

**APPLICATION FOR NOMINATION TO THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT**

Instructions: *Respond fully to the questions asked below. Please make all efforts to include your full answer to each question in this document. You may attach additional pages, as necessary, however it is discouraged. In addition to the application, you must provide a recent color photograph to help identify yourself.*

Full Name: Galen Douglas Bauer [REDACTED]

Florida Bar No.: 0014156

Date Admitted to Practice in Florida: 9/27/2005

1. Please state your current employer and title, including any professional position and any public or judicial office you hold, your business address and telephone number.

Partner
Spohrer & Dodd, PL
76 S. Laura St., Ste. 1701
Jacksonville, FL 32202
Office: (904) 309-6500

2. Please state your current residential address, including city, county, and zip code. Indicate how long you have resided at this location and how long you have lived in Florida. Additionally, please provide a telephone number where you can be reached (preferably a cell phone number), and your preferred email address.

[REDACTED]
Ponte Vedra, St. Johns County, 32081

I have resided at this address since June 20, 2025. We built the home and it was only recently completed and ready to close on that date. I have lived in St. Johns County since 2013 except for a short time during the pendency of my divorce. I have lived in Florida for the last 23 years.

[REDACTED]
Email: galenbauer@yahoo.com

3. State your birthdate and place of birth.

[REDACTED]
Place of birth: Huntington, Indiana

4. Are you a registered voter in Florida (Y/N)? Yes
5. Please list all courts (including state bar admissions) and administrative bodies having special admissions requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have ever been suspended or resigned. Please explain the reason for any lapse in membership.

The Florida Bar, admitted September 27, 2005

U.S. District Court, Middle District of Florida, admitted December 15, 2005

U.S. District Court, Northern District of Florida, admitted December 16, 2009

U.S. District Court, Southern District of Florida, admitted October 14, 2010

U.S. Court of Appeals, Eleventh Circuit, admitted November 1, 2006

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias.

No.

EDUCATION:

7. List in reverse chronological order each secondary school, college, university, law school or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, the date the degree was received, class standing, and graduating GPA (if your class standing or graduating GPA is unknown, please request the same from such school).

Harvard University, Harvard Extension School

2017-2022

ALM Degree, awarded May 26, 2022

4.0 Graduating GPA

The school does not assign class rank.

Florida Coastal School of Law

2003-2005

Juris Doctorate, *cum laude*, awarded on May 14, 2005

3.38 Graduating GPA

Class rank: 17/237

Indiana University

1997-2000 (excluding AP courses taken in high school)

Bachelor of Science in Education, awarded on May 10, 2000

3.28 Graduating GPA

The University does not assign class rank.

Valparaiso University
1996-1997
No degree earned; transferred to Indiana University

Marquette Catholic High School
1992-1996
Indiana Academic Honors Diploma
3.5192 Graduating GPA
Class rank: 15/48

8. List and describe any organizations, clubs, fraternities or sororities, and extracurricular activities you engaged in during your higher education. For each, list any positions or titles you held and the dates of participation.

NCAA Division I Baseball Player (1996-97)
Delta Sigma Phi Fraternity (1996-97)
Mock Trial Team Member, Florida Coastal School of Law (2003-05)
Team President (2004-05)
Law Review, Florida Coastal School of Law (2003-05)
Assistant Editor-in-Chief (2004-05)

EMPLOYMENT:

9. List in reverse chronological order all full-time jobs or employment (including internships and clerkships) you have held since the age of 21. Include the name and address of the employer, job title(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

Spohrer & Dodd, PL – Partner (2009-present)
76 S. Laura St., Ste. 1701
Jacksonville, FL 32202

Spohrer & Dodd, PL – Associate (2007-09)
76 S. Laura St., Ste. 1701
Jacksonville, FL 32202

Spohrer Wilner, PA – Associate (2005-07)
701 W. Adams St., Ste. 2
Jacksonville, FL 32204

Spohrer, Wilner, Maxwell & Matthews, PA – Law clerk (2003-05)
701 W. Adams St., Ste. 2
Jacksonville, FL 32204

Summit Painting Company (1998-2002)

6251 Maplecrest Road

Fort Wayne, IN 46835

(260) 385-1549

Performed commercial and industrial painting and drywall finishing while also taking full-time, undergraduate course load, then later while working as a school teacher and coach.

North Miami Community Schools (2001-02)

High School Teacher and Coach

394 E 900 N

Denver, IN 46926

(765) 985-3891

Taught high school physical science, chemistry, and advanced chemistry to high school sophomores, juniors, and seniors. Coached junior varsity basketball and varsity golf.

Huntington County Schools (2000-01)

Middle School Teacher

1063 E 900 S

Warren, IN 46792

(260) 356-8312

Taught middle school science to sixth, seventh, and eighth graders.

- 10.** Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I am board certified in aviation law. I work in a civil litigation practice primarily representing plaintiffs in personal injury and wrongful death cases. I represent defendants in the same types of cases, but only sporadically.

Most of my work within the realm of personal injury and wrongful death litigation is in the areas of medical malpractice and aviation law. However, I have also handled car accidents, product liability claims, civil rights claims, and commercial and construction litigation. I have advised and defended corporate clients sporadically throughout my years of practice. However, my typical client is an injured individual or a grieving family who recently lost a loved one. Most of my clients have no experience with the court system. They need guidance about court rules, procedures, and timelines, as well as a dispassionate evaluation of the merits of their claim and of potential defenses. About a quarter of my time is spent reviewing potential cases and explaining to prospective

clients why I will not represent them and why I believe they do not have a meritorious case.

I practice in both state and federal courts.

11. What percentage of your appearance in court in the last five years or in the last five years of practice (include the dates) was:

| | Court | | Area of Practice | |
|----------------------|------------|----------|------------------|--------------|
| Federal Appellate | _____ | % | Civil | <u>100</u> % |
| Federal Trial | <u>10</u> | % | Criminal | _____ % |
| Federal Other | _____ | % | Family | _____ % |
| State Appellate | _____ | % | Probate | _____ % |
| State Trial | <u>90</u> | % | Other | _____ % |
| State Administrative | _____ | % | | |
| State Other | _____ | % | | |
| TOTAL | <u>100</u> | % | TOTAL | <u>100</u> % |

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation:

Not applicable.

12. In your lifetime, how many (number) of the cases that you tried to verdict, judgment, or final decision were:

| | | | |
|--------------|----------|------------------------|----------|
| Jury? | <u>9</u> | Non-jury? | <u>1</u> |
| Arbitration? | <u>0</u> | Administrative Bodies? | <u>0</u> |
| Appellate? | <u>0</u> | | |

13. Please list every case that you have argued (or substantially participated) in front of the United States Supreme Court, a United States Circuit Court, the Florida Supreme Court, or a Florida District Court of Appeal, providing the case name, jurisdiction, case number, date of argument, and the name(s), e-mail address(es), and telephone number(s) for opposing appellate counsel. If there is a published opinion, please also include that citation.

I do not practice appellate law so I have not had the opportunity to present argument to these courts.

14. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended, or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

15. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain full.

No.

16. For your last six cases, which were tried to verdict or handled on appeal, either before a jury, judge, appellate panel, arbitration panel or any other administrative hearing officer, list the names, e-mail addresses, and telephone numbers of the trial/appellate counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Hair v. Baptist Nassau, Inc., Circuit Court, Fourth Judicial Circuit, Nassau County, FL, 2022-CA-000274

Trial counsel for the plaintiffs, in addition to myself, included:

Robert F. Spohrer, Esq.
Email: rspohrer@sdlitigation.com
Phone: (904) 309-6500

Trial counsel for the defendants included:

Shylie A. Bannon, Esq.
Email: sbannon@hallboothsmith.com
Phone: (904) 236-4929

Steve D. Paveglio, Jr., Esq.
Email: spaveglio@hallboothsmith.com
Phone: (904) 236-4929

Nowlin v. Whittaker and Borland-Groover Clinic, P.A., Circuit Court, Fourth Judicial Circuit, 16-2019-CA-002527

Trial counsel for the plaintiffs, in addition to myself, was:

Jay M. Howanitz, Esq.
Email: jhowanitz@sdlitigation.com
Phone: (904) 309-6500

Trial counsel for the defendants included:

Davis C. Love, Esq.
Email: dlove@childslegalgroup.com
Phone: (904) 396-3007

Brian Pederson, Esq.
Email: bpederson@childslegalgroup.com
(904) 396-3007

Appellate Counsel for the defendants included:

Dinah Stein, Esq.
Email: dstein@mhicksllaw.com
Phone: (305) 374-8171

Appellate Counsel for the plaintiffs included:

John S. Mills, Esq.
Email: jmills@mills-appeals.com
(904) 801-2444

Gomes v. Baldwin-Lane et. al., Circuit Court, Fourth Judicial Circuit, 16-2019-CA-008983

Trial counsel for the plaintiffs, in addition to myself, was:

Jay M. Howanitz, Esq.
Email: jhowanitz@sdlitigation.com
Phone: (904) 309-6500

The defendants were not represented at trial. I have added a seventh trial to this list since there is no opposing counsel to contact from this case.

Gomez v. Zeta Jax, Inc., Circuit Court, Fourth Judicial Circuit, 16-2020-CA-003114

Trial counsel for the plaintiff was:

Joshua A. Woolsey, Esq.
Email: josh@woolseymorcom.com
Phone: (904) 638-4235

I was trial counsel for the Defendant.

Silcox v. Hunter, U.S. District Court, Middle District of Florida. Case No. 3:16-cv-1509-J-32MCR

Trial counsel for the plaintiff, in addition to myself, included:

Keith Maynard, Esq.
Email: kmaynard@sdlitigation.com
Phone: (904) 309-6500

Trial counsel for the defendant included:

Matthew J. Carson, Esq.
Email: mcarson@sniffenlaw.com
Phone: (850) 205-1996

Michael P. Spellman, Esq.
Email: mspellman@sniffenlaw.com
Phone: (850) 205-1996

Felker v. Zampatti, U.S. District Court, Middle District of Florida. Case No.: 3:10-cv-459-J-32TEM

Trial counsel for the plaintiff, in addition to myself, included:

Robert F. Spohrer, Esq.
Email: rspohrer@sdlitigation.com
Phone: (904) 309-6500

Counsel for Defendant Zampatti included:

Raymond L. Roebuck, Esq.
Email: rroebuck@oharalawfirm.com
Phone: (904) 346-3166

Alexis M. Clay, Esq.
Email: alexis.clay.k1iz@statefarm.com
Phone: (904) 493-3400

McLane v. Ethicon Endo-Surgery, Inc., U.S. District Court, Middle District of Florida. Case No.: 3:12-cv-406-J-39PDB.

Trial counsel for the plaintiff, in addition to myself, included:

Robert F. Spohrer, Esq.
Email: rspohrer@sdlitigation.com
Phone: (904) 309-6500

Trial counsel for the defendant included:

David R. Noteware, Esq. (retired)
Phone: (214) 969-1432

Timothy E. Hudson, Esq.
Email: tim.hudson@btlaw.com
Phone: (214) 258-4188

17. For your last six cases, which were either settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

- a. ***Garvin v. St. Vincent's Medical Center, Inc., et. al.***, Circuit Court, Fourth Judicial Circuit, Duval County, Case No. 2024-CA-000296.

In addition to myself, counsel for the plaintiff was:

Billie Jo Taylor, Esq.
Phone: (904) 251-1111

Counsel for the defendants included:

J. Brent Allen, Esq.
Phone: (904) 236-4929

Jami Kimbrell, Esq.
Phone: (850) 201-0942

- b. ***Napier, Lail, Moss, Pettaway, et. al. v. Miami Air International, Inc.***, U.S. District Court, Middle District of Florida, Case Nos. 3:21-cv-413; 3:22-cv-139; and 3:19-cv-637.

In addition to myself, counsel for the plaintiffs included:

Robert F. Spohrer, Esq.
Keith L. Maynard, Esq.
Phone: (904) 309-6500

C. Stewart Gill, Esq.
Phone: (757) 244-7000

Counsel for the defendant included:

Sarah Korapaty, Esq.
Phone: (212) 513-3563

Joshua Levenson, Esq.
Phone: (954) 468-7852

Lee Teichner, Esq.
Phone: (305) 349-2279

- c. ***Greaves v. Tallahassee Medical Center, Inc., et. al.***, No case number was assigned, claims were resolved prior to litigation.

I was the only counsel for the plaintiffs.

Counsel for the defendants included:

Aaron P. Ryan, Esq.
Phone: (850) 777-3258

Joe Longfellow, III, Esq.
Phone: (850) 297-0090

- d. ***Nowlin v. Whittaker and Borland Groover Clinic, P.A.***, Circuit Court, Fourth Judicial Circuit, Duval County, Case No. 16-2019-CA-002527.

In addition to myself, counsel for the plaintiffs was:

Jay M. Howanitz, Esq.
Phone: (904) 309-6500

Counsel for the defendants included:

Davis C. Love, Esq.
Brian Pederson, Esq.
Phone: (904) 396-3007

- e. ***Wedner v. Mayo Clinic Jacksonville***, Circuit Court, Fourth Judicial Circuit, Duval County, Case No. 16-2018-CA-007415.

In addition to myself, counsel for the plaintiffs was:

Robert F. Spohrer, Esq.
Phone: (904) 309-6500

Counsel for the defendant was:

Edward McCarthy, III, Esq.
Phone: (904) 346-5730

- f. ***Estate of Robert Smith v. Al-Saghir, et. al.***, Circuit Court, Fourth Judicial Circuit, Clay County, Case No. 2021-CA-000365.

I was the only counsel for the plaintiffs.

Counsel for the defendants included:

Davis C. Love, Esq.
Brian Pederson, Esq.
Phone: (904) 396-3007

Tyler E. Batteese, Esq.
Phone: (813) 774-6363

18. During the last five years, on average, how many times per month have you appeared in Court or at administrative hearings? If during any period you have appeared in court with greater frequency than during the last five years, indicate the period during which you appeared with greater frequency and succinctly explain.

Approximately 5-6 times per month.

19. If Questions 16, 17, and 18 do not apply to your practice, please list your last six major transactions or other legal matters that were resolved, listing the names, e-mail addresses, and telephone numbers of the other party counsel.

Not applicable.

20. During the last five years, if your practice was greater than 50% personal injury, workers' compensation or professional malpractice, what percentage of your work was in representation of plaintiffs or defendants?

Greater than 95% of my practice is in representation of plaintiffs and less than 5% is in representation of defendants.

21. List and describe the five most significant cases which you personally litigated giving the case style, number, court and judge, the date of the case, the names, e-mail addresses, and telephone numbers of the other attorneys involved, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant.

1. ***McMahon v. Presidential Airways, Inc.***, U.S. District Court, Middle District of Florida. Case No.: 6:05-cv-1002-ORL-28GJK. Honorable John Antoon, II, United States District Judge.

Reported Decisions:

McMahon v. Presidential Airways, Inc., 410 F. Supp. 2d 1189 (M.D. Fla. 2006).
McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006).
McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007).

I represented the widows and children of three soldiers who were killed in a plane crash in Afghanistan. The flight was operated by a government contractor. I acted as the second chair to Bob Spohrer throughout the case. However, I had significant involvement in every aspect of the case, from taking depositions and discovery to attending hearings, multiple mediations, and researching and writing voluminous briefs on complex legal issues, including: removal jurisdiction, federal preemption, the political question doctrine, choice of law, the combatant activities exception to the Federal Tort Claims Act, and more.

The case was not tried. It was resolved while the second appeal in the case was pending in the Eleventh Circuit.

The case was significant because it tested and has helped to define the limits of intra-governmental immunity doctrines. It prevented active-duty soldiers from being singled out for special disfavor in the law simply because they were active-duty when killed by alleged negligence of a contractor working in a combat zone in a foreign country.

Many other lawyers were involved. Other lawyers for the plaintiffs included:

Robert F. Spohrer, Esq.
(904) 309-6500
rspohrer@sdlitigation.com

Sean B. Cronin, Esq.
(904) 388-9555
sean@croninmaxwell.com

Robert B. Guild, Esq.
(904) 885-2285
rbguildlaw@yahoo.com

Appellate counsel for the plaintiffs included:

Tracy S. Carlin, Esq.
(813) 223-4300
tcarlin@bbsappeals.com

Rebecca B. Creed, Esq.
(904) 305-0075
rcreed@appellate-firm.com

For the defendant, I provide the names and numbers of the lead attorneys because many others had peripheral roles.

Mark Dombroff, Esq.
(202) 696-1473
mdombroff@foxrothschild.com

Thomas Almy, Esq.
(retired, contact information unknown)

Douglas R. Beam, Esq.
(321) 723-6591
eservice1@dougbeam.com

J. Denny Shupe, Esq.
(267) 297-3335
dshupe@victorrane.com

Jonathan M. Stern, Esq.
(202) 545-7768
jstern@victorrane.com

Other attorneys for the defendant included: Tracey L. Dolin, M. Miller Baker, Michael P. Socarras, Mark P. Schnapp, Sabrina R. Ferris, Robert L. Elam, John Armando Boudet.

