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1. What are the venues/areas in Florida that are considered dangerous or liberal?

As always, demographics, lifestyles, recent events, economic state, percentages of accidents, and location of highways are factors that affect the verdict and settlement trends in trucking cases. According to the Florida Department of Highway and Motor Vehicles "Traffic Crash Facts Annual Report 2017," of all Florida counties, Miami-Dade County, Broward

County, Palm Beach County, Orange County, Hillsborough County, and Duval County had the highest numbers of reported Commercial Motor Vehicle related motor vehicle crashes in 2017, as well as on average for years 2015 and 2016. The 2018 numbers are not yet available.

Further, Duval County, Hillsborough County, Lee County, Marion County, Miami-Dade County, Orange County, Palm Beach County, and Polk County reported the highest number of CMV-related traffic fatalities in 2017, as well as on average for years 2015 and 2016.

According to Westlaw's verdict and settlement trends case evaluator, from 2014 to 2018, Duval County, Orange County, and Palm Beach County had the highest number of jury awards on average, with Miami-Dade County and Marion County following closely behind. However, the highest award was in 2014 in Manatee County, Florida for $26,000,000. Apart from that outlier, on average, Orange County, Miami-Dade County, and Palm Beach County had the highest jury awards.

Additionally, South Florida is considered a particularly unfavorable venue for insurers in bad faith cases which is potentially indicative of significant jury awards. The Eleventh Circuit noted in *Novoa v. Geico Indem. Co.*, that "Florida's third-party bad faith cause of action creates an incentive for a claimant in [the Plaintiff's] situation to reject any proposed settlements and instead plan to proceed with a bad faith claim." *Novoa v. GEICO Indem. Co.*, 542 Fed. Appx. 794, 796 (11th Cir. 2013).

Escambia, Gadsden, Jefferson, Volusia, Orange, Hillsborough, Palm Beach, Broward, and Miami-Dade counties are considered the most dangerous venues due to their historically high jury verdicts and settlements. Several of these counties, such as Escambia (Pensacola), have disproportionately high numbers of plaintiffs' attorneys when compared to their general total populations. Moreover, Miami-Dade, Broward, and Palm Beach counties have the most diverse populations which result in more diverse jury pools. Thus, themes that resonate with each member of the jury are considered more challenging to craft.

With respect to the socio-economic background of jurors in Florida, Miami-Dade, Broward, Hillsborough, Hardee, Highlands, St. Lucie, Jefferson, Gadsden, and Escambia counties are considered the most liberal due to their number of economically disadvantaged residents, lower levels of relative education, and perceived more liberal social values.

2. What were the significant trucking verdicts or rulings in your state last year?

In *Tyler v. Gibbs & Register Inc.*, 2017 WL 2306227 (Fla. 9th Jud. Cir., Orange County, May 4, 2017), a jury awarded damages of $12,240,000. The mother was driving a car southbound on U.S. 17, with her 11-year-old son as a passenger, when a truck driver working within the scope his employment attempted to pass traffic. The mother's vehicle was struck head-on by the truck while traveling approximately 65 m.p.h. the mother suffered fatal injuries and the child sustained severe injuries. The child and his mother's estate filed a lawsuit against the trucking company and the truck driver. The plaintiffs contended the truck driver was negligent in the operation of his employer's vehicle and the trucking company was vicariously

liable. The defendants admitted the truck driver's negligence and the court determined he was acting in the course of his employment.

In *Boyette v. Newman's Heating & Air Conditioning, Inc.; Parrish*, 2017 WL 10351319 (Fla. 8th Jud. Cir., Alachua County, Sept. 8, 2017) the jury awarded $5.8 million in damages including $946,000 past medical expenses, $3.5M in future medical expenses, and $1.15M in pain & suffering. However, the jury assigned 95% liability to a nonparty diver and the remaining 5% to the defendants, which reduced award against the defendants to $290,500. In *Boyette*, the plaintiff was rear-ended by a nonparty at an intersection which caused her vehicle to be pushed into the intersection. The plaintiff was then struck for the utility truck operated by defendants. The plaintiff suffered severe injuries, including a traumatic brain injury and suffered permanent trauma-induced amnesia and dementia. Immediately after the accident, she was confined to an ICU but was transferred to rehabilitation and nursing facilities for over a year. The plaintiff alleged that the defendant's employee driver was exceeding the speed limit by 10 miles per hour and talking on his cell phone. The defendants disputed liability and claimed the plaintiff was not wearing her seatbelt.

