PBCJA PRESIDENT'S MESSAGE
October 2018 – Sean C. Domnick, President

The Trial Lawyer – Promoting Safety – Demanding Accountability – Forcing Change

It is with great pride that I write this last President’s message for the Palm Beach County Justice Association (PBCJA). Thank you for electing me and working with me to build a stronger trial lawyer community. For many years, the U.S. Chamber of Commerce attempted to sully our reputation, turning the term “trial lawyer” into a word synonymous with greed. However, over the past two centuries, it has been trial lawyers, and the right to trial by jury, that has made consumers safer, held wrongdoers accountable and succeeded in implementing real social change. I am so proud to be a trial lawyer. I know the stronger we are as a trial lawyer community, the safer we are as a society.

A great trial lawyer and former AAJ president Theodore I. Koskoff had an inspiring definition about a lawyer’s contributions to society and one that informs how we must view the role of the trial lawyer today. "If you are a lawyer, what are you? If you are a lawyer, you stand between the abuse of governmental power and the individual. If you are a lawyer, you stand between the abuse of corporate power and the individual. If you are a lawyer, you stand between the abuse of judicial power and the individual. If you are a lawyer, you are the hair shirt to the smugness and complacency of society. If you are a lawyer, you are helping to mold the rights of individuals for generations to come."

We live in a world where the price of a stock can be weighed against the price of a life and a formula is applied to determine the human cost as a line item on a balance sheet. The trade off for loss of life and cost of future litigation can easily be justified by the profit margin for shareholders.

Trial lawyers have been a guardian of safety in a civil justice system that favors business interests over the interests of the individual and the injured. Our history proves the extent of this epidemic and the seismic changes that ripple out and save lives when trial lawyers intervene and demand accountability. So often when it comes to making our society safer
and more just, it is Trial Lawyers who have been the impetus for change when our legislatures have failed us.

Defective vehicles have been traversing our roadways for decades and in many cases the manufacturers hid the problems from regulators and deceived the public for the sake of profit. The Takata airbag and Toyota sudden acceleration scandals made automobile safety a top of mind issue again and brought back memories of the Firestone tire tragedies. Over the past 60 years, door latches, gas tanks, electronic stability control, air bags, illusory park systems, tires, side impact protection, seats, seat belts, power windows and roofs are all safer as a result of the civil justice system and the bold trial lawyers who took on these manufacturing giants and won. Today, thanks to litigation AND innovation, vehicles are safer.

For centuries, women were treated as second class citizens, subjects of marketing campaigns designed to promote dangerous and defective drugs and medical devices. Dose efficacy was not weighted on the different ways men and women metabolize drugs and FDA testing to date is “cleared” on the basis of manufacturers own assertions. It was not until as recently as 1993 that legislation was enacted requiring that women be included in human subject research. There is a long list of dangerous drugs and devices from Thalidomide to the Dalkan Shield and Copper-7 IUD that prove how drug companies gambled with the lives of women for the sake of profits. Even today, despite the fact that the United States National Toxicology Program classified talc as a carcinogen in 1993 and the countless cases of women developing Ovarian cancer, Johnson & Johnson has denied any wrongdoing and the product remains on the market.

Trial lawyers are the only line of defense in a nation where laws are ghostwritten by special interests serving the needs of corporations over individuals. Pharmaceutical companies and auto manufacturers represent just a few exemplars of the vast assault perpetrated by corporations against individuals. Trial lawyers take on these corporate goliaths, protecting and defending individuals and breaking patterns of greed and injustice. Thank you for choosing to join this noble profession and for giving me this opportunity to serve this cause. I am humbled and grateful to have served you and to hope we continue to work together, demanding accountability and improving safety for the collective good of our nation.

Thank you for giving me this opportunity to serve you.

