IN THE CIRCUIT COURT, OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

DAVID SALDANA and
KATHY SALDANA,

Plaintiffs,

v.

JAMES SCHULTZ, PROGRESSIVE MANAGEMENT OF AMERICA, INC MYRTLE GROVE ACQUISITIONS, LLC,

Defendants.

_____/

CASE NO: 2023-CA-000292

DEFENDANTS' (1) MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT; (2) MOTION FOR NEW TRIAL; (3) MOTION FOR REMITTITUR; AND (4) MOTION FOR JUROR INTERVIEW[1]

DEFENDANTS James Shultz, Progressive Management of America, Inc., and Myrtle Grove Acquisitions, LLC, file these Motions under Rules 1.431(h), 1.480, and 1.530, and state:

1. This personal injury action tried before a jury resulted in a July 11, 2025, verdict.

2. The jury found the Defendants liable and awarded the following damages to Plaintiff David Saldana: (1) $180,000 in past medical expenses; (2) $10,000,000 in future medical expenses; (3) $265,000 in past lost wages; (4) $477,000 in lost wages to be sustained in the future; (5) $20,000,000 in past pain and suffering; and (6) $19,078,000 in future pain and suffering, for a total of $50,000,000.

3. Final Judgment was entered on July 16, 2025, in favor of Plaintiff and against Defendants for $50,000,000. That Final Judgment must be vacated for the reasons below.

[1] Undersigned's office ordered the entire trial transcript on an expedited basis for receipt on Monday, July 21, 2025. As of July 28, 2025, the undersigned's office has only received rough, incomplete drafts, and we have not been provided with the official version yet. The information and arguments herein are based on counsel's best recollections from trial and portions of the rough drafts. It will be amended upon review of the official transcripts to the extent necessary.

4. Under Rule 1.480, Defendants are entitled to judgment in accordance with their motion for directed verdict because there were no pled allegations and no evidence that Defendants had actual or constructive knowledge of prior, similar criminal acts on the premises. Therefore, Defendants are entitled to judgment as a matter of law on duty and causation.

5. In the alternative, under Rule 1.530, Defendants were denied the right to a fair trial for many reasons, which individually and cumulatively, necessitate a new trial.

6. As an alternative to a new trial on past and future medical expenses (only), Defendants are entitled to remittitur of those awards.

7. Additionally, as an alternative to a directed verdict and a new trial, Defendants are entitled to interview the jurors to determine whether they violated this Court's instructions by viewing—during trial—content posted on social media by Zarzaur Law, P.A. about this trial and about insurance carriers.

RULE 1.480 MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE THE PLEADINGS AND FACTS DO NOT GIVE RISE TO A DUTY TO PROTECT PLAINTIFF FROM THE THIRD-PARTY CRIMINAL ATTACK AS A MATTER OF LAW.

A motion for directed verdict "raises a question of law for the trial judge respecting the legal sufficiency of the evidence to sustain a verdict against the defendant." *Deatrick Leasing Corp. v. Rand's Paint & Body Shop, Inc.*, 247 So. 2d 532, 532 (Fla. 3d DCA 1971) (quoting *Greenberg v. Post*, 155 Fla. 135, 139 (Fla. 1944)).

A court should enter judgment in accordance with a motion for directed verdict if it "determine[s] that no reasonable jury could render a verdict for the non-moving party." *Houghton v. Bond*, 680 So. 2d 514, 522 (Fla. 1st DCA 1996); *see Metropolitan Dade County v.* Martino, 710 So. 2d 20 (Fla. 3d DCA 1998) (reversing denial of motion for judgment in

accordance with prior motion for directed verdict holding no reasonable juror could find in plaintiff's favor on negligent hiring/supervision). Where the Plaintiff's evidence is insufficient to prove his or her case, directed verdict must be entered in the Defendant's favor. *See e.g., Anesthesiology Critical Care & Pain Mgmt. Consultants, P.A. v. Kretzer*, 802 So. 2d 346, 351 (Fla. 4th DCA 2001) ("Because appellees failed to prove the essential elements of their claim, a directed verdict should have been entered in appellant's favor."). All evidence and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Deauville Hotel Mgmt., LLC v. Wa*rd, 219 So. 3d 949, 952 (Fla. 3d DCA 2017). Directed verdict is appropriate on the elements of duty and, separately, causation.

Duty is ordinarily a question of law for the trial court to decide rather than a question of fact. *Bing v. Alachua Cnty.*, 392 So. 3d 266, 269 (Fla. 1st DCA 2024) (citing *Casey v. Mistral Condo. Ass'n, Inc.*, 380 So. 3d 1278, 1283 (Fla. 1st DCA 2024)). "Florida courts have long been loathe to impose liability based on a defendant's failure to control the conduct of a third party." *Boynton v. Burglass*, 590 So. 2d 446, 448 (Fla. 3d DCA 1991). "As a general principle, a party has no legal duty to control the conduct of a third person to prevent that person from causing harm to another." *Aguila*, 878 So. 2d at 398 (citing *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985); *Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 338 (Fla. 4th DCA 1998)). The exceptions to this rule are limited.

"Florida courts have held that a landlord has no general duty to protect a tenant from **criminal attacks** by third persons." *Aguila*, 736 So. 2d at 61 (citing *Czerwinski v. Sunrise Point Condominium*, 540 So. 2d 199 (Fla. 3d DCA 1989); *Whelan v. Dacoma Enters., Inc.*, 394 So. 2d 506 (Fla. 5th DCA 1981)) (emphasis added); *see also Paterson v. Deeb*, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985) ("[A]s a general rule, a landowner has no duty to protect an invitee on his

premises from criminal attack by a person over whom the landowner has no control unless the criminal attack is reasonably foreseeable") (citations omitted).

However, landlord-tenant is an example of a special relationship which can give rise to a duty to protect from the conduct of a third party. *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499, 503 (Fla. 4th DCA 2005) (citing *Gross*, 716 So. 2d at 338) (emphasis added). "To impose such a duty, the tenant must allege and prove that the landlord had actual or constructive knowledge of prior similar acts committed on invitees on the premises." *Menendez*, 736 So. 2d at 61 (citing *Paterson*, 472 So. 2d 1210) (emphasis added); *see also T.W.*, 908 So. 2d at 503 (citing *Salerno v. Hart Fin. Corp.*, 521 So. 2d 234, 235 (Fla. 4th DCA 1988). Additionally, a plaintiff may allege that the criminal attacker had a known history of physical violence. *See Saunders v. Baseball Factory*, 361 So. 3d 365, 370 (Fla. 4th DCA 2023) (finding that there was no foreseeable zone of risk and that the plaintiff "did not allege that the player had a known history of violence or that any prior incidents of violence had occurred at these tournaments").

Plaintiff failed to meet his threshold burden. Plaintiff failed to allege any prior occurrences of similar criminal conduct on the premises. Plaintiff failed to allege any prior occurrences of similar criminal conduct involving Ms. Buschbaum. Plaintiff failed to allege that Defendants had undertaken, or represented that they would undertake, responsibility for the security of the tenants of Myrtle Grove. Plaintiff failed to allege that Defendants removed any existing security measures on the property. Plaintiff failed to allege any prior, similar negligence on behalf of Defendants which resulted in harm similar to the harm suffered here.

As a matter of law, Plaintiff failed to allege facts which give rise to a duty to protect the tenants of Myrtle Grove from reasonably foreseeable criminal activity. In short, Plaintiff failed to allege anything to open the courthouse door. And it should not have been opened.

Additionally, there is no record evidence which establishes that Defendants had a duty to protect the tenants of Myrtle Grove from reasonably foreseeable criminal activity. "To determine whether the risk of injury to a plaintiff is foreseeable under the concept of duty, courts must look at whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury, **not simply whether it was within the realm of any conceivable possibility**. *Saunders*, 361 So. 3d at 369 (quoting *Grieco v. Daiho Sangyo, Inc.*, 344 So. 3d 11, 23 (Fla. 4th DCA 2022)) (emphasis added); *see also Johnson v. Wal-Mart Stores East, LP*, 389 So. 3d 705, 709 (Fla. 5th DCA 2024) ("[i]mportantly, to establish a duty, the zone of risk created by a defendants conduct 'must have been reasonably foreseeable, not just possible") (quoting *Graham v. Langley*, 683 So. 2d 1147, 1148 (Fla. 5th DCA 1996)). "A legal duty does not exist merely because the harm in question was foreseeable—instead, the defendant's conduct must 'create' the risk. *Saunders*, 361 So. 3d at 369 (citing *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 396 (Fla. 1st DCA 2004)). "In other words, a duty requires one to be in a position to 'control the risk.'" *Id.* (citing *Surloff v. Regions Bank*, 179 So. 3d 472, 476 (Fla. 4th DCA 2015)).

People do not generally have a duty to protect from the conduct of third parties because "[n]ormally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence." *Id.* (quoting *Restatement (Second) of Torts* § 302 cmt. D (Am. Law Inst. 1965)). "This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law." *Id.* (citing *Restatement (Second) of Torts* § 302 cmt. D (Am. Law Inst. 1965)). "Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it." *Id*. (citing *Restatement (Second)*

of Torts § 302 cmt. D (Am. Law Inst. 1965)). "The question is whether it was *objectively* reasonable to expect the danger causing [the plaintiff's] injury, not whether it was within the realm of any conceivable possibility." *Id*. at 371 (emphasis in original).

There is no record evidence of any prior, similar violent attacks on the property. The only evidence of prior criminal conduct at Myrtle Grove is evidence regarding the solicitation of prostitutes by an unnamed, unrelated tenant. Assuming *arguendo* that the solicitation of prostitutes gave rise to a duty, the scope of that duty is defined by the "zone of risk" created by that criminal conduct. Therefore, Defendants' duty would be to protect the tenants only from harm which is a reasonably foreseeable result of prostitution. Plaintiff did not present any evidence that Defendants breached this duty. Even if Plaintiff did present evidence of a breach, no reasonable jury could find that the attack on Plaintiff by a **fellow tenant**, not a prostitute, was a reasonably foreseeable result of Defendants' failure to protect the tenants from **prostitution**.

There is no evidence that the assailant, Ms. Buschbaum, had ever physically attacked another person, on or off the premises. There is also no evidence that Defendants had knowledge of any such physical attacks. The evidence showed that Defendants had knowledge of only one[2] prior, verbal altercation involving Ms. Buschbaum. The only other evidence Plaintiff argues indicated a 'violent' propensity was her: (1) flirtatiousness; (2) generally erratic behavior; (3) false accusation of improper touching; and (4) gun ownership and knowledge of how to use it. There was no evidence of any prior, physical violence. There was also no evidence that she had even threatened to use physical violence against Plaintiff or any other tenant.

The law is clear: only knowledge of prior, similar conduct can give rise to a duty to protect tenants from reasonably foreseeable criminal conduct. *See Menendez*, 736 So. 2d at 61.

[2] Improper hearsay evidence of a second verbal altercation was allowed into evidence, but even that improper evidence failed to establish that Defendants had actual or constructive knowledge of that event.

Plaintiff failed to establish that Defendants had a duty to protect him from Ms. Buschbaum's attack. Judgment in Defendants' favor is required given this lack of duty as a matter of law.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE NO REASONABLE JUROR COULD HAVE FOUND THAT PLAINTIFF PROVED THE ELEMENT OF CAUSATION.

Plaintiff did not prove that the criminal attack was the foreseeable result of any purported breach by Defendants or that Defendants' alleged breach was the legal cause of Plaintiff's injuries.

A person who has been negligent is not liable for the damages suffered by another when some separate force or action is "the active and efficient intervening cause," the "sole proximate cause," or an "independent" cause. *Gibson v. Avis Rent-A-Car-Sys.*, 386 So. 2d 520, 522 (Fla. 1980) (citations omitted). On the other hand, one who is negligent is not absolved of liability when his conduct "sets in motion" a chain of events resulting in injury to the plaintiff. *Id*. (citations omitted). If an intervening cause is foreseeable, the original negligent actor may still be held liable. *Id*. One way of determining whether an intervening cause was foreseeable "is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct." *Id*. This question may be answered in different ways. *Id*.

First, the legislature may specify the type of harm for which a tortfeasor is liable. *Id*. (citations omitted). Second, it may be shown that the particular defendant had actual knowledge that the same type of harm has resulted in the past from the same type of negligent conduct. *Id*. (citation omitted). Finally, there is the type of harm that has so frequently resulted from the same type of negligence that "in the field of human experience the same *type* of result may be expected again." *Id*. (citation omitted) (emphasis in original). Only the second prong applies to this case.

There was no evidence that Defendants knew or should have known of any similar injuries or occurrences prior to the criminal attack. There was no evidence that Defendant Schultz's negligent conduct had ever previously resulted in a criminal attack on a tenant—and certainly no evidence of this same alleged conduct leading to a criminal attack. There is no evidence of any prior criminal attacks on the premises. There is also no evidence that Ms. Buschbaum herself had ever criminally or physically attacked someone. Therefore, the attack was legally unforeseeable.

