ELEMENTS OF DAMAGES IN FLORIDA

by Riley Beam, Lisa Cabrera, Courtney Engelke, Dustin Herman, Fay O. Pappas, Bailey Fisher, Christopher Paulos, Matthew K. Schwencke, and Mallory Widgren

I. Wage Loss/Future Earning Capacity – by Fay O. Pappas; Bailey Fisher, PLLC, Winter Park, Fla.

A. How to measure

1. "An award for loss of earning capacity is measured by the plaintiff's diminished ability to earn money in the future. The jury is not to be concerned with actual future loss of earnings, but with *the loss of the power to earn*." *W.R. Grace & Co.-Conn. v. Pyke*, 661 So.2d 1301, 1304 (Fla. DCA 3d 1995) (citing *Baggett v. Davi*s, 169 So. 372 (Fla.1936)) (emphasis added).

2. "A plaintiff must demonstrate not only *reasonable certainty of injury,* but must present evidence which will allow a jury to reasonably calculate lost earning capacity." *Id.* at 1302. (internal citations omitted) (emphasis added).

3. "The 'reasonable certainty' rule for the calculation of damages does not require mathematical precision, and such an award by the jury will not be disturbed if supported, as here, by substantial competent evidence." *West Boca Medical Center, Inc. v. Marzigliano*, 965 So.2d 240, 244-45 (Fla. 3d DCA 2007) (award of $360,000 for loss of future earning capacity upheld when it was shown that a 59-year-old nurse who was planning to work eight more years was making $22,000 less per year after the injury). The court explained: "The jury may have intended to base its award on the demonstrated losses after the accident (but projected for a term longer than eight years), or it may have decided that Marzigliano should not work because of the risk of further injury, reducing eight years of lost future earning capacity to present value." *Id.* at 244.

4. "In measuring the loss of wage-earning capacity, no single factor is conclusive. Criteria by which loss of earning capacity may be measured have been announced in a number of cases

decided by this Court. These criteria include:

(1) Extent of actual physical impairment;
(2) Claimant's age;
(3) Industrial history;
(4) Education of claimant;
(5) Inability to obtain work of a type which claimant can perform in light of his after-injury condition;
(6) Wages actually being earned after the injury (a factor entitled to great weight);
(7) Claimant's ability to compete in the open labor market the remainder of his life, including the burden of pain, or inability to perform the required labor;
(8) Claimant's continued employment in the same employ." *Walker v. Elec. Products & Eng'g Co., 248 So.2d 161, 163 (Fla. 1971).*

5. "Once an amount is determined, a jury is required to reduce any award for loss of future earning capacity to present value." *Id.* at 1302 (citing Section 768.77, Florida Statutes (1993)); *Townsend v. Gibso*n, 67 So.2d 225 (Fla.1953).

B. Potential Limitations

1. *Pyke* held that an award for damages of loss of future earning capacity "shocked judicial conscience," as it awarded more per year than the worker actually earned prior to his injury. *Pyke*, 661 So.2d at 1303. However, *Pyke* is factually distinguishable: "While there was some evidence that plaintiff had sustained an injury, there was no expert or lay testimony regarding his loss of future earning capacity. There was no testimony presented concerning the employment market for a 53-year-old individual with high school education." *Id.*

2. "Where a plaintiff is earning as much or more than he or she earned prior to the injury, as was [plaintiff in this case], it is more difficult for the plaintiff to prove that he or she has suffered a future economic loss." *Miami-Dade County v. Cardoso*, 963 So.2d 825, 828 (Fla. 3d DCA 2007).

3. "However, if the injured party is earning more after the injury, he is not precluded from recovering damages for loss of future earning capacity. 'Such facts are merely evidence to be weighed by the jury in determining whether or not the injured party's earning capacity has been impaired.'" *Truelove v. Blount*, 954 So.2d 1284, 1288 (Fla. 2d 2007) (quoting *Allstate Ins. Co. v. Shilling*, 374 So.2d 611, 613 (Fla. 4th DCA 1979)).

4. **Take Away:** A vocational expert should be used at trial to establish future loss of earning capacity, and an economist used to reduce the amount to present value.

C. Entitled to Jury Instruction

1. Plaintiffs are entitled to a jury instruction on loss of future earning capacity, so long as evidence of injury and evidence sufficiently detailed to allow a jury to quantify this loss exist. *See Pyke,* 661 So.2d at 1303; see also, *Hartfield v. Wells Bros., Inc.*, 378 So.2d 33 (Fla. 2d DCA 1979), cert. denied, 388 So.2d 1119 (Fla. 1980); *Allstate Ins. Co. v. Shilling*, 374 So.2d 611 (Fla. 4th DCA 1979).

2. "The test for entitlement to an instruction on loss of future earnings is not dependent upon earnings either before or after the injury. Rather, the test is whether the injured party's capacity to labor has been diminished by virtue of the injuries suffered." *Hubbs v. McDonald*, 517 So.2d 68, 69 (Fla. 1st DCA 1987).

D. Recent Developments in Case Law: Documentation Not Required To Prove Wage Loss

1. In 2013, the same appeals court that brought us *Pyke* upheld a very liberal view towards wage loss calculations.

2. In *Maggolc, Inc. v. Roberson*, 116 So.3d 556 (Fla. DCA 3d 2013), the Third DCA asked "whether the evidence [of wage loss and loss of earning capacity] […], uncorroborated by any income tax returns (because [plaintiff] filed none), bank records, receipt books, credit card slips, Social Security earnings history, client lists, appointment records, expenses, or other documents, is collectively sufficient to prove past lost earnings and loss of earning capacity with 'reasonable certainty.'" *Id.* citing *Auto-Owners Inc. Co. v. Tompkins*, 651 So.2d 89, 91 (Fla. 1995).

3. It is not as important to have "reasonable certainty" when it comes to computing wage loss, as it is to prove "reasonable certainty" when it comes to causation and physical injury damages. *See Id.* citing *Twyman v. Roell*, 166 So. 215 (Fla. 1936).

4. The *Roberson* court affirmed the trial court's award of $85,000 in past lost earnings and $160,000 in future lost earning capacity, proclaiming "[n]o Florida court has determined that a claim for an individual's lost past earnings must be supported by documentary evidence, or that the failure to file income tax returns for those earnings [. . .] precludes recovery." 116 So.3d at 558.

E. Wage Loss and Drug Use: Cases to Distinguish

1. On its face, the court in *Botte v. Pomeroy,* 497 So.2d 1275 (Fla. DCA 4th 1986), admits evidence of plaintiff's drug use on issues of future earning capacity. But remember this: "in this case the appellant was injured while still a teenager and by that time had not carried on any useful employment," and "[w]e believe the jury was entitled to have some information on the appellant's track record, limited as it was. Under these particular circumstances, the court on retrial may permit the defendants to rebut evidence of Botte's future earning capacity with carefully circumscribed questions relating to his means of support prior the accident." *See Id*. at 1278-79 (emphasis added). There was collateral testimony teen plaintiff sold drugs.

