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THE WAR ON CIVIL DEFENDANTS IN FLORIDA: WHERE WE ARE, HOW WE GOT HERE, HOW TO FIX IT, AND WHY IT MATTERS

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PART I. INTRODUCTION: WHERE WE ARE

Florida is a desirable place for most. What's not to love? Sunny beaches, a usually moderate climate, stunning destinations, and no state income tax. Unfortunately, civil litigants in Florida's courts are facing a hurricane of trouble and are quickly learning that Florida is nearly the last place you want to be sued.[2] Tort reform efforts in the 1980s and 1990s, drastically outdated doctrines, and recent decisions of Florida's

[2] *See* AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2020–2021 2 (2020), https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_09d-1.pdf [https://perma.cc/5SCY-K5QL].

highest court have fiercened the storm into a Category 5.

In the late 1980s, Florida enacted legislation that scrapped the American Rule for attorneys' fees in some cases.[3] Today, Florida courts routinely award prevailing plaintiff lawyers between $500–$800 per hour in fees and, in one recent case, $1,000 per hour.[4] These fees are drastic for fairly routine civil matters like car accidents and slip and falls. The means for this abhorrent outcome is Florida's Proposal for Settlement ("PFS") rule codified at Florida Statutes § 768.79 and Florida Rule of Civil Procedure 1.442.[5] Under the statute and rule, a plaintiff prevails at trial if the judgment obtained is 25% above the plaintiff's pre-trial offer.[6] The attorneys' fee award can add $500,000–$1,000,000 to the judgment obtained for the plaintiff. By contrast, a defendant's PFS is successful (resulting in the payment of their fees by the plaintiff) if the judgment obtained is less than 75% of the defendant's pre-trial offer.[7] Unfortunately, even if a defendant's proposal wins after trial, defendants are not as fortunate for a few legal and practical reasons: (1) defendants' attorneys' fees are historically capped at their contractual rate with their attorneys[8] (which are traditionally far lower); and (2) most personal injury plaintiffs are judgment-proof, so there are no assets to recover fees from even if a judgment against the plaintiff was secured. The proposal for the settlement statute was designed to curb litigation. Instead, it helped to transform litigation in Florida into a game of cat-and-mouse in which case values are distorted and the outcomes are increasingly unjust.

The PFS statute is not entirely to blame for the storm. Lawyer to medical provider referrals of plaintiff-patients, the Florida Supreme Court's protections afforded to these referrals, and the resulting coziness of the plaintiff's bar with the medical providers to whom they refer cases are also substantial causes for alarm. In *Worley v. Central Florida YMCA*, the Florida Supreme Court determined an attorney's referral of a client to a medical provider for treatment is legal advice

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[3] Tort Reform & Insurance Act of 1986, Ch. 86-160, § 68, 1986 Fla. Laws 695, 763. Also, see Pamela B. Fort, Theodore G. Granger, Ricky L. Polston & Sheri L. Wilkes, Florida's Tort Reform: Response to a Persistent Problem, 14 Fla. St. U. L. Rev. 505 ,531 (1986).

[4] *See* Order on Plaintiff's Amended Motion for Award of Attorneys' Fees and Costs at 2, Looney v. Crime, No. 16-2017-CA-005718 (Fla. Cir. Ct. July 23, 2020).

[5] *See* FLA. STAT. § 768.79(1); FLA. R. CIV. P. 1.442.

[6] FLA. STAT. § 768.79(1).

[7] *See id.*

[8] *See, e.g.*, Gemini II, Ltd. v. Mesa Underwriters Specialty Ins. Co., No. 12-61711-CIV-ZLOCH, 2015 U.S. Dist. LEXIS 192460, at *11 (S.D. Fla. Oct. 14, 2015) ("[T]he [c]ourt will not award more fees than those for which Defendant . . . and its counsel contracted; i.e., those that were there *actually incurred*.").

and is afforded protection under the attorney-client privilege.[9] This decision in addition to others make the task of discovering and proving the depth of the relationship between treating physicians and the plaintiff's attorney nearly impossible. Defendants are not able to fully inform the jury of the plaintiff's physicians' obvious bias at trial. By contrast, the relationship between the defendant, the defendant's lawyers, and the defendant's expert witnesses (who are often of the same qualifications as the plaintiff's treating doctors) is subject to deep exploration by plaintiffs under the Florida Rules of Civil Procedure and the Florida Supreme Court's decision in *Allstate Insurance Co. v. Boecher*.[10]

Florida's arcane collateral source rule also contributes to the problem and creates powerful incentives for litigation abuse. This rule has the effect of encouraging plaintiffs to unnecessarily drive up their medical expenses. Plaintiffs are refusing to treat and submit bills to their health insurance provider and instead prefer to treat under letters of protection (effectively, liens) to drive up medical expenses. What should be seen as a failure to mitigate damages is instead a fraud welcomed in our courts. As a result, the cottage industry of plaintiff's physicians created by the *Worley* decision are dictating their own prices without any grounding in reality and absent normal market forces. Routine procedures are "unbundled,"[11] or double-billed, and prices are drastically inflated. The normal market incentive for seeking lower prices is reversed, and there is no risk to providers of insurance fraud, or qui tam actions. The result is an extortion of defendants by allowing the plaintiff to present artificially high medical expenses to the jury.

In all, this article intends to expose the war on civil defendants in Florida, explore reform efforts, and propose solutions for truly meaningful tort reform. Any reform must necessarily address an overhaul of the proposal for settlement statute and rule, encourage mitigation of plaintiffs' alleged damages, overturn *Worley v. YMCA* and other decisions of the Florida Supreme Court, discourage the cozy relationships between referring attorneys and medical providers, cap non-economic damages, and return economic thinking to law and policy.

PART II. HOW WE GOT HERE: A REMINDER THAT INCENTIVES

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[9] 228 So. 3d 18, 20 (Fla. 2017).

[10] *See* 733 So. 2d 993, 998 (Fla. 1999) (holding that a jury has a compelling interest in assessing the potential bias of expert witnesses).

[11] "'Unbundling' means an action that submits a billing code that is properly billed under one billing code, but that has been separated into two or more billing codes, and would result in payment greater in amount than would be paid using one billing code." FLA. STAT. ANN. § 627.732 (West)

MATTER—HOW GOOD INTENTIONS, WRONGLY DECIDED AND MISINTERPRETED CASES, AND OUTDATED DOCTRINE CREATED CRISIS IN FLORIDA

A. Florida's Proposal for Settlement Statute—A Wild Alligator[12]

Many are familiar with offers of judgment made possible by Rule 68 of the Federal Rules of Civil Procedure[13] and similar statutes in many states.[14] Under Federal Rule 68, an offering party is entitled to the costs that were incurred after an offer was made if the judgment obtained by the offeree at trial was less favorable than the offer.[15] Costs under Rule 68 "are limited to [those] allowable under . . . Rule 54(d)[,]"[16] which are set forth in 28 U.S.C. § 1920.[17] Notably, Rule 68 alone does not authorize taxation of the prevailing party's attorneys' fees.[18] Rule 68 was intended to "encourage the settlement of litigation."[19]

Similarly, in 1986, Florida followed suit by enacting what is now Florida Statutes § 768.79 and Florida Rule of Civil Procedure 1.442.[20] Florida's creation, however, is markedly and expensively different than the formulations of its sister states and Congress. The intent of Florida's rule is to encourage early settlement, resolve civil cases in general at whatever stage, and sanction parties who unreasonably fail to accept an offer and end the dispute.[21] The statute provides:

> (1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent

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[12] The author also recently co-authored a short work on this topic. *See* Christopher Barkas & Kyle Weaver, *"Florida Man" Strikes Again: $1000 an Hour Attorneys' Fees*, USLAW MAGAZINE, Summer 2021, at 22, https://www.carrallison.com/wp-content/uploads/Florida-Man-Strikes-Again-by-Carr-Allison.pdf [https://perma.cc/4DYF-SWNH].

[13] FED. R. CIV. P. 68.

[14] *See, e.g.*, ALA. R. CIV. P. 68.

[15] FED. R. CIV. P. 68(d).

[16] Thomas v. Caudill, 150 F.R.D. 147, 149 (N.D. Ind. 1993).

[17] Taxable costs include fees for the clerk and marshal, transcript fees, witness and copying fees, docketing fees, fees for court appointed experts, and compensation of interpreters. 28 U.S.C. § 1920.

[18] *Thomas*, 150 F.R.D. at 149–50.

[19] Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981).

[20] *See generally* FLA. STAT. § 768.79; FLA. R. CIV. P. 1.442.

[21] MGR Equip. Corp. v. Wilson Ice Enters., Inc., 731 So. 2d 1262, 1264 (Fla. 1999).

> less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.[22]

In essence, if the plaintiff files a PFS and the judgment obtained[23] exceeds the plaintiff's pre-trial offer by 25%, the plaintiff is entitled to attorneys' fees from the date of the offer through trial.[24] Similarly, if the defendant files a PFS and the judgment obtained is 25% or less than the defendant's pre-trial offer, the defendant is entitled to attorneys' fees from the date of the offer through trial.[25] As an example, assume the plaintiff filed a PFS for $100,000. The PFS was not accepted, so it expired by operation of law after thirty days.[26] The case proceeded to trial and the judgment obtained by the plaintiff was $140,000. The plaintiff's "judgment obtained" was more than 25% above their $100,000 PFS, so they are entitled to attorneys' fees from the day the PFS was filed through trial. In a different hypothetical case, assume the defendants served a $100,000 PFS to the plaintiff that expired after thirty days by operation of law.[27] After trial, the "judgment obtained" by the plaintiff was $50,000, which falls below the 25% safe harbor,[28] so the defendants are entitled to their attorneys' fees from the service of the proposal through trial.[29]

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[22] FLA. STAT. § 768.79(1) (2021).

