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THE TRIAL ADVOCATE

A PUBLICATION OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

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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 Frank Pierce, IV

Things overheard in 2022…

"Is that a trial order?!? The case isn't even at issue, and we didn't have a hearing!"

"Sure, I guess set us for April.I only have two other trials set that month."

"Oh, you want to schedule a CME? We are scheduling the doctor's first availability four months out."

Well, it looks like that's where we are for the moment. Out of the frying pan and all that. We have all faced unprecedented challenges over the last few years whether they be personal, professional, or anywhere in between. The road ahead may be full of uncertainty, but we shall persist.

In 2023 the FDLA will be returning to Big Sky, Montana for the annual winter seminar in January. Though it may be a little off the beaten path, Lone Mountain at Big Sky offers some of the most breathtaking views in the West with Yellowstone National Park right around the corner. The mountain has an enormous set of trails for beginner and expert alike. With the mountain already receiving record-breaking snowfall, this meeting should prove to be one to remember.

Throughout the year we will put on the headline events of FLCC at Disney, FINS, and the Leaders Summit. We are excited to announce the FLCC has a new home at Disney's Yacht and Beach Club. This new venue will give the Florida Liability Claims Conference the elbow room it needs to continue the growth we've seen the last few years. The Florida Insurance Network Symposium will return to the Renaissance International Plaza in the heart of Tampa in August. And after kicking off the year in the Northern Rockies, the FDLA will head nearly as south as you can get for the 2023 Leaders Summit at the Ocean Reef Club on Key Largo in September.

As we move forward into 2023 and through the morass of overlapping trial settings, overbooked experts, and cascading case management deadlines, remember that we are all in this together. The FDLA community is here to help. If the mountains in front of you seem impassable, just remember that Hannibal of Carthage invaded Italy by crossing through the Alps with elephants.

"We will either find a way or make one."

Executive Director's Message

By Ana Ramos

As I write this column, it's almost Thanksgiving, and I have much to be thankful for. My family, our health, my friends, and this job that I love. I'm also grateful for our FDLA members, who have participated in many of our events this year as we've tried to continue improving our services.

It's gratifying to see that our efforts are not in vain, as we have grown tremendously over this last year. We can boast of over 300 new members in 2022 alone. Our total membership now exceeds 1300, and our in-house counsel and adjuster membership has grown from just 12 in 2018 to 480 today! Because the FDLA exists to serve all involved in Florida's defense bar, including private attorneys, government attorneys, in-house counsel, and adjusters alike.

By the end of 2022, we will have put on 16 quality webinars, including an entire series dedicated to career-building and trial skills and several webinars on today's hottest topics, many of which drew audiences of over 100 registrants. If you haven't checked out the FDLA's on-demand library, filled with free webinars and affordable CLE bundles from our 2022 live events, please visit *www.fdla.org* and look under the Events tab.

Our live events were something special in 2022. After our spring Professional Liability Symposium and the sold-out FLCC in June, we still had two more events planned for the fall. In August, we held the third annual Florida Insurance Network Symposium (FINS) at a new favorite location, the Renaissance Tampa International Plaza. We kicked off the event with a reception and dine-around, where attendees and sponsors enjoyed dinner at a variety of restaurants right next door to our venue. The conference was well-attended and included speakers covering the most pressing issues affecting bad faith, coverage, and first-party practitioners.

In September, over 60 leaders from firms big and small across Florida gathered at the JW Marquis Miami for our 2023 Leaders Summit. We couldn't invite so many of our friends to come to Miami and not show them a great time, so on our first night, everyone boarded a luxury yacht for a Biscayne Bay cruise where we enjoyed delicious food and drinks, live music, and spectacular views of the Miami skyline. The next day, managing partners, firm leaders, and other seasoned attorneys enjoyed a full day of informative sessions focused on improving law firm professionalism, longevity, and retention. A separate track gathered some of these firms' brightest young associates for a Young Lawyer Leadership Academy, where FDLA leaders, guests, and judiciary members gave them a full day of one-on-one instruction on how to succeed in the legal field. And during lunch, everyone was treated to an inspirational keynote address by Florida Supreme Court Justice John Couriel.

We welcomed our 2022-23 FDLA Board of Directors during the Leaders Summit, including several new members. (The theme for the dinner was "Miami Vice," so don't judge some of our wardrobe choices.) Our board is excited about where the FDLA is going, and I am thankful to work with such a lovely group of people who genuinely care about this organization. Check out the President's Column, where our new commander-in-chief, Frank Pierce, IV, will discuss the FDLA's exciting plans for 2023. We can't wait to see what the new year holds for us, but as always, the FDLA will be here to help you be the best defense attorney you can be. Reach out any time.

Thank You to Our Leaders Summit Annual Sponsors & Exhibitors!

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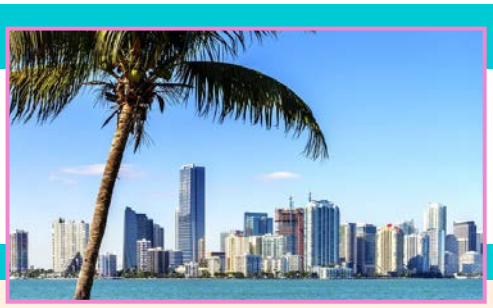
2022 LEADERS SUMMIT



FINS 2022 Florida Insurance Network Symposium

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FDLA WINTER MEETING

JANUARY 22 – 24, 2023

FDLA has your much needed winter escape! Join us in MONTANA this January for the 2023 Winter Meeting.

FDLA
FLORIDA DEFENSE LAWYERS ASSOCIATION

For additional information:
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Come and enjoy the majestic views and unparalleled skiing of Big Sky, Montana. Nestled in the Rocky Mountains, it is known as home to "The Biggest Skiing in America", boasting 5,850 skiable acres, spread out across four mountains.

Our venue, Big Sky Resort, is a true ski in ski out resort, with direct access to ski lifts. Just a few minutes from our resort, you can enjoy shopping and dining in the local Big Sky Mountain Village. You can also indulge your need for adventure with zip-lining, dogsledding, snowmobiling, and many other winter activities, or head Southeast for a day trip to Yellowstone National Park, with its wildlife, hot springs and gushing geysers. To unwind, enjoy the resort's pool and hot tubs or pamper yourself at Solace Spa. Whether you are an avid skier or not, this trip offers an unforgettable opportunity for you and your family to experience something wholly different from our daily lives here in sunny Florida.

All CLE will be pre-recorded, so registered attendees can access the sessions on-demand and enjoy more free time at Big Sky. All our on-site gatherings will be focused on networking opportunities.

HOTEL: BIG SKY RESORT

https://bigskyresort.com / 50 Big Sky Resort Rd. / Big Sky, MT 59716 / (800) 548-4486

The reservation link and a link to purchase discounted lift tickets will be providing to those who register.

- Room rates start at $339
- Located at the base of Lone Peak
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- On-site restaurants and bar
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REGISTRATION FEES

FDLA Members	$275
Non-Members	$325
(Includes FDLA 2023 Membership for qualifying FL attorneys)	
Guests of Registered 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 BIG SKY

After flying into Bozeman Yellowstone International Airport, enjoy the scenic hour-long drive through the Canyon up Highway 191. Car rental options are available at the airport.

Shuttle and private transportation options available at: https://www.visitbigsky.com/get-inspired/big-sky-stories/how-to-get-from-the-bozeman-airport-to-big-sky

FDLA WINTER MEETING

JANUARY 22 – 24, 2023

TOPICS & SCHEDULE

The CLE topics below are being presented by members of our FDLA Board of Directors. A link to recordings of all CLE sessions will be provided to registered attendees for on-demand viewing. There will be no live classroom time during the Winter Meeting. Florida Bar CLE approval is pending.

CLE TOPICS WILL INCLUDE:

First Party Property Caselaw Update
Nicole Fluet
Galloway Johnson Tompkins Burr & Smith

The Proper Care and Feeding of Your In-House Counsel
Jacqueline Ambrose
Florida Cancer Specialists & Research Institute

Expert Discover - What Should You Actually Produce
Elizabeth Plummer
Quintairos, Prieto, Wood & Boyer, P.A.

Soft Tissue Injury Claims, Inflated Damages, and LOP's
Benny Kashi
Cooney Trybus Kwavnick Peets
Bill Peterfriend
Luks, Santaniello, Petrillo, Cohen & Peterfriend

Spoliation: The Cost of Failure to Preserve Physical and Electronic Evidence
Elaine Walter
Boyd Richards Parker & Colonnelli, P.L.

Bad Faith Caselaw Update
Gary Guzzi
Akerman LLP

Recent Developments in Proposals for Settlement and FL Statute 57.105
Frank Pierce, IV and
Taylor Koshak
Bowman and Brooke

Analyzing Coverage Issues
Pamela Nelson
Boyd & Jenerette

FDLA
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SCHEDULE

SUNDAY
Possible Morning Group Excursion(TBD)
6:00-7:00pm Cocktail Hour
7:00pm Dine Around

MONDAY
Possible Morning Group Excursion (TBD)
6:00-7:00pm Cocktail Hour
7:00pm Dine Around

TUESDAY
7:00pm Farewell Dinner

Editorial By Barbara Busharis

Room for One More: Welcome the Sixth District

When Florida's Sixth District Court of Appeal opens its doors, advocates in some of the affected counties may find they are bound by different precedent, or no precedent at all. (This is why the "Sixth District" has long been a feature of legal writing assignments.)

Some advocates may find themselves on opposite sides of a conflict issue. Litigants in Duval County are currently bound by decisions of the First District Court of Appeal. Starting on January 1st, they will be bound by decisions of the Fifth District. Whether that is cause for celebration or dismay may depend on one's perspective.

For the most part, the effect of the new alignment of counties with appellate districts is likely to be more subtle. On true issues of first impression, circuit and county courts will have to continue doing what they already do — make the best possible ruling with the information available. As soon as a District Court of Appeal addresses a new issue, moreover, its decision will be binding on trial courts in the Sixth District just as it already is on the existing district courts.[1] Trial courts in the Ninth, Tenth, and Twentieth Circuits, which are migrating from the Second and Fifth Districts, will still be bound by appellate precedent in a large number of cases.

Still, the reconfiguration of districts will open doors to advocacy in several ways. Trial attorneys in the counties and circuits that have migrated will need to evaluate cases in light of rulings that they might otherwise have ignored. Trial attorneys in the Sixth District will be able to look for opportunities to steer the development of the law in that district by carefully selecting and emphasizing favorable precedent from other districts.

At the appellate level, the Sixth District — as the final authority for the vast majority of cases arising in the Ninth, Tenth, and Twentieth Circuits — will not be bound by any of its sister district courts. Therefore, appellate attorneys will not be limited by the existence or absence of conflict in other districts.

At the highest level, the addition of an appellate district will create additional opportunities to seek conflict jurisdiction in the Florida Supreme Court. There are two paths to conflict jurisdiction: a certified conflict, which confers jurisdiction automatically,[2] and "express and direct" conflict, which must appear on the face of the decision for which review is sought.[3]

Whether the high court agrees that a conflict exists is often a function of how broadly or narrowly the issues are framed. For example, in *Gutierrez v. Vargas*,[4] the Florida Supreme Court reversed a decision in which the Third District remanded a medical malpractice case based on a violation of the "one expert per specialty" rule. Petitioners argued this conflicted with a Fourth District opinion allowing the jury to hear from multiple treating physicians.[5] The Florida Supreme Court agreed, holding that because two of the witnesses at Petitioner's trial had testified as treating physicians rather than experts, it had not been error to allow them to testify.[6] However, three justices dissented with the court's exercise of jurisdiction. Justice Canady, joined by Justice Lawson, described the conflict case as presenting the "narrow issue" of whether a subsequent treating physician could testify regarding the effect of the defendant's care on subsequent care.[7] He concluded both cases involved medical malpractice and the testimony of treating physicians, but did not expressly and directly conflict.[8] Justice Polston distinguished the cases in terms of the witnesses' roles: the case under review "analyzed the difference between treating physician testimony and expert physician testimony," while the conflict case "analyzed the difference between subsequent treating physician testimony and co-treating physician testimony."[9]

A new district will provide new avenues for advocacy. Framing and preserving issues carefully will be essential for those seeking to maximize the opportunities this provides.

[1] *See Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."); *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976) (reasoning that requiring trial courts to follow district court precedent "is logical and necessary in order to preserve stability and predictability in the law…").

[2] Jurisdiction is still discretionary, but obtaining a certified question means the court does not have to inquire further into whether a conflict is present.

[3] *See, e.g., Ford Motor Co. v. Kikis,* 401 So. 2d 1341, 1342 (Fla. 1981).

[4] 239 So. 3d 615 (Fla. 2018).

[5] *Id.* at 621 (citing *Cantore v. West Boca Med. Ctr.,* 174 So. 3d 1114 (Fla. 4th DCA 2015)).

[6] *Id.* at 622-25. Another expert had testified in rebuttal. *Id.* at 627-28.

[7] *Id.* at 630 (Canady, J., dissenting).

[8] *Id.*

[9] *Id.* at 631 (Polston, J., dissenting).

Judicial Perspectives

The HONORABLE PAIGE KILBANE is a Palm Beach Circuit Court Judge. She currently presides in the Civil Division of the Circuit Court. She previously served as a County Court Judge after being appointed by now-Senator Rick Scott in 2018. While a County Court Judge, she also served as the Administrative Judge for the County Civil Division as well as the Administrative Judge for the Civil Traffic Division. In June of 2020, Governor Ron DeSantis appointed Judge Kilbane to the 15th Judicial Circuit Court. Judge Kilbane received both her undergraduate and Juris Doctor degrees from the University of Florida. Prior to taking the bench, Judge Kilbane served as an Assistant State Attorney in the 19th Judicial Circuit, as a complex commercial and intellectual property litigator with Mracheck Law, and finally as Staff Counsel for Allstate, Esurance and Encompass handling a broad range of auto and property matters.

Judge Kilbane currently serves on the Florida Bar Small Claims Rules Committee and the Florida Supreme Court Civil Jury Instruction Committee.

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

Great listening skills. Not only do these attorneys have an understanding of the law at issue, the facts as they apply to the law in their case, and candor with the court, but most of all they listen to the court and their opponents and can respond efficiently and effectively. If the Court has reviewed the Motion ahead of the hearing, a brief history of the basics of the case and the standard of review is generally far less helpful than addressing the issue at hand, providing the best case to support the legal position, or distinguishing their case from controlling case law. Having the restraint and confidence to do only what is necessary based on the fluid situation in the courtroom is a skill that can and should be honed by lawyers at every level.

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

Never stoop to their level. While it may be tempting to counteract perceived attacks with similar rhetoric, it is rarely if ever fruitful for the attorney or their client. Continue to be prepared, as responsive as possible and at all times professional. As my mother has always told me, the cream always rises to the top.

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

Palm Beach Courthouse

Judges hear many similar motions every day. The issue may be slightly different but a seasoned judge often does not need the standard recited or the background facts restated. Like the attorney, they have prepared for the hearing and are ready to address the legal issues at hand. As an attorney, sometimes I had the tendency to argue my position as I had planned and transitioning to what the judge asked could be tough. I didn't realize how difficult it could be for the judge to obtain the information they need to make a decision when I did that. Lesson learned!

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

Not having a working knowledge of the documents, i.e. exhibits, to be used at trial. Whether it's the contents of those documents or the potential objections/exceptions to those documents coming into evidence, attorneys need to be prepared to deal with those routine issues during trial without delay.

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

In the Circuit Civil Division there are very few, if any, true emergencies. Most of the "emergency" motions received are only perceived as emergencies because timely action was not taken. Motions for protective order or motions to compel are easy examples of motions that are never true emergencies. Even motions to cancel foreclosure sales are not emergencies. Sometimes delays happen, but they should not become the court's emergencies. Simply setting a hearing to address the issue should suffice.

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

Most attorneys do a great job and do all they can to assist the court. Being prepared for the hearing by reviewing the Motion, case law and court docket, as well as speaking to opposing counsel in advance of the hearing will always help. That way you may be able to narrow the issues ahead of the hearing and even if you cannot, you know exactly

where to direct the judge's attention so you can best utilize your hearing time.

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?

A CLE targeted at practice in a post-COVID world, including communication and case management, would address the many changes in the profession since the start of the pandemic. Since the post-COVID world presents challenges far beyond remote hearings, most notably the Differentiated Case Management Orders and proposed changes to the Civil Rules, a CLE that aims to assist with time management, organization, cooperation and true communication with opposing counsel may serve to relieve a lot of the friction I see on a daily basis. The demands on everyone are higher than ever; however, lawyers still have an ethical duty to zealously represent their clients. This duty persists in spite of attorney and staff turnover, illness, multiple trials and the list goes on. Helping lawyers, at all practice levels, best understand what is necessary to move a case forward, how to get a case ready for trial, strategies to deal with unresponsive opposing counsel, the requirements and timeframes of new rules, and training of attorneys and support staff to meet these new demands would facilitate the profession's transition in this new phase.

Five Simple Ways to Improve Your Legal Writing Skills

By Mihaela Cabulea

MIHAELA CABULEA is a Florida Bar Board Certified Specialist in Appellate Practice. She heads the Appellate Practice group of Butler Weihmuller Katz Craig and focuses her practice on liability defense, first and third-party coverage, and extra-contractual matters in state and federal appellate courts. She also provides litigation support with dispositive motions and appellate support at trial.

Before joining Butler, she clerked for the Honorable Patrick A. White, U.S Magistrate Judge in the Southern District of Florida and served as a senior judicial staff attorney in the Seventeenth Judicial Circuit Court of Florida. She served on the Florida Bar Appellate Court Rules Committee from 2013 to 2016.