For the United States, as an interested party:

Kathlynn G. Fadely Lear, Esq. (retired, contact information unknown)

Carolyn J. Adams, Esq. (retired)
cjacksonadams@gmail.com

Justin Cretien, Esq.
(703) 395-7459
jchretien4@gmail.com

2. ***Flanigan v. Westwind Technologies, Inc.***, U.S. District Court, Western District of Tennessee. Case No.: 07-1124. Honorable J. Daniel Breen, United States District Judge.

Reported Decisions:

Flanigan v. Westwind Technologies, Inc., 648 F. Supp. 2d 994 (W.D. Tenn. 2008).

I represented the widow and children of an active-duty soldier who was killed in a helicopter crash in Afghanistan. I was responsible for responding to motions to dismiss

filed by government contractors. That work represented virtually the entire case because it was resolved soon after the court announced the decision cited above.

The case was significant because it further defined the limits of government contractor liability in light of the combatant activities exception to the Federal Tort Claims Act. This case arose in the context of an alleged product defect in a military helicopter, which killed a pilot from the Tennessee National Guard.

Other lawyers for the plaintiff were:

Robert Spohrer, Esq.
(904) 309-6500
rspohrer@sdlitigation.com

Jeffrey S. Rosenblum, Esq.
(901) 527-9600
jeffr@randrfirm.com

Edward R. Curtis, Esq.
(954) 525-7500
erc@trippscott.com

For the defendant, I provide the names and numbers of the lead attorney because many others had peripheral roles:

Joanna E. Herman, Esq.
(858) 202-5349
jherman@mlaglobal.com

Other attorneys for the defendant included: James W. Huston (deceased), William V. O'Connor (deceased), Tricia T. Olson, Brian S. Faughnan, Cannon F. Allen, John Randolph Bibb, Jr., Robert F. Chapski, Gary C. Shockley, Marneea L. Baker, Beth Marie Strosky, Kelly F. Moser, Steven S. Bell, Todd W. Rosencrans.

3. ***Moss v. Miami Air International, Inc., Case No. 3:19-cv-637; Lail v. Miami Air International, Inc., Case No. 3:21-cv-413; Pettaway v. Miami Air, International, Inc., Case No. 3:22-cv-139;*** U.S. District Court, Middle District of Florida. Honorable Timothy J. Corrigan, United States District Judge.

Reported Decisions:

Pettaway v. Miami Air Int'l, Inc., 624 F. Supp. 3d 1268 (M.D. Fla. 2022).
Diaz v. Miami Air Int'l, Inc., 757 F. Supp. 3d 1265 (M.D. Fla. 2024).

I represented 29 airline passengers who were injured when a commercial airliner overshot the runway while attempting to land at NAS Jacksonville. The airliner, which was carrying 137 passengers, crashed into the St. Johns River. My clients were current and former military members, and military contractors, who were supporting the 9/11 trials and detention of suspected terrorists in Guantanamo Bay, Cuba.

I was responsible for all aspects of these cases, including setting case strategy, drafting pleadings and other court filings, completing discovery, coordinating expert witnesses, leading settlement negotiations as the plaintiffs' representative, and more.

These cases were significant for several reasons. First, one of these cases raised the novel question of whether the U.S. military base in Guantanamo Bay, Cuba, constitutes U.S. or Cuban sovereign territory for purposes of the applicable aviation law treaty. Second, the cases raised questions of the recoverability of mental damages (i.e. PTSD) under the applicable treaty by survivors of a plane crash. Third, management of the litigation was complex due to the large number of plaintiffs, who were scattered throughout the United States and around the world.

In addition to myself, counsel for the plaintiffs included:

Robert F. Spohrer, Esq.
rspohrer@sdlitigation.com
(904) 309-6500

Keith L. Maynard, Esq.
kmaynard@sdlitigation.com
(904) 309-6500

C. Stewart Gill, Esq.
sgill@smithlawcenter.com
(757) 244-7000

Counsel for the defendant included:

Sarah Korapaty, Esq.
sarah.korapaty@hklaw.com
Phone: (212) 513-3563

Joshua Levenson, Esq.
joshua.levenson@hklaw.com
(954) 468-7852

Lee Teichner, Esq.
lee.teichner@hklaw.com
(305) 349-2279

4. ***Ponder v. Advanced Medical Optics, Inc.***, Fourth Judicial Circuit, Duval County, Florida. Case No.: 16-2007-CA-008478. Honorable Haldane Taylor, Circuit Judge.

I was responsible for all aspects of litigation, including the drafting of all filings, extensive legal research and writing, fact and expert witness discovery, and negotiation of a resolution. Discovery was difficult but extensive. The court appointed a special master early in the case. I oversaw three other people who were reviewing upwards of 700,000 documents produced.

The case was significant for two reasons. First, it tested the viability of Florida common law product liability claims against federal preemption by virtue of FDA regulation. Second, this case was the first of hundreds of cases around the country involving the same product. We were able to keep this case moving faster than any other case in the country. For that reason, the case was handled as a sort of bell weather case often seen in mass tort litigation.

In addition to myself, counsel for the plaintiff included:

Chad S. Roberts, Esq.
(305) 240-5148
chad.roberts@robertsdiscovery.com

Counsel for the defendant included:

Edward L. Birk, Esq.
(904) 807-2179
ebirk@marksgray.com

William M. Corley, Esq.
(904) 398-0900
billandsheri523@yahoo.com

5. ***Bridges v. United States of America***, U.S. District Court, Middle District of Florida. Case No.: 3:15-cv-1248-J-25PDB. Honorable Henry Lee Adams, Jr., United States District Judge.

I represented an elderly widower and daughter of a woman who died following alleged medical negligence at Naval Hospital Jacksonville. I was not responsible for the initial factual investigation but was responsible for filing suit and for handling all aspects of litigation thereafter.

The case was significant because it involved a significant legal issue that questioned whether federal law preempted Florida's statutory notice and presuit requirements for medical negligence claims. It also was significant because the decedent was the primary

caretaker for her adult daughter, who was born with severe Down's Syndrome. The result meant the widower could secure caretakers to help care for his daughter and himself.

Two other lawyers were involved for the plaintiff. Gretchen VanLiere was responsible for the presuit investigation. Robert Spohrer attended the pre-trial conference and was preparing to try the case with me.

Counsel for the United States of America were:

Jason P. Mehta, Esq.
(904) 888-0370
jmehta@foley.com

Ronnie S. Carter, Esq.
(904) 301-6300
ronnie.carter@usdoj.gov

22. Attach at least two, but no more than three, examples of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach a writing sample for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

Please see Attachments A and B. Attachment B is submitted without the voluminous exhibits. I was responsible for researching, drafting, and editing the entirety of both documents. The only assistance I had with either document was with final formatting.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE

23. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved, the dates of service or dates of candidacy, and any election results.

No.

24. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name(s) of the commission, the approximate date(s) of each submission, and indicate if your name was certified to the Governor's Office for consideration.

I submitted an application to the Fourth Judicial Circuit JNC in February, 2019 and again in February, 2023. My name was certified to the Governor's Office for consideration both times.

25. List any prior quasi-judicial service, including the agency or entity, dates of service, position(s) held, and a brief description of the issues you heard.

Not applicable.

26. If you have prior judicial or quasi-judicial experience, please list the following information:

- (i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;
- (ii) the approximate number and nature of the cases you handled during your tenure;
- (iii) the citations of any published opinions; and
- (iv) descriptions of the five most significant cases you have tried or heard, identifying the citation or style, attorneys involved, dates of the case, and the reason you believe these cases to be significant.

Not applicable.

27. Provide citations and a brief summary of all of your orders or opinions where your decision was reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

28. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

29. Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give the date, describe the complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

Not applicable.

30. Have you ever held an attorney in contempt? If so, for each instance state the name of the attorney, case style for the matter in question, approximate date and describe the circumstances.

Not applicable.

- 31.** Have you ever held or been a candidate for any other public office? If so, state the office, location, dates of service or candidacy, and any election results.

No.

NON-LEGAL BUSINESS INVOLVEMENT

- 32.** If you are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

I am a Director of Stanton Rowing Foundation, Inc. d/b/a First Coast Rowing Club. This is a 501(c)(3) non-profit organization for youth rowing in Jacksonville. I do not intend to resign if appointed. However, I will be term-limited out of board membership in 2026.

I am a partner and shareholder in my law firm, Spohrer & Dodd, PL. I intend to resign immediately if appointed to judicial office.

- 33.** Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, explain and provide dates. If you received any compensation of any kind outside the practice of law during this time, please list the amount of compensation received.

I formed a Florida limited liability company called St. Johns Kitchens, LLC, and was a member and registered agent until I dissolved that business. I formed the business for my ex-wife. She wished to be self-employed as a kitchen and bath designer. After being self-employed for a little over two years, she decided to go back to work with her former employer. After we wound up the affairs of that business, we dissolved the company. I did not receive any compensation.

POSSIBLE BIAS OR PREJUDICE

- 34.** The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you, as a general proposition, believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

I would have no limitations or mental reservations except for those cases involving my current law firm or law partners, family members and friends, and First Coast Rowing Club, of which I am a board member.

PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES

35. List the titles, publishers, and dates of any books, articles, reports, letters to the editor, editorial pieces, or other published materials you have written or edited, including materials published only on the Internet. Attach a copy of each listed or provide a URL at which a copy can be accessed.

“What’s the Verdict? Have elections or appointments contributed more to gender and racial diversity among Florida’s trial court judges?” Master’s thesis, Harvard University ProQuest Dissertations Publishing, 2022.

Available at: <https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37371586> (last visited May 22, 2025).

“Identifying and Handling a Military Aviation Claim,” Attorney at Law Magazine, First Coast Edition, Vol. 2, No. 1, February 2017. Available at:

<https://attorneyatlawmagazine.com/public-articles/personal-injury/identifying-and-handling-a-military-aviation-claim> (last visited May 22, 2025).

“Big Brother is a Drone?: 2015 Amendments to Florida ‘Freedom from Unwarranted Surveillance Act.’” Vectors: Florida’s Aviation Law Journal, Vol. 4, Issue 1, November 2015. (copy attached)

36. List any reports, memoranda or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. Provide the name of the entity, the date published, and a summary of the document. To the extent you have the document, please attach a copy or provide a URL at which a copy can be accessed.

I drafted a Grade Review Petition Determination on behalf of The Florida Bar’s Aviation Law Certification Committee. A candidate for board certification failed the 2021 written examination and petitioned the committee to review that candidate’s test grade. As the chair of the certification committee, I was responsible for leading the committee through that process and drafting the committee’s Determination on the petition. The Determination was not published and should remain confidential to protect the integrity of the certification exam and the identity of the petitioner. A copy is attached as Attachment C.

37. List any speeches or talks you have delivered, including commencement speeches, remarks, interviews, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place they were delivered, the sponsor of the presentation, and a summary of the presentation. If there are any readily available press reports, a transcript or recording, please attach a copy or provide a URL at which a copy can be accessed.

A. I was interviewed by Attorney At Law Magazine on or around November 22, 2021, for its litigator spotlight feature. That interview is available at: <https://attorneyatlawmagazine.com/stories/attorney-interview/galen-bauer> (last accessed June 6, 2025).

B. “Careers in Aviation: Aviation Law.” Switzerland Point Middle School STEM Classes. May 27, 2021. I presented to three classes of middle school students on what I do as attorney practicing in the field of aviation law. The lectures were designed to fill a curriculum requirement for a course in Aviation and Aerospace. There were no press reports, transcripts, or recordings.

C. I was interviewed in Jacksonville, FL, by News4Jax on or about July 8, 2019, in connection with an ongoing case. An article regarding the case and statements attributed to me may be found at: <https://www.news4jax.com/news/2019/07/08/passenger-sues-miami-air-over-injuries-from-737-crash/> (last accessed June 6, 2025).

D. Panel Moderator, “Technology in Trial.” American Bar Association, Tort Trial and Insurance Practice Session, Aviation and Space Law Committee, Washington, D.C., November 2016. This panel discussed the state-of-the-art in trial presentation technologies, using examples from aviation mishap cases. No press reports, transcripts, or recordings are available to my knowledge.

E. I was interviewed on or around September 1, 2014, by the Jacksonville Daily Record for its Lawyer Snapshot feature. That article is available at: <https://www.jaxdailyrecord.com/news/2014/sep/01/lawyer-snapshot-galen-bauer/> (last accessed June 6, 2025).

F. “Blackwater: Lessons Learned from Taking on the Military/Industrial Complex.” Lawyer Pilots Bar Association, Summer Meeting, Vancouver, BC, July 2013. This lecture explained legal defenses uniquely available to government contractors. No press reports, transcripts, or recordings are available to my knowledge.

38. Have you ever taught a course at an institution of higher education or a bar association? If so, provide the course title, a description of the course subject matter, the institution at which you taught, and the dates of teaching. If you have a syllabus for each course, please provide.

Yes. I served as an adjunct professor at Florida Coastal School of Law from approximately 2009 to 2015. I taught a workshop component of a course called “Trial Practice.” I did not use a syllabus. In that course, I taught law students how to perform the basic functions of a trial, including how to deliver an opening statement and closing argument, conduct direct and cross examinations, establish foundations for admission of evidence, handle evidence once admitted, make proper objections, and more.

- 39.** List any fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement. Include the date received and the presenting entity or organization.

American Board of Trial Advocates, (ABOTA) member, inducted December, 2024.

Super Lawyer, Medical Malpractice, SuperLawyers Magazine, 2024.

Dean's List Academic Achievement Award; May 26, 2022; Harvard Extension School.

Thomas Small Prize; May 26, 2022; Harvard Extension School, awarded for academic achievement and character.

Named Rising Star by SuperLawyers Magazine, 2013-18.

Top 10 Attorneys Under 40, Attorney at Law Magazine, First Coast Edition, Vol. 2, No. 6, 2017.

Top 40 Under 40, National Trial Lawyers, 2013.

40 Under 40, Jacksonville Business Journal, 2009.

- 40.** Do you have a Martindale-Hubbell rating? If so, what is it and when was it earned?

Yes. AV-Preeminent, earned in 2013.

- 41.** List all bar associations, legal, and judicial-related committees of which you are or have been a member. For each, please provide dates of membership or participation. Also, for each indicate any office you have held and the dates of office.

Jacksonville Bar Association, member, 2005-present

Jacksonville Justice Association, member 2005-present

board of directors, approx. 2012-13

Florida Justice Association, member, 2005-present

American Association for Justice, member, 2005-2021

American Bar Association, member, cannot recall years of membership

Florida Bar Aviation Law Certification Committee, 2015-2021

Committee Chairman, 2020-2021

Florida Bar Aviation Law Committee, approx.. 2020 through June 30, 2027

- 42.** List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in the previous question to which you belong, or to which you have belonged

since graduating law school. For each, please provide dates of membership or participation and indicate any office you have held and the dates of office.

St. Joseph Catholic Church, parishioner, 2008-2021
St John Paul II Catholic Church, parishioner, 2022-present
The Chester Bedell American Inn of Court, Master, approx. 2008-present
First Coast Tiger Bay Club, member, 2019-20
Native Sons & Daughters, member, 2010-18
First Coast Rowing Club, Director, 2020-present
Board President, 2022-2024

43. Do you now or have you ever belonged to a club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion (other than a church, synagogue, mosque or other religious institution), national origin, or sex (other than an educational institution, fraternity or sorority)? If so, state the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No.

44. Please describe any significant pro bono legal work you have done in the past 10 years, giving dates of service.

Florida Bar Young Lawyers Hurricane Disaster Relief Legal Services, 2017-18. I consulted with people from around the State of Florida about homeowner's insurance claims arising out of hurricane damage to their homes, including reviewing and advising them about their rights and obligations under the terms of their homeowner's insurance policies.

I represented semi-truck owner/operator whose semi-tractor was damaged. He was denied property damage coverage at a time when he and his wife were focusing on their newborn baby, who was born with serious medical conditions and undergoing operations. This representation began in early 2018 and ended in late 2018.

I provided *pro bono* representation to two inmates who did not receive timely treatment for chronic hepatitis C infections while incarcerated. Each filed *pro se* cases in federal court. I provided this representation as a service to the court.

45. Please describe any hobbies or other vocational interests.

I enjoy traveling, spending time with my family, and sports. I like to play golf and pickleball. I enjoy going to Jacksonville Jaguars and Jacksonville Jumbo Shrimp games. I also enjoy do-it-yourself home improvement projects.

46. Please state whether you have served or currently serve in the military, including your dates of service, branch, highest rank, and type of discharge.

