STATE OF FLORIDA COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-suit Notice Requirements/Prerequisites to Suit

Generally, pre-suit notice is not required as a prerequisite to commencing a civil lawsuit. Exceptions include lawsuits against the state and its agencies or subdivisions, FLA. STAT. § 768.28 (2012), medical malpractice actions, FLA. STAT. § 766.106(2) (2012), claims for civil theft, FLA. STAT. § 772.11, construction defect actions, FLA. STAT. § 558.004, nursing home negligence actions, FLA. STAT. § 400.0233, certain libel or slander actions, FLA. STAT. § 770.01, claims against car dealers pursuant to Florida's Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.98, homeowners' associations presuit dispute resolution, FLA. STAT. § 720.311, condominium disputes, FLA. STAT. § 718.1255,extracontractual liability for statutory bad faith, FLA. STAT. § 624.155, certain discrimination claims, Chapter 760, FLA. STAT., assisted care claims for residents' rights violations or negligence, FLA. STAT. § 429.293, construction lien notices, Chapter 713, FLA. STAT., various lien notices, Chapter 713, FLA. STAT., foreclosure notices, Chapter 702,FLA. STAT.., eminent domain procedures, Chapter 73, FLA. STAT., various notice provisions under landlord and tenant law, Chapter 83, FLA. STAT., and certain contractual provisions.*See e.g.*, ***PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.***, 566 Fed. Appx. 845 (11th Cir. 2014)(holding six month delay in reporting property damage claim was not "prompt notice").

Relationship to the Federal Rules of Civil Procedure

The Florida Rules of Civil Procedure are largely patterned after the Federal Rules of Civil Procedure and in many respects operate in the same fashion. However, where the State Court Rules omit a provision that is in the Federal Rules, it will be concluded that the omission was intentional by the draftsman of the State Court Rules. ***Castner v. Ziemer***, 113 So. 2d 263 (Fla. 2d DCA 1959).

Description of the Organization of the State Court System

A) **Judicial selection.** Justices of the Supreme Court and judges of the District Courts of Appeals are appointed by the Governor, after being nominated by the appropriate judicial nominating commission, and then retained for a term of six years by vote of the qualified electors of the territorial jurisdiction of the court. Likewise, Circuit Court and County Court judges are elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. Circuit Court judges serve six year terms, while County Court judges serve four year terms. *See generally* FLA. CONST. art. V, § 10.

1) **Procedures.** The procedures for conducting judicial elections are provided by Chapter 105 of the Florida Statutes. Judges must remain nonpartisan, and are thus prohibited from campaigning or qualifying for the judicial office based on party affiliation when seeking election or retention. Likewise, no political party or partisan political organization may endorse, support, or assist any candidate in the campaign for election to judicial office. Candidates for Supreme Court Justice,

District Court of Appeal Judge, and Circuit Court Judge must qualify with the Division of Elections of the Department of State, and candidates for the office of County Court Judge must qualify with the Supervisor of Elections of the county.

B) **Structure.** The judicial power in the State of Florida is vested in a Supreme Court, five District Courts of Appeal, Circuit Courts, and County Courts. *See* FLA. CONST. art. V, § 1.

C) Alternative dispute resolution.

1) **Arbitration.** In addition to contractual agreements to arbitrate, the Florida Statues provide a number of subject matters for which disputes are required to be arbitrated pursuant to the Florida Arbitration Code (Chapter 682 of the Florida Statutes). Arbitration is considered to be a favored means of dispute resolution, and courts will go to great lengths to uphold proceedings resulting in an award. ***Roe v. Amica Mut. Ins. Co.***, 533 So. 2d 279 (Fla. 1988).

2) **Mediation.** While "arbitration" is defined as a process whereby a mutual third person or panel considers the facts and arguments and renders a decision which may be binding or non-binding, "mediation" involves a neutral third person facilitating the resolution of the dispute between parties while the decision making power remains with the parties. A presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration. In fact, most Circuit Courts in Florida now require civil matters to be mediated and impassed before proceeding to trial.

Service of Summons

A) **Person.** In civil actions, there are two methods of service of original process: personal service and substituted or constructive service. All process must be served by the sheriff of the county where the person to be served is found, except in the case of initial non-enforceable civil process, which may be served by a special or certified process server. FLA. STAT. § 48.021(1) (2015). Personal service is the primary method of obtaining jurisdiction over a person, and such service is made by delivering a copy of the process to the person to be served with a copy of the complaint, petition, or other initial pleading or paper.

B) **Substituted service.** Substituted service is available in limited situations. For example, service can be made by delivering a copy of the process and of the initial pleading to a person who is 15 years of age or older residing in the usual place of abode of the defending party after informing that person of the contents of the process and pleading. FLA. STAT. § 48.031 (2015). Another form of permitted substituted service is on an agent, where the agent was appointed for that purpose.

C) **Private corporation.** Service of process on a corporation is made by delivering a summons and a pleading to the proper officer or agent of the corporation, and such service is regarded as the equivalent of personal service. Service may be made on a superior

corporate officer or business agent, or on the registered agent designated by the corporation. FLA. STAT. § 48.081 (2015). It is also permissible to serve process on any officer or agent transacting business while he is in Florida, if the corporation is a foreign one, and as long as the foreign corporation engages in substantial and not isolated activities in Florida.

D) **Public corporation.** To obtain service of process on a public entity having a governing board, counsel or commission, or on a public corporation, process is delivered to the president, mayor, chairman or other head; to the vice-president, vice-mayor or vice-chairman; or to any member of the governing board, counsel or commission. Service on these groups of persons can only be made if persons in the preceding groups are absent from the county. Process against other public entities (except state, United States, and federal entities) is served on the public officer being sued or the chief executive officer of the entity. FLA. STAT. § 48.111 (2015).

Statutes of Limitations

A) **Construction.** An action founded on the design, planning or construction of an improvement to real property must be brought within 4 years, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the engineer, architect, or contractor and his or her employer, whichever date is the latest. If the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence, up to a maximum of 10 years. FLA. STAT. § 95.11(3)(c) (2015).

B) Contract.

1) **Oral.** The statute of limitations for claims regarding oral contracts is four years. FLA. STAT. § 95.11(3)(k) (2015).

2) **Written.** The statute of limitations for claims regarding written contracts is five years. FLA. STAT. § 95.11(2)(b) (2015).

C) **Contribution.** A separate action by a tortfeasor to enforce contribution must be commenced within one year after the original judgment has become final. FLA. STAT. § 768.31 (2015).

D) **Employment.** An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime must be brought within two years. FLA. STAT. § 95.11(4)(c) (2015). Otherwise, unless specified by statute, the default statute of limitations is four years. FLA. STAT. § 95.11(3)(p).

E) **Fraud.** The statute of limitations for fraud actions is four years. FLA. STAT. § 95.11(3)(j) (2015).

F) **Governmental entities.** The statute of limitations for claims against governmental entities is four years, except claims must be presented in writing to the appropriate agency and to the Department of Financial Services within 3 years after the claim accrues. FLA. STAT. § 768.28(6) (2015).

G) **Personal injury.** The statute of limitations for personal injury claims is four years. FLA. STAT. § 95.11(3)(a) (2015).

H) **Professional liability.** The statute of limitations for professional liability, other than medical malpractice, is two years. FLA. STAT. § 95.11(4)(a) (2015). Medical malpractice must be commenced within two years from the time the incident giving rise to the action occurred, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued, except that this four year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday. FLA. STAT. § 95.11(4)(b).

