does not put the bad guy on the verdict form.

The Legislature and the tort reform industry took their shot. They drafted legislation that they hoped would do what the Florida Supreme Court had previously called irrational — allowing a negligent property owner to shift the blame to the intentional criminal — the very foreseeable risk that they had a duty to work to prevent or deter. They made their shot. They jammed that bill through the Legislature and got it signed by the governor. Yet, they lost the game. The bill passed and signed was horribly written by people who did not have sufficient familiarity with negligent security law to understand what they intended to change, or how it could be changed. As a result, through some combination of arrogance, ignorance, and laziness, they failed to realize that the bill they were passing doesn't do what they hoped it would do.

In the lead-up to the filing of HB 837, and in the initial conversations about it, we were repeatedly told by the proponents of this bill that the tort reform package “Would not impact any one area of law, but instead, would serve as a road map which applied to all types of cases.” We knew there would be battles over medical payments, comparative fault, bad faith, and attorney's fees. When the bill was drafted and filed, that turned out to be accurate. However, the day prior to the bill's first House Committee Hearing, four minutes before the amendment-filing deadline, a bomb was dropped on us, crime victims, safety, and negligent security cases. An amendment was filed which directly impacted one area of law, one type of case, one type of victim. That amendment, which was added to the bill and subsequently passed, at least in the popular consciousness, would “add the bad guy to the verdict form” in a negligent security case. For those of us who handle negligent security cases and are intimately familiar with the case law surrounding this area, it was immediately obvious that the language of the bill, in the face of the existing law, didn't do that.

Prior to last March, most people who had handled a negligent security case — as a plaintiff, a defendant, an adjuster, a mediator — knew that “in Florida the bad guy doesn't go on the verdict form.” But I would venture to guess that most people hadn't read the case law and didn't fully understand why. This includes the authors and sponsors of the tort bill. Likewise, since the tort bill, when I've asked people what the bill changed about negligent security cases, the response is usually, “Now the bad guy goes on the verdict form.” But I would venture to guess that most people haven't read the bill. They are wrong.

Before we discuss what the bill says, it is important to discuss what the bill doesn't say. The bill doesn't say that an intentional foreseeable criminal act can be considered an intervening or

contributing case. It does not specifically say that the jury can consider the fault of the intentional criminal actor. HB 837, enrolled as Fla. Stat. section 768.0701 (2024), states:

Premises liability for criminal acts of third parties. — Notwithstanding s. 768.81(4),<sup>1</sup> in an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury.

The language of the statute, or better yet, the language not used in the statute, is crucially important to the application of the statute. The common law in the area of negligent security has been well developed over the past 40 or so years, and Florida law is very specific regarding statutes that are passed in derogation of the common law.

“Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specifically and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.” 30 Fla. Jur. Statutes 130. “Inference and implication cannot be substituted for clear expression.” *Dudley v. Harrison, McCready & Co.*, 127 Fla. 687, 172 So. 820 (1937).

*Carlile v. Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977). *See also Slawson v. Fast Food Enter.*, 671 So. 2d 255, 257 (Fla. 4th DCA 1996) (“In other words, statutes abolishing or limiting the common law must be clear as to the abrogation or change; when the extent of the abrogation or change is not clear from the text of the statute, then the common law rule stands.”).

To put it simply, if the Legislature intends to pass a statute to change the common law, they actually need to know what the common law says, and why it says it. Any new law passed which derogates the common law will be strictly construed, and limited to what it says in clear and unequivocal terms. Inference, intent, and implication shall not be considered in interpreting the effects of the new law. HB 837 simply and

exclusively states that the trier of fact must consider the fault of all persons who contributed to the injury. The common law, as will be detailed below, clearly states that the intentional foreseeable criminal cannot be considered a contributing cause. The bad guy does not go on the verdict form.

Before we dive into the common law, and what wasn't and was changed, we need to consider where the Legislature — or better yet the insurance and tort reform industries that were working with the Legislature — came up with the cockamamie language that became law. Simply, they knew not what they were changing, and they didn't do their homework. They simply looked at language they had previously used to amend the comparative fault statute, and tacked it onto this bill, but it doesn't fit this scenario. In very summary fashion, the law in Florida used to be that when an automobile wasn't crashworthy, and someone was injured after an accident because of the defect in the automobile, the auto manufacturer, when sued for the defect, could not Fabre the negligent driver who caused the accident. There is an old saying that bad fact patterns make for bad law. That is true in the Legislature as well as the courts.

In 2002, the Supreme Court decided the case of *D'Amario v. Ford Motor Co.*, 806 So. 2d 424 (Fla. 2002). In *D'Amario*, a minor named Clifford Harris got in a Ford automobile with a friend who was drunk, and the friend drove into a tree. Upon impact, a faulty relay switch caused the car to go up in flames, injuring Harris. The Plaintiff moved to exclude evidence about the driver's intoxication and to exclude the driver as a Fabre defendant, and the Court denied the Plaintiff's request. The case worked its way through the courts, and the Supreme Court eventually granted a new trial, upholding the principle that if a car is not crashworthy, and someone is injured in an accident because of the defect, the jury can't consider the fault of the negligent driver.

Needless to say, the auto manufacturers were apoplectic that the fault of the drunk driver could not be considered, and in 2011, the Legislature passed a bill which amended the comparative fault statute as follows, in pertinent part: "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 ..." § 768.81(b), Fla. Stat.

The 2023 Legislature didn't do their homework. They simply borrowed the same language and tried to apply it to negligent security cases. But it doesn't work. Unlike crashworthiness cases which compare negligence to negligence in a comparative negligence scheme, considering the fault of the intentional criminal in a security case would be comparing an intentional act to negligence in a comparative negligence scheme. There is an entirely different body of case law in negligent security

cases than there was in crashworthiness cases, and the law in a security context says that the intentional criminal cannot be considered a contributing legal cause.

As such, while the trier of fact now has to consider the fault of anyone who contributed to the incident, this does not include, and cannot include, the intentional criminal actor. This identical language, when applied to a crashworthiness context versus a security context, is comparing apples to aardvarks. When a statute derogates the common law, it has to be considered in the face of the existing common law. HB 837, when applied to the law, does not put the intentional criminal on the verdict form.

Since at least 1980, Florida courts have defined and refined the common law in negligent security cases as it relates to comparative negligence generally, and the fault of the intentional criminal tortfeasor specifically. The Third DCA, in *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So. 2d 98 (Fla. 3rd DCA 1980), clarified that the foreseeable intentional act of a criminal, from which the property owner has a duty to protect invitees, cannot be considered an independent intervening cause or superseding cause. "We first reject, as entirely fallacious, the defendant's claim that the brutal and deliberate act of the rapist-murderer constituted an 'independent intervening cause' which served to insulate it from liability. It is well-established that if the reasonable possibility of the intervention, criminal or otherwise, of a third party is the avoidable risk of harm which itself causes one to be deemed negligent, the occurrence of that very conduct cannot be a superseding cause of a subsequent misadventure." *Id.* at 101. The *Holley* opinion cites to the Restatement (Second) of Torts section 449 (1965) at Comment b: "To deny recovery because the other's exposure to the very risk from which it was purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make it a nullity."

The reasoning in *Holley* was adopted by the Supreme Court in the seminal case of *Merrill Crossings Assoc. v. McDonald*, 705 So. 2d 560 (Fla. 1998). In *Merrill*, the Supreme Court affirmed that (1) A negligent security case is an action based on an intentional tort such that joint and several liability still applies, and comparative negligence generally does not apply; and (2) It is appropriate to exclude the intentional criminal from the verdict form. *See id.*

In clear and simple terms, *Merrill* addressed two distinct but related questions, both of which had the effect of keeping the criminal off the verdict form. This is not controversial or up for debate. The Court literally started the opinion by posing the two questions.

The first question was whether a negligent security case was based on an intentional tort. The Court answered that it was,

and the result of that is that joint and several is applicable, and that comparative negligence does not apply to these cases based on the plain language of the comparative negligence statute. Because there is no comparative at all, the fault of the bad guy — or anyone else other than the defendants — cannot be considered by the jury. This is the part of the common law that was first, ameliorated by the courts as will be detailed below, and next, impacted by HB 837. HB 837 stated, in simple terms, that despite the comparative negligence statute not applying to cases based on an intentional tort, the comparative negligence statute would apply in negligent security cases.

The second question addressed by the Court in *Merrill* was related but was an entirely separate question. Regardless of whether comparative *generally* applies, can the fault of the intentional criminal actor *specifically* be considered? The Court affirmatively held that it cannot be considered as it cannot be considered a legal contributing cause. This part of the holding has been consistently ratified by the Courts and was not addressed by HB 837.

So where do we find ourselves today? The jury must consider the fault of anyone that contributed to the incident, but the intentional criminal cannot be considered a legal contributing cause.

In the wake of *Merrill*, Florida courts have consistently affirmed the holding regarding the intentional criminal tortfeasor specifically but have allowed comparative generally as to other negligent parties. In 2009, the Fifth DCA issued its opinion in *Hennis v. City Tropics Bistro*, 1 So. 3d 1152 (Fla. 5th DCA 2009). The *Hennis* Court agreed that the fault of intentional tortfeasor could not be considered, but held that as to other negligent actors, comparative fault could be considered. When examining HB 837 in light of the common law, the effect of HB 837 was simply to codify *Hennis*.

The simple and plain pronouncement of the law passed by the 2023 Legislature is that the fault of Fabre defendants who legally contributed to the incident must now be considered by the jury in a negligent security case. However, the common law remains unchanged that the intentional criminal actor *cannot* be considered a contributing cause, and further, joint and several still applies as these cases are based on intentional

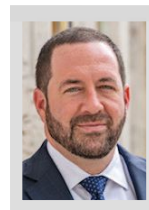
tort. That has been the common law and remains unchanged by this statute.

Like Kevin Durant, the Legislature took their shot, they made their shot, but if their intention was to add the criminal to the verdict form, they lost the game.

Had HB 837 simply and plainly stated that the fault of the criminal must be considered, or that the intentional foreseeable criminal act can be considered a legal cause, this would be an entirely different conversation. There is certainly risk in talking about this publicly, and we can all rest assured that future Legislatures will try to amend the law to “fix” it. However, there is no point in having the law on our side if we aren’t able to use it, and to use it, we have to talk about it. We will need to be vigilant in fighting this bill when it gets filed again. In the meantime, we need to be strategic in how and when we start to fight this battle in the courts, considering the facts of our case, the Judge we are in front of, and other salient factors to decide whether and how we fight this battle. The future of crime victims’ rights in Florida depends on our success. Public safety depends on our success, and we need to deal with this collectively.

Overtime lurks, but for us, overtime won’t be a five-minute period playing against a physically and emotionally exhausted team. It will be Motions to Strike Affirmative Defenses, Motions in Limine, and Motions for Summary Judgment in our security cases. It will be not discounting our security cases at mediation, and not being afraid to bring these cases. I still believe in justice, the courts, and precedent, and while we may not agree with all Judges on all things, we can all agree that our Judges will follow and respect the law.

The law is on our side. Let’s go win. ■



**TODD MICHAELS**

joined The Haggard Law Firm in 2009 and was named partner in 2014. In addition to his negligent security work, Todd also handles rideshare (Uber/Lift) liability, premises liability, aviation, admiralty/maritime, auto accident and other injury cases. He is a longstanding and proud EAGLE Advocate member of the FJA.

<sup>1</sup> Section 768.81 is the Comparative Fault statute. Subsection 4 reads: “This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution to any action based upon an

intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.”



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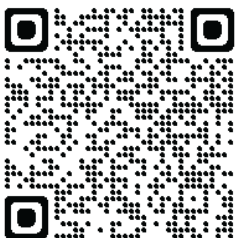
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# UNINTENTIONALLY INTENTIONAL: FLORIDA SUPREME COURT REWRITES DRAM SHOP LAW

by Brent Steinberg



A recent Florida Supreme Court decision protects establishments that willfully serve alcohol to underage college students, effectively rewriting Florida’s dram shop law in the process.

Those of you in the Tampa Bay area may remember this as the horrifically tragic “Pray for Jackie” case. Eighteen-year-old Jackie Faircloth, while visiting friends at Florida State University, had just departed a bar, Cantina 101, and was crossing the street when she was struck by a vehicle going 25 mph over the speed limit. That vehicle was operated by 20-year-old Devon Dwyer — a bartender at Potbelly’s who had just left work. Despite knowing Dwyer’s age, Potbelly’s had furnished him with approximately 24 *alcoholic drinks* that evening. Both Faircloth and Dwyer were intoxicated at the time of the accident.

By the time of trial, it was undisputed that both Potbelly’s and Cantina 101 had violated Florida’s “dram shop” statute, section 768.125. That statute permits claims against “a person who

*willfully* and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age.”

After a jury verdict, the trial court ultimately entered a \$28.6 million judgment in favor of Faircloth and against Potbelly’s and Cantina 101, jointly and severally. On appeal, the First DCA reversed.<sup>1</sup>

In a 2-1 decision, the First DCA held the trial court erred by prohibiting Potbelly’s from asserting comparative negligence (under section 768.81) and an alcohol defense (under section 768.36).

The court explained a dram-shop defendant can essentially step into the shoes of the underage patron it willfully served and assert those defenses against an injured third party to the same extent the underage patron could have asserted them if they were defending the action. However, the dram-shop

defendant (Potbelly's) was not allowed to compare its fault with the underage patron (Dwyer).

The First DCA's opinion left several unanswered questions as to how the trial court was supposed to implement its rulings on remand. But the court gave the Florida Supreme Court an opportunity to weigh in, certifying the following question as one of great public importance:

Whether the comparative fault statute, section 768.81, Florida Statutes, applies to tort actions involving the dram-shop exception contained in section 768.125, Florida Statutes, against a vendor who willfully and unlawfully sold alcohol to an underage patron, resulting in the patron's intoxication and related injury?

This set the stage for the Supreme Court to issue the most consequential opinion in Florida's dram shop jurisprudence in decades, if not ever. The end result? A decision that strikes a major blow to victims of intoxicated underage patrons and habitual drunkards.

The court answered the First DCA's question in the affirmative and held the vendor's liability under section 768.125 sounds in negligence, rather than intentional tort, even though the statute requires "willful" misconduct to impose liability.<sup>2</sup> That ruling allows the dram-shop defendant to raise comparative negligence as a defense.

Once again, Justice Labarga was the lone dissenter. He opined, in part, as follows:

Because it is not legally feasible to apply the concept of comparative negligence to an intentional tort, the majority was faced with the Herculean task of transforming a statute that expressly requires a *willful* act into a negligence action. Somehow, notwithstanding clear, and unambiguous statutory language, well-settled case law, and logic to the contrary, the majority purports to do just that. Unfortunately, the sad consequence of today's action is the erroneous erosion of Florida's longstanding dram shop act.<sup>3</sup>

But alas, accident victims must now make these policy arguments across the street at the Capitol if they want to ensure section 768.125 protects accident victims and "juveniles who would buy alcoholic drinks from the deleterious consequences of unscrupulous vendors intentionally and unlawfully allowing underage drinking."<sup>4</sup>

So, how are auto practitioners supposed to proceed in light of the *Faircloth* opinion? Good question.

The majority opinion provides little guidance as to what the verdict form is supposed to look like in a dram shop case. The court "neither approve[d] nor disapprove[d] the district court's 'derivative liability' analysis and its conclusion that liability cannot be apportioned between a selling bar and the underage drinker who becomes intoxicated and injures himself or others."<sup>5</sup>

I appreciate the court's reticence to go outside the scope of the certified question. But it sure seems like this will result in additional needless litigation, and likely another appeal, after the parties are forced to retry the dram shop action. Meanwhile, it has been approximately a decade since the accident, and the Faircloth family still seeks compensation to help defer the costs of her round-the-clock care. You know what they say about justice delayed?

### ***Boecher's Baby Brother Is Born***

In 1999, the Florida Supreme Court's decision in *Boecher*<sup>6</sup> permitted discovery of a firm's financial relationship with an expert. Eighteen years later, in *Worley*,<sup>7</sup> the court ruled a plaintiff attorney's referral of a client to a *treating physician* is protected by attorney-client privilege, and limited discovery of the financial relationship between the plaintiff's law firm and treating physician.

But what about the so-called *hybrids*, who both render care to the plaintiff as a treating physician but also provide expert opinions (i.e., on causation or permanency) developed solely for purposes of litigation?

The First DCA recently answered that question in *Pitts v. Neptune*,<sup>8</sup> holding the trial court did not depart from the essential requirements of law by applying *Boecher* to compel information regarding the plaintiff's law firm's financial relationship with the hybrid expert/treating physician. Although the opinion does not address the *scope* of the discovery permitted, presumably the court is referring to the amount of money the law firm has paid for expert services, rather than the amount of money paid for work as a treating physician from the law firm's other clients.

The First DCA's holding should not come as a surprise to practitioners who have been paying attention to the trends of our appellate courts. The surprising — and troubling — part of the opinion is the discussion of *how* these doctors became hybrid experts:

These physicians were given litigation binders that contained various medical records from [the plaintiff's] other providers and planned to offer testimony based on their review of those records and their treatment of [the plaintiff]. This is the work of an expert witness, not an ordinary treating physician.<sup>9</sup>

Is it not equally possible that these physicians wanted to review the other doctors' medical records to ensure they didn't miss something while rendering medical care to the plaintiff? The court implicitly rejected that notion simply because the records were provided by the plaintiff's attorney, rather than the patient or another medical provider.

And even if they only reviewed them to prepare for trial, so what? Since when did a physician become an expert simply by reviewing records to save themselves from embarrassment on cross-examination?

How about an eyewitness who saw the defendant run the red light? Do they become an expert simply because the plaintiff's lawyer, doing their due diligence, asked them to review photographs, accident reconstruction simulations and the like to make sure their memory jives with the other evidence?

The suggestion that a treating physician, or any other fact witness, automatically becomes an expert simply because they reviewed documents in anticipation of a trial is just plain wrong.

The focus should instead remain on the scope of the opinions and testimony the physician is being asked to give. The physician puts on the "expert hat" once they are forming new opinions (developed outside their normal course of care) in order to help the jury decide the case.<sup>10</sup> Otherwise, they should be treated as fact witnesses, regardless of whether they reviewed a "litigation binder" with other medical records.

Of course, some of these issues would be mooted by HB 837 (which did not apply in *Pitts*). Section 768.0427(3)(e) overruled *Worley* in any case with a "letter of protection" as defined in section 768.0427(1)(d). That will, no doubt, be an additional complication for many auto practitioners.

We will all eventually reach the destination, but man, there is a long and winding road ahead.

### **An Arm Doesn't Always Cost You a Leg**

In the world of Florida tort law, there is a common myth that plaintiffs who claim an injury waive their constitutional right to privacy over their medical history on *any* condition.

The Sixth DCA recently debunked this myth.

In *Dominguez v. Omana*,<sup>11</sup> a medical malpractice lawsuit regarding a botched armpit surgery, the defendants sought production of "any and all" medical records "for the last ten years" pertaining to the plaintiff. The plaintiff objected, arguing the subpoenas were overbroad and violated her constitutional right to privacy as it was highly probable that irrelevant medical records would be produced. The plaintiff asked the court to limit the scope of the

subpoenas or conduct an in camera inspection before allowing the documents to be produced.

The trial court found the plaintiff waived her right to privacy when she put her physical condition at issue and that the subpoenas were reasonably likely to lead to the discovery of admissible evidence, denying both requests.

On certiorari review, the Sixth DCA quashed the trial court order. The court found that despite waiving her right to privacy in relevant medical records, the plaintiff still had a right to privacy in *irrelevant* medical records.

