

# Perspectives

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## Florida Supreme Court Rules Engle Class Action Smokers and Their Survivors Can Sue for Personal Injury and Wrongful Death

**T**his past December, the Florida Supreme Court made final the landmark decision that Florida residents who were suffering from nicotine addiction by November 21, 1996 are entitled to file individual lawsuits against the tobacco companies and have the benefit of certain key jury findings. These simplified trials will begin with the legal conclusions that the class action jury made in 1999; specifically, that

the major tobacco companies are liable based on findings of fraudulent concealment, product defect, breach of warranty, and negligence as a matter of law. Although plaintiffs must prove causation, the trials will be streamlined. Florida smokers and the families of deceased smokers must file lawsuits within one year of the Supreme Court's mandate or they will be time barred.

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GERSON & SCHWARTZ P.A.

## Recognition as a Top Legal Services Provider

**O**ur law firm is consistently recognized within the legal profession for providing high-quality legal services. For more than 30 years, we have earned Martindale-Hubbell's coveted AV rating. For the last few years, we have been recognized in the "Top Lawyers" listing of the South Florida Business Review, as well as the newer Florida "Super Lawyers," which names the top Florida attorneys in various practice areas across the state and is based on a survey of more than 44,000 of our peers in the legal profession. Because we do not advertise in these or any other publications that rate lawyers, we are proud that our recognition is based solely on merit and our firm's reputation for excellence. ■

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## Florida Supreme Court Rules Engle Class Action Smokers and Their Survivors Can Sue for Personal Injury and Wrongful Death

Our firm is one of a handful with substantial experience trying cases against the tobacco industry. Four years ago, with co-counsel, we obtained the largest compensatory damages verdict ever against cigarette makers. The \$37.5 million jury verdict obtained for our client, admired Miami attorney John Lukacs, is the only individual Engle class member case to have been tried after the Engle 1999 class action trial. Despite our client's later death from tobacco cancer, his fight for justice survives. We hope to conduct a punitive damages trial in the matter in the near future.

Our law firm represents many class member victims of cancer and tobacco-caused airway diseases. We have also established numerous co-counsel relationships throughout Florida and welcome referrals from other lawyers. Contact us before time runs out. ■

## Serving the Victims of Crime

**O**ur firm has long been involved in the fight to obtain compensation and justice for crime victims. Whether we are providing legal representation or outside the courtroom support to nationwide advocacy and community-based initiatives, our efforts reflect the firm's 36-year commitment to the cause of victim rights.



### Assisting National Crime Victim Organizations

With its mission of forging a national commitment to help victims of crime rebuild their lives, the National Center for Victims of Crime (NCVC) is the nation's leading advocacy group for crime victims. Recently, Phil Gerson was appointed to the Board of Directors of this prestigious Washington, D.C.-based nonprofit organization. NCVC provides individual victim services and education as well as public policy and legislative initiative on both state and national levels. Also, having previously served as its first Board president, Phil continues his nearly 10 years of assistance to the National Crime Victim Bar Association (NCVBA) as a board member. NCVBA is made up of attorneys representing crime victims in civil matters across America. It refers crime victims to local attorneys and works to increase public awareness of civil remedies available to victims of crime.



### Supporting Efforts to Empower Miami's Crime Victims

Since 1995, Victim Services Center (VCS) has delivered crisis intervention services to help those traumatized by crime to cope and recover. Phil Gerson is proud to serve on the Board of Directors of this organization for which the firm also provides pro bono legal services as its general counsel. As Miami's leading mental health nonprofit intervention organization for crime victims, VCS continues to expand its mental health outreach programs in an effort to provide full victim assistance. This past year, Ed Schwartz successfully handled several matters for the organization and continues to provide counsel and advice. Our firm has enthusiastically supported VCS events this past year and looks forward to expanding our financial commitment. ■



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## Premises Liability

**W**hen accidents and crimes take place on someone else's property, that someone needs to take responsibility. Too often, property owners and managers deny their responsibility. This past year, we successfully represented many people who were injured when adequate measures to protect them were not taken. Here are a few examples.



