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Delineating Defects: A Primer on Florida Product Liability Law (2017)

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DELINEATING DEFECTS: A PRIMER ON FLORIDA PRODUCT LIABILITY LAW (2017)

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Mr. Hernandez graduated *magna cum laude* from St. Thomas University School of Law (2010). He received his B.A. in Philosophy from Florida International University (2006). While in law school, Mr. Hernandez was the Executive Editor of the *St. Thomas Law Review*. It is a great honor and privilege for Mr. Hernandez to return to the *St. Thomas Law Review* as an author. His last law review article was published in the *Creighton Law Review* as part of a Civil Procedure Symposium along with great civil procedure scholars such as Richard D. Freer. *See* Armando Gustavo Hernandez, *The Head-on Collision of Gasperini and the Derailment of Erie: Exposing the Futility of the Accommodation Doctrine*, 44 Creighton L. Rev. 191 (2010); *see also Richard D. Freer*, EMORY UNIVERSITY SCHOOL OF LAW, http://law.emory.edu/faculty-and-scholarship/faculty-profiles/freer-profile.html (last visited Mar. 18, 2018).
Mr. Hernandez dedicates this Article as a promise to and in the loving memory of his deceased father, Armando Hernandez, who was instrumental in supporting his legal career and sacrificing so much to ensure his development. Mr. Hernandez would also like to thank his mother Xiomara, wife Aileen, daughter Arya, and his entire family for the immense amount of inspiration they provide. Without them none of his achievements would be possible or his life so replete.
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I. INTRODUCTION

"The safety of the people shall be the highest law."
– Marcus Tullius Cicero[1]

"For safety is not a gadget but a state of mind."
– Eleanor Everet[2]

"We must respect the past, and mistrust the present, if we wish to provide for the safety of the future."
– Joseph Joubert[3]

The introductory quotes above frame the overall intention and roadmap of this Article. Ensuring the safety and well-being of children, women, and men in our community is among the highest priorities under the law. It is important to know where you have been to know where you are going. Careful scrutiny and reflection breeds keener understanding of purpose, direction, and meaningful change. Safety is paramount and cannot be treated as a mere means to an end, but instead must be

1. *See* Phoebe E. Arde-Acquah, *Salus Populi Suprema Lex Esto: Balancing Civil Liberties and Public Health Interventions in Modern Vaccination Policy*, 7 WASH U. JUR. REV. 337, 337 n.*See generally Marcus Tullius Cicero*, HISTORY CHANNEL, http://www.history.com/topics/ancient-history/marcus-tullius-cicero (last visited Mar. 18, 2018) (noting how Cicero was one of the "greatest orator[s] of the late Roman Republic" as well as "[a] brilliant lawyer . . . [who] was one of the leading political figures of the era of Julius Caesar, Pompey, Marc Antony and Octavian").

2. *Eleanor Everet Quotes*, FINESTQUOTES.COM, http://www.finestquotes.com/author_quotes-author-Eleanor%20Everet-page-0.htm (last visited Mar. 18, 2018).

3. *Joseph Joubert Quotes*, BRAINYQUOTE.COM, https://www.brainyquote.com/quotes/joseph_joubert_386955 (last visited Mar. 18, 2018).

approached as an ever-present state of mind or an end in itself. The wisdom one gleams from the above-referenced quotes inspires the aforementioned intentions, insights, and axioms, which guide this Article.

Technology, rampant innovations, widespread access to information and supplies, growing populations, the digitalization of modern society, and increasing consumer sophistication have all drastically changed the nature of product development, design methods, safety considerations, corporate responsibility, and product liability jurisprudence.[4] In today's consumer landscape of daily headlines and iPhone notifications regarding Takata Airbag recalls,[5] the Volkswagen emission scandal,[6] Johnson & Johnson talc powder litigation,[7] pelvic mesh litigation,[8] multi-faceted Uber

4. *See, e.g.*, James Peckham & John McCann, *iPhone through the ages: just how much has it changed?*, TECHRADAR (Sept. 13, 2017), http://www.businessinsider.com/18-tech-products-that-didnt-exist-10-years-ago-2017-7 (discussing the evolution and product development of the iPhone); Avery Hartmans, *These 18 incredible products didn't exist 10 years ago*, BUSINESS INSIDER (July 16, 2017), http://www.businessinsider.com/18-tech-products-that-didnt-exist-10-years-ago-2017-7 (exemplifying the evolution of modern products); James Hailstones, *10 Products That Have Changed Drastically Over Time*, THE RICHEST (June 1, 2015), https://www.therichest.com/rich-list/10-products-that-have-changed-drastically-over-time/ (noting these changes may even be pushed by fashion).

5. *See generally Takata Airbag Recall - Everything You Need to Know*, CONSUMER REPORTS, https://www.consumerreports.org/cro/news/2016/05/everything-you-need-to-know-about-the-takata-air-bag-recall/index.htm (last updated July 14, 2017) (noting that airbags made by Takata, a parts supplier, were recalled because they deployed explosively killing or injuring passengers).

6. *See generally* Russell Hotten, *Volkswagen: The scandal explained*, BBC NEWS (Dec. 10, 2015), http://www.bbc.com/news/business-34324772 (noting that Volkswagen admitted to cheating emissions tests using their defeat device, which changed car performance during emissions testing).

7. *See generally* Roni Caryn Rabin, *$417 Million Awarded in Suit Tying Johnson's Baby Powder to Cancer*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/health/417-million-awarded-in-suit-tying-johnsons-baby-powder-to-cancer.html (noting talc used in Johnson's baby powder was linked to causing cancer).

8. *See generally* Chris Mondics, *Philadelphia jury awards $20M to Cinnaminson woman in pelvic-mesh trial,* THE INQUIRER (last updated Apr. 28, 2017), http://www.philly.com/philly/business/law/Jury-awards-20-million-to-woman-in-pelvic-mesh-trial.html (noting that lawsuits accused Johnson & Johnson's pelvic-mesh of causing chronic pain and necessitating multiple surgeries); Tina Bellon, *J&J hit with $57 mln verdict in latest pelvic mesh trial*, REUTERS (Sept. 7, 2017) https://www.reuters.com/article/ethicon-lawsuit/jj-hit-with-57-mln-verdict-in-latest-pelvic-mesh-trial-idUSL2N1LO2EL (noting one lawsuit found Johnson & Johnson liable and awarded the plaintiff $57 million in the largest jury verdict to date); Hannah Devlin, *Revealed: Johnson & Johnson's 'irresponsible' actions over vaginal mesh implant*, THE GUARDIAN (Sept. 29, 2017) https://www.theguardian.com/society/2017/sep/29/revealed-johnson-johnsons-irresponsible-actions-over-vaginal-mesh-implant (noting that the vaginal mesh implant was produced without the company testing the product with a clinical trial).

lawsuits,[9] fatal toddler accidents with IKEA furniture,[10] and so much more, there is an increased awareness of and hypersensitivity to safety notices, recalls, consumer watchdogs, growing corporate distrust, and increased product or consumed-based litigation.[11] In the ever-growing, constantly-expanding, complex, and nuanced area of product liability law, it is critically important to have a firm handle on the state of the practice area, existing precedent, developments, evolving theories, and trends.[12]

Against the aforementioned backdrop, this Article is inspired from a short-term vision of creating an annual snapshot or a go-to reference guide covering Florida product liability law.[13] This Article also aims to achieve

9. *See generally* David Meyer, *Uber Is Already Getting Sued Over Its Gigantic Data Breach*, FORTUNE (Nov. 22, 2017), http://fortune.com/2017/11/22/uber-data-breach-lawsuit/ (noting that Uber paid its hackers $100,000 after a data breach to delete the data and not disclose the incident); Bonnie Christian, *Could lawyers and lawmakers regulate Uber to death?*, WIRED (Nov. 15, 2017), http://www.wired.co.uk/article/uber-future-after-softbank-and-legal-woes (noting that courts in the United Kingdom were requiring additional regulations for Uber, holding that Uber drivers needed to be "classified as works" in order to "guarantee minimum wage"); Brendan McDermid, *Colorado fines Uber $8.9M for nearly 60 problem drivers*, FOX BUSINESS (Nov. 20, 2017), http://www.foxbusiness.com/markets/2017/11/20/colorado-fines-uber-8-9m-for-nearly-60-problem-drivers.html (noting Colorado regulators fined Uber $8.9 million for hiring employees with criminal or motor vehicle offenses); William Vogeler, Esq., *Uber Quickly Settles Self-Driving Car Death*, FINDLAW (Mar. 30, 2018), http://blogs.findlaw.com/technologist/2018/03/uber-quickly-settles-self-driving-car-death.html?DCMP=NWL-pro_top.

10. *See generally* Eli Rosenberg, *Ikea furniture has killed eight children. Millions of recalled dressers may still be out there.*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/21/ikea-furniture-has-killed-eight-children-millions-of-recalled-dressers-may-still-be-out-there/?utm_term=.5e18efbaaec0 (explaining that Ikea recalled millions of pieces of furniture after toddlers were killed).

11. *See* Jason E. Adams et al., *Understanding General Distrust of Corporations*, 13 CORP. REPUTATION REV. 38, 38 (2010); Bourree Lam, *Quantifying Americans' Distrust of Corporations*, THE ATLANTIC (Sept. 25, 2014),https://www.theatlantic.com/business/archive/2014/09/quantifying-americans-distrust-of-corporations/380713/z (explaining how the general public is more skeptical of corporations and only 36 percent of Americans feel corporations are a source of hope); Larry Alton, *How Corporate Distrust Is Reshaping Advertising*, AD WEEK (Aug. 17, 2017), http://www.adweek.com/digital/larry-alton-guest-post-how-corporate-distrust-is-reshaping-advertising/#/ (stating that "82 percent of Americans . . . are dubious about big businesses"); Kimberly D. Elsbach, *America's Corporate Distrust Problem*, UC DAVIS (Apr. 5, 2012), https://gsm.ucdavis.edu/blog-feature/americas-corporate-distrust-problem (explaining how the public does not trust the leaders in corporations); *Defective product verdicts against business rise*, BLOOMBERG (Feb. 5, 2011), https://www.pe.com/2011/02/05/defective-product-verdicts-against-business-rise/.

12. *See* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 645–47, 653, 664–65 (1995) (referencing product liability law as "a public law subject" and noting how product liability law has developed with modern technology).

13. *See infra* Parts II–V. This Article will focus primarily on recreational, vehicular,

the long-term goal of serving as an easy-to-use, comprehensive, and pragmatic compendium on Florida product liability law going forward for lawyers, judges, law students, engineers, industry insiders, etc. Part II of this Article explores the state of Florida product liability law decided in 2017 on both the state and federal court levels in the seminal areas of design defect, manufacturing defect, and/or failure to warn.[14] Part III of this Article outlines trends and developments in the ancillary areas of procedural law, evidence, and jury instructions, among others.[15] Part IV of this Article outlines and examines important product liability verdicts in Florida in 2017.[16] Part V concludes with prospective commentary on the state of Florida product liability law and things to be cognizant of on the horizon.[17]

II. STATE OF THE CASE LAW

The seminal case in Florida delineating the universe of elements under product liability law is *West v. Caterpillar Tractor Co., Inc.*[18] In *West*, the Florida Supreme Court made explicitly clear that Florida would recognize strict liability as a matter of Florida law and adhere to the Second Restatement of Torts.[19] The Florida Supreme Court harped on the following rationale as articulated by the Third District Court of Appeal:

> At the heart of each theory is the requirement that the plaintiff's injury must have been caused by some *defect* in the product. Generally, when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the manufacturer. It is not contemplated that a manufacturer should be made the insurer for *all*

automotive, appliances, and similar product liability sub-categories. *See infra* Part II. This Article will have little to no emphasis on medical malpractice or pharmaceutical litigation, which can be an entire treatise in itself. *See infra* Parts II–V. Moreover, the Article does not set out to cover each and every nuance of case law, verdicts, and/or trends under Florida product liability law, but instead the most salient in the opinion of the author. *See infra* Parts III–IV.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976). As of March 18, 2018, *West* has been cited on Westlaw a total of 3,480 times, including in 447 cases, 2,432 trial court documents, sixteen trial court orders, 240 appellate court documents, and 344 secondary sources.

