Name of Preparer:

Gary F. Baumann, Esq. - Baumann, Gant & Keeley, P.A.

City and State of Firm:

Fort Lauderdale, Florida

Overview of State of Florida Court System

A. Trial Courts

Circuit courts are the highest trial courts in Florida's judicial system and are courts of general jurisdiction. Cases include matters relating to major criminal offenses (felonies) which can result in imprisonment in a state correctional institution, domestic relations cases such as dissolution of marriage (divorce), civil cases involving amounts greater than $15,000, juvenile delinquency and dependency cases, and probate cases, such as the processing of wills and settling estates of deceased persons. Circuit courts are also granted the power to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, and all other writs necessary to the complete exercise of their jurisdiction. Circuit courts are simultaneously the highest trial courts and the lowest appellate courts in Florida's judicial system. The majority of jury trials in Florida take place before one judge sitting as judge of the circuit court.

County courts, which are courts of limited jurisdiction, handle county and city ordinance violations, traffic infractions, minor criminal offenses (misdemeanors), and civil cases involving amounts of $15,000 or less, such as landlord-tenant and small claims disputes. The majority of non-jury trials in Florida take place before one judge sitting as a judge of the county court.

While not mandatory, by application of custom, practice, and local rules, most civil cases filed in Florida will be mediated by agreement or order at some stage in the litigation. Additionally, mediation can be required by statute or contract.

B. Appellate Courts

District Courts

The State is divided into appellate court districts and there is district court of appeal (DCA) serving each district. There are five such districts that are headquartered in Tallahassee, Lakeland, Miami, West Palm Beach, and

Daytona Beach.

The district courts of appeal can hear appeals from final judgments and can review certain non-final orders. By general law, the district courts have been granted the power to review final actions taken by state agencies in carrying out the duties of the executive branch of government.
Additionally, the district courts have been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.

As a general rule, decisions of the district courts of appeal represent the final appellate review of litigated cases. A person who is displeased with a district court's express decision may ask for review in the Florida Supreme Court and then in the United States Supreme Court, but neither tribunal is required to accept the case for further review. Most are denied.

Supreme Court

The highest Court in Florida is the Supreme Court, which is composed of seven Justices. At least five Justices must participate in every case and at least four must agree for a decision to be reached.

The jurisdiction of the Supreme Court is set out in the Constitution with some degree of flexibility by which the Legislature may add or take away certain categories of cases. The Court must review final orders imposing death sentences, district court decisions declaring a State statute or provision of the State Constitution invalid, bond validations, and certain orders of the Public Service Commission on utility rates and services. If discretionary review is sought by a party, the Court at its discretion may review any decision of a district court of appeal that expressly declares valid a state statute, construes a provision of the state or federal constitution, affects a class of constitutional or state officers, or directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. The Supreme Court may review certain categories of judgments, decisions, and questions of law certified to it by the district courts of appeal and federal appellate courts. The Supreme Court has the constitutional authority to issue the extraordinary writs of prohibition, mandamus, quo warranto, and habeas corpus and to issue all other writs necessary to the complete exercise of its jurisdiction.

Post-Judgment Interest Rate is 4.75% per annum.

Procedural

A. Venue

Generally, actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

- Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.
- Actions on several causes of action may be brought in any county where any of the causes of action arose. When two or more causes of action joined arose in different counties, venue may be laid in any of such counties, but the court may order separate trials if expedient.
- Actions on several causes of action may be brought in any county where any of the causes of action arose. When two or more causes of action joined arose in different counties, venue may be laid in any of such counties, but the court may order separate trials if expedient.
- A change of venue shall be granted when it appears impracticable to obtain a qualified jury in the county where the action is pending.

B. Statute of Limitations

Written Contract – 5 years
Construction Defect – 10 years
Professional Malpractice – 2 years
Negligence – 4 years
Wrongful Death – 2 years

C. Time for Filing an Answer

Unless a different time is prescribed in a statute of Florida, a defendant shall serve an answer within 20 days after service of original process and the initial pleading on the defendant, or not later than the date fixed in a notice by publication.

D. Dismissal Re-Filing of Suit

Voluntary Dismissal

Except in actions in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be

dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (B) by filing a stipulation of dismissal signed by all current parties to the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim.

Leave of Court

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.

Liability

A. Negligence

In a comparative negligence system, the injured party may still recover some of his or her damages even if he or she was partially to blame for causing the accident. Plaintiff's financial recovery may be reduced, or even prohibited, depending how plaintiff's actions caused or contributed to the accident

In a contributory negligence system, the injured person could only recover for his/her injuries and damages if they did not contribute to the accident in any way.

Florida is a pure comparative negligence system, which means a judge or jury assigns a percentage of fault to each responsible party and then apportions the damage award accordingly. Using this system, an injured person may recover his or her damages even if the injured person was

99% at fault in causing the injury, with those damages reduced by his or her portion of the fault.

B. Negligence Defenses

Implied assumption of risk has historically been divided into the categories of primary and secondary. The term primary assumption of risk is simply another means of stating that the defendant was not negligent, either because he owed no duty to the plaintiff in the first instance, or because he did not breach the duty owed. Secondary assumption of risk is an Affirmative Defense to an established breach of a duty owed by the defendant to the plaintiff.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence means that 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

D. Negligent Hiring and Retention

(1) In a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, such employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general. A background investigation under this section must include:

(a) Obtaining a criminal background investigation on the prospective employee under subsection (2);

(b) Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;

(c) Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;

(d) Obtaining, with written authorization from the prospective employee, a check of the driver's license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or
(e) Interviewing the prospective employee.

(2) To satisfy the criminal-background-investigation requirement of this section, an employer must request and obtain from the Department of Law Enforcement a check of the information as reported and reflected in the Florida Crime Information Center system as of the date of the request.

(3) The election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee.

Action based on negligence of employer

- Common theory in intentional tort cases – where employee acts outside course of employment (*Tallahassee Furniture v. Harrison*); contact between employee and third party must be employment-related
- Charitable entity may be subject to liability (*Malicki v. Doe*, 2002 Fla. LEXIS 434 (Fla. Mar. 14, 2002) (Church corporation)
- Duty to investigate employees background: when position will require employee to ensure the welfare and safety of third parties, the law imposes duty of reasonable inquiry into the prospective employee's history (*Williams v. Feather Sound, Inc*.)
- Presumption of reasonable care when employer performs statutory background check (See F.S. 768.096)(Must be causal connection between failure of investigation and tort)

E. Negligent Entrustment

Motor vehicles: Consent to use shifts burden to owner of vehicle to show conversion (Affirmative defense)

- Statutory exception to liability for long term leases

Firearms:

- Knew or should have known standard
- Sale to intoxicated person may be basis for liability

F. Dram Shop

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

G. Joint and Several Liability

In Florida, Joint and Several Liability has been replaced with comparative law.

H. Wrongful Death and/or Survival Actions

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, but shall not affect the recovery of any other survivor.