Sean C. Domnick
As 2018 comes to an end, I reflect on what a great year it has been serving with my fellow board members of the PBCJA Young Lawyers’ Board. At the beginning of the year, we set a goal to plan two different types of events. The first was a happy hour event in which we were able to team up with the Palm Beach County Bar Association Young Lawyers Section for a great night of networking. This event was a great success and provided opportunities to network with other young attorneys.

Our second event is our Thanksgiving Charitable Project. We will provide Children’s Outreach, Inc. with Thanksgiving food donations. Children’s Outreach is a very deserving charity that focuses on providing food, clothing assistance and health service referrals for families with children and seniors. With the generous help from Cheney Brothers, Inc., we are hoping to feed 500 less fortunate people in our community. The PBCJA Young Lawyers’ Board is accepting monetary donations to assist with purchasing the food items.

With the end of one year comes the excitement of the new year. I look forward to serving as Chair of the PBCJA Young Lawyers’ Board for 2019. It is my goal to continue our accomplishments of hosting a networking event and charitable event, as well as to recruit more young lawyers to get involved. As a young lawyer, I can attest that it is difficult adjusting to the first few years of law practice and making time for anything outside of work. As a member of this board, I have had the opportunity to be a part of a group that can relate to the struggles I face as a young lawyer and provide a support system and sounding board for when I need advice. If any young lawyers are interested in getting involved or would like more information, please feel free to reach out to a board member.

We wish everyone a wonderful upcoming holiday season and a happy new year filled with prosperity, joy and contentment.
What’s at Stake for Us in the Election for Florida’s Next Governor

BY ADAM J. RICHARDSON
Burlington & Rockenbach, PA

The November 6, 2018, election is fast approaching. It pits Democrat Andrew Gillum against Republican Ron DeSantis. Two leading politics websites have shown the race trending Gillum’s way. As of the time of writing, the Real Clear Politics Average has Gillum up 3.7 points.¹ FiveThirtyEight gives Gillum a 77% chance of winning using its “Classic” model.² But nothing in life is certain. In the home stretch, it is critical that we support Gillum. Our practices depend on it.

A long-running dispute in this state has been over who has the authority to fill three upcoming vacancies on the Supreme Court of Florida because three justices must retire in January 2019. Those three justices, Barbara Pariente, Fred Lewis, and Peggy Quince, make up the bulk of the four-member liberal bloc on the seven-member court.

We can easily see the impact these justices have had on our practices in three recent opinions released by the court. In Odom v. R.J. Reynolds Tobacco Co.,³ Justice Pariente wrote an opinion, joined by Justices Lewis, Quince, Labarga, and Lawson, striking down a cap created by the district court on the amount of noneconomic damages an adult child can be awarded for a parent’s wrongful death. Next, in Harvey v. GEICO General Insurance Co.,⁴ the court reinstated a multimillion-dollar verdict for an insured in his bad-faith lawsuit against his insurer, finding the district court misapplied the directed-verdict standard and relied on nonbinding federal decisions that misconstrued the court’s bad-faith precedent. Justice Quince wrote the majority opinion, joined by Justices Pariente, Lewis, and Labarga. Finally, in DeLisle v. Crane Co.,⁵ Justice Quince wrote a majority opinion striking down the Daubert amendment as unconstitutional. She was joined by Justices Pariente, Lewis, and Labarga.

None of these decisions, which are obviously good for our clients and our practices, would have been possible without the retiring justices. Who is appointed to replace them is of paramount importance. Outgoing Governor Rick Scott insisted he had the authority to make the appointments. He even had the Judicial Nominating Commission begin the process and ordered it to certify nominations by November 10, 2018.⁶ The Supreme Court rejected Governor Scott’s argument. In an order issued October 15, 2018, the Supreme Court held,

³ No. SC17-563 (Fla. Sept. 20, 2018).
⁴ No. SC17-85 (Fla. Sept. 20, 2018).
among other things, that the incoming governor—not Governor Scott—has the “sole authority to fill the vacancies.”