Plaintiffs argue that the events made it reasonably foreseeable that she could become violent. That is legally insufficient to satisfy foreseeability in this case. Defendants found no Florida case, and Plaintiff failed to present any, where a court found that a shooting, or any physical assault, was foreseeable when there was no evidence of a prior physical assault. That is because Defendants have no duty to protect against something that someone *might* be capable of but has never done before. *See Saunders*, 361 So. 3d at 369 ("to determine whether the risk of injury to a plaintiff is foreseeable under the concept of duty, courts must look at whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury, not simply whether it was within the realm of any conceivable possibility").

Plaintiff did not meet their burden of proving that Defendants' alleged failures were the legal **cause** of Plaintiff's injuries. The duty to protect, if Defendants had one, would be a duty to warn the tenants of Myrtle Grove. *See T.W.*, 908 So. 2d at 506-07 (finding that an apartment complex had a duty to warn of, but not investigate, a sexual assault on a resident minor by another tenant). However, the evidence clearly shows that Ms. Buschbaum's prior acts and proclivities were well known by the other tenants, including Plaintiff. Therefore, Defendants cannot be found liable for a failure to warn. *See Collias v. Gateway Acad. of Walton Cty., Inc.*,

313 So. 3d 163 (Fla. 1st DCA 2021) (discussing how the "open and obvious danger" doctrine absolves a landowner on a failure to warn theory). Plaintiff argues that Defendants had a duty to warn Plaintiff that Ms. Buschbaum owned a gun, but there is no legal support for that argument.[3] Plaintiff cannot—and did not—prove legal cause or liability.

There is no duty owed as a matter of law in this case based on the pleadings and the evidence at trial. There is no evidence to sustain any finding of causation. As both are elements of any negligence claim, no reasonable jury could find that Plaintiff proved his claim. Accordingly, Defendants are entitled to judgment in accordance with their motion for directed on the issue of liability based on Plaintiff's failure to prove both (or either) duty and causation.

WHEREFORE, Defendants James Shultz, Progressive Management of America, Inc., and Myrtle Grove Acquisitions, LLC, respectfully request that this Court set aside the verdict, vacate the Final Judgment, and enter a Directed Verdict in Accordance with Motion for Directed Verdict on Liability in favor of Defendants and against Plaintiff.

[3] This Court acknowledged that the Defendants had no legal duty to tell tenants that another tenant owned a gun. (PTCT. 26).

RULE 1.530 MOTION FOR NEW TRIAL (ALTERNATIVE RELIEF TO A DIRECTED VERDICT ON LIABILITY)

I. DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THE JURY'S FINDING OF LIABILITY AGAINST DEFENDANTS IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND A PRODUCT OF IMPERMISSIBLE INFERENCE STACKING.

A trial court has broad discretion in ruling on a motion for new trial. *Cloud v. Fallis,* 110 So. 2d 669, 673 (Fla. 1959). "A trial judge has the responsibility to draw 'on his or her talents, his or her knowledge, and his or her experience to keep the search for the truth in a proper channel,' and the trial judge should always grant a motion for a new trial when 'the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.'" *Brown v. Estate of Stuckey*, 749 So. 2d 490, 497 (Fla. 1999). "The trial judge's discretion permits the grant of a new trial even if it is not clear, obvious and indisputable that the jury was wrong." *Kuebler v. Ferris*, 65 So. 3d 1154, 1157 (Fla. 4th DCA 2011).

In fact, the trial court is "to grant a new trial 'if the manifest weight of evidence is contrary to the verdict.' When making this determination, 'the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence.'" *Hahn v. Medeiros*, 858 So. 2d 1242, 1243 (Fla. 5th DCA 2003) (internal citations omitted).

For the reasons discussed in the renewed Motion for Directed Verdict above, a finding of duty and causation is against the manifest weight of the evidence. Even if this Court disagrees with the propriety of directed verdict on that issue, a new trial is necessary. But the manifest weight of the evidence also does not support a finding of legal cause because it would require impermissible inference stacking and speculation.

The jury was instructed that "[n]egligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to

producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred." A finding of legal cause, based on the evidence in this case, can only be reached by speculation or by stacking inferences.

A plaintiff may use circumstantial evidence to prove his case, but there are limits to the inferences that can be drawn from such evidence. *See Tallahassee Med. Ctr. v. Kemp*, 324 So. 3d 14, 15 (Fla. 1st DCA 2021). A plaintiff may not stack inferences upon debatable inference drawn from circumstantial evidence. *Id*. (citation omitted). Instead, a new trial is necessary if a plaintiff "relies upon circumstantial evidence to establish a fact, fails to do so to the 'exclusion of all other reasonable inferences, but then stacks further inferences upon it to establish causation." *Id*. (cleaned up). This rule against stacking inferences "protects litigants from verdicts based on conjecture and speculation." *Id*. at 16-17 (cleaned up).

Plaintiff suggested three different things that Defendants could have done to prevent his injuries.

Eviction

First, Plaintiff suggested that Defendants would have prevented the attack by evicting Ms. Buschbaum. To reach this outcome, the jury would need to stack three inferences. First, the jurors needed to infer that a court of law would find Ms. Buschbaum's actions to be a material breach of her lease. Plaintiff's expert, Mr. Goldshine, was adamant that her actions were a breach of her lease, but he is not a lawyer, and the provision he relied upon does not exist. Therefore, the jury needed to infer that a court of law would find that Ms. Buschbaum's actions constituted "violence or threats of violence, including but not limited to, the unlawful discharge of firearms." *4/4/25 Lease Agreement*. There was no evidence that a court would make that finding, or that there were any actual threats or acts of violence. Speculation based on

circumstantial evidence is necessary to conclude that eviction was possible.

Next, the jury had to infer that the eviction process would have been completed prior to the attack. The evidence shows that nobody knows how long the eviction process would take. There was no evidence that the eviction process would have, or even could have, been completed prior to the shooting. Common sense dictates that if she still resided in Myrtle Grove at the time of the shooting, a pending eviction would have no effect on the attack.

Finally, the jury needed to infer that she would not have attacked Plaintiff if she no longer resided at Myrtle Grove. The property was not gated and there was no evidence that anybody could have prevented her from entering the property if she were evicted. There was no evidence at all showing that the attack was any less likely to occur. Impermissible inference stacking and speculation is the only way a jury could conclude that trying to evict her would have prevented the attack.

Communications between Schultz and Officer Touchstone

Plaintiff also argued that the attack would have been prevented if Defendant Schultz had been forthcoming with Officer Touchstone on the night of the sexual assault allegation. Officer Alvarez testified that it would have, but this testimony should not have been allowed[4] and was itself improperly based on inference stacking. Officer Alvarez, without personal knowledge, speculated that Officer Touchstone would not have issued an arrest warrant for Plaintiff if Defendant Schultz had been forthcoming from the beginning.[5]

Officer Alvarez then used that speculation as the basis for an inference that the lack of an arrest warrant for Plaintiff would have somehow prevented the attack. But there is no evidence

[4] This is discussed in detail below as its own separate ground for a new trial.
[5] Another issue discussed in greater detail below is that Defendants were unable to call Officer Touchstone to rebut this improper speculation testimony, and that too requires a new trial on its own.

to support this, and Officer Alvarez did not explain how he jumped to that speculative conclusion. Further, the evidence shows that it took 5 days for police to retract the arrest warrant after Defendant Schultz told them everything he knew.[6] There were only 3 days between the initial investigation by Officer Touchstone and the shooting. Officer Alvarez's inferences were impermissibly stacked and based on pure speculation. The jury would need to stack the same inferences and speculation to find that Defendant Schultz's lack of candor was the legal cause of Plaintiff's injuries.

Warning

Finally, Plaintiff argued that the attack would have been prevented if Plaintiff had been warned. As discussed in the Renewed Motion for Directed Verdict, the facts of this case absolve Defendants of liability under a failure to warn theory. Nevertheless, even if liability were possible based on a failure to warn theory, the jury would still need to speculate to find that Defendants' failure to warn was a "but for" cause of the attack.

Plaintiff testified that he would not have followed Ms. Buschbaum back to her apartment on the night of the attack if he knew she owned a gun. The jury would have to infer or assume facts not in evidence to conclude this would have prevented the attack. First, the jury must assume that she did not already have the gun on her person when she asked him to come over. The inference that she was not already armed is based solely on the circumstantial evidence that she went back to her apartment. But there are a number of reasons she could have gone back to her apartment before attacking him. Therefore, this inference is not an inference that can be used to conclude that going directly back to his vehicle or home would have prevented the attack.

Even if the jury could assume that she was initially unarmed, they still must speculate

[6] It took 5 days even with the benefit of additional interviews of neighbors, colleagues, etc. These interviews were conducted in response to the shooting, and there is no indication that they would have been conducted in response to the sexual assault allegation.

that she would not have had time to retrieve her gun from inside her apartment. The evidence showed that their apartments were so close they shared a wall. There is no direct or circumstantial evidence showing that Ms. Buschbaum lacked the time to retrieve her gun and shoot Plaintiff before he left the premises. Therefore, even if Defendants could be liable based on a failure to warn, the manifest weight of the evidence still does not support that failure being a cause-in-fact of the attack.

Any finding that Defendants could have prevented the attack is against the manifest weight of the evidence. There was also no duty to prevent the attack, and it was legally unforeseeable. Accordingly, Defendants are entitled to a new trial.

II. DEFENDANTS WERE DENIED THE RIGHT TO A FAIR TRIAL BASED ON ALLOWING REBUTTAL TESTIMONY OF OFFICER ALVAREZ.

A. A *Binger* analysis reflects Defendants would be—and were in fact—prejudiced by Officer Alvarez's testimony.

On Wednesday night, day 3 of trial, Plaintiff for the first time disclosed Officer Alvarez as a potential rebuttal witness. On the morning of day 4, Plaintiff's counsel brought this disclosure to the Court's attention. This Court did not ask for any argument from Defendants, and, in fact, told the defense not to respond at that time.

On day 5, Plaintiff called Officer Alvarez as a rebuttal witness, and Defendants objected to calling him in that capacity. Defendants argued Plaintiff could have, but did not, bring out this evidence in their case-in-chief, and that "It's not something that's just new or just came up." The Court stopped the defense from arguing, stating "[l]et me stop you right there." The Court then rejected this argument stating, "[a]ssuming that's true, then there's no such thing as a rebuttal evidence."

Plaintiff was required under binding Florida Supreme Court precedent to disclose Officer

Alvarez as a witness and/or a rebuttal witness. "Consistent with this rule, we now hold that a pretrial order directing the parties to exchange the names of witnesses requires a listing of **all** witnesses that the parties reasonably foresee will be called to testify, whether for substantive, corroborative, impeachment **or rebuttal purposes.**" *Binger v. King Pest Control,* 401 So. 2d 1310, 1313 (Fla. 1981) (emphasis added).

During a break in Officer Alvarez's testimony, Defendants requested that this Court conduct a *Binger* analysis, arguing that the late-disclosed witness prejudiced the defense. This Court denied Defendants' objection to Alvarez's testimony, finding that (1) the objection was untimely, (2) this situation was unforeseeable, and (3) any prejudice was ameliorated with having the witness review other statements and cross-examining the witness. Officer Alvarez's testimony was prejudicial under *Binger*, should not have been admitted at trial, and resulted in the denial of the right to a fair trial.

"A trial judge has broad discretion in determining whether to admit the testimony of a witness or permit introduction of an exhibit not disclosed pursuant to a pretrial order." *Tomlinson-McKenzie v. Prince*, 718 So. 2d 394, 396 (Fla. 4th DCA 1998) (citing *Binger*, 401 So. 2d at 1313). This discretion, however, must not be exercised blindly. *Binger*, 401 So. 2d at 1314. The trial court is guided "primarily by whether the objecting party would be prejudiced by the admission of the evidence." *Tomlinson-McKenzie*, 718 So. 2d at 396 (citing *Binger*, 401 So. 2d at 1314). "Other factors which may enter into the exercise of discretion are: (i) the objecting party's ability to cure the prejudice . . . (ii) the calling party's possible . . . bad faith noncompliance with the pretrial order; and (iii) the possible disruption of . . . trial . . . ." *Binger*, 401 So. 2d at 1314. "When evaluating whether a party is surprised in fact, the *Binger* court looked to whether *the identity of witness was known* and then to whether *the substance of the*

testimony was known. 401 So. 2d at 1314 (evaluating whether the objecting party "knew, of course, *who he was* and *what he would say*" (emphasis added)).

Once trial commences, "lawyers are engaged in the unfolding of the evidence they have already collected." *Gurin Gold, LLC v. Dixon*, 277 So. 3d 600, 604 (Fla. 4th DCA 2019). "Civil trials are not to be ambushes for one side or the other." *Dep't of Health & Rehab. Servs. v. J.B. by & Through Spivak,* 675 So. 2d 241, 243 (Fla. 4th DCA 1996). "When a party presents evidence at trial not previously seen or heard by the opposing party, the admission of that evidence is inherently prejudicial." *Citizens Prop. Ins. Corp. v. Vazquez,* 260 So. 3d 396, 398 (Fla. 3d DCA 2018).

