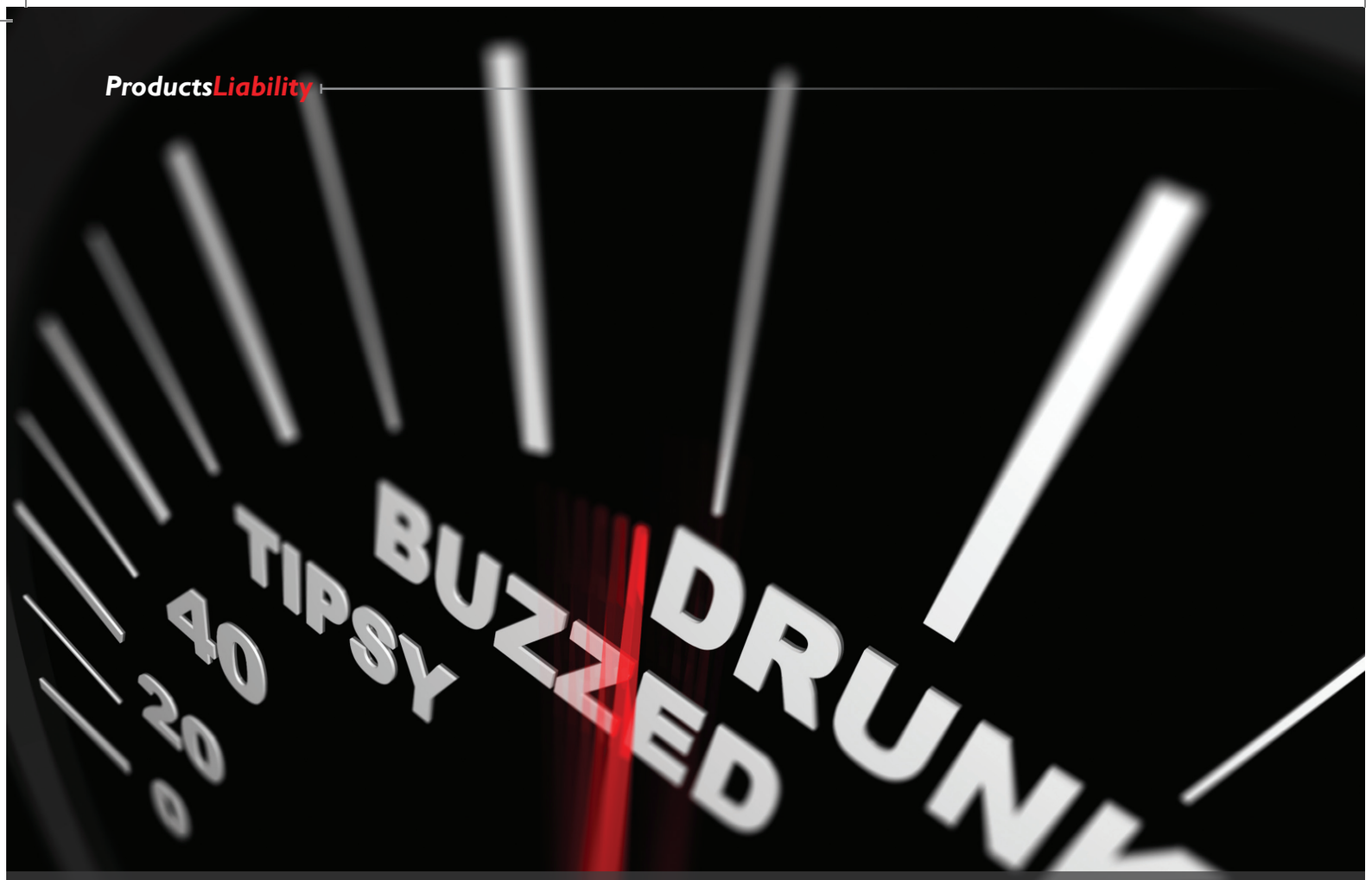

Picking Up The Pieces

Making the Jury Aware of the Draconian Consequences Florida's Intoxication Defense Law Seeks to Impose on Plaintiffs

by Diana Martin, Leslie Kroeger and Ted Leopold

Now that plaintiffs no longer have the shield provided by the Florida Supreme Court in *D'Amario v. Ford*, 806 So. 2d 424 (Fla. 2002), the sword provided to defendants by the legislature in section 768.36, Florida Statutes, commonly referred to as the intoxication defense, has much greater potential to be deadly. Therefore, it is essential that a jury be made aware of the effect that its verdict will have if it finds a plaintiff was primarily at fault for his or her own injuries as a result of intoxication.

Section 768.36, entitled "Alcohol or drug defense," provides that:

> (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.

