Volume 38 • Number 3

THE TRIAL ADVOCATE

A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

INSIDE THIS ISSUE

IN THIS ISSUE

The *Trial Advocate* is published three times a year by FDLA. Subscriptions are part of the membership benefits. Others wishing subscriptions should contact the Florida Defense Lawyers Association.

Submit articles or query letters to: Barbara Busharis, *TA* Editor, in care of the Florida Defense Lawyers Association, 5727 NW 7 Street, Suite 66, Miami, FL 33126.

FDLA
FLORIDA DEFENSE LAWYERS ASSOCIATION

President's Message

By Devang Desai

Thank you to the Florida Defense Lawyers Association for allowing me the opportunity to serve as your President for 2019-2020. It is an honor and privilege to have the trust of my fellow members to lead this outstanding organization. As in the past, we continue to face challenges in our profession, which make the need for your active engagement in our organization that much more critical. The need to mentor young lawyers and advocate for the defense bar provides us with an exciting set of opportunities in the coming year.

During my tenure, I hope to work with our talented Board of Directors to grow our membership and continue to deliver programs that are of value (and fun) to our members. It is clear to me that the strength of our organization lies in developing new talent, as well as keeping ourselves current on the latest strategies to combat the Plaintiff's bar and advances in our profession. In the coming months, FDLA will host webinars and our annual winter meeting in Tahoe, Nevada. It is my hope that you would be able to participate in any of these upcoming events, or help us in promoting them to members of your legal networks both within your firms and outside them. Earlier this month, FDLA hosted a successful ADR Skills Workshop under the leadership of conference chairman Frank Pierce, IV. This was a terrific day-long workshop.

Following our winter meeting in January of 2020, we are looking forward to hosting our inaugural Medical Malpractice Summit on April 15-16, 2020 in Orlando, Florida, followed by our signature event, the Florida Liability Claims Conference (FLCC), on June 3-5, 2020 at Disney's Boardwalk Inn. I hope you will make plans to attend.

Lastly, I want to congratulate Traci Mckee, our most recent past president, for a fantastic 2018-2019 year. During Traci's tenure as President, she led efforts not only to grow our organization but also to transition it into a more dynamic, positive and transformative one. Our organization is eternally grateful for her leadership and continued involvement.

In the coming months, I look forward to meeting with many of you as we continue to build upon the energy and momentum of the last few years. I am excited to lead our organization and am counting on your pledge to help us grow and further advance the mission of the FDLA.

Best wishes,
Devang Desai

Executive Director's Message

By Ana Ramos

Connections Matter

Stay-at-home moms are master networkers. I know because I was one for 12 years. I belonged to endless groups. La Leche League, MOPS (Mothers of Preschoolers), Gymboree, PTAs, and homeschooling co-ops (even though I didn't homeschool!) – there are so many opportunities for moms who understand that we cannot do it alone and it's no fun trying.

Generally speaking, lawyers are a different breed. Independent, competitive, driven – you often forget the importance of community and camaraderie. That's where voluntary bar organizations come in. Organizations like the Florida Defense Lawyers Association serve as not only a source for continuing education, but as a conduit for making meaningful connections. Even putting aside the genuine friendships that can develop among members, there are professional relationships that often go overlooked or undervalued.

Wouldn't you benefit from expanding your circle of colleagues who practice in your field? Think of the resources you would have at your fingertips if you had a statewide network of likeminded lawyers who face your same challenges. Our substantive committees are about to undergo an existential transformation with the launching of our new website. Through the use of online communities, our goal is to help our committees communicate more effectively and make them dynamic information sharing entities.

Our website will also boast an updated, fully searchable databank we've called TheVault. We encourage our members to upload court orders, motions, brief, impeachment documents, deposition transcripts, anything you feel will benefit your fellow members in their practice. By supporting FDLA members in this way, you'll also be building our value as an organization and encouraging others to do the same.

With the success of our first ever Florida Insurance Network Symposium (FINS), we realized the need for area-specific seminars to help practitioners in specialized fields hone their craft. FINS brought together 100 attendees who spent the day in informative sessions geared toward bad faith, first person property, and insurance coverage. Participants left the event having gained not only useful information, but also valuable contacts with other FDLA members from around the state practicing in their field. In the spring, we plan to introduce a similar event geared toward Medical Malpractice as we continue trying to meet the needs of our members and offer opportunities to connect and to grow your network.

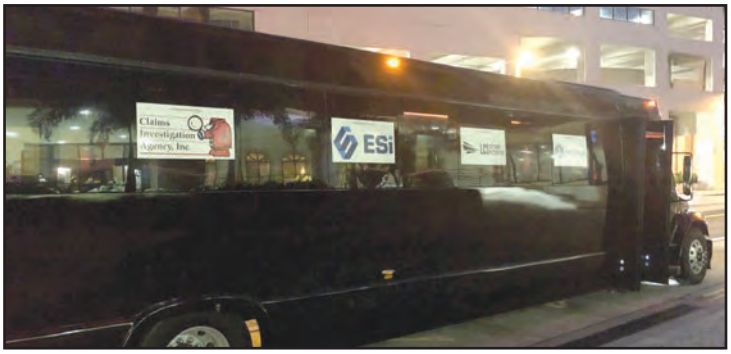
FDLA events are an excellent place to network, meet potential mentors and mentees, and make connections who may ultimately refer work your way or just be great friends who improve your quality of life. We strive to make our events informal, unstuffy, and highly inclusive. Our leadership is always on the lookout for our newest members, our young members, and those who are just discovering the benefits of attending a live event. We'll make sure you feel welcomed and make some good connections. The law is a trying career (no pun intended), but it's easier when you've made friends along the way.

FDLA's new website is COMING SOON!

www.fdla.org

FLORIDA INSURANCE NETWORK SYMPOSIUM (FINS)

On August 15th and 16th, 100 attendees gathered at the Sheraton Tampa Riverside to discuss issues pertaining to bad faith, first party property, and insurance coverage. It was the FDLA's first conference of its kind and it was a huge success. Many thanks to FDLA board member Matt Lavisky of Butler Law for his vision and his work putting the program together. Mark your calendars now for next year's FINS, scheduled for August 13 and 14, 2020 at the same location.



ADR SKILLS TRAINING SEMINAR

Many thanks to everyone who participated in our ADR Skills Training Seminar on November 1, 2019 in Orlando. We had a great group of attorneys both young and "seasoned" who came out to hone their ADR skills. The FDLA appreciates the efforts of Frank Pierce, IV of Goldberg Segalla for spearheading the event and putting the program together.

LAW FIRM LEADERS SUMMIT

This year, the FDLA replaced its traditional three-day beachside Annual Meeting with a condensed Summit which brought together senior partners from firms around the state to discuss issues surrounding firm management and effective leadership. Aided by experts in their fields we covered best practices in topics such as hiring and retaining associates; law firm insurance coverage; cyber security; and effective marketing, branding and public relations for law firms. It was a wonderful networking and educational opportunity, as well as a great time for catching up with FDLA friends. We are finalizing plans for an exciting new venue for the 2020 Summit. Stay tuned for details, but please plan to join us in September of 2020 in Orlando.











LAW FIRM LEADERS SUMMIT










LAW FIRM LEADERS SUMMIT SPONSORS

FDLA

LAW FIRM LEADERS SUMMIT

Thank you to our Sponsors and Exhibitors.

Platinum Sponsor

S-E-A

Gold Sponsors

Claims Investigation Agency, Inc.

Exponent

Silver Sponsor

Global Engineering Scientific Solutions

Bronze Sponsor

Robson Forensic

b l g | BOLIN LAW GROUP

Central Florida Legal Nurse Consultants

COMPEX

CONROY SIMBERG

ESi

GMA

KUBICKI DRAPER

LCS RECORD RETRIEVAL

LexisNexis

MINT LEGAL SOLUTIONS LLC

MarksGray

OMEGA FORENSIC

RIMKUS Consulting Group, Inc. Forensic Engineers and Consultants

SPECIAL COUNSEL

TRG

The Tower Ridge Group, LLC

FLORIDA INSURANCE NETWORK SYMPOSIUM (FINS) SPONSORS

FDLA

FINS 2019 Florida Insurance Network Symposium

We appreciate the support of our Sponsors. Thank you!

Platinum Sponsor

S-E-A

Gold Sponsors

Claims Investigation Agency, Inc.

Exponent

Silver Sponsor

Global Engineering Scientific Solutions

Bronze Sponsor

Robson Forensic

BUTLER Weihmuller Katz Craig

KUBICKI DRAPER

SIMON REED & SALAZAR

CogentEdge

Medlogix

MINT LEGAL SOLUTIONS LLC

ESi

MINTZER SAROWITZ ZERIS LEDVA & MEYERS, LLP

LCS RECORD RETRIEVAL

FDLA

FINS 2019 Florida Insurance Network Symposium

We appreciate the support of our Exhibitors. Thank you!

Platinum Sponsor

S-E-A

Gold Sponsors

Claims Investigation Agency, Inc.

Exponent

Silver Sponsor

Global Engineering Scientific Solutions

Bronze Sponsor

Robson Forensic

ARCCA

CED TECHNOLOGIES INC SCIENCE EXPLAINED

ESi

FM FLAYMAN MEDIATION

HAAG

JS|HELD

LCS RECORD RETRIEVAL

MDD FORENSIC ACCOUNTANTS

NELSON FORENSICS

RGA ARCHITECTURE | PLANNING | FORENSICS

RIMKUS Consulting Group, Inc. Forensic Engineers and Consultants

FDLA Winter Meeting
January 15-20, 2020

EXPLORE LAKE TAHOE'S MAJESTIC SCENERY THIS WINTER WITH FDLA!

Look no further! FDLA has found your winter escape! We are heading west for the Annual Winter Conference in January 2020. Admire the beautiful snow-covered mountains and crystal blue waters of Lake Tahoe all while earning CLE, mingling with colleagues, and strategizing business for the upcoming year. The Ridge Tahoe is an 11-acre private resort, club, and spa located on Heavenly Mountain Resort in Nevada. Providing access to casinos, incredible restaurants and nightlife, and an idyllic village with ice-skating and cozy mountain shops, The Ridge Tahoe is a treasured destination in Lake Tahoe. FDLA members and our annual sponsors will be presenting on a wide array of topics for CLE credit. Bring your family and head west to hit the slopes or take a snowmobile ride through the mountains of Lake Tahoe while networking. The FDLA Winter Conference is designed to blend professional and personal time perfectly. Grab your winter coat, a hot toddy, and we'll meet you by the fire pit! See you in January.

HOTEL

The Ridge Tahoe - www.ridgetahoeresort.com
400 Ridge Club Drive, Lake Tahoe, NV 89449
Phone: 775-220-3030
Reservations link:
bookings.ihotelier.com/bookings.jsp?groupID=2584006&hotelID=96192

- Located on Heavenly Mountain Resort Nevada
- 11-acre Private Resort, Club, and Spa
- Easy access to Casinos, Restaurants, Mountain Gondola, Lake Tahoe, and more
- Indoor and Outdoor Swimming Pools and Jacuzzi's
- Full-service Spa and On-site Health Club

ACTIVITIES

Snowmobiling – Friday (Time TBD)
Take an exhilarating snowmobile ride through the mountains above Lake Tahoe. Enjoy breathtaking views of the lake and ride through tree-lined trails in the backcountry with a professional guide.

Distillery Tour – Saturday (Time TBD)
Visit The Bently Heritage Distillery in Minden, NV for a firsthand look at single malt whiskey production, a tour of the historic mill and creamery buildings, and a sampling of spirits.

Where professional networking meets personal downtime

WEDNESDAY	Travel Day
THURSDAY	Ski & Play
4:00-6:00pm	CLE
6:00-7:00pm	Cocktail Hour & Hors d'oeuvres

FRIDAY

Friday Morning - Snowmobile Tour - ***Time and Cost TBD***

4:00-6:00pm	CLE
6:00-7:00pm	Cocktail Hour & Hors d'oeuvres

SATURDAY

Saturday Morning - Bently Heritage Distillery Tour - ***Time and Cost TBD***

4:00-6:00pm	CLE
6:00-7:00pm	Cocktail Reception
7:00-10:00pm	Farewell Dinner

SUNDAY	Free Day
MONDAY	Travel Day

Florida Bar Credits will be requested

REGISTRATION FEES

FDLA Members	$275
Non-Members	$350
(Includes FDLA 2020 Membership for qualifying FL attorneys)	
Guests of CLE Attendees	$175
Children 8-17	$75
Children 7 & Under	Free

Guests and children are invited to all cocktail hours and the Farewell Dinner.

GETTING TO THE RIDGE:

From The Reno-Tahoe International Airport (RNO), The Ridge Tahoe is a 1 hr 15 min drive. Car rental options are available at the airport. Private transportation available through:

- Bell Limo Service https://bell-limo.com/
- Reno Tahoe Shuttle https://www.reno-tahoeairportshuttle.com

Please contact the resort for more options and detailed transportation information.

Editorial

By Barbara Busharis

The Most Wonderful Time of the Year

It's the time of year when we are can be overwhelmed with opportunities to do for others, particularly children. Everywhere we turn, someone is collecting toys, books, coats, or iPads. Are we being Scrooges if we ignore some of the requests as they start to blur together?

If you occasionally have thoughts along those lines, or wish you could do more but aren't sure where to start, allow me to suggest a few alternatives to the holiday toy drive.

One of the ways you can be the most helpful in a child's life is to be a mentor. As attorneys, we all know the benefits of having a mentor, and many of us also know the rewards of being one. The benefits and rewards of mentoring children and youth are even more significant. Big Brothers Big Sisters (BBBS) often cites statistics showing that, after a year and a half with a mentor, children were less likely to be using drugs and alcohol, less likely to skip school, and less likely to be aggressive than their peers.[1]

It can unquestionably be difficult for busy professionals to find the time to mentor a youth, but the needs are clear and present year-round and are particularly acute for young men. In some parts of Florida the waiting list for boys to get a mentor is *over a year long*. To offer more flexibility, many mentoring programs, including BBBS, offer more options than the traditional one-on-one, "social" type of mentoring with which most people are familiar. For example, some local BBBS organizations offer a school-based mentoring program involving a commitment of one hour a week, during the school day. Other local BBBS organizations offer group-based mentoring and workplace mentoring. If the time commitment required to be a mentor is a hurdle for you, you might look into one of these programs.

You might also consider mentoring programs with a special focus, like Girls on the Run, which has about a dozen local "councils" in Florida. Girls on the Run takes elementary and middle-school girls through a ten-week program incorporating discussions, activities, and of course running, and which culminates in a "celebratory" 5K. The organization relies on volunteer coaches of both genders, as well as "running buddies" for each of the participants.

Another alternative is board service for an organization involved with children and youth. LinkedIn and other platforms allow you to indicate your willingness to serve, as well as to search for opportunities with local agencies. Nonprofit boards come in many shapes and sizes, and often welcome people with varying degrees of experience — you do not have to wait for a certain point in your career to be of value to them.

Finally, instead of donating toys or clothes, you can also support children and youth by donating experiences. Existing mentoring programs are often happy to accept tickets to movies, sports events, or other performances at any time of year. Another option not limited to the holiday season: donate a scholarship or two to a summer camp. Even low-cost camps are often out of reach for struggling families or families with multiple children, and existing scholarships or discounts are usually snapped up quickly.

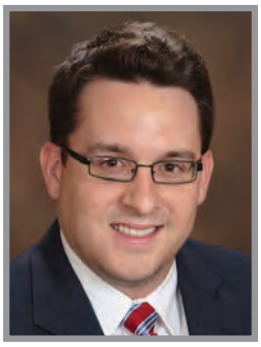
My point is not to criticize toy drives or other expressions of care at the holidays. Many people put a great deal of effort and thought into these programs, and they make a difference. But the needs in many children's lives cannot be addressed with presents once a year.

Ebenezer Scrooge is one of my favorite fictional characters, and I will watch any version of *A Christmas Carol* — animated, musical, performed by kittens. I'm an easy target for redemption stories. The greatest change in old Ebenezer wasn't that he gave Bob Cratchit a raise and a prize-winning turkey, however; it was that he kept the spirit of giving all year long.

[1] *See* 2018 Big Brothers Big Sisters of America Annual Impact Report at 3, available at https://www.bbbs.org/wp-content/uploads/2018-BBBSA-Annual-Impact-Report.pdf.

Making the Most of the Attorney-Client Relationship

By Matt Holtsinger



MATT HOLTSINGER is an attorney at Rywant, Alvarez, Jones, Russo & Guyton, P.A. Mr. Holtsinger focuses his practice on personal injury litigation, construction defect litigation, premises liability, and real estate litigation. Mr. Holtsinger also represents debtors and creditors in consumer and commercial bankruptcy cases and debt collection matters in state and federal court. He has been published in bankruptcy journals and has lectured on numerous occasions on consumer bankruptcy issues. He is married and has three children.

It goes without saying that clients are the lifeblood of any successful law firm. The best way to ensure that clients keep coming in the door is to provide current and former clients with a high level of satisfaction with your services, and the key to client satisfaction is effective communication. Building a rapport with a client, managing his or her expectations, preparing the client for testimony, and guiding the client through the stresses and emotions inherent in litigation are all crucial to ensuring that the client is happy with your representation.

Many young lawyers are ill-prepared for this aspect of the profession. This is because client communication skills are learned through practice and gained through experience. Historically, law school, while doing a great job of training law students on how to think and argue like a lawyer, often ignore the practical aspects of client management. For a new lawyer, navigating the attorney-client relationship can be a daunting and unfamiliar task and many young lawyers may even come to see certain clients as an obstacle to resolving a case rather than a partner in the process. This kind of attitude will almost certainly result in an unhappy outcome for both the lawyer and the client. Ultimately, communication and transparency during the lawsuit will make the difference as to whether the client is satisfied or dissatisfied with the outcome. The goal of this article is to identify some strategies that lawyers can employ to improve client communication skills.

Set Expectations Early and Often

Each client is unique. Clients come from diverse walks of life and have differing goals, personalities, and expectations. Treating every client as a unique individual (or entity in the corporate context) is therefore crucial to obtaining client satisfaction. Understanding what a client needs on an individual basis begins with frank and honest communication. Effective communication is the foundation of a successful attorney-client relationship as it builds a relationship of trust and cooperation which is vital to the lawyer's ability to adequately represent the client's interests.

At the outset of a case, most clients will be in the dark as to how a lawsuit unfolds and the particular legal issues at play in the controversy. The client may have a very good understanding of the facts giving rise to the lawsuit (and may speak about the facts passionately), but the client often does not understand what those facts mean as it relates to possible outcomes in the lawsuit. This will likely be the first time the client has been involved in a lawsuit, especially if the client is an individual. Thus, the client will naturally feel a lot of different emotions including anger, fear, and uncertainty. For many clients, the litigation process is a highly stressful, long and frustrating journey into the unknown. Therefore, part of your job as a lawyer is to try and set the client's mind at ease and to let the client know that you will be there for him or her every step of the way.

The lawyer's technical expertise is vital. This includes obtaining all the crucial facts, asking the right questions, identifying witnesses and documents, and explaining how the law of the particular case applies to the facts. Giving legal advice to a client must be done in a way that is not overly byzantine, but rather understandable to a person without a legal background. You also need to communicate in a precise enough manner so as not to mislead the client or give false or unrealistic expectations. This can, at times, be an uncomfortable process. While you are supposed to be a zealous advocate for your clients' positions when dealing with adversaries, judges, or third parties, conversations with your clients must be frank and candid, even if that means broaching unpleasant topics to ascertain the truth or providing the client with an accurate prognosis of the likely range of outcomes in the case.

The client will also likely not understand the time horizon on resolving his or her case or the costs associated with litigation. Having a frank conversation about these very important details early on is crucial to ensuring that the client is not dissatisfied as the case progresses. For example, most clients do not have an endless amount of money to expend on attorney's fees and costs. Thus, for clients with a tight budget, a more conservative litigation strategy or a quick exit may be in the client's best interest.