In *Maman v. Zip Transport & Services Inc.; Strelitz*, 2018 WL 1911197 (Fla. 11th Jud. Cir., Miami-Dade County, Jan. 10, 2018) the plaintiff obtained a verdict in his favor for $50,000, representing only past medical expenses. The plaintiff alleged he was the passenger in a 2003 utility tractor-trailer owned and operated by the defendants which was involved in a single-vehicle accident. The defendant driver lost control resulting in tractor-trailer leaving the roadway. The driver was allegedly checking his GPS navigation. The plaintiff claimed nasal and facial fractures and a lumbar disc burst fracture. As a result, he had to undergo surgery, including insertion of a titanium spinal cage and screws. Liability was admitted.

In *Tennant v. Handi-House Mfg. Co.; Love*, 2018 WL 4908020 (M.D. Fla. Aug. 27, 2018) jury returned a verdict of $1,125,000 ($250,000 in past medical expenses, $400,000 in future medical expenses, and $200,000 in pain & suffering). However, the plaintiff was found 60% at fault, and the verdict was reduced to $450,000. The plaintiff was rear-ended by a tractor-trailer owned and operated by the defendants. The tractor-trailer had stopped while attempting to negotiate a left turn into the defendant's business. Among other allegations of negligence, the plaintiff contended that the defendant driver failed to yield, negligently blocked traffic, and improperly changed lanes. The plaintiff claimed to have suffered from a traumatic brain injury with cognitive difficulties, post-traumatic stress disorder, depression, and cervical and lumbar herniation and spondylosis as well as permanent impairment and inability to work.

In *Torres v. First Transit Inc.*, 2018 WL 6609773 (S.D. Fla. Nov. 8, 2018) the jury awarded $4,927,604.38 in damages to the driver ($877,604 in past medical expenses and $4M in pain & suffering) and a total of $2,496,261.13 to the passenger ($396,531 in past medical expenses and $2.1M in pain & suffering). The plaintiffs were traveling southbound in their landscaping truck and trailer, when the defendant's bus turned left in front of their vehicle. The landscaping truck driver suffered multiple fractures to his right leg, patella, femur, fibula, and multiple rib fractures, requiring several surgeries and a 16% impairment rating. The passenger suffered lumbar vertebrae fractures, fractures to his right tibia and fibula, and multiple hand fractures, also resulting in several surgeries. The defendant admitted liability.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Yes, subject to a proper evidentiary predicate and an inquiry into its probative versus prejudicial value. In Florida, both accident animations and computer-generated evidence are admissible as demonstrative evidence under certain conditions in support of expert witness testimonies. There are three stages to admissibility: (1) laying a proper foundation; (2) establishing the reasonably related facts in the subject area of which the testimony is given; and (3) portraying an accurate depiction of what it purports to be.

As with all demonstrative evidence, laying the proper foundation is fairly straight-forward, yet absolutely necessary step in the process. Courts have opined that a foundation for accident animations and computer-generated evidence is proper if (a) the opinion evidence is helpful to the trier of fact; (b) the expert is properly qualified; (c) the demonstrative evidence is properly applied to the evidence at trial; and (d) the evidence is not portrayed in a way that presents an unfair prejudice that outweighs its probative value. *Pierce v. State of Florida*, 671 So. 2d 186, 190 (Fla. 4th DCA 1996). The probative versus unfair prejudice balancing test is especially treacherous. *See Coddington v. Nunez*, 151 So.3d 445, 447-48 (Fla. 2d DCA 2013) (Upholding the trial Court's decision that an accident simulation was inadmissible because the circumstances "'depicted in the simulation might be right, but the jury is likely to place undue and extraordinary emphasis on the simulation' which 'could very well lead the jury to defer to the opinion of the expert.'").