19. *Id.* at 86–87. (citing Royal v. Black and Decker Mfg. Co., 205 So.2d 307, 309 (Fla. 3d DCA 1967)) (highlighting the Third District Court of Appeal of Florida as an example of the then-forming trend of Florida decisions moving toward strict liability); *see also* Pinchinat v. Graco Children's Prods., Inc., 390 F. Supp. 2d 1141, 1146 (M.D. Fla. 2005) (exemplifying *West* as the case adopting strict liability).

physical injuries caused by [its] products.[20]

The Florida Supreme Court went on to expound on the infant-stages of product liability under Florida law with the following sentiment:

> In other words[,] strict liability should be imposed only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. The user should be protected from unreasonably dangerous products or from a product fraught with unexpected dangers. In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.[21]

"Strict liability does not make the manufacturer or seller an insurer. Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence."[22]

Florida product liability law is viewed in three main categories: (1) design defect; (2) manufacturing defect; and (3) warnings (failure to warn and/or inadequate warnings).[23] "An entity can be liable for each type of defect under theories of strict liability and negligence."[24] "Both theories share the common elements of a defective product and causation."[25] "For claims in negligence and strict liability, a plaintiff must prove that the product was defective. In general, proof of a defect determines a breach of a duty under a negligence theory and the presence of an unreasonably dangerous condition under a strict liability theory."[26]

In order to establish a prima facie claim for design defect, a plaintiff carries the burden of proving the following essential elements: "(1) a product (2) produced by a manufacturer (3) was defective or created an

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20. *West*, 336 So. 2d at 86 (quoting *Royal*, 205 So. 2d at 309).

21. *Id.* at 86–87.

22. *Id.* at 90.

23. *See Pinchinat*, 390 F. Supp. 2d at 1146; Force v. Ford Motor Co., 879 So. 2d 103, 106 (Fla. 5th DCA 2004) ("In the byzantine world of products liability, there are three basic families of defects . . . .").

24. Zaccone v. Ford Motor Co., No. 2:15-cv-287-FtM-38CM, 2017 WL 1376160, at *3 (M.D. Fla. Apr. 17, 2017).

25. *Id.*

26. O'Bryan v. Ford Motor Co., 18 F.Supp. 3d 1361, 1366 (S.D. Fla 2014) (internal citations omitted).

unreasonably dangerous condition (4) that proximately caused (5) injury."[27] Whether a product is defective is determined using the consumer expectations test and, in some instances, the risk utility test.[28] "On the one

27. *Pinchinat*, 390 F. Supp. 2d at 1148 (citing McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1257 (11th Cir. 2002)).

28. *See* Aubin v. Union Carbide Corp., 177 So. 3d 489, 502, 512 (Fla. 2015); *see also* Armando Gustavo Hernandez, *Supreme Court Evaluates Consumer Expectations Test in Strict Liability Claims*, DAILY BUS. REVIEW (Nov. 16, 2015), https://www.law.com/dailybusiness review/almID/1202742506297/#ixzz3rl9RKh98. In the seminal *Aubin* decision:

> The Aubin court concluded that "the definition of design defect first enunciated in West, which utilizes the consumer expectations test, instead of utilizing the risk utility test and requiring proof of a reasonable alternative design, best vindicates the purposes underlying the doctrine of strict liability." The underlying purpose of strict liability, as the court indicates, is "to relieve injured consumer from the difficulties of proving negligence on the part of the product's manufacturer." The court noted that "by introducing foreseeability of the risk to the manufacturer as part of the calculus for design defect and requiring proof of a 'reasonable alternative design,' the Third Restatement reintroduces principles of negligence into strict liability."
>
> In arriving at its holding, the court analyzed and was guided by other state supreme court opinions (i.e. Connecticut, Kansas, Pennsylvania and Wisconsin) that had considered the same question and expressed public policy concerns about the risk utility test as applied to design defects. The court emphasized how the risk utility test "blurs the distinction between strict products liability claims and negligence claims . . . focus[ing] on the conduct of the manufacturer." In addition, it found that the Third Restatement's risk utility test and alternative design requirement "imposes a higher burden on consumers to prove a design defect than exists in negligence cases — the antithesis of adopting strict products liability in the first place." Moreover, the court was persuaded that the consumer expectations tests "intrinsically recognizes that a manufacturer plays a central role in establishing the consumers' expectations for a particular product, which in turn motivates consumers to purchase the product." The court rejected proof of a reasonable alternative design as a required element and declared such an unnecessary and additional burden. The court commented that such a requirement "could insulate a manufacturer from all liability for unreasonably dangerous products solely because a reasonable alternative design for that type of product may be unavailable."
>
> It is important to note that the Florida Supreme Court did not reject the risk utility test and reasonable alternative design concept in all regards. The Aubin decision, while seemingly far sweeping, should not be read so broadly. The court commented that the "consumer expectations test does not inherently favor either party." The decision, at a very minimum, holds that the consumer expectations test — as enunciated in West Caterpillar and its progeny, as well as the Second Restatement of Torts — must be used to define a design defect. However, the decision does not expressly (or even impliedly) reject the risk utility test in other contexts (such as negligence counts, as an affirmative defense, or as an additional standard). Instead, the court explains that a "defendant may present evidence that no reasonable alternative design existed while also arguing in defense that the benefit of the product's design outweighed any risks or injury or death caused by the design." Moreover, in light of the existing product liability instructions recently promulgated by the very same Aubin court, the risk utility test is still relevant and worthy of consideration either in addition to the

hand, the consumer expectations test essentially posits that a product is defectively designed if the plaintiff is able to demonstrate that the product did not perform as safely as an ordinary consumer would expect when used in the intended or reasonably foreseeable manner."[29] "On the other hand, the risk utility test postulates that a product is unreasonably dangerous because of its design if the risk of danger in the design outweighs the benefits."[30]

"[A] manufacturing defect may occur when a mistake is made in the manufacturing process that results in a departure from the manufacturing plan which produces a flaw in an otherwise correctly *designed* product."[31] The First District Court of Appeal, in *Cassisi v. Maytag Co.*,[32] "observed that the consumer expectation test works reasonably well to determine whether a product is defective based on a flaw in manufacturing in a products liability case based on strict liability."[33] For purposes of a manufacturer's defect, "*Cassisi* permits a plaintiff to establish an inference of defect sufficient to send the case to the jury by showing that the malfunction occurred during normal usage of the product."[34]

Lastly, in order to establish a prima facie claim for failure to warn and/or inadequate warnings, a plaintiff carries the burden of proving the

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consumer expectations test or as a defense. The Aubin court expressly noted that the recent product liability instructions use both the consumer expectations and risk utility tests. The Aubin decision indicates nothing that would undermine the giving of both instructions going forward under the appropriate facts.

Hernandez, *supra.*

29. Hernandez, *supra* note 28.

30. *Id.*

31. 6 THOMAS D. SAWAYA, PERSONAL INJURY & WRONGFUL DEATH ACTIONS § 13:17, Westlaw (2017–2018 ed.) (emphasis added).

32. Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981).

33. SAWAYA, *supra* note 31 (citing *Cassisi*, 396 So. 2d at 1145).

34. Cooper v. Old Williamsburg Candle Corp., 653 F. Supp. 2d 1220, 1224 (M.D. Fla. 2009) (citing *Cassisi*, 396 So. 2d at 1148). The Middle District Court of Florida noted the following regarding the *Cassisi* inference:

> The *Cassisi* inference applies when circumstantial evidence demonstrates that the malfunction occurred during normal operation of the product. . . . "[W]hen a product malfunctions during normal operation, a legal inference . . . arises, and the injured plaintiff thereby establishes a prima facie case for jury consideration." . . . "[T]he normal use requirement from *Cassisi* is based on the consumer-expectations test from the Restatement of Torts (Second), which asks whether 'the ordinary consumer's expectations [are] frustrated by the product's failure to perform under the circumstances in which it failed.'" . . . Whether the use qualifies as normal is generally a question of fact for the jury.

Id.

following essential elements: (1) "a manufacturer or distributor of the product at issue," and (2) "did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of the manufacture and distribution."[35] "Unless the danger is obvious or known, a manufacturer has a duty to warn where its product is inherently dangerous or has dangerous propensities."[36] In order to adequately warn, "the product label must make apparent the potential harmful consequences[,]" and "[t]he warning should be of such intensity as to cause a reasonable person to exercise for his [or her] own safety caution commensurate with the potential danger."[37] Moreover, "[a] warning should contain some wording directed to the significant dangers arising from failure to use the product in the prescribed manner, such as the risk of serious injury or death."[38]

Additionally, there are numerous available affirmative defenses unique to the product liability context. For example, the state of the art defense, which is statutorily codified, is paramount in product liability actions.[39] The pertinent statute provides that in a products liability action against the manufacturer based on defective design of its product, "the finder of fact shall consider the state of the art of scientific and technical knowledge and other circumstances that existed at the time of manufacture, not at the time of loss or injury."[40] This defense is available in cases based on negligence as well as strict liability. Similarly, "statutes of repose 'bar actions by setting a time limit within which an action must be filed as measured from a specified act, after which time the cause of action is extinguished.'"[41]

35. Pinchinat v. Graco Children's Prods., Inc., 390 F. Supp. 2d 1141, 1146 (M.D. Fla. 2005) (citing Ferayorni v. Hyundai Motor Co., 711 So. 2d 1167, 1172 (Fla. 4th DCA 1998)).

36. *Id.* (quoting Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133, 1139 (Fla. 4th DCA 2002)).

37. Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133, 1139 (quoting Am. Cyanamid Co. v. Roy, 466 So. 2d 1079, 1082 (Fla. 4th DCA 1984)).

38. Brito v. Cty. of Palm Beach, 753 So. 2d 109, 112 (Fla. 4th DCA 1998).

39. *See* FLA. STAT. § 768.1257 (2017); *see also* SAWAYA, *supra* note 31 ("When the [Florida] legislature enacted Fla. Stat. § 768.1257 . . . it adopted the state of the art defense in products liability cases based on defective design of the product.").

40. § 768.1257.

41. Hess v. Philip Morris USA, Inc., 175 So. 3d 687, 695 (Fla. 2015) (quoting Merkle v. Robinson, 737 So. 2d 540, 542 n.6 (Fla. 1999)). "The period of time established by a statute of repose commences to run from the date of an event specified in the statute. . . . At the end of the time period the cause of action ceases to exist." *Id.* (quoting Carr v. Broward Cty., 505 So. 2d 568, 570 (Fla. 4th DCA 1987)). "[T]he statute of repose [can] be constitutionally applied to bar

Against the foregoing preliminary background on the categories of Florida product liability law, below is a thorough examination of the state of Florida product liability law –decided in 2017 – on both the state and federal court levels.