Institute Best Communications Practices

A lawyer is only as successful as the team of people around him or her. You therefore need to develop a culture at your firm that emphasizes the importance of client communication and you must instill a commitment to client satisfaction in every individual that works at your firm, from the file clerks to the most senior paralegals. Ensuring that every person at the firm is equally committed to these goals is crucial because every interaction the client has with your firm will affect the overall satisfaction the client has with the representation. I recommend creating a system of client communication processes for every case that is handled. For example, instituting a procedure whereby a client is provided an update at regular intervals (even if there have been no substantive changes in the case) will let the client know that you are always engaged in their case and that the client has not been forgotten. Similarly, a policy of always following up a telephone call with an email or a letter summarizing what was discussed can avoid a situation where your advice is lost in translation or misinterpreted by the client. It is also a good idea to regularly review your client communication processes in an effort to constantly improve communications with your clients.

Embrace Your Role as a Counselor

Being a successful lawyer is not all about mastery of technical legal knowledge or being the smoothest person in the courtroom. Success also requires that you get to know your client on a personal level. You must know what each client's goals and desires are, as well as what they expect or hope to receive at the end of the case. This requires that you listen to the client on a personal level and engage with the client empathically. This also means that you must have regular communication with your clients and must never be too busy to give each client your time. Again, each client is unique. Some may be distant and indifferent to the whole process. You must work to keep those clients engaged. Other clients require a lot of hand holding and reassurance. This may require a significant amount of time in client management. Sometimes, all the client wants is to express the emotions he or she is feeling during the process, or to seek assurance that you are zealously advocating for him or her. Understanding each client's needs on an individual level is therefore an invaluable skill for a lawyer to possess and this comes with practice and a genuine desire to serve people.

Problem Solving

A mentor of mine once told me that the essence of the job of a lawyer is to solve problems. This usually entails obtaining a consensual settlement for the client short of having a judge or jury decide the outcome. There is a saying that a good settlement is one in which neither party is satisfied. In my experience, this is true to an extent. After all, individuals end up in litigation because something went wrong, and the parties were unable to resolve their differences amicably. Therefore, obtaining a settlement that each party can ultimately accept necessarily requires that each party give up something that they were previously not willing to give up. However, the level of satisfaction that a client feels in the context of a settlement can be relative and can vary greatly depending on how well you have communicated with the client and how well you have set the appropriate level of expectation.

The most rewarding experiences of my legal career are those moments when I receive a heartfelt embrace or a kindly worded letter at the end of the case because the client is truly grateful for the time and effort I have expended in obtaining the result. In the settlement context, those clients invariably were not made 100% whole. But those satisfied clients were grateful largely because they knew that I truly cared about solving their legal problem as efficiently and expeditiously as possible.

Fostering the attorney-client relationship is one of the most important aspects of a successful practice and this aspect is not always examined by lawyers. Taking the time to try and continuously improve the lawyer-client relationship by building trust and a genuine connection with all clients can be both personally rewarding and good for business.

Judicial Perspectives

JUDGE JARED SMITH

What is the most common trait you see in attorneys you consider to be the best in their respective fields?

Narrowing that down to one trait is challenging, but there is one trait that I would say truly distinguishes those at the top. The best attorneys who appear before me are the ones that have done everything possible to reach a resolution with the opposing side prior to the matter coming before me. The best attorneys know the law and are often able to align their opponents with the law well before the matter reaches my courtroom.

What general advice would you give a young attorney who is up against a discourteous or overbearing opposing counsel?

Interestingly, I thought I would have to deal with this much more as a judge than I actually have. And that is a good thing. For those instances when you are in front of counsel that appears to be skilled in pushing your buttons, resist the temptation to respond in kind. If I see a situation where one attorney has been rude or even just unresponsive to another attorney's reasonable requests, it will not go well for the wrongdoer. To some extent you have to trust the system to do its work. As common sense would tell you, when dealing with this type of counsel, ensure all correspondence is in writing. I know there may be the thought that it would be better to communicate only by letter rather than email. However, in today's electronic age, you may be the one viewed as the obstructionist if you make that move, so be careful with going to that extreme.

What is one new perspective you gained upon becoming judge that you did not have as an attorney?

I have a much greater respect for the role of a judge. It is one thing for two attorneys to make arguments before a judge about what position they feel best serves their respective clients, but it something entirely different having to be the one who makes the decision as to which position best fits with the law. Judges also have on their shoulders the effect of the decisions they make, which was especially felt for me when I was handling my domestic violence division. I think when you are arguing motions, it would not hurt in your advocacy to have some level of empathy toward the court in understanding that burden.

What is the most common mistake you see attorneys commit at trial?

I have seen several instances of a general lack of preparation. Probably some of the top issues are lack of authentication of exhibits (which could have in most instances been easily resolved prior to trial, through either request for admissions or pretrial stipulations) and a failure to narrow the issues.

Judge Jared Smith was appointed to the Hillsborough County Court in 2017, retained by election in 2018, and appointed to the Circuit Court, 13th Judicial Circuit (Hillsborough), in 2019.

What are some examples of issues that qualify for emergency hearings, and some examples of issues that do not?

If a matter is about to cause some irreparable harm to a party, then an emergency exists. I had a domestic violence case in which I issued a temporary injunction in favor of the petitioner giving her temporary, exclusive possession of a shared residence. A condition of the injunction was that the petitioner was not supposed to remove or damage any items in the home. A day later, the respondent filed an emergency motion for relief stating that his personal effects were being sold on e-bay. Now that was an emergency! There are a large percentage of motions labeled "emergency" which in fact are not. Motions labeled emergent will immediately be brought to my attention. That is why it is important to only label the motion as emergent if it truly is emergent.

What are some positive recent trends you have seen in the practice of law? Any negative recent trends?

There have been some recent common sense modifications to the law to bring it up to date. One example was the increase of county court jurisdictional amounts from $15,000 to $30,000. In regard to "negative trends" I would say one of the challenges still facing our younger attorneys is getting trial experience in a time when the percentage of cases resolved by alternative dispute resolutions (mediation, arbitration, etc.) continues to grow.

What are some things attorneys can do to make your job easier at hearings? At trial?

Trial briefs and motion hearing notebooks are appreciated. I do read them, assuming I get them in sufficient time before the hearing. I am amazed how often I walk in to hearings and the side opposing a motion has not even filed a responsive brief (or files it the afternoon or evening before a morning hearing).

What is one feature of the court system or the broader legal system that you wish could be changed?

Court systems vary from circuit to circuit in Florida, and I can say that I have been very impressed with what I have seen in Hillsborough County (the 13th Judicial Circuit), especially now that I am looking from the "inside out." Statewide, they are taking a close look at the pay structure for judicial staff (I am particularly thinking of Judicial Assistants). They are often the unsung heroes of the courthouse, and if we want qualified people to apply for these positions and stay in these positions (which is equally important to both the judges and those appearing before them) we will need to ensure compensation stays competitive.

Based on what you have seen in your hearings and trials as a judge, what is the number one CLE topic that you think would be of benefit to the attorneys who practice before you?

As noted previously, not enough cases are going to trial nowadays to effectively train up our next generation of trial lawyers. Continuing education on trial skills in general is always a positive, with special emphasis on getting those seasoned trial attorneys to contribute their experiences.

How do you achieve work life balance with your personal life?

Family is certainly important to me. I give my wife (who sacrificed her legal career to raise our four children) much credit for creating meaningful times together, so I mostly try to step out of the way and let her do what she does best. The main thing I would say to this point is, if I don't intentionally plan personal time (such as exercise or other routines) or family time into the schedule, it will not happen. I had a good chaplain friend teach me that many years ago when I was serving as a JAG officer at MacDill Air Force Base and I have tried to, although not always successfully, apply that going forward.

If a movie were made about you, what actor would you want to portray you? Why?

I would have to say Jim Caviezel. I heard him speak one time a few years back and was very impressed with his character. He loves his family, has a strong faith, and loves his country. He and his wife have adopted three children from China, and we also have also experienced the joy of adoption in our family.

Save a tree! Receive your issue of *The Trial Advocate* in a downloadable, full-color PDF three times a year.

Email Ana Ramos, *aramos@fdla.org*, to stop receiving paper copies.

2019 Insurance and Tort Case Law Update

Compiled by: John M. Miller and Miguel R. Roura

This annual feature of the *Trial Advocate* was compiled from materials presented at the Florida Liability Claims Conference. We thank the FLCC presenters: John M. Miller, Henderson, Franklin, Starnes & Holt, P.A., and Miguel R. Roura, Roig Lawyers, as well as Elaine D. Walter, Boyd Law Group.

DISCOVERY

Business Telecomm. Servs., Inc. v. Madrigal, 265 So. 3d 676 (Fla. 3d DCA 2019).

The Third District denied a petition for certiorari seeking to quash an order requiring the production of surveillance video in advance of the plaintiff's deposition in a personal injury suit. The defendant relied on *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980), which held that a surveilling party could depose the witness who was filed before producing the film. *Dodson,* however, involved surveillance of the plaintiff after an accident. In this case, the surveillance video was taken on the date plaintiff was allegedly injured, and thus was distinguishable from "post-accident surveillance videos of a plaintiff's activities." Because the trial court has discretion in the admission of evidence, and the appellate court could find no bright-line rule on the issue, the defendant could not satisfy the standard of demonstrating a departure from the essential requirements of law.

EVIDENCE

Bellezza v. Menendez, 273 So. 3d 11 (Fla. 4th DCA 2019).

The Fourth District Court of Appeal reversed and remanded for a new trial where the trial court had allowed discovery of (1) payments by the plaintiff's attorneys firm to the treating physicians over five years and (2) letters of protection between the plaintiff's attorneys firm and the treating physicians. The trial court also compelled the deposition and trial testimony of the plaintiff's attorney regarding these documents. The claim arose from a collision between the defendant law firm's vehicle, driven by one of its employees, and the plaintiff, who was walking his bicycle along the street. The plaintiff sued the driver and the law firm ("defendants") for negligence and vicarious liability. During discovery, the defendants requested information regarding the financial relationship between the plaintiff's attorney and his treating physicians. The plaintiff objected to each request. After discovery, but before trial, the Supreme Court of Florida held that "the financial relationship between a plaintiff's law firm and the plaintiff's treating physician is [not] discoverable" in *Worley v. Central Florida YMCA*, 228 So. 3d 18, 22 (Fla. 2017). Because the trial in *Bellezza* occurred after *Worley* was decided, the requested discovery, although previously allowed, was no longer permitted as it violated attorney-client privilege. The Fourth District noted: "While letters of protection may be admitted to establish bias, any further inquiry regarding the 'cozy agreement' between a law firm and a treating physician is disallowed. If that information is not discoverable, it certainly is not admissible." *Bellezza*, 273 So. 3d at 15. The defendants' case had emphasized the plaintiff-attorney's financial relationship with the treating physicians in opening statements, witness testimony, and closing argument.

Anderson v. Mitchell, --- So. 3d ---, 44 Fla. L. Weekly D899 (Fla. 2d DCA Apr. 5, 2019).

In a negligence action against a motorist who struck a pedestrian, defense counsel objected to deposition questions about statements the defendant and his wife made at the time of accident. The Second District Court of Appeal ruled that Section 316.066(4), Florida Statutes, makes information regarding the crash report and those that fill out the crash report inadmissible at trial; it does not make the information undiscoverable. The court reasoned that Florida statutes such as section 90.502(2) (defining the attorney-client privilege) create privileged categories of information by expressly using the word "privilege" in the statute. Conversely, the legislature has enacted statutes like section 316.066(4) that make information inadmissible in court but do not otherwise prohibit its disclosure. *See, e.g.*, §§ 90.408 (providing that evidence of settlement negotiations "is inadmissible to prove liability or absence of liability for the claim or its value"), 90.409 (providing that evidence of payment of medical expenses "is inadmissible to prove liability for the injury or accident"), 90.410 (providing that evidence regarding pleas and plea offers "is inadmissible, except when such statements are offered in a prosecution under chapter 837"). Although previous versions of section 316.066(4) created a privilege, that language was deleted in 1989; the fact that the statute continues to be referred to as the "accident report privilege" does not overcome the plain language of the current version.

Gurin Gold, LLC v. Dixon, 277 So. 3d 600 (Fla. 4th DCA 2019).

In a personal injury suit, the plaintiff's expert stated at deposition that he had not viewed the results of a 2010 MRI following an earlier accident, but had only viewed the plain-

tiff's 2014 MRI results. Plaintiff's counsel did not show the 2010 MRI to the expert until trial had already begun, and then proffered new opinion testimony based on the earlier scan. Although the trial court initially granted a motion to exclude the testimony, calling it "egregious" and "inappropriate" to present new information during trial, the trial court then reversed its own ruling and allowed the expert to testify, noting his overall opinion had not changed and he was subject to cross-examination. The Fourth District reversed and remanded for a new trial, listing several ways the defense had relied on the expert's pre-trial testimony. The appellate court pointed out the defense could cross-examine the expert but could not, mid-trial, develop new expert testimony to rebut his comparison of the two scans.

Lopez v. Wilsonart, LLC, 275 So. 3d 831 (Fla. 5th DCA), review granted, 2019 WL 5188546 (Fla. Oct. 15, 2019).

Jon Lopez died when his pickup truck crashed into the rear of a freight truck when approaching an intersection. His estate sued the trucking company and the driver, alleging negligence on the part of the truck driver. The defendants moved for summary judgment, arguing the decedent was the sole cause of the collision and that dash cam footage from the truck contradicted the plaintiff's eyewitness and expert testimony. The trial court entered summary judgment for the defendants, citing cases where video footage contradicted witness testimony. The Fifth District reversed, stating Florida's restrictive standard for summary judgment prohibited the trial court from weighing conflicting evidence when deciding whether a genuine issue of material fact was present. Noting the increasing use of video and digital evidence, the Fifth District certified a question of great public importance: "Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?" The Florida Supreme Court has accepted review in Case No. SC19-1336 and has ordered briefing on the following question, in addition to the certified question: "Should Florida adopt the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)? If so, must Florida Rule of Civil Procedure 1.510 be amended to reflect any change in the summary judgment standard?"

FEES

Rickard v. Nature's Sleep Factory, 261 So. 3d 567 (Fla. 4th DCA 2018).

A supplier sued the defendant, Nature's Sleep Factory, and two other defendants for breach of contract, false advertising, and defamation. The defendants filed an answer, affirmative defenses and a counterclaim. At the beginning of the trial, the supplier announced a voluntary dismissal of its claims against two defendants. In light of that dismissal, the defendants served a motion for prevailing party fees and costs. The next business day, the supplier filed a response, and served — without filing — a motion for 57.105 fees, addressing defendants' failure to timely plead entitlement to fees as required. A few days before the hearing and 23 days after the safe harbor period had expired, the defendants withdrew their motion for fees and cost. The defendants conceded that attorney's fees had not been timely pled. The attorney explained that he could not get approval to revoke the motion during the safe harbor period, because his client was out of the country and unreachable. At the hearing, the trial court observed that the request for fees for 4.65 hours at $450.00 an hour was reasonable, but stated that she hated these motions, and acknowledged that appellate courts look at them strictly. The judge subsequently entered an order denying the motion for sanctions. The Fourth District reversed and awarded the fees, stating defense counsel "had no excuse for failing to withdraw the motion." The attorney's unsworn statements about the client's absence from the country did not constitute evidence, and the ability to reach one's client is not an excuse for the requirement to withdraw a frivolous motion pursuant to section 57.105, because officers of the court have a duty to withdraw admittedly non-meritorious motions with or without a client's permission: "There is no exception for attorneys who feel restrained from dropping a claim which the attorney has come to understand is not legally supported because the attorney has not had an opportunity to consult with his client."

Roberts v. PNC Bank, 263 So. 3d 119 (Fla. 5th DCA 2018).

In this appeal from an award of sanctions, the court found the appellants and their attorney had failed to preserve the issue for appeal by entering into a stipulated final judgment which set forth the entitlement to an amount of the sanctions that were imposed. The trial court had awarded sanctions because the defendants and their attorneys insisted on pursuing a defense that they knew or should have known was not supported by the facts or law in a mortgage foreclosure case. The bank had served a safe harbor letter pursuant to section 57.105, but the defendants still refused to withdraw the defense. The defendants repeatedly asserted

the defense of "payment/assignment" in their answer, discovery responses, and deposition testimony, even though it was clear that the defense was not supported by any documentary evidence, and the testimony of one of the defendants was internally inconsistent and not credible. Based on these facts, in addition to the parties' waiver of the issue, the trial court's order was supported by competent substantial evidence regarding the lack of merit of the defense, and the Fifth District affirmed. The court then addressed a "blatant, material misrepresentation" by defendants' attorney in his Amended Initial Brief, which asserted the trial judge had failed to make a particular finding which, in fact, was explicitly stated in the trial court's sanctions order. The appellate court issued an order to show cause as to why the attorney should not be sanctioned from making what appears to be "a blatant material misrepresentation in the brief that he filed with this court and for failing to correct the misrepresentation when it was clearly and forcefully brought to his attention by opposing counsel."

Sentz v. Tracy, 266 So. 3d 1279 (Fla. 5th DCA 2019).

The plaintiff in a personal injury case sent the defendant several requests for admissions, which asked the defendant to broadly concede negligence, causation and damages. The plaintiff asked the defendant to admit that she "negligently and carelessly maintained, operated and controlled" her motor vehicle which caused it to collide with the plaintiff's vehicle. The defendant denied the request. Rule 1.380(c) does authorize the trial court to award expenses, including attorney's fees, against a party that fails to admit the truth of a request for admission made pursuant to rule 1.370. However, the purpose of requests for admissions is to define and limit the issues in controversy between the parties, thus reducing the expense and delay that might otherwise be unnecessarily involved in the trial and facilitate proof at trial. That is accomplished by compiling admissions to those matters over which there is no good faith controversy. Notably, there is an important distinction between requests for admissions that would resolve the ultimate issues in the case if admitted, and requests that simply go to establish relevant facts**.** Because these requests for admissions went to the ultimate issues rather than relevant facts**,** the court found that awarding attorney's fees would render 1.380(c) a prevailing party fee provision, rather than an exception to the rule that individual parties bear their own fees. It declined the invitation to make such a ruling.

MALPRACTICE

Arch Ins. Co. v. Kubicki Draper, LLP, 266 So. 3d 1210 (Fla. 4th DCA 2019).

An insurance company retained Kubicki Draper, LLP to represent its insured in the defense of a lawsuit. Once the lawsuit settled, the insurer sued the law firm for legal malpractice, alleging the law firm should have asserted a statute of limitations defense sooner in the litigation and its delayed assertion of that defense subjected the insurer to a larger settlement. The law firm moved for summary judgment, contending the insurer lacked standing to sue the law firm for legal malpractice because there was no privity between them. The trial court granted summary judgment in favor of the insurer. On appeal, the Fourth District agreed with the trial court's reasoning that the insurer was not in privity with the law firm and, thus, the insurer lacked standing to sue the law firm. The court added that the insurer's suit did not qualify under two recognized exceptions to privity rules allowing a third party can pursue a legal malpractice against counsel: (1) will drafting; and (2) private placement. The court also certified the following question of great public importance: "Whether an insurer has standing to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend." The Florida Supreme Court has accepted jurisdiction in Case No. SC19-673.[1]

Specialty Hosp.-Gainesville, Inc., v. Barth, 277 So. 3d 201 (Fla. 1st DCA 2019).