In addition to holding a J.D. from the University of Miami, where she served as a Dean's Fellow in the Legal Writing Center, she holds a Ph.D. in Philosophy and an M.A. in American Studies from Babeș-Bolyai University in Cluj-Napoca, Romania. As a Ph.D. student, she spent the 2001-01 academic year as a Fulbright Visiting Researcher at Stanford University.

There is no shortage of legal writing books and articles that young lawyers can use to improve their writing skills. But given all the demands the legal profession places on us, lawyers, when can one find the time to read and, most importantly, implement all that advice, some of which is most unrealistic given the deadline-driven reality we live in? My aim in this column is to repeat as little as possible from that textbook advice. My focus will be on some practical tips and how to implement them in the context of writing persuasive summary judgment motions or responses in opposition to such motions under the recently amended Florida summary judgment standard.

Know your audience and adapt your writing style to it.

Writing legal memoranda for a senior attorney. If, for example, a senior attorney in your firm asks you to write a legal memorandum addressing all the potential grounds for summary judgment in a particular case, your task is not simply to gather a collection of authorities, endless string cites, and block quotes. Rather, it is to survey the parties' pleadings in the case, the evidence produced during discovery, and the applicable law, and provide a comprehensive roadmap for a summary judgment motion. The young lawyer's common mistake is to inundate the senior attorney with too much information, without much analysis, when the senior attorney expects a thorough analysis and an objective evaluation of the chances of success. This entails a discussion of pertinent authorities applied to the facts of the case, and an objective evaluation of the merits of each ground for summary judgment. Do not be afraid to be assertive and write confidently when you assess the strengths and weaknesses of the movant's position.

Explain whether you recommend moving for final or partial summary judgment. Perhaps discovery is still ongoing and you have not yet developed the evidentiary basis for certain defenses. Identify those defenses, briefly state what other evidence is needed to move for summary judgment on those defenses, and explain why you need to depose additional witnesses and why an affidavit from the corporate representative would not suffice. If a certain defense (fraud, for example) is not suitable for summary judgment, do not be afraid to recommend against moving for summary judgment on that defense. Let the senior attorney know if you think the answer and affirmative defenses must be amended as a result of discovery before moving for summary judgment.

While you plan and draft the memorandum, keep in mind that it should serve two purposes for the senior attorney: it should be easily convertible into a summary judgment motion and into a report to the client. If you accomplish this task successfully, it is very likely that the senior attorney will be impressed with your work, will rely on you regularly and give you more and more responsibility.

Writing a summary judgment motion for filing with the court. The amended summary judgment rule requires trial judges to state on the record their reasons for granting or denying summary judgment. The reason for this requirement is to ensure "that Florida courts embrace the federal summary judgment standard in practice and not just on paper."[10] In clarifying the degree of specificity needed to comply with this requirement, the Florida Supreme Court stated that "it will not be enough for the [trial] court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review."[11] Surprisingly, more than a year after the amendment of the rule, there are still trial judges who do not comply with this requirement. Thus, your job is to educate the judge. Do not wait to do so until it is too late, or else you will risk a reversal that makes your client and the court unhappy and wastes a lot of resources. Florida appellate courts have already enforced this requirement and will likely continue to do so.[12]

To know your burden on summary judgment, know what the burden of proof will be at trial. The new standard for summary judgment is similar to the directed verdict standard and "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require sub-

mission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[13] If the moving party, which you represent, bears the burden of proof at trial, then you must establish all essential elements of the defense(s) you are relying on to obtain summary judgment.[14] The moving party "must support its motion with credible evidence ... that would entitle it to a directed verdict if not controverted at trial."[15] If the nonmoving party bears the burden of proof at trial, then the moving party may obtain summary judgment by establishing the nonexistence of a genuine issue of material fact as to any essential element of the nonmoving party's claim or affirmative defense.[16] The moving party does not have to "support its motion with affidavits or other similar material *negating* the opponent's claim."[17] The moving party may discharge the burden by showing the court that "there is an absence of evidence to support the nonmoving party's case."[18]

Despite this change, there are plenty of trial judges who still feel compelled to deny summary judgment based on some irrelevant dispute of fact. Your task is to educate the judge that summary judgment is no longer a disfavored means of resolving a case and to persuade the judge that summary judgment for your client is warranted. You can do that best by connecting your arguments with the legal standard and the burden of proof.

Have a structure and a roadmap before you start writing and stick to it.

Many attorneys start writing without a plan or a clear structure in mind, hoping that eventually the arguments will reveal themselves to them by trial and error. This approach might lead to a quicker first draft, but that draft will be in need of many re-writes prior to it reaching a satisfactory final draft status. Planning and structuring your arguments is key to persuasive and succinct writing. It is also the most efficient path to the final product. Although it might take longer before a draft is complete under this approach, that draft will be very close to the final product and will only need minor edits for typos and style. Before you start a new paragraph, ask yourself what message you want to convey in that paragraph and stick to that message. That way, the points you want to make will not be scattered throughout the legal document you are drafting, but will be succinctly addressed in one or two paragraphs at most.

Less is almost always more.

> "I have only made this letter longer because I have not had the time to make it shorter."[19]

Succinct writing takes time. But it is time well spent. Judges and law clerks read thousands of pages each week. If you can express your arguments succinctly they will be able to follow and remember them better.

In our example of drafting a summary judgment motion, how can you write succinctly without sacrificing the content of your motion? In addition to having a roadmap, writing each paragraph with a purpose in mind, and avoiding unnecessary arguments that detract from the main issues in the case, try to condense your statement of undisputed material facts to include only the material facts. If, for example, your case involves a breach of a property insurance contract, ask yourself if it is really a material fact that a policy was issued to the policyholder and the policy was in effect between certain dates, covering certain property. Unless there is a dispute as to whether the loss occurred during the policy period, those facts are most likely not material. Instead of adding every insignificant fact to your statement of undisputed material facts, try to tell the judge a story about your case in an introductory section that informs the court about the background of the case, the issues for the court's determination and the reasons why the court should rule in your client's favor.

Avoid unnecessary use of dates. Unless dates are essential for the issues presented — e.g., when you have a late notice issue — there is no need to inundate the court with dates. Avoid countless string cites for well-established legal principles. And do not overcomplicate your analysis by resorting to legal treatises and analogizing with federal law when the issues you are analyzing are well-settled. Choose the number of block quotes wisely. When the precise language of your source is not critical, try to paraphrase and simplify as much as possible, rather than parrot legal authority. Avoid long conclusions that summarize the arguments; a summary of the argument should be included upfront when you provide the court with a roadmap. Instead, focus your conclusion on your prayer for relief and make sure you ask for alternative relief if appropriate. If you are writing a legal memorandum for a senior attorney, use the conclusion to provide a recommendation, not a summary.

There are, however, times when you need to provide the court with a more detailed recitation of the facts or of the procedural history of the case. For example, when your opponent has presented a distorted version of the case or facts, take the time to provide the court with the full story rather than resort to attacking your opponent.

Develop a concise writing style that avoids unnecessary verbiage. Try to get rid of antiquated words or phrases like: "herein," "hereto," "hereinafter," "therewith," "aforementioned," "notwithstanding anything to the contrary contained herein," "notwithstanding the aforementioned."

For example, write:

On May 15, 2021, the homeowners notified their insurer of the loss. (12 words)
Not
On or about May 15, 2021, Mr. and Mrs. Jones gave notice of the loss to their insurer. (18 words)
The insurer investigated the claim. (5 words)
Not
The insurer proceeded to conduct an investigation of the claim. (10 words)

These might seem small changes, but they can make a big difference if you consistently apply them throughout your document. You will end up with a concise, easy to follow legal document and the reader will appreciate that.

Write with integrity.

As a former judicial staff attorney and a career law clerk in state and federal court, I can say without hesitation that

misrepresenting the facts or the law and casting aspersions on your adversary or the court is by no means good advocacy. This calls into question your professional judgment and the strength of your arguments. If such remarks make their way into your initial draft, make sure to delete them from your final draft or otherwise you risk damaging your reputation, which will ultimately be detrimental to your clients.

> As Justice Ginsburg once wrote in an article on appellate advocacy:
>
> Above all, a good brief is trustworthy. It states the facts honestly. It does not distort lines of authority or case holdings. It acknowledges and seeks fairly to account for unfavorable precedent. A top quality brief also scratches put downs and indignant remarks about one's adversary or the first instance decisionmaker. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.[20]

Try to apply these principles consistently and you will earn the respect of judges and other practitioners.

Learn to deconstruct and you will know how to construct

Some reputable legal scholars have suggested that "[t[he best way to become a good legal writer is to read good prose."[21] And by good prose they do not mean legal prose.[22] This assumes good writing is "contagious," when in fact it takes a lot of effort and work to become a good writer.

I think reading good prose is a great way to polish already good writing skills, but will hardly make anyone a good legal writer. There is a more efficient way to learn the art of persuasive legal writing. Try to deconstruct your opponents' writing and you will soon learn to avoid their mistakes. In the process, you will become a much better legal writer.

For example, below is a redacted[23] portion of a "statement of undisputed material facts" from a summary judgment motion written after the amendment of the summary judgment standard in Florida. In the process of responding to it, as required by the amended summary judgment rule,[24] one inevitably learns how to draft a better statement of undisputed material facts.

1) *On or about March 13, 2021, there was a fire within Orchid Club Apartments, Unit 1313 at 1311 NE 13th Street, Delray Beach, FL, within which children AM and SM lost their lives.*

2) *Defendants Orchid Club West, LLC and Careless Management Corp., are owners, lessors and landlords of Orchid Club Apartments, which includes but is not limited to 1311 NE 13th Street, Unit 1313, Delray Beach, FL (hereinafter referred to as the "subject apartment").*

3) *As per City of Delray Beach, Code of Ordinance, §113.13, NFPA 101 Fire Code & Life Safety Code codified by §633.202, Florida Statutes, it was and currently remains, the non-delegable responsibility of owners, landlords and lessors of rental housing and apartment buildings to install working smoke detection devices within all apartment units and all bedrooms and/or sleeping areas within each apartment unit. It also was and is the non-delegable responsibility of owners, landlords and lessors to inspect, test and maintain all smoke detection devices within all apartment units.*

4) *In violation of Fire Safety Codes, the Defendant owners, landlords and lessors of Orchid Club Apartments failed to install, inspect, test and maintain smoke detection devices within all rental apartment units and rental apartment bedrooms.*

5) *On March 13, 2021, Orchid Club Apartments, Unit 1313 at 1311 NE 13th Street, Delray Beach, Florida did not have operational smoke detection devices and was in violation of the Fire Safety Codes.*

6) *The fire Safety Codes are all aimed at public safety and establish a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.*

7) *Count I through IV of Plaintiff's Amended Complaint, e-filed with the Court on June 4, 2022, contains the following language as to each Defendant: [Extensive block quote from the amended complaint followed].*

Without even knowing the facts of the case, one can tell there is a lot wrong with this recitation of "undisputed material facts." First, there is no citation to the record, as required by the amended Florida Rule of Civil Procedure 1.150(c)(1)(A) (which specifies that the parties must support their factual position by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials…"). Second, the alleged statement of undisputed material facts consists mostly of: recitations of law (¶ 3); arguments, speculations, and legal conclusions (¶¶ 4, 5, 6); and allegations in the complaint, which are not taken as true at the summary judgment stage (¶ 7). Third, although the information in paragraph 1 is true, the death of one of the children was immaterial because there was no claim brought for her death. Similarly immaterial is the address and the unit number where the fire occurred, yet that information is repeated in several paragraphs. The assertion in paragraph 5 was disputed. Thus, in seven paragraphs of alleged material facts, there is a single undisputed material fact: namely, that one child died as a result of a fire.

If you accomplish well your task of responding to your opponents' position, you will inevitably become a better legal writer, because next time you draft a legal document you will be more careful not to repeat the same mistakes.

Conclusion

Persuasive legal writing is the product of logical thinking and meticulous editing to attain clarity and style. This article provides five ways to improve your legal writing skills. Some are easy to implement, others take more time, experience, and discipline. To attain competence in legal writing one must continue to grow.

[1] *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72, 77 (Fla. 2021).
[2] *Id.*
[3] See, e.g., *Jones v. Ervolino*, 339 So. 3d 473 (Fla. 3d DCA 2022) (reversing summary judgment because neither the trial court's oral pronouncement nor its written order stated on the record the reasons for granting or denying the motion as required by the newly amended summary judgment standard under Florida Rule of Civil Procedure 1.510(a)(a).1).
[4] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (explaining that the movant is entitled to summary judgment where the evidence is such that it would require a directed verdict for the movant and noting that the "genuine dispute" summary judgment standard is similar to the "reasonable jury" directed verdict standard).
[5] *United States v. Four Parcels of Real Prop, in Greene and Tuscaloosa Counties,* 941 F. 2d 1428, 1438 (11th Cir. 1991).
[6] *Id.* (internal quotation marks and citations omitted).
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).
[8] *Id.* at 323 (emphasis in original).
[9] *Id.* at 324.
[10] Blaise Pascal, The Provincial Letters, Letter 16, 1657.
[11] The Honorable Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C.L. Rev. 567, 568 (1999).
[12] Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 62 (Thomson/West 2008) (quoting Judge Easterbrook of the Seventh Circuit).
[13] *Id.* ("And legal prose ain't that.").
[14] All names, addresses, and dates are fictitious.
[15] Keep in mind that if you do not respond and address all the movant's alleged undisputed material facts, you risk having the court consider the facts undisputed for purposes of the motion. Fla. R. Civ. P. 1.150(e)(2).

Recent Legal Developments

By Ezequiel Lugo

EZEQUIEL LUGO is a Board Certified Appellate Specialist at Banker Lopez Gassler P.A. Mr. Lugo's practice focuses on appeals and trial support. Mr. Lugo is admitted to practice in all state courts of Florida and the United States Court of Appeals for the Eleventh Circuit. He is a member of the Appellate Practice Section of The Florida Bar and the Hillsborough County Bar Association. He is a past Co-Chair of the Appellate Section of the Hillsborough County Bar Association.

FLORIDA SUPREME COURT DECISIONS

1. Must the plaintiff in an *Engle*-progeny case prove that the smoker relied on statements to prevail on fraudulent concealment and concealment conspiracy claims?

Prentice v. R.J. Reynolds Tobacco Co., 338 So. 3d 831 (Fla 2022), answered the question in the affirmative and held that the "plaintiff must prove reliance on a statement that was made by an *Engle* defendant (for a concealment claim) or co-conspirator (for a conspiracy claim) and that concealed or omitted material information about the health effects or addictiveness of smoking cigarettes." Reliance on pure silence or a passive failure to disclose is insufficient.

2. Is a contractual provision indicating Florida is "a jurisdiction accepted by the parties" a choice of law provision or a forum selection clause?

The Florida Supreme Court, in *Tribeca Asset Management, Inc. v. Ancla International, S.A.*, 336 So. 3d 246 (Fla. 2022), held that such a provision is a choice of law provision because it began by stating the agreement "will be governed by the laws of the State of Florida[.]"

3. Can an arbitrator decide whether a dispute is subject to a contract's arbitration provision?

In *Airbnb, Inc. v. Doe*, 336 So. 3d 698 (Fla. 2022), the supreme court held that an arbitrator could decide arbitrability where the contract was governed by the Federal Arbitration Act and incorporated by reference the American Arbitration Association Rules that expressly delegate such determinations to the arbitrator.

4. Does service of the notice of intent to initiate medical malpractice litigation toll the applicable statute of limitations?

The Florida Supreme Court held that "it is the timely mailing of the presuit notice of intent to initiate litigation, not the receipt of the notice, that begins the tolling of the applicable limitations period for filing a complaint for medical negligence" in *Boyle v. Samotin*, 337 So. 3d 313 (Fla. 2022).

5. Does the holding in *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015), apply to past medical expenses?

Dial v. Calusa Palms Master Association, 337 So. 3d 1229 (Fla. 2022), answered the question in the negative.

6. May a trial court order a judgment debtor to act on out-of-state property?

Shim v. Buechel, 339 So. 3d 315 (Fla. 2022), held that "a trial court may order a defendant over whom it has in personam jurisdiction to act on foreign property pursuant to section 56.29(6), Florida Statutes (2021)[.]"

7. Does the Workers' Compensation Law bar circuit courts from adjudicating lawsuits by injured workers against health care providers for debt collection practices prohibited by the Florida Consumer Collection Practices Act?

The Florida Supreme Court answered the question in the negative in *Laboratory Corp. of America v. Davis*, 339 So. 3d 318 (Fla. 2022), because the Workers' Compensation Law gives the Department of Financial Services exclusive jurisdiction over matters concerning "payments by a carrier to a provider" but not over "dissimilar matters that involve improper billing of a worker by a provider."

FIRST DISTRICT DECISIONS

8. Does the "going and coming" statute bar a workers' compensation claim for an injury sustained after an airport worker walked through airport security and was on the way to the airport-employee parking lot?

In *Aquino v. American Airlines*, 335 So. 3d 768 (Fla. 1st DCA 2022), the appellate court affirmed the denial of the claim and rejected the worker's argument that the injury occurred while traversing between two parts of the employer's premises because the employer did not control the airport-employee parking lot or the public sidewalk where the injury occurred.

9. Does the "going and coming" statute bar a workers' compensation claim for an injury sustained by a "field employee" of a residential remodeling company while on the way to the first job of the day?

DSK Group, Inc. v. Hernandez, 337 So. 3d 814 (Fla. 1st DCA 2022), held that the "going and coming" statute barred the claim. The appellate court explained that the statute's application is not limited to workers who commute between home and the employer's premises.

10. Does a resident of an assisted living facility have to comply with the presuit requirement and statute of limitations from the Assisted Living Facilities Act when asserting a premises liability claim against the facility based on a slip and fall?

