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The Voice

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"Who Are You?": An Accountant's Liability to Non-Client, Third Parties

By Katrina L. Smeltzer, Lyndon P. Sommer, and Joseph F. Devereux III

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"I think humanitarian work needs to stop being a 'by the way' thing. It should be something that we are living as the norm."

—Umra Omar, Safari Doctors, Kenya, on World Humanitarian Day (Aug. 19, 2020).

This Week's Feature

"Who Are You?": An Accountant's Liability to Non-Client, Third Parties

By Katrina L. Smeltzer, Lyndon P. Sommer, and Joseph F. Devereux III



Most accountants expect that they owe a duty to their clients. However, accountants and their attorneys are often surprised to learn that an accountant may also owe a duty to a third party who was not the accountant's client.

There is no uniform standard that establishes an accountant's duty to a third party. Rather, the extent of an accountant's duty to third parties depends on the laws of the state in which the accountant practices. This lack of uniformity has created four differing approaches among states, which have largely been set by judicial interpretation.

The Four Approaches

The four approaches that a state may take are the privity approach, the "near privity" approach, the Restatement approach, and the "foreseeability" approach.

The Privity Approach: The Most Restrictive

Traditionally, an accountant could not be liable in contract or tort to a third party with whom the accountant did not have privity of contract. This rule is simple and straightforward; the duty of care extended only to those parties for whom contractual privity exists.

This is the most restrictive approach, and today, it is only used in four of the 50 states: Colorado, Nevada, Virginia, and Pennsylvania.

The "Near Privity" Approach: Less Restrictive

Six states, such as New York and Maryland, have adopted a less restrictive approach requiring "near privity." For example, in *Parrott v. Coopers & Lybrand*, a New York court reiterated that in the absence of privity, a party seeking to recover for a loss suffered due to another's negligent misrepresentation must show a relationship so close as to approach that of "near privity." 741 N.E.2d 506, 508 (N.Y. 2000). A party seeking to establish "near privity" must prove the following:

> (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

Id. (quotation omitted).

Under this approach, the third party must be known to the accountant, and the accountant must know that the third party will rely on his or her statements. This is a heavy standard to meet because a third party must prove that the accountant's words or actions were directed toward him or her and that he or she was an intended beneficiary of the accountant's engagement by the client.

The Restatement Approach: The Moderate and Majority Approach

Most states follow the standard outlined in section 552 of the Restatement (Second) of Torts. Under the Restatement section, accountants are liable to (1) third parties to whom the accountant intends to give the information; (2) third parties to whom the accountant knows the recipient plans on giving the information; (3) third parties who the accountant plans on influencing with the information; or (4) third parties who the accountant knows the recipient will influence by using the information. This approach is considered the moderate approach and has been adopted by 26 states, including Arizona, Georgia, Massachusetts, and Missouri.

For example, in *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, a Missouri Court of Appeals reinforced the state's adoption of the Restatement approach by holding that an accountant is liable to a third party when he or she knows that the work product is to be used by the third party for his or her benefit and guidance, or knows that the recipient intends to supply the work product to prospective users. 493 S.W.2d 378, 383 (Mo. Ct. App. 1973). The court also established a framework for determining third-party liability by balancing (1) the extent to which the transaction was intended to affect a plaintiff; (2) the foreseeability of harm to him or her; (3) the degree of certainty that the plaintiff suffered injury; and (4) the closeness of the connection between the accountant's conduct and the injury suffered. *Id.*

The "Foreseeability" Approach: The Least Restrictive

The least restrictive approach and the one that creates the greatest risk and uncertainty is the "foreseeability" approach, which three states have adopted. The "foreseeability" standard adopted by Wisconsin, for instance, renders an accountant liable for the foreseeable injuries resulting from an accountant's negligent acts, unless, as a matter of policy, recovery is denied based on grounds of public policy. *Citizens Nat'l Bank v. Timm, Schmidt & Co.*, 335 N.W.2d 361, 366 (Wis. 1983). Part of the rationale for imposing such broad liability on accountants is to make accountants more careful in the execution of their duties to clients and to ensure that third parties who rely on an accountant's preparation of financial statements are protected. *Id.* at 365.

Conclusion

The duty that an accountant owes to third parties has evolved over time, and although courts take different approaches, the overarching theme has been to expand an accountant's potential liability to third parties. Whereas liability was once limited to the existence of a contract, it has now, in the most extreme cases, extended to create potential liability to any third party who is reasonably foreseeable to the accountant.