Thus, the trial court departed from the essential requirements of law, causing irreparable harm, by not limiting the scope of the subpoenas or conducting an in camera inspection to ferret out the irrelevant records.

You will definitely want to keep this case handy for the next time a nonparty subpoena "casts too wide a net."

### **UMpossible Partial Final Judgment**

If you are ever fortunate enough to obtain an excess verdict against a UM carrier, beware there is a procedural minefield that lies ahead.

For years, the fight was over the "*Bottini* issue" — whether the amount of the verdict would be binding in the subsequent bad faith action against the UM carrier. But in the 2016 *Fridman* decision, the Florida Supreme Court answered "yes," holding the "determination of damages obtained in the UM action becomes a binding element of damages in the subsequent bad faith litigation against the same insurer."<sup>12</sup>

The court explained the appropriate procedure was to enter a partial final judgment against the UM carrier after the jury verdict. Then, the insured could pursue the amount of the verdict in excess of the limits via a bad faith claim (in the same action if they timely filed a motion to amend the complaint to add a bad faith count).

But what should the partial final judgment following the UM verdict say? That answer is less certain.

Six years ago, in *21st Century Centennial Ins. Co. v. Walker*,<sup>13</sup> the Fourth DCA said the "preferable approach" was to enter a final judgment for the full amount of the verdict, but to limit execution of the judgment to the policy amount — at least until there was a determination of bad faith.

But in *State Farm v. Finson*,<sup>14</sup> issued this April, the Second DCA disagreed with *Walker* and said the judgment amount must be limited to the policy limits, and then simply reference the amount of the excess verdict without actually entering judgment in that amount.

At first blush, that may seem like a mundane procedural nuance. But it could impact your client's right to recover interest on the amount of the "excess." And depending on the size of the verdict, and the amount of delay created by the UM carrier, that could easily be a six-figure swing.

This is not the only potential issue with the wording of a partial final judgment. I have seen insurance bad faith defense lawyers, who deal with these issues all the time, take advantage of the unsuspecting auto practitioner who may not realize the UM carrier's proposed judgment language somehow limits the plaintiff's right of recovery in the ensuing bad faith case. So, my advice is that you reach out to your go-to bad faith lawyer before entry of the partial final judgment, to ensure you are not committing any unforced errors.

### Driving Hammered Will Get You Nailed

Ever since Rule 9.130 of the Florida Rules of Appellate Procedure was amended to allow immediate review of an order granting or denying a motion to plead punitive damages, the utility of seeking punitives has significantly diminished in auto cases. Even if the trial court grants your motion, it practically guarantees a year delay.

But in *Gattorno v. Souto*,<sup>15</sup> the Third DCA provides auto practitioners with a glimmer of hope. It can be cited for the proposition that if the defendant was driving while intoxicated, the plaintiff is entitled to plead punitive damages as a matter of law.

### No Setoff for Settling Spouses

A recent Sixth DCA case contains one of the, er, more creative (?) defense arguments I have ever seen.

In *Morris v. Boyer*,<sup>16</sup> Morris sued Wife (driver) and Husband (co-owner). He served a proposal for settlement (PFS) on Husband for \$50,000, which was accepted and paid.

Morris then served a PFS on Wife for \$49,500. The nonmonetary term was the same as the first PFS — if Wife paid, Morris would dismiss her from the case.

Wife filed a "notice of acceptance." But she argued she didn't have to pay Morris anything because her Husband (who was vicariously liable) had already paid him for the same injuries.

Morris moved to enforce the settlement. The trial court denied the motion, determined that Wife was entitled to a setoff "as a matter of law," and then entered a final judgment in Wife's favor.

Huh?

On appeal, the Sixth DCA reversed. The trial court had no legal basis to enter judgment in Wife's favor after she accepted the PFS. The trial court also lacked the power to apply a post-judgment setoff, because the PFS did not include entry of a judgment as a nonmonetary term.

If there is a lesson to be learned here, it is that you must be exceedingly careful when drafting proposals for settlement.

Imagine if the PFS to Wife was a straight-up demand for judgment. If Wife accepted, and a judgment was entered against her, would she then be entitled to a setoff under section 768.041 for the amount previously paid by Husband? Perhaps so.

### More Time for Fees, Please

Everyone knows you must file a motion for attorney's fees within 30 days from the date of the judgment. But what happens after entitlement is determined — is there a time limit for filing a motion to determine the *amount* of fees owed?

No. As the Fourth DCA recently explained,<sup>17</sup> there is no jurisdictional time limit for scheduling a hearing on the amount to be awarded so long as the original motion for fees was timely filed. ■



#### BRENT STEINBERG

is a shareholder at Swope, Rodante P.A. in Tampa, where he handles catastrophic injury, insurance bad faith, legal malpractice and insurance coverage cases throughout Florida and Georgia, at both the trial and appellate levels. He is a Florida Bar board-certified appellate specialist and is AV-rated by Martindale-Hubbell. Brent is a member of the FJA Board of Directors, serves as Chair of the Legislative Subcommittee on Auto Insurance and Insurance Bad Faith, and serves as Co-Chair of the HB 837 Appellate Review Committee. He is an EAGLE Patron.

<sup>1</sup> 342 So. 3d 232 (Fla. 1st DCA 2022).

<sup>2</sup> *Faircloth v. Main St. Ent., Inc.*, 49 Fla. L. Weekly S59, 2024 WL 972238 (Fla. Mar. 7, 2024).

<sup>3</sup> *Id.* at \*5 (Labarga, J., dissenting).

<sup>4</sup> *Id.* (citation and internal quotation omitted).

<sup>5</sup> *Id.* at \*2.

<sup>6</sup> *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999).

<sup>7</sup> *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017).

<sup>8</sup> 49 Fla. L. Weekly D555, 2024 WL 956908 (Fla. 1st DCA Mar. 6, 2024).

<sup>9</sup> *Id.* at \*1.

<sup>10</sup> *Gutierrez v. Vargas*, 239 So. 3d 615, 622 (Fla. 2018).

<sup>11</sup> 49 Fla. L. Weekly D617, 2024 WL 1123418 (Fla. 6th DCA Mar. 15, 2024).

<sup>12</sup> *Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1228 (Fla. 2016).

<sup>13</sup> 254 So. 3d 978 (Fla. 4th DCA 2018).

<sup>14</sup> 49 Fla. L. Weekly D845, 2024 WL 1669445 (Fla. 2nd DCA Apr. 17, 2024).

<sup>15</sup> 49 Fla. L. Weekly D678, 2024 WL 1289889 (Fla. 3rd DCA Mar. 27, 2024).

<sup>16</sup> 49 Fla. L. Weekly D570, 2024 WL 996291 (Fla. 6th DCA Mar. 8, 2024).

<sup>17</sup> *HCA Health Servs. of Fla., Inc. v. Berlin*, 49 Fla. L. Weekly D863a, 2024 WL 1644474 (Fla. 4th DCA Apr. 17, 2024).

# ROY'S TRIAL LAW TIP #22: ENFORCEMENT OF SETTLEMENTS

by Roy D. Wasson

## A. Introduction

More and more often these days, defense attorneys are settling cases with trial lawyers, and then making up all kinds of excuses to delay remitting payment, by attempting to interject new material terms into the settlement (such as confidentiality provisions) after the amount of payment has been agreed to. This article provides a framework for moving to enforce the settlement you have reached without succumbing to unexpected conditions.

## B. Public Policy of Florida Regarding Enforcement of Settlements

There is a strong public policy in Florida which recognizes the value of negotiated settlements. The courts of Florida have long recognized the public policy in favor of settling cases will be furthered by enforcement of such settlements upon appropriate motion. "Settlements are highly favored as a means to conserve judicial resources and will be enforced when it is possible to do so ...." *Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr, Inc.*, 704 So. 2d 669, 673 (Fla. 1<sup>st</sup> DCA 1997).

## C. No Requirement of a Written Settlement Agreement

There is no requirement that most settlement agreements be in writing. "An enforceable settlement agreement may be reached orally. All that is required is that the terms be clear, definite, and capable of proof." 9 Fla. Jur. 2d *Compromise Accord, and Release* Section 22 (1997). However, it is safer to obtain a confirming letter from the defense attorney than it is simply to write a letter yourself confirming the terms of the settlement.

In *Roggio-Wilgus v. Marlin* 699 So. 2d 1050 (Fla. 4<sup>th</sup> DCA 1997), the court held that there was no enforceable settlement when a letter from one attorney to the other purported to confirm their telephone conversation about settling the case but which stated that the other attorney should call if the letter is inaccurate, and the other attorney *did* call to correct a part of the letter which was inaccurate.

Note that where there is a written settlement agreement prepared, normal rules of contract apply to require it to be signed by both parties. See *Lickert v. Pike*, 736 So. 2d 724 (Fla. 2<sup>nd</sup> DCA 1999). Further, if there is a confirming letter which indicates that there

remain further details about the settlement to be negotiated, the settlement will not be enforced. See *Belcher Partnership Inc. v. Ferguson*, 704 So. 2d 653 (Fla. 2<sup>nd</sup> DCA 1998). If, on the other hand, the case is a simple personal injury case involving the offer of an amount of money in exchange for a general release, those terms alone can be agreed to verbally and documented by a confirming letter and the settlement will be enforceable.

A settlement reached at mediation must be reduced to writing at the mediation in order to be binding, because the confidentiality requirement applicable to mediations will not permit verbal testimony about what took place at the mediation in the absence of such a writing. See *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515 (Fla. 3<sup>rd</sup> DCA 1994).

## D. Legal Standards for Enforceable Settlement Agreements

All that is required to reach a binding and enforceable settlement is an offer and acceptance of the essential terms, just as with any simple contract. *E.g.*, *Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985).

In response to arguments by the defendant that a settlement is not enforceable because there remained unstated details concerning the settlement to be worked out, it is *not* the law of Florida that every single detail be expressly agreed upon, prior to there being an enforceable settlement. A settlement is judicially enforceable where it is "sufficiently specific and mutually agreeable as to every *essential element*." *Williams v. Ingraham*, 605 So. 2d 890, 893 (Fla. 1<sup>st</sup> DCA 1992). The most essential elements of any settlement are the amount and terms regarding payment. See *Giovo v. McDonald*, 791 So. 2d 38 (Fla. 2<sup>nd</sup> DCA 2001).

Once the material terms have been agreed upon, a settlement will be enforced, even if the parties have yet to negotiate some of the minor points of the settlement, and even if the court must be called upon to determine how some details will be resolved. "Uncertainty as to nonessential terms or small items will not preclude the enforcement of a settlement agreement." *Spiegel v. H. Allen Homes, Inc.*, 834 So. 2d 295 (Fla. 4<sup>th</sup> DCA 2002). A party may not avoid its duties under a settlement agreement by claiming lack of agreement on every detail. "Where the parties have agreed

to the essential terms of a settlement, *it will be enforced.*” *State Farm Mut. Auto Ins. Co. v. InterAmerican Car Rental, Inc.*, 781 So. 2d 500, 502 (Fla. 2001) (emphasis added).

### **E. Failure to Agree to Details of Release Does Not Bar Enforcement**

Often the defendant will argue that there is no enforceable settlement because the parties have not yet come to terms on all the elements to be contained in the release. However, the lack of agreement as to the specific terms of a release will not bar enforcement of a settlement.

There is no need for parties to a settlement to expressly reach an agreement about executing a release because furnishing a release which is consistent with the settlement is an implicit term. *Erhardt v. Duff*, 729 So. 2d 529 (Fla. 4<sup>th</sup> DCA 1999). *Accord, e.g., Wong v. Bailey*, 752 F.2d 619 (11th Cir. 1985) (failure to contemplate specific language of release does not constitute lack of meeting of minds sufficient to deny enforcement of settlement, applying Georgia law).

Your client will not be able to accept a settlement without signing a general release, however, in the absence of some specific understanding reached through negotiations that eliminates the implied agreement to sign a general release. *See Grimsley v. Inverrary Resort Hotel, Ltd.*, 748 So. 2d 299 (Fla. 4<sup>th</sup> DCA 2000).

On the other hand, where a settlement is reached orally and the defendant provides a release containing what the courts have found to be an essential term, courts often find that there was no “meeting of the minds” and refused to enforce its settlement. For example, in *Nichols v. Hartford Ins. Co.*, 834 So. 2d 217 (Fla. 1<sup>st</sup> DCA 2002), the proposed release provided by the defendant contained indemnification language which required the plaintiff to indemnify the insurance company for any future litigation arising out of the subject accident or the plaintiff’s claims. The court found that such indemnification language constituted an essential term which prevented enforcement of the settlement due to the lack of a meeting of the minds. Further, the First District reversed the trial court’s enforcement of the settlement, even though the defendant had responded to the plaintiff’s objection to the indemnification language by submitting a new proposed release without such language. The court held as follows:

In Florida, settlement agreements are governed by the law of contracts. *See Williams v. Ingram*, 605 So. 2d 890, 893 (Fla. 1<sup>st</sup> DCA 1992). Pursuant to contract law, the acceptance of an offer which results in an enforceable agreement must be (1) absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly stated within the offer. *Cheverie v. Geisser*, 783 So. 2d 1115, 1119 (Fla. 4<sup>th</sup> DCA 2001). Thus, an acceptance must contain an assent — or meeting of the minds — to the essential terms contained in the offer. *Id.*

Here, the parties agree that the material facts are undisputed, and they conceded at oral argument that although it was implicit in the settlement agreement that the Appellants would execute releases, there was no meeting of the minds as to whether indemnification language would be included in those releases. The issue before us is whether this disagreement between the parties as to the indemnification language was an essential term of the settlement. We agree with the Appellants and find that it was.

The definition of “essential term” varies widely according to the nature and complexity of each transaction and is evaluated on a case-by-case basis. *See Dimase v. Aquamar 176, Inc.*, 835 So. 2d 1150, 2002 Fla. App. LEXIS 7390, 27 Fla. L. Weekly D1237 (Fla. 3d DCA May 29, 2002); *see also Giovo v. McDonald*, 791 So. 2d 38, 39 (Fla. 2d DCA 2001) (“Certainly, what is an ‘essential term’ of a contract differs according to circumstances.”). Although all the details of a release do not need to be absolutely decided as long as the parties agree on the essential terms, *see Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985) (noting settlement agreement is enforceable even though the agreement fails to anticipate every contingency), the indemnification clause in this case was an essential term.

In *Cheverie*, the claimant’s husband was killed in an automobile accident, and claimant had filed a wrongful death action. The trial court dismissed the complaint, finding the parties had reached a settlement agreement despite the fact that the parties had not agreed on the indemnification language in the release. The appellate court reversed, finding there was no meeting of the minds, and therefore, no settlement agreement:

Here, there was no evidence of acceptance on [] crucial terms. Plaintiff did not agree to the indemnification language in the release defendant presented for her execution. Plaintiff immediately raised an objection to the proposed release after receiving it and demanded its removal. However, this issue was not resolved before suit was filed. Where the language of a release is disputed and the parties fail to reach an agreement as to the character, nature, or type of release to be used, an essential element of the agreement is not established.

783 So. 2d at 1119. *See also Long Term Management, Inc. v. University Nursing Care Center*, 704

So. 2d 669, 675 (Fla. 1st DCA 1998) (“UNCC’s counsel called with objections to an indemnification clause .... These circumstances do not show the requisite meeting of the minds ....”). Therefore, the trial court should have denied The Hartford’s motion for summary judgment on their settlement enforcement claims and should have granted the Nichols’ motion for summary judgment on the defense that there was no meeting of the minds.

The Hartford argues that the “tender” of the check within the time limits constituted completion of the settlement agreement despite the fact that the parties disagreed about the indemnification language. Appellees conceded at oral argument, however, that appellants’ attorney was not free to cash the check until the terms of the release had been agreed to. Therefore, no settlement could have existed at that time.

The Hartford also argues that Appellants’ failure to respond after the objectionable language was removed from the releases indicated acceptance. However, The Hartford’s removal of the indemnification language evinced a new settlement offer which the Nichols were not obliged to accept. See *Ribich v. Evergreen Sales & Service, Inc.*, 784 So. 2d 1201 (Fla. 2d DCA 2001) (reversing summary judgment based on holding that there was no meeting of the minds and, therefore, no settlement agreement where insured had returned insurer’s tendered check and thereby rejected any counteroffer by insurer); see also, *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So. 2d 306 (Fla. 2000) (analyzing specific language in release to determine the ultimate rights and potential liabilities of the parties).

*Id.* at 219-20.

Where parties have left undecided certain terms that are essential, the court will find that they have only reached “an agreement to agree,” which is unenforceable under Florida law. *ABC Liquors, Inc. v. Centimark Corp.*, 967 So. 2d 1053, 1056 (Fla. 5<sup>th</sup> DCA 2007). “Where essential terms of an agreement remained open, subject to future negotiation, there can be no enforceable contract.” *Suggs v. Defranco’s, Inc.*, 626 So. 2d 1100, 1100-01 (Fla. 1<sup>st</sup> DCA 1993).

### F. Need for Evidence of Objective Agreement on All Essential Terms

Should the defendant and its insurer attempt to put on evidence that their attorneys and claims representatives believed that the terms of the settlement were to include some unstated provision, the court can and should disregard such evidence as immaterial,

even if it finds that the defendant’s witnesses are sincere. Such an assumed subjective belief which is not reflected in the letters and other expressions of the parties’ agreement cannot be incorporated into the settlement after the material terms have been agreed upon.

The expressions of the terms used in the conversations and letters between the parties must be enforced objectively. “[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of *external signs* — not on the parties having *meant* the same thing but having *said* the same thing.” *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 407 (Fla. 1974) (emphasis added).

### G. Requirement of Express Authority from Client to Settle

One change which has occurred in the law in the last couple of decades is that the counsel of record for a party no longer has the implicit authority of his or her client to settle a case. That change in the law has permitted parties to change their mind about settling, by convincing the trial judge that they had not given their attorney the authority to accept a settlement offer.

In *Lechuga v. Flanigan’s Enterprises, Inc.*, 533 So. 2d 856 (Fla. 3<sup>rd</sup> DCA 1988), the court reversed an order enforcing a settlement agreement on the ground that the attorney did not have express authority of his client to enter into the settlement. The court held that “[t]he employment of an attorney does not, of itself, give the attorney authority to compromise the client’s cause of action or settle the client’s claim ...., absent an emergency situation .... It follows that an attorney has no authority to settle a client’s claim on conditions other than those unequivocally approved by the client.” *Id.* at 857. Thus, it would be worthwhile for you to gather evidence before you need it that the defense attorney has his or her client’s authority to enter into the settlement agreement, such as by his or her failure to contradict your confirming letter that the negotiated settlement is with his client’s authority.

The mere fact that the defendant denies that its attorney had settlement authority will not preclude the trial judge from finding that such authority was given. As with any other contested issue of fact, the trial court will need to conduct an evidentiary hearing to determine the issue of the attorney’s authority, when that issue is controverted. See *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204 (Fla. 5<sup>th</sup> DCA 1998) (affirming order enforcing settlement based upon conflicting evidence of counsel’s authority from client to settle). “A party seeking to compel enforcement of a settlement bears the burden of proving that an attorney has the clear and unequivocal authority to settle on the client’s behalf.” *Sharick v. Southeastern University of the Health Services*, 891 So. 2d 562, 565 (Fla. 3<sup>rd</sup> DCA 2004).

