FOR MORE INFORMATION

DICKINSON & GIBBONS, P.A.
Sarasota, Florida
www.hallevans.com

A. James Rolfes, Esq.
ajrolfes@dglawyers.com

Andrew Douberly, Esq.
adoublerly@dglawyers.com

Mark S. Tomlinson, Esq.
mtomlinson@dglawyers.com

TAYLOR DAY P.A.
Jacksonville, Florida

John D. Osgathorpe
jdo@taylordaylaw.com

Mike J Cox
mjc@taylordaylaw.com

Kimano Edwards
kedwards@ taylordaylaw.com

Shannon M. Anderson
sanderson@ taylordaylaw.com

Taylor Schmidinger
tschmininger@ taylordaylaw.com

FOWLER WHITE BURNETT P.A.
Miami, Florida

Christopher E. Knight
ckinght@fowler-white.com

Edward Briscoe
ebriscoe@fowler-white.com

Katina M. Hardee
khardee@fowler-white.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

FLORIDA

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

Florida has no statutory self-critical analysis privilege, except in the context of peer review of medical care. *See generally* *Liberty Mut. Ins. Co. v. Wolfson*, 773 So. 2d 1272, 1274 (Fla. 4th DCA 2000).

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

Trial courts have broad discretion in discovery matters. See Friedman v. Heart Inst. of Port St. Lucie, Inc., 863 So.2d 189, 194 (Fla.2003). In exercising that discretion, courts will look to whether a third party's litigation funding file is relevant to the subject matter of the case and is admissible or reasonably calculated to lead to admissible evidence. For example, in Estate of McPherson ex rel. Liebreich v. Church of Scientology Flag Service Organization, 815 So. 2d 678 (Fla. 2d DCA 20020, the defendant in a wrongful death case sought information from the plaintiff and its counsel regarding the source of significant contributions to fund the litigation. There, the court found that the information sought was not reasonably calculated to lead to the discovery of admissible evidence in the trial of the wrongful death action. See also Matthews v. City of Maitland, 923 So. 2d 591 (Fla. 5th DCA 2006) (holding that discovery directed to disclosure of names who contributed to the litigation fund and the amounts each contributed was not relevant).

However, in Abu-Ghazaleh v. Chaul, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), the court held that the third party funders were real parties to the claim for adverse costs purposes because they had significant control over the claim. Following Abu-Ghazaleh, courts may order the disclosure of third-party funding agreement in claims involving adverse costs for the purpose of determining whether the third party funder had significant control of the claim.

It should be noted that the Florida Bar also "discourages the use of non-recourse advance funding companies." However, that does not stop attorneys from providing their clients with information about non-recourse advanced settlement funding it they feel it is in their best interest. Further, attorneys are prohibited from being a party to any sort of agreement between a client and legal funding company. Attorneys are also forbidden from speculating on what they believe a claim may settle for, but attorneys can provide facts about a claim to the third party litigation funding company with their client's informed consent.

In Fausone v. U.S. Claims, Inc., 915 So. 2d 626 (Fla. 2d DCA 2005), the court stated that

[s]uch [litigation loan] agreements create confusion concerning the party who

actually won and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally . . . . This court has no authority to regulate these agreements . . . . " However, if The Florida Bar is going to allow lawyers to promote and provide such agreements to their clients, it would seem that the legislature might wish to examine this industry to determine whether Florida's citizens are in need of any statutory protection.

See id. at 630.

Taking that invitation, House of Representatives' Civil Justice Subcommittee on February 5, 2020, voted 20-2 to approve House Bill 7041 which would require litigation funders to register with the Department of State, caps fees at $500, limits any interest charged at 30 percent and requires disclosure of the funding agreement to the court. Unfortunately, it was then put on Calendar where it was indefinitely postponed, withdrawn from consideration, and died. An identical measure was filed in the Senate on January 13, 2020, Senate Bill 1828 (2020), which was referred to Banking and Insurance but met the same fate.

