IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

CASE NO.: 01-09-CA-5044

DEBBIE MITCHELL as Personal Representative of the ESTATE OF TOMMIE LEE LEWIS, deceased, and on behalf of his survivors,

Plaintiff,

vs.

WERNER ENTERPRISES, INC., a foreign corporation, JEAN FRANCOIS EDME, individually, and MATTHAN PROPHETE, individually,

Defendants.
_____/

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff, **DEBBIE MITCHELL, as Personal Representative of the Estate of TOMMIE LEE LEWIS, deceased, and on behalf of his survivors,** by and through the undersigned attorneys and pursuant to *Rule 1.510, Fla. R. Civ. P.,* moves this Honorable Court for entry of partial summary final judgment on the statutory alcohol and drug defense asserted under *Section 768.36, Fla. Stat.* and any defense of comparative negligence that is based upon allegations that Plaintiff's decedent, Tommie Lewis, was operating a tractor trailer combination while under the influence of marijuana on the following grounds:

Statement of the Case

This case arises from a multi-vehicle accident that occurred on southbound Interstate 75 on or about October 12, 2007. Defendant, Edme, lost control of his own tractor trailer while southbound on Interstate 75, flipped completely over onto Interstate 75, and came to a rest partially in the Southbound lanes of travel, followed by a chain reaction of collisions from vehicles which had been following Edme, including Plaintiff's decedent, Mr. Lewis, and several other vehicles. Mr. Lewis was also driving a tractor trailer which collided with the overturned tractor trailer resulting in a violent collision and explosion. This collision resulted in the death of Mr. Lewis at the scene.

Defendants' Contentions

Defendants assert, *inter alia,* the statutory alcohol or drug use defense found at *Section 768.36, F.S.* which provides as follows:

> **768.36 Alcohol or drug defense.--**
>
> (1) As used in this section, the term:
>
> (a) "Alcoholic beverage" means distilled spirits and any beverage that contains 0.5 percent or more alcohol by volume as determined in accordance with s. 561.01(4)(b).
>
> (b) "Drug" means any chemical substance set forth in s. 877.111 or any substance controlled under chapter 893. The term does not include any drug or medication obtained pursuant to a prescription as defined in s. 893.02 which was taken in accordance with the prescription, or any medication that is authorized under state or federal law for general distribution and use without a prescription in treating human diseases, ailments, or injuries and that was taken in the recommended dosage.
>
> (2) In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

> (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and
>
> (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

Defendants also assert comparative negligence. Defendants contend that the decedent, Mr. Lewis, was under the influence of marijuana at the time of the accident. Defendants contend that Plaintiff's decedent was under the influence of marijuana at the time of the accident and as a result, Mr. Lewis was at least 50% at fault for his own death.

Burden of Proof

The burden of proving each element of an affirmative defense rests on the party that asserts the defense. *Custer Medical Center v. United Auto Ins. Co.,* ___ So. 3d ___, 2010 WL 4340809 (Fla. 2010), *citing Dorse v. Armstrong World Indus.,* 513 So. 2d 1265, 1269 n.5 (Fla. 1957).

Summary of Plaintiff's Argument

1. There is no evidence that Mr. Lewis was under the influence of marijuana at the time of the accident.
2. There is no blood evidence or evidence in urine samples that Mr. Lewis was under the influence of marijuana at the time of the accident.
3. There is no admissible expert testimony that Mr. Lewis was under the influence of marijuana at the time of the accident.
4. There is no lay testimony that Mr. Lewis was under the influence of marijuana at the time of the accident.

5. There is no evidence that Mr. Lewis was 50% at fault because of being under the influence of marijuana at the time of the accident.
6. *Section 768.36, Fla. Stat.* is unconstitutional.

Argument

Evidence of Marijuana Use In This Case:

Post-mortem urine and blood samples from Mr. Lewis showed the presence of an ***inactive*** constituent of cannabis. The ONLY evidence of marijuana use in this case is that Mr. Lewis' post-mortem urine and blood samples tested positive for this inactive metabolite of cannabis, delta 9-carboxy THC, or THCC. In other words, the metabolite contained in Mr. Lewis' urine and blood samples would have no effect on the brain and no pharmacologic effect on the body, as Dr. Goldberger testified in this Court on September 14, 2010 in Allen M. Finley v. Edme et al., Case No.: 2008-CA-2234-DIV-K.