Both candidates released statements after the court’s order. Gillum said, in part, that filling the vacancies “is a duty I take extremely seriously and, as governor, one of my top priorities will be to restore the integrity of the judicial nominating process.”\(^7\) DeSantis released a statement that said, in part: “If Andrew Gillum is elected, out-of-state, radical groups would pressure him to appoint activist judges who would legislate from the bench to fit their own ideology. The consequences of this would be felt for generations, and it would be dangerous for every person in our state.” On his campaign website, DeSantis also promises he will “End Judicial Activism” and “Appoint constitutional conservatives to the Florida Supreme Court.”\(^8\)

The differences between the candidates on this issue—in substance and in tone—could not be clearer. We can say with some confidence that a Governor Gillum would appoint much different justices than a Governor DeSantis. If a Governor DeSantis appoints three new conservative justices to the supreme court, we could see new legislative efforts to curtail our clients’ constitutional rights to access the courts, or to treat different litigants differently. Would the court enforce our state’s constitution? What about important unresolved medical-malpractice issues like the arbitration and Medicaid caps? And would the court exercise its jurisdiction to ensure that the district courts correctly apply the law? These things and more are at stake—and so are our client’s rights, and our practices.

Yes, the recent polls are trending toward Gillum. “Nothing is written,” T.E. Lawrence says in Lawrence of Arabia. From now until the election, we must support Gillum. It must be Gillum who makes the three appointments.

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The Florida Governor’s race is on everyone’s mind, but it would be a mistake to ignore another Florida race that has significant implications for our clients and our law firms. For Attorney General, all of us should be enthusiastically supporting and voting for one of our own, Florida Justice Association member State Representative, Sean Shaw.

Elected in 2016 to represent District 61 in the Florida House, Rep. Shaw checks all the boxes as someone who will fight for Florida’s citizens and the right to trial by jury as the State’s “top cop.” Shaw earned his undergraduate degree from Princeton University, and his law degree from the University of Florida. Like his father, the late Florida Supreme Court Justice Leander Shaw, Sean Shaw exhibits a passion for justice and fights for individual rights when they are threatened by insurance companies and big corporations.

Shaw lists his top priorities as “Protect Children and Families,” “Crack Down on Corruption and Fraud,” and “Defend Civil & Equal Rights.” As he has exhibited throughout his legal career, Sean Shaw will do everything within his power to give Florida citizens a fair shake, and will not cozy up to the insurance lobbyists.

While outgoing Attorney General Pam Bondi went out of her way to side with oil companies and big corporations after the calamitous BP oil spill years ago, Rep. Shaw put his efforts into helping the victims of BP’s negligence. It is time for Florida to have an Attorney General who uses the power of the office for the good of the people, not corporations and insurance companies. Sean Shaw will be a breath of fresh air. On August 28, 2018, the Palm Beach Post ran an article “Know Your Candidates.” Shaw states, “I have helped Floridians fight back against their insurance companies when those companies refuse to honor their policies, aided those with defective Chinese drywall get the settlements they deserve, and worked to help those affected by the BP oil spill. Under former CFO Alex Sink, I served as Insurance Consumer Advocate for the state. Most importantly, we’re going to crack down on those seeking to defraud and scam consumers, especially those who target our elderly population.”

As stated above, Sean Shaw is a member of the Florida Justice Association, and his professional work involves fighting for individuals against insurance companies for property damage claims. He works with the Merlin Group in the Tampa area, and previously worked for Morgan & Morgan.