Consequently, accountants and their attorneys need to be mindful of the various state approaches and the circumstances under which an accountant could be held "accountable" to third parties. This is critical knowledge so that an accountant can be proactive in mitigating risk by clearly defining the accountant's role and duties with a client and providing appropriate disclaimers in the accountant's finished product.

Katrina L. Smeltzer, a Kansas City-based attorney, is part of **Sandberg Phoenix & von Gontard, PC's** business litigation practice group, focusing her practice on representing professionals and representing and assisting insurance companies with coverage decisions and resolving construction disputes. Ms. Smeltzer is an experienced litigator, representing clients from many different industries on varied matters. She handles matters from the pre-suit investigative stage through trials. She also has significant writing experience and is a part of the firm's appellate team. Ms. Smeltzer is a member of the DRI Professional Liability Committee.

Lyndon P. Sommer is a shareholder in **Sandberg Phoenix's** St. Louis, Missouri, office, and member of the firm's business litigation and product liability practice groups. He focuses his work in the areas of commercial litigation, professional liability, and product liability. Mr. Sommer specializes in professional negligence cases involving certified public accountants, who he has successfully defended in trials and on appeal. He is experienced in defending accountants in federal courts and is very familiar with federal procedure and expert requirements. Throughout his career, he has handled more than 100 professional negligence cases. Mr. Sommer is a member of the DRI Professional Liability Committee.

Joseph F. Devereux III is a St. Louis-based attorney in **Sandberg Phoenix's** business litigation practice group and has extensive litigation experience representing small and medium-sized companies, individuals, and entrepreneurs. Mr. Devereux practices in both state and federal courts throughout the United States and has developed a reputation as a strong advocate for his clients and their interests. His practice focuses primarily on commercial and construction litigation. He represents contractors, subcontractors, engineers, architects, and real estate developers in litigation arising out of design and construction defects, delay claims, mechanic's liens, and bond claims.

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Article of Note

Recovery of Medical Bills: "Face Amount" Versus "Amount Paid"

By Walter Judge and Jennifer McDonald


A medical malpractice plaintiff may not recover more than the defendant was actually paid for treating the plaintiff.

In a decision of significance in medical malpractice cases, a Vermont superior court has recently held that a medical malpractice plaintiff cannot recover from the defendant hospital more in medical specials damages than the amount that the hospital received in payment for treating the plaintiff. *See DeGraff Spear v. University of Vermont Medical Center*, Docket 239-3-18 Cncv. (Toor, J.) (Vt. Super. Ct. May 12, 2020).

Background

For years a battle has been raging in the United States over whether a personal injury plaintiff can recover from the tortfeasor, by way of medical specials, (1) the "face amount" of his or her medical bills for accident-related treatment, which typically includes a portion that the health-care provider has "written off" and agreed not to pursue from the patient plaintiff), or (2) only the lesser amount that the health-care provider, after applying its write-off, accepted in full satisfaction of those bills from an insurance company or other third-party payor, or government benefit (e.g., Medicaid or Medicare), that is, the "amount actually paid." The answer depends on the jurisdiction, and comprises a spectrum.

The Spectrum

On one end, in some states, either by judicial ruling or by statute, a plaintiff cannot recover more than his or her health-care provider, or providers, accepted in full satisfaction of the bills. *See, e.g., Stayton v. Delaware Health Corp.*, 117 A.3d 521, 530 (Del. 2015) (involving a common law ruling that the amount paid by Medicare or Medicaid is dispositive of the reasonable value of health-care services, and the collateral-source rule does not require otherwise); *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541 (Cal. 2011) (same); *Hanif v. Housing Authority*, 200 Cal. App. 3d 635 (Cal. Ct. App. 1988) (same); Iowa Code §§ 622.4, 668.14A (limiting a plaintiff's recovery to the amount actually paid); Tex. Civ. Prac. & Rem. Code § 41.0105; *Haygood v. Garza de Escabedo*, 356 S.W.3d 390 (Tex. 2011) (confirming that the Texas statute limits a plaintiff's recovery to only the discounted amount, and limits evidence of medical expenses to the amount paid).

On the other end, in some states, a plaintiff can recover the full "face amount" of his or her bills, and a defendant cannot introduce evidence of the "amount actually paid." *See Lopez v. Safeway Stores, Inc.*, 129 P.3d 487 (Ariz. Ct. App. 2006).