### Reduction in Hotel Security Leaves Tourists Defenseless

Drawn to Central Florida by its famed tourist attractions, our clients also experienced its unattractive side. The three female travelers were staying at a hotel they believed to be safe when two armed men forced open their hotel room door as it was closing. During the strong-arm robbery the men terrorized the women both physically and sexually. Miraculously, our clients suffered no serious physical injuries. Though the sexual intimidation was not reported, all three women suffered psychological consequences from the crime. Our discovery efforts on their behalf uncovered the mistakes on the part of hotel management, which led to victimization. We found that the one guard on duty had noticed the assailants while making his rounds prior to the assault. Despite the fact that the men were loitering at 1 a.m., the guard failed to confront or even question them. The guard also admitted seeing the same men a second time as they left the parking lot in a rush. Significantly, the aggressive discovery also



exposed cutbacks in security staffing that had been made before the incident. Indeed, the one security guard on duty was required to retrieve the room service breakfast orders left on doorknobs. This distracted him from his security patrol and hampered his duty to protect our clients. Our firm was able to reach a favorable settlement for our clients as the trial date neared. A confidential settlement agreement provision however, prevents us from disclosing the settlement amount and the identity of the hotel.

### Shopping Center Security Cutbacks Cost Shopper Dearly

When management cuts corners on security to save a buck, innocent people pay the price. One Sunday evening, while shopping at a large strip shopping center, our client fell victim to thieves who violently threw her to the ground and attempted to snatch her handbag. Our investigation of this strong-arm robbery attempt revealed that management had revised the security plan to save money. While a combination of off-duty policemen and private security guards patrolled the center at other times, on Sunday evenings there was a three-hour gap with no security. The criminals took advantage of this window of opportunity. A comprehensive security plan probably would have prevented this violent crime.

### Lapse in Supervision Enables Sexual Assault/Rape

Our client, a developmentally disabled 29-year-old woman, was sexually assaulted and/or raped in the bathroom of a private adult training center supported by public funding. Initially, program supervisors asserted that the sexual contact between our client, who has a mental age of a 4-year-old, and a legally incompetent male with a much higher functioning level, was consensual. However, supervisors later admitted that the program director momentarily lost track of both until she discovered them in a single-user bathroom. Because our client is largely nonverbal and unable to comprehend the concept of sexual contact, the case presented difficult challenges of proof. We retained leading experts to evaluate our client and formulated a damages claim that was based on observed behavioral changes. The case was settled for a confidential sum at mediation and the proceeds will be used to fund a special needs trust.

## Alcohol and Rule Violations Lead to ATV Accident

Our clients, husband and wife, were guests at the annual Wild Hog jamboree and barbecue held at the Everglades Conservation and Sportsman's Club in the Everglades. The driver of an ATV on which our clients were riding lost control of the vehicle, which slid through mud and into the side of a parked truck. The impact caused severe leg fractures that led to multiple surgeries for both clients. Dissatisfied with the discouraging case evaluation previously provided by two separate law firms, the injured husband and wife retained us. We successfully refocused the case as an inadequate security premises liability claim. Extensive discovery revealed not only that the driver of the ATV had been drinking but that she was the wife of the untrained club member chief of security for the event. Also, the ATV that had been specially designated for security use at the event was not designed to hold passengers. In addition, club rules governing the operation of ATVs during the event were probably violated. As the trial date approached, our clients accepted a favorable settlement offer of \$800,000.

## Dangerous Escalator Handrail Injures Toddler



Holding her mother's hand, our four-year-old client took a ride down a department store escalator. The toddler lost her sneaker. At the bottom of the landing, she reached down to pick up her sneaker and her other hand followed the handrail into the gap where the rail entered the return. The machinery pinched her 4th and 5th fingers. Pediatric surgeons had to perform contracture release surgery on the youngster. At mediation we were able to reach a confidential structured settlement that includes a Florida prepaid college plan and a future income stream. ■

## The Public Needs Protection from Confidentiality Agreements

Open access to court records and documents has long been recognized in Florida and throughout the United States. Confidentiality agreements run counter to this tradition. Still, defendants routinely insist that plaintiffs enter into a confidentiality agreement as a condition of settlement. No legitimate interest is protected by this strong-arm tactic. Rather, these agreements prohibit disclosure of information that could alert consumers and potential victims to dangers that defendants know exist with regard to their products, premises, or ongoing conduct. Clearly, the enactment of the sunshine in litigation act would be in the public interest. ■



# Medical Malpractice

**W**hen a healthcare provider fails to meet the governing standard of medical practice, the negligent act can result in serious injury or even death. This past year, we successfully represented many hurt by these costly blunders.