Rep. Shaw’s list of endorsements is impressive, including the local newspapers Miami Herald, Sun-Sentinel and Palm Beach Post. As former Attorney General Bob Butterworth said in his endorsement, “Once Sean Shaw is elected Attorney General, Floridians will have an active advocate on their behalf.” To have someone like him serving as Florida’s Attorney General is in our families’, clients’, and friends’ best interests. Just as the Florida Justice Association lists several “PACs” on its website for members to donate to Rep. Shaw’s campaign, the Palm Beach County Justice Association similarly endorses and strongly encourages you to support and vote for Sean Shaw to be the next Attorney General of our great state.
The person under the heading Florida Agriculture Commissioner is a constitutional officer whom we will elect November 6th. What does this person do? On the ballot, do you guess or leave it blank? Or, as I have done in the past, vote for Agriculture Commissioner based on the recommendation of others. Every election is important, but this mid-term election is crucial for a lot of reasons. Yes, the winner of Andrew Gillum v. DeSantis in Florida’s gubernatorial race is critical for a myriad of reasons, including three immediate Supreme Court appointments. But, a leader is only as good as his supporting cast, which includes his Cabinet.

The Agriculture Commissioner along with the Attorney General and Chief Financial Officer serve with the Governor to make up the Executive Cabinet. Since the cabinet was formed to decentralize the Governor’s authority and because my gubernatorial choice is Andrew Gillum, I needed to know more about the Democratic nominee for Agriculture Commissioner, Attorney Nikki Fried. I learned that this cast member plays a key role not only in farming but in consumer services. Aha!

The position has far more reach and responsibilities than meets the eye. Did you know that in addition to enforcing plant life, agriculture, animal health regulations pests and diseases, for an annual salary of $128,972, the duties also include overseeing concealed weapons permits, school lunches, lemon law rules, auto repair and pawn shops, roller coasters and much more? The state agency’s full name is the “Florida Department of Agriculture and Consumer Services.”

Simply put, the FDACS is divided by business and consumer interests. It establishes rules for unfair and unsafe business practices, concealed weapons permits, health & safety, recreation & leisure, animals including dog & cat travel, aquaculture, forestry and produce industries, license producers, gas pumps, maps, motor vehicle repair shops, pawn shops,
emergency preparedness, agriculture law enforcement, identity theft, charitable organizations, dance studios, telemarketers, lemon law mediation & arbitration, and more.12

The November 6, 2018 mid-term election for the Agriculture & Consumer Commissioner will be tight. Democratic Nominee Nikki Fried is considered the “People’s Commissioner. On hot button issues the candidates greatly differ for which one will have control are: Felons Rights, Gun Control, Environment- Clean Water, and Marijuana.

Contrasting Nikki Fried from her Republican opponent, in its October 2 edition13, the Sun Sentinel endorsed Nikki Fried indicating “[t]he Miami native and Fort Lauderdale resident has good ideas for the agriculture part of the job and for the consumer part of the job” to include:

1) Automatic restoration of civil rights to ex-felons who have paid society’s debt. The Agriculture Commissioner sits on the clemency board, so Caldwell could hinder restoration, even if voters approve it.
2) Concealed weapon permitting audit and shifting function to FDLE which performs background checks. NRA opposes this.
3) Clean water solutions regarding the Everglades, Okeechobee Green Algae and Red tide crisis.
4) Medical marijuana advocate.
5) Legalization of recreational marijuana for those 21 and she estimates revenue potential for Florida
6) Addressing food deserts and expanding the Farm-to-School program

Historically, Attorney Nikki Fried will be the first elected woman to serve as Florida’s Agriculture Commissioner. Let’s vote, and #BringItHome! *

BACK TO THE FUTURE: MEDICAID STYLE
BY TODD BELISLE THE CENTERS

12 floridabar.org-public/consumer/tip008 and ballotpedia.org-Florida Commissioner of Agriculture and Consumer Services and https://www.freshfromflorida.com/Divisions-Offices/
Only a short time has passed since President Trump signed the Bipartisan Budget Act of 2018 into law on February 9, 2018. While his signature grabbed headlines because it ended an overnight government shutdown, one small section of the Act went unnoticed despite the profound effect it had on the rights of injured parties to retain larger portions of their personal injury settlements.

**Background**

Plaintiff attorneys are all too familiar with the persistent issue of Medicaid’s third party recovery rights when they settle cases for clients who receive Medicaid. Medicaid exercises these recovery rights because federal law requires each State to implement State laws creating recovery rights when the State has provided medical services due to a negligent third party. However, a State’s recovery right is a narrow exception to the broader federal anti-lien statute that says, “[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan [Medicaid].”