Jurisdictions that have allowed a plaintiff to recover the full "face amount" of the bills and refuse to allow the defendant to introduce evidence of the "amount actually paid" typically do so—wrongly, in our view—under the "collateral-source rule." The collateral-source rule holds that a tortfeasor cannot benefit, that is, limit its damages exposure, from the fact that a third-party payor (e.g., insurance) paid the plaintiff's medical bills. Otherwise, the theory goes, the tortfeasor avoids some amount of liability by the fortuity that the plaintiff was insured. *Id.* at 487.

In between, in yet other states, a plaintiff can recover the "reasonable value" of his or her accident-related medical treatment; it is up to the jury to determine that amount; and the jury may consider both the "face amount," and the "amount actually paid." *See Robinson v. Bates*, 112 Ohio St. 3d 17, 857 N.E.2d 1195 (2006) (in Ohio, "[b]oth the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care"). *See also Law v. Griffith*, 457 Mass. 349, 930 N.E.2d 126 (Mass. 2010) (holding that a plaintiff may introduce bills showing the "face amount" as evidence of reasonable value, and a defendant may introduce contrary evidence of reasonable value but may not introduce the "amount actually paid" because such evidence is contrary to the collateral-source rule).

The Vermont Supreme Court has not addressed the "face amount" versus "amount actually paid" issue, but the court does follow the collateral-source rule, and most Vermont superior judges who have addressed this issue have cited that rule in refusing to allow the defendant to limit a plaintiff's recovery of medical specials to the amount actually paid for medical services.

We do not believe that this is properly analyzed as a collateral-source rule issue. Restatement (Second)

Torts § 920A (1979). The issue is not that a third-party payor (insurance, or Medicaid, for instance) paid for all or part of a plaintiff's medical bills. Rather, the issue is a damages issue: what is the reasonable value of the medical services provided as established by how much the medical treatment actually cost. A defendant who is seeking to limit a plaintiff's recovery of medical specials to the amount actually paid and accepted as full payment is not seeking to avoid liability for the specials but is only seeking to prevent a plaintiff from recovering more than the treatment actually cost—from obtaining a windfall, through the artifice of presenting the jury with medical bills that show a false dollar figure for the treatment rendered. We believe that this amounts to misleading the jury into awarding an unfairly high damages award in the medical specials category—effectively a form of punitive damages without the requisite showing of malice. *See, e.g., Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541 (Cal. 2011) (holding that limiting the amount of a plaintiff's recoverable medical specials to the amount paid by the plaintiff's insurer in full satisfaction of the medical bills does not violate collateral-source rule).

The Medical Malpractice Context

But what about a situation in which the defendant and the health-care provider that treated the plaintiff and whose bills are at issue *are one and the same*? This is exactly the situation in the typical medical malpractice case. A Vermont superior court addressed the question in *DeGraff Spear*, ruling in the defendant hospital's favor.

The DeGraff Spear Case

It's important to understand the basic facts. The plaintiff was treated at the University of Vermont Medical Center hospital (UVMMC) and experienced complications. She subsequently was treated extensively at another hospital. At both facilities she incurred substantial medical bills. The bills from both UVMMC and the subsequent hospital were paid by Medicare and her husband's military health insurance, for a fraction of the face amount of the bills and in full satisfaction of those bills, so the plaintiff owed the two hospitals nothing. She sued UVMMC for malpractice, alleging that her lengthy treatment at UVMMC and at the subsequent hospital was due to UVMMC's negligence. She sought to recover the full face amount of the bills issued from both UVMMC and the subsequent hospital. UVMMC moved to limit the plaintiff's recovery to the amount paid by Medicare and the military insurer for the bills from both hospitals.

The Court's Analysis

Pertaining to the bills from the second hospital, the court predictably followed the conventional analysis and treated the issue as a "collateral-source" issue, ruling that the plaintiff could recover the full face amount. The court rejected UVMMC's argument that government payments, such as Medicare, should be treated differently from private insurance under the collateral-source rule.

But pertaining to the bills from UVMMC, the court concluded that the collateral-source rule did not apply, and it would be unfair for UVMMC to have to pay back to the plaintiff the full face amount of UVMMC's bills when UVMMC itself had "written off" a huge portion of those bills and accepted a much lower amount from Medicare and the military insurer in full payment. Accordingly, UVMMC's liability on its own bills will be limited to the amount actually paid.