[23] For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced. FLA. STAT. § 768.79(6) (2021).

[24] FLA. STAT. § 768.79(1) (2021).

[25] *Id.*

[26] *See id.*

[27] *Id.*

[28] Here, plaintiff would not have to pay attorneys' fees if the net judgment was between $75,000 and $100,000. *Id.*

[29] *Id.*

i. Timing

The first PFS may be served by the plaintiff ninety days after service of the lawsuit.[30] The first PFS may be served by the defendant ninety days after commencement of the lawsuit.[31] The time frame for responding to the PFS may be extended by agreement of the parties or may be extended by order of the court.[32] The first of many issues with Florida's PFS scheme is the fact a party must make a financially risky decision about a case only ninety days into their involvement in the case.

Assume in this hypothetical the plaintiff filed a personal injury action in which the plaintiff claims medical injury and damages in the past and future in addition to non-economic damages. In the very best circumstance, after being served with the complaint, the defendant is able to retain counsel the same day and propound discovery to the plaintiff immediately. Unlikely. The intent of the written discovery is to learn the real nature of the plaintiff's claims (factually and legally), the strength and availability of defenses the defendant may be able to assert, and what damages the plaintiff claims.[33] The plaintiff's answers are due thirty days after they are served,[34] but experience tells us that rarely occurs. Upon receipt of the interrogatory answers, at best thirty days after service of the complaint, the defendant needs to issue subpoenas to the plaintiff's pre-and-post-accident medical providers, insurers, employers, and other persons or entities who may have discoverable information to assist the defendant in evaluating the claim. The non-party production and subpoena process is inefficient and rarely produces records within thirty days. In addition, the process may be drastically delayed by an objection from the adverse party or the subpoenaed entity, which requires a hearing and leaves the litigant at the mercy of getting a hearing on the court's already overwhelmed docket.

The defendant also wants to hear directly from the plaintiff during this time period in a deposition to weigh the plaintiff's credibility, determine how they present as a witness, and inquire deeper into facts and information to which answers in written discovery simply cannot

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[30] FLA. R. CIV. P. 1.442(b).

[31] *Id.*

[32] *See* FLA. R. CIV. P. 1.090(b); Koppel v. Ochoa, 243 So. 3d 886, 892 (Fla. 2018) ("Rule 1.090 allows for the time period set forth in Rule 1.442 to be enlarged, but this enlargement is at the trial court's discretion if the motion was filed before expiration of the time period and cause has been shown.").

[33] *See In re* Amendments to the Fla. Rules of Civ. Procedure–2019 Regular-Cycle Report, 292 So. 3d 660, 690–92 (Fla. 2019) (providing twenty-two general personal injury negligence interrogatories to the plaintiff).

[34] FLA. R. CIV. P. 1.340(a).

convey. The timing of other discovery and the schedule of all counsel involved rarely accommodates a deposition within the first ninety days of the case. Often, the risk of attorneys' fees attendant to a PFS is greater than the risk of the underlying facts of the case in which the PFS is served. Yet, rarely do the parties have enough information to fully and fairly evaluate the proposal for settlement. The time period for serving a PFS after the suit begins and the time period to evaluate the PFS after it is served is simply too short in today's litigation environment to ensure the parties are able to make fully informed decisions that carry such drastic financial ramifications.

ii. Form, Content, and Confusion with Multiple Parties

The technical requirements and the exceptions thereto could themselves form the basis of an entire law review article. Indeed, the confusion has filled many pages of the Southern Reporter. In general, a PFS must state: (1) the name of the party or parties making the proposal and to whom it is being made; (2) that "the proposal resolves all damages that would otherwise be awarded in a final judgment[;]" (3) all relevant conditions with particularity; (4) the total monetary amount of the proposal and any non-monetary conditions; (5) the amount to settle a punitive damages claim (if any); and (6) "whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim[.]"[35] Easy enough, right? Wrong. Let the complications begin.

A proposal from one defendant to one plaintiff, or from one plaintiff to one defendant, is always valid.[36] A proposal from two offering parties (a "joint proposal") to one opposing party is valid so long as the amounts attributable from each offering party are stated.[37] However, a proposal from one offering party to two opposing parties is generally invalid if the acceptance of all offerees is a condition of the proposal.[38] Each party must be able to independently evaluate and act upon the proposal, and their acceptance or rejection of the proposal cannot be conditioned upon the acceptance or rejection of the other party to whom the proposal was offered.[39]

For example, suppose a husband and wife file suit against one defendant. Each has his or her own separate causes of action for injury against the defendant in addition to any claims for loss of consortium. A single proposal from the defendant is served on both plaintiffs. The

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[35] FLA. R. CIV. P. 1.442(c)(2).

[36] *See* FLA. R. CIV. P. 1.442(c)(3).

[37] *See id.*

[38] Att'ys Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646, 651–652 (Fla. 2010).

[39] *Id.* at 650.

proposal does not apportion any amounts to each offeree, and the acceptance of the proposal by both is required, otherwise the offeror states the proposal is deemed rejected. The proposal is invalid because it requires mutual agreement of the husband and wife to resolve their claims, fails to apportion the amounts attributable to each party, and prohibits each from independently evaluating their respective claims.[40] Each plaintiff in the hypothetical must be able to accept or reject the proposal without the requirement they obtain the agreement of their co-plaintiff.[41] Otherwise, "the offeree[s] lack independent control over the decision to settle [the case] and conclude the litigation[,]" which may later subject them to an unfavorable outcome or financial penalty in the form of attorneys' fees.[42] The example proposal can be cured by attributing an amount to each offeree and removing any requirement that they both accept the proposal.[43]

There are many more nuances, intricacies, confusing, and ever-changing issues with PFSs.[44] The example above and the intricacies detailed in Lauren Rehm's Note *A Proposal for Settling the Interpretation of Florida's Proposals for Settlement* make clear the PFS statute and its complications waste litigants' time and money, erode confidence in the judicial system, lessen the predictability and finality of outcomes, and waste precious and already scarce judicial resources.

Perhaps more troubling, nonsensical, and damaging to Florida's business community is the interplay of vicarious liability doctrines and Florida's PFS law. In general, there are two theories of vicarious liability present in Florida personal injury litigation. The first is liability under Florida's Dangerous Instrumentality Doctrine. In Florida, the owner of a vehicle (or any other "dangerous instrumentality") is vicariously responsible for the negligence of the operator of the vehicle, so long as the vehicle was operated with the owner's permission and consent.[45] The second common vicarious liability doctrine is the familiar doctrine of respondeat superior, under which an employer is responsible without a showing of their own fault or wrongdoing for the negligence of their employee.[46] Under either theory, the vicariously responsible party is only liable in damages if the

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[40] *See id.* at 650–51.

[41] *Id.* at 651.

[42] *Id.* at 651–52.

[43] FLA. R. CIV. P. 1.442(c)(3); *Gorka*, 36 So. 3d at 651.

[44] *See* Lauren Rehm, *A Proposal for Settling the Interpretation of Florida's Proposals for Settlement*, 64 FLA. L. REV. 1811, 1812–14, 1814 n. 13 (2012).

[45] S. Cotton Oil Co. v. Anderson, 86 So. 629, 631 (Fla. 1920); FLA. STAT. § 324.021(9)(b)(3) (2021).

[46] Williams v. Hines, 86 So. 695, 697 (Fla. 1920).

actively negligent tortfeasor (the driver or employee) is liable.[47] After judgment is entered, the plaintiff may choose to recover from either the directly or vicariously liable defendant jointly and severally.[48]

In the context of PFSs, each party—even if the party is only vicariously liable—may be served with a proposal for settlement. PFSs are commonly served to the active tortfeasor and the vicariously responsible tortfeasor for differing amounts. This is frequently a *de facto* legal fiction because, though each defendant is technically a separate legal entity, the defendants are treated as a single party with one line on the verdict form; each usually has the same defense counsel, and commonly the ultimate payor of the judgment is the same (whether the corporate entity, or the insurance company who indemnifies both defendants). For example, in commercial trucking cases, a driver may receive a proposal for settlement for $75,000, and the driver's employer (and/or the vehicle owner) will receive a proposal for settlement for $150,000. If the proposals are both rejected, the plaintiff only needs to recover a net judgment of $93,750 to subject *both* defendants to the payment of their attorneys' fees. By contrast, if the decision is made to pay the $75,000 to end the case against the driver (the directly liable party) it *does not* end the case against the vicariously responsible party.[49] This makes no legal sense—once the actively liable tortfeasor's liability is extinguished, so too the vicariously responsible party's liability should be terminated.

If the case proceeds to trial against only one defendant because a proposal was accepted, the plaintiff is not entitled to the sums already paid.[50] For example, if the gross verdict at trial in the example above was $200,000, the $75,000 already paid by the settling defendant is set off from the verdict, resulting in $125,000 of liability for the remaining defendant. However, for purposes of determining the success or failure of the $150,000 PFS against the remaining defendant, the earlier settlement is not subtracted.[51] Though the remaining defendant does not have to pay the $75,000 again, the net judgment obtained by the plaintiff is $200,000, which is greater than 25% above the plaintiff's $150,000 PFS.[52] The plaintiff's PFS is successful, so the remaining defendant is liable for the $125,000 additional damages and whatever

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[47] *See id.* at 697–98; *Anderson*, 86 So. at 631.