Florida has implemented its recovery Statute in Fla. Stat. §409.910, which is known as the “Medicaid Third-Party Liability Act.” Sub-paragraph (11)(f) of 409.910 creates an artificial formula wherein 25% of the gross settlement is deducted for attorney fees along with taxable costs. After these two deductions, Medicaid is entitled to half of the remaining balance up to, but not to exceed, its full lien. States are free to tailor their own recovery statutes as their legislatures decide, and as unfair as 409.910 can sometimes be, there are States with even more burdensome recovery statutes. To the detriment of Medicaid recipients, States’ recovery rights went unchallenged for many years.

**The Ahlborn Ruling**

This state of affairs eventually changed in 2006 when the U.S. Supreme Court unanimously held in *Arkansas Department of Health and Human Services v. Ahlborn*, that Arkansas was only entitled to assert its Medicaid claim against that portion of Heidi Ahlborn’s settlement representing payment for medical expenses. Further, any attempt by Medicaid to recover more than the portion allocated to medical care would violate the federal anti-lien statute.

*Ahlborn* and its progeny had far reaching positive effects in Florida and around the country. While the successful application of *Ahlborn* often required good lawyering, it was now possible to greatly reduce Medicaid liens thereby increasing net recoveries for clients. In 2013, the rights of Medicaid recipients were bolstered further when the U.S. Supreme Court revisited the issue in *WOS v. ex. Rel. Johnson*, and found that a North Carolina statute was preempted by the federal anti-lien statute to the extent it

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17 *Id.* at 1764.
created a conclusive presumption that one-third of a tort recovery represents compensation for medical expenses.\textsuperscript{18}

\textbf{Bipartisan Budget Act of 2013}  
Very likely in response to \textit{WOS}, everything changed for the worse in December 2013 when President Barack Obama signed the Bipartisan Budget Act of 2013 ("the BBA"). Under Section 202 of the BBA, in a Section titled, "Strengthening Medicaid Third-Party Liability," the anti-lien provision of federal law was amended such that States could assert their third party recovery rights against a Medicaid recipient’s entire settlement and not just the portion designated as payment for medical care. The effect of Section 202 was to eviscerate \textit{Ahlborn}. The Section had an effective of October 1, 2014, but this date was successfully pushed back several times. However, the Section became effective in October of 2017 thereby denying plaintiffs the relief previously available under \textit{Ahlborn}.

\textbf{Bipartisan Budget Act of 2018}  
Coming full circle to President Trump, the BBA’s terrible effect was completely reversed when he signed the Bipartisan Budget Act of 2018 on February 9, 2018.\textsuperscript{19} One small section of the Act, Section 53102, completely repealed the BBA’s rollback of the federal anti-lien provision with an effective date of September 30, 2017. In referring to the BBA amendment that eviscerated \textit{Ahlborn}, the language of Section 53102 says that the law, "\textit{shall be applied and administered as if such amendments had never been enacted}."\textsuperscript{20}

While this is truly wonderful news for plaintiffs and their attorneys, we all owe a large debt of gratitude to the American Association of Justice whose tireless efforts over many years achieved the successful repeal of Section 202 of the BBA.

Contact us today if you have questions about this article or if our staff can help you maximize recoveries for your clients as well as help protect their eligibility for both current and future public benefits.

\textsuperscript{19} Public Law 115-123: Bipartisan Budget Act of 2018. (132 Stat. 64; Date 2/9/18).  
\textsuperscript{20} Id. at § 53102(b)(1).
Since shortly after the first automobiles rolled off an assembly line, guardrails, bridge rails, crash cushions, and other safety devices have been installed on roadways in an effort to improve the safety of the traveling public. Just as automotive safety design has improved tremendously over the years, the design and application of roadside safety appurtenances has improved vastly as well. State Highway Departments and the Federal Highway Administration were the original driving force behind many of these safety improvements, but over the last 30 years or so private industry has provided much of the innovation that has led to products which make the roads safer. This is especially true with guardrail terminals.