The collateral-source rule only prevents an alleged tort-feasor (here, the medical malpractice defendant, UVMMC) from benefitting from a third party's (typically, an insurer's) payments to a third-party health-care provider, to cover a plaintiff's damages caused by the tortfeasor. To constitute a collateral source, there must have been a payment made by an unrelated third party on behalf of the plaintiff. *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal.3d 1 (Cal. 1970). In a typical case, a defendant-tortfeasor is not permitted to benefit from that third-party payment by way of reducing its damages liability to the plaintiff. But when a defendant is "connected with" the payment, the collateral-source rule does not apply. In a medical mal-practice case, the defendant hospital is not an unrelated third party and is "connected with" the reduced bill when it writes off the amount of the bill that is not paid by the third party (insurance or Medicare). This written-off amount is essentially a partial payment of the bill by the defendant hospital and is therefore "outside" the collateral-source rule. Therefore, the court concluded that the plaintiff could only recover the amount of UVMMC's bill paid by Medicare. In this situation, to have ruled otherwise would have forced UVMMC to give back to the plaintiff, in the form of medical specials, approximately $300,000 *more* than it received and accepted in payment for those specials.

It would have been unreasonable for UVMMC to have to pay to the plaintiff in medical expenses an amount that UVMMC already had incurred and "paid" on the plaintiff's behalf by writing those expenses off and accepting a lower payment from Medicare. (It should be noted that we are only discussing the category of damages known as "medical specials." A personal injury plaintiff is of course free to seek whatever amount of *general* damages, such as pain and suffering, that he or she can persuade a jury is fair and just under the circumstances.) To the extent that there was any benefit in *DeGraff Spear* to the plaintiff from the defendant's write-off, that benefit was provided by the defendant, at the defendant's own expense.

A few other courts have ruled the same way based on similar facts, or indicated that they would do so. *See Williamson v. St. Francis Med. Ctr., Inc.*, 559 So. 2d 929 (La. Ct. App. 1990); *see also Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003) (discussing and distinguishing an earlier decision holding that application of the collateral-source rule when "medical services [were] provided by the tortfeasor itself...would have required, in effect, double payment.").

Conclusion

This *DeGraff Spear* decision is significant in the medical malpractice area. It is significant for that species of medical malpractice cases in which (1) the plaintiff is not seeking recovery of medical bills from a third-party health-care provider that treated him or her to address the defendant health-care provider's alleged malpractice (or not *only* from such a third party), but of the medical bills from the defendant itself; and (2) the "face amount" and "amount actually paid" differential is significant.

The court's ruling in this case establishes precedent that in such a case the plaintiff cannot seek to recover a greater amount of damages, in the form of medical specials, than the defendant was actually paid for treating the plaintiff.

Walter Judge, of **Downs Rachin Martin PLLC,** in Burlington, Vermont, represents businesses in the state and federal courts of Vermont, Massachusetts, and Maine in commercial matters (such as contract disputes, unfair competition), intellectual property litigation (enforcement of copyright, trademark, and trade secret rights), and product liability and personal injury defense. He defends retail establishments, premises owners, trucking companies, institutions, and individuals against negligence and personal injury claims. In 2019, Mr. Judge obtained a $3.6 million jury verdict in a federal court on behalf of an aviation company against a competitor. He is a longtime member of DRI as well as other defense organizations.

Jennifer McDonald, of **Downs Rachin Martin PLLC,** in Burlington, Vermont, is an experienced trial lawyer who represents clients at every stage of civil litigation. She has tried cases to verdict in state and federal courts and handled appeals in the Vermont Supreme Court and the U.S. Court of Appeals for the Second Circuit. Her practice includes commercial litigation, contract, construction, federal preemption, white-collar defense, investigations, and municipal litigation. She regularly defends businesses and institutions in personal injury, wrongful death, medical malpractice, and other claims. In addition, Ms. McDonald conducts arbitrations before the AAA and the International Chamber of Commerce (ICC). She is also a member of DRI.

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Practice in a Pandemic: DRI and SLDOs Rise Like a Phoenix to Lead the Way

By Mark A. Fredrickson, DRI North Central Director

In January 2020 our Space Planning Committee circulated a survey that included a number of questions dealing with the concept of "hoteling" some of the lawyer offices. I was not a fan! The practice of law requires daily organic interactions that blossom in an office setting...or so I thought.