Cohen v. Autumn Village, Inc., 339 So. 3d 429 (Fla. 1st DCA 2022), answered the question in the affirmative because the unambiguous statutory language shows that the Legislature intended for common law negligence claims to fall within the scope of the act.

11. May a defendant in a dram shop action assert affirmative defenses based on comparative fault and the statutory alcohol defense?

In *Main Street Entertainment, Inc. v. Guardianship of Faircloth*, 342 So. 3d 232 (Fla. 1st DCA 2022), *rev. granted,* 2022 WL 16547789 (Fla. Oct. 31, 2022), the First District analyzed the application of these defenses in the context of an accident where an intoxicated driver struck an intoxicated pedestrian. The appellate court held that the dram shop could not seek apportionment of liability between itself and its intoxicated patron (the driver), but could seek apportionment of fault as to a different bar that served the pedestrian or, if circumstances permitted, as to the intoxicated pedestrian. The appellate court also held that the dram shop could assert the statutory alcohol defense from section 768.36(2), Florida Statutes, as to the intoxicated pedestrian, but only if the pedestrian's intoxication was caused by something other than being served alcohol by the other bar. The First District certified the question as to whether section 768.81, Florida Statutes, applies to dram shop actions to the Florida Supreme Court.

12. Is a party entitled to a new trial based on the denial of a for-cause challenge to a potential juror where another objectionable juror would have served as a principal juror if the challenge had been granted?

The First District Court of Appeal answered the question in the negative in *Seadler v. Marina Bay Resort Condominium Association, Inc.,* 341 So. 3d 1146 (Fla. 1st DCA 2021), *rev. granted,* 2022 WL 16543867 (Fla. Oct. 31, 2022). After denying rehearing, the court certified conflict with the Second, Third, Fourth, and Fifth Districts.

SECOND DISTRICT DECISIONS

13. Is an accepted proposal for settlement subject to attack on unilateral mistake grounds based on argument that the omission of a co-defendant was done in error?

Williams v. Fernandez, 335 So. 3d 194 (Fla. 2d DCA 2022), answered the question in the negative where no admissible evidence supported the argument. The appellate court also noted that unilateral mistake was "not statutorily defined as an escape hatch" for proposals for settlement under section 768.79, Florida Statutes.

14. Does the failure to notify a defendant's known counsel of an application for a clerk's default and the subsequent default proceedings render a final default judgment void or voidable?

In *KB Home Fort Myers LLC v. Taishan Gypsum Co.*, 336 So. 3d 841 (Fla. 2d DCA 2022), the Second District reversed a trial court order finding a final default judgment void and explained that the judgment was merely voidable because: (1) the failure to notify counsel was not a due process violation where the defendant itself had notice of the action and the default proceedings; (2) there was no evidence supporting the "known counsel" theory; and (3) the failure to notify a defaulted party of a damages hearing renders the judgment voidable, not void.

15. Are appraisal provisions in automobile policies invalid?

Progressive American Insurance Co. v. Glassmetics, LLC, 343 So. 3d 613 (Fla. 2d DCA 2022), rejected multiple challenges to an appraisal provision included in an automobile policy and held that: (1) the provision did not address attorney's fees and did not violate the public policy underlying section 627.428, Florida Statutes; (2) the procedures for arbitration do not apply to appraisals and the absence of a description of detailed procedures does not render an appraisal provision unenforceable; (3) the appraisal provision did not result in a complete waiver of the right to a jury trial or the right of access to courts; and (4) the retained rights clause did not render the appraisal provision ambiguous or unenforceable.

16. Is the fact that a judge refers counsel to a local professionalism panel sufficient to support a motion for judicial disqualification?

In *Mongelli v. Florida Health Sciences Center, Inc.*, 339 So. 3d 480 (Fla. 2d DCA 2022), the appellate court held that "a trial court judge may refer a lawyer perceived as discourteous to a local professionalism panel without concern that he or she, by that action alone, will be subject to disqualification."

17. Does a notarized letter lacking an oath or affirmation satisfy the medical malpractice presuit requirements from section 766.203(2), Florida Statutes?

Andary v. Walsh, 342 So. 3d 749 (Fla. 2d DCA 2022), held that the plaintiffs had not complied with the presuit requirement of a "verified written medical expert opinion" by providing a notarized letter without an attestation, authentication, oath, or verification of what function the notarization was supposed to serve.

THIRD DISTRICT DECISIONS

18. Are unsworn pleadings and other documents relating to dismissed and settled co-defendants admissible in a trial of the remaining co-defendants?

The Third District answered the question in the negative in *Hernandez v. CGI Windows and Doors, Inc.,* 347 So. 3d 113 (Fla. 3d DCA 2022), reversed a defense judgment, and remanded for a new trial.

19. Must a trial court include specific findings when entering an order ruling on a motion to dismiss for failure to comply with Chapter 766's presuit requirements?

University of Miami v. Jones, 338 So. 3d 401 (Fla. 3d DCA 2022), reiterated that the failure to make any findings regarding the plaintiff's compliance with the presuit requirements constitutes a departure from the essential requirements of the law.

20. Does loss of intended use of insured property constitute "direct physical loss or damage to property" under an all-risk commercial property policy?

Commodore, Inc. v. Certain Underwriters at Lloyd's London, 342 So. 3d 697 (Fla. 3d DCA 2022), interpreted the policy language to require "some actual alteration to the insured property" and held that loss of intended use alone was insufficient to trigger coverage. Neither government closure orders nor COVID-19 particles on the surfaces of a restaurant result in actual, tangible alteration to the insured property.

21. Is an insured's silence following a coverage determination of an initial claim sufficient to establish the requisite genuine disagreement over the amount of loss of a supplemental claim necessary to compel appraisal?

Certain Underwriters at Lloyd's v. Lago Grande 5-D Condominium Association, Inc., 337 So. 3d 1277 (Fla. 3d DCA 2022), answered the question in the negative in a case where the trial court compelled appraisal even though the insured never presented any estimate of the damages or the costs of repair. The appellate court rejected the insured's argument that *U.S. Fidelity & Guaranty Co. v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999) (en banc), and its progeny do not require an insured to provide a meaningful exchange of information where the insurer has been able to determine the alleged amount of loss through its independent investigation.

22. Does Florida law preclude a plaintiff from pursuing a claim against a vehicle's owner under the dangerous instrumentality doctrine where the driver weaponizes the vehicle with the intent to cause bodily herm?

Sager v. Blanco, 342 So. 3d 697 (Fla. 3d DCA 2022), answered the question in the negative where the weaponized use of the vehicle is reasonably anticipated.

FOURTH DISTRICT DECISIONS

23. Does *Daubert* apply to expert testimony on the issue of attorneys' fees?

The Fourth District answered the question in the affirmative in *Philip Morris USA, Inc. v. Naugle*, 337 So. 3d 13 (Fla. 4th DCA 2022).

24. Where a co-defendant settles an attorney's fee claim, is the other co-defendant entitled to a setoff when the court determines the amount of fees owed pursuant to a rejected proposal for settlement?

Philip Morris USA Inc. v. Gore, 344 So. 3d 1 (Fla. 4th DCA 2022), held that the setoff statutes do not apply to fee claims based on a proposal for settlement but a reasonable fee under section 768.79, Florida Statutes, should not include duplicative amounts which the offeror has already been paid by or awarded against any other offerees.

25. May a spouse bring a marital consortium claim based on injuries to the other spouse that predate the marriage?

Philip Morris USA, Inc. v. Rintoul, 342 So. 3d 656 (Fla. 4th DCA 2022), the Fourth District answered the question in the negative because marriage is an essential element of a loss of marital consortium claim. The appellate court also rejected the argument that *Obergefell v. Hodges*, 576 U.S. 644 (2020), should be applied retroactively to establish that a common law marriage existed at the time of the injury.

26. What happens when the nonmovant fails to serve a response to a motion for summary judgment under the current version of Florida Rule of Civil Procedure 1.510?

Lloyd S. Meisels, P.A. v. Dobrofsky, 341 So. 3d 1131 (Fla. 4th DCA 2022), held that "[b]ecause the defendants failed to file a response with their supporting factual position, as required under the amended rule, the trial court was permitted to consider the facts set forth in the plaintiff's motion for summary judgment as 'undisputed for purposes of the motion.'" The trial court is permitted, but not required, to consider other materials in the record.

27. Does a plaintiff have to establish a meritorious defense when seeking to set aside a dismissal on the ground of excusable neglect under Florida Rule of Civil Procedure 1.540(b)?

Pierre v. American Security Insurance Co., 346 So. 3d 62 (Fla. 4th DCA 2022) (en banc), answered the question in the

negative and receded from language in *Arriechi v. Bianchi*, 318 So. 3d 4 (Fla. 4th DCA 2021), that supported the contrary position.

FIFTH DISTRICT DECISIONS

28. May a plaintiff recover the balance owed on a car loan in a suit to recover property damages related to a car accident?

The Fifth District, in *Turay v. McCray*, 337 So. 3d 895 (Fla. 5th DCA 2022), held that the balance owed on the car loan is not a proper element of damages and explained that recovery is limited to the property's value on the date of loss.

29. Can a trial court award a contingency multiplier under a federal statute allowing prevailing party attorney's fees?

BMW of North America, LLC v. Henry, 336 So. 3d 1255 (Fla. 5th DCA 2022), held that contingency multipliers are prohibited when awarding attorney's fees under a federal fee-shifting statute.

30. May a trial court compel appraisal before the insurer has made a coverage determination and the court has ruled on any coverage issues?

In *American Coastal Insurance Co. v. Villas of Suntree Homeowner's Association, Inc.,* 346 So. 3d 126 (Fla. 5th DCA 2022), an appeal involving a supplemental hurricane claim, the Fifth District held that the trial court had discretion to employ a dual-track approach and compel appraisal even where the insurer has not yet reached a coverage decision. The appellate court also rejected the argument that an order compelling appraisal must contain explicit factual findings.

31. Is a PIP insurer obligated to apply a non-emergency medical provider's bill to the deductible before applying an emergency medical provider's bill to the deductible?

The Fifth District answered the question in the negative in *Progressive American Insurance Co. v. Emergency Physicians, Inc.*, 342 So. 3d 727 (Fla. 5th DCA 2022).

32. Does an insured's act of cashing a check tendered as payment of an initial claim constitute a full settlement that bars a subsequent supplemental claim?

Lemon v. People's Trust Insurance Co., 344 So. 3d 56 (Fla. 5th DCA 2022), answered the question in the negative where the language of the check indicated it was offered in settlement of only the initial claim and there was no evidence of an intent to preclude supplemental claims.

Appealing Matters

By Robert C. Weill

This recurring column collects and summarizes civil cases and other noteworthy cases pending on the merits before the Florida Supreme Court. Cases marked with an asterisk have been decided or disposed of but are included because the time for rehearing has not expired, there is a post-decision motion pending, or related proceedings are not yet completed. The term "tag case" refers to a case that involves the same or a similar issue to another case already pending before the court. The court typically stays tag cases until the lead case is finally decided.

Oral arguments can be watched on the WFSU Gavel to Gavel website, the Florida Supreme Court's Facebook page, or the court's YouTube channel, all available at https://www.floridasupremecourt.org/Oral-Arguments/Oral-Argument-Broadcasts. To check on the current status of any case after publication of this article, go to: http://onlinedocketssc.flcourts.org/ and input the Florida Supreme Court case number (preceded by "SC" in the entries below).

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Appellate Procedure & Jurisdiction

Scope of Certiorari Jurisdiction — Orders Denying Motions to Dismiss for Failure to Comply with the Medical Malpractice Act's Presuit Requirements. Whether certiorari review of orders denying motions to dismiss for failure to comply with the presuit requirements of Florida's Medical Malpractice Act is limited solely to procedural defects in the presuit process and not available to a trial court's determination of a claimant's actual, legal compliance with the statutorily required condition precedents prior to filing a medical negligence lawsuit. ***Univ. of Fla. Bd. Of Trustees v. Carmody,* No. SC22-68** (*rev. granted* May 25, 2022). DCA decision: 331 So. 3d 236 (Fla. 1st DCA 2021) (holding that certiorari review was not available for trial court's determination regarding corroboration of patient's claim). Status: briefing; oral argument will be set at a later date.

Certiorari Jurisdiction — Orders Vacating Arbitration Awards. Certified Conflict: Is certiorari jurisdiction available to review orders that vacate an arbitration award and remand for another arbitration hearing? ***Unifirst Corp. v. Joey's New York Pizza, LLC*, No. SC22-181** (*rev. granted* July 27, 2022). DCA decision: 331 So. 3d 1231 (Fla. 2d DCA 2021) (declining to treat appeal from order vacating an arbitration award and ordering the parties to renewed arbitration as a petition for writ of certiorari). Status: briefing; oral argument will be set by separate order.

Civil Procedure

Denial of Challenges for Cause — Per Se Reversible Error. Certified Conflict: Whether a trial court's error in failing to strike a potential juror for cause, when properly preserved, is per se reversible error in a civil case. ***Seadler v. Marina Bay Resort Condo. Ass'n*, No. SC22-984** (*rev. granted* Oct. 31, 2022). DCA decision: 341 So. 3d 1146 (Fla. 1st DCA 2022) (holding that any error in the trial court's refusal to strike presumptive principal juror for cause was not prejudicial to vacationer and thus did not warrant reversal of judgment and granting of new trial). Status: briefing; oral argument will be set at a later date.

Family Law/Probate

Posthumously-Conceived Child — "Provided For" in Decedent's Will. Certified Questions from the Eleventh Circuit Court of Appeals: (1) Under Florida law, is [a posthumously-conceived child] "provided for" in the decedent's will within the meaning of Fla. Stat. § 742.17(4)? (2) If the answer is yes, does Florida law authorize a posthumously conceived child who is provided for in the decedent's will to inherit intestate the decedent's property? ***Steele v. Commissioner of Social Security*, No. SC22-1342** (jurisdiction invoked on Oct. 12, 2022). 11th Cir. decision: 51 F.4th 1059 (11th Cir. 2022). Status: briefing.

Government

Marsy's Law — Application to Law Enforcement Officer. The case presents three questions of constitutional construction: (1) Whether a law enforcement officer who is threatened with harm in the course and scope of official duty is a "crime victim" under article I, section 16, of the Florida Constitution ("Marsy's Law"); (2) Whether Marsy's Law requires a triggering event—the commencement of a criminal proceeding—before a "crime victim" is entitled to its constitutional protections; and (3) Whether Marsy's Law provides a constitutional right of anonymity to law enforcement officers who are threatened with harm in the course and scope of duty. ***City of Tallahassee v. Fla. Police Benevolent Ass'n*, No. SC21-651** (*rev. granted* Dec. 21, 2021). DCA decision: 314 So. 3d 796 (Fla. 1st DCA 2021) (holding that two city police officers who fatally shot suspects threatening them with deadly force were entitled to victim confidentiality protection under Marsy's Law, that victim protection begins at the time of victimization, and the officers' names were entitled to confidential treatment). Status: oral argument was rescheduled to Dec. 7, 2022; briefing was completed on June 10, 2022.

Immunity — Local Legislators & Local Governments — Separation of Powers. Per Petitioner, this case presents two issues: (1) whether local legislators' legislative immunity for purely legislative activities may be stripped away by State's preemption of an area of law, without violating separate of powers principles; and (2) whether the discretionary function immunity of local governments may be vitiated by state statute, without violating separate of powers principles. ***City of Weston, Fla. v. State*, No. SC21-917** (*rev. granted* Sept. 9, 2021) (consolidated with *City of Weston v. State*, No. **SC21-918**). DCA decision: 316 So. 3d 398 (Fla. 1st DCA 2021) (holding that governmental entities were not protected by government function immunity and individual government officials were not protected by legislative immunity). Status: decision pending; oral argument took place on June 9, 2022; briefing was completed on Mar. 16, 2022.

Insurance

Uninsured Motorist Insurer — Bad Faith Settlement Payment — Setoff. Certified Question: Is a settlement payment made by an uninsured motorist insurer to settle a first-party bad faith claim subject to setoff under section 768.041(2) or a collateral source within the meaning of section 768.76? ***Ellison v. Willoughby*, No. SC21-1580** (*rev. granted* Jan. 25, 2022). DCA decision: 326 So. 3d 214 (Fla. 2d DCA 2021) (holding that co-owner of truck involved in collision that injured automobile passenger was not entitled to a setoff of settlement amount awarded to passenger from passenger's uninsured motorist (UM) insurer under statute governing release or covenant not to sue; co-owner was not a joint tortfeasor with insurer, settlement funds applied only to passenger's claims against insurer for breach of contract and bad faith refusal to settle, which were not and could not be asserted against co-owner, and settlement amount was considered separate from damages, and thus, denial of setoff did not result in a "windfall" to passenger). Status: briefing; oral argument will be set at a later date.

Insurance — Disinterested Appraiser. Certified Conflict: Can a fiduciary, such as a public adjuster or appraiser who is in a contractual agent-principal relationship with the insureds and who receives a contingency fee from the appraisal award, be a disinterested appraiser as a matter of law?[1] ***Parrish v. State Farm Fla. Ins. Co.*, No. SC21-172** (*rev. granted* Dec. 21, 2021). DCA decision: 312 So. 3d 145 (Fla. 2d DCA 2021) (holding that public adjuster that had contingency interest in or represented insured in appraisal process was not a "disinterested appraiser" under terms of insurance policy and, thus, required disqualification from appraisal process). Status: decision pending; briefing was completed on May 23, 2022; no oral argument.