In a products case, this means that a plaintiff injured by a defective product can be completely precluded from recovering damages if the jury finds the elements of the intoxication defense satisfied, even if the plaintiff's fault did not contribute to the cause of his or her injuries. In order to make the jury aware of the draconian effect that such a determination will have, plaintiff's counsel should ask for a modification to the standard jury instructions and explain to the jury in closing what will happen if it finds the plaintiff was primarily at fault as a result of being under the influence of alcohol or drugs.

The standard comparative negligence instruction states: "In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of (claimant). The court will enter a judgment based on your verdict and, **if you find that (claimant) was negligent in any degree, the court in entering judgment will reduce the total amount of damages by the percentage of negligence which you find was caused by (claimant).**" Fla. Std. Jury Instr. (Civ.) 501.4 (emphasis added). The emphasized portion of this instruction is an incorrect statement of the law in those cases in which a jury is going to consider the intoxication defense. Therefore, it is essential that plaintiff's counsel request a modified instruction.

Although there is no mention of the intoxication defense in the standard instructions, or any case law discussing appropriate discussions to give in a case where the intoxication defense is at play, there is some persuasive legal authority on which plaintiff's counsel can rely. In *Flamingo Oil Co. v. Veloz*, 748 So. 2d 346 (Fla. 3d DCA 1999), the trial court instructed the jury that all of plaintiff's damages would be apportioned among the joint tortfeasors based on their percentages of fault. This instruction was incorrect because, under the law at the time, the defendants were jointly and severally liable for economic damages. The Third District reversed, holding the instruction was legally wrong and harmful because it "deceived the jury into believing that by allocating a small amount of fault" to a defendant, that defendant would be required "to pay only a minimal share of the economic damages." 748 So. 2d at 349. The court recognized, "The fact is that the trial court's misinstruction on damages may well have had an impact on the jury's apportionment of fault." *Id.*

The same can certainly be said in a case where the jury is considering the intoxication defense. A jury should be permitted to factor in its apportionment of fault between an intoxicated plaintiff and a defendant in a products liability case that the difference between its apportionment of fault to plaintiff in the amount of 50% or 50.01% is not merely .01%, but is 100% of the plaintiff's damages. Not only should the jury hear about the possible effect of the intoxication defense in the jury instructions provided by the court, but plaintiff's counsel is entitled to explain the operation of the defense to the jury during closing. As explained by the Fourth District in *Slawson v. Fast Food Enterprises*, 671 So. 2d 255, 260 (Fla. 4th DCA 1996), "a lawyer is usually entitled to argue the applicable law to the jury." There, the court held that where a defendant was seeking the benefit of apportionment under the comparative fault statute, that "'the jury should be told about the effect that the statute will have on its verdict, just as it is told about the effect of traditional comparative negligence.'" *Id.* And, it determined it was prejudicial error not only for the court to fail to properly instruct the jury on the law, but also for the court to limit plaintiff's closing argument on the issue. *Id.*

As the intoxication defense has been given new vitality in products liability cases now that a jury is permitted to consider the fault of the plaintiff, even when the plaintiff's injuries are solely caused by the product defect and not the plaintiff's actions, it is imperative that trial counsel ensures the jury is made aware of the potential effect of its apportionment of fault to the plaintiff. To do this, plaintiff's counsel must request that the court give the jury a modified comparative negligence instruction, as well as inform the jury during closing argument that its allocation of more than 50% fault to the plaintiff as a result of plaintiff being under the influence of alcohol or drugs will result in reducing plaintiff's damages by 100 percent. The allocation of fault is not a mathematical equation—but is based on any number of amorphous ideas a jury has about what the result should be in any particular case and can most certainly be influenced by the knowledge that a small shift in the allocation of fault will have a dramatic difference on the outcome of a case.

Diana L. Martin
Ms. Martin is an associate at Leopold Law, P.A., in Palm Beach Gardens, where she handles civil appeals in state and federal courts and provides litigation support. Ms. Martin is a 2002 high-honors graduate of the University of FloJrida Levin College of Law. Before entering private practice, she was a law clerk to the Honorable Martha Warner at the Fourth District Court of Appeal.

Leslie M. Kroeger
Ms. Kroeger is a shareholder at Leopold Law, P.A. is a successful civil trial attorney with a practice focused on complex civil litigation matters, including products liability, automotive crashworthiness, wrongful death and cases involving managed care abuse. As a dedicated advocate, Ms. Kroeger has been vocal in the Florida Legislature lobbying on behalf of consumers and promoting vehicle safety. She has achieved an AV rating from Martindale-Hubbell and was recently recognized as one of Florida's Legal Elite. She currently serves as a member of the Executive Committee of the Florida Justice Association.

Theodore J. Leopold
Mr. Leopold is a managing partner of Leopold Law, P.A. has a national practice specializing in consumer justice litigation with a focus on complex products liability, managed care, catastrophic injury, automotive crashworthiness, wrongful death and class action litigation. For many consecutive years, Mr. Leopold has been profiled in The Best Lawyers in America.