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Introduction

The hallmark case in Florida tort law during the last survey year came in the area of products liability. Although manufacturers of products may, through warnings, avoid liability for consequences beyond those normally expected by consumers, in some instances their products do not reach the consumer directly. In one type of case, as with prescription pharmaceuticals, the state controls distribution of the product so that it must first pass through the hands of a responsible intermediary. In the second, as with products sold to employers for use in industry, the manufacturer sells the product to one individual expecting that a number of others will use the product. The question then arises whether warnings directed only to the intermediary or the primary purchaser will suffice when the ultimate consumer suffers an injury. This past year, the Florida Supreme Court addressed the first of these circumstances.[1]

Hoffman-LaRoche manufactured Accutane, a prescription drug designed to ease the effects of severe cases of acne. An insert included in all packages warned of dangers to unborn children of mothers who ingested Accutane.[2] Felix, under the care and at the recommendation

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1. Felix v. Hoffman-LaRoche, Inc., 540 So. 2d 102 (Fla. 1989); *see also* Childers v. Hoffman-LaRoche, Inc., 540 So. 2d 102 (Fla. 1989).

2. The relevant text of the warning read:

> Women of childbearing potential should not be given Accutane unless an effective form of contraception is used, and they should be fully counseled on the potential risks to the fetus should they become pregnant while undergoing treatment. Should pregnancy occur during treatment, the physician and patient should discuss the desirability of continuing the pregnancy.
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> . . .
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> WARNINGS: Although no abnormalities of the human fetus have been reported thus far, animal studies with retinoids suggest that teratogenic

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of Dr. Greenwald, ingested Accutane to help cure her acne. She alleged the doctor did not warn her of Accutane's dangers.[3] The Accutane she received contained the insert, yet she began using the drug despite her pregnancy. She gave birth to a child with birth defects so severe it suffered a very early death. Felix then sued the drug manufacturer.

A pharmaceutical company has no duty to warn the ultimate consumer of dangers in the use of its prescription drugs, but only to convey adequate warnings to the prescribing physician. The physician is allowed to weigh the various risks and benefits of passing on the warnings to the patient, and the manufacturer need go no further than to inform the physician of the risks.[4] The question of adequacy of warnings given to the physician often lies within the province of the jury. However, in some instances the question is so clear the court may respond to it on its own. Felix presents such an instance. Since the physician understood the nature of the warnings, his actions in negligently failing to give the patient warning would effectively supercede any liability of the manufacturer.

The Florida Supreme Court has thus fallen in line with the great majority of jurisdictions that have adopted the "learned intermediary" rule for warnings.[5] The implications of *Felix* for manufacturers who elect to warn only immediate purchasers of products are not yet clear. On the one hand, the learned intermediary rule could stand by itself. It depends on an intermediary having superior knowledge to that of the consumer, combined with a fiduciary duty to make decisions in the consumer's best interests. In another context, Florida courts have determined manufacturers of bulk products sold to intermediaries for repackaging need not warn of toxic properties of the products.[6] Because

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effects may occur. It is recommended that contraception be continued for one month or until a normal menstrual period has occurred following discontinuation of Accutane therapy.

Felix, 540 So. 2d at 103.

The Court specifically found that the language of the warning was sufficient to convey to the reader the message that Accutane should not be used by pregnant women. *Id.* at 105.

3. The doctor claimed to have warned her, but this dispute is irrelevant to her suit against the manufacturer. *Id.* at 104.

4. The doctor understood the warnings and knew the drug should not be used by pregnant women. *Id.*

5. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1973), *cert. denied*, 419 U.S. 1096 (1974). *See generally* M. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 19.07[7] (1987).

6. Shell Oil Co. v. Harrison, 425 So. 2d 67 (Fla. 1st Dist. Ct. App. 1982), *rev.*

of this dichotomy, we can expect further developments in this area in future years.