3. **Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?**

"[W]here the corporate defendant is not seeking affirmative relief, the deposition of the corporate representative should ordinarily be taken at the corporation's principal place of business." Dan Euser Waterarchitecture, Inc. v. City of Miami Beach, 112 So. 3d 683, 684 (Fla. 3d DCA 2013). A "nonresident corporate defendant need not produce a nonresident corporate officer in Florida." Fortune Ins. Co. v. Santelli, 621 So.2d 546, 547 (Fla. 3d DCA 1993).

4. **What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?**

An entity's admission that its driver was in the "course and scope" of his or her employment is not a matter of direct negligence but one of vicarious liability, usually by virtue of Florida 'dangerous instrumentalities' doctrine or through the law of agency/respondent superior. Direct claims such as negligent hiring, retention, and supervision (all distinct causes of action), also exist under Florida law, although in many cases these are concurrent theories of liability based upon the same damage and are thus often vulnerable to dispositive action before trial. See, e. g., Mallory v. O'Neil, 69 So.2d 313 (Fla.1954); McArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198 (Fla. 4th DCA 1970). The distinction between vicarious liability and direct being that where liability exits as a matter of law (vicarious) versus a creation of liability by the direct acts or omissions of the active tortfeasor (direct).

The nuance is important yet often subtle in the pleadings. Even so, the analysis starts there. As to vicarious liability, the analysis as to whether the motor carrier/corporate entity is truly vicariously liable deserves perhaps more legal effort than the benefits versus detriments of admitting the driver was an employee or agent. As mentioned above, a corporate entity involved in an automobile accident might be liable by virtue of its relationship to the driver and/or its relationship to the vehicles. Of course, modern commercial transportation and logistics creates an incredible number of factual pitfalls as to both relationships. For instance, the analysis of an independent-contractor driver versus a direct employee are going to be different; or, in other cases, where the entity owns the trailer but not the tractor; or, does the entity simply brokering the load, contracting with the driver, and owning no vehicle involved.

Florida law continues to recognize a strong version of the 'dangerous instrumentality' doctrine, wherein the owner of a vehicle is (essentially per se) vicariously liable for the actions of the permissive driver. See e.g., S. Cotton Oil Co. v. Anderson, 80 Fla. 441, 445, 86 So. 629, 631 (Fla. 1920) (establishing Florida's dangerous instrumentalities doctrine, "This responsibility must be measured by the obligation resting on the master or

owner of an instrumentality that is peculiarly dangerous in its operation, when he intrusts it to another to operate on the public highways."). As the case law developed, the common factor for consideration for vicarious liability was often the ability to exercise control over the vehicle. See Aurbach v. Gallina, 753 So. 2d 60 (Fla. 2000) (the Court recognized that "whether an entity or individual is vicariously responsible as a bailee for the negligent operation of a motor vehicle may be a fact-based inquiry" but the non-title holding parent of a negligent driver was ultimately held not vicariously liable, on appeal, for the negligence of the driver). Notably, Florida statutory law now includes some limitations of liability for leased vehicles and to owners of vehicles that maintain sufficient liability insurance coverage. See generally, § 48.193, Fla. Stat. For these reasons and other, depending upon the circumstances, the analysis of vicarious liability through the 'dangerous instrumentality' doctrine can be quite complex.