I. Vicarious Liability

A person or other legal entity is subject to liability for the negligence of another person, who is himself negligent, based upon the relationship

between the wrongdoer and that person or entity

Respondeat Superior: A relationship between Employer-employee or Principal-agent

Elements of cause of action:

(1) employment relationship existed between tortfeasor and employer at the time the tort was committed and

(2) the employee's negligent act or omission (*Hargrove v. City of Cocoa Beach*), or wrongful act, occurred within the scope of employment and in furtherance of the employer's interest

Court will consider whether:

(1) Work was of the kind the servant was employed to perform

(2) The conduct occurred substantially within the hours of work and at the place of work

(3) Act was intended, at least in part, to serve interests of the employer (motive test)*

* Rejection of liability under motive rule illustrated in assault & battery, and sexual harassment cases

* Employer may be subject o liability under negligence theory for negligent hiring or retention (*Tallahassee Furniture v. Harrison*)

* Employer ratification of act, constructive knowledge of wrongful nature of employee's

Independent Contractor: General rule of non-liability of employer for negligence of independent contractor

Exceptions:

(1) Where employer assumes actual control over the method of performance, including the order in which the work is done, the time at which specific tasks are to be performed, and the selection of employees to complete certain services (Mere monitoring, e.g., for insurance purposes, or retention of general supervisory control, e.g., as to timetable, not sufficient to impose liability)

(2) The agreement is for the contractor's performance of a non-delegable duty of the employer

(3) The contracted work is an inherently dangerous activity: machine, vehicle, or tool the use of which exposes the public to an extraordinary risk of harm (See also hazardous occupations

statute, F.S. Ch 769) (exception re contractor's own employees, unless employer fails to warn contractor of non-obvious danger to contractor's employees)

(4) The contracted work involves the use of an inherently dangerous instrumentality

(5) The contract requires the independent contractor to act tortuously

(6) The employer knows or should know of a danger on the property where the work is performed and fails to warn the independent contractor adequately of the danger.

J. Exclusivity of Workers' Compensation

Florida's Workers' Compensation law provides, in most instances, that workers' compensation is the "exclusive remedy" for work related injuries

- Injured workers are prohibited from suing the employer for injuries suffered while on the job.
- If the on the job injuries are caused by the negligence of a co-worker, you may be able to bring a personal injury claim against the individual.
- If an employer's negligent conduct rises to the level of "culpable", then a cause of action could be maintained for damages for injuries sustained due to the employer's negligent actions. Proving an employer culpable is a very difficult burden and Florida's courts rarely make such a finding.

Damages

A. Statutory Caps on Damages

1. Damage Caps Against Practitioners

- **Limitations Generally:** Non-economic damages shall not exceed $500,000 per plaintiff, and no practitioner defendant shall be liable for more than $500,000 in non-economic damages. Also, the total non-economic damages recoverable from all plaintiffs against all practitioners shall not exceed $1,000,000.
- **Death or Permanent Vegetative State:** There is an exception to the general rule for cases of death or permanent vegetative states. If the negligence results in a permanent vegetative state or death, total non-economic damages recoverable from all practitioners shall not exceed $1,000,000.
- **Severe Non-Economic Harm and Catastrophic Injury:** There is another exception to the general rule: if the non-economic harm to

the plaintiff is particularly severe and the negligence caused a "catastrophic injury," the total non-economic damages recoverable from all practitioners shall not exceed $1,000,000.

- **Limitations for Negligence Arising out of Emergency Services and Care:** Non-economic damages shall not exceed $150,000 per plaintiff. Also, the total non-economic damages recoverable by all plaintiffs from all practitioners shall not exceed $300,000.
- **Limitations for Negligence Arising out of Services and Care to a Medicaid Recipient:** Non-economic damages may not exceed $300,000 per plaintiff. Also, each practitioner providing care to a Medicaid recipient is not liable for more than $200,000. However, these limitations do not apply if the plaintiff(s) can prove that the practitioner(s) acted in a wrongful manner.

2. Damage Caps Against Non-Practitioners

- **Limitations Generally:** Non-economic damages shall not exceed $750,000 per plaintiff against all non-practitioners. Also, the total non-economic damages recoverable by all plaintiffs from all non-practitioners shall not exceed $1,500,000.
- **Death or Permanent Vegetative State:** There is an exception to the general rule for cases of death or permanent vegetative states. If the negligence results in a permanent vegetative state or death, total non-economic damages recoverable from all non-practitioners shall not exceed $1,500,000.
- **Severe Non-Economic Harm and Catastrophic Injury:** There is another exception to the general rule: if the non-economic harm to the plaintiff is particularly severe and the negligence caused a "catastrophic injury," the total non-economic damages recoverable from all practitioners shall not exceed $1,500,000.
- **Limitations for Negligence Arising out of Providing Emergency Services and Care:** Non-economic damages shall not exceed $750,000 per plaintiff. Also, the total economic damages recoverable by all plaintiffs from all non-practitioner defendants shall not exceed $1,500,000.

B. Compensatory Damages for Bodily Injury

Jury Instructions

a. When directed verdict is given on liability:

You should award (claimant) an amount of money that the

greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damage (claimant) is reasonably certain to [incur] [experience] in the future. You shall consider the following elements:

b. All other cases:

If your verdict is for **(defendant)**, you will not consider the matter of damages. But if the greater weight of the evidence supports **(claimant's)** claim, you should determine and write on the verdict form, in dollars, the total amount of [loss] [injury] [or] [damage] which the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damages that **(claimant)** is reasonably certain to incur or experience in the future. You shall consider the following elements:

Elements

a. Injury, pain, disability, disfigurement, loss of capacity for enjoyment of life:

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.

b. Medical expenses:

Care and treatment of claimant:

The 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].

Care and treatment of minor claimant after reaching majority:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably to be obtained by (minor claimant) after [he] [she] reaches the age of (legal age).

c. Lost earnings, lost time, lost earning capacity:

When lost earnings or lost working time shown:

[Any earnings] [Any working time] lost in the past [and any loss

of ability to earn money in the future].

When earnings or lost working time not shown:

Any loss of ability to earn money sustained in the past [and any such loss in the future].

d. Spouse's loss of consortium and services:

On the claim brought by (spouse), you should award (spouse) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (spouse) for any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future] caused by the incident in question.

e. Parental damages for care and treatment of claimant's minor child; parental loss of child's services, earnings, earning capacity:

On the claim[s] of (parent(s)), you should award (parent(s)) an amount of money, which the greater weight of the evidence shows will fairly and adequately compensate (parent(s)) for damages caused by the incident in question. You shall consider the following element[s] of damage:

The reasonable [value] [or] [expense] of [hospitalization and] medical [and nursing] care and treatment necessarily or reasonably obtained by (parent(s)) for [his] [her] [their] child, (name), in the past [or to be so obtained in the future until (name) reaches the age of (legal age)].

[Any loss by (parent(s)) by reason of [his] [her] [their] child's injury, of the [services] [earnings] [or] [earning ability] of [his] [her] [their] child in the past [and in the future until the child reaches the age of (legal age)].]

[Any economic loss sustained by (parent(s)) [including] [any earnings lost in the past] [and] [any loss of ability to earn money in the future] reasonably resulting from the need to care or provide for the child because of the child's injury [until (name) reaches the age of (legal age)].]

f. Parental loss of filial consortium as a result of significant injury resulting in child's permanent disability:

In addition, if the greater weight of the evidence shows that (claimant child) sustained a significant injury resulting in (claimant child's) permanent total disability, you shall consider the following element of damage:

Any loss by (parent(s)), by reason of that injury, of their child's

companionship, society, love, affection, and solace in the past [and in the future until the child reaches the age of (legal age)].

If the greater weight of the evidence does not support (parent(s)'s) claim that their child sustained a significant injury resulting in permanent total disability, your verdict should be for (defendant(s)) on this element of damage.

g. Unmarried dependent's claim for loss of parental consortium:

In addition, if the greater weight of the evidence shows that (claimant parent) sustained a significant injury resulting in (claimant parent's) permanent total disability, you shall consider the following element of damage:

Any loss by reason of (claimant parent's) injury of (claimant parent's) services, comfort, companionship and society in the past and in the future.