A. DESIGN DEFECT

We begin, in no particular order, with *Zaccone v. Ford Motor Co.*, where a pro-se litigant and widower brought a product liability lawsuit against Ford Motor Company "for an allegedly defective airbag system, roof structure, and rollover prevention/protection system in his late-wife's 2006 Ford Escape."[42] By way of background, the facts underlying the subject lawsuit are both tragic and very telling. "[O]n May 6, 2013 . . . Mr. Zaccone and his [deceased] wife, Judy Hanna, embarked on a cross-country road trip . . . to celebrate their seven-year wedding anniversary."[43] The trip preparation included popping a bottle of champagne, a couple of glasses for each, and drinking a can or two of beer, and a glass or two of wine.[44] Mr. Zaccone and his wife started their trip with Mr. Zaccone driving and his wife riding in the front passenger seat.[45] "The couple stopped in Miami, where [Mr.] Zaccone drank about two glasses of Kahlua with milk and Hanna drank about two glasses of wine."[46] After leaving Miami, Mr. Zaccone "drove west to Naples, Florida" where the couple stopped again for "a couple of drinks."[47] "The couple then continued driving north until they reached Punta Gorda, Florida . . . [in the late

claims even when the cause of action does not accrue until after the period of repose has expired." *Id.* (quoting Damiano v. McDaniel, 689 So. 2d 1059, 1060 (Fla. 1997). "[S]tatutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests." *Id.* (quoting *Carr*, 505 So. 2d at 95. "Statutes of repose are 'legislative determination[s] that there must be an outer limit beyond which [claims] may not be instituted,' attempt[ing] to balance the rights of injured persons against the exposure of [defendants] to liability for endless periods of time." *Id.* (quoting Kush v. Lloyd, 616 So. 2d 415, 421–22 (Fla. 1992)). "Certainly, over time "memories fade, documents are destroyed or lost, and witnesses disappear." *Id.* (quoting Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 209 (Fla. 2003)).

42. Zaccone v. Ford Motor Co., 2:15-cv-287-FtM-38CM, 2017 WL 1376160, at *1 (M.D. Fla. Apr. 17, 2017).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

evening] where everything turned for the worse."[48] Mr. Zaccone and Hanna "were fighting because he wanted to find a hotel for the night, but Hanna wanted to continuing travel north on Interstate 75—to Tampa."[49] "Hanna was allegedly 'screaming' at [Mr.] Zaccone not to get off the highway."[50] Mr. Zaccone had "a real bad feeling," and told his wife, "I really don't like the way this is going, Judy, I think we're going to turn around and go back home" and suggested that the couple separate for a while.[51] Displeased with the comment, Mrs. Zaccone "grabbed the steering wheel and jerked it[,]" causing the Ford Escape to "fishtail" at an excessive rate of speed and ultimately rollover "at least three times for 300 feet."[52] "[N]either of [the front airbags] deployed during the rollover."[53] Both Mr. and Mrs. Zaccone had their seatbelts on but only Mr. Zaccone survived.[54]

Mr. Zaccone brought suit against Ford, "claiming the Escape's airbag system, roof structure, and rollover protection system were defective."[55] The causes of action sounded in "negligence, strict liability manufacturing defect, strict liability design defect, strict liability failure to warn, and negligent failure to warn."[56] Ford moved for summary judgment, alleging that plaintiff had no evidence to show that the Escape was defective at the time of the accident, and that any alleged defect or associated failure to warn was the proximate cause of injury.[57]

Finding in favor of Ford on summary judgment, the Middle District noted that plaintiff had "no expert evidence to support [the] allegations, even though the Court twice extended the expert disclosure and discovery deadlines to accommodate" the pro se litigant (who was incarcerated).[58] The Middle District emphasized that a "defect must be proven by expert testimony" and that "expert testimony is often required to establish defective design of a product."[59] The *Zaccone* Court also put great weight

48. *Zaccone*, 2017 WL 1376160, at *1.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at *1–2.
53. *Id.* at *2. The Ford Escape "did *not* have side-impact or side curtain airbags." *Id.* (emphasis added).
54. *Zaccone*, 2017 WL 1376160, at *2.
55. *Id.*
56. *Id.*
57. *Id.* at *3.
58. *Id.* at *3, *5.
59. *Id.* at *3 (first quoting Savage v. Danek Med., Inc., 31 F. Supp. 2d 980, 983 (M.D. Fla.

on the fact that no expert had inspected the subject vehicle on behalf of the plaintiff, even though a court order requiring preservation of the vehicle had been entered for nearly one year.[60] Along the same lines, the *Zaccone* Court highlighted the pro se plaintiff's quantum of proof problem and lack of expert basis to establish a defect in explaining that

> [a]t most, Zaccone points to photographs of the Escape post-accident and opines that there was a sufficient near-frontal collision to trip the airbag sensors. But Zaccone is not qualified to make that determination. He also cannot rely on the mere non-deployment of the Escape's front airbags and the occurrence of the rollover crash to establish a defect.[61]

The Middle District even went as far as to assume application of the *Cassisi* inference, which would alleviate plaintiff's burden of proving a defect, but still found the lack of causation evidence and/or expert opinion (engineering, medical or otherwise) fatal to plaintiff's claims.[62] As the Middle District aptly concluded, "In sum, Zaccone falls short of showing a defect in the Escape at the time of the accident."[63]

In *Allen v. Wing Enterprises, Inc.*, a case with strikingly similar facts as *Zaccone*, we are presented with another pro se plaintiff and the firm tenant of Florida product liability law that a claimant must establish a design defect through expert opinion.[64] The plaintiffs' "complaint alleged that [the defendant] Wing Enterprises acted negligently, and sought recovery under strict liability and *res ipsa loquitur* theories."[65] The plaintiffs "alleged that in 2012 they bought two Little Giant Extreme Ladders for use in their business."[66] Defendant "Wing Enterprises

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1999); and then quoting Worsham v. A.H. Robins Co., 734 F.2d 676, 687 n.8 (11th Cir. 1984)).

60. *Zaccone,* 2017 WL 1376160, at *3.

61. *Id.* (citing Husky Indust., Inc. v. Black, 434 So. 2d 988, 995 n.8 ("'[T[he mere showing' that product exploded was not sufficient to prove that the product was defective.")).

62. *Id.* at *3, *4–5.

63. *Id.* at *4.

64. *See* Allen v. Wing Enterprises, Inc., 8:15-cv-1808-T-17AEP, 2017 WL 3720877, *1, 2 (M.D. Fla. Feb. 27, 2017).

65. *Id.* at *1. *See generally Res ipsa loquitur*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[T]he doctrine whereby when something that has caused injury or damage is shown to be under the management of the party charged with negligence.").

66. *Allen*, 2017 WL 3720877, at *1; *see also* LITTLE GIANT XTREME, https://www.littlegiantxtreme.com/?gclid=EAIaIQobChMI28vAhvXz1wIVm1YNCh3RLwIbEAAYASAAEgI0XfD_BwE (last visited Mar. 18, 2018) (advertising the Little Giant Xtreme ladder).

manufactured, designed, and distributed these ladders."[67] "To advertise their ladders, defendant Wing Enterprises ran internet campaigns and infomercials on television."[68] "Designed to configure into several shapes, the Little Giant Extreme Ladders came equipped with locking hinges that allowed users to comport them into different configurations."[69] "On July 16, 2013, [Mr.] Allen used both of his Little Giant Extreme Ladders in an approved configuration."[70] "However, one of the hinges failed during normal operation, broke, and collapsed[,]" causing Mr. Allen to fall "to the ground and suffer[] serious injuries."[71]

Defendant Wing Enterprises moved for summary judgment, claiming that the Allens failed to establish a defect and/or that any defect caused the alleged injuries.[72] United States District Judge Elizabeth A. Kovachevich for the Middle District of Florida (Tampa Division) granted summary judgment in favor of defendant Wing Enterprises.[73] Judge Kovachevich noted that "the Allens offered absolutely no expert testimony to support their contention that Wing Enterprises acted negligently or [was] liable under a strict liability theory."[74] As in *Zaccone*, the Allens were granted additional time by the district court to proffer such expert testimony in support of a design defect.[75] "The Allens failed to take advantage of [the] opportunity" and "suffer[ed] the consequences."[76]

The *Allen* decision crystallizes that Florida law requires a plaintiff in a product liability case to prove a defect in the product that allegedly caused the injury.[77] As a matter of Florida law, "[e]xpert testimony is

67. *Allen*, 2017 WL 3720877, at *1.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Allen*, 2017 WL 3720877, at *1, *3.
74. *Id.* at *2.
75. *See id.*
76. *Id.*
77. *See id.*; *see also* Leoncio v. Louisville Ladder, Inc., 601 F. App'x 932, 933 (11th Cir. 2015) ("Florida law is clear that Mr. Leoncio's failure to read the warning cuts off Louisville Ladder's liability based on the alleged inadequacy of the warning."); Samantha Joseph, *Fort Lauderdale Attorneys Win $4.7 Million Against Home Depot, Tricam*, DAILY BUSINESS REVIEW (Aug. 14, 2017), https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2017/08/14/fort-lauderdale-attorneys-win-4-7-million-against-home-depot-tricam/?slreturn=20180023173416 (noting the plaintiff successfully argued that the ladder's manufacturing defect "that placed rivets in one of the rear rails" out of alignment caused his fall); MORTON F. DALLER, PRODUCT LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM 180 n.29 (Wolters Kluwer 2017).

required to establish a defect under a negligence or strict liability theory."[78] "The failure to offer expert testimony to support a products liability theory is [proper grounds] for dismissal."[79] The Middle District even notes that it has been steadfast in dismissing product liability cases for failure to offer sufficient expert testimony.[80]

Along the same lines, and also emanating from the Middle District of Florida, is *Wright v. Insight Pharm.*[81] The facts involve an infant product named "Gentle Naturals Cradle Cap Treatment . . . [used] for treating infant cradle cap."[82] The "[p]laintiff purchased the product from . . . Wal–Mart in its original container and firmly sealed."[83] The plaintiff alleged "that the minor children suffered adverse photosensitive reactions to the product resulting from the combination of the product on their skin and exposure to sunlight, and that they have a permanent loss of pigmentation in the affected areas."[84] The allegations of product defect included "design, manufacture, production, advertising, sale, and warnings[,] rendering [the product] unsafe for its intended use."[85]

Judge Steele commenced the legal analysis with the following basic tenets:

> In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the

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When expert testimony is provided to support a claim for a defective design of a ladder the results can be noteworthy and in contrast to the result in *Allen*. *See* Joseph, *supra*. However, even with an expert opinion supporting a design defect claim, there can be hurdles to overcome. *See Leoncio,* 601 F. App'x at 933. In *Leoncio* the Circuit Court granted summary judgment in favor of defendant Louisville Ladder as a result of plaintiff Rene Leoncio's failure to read the on-product warning labels despite plaintiff's expert opinions that the ladder was defective due to inadequate warnings. *Id.* at 933. The ruling for Louisville Ladder in *Leoncio* was upheld on appeal to the Eleventh Circuit Court of Appeals. *Id.*

78. *Allen*, 2017 WL 3720877, at *2.

79. *Id.*

80. *See, e.g.*, Wilson v. Danek Med., Inc., No. 96-2460-CIV-T-17B, 1999 WL 1062129, at *4 (M.D. Fla. Mar. 29, 1999) ("[W]ithout any [expert] testimony that the product was defective, [there] was not sufficient [evidence] to withstand summary judgment."); Savage v. Danek Med., Inc., 31 F. Supp. 2d 980, 983 (M.D. Fla. 1999) ("A defect must be proven by expert testimony.").

81. Wright v. Insight Pharm., LLC, 2:16-cv-547-FtM-99MRM, 2017 WL 4310252 (M.D. Fla. Sept. 28, 2017).

82. *Id.* at *1.

83. *Id.*; *see also Gentle Naturals Baby Cradle Cap Treatment Kit*, WALMART, https://www.walmart.com/ip/Gentle-Naturals-Baby-Cradle-Cap-Treatment-4-oz/20746440 (last visited Mar. 18, 2018).

84. *Wright*, 2017 WL 4310252, at *1.