As a practical matter, vicarious liability by virtue of agency and/or respondent superior is either admitted freely (wherein the driver is quite obviously an employee and obviously within the "course and scope") or is otherwise a worthy, but very fact-intensive, discussion. The determination of agency, whether or not a person was acting within the scope and scope of a lawful employment, is a question of law in Florida, if the facts are not in dispute; therefore, it is an issue potentially subject to a dispositive motion. See Whetzel v. Metropolitan Life Ins. Co., 266 So.2d 89, 90 (Fla. 4th DCA 1972). "The essential elements of an actual agency relationship are: 1) acknowledgment by the principal that the agent will act for him or her, 2) the agent's acceptance of the undertaking, and 3) control by the principal over the actions of the agent." Font v. Stanley Steemer Int'l, Inc., 849 So. 2d 1214, 1216 (Fla. 5th DCA 2003). In certain circumstances, Florida law also recognizes apparent agency, wherein the principle might create a triable issue for the plaintiff by making the contractor appear to be an agent but really was not. See generally, S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n, 89 So. 3d 264, 267 (Fla. 3d DCA 2012) ("In examining whether agency exists, the principal's actions are the primary indication of the relationship, and such examination is generally done by the trier of fact unless there is indisputably no connection between the principal and the agent. [Citation Omitted]. Thus, an agent who exceeds his authority cannot create agency and make the principal liable, [citation omitted], but a principal who fails to repudiate or prevent a previously-authorized agent's continued representation can be held responsible for the agent's actions."). Finally, criminal conduct and/or instances of behavior outside the scope of the agency are also potential issues for initial consideration for defenses against vicarious liability. See generally, Sussman v. Fla. E. Coast Properties, Inc., 557 So. 2d 74, 76 (Fla. 3d DCA 1990) ("When the employee detoured on her way to work to stop at a supermarket, where she purchased a cake for a fellow employee's birthday celebration, although she was enroute to her place of employment when she struck and injured a pedestrian with her personal vehicle, she was outside the scope of the employer's business as a matter of law."). Modernly, these are issues that are likely to face further litigation given the rise of companies like Uber, wherein the drivers are often independent operators using vehicles they own.

In sum, the benefits or detriments to admitting to an employment relationship should begin with an evaluation of the vicarious claims. These vicarious theories, agency versus dangerous instrumentality, are not necessarily one in the same but are often pled together on the same facts. While a corporate defendant might be liable under agency theory, it might not be liable under dangerous instrumentality, and vice versa. See Saullo v. Douglas, 957 So. 2d 80 (Fla. 5th DCA 2007) (holding, as a matter of first impression that the motor carrier was not liable for driver, an independent contractor, under agency but could be vicariously liable by virtue of its leasing the tractor under the dangerous instrumentality doctrine). Ultimately, Federal motor carrier regulation adds even further complexity to the analysis but does not necessarily change considerations for admitting or disputing the agency of the driver in a Florida action.

That said, admitting whether a driver was in the "course and scope" of employment is a complex decision, primarily involving questions of fact and law, which often must be made right at the pleading stage. Even

when an actual, undisputed employee is involved in a collision, the analysis still might turn on 'what they were doing' or 'where they were going' and not on their actual employment status. In many cases, this analysis is taken for granted, but it should not be overlooked, as it might be the difference for a dispositive issue. Ultimately, this means that client and counsel must be prepared for that discussion right away. Once admitted, it may be very difficult to set that concession aside. On the other hand, if initially denied, counsel must be mindful to amend the pleadings timely, if contrary discovery clearly erodes those employment defenses, especially client admissions. As vicarious liability must be specifically pled, you should expect there will need to be specific allegations put forth in the pleading to establish the relationship between driver and corporate entity. If no such ultimately facts exist, perhaps the discussion should turn on whether to move to dismiss or for a more definite statement. Forcing the plaintiff to define that relationship in the pleadings first may have both strategic and tactical benefits in the litigation.

5. Please describe any noteworthy nuclear verdicts in your State?

A Florida jury handed down a $411,726,608 verdict in October 2020 to Duane Washington and his three sons for injuries which left Mr. Washington partially paralyzed after a 45-vehicle pileup in 2018 caused by Defendant, Top Auto Express Trucking Company ("Top Auto"). Specifically, on July 24, 2018, heavy rain caused traffic to slow down on the I-10 around 5 p.m. Top Auto's driver attempted to avoid a collision but instead jackknifed and caused a chain reaction of collisions. Plaintiff was riding his motorcycle at the time and tried to steer his motorcycle into the median but ended up hitting a stopped truck which did not have lights on while in the emergency lane.

It appears that Top Auto's attorneys withdrew from the case prior to trial when Top Auto rejected $1 million settlement offer from Mr. Washington. At trial, Top Auto did not call or question any witnesses, submit any exhibits for the jury, or present an opening or closing argument on its behalf.