Negligence

Generally — Impact Rule

Two interesting emotional distress cases from the District Courts of Appeal highlighted judicial developments in negligence during the past year. In the first, a photographer contracted with Floyd to videotape Floyd's daughter's wedding.[7] The day arrived, the wedding party went to the church, and the ceremony went off with no trouble.[8] The photographer took a videotape. Unfortunately, the photographer taped a wedding that took place at a church adjacent to the one in which Floyd's daughter was married. After giving several different reasons for not showing up, the photographer told Floyd and his wife what had occurred. Floyd's wife sued the photographer, seeking damages for her emotional distress, for negligence, and for breach of contract. At trial, the judge permitted the case to reach the jury only on a breach of contract theory.

The First District Court of Appeal, affirming the jury verdict on the contract count, reversed and ordered a new trial based on the trial judge's refusal to send the negligence count to the jury. In Florida, "when a breach of contract is attended by some additional conduct which amounts to an independent tort, such a breach can constitute negligence."[9] Since the photographer could not even locate the proper church, the jury could have found independent negligence and should have heard the case on that theory. However, no matter how close mother and daughter may have been, the emotional distress count could not lie. A long line of Florida cases have held that when the case revolves around a breach of contract—no matter how flagrant or how bad the faith—the plaintiff may not recover on a theory of infliction of emotional distress.[10]

The assault on the bastion of the impact rule, begun in 1985 with

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denied, 436 So. 2d 98 (Fla. 1983).

7. Floyd v. Video Barn, Inc., 538 So. 2d 1322 (Fla. 1st Dist. Ct. App.), *rev. denied*, 542 So. 2d 1335 (Fla. 1989).

8. One is tempted to say "without a hitch," but in this context the vernacular would be grossly inaccurate.

9. *Floyd*, 538 So. 2d at 1324 (citations omitted).

10. *Id.* at 1325, and cases cited therein.

Champion v. Gray,[11] continues to expand the opportunities for recovery based on emotional distress. However, on occasion the courts seem to confuse normal tort recovery with the highly specialized impact rule, applied only in cases of emotional distress. Most recently, a father and two sons standing on a sidewalk saw a sports car racing out of control directly toward them.[12] Fortunately, they dove to one side and the car raced past them. The father, however, fell in a stony area, striking and injuring his knee. When he sued the driver and the owner, the trial court granted the defendants' motion for summary judgment, believing the impact rule barred recovery.

In reversing the trial court, the Third District Court of Appeal rejected the impact rule analysis. The court reasoned, that the impact rule would not apply because "[t]he plaintiff's injury did not develop . . . as the result of an emotional trauma, and the plaintiff [was] not seeking compensation for illness to the body claimed to be caused by a nervous or emotional derangement."[13] The trial court erroneously had taken a doctrine from one area of tort law and applied it to a basic cause of action sounding simply in negligence.

Res Ipsa Loquitur

Although plaintiffs may incur difficulty demonstrating exclusive control of instrumentality when seeking to apply *res ipsa loquitur* against stores, the Third District Court of Appeal provided some relief in instances where the instrumentality lies beyond the normal reach of customers.[14] McCrory's Department Store kept a sweeper on a shelf isolated from its customers. The sweeper was significantly wider than the shelf and fell, injuring Deveaux, who was shopping in the store. She obtained a jury verdict against McCrory's, basing her case on a theory of *res ipsa loquitur*. On appeal, the Third District Court of Appeal affirmed.

The inaccessibility of the shelf to normal customer traffic would suffice to sustain proof of the first prong of *res ipsa loquitur*: the instrumentality must have been in the exclusive control of the defendant.

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11. 478 So. 2d 17 (Fla. 1985); *see also* Brown v. Cadillac Motor Car Div., 468 So. 2d 903 (Fla. 1985).

12. Lowd v. Cal Kovens Constr. Corp., 546 So. 2d 1087 (Fla. 3d Dist. Ct. App.), *rev. denied*, 554 So. 2d 1167 (Fla. 1989).

13. *Id.* at 1089.