In the second stage, the party seeking admission of demonstrative evidence must establish that the facts or data used by the expert to form his or her opinion expressed by the accident animation or the computer-generated evidence are of a type of information reasonably relied upon by experts in the same subject area. *Pierce at 809.* However, the facts or data themselves do not need to be admitted into evidence. Likewise, the reasonableness of the expert reliance upon that facts or data information may be challenged through cross-examination. *Id.*

Finally, the animation or computer-generated evidence must be a fair and accurate depiction of what it purports to be, similar to the admission of photographs, videos, etcetera. *Id.* If applied correctly, an accident animation or computer-generated evidence can effectively support and simplify an expert witness' testimony; however, the effort, time, and cost in creating an animation may all be for naught if it is mishandled during litigation. Additionally, a cost benefit analysis may be warranted as the cost of creating an animation may outweigh the effectiveness of showing it to a jury, especially as demonstrative evidence, by its very nature, is not permitted in the jury room for deliberations. *Pierce* at 808.

4. Identify any significant decisions or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

Within the past two (2) years the law in Florida regarding the admissibility of in-cab videos has solidified. As video evidence, in-cab videos are subject to the same evidentiary rules regarding admissibility as other surveillance videos. "Since there must be proper authentication prior to the admission of a videotape, videotapes are not self-authenticating. There are two types

of authentication methods for admitting videotapes: (1) through 'pictorial testimony,' and (2) through the 'silent witness' theory." *Richardson v. State*, 228 So. 3d 131, 133 (Fla. 4th DCA 2017).

Method one requires the witness to identify the video evidence as a "fair and accurate representation" of what is purported to be contained on the video. This witness need not be the actual person who took the video, but can be a witness who saw what the video portrays personally and can testify to the accuracy of the video. *See Bryant v. State*, 810 So. 2d 532, 536 (Fla. 1st DCA 2002). The second method is sometimes referred to as the "silent witness" method of authentication. This second method of authentication can be satisfied if there is sufficient witness testimony as to establish the reliability of the video evidence. The witness need not be someone who witnessed the events captured on video. The court will focus on the following factors in determining if reliability is established. (1) evidence establishing the time and date of the photographic evidence; (2) any evidence of editing or tampering; (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (5) testimony identifying the relevant participants depicted in the photographic evidence. *See Wagner v. State*, 707 So. 2d 827, 831 (Fla. 1st DCA 1998). The "silent witness" method of authentication can often be satisfied by an evidence custodian.

Turning to the retention and spoliation of in-cab videos, within the past two (2) years there have not been any significant trends or decisions regarding retention and spoliation of in-cab videos. The duty to preserve materials arises by statute, contract, or by a properly served discovery request. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004). Additionally, the duty to preserve materials arises when a person or organization "should reasonably foresee litigation". *League of Woman Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015) (citing collected cases). A successful assertion of spoliation requires proof of: (l) existence of a potential civil action; (2) a legally recognized duty to preserve evidence; (3) destruction of that evidence: (4) a significant impairment in the ability to prove the claim or defense; (5) a causal relationship between the evidence destruction and the inability to prove the claim or defense; and (6) damages. *See Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990); *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004); *Hagopian v. Publix Supermarkets, 1nc.,* 788 So. 2d 1088, 1091 (Fla. 4th DCA 2001).

In addition to a specific demand, the duty to preserve may arise pursuant to a contract, a statute, or when litigation is reasonably foreseeable. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004); *League of Women Voters of Florida v. Detzner,* 172 So. 3d 363, 391(Fla. 2015) (holding that litigation was inevitable and the systematic deleting of emails and other documents relating to the dispute, justified the trial court judge in giving an adverse inference against the organization deleting the materials.). Thus, the duty to preserve any item may arise prior to commencement of litigation, if the person or organization in custody or control of the item reasonably should know that the item relevant to imminent or pending litigation. Additionally, a duty to preserve evidence can also arise as a

result of an express or implied agreement. *Miller v. Allstate Insurance Co.*, 573 So. 2d 24, 27 (Fla.3d DCA 1990) (plaintiff's insurer had agreed with plaintiff that it would preserve her vehicle which she needed in a planned product liability action against the manufacturer, which vehicle had been totaled, allegedly as a result of the accelerator becoming stuck. Her insurer sold the vehicle to a salvage yard, thereby significantly impairing her ability to bring a claim against the manufacturer for a defect. The court found that the insurer owed had a contractual duty to plaintiff to preserve the vehicle.).