Notably, this was the first Zoom trial held in Florida's Second Circuit Court. The verdict is believed to be the largest nuclear verdict ever against a single trucking company defendant. Washington v. Top Auto Express, Inc., et al, Case No. 18-CA-000861, in the Circuit Court for Gadsden County, Florida

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

Discovery of amounts actually billed or paid is generally allowed because a Plaintiff is entitled to submit gross or "retail" medical bills to the jury, subject to a post-verdict collateral source setoff. The following exceptions apply:

a. Social Security Disability Insurance, Automobile Insurance (Personal Injury Protection and Bodily Injury Only)

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). F.S. § 768.76(l)-(4). Defendant is further entitled to a post-verdict reduction in the amounts contractually adjusted by the provider in accepting payment. Plaintiff is also entitled to collect damages for past medical expenses for-health insurance and HMO/PPO lien amounts. Goble v. Frohman, 901 So. 2d 830, 833 (Fla. 2000).

b. 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. §768.76(1), Fla. Stat.

There are certain exceptions to this rule. For example, there are no reductions for collateral sources for which

a subrogation or reimbursement right exists. § 768.76(1), Fla. Stat.

Benefits received under Medicare, or any other federal program providing for a federal government lien or right of reimbursement from the plaintiffs recovery, the Florida Worker's Compensation Law, the Medicaid Program of Title XIX of the Social Security Act or from and medical services program administered by the Florida Department of Health shall not be considered a collateral source. § 768.76(2)(b),Fla. Stat. This exception does not result in a windfall to plaintiffs because Medicare and similar collateral sources retain a right of subrogation or reimbursement. Additionally, § 768.76 does not allow reductions for future medical expenses. Joerg v, State Farm Mut. Auto. Ins. Co., 176 So. 3d 1247 (F1a.2015).

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Discovery of amounts actually charged and accepted by a healthcare provider for certain procedures may be allowed if the defendant can show the relevancy for the need of such information, but same may be subject to a confidentiality agreement. In Columbia Hosp. (Palm Beaches) Ltd. Partnership v. Hasson, 33 So. 3d 148 (Fla. 4th DCA 2010), the plaintiff claimed that she suffered bodily injury in connection with an accident and incurred medical expenses. The defendants sought discovery from the hospital through a subpoena duces tecum for documents concerning a particular procedure plaintiff had, including the amount the hospital has charged patients with and without insurance, those with letters of protection, and differences in billing for litigation patients versus non-litigation patients. The hospital, a non-party, moved for a protective order asserting that the information sought is protected as trade secrets. The trial court denied the hospital's motion for protective order, and the hospital appealed. The Fourth District Court of Appeal concluded that defendants

> sufficiently explained why they needed the information: in order to dispute, as unreasonable, the amount of medical expenses that the plaintiff will seek to recover from them, if the hospital charges non-litigation patients a lower fee for the same medical services. A claimant for damages for bodily injuries has the burden of proving the reasonableness of his or her medical expenses.

See id. at 150 [citations omitted]. However, the Fourth District Court of Appeal held that the trial court erred because it did not order that the production of such documents be subject to a confidentiality agreement. See also Lake Work Surgical Center, Inc. v. Gates, 266 So. 3d 198, 202-203 (Fla. 4th DCA 2019) (allowing discovery of contracted reimbursement rates by private health insurance carriers for the surgery received by plaintiff subject to a confidentiality agreement).

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

In order to subject an out of state party to personal jurisdiction in Florida, the court must first determine whether sufficient facts exist to subject the defendant to Florida's long-arm statute. If sufficient facts exist, the court must then determine if sufficient "minimum contacts" exist between the defendant and the forum state to satisfy due process. This two-step analysis was first approved by the Florida Supreme Court in the case of Venetian Salami Co. v. Parthenais, 554 So.2d 499, 501–02 (Fla.1989).