2. In his dissent in *Duffel v. South Walton Emergency Services, Inc.*, 501 So.2d 1352 (1987), Judge Ervin stated that "[b]ecause appellant […] had abandoned her damage claims for loss of wages and loss of earning capacity, evidence of appellant's drug abuse problems had only marginal value to her remaining claims

for loss of enjoyment of life and pain and suffering." *Id.* at 1355. Without relevance to wage loss and loss of earning capacity on the table, argued evidence of drug use must be funneled through a Florida Evidence Code 90.403, prejudice versus probative analysis, where it should die a swift death. *See Id.*

II. Past and Future Medical Damages – by Courtney Engelke; Colson Hicks Eidson, Coral Gables, Fla.

A. Medical Damages in General

1. Florida law permits the recovery of "[t]he reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (claimant) in the past [or to be so obtained in the future]." Fla. Std. Jury Instr. (Civil) 6.2b.

2. The plaintiff in a personal injury lawsuit has the burden of "prov[ing] the reasonableness and necessity of medical expenses" to recover them. *Albertson's Inc. v. Brady*, 475 So.2d 986, 988 (Fla. 2d DCA 1985). Plaintiffs bear "the entire burden to prove that [their] claimed damages were reasonable, necessary, and related to the accident." *USAA Cas. Ins. Co. v. Shelton*, 932 So.2d 605, 606 (Fla. 2d DCA 2006).

B. Past Medical Damages and Admitting Medical Bills Into Evidence

1. "Although some jurisdictions consider evidence of the amount of a medical bill to be sufficient proof of reasonableness, many, including Florida, require something more." *Albertson's Inc.*, 475 So.2d at 988. The amount of the bills alone is not sufficient proof that they were reasonable; the plaintiff must show that the "bill [is] for medical services related to the injury which is the subject of the litigation." *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996).

2. A records custodian is not needed to introduce a medical bill into evidence, "unless some evidence is introduced that the bill is faulty." *A.J.*, 677 So.2d at 938 (citing *Crowe v. Overland Hauling Inc.*, 245 So.2d 654, 657, n. 5 (Fla. 4th DCA 1971)).

3. "[E]xpert testimony is not necessary to render medical bills admissible in evidence." *Morton's of Chicago, Inc. v Lira,* 48 So.3d 76, 79 (Fla. 1st DCA 2010) (citing *Garrett v. Morris Kirschman & Co.*, 336 So.2d 566, 571 (Fla.1976)). "When a plaintiff testifies as to the amount of his or her medical bills and introduces such bills into evidence, it becomes 'a question for a jury to decide, under proper instructions, whether these bills represented reasonable and necessary medical expenses.'" *Irwin v. Blake*, 589 So.2d 973, 974 (Fla. 4th DCA 1994) (quoting *Garrett*, 336 So.2d at 571 (Fla.1976)).

4. But, medical bills may be excluded unless plaintiff offers testimony that the bills are related to the injury at issue. *Albertson's Inc*., 475 So.2d 986 (distinguishing *Crowe*, and holding medical bills were improperly admitted into evidence when physicians did not testify that the bills were related to the accident and defendants did not stipulate as to the reasonableness of the bills).

5. Additionally, defendants may present evidence and argue that medical bills were not reasonable or necessary. *See Irwin*, 589 So.2d at 974 ("trial court did err in barring appellants from arguing to the jury that appellee's medical bills were not reasonable and necessary."); *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So.3d 538, 542 (Fla. 2d DCA 2012) ("trial court abused its discretion in excluding the testimony of [defendant's medical billing and coding expert]").

6. "At a minimum, the plaintiff was entitled to recover for those medical expenses incurred for any diagnostic testing which was reasonably necessary to determine whether the accident caused her injuries." *Sparks-Book v. Sports Authority Inc.*, 699 So.2d 767, 768 (Fla. 3d DCA 1997) (plaintiff transported to an emergency room and had x-rays taken after rear-end collision); but s*ee State, Dept. of Transp. v. Rosari*o, 782 So.2d 927, 928 (Fla. 2d DCA 2001) (holding plaintiff was not entitled to recover for diagnostic testing when plaintiff "had preexisting back problems for which he had surgery and extensive treatments; he showed a lack of candor with his treating physicians and in his answers to interrogatories; a videotape depicted his on-the-job physical capabilities; and expert medical opinions conflicted as to the issue of causation.").

7. An injured party is entitled to prejudgment interest on past medical expenses only when the party has made "actual out-of-pocket payments on those medical bills at a date prior to the entry of judgment." *Alvardo v. Rice*, 614 So.2d 498, 500 (Fla. 1993).

8. **Take Away:** To avoid issues on appeal, if defendant refuses to stipulate to the reasonableness and necessity of the medical bills, it is best to have a physician testify that the medical bills were reasonable and that the treatment was necessary and related to the accident at issue.

C. Future Medical Damages and Sufficiency of Evidence

1. "It is a plaintiff's burden to establish that future medical expenses will more probably than not be incurred." *Montesinos v. Zapata*, 43 So.3d 97, 99 (Fla. 3d DCA 2010) (citing *Kloster Cruise Ltd. v. Grubbs*, 762 So.2d 552, 556 (Fla. 3d DCA 2000)). "That burden will only be met with competent substantial evidence." *Montensinos*, 43 So.3d at 99 (holding that, on remand, plaintiff would be allowed to submit "competent medical testimony that in the future it is more likely than not that a hip replacement will be needed").

2. Florida law restricts recovery of future medical expenses to those expenses "reasonably certain" to be incurred. *Loftin v. Wilson*, 67 So.2d 185, 188 (Fla. 1953). See also Fla. Std. Jury Instr. (Civ.) 6.1.

3. Future medical expenses cannot be grounded on the mere "possibility" or "mere probability" that certain treatments might be obtained. *White v. Westlund*, 624 So.2d 1148, 1150 (Fla. 4th DCA 1993); *Frei v. Alger,* 655 So.2d 1215, 1216 (Fla. 4th DCA 1995).

4. But, "whatever qualification is placed on the opinion by the expert (i.e., surgery is possible or likely) goes to the weight of the opinion, and not its admissibility. Therefore, we agree that a medical expert may testify that future medical procedures are "possible" or "likely," and need not phrase an opinion in terms of such surgery or treatment being "reasonably necessary." Consistent with instructions 6.1(a) and 6.2(c), whether the plaintiff has satisfied his burden of proving that such future operative procedures are reasonably necessary is an issue for the jury to decide so long as there is competent evidence upon which the issue may be submitted to the jury. *White*, 624 So.2d at 1151 (emphasis in original) (citing *Vitt v. Ryder Truck Rentals, Inc.*, 340 So.2d 962 (Fla. 3d DCA 1996).