Denial of Insurance Coverage — Timing of Appraisal vs. Determination of Coverage. Certified Conflict — Following an insurer's denial of coverage, can a court before deciding the issue of coverage, send the case to appraisal to determine the amount of the loss? ***Fla. Ins. Guar. Ass'n v. Leeward Bay at Tarpon Bay Condo. Ass'n*, No. SC20-1766** (*rev. granted* Feb. 8, 2021). DCA decision: 306 So. 3d 1238 (Fla. 2d DCA 2020) (holding that the trial court could allow the appraisal of the insured's loss and the determination of coverage of such loss to move forward on a dual-track basis). Status: request for dismissal filed on Nov. 16, 2022; briefing; stay pursuant to § 631.67, Fla. Stat. (insurer insolvency) was lifted on Sept. 1, 2022; oral argument will be set at a later date.

- Tag Case to *Leeward*:

  ***Weston Ins. Co. v. Riverside Club Condo. Ass'n*, No. SC21-567**. DCA decision: 46 Fla. L. Weekly D590, 2021 WL 982809 (Fla. 2d DCA Mar. 2021). Status: stayed on Sept. 2, 2022 for 6 months because of insurer insolvency; oral argument took place on June 8, 2022; briefing was completed on Mar. 16, 2022; jurisdiction accepted on Nov. 12, 2021; stay lifted on June 21, 2021.

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[1] This was the same issue before the Court in *State Farm Fla. Ins. Co. v. Sanders*, No. **SC20-596** (*rev. granted* Oct. 7, 2020), which Court dismissed for lack of jurisdiction

Property

Municipal or Public Purposes — Tax Exemption — City Golf Course. Certified Question: Is a city's public golf course still being "used exclusively by it for municipal or public purposes," so that it remains tax exempt under Article VIII, Section 3 of the Florida Constitution, if the City turns the course and its appurtenant facilities over to a private business to operate and manage for the business's own profit or loss, in return for an annual fee that the business pays to the City for the privilege? ***City of Gulf Breeze v. Brown*, No. SC22-741** (*rev. granted* Aug. 18, 2022). DCA decision: 336 So. 3d 1226 (Fla. 1st DCA 2022) (holding that golf course was not used exclusively for municipal or public purpose, and, thus, did not qualify for the state constitutional tax exemption). Status: briefing; oral argument will be set at a later date.

Ad Valorem Taxation — County-Owned Property Outside County's Jurisdictional Boundaries. Certified Question: Is property owned by a county outside its jurisdictional boundaries immune from ad valorem taxation by the county in which the property is located? ***Pinellas County, Florida v. Joiner*, No. SC19-1819** (*rev. granted* Feb. 21, 2022). DCA decision: 279 So. 3d 860 (Fla. 2d DCA 2019) (holding that a county's immunity from taxation does not extend extraterritorially to property that it owns in another county). Status: oral argument was rescheduled to Dec. 7, 2022; briefing was completed on July 25, 2022.

Property Appraisers — Apportionment of Homestead Properties. Is Florida Administrative Code Rule 12D-7.013(5), which allows county property appraisers to apportion a homestead between its business use and residential use, unconstitutional as an invalid exercise of delegated legislative authority? ***Furst v. Rebholdz*, No. SC20-1479** (*rev. granted* Jan. 14, 2022). DCA decision: 302 So. 3d 423 (Fla. 2d DCA 2020) (holding administrative rule that provided property used as a residence and also used by the owner as a place of business did not lose its homestead character and was to be separated with the residence portion being granted homestead tax exemption and the remainder being taxed was an invalid exercise of delegated legislative authority). Status: decision pending; oral argument took place on Nov. 3, 2022; briefing was completed on Sept. 2, 2022.

Torts

Comparative Fault — Application to Tort Actions Involving the Dram-Shop Exception. Certified Question: Whether the comparative fault statute, section 768.81, Florida Statutes, applies to tort actions involving the dram-shop exception contained in section 768.125, Florida Statutes, against a vendor who willfully and unlawfully sold alcohol to an underage patron, resulting in the patron's intoxication and related injury? ***Guardianship of Jacquelyn Ann Faircloth v. Main Street Entertainment, Inc.*, No. SC22-910** (*rev. granted* Oct. 23, 2022). DCA decision: 342 So. 3d 232 (Fla. 1st DCA 2022) (holding, in part, that bar that served driver should have been permitted to present comparative fault defense). Status: briefing; oral argument will be set at a later date.

Common Law Marriage-Before-Injury Rule — Loss of Consortium Claim. Certified Conflict: Does the common law marriage-before-injury rule preclude loss of consortium damages for a surviving spouse where the injury predated the marriage? ***Ripple v. CBS Corp.*, No. SC22-597** (*rev. granted* July 27, 2022). DCA decision: 337 So. 3d 45 (Fla. 4th DCA 2022) (holding Wrongful Death Act did not supersede common law rule requiring spouses to be married at time of injury for non-injured spouse to recover damages for loss of consortium, and, thus, wife who was not married to mesothelioma patient at time of his alleged injury from asbestos exposure could not bring claim for damages, under surviving-spouse provision of Act, following patient's death). Status: briefing; oral argument will be set at a later date.

- Tag Case (stayed pending disposition of *Ripple*):

  ***Rintoul v. Philip Morris USA, Inc.*, No. SC22-1038**. DCA decision: 324 So. 3d 656 (Fla. 4th DCA 2022) (holding that smoker and his husband were not married at time of manifestation of smoker's chronic obstructive pulmonary disease (COPD), and, thus, following smoker's death from COPD, husband could not recover damages from tobacco companies for loss of marital consortium, even if prohibition on same-sex marriage, which violated Fourteenth Amendment, prevented smoker and husband from marrying prior to smoker's injury; jury could not create marriage or retroactively recognize common law marriage, which Florida did not recognize at time husband alleged he would have married smoker, common law precluded marital consortium claims for injuries predating marriage, Wrongful Death Act did not displace "marriage before injury" rule, and smoker and husband never sought marriage license before injury). Status: stayed pending disposition of *Ripple* on Aug. 24, 2022.

Probate Code — Cause of Action Against Decedent. Certified Conflict: Whether the Probate Code bars a plaintiff's cause of action — arising out of a decedent's tort — brought more than two years after the decedent's death where the plaintiff seeks to recover from an insurance policy and not from the decedent's estate, its personal representative, or its beneficiaries. ***Tsuji v. Fleet*, No. SC21-1255** (*rev. granted* Jan. 13, 2022). DCA decision: 326 So. 3d 143 (Fla. 1st DCA 2021) (holding that negligence action plaintiffs injured in automobile accident sought to bring against estate of driver who caused the accident was time-barred

under non-claim 2-year statute of limitations found in Probate Code, and thus any action plaintiffs wished to maintain against driver's insurance carrier was also time-barred, even though limitations statute did not list casualty insurers among parties who could not be liable for untimely claims against an estate; an insurer could not be liable for untimely claims until a creditor sought and perfected a claim against decedent tortfeasor through entry of a judgment establishing decedent's liability). Status: decision pending; oral argument took place on Nov. 2, 2022; briefing was completed on Aug. 19, 2022.

Punitive Damages Award — Relation to Compensatory Damages Award. Certified Question: When other factors support the amount of punitive damages awarded, but the award is excessive compared to the compensatory award, does the amount of punitive damages that may legally be imposed for causing the death of a human being depend on the actual amount of compensatory damages awarded to the decedent's estate, even when that compensatory award is modest and the punitive award would be sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct? ***Coates v. R.J. Reynolds Tobacco Co.*, No. SC21-175** (*rev. granted* July 8, 2021). DCA decision: 308 So. 3d 1068 (Fla. 5th DCA 2020) (holding punitive damages award that was 106.7 times greater than net compensatory aware was excessive). Status: decision pending; oral argument took place on June 9, 2022; briefing was completed on Mar. 7, 2022.

Dangerous Instrumentality Doctrine — Application to Bailor-Bailee Situation. Certified Question: Under the dangerous instrumentality doctrine, can one family member who is a bailee of a car [i.e., a wife] be held vicariously liable when the car's acknowledged title owner [i.e., a husband] is another family member who is also vicariously liable under the doctrine? ***Emerson v. Lambert*, No. SC20-1311** (*rev. granted* Apr. 28, 2021). DCA decision: 304 So. 3d 364 (Fla. 2d DCA 2020) (answering the certified question in the negative). Status: decision pending; oral argument took place on Feb. 2022; briefing was completed on Nov. 8, 2021.

***Fraud — Detrimental Reliance.** The court held that an *Engle*-progeny plaintiff must prove reliance on a statement that was made by an *Engle* defendant (for a concealment claim) or a co-conspirator (for a conspiracy claim) and that concealed or omitted material information about the health effects of addictiveness of smoking cigarettes. The Court approved the First District's decision under review and disapproved the decisions of the Second, Third, and Fourth Districts in *Philip Morris USA, Inc. v. Duignan,* 243 So. 3d 426 (Fla. 2d DCA 2017), *Philip Morris USA, Inc. v. Chadwell,* 306 So. 3d 174 (Fla. 3d DCA 2020) and *R.J. Reynolds Tobacco Co. v. Burgess*, 294 So. 3d 910 (Fla. 4th DCA 2020). ***Prentice v. R.J. Reynolds Tobacco Co.*, No. SC20-291** (*rev. granted* Aug. 11, 2020). DCA decision: 290 So. 3d 963 (Fla. 1st DCA 2019) (holding that for a tobacco company to be liable for conspiracy to commit fraudulent concealment, in an *Engle* lawsuit regarding smoking-related injuries, a plaintiff is required to prove that he detrimentally relied on a specific false or misleading statement by the company). Status: the mandate issued on June 9, 2022; the motion for rehearing was denied on May 17, 2022; decided on Mar. 17, 2022; oral argument took place on June 2021; briefing was completed on Mar. 19, 2021.

- Tag Cases (subject to orders to show cause):

  ***R.J. Reynolds Tobacco Co. v. Burgess*, No. SC20-366**. DCA decision: 294 So. 3d 910 (Fla. 4th DCA 2020) (holding that there was sufficient evidence to *infer* smoker detrimentally relied upon company's pervasive advertising and creation of false controversy about risks of smoking).

  ***Philip Morris USA v. Duignan*, No. SC22-330**. DCA decision: 338 So. 3d 308 (Fla. 2d DCA 2022) (holding estate of tobacco smoker was not required to show reliance on a "statement" made by the defendants for the estate to prevail on its claims for fraud by concealment and conspiracy).

  ***Miller v. R.J. Reynolds Tobacco Co.*, No. SC21-1596**. DCA decision: 3267 So. 3d 1221 (Fla. 1st DCA 2021) (citing *Prentice*).

Realignment of Appellate Districts

**In re Redefinition of Appellate Districts and Certification of Need for Additional Appellate Judges*, No. SC21-1543, 2021 WL 5504715, 46 Fla. L. Weekly S355 (Fla. Nov. 24, 2021). The Florida Supreme Court created a sixth appellate district with accompanying changes to the existing boundaries of the First, Second, and Fifth Districts. The Court initially determined that six new appellate judgeships were needed for the continued effective operation of the newly aligned district courts of appeal. On December 22, 2021, the Court amended its initial opinion by adding an additional judgeship and reallocating them.

NOTE: On June 2, 2022, the Governor signed into law the bill creating the Sixth District Court of Appeal. *See* Ch. 2022-163, Laws of Fla. (CS/HB 7027). The law becomes effective on January 1, 2023. The law did not follow the supreme court's recommended alignment. Per the FSC opinion, the Second DCA would have included the 9th, 10th, and 20th Judicial Circuits and the Sixth DCA would have included the 6th, 12th, and 13th Judicial Circuits. *In re Redefinition of Appellate Districts & Certification of Need for Additional Appellate Judges*, 2021 WL 5504715, at *4-5, 46 Fla. L. Weekly S355 (Fla. Nov. 24, 2021). The Legislature reversed the realignment as noted in Table 1 below.

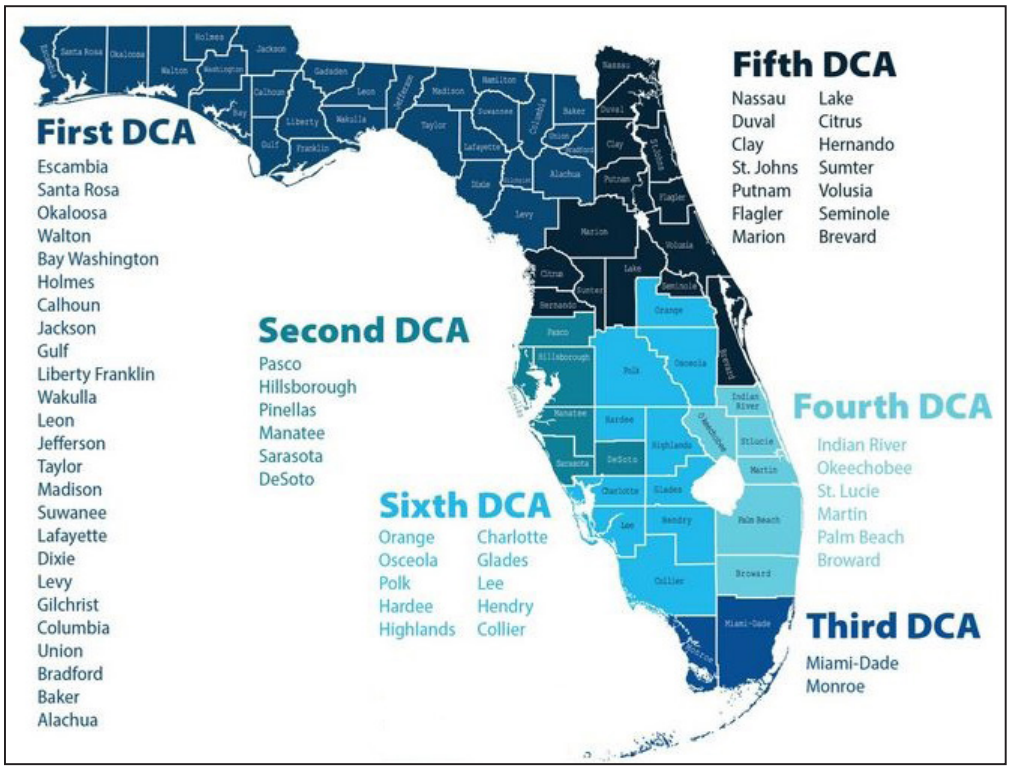
Table 1. Realignment of Judicial Circuits.

DCA	Current Circuits	Realigned Circuits
First DCA	1, 2, 3, **4**, 8, 14	1, 2, 3, 8, 14
Second DCA	6, **10**, 12, 13, **20**	6, 12, 13
Third DCA	11, 16	11, 16 (no change)
Fourth DCA	15, 17, 19	15, 17 19 (no change)
Fifth DCA	5, 7, **9**, 18	**4**, 5, 7, 18
Sixth DCA	N/A	**9, 10**, **20**

See Ch. 2022-163, §§ 5-8, Laws of Fla.

The table below depicts the new geographic boundaries of the district courts of appeal as of January 1, 2023:

Table 2. New Geographic Boundaries of Appellate Districts.



Based on the addition of the new Sixth DCA, the new law reorganizes the existing appellate judges and adds seven new appellate judges statewide. The new law:

- *Decreases* the number of appellate judges in the First DCA from 15 to 13;
- *Decreases* the number of appellate judges in the Second DCA from 16 to 15;
- Leaves the number of appellate judges in the Third DCA at 10;
- Leaves the number of appellate judges in the Fourth DCA at 12;
- *Increases* the number of appellate judges in the Fifth DCA from 11 to 12; and
- Provides the newly created Sixth DCA with 9 appellate judges.

Ch. 2022-163, § 10, Laws of Fla. Due to the above reorganization, only seven *new* appellate judges are needed. Effective January 1, 2023, a current DCA judge residing in a county within a realigned district will be a DCA judge of the new district where he or she resided on December 22, 2021.[2] *Id.* § 15. No vacancy in office shall occur by reason of the realignment of the DCAs. *Id.* Moreover, per the FSC, "no existing district court judge have to change residence in order to remain in office as a result of the realignment of the districts." *In re Redefinition of Appellate Districts & Certification of Need for Additional Appellate Judges*, No. SC21-1543, 2021 WL 5504715, 46 Fla. L. Weekly S355 (Fla. Dec. 22, 2021) (Supplemental Opinion).

[2] Pursuant to the Florida Constitution, all judges must reside with the territorial jurisdiction of their court. *See* Art. V, § 8, Fla. Const.

Table 3. Reassignment of DCA Judges (as of Jan. 1, 2023).

First DCA	Second DCA	Third DCA	Fourth DCA	Fifth DCA	Sixth DCA
Joseph Lewis, Jr.	Stevan T. Northcutt	Kevin Emas	Martha C. Warner	Kerry I Evander	Jay P. Cohen***
Bradford L Thomas	Darryl C. Casaneuva	Ivan F. Fernandez	Robert M. Gross	Scott Makar*	Meredith L. Sasso***
L. Clayton Roberts	Morris Silberman	Thomas Logue	Melanie G. May	F. Rand Wallis	Dan Traver***
Lori S. Rowe	Patricia J. Kelley	Edwin A. Scales, III	Dorian K. Damoorgian	Brian D. Lambert	John K. Stargel**
Stephanie W. Ray	Craig C. Villanti	Norma S. Lindsey	Cory J. Ciklin	James A. Edwards	Mary Alice Nardella***
Timothy D. Osterhaus	Edward C. LaRose	Eric Wm. Hendon	Jonathan D. Gerber	Harvey L. Jay, III*	Carrie Ann Wozniak***
Ross L. Bilbrey	Nelly Khouzam	Bronwyn Miller	Spencer D. Levine	Eric J. Eisnaugle	VACANT*****
Susan L. Kelsey	Robert Morris	Monica Gordo	Burton C. Conner	John M. Harris	VACANT*****
Thomas D. Winokur	Anthony K. Black	Fleur J. Lobree	Alan O. Furst	VACANT****	VACANT*****
M. Kemmerly Thomas	Daniel H. Sleet	Alexander S. Bokor	Mark W. Klingensmith	VACANT****	
A.S. Tanenbaum	Matthew C. Lucas		Jeffrey T. Kuntz	VACANT****	
Rachel E. Nordby	Susan H. Rothstein-Youakim		Edward L. Artau	VACANT****	
Robert E. Long Jr.	J. Andrew Atkinson				
	Andrea Teves Smith				
	Suzanne Labrit				

Formerly on the First DCA** ****Formerly on the Second DCA** ** Formerly on the Fifth DCA**

****On October 18, 2022, the Fifth District Court of Appeal Judicial Nominating Commission nominated the following individuals, in alphabetical order, to Gov. Ron DeSantis to fill the four vacancies: :

Boatwright, C. Joseph II
Branham, Jeb T.
Charbula, Meredith
Chase, Melanie F.
Dees, Robert M.
Kelly, Christopher
Kilbane, Paige G.
MacIver, John
Roberson, Eric C.
Russell, Cristine M.
Salvador, Tatiana R.
Savona, Therese A.
Soud, Adrian G.
Sprysenski, Christopher M.
Vitale, Michael S.