14. Deveaux v. McCrory Corp., 535 So. 2d 349 (Fla. 3d Dist. Ct. App. 1989).

However, the court in its own language seems to negate the applicability of the doctrine in this case. The second prong of *res ipsa loquitur* requires the plaintiff to demonstrate that the accident could not have occurred without negligence. To support this second test, the *Deveaux* court argues that "the sweeper was too wide to be stored on such [a] shelf and presented a danger of falling on customers."[15] The record appears to have disclosed more than ample evidence to support a specific theory of negligence by the defendant, and the court should not have allowed the jury to draw the inference of negligence suggested by the logic of *res ipsa loquitur*.[16] The specificity of the court's description indicates that the proof goes beyond some evidence which might tend to show negligence, but constitutes such a substantial showing that it negates the applicability of *res ipsa loquitur*.[17]

Negligence by Violation of Statute

The muddled area of the liability of vendors of liquor became increasingly muddled in the past year. The Third District Court of Appeal held that the defendant had the burden of preserving for the appellate record the issue of whether the plaintiff *failed* to introduce sufficient evidence of the purchaser's appearance at the time of purchase.[18] The defendants appealed from a denial of their motion to dismiss at the close of the plaintiff's evidence, arguing that the plaintiff introduced no evidence that at the time of sale he appeared to be underage. However, the appeal court held that "because the plaintiff's appearance at trial was not memorialized for inclusion in the record, this court cannot determine whether his appearance was such that no reasonable-minded jury could have concluded that six years earlier he looked younger than the age of nineteen."[19] In a strongly worded dissent, Judge Baskin first noted that the trial court itself found the plaintiff failed to produce any evidence of his actual appearance at the time

15. *Id.* at 350.

16. "Proof may show just how the accident happened and this showing may preclude the likelihood of defendant's negligence or so reduce it as to leave an insufficient basis in probabilities for an inference of negligence." IV F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 19.10 (2d ed. 1986).

17. *Cf.* W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 260 (5th ed. 1984) (lesser showing of evidence will not negate inference).

18. Tuttle v. Miami Dolphins, Ltd., 551 So. 2d 477 (Fla. 3d Dist. Ct. App. 1989).

19. *Id.* at 484.

of trial, and continued: "Defendants *met* their appellate burden when they pointed to plaintiff's failure to prove his case. Defendants are not required to negate an unproved claim in order to prevail on appeal; the lack of proof in the record entitles them to a directed verdict."[20]

One should also note the apparently aberrational case of *Booth v. Abbey Road Beef & Booze, Inc.*,[21] holding that a cause of action for negligence *per se* based on violation of Florida Statutes section 562.11[22] still exists. However, the case not only does not consider the effect of section 768.125,[23] it does not even mention the statute or the Florida Supreme Court cases interpreting the statute. Indeed, it refers to section 562.11 as a "dram shop act,"[24] even though that section in no way relates to civil liability. This case will most probably have little precedential effect due to its facial conflict with the Florida Supreme Court's earlier decision in *Armstrong v. Munford, Inc.*[25]

Defenses

The Florida Supreme Court went far toward settling the question of when the statute of limitations begins to run in actions where knowledge of existence of a cause of action is pivotal.[26] The Evans purchased a new home from Almand Construction in 1972. It began to settle some time thereafter, and in 1978 the Evans informed Almand of structural damage due to the settling. In 1982 the Evans received an

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20. *Id.* at 486 (Baskin, J., dissenting) (emphasis in the original).

21. 532 So. 2d 1288 (Fla. 4th Dist. Ct. App. 1988), *rev. denied*, 542 So. 2d 1332 (Fla. 1989).

22. The relevant part of the statute states:

> It is unlawful for any peron to sell, give, serve or permit to be served alcoholic beverages to a person under 21 Years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises . . . .

FLA. STAT. § 562.11(1)(a)(1989).

23. The relevant passage states:

> [A] person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking ages . . . may become liable for injury or damage caused by or resulting from the intoxication of such minor . . . .

FLA. STAT. § 768.125 (1989).

24. *Booth*, 532 So. 2d at 1290.

25. 451 So. 2d 480 (Fla. 1984) (Fla. Stat. § 768.125 limits prior right of plaintiffs to recover).

26. Almand Const. Co. v. Evans, 547 So. 2d 626 (Fla. 1989).

engineering report stating that the damage was due to construction of the house on unsuitable fill. In 1985, Evans finally filed suit based on the damage. The trial court held the suit time-barred, and granted summary judgment to Almand. After the First District Court of Appeal reversed,[27] the Florida Supreme Court reinstated the trial court's decision.