The United States Court of Appeals for the Eleventh Circuit has determined spoliation claims in federal court will be governed by the Federal Rules of Civil Procedure. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). However, federal courts handling matters in Florida have looked to the state law for guidance on spoliation matters. *Long v. Celebrity Cruises, Inc.*, 12-22807-CIV, 2013 WL 12092088, at *2 (S.D. Fla. July 31, 2013) ("Florida law is consistent with *Flury*'s application of Georgia law. Florida courts applying Florida spoliation law also do not require bad faith to sanction a party who loses evidence."). With regards to federal claims of spoliation as they pertain to in-cab videos specifically, Federal Rule of Civil Procedure 37(e) is important to note, as it provides rules on loss of electronically stored evidence:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters?

There are no specific laws or rules that govern telematics data. Generally, the duty to preserve evidence, including electronic data evidence, is dictated by statute, contract, or by a properly served discovery request. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843,845 (Fla.4th DCA 2004). While there are currently no Florida Statutes mandating

preservation of evidence in trucking litigation specifically, the Florida Supreme Court has recognized a common law duty to preserve evidence when litigation of a potential claim is imminent or known. *League of Women Voters of Florida v. Detzner*, lT2 5o.3d363, 391 (2015). The duty to preserve evidence would extend to electronic data, including data from event data recorders, which is admissible evidence. Matos v. Stare, 899 So. 2d 403,407 (Fla. 4th DCA 2005).

Once the duty arises, a well-conceived plan for collecting and discovery of electronic evidence should be implemented and a "litigation hold" should be imposed. In some instances, the original file (meaning a forensically sound copy) must be admitted into evidence. *Fla. Stat.* § 90.953. Special care must be taken with preservation and custody of electronically stored information because of the ease of destruction, alteration, or corruption. In the digital milieu, casual handling of an electronic file can easily alter its metadata and overall integrity.

Failure to preserve relevant evidence may lead to sanctions. See *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015); *Martino v. Wal-Mart Stores, Inc*., 908 So.2d 342 (Fla. 2005); *Jost v. Lakeland Regional Medical Center, Inc.*, 844 So.2d 656 (Fla. 2d DCA 2003). However, if a party fails to preserve electronic truck monitoring data and the other party asserts a spoliation claim, the court will consider if there is a lack of bad faith on the part of the party who failed to preserve the evidence, the extent of prejudice to the other party, and whether or not the data was not material or relevant. If the analysis is in favor of the party who failed to preserve the evidence, the court may find that sanctions are unwarranted. *See Harrell v. Mayberry*, 754 So. 2d 2nd DCA 2000), citing *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629, 630 (Fla. 3d DCA 1995; *Delong v. A. Top Air Conditioning Co*., 710 So. 2d 706 (Fla. 3rd DCA 1998).

6. Is a positive post-accident toxicology result admissible in a civil action?

Yes. Under Florida law, the results of breath, urine, and blood tests administered in accordance with Florida Statutes Sections 316.1932 or 316.1933, are not confidential and are admissible into evidence when otherwise admissible for any civil action arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties. *See* Fla. Stat. §316, 1934(2). These results are admissible in a civil trial regardless of whether the test was made for the purpose of accident report investigation or criminal investigation. *Brackin v. Boles*, 452 So. 2d 540 (Fla. 1984). It is permissible for a plaintiff to introduce any competent and relevant evidence on the question of the defendant's intoxication at the time of the accident in order to support the charge of negligence. *Frazee v. Gillespie*, 98 Fla. 582, 124 So. 6 (1929).

7. Is post-accident investigation discoverable by adverse counsel?

Generally, no. Section 316.066, Florida Statutes, provides that crash reports made by a person involved in a crash and statements made by such a person to a law enforcement officer for the purpose of completing a crash report may not be used as evidence in any civil trial. See *Angelucci v. Gov't Emples. Ins. Co*., 4l2 Fed. Appx. 206 (llth Cir. 2011). Further, section

316.650, Florida Statutes, provides that traffic citations shall not be admissible evidence at trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation. *See*, Fla. Stat. §316.650(9). Post-accident investigation conducted by an attorney, investigator, or expert retained by a trucking company and/or insurance carrier is generally protected under the work product privilege.

8. Describe any laws in your State that regulate automated driving systems (autonomous vehicles) or platooning.

Automated Driving Systems (autonomous vehicles): In 2012, the Florida legislature declared its intent to encourage the safe development, testing and operation of motor vehicles with autonomous technology on public roads of the state and found that the state does not prohibit nor specifically regulate the testing or operation of autonomous technology in motor vehicles on public roads**.** Effective July 1, 2016, Florida Statute Sections 319.145 and 316.85 expanded the allowed operation of autonomous vehicles on public roads and eliminated requirements related to the testing of autonomous vehicles and the presence of a driver in the vehicle. Essentially, the laws permit the operation of these vehicles on public roads by individuals with a valid driver license.