### H. Effect of the Parol Evidence Rule

While it is usually the defense which raises the parol evidence rule against the plaintiff, you can use the doctrine to enforce a settlement and keep out evidence of preliminary discussions of other terms which are not contained in the letters which confirm the settlement. Make the argument that the most recent letters exchanged between counsel for the parties or the insurers’ claims

personnel are complete integrations, and that any other terms which may have been discussed in preliminary negotiations are so significantly different from, and inconsistent with, those terms which *were* agreed to, that any attempt to establish them as a part of the settlement contract would fail as a matter of law.

The appellate courts of Florida have applied the parol evidence rule specifically in the context of settlement agreements to bar attempts to add or vary terms of such a settlement. In *Ghahramani v. Guzman*, 768 So. 2d 535 (Fla. 4<sup>th</sup> DCA 2000), the court affirmed a summary judgment enforcing a settlement as originally written, rejecting one of the party's efforts to add terms not originally agreed to, holding as follows:

The parol evidence rule bars claims arising out of prior extrinsic agreements, oral or written, which vary, alter, or modify the terms of a clear, unambiguous, and fully integrated document .... Because the settlement agreement is otherwise clear and unambiguous on its face, we hold that Ghahramani failed to rebut Guzman's motion for summary judgment. See, generally, *Sun Microsystems of California v. Engineering and Mfg. Systems, C.A.*, 682 So. 2d 219, 220 (Fla. 3<sup>d</sup> DCA 1996) (holding settlement agreements are generally favored as a matter of public policy). Accordingly, we affirm the summary judgment.

*Id.* at 537-38.

### **I. Courts Lack Power to Impose New Terms Under 'Fairness'**

In ruling on a motion to enforce a settlement, the courts should not be tempted to condition enforcement of the settlement upon the plaintiffs' acceptance of some new terms sought by the defense out of a sense of fairness and equity. It is reversible error to include in an order enforcing a settlement terms and conditions not originally agreed to by the parties, no matter how well meaning would be such action by a court. See *Sinclair v. Clay Elec. Co-Op, Inc.*, 584 So. 2d 1065 (Fla. 5<sup>th</sup> DCA 1991).

### **J. Costs and Attorney's Fees in Enforcement Proceedings**

There is not much law on the subject of recovering costs and attorney's fees incurred in proceedings to enforce a settlement agreement. Of course, such costs and fees are recoverable where the settlement agreement itself provides for such relief in enforcement proceedings. See *Hallenbeck v. Range Lines Supply Corp.*, 697 So. 2d 876 (Fla. 4<sup>th</sup> DCA 1997). Other cases have recognized that attorney's fees and costs are recoverable where the settlement is of a contractual claim involving a contract provision which permitted recovery of fees. See *Mickesue, Inc. v. DSR Group, Inc.*, 691 So. 2d 56 (Fla. 4<sup>th</sup> DCA 1997). Attorney's fees and costs may be recovered in proceedings to enforce settlement agreements reached at mediation. See Fla. R. Civ. P. 1.730.



One case recognizing the recoverability of attorney's fees as a sanction in a wrongful death case where fees would not appear to have been ordinarily recoverable in the case itself is *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204 (Fla. 5<sup>th</sup> DCA 1998). In such a case it would appear that the party seeking enforcement of the settlement would need to establish bad faith or grounds such as those contained in section 57.105, Fla. Stat.

Section 627.4265, Fla. Stat., provides that the failure of an insurer to tender payment of settlement funds no later than 20 days after a settlement agreement has been executed will permit the recovery of interest at the rate of 12 percent. That statute applies only to settlement agreements which are "agreed in writing." Further, "if a tendered payment is conditioned upon the execution of a release, the interest shall not begin to accrue until the executed release is tendered to the insured." *Id.* If you begin to get the idea that defense counsel is dragging his/her feet about concluding the settlement, go ahead and have your client execute a release (there is a decent form on the Florida Bar Trial Lawyers' section website) and provide it to defense counsel to start the interest clock ticking.

### **Conclusion**

Nothing feels worse than settling a case and waiting for a settlement draft that never comes or is preceded by an onerous release filled with terms never discussed. This article should help you enforce the original agreement and get paid without further delay. ■

Keep tryin'  
Roy



#### **ROY D. WASSON**

is board certified in appellate practice with extensive courtroom experience in more than 900 appeals and thousands of trial court cases. He is an EAGLE<sup>®</sup> patron, a former member of the FJA<sup>®</sup> Board of Directors, a fellow of the Academy of Florida Trial Lawyers, a past chairman of the FJA<sup>®</sup> Appellate Practice Section, and a member and past chair of the Amicus Curiae Committee. Wasson is a recipient of the FJA<sup>®</sup> Gold EAGLE<sup>®</sup>, Silver EAGLE<sup>®</sup>, Bronze EAGLE<sup>®</sup>, and EAGLE<sup>®</sup> Legend 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.

# 'MEET AND CONFERS' IN FLORIDA MOTION PRACTICE

by Peter Spillis and Jeffrey Popoviz

Few terms engender such frustration as “meet and confer.” Nearly every plaintiff’s attorney knows what it’s like to try to convince an insurance defense lawyer that their client’s boilerplate objections are meritless. Nonetheless, trying to resolve issues without judicial intervention is an integral part of pretrial motion practice — and, in nearly every judicial circuit, a required one, too.

This article is a practical resource. The authors have reviewed the administrative orders and local rules of every Judicial Circuit to compile the various meet and confer requirements, which are often overlooked in the heat of motion practice.

Before we jump to specifics, some overarching principles.

*First*, some meet and confers are mandatory. Under the Florida Rules of Civil Procedure, a party who wants to file a motion to compel discovery “must” meet and confer with the opposing side and certify that such occurred.<sup>1</sup> This aligns with Federal Rule of Civil Procedure 37.<sup>2</sup>

*Second*, courts differ as to what a proper “meet and confer” entails. Some, like the Northern District of Florida, take the position that “simply corresponding with opposing counsel is not considered a good-faith attempt to confer or have a conference to resolve discovery disputes.”<sup>3</sup> (“[C]onfer means ‘to have a conference; compare and exchange ideas; meet for discussion; converse.’”<sup>4</sup>) Others, like the Seventeenth Judicial Circuit, expressly contemplate that such an exchange may occur over “email” or “text message.”

*Third*, this guide is intended to be a practical guide, not an exhaustive one. Accordingly, it provides those local *court-wide* administrative orders or rules which require litigants to meet and confer prior to filing a motion *in the personal injury context*. Because judicial preferences vary, be sure to check your judge’s policies and procedures before filing any motion.

Onto the specifics.

*First Judicial Circuit.* No apparent meet and confer requirement pursuant to local rule or administrative order.

*Second Judicial Circuit.* No apparent meet and confer requirement pursuant to local rule or administrative order.

*Third Judicial Circuit.* “Prior to filing any motion, counsel have a duty to confer with each other directly in good faith, *not through law firm staff*, to attempt to narrow or resolve issues.”<sup>5</sup> “In good faith” means you are professional and temperate in your communications, you return phone calls and emails in a timely manner, and you do not set unreasonable deadlines for responses.<sup>6</sup> There is no apparent certification requirement.

*Fourth Judicial Circuit.* Litigants have an obligation to “seek to resolve discovery issues without court intervention whenever possible.”<sup>7</sup> But a specific meet and confer requirement exists only for motions to compel and for a protective order.<sup>8</sup> The same for certification, which must include language that counsel “is aware of the provisions in First Amended Administrative Order No. 88-2 that” include, among other things, the meet and confer requirement and the mandate that “the hearing noticed may not be cancelled by agreement of the parties or counsel.”<sup>9</sup>

*Fifth Judicial Circuit.* Litigants have an obligation to seek to resolve pretrial issues without court intervention whenever possible.<sup>10</sup> But a specific meet and confer requirement apparently exists only for cases filed in Marion County — and only for motions to compel or for a protective order.<sup>11</sup> In those cases, counsel must “attach” to the motion “a copy of the correspondence with opposing counsel of the good faith effort to resolve the discovery dispute.”<sup>12</sup>

*Sixth Judicial Circuit.* Litigants have an obligation to “make every reasonable effort to resolve [an] issue before setting a motion for hearing.”<sup>13</sup> But a specific meet and confer requirement apparently exists only for motions to compel or for a protective order.<sup>14</sup> The same for certification, which must be titled “Certificate of Good-Faith.”<sup>15</sup>

*Seventh Judicial Circuit.* Excluding “summary judgment or other case dispositive motions,” “[b]efore any motion is filed, the moving party shall contact the opposing party and attempt, in good faith, to amicably resolve the issues raised by the motion(s).”<sup>16</sup> In the context of motions to compel discovery, “the moving party must notify the opposing party, in writing, of the specific deficiencies of his/her discovery response and the specific actions necessary to cure said asserted deficiencies,” and such “[w]ritten notice must provide 10 days for the opposing party to cure the asserted deficiencies” before any motion may be filed.<sup>17</sup> Note that, if the opposing party requests a reasonable extension, the movant may not file his or her motion.<sup>18</sup>

Any motion encompassed by these requirements “shall contain a certificate of the movant’s attorney if represented (or the moving party if unrepresented) certifying his/her compliance” therewith.<sup>19</sup>

*Eighth Judicial Circuit.* “Prior to filing ANY motion, counsel filing the motion shall confer with opposing counsel by telephone or in person in a good faith attempt to resolve the motion.”<sup>20</sup> “The motion shall contain a good faith statement reflecting the date and time of the conference with opposing counsel.”<sup>21</sup> “A statement that counsel attempted to confer with opposing counsel is insufficient unless the good faith statement details the date and time of at least three attempts to confer that occurred within the one-month period immediately prior to the filing of the motion.”<sup>22</sup>

*Ninth Judicial Circuit.* Excluding motions for judgment on the pleadings, for summary judgment, and for the maintenance of a class action, “[p]arties shall meet in person or by telephone and confer on the subject at issue before requesting hearing time.”<sup>23</sup> “The term ‘confer’ requires a substantive conversation in person or by telephone in a good faith effort to resolve the motion without the need to schedule a hearing, and does not envision an exchange of ultimatums by fax, e-mail or letter.”<sup>24</sup>

“Counsel who merely attempt to confer have not conferred . . .”<sup>25</sup> But [i]f counsel who notices the hearing is unable to reach opposing counsel to conduct the conference after three (3) good faith attempts,” that suffices.<sup>26</sup> In such circumstance, “counsel who notices the hearing must identify in the [pertinent] Certificate of Compliance the dates and times of the efforts made to contact opposing counsel.”<sup>27</sup>

Regardless, “[c]ounsel shall include in the Notice of Hearing [a] . . . Certificate of Compliance certifying that the meet and confer occurred (or did not occur and setting out the good faith attempts to schedule the conference) and identifying the date of the conference, the names of the participating attorneys, and the specific results obtained.”<sup>28</sup> It must also note that “a lawyer in my firm with full authority to resolve this matter had a substantive conversation in person, by telephone or by video conference with opposing counsel in a good faith effort to resolve this motion before the motion was noticed for hearing but the parties were unable to reach an agreement.”<sup>29</sup>

*Tenth Judicial Circuit.* As a matter of professionalism, “[a]ttorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part.”<sup>30</sup> Against that backdrop, any “party or . . . attorney noticing a motion to be heard on the Uniform Motion Calendar shall contact opposing counsel and make a good faith attempt to resolve the matter without judicial involvement” and certify the same.<sup>31</sup>

*Eleventh Judicial Circuit.* “Counsel and self-represented litigants must meet and confer sufficiently in advance of hearings in order to accurately reflect the amount of time required, by eliminating

those issues upon which agreement can be reached.”<sup>32</sup> There is no apparent certification requirement.

*Twelfth Judicial Circuit.* “Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact the opposing attorney to determine if the matter can be resolved in whole or in part.”<sup>33</sup> In the context of “discovery-related motion[s],” “[b]efore filing,” “the attorney for the moving party shall confer or make a reasonable good faith effort to confer with the attorney for the opposing party in a good faith effort to resolve the issues raised.”<sup>34</sup> “When a [discovery-related] motion is filed, a statement certifying that the attorney has conferred with the opposing attorney and that they have been unable to resolve the dispute shall also be filed.”<sup>35</sup>

*Thirteenth Judicial Circuit.* There is no meet and confer requirement for “motion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action.”<sup>36</sup> “[B]efore the moving party or moving party’s counsel files any other motion, the party or counsel should confer with the opposing party or opposing counsel in a good faith effort to resolve the issues raised by the motion.”<sup>37</sup> “The moving party or moving party’s counsel should file with the motion a statement certifying that the moving party or moving party’s counsel has conferred with the opposing party or opposing party’s counsel — either in person, by telephone, or by video conferencing device — and stating whether the party or counsel agree on the resolution of the motion.”<sup>38</sup> That certification “should describe, with particularity, all of the efforts undertaken to accomplish dialogue with the opposing party or opposing party’s counsel prior to filing the subject motion.”<sup>39</sup>

*Fourteenth Judicial Circuit.* No apparent meet and confer requirement pursuant to local rule or administrative order.

*Fifteenth Judicial Circuit.* “Prior to filing and serving a Notice of Hearing for a Uniform Motion Calendar hearing or a specially set hearing, the attorney noticing the motion for hearing shall attempt to resolve the matter and shall certify the good faith attempt to resolve.”<sup>40</sup> Counsel must certify the same by way of a prescribed form.<sup>41</sup>

*Sixteenth Judicial Circuit.* “Counsel shall meet and confer regarding all disputed issues before setting a hearing to resolve those issues on motion,” such that “[f]ailure to comply with this requirement may result in removal of motions from the docket, rescheduling of motions by the [c]ourt, denial of motions, or sanctions, as appropriate.”<sup>42</sup> There is no apparent certification requirement.

*Seventeenth Judicial Circuit.* Before “setting any matter” for hearing, the “party or parties noticing the motion shall attempt to resolve the matter by direct communication with all parties, and shall also certify a good faith attempt to resolve or narrow the issues contained in the motion.”<sup>43</sup> “Direct communication means by oral or written communication, including by telephone, in person, email, or

text messaging.”<sup>44</sup> There are distinct certification requirements for uniform motion calendar motions and special set motions.<sup>45</sup>

*Eighteenth Judicial Circuit.* Although there is no apparent prefiling meet and confer requirement, “counsel and unrepresented parties shall seek to resolve discovery issues without court intervention whenever possible.”<sup>46</sup> To that end, in Brevard County, “[w]ithin sixty (60) days from the date of filing of a [m]otion, the movant must coordinate with opposing counsel and either submit a proposed [a]greed [o]rder on the [m]otion or schedule a hearing and file a [n]otice of [h]earing; otherwise, the [m]otion/objection is deemed abandoned and denied.”<sup>47</sup>

*Nineteenth Judicial Circuit.* “Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part.”<sup>48</sup> There is no apparent certification requirement.

*Twentieth Judicial Circuit.* There is no meet and confer requirement for motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a cause of action, to dismiss for lack of prosecution, or to otherwise involuntarily dismiss an action.<sup>49</sup> For all other motions, the movant “shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement certifying that the moving counsel has conferred with opposing counsel and that counsel have been unable to agree on the resolution of the motion.”<sup>50</sup>

*Northern District of Florida.* A meet and confer is “not required for a motion that would determine the outcome of a case or a claim, for a motion for leave to proceed in forma pauperis, or for a motion that properly may be submitted *ex parte*.”<sup>51</sup> But for all other motions, prior to filing, “an attorney for the moving party must attempt in good faith to resolve the issue through a meaningful conference with an attorney for the adverse party.”<sup>52</sup> “The conference may be conducted in person, by telephone, in writing, or electronically, but ... [a]n email or other writing sent at or near the time of filing the motion is not a meaningful conference.”<sup>53</sup> “A motion or supporting memorandum must include a certificate — under a separate heading — confirming that the moving party complied with the attorney-conference requirement ... and setting out the results.”<sup>54</sup>

*Middle District of Florida.* “Before filing a motion in a civil action, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, or to certify a class, the movant must confer with the opposing party in a good faith effort to resolve the motion.”<sup>55</sup> “At the end of the motion and under the heading ‘Local Rule 3.01(g) Certification,’ the movant: (A) must certify that the movant has conferred with the opposing party, (B) must state whether the parties agree on the resolution of all or part of the motion, and (C) if the motion is opposed, must explain the means by which the conference occurred.”<sup>56</sup>

A party may file his or her motion even if the opposing party is unavailable.<sup>57</sup> In such instance, “the movant after filing must try diligently for three days to contact the opposing party.”<sup>58</sup> “Promptly after either contact or expiration of the three days, the movant must supplement the motion with a statement certifying whether the parties have resolved all or part of the motion.”<sup>59</sup>

*Southern District of Florida.* There is no meet and confer requirement for “motion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, for pro hac vice admission, or to involuntarily dismiss an action, for garnishment or other relief under Federal Rule of Civil Procedure 64, or ... or a petition to enforce or vacate an arbitration award.”<sup>60</sup> For all other motions, “counsel for the movant shall confer (orally or in writing), or make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues to be raised in the motion.”<sup>61</sup>

“[A]bove the signature block [of the motion], counsel for the moving party shall certify either: (A) that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so; or (B) that counsel for the movant has made reasonable efforts to confer with all parties or non-parties who may be affected by the relief sought in the motion, which efforts shall be identified with specificity in the statement (including the date, time, and manner of each effort), but has been unable to do so.”<sup>62</sup> “If certain of the issues have been resolved by agreement, the certification shall specify the issues so resolved and the issues remaining unresolved.”<sup>63</sup> ■





## PETER SPILLIS

Peter K. Spillis is the Managing Partner of Kelley | Uustal, PLC and has more than 30 years of experience in high-stakes civil trial work. He received his undergraduate degree from Texas Christian University and his law degree from The University of Miami School of Law. He heads the firm's medical malpractice team and handles complex commercial, industrial and products cases. Peter is an EAGLE Patron.

## JEFFREY POPOVIZ

Jeffrey Popoviz is an associate at Kelley | Uustal, PLC. He received his undergraduate degree from Temple University and his law degree from the University of Pennsylvania Law School. Jeff is a member of both the Florida and Pennsylvania bars. He is an FJA Soaring EAGLE member.

<sup>1</sup> See Fla. R. Civ. P. 1.380(a)(2) (mandating that any motion to compel “include a certification that the movant, in good faith, has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action”).

<sup>2</sup> See Fed. R. Civ. P. 37(a)(1).

<sup>3</sup> See *Haugdahl v. Fla. Dep’t of Agriculture and Consumer Servs.*, No. 4:19-cv-87, 2019 WL 6271267, at \*1 (N.D. Fla. Oct. 17, 2019) (Walker, J.) (cleaned up).

<sup>4</sup> *Id.*

<sup>5</sup> *C.f.* Third Jud. Cir. Form Order 2-5, Ex. B, at ¶ 1 (emphasis in original); *see generally* Third Jud. Cir. Admin. Order 2021-004, at ¶ 10 (Apr. 29, 2021) (requiring the use of a case management order that is “substantially in the same form” as “Form Order 2-5, with exhibits”).

<sup>6</sup> See Third Jud. Cir. Form Order 2-5, Ex. B, at ¶ 1.

<sup>7</sup> See Fourth Jud. Cir. Second Am. Admin. Order 2023-17, Attachment A, at ¶ 5 (Aug. 15, 2023).

<sup>8</sup> See Fourth Jud. Cir. First Am. Admin. Order 88-2, at ¶ 1 (July 17, 2020).

<sup>9</sup> See *id.* ¶¶ 1, 4 (setting forth specific language for the certification).