No.

47. Please provide links to all social media and blog accounts you currently maintain, including, but not limited to, Facebook, Twitter, LinkedIn, and Instagram.

LinkedIn: <https://www.linkedin.com/in/galen-bauer-796a5714>

Twitter: <https://twitter.com/galenbauer?lang=en>

Instagram: <https://instagram.com/galen94>

Facebook: <https://www.facebook.com/share/16rQAJmRnU/?mibextid=wwXlfr>

FAMILY BACKGROUND

48. Please state your current marital status. If you are currently married, please list your spouse's name, current occupation, including employer, and the date of the marriage. If you have ever been divorced, please state for each former spouse their name, current address, current telephone number, the date and place of the divorce and court and case number information.

I am married to [REDACTED]. She is self-employed as a freelance marketing consultant. We were married on June 20, 2024.

I was divorced in 2022. My former wife was Shelly Bauer, 4920 Blackhawk Drive, St. Johns, Florida 32259. Phone: (904) 962-8856. The divorce was in St. Johns County, Florida and was finalized on July 11, 2022; Case No.: DR21-2259.

49. If you have children, please list their names and ages. If your children are over 18 years of age, please list their current occupation, residential address, and a current telephone number.

[REDACTED], age 17.

[REDACTED], age 20. Combat medic, U.S. Army Reserves, and college student.

[REDACTED]
[REDACTED]
[REDACTED]

CRIMINAL AND MISCELLANEOUS ACTIONS

- 50.** Have you ever been convicted of a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

- 51.** Have you ever pled nolo contendere or guilty to a crime which is a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

- 52.** Have you ever been arrested, regardless of whether charges were filed? If so, please list and provide sufficient details surrounding the arrest, the approximate date and jurisdiction.

No.

- 53.** Have you ever been a party to a lawsuit, either as the plaintiff, defendant, petitioner, or respondent? If so, please supply the case style, jurisdiction/county in which the lawsuit was filed, case number, your status in the case, and describe the nature and disposition of the matter.

I was a petitioner in a divorce proceeding styled In re: The Marriage/Matter of: Galen D. Bauer, Husband, and Shelly M. Bauer, Wife, Seventh Judicial Circuit, St. Johns County, Florida, Case No. DR21-2259. All issues were resolved and the petition for divorce was granted.

- 54.** To your knowledge, has there ever been a complaint made or filed alleging malpractice as a result of action or inaction on your part?

No.

- 55.** To the extent you are aware, have you or your professional liability carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the name of the client(s), approximate dates, nature of the claims, the disposition and any amounts involved.

No.

- 56.** Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court,

administrative agency, bar association, or other professional group. If so, provide the particulars of each finding or investigation.

No.

57. To your knowledge, within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers, clients, or the like, ever filed a formal complaint or accusation of misconduct including, but not limited to, any allegations involving sexual harassment, creating a hostile work environment or conditions, or discriminatory behavior against you with any regulatory or investigatory agency or with your employer? If so, please state the date of complaint or accusation, specifics surrounding the complaint or accusation, and the resolution or disposition.

No.

58. Are you currently the subject of an investigation which could result in civil, administrative, or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation, and the expected completion date of the investigation.

No.

59. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you, this includes any corporation or business entity that you were involved with? If so, please provide the case style, case number, approximate date of disposition, and any relevant details surrounding the bankruptcy.

No.

60. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

61. Please explain whether you have complied with all legally required tax return filings. To the extent you have ever had to pay a tax penalty or a tax lien was filed against you, please explain giving the date, the amounts, disposition, and current status.

Yes, I have complied. I never have had a tax lien or penalty.

HEALTH

62. Are you currently addicted to or dependent upon the use of narcotics, drugs, or alcohol?

No.

63. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism? If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.] Please describe such treatment or diagnosis.

No.

64. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner: experiencing periods of no sleep for two or three nights, experiencing periods of hyperactivity, spending money profusely with extremely poor judgment, suffering from extreme loss of appetite, issuing checks without sufficient funds, defaulting on a loan, experiencing frequent mood swings, uncontrollable tiredness, falling asleep without warning in the middle of an activity. If yes, please explain.

No.

65. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner? If yes please explain the limitation or impairment and any treatment, program or counseling sought or prescribed.

No.

66. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, provide full details as to court, date, and circumstances.

No.

67. During the last ten years, have you unlawfully used controlled substances, narcotic drugs, or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal or State law provisions.)

No.

68. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned, or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs, or illegal drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

69. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal, and the reason why you refused to submit to such a test.

No.

70. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No.

SUPPLEMENTAL INFORMATION

71. Describe any additional education or experiences you have which could assist you in holding judicial office.

I completed a master's degree in Legal Studies in 2022. Some have argued that the coursework and degree were unnecessary because I have a law degree already. I disagree. More education cannot be a bad thing. The program was broader than a law school program in some respects and narrower in other respects. For example, in one course I looked at the philosophical and moral underpinnings of American crime and punishment. A classic law school class in criminal law does not allow much time for study of those broader issues. The program was narrower in that it allowed for focused study in specific areas of law that were covered only generally in law school. I focused more on Constitutional issues than any others. I spent an entire semester studying the history and development of the Second Amendment and the regulation of firearms in the United States. I spent another semester studying only the searches and seizures, due process, and equal protection clauses of the 4th, 5th, and 14th Amendments. These may not be practical issues facing judges daily but they provide a large part of the Constitutional framework for our system of justice, especially criminal justice. I believe the program was valuable even though I had a law degree before I started it.

My career has been in civil litigation. I have handled hundreds of civil cases and thousands of potential civil cases over the course of my career. I understand the practical nuances of civil case management, including in the most complex of cases. The learning

curve is steep and long in civil litigation, but with my experience in the field, I could manage a civil docket and preside over civil jury trials immediately.

- 72.** Explain the particular contribution you believe your selection would bring to this position and provide any additional information you feel would be helpful to the Commission and Governor in evaluating your application.

I would continue a long tradition of faithful allegiance to the rule of law. I respect and value the separation of powers. I believe our Constitutional design strictly forbids judges from imposing, or even attempting to impose, their own public policy whims. A good judge is faithful to that Constitutional design; they apply the law as it is written by the policy-making branches of government. I will work hard to make sure I am always that kind of judge.

I am mature enough to understand that being a judge is not just a weekday job. It is a position of great trust and great responsibility within the community. A good judge must be thorough, decisive, firm, and fair. If selected, I would offer every one of those qualities, and would work very hard to prove worthy of the trust and responsibility placed in me.

I value the contributions of our military and law enforcement in keeping our country and our community safe. My biggest regret in life is that I have never served in the military like my father, brothers, and now, my daughter, have served. I was not accepted into the Naval Academy when I applied as a senior in high school. After that, my education and career took me down a civilian path, but I have never lost the desire to serve my country and my community in some way. I view a judgeship as an opportunity for me to serve.

REFERENCES

- 73.** List the names, addresses, e-mail addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for a judicial position and of whom inquiry may be made by the Commission and the Governor.

Robert Guy
332 Talwood Trace
Saint Johns, FL 32259
(904) 778-6058
hiteguy77@yahoo.com

Edward McCarthy, III, Esq.
Rogers Towers, P.A.
1301 Riverplace Blvd., Ste. 1500
Jacksonville, FL 32207-1811
(904) 398-3911
emccarthy@rtlaw.com

Robert Spohrer, Esq.
Spohrer & Dodd, PL
76 S. Laura St., Ste. 1701
Jacksonville, FL 32202
(904) 309-6500
rspohrer@sdlitigation.com

Davis C. Love, Esq.
Childs, Hester & Love, PA
6022 San Jose Blvd., Floor 2
Jacksonville, FL 32217
(904) 396-3007
dlove@childslegalgroup.com

Honorable Howard Maltz
4010 Lewis Speedway, Room 365
St. Augustine, FL 32084
(904) 827-5600
smiller@circuit7.org

Barry Newman, Esq.
Newman Legal Group, P.A.
4004 Atlantic Blvd.
Jacksonville, FL 32207-2037
(904) 355-6000
barry@legaljax.com

Kelly G. Hamer, Esq.
DGH Legal, PLLC
1333 SE 25th Loop, Ste. 101
Ocala, FL 34471-1071
hamer@dghlegal.com

Mark Vandelloo
Casa Marina Hotel and Restaurant
691 1st Street North
Jacksonville Beach, FL 32250
(904) 505-4177
mvandelloo@casamarinahotel.com

F. Duke Regan, Esq.
Pajcic & Pajcic
1 Independent Dr., Ste. 1900
Jacksonville, FL 32202
(904) 257-8579
duke@pajcic.com

Terrence M. White, Esq.
UWWM Mediation Group
1400 Hand Ave., Ste. D
Ormond Beach, FL 32174
(386) 253-1560
twhite@uww-adr.com

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(1), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 20th day of June, 2025.

Galen D. Bauer
Printed Name

[Signature]
Signature

State of Florida
County of Duval

Sworn to (or affirmed) and subscribed before me by means of physical presence OR online notarization this 20th day of June, 2025,

By Galen Bauer

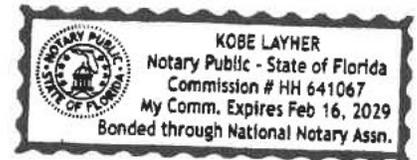
Personally known

Produced ID

Type of Identification _____

[Signature]
Signature Notary Public

Kobe Layher
Printed name of Notary Public



(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.

FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: \$168,750; Salary of \$150,000 plus bonuses
Last Three Years: 2024: \$373,424
2023: \$440,651
2022: \$263,218

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: \$168,750; Salary of \$150,000 plus bonuses
Last Three Years: 2024: \$373,424
2023: \$440,651
2022: \$263,218

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current Year-To-Date: \$4,478
Last Three Years: 2024: \$6,862
2023: \$901
2022: \$2,608

This income is mostly interest earnings from savings accounts. In 2022, \$2,500 was an academic prize from Harvard University.

4. State the amount you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current Year-To-Date: \$4,478
Last Three Years: 2024: \$6,862
2023: \$901
2022: \$2,608

This income is mostly interest earnings from savings accounts. In 2022, \$2,500 was an academic prize from Harvard University.

5. State the amount of net income you have earned or losses incurred (after deducting

expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current Year-To-Date: \$4,478
Last Three Years: 2024: \$6,862
2023: \$901
2022: \$2,608

This income is mostly interest earnings from savings accounts. In 2022, \$2,500 was an academic prize from Harvard University.

FORM 6
FULL AND PUBLIC
DISCLOSURE OF
FINANCIAL INTEREST

PART A – NET WORTH

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of June 22, 2025 was \$1,404,298.

PART B - ASSETS

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds \$1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is \$ 150,000

ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:

| DESCRIPTION OF ASSET (specific description is required – see instructions p. 3) | VALUE OF ASSET |
|---|----------------|
| 401k Plan (John Hancock) | \$867,348 |
| IRA Accounts (Northwestern Mutual) | \$52,879 |
| Health Savings Account (Synovus Bank) | \$5,385 |
| Credit Union Accounts (Vystar Credit Union) | \$2,036 |
| Credit Union Accounts (Community First Credit Union of Florida) | \$31,784 |
| Bank Accounts (Chase Bank) | \$20,373 |
| Bank Account (American Express National Bank) | \$39,448 |
| Bank Account (Everbank) | \$13,228 |
| Investment Account (Robinhood) | \$1,981 |
| Real Property ([REDACTED] , Ponte Vedra, FL 32081) | \$773,000 |

PART C - LIABILITIES

LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):

| NAME AND ADDRESS OF CREDITOR | AMOUNT OF LIABILITY |
|-------------------------------------|---------------------|
| Car Loan (Ford Motor Company) | \$40,814 |
| Student Loan (Sloan Servicing) | \$10,043 |
| Home Mortgage (Vystar Credit Union) | \$500,000 |

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

| NAME AND ADDRESS OF CREDITOR | AMOUNT OF LIABILITY |
|------------------------------|---------------------|
| Not applicable | |
| | |

PART D - INCOME

You may **EITHER** (1) file a complete copy of your latest federal income tax return, including all W2's, schedules, and attachments, **OR** (2) file a sworn statement identifying each separate source and amount of income which exceeds \$1,000 including secondary sources of income, by completing the remainder of Part D, below.

I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.
 (if you check this box and attach a copy of your latest tax return, you need not complete the remainder of Part D.)

PRIMARY SOURCE OF INCOME (See instructions on page 5):

| NAME OF SOURCE OF INCOME EXCEEDING \$1,000 | ADDRESS OF SOURCE OF INCOME | AMOUNT |
|--|--|-----------|
| Spohrer & Dodd, PL | 76 S. Laura St., Ste. 1701, Jacksonville, FL 32202 | \$369,562 |
| Everbank | P.O. Box 44060, Jacksonville, FL 32231 | \$1,468 |
| American Express National Bank | P.O. Box 30384, Salt Lake City, UT 84130 | \$5,034 |
| | | |

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

| NAME OF BUSINESS ENTITY | NAME OF MAJOR SOURCES OF BUSINESS' INCOME | ADDRESS OF SOURCE | PRINCIPAL BUSINESS ACTIVITY OF SOURCE |
|-------------------------|---|-------------------|---------------------------------------|
| Not applicable | | | |
| | | | |
| | | | |

PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]

| | BUSINESS ENTITY #1 | BUSINESS ENTITY #2 | BUSINESS ENTITY #3 |
|---|--------------------|--------------------|--------------------------|
| NAME OF BUSINESS ENTITY | Not applicable | | |
| ADDRESS OF BUSINESS ENTITY | | | |
| PRINCIPAL BUSINESS ACTIVITY | | | |
| POSITION HELD WITH ENTITY | | | |
| I OWN MORE THAN A 5% INTEREST IN THE BUSINESS | | | |
| NATURE OF MY OWNERSHIP INTEREST | | | <input type="checkbox"/> |

IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE

OATH

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

[Handwritten Signature]

SIGNATURE

STATE OF FLORIDA

COUNTY OF Duval

Sworn to (or affirmed) and subscribed before me this 22nd day of June, 20 25 by Galen Bauer

[Handwritten Signature]

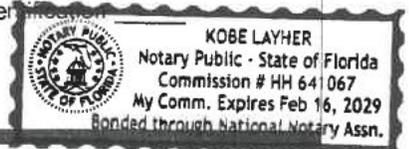
(Signature of Notary Public—State of Florida)

Kobe Layher

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

Type of Identification Produced _____



JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: June 22, 2025

JNC Submitting To: Seventh Judicial Circuit

Name (please print): Galen D. Bauer

Current Occupation: Attorney

Telephone Number: 904-838-1610

Attorney No.: 0014156

Gender (check one): Male Female

Ethnic Origin (check one): White, non-Hispanic

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: St. Johns

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR
FDLE TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Galen D. Bauer

Printed Name of Applicant

Signature of Applicant

Date:

June 22, 2025



Attachment A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHRISTINE PHILLIPS,

Plaintiff,

CASE NO.: 8:21-CV-000876-JSM-CPT

v.

BRITISH AIRWAYS, PLC,

Defendant.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

The Court should deny Defendant's motion for summary judgment because the undisputed, material facts¹ establish: 1) the Montreal Convention provides a strict liability, rather than a fault-based, method of compensation; 2) an "accident" that triggers strict liability under the Montreal Convention is an unusual and unexpected *event*, not an unusual or unexpected *condition*, *object*, or *cause*; and 3) the event at issue was not an internal reaction of the Plaintiff, Mrs. Phillips.

¹ Mrs. Phillips does not dispute Defendant's statements of fact contained in Defendant's Statement of Undisputed Material Facts (Doc. 34). However, additional, undisputed facts that are not provided in Defendant's statement but are relevant to the cross-motions for summary judgment are contained in Plaintiff's Statement of Undisputed Material Facts (Doc. 38).

The Montreal Convention imposes a strict liability scheme in which concepts of fault are relevant only to the measure of damages.

An “accident” occurs when there is an unusual or unexpected event, external to the passenger. *Saks*, 470 U.S. at 407. Therefore, a negligence analysis plays no role in the threshold determination that an accident happened. The only determination the Court must make is whether Mrs. Phillips’ injury occurred from an unusual or unexpected event, external to her, or whether, instead, her leg was broken from some internal reaction.

The issue of due care, and the facts that inform a due care analysis, are not relevant to the threshold issue of whether Defendant is strictly liable under the Montreal Convention because Mrs. Phillips’ injury was the result of an accident. *See Air France v. Saks*, 470 U.S. 392, 407 (1985) (noting that “accident” determination “involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury.”). *See also Campbell v. Air Jamaica, Ltd.*, 760 F.3d 1165, 1172 (11th Cir. 2014); *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997).

