

Perspectives



GERSON & SCHWARTZ P.A.

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Using Creative Approaches, “Impossible” Cases Become Possible – and Justice Prevails

Skil and experience mark a good law firm. But the best firms – the ones that take, and win, the cases that seem impossible – have something else, too: creativity and determination. With the insurance industry eliminating coverage for assault-and-battery incidents at commercial establishments, too many crime victims are finding that lawyers won't take their case. It's easy to understand why: Without insurance coverage, recovery may be nonexistent. And for crime victims, this seems to further the injustice. It's a trend we don't like – and we're fighting back. We're doing so by taking these cases. And through creativity and determination, we're winning them. In numerous uninsured cases, we've recovered substantial damages from business and property owners – vindicating the rights of our clients and helping them obtain the recovery, and accountability, they deserve.

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Misdiagnosed Brain Tumor Case Settled



The headaches came – and they didn't go away. That got our client understandably worried, and she sought the help of her doctor, an internist. But for more than a decade, as the headaches came and other troubling symptoms – difficulty swallowing, depression, even suicide attempts – developed progressively, they were dismissed. It was nothing more than migraines or tension headaches, her doctor said. Unfortunately, our client's internist was wrong. And had he performed the right diagnostics, kept adequate records, and followed standard protocols, he would have known that. He would have seen that his patient had a serious problem, indeed.

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Misdiagnosed Brain Tumor Case Settled

It was only after our client began suffering visual disturbances and went to another doctor, an ophthalmologist, that she received the correct – and sobering – diagnosis: An MRI revealed a baseball-size tumor, called a hemangioma, growing outside her brain. While not a malignant lesion, it was large enough to compress other parts of the brain and do damage. Neurosurgery followed, but so did a postsurgical infection and sensory losses. Two follow-up operations were necessary. Even today, almost two decades after those first headaches, our client suffers pain and discomfort.

And it was all preventable. The scope of the surgery – and the resulting complications – could have been reduced had the tumor been removed when it was far smaller. An adequate treatment plan by our client's primary doctor would have resulted in a more timely diagnosis. Our expert showed that the way the defendant worked – with inadequate workups and record-keeping – was negligent, and put our client at unacceptable, unnecessary risk.

While the doctor's negligence was clear, the case presented obstacles, as his practice was owned by a corporation based on a Caribbean island, and his insurance company was also based in the Caribbean. But we were able to obtain a confidential settlement that exhausted policy limits. ■



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Smokers' Class Action Enters New Phase

Individual Suits – and Trust Fund Claims – Soon to Hit Courts



After 14 years of litigation, the landmark *Engle* smokers' class action case is still making headlines – bringing hope to thousands of Florida residents who have suffered due to tobacco company deceit and exploitation. Our firm – which in 2002 won a \$37.5 million jury verdict in the only post-*Engle* lawsuit tried to date, the John Lukacs case, – has been at the forefront, protecting the rights of victims, working to get them the compensation – and accountability – they don't just need, but deserve. In 2008, we are stepping up our work even more.

Engle, which established tobacco industry responsibility for 16 diseases, gives members of the class the benefit of the *Engle* jury's determinations about industry conduct (finding, among other things, negligence, product defect, fraudulent concealment, and conspiracy) and general causation for the enumerated diseases. That means that in their individual suits, plaintiffs don't have to start from scratch, but need only prove their medical conditions and their exposure to smoke.

The Florida Supreme Court, reversing the Third District Court of Appeal, gave class members a right to bring their individual cases. Our firm – as a recognized leader in tobacco litigation – filed numerous lawsuits on behalf of Florida residents, and we plan to try *Engle* cases before year's end. We also expect to conduct a second trial, on punitive damages, for the Lukacs family.

Currently, we are working on perfecting claims to the *Engle* Trust for qualifying class members. Individuals who qualify can share in a \$580 million fund. We expect payments to be received as soon as the end of the year. All of our clients who filed individual suits should have valid trust fund claims. Our staff is hard at work helping others qualify for fund payments for the harms they suffered because of tobacco companies' products. While our firm still has more work ahead, one thing is clear: We will continue our leadership role among lawyers working to bring the tobacco industry to justice. ■

Settlement in Private Road Rollover Case

A private road may be open only to certain drivers, but when it is inadequately designed and constructed, danger isn't choosy. Our client, a 71-year-old truck driver, suffered a skull fracture – resulting in hospitalization, rehabilitation, and an enormous workers' compensation lien – in a 2005 accident on a private road used by contractors hauling fill material to a construction site.