<sup>10</sup> See Fifth Jud. Cir. Admin. Order A-2021-58, at ¶ VI(10) (Dec. 1, 2021) (“A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.”).

<sup>11</sup> See Fifth Jud. Cir. Admin. Order M-2022-35, Attachment 2, at ¶ 5 (June 29, 2022).

<sup>12</sup> See *id.*

<sup>13</sup> See Sixth Jud. Cir. Admin. Order 2015-052, Attachment A, ¶ G(1), *rescinded on other grounds* by Sixth Jud. Cir. Admin. Order 2024-010 (Feb. 28, 2024).

<sup>14</sup> See Sixth Jud. Cir. R. 5(C)(1); Sixth Jud. Cir. Admin. Order. PI-CIR-98-30 (May 4, 1998).

<sup>15</sup> See Sixth Jud. Cir. R. 5(C)(1) (requiring “a statement certifying that he or she has ... conferred with opposing counsel and that counsel have been unable to resolve the dispute.”); Sixth Jud. Cir. Admin. Order. PI-CIR-98-30 (May 4, 1998) (mandating that counsel file “with his/her motion a Certificate of Good-Faith,” and do so “before scheduling a hearing on the motion”).

<sup>16</sup> See Seventh Jud. Cir. Uniform Pretrial Procedures in Civ. Actions, at ¶ 6(c) (Jan. 2023).

<sup>17</sup> See Seventh Jud. Cir. Admin. Order 2022-004 (Sept. 27, 2022) (emphasis in original).

<sup>18</sup> See *id.*

<sup>19</sup> See Seventh Jud. Cir. Uniform Pretrial Procedures in Civ. Actions, at ¶ 6(c).

<sup>20</sup> See Eighth Jud. Cir. Admin. Order 03-09, Appendix A, at ¶ 5 (Apr. 23, 2021) (standing case management order applicable to all civil cases).

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See Uniform Admin. Policies and Procedures of the Civ. Div. of the Ninth Jud. Cir., at § 11(c)(1) (May 2020); *see also* Ninth Jud. Cir. Am. Admin. Order 2012-03-01, ¶ 6 (Sept. 24, 2020) (requiring, prior to noticing a hearing, “a substantive conversation in person or by telephone or video conference in a good faith effort to resolve the motion”).

<sup>24</sup> See Ninth Jud. Cir. Admin. Order 2012-03-01, ¶ 6 (Sept. 24, 2020).

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*; *see also* Uniform Admin. Policies and Procedures of the Civ. Div. of the Ninth Jud. Cir., at § 11(c)(1) (May 2020) (“All notices of hearing must reflect that the parties met, in person, and conferred on the subject being brought before the Court for resolution.”).

<sup>29</sup> See Ninth Jud. Cir. Admin. Order 2012-03-01, at Ex. A (Sept. 24, 2020).

<sup>30</sup> See Tenth Jud. Cir. Admin. Order 7-6.0, Ex. A, at ¶ (V)(2) (Apr. 12, 1993).

<sup>31</sup> See Tenth Jud. Cir. Admin. Order 3-22.1, at ¶ 1 (June 27, 1995).

<sup>32</sup> See Eleventh Jud. Cir. Admin. Mem. 23-C 24 AF CA 01 (Nov. 8, 2023); *see also* Eleventh Jud. Cir. Admin. Order 22-05, Ex. 1, at V(2) (Oct. 24, 2022) (“Attorneys should, whenever possible, prior to filing or upon receiving a motion, contact opposing counsel to determine if the matter can be resolved in whole or in part.”).

<sup>33</sup> See Twelfth Jud. Cir. Admin. Order 2010-22.2, Ex. 1, at ¶ (F)(1) (Oct. 20, 2010).

<sup>34</sup> See *id.* ¶ (E)(1)(c).

<sup>35</sup> See *id.*

<sup>36</sup> See Thirteenth Jud. Cir. Admin. Order 2024-021, at ¶ 11(A) (Feb. 19, 2024) (cleaned up).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> Fifteenth Jud. Cir. R. 4, at ¶ 2; *see also* Fifteenth Jud. Cir. Admin. Order 3.202-10/2023, at ¶ 1 (Oct. 4, 2023) (independently imposing a requirement that, prior to hearing a “motion to compel discovery or for protection from discovery,” counsel “confer[]” in an attempt to “resolve the discovery dispute without a hearing”).

<sup>41</sup> See Fifteenth Jud. Cir. R. 4, at ¶ 2 (setting forth a form certification requirement).

<sup>42</sup> *C.f.* Sixteenth Jud. Cir. Admin. Order 2.072/21-1 (Apr. 30, 2021) (emphasis in original) (setting forth a model case management order).

<sup>43</sup> See Seventeenth Jud. Cir. R. 10A.

<sup>44</sup> See Seventeenth Jud. Cir. R. 10A.

<sup>45</sup> *C.f.* Seventeenth Jud. Cir. R. 10A (mandating, for uniform motion calendar motions, that counsel certify: “I hereby certify that A) the movant has conferred or attempted to confer with all parties or self-represented parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion; and B) the issues in the motion may be heard and resolved by the court within five (5) minutes.”), *with id.* (mandating, for special set motions, that counsel certify: “I hereby certify that I have made a good faith attempt to resolve this matter by having direct communication about the matter with all parties, prior to my noticing this motion for hearing.”).

<sup>46</sup> See Seventeenth Jud. Cir. Admin. Order 24-06, Ex. B & Ex. D (Apr. 16, 2024).

<sup>47</sup> See *id.*

<sup>48</sup> See Nineteenth Jud. Cir. Am. Admin. Order 2015-06, Ex. A, at V(2) (Sept. 22, 2017).

<sup>49</sup> See Twentieth Jud. Cir. Admin. Order 2.20, Attachment A, at ¶ I.

<sup>50</sup> See *id.*

<sup>51</sup> See N.D. Fla. R. 7.1(D).

<sup>52</sup> See N.D. Fla. R. 7.1(B).

<sup>53</sup> See N.D. Fla. R. 7.1(B); *see also id.* (“When a conference is conducted in writing or electronically, an attorney ordinarily should be afforded at least 24 hours — as calculated under Federal Rule of Civil Procedure 6 — to respond to a communication.”).

<sup>54</sup> See N.D. Fla. R. 7.1(C).

<sup>55</sup> See M.D. Fla. R. 3.01(g)(1).

<sup>56</sup> See M.D. Fla. R. 3.01(g)(2).

<sup>57</sup> See *id.*

<sup>58</sup> See M.D. Fla. R. 3.01(g)(3).

<sup>59</sup> See *id.*

<sup>60</sup> See S.D. Fla. R. 7.1(a)(3).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

# MRS. ROBINSON AND THE STRUGGLE TO ESTABLISH PERSONAL JURISDICTION OVER NONRESIDENT PRODUCT MANUFACTURERS

by Stephen F. Rosenthal and Christina H. Martinez

The authors of *Robinson Helicopter Co., Inc. v. Gangapersaud*, 346 So. 3d 134 (Fla. 2<sup>nd</sup> DCA 2022), may have been listening to Simon & Garfunkel’s “Mrs. Robinson” as they wrote, since “[e]very way you look at this, you lose.” Or at least the plaintiffs do when they’re trying to sue a nonresident manufacturer whose product injures someone in Florida.

If you’re suing such a corporation, you should be mindful of the potential obstacle this decision creates as well as ways to challenge it. Though *Robinson* purports to apply the U.S. Supreme Court’s most recent personal jurisdiction precedent, *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), it actually distorts the case. This article examines this tension and recommends strategies for combatting motions to dismiss for lack of personal jurisdiction in product liability cases against nonresident corporations.

*Robinson* involved circumstances that, one might think, presented a reasonably strong case for the exercise of personal jurisdiction over the nonresident aircraft manufacturer, yet the Court dismissed the case. Robinson originally sold the helicopter to a dealer in Indiana, which resold it to a Florida dentist’s medical practice.<sup>1</sup> While being flown in Florida, the helicopter experienced an engine power loss, forcing a landing.<sup>2</sup> The owner-pilot reached out to Robinson, which then gave a local Florida helicopter service provider, FSH, instructions for diagnosing and repairing the problem and also shipped it replacement parts.<sup>3</sup> FSH installed a part Robinson sent to replace the fuel pump and then tried to fly the helicopter to a repair facility in Sarasota.<sup>4</sup> Shortly after takeoff, the engine failed again, forcing a crash landing on a Tampa roadway. A rotor blade struck a car, killing one person and injuring another.<sup>5</sup> The family sued Robinson for strict products liability for a defective component and negligence for failing to properly diagnose and repair the problem.<sup>6</sup>

The trial court denied Robinson’s motion to dismiss for lack of personal jurisdiction, but the Second District reversed.<sup>7</sup> This article focuses on the Court’s analysis of the constitutional prong of the due process analysis. The Second District held that Robinson lacked sufficient contacts with Florida to find purposeful availment of the forum in part because the owner of the helicopter was the one to reach out to it for help. More significantly, though, the Court dismissed as irrelevant Robinson’s relationships with 11 “authorized service centers” and three “authorized dealers” in Florida and held that “Robinson has not

‘systematically’ served a market in Florida for the type of helicopter involved in this case.”<sup>8</sup>

*Robinson* contains an error that threatens to limit Floridians’ ability to seek civil redress against nonresident corporations whose products flow into the state, or who solicit services in Florida, when their out-of-state acts or omissions cause injury to property or people here.<sup>9</sup> The problem lies in the Court’s adoption of a mistaken and unduly rigid reading of the Supreme Court’s decision in *Ford*. In applying the Supreme Court’s due process test governing a defendant’s purposeful availment of a market, the Court misread *Ford* to tighten and ratchet up that standard rather than to maintain its long-standing flexibility in assessing a defendant’s relevant contacts to a forum.

*Ford* broke no new ground in personal jurisdiction jurisprudence, and merely rejected an unwarranted tightening of the causal nexus that Ford Motor Company and some courts advocated as part of the constitutional due process analysis. The Supreme Court made clear that it “resolve[d] these [consolidated] cases by proceeding as the Court has done for the last 75 years — applying the standards set out in *International Shoe [Company v. Washington]*, 326 U.S. 310 (1945) and its progeny.”<sup>10</sup> “In thus reiterating [its] longstanding approach” to the jurisdictional inquiry, and specifically to the “arise out of or relate to” prong, the Court rejected Ford’s call to adopt a rule “that only a strict causal relationship between the defendant’s in-state activity and the litigation will do.”<sup>11</sup> Ford’s proposed “causal test would [have] put jurisdiction in only the States of first sale, manufacture, and design” of the product.<sup>12</sup>

The proper, more flexible standard the Court adopted permits “[a] different State’s courts” to exercise jurisdiction “because of another ‘activity or occurrence’ involving the defendant that takes place in the State.”<sup>13</sup> The paradigmatic situation is “when a company . . . serves a market for a product in the forum State and the product malfunctions there.”<sup>14</sup> The Court illustrated this concept with the scenario first articulated in the plurality opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980):

If the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but *arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in several or all*

*other States*, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.<sup>15</sup>

That is because “a corporation [which] has continuously and deliberately exploited a State’s market ... must reasonably anticipate being haled into that State’s courts to defend actions based on products causing injury there.”<sup>16</sup>

The *Robinson* Court approached the purposeful availment requirement without paying sufficient heed to the Supreme Court’s guidance in both *Ford* and *Woodson*. The “rule” from those cases recognizes that a nonresident defendant’s effort to serve the forum state’s market “*indirectly*, through others” is one of several “affiliating circumstances” that can support purposeful availment.<sup>17</sup> This, of course, is the way many companies do business.

### Indirect Exploitation of a Market

In *Ford*, the Court identified the affiliating circumstances establishing Ford’s purposeful availment of the forum. They included Ford’s “distribut[ion] [of] replacement parts both to its own dealers and to independent auto shops in the two States.”<sup>18</sup> The Court specifically noted that “Ford’s in-state activities designed to make driving a Ford convenient,” including “that *other* auto shops have ample supplies of Ford parts,” are contacts that could turn a forum resident into a Ford owner, even when buying the car out of state.<sup>19</sup> The Supreme Court concluded that Ford’s provision of its own original parts to *independent* repair facilities is an activity — not unlike Ford’s sales and repairs of its cars at the company’s in-state network of dealers — that “make[s] Ford money,” as well as “foster[s] ongoing connections to its cars’ owners ... making it easier to own a Ford.”<sup>20</sup> Such an “affiliating circumstance” is directly pertinent to whether a defendant has purposely availed itself of the privilege of conducting business in the forum state and can support the exercise of specific jurisdiction.<sup>21</sup>

Thus, a defendant’s indirect use of third parties to serve the forum-state market for its product cannot be disregarded in assessing the defendant’s ties to the forum for purposes of specific jurisdiction. Such “indirect” servicing of Florida’s market for its products *does* evidence purposeful availment.<sup>22</sup>

The *Robinson* Court appears not to have heeded this guidance, limiting the contacts it considered solely to the activities of the company’s own in-state “employees, agents, or representatives.”<sup>23</sup> It disregarded the relevance of Robinson’s use of “‘authorized’ dealers and service centers in ... Florida” because “those businesses are separate entities.”<sup>24</sup> In contrasting the fact that “Ford has dealers in every state” with the corporate separateness between Robinson and its authorized dealers, the Second District evidently presumed Ford owned or employed its dealers.<sup>25</sup> That’s a mistaken assumption. Nothing in *Ford* warrants it, and reported decisions make plain that Ford dealers are separate corporate entities.<sup>26</sup>

The Second District’s disregard of indirect contacts with Florida through Robinson dealers likely contributed to its conclusion that there

was “no indication that Robinson engages in any targeted advertising in Florida.”<sup>27</sup> Yet there was evidence — argued to the Court but unmentioned in its opinion — that Robinson “advertises” its three “authorized dealers” and 11 “authorized service centers” throughout Florida, allowing owners to “obtain maintenance and repair work all over the state of Florida ... [and] Robinson to ensure that it can fulfill its warranty obligations for owners based in Florida.”<sup>28</sup> Given the Second District’s dismissal of the relevance of third-party dealers and service centers altogether, it likely discounted this advertising in assessing Robinson’s purposeful availment of the Florida market.

The circumstances concerning Robinson’s cultivation of a market for its helicopters in Florida, even if done indirectly through others, are not meaningfully different than those in *Ford*. Ford’s use of its network of dealers and independent auto shops to provide original Ford parts to Ford owners in the forum states (no matter where they purchased their car) facilitated in-state residents’ ability to buy and drive new or used Ford cars.<sup>29</sup> Robinson’s affiliation and relationship with Florida-based independent dealers and service centers likewise facilitates the ease of use or ownership of its helicopters in Florida. Robinson sells its helicopters, including the popular R44 model involved in that case, in Florida through authorized dealers.<sup>30</sup> And when repair needs arise, no fewer than 11 Robinson-authorized repair centers stand ready throughout Florida.<sup>31</sup> Indeed, the helicopter owner in *Robinson* did exactly what the manufacturer’s activities in Florida were designed to promote: purchase a Robinson helicopter for use in Florida and, when the need arose, turn to Robinson’s authorized dealers and service centers in Florida to repair the chopper as needed, in that case with Robinson’s direct advice.<sup>32</sup>

### Raising the Constitutional Floor

Apart from disregarding Robinson’s use of third parties to serve the Florida market for its products indirectly, the Second District also artificially treated *Ford* as though it set a very high floor for purposeful availment. “Robinson Helicopter Company is no Ford Motor Company,” the Court remarked, observing that “Ford is a universally acknowledged household name” whereas “Robinson, on the other hand, is a comparatively small company.”<sup>33</sup> True, but if approximating Ford’s presence were the standard, precious few companies would meet it.

It is not, despite the Second District’s language. The Supreme Court did not raise the bar for purposeful availment up to the level that only a giant company like Ford could surmount. The discussion of the facts in *Ford* was, necessarily, limited to the defendant before the Court. And it was designed to explain why it was “[s]mall wonder” that Ford “conceded ‘purposeful availment’ of the pertinent state markets.”<sup>34</sup> Major auto manufacturers sued for injuries arising from an in-state accident involving a vehicle they manufactured represent “paradigm example[s] of how specific jurisdiction works.”<sup>35</sup> Nothing in *Ford* suggests that fewer contacts with the forum state, by a smaller company, could not support specific jurisdiction, provided that the contacts are “the defendant’s own choice and not random, isolated, or fortuitous.”<sup>36</sup>

In other words, the Supreme Court never suggested that the extent of Ford’s in-state contacts was anything close to the floor for minimum contacts. That would have made no sense since the case was not even a close one.<sup>37</sup> The Supreme Court characterized Ford’s many contacts as

an undeniably clear example of (more than) minimum contacts necessary to support jurisdiction, not that they somehow set a new baseline against which all other defendants' contacts must be measured.<sup>38</sup> The Court was careful to contrast cases involving "sporadic transactions" from those involving "continuous" business activities,<sup>39</sup> "between [which] poles," Justice Gorsuch observed in a concurrence, "lie a virtually infinite number of 'affiliations'" that may or may not be enough to support specific jurisdiction.<sup>40</sup> Thus, the task for plaintiffs trying to survive jurisdictional motions to dismiss, and for courts ruling on such motions, is to identify, from the ground up, what kind of contacts are sufficient to show purposeful availment of a market for one's products. It is not, as the *Robinson* Court did, to start from the ceiling of a paradigm example and identify ways that the case at bar falls short of that.<sup>41</sup>

The two takeaways from this discussion are that *Robinson* erroneously treated *Ford* as though it set a comparative floor for minimum contacts and misread *Ford* as license to disregard a nonresident manufacturer's use of third parties in Florida to exploit the market for its products.

### The Relationship Between the Defendant and the Third Party

The *Robinson* Court seemed to miss that the targeting of a forum "required for 'purposeful availment' may be done 'directly or indirectly.'"<sup>42</sup> If a defendant's sale of goods arises from its efforts to directly or indirectly serve the market for its products in Florida, it is not unreasonable to subject it to suit in Florida if its allegedly defective product causes an injury here.<sup>43</sup>

The Supreme Court's formal adoption of this principle in *Ford* is rooted in the reasoning of the plurality opinion in *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1987). The *Asahi* Court rejected the plaintiffs' argument that the placement of a product into the stream of commerce, without more, was an act by the defendant purposefully directed toward the forum state.<sup>44</sup> Nonetheless, the Court recognized that certain "additional conduct of the defendant" can serve as a basis for specific jurisdiction when it "indicate[s] an *intent or purpose* to serve the market in the forum state" ... or indicates that the product is '*purposefully directed* toward the forum State."<sup>45</sup> Among other things, such additional conduct can include serving the forum market through third parties by, for example, establishing channels for providing regular advice to customers in the forum state and marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.<sup>46</sup> In *Asahi* itself, the Court rejected specific jurisdiction because such "additional conduct" was lacking; the defendant "did not create, control, or employ the distribution system that brought its valves to California."<sup>47</sup>

The Third District recently embraced and applied this principle in *Mazda Motor Corporation v. Triche*, where a divided court noted that "marketing [a] product *through a distributor* who has agreed to serve as the sales agent in the forum State" is among the acts that can demonstrate "a foreign defendant's 'intent or purpose to serve the market in the forum State' justifying specific jurisdiction."<sup>48</sup>

A question that remains to be explored is the nature of the relationship between the defendant and the third party that is necessary before

the in-state contacts of that entity can appropriately be attributed to the defendant. *Ford* appears to condone sweeping in a broad range of relationships with third parties, with varying degrees of control by the defendant. It considered, for example, the manufacturer's distribution of parts to both "its own dealers" and "independent auto shops."<sup>49</sup> Ford dealers are likely, as noted, to be separately owned companies.<sup>50</sup> And unquestionably "independent auto shops" are separate entities over whom Ford exercised at most attenuated control.<sup>51</sup>

Despite the breadth of relationships with third parties and related activity that can seemingly qualify as "additional conduct" for assessing purposeful availment under *Ford*, other courts conducting the inquiry appear to have required a substantial degree of control over the third party.<sup>52</sup> The Third District, for example, held that Mazda's act of "creating, deputizing, and utilizing" a corporate subsidiary qualifies as the type of indirect marketing conduct that could demonstrate a defendant's purposeful availment.<sup>53</sup> While a parent-subsidiary relationship may entail greater degrees of control than that which existed between Ford and its independent auto shops, the Third District did not address at length how or whether Mazda specifically directed the activities of its domestic subsidiaries. This aspect of the inquiry remains somewhat uncharted. So long as a defendant deliberately utilized the third party to advance the sale of its products in the state, the third party's foreseeable conduct in furtherance of that objective should count toward purposeful availment.