Mr. Barth was paralyzed during surgery and transferred to Select Specialty Hospital-Gainesville for long-term treatment. At Specialty, he developed a deep-tissue pressure ulcer that necessitated additional surgery and hospitalization. He brought a suit against Specialty, alleging medical malpractice pursuant to chapter 766, Florida Statutes, and a violation of the Adult Protective Services Act pursuant to chapter 415, Florida Statutes. Specialty identified a subsequent treating hospital as a non-party tortfeasor. A jury found Specialty liable on both counts and found comparative fault on the part of the subsequent treating hospital. The First District reversed the judgment as to the chapter 415 claim, holding the allegations against Specialty involved medical negligence, for which chapter 766 provides the exclusive remedy. On cross-appeal the court also reversed the apportionment of damages, stating section 768.81, which involves joint and several tortfeasors, "does not apply to independent and subsequent tortfeasors." The court also noted the absence of any evidence that if the subsequent treating hospital had used due care, Mr. Barth's condition would have improved; on the contrary, experts testified at trial that Specialty's negligence in handling Mr. Barth made his injury inevitable. Whether the subsequent treatment exacerbated

[1] At the time this column was published briefing had not been completed and a date for oral argument remained to be set.

the injury was not legally relevant under *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

PROCEDURE

Gannon v. Cuckler, --- So. 3d ---, --- Fla. L. Weekly D--- (2D17-4888) (Fla. 2d DCA Oct. 16, 2019).

The plaintiff in a products liability case appealed an order dismissing some of her claims for lack of personal jurisdiction, arguing that certain defendants waived the jurisdictional defense by failing to assert it as required by Florida Rule of Civil Procedure 1.140(b), (g), and (h). The Second District agreed based on an analysis of the plain language of the rule. The defendants filed an initial motion under rule 1.140(b) based on a failure to state a cause of action, without including the jurisdictional defense; therefore, the defense was waived, and the waiver was not cured by denying jurisdictional allegations when answering the complaint. In addition, the plain language of the rule prevented the defendant from filing an amended motion to dismiss including the omitted defense. The court certified conflict with precedent from the Third, Fourth, and Fifth District Courts of Appeal.

PROPOSALS FOR SETTLEMENT

Wheaton v. Wheaton, 261 So. 3d 1236 (Fla. 2019).

Wheaton resolved a certified conflict as to whether proposals for settlement made pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 must comply with the email service provisions of Florida Rule of Judicial Administration 2.516. Respondent, Mardella Wheaton, sued her ex-daughter-in-law, Petitioner, Sandra Wheaton, for unlawful detainer. Petitioner served a proposal for settlement on Respondent via email. Respondent received the proposal but did not accept it. After Petitioner successfully sought summary judgment, she filed a motion to enforce her proposal and collect attorney's fees. The trial court held Petitioner's failure to comply with the requirements of rule 2.516 made the proposal for settlement unenforceable and denied the motion; the Third District affirmed. The Florida Supreme Court held the plain language of section 768.79 and rule 1.442 does not require service by email. Moreover, because a proposal for settlement is a document that is required to be served on the party to whom it is made, rule 2.516 does not apply. Accordingly, the Third District erred in affirming the trial court.

Palmentere Bros. Cartage Serv., Inc. v. Copeland, 277 So. 3d 729 (Fla. 1st DCA 2019).

In this appeal from a verdict for the plaintiff based on a collision involving a tractor-trailer, the First District reversed an award of section 768.79 fees and expenses. When a plaintiff amends a complaint to add a claim for punitive damages, and the plaintiff previously served a proposal for settlement that addressed all claims without punitive damages, the plaintiff must serve an updated proposal to address the new punitive damages claim to be able to collect fees and expenses later: "Appellants cannot be sanctioned under section 768.79 and rule 1.442, based on the substantial punitive damages verdict here, because Copeland explicitly disclaimed punitive damages in her only settlement proposal. When Copeland made her section 768.79-based offer of judgment for $345,000 in April 2014, she hadn't yet added a punitive damages claim to her complaint."

SPOLIATION

Shamrock-Shamrock, Inc. v. Remark, 271 So. 3d 1200 (Fla. 5th DCA 2019).

The defendant in this case was a member of a planning board that was sued after it denied a developer's rezoning request. She was not a party to the original action. In the original action, the developer served her with a series of deposition notices, the last of which included a *duces tecum* request for documents to be produced at the deposition. However, she testified at her deposition that she had obtained a new computer and destroyed the old one, along with any documents it held, before she was served with the subpoena *duces tecum*. The developer then filed a complaint against her, alleging she destroyed her old computer either intentionally or in bad faith. The plaintiff-developer argued that she had a duty to preserve evidence on her computer based on the foreseeability of the underlying lawsuit and her actual knowledge of the lawsuit. The Fifth District declined to extend a third party's duty to preserve evidence based on the foreseeability or knowledge of litigation, reasoning that such a "broad pronouncement would be tantamount to declaring a general legal duty on any nonparty witness to anticipate the needs of others' lawsuits."[2]

TORTS/INSURANCE

Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr., Inc., 260 So. 3d 219 (Fla. 2018).

In this case, involving the proper method of applying a personal injury protection (PIP) insurance policy deductible

[2] The outcome of whether a duty existed would presumably have been different if the defendant had destroyed her computer after she received a subpoena duces tecum. In this situation, there would be an argument that the duty of preservation arose once she received the subpoena requiring her to produce the documentation. The Florida Supreme Court declined to accept review of the decision. *See* Case No. SC19-1106, 2019 WL 5290225 (Fla. Oct. 17, 2019).

to a medical provider's bill for hospital emergency services and care, the Florida Supreme Court held the deductible should be subtracted from the total charges prior to application of the reimbursement limitation in section 627.736(5)(a)1.b., Florida Statutes. The Fifth District had taken this approach and certified a question of great public importance. While the case was pending, the Fourth District reached the opposite conclusion in *State Farm Mutual Automobile Co. v. Care Wellness Center, LLC*, 240 So. 3d 22 (Fla. 4th DCA 2018), holding that the deductible should be applied after charges are reduced under any fee schedule found in section 627.736. Accordingly, the Supreme Court approved the Fifth District's decision in *Florida Hospital Medical Center* and disapproved the Fourth District's decision in *Care Wellness Center*.

Lee Mem'l. Health Sys. v. Progressive Select Ins. Co., 260 So. 3d 1038 (Fla. 2018).

Ruben Gallegos was struck by a car and injured; Lee Memorial Health Systems (LMHS) provided hospital services related to Mr. Gallegos' injuries and recorded liens on two different dates of service pursuant to chapter 2000-439, section 18, Laws of Florida (the LMHS Lien Law), which created LMHS as a "public health care system" provided that LMHS was entitled to liens for reasonable charges for its services. The Second District Court of Appeal held the LMHS Lien Law violated two provisions of the Florida Constitution. The Florida Supreme Court affirmed in part and reversed in part. The high court held that the Second District should not have reached the question of whether the LMHS Lien Law violates the constitutional prohibition against the impairment of contracts under article I, section 10 because the issue was not properly before the court. However, the Florida Supreme Court then held (1) the Second District correctly found that the LMHS Lien Law violates article III, section 11(a)(9) of the Florida Constitution as a special law pertaining to the "creation, enforcement, extension or impairment of liens based on private contracts." A discussion of statutory damages was unnecessary in light of the determination that the LMHS Lien Law was unconstitutional and unenforceable.

State Farm v. Ferranti, 256 So. 3d 238 (Fla. 5th DCA 2018).

After the plaintiff was rear-ended, he sued his insurer, State Farm, under his UM/UIM coverage. He moved for partial summary judgment on liability and causation, but State Farm argued the plaintiff's testimony established "issues of material fact regarding his pre-existing medical conditions" and therefore his motion for partial summary judgment was premature. The trial court granted the motion, holding that "causation was established as a matter of law because 'the tortfeasor . . . was a legal cause of some loss, injury or damages.'" But the appellate court reversed, stating that "the trial court erred in granting partial summary judgment regarding causation and damages when Ferranti's deposition testimony revealed, and he himself later conceded, that there was overwhelming evidence of preexisting conditions which directly related to the issue of causation." The court remanded for a new trial and discussed other evidentiary issues that were likely to reoccur. In particular, the court opined that the trial court abused its discretion in excluding evidence of the plaintiff's prior lower back injury because that evidence was relevant to his claim of permanent injuries as well as pain and suffering.

Citizens Prop. Ins. Co. v. Laguerre, 259 So. 3d 169 (Fla. 3d DCA 2018).

Citizens paid approximately $8,000 on a claim that an appraisal estimate showed was worth about $60,000. After the appraisal umpire issued an award in the amount of $27,000, Citizens agreed the plaintiff was entitled to attorney's fees. At the fee hearing, plaintiff presented expert testimony of an attorney who testified that these types of "first party/late notice cases" have become very difficult to handle. After the fee hearing, the trial court entered an order applying an hourly rate of $325, finding 185 hours was appropriate, and creating a lodestar of $60,125. The trial court also applied a 2.0 multiplier based on findings that (1) the relevant market required a fee multiplier to obtain competent counsel; (2) the plaintiff's counsel faced substantial risk of nonpayment; (3) the likelihood of success at the outset (defendant's evaluation of the claim reflected in the proposal for settlement of $2,000 which had been served on the plaintiff); and (4) the novelty and difficulty of the question involved, and the results obtained. On appeal, Citizens contended the multiplier was not warranted because there was no evidence that plaintiff had difficulty obtaining competent counsel, the results obtained did not warrant one, and the complexity of the issues could not be the basis for awarding a multiplier. Based on the Florida Supreme Court's decision in *Joyce v. Federated Nat'l Ins. Co.*, 228 So.3d 1122, 1131-32 (Fla. 2017), which was decided while this case was still pending, it is no longer the rule that multipliers are only proper in rare and exceptional circumstances. Instead, the court looked to current law on fee multipliers as expressed in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), *Standard Guarantee Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990), and *Joyce*. The Third District found competent substantial evidence to support the award of the multiplier under the principles of *Rowe*, *Quanstrom,* and *Joyce*, and therefore no abuse of discretion in the trial court's

order. This case appears to be important authority for supporting the award of a multiplier in any difficult contingency fee case.

Harper v. Geico Gen'l Ins. Co., 272 So. 3d 448 (Fla. 2d DCA 2019).

In this appeal from summary judgment in favor of an insurer, the issue was when the 60-day cure period for bad faith by an insurer begins to run. The plaintiff was involved in an automobile accident on June 30, 2013, in which she sustained serious injuries. She filed suit against both the at-fault driver and GEICO on December 10, 2013. GEICO then paid the plaintiff the at-fault driver's liability limits under his policy, but not the benefits claimed under the plaintiff's UM policy. The plaintiff filed a civil remedy notice (CRN) with the Department of Financial Services on December 18, 2013, and she mailed a copy to GEICO the same day. GEICO received the mailed copy of the CRN on December 26, 2013, and did not mail the UM settlement payment to plaintiff's counsel until Friday, February 21, 2014. The Second District noted that section 624.155(3)(d) "plainly states that no action shall lie if the damages are paid or corrective action is taken within sixty days after the insured files the CRN." Thus, the cure period began when the CRN was electronically filed with the Department, not when GEICO allegedly received the mailed copy. Sixty days from that date was February 16, 2014, which was a Sunday, making the end of the sixty-day cure period Monday, February 17, 2014. Because GEICO did not pay Harper's claim within sixty days of the date the CRN was electronically filed with the Department, the plaintiff was entitled to pursue her action for GEICO's alleged bad faith, and judgment in favor of the insurer was reversed.

Reid v. Daley, 276 So. 3d 878 (Fla. 1st DCA 2019).

A prisoner in the state corrections system filed a civil suit alleging he was a victim of fraud, deceit, dishonesty, and misrepresentation on the part of his post-conviction attorney. He sued the lawyer for monies he paid for work that was never done, as well as for mental anguish and emotional damages. The trial court properly dismissed the complaint because the $4,500 being sought did not meet the circuit court jurisdictional requirement. In addition, the complaint did not state a cause of action for emotional damages because the impact rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries sustained in an impact. While there is a very narrow class of cases to which the impact rule does not apply, i.e., where foreseeable harm is predominately emotional in nature, this was not one of those cases. Although the plaintiff alleged that the defendant's conduct caused him anger, humiliation, embarrassment and hypertension, that distress is the kind of intangible mental injury which is inadequate to overcome the impact rule. The court declined to extend *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003), which allowed emotional distress damages for a prisoner who alleged his attorney failed to turn over a document that would have resulted in the prisoner's release. *Rowell*, by its own terms, is limited to those rare situations where it is beyond dispute that a prisoner is wrongfully incarcerated and his attorney fails or chooses not to act on his behalf.

#MeToo: Preventing and Defending Workplace Harrassment Claims

By Jeffrey D. Slanker

JEFFREY SLANKER is a shareholder in the law firm of Sniffen & Spellman in Tallahassee, Florida. Mr. Slanker practices in the areas of Labor and Employment Law, Appellate Law, Local Government Law, Administrative Law, and Civil Rights Defense. Mr. Slanker is active in the Defense Research Institute's Labor and Employment Law Committee, the Florida Defense Lawyers Association, the Employers' Counsel Network, and the Florida Bar's Labor and Employment Law Section. He has been recognized as a rising star in labor and employment law by Florida Super Lawyers. Mr. Slanker received his B.S.B.A. in Economics from the University of Central Florida and his J.D. from Emory University School of Law.

The #MeToo and #timesup movements continue to dot headlines around the country. Individuals and employees are increasingly cognizant of their rights under employment discrimination laws given the ongoing press coverage of various high-profile scandals involving sexual harassment and assault. Employers and businesses are more well served now than ever to make sure that their policies, training regimen, and internal controls are sufficient to place employees on notice that harassment must be reported. Employers must also be sure that reported harassment is addressed appropriately. Advising clients on how to navigate this world, navigate new trends in harassment litigation, and defend harassment claims, is evolving. This article highlights some of the finer points of preventing and defending harassment litigation.

Trends

There is no doubt that the increased awareness around the #MeToo movement is resulting in tangible increases in sexual harassment claims and charges. The United States Equal Employment Opportunity Commission ("EEOC"), the federal governmental executive agency tasked with addressing and eliminating employment discrimination, has published statistics that demonstrate just how much that increased awareness has resulted in additional claims and litigation.

The most recent statistics date to the EEOC's fiscal year 2018. During fiscal year 2018, the number of sexual harassment charges filed with the EEOC increased more than 12 percent from the prior fiscal year. Previously, there had been no increase year over year of such charges for the preceding five years. The EEOC, which also chooses to litigate some claims on behalf of complaining parties, filed 41 separate sexual harassment federal lawsuits, a more than 50 percent increase from the previous year. Reasonable cause findings by the EEOC, or findings of reasonable cause to believe that sexual harassment occurred, increased 23 percent from 2017 to 2018. The EEOC recovered almost 70 million dollars for sexual harassment victims in 2018, an increase of over 22 percent from fiscal year 2017 when the EEOC recovered 47.5 million dollars for sexual harassment victims. Statistics do not lie; sexual harassment claims are increasing at a high rate.[1]

Types of Harassment Claims

Generally, in employment discrimination jurisprudence, there are two types of harassment claims: *quid pro quo* harassment, also referred to as harassment that results in a tangible employment action, and hostile work environment harassment, or harassment that does not result in a tangible employment action.[2] The difference between these two is important because different types of relief and standards for vicarious liability apply to each type of harassment.[3]

EDITOR'S NOTE: Claims of sexual harassment and employment discrimination have increased in the wake of the #MeToo movement and high-profile sexual harassment cases. Employers would be well served to review their policies and practices with the goal of preventing harassment and encouraging timely reporting should incidents occur. This article summarizes some best practices for employers and defense counsel.

As an initial matter, both federal and Florida state law prohibit harassment based on sex and both statutes are interpreted similarly.[4] That is because the federal law prohibiting sexual harassment, Title VII of the Civil Rights Act of 1964, and the state law prohibiting sexual harassment, the Florida Civil Rights Act of 1992, contain similar statutory language.[5] In fact, the Florida Civil Rights Act and its provisions prohibiting employment discrimination are modeled on Title VII.[6]

Quid pro quo is Latin for "something for something."[7] This is the type of harassment that most individuals think of when they think of workplace harassment. This harassment occurs when a supervisor conditions some tangible aspect of employment on submission to sexual advances or satisfaction of a sexual demand.[8] If a supervisor conditions, for example, a raise, a promotion, or even continued employment on submission to sexual advances, this would constitute tangible employment action harassment.[9]

In the context of defending harassment claims, an ounce of prevention is worth a pound of cure.

Hostile work environment harassment is when an individual does not actually suffer a tangible employment action, but rather suffers from and experiences a work environment that is so hostile and offensive based on behavior attributable to a sex-based animus, that it is as if a tangible employment action had occurred.

To establish hostile work environment harassment, plaintiffs must show:

(1) they belong to a protected class;
(2) they were subjected to unwelcome harassment;
(3) the harassment was based on their protected class;
(4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and
(5) a basis for holding the employer liable.[10]

Most of these elements are fairly straightforward. A significant portion of disputes in litigation of sexual harassment claims concern whether the alleged harassment is severe and pervasive. There is both a subjective and objective component to severe and pervasiveness.[11] "If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."[12]

To this end, an individual must show the environment was objectively severe and pervasive under the totality of the circumstances.[13] This ensures civil rights statutes do not become civility codes and that ordinary workplace interactions are not deemed unlawful harassment.[14] Courts balance four factors to determine whether harassment is objectively severe and pervasive to constitute a hostile work environment:

(1) the conduct's frequency;
(2) its severity;
(3) whether it is physically threatening or humiliating, or a mere offensive utterance; and
(4) whether it unreasonably interfered with an individual's job performance.[15]

The "mere utterance of an ... epithet which engenders offensive feelings in an employee ... does not sufficiently affect the conditions of employment" but rather the atmosphere must be so "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment."[16]

Defense to Harassment Claims

In the context of defending harassment claims, the saying "an ounce of prevention is worth a pound of cure" is all the truer. The United States Supreme Court has established an affirmative defense for employers defending hostile work environment claims, but it does not apply to *quid pro quo* claims given that such claims result in vicarious liability on the part of the employer.[17]

An employer may assert an affirmative defense to hostile work environment claims if it can establish that it "exercised reasonable care to prevent and correct promptly any … harassing behavior," and the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided … or to avoid harm otherwise."[18]

The first part of this defense is established if an employer promulgates an anti-harassment policy of which employees are aware.[19] Small employers may also establish this prong by showing they employed informal complaint mechanisms, even in the absence of a formal policy.[20] The second prong is established if an employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer.[21] The rationale for this requirement is to allow employers the ability to resolve issues in the workplace of which it might not be aware. Plaintiffs must reasonably take advantage of anti-harassment policies and corrective procedures because workplace discrimination cannot be remedied if the employer lacks knowledge of the discrimination and does not have the victim's cooperation.[22] Victims of discrimination are obligated to use reasonable care to avoid harm where possible and utilize tools provided by the employer to resolve discrimination.[23] When an individual waits too long to complain, he unreasonably fails to avail himself of preventative measures.[24] Employees must also give their employers an opportunity to correct the harassment and be open to corrective opportunities provided by employers.[25]

Preventative Measures and Best Practices

Smart employers must have an action plan to make sure that policies implemented are effective and followed. Smart defense counsel must vet anti-harassment policies and procedures and practices implementing such procedures. This must involve a multi-pronged approach to make sure that harassment claims are identified and corrected.