On the motion for summary judgment, Almand had the burden of demonstrating that there was no issue of material fact to be tried, and met this burden when the pleadings themselves proved the case time-barred. The Evans made no subsequent showing of any justiciable issue of fact. However, the Evans were not required to know the exact reason the house settled to enable them to file the law suit. As the Evans knew of the settling and damage, they were "on notice that they had, or might have had, a cause of action."[28]

In a case dealing with interspousal immunity, the husband drove a car owned by a corporation and had an accident in which his wife incurred injuries.[29] She sued the corporation, basing her action on the dangerous instrumentality doctrine imposing liability on the owner of a motor vehicle for torts committed by a permissive user.[30] The corporation received summary judgment, based on its affirmative defense of interspousal tort immunity. The Fourth District Court of Appeal reversed and remanded the case, finding that interspousal tort immunity was not available to the non-spousal owner. The defendant sought to distinguish an earlier Florida Supreme Court case that had rejected the same argument,[31] on the grounds that the owner was also the driver's employer, and the case revolved around issues of *respondeat superior*. However, "the dangerous instrumentality doctrine stands alone, independent of other theories of liability."[32] Thus, the owner cannot take advantage of the driver's spousal relationship with the plaintiff.

An interesting variant to intrafamilial tort immunity came in the case of *Johnson v. School Board of Palm Beach County*.[33] In a suit by the parents of a deceased child against the School Board, the jury

27. Evans v. Almand Constr. Co., 530 So. 2d 485 (Fla. 1st Dist. Ct. App. 1988).
28. *Almand Constr. Co.*, 547 So. 2d at 628.
29. Lambert v. Indian River Elec., Inc., 551 So. 2d 518 (Fla. 4th Dist. Ct. App. 1989).
30. *See, e.g.*, Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832 (Fla. 1959).
31. May v. Palm Beach County Chem. Co., 77 So. 2d 468 (Fla. 1955).
32. *Lambert*, 551 So. 2d at 519 (citing *Susco*, 112 So. 2d at 832).
33. 537 So. 2d 685 (Fla. 4th Dist. Ct. App. 1989).

found each parent twenty percent negligent with relation to the accident in which the child died. The parents had filed a separate claim in their own right under the wrongful death statute. The trial court, attempting to deal with the School Board's claims against the parents for contribution in the individual cases, assessed each parent twenty percent in contribution for the claim of the other spouse. The parents appealed the contribution assessment, raising as a defense the doctrine of intrafamilial tort immunity, but the Fourth District Court of Appeal affirmed.

Since the parents sued in their own right, they were not suing each other to vindicate the claim of their child. The *Johnson* court held that to allow "each parent . . . to [avoid] contribut[ing] and account[ing] for his or her share of the wrongdoing to the other parent"[34] would be unfair to the school board and a windfall to each appellant. Since intrafamilial tort immunity was not at issue, the question of insurance limits was irrelevant.[35]

Finally, a defendant attempted to interpose the seat belt defense in a case brought by an intoxicated minor passenger.[36] The passenger argued that he was incapable of putting on his seat belt due to his intoxicated state, and that the driver knew of his incapacity. The Fifth District Court of Appeal found the trial court correctly granted the driver's motion for summary judgment.[37] The driver cannot ensure that the passenger will wear an available seat belt, even if the passenger is drunk. "As a matter of public policy"[38] the court was not persuaded that "[the plaintiff] could not have adequately protected himself from the consequences of his own voluntary inebriation where at the time he was old enough to operate a dangerous instrumentality under Florida law."[39]

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34. *Id.* at 686.

35. *Cf.* Joseph v. Quest, 414 So. 2d 1063 (Fla. 1982) (intrafamilial tort immunity not a defense up to limits of insurance policy carried by defendant).

36. Bonds v. Fleming, 539 So. 2d 583 (Fla. 5th Dist. Ct. App. 1989).

37. The parties had stipulated that the passenger's injuries came entirely from his failure to wear a seat belt. *Id.* at 584.

38. *Id.*

39. *Bonds*, 539 So. 2d at 585.