85. *Id.*

> product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.[86] A nonmanufacturing retailer is also subject to strict liability for an alleged defective product.[87] For a claim based on a theory of negligent design, manufacturing or the failure to provide adequate warnings, plaintiff must show that defendants owed a duty of care, that was breached, and the breach was a proximate cause of plaintiff's injury, and mostly importantly that the product itself was defective or unreasonably dangerous.[88]
>
> For both the strict liability claims and the negligence claims, plaintiff bears the burden of proof to show that the product was defective[.][89] [Most significantly,] a defect must be proven by expert testimony[.][90]

Applying the foregoing principles, Judge Steele found that the "plaintiff presented no evidence to support her burden as to any elements by failing to respond and failing to timely disclose an expert."[91] "Without any expert testimony or the potential for expert testimony at trial, the Court [was compelled] to grant summary judgment in favor of defendants" as a matter of well-established Florida product liability law.[92]

B. WARNINGS

In *Thibault v. White*, a case with a factual scenario all too real for this author,[93] Plaintiffs brought a myriad of claims relating to ingestion of raw oysters.[94] The background story is that Mr. Thibault was vacationing "in Panama City Beach, Florida during Labor Day Weekend of 2014."[95] "Mr. Thibault walked on the beach but did not enter the Gulf of Mexico." Mr. Thibault dined at defendant's restaurant – Dat Cajun Place Café – where he consumed raw oysters.[96] "At the time, Mr. Thibault knew he suffered from

86. *Id.* (quoting West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80, 87 (Fla. 1976)).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Wright*, 2017 WL 4310252, at *2.
91. *Id.*
92. *Id.*
93. Mr. Hernandez suffers from severe anaphylactic allergies to shelled fish, among other things.
94. *See* Thibault v. White, 5:16-cv-56-GRJ, 2017 WL 1902173, at *1, *2 (N.D. Fla. Jan. 18, 2017).
95. *Id.* at 1.
96. *Id.*

chronic liver disease and Hepatitis C."[97] Mr. Thibault claimed, "he did not know that consuming raw oysters presented a serious risk of bacterial infection to persons with liver disease."[98]

Procedurally, plaintiffs filed a Motion to Exclude Expert Testimony, Motion to Exclude Evidence of Alcohol Consumption, and a Motion for Partial Summary [Judgment], which the defendants opposed.[99] "Plaintiffs did not file a reply to Defendants' response in opposition to the motion for partial summary judgment."[100] Plaintiffs' Motion for Partial Summary Judgment focused only on the negligence per se and strict liability counts of their four-count complaint.[101] In moving for partial summary judgment on their strict liability claim, plaintiffs argued, on the one hand, that Florida law required defendants to warn plaintiffs that the raw oysters were dangerous and failed to do so, causing injury to Mr. Thibault.[102] In opposing summary judgment, on the other hand, defendants argued that plaintiffs failed to plead a failure to warn theory of strict liability.[103] Alternatively, defendants argued that "there are genuine disputes of material fact as to whether defendants' oysters were defective or unreasonably dangerous, whether defendants' warnings were adequate, and if the warnings were inadequate, whether the warnings were the proximate cause of Mr. Thibault's infection."[104]

The *Thibault* Court denied the motion for partial summary judgment, finding genuine issues of material fact.[105] As a matter of Florida product liability law,

> [a] strict liability failure to warn claim requires a plaintiff to prove that defendant: (1) is a manufacturer or distributor of the product at issue; and (2) "did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best

97. *Id.*
98. *Id.*
99. *Id.*
100. *Thibault*, 2017 WL 1902173, at *1.
101. *Id.* at *9.
102. *Id.* at *11.
103. *Id.*
104. *Id.*
105. *Id.* at *12. First, the Court found a genuine issue of material fact regarding "whether Defendants' oysters were defective or unreasonably dangerous." *Id.* "Second, a genuine dispute remains as to whether Defendants' warnings were adequate." *Id.* at *13.

> scientific and medical knowledge available at the time of the manufacture and distribution."[106]

Additionally, "a strict liability failure to warn claim requires that the plaintiff prove the inadequate warning was the proximate cause of injuries."[107] In order to de deemed an adequate warning, a "product label must make apparent the potential harmful consequences" and contain "such intensity as to cause a reasonable [person] to exercise . . . safety caution commensurate with the potential danger."[108] "The sufficiency and reasonableness of warnings are questions of fact best [reserved to the province of] the jury, unless the warnings are [facially] accurate, clear, [unequivocal,] and unambiguous.[109]

With regards to the genuine issue of material fact regarding the adequacy of the warnings, the Court first turned to Fla. Admin. Code R. 61C-4.010(8) regarding food establishments serving oysters publishing the following notice:

> Consumer Information: There is risk associated with consuming raw oysters. If you have chronic illness of the liver, stomach or blood or have immune disorders, you are at greater risk of serious illness from raw oysters, and should eat oysters fully cooked. If unsure of your risk, consult a physician.[110]

In the *Thibault* case, the defendant café undisputedly "had four warning notices posted throughout the restaurant that complied with" the above code provision.[111] Mr. Thibault testified that he did not see any warnings but did not deny the warnings were posted; consequently, the issue was adequacy of the warnings.[112] The *Thibault* Court found that a reasonable jury might find that Mr. Thibault could and should have seen any of the posted notices, that Mr. Thibault simply failed to read the

106. *Id.* at *12 (quoting Thomas v. Bombardier Rec. Prods., Inc., 682 F. Supp. 2d 1297, 1300 (M.D. Fla. 2010)). On a side note, the author, Mr. Hernandez, was an integral part of the trial team representing Bombardier Recreational Products, Inc. in the *Thomas* case.

107. *Id.* (citing Giddens v. Denman Rubber Mfg. Co., 440 So. 2d 1320, 1323 (Fla. Dist. Ct. App. 1983) ("explaining that in a strict liability failure to warn claim, [u]nless it be said that the failure to warn was not, as a matter of law, a proximate cause of plaintiff's injury, the issue of proximate causation is one for the jury")).

108. *Id.* at *13 (quoting Am. Cyanamid Co. v. Roy, 466 So. 2d 1079, 1082 (Fla. 4th DCA 1984)).

109. Thomas v. Bombardier Recreational Prods., Inc., 682 F. Supp. 2d 1297, 1300 (M.D. Fla. 2010).

110. *Thibault*, 2017 WL 1902173, at *13 (quoting FLA. ADMIN. CODE R. 61C-4.10(8)).

111. *Id.*

112. *Id.*

warnings, or that the causation of Mr. Thibault's alleged injuries was something other than the consumption of the oysters—all of which required denying summary judgment.[113] The *Thibault* decision also accentuates the importance of certain underlying strategy decisions that litigators face regarding whether to move for summary judgment, the likelihood of success of such a dispositive motion, and giving away too much prior to trial.

In *Hernandez v. Wahoo Fitness, LLC*, a "minor child was permanently injured when [the child] swallowed a lithium battery that was installed in a cycling speed and cadence sensor manufactured and distributed by defendant."[114] The case came before the Middle District regarding "Defendant's Motion to Withdraw a Response to Request for Admission."[115] The plaintiffs alleged "that the battery was defective, unreasonably dangerous, and unfit for its intended use."[116] The plaintiffs also alleged "that the Defendant knew or should have known of the battery's dangerous propensities and recklessly distributed its product with inadequate warnings and instructions."[117] The defendant claimed "that before [the subject] accident the only risk it was aware of was the risk of fire if certain batteries were packaged too closely together."[118] "*After* [the subject] accident, Defendant added a warning to the sensor, warning of the possibility that it could cause serious burns or death."[119] After some confusion as to the actual manufacturer of the battery (either Sony or Maxell), the defendant mistakenly admitted to providing no warning in response to the request for admission.[120] Subsequently, the defendant sought to withdraw the admission.[121] Because the plaintiff could not

113. *Id.* at *13–14; *cf.* Ruiz v. Wintzell's Huntsville, L.L.C., 5:13-CV-02244-MHH, 2017 WL 4305004, at *1 (N.D. Ala. Sept. 28, 2017) (involving a plaintiff who developed a severe infection after eating raw oysters, which was decided under Alabama law).

114. Hernandez v. Wahoo Fitness, LLC, 6:15-cv-1989-Orl-41TBS, 2017 WL 3720827, at *1 (M.D. Fla. Jan. 31, 2017).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (emphasis added).

120. *See Hernandez*, 2017 WL 3720827, at *1.

121. *See id.* at *1.

> Federal Rule of Civil Procedure 36(b), which governs requests for admissions, provides that "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."

establish any prejudice that would be caused by allowing defendant to withdraw the admission, the district court granted leave to do so.[122]

Finally, in *Cerrato v. Nutribullet, LLC*, the plaintiffs purchased defendants' Nutribullet Pro 900 blender and encountered an alleged defect with a blender that would not turn off once engaged.[123] The plaintiff "unplugged the blender to make it stop[,] . . . waited approximately twenty minutes for it to cool down[,]" and then tried to open the lid.[124] "[T]he contents inside the cup exploded, severely burning [the plaintiff] and causing property damage to her kitchen."[125] The plaintiff's expert opined that the subject blender was defective due to design and warnings.[126] The plaintiff's expert postulated that the on-product warnings "only warn[] against running [the blender] for more than a minute. Without a motor timer (set to approximately 1 minute) and/or a second thermal cut-off switch" the subject blender is duly defective as to warnings and design.[127] The defendants moved for summary judgment on the plaintiff's warnings-based claims contending that: (1) the plaintiff "cannot establish that a product defect caused the incident and [their] injuries;" and (2) the plaintiffs' own expert failed to provide "any causation opinion that a different warning would have resulted in a different outcome."[128]

Focusing on just the warnings-based claims for purposes of this section of the Article, the *Cerrato* Court denied summary judgment in favor of the defendants on the warnings claims.[129] The Middle District found ample expert opinions to support plaintiff's claims of inadequate

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Id.

122. *See id.* at *2.

123. Cerrato v. Nutribullet, LLC, 8:16-cv-3077-T-24JSS, 2017 WL 5164898, at *1 (M.D. Fla. Nov. 7, 2017).

> [Functionally,] [t]he blender does not have an "on/off" switch. Instead, the blender consists of a cup that holds the ingredients to be blended, a lid that contains the blending blades, and a base that contains the motor. When the cup is twisted into the base, the motor turns on; when the cup is twisted off the base, the motor turns off.

Id.

124. *Id.*

125. *Id.*

126. *Id.* at *2.

127. *Id.*

128. *Id.* at *12.

129. *See Cerrato*, 2017 WL 5164898, at *12.

warnings.[130] Specifically, the *Cerrato* Court noted the expert opinions relating to: the implication of the on-product warning label that the blender will shut off if it gets hot juxtaposed to the expert testing that after running for extended periods of time the blender's sensors would not shut it off; and/or the internal temperature limit being too high to protect the user.[131] Even more interestingly, the Middle District debunked a seemingly misplaced legal contention on the part of the defendants regarding alternative warnings.[132] The *Cerrato* opinion stated: "To the extent that Defendants argue that there must be an expert opinion that specifically opines that different warnings would have resulted in a different outcome, Defendants *fail to cite to legal authority within Florida or the Eleventh Circuit to support that specific proposition.*"[133] The latter point is critical as defendants often erroneously raise this argument in an effort to improperly burden-shift.

III. TRENDING: PROCEDURAL, EVIDENTIARY, & MORE

Outside of the three main categories of traditional Florida product liability law covered above, this Article also seeks to address matters concerning procedural considerations and/or pointers, evidentiary developments connected with the practice of Florida product liability law, and other miscellaneous matters that often arise—such as standing, application of the economic loss doctrine, etc.—which are essential to the practice area.

A. IS *DAUBERT* STILL A THING IN FLORIDA?

"Florida courts, lawyers and litigants have been addressing the admission of expert testimony under the *Daubert* standard since it was passed by the [Florida] Legislature in 2013."[134] "There have been countless

130. *See id.* at *12–13.

131. *See id.* at *13–14.

132. *See id.* at *14.

133. *Id.* at *14 (emphasis added). In fact, no such legal authority exists, or the Middle District surely would have cited it. *See id.* Moreover, Florida is *not* a heeding presumption jurisdiction. *See id. See* Answer Brief for Appellant at 11–12, Rene Leoncio and Heidi Leoncio v. Louisville Ladder, Inc. f/k/a Davidson Ladder Co., No. 14-12972 (11th Cir. Jan. 21, 2015) ("Most importantly, Florida products liability law—unlike California, Pennsylvania, and Virginia—does not recognize a heeding presumption.").