Review, Vet, and Analyze Policies and Procedures and Update as Appropriate

Obviously, the starting point in preventing liability for harassment claims is making sure the employer has an "effective" anti-harassment policy. There are certain elements that anti-harassment policies must have to be effective. The policy must clearly prohibit sexual harassment. The policy must provide multiple avenues for an employee to complain of alleged harassing behavior so that an employee need not report to their harasser.[26] The policy should require employees to report alleged harassment and should provide for prompt investigation of complaints. Employers should also disseminate policies to all employees, and obtain signed acknowledgements of receipt of anti-harassment policies[27]

Conduct Training of Human Resources Staff and Managers Addressing and Dealing with Harassment Complaints

Employers must make sure they are training staff effectively and should train human resources staff and management personnel with responsibility to recognize harassment in the workplace with special care. Indeed, workplace managers and staff that are in any way responsible for recognizing or intaking and processing sexual harassment allegations in the workplace must understand their obligations to promptly identify potential harassment and permit it to be investigated. Employers should train such employees on how to handle complaints of harassment and where it must be reported to be investigated. Employers should also guide managerial and human resources employees on how to identify situations where harassment might not be present but could escalate into harassment. This could include uncivil conduct, jokes, and other behavior that is starting down the road of harassment. Importantly, employers must make very clear that retaliation of any kind against an employee for reporting sexual harassment is absolutely prohibited. Without diligent front-line policing of workplace conduct, harassment could go unchecked and unaddressed. This will lead to potential liability if it is deemed that an employer's policy was not effective in identifying and eradicating sexual harassment in the workplace.

Conduct and Establish a Training Regimen for Staff That Complies with EEOC Best Practices

Training of staff on the anti-harassment policy and reporting procedure is crucial as well. Employees should be trained to recognize harassment and report it to management. The focus should be on organizational norms and rules in addition to the specifics of the anti-harassment policy. Employees should be trained on what their rights and responsibilities are with respect to harassment in the workplace and what happens when they are a victim of harassment or observe harassment in the workplace. Employees should also be informed of the investigative mechanisms for addressing harassment claims, their freedom from retaliation for reporting conduct, and what could happen if someone is found guilty of harassment in the workplace. The EEOC has issued best practices on the conduct of anti-harassment training. They recommend that such training be:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

Of particular focus to the EEOC's best practices for this training is tying the training to the specific and unique requirements of a workplace and workforce. The EEOC has also recommended different approaches to training, including: workplace civility training, respectful workplace training, and bystander intervention training with the aim towards eliminating conduct that might not be unlawful harassment, but could contribute to a workplace where unlawful harassment could occur.[28]

A New World: Special Considerations in Defending Sexual Harassment Claims

One big change in many states in the country in the wake of the #MeToo movement has been tougher laws on the state level with respect to sexual harassment. While such legislative changes have not occurred on the state level in Florida, changes in other states may provide a look towards the future of the defense of sexual harassment claims in Florida.

New York has passed sweeping legislation affecting sexual harassment claims on several fronts. The legislation prohibits employers from requiring employees to arbitrate

sexual harassment claims.[29] New York law also makes annual sexual harassment training mandatory and requires that the training meet a myriad of requirements.[30] Notably, New York has lowered the bar for establishing sexual harassment claims, requiring plaintiffs meet a lower bar than the severe and pervasive requirement for showing hostile work environment harassment.[31]

California has also passed sweeping new legislation with unique specific requirements as it relates to sexual harassment training. Under California law, employers with at least five employees must provide two hours of interactive sexual harassment training to supervisory employees and at least one hour of such training to non-supervisory employees. Training must be provided once every two years after an initial training.[32]

Vermont has passed sexual harassment legislation with some unique characteristics. Under Vermont law, employers may not include no-rehire provisions in settlement agreements that resolve claims of sexual harassment. Vermont law also permits the state's attorney general to enter onto employer premises and investigate claims of sexual harassment. This includes authority to interview employees and examine employer records. The Attorney General is authorized then to require employers to conduct annual training and conduct workplace surveys of the working environment depending on the results of the investigation.[33]

While Florida employers are not dealing with statewide restrictions like these, employers must be aware of local ordinances that may impose heightened requirements than state and federal law. Federal governmental contractors must be sure to comply with all conditions and executive orders imposed. Furthermore, some unique characteristics of federal law, and specifically, federal tax law, affects the litigation and resolution of sexual harassment claims. The 2017 Tax Cuts and Jobs Act, and specifically the new section 162(q) of the Internal Revenue Code added by the Act, prohibits employers from deducting from taxes any settlement or payment related to sexual harassment where the settlement contains a non-disclosure provision or the attorney's fees related to such settlement or payment. Employers and their counsel must carefully consider the implications of the deduction and whether sacrificing the deduction or non-disclosure agreement is more advantageous on a case by case basis.

Conclusion

Sexual harassment claims will likely continue to grow with the increased publicity and awareness of such claims given the #MeToo and #timesup movements. Forward-thinking employers and defense counsel need to equip their clients and businesses with the most up-to-date preventative measures with an eye towards ensuring that workplace harassment does not occur and does not even have a chance to begin. Employers that find themselves in suit, and defense counsel advising them, must be sure to stay abreast of the applicable law which is changing, in some ways significantly, and with the technical aspects of defending and resolving harassment claims.

1 What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment, United States Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm_ (last accessed September 9, 2019).
2 *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 508 (11th Cir. 2000).
3 *See generally Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 760–63 (1998).
4 *See Alvarez v. Royal Atlantic Developers, Inc.*, 610 F. 3d 1253, 1271 (11th Cir. 2010)
5 *Id.*
6 *Id.*
7 Black's Law Dictionary (10th ed. 2014).
8 *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F. 3d 1227, 1232 (11th Cir. 2006).
9 *See id.*
10 *Gupta v. Fla. Bd. of Regents*, 212 F. 3d 571, 581 (11th Cir. 2000) (internal citations omitted), *abrogated on other grounds* by *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).
11 *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).
12 *Id.*
13 *See id.* at 23.
14 *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Gupta*, 212 F.3d at 583.
15 *See Harris*, 510 U.S. at 21-22.
16 *Id.* at 21 (internal quotations and citations omitted).
17 *See Frederick v. Sprint/United Mgmt. Co.*, 246 F. 3d 1305, 1311 (11th Cir. 2001).
18 *Id.* at 1313.
19 *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1303 (11th Cir. 2007) (holding if an employer promulgates an anti-harassment policy of which the plaintiff is aware, it is presumed to have complied with its duty under the defense's first prong).
20 *See Frederick*, 246 F. 3d at 1313-14.
21 *See Faragher*, 524 U.S. at 807.
22 *Madray v. Publix Supermarkets, Inc.*, 208 F. 3d 1290, 1302 (11th Cir. 2000).
23 *See Faragher*, 524 U.S. at 807.
24 *Baldwin*, 480 F. 3d at 1287, 1307 (finding defense applied because the plaintiff waited over three months after first instance of harassment to complain).
25 *Fodor v. E. Shipbuilding Grp.*, 598 F. App'x. 693, 697 (11th Cir.), *cert. denied*, 136 S. Ct. 146, *reh›g denied*, 136 S. Ct. 576 (2015) ("Because Fodor never gave Eastern 'an opportunity to address the situation and prevent further harm from occurring' … and because Eastern took reasonable care to prevent harassment beforehand, the Faragher/Ellerth defense shielded Eastern from liability for a hostile work environment"); *Coates v. Sundor Brands, Inc.,*164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring) (the second prong is also met where a response by the company, including meeting to discuss concerns with the offending supervisor and offering an alternative position was inadequate" to the plaintiff).
26 *See Walton v. Johnson & Johnson Services, Inc.*, 347 F. 3d 1272, 1286 (11th Cir. 2003) (explaining that at a minimum, employers must establish a complaint procedure that encourages victims to report the harassment without having to go to the offending supervisor).
27 *See Madray*, 208 F. 3d at 1298 (stating that dissemination of the policy "is fundamental to meeting" the first element of the defense).
28 *Promising Practices for Preventing Harassment*, Equal Employment Opportunity Commission, eeoc.gov/eeoc/publications/promising-practices.cfm (last accessed September 9, 2019).
29 N.Y. C.P.L.R. 7515 (McKinney).
30 N.Y. Lab. Law § 201-g (McKinney).
31 N.Y. Exec. Law § 290, et. seq. (McKinney).
32 Cal. Gov't Code § 12950, et. seq. (West).
33 Vt. Stat. Ann. tit. 21, § 495h (West).

GREGORY A. GIDUS is an associate in the Tampa office of Carlton Fields, PA. He represents insurance clients in sophisticated first-party property and third-party liability coverage matters and other complex coverage disputes involving directors and officers liability insurance, errors and omissions liability insurance, professional liability insurance, employment practices liability insurance, comprehensive general liability insurance, financial institution bonds, and first-party bad faith. Mr. Gidus also counsels businesses and other clients on cybersecurity issues and assists in responding to security breaches and data loss incidents, guiding clients through the loss of personally identifiable information and other system compromises.

ROBIN P. KEENER is a shareholder with Stoler Russell Keener Verona P.A. Her practice is concentrated in the area of insurance coverage and good faith claims handling. She represents insurance clients throughout the state of Florida in litigation including declaratory, breach of contract and extra-contractual actions. The majority of Ms. Keener's practice is focused on third party personal and commercial insurance coverage issues involving serious bodily injury claims and construction defect claims. She is admitted to practice in all state courts of Florida; the Eleventh Circuit Court of Appeals; and the United States District Courts for the Northern, Middle and Southern Districts of Florida. She is AV-rated by Martindale-Hubbell

Florida Legislature Creates Right of Contribution for Defense Costs Among Liability Insurers

By Gregory A. Gidus and Robin P. Keener

While much of the Florida insurance industry focused on assignment of benefits legislation this session, the legislature also passed, and the governor signed into law, House Bill 301, an omnibus insurance bill that addresses various portions of the State's insurance code. Of particular importance, especially for insurers involved in construction defect, environmental, and other types of long-tail claims, is the establishment of section 624.1055, Florida Statutes, which creates a right of contribution for defense fees among liability insurers that each have a duty to defend a mutual insured.

It is very common, particularly in construction defect actions, that multiple carriers will have a duty to defend a common insured. This can occur when the timing of the alleged damages are unknown and multiple policy periods with different insurers are implicated or when a general contractor has been added as an additional insured on numerous subcontractors' policies.

Prior to the creation of section 624.1055, it was well-settled Florida law that "[c]ontrubution is not allowed between insurers for expenses incurred in defense of a mutual insured."[1] This prohibition was based on the reasoning that "[t]he duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer."[2] In *Argonaut Insurance Co. v. Maryland Casualty Co.*, the Third District also rejected the argument that subrogation should be allowed to discourage insurers from avoiding their duty to defend, stating:

> The Legislature has not seen fit to allow contribution for costs or attorney's fees between insurance companies. If contribution for costs were allowed between insurance companies, there would be multiple claims and law suits. The insurance companies would have no incentive to settle and protect the interest of the insured, since another law suit would be forthcoming to resolve the coverage dispute between the insurance companies. This is contrary to public policy, particularly since the insured has been afforded legal protection and has not had to personally pay any attorney's fees.[3]

However, the practical effect of the *Argonaut* ruling was to discourage insurers from being the first to assume the defense of a mutual insured. This reluctance was based on the fact that the defending insurer would be on the hook for the entire defense without any rights against other insurers who also had, or potentially had, a duty to defend. Once any insurer undertook the defense of a common insured, other insurers who also had, or potentially had, a duty to defend would suffer no consequences for failing to contribute to the defense. This scenario was especially common in construction defect lawsuits, where the duty to defend could be triggered in numerous policy years and under multiple policies issued to contractors, subcontractors, and others.

EDITOR'S NOTE: The Florida Legislature has recognized the benefit of providing for contribution for defense costs among insurers in a provision that will apply to any claims or suits initiated after January 1, 2020.

But now, the Legislature has recognized the benefits to all parties of contribution for defense costs between insurers. Section 624.1055, which applies to "any claim, suit, or other action initiated on or after January 1, 2020," states:

> A liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action.[4]

This right to contribution applies broadly to liability insurance policies issued for delivery in Florida and to "liability insurance policies under which an insurer has a duty to defend an insured against claims asserted or suits or actions filed" in Florida, including policies issued by surplus lines insurers.[5] However, section 624.1055 does not apply to "motor vehicle liability insurance or medical professional liability insurance."[6]

One question left unanswered by the Legislature is how courts will allocate defense fees among the insurers with shared duties to defend. The statute directs the court to allocate defense fees among the insurers who owe a defense "in accordance with the terms of the liability insurance policies."[7] However, this provision also permits the court to "use such equitable factors as the court determines are appropriate in making such allocation."[5] As the policies are unlikely to fully address all of the allocation issues, the courts will play a substantial role in determining how this statute is implemented. It is not clear at this time what method courts will use or what "equitable factors" will be considered.

Despite this lingering question, the enactment of section 624.1055 should prove beneficial to both insureds and insurers.

1 *Argonaut Ins. Co. v. Md. Cas. Co.*, 372 So. 2d 960, 963 (Fla. 3d DCA 1979).
2 *Id.*
3 *Id.* at 964.
4 § 624.1055(4), Fla. Stat. (2019).
5 *Id.*
6 § 624.1055(5).
7 § 624.1055(1).
8 *Id.*

FDLA
FLORIDA DEFENSE LAWYERS ASSOCIATION

Liability for an Employee's Intentional Torts

By John A. Chiocca and Chelsea Furman

JOHN A. CHIOCCA is a partner in the West Palm Beach office of Cole, Scott & Kissane, P.A., where his practice focuses on the defense of construction defect, premises liability, and personal injury claims. He is the co-chair of FDLA's Premises Liability Committee, a Board Certified Specialist in Florida Construction Law, and is AV-rated by Martindale-Hubbell. Mr. Chiocca is a 1998 graduate of the University of Virginia School of Law.

CHELSEA FURMAN is an associate at Cole, Scott & Kissane in West Palm Beach, Florida. She predominantly defends personal injury and wrongful death claims. Ms. Furman earned a Bachelor of Science degree from Florida State University and received her Juris Doctor from Florida State University College of Law in 2015.

There is a widely mistaken belief that employers cannot be held liable for the intentional torts of their employees. Many employers have the erroneous impression that if they do not direct an employee to commit an intentional bad act, they are automatically shielded from liability. This article will address this incorrect interpretation of the law and will discuss the most common arguments for employer liability for employee's intentional bad acts.

An employer can be held liable for the intentional torts of its employees, including acts like false imprisonment, assault, battery, and even homicide.[1] There are two common paths to liability: (1) to assert that the employer is vicariously liable for the tortious conduct of its employee; and (2) to pursue a claim for negligent hiring or negligent retention/supervision. For vicarious liability claims, the focus is on whether the alleged tort was within the employee's scope of employment. With respect to claims for negligent hiring or negligent retention/supervision, the core predicate for establishing liability hinges upon foreseeability of the employer.

Vicarious Liability

Vicarious liability is not based upon the acts of the employer, but rather, the acts of the employee imputed to the employer.[2] In Florida, an employer can be held vicariously liable for an employee's tortious conduct if the employee committed the alleged act: (1) within the scope of employment, or (2) during the course of employment and to further a purpose or interest, however excessive or misguided, of the employer.[3]

In determining whether the conduct occurred within the scope of employment, it is not enough to simply show that an employee was on duty at the time.[4] The conduct of an employee is considered within the course and scope of employment when it: (1) is of the kind the employee is hired to perform, (2) occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) is activated, at least in part, by a purpose to serve the employer.[5] The question of whether an employee is acting within the course and scope of employment, where the facts are not in dispute, is a question of law.[6]

It is often unclear as to whether an employee's tortious act was committed within the scope of employment or in furtherance of a business interest. If an employee were to assault or batter someone while on the job, it would be unlikely that this would be performed in the scope of employment or to further a purpose of the business. However, the business may still be vicariously liable for the employee's actions. In *Diaz v. Cabeza*, the Plaintiff, Diaz, was a waiter/busboy at Defendant Cabeza's restaurant.[7] Diaz alleged that Cabeza verbally abused him before striking him with a wine bottle and a fork. Diaz sued Cabeza for assault and battery, and he sued the restaurant on the theory that the restaurant, as the employer, was vicariously liable for Cabeza's acts. The restaurant moved for summary judgment, arguing that it could not be held vicariously liable for Cabeza's intentional torts because the acts of assault and battery could not have been motivated by a purpose to serve the interests of the restaurant. The trial court's summary judgment was reversed because there was a permissible inference from that stated facts that Cabeza committed these aggressive acts to make his staff work harder and faster.[8]

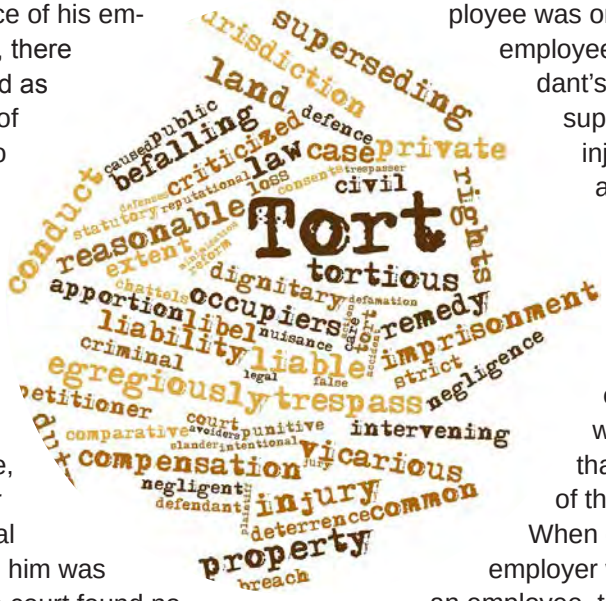
In a similar decision, in *Montadas v. Dade Scrap Iron & Metal*, the plaintiff, a pizza delivery driver, was attacked by the vice president/owner of Dade Scrap Iron & Metal because he was late

EDITOR'S NOTE: An employer can be held responsible for an employee's intentional torts through a theory of vicarious liability, as well as through claims of negligent hiring, supervision, or retention. The following article summarizes Florida court decisions illustrating how hiring practices and supervision affect an employer's potential exposure.

with his pizza delivery to the establishment.[9] The driver sued Dade Scrap Iron & Metal as the tortfeasor's employer. Summary judgment in the employer's favor was reversed due to the existence of disputed facts surrounding the question of whether the employee's act was committed within the scope of his employment and/or in furtherance of his employer's business interest. Specifically, there were "conflicting accounts in the record as to whether [the owner] had a practice of ordering in pizza for [his] employees to expedite their lunch breaks in order to make more productive use of their time."[10]

Generally, sexual assaults and sexual batteries committed by employees are held to be outside the scope of their employment and therefore insufficient to impose vicarious liability on the employer.[11] For example, in *Iglesia Cristiana La Casa Del Senor v. L.M.*, a pastor was accused of sexual assault, and the church that employed him was sued for his intentional bad acts.[12] The court found no vicarious liability where the sexual assault by the pastor did not occur on church property, and the record did not support a finding that the pastor's criminal act constituted the kind of conduct he was employed to perform or that he was in any way motivated by his desire to serve the church.[13] The court held that the record established that the pastor's purpose in arranging a meeting with the assault victim was to satisfy his personal interests, and not to further the church's objectives.[14] The "sexual assault was an independent, self-serving act by [the pastor]; an act that he knew was wrong to commit and that the Church would surely have tried to prevent had it known of his plans."[15] Accordingly, the court found, as a matter of law, that the church could not be held vicariously liable for the pastor's criminal act.[16]

While vicarious liability is typically not imposed on employers when an employee commits the tortious act of sexual battery, Florida recognizes vicarious liability when "the employer is a common carrier for hire to the public, and the tort or attack is by an employee upon a passenger while the contract for transport is being accomplished."[17] In *Nazareth v. Herndon Ambulance Services*, the plaintiff was assaulted by the EMT who attended her in the passenger part of the ambulance on the way to the hospital.[18] Florida imposes vicarious liability on the employer in such cases due to "the existence of the implied contract between the victim-passenger and the carrier for safe passage, free from attack by the carrier's employees."[19] This high standard of care imposed upon common carriers is because a passenger must entrust his or her body to the carrier's care and control, thereby creating a special duty to protect.[20]



Negligent Hiring and Retention/Supervision

In contrast to vicarious liability, a claim of a negligent hiring or retention/supervision claim does not depend on whether the incident occurred while the defendant's employee was on duty or off duty or whether the employee was seeking to further the defendant's interest. Such claims for negligent supervision and/or retention permit an injured plaintiff to recover damages against an employer for acts an employee committed outside the scope and course of employment.[21]

The torts of negligent hiring, or negligent retention/ supervision are fundamentally distinct from the employee's underlying, intentional wrong.[22] However, it "is necessary that the underlying wrong—the actions of the employee or servant—be a tort."[23] When confronted with claims that assert an employer was negligent in hiring and retaining an employee, the crucial distinction between the two is the time at which the employer is charged with knowledge of the employee's unfitness.