Proposed Legislation no. 1: Senate Bill No. 932 proposes an exemption of a fully autonomous vehicle being operated with the automated driving system engaged from a prohibition on the active display of television or video; exempts a motor vehicle operator who is operating an autonomous vehicle from a prohibition on the use of wireless communications devices; provides that a licensed human operator is not required to operate a fully autonomous vehicle; authorize a fully autonomous vehicle to operate in this state regardless of whether a human operator is physically present in the vehicle, etc. *See,* 2019 Florida Senate Bill No. 932, Florida One Hundred Twenty-First Regular Session, 2019 Florida Senate Bill No. 932, Florida One Hundred Twenty-First Regular Session.

Proposed Legislation no. 2: Senate Bill No. 311 exempts autonomous vehicles & operators from certain prohibitions; provides that human operator is not required to operate fully autonomous vehicle; authorizes fully autonomous vehicle to operate regardless of presence of human operator; provides that automated driving system is deemed operator of autonomous vehicle operating with system engaged; authorizes Florida Turnpike Enterprise to fund & operate test facilities; provides requirements for operation of on-demand autonomous vehicle networks; revises registration requirements for autonomous vehicles. 2019 Florida House Bill No. 311, Florida One Hundred Twenty-First Regular Session, 2019 Florida House Bill No. 311, Florida One Hundred Twenty-First Regular Session.

Platooning: effective through 2018, Florida Statute Section 316.0896 authorized the Department of Transportation, in consultation with the Department of Highway Safety and Motor Vehicles, to conduct a pilot project to study the use and safe operation of driver-assistive truck platooning technology for the purpose of developing a pilot project to test vehicles that are equipped to operate using driver-assistive truck platooning technology. Fla. Stat. Ann. § 316.0896 (West). However, notably, on March 5, 2019, Senate Bill 660 was introduced and is

now pending. The bill proposes a repealing of 316.0896. *See,* 2019 Florida Senate Bill No. 660, Florida One Hundred Twenty-First Regular Session, 2019 Florida Senate Bill No. 660, Florida One Hundred Twenty-First Regular Session.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

Florida prohibits the use of handheld electronic devices while operating commercial motor vehicles, and prescribes fines for such violations. *See,* §316.302(1), Fla. Stat. generally adopting 49 C.F.R. §§ 382,385, and 390-397; *See,* also Fla. Stat. §316.3025. This restriction applies to both texting and talking on handheld devices. See §316.3025(6)(a) citing generally 49 C.F.R. §§392.80 and 392.82. An emergency exemption to the prohibition on using handheld electronic devices is provided in the event of a declared emergency.) Fla. Stat.§ 316.3025(6)(c); while driving when necessary to communicate with law enforcement officials or other emergency services. *See,* Fla. Stat. §316.302(l)(c). Commercial motor vehicle drivers may also use handheld devices when they have moved the vehicle to the side of, or off the highway and the vehicle is halted in a location where it can safely remain stationary. Fla. Stat. §316.302(l).

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs' counsel.

The following cases deal with improper Golden Rule and/or Reptile style arguments in Florida:

- *Cohen v. Pollack*, 674 So. 2d 805 (Fla. 3d DCA 1996)(attorney's beliefs or feelings toward a case or the trial's participants are irrelevant and create reversible error);
- *State Farm Mutual Automobile Ins. Co. v. Curry*, 608 So. 2d 587 (Fla. 3d DCA 1992)(asking the jury to "put yourself in the plaintiff's position, you can imagine the mental anguish and frustration" is the very definition of a golden rule argument which is not allowed);
- *Metropolitan Dade County v. Zapata*, 601 So. 2d 239,241 (Fla. 3d DCA 1992) (court held that asking jurors to "walk in their shoes" is prohibited);
- *Coral Gables Hospital, Inc. v. Zabala*, 520 So. 2d 653 (Fla. 3d DCA 1988) (held that it was improper for plaintiff to ask jurors to put themselves in plaintiff's position);
- *National Car Rental System. Inc. v. Bostic*, 423 So. 2d 915, 916 (Fla. 3d DCA 1982) (held that when plaintiff's counsel stated "If the shoe is on the other foot, would your wear it?", he improperly invoked proposition of the jury putting themselves in the place of plaintiff);
- *Klein v. Herring*, 347 So. 2d 681 (Fla. 3d DCA 1977)(court held that remarks of plaintiff's counsel which in effect asked the jury to put itself in the place of plaintiff mandated a new trial);
- *Magid v. Mozo*, 135 So. 2d 772 (Fla. 1st DCA 1961)(held that argument by plaintiff's counsel that jury should measure plaintiff's pain and suffering by putting themselves in plaintiff's place and trying to figure out how much it would be worth to them to go through pain and suffering plaintiff went through was inappropriate argument);