If the greater weight of the evidence does not support the claim that (claimant parent(s)'s) sustained a significant injury resulting in permanent total disability, your verdict should be for (defendant(s)) on this element of damage.

h. Property damage:

Any damage to [his] [her] [its] (identify automobile or other personal property).

The measure of such damage is:

[the difference between the value of the (name property) immediately before (incident complained of) and its value immediately afterward.]

[the reasonable cost of repair, if it was practicable to repair the (name property), with due allowance for any difference between its value immediately before the (incident complained of) and its value after repair.]

You shall also take into consideration any loss to (claimant) [for towing or storage charges and] by being deprived of the use of [his] [her] [its] (name property) during the period reasonably required for its [replacement] [repair].

C. Collateral Source

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award 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; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.

D. Pre-Judgment/Post-Judgment Interest

Prejudgment interest is the interest awarded from the period of time from when a sum is liquidated until the time a final judgment is entered. It is meant to compensate the prevailing party for the loss of use of his money from the date it is determined that he is entitled to a sum of money to the time when final judgment is entered. The calculation of prejudgment interest becomes increasingly important in those cases where parties file post-trial motions (i.e., motions for judgment notwithstanding the verdict, motions for costs, motions for new trial, etc.), that ordinarily take some time before they are heard and decided.

Conversely, post-judgment interest is the interest awarded for the period of time from the date of the final judgment until the money is finally collected. Post-judgment interest is meant to encourage parties to pay quickly the damages that are due, and to compensate the prevailing party for the inability to use the awarded money for the period of time that an appeal is pending, which in many cases can take up to several years to be decided.

E. Damages for Emotional Distress

Negligent Infliction of Emotional Distress Claim:

1) The plaintiff must suffer a physical injury;
2) the plaintiff's physical injury must be caused by the psychological trauma;
3) the plaintiff must be involved in some way in the event causing the negligent injury to another; and
4) the plaintiff must have a close personal relationship to the directly injured person.

The elements of the **Intentional Infliction of Emotional Distress** cause of action are:

1. The wrongdoer's conduct was intentional or reckless;

2. The conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
3. The conduct caused emotional distress; and
4. The emotional distress was severe.

Johnson v. State Dept. of Health and Rehab. Svc's, 695 So.2d 927 (Fla. 2d DCA 1997)]], *quoting Dominguez v. Equitable Life Assurance Soc'y*, 438 So.2d 58, 59 (Fla. 3d DCA 1983).

Only conduct, which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," meets the standard necessary to state a claim for IIED. *Clemente v. Horne*, 707 So.2d 865, 867 (Fla. 3d DCA 1998), *citing* Restatement (Second) of Torts, § 46 cmt. D (1965). "It is not enough that the intent is tortuous or criminal; it is not enough that the defendant intended to inflict emotional distress; and it is not enough if the conduct was characterized by malice or aggravation." *Id. citing State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So.2d 1210, 1213 (Fla. 5th DCA 1995).

Claims based solely on allegations of verbal abuse are also generally legally insufficient. *De La Campa v. Grifols America Inc.*, 819 so.2d 940 (Fla. 3d DCA 2002) *citing Ponton v. Scarfone*, 468 So.2d 1009 (Fla. 2d DCA 1985) (statements made to induce employee to join sexual liaison did not establish IIED).

F. Wrongful Death and/or Survival Action Damages

Jury Instructions with Elements

In determining the damages recoverable on behalf of (decedent's) estate, you shall consider the following elements:

a. Lost earnings:

The estate's loss of earnings of (decedent) from the date of injury to the date of death, [less any amount of monetary support you determine a survivor lost during that period].

b. Lost accumulations:

The estate's loss of net accumulations: "Net accumulations" is the part of (decedent's) net income [from salary or business] after taxes, including pension benefits [but excluding income from investments continuing beyond death], which (decedent), after paying [his] [her] personal expenses and monies for the support of [his] [her] survivors, would have left as part of [his]

[her] estate if [he] [she] had lived [his] [her] normal life expectancy.

c. Medical or funeral expenses:

Medical or funeral expenses due to (decedent's) injury or death which [have become a charge against (decedent's) estate] [were paid by or on behalf of (decedent) by one other than a survivor].

ELEMENTS FOR SURVIVING SPOUSE,CHILD OR PARENTS OF CHILD:

In determining any damages to be awarded (decedent's) personal representative for the benefit of (decedent's) surviving [spouse] [children] [or] [parents], you shall consider certain additional elements of damage for which there is no exact standard for fixing the compensation to be awarded. Any such award should be fair and just in the light of the evidence regarding the following elements:

d. Damages of surviving spouse:

The [(wife's) (husband's)] loss of (decedent's) companionship and protection, and [her] [his] mental pain and suffering as a result of (decedent's) injury and death. In determining the duration of the losses, you may consider the [joint life expectancy of (decedent) and (surviving spouse)] [life expectancy of (surviving spouse)] together with the other evidence in the case.

e. Damages by surviving child:

The loss by (name all eligible children) of parental companionship, instruction and guidance, and [his] [her] [their] mental pain and suffering as a result of (decedent's) injury and death. In determining the duration of those losses, you may consider the [joint life expectancy of (decedent) and (surviving child) [each of (surviving children)]] [life expectancy of (surviving children) [each of the surviving children]] together with the other evidence in the case.

f. Damages by surviving parent of child:

The mental pain and suffering of (parents) as a result of the injury and death of (child). In determining the duration of mental pain and suffering, you may consider the life [expectancy] [expectancies] of (surviving parent(s)) together with the other evidence in the case.

ELEMENTS FOR SURVIVORS, INCLUDING SURVIVING

SPOUSE, CHILD OR PARENTS OF CHILD:

In determining any damages to be awarded (decedent's) personal representative for the benefit of [each of] (decedent's) survivor[s]* (name them all), you shall consider the following elements:

**Further instructions may be required if there is a factual question of whether a person is a "survivor" within the meaning of F.S. 768.18(1).*

g. Lost support and services:

The [survivor's] [survivors', (name them all)], loss, by reason of (decedent's) injury and death, of (decedent's) support and services [including interest at (legal rate) on any amount awarded for such loss from the date of injury to the date of death]. In determining the duration of any future loss, you may consider the joint life expectancy of the survivor(s) and (decedent) [and the period of minority, ending at age 25, of a healthy minor child].

In evaluating past and future loss of support and services, you shall consider the survivor's relationship to (decedent), the amount of (decedent's) probable net income available for distribution to the survivor and the replacement value of (decedent's) services to the survivor(s). ["Support" includes contributions in kind as well as sums of money. "Services" means tasks regularly performed by (decedent) for a survivor that will be a necessary expense to the survivor because of (decedent's) death.]*

**The bracketed material should be given only when warranted by the evidence and requested by a party.*

h. Medical and funeral expenses paid by survivor:

[Medical] [or] [funeral] expenses due to (decedent's) [injury] [or] [death] paid by any survivor.

G. Punitive Damages

a. Punitive damages generally:

There is an additional claim in this case that you must decide. If you find for (claimant) and against (defendant(s)), you must decide whether, in addition to compensatory damages, punitive damages are warranted as punishment to [one or more of] (defendant(s)) and as a deterrent to others.

b(1). Punitive damages for acts of an individual defendant:

(Claimant) claims that punitive damages should be awarded against (defendant) for [his] [her] [its] conduct in (describe the alleged punitive conduct). Punitive damages are warranted against (defendant) if you find by clear and convincing evidence that (defendant) was guilty of intentional misconduct or gross negligence, which was a substantial cause of [loss] [injury] [or] [damage] to (claimant). Under those circumstances you may, in your discretion, award punitive damages against (defendant). If clear and convincing evidence does not show such conduct by (defendant), punitive damages are not warranted against (defendant).