A. Negligent Hiring

A claim for negligent hiring arises when, before the time the employee is hired, the employer knew or should have known that the employee was unfit. When evaluating a negligent hiring claim, "the inquiry is focused on whether the specific danger that ultimately manifested itself … reasonably could have been foreseen at the time of hiring."[24] To establish a *prima facie* claim for negligent hiring, a plaintiff must demonstrate that:

(1) the employer was required to make an appropriate investigation of the employee and failed to do so;

(2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and

(3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.[25]

Liability in these cases focuses on the competence of the employer's background investigation of a prospective employee prior to employment. Generally, the standard is whether the "employer exercised the level of care which, under all the circumstances, the reasonably prudent man would exercise in choosing or retaining an employee for the particular duties to be performed."[26]

There is a presumption of no negligence for an employer that hires an employee who ends up committing an intentional tort if, before hiring, "the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."[27] Obtaining a criminal background check from the Department of Law Enforcement, making an effort to contact references and former employers, requiring the completion of an employment application that includes questions relating to whether the prospective employee has ever been convicted of a crime or sued for an intentional tort, obtaining a check of the driver's license record if relevant to the work that would be performed, and interviewing the prospective employee are the requirements of a background investigation that will entitle an employer to a presumption of not being negligent in hiring an employee who later commits an intentional tort.[28] If an employer opts not to conduct the thorough investigation described above, that choice does not create a converse presumption that there was a failure by the employer to use reasonable care in hiring.[29] However, it becomes necessary to consider the type of work that the prospective employee is to perform in determining the responsibility of the employer to investigate an applicant's background.[30] The analysis uses a sliding scale that factors in the amount of contact a prospective employee is to have with others.

Where the employee's prospective duties will require only "incidental contact" with others, the required level of inquiry is "correspondingly reduced so that obtaining past employment information and personal data during the initial interview may be sufficient."[31] *Tallahassee Furniture Co. v. Harrison* involved an employee who worked as a furniture deliveryman for a furniture company. The job entailed delivering furniture to customers' homes on a daily basis, specifically at times prearranged with the customers. The deliveryman returned to the plaintiff's home three months after delivering her furniture and assaulted her, having gained entry on a pretext about a receipt.[32] Despite the perceivable contact this employee would have with customers, no job interview was conducted, no references were requested, and he was not asked to complete a job application form. The delivery man was later found to be a paranoid schizophrenic and drug addict with an extensive criminal history.[33]

The court considered the meaning of "incidental contact" in the context of whether the employer had an obligation to conduct an independent investigation. It took into account that the delivery man's entry at the time of the attack was gained by consent, based on the employee's employment-related contact with the victim. The court held that because that employee's contact with the public was far more than incidental, the employer had a duty to inquire, not only as to criminal record, but to previous employment and character references as well.[34]

B. Negligent Retention/Supervision

The terms "negligent retention" and "negligent supervision" are frequently used interchangeably. As with negligent hiring, negligent retention likewise focuses on an employee's fitness. The difference is that it relates to a time after a problem employee began working when an employer became aware, or should have become aware, of the problem, and whether the employer then took action, such as investigating, reassigning, or terminating employment.[35] The Fourth District held that a cause of action for negligent retention has the following three essential elements:

(1) the employer was on notice of the employee's potentially harmful propensities;

(2) the plaintiff was within the foreseeable zone of risk created by the employment; and

(3) the employer's breach of duty proximately caused the plaintiff's injuries.[36]

The foreseeability inquiry relates both to duty and causation. The duty element focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that posed a general threat of harm to others.[37] With respect to causation, the focus is on whether and to what extent the defendant's conduct "foreseeably and substantially caused the specific injury that actually occurred."[38]

The leading case, *Garcia v. Duffy*, analyzed whether an employer owes a duty to a plaintiff to retain safe and competent employees by looking at the following three factors:

(1) both the employee and the plaintiff had a right to be in the place where the wrongful act occurred;

(2) the plaintiff met the employee as the direct consequence of the employment; and

(3) the employer would receive some benefit, even if only an indirect or potential benefit, from the meeting between the plaintiff and the employee.[39]

Courts have limited an employer's liability by looking for some nexus between the plaintiff and the tortfeasor's employment. There has to be "some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by [its] employee against any person under any circumstances."[40] Employer liability for negligent retention is proper only when the employer has "a legal duty, arising out of the relationship between the employment in question and the particular plaintiff, owed to a plaintiff who is within the zone of foreseeable risks created by the employment."[41] The employer not only must "owe a duty to the plaintiff; [but] the breach of that duty must be the proximate cause of the plaintiff's harm."[42]

In *Magill v. Bartlett Towing,*[43] an off-duty Bartlett employee drove a company tow truck, turned on its emergency lights, and pulled behind another car, causing that driver to pull over. The employee screamed at the driver to get out of her car, and when she did, the driver pushed her to the ground and stole her vehicle. Despite the employee using the company's tow truck when he committed the crime, the court did not find the employer liable for negligent retention.[44] The court explained that the plaintiff needed to "allege facts that would establish some relationship or nexus between the plaintiff and the tortfeasor's employment from which a legal duty would flow from the defendant-employer to that particular plaintiff."[45] The plaintiff failed to show a sufficient nexus between her and the tortfeasor's employment to support a finding that Bartlett Towing owed her a duty to employ and retain non-dangerous employees. The tortfeasor's employment with Bartlett Towing did not cause the plaintiff to meet the employee.[46] Only in circumstances where an employer is somehow responsible for bringing the plaintiff or third party into contact with the employee, whom the employer knew or should have known is predisposed to committing a wrong under particular circumstances, should the law impose liability on the employer.[47]

In a similar case, *Valeo v. East Coast Furniture Co.*,[48] the plaintiff's vehicle collided with a vehicle driven by an East Coast Furniture employee. Following the accident, the plaintiff approached the employee. Believing that the plaintiff was trying to rob him of the cash he was carrying for his employer, the employee swung a padlock at the plaintiff, causing injury to his eye.[49] As in *Magill*, the court held that because the employee did not meet the plaintiff as a direct consequence of his employment, his encounter with the plaintiff would not have been "reasonably foreseeable to the [employer] in the context of hiring or retaining its employee . . . ."[50]

Conclusion

It is essential that employers and their counsel understand the potential for liability for an employee's intentional torts. Adopting appropriate hiring practices and providing adequate supervision is essential to protect employers from being held responsible for tortious acts.

1 *E.g.*, *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 219 (Fla. 1936) (employee detained plaintiff and compelled her to return to store); *Stinson v. Prevatt*, 94 So. 656, 658 (Fla. 1922) (employee mortally shot plaintiff's husband); *Trabulsy v. Publix Super Market, Inc.*, 138 So. 3d 553, 554 (Fla. 5th DCA 2014) (employee shoved plaintiff causing plaintiff to fall to the floor); *Gonpere Corp. v. Rebull*, 440 So. 2d 1307, 1307 (Fla. 3d DCA 1983) (employee shot plaintiffs); *Parsons v. Weinstein Enterprises, Inc.*, 387 So. 2d 1044, 1045 (Fla. 3d DCA 1980) (company president and other employees chased, cornered, and beat plaintiff).

2 *Goss v. Human Servs. Assocs.*, 79 So. 3d 127 (Fla. 5th DCA 2012).

3 *Id.* at 132.

4 *Fields v. Devereux Found., Inc.*, 244 So. 3d 1193, 1196 (Fla. 2d DCA 2018); *see also Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986).

5 *Goss*, 79 So. 3d at 132.

6 *Id.* at 131-32 (citing *Saullo v. Douglas*, 957 So. 2d 80, 86 (Fla. 5th DCA 2007)).

7 *Diaz v. Cabeza*, 51 So. 3d 556 (Fla. 3d DCA 2010).

[8] *Id.*
[9] *Montadas v. Dade Scrap Iron & Metal*, 666 So. 2d 1054 (Fla. 3d DCA 1996).
[10] *Id.*
[11] *Nazareth v. Herndon Ambulance Serv.,* 467 So. 2d 1076,1078 (Fla. 5th DCA 1985). Note that such acts may be actionable as sexual harassment under the Florida Civil Rights Act and/or federal law, but that topic is beyond the scope of this article.
[12] *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So. 2d 353, 357-58 (Fla. 3d DCA 2001).
[13] *Id*. (quoting *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 599 (Okla. 1999)).
[14] *Id*. at 358.
[15] *Id.*
[16] *Id.*
[17] *Nazareth*, 467 So. 2d at 1078.
[18] *Id.*
[19] *Id.* at 1079.
[20] *Id.* at 1079-81.
[21] *City of Boynton Beach v. Weiss*, 120 So. 3d 606 (Fla. 4th DCA 2013); *see also ACTS Ret.-Life Cmtys. Inc. v. Estate of Zimmer*, 206 So. 3d 112, 117 (Fla. 4th DCA 2016).
[22] *G4S Secure Solutions USA, Inc. v. Golzar*, 208 So. 3d 204 (Fla. 3d DCA 2016).
[23] *ACTS Retirement-Life Cmtys. Inc. v. Estate of Zimmer*, 206 So. 3d 112 (Fla. 4th DCA 2016); *see also Gutman v. Quest Diagnostics Clinical Labs., Inc.*, 707 F. Supp. 2d 1327, 1331 (S.D. Fla. 2010).
[24] *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002).
[25] *Id.* (quoting *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. 2d DCA 1986)).
[26] *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 750 (Fla. 1st DCA 1991) (quoting *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. 2d DCA 1986)).
[27] § 768.096(1), Fla. Stat. (2019).
[28] § 768.096(1) & (2), Fla. Stat. (2019).
[29] § 768.096(3), Fla. Stat. (2019).
[30] *Garcia,* 492 So. 2d at 440-41.
[31] *Id*.
[32] The receipt was for a TV that the plaintiff had given the deliveryman during his first visit when he delivered the furniture:
Turner told Harrison that he needed a receipt for the television set she had given him, because "they," which Harrison assumed meant Tallahassee Furniture, thought he had stolen it.*Tallahassee Furniture Co.*, 583 So. 2d at 748.
[33] *Id.*
[34] *Id.*
[35] *Garcia*, 492 So. 2d at 439; *see also Dep't of Envtl. Prot. v. Hardy*, 907 So. 2d 655, 660 (Fla. 5th DCA 2005).
[36] *Ahern v. Odyssey Re (London) Ltd.*, 788 So. 2d 369, 372 (Fla. 4th DCA 2001).
[37] *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).
[38] *Id.*
[39] *Garcia*, 492 So. 2d at 440. Note that these are not elements of a test; an employer may be liable for negligent retention even if one of these factors is absent. *Id.*
[40] *Id.* at 435; *see also Valeo v. E. Coast Furniture Co.*, 95 So. 3d 921 (Fla. 4th DCA 2012).
[41] *Garcia*, 492 So. 2d at 440.
[42] *Watson v. City of Hialeah*, 552 So. 2d 1146, 1149 (Fla. 3d DCA 1989).
[43] *Magill v. Bartlett Towing, Inc.*, 35 So. 3d 1017 (Fla. 5th DCA 2010).
[44] *Id*.
[45] *Id.*at 1021.
[46] *Id.*
[47] *Garcia*, 492 So. 2d at 439.
[48] 95 So. 3d 921 (Fla. 4th DCA 2012).
[49] *Id.*
[50] *Id.* at 924.

An Attempt To Control What Controls Itself: Unraveling Florida's Autonomous Vehicle Laws

By Evan P. Dahdah

EVAN P. DAHDAH graduated from Florida State University with a B.S. in Political Science, cum laude, in 2017, and is a third-year student at Stetson University College of Law. He served as an Articles & Symposia Editor for the *Stetson Law Review* in 2018–2019 and is a current member of the Stetson Moot Court Board.

A car that can drive itself. With the help of a billion-dollar portfolio and a trusted assistant, Bruce Wayne's "Batmobile" could quickly drift around corners and cars while his hands were busy zipping up his superhero suit. George Jetson could get his son ready for school during their morning commute with the help of a flying vehicle driving itself. The idea of owning anything even remotely similar to these vehicles once seemed impossible for the average person. However, fully autonomous vehicles ("AVs") are no longer fantasy; cars with a self-driving option are already being tested across the country.

Overall, Americans — both policymakers and the everyday citizen — expect AVs to serve a wide array of uses.[1] Not only can these vehicles increase the efficiency of our globalized economy, but these vehicles may also have a tremendous impact on driver safety by reducing collisions through the utilization of highly advanced computer systems that can predict and prevent accidents.[2] The beginning stage of a technological era, however, will inevitably carry bugs, glitches, or viruses.[3] These unpredictable dangers with AVs during their beginning stages will be felt by the drivers of the vehicles, but most importantly the public using the same roads. It only takes a split second for an AV to glitch, and a distracted human operator (with the mindset that the vehicle is driving itself) to cause serious harm to the vehicle, driver, or third parties.[4]

As a result of state legislatures encouraging the use of autonomous vehicles on their roads, the public's fears surrounding this technology have commanded federal attention over the past decade. Due to the rapid evolution of vehicles being programmed with various levels of automation, the Department of Transportation (DOT), through the National Highway Traffic Safety Administration (NHTSA), continues to research, test, and implement lower level policy documents and guidelines for states to incorporate into laws regulating these vehicles on their roads.[5] The NHTSA currently regulates the manufacturing safety standards of these vehicles, while state governments are given the discretion of regulating these vehicles' operation on their roadways.[6]

Even though states are given the discretionary power to regulate the operation of AVs, state laws may be preempted if they stand as an "obstacle to the accomplishment and execution of a NHTSA safety standard."[7] And although the NHTSA is currently conducting the early phases of testing and research for these vehicles prior to the enactment of federal uniform laws, several states have raced to establish AV laws without a firm grasp of the technology.

This article will discuss Florida's effort to become one of the first states to allow these vehicles on its roads. The article begins with the legislative history behind the state's current AV laws,

EDITOR'S NOTE: This timely article provides a survey of Florida's efforts to promote autonomous or "self driving" vehicles from 2012, when Florida passed one of the first statutes governing these vehicles, to legislation passed in 2019. The article also looks at approaches to limiting liability for the use of this developing technology in Florida and elsewhere. It was adapted from a Note originally written for the *Stetson Law Review.*

and then compares the plain language of Florida's laws with other state AV laws. The article will identify several gaps in Florida's current laws and will propose potential solutions for the Florida courts and legislature.

I. FLORIDA AND THE AUTONOMOUS VEHICLE

A. Florida's Hopes and Dreams for the Self-Driving Car

In 2012, Florida became one of the first states, alongside Nevada, Michigan, and California, to enact legislation governing the testing and use of autonomous vehicles on its roadways.[8] Senator Brandes, a veteran lawmaker who has been the main proponent of autonomous vehicles, pioneered the first AV bill.[9] He recently spoke about the rapid progression of the AV industry at the 2018 Florida Autonomous Vehicle Summit, and seeks to have these vehicles on Florida roads as soon as possible.[10]

Because Florida's first AV statutes in 2012 mandated a "testing phase" and a report ("the Report") from the Department of Highway Safety and Motor Vehicles (DHSMV) by February 12, 2014, Florida could not establish itself as an automated vehicle testing ground to receive federal grants or private investment until those results were determined. As this article will explain in more detail in the following sections, the Report was a prerequisite for both public and private funding for AVs and related technology. Shortly after the DHSMV's report in 2014, however, the Florida Legislature passed a bill which expanded the entities authorized to conduct autonomous vehicle testing to include research organizations with accredited educational institutions. Florida is currently undertaking massive plans while relying heavily on the private sector to introduce this technology onto its roads as soon as possible. Thus, although the benefits of autonomous vehicle technology are framed in terms of cities using these technologies, the driving force behind this push for automation seems to be grounded in something else — profit.[11]

Tampa is one of the first cities in the nation to deploy automated and connected vehicle technology on real city streets.[12] The Tampa Hillsborough Expressway Authority (THEA) has created a "Connected Vehicle Pilot Program" ("Pilot Program") in attempts to transform its downtown area into a more advanced, autonomously backed transportation system. The goals of the Pilot Program are several-fold: (1) prevent crashes through the use of automated vehicles; (2) enhance traffic flow; (3) improve transit trip times; and (4) reduce greenhouse gas emissions.[13] Once the Report was finalized in 2014, THEA was able to accept a DOT contract as a part of its own federal pilot program to test these vehicles in various parts of the U.S.[14] In 2016, the DOT authorized THEA and its private sector partners to proceed with a design, testing, and deployment stage that began on January 1, 2018.[15] Over the course of 2017, THEA finalized its $21 million-project to fully scale the connected vehicle technology throughout Tampa's downtown. Included as one of THEA's partners on the Pilot Program is the University of South Florida Center for Urban Transportation Research — an "accredited education institution" — which is required under Florida law to allow THEA's AV testing to move forward.

Another new project that Florida has planned is SunTrax, a "large-scale, state-of-the-art facility being developed by the Florida Department of Transportation (FDOT), Florida's Turnpike Enterprise (FTE) dedicated to the research, development and testing of tolling and emerging transportation technologies in safe and controlled environments."[16] Similarly to THEA's Pilot Program, SunTrax's funding comes from its partnership with the U.S. DOT as a "designated AV proving ground" — among only ten other areas in the nation. SunTrax's mission is simple: it will be a 400-acre site along one of Florida's main interstates that will be solely used to accelerate the future of transportation.[17] This massive site will be created to mirror many situations that regular vehicles encounter on a daily basis, including a 2.25-mile oval with a 70 mph design speed, a replicated multi-modal passenger transfer (similar to airport drop-off terminals), a simulation of urban intersections, and an overpass above the main road.

B. The History of Florida's AV Laws

1. The Climb: 2012

At the time of the AV laws' inception, fully automated vehicles were not even available to the public. Florida's legislature began its mission toward automation by stating that its intent behind its first AV laws was to encourage the "safe development, testing, and operation of motor vehicles with autonomous technology on the public roads of the state."[18] Having high hopes for its new laws in a vastly unknown industry, Florida began its pursuit of automation in 2012.[19] With a quick definition of "autonomous technology,"[20] and a muddled definition of whom the "operators" of the vehicles are during its "testing phase," the original AV laws[21] left puzzling questions.