Personal jurisdiction can exist in two forms, as summarized by the court in Caiazzo v. Am. Royal Arts Corp., 73 So.3d 245, 249–50 (Fla. 4th DCA 2011). In conferring "specific" personal jurisdiction, the alleged activities or actions of the defendant are directly connected to the forum state. In conferring "general" personal jurisdiction, a defendant's connection with the forum state is so substantial that no specific or enumerated relationship between the alleged wrongful actions and the state is necessary. Id. at 250. Personal jurisdiction under Florida's long-arm statute can be obtained through a finding of either specific or general personal

jurisdiction.

Florida's Long-Arm Statute is codified under § 48.193, Fla. Stat., Section 48.193(1)(a) addresses specific personal jurisdiction and sets out nine (9) specific acts which allow Florida courts to exercise jurisdiction over out-of-state defendants. These acts include:

1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

2. Committing a tortious act within this state.

3. Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

4. Contracting to insure a person, property, or risk located within this state at the time of contracting.

5. With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

   a. The defendant was engaged in solicitation or service activities within this state; or

   b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

7. Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

8. With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

9. Entering into a contract that complies with s. 685.102.

Alternatively, Section 48.193(2), Fla. Stat., addresses general personal jurisdiction, and is much broader in conferring jurisdiction, stating: "[a] defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." Florida courts have held "substantial and not isolated" to mean "continuous and systematic general business contact" with Florida. See, e.g., Woods v. Nova Cos. Belize Ltd., 739 So.2d 617, 620 (Fla. 4th DCA 1999); Am. Overseas Marine Corp. v. Patterson, 632 So.2d 1124, 1128 (Fla. 1st DCA 1994)

As is evidenced from Florida's long-arm statute, Florida casts a wide net in capturing personal jurisdiction over a non-resident. Once personal jurisdiction has been established under Florida's long-arm statute, courts must address the second prong of the two-part analysis, namely whether the non-resident has sufficient "minimum contacts" to satisfy Federal due process considerations. The federal due process considerations are more restrictive than the broad jurisdictional threshold contained in Section 48.193, Fla. Stat. The United States Supreme Court in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) held that "minimum contacts" are established where a defendant has "purposefully avail[ed] [himself

or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 474-75. In sum, the State's federal counterparts have held that a company which avails itself of doing business in a state can "reasonably anticipate" being subject to that state's jurisdiction. World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Additionally, the conferring of jurisdiction cannot be unreasonable when considering the minimum contacts which exist, because such an unreasonable conference would offend due process. Caiazzo, 73 So.3d at 253. The minimum contacts due process requirement is a fact specific inquiry and depends upon the facts of each case. See Venetian Salami Co. 554 So. 2d at 500 (citations omitted).

Ultimately, if an employee is injured in Florida, and seeks to bring in an out-of-state defendant, the courts will examine Florida's long-arm statute, and the enumerations therein, along with the minimum contacts requirement under federal due process requirements, and if these considerations can be met, jurisdiction will be conferred.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Fla. R. Civ. P. 1.290 governs pre-suit depositions or the taking of sworn testimony. This rule allows filing a petition to take the pre-suit deposition of an individual what about a corp rep? or otherwise perpetuate a person's testimony. Additionally, there are statutes specific to certain cases of action, such as medical malpractice, that modify this general Fla. R. Civ. P. Additionally, separate from Rule 1.290, Florida still allow a "pure bill of discovery" in limited circumstances.

Rule 1.290 requires filing "a verified petition in the circuit court in the county of the residence of any expected adverse party" which petition is titled "in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of Florida, but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it, (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each….' Fla. R. Civ. P. 1.290

The petition must be served upon the party whose testimony is sought. "If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The deposition may then be taken …" Fla. R. Civ. P. 1.290

Additionally, separate from the above procedure, Florida still recognizes a common law "pure bill of discovery" that can be used to take pre-suit depositions. However, "pure bill" is restricted to situations where no other option (such as the above statute) would be sufficient, and there is an articulable need to preserve the evidence.