I) **Property damage.** The statute of limitations for property damage is four years. FLA. STAT. § 95.11(3)(a), (h) (2015).

J) **Wrongful death.** The statute of limitations for wrongful death is two years. FLA. STAT. § 95.11(4)(d) (2015).

K) **Tolling.** Various circumstances under which limitations periods are tolled are provided by FLA. STAT. §§ 95.051, 95.031 (2015). They describe the computation of time for accrual of causes of action and running of limitations periods.

Statute of Repose

FLA. STAT. § 95.031 (2015), addressing computation of time, contains several repose periods, such as 12 years for fraud and product liability.

Venue Rules

Lawsuits against individuals shall be brought only in the county "where the defendant resides, where the cause of action accrued, or where the property in litigation is located." FLA. STAT. § 47.011 (2015). Actions against domestic corporations shall be brought only in the county where the corporation has or usually keeps an "office for transaction of its customary business," "where the cause of action accrued," or "where the property in litigation is located." FLA. STAT. § 47.051 (2015). Actions against a foreign corporation doing business in Florida shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation was located. *Id.*

1) ***Forum non conveniens.*** Florida's *forum non conveniens* statute, FLA. STAT. § 47.122 (2015), provides that "for the convenience of the parties or witnesses or in the interest of

justice, any court of record may transfer any civil action to any other court of record in which it might have been brought."

NEGLIGENCE

Comparative Fault/Contributory Negligence

Florida is a "pure comparative fault" state, meaning that any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and non-economic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. FLA. STAT. § 768.81(2) (2015). The court enters judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability. Fault can be attributed to a non-party, if the defendant affirmatively pleads the fault of the non-party and, absent a showing of good cause, identifies the non-party. FLA. STAT. § 768.81(3)(2015). The defendant has the burden of proving by a preponderance of the evidence at trial that the non-party is at fault in causing the plaintiff's injuries.

Comparative Fault does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by Chapter 403, Chapter 498, Chapter 517, Chapter 542, or Chapter 895.

Exclusive Remedy – Worker's Compensation Protections

Generally, under the workers' compensation law of Florida, Chapter 440 of the Florida Statutes, workers' compensation is the exclusive remedy available to an employee injured in the course of his or her employment as to any negligence on the part of the employer, even gross negligence. Thus, where an injury is compensable solely and exclusively under the workers' compensation law, the employer is immune from liability in a civil action instituted on behalf of the injured employee. The immunity extends to a survivor of the employee, and to injuries or disability resulting from medical treatment incidental to the original injury.

In 2003, the legislature created a narrow intentional tort exception if the employee proves by clear and convincing evidence, that: 1. The employer deliberately intended to injure the employee; or 2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.. FLA. STAT. §440.11

A) **Subcontracts.** Where a contractor sublets any part or parts of the work to a subcontractor, all of the employees of such contractor and subcontractor engaged in such contract work are deemed to be employed in "one and the same business," requiring the contractor to secure workers' compensation coverage to all such employees, except employees of a subcontractor who has secured such coverage. FLA. STAT. § 440.10(1)(b) (2015).

Indemnification

A) Common law indemnity is the most restrictive type of indemnity. To establish a cause of action for common law indemnity, a plaintiff must typically plead and prove four elements: (1) that he or she is without fault; (2) that his or her liability is vicarious and solely for the wrong of another; (3) that the defendant is with fault; and (4) that there is a special relationship between the plaintiff and defendant. ***Houdaille Indus., Inc. v. Edwards***, 374 So. 2d 490 (Fla. 1979). The term "special relationship" merely describes a relationship which makes a faultless party "only vicariously, constructively, derivatively, or technically liable for the wrongful acts" of the party at fault. ***Diplomat Props., L.P. v. Tecnoglass, LLC***, 114 So. 3d 357 (Fla. 4th DCA 2013).

B) **Contractual indemnity.** Unlike common law indemnity, contractual indemnity is not concerned with special relationships or vicarious, constructive, derivative or technical liability-rather, it is concerned with the express terms of the agreement to indemnify. Contractual indemnity is subject to general rules involving the validity and construction of contracts, such as the requirement for sufficient and present consideration. A plaintiff must plead and prove the existence of a valid contractual right to indemnification and the inclusion of the claim within the scope of the contractual duty. An agreement for indemnification against one's own negligence is valid as long as the contract expresses an intent to indemnify against the indemnity's own wrongful actions in "clear and unequivocal terms." ***Natco Ltd. P'ship v. Moran Towing of Fla.***, 267 F.3d 1190 (Fla. 2001). For an indemnity provision to be enforceable it must be clear, specific, and unequivocal. There are limitations and regulations for contractual indemnity construction contracts and design professional contracts. See FLA. STAT. § 725.06 and FLA. STAT. § 725.08.

Joint and Several Liability

See discussion as to comparative fault/contributory negligence above.

Strict Liability

Florida recognizes a cause of action for strict liability for acts which, though lawful, are so fraught with the possibility of harm to others that the law treats them as allowable only on the terms of insuring the public against injury. Strict liability has been applied to a variety of circumstances, as long as the ultra-hazardous or abnormally dangerous activity poses some physical, rather than economic, danger to persons or property in the area. ***Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.***, 460 So. 2d 510 (Fla. 3d DCA 1984). For an activity to be abnormal and dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. ***Id.***

Willful and Wanton Conduct

A) A defendant may be held liable for punitive damages in Florida only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of

intentional misconduct or gross negligence. "Intentional misconduct" means actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentional pursuit of that course of conduct. "Gross negligence" means that the defendant's conduct was so reckless or wanting in the care that it constituted a conscious disregard or indifference to the life, safety or rights of persons exposed to such conduct. FLA. STAT. § 768.72 (2) (2015).

B) **Corporations.** An employer, corporation, or other legal entity may be liable for punitive damages for the conduct of an employee or agent only if the conduct meets the criteria specified in the preceding paragraph and the entity actively and knowingly participated in such conduct, the officers, directors, or managers of the entity knowingly condoned, ratified or consented to such conduct, or the entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages or injuries suffered by the claimant. FLA. STAT. § 768.72 (3) (2015).

C) **Procedure.** Procedurally, no claim for punitive damages will be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. Thereafter, the claimant may move to amend the complaint to assert a claim for punitive damages as allowed by the Florida Rules of Civil Procedure. The rules also specify that they should be liberally construed to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. FLA. R. CIV. P. 1.190 (2015).

DISCOVERY

Electronic Discovery Rules

Effective September 1, 2012, the Florida Rules of Civil Procedure were significantly amended to address the discovery of electronically stored information (ESI). The amendments affect Rule 1.200 (Pretrial Procedure), Rule 1.201 (Complex Litigation), Rule 1.280 (General Provisions Governing Discovery), Rule 1.340 (Interrogatories to Parties), Rule 1.380 (Failure to Make Discovery: Sanctions), and Rule 1.410 (Subpoena).

Expert Witnesses

A) **Forms of Disclosure—reports required.** Under FLA. R. CIV. P. 1.280(b)(4) (2015), discovery of facts known and opinions held by experts, not privileged and relevant to action, regardless of whether it is admissible, developed in anticipation of litigation or for trial, may be obtained only as follows:

> (A)(i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with Rule 1.390, Depositions of Expert Witnesses, without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

1) **Personal financial and business records.** An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. FLA. R. CIV. P. 1.280(b)(4). Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of the rule concerning fees and expenses as the court may deem appropriate. FLA. R. CIV. P. 1.280 (b)(4)(A)(iii)(2015). However, there is not intended to be a blanket bar on discovery from parties about information they have in their possession about an expert, including the party's financial relationship with the expert. ***Allstate Ins. Co. v. Boecher****,* 733 So. 2d 993, 999 (Fla. 1999).