The road had no shoulder or recovery area, so when the unbelted driver momentarily drove off the paved surface and tried to steer back onto it, the fully loaded dump truck flipped onto its side, resulting in his severe injuries. Working with our career-long colleagues at The Wolfson Law Firm, we were pleased to secure a confidential settlement at mediation – for an amount adequate to resolve the lien and result in a recovery for our client. ■

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Using Creative Approaches, “Impossible” Cases Become Possible – and Justice Prevails

We’ve been successful because we’ve changed the game. By looking to the owner of the property – rather than the lessee or operator of the business on the premises – we’ve been able to establish their duty to our clients, and their failure to meet it. In some cases, we’ve shown that the owner knew, or should have known, that violence that began inside an establishment – such as a bar fight – would spill out into common areas, like a parking lot, and reasonable measures, including adequate security, should have been taken. We’ve found that there’s often a history of violence, and owners have, wrongly, averted their eyes.

We’ve also won cases by showing that property owners were negligent by failing to evict problem tenants – for example, a nightclub was well known for violence and drug dealing. By closing their eyes to what was going on – and what was bound to happen down the road – owners are liable for the harm our clients suffered. And juries have agreed.

We’ve found, too, some strategic advantages of

taking “uninsured” cases. For one thing, defendants not covered by insurance are footing their own legal bills – and worried about what the jury may award. These defendants are much more likely to come to the table – and do what is right without having a jury tell them to.

It’s not just property owners who face potential liability, either. We just successfully settled an important case against an insurance agent who failed in his duty to adequately provide assault-and-battery coverage (still available at the time) to a property owner. During the case, we discovered that the establishment had been the scene of a criminal attack almost identical to the one our client suffered several years later. But when new owners subsequently took over, the insurance agent didn’t share that information – or help them get coverage. When our client was injured, we sued the agent, who was covered by his errors-and-omissions carrier. Ironically, the settlement was for almost the same amount the insurance policy would have paid – had the property owners bought it.

These cases are just one way we’re using the civil courts to fight for the rights of crime victims. We’ve brought actions against sexual offenders, too. Most people are surprised to learn that many predators are affluent and well-educated, often holding good jobs. This makes it easier for them to hide their criminal acts. But it also makes it easier for us to recover monetary damages for the harm they have caused.

Yet perhaps the most important thing we’ve learned is this: It’s often possible to win an “impossible” case. Clients – and lawyers – shouldn’t give up if there is no available insurance. We’ve learned how to work around the new rules, and realities, of these cases. And we’re ready to work with – and help – crime victims and law firms. Before you turn away a serious injury case that seems “impossible”, call us. We want to help! ■

Sexually Abused as Child, Victim Finds Vindication in Civil Suit

After a surprise decision in which a well-known Columbus, Ohio child molester was sentenced to probation instead of jail time, our client – who as a child had been abused by the convicted individual – was understandably outraged (nor was he alone: the case became a major story on the cable talk shows, where law enforcement personnel and victims advocates also protested the sentence). But rectifying the situation was no easy matter. Our client sought out legal representation for a civil case – but it went nowhere. He looked for other options – but none looked promising. Fortunately, however, the story didn’t end there.

After an Ohio victims’ advocacy group reached out to us for help, our new associate, Nick Gerson, researched state law and discovered that our client had been given flawed advice by his previous lawyers. They had told him Ohio’s statute of



limitation had run out – making him unable to bring suit against his abuser. But that was wrong. In fact, Ohio is one of several states that tolls the statute of limitations on child sexual abuse cases until the minor reaches maturity. That meant that our client still had time to bring his case. We then brought on Columbus lawyers Greg Barwell and E. Joel Wesp to act as local counsel.

Back in Florida, we researched Ohio law further and discovered one of particular importance in

the case: a statute that required the reporting of suspected child abusers. Typically these types of statutes apply to medical personnel and teachers, but since the Ohio law simply required a factual basis for suspecting the abuse, our contention was that it should apply to the defendant’s wife, who had confided to a detective that at one point she had suspected that her husband was molesting their own children. We then joined the wife as a co-defendant in the case, arguing that if she had not failed in her duty to blow the whistle on her husband, our client might never have been harmed. It was a novel theory, but in the end we didn’t need to convince a jury: Just as we were about to begin deposing the defendants, a confidential settlement was reached, helping our client to close the door – with some measure of vindication and justice – on a terrifying, traumatic chapter of his life. ■

Settlement in Colorado Snowmobile Accident



Pressed and prodded by a tour leader to drive an unfamiliar snowmobile faster than she felt prudent, our client, a Miami Beach psychiatrist, was severely injured after losing control of the vehicle and falling 200 feet down a steep mountainside. The instructor/leader, having paired our client and her family – all novice snowmobile riders – with experienced drivers, took the group through sharp turns and continually chastised our client – a nervous first-time driver – for going too slow. After a stop at a silver mine, the leader and the experienced riders rapidly drove on and, speeding along a bend in the path, out of site. Fearing that she would lose the group and become lost in the snowy wilderness, our client accelerated – and missed the turn, fell over the side of the trail, and crashed hundreds of feet below, suffering severe orthopedic injuries that required extraordinary interventions at the Mayo Clinic in order to save her leg. Even today, after a difficult two-year rehabilitation, she suffers pain and loss of strength and endurance in her knee.