Defendants were blindsided not only by the mid-trial disclosure of Officer Alvarez, but also by the substance of Officer Alvarez's testimony. *See Heritage Prop. &as. Ins. Co. v. Killmeyer*, 382 So. 3d 708, 713 (Fla. 4th DCA 2024) ("The *substance* of the paralegal's testimony . . . was also a surprise and prejudiced the insurer.") (emphasis in original); *Salcedo v. Asociacion Cubana,* 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979) ("[C]ourts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed."). Officer Alvarez's testimony was unknown to Defendants due to his untimely disclosure. This alone is sufficient to warrant a new trial under *Binger*.

The surprise of Officer Alvarez as a witness was compounded by the surprise of his testimony which: (1) was not in rebuttal to any new evidence presented during Defendants' case-in-chief, and (2) included new opinion testimony regarding the likelihood of preventing the attack. Defendants cannot and should not be expected to anticipate the introduction of new evidence or opinions that should have been disclosed prior to trial and introduced during Plaintiff's case-in-chief. *See Grau v. Branham*, 626 So. 2d 1059, 1061 (Fla. 4th DCA 1993)

("Clearly, except under extraordinary circumstances which do not exist here, the lawyers have a right to expect that once a trial commences, discovery and examinations must cease."); *see also Binger*, 401 So. 2d at 1314 ("Requiring reasonable compliance with a pretrial order directing witnesses' disclosure will help to eliminate surprise and avoid trial by 'ambush.'"); *Office Depot, Inc. V. Miller*, 584 So. 2d 587, 589 (Fla. 4th DCA 1991) ("Both this court and the supreme court held in Binger that the trial court abused its discretion in allowing an undisclosed rebuttal witness to testify. A new trial was ordered."); *Gurin Gold, LLC*, 277 So. 3d at 604; *Vazquez*, 260 So. 3d at 398;

Inability to Cure Prejudice

The events that transpired prior to the end of trial show that the prejudice could not be cured. Officer Alvarez was called as a rebuttal witness on Friday afternoon. The timing is important because the Court previously indicated that a mistrial would be declared if the trial did not conclude by the end of the week. Following Officer Alvarez's surprise testimony, Defendants attempted to call Officer Touchstone as a sur-rebuttal witness. But Officer Touchstone was unable to be reached so late on a Friday afternoon. Therefore, in addition to being unable to call Officer Touchstone as a witness, Defendants were also unable to proffer her testimony or indicate with certainty whether she would be available to testify on Monday.

Without this information, the Court denied Defendants' request to hold the record open until the following week. Both the surprise testimony of Officer Alvarez and the decision not to extend trial to accommodate Officer Touchstone resulted in irreversible prejudice. *See Grau*, 626 So. 2d at 1061 ("It is not enough that the defendant simply know what a witness may say before he testifies. Prejudice also exists by the fact that appellant is unable to counter the offered testimony"). With so little time remaining before the end of trial, there is nothing Defendants

could have done to cure the prejudice caused by the untimely disclosure.

Non-Compliance and Possible Bad Faith

The record also indicates noncompliance and possible bad faith. Plaintiff was aware of Officer Alvarez prior to filing the Complaint in February 2023. The deadline to file a list of all rebuttal witnesses who were expected to testify at trial was February 25, 2025. *10/30/24 Scheduling Order*. Yet Plaintiff did not disclose Officer Alvarez until day 3 of trial had been completed. *7/9/25 Plaintiff's Third Amended Fact Witness List*. Non-compliance is indisputable.

The in-trial events further call into question the unusual timing of the disclosure. In the mid-trial witness disclosure, Plaintiff stated the following regarding Officer Alvarez:

> Plaintiff is listing Investigator Eric Alvarez as a contingent rebuttal witness should the Defendants continue referencing law enforcement as a potential culpable party. In the event that there is not further reference to such theory then this witness will not be necessary.

But there was no reference to law enforcement as a potential culpable party before the untimely disclosure; therefore, the Plaintiff's reason simply did not exist. There was also no reference after the untimely disclosure. Therefore, according to Plaintiff's own representation, the witness was not necessary. And maybe most importantly, the police were not included as *Fabre* defendant(s); therefore, the jury could not place any blame on officers as a matter of law. In other words, law enforcement could not be found "culpable" as a matter of law in this case. Therefore, no valid reasons existed for the untimely disclosure of this 'rebuttal' witness.

Further, during the brief argument that took place before Officer Alvarez took the stand, Plaintiff's counsel identified an entirely different reason for needing him as a rebuttal witness. Plaintiff's counsel stated that he disclosed Officer Alvarez on Wednesday night because he did not expect Defendants to present evidence regarding Mr. Schultz's actions or knowledge during

the three-day period that Plaintiff made the central theme of his case. Not only is it unbelievable that Plaintiff could not foresee a defense against Plaintiff's central theme of the case; it is also a facially different reason than the reasons Plaintiff gave in his Third Amended Witness list. Specifically, Plaintiff argued that it was "not accurate" and "not true" that Buschbaum came to Mr. Schultz and disclosed new stuff between the 22nd and the 28th. Plaintiff argued that "I think we illustrated that" during his case-in-chief. However, Plaintiff previously asked Defendant during his own case-in-chief to admit that Ms. Buschbaum came to him and said "I don't care what everybody thinks, I'm sticking to my story." Plaintiff's stated reason is not an accurate account of the events that had already transpired.

Plaintiff's counsel also told the Court that he needed to be able to argue to the jury that Defendant Schultz only came clean because Vicki Williams caught him in a lie. This is something he already did during his cross-examination of Defendant Schultz and something he should have accounted for in his case-in-chief. The defense presented no evidence or argument during its case-in-chief that prompted the need for that argument in rebuttal. This was yet another invalid and facially different reason for needing rebuttal and for not having previously disclosed Officer Alvarez.

Then, when *Binger* was briefly addressed in the middle of Officer Alvarez's testimony, Plaintiff's counsel reverted back to the reason identified in its initial untimely disclosure: that Defendants somehow raised an issue regarding the culpability of police.

Plaintiff's counsel also told the Court on several occasions that he listed Officer Alvarez as a rebuttal witness in the middle of trial because he was surprised by "references" or "allusions" made by Defendants. This argument is not only invalid to claim surprise, but also as grounds for calling a rebuttal witness to begin with.

> Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter **brought out by evidence of the defendant** and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant.

Driscoll v. Morris, 114 So. 2d 314, 315 (Fla. 3d DCA 1959) (emphasis added); *see also Dorvil v. Purolator Courier Corp.*, 578 So. 2d 294, 295 (Fla. 3d DCA 1991) ("[T]he trial court properly precluded the plaintiffs from calling a doctor as a rebuttal witness because the doctor's testimony did not constitute proper rebuttal and was, in any event, cumulative."); *Laurent v. Uniroyal, Inc.*, 515 So. 2d 1050, 1051 (Fla. 3d DCA 1987) ("First, we find no error in the trial court's exclusion of Laurent's rebuttal testimony which was cumulative in nature and should have been presented during Laurent's case-in-chief."). Plaintiff filed the Third Amended Witness List before he rested his case-in-chief. It is impossible for Defendants to have presented evidence that surprised Plaintiff when Defendants had not yet presented any evidence. And "references" or "allusions" are insufficient to support rebuttal testimony absent actual evidence presented by the defense.

Finally, Officer Alvarez did not testify regarding any of the subject matter that Plaintiff claimed to need him for. According to Officer Alvarez's own rebuttal testimony, he was not even involved in the case during the three-day window that Plaintiff used as reason to call him. He did not become involved until after the shooting occurred. Therefore, even if there was evidence and argument that the police were culpable, he would have no personal knowledge as to the initial investigation or the thought process of Officer Touchstone. He was not disclosed as an expert, which makes this new, solicited opinion entirely improper.

Further, Plaintiff asked Officer Alvarez if he could identify any inconsistencies between Mr. Schultz's statements on September 28th and what Ms. Buschbaum told Officer Touchstone

on September 22nd. He could not. Officer Alvarez did not testify as to whether Ms. Buschbaum came to Mr. Schultz with new information between the 22nd and the 28th. Officer Alvarez also could not specifically recall whether Ms. Williams had any proof on her cell phone. None of the testimony Plaintiff claimed to need in rebuttal was actually testified to by Officer Alvarez—a fact Defendants could have told the Court had Officer Alvarez been disclosed in enough time for his testimony to be known. The only new testimony offered by Officer Alvarez was his improper opinion that Mr. Schultz's full disclosure on the 22nd would have "delayed" the shooting.

Officer Alvarez did not, and could not, properly testify on the subject matter he was supposedly called for. Instead, his testimony improperly bolstered Plaintiff's case with new testimony that should have been disclosed timely and presented as part of Plaintiff's case-in-chief.

Disruption of an Orderly and Efficient Trial

The final part of the *Binger* analysis asks the Court to determine whether calling the witness would disrupt the orderly and efficient trial of the case. Again, it is clear based on the events of Friday afternoon that this factor of the *Binger* analysis is met. The late disclosure and surprise nature of his testimony left Defendants with no time to organize or prepare. During cross-examination, defense counsel was constantly scrambling to find evidence and testimony to refresh the officer's memory or impeach him. This resulted in frequent and repeated delays and breaks. It also made for a very unclean presentation of evidence for the jury.

Further, the surprise testimony necessitated that Defendants call an additional witness. To allow this witness to testify, the Court would have needed to extend trial into at least Monday of the following week. Over the course of trial, the Court repeatedly told the parties that this was

not an option. Ultimately, the Court decided not to allow it. Instead, the Court should not have allowed Officer Alvarez to testify.

The prejudicial impact of Officer Alvarez's testimony necessitates a new trial. *See In re Estate of Paulk*, 503 So. 2d 368, 369 (Fla. 1st DCA 1987) ("Finally, we approve the trial court's decision to exclude the testimony of the rebuttal witness who had not been listed as a witness, and who was not disclosed to the objecting parties prior to being called to testify. The manner in which the rebuttal witness was called operated to surprise the objecting parties with no opportunity to cure the prejudice.").

B. Defendants were further prejudiced because Officer Alvarez gave improper opinion testimony on an ultimate issue.

> Under section 90.703 of Florida's Evidence Code, a witness is permitted to testify to an ultimate fact in a case. This statute specifically provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact." § 90.703, Fla. Stat. (1993). However, this rule does not render admissible all opinions on the ultimate issues. Witnesses will be prevented from expressing their conclusions when the opinion only tells the jury how to decide the case and does not help the jury to determine what occurred.

Schneer v. Allstate Indem. Co., 767 So. 2d 485, 488 (Fla. 3d DCA 2000) (internal quotations and footnote omitted); *see also Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984) ("If the witness' conclusion tells the trier of fact how to decide the case, and does not assist it in determining what occurred, then it is inadmissible.").

Officer Alvarez was improperly permitted, over objection, to express his conclusion as to an ultimate issue: whether Defendant Schultz's initial non-disclosure of information to Officer Touchstone was a legal cause of Plaintiff's injuries. Specifically, he opined on whether Defendant Schultz would have prevented the attack by telling Officer Touchstone everything he knew the night of the sexual assault allegation. Officer Alvarez's opinion—not only from a

police officer, but from an investigating officer—told the jury how to **decide the case**. It did not help the jury **determine** what occurred. It constitutes a blatantly impermissible opinion on the ultimate issue before the jury.

Moreover, the very question asked of Officer Alvarez improperly insinuated the existence of facts never presented to the jury: that Officer Touchstone would not have issued an arrest warrant had Defendant Schultz given her more information, whether she asked for it or not. This improper inquiry requires a new trial.

It is axiomatic that counsel cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.

> Counsel has no right to introduce arguments that are not supported by the evidence produced on the trial. The rights of parties are to be determined from the evidence. If he can be permitted to make assertions of facts, or insinuations of the existence of facts, not supported by the proof, there is danger that the jury will lose sight of the issue or be influenced by misstatements to the prejudice of the other party. [citation omitted]

Del Monte Banana Co. v. Chacon, 466 So. 2d 1167, 1172 (Fla. 1985) (quoting *Watkins v. Sims,* 81 Fla. 730, 88 So. 764, 767 (1921)).

There was no evidence that the cause-in-fact of the shooting was related to what Mr. Schultz relayed, or failed to relay, to Officer Touchstone. Officer Alvarez was not involved until after the shooting. The question posed to Officer Alvarez was not based on any facts in evidence; it was meant to—and did—insinuate based on mere speculation that Mr. Schultz's "withholding" of information caused the shooting three days later. The jury's excessive and unsupported verdict turned on this 11th hour "gotcha" question and answer. A new trial is required.

C. Defendants were further prejudiced through the inability to call a sur-rebuttal witness to counter Officer Alvarez's 11th hour testimony.