2) **Non-testifying experts.** Disclosure of names of expert witnesses who were not expected to testify at trial is not required absent showing of exceptional circumstances. ***Lift Systems, Inc. v. Costco Wholesale Corp.****,* 636 So. 2d 569 (Fla. 3d DCA 1994).

3) **Attorney-Client Privilege and Referral Agreement with Treating Physicians. T**he attorney-client privilege protects a party from being required to disclose that his or her attorney referred the party to a physician for treatment. ***Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.,*** No. SC15-1086, 2017 Fla. LEXIS 812, at *2 (Fla. Apr. 13, 2017). While the existence of such a relationship remains

discoverable and relevant at trial, the information must be obtained from a source independent of the party or her counsel. *Id.*

4) **Billing.** Expert in personal injury litigation is not required to disclose the number of hours of private expert work in one year, or hourly rate information where the disclosure has the effect of disclosing the expert's yearly earnings. ***Lynd v. Dist. Bd. of Trustees of Broward Cmty. Coll.***, *Fla.*, 696 So. 2d 953 (Fla. 4th DCA 1997).

B) **Rebuttal witnesses.** Rebuttal evidence is offered after the defense has rested its case and is directed to refuting the evidence introduced by the defendant, unless the court exercises its discretion under FLA. STAT. § 90.612(1) (2015) to permit broader proof. For example, evidence that refutes the defense theory or impeaches a defense witness is normally a proper subject for rebuttal. However, evidence that is merely cumulative of evidence introduced during the case-in-chief may be excluded.

1) **Purpose. "**Generally, rebuttal testimony is permitted to refute a defense theory or to impeach a defense witness." ***Rimmer v. State***, 825 So. 2d 304, 321 (Fla. 2002).

2) **Cumulative testimony.** There is no abuse of discretion in refusing to admit expert's deposition on rebuttal when the deposition was cumulative of opinion testimony offered during plaintiff's case-in-chief. ***Castillo v. Bush***, 902 So. 2d 317 (Fla. 5th DCA 2005).

a) **Result.** Refusal to permit an expert to testify on rebuttal was not reversible error when the expert's testimony was cumulative and could have been submitted during plaintiff's case-in-chief. ***Rhodes v. Asplundh Tree Expert Co.***, 528 So. 2d 459, 460 (Fla. 3d DCA 1988).

3) **Part of case in chief.** It was "plainly appropriate" to exclude records of a second treating physician because the opinion contained in the records was "obviously a matter of the plaintiff's case in chief and was therefore in rebuttal of nothing," and because the treating physician was not included in any pre-trial disclosure. ***Sorondo v. Batet***, 782 So. 2d 540, 541-42 (Fla. 3d DCA 2001).

C) Discovery of expert work product.

1) **Need of evidence.** To demonstrate a "need," sufficient to compel discovery of work-product materials, a party must present testimony or evidence demonstrating that the material requested is critical to the theory of the requester's case, or to some significant aspect of the case. ***Nevin v. Palm Beach Cnty. School Bd.***, 958 So. 2d 1003 (Fla. 1st DCA 2007).

2) **Timeframe.** General work product rule limited personal representative of patient's estate to asking deposition questions of city's employee concerning facts and opinions held prior to employee becoming specially employed by city in preparation for trial in personal representative's medical negligence action against

city concerning paramedics' response to patient's complaints of chest pains. Thus, the personal representative could not discover employee's expert opinions concerning paramedics' standard of care and compliance with city fire and rescue department patient treatment protocol. ***City of Jacksonville v. Rodriguez***, 851 So. 2d 280 (Fla. 1st DCA 2003).

3) **Scope.** A discovery order in civil commitment proceedings initiated with respect to criminal defendant, ordering defendant to disclose names of "any persons" who had examined, evaluated, or reviewed defendant's records improperly compelled defendant to divulge names of experts consulted for trial but not intended to be called to testify at trial, which information was protected by the work product doctrine, where state made no showing of exceptional circumstances. ***Muldrow v. State***, 787 So. 2d 159 (Fla. 2d DCA 2001).

4) **Demonstration.** A videotape of plaintiffs' expert performing and explaining tests on venetian blind and adjustment cord, from which plaintiffs' two-year-old son was accidentally hanged, was "work product" prepared in anticipation of litigation and trial and was discoverable only on showing that tape was necessary to preparation of case. ***Horne v. K-Mart Corp.***, 558 So. 2d 1079 (Fla. 4th DCA 1990).

5) **No exceptional circumstances.** Electric contractor failed to show exceptional circumstances which would allow it to invade work-project immunity and take depositions of two experts retained in anticipation of litigation by owner of business premises destroyed by fire but who would not be called for trial. The electric contractor also employed experts to investigate cause of fire, and evidence and findings of investigatory team of Bureau of Alcohol, Tobacco and Firearms had been documented. ***Gilmor Trading Corp. v. Lind Elec., Inc.***, 555 So. 2d 1258 (Fla. 3d DCA 1989).

6) **Expectation of testifying.** Report prepared by expert expected to testify at medical malpractice trial was not protected by work product privilege and was discoverable. ***Peck v. Messina***, 523 So. 2d 1154 (Fla. 2d DCA 1988).

7) **In anticipation of litigation.** Reports, memoranda, and other documents of an expert witness hired to conduct an investigation of a fire in anticipation of litigation constituted work product. It was exempt from discovery in negligence action brought by corporation which owned premises in which fire occurred against another corporation for permitting the fire to start, where defendant deposed several members of the arson task force who were on the scene during and immediately after the blaze, and thus, had access to details concerning location of the fire and opportunity to obtain information regarding its circumstances. The defendant did not demonstrate any exceptional circumstances to permit granting his motion to depose the expert as a non-testifying expert. ***Wackenhut Corp. v. Crant-Heisz Enterprises, Inc.***, 451 So. 2d 900 (Fla. 2d DCA 1984).

8) **Court order.** Respondent was not entitled to production of photographs and notes on which petitioner's expert, whom petitioner did not expect to call as witness, had relied. The photographs and notes were obtained pursuant to an earlier court order granting petitioner access to respondents' building. As the respondents had access to building, with every opportunity to take their own photographs and make their own notes, order compelling production had to be quashed. ***Centex Rooney Const. Co., Inc. v. SE/Broward Joint Venture***, 697 So. 2d 987 (Fla. 4th DCA 1997); FLA. R. CIV. P. 1.280.

Non-Party Discovery

A) **Subpoenas.** A party may seek inspection and copying of any documents or things within the scope of FLA. R. CIV. P. 1.350(a) (2015) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things.

> A party desiring production under this rule shall serve notice on every other party of the intent to serve a subpoena under this rule at least 10 days before the subpoena is issued if service is by delivery and 15 days before the subpoena is issued if the service is by mail. The proposed subpoena shall be attached to the notice and shall state the time, place, and method for production of the documents or things, and the name and address of the person who is to produce the documents or things, if known, and if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; shall include a designation of the items to be produced; and shall state that the person who will be asked to produce the documents or things has the right to object to the production under this rule and that the person will not be required to surrender the documents or things. A copy of the notice and proposed subpoena shall not be furnished to the person upon whom the subpoena is to be served. If any party serves an objection to production under this rule within 10 days of service of the notice, the documents or things shall not be produced pending resolution of the objection in accordance with subdivision (d).