"Intentional misconduct" means that (defendant) had actual knowledge of the wrongfulness of the conduct and that there was a high probability that injury or damage to (claimant) and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that (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.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

b(2). Direct liability for acts of managing agent, primary owner, or certain others:

(Claimant) claims that punitive damages should be awarded against (defendant) for the acts of (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) in (describe the alleged punitive conduct). Punitive damages are warranted against (defendant) if you find by clear and convincing evidence that (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault) [was] [were] personally guilty of intentional misconduct or gross negligence which was a substantial cause of [loss] [injury] [or] [damage] to (claimant). Under those circumstances you may, in your discretion, award punitive

damages against (defendant corporation or partnership). If clear and convincing evidence does not show such conduct by (managing agent, primary owner, or other person whose conduct may warrant punitive damages without proof of a superior's fault), punitive damages are not warranted against (defendant).

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to (claimant) and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) 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.]

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.]

b(3). Vicarious liability for acts of employee:

(Claimant) claims that punitive damages should be awarded against (employee/agent) and (defendant employer) for (employee/agent's) conduct in (describe the alleged punitive conduct). Punitive damages are warranted against (employee/agent) if you find by clear and convincing evidence that (employee/agent) was personally guilty of intentional misconduct or gross negligence, which was a substantial cause of [loss] [injury] [or] [damage] to (claimant). Under those circumstances you may, in your discretion, award punitive damages against (employee/agent). If clear and convincing evidence does not show such conduct by (employee/agent) punitive damages are not warranted against either (employee/agent) or (defendant employer).

If you find that that punitive damages are warranted against (employee/agent) you may also, in your discretion, award punitive damages against (defendant employer) if you find from clear and convincing evidence that:

(A). (defendant employer) actively and knowingly participated

in such conduct of (employee/agent); or

(B). the [officers] [directors] [or] [managers] of (defendant employer) knowingly condoned, ratified, or consented to such conduct of (employee/agent); or

(C). (defendant employer) engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to (claimant).

If clear and convincing evidence does not show such conduct by (defendant employer), punitive damages are not warranted against (defendant employer).

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to (claimant) and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) 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.]

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.]

(**b)(4). Vicarious liability for acts of employee where employee is not a party or is not being sued for punitive damages:**

(Claimant) claims that punitive damages should be awarded against (defendant employer) for (employee/agent's) conduct in (describe the alleged punitive conduct). Punitive damages are warranted if you find by clear and convincing evidence that (employee/agent) was personally guilty of intentional misconduct or gross negligence, which was a substantial cause of [loss] [injury] [or] [damage] to (claimant) and that:

(A). (defendant employer) actively and knowingly participated in such conduct of (employee/agent); or

(B). the [officers] [directors] [or] [managers] of (defendant

employer) knowingly condoned, ratified, or consented to such conduct of (employee/agent); or

(C). (defendant employer) engaged in conduct that constituted gross negligence and that contributed to the [loss] [damage] [or] [injury] to (claimant).

Under those you may, in your discretion, award punitive damages against (defendant employer). If clear and convincing evidence does not show such conduct by (employee/agent), punitive damages are not warranted against (defendant employer).

["Intentional misconduct" means that (person whose conduct may warrant punitive damages) had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to (claimant) and, despite that knowledge, [he] [she] intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of (person whose conduct may warrant punitive damages) 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.]

["Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. As I have already instructed you, "greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.]

c. Closing punitive damage instruction:

If you decide that punitive damages that are warranted against [one or more of] (defendant(s)) then you must decide the amount of punitive damages, if any, to be assessed as punishment against (defendant(s)) and as a deterrent to others. This amount would be in addition to the compensatory damages you have previously awarded. In making this determination, you should consider the following:

(1). the nature, extent and degree of misconduct and the related circumstances, including the following:

(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 [(defendant)] [(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)];

(C). whether, at the time of [loss] [injury] [or] [damage], [(defendant)] [(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)] had a specific intent to harm (claimant) and the conduct of [(defendant)] [(the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant)] did in fact harm (claimant), [and]

[(2). [the financial resources of (defendant(s)); and]

[(3). (identify any other circumstance that the jury may consider in determining the amount of punitive damages.)]

[However, you may not award an amount that would financially destroy (defendant(s)).]*

You may in your discretion decline to assess punitive damages. [You may assess punitive damages against one defendant and not the other[s] or against more than one defendant. Punitive damages may be assessed against different defendants in different amounts.]

H. Diminution in Value of Damaged Vehicle

Florida does recognize a valid claim for diminution of value against the negligent party and his or her insurance carrier. The Florida case of *Siegel v. Progressive Insurance Company*, 819 So.2d 238 (Fla. 2002) discussed this legal concept and its validity. While recognizing this right to claim diminution in value damages against an "at fault" party, the Court was careful to recognize that this remedy is not available against one's own insurance company. In other words, the claim arises out of the negligence claim against the negligent party but is not a remedy available under a contract theory against your own insurance company.

I. Loss of Use of Motor Vehicle

A person is entitled to be compensated for the loss of use of their vehicle. The amount of money they are entitled to for loss of use is normally

calculated by determining the cost of renting a similar vehicle times the number of days they were without the use of their vehicle.

Evidentiary Issues

A. Preventability Determination

Florida applies the doctrine of Comparative Negligence in this regard.

B. Traffic Citation from Accident

Citations shall not be admissible evidence in any trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation.

Effect of Plea

Plead Guilty or No Contest

- Pay the fine.
- Incur points on your driving record (which could lead to license suspension or revocation).
- Experience an increase in auto insurance rates.
- If applicable, enroll and complete a Basic Driver Improvement Course to avoid points and an insurance increase.

Plead Not Guilty

- Contest the ticket during a hearing.
- Hire an attorney or represent yourself during the hearing. (Either option will require some prep time.)
- Forfeit the possibility of a plea bargain or incurring lesser charges.
- Suffer no penalties if found not guilty (except any applicable court/attorney fees).
- Appeal the guilty verdict (if applicable).
- A person can choose to testify if they so wish at their hearing, but it is not required.

C. Failure to Wear a Seat Belt

Florida applies the doctrine of comparative negligence in this regard.

D. Failure of Motorcyclist to Wear a Helmet

Florida applies the doctrine of comparative negligence in this regard.

E. Evidence of Alcohol or Drug Intoxication

Voluntary intoxication resulting from the consumption, injection, or other

use of alcohol or other controlled substance is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance was pursuant to a lawful prescription issued to the defendant by a practitioner.

F. Testimony of Investigating Police Officer

Lack of personal knowledge.—Except If the person is an expert witness, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness's own testimony.

G. Expert Testimony

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Florida has recently changed from applying *Frye* to applying *Daubert*.

Under *Frye* the Florida Judge's role was to assure that when an expert offered testimony based on new or novel scientific theories or techniques, the theory or technique utilized by the expert was generally accepted as reliable in the relevant scientific community. As such, the *Frye* standard only applied when an expert attempted to render an opinion based upon new or novel scientific techniques. Thus, in cases where the expert's opinion was not based upon a new or novel scientific technique, even the *Frye* standard was inapplicable.

The *Daubert* standard includes the *Frye* "general acceptance" standard but goes beyond that and requires a trial Judge to determine that: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. *Daubert's* application is more encompassing and may lead to more success in challenging questionable expert testimony through motions in limine. Moreover, *Daubert* more firmly establishes the court as "gatekeeper" to

prevent unsupported opinion testimony from reaching the jury.

H. Collateral Source

The collateral source rule bars the admissibility of evidence at trial to show that a plaintiff's losses have been compensated from other sources, such as the plaintiff's insurance or workers compensation.