*****On October 21, 2022, the Sixth District Court of Appeal Judicial Nominating Commission nominated the following individuals, in alphabetical order, to Gov. DeSantis to fill the three vacancies:

Michael Paul Beltran
Danielle Lynn Brewer
Paetra T. Brownlee
Kyle S. Cohen
Angela Jane Cowden
Christopher Dale Donovan
Stephen S. Everett
Zachary M. Gill
Gerald Paul Hill, II
Michael S. Kraynick
Diego M. Madrigal III
Michael Patrick McDaniel
Michael Thomas McHugh
Joshua Mize
Jared Edward Smith
Patricia Lynn Strowbridge
Jennifer Anne Swenson
Keith F. White

The Governor has 60 days from the nominations to fill the vacancies.

Rule Amendment Cases (new cases since last publication of Appealing Matters)

In re Amendments to the Florida Rules of General Practice & Judicial Administration & the Code of Judicial Conduct, No. SC22-1387, 2022 WL 16984723 (Fla. Nov. 17, 2022). The Florida Supreme Court amended Rule 2.420 and Canon 3 to resolve any uncertainty and inconsistency in the treatment of judicial branch records at the conclusion of judicial service and in the continued confidentiality of non-public information. The court amended Rule 2.420(b)(3) (Custodian) to provide that "[a]t the conclusion of service on a court, each justice or judge shall deliver to the court's chief justice or chief judge any records of the judicial branch in the possession of the departing justice or judge." This amendment accounts for justices' and judges' departure from the bench

and formally relieves them of their role under Rule 2.420 as records custodians. The court also amended Canon 3(B)(12) to provide that "[a] former judge is expected to maintain the confidentiality of nonpublic information acquired in a judicial capacity." This language is intended to emphasize the expectation of judicial confidentiality beyond retirement and to communicate as much to the public.

In re Amendments to Florida Rules of Civil Procedure — Uniform Guideline for Taxation of Costs, No. SC21-1581, 2022 WL 16842647 (Fla. Nov. 10, 2022). The Court amended the Guidelines "largely for clarification purposes. Under the section designated "I. Litigation Costs That Should Be Taxed," the Court amended **p**aragraph two of subdivision A, "Depositions," to include as a cost that should be taxed "audiovisually recorded depositions." Under subdivision C, "Expert Witnesses," "trial testimony" is changed to "court testimony." This expand**s** the Guidelines to testimony given in court rather than only trial testimony. In addition, new subdivision G, "Filing Fees and Service of Process Fees," is added to section I. Under the section designated "II. Litigation Costs That May Be Taxed as Costs," the court amended subdivision A and related paragraphs to include nonbinding arbitration fees and expenses in addition to mediation. Lastly, the court added new subdivision D to include testifying expert witnesses as litigation costs that may be taxed as costs. This subdivision includes three paragraphs, including (1) an expert's reasonable fee for "conducting examinations, investigations, tests, and research and preparing reports"; (2) an expert's reasonable fee "for testimony at court-ordered nonbinding arbitration"; and (3) an expert's reasonable fee "for preparing for deposition, court-ordered nonbinding arbitration, and/or court testimony." These amendments are effective January 1, 2023.

*In re Amendments to the Florida Evidence Code***,** No. SC22-1040**,** 2022 WL 4102693 (Fla. Sept. 8, 2022). The Court adopted *to the extent procedural* the recent addition of section 90.2035, Florida Statutes to the Florida Evidence Code by the Florida Legislature entitled "Judicial notice of information taken from web mapping services, global satellite imaging sites, or Internet mapping tools**."** *See* ch. 2022-100, § 1, Laws of Fla. Under new section 90.2035, whenever a party intends to offer into evidence information obtained from web mapping services, global satellite imaging sites, or Internet mapping tools, the party must file with the court a notice of intent that includes copies of any image, map, location, distance, or calculation the party intends to introduce. § 90.2035, Fla. Stat. (2022). An opposing party may object to the court taking judicial notice of the information and entering it into evidence, though in civil cases there is a rebuttable presumption that such information should be judicially noticed. *Id.* The rebuttable presumption may be overcome if the court finds by the greater weight of the evidence that the information does not fairly and accurately portray what it is being offered to prove or that it otherwise should not be admitted under the Florida Evidence Code. *Id.* If the court overrules the objection (in either a civil or criminal case), it must take judicial notice of the information and admit it into evidence. *Id.* In criminal cases, the court must then instruct the jury that it may or may not accept the noticed facts as conclusive. *Id.* The adoption of the amendment is effective retroactively to July 1, 2022.

In re Amendments to Florida Rule of Civil Procedure 1.530 and Florida Family Law Rule of Procedure 12.530, No. SC22-756, 2022 WL 3650789 (Fla. Aug. 25, 2022) (effective immediately). Florida Rule of Civil Procedure 1.530 and Florida Family Law Rule of Procedure 12.530 are amended to clarify that filing a motion for rehearing is required to preserve an objection to insufficient trial court findings in a final judgment order. The following sentence is added to subsection (a) of both rules: "To preserve for appeal a challenge to the sufficiency of a trial court's findings in the final judgment, a party must raise that issue in a motion for rehearing under this rule."

In re Amendments to Florida Rules of Civil Procedure 1.530 and 1.535, No. SC22-115, 2022 WL 3650772 (Fla. Aug. 25, 2022) (effective Oct. 1, 2022). The Court amended Rule 1.530 to clarify when the deadline to file a motion for new trial or motion for rehearing begins to run. The phrase "15 days after entry of the judgment," in subdivisions (d) and (g), was replaced with "15 days after the date of filing of the judgment." Because Rule 1.535 deals entirely with motions filed in connection with the procedures set forth in Rule 1.530, the text of Rule 1.535 was moved to Rule 1.530 as new subdivision (h), and Rule 1.535 was deleted. Also, "Remittitur or Additur" was added to the title of Rule 1.530 to reflect that Rule 1.530 will now address motions for remittitur and additur.

In re Amendments to Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure, No. SC21-990, 2022 WL 2721129 (Fla. July 14, 2022) (effective Oct. 1, 2022). The amendments provide permanent and broader authorization for the remote conduct of certain court proceedings. The specific rule changes are summarized below.

RULE	AMENDMENT
Fla. R. Gen. Prac. & Jud. Admin 2.530 (Communication Technology)	This substantially rewritten rule now provides for a general authorization for court proceedings through communication technology and applies unless another rule of procedure or general law governs. Baker Act hearings are excluded from this general authorization. The rule defines communication technology and allows a court official to authorize its use upon a party's written motion or at the discretion of the court official. A party may file an objection in writing within 10 days or within a period directed by the court official. But the court official is required to grant a motion to use communication technology for non-evidentiary proceedings scheduled for 30 minutes or less absent good cause to deny it. A motion to present testimony through communication technology is required to set forth good cause and specify whether each party consents to the form requested. However, only audio-video communication technology (as opposed to audio communication technology) is authorized for the testimony of a person whose mental capacity or competency is at issue. The rule allows the oath to be administered through audio-video communication technology by a person not physically present with the witness. Additionally, the rule allows prospective jurors to participate through communication technology to determine whether they will be disqualified, be excused, or have their service postponed. And the rule allows prospective jurors to participate in voir dire and empaneled jurors to participate in a trial through audio-video communication technology when authorized by another rule of procedure.
Fla. R. Gen. Prac. & Jud. Admin 2.516 (Service of Pleadings & Documents)	This rule is amended to require non-represented parties to designate an e-mail address to which service must be directed unless the party is in custody or the party is excused by the clerk of court from e-mail service after declaring that the party does not have an e-mail account or does not have regular access to the internet. New forms are adopted for non-represented parties to request to be excused from e-mail service, to designate an e-mail address, and to change a mailing address or e-mail address.
Fla. R. Crim. P. 3.116 (Use of Communication Technology)	This rule addresses the use of communication technology in criminal proceedings with delineated exceptions covered by other criminal rules. Except for its communication technology definitions, Rule 2.530 does not apply in criminal proceedings. Upon the court's own motion or upon a party's written request, Rule 3.116 authorizes a judge to direct that communication technology may be used by one or more parties for pretrial conferences, but the defendant or defendant's counsel must waive the defendant's physical attendance at pretrial conferences pursuant to Rules 3.180(a)(3) and 3.220(o)(1). The rule also authorizes the judge to allow the taking of testimony through communication technology if all parties consent and the defendant waives any otherwise applicable confrontation rights.
Fla. R. Civ. P. 1.430(d) (Juror Participation Through Audio-Video Communication Technology)	The rule allows prospective jurors to participate in voir dire and empaneled jurors to participate in civil trials through audio-video communication when stipulated by the parties in writing and authorized by the court. Depositions can be taken via communication technology under Florida Rule of Civil Procedure 1.310 when ordered by the court or without leave of court if stipulated by the parties. And the use of communication technology is authorized in mediation and arbitration by stipulation of the parties or by court order under Florida Rule of Civil Procedure 1.700.
Fla. Small Claims R. 7.150(d)	This rule allow jurors in small claims cases to participate in voir dire and trials via audio-video communication technology when stipulated by the parties in writing and authorized by the court.
Fla. R. App. P. 9.320 (Oral Argument)	New subdivision (e) (Use of Communication Technology) is added to the rule. A party may now request (with a stated reason) in its request for oral argument or the court, on its motion may order, the participation in oral argument through the use of communication technology.

*_In re Amendments to the Rules Regulating the Florida Bar—Biennial Petition_, No. SC20-1467, 2022 WL 620039 (Fla. Mar. 3, 2022) (**effective May 2, 2022**). The significant rule amendments are summarized below.

RULE	AMENDMENT
R. Regulating Fla. Bar 1-3.6 (Delinquent Members)	Subdivision (g) is added to make clear that a member who fails to file the trust account certificate required in chapter 5 of the Bar Rules will be deemed delinquent, and will be ineligible to practice law in Florida.
R. Regulating Fla. Bar 1-3.8 (Right to Inventory)	The title of subdivision (b) is changed to "Maintenance of Confidentiality," and the subdivision is amended to provide that an inventory lawyer "may seek a protective order from the appropriate court or take other action necessary to protect confidential information of the subject lawyer's clients." Subdivision (c) (Status and Purpose of Inventory Lawyer) is amended to clarify that an inventory lawyer does not represent the lawyer whose files are being inventoried or that lawyer's clients. Subdivision (d) (Rules of Procedure) is deleted in its entirety, and the remaining subdivisions are re-designated accordingly. To assist in finding inventory lawyers for the files of lawyers who are deceased, disbarred, or suspended for a lengthy period, or who are either incapacitated or incarcerated, new subdivision (e) (Payment of Inventory Lawyer) is added. The new subdivision provides that the Bar may pay an inventory attorney a reasonable fee for his or her services..
R. Regulating Fla. Bar 3-5.2 (Emergency Suspension and Interim Probation or Interim Placement on the Inactive List for Incapacity Not Related to Misconduct)	Subdivision (g) (Motions for Dissolution) is amended to preclude the filing of a motion to dissolve or amend an emergency suspension in cases where the Bar has demonstrated through either a hearing or trial that it is likely to prevail on the merits of the underlying alleged rule violations.
R. Regulating Fla. Bar 3-6.1 (Generally)	Subdivision (a) (Authorization and Application) is amended to include the phrase "lawyers on the inactive list due to incapacity." This change makes clear that a lawyer who is placed on the inactive list due to incapacity and is employed by a law firm is subject to the same restrictions as a disbarred or suspended lawyer.
R. Regulating Fla. Bar 3-7.1 (Confidentiality)	Subdivision (j) (Chemical Dependency and Psychological Treatment) is amended to add judges and justices to the category of those whose voluntary treatment for chemical dependency or psychological problems is deemed confidential. This change is aimed at encouraging members of the Florida judiciary to seek treatment when necessary for chemical dependency and mental health issues.
R. Regulating Fla. Bar 4-7.13 (Deceptive & Inherently Misleading Advertisements)	New subdivision (b)(12) (Examples of Deceptive and Inherently Misleading Advertisements) prohibits as a deceptive and misleading advertisement "a statement or implication that another lawyer or law firm is part of, is associated with, or affiliated with the advertising law firm when that is not the case, including contact or other information presented in a way that misleads a person searching for a particular lawyer or law firm, or for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm." The corresponding new comment to subdivision (b)(12) provides explanation and examples of the types of advertisements prohibited by new subdivision (b)(12).

RULE	AMENDMENT
R. Regulating Fla. Bar 4-7.18 (Direct Contact with Prospective Clients)	A new comment with the heading "Permissible contact" is added to explain that a lawyer may initiate the mutual exchange of contact information at business-related events and on business-related social media platforms if the lawyer initiates no discussion of specific legal matters. The comment also makes clear that a lawyer who knows a person has a specific legal problem may not go to a specific event in order to initiate such an exchange and that "[a]n accident scene, a hospital room of an injured person, or a doctor's office are not business or professional conferences or meetings."
R. Regulating Fla. Bar 6-314 [new rule]	New Rule 6-3.14 (Sunset of Certification Areas) provides that the Board of Legal Specialization and Education will petition the Court to close a certification area to initial applicants if any certification committee has not received an initial certification application for five consecutive years.
R. Regulating Fla. Bar 10-2.1 (Generally)	This rule is amended to place definition terms within quotation marks and to reorder the definitions in alphabetical order. The phrase "or been revoked" is added to the definition in newly re-designated subdivision (g) (Nonlawyer or Nonattorney) to reflect disciplinary revocation as a form of disbarment.
R. Regulating Fla. Bar 10-2.2 (Form Completion by a Nonlawyer)	Subdivision (c)(2) (As to All Legal Forms) is amended to conform the definition of paralegal to the definition for the term in Rule 10-2.1. The Court modified the Bar's proposal to correctly reference the newly re-designated definition for paralegal in subdivision (h) of rule 10-2.1.
R. Regulating Fla. Bar 14-3.1 (Application Required)	Because there is no formal certification for mediators and arbitrators of Bar matters, the word "certification" in subdivision (a) (Applications) is replaced with the word "approval." For consistency, the Court makes the same change to the title of subchapter 14-3, so that the title now reads "Approval of Program Mediators and Arbitrators."

Defending Discrimination Claims by Deaf Plaintiffs in a Healthcare Setting

By Kimberly A. Potter Richardson

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The Supreme Court issued an opinion on April 28, 2022 that analyzed the issue of whether emotional distress constitutes a compensable damage under the Rehabilitation Act of 1973 ("Rehab Act") and the Patient Protection and Affordable Care Act ("Affordable Care Act").[1] In a case involving a deaf and blind plaintiff, the Supreme Court ruled that damages for emotional distress are not compensable under either act.[2] This article not only addresses the significance of that decision but also discusses claims against medical providers and healthcare facilities for violations of Title III of the Americans with Disabilities Act ("ADA"), the Rehab Act, and the Affordable Care Act brought by deaf, hard of hearing, and/or blind patients.

BACKGROUND OF ANTI-DISCRIMINATION LAWS

Title III of the ADA (42 U.S.C. §12181), Section 504 of the Rehab Act (29 U.S.C. §794(a)), and the Affordable Care Act (42 U.S.C. §18116), provide protections to disabled persons from discrimination based on disability by certain enumerated "places of public accommodation."[3] This triumvirate governs discrimination dependent on whether the entity involved receives federal financial assistance.

Historically, Congress enacted four statutes prohibiting recipients of federal financial assistance from discriminating based on certain protected grounds.[4] Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) forbids race, color, and national origin discrimination in federally funded programs or activities.[5] Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) similarly prohibits sex-based discrimination.[6] The Rehab Act (29 U.S.C. §794) bars funding recipients from discrimination based on disability.[7] Finally, the Affordable Care Act (42 U.S.C. §18116) outlaws discrimination on any of the preceding grounds in addition to age by healthcare entities receiving federal funds.[8] None of these statutes expressly provides victims of discrimination a private right of action to sue the funding recipient in federal court but subsequent litigation established that an implied right to sue exists thereunder.[9]

In 1978, Congress amended the Rehab Act to provide that the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (the "Civil Rights Act") apply to actions brought under Section 504 of the Rehab Act. In 1990, Congress enacted the ADA which was likewise modeled after the Civil Rights Act.[10] There are five titles of the ADA, two of which are relevant for purposes of this article: Title II – private right of action against state and local governments for discrimination and Title III – private right of action against private businesses that offer services and/or goods to the public.