Although our client had signed a release before going out on the trail, such releases only cover ordinary negligence. Our contention was that the actions of the tour guide, in flagrant, knowing disregard of our client's abilities – and safety – constituted gross negligence. The case was settled for a confidential amount. ■

After Restaurant Ignores Own Policies, Altercation Costs Returning Soldier His Hearing

We were privileged to represent – and successfully obtain compensation for – a U.S. Army veteran who returned from a second tour of duty in Iraq only to be beaten, and suffer permanent injuries, after restaurant staff ignored company policy, industry standards, and state law by continuing to serve clearly intoxicated patrons.

In March 2004, our client, who had just participated in a parade down Biscayne Boulevard, was celebrating with fellow soldiers, all in street clothes, what was to be their last day in the Army. They were drinking heavily, and managers at the restaurant, which was located inside a major shopping mall, noticed that the group was intoxicated, yet continued – contrary to the chain's internal regulations – to serve still more alcoholic beverages to the soldiers. No monitoring was performed; no mall security – readily available nearby – notified. When a subsequent verbal dispute with another patron drew the attention of a waitress, no managers were summoned. Indeed, at every possible juncture, restaurant staff ignored policies explicitly created to deal with, and protect, intoxicated patrons. Instead, the situation became increasingly dangerous.

The results were, unfortunately, little surprise. While the soldiers were not physically aggressive,



the other patron was, and our client was punched and knocked off his feet. Striking the back of his head on the pavement, he sustained a fractured skull and a total loss of hearing. In time, cochlear implants have helped restore some hearing, but not all, and our client will suffer a permanent loss. Taking on his case, we were able to obtain the restaurant chain's internal policies and show how, at every turn, they were not followed by staff, creating a foreseeable, preventable confrontation and injury. Confidential settlements were reached with both the restaurant operators and the shopping center. Trial against the assailant is expected to commence later this year. ■

Falling Deck and Inspectors' Failings Result in \$2.5 Million Verdict

Working with noted Atlanta trial lawyer Richard Jones, we obtained a \$2.5 million jury award for our client, who suffered severe – and permanent – injuries when the deck of a house she was visiting collapsed from under her. The house – a foreclosed Atlanta property that had been listed for sale on the U.S. Department of Housing and Urban Development's Web site – had been examined, prior to the visit, by HUD inspectors, who overlooked or ignored dangerous signs of rotten wood. In the collapse, our client – who was considering purchasing the vacant house and had climbed the back steps to the deck to look in the windows – suffered a mangled foot and a compound, or open, fracture of the ankle. She underwent five surgeries to repair the damage, but was still left with a very restricted range of motion. Together with our Atlanta-based colleague, who served as lead counsel, we shaped and presented evidence and argument that convinced the jury that a multimillion-dollar damage award was warranted. ■

Assisting International Cruise Victims



While cruise ships may look sparkling clean and safe, behind the surface lies an industry that lacks any formal regulation – and all-too-often, accountability – for what occurs on-board. And, unfortunately, plenty goes on: sexual crimes that are unreported. Violent assaults covered up by ship personnel. Passengers that go missing – never to be seen again. And perhaps the most troubling problem of all: an industry that has become skilled at holding off any attempts at reform. Most people are shocked when they learn just how poorly policed the cruise industry is – or how easily victims can find themselves with no recourse for the harm they have suffered.

Most law firms don't appreciate the true situation, either, because they rarely – or never – handle these cases.

Our unique experience, both on behalf of victims of cruise ship crime and in maritime litigation, has helped us develop a national reputation in this important, but poorly understood, area of law. So much so that Ken Carver, president of the advocacy group International Cruise Victims (ICV), has asked for our help in making the case for federal legislation to protect the rights of cruise ship crime and negligence victims – and to assist in fostering a dialogue with the cruise industry.