134. Armando G. Hernandez, *Hold Your Horse and Carriage: Daubert Hasn't Gone Anywhere Yet; Board of Contributors*, DAILY BUSINESS REVIEW (Feb. 21, 2017),

appellate and state court rulings as well as memoranda analyzing and applying *Daubert* as a matter of Florida law."[135] "While everything seemed to be proceeding normally under *Daubert*, opponents of the *Daubert* amendment resisted the change and sought a return to the days of *Frye*."[136] "The state of uncertainty around this area of evidentiary jurisprudence, as well as the brewing tension between *Daubert* and *Frye*, were well-documented."[137] "After hearing oral argument[s] and considering various briefs and comments, the Florida Supreme Court had for consideration before it the regular-cycle report of the Florida Bar's [C]ode and [R]ules of [E]vidence [C]ommittee."[138] On February 16, 2017, "the Supreme Court boldly pronounced it would decline to adopt the 2013 *Daubert* amendment to Florida's Evidence Code to the extent that the amendment is procedural in nature."[139]

"In *In Re: Amendments to the Florida Evidence Code*, the majority of the court expressed 'grave constitutional concerns' with the right to a fair trial and the right of access to courts."[140] Justice Ricky Polston sternly dissented while placing emphasis on the undeniable reality that *Daubert* has been routinely applied by state and federal courts since 1993.[141] "Has

https://www.law.com/dailybusinessreview/almID/1202779567683/Hold-Your-Horse-and-Carriage-Daubert-Hasnt-Gone-Anywhere-Yet/?rss=rss_dbr&slreturn=20180112202534 [hereinafter *Horse and Carriage*]); *see* FLA. STAT. § 90.702 (2017) (outlining the requirements for admission of expert testimony); H.R. 7015, 2013 Leg., 115th Reg. Sess. (Fla. 2013) (explaining the effect that the enactment of Fla. Stat. § 90.702 will have on the interpretation of Supreme Court precedent).

135. *Horse and Carriage*, *supra* note 134.

136. *Id.*; *see* Gary Blankenship, *Court set to revisit Daubert*, FLORIDA BAR NEWS (Sept. 15, 2017), https://www.floridabar.org/news/tfbnews/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2F1ec18d70dde74b2b85258194004579cc (explaining that there are many arguments against the adoption of the *Daubert* standard).

137. *Horse and Carriage*, *supra* note 134; *see also* Gary Blankenship, *Board takes up controversial expert witness rule*, FLORIDA BAR NEWS (Nov. 1, 2015), https://www.floridabar.org/news/tfb-news/?durl=%2FDIVCOM%2FJN%2Fjnnews01.nsf%2FArticles%2FFA4EBA5C7C6F735485257EEA005535D1 (explaining how concerns over efficient use of resources have prevented *Daubert* from being ratified into law decades after a Supreme Court decision).

138. *Horse and Carriage*, *supra* note 134.

139. *Id.*; *see In re* Amendments to the Fla. Evidence Code, 210 So. 3d 1231, 1235–36, 1239 (Fla. 2017) (Polston, J., dissenting) (explaining that because the adoption of *Daubert* raises constitutional concerns, it would best be considered at a different time).

140. *Horse and Carriage*, *supra* note 134 (quoting *In re Fla. Evidence Code*, 210 So. 3d at 1239 (majority opinion)).

141. *In re Florida Evidence Code*, 210 So. 3d at 1242 (Polston, J., dissenting).

the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not[,]" Justice Polston wrote.[142] Justice Polston is directly on point with his dissenting commentary and rationale. The majority's "grave constitutional concerns" justification is intellectually dishonest, detached from steadfast and objective reality, and illogical.[143] Since revising the right to access to court in the Florida Constitution in 1968, there has never been any indication that said right could – or would – be denied with a stringent evidentiary standard that is applied well into a given litigation following initial discovery.[144] The *Daubert* standard as a matter of Florida law provides a reasonable alternative[145] to *Frye* and arguably elevates the quality of expert opinions being admitted in Florida courts.[146]

"The procedural versus substantive distinction is critical to the analysis and livelihood of *Daubert* as a matter of Florida law going forward."[147] "To the extent that the amendment is construed as strictly procedural in nature (*i.e.*, not impacting rights, obligations, causes of actions, etc.), the Florida Supreme Court ruled that the Florida Legislature's amendment raises constitutional concerns which require rejection of the amendment."[148] "Whether the *Daubert* amendment is unconstitutional is left to be determined."[149] "The recent ruling did not address this issue head on."[150] "Not until an actual case and controversy is before the Supreme Court can that discrete and seminal issue be decided."[151] "Therefore, until then the *Daubert* amendment in the Florida

142. *Id.*

143. *See id.* at 1242–43.

144. *See* FLA. CONST. art. I, § 21, ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

145. *Cf.* Nationwide Mut. Fire Ins. Co. v. Pinnacle Med. Inc., 753 So. 2d 55, 59 (Fla. 2000) (finding that a statute mandating arbitration of medical provider's claim as assignee of personal injury protection (PIP) benefits did not provide a reasonable alternative to suit and, therefore, was unconstitutional as a denial of access to the courts).

146. *See* Armando G. Hernandez, *Why the Florida Supreme Court Shouldn't Undo Daubert*, LAW 360 (July 15, 2016) https://www.law360.com/articles/817764/why-the-florida-supreme-court-shouldn-t-undo-daubert.

147. *Horse and Carriage*, *supra* note 134.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

Evidence Code remains a valid and binding law."[152]

B. PROCEDURAL POINTERS & MISCELLANEOUS MATTERS

i. Class Certification

In *Graham v. R.J. Reynolds Tobacco Co.*, the Eleventh Circuit dealt with a wrongful death lawsuit that was brought in federal court by an individual former class member following a class decertification in state court in a big tobacco class action matter.[153] By way of brief background, "[t]he Florida Supreme Court upheld the jury verdicts of negligence and strict liability in *Engle v. Liggett Group, Inc.*," and "decertified the class to allow individual actions [regarding] the remaining issues of specific causation, damages, and comparative fault."[154] The *Engle* decision made clear that the jury findings of negligence and strict liability had preclusive effect in the later individual actions, and the Florida Supreme Court reaffirmed that ruling in *Philip Morris USA, Inc. v. Douglas*.[155] In *Graham*,

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152. *Id.*; *see also* Samantha Joseph, *Game-Changer: Closely Watched Case Could Change Florida's Evidence Rules*, DAILY BUSINESS REVIEW (Aug. 22, 2017), https://www.law.com/dailybusinessreview/almID/1202796146163. The aforementioned legal periodical quotes Mr. Hernandez as follows:

> "A lot of people thought that *Daubert* was dead," said Miami litigator Armando Hernandez of the Law Offices of Armando G. Hernandez. "I got a lot of calls. I was like, 'Guys relax for a second, because that was not what it said.' That opinion had no bite. It didn't say anything, but some people wanted to glean from it something that wasn't there."

Joseph, *supra*.

153. Graham v. R.J. Reynolds Tobacco Co., 857 F.3d 1169, 1174 (11th Cir. 2017).

154. *Id.*; *see also* Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).

155. *See Graham*, 857 F.3d at 1174; *see also* Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419 (Fla. 2013).

> After members of the *Engle* class filed thousands of individual actions in state and federal courts, [Florida courts] had to determine the extent to which the smokers could rely on the approved findings from Phase I to establish certain elements of their claims. . . . In *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), [the Eleventh Circuit] stated that, [as a matter of] Florida law, courts should give preclusive effect to the findings only to the extent that the smoker can "show with a 'reasonable degree of certainty' that the specific factual issue was determined in his [or her] favor." . . . [T]he Florida Supreme Court [has] ruled that the approved findings from Phase I established common elements of the claims of *Engle* class members. . . . The [Phase I] jury is asked to determine "all common liability issues," and hears evidence that the tobacco companies' cigarettes were "defective because

the appellate court held that the preclusive effect of certain findings in the prior underlying class action did not violate the Due Process Clause.[156] Alternatively, the Eleventh Circuit held that "federal law did not preempt giving preclusive effects to findings of negligence and strict liability in the prior underlying class action."[157]

ii. Economic Loss Doctrine

In *Varner v. Dometic Corp.*, "Brandy Varner and nine other individuals [brought a] class action suit against Dometic Corporation ("Dometic") for manufacturing allegedly defective refrigerators."[158] The plaintiffs moved for class certification and the defendant moved for summary judgment.[159] United States District Judge Robert Scola of the Southern District Court of Florida ultimately held that the plaintiffs had "failed to adequately support their allegations of an inherent defect manifest in *all* Dometic cooling units and that [any of the plaintiffs had] suffered economic harm as a result of [any] defect."[160] The *Varner* Court

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> they are addictive and cause disease." . . . The [C]ourt explained that the approved findings concerned conduct that "is common to all class members [without variance] . . . from case to case" . . . . Phase I findings are [sufficiently] specific . . . to establish some elements of the smokers' claims. . . . [T]he jury findings "conclusively establish" that the tobacco companies manufactured defective products and . . . failed to exercise the degree of care of a reasonable person . . . [as well as] establish general causation.

Graham, 857 F.3d at 1178–79.

156. *Graham*, 857 F.3d at 1170, 1181 (explaining the rationale that the tobacco companies have adequate notice and an opportunity to be heard and the *Engle* Phase I proceedings do not arbitrarily deprive them of property).

157. *Id.* at 1170, 1186.

158. Varner v. Dometic Corp., No. 16-22482-Civ-Scola, 2017 WL 5462186, at *1 (S.D. Fla. Jul. 27, 2017).

159. *See id.*

160. *Id.* at *30. In analyzing the standing issue, Judge Scola noted:

> A plaintiff has standing to bring a claim if the following three elements are met: (1) the plaintiff has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. . . . An injury in fact is "an invasion of a legally protected interest which is (1) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." . . . "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." . . . For an injury to be concrete, the "injury must be 'de facto'; that is, it must actually exist." . . . An injury need not be tangible in order to be concrete.

Id. at *2 (first quoting Lujan v. Def.'s of Wildlife, 504 U.S. 555, 560 (1992); and then quoting

rejected the notion that the plaintiffs could establish standing based *solely* on an increased risk of harm.[161] Deeming the plaintiffs' "purported injuries as more speculative than imminent", and finding no "standing to pursue the claims", Judge Scola dismissed the lawsuit without prejudice.[162]

The *Varner* decision dealt in-depth with application of the economic loss doctrine.[163] Simply put, the economic loss doctrine under Florida law posits that a party is barred from pursuing another party with whom it is in privity of contract for economic losses under a tort theory.[164] Even after the seminal Florida Supreme Court decision in 2013 of *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*,[165] it is clear that the economic loss rule only applies in a products liability setting.[166] Under a "benefit of the bargain theory", the plaintiffs in *Varner* carried the burden of alleging and proving "overpayment, loss in value, or loss of usefulness" in connection with the refrigerators.[167] The plaintiffs contended that they "sufficiently

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

161. *See id.* at *3. Addressing the plaintiffs' misplaced reliance on an increased risk of harm to establish standing based on *In re* Takata Airbags Products Liability Litigation, 193 F. Supp. 3d 1324 (S.D. Fla. 2016), Judge Scola clarified that:

> To the extent that the Plaintiffs are again attempting to rely on an increased risk of harm to establish standing, they have provided no case law that would persuade the Court to re-visit its earlier ruling. The Plaintiffs rely heavily on [*In re Takata*], to support their argument that "they should not have to wait to see if their cooling units release noxious fumes or ignite in order to recover the economic losses they incurred at the point of sale." . . . In *In re Takata*, Judge Moreno held that the plaintiffs' allegations of a uniform defect in the airbags in their cars were sufficient to confer standing, even though the plaintiffs' airbags had performed satisfactorily. . . . However, Judge Moreno specifically cautioned that his analysis was "limited to the motion to dismiss stage, taking as true Plaintiffs' allegations of a uniform defect . . . " and noted that the defendants' allegations that other causes and factors could contribute to the alleged airbag malfunctions were properly considered at the summary judgment stage. . . . Thus, this case does not support an argument that a plaintiff can establish standing based solely on a risk of harm, absent any allegation of a uniform defect.