Premises Liability

Dangerous Exterior Conditions

Two cases in the past survey year clarified the circumstances under which a defendant will avoid liability for an automobile leaving the defendant's private parking lot, jumping a curb and injuring a plaintiff. In the first, Cohen was using a telephone located immediately outside and on the premises of a convenience store operated by Southland.[40] The adjacent parking lot, also owned by Southland, had no cement bumpers or other devices to separate the parking area from the sidewalk which ran along the building. Schrider's car left the parking area, crossed the sidewalk, and struck Cohen. Cohen sued Southland, and the trial court granted the defendant's motion for summary judgment. The Fourth District Court of Appeal reversed.

In the three years prior to the incident, cars had left the margins of the store's parking lot at least ten times causing similar accidents. Even if Schrider's car had lost its brake power, as Schrider testified, it was for the jury to determine whether Southland could have foreseen injury to a person on its premises from such an occurrence. The earlier incidents indicate that the foreseeability of later similar occurrences certainly remains the province of the jury to determine.

In contrast, the later case of *Molinares v. El Centro Gallego, Inc.*,[41] presented an instance where on similar facts the trial court properly granted summary judgment to the defendant. Molinares was about to enter a restaurant when a motorist in error put his foot on the gas pedal of his car. The car went over a curb, crossed the sidewalk, and struck Molinares, who sued the restaurant which also owned the parking lot. Molinares showed no prior instances of similar accidents at the location, and the trial court granted the restaurant's motion for summary judgment. The Third District Court of Appeal affirmed, distinguishing *Cohen v. Schrider* on the basis that in *Molinares* the defendant had no knowledge that the construction of the parking lot created a hazard of cars jumping the curb.

> We only conclude that much like most governmental entities which quite properly build curbed sidewalks along their streets without parallel barriers or bumpers to protect pedestrians from motorists driving in the street, a business establishment is similarly entitled

40. Cohen v. Schrider, 533 So. 2d 859 (Fla. 4th Dist. Ct. App. 1988).
41. 545 So. 2d 387 (Fla. 3d Dist. Ct. App. 1989).

> to rely on the safety of a curbed sidewalk in front of its business to protect its invitees as they enter and exit the said business—at least in the absence of any prior history of motor vehicle accidents involving its invitees in front of its business not withstanding the protective sidewalk.[42]

Even where a dangerous condition exists on the property of a defendant, a plaintiff seeking to recover must first demonstrate that the defendant knew of the condition or should have discovered it. A child visiting the tenant of an apartment fell from a tree outside the building and cut himself on some broken glass that was lying on the ground.[43] He sued the apartment owner, who moved for summary judgment. The Fifth District Court of Appeal affirmed the trial court's granting of the motion.[44] Plaintiffs injured by a foreign substance on property can recover from the owner only upon a showing that the owner knew of the existence of the substance, or from surrounding circumstances giving the owner constructive notice of the substance's presence. Normally, constructive notice is shown where the substance had stayed on the property for a sufficient length of time for the owner to have had a fair opportunity to have discovered it. "The crux of the cause of action for premises liability is not legal title or ownership, but the failure of a person who is in actual possession and control . . . to use due care to warn, or to exclude, [*sic*] licensees or invitees from areas known to the possessor to be dangerous because of operations or activities or conditions."[45] The plaintiff made no showing of the length of time the glass had lain on the ground; accordingly the plaintiff failed to prove sufficient facts to warrant a conclusion of constructive notice.

Judge Glickstein dissented. Testimony showed that the owner employed a handyman to pick up trash in the morning, but the accident occurred around noon. From this testimony a jury could have inferred that the owner did have notice, and since "there [were] various inferences to be made and conclusions to be drawn concerning a particular issue, the matter should [have been] submitted to a jury."[46]

Two cases stressed that even where the landowner owed a duty to

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42. *Id.* at 388 (footnote omitted).
43. Haynes v. Lloyd, 533 So. 2d 944 (Fla. 5th Dist. Ct. App. 1988).
44. The court initially held that broken glass on the premises of a building used for residential purposes constitutes a dangerous condition as a matter of law. *Id.* at 945.
45. *Id.* at 946 (footnote omitted).
46. *Id.* at 948 (Glickstein, J., dissenting) (citation omitted).