Title III of the ADA provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[11] Hospitals, nursing homes, and medical facilities are included within the definition of "public accommodation."[12] Generally, public accommodations are

EDITOR'S NOTE: A recent U.S. Supreme Court decision has clarified that plaintiffs seeking damages for discrimination based on certain protected characteristics must demonstrate physical or pecuniary compensable injury, and cannot recover damages for emotional distress alone. This article discusses the significance of that decision with a focus on discrimination claims brought by deaf, hard of hearing, and blind plaintiffs against health care providers. Note that in some places the terminology "hearing impaired" is used, although disfavored among advocates for the deaf and hard of hearing, because the phrase continues to be used in various legal documents.

prohibited from discriminating against disabled persons by denying participation or the opportunity to participate in activities or services.[13] "The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered."[14]

Moreover, discrimination may be found if the accommodation fails "to make reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."[15] And, "[a] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids or services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[16]

Intent to discriminate is not required under Title III.[17] It is sufficient to show a set of circumstances that gave rise to an inference that the denial of the full and equal enjoyment of medical treatment was based on the plaintiff's disability.[18]

Under Section 504 of the Rehab Act, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."[19] With respect to hospitals, physicians, and other healthcare entities that receive federal financial assistance, a qualified individual with a disability is someone "who meets the essential eligibility requirements for the receipt of services."[20]

The elements of a Rehab Act claim include: the plaintiff is disabled as defined by law; he or she is qualified to participate in a program or activity; the defendant is a recipient of federal financial assistance; and there is a nexus between the complained of action and the plaintiff's disability.[21]

The Affordable Care Act prohibits discrimination on the same grounds as the Rehab Act and incorporates its "enforcement mechanisms."[22] 42 U.S.C. § 18116(a). To avoid discriminating against patients with disabilities, hospitals "shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with" those patients.[23]

THE *CUMMINGS* OPINION

As will be discussed in greater detail below, before the Supreme Court's ruling in *Cummings v. Premier Rehab Keller, P.L.L.C.,* plaintiffs could pursue an award of compensatory damages for emotional distress caused by the discriminatory conduct.[24] This decision, however, changes everything. Now, potential plaintiffs will need to establish some other type of **physical or pecuniary compensable injury** that resulted from the alleged discrimination which, in many instances, will be quite difficult to accomplish. From a defense perspective, this is an excellent result and could significantly impact this type of litigation.

In *Cummings,* the precise issue presented to the Supreme Court was whether damages for emotional distress may be recovered under the statutes passed by Congress that prohibit recipients of federal financial assistance from discriminating based on certain protected characteristics.[25] By way of background, the plaintiff in that case was deaf and legally blind and communicated primarily in American Sign Language ("ASL").[26] She sought physical therapy at the defendant's facility and requested they provided her with an ASL interpreter.[27] The defendant declined to provide the interpreter, instead telling the plaintiff she could communicate with the therapist using written notes, lip reading, or gesturing.[28] The plaintiff then filed suit alleging that the defendant's failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehab Act and the Affordable Care Act.[29]

The district court dismissed the plaintiff's complaint, observing that "the only compensable injuries that [the plaintiff] alleged [against the defendant] were 'humiliation, frustration, and emotional distress.'"[30] The district court opined that "damages for emotional harm" are not recoverable in private actions brought to enforce the Rehab Act or the Affordable Care Act.[31] The Fifth Circuit affirmed.[32] The Supreme Court then granted certiorari.[33]

The Supreme Court conducted a thorough analysis of contract principles to determine whether federal funding recipients would have been on sufficient notice that by contracting to receive such assistance, they would be liable for emotional distress damages resulting from engaging in discriminatory conduct.[34] After lengthy analysis, the Supreme Court ultimately determined that "emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes [the Rehab Act and Affordable Care Act.]"[35]

The dissent believed that, based on general contract principles, federal funding recipients were on notice that emotional distress damages could be awarded for violations of the Rehab Act and Affordable Care Act. Quoting the Senate Commerce Committee, the dissent noted:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.[36]

The dissent concluded that "contract law is sufficiently clear to put prospective funding recipients on notice that in-

tentional discrimination can expose them to potential liability for emotional suffering."[37] The dissent further recognized that often emotional distress would be the *only* compensatory damage suffered by those discriminated against.[38]

LITIGATION BY DEAF PLAINTIFFS

While discrimination takes many forms, in recent years there has been increasing litigation against various types of healthcare providers and/or facilities for failing to provide appropriate auxiliary aids to assist deaf, hard of hearing, and/or blind patients while receiving medical care. One claim raised by deaf plaintiffs is that a defendant facility failed to provide an effective means to communicate during the medical appointment or hospital/nursing home residency.[39] "Effective communication" is a term of art and is an element in establishing a cause of action for failing to comply with the anti-discrimination provisions of the ADA and Section 504 of the Rehab Act.[40] For example, if the facility or provider did not provide an ASL (American Sign Language) interpreter, despite the plaintiff's request, then those provisions could have been violated.[41]

Whether a facility violated the ADA or Rehab Act often turns on whether the facility provided a method of "effective communication" with a deaf patient.

For instance, in *Nix v. Advanced Urology Institute of Georgia,* the plaintiff had been deaf since birth.[42] Her native language was American Sign Language, but she could read and write English at a high school level.[43] She had an urgent medical issue and was referred to the defendant's medical practice for treatment.[44] While making the appointment by a video relay service, she forgot to request a sign language interpreter.[45] When she contacted them the next day, the defendant procured what it believed to be a qualified American Sign Language interpreter.[46] During the appointment, it became clear that the interpreter was unable to adequately communicate with the plaintiff and they had to resort to exchanging written notes.[47] The plaintiff filed suit alleging violations of the Affordable Care Act and Rehab Act.[48] On appeal from the entry of summary judgment in favor of the defendant, the Eleventh Circuit held that the plaintiff failed to establish the defendant acted with deliberate indifference to the plaintiff's statutory rights.[49]

Similarly, in *Lee v. University Medical Center of Princeton,* the plaintiffs claimed the hospital failed to provide appropriate services for the deaf patient.[50] In that case, the plaintiffs sought declaratory, injunctive, and monetary relief.[51] On the date in question, the patient's spouse contacted the emergency department to request an interpreter prior to their arrival to the hospital.[52] Upon arrival, the emergency department staff triaged the patient using written notes and placed him in a bed for treatment.[53] The plaintiffs again requested an interpreter.[54] The hospital staff brought a video remote interpretation machine ("VRI") to the plaintiff's bedside, but it did not function correctly.[55] Later that evening, approval was provided to obtain the services of an on-site American Sign Language ("ASL") interpreter, but the interpreter was not available until the next morning.[56] The plaintiffs instead left the hospital and went to the patient's regular physician's office the next day where he was likewise treated without the use of an interpreter.[57] Importantly, the hospital had a policy entitled "Services for the Hearing Impaired," which, according to the defendant, it attempted to follow.[58] Also of significance, the plaintiff returned to the hospital an additional time for other treatment with the assistance of an interpreter.[59]

Under the ADA or Rehab Act, the plaintiffs must demonstrate that they were disabled; the hospital is a "place of public accommodation" under Title III; and it unlawfully discriminated against them on the basis of a disability by (a) failing to make a reasonable modification that was (b) necessary to accommodate the disability).[60] In *Lee,* the defendant hospital moved for summary judgment.[61] Whether a hospital has provided appropriate auxiliary aids to a deaf patient is typically a fact-intensive inquiry, however, "not every denial of a request for an auxiliary aid precludes summary judgment or creates liability under the ADA or the Rehab Act".[62] The type of auxiliary aid or service necessary to ensure "effective communication" will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.[63]

The requirements are similar under the Rehab Act: a recipient hospital that provides health services or benefits shall (i) "establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care"; (ii) "provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question"; and (iii) "is not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons" in its use of "aids, benefits, and services," "but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."[64] The ultimate decision, however, rests with the public accommodation.[65]

The court found that based on the record, the hospital provided the auxiliary aids necessary to ensure the plaintiffs could communicate with hospital staff during their brief emergency room visit at the level required by the law.[66] Although the VRI machine malfunctioned, the patient's spouse exchanged handwritten notes with the staff.[67] They were able to ascertain the reason for the visit and assess his medical condition.[68] Moreover, the record showed that the hospital did in fact request an interpreter but the plaintiffs left before the interpreter could arrive.[69]

The *Lee* case reinforces that the choice of auxiliary aid is left to the healthcare provider so long as the method of communication is "effective."[70] Thus, the ADA and Rehab Act do not necessarily require an ASL interpreter for a deaf patient when the "public accommodation" provides "effective communication" for the patient.[71] Determining what constitutes "effective communication" is a common thread throughout current case law and will be addressed in greater detail in

subsection C, below.

Another key case in the Eleventh Circuit is *Silva v. Baptist Health South Florida, Inc.*[72] In *Silva,* the Eleventh Circuit held that "the relevant inquiry is whether the [provider's] failure to offer an appropriate auxiliary aid impaired the patient's ability to exchange medically relevant information with hospital staff."[73] It is not a defense to show that the patient could participate in the most basic elements of the medical exchange.[74] Moreover, the patient does not have to show actual deficient treatment or recount exactly what the patient did not understand.[75]

The touchstone of the inquiry is whether the alternative accommodation provided "effective communication."[76] Proving the failure to provide a means of effective communication permits only injunctive relief.[77] To win monetary damages, the plaintiff must show that the defendant was deliberately indifferent in failing to ensure effective communication.[78] But, first, the plaintiff must establish standing to seek a permanent injunction against the defendant. In doing so, the plaintiff must show a real and immediate likelihood that he or she will return to the facility or provider and that he or she will likely experience a denial of benefits or discrimination upon such return.[79]

For instance, a plaintiff could allege that if he or she required additional medical services that would require further medical treatment from the defendant provider, but would be unable to return given that provider's inability to provide effective communication in violation of federal and state law. A lack of standing argument in that example would not prove successful.

COMMON DEFENSES AND ISSUES TO CONSIDER

The following list of issues and/or defenses is not exhaustive. Accordingly, the author has included common issues to consider when defending these types of claims.

A. STANDING

As in every case, standing is required to pursue a claim. To establish standing for injunctive relief, a plaintiff must first demonstrate that he or she will suffer an injury in fact which is: (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.[80] Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if not accompanied by continuing, present adverse effects.[81]

In the context of discrimination by a healthcare provider, a plaintiff may only seek relief if that person will more than likely return to the facility in the future and he or she will again experience a denial of benefits or discrimination upon return.[82] If the plaintiff cannot establish these elements, then his or her claim will probably be dismissed.

B. UNDUE BURDEN DEFENSE

One possible defense is that the reasonable accommodation will create an "undue burden" on the defendant facility. Simply put, "undue burden" is defined as "significant difficulty or expense."[83] There are five factors to consider: (1) the nature and cost of the action needed; (2) the overall financial resources of the site(s) involved; the number of persons employed at the site(s); the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operations of the site(s); (3) the geographic separateness, and the administrative or fiscal relationship of the site(s) in question to any parent corporation or entity; (4) if applicable, the overall financial resources of the parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and, (5) if applicable, the type of operation or operations of any parent corporation, or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.[84]

Some of these elements would not apply in defending litigation brought by a hearing impaired or blind person for the defendant's failure to provide "effective communication" through an appropriate "auxiliary aid." In this context, most of the case law pertains to a facility's failure to provide auxiliary aids or services.[85]

C. WHAT ACTUALLY IS "EFFECTIVE COMMUNICATION" AND AN APPROPRIATE "AUXILIARY AID"?

In *Silva v. Baptist Health South Florida, Inc.*, the Eleventh Circuit considered the appropriate standards for evaluating effective-communication claims.[86] The "correct standard examines whether the deaf patient experienced an impairment in his or her ability to *communicate* medically relevant information with hospital staff."[87] "The focus is on the effectiveness of the communication, not on the medical success of the outcome."[88]

There, the Eleventh Circuit pointed out that the "ADA and [Rehab Act] focus not on quality of medical care or the ultimate treatment outcomes, but on the equal opportunity to *participate* in obtaining and utilizing services."[89] While the exchange of information between doctor and patient is part-and-parcel of healthcare services, "[i]t is not dispositive that the patient got the same ultimate treatment that would have been obtained even if the patient were not deaf."[90] Citing to 45 C.F.R. §84.4(b)(2): Aids, benefits, and services, to be equally effective, are *not required to produce the identical result or level of achievement* for handicapped and nonhandicapped persons, *but must afford handicapped persons equal opportunity to obtain the same result,* to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.[91]

The court further explained that "what matters is whether the handicapped patient was afforded auxiliary aids sufficient to ensure *a level of communication* about medically relevant information substantially equal to that afforded to non-disabled patients."[92] The focus is "not on the downstream consequences of communication difficulties, which could be remote, attenuated, ambiguous, or fortuitous."[93] "For this reason, claims for ineffective communication are not equivalent to claims for medical malpractice."[94]

The type of auxiliary aid or service necessary to ensure effective communication depends on: (1) the method of communication used by the individual; (2) the nature, length, and difficulty of the communication taking place; and (3) the complexity of what is being communicated.[95] Auxiliary aids and services must be provided in accessible formats, in a

timely manner, and in a way that protects the privacy and independence of the individual with a disability.[96] A public entity or private business cannot impose a surcharge on an individual with a disability to cover the costs of the auxiliary aid or service provided.[97]

Examples of appropriate auxiliary aids for deaf persons may include: qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.[98] As stated above, it is up to the medical provider to determine which auxiliary aid it will provide the patient; the patient's preferred method of communication certainly plays a role.[99]

D. DAMAGES

The ADA provides for injunctive relief, while the Rehab Act and Affordable Care Act provide for monetary relief.[100] Attorney's fees are provided under all three Acts.[101] Given that the ADA only provides injunctive relief, plaintiffs usually also allege violations of the Rehab Act and the Affordable Care Act which provide additional monetary relief for defendants who receive federal funding according to those statutes.[102]

Under the Rehab Act, to recover monetary damages, a plaintiff must show intentional discrimination.[103] Even assuming that the defendant failed to provide the appropriate auxiliary aid by not providing a live interpreter, for instance, that would not be enough to sustain a claim for monetary damages.[104] Intentional discrimination requires a showing that the provider was *deliberately indifferent*.[105] "Deliberate indifference" occurs when a defendant had knowledge that a federally protected right was substantially likely to be violated and the defendant failed to act *despite that knowledge*.[106] For instance, a public entity is deliberately indifferent if one of its officials "knew that harm to a federally protected right . . . was substantially likely and failed to act on that likelihood."[107] It is an "exacting standard" that requires a showing of more than gross negligence.[108]

Again, under the *Cummings* opinion, plaintiffs will no longer be able to recover solely for emotional distress damages even though often those are the only damages a plaintiff will suffer. It remains to be seen how this decision will affect litigation under these Acts moving forward.

CONCLUSION

There is an abundance of jurisprudence on discrimination under Title III of the ADA, the Rehab Act, and the Affordable Care Act with issues too numerous to categorize in one article. The *Cummings* opinion has already altered, and will certainly continue to alter, the landscape of this type of litigation. Relying on contract-based remedies to support compensatory damage claims under the Rehab Act and Affordable Care Act will undoubtedly require some creativity on the part of plaintiffs' counsel. However, the *Cummings* opinion provides a solid framework for defeating compensatory damages claims brought by these plaintiffs.

1 *Cummings v. Premier Rehab Keller, P.L.L.C.,*596 U.S. ___, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022). Note: the citations to *Cummings* throughout this article are to the slip opinion.
2 *Cummings*, slip op. at 16.
3 *Id.* at 3.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *See id.*
10 *See United States v. Sec'y Fla. Agency for Health Care Admin.,* 21 F. 4th 730, 734 (11th Cir. 2021).
11 42 U.S.C. § 12182(a).
12 *Liese v. Indian River Cty. Hosp. Dist.,* 701 F.3d 334,342-44 (11th Cir. 2012).
13 *See id.*
14 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).
15 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).
16 42 U.S.C. § 12182(b)(2)(A)(iii).
17 *See Mayberry v. Von Valtier,* 843 F. Supp. 1160, 1164 (E.D. Mich. 1994).
18 *Id.*
19 29 U.S.C. § 794(a).
20 42 U.S.C. § 12131(2).
21 *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712, 83 L.Ed. 2d 661 (1985).
22 *Nix v. Advanced Urology Inst. of Ga*., 2021 U.S. App. LEXIS 24467, *4-5 (11th Cir. 2021 (not published) (citing 42 U.S.C. §18116(a)).
23 *Id.* (citing 28 C.F.R. §36.303.).
24 *Compare id.* and *Crane v. Lifemark Hosps., Inc.,* 898 F.3d 1130 (11th Cir. 2018) *with Fantasia v. Montefiore New Rochelle,* 2022 U.S. Dist. LEXIS 107935 (S.D.N.Y. 2022).
25 *Cummings*, slip op. at 1.
26 *Id.* at 2.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* (citation omitted).
31 *Id.* (citation omitted).
32 *Id.*
33 *Id.*
34 *See generally Cummings*, slip op. at 1-2.
35 *Id.* at 16.
36 *Id.* at 6 (Breyer, J., dissenting) (citations omitted).
37 *Id.* at 7 (Breyer, J., dissenting).
38 *See id.* at 11 (emphasis added).
39 *See, e.g., Lee v. Univ. Med. Ctr. of Princeton,* 2022 U.S. Dist. LEXIS 12669 (D.N.J. 2022); *Silva v. Baptist Health S. Fla., Inc.,* 856 F.3d 824 (11th Cir. 2017); *Southwell v. Summit View of Farragut, LLC,* 2013 U.S. Dist. LEXIS 163442 (E.D. Tenn. 2013); *Gillespie v. Dimensions Health Corp.*, 369 F. Supp. 2d 636 (D. Md. 2005); *Majocha v. Turner,* 166 F. Supp. 2d 316 (W.D. Pa. 2001).
40 *See generally Silva,* 856 F.3d at 833-36.
41 *See generally Nix*, 2021 U.S. App. LEXIS 24467 (11th Cir. 2021).
42 *Id.* at *1.
43 *Id.*
44 *Id.* at *2.
45 *Id.*
46 *Id.* at *2-3.
47 *Id.*
48 *Id.*
49 *Id.* at *5.
50 2022 U.S. Dist. LEXIS 12669 (D.N.J. 2022).
51 *Id.* at *5.
52 *Id.* at *1-4.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*