5. Proving a permanent injury is not a requirement for an award of future medical expenses. *Auto-Owners Ins. Co. v. Tompkins*, 651 So.2d 89 (Fla. 1995).

6. **Take Away***:* To avoid issues on appeal, have testimony that in a physician's opinion, which is held to within a "reasonable degree of medical certainty," plaintiff will "more likely than not" need the proffered future medical care/life care plan – and that the cost of each and every item in the life care plan is reasonable. Can also track the jury instructions that the medical treatment and expenses in the life care plan are "reasonably necessary" and are "reasonably certain" to be incurred.

D. Defense Bar Seeking Non-Party Discovery Related to Medical Billing and Discovery Showing Ongoing Relationship between Doctors and Law Firms

1. A defendant can discover a non-party medical provider's trade secrets regarding what it charges litigation versus non-litigation patients "in order to dispute, as unreasonable, the amount of medical expenses." *Columbia Hospital (Palm Beaches) Ltd. Partnership v. Hasson*, 33 So.3d 148 (Fla. 4th DCA 2010) citing *A.J. v. State*, 677 So.2d 935, 937 (Fla. 4th DCA 1996) ("The patient's obligation is not to pay whatever the provider demands, but only a reasonable amount").

2. *Brown v. Mittelman*, 152 So.3d 602 (Fla. 4th DCA 2014) Defendants were entitled to discovery regarding patients previously represented by plaintiff's law firms, letter of protection cases, and referrals from the plaintiff's attorneys. The court found that the discovery was reasonably limited in time and sought to uncover an ongoing relationship between the doctor and the plaintiff's lawyers that might bias the doctor to provide favorable testimony for the plaintiff.

3. See also *Katzman v. Rediron Fabrication, Inc.*, So.3d , 36 FLW D1747 (Fla. 4th DCA 8-10-11) (opinion later withdrawn and superseded with substitute opinion *Katzman v. Rediron Fabrication, Inc.*, 76 So.3d 1060 (Fla. 4th DCA 2011), review dismissed, 88 So.3d 149 (Fla. 2012) (recognizing a "direct referral by the lawyer to the doctor" as a circumstance that creates a potential for bias); *Pack v. Geico Gen. Ins. Co.*, 119 So.3d 1284 (Fla. 4th DCA 2013) (recognizing that the potential bias arising from a letter of protection exists independent of any referral relationship).

III. Physical Pain & Suffering – by Mallory Widgren; King & Markman, Orlando, Fla.

A. Measure of Damages/Jury Question

1. Amount to be allowed as compensation for pain and suffering is a jury question. *Kraus v. Osteen*, 135 So.2d 885 (Fla. 2d DCA 1961); *Ratner v. Arrington*, 111 So.2d 82 (Fla. 3d DCA 1959).

2. Juries are afforded wide latitude in the award of pain and suffering damages. *Collins v. Douglass*, 874 So.2d 629 (Fla. 4th DCA 2004).

3. The rule for measuring damages for pain and suffering, past, present and future, is that there is no standard by which to measure it except the enlightened conscience of impartial jurors. *Braddock v. Seaboard Air Line R. Co.*, 80 So.2d 662 (Fla. 1955).

4. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence. Florida Standard Jury Instruction 501.3.

5. The degree of negligence, extent of injury, and its equivalent in labor and commodities are main criteria available to jury to measure amount of its verdict in personal injury action. *Margaret Ann Super Markets v. Scholl*, 34 So.2d 238 (Fla. 1947).

B. Excessive Awards For Non-Economic Damages

1. Beware of *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953). In *Loftin*, the Supreme Court of Florida stated in dicta that an award of damages which included an amount for pain and suffering which, when invested at 3 percent per annum, simple interest, would "yield a return to the plaintiff of an amount in excess of his entire annual earnings prior to his injury, leaving the principal amount intact at his death to pass to his heirs. … is contrary to the original intention of the law providing compensatory damages for those who have suffered personal injuries." *Id.* at 190.

2. **NOTE:** The formula set forth in Loftin has been all but expressly overruled. In *Seaboard Coast Line R. Co. v. McKelvey*, the Third DCA stated: "In affirming this verdict here under review, we are accepting the Supreme Court's pronouncement in *Braddock v. Seaboard Airline Railroad Company, supra*, as to the validity of a jury's verdict for future pain and suffering, and rejecting the formula set forth in *Loftin v. Wilson*. S*eaboard Coast Line R. Co. v. McKelvey*, 259 So.2d 777, 782 (Fla. 3d DCA 1972) (certifying the conflict to the Supreme Court of Florida "as a matter of great public interest, to determine whether there should be a formula to establish the outer limits of a jury's discretion in awarding damages for humiliation, pain and suffering").

3. On review, the Supreme Court of Florida upheld the verdict and affirmed the opinion of the Third DCA, stating: "Quite obviously some speculation enters into most personal injury

actions, but the yardstick does not exist which can measure future humiliation, pain and suffering of the injured with sufficient certainty to divest a jury of exercising its sound discretion to determine the damage award based upon the evidence and merits of each case under consideration." *Seaboard Coast Line R. C. v. McKelvey*, 270 So.2d 705, 706 (Fla. 1972) (upholding the verdict, without expressly rejecting the formula in *Loftin*).

4. "In determining whether a verdict is excessive, vague expressions by the courts about 'conscience-shocking amounts' do not furnish the enlightenment that the public should expect from judges about how they arrive at their decisions… . In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Bould v. Touchette*, 349 So.2d 1181, 1184-85 (Fla. 1977).

5. Verdict of $30 million in non-economic damages to parents for the loss of their son was affirmed. *General Motors Corp. v. McGee*, 837 So.2d 1010 (Fla. 4th DCA 2002) (parents and son horribly burned in car accident, son later died).

C. Consciousness

The courts will allow awards of damages for conscious pain and suffering. In the event the decedent is injured and rendered unconscious and never regains consciousness, no award may be given for pain and suffering. *Doby v. Griffin*, 171 So.2d 404 (Fla. 2d DCA 1965); *Morrison v. C.J. Jones Lumber Co.*, 126 So.2d 895 (Fla. 2d DCA 1961).

D. Maritime PI

A jury in a maritime [wrongful death case] is free to allow damages for loss of support and service although not damages for pain and suffering. *Glabvo Dredgin Contractors v. Brown*, 374 So.2d 607 (Fla. 3d DCA 1979).

E. Motor Vehicle Accidents

As long as part of the bodily injury arising out of a motor vehicle accident involves a permanent injury within a reasonable degree of medical probability, the plaintiff can recover noneconomic damages related to his pain, suffering, mental anguish and inconvenience for all of the injuries related to the accident. Fla. Stat. §627.737(2)(b); *Wald v. Grainger*, 64 So.3d 1201 (Fla. 2011); *Rolon v. Burke*, 112 So.3d 118 (Fla. 2d DCA 2013).