"No citation of authority is necessary for the well-established principle that all parties are entitled to a fair trial." *Samuels v. Torres*, 29 So. 3d 1193, 1196 (Fla. 5th DCA 2010). Defendants did not receive a fair trial because they and Plaintiff were placed on uneven playing fields. Simply put, Plaintiff was allowed to call an 11th hour, never-before-disclosed rebuttal witness on an ultimate issue for the jury (causation), yet Defendants were prohibited from calling a surrebuttal witness on that exact same issue. *See Rose v. Madden & McClure Grove Service*, 629 So. 2d 234, 236 (Fla. 1st DCA 1993) ("If new points are brought out during plaintiff's rebuttal, the defendant may meet them by evidence in rejoinder, otherwise known as surrebuttal."); *Florida Power Corp. v. Smith*, 202 So. 2d 872, 880-81 (Fla. 2d DCA 1967) ("Thus the evidentiary door was opened by plaintiffs to introduction by Florida Power, in surrebuttal, of Rule 4.03 itself as a direct reply to the evidence adduced by plaintiffs in rebuttal.").

What occurred here is akin to what occurred in the criminal case of *Purifoy v. State*, 880 So. 2d 822 (Fla. 1st DCA 2004). Purifoy was convicted of battery on a law enforcement officer and resisting arrest with violence. *Id*. On appeal, he claimed that the trial court erred in refusing to allow his wife's surrebuttal testimony to contradict that of the State's rebuttal witness, Seargeant Jones. *Id.* The First District reversed. *Id*. It held the exclusion of the surrebuttal testimony error because Purifoy's wife would have contradicted the testimony of Sergeant Jones. *Id*. The exclusion was harmful. "This was a highly contested case with contradictory testimony. Sergeant Jones' testimony concerning appellant's admission, which Mrs. Purifoy would have refuted in her surrebuttal testimony, may well have swayed the jury to return the verdict against appellant." *Id.*

This is what occurred here as well. Officer Alvarez offered new testimony on rebuttal insinuating that Officer Touchstone would have either (1) not issued a warrant or (2) arrested

Ms. Buschbaum if Defendant Schultz had been fully forthcoming. Defendants then attempted to call that *very* officer—Officer Touchstone—to offer contradictory testimony. Defendants took the immediate steps of contacting Officer Touchstone as soon as that testimony was offered but were unable to reach her on such short notice. Her testimony was necessary to *attempt* to combat the trial by ambush perpetrated by Plaintiff in the 11th hour. Failure to allow her testimony—and failure to give her the weekend to travel to the courthouse to testify on Monday—resulted in an unfair trial.

This is a denial of Defendants' due process rights. It is analogous to a court's failure to continue trial when the non-moving party's actions are what necessitated the continuance.

> Although trial courts are endowed with rather broad discretion in deciding whether to grant or deny a motion for continuance, the exercise of that discretion is not absolute. We are charged with the task of reviewing a court's decision on a continuance motion and setting it aside if we determine the trial court abused its discretion. This court considers certain factors in making that determination, including: 1) whether the movant suffers injustice from the denial of the motion; 2) whether the underlying cause for the motion was unforeseen by the movant and whether the motion is based on dilatory tactics; and 3) whether prejudice and injustice will befall the opposing party if the motion is granted.

Myers v. Siegel,920 So. 2d 1241, 1242 (Fla. 5th DCA 2006) (internal citations omitted).

"[T]here are indeed cases in which the appellate court will have no alternative but to reverse, because the injustice caused by the denial of the motion outweighs the judicial policy of deferring to the trial judge." *Shands Teaching Hosp. & Clinics, Inc. v. Dunn*, 977 So. 2d 594, 599 (Fla. 1st DCA 2007). This is precisely such a case.

III. DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS NOT INSTRUCTED ON THE CORRECT LAW CONCERNING THE DUTY TO PROTECT A PLAINTIFF FROM REASONABLY FORESEEABLE CRIMINAL ACTS OF A THIRD PARTY, AND THE DEFENDANTS WERE NOT SEPARATED ON THE VERDICT FORM.

"Accurate jury instructions are crucial to the fair operation of our civil jury trial system.

To that end, a trial court abuses its discretion and commits reversible error if it provides an erroneous instruction that 'reasonably may have misled the jury.'" *R.J. Reynolds Tobacco Co. v. Harris,* 346 So. 3d 643, 646 (Fla. 1st DCA 2022) (quoting *Aubin v. Union Carbide Corp.,* 177 So. 3d 489, 517 (Fla. 2015)). *See also Jacobs v. Westgate,* 766 So. 2d 1175, 1180 (Fla. 3d DCA 2000) ("Reversal is required where a jury might reasonably have been misled, regardless of whether it has actually been misled.").

"The office of an instruction to the jury is to enlighten the jury upon questions of law pertinent to the issues of fact submitted to them in the trial of the cause and an instruction which tends to confuse rather than enlighten, is calculated to mislead the jury and cause them to arrive at a conclusion that otherwise might not have been reached by them, and is cause for reversal." *Edwards v. Fitchner*, 139 So. 585, 586 (Fla. 1932).

"In order to be entitled to a special jury instruction, [a party] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001) (emphasis added).

A new trial is required based on (1) the failure to give Defendants' proposed, special instruction on liability; (2) the giving of an inaccurate special instruction on liability; and (3) the giving of an inaccurate instruction telling the jury that Defendants had a duty to protect Plaintiff from reasonably foreseeable criminal conduct.

Defendants' Proposed Instruction

Both parties requested special instructions because Plaintiff's theory of the case was that Defendants failed to protect him from a reasonably foreseeable criminal act. Both parties and the

Court agreed that the standard instructions did not adequately cover the law governing Plaintiff's theory of the case. The only pertinent question is whether Defendants' proposed special instruction was a straightforward and correct statement of the law. Defendants proposed a special instruction on liability, which provided "The issues for you to decide are:"

> (1) Whether there was actual or constructive knowledge of prior criminal occurrences that put Defendants on notice that criminal conduct was reasonably foreseeable.
>
> (2) Whether Defendants were negligent in failing to protect Plaintiff from the harm posed by that reasonably foreseeable criminal conduct.
>
> (3) Whether Defendants' negligence was the legal cause of Plaintiff's loss, injury or damage.

The first prong asks the jury whether Defendants had a duty to protect Plaintiff from reasonably foreseeable criminal conduct. "Florida courts have held that a landlord has no general duty to protect a tenant from criminal attacks by third persons." *Aguila*, 736 So. 2d at 61 (citation omitted). "To impose such a duty, the tenant must allege and prove that **the landlord had actual or constructive knowledge of prior similar acts** committed on invitees on the premises." *Menendez*, 736 So. 2d at 61 (citation omitted) (emphasis added). *Menendez* does not use the word criminal, but it is appropriate here. The criminal conduct in this case is a shooting. While it may be possible that *some* non-criminal acts can make *some* criminal conduct foreseeable, there is no legal act which is "similar" to a shooting. Once knowledge of prior criminal activity is established, Defendants are then on notice that similar criminal activity may occur in the future. The first prong is a straightforward, correct statement of the law regarding duty. Absent this instruction, the jury was not apprised of the correct law to follow on duty.

The second prong asks the jury whether Defendants breached that duty. The "zone of risk" created by the defendant defines the scope of the duty. *Smith v. Fla. Power & Light Co.*,

857 So. 2d 224, 229 (Fla. 2d DCA 2003). The scope of the "zone of risk" is in turn determined by the foreseeability of a risk of harm to others. *Id*. In other words, Defendants' duty is based on the conduct which gave rise to it. In this case, that conduct is the "prior criminal occurrences" in the first prong. Therefore, Defendants breach their duty if they fail to protect Plaintiff from harm which is a reasonably foreseeable result of similar criminal conduct. The second prong is a straightforward and correct statement of the law. Absent this instruction, the jury was not apprised of the correct law to follow in terms of breach. The third prong mirrors standard instruction 401.18. It was necessary to instruct the jury on causation.

Accordingly, Defendants are entitled to a new trial because their special instruction was not given, and without it, the jury did not receive the correct law upon which its findings were governed.

The Court's Special Instruction

The Court's special instruction, in relevant part, was:

> Thus, the issues that you must decide are, one, whether the defendants knew or should have known of foreseeable criminal conduct, and if so, two, whether the defendants were negligent in failing to protect a tenant from the result of reasonably foreseeable criminal conduct, and, if so, three, whether such negligence was a legal cause of the damage sustained by plaintiff.

This instruction is inaccurate because it does not instruct the jury that there must have been a prior, similar act. As discussed in the renewed Motion for Directed verdict, there is no Florida case involving a battery of any kind where foreseeability was predicated on something other than prior physical or criminal acts either (1) on the premises or (2) by the assailant. The law does not require a landlord to protect its tenants from something that someone might be capable of but has never done before. The criminal conduct of a third party is not legally foreseeable unless something similar has already happened.

Without the instruction that there must first be a prior, similar act, the jury was free to find liability based on a mere possibility. This is error and may have reasonably misled the jury. *See Johnson*, 389 So. 3d at 709 ("[i]mportantly, to establish a duty, the zone of risk created by a defendants conduct 'must have been reasonably foreseeable, not just possible") (citation omitted). A new trial is required.

The Duty Instruction

It was error to give a preemptive charge regarding duty. In the Court's special instruction, it asked the jury to determine whether Defendants "knew or should have known" that Ms. Buschbaum's criminal conduct was reasonably foreseeable. That knowledge inquiry is only relevant to duty. Therefore, if the Court determines that there is a duty, then it should not give that instruction. But the Court gave this instruction alongside the preemptive charge that Defendants *did* have a duty.

The record appears to indicate that this Court did not determine that Defendants had a duty to protect Plaintiff from the attack. At summary judgment, the Court found that duty was a disputed issue of fact. Throughout the course of trial, the Court would not definitively say that there was a duty. In response to argument that duty was an issue for the Court to determine, the Court indicated that it was not error to pass that question to the jury when the material facts were disputed. There were no rulings or indications, other than the preemptive charge, that the Court made a determination. Therefore, no charge should have been given.

If the Court passed the question of duty to the jury, it was error to instruct them that the Defendants did have a duty. If the Court determined that there was a duty, then the "knew or should have known" instruction was erroneous, misleading, and confusing. A new trial is required under either scenario.

Further, the Court improperly denied Defendants' request to separate the Defendants on the jury form. *See Hennis v. City Tropic Bistro, Inc.*, 1 So. 3d 1152 (Fla. 5th DCA 2009) (finding that even in cases based upon an intentional tort, fault can still be apportioned amongst the other tortfeasors).

IV. A NEW TRIAL IS REQUIRED BECAUSE DEFENDANTS WERE PREJUDICED BY THE RULINGS, INDIVIDUALLY AND COLLECTIVELY, REGARDING THE PARTIES' COMPETING EXPERT WITNESSES

A. Defendants are entitled to a new trial because they were prejudiced through the untimely disclosure of expert witness Jeff Goldshine.

Defendant was prejudiced by the late disclosure of Plaintiff's expert witness, Jeff Goldshine, whose opinions were not fully memorialized until just before trial. *Cf. Suarez-Burgos v. Morhaim*, 745 So. 2d 368, 370 (Fla. 4th DCA 1999) ("Clearly the *purpose* of Rule 1.360(b) is to require disclosure of the opinions of expert witnesses so that the other side may take those opinions into account in defending or prosecuting the case. A party can hardly prepare for an opinion that it doesn't know about, much less one that is a complete reversal of the opinion it has been provided."); *see also Tetrault v. Fairchild*, 799 So. 2d 226, 227 (Fla. 5th DCA 2001) (holding treating doctor given MRIs to review shortly before trial to develop expert opinions constituted trial by ambush warranting a new trial); *Dep't of Health & Rehab. Servs. v. J.B. by & Through Spivak,* 675 So. 2d 241, 243 (Fla. 4th DCA 1996) (holding trial court abused its discretion in permitting plaintiff to present newly-formed opinions by expert economist and treating physician regarding information obtained after discovery deadline); *Gurin Gold, LLC v. Dixon*, 277 So. 3d 600, 603 (Fla. 4th DCA 2019) (holding defendants prejudiced based on trial by ambush and stating, "In the present case, [defendants] were confronted with new and additional undisclosed testimony during trial and after opening statements which pertained to the comparison of two different MRIs as well as Dr. Myers's conclusions regarding the content of

the two MRIs."); *Citizens Prop. Ins. Corp. v. Vazquez*, 260 So. 3d 396, 398 (Fla. 3d DCA 2018) ("When a party presents evidence at trial not previously seen or heard by the opposing party, the admission of that evidence is inherently prejudicial.").