In Venezia Lakes Homeowners Ass'n, Inc. v. Precious Homes at Twin Lakes Prop. Owners Ass'n, Inc., 34 So. 3d 755, 758 (Fla. 3d DCA 2010) the Court explained that when there is an absence of an adequate legal remedy (e.g., Rule 1.290 is inapplicable), a pure bill of discovery "may be used to identify potential defendants and theories of liability and to obtain information necessary for meeting a condition precedent to filing suit." However, a bill of discovery may not be used "as a fishing expedition to see if causes of action exist." Nor is it available simply to obtain a preview of discovery obtainable once suit is filed. Similarly, "a pure bill of discovery should be granted if there is some reasonable basis to believe that discovery in a later damages

action would be inadequate or too late to vindicate the litigant's right to evidence." Lewis v. Weaver, 969 So. 2d 586, 587 (Fla. 4th DCA 2007) (internal citation omitted). The pure bill allows a putative plaintiff to "obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in [the defendant's] custody, in aid of the prosecution or defense of an action pending or about to be commenced." It may also avoid a spoliation claim later. Id.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

Yes. In Florida, under Section 323.001(1), *Fla. Stat.*, "[a]n investigating agency may place a hold on a motor vehicle stored within a wrecker operator's storage facility for a period not to exceed 5 days, excluding holidays and weekends, unless extended in writing." Florida has enumerated multiple instances in which a motor vehicle, arguably including a tractor-trailer, can be held or impounded for periods in excess of the 5 days allowed by §323.001(1). These additional instances are outlined in §323.001(4)(a-g) and also recited in the Florida Highway Patrol Policy Manual, Policy Number 11.04.04(H), and include instances where:

1. There is probable cause to believe that the vehicle may be seized and forfeited under the Florida Contraband Forfeiture Act; In compliance with a court order;

2. There is probable cause to believe that the vehicle may be seized and forfeited in accordance with Section 372.312, F.S. for a violation of the wildlife laws;

3. There is probable cause to believe that the vehicle was used as the means of committing a crime;

4. There is probable cause to believe that the vehicle is itself evidence that tends to show that a crime has been committed or that the vehicle contains evidence, which cannot be readily removed, that tends to show that a crime has been committed;

5. There is probable cause to believe that the vehicle was involved in a traffic crash resulting in death or personal injury and should be sealed for investigation and collection of evidence by a traffic homicide investigator;

6. The vehicle is impounded or immobilized pursuant to Section 316.193, Florida Statutes; Driving Under the Influence or Section 322.34, Florida Statutes; Driving while License Suspended, Revoked, Canceled, or Disqualified; and

7. In compliance with a court order.

Though the Florida Highway Patrol Policy Manual specifies that holds are to be released as soon as possible, the times for release can vary based upon the reason for the hold enumerated above. When a hold is to extend beyond the 5 days, Section §323.001(5) instructs that the writing must specify: (a) the name and agency of the law enforcement officer placing the hold on the vehicle; (b) the date and time the hold is placed on the vehicle; (c) a general description of the vehicle, including its color, make, model, body style, and year; VIN (Vehicle Identification Number); registration license plate number, state, and year; and validation sticker number, state, and year; (d) the specific reason for placing the hold; (e) the condition of the vehicle; (f) the location where the vehicle is being held; and (g) the name, address, and telephone number of the wrecker operator and the storage facility.

In sum, though Florida Statutes allow for the 5 day hold of a vehicle, there is no set limit on how long a vehicle may be held in certain circumstances if one of the prescribed instances outlined in §323.001(4)(a-g), Fla. Stat. is met, and the hold is in writing in accordance with §323.001(5). A vehicle hold can be terminated if there is a judicial finding of no probable cause for having continued the immobilization or impoundment.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

Under Florida law, to obtain punitive damages a plaintiff must, first, move for leave to amend pleadings to allege punitive damages, since punitive damages cannot be alleged from the outset of a claim. *See* §768.72(1), *Fla. Stat.; Fla. R. Civ. P.* 1.190(f). Second, convince the jury to award punitive damages.