The autonomous technology used in AVs was originally defined as the technology installed in the motor vehicle with the capability to drive *without the active control or monitoring by a human operator*.[22] However, somewhat contradicting this definition, the "operator" of these vehicles was the person who "causes the vehicle's autonomous technology to engage, *regardless of whether the person is physically present in the vehicle while the vehicle is operating in autonomous mode*."[23] Thus, Florida frontloaded its laws in preparation for the inevitable deployment of automated vehicles that would not require a human's monitoring of the environment.[24] Additionally — but unclearly — Florida's introduction of such laws came with controversy about who could use the vehicles. Was Florida's first set of AV laws exclusively created for "employees, contractors, or other persons designated by manufacturers of autonomous technology" who may operate these vehicles for testing purposes, or were the laws crafted to apply to anyone in the public who owns an autonomous vehicle?[25]

The 2012 versions of sections 316.85 and 316.86, Florida Statutes, are the foundation of Florida's AV law.[26] Analyzing the scope of both sections as originally enacted supports a conclusion that the plain language of each provision was meant to govern two separate functions of law pertaining to AV use.[27] Section 316.85 was meant to be broad, while section 316.86 was meant to be narrow.[28] By cross referencing the language of section 316.85(2), which stated that, "[f]or purposes of this *chapter*," all Chapter 316 of Florida Statutes is applicable to the operation of a vehicle equipped with autonomous technology.[29] However, the operation of an autonomous vehicle could not have been limited to solely testing purposes, because section 316.85(2)'s language stated that "a person who possesses a valid driver license may operate an autonomous vehicle in autonomous mode."[30]

Conversely, section 316.86's limitation on the use of AVs for testing could not be read broadly to cover all of Chapter 316 because doing so would take away the utility of section 316.85. The title of section 316.85 explicitly stated: "Operation of vehicles equipped with autonomous technology on roads for testing purposes."[31]

Another seemingly apparent difference between the two provisions was how each treated the "operator" of the vehicle. While Section 316.85 required only that the operator possess a valid driver license, Section 316.86 limited these vehicles' use to testing purposes.[32] Further, the language of Section 316.86 that *required a human operator inside* the vehicle during its operation was incompatible with the language of Section 316.85, which *did not require the "operator" of the vehicle to be inside* the vehicle while it is in autonomous mode.[33]

2. The Run: DHSMV's Report

In establishing section 316.86, Florida Statutes, the Florida Legislature required that the Report be submitted to the President of the Senate and the Speaker of the House of Representatives by February 12, 2014. Although the DHSMV had almost two years to create the Report, it was filed on February 10, 2014[34] and was only seven pages long. The Report illustrates Florida's attempt to advance AV laws faster than its lawmakers could understand the technology.

Instead of clarifying the "public use" or "testing" debate, the DHSMV's interpretation of the 2012 enacted AV legislation limited the current statutes to authorizing the testing of autonomous vehicles. The Report did not address the operation of AV use for non-testing purposes, and did not shed light on how sections 316.85 and 316.86 were meant to coexist as both a public use statute and a testing requirement statute.[35]

The Report also failed to provide the required precautions and recommendations[36] for the Florida Legislature to consider before continuing its push to automation. While the DHSMV deferred to the NHTSA for vehicle safety standards, the Report further included eight recommendations from the NHTSA suggesting how states should develop their policies regarding the operation of these automated vehicles.[37] The Report's analysis was based on these recommendations[38] while using other state AV laws to establish whether Florida's laws at the time were sufficient to allow lawmakers to proceed into creating new and more detailed AV regulations.

The Department analyzed NHTSA's recommendation that "drivers understand how to operate a self-driving vehicle safely and that on-road testing minimizes risk to other road users."[39] Although pointing to section 316.86 — which ambiguously limited "operators" during a testing stage to licensed drivers who are allowed to test these vehicles — the Report's analysis omitted section 316.85, which unambiguously allowed *any* driver with a valid driver license to operate an AV.[40]

The Report mentioned proposed AV regulations from California, Nevada, and Michigan that include similar testing provisions to that of section 316.86; however, those state laws mandated additional safeguards.[41] For example, Nevada requires "two licensed drivers to be in the autonomous vehicle while testing and that the state issue red license plates to test vehicles."[42] Michigan also requires its AVs to have a "special license plate."[43] This unique requirement provides awareness to other drivers that a vehicle may be operating in autonomous mode — which could arguably limit the number of crashes during testing phases — when the technology is most susceptible to glitching. The Report, however, quickly disposed of this idea by stating that "Florida has over 200 specialty license plates, so identification may not be effective."[44] The Report ignored the fact that other highly populated states like Nevada and Michigan already had a multitude of specialty license plates.[45]

The Report also described Florida's simplistic process of establishing liability when AVs cause harm through a finding of only two facts: (1) the person who engages the autonomous technology is the operator; and (2) the original vehicle manufacturer is not liable for a defect in the autonomous technology unless the defect was present when the vehicle was manufactured.[46] However, while the Report stated that "Florida law briefly addresses liability,"[47] this two-prong test does not clearly resolve situations when other Florida laws may apply.

For example, the Florida Ban on Texting While Driving Law ("Texting Law") allows law enforcement to "issue citations as a secondary offense to persons who are texting while driving."[48] Included within the Texting Law, however, a person who is operating an autonomous vehicle is permitted to text while the car is moving.[49] This is inconsistent with Section 316.145, which requires that an autonomous vehicle have a system to alert the operator if the technology fails so that the operator can take control of the vehicle. How can an operator safely be attentive to the surrounding environment if they are too busy texting? Further, this loophole appears to authorize operators of lower level automated vehicles — who are still required to be aware of the surrounding environment — to text while driving. Like the texting-while-driving scenario, Florida's legislature seemingly authorizes a similar exemption for AVs in its amendment of section 316.303, which

allows vehicles equipped with autonomous technology to have an active television screen while the AV is in motion.[50]

Although the Report found that current Florida law satisfied only four of the eight NHTSA recommendations[51] and stated that "detailed policies and regulations may not be feasible at this time at the federal or state level[,]"[52] the Report proposed no change to the existing law and thus failed to clarify the confusion amongst the public, the policymakers, and even the DHSMV themselves.[53] The Department offered no guidelines for the Florida legislature to use in their creation of future policies.[54]

3. The Jump: 2016

Following the Report, the Florida Legislature made substantial amendments to the AV laws. These amendments demonstrate that the Florida legislature did not address the precautions mentioned at the end of the Report. The Final Bill Analysis for H.B. 7061, which amended the original AV laws into what they are today, refers to the federal government's role in developing "vehicle safety" measures to give states more guidance on their formulation of AV laws.[55] Although the NHTSA and the Report both counsel states to slow the pace of broadening the scope of AV laws, very little additional research preceded these amendments, enacted less than two years after the Report was filed.

The first significant change to Florida's AV law in the 2016 amendments occurred with the removal of the "testing" provisions in section 316.86.[56] Autonomous vehicles are now allowed on the public roads without any prior testing procedure or requirements. Currently, section 316.86 only includes liability protections for the original manufacturer of the AV.[57] This continues to encourage large manufacturers and software engineers to bring their products to Florida to pioneer the AV industry.[58]

Other changes to the original AV laws stem from amendments to section 319.145, which demonstrate that registered autonomous vehicles are only required to meet *applicable* federal standards and regulations,[59] rather than simply "[continuing] to meet federal standards and regulations."[60] This subtle alteration to the statute's language demonstrates Florida's willingness to stray away from NHTSA's guidance documents and policy statements by proclaiming that autonomous vehicles now only have to meet applicable federal standards. Due to the lack of any federal law during the beginning stages of this new industry, Florida purposefully positioned itself to be in a zone of autonomy that may have led to new developments by the NHTSA or DOT.

Also included in section 319.145 are the "safety clauses" which govern the means of how an autonomous vehicle must be created in order to ensure the highest rate of success and to minimize any possibility of injury.[61] The amendment to section 319.145 merely reworded the "safety clauses" included in the statute and failed to provide any additional protection to AV operators. The only slight difference between the 2012 version of section 319.145 and its 2016 amendment is that instead of requiring a visual indication for the "operator" to take control of the vehicle should the technology fail (as indicated in the 2012 version), the 2016 amendment simplifies the language so that now the operator is "required . . . to take control" of the vehicle.[62] However, this requirement will be met with skepticism by consumers once problems arise during an autonomous ride. Why should the operator of an AV be required to take control of the vehicle if a technological failure occurs, when the entire essence of autonomous vehicles is to allow the driver to let the car drive itself? Expecting an operator of an AV moving at high speeds to understand when a failure has occurred and then to navigate the vehicle safely — within the fraction of a second it occurs — is an almost impossible task.[63]

Expecting an operator of an AV moving at high speeds to understand when a failure has occured and then navigate the vehicle safely — within the fraction of a second it occurs — is an almost impossible task.

Florida's legislature has also deviated substantially from the traditional human operator requirements by statutorily allowing a human operator to have less control within these vehicles. With the recent amendment of section 316.303, "active television broadcast[s] or pre-recorded video entertainment content" is permitted to be visible from the driver's seat while the vehicle is in motion if the vehicle is being operated by autonomous technology.[64] Simply put, under current Florida law the "operator" of the autonomous technology is allowed to watch television during their trip in an automated vehicle. Without offering any explanation or support for the evolution of section 316.303's longstanding prohibition of "television-type receiving equipment" during the operation of a vehicle to expressly authorizing *any type* of entertainment content in an AV,[65] the legislature simply amended the statute and moved on. When section 316.303 is cross-referenced with section 319.145, an important question emerges — how can Florida's laws require an "operator" of an AV to take control of its vehicle in the *split second* that the technology fails while it is moving along public roads at very high speeds? Moreover, how can Florida's laws also permit the same "operator" to be watching a final drive of the Rams vs. Patriots Superbowl when this critical situation occurs? Vehicle manufacturers like Tesla, which have already begun to develop alert systems for operators who fall asleep, may provide the answer to this question.[66]

Another puzzling question that arises when reading Florida's AV laws contemplates a situation where an AV is being operated without a human present inside the vehicle.[67] Should the technology fail in this situation, a human operator would still be legally required to take control of the vehicle as

section 316.145 requires.[68] Section 316.145 prescribes an unrealistic alternative that if a human operator cannot take control of the vehicle if the automated technology fails, then the technology itself must be capable of bringing the vehicle to a complete stop.[69] If the technology operating the vehicle fails and there is no operator inside the vehicle to take control, it is highly unlikely that the same failing technology would be able to adequately and safely bring the vehicle to a complete stop.[70]

It seems premature for Florida's legislature to allow these vehicles to be used without a human operator present in the vehicle while expecting an AV to predict a failure and then — while it is failing — to safely stop in accordance with its surrounding environment. However, with the addition of these new requirements that undoubtedly must coexist for these vehicles to work, manufacturers will now have to create a sort of "back-up system" to the vehicle's autonomous technology if the AV technology fails.[71] These examples will undoubtedly arise in situations that are already beginning to develop among various pilot programs and future business opportunities that Florida is actively seeking. The main complication with the coexistence of these statutes will be how courts will assign liability to the person who, although not inside the vehicle, engaged the autonomous vehicle to operate, or the manufacturer who did not safeguard the vehicle with adequate emergency systems.[72] This will be a tricky task for state courts because the only detailed law governing the use of autonomous vehicles is an exemption from liability of the car manufacturer under Section 316.86.

4. The Splash: 2018's Failed Bills & 2019's Current Law

Following the enactment of Florida's 2016 amended autonomous vehicle laws, the Florida legislature attempted to broaden these laws into an even more progressive and lenient system in 2018.[73] These proposed changes included different terms or phrases to define what is considered the "driver" or "operator" of an autonomous vehicle, such as a change from "autonomous vehicle" to "automated driving system." Additionally, the legislature attempted to distinguish between "fully autonomous vehicles" and "semi-autonomous vehicles" — where the former *no longer would need* a licensed human operator present. Although these two bills died in committee,[74] the legislature quickly revisited these ideas in 2019.

Effective July 1, 2019, House Bill 311 amended a variety of existing AV statutes to provide clarity and conform to ongoing federal research in this field.[75] The legislature revisited the idea of distinguishing fully autonomous vehicles with semi-autonomous vehicles and codified this change in two sections of Florida Statutes.[76] This change clearly separates vehicles that "[do] not require a licensed human operator" and are "designed to function without a human operator"

from vehicles that are not fully autonomous, likely due to the complex fact-intensive situations that would have previously plagued courts for determining tort liability.[77]

Notably, these amendments tried to clarify the Catch-22 language of the previous AV law, which required the "operator" of an autonomous vehicle to take control of the vehicle if a failure occurred. Now, fully autonomous vehicles must achieve a "minimal risk condition" if a failure of the automated driving system occurs.[78] Fully autonomous vehicles also must be covered by insurance that provides primary automobile coverage of at least $1 million for death, bodily injury, and personal injury protection benefits.[79]

Legally, by distinguishing and codifying the different types of autonomous vehicles that will use Florida's roadways, the Legislature may have clarified the issues involved in determining liability when accidents occurs. The Legislature's goal in enacting the bill is clearly to encourage further development and use of AVs: "the bill could serve to stimulate private sector investment in Florida and incentivize autonomous vehicle research, testing, and deployment in Florida. Insurance companies may see an indeterminate increase in sales resulting from application of insurance requirements to on-demand autonomous vehicle networks and autonomous vehicles."[80] This demonstrates the confidence and expectations that Florida — along with other states — holds for the future of the autonomous vehicle field.

II. PREDICTING LIABILITY FOR AV FAILURES

When dealing with a question of liability involving an AV, fingers will generally be pointed in three directions: (1) the car manufacturer; (2) the company that created the car's AV technology; or (3) the human behind the AV wheel.[81] In each circumstance, there will be arguments that could hold weight under various theories of liability — however, different states have decided to either shield or expose one of these parties in attempts to help courts determine how to impose liability when something goes wrong.[82]

A. Who's Liable? Automobile Manufacturers, Developers, or the "Drivers"?

Currently, under Florida's laws regarding AVs, only two statutes even mention the word "liability," and they each do so briefly and ambiguously.[83] Courts will have to decide how exactly Florida's AV laws can coexist when one statute contemplates liability on the part of a third-party manufacturer if the technology fails[84] and another statute seems to rest liability on the "operator"[85] in certain situations.

Some experts and attorneys in practice have suggested[86] that traditional products liability[87] will apply to claims against an AV's manufacturer. Although Florida recognizes that manufacturers may be held strictly liable for an injury to the user of its products,[88] section 316.86 seeks to protect manufacturers from liability by developing clear exemptions in its language.[89] This statute, however, may not account for the various other errors that might expose a manufacturer to liability. Because of the complex designs involved with AVs, manufacturers will have to redesign their vehicles to safely utilize the technology, radars, and sensors for the vehicle to work properly.[90] Due to the symbiotic relationship between the third-party technology company and the manufacturer required to produce a working product, manufacturing defects will still be at the helm of lawsuits and may involve multiple providers of different components of the vehicle. Accordingly, although manufacturers seem shielded from liability, there is still a risk to the public during the early production stages of AVs because of the unforeseen glitches that may arise.[91] Complex questions of liability were left unanswered in 2014 when the DHSMV Report quickly concluded that liability for AVs could be addressed by a simple two-prong test.[92] These questions, however, remain in the present statutory scheme.

B. State Guidance Towards Defining Liability

1. California

As one of the first states that welcomed AVs onto its roads, California enacted legislation in 2012 that required California's Highway Patrol to adopt "safety standards and performance requirements to ensure the safe operation and testing of autonomous vehicles."[93] The framework of California's first enacted legislation not only includes a more robust testing requirement than Florida's,[94] but also incorporates a different approach as to how liability for the manufacturers of AVs must be established.

Where manufacturers in Florida are "shielded" from liability in the event of a defect or glitch in the autonomous technology, California "requires the manufacturer to sign a document binding them to the autonomous vehicle."[95] "Manufacturer" under California's autonomous vehicle laws is defined as,

> The person . . . that originally manufactures a vehicle and equips autonomous technology on the originally completed vehicle or, in the case of a vehicle not originally equipped with autonomous technology by the vehicle manufacturer, the person that modifies the vehicle by installing autonomous technology to convert it to an autonomous vehicle after the vehicle was originally manufactured.[96]

California instituted a less vague path to liability should a defect or a crash occur that will place liability on the manufacturer through a signed document, whether it is the original manufacturer of the vehicle or "the person that modifies the vehicle by installing autonomous technology to convert it to an autonomous vehicle."[97] Consistent with California's approach, multiple representatives from major companies that are advancing this technology like Google, Mercedes-Benz, and Volvo, have stated that they, the manufacturers of self-

driving vehicles, would voluntarily take responsibility for any accidents caused by these cars.[98]

2. Nevada

Nevada boasts twenty separate statutes within its exclusive autonomous vehicle statutory code ("Nevada's Code").[99] Within Nevada's Code are various detailed statutes that pertain to the execution of an autonomous industry, such as defining: (1) the automated driving system;[100] (2) the permitted tasks that the vehicles' may use during their operation;[101] (3) the testing or operation requirements;[102] and most importantly, (4) the questions of liability.[103]

Like Florida and California, Nevada's Code also includes such an exemption.[104] Nevada's Code, however, takes a step further by also protecting the "original manufacturer *or developer* of an automated driving system" from any damages that may arise out of a defect not caused by their own technology.[105] While using very similar language as Florida's law to shield the vehicle manufacturers, Nevada's Code provides additional coverage for the developer of the AV's technology by clarifying its role in liability. As demonstrated above, vehicle manufacturers will have to adapt the physical structures of AVs in order to coexist with the developer's technology.[106] During the beginning phases of these relationships, the developers of the technology must have a shield from liability for their businesses to be profitable.[107] With Florida's statutory scheme, developers of the autonomous technology do not have any explicit coverage other than a common law claim of products liability against the vehicle manufacturer who is presumed to be exempt from liability.[108] However, Nevada's extra layer of protection for these developers allows Nevada courts to analyze the root of the issues in each case to determine who was at fault — the person, the vehicle manufacturer, or the developer of the AV technology.

Nevada's Code also differentiates between an "autonomous vehicle"[109] and a "fully autonomous vehicle."[110] This distinction is important for courts to apply a categorical methodology during its initial encounters with AV lawsuits — the actual human operator's conduct in the case of an accident should be viewed differently depending on the circumstances. Additionally, Nevada's Code prescribes a three-prong requirement for the human operator of an AV that is not fully autonomous if the vehicle's technology fails.[111] Nevertheless, if the vehicle is fully autonomous — which will likely be without a human operator[112] — the vehicle must be "capable of achieving a minimal risk condition if a failure of the automated driving system occurs." A human operator will certainly interact with a fully autonomous vehicle differently than autonomous vehicle that requires *some* attention. If a human operator is inside the vehicle that is not fully autonomous, a more workable approach by courts could place liability on those operators since they are supposed to be aware of their surroundings while the AV is in motion.

3. Lessons for Florida

Although Florida's current AV laws are similar to California's, Florida can protect drivers and the public from lengthy litigation involving either the manufacturers or developers who want to stand by their products and have those companies sign an extra form binding them to their AVs. In the event of an accident, courts can look to these pre-signed forms that would provide for less discovery and time during litigation, but more importantly less monetary and emotional costs for the party's involved. Additionally, the manufacturers can win the public's trust and increase customer interest in these vehicles by standing by their products through a binding document.

Florida's AV laws surrounding the liability of an AV's manufacturer or developer should look to the statutory language in Nevada's Code for analyzing cases that will inevitably arise in these third-party situations. Although a violation of a statute raises a presumption of negligence per se,[113] Florida's law must first make sense of the situations at hand. If a "fully autonomous" vehicle is in the same category for liability purposes as a semi-autonomous vehicle, the human operators will be unfairly treated. Although section 316.145 requires the human operator to take control of the vehicle in the event of a failure, the expectation is that a human operator will most likely be focused elsewhere while the vehicle is in motion. Thus, even though the human operator violated the statute and negligence per se would traditionally be presumed, courts must analyze the vehicle's autonomy — like in Nevada's Code — to better understand the individual human operator's situation.

III. THE FUTURE FOR AN UNPREDICTABLE ERA

The issues raised here will most likely be solved either through a federal preemptive process, adoption of legislative standards that will fill the gaps of Florida's current AV laws, or the courts' creation of precedent that clarifies the paradoxical language of the laws. Ultimately, autonomous vehicle legislation, implementation, and execution will begin slowly and progress gradually. As the expectations for AVs have been exponentially increasing by the year, manufacturers and large companies have become aware of the high risks involved with making AVs available to the public before they are ready for actual widespread use.