Bear in mind that the inquiry should encompass contacts related to the defendant's entire product line, not just the particular product model at issue. Obtaining the data to document those broader contacts begins with discovery,<sup>54</sup> which should be cast sufficiently broadly to capture the defendant's efforts to exploit the full market for its products. Ample precedent supports the relevance of discovery into a defendant's full product line both to the constitutional<sup>55</sup> and statutory<sup>56</sup> aspects of the personal jurisdiction inquiry.

To make Florida law more robust in holding nonresident product manufacturers accountable in our courts for their tortious conduct that causes harm in Florida, plaintiffs' counsel should take appropriately gauged jurisdictional discovery, explore defendants' indirect exploitation of the market for their products through third parties, and where possible resist *Robinson's* undue constriction of personal jurisdiction. ■



#### STEPHEN F. ROSENTHAL

Stephen F. Rosenthal is a partner at Podhurst Orseck, P.A. in Miami. With nearly 30 years of experience, he is board certified in appellate litigation yet maintains an active trial practice. He handles plaintiff-side tort work and commercial litigation. He is often sought out by other firms for appellate work. Stephen is an FJA EAGLE Patron and former Board member. Prior to joining the firm in 2001, he served as a trial attorney at the U.S. Department of Justice, clerked for Judge Rosemary Barkett on the U.S. Court of Appeals for the Eleventh Circuit, and graduated from Harvard Law School.



#### CHRISTINA H. MARTINEZ

Christina H. Martinez is an associate at Podhurst Orseck, P.A. in Miami. Her practice focuses on appellate litigation, although she also devotes significant time to trial matters, primarily in the plaintiff-side personal injury space. Before joining the firm, Christina worked at a large multinational firm in New York City and clerked for Chief Judge Cecilia Altonaga on the U.S. District Court for the Southern District of Florida and for Judge Adalberto Jordan on the U.S. Court of Appeals for the Eleventh Circuit. She is a graduate of Harvard Law School.

- <sup>1</sup> *Robinson*, 346 So. 3d at 142.
- <sup>2</sup> *Id.* at 137.
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.* at 138.
- <sup>7</sup> *Id.* at 137-38.
- <sup>8</sup> *Id.* at 144.
- <sup>9</sup> See § 48.193(1)(a)6., Fla. Stat.
- <sup>10</sup> *Ford*, 592 U.S. at 360 n.2 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).
- <sup>11</sup> *Id.* at 362 & n.3.
- <sup>12</sup> *Id.* at 362.
- <sup>13</sup> *Id.* (cleaned up).
- <sup>14</sup> *Id.* at 363.
- <sup>15</sup> *Ford*, 592 U.S. at 363 (quoting *Woodson*, 444 U.S. at 297) (cleaned up; emphasis added).
- <sup>16</sup> *Id.* at 364 (cleaned up).
- <sup>17</sup> *Woodson*, 444 U.S. at 295 (emphasis added); *accord Ford*, 592 U.S. at 363 (“directly or indirectly”) (quoting *Woodson*, 444 U.S. at 297).
- <sup>18</sup> *Ford*, 592 U.S. at 365; see also *id.* at 356 (identifying “Ford’s own network of dealers [which] offer[] an array of maintenance and repair services,” as well as “[Ford’s] provi[sion] [of] original parts to auto supply stores and repair shops across the country”).
- <sup>19</sup> *Id.* at 367 (emphasis added).
- <sup>20</sup> *Id.* at 365.
- <sup>21</sup> See *Woodson*, 444 U.S. at 295.
- <sup>22</sup> *Ford*, 592 U.S. at 363; *Woodson*, 444 U.S. at 295, 297.
- <sup>23</sup> *Robinson*, 346 So. 3d at 144.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 143.
- <sup>26</sup> See, e.g., *Ocana v. Ford Motor Co.*, 992 So. 2d 319, 326-27 (Fla. 3rd DCA 2008) (rejecting argument that an authorized Ford dealer was an actual or apparent agent of Ford Motor Company); *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331, 1332 (11th Cir. 2004) (explaining that Ford truck dealers are franchisees).
- <sup>27</sup> *Robinson*, 346 So. 3d at 144.
- <sup>28</sup> See Answer Br. of Appellees at 21, *Robinson Helicopter Co., Inc. v. Gangapersaud*, No. 2D20-2470 (Fla. 2<sup>nd</sup> DCA June 22, 2022) (hereinafter *Robinson* Answer Br.).
- <sup>29</sup> *Ford*, 592 U.S. at 365.
- <sup>30</sup> *Robinson* Answer Br. at 3, 7-8, 19.
- <sup>31</sup> *Id.* at 8.
- <sup>32</sup> *Id.* at 4, 8.
- <sup>33</sup> *Robinson*, 346 So. 3d at 143.
- <sup>34</sup> *Ford*, 592 U.S. at 365.
- <sup>35</sup> *Id.* at 366 (cleaned up).
- <sup>36</sup> *Id.* at 359 (quotation omitted).
- <sup>37</sup> *Id.* at 365.
- <sup>38</sup> *Id.* at 366.
- <sup>39</sup> *Id.* at 366 n.4.
- <sup>40</sup> *Id.* at 378 (Gorsuch, J., concurring in the judgment).
- <sup>41</sup> Even if *Robinson*’s approach were an appropriate analytic point of reference, the Court’s depiction of *Robinson* “as a ... small company ... which produced fewer than fifty helicopters in 2020,” is striking. 346 So. 3d at 143-44. *Robinson* touts itself as “the world’s leading manufacturer of civil helicopters” which has “since the early 80s produced more civil helicopters than all other U.S. manufacturers combined.” See <https://robinsonheli.com/news/robinson-produces-10000th-helicopter>.
- <sup>42</sup> *Mazda Motor Corp. v. Triche*, 365 So. 3d 403, 409 (Fla. 3rd DCA 2023).
- <sup>43</sup> *Id.* at 410 (quoting *Woodson*, 444 U.S. at 297).
- <sup>44</sup> *Asahi*, 480 U.S. at 112.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.*
- <sup>48</sup> *Mazda Motor Corp.*, 365 So. 3d at 411-12 (quoting *Asahi*, 480 U.S. at 112) (emphasis added).
- <sup>49</sup> 592 U.S. at 365.
- <sup>50</sup> See, e.g., *Ocana*, 992 So. 2d at 326-27 (examining whether Ford dealer could be actual or apparent agent of Ford Motor Company).
- <sup>51</sup> 592 U.S. at 365. The *Robinson* Court unduly narrowed this inquiry. It excluded contacts through authorized service centers because “those businesses are separate entities.” 346 So. 2d at 144. This aspect of *Robinson* conflicts with the Supreme Court’s decision in *Ford*.
- <sup>52</sup> *Mazda Motor Corp.*, 365 So. 3d at 412; *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1550 (11th Cir. 1993) (personal jurisdiction exists over a French auto manufacturer based in part on its series of commercial agreements with third parties, including one which agreed to act as the manufacturer’s exclusive marketer and distributor in the United States and under which the manufacturer retained significant control).
- <sup>53</sup> *Mazda Motor Corp.*, 365 So. 3d at 412.
- <sup>54</sup> A “[p]laintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction.” *Gleneagle Ship Mgt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) (discussing *Blanco v. Carigulf Lines*, 632 F.2d 656 (5th Cir. 1980), and “adopt[ing] the federal courts’ policy allowing discovery on questions of jurisdiction”); see *Eaton v. Dorchester Devel., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) (citing *Blanco*, 632 F.2d at 658).
- <sup>55</sup> In *Ford*, the Supreme Court clearly spoke in terms broader than the particular model vehicles at issue when discussing purposeful availment. See 592 U.S. at 361 (discussing “the market for automobiles and related products”); *id.* at 365 (considering that “Ford urges Montanans and Minnesotans to buy its vehicles, including ... Explorers and Crown Victorias”) (emphasis added); *id.* (“Ford cars — again including those two models — are available for sale”) (emphasis added); *id.* (noting that in-state dealers “regularly maintain and repair Ford cars” generally) (emphasis added); *id.* at 374 (Alito, J., concurring) (“The whole point of [Ford’s marketing] activities was to put more Fords (including those in question here) on Minnesota and Montana roads.”) (emphasis added). *Accord Downing v. Losuar*, 507 P.3d 894, 909 (Wash. Ct. App. 14, 2022) (rejecting Textron Aviation’s “product specific” argument that the Court “should assess its contacts with Washington State by limiting [its] review only to the model of airplane relevant to this suit”), *review denied sub nom. Downing v. Textron Aviation, Inc.*, No. 100930-5, 2022 WL 4093925 (Wash. Sept. 7, 2022); *Cohen v. Cont’l Motors, Inc.*, 864 S.E.2d 816, 826 (N.C. Ct. App. 2021) (considering aircraft engine manufacturer’s sales of component parts generally, not simply sales of the part at issue), *rev. denied*, 868 S.E.2d 859 (N.C. 2022); *Godfried v. Ford Motor Co.*, No. 1:19-CV-00372-NT, 2021 WL 1819696, at \*5 (D. Me. May 6, 2021) (rejecting manufacturer’s reading of the Supreme Court’s test as looking only to the specific product at issue); *Sibley v. Air & Liquid Sys. Corp.*, No. 20-CV-07697-MMC, 2021 WL 2688819, at \*3 (N.D. Cal. June 30, 2021) (citing *Ford* in rejecting pump manufacturer’s argument limiting the specific jurisdiction inquiry to the particular model at issue).
- <sup>56</sup> *Davis v. Pyrofax Gas Corp.*, 429 So. 2d 1044 (Fla. 1986) (“A manufacturer or wholesaler that avails itself of the privilege of conducting solicitation activities and promoting or distributing its product line with the State of Florida should be amenable to a suit in Florida by one whose injury is occasioned by the use in Florida of the corporation’s product purchased out of the state.”) (emphasis added); *Kravitz v. Gebrueder Pletscher Druckgusswarenfabrik*, 442 So. 2d 985, 987 (Fla. 3<sup>rd</sup> DCA 1984) (holding that a nonresident manufacturer’s “activities in the state, i.e., the sales to an independent Florida distributor of bicycle racks, the likes of which caused injury to a person within the state, constitute sufficient minimum contacts ...”) (emphasis added); *Shoei Safety Helmet Corp. v. Conlee*, 409 So. 2d 39, 41 (Fla. 4<sup>th</sup> DCA 1981) (“As we see it, the case boils down to whether there must be connexity to the specific manufactured object involved in the cause of action — here the specific helmet worn by the injured appellee — or whether the connexity can be to the general manufacturing activity in which the nonresident is engaged — here all models of motorcycle helmets. We find the latter more persuasive.”) (emphasis added).

# JURISDICTIONAL DISCOVERY: PROVING ‘PURPOSEFUL AVAILMENT’ IN PRODUCT LIABILITY CASES

by Ryan C. Tyler



When a defective product harms someone in Florida, every party in the distribution chain is strictly liable, including the retailer, distributor, and manufacturer.<sup>1</sup> If your client purchased the product in Florida, personal jurisdiction most likely isn't an issue for the retailer or distributor.

But if the product manufacturer is located out of state, you'll likely be up against a motion to dismiss for lack of personal jurisdiction. This is when jurisdictional discovery becomes your best asset. In this article, I give a brief explanation on how the jurisdictional discovery process works and provide suggestions on what to look for in product liability cases where you need to attach specific personal jurisdiction over a foreign manufacturer.

**Procedure.** Let's start with a rundown of the procedure for addressing personal jurisdiction disputes in Florida. The seminal *Venetian Salam*<sup>2</sup> decision provides for a burden-shifting process: "First, a court must determine whether sufficient jurisdictional facts are alleged to bring the action within the ambit of Florida's long-arm statute . . ."<sup>3</sup> If the plaintiff meets this initial threshold, then the burden shifts to the

defendant to "provide admissible evidence that refutes the essential jurisdictional facts set forth in the plaintiff's complaint."<sup>4</sup>

Assuming that the "defendant fully refutes the jurisdictional allegations, then the burden shifts back to the plaintiff to prove the basis for jurisdiction."<sup>5</sup> It's at this point — after the defendant submits a legally sufficient affidavit refuting jurisdiction — that jurisdictional discovery comes into play. After jurisdictional discovery is completed, the plaintiff submits their own "sworn proof" establishing jurisdiction. Your "sworn proof" can include affidavits, deposition testimony, interrogatory answers, and documents.<sup>6</sup> If the trial court cannot reconcile the parties' competing evidentiary submissions, the court must hold an evidentiary hearing to resolve the dispute.<sup>7</sup>

**Timing.** It's important to note that, as the plaintiff, you have a right to "to conduct limited discovery on the jurisdictional question in order to gather facts and file an opposing affidavit."<sup>8</sup> But you must act quickly to ensure that right isn't waived — expediency is key to successfully completing jurisdictional discovery.

Two tasks should be completed promptly after the defendant moves to dismiss based on a purported lack of personal jurisdiction. First, file a motion requesting leave to conduct jurisdictional discovery. Second, serve your jurisdictional discovery requests on the defendant and set a deposition of the defendant's corporate representative. Do not delay in completing these tasks — the right to jurisdictional discovery can be squandered by waiting until the “eleventh hour” to initiate the jurisdictional discovery process.<sup>9</sup>

Likewise, your request for jurisdictional discovery should be its own discrete filing specifying the information and materials you intend on obtaining through jurisdictional discovery. Don't merely include a vague, general request for jurisdictional discovery as part of your response to the motion to dismiss request, as doing so could constitute waiver.<sup>10</sup>

**Areas of Inquiry.** Each of your jurisdictional discovery requests should relate back to the averments in the defendant's affidavit, the jurisdictional allegations in your complaint, the relevant section(s) of Florida's long-arm statute,<sup>11</sup> or the defendant's “purposeful availment” of the Florida market for their product. In product liability cases, the “minimum contacts” test rises and falls on “purposeful availment.” That is, whether the foreign manufacturer acted to ensure its products would be marketed, sold, or consumed in the forum state. The United States Supreme Court explained the “purposeful availment” doctrine as follows:

When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there .... Hence if the sale of a product of a manufacturer ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer ... to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).<sup>12</sup>

When drafting your jurisdictional discovery requests, start with the most obvious signs of purposeful availment. For example, whether the defendant has offices or employees in Florida, is registered to do business in Florida, holds Florida licenses, operates bank accounts in Florida or owns property in Florida. Also, look for evidence that the

defendant sent its employees or agents to Florida to market or sell its products here.<sup>13</sup>

Then, focus evidence that the defendant marketed its products in Florida, serviced its products in Florida, or provided warranty services for its products in Florida.<sup>14</sup> Evidence that the defendant knowingly sells its products online to Florida residents will also prove helpful for establishing purposeful availment.<sup>15</sup> Jurisdiction can attach even if the defendant used a third-party agent or subsidiary to perform its Florida-specific marketing, selling, servicing, or warranting — purposeful availment can be established through a defendant's direct or indirect actions.<sup>16</sup>

Next, request evidence that the defendant performed tests on its products, or changed the product's design, manufacturing, labeling, or packaging in an attempt to comply with Florida law.<sup>17</sup> This will show that the foreign defendant manufactured its products in anticipation of sales and use in Florida.<sup>18</sup> Evidence that the defendant registered trademarks in Florida for its products is helpful for the same reason — i.e., the defendant protected intellectual property related to its product in Florida because the defendant intended for its product to be sold and used in Florida.<sup>19</sup>

Finally, do everything you can to obtain sales data for the product in Florida. This includes the number of products the defendant sells in Florida, the amount of revenue the defendant derives from sales of its products in Florida, and the percentage of its total revenue that the defendant derives from sales of its products in Florida.

The sales figures you seek should be limited to the time frame your client used the product. For example, if your client used the product from 2015 to 2020, then you want the sales data from 2015 to 2020. Defendants will fight tooth and nail over producing internal financial information, but the battle is worth it. The more money a defendant makes from selling their product in Florida, the more likely it is that a Florida court has jurisdiction over the defendant when that product harms someone in Florida.<sup>20</sup>

**Conclusion.** Other than the general understanding that jurisdictional discovery should be “limited” and not “broad, onerous or expansive,” there is no bright-line rule dictating *how* to complete jurisdictional discovery.<sup>21</sup> So all your favorite discovery tools are fair game — requests for production, requests for admissions, interrogatories, depositions, etc. Just keep in mind that, as is the case with merits discovery, the more focused your jurisdictional discovery requests are, the more likely the court will be to order the defendant to comply with the requests. ■



**RYAN C. TYLER**

is a Miami native and founder of Tyler Law Firm. Ryan focuses his practice on appellate litigation and trial support in medical malpractice and product liability cases. Ryan has handled appellate matters in all of Florida's appellate courts, including the Florida Supreme Court, and has won numerous awards for his pro bono appellate work.

