**ANNOTATIONS AND COMMENTS**

42 U.S.C. § 1983 imposes liability on persons who cause deprivations of federal rights “under color of state law[.]” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (citing 42 U.S.C. § 1983). The statute’s “under color of law” requirement means “the same thing as the ‘state action’ required under the Fourteenth Amendment.” *Id.* at 928. Thus, the liability created by § 1983 “do[es] not apply to private parties unless those parties are engaged in activity deemed to be ‘state action.’” *Nat’l Broad. Co. v. Commc’ns Workers of Am.*, 860 F.2d 1022, 1024 (11th Cir. 1988).

The Eleventh Circuit has identified three tests to determine whether a private party’s conduct amounts to state action: “(1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test.” *Willis v. Univ. Health Servs.*, 993 F.2d 837, 840 (11th Cir. 1993) (citing *Nat’l Broad. Co.*, 860 F.2d at 1026). This instruction addresses the nexus/joint action test.

Under the “nexus/joint action test” for § 1983 liability, a plaintiff may establish that a private defendant acted under color of state law by showing (1) that the defendant “reached an understanding” with state officials to violate the plaintiff’s federal rights; and (2) that the defendants committed “an actionable wrong to support the conspiracy.” *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990) (quoting *N.A.A.C.P. v.* *Hunt*,891 F.2d 1555, 1563 (11th Cir. 1990)).

Evidence of an understanding and willful participation is essential to succeeding on a conspiracy-focused theory of state action. “The plaintiff does not have to produce a ‘smoking gun’ to establish the ‘understanding’ or ‘willful participation’ required to show a conspiracy, but must show some evidence of agreement between [a private party and state actor].” *Rowe v. City of* *Fort Lauderdale*, 279 F.3d 1271, 1283–84 (11th Cir. 2002) (citations omitted). A conspiracy between state and private actors is a common but not necessary way to succeed on a § 1983 claim proceeding under a nexus/joint action theory. *See* *Bailey v. Bd. of Cnty. Comm’rs of Alachua Cnty.*, 956 F.2d 1112, 1122 (11th Cir. 1992) (“[T]he linchpin for conspiracy is agreement, which presupposes communication[.]”). Producing evidence of conspiracy requires evidence that the alleged parties to the agreement were aware of the agreement. *See Rowe*, 279 F.3d at 1285 (“Rowe’s evidence would not allow a reasonable jury to find that Doss was aware of a conspiracy, much less that she agreed to participate in one.”). Other examples of sufficient “state action” by an otherwise private actor include when the state “make[s] an active choice to partner with a private entity in a way that can impart liability” and when a private actor “take[s] up the mantle of sovereignty through the *ex parte* use of civil or criminal processes.” *Charles v. Johnson*, 18 F.4th 686, 696 (11th Cir. 2021) (alterations added). This is not necessarily an exhaustive list of ways to prove an understanding that results in joint action. These are just some examples the Eleventh Circuit has identified. But whatever the precise version of the nexus/joint action theory a plaintiff employs, the plaintiff must show an understanding and willful participation between private and state actors to hold the defendant liable. *See id.*

The Eleventh Circuit has held that state action issues present mixed questions of fact and law. *See Duke v. Smith*, 13 F.3d 388, 392 (11th Cir. 1994); *see also Almand v.* *DeKalb Cnty.*, 103 F.3d 1510, 1513–14 (11th Cir. 1997) (collecting cases).