



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

[www.palmbeachbar.org](http://www.palmbeachbar.org)

January 2014

The Board of Directors and Bar Staff wish you and your families a Happy New Year!

## Transaction Committee to host its first Happy Hour



Members are invited to join the Transaction Law Committee for their first cocktail reception on Wednesday, January 15 from 5:30 p.m. to 7:00 p.m. at 264 in Palm Beach. The cost is \$15.00 and includes two drinks, plus food. Kindly RSVP online at [www.palmbeachbar.org](http://www.palmbeachbar.org)

## Mark your calendar for upcoming Membership Events

### February 3:

Joint Luncheon with Forum Club with guest speaker U.S. Supreme Court Justice Samuel Alito

### March 7:

Bench Bar Conference; Luncheon guest speaker will be Laurence Leamer, author of fifteen books including five New York Times bestsellers. Leamer is best known for his trilogy on the Kennedys including *The Kennedy Women*.

### April 22:

Law Day Luncheon with guest speaker Former FL Supreme Court Chief Justice Charles Wells

### April 29:

Annual Judicial Reception

### June 7:

Annual Installation Banquet

## U.S. Supreme Court Justice Samuel Alito to Speak February 3



The PBCBA and the Forum Club of the Palm Beaches are pleased to present U.S. Supreme Court Justice Samuel Alito as its guest speaker for a joint membership luncheon to be held on Monday, February 3 at the Palm Beach County Convention Center.

Samuel A. Alito, Jr. was nominated as an Associate Justice of the Supreme Court by President George W. Bush and was sworn in on January 31, 2006. He previously served as a judge of the United States Court of Appeals for the Third Circuit, having been appointed by President George Bush in 1990.

He began his legal career as a law clerk for the Hon. Leonard I. Garth of the United States Court of Appeals for the Third Circuit. From 1977 to 1981, he was an Assistant United States Attorney in Newark, New Jersey. From 1981 to 1985, he was an Assistant to the Solicitor General of the United States, and

in that capacity he briefed and argued numerous cases in the United States Supreme Court. From 1985 to 1987, he was Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel, which is responsible for providing legal advice to the Justice Department and other components of the Executive Branch. In 1987, Justice Alito was appointed by President Reagan as the United States Attorney for the District of New Jersey. He held this office until his appointment to the Third Circuit.

## Nominating petitions available for Board of Directors

The annual election of officers and directors for the Palm Beach County Bar will take place via online voting in April. Persons seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for President-elect will be available on December 13 and are due back in the office by 5 p.m. on January 13. Petitions for director-at-large seats will be available on December 20 and are due back in the Bar office by 5 p.m. on January 21. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting it to [pburns@palmbeachbar.org](mailto:pburns@palmbeachbar.org). For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that sign their petitions are members in good standing, otherwise, the petition will be deemed invalid.

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## Probable Causation

By Ted Babbitt

I thank **Rebecca Mercier-Vargas** who was the appellate attorney who successfully obtained a reversal in the case of Friedrich v. Fetterman and Associates, P.A., 38 Fla. L. Weekly S768 (Oct. 24, 2013).

Gooding v. University Hospital Building, Inc., 445 So. 2d 1015 (Fla. 1984) established the causation test in a negligence action in Florida. There, the Supreme Court held that in order to be successful, the plaintiff must show that there is sufficient evidence that it is more likely than not that the negligence of a defendant caused plaintiff's injury. The issue of what kind of evidence is sufficient to support that conclusion was the subject of Friedrich, supra.

In that case, the plaintiff was in an automobile accident and sought the services of a personal injury firm. While sitting in a conference room chair in the attorney's office, the chair collapsed and plaintiff was seriously injured. Plaintiff alleged that he was a business invitee and that the law firm owed a duty of reasonable care to warn him of the chair's dangerous condition.

The evidence established the chair had been purchased years before and had been used daily without incident but that the law firm had not made any physical inspection of the chair. The experts for both sides agreed that the defect in the chair was a manufacturing defect which had been there since the chair was produced and that it was not visible to a visual inspection.

Plaintiff's expert testified that it was appropriate to do a "flex test" of the chairs every six months and that a hands on inspection of the chair in that manner would have found the weakness. The defendant's expert testified that that kind of inspection would reveal nothing and that the best test was daily use. The jury found for the plaintiff and a substantial judgment was awarded against the law firm.

The Fourth District reversed in Fetterman and Associates, P.A., v Friedrich, 69 So. 3d 965 (Fla. 4th DCA 2011). The Court relied for its reversal on the cross examination of plaintiff's expert in which he admitted that he had no opinion as to when exactly the failure of the chair would have been discoverable and that it could have been at any time prior to the accident. Thus, he testified that he had no time frame as to when the testing would have been effective.

The Supreme Court reversed the Fourth District and reinstated the verdict, finding that the Fourth District had impermissibly reweighed the evidence that was presented to the jury and that there was sufficient evidence to support the verdict. At Page 770, the Supreme Court held:

Here, the jury was presented with conflicting testimony as to whether the negligence probably caused the injury and whether the injury would not have occurred but for the negligence. Evidence was presented that could serve as a basis to support a finding that the defendant's negligence caused the injury, i.e., Friedrich's expert testified that a hands-on inspection should have revealed the defect.

Based on the conflicting testimony above, whether the weak joint in the chair would have been discovered if Fetterman had a procedure in place to inspect the chair was ultimately an issue to be determined by the jury. In this case, there is sufficient "proof that the negligence probably caused the plaintiff's injury," such that the trial court did not err in denying Fetterman's motion for a directed verdict. *Gooding, supra*, at 1018.

What is interesting about this opinion is that the cross examination of plaintiff's expert resulted in an admission that it was possible that an inspection, even if performed as plaintiff's expert thought was reasonable, might not have revealed the defect. Notwithstanding that testimony, the Supreme Court relied upon the expert's conclusion that it was probable that an inspection would have revealed the defect. The Supreme Court held, in essence, what *Gooding, supra*, requires is any admissible evidence that there is a probability that defendant's negligence caused plaintiff's injury. Once that testimony is admitted, even if its underpinnings are rendered suspect by an inability of the witness to establish within certainty that that probability would have occurred under the facts of the case, the assertion of the expert opinion that it is more likely than not that the negligent act caused the injury is sufficient to support a jury determination. While reasonable people could differ as to the sufficiency of the support for the expert's opinion, that is precisely why jury trials are utilized to make findings of fact and a directed verdict is prohibited under those circumstances.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.

## Mediation Services

Kent S. Pratt

Supreme Court Certified Circuit Mediator



- Florida Supreme Court Certified Circuit Mediator (2011-Present)
- Florida Bar Certified Civil Trial Lawyer (1986 – Present)
- AV Preeminent Rated
- J.D. Stetson University College of Law (1976)

Hourly Rates/Per Diem Rates Available on Request; No Administrative Fees.  
For Scheduling, contact Kelly Martyn.

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