The North Central Region (Illinois, Indiana, Minnesota, North Dakota, South Dakota, and Wisconsin) had its Regional Meeting in Scottsdale at the end of February, and we were blissfully unaware of what was starting to spread from China. Our DRI Board Meeting immediately followed the Regional Meeting, also in Scottsdale (some deft planning allowed me a week of sunshine!). The media just started giving more air time to the virus in those days, and the board started having some, as it turns out, very optimistic discussions regarding how DRI should respond.

A mere week after returning to the tundra, our daughter was sent home from college and people were talking about stay-at-home orders. Minnesota put one in place on March 28th. I've never seen anything like it. People were actually hoarding toilet paper and downtown Minneapolis looked like a ghost town. Under Minnesota's order, attorneys were allowed to work from their offices, and I did. Most did not. I remember March and early April being a frenzy of activity, figuring out how to navigate the new reality, advising clients how they should react and change their operations, and telling some that they could not stay open. Guidance from the government changed, it seemed, on a daily basis. Courts closed. People were scared, confused, and angry—understandably so. I decided to grow a beard, looked like an older, fatter, and less talented Jerry Garcia, and it itched. I shaved it when they finally allowed us to get a haircut in early June.

I had one case where every judge in the original district had a conflict, and the supreme court appointed a judge in a different district to hear the case. Just as we were finishing discovery and getting ready to file a summary judgment motion, the court-assigned judge resigned. A new judge was appointed. One of the opposing parties tried to strike her. When the new judge properly refused to allow the strike, there was an appeal. The Minnesota Supreme Court upheld the decision. At long last we were now ready to file the motion. We did. We briefed it. The hearing was set for early April... it was then postponed to the end of July. Another eternity, it seemed. Oh well, at least by then we should have an in-person hearing, I told the client. Wrong! We argued it via Zoom. By then, that wasn't really a new thing. We had done many hearings, depositions, and even mediations via Zoom. The new normal. Not good because it's hard to read body language and nonverbal clues, but at least possible. Perhaps by the next time I'll see you in person, I'll know what happened. Ask me. Hopefully, it will still be fresh in my mind.

In the intervening months, plenty of other things have changed. On Memorial Day, a Minneapolis police officer was shown in a disgusting and disturbing video kneeling on the neck of George Floyd, who died in custody, setting off a series of protests marred by senseless violence and destruction, serious discussions concerning systemic racism and how to address it, and, unfortunately, the social media-driven politics of division and blame. Derick Chauvin was subsequently charged, correctly in my opinion, with murder. It was sad and scary. It spawned what can only be described as radical calls for disbanding (not defunding or reforming) the Minneapolis Police Department. In turn, over 100 Minneapolis police officers have either left the department, been fired or arrested, or filed for disability. Murder, gang violence, carjacking, and robbery are at record levels. And every day more people test positive, are hospitalized, and die from the pandemic as we try to balance staying safe and preventing the virus from destroying the economy. The rhythms of life in modern America have become syncopated, often beyond recognition, as we try to decide

whether and how to return to school, watch a baseball game, or just go out to dinner.

I still go to the office every day. I feel safe. Downtown Minneapolis remains a post-apocalyptic ghost town, which is likely to continue for some time. There are some lawyers in our office who I haven't seen since March, and many only come in when they feel that it is essential. My assistant just told me that she wants to cut back on the amount of time she spends in the office, not because of COVID-19, but because of the increased lawlessness. These are strange times.

Throughout this pandemic, DRI leadership has responded with ingenuity, flexibility, practicality, and optimism concerning the changes forced upon us. Leadership at the committee and SLDO levels have creatively found solutions to overcome the restrictions of doing things the way that they've always been done. And our members and their firms continue to lead the way as the practice of law accelerates changes that were probably inevitable.

I know that I could not have stayed sane if it had not been for the relationships that I have developed through the Minnesota Defense Lawyers Association and DRI. The ability to continue to interact with these folks to discuss the new, serious issues that confront us every day keeps me sane. Little did I know when I was in Scottsdale that the next year would bring the world crashing down. I am hopeful that it will rise like a Phoenix, better, stronger, and more just. I don't pretend to know what the next week or month will bring. I do know that I have reconsidered my opinions on whether it is necessary for lawyers to be in the office most of the time. The practice of law does require human interaction, but humans adapt, and good lawyers are human (at least for the foreseeable future). We will continue to adapt and be better for it.