Pursuant to this Court's Scheduling Order, expert witnesses were to be disclosed on January 1, 2025. *10/30/24 Scheduling Order*. Plaintiff disclosed Jeff Goldshine as an expert witness for the first time less than one month before trial. *6/9/25 Plaintiffs' Amended Expert Witness List*. On June 12, 2025, just three days after Plaintiffs' disclosure, Defendants noticed the deposition of Mr. Goldshine for June 24, 2025. *6/12/25 Defendants' Notice of Taking Deposition Duces Tecum of Jeff Goldshine, CPM*. Within eight days of that deposition, Defendants obtained a certified copy of the transcript and filed a *Daubert* motion directed towards Mr. Goldshine's testimony. *7/2/25 Defendants' Motion to Strike and/or Motion in Limine.* Even with extreme diligence, Defendants were unable to cure the prejudice caused by the untimely disclosure.

"In civil trials, the failure of the other side to disclose an expert witness before trial is usually understood to authorize opposing counsel to prepare for a trial without such evidence." *Pickel v. State*, 32 So. 3d 638, 640 (Fla. 4th DCA 2009). "[L]itigation should no longer proceed as a game of 'blind man's bluff.'" *Baptist Hosp., Inc. v. Rawson*, 734 So. 2d 1157, 1160 (Fla. 1st DCA 1999) (quoting *Jones v. Seaboard Coast Line Railroad Co.*, 297 So. 2d 861, 863 (Fla. 2d DCA 1974)). Yet that is exactly what occurred when Plaintiff's expert witness was disclosed less than one month before trial and was still permitted to testify.

Defendants had insufficient time to rebut Mr. Goldshine's testimony. His opinions and methodology were not fully known until 13 days before trial. Even if the April affidavit of Mr. Goldshine put Defendants on notice of his entire testimony—it did not—one month is not

enough time to prepare an adequate defense to that testimony. The Scheduling Order was supposed to ensure that Defendants have 30 days after Plaintiff's expert disclosure to obtain and disclose an expert of their own. *See 10/30/24 Scheduling Order*. Yet the June 9th disclosure of Jeff Goldshine left Defendants with just 28 days to: (1) determine if a competing expert was necessary; (2) vet and obtain a qualified expert that was available on one month's notice; (3) get him familiar with the facts of the case so that he could formulate a well-reasoned opinion; and (4) make him available for deposition in adequate time for Plaintiff prepare and file a *Daubert* motion that the Court could consider.

This prejudice grew when Defendants' security expert—who was expected to testify that the attack was not foreseeable or preventable with reasonable security measures—was struck six days before trial. This left Defendants without any expert testimony whatsoever. This proved even more damaging when Mr. Goldshine testified at trial that the attack was foreseeable and preventable if Defendant Schultz had merely acted as a prudent, reasonable property manager. Without an expert, Defendants were unable to rebut that testimony.

Further, the late disclosure of Mr. Goldshine resulted in the Court's inability to consider Defendants' *Daubert* motion. The Court declined to consider Defendants' *Daubert* motion on the first day of trial because it was filed late, and the Court did not have adequate time to carefully consider the motion or fully review the deposition transcript. This is patently unfair and prejudicial when Defendants' own expert was excluded based on a *Daubert* motion that Plaintiff had adequate time to file and have considered before trial. This was possible because Defendants disclosed their expert early enough to afford Plaintiff that opportunity. Plaintiff did not even have to exercise the same level of diligence in obtaining Mr. Wheatley's opinions and

have his *Daubert* motion considered.[7]

Plaintiffs argued that Defendants were on notice when they filed his affidavit in April. But Defendants were entitled to—and did—rely on Plaintiff's representation by omission in the expert disclosure that he would not testify at trial. Accordingly, Defendants were prejudiced and a new trial is required.

B. Defendants are entitled to a new trial because expert witness Jeff Goldshine should have been precluded from testifying under *Daubert*.

Mr. Goldshine's opinions were the definition of speculation and improper expert testimony.

> Under *Daubert*, "the subject of an expert's testimony must be 'scientific knowledge.'" 509 U.S. at 590. "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be **derived by the scientific method**." *Id*. (emphasis added). The touchstone of the scientific method is empirical testing — developing hypotheses and testing them through blind experiments to see if they can be verified. *Id*. at 593; *see also Black's Law Dictionary* 1465-66 (9th ed. 2009) ("[S]cientific method [is] [a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation."). As the United States Supreme Court explained in *Daubert*, "This methodology is what distinguishes science from other fields of human inquiry." *Id*. at 593. Thus, "a key question to be answered" in any *Daubert* inquiry is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. *Id*. . . . . Subjective belief and unsupported speculation are henceforth inadmissible. *See Daubert*, 509 U.S. at 590.

Perez v. Bell South Telecomms., Inc., 138 So. 3d 492, 498-499 (Fla. 3d DCA 2014) (emphasis added). *See also Doctors Co. v. Dep't of Ins.,* 940 So. 2d 466, 470 (Fla. 1st DCA 2006) ("An expert's opinion testimony is inadmissible if it is grounded in speculation, conjecture, or incorrect assumptions.").

At his deposition, Mr. Goldshine testified that his review and opinions were based on the

[7] Defendants' expert was disclosed on April 29, 2025. Plaintiff did not depose Mr. Wheatley until June 18, 2025, and therefore, did not file a *Daubert* motion until June 23, 2025.

facts and claims laid out in the case. (Goldshine Dep. 35:12-17). When asked about his methodology, Mr. Goldshine testified:

> What a standard of care is, what a management company is supposed to provide, and depending on the issue that I'm opining on, Ms. Parsons, it would be to that specific kind of a situation. Resident relations are important. Whether – you know, on a 500 unit property, if you had a Ms. Buschbaum, that would be a major issue that needed to be dealt with. Because there's a concern this person may not be all on the up-and-up and have challenging issues that have been a part of their life on a 35 unit property, where there was never—there wasn't any kind of a write-up. Again, I don't know Mr. Schultz's motivations for not being a strong manager and taking charge when you have a resident that's an unusual kind of resident, and I – you know, I think what I'm saying is that the job wasn't – the job wasn't done. And, frankly, from a training standpoint, I don't think he had any kind of training that was relevant to what he was doing. Your manual is basically an HR manual. It's an employee manual. It's not an operations manual. I believe it was asked if there were operations manuals that you – you know, that Progressive had, but I don't think we've ever – I could tell you that I was never able to receive any kind of an ops manual that told you how to do your job. So you have a very unqualified person in there that I think was intimidated. You had a manager that intimidated or – or I – you know, by Ms. Buschbaum or whatever, but I think there's clearly a double standard in wanting to deal with – maybe he just didn't want to deal with it because he was afraid of her. I don't know.

(Goldshine Dep. 45:16-46:23).

There is no discernable methodology there other than, at best, an inference that he is going to use his experience as a property manager to review the evidence and come to entirely speculative conclusions. Indeed, his methodology is littered with speculation, including irrelevant speculation regarding whether Mr. Schultz was intimidated by Ms. Buschbaum. Mr. Goldshine should have been stricken based on unreliable methodology alone. He also should have been stricken because, to the extent Mr. Goldshine had a discernable methodology, it was the same methodology that the jury would use—a ground on which this Court struck defense expert Ken Wheatley. *See 7/1/25 Order on Ken Wheatly*.

Mr. Goldshine's opinions were unreliable. His Affidavit in opposition to summary judgment was based on Plaintiff counsel's *summary* of the facts. (Goldshine Dep. 32:13-22;

35:12-15; 36:1-8). Mr. Goldshine could not identify which depositions or materials he reviewed in reaching his opinions. (Goldshine Dep. 5:15-25; 6:1-15). He did not personally talk to any witnesses. (Goldshine Dep. 23:1-3). He did not do a background check on Ms. Buschbaum. (Goldshine Dep. 31:22-25). He was not familiar with any relevant Florida law governing landlords or property managers. He did not even review the lease before testifying at trial regarding opinions that were purportedly based on the lease.

At best, Mr. Goldshine's opinions were based on his experience and an inadequate review of record evidence. At worst, Mr. Goldshine's opinions were based entirely on the allegations of the Complaint and Plaintiff's theory of the case. In any event, Mr. Goldshine's opinions were unreliable and he should have been stricken. Mr. Goldshine's testimony prejudiced the Defendants on the highly contested issue of liability. Defendants are entitled to a new trial.

C. Defendants are entitled to a new trial because Jeff Goldshine's irrelevant testimony mislead the jury about the importance of certain facts regarding Schultz's management of the property.

"To be relevant, and, therefore, admissible, evidence must prove or tend to prove a fact in issue." *Stano v. State*, 473 So. 2d 1282, 1285 (Fla. 1985). "According to section 90.702, Florida Statutes (1997), the purpose of expert testimony is to 'assist the trier of fact in understanding the evidence or in determining a fact in issue.'" *Smith v. Hooligan's Pub & Oyster Bar, Ltd.*, 753 So. 2d 596, 600 (Fla. 3d DCA 2000).

The governing law indicates that the relevant jury inquiries are (1) whether Defendants had actual or constructive knowledge of prior, similar acts; (2) whether Defendants failed to protect Plaintiff from harm that is the reasonably foreseeable result of a subsequent, similar act; and (3) whether that failure was the legal cause of Plaintiff's injuries. The final, inaccurate jury

instructions instead asked the jury more generally to determine if the criminal conduct of Ms. Buschbaum was reasonably foreseeable. Mr. Goldshine's testimony did not assist the jury in answering either set of questions. Therefore, his testimony was irrelevant and did not assist the trier of fact determining a fact in issue.

Mr. Goldshine testified extensively regarding Defendant Schultz's training, qualifications and skills as a property manager. That testimony is not probative of any relevant question regarding Defendants' liability in this case. It does not assist the trier of fact in determining whether Defendants had knowledge of any prior, similar acts; it does not assist the trier of fact in determining whether the criminal attack was reasonably foreseeable; it does not assist the trier of fact determine if Defendants breached a duty to protect Plaintiff; and it does not assist the trier of fact in determining whether that breach was the legal cause of Plaintiff's injuries. Defendant Schultz's training, qualifications, and skills as a property manager are wholly irrelevant to the pertinent issues in this case. The repeated testimony regarding Defendant Schultz's inadequacies served only to prejudice the jury against Defendants and mislead the jury as to the importance of those facts as to the hotly contested issue of liability.

Mr. Goldshine's testimony also focused on Defendants' business practices regarding documentation of certain events and performance reviews. However, Mr. Goldshine never indicated how, or if, adequate documentation or performance reviews would have protected Plaintiff from the attack. Likewise, he never identified how, or if, adequate performance reviews would have protected Plaintiff from the attack. This is likely because there is no reliable methodology which could tie those failures to Plaintiff's injuries. This too served only to prejudice the jury against Defendants.

Mr. Goldshine testified extensively regarding the actions of a "reasonably prudent

property manager." As discussed above, "reasonably prudent property manager" is not the standard for determining whether Defendants were negligent in this case. Under the facts of this case, Defendant Schultz's alleged failure to act as a "reasonably prudent property manager" could never make Defendants liable for Plaintiff's injuries.

As discussed in the Renewed Motion for Directed Verdict, Plaintiff's injuries are not a foreseeable result of any failure to act as a "reasonably prudent property manager." Even using the incorrect law on which the jury was instructed, Defendants can only be liable for Plaintiff's injuries if the criminal act of Ms. Buschbaum were reasonably foreseeable, and Defendants failed to take reasonable precautions to protect Plaintiff from that criminal act. This again makes Mr. Goldshine's testimony wholly irrelevant. Plaintiff's counsel apparently agrees because he had this to say with regard to defense expert Ken Wheatley:

> But does he have the background to give the opinion that somebody did or did not breach the standard of care or duty? And isn't that the point of expert testimony in a negligence case? I thought that was the point, it wasn't some other point.

(PTCT. 47). "Reasonably prudent property manager" is not the standard of care in this case. Therefore, Mr. Goldshine's opinions on that topic are "not the point of expert testimony."

Collectively, Mr. Goldshine's testimony allowed Plaintiff to inflate the importance of these irrelevant facts and opinions. The first words of Plaintiff's opening statement were that this was a case about profits over people. In closing argument, Plaintiff explained to the jury that the standard negligence instruction meant that Defendants were negligent if they failed to act as a reasonably prudent property manager would have acted. These are just two of many similar references and arguments made over the course of trial. Without Mr. Goldshine's irrelevant testimony and opinions, Plaintiff would not have been able to mislead the jury about the importance of this evidence.

This prejudice was exponentially increased by the fact that Defendants were not allowed to add Ms. Buschbaum as a *Fabre* defendant or identify her as an intervening cause. Defendants agree that Ms. Buschbaum is an improper *Fabre* defendant in a case where the alleged duty is to protect from her criminal conduct, but she would be a proper *Fabre* defendant and an intervening cause in a case where the duty was to act as a reasonably prudent property manager. *See Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993); *Gibson*, 386 So. 2d 520; *Hennis v. City Tropics Bistro, Inc.*, 1 So. 3d 1152 (Fla. 5th DCA 2009).[8] The admission of Mr. Goldshine's irrelevant testimony effectively allowed Plaintiff to have his cake and eat it too. Accordingly, a new trial is required because Mr. Goldshine's irrelevant testimony and opinions caused substantial, incurable prejudice to Defendants.