[57] *Id.*
[58] *Id.* at *4-5.
[59] *Id.* at *14-15.
[60] *Id.* at *11 (citations omitted).
[61] *Id.* at *1.
[62] *Id.* at *12 (citation omitted).
[63] *Id.* (citing 28 C.F.R. § 36.303(c)(1)).
[64] *Id.* at *13 (quoting 45 C.F.R. §§ 84.4(b)(2),(c), 84.52(d)(1).
[65] *Id.* (citing 28 C.F.R. § 36.303(c)(1)(ii).
[66] *Id.* at *18.
[67] *Id.* at *18-19.
[68] *Id.*
[69] *Id.*
[70] *Id.* at *22-23.
[71] *Id.* at *23-24.
[72] 865 F.3d 824 (11th Cir. 2017).
[73] *Id.* at 829.
[74] *Id.* at 830-31.
[75] *Id.* at 833-34.
[76] *Id.* at 831.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 832.
[80] *Gillespie v. Dimensions Health Corp.*, 369 F. Supp. 2d 636, 640 (D. Md. 2005) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)).
[81] *Gillespie,* 369 F. Supp. 2d at 641 (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (citations omitted)).
[82] *See, e.g., id.* at 643. *See also Silva,* 856 F.3d at 831-32.
[83] 28 C.F.R. § 36.104.
[84] 28 C.F.R. § 36.104.
[85] See cases cited above.
[86] *Silva, 856 F.3d at 833.*
[87] *Id.* (emphasis in original).
[88] *Id.*
[89] *Id.* at 834 (emphasis in original) (citations omitted).
[90] *Id.* (citation omitted).
[91] *Id.* (quoting 45 C.F.R. § 84.4(b)(2) (emphasis in original).
[92] *Id.* (emphasis in original).
[93] *Id.*
[94] *Id.*
[95] https://adata.org/factsheet/communication.
[96] https://adata.org/factsheet/communication.
[97] https://adata.org/factsheet/communication.
[98] https://adata.org/faq/what-kinds-auxiliary-aids-and-services-are-required-ada-ensure-effective-communication.
[99] *Silva,* 856 F.3d at 840 n.14 ("The hospital ultimately gets to decide, after consulting with the patient, what auxiliary aid to provide. 28 C.F.R. § 36.303(c)(1)(ii). But whatever communication aid the hospital chooses to offer, the hospital must ensure effective communication with the patient.").
[100] *See generally Silva,* 856 F.3d 824.
[101] *See generally* 42 U.S.C. § 12205 (Title III of the ADA); 29 U.S.C. § 794 *et seq.* (Rehab Act); and 42 U.S.C. § 18116 *et seq.* (Affordable Care Act).
[102] *See, e.g., Nix v. Advanced Urology Inst. of Ga.*, 2021 U.S. App. LEXIS 24467 (11th Cir. 2021).
[103] *Lee,* 2022 U.S. Dist. LEXIS 12669, *23 (citations omitted).
[104] *Id.*
[105] *Id.* (emphasis added).
[106] *Id.* at *23-24 (citation omitted) (emphasis added).
[107] *Nix,* 2021 U.S. App. LEXIS 24467 at *4 (citations omitted).
[108] *Id.* (citations omitted).

A Look Back at the Transitory Foreign Substance Statute

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On July 1, 2010, the law governing transitory foreign substance cases shifted dramatically after section 768.0710, Florida Statutes was supplanted by section 768.0755. The update in the law was seen as a win for premises owners as it shifted the burden of proof completely to plaintiffs to prove that a business establishment had actual or constructive knowledge of a dangerous condition and should have taken action to remedy it. It has been a little over 12 years since the change in the law was enacted and a study of the verdicts in transitory foreign substance cases over that time show that the initial optimism about the law being more favorable to premises owners was accurate.

Notice of a transitory foreign substance is typically the most difficult aspect of the plaintiff's case and should be challenged, if possible, in a motion for summary judgment.

A verdict search for judgments in all transitory foreign substance cases in Florida from July 2, 2010 to August of 2022 resulted in 28 relevant published verdicts. Analysis of the results showed that plaintiff's verdicts were rendered in only three of those cases.[1] This statistic alone may allow premises owners all over Florida to breathe a sigh of relief. Understanding how section 768.0755 has been applied in these cases is useful for developing persuasive Motion for Summary Judgment arguments.

In transitory foreign substance cases, actual notice is typically the most difficult area for plaintiffs to prove. In the three cases where a plaintiff's verdict was rendered, the plaintiffs were able to show defendants had some actual knowledge of the alleged substance. Plaintiffs in a majority of the remaining 25 cases made constructive knowledge arguments. According to section 768.0755, constructive knowledge may be proven by circumstantial evidence showing that:

(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

(b) The condition occurred with regularity and was therefore foreseeable.[2]

Often plaintiffs fall into an "inference stacking pithole" to establish constructive knowledge in their cases. Over the years, Florida courts have made it very clear that it is impermissible for plaintiffs to attempt to prove causation by stacking inferences.[3] Eleven of the 28 post 2010-cases resulted in summary judgment granted in favor of defendants. This finding supports the idea that premises owners have a greater chance of disposing of their transitory foreign substance case without even having to go to trial. Identifying whether the plaintiff is attempting to prove their claim by stacking inferences is an important first step in determining whether the premises owner has grounds to file a Motion for Summary Judgment.

A perfect example of this is found in *Francella v. Furman's, Inc.*.[4] The court granted defendant's Motion for Summary Judgment after finding that the record was devoid of direct evidence of a transitory substance on the floor of a restroom. The summary judgment evidence was not sufficient to establish the inference that plaintiff's pants, which he had noticed were wet after being transported to a hospital following the fall, were wet because of the alleged transitory substance to

EDITOR'S NOTE: Since 2010, Florida law has imposed a requirement that plaintiffs in slip-and-fall cases demonstrate a business had actual or constructive knowledge of a transitory foreign substance allegedly causing the slip-and-fall. The requirement was favorable to premises owners, who previously had to defend these cases without a knowledge requirement. In particular, defendants have been able to resolve cases through motions for summary judgment that were not previously available.

the exclusion of all other inferences. Showing that a plaintiff's claim is supported by an assumption rather than actual knowledge or direct evidence is one of the most successful arguments made by defendants when moving for summary judgment.

Another area to pursue when attempting to overcome plaintiff's claims of constructive knowledge is to determine whether the alleged hazard occurred with such frequency that it would have been foreseeable to the premises owner. In *Holloway-Ramos vs. Life Care Centers of America, Inc.*,[5] defendants argued against plaintiff's claims that a transitory foreign substance was frequent and foreseeable by pointing to testimony of its human resources director that all employees are trained to cleanup spills immediately and that in her 17 years, she could not recall the occurrence of a slip and fall incident. Providing evidence that the circumstances surrounding the incident were out of the norm for the establishment is an effective way to dispute plaintiff's claims that the incident was foreseeable. While it may not be an argument available in all cases, the use of testimony from a corporate representative is a promising tactic to utilize when pursuing this defense.

Comparing the time the incident took place to the amount of time the substance was on the floor is another persuasive argument for premises owners to make in when seeking summary judgment. In *Archambault v. Phase Three Star LLC*,[6] the court concluded that water on the floor for less than four minutes was insufficient to satisfy the statutory requirement that the alleged dangerous condition had to exist for such a length of time that, in the exercise of ordinary care, the defendant should have known of the condition before constructive knowledge could be imputed. Utilizing surveillance footage and witness testimony to pin down the amount of time the liquid was on the floor is an effective way to dispute imputations of constructive knowledge.

Overall, the change in the law governing transitory foreign substance cases has had a positive impact for defendants and premises owners. Understanding the supporting case law and knowing what arguments to make to dispose of the case before trial are keys to saving your client time and money.

[1] *Morales v. Walgreen Co.,* JVR No. 1808150023, 2018 WL 3940844 (Fla. 11th Jud. Cir. April 18, 2018); *Noguera v. Colonial Grocery Plaza, Corp. d/b/a Bravo Supermarket*, No. 15 FJVR 5-25, 2015 WL 2152747, (Fla. 9th Jud. Cir. Jan. 26, 2015); *Webster v. Wal-Mart Stores East, LP*, No. 20 FJVR 5-8, 2020 WL 2465919 (Fla. 7th Jud. Cir. Jan. 15, 2020).

[2] § 768.0755(1)(a-b), Fla. Stat.

[3] *See Howard v. MMMG*, 299 So. 3d 40, 42 (Fla. 4th DCA 2020) ("Summary judgment may be granted based on impermissible inference stacking") (quotation omitted); *Santa Lucia v. LeVine*, 198 So. 3d 803, 809 (Fla. 2d DCA 2016) (a plaintiff must prove causation without an impermissible stacking of inferences); *McCarthy v. Broward College*, 164 So. 3d 78, 82 (Fla. 4th DCA 2015) (affirming summary judgment in slip and fall case where plaintiff's theory was based on impermissible inference stacking); *Shartz v. Miulli*, 127 So. 3d 613, 6180 (Fla. 2d DCA 2013) ("the plaintiff must establish causation without an impermissible stacking of inferences").

[4] *Francella v. Furman's, Inc. D/B/A Burger King*, 22 FJVR 4-27.

[5] *Holloway-Ramos vs. Life Care Centers of America, Inc., d/b/a Life Care Center of Orange Park,* 17 FJVR 3-9.

[6] *Archambault v. Phase Three Star LLC, d/b/a Hardee's Restaurant*, 19 FJVR 2-1 (2018).

Risk Transfer and Tendering the Defense: Vendors, Partners, and Contracts

By Tabitha G. Jackson and Joshua Miller

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Tender of Defense

Often when we receive a new assignment, there is ample opportunity to seek out contribution or a complete defense from a third party. These potential third parties may include another insurance carrier, the property owner, the manufacturer of a product, or someone's employer (if injured while on the job). To determine if a tender of defense or right to contribution is appropriate, it is advisable to review the applicable vendor agreements/contracts, leases, and any other relevant policies and certificates of insurance ("COI") that exist. When reviewing the COIs, it is important to note that they are for informational purposes only and at times, are not legally binding on their own. Seeking contribution or an agreement to accept the tender of a defense in an action can be incredibly frustrating. The time it takes to analyze the players, determine who has what insurance, and determine who owes what to whom can take plenty of time, money, and resources to pin down. Upon a successful tender, however, or agreement for contribution, the results can be rewarding and more than offset the time and resources expended to achieve it.

Of course, each case is unique. Whether you are dealing with a slip and fall, an "alleged wind event" resulting in roof damage, an automobile accident, or a "contaminated" food product, there should be a line on your "to-do" list to see if tender is appropriate. Even if a complete tender of your client's defense is not available, contribution may be another tactic with risk transfer that can lessen the exposure in a higher value case. If a tender of defense or right to contribution is in your client's best interest, below are a few items of "go-to" importance when considering risk transfer.

Check List & Questions to Answer Before Tendering

- Identify the Players: Think construction contractors, owners/lessees of a property, ingredient and packaging suppliers, or the injured plaintiff's/claimant's employer.
    - Put yourself in the shoes in those of whom you're seeking monetary contribution:
        - Was the roof damaged as a result of a contractor's negligence or poor work?
        - Did an incident occur on a property that was leased by or to your client?
        - Was the plaintiff/claimant injured due to inferior or non-conforming ingredients provided by a supplier?
        - Was the plaintiff/claimant operating/behaving within the scope of their employment at the time of the alleged incident?

    Situations like these may provide opportunities to support a demand for defense and indemnification or claim for contribution.

- Contracts and Agreements: Review applicable vendor agreements and contracts between your client and potential third-party actors. Indemnity and subrogation language can be the answer to your risk transfer inquiry. Does your client have an enforceable agreement with the involved party? Did the incident trigger the defense and indemnification obligations of the other party? Does the agreement require your client to be named as an additional insured on the vendor's insurance policy? Is there a waiver of subrogation?

- Identify the Business Partner: Who manages the relationship with this vendor? Are there any business reasons that should be considered prior to tendering? Make sure your client is in agreement with submitting the tender. It is usually beneficial if the business partner

EDITOR'S NOTE: Knowing when to tender a defense or seek contribution in order to transfer risk or lessen a client's exposure is a valuable tool for defense attorneys. This article summarizes some practical considerations and questions to ask when assessing the possibility of contribution from vendors, lessors, and other third parties.

discusses the matter with the vendor prior to tendering to help protect the business relationship. A discussion can also help expedite the tender process and achieve an acceptance of a tender. The vendor may also have a business reason to accept a tender even if the tender is not fully supported by a contractual obligation.

  - If your client chooses not to tender, notwithstanding contractual support for it, make sure this decision is well documented. In the event another attorney, client contact, or carrier later reviews the file, it will be prudent to have this decision in writing to avoid any confusion as to why the decision was made.

- Other Insurance: Ascertain what other layers of insurance remain (linear or preceding your client's).

  - In Florida, the duty to defend for insurers is broad. This duty to defend is implicated based solely on the allegations contained in the plaintiff's complaint, and insurers are required to defend against an entire suit even if some of the allegations fall outside of the insurer's scope of coverage.[1]
  - If a complaint contains any allegations that fall within potential coverage, an insurer you tender to has a duty to step in and defend. If there is any doubt about whether this duty to defend exists in a matter, it is resolved in favor of the insured.[2] Note that the duty to defend for insurers in Florida is separate from insurers' duty to indemnify. Insurers may have a duty to defend, but if the facts of the case later show there is no coverage, then there will be no duty to indemnify.[3]

Often when we review contracts and vendor agreements, there remains indemnity language that "historically" goes both ways. An example is inserted below from a lease agreement between a landlord and a tenant. You will note both parties are required to maintain insurance covering the other as an "additional insured."

An agreement like this can be confusing at first and might initially sway you from pursuing risk transfer or contribution. As you note closer, however, the particular obligations of each party are clearly outlined. In this example, it can be concluded that the *tenant* shall handle damages sought relating to the *use of the premises or arising on the premises*. Likewise, the *landlord* should remain responsible for damages sought based on the *landlord's* activities or the *landlord's* maintenance and repair of the premises. When dissecting the language, it is distinguishable where the responsibility lies between the parties when damages are being sought. Once you have established where the particular obligations for each party lie, you can determine whether seeking contribution or complete defense of liability is available to your client.

[redacted] INSURANCE AND INDEMNITY

Section [redacted] Tenant's Insurance

Tenant will maintain in full force and effect during the Term commercial general liability insurance, insuring Landlord and Tenant as their interests may appear, against any and all claims and demands for damage to property or injury to persons or loss of life arising out of or related to the use of or resulting from any accident occurring in, upon or about the Premises, with a combined single limit coverage of not less than [redacted] All such insurance will name Landlord as an additional insured. Tenant will also maintain in full force and effect during the Term any legally required workers' compensation insurance covering all of Tenant's employees working on the Premises.

Section [redacted] Landlord's Insurance

Landlord will maintain in full force and effect commercial general liability insurance, insuring Tenant and Landlord as their interests may appear, against any and all claims and demands for damage to property or injury to persons or loss of life arising out of or related to Landlord's activities on or maintenance and repair of the Premises with a combined single limit coverage of not less than [redacted] Landlord will also maintain in full force and effect a policy of "all risk" property insurance in an amount equal to the full replacement cost of the building and all improvements that are a part of the Premises, and Landlord warrants and agrees that all proceeds received from such insurance shall be used in the first instance in accordance with Landlord's obligations under Article [redacted] of this Lease. The general liability insurance policy will name Tenant as an additional insured.

The basis for claims for indemnity falls under common law indemnity or contractual indemnity. For contractual indemnity claims, the court is concerned only with the express terms of the agreement between the parties.[4] No weight is given to any special relationships or any potential vicarious liability. The obligation to indemnify must be determined solely by the language of the agreement.

In contrast, Florida courts have established a two-prong test to determine whether individuals can prevail on a claim of common law indemnity: "[f]irst, the party seeking indemnification must be without fault, and its liability must be vicarious and solely for the wrong of another. Second, indemnification can only come from a party who was at fault."[5] An action for common law indemnity also requires a special relationship between the parties.[6] Failure to satisfy the two prongs and special relationship requirement precludes a party from prevailing under common law indemnity in the state of Florida.

When you find yourself defending a new pre-suit claim or matter in litigation similar to this, speak with your client about tendering or seeking contribution. It is important to explore this avenue sooner rather than later as a failure to tender the defense in a timely manner may limit your client's recovery for expenses incurred.[7] The steps to take include the following:

1. Review the contract and/or vendor agreement carefully and if liability lies elsewhere, determine who the liable parties are.
2. Confirm that your client is in agreement with tendering defense and/or seeking contribution from third party.
3. Prepare the tender letter addressed to the appropriate party for client approval.

   - Make sure your correspondence is directed to the correct individuals. Work with your client to determine who the appropriate contacts may be of the third party you intend to tender.
   - Include a narrative of the allegations made in Plaintiff's Complaint and the basis for third-party liability under the facts and Florida case law.
   - Add provisions from any vendor agreements/ contracts between your client and the third party, highlighting the specific language establishing liability in the matter.
   - As you prepare the tender letter, consider any potential arguments they might make in an attempt to avoid acceptance and broach these arguments before they have the chance to raise them in a response to your letter.
   - Ensure you also have included the request for insurance disclosure pursuant to section 627.4137, Florida Statutes.

- Remind the party/vendor of the agreement they have with your client and the possibility of a seeking damages for a breach of contract action, if applicable.