Although current law allows the use of AVs, perhaps Florida should tap the brakes until more research and development into the safety of these vehicles is conducted and disseminated. For example, the Department of Transportation is currently undertaking pilot programs to test and research AVs, and the Drafting Committee on Highly Automated Vehicles is working on a uniform law to cover the deployment of automated driving systems for statewide adoption.[114] This Committee is attempting to answer various questions that most states advancing the use of AVs simply cannot answer.[115] A 2017 Committee report noted that,

according to USDOT and NHTSA, the "goal of state policies in the automated realm should be *sufficiently consistent* to avoid a patchwork of inconsistent State laws that could *impede innovation and the expeditious and widespread distribution of safety enhancing automated vehicle technologies*."[116] A uniform code could help to fill the widespread holes within not only Florida's quick-paced AV laws but within the laws states across the country.

Although current law allows the use of AVs, perhaps Florida should tap the brakes until more research and development into the safety of these vehicles is conducted and disseminated.

The federal government has granted state policymakers an enormous amount of power with the creation of AV laws. State policymakers must take a step back and fully understand the implications of allowing an emerging industry to have free reign in the world of transportation that already has a multitude of complex issues. Before passing legislation to expand the use of self-driving vehicles on Florida roads, state policymakers should shift gears and slow down their rapid progression of new AV laws until NHTSA researches and implements national safety standards. Only then can AVs in Florida fufill the state legislature's mission for the "safe development, testing, and operation of [AVs] on the public roads."

1 *THINK, America THINKS: The Road to Autonomous Vehicles – 2018*. This survey polled a random nationwide sample of 1,000 adults 18 years or older and found that these services can include travel between transit/ train stations or airports, taxi services, campus travel, local delivery, trucking services, and personal use.

2 *See* NHTSA, *Automated Vehicles for Safety, The Evolution of Automated Safety Technologies*, https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety (last visited Oct. 23, 2019) (explaining that 94 percent of serious crashes are due to human error).

3 *See, e.g.*, Patrick Lin, *Why Ethics Matters for Autonomous Cars*, *in* Autonomous Driving Technical, Legal and Social Aspects 69, 79 (Markus Maurer, J. Christian Gerdes, Barbara Lenz, Hermann Winner eds., 2016) (demonstrating that "no complex technology we have created has been infallible"); DB, *China Hacked the Pentagon to Get Weapons Programs Data*, TPM (May 29, 2013, 4:14 AM), https://talkingpointsmemo.com/news/china-hacked-the-pentagon-to-get-weapons-programs-data (showing the cyberattacks on the Pentagon by China exploiting vulnerable technology).

4 The National Transportation Safety Board indicated that the autonomous Uber vehicle detected the pedestrian six seconds before the crash, but the human "backup" driver failed to intervene in time. Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, New York Times, Mar. 18, 2018, https://www.nytimes.com/2018/03/19/technology/ uber-driverless-fatality.html. Tesla's first major incident with its autonomous vehicle technology occurred on May 7, 2016, in Williston Florida, where the vehicle failed to apply the brakes when "neither the autopilot nor the driver noticed the white side of [a] tractor trailer against a brightly lit sky." Bill Vlasic & Neal E. Boudette, *Self-Driving Tesla Was Involved in Fatal Crash, U.S. Says*, New York Times, June 30, 2016, https://www.nytimes.com/2016/07/01/business/self-driving-tesla-fatal-crash-investigation.html?module=inline.

5 NHTSA has adopted and implemented SAE International's Levels of Automation and other applicable terminology. U.S. Dept. of Transportation, *Preparing for the Future of Transportation, Automated Vehicles 3.0* iv (Oct. 2018), https://www.transportation.gov/sites/ dot.gov/files/docs/policy-initiatives/automated-vehicles/320711/preparing-future-transportation-automated-vehicle-30.pdf [hereinafter AV 3.0] ("*Level 1* automation only includes a few driver assistance features, but the vehicle is still controlled by the driver; *Level 2* automation has combined automated functions such as acceleration and steering, but the driver must remain engaged with the driving task and monitor the environment at all times; *Level 3* automation requires a driver that is ready to take control of the vehicle at all times with notice, but that driver is not required to monitor the environment; *Level 4* automated vehicles are capable of performing driving functions under certain conditions, and the driver may have the option to control the vehicle; *Level 5* automation is a fully automated vehicle under all conditions.").

6 Brian A. Browne, *Self-Driving Cars: On the Road to a New Regulatory Era*, 8 Case W. Reserve J.L. Tech. & Internet 1, 1 (2017); *see* Pilot Program for Collaborative Research on Motor Vehicles with High or Full Driving Automation, 83 Fed. Reg. 50,872, 50,875 (Oct. 10, 2018) ("NHTSA's authority over [automated driving systems] is broad and clear. The Act obligates NHTSA to regulate the safety of motor vehicles and 'motor vehicle equipment.'").

7 *Geier v. American Honda Motor Co.*, 529 U.S. 861, 863 (2000). The Court also noted that the DOT is "likely to have a thorough understanding of its own regulation[s] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." *Id.*

8 2012 Fla. Sess. Law Serv. Ch. 2012-111 (C.S.H.B. 1207); Nev. Rev. Stat. § 482A (West 2012); Mich. Comp. Laws. §§ 227, 257 (West 2014); Cal. Veh. Code § 38750 (West 2013); Ben Husch & Anne Teigen, *A Roadmap for Self-Driving* Cars, State Legislatures Magazine (Jan. 1, 2017), http://www.ncsl.org/bookstore/state-legislatures-magazine/a-roadmap-for-self-driving-cars.aspx.

9 2012 Fla. Sess. Law Serv. Ch. 2012-111 (C.S.H.B. 1207).

10 Janelle I. Taylor, *Jeff Brandes: 5 Takeaways from Autonomous Vehicle Summit*, FLAPOL (Nov. 29, 2018), http://floridapolitics.com/archives/282227-jeff-brandes-5-takeaways-from-autonomous-vehicle-summit.

11 *See* Stephen McBride, *The Driverless Car Revolution Has Begun – Here's How to Profit*, Forbes (Sep. 6, 2018, 10:08 AM), https://www.forbes.com/sites/stephenmcbride1/2018/ 09/06/the-driverless-car-revolution-has-begun-heres-how-to-profit/#495d1fb461cf; Michelle Andersen, et. al., *Where to Profit as Tech Transforms Mobility*, BCG, (Aug. 23, 2018), https://www.bcg.com/en-us/publications/2018/profit-tech-transforms-mobility.aspx (explaining that the transformation of the automobile industry towards automation will allow for the private sector to monetarily capitalize through new social trends (such as shared mobility and ride sharing) and expansion of the typical "automobile boundaries").

12 Tampa Hillsborough Expressway Authority, *THEA Connected Vehicle Pilot – Fact Sheet*, Connected Vehicle Pilot THEA (Nov. 14, 2018), https://www.tampacvpilot.com/wp-content/uploads/2018/11/2672-THEA-Connected-Vehicle-Pilot-Fact-Sheet-20181114-rgb.pdf.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Florida's Turnpike Enterprise (FTE) SunTrax*, FDOT (last visited Oct. 23, 2019), http://www.fdot.gov/traffic/its/projects_deploy/cv/MapLocations/FTE_SunTrax.shtm.

17 *Accelerating the Future of Transportation*, SunTrax (last visited Oct. 23, 2019), http://www.suntraxfl.com/wp-content/uploads/2017/11/SunTrax-Brochure-.pdf.

18 House of Representatives, Final Bill Analysis, C.S./H.B. 1207 at 2 (Fla. 2012).

19 Both the Florida's House and Senate unanimously voted for the passage of these new automated vehicle laws. *Id.* at 1.

20 "[T]echnology installed on a vehicle enabling it to operate without the active control and continuous monitoring of a human operator." *Id.*

21 These statutes are: (1) § 316.003, Fla. Stat. (2012) defining the terms "autonomous vehicle" and "autonomous technology" when used in provisions for traffic control); (2) § 316.85, Fla. Stat. (2012) (authorizing a person who possesses a valid driver license to operate an autonomous vehicle as well as defining the "operator" of an autonomous vehicle); (3) § 319.145, Fla. Stat. (2012) (requiring that autonomous vehicles registered in the state meet federal standards and regulations, specifying certain requirements for such vehicles, authorizing the operation of "vehicles equipped with autonomous technology by certain persons for testing purposes under *certain conditions*," limiting liability of the "original manufacturer of a vehicle converted to an autonomous vehicle," and requiring the DHSMV to prepare a report on the safe testing and operation

of autonomous vehicles by February 12, 2014).

[22] § 316.003, Fla. Stat. (emphasis added).

[23] *Id.* § 316.85 (emphasis added). This statute included a testing provision. *Compare* House of Representatives Final Bill Analysis C.S./H.B. 1207 (2012) (stating "[§ 316.85, F.S.] provides that vehicles equipped with autonomous technology may be operated on roads in this state by employees, contractors, or other persons designated by manufacturers of autonomous technology for the purpose of testing the technology"), *with* House of Representatives Final Bill Analysis C.S./H.B. 7061 (2016) (amending § 316.85 to "expressly authorize a person holding a valid driver license to operate an autonomous vehicle in autonomous mode on roads in this state . . . Operation of an autonomous vehicle on roads in this state *would no longer be limited to licensed drivers designated for testing purposes*.") (emphasis added). *See also id.* at n.51 (2016) (discussing a DHSMV email to committee staff dated Jan. 25, 2016, stating that the DHSMV will authorize operation of autonomous vehicles without a human physically present in the vehicle only on a closed course).

[24] *See* AV 3.0, *supra* note 5 (explaining how these levels of automation do not require a human to be monitoring the vehicle while it is in autonomous mode).

[25] *Compare* § 316.86, *with* House of Representatives Final Bill Analysis C.S./H.B. 1207 (2012); John W. Terwilleger, *Navigating the Road Ahead: Florida's Autonomous Vehicle Statute and its Effect on Liability*, 89 Fla. B.J. 26 at 3 (2015) (citing § 316.85 "[o]perators are limited to either the autonomous technology manufacturer's 'employees, contractors, or other designated persons,' or 'research organizations associated with accredited educational institutions'"), *with* § 316.85 ("Autonomous vehicle operation . . . (1) A person who possesses a valid driver license may operate an autonomous vehicle in autonomous mode (2) For purposes of this chapter . . . a person shall be deemed to be the operator of an autonomous vehicle operating in autonomous mode when the person causes the vehicle's autonomous technology to engage, regardless of whether the person is physically present in the vehicle . . . ."). *See also* Jeffery Mackowski, Comment, *Good But Not Great: Autonomous Vehicles and the Law in Florida*, 11 FIU L. Rev. 221, 232–33 (2015) (arguing that Florida's original autonomous vehicle laws did not limit the operation of these vehicles to only testing use).

[26] The text of § 316.86, Fla. Stat. (2014) is identical to the session law text to which it was enacted in 2012. *See* 2012 Fla. Laws. ch. 2012-174, 100.

[27] *But see* DHSMV Publication, *Excellence in Service, Education and Enforcement*, https://www.flhsmv.gov/html/CJSummer2012.pdf (last visited Oct. 23, 2019) (stating that "a person who possesses a valid driver license may operate an autonomous vehicle in autonomous mode on a Florida road-way if manufacturers of the technology *designate the person as a driver for testing purposes*") (emphasis added). This statement by the DHSMV on the front page of its "2012 Legislative Update" derives from a mix of both § 316.85 and § 316.86 to create an ambiguous definition of who could actually use these vehicles from the onset of the initial AV laws by taking away the plain language of each statute.

[28] Mackowski, *supra* note 25, at 234.

[29] § 316.85(2) (emphasis added).

[30] *Id.*

[31] § 316.86.

[32] *Compare* § 316.85(1) ("A person who possesses a valid driver license may operate an autonomous vehicle in autonomous mode on roads in this state if the vehicle is equipped with autonomous technology."), *with* § 316.86(1) ("Vehicles equipped with autonomous technology *may be operated on roads in this state* by employees, contractors, or other persons designated by manufacturers of autonomous technology . . . .").

[33] §§ 316.86, 316.85 (emphasis added).

[34] Julie L. Jones, Fla. Dep't of Highway Safety and Motor Vehicles, *Autonomous Vehicle Report* 1 (Feb. 1, 2014), www.flhsmv.gov/html/HSMVAutonomousVehicleReport2014.pdf [hereinafter AV Report (2014)].

[35] *Compare id.* at 6 (stating that the NHTSA "does not recommend that states attempt to establish safety standards for autonomous vehicle technologies (for public use)"), *with* § 316.85 (prescribing safety standards for public use of autonomous vehicles).

[36] § 316.86 (requiring the DHSMV to submit a report "recommending additional legislative or regulatory action that may be required for the safe testing and operation of motor vehicles equipped with autonomous technology").

[37] AV Report (2014), *supra* note 34, at 3 ("(1) Ensure that the driver understands how to operate a self-driving vehicle safely[;] (2) Ensure that on-road testing of self-driving vehicles minimizes risks to other road users[;] (3) Limit testing operations to roadway, traffic and environmental conditions suitable for the capabilities of the tested self-driving vehicles[;] (4) Establish reporting requirements to monitor the performance of self-driving technology during the testing[;] (5) Ensure that the process for transitioning from self-driving mode to driver control is safe, simple, and timely[;] (6) Self-driving test vehicles should have the capability of detecting, recording, and informing the driver that the system of automated technologies has malfunctioned[;] (7) Ensure that installation and operation of any self-driving vehicle technologies does not disable any federally required safety features or systems[;] (8) Ensure that self-driving test vehicles record information about the status of the automated control technologies in the event of a crash or loss of vehicle control.").

[38] *Id.* at 5.

[39] *Id*.

[40] *See* § 316.85, Fla. Stat. (describing that anyone who owns a valid driver license may operate an autonomous vehicle).

[41] *See* AV Report (2014), *supra* note 34, at 4 (explaining these additional safeguards).

[42] Nev. Rev. Stat. Ann. § 482A.070 (West 2013); AV Report (2014), *supra* note 34, at 4.

[43] Mich. Dep't of Transp., Public Act 231 of 2013; Section 665(3) Testing and Operation of Automated Vehicles 1 (2013) (discussing how Public Act 231 will allow autonomous vehicles to drive on public roads if they display a "manufacturer" license plate); AV Report (2014), *supra* note 35, at 4.

[44] AV Report (2014), *supra* note 34, at 4.

[45] These states have a variety of special license plates that are available to purchase. *See* State of California Department of Motor Vehicles, *California Special Interest License Plates*, https://www.dmv.ca.gov/portal/dmv/detail/online/elp/elp; Department of Motor Vehicles Official Website of the State of Nevada, *License Plates*, DMV, http://www.dmvnv.com/platesmain.htm; *License Plate Store*, State of Michigan Secretary of State, https://www.michigan.gov/sos/0,4670,7-127-1585_1595---,00.html.

[46] AV Report (2014), *supra* note 34, at 5.

[47] *Id.*

[48] § 316.305(1)(d), Fla. Stat. (2018); Mackowski, *supra* note 25, at 237.

[49] § 316.305(3)(b)(7).

[50] Further discussed in Part II(B)(3).

[51] Mackowski, *supra* note 25, at 231.

[52] AV Report (2014), *supra* note 34, at 6.

[53] "[T]here are no national safety standards and many unknowns. Policymaking at this juncture is difficult, at best." *Id.* at 7.

[54] *See* Mackowski, *supra* note 25, at 232 (explaining that the Department did not even attempt to use its comparison of other state regulations in its Report for future Florida law that may have created some solutions to the lack of satisfaction for the NHTSA recommendations).

[55] House of Representatives, Final Bill Analysis, C.S./H.B. 7061 at 2 (Fla. 2016).

[56] § 316.86, Fla. Stat. (2016).

[57] *Id.*

[58] *See* Brandes, *supra* note 10 (demonstrating through Senator Brandes, the lead support of AVs, that Florida's AV laws are intended to encourage private development through exemptions of liability for big manufacturers).

[59] § 319.145, Fla. Stat. (2012).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* Klaus Dietmayer, *Automated Driving in Its Social, Historical and Cultural Contexts*, *in* Autonomous Driving Technical, Legal and Social Aspects 407 (Markus Maurer, J. Christian Gerdes, Barbara Lenz, Hermann Winner eds., 2016) ("While simulator studies of *highly-automated* driving have shown that realistic transfer times to the driver . . . can be assumed before the driver can reliably take over the driving task again, with *fully automated* driving a human would not provide any backup whatsoever.") (emphasis added); Christian Gold et. al., *"Take over!" How Long Does it Take to Get the Driver Back into the Loop?*, BMW Group Research & Technology 1942 (2016) (demonstrating that quick decision-making with a failed automated vehicle operating in autonomous mode generally leads to the "excessive use of the brakes, a low quality of manifestation of awareness, and a high risk of collision if another vehicle is near").

[64] § 316.303, Fla. Stat. (2018).

[65] *Compare* § 316.303(1), Fla. Stat. (2016) ("No motor vehicle operated on the highways of this state shall be equipped with television-type receiving equipment so located that the viewer or screen is visible from the driver's

seat), *with* § 316.303(1), Fla. Stat. (2018) ("No motor vehicle may be operated on the highways of this state if the vehicle is actively displaying moving television broadcast or pre-recorded video entertainment content that is visible from the driver's seat while the vehicle is in motion, *unless the vehicle is equipped with autonomous technology . . . and is being operated in autonomous mode* . . . .") (emphasis added).

[66] § 316.85, Fla. Stat. (2016) ("[A] person shall be deemed to be the operator of an autonomous vehicle operating in autonomous mode when the person causes the vehicle's autonomous technology to engage, regardless of whether the person is physically present in the vehicle while the vehicle is operating in autonomous mode.").

[67] *See id.*§ 319.145 (requiring the operator to "take control of the autonomous vehicle" should the autonomous technology fail).

[68] *Id.*

[69] *See* Dietmayer, *supra* note 63, at 407 (stating that a vehicle can only achieve a safe degree of autonomy if it can "perceive its surroundings, interpret them appropriately and be able to derive and execute reliable actions continuously").

[70] Elon Musk discussed new updates to the Tesla autopilot software, such as the vehicle gradually slowing down if the human operator has not touched the vehicle's wheel, the vehicle triggering emergency lights to alert the operator, or the car's horn sounding to wake up the operator. Joe Rogan, *Joe Rogan Experience #1159 – Elon Musk*, 01:08:22–01:10:16 (Sep. 7, 2018).

[71] *See* Walther Wachenfeld & Hermann Winner, *Automated Driving in Its Social, Historical and Cultural Contexts*, *in* Autonomous Driving Technical, Legal and Social Aspects 428–29 (Markus Maurer, J. Christian Gerdes, Barbara Lenz, Hermann Winner eds., 2016) (explaining that the goal of "emergency intervening systems"—which would automatically engage once the vehicle senses the driver has lost control—would only activate "when the loss of control becomes obvious and thus there is a severely increased risk" of harm).

[72] *See* Terwilleger, *supra* note 25, at 32 (suggesting that traditional products liability law will apply).

[73] Included in the Transportation Committee's analysis for C.S./S.B. 712, the Florida Senate uses the NHTSA's federal guidance for automated driving systems, but without confronting the various weaknesses that the federal guidance documents continuously state are still abundant in this sector. Florida Senate, Transportation Bill Analysis and Fiscal Statement, C.S./S.B. 712 at 2–3 (Fla. 2018).

[74] H.B. 353 (Fla. 2018); S.B. 712 (Fla. 2018). H.B. 353 died in Government Accountability Committee and S.B. 712 died in the Banking and Insurance Committee.

[75] *See* Chapter 2019-101, Laws of Florida (amending §§ 316.003, 316.85, 319.145, 322.015, 338.2216, 316.062, & 316.065, Fla. Stat. (2019)).