It has been our privilege to help ICV by providing legal counsel, helping to direct policy goals, and advancing legislative reform. We've introduced ICV to the National Center for Victims of Crime, resulting in a terrifically successful alliance between the two groups. We've also brought aboard well-known maritime lawyers Jim Walker and Jack Hickey to help ICV in its quest for legislative protections for cruise ship passengers. We will continue to help in any way we can to ensure that the appropriate regulations and safeguards are enacted by Congress – so that dream vacations don't turn into nightmares. ■

Nick Gerson Joins Firm

With his law and technology background, and growing role in our many crime victim cases, Nick Gerson, the firm's newest lawyer, has already become an integral part of our practice.

Nick didn't come to the law via the traditional route – and it's his diverse experiences that make him an important addition to our roster and capabilities. After college, Nick moved to Manhattan and worked in the burgeoning Internet services industry, specializing in sales of Web services to major corporations. It was there that he honed critical client relations skills that he puts to valuable use today at the firm. It was also where he

got a hands-on education in the technologies that are becoming increasingly important to the practice of law.

Seeking to return to South Florida, Nick began studies in an accelerated law degree program at St. Thomas University, and upon passing the bar, began a one-year term with a well-known commercial litigation firm. A year ago, he returned to our firm, where he had clerked during law school. Energetic, resourceful, and dedicated to obtaining the best possible results for our clients, Nick doesn't just make us better at what we do – he represents our future. ■





Jury Verdict Nullification Heads for Appeal



Our client expected justice — instead he got judicial error. We're working to fix that. Back in 2001, the plaintiff, a 24-year-old man, suffered a partial hearing loss and a mild brain injury after he was beaten with a beer bottle in the parking lot of an International Drive apartment community in Orange County. The unidentified assailant had followed him from his job at a nearby Publix and was able to enter the 360-unit complex through a malfunctioning electronic access gate. At the invitation of Orlando lawyer Tye Van Buren, we served as lead counsel in the subsequent security negligence case, and argued that the property owner and manager — a Cincinnati, Ohio insurance company — had touted the security gates in its advertisement, but took no measures to secure the facility when frequent gate malfunctions occurred. The jury, agreeing with our negligence theory, returned a \$700,000 award for our client — which the judge then nullified, entering judgment, instead, for the defendants. Citing judicial errors on the part of the judge, we have appealed her decision, and are confident of obtaining a reversal, or at a minimum, a new trial where we will be allowed to present a cache of incriminating evidence the trial judge had disallowed, again erroneously. ■

Lectures and Presentations

Some of the most important words a lawyer will speak are not to a jury, but to other lawyers, sharing the insights and experience that can help make them better advocates for their own clients. In the past year, Phil Gerson has continued his tradition of giving back to the legal community with a series of lectures and presentations.

For the National Business Institute's program on settlement of personal injury cases, Phil authored a paper and lectured, to both new and experienced lawyers, on the legal, practical, ethical, and strategic issues relating to settlements. Phil also helped to organize the curriculum for the National Crime Victim Bar Association's conference in Washington, D.C., arranging for Barry Scheck to discuss the use of DNA evidence in civil suits, Allan Gerson to present on civil remedies for terrorist acts, and Barry Epstein to speak on civil damages claims for domestic violence. Phil is already helping to plan this year's conference, to be held in Chicago in October. We hope to see

many of our friends and colleagues there for what is shaping up to be a superior program.

As an expert in the use of civil litigation for crime victims, Phil Gerson addressed a plenary session of both the National Center for Victims of Crime and the National Crime Victim Bar Association at the groups' joint conference last year. In his talk, Phil chronicled how the civil justice movement — which began with the famous Connie Frances case in the 1960s, when lax hotel security resulted in a violent, foreseeable assault — has brought about safer hotel room locks, security in public places, better reporting of child abuse offenders, and enhanced safety across the board in society.

We're proud to be trial lawyers — helping those who have been harmed find redress and closure, and helping to make our communities safer. We don't just fight for fair compensation when harm has been done. We fight for prevention, responsibility — and justice. ■

Continued Support for Crime Victims' Advocacy Groups

Our commitment to helping crime victims doesn't stop at the courtroom door. Over the past decade, we've been active participants — and supporters — of key victims' advocacy groups, including the National Center for Victims of Crime, in Washington, D.C., and the Victims Service Center in Miami, both of which count Phil Gerson as a dedicated board member. Through our hands-on service, conference presentations, pro bono

legal work, fundraising efforts, and own financial contributions, we're continually working to assist crime victims — and those who work with them — seek answers, redress, and justice. This year we increased our gifts to both the NCVC and VSC — and we'll remain active in the future, too. Because protecting, and enforcing, the rights of those victimized by crime is among the most important work any lawyer will ever do. ■