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Where Do We Go from Here?

By Eddie L. Holiday III

My name is Eddie L. Holiday III. My family is made of public servants. My father, Eddie Lee Holiday II, served as an avionics navigations systems technician for the United States Air Force. My grandfather, Eddie Lee Holiday, served as a drill sergeant in the United States Army in the 1950s, primarily in Louisiana and Texas. My grandfather served his country during the Jim Crow era and experienced the abuse of power by federal, state, and local officials. Even though my grandfather suffered physical beatings and demeaning insults by police officers, he continued to serve his country, as he believed that through hard work and perseverance, his county would recognize the humanity of its fellow African American citizens. We, as a nation, are still working toward that goal.

Unlike my father and grandfather, I never served in the military. Instead, I attended college and earned my undergraduate degree from *the best* historically Black university, Howard University. I continued my matriculation at the prominent Howard University School of Law. I chose Howard University School of Law because it is the home of my legal heroes: Charles Hamilton Houston—known as "the man who killed Jim Crow"—and the Honorable Supreme Court Justice Thurgood Marshall. Charles Hamilton Houston once said, "a lawyer is either a social engineer or a parasite on society." His mentee, Justice Marshall, said, "the practice of law should serve as a tool for creating equality in society." I took those wise words to heart, thought back on my family's legacy, and made the decision to begin my legal career as a public servant. To that end, I left Washington, D.C., and travelled to Miami, Florida, to become an assistant state attorney in the country's fourth largest prosecuting office.

While I was a prosecutor, I had the opportunity to take and defend countless depositions and first-chair over two dozen bench trials and over 50 jury trials to verdict. Near the end of my time at the Miami-Dade Office of the State Attorney, I assisted the trial team that prosecuted the police-involved shooting of Mr. Charles Kinsey. Mr. Kinsey was an unarmed African-American mental therapist who was assisting a patient with severe autism when he was shot in the leg by a police officer in North Miami. After a hung jury, the second trial resulted in the jury finding the officer guilty of culpable negligence.

As I made the transition from criminal to civil, I continued to follow the criminal proceedings of other police-involved shootings across the county. I realized not only how difficult it is to charge police officers, but also that the verdict in Mr. Kinsey's shooting was an anomaly. While police shootings and other forms of police misconduct against unarmed minorities are beginning to lead to more filed charges, the charges are not leading to convictions. Between 2005 and 2017, 80 officers had been arrested on murder or manslaughter charges for on-duty shootings; and during that 12-year span only 35 percent were convicted. Of course, each trial has its own unique set of facts, but the jury pools are hardly a reflection of their communities with respect to race. I don't admit to having all the answers, but I do have one question for the legal community, "Where do we go from here?"

The reason I ask, "Where do we go from here?" is because the United States has a long history of conscious racial discrimination by lawyers in the jury selection process. It has been over 140 years since the Supreme Court ruled that excluding African Americans from the jury selection process is a violation of the Equal Protection Clause of the 14th Amendment. *See Strauder v. West Virginia*, 100 U.S. 303 (1879); *Batson v. Kentucky*, 476 U.S. 79 (1986) (extending to peremptory challenges by prosecutors); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending to peremptory challenges in civil matters). Even to this day, there are lawyers who attempt to remove jurors because of the color of their skin and not because they are unable to assess fairly the facts of a given case.

The reason I ask, "Where do we go from here?" is because even without the use of peremptory challenges to remove potential African-American jurors, the current federal and state systems effectively exclude a sizeable portion of the African-American population. For instance, Florida state courts select jurors based on DMV records, such as a driver's license or identification card. African Americans who do not have an identification card or a driver's license—because they do not own a car—will simply never have the opportunity to serve on a jury. The federal system is equally at fault. At the federal level, courts ran-

domly select jurors from voter lists and sometimes drivers lists. African Americans who are not registered to vote because they do not have a driver's license or identification card are likewise excluded from serving on a federal jury.

The reason I ask, "Where do we go from here?" is because we must find a way to ensure that murder trials and potential civil cases on behalf of victims like George Floyd are comprised of jurors who truly reflect the communities of the defendant officers and the victims. Should the United States Supreme Court revisit portions of its *Virginia v. Rives*, 100 U.S. 313 (1879), decision regarding all-white juries? Should the court system develop a means of summoning potential jurors other than voter and DMV records? Should convicted felons be able to have their civil rights immediately restored upon successfully paying their debts to society?