F. Wrongful Death Statute/Death of Plaintiff

1. The Wrongful Death Act and the survival statute create distinct causes of action.

2. If the personal injuries result in death, the Wrongful Death Act terminates a party's right to bring an action to recover pain and suffering of the decedent. Fla. Stat. § 768.20; *Smith v. R.J. Reynolds Tobacco Co.*, 103 So.3d 955 (Fla. 2d DCA 2012); *Stewart v. Price*, 718 So.2d 205 (Fla. 1st DCA 1998). But the surviving spouse and children under the age of 25 may recover for mental pain and suffering from the date of the injury. Fla. Stat. §768.21(2) and (3).

3. If the personal injuries do not cause the decedent's death, an action may be maintained under the survival statute by the decedent's personal representative and pain and suffering damages may be recovered. Fla. Stat. §46.021; *Williams v. Bay Hosp. Inc.*, 471 So.2d 626 (Fla. 1st DCA 1985); *Florida Cent. & P.R. Co. v. Foxworth*, 25 So. 338 (Fla. 1899).

G. Damages For Physical Pain And Suffering Must Be Awarded If No Conflicting Evidence

1. For Past Pain & Suffering

i. Where the evidence is undisputed or substantially undisputed that a plaintiff has experienced and will experience pain and suffering as a result of an accident, a zero award for pain and suffering is inadequate as a matter of law. *Parrish v. City of Orlando*, 53 So.3d 1199 (Fla. 5th DCA 2011); *Ellender v. Bricker*, 967 So.2d 1088 (Fla. 2d DCA 2007); *Dolphin Cruise Line, Inc. v. Stassinopoulos*, 731 So.2d 708 (Fla. 3d DCA 1999); *Aymes v. Automobile Ins. Co. of Hartford, Connecticut*, 658 So.2d 1246 (Fla. 4th DCA 1995).

ii. When a jury's award of damages for plaintiff's medical expenses demonstrated that the jury accepted plaintiff's physical injuries, some type of award for pain and suffering was mandated. *Een v. Rice*, 637 So.2d 331 (Fla. 2d DCA 1994). See also, *Casper v. Melville Corp.*, 656 So.2d 1354 (Fla. 4th DCA 1995); *Ellender v. Bricker*, 967 So.2d 1088 (Fla. 2d DCA 2007); *Katz v. Allstate Ins. Co.*, 905 So.2d 243 (Fla. 4th DCA 2005).

iii. When jury's verdict awarding damages for past and future medical expenses, past and future lost wages, and future pain and suffering, but nothing for past non-economic damages, the verdict was both inconsistent and inadequate. *Scott v. Sims*, 874 So.2d 21 (Fla. 1st DCA 2004).

2. For Future Pain & Suffering

When undisputed testimony that the injury was a permanent injury caused by the incident and jury awarded future medical expenses. *Parrish v. City of Orlando*, 53 So.3d 1199 (Fla. 5th DCA 2011). See also, *Stein v. Cigna Ins. Co.*, 744 So.2d 462 (Fla. 4th DCA 1997); *Ellender v. Bricker*, 967 So.2d 1088 (Fla. 2d DCA 2007).

H. Damages For Physical Pain And Suffering May Not Be Awarded

1. For Past Pain & Suffering

i. When a defendant has presented evidence disputing such damages or when future noneconomic damages are uncertain or speculative. *Ellender v. Bricker*, 967 So.2d 1088 (Fla. 2d DCA 2007).

ii. When jury disbelieves plaintiff's testimony regarding pain

and suffering or attributes pain to other condition. *Fitzgerald v. Molle-Teeters*, 520 So.2d 645 (Fla. 2d DCA 1988).

iii. When only pain involved was momentary sting. *Leister v. Jablonski*, 629 So.2d 981 (Fla. 5th DCA 1993).

2. For Future Pain & Suffering

When there was substantial competent evidence from which jury could have concluded that despite plaintiff having sustained permanent injury she had not proved that she would incur future losses for which damages should be awarded. *Berg v. Sturgeon*, 718 So.2d 887 (Fla. 4th DCA 1998). See also, *Tavakoly v. Fiddlers Green Ranch of Florida, Inc.*, 998 So.2d 1183 (Fla. 5th DCA 2009).

IV. Mental Pain and Anguish – by Matthew K. Schwencke; Searcy Denney Scarola Barnhart & Shipley, West Palm Beach, Fla.

A. Physical Impact Rule

1. In a simple negligence action, the "impact rule" provides that there can be no recovery for mental or emotional pain and suffering unconnected with physical injury. *Thomas v. Hospital Bd. of Directors of Lee County*, 41 So.3d 246 (Fla. 2d DCA 2010).

2. The essence of the impact is one where the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body. *Zell v. Meek*, 665 So.2d 1048, 1050 n. 1 (Fla.1995).

B. Make Sure the Mental Distress was Manifested by Physical Injury

The plaintiff must be involved in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer mental distress and accompanying physical impairment within a short time of the incident. *Willis v. Gami Golden Glades, LLC*, 967 So.2d 846 (Fla. 2007).

C. Claim Involving the Injury or Death of a Loved One

Negligent Infliction of Emotional Distress claim under *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), if:

1. Plaintiff suffers a physical injury;

2. Plaintiff's physical injury is caused by the psychological trauma;

3. Plaintiff is involved some way in the event causing the negligent injury to another; and

4. Plaintiff has a close personal relationship to the directly injured person.

D. Psychotherapist-Patient Prviledge

Psychotherapist-patient privilege is not waived if the plaintiff withdraws claim for mental or emotional anguish prior to the discovery of psychotherapy records. *Ireland v. Francis*, 945 So.2d 524 (Fla 2nd DCA 2006).

V. Scarring/Disfigurement – by Lisa Cabrera; The Alvarez Law Firm, Coral Gables, Fla.

A. Florida's No Fault Statutes: Scarring and Disfigurement Must be Permanent

1. Fla. Stat. §627.737(2) governs what non-economic damages a claimant is entitled to collect after an automobile accident. Fla. Stat. §627.737 outlines the threshold of injury a claimant must meet before he/she can recover damages as a result of an automobile accident. The threshold must be met irrespective of who was at fault for the accident.

2. Fla. Stat. §627.737(2) reads as follows:
"In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730-627.7405, or against any person or organization legally responsible for her or his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scarring or disfigurement.

(d) Death.

See, Fla. Stat. § 627.737(2)(c).

3. Fla. Stat. §627.737 does not define the terms "permanent scarring or disfigurement." These have been subject to interpretation by the courts. "The only issue to be here resolved relates to the definition of 'permanent disfigurement' as that term is used in the Florida Automobile Reparations Reform Act, specifically F.S. §627.737. That statute provides that any person who suffers an injury in an automobile accident which results in a permanent disfigurement 'may recover damages in tort for pain, suffering, mental anguish and inconvenience' resulting from the injury." *Gillman v. Gillman*, 319 So.2d 165, 166 (Fla. 1st DCA 1975).