I. Recorded Statements

Under most circumstances, the consent of all parties to the conversation before taping is allowed. If the court determines that the statement was obtained in violation of state law, it will not qualify as generally admissible evidence.

J. Prior Convictions

(1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

(2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

K. Driving History

While the general rule is that the parties' driving records are inadmissible to prove that either party drove negligently at the time of the accident, these records can be admitted for other purposes. For example, if the defendant screws up at trial and testifies about how great a driver he is, he has just opened the door for his bad driving record to be entered into evidence to counter that assertion. The record is not being submitted to prove that he drove negligently the day of your accident. It is merely to challenge his assertion (which was obviously meant to convince the jury that he was not

negligent).

The same is true if the person falsely volunteers that he has never had a moving violation. In that case, the driving record evidence would be introduced to impeach his credibility.

L. Fatigue

Florida applies the doctrine of comparative negligence in this regard.

M. Spoliation

Proposed Instruction:

301.11 SPOLIATION

Inference from loss, destruction, or failure to preserve evidence.

If you find that:

(Name of party) [lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the (describe evidence) to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the (describe evidence) would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party). You may consider this, together with the other evidence, in determining the issues of the case.

Until 2003, Florida courts recognized an independent tort of spoliation for both first and third party claims. However, that all began to change with the Fourth District Court of Appeal's decision in *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003). In *Martino*, the plaintiffs filed a premises liability action against Wal-Mart, alleging that Mrs. Martino was injured while shopping at a Wal-Mart store when her shopping cart collapsed. Later, when Wal-Mart could not produce the shopping cart nor the security video that may have recorded the incident, the plaintiffs added a claim against Wal-Mart for spoliation of evidence. Wal-Mart filed a motion to dismiss the plaintiff's spoliation claim, which the trial court granted.

The Fourth District Court of Appeals affirmed the trial court's decision in *Martino* and held that there is no independent cause of action when a

defendant in a spoliation claim is also the defendant in the claim impaired by the destruction of evidence. See *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003). The Fourth District upheld the trial court's decision as there were "any number of sanctions and negative consequences ... available against parties to litigation," and as such, an independent cause of action for spoliation was unnecessary. See *Martino*, *supra* at 1256. In support of its finding, the appellate court relied on a California Supreme Court case, wherein the Court favored sanctions as opposed to an independent cause of action. *See Cedars-Sinai Medical Center v. Superior Court,* 954 P. 2d 511 (Cal. 1998). The California court held that there were adequate remedies already in place to address spoliation of evidence. *Id*.

In 2005, the Florida Supreme Court approved the Fourth District's dismissal of the independent cause of action for spoliation of evidence and also held that an independent cause of action for spoliation of evidence "is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same." *See Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 1995), citing to 835 So. 2d 1256. The Florida Supreme Court agreed that the adverse inferences and the myriad of other available sanctions were adequate. Consequently, the Supreme Court of Florida overruled several long-standing decisions that had previously recognized an independent cause of action for spoliation where the plaintiff still had other remedies.

In spite of the *Martino* decision, the Supreme Court of Florida still left open the question of the validity of third party spoliation claims (i.e. claims where the underlying action is against another defendant). Specifically, the Florida Supreme Court stated in a footnote, that it was "not considering whether there is a cause of action against a third party for spoliation of evidence. [The Martino] decision is limited to claims for spoliation of evidence against first-party defendants." *See Martino, supra* at 346 n.2 A close reading of *Martino* reveals that the Court only disapproved of independent spoliation claims where "the defendant in the spoliation claim is also the defendant in the underlying claim allegedly impaired by the loss or destruction of the evidence." *See Martino*, 835 So. 2d at 1254.

While the *Martino* Court failed to expressly address the viability of a third party spoliation claim, the rationale promulgated for denying the availability of a first party spoliation claim seems inapplicable to third party spoliation

claims. Without an independent cause of action for third party spoliation, an aggrieved party would have no avenue of recovery where a third party impaired its underlying claim through the spoliation of evidence. On this point, one federal district court in Florida recently addressed the limitations of the *Martino* decision and stated, "it would appear, however, that the third party spoliation claims, i.e. claims where the underlying action is against another defendant, are permitted even under this cloud of conflicting authority." *James v. U.S. Airways, Inc.*, 375 F. Supp. 2d 1352, 1354. (M.D. Fla. 2005). Accordingly, under the current state of Florida law, third party spoliation claims appear to be a viable means of recovery when a third party destroys evidence relevant to the potential civil action.

Thus, it would appear that while *Martino* overruled well established case law and limited the availability of a spoliation claim in certain first party situations, third party spoliation claims are still permitted so long as all the elements for such a claim are established.

Settlement

A. Offer of Judgment

768.79 Offer of judgment and demand for judgment.—

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) An offer may be withdrawn in writing which is served before the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines

promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any post offer collateral source payments received or due as of the date of the judgment, plus any post offer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any post offer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

B. Liens

Failure to provide for lien satisfaction could result in additional liability for the settling party as well as the carrier. Careful consideration must be employed to ensure that all liens have been resolved from the proceeds of

any settlement.

C. Minor Settlement

Parents as natural guardians are authorized on behalf of their minor child to settle and consummate a settlement of any claim or cause of action accruing to the minor child for damages to the person or property of the child and to receive, manage, and dispose of the proceeds of the settlement without appointment, authority or bond when the amount involved does not exceed Fifteen Thousand Dollars ($15,000); and

WHEREAS, court approval is required to settle a lawsuit on behalf of a minor; and

WHEREAS, case law suggests that pre-suit minor settlements must also be approved by the court; and

WHEREAS, pursuant to §744.387(2), Florida Statutes, a legal guardianship shall be required when the amount of the net settlement to the ward exceeds Fifteen Thousand Dollars ($15,000); and

WHEREAS, §744.387(4)(a), Florida Statutes, allows the court to appoint a guardian ad litem to represent a minor's interest in any case in which the minor has a claim for personal injury, property damage, or wrongful death in which the gross settlement for the claim of the minor equals or exceeds Fifteen Thousand Dollars ($15,000); and

WHEREAS, as further set forth in §744.387(4)(a), Florida Statutes, in any case in which the gross settlement involving a minor equals or exceeds Twenty-five Thousand Dollars ($25,000), the court must appoint a guardian ad litem to represent the minor; and

WHEREAS, apart from the aforementioned statutory authority, courts possess the inherent authority to appoint a guardian ad litem to protect a minor's interest; and

D. Negotiating Directly with Attorneys

Yes, claims professionals can negotiate directly with attorneys.

E. Confidentiality Agreements

Florida confidentiality agreements must specify what constitutes confidential information, how long the information must remain confidential and what the consequences for breaking the agreement are. In addition, the agreement should specify what information is not part of the confidentiality agreement. If the agreement is not specific enough, it cannot be enforced as the employee can easily misinterpret the terms of the agreement.

F. Releases

A full release is a form which is signed by claimants and releases insureds from bodily injury and property damage liability which arose out of an accident.

Joint Tortfeasor release

(5) RELEASE OR COVENANT NOT TO SUE.—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

G. Voidable Releases

Florida contract law is applied to evaluate the enforceability of releases. Challenges based upon competency of the party executing a settlement agreement without the advice of counsel are the most common challenges to a settlement in pre-suit matters.

Transportation Law

A. State DOT Regulatory Requirements

B. State Speed Limits

What is the purpose of a speed limit?

The primary purpose is to provide improved safety by reducing the probability and severity of crashes. A speed limit sign notifies drivers of the maximum speed that is considered acceptably safe for favorable weather and visibility. It is intended to establish the standard in which normally cautious drivers can react safely to driving problems encountered on the roadway. Properly set speed limits provide more uniform flow of traffic and appropriately balance risk and travel time, which results in the efficient use of the highway's capacity and less crashes.