Id. (quoting *In re Takata*, 193 F. Supp. 3d at 1335).

162. *Id.* at *30.

163. *See id.* at *11.

164. Varner v. Domestic Corp., No. 16-22482-Civ-Scola, 2017 WL 5462186, at *27 (S.D. Fla. July 27, 2017); *see also* 8 FLA. PRAC., CONSTR. LAW MANUAL § 15:1, Westlaw (2017–2018 ed.).

165. Tiara Condo. Ass'n v. Marsh & McLennan Cos., 110 So.3d 399 (Fla. 2013).

166. *Id.* at 400.

167. *Varner*, 2017 WL 5462186, at *21 (citing *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 754 F. Supp. 2d 1145, 1165 (C.D. Cal. 2010)).

alleged 'lost resale value as a result of the dangerous defect'" and that "the alleged defect 'diminishe[d] the value of the cooling unit purchased[,] [which yields] an economic loss at the point of sale."[168] In executing its economic loss doctrine analysis, the Southern District differentiated between the alleged losses of plaintiffs whose refrigerators functioned properly and the alleged losses of the plaintiffs whose refrigerators did not function.[169]

First, the *Varner* Court found that the plaintiffs with operational refrigerators did not put forward any evidence that Dometic refrigerators had actually dropped in value as a result of the alleged defect.[170] Moreover, the Court noted a contradictory averment on the part of the plaintiffs in which the complaints alleged that "millions of RV owners remain unaware of the significant and dangerous safety risks posed by" the alleged defect yet argue in opposition to defendant's motion that "it makes sense that consumers would be less willing to buy or use RVs with Dometic refrigerators."[171] The plaintiffs maintained that they provided evidence that their damages amount to the cost to restore the plaintiffs to the point of the benefit of their bargain; in other words, "the cost to replace the defective cooling units with a non-defective cooling unit."[172] The plaintiffs relied on the expert report of Jonathan Cunitz, which the *Varner* Court found simply calculated "the average installment cost of a non-defective cooling unit."[173] The "expert" "calculation [did] not establish that the [p]laintiffs *overpaid* for their refrigerators, that their refrigerators have *lost value*, or that their refrigerators have *lost usefulness*."[174] Since there is no evidence that the plaintiffs with operational refrigerators experienced a manifestation of the alleged defect or have incurred expenses in replacing or repairing their refrigerators, the *Varner* Court deemed Mr. Cunitz's expert report as irrelevant to the question of standing and the evaluation of the economic loss doctrine.[175] In sum, the *Varner* Court held that the plaintiffs with operational refrigerators failed to support their allegations that they

168. *Id.* at *21–22.
169. *Id.* at *22.
170. *Id.* at *26.
171. *Id.* at *25.
172. *Id.*
173. Varner v. Domestic Corp., 16-22482-Civ-Scola, 2017 WL 5462186 at *25–26 (S.D. Fla. July 27, 2017).
174. *Id.* at *26 (emphasis added).
175. *See Varner*, 2017 WL 5462186, at *8.

overpaid and/or lost value as a result of the alleged defect.[176]

Secondly, addressing the two plaintiffs with non-operational refrigerators, the *Varner* Court found that "[w]hile the alleged loss of usefulness of the refrigerator[s] may establish an injury in fact, [the plaintiffs] must also establish that there is a causal connection between their injury and the conduct complained of."[177] In order to establish causation, the plaintiffs had to demonstrate the alleged injury is "fairly traceable to the challenged action of the defendant" as opposed to "the result of the independent action of some third party not before the [C]ourt."[178] The Court harped on the general nature of plaintiffs' assertions of causation without any citation to any evidence in support thereof as well as some seeming contradictions in one of the plaintiff's depositions refuting causation.[179] Ultimately, Judge Scola held that the plaintiffs with the non-operational refrigerators also lacked standing, failed to establish causation, and did not adequately support their claims of economic harm as a result of any alleged defect.[180]

In yet another Southern District case, *Melton v. Century Arms, Inc.*, application of Florida's economic loss rule was at the core of the contestable issues and analysis.[181] The *Melton* case involved a "products liability class action brought by owners of [Century AK–47] rifles [with full-auto safety selectors] manufactured by Century Arms, Inc., Century International Arms Corporation, Century Arms of Vermont, Inc., and Century International Arms of Vermont, Inc."[182] The plaintiffs/consumers alleged that "the safety mechanism in certain model[] [rifles were] defectively designed and allow[ed] the rifles to fire when the safety lever [was] moved above the safety position."[183] The plaintiffs also alleged that "Century had knowledge of the design defect for years and [eventually] changed the safety mechanism on [the] current models, but never warned

176. *Id.*
177. *Id.*
178. *Id.* (citing Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury, 773 F.3d 243, 247 (11th Cir. 2014)).
179. *Id.* at *8–9.
180. *Id.* at *9.
181. Melton v. Century Arms, Inc., 243 F. Supp. 3d 1290, 1300–01 (S.D. Fla. 2017).
182. *Id.* at 1296; *see also* Carmel Cafiero & Daniel Cohen, *Class action lawsuit alleges AK-47 rifle 'safety defect'*, WSVN 7 NEWS (Feb. 9, 2016), http://wsvn.com/news/class-action-lawsuit-alleges-ak-47-rifle-safety-defect/ (elaborating on a recent class action suit that "claims certain AK-47 rifles can fire unexpectedly without someone pulling the trigger").
183. *Melton*, 243 F. Supp. 3d at 1296.

the public or recalled the allegedly defective rifles."[184] "Only one named [p]laintiff report[ed] that an accidental discharge had actually occurred – the others claim[ed] only to be aware of the risk" of discharge.[185]

The defendants-manufacturers moved to dismiss the plaintiffs' claims "for lack of standing or for failure to state a claim upon which relief can be granted."[186] On the one hand, the defendants contended that the plaintiffs had no standing because there were no allegations that "the defect actually manifested itself in an unintentional firing or that [p]laintiffs were injured by an unintentional firing."[187] The defendants further contended that the claims for defective design or failure to warn – without a corresponding, traceable injury-in-fact – were impermissible and legally non-cognizable "no-injury" products liability claims.[188] On the other hand, the plaintiffs countered that standing was sufficient since they claimed economic harm such overpayment, loss of value, and/or loss of usefulness arising from or related to the loss of their "benefit of the bargain."[189] Judge Federico A. Moreno held that "if [the] 'benefit of the bargain' damages are theoretically available for the causes of action that have been asserted, dismissal on the pleadings is premature."[190] In light of the allegations and favorable standard of review at the motion to dismiss stage, Judge Moreno was compelled to deny the motion.[191]

iii. Affirmative Defenses / Discovery Rule

In *Wright*, discussed earlier in addressing the state of warnings law, the issue of Florida's statute of limitations for product liability claims as an affirmative defense and application of the discovery rule were also thoroughly addressed.[192] In *Wright*, the plaintiffs brought a multi-count complaint against Insight Pharmaceuticals, LLC and Wal-Mart Stores, Inc.,

184. *Id.* at 1296–97.
185. *Id.* at 1297.
186. *Id.* at 1296.
187. *Id.* at 1298.
188. *Id.* at 1298–99. In support of this assertion, the defendants cited a litany of cases in which claims were dismissed for lack of standing where the plaintiffs sought damages for costs of remedying safety hazards. *See id.*
189. *Melton*, 243 F. Supp. 3d at 1298–99.
190. *Id.* at 1299 (citing Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 452 (5th Cir. 2001)).
191. *See id.*
192. *See* Wright v. Insight Pharm., LLC, No. 2:16–cv–547–FtM–99MRM, 2017 WL 275794, at *2 (M.D. Fla. Jan. 20, 2017).

alleging injuries from the use of the warning-less Gentle Naturals® Cradle Cap Treatment.[193] The defendants argued that the plaintiffs' causes of actions should be dismissed as time-barred by operation of Florida's four-year statute of limitation.[194] The *Wright* Court noted that the "statute of limitations is an affirmative defense, and the burden of proving an affirmative defense is on the defendant."[195] "A plaintiff is not required to anticipate and negate an affirmative defense in the [pleadings]."[196] Florida's four-year statute of limitations runs "from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence."[197]

In *Wright*, the defendants contended that the claims were facially time-barred as the plaintiffs "knew of their injuries and the connection to the product" more than four years prior to filing the operative complaint.[198] The plaintiffs countered "that it is reasonable to infer from the face of the [operative] complaint that it was not until *after* [the expiration of the four-year statute of limitations] that plaintiffs were aware of the source of their injury."[199] Judge Steele of the Middle District of Florida turned to the well-known "discovery rule" and noted that "[i]t is well established that the statute of limitations on a products liability action begins to run when a plaintiff (1) knows that she was injured, and (2) has notice of a possible connection between her injury and the product at issue."[200] In applying the discovery rule to the lenient motion to dismiss stage, the *Wright* Court held it was not clear that the plaintiffs had knowledge of the injury or the connection to the product prior to July 8, 2012 (the triggering deadline for purpose of the statute of limitations).[201] Consequently, the motion to dismiss was denied.[202]

193. *Id.* at *1.
194. *Id.* at *2.
195. *Id.* (citing Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1292 (11th Cir. 2005)).
196. *Id.* (citing La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004)).
197. *Id.* (quoting FLA. STAT. § 95.031 (2017)).
198. *Wright*, 2017 WL 275794, at *2.
199. *Id.* (emphasis added).
200. *Id.* (citing University of Miami v. Bogorff, 583 So. 2d 1000, 1004 (Fla. 1991)).
201. *Id.*
202. *Id.*

IV. VERDICTS: THE YEAR IN REVIEW

Under the present trends and jury dynamics of civil litigation, especially in the areas of product liability and medical malpractice, large verdicts are sweeping the nation. Daily alerts and news updates constantly reveal noteworthy verdicts, such as Johnson & Johnson being tagged with a $247 million verdict in a defective hip implant lawsuit[203] and $417 million in an ovarian cancer talcum powder case.[204] The following section details product liability verdicts carefully circumscribed to include only Florida verdicts in the 2017 calendar year. Such information is imperative for purposes of case evaluation, jurisdictional assessments, jury trends, emerging theories of liability, and expert selection.

In a fairly recent product liability lawsuit against manufacturer Tricam Industries, Inc. and retailer Home Depot, involving a defective step ladder, and sounding in strict liability and negligence, a South Florida federal jury rendered a verdict (on July 1, 2017) in favor of the plaintiffs in the amount of $4,707,799.20, which included $517,000 in past lost earnings; $200,799.20 in past medical expenses; $1,800,000 in future lost earnings; $223,000 in future medical expenses; $367,000 in past pain and suffering; and $1,600,000 in future pain and suffering.[205] The verdict was particularly noteworthy because the majority of rivet-based defects and/or theories of liability in ladder litigation result in summary judgment, the striking of experts and/or defense verdicts.[206] The verdict was later reduced by $2 million when United States District Judge Robert Scola Jr. "slashed the future-earnings portion of [plaintiff's] verdict from $1.8 million to $0,

203. *See* Jef Feeley & Tom Korosec, *J&J Ordered to Pay $247 Million Over Defective Hips*, BLOOMBERG TECHNOLOGY (Nov. 16, 2017), https://www.bloombergquint.com/onweb/2017/11/16/j-j-ordered-to-pay-more-than-200-million-over-defective-hips.

204. *See* Larry Bodine, *Trial Judge Reverses $417 Million Verdict in Talcum Powder Cancer Case*, THE NATIONAL TRIAL LAWYERS (Oct. 25, 2017), https://www.thenationaltriallawyers.org/2017/10/trial-judge-reverses-417-million-verdict-in-talcum-powder-cancer-case/.

