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### [Reptile Autopsy: Reptile Superstar Clay Mitchell](#)

**By Don Keenan**

As a puppy lawyer, one of the southern legends of the Trial Bar was, and still is, Fred Levin and his firm in Pensacola, Florida. Later on in my career I had the privilege of working with Fred as a fellow member of the Inner Circle. Fred has always had the reputation for thinking outside the box and has always surrounded himself with true superstar lawyers at his firm. Fred has worked with everyone from Marty, his own son (also a Harvard divinity graduate), to Rubin Askew, who later served as Governor of Florida, to Lefferts Mabie, to mass tort genius Mike Papantonio, and a Reptile aficionado Virginia Buchanan with whom I've had the privilege of working a very difficult but successful case with. On top of all this talent is a compassionate heart: the Levin Foundation sets the gold standard.

Until recently, I had heard of but never met Fred's long-standing partner, Clay Mitchell. In fact, I didn't meet Clay until the first Reptile Deposition Seminar in June this year. Clay is a very impressive fellow in an Abe Lincoln-type way. During my short time with Clay, he told me about a remarkable Reptile verdict that I'd never heard of and I encouraged him to let us tell the story on the blog. Not only did he do an extensive interview with our Paul Kaufman, but he also supplied the closing argument which is attached. The following is Paul's interview with Clay Mitchell:



#### **Paul Kaufman Interviews Clay Mitchell:**

It was a real treat to interview this month's Reptile Superstar. Clay Mitchell is a trial lawyer who is a true credit to the profession. Most of the attorneys interviewed so far have been young. In contrast, Clay has practiced for over 46 years. Although he has practiced since 1965 he has not been content to rest on his laurels but has been devoted to professional growth, constantly improving and adapting to try to keep an edge on the opposition. Clay said, "Being old you have to evolve or die." The latest, and very successful, stage in his evolution is the adoption of The Reptile. The use of Reptilian techniques was a large factor in obtaining a verdict of \$2.3 Million dollars in a case with an offer of only \$225,000.

Clay Mitchell started his career (as many successful trial lawyers including Don Keenan) as a prosecuting

attorney. After two years he went into private practice doing plaintiff personal injury and criminal defense. After a four-year stint as a Circuit Court judge he joined Fred Levin's law firm in 1981 and has remained a partner there since. When he realized the world was changing and getting good results at trial were more difficult Clay began his quest to improve. He has done focus groups since the 1990s. He has made use of several references, including David Ball on Damages, Rick Friedman's Rules and Polarizing, and, more recently, Don's two books on closing argument, trial blog, and the Reptile book.

Clay first read the Reptile book in the autumn of 2009, a few months after it was released. He has since attended the Reptile deposition seminar in Atlanta. He realized there was valuable information in the Reptile book that could be useful in an important upcoming trial – Penny Nixon vs. Ashbritt, Inc. and Gulf Sandblasting and Painting, Inc. The case had been pending in Escambia County, Florida for several years. After an initial reading of the Reptile book a “light went off” in his head. (We have heard that from other autopsy contributors). He re-read the book, highlighting and bookmarking many areas for the purpose of incorporating the Reptile at the upcoming trial. The effort was worthwhile.

The Nixon v. Ashbritt case presented several difficult issues for the plaintiff. Penny Nixon drove into the back of a stopped truck on a rainy, misty night in September 2004. The truck was being used as part of the emergency clean up in the aftermath of Hurricane Ivan. Ashbritt won a competitive bid for the contract to clean up in part by warranting to supply safe vehicles. They subcontracted part of the job to Gulf Sandblasting, who in turn rented an unsafe vehicle from Mississippi. The truck was in violation of federal safety standards by failing to have reflective markings on the side and rear. The driver of the truck did not put out a triangle warning behind the stopped vehicle. Even without the required markings there was a problem with contributory negligence on the part of the plaintiff. The Reptile came to the rescue. Clay emphasized the rules the defendants broke and spread the tentacles of danger by pointing out the various potential victims including “younger drivers and old drivers, mothers and children, grandmothers and grandfathers.” Surely the jurors could identify with at least one of those categories. He also used the Reptilian concept of the defendant Ashbritt, the general contractor, violating a contract by failure to provide the promised safe vehicles. The concept of contract violations as a Reptilian trigger has been discussed before in this blog. A person who was not reliable to keep a promise or commitment was, in the past, a threat to one's survival. The Reptile remembers that. Clay showed excerpts of the contract in opening and throughout the trial. How effective were these Reptilian strategies? At the end of the day the jury only apportioned 3% to the plaintiff. Ashbritt, the deepest pocket, tried to insulate itself by claiming it was not them who rented the unsafe vehicle but rather the subcontractor, Gulf Sandblasting. The jury was not impressed with that argument and, finding Ashbritt had the greatest responsibility for safety, apportioned 65% to them and 25% to Gulf.