To summarize, the psychoactive constituent in marijuana was NOT found in Mr. Lewis' urine or blood samples. Dr. Goldberger has repeatedly testified in depositions and in open court that these toxicology lab test results are ***not*** evidence that Mr. Lewis was under the influence of marijuana at the time of the accident and that there is ***no toxicological evidence*** establishing that Mr. Lewis was under the influence of marijuana at the time of the accident.

There Is No Evidence Mr. Lewis Was

Under Influence of Marijuana At The Time Of The Accident

There is no evidence at all that Mr. Lewis was under the influence of marijuana use at the time of the accident:

The fact is that there is no evidence at all that Mr. Lewis was under the influence of marijuana the time of the accident. Rather, there is ***only evidence of past use of marijuana***. The ONLY evidence of marijuana use in this case is that Mr. Lewis' post-accident post-mortem urine and blood samples tested positive for the inactive metabolite of cannabis, delta 9-carboxy THC, or THCC. The active constituent of marijuana that would prove Mr. Lewis was under the influence was ***absent*** from his urine and blood samples, as was evidence of any other drugs or alcohol. The metabolite contained in the urine and blood samples would have had no effect on the brain and no pharmacologic effect on the body, as Dr. Goldberger testified in this Court on September 14, 2010 in Allen M. Finley v. Edme et al., Case No.: 2008-CA-2234-DIV-K. The psychoactive constituent in marijuana that would prove he was under the influence at the time of the accident was ***NOT*** found in Mr. Lewis' urine or blood samples.

Dr. Goldberger has repeatedly testified in depositions and in open court regarding this accident that these toxicology lab test analyses are not evidence that Mr. Lewis was under the influence of marijuana at the time of the accident and that ***there is no toxicological evidence establishing that Mr. Lewis was under the influence of marijuana*** at the time of the accident. Thus, these urine and blood results are only evidence of past use of marijuana.

The fact that Mr. Lewis had smoked marijuana in the past clearly does not establish that he was under the influence at the time of the accident. Indeed, the fact that Mr. Lewis had smoked

marijuana in the past is irrelevant. That Mr. Lewis had in the past smoked marijuana is not probative of any issue and does not tend to prove or disprove any material issue in this case.

To be relevant, evidence must tend to prove or disprove a fact in issue. *See Taylor v. State,* 583 So.2d 323, 328 (Fla.1991), *cert. denied,* 513 U.S. 1003, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). *See also* § 90.401, Fla.Stat. ("Relevant evidence is evidence tending to prove or disprove a material fact."). See also, *Nichols v. Benton*, 718 So.2d 925 (Fla. 1st DCA 1998)(holding that evidence of pedestrian's past or occasional current use of alcohol and marijuana was not relevant to issue of damages from closed head injury).

In *Shaw v. Jain*, 914 So. 2d 458 (Fla. 1st DCA 2005) the court granted a new trial to a medical malpractice victim when evidence of drug testing showing marijuana use was admitted at trial over her objection. The court concluded that the evidence was irrelevant in that there was no evidence that the use of marijuana tended to prove or disprove any issue in the case. In so holding, the Court stated as follows:

> As Professor Ehrhardt explains in his treatise on Florida evidence, "for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." Charles W. Ehrhardt, *Florida Evidence* § 401.1, at 120 (2005 ed.) (footnote omitted). Section 90.402 states that "[a]ll relevant evidence is admissible, except as provided by law."§ 90.402, Fla. Stat. (2004). As Professor Ehrhardt again explains, section 90.402 excludes by logical implication all evidence which is not relevant. *Florida Evidence* § 402.1, at 162 n. 1.

In this action, the fact that Mr. Lewis had in the past used marijuana is not probative of any issue in the case, and is certainly not probative of whether he was impaired from smoking of

marijuana at the time of the accident, absent scientific, medical or toxicological evidence that he was under the influence of marijuana at the time of the accident. There is no such scientific evidence of impairment at the time of the accident. Moreover, there is no direct testimony from which one could conclude that Mr. Lewis was under the influence of marijuana at the time of the accident, nor is there any circumstantial evidence that he was under the influence of marijuana at the time of the accident.