- *Nunez v. Bennett Motor Express*, LLC, 2017 WL 5192092 (Fl. Cir. Ct. March 31, 2017)(Defendant's motion in limine to prevent Golden Rule Arguments and Reptile Strategy granted to the extent that plaintiff may not make any Golden Rule arguments or rely upon information outside the evidence);
- *Sifuentes v. Savannah at Riverside Condominiums Assoc., Inc.*, 2015 WL 12803937 (Fl. Cir. Ct. May 20, 2015)(Holing plaintiff shall not use Golden Rule or Reptile Strategy during voir dire); and
- *Ferreiro v. Weeks*, 2016 WL 5871180 (Fl. Cir. Ct. January 28, 2016) (Holding questions, statements, or comments regarding personal or community safety and protection are prohibited).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

Federal Court offers a streamlined advantageous structure compared to State Court. However, Federal Courts demand strict compliance with the removal requirement and generally will try to avoid accepting jurisdiction when possible in diversity cases. Federal Courts also may not be the preferred venue when liability is clear.

Once in Federal Court, the Court will enter a scheduling order where the case is set to proceed to trial on a given trial calendar. In addition, the parties have mandatory initial disclosures which includes knowledge about witnesses and their knowledge of the case; location and content of documents; damage calculations and factual basis for same; as well as copying and inspection of insurance agreement. *See* Fed. R. Civ. P. 26(a)(1)(A)(i)-(iv). Further, unlike State Court, the parties are required to disclose expert reports; the basis of all opinions; all exhibits used in reaching any opinion; curriculum vitae; list of publications; and list of any other cases in which the expert has testified as an expert at trial or deposition within the proceeding 4 years. *See* Fed. R. Civ. P. 26(a)(2)(i)-(vi). Having this information prior to the expert's deposition is invaluable.

In Federal Court, most motions are briefed without the opportunity to make oral argument, whereas most State Court motions require a hearing unless it is a stipulated motion. Federal Judges are also more likely to follow the letter of the law and/or if they believe that their decision would be affirmed, if appealed. In that sense, Federal Judges are generally seen as more defense friendly than State Court Judges when it comes to motions to dismiss and motions for final summary judgment.

Regarding discovery, unlike State Court, in Federal Court the parties have a duty to supplement their disclosures and discovery responses. *See* Fed. R. Civ. P. 26(e). There are also fewer frivolous objections to discovery requests in Federal Court. Furthermore, unlike State Court, the Attorney issues Federal subpoenas and there is nationwide subpoena power. *See* Fed. R. Civ. P. 45.

In State Court, the standard for summary judgment is very difficult to satisfy and will be denied if the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the "slightest doubt" that an issue might exist. *See Nard,*

Inc. v. Devito Contr. & Supply, Inc., 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000) (citations omitted). But on the other hand, in Federal Court the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is actually a genuine issue for trial—must do "more than simply show that there is some metaphysical doubt as to the material facts." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). In fact, summary judgment may be granted if the nonmovant fails to adduce evidence which, when viewed in a light most favorable to him, would support a jury finding in his favor. *Anderson*, 477 U.S. at 254-55. In other words, the nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In addition, Federal Court juries are randomly selected from the certified list of registered voters from Florida's Secretary of State. In order to qualify as a jury in Federal Court, one must be registered to vote and reside for one year within the boundary of the particular District Court. On the other hand, State Court juries are randomly selected from the Department of Highway Safety and Motor Vehicles' records of people having a driver's license or identification card in the county where the litigation is pending.