- <sup>1</sup> *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994) (“In adopting strict liability, we recognized that a manufacturer, who places a potentially dangerous product on the market and encourages its use, undertakes a special responsibility toward members of the public who may be injured by the product. [] Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors.”) (internal citations omitted).
- <sup>2</sup> *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989).
- <sup>3</sup> *Kitroser v. Hurt*, 85 So. 3d 1084, 1087 (Fla. 2012) (citing *Venetian Salami*).
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Tobacco Merchants Ass’n v. Broin*, 657 So. 2d 939, 941 n.3 (Fla. 3<sup>rd</sup> DCA 1995) (“Other competent sworn proof, such as depositions, a verified complaint or documents, may substitute for the affidavit to support the parties’ allegations as to jurisdiction.”); *Redwood Recovery Servs., LLC v. Addle Hill, Inc.*, 140 So. 3d 1037, 1040 n.2 (Fla. 3<sup>rd</sup> DCA 2014) (“A plaintiff may prove a basis for long-arm jurisdiction either by affidavit or ‘other sworn proof,’ which includes deposition testimony.”).
- <sup>7</sup> *See, e.g., Madonna v. Gaynor*, 95 So. 3d 990 (Fla. 2<sup>nd</sup> DCA 2012) (“We conclude that the trial court erred in failing to conduct an evidentiary hearing as required by *Venetian Salami* . . . to resolve the issues of fact relating to personal jurisdiction.”).
- <sup>8</sup> *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992). *See also Suroor Bin Mohammed Al Nahyan v. First Inv. Corp.*, 701 So. 2d 561 (Fla. 5<sup>th</sup> DCA 1997) (“The defendant has filed an affidavit directed to the issue [of personal jurisdiction] and the plaintiff is entitled to discovery to test its accuracy. We agree with the lower court that it is appropriate to permit discovery on such limited issues.”); *Cap. Corp. Merch. Banking, Inc. v. Network Sol.*, No. 6:07-cv-1626-Orl-19KRS, at \*1 (M.D. Fla. May 13, 2008) (“When, as here, the defendant presents evidence in support of its argument that personal jurisdiction cannot exist, the plaintiff should, in fairness, be permitted to engage in limited discovery to test these averments.”); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) (“Plaintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction. . . . [T]he rules entitle a plaintiff to elicit material through discovery before a claim may be dismissed for lack of jurisdiction.”) (internal citation and quotation marks omitted).
- <sup>9</sup> *See, e.g., Estes v. Rodin*, 259 So. 3d 183, 198-99 (Fla. 3<sup>rd</sup> DCA 2018) (trial court did not abuse its discretion in denying plaintiffs’ request to conduct jurisdictional discovery because it was made “at the eleventh hour”); *Am. Civil Liberties Union of Fla., Inc. v. City of Sarasota*, 859 F.3d 1337, 1341 (11th Cir. 2017) (explaining that trial court can deny jurisdictional discovery if the plaintiff “unduly delayed in propounding discovery or seeking leave to initiate discovery”); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 n.7 (11th Cir. 1999) (rejecting argument that plaintiffs were erroneously denied jurisdictional discovery where they made “no discovery efforts . . . in the eight months between the time [they] filed the complaint and the time it was dismissed”).
- <sup>10</sup> *In re Zantac (Ranitidine) Prods. Liab. Litig.*, MDL No. 2924, at \*5-6 (S.D. Fla. Oct. 30, 2020) (explaining that a “request for jurisdictional discovery, within a response [to a motion to dismiss] and without [its own] motion,” was “procedurally flawed”).
- <sup>11</sup> Florida’s long-arm statute is located in Fla. Stat. § 48.193 (2024).
- <sup>12</sup> The Supreme Court recently reaffirmed the validity and viability of the purposeful availment doctrine in *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1027 (2021).
- <sup>13</sup> *La Potencia, LLC v. Chandler*, 22-80417-CIV-RUIZ/MAYNARD, at \*19 (S.D. Fla. Nov. 3, 2022) (“Specifically, [the defendant’s] representatives traveled to Florida to promote and market allegedly infringing goods at spring training camps in Florida and [defendant] shipped baseball bats into Florida to MLB players and teams 19 times. These contacts were not random, fortuitous, or attenuated. As a result, purposeful availment for due process purposes is shown here.”).
- <sup>14</sup> *Mazda Motor Corp. v. Triche*, 365 So. 3d 403, 411 (Fla. 3<sup>rd</sup> DCA 2023) (“If not Florida, what market were these actions of Mazda Japan intended to reach? Put another way, if not to serve the State’s market, what was the purpose of Mazda Japan designing vehicles for, shipping vehicles to, and continuing to provide technical support in the form of recalls for its vehicles owned in Florida? Whatever other markets Mazda Japan was targeting, these circumstances support a reasonable inference that Mazda Japan targeted its vehicles toward Florida, which is all the Plaintiff must show to overcome a motion to dismiss.”).
- <sup>15</sup> *Easygroup Ltd. v. Skyscanner*, No. 20-20062-CIV-ALTONAGA/Goodman, at \*22 (S.D. Fla. Sep. 11, 2020) (finding that defendant purposefully availed itself of Florida market because it did “business over the Internet in the United States and Florida; [was] willing to (and [did]) directly sell its services to Florida customers; [had] not limited its sales to any region or area; and accept[ed] payment from Florida customers”); *Galaxy Am., Inc. v. EZ Inflatables, Inc.*, Case No: 2:19-cv-855-JES-MRM, at \*15 (M.D. Fla. May 12, 2021) (defendants purposefully availed themselves of Florida market because they “intentionally targeted customers in Florida through their website, social media, direct marketing, and regular attendance at trade shows, and have marketed and sold products in the State of Florida through these channels”).
- <sup>16</sup> *Mazda Motor Corp.*, 365 So. 3d at 412 (“[A] defendant ha[s] ‘purposefully availed’ itself of the privilege of doing business within a jurisdiction when the defendant ha[s] not itself marketed products in the jurisdiction but ha[s] entered into an exclusive agreement with a third party to market its product within the jurisdiction.”); *Lewis v. Mercedes-Benz United States*, 530 F. Supp. 3d 1183, 1239 (S.D. Fla. 2021) (“Many courts have held that a foreign manufacturer that utilizes an American subsidiary to target distribution of its product to the forum state is appropriately subject to those states’ jurisdiction.”) (internal citations omitted); *Patt v. Volkswagen Grp. of Am.*, 22-cv-21585-BLOOM/Otazo-Reyes, at \*10-11 (S.D. Fla. Aug. 14, 2023) (“In response to Audi’s Motion, [the plaintiff] has introduced uncontroverted evidence of an extensive network of dealerships and service centers in Florida that sell and service Audi vehicles. Because Audi has ‘systematically served a market in’ Florida, either directly or indirectly, Audi does not avoid Florida’s jurisdiction merely because VWGoA directly runs those entities.”) (internal citation omitted).
- <sup>17</sup> *Mazda Motor Corp.*, 365 So. 3d at 411 (“Mazda Japan — not its American subsidiary — designed those vehicles to comply with U.S. regulations.”); *Lewis*, 530 F. Supp. 3d at 1212 (“Indeed, [the defendant’s agent] performed tests on its product that were meant to comply with unique American regulations, and such tests would not have otherwise been required for other markets. And [the defendant] specifically requested of [its agent] that technical specifications be made to comply with American regulations.”).
- <sup>18</sup> *King v. Gen. Motors Corp.*, 5:11-cv-2269-AKK, at \*16 (N.D. Ala. Apr. 18, 2012) (“GM Canada possesses more than some vague awareness that its products might reach U.S. markets — it manufacture[s] vehicles, such as the one at issue, to comply with federal regulations. This equates to manufacturing a product in anticipation of sales in Alabama.”) (internal citation and quotation marks omitted).
- <sup>19</sup> *Mazda Motor Corp.*, 365 So. 3d at 407-08 (“Mazda Japan has registered trademarks with the U.S. Patent and Trademark Office for the following: ‘Mazda,’ ‘MazdaUSA,’ ‘Zoom-Zoom,’ ‘Mazda Dealer Online,’ ‘Reward Performance by Mazda,’ ‘RPM Reward Performance by Mazda,’ ‘Mazda Zero to Drive Event,’ and ‘Mazda Capital Services.’”).
- <sup>20</sup> *See, e.g., Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 262 (Fla. 4<sup>th</sup> DCA 2011) (purposeful availment found when defendant’s “overall sales delivered to Florida addresses from 2003-2007 were 4.35% of his total sales and amounted to approximately \$100,000”); *Dobler S.A. v. Gift Guru*, No. 16-23137-CIV-GAYLES, at \*12 (S.D. Fla. Oct. 16, 2017) (“Here, Defendants marketed and sold . . . products through Amazon, received at least thirty-two orders from Florida customers, and arranged for products to be shipped to Florida. Defendants sold multiple . . . products as part of a broad, long-term e-commerce business that extended its reach to Florida consumers. Such conduct is sufficient to the purposeful availment requirement.”); *Carmel & Co. v. Silverfish, LLC*, No. 1:12-cv-21328-KMM, at \*12 (S.D. Fla. Mar. 21, 2013) (“Here, Silverfish purposefully availed itself of the Florida forum. From 2002 to 2012, 7.9% of Silverfish’s total sales came from Florida, which includes 238 transactions.”); *Advantus, Corp. v. Sandpiper, Inc.*, No. 3:18-cv-1368-J-34JRK, at \*48 (M.D. Fla. Sep. 30, 2019) (finding that defendant purposefully availed itself of Florida market despite the fact that sales to Florida customers amounted to no more than 0.007 percent of defendant’s total sales); *Wish Atlanta, LLC v. Contextlogic, Inc.*, No. 4:14-CV-00051 (CDL), 2014 WL 5091795, at \*5 (M.D. Ga. Oct. 9, 2014) (“[P]ersuasive authority suggests that a corporation purposefully avails itself of a forum when the corporation derives revenue from the forum state, even when that revenue represents only a small percentage of the corporation’s total annual revenue.”) (internal citations omitted).
- <sup>21</sup> *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) (“We emphasize that the discovery which is envisioned by our holding here should not be broad, onerous, or expansive, nor should it address the merits of the case. Also, where possible, the discovery should be carried out so as to minimize expense to the defendant.”).

# ACCOMMODATION OF OPPRESSION – AS BAD AS COLLABORATION

by Judge Milton Hirsch

## July

It is impossible to know who, or how many, made up the French *resistance* during World War II. No records were kept; and after the war a considerable mythopoeia grew up that engulfed such historical data as might have existed. The French schoolgirl who, seated at her desk, tapped out with her pencil, or her fingernail, dot-dot-dot-dash — Morse code for “V,” as in *victoire*, victory — might claim after the war that she was involved in the *resistance*. And in some sense, she was. At various times Picasso, Josephine Baker, and Hemingway claimed that they were involved in the *resistance*. And in some sense, they were.

At the other extreme there were the collaborators, the Klaus Barbies, the Vichy *milice*. These were Hitler’s willing — no, enthusiastic — allies.

Most French, however, lived by the notion of *accommodation*. They were not Nazi enthusiasts. But they acclimated themselves to the new order, the realities of earning a living, encountering Germans on patrol or in the metro, getting permits and certificates to conduct daily life. Resistance, after all, would be futile. And it could make matters worse.

Which brings us to Virginia Hall. Virginia Hall was an American woman, well-bred, well-educated (Radcliffe and Barnard, no less). She happened to be a tourist in France when Germany invaded and, to the shock of the Western world, France collapsed almost overnight. In all likelihood she could have gotten out, gotten to England or Spain or Portugal. Much of her life is shrouded in mystery, and we do not know why she chose to stay. Perhaps she recognized that France’s fight in 1939 would be America’s fight by the end of 1941. Perhaps she was raised to believe that democracy is such a uniquely precious thing that it must be defended whenever and wherever it is attacked.

Perhaps she realized that *accommodation* is every bit as bad as collaboration; that resistance is never futile; and that when liberty is lost, nothing can make matters worse.

Virginia Hall was the most important American participant in the *resistance*. We know that because the Gestapo referred to her as “the most dangerous of all allied spies.” Barbie

and the other Nazi higher-ups in France spared no effort to capture her. She outwitted them at every turn.

After the war, Virginia Hall was decorated by both the British and American governments. She spent the following decades working quietly at a desk job in the bowels of the CIA’s Langley facility. She is commemorated in the CIA Museum — but that museum isn’t open to the public, and the odds are you’ve never even heard of Virginia Hall. She died at age 76 on July 8, 1982.

*Vive la resistance!*

## August

D.H. Lawrence’s *Lady Chatterley’s Lover* was written in 1928. Three decades later, it engendered litigation in three venues and on two continents.

*In the Matter of Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 4 N.Y. 2d 349 (N.Y. 1958), concerned a film version of the novel. Five judges wrote opinions, extending to dozens of pages. The upshot was a holding that the movie had properly been banned, as encouraging sexual immorality.



The following year, in *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S.D.N.Y. 1959), Judge Frederick Van Pelt Bryan, in a very thorough and scholarly opinion, determined that the novel itself — not the film version — was not obscene and could not be denied distribution by access to the U.S. mails. Based on that ruling, on August 16, 1960, Penguin Books Ltd. and its founder, Allen Lane, published the first unexpurgated edition in Britain of *Lady Chatterley’s Lover*.

Criminal — not civil or injunctive, but criminal — proceedings were brought against Penguin and Lane. The case was tried in Courtroom 1 of the Old Bailey in October of 1960.

In his opening statement, prosecution counsel asked the jury of 12 men if they would let their wives or household servants read such a novel as *Lady Chatterley’s Lover*. This set off a firestorm of snickering comment in the London press and may have set the tone for the entire trial. It was 1960, and the inventory of men who presumed to dictate leisure reading habits to their wives was dwindling rapidly; the inventory of men who could and did maintain an army of domestic servants, dwindling even more rapidly. The British public, and perhaps the jurors, concluded that the entire prosecution was the last gasp of Edwardian values and mores.

At trial, the defense called 35 witnesses, most of them clergymen or professors of literature, to testify to the artistic and moral worth of the novel. The prosecution called two witnesses, one of them a detective involved in the case. It had apparently been the intention of the prosecution to call Rudyard Kipling as an expert, until it was pointed out by a junior member of the prosecution team that Kipling died in 1936.

The jury deliberated for three hours and returned a verdict of not guilty. To that verdict many attributed the “Permissive Society” of 1960s Britain. ■



**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 [groups.google.com/forum/#!forum/MiltHirschConstitutionalCalendar/Join](https://groups.google.com/forum/#!forum/MiltHirschConstitutionalCalendar/Join).





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# THE LIGHT WOTUS: A LAMENT FOR THE CLEAN WATER ACT IN TWO PARTS

by Becca Timmons

## Part I

So, this column is back. A lot happened in the world of environmental law during my 2023 hiatus: a federal district court vacated Florida's Section 404 dredge-and-fill permitting authority, finding Florida's permitting process to be woefully insufficient to comply with other federal environmental laws; 1 Chevron deference appears poised to catastrophically disintegrate in orbit; and the Supreme Court rolled back the jurisdiction of the Clean Water Act (CWA) to a 40-year low. Let's start with Clean Water Act jurisdiction. This is going to be a two-parter. Part I will introduce the jurisdictional history surrounding the regulatory reach of the Clean Water Act, and the next installment will be an in-depth analysis and discussion of the recent developments and decisions that led to the jurisdictional nadir of the CWA: *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023), and *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1343 (S.D. Ga. 2019).

Florida's attorney general was one of several state attorneys general and private parties who challenged the Environmental Protection Agency's (EPA) authority under the CWA to regulate interstate and intrastate waters. The concept litigated was WOTUS. You may recall I briefly introduced WOTUS and the CWA in my September/October 2020 article. As a reminder for my usual readers (hi mom) and a brief explanation to my newer readers (welcome), WOTUS = "Waters of the United States" as defined by the CWA. And it matters because those five words alone define the CWA's jurisdiction. Which waters are federally regulated turns entirely on how narrowly or broadly the EPA and Army Corps of Engineers interpret and promulgate regulations for "waters of the United States" at a given time. Let's start at the beginning.

## The Reach of the CWA

To put it simply, the CWA prohibits the unpermitted discharge of any pollutant into a "navigable water." See 33 U.S.C. Section 1311. Then, in what might be the least helpful definition in the entire act, the CWA defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. Section 1362. Illuminating.

The statutory definition for "navigable waters" leaves much room for interpretation by the two enforcement agencies of the CWA: the EPA and the Department of the Army. Rarely have there been stranger bedfellows than the Chaco-wearers of the EPA and the U.S. military, but here we are. The EPA is tasked with enforcement of the National Pollution Discharge Elimination System (NPDES) permitting program of the CWA, which makes sense. If, say, a refinery wants to discharge effluent into the Mississippi River, they would need to get an NPDES permit which dictates what and how much the refinery can release. Congress

did later declare that the goal of the CWA and its various permitting and regulating powers is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. Section 1251.

The Department of the Army, specifically the Army Corps of Engineers, administers the permitting program under Section 404 of the CWA, otherwise known as dredge-and-fill permits. If a land developer wants to drain and fill a wetland so it can build Mattress Firms, spec homes and maybe a Panera Bread, they would need to first get a permit from the Army Corps of Engineers. Why? The civil works mission area of the Army Corps is charged with keeping waterways navigable as well as constructing and operating flood control — both significant military and security interests. Construction of levees and dams, dredging operations, and any other activity that might interfere with the civil works mission area falls within the regulatory purview of the Corps and must be authorized by permit.

To carry out their respective missions, the EPA and the Corps are vested with authority by Congress to promulgate and execute regulations under the CWA. The agencies are — supposed to be — accorded deference in interpreting the statute and issuing regulations to administer the statute, including their interpretation of "waters of the United States." The drafters of the CWA figured that the agencies that are really good at hydrology and physics and chemistry would be well-equipped to fill any definitional gaps and figure out what waters need to be regulated pursuant to the goals and interests of the CWA.

The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (internal quotes and cites omitted).

Chevron deference, as it came to be known, defines the role of judicial oversight over administrative procedure — it sets the rules for how far the courts can second-guess an expert agency's own regulations.<sup>2</sup>

## The Ebb and Flow of WOTUS

The definition of WOTUS has been repeatedly litigated throughout the lifetime of the CWA. For the first three years that the CWA was in effect, “navigable waters” meant navigable in fact. But this definition was entirely too narrow for the Corps to carry out the civil works mission. So, in 1975 the Corps reinterpreted WOTUS to include “not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). This 1975 interpretation thus included all “freshwater wetlands” that were adjacent to a WOTUS and significantly expanded the Corps’ jurisdiction. Recognizing a need for more clarity, the Corps promulgated the below regulation to define “freshwater wetland” in 1977:

The term ‘wetlands’ means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 CFR § 323.2(c) (1978).

This was a wetland too far for developers, and the 1977 WOTUS rule was challenged and heard before the Supreme Court in 1985. The Court turned to the legislative history of the CWA to determine if the Corps’ interpretation of “waters of the United States” was reasonable and lawful under the Administrative Procedure Act:

Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into “navigable waters,” see CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), the Act’s definition of “navigable waters” as “the waters of the United States” makes it clear that the term “navigable” as used in the Act is of limited import. In adopting this definition of “navigable waters,” Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term. S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, (1985).

The Supreme Court ultimately upheld the 1977 regulation holding that “[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate

basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

With the all-clear from the Supreme Court in *Riverside Bayview Homes*, the Corps pressed its luck and again expanded its interpretation of WOTUS, this time to include intrastate waters that provide habitat for migratory birds. The Corps essentially found that because migratory birds cross state lines, they are federal birds, and a totally intrastate pond occupied by a federal bird is subject to federal regulation. This became known as the Migratory Bird Rule. The Corps invoked the Migratory Bird Rule to deny a fill permit for a solid waste facility that was to use an abandoned and flooded gravel pit for waste storage. The Supreme Court rejected the Rule, finding it exceeded that scope of authority delegated to the Corps under the CWA. “Beyond Congress’ desire to regulate wetlands adjacent to ‘navigable waters,’ respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170-71 (2001). In *SWANCC*, the Court found that Congress never explicitly or implicitly intended to grant the Corps jurisdiction over waters with “no significant nexus” to interstate or navigable-in-fact waters even if that waterway implicated or affected a federal interest.

At this point the Corps was 1-and-1 for wins and losses before the Supreme Court on WOTUS and a boundary appeared to be forming: Wetlands connected in some way to interstate waters were fair game but isolated intrastate waters were to be left to the states. Naturally, the next question was, how connected must a wetland be to be “connected”?

The Supreme Court was asked to reconcile the “connection” first identified in *Riverside Bayview Homes* and the “significant nexus” identified in *SWANCC*. The plurality found:

[O]nly those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC* 531 U.S., at 167, 121 S.Ct. 675.

*Rapanos v. United States*, 547 U.S. 715 (2006).