In *Edwards v. State*, 548 So.2d 656 (Fla.1989), the Florida Supreme Court held that evidence of drug use for the purpose of impeachment should be excluded unless:

> (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount.

Id. at 658. Defendant cannot show any of the foregoing. Evidence of the alleged use of marijuana in the past, even for impeachment purposes and would be excluded from the trial of this matter in that it is not relevant and does not tend to prove or disprove any material fact in the case.

There is simply no relevant and probative evidence that Mr. Lewis was under the influence of marijuana or had smoked marijuana while driving his truck or at or near the time of the accident. No medical, scientific, or toxicological evidence establishes that Mr. Lewis was under the influence of marijuana at the time of the accident. There is no competent and admissible expert testimony that Mr. Lewis was under the influence of marijuana at the time of the accident.

No eyewitness or lay witness has testified that Mr. Lewis was observed smoking marijuana at or near the time of the accident, that he smelled of marijuana, that any marijuana was found at the scene of the crash, that his eyes were bloodshot, that he had the "munchies", that he exhibited any signs of being "stoned" at or near the time of the accident. There is nothing to support a conclusion that Mr. Lewis was under the influence of marijuana at the time of the accident. There is only evidence of past use of marijuana, i.e. the presence of the inactive constituent of marijuana in Mr. Lewis' urine and blood samples and the absence of the active constituent of marijuana in his urine and blood samples.

Given the complete and total absence of any direct or circumstantial evidence that Mr. Lewis was under the influence of marijuana at the time of the collision, Plaintiffs move this Court for partial summary judgment upon the statutory intoxication defense and upon any claim of comparative negligence based upon any contention he was under the influence of marijuana.

*There can be no competent and admissible **expert** testimony that Mr. Lewis was under the influence of marijuana at time of accident:*

In this action, there is no genuine issue of material fact that there can be no competent **expert** testimony that Mr. Lewis was under the influence of marijuana at the time of the accident because there is an absence of both scientific and factual data to support any such opinion. There is no medical, toxicological, or scientific data and no lay testimony of any observations upon which any expert could lawfully conclude that Mr. Lewis was under the influence of marijuana at the time of the accident. The only evidence of marijuana consumption at all is the presence of an <u>inactive</u> constituent of marijuana, which proves only past use of marijuana. Dr. Goldberger has repeatedly

confirmed that Mr. Lewis' urine and blood samples did NOT contain the active constituent of marijuana that would prove he was under the influence of marijuana and only contained the inactive constituent that would prove past use of marijuana.

Since there is/was no medical, toxicological or scientific evidence of any active constituent of marijuana in Mr. Lewis' system at the time of the accident, it would be pure speculation and conjecture for any expert to conclude, simply from the past history of smoking marijuana, along with allegations and contentions of nothing more than simple negligence, at most, in the operation of his truck, that the Mr. Lewis was under the influence of marijuana at the time of the accident. It is axiomatic that an expert's opinion must be of sound factual basis and cannot be based on speculation, conjecture, guesswork, and assumptions.

An expert's opinion is inadmissible if based on insufficient data, speculation, and assumed facts. *Young-Chin v. City of Homestead*, 597 So.2d 879 (Fla. 3d DCA 1992), *Arkin Construction Co. v. Simpkins*, 99 So.2d 557 (Fla. 1957). There is a complete lack of data upon which to base any opinion or draw any conclusion in this case that decedent was under the influence marijuana. Any expert conclusion otherwise would be pure speculation and conjecture. There is no scientific, medical, or toxicological data to prove anything other than past marijuana use, and there is no lay testimony or circumstantial evidence upon which to base any such opinion.

For an expert to conclude that Mr. Lewis was under the influence of marijuana, the expert would have to speculate that he was smoking marijuana at or near the time of the accident simply because he had smoked it in the past. There is no evidence that Mr. Lewis was smoking marijuana at or near the time of this accident. Any opinion that Mr. Lewis was high at the time of the accident

would necessarily be pure conjecture and not based upon any generally accepted scientific principle or methodology, or any data in this case. Any such opinion would be engaging in classic bootstrapping; inferring expert opinions and conclusions from the conclusions themselves, supported by nothing more than the experts' own testimony. Any such expert testimony would not be helpful to the jury, and instead, would only serve to confuse the jury.