“Try the Lie” was the subject of this blog. The Reptile hates a liar; they are the same kind of threat to survival as one who breaks a contract. Clay was able to demonstrate lies by the defense in several areas. Their reconstruction expert showed a simulation with the back of the truck being lit up and no darkness or mist. The same expert showed photos with reflective tape on the back of the trailer even though several witnesses testified there was no reflective tape at the time of the wreck. The general contractor and subcontractors said they were not renting the truck the day of the wreck but there was evidence they were paid for the loads hauled that day.

There were other difficult issues besides contributory negligence and apportionment. The plaintiff had a long history of psychiatric problems before the wreck including childhood sexual abuse, depression, suicide attempts, and multiple failed marriages. She worked as a nursing assistant but wanted to become a nurse and was in nursing school. The defense relied on the argument that, because of her extensive mental health issues pre-injury the plaintiff would have had a miserable life regardless. Clay filed a motion in limine to keep out the sexual abuse history; the judge took that under advisement and deferred a ruling until trial. In his opening Clay used the “Swift Boat” approach, mentioned in this blog, and surprised the defense by talking about the sexual abuse and psychiatric history. He then played a clip of the defense psychiatrist expert agreeing the frontal lobe brain damage from this wreck was “the straw that broke the camel's back” for a person with the

plaintiff's past.

In another brilliant Reptilian Swift Boat attack Clay noticed the defense attorney asking in depositions, “Don’t you agree the past is the best predictor of the future?” The defense attorney apparently wanted to make the point that the plaintiff’s past problems were destined to be repeated in the future regardless of the wreck. Clay did his homework and got an old closing argument transcript from the same lawyer. He used the same language. On rebuttal in the closing Clay jumped on the past predicts the future argument and turned it against the defendant, linking the rules breaking of the past with a prediction of more in the future if the defendant is given a free pass.

Clay Mitchell proved in this trial he is a serious student of the Reptile; successfully employing multiple Reptilian strategies that he credits as being major factors in the verdict. (The verdict of \$2.3 Million was more than he asked for in closing. See the attached closing which Clay has kindly given permission to share.) Clay said thanks to Don and David for the Reptile book; we said thanks to Clay for a veteran showing us all how to apply the Reptile with maximum effectiveness. To see Clay’s closing argument, please [click here](#).

### SWITCHING GEARS:



On a side note, there are some truths to myths, particularly “the dog ate my homework.” David Slawsky agreed to review the Opening Statements DVD for his state of New Hampshire, but notified my office that he would need a new copy, as his dog had eaten the disc. On your behalf, I pressed for proof and was pleasantly surprised when I received proof of the damaged DVD above. I’m somewhat honored that Maggie spent the time on the DVD that she did.

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### 4 Responses to “Reptile Autopsy: Reptile Superstar Clay Mitchell”

1.  *Virginia Buchanan* says:  
[July 29, 2011 at 6:58 am](#)

We all watched Clay “live” this case, and he put himself totally into it. He was against aggressive,

relentless defense counsel, one was particularly disrespectful and unprofessional. Clay kept his focus and stood his ground. The article talks about some of the tough facts, but this case stands out as one with some of the most difficult facts. Clay vigorously used motion in limine practice and then boldly embraced all the rulings to use them to his advantage. This was in many ways a stunning verdict – a case that could have been so easily lost. Clay’s dedication and the liberal use of the reptile brought victory to a deserving client.

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2.  [Sach Oliver](#) says:  
[July 29, 2011 at 8:40 am](#)

Clay, congrats!

[Reply](#)

3.  [Robert Margeson](#) says:  
[July 29, 2011 at 8:46 am](#)

As always, I appreciate your blogs and the gems which you so generously distribute each time to the plaintiff’s bar. I presently have a malpractice case where the plaintiff like Penny in Clay Mitchell’s case above had extensive mental health issues pre-injury, and the defendant is exploiting this during deposition testimony, and it is apparent that the defendant will argue and advance this same theme that our plaintiff would have had a miserable life regardless of this doctor’s malpractice. It would be most helpful if I could obtain a copy of Clay’s closing argument, as his argument was not attached above. Your assistance would be sincerely appreciated. Thanks again as usual. Robert M. Margeson, III  
Albany, Georgia

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4.  [Libby Jongeward](#) says:  
[July 29, 2011 at 9:05 am](#)

Thanks for your patience as we worked through some technical difficulties this morning. The link should be fully functional now but please don’t hesitate to call or email if you have any further problems.

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