FLA. R. CIV. P. 1.351 (2015).

1) **Medical malpractice.** In medical malpractice action, counsel for defendants could not obtain updates of patient's medical records from patient's treating physicians without serving notice on every other party of intent to serve subpoena for production. ***Figaro v. Bacon-Green***, 734 So. 2d 579 (Fla. 3d DCA 1999).

B) **Respondents.** "If any party serves an objection to production under this rule within 10 days of service of the notice, the documents or things shall not be produced pending

resolution of the objection in accordance with subdivision (d)." FLA. R. CIV. P. 1.351 (2015).

C) **Time frames for responses.** Notice of intent to subpoena a non-party must be completed 10 days before issuance if service is by delivery or 15 days before issuance if service is by mail. ***Id.*** Objection to non-party subpoena must be entered within 10 days of service of the notice. ***Id.***

Privileges

A) As recognized. Under FLA. STAT. § 90.501 (2015), no person in a legal proceeding has a privilege to:

(1) Refuse to be a witness.

(2) Refuse to disclose any matter.

(3) Refuse to produce any object or writing.

(4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.

B) Attorney-client privilege. Under FLA. STAT. § 90.502 (2012),

> A lawyer on behalf of the client, the client, a guardian or conservator of the client, a personal representative of a deceased client, or a successor, assignee, trustee in dissolution or similar representative has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications learned of by the legal services rendered to the client.

1) **Exceptions.** Under FLA. STAT. § 90.502(4) (2015), the exceptions to lawyer-client privilege are as follows:

a) When the lawyer's services are used in a crime or fraud.
b) A communication is relevant to an issue between parties who claim through the same deceased client.
c) When the communication is relevant to a breach of duty as a result of lawyer-client relationship.
d) When the lawyer is testifying as a witness about the competence or intention of the client is executing a document.
e) Joint communication of two people who consulted the same lawyer.

2) **Privilege log.** Although waiver of the attorney-client privilege and work-product doctrine is not favored, the rule requiring creation of a privilege log is mandatory,

and a waiver can be found by failure to file a privilege log. FLA. R. CIV. P. 1.280 (2015); ***Morton Plant Hosp. Ass'n, Inc. v. Shahbas ex rel. Shahbas***, 960 So. 2d 820 (Fla. 2d DCA 2007).

C) **Statements.** Statements made during privileged communication that are relevant to the law suit are presumed privileged. ***Sussman v. Damian***, 355 So. 2d 809 (Fla. 3d DCA 1977). Statements that are defamatory made in the course of litigation, even if not under oath or in court, have absolute immunity. ***Fariello v. Gavin***, 873 So. 2d 1243 (Fla. 5th DCA 2004).

D) **Self-critical analysis**. Florida has a strong statutory privilege for peer review and quality assurance meetings, participants, and documentation. The quality assurance and peer review privileges are found both within Chapter 395 of the Florida Statutes, which governs hospitals, as well as Chapter 766, Florida Statutes, which governs actions for medical malpractice.

1) **Amendment 7**. The participants in the peer review process are absolutely immune from civil liability arising out of their participation in the peer review process. Florida's Legislature has created a strong statutory privilege precluding the discovery of documentation generated through the peer review process. However, the application of the peer review privilege as it relates to documentation created during peer review and quality assurance meetings was drastically altered with the passage of what is commonly referred to as Amendment 7 during the general election of November 2004. On that date, the voters in the state of Florida passed a constitutional amendment, entitled *Patients' Right to Know About Adverse Incidents*, which allows for patients or representatives of patients to obtain documentation reflecting adverse incidents at medical facilities. The effect of the constitutional amendment is to greatly weaken the peer review privilege as it currently exists in Florida. *See* FLA. CONST. art. X, § 25.

2) **Implementation statute.** The Florida Legislature passed what was promoted as an implementation statute for this constitutional amendment at FLA. STAT. § 381.028 (2008). This has been held unconstitutional in part by ***Fla. Hosp. Waterman, Inc. v. Buster***, 934 So. 2d 478 (Fla. 2008) and ***W. Fla. Reg'l Medical Ctr., Inc. d/b/a W. Fla. Hosp. v. See***, 18 So. 3d 676 (Fla. 1st DCA 2009).

E) **Others for consideration.** Other privileges in Florida include:

1) Journalist's privilege, FLA. STAT. § 90.5015 (2015);
2) Psychotherapist-patient privilege, FLA. STAT. § 90.503 (2015);
3) Sexual assault counselor-victim privilege, FLA. STAT. § 90.5035 (2015);
4) Domestic violence advocate-victim privilege, FLA. STAT. § 90.5036 (2015);
5) Husband-wife privilege, FLA. STAT. § 90.504 (2015);
6) Privilege with respect to communications to clergy, FLA. STAT. § 90.505 (2015);
7) Accountant-client privilege, FLA. STAT. § 90.5055 (2015); and
8) Privilege with respect to trade secrets, FLA. STAT. § 90.506 (2015).

Requests to Admit

A) **Request.** A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of FLA. R. CIV. P. 1.280(b) (2008) (information relevant to the litigation) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless previously disclosed. The request for admission cannot exceed 30 requests. FLA. R. CIV. P. 1.370(a) (2012).

B) **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court permits withdrawal or amendment of the admission. FLA. R. CIV. P. 1.370(b).

Unique State Issues

A) **Attorney's fees in medical malpractice cases.** In the November 2004 general election, Florida voters passed an amendment to the Constitution that limits attorney's fees awardable in a medical malpractice case to $250,000.00. FLA. CONST. art I, § 26. However, plaintiff's lawyers in medical malpractice claims have won approval from the Florida Bar to have their clients sign a contract that includes a waiver of this constitutional right, meaning that assuming such a waiver has been executed, the constitutional amendment has no practical effect. *See, e.g.*, Attorney's Fees, available at http://www.floridamalpractice.com/fees.htm.

B) **Three strikes and you are out.** In the November 2004 general election, the voters in the state of Florida passed a constitutional amendment commonly referred to as the Three Strikes and You Are Out rule. Under this rule, if a healthcare practitioner is found to have committed malpractice on three occasions, that practitioner's license to practice is revoked. FLA. CONST. art. X, § 26. Settlements do not count as a strike under this rule. ***Id.*** However, if there is a finding of liability by an arbitration panel, a jury, or an administrative proceeding concerning a practitioner's license, that would count as one strike. ***Id.*** Although this has not been litigated, it appears that a practitioner could not receive two strikes for the same event, such as when there is a separate jury verdict resulting in a finding of liability and an administrative proceeding resulting in the discipline of a practitioner's license.

C) **Tortfeasors on the verdict form.** Under Florida law, if a defendant wants the jury to apportion fault to a non-party to the action, the defendant is required to formally identify that non-party during the course of discovery in order to be able to place that individual on the verdict form. This doctrine is known as placing a ***Fabre*** defendant on the verdict form, so named for the decision of the Florida Supreme Court in ***Fabre v. Marin***, 623 So. 2d 1182 (Fla. 1993).