Concepts of fault do not appear in the plain language of Article 17 of the Montreal Convention. Instead, the plain language of Article 17(1) provides that an airline “is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or

injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” That language makes no mention of negligence or fault. The treaty does not require a dangerous condition or abnormal operation of an aircraft before liability is imposed on an airline. Instead, concepts of fault are relevant only to defenses an airline might raise to limit its liability, as allowed by Article 21 of the Convention.

Defendant’s factual allegations, when taken as a whole, suggest that Mrs. Phillips’ injury was due to her own negligence. Those allegations relate to an affirmative defense that serves only to limit Defendant’s liability under the Montreal Convention, not to eliminate it altogether. *See Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1367 (S.D. Fla. 2008). Such allegations are not relevant to the Court’s determination of whether an accident caused Mrs. Phillips’ injuries. *Saks*, 470 U.S. at 407. They are relevant only to whether Defendant is entitled to limit its liability to the cap on strict liability damages found in Article 21. *Id.*; *Ugaz*, 576 F. Supp. 2d at 1367. The Court should not consider fault-based factual assertions to decide the pending, cross-motions for summary judgment on the issue of whether there was an “accident” for purposes of strict liability.²

² To the extent the Court disagrees and might be inclined to consider those factual assertions, the Court cannot make the inferences Defendant suggests. Factual inferences must be construed against Defendant for purposes of its cross-motion for partial summary judgment. *See Kragor v.*

An accident is an unusual or unexpected event, not an unusual or unexpected condition, object, or cause.

In its motion, Defendant strains to change the definition of “accident” from an unexpected or unusual event to an unexpected or unusual condition, object, or cause. Defendant discusses debris on the stairs, general inspection and state of repair of the stairs, and the lack of some dangerous condition that might be a contributing cause of a fall. But those arguments are merely distractions from the critical question of whether there was an unusual or unexpected event.

Here, the relevant event is that Mrs. Phillips’ shoe lodged into the airstairs and tripped her down the stairs. The Eleventh Circuit instructs that we define “the relevant event by asking what precise event or events allegedly caused the damage sustained by the plaintiff.” *Krys*, 119 F.3d at 1521 & n. 10. Defendant urges the Court to focus on the condition of the staircase itself. However, a condition or an object is not an event. An “event” is “something that happens.” Webster’s Third New International Dictionary, Merriam-Webster, (1986). As applied to this case, if it was the object (the airstairs) that was the sole cause of Mrs. Phillips’ injury, then every passenger who used those stairs also would have been injured. Plaintiff was the only person on the flight

Takeda Pharms. Am., Inc., 702 F.3d 1304, 1307 (11th Cir. 2012).

who was injured while disembarking those stairs. So, there must have been some other cause contributing to Mrs. Phillips' injury apart from the mere existence of the airstairs. As the Eleventh Circuit instructs, then, this Court should ask "what precise event or events allegedly caused the damage sustained by the plaintiff." The answer is not the mere existence of the airstairs. The answer is slightly more precise. Here, the event that caused the damage sustained by Plaintiff was the happening of her shoe becoming lodged into the airstairs and tripping her down the stairs. That event caused the damage she sustained. Plaintiff proved an "accident" in her motion for partial summary judgment because she proved that at least one cause of her injury in the chain of causes was an unexpected or unusual event external to her. *Saks*, 470 U.S. at 406 (concluding, "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger.").

Defendant wrongly urges the Court to focus its "event" inquiry on an object – the airstairs. It submits photographs of a small part of the airstairs. It protests that there is no allegation of water or debris on the stairs. But airstairs, water, and debris are all objects, not events. In cases that discuss the condition of airstairs or the presence of water or debris on airstairs, the relevant event is the slip or trip and fall that led to injury. Without the event of the slip or trip and fall, there would be no unusual or unexpected event and,

therefore, no accident. Here, when determining whether an unexpected or unusual event occurred, the relevant event on which the Court should focus is the fact that Mrs. Phillips' shoe became lodged as she was walking down the airstairs, which led to her tripping, falling, and breaking her leg. That is the happening here, not the condition or existence of the airstairs. Any reasonable person³ experiencing or witnessing such an event would call it unexpected, unusual, and an accident. As explained below, courts interpreting the Montreal Convention agree.

The inquiry here is whether there was an “accident” in accordance with the Montreal Convention, not whether there was an “occurrence.”

When interpreting the Montreal Convention, the Supreme Court crafted its definition of “accident” to avoid the accident versus occurrence debate. The Court made clear that it did not want to impose upon lower courts the burden of engaging in an analysis of accident versus occurrence in every Montreal Convention case. *Saks*, 470 U.S. at 406 (referring to the analysis as a “Serbonian bog”). Therefore, this Court need not engage in that type of

³ Defendant relies on cases from outside the Eleventh Circuit to argue that an objective standard applies to whether a given event is considered unexpected or unusual. The Eleventh Circuit applies a subjective standard. *See Campbell*, 760 F.3d at 1172 (describing relevant inquiry as “whether or not the event itself, *as experienced by the passenger*, was unexpected.”) (emphasis added). Here, though, the Court need not decide which standard applies because the event was unexpected from both a subjective and an objective point of view.

analysis here. The Supreme Court did that work already. It provided a clear definition of “accident” as that word is used in the Montreal Convention. Any discussion of “occurrence” misses the mark. If a passenger is injured as a result of some unexpected or unusual event external to the passenger, then there has been an “accident.”

An unexpected and unusual event caused Mrs. Phillips’ injury. Neither Plaintiff nor any reasonable person would expect the heel of their shoe to lodge into a mobile staircase while disembarking an aircraft. Neither Plaintiff nor any reasonable person would expect their heel to lodge so firmly that it is ripped away from the remainder of their shoe. Neither Plaintiff nor any reasonable person would expect to be tripped and fall down stairs. Therefore, the event causing Mrs. Phillips to break her leg was an unexpected and unusual event.

Flipping the argument to its converse, it is neither expected nor usual for a passenger’s shoe to lodge into a stair, for passengers to trip on stairs, or for passengers to fall down mobile staircases. Any reasonable person expects their foot and footwear to lift without resistance when they attempt to take their next step down a flight of stairs. Defendant’s motion seemingly concedes this when it points out that Mrs. Phillips was the only passenger injured while disembarking via the airstairs. It is expected and usual for passengers to proceed safely down airstairs without having their shoes lodge into the stairs.

Therefore, the circumstances causing Mrs. Phillips' injury were both unexpected and unusual.

The event was external to Mrs. Phillips.

The event of Mrs. Phillips' shoe lodging into the staircase and Mrs. Phillips then tripping and falling was external to her. The *Sensat*, *Gezzi*, *McCarthy*, and *Ugaz* cases demonstrate the principle of external events causing injury. *Sensat v. Southwest Airlines Co.*, 363 F. Supp. 3d 815 (E.D. Mich. 2019); *Gezzi v. British Airways, PLC*, 991 F.2d 603 (9th Cir. 1993); *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354 (S.D. Fla. 2008); *McCarthy v. Am. Airlines, Inc.*, 2008 U.S. Dist. LEXIS 49389 (S.D. Fla. June 27, 2008). *Sensat*, *Gezzi*, and *McCarthy* all concluded that external events or forces caused or contributed to the plaintiffs' injuries. *Ugaz* concluded the opposite.

The facts of this case are similar to those presented in *Sensat*, where the court concluded that a passenger's foot becoming caught in airstairs was external to the passenger. Like the Defendant here, the defendant in *Sensat* sought summary judgment and, in support, argued that the passenger's injury was caused by his own, internal reaction to a normal condition of airstairs. *Sensat*, 363 F. Supp. 3d at 819. The court rejected that argument and concluded that "[t]he gap in the airstairs certainly was 'external' to the plaintiff. . ." *Id.* at 821. Just as the gap in the airstairs was external to the plaintiff in *Sensat*, the fact that Mrs. Phillips' heel on her shoe lodged into the

stairs in this event certainly was external to her. Like the instant case, *Sensat* did not involve any allegation that the airstairs were contaminated by foreign debris or water, which could have contributed to the plaintiff's injury. Instead, like this case, *Sensat* alleged only that his foot was lodged or caught in a gap in the airstairs – a gap that apparently appeared in the normal operation and use of those airstairs.⁴ The gap in *Sensat*, like the gap or other condition that caused Mrs. Phillips' shoe to lodge here, was external to Plaintiff.

The tripping event in this case also is like the external events in the *Gezzi* and *McCarthy* cases. *Gezzi* involved a passenger who fell on a wet step after his request for wheelchair service to the aircraft could not be entirely fulfilled. *Gezzi* at 604. The district court concluded, and the appellate court affirmed, that an “accident” occurred because the passenger fell on a wet step. The appellate court did not reach the issue of whether the airline's inability to fulfill the passenger's request for wheelchair access would, on its own, constitute an accident. *Id.* at 605. *McCarthy* explained that the Eleventh Circuit has cited to *Gezzi*, “likely indicating agreement with [Gezzi's] reasoning and analysis. *McCarthy*, 2008 U.S. Dist. LEXIS 49389, at *16. *McCarthy* concluded that two events were external to the passenger there. First, after

⁴ The *Sensat* Court did not focus on negligence issues because it recognized that its analysis was confined to the strict liability issue of whether an accident caused the plaintiff's injury.

boarding, a passenger was directed to remove his bag from the aircraft and check it plane-side. *Id.* at *2. Second, while standing on board the aircraft near a door, the passenger was touched by a flight attendant, lost his balance, and fell or jumped out of the aircraft. *Id.* The court deemed both factors external to the passenger and concluded that they would constitute an accident under the Montreal Convention.⁵ *Id.* at *15. Here, just like in *Gezzi* and *McCarthy*, an unexpected, outside force acted on the Plaintiff when her shoe became lodged into the airstairs. Something held onto her heel so firmly that it pulled the sole of the heel away from the rest of her shoe, interrupted her normal gait so much that it caused her to fall down the stairs, and caused her to break her leg when she landed on the concrete tarmac. Her injury did not result from some internal, physiologic reaction due to normal operation of a flight.

Just like the courts did in *Gezzi* and *McCarthy*, this Court should conclude that Plaintiff was injured by an external event, to wit, her shoe lodging into the airstairs and causing fall down the stairs.

The *Ugaz* opinion explained why the circumstances there were distinct from those presented here. There, no outside force contributed to the plaintiff's

⁵ Defendant reads *McCarthy* to say that the only unexpected, external factor was the touching of the passenger by the flight attendant. However, the court clearly expressed that a combination of factors, only one of which was the touching, were external factors that contributed to the passenger's injury.

fall and injury. *Ugaz*, 576 F. Supp. 2d at 1366. The plaintiff did not allege that her foot or shoe became lodged or caught in any way. Instead, she fell on an inoperable escalator when she tried to lift a bag. *Id.* at 1359. The court concluded there was no evidence presented to prove that an inoperable escalator constituted an unusual or unexpected event. However, the court's reasoning did not focus on the escalator as the "event" in question. The court reasoned that the plaintiff fell because of "her own decision to climb an acknowledged inoperable escalator" rather than because of any "direct outside influence." *Id.* at 1366. There could be no event external to the plaintiff since there was no allegation that any external force caused or contributed to her fall. With no external event, there could be no accident under the Montreal Convention. The *Ugaz* opinion distinguished *Gezzi* and *McCarthy* on that basis. The court wrote, "In *Gezzi* and *McCarthy*, both of which deal with stairs, an outside force at least allegedly caused the Plaintiff's respective falls." *Id.* *Ugaz* is different from the instant case for the same reason it is different from *Gezzi* and *McCarthy*. Unlike *Ugaz*, the instant case involves an external event that resulted in the fall.

The cases Defendant cites regarding internal, physiologic events like heart attacks have no application here. The cases that have found internal events are those where the passenger suffered from some pre-existing condition that caused them to suffer a physiologic event unrelated to trauma

from an external source. For example, the seminal case of *Air France v. Saks*, 470 U.S. 392 (1985) involved hearing loss of a passenger due to the normal operation of an aircraft's pressurization system. No unexpected event external to her caused her hearing loss. Cases involving heart attacks and the development of deep vein thrombosis similarly have been held the result of internal reactions of passengers rather than the result of external events. *See, e.g., Rajcooar v. Air India, Ltd.*, 89 F. Supp. 2d 324 (E.D.N.Y. 2000) (concluding passenger's heart attack was internal to the passenger); *Rodriguez v. Ansett Austl., Ltd.*, 383 F.3d 914 (9th Cir. 2004) (concluding passenger's development of deep vein thrombosis was internal reaction).

Traumatically induced injuries, like the broken leg that resulted from Mrs. Phillips' fall in this case, are very different from the physiologic reactions. Here, Plaintiff did not suffer from any internal, physiologic reaction such as a heart attack, hearing loss, or deep vein thrombosis. Instead, an external force tripped her and another external force fractured her leg. Mrs. Phillips' injuries in this event were caused by events external to her and not by internal, physiologic reactions. Therefore, the events causing injuries here are different from those discussed in the internal event line of cases.

Plaintiff is not required to prove any malfunction or abnormality in the operation of an aircraft to establish an "accident" occurred.

Neither the Supreme Court nor the Eleventh Circuit has ever required

a passenger to prove that their injury resulted from some malfunction or abnormality in the operation of an aircraft. The authority on which Defendant relies for that proposition, namely the trial court's decision in *Moore v. British Airways, PLC*, 2020 U.S. Dist. LEXIS 242630 (D. Mass. Dec. 28, 2020), was recently overturned on appeal. *See Moore v. British Airways, PLC*, ___ F. 4th ___, 2022 U.S. App. LEXIS 11692 (1st Cir. Apr. 29, 2022). In its appellate opinion, the First Circuit explicitly rejected the trial court's reading of a prior opinion of the First Circuit, saying, "The Court below read [dicta] as if it imposed an 'additional' test beyond the *Saks* formulation. We reject this reading and disavow any intention of altering the *Saks* formulation." *Moore*, 2022 U.S. App. LEXIS 11692, *10 & fn. 3 (internal citations omitted). Defendant's motion urges this Court to create the very same requirements that the trial court in *Moore* created. Those requirements have now been rejected as inconsistent with the definition of "accident" provided by the Supreme Court in *Saks*. Accordingly, this Court should decline the invitation to add additional terms to the meaning of "accident."

The reasoning of the trial court's decision in *Moore* has been criticized by other courts for judicially fabricating requirements above and beyond what the Montreal Convention, Supreme Court, and Eleventh Circuit require. *See, e.g., Arellano v. American Airlines, Inc.*, 69 F. Supp. 3d 1345, 1348 (S.D. Fla. 2014). *Arellano* was decided before *Moore*, but *Arellano* explained why the cases on

which *Moore* relied are unpersuasive and inapplicable in the Eleventh Circuit. *Id.* Defendant relies on *Moore* only to urge this Court to graft an additional element – some inappropriate or unintended happenstance in the operation of the aircraft or airline – onto the Supreme Court’s definition of “accident.” This Court should decline that invitation as the court did in *Arellano*. Instead, this Court should follow the definition of accident from the Supreme Court in *Saks* and from Eleventh Circuit in *Campbell*, and should refuse to create an additional element of an accident claim under the Montreal Convention.

Conclusion

In conclusion, the Court should deny Defendant’s motion because the undisputed, material facts establish that an accident – an unexpected or unusual event, external to her – caused or contributed to Mrs. Phillips’ injuries. According to binding precedent from both the Supreme Court and Eleventh Circuit, the proper inquiry here is the event of a shoe lodging into airstairs and causing or contributing to a fall and a broken leg, not on the mere existence of an object such as airstairs or on the condition of those airstairs. Under these circumstances, the Montreal Convention imposes strict liability on Defendant, at least up to the cap on strict liability type damages as established by Article 21 of the Convention. Considerations of fault are relevant only to limitations on the measure of damages. For these reasons, the Court should deny Defendant’s motion for summary judgment, grant Plaintiff’s motion for partial

summary judgment, and limit the trial of this cause to Defendant's due care affirmative defenses and Mrs. Phillips' damages.

Respectfully submitted this 4th day of May, 2022.

SPOHRER & DODD, P.L.

/s/ Galen D. Bauer

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed with the CM/ECF system for the United States District Court, Middle District of Florida, which system will serve copies on counsel for all parties.

/s/ Galen D. Bauer

Galen D. Bauer, Esquire

Attachment B

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 2018-CA-3281

DIVISION: CV-H

JILL MAXWELL and JODY

MAXWELL,

Plaintiffs,

v.

ALCON RESEARCH, LLC,

Defendants,

_____ /

**PLAINTIFFS' RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The Court should deny Defendant's motion for summary judgment. Defendant manufactured a product that failed to conform to the mandatory specifications for manufacture. FDA preemption does not extend to manufacturing defect claims; it extends only to design defect claims. Plaintiffs are pursuing a manufacturing defect claim here – not a design defect claim – so their claim is not preempted. Regarding the failure to warn claim, Plaintiffs' claim is based on a post-sale failure to warn. Only pre-sale failure to warn claims are preempted. Design defect claims and pre-sale failure to warn claims are preempted because product designs and warnings are reviewed for safety and adequacy by the FDA. Once the FDA approves, state tort

claims challenging the very same issues already reviewed and approved by the FDA are preempted. However, the FDA never approves a manufacturer to make products with manufacturing defects, as happened here. Manufacturers are required to make products that adhere to the approved specifications. Post-sale warnings also are not part of the FDA review and approval process that gives rise to preemption of pre-sale warnings claims. For this reason, post-sale warnings claims are not preempted.

The evidence adduced during discovery shows that Defendant did, in fact, manufacture a product with a manufacturing defect. That product, known as the UltraSert, malfunctioned during Plaintiff Jill Maxwell's surgery and injured her. Both circumstantial evidence and direct evidence prove that the UltraSert was defectively manufactured. A timeline of manufacturing issues, UltraSert recalls, Defendant's product defect investigation, and changes made to its manufacturing process, show that the specific UltraSert used in Jill Maxwell's surgery was manufactured at the same manufacturing facility, using the same manufacturing process, by the same people, as other UltraSerts that Defendant has admitted were defectively manufactured. Moreover, the specific UltraSert under scrutiny here was manufactured after other UltraSerts containing manufacturing defects but before Defendant discovered the flaws in its manufacturing process and corrected those flaws. Therefore, it is more likely that the specific UltraSert used on Jill Maxwell contained the same defect as other UltraSerts made at the same place, by the same people, using the same processes, around the same time as other, known defective UltraSerts.

Direct evidence also establishes that the UltraSert was defectively manufactured. Jill Maxwell's surgeon, Darby Miller, MD, testified at length about how the UltraSert malfunctioned while he was using it as he had always done with other UltraSerts before. He immediately knew that the UltraSert was defective, reported the defect to Defendant, and informed the Maxwells. Dr. Miller explained how the normal resistance offered by the injector suddenly and unexpectedly gave way, causing an intraocular lens to shoot out and injure Jill Maxwell. Defendant has hired several experts to attack Dr. Miller, but none of them can refute his direct eyewitness testimony that the product malfunctioned under normal use.

As for the post-sale failure to warn claim, the evidence adduced shows that Defendant received many reports from surgeons around the world that UltraSert devices were failing and causing lenses to shoot out and injure patients. Those reports gave Defendant notice of a risk of using its UltraSert and gave rise to a duty on the part of Defendant to warn surgeons of that risk. Defendant failed to warn Mayo Clinic and Dr. Miller. It has admitted it provided no warning whatsoever and, instead, argues that it had no obligation to advise anyone of the dangers it knew about its UltraSert.

For these reasons, the Court should deny the motion for summary judgment and allow this case to be presented to a jury.

I. SUMMARY JUDGMENT STANDARD

Even under Florida's new summary judgment standard, a movant still must show that there is "no genuine dispute as to any material fact and that the movant is

entitled to judgment as a matter of law.” Fla. R. Civ. P. 1.510(a). The new summary judgment rule does not suddenly turn judges into jurors. That new rule preserves the traditional roles of judges and jurors by making clear that disputed issues of material fact must be decided by a jury. The First DCA very recently reaffirmed that, even under the new standard, summary judgment is reversible error where genuine issues of material fact remain. *See Gradia v. Baptist Hosp.*, 2022 Fla. App. LEXIS 5451, Case No. 1D21-1560 (Fla. 1st DCA Aug. 10, 2022) (copy attached as Exhibit 1). Here, genuine issues of material fact remain so the Court must deny the motion for summary judgment and allow a jury to fulfill its role as fact finder.

II. UNDISPUTED FACTS

1. Background facts

- a. Alcon is a medical company specializing in the development and manufacture of eye care products.¹
- b. Alcon is the manufacturer of the UltraSert.
- c. The AcrySof IQ IOL is a lens used for the replacement of the human lens in the eye to achieve visual correction in adult patients following cataract surgery.
- d. The UltraSert is a delivery system used to “deliver” (implant) the IOL.
- e. The UltraSert is preloaded with an IOL and is used during cataract surgery to replace the eye’s natural lens. One component of the device is a plunger, which, when pushed, will cause the IOL to advance through the nozzle and exit the device. Prior to use,

¹ Undisputed facts 1a-d are the same as facts 1-4 in the Statement of Facts in Defendant’s motion for summary judgment.

plunger locks prevent the IOL from being inadvertently dispensed.²

2. Recalls and Safety Notices

- a. Alcon notified the FDA of a voluntary recall of some lots of UltraSerts with an initiation date of July 28, 2016. *See* Exhibit 2, U.S. UltraSert recall event information from FDA.
- b. Alcon's public statement regarding the reason for the Ultrasert recall was, "The UltraSert Delivery System from certain lots have an inferior surface characteristic that could result in the IOL becoming lodged in the Delivery System." *Id.*
- c. In the recall event information, Alcon admitted that it had manufacturing problems with the UltraSert and stated, "[t]he root cause for the insufficient coating on the interior of the nozzle was identified with the nozzle coating process and the manufacturing site has implemented corrective actions to prevent recurrence." *Id.*
- d. Alcon sent out a Field Safety Corrective Action in Denmark, stating, "Alcon has learned that a subset of the UltraSert Delivery Systems from specific manufacturing lots may not have received a complete coating on the interior surface of the delivery system." *See* Exhibit 3, Alcon Field Safety Corrective Action.
- e. In the United Kingdom, on July 29, 2016, Alcon sent a document entitled "Urgent: Field Safety Notice" that stated, "we have determined the UltraSert Delivery Systems from certain lots have an interior surface characteristic that could result in the IOL becoming lodged in the UltraSert Delivery System. . . . [I]f the lens is forced through the nozzle this could result in damage to the lens and/or nozzle, possibly injuring the patient. *See* Exhibit 4, Alcon UK Urgent Field Safety Notice.

² This fact, Fact 1e, is the same as the first three sentences of fact 5 in the Statement of Facts in Defendant's motion for summary judgment. Defendant's version of the facts includes an additional sentence about directions given to the surgeon. However, Plaintiff does not agree with that assertion because it is incomplete in that it omits additional, non-approved directions for use that Alcon gave to Mayo Clinic and Dr. Miller. Further, factual detail on this issue is provided below.

3. Timeline of Manufacture

- a. Alcon has two manufacturing facilities that manufactured UltraSerts during the relevant time period. *See* Exhibit 5, Deposition of Alcon Research Ltd., Inc., taken April 7, 2022, at 11:13-19.
- b. The UltraSert used in Jill Maxwell's surgery was manufactured at Alcon's Huntington, WV facility. *Id.* at 12:14-14:6.
- c. The UltraSerts included in the recalls were manufactured at Alcon's Huntington, West Virginia manufacturing facility. *Id.* at 17:4-16. Those UltraSerts were manufactured in October, 2015. *Id.* at 16:16-17:3.
- d. The UltraSert used in Jill Maxwell's surgery was manufactured on December 17, 2015. *Id.* at 53:17-22.
- e. The same persons who performed the interior coating applications to the UltraSerts in the recalled lots are the same persons who applied the interior coating applications on the UltraSert used in Jill Maxwell's surgery. *Id.* at 32:7-17.
- f. Alcon did not complete its investigation into the reason for the manufacturing defects until sometime after March 7, 2016. *See* Ex. 6, Deposition of Meghan Munson, taken July 7, 2022, at 21:18-22:13.
- g. Based on the findings of its investigation, Alcon did not initiate improvements to its manufacturing processes until August 4, 2016. *See* Ex. 5, Dep. of Alcon Research, at 45:21-47:20.
- h. Based on the foregoing timeline, there is no dispute that the UltraSert used in Jill Maxwell's surgery was made after known problems with Defendant's manufacturing processes and before those problems were identified and corrected.

4. Changing to non-FDA approved directions for use

- a. Alcon's FDA approved directions for use for the UltraSert instruct a surgeon to "gently advance the plunger in one smooth, continuous motion," to cause the IOL to exit the UltraSert injector. DFU at 2, 6-9.

- a. Alcon promulgated non-approved directions for use by directing physicians to follow “an addition to our technique” for using the UltraSert that was not contained with the product’s directions for use that were reviewed and approved by the FDA. *See* Ex. 7, Deposition of Adam Free, taken June 25, 2020, at 22:13-25:13; Ex. 5 to Dep. of Adam Free.
- b. Dr. Miller actually received those new, non-FDA approved directions for using the UltraSert from Alcon’s representative, around September, 1, 2016, which was before Jill Maxwell’s surgery in November, 2016. *See* Ex. 8, Deposition of Darby Miller, MD, taken November 11, 2020, at 63:24-64:8.

5. UltraSert Malfunction

- a. Darby Miller, MD, is a medical doctor employed by Mayo Clinic. Miller Dep. at 7:13-20.
- b. Dr. Miller practices comprehensive ophthalmology, as well as cornea and cataract surgery. *Id.* at 10:2-10.
- c. He performed Jill Maxwell’s surgery on November 3, 2016. *Id.* at 13:7-10.
- d. That surgery was a phacoemulsification cataract extraction with an intraocular (“IOL”) lens implantation in Ms. Maxwell’s left eye. *Id.* at 14:12-24.
- e. Before Ms. Maxwell’s cataract surgery, Dr. Miller had done approximately 1,000 similar lens replacement procedures and had been involved in several thousand as either the primary or assistant surgeon. *Id.* at 17:6-13.
- f. Dr. Miller did approximately fifty of those prior procedures using the same product as the one at issue here, Alcon’s UltraSert injector. *Id.* at 19:4-11.
- g. Nothing about Ms. Maxwell’s presentation caused Dr. Miller to expect that her lens replacement procedure would be any more or less difficult than the thousand other procedures he had done. *Id.* at 16:19-17:5.

- h. Dr. Miller used Alcon's UltraSert injector during his November 3, 2016 surgery on Jill Maxwell. *Id.* at 142:14-143:9.
- i. During the surgery, an intraocular lens shot out of the UltraSert and injured Jill Maxwell's eye by rupturing her posterior capsule. *Id.* at 20:18-25; 23:18-24:15.
- j. Dr. Miller described that during Ms. Maxwell's surgery, the resistance of the UltraSert injector gave way, causing the lens to shoot out of that injector and tear the capsular bag, a structure in Ms. Maxwell's eye. *Id.* at 18:4-22.
- k. He explained that the injector offers a certain amount of resistance in normal use and that, during Ms. Maxwell's surgery, the normal resistance "completely went out . . . similar to your brakes going out in a car." *Id.* at 20:1-7. The resistance that the device was offering his thumb suddenly went to zero. *Id.* at 20:8-14.
- l. Dr. Miller was "shocked" and "couldn't believe what had just happened." *Id.* at 53:16-25.
- m. It was the only time the resistance of the injector gave way, out of the thousands of similar surgeries in which Dr. Miller was involved. *Id.* at 67:16-22. He had never heard of any other, similar professionals having a problem with the UltraSert plunger suddenly giving way and had no reason to suspect that could happen. *Id.* at 71:17-23.
- n. Dr. Miller never discussed that risk with Jill Maxwell as a risk of the procedure because it was not a risk he was even aware of. *Id.* at 163:15-21.
- o. The UltraSert failed to perform as Dr. Miller expected it to perform. After the surgery was over, that same day, Dr. Miller contacted Defendant's sales representative, Jason Thorpe, to make him aware that the UltraSert malfunctioned and to describe to him the nature of the malfunction. *Id.* at 26:13-27:7.
- p. He also spoke to Ms. Maxwell in the postoperative area about the device failure and explained that the resistance of the injector had given way. *Id.* at 28:11-29:18.

- q. Dr. Miller had no doubt in his mind that the UltraSert malfunctioned. *Id.* at 27:14-24. When asked if he believed the UltraSert he used in Jill Maxwell's surgery failed to perform as he expected it would perform, he testified, "Yes, absolutely." *Id.* at 164:6-9.
- r. Mayo Clinic submitted an adverse event report to the FDA, reporting a product defect/malfunction and further explaining, "During an IOL procedure, the resistance of the Alcon AU00TO lens injector gave way causing the IOL to shoot through the posterior capsular bag and cause a tear." See Exhibit 13 to Miller Dep.
- s. Mayo Clinic had all of Alcon's UltraSert devices removed from the hospital's inventory, believing the UltraSert to be a "faulty system." Miller Dep. at 68:23-69:9; 73:14-17.

6. MAUDE Reports

- a. MAUDE is an acronym that stands for Manufacturer and User Facility Device Experience. MAUDE is a government database that houses "medical device reports of suspected device-associated deaths, serious injuries, and malfunctions. See <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm>.
- b. After experiencing the malfunction of the UltraSert during Jill Maxwell's surgery, Dr. Miller went to the FDA's MAUDE database to search for other reports of failures from other surgeons. See Ex. 7, Miller Dep., at 82:10-25.
- c. Dr. Miller found around ten prior, similar incidents when he searched the MAUDE database. *Id.*

7. Failure to Warn

- a. Alcon knew that the UltraSert posed a risk of injury to patients due to the possibility that the UltraSert did not have an adequate interior coating applied during the manufacturing process. See Ex. 2, U.S. Recall Notice.
- b. Alcon initiated the recall on July 28, 2016. *Id.*

- c. On or before July 28, 2016, Alcon knew about the dangers that manufacturing defects in UltraSerts posed to patients. *Id.*
- d. Despite knowing the risk, Alcon never provided any post-sale warning of that risk to Dr. Miller or Mayo Clinic. See Exhibit *See* Alcon Research Ltd, Inc.,s Supplemental Response to Plaintiffs' First and Second Sets of Requests for Production, number 1, attached as Exhibit 9.
- e. Alcon did not provide Mayo Clinic any notification of its recall of UltraSerts. *See* Ex. 5, Dep. of Alcon Research, at 40:14-44:12.
- f. Nor did Alcon notify Mayo Clinic of any problems Alcon had with its manufacturing processes for UltraSerts. *Id.*
- g. Dr. Miller would not have used the UltraSert in Jill Maxwell's surgery if Alcon had informed him of the problems other users had with UltraSerts and the risk the UltraSert posed to his patient. *See* Ex. 8, Miller Dep., at 83:3-8.

III. DEFENDANT'S "STATEMENT OF FACTS" IS MISLEADING BECAUSE IT PRESENTS MANY ISSUES OF FACTS AS IF THEY WERE UNDISPUTED.

Many of the "facts" listed in Defendant's motion are hotly contested issues of fact that can be decided only by the jury. Defendant presents many opinions of its experts as if they are undisputed facts. However, as this Court is aware, a jury is free to weigh the testimony of expert witnesses and even to reject that testimony altogether. *See Wald v. Grainger*, 64 So. 3d 1201, 1205 (Fla. 2011). Indeed, regarding expert witness testimony, Florida Standard Jury Instruction 601.2, Believability of Witnesses, provides, "you may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all other evidence in the case." Plaintiffs do not dispute that the

experts said what they said. But, just because an expert witness expresses an opinion does not render that opinion unimpeachable fact. The opinions of Defendant's experts are fraught with problems so Plaintiffs have filed separate motions challenging the admissibility of many of those opinions. Even the opinions that are admissible are of questionable validity and will be undermined on cross-examination at trial. Therefore, the Court should be cautious when reading Defendant's "Statement of Facts" and not accept those facts as undisputed. The majority of those facts are disputed and should not have been presented as if they are undisputed in a summary judgment motion.

For example, Alcon (mis)represents, "Plaintiff's (sic) only disclosed expert, Dr. Charles Stephen Foster, M.D., opined that Dr. Miller deviated from the acceptable and appropriate standard of care . . ." Motion at 11, para. 44. However, Dr. Foster never gave any such opinion; he never testified in this case or made any other statements under oath. Instead, Defendant gleaned that summary from an expert witness disclosure prepared by Plaintiffs' counsel. An expert witness disclosure is not admissible as expert opinion. Plaintiffs' counsel certainly had no special expertise in ophthalmologic surgery to be able to give admissible expert opinions when drafting an expert witness disclosure. Opinion testimony must meet the safeguards established by Florida Statute Section 90.702 to ensure it is based on sufficient facts or data, the product of reliable principles and methods, and that the witness has applied the principles or methods reliably.

IV. THE MAXWELLS' CLAIMS ARE NOT PREEMPTED.

Defendant previously tried to convince this Court that Plaintiffs claims are preempted and this Court disagreed. The preemption issues were thoroughly briefed, argued, and ruled upon already. The Court determined that Plaintiffs' claims are not preempted. *See*, Order on Motion to Dismiss, attached as Exhibit 10. Defendant's summary judgment does nothing more than repeat the same preemption arguments it made and lost before, in the hope of getting a different result even though the relevant facts and law are the same as before.

The Maxwells' claims do not directly seek to enforce federal regulations. Rather, their claims seek to enforce common law duties, owed under Florida law, that parallel the requirements of federal law. This distinction is subtle but important to determining which claims are preempted and which are not. Florida has long recognized a common law claim where a manufacturing defect in a product causes injury to a consumer of that product. *See, e.g., West v. Caterpillar Tractor Company, Inc.*, 336 So. 2d 80 (Fla 1976). The failure-to-warn type of product liability claim is also well established as a viable, common law cause of action in Florida. *See, e.g., Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989). Because the Maxwells' claims are based on common law causes of action in Florida, and because the duties the Maxwells seek to enforce are consistent with and parallel to the requirements of federal law, their claims are not preempted.

Alcon suggests these claims are preempted merely because it obtained pre-market approval for its product from the FDA. But, merely obtaining pre-market

approval is not enough to establish the affirmative defense¹ of preemption. Instead, to prove a preemption defense, Alcon must establish that it obtained pre-market approval to manufacture the product in accordance with specifications it provided to the FDA, and that it, in fact, manufactured the product in accordance with those approved specifications. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

The concept of FDA preemption gives Defendant no shelter here because Defendant made a product that did not comply with the FDA-approved and required specifications for that product. The concept of FDA preemption does not give a manufacturer immunity when that manufacturer fails to meet the required specifications for a product. Preemption applies only when the product is made in accordance with the design specifications that were reviewed and approved by the FDA. Design defect claims and manufacturing defect claims are treated differently. Design defect claims are preempted. Manufacturing defect claims are not preempted. *Reigel*, 552 U.S. at 330.

a. The Maxwells' claims are not expressly preempted.

i. The Court must presume the Maxwells' claims are not preempted.

When analyzing a preemption issue, the Court must start with a presumption against preemption. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (“Congress does not cavalierly pre-empt state law causes of action. . . . [W]e ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”). *Lohr*, 518 U.S. at 485 (quoting, *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992)).

Therefore, state law product liability claims must be allowed to proceed unless Congress expressed a clear and manifest intent to preempt those claims when passing the Medical Device Amendments (“MDA”) (90 Stat. 539) to the Food, Drug and Cosmetic Act (“FDCA”). The clear and manifest intent of Congress in passing the MDA was to protect consumers by “provid[ing] for the safety and effectiveness of medical devices intended for human use.” *Id.* at 489 (quoting preamble to the MDA, 90 Sta. 539). The Supreme Court has plainly held that FDCA preemption is limited in scope: “The legislative history [] confirms our understanding that § 360(k) simply was not intended to pre-empt most, let alone all, general common-law duties enforced by damages actions.” *Id.* at 491. A broad preemptive scope would undermine the express intent of Congress in passing the MDA.

ii. The U.S. Supreme Court’s decisions in Lohr and Riegel are binding on this Court.

U.S. Supreme Court decisions that construe federal law are binding on this Court. *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007). Decisions of lower federal courts are not binding but are persuasive and usually followed unless those decisions are conflicting. *Id.* The two U.S. Supreme Court decisions in *Medtronic v. Lohr*, 518 U.S. 470 (1996)³ and *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) bind this Court. Both considered whether plaintiffs could pursue state law damages claims against the manufacturer of FDA-approved medical devices.

In *Lohr*, the Supreme Court specifically rejected a defendant manufacturer’s preemption arguments in the context of Florida product liability claims. The state

³ Defendant did not discuss or even cite *Lohr* in the motion for summary judgment.

law claims raised by *Lohr* were similar to the claims raised here. *Lohr*, 518 U.S. at 481 (noting that *Lohr*'s claims included Florida common law claims for strict liability and negligent manufacturing and failure to warn). Here, Alcon's preemption arguments are the same as the defendant's preemption arguments in *Lohr*, because both argued that all common law causes of action are preempted. *Id.* at 487. The Supreme Court held that *Lohr*'s claims were not preempted, and wrote, "[n]othing in § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Lohr*, 518 U.S. at 495. This Court should reject Alcon's preemption arguments here for the same reasons the Supreme Court rejected those same arguments in *Lohr*.

Riegel reaffirmed *Lohr*'s conclusion that state law damages remedies are not preempted so long as the duties owed under state law are premised on a violation of FDA regulations. In *Riegel*, the plaintiff alleged common law claims under New York law and argued the defendant manufacturer could be liable even though it complied with FDA requirements. *Riegel*, 552 U.S. at 320-21, 330. The trial court and Supreme Court concluded the claims were preempted, but only because the plaintiff did not allege parallel claims until after the Supreme Court accepted certiorari. *Id.* at 330. The *Riegel* opinion made clear that the plaintiff's claims would not have been preempted if they had raised those claims as parallel claims at an earlier stage of litigation. *Id.* at 330. The Supreme Court concluded, "§ 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal

requirements.” *Id.* The U.S. Court of Appeals for the Seventh Circuit later summarized the Supreme Court’s mandate in *Riegel*: “The Court gave lower courts clear instructions to allow claims to proceed when they are based on claimed violations of federal law.” *Bausch v. Stryker Corp.*, 630 F.3d 546, 552 (7th Cir. 2010).

While this Court is bound by the Supreme Court’s decisions in *Lohr* and *Riegel*, the Eleventh Circuit’s recent opinions in *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319 (11th Cir. 2017) and *Godelia v. Doe 1*, 881 F.3d 1309 (11th Cir. 2018) are persuasive and instructive. *Mink* and *Godelia* both analyzed FDA preemption. Both opinions thoroughly analyzed the limited scope of that preemption. Like the Maxwells’ claims here, the plaintiff in *Mink* alleged claims for strict liability and negligence arising out of a manufacturing defect. *Mink*, 860 F.3d at 1331. In *Mink*, the defendant argued the claims were preempted by the MDA. *Id.* at 1323. The trial court agreed and dismissed the complaint. The Eleventh Circuit reversed, holding that the plaintiff’s manufacturing defect claims were not preempted because they alleged the manufacturer breached a common law duty that paralleled the requirements of federal law. *Id.* at 1330-31. Defendant did not distinguish, discuss, or even cite either of these cases in its motion.

The Florida preemption cases cited by Alcon were decided before those courts had the benefit of the Eleventh Circuit’s opinions in *Mink* and *Godelia*. Alcon relies on cases decided between 2011 and 2015, which involved allegations different from

those made here.⁴ See, Alcon's Motion to Dismiss, at 16; *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1301-02 (11th Cir. 2011) (plaintiff did not plead parallel claim); *Leroy v. Medtronic, Inc.*, 2015 WL 4600880, at *8 (N.D. Fla. Jul 29, 2015) (*pro se* plaintiff failed to identify any specific federal requirements that formed the basis for parallel claims); *Brown v. DePuy Orthopaedics, Inc.*, 978 F. Supp. 2d 1266 (M.D. Fla. 2013) (concluding plaintiff did not properly state parallel claims and denying leave to amend since court-imposed deadline for amending pleadings had passed); *McClelland v. Medtronic, Inc.*, 944 F. Supp. 2d 1193, 1196 (M.D. Fla. 2013) (plaintiff alleged defendant failed to warn the FDA of product defects); *McClelland v. Medtronic*, 2012 WL 5077401 (M.D. Fla. Sept. 27, 2012) (same case as prior citation).

Mink and *Godelia* were not decided until 2017 and 2018, respectively. The cases decided before *Mink* and *Godelia* should not persuade this Court to dismiss Plaintiffs' claims when the more recent opinions of the Eleventh Circuit dictate a different result. Moreover, the *Wolicki-Gables* case, upon which Alcon relies, involved allegations different from those made by the Maxwells here. The plaintiff in *Wolicki-Gables* made no attempt to identify any specific failure to comply with FDA regulations, or to otherwise plead parallel claims. *Id.* at 1301-02. Their claims were dismissed for that reason. *Id.* Here, the Maxwells have clearly made parallel claims. See, e.g., Second Amended Complaint, ¶ 13 ("Plaintiffs' manufacturing defect claim is based on state requirements that are parallel to the requirements of federal law for

⁴ Unlike the cases catalogued in Alcon's motion to dismiss, the Maxwells here allege parallel claims, none of which are based on Alcon's failure to warn the FDA.

the Ultrasert . . .”), ¶ 36 (“Alcon Research had a Florida common law duty to comply with FDA regulations in its manufacture of the Ultrasert.”), ¶ 41 (“the Florida common law duties of care owed by Alcon Research parallel the requirements imposed on Alcon Research by federal law.”), and ¶ 53 (“These duties owed by Alcon, under Florida law, are parallel to the duties owed by Alcon under federal law.”). For this reason, the Court here should acknowledge that Plaintiffs’ claims are parallel claims that arise under state law and parallel the requirements of federal law. Therefore, the claims are not preempted and the Court should deny Alcon’s motion for summary judgment.

iii. Alcon overstates the scope of preemption.

Alcon overstates the scope of preemption⁵ in an effort to secure total immunity for itself. It suggests that any claims involving a FDA-premarket approved Class III medical device are automatically preempted. Motion at 20. That is a plainly wrong legal proposition that would lead this Court to commit clear, legal error. In the *Lohr* case, Medtronic argued just as Alcon does here: that Congress intended to completely preempt state law causes of action relating to products that have received premarket approval from the FDA. The Supreme Court called that argument “unpersuasive” and “implausible.” *Lohr*, 518 U.S. at 487. The Court explained the obvious irony of the

⁵ There can be little doubt that Congress intended to preempt some state law claims. For example, a state law negligent design claim would challenge design specifications which were reviewed and approved by the FDA. The FDA does not approve design specifications until it has weighed the risks versus effectiveness of a new product. *See Riegel*, 552 U.S. at 318. Preemption exists to prevent a manufacturer from being liable under state law for a design defect even though it made the product exactly in accordance with the design specifications required by the FDA. *See Mink*, 860 F.3d at 1326.

argument, especially considering the explicit intent of Congress to protect consumers when passing the FDCA: “Under Medtronic’s view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device.” *Id.* The Court continued, “Medtronic’s construction of § 360k would therefore have the perverse effect of granting complete immunity . . . to an entire industry that, in the judgment of Congress, needed more stringent regulation in order ‘to provide for the safety and effectiveness of medical devices intended for human use.’” *Id.*

The medical device amendments were not intended by Congress to grant medical device manufacturers complete immunity from state law damages claims. *Bausch*, 630 F.3d at 552 (“The Supreme Court thus has made clear that section 360k protects a medical device manufacturer from liability to the extent that it has *complied* with federal law, but it does not extend protection from liability where the claim is based on a *violation* of federal law.”) (emphasis in original). In *Bausch*, the U.S. Court of Appeals for the Seventh Circuit considered whether Illinois strict liability and negligence claims could proceed against the manufacturer of an FDA-approved, Class III medical device. *Id.* at 549. It reversed the trial court’s grant of dismissal based on preemption. *Id.* The Court noted that the FDCA was enacted to protect human life and safety, and wrote, “The idea that Congress would have granted civil immunity to medical device manufacturers for their violations of federal law that hurt patients is, to say the least, counter-intuitive.” The Seventh Circuit

held that state common law claims may be premised on a state law duty informed by federal regulations. *Id.* at 553. The Court concluded:

medical device manufacturers who subject their class III devices to the rigorous [premarket approval] process are protected by federal law from civil liability so long as they *comply* with federal law. That protection does not apply where the patient can prove that she was hurt by the manufacturer's *violation* of federal law.

Id. (italics in original, bold added). Here, the Maxwells allege that Alcon's liability arises not out of compliance with FDA regulations, but rather, out of its violation of those regulations and the parallel duty of care under Florida law. Like the Seventh Circuit, this Court should conclude that the Maxwells' claims are not preempted.

Alcon's reach for complete preemption completely ignores a whole body of case law, emanating from the U.S. Supreme Court, that describes and defines the concept of a non-preempted parallel claim. *See, e.g., Lohr*, 518 U.S. at 495 ("Nothing in §360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."); *Mink*, 860 F.3d 1319. "[T]he Florida common law duty to use due care in manufacturing is parallel to the federal requirement that a device be manufactured according to federal specifications." *Rowe v. Mentor Worldwide, LLC*, 297 F. Supp. 3d 1288, 1299 (M.D. Fla. 2018), *citing Mink*, 860 F.3d at 1330.

b. The Maxwells' claims are not impliedly preempted.

The Maxwells' claims are not impliedly preempted. The doctrine of implied preemption derives from 21 U.S.C. Section 337(a), which provides that all actions to

enforce violations of the FDCA be maintained in the name of the United States. *Mink*, 860 F.3d at 1327. If a claim is brought for the sole purpose of enforcing violations of FDA regulations, then that claim is impliedly preempted. Claims premised on state common law duties are not the same as claims brought to enforce FDA regulations. *Id.* The negligence and strict liability claims brought by Plaintiffs under Florida law here seek to enforce state law duties of care, not FDA regulations. Plaintiffs rely on specific FDA regulations because a violation of a statute or administrative rule or regulation has long been recognized in Florida as *prima facie* evidence of a violation of a common law duty. See, *Fla. Dep't of Corrections v. Abril*, 969 So. 2d 201, 205 (Fla. 2007); *Alford v. Meyer*, 201 So. 2d 489 (Fla. 1st DCA 1967) (explaining, "The rationale supporting the admission of a statute, ordinance, or administrative rule or regulation as prima facie evidence of negligence is that the standard of conduct or care embraced within such legislative or quasi-legislative measures represent a standard of at least reasonable care which should be adhered to in the performance of any given activity.").

Both the *Mink* and *Godelia* opinions approved the same types of claims as Plaintiffs allege here. Both held that such claims based on Florida common law were not impliedly preempted. The *Mink* opinion explained, "The duty of a manufacturer to use due care in manufacturing a medical device predates the Medical Device Amendments, and is a duty that [the manufacturer] owes Mr. Mink (as opposed to the FDA). This theory of liability is therefore not impliedly preempted by federal law." *Mink*, 860 F.3d at 1330. *Mink* also concluded that the manufacturing defect claim at

issue there – the same claim the Maxwells make here – is not impliedly preempted.
Id.

State law product liability claims are not preempted merely because the complaint mentions federal regulations. *See Godelia*, 881 F.3d at 1318-1320. To the contrary, Eleventh Circuit precedent requires a plaintiff to plead specific violations of federal regulations in order to state a cause of action for a state law strict liability and negligent manufacturing claim where an FDA-approved product is in question. *Id.* at 1319. Common law negligence claims in Florida may rely on statutes or regulations as the source of the duty element of the negligence cause of action. *See Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007) (“We explained in *McCain* that duty ordinarily arises from four general sources: ‘(1) legislative enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case.’”) (internal citations omitted). Evidence of a statutory violation “will not overhaul the negligence cause of action, as ‘the claimant still needs to prove all elements of actionable negligence.’” *Kohl v. Kohl*, 149 So. 3d 127, 132 (Fla. 4th DCA 2014) (quoting *Tierney v. Black Bros. Co.*, 852 F. Supp. 994, 1000 (M.D. Fla. 1994).

A negligence claim that relies on a statute or regulation as evidence of the duty of care remains a negligence claim. The statute or regulation simply serves as the source of the duty and evidence of what conduct does or does not constitute reasonable care. “One way that common law negligence evolves with changes in society is that it incorporates contemporary standards of conduct evidenced by legislative

enactments.” *Kohl*, 149 So. 3d at 134. Therefore, the mere mention of federal regulations does not render a claim preempted. Instead, the federal regulations define the duty element of a viable, common law negligence claim.

c. The Maxwells’ post-sale failure to warn claim is not expressly or impliedly preempted.

Alcon has a duty, imposed by section 360i, “to report incidents in which the device may have caused or contributed to death or serious injury, or malfunctioned in a manner that would likely cause or contribute to death or serious injury if it recurred.” *Riegel*, 552 U.S. at 319. That duty is owed by the manufacturer to the FDA. Claims that a manufacturer violated a duty it owed to the FDA are impliedly preempted. *Mink*, 860 F.3d at 1327. But here, Plaintiffs’ failure to warn claims are different. Plaintiffs do not allege that Alcon violated its duty to warn the FDA of defects and risks it knew about before Jill Maxwell was injured by its defective injector.

Plaintiffs’ failure to warn claim alleges that Alcon violated its duty to warn foreseeable users of its product, including to the Mayo Clinic and Dr. Miller, as is required to state a negligence claim under Florida law. *See Advance Chemical*, 478 So. 2d at 447; *Paterson*, 472 So. 2d at 1214. Dr. Miller and Mayo Clinic are learned intermediaries. Under Florida’s learned intermediary doctrine, Alcon’s duty to warn ran to Dr. Miller, not directly to the Maxwells. *See Upjohn Co. v. MacMurdo*, 562 So. 2d 680, 683 (Fla. 1990). The Eleventh Circuit Court of Appeals provided a helpful summary of the relevant aspects of the learned intermediary doctrine:

The learned intermediary rule is a corollary to the rule that a manufacturer of prescription drugs or products discharged its duty to warn by providing the physician with information about risks associated with those products. The manufacturer's duty to warn of drug hazards runs to the physician, not directly to the patient. The learned intermediary rule provides that the failure of the manufacturer to provide the physician with an adequate warning of the risks associated with a prescription product is not the proximate cause of a patient's injury if the prescribing physician had independent knowledge of the risk that the adequate warning should have communicated. Thus, the link between a patient's injury and the alleged failure to warn is broken when the prescribing physician had 'substantially the same' knowledge as an adequate warning from the manufacturer should have communicated.

Christopher v. Cutter Laboratories, 53 F.3d 1184, 1192 (11th Cir. 1995). Alcon's duty to warn arose when it began learning it had manufactured and distributed defective products that did not comply with the approved specifications. A claim that Alcon violated a duty it owed to foreseeable users is different from a claim that Alcon violated a duty it owed to the FDA. Moreover, nothing about Alcon's duty to report to the FDA prohibits it from also discharging its duty to warn foreseeable users or consumers of its product. As explained below, Alcon learned of specific risks associated with using the UltraSert and provided no warning to Dr. Miller. Dr. Miller was unaware of the risks that Alcon knew about and confirmed that he would have used a different product if he had been made aware of those risks. Therefore, the Maxwells' failure to warn claim is not preempted and must be submitted to a jury.

d. The Illinois and Texas cases relied on by Alcon are distinguishable and unpersuasive.

The Illinois and Texas cases cited by Alcon were very different from the instant case. The Texas case, *Thomas v. Alcon Laboratories, Inc.*, was decided on factual findings derived from evidence after discovery. See *Thomas* letter decision, at 2. Specifically, the court concluded, “there is no evidence that Plaintiff’s AcrySof intraocular lens deviated in any way from FDA-Approved specifications.” *Id.* The Court also made a factual finding that no evidence was presented to support the causation element of the Plaintiff’s claims. *Id.* On the issue of preemption, the court merely announced its ruling in a conclusory fashion with no accompanying legal analysis. *Id.* That court’s decision carries no persuasive or precedential value on the issue of preemption since its mention of preemption was dicta and contained no legal analysis of that issue.

The Illinois case submitted by Alcon, *Raleigh v. Alcon Laboratories, Inc.*, 934 N.E. 2d 530 (Ct. App. Ill. 2010) is equally distinguishable and unpersuasive. First, the court’s decision was based, in part, on its factual conclusion that the product at issue was manufactured in compliance with the federally-required specifications. *Id.* at 540. That court specifically noted that the “plaintiff’s claims would not be preempted if they were ‘parallel’ to the federal requirements, such as if the claims were for damages premised upon a violation of FDA regulations.” *Id.* at 540. Importantly, the Maxwells’ claims here are the type of parallel claims that the Illinois court acknowledged would not be preempted. Second, that decision involved an intraocular lens, which is an entirely different product from the Ultrasert injector at

issue here. *Id.* Here, Alcon represents to this Court that the Illinois case involved “the specific class of devices at issue here.” Alcon motion at 18. Yet, the Illinois case involved an intraocular lens whereas this case involves the UltraSert device used to implant such a lens. The Court should not be misled by Alcon’s apparent representation that the Illinois case involved the same product as the product at issue in this case. Third, just as with the Texas case, the Illinois court’s discussion of preemption was unnecessary to its resolution and was, therefore, dicta. The court did note, however, “Plaintiff’s claims would not be preempted if they were ‘parallel’ to the federal requirements, such as if the claims were for damages premised upon a violation of FDA regulations.” *Id.* at 540. Plaintiff’s claims in the instant case are premised upon violations of FDA regulations and concomitant state common law duties of care. Therefore, the Illinois opinion submitted by Alcon actually supports the Maxwells’ position here. The Illinois Court made clear that the claims there would not have been preempted if they were damages claims akin to the claims made by the Maxwells in this case.

e. Alcon’s use of non-approved instructions provides another reason why there is no FDA preemption here. The use of non-approved instructions means the product was not FDA approved.

Alcon gave directions for using UltraSert that were not approved by the FDA. Miller dep. at 62:21-63:23; Ex. 5 to Miller Dep., non-approved directions and email regarding same. Directions for use of a medical device are considered a part of the product labeling for the purpose of FDA approval and, therefore, for the purpose of conducting a preemption analysis. *See, Horn v. Thoratec Corp.*, 376 F.3d 163, 177 &

fn. 22 (3d Cir. 2004). Alcon's promulgation of non-FDA approved directions for using the UltraSert rendered the entire product non-FDA approved. The product was only FDA-approved if its directions for use were reviewed by the FDA and approved by the FDA. *See* 21 U.S.C. § 360e(c)(1)(F) ("Any person may file with the Secretary an application for premarket approval for a class III device. Such an application shall contain specimens of the labeling proposed to be used for such device."). Alcon gave Mayo Clinic and Dr. Miller directions for use that were never reviewed or approved by the FDA. It is irrelevant to a preemption analysis whether the non-approved directions for use played a causal role in Jill Maxwell's injury. Her injury has nothing to do with the facts relevant to the preemption analysis. Since Defendant gave Mayo Clinic and Dr. Miller directions for use that were not previously submitted to the FDA, then reviewed and approved by the FDA, there is no preemption because the product, including the directions for use given to Dr. Miller, was not reviewed and approved by the FDA. Therefore, there can be no preemption here and Defendant's motion must be denied.

V. THE ULTRASERT HAD A MANUFACTURING DEFECT. DEFENDANT FAILED TO MANUFACTURE IT IN ACCORDANCE WITH THE REQUIRED SPECIFICATIONS AND, THEREFORE, VIOLATED ITS FLORIDA COMMON LAW DUTIES.

Alcon had a Florida common law duty to manufacture the UltraSert in accordance with its manufacturing specifications. *Rowe*, 297 F. Supp. 3d at 1299, *citing Mink*, 860 F.3d at 1330. That state law duty of reasonable care parallels the requirements of federal law. In other words, reasonable care requires the Defendant to manufacture its products as it has agreed to do as a precondition of receiving FDA

approval. Because these concepts are discussed thoroughly in the preemption discussion above, Plaintiffs will not belabor the same points further here.

The UltraSert used in Jill Maxwell's surgery was defectively manufactured. Based on the application of the *Cassisi* inference, Plaintiffs do not need to prove the exact nature of the defect. *Id.* at 1149. However, Plaintiffs expect that they will be able to prove that the UltraSert at issue had an incomplete interior coating based on the testimony of Dr. Miller (Facts, Section 5) and the great deal of evidence demonstrating the manufacturing problems Defendant was having. Indeed, the evidence shows that the UltraSert used in Jill Maxwell's procedure was made in the same facility, around the same time, by the same people, and using the same processes as other UltraSerts that were established to be defectively manufactured. (Facts, Sections 2, 3, 4, and 6).

Alcon's failure to manufacture the UltraSert in accordance with that product's specifications constitutes a breach of the duty of reasonable care that Alcon owed under Florida law. *See, e.g. Godelia v. Doe 1*, 881 F.3d 1309, 1318-20 (11th Cir. 2018).

a. Plaintiffs do not need an expert to say the product was defective.

Plaintiffs are entitled to an inference that the product was defective. Here, the UltraSert failed under normal operation. When a product malfunctions during normal operation, a legal inference, which is in effect a mirror reflection of the Restatement's standard of product defectiveness, arises, and the injured plaintiff thereby establishes a *prima facie* case for jury consideration. *Cassisi v. Maytag Co.*, 396 So. 2d 1140, (Fla. 1st DCA 1981). It makes no difference whether the product that failed during normal use is available for inspection or not. *Id.* at 1150-51. The

following passage from *Cassisi* explains that plaintiffs do not need an expert to say the product was defective:

A malfunction evidences a defect. (citations omitted) The plaintiff is not obliged to negate alternative grounds of causation. In approving the lower court's judgment, the Third Circuit Court of Appeals held that a "defective condition" within the meaning of Section 402A (can be established) by proving ... the product functioned improperly in the absence of abnormal use and reasonable secondary causes. And the inference was extended to the time of sale as well as the time of injury, the court observing that there was ... sufficient evidence to satisfy reasonable and well-balanced minds that a defect existed at the time of sale.

Id. at 1149 (internal citations and quotations omitted), *citing Greco v. Bucciconi Engineering Co.*, 283 F. Supp. 978 (W.D. Pa. 1967). Under the authority of *Cassisi*, the only facts required for the inference to apply and thereby establish a plaintiff's prima facie case of a product defect are 1) the product malfunctioned; and 2) the malfunction occurred during normal operation. *Id.* at 1151. The inference of a defect extends both to the time of use and to the time the product left the control of the manufacturer. *Id.* at 1149. Therefore, when the inference applies, it provides *prima facie* evidence of a defect at both the time the product was used and the time that product left the control of the manufacturer. *Id.* at 1149-51. In short, the inference establishes the plaintiff's prima facie case and creates a jury-submissible case. *Id.* at 1151-52.

Even if the Court ultimately determines that Plaintiffs are not entitled to a *Cassisi* inference, Plaintiffs still do not need an expert (apart from Dr. Miller) to testify that the UltraSert was defective. Dr. Miller is a well credentialed and trained

surgeon who has special expertise and experience with using intraocular lens injector devices, including UltraSert. He has given, and will give at trial, his testimony that the UltraSert malfunctioned during normal use, that he had never experienced or heard of such a product malfunction before, and that the UltraSert failed to perform as he expected it to perform. *See*, Undisputed Facts, Section 5, above.

VI. DEFENDANT WAS ON ACTUAL NOTICE OF MANY USER-REPORTED MALFUNCTIONS OF ULTRASERT, IN WHICH LENSES SHOT OUT OF THE INJECTOR, AND FAILED TO WARN DR. MILLER OR MAYO CLINIC OF THOSE RISKS OF USING ULTRASERT.

Alcon recalled some of its UltraSert devices. The recalled devices were manufactured at Alcon's manufacturing facility in Huntington, West Virginia. Dr. Miller was not aware of the UltraSert recalls before Ms. Maxwell's surgery but would have liked to know that information. Miller Dep. at 58:16-59:10. He testified as follows:

15 . . . In your discussions with Jill
16 Maxwell of the risks of the surgery, certainly
17 you never discussed with her the risk that the plunger might
18 suddenly give way and cause her injury, because that's
19 not a risk that you were even aware of at that time; is
20 that true?
21 A. That's correct.

Miller Dep. at 163:15-21. Defendant admits it provided no warning. It did not provide any Field Safety Notices to Mayo Clinic. *See* Ex. 9, no. 1. Yet, it provided Field Safety Notices regarding UltraSert to other entities. *See* Exhibits 3-4, Field Safety Notices. Defendant also admits that it provided no recall notices to Mayo Clinic. *See* Ex. 5, Dep. of Alcon Research, at 40:14-44:12.

a. Defendant had a duty to warn of dangers it learned about after it sold the product.

“[W]hether a manufacturer or distributor has a duty to warn under the circumstances are usually questions of fact for the jury.” *Advance Chemical*, 478 So. 2d at 447-48. Based on the legal authorities analyzed above, Defendant had unique knowledge that surgeons were having problems with UltraSert injectors and were reporting that lenses were unexpectedly shooting out of the injectors. When coupled with the knowledge that its products were being used, and would continue to be used on patients throughout the United States and throughout the world, Defendant had a duty to warn surgeons and facilities using UltraSerts about the risks of lenses not ejecting properly and potentially injuring patients.

Defendant misapprehends the basis of the Maxwells’ failure to warn claim. The claim is not based only Defendant’s failure to advise physicians of UltraSert recalls it conducted in foreign counties. The fact that the recalls happened is highly relevant but that fact is not the sole basis of the failure to warn claims. The fact that the recalls happened tend to prove the underlying knowledge that Defendant had and refused to share with physicians using its products. The many complaints of failures, the nature of Defendant’s known manufacturing defects, and the *reasons* for the recalls that form the basis of Plaintiffs’ failure to warn claims. The most important knowledge that Defendant needed to share with surgeons was the reasons for the recalls of UltraSert. If surgeons like Dr. Miller had been informed of the reasons for the UltraSert recalls, then those surgeons could decide whether to use the UltraSert or some other device and also could have advised their patients about the risks

associated with use of the UltraSert. Defendant had a duty to warn Dr. Miller and failed to do so.

b. There is no dispute that Defendant failed to warn.

Here, there is no dispute that Defendant provided no post-sale warning to Dr. Miller or Mayo Clinic. See Ex. 9, Undisputed Facts 7d-f.

Since it is undisputed that Defendant provided no warning here, there is no need for expert testimony regarding the adequacy of a warning. “The ‘adequacy or inadequacy of the warning to inform a physician must, except in the more obvious situations, be proved by expert testimony.’” *Barrow v. Bristol-Myers Squibb Co.*, 1998 U.S. Dist. LEXIS 23187, at *169 (M.D. Fla. Oct. 29, 1998), quoting *Upjohn Co. v. MacMurdo*, 562 So. 2d 680, 683 (Fla. 1990). This case is the classic “more obvious situation” referenced by the *Barrow* and *Upjohn* courts because, here, there is no debate about the adequacy of the warning. There was no warning in this case. Alcon admits that it provided no warning to Dr. Miller or Mayo Clinic and attempts to defend its failure to warn by arguing it had no duty to warn. If the jury determines that Alcon did, in fact, have a duty to warn based on its knowledge of UltraSert risks, then Alcon is liable for failing to warn because it provided no post-sale warning whatsoever.

VII. CAUSATION

There is no dispute that Jill Maxwell was injured by the adverse event that occurred during her cataract surgery. And, if the jury finds a manufacturing defect or failure to warn, then there can be no dispute that those are the entire cause of, or

a substantial contributing cause of, Ms. Maxwell's injuries. Indeed, Dr. Miller testified about how the lens shot out of the UltraSert injector and into Ms. Maxwell's eye, rupturing her posterior capsule. *See* Facts, Section 5i-r. Those facts satisfy the causation element with regard to the manufacturing defect claim.

Regarding causation on the failure to warn claim, Dr. Miller testified that he only learned about other surgeons having problems with the UltraSert in the days after Jill Maxwell's procedure. Miller Dep. at 82:10-83:2. He also testified that if he had known about these issues before Jill Maxwell's procedure, i.e. if Alcon had warned him, then he would not have used the UltraSert for Jill Maxwell's procedure and would have used a different device instead. *Id.* at 83:3-8. Dr. Miller's testimony in this regard establishes that Defendant's failure to warn was both the cause in fact and proximate cause of Jill Maxwell's damages.

Even if Defendant is able to establish its affirmative defense of third party fault, that defense would serve only to establish that some other cause contributed to Ms. Maxwell's damages. The jury would have to apportion fault in accordance with Florida's standard jury instruction on causation: "In order to be regarded as a legal cause of damage, a defect in a product or negligence need not be its only cause. A defect in a product or negligence may also be a legal cause of damage even though it operates in combination with some other cause . . ." Fla. Std. Jury Inst. 403.12, Legal Cause. Therefore, the question of the proximate cause of Plaintiffs' damages can only be determined by a jury. *See, e.g. Welfare v. Seaboard Coast Line R.R.*, 373 So. 2d

886, 888-89 (Fla. 1979); *Van Deese v. McKinnonville Hunting Club, Inc.*, 874 So. 2d 1282, 1287-88 (Fla. 1st DCA 2004).

VIII. CONCLUSION

In conclusion, the Court should deny Defendant's motion for summary judgment. The record evidence in this case establishes that a product manufactured by Defendant malfunctioned during normal use, that Defendant had problems with its manufacturing processes for the type of product at issue, that those manufacturing problems led to many user reports of product malfunctions and patient injuries, and that Defendant recalled some lots of the product after confirming that it had problems with its manufacturing processes. The record evidence also establishes that Defendant had unique knowledge of the risks of using its product and failed or refused to pass that information along to physicians who it knew were using its products. Finally, the record evidence establishes that the malfunction of the product during Ms. Maxwell's surgery injured her and that, if her surgeon had been warned about the unique risks posed by Defendant's product, then he would have chosen a different product to perform the surgery in question. For these reasons, the record evidence demonstrates Defendant's liability, causation, and damages. Therefore, the Court must deny the summary judgment motion and allow the case to be presented to a jury.

SPOHRER & DODD, P.L.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court using the ECF system this 25th day of August 2022 to:

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/s/ Galen D. Bauer

Attorney

Attachment C

Florida Bar Aviation Law Certification Committee

Grade Review Petition of 705AV21

Review Determination

July 15, 2021

The Aviation Law Certification Committee met on July 9, 2021 for the purpose of reviewing a grade review petition relating to the 2021 Aviation Law Certification Exam. The grade review petition was disseminated to all committee members for review in advance of the meeting. The petition was reviewed again by the committee during the petition review meeting.

Upon review, the Committee determined to uphold each grade assigned to Petitioner's essay responses. However, the Committee agreed with Petitioner that three of their multiple choice answers were, arguably, correct and determined to award an additional point for each of those three questions. **Overall, the Committee determined that Petitioner's exam score should be increased by three points.**

A more detailed explanation of the Committee's decision follows:

Essay 1 – Score upheld.

The Committee determined that a score of 2 was the highest score that could be justified based on Petitioner's essay answer. A score of 2 demonstrates limited competence in response to the question. An essay earning a 2 demonstrates little understanding of the facts or law and little ability to reason to a conclusion.

Petitioner relied heavily on remarks of a lecturer at the exam review course. However, examinees are cautioned at the review course that lecturers are not on the certification committee, have no knowledge of what is on the examination, and offer only their own opinions of what might be tested and how to respond.

The essay provided information that was discussed by the lecturer at the review course. However, the essay did not address the issues requested in the essay prompt. For example, the essay discussed tax implications of registering an aircraft. That was a minor issue raised by the fact pattern. However, Petitioner's focus on the mechanism for registering aircraft engines and propellers on the U.S. Registry is not responsive to the question. When discussing that non-responsive issue, Petitioner stated criteria for such registrations that were incorrect. Moreover, Petitioner omitted major issues in the question prompt, including the

serious issue of operational control raised by the degree of the husband and wife's respective participation. Petitioner asserted that a U.S. corporation is a possible solution if only the husband will be involved. That not correct. It is prohibited by the Federal Aviation Regulations. Such an error could result in a void *ab initio* registration with consequences that could include aircraft seizure, lack of insurance coverage, civil penalties or enforcement action against the pilot's airman's certificates. Competence for board certification in aviation law requires a level of knowledge that would not subject a client and the client's property to such risks, and such registration knowledge is very basic in the area of aircraft registration. A lack of such basic knowledge demonstrates that the candidate has little understanding of the facts and law and little ability to reason to a correct conclusion.

Petitioner also failed to discuss Based And Primarily Used ("BAPU") registration, which was a major issue presented by the fact pattern. Petitioner also failed to discuss whether the aircraft can legally be put on the certificate of the Part 135 operator.

An essay earning a score of 3 must demonstrate some competence in response to the question. The Committee is of the view that Petitioner's essay demonstrated only limited competence in the area being tested. Petitioner failed to address major issues raised by the fact pattern and question prompt and, instead, discussed other issues not raised in the question. The Committee, therefore, determined that the prior score of 2 could not be changed.

Essay 2 – Petitioner made no challenge to the score awarded for this essay.

Essay 3 – Score upheld.

The Committee determined a score of 4 was appropriate for this essay. A score of 4 demonstrates competence in response to the question. A score of 4 demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues of law, and adequate ability to reason to a conclusion. Petitioner demonstrated more than just some competence a did not deserve a score of 3. However, Petitioner did not demonstrate the clear competence required to earn a score of 5 because Petitioner missed some of the major issues presented by the fact pattern.

Petitioner demonstrated competence by providing several common grant assurances for federally obligated land. However, Petitioner failed to discuss several major issues raised in the fact pattern. For example, Petitioner's essay included no discussion of the concept of expected useful life of the new taxiway, which generally

binds the airport to grant assurances for 20 years. Another major issue presented by the fact pattern is the issue of residential through the fence (“RTTF”) operations. Petitioner failed to discuss or even identify that issue.

Petitioner concluded the lake at the end of the runway likely would jeopardize airport safety but pointed to no facts and provided no reasoning in support of that conclusion.

Finally, Petitioner made no mention of the airport layout plan required by Federal Grant Assurance 29. He or she failed to recognize that the airport layout plan would have to be updated to show proposed access points on the developer’s plan, proposed non-aviation areas, and more.

Overall, the Committee is of the view that Petitioner demonstrated the competence required to earn a score of 4 but missed several major issues that should have been identified to demonstrate the clear competence required to earn a score of 5. The Committee, therefore, determined that the prior score if 4 could not be changed.

Essay 4 – Score upheld.

The committee determined that the score of 4 was the highest score that could be justified based on Petitioner’s essay answer. A score of 4 demonstrates competence in response to the question. A score of 4 demonstrates an adequate understanding of the facts, an adequate recognition of most of the issues of law, and adequate ability to reason to a conclusion.

The first essay prompt called for a discussion of the applicable statute of limitations, venue consideration, choice of law considerations, and available damages. Petitioner’s essay did not address any of these issues. Such issues are common, significant, and fundamental considerations in aviation litigation.

The second essay prompt called for an application of GARA. Petitioner discussed GARA but offered little application of the facts or analysis of how GARA would apply to the facts presented. While the essay did recite some GARA principles, it did demonstrate that Petitioner was sufficiently competent to apply those principles.

Neither part of the essay response demonstrated a level of clear competence to justify a score higher than 4. The Committee, therefore, determined that the prior score could not be changed.

Multiple Choice Questions

Question 4 – Petitioner is correct that the exam answer key was mis-marked. Petitioner gave the correct answer, D, and was previously given credit for that correct answer. The Committee was made aware of the mistake on the computerized answer key before grading the exams. Petitioner provided the correct answer, D, and was given credit for that correct answer even though the computerized answer key shows it as an incorrect answer. Since credit already was given for this question, additional credit cannot be awarded.

Question 8 – The Committee agrees with Petitioner that answer choice D is debatable and could be construed as a correct answer. Therefore, the Committee has determined that Petitioner should be given credit for this question.

Question 9 – The Committee determined to uphold the score on this question and award no points. The Committee is unaware of any authority for such an expansive definition of the word “services” as is suggested by Petitioner. Therefore, the Committee maintains the view that pilot services rendered to an employer who may or may not own the aircraft cannot result in a lien against that aircraft under Florida law.

Question 24 – The Committee determined to uphold the score on this question and award no points. The first sentence of Article 3, Section 4 of the Moon Treaty forbids the establishment of military bases, installations and fortifications. The creation of an “exclusion zone” for use by U.S. military scientists where there is no risk of international surveillance is, therefore, not legally permissible. For that reason, neither of the proposed uses of the moon base in the question is legally permissible.

Question 36 – The Committee agrees with Petitioner that answer choice B is debatable and could be construed as a correct answer. Therefore, the Committee has determined that Petitioner should be given credit for this question.

Question 37 – The Committee determined to uphold the score on this question and award no points. The question prompt specifically asks about the employee’s rights

under the collective bargaining agreement. Petitioner's argument relies on rights *outside* of the collective bargaining agreement and, therefore, ignores the specific call of the question.

Question 42 – The Committee determined to uphold the score on this question and award no points. The question prompt specifically asks for the altitude above which pilots must never fly without being on supplemental oxygen. That altitude is 12,000 feet MSL. Pilots may fly between 10,000 and 12,000 feet MSL for no longer than 30 minutes without supplemental oxygen. Therefore, to say that pilots must never fly above 10,000 feet MSL without supplemental oxygen is incorrect.

Question 50 – The Committee agrees with Petitioner that answer choice A is a correct statement and could be construed as a correct answer. Therefore, the Committee has determined that Petitioner should be given credit for this question.

Question #35: Attached article

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Big Brother Is A Drone?



2015 Amendments to Florida “Freedom from Unwarranted Surveillance Act”

By Galen Bauer

New amendments to Florida’s drone surveillance act, Florida Statute Section 934.50, allow drones to follow you, watch and take pictures and videos of you, your house, your spouse, and even your kids. The amendments became effective July 1, 2015, and moved us eerily closer to the world imagined by George Orwell in his publication *1984* – a world where at all times and in all places, “BIG BROTHER IS WATCHING YOU.” This article explores the recent amendments to Florida’s drone surveillance law and acknowledges the many beneficial uses for drones, but urges that strict limitations on drone surveillance are necessary to avoid a dangerous drift toward an Orwellian society.

Drone use versus Personal privacy

Drone use is becoming more commonplace every day. We’ve all heard news reports about “drone strikes” to eliminate enemy combatants in war zones. Those still happen, but they’re old news. People are finding new, practical uses for drones on a daily basis. Photographers around the world are using drones to find better angles to capture their subjects. Switzerland is using drones for postal delivery. Closer to home, police are using drones to perform search and rescue in rough terrain allowing them to search more area in less time. NFL teams are using drones to make videos of practices. Amazon promises 30-minute delivery of products by drone as soon as FAA rules allow it. Whether legal or not, there are infinite uses for drones. The field is in its infancy and will grow exponentially as people discover how to use them to be more productive in less time and at a lower cost. Whether you’re a drone fan or not, the drone era has arrived, is growing, and is here to stay.

As drone use has increased, so have concerns about

individual privacy and property rights and the need for reasonable restrictions on their use to protect those rights. But, as freedom loving people, we enjoy the ability to pursue our careers and hobbies without restriction. As such, a natural tension has emerged between drone use and individual privacy. One expert recently advised Congress that drones present “a nightmare scenario for civil liberties.”¹ So, where should the lines be drawn? Should drones be allowed to fly ten feet above your house if it’s delivering a package to your neighbor? 50 feet? What if it’s videotaping you while you try to enjoy an evening cocktail in your backyard hot tub? What if it’s videotaping your neighbor to see whether they’re doing something that might undermine their Social Security Disability claim? As Congress struggles with these questions, Florida lawmakers have been trying their own hand at the balancing of these competing interests.

In 2013, Florida adopted the “Freedom from Unwarranted Surveillance Act” (Act) and, effective July 1, 2015, amended that Act to allow for more drone activity in Florida. With these new amendments, the trend in Florida is clearly toward sacrificing individual liberties to encourage widespread drone use.

2013 – Freedom from Unwarranted Surveillance

As stated above, the first version of the Act was enacted in 2013. In both name and in substance, the Act protected Florida citizens from unwarranted governmental intrusion. Specifically, the Act said, “A law enforcement agency may not use a drone to gather evidence or other information.” Fla. Stat. § 934.50(3) (2013). It provided only three limited exceptions related to the use by a law enforcement agency, being: 1) to prevent a terrorist attack; 2) to prevent imminent danger to life or serious damage to property; or 3) when the

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specific use is authorized by a search warrant. Fla. Stat. § 934.50(4). As you can see, the act was short and simple. The practical ramification, related to criminal prosecution against an individual or entity, was any evidence gathered by a law enforcement agency outside of any of the three exceptions would be inadmissible as evidence because it was gathered in violation of their constitutionally protected rights to privacy. Fla. Stat. 934.50(6).

However, the 2013 Act fell short for several reasons. First, it ignored private drone use altogether. Individuals remained free to use drones for any “recreational” purpose or any specially authorized purpose, consistent with FAA regulations. Second, the 2013 Act made no mention of civil litigation or administrative proceedings. Theoretically, evidence gathered illegally by a drone could be used in civil litigation and administrative proceedings. Third, the 2013 Act provided no real penalties for violators and no meaningful way for victims to protect their privacy. The Act provided for an unspecified “civil action” but did not include any damages provisions or prevailing party attorney’s fees and was only applicable against the aggrieving law enforcement agency. Fla. Stat. 934.50(5). Thus, victims had little certainty about what they might achieve other than a restraining order if they brought a civil action. Lawyers had little incentive to accept representation for those claims when faced with elusive damages and no attorney’s fee provision. With these shortfalls, the 2013 act needed more work.

The 2015 Amendments

The 2015 amendments to the Act solved many of the problems from which the 2013 version suffered, but overlooked one shortcoming. First, the amendments address

drone use by private actors and provide some limitations on that use. Second, the amendments help to provide meaningful recourse to victims of illegal drone surveillance. The amendments specifically provide for injunctive relief, prevailing party attorney’s fees, and the possibility of punitive damages against the operator who conducted drone surveillance in violation of the Act. In these respects, the 2015 Amendments are major improvements to the Act.

The one shortcoming overlooked by the 2015 amendments is the provision regarding admissibility of evidence. That issue was addressed, with identical language in both the 2013 and 2015 versions, in subsection (6) of Section 934.50. The Act provides that evidence gathered through illegal drone surveillance is inadmissible in criminal cases. But, neither the 2013 version nor the 2015 version addresses admissibility of illegally gathered evidence in civil cases or administrative proceedings. To address this oversight, the Florida legislature needs to amend the Act further to clarify that illegally gathered evidence is inadmissible in civil cases and administrative proceedings, as well as in criminal cases.

The 2015 amendments also added more categories of drone surveillance activities that are now permissible. Where the 2013 act had only three exceptions to the general prohibition on drone surveillance, the 2015 version now has nine, with one of those exceptions having five subparts. Fla. Stat. § 934.50(4) (2015). The amendments also added a new subsection (b) that applies specifically to private drone operators. That subsection provides:

(b) A person, state agency, or a political subdivision . . . may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct



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Big Brother is a Drone?

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surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

The phrase "in violation of such person's reasonable expectation of privacy" and the definition of that phrase, leave only a small piece of our lives presumptively private -- essentially we have to be inside our home or inside our walled-off yard. If we leave our home, drones can follow us and take pictures of us virtually wherever we go. If we're in our backyard and can be seen from the street or from across the retention pond, then a drone can hover over our backyard to watch us.

Even that tiny sliver of private life that the amendments do preserve can easily be taken away. Subsection (b) allows surveillance, even where there's an expectation of privacy, if we have given written consent. Hypothetically, it won't be long until our auto insurance carrier sends us a policy amendment that says by signing a coverage application or renewal, we consent to drone surveillance. How many Floridians will "consent" by virtue of getting auto insurance? How many will even notice or read the drone surveillance consent sentence in the middle of the lengthy boilerplate?

Even if we refuse to consent to drone surveillance and are in a place where we have a reasonable expectation of privacy, we can still be watched, photographed and videotaped. The 2015 amendments added six new circumstances where drone surveillance is permissible even where the subject of surveillance has a reasonable expectation of privacy. Those six new exceptions are:

- if the party doing the surveillance is engaged in a business or profession licensed by the state, subject to some limitations; Fla. Stat. § 934.50 (4)(d);
- for appraising property for the purpose of assessing property taxes; Fla. Stat. § 934.50(4)(e);
- to take images by or for an electric, water, or natural gas utility; Fla. Stat. § 934.50(4)(f);
- for aerial mapping; Fla. Stat. § 934.50(g);
- to deliver cargo; Fla. Stat. § 934.50(h); and
- to capture images necessary for safe operation or navigation of a drone; Fla. Stat. § 934.50(4)(i).

One of these new exceptions, subsection (d), could be the exception that swallows the whole rule, depending on how the courts interpret it. The entirety of that exception is:

(d) by a person or an entity engaged in a business or profession licensed by the state, or by an agent, em-

ployee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's entity's or license. However, this exception does not apply to a profession in which the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

The second sentence of subsection (d) appears to prohibit licensed private investigators from using drones for surveillance. That conclusion is also supported by the legislative history of the amendment.² If Florida courts conclude that, indeed, private investigators cannot use drones for surveillance, then Section 934.50 should accomplish its original purpose and Floridians can worry less that drones are watching them. If however, subsection (d) is not interpreted to preclude private investigators from using drones, then drone use will grow exponentially. Drones will be watching people on behalf of investigators working for governments, law firms, insurance companies, political rivals, business rivals, jealous lovers, and so on. The erosion of personal privacy will be curbed if Florida courts interpret subsection (d) to preclude use by private investigators, as it was seemingly intended. **Keeping "you" from becoming "me"**

Drones are here to stay. Only time will tell how pervasive they will become in our daily lives. Federal and state lawmakers will continue to hone drone laws as the abilities and practical uses of drones grow. Florida's 2015 amendments to the Freedom from Unwarranted Surveillance Act set a clear direction in favor of growing the drone industry at the cost of individual rights. As we search for a balance between drone usefulness and drone intrusion, we need to be mindful of the rights lost by those who are subject to drone surveillance. For many of us, it's not a problem if we can be the ones saying "BIG BROTHER IS WATCHING YOU" because "you" doesn't mean "me." When the tables turn and "you" suddenly becomes "me," we regret ever allowing drone surveillance at all. Surely, none of us want a world where at all times, and in all places, we have to be thinking "IF BIG BROTHER ISN'T WATCHING ME, THEN SOMEONE ELSE IS." When it comes to surveillance by drones, let's proceed with extreme caution. ✈



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Endnotes

1 Statement of Harley Geiger (Senior Counsel and Advocacy Director for the Center for Democracy & Technology) before the U.S. House Committee on Oversight and Government Reform, June 17, 2015.

2 Staff Analysis of CS/SB 766, "Surveillance by a Drone", Committee on Judiciary, Florida Senate (March 26, 2015).