[48] Hooker & McConnell, *Joint and Several Liability in Florida: Are Reports of its Demise Greatly Exaggerated?*, FLA. BAR J. (Dec. 2008), https://www.floridabar.org/the-florida-bar-journal/joint-and-several-liability-in-florida-are-reports-of-its-demise-greatly-exaggerated/ [https://perma.cc/AJ2V-E5LW].

[49] *See* McGregor v. Molnar, 79 So. 3d 908, 911 (Fla. Dist. Ct. App. 2012).

[50] *See Gorka*, 36 So. 3d at 650–51.

[51] *See* Wilcox v. Neville, 283 So. 3d 878, 882–83 (Fla. Dist. Ct. App. 2019).

[52] *See* FLA. STAT. § 768.79(6)(b) (2021); Barkas & Weaver, *supra* note 12, at 23.

additional amount the court determines are the plaintiff's post-offer reasonable fees and costs.

iii. Determining a "Reasonable" Fee Award

The trial court computes attorneys' fee award in its discretion based on, but not limited to, the following factors provided by statute:

1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.[53]

This framework seems to mean little in practice because courts are awarding plaintiff lawyers $500 to $800 per hour and, in one particularly worrisome case, $1,000 per hour in a straightforward small personal injury accident case.[54] The attorneys' fee award in that case exceeded $750,000 on what was originally a $25,000 offer to resolve the case.[55] By contrast defendants are limited to their contractual rate with their lawyers.[56]

iv. Good Intentions Gone Wrong

The Florida Legislature's intent to encourage resolution of cases went horribly wrong. Practically speaking, instead of creating an incentive to resolve cases early, section 768.79 created an unworkable framework and substantially more litigation—not over the merits of the cases, but over the interpretation and application of the PFS statute. In addition, because attorneys' fee awards in some cases can reach $1,000,000, the incentive once a PFS is rejected is to try the case to ensure a substantial fee award. Even in negotiations, the merits of any given case have been eclipsed by expired PFSs, with particularly cheeky plaintiff lawyers threatening involvement of multiple attorneys

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[53] FLA. STAT. § 768.79(7)(b) (2021).

[54] *See* Order on Plaintiff's Amended Motion for Award of Attorneys' Fees and Costs, *supra* note 4, at 1–2.

[55] *Id.* at 1, 7, 10.

[56] Barkas & Weaver, *supra* note 12, at 23; *see also* Gemini II, Ltd. v. Mesa Underwriters Specialty Ins. Co., No. 12-61711-CIV-ZLOCH, 2015 U.S. Dist. LEXIS 192460, at *11 (S.D. Fla. Oct. 14, 2015).

to drive up fees and costs.[57] Finally, the attorneys' fee sanction is only payable by client, rather than attorney and client.[58] A plaintiff's PFS that is successful usually has corporate pockets to empty, meaning the fee judgment is recoverable and is a real, tangible sanction against defendants. By contrast, a vast majority of plaintiffs in personal injury litigation are judgment proof—there are few, if any, assets to recover.[59] So, a defendant who succeeds on a PFS against a judgment-proof plaintiff expends hundreds of thousands of dollars in legal fees and expenses only to be handed a worthless judgment.

Outside of practical flaws, the statute suffers from a number of legal infirmities. Chief among them is the splitting of PFSs between actively and vicariously responsible tortfeasors even though there is no apportionment of liability between them.[60] The legal question of how a vicariously responsible party can remain legally responsible despite the fact the claim against the actively negligent tortfeasor was resolved is puzzling and lacks common sense. In addition, defendants and plaintiffs are treated differently in the computation of the attorneys' fee award without any rational basis. A defendant's fee recovery on a successful PFS is capped at his contract rate with his defense lawyers, but a plaintiff's fees are not capped.[61] Plaintiffs' attorneys' fees are also traditionally far more expensive per hour (by a factor of 3–5) than those of their defense counterparts. An equal protection question is raised under the circumstances. In addition, if fees of close to $1,000,000 are awarded by the court (without a jury), there are concerns as to whether the award may be a deprivation of property without due process of law or an excessive fine or penalty.

B. Negligent Hiring, Training, Supervision, Retention and Entrustment

Claims are increasingly brought against Florida employers for negligent hiring, training, supervision, retention and entrustment (collectively "negligent employment"). The claims are usually meritless under existing law but merely serve as an avenue for the plaintiff to undertake more liberal discovery to uncover an employee's otherwise irrelevant past and drive up defense costs.

In *Mallory v. O' Neil*, the Florida Supreme Court first recognized

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[57] *See* Barkas & Weaver, *supra* note 12, at 23.

[58] *See, e.g.*, *Gemini II*, 2015 U.S. Dist. LEXIS, at *14–15.

[59] *See* Barkas & Weaver, *supra* note 12, at 23.

[60] *See* Dewit v. UPS Ground Freight, Inc., No. 1:16cv36-MW/CAS, 2017 U.S. Dist. LEXIS 167963, at *10–11 (N.D. Fla. June 16, 2017) (citations omitted) ("Florida law does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor.").

[61] Barkas & Weaver, *supra* note 12, at 23.

an employer's liability forming the basis of the contemporary doctrines of negligent hiring, training, and supervision.[62] The *Mallory* court adopted section 317 of the *Restatement of Torts*, which provides in relevant part: "[a] master is under a duty to exercise reasonable care so to control his servant while acting outside the course [and scope] of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them . . . ."[63] As a result, Florida courts routinely dismiss negligent employment claims as a matter of law where an employee's alleged tortious conduct was committed within the course and scope of his or her employment.[64]

In addition to the guidance in *Mallory*, other Florida courts hold once a party has admitted vicarious responsibility for the alleged negligence of its employee/agent, "derivative-liability claims are improper where [they] impose no additional liability."[65] The decision of the United States District Court for the Northern District of Florida in *Dewit v. UPS Ground Freight, Inc.*, is instructive.[66] In *Dewit*, the plaintiffs were involved in an automobile accident with an independent contractor of UPS Ground Freight.[67] There, the plaintiffs filed suit, alleging the negligence of the independent contractor for UPS Ground Freight, the vicarious responsibility of UPS Ground Freight for the actions of the contractor, and the negligence of UPS Ground Freight in hiring, training, retaining, and supervising the contractor.[68] UPS

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[62] *See Mallory*, 69 So. 2d 313, 315 (Fla. 1954).

[63] *Id.* at 315; RESTATEMENT (FIRST) OF TORTS § 317 (AM. L. INST. 1934).

[64] *See, e.g.*, Belizaire v. City of Miami, 944 F. Supp. 2d 1204, 1207, 1215 (S.D. Fla. 2013) (dismissing negligent retention claim where police officers were acting within line and scope of employment, stating "Florida law requires that a claim for negligent retention allege acts committed outside the course and scope of employment"); Santillana v. Fla. St. Ct. Sys., No. 6:09-cv-2095-Orl-19KRS, 2010 U.S. Dist. LEXIS 3049, at *33–34 (M.D. Fla. Jan. 14, 2010) (dismissing negligent supervision claim, stating "it is clear that the alleged acts by employees giving rise to liability for negligent supervision must occur outside the employees' scope of employment"); Gillis v. Sports Auth., Inc., 123 F. Supp. 2d 611, 614, 617–18 (S.D. Fla. 2000) (dismissing negligent hiring, supervision, and retention claims where complaint failed to allege Sports Authority's employees acted outside the course and scope of employment when employees discriminated against the plaintiff); *see also* Walter G. Latimer, *Liability of the Commercial Driver: Negligent Hiring Meets the Dangerous Instrumentality Doctrine*, 75 FLA. BAR J. 42 (2001) ("Unless a driver has acted outside the scope of his employment, a plaintiff may not invoke theories of negligent hiring or retention.").

[65] Dewit v. UPS Ground Freight, Inc., No. 1:16cv36-MW/CAS, 2017 U.S. Dist. LEXIS 167963, at *8 (N.D. Fla. June 16, 2017) (citing Shaw v. Pizza Hut of Am., Inc., No. 8:08-cv-27, 2009 U.S. Dist. LEXIS 48912, at *1 (M.D. Fla. June 1, 2009)) (commercial automobile case).

[66] *Id.* at *11.

[67] *Id.* at *3–8.

[68] *Id.* at *4–5.

Ground Freight admitted its vicarious responsibility for the actions of the contractor and moved for summary judgment on the negligent employment claims.[69]

The Northern District first surveyed the decisions of several state and federal courts that had disallowed negligent employment claims before agreeing and explain:

> Here too, Plaintiffs' derivative-liability theories are "totally unnecessary." UPS Freight is bound by its admission that it is vicariously liable for Mr. Stone's alleged negligence. And that alleged negligence is "inextricably intertwined" with Plaintiffs' derivative-liability claims against UPS Freight; indeed, the derivative-liability claims may only survive if Mr. Stone was, in fact, negligent. And Plaintiffs do not seek punitive damages. Plaintiffs' derivative-liability claims are thus duplicative of their vicarious liability claim and must be dismissed.[70]

The Northern District next addressed the argument that the negligent employment claims could "expose UPS [Ground] Freight to additional liability because the jury [would] . . . apportion liability among all alleged tortfeasors."[71] The Northern District rejected the argument, bluntly explaining: "Nonsense. Florida law 'does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor.'"[72]The court ultimately concluded that "[b]ecause Plaintiffs' derivative-liability claims do not expose UPS Freight to any additional liability, they are duplicative of the vicarious-liability claims and must be dismissed."[73]

The decisions of the First District Court of Appeal in *Dunmore v. Eagle Motor Lines*[74] or the Fifth District Court of Appeal in *Trevino v. Mobley*[75] are frequently raised in opposition to defense motions to dismiss or motions for summary judgment on the negligent employment issues. The opposition is misplaced because the cases are simply not applicable. Addressing these two cases, in *Dewit*, the United States District Court for the Northern District of Florida explained:

> Contrary to Plaintiffs' assertion, *Dunmore v. Eagle Motor Lines* and *Trevino v. Mobley* are readily distinguishable. *Dunmore*, for example, did not involve vicarious liability and derivative-liability claims

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[69] *Id.* at *4–8.