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

Accident reconstruction experts may be permitted to give an opinion on how an accident happened, the point of impact, the angle of travel, the responsibility of the parties involved, and the interpretation of photographs. Generally such opinion testimony is received in evidence only if: (1) there exists sufficient factual data to assume a reasonably complete and accurate reconstruction of the accident without having to resort to speculation, and (2) the opinion will assist the trier of fact in the determination of the issue. ***Andrews v. Tew By and Through Tew***, 512 So. 2d 276 (Fla. 2d DCA 1987). Even if a witness was not qualified as an expert in accident reconstruction, such testimony would be admissible of it was based on experience in investigating causes of accidents and was within the expertise of an accident investigator. ***Mathieu v. Schnitzer***, 559 So. 2d 1244 (Fla. 4th DCA 1990).

Appeal

A) **When permitted.** Appeals are always permitted as of right when a final judgment has been entered at the trial court level. FLA. R. APP. P. 9.040 (2012). Final appeals from a County Court judgment are appealed to the Circuit Court. FLA. R. APP. P. 9.160 (2014). Judgments from the Circuit Court, which is the court of general jurisdiction in Florida for all civil actions in which more than $15,000.00 is at issue, are appealed to the District Courts of Appeal. Florida is divided into five districts. Under certain limited circumstances, an opinion of the District Court of Appeal can be appealed to the Florida Supreme Court only when the opinion expressly declares valid a state statute, expressly construes a provision of the State or Federal Constitution, expressly affects a class of constitutional or state officers, expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law, passes upon a question certified to be of great public importance, or is certified to be in direct conflict with a decision of another District Court of Appeal. FLA. R. APP. P. 9.030 (2012).

1) **Interlocutory orders.** There are certain interlocutory orders that can be the subject of appellate review during the pendency of a civil action. Appeals of non-final orders that are subject to immediate review by an appellate court while a civil matter remains pending include those orders that concern venue, that address injunctions, that determine jurisdiction over the person, that determine the right to the immediate possession of property, that determine the right to immediate monetary relief or child custody in a family law matter, that determine the entitlement of a party to arbitration or an appraisal under an insurance policy, that determine as a matter of law that a party is not entitled to workers' compensation immunity, that a class should be certified, that a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law, that a governmental entity has taken an action that has inordinately burdened real property, or that grant or deny the appointment of a receiver and terminate or refuse to terminate a receivership. *See generally* FLA. R. APP. P. 9.130 (2014).

2) **Certiorari.** There are other orders that are also subject to immediate appellate review, though not in the form of an interlocutory appeal. Those are original proceedings that are initiated with the District Court of Appeal and are identified as extraordinary writs. The most common extraordinary writ is a petition for a writ of *certiorari*. Under Florida law, a party may seek immediate review of a trial court order via a petition for writ of *certiorari* only if the party seeking review can demonstrate that the trial court order in question will cause that party irreparable harm that cannot be remedied by a final appeal, and that the trial court's decision constitutes a departure from the essential requirements of law. Petitions for writ of *certiorari* are rare, however, the most common such petition involves a trial court order that has the effect of compelling the disclosure of privileged material through the discovery process. *See generally* FLA. R. APP. P. 9.030 (2012).

B) **Timing.** The timing of appellate actions is set forth within the Florida Rules of Appellate Procedure. A notice of appeal must be filed within thirty (30) days of the date of rendition of the order to be reviewed. Rendition means the actual entry in the clerk's docket of the order in question. Florida law allows for a motion for new trial to be filed after a jury verdict within ten (10) days of the verdict. If a timely motion for new trial is filed, the 30-day time period for the submission of the notice of appeal commences only with the rendition of the order addressing the motion for new trial. *See generally* FLA. R. APP. P. 9.100 (2014).

1) **Brief.** In a standard appeal of a final judgment, the initial brief is due to be served seventy (70) days after the service of the notice of appeal. The appellee then has twenty (20) days to serve an answer brief, followed by twenty (20) days to submit a reply brief. All requests for oral argument and for attorney's fees and costs on appeal must be filed on or before the deadline for the submission of the reply brief. There is no time deadline under Florida law for the completion of oral argument, or for the issuance of an order or opinion concluding the appellate process. *See generally* FLA. R. APP. P. 9.210 (2014).

2) **Interlocutory appeals.** All notices of interlocutory appeal and petitions for writ of *certiorari* are due on or before the thirtieth day after the rendition of the order to be reviewed. The initial brief in an interlocutory appeal is due within fifteen (15) days of the service of the notice. The answer briefs and reply briefs are under the normal schedule. The submission of a petition for writ of *certiorari* does not automatically trigger an answer brief or response. Instead, the District Court will issue an order to show cause if it determines that the petition meets the initial jurisdictional threshold to warrant a response. The District Court will indicate in the order to show cause how much time the party has to respond and in turn to reply, although a typical timeframe is twenty (20) days to respond followed by ten (10) days to reply. *See generally* FLA. R. APP. P. 9.130 (2014).

Biomechanical Testimony

Biomechanical engineer experts seek to prove whether the forces of an automobile accident caused the alleged injury and whether the characteristics of the crash are consistent with causing the harm. Experts on accident reconstruction and biomechanics, without medical training, are not qualified to render opinions about the extent of injuries resulting from an automobile accident. ***Mattek v. White***, 695 So. 2d 942 (Fla. 4th DCA 1997). Instead, a biomechanical engineer would, for example, be capable of testifying that a plaintiff would not have suffered injuries connected with hitting the dashboard if he were wearing a seatbelt. ***Stockwell v. Drake***, 901 So. 2d 974, 976 (Fla. 4th DCA 2005); s*ee also* ***Zane v. Coastal Unilube, Inc.***, 774 So. 2d 761 (Fla. 4th DCA 2001). An expert's opinion must be based on methodology, literature, or studies, and there must be more support for the opinion than simply the testimony itself. ***Brito v. County of Palm Beach***, 753 So. 2d 109 (Fla. 4th DCA 1998).

Collateral Source Rule

The court shall reduce the amount of damages awarded to compensate a claimant by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. Collateral sources include Social Security disability, private disability insurance, private medical bill reimbursement coverage, HMO payments and other contractual discounts, and wage continuation plans following disability. *See* ***Goble v. Frohman***, 901 So. 2d 830 (Fla. 2005); FLA. STAT. § 768.76 (2008).

Convictions

A) **Criminal.** "If the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment," evidence of a crime can be used to impeach the witness. FLA. STAT. § 90.610 (2012).

B) **Traffic.** Because traffic tickets are misdemeanors, they cannot be used to impeach a witness. *See* ***Hulick v. Beers***, 7 So. 3d 1153 (Fla. 4th DCA 2009); ***Royal Indemnity Co. v. Muscato***, 305 So. 2d 228 (Fla. 4th DCA 1975).

Day in the Life Videos

The admissibility of a videotape must be decided according to the particular circumstances in each case. ***Aetna Cas. & Sur. Co. v. Cooper***, 485 So. 2d 1364 (Fla. 2d DCA 1986). Generally, a videotape offered to prove the truth of the matter asserted constitutes inadmissible hearsay, unless it comes within an exception of the hearsay rule, or if it is offered for some other admissible purpose that would remove it from the definition of hearsay. ***Id.*** Relevant evidence proffered by videotapes is inadmissible where its probative value is substantially outweighed by the danger of unfair prejudice, the confusion of issues, the misleading of a jury, or the needless presentation of cumulative evidence. *See* FLA. STAT. § 90.403 (2012). Highly emotional testimony in the form of a video or slide show has been held to be so prejudicial as to have deprived a party of a fair trial. ***Kane Furniture Corp. v. Miranda***, 506 So. 2d 1061 (Fla. 2d DCA 1987).