As to the plaintiff seeking the court's permission to amend its complaint to allege punitive damages against the defendant, the plaintiff must make "a reasonable showing [to the Court] by evidence in the record or proffered … which would provide a reasonable basis for recovery of such damages." §768.72(1), *Fla. Stat.* The statute leave to the judge to analyze the facts and circumstances to decide whether they satisfy the "reasonable showing" or "reasonable basis" threshold or standard. The Judge's ruling permitting or refusing reviewed under the abuse of discretion standard.

If a punitive damages claim is permitted, then the jurors will award punitive damages if they find the plaintiff has proven with "clear and convincing evidence" that the defendant engaged in "intentional misconduct or gross negligence." §768.72(2), *Fla. Stat.* Florida's jury instructions state that "'[c]lear and convincing evidence' differs from the 'greater weight of the evidence' in that it is more compelling and persuasive." The standard jury instructions provide that the "'greater weight of the evidence' means the more persuasive and convincing force and effect of the entire evidence of the case."

The jury is instructed that "intentional misconduct" means "that [the defendant] had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to [the plaintiff] would result and, despite that knowledge, [the defendant] intentionally pursued that course of conduct, resulting in injury or damage." See also §768.72(2)(b), Fla. Stat. Likewise, the jury will be instructed that "gross negligence" means "the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." *See also* §768.72(2)(b), *Fla. Stat.*

An award of punitive damages against a defendant for the conduct of an employee requires the evidence of the defendant's "intentional misconduct or gross negligence" plus evidence "(a) [the defendant] …actively and knowingly participated in such conduct; (b)…[the defendant's] officers, directors, or managers … knowingly condoned, ratified, or consented to such conduct; or "(c) [the defendant]... engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant." §768.72(2), Fla. Stat. With regard to the defendant's liability for the acts of an employee, the Florida jury is instructed that "if… punitive damages are warranted against the employee, you may also, in your discretion, award punitive damages against [the defendant] if … (A) [it] … actively and knowingly participated in such conduct…; (B) the [officers] [directors] [or] [managers] of [the defendant] knowingly condoned, ratified, or consented to such conduct…; or (C) [the defendant] engage in conduct that constituted gross negligence and that contributed to the [loss, damage or injury]…"

Finally, with regard to the amount of punitive damages, the jury is instructed "you must decide the amount of punitive damages… to be assessed as punishment … and as a deterrent to others… [and] you should consider…(1) the nature, extent and degree of misconduct and the related circumstances, including…: (A) whether the wrongful conduct was motivated solely by unreasonable financial gain; (B) whether the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by [the defendant]/[the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant]…."

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

In March 2020, Florida suspended all in person jury trials. Though Florida has not specifically mandated Zoom trials occur, a number of judicial circuits throughout the state have since begun conducting jury trials using

virtual means. Following the declaration of the pandemic, Florida Supreme Court Chief Justice Charles T. Canady issued Administrative Order AOSC20-23, which has since been amended on multiple occasions to conform with the ever-changing climate. The Administrative Order was issued to provide guidance and direction to Florida Courts as they attempt to navigate the pandemic. AOSC20-23 was most recently amended on February 17, 2021. This administrative order confers authority on the part of chief judges in their respective circuits to authorize and take necessary steps to support the remote conduct of proceedings. In specifically addressing remote civil jury trials, Judge Canady instructed any judicial circuit may remotely conduct civil jury trials if all parties consent to participating in the remote trial. Though not mandated per se, the courts in Florida have been provided autonomy in making individual determinations regarding their respective circuits.

Though the determination whether to proceed with a Zoom trial is based upon the agreement of the parties and presiding judge, there have been a number of civil jury trials which have proceeded via Zoom in circuits throughout the state. Florida made national news in August 2020 for holding the first jury trial in the United States conducted solely via Zoom, including *voir dire*. In the case of *Griffin v. Albanese Enterprises, Inc.*, the plaintiff sued the owners of a Jacksonville, Florida gentlemen's club when she was reportedly beaten and suffered injuries at the hands of the club's bouncers. The case proceeded to trial on the issue of damages, and the jury returned a verdict for the plaintiff, awarding her $354,000.00 in damages.