D. Defendants were prejudiced by the improper exclusion of their expert witness Ken Wheatley, who would have testified on the same issues as those testified to by Jeff Goldshine.

Defendants did not receive a fair trial because they and Plaintiff were placed on uneven playing fields. *Cf. Samuels*, 29 So. 3d at 1196. Mr. Goldshine was allowed to opine on foreseeability and prevention, which is the same subject matter this Court found to be within the purview of the jury when excluding Ken Wheatley. There is no basis in law for such a disparate application of the rules of evidence in favor of one party and against the other.

Section 90.702, Florida Statutes, sets forth the criteria for expert testimony, consistent with the federal standard outlined in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), as follows:

> 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

[8] Collectively discussing intervening causes, *Fabre* defendants, and comparative negligent security actions. Notably, *Hennis*, and cases discussed therein, are all cases where the defendant breached a duty to provide security. None involves breach of a duty that is not intended to protect a plaintiff from the criminal conduct of a third party.

> 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.

§ 90.702, Fla. Stat.; *see also In re Amendments to the Fla. Evidence Code*, 278 So. 3d 551, 551 (Fla. 2019) (adopting amendments to chapter 90, Florida Statutes, and thereby replacing *Frye v. United States*, 293 F. 2d 1013 (D.C. Cir. 1923), with *Daubert*, as the standard in Florida for evaluating expert testimony).

Because the right to call witnesses is an important due process right, "[t]he exclusion of the testimony of expert witnesses must be carefully considered and sparingly done." *Pascual v. Dozier*, 771 So. 2d 552, 554 (Fla. 3d DCA 2000). "[R]ejection of expert testimony under *Daubert* is the exception rather than the rule." *Vitiello v. State*, 281 So. 3d 554, 560 (Fla. 5th DCA 2019) (citation and quotations omitted). Instead, attacks on debatable evidence are properly made through the tools of '"[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."' *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999) (quoting Daubert, 509 U.S. at 596).

An expert's opinion is "helpful" under Daubert where it is relevant to determining *any* fact in issue in the case. *Smith v. Ford Motor Co.,* 215 F. 3d 713, 721 (7th Cir. 2000). "Doubts regarding 'whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Clark by & Through Clark v. Heidrick*, 150 F3d 912, 915 (8th Cir. 1998) (quoting *Larabee v. MM&L Int'l Corp*., 896 F.2d 1112, 1116 n. 6 (8th Cir. 1990).

At the hearing on Plaintiff's *Daubert* motion, Plaintiff argued that "whether or not there was adequate security measures at Myrtle Grove Villas, is not relevant." (PTCT. 38). The

primary argument for exclusion was that "Mr. Wheatley isn't qualified to testify as to the reasonableness of the management of this particular property…" (PTCT. 38). His testimony was expected to include the policies and procedures in place at Myrtle Grove and whether they were adequate to keep the tenants safe. (PTCT. 40). Mr. Wheatley's testimony would include the general standards applied to the investigation of prospective tenants by management companies. (PTCT. 50-51). Mr. Wheatley was also expected to testify as to whether Ms. Buschbaum's actions made the attack foreseeable. (PTCT. 41).

In its Order, the Court determined that his opinions were relevant because "foreseeability and security are woven into the litigation file." *7/1/25 Order on Plaintiff's Motion to Exclude Testimony of Defense Expert Ken Wheatley*. The Court also stated that "[q]ualifications regarding security measures are not a serious issue merely because it is not worked in the field of property management." *Id*. However, the Court then noted that "his methodology to determine foreseeability will largely be the same methodology (consideration of admissible evidence) employed by the jury to determine the same issue." *Id*. "Except for two references, the expert opinion is largely a recitation of conclusions based upon the testimony of others and a lack of other evidence." *Id.*

The Court then took issue with Mr. Wheatley's reliance on an assessment model that it found was not the product of reliable methods or principles. *Id*. The Court also took issue with Mr. Wheatley's assessment regarding the pathway to violence. *Id*. The Court ruled that Mr. Wheatley's opinion fell outside the statutory gate upon which the trial court is obligated to guard. Defendants respectfully contend this was error. Even if his foreseeability opinions were properly stricken—they were not—the Order does not address the remainder of Mr. Wheatley's opinions. Specifically, it does not address Mr. Wheatley's opinions related to the preventability

of the attack or the increased precautions, if any, warranted by Ms. Buschbaum's actions. Those opinions were both relevant and admissible under *Daubert*.

Further, the Court should have permitted Mr. Wheatley to testify regarding his conclusions, even those the Court believed to be based solely on record evidence. The Court permitted Plaintiff's expert, Mr. Goldshine, to testify regarding his conclusions and opinions, most of which were based solely on a review of the same evidence.[9] Mr. Goldshine relied on that information when he opined that the attack was foreseeable and preventable.

It is patently unfair to exclude Defendants' entire expert testimony while simultaneously allowing Plaintiff's expert to offer opinions which were based on the same methodology used by the defense expert. Either both should have been stricken or both should have been allowed. Accordingly, Defendants are entitled to a new trial.

V. DEFENDANTS WERE PREJUDICED BY ADMISSION OF IMPROPER HEARSAY TESTIMONY OF RESIDENTS WHO TESTIFIED AT TRIAL.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. §90.801, Fla. Stat. Hearsay within hearsay is when a statement contains another hearsay statement within it. Under section 90.805, such combined hearsay statements are only admissible if each part of the statement independently conforms to an exception to the hearsay rule. *See Hartong v. Bernhart*, 128 So. 3d 858, 863 (Fla. 5th DCA 2013). Testimony from a witness, who did not himself hear a statement of another person, and who has no knowledge of whether the statement was actually made, is impermissible hearsay within hearsay. *See Hill v. State*, 549 So. 2d 179, 182 (Fla. 1989).

In this case, Vicki Williams testified over objection that a fellow resident, Brenda

[9] His summary judgment affidavit was based on a summary of facts given to him by Plaintiff's counsel. At his deposition, he could not identify any of the specific deposition or discovery materials that he reviewed. At trial, it became clear that he did not read the lease before offering opinions purportedly based on the specific provisions of the lease.

Schadler, told her that Ms. Buschbaum was involved in a verbal altercation with a different, unnamed tenant. It allegedly occurred when the unnamed tenant put boxes in the recycling bin without breaking them down. Notably, Ms. Schadler also testified at trial and did not mention this verbal altercation. This increases the unreliability of a statement that already contained hearsay within hearsay. Without this hearsay testimony, there would have been evidence of only one verbal altercation involving Ms. Buschbaum.

This impermissible testimony doubled the number of prior verbal altercations for the jury to consider. In a case where foreseeability is determined solely based on Defendants' knowledge of Ms. Buschbaum's prior actions and propensities, Plaintiff cannot show that this error was harmless. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1253 (Fla. 2014) ("[T]he beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict."). A new trial is required.

VI. DEFENDANTS WERE DENIED THE RIGHT TO A FAIR TRIAL BASED ON THE CUMULATIVE IMPACT OF ABOVE ERRORS.

The above errors, individually, prejudiced Defendants. Taken together, the cumulative effect destroyed Defendants' right to a fair trial. *Manhardt v. Tamton*, 832 So. 2d 129, 132-33 (Fla. 2d DCA 2002) (trial court abused its discretion in failing to grant new trial as the totality of circumstances were pervasive enough to raise doubts as to the overall fairness of the trial); *Elgin Sweeper Co. v. Tejada*, 697 So. 2d 180, 180 (Fla. 3d DCA 1997); *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1175 (Fla. 3d DCA 1985). The totality of the errors described above was so pervasive that it raises doubts as to the overall fairness of the trial. The excessive verdict is indicative of that unfairness. A new trial is required.

VII. A NEW TRIAL IS REQUIRED BECAUSE THE AWARD OF $50,000,000 IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IS EXCESSIVE, SHOULD SHOCK THE JUDICIAL CONSCIENCE, AND CLEARLY WAS THE

RESULT OF THE UNDUE INFLUENCE OF PASSION AND PREJUDICE.

"A trial judge may order a new trial on the grounds that the verdict is inadequate or excessive, against the manifest weight of the evidence, or both." *Brown*, 749 So. 2d at 498. "Regarding inadequate or excessive verdicts, this ground is corollary of the ground asserting that the verdict is contrary to the manifest weight of the evidence. *Id*. "A new trial may be ordered on the grounds that the verdict is excessive or inadequate when (1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice." *Id*.

While a jury has wide-ranging authority to determine damages, it "is not an unbridled one and has long been subject to limited trial court superintendence through the post-trial order of remittitur or new trial. The underlying rationale for such limited superintendence is to prevent so-called haywire or runaway jury verdicts from standing." *Rety v. Green*, 546 So. 2d 410, 418 Fla. 3d DCA 1989). This is a textbook example of a runaway jury.

Fifty million dollars ($50,000,000) is so excessive that it should both shock the judicial conscience and show that the jury must have been unduly influenced by passion or prejudice. In a majority of the damages categories, the jury award exceeded undisputed amounts in evidence and/or the maximum number award proposed by Plaintiff in closing argument. That does not happen unless the jury was unduly influenced by passion or prejudice. The only other explanation would be that the jury so misunderstood the evidence and law of the case that the entire verdict is unreliable. In either event, the jury did not do what they were tasked to do and a new trial is required.

What appears clear is that the jury decided it wanted to award the round figure of $50,000,000 and broke that down—regardless of whether there was supportive evidence—into the individual damages categories. This runaway jury's verdict cannot stand. A new trial is

required.

A. A new trial is required because the award of past medical expenses is excessive and against the manifest weight of the evidence.

A plaintiff is entitled to recover damages only for those amounts actually suffered or paid. *See Thyssenkrupp Elevator Corp. V. Lasky*, 868 So. 2d 547, 550 (Fla. 4th DCA 2003) (damages suffered for medical expenses do not include amounts beyond those paid for the bills).

Here, Plaintiff did not submit his past medical bills into evidence. Rather, Plaintiff entered into evidence a stipulated amount: $159,838.43. Yet the jury awarded $180,000.00 in past medical expenses. The Jury either (1) materially misunderstood the instructions and the evidence; (2) considered information that was not in evidence; or (3) were unduly influenced by passion or prejudice. A new trial is required because, as the First District States "A court cannot allow a jury to award a greater amount of damages than what is reasonably supported by the evidence at trial." *McCarthy Bros. Co. v. Tilbury Constr., Inc.*, 849 So. 2d 7, 9 (Fla. 1st DCA 2003).

B. A new trial is required because the award of future medical expenses is excessive, against the manifest weight of the evidence, a product of passion and prejudice, and should shock the judicial conscience.

By far, the most egregious part of the verdict was the award of $10,000,000 in future medical expenses when Plaintiff submitted a total of $239,967.01 for such expenses. This was the product of the runaway jury, which simply decided to award $50,000,000 even if it meant completely ignoring the evidence.

"It has long been accepted in Florida that a party claiming economic losses must produce evidence justifying a definite amount." *United Auto. Ins. Co. v. Colon*, 990 So. 2d 1246, 1248 (Fla. 4th DCA 2008). A plaintiff must prove with reasonable certainty (1) that she will require particular future medical treatment and (2) the amount of expenses for such treatment. Florida

law restricts recovery of future medical expenses to those expenses "reasonably certain" to be incurred. *Loftin v. Wilson,* 67 So. 2d 185, 188 (Fla. 1953). Further, there must also be an evidentiary basis upon which the jury can, with reasonable certainty, determine the amount of those expenses. *Loftin*, 67 So. 2d at 188 ("In every case, plaintiff must afford a basis for a reasonable estimate of the amount of his loss and only medical expenses which are reasonably certain to be incurred in the future are recoverable."); *Volusia Cty. v. Joynt*, 179 So. 3d 448, 452 (Fla. 5th DCA 2015) (holding the trial court erred in failing to grant the County's motion for directed verdict as to future medical expenses). *See also Truelove v. Blount*, 954 So. 2d 1284, 1287 (Fla. 2d DCA 2007) ("Only medical expenses which are reasonably certain to be incurred in the future are recoverable.").

The excessive award of future medical expenses in this case both shocks the judicial conscience and indicates that the jury has been unduly influenced by passion or prejudice. Plaintiff, who is approximately 70 years old, submitted evidence that he would need only $239,967.01 for future medical care. Yet, the jury awarded an unconscionable $10,000,000.00 dollars in damages for future medical care. That is over 4,000% more than the greatest amount supported by the evidence.