Writing for himself in concurrence, Justice Kennedy rejected the hydrological connection test advanced by the plurality and instead revived the “significant nexus” requirement of *SWANCC* as the appropriate test. So, no majority opinion and still really no clarity on how the Corps is to figure out what a WOTUS is.<sup>3</sup>

## The Clean Water Rule

With no majority opinion in *Rapanos* on the issue, the EPA promulgated yet another new regulation to clarify the reach of the CWA. The 2015 Clean Water Rule attempted to draw a bright line on CWA jurisdiction once and for all and determined that certain waters were “jurisdictional by rule.” These waters included:

1. traditional navigable waters;
2. interstate waters, including interstate wetlands;
3. the territorial seas;
4. impoundments of waters otherwise identified as jurisdictional;
5. tributaries of the first three categories of “jurisdictional by rule” waters; and
6. waters adjacent to a water identified in the first five categories of “jurisdictional by rule” waters, including “wetlands, ponds, lakes, oxbows, impoundments, and similar waters.”

Revised Definition of “Waters of the United States,” 88 FR 3004-01.

As you might imagine, the 2015 Clean Water Rule immediately drew the ire of manufacturing, agriculture, mining and the state

governments aligned with those interests. Before the Clean Water Rule could take effect, 27 states filed suit in the District of North Dakota and Southern District of Georgia seeking injunctions. In May 2023, for its part, the Supreme Court did resolve the WOTUS issue.

This is probably a good place to stop for now; there’s plenty to absorb here, and I wouldn’t blame you if you’ve already had enough of my musings on the issue for now — seriously, if you’re still reading this, good on you.<sup>4</sup> Stay tuned for Part II to find out just exactly where SCOTUS landed on WOTUS. Spoiler: It’s not great for people who like water. ■



### BECCA TIMMONS

is an associate attorney at Levin Papantonio and focuses her practice on mass torts and class actions. Timmons graduated cum laude with a Bachelor of Science in journalism from the University of Florida. She then earned her Juris Doctorate and Certificate in Environmental Law from Tulane Law School. Timmons also holds a Master of Public Health from Tulane University School of Public Health and Tropical Medicine. Timmons is a regular member of FJA and the Women’s Caucus Section.

<sup>1</sup> I’m sure you are all overcome with anticipation on the fate of dredge-and-fill permits — fret not — Florida’s Section 404 fiasco will indeed get its own article later this year. That page-turner is incoming.

<sup>2</sup> For now. Also more on this at another time.

<sup>3</sup> SCOTUS showed it didn’t know a WOTUS from a hole in the ground.

<sup>4</sup> You must get as amped up about water as I do. Or you have wicked bad insomnia.



## TWO EXPERT COMPANIES. ONE GOAL.

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# WEIRD SCIENCE TO APPLY AT YOUR NEXT MEDIATION

by Lance A. Harke and Steve Jaffe

Great trial lawyers (including our own incoming FJA President Todd Michaels) know how to settle cases because, like General Eisenhower, they understand total victory is best achieved by expending only the precise necessary force, material, and resources to win — and no more.

If trial is negotiation by other means, and most cases settle, that means most cases (even trials) ultimately settle via successful negotiation. Skilled mediators know that scientific principles underlie a successful settlement, and that these three key scientific principles will achieve higher settlement outcomes for you and your clients.

Here are the “big three”:

**1. Anchors Away** – Why do humans tend to rely too heavily on the first piece of information offered (the “anchor”) when making decisions?<sup>1</sup> This so-called “anchoring effect” is a cognitive bias carefully documented in the scientific literature. It distorts decision-making by “anchoring” the recipient to a bargaining value even where the recipient deems the demand excessive or out of line. That “anchor” can then be a reference point for the entire mediation.

But anchors only work if they hold your boat onto the seabed floor. Science also teaches that absurd demands will not anchor anyone to anything. Avoid ridiculously high (or low) demands and toss your anchor within reach of your final goal. If your “anchor” is too high, you will lose all credibility and your settlement will likely drift on the currents or perhaps be “anchored” to your opponent’s more reasonable initial settlement value. Be smart with your anchor toss and always keep your final goal in mind.<sup>2</sup>

**2. Brackets and Midpoints** – Why does the mind immediately go to the “midpoint” of a proposed bracket? As UWWM’s own Michelle Jernigan puts it in this excellent video<sup>3</sup> on how to use brackets in mediation, the mind does this because *that is the precise point of the proposed bracket!* A bracket is where one party sets value points for both parties, thereby establishing a range for settlement. Michelle observes that the range is indeed intended to forecast or signal to the other side a “midpoint” that the proponent can live with. Thus, it is important that you can live with the midpoint before suggesting or accepting a bracket. Often, proposed brackets are met with “counter-brackets,” which can seem frustrating but actually represent progress — you have just received a signal about what your opponent is willing to settle for.

The party whose bracket is accepted will control the playing field and the outcome. Brackets are especially effective when the parties are

running out of time, there have been too many incremental moves, or the parties are at a stalemate. If the bracket is accepted, the proponent of the bracket has the obligation to make the next move, which will immediately affect the midpoint. At this point it usually makes sense to revert back to solid numbers, often using the midpoints of the midpoints.<sup>4</sup>

**3. Buyer’s Remorse** – Got PPCD? Buyer’s remorse (or “post-purchase cognitive dissonance”) is very real and can easily derail an otherwise long day of successful settlement negotiations. It’s a phenomenon usually associated with high-value, important decisions (purchasing a house or car or settling a big case), even though social science teaches us that, generally, we want to be satisfied with our own decisions.

As advocates, you can get ahead of the creeping cognitive dissonance of your client or your opposing counsel’s client by reassuring them of the reasonableness of the proposed settlement. That’s why car manufacturers tout J.D. Power rankings in their marketing, so you’ll feel good about the Buick you just drove off with, and why Zillow shares neighborhood comps for the house you just bought.<sup>5</sup>

In the context of lawsuits, this means sharing comparable settlements or jury verdicts for similar injuries or causes of action and sharing them with the mediator and opposing counsel as well. In this way, you can head off buyer’s remorse before it begins to unravel your hard-fought settlement.

By knowing the science behind anchors, brackets, midpoints, and how to prevent buyer’s remorse, you and your client can obtain the best results possible at mediation, as efficiently and effectively as possible. To settle with confidence, settle with science! ■



## LANCE A. HARKE

Before becoming a full-time neutral with Upchurch Watson White & Max, Lance Harke practiced in the area of multi-state consumer class action litigation. He has served as lead class counsel or a member of the plaintiffs’ steering committee in a wide variety of national multi-district mass tort and class action litigations, including some of the largest cases in U.S. history.



## STEVEN R. JAFFE

joined Upchurch Watson White & Max as a mediator after serving as a partner at several well-known civil trial firms. Steven has litigated a wide variety of civil matters, from both the defense and plaintiff sides, throughout Florida and nationwide since 1984. He has mediated now over 2,500 cases, and his extensive litigation practice, coupled with his philanthropic work and involvement in more than a dozen professional, charitable and civic organizations, has provided him a unique ability to understand people and to understand every side of a civil case. With exceptional speed, Steven comprehends complex issues and provides practical and unique solutions necessary for the mediation process.

<sup>1</sup> *What Is the Anchoring Effect? – PON – Program on Negotiation at Harvard Law School.*

<sup>2</sup> Science also explains why everything for sale is priced at a very precise value — precise numerical demands are more effective than simple round number demands. For example, a house with a list price of \$255,500 will likely attract higher bids than a list price of \$256,000 or \$255,000. *Id.* The mind also tends

to ignore the last number in preference for the first number (\$29.99 seems a lot less than \$30).

<sup>3</sup> Mentoring with the Masters: Bracketing in Negotiation – YouTube.

<sup>4</sup> Bracketing: An Alternative Mediation Technique – plaintiffmagazine.com.

<sup>5</sup> The Science Behind Why You Buy What You Do – The Atlantic.

# TBTLA – UPHOLDING THE PROFESSION OF LAW AND EQUIPPING MEMBERS

by N. Brook Nutter, TBTLA President

Tampa Bay Trial Lawyers Association (TBTLA) was officially formed in 2001 by 11 trial attorneys: Todd Alley, Troy Andrews, Web Brennan, Don Buckler, Fritz Gray, Don Greiwe, Bob Joyce, Lisa Kelley, Tony Martino, Richard Shapiro, and Dale Swope. Since then, our membership list continues to grow, to what is now 453 plaintiff attorneys practicing in the Tampa Bay area (to include Hillsborough, Pinellas, Pasco, and Manatee counties). Florida Justice Association membership is a required condition for eligibility to our organization.

Our mission is to “Uphold and defend the principles of the Constitutions of the United States and the State of Florida . . . *to train* in all fields and phases of advocacy, to promote the administration of justice for the public good; *to uphold the honor and dignity* of the profession of law, etc.”

Our goal is to equip our members with cutting-edge tools to advance the cause of those who are damaged in person or property and who must seek redress in a court of law. In line with our mission, TBTLA schedules a number of continuing legal education events throughout the year for our members. We begin each year with a CLE focused on the legislative session, so that our members know what new laws have been passed and what battles we may face in Tallahassee each upcoming legislative session. Our upcoming CLEs for the remainder of 2024 will focus on cross-examination of expert witnesses, issues involving the new HB 837 and the introduction of medical billing at trial, themes in opening statements, and many others. These are advanced-level CLEs, and our presenters at these CLEs are seasoned trial attorneys.

In anticipation of the Florida legislative session in Tallahassee, each year TBTLA, working in tandem with the FJA, sends volunteer members to a Legislative Law Week that allows us to assist the FJA in their fight for consumers and families of the injured. Our members have stood up for clients in Tallahassee by attending workshops, meeting with legislators, offering testimony to committees, and just being there for whatever we can help FJA with.

Our Executive Board is made up of a diverse group of trial attorneys. Currently, I serve as our president, Felipe Fulgencio is our president-elect, and the rest of the Board consists of Jason Whittemore, Karina Perez Ilic, Brent Steinberg, Maegen Luka, Alina Morros, Mike Trentalange, Courtney Umberger, Scott Distasio, Eric Taylor, and Lex Lorenzo. Our executive director is Laura Wright. This Board reflects the diversity of TBTLA's membership demographics, which encourages plaintiff attorneys of any ethnicity or background to join our association. The Board consists of attorneys of all ages and experience levels. Some are solo practitioners and others run large firms.

Membership also gives access to the TBTLA Listserv, which encourages a powerful exchange of legal information between our members.

Similar to the FJA Listserv, our email exchange provides a more local focus to our members. The importance of our Listserv cannot be understated. It gives new attorneys access to experienced litigators who are always willing to assist. It is like having a senior partner down the hall in the corner office that you can go ask about a particular legal issue.

In addition to our Listserv, TBTLA sponsors an annual golf tournament named “The Carl Hinson Memorial Invitational” in honor of our late friend and TBTLA past president Judge Carl Hinson. Through this tournament and our generous members, TBTLA raises funds for various charities in and around the Tampa Bay area. We are also fortunate to have generous sponsors made up of legal vendors such as court reporting firms, imaging facilities, life care planners, banks, trial consultants, and more. This year, with the help of those sponsors, we raised money for the Crisis Center of Tampa Bay.

We also just welcomed judges from the Sixth and Thirteenth Judicial Circuits and judges from the Second District Court of Appeals to a Judicial Reception. This annual event allows our members to socialize with our local judges, and also offers our judges a chance to learn more about our organization and its purpose. This year's reception attracted almost 120 members and more than 25 judges, who all enjoyed each other's company outside of the courthouse (and in person, not through Zoom!).

Our local judges are also invited to our annual Gala event. This year's Gala will be titled the “Barrister's Ball” and will be held at the old federal courthouse in Tampa. Finally, we wrap up the year with our Holiday Party where we sponsor a holiday toy drive and also announce the next year's Executive Board.

By donating their time and money, the Tampa Bay Trial Lawyers Association members not only uphold the principles of justice and fairness but also embody the spirit of service that enriches our community and inspires others to do the same. We encourage cooperation and camaraderie among our members, uphold the honor and dignity of the legal profession and pursue the highest standards of ethical conduct and integrity.

Anyone interested in joining our association should contact Laura Wright at [laura.wright@tbtda.com](mailto:laura.wright@tbtda.com). ■



## N. BROOK NUTTER

N. Brook Nutter, a Tampa native and current President of TBTLA, is renowned for his exceptional legal counsel and representation across various areas of law. With a reputation for expertise, integrity, and commitment to securing favorable outcomes, he is highly esteemed in the legal community. He passionately advocates for justice, prioritizing the rights and interests of his clients while upholding the highest standards of professionalism. N. Brook Nutter is an EAGLE Sponsor member.

# WHAT WE DID, WHY WE DID IT

by Wayne Hogan, 1992-1993 President

In the fall of 1992, success marked our recent past. Floridians had rejected a \$100,000 cap on redress for injuries. Moving into the '90s, led by presidents John Romano, Karen Gievers, and Phil Freidin, and a small but determined staff, we staved off legislative threats and won positive changes. John, Karen, and Phil have recounted that work in their Past Presidents columns.

**The Future.** Those efforts were not made to help the then-clients of Academy members; as substantive bills, bad legislation could not be applied retroactively. Most importantly, then, those efforts were about the future; they protected the rights of everyday people who could not know that someday they would need those rights. The Academy stood guard for them. Our work is always about the future.

**Opposing Prejudice.** With its Harry Philo Award, the American Association for Justice honors the memory of its late president who taught a generation of us to apply the principles of safety to succeed for our clients; three pillars of safety: eliminate the hazard, guard against the hazard, warn against the hazard. No opposing expert can refuse to acknowledge those principles without appearing stupid or just on-the-take. After all, no person, no corporation, no government, no one has the right to ignore safety and injure people. That's why our Constitution demands court access for the redress of any injury.

Some say, though, that governmental rules, regulations, and approvals can preclude the injured from exercising their right to bring to account those that fail to eliminate, guard against, and warn against hazards. Such laws, meant to shield those that cause harm, and those that take money to insure them, are instruments of prejudice. They prejudice the outcome and thwart redress for injury. They disregard the facts and default to a prejudged result. Such laws declare, "The facts don't matter." Under them, the injured are told to just accept inflicted harm as their fate.

That's where we come in, and that's why we must have a continuing set of leaders willing to devote themselves to working to protect the rights of those who will be harmed in the future. To do that, they offer not only their year as president for Florida Justice, but a series of years. And sincere thanks should flow to the law partners, and, often, specific law partners, who do what must be done to support the effort while our presidents and officer corps do the necessary work for Florida Justice. That's how we keep prejudice out of the statute "books."

**Protecting Workers.** The fall of 1992 began a yearlong workers' compensation battle. We, the Academy's civil jury trial lawyers, joined with the Florida Workers' Advocates to protect what remained of workers' rights to compensation and medical care. Workers had already suffered the unfair trading away of their right of access to the courts and the right to trial by

jury. (Much of this was detailed in my monthly columns in that term's *Academy Journal*.) Our president-elect, Greg Barnhart, took on the challenge of holding off medical malpractice legislation while I was engaged full time on workers' rights. A big part of the attack was focused on preventing injured workers from having effective legal representation. The claim was that attorneys' fees were driving insurance rates, but throughout the regular legislative session, statewide post-session special hearings and special session efforts, we proved the claim was false to its core. We proved attorneys' fees were less than one penny out of the premium dollar. We made some headway, but the die was cast, and injured workers were hurt again. That was the major disappointment in that Academy year.

Every time I reflect on that year though, one key, lasting decision comes to mind: I insisted we reinstall John Romano, founder of the Workhorse Seminar, as permanent head of that most popular annual week of hard work and lesson-sharing on how to best represent our clients. I smile when I think of the difference that has made.

**Evan J. Yegelwel.** What matters most — within the law firms of our members who serve as officers and eventually as president for Florida Justice — is the support of our law partners. As Florida Justice's officers leave their families and firms for weeks, even months, on a mission for all of us, we should all consider the contributions their law partners make to the effort. They keep law practices going so Florida Justice's work can be done.

Only those who have been there can know what it means to have all-in support from our partners in this work. And, in my case, I had the full support of my partners at Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel, but I must take this opportunity to say I was truly blessed to have the constant, unwavering friendship and support of my closest trial partner and friend — a great trial lawyer and great person — Evan Yegelwel. We had an inner passage between our offices, and no office day went by without our visiting, Evan telling a story, analyzing, Evan telling a story, strategizing, Evan telling a story, and planning the work for our clients. When I was away during my year as president, Evan kept our clients' cases moving and proved himself to be the better of the two of us at helping jurors see the magnitude of what had happened.

Today, Evan's office is our Evan J. Yegelwel Conference Room, as Evan is unable to be there. He has a variant of ALS known as primary lateral sclerosis. He is unable to speak and cannot walk, and he is at risk when even his closest friends visit, so we rarely see each other. We "talk" by text and email, as he still types. (If it's very important, he calls me, so I know to check what he has sent.) Evan's mind is as sharp as ever; PLS has not prevented him from continuing to act on behalf of our clients, particularly victims of the 9/11 terror attacks who now hold a judgment against Iran for facilitating the terrorism inflicted on 9/11.

In Phil Freidin's delightful Past Presidents column, he noted the teachings of Louis Nizer, a leading trial lawyer of the middle decades of the 20th century. Like Phil, I learned from Nizer's *My Life in Court*, especially what he called the Rule of Probability, which I've used ever since. Evan did us one better, though; he not only read the books, but he also arranged for Mr. Nizer to speak at our 1993 Spring Seminar. But Evan, in trial, missed the seminar, so Evan being Evan followed up and met Mr. Nizer for dinner in New York City.

Most who have served as president have had the benefit of having someone who stepped in the way Evan Yegelwel did for me. All of us in Florida Justice are fortunate there are such loyal, dedicated lawyers who support our work.

**W.C. Gentry.** As I conclude, I want to thank my friend, W.C. Gentry, for his years of service to Florida Justice. I was fortunate to try cases with him, and learn from him, when we were both still in our late 20s, and later for several years we worked on a case of state and national importance. When the case settled, I told Gov. Chiles how fortunate we had been to have W.C. on the case, because he proved himself the most complete lawyer I'd ever known. In W.C.'s Past Presidents message, he recalled in detail the slog that was the 1986 legislative session. The people's rights were bushwhacked in the worst kind of skulduggery. We had been told those rights would not be at risk in that session, but the rug was pulled out from under us. W.C., who was to be in Tallahassee

for the day, ended up wearing his suit there all week; hence, the term "GentryWear." He countered with insurance reform and the battle was joined. And, in the long term, the people's rights survived as appellate rulings softened the blow. W.C.'s leadership and determination won out in the end.

**Conclusion.** The fights we have put up have taught a lesson that the enemies of the right to redress for injury would do well to remember. We have defended justice because it is always the right thing to do. ■



**WAYNE HOGAN**

Wayne Hogan, a Jacksonville native, is President and Partner of Terrell Hogan Yegelwel, P.A. and has been with the firm since 1977. He graduated from Florida State University, where he received both his bachelor's and J.D. degrees. He specializes in all areas of personal injury law and has continuously fought and focuses on bringing to account those who profit from defective, dangerous products. Best known is Hogan's joining with other leading trial lawyers in product liability and racketeering claims against the cigarette industry. The lawsuit achieved a historic \$17 billion settlement and led to the national tobacco settlement. The case set the stage for significant changes in tobacco control laws, beginning with removing all billboard advertising and the retirement of

Joe Camel and the Marlboro Man.

Additionally, Hogan has extensive experience in the field of punitive damages having obtained punitive damage verdicts in trials of 26 cases against manufacturers of defective products and having represented the plaintiffs in Florida's first asbestos disease punitive damages trial and successfully handled the precedent-setting appeal. This case upheld the right of plaintiffs to receive punitive damages in such toxic tort litigation and also sustained the right of plaintiffs to obtain multiple exemplary damages awards.