Who sets speed limits on the state highways?

The Florida Legislature authorized the Florida Department of Transportation to establish speed limits on state highways up to the following maximums: 70 mph on Interstates, 65 mph on a four-lane divided highway outside an urban area (with a population of 5,000 or more), and 60 mph on other state highways. Select the following links (These links open a new browser windows) for information concerning the establishment of state speed limits, residential speed limits, and school speed limits in the state of Florida. More information can be found at The Florida Legislature's Statutes website.

Why are speed limits different in each state?

Federal legislation gives individual states the authority to establish their own maximum speed limits. The Florida Legislature, as mentioned above, establishes our maximum speed limits.

How are speed limits established?

It is common traffic engineering knowledge that about 85 percent of all drivers travel at reasonably safe speeds for the various roadway conditions they encounter, regardless of speed limit signs. This leaves 15 percent of drivers who must be reminded of the maximum speed limit. This reminder must be coupled with meaningful enforcement. Based on this knowledge, a traffic engineering study is conducted to establish speed limits on the state highway. The Department uses the "85th percentile" method of determining appropriate and safe posted speed limits in conjunction with the maximum statute based speeds. This method is based on extensive nationally accepted studies and observations. By measuring the speed of hundreds of vehicles at various points along the roadway, traffic engineers are able to use data to determine a reasonable and safe maximum speed to post for all vehicles to travel.

What influences a driver's selected speed?

A driver's choice of speed is a balance between expedience and safety, and is often a subconscious reaction to the environment. The vehicle speed chosen by a driver may be influenced by, the presence of other vehicles, weather, road conditions, road geometrics, and other factors such as:

- Time of Day Purpose of trip
- Ambient light
- Familiarity of driver with the road
- Condition of vehicle
- Urgency of trip

- Emotional condition of driver
- Driver skill
- Personality of driver
- Speed of other vehicles
- Drive late or on time
- Presence and/or history of enforcement
- Length of Trip
- Pavement wetness
- Weather
- Type of vehicle
- Vehicle parking
- Lane width
- Traffic volume
- Adjacent land use and development
- Pavement roughness
- Shoulder width and condition
- Pavement type and condition
- Speed traveled for previous 5 or 10 miles

How do I get a speed limit reviewed on a State Highway?
If you feel there is a need to change a speed limit on a state highway, or you have further questions regarding our determination of speed limits, please contact the District Traffic Operations Engineer at your local Florida Department of Transportation office.

C. Overview of State CDL Requirements

A. Who Needs a Commercial Drivers License

A commercial drivers license is required in Florida for any driver operating a tractor/trailer with a declared weight of 26,001 LBS or more. Below are the different classes of commercial drivers license

a) Commercial Drivers License (CDL)

CLASS A*:* Any Tractor/Trailer combination that has an actual weight, declared weight or GVWR of 26,001 LBS. or more, provided towed vehicle is more than 10,000 LBS.
CLASS B: Any single motor vehicle that has an actual weight, declared weight or GVWR of 26,001 LBS. or more, or any such vehicle towing a vehicle of 10,000 LBS. or less.

CLASS C: Any motor vehicle that has an actual weight, declared weight or GVWR of less than 26,001 LBS. when endorsements "H" or "P" would be required on the driver license OR any combination of motor vehicles where the towing vehicle is less than 26,001 LBS. GVWR and the towed vehicle has a GVWR of 10,000 LBS. or less, but together they weigh 26,001 LBS. or more.

Currently, there aren't any requirements for apprenticeship or driver training to obtain your Florida CDL. You'll just be required to pass the applicable tests.

- In addition to passing all the tests and paying applicable fees, you must meet basic eligibility requirements. You will not be eligible for a CDL if one of the following is true:
  - You already have a license from another state (illegal to hold more than one license)
  - You are under suspension, revocation, or cancellation in Florida or another state
  - You are under disqualification in Florida or another state for reasons including alcohol citations and serious traffic violations (see this FAQ for more details)

- Drivers of some vehicles are exempt from requiring a CDL. These include:
  - Drivers of authorized emergency vehicles
  - Drivers of military vehicles
  - Farmers transporting goods or machinery within 150 miles of their farms
  - Drivers of recreational vehicles
  - Drivers of single-unit trucks that are transporting their own goods not for sale
  - Employees of public transport systems who move vehicles from one place to another in confined areas belonging to the transport company

Insurance Issues

A. State Minimum Limits of Financial Responsibility

The required financial liability limits are $10,000 for injury liability per person in an accident, $20,000 for all injuries in an accident, and $10,000 for property damage in an accident.

B. Uninsured Motorist Coverage

Insurance companies who sell insurance in Florida are required to offer uninsured motorists coverage but this coverage is not mandatory and you may reject this coverage.

The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the rating plan of the company as may be selected by the named insured. The limits set forth in this subsection, and the provisions of subsection (1) which require uninsured motorist coverage to be provided in every motor vehicle policy delivered or issued for delivery in this state, do not apply to any policy which does not provide primary liability insurance that includes coverage for liabilities arising from the maintenance, operation, or use of a specifically insured motor vehicle. However, an insurer issuing such a policy shall make available as a part of the application for such policy, and at the written request of an insured, limits up to the bodily injury liability limits contained in such policy or $1 million, whichever is less.

Coverage is available to commercial drivers insured by uninsured tortfeasors

Under Florida law, whenever you elect to carry Uninsured/Uninsured Motorist coverage, your insurance carrier is obligated to offer you “stacking” UM coverage. Stacking UM coverage allows you to combine the coverage limits of the UM coverage on each of your vehicles, to create essentially a “super policy”.

C. No Fault Insurance

Florida is one of the few states in the U.S. that requires drivers to carry no-fault insurance. Florida no-fault insurance is a form of personal injury protection (PIP) insurance that covers drivers, passengers and pedestrians regardless of whether or not their negligence or actions played a part in the accident.

According to the Florida Department of Highway Safety and Motor Vehicles, "all owner/registrants of a motor vehicle with four wheels or more [must] carry a minimum of $10,000 of personal injury protection (PIP) and $10,000 of property damage liability (PDL)." If you allow this coverage to

lapse, or if you never obtain it at all, you can be cited for failing to maintain financial responsibility.

Essentially, the purpose of PIP insurance coverage is to limit the damages an injured party can claim against the person who caused an auto accident. Because you carry no-fault Insurance, you don't have to sue the other party's insurance company to take care of medical bills and other resulting damages.

Unlike other types of auto insurance, Florida no-fault insurance follows the driver (as well as passengers and pedestrians) rather than the car, unless one of the people involved does not have it himself.

Florida residents who live at least 90 days out of the year in the state are required to carry PIP insurance on their vehicles. It is also required of any driver whose car is registered in the state.

Keep in mind that Florida no-fault insurance does not apply to property damage, though you are required to carry property damage liability insurance. PIP insurance only protects people who are injured in auto accidents; it covers damages such as medical bills, lost wages and similar expenses.

It is also important to note that $10,000 is only the minimum requirement for PIP insurance coverage in Florida. Drivers are free to purchase additional coverage if they find it prudent, and it's a good idea if you don't have sufficient money in the bank to cover serious injuries if you are ever in an accident.

D. Disclosure of Limits and Layers of Coverage

627.4137 Disclosure of certain information required.—

Each insurer which does or may provide liability insurance coverage to pay all or a portion of any claim which might be made shall provide, within 30 days of the written request of the claimant, a statement, under oath, of a corporate officer or the insurer’s claims manager or superintendent setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

(a) The name of the insurer.
(b) The name of each insured.
(c) The limits of the liability coverage.