Moreover, the interest rate on judgments are significantly lower in Federal Court compared to State Court. Indeed, the interest rate on judgments in State Court is 6.33% as of January 2019 compared to 2.55% in Federal Court as of March 1, 2019. *See* Fla. Stat. § 55.03 and 28 U.S.C. § 1961.

However, because Federal Court is more structured, there can be some disadvantages. Specifically, the Rules are vigorously followed; deadlines are strictly enforced, and sanctions are sometimes imposed for violations of same. The parties are also not able to move the deadlines in the Court's Scheduling Order without Court approval. Likewise, the time limits to respond and/or reply to Motions in Federal Court are short. Further, there is no rule providing for an independent medical examination as a matter of right as there is in State Court. *See* Fla. R. Civ. P. 1.360. A motion must be filed with the Federal Court for an independent medical examination. *See* Fed. R. Civ. P. 35.

12. How does your State handle the admissibility of traffic citations (guilty plea, pleas of no contest, etc.) in subsequent civil litigation?

Under Florida law, a party's past driving record is not admissible under normal circumstances. *See Dade County v. Carucci*, 349 So. 2d 734 (Fla. 3d DCA 1977). Further, section 316.066, Florida Statutes, provides that crash reports made by a person involved in a crash and statements made by such a person to a law enforcement officer for the purpose of completing a crash report may not be used as evidence in any civil trial. *See Angelucci v. Gov't Emples. Ins. Co*., 412 Fed. Appx. 206 (11th Cir. 2011). In addition, Section 316.650, Florida Statutes, provides that traffic citations shall not be admissible evidence at trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation. Fla. Stat. § 316.650(9).

Likewise, section 318.14, Florida Statutes, provides that a person's admission to a noncriminal traffic infraction is not admissible in any civil proceeding. However, section 318.19, Florida Statutes, provides that a traffic defendant's plea of guilty to (1) any infraction which results in a crash that causes the death of another, (2) any infraction that results in a crash that causes "serious bodily injury" of another as defined in section 316.1933(1), (3) any infraction that involves driving a vehicle past a school bus on the side that children enter and exit when the school bus displays a stop signal, (4) any infraction that involves driving a vehicle on a highway which is not constructed so as to prevent any of its load from escaping therefrom, (5) any infraction that involves hauling, on a pubic road or highway open to the public, dirt, sand, lime rock, gravel, silica, or other similar aggregate or trash, garbage, any inanimate objects, or any similar materials that could fall or blow from such vehicle, without preventing such materials from escaping from such vehicle, or (6) any infraction of exceeding the speed limit by 30 miles per hour or more may be admissible in a civil trial. *See Mackey v. Reserve Ins. Co*., 349 So. 2d 830 (Fla. 1st DCA 1977).

However, the results of breath, urine, and blood tests administered in accordance with Sections 316.1932 or 316.1933, Florida Statutes are not confidential and are admissible into evidence when otherwise admissible for any civil action arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties. See Fla. Stat. § 316.1934(2)

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

Generally, a Plaintiff is entitled to submit gross or "retail" medical bills to the jury, subject to a post-verdict collateral source set-off. The following exceptions apply:

Social Security Disability Insurance, Automobile Insurance (PIP/BI only), Health Insurance, HMO/PPO Insurance, and Voluntary Disability Insurance:

Plaintiff may submit gross or "retail" bills to the jury. Defendant is entitled to a post-verdict reduction in the amounts paid by automobile insurance (PIP/BI only). Fla. Stat. § 786.76(1)(2)(a)(1)-(4). Defendant is further entitled to a post-verdict reduction in the amounts contractually adjusted by provider in accepting payment from any of the sources in 25(A). Plaintiff is entitled to collect damages for past medical expenses for health insurance and HMO/PPO lien amounts. *See Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005).

Medicare, Medicaid, and Workers Compensation:

The Florida Legislature has abrogated the common law collateral source damages rule. Trial courts must reduce awards 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. Fla. Stat. § 786.76(1). There are certain exceptions to this rule. For example, there are no reductions for collateral sources for which a subrogation or reimbursement right exists. *See id*.