The purpose of a guardrail is to shield motorists from natural or man-made obstacles located along either side of a traveled way. An impact with a guardrail system should prevent contact with the hazard being shielded, and be less severe than an impact with that hazard. A typical guardrail system is anchored on both ends, and when an errant vehicle impacts along the length of guardrail, tension is developed in the rail and the vehicle is redirected away from the hazard. The ends of the guardrail system are potential problem locations, as a vehicle impacting an untreated guardrail end can be stopped abruptly resulting in high deceleration forces for the occupant, or the guardrail could penetrate the occupant compartment and cause serious injury. In the early days these guardrail ends were left untreated, resulting in many vehicles being ‘speared’ with the guardrail during a collision.

Guardrail “Terminals” were eventually developed to improve the impact performance of the ends of the guardrail systems. These terminals started out as basic as twisting the guardrails and anchoring it at ground level, and have evolved over the years to sophisticated "energy absorbing" terminals which capture the errant vehicle and bring it to a controlled stop. The technology used for many of these modern guardrail terminals is proprietary, and are only available for purchase from the company owning rights to the patents.

Having worked for ten years designing and crash testing roadside safety appurtenances, I’ve had the opportunity to lead the development of several of these lifesaving designs, and have seen first-hand the difference that this technology can make in the dynamics of a collision. Of course, guardrails and guardrail terminals cannot be designed to safely bring vehicles to a stop under every impact condition, but they must be crash tested under specified impact conditions and approved for use by the Federal Highway Administration before they can be used in any projects using federal funds (a large majority of roadway projects receive at least some amount of federal funding).
Even with all of this improved safety technology, people die as a result of impacts with guardrail terminals every day. Some of these deaths are the result of extreme or unusual impact conditions, but many are the result of poor product design, improper terminal selection, or faulty installation. If you have a case that involves these issues, it is very important to understand the role that the safety device played. In order to understand these issues, it is important to involve an expert familiar with the design and operation of roadside safety devices early on in your investigation.

BUILDING GUARDRAIL FAILURES

BY MARK DUCKETT, local structural engineer ROBSON FORENSIC

Form vs. Function
Guardrail systems are typically required on an edge where there is a 30” differential in height beyond that edge. While their appearance may be conventional, contemporary or artistic, they must be engineered to safely resist the loading that they will reasonably experience in their lifetime. Building codes clearly address this issue by specifying the minimum loads to which guard systems are to be designed.

The Anatomy of a Guardrail
Depending on the application, the top rail and/or handrail is located between 36” and 42” above the floor. Bottom rails (where provided) are generally constructed with less than a 2” clearance between the bottom of the rail and the floor’s surface. Intermediate, vertical rails (balusters) are typically spaced to prevent a 4” diameter sphere from fitting between them — therefore preventing a child’s head from potentially getting stuck between rails.

Guardrail systems are commonly supported/anchored at the floor. The support posts can be directly embedded into the concrete substrate or bolted to the top or side of the floor system. Expansion-type anchors and epoxy anchors are the most prevalent types of anchors used when connected to a concrete slab; wood
screws and through-bolts are the obvious choices when connecting to wood members.

**Guardrail Design**
Top rails and handrails must be engineered for loading that can occur in any direction. One required design load is a concentrated load (single point load) of 200 pounds at any location. Another example of a code-specified load is the criteria for top rails and handrails to be designed to safely resist a uniform load of 50 pounds per foot. It is important to note that the loads are not required to be applied simultaneously; only to design for that condition which produces the worst case. To put these code specified minimum loads into our perspective, a 200 pound concentrated load is roughly equivalent to the weight of 24 gallons of milk while a 50 pound per foot uniform load is similar to the weight of 6 gallons of milk along EACH foot of the handrail/top rail.