(d) A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.
(e) A copy of the policy.

In addition, the insured, or her or his insurance agent, upon written request of the claimant or the claimant's attorney, shall disclose the name and coverage of each known insurer to the claimant and shall forward such request for information as required by this subsection to all affected insurers. The insurer shall then supply the information required in this subsection to the claimant within 30 days of receipt of such request.

(2) The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to such statement.

(3) Any request made to a self-insured corporation pursuant to this section shall be sent by certified mail to the registered agent of the disclosing entity.

E. Unfair Claims Practices

Unfair Insurance Claim Settlement Practices are generally defined as "if the Insurer knowingly commits or performs with such frequency as to indicate a general business practice" according to the following:

1. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
2. Failing to acknowledge and act with reasonable promptness upon communications with respect to claims arising under insurance policies (14 days for homeowners' claims and 30 days for auto claims);
3. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
4. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
5. Failing to affirm or deny coverage of claims within 30 days after proof of loss statements have been completed;
6. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
7. Compelling insureds to institute litigation to recover amounts

due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

8. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
9. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
10. Making claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;
11. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
12. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
13. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
14. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;
15. Using as a basis for cash settlement with a first party automobile insurance claimant an amount which is less than the amount which the insurer would pay if repairs were made unless such amount is agreed to by the insured or provided for by the insurance policy.

F. Bad Faith Claims

In Florida, the law allows for judges to award attorney's fees as well as punitive damages on behalf of the plaintiff suing an Insurance Company in a bad-faith insurance matter (an Insurer's unreasonable withholding of

insurance policy benefits). The importance in having the threat of punitive damages (in an amount sufficient enough to deter malicious, fraudulent or oppressive conduct) being awarded in bad faith cases is enormous as it is the only financial incentive for an Insurer to abide by fair dealing and acceptable good faith standards with Insureds. In the absence of the threat of punitive damages, financially, an Insurer is actually encouraged to engage in unfair claims practices.

Florida does not recognize any common law "bad-faith" cause of action against a first-party insurer. Prior to the creation of Florida's "Civil Remedy Statute," if an insurer acted in "bad-faith" in settling the claim submitted by its insured, the only remedy available to the insured, in the absence of an independent tort committed by the insurer, such as fraud, is to file a breach of contract claim against its insurer and recover only those damages contemplated by the parties to the policy. *Butchikas v. Travelers Indemnity Co.*, 343 So. 2d 816 (Fla. 1976); *Baxter v. Royal Indemnity Co.*, 285 So. 2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

In 1982, the Florida Legislature enacted Fla. Stat. § 624.155, referred to as the "Civil Remedy Statute," which the Florida courts have interpreted to authorize first-party "bad-faith" legal actions. *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 266 (Fla. 5th DCA 1987) was the first such Florida appellate decision holding:

The plain meaning of § 624.155(1)(b) extends a cause of action to the first party insured against its insurer for bad-faith refusal to settle. The language of § 624.155 is clear and unambiguous and conveys a clear and definite meaning. It provides a civil cause of action to "any person" who is injured as a result of an insurer's bad-faith dealing.

The Florida Supreme Court denied review of *Opperman* in 1988 (523 So. 2d 578), but subsequently approved of its statutory interpretation in *McLeod v. Continental Ins. Co.*, 591 So. 2d 621 (Fla. 1992).

The operative statutory language of Fla. Stat. § 624.155 is contained in sub-section (1)(b)1 that states:

> (1) Any person may bring a civil action against an insurer when such person is damaged. . .
>
> . . .

(b) By the commission of any of the following acts by the insurer:

1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interests. . .

This statutory "bad-faith" standard has been incorporated into the Florida Standard Jury Instructions as M1 3.1 that reads as follows:

> The issue for your determination is whether (defendant) acted in bad-faith in failing to settle the claim [of] [against] (insured). An insurance company acts in bad-faith in failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interest.

The Supreme Court of Florida in the case of *State Farm Mut. Ins. Co. v. LaForet*, 658 So. 2d 55 (Fla. 1995), rejected the "fairly debatable" standard for the one contained in the above quoted jury instruction:

> Under the "fairly debatable" standard, a claim for "bad-faith" can succeed only if the plaintiff can show the absence of a reasonable basis for denying the claim. . . . To date, no Florida court has specifically adopted the "fairly debatable" standard in a "bad-faith" actions. Moreover, the approach by Florida courts in bad-faith actions has been described as "unsettled.". . . Florida differs, however, from most jurisdictions given that first-party bad-faith actions are actionable only under § 624.155 and not the common law. . . . Section 624.155 provides an insurer has acted in bad-faith if it has "[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for [the insured's] interests. . . . Because the specific standard is set forth in § 624.155, we find it unnecessary and inappropriate to apply the 'fairly debatable' standard to bad-faith actions in Florida."

Id. at 62.

On the issue of damages, the Florida Supreme Court has held "there can be recovery for the damages incurred for violation of § 624.155(1)(b)1

which occurred before the determination of liability or the extent of damages on the underlying insurance contract." *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000). The Florida Supreme Court stated in Vest:

> . . . We expressly state that Blanchard is properly read to mean that the "determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the [insured's] damages" are elements of a cause of action for bad-faith. Once those elements exist, there is no impediment as a matter of law to a recovery of damages for violation of § 624.155(1)(b)1 dating from the date of a proven violation. . . . In sum, we expressly hold that a claim for bad-faith pursuant to § 624.155(1)(b)1 is founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its insured to pay. This obligation on the part of insurer requires the insurer to timely evaluate and pay benefits owed on the insurance policy. We hasten to point out that the denial of payment does not mean an insurer is guilty of bad-faith as a matter of law. The insurer has a right to deny claims that it in good faith believes are not owed on a policy. Even when it is later determined by a court or arbitration that the insurer's denial is mistaken, there is no cause for action if the denial was in good faith. Good-faith or bad-faith decisions depend upon various attendant circumstances and usually are issues of fact to be determined by a fact-finder.

Id. at 1275. *See also* Douglas G. Houser, Ronald J. Clark, and Linda M. Bolduan, Good Faith as a Matter of Law – An Update on the Insurance Company's "Right to be Wrong," Tort Trial & Insurance Practice Law Journal, p. 1045, Vol. 39, No. 4 (Summer 2004).

3. II. Condition Precedent

There is a required condition precedent to bringing a first-party "bad-faith" action against an insurer. Florida Statute § 624.155(3)(a) states:

> (3) (a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.

(b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
2. The facts and circumstances giving rise to the violation.
3. The name of any individual involved in the violation.
4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

(c) Within 20 days of receipt of the notice, the department may return any notice that does not provide the specific information required by this section, and the department shall indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity shall be exempt from the requirements of chapter 120.

(d) No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(e) The authorized insurer that is a recipient of a notice filed pursuant to this section shall report to the department on the disposition of the alleged violation.

(f) The applicable statute of limitations for an action under this section shall be tolled for a period of 65 days by the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

This provision of this statute is referring to what is called the “Civil Remedy Notice of Insurer Violation” (“Civil Remedy Notice”). A typical Civil Remedy Notice as submitted by an attorney on behalf of an

insured is attached as Appendix A.