Benefits received under Medicare, or any other federal program providing for a federal government lien on or right of reimbursement form the Plaintiff's recovery, the Florida Worker's Compensation Law, the Medicaid Program of Title XIX of the Social Security Act or from any medical services program administered by the Florida Department of Health shall not be considered a collateral source. Fla. Stat. § 786.76(2). This exception does not result in a windfall to Plaintiffs because Medicare and similar collateral sources retain a right of subrogation or reimbursement. In addition, section 768.76 does not allow reductions for future medical expenses. *See Joerg v. State Farm Mut. Auto. Ins. Co*., 176 So. 3d 1247 (Fla. 2015).

14. Describe any statutory caps in your State dealing with damage awards.

In Florida, there is no statutory damages cap for standard personal injury cases. However, there are statutory caps in medical malpractice cases. Florida imposes a $500,000 cap on damages in medical malpractice lawsuits against practitioners for personal injury or wrongful death for noneconomic damages regardless of the number of such practitioner defendants or claimants. *See* Fla. Stat. § 766.118 (2)(a). Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, shall not exceed $1 million. *See id*. at (2)(b). In cases that do not involve death or permanent vegetative state, the patient injured by medical negligence may recover noneconomic damages not to exceed $1 million if: (1) the trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and (2) the trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient. However, the total noneconomic damages recoverable by all claimants from all practitioner defendants shall not exceed $1 million in the aggregate. *Id*. at (2)(c).

The statutory cap is $750,000 in medical malpractice lawsuits against non-practitioner defendants. *See* Fla. Stat. § 766.118 (3)(a). Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable by such claimant from all non-practitioner defendants under this paragraph shall not exceed $1.5 million. *See Id*. at (3)(b). The patient injured by medical negligence of a non-practitioner defendant may recover noneconomic damages not to exceed $1.5 million if: (1) the trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and (2) the trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient. *Id*.

Further, non-practitioner defendants are subject to the cap on noneconomic damages provided in this subsection regardless of the theory of liability, including vicarious liability. *Id*. at (3)(c). Thus, the total noneconomic damages recoverable by all claimants from all non-

practitioner defendants under this subsection shall not exceed $1.5 million in the aggregate. *Id*. at (3)(c).

There is also a cap of $150,000 per claimant on noneconomic damages for negligence of practitioners providing emergency services and care as defined in Florida Statute § 395.002(9), providing services pursuant to Florida Statute § 401.265, or providing services as pursuant to obligations imposed by 42 U.S.C. s. 1395dd to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition. *Id*. at (4)(a). Notwithstanding paragraph (a), the total noneconomic damages recoverable by all claimants from all such practitioners shall not exceed $300,000. Id. at (4)(b).

Likewise that is a cap of $750,000 per claimant regardless the number of non-practitioner defendants on noneconomic damages for negligence of non-practitioners providing emergency services and care pursuant to obligations imposed by Florida Statute § 395.1041 or Florida Statute § 401.45, or obligations imposed by 42 U.S.C. s. 1395dd to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition. *See* Fla. Stat. § 766.118 (5)(a). Notwithstanding paragraph (a), the total noneconomic damages recoverable by all claimants from all such non-practitioner defendants shall not exceed $1.5 million. *See id*. at (5)(b).

Notwithstanding Florida Statute § 766.118 (2), (3), (5), there is also a cap of $300,000 regardless of the number of practitioner defendants for noneconomic damages for negligence of a practitioner providing services and care to a Medicaid recipient, unless the claimant pleads and proves, by clear and convincing evidence, that the practitioner acted in a wrongful manner. *See id*. at (6). A practitioner providing medical services and medical care to a Medicaid recipient is not liable for more than $200,000 in noneconomic damages, regardless of the number of claimants, unless the claimant pleads and proves, by clear and convincing evidence, that the practitioner acted in a wrongful manner. *See id*. The fact that a claimant proves that a practitioner acted in a wrongful manner does not preclude the use of the limitation on noneconomic damages prescribed elsewhere in Florida Statute §766.118. *Id*.

Florida also limits punitive damages to three times the amount of the compensatory damages or $500,000, whichever is greater. *See* Fla. Stat. § 768.73(1)(a)(1)-(2). However, the court is not prohibited from exercising its jurisdiction under Florida Statute § 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages. But, if the defendant's intentional misconduct was motivated purely by the opportunity for unreasonable financial gain and the court 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, the court may award punitive damages up to $2 million or four times the amount of the compensatory damages, whichever is greater for each claimant. *See id*. at (b)(1)-(2). If the fact finder determines that at the time of the injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages. *Id*. at (1)(c).