[76] §§ 316.003 & 316.85, Fla. Stat.

[77] *Id.*

[78] "Minimal risk condition" is defined as a "reasonably safe state, such as bringing the vehicle to a complete stop and activating the vehicle's hazard lights." § 319.145 (2019).

[79] § 627.749, Fla. Stat. (2019).

[80] C.S./H.B. 311 at 6.

[81] *See generally* Terwilleger, *supra* note 25, at 32.

[82] For example, Florida has expressly manifested its intent to protect the manufacturers of these vehicles to encourage development and its economy intrastate. *See* § 316.86, Fla. Stat. (2016); AV Report (2014), *supra* note 34, at 7.

[83] *See* § 316.86 (regarding a manufacturer's liability); § 319.145 (requiring the human driver to take control of the vehicle if the technology fails); House of Representatives, Transportation and Ports Subcommittee Staff Analysis, C.S./H.B. 7061 at 8 (Fla. 2016) (stating that the effect of the legislature's failed proposed change to § 316.85 would "[place] responsibility for actionable [liability] events related to an autonomous vehicle while operating in autonomous mode *with the driving system*, potentially including the owner, manufacturer, or seller of the system").

[84] *See* § 316.86 (shielding an original manufacturer of an autonomous vehicle if there is a defect in the technology created by a third party).

[85] § 319.145. This statute can also add another layer of liability to the situation by stating that the "autonomous vehicles registered in [Florida] must continue to meet applicable federal standards and regulations" thus the original manufacturer, although protected on the surface from liability should a technological defect arise, must also be subject to liability if federal standards change and the manufacturer fails to follow those standards.

[86] Terwilleger, *supra* note 25, at 32; Jeffrey K. Gurney, *Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles*, 2013 U. Ill. J.L. Tech. & Pol'y 101, 127 (2013).

[87] Under Florida's strict liability laws, there are three different categories of ways that a product may be considered "defective," (1) virtue of a design defect; (2) manufacturing defect; (3) or an inadequate warning. *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361 (S.D. Fla. 2012).

[88] *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 510–11 (Fla. 2015) ("'[W]here a manufacturer places a defective and unreasonably dangerous product into the stream of commerce, the manufacturer, not the injured customer, should bear the costs of the risks posed by the product.'") (quoting *Green v. Smith & Nephew AHP, Inc.*, 629 N.W. 2d 727, 752 (2001)).

[89] § 316.86 (stating that the "original manufacturer of a vehicle converted by a third party into an autonomous vehicle is not liable in, and shall have a defense to and be dismissed from, *any legal action* brought against the original manufacturer by any person injured due to an alleged vehicle defect caused by the conversion of the vehicle, or by equipment installed by the converter, unless the alleged defect was present in the vehicle as originally manufactured") (emphasis added).

[90] *See* Hermann Winner & Walther Wachenfeld, *Effects of Autonomous Driving on the Vehicle Concept*, *in* Autonomous Driving, Technical, Legal, and Social Aspects 257–61 (Markus Maurer, J. Christian Gerdes, Barbara Lenz & Hermann Winner eds., 2016) (illustrating the required areas for a car manufacturer's design either inside or outside that will need to be altered for a vehicle to adequately use autonomous technology).

[91] *See* Dana M. Mele, Comment, *The Quasi-Autonomous Car as an Assistive Device for Blind Drivers: Overcoming Liability and Regulatory Barriers*, 28 Syracuse Sci. & Tech. L. Rep. 26, 42 (2013) (explaining that developers of these computer and software systems will have a greater incentive to create a safer product if exposed to a heightened liability standard, but can also be deterred if liability also rests on the manufacturers once the product is in the market).

[92] *See* text accompanying notes 46-47, above.

[93] Senate Bill No. 1298, S.B. 1298 (Cal. 2012).

[94] California law requires that: (1) An autonomous vehicle that was to be operated on public roads for testing purposes must have a driver that possesses a proper class of license for the autonomous vehicle; (2) The manufacturer of the vehicle must designate a person for the testing; (3) The driver must monitor the vehicle; and (4) The manufacturer must obtain and prove insurance in the amount of five million dollars as well as have a certification that meets various safety mechanisms for the testing of the vehicle. Cal. Veh. Code Ann. § 38750(5)(b) (West 2012). *See* Mackowski, *supra* note 25, at 241 (demonstrating that the testing entities in California must jump through more detailed and expensive hoops than under Florida's testing policies).

[95] AV Report (2014), *supra* note 34, at 5; Cal. Veh. Code Ann. § 38750(G)(3) (West 2017).

[96] Cal. Veh. Code Ann. § 38750(a)(5).

[97] *Id.*

[98] Browne, *supra* note 6, at 6.

[99] *See* Nev. Code. Ch. 482A. Autonomous Vehicles (2019).

[100] Nev. Rev. Stat. § 482A.025–482.036 (West 2019).

[101] *Id.* § 482A.034.

[102] *Id.* § 482A.070.

[103] *Id.* § 482A.090.

[104] *Id.*

[105] *Id.*

[106] Winner & Wachenfeld, *supra* note 90.

[107] *See generally* Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 Santa Clara L. Rev. 1321, 1340 (2012) (explaining that because of the deep pockets of the manufacturers and developers of new products, these developers historically need to be protected during the initial stages since the rate of failure is high; otherwise, they will be "unduly impeded by liability concerns").

[108] *See* § 316.86 (defining this exemption).

[109] Nev. Rev. Stat. § 482A.030 (West 2019).

[110] *Id.* § 482A.036.

[111] "If the autonomous vehicle is not a fully autonomous vehicle, the autonomous vehicle is: (1) Equipped with a means to engage and disengage the automated driving system which is easily accessible to the human operator of the autonomous vehicle; (2) Equipped with an indicator located inside the autonomous vehicle which indicates when the automated

driving system is operating the autonomous vehicle; and (3) Equipped with a means to alert the human operator to take manual control of the autonomous vehicle if a failure of the automated driving system occurs which renders the automated driving system unable to perform the dynamic driving task relevant to its intended operational design domain." *Id.* § 482A.080(2)(a).

[112] *Cf. id.* § 482A.200 (specifically prescribing that no Nevada laws "shall be construed to require a human driver to operate a fully autonomous vehicle which is being operate by an automated driving system").

[113] Restatement (Third) of Torts § 14 (2010); *see also* Andrew R. Swanson, Comment, *"Somebody Grab the Wheel!": State Autonomous Vehicle Legislation and the Road to a National Regime*, 97 Marq. L. Rev. 1085, 1118 (2014) (explaining that a court may adopt standards of reasonable care under the circumstances for driver liability).

[114] In one of the Drafting Committee's early memos regarding the scope of the Committee's jurisdiction over highly automated vehicles, Commissioner Pam Bertani states that "it is no surprise that the current State-of-the-States regarding automated vehicle legislation is, at best, in a state of disarray." Memorandum from Commissioner Pam Bertani, Chair, Study Committee on State Regulation of Driverless Cars, to ULC Committee on Scope and Program, *Final Study Committee Report to Scope and Program*, Uniform Law Commission (Jan. 9, 2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=11589fe3-8399-d300-bd53-3f4752d2f059&forceDialog=0.

[115] Some questions include: (1) "When driving does not involve a traditional human driver, should there be some legal entity with similar obligations? If not, what is the alternative?"; (2) "Does the draft uniform law place appropriate requirements on relevant state agencies?"

[116] Memorandum from Commissioner Pam Bertani, *supra* note 114, at 6.

Welcome NEW MEMBERS

Lian Anthony
Bronstein & Carmona
8000 Peters Rd, Ste A-200
Ft Lauderdale, FL 33324
954-358-0444
lanthony@bronstein-carmona.com

Jessica Baik
Rumberger, Kirk & Caldwell
100 North Tampa St, Ste 2000
Tampa, FL 33602
813-472-7534
jbaik@rumberger.com

Rebekah Bailey
FCNA
520 Fellowship Rd
Mount Laurel, NJ 08054
336-391-3952
rbailey@feiwebsite.com

Diane Barnes-Reynolds
Simon Reed & Salazar, P.A.
201 N. Franklin St, Ste 3410
Tampa, FL 33602
813-448-1575
dbarnes@simonreedlaw.com

David Bronstein
Bronstein & Carmona, P.A.
8000 Peters Rd, Ste A-200
Ft Lauderdale, FL 33324
954-358-0444
dbronstein@bronstein-carmona.com

Jennifer Brower
Lewis Brisbois Bisgaard & Smith
401 E Jackson St, Ste 3400
Tampa, FL 33602
941-586-8235
jennifer.brower@lewisbrisbois.com

Cristina Cambo
Bolin Law Group
1905 East 7th Ave
Tampa, FL 33605
813-868-0600
cpc@bolin-law.com

Stacy Carrozza
Lakeland Regional Health
P.O. Box 95448
Lakeland, FL 33804
863-687-1072
stacy.carrozza@mylrh.org

Jamie Combee Noveas
Butler Weihmuller Katz Craig
400 N Ashley Dr Ste 2300
Tampa, FL 33602
813-281-1900
jnovaes@butler.legal

Darick Crumbly
State Farm Corporate
Law Department
250 South Orange Ave,
Ste 600
Orlando, FL 32801
407-872-2498
darick.crumbly.wcnh@statefarm.com

Evan Dahdah
Stetson University College of Law
1401 61st St S
Gulfport, FL 33707
954-806-5803
edahdah@law.stetson.edu

Kathryn Desire
Boyd Richards Parker &
Colonnelli, P.L.
1600 West Commercial Blvd,
Ste 201
Ft Lauderdale, FL 33309
954-848-2460
kdesire@boydlawgroup.com

Benjamin Dowers
Gunther McIntosh
888 SE 3rd Ave, Ste 201
Ft Lauderdale, FL 33316
954-556-1487
bwd@gunthermcintosh.com

Christopher Dutton
Dutton Law Group
4921 Memorial Blvd Ste 110
Tampa, FL 33634
813-247-2222
cdutton@duttonlawgroup.com

Brian Eves
Mintzer Sarowitz Zeris Ledva
and Meyers
6921 Pistol Range Rd, Ste 101
Tampa, FL 33626
813-885-5220
beves@defensecounsel.com

Sorena Fallin
Ragsdale Liggett PLLC, LLC
165 Wells Rd, Ste. 102
Orange Park, FL 32073
904-375-9773
sfallin@rl-law.com

Jolynn Falto
Eclat Law, LLP
307 Cranes Roost Blvd., Ste 2010
Altamonte Springs, FL 32701
407-636-7004
jfalto@eclatlaw.com

William Finlayson IV
United Property & Casualty
Insurance Co.
800 2nd Ave South
Saint Petersburg, FL 33701
727-895-7737
dfinlayson@upcinsurance.com

David Halverson
Banker Lopez Gassler PA
4415 Metro Parkway, Ste 208
Ft Myers, FL 33916
239-322-1300
dhalverson@bankerlopez.com

Alexandra Hayes
Clarke Silverglate
799 Brickell Plaza #900
Miami, FL 33131
305-377-0700
ahayes@cspalaw.com

Jason Holbrook
Rogers Towers
1301 Riverplace Blvd., Ste 1500
Jacksonville, FL 32207
904-398-3911
jholbrook@rtlaw.com

D. Kelly
Butler Weihmuller Katz Craig
400 N Ashley Dr Ste 2300
Tampa, FL 33602
813-281-1900
gkelly@butler.legal

Melody Kitchen
Kubicki Draper, P.A.
76 S. Laura St, Ste 1400
Jacksonville, FL 32202
904-348-7521
mk@kubickidraper.com

Josh Levy
Kennedys, LLP
1395 Brickell Ave
Miami, FL 33012
305-371-1111
Josh.levy@kennedyscmk.com

Jacob Liro
Wicker, Smith, O'Hara, McCoy
& Ford, P.A.
2800 Ponce De Leon Blvd.,
Ste 800
Coral Gables, FL 33134
305-448-3939
jliro@wickersmith.com

Alejandro Lopez
Boyd Richards Parker Colonnelli
589 SW 159 Terrace
Pembroke Pines, FL 33027
954-848-2467
alopez@boydlawgroup.com

Dennis Meyers
HD Law Partners
2002 N. Lois Ave., Ste 510
Tampa, FL 33607
813-253-5333
meyers@hdlawpartners.com

Jovani Monexil
FAMU College of Law
4733 Indian Gap Drive
Orlando, FL 32812
404-454-8537
Jovani.Monexil@gmail.com

Sarah Papadelias
Banker Lopez Gassler P.A.
501 E. Kennedy Blvd., Ste 1700
Tampa, FL 33602
813-347-4018
spapadelias@bankerlopez.com

Thais Passerieu
Butler Weihmuller Katz Craig
400 N Ashley Dr Ste 2300
Tampa, FL 33602
813-281-1900
tPasserieu@butler.legal

Jimmy Pham
Schutt, Schmidt, & Noey
11291 Alumni Way Apt 313-C
Jacksonville, FL 32246
510-458-7760
jaypham942@gmail.com

Lucretia Pitts Barrett
Universal Property & Casualty
Insurance Co.
1110 W. Commercial Blvd
Ft Lauderdale, FL 33309
954-958-1200 X6092
lb0315@universalproperty.com

Maggie Potter
Galloway Law
400 N. Ashley Dr. Ste 1000
Tampa, FL 33602
813-977-1200
mpotter@gallowaylawfirm.com

Kevin Ross
eclat Law, LLP
307 Cranes Roost Blvd., Ste 2010
Altamonte Springs, FL 32701
407-636-7004
kevin.ross@eclatlaw.com

Peter Rowell
Law Office of Peter B. Rowell P.A.
8950 SW 74th Court, Ste 2201 A71
Miami, FL 33156
305-998-9657
peter@rowellpa.com

Welcome NEW MEMBERS

Fay Ryan
Butler Weihmuller Katz Craig
400 N. Ashley Dr, Ste 2300
Tampa, FL 33602
813-594-5812
fryan@butler.legal

Robert Schulte
Scarborough Attorneys at Law
100 S. Ashley Drive, Ste. 450
Tampa, FL 33602
813-253-0097
bob@scarboroughattorneys.com

Troy Seibert
Butler Weihmuller Katz Craig LLP
400 N Ashley Dr. #2300
Tampa, FL 33602
81321281900
tseibert@butler.legal

Gregory Shoemaker
Wade, Palmer @ Shoemaker, P.A.
14 North Palafox St
Pensacola, FL 32502
850-429-0755
gshoemaker@wpslawyers.com

David Terry Jr.
Simon Reed & Salazar, P.A.
7208 West Sand Lake Rd,
Ste 302
Orlando, FL 32819
407-901-9265
dterry@simonreedlaw.com

Alison Trejo
Kelley Kronenberg
10360 West State Rd 84
Ft Lauderdale, FL 33324
954-370-9970
atrejo@kelleykronenberg.com

Alexis Upton Esq.
Abbey Adams Byelick & Mueller, LLP
3201 34th St South
St Petersburg, FL 33711
727 821 2080
aupton@abbeyadams.com

Jeffrey Wank
Kelley Kronenberg
10360 West State Rd 84
Ft Lauderdale, FL 33324
954-370-9970
jwank@kelleykronenberg.com

Christina Welch
FCCI Insurance Group
6300 University Parkway
Sarasota, FL 34240
941-907-2786
cwelch@fcci-group.com

Paige Wojdyla
Abbey Adams Byelick & Mueller, LLP
3201 US Highway 19 South,
9th Floor
St Petersburg, FL 33711
727-821-2080
pwojdyla@abbeyadams.com

Orion Wright Esq.
Banker Lopez Gassler P.A.
4415 Metro Pkwy, Ste 208
Fort Myers, FL 33916
239-322-1300
owright@bankerlopez.com

FDLA
FLORIDA DEFENSE LAWYERS ASSOCIATION

FLORIDA DEFENSE LAWYERS ASSOCIATION

APPLICATION FOR MEMBERSHIP

I hereby apply for membership in the Florida Defense Lawyers Association:

Name: Last: _____ First: _____ Middle: _____

Firm Name: _____

Office Address: _____

Phone Number: _____ E-mail Address: _____

Number of Years in Practice: _____ Private Practice: YES ____ NO ____ Date of Birth: _____

Date of Admission to the FL Bar: (Month/Year) _____ FL Bar Number: _____

Degrees Held (Please include school and year of graduation)

_____

Are you a member of any of the following organizations? DRI ___ FDCC ___ IADC ___ ADTA ___ ABA ___

Other bar and professional organizations to which you belong:

_____

Are you now devoting a substantial portion of your professional time (more than 51%) to the practice of civil defense litigation? YES ___ NO ___. If so, what percentage of your time is so spent? _____%

What area comprises the largest portion of your defense practice? (e.g., medical malpractice, automobile, product liability, workers' compensation, insurance coverage, appellate, etc.)

_____

Please indicate committees you would like to join in order to receive case law updates and other committee news.

___ Amicus Committee
___ Auto/Transportation
___ Bad Faith
___ Class Action
___ Construction Law
___ Diversity & Inclusion
___ First Party Property
___ Government Law
___ In-House Counsel
___ Insurance Coverage
___ Labor & Employment
___ Legislative Action
___ Medical Malpractice
___ Premises Liability
___ Products Liability
___ Professional Liability
___ Trial Advocate
___ Women in the Law
___ Workers Comp
___ Young Lawyers

Please enclose first year dues.

First year dues for all new members (regardless of years in practice) - **$50**

Annual renewal dues after the first year:

Regular Member - **$250.00**
(practicing more than 10 years)
Young Lawyer - **$50.00**
(practicing 10 years or less)
Government Lawyer - **$125**
(working solely for a government agency)
In-House Counsel or Claims Professionals - **Free**
Retired FDLA Member - **Free**

I HEREBY CERTIFY THE ABOVE INFORMATION TO BE TRUE AND CORRECT.

Signature of Applicant: _____ Date: _____

Please return the completed application with a check for $50 to the FDLA office.
To pay by credit card, please visit www.fdla.org and complete the online application.

Ana Ramos - Executive Director
Florida Defense Lawyers Association / 5727 NW 7 Street, Suite 66 / Miami, FL 33126
Phone: 786-447-8469 / aramos@fdla.org / www.fdla.org

FDLA is exempt from Federal taxation under IRC 501 (c)(6). Membership dues are not tax deductible as a charitable contribution; they may be deductible as a business expense. Federal ID Number: 59-2717926

Just as a watchmaker carefully assembles and adjusts the movement of a fine timepiece, our highly qualified mediators and staff attend to the details and timing of your individual resolution. When you put your dispute in our hands, you can rest assured the gears will continue to turn toward settlement.

For more information about Upchurch Watson White & Max, visit UWW-ADR.com or call (800) 863-1462.

Selected Panel Members:


Ana Cristina Maldonado


Timothy J. McDermott


Benjamin W. Newman


Brenda J. Newman


April Y. Walker


Steven Jaffe


Scott Baughan

Orlando | Ormond | Ocala | Jacksonville | West Palm | Ft. Lauderdale | Miami | Birmingham

FLORIDA DEFENSE LAWYERS ASSOCIATION

5727 NW 7 Street, Suite 66, Miami, Florida 33126

The Trial Advocate

A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

2020 FDLA CALENDAR

Watch your email for notices and information on how to register for upcoming FDLA meetings and webinars!

JANUARY 15–20 — Winter Meeting
The Ridge Tahoe
Lake Tahoe, NV

APRIL 16–17 — Med Mal Symposium
Doubletree Orlando Downtown
Orlando, FL

JUNE 3–5 — 2020 Florida Liability Claims Conference (FLCC)
Disney's Boardwalk Inn
Orlando, FL

AUGUST 13–14 — Florida Insurance Network Symposium (FINS)
Sheraton Tampa Riverwalk
Tampa, FL

SEPTEMBER 24–25 — 2020 Law Firm Leaders Summit
Margaritaville Resort Orlando
Orlando, FL