[70] *Id.* at *9–10 (citations and parentheticals omitted).

[71] *Id.* at *10.

[72] *Dewit*, 2017 U.S. Dist. LEXIS 167963, at *10–*11.

[73] *Id.* at *11.

[74] 560 So. 2d 1261 (Fla. Dist. Ct. App. 1990)

[75] 63 So. 3d 865 (Fla. Dist. Ct. App. 2011).

> brought against the *same* party (as is the case here). Rather, those claims were brought against *separate* parties. The derivative-liability claim therefore "imposed additional liability on [the allegedly derivatively liable defendant] not available to plaintiff against [that defendant] under any other alleged legal theory." Similarly, in *Trevino*, a Florida Statute limited the plaintiff's damages for the vehicle owner's vicarious liability but not for his derivative liability. The derivative-liability claim therefore exposed the vehicle owner to additional liability. No such statute applies here.[76]

As the *Dewit* court recognized, the *Trevino* court allowed a negligent entrustment claim to stand against the personal vehicle owner in addition to the purely vicarious dangerous instrumentality claim *because the dangerous instrumentality doctrine caps damages available against personal automobile owners*. The dangerous instrumentality doctrine does not cap damages in cases involving commercial automobiles like those owned by employers and driven by employees while in the course and scope of their employment.[77]

Negligent employment claims should not ordinarily be given the time of day. The claims lack legal merit and are practically useless except for their value in harassing defendants. Allowing the claims to survive motions to dismiss or motions for summary judgment only serves to waste time and exaggerate costs of defending the meritless claims.

C. The Proliferation of the Medical-Legal Industry Because of Wrongly Decided and Misinterpreted Case Law.

i. Allstate Insurance Co. v. Boecher

In *Allstate Insurance Co. v. Boecher*, the Florida Supreme Court sought to determine whether Florida's discovery rules permitted discovery requests to parties regarding the "party's use of and payments to . . . particular expert[s]."[78] In *Boecher*, the plaintiff filed suit against his uninsured motorist carrier, Allstate.[79] Allstate hired an "accident reconstruction and injury causation expert."[80] In response, the plaintiff sent interrogatories to Allstate seeking the identity of cases in which the expert performed work in the prior three years and the amount of payments made by Allstate to the expert in the preceding

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[76] *Id.* at *10 n5. (alterations in original) (citations omitted)

[77] *See* FLA. STAT. § 324.021(9)(c)(1) (damages cap does "not apply to an owner of motor vehicles that are used for commercial activity in the owner's ordinary course of business").

[78] 733 So. 2d 993, 994 (Fla. 1999).

[79] *Id.*

[80] *Id.*

three years.[81] Allstate objected and the trial court overruled the objections, requiring Allstate's response.[82] The intermediate court of appeal affirmed the trial court's decision.[83]

Beginning its analysis of the issue, the court reminded "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics."[84] The court weighed earlier precedent involving discovery sent directly to expert witnesses and rejected any comparison because the discovery in *Boecher* was sent to the party, not the expert.[85] The court ultimately provided a long explanation for its decision:

> The information sought here would reveal how often the expert testified on Allstate's behalf and how much money the expert made from its relationship with Allstate. The information sought in this case does not just lead to the discovery of admissible information. The information requested is directly relevant to a party's efforts to demonstrate to the jury the witness's bias.
>
> The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.
>
> Any limitation on this inquiry has the potential for thwarting the truth-seeking function of the trial process. As we observed in *Krawzak*, we take "a strong stand against charades in trials." To limit this discovery would potentially leave the jury with a false impression concerning the extent of the relationship between the witness and the party by allowing a party to present a witness as an independent witness when, in fact, there has been an extensive financial relationship between the party and the expert. This limitation thus has the potential for undermining the truth-seeking function and fairness of the trial.[86]

The court overruled the objections and ordered Allstate to respond to the discovery.[87] The *Boecher* court's explanation resonates today, far outside the context of expert witness discovery. Ironically, despite the words of the court, litigation and trials today are often "charades"

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[81] *Id.*

[82] *See id.*

[83] *Id.*

[84] *Boecher*, 733 So. 2d at 995 (alteration in original).

[85] *Id.* at 995–97.

[86] *Id.* at 997–98 (citations omitted).

[87] *Id.* at 988.

as it pertains to medical expenses,[88] referral relationships between doctors and lawyers and the privilege they are afforded,[89] and plaintiffs' failures to mitigate damages[90] to the great financial detriment of defendants.

ii. Worley v. Central Florida YMCA

In Worley v. Central Florida Young Men's Christian Association, Inc. ("Worley") the Florida Supreme Court sought to resolve a conflict among the district courts of appeal regarding whether the attorney client privilege protects a party from disclosing the fact the party's attorney referred the party for treatment.[91] The plaintiff in Worley fell in the parking lot of the YMCA and sought treatment twice from an area hospital.[92] The plaintiff was advised by the hospital to seek follow up care from a specialist.[93] Ms. Worley did not seek care from a specialist for "a month or two" because she did not have enough money or any health insurance."[94] Only after retaining counsel did Ms. Worley obtain treatment from providers other than the hospital.[95]

After suit was filed, the defendant "repeatedly attempted to discover the relationship between [the plaintiff's] law firm . . . and her treating physicians."[96] During the plaintiff's deposition, she was asked whether "she was referred to her [physicians] by her attorneys."[97] Ms. Worley's counsel objected on the basis of the attorney-client privilege.[98] Defense counsel also propounded Boecher interrogatories on Ms. Worley "in an effort to establish the existence of a referral relationship" between Ms. Worley's treating physicians and her attorneys.[99] Ms. Worley's counsel objected on the basis that the requests were "overbroad, vague, unduly and financially burdensome, irrelevant and in violation [of] . . . Florida Rule of Civil Procedure 1.280(b)(4)" and that the plaintiff's firm did not maintain the information requested for treating physicians.[100] The trial court sustained Ms. Worley's objection based on the attorney-client privilege

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[88] *Id.* at 998; *see also* discussion *infra* Section II.D.
[89] *See* discussion *infra* Section III.C.ii.
[90] *See* discussion *infra* Section II.D.
[91] 228 So. 3d 18, 20 (Fla. 2017).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Worley*, 228 So. 3d at 20.
[97] *Id.*
[98] *Id.*
[99] *Id.; see also infra* Section II.C.i.
[100] *Worley*, 228 So. 3d at 21.

but did not address the outstanding Boecher discovery requests.[101]On appeal before the Florida Supreme Court, the narrow issues for the court's consideration were "whether the attorney-client privilege protects a plaintiff from disclosing that an attorney referred him or her to a doctor for treatment, or a law firm from producing documents related to a possible referral relationship between the firm and its client's treating physicians."[102]– The court began its analysis by resolving a related issue necessary to its determination: "whether the financial relationship between a plaintiff's law firm and the plaintiff's treating physician is discoverable."[103] The court rejected the premise that its earlier decision in Boecher was applicable to the issues before it, and noted the extension of its ruling to include the relationships between physicians and law firms in its wake.[104]

The court next justified its conclusion by explaining the differences between Boecher and the case before it. Specifically, the court noted "the law firm [was] not a party to the litigation[;]" however, in Boecher, the discovery was directed to Allstate, who was a party.[105] The experts involved in Boecher were also retained experts chosen by the party, not treating physicians.[106] The court admitted the defendant was permitted to attack a treating physician's credibility based on bias, but explained that could be demonstrated by introducing evidence of any letter of protection or other financial interest in the outcome of the case.[107] The court further justified its ruling: "Allowing further discovery into a possible relationship between the physician and the plaintiff's law firm would only serve to uncover evidence that, even if relevant, would require the production of communications and materials that are protected by attorney-client privilege."[108]

The court finally turned to the specific question before it: "whether the attorney-client privilege precludes defense counsel from asking a plaintiff whether his or her attorney referred the plaintiff to a physician for treatment."[109] It reviewed the parameters of the client privilege before concluding a referral of a patient-client to a particular physician by the patient's attorney is attorney-client privilege.[110] The court rejected the defendant's argument that "the lawyer's act of referring a

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[101] *See id.*
[102] *Id.* at 22.
[103] *Id.*
[104] *Id.* at 22–23.
[105] *Id.* at 23.
[106] *See Worley*, 228 So. 3d at 21.
[107] *Id.* at 23–24.
[108] *Id.* at 24.
[109] *Id.*
[110] *Id.* at 24–25.

client to a treating physician is [merely] an underlying fact, not a communication[,]" explaining:

> That the plaintiff was treated by a particular doctor is an underlying fact. That the plaintiff received a referral to see a particular doctor is also an underlying fact. However, whether the plaintiff's attorney requested that the client see a certain doctor requires the plaintiff to disclose a part of a communication that was held between the plaintiff and attorney, and we resist any attempts to separate the contents of communications to distinguish "facts" from privileged information. To hold otherwise would severely undermine the purpose of the privilege, which is to encourage the free flow of information between attorneys and their clients.[111]

The dissent correctly focused on the fact that only communications between attorney and client for the purposes of obtaining legal advice are privileged.[112] The dissent explained: "A lawyer's referral of a client to a treating medical provider is for the purpose of the client's medical care, not in furtherance of legal services. Therefore, the referral itself is not protected as an attorney-client privileged communication."[113]

The *Worley* decision dealt a major blow to defendants in Florida's courts. The Florida Supreme Court essentially sanctified all words uttered between an attorney and a client as privileged. Certainly, seeing a particular doctor cannot be said to be "legal advice." If it can be, does that admission itself not establish exactly how powerful and dangerous the issue is? If selection of a physician is legal advice, the implications are obvious. The physician is less about medical care and more about legal strategy—another fact in the litigation game being played that the jury is not permitted to consider. Plaintiff lawyers may now refer plaintiffs to physicians they know will provide their clients with favorable testimony. The physicians will continue to do so because they want to continue receiving referrals. The *Worley* decision forbids defendants from exposing the choice of doctor for what it is: litigation gamesmanship. The decision shrouds the plaintiff's firm—and the physicians they refer patients to—from the truth-finding function of our courts and disallows the defendants or the jury from ever learning just how cozy (a.k.a motivated to provide favorable testimony) the physician-attorney relationship is. The decision enhanced the legitimacy of the already shady medical-legal referral network and created a cottage industry immune from scrutiny.