205. *See* Ore, et al. v. Tricam Industries, Inc., et al., No. 0:14-cv-60269-RNS, 2017 WL 4416429 (S.D. Fla. July 1, 2017) ("On April 6, 2012, plaintiff Moises Ore was using a Husky brand stepladder to retrieve tires at a Tire Kingdom warehouse where he worked as a regional sales manager when one or more of the rivets failed, causing plaintiff to fall to the ground and sustain injuries."); *see also* Samantha Joseph, *Fort Lauderdale Attorneys Win $4.7 Million Against Home Depot, Tricam*, DAILY BUSINESS REVIEW (Aug. 14, 2017), https://www.law.com/dailybusinessreview/almID/1202795422894/ (reporting on the multi-million dollar award and the attorneys who won the verdict).

206. *See, e.g.*, Ojeda v. Louisville Ladder Inc., 410 F. App'x 213, 214 (11th Cir. 2010).

and the past-earnings portion from about $517,000 to about $350,000, citing the strokes [plaintiff] suffered in the interim as a cutoff date for earnings-related damages."[207]

In *Georg v. Ford Motor Co.*, a product liability lawsuit involving allegedly defective airbags in a 2003 Lincoln Town Car, the plaintiff lost control of his vehicle, struck a tree, and "sustained serious injuries, including a fractured neck, when the torso airbag on the passenger side failed to deploy."[208] "The plaintiff claimed that Ford installed a faulty passenger side air bag system and fail[ed] to utilize state-of-the-art design alternatives to make the vehicle safer."[209] The Middle District granted summary judgment in favor of Ford as to the claims of manufacturing defect and failure to warn.[210] "Over plaintiff's objection, Judge Presnell allowed evidence that both [the plaintiff] and the vehicle's driver had consumed alcohol before the crash, finding that the testimony was relevant to the cause of the accident and to plaintiff's credibility."[211] Following a jury trial on the design defect claim, a verdict in favor of the defendant was entered.[212]

In *Llera v. Ford Motor Co.*, a case with strikingly similar facts to *Georg* and decided only a few months later, a 20-year-old young man operating a 2003 Ford Mustang crashed the vehicle into a tree, killing himself and a passenger.[213] The driver's "blood alcohol level at the time was .175."[214] The plaintiff filed a wrongful death product liability action against Ford, "claiming that the airbag improperly deployed when the vehicle hit a curb, blocking the decedent's view of the road and causing the crash."[215] The Palm Beach County jury returned a verdict in favor of Ford.[216]

207. Cara Salvatore, *Verdict Slashed By $2M In Fla. Ladder-Fall Trial*, LAW360 (Oct. 16, 2017), https://www.law360.com/articles/974866/verdict-slashed-by-2m-in-fla-ladder-fall-trial.

208. Georg v. Ford Motor Co., No. 6:15-cv-00141-GAP-GJK, 2017 WL 3045441 (M.D. Fla. Mar. 28, 2017). "The complaint, originally filed in Brevard County Circuit Court, was later removed to the United States District Court for the Middle District of Florida." *Id.*

209. *Id.*

210. *See id.*

211. *Id.*

212. *Id.*

213. Llera v. Ford Motor Co., No. 2005CA001924, 2017 WL 5070673 (Fla. 15th Cir. Ct. July 18, 2017).

214. *Id.*

215. *Id.*

216. *See id.*

In the well-known *Takata* airbag multi-district litigation centralized in the Southern District of Florida before Judge Federico Moreno, a sizeable settlement was reached in the amount of $553,567,307.[217] "Owners of automobiles manufactured by Takata Bayerische Motoren Werke AG, BMW of North America LLC, BMW [M]anufacturing Co. LLC, Mazda Motor Corporation, Mazda Motor of America Inc., Subaru of America Inc., Fuji Heavy Industries Ltd., Toyota Motor Corporation, Toyota Motor Sales U.S.A. Inc., Toyota Motor North America Inc., Toyota Motor Engineering & Manufacturing North America Inc.[,] alleged the vehicles contained airbags manufactured by Takata Corporation that contained defective inflators."[218] "The sudden and unexpected inflation of the airbags allegedly caused death, injuries and property damage."[219] The thousands of "plaintiffs contended the defendants attempted to limit the scope of a recall and then delayed sending out recall notices to vehicle owners."[220]

Moving onto big tobacco litigation, on May 9, 2017, in *Lawrence v. R.J. Reynolds Tobacco Co. et al.*, located in the Fifth Circuit Court in and for Marion County, Florida, in a wrongful death case sounding in negligence and strict liability related to laryngeal/pharyngeal cancer and/or death allegedly arising from addiction to cigarettes, the jury awarded a verdict in the amount of $858,209 (including $363,373 in medical expenses; $244,836 in loss of services; and $250,000 in loss of consortium).[221] "The jury found the decedent 65% liable and R.J. Reynolds 35% liable."[222] "The jury also found that plaintiff was entitled to punitive damages."[223]

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217. Koehler v. Takata Corp., No. 1:14CV02599, 2017 WL 3712944 (S.D. Fla. May 18, 2017); *see also* Nathan Hale, *Final OK Granted For $741M In Takata MDL Settlements*, LAW 360 (Nov. 1, 2017), https://www.law360.com/articles/980667/final-ok-granted-for-741m-in-takata-mdl-settlements; Rachel Graf, *Honda Gets Final Nod On $605M Deal In Takata Air Bag MDL*, LAW 360 (Feb. 28, 2018), https://www.law360.com/articles/1016980/honda-gets-final-nod-on-605m-deal-in-takata-air-bag-mdl. Judge Moreno approved $741 million in settlements reached by Toyota, BMW, Subaru and Mazda to resolve consumer class actions over the dangerously defective Takata Corp. air bags, including an award of $166 million in attorneys' fees for class counsel. *See* Hale, *supra*. Honda Motor Co., Ltd. recently received final approval from Judge Moreno regarding a $605 million-dollar settlement, ending allegations against Honda in the multidistrict litigation over faulty Takata air bags. *See* Graf, *supra*.

218. *Koehler*, 2017 WL 3712944.

219. *Id.*

220. *Id.*

221. Lawrence v. R.J. Reynolds Tobacco Co. et al., No. 42-2009-CA-000178-B, 2017 WL 4416433, at *1 (Fla. 5th Cir. Ct. May 9, 2017).

222. *Id.*

223. *Id.*

In another tobacco verdict in the Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida, a jury awarded $15,800,000 (which was later judicially reduced to $13,800,000) in a wrongful death action concerning the death of an adult male smoker as a result of lung cancer.[224] "The plaintiff estate contended that the defendants were strictly liable for placing a defective product on the market[] and fraudulently concealed and conspired to conceal the health effects or addictive nature of smoking."[225] "The decedent was survived by his spouse and [four] adult children."[226] "The jury determined defendant R.J. Reynolds was 60% at fault, Philip Morris was not at fault[,] and the decedent was 40% at fault."[227]

Continuing along the litany of tobacco verdicts in 2017, a Pinellas County jury rendered a verdict of $5,800,000 in favor of a deceased woman who started smoking as a teenager and died in 1995 at the age of 47 from lung cancer.[228] "The widower of the deceased argued that the defendant's concealment of the harmful effects of smoking led to his wife's nicotine addiction, smoking-related disease[,] and death."[229] The jury award "includ[ed] $1.8 million each to the decedent's husband and two children."[230] The trial court "later imposed an additional $400,000 in punitive damages."[231]

In a rare non-*Engle* tobacco case, the law firm of Kelley/Uustal obtained a $2.2 million dollar verdict.[232] The verdict was obtained in a speedy fashion after only a seven-day jury trial (including deliberations).[233] The trial included just a few witnesses from each side, and the plaintiffs

224. Lima v. R.J. Reynolds Tobacco Co., No. 29-2015-CA-007140, 2017 WL 2306252, at *1–2 (Fla. 13th Cir. Ct. Apr. 20, 2017).

225. *Id.* at *2.

226. *Id.*

227. *Id.*

228. Brown v. Philip Morris et al., No. 15-2451-CI, 2017 WL 2264504, at *1 (Fla. 6th Cir. Ct. Mar. 1, 2017).

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Celia Ampel, *Speedy Tobacco Trial Ends in $2.2M Verdict*, DAILY BUSINESS REVIEW (Aug. 21, 2017), https://www.law.com/dailybusinessreview/almID/1202796052734/; *see also Josiah Graham*, KELLEY UUSTAL, https://www.justiceforall.com/attorney-profiles/josiah-graham/ (last visited Mar. 19, 2018) (providing the profile of attorney Josiah Graham). In an interesting cultural reality-TV side note, one of the attorneys for the plaintiff was Josiah Graham (a participant in the 2017 season of the Bachelorette). *See* Ampel, *supra*.

233. *See* Ampel, *supra* note 232 (noting that the typical tobacco jury trial takes about three to four weeks).

"decided to try to keep the testimony of a tobacco historian to less than two days, focusing only on a handful of 'smoking-gun documents' to argue the tobacco industry designed cigarettes to be addictive."[234] The defense argued that the plaintiff's tongue cancer was caused by HPV (as evidenced in certain medical records).[235] In the end, the jury determined the smoking-related throat cancer was the cause of plaintiff's death, returned a $4 million verdict, assigning 45% of the liability to the plaintiff, which reduced the award to $2.2 million, and declined to award punitive damages.[236]

Finally, in *Palis v. Billy Goat Indus. Inc. et al.*, we are presented with a product liability action involving amputation of phalanges and severe injuries to the hand during use of a lawnmower.[237] Specifically, the plaintiff "was using the [lawn]mower . . . in Weston, Florida, when the cutting deck became clogged with grass."[238] "The plaintiff contended she disengaged the blades by releasing the operator presence control and reached under the mower to clear the grass clog."[239] "However, the plaintiff [maintained] that the blades had not disengaged and her hand became caught in the blades, causing a severe hand injury."[240] "The plaintiff sought damages from the defendant manufacturer and seller of a 33-inch self-propelled push mower under both negligence and strict liability theories."[241] "The plaintiff claimed the defendant was negligent in the planning, designing, manufacturing, testing, inspecting, marketing[,] and distribution [of] the mower and failed to warn of the risks associated with using it."[242] "The plaintiff also asserted that the defendants were strictly liable for placing a dangerous and defectively-designed product on the market."[243] "The plaintiff argued that the cutting blades failed to stop within the consumer protective industry standard of seven seconds or the five seconds[,] which the defendant manufacturer represented to its

234. *Id.*
235. *Id.*
236. *Id.*
237. Palis v. Billy Goat Indus., Inc., No. CACE15002559, 2017 WL 3090400, at *1 (Fla. 17th Cir. Ct. Mar. 13, 2017).
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Palis*, 2017 WL 3090400, at *1.

customers that the blades would stop."[244] On the contrary, "[t]he defendants denied that the mower was defective and maintained that the plaintiff was negligent in the operation of the lawnmower[, which] caus[ed] her own injuries and damages."[245] The jury returned a verdict in favor of the defendants on all counts.[246]

V. LOOKING AHEAD

Having thoroughly examined the state of product liability case law in Florida, emerging trends, and product liability verdicts, it is essential to maintain a prospective outlook into the horizon of product liability law in Florida, what lies ahead, and what to keep an eye on.

Tracking the General Motors faulty ignition litigation will certainly be worthwhile.[247] "Ignition switch actions have been brought in at least 38 federal district courts, including Connecticut, California, New York and Texas[,]" following General Motors' national recall in June 2014.[248] "General Motors [agreed to] pay $120 million to state attorneys general to settle allegations that the automaker concealed an ignition-switch defect."[249] General Motors is seeking to "transfer [additional] cases to the multidistrict litigation docket in the Southern District of New York."[250] In the most recent case, a plaintiff "asserts he was severely injured when his 2012 Chevrolet Camaro lost engine power and shut down[,]" which caused him to crash into a tree and suffer severe injuries to his head, neck, eyes, and back.[251]

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244. *Id.*

245. *Id.*

246. *Id.* at *2. "The defendant . . . filed for attorney's fees and costs." *Id.*

247. *See, e.g.*, Carley Meiners Beckum, *GM Looks to Consolidate Another Lawsuit Over Its Faulty Ignition Switches*, CONNECTICUT LAW TRIBUNE (Sept. 27, 2017), https://www.law.com/ctlawtribune/sites/ctlawtribune/2017/09/27/gm-looks-to-consolidate-another-lawsuit-over-its-faulty-ignition-switches/; Katheryn Hayes Tucker, *Judge Makes Key Rulings in GM Ignition Defect MDL Case*, DAILY BUSINESS REVIEW (June 9, 2017), https://www.law.com/dailybusinessreview/sites/dailyreportonline/2017/06/09/judge-makes-key-rulings-in-gm-ignition-defect-mdl-case/?back=law.