"[T]he basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of any experts retained by Defendants cannot constitute proof of the existence of the facts necessary to the support of the opinion." See e.g. *Schindler Elevator Corp. v. Carvalho,* 895 So. 2d 1103, 1106 (Fla. 4th DCA 2005). An expert opinion is not admissible when it is based on speculation or conjecture. *See St. Joseph's Hosp. v. Cox,* 14 So. 3d 1124, 1127 (Fla. 2d DCA 2009)(rejecting a physician's opinion about causation that was "purely speculative"); *Daniels v. State,* 4 So. 3d 745, (Fla. 2d DCA 2009)(holding that an expert opinion that lacks a proper factual basis is inadmissible); *Jackson County Hosp. v. Aldrich,* 835 So. 2d 318, 328 (Fla. 1st DCA 2002)(reversing denial of a directed verdict where an expert's opinion on causation was based on speculation).

Plaintiff would expect Defendants to cite *State v. Sercey,* 825 So.2d 959 (Fla. 1st DCA 2002) for the proposition that the presence of marijuana components in the blood are admissible, even where that presence could not be quantitatively related to impairment. *Sercey* holds, in part, that the State can prove impairment in a criminal case by a combination of alcohol and a controlled substance by using evidence of the presence of a controlled substance or alcohol in the blood of the accused, along with other evidence of impairment, such as erratic driving and the fact that an accident occurred. However, in that criminal case, there is a most crucial distinction. In *Sercey,* the blood

specimen contained tetrahydrocannabinol (THC), **the psycho-active component of marijuana**. In this wrongful death case, **this psycho-active component was not present in Mr. Lewis' blood**. On the contrary, only the **inactive** component was present.

Here unlike *Sercey*, there is no scientific evidence or data upon which any expert could base an opinion that Mr. Lewis was under the influence of marijuana at the time of the accident. The only evidence of marijuana use is of past usage. There can be no competent expert testimony that Mr. Lewis was under the influence of marijuana at the time of the accident.

There is also no evidence from any lay witness of observations of Mr. Lewis before the accident to suggest he was under the influence of marijuana. There is no evidence of erratic driving suggestive of driving under the influence. At best, there is only evidence of some comparative negligence in failing to avoid the collision with Defendants' truck which had overturned in the middle of an interstate highway.

There is simply no factual basis for any expert conclusion that Mr. Lewis was under the influence of marijuana at the time of the accident, whether from blood or urine tests or from lay witness observations. On these facts, the conclusion by any expert that Mr. Lewis was under the influence of marijuana at the time of the accident would be pure speculation and conjecture based only on the known fact that he had used marijuana on past occasions. Plaintiff is entitled to partial summary judgment on this statutory drug defense and on any contentions of comparative negligence based upon impairment by marijuana, as well.

*There is no **lay** testimony that Mr. Lewis was under the influence of marijuana at the time of the accident:*

There is a complete and total absence of any testimony from any witness of any observations upon which to base any conclusion that the decedent was under the influence of marijuana at the time of the accident. There is no evidence from anyone that they smelled marijuana upon him at any material time, that he exhibited any signs of being impaired by cannabis, such as bloodshot eyes, "the munchies", or any other evidence whatsoever, upon which ANY witness or juror could base a conclusion that he was "stoned" at the time of the accident or had been smoking marijuana at or near the time of the accident.

Absent an active metabolite in blood serum or urine and/or temporally relevant personal observations by some witness of impairment or marijuana use, there is no genuine issue of material fact as to whether there is any evidence from which a jury could conclude that Mr. Lewis was under the influence of marijuana at the time of the accident. There are no witnesses who will testify to any fact that will create an issue of fact on the issue of whether Mr. Lewis was under the influence of marijuana at the time of this fatal accident. There will be no witness who will testify that he or his truck smelled of marijuana, that he was seen in an impaired state before the accident, e.g. bloodshot eyes, etc. There will be no testimony from any lay witness that will establish any such issue of fact. Concluding that Mr. Lewis was under the influence of marijuana at the time of this accident would require rank speculation and conjecture. Plaintiffs are entitled to partial summary judgment on the statutory alcohol and drug defense and on any claim of comparative negligence based on contentions that Mr. Lewis was under the influence of marijuana at the time of the accident.