## Podiatric Negligence Results in Corrective Surgery

He was 55 yearsold and able to play soccer with the best of them. Unfortunately, after arthroscopic ankle surgery, our client could not even lift his foot. Physical therapy failed to correct the problem. A second podiatrist discovered that the two major tendons bordering the arthroscopic incision were actually severed. Subsequent surgery repaired the damaged tendons. Though the original surgeon never admitted that his procedure severed the tendons the case was settled at mediation subject to a confidentiality agreement.



## Surgical Error Costs Mother's Life

It was supposed to be a routine procedure. But mistakes by medical staff led to the tragic death of a single mother of two. Lap sponges used during surgery were left in our client's abdomen causing an undetected infection. Treating physicians who subsequently tried to diagnose our client's enigmatic deterioration were misled by operating room records that erroneously showed all sponges accounted for. Instead, as the autopsy of our client revealed, the sponges were wrapped in the young mother's intestine. Through careful and thorough analysis both before and during pre-suit discovery, we were able to obtain an early mediation settlement with the hospital.



## Shipboard Misdiagnosis Leads to Multiple Surgeries

Though the Florida Supreme Court just ruled Cruise Lines aren't responsible for on-board doctor negligence we succeeded in resolving a case before the opinion was issued. Had we waited our client would have had no practical remedy against a Romanian physician.

During a vacation cruise, our client fell on a dock at one of the cruise's ports of call. The onboard physician told her that there was no fracture, just a sprained wrist. Only, the ship's physician was wrong. The X-ray showed a non-displaced break. Not realizing the serious extent of the injury, our client continued on with the cruise. When she returned home from her "vacation", our client was still in pain, so she sought the care of a hand surgeon and underwent two surgeries to correct the displaced bones, which could have been fixed on board without surgery. Our firm negotiated a settlement favorable to our client in this matter; however, in light of the confidentiality agreement that the defendant insisted our client enter into, we are prevented from saying more about this case. ■

# A Family that Works Together



Philip Gerson, Edward Schwartz, Xiomara Diaz, Denise Rosa and Aracelys Gonzalez

Affectionately known as Z, our office manager Xiomara Diaz began as a secretary with the firm over 22 years ago. As the firm developed and grew, so did her responsibilities. It was under Z's watchful eye that her 9-year-old goddaughter, Ara happily busied herself placing stamps on our *Perspectives* newsletters to be mailed and retrieved faxes from the machine on school holidays. Eight years later, Ara, works with us on a part-time basis sorting out the maze of crime data for our security negligence cases. Fresh out of high school, Denise Rosa answered the ad we placed in a community college newspaper. Under Z's tutelage, the young receptionist grew to become a superb legal secretary. We all missed Denise when she temporarily moved to Orlando but were

overjoyed when she returned. Her four-year-old son, Rey, is one of the more precocious members of our extended firm family.

Together, we have experienced the trial victories, good settlements, peer and community recognition as well as other professional milestones. We invite everyone to visit Gerson & Schwartz P.A. at our well-known building on Coral Way. Our committed family of professionals has worked side-by-side for decades to achieve justice for every client. With a core group like Phil, Ed, Z, and Denise working together shared responsibility and task specialization thrive in our happy environment. When you enjoy the atmosphere of mutual respect and true collegiality that we have, our clients both appreciate and benefit from it. ■

## Our Family Is Here When Your Family Needs Us

Since 2001, our clients and colleagues have known where to find us—1980 Coral Way. And they still can. Only now, as they approach our doorstep, they are greeted by the comforting words: “Gerson & Schwartz P.A.” Our new sign not only adorns the building that we have called home for many years but stands as a testament to the true partnership that Phil and Ed enjoy. Welcome! ■



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**We are a small firm *and* a big family.**