By contrast, defendants are yet again treated drastically differently. Defendants, by definition, do not have the privilege of

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[111] *Id.* at 25.

[112] *See Worley*, 228 So. 3d at 29 (Polston, J., dissenting).

[113] *Id.* at 26–27.

having treating physicians who are apparently immune from discovery. Defendants must resort to hiring experts to defend themselves. As a consequence, the selection of a particular expert and any historical relationship between the defendant, defense firm, and expert is the subject of deep exploration. The *Worley* decision is wrong. The decision missed the mark on what is a privileged communication, furthered the plight of defendants, and worsened the already deteriorating litigation climate in Florida.[114]

D. Recent Appellate Efforts to Lessen the Fallout from Worley

The Supreme Court of Florida recently heard two subtle challenges to its earlier decision in *Worley* in *Younkin v. Blackwelder*[115] and *Dodgen v. Grijalva*.[116] In essence, the question presented in both appeals was "[w]hether it is a departure from the essential requirements of law to permit discovery regarding the financial relationship between a defendant's nonparty insurer and an expert witness retained by the defense[.]"[117] The court took a narrow approach, finding *Worley* inapplicable to the facts presented, because *Worley* only addressed relationships with treating physicians.[118] The court declined the opportunity to revisit *Worley* and the concerns raised by the defendant and the district court, explaining:

> [W]e recognize the concern about what the Fourth District described as a post-*Worley* uneven playing field skewed in favor of plaintiffs when it comes to the discovery of financial-bias relationships between the parties' medical experts and non-party representatives. But whether *Worley* was wrongly decided or whether some other factor has caused the purportedly uneven playing field, is not properly before us. The holding of *Worley* should be reexamined only in a case in which it is actually at issue.[119]

Justice Polston dissented in both cases.[120] He was sharply critical of the majority's unwillingness to correct its erroneous decision in *Worley*

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[114] *See* Nathan Hale, *Fla. High Court Passes on Discovery Disparity Question*, LAW 360 (Oct. 14, 2021, 5:12 PM), https://www.law360.com/insurance-authority/general-liability/articles/1431113/fla-high-court-passes-on-discovery-disparity-questionhttps://www.law360.com/insurance-authority/general-liability/articles/1431113/fla-high-court-passes-on-discovery-disparity-question [https://perma.cc/9BHJ-6ZK6].

[115] Youngkin v. Blackwelder, No. SC19-385, 2021 Fla. LEXIS 1659, at *2 (Fla. Oct. 14, 2021).

[116] Dodgen v. Grijalva, No. SC19-1118, 2021 Fla. LEXIS 1657, at *2 (Fla. Oct. 14, 2021).

[117] *Id.* at *3; *Youngkin*, 2021 Fla. LEXIS 1659 at *4.

[118] *Dodgen*, 2021 Fla. LEXIS 1657 at *10–12.

[119] *Id.* at *14.

[120] *Id.* at *15 (Polston, J., dissenting); *Youngkin*, 2021 Fla. LEXIS 1659 at *8 (Polston, J., dissenting).

and recognized the inequity of *Worley*, quoting Justice Lambert from the lower court:

> [U]nder Worley, a plaintiff law firm can refer 100 of its clients to the same treating physician, who may later testify as an expert witness at trial, without that referral arrangement being either discoverable or disclosed to the jury, yet if a defense firm sends each one of these 100 plaintiffs to its own expert to perform a CME under Florida Rule of Civil Procedure 1.360, and then later to testify at trial, the extent of the defense law firm's financial relationship with the CME doctor is readily discoverable and can be used by the plaintiff law firm at trial to attack the doctor's credibility based on bias. Nevertheless, this appears to be the present status of the law.[121]

Justice Polston also recalled the court's earlier decisions recognizing "unequal treatment in discovery is not appropriate."[122]

Unfortunately, the Supreme Court of Florida sidestepped the issue created just four years earlier in *Worley*. It is ironic, yet fitting, that the court avoided reversing itself by citing its own limited jurisdiction and narrowly addressing the questions presented to it on appeal. *Worley* was the byproduct of the very thing the court refused to do in *Younkin* and *Dodgen*. Justice Polston's dissent bluntly addresses this same irony and perfectly frames the plight faced by defendants. Justice Polston's dissent also seems to indicate he is inclined to reverse the erroneous decision in *Worley* when the issue is presented to the court again, in whatever form.

E. Letters of Protection, an Outdated Collateral Source Rule, and the Plaintiff's Failure to Mitigate Damages

Historically, a letter of protection ("LOP") was "a document sent by an attorney on a client's behalf to a health-care provider when the client needs medical treatment, but does not have insurance."[123] Essentially, it is an "IOU" for healthcare that was to be repaid at the conclusion of litigation.[124] The LOP was a necessary evil for the uninsured plaintiff. However, plaintiffs and their counsel are now electing to treat under LOPs rather than submit their bills to health insurance or Medicare.[125] If the charges are not submitted to health insurance, the bills remain unpaid and unadjusted, so they are higher.

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[121] *Youngkin*, 2021 Fla. LEXIS 1659, at *10 (Polston, J., dissenting) (citation omitted) (quoting Younkin v. Blackwelder, 332 So. 3d 1032, 1034 (Fla. Dist. Ct. App. Feb. 22, 2019).

[122] *Id.* at *10–11 (citing Elkins v. Syken, 672 So. 2d 517, 522 (Fla. 1996)).

[123] Caroline C. Pace, *Tort Recovery for Medical Beneficiaries: Procedures, Pitfalls and Potential Values*, HOUS. LAW., March/April 2012, at 27.

[124] *See id.*

[125] *See id.*

But why pay more for the same services and not submit them to insurance? Plaintiff lawyers and plaintiffs believe that:

> [P]otenial recovery likely depends on the amount of admissible medical expenses . . . Under these circumstances, the medical providers and [the plaintiff's] interests are aligned: the medical provider wants to be paid as much as possible up to what is reasonable; and [the plaintiff] wants to submit to the jury and recover as much as possible up to what is reasonable. At minimum, both prefer to recover an amount greater than Medicare's discounted rate.[126]

The foregoing is an interesting quote to chew on. The plaintiff and her physicians reportedly only want to recover what is "reasonable." In non-litigated cases, the plaintiff would submit their bills to Medicare, and the physicians would accept Medicare's discounted payments under their existing contract. It is therefore only "unreasonable" to submit bills to health insurance when the case is litigated and there is something to gain from someone else (the defendant or their insurer) by driving up the medical bills beyond what was otherwise "reasonable." I prefer the phrase "legal gamesmanship" to describe the practice.

If the legal system operated efficiently, the legal doctrines of mitigation of damages or avoidable consequences would intervene. Each claimant has a duty to reduce their additional damages that could have been avoided by reasonable efforts.[127] Here, the jury would be informed the plaintiff had health insurance or Medicare which would have reduced their medical expenses but failed to do so. The jury could then weigh the evidence and determine whether the plaintiff acted reasonably and what damages (if any) to award. Unfortunately, the morally and economically distasteful practice of driving up medical bills with LOPs, to the great expense of the defendants and society at large is protected by the application of an arcane, outdated, and inapplicable doctrine known as the collateral source rule.

The collateral source rule made its debut in American jurisprudence by way of the United States Supreme Court in 1855 in *Monticello v. Mollison.*[128] In practice, the collateral source rule operates as "both a rule of damages and as a rule of evidence."[129] As

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[126] *Id.*

[127] *Mitigation-of-Damages Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle inducing a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach. . . . Also termed *avoidable-consequences doctrine*.").

[128] *See* The Propeller Monticello v. Mollison, 58 U.S. 152 (1854); Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 LOUISVILLE L. REV. 1, 7–8 (2009).

[129] Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009).

such, "[i]t prohibits both the reduction of a recovery by payments from collateral sources and the introduction of evidence of such payments."[130] Stated another way, defendants may not present evidence that the plaintiff's medical bills have been paid by a collateral source, like insurance, and a damage award may not be reduced because the plaintiff has already received compensation from another source.[131]Historical philosophical rationales for the collateral source rule included deterrence,[132] unjust enrichment,[133] the creation of incentives for risk mitigation,[134] and restorative justice.[135]

A version of the collateral source rule was eventually adopted by all fifty states.[136] However, in the decades following the collateral source rule's universal adoption, many states modified or abrogated the rule by statute.[137] In fact, the rule only exists in its common law form in twelve states: Arkansas, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, West Virginia, Wyoming and Hawaii.[138] The most common revised collateral source statutes forbid recovery of compensation provided by a collateral source,[139] and most, including Florida, "exclude collateral payments for which there are subrogation rights, to ensure that a plaintiff is not undercompensate" and "are generally offset by the amount paid by a plaintiff for insurance premiums or other payments made in order to obtain the collateral benefit."[140] Florida's Collateral Source Rule

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[130] *Id.*

[131] *See id.*

[132] The belief is the rule created incentives which would deter actors from engaging in tortious conduct. Ann S. Levin, *The Fate of The Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736, 750–752 (2013).