Absent ambiguity and doubt when reviewing language, feel confident when pursuing contribution or an agreement for another party to take over the defense when the language is in your client's favor even if your initial attempt is not accepted.

Denied — What Next?

What happens if the party denies your request for tender of defense or for contribution? Don't let your tenacity weaken simply because the first response is "no." Often, when going this route, the parties' carrier or third-party administrator may send a generic denial. At times, the language cited may not even be applicable or relevant.

Often, you will not receive the required insurance disclosure pursuant to your section 627.4137, Florida Statutes. request. Your next steps are crucial. Of course, the first step is always to communicate with your client and let them know your plan on continuing to pursue this avenue. Ask your client for a contact of someone who may have a relationship with this particular vendor or contractual partner for a manager or attorney (with that vendor) who may be able to further your goal. Once you are in contact with someone in vendor management or an attorney for the company from which you're seeking a defense, it's time to strategize. Revamp your tender demand and correct the prior response's misstatement of the contract or policy. Note the specific language in your correspondence that triggers the "additional insured" insurance via the certificate of insurance. This will stem from your vendor agreement, lease agreement, contract, or other document your client has with the would-be tender recipient. Contribution is another avenue to seek when thinking of the possibility of risk transfer. Once you are in communication with either an attorney for the vendor/company and/or manager who handles the specific vendor relationship, consider seeking contribution as the last resort. In the event a vendor or party to a contract is not on board with a full acceptance of the defenses, they may be inclined to contribute to the resolution to foster the continuing business relationship.

Final Thoughts

During conversations and counseling with your client, it is of paramount importance to stress that strong and clear language be contained within their respective agreements with outside parties and vendors. Parties naturally seek to shield themselves from future liability and litigation. It is imperative that the language used in the agreements lack any ambiguity and makes certain when and what insurance policy takes effect. In the event there may be possible confusion of a term, suggest definitions to be added to the contract. This can help your client avoid what usually becomes an up-hill battle in tender situations. Encourage your client to list, define, and make clear in the contract the terms of indemnification and subrogation. The circumstance of when those would arise can differ from party to party. If your client agrees to shoulder the costs, fees, or liability for certain circumstances, make sure those terms are unambiguously identified as well.

Signed agreements with strong defense and clear indemnification provisions are critical to protecting your client's interests.

Noting that liability is not simply one-sided may aid in future litigation if the opposing party argues that the contract is ambiguous and the contract is therefore interpreted against the drafter.[7] In the same way that you can use the language of an agreement or contract in your favor, the opposing party can defeat the interpretation if your client's language is ambiguous.

At times, companies tend to place too much emphasis on insurance coverage requirements for vendors. It is often more important to do business with financially strong and reputable companies that have the "ability to pay" in the event of a loss. Signed agreements with strong defense and indemnification provisions are critical. The importance of longstanding relationships with your business partners may be more important than tendering the defense or seeking contribution.

In sum, there is no universal approach to tender of defense or risk transfer. Every case and every client is unique, but the potential benefits available to your clients when you are well-versed in the topic are difficult to understate. For attorneys practicing civil defense in the state of Florida, the knowledge of when and how to tender is a valuable addition to your legal practice toolkit.

[1] *Tropical Park, Inc. v. U.S. Fidelity & Guaranty Co.*, 357 So. 2d 253, 256 (Fla. 3d DCA 1978) (holding an insurer had a duty to defend even when a mistaken allegation in the complaint fell outside of the scope of coverage).

[2] *See generally Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 814 (Fla. 1st DCA 1985).

[3] *Klaesen Bros., Inc. v. Harbor Ins. Co.*, 410 So. 2d 611, 613 (Fla. 4th DCA 1982) (reversing judgment and finding no duty to indemnify when the claim fell outside of policy coverage).

[4] *Camp, Dress & McKee, Inc. v. Paul N. Howard Co.*, 853 So. 2d 1072 (Fla. 5th DCA 2003).

[5] *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 642 (Fla. 1999).

[6] *Houdaille Indus., Inc. v. Edwards,* 374 So. 2d 490, 493 (Fla. 1979).

[7] *See Northbrook Property and Cas. Co. v. City Nat. Bank of Miami*, 591 So. 2d 1026, 1028 (Fla. 3d DCA 1991) (affirming denial of recovery of attorney's fees when an insurer failed to tender until more than two years after the litigation began).

[8] *New York Life Ins. Co. v. Kincaid*, 136 Fla. 120, 124-25 (Fla. 1939) (noting "ambiguous terms, conditions or provisions in a contract of insurance are to be fairly construed in favor of the insured"); *Bunnell Medical Clinic, P.A. v. Barrera*, 419 So. 2d 681, 683-84 (Fla 5th DCA 1982) (noting summary judgment on liability against a medical clinic was improper when the terms of its employment contract covering malpractice insurance were ambiguous).

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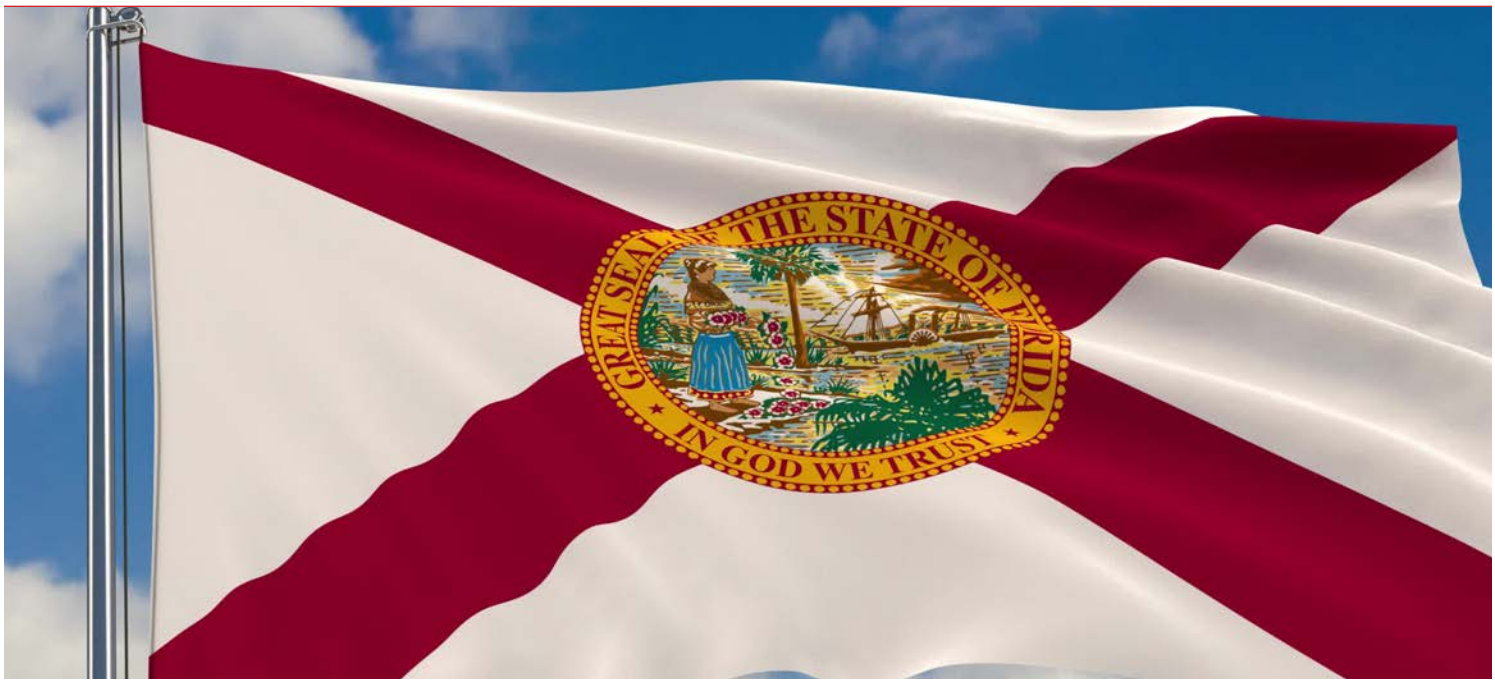

Shots Fired at the "Stop WOKE" Act's Expansion of Florida Civil Rights Act

By Kayla M. Scarpone and Mackenzie D. Hayes

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Employers generally conduct diversity, equity, and inclusion (DEI) trainings to help guard against potential liability for discrimination claims. However, an attempted expansion of the Florida Civil Rights Act (FCRA) through HB 7 (2022)[1] (nicknamed the "Stop WOKE" Act[2]) has placed employers on edge about what material can be referenced or included in such trainings and potentially opened the door for increased liability simply for providing the trainings, a situation United States District Judge Mark Walker aptly described as placing Florida in a state of "First Amendment upside down."[3]

The Act was passed by the Florida House and Senate in Spring 2022, signed into law by Governor DeSantis on April 22, 2022, and became effective on July 1, 2022. The bill largely models a previous Executive Order entered by then-President Trump in 2020[4] that purported to limit inclusion of certain "divisive" topics in trainings administered by federal contractors. That Executive Order was subject to multiple First Amendment lawsuits and was enjoined by a federal court.[5] The Order was subsequently revoked by President Biden on his first day in office in January 2021.[6]

The FCRA prohibits unlawful discrimination in employment, among other areas,[7] and was largely patterned after Title VII of the Federal Civil Rights Act of 1964 ("Title VII"). The FCRA applies to covered employers (generally those with 15 employees or more, including government entities).[8] The "Stop WOKE" Act amended the FCRA, including that it is unlawful for a covered employer to subject any individual working in Florida, as a condition of employment, to training or instruction that "espouses" or "promotes" belief in any of the following concepts:

- That members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.
- That an individual, by virtue of their race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

EDITOR'S NOTE: Employers in Florida, as elsewhere, often conduct training to guard against liability for claims of discrimination in the workplace. The ability of contractors to provide this training without themselves being accused of civil rights violations has been called into question by the so-called "Stop WOKE" Act. This article describes the resulting conundrum and summarizes current challenges to that Act.

- That an individual's moral character or status as either privileged or oppressed is necessarily determined by their race, color, sex, or national origin.

- That members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.

- That an individual, by virtue of their race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.

- That an individual, by virtue of their race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

- That an individual, by virtue of their race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.

- That such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.[9]

The Act provides that it does not prohibit discussion of these ideas "as part of a course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts."[10] However, the line between what constitutes objective discussion versus endorsement is murky and it was unclear how courts and the Florida Commission on Human Rights[11] would enforce and draw the line regarding the same. Moreover, the fact that any employee who simply alleged they felt compelled to believe in the prohibited concepts could presumably file suit would arguably lead to a chilling effect over even completely "lawful" and "objective" employer-initiated discussions.

The Act also included a similar prohibition against educators instructing on similar concepts in public schools.[12] The Act was one of the most hotly contested bills of the 2022 session and was quickly subject to multiple challenges in federal court.

The day the Act went into effect (April 22, 2022), a group of plaintiffs including educators, a schoolchild, and a DEI consultant sued Governor Ron DeSantis, Attorney General Ashley Moody, the Commissioner of the Florida State Board of Education, and members of the Florida Board of Governors of the State University System. Plaintiffs alleged that the Act violates the teachers' First Amendment rights to free expression and academic freedom, violates the students' First Amendment right to access information, impermissibly regulates speech without a legitimate government interest, and is unconstitutionally vague.[13]

After Defendants in that case filed a motion to dismiss, Plaintiffs Falls and Harper (both public school teachers) and Plaintiff RMJ (an incoming kindergartener) were allowed to continue the lawsuit against the Board of Education. Plaintiff Cassanello (a professor at UCF) was allowed to continue against the Board of Governors. However, the claims of Plaintiff Hodo (the DEI training consultant) were dismissed for lack of standing for failure to sufficiently allege either actual injury or third-party standing. The court specifically found Hodo had not sufficiently alleged imminent injury because she had only claimed that some of her clients *might* no longer employ her to conduct DEI trainings because of the Act without alleging any concrete loss of business. All claims against Governor DeSantis were dismissed, because the governor's executive authority alone is not enough to make him a proper party for a plaintiff challenging the constitutionality of a law that does not give him enforcement authority. The case is still pending before District Court Judge Mark E. Walker as to the education claims.[14]

A second case also before Judge Walker challenging the Act was filed by employers and consultants who alleged the Act violates their First Amendment right to free expression and is unconstitutionally vague and overbroad. Plaintiffs Honeyfund.com, Inc. and Primo Tampa, both employers, alleged that they plan to alter their company DEI trainings against their will to comply with the Act. Plaintiff Chevara Orrin and her DEI consulting company, Whitespace Consulting, alleged that they had already lost clients because of the Act. All Plaintiffs were found to have sufficiently established standing against all Defendants except for Governor DeSantis.[15]

On August 18, 2022, after weighing the required factors, Judge Walker granted in part and denied in part[16] the Plaintiffs' motion for preliminary injunction in the *Honeyfund* case, forbidding the Act from being enforced against employers, describing it as "a naked viewpoint-based regulation on speech that does not pass strict scrutiny."[17] Judge Walker also found that the Act was impermissibly vague based on certain terms as well as the lack of guidance regarding where the line between "objective" discussion of certain topics and "endorsement" of the same falls. Therefore, the court concluded, Plaintiffs would be left with no choice but to self-censor their speech.[18]

Also on August 18, 2022, the ACLU filed a complaint brought by college instructors and students at Florida universities against the Board of Governors of the State University System, the Commissioner of the Florida State Board of Education, and the Boards of Trustees of the University of Florida, the University of South Florida, Florida International University, Florida A&M University, Florida State University, and the University of Central Florida. The complaint alleges that the Act violates the First Amendment rights to free speech and receive information and the Fourteenth Amendment right to equal protection, and in addition that the Act is unconstitutionally vague. Plaintiffs are also requested an injunction in that case, applied to educators and students.[19] That case is still pending before the District Court.

All Defendants filed a Notice of Appeal in the *Honeyfund* case on August 18, 2022.[20] Although Judge Walker originally declined to stay the *Honeyfund* case pending appeal when he granted the preliminary injunction, a joint motion to stay

filed by the parties was granted on September 30, 2022.[21] The appeal is now pending before the United States Court of Appeals for the Eleventh Circuit, and briefing is underway.[22]

The final outcome of these ongoing legal challenges is still unclear. For the time being, the FCRA expansion under the "Stop WOKE" Act has been enjoined and is no longer in effect. However, based on the pendency of the appeal, employers should still be prepared to carefully review and evaluate any equal opportunity, anti-discrimination, anti-harassment, and DEI trainings and initiatives for the likelihood that they would violate the expansion were it reinstated.

1 Senate Bill 148.
2 The title is an acronym for "Stop Wrongs to Our Kids and Employees."
3 "In the popular television series *Stranger Things*, the 'upside down' describes a parallel dimension containing a distorted version of our world. *See* Stranger Things (Netflix 2022). Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely." *Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *2-3 (N.D. Fla. Aug. 18, 2022).
4 Executive Order on Combating Race and Sex Stereotyping, Executive Order 13950 of September 22, 2020.
5 *Santa Cruz Lesbian and Gay Cmty. Ctr., et al. v. Trump*, No. 5:20-cv-07741-BLF (N.D. Cal. Dec. 23, 2020).
6 Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Executive Order 13985 of January 20, 2021.
7 § 760.08-760.10, Fla. Stat. (2022).
8 *See id.* at § 760.02(7).
9 *Id.* at § 760.08(8)(a).
10 *Id.* at § 760.08(8)(b).
11 The administrative exhaustion requirement applies to such claims, just as any other FCRA claim. § 760.11(1), Fla. Stat. (2022).
12 § 1000.05(4)(a), Fla. Stat. (2022).
13 First Amended Complaint, *Falls, et al. v. DeSantis*, Case No.: 4:22-cv-166-MW-MJF (N.D. Fla. April 22, 2022).
14 Order Granting in Part and Denying in Part Motion to Dismiss, *Falls, et al. v. DeSantis*, Case No.: 4:22-cv-166-MW-MJF (N.D. Fla. July 8, 2022) & Order Denying Defendants' Motion for Partial Summary Judgment, *Falls, et al. v. DeSantis*, Case No.: 4:22-cv-166-MW-MJF (N.D. Fla. September 8, 2022).
15 *See* First Amended Complaint, *Honeyfund.com, Inc.*, Case No. 4:22-cv-227-ACW-MAF (N.D. Fla. June 30, 2022).
16 The partial denial was based on the fact that no standing was found as against Governor DeSantis. *Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 U.S. Dist. LEXIS 147755, at *18 (N.D. Fla. Aug. 18, 2022).
17 *Id.* at *3.
18 *Id.* at *30-41.
19 Verified Complaint, *Pernell, et al. v. Florida Bd. of Governors*, Case No. 4:22-cv-304-MW-MAF (N.D. Fla. Aug. 18, 2022).
20 Notice of Appeal, *Honeyfund.com, Inc.*, Case No. 4:22-cv-227-MW-MAF (N.D. Fla. Aug. 18, 2022).
21 Order Granting Joint Motion to Stay Pending Appeal, *Honeyfund.com, Inc.*, Case No. 4:22-cv-227-MW-MAF (N.D. Fla. Aug. 18, 2022).
22 *Honeyfund.Com Inc., et al. v. Governor, State of Florida, et al.*, Case No. 22-13135 (11th Cir. Sept. 19, 2022).

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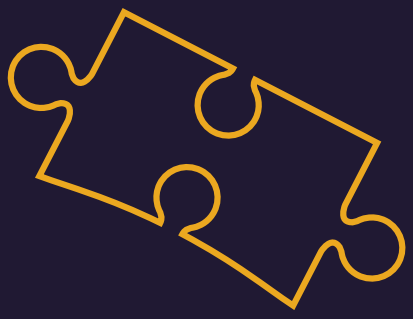

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