4. "The Florida Automobile Reparations Reform Act does not define the word 'disfigurement' however, other jurisdictions have defined that term as being 'that which impairs or injures the beauty, symmetry or appearance of a person or thing; or that renders unsightly, misshapen, or imperfect, or deformed in some manner.' *Id.* (citing *Bethlehem-Sparrows Point Shipyard v. Damasiewicz*, 187 Md. 474, 50 A.2d 799).

5. "In *Branham v. Denny Roll and Paint Company*, 223 N.C. 233, 25 S.E.2d 865, the court defined 'disfigurement' as a 'blemish, a blot, a scar or a mutilation that is external and

observable, marring the appearance.'" *Gillman*, 319 So.2d at 166. "We hold that a permanent scar may be a permanent disfigurement within the contemplation of Fla. Stat. §627.737. We do not imply that every scar is a disfigurement but when the existence of the scar is established, whether or not it is a disfigurement is a matter of fact to be determined by the trier of fact and may not be resolved, when properly placed in issue, by summary judgment." *Id*. at 166-67.

6. Furthermore, Florida courts have dealt with the issue of future scarring as a result of a necessary procedure for an injury sustained during an accident. "Generally, whether a facial scar is a disfigurement is for the jury's observation and evaluation and is not subject to determination as a matter of law." *Cohen v. Pollack*, 674 So.2d 805, 806 (Fla. 3d DCA 1996).

7. Florida courts have held where an objective observation cannot be made in respect to whether the scaring in fact is permanent, and has left some remnants that are visible, the plaintiff cannot recover damages for suffering a "significant and permanent scarring or disfigurement." *See Geico Gen. Ins. Co. v. Cirillo-Meijer*, 50 So.3d 681, 684-685 (Fla. 4th DCA 2010) (Holding that where the plaintiff had yet to have surgery, "there was no evidence regarding the extent to which any scarring would be visible and remain so, or the extent to which the scars would be discolored or raised, i.e., there was no evidence apart from the length that would have permitted a jury to find that the scar rose to the level of 'significant and permanent.'").

8. Lastly, the issue of whether a scar or disfigurement, under Fla. Stat. §627.737, rises to the level of permanent and therefore meets the threshold under the statute, is a factual one for the jury to decide. *See Jarrell v. Churm*, 611 So.2d 69 (Fla. 4th DCA 1992); *Martin v. Young*, 443 So.2d 293 (Fla. 3d DCA 1983).

VI. Embarrassment/Humiliation/Inconvenience – Riley Beam; Douglas R. Beam, P.A., Melbourne, Fla.

A. Determination Is Purely A Function of The Judiciary

1. "[W]e cannot imagine a more purely judicial function than a contested adjudicatory proceeding involving disputed facts that results in an award of unliquidated common law damages for personal injuries in the form of humiliation and embarrassment. We see a significant distinction between administrative awards of quantifiable damages for such items as back rent or back wages and awards for such nonquantifiable damages as pain and suffering or humiliation and embarrassment." *Broward County v. La Rosa*, 505 So.2d 422, 424 (Fla. 1987).

2. Humiliation can be inferred from the circumstances as well as established by the testimony. *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

B. Humiliation In §1981 Cases

1. "The Supreme Court has indicated that a plaintiff may recover for emotional harm under §1981. *See Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. at 460, 95 S.Ct. at 1720 (1975). Humiliation and insult are recognized, recoverable harms. *See, e.g., Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir.1996)." *Ferrill v. Parker Group, Inc.,* 168 F.3d 468, 476 (11th Cir. 1999).

2. "The plaintiff testified at trial that he had been embarrassed and humiliated by defendant's refusal to rent an apartment to him. The evidence showed defendant openly laughed at plaintiff's desire to live in a predominantly white section of town and then hung up the telephone on him […] That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or special damages. *See McNeil v. P–N & S, Inc.*, 372 F.Supp. 658 (N.D.Ga.1973). In any event, the plaintiff offered sufficient evidence to establish his right to an evidentiary hearing for the court to carefully resolve issues as to sufficiency of the proof of compensatory damages and the amount thereof." *Marable v. Walker,* 704 F.2d 1219, 1220-21 (11th Cir. 1983).

C. Humiliation in False Arrest/Police Negligence Claims

African-American film crew members were stopped by security guards at Magic Mall in Orlando, Florida during their video shoot. The film crew had authority to film at the Mall, but the security guards called in a "signal zero" to the Orange County Sheriff's office. The crew was allegedly commanded, at gunpoint, to hit the ground. They were handcuffed, frisked, searched and interrogated before they were ultimately released with no charges filed. Each plaintiff was awarded $50,000 for mental anguish, inconvenience, humiliation, and lost capacity for enjoyment of life, as well as $2,000,000 in punitive damages. *Bartley v. Kim's Enter. of Orlando*, 2012 WL 8441369 (M.D.FL. 2012).

D. Humiliation As Part of Punitive Damages

Punitive damages award in amount of statutory cap of $500,000 for employer's battery of employee was not excessive, under Florida law; award did not evince passion, prejudice, or corruption, given the many years during which employer touched and harassed employee in the workplace, his repeated and public humiliations of her, and his refusal to desist despite her repeated requests. *Myers v. Central Florida Investments, Inc.*, 592 F.3d 1201 (11th Cir. 2010).

E. Contract Actions May Include Inconvenience/Loss of Use, but not Embarrassment/Humiliation

"We find that the physical discomfort suffered by the Hobbleys because of Sears' failure to install their new furnace was clearly in the contemplation of the parties at the time they entered into the agreement. The value of a warm home during the winter months, is not so uncertain or speculative as to be impossible to fix in a monetary award." *Hobbley v. Sears, Roebuck & Co.*, 450 So.2d 332, 333-34 (Fla. 1st DCA 1984).

F. Remittiturs/Additurs In Relationship to Embarrassment/ Humiliation/Inconvenience Damages

1. "It has long been the rule in this state that there is no objective standard by which to measure these kinds of damages." *Angrand v. Key*, 657 So.2d 1146, 1149 (Fla. 1995). "Jurors know the

nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem is not one of mathematical calculation but involves an exercise of their sound judgment of what is fair and right." *Id*. (quoting *Braddock v. Seaboard Air Line R. Co*., 80 So.2d 662, 668 (Fla. 1955).

2. Non-economic damages award of $1,100,000 for embarrassment and humiliation was "grossly excessive" in an age discrimination case, and failure to grant the motion for remittitur was an abuse of discretion. *City of Hollywood v. Hogan*, 986 So.2d 634, 647 (Fla. 4th DCA 2008).