Wayne is an EAGLE Founder member and served as President of this organization between the years 1992-93. He belongs to a litany of professional associations and has been the recipient of numerous awards. Since 1992 Wayne has supported and partnered with the FSU College of Law to grow The Donald J. Weidner Summer for Undergraduates Program that brings to campus undergraduate students from Florida and throughout the country for a month-long law school immersion.



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# RECOGNIZING OUTSTANDING PARALEGAL LEADERS IN THE PROFESSION

by Elizabeth Howse

## FJA Paralegal of the Year Award Presented to Monica Heuman

The FJA Paralegal Committee is proud to announce its Paralegal of the Year Award recipient, Monica Heuman! This award is given each year to an FJA member who has demonstrated or promoted outstanding professionalism in Florida, as defined by exemplary ethical conduct, character, integrity, respect for the legal system and all its participants, commitment to maintaining the highest levels of professional competence, courtesy, civility, and commitment to serving clients, the community, and the public good.

Nominated by many of her peers, Monica is not only a selfless advocate for her clients and her team, but she is also a pioneer in leading programming and education for the advancement of paralegals in her local community. She is the 2024-2025 chair of the FJA Paralegal Section, member of the National Paralegal Association, and the only paralegal on the Board of Directors for the Broward County Trial Lawyers Association (BCTLA). She also sits on the Broward College Advisory Board for Legal Studies and on the NALA Subject Matter Task Force on Advance Paralegal Certification for Personal Injury.

In 2023, she and another attorney led an effort to create a databank relating to HB 837 Orders for members to access. She was solely responsible for uploading the Orders to the database, naming them, and creating a Notice Flyer for the attorney to email out to all members of the BCTLA.

In addition to her work in the legal community, Monica also participates in community outreach; she is an annual speaker for Take Stock in Children, an organization dedicated to breaking the cycle of poverty for low-income, academically qualified students. She speaks to high school juniors and seniors annually about the advantages of having a mentor and advises on interview and résumé best practices. She also serves as a mentor for the Broward College Paralegal Studies Program, since its inception in 2020, assisting paralegal students in finding long-term



Pictured from left to right: Barbara Diaz, Lori L. McGrath, and Monica Heuman.

employment in law firms by performing mock interviews, reviewing résumés, and providing interview pointers.

Even with all her involvement and philanthropic activities, Monica still finds time to be a wonderful mother and friend. She is an active and dedicated “soccer mom” for both of her sons’ soccer teams. If the coach needs assistance during practice or a game, Monica is quick to step in and assist. She also notifies other parents when there is a change in the game or practice schedule. Finally, Monica reached out to a fellow colleague who was going through the stress of learning that their child was going to be a special needs child on the spectrum. She graciously provided support, gave advice on

what steps to take to make sure the child received all the necessary services, and counseled the parent through their grief.

Monica is a shining example of what this award is all about, and her peers know her for always having a warm smile on her face, a selfless and humble attitude, and a strong sense of right and wrong beyond reproach.

Congratulations, Monica Heuman, on this well-deserved award!

The Paralegal of the Year Award was presented at the Civil Litigation for Paralegals Seminar at FJA's Annual Convention held at The Breakers in West Palm Beach on Friday, June 14, 2024.

### **FJA Paralegal Lifetime Achievement Award Presented to Barbara Diaz**

Established in 2024, the FJA Paralegal Lifetime Achievement Award recognizes a paralegal who has demonstrated or promoted outstanding professionalism in Florida, as defined by exemplary ethical conduct, character and integrity, respect for the legal system and all its participants, commitment to maintaining the highest levels of professional competence, courtesy, civility, and commitment to serving clients, the community, and the public good for 20 or more years. This year's award recipient, Barbara Diaz, has reached this incredible milestone. For Barbara, this accolade represents not just a recognition of her achievements, but a testament to her unwavering commitment to excellence in the legal field.

Nominated by her boss of 28 years, Michael Haggard, Barbara started her work with him at the Public Defender's Office, transitioned with him into private practice, and has worked with him for his entire tenure at The Haggard Law Firm.

During that time, she has dedicated herself to those who have been injured through the fault of someone else and is known for being one of the most caring, compassionate, and fiercely loyal people you will ever meet. She has helped thousands of clients find closure through the civil justice system and still keeps in touch with many of those clients today.

One of the most impactful cases she worked on was for former client Sami Barrak. Sami and a friend were leaving an establishment when the friend returned to retrieve an item left inside. As Sami sat in his car and waited for his friend to return, he was approached by an unknown person. He was shot in the neck, rendering him a ventilator-dependent quadriplegic. Barbara was the legal assistant on that case, and the \$102.7 million verdict is the largest jury verdict awarded

in history for a negligent security case. Sami is still with us to this day and living a wonderful, fulfilling life, thanks in part to Barbara.

Barbara has continued to evolve as the world has evolved. She started her career in the time of WordPerfect, Red Books and fax correspondence. Today, she continues to serve her clients using case management software and keeps her calendars online. Her knowledge of the legal field is unmatched, and she is always willing to share her wealth of information with anyone who needs it. There isn't a task too small or a project too big that she isn't willing to take on. During last year's legislative session, she was on the phone with clients to get letters of support, calling legislators, helping with travel arrangements as well as any request made, as she understood that victims of crime would be severely impacted.

In a world where excellence is often celebrated but rarely truly understood, Barbara stands as an outstanding example of what it means to evolve as the world has evolved. To think about all the changes that have happened over the last 28 years in working as a paralegal, it is astonishing to contemplate all the milestones Barbara has had to reach over and over again.

Congratulations to Barbara Diaz for this incredible achievement, and cheers to 28 years!

The Paralegal Lifetime Achievement Award was presented at the Civil Litigation for Paralegals Seminar at FJA's Annual Convention held at The Breakers in West Palm Beach on Friday, June 14, 2024.

### **FJA President's Award Presented to Lori L. McGrath**

On Friday, June 14, the FJA Paralegal and Legal Assistant Section proudly presented its Chair, Lori L. McGrath, Searcy Denney Scarola Barnhart and Shipley, with the President's Award. Congratulations, Lori! ■



#### **ELIZABETH HOWSE**

is a paralegal at the Romano Law Group in West Palm Beach. Originally hailing from Minnesota, Elizabeth moved to the Sunshine State in 2017, where she initially worked in insurance defense. In January 2020, she made the transition to the Plaintiff's side, and shortly thereafter, she became a proud member of the FJA.

# TEMPORARY PARTIAL DISABILITY AND THE MISCONDUCT DEFENSE

by Kimberly J. Syfrett

When injured workers who have not reached maximum medical improvement (MMI) are returned to work in a limited capacity by the authorized doctor, their employers may or may not have a suitable job available. If the injured worker is not offered suitable employment by the employer or has returned to work within his or her restrictions but does not earn wages greater than or equal to 80 percent of the pre-injury average weekly wage (AWW), then temporary partial disability (TPD) benefits may be owed. The burden is initially on the employee to show a causal relationship between the loss of wages and the compensable injury,<sup>1</sup> and this can be done through medical evidence of limitations caused by the work injury which preclude adequate performance of the prior job. Once established, TPD benefits will be due unless the employer/carrier (E/C) can demonstrate a valid defense to payment. One such defense is the misconduct defense.

Florida law provides that TPD benefits can be denied if the employee has been terminated by the employer for misconduct.<sup>2</sup> In workers' compensation, "misconduct" is defined as:

- (a) Conduct evincing such *willful or wanton disregard* of an employer's interests as is found in *deliberate* violation or disregard of standards of behavior which the employer has the right to expect of the employee; or
- (b) *Carelessness or negligence* of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer.<sup>3</sup>

Additional insight into the concept of "misconduct" is found in the section of Florida law dealing with Unemployment and Re-employment Assistance. In this section, "misconduct" is described as:

- (a) Conduct demonstrating *conscious disregard* of an employer's interests and found to be a *deliberate* violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than \$50, or theft of employer property or property of a customer or invitee of the employer.

(b) *Carelessness or negligence* to a degree or recurrence that manifests culpability or wrongful intent or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in *deliberate* violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A *willful and deliberate* violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e)1. A violation of an employer's rule, unless the claimant can demonstrate that:

- a. He or she did not know, and could not reasonably know, of the rule's requirements;
  - b. The rule is not lawful or not reasonably related to the job environment and performance; or
  - c. The rule is not fairly or consistently enforced.
2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.<sup>4</sup>

In *Thorkelson v. NY Pizza & Pasta, Inc.*, the First DCA found the Unemployment Compensation Law defines "misconduct" virtually identically to the way the Legislature has defined "misconduct" for workers' compensation purposes. It is well established that where the Legislature uses the exact same words or phrases in two different statutes, it can be assumed the legislative intent is for the same meaning to apply in each.<sup>5</sup> Therefore, the cases deciding misconduct in unemployment compensation matters can be applied as established law in workers' compensation cases.<sup>6</sup>

Along this line of reasoning, the *Thorkelson* court referenced the unemployment case of *Blodgett v. Fla. Unemployment App. Comm'n.*<sup>7</sup> which held "[a]n employee's actions sufficient to justify discharge from employment do not necessarily constitute misconduct sufficient to bar recovery of unemployment benefits." Applying this rationale to

workers' compensation cases, whether the facts establish "just cause" for an employer to terminate an employee's employment and whether the terminated employee is disqualified from receiving TPD benefits, are two separate issues. The violation of an employer policy may constitute a legitimate and reasonable basis for termination; however, for an employee to be disqualified from receiving wage loss benefits, there should be evidence of more egregious, repeated violations of explicit policies coupled with several warnings.<sup>8</sup>

There are numerous other unemployment cases wherein specific instances of "misconduct" have been examined by the courts to determine whether an employee's actions, which may have supported the basis for the termination, would also support the disqualification to unemployment benefits. These include:

- *Betancourt v. Sun Bank Miami, N.A.*, 672 So. 2d 37 (Fla. 3rd DCA 1996) – Although an employee's actions may justify discharge, the same conduct does not necessarily preclude entitlement to unemployment benefits.
- *Cullen v. Neighborly Senior Services*, 775 So. 2d 392 (Fla. 2nd DCA 2000) – Meeting between employee and operations supervisor occurred in a private office with only two other employees present. This isolated incident where the employee raised his voice to the operations supervisor did not constitute misconduct.
- *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665 (Fla 3rd DCA 1992) – Appellant's isolated use of offensive language during a private argument with her supervisor was not misconduct connected with work.
- *Johnson v. Florida Unemployment Appeals Comm'n*, 513 So. 2d 1098 (Fla. 3rd DCA 1987) – Offensive language was not misconduct where it was an isolated incident, was in a private office, and was neither a personal attack on the supervisor nor calculated to undermine authority.
- *Jorge v. Florida Unemployment Appeals Comm'n*, 765 So. 2d 889 (Fla. 3rd DCA 2000); *Pascarella v. Unemployment Appeals Comm'n*, 664 So. 2d 1089 (Fla. 5th DCA 1995) – If the claimant's refusal to perform the assigned task was unreasonable, his conduct constitutes misconduct connected with work.
- *Bulkan v. Florida Unemployment Appeals Comm'n*, 648 So. 2d 846 (Fla. 4th DCA 1995) – Poor judgment does not automatically constitute misconduct under § 443.
- *McKinney v. United States Sugar Corp.*, 492 So. 2d 478 (Fla. 4th DCA 1986) – Isolated good faith errors in judgment do not constitute misconduct.
- *McCarty v. Fla. Unemployment App. Comm'n*, 878 So. 2d 432 (Fla. 1st DCA 2004) – "an employer has the right to terminate an employee's employment and whether a terminated employee meets the disqualification criteria ... are separate issues."<sup>9</sup>

A current client was fired from her position as a property manager for what the employer described as excessive absenteeism (coincidentally,

on a day when she was at work). She had been working in a light-duty capacity for over a year following the work accident, and during this time had received several compliments from her employer for a job well done. However, at her annual review approximately 10 months prior to the termination, a goal had been set for the employee to reduce her absences and tardiness so as to not repeatedly impose on her fellow employees who had to cover for her when she was late or absent from work. No other warnings, reprimands, or other actions were taken by the employer prior to termination. In fact, documentation from the employer showed the employee to have consistently communicated with her supervisor prior to each absence, and all absences were shown to be "approved." Some of the absences over the year were for treatment of the work injury, and the employee was either paid with accrued leave time or granted "leave without pay."

After termination, the client was denied TPD benefits due to her chronic absenteeism. A petition was filed, and the E/C has consistently maintained that, but for her excessive absenteeism leading to termination, light-duty work would have been available for her, and thus no indemnity is owed. Obviously, the question for the judge of compensation claims (JCC) in this case will be whether the employee's absenteeism is the equivalent of "misconduct" as anticipated by the Legislature in the workers' compensation and unemployment statutes.

While my client's absenteeism may have been a legitimate reason for termination by the employer, the best argument for the employee is that these facts do not support a misconduct defense resulting in the disqualification for TPD benefits. The employee always communicated with her supervisor about the reason for being late or absent from work, and when applicable even provided documentation for positive COVID-19 testing and visits to doctor's appointments. She was never considered a "no show, no call." Rather than reprimanding the employee, each of the absences are shown in employer documents to be "approved" by the supervisor. While there may have been excessive absenteeism when looking at just the specific number of days/hours missed by the employee, the totality of the evidence fails to show "a deliberate violation or disregard of the reasonable standards of behavior" as required by section 440.02(18) under the workers' compensation law. Furthermore, there is also insufficient evidence to prove "[c]hronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence" as would be required by section 443.036(29) of the Florida unemployment laws.

Therefore, without a valid "misconduct" defense, the carrier will owe TPD benefits in those cases where the injured employee, as a result of the workplace injury, is unable to successfully perform the tasks of his or pre-injury job, which directly results in a cessation of the performance of that employment and an attendant reduction of income.<sup>10</sup> ■

<sup>1</sup> *Wyeth/Pharma Field Sales v. Toscano*, 40 So. 3d 795 (Fla. 1st DCA 2010).

<sup>2</sup> Fla. Stat. § 440.15(4)(e) (Oct. 1, 2003).

<sup>3</sup> Fla. Stat. § 440.02(18) (Oct. 1, 2003).

<sup>4</sup> Fla. Stat. § 443.036(29) (2024).

<sup>5</sup> *Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202 (Fla. 1958).

<sup>6</sup> 956 So. 2d 542, 545 (Fla. 1st DCA 2007).

<sup>7</sup> 880 So. 2d 814, 815 (Fla. 1st DCA 2004).

<sup>8</sup> *Ash v. Fla. Unemplmt. App. Comm'n*, 872 So. 2d 400, 402 (Fla. 1st DCA 2004) (quoting *Barchoff v. Shells of St. Pete Beach, Inc.*, 787 So. 2d 935, 936 (Fla. 2nd DCA 2001)).

<sup>9</sup> This list was primarily put together by Jeffrey Gale, Esq., for his website article published Apr. 28, 2024.

<sup>10</sup> *Toscano* at 798.

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**SOARING MEMBER  
(YEAR 1) – \$750**

**Joshua Peter Padron**

EAGLE Recruited by Todd Jordan Michaels

# 2024 TOP EAGLE RECRUITERS

Thank you to all members who participated in this year's recruitment competition. Your efforts to encourage your peers to join the FJA EAGLE® program and support our mission are greatly appreciated. We extend a special thank-you and recognize those listed below for being this year's top *recruiters*.

## RECRUITING CHAMPION

Stephen Cain

## GOLD

Maryann M. Furman  
Adriana Gonzalez  
Peter Hunt  
Todd Jordan Michaels  
Curry G. Pajcic  
Brent G. Steinberg

## SILVER

Jonathan E. Freidin  
Francoise M. Haasch  
Christopher Ligori  
Matthew Posgay  
Waylon Thompson

## BRONZE

Jason R. Fraxedas  
Jack Hickey  
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# CLE EVENT CALENDAR

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### SEMINAR HIGHLIGHTS

- ◆ Auto Negligence
- ◆ Insurance & Bad Faith
- ◆ Medical Malpractice
- ◆ Traumatic Brain Injury



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## — DATES TO REMEMBER —

### JULY

July 26 – Proposal for Settlement Webinar (9am-12pm)

### AUGUST

Aug 07 – Christian D. Searcy Voir Dire Institute  
Renaissance SeaWorld, Orlando

Aug 07-10 – Al J. Cone Trial Advocacy Institute  
Renaissance SeaWorld, Orlando

### SEPTEMBER

Sept 06 – Expert Webinar Series #4 (12pm-1pm)

Sept 18-20 – Masters of Justice  
Four Seasons Resort, Orlando

### OCTOBER

Oct 01 – HB 837 Webinar Series #1 (12pm-1pm)

Oct 04 – Boot Camp Webinar Series (Part II) #1 (12pm-1pm)

Oct 11 – Boot Camp Webinar Series (Part II) #2 (12pm-1pm)

Oct 15 – HB 837 Webinar Series #2 (12pm-1pm)

Oct 18 – Expert Webinar Series #5 (12pm-1pm)

Oct 29 – HB 837 Webinar Series #3 (12pm-1pm)

### NOVEMBER

Nov 01 – Boot Camp Webinar Series (Part II) #3 (12pm-1pm)

Nov 08 – Boot Camp Webinar Series (Part II) #4 (12pm-1pm)

Nov 15 – Learn from the Legends Seminar  
Grand Bohemian, Orlando

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Curry Pajcic, Waylon Thompson, Todd Michaels, and Stephen Cain.

## FJA RESEARCH AND EDUCATION FOUNDATION



# CELEBRATING LEADERSHIP

Foundation Launches New Leadership Academy

Photographs by Sara Pratt



Master of Ceremonies, Howard Coker.

On Wednesday, June 12, members put on their favorite tropical shirts for the Foundation’s Welcome Reception and Dinner at The Breakers Palm Beach during FJA’s Annual Convention.

The Foundation had much to celebrate during the event which featured a beachy reception, steel drum band, and a special encore vocal performance by FJA EAGLE member DeWayne Terry.

The theme this year was Celebrating Leadership, and the FJA recognized Director of Fund Development, Robert L. Paulk III, for his 37 years of extraordinary leadership with the Association.

During the event, the Foundation announced its all new Leadership Academy which will select its first class in the Fall of 2024.



Jeff Porter presenting Rob Paulk with a commemorative surfboard.

## LEADERSHIP ACADEMY

The Foundation’s Leadership Academy provides leadership development opportunities for Florida’s personal injury community.

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- Leadership in your community.
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[myfja.org/leadershipacademy](https://myfja.org/leadershipacademy)

# James Wire, MD

Plastic Surgery Medical Expert

## Veritas et Aequitas

For over 20 years, Dr. James Wire has provided expert medical opinion in the specialty of plastic surgery and hand surgery.

He has worked with a plethora of law firms representing both plaintiff and defendant.

He has vast experience and knowledge of injuries and conditions including dog bites; scarring as a result of trauma; burns; medical conditions including skin and breast cancer; hand and congenital conditions; and cosmetic surgery complications.

Dr. Wire is board-certified, with extensive experience in treatment methodologies including revisions, transplants, lasers, and grafting. His reports are concise and consistent and based upon his thorough knowledge and clinical experience as a board-certified plastic surgeon.



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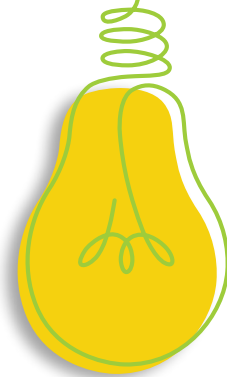


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