Where do we go from here?

Eddie L. Holiday III is an associate in the Miami office of **Bowman and Brooke LLP.** Mr. Holiday's practice includes various aspects of complex civil litigation in state and federal courts. Recognized as a "Rising Star 40 Under 40" in the *Daily Business Review* and "Top 40 Under 40 in Florida" by the National Black Lawyers Top 100, his practice consists of representing Global 500 clients with a focus on defenses premises and product liability claims. He is on the board of directors for the League of Prosecutors, fundraising chair for the National Association of Black Prosecutors – South Florida Chapter, and Young Lawyers Liaison for the DRI Diversity and Inclusion Committee.

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Ebner Elected to ALF Leadership

Larry Ebner has been elected Senior Vice President & General Counsel of the **Atlantic Legal Foundation**, where he will develop strategy and implement that national public interest law firm's cornerstone amicus curiae program. Larry also will continue his nationwide appellate practice at Capital Appellate Advocacy PLLC and serve as co-vice chair of the DRI Center for Law and Public Policy and immediate past chair of the DRI Amicus Committee. Click here to read the ALF's full press release.

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Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and email address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Kile T. Turner

DRI member Kile T. Turner of the Birmingham, Alabama, firm **Norman Wood Kendrick & Turner** recently won a reversal for his client in a coverage case at the Eleventh Circuit Court of Appeals. In *Sellers v. Nationwide Insurance*, No. 18-15276, 2020 WL 4555787 (11th Cir. Aug. 7, 2020), Mr. Turner successfully argued that the district court abused its discretion when it applied the federal law instead of Alabama law to determine whether issue preclusion applied. Interestingly, the trial judge was not only the presiding judge for the Northern District of Alabama, but had also been Mr. Turner's insurance law professor in law school.

In the underlying case, the plaintiffs filed suit against the general contractor for defective construction of the foundation to their large home that resulted in over $450,000 in damages. The general contractor filed a third-party action against Nationwide's insured, Durham Contracting. Nationwide filed a declaratory judgment, and the court held that the resulting damages precluded the Nationwide policy period, and thus, they were not covered. The plaintiffs obtained an assignment from the general contractor and took a judgement against Durham, both individually and as the general contractor's assignee. The plaintiffs then sought to collect the judgment under Alabama's direct action statute.

The district court held that the plaintiffs were not barred by the doctrine of issue preclusion from pursuing their claim against Nationwide as the general contractor's assignee. The case proceeded to a trial, resulting in a verdict for the plaintiffs. On appeal, though, Mr. Turner successfully argued that Alabama's "expansive definition of privity" applied and that the district court judge abused her discretion when she applied the more restrictive standard.

DRI Announces Its 15th Annual Diversity Law Student Scholarship Competition

DRI announces its 15th annual **Law Student Diversity Scholarship Competition** in which two $10,000 scholarships will be awarded. The program is open to students who will be in their second or third year of law school in the 2020–2021 academic year. Eligible are African American, Hispanic, Asian, Native American, LGBT, and multi-racial students. Also eligible are female law students, regardless of race or ethnicity and law students who come from backgrounds that would add to the cause of diversity, regardless of race or gender.

The goal of these scholarships is to provide financial assistance to two worthy law students from ABA-accredited law schools to promote, in a tangible way, the DRI Diversity and Inclusion Statement of Principle. Since its inception, the program has awarded $300,000 in scholarships.

To qualify for this scholarship, a candidate must be a full-time student. Evening students also qualify for consideration if they have completed one-third or more of the total credit hours required for a degree by the applicant's law school.

Two scholarships in the amount of $10,000 each will be awarded to applicants who best meet the following criteria:

- Demonstrated academic excellence
- Service to the profession
- Service to the community
- Service to the cause of diversity

Click here to access the scholarship application and information or go to www.dri.org. **Applications must be received by DRI no later than August 31, 2020.**

Lightfoot Magic

Lightfoot Franklin & White LLC partnered with Magic Moments to fundraise and give seven-year-old Cayden his "magic moment"—a trip to the beach! Cayden is going through treatments for a brain tumor at Children's of Alabama. Learn more about his story here: https://bit.ly/31FTUe1. #LightfootCares #LawyersGiveBack

Avery Berke

Why is it important to help other people who need our help?

Because sometimes people need help and if we have the ability to do it we should.