Dead Man's Statute

Florida no longer has a Dead Man's Statute. Now, Florida courts admit testimony by interested parties regarding writings or statements by unavailable witnesses. FLA. STAT. § 90.804(2)(e) (2008).

Medical Bills

The plaintiff in a personal injury suit has the burden to prove the reasonableness and necessity of medical expenses. ***Shaw v. Puleo***, 159 So. 2d 641 (Fla. 1964) (overruled in part by ***Griffis v. Hill***, 230 So. 2d 143 for excess jury award). *See* ***State Farm Mut. Auto. Ins. V. Bowling***, 81 So. 3d 538 (Fla. 2d DCA 2012). Expert medical testimony is not required in order to admit medical bills into evidence. *See* ***Sea World of Fla., Inc. v. Ace American Ins. Co., Inc.,*** 28 So. 3d 158, 160 (Fla. 5th DCA 2010) (citing ***Garrett v. Morris Kirschman & Co.***, 336 So. 2d 566 (Fla. 1976)). A plaintiff's testimony may adequately establish the reasonableness and necessity of medical bills if the treatment procedures are clearly related to the accident. ***Albertson's Inc. v. Brady***, 475 So. 2d 986, 988 (Fla. 2d DCA 1985); *see also* ***Easton v. Bradford***, 390 So. 2d 1202 (Fla. 2d DCA 1980). Damages awarded to a plaintiff should be "equal to and precisely commensurate with the loss sustained." *See* ***Hollins v. Perry***, 582 So. 2d 786 (Fla. 5th DCA 1991) (holding that award exceeding plaintiff's $35,000.00 hospital bill was excessive to compensate plaintiff for medical expenses in personal injury case); *see also* ***Tucker v. John Galt Ins. Agency Corp.***, 743 So. 2d 108, 111 (Fla. 4th DCA 1999) (citing ***Hanna v. Martin***, 49 So.2d 585 (Fla. 1950)). However, the trend in Florida has been to allow the plaintiff to introduce the gross amount of medical bills before any write-offs. *See* ***Goble v. Frohman***, 901 So. 2d 830 (Fla.2005).

Offers of Judgment

Offers of judgment under Florida law are governed by FLA. STAT. § 768.79 (2012) and FLA. R. CIV. P. 1.442 (2013). "Offer of judgment" is no longer the term used for this type of submission. Instead, these documents are called proposals for settlement.

A) **Substance.** Under Florida law, when a party serves a proposal for settlement, the responding party has thirty (30) days in which to accept or reject the offer. Fla. Stat. § 768.79(4) (2012). If there is no response within that 30-day period, the proposal is deemed to be rejected. ***Id.*** If a plaintiff serves a proposal for settlement that is rejected, and the jury verdict is greater than 25% larger than the amount of the proposal, the plaintiff is entitled to the recovery of all attorney's fees incurred from the date of service of the proposal. Fla. Stat. § 768.79(1) (2012). Conversely, if a defendant serves a proposal for settlement that is rejected, and the jury's verdict is more than 25% less than the proposal, or if a defense verdict is obtained, then the defendant is entitled to the recovery of all attorney's fees incurred from the date of service of the proposal. ***Id***; FLA. STAT. § 768.79 (2012).

B) **Procedure.** The procedural form of the proposal for settlement is governed by FLA. R. CIV. P. 1.442(b) (2012). The proposal cannot be served on a defendant earlier than ninety (90) days after service of process on the defendant. ***Id.*** Service on a plaintiff cannot be

served earlier than ninety (90) days after the action has been commenced. ***Id.*** The deadline for filing a proposal for settlement is forty-five (45) days before the date set for trial or the first date of the docket in which the case is set for trial, whichever is earlier. ***Id.***

C) **Details.** The proposal for settlement must name the party or parties making the proposal, and the party or parties to whom the proposal is being made. The proposal must identify the claim or claims the proposal is attempting to resolve. The proposal must state with particularity any relevant conditions. The proposal must state the total amount of the proposal and state with particularity all non-monetary terms of the proposal. The proposal also must state with particularity the amount proposed to settle a claim for punitive damages if there is a claim for punitive damages in the case. FLA. STAT. § 768.79(2)(a)-(d) (2012). The proposal must include a certificate of service in the form required under FLA. R. CIV. P. 1.080(f). As of September 1, 2012, the proposal, and any other document in civil cases, must be filed electronically. *See* Rule 2.516 of Judicial Administration.

Offers of Proof

After a piece of evidence has not been admitted, an attorney will make an offer of proof, or a statement made to the judge outside of the jury's presence regarding what the evidence is and what it will show, to preserve the matter for appeal. *See* FLA. STAT. § 90.104(1)(a) (2012).

Prior Accidents

Evidence of prior or subsequent accidents cannot be used to show negligence in the current accident at issue. ***Griffin v. Ellis Aluminum & Screen, Inc.***, 30 So. 3d 714 (Fla. 3d DCA 2010). However, they may be used to show notice or knowledge of a dangerous condition. There are four required elements that must be satisfied prior to admitting similar accident evidence for the purpose of showing notice or knowledge of a dangerous condition. ***Ford Motor Co. v. Hall-Edwards***, 971 So. 2d 854 (Fla. 3d DCA 2007).

(1) Evidence of similar accidents may not be offered to prove negligence or culpability, but may be admissible to show the dangerous character of an instrumentality and to show the defendant's knowledge.

(2) The similar accidents must pertain to the same type of appliance or equipment under substantially similar circumstances.

(3) The similar accident evidence must have a tendency to establish a dangerous condition at a specific place.

(4) The accident must not be too remote in time to the accident at issue, thereby causing it to lack sufficient probative value.

Perret v. Seaboard Coast Line R.R., 299 So. 2d 590 (Fla. 1974). The burden of meeting this four-part test and laying a sufficient predicate to establish similarity between the two incidents falls on the party seeking admission of the prior accident evidence. ***Stephenson v. Cobb***, 763 So. 2d 1195

(Fla. 4th DCA 2000). In addition, it is within the trial court's discretion to decide the admissibility of prior occurrence or nonoccurrence of prior incidents that are under substantially similar conditions. ***Hogan v. Gable***, 30 So. 3d 573 (Fla. 1st DCA 2010).

Relationship to the Federal Rules of Evidence

Florida has adopted a version of the Uniform Rules of Evidence, which were designed to be identical to the Federal Rules of Evidence as promulgated by the United States Supreme Court. Cases interpreting the Federal Rules of Evidence, on which Florida's Evidence Code is based, are highly informative in the analysis of the state rules. Such state rules should be construed in accordance with federal court decisions interpreting the Federal Rules. ***Moore v. State***, 452 So. 2d 559 (Fla. 1984); *see also* ***State v. Gerry***, 855 So. 2d 157, 163 (Fla. 5th DCA). Although Florida courts frequently refer to federal decisions as persuasive in the interpretation of Florida's Evidence Code, those decisions are of limited assistance in those instances where there is a difference between the federal and Florida statutes. ***Id.*** Such decisions are also of little help in cases where Florida expressly adheres to an evidentiary rule that has been superseded by the Federal Rules of Evidence. ***Ramirez v. State***, 810 So. 2d 836 (Fla. 2001).