[133] The "unjust enrichment" rationale bears substantial similarity to the deterrence rationale discussed *supra* note 133. Simply put, under the unjust enrichment rationale, supporters argue that a tortfeasor should not benefit from an insurance contract to which the tortfeasor was not a party. *Id.* at 752–53.

[134] Tied closely with the unjust enrichment rationale, supporters of the collateral source rule urge that the rule incentivizes the populous to purchase insurance. *Id.* at 753–56.

[135] Historically the collateral source rule was viewed as a means to compensate a tort victim for the true cost of their injury, including out–of–pocket expenses like attorneys' fees. *See* Rebecca Levenson, *Allocating the Costs of Harm to Whom They are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. PA. L. REV. 921, 928–29 (2012).

[136] Larry D. Warren & Nathan L. Mechler, *Paid or Incurred and the Collateral Source Rule Across the Country*, 59 FED'N DEF. & CORP. COUNS. Q. 203, 206 (2009).

[137] *See id.*; *see, e.g.*, FLA. STAT. § 768.76 (2021) (abrogating the common law collateral source rule in Florida).

[138] Guillermo Gabriel Zorogastua, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 463 n.3 (2007).

[139] Benjet, *supra* note 129, at 211.

[140] *Id.*

provides:

> In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.[141]

As an example, at trial, the plaintiff wants to introduce evidence of the cost of medical care associated with her injury. Assume that the plaintiff suffered a broken leg and spent three days in a private room at the hospital. Further, assume plaintiff purchased health insurance and was fully covered. At the conclusion of the plaintiff's stay in the hospital her balance was $150,000. The plaintiff did not pay any of her medical expenses personally except for $1,000 in co-insurance payments. Her insurer paid the hospital $35,000 and received $l14,000 in contractual adjustments.[142] This is commonplace as insurers are able to negotiate steep discounts with medical providers and rarely pay the "retail value" of medical services.[143] The insurer also maintains a contractual right of subrogation/reimbursement over the $35,000 it paid for the plaintiff's care.[144] In other words, this $35,000 is what must be paid back to the insurer (less negotiated reductions for attorneys' fees and costs, and other discounts) from any recovery from a third-party tortfeasor.

At trial, the plaintiff will introduce evidence of her $150,000 bill from her hospital stay as evidence of her damages. The collateral source rule historically (and currently in Florida) prevents the defendant from presenting evidence that the plaintiff's bill was adjusted in part as well as the balance paid by insurance.[145] After the jury returns their verdict based upon their belief that the plaintiff incurred $150,000 in medical expenses, the trial court sets off any discounts or amounts for which there is no right of subrogation or

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[141] FLA. STAT. § 768.76(1) (2021).

[142] *See* Michael K. Beard & Dylan H. Marsh, *Arbitrary Healthcare Pricing and the Misuse of Hospital Lien Statutes by Healthcare Providers*, 38 AM. J. TRIAL ADVOC. 255, 255–56 (2014).

[143] *See id.*

[144] *See id.* at 263–67 (discussing hospital liens for treatment of insured plaintiffs in personal injury cases).

[145] *See* FLA. STAT. § 768.76 (2021).

reimbursement.[146] In the example, the jury's verdict was $500,000. The trial court sets off (subtracts) the $114,000 of medical expenses that were adjusted and not paid by either the insurance company or the plaintiff, which reduces her net judgment to $386,000.

Florida's collateral source rule presents two substantial problems for defendants. First, allowing the unreduced charges (or gross charges) to be shown to a jury results in larger jury verdicts overall, which are out of proportion to reality. Plaintiff lawyers expressly acknowledge that they prefer that the juries see higher medical expenses, which they believe leads to higher verdict awards.[147] Even with post-trial setoffs for contractual adjustments received by insurers, the result is often a drastic windfall for plaintiffs.

Second, Florida's collateral source rule is cited by plaintiffs to preclude introduction of evidence that the plaintiff had private health insurance or Medicare and failed to submit their bills to the insurer for adjustment or payment. Thus, the collateral source rule is used as a shield to prevent the jury from hearing damaging evidence that the plaintiff engaged in gamesmanship and intentionally increased their medical expenses for purposes of litigation. However, from a common sense reading of the collateral source, it is evident that the rule only applies to payments made on behalf of the plaintiff; it does not apply where the insurance was available but not used.[148] The intent of introducing the evidence is not to inform the jury that the medical expenses were already paid. In that circumstance, the collateral source rule would bar the evidence. But here, it is quite the contrary. The intent of introducing the evidence is to prove a failure to mitigate damages. The collateral source rule should not be allowed to be used as both a sword and a shield: ensuring windfalls to plaintiffs in some circumstances and protecting them from having their inequitable litigation game exposed in front of a jury. The law should not protect those who choose to exaggerate their own damages unnecessarily to gain a litigation advantage. The intent of injury litigation is compensation, but the abuses of plaintiffs and the plaintiff bar are becoming punitive rather than compensatory.

PART III. HOW TO FIX IT AND WHY IT MATTERS

A. Past Reform Efforts and Notable Pending and Decided Florida Supreme Court Cases

In recent years, there have been several reform efforts of note in

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[146] *See id.*

[147] *See* Pace, *supra* note 123, at 27–28.

[148] *See* Fla. Stat. § 768.76 (2021).

Florida. Below, I outline each briefly.

i. Florida Supreme Court Returned to the *Daubert* Standard for Admissibility of Expert Witness Testimony

Expert testimony in Florida is governed by Florida Statutes section 90.702.[149] In the past ten years there was uncertainty in Florida whether the standard for expert witness testimony was governed by *Frye* or the *Daubert* standard.[150] Initially, the statute was enacted to unite Florida law and federal law under the same standard of admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals* and its progeny, but a separation of powers issue between the legislature and the judiciary left subordinate courts guessing.[151] Finally, in May 2019, the Florida Supreme Court clarified once and for all that Florida is, in fact, a *Daubert* jurisdiction.[152]

The change was a big victory for defendants. Under *Frye*, only new or novel scientific evidence is subject to intense scrutiny by the trial court in determining its admissibility.[153] By contrast, *Daubert* requires that the trial court assess all expert testimony and the for it to ensure reliability.[154] Under *Daubert*, an expert's opinion is not admissible simply because it is spoken by an expert, "nor can an expert's self-serving assertion that his conclusions were 'derived by the

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[149] Under section 90.702:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

FLA. STAT. § 90.702 (2013).

[150] *See generally In re* Amendments to Florida Evidence Code, No.278 So. 3d 551, 552 (Fla. 2019).

[151] *See id.*

[152] *See id.* at 554.

[153] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[154] The trial court serves as a gatekeeper and must not "simply tak[e] the expert's word for it." Hughes v. KIA Motors Corp., 766 F.3d 1317, 1331 (11th Cir. 2014). The court must undertake an independent analysis of each step in the logic leading to the expert's conclusions and "*any* step that renders the analysis unreliable under the *Daubert factors renders the expert's* [entire] *testimony inadmissible*." McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1245 (11th Cir. 2005). The proponent of the expert bears the burden of demonstrating the expert's testimony satisfies the *Daubert* standard. Booker v. Sumter Cnty. Sheriff's Off., 166 So. 3d 189, 195 (Fla. Dist. Ct. App. 2015); *see also* Lewis v. CITGO Petroleum Corp., 561 F.3d 698 (7th Cir. 2009). "The purpose of the gatekeeping requirement is to ensure an expert 'employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Booker*, 166 So. 3d at 192 (quoting Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)).

scientific method' be deemed conclusive."[155] Instead, an expert's opinion "must be grounded in the scientific process and may not merely be a subjective belief or unsupported conjecture."[156] Essentially, under *Frye*, so long as an expert was qualified by training or experience, the expert could offer whatever opinion they (and the proponent of their testimony) wanted. The result was a lot of conjecture and junk science. *Daubert* should be victory for our courts and all litigants because it ensures juries are not presented with questionable science as evidence for their ultimate decision.

ii. Florida Supreme Court Adopted the Federal Summary Judgment Standard

A surprise order from the Florida Supreme Court on New Year's Eve changed Florida's outdated and largely meaningless summary judgment rule overnight.[157] The order, which was entered upon the court's own motion, changed the way the Florida courts determine whether a party is entitled to summary judgment.[158] The change brings Florida's interpretation of the standard for summary judgment into agreement with federal courts and a substantial majority of state courts across the nation.[159]

Summary judgment is a pre-trial procedure which can result in the dismissal of specific claims or entire cases.[160] Generally, summary judgment is warranted if the moving party can establish that there are no material facts in dispute and that moving party is entitled to judgment as a matter of law.[161] In practice, Rule 1.510 of the Florida Rules of Civil Procedure precluded entry of summary judgment if there were seemingly any facts in dispute (no matter their unimportance) and even facts which were demonstrably false.[162] By contrast, federal courts interpreting the nearly identical Rule 56 of the Federal Rules of Civil Procedure are not so constrained.[163] Federal courts are empowered to enter summary judgment unless the evidence is "such that a reasonable jury could return a verdict for the nonmoving

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[155] McDowell v. Brown, 392 F.3d 1283, 1299 (11th Cir. 2004) (quoting Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315–16 (9th Cir. 1995)).