Intermediate rails are often required to safely resist a 50 pound load applied over a 1 square foot area.

In parking garages, the guard systems are required to safely restrain a moving vehicle. An example of this requirement is for the guardrail system to be engineered to safely resist a 10,000 pound load applied 18" above the floor. 10,000 pounds is approximately equivalent to the weight of 2 full size pick-up trucks.

**Understanding Guardrail Failures**
Guardrail systems most often fail at their connection points, particularly the connection between the bottom of the system and the floor to which it is mounted. Some failure mechanisms can be quite complex consisting of multiple issues while other failures may be quite simple. An example of a "simple" failure would be one whose anchor bolts were installed too close to the free edge of the concrete substrate, resulting in inadequate structural support for the minimally prescribed loads. Other failure mechanisms may include poor welding, spalled and cracked concrete, faulty initial design, deteriorated wood or just inadequate maintenance.

**STRUCTURAL ENGINEERING CASEWORK**
Structural engineering casework takes many forms, some of our most notable casework involves the collapse of concert shells, parking garages, and buildings adjacent to construction sites; however, not all of our structural casework involves the collapse of a building. Some of our most interesting casework involves the collapse of billboards, fire escapes, and bleachers. Our structural engineers identify the causes of structural failure in cases involving professional liability, construction defect claims, and personal injury.
BIOMECHANICS OF INJURY CAUSATION
A TYPICAL METHODOLOGY IN VEHICULAR ACCIDENTS EVALUATION

BY: DR. FARHAD BOOESHAGHI  GLOBAL ENGINEERING SCIENTIFIC SOLUTIONS

What if liability is of little to no question, and the causation is the focal point of the case? The Plaintiff says: "I was fine before the accident, and all of my injuries started after the accident". The plaintiff’s medical doctors say that the Plaintiff was injured as the result of the accident. The medical doctors retained by the defendant says that all plaintiff’s injuries are pre-existing.

To rebuttal the plaintiff’s injury claims, the Defendant retains the services of an Accident Reconstructionist and a Biomedical Engineer to evaluate the case. The Accident Reconstructionist reconstructs the accident, and defines Vehicle Dynamics (behavior of the vehicles during the accident) and determines Delta-V and G-Forces on the plaintiff’s vehicle. The Biomedical Engineer defines Occupant Kinematics (how the plaintiff’s body responded to the vehicle dynamics determined by the accident reconstructionist) and the Biomechanics of Injury Causation (whether or not the mechanisms of the plaintiff’s injuries are consistent with the ones created during the subject accident.) The Plaintiff hires an Accident Reconstructionist/Biomedical Engineer to assist with rebutting the defendant’s experts.

A typical injury causation defense is the use of seatbelt. The Florida Statute 316.614 – Safety Belt Usage – regulates and requires the use of the seatbelt by the driver, front seat passenger, and occupants under the age of 18. There are multiple ways to evaluate and determine whether or not the plaintiff was wearing her seatbelt. Traditionally, physical evidence on the safety belt and/or its components are used for such evaluations. In addition, majority of the vehicles on the road today are equipped with some form of EDR (Event Data Recorder) a/k/a Blackbox. During a collision, most Blackboxes register whether or not the occupant(s) were utilizing their seatbelt. In most vehicles, the imaging (download) of the Blackbox assists with determining the use of the seatbelt by the driver and/or the front seat passenger.

In such case that it is determined the Plaintiff wasn’t utilizing the seatbelt during the accident, then the contentions evolve to what difference it would have made if had the
seatbelt on. An approach to address this question is to perform exemplar analysis, evaluate the biomechanics of injury causations with and without the use of seatbelt, study related published literature and compare the findings with the mechanism of injury created during the accident.