No Evidence That Marijuana Impairment Was 50% Proximate Cause of Accident

Further, there exists no genuine issue of material fact that there is no competent evidence that any such impairment, even if proven, was a cause of the accident to any degree, much less 50%.

Alcohol Drug Defense Statute Is Unconstitutional

Unconstitutional Abolition of Common Law:

In addition, Section 768.36, F.S. is unconstitutional. It is unconstitutional because it abolishes and alters the common law comparative negligence doctrine without providing a reasonable alternative. A statute is unconstitutional if it abolishes a common law doctrine without providing a reasonable alternative, absent an overwhelming public necessity. *Warren v. State Farm Mutual Automobile Insurance Company*, 899 So.2d 1090 (Fla. 2005) quoting *Kluger v. White*, 281 So.2d 1 (Fla. 1973). Over thirty years ago in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), the Florida Supreme Court adopted and made a part of the common law of the State of Florida, the comparative negligence doctrine. The *Hoffman* court recognized the inherent unfairness in denying recovery where an injured plaintiff was 1% at fault. The Florida Legislature has abrogated this thirty year old common law doctrine of comparative negligence without providing any reasonable alternative to those affected. Thus, the statute is unconstitutional.

Violation of Due Process:

The statute is also unconstitutional in that it violated the right to substantive due process and denies Plaintiff the right to trial by jury pursuant to Article I, §§ 9 and 22. The statute should also not be applied because it is unconstitutional in that it violates the Due Process clauses of the Florida Constitution (Article I, § 9) and of the United States Constitution (Amend. 14) in that:

i. It is arbitrary and/or capricious by allowing recovery to all plaintiffs whose state of being "under the influence" is 50% of the cause of their injuries, but denying any recovery to all plaintiffs whose state of being "under the influence" is 51%[1]; and/or

ii. It is standardless and vague in that it provides the jury with no manner to measure whether the state of being "under the influence" amounts to more than 50% of the cause of a plaintiff's injuries; and/or

iii. It is standardless and vague in that, with regard to plaintiffs who have imbibed both a) distilled spirits and/or beverages that contain 0.5 percent or more alcohol by volume and b) beverages that contain less than 0.5 percent alcohol by volume, it provides the jury with no manner in which to measure to what percent of the causation of injury is due to the use of beverages in category a) and b) in determining whether the state of being "under the influence" was more than 50% of the cause of their injuries; and/or

iv. It is standardless and vague in that, in plaintiffs are both "under the influence" of distilled spirits and/or beverages whose alcohol content is .05 percent or more by volume and who are in addition impaired for other reasons (for example, those "under the influence" of other beverages which are not distilled spirits or which contain less than 0.5 percent alcohol by volume (see Fla. Stat. § 768.36(1)(a)), those "under the influence" of lawful medications (see Fla. Stat. § 768.36(1)(b)), or those who are overtired or

[1]Or, even more accurately stated, 50.1%, or 50.01%, or 50.001%, etc., ad nauseum.

mentally disabled), it provides the jury with no manner to measure to what extent the plaintiff's impairment is caused by a) being "under the influence" of distilled spirits and/or beverages whose alcohol content is .05 percent or more by volume and b) other causes; and/or

v. It is overbroad and/or arbitrary and capricious in that it deprives a plaintiff whose state of being "under the influence" is more than 50% of the cause of his injuries any recovery even when the plaintiff is engaged in entirely lawful conduct (as opposed to operating a motor vehicle or undertaking surgery upon a patient).

Denial of Access to Courts:

The statute arbitrarily precludes recovery at 50.01% negligence, 50.001 % negligence, 50.0001 % negligence, and so on, effectively denying access to the court, under Article I, § 21. This is similar to the $ 450,000 cap on compensatory damages struck down by the Supreme Court of Florida in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). The statute violates the Plaintiffs' right of access to the courts by abolishing the rights of plaintiffs whose "under the influence" state is more than 50% of the cause of their injuries to recover full damages without providing them with a reasonable alternative for recovery of their full damages and without the Legislature showing an overpowering public necessity for abolishment of said rights and that no alternative method of meeting such public necessity existed.