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** Evidence of failure to wear an available and fully operational seat belt may be considered by the jury in assessing a plaintiff's damages where the "seat belt defense" is pled and it is shown by competent evidence that failure to use the seat belt produced or contributed substantially to producing at least a portion of the damages. ***Insurance Co. of North America v. Pasakarnis***, 451 So. 2d 447 (Fla. 1984) (abrogated by ***Ridley v. Safety Kleen Corp.***, 693 So. 2d 934 (Fla. 1996) (announced prior to Florida safety belt law). The "seat belt defense" provides that if the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of the plaintiff's injuries, then his recovery should be reduced accordingly. ***Id.*** ***Ridley*** later clarified that the jury should be instructed to calculate single total percentage for comparative negligence whether it involves seat belt issue or another issue of comparative negligence, rather than reducing plaintiff's award by comparative fault in causing accident and then reducing that amount a second time by deducting percentage of fault caused by failure to wear seat belt. 693 So. 2d at 944.

1) **Burdens.** The seat belt issue should be raised by an affirmative defense of comparative negligence. ***Ridley v. Safety Kleen Corp.***, 693 So. 2d 934 (Fla. 1996). "A defendant has the initial burden to present competent evidence that the plaintiff's vehicle contained seat belts" that could have been used and that such evidence would constitute a prima facie showing that the seat belts were operational. ***Bulldog Leasing Co., Inc. v. Curtis***, 630 So. 2d 1060 (Fla. 1994). For the jury to consider the seat belt defense, the defendant must plead and prove that the plaintiff failed to use an available and fully operational seat belt, that not using the seat belt was unreasonable given the circumstances, and that failure to use the seat belt caused or contributed to the plaintiff's damages. ***Smith v. Butterick***, 769 So. 2d 1056 (Fla. 2d DCA 2000). Once a prima facie showing has been made by

the defendant, the burden then shifts to the plaintiff to rebut the evidence presented by the defendant by presenting contrary evidence concerning the operability of the seat belt. ***Bulldog Leasing Co.***, 630 So. 2d at 1065.

B) **Helmets.** Similarly, defendants can argue comparative negligence when a plaintiff fails to wear protective headgear at the time of an accident in violation of FLA. STAT. § 316.211 (2012). However, as with the seat belt defense, defendants must introduce evidence that the violation of the statute is the proximate cause of injuries sustained by the plaintiff. ***Rex Utilities, Inc. v. Gaddy***, 413 So. 2d 1232 (Fla. 3d DCA 1982).

Spoliation

A) **Prima facie case.** "Spoliation" is destruction or significant and meaningful alteration of evidence and is recognized in Florida as a tort cause of action. To state a claim for spoliation of evidence under Florida law, the plaintiff needs to allege destruction, not concealment, of evidence. ***Florida Evergreen Foliage v. E.I. Dupont De Nemours***, 470 F. 3d 1036 (11th Cir. 2006). The doctrine of spoliation arises when it is alleged that a crucial piece of evidence is unavailable because of the actions of one of parties. This tort consists of the following elements:

> (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) the destruction of that evidence; (4) a significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.

Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

B) **Requirements.** A spoliation claim does not require the plaintiff to establish that he or she would have succeeded in his or her civil suit if the evidence had been properly maintained but, rather, requires only that he or she establish that the destruction of evidence cost him or her the opportunity to prove his or her lawsuit. *See* ***id.*** A spoliation claim compensates the plaintiff for the loss of recovery in the underlying case due to the inability to prove the case because of the lost or destroyed evidence; it does not compensate the plaintiff for the bodily injury or property damages he or she actually sustained. *See* ***id.***

C) **Automobile cases.** Plaintiff could not sue uninsured motorist insurer for spoliation, since mistaken destruction of her wrecked automobile did not significantly impair her ability to prove uninsured motorist claim. ***Continental Ins. Co. v. Herman***, 576 So. 2d 313 (Fla. 3d DCA 1990). There is no coverage for a spoliation claim under a standard commercial general liability policy of insurance.

Subsequent Remedial Measures

A) FLA. STAT. § 90.407 (2008) states:

> Evidence of measures taken after an injury or harm caused by an event, which measures if taken before the event would have made injury or harm less likely to occur, is not admissible to prove negligence, the existence of a product defect, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or the feasibility of precautionary measures, if controverted, or impeachment.

B) **Policy.** Evidence of subsequent remedial measures is not admissible because it would penalize a defendant for an attempt to prevent injury to others. ***City of Miami Beach v. Wolfe***, 83 So. 2d 774 (Fla. 1955). *See also* ***Reinhart v. Seaboard Coast Line R. Co.***, 422 So. 2d 41, 45 (Fla. 2d DCA 1982).

Use of Photographs

The basic test of admissibility of photographs is not necessity, but relevance. ***Dufour v. State***, 905 So. 2d 42, 73 (Fla. 2005). Photographs can be relevant to a material issue either independently or as corroborative of other evidence. ***Armstrong v. State***, 73 So. 3d 155, 166 (Fla. 2011) *cert. denied*, 2012 WL 553991 (U.S. June 11, 2012). Photographs are admissible if relevant to establish a material fact in the lawsuit or if they illustrate or explain the testimony of a witness. ***Olsten Health Services, Inc. v. Cody***, 979 So. 2d 1221 (Fla. 3d DCA 2008); ***Scarlett v. Ouellette***, 948 So. 2d 859 (Fla. 2d DCA 2007). In order to introduce a photograph into evidence, its proponent must establish that the photograph "fairly and accurately represents what it purports to depict." ***Barkett v. Gomez***, 908 So. 2d 1084 (Fla. 3d DCA 2005). "If a photograph is a correct representation of a physical object to which testimony is adduced, it is admissible in evidence for the use of witnesses to explain their testimony and to enable a jury to understand the case." ***Simmons v. Roorda***, 601 So. 2d 609 (Fla. 2d DCA 1992). For example, photographs may be indicative of the force of impact and the speed of vehicles in an automobile accident, and the jury can then be left to draw reasonable inferences from them. ***Wall v. Alvarez***, 742 So. 2d 440 (Fla. 4th DCA 1999).

DAMAGES

Caps on Damages

There are few scenarios in which Florida has caps on damages.

A) **Claims against state.** Claims against the State are limited by Florida's limited waiver of sovereign immunity. Recoverable damages against the state or its subdivisions or agencies are limited to $200,000.00 per person or $300,000.00 per incident. FLA. STAT. § 768.28(5), (2012).

B) **Medical malpractice.** Medical malpractice actions are governed by Chapter 766, Florida Statutes. There are several caps on damages in this statute. For example, claims against medical providers for non-economic damages are limited to $500,000 - $1 million depending on the nature of the injury. FLA. STAT. § 766.118(2) (2012). Claims against

non-practioners are limited to between $750,000 and $1.5 million depending on the nature of the injury. FLA. STAT. § 766.118(3) (2012). In addition, both types of claims have total amount caps which apply regardless of the number of defendants. There are separate caps for damages sustained while providing emergency medical care. FLA. STAT. § 766.118(4), (5) (2012). Damages may also be capped in medical malpractice actions when the defendant undertakes arbitration. FLA. STAT. 766.207(7) (2012).

Available Items of Personal Injury Damages

A) **Past medical bills.** Reasonable and necessary past medical expenses are recoverable. They are limited, however, to recovery of what has actually been paid or are owed. To the extent bills are actually reduced by third party payors (health insurance, Medicaid, etc.), only those reduced amounts are recoverable. *See* ***Thyssenkrupp Elevator Corp. v. Lasky***, 868 So. 2d 547, 549 (Fla. 4th DCA 2003); *see also* ***Boyd v. Nationwide Mut. Fire Ins. Co.***, 890 So. 2d 1240, 1241 (Fla. 4th DCA 2005).