Subsequently, in October, 2020, the most notable jury verdict in Florida, and possibly the United States, was returned by a jury in Gadsden County, Florida, outside of Tallahassee. The trial in the case of *Duane Washington v. Top Auto Express, Inc.* proceeded entirely via Zoom, including *voir dire*. Mr. Washington suffered significant injuries when he was ejected from his motorcycle during an accident in July, 2018, when two tractor-trailers lost control in bad weather. The jury returned a verdict in the amount of $410,326,608.42 in favor of Mr. Washington.

We were unable to uncover any civil appellate decisions addressing the constitutional or procedural concerns of holding a trial solely via Zoom, though a number of criminal appellate decisions have been published which appear to uphold the constitutional rights and considerations of a defendant when proceedings are held electronically. Specifically, in *Clarington v. State*, Case No. 3D20-1461, 2021 WL 115633 (Fla. 3d DCA 2021), the court determined that a defendant's constitutional and statutory right to be physically present at a probation violation hearing may be satisfied via Zoom under the operation of AOSC 20-23, though the Third District certified multiple questions of great public importance to the Florida Supreme Court as it concerned the issue.

Though the above examples are extraordinary cases, they evidence the ongoing efforts by judicial circuits to fulfill their duties and hear cases throughout a national pandemic. It can be expected that the number of trials will continue to increase as the COVID-19 positivity rate continues to decrease, and the vaccination of Americans continues to become more widespread.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

In an effort to curb substantial punitive damages awards, Florida enacted Section 768.73, Fla. Stat., which provides a limitation on an award of punitive damages. Specifically, §768.73(1)(a) provides that an award of punitive damages may not exceed the greater of: "(a) Three times the amount of compensatory damages awarded to each claimant entitled thereto…; or (b) the sum of $500,000.00. The statute goes on to state that if a "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," the award may increase to the greater of: "four times the amount of compensatory damages awarded to each claimant entitled thereto; or (b) the sum of $2 million." Finally, under §768.73(1)(c), if the "fact finder determines that at the time of 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 shall be no cap on punitive damages.

Though Florida has a cap on the award of punitive damages, and subsequent Florida cases have upheld the cap, and the need for relation of punitive damages to the underlying harm, it has not stopped juries in Florida from handing down massive verdicts awarding tens of millions in punitive damages. In October 2017, a Broward County [Ft. Lauderdale] jury found a construction company liable for failing to provide construction vehicles a safe means of exiting median construction which was underway on Interstate 75, which led to a construction worker improperly exiting the median construction work zone, and causing an accident which resulted in the death of the plaintiff. In finding the construction company liable, the jury awarding the plaintiff's estate $20 million in compensatory damages, and $25 million in punitive damages. Multiple tobacco cases have also proceeded against manufacturers such as R.J. Reynolds and Philip Morris USA, which have resulted in multi-million-dollar punitive damages awards.

Florida law mandates under Section 768.72(1), Fla. Stat., that no claim for punitive damages is 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." Further, Section 768.72(2), Fla. Stat, outlines that a defendant can only be held liable for punitive damages if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. The statute defines "intentional misconduct" as the "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, intentionally pursued that course of conduct, resulting in injury or damage," and defines "gross negligence" as "conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Currently, there are two tobacco-related cases which were filed against RJ Reynolds which are currently up on appeal. The Florida Supreme Court has agreed to hear the cases of Linda Prentice v. RJ Reynolds Tobacco Company, Case SC20-291, following the First District Court of Appeals verdict tossing a $6.4 million dollar award, and the case of Mary Sheffield v. RJ Reynolds Tobacco Company, Case No.: SC19-601, in which the jury returned a $5 million-dollar punitive damages award. The Fifth District Court overturned the award and applied the prior 1999 punitive damages statute in Florida, which shielded the defendant from paying punitive damages. Ultimately punitive damage awards are an area of the law that is under continuous scrutiny and will continue to be a point of contention and legal argument well into the future.