It is not possible to reach that verdict without the undue influence of passion or prejudice. A new trial is required. *See Fravel v. Haughey*, 727 So. 2d 1033, 1037-38 (Fla. 5th DCA 1999) (reversing jury's award of $200,000 in future medical expenses where only evidence reflected future medical expenses of between $20,000 and $25,000); *Moreno v. Diaz*, 943 So. 2d 1011 (Fla. 3d DCA 2006) (holding the jury's award of $171,000 in future medical expenses was not supported by the evidence reflecting only a need for $79,000 in future medical expenses); *Pruitt v. Perez-Gervert*, 41 So. 3d 286, 288 (Fla. 2d DCA 2010) (holding the jury's award of

$163,088 in future medical expenses was unsupported as the only evidence at trial reflected that Plaintiff was reasonably certain to incur $88,960 in such expenses).

C. A new trial is required because the award of past and future noneconomic damages is excessive, against the manifest weight of the evidence, a product of passion and prejudice, and should shock the judicial conscience.

The jury awarded $39,078,000 in noneconomic damages even though Plaintiff did not even request that much. The curious figure of $19,078,000 in future pain and suffering was created out of thin air for the purpose of reaching a $50,000,000 verdict. The noneconomic damages awards for past and future pain and suffering cannot stand, and a new trial is necessary.

Reversal on this issue is warranted where "the verdict is so inordinately large as to obviously exceed the maximum limit of a reasonable range within which the jury may properly operate." *Whitney v. Milien*, 125 So. 3d 817, 819 (Fla. 4th DCA 2013). *See also W.R. Grace & Co. v. Pyke*, 661 So. 2d 1301, 1304 (Fla. 3d DCA 1995) ("Even assuming plaintiff submitted sufficient evidence of injury, the evidence does not support the amount of damages awarded. The verdict . . . is so excessive as to shock the judicial conscience and it cannot withstand appellate scrutiny. Accordingly, the verdict cannot stand.") (cleaned up).

"Under Florida law an award of non-economic damages must bear a reasonable relation to the philosophy and general trend of prior decisions in such cases." *R.J. Reynolds Tobacco v. Schleider Co.*, 273 So. 3d 63, 72 (Fla. 3d DCA 2018) (cleaned up). "The comparison of jury verdicts reached in similar cases provides one method of assessing whether the amount awarded bears reasonable relation to the amount of damages proved and the injury suffered." *Aills v. Boemi*, 41 So. 3d 1022, 1028 (Fla. 2d DCA 2010) (internal citations and quotations omitted). *See also Loftin v. Wilson,* 67 So. 2d 185, 189 (Fla. 1953) (reviewing awards in similar cases, which "lead[] to the conclusion that the award here of more than $200,000 for 'pain and

suffering' alone is far out of lien [sic].").

The following were the highest five verdicts in the State of Florida in 2024. A review of these compared with the facts and injuries of this case, reflect that the award in this case does not bear a reasonable relation to the philosophy and general trend of prior decisions in Florida.

1. $310 million verdict against manufacturer of ride 14-year-old fell from and died.
2. $100 million verdict against OB-GYN who caused 10-day-old infant permanent, life-altering injuries during circumcision.
3. $31 million verdict to daughter of deceased patient of Cleveland Clinic who failed to place decedent in intensive care unit, leading to deprivation of oxygen to brain and irreversible anoxic brain injury.
4. $25 million to 67-year-old claiming Hospital staff failed to stop a rapist from attacking her, and the rapist was a nurse in charge of taking care of her at the hospital.
5. $16 million in favor of widow of decedent claiming Phillip Morris was negligent, conspired to commit fraud, and purposefully concealed the health effects of its product, leading to the death of Garcia.

Florida Business Review Online, *Top Five Florida Verdicts of 2024*, Daily Business Review, (Dec. 24, 2024) attached as *Exhibit A.*[10]

Defendants recognize the severity of this case. Plaintiff unquestionably suffered a horrific attack in this case and suffered severe physical and psychological injuries. He also suffered a wrongful sexual assault accusation and humiliation at his place of work. Plaintiff,

[10] This can also be found online and viewed with a Lexis subscription. Tommaso Baronio, *Top Five Florida Verdicts of 2024*, FL. BUS. REV. ONLINE, (December 26, 2024), https://link.edgepilot.com/s/867541a5/t5ESypjT7UKnX-p6NSf1nA?u=https://www.law.com/dailybusinessreview/2024/12/26/top-five-florida-verdicts-of-2024/?slreturn=20250728104811.

however, recovered remarkably well from his physical injuries resulting from the shooting. The most significant impact in terms of noneconomic damages of the incident was psychological in nature, including PTSD. The award of $50,000,000 is excessive, especially when comparing it to the cases above involving the death of a 14-year-old, the life-altering injuries sustained by a 10-day-old infant, and the $31 million award to a patient who suffered irreversible anoxic brain injury due to oxygen deprivation.

The additional multi-million dollar verdicts below (some of which were in this County), when compared with the facts of this case, reflect that the $50,000,000 award is excessive and outside the bounds within which this jury could operate.

- *Jane Doe v. Hacker*, 2023 12194 CIDL, 2025 Jury Verdicts LEXIS 52333 (Fla. Cir. Ct. 7th, Feb. 3, 2025): $2,500,000 to 6-year-old diagnosed with PTSD and severe anxiety who was sexually abused by adult son of family friend over three-year period.

- *Williams v. Blackwater 1, LLC*, 2023-CA-003406, 2025 FL Jury Verdicts Rptr. LEXIS 82 (Fla. Cir. Ct. 1st [Escambia County] Jan 13, 2025): $17,606,667.30 for Plaintiffs where minor plaintiff drowned while swimming and sibling sustained emotional distress and physical injuries while coming into contact with sibling during the drowning.

- *Gross v. Coley*, 2022-CA-00192, 2024 Jury Verdicts LEXIS 1682 (Fla. Cir. Ct. 1st [Escambia County] Jan 26, 2024): $5,700,000 to 30-year-old Plaintiff who suffered herniated disk and an annular tear, necessitating spinal fusion surgeries. His past medical expenses exceeded $593,700. He continued to suffer pain limitations, was unable to work, and was a candidate for another fusion surgery.

- *Jane Doe v. Curtis*, 09-002747-CI, 2018 Jury Verdicts LEXIS 86786 (Fla. Cir. Ct. 6th, Nov. 5, 2018): $10,000,000 in *punitive damages* and $3,300,000 in past/future pain and suffering to 27-year-old employee repeatedly sexually assaulted by her boss on a boat and diagnosed with PTSD.

- *Vahle v. Mixon*, 2017-CA-001347, 2022 Jury Verdicts LEXIS 13294 (Fla. Cir. Ct. 1st [Escambia County] May 18, 2022): $7,590,000 to 65-year-old against Hospital that failed to diagnose bacterial infection, resulting in an "above-the-knee amputation of his right leg."

There are limited verdicts involving the same facts as the present, but Defendants located the following case where a plaintiff was shot and sought damages for PTSD:

- *Arbolaez v. Blackwater Partners, Ltd., etc.*, 2018-000034-CA-01 2019 Jury Verdicts LEXIS 13842, (Fla. Cir. Ct. 11th, May 2, 2019): 21-year-old shot once by security guard, hospitalized for four days, claiming PTSD awarded $500,000.

Plaintiff told the jury in closing argument that a reasonable range for past pain and suffering was between eight and fifteen million dollars. Plaintiff is not required to tell the jury that there is a maximum award that is appropriate for past pain and suffering. Therefore, it can be safely assumed that Plaintiff would not limit his potential recovery if he believed that any higher amount could be justified by the evidence. The jury's award, which was millions of dollars more than requested, reflects that this was a runaway jury and that the noneconomic damages award cannot stand.

The award of $39,078,000 for past and future pain and suffering cannot be justified based on the facts and evidence of this case. The award is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Lassiter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1979). A new trial is required.

VIII. A NEW TRIAL IS REQUIRED *IF* THIS COURT GRANTS THE RULE 1.431(h) MOTION BELOW, AND ONE OR MORE JURORS CONSIDERED EXTRANEOUS INFORMATION BY VIEWING ZARZAUR LAW, P.A.'S SOCIAL MEDIA DURING TRIAL.

Defendants seek alternative relief below under Rule 1.431(h). If an interview occurs, and if any of the jurors improperly considered extraneous information by viewing Zarzaur Law, P.A.'s social media posts during trial, Defendants must receive a new trial.

WHEREFORE, Defendants James Shultz, Progressive Management of America, Inc., and Myrtle Grove Acquisitions, LLC, respectfully request that this Court set aside the verdict, vacate the Final Judgment, and enter an order granting a new trial on all issues.

RULE 1.530 MOTION FOR REMITTITUR: ONLY ON PAST/FUTURE MEDICAL EXPENSES (ALTERNATIVE RELIEF TO A DIRECTED VERDICT AND A NEW TRIAL)

"[W]here a verdict is against the manifest weight of the evidence, the trial court has an affirmative duty to order a remittitur or to grant a new trial." *Ernie Haire Ford, Inc. v. Atkinson,* 64 So. 3d 131, 133 (Fla. 2d DCA 2011). Section 768.74, Florida Statutes, "requires the trial court, upon a proper motion, to review an award of money damages 'to determine if [the] amount is excessive . . . in light of the facts and circumstances which were presented to the trier of fact,' . . . and to 'order a remittitur' if it 'finds that the amount awarded is excessive[.]'" *Coates v. R.J. Reynolds Tobacco Co.*, 375 So. 3d 168, 172 (Fla. 2023) (quoting § 768.74, Fla. Stat. (1997)). That statute states in pertinent part:

> **(1)**In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.
>
> **(2)**If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be.
>
> **(3)**It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive.

§ 768.74, Fla. Stat. The statute sets forth criteria for determining the excessiveness or inadequacy of a verdict. The Court shall consider:

> **(a)**Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> **(b)**Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;
>
> **(c)**Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

> **(d)**Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and
>
> **(e)**Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

§ 768.74(5)(a)-(e), Fla. Stat. The Legislature explained:

> It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of this state..

§ 768.74(6), Fla. Stat.

I. THE AWARD OF $180,000 IN PAST MEDICAL EXPENSES MUST BE REMITTED TO $159,838.43.

As argued above, the award of $180,000 in past medical expenses is unsupported by the evidence. The total amount of $159,838.43 was entered into evidence, without the accompanying bills, as an undisputed amount for past medical expenses. The jury's job should have been simple. If they found Defendants liable, they should have transcribed $159,838.43 onto the verdict form for past medical expenses. Their failure to do so is indicative of (1) prejudice, passion, or corruption; (2) ignoring the evidence or misconceiving the merits of the case; (3) taking improper elements into account; and/or (4) arriving at the amount by speculation or conjecture. The amount awarded is not supported by the evidence and is not such that can be adduced in a logical manner by reasonable persons. Therefore, past medical expenses must be remitted to $159,838.43.

II. THE AWARD OF $10,000,000 IN FUTURE MEDICAL EXPENSES MUST BE REMITTED TO $239,967.01.

Also as discussed above, the award of $10,000,000 for future medical expenses is unsupported by the evidence. The total amount of $239,967.01 was entered into evidence as an undisputed amount for future medical expenses. The jury's job should have been simple. If they found Defendants liable, they should have transcribed $239,967.01 onto the verdict form for future medical expenses. Their failure to do so is indicative of (1) prejudice, passion, or corruption; (2) ignoring the evidence or misconceiving the merits of the case; (3) taking improper elements into account; and/or (4) arriving at the amount by speculation or conjecture. In any event, the amount awarded is not supported by the evidence and is not such that can be adduced in a logical manner by reasonable persons. Therefore, past medical expenses must be remitted to $239,967.01.

WHEREFORE, Defendants James Shultz, Progressive Management of America, Inc., and Myrtle Grove Acquisitions, LLC, respectfully request—*only* in the event that it does not grant directed verdict or order a new trial—that this Court set aside the verdict, vacate the Final Judgment, and enter an order remitting *only* (1) the past medical expenses award to $159,838.43 and (2) the future medical expenses award to $239,967.01.

RULE 1.431(h) MOTION FOR JUROR INTERVIEW
(ALTERNATIVE RELIEF TO A DIRECTED VERDICT AND A NEW TRIAL)

I. ALL JURORS SHOULD BE INTERVIEWED TO DETERMINE WHETHER THEY SAW PLAINTIFF'S COUNSEL'S SOCIAL MEDIA POSTS DURING TRIAL, AND A NEW TRIAL SHOULD BE GRANTED IF THAT OCCURRED.

Defendants move to interview all the jurors on the panel to determine whether they saw—during trial—any social media posts by Zarzaur Law, P.A. about this case and/or posts that disparage insurance companies. This motion does not concern the First Amendment; it only concerns the right of Defendants to have an impartial jury decide this case uninfluenced by social media posts about this case and insurance companies. Clearly, the jury took improper elements into their damages award as shown above. Defendants have a legitimate concern that the excessive awards in this case, which should shock the judicial conscience, could have been influenced by Zarzaur Law, P.A.'s social media if the jury saw the same during trial.

On June 18, 2025, Defendants filed an Emergency Motion for a Protective Order Concerning Social Media Posts about the Ongoing Case upon learning that Plaintiff's counsel was posting numerous videos about this case on Zarzaur Law, P.A.'s Instagram account (zarzaurlawpa). *Defendants' Emergency Motion, etc.,* 6/18/25.