[156] *Lewis*, 561 F.3d at 705.

[157] *See In re* Amendments to Fla. R. Civ. P. 1.510, 309 So. 3d 192 (Fla. 2020) (per curiam).

[158] *Id.* at 192.

[159] *Id.*

[160] *See, e.g., id.* at 194.

[161] *Id.* at 192.

[162] *See id.* at 193.

[163] *See, e.g., In re* Amendments to Fla. R. Civ. P. 1.510, 309 So. 3d 192, 193 (Fla. 2020) (per curiam).

party."[164] Under the federal summary judgment standard, "merely colorable" evidence—or evidence that "is not significantly probative"—cannot preclude summary judgment.[165]

In essence, gone are the days in Florida where a non-movant could skate by summary judgment relying on counsel's ability to create issues from thin air.[166] The alteration of Florida Rule 1.510 is a victory for defendants and the business community.[167] Florida's prior summary judgment standard nearly guaranteed cases would reach trial (at great expense) even when completely lacking evidence or merit.[168] The change ensures that the rules of civil procedure accomplish their intended purpose: to secure the just, speedy, and inexpensive determination of every action.[169] The rule change took effect May, 21, 2021.[170]

iii. Recent Legislative Efforts

During the 2019, 2020, and 2021 legislative sessions, the Florida Legislature entertained tort reform measures to cap non-economic damages,[171] allow introduction of the amount of paid medical expenses rather than billed,[172] and provide a framework for what is a reasonable medical expense when medical care was provided under letters of

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[164] *Id.* (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

[165] *Id.* (quoting *Anderson*, 477 U.S. at 248).

[166] *Cf. id.* at 194 (explaining that one goal in adopting the federal summary judgment standard is to relieve parties from litigating meritless claims).

[167] *See* Kyle W. Robisch, *Smoother Sailing on Summary Judgment: Practical Implications of Florida Adopting the Federal Summary Judgment Standard*, BRADLEY ARANT BOULT CUMMINGS, LLP: INSIGHTS & EVENTS (Nov. 11, 2021), https://www.bradley.com/insights/publications/2021/01/smoother-sailing-on-summary-judgment-practical-implications-of-florida-adopting-the-federal [https://perma.cc/9BZQ-PPNU].

[168] *Id.*

[169] *See In re* Amendments to Fla. R. Civ. P. 1.510, 309 So. 3d 192, 194 (Fla. 2020) (per curiam).

[170] *Id.* at 195.

[171] FLA. H.R. SUBCOMM. ON CIV. JUST., H.R. 17 (2019) STAFF ANALYSIS 6 (Mar. 8, 2019), https://www.flsenate.gov/Session/Bill/2019/17/Analyses/h0017a.CJS.PDF [https://perma.cc/A6EY-944C]; FLA. S. COMM. ON JUDICIARY, S.B. 1668 (2020) STAFF ANALYSIS 5 (Jan. 30, 2020), https://www.flsenate.gov/Session/Bill/2020/1668/Analyses/2020s01668.pre.ju.PDF [https://perma.cc/2KRB-VK75]; FLA. S. COMM. ON JUDICIARY, S.B. 846 (2021) STAFF ANALYSIS 6 (Mar. 8, 2021), https://www.flsenate.gov/Session/Bill/2021/846/Analyses/2021s00846.ju.PDF [https://perma.cc/L2J8-BG8Z].

[172] FLA. H.R. SUBCOMM. ON CIV. JUST., H.R. 17 (2019) STAFF ANALYSIS 5 (Mar. 8, 2019) https://www.flsenate.gov/Session/Bill/2019/17/Analyses/h0017a.CJS.PDF [https://perma.cc/A6EY-944C].

protection, by using Medicare's rates as a guide.[173] Unfortunately, these reforms were unsuccessful. I anticipate they will be raised again in coming legislative sessions.

In 2021, the legislature also proposed scrapping Florida's No-Fault Statutes, more commonly called Personal Injury Protection, or "PIP."[174] Generally speaking, PIP is mandatory on Florida registered and garaged vehicles and provides $10,000 in coverage regardless of which party in the accident was at fault.[175]For defendants, the important feature of PIP is a "permanency threshold." In Florida lawsuits arising from an automobile accident, the plaintiff must prove they suffered a permanent injury within a reasonable degree of medical certainty, death, significant scarring, or loss of use of a major bodily function to be entitled to non-economic damages (pain/suffering).[176] If the plaintiff fails to establish any of the aforementioned, they are limited only to the recovery of economic damages.[177]

The legislature's proposed statute, which would replace PIP, established a mandatory statutory minimum bodily injury coverage of $25,000 and included some bad faith reforms as well.[178] However, the major downside to the PIP repeal was the apparent elimination of the permanency threshold. Absent the threshold, plaintiffs would be entitled to recover non-economic damages so long as the jury found some injury was caused in the accident. Ultimately (and luckily) the governor vetoed the bill.[179] Lawmakers, lobbyists, and advocates for change must resist any change to existing PIP law that will undermine the permanency threshold, which is one of the few remaining devices to help level the playing field for defendants in Florida.

B. Suggestions for Real and Lasting Reform

i. Proposal for Settlement Reform

a. Cap Attorneys' Fees as a Percentage of the Verdict

The intent of Florida's PFS statute has been corrupted, resulting

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[173] *Id.*

[174] Christine Jordan Sexton, *Is PIP Repeal Headed for a Comeback?*, FLA. POL., (Sept. 9, 2021) https://floridapolitics.com/archives/455498-is-pip-repeal-headed-for-a-comeback/ [https://perma.cc/6NU9-EKFB]; (discussing S.B. 54, 2021 Leg., Reg. Sess. (Fla. 2021)).

[175] *See* FLA. STAT. § 627.736 (2021)

[176] FLA. STAT. § 627.737 (2021)

[177] *Id.*

[178] *See Florida Governor Cites 'Unintended Consequences' in Veto of Auto Insurance Bill*, INS. J. (June 30, 2021), https://www.insurancejournal.com/news/southeast/2021/06/30/620736.htm [https://perma.cc/R3U7-CQGS].

[179] *Id.*

in egregious fee awards. The fees are out of touch with the often-simple underlying action. The PFS is no longer a tool to encourage settlement. The PFS statute is merely another vehicle to extract money from defendants (and their insurers), who are at a great disadvantage under the rule.

For example, in a car accident case, imagine that the plaintiff had a few thousand dollars of medical bills for conservative non-operative treatment. The defendant was then served with a $75,000 PFS on the ninety-first day of the case. It was rejected because, up until then, the value of the case was far below $75,000. Immediately after expiration of the PFS, the plaintiff ramps up treatment and has surgery. The medical expenses are now six figures, so the case value changed dramatically from when the PFS was initially served and to when it expired. The now-expired PFS becomes a bargaining chip for the plaintiff. The case is tried because the expectations of the parties and respective case valuations are dramatically different. Trial may result in a fee award of hundreds of thousands of dollars.

The example makes it evident the PFS statute furthers cat-and-mouse litigation tactics and is a tool for imposing excessive fines/penalties in violation of the United States Constitution. Any PFS reform must correct the incentives for the plaintiff and plaintiff's attorney—that is, the PFS statute must be changed to make it less financially rewarding than the underlying case. At present, and from my experience, the largest obstacle in resolving a case is an expired proposal for settlement. An expired proposal frequently increases the values in settlement than the facts of the underlying case.

A simple cap on the hourly rate awarded is insufficient and carries incentive issues of its own, namely the incentive to increase billed hours at a lower rate to net the same attorneys' fee award after trial. A more feasible solution is capping attorneys' fee liability as a percentage of the verdict. In Florida, plaintiff lawyers who operate on contingency fees are already limited.[180] Debate over the number can rage, but assume the cap for PFS fees was 25% of the judgment obtained. In practice, if the judgment obtained was $100,000, and resulted in attorneys' fee liability, the fee sanction against the defendants would be $25,000. By contrast, under the existing system, the fee award could exceed $500,000, for an underlying case which was only worth $100,000 according to the jury. The disparity in value is most evident considering a contingency fee on the $100,000 recovery would result in a maximum attorneys' fee of $40,000 under the existing Rules Regulating the Florida Bar. In sum, an attorneys' fee cap which realigns the statutory intent of encouraging settlement is necessary if

[180] RUL. REG. FLA. BAR 4-1.5(f).

the PFS statute is to survive.

b. Require the Posting of Bond to Cover Attorneys' Fee Awards Before a Proposal for Settlement May be Filed By Either Party

PFS awards are normally only a real threat against defendants. The plaintiff in the vast majority of litigated cases (at least, in bodily injury cases) is judgment proof. The threat of an adverse judgment against most plaintiffs is educational, at best. By contrast, corporate defendants or insurers providing indemnity to defendants are capable of paying. This fact further erodes the intended deterrent of proposals for settlement. A suggested reform is requiring a bond to be posted, or a PFS insurance policy which insures against fee awards be obtained before a party may serve a PFS to the opposing party. The extent of coverage is open for debate, but a certain statutory minimum policy limit to cover a reasonable attorneys' fee could be established to level the playing field.

At present, a party may serve a PFS quite cavalierly and without much thought or expense. The requirement of purchasing a bond or insurance policy increases the thought and investment in serving a proposal for settlement and should result in fewer proposals and only in cases where the hammer of a PFS is needed to break stalemate in settlement negotiations and potentially coerce settlement. In addition, the requirement of a bond or insurance will correct the current inability of defendants to collect most PFS judgments against judgment proof plaintiffs.

c. Expand the Timeframe or Set Conditions on the Timing for Proposals for Settlement.