VII. Loss of Capacity for the Enjoyment of Life – by Dustin Herman; Romano Law Group, Lake Worth, Fla.

A. Florida Has Long Recognized the Loss of Capacity for the Enjoyment of Life as Separate From Pain and Suffering

1. "The measure of damages in a case like the one at bar embraces many elements. The pain and suffering, both physical and mental, resulting from the character or nature of the injury, the inconvenience, humiliation, and embarrassment she will suffer on account of the loss of an arm, the diminished capacity for enjoyment of life to which all the limbs and organs of the body with which nature has provided us are so essential, and her diminished capacity for earning a livelihood, all of these inconveniences and humiliations the child will suffer the remainder of her life, regardless of the element of her life expectancy." *Tampa Electric Co. v. Bazemore*, 85 Fla. 164, 179, 96 So. 297, 302 (Fla. 1923) (emphasis added).

2. Loss of human relations is an important part of a damages calculation. *See Florida Power & Light, Co. v. Robinson*, 68 So.2d 406, 415 (Fla. 1953) (large verdict justified where plaintiff had no control of his bowels, was unable to be intimate with his wife, and "no longer ha[d] an active and normal family life or any social contacts").

3. "Any bodily injury sustained by (name) and any resulting pain and suffering [disability or physical impairment] [disfigurement] [mental anguish] [inconvenience] [or] [loss of capacity for the enjoyment of life] experienced in the past [or to be experienced in the future]. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence." Fla. Std. Jury Instr. (Civil) 501.2(a).

B. "Per diem" Arguments Are Within Trial Court's Discretion

1. It is not an abuse of discretion for a trial court to allow counsel to make a per diem argument for "pain and suffering" and "physical disability and inability to lead a normal life." *Ratner v Arrington*, 111 So.2d 82, 89 (Fla. 3d 1959) (taking judicial notice that it has long been the custom in Dade County for attorneys "to use damage charts in arguments to the jury and to submit perdiem amount arguments with reference to such elements of damages as pain and suffering, inability to lead a normal life and loss of earning capacity"). See also *Perdue v. Watson*, 144 So.2d 840 (Fla. 2d DCA 1962) (expressly adopting the reasoning and conclusion in *Ratner*).

2. The Supreme Court of Florida per curiam affirmed a plaintiff's use of a large chart to visually present the per diem argument to the jury. *Seaboard Air Line R. Co. v. Braddock*, 96 So.2d 127 (Fla. 1957) (the dissenting opinion included the chart in its entirety in the opinion).

3. "The weight of authority favors allowing use in argument of a mathematical formula such as suggesting amounts of a per diem basis when damages for pain and suffering are involved." *Ratner*, 111 So.2d 82, 88 (Fla. 3d 1959) (citing numerous cases around the country that allow per diem arguments).

4. "If the trial court decides to permit a per diem argument, it may caution the jury that the figures used therein are not to be considered as evidence. However, the instruction given in this case simply went too far." *McDaniel v. Prysi*, 432 So.2d 174, 175 (Fla. 2d 1983) (scolding the trial court for implying that "the figures were ridiculous").

5. "Authorities approving [per diem] arguments give numerous reasons:

(1) that it is necessary that the jury be guided by some reasonable and practical considerations;

(2) that a trier of the facts should not be required to determine the matter in the abstract, and relegated to a blind guess;

(3) that the very absence of a yardstick makes the contention that counsel's suggestions of amounts mislead the jury a questionable one;

(4) the argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing, because the jury must, by that or some other reasoning process, estimate and allow an amount appropriately tailored to the particular evidence in that case as to the pain and suffering or other such element of damages;

(5) that a suggestion by counsel that the evidence as to pain and suffering justifies allowance of a certain amount, in total or by per diem figures, does no more than present one method of reasoning which the trier of the facts may employ to aid him in making a reasonable and sane estimate;

(6) that such per diem arguments are not evidence, and are used only as illustration and suggestion;

(7) that the claimed danger of such suggestion being mistaken for evidence is an exaggeration, and such danger, if present, can be dispelled by the court's charges; and

(8) that when counsel for one side has made such argument the opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which the damages are sought."

Ratner, 111 So.2d at 89.

C. "Value of Life" Arguments Are Improper

1. Cannot compare value of plaintiff's life to a painting. *See Fasani v. Kowalski*, 43 So.3d 805, 810-11 (Fla. 3d DCA 2010) (can't compare a brain injury to a damaged Picasso painting); *Chin v. Caiaffa*, 42 So.3d 300, 310 (Fla. 3d DCA 2010); *Carnival Corp. v. Pajares*, 972 So.2d 973, 979 (Fla. 3d DCA 2007) (comparison of life to a Van Gogh painting "highly improper, but not fundamental error requiring reversal even though opposing party did not object at the time statement was made);

2. Use of the "magic button" analogy was improper. *Bocher v. Glass*, 874 So.2d 701 (Fla. 1st DCA 2004) (granting new trial when plaintiff's counsel used jurors' names in the "magic button" analogy during closing, implicating suggesting that the jurors place themselves in the plaintiff's shoes, and plaintiff's counsel also compared the value of life to a painting).

3. Cannot urge the jury to place a monetary value on life "just as a monetary value is placed on an eighteen million dollar Boeing 747 or an eight million dollar SCUD missile." *Public Health Trust of Dade County v. Geter*, 613 So.2d 126, 127 (Fla. 3d DCA 1993) (holding that the trial court erred in failing to grant a new trial).

4. Cannot compare Plaintiff's damages to that of celebrities or people in the news. *Wright & Ford Millworks, Inc. v. Long*, 412 So.2d 892 (Fla. 5th DCA 1982) (counsel brought up Paul Newman, James Garner, and Carol Burnett in closing).

D. Not All States Recognize Loss of Enjoyment of Life as a Separate From Pain and Suffering

1. "There exist three well-known categories of compensatory damages in personal injury cases: (1) loss of earning capacity; (2) out-of-pocket expenses; and (3) pain and suffering. About half of the states recognize a fourth category-'loss of enjoyment of life.'" *Rufino v United States*, 829 F.2d 354, 359 (2d Cir. 1987). "We cautiously predict that in this evolving area of the law, New York will in due course recognize loss of enjoyment of life as a separately compensable item of damages." *Id.* at 362.

2. A case often cited by state courts analyzing the issue is *Thompson v. Nat. Railroad Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980) ("Pain and suffering, permanent injury, and loss of enjoyment of life each represent separate losses which the victim incurs. Permanent impairment compensates the victim for the fact of being permanently injured whether or not it causes any pain or inconvenience; pain and suffering compensates the victim for the physical and mental discomfort caused by the injury; and loss of enjoyment of life compensates the victim for the limitations on the person's life created by the injury.").

E. No Damages for Loss of Enjoyment of Life Under Florida's Wrongful Death Statute

"The [Florida Wrongful Death Act] does not, however, provide a cause of action for the pain and suffering of a decedent, nor does it provide for hedonic damages . …" *Degraw v. Gualtieri*, 2013 WL 3462332*3 (M.D. Fla. 2013).