Defendants argued the videos had the potential to bias and influence the venire. *Id.* And further, that the videos provide enough detail "for a member of the venire to search online and find news stories about the subject incident or access information that may not be admitted into evidence at this subject trial." *Id.*

Plaintiff responded to the Motion indicating that three videos about this case were previously posted on Instagram: (a) November 26, 2024, (b) April 15, 2025, and (c) June 17, 2025. *Plaintiff's Response, 6/23/25.*[11] These videos discussed the case, the mediation process,

[11] Defendants filed these three videos via USB storage drive on June 19, 2025.

and the ruling on Defendants' Motion for Summary Judgment. *Id.*

Zarzaur Law, P.A. maintains an extensive social media presence, which includes the following social media and followers as of June 23, 2025: (1) LinkedIn (602 followers); (2) Facebook (10,000 followers); (3) Instagram (3,641 followers); and TikTok (6,994 followers). *Id* at fn. 1. Plaintiff recognized that the criminal cases associated with this civil action (involving Naomi Jones and Yagaunda Buschbaum) "were newsworthy and a simple Google search yields numerous news articles sharing nearly identical information as contained in Plaintiffs'' Counsel's videos." *Id*. at fn. 2.

The transcripts from the three videos were included in Plaintiff's Response. The June 17, 2025, video included the following caption, which informed the public that evidence reflected Defendants ignored complaints about the assailant, which escalated or led to a shooting:

> Trial Update: Negligent Security and Premises Liability
>
> Our firm will soon begin trial in a critical case involving a 2020 shooting at Myrtle Grove Apartments in Pensacola, where our client was shot six times by another resident. *Evidence suggests repeated complaints about the assailant's behavior were ignored by property management and that fabricated allegations escalated into near-fatal violence.*
>
> *Summary judgment was denied by the court, affirming that the case presents serious factual issues appropriate for the jury to decide.* We will continue providing updates as the trial proceeds.

Id. (emphasis added).

The video informed the public that Defendants filed a motion for summary judgment trying "to argue that legally, it's an insufficient case to present to a jury. . . . And Judge Pitre decided, after [a] hearing, that this case should go to a jury. There's a genuine issue of material fact, so that's what a summary judgment is." It further provided, "We're going to be posting updates on this . . . and we're going to be in trial here in Escambia County. So we'll be giving

you updates as things progress." *Id.*

Plaintiff posted another video on June 30, 2025, which Defendants filed with this Court on July 1, 2025. *Notice of Filing, 7/1/25.* This Court heard argument on June 30, 2025, and denied the Motion on July 1, 2025. The Order states in pertinent part:

> After hearing arguments of both counsel, the motion is **DENIED**. While counsel for the movant has expressed legitimate concerns, there is no applicable statute or rule for relief. From what can be gleaned during the arguments, there are insufficient facts that rise to the level of triggering the specific rule regarding pretrial publicity. This Court has reviewed the videos and such does not trigger a remedy.

Order on Emergency Motion, etc., 7/1/25. This Order included a footnote, which states: "It is not overlooked that Plaintiff's counsel dutifully noted that (i) the defense denies the allegations and will have the opportunity to present their side and (ii) it is not counsel's obligation to present their case [as if the publication were subject to a pre-1987 FCC fairness doctrine]."

If any juror saw the videos posted by Zarzaur Law, P.A. on Instagram—and shown to this Court during the June 30, 2025, hearing—they may have seen other videos on that same social media, which include the following (paraphrased as best as possible through watching videos posted on the Instagram account):

- June 19, 2025:

  > "We also have other types of cases going on whether it be apartment cases where a management company takes risks and they end up causing a bad thing to happen to a tenant or a tragic thing to happen to a tenant."
  >
  > "The most interesting thing I've observed is how much insurance companies and their lawyers hate it [Zarzaur Law, P.A. posting on social media in the public domain]."
  >
  > "For years before social media was like this, they [insurance companies] were allowed to get away with keeping this stuff quiet."
  >
  > "They [insurance companies] don't want anybody to suspect that their client is potentially a potential to public safety"

Defendants' Notice of Filing, 7/24/2025.

- July 1, 2025 (regarding this case):

  "The Defendant filed a motion basically asking the court to prevent me from posting social media. . . .

  "But I did think it was of public interest to know the Defendant in this case . . . they filed this motion to have me basically gagged, if you will, and the judge correctly in my opinion denied that motion."

Defendants' Notice of Filing, 7/24/2025.

Zarzaur Law, P.A. (or someone on its behalf) videoed the trial and continued posting updates to the firm's social media account during trial. *Defendants' Notice of Filing, 7/24/2025.* The videos were either edited portions of the trial (including testimony and opening statements), or taken at Zarzaur Law, P.A. after each day recapping the particular trial events that day. The daily recaps by Mr. Zarzaur were fair representations and explained the events in mostly a procedural and educational manner.

With that said, Defendants would be deprived of the right to a fair trial—where the jury must consider ***only*** what it sees and hears in real-time in Court—if any juror saw any of the above-mentioned videos during trial. Indeed, this Court gave the standard jury instruction to prohibit the jury from looking at social media regarding this case:

202.6 INSTRUCTIONS ON ADJOURNMENT

> As I instructed before this trial started, you, as jurors, will decide this case based solely on the evidence presented in this courtroom. After you leave here, you must not conduct any research, directly or indirectly, about this case, including the facts, the legal issues, or the individuals and entities involved. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see on the Internet or social media, including through e-mail, text messaging, blogs, or

> social media such as Facebook, Instagram, X formerly known as Twitter, Snapchat, TikTok or any other electronic communication whatsoever.

As this trial was highly publicized—more so than most run-of-the-mill civil actions—Defendants were concerned that the jurors may visit any one of Zarzaur Law, P.A.'s social media cites/links upon recess. This especially included Instagram where Zarzaur Law, P.A. had publicized this trial long before commencement of trial and continued to publicize video during the trial. Based on this substantial concern, which this Court deemed "legitimate," when ruling on Defendants' Emergency Motion, Defendants requested that this Court ask the jury whether they had—during trial—seen Zarzaur Law, P.A.'s social media posts on at least one occasion towards the end of trial. This Court declined the request. Therefore, it is impossible to know whether any of the jurors, during trial, saw any of the aforementioned videos during recess. If *any* juror saw one or more of the social media posts discussed above, the Defendants would be entitled to a new trial, as the jury would have violated the instructions quoted above.

Indeed, this is such a serious issue that the Florida Bar enacted a Rule Regulating the Florida Bar on this topic:

RULE 4-3.6 TRIAL PUBLICITY

> **(a) Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

The **Comment** to this Rule states

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of

> evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Defendants would obviously be severely prejudiced if any juror saw or heard the following comments made by Mr. Zarzaur about insurance companies in the same video he discussed this case:

> "For years before social media was like this, they [insurance companies] were allowed to get away with keeping this stuff quiet."
>
> "They [insurance companies] don't want anybody to suspect that their client is potentially a potential to public safety"

Defendants would be equally prejudiced if a juror saw Mr. Zarzaur explaining that Defendants "filed a motion to have me basically gagged." Defendants have no way of knowing whether any of the jurors saw Zarzaur Law, P.A.'s social media posts because the Court did not ask. Without knowing this answer, Defendants cannot know whether they were denied the right to a fair trial based on the jury improperly considering extrajudicial statements that would materially prejudice the defense.

Accordingly, Defendants move this Court under Rule 1.431(h) (as alternative relief to the Rule 1.480 and 1.530 motions) for an interview of all jurors on the panel. That rule states:

> **(h) Interview of a Juror.** A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion must be served within 15 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion must state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge must enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

Fla. R. Civ. P. 1.431(h).

Defendants request a hearing on this Motion under Rule 1.431(h) and entry of an order permitting interviews of the following jurors:

1. Denise Evelyn Manzanares:
   - 2610 Nowak Dairy Rd., Cantonment, FL 32533-9609

2. Anjanette M. Rushing:
   - 225 Saint Cedd Ave., Pensacola, FL 32503-7939

3. Kari L. Basch:
   - 633 Downhaul Dr., Pensacola, FL 32507-7982

4. Lori Jo Howell:
   - 1644 Condor Dr., Cantonment, FL 32533-5834

5. Kimberley Kay Woytassek
   - 10857 Blacktail Loop, Pensacola, FL 32526-4568

6. Bryan Greenwalt:
   - 2328 Badger Cir., Cantonment, FL 32533-7883

WHEREFORE, Defendants James Shultz, Progressive Management of America, Inc., and Myrtle Grove Acquisitions, LLC, respectfully request that—*only* in the event directed verdict or a new trial is not granted—this Court grant a juror interview of all jurors on the panel to learn whether any or all of them saw Plaintiff's counsel's social media postings about this case and/or about insurance companies during trial, and grant a new trial in the even that occurred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a copy of the foregoing has been furnished via Florida Courts E-Filing Portal to Clerk of the Court and to: **Joseph A. Zarzaur, Jr., Esq.,** Zarzaur Law. P.A., P.O.Box 12305, Pensacola, FL 32591 (joe@zarzaurlaw.com, service@zarzaurlaw.com); **Elizabeth A. Parsons, Esq**., 307 South Palafox Street, Pensacola, FL 32502 (eparsons@wpslawyers.com); on this 28th of July, 2025.

BOYD & JENERETTE, P.A.

/s/ Kevin D. Franz
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Top Five Florida Verdicts of 2024

Florida Business Review Online

December 26, 2024 Thursday

EXHIBIT

A

DAILY BUSINESS REVIEW

Length: 600 words

Body

Miami South Beach in Florida with luxury apartments and waterway. Credit: pozdeevvs/Adobe Stock

We've come to the end of another hectic year of litigation, and as we look forward to another year of hard work, here are the five most lucrative verdicts the Daily Business Review covered in 2024.

After Ride's Manufacturer Fails to Appear in Court, Orlando Jury Awards $310M to Parents In Teen's Death

In early December, an Orlando jury awarded Tyre Sampson's parents a $310 million verdict against Funtime, the Austrian-based manufacturer of the ICON Park ride that Sampson fell from and died. Notably, Funtime did not appear during the trial to defend itself.

Tyre Sampson, 14, fell to his death from the Orlando Free Fall ride on March 24, 2022. His parents, Nekia Dodd and Yarnell Sampson, were represented by Michael Haggard and Kimberly Wald of the Haggard Law Firm, Michael Richardson of Hilliard Law and civil rights attorney Ben Crump.

It took less than an hour before the jury returned the $310 million verdict. The ride has been closed since Sampson died.

$100M South Florida Verdict: 'No Amount of Money Can Undo the Harm'

At the end of August, a jury returned a verdict of $100 million in the Palm Beach County Court against Dr. Berto Lopez, a former OB-GYN from Palm Beach County, whose medical license was revoked in February 2021.

South Florida law firm Grossman Roth Yaffa Cohen obtained the verdict in litigation focused on an incident involving a 10-day-old infant who suffered permanent, life-altering injuries during a circumcision performed by the doctor, who had his medical license restricted and eventually revoked.

Broward Jury Returns $31.9M Verdict Against Cleveland Clinic Florida

A state court jury in Fort Lauderdale awarded a $31.9 million award to the daughter of a deceased patient of the Cleveland Clinic Florida, finding that the medical center's negligence was the legal cause of the patient's death.

Diana Santa Maria of the Law Offices of Diana Santa Maria, and David Carter and Dane Ullian, partners at Gould Cooksey Fennell, represented the estate of Saverio Sasso, the patient.

Instead of placing Sasso in an intensive care unit, as his conditions warranted, the hospital placed him in an intermediate-care step-down unit for observation. Overnight, his condition deteriorated, then an inexperienced team

arrived and performed multiple intubation attempts, depriving his brain of oxygen and resulting in an irreversible anoxic brain injury from which he would never recover.

$25M Award: Jury Finds Hospital Negligent After Patient Raped

In early October, a jury in Citrus County awarded a 67-year-old Florida woman $25 million after she said Hospital Corporation of America's Citrus Memorial Hospital staff failed to stop a rapist from attacking her. The attacker was a nurse in charge of taking care of the patient.

The woman hired the litigation team of Eric Rosen of Rosen Injury Law in Davie, and Gregory Roe and Thomas Kennedy of Tampa's Kennedy Law Group, claiming that HCA was negligent in failing to supervise its staff, provide adequate security, nursing care and treatment.

Miami Jury Returns $16M Verdict: Meet the Winning Lawyers

Jonathan and Philip Freidin at Freidin Brown sued Philip Morris Usa, representing Gloria Garcia, widow of Manuel Garcia, whom they alleged died of a smoking-related illness in 1998.

A Miami jury returned a $16 million verdict. The plaintiffs claimed that Philip Morris was negligent, conspired to commit fraud, and purposefully concealed the health effects of its Marlboro Red products, leading to the death of Garcia, a Miami resident.

Load-Date: January 29, 2025

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