This methodology also applies to LVC’s (Low Velocity Collisions). In general, the LVCs depict little to no observable damage to the vehicles, and calculated delta-v on the plaintiff’s vehicle is less than 5 MPH. In such case, understanding occupant kinematics is of essence in injury causation mechanism evaluation. Occupant body position in relation to the interior of the vehicle as well as the topography of the road and collision angles must be well studied and considered. It is essential to understand that the injury causation is not a direct function of the vehicle speeds, and it is dependent on the delta-v and collision pulse generated during the impact.

**LLC Member Disputes:**
**What Are the Key Duties Owed by Managers and Members?**

By Adam Rabin McCabe Rabin

Under the Florida Revised Limited Liability Act (“Act”), there are certain key duties that apply to LLC managers and members. Which duties apply to managers and members depend on the LLC’s designation of management as manager-managed or member-managed.

**How Are Managers and Members’ Duties Defined?**

Under the Act, the fork in the road is that the organizing members of the LLC must designate whether the LLC will be manager-managed or member-managed. This is an important distinction because the Act defines managers and members’ rights and duties based upon this designation. If no designation is made, the LLC defaults to a member-managed LLC. In what in many cases will be an unintended consequence, this default designation will give all members the right to manage the LLC and will impose broader duties and potential liability upon all members. See § 605.0407(1), Fla. Stat.
Under the Act, there also is no longer a “managing member.” See § 605.0407(1), Fla. Stat. The term “managing-member” is now obsolete, and any LLC formation documents should be updated to remove the term.

Management, likewise, should update the LLC’s operating agreement or articles of organization to designate the LLC’s management type. From this designation, the managers and members’ rights and duties will follow, including whether these documents broaden or limit the right and duties. See §§ 605.0407, 605.0105, Fla. Stat.

What are the Key Duties for Managers and Members?

Each manager of a manager-managed LLC, or member of a member-managed LLC, owes a fiduciary duty of loyalty to the LLC and its members. This is the core duty imposed upon managers and members, the breach of which often results in litigation. Importantly, the fiduciary duty of loyalty is not imposed upon a member, if the LLC is manager-managed. Members only have such a duty in a member-managed LLC. See § 605.04091(2), Fla. Stat.

The fiduciary duty of loyalty requires a manager in a manager-managed LLC, and a member in a member-managed LLC, to:

1. Account to the LLC, and hold for it as trustee, the LLC’s property, profit or benefit derived by the manager or member.
2. Refrain from dealing with the LLC as a person having an interest adverse to the LLC.
3. Refrain from competing with the LLC.


The Act, however, imposes certain limits on the duty of loyalty. In particular, managers or members do not violate their duty of loyalty solely because their conduct furthers their own interests. See § 605.04091(5), Fla. Stat. The manager or member further is entitled to rely on information and opinions that are prepared by employees or professionals, if the content is reasonably reliable. See § 605.04091(4), (6), Fla. Stat.

A manager in a manager-managed LLC, and a member in a member-managed LLC, also owes a fiduciary duty of care to the LLC and its members. The duty of care requires that the manager or member refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violations of law. See § 605.04091(3), Fla. Stat.

Managers and members must execute all fiduciary consistent with the obligations of good faith and fair dealing. See § 605.04091(4), Fla. Stat.

Do Operating Agreements and Common Law Principles Supplement a Manager or Member’s Duties?

The Act gives maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. The principles of law and equity, including common law principles relating to the fiduciary duties, supplement the provisions of the
Act. § 605.0111(3), Fla. Stat. This suggests that case law from other similar areas, e.g., corporations, may be borrowed and applied to LLCs.

**Conclusion**

It is critical for an LLC’s organizers or management to designate whether the LLC is manager-managed or member-managed. The key duties that govern managers and members -- including the fiduciary duties of loyalty and care and the obligation to perform such duties in good faith -- flow from this management designation. Equally important, the management designation may limit a manager or member’s liability. With the increased use of the LLC form to operate closely held businesses, as a plaintiff’s lawyer, you should be aware of the key fiduciary duties that apply to LLCs, and how the LLC’s management-designation may help or hurt your client’s case.