248. Beckum, *supra* note 247.

249. Celia Ampel, *General Motors Agrees to $120M Ignition Switch Settlement with States*, DAILY BUSINESS REVIEW (Oct. 19, 2017), https://www.law.com/corpcounsel/sites/dailybusinessreview/2017/10/19/general-motors-agrees-to-120m-ignition-switch-settlement-with-states/.

250. Beckum, *supra* note 247.

251. *Id.*

Also, right in the heart of downtown Miami, is a pending CPVC fire sprinkler pipes class action litigation regarding alleged defects in the resin and/or other materials used in the fire sprinkler systems of various newly built high-rise buildings in the emerging Brickell/Downtown Miami area.[252] "This problem is so large that even the class action lawyers have no idea how many buildings in the country it affects, but say the number of building could reach thousands and damages in the millions."[253] The cases are located in the complex litigation division of Miami-Dade County Circuit Court before the Honorable Jennifer Bailey.[254] There are issues concerning the application of the above-discussed economic loss doctrine, which were brought at the motion to dismiss stage, but will likely be decided at the summary judgment stage.[255]

252. *See $1 Billion Lawsuit Alleges Cover-Up in Faulty PVC Pipes*, CBS MIAMI (Dec. 9, 2015), http://miami.cbslocal.com/2015/12/09/1-billion-lawsuit-alleges-cover-up-in-faulty-pvc-pipes/ [hereinafter *$1 Billion Lawsuit*]; David Ovalle, *Lawsuit alleges faulty fire sprinklers in Miami high-rise condo buildings*, MIAMI HERALD (Dec. 4, 2015), http://www.miamiherald.com/news/local/community/miami-dade/article47998695.html; Mike Seemuth, *Two Miami condos sue over sprinklers pipes*, THE REAL DEAL (Dec. 5, 2015), https://therealdeal.com/miami/2015/12/05/two-miami-condos-sue-over-sprinkler-pipes/; *Construction Defect Class Action Lawsuit Filed Alleging a National Cover-up of Pipe Defects in Condo Fire Sprinkler Systems*, COLSON HICKS EIDSON (Dec. 8, 2015), https://www.colson.com/construction-defect-class-action-lawsuit-filed-national-pipe-defects-condo-fire-sprinkler-systems; Class Action Complaint and Demand for Jury Trial at 2–3, Wind Condo. Ass'n v. Allied Tube & Conduit Corp., No. 1:15-CV-24266 (S.D. Fla. dismissed Aug. 3, 2016), ECF No. 1; *Wind Condominium Association, Inc., et al v. Allied Tube & Conduit Corporation, et al.*, LAW360, https://www.law360.com/cases/564b3204656b3a5fc6000009 (last visited Mar. 20, 2018) [hereinafter LAW360]; David Ovalle & Jay Weaver, *Top Miami civil lawyer Ervin Gonzalez found dead at his home*, MIAMI HERALD (June 9, 2017), http://www.miamiherald.com/news/local/community/miami-dade/article155258389.html; Staci Zaretsky, *Powerhouse Litigator Found Dead in His Home in Suspected Suicide*, ABOVE THE LAW (June 9, 2017), https://abovethelaw.com/2017/06/powerhouse-litigator-found-dead-in-his-home-in-suspected-suicide; Celia Ampel, *Noted South Florida Litigator Ervin Gonzalez Dies at 57*, DAILY BUSINESS REVIEW (June 9, 2017), https://www.law.com/dailybusinessreview/almID/1202789231340/. The author Armando Hernandez was formerly involved in the CPVC litigation representing Georg Fisher Harvel. *See* LAW360, *supra*. Also involved in the CPVC litigation, and in fact spear-heading it in many regards, was the late Ervin Gonzalez. *See id.*; Ovalle & Weaver, *supra*; Zaretsky, *supra*. Ervin was a phenomenally skilled and well-respected litigator as well as an inspiration to so many. Zaretsky, *supra*. The author is truly heartbroken for his wife Janice and wishes Ervin eternal rest.

253. *$1 Billion Lawsuit*, *supra* note 252.

254. *See* Omnibus Order on Matters Heard on December 16, 2016, Wind Condo. Ass'n v. Allied Tube & Conduit Corp., No. 2016-018480-CA-01 (Fla. 11th Cir. Ct. dismissed Feb. 22, 2017).

255. *See supra* Part III, Section B (ii); *see also, e.g.*, Motion to Dismiss Complaint at 5, Wind Condo. Ass'n, Inc. v. Allied Tube Conduit Corp., et al., No. 2016-018480-CA-01 (11th Cir.

On another note, the seminal impact of the *Aubin v. Union Carbide* decision is still transgressing and must be closely followed as the consumer expectation test had had its strength restored.[256] It will be interesting to note any retrials based on *Aubin* – such as *Font v. Union Carbide*[257] – as well as limitations and emerging case law regarding the use, if any, of the risk-utility test, use of risk-utility only as an affirmative defense, whether the consumer expectation test is applicable to certain product types based on complexity, etc.

Additionally, the pending decision in *DeLisle* currently before the Florida Supreme Court could mark the end of *Daubert* in Florida.[258] The *DeLisle* matter is the first case and controversy before the Court since its last ruling or treatment of the issue as presented in the context of the regular cycle report.[259] Various organizations such as the Florida Justice Association, the Washington Legal Foundation, the Florida Defense Lawyers Association, and various others, have requested leave to file amicus briefs.[260] The Court heard oral arguments on Tuesday, March 6, 2018, but has not yet issued an opinion.[261]

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dismissed Feb. 22, 2017).

256. *See* Armando Hernandez, *Jury Instructions Changed for Product Liability Cases*, DAILY BUSINESS REVIEW (May 6, 2015), https://www.law.com/dailybusinessreview/almID/12027255 78900; *see also* Hernandez, *supra* note 28 ("It is important to note that the Florida Supreme Court did not reject the risk utility test and reasonable alternative design concept in all regards.").

257. Font v. Union Carbide Corp., 199 So. 3d 323, 324–25 (Fla. 3d DCA 2016) (per curiam) (remanding the case for new trial based on *Aubin v. Union Carbide Corp.*, 177 So. 3d. 489 (Fla. 2015)); *see also* Celia Ampel, *Florida Supreme Court Sets Stage for $2.8M Asbestos Verdict*, DAILY BUSINESS REVIEW (Dec. 4, 2017), https://www.law.com/dailybusinessreview/sites/daily businessreview/2017/12/04/florida-supreme-court-set-stage-for-2-8m-asbestosverdict/?back=law.

258. *Joseph*, *supra* note 152.

259. *See id.*

260. *See id.*

261. *See* Celia Ampel, *Much-Debated 'Daubert' Standard Has Its Day in Florida Supreme Court*, DAILY BUSINESS REVIEW (Mar. 5, 2018), https://www.law.com/dailybusinessreview/2018/03/05/much-debated-daubert-standard-has-its-day-in-florida-supreme-court/ [hereinafter *Much-Debated 'Daubert'*]; *see also* Celia Ampel, *Florida Justices Question Whether Time Is Right to Adopt Daubert Standard*, DAILY BUSINESS REVIEW (Mar. 6, 2018), https://www.law.com/dailybusinessreview/2018/03/06/florida-justices-question-whether-time-is-right-to-adopt-daubert-standard/ [hereinafter *Florida Justices Question*]. James Ferraro, DeLisle's attorney, commented: "When you get a collective group of six people together, you're more likely to get the correct answer than one person who went to law school." *See Much-Debated 'Daubert'*, *supra.* According to some accounts, during oral argument it appeared as if the Florida Supreme Court Justices did not seem quite ready to adopt *Daubert* and others questioned the timing as well as whether the plaintiff brought the "right case" to challenge *Daubert*. *See Florida Justices Question*, *supra.*

In closing, the outer fringes of the future of product liability law is unquestionably tethered to self-autonomous vehicles (including semi-trucks). As the new technology advances, the consumer intrigue and demand grow, and the wide-ranging issues or concerns are rampant. Directly intersecting with the aforementioned are statistics such as the following: in 2015, "there were [approximately] 4,067 fatalities . . . and 116,000 people injured in crashes involving large trucks[;]"[262] in 2013, there were approximately 3,981 fatalities and 95,000 injuries in crashes involving large trucks;[263] in 2014, "motor vehicle crashes were the leading cause of death for age 11 and every age 16 to 24[;]"[264] "from 2005 to 2007, [approximately] 94% of motor vehicle related crashed were attributed to driver error."[265] As one article framed it:

> This begs the question, is the new advent of self-driving cars and the concept of self-driving semi-trucks a solution to the problem of driver error crashes? The short answer is, probably yes. Automated vehicular technology takes control away from the driver[] and is expected to dramatically reduce automotive injuries and fatalities. Certain auto manufacturers have, in fact, stated their objectives include designing and distributing vehicles in the coming years that will have zero fatalities. The consuming public should hope for such a future.[266]

The advent of self-driving vehicles also brings with it numerous legal, ethical, and moral conundrums.[267] For example, what will the parameters be for driverless technology design in choosing between two unavoidable crashes (*i.e.*, proceeding straight and hitting a pregnant woman-pedestrian versus taking an evasive maneuver that may end up in a schoolyard full of children)? Is society and the legal system prepared for autonomous driving technology making life or death decisions?[268] Moreover, is it even feasible for a driver to take over in a crash scenario, and, if so, how will the design

262. Michael A. Hersh & Kimberly L. Wald, *'Transformer' Semi-Trucks? The Increasing Interest in Self-Driven Vehicles; Board of Contributors*, DAILY BUSINESS REVIEW (Apr. 25, 2017), https://www.law.com/dailybusinessreview/almID/1202784484228/transformer-semitrucks-the-increasing-interest-in-selfdriven-vehicles/?back=law (citing the National Highway Traffic Safety Administration (NMVCCS)).

263. *Id.*

264. *Id.* (citing the 2015 Centers of Disease Control and Prevention Report).

265. *Id.* (citing a survey conducted by the NMVCCS).

266. *Id.*

267. *Id.*

268. *See* Kamala Kelkar, *How will driverless cars make life-or-death decisions?*, PBS (May 28, 2016), https://www.pbs.org/newshour/nation/how-will-driverless-cars-make-life-or-death-decisions.

of the warning for such function and what will be the human factors evaluation and reaction time for such? Is the accelerated feasibility of such quickly-progressing technology reasonably safe? Additionally, how will responsibility be determined and/or apportioned in the driverless technology world? Lastly, autonomous vehicle technology has an inevitable and necessary impact on the insurance market and insurance litigation.[269]

269. *See* Walter J. Andrews & Paul T. Moura, *In the Race to Win the Autonomous Vehicle Market, Covering Risk Is Key*, DAILY BUSINESS REVIEW (Oct. 11, 2017), https://www.law.com/dailybusinessreview/sites/dailybusinessreview/2017/10/11/in-the-race-to-win-the-autonomous-vehicle-market-covering-risk-is-key/?back=law; Ronald L. Kammer, *Impact of Driverless Cars on the Insurance Market; Board of Contributors*, DAILY BUSINESS REVIEW (May 8, 2017), https://www.law.com/dailybusinessreview/almID/1202785523291/impact-of-driverless-cars-on-the-insurance-market/?back=law.