What's a memory that makes you happy?

When we went to Idaho last summer (FDCC Annual Meeting in Sun Valley).

What do you look forward to when you wake up?

When I'm at my dad's house, seeing Maggie (*Maggie is her dog*). **Follow-up question: What about when you're at my house?** Answer: Seeing you. (*Hmmmmm. Wonder if she felt compelled to say that. – LB*)

At what age is a person an adult?

18.

What is the hardest thing about being a kid?
Having to clean your room all the time.

If you could make one rule that everyone in the world had to follow, what rule would you make?

That you can't be mean to others.

What is your perfect meal?

Chick-fil-A nuggets, French fries, ice cream, and Dr. Pepper.

What do you want to be when you grow up?

A veterinarian.

Avery is the nine-year-old daughter of DRI board member and ADTA President Lori M. Berke of the Berke Law Firm PLLC in Phoenix.

Upcoming Seminars

Medical Liability and Health Care Law Virtual Seminar, Thursday, August 20–Friday, August 21, 2020

Click here for details.

DRI Virtual Annual Meeting, Wednesday, October 21–Friday, October 23, 2020

Click here for details.

Upcoming Webinars

Smart Homes and Fire Investigation, August 25, 2020, 12:00–1:00 pm CDT

Click here for details.

Human Health Risk Assessment, August 26, 2020, 12:00–1:00 pm CDT

Click here for details.

Learn from Those Who Know: Jury Trial Tactics During the COVID-19 Pandemic, September 15, 2020, 12:00–1:00 pm CDT

Click here for details.

Telehealth—The New Frontier, September 22, 2020, 12:00–1:00 pm CDT

Click here for details.

Motorcycle Accident Reconstruction, September 24, 2020, 12:00–1:00 pm CDT

Click here for details.

Federal Court Jurisdiction: Removal Complexities and Common Pitfalls to Avoid in the Process, October 7, 2020, 2:00–3:00 pm CDT

Click here for details.

Your CLE and Marketing Professionals Now Have a DRI Membership Option!

Now more than ever, law firm marketing and CLE professionals face increasing demands to demonstrate firm value to clients and provide business development opportunities for their firms.

> "Investing is laying out money now to get more money back in the future."
>
> —Warren Buffett

DRI's affiliate membership was created for CLE and marketing professionals* who work for defense-oriented law firms of all sizes.

Affiliate membership provides access to the professionals, business development opportunities, and programs of DRI. More importantly, membership provides a forum to discuss the challenges, opportunities, and solutions facing legal teams today and in the future.

Annual dues are just $125. Here is the link to the Affiliate Membership Application.

Affiliate members receive the following membership benefits:

- access to *For The Defense* (FTD);
- access to *The Voice*—DRI's weekly e-newsletter;
- discounts on educational products and seminars;
- membership in substantive law committees (at no charge); and
- access to members-only discount programs.

Affiliate members are not eligible for DRI leadership positions. Membership does not include access to the following resources: LegalPoint, Expert Witness Services, *In-House Defense Quarterly*, and committee e-newsletters.

Please note the affiliate program is only available to those professionals of firms/companies with DRI members in good standing.

* Law Firm Marketing Chief Marketing Officers/Directors/Managers/CLE Directors/Managers.

New Member Spotlight

Zachary Dunlap, Ford Motor Company

Zachary Dunlap serves as counsel for **Ford Motor Company**, where he advises globally on automotive safety, emissions, and regulatory issues. He is licensed to practice law in Michigan and was previously licensed in Ohio. He is admitted to practice in the Southern District of Ohio and the U.S. Supreme Court.

Prior to Ford, Mr. Dunlap served as a senior trial attorney at the National Highway Traffic Safety Administration, Washington, D.C. He also served as a senior counsel at the Hyundai America Technical Center, Inc. (HATCI) and as an assistant attorney general in Ohio. He earned his juris doctor degree from the Moritz College of Law at Ohio State University and a bachelor's degree in history from Ohio Wesleyan University.

Mr. Dunlap grew up on a farm in Southern Ohio and enjoys spending his free time outdoors with his family. He is also a diehard Buckeyes fan living minutes away from Ann Arbor.

Quote of the Week

"I think humanitarian work needs to stop being a 'by the way' thing. It should be something that we are living as the norm."

—Umra Omar, Safari Doctors, Kenya, on World Humanitarian Day (Aug. 19, 2020).