As explained above, at present a party could be forced to evaluate their case and make financially consequential determinations and predictions about the case without much information. Bad or insufficient information are directly correlated with inefficient and thereby disadvantageous outcomes for the parties and court system. A better solution is to extend the timeframe for serving PFSs to a minimum of six months after service of the suit or commencement (depending on the party serving/being served). Alternatively, a PFS should not be permitted while there is outstanding discovery owed to the party to whom a PFS was served, or to a party who requested the deposition of the party serving the PFS.

Timing reform for PFSs is necessary because plaintiffs always have a better idea of the value of their case—it is personal to them, whereas defendants are forced to gather their information for decision making directly from the plaintiff (party discovery, depositions, etc.)

and often from non-parties (medical providers, employers, and similar). Absent timing reform, the PFS rule will continue to punish defendants for merely being defendants and lacking sufficient information to evaluate their cases and make decisions about the plaintiff's case.

d. Disallow the Splitting of Proposals for Settlement Between Actively and Vicariously Responsible Parties

Doctrines of vicarious responsibility are legal fictions created for policy reasons. In Florida, PFSs take advantage of vicarious responsibility cases by splitting proposals for settlement between the actively and vicariously responsible tortfeasor. This practice defies logic, as there is no apportionment of damages between the vicariously responsible tortfeasor and actively responsible tortfeasor at trial. Alternatively, if the practice of splitting proposals for settlement continues, the law should be changed so resolution of a claim against either the directly or vicariously responsible party resolves the claim against the remaining party (whether the party is directly or vicariously liable).

e. Allow Proposals to be Set Aside for Materially Changed Information

Proposals for settlement require the parties to evaluate the case at a snapshot in time, and likely without sufficient information. In an example provided above, the case was non-surgical with low medical expenses.[181] Once the proposal expired, treatment ramped up and a surgery was performed, causing a drastic change in value. The low PFS now has a much greater likelihood of success at trial, creating substantial fee risk if it does. The defendants could be held responsible for a large attorneys' fee award, even though they did not act unreasonably in rejecting the PFS which was not a reasonable value of the case at the time it was served/expired. The decision to have surgery thereafter, without warning and outside the control of the defendants, must be considered a material change in information, such that the defendants are not responsible for fees in what is a completely different factual case than the one they were presented with when they rejected the PFS. Without correction, the incentive structure is flawed and encourages hiding information until after a PFS is expired. The practice is also simply unfair to defendants.

[181] *See supra* Section III.B.i.

ii. Non-Economic Damages Reform

a. Cap Non-Economic Damages

The author's recent survey of verdicts exceeding $1,000,000 revealed most of the damages awarded (about 80%) were comprised of non-economic damages (pain and suffering, etc.).[182] For example, a recent case in Osceola County, Florida resulted in a verdict of over $4,000,000.[183] The past medical expenses were $87,580.70 and future medical expenses were $550,856.63, for a total economic damages award of $683,437.33.[184] Thus, non-economic damages (in the past and future) were $3,719,898.44, or 85.35% of the total verdict. Non-economic damage awards are out of control and are not tied to any traditional or reasonable valuation of the case. Psychologists and academics may posit whatever theories they wish for why juries are increasingly liberal in their non-economic damages awards. But one thing remains abundantly clear: non-economic damages need to be reined in to slow the tort-crisis in Florida.

Capping non-economic damages in Florida is not a new idea. In 1986, the legislature attempted to cap non-economic damages at $450,000.[185] The measure was ultimately deemed unconstitutional and overturned the following year by the Florida Supreme Court because

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[182] Denise Rees & William Rees v. Fort Myers Diner, LLC, No. 17-CA-001501 (Fla. Lee County Circuit Ct.) (Aug. 26, 2021) (56.4% non-economic damages); Napper v. Napolitano, No. CACE-16-022147 & Graf (Fla. Broward County Circuit Ct.) (Aug. 19, 2021) (94.84% non-economic damages); Clemons v. Shelton Trucking Service, No. 2019-CA-000806 (Fla. Alachua County Circuit Ct.) (Aug. 5, 2021) (79.81% non-economic damages); Myers v. Safeco Ins. Co. of Ill., No. 2018-CA-000471 (Fla. Marion County Circuit Ct.) (July 29, 2021) (81.05% non-economic damages); Cestonmi v. Thompson & Innovative Masonry Restoration, Inc. No. 19-CA-002509 (Fla. Hillsborough County Circuit Ct.) (July 16, 2021) (73.42% non-economic damages); Cardona v. Cline, No. 2018-CA-000114 (Fla. Osceola County Circuit Ct.) (July 2, 2021) (85.35% non-economic damages); Brasher v. Paul, No. 2017-CA-0941 (Fla. Clay County Circuit Ct.) (July 2, 2021) (89.22% non-economic damages); Finson v. State Farm Mut. Auto. Ins. Co., No. 18-003409-CI (Fla. Pinellas County Circuit Ct.) (May 27, 2021) (69.38% non-economics); Burke v. Lancheros and VL Transport, No. 2017-CA-010082-O (Fla. Orange County Circuit Ct.) (May 21, 2021) (79.82% non-economic damages); Rodgers v. City of Gainesville Regional Utilities, No. 01-2016-CA-000659 (Fla. Alachua County Circuit Ct.) (May 6, 2021) (95.57% non-economic damages); Winklejohn v. Callari, No. 2018-020841-CA-01 (Fla. Miami-Dade County Circuit Ct.) (Mar. 3, 20201) (61.43% non-economic damages); Cox v. Jason's Grading, Inc., No. 262016CA000740CAAXMX (Fla. Hendry County Circuit Ct.) (Feb. 12, 2020) (88.20% non-economic damages); Lightfoot v. Hunt, Mercury Ins. Co., No. 2012-CA-001281 (Fla. Duval County Circuit Ct.) (Aug. 19, 2019) (86.04% non-economic damages).

[183] *Cardona*, No. 2018-CA-000114, at 2.

[184] *Id.* at 1.

[185] Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws § 695 (repealed 1990); *see* Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987).

the measure denied access to courts absent a reasonable alternative remedy and there was no overpowering public necessity shown to justify the cap.[186] Florida would join eight other states if the cap is successfully implemented.[187] As it stands, Florida is one of seven states that have passed non-economic damages reform, which was ultimately found unconstitutional.[188]

In "Why It Matters," I discuss the grim details of the business and insurance landscape in Florida. The numbers highlighted there are compelling and demonstrate our state's business and insurance crisis, which has a negative impact on all Floridians. Stated differently, there is now an overpowering public necessity to justify capping non-economic damages.

iii. Encourage Mitigation of Damages and Correct Incentives to Avoid Driving Up Losses

Phantom damages—those which are written off by providers but still given to plaintiffs as compensation because write offs and payments are not admissible—must be eliminated. Florida should admit evidence at trial of what was actually paid by a collateral source rather than what was charged to correct perverse incentives. No, this does not violate the collateral source rule because the jury does not need to know the bills were paid or by whom they were paid. Instead, imagine plaintiff's bills were $100,000. Plaintiff had health insurance that received $75,000 in adjustments and paid $25,000. The jury should be informed that the cost of the plaintiff's care was $25,000 and nothing else. Otherwise, providers (especially those in tight medical-legal relationships thanks to *Worley*) are encouraged to charge outlandish retail prices to ensure the jury sees and awards large medical expenses and also awards substantially more in non-economic damages.

Plaintiffs are under an affirmative duty to mitigate their losses. But what remedy do defendants have under the existing framework that bars evidence that the plaintiff had a way to lower expenses (health insurance) and opted not to use it? The collateral source rule should not be used as a sword and a shield—generating large economic damages awards but preventing the jury from hearing evidence about the plaintiff's failure to mitigate damages. Florida courts must allow evidence at trial that the plaintiff failed to mitigate damages because

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[186] *Smith*, 507 So. 2d at 1087–89.

[187] *Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUST. & DEMOCRACY (Aug. 22, 2020), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.cc/MG4G-B8C2].

[188] *Id.*

they had a means to pay for or reduce the medical expenses sought or, alternatively, cap non-economic damages if the plaintiff elects not to mitigate their damages as a matter of law. Otherwise, defendants, insurers, and the public in general will continue to be the victim of a great windfall for the few and the expense of many.

C. Why it Matters

According to a recent Florida House of Representatives Staff Bill Analysis, in 2016 costs and compensation paid in the tort system totaled $429 billion, or 2.3% of GDP.[189] Florida had a higher tort liability system of any other state at 3.6% of GDP, or approximately $4,442 annually per household.[190] Florida's broken system is responsible for "$7.6 billion in direct costs; $11.8 billion in annual output; 126,139 jobs; $614.8 million in State revenues; and $516 million in local government revenues."[191] Florida was once open for business but was recently ranked a "judicial hellhole[,]" which is indicative of the fact its courts "systemically apply laws and procedures unfairly towards defendants in civil cases."[192]

PART IV: CONCLUSION

Florida's natural beauty and draw aside, it is a difficult place to be sued, especially for businesses and their insurers. Reform efforts are necessary to ensure all parties in Florida's state courts are treated evenhandedly and receive a fair trial. Otherwise, all Floridians are sure to pay the cost.

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[189] FLA. H.R. SUBCOMM. ON CIV. JUST., H.R. 17 (2019) STAFF ANALYSIS 3 (Apr. 10, 2019), https://www.flsenate.gov/Session/Bill/2019/17/Analyses/h0017e.JDC.PDF [https://perma.cc/K6E8-V35E].

[190] *Id.*

[191] *Id.*

[192] *Id.*