Violation of Equal Protection Clause:

The statute is also unconstitutional in that it violates the Equal Protection Clause, Article I, § 2 by singling out a particular category of plaintiffs, those impaired by alcohol or drugs, whether illegally impaired or not, (e.g. a pedestrian or a passenger in an automobile would be legally intoxicated) for lesser rights in civil actions. This is a violation of the Equal Protection Clause.

The statute is unconstitutional and should not be applied in that it violates the Equal Protection clauses of the Florida Constitution (Article I, § 2) and the United States Constitution (Amend. 14) by:

i. Discriminating against plaintiffs whose injuries are more than 50% caused by their being "under the influence" by taking away their right to collect damages caused by the wrongdoing of defendants but does not similarly mandate any penalty or award of damages against a defendant who is "under the influence" where such state is more than 50% the cause of a plaintiff's damages; and/or

ii. Discriminating against plaintiffs who are more than 50% the cause of their damages due to being "under the influence" by denying them any recovery but does not similarly deny recovery to plaintiffs who are more than 50% the cause of their own damages due to any other cause (including those who are "under the influence" to an extent that such state is less than 50% of the cause of their injuries, but who are found by a jury to be overall more than 50% comparatively negligent in combination with other non-"under the influence" factors); and/or

iii. Discriminating against plaintiffs who are more than 50% the cause of their damages due to being "under the influence" by denying them any recovery but allowing recovery to plaintiffs whose state of being "under the influence" is 50% or less of the cause of their own damages; and/or

iv. Discriminating against plaintiffs who are more than 50% the cause of their damages due to being "under the influence" by denying them any recovery but allowing recovery to plaintiffs who are impaired for other reasons (for example, those "under the influence" of other beverages which are not distilled spirits or which contain less than 0.5 percent alcohol by volume (see Fla. Stat. § 768.36(1)(a)), those "under the influence" of lawful medications (see Fla. Stat. § 768.36(1)(b)), or those who are overtired or mentally disabled) and whose impairment is more than 50% of the cause of their own damages.

Denial Of Right To Trial By Jury:

It violates the Right of Trial by Jury clause of the Florida Constitution (Article 1, § 22) by prohibiting plaintiffs whose "under the influence" state is more than 50% of the cause of their injuries from recovering the amount of their damages that a jury finds or otherwise would find was caused by a defendant tortfeasor.

Violation of Separation of Powers Doctrine:

It violates the separation of powers doctrine of the Florida Constitution by altering the rules

of practice and procedure in Florida's courts (Art. V, § 2) inasmuch as it is a legislative enactment affecting a power textually dedicated to the Florida Supreme Court (which even the Florida Legislature conceded by implication).[2]

Conclusion

For the foregoing reasons, Plaintiffs Motion for Partial Summary Judgment should be GRANTED and summary final judgment entered on the Alcohol and Drug Defense asserted under *Section 768.36, F.S.* and on any comparative negligence claims based upon claims that the decedent, Mr. Lewis, was under the influence of marijuana at the time of the accident. There is no competent evidence that Mr. Lewis was impaired at the time of the accident from marijuana or any other drug or alcohol; and there exists no genuine issue of material fact establishing or tending to prove that Mr. Lewis was under the influence at the time of the accident. In addition, Partial Summary Judgment should be granted as to the Alcohol and Drug Defense, Section 768.36, F.S. on the grounds that it is unconstitutional.

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[2]The Amendment Notes to Fla. Stat. § 768.36 states as follows:

Laws 1999, c. 99-225, § 34 provides that:

"Section 34. It is the intent of this act and the Legislature to accord the utmost comity and respect to the constitutional prerogatives of Florida's judiciary, and nothing in this act should be construed as any effort to impinge upon those prerogatives. To that end, should any court of competent jurisdiction enter a final judgment concluding or declaring that any provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the Legislature hereby declares its intent that any such provision be construed as a request for rule change pursuant to § 2, Art. 5 of the State Constitution and not as

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail – postage paid, this _____ day of May, 2011, to: Alan Landerman, Alvarez, Sambol, Winthrop & Madson, P.A., 100 S. Orange Avenue, Ste. 200, Orlando, FL 32801 and Lance D. Lourie, Esq., 3348 Peachtree Road, NE, Tower Place 200, Suite 1050, Atlanta, GA 30326.

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a mandatory legislative directive."