B) **Future medical bills.** Reasonable and necessary future medical expenses are recoverable. ***Pruitt v. Perez-Gervert***, 41 So. 3d 286, 288 (Fla. 2d DCA 2010), *reh'g denied* (Aug. 19, 2010), *review dismissed*, 47 So. 3d 1290 (Fla. 2010).

C) **Hedonic damages.** Florida does not award hedonic damages. *See* ***Brown v. Seebach***, 763 F. Supp. 574, 583 (S.D. Fla. 1991).

D) **Increased risk of harm.** Despite the potential problems with proof, Florida courts may permit claims for emotional distress associated with an increased risk of harm. *See* ***Merced v. Qazi***, 811 So. 2d 702, 704 (Fla. 5th DCA 2002).

E) **Disfigurement.** This is considered part of the pain and suffering, or non-economic, damages element of a claim. There is no particular standard for the evaluation of such damages. *See* ***Norman v. Farrow***, 880 So. 2d 557 (Fla. 2004).

F) **Disability.** This is also considered part of the pain and suffering, or non-economic, damages element of a claim. There is no particular standard for the evaluation of such damages. *See* ***id.***

G) **Past pain and suffering.** This is considered part of the pain and suffering, or non-economic, damages element of a claim. There is no particular standard for the evaluation of such damages. *See* ***Waste Mgmt. v. Mora***, 940 So. 2d 1105 (Fla. 2006).

H) **Future pain and suffering.** This is also considered part of the pain and suffering, or non-economic, damages element of a claim. There is no particular standard for the evaluation of such damages. *See* ***id.***

I) **Loss of society.** This is a factor in an award for consortium claim damages. *See* ***United States v. Dempsey***, 635 So. 2d 961, 963-64 (Fla. 1994).

J) **Lost income, wages and earnings.** A claimant may recover lost wages from the date of the accident to the date of Trial. A claimant may also recover for loss of earning capacity (as opposed to lost future wages) if proven with competent evidence. *See* ***Eagle Atl. Corp. v. Maglio***, 704 So. 2d 1104, 1105 (Fla. 4th DCA 1997); ***Utvich v. Felizola***, 742 So. 2d 847, 848 (Fla. 3d DCA 1999).

Lost Opportunity Doctrine

A claimant who is deprived of an opportunity or chance to gain an award or profit may be awarded damages even where damages are uncertain. ***Miller v. Allstate Ins. Co.***, 573 So. 2d 24, 29 (Fla. 3d DCA 1990).

Mitigation

A party has the duty to mitigate his damages under Florida law. However, "[e]xtraordinary efforts on the part of a plaintiff to mitigate are not required." ***Sys. Components Corp. v. Florida Dept. of Transp.***, 14 So. 3d 967, 982 (Fla. 2009).

Punitive Damages

A) **When may be brought.** A claim for punitive damages may not be brought without leave of court. FLA. STAT. § 768.72(1) (2012). The trial court is to make a preliminary determination whether the claim is one which should be presented to a jury. *See* ***Leavins v. Crystal***, 3 So. 3d 1270, 1272 (Fla. 1st DCA 2009).

B) **Standard.** Punitive damages may be brought in any action in which the evidence shows the defendant against whom the damages are sought is "personally guilty of intentional misconduct or gross negligence." FLA. STAT. § 768.72(2) (2012). Entitlement to punitive damages must be established by clear and convincing evidence; the amount of such damages is subject to the preponderance of evidence standard. FLA. STAT. § 768.725 (2012). ***Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.***, 16 So. 3d 1006, 1009 (Fla. 1st DCA 2009).

C) **Insurability.** It is against Florida public policy to insure punitive damages caused by the conduct which rises to the level needed to award such damages. ***Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.***, 617 So. 2d 455, 459 (Fla. 3d DCA 1993). An exception to this general policy is when the insured himself is not personally at fault, but is merely vicariously liable for another's wrong. ***Id.***

D) **Caps.** Punitive damages have some limitations. As a general rule, they cannot exceed the greater of three times the compensatory damages, or $500,000.00. FLA. STAT. § 768.73(1)(a), (2012).

> Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together

> with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of

four times compensatory damages or $2 million. FLA. STAT. § 768.73(1)(b) (2012). In the event a jury finds the defendant acted with the specific intent to harm the claimant, there is no cap on punitive damages. FLA. STAT. § 768.73(1)(c) (2012). Punitive damages may not be awarded to the extent they will bankrupt the defendant. *See* **Owens-Corning Fiberglass Corp. v. Ballard**, 739 So. 2d 603, 607 (Fla. 4th DCA 1998) *approved*, 749 So.2d 483 (Fla. 1999).

Recovery and Pre- and Post-Judgment Interest

A) **Prejudgment interest.** A claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date. ***Berloni S.p.A. v. Della Casa, LLC***, 972 So. 2d 1007, 1011 (Fla. 4th DCA) (citing ***Argonaut Ins. Co. v. May Plumbing Co.***, 474 So. 2d 212 (Fla. 1985)). Generally, the damages in a personal injury action are considered to be too speculative for the award of prejudgment interest. ***Lumbermens Mutual Casualty Co. v. Percefull***, 653 So. 2d 389 (Fla. 1995). Medical bills incurred by a plaintiff may be considered "liquidated" for this purpose, but are only subject to prejudgment interest if the plaintiff actually paid them. ***Busem v. Musa Holdings, Inc.***, 46 So. 3d 42, 45-46 (Fla. 2010).

B) **Post-judgment interest.** Post-judgment interest is governed by Section 55.03, Florida Statutes. The interest rate is determined by the state's Chief Financial Office beginning on January 1st of each year, and applies for the following 12 months. The interest rate in place at the time judgment is entered remains the proper interest rate on a judgment, regardless of the change in rate over the years. *See* ***Beverly Enterprises-Florida, Inc. v. Spilman***, 689 So. 2d 1230, 1231 (Fla. 5th DCA 1997).

Recovery of Attorneys' Fees

At common law, attorney's fees are not a recoverable damage by a prevailing party, but they may be awarded when provided for by contract or statute. ***P.A.G. v. A.F.***, 602 So. 2d 1259 (Fla. 1992). However, there are other circumstances in which attorney's fees may be awarded, such as by an insured who is required to litigate insurance coverage issues in order to obtain coverage. ***Underwood Anderson & Associates, Inc. v. Lillo's Italian Restaurant, Inc.***, 36 So. 3d 885 (2010); *see also* ***Omega Ins. Co. v. Johnson***, 2014 WL 4375189, at *1 (Fla. 5th DCA 2014).. Likewise, there are opportunities through proposals for settlement to shift the risk of attorney's fees. *See* "Proposals for Settlement" section.

Settlement Involving Minors

The court approval and guardianship issues related to settlement of minor's claims are governed by FLA. STAT. § 744.387 (2012).

Taxation of costs

The party recovering judgment, for the purposes of Fla. Stat. § 57.041(1), is entitled to recover taxable costs incurred in the litigation. ***Bessey v. Difilippo***, 951 So. 2d 992 (Fla. 1st DCA 2007), *review denied* 965 So. 2d 121 (Fla. 2007). The Florida Supreme Court issued a guideline for trial courts to consider when determining what costs should be taxed. ***In re Amendments to Uniform Guidelines for Taxation of Costs***, 915 So. 2d 612 (Fla. 2005).