F. Damages For Loss of the Capacity For Enjoyment of Life For Comatose Patients Not Decided In Florida

1. "The Supreme Court of Appeals of West Virginia held that, as a matter of state law, damages for the loss of the capacity to enjoy life were assessable upon an objective basis, and it did not matter that this particular plaintiff is unaware of his loss. It is perfectly clear, however, that an award of $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him." *Flannery for Flannery v. U.S.*, 718 F.2d 108, 111 (4th Cir. 1983) (after certifying the question to the West Virginia Supreme Court, the Fourth Circuit decided the question on its own by labeling damages awarded to a comatose patient for loss of enjoyment of life as punitive, and striking down the award since punitive damages are not allowed under the Federal Tort Claims Act).

2. The Supreme Court of Florida avoided deciding the issue by remanding the case on other grounds, but Justice Overton dissented and stated: "I would expressly reject the Flannery Rule. . . . I am unable to accept the proposition that a comatose patient may not, as a matter of law, recover compensatory damages for the loss of capacity for the enjoyment of life. Under such a rule of law, damages awarded to the most grievously injured individuals would be reduced solely because of the nature and seriousness of the victims' injuries." *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 792 (Fla. 1985) (Overton J., dissenting).

G. All District Courts Agree: Claiming Damages for Loss of Enjoyment of Life Does Not Waive the Psychotherapist-Patient Privilege

1. "A claim for loss of enjoyment of life, 'without more, does not place the mental or emotional condition of the plaintiff at issue so as to waive the protection of section 90.503.'" *Byxbee v. Reyes*, 850 So.2d 595, 596 (Fla. 4th DCA 2003) (quoting *Partner-Brown v. Bornstein*, 734 So.2d 555, 556 (Fla. 5th DCA 1999)); see also *Ireland v. Francix*, 945 So.2d 524, 525 (Fla. 2d DCA 2006).

2. "Although the psychiatric records might contain information that would be relevant for impeachment purposes . . . the section 90.503(4)(c) exception applies only when the patient-rather than some party who opposes the patient in litigation-places his mental or emotional condition in issue." *Bandorf v. Volusia County Dept. of Corrections*, 939 So.2d 249, 251 (Fla. 1st DCA 2006).

3. Even requiring psychotherapy records to be produced for an in camera inspection by the court violates the psychotherapist-patient privilege when the plaintiff has not placed his mental condition at issue. *Webb v. Dollar Tree Stores, Inc.*, 987 So.2d 778 (Fla. 3d DCA 2008).

VIII. Punitive/Exemplary Damages – by Christopher Paulos; Levin Papantonio Thomas Mitchell Rafferty & Proctor, Pensacola, Fla.

A. Punitive Damages are Permitted by Statute in Florida but Must Be Specifically and Timely Sought

1. Pursuant to Florida Statute §768.72, "[i]n any civil action, [a] claim for punitive damages shall be permitted [if] 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." Punitive damages are considered "general damages" in Florida (see *Winn & Lovett Grocery Company v. Archer*, 171 So. 214 (Fla. 1936)).

2. The amount of punitive damages is correlated to any award for compensatory damages, and ultimately controlled by statutory limitations (first enacted in 1987, discussed below) and/or the Fourteenth Amendment due process considerations of *BMW of North America v. Gore*, 517 U.S. 559 (1996).

3. "Courts have interpreted the text [of Florida Statute § 768.72] to contain two distinct parts: a pleading aspect and a discovery aspect." *Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1349 (S.D. Fla. 2008).

B. Pleading and Proving Punitive Damages

1. Plaintiffs who generally plead punitive damages in their initial complaint should expect motions to dismiss or strike those portions/allegations. However, "[t]he claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure." Fla. Stat. §768.72(1). "[T]o plead a claim for punitive damages, a plaintiff must comply with section 768.72(1), Florida Statutes." *Estate of Despain v. Avante Group, Inc.*, 900 So.2d 637, 641 (Fla. 5th DCA 2005). "[S]ection 768.72 has created a substantive legal right not to be subject to a punitive damage claim until the trial court rules that there is a reasonable evidentiary basis for punitive damages." *Holmes v. Bridgestone/Firestone, Inc.*, 891 So.2d 1188, 1191 (Fla. 4th DCA 2005) (citing *Globe Newspaper Co. v. King*, 658 So.2d 518 (Fla.1995)). *See Estate of Despain*, at 641-42. See also *Leavins v. Crystal*, 3 So.3d 1270, (Fla. 1st DCA 2009).

2. "Although the safest practice would be to proffer the actual evidence, an oral proffer may be sufficient, particularly if there is no dispute as to what the evidence would have been." *Holmes*, 891 So.2d 1188, n.1.

3. The question as to the "reasonableness" of plaintiff's evidentiary showing for the recovery of punitive damages is a matter of law subject to de novo review, as opposed to an abuse-of-discretion standard applied to traditional rulings on amendments. *Id.*

4. Florida Rule of Civil Procedure Rule 1.190(F) provides that "[a] motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing." (emphasis added).

C. Discovery Designed for Punitive Damages

1. Florida Statute § 768.725 provides that in "all civil actions, the plaintiff must prove [punitive damages] by clear and convincing evidence... the 'greater weight of the evidence' burden of proof applies to a determination of the amount of damage." *See Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1009 (Fla. 1st DCA 2009) (reversing the trial court and holding that sufficient evidence to support an amended claim for punitive damages had been proffered). "The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted." Fla. Stat. §768.72(1).

2. Federal courts have found Florida's statutory restriction on financial worth discovery is "a pleading statute that has no effect on discovery practice in federal court" and may give rise to a conflict between §768.72's "discovery aspect" and Federal Rule of Civil Procedure Rule 26. Rule 26 will govern the discovery of a party's financial worth in a federal diversity cases. *Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1349 (S.D. Fla. 2008).

D. Bifurcation of Trial

1. "[T]rial courts, when presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial. At the first stage of a trial in which punitive damages are an issue, the jury should hear evidence regarding liability for actual damages, the amount of actual damages, and liability for punitive damages... If, at the first stage, the jury determines that punitive damages are warranted, the same jury should then hear evidence relevant to the amount of punitive damages[.]" *W.R. Grace & Co.-Conn., v. Waters*, 638 So.2d 502 (Fla. 1994).

2. See also, *Dessanti v. Contreras*, 695 So.2d 845 (Fla. 4th DCA 1997) (holding failure to bifurcate was harmless error). *See Swanson v. Robles*, 39 FLW D13 (Fla. 2nd DCA 2013) (pending release for publication) for a recent discussion of the W.R. Grace and *Dessanti* opinions. See also, Fla. Std. Jury Instr. (Civil) §§503.1 and 503.2 regarding punitive damages for bifurcated and non-bifurcated proceedings.

E. Statutory Limitations on Punitive Damages

1. Florida Statute §768.73 limits the amount of punitive

damages to 3x the amount of compensatory damages awarded to each claimant or $500,000. In cases where the finder of fact determines the conduct submitted for punitive damages was motivated solely by unreasonable financial gain or that the tortfeasor was aware of the unreasonably dangerous nature of their conduct, or knew of the high likelihood of injury, then the limitation on the award of punitive damages is increased to 4x the compensatory damages, or $2 million.