The Supreme Court of Florida interpreted the significance of the Civil Remedy Notice in the case of *Talat Enterprises, Inc. v. Aetna Cas. & Surety Co.*, 753 So. 2d 1278 (Fla. 2000). *Talat* was a first-party action by an insured against its insurer for damages caused by the insurer's alleged "bad-faith" in settling a fire-damage claim made under a property insurance policy. The insurer argued that the statutory provision stating that "[n]o action shall lie if, within 60 days after filing Notice, the damages are paid or the circumstances given rise to the violation are corrected," is a cure period during which an insurer may avoid "bad-faith" litigation by paying the contractual damages owed within the 60-day window. The insurer contended that because it paid the arbitration award before *Talat* even filed its Civil Remedy Notice, it paid the damages or corrected the circumstances giving rise to the violation, thereby precluding the instant action. The insured, on the other hand, argued that this provision was a confession period during which an insurer must pay all the extra-contractual damages caused by the alleged "bad-faith" to avoid an action under the statute. The insured contended that the insurer's interpretation of the statute turns what was intended to be a consumer protection law into an amnesty program for "bad-faith" insurers.

The Florida Supreme Court stated in *Talat* that when one reads the Civil Remedy statute in context and with the understanding that it is in derogation of the common law, it is plain that the Florida Legislature intended the Notice to the Department to serve as a basis for the Department to assist in the settling of claims and to monitor the insurance industry. The Supreme Court also found that the 60-day period was a time in which the insured could act to "cure" a violation. The Florida Supreme Court expressly stated:

> It naturally follows that for there to be a "cure," what had to be "cured" is the non-payment of the contractual amount due the insured. In the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy after all the conditions precedent of the insurance policy in respect to payment are fulfilled. Section 624.155(1)(b). . . is correctly read to authorize a civil remedy for extra-contractual damages if a first-party insurer does not pay the contractual amount due the insured after all the policy conditions

> have been fulfilled within 60 days after a valid notice has been filed. . . [the statute] cannot reasonably be construed to require payment of extra-contractual damages to avoid bad-faith litigation until the conditions for payment under the policy have been fulfilled and the insurer has failed to cure within the 60-day statutory period for cure after notice is filed in accord with the statute. . .
>
> Finally, it must be recognized that what [the statute] creates is a statutory "civil remedy." For *Talat* there is no remedy within the statute. Pursuant to the statute, there is no remedy until the Notice is sent by the insured and the insurer has the opportunity to "cure" the violation. If the insurer pays the damages during the cure period, then there is no remedy. For this to comport with logic and common sense, this has to mean that extra-contractual damages that can be recovered solely by reason of this Civil Remedy statute cannot be recovered when the remedy itself does not ripen if the insurer pays what is owed on the insurance policy during the cure period. The statutory cause of action for extra-contractual damages simply never comes into existence until expiration of the 60-day window without the payment of the damages owed under the contract. We find that in creating this statutory remedy for "bad-faith" actions, the Legislature provided this 60-day window as a last opportunity for insurers to comply with their claim-handling obligations when a good-faith decision by the insurer would dictate that contractual benefits are owed.

Id. at 1283-84. *See also Lane v. Westfield Ins. Co.*, 862 So. 2d 774 (Fla. 5th DCA 2004) (insured's "bad-faith" complaints alleging that insurer had filed groundless lawsuits against him were cured within or before the expiration of the 60-day period, the complaint regarding the lightning claim was cured by a jury verdict in favor of the insured, and the complaint regarding the windstorm claim was cured by dismissal of the insurer's claim).

An insurer's failure to timely respond to a Civil Remedy Notice at all creates a rebuttal presumption that the contents of the Civil Remedy Notice are true and, thus, presumably the insurer has committed "bad-faith." *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617 (Fla. 1994). The Florida Supreme Court stated, "when an insurer does not respond within 60 days, the insurer flouts the very purposes of § 624.155. . . an insurer's failure to respond within the 60 day period will create a presumption of bad faith sufficient to

shift the burden to the insurer to show why it did not respond. An insurer may have a good reason for not wanting to settle for the amount demanded, but we find it difficult to articulate a possible reason not to respond within 60 days."

In addition to serving and filing a Civil Remedy Notice that has not been timely cured by the insurer, the existence of contractual liability and the determination of the extent of contractual damages are elements of the "bad-faith" action and, therefore, must pre-exist the bringing of such a "bad-faith" action. *See, Vest v. Travelers Ins. Co.*, 753 So. 2d 1270 (Fla. 2000) (we expressly state that *Blanchard* is properly read to mean that the "determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the [insured's] damages" are elements of a cause of action for "bad-faith," and once those elements exist, there is no impediment as a matter of law to recovery of damages for violation of § 624.155(1)(b)1); *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991) (the determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the of the [insured's] damages are elements of a cause of action for a bad-faith claim and until these elements exist, no bad-faith cause of action exists).

In the Florida Third District Court of Appeal case of *Liberty Mutual Ins. Co. v. The Farm, Inc.*, 754 So. 2d 865, 866 (Fla. 3d DCA 2000), the Florida Appellate court stated:

> There has been some confusion in the law when a claim for insurer bad-faith can be asserted. Although the trial court did not have the benefit of it, the Florida Supreme Court has recently clarified that "bringing a cause of action in Court for a violation of § 624.155(1)(b)1 [statutory bad faith] is premature until there is a determination on liability and extent of damages owed on the first-party insurance contract. . . . Since damages have yet to be determined in the first-party action, the insured's claim for statutory bad-faith was not right and must be dismissed without prejudice as being premature."

Unfortunately, there still remains some confusion in the law. *See, Plante v. USF&G Specialty Ins. Co.*, 17 Fla. L. Weekly Fed. D. 686 (U.S. Dist. Ct. S.D. June 2, 2004) (when an insurer makes payment upon an insured's claim and refuses to pay any more, a "final determination" of liability and extent of damages has occurred for purposes of the bad-faith statute).

The Florida Supreme Court recognized a common law action for third-party bad faith as early as 1938.3 Its decision to do so grew out of the realization that insurance contracts had come to “occupy a unique institutional role” in modern society, as they became an economic necessity for businesses and individuals.4 Additionally, as liability policies replaced indemnity policies, the insurer’s power over the insured’s situation became greater, requiring a remedy for when that power was abused.

Under a liability policy, the insured’s role is essentially limited to selecting the type and desired level of coverage and paying the corresponding premium. Insurance coverage, theoretically, offers security and peace of mind against unforeseeable losses. As part of the contract, the insured surrenders to the insurer all control over the negotiations and decision making as to claims. The insured’s role is relegated to the obligation to cooperate with the insurer’s efforts to adjust the loss. The insurer makes all the decisions with regard to claims handling and thereby has the power to settle and foreclose an insured’s exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.5 As a result, “the relationship between the parties arising from the bodily injury liability provisions of the policy is fiduciary in nature, much akin to that of attorney and client,” because the insurer owes a duty to refrain from acting solely on the basis of its own interests in the settlement of claims.6 Accordingly, and because of this relationship, the insurer owes a duty to the insured to “exercise the utmost good faith and reasonable discretion in evaluating the claim” and negotiating for a settlement within the policy limits.7 When the insurer fails to act in the best interests of the insured in settling a claim, an injured insured is entitled to hold the insurer accountable for its “bad faith.”

G. Coverage – Duty of Insured

In order to prevail in Florida on a coverage defense that the insured breached the cooperation clause in a liability policy, the insurer "must show that it has exercised diligence and good faith in bringing about the cooperation of its insured and must show that it has complied in good faith with the terms of the policy." Ramos v. Northwestern Mut. Ins. Co., 336 So. 2d 71, 75 (Fla. 1976).

H. Fellow Employee Exclusions

Defendant may not plead as a defense that the injury was caused by

negligence of a fellow employee, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee.

(b) When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer's actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence, that:

1. The employer deliberately intended to injure the employee; or
2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment.