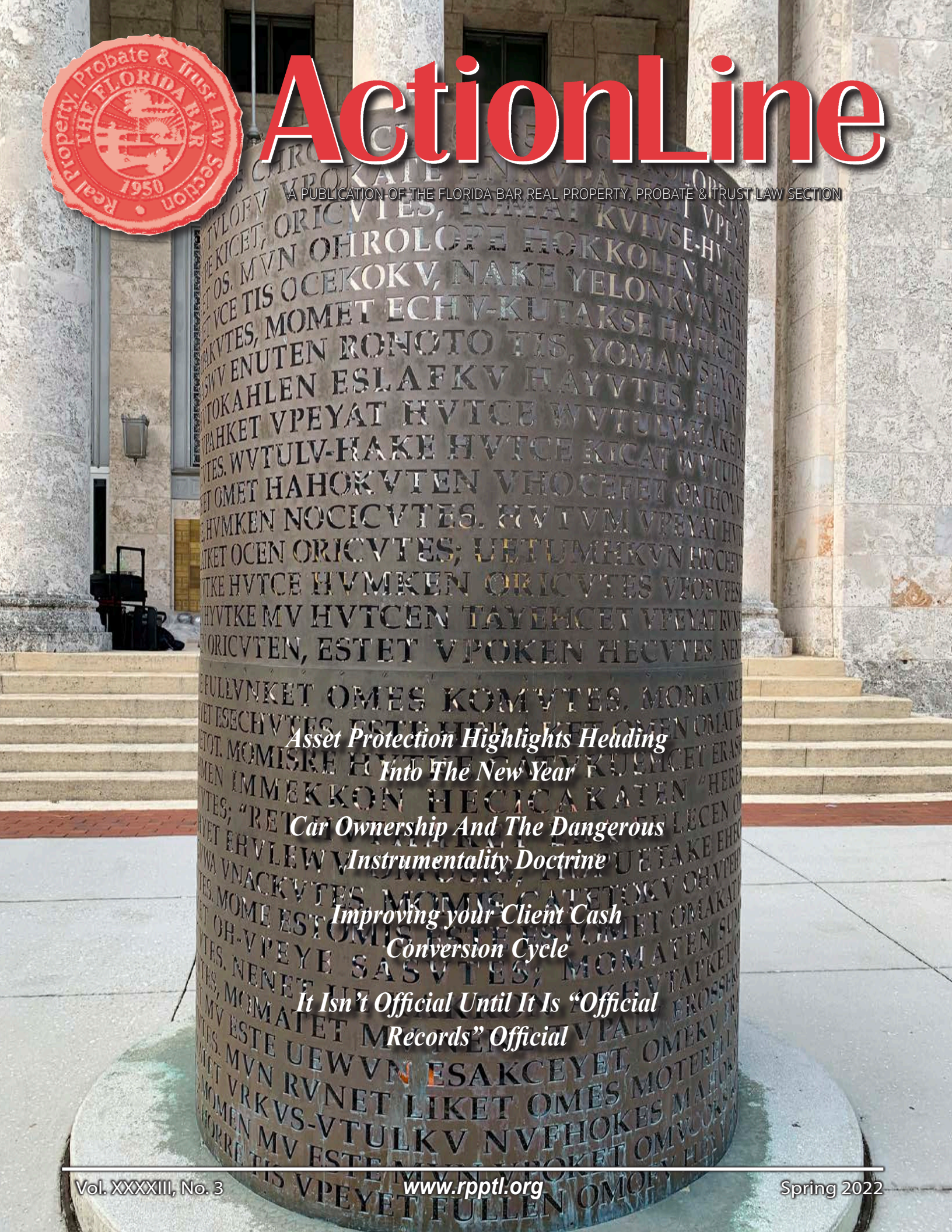

ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

Asset Protection Highlights Heading Into The New Year

Car Ownership And The Dangerous Instrumentality Doctrine

Improving your Client Cash Conversion Cycle

It Isn't Official Until It Is "Official Records" Official

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Car Ownership And The Dangerous Instrumentality Doctrine

By Joseph M. Percopo, Esq., LL.M.; Orlando, Florida

Unbeknownst to most Florida drivers, their automobile is their most dangerous and biggest potential personal liability. The commercials, billboards, and radio stations are abounding with advertisements offering assistance and suggesting large financial recovery for anyone injured in an automobile accident. Therefore, it should come as no surprise that if a driver is at fault for a car accident, a legal demand letter is very likely to follow. However, it is not just the driver who should expect to receive a demand letter but so should the legal owner of the vehicle. This proposition comes as a surprise to many because generally it is the person who acted negligently (the driver, in this case) that would be the party responsible for damages. So why then is a vehicle owner who was not driving also potentially liable for the injuries that occurred with their vehicle? And what, if anything, can be done to minimize liability to the owner?

The Dangerous Instrumentality Doctrine

In 1920, the Florida Supreme Court adopted the application of the "dangerous instrumentality doctrine" to automobiles.[1] The doctrine causes the imposition of "strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another."[2] The application and breadth of the doctrine has continued to evolve over the years through both the courts[3] and the legislature.[4] The evolution has created liability limitations[5] and exceptions to the "strict vicarious liability" doctrine that would otherwise apply. Fla. Stat. § 324.021(9)(b)(3) (2021), limits the liability of a natural owner under the dangerous instrumentality doctrine up to "$100,000 per person and up to $300,000 per incident for bodily injury and up to $50,0000 for property damage." However, if the driver is uninsured or has a policy with "limits less than $500,000 combined property damage and bodily injury liability, the owner shall be liable for up to an additional $500,000" reduced by amounts recovered from the driver and driver's insurer, if any.[6] Since the doctrine is premised on an owner[7] allowing, whether expressed or implied,[8] another to use the automobile, he or she is not subject to liability if the automobile is stolen or used without permission.[9] Additionally, the "shop rule" exception provides that an owner is not liable for the negligent driving of a repair shop employee[10] or a valet driver.[11]

Minor Drivers

In order for a minor, who is not yet 18 years old, to drive, a parent, guardian, or other responsible person must sign a Parental Consent for a Driver Application of a Minor form[12] whereby he or she agrees to the obligations imposed by Fla. Stat. § 322.09 (2021).[13] Once the aforementioned application is signed, "[a]ny negligence or willful misconduct of a minor under the age of 18 years when driving…shall be imputed to the person who has signed the application of such minor"[14] regardless of whether or not the signer owns the automobile. The signer will be "jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct,"[15] and therefore, be unable to avail himself or herself of the liability limitations of Fla. Stat. § 324.021(9)(b)(3)

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(2021). A parent or guardian who revokes the minor's driving privileges[16] or does not sign the application for the minor, generally, is not liable for the negligence of a minor driver under Fla. Stat. § 322.09 (2021).[17] Additionally, when a minor reaches the age of majority, the liability imposed by Fla. Stat. § 322.09 (2021) ends;[18] however, a parent may still be liable under the dangerous instrumentality doctrine and/or for negligent entrustment.

Negligent Entrustment

The owner of a automobile has a "nondelegable obligation to ensure that a vehicle is operated properly."[19] Thus, Florida recognizes a cause of action for the negligent entrustment of an automobile[20] which allows an injured party to bring an action against someone who entrusts another with an automobile when the "entrustor knew or should have known some reason why entrusting the [automobile] to another was foolish or negligent"[21] and the "harm was or should have been foreseeable" to the entrustor.[22] It is important to note that Fla. Stat. § 324.021(9)(b)(3) (2021), does not limit liability for negligent entrustment.[23]

Protecting Yourself (and Your Family)

The first step is to audit the ownership of all your automobiles, including those you or your spouse may not drive but helped someone else acquire. It is important to examine the title of each vehicle to be absolutely certain as to ownership. Since the dangerous instrumentality doctrine creates immediate liability risk to anyone on the title, if you are not the primary driver of the automobile then your name should be removed from the title.[24] This is true even of married couples. In fact, an automobile titled in the names of both spouses that causes injury not only exposes the assets of each individual spouse but also those joint marital assets that may have otherwise been protected due to tenants by the entirety ownership.[25]

The second step is to review your insurance. The amount of coverage, including uninsured motorist insurance, is a personal choice, as is whether to also carry an umbrella policy. The liability limitations of Fla. Stat. § 324.021(9)(b)(3) (2021) apply only when you are not the driver and you have not negligently entrusted the vehicle to another person. Therefore, at a minimum, you will want to have coverage for the $850,000 statutory maximum personal liability[26] that can arise from allowing another to use your vehicle. This level of coverage can be accomplished wholly through automobile insurance or a combination of automobile insurance and umbrella policy coverage. Keep in mind that if you are the negligent actor or negligently entrust another to use your automobile, there is no liability limitation. Thus, the more coverage and the bigger your umbrella policy the safer you will be and the more soundly you will be able to sleep at night. Additionally, it is worth noting that even if a family retitles all the cars into individual names, they can still continue to be on a group policy. A group policy does not cause liability like the automobile title. However, be wary of insurance coverage gaps. For example, if a child does not live with you and is not listed as an insured on your policy, then you may be liable for the child's negligence and your insurance may not provide coverage. Consider also, even if a child has his or her own insurance policy, you may still be personally liable for damages he or she causes in the excess of his or her policy limits, and your insurance may not provide any coverage.[27] Therefore, consider consulting with an insurance expert to help evaluate your insurance needs and planning for potential insurance coverage gaps.

The third step is to seriously consider who you are going to let drive. Be cautious not to allow someone who is unlicensed, uninsured, intoxicated, incompetent, inexperienced, unfit, foolish, reckless, or dangerous to drive your automobile, otherwise you are exposing yourself to unlimited personal liability via negligent entrustment. With regards to a minor, if you are going to allow him or her to drive, remember that someone is going to have to sign and agree to unlimited liability for the acts of that minor driver. The parent or guardian with the least assets at risk[28] should be the one who signs the parental consent form. Additionally, the parent or guardian who did not sign the parental consent form should be sure that his or her name is not on the title to any automobile that the minor may be driving. By taking this approach, if the minor driver causes an accident, only one spouse faces liability and fewer assets will be exposed to creditors beyond insurance.[29] While the liability from the parental consent terminates when a minor reaches age 18, car title liability does not; therefore, it is critical that any parent whose name is on the title remove his or her name and place title solely in the now "legal adult" child's name.

Lastly, be smart and be safe.

J. PERCOPO

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Endnotes

1 *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 41 (Fla. 1920).

2 *Estate of Villanueva ex rel. Villanueva v. Youngblood*, 927 So. 2d 955 (Fla. 2d DCA 2006). See also *Mathews v. Lawnlite Co.*, 88 So. 2d 299 ("Dangerous instrumentalities have been defined as those which by nature are reasonably certain to place life and limb in peril when negligently constructed, such as airplanes, automobiles, guns and the like"); *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1985)("a golf cart when negligently operated on a golf course, has the same ability to cause serious injury as does any motor vehicle operated on a public highway"). Note: boats (including jet skis and other watercraft but excluding seaplanes) are considered dangerous instruments, but liability is governed by Fla. Stat. § 327.32, and an owner, absent negligent entrustment, is liable only if he or she is physically present when the negligence occurs.

3 See *Lambert v. Emerson*, 304 So.3d 364, 368-369 (Fla. 2d DCA 2020) (provides a concise summary of some of the key cases which have attempted to define the dangerous instrumentality doctrine's boundaries).

4 *Lambert v. Emerson*, 304 So.3d 364, 370 (Fla. 2d DCA 2020) ("public policy parameters… Fla. Stat. § 324.021 (1955) was enacted…[defining] the owner of an automobile to include the legal title holder and lessees. By amendment in 1986, however, the legislature eliminated long-term automobile lessors from liability under the dangerous instrumentality doctrine…[t]hen in 1999, the legislature capped the extent of vicarious liability for bodily injury and property damage for [short-term] lessors… and for owners who are natural persons.")

5 Fla. Stat. § 324(9)(b)(1) (2021) (lessors in excess of one year are not deemed an owner provided the lessee carries insurance not less than $100,000 per person and $300,000 per incident of bodily injury and $50,000 property damage); Fla. Stat. § 324.021(9)(b)(2) (2021) (lessors of 1 year or less shall be deemed an owner for only up to "$100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage" as well as up to an additional $500,000 if the lessee is uninsured or has a policy with less than $500,000, reduced by amounts recovered by the lessee, driver, and insurance); see also the Graves Amendment, 49 U.S.C. § 30106 (2021), "a federal tort reform statute which purports to shield rental car companies from certain vicarious liability suits." *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008).

6 Fla. Stat. § 324.021(9)(b)(3) (2021).

7 *Rondell v. Romano*, 331 So.3d 879 (2d DCA 2022)("the initial analytical step imposed by [the dangerous instrumentality] doctrine is to focus upon the identity of the owner, as the nondelegable obligation rests upon that determination. To qualify as an owner, the law requires a party to possess an identifiable property interest in the subject vehicle").

8 *Depriest v. Greeson*, 213 So.3d 1022 (Fla. 1st DCA 2017). See also *Ray v. Earl*, 277 So. 2d 73 (Fla. 2d DCA 1973) (Consent may be implied if not expressly withdrawn or limited, and such consent may therefore extend to a second driver who was permitted to drive by the original driver who received permission to use the automobile).

9 *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959); *Hertz Corp v. Jackson*, 617 So. 2d 1051 (Fla. 1993).

10 See *Castillo v. Bickley*, 363 So. 2d 792 (Fla. 1978); *Roberts v. United States Fidelity & Guar. Co.*, 498 So. 2d 1037 (Fla. 1st DCA 1986). However, this exception does not apply when a service person is picking up or returning the owner's car because the action is authorized by the owner. See *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988); *Grilli v. LeBo Properties Corp.*, 553 So.2d 352 (Fla. 2d DCA 1989); see also *Romer v. Fields Motorcars of Florida, Inc.*, 2022 WL 479071 (5th DCA 2022)(court found that dealership providing a customer a loaner was not protected by the Graves Amendment since a bailment is not a lease or a rental agreement).

11 *Fahey v. Raftery*, 353 So. 2d 903 (Fla. 4th DCA 1977).

12 https://www.flhsmv.gov/pdf/forms/71142.pdf.

13 Fla. Stat. § 322.09(1)(a) (2021).

14 Fla. Stat. § 322.09(2) (2021); however, liability is limited to "actual damages caused by [a] minor, but not for exemplary damages that are assessed as punishment." *Hartford Acc. and Indem. Co. v. Ocha*, 472 So. 2d 1338, 1342 (Fla. 4th DCA 1985).

15 Fla. Stat. § 322.09(2) (2021) (emphasis added).

16 Fla. Stat. § 322.10 (2021) (a "person who has signed the application of a minor for a driver license may thereafter file with the department a verified written request" to cancel the minor's license and relieve himself or herself of the liability imposed under Fla. Stat. § 322.09).

17 *Aurbach v. Gallina*, 753 So. 2d 60, 65 (Fla. 2000) (the statutory vicarious liability of Fla. Stat. § 322.09 applies only to the "parent who signs the driver's license application for a minor child"); See also *Lambert v. Emerson*, 304 So.3d 364 (Fla. 4th DCA 2020)(a bailee may not be "vicarious[ly] liable under the dangerous instrumentality doctrine [if] the undisputed title owner, has also been found vicariously liable for what is, essentially, the same entrustment of the same vehicle"); review granted, No. SC20-1311, 2021 WL 1661247 (Fla. Apr. 28, 2021) (the 4th DCA certified the following question to the Florida Supreme Court: "Under the dangerous instrumentality doctrine, can one family member who is a bailee of a car be held vicariously liable when the cars acknowledged title owner is another family member who is also vicariously liable under the doctrine?").

18 *Aurbach v. Gallina*, 735 So. 2d, 60, 65 (Fla. 2000).

19 *Hertz Corp. V. Jackson*, 617 So. 2d 1051, 1053 (Fla. 1993).

20 *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1208 (Fla. 1997).

21 *Mullins v. Harrell*, 490 So. 2d 1338, 1340 (Fla. 5th DCA 1986).

22 *Williams v. Bumpass*, 568 So. 2d 979 (Fla. 5th DCA 1990).

23 Creditor Protection for Florida Physicians at 64 (Alan Gassman, Haddon Hall Publishing, LLP 2012).

24 A frequent concern is whether not having both names on the car will necessitate a probate. The Florida DMV has a process whereby title of a vehicle may be transferred without probate as permitted by Fla. Stat. § 319.28(1)(2021).

25 Tenants by the entirety ownership in Florida is a special form of ownership which treats "married couples as one unit – each spouse having an undivided interest in the property." Joseph M. Percopo, The Impact of Co-Ownership on Florida Homestead, Fla. B.J. 32, 35 (May 2012). Therefore, assets of a martial unit are not available to individual creditors of either spouse. However, if an injured party has an action against both spouses, then otherwise non-exempt tenants by the entirety assets may be exposed to such creditor's claim.

26 $300,000 per incident + $50,000 property damage + $500,000 additional economic damages = $850,000.

27 The liability in this case arises because in most cases the child has his or her own insurance policy since it is less expensive then being included on a parent's policy (which typically has higher coverage). This usually coincides with the parents maintaining their policy without including their child as an additional insured (to keep costs down), which means the parents' insurance policy will not provide protection for negligence of the child driver. Therefore, a parent may have traded up front insurance cost savings for a personal liability insurance coverage gap.

28 Meaning the parent or guardian who has the fewest non-exempt assets exposed to creditors. For example, a parent with a very large 401(k) but no other assets in their name individually is well suited to sign because his or her retirement account is an exempt asset and he or she would have no other non-exempt assets available for creditors to attack. Fla. Stat. § 222.21 (2021).

29 Fewer assets are exposed because the injured party is unable to make claims against tenants by the entirety assets, as well as those assets owned individually by the spouse that is not on the title and did not sign the parental consent form.