2. If it is determined that the defendant(s) had the specific intent to harm, or were intoxicated at the time of the act or omission, or if the civil action involves abuse of a child or elderly person, then the statutory caps do not apply. See Fla. Stat. §768.736, and §768.74.

3. Punitive damages against nursing homes and related healthcare facilities are specifically governed by Fla. Stat. §400.0238 (enacted May 15, 2001, amended on June 26, 2003) and provide for a maximum award of either 3x or 4x the compensatory damages or $1 million to $4 million, depending on the egregiousness of the conduct.

4. Florida's standards for and limitations on punitive damages apply in arbitration proceedings when the remedy is available. The arbitrator awarding punitive damages must issue a written opinion setting forth the conduct giving rise to the punitive damages and their application of the standards set by §768.72. Fla. Stat. §768.737.

5. Florida Statutes governing the limitation of punitive damages have been found by the Florida Supreme Court to be substantive laws that may not apply to misconduct that arose before the effective date of the statute, therefore, the date of a defendant's conduct should always be considered when seeking and measuring punitive damages. *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994), (disapproved of by *Weingrad v. Miles*, 29 So.3d 406 (Fla. 3d DCA 2010) (Third District DCA found the statutory cap on noneconomic damages in medical malpractice actions was substantive in nature and therefore could be retroactively applied)). Recently, the Florida Fourth DCA, relying on *Mancusi*, ruled that §768.73(1)(a)(1) did not "require" the reduction of punitive damages to 3x the compensatory award due to the date upon which the defendants' conduct giving rise to the punitive award occurred. *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So.3d 1049, 1050 (Fla. 4th DCA 2013), reh'g denied (Dec. 11, 2013).

6. Florida's limitations on punitive damages, and other reformations of the civil tort system, have been challenged on constitutional grounds and upheld. *State v. Florida Consumer Action Network*, 830 So.2d 148, 156 (Fla. 1st DCA 2002) (seeking declaratory relief of a trial court order finding revisions to Florida's tort system violative of Article III, Section 6, of Florida Constitution; single-subject requirement. (The First DCA reversed and remanded, rev. den'd by FL Sup. Ct., 852 So.2d 861 (Fla. 2003))).

F. Constitutional Limitations on Punitive Damages

1. Two United States Supreme Court cases frequently cited by both defendants and plaintiffs on the issue of punitive damages are *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). These cases provide litigants and courts with "guideposts" on appropriateness and fairness of monetary damage awards designed to punish defendants for their conduct. These cases have been relied upon by courts in examining punitive damage awards that raise or surpass the threshold of state laws or precedent that provide for the remedy civil cases.

2. In determining if a punitive award is unconstitutional, a court should weigh: 1) the degree of reprehensibility of the nondisclosure; 2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between award at issue and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. 559, at 575.

3. To determine a defendant's reprehensibility, "the most important indicium" of a punitive damages award's reasonableness— courts must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. *State Farm*, 538 U.S. 408, 409 (2003) (citing *Gore*).

4. The U.S. Supreme Court, in *Gore* and *State Farm*, also indicated that a punitive damages award exceeding a single-digit ratio between the punitive and compensatory damages will likely be found violative of a defendant's due process rights. Limiting awards to single-digit ratios will still achieve a State's deterrence and retribution goals, while avoiding due process impingement. The U.S. Supreme Court has commonly used a 4 to 1 ratio in their decisions, but have affirmed awards of greater range if the balancing test of *Gore* provides a rationale. *Id., see also, Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

5. Lastly, in determining the difference between award at issue and the civil penalties authorized or imposed in comparable cases, the U.S. Supreme Court has also cautiously considered the availability and amount of criminal penalties that could be imposed. "[T]he remote possibility of a criminal sanction does not automatically sustain a punitive damages award," but does "have bearing on the seriousness with which a State views the wrongful action." *State Farm*, 538 U.S. 408, at 428.

6. Courts have used these "guideposts," along with the Florida statutory limitations, to both uphold or reverse punitive damages awards that are facially violative of §768.73.

7. "The three criteria a punitive damages award must satisfy under Florida law to pass constitutional muster are: (1) "the

manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct;" (2) the award "bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy to the defendant;" and (3) a reasonable relationship exists between the compensatory and punitive amounts awarded." *R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1072 (Fla. 1st DCA 2010) (quoting *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (2006)). See also, *RoadSafe Traffic Sys., Inc. v. Ameriseal Ne. Florida, Inc.*,WL 4543214 (D. Del. 2011).

G. Remittitur & Additur

1. Pursuant to Florida Statute §768.74, the trial court has the responsibility to review the amount of an award and determine if it is excessive or inadequate "in light of the facts and circumstances which were presented to the trier of fact." §768.74(1). "If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be." §768.74(2). In making its determination, the trial court is guided by the following statutory considerations:

> "In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
>
> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons."

Fla. Stat. §768.74(5). See also, *Lorillard Tobacco Co. v. Alexander*, 123 So.3d 67, 76 (Fla. 3d DCA 2013) (reh'g denied (Oct. 29, 2013) (finding a $25 million punitive damages not unconstitutionally excessive and affirming the trial court's remittitur of compensatory damages in light of the jury's finding of comparative fault)).

2. "If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only." Fla. Stat. §768.74(4).

3. Recently, defendants in tobacco cases have used *Waste Mgmt., Inc. v. Mora*, 940 So.2d 1105, 1109 (Fla. 2006), to claim that they are the adversely affected party as defined by §768.74(4) (whereas *Mora* addressed §768.043(1), providing for remittitur and additur in actions arising from operation of motor vehicles, and found that the plaintiff was the adversely affected party as defined by that section; it should also be noted that *Mora* involved a plaintiff's objection to the trial court's additur despite no pending motion).

4. The use of *Mora* by tobacco defendants has found traction with some courts. In *R.J. Reynolds Tobacco Co. v. Townsend*, 118 So.3d 844, 847 (Fla. 1st DCA 2013), the court found that the defendants had waived their right to seek a new trial on damages as provided for by *Mora* and §768.74(4). On December 17, 2013, in their second appeal on damages, the defendants in *R.J Reynolds v. Webb*, 93 So.3d 331 (1st DCA 2012) succeeded in setting aside the trial court's remittitur of compensatory and punitive damages and denial of a new trial on the issues. *R.J Reynolds v. Webb,* 130 So.3d 262, 264 (Fla. 1st DCA 2013), reh'g denied (Jan. 29, 2014) ("Webb II"). The First DCA opined that the defendants were the "adversely affected" party under §768.74(4) and because they did not agree to the remittitur, a new trial on damages was proper. This recent decision calls into question the practicality of Florida remittitur, which under *Webb II* is now tantamount to court-ordered post-verdict settlement negotiations, with a new trial always available to the "adversely affected" party.

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