a person to correct a condition, if the person also knew of the condition, the landowner would not be liable for injuries that it engendered. Crawford, a housekeeper in the Millers' home, knew that the Millers had installed Malibu lights in the shrubbery which bordered the front walk. She later tripped and fell on the walk and sued the Millers, arguing that she had fallen on the protruding edge of one of the lights. The trial court granted the defendants' motion for summary judgment, and the Third District Court of Appeal affirmed. Even if the lights constituted a dangerous condition which the shrubbery masked, "there is no dispute that appellant was aware of the existence of the lights."[47] Her knowledge precluded her recovery.[48]

In a similar case, McAllister had used a parking lot on many occasions and knew that several white concrete blocks marked the boundary of Robbins' property.[49] One evening, trying to take a shortcut which required him to step over the blocks, he caught his foot on a block, fell, and was injured. The First District Court of Appeal affirmed the grant of summary judgment for the defendant.[50] At first, the blocks presented no evident hazard.[51] However, even if the defendant owed a duty to the plaintiff, "there was no question of duty to warn, since plaintiff's knowledge was equal to that of the defendants."[52]

Fireman's Rule

Until this past year, the Florida Supreme Court had never decided that the "Fireman's Rule" applied in the state of Florida.[53] When fi-

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47. Crawford v. Miller, 542 So. 2d 1090 (Fla. 3d Dist. Ct. App. 1989).

48. A similar theory underlay the court's decision in Parrish v. Matthews, 548 So. 2d 725 (Fla. 3d Dist. Ct. App. 1989). A maid, hired to clean and straighten the interior of a residence, slipped on a piece of paper on a staircase in the house. The Third District Court of Appeal affirmed a summary judgment in favor of the homeowner, based not directly on the knowledge of the plaintiff, but on the principle that "[w]here, as here, the injury occurred as a result of a condition the plaintiff was engaged to correct, summary judgment was properly entered for defendants." *Id.*

49. McAllister v. Robbins, 542 So. 2d 470 (Fla. 1st Dist. Ct. App. 1989).

50. "[A] person is not required to take measures to avoid a danger which the circumstances as known to him do not suggest as likely to happen." *Id.*

51. *Id.*

52. *Id.* Note, however, Judge Ervin's dissent, which argued that since the lighting was very poor, the jury should have decided whether the hazard was open and obvious, as well as whether McAllister's knowledge was indeed equal to Robbins'.

53. The Court did, many years ago, suggest in *dicta* that it favored the rule. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940).

nally required to confront the issue, the court definitively determined that the restriction on recovery in tort actions by professional rescuers does exist as a part of Florida common law; however it must yield in the teeth of a statutorily created cause of action.[54] Kilpatrick, a police officer responding to a burglar alarm, entered Sklar's yard by climbing a wrought iron fence capped with spikes.[55] To his dismay, Kilpatrick soon found himself face to face with Sklar's four Great Danes.[56] Barely outdistancing the dogs, Kilpatrick reached the fence only to impale his calf on one of the spikes as he tried to leave the yard.[57]

Kilpatrick sued Sklar based on two causes of action: common law negligence and strict liability as a dog owner, based on Florida law.[58] Sklar interposed an answer asserting the Fireman's Rule as a defense to both counts of the complaint, and the trial court granted summary judgment according to the theory of the answer.[59] The Third District Court of Appeal affirmed the summary judgment on the common law count, but reversed as to the statutory claim, remanding to allow the court to consider whether any statutory defenses[60] existed.[61] The Florida Supreme Court affirmed.[62]

The court believed the Fireman's Rule was a part of Florida common law[63] for several reasons. First, it cited cases from lower Florida courts adopting the rule based on the premises liability theory that the professional rescuer, as a mere licensee on real property, can expect no duty from the owner other than to refrain from willful and wanton mis-

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54. FLA. STAT. § 767.01 (1981) ("Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons.").
55. Kilpatrick v. Sklar, 548 So. 2d 215, 218 (Fla. 1989).
56. *Id.* at 216.
57. *Id.*
58. FLA. STAT. § 767.01 (1981).
59. Mrs. Sklar was also named as a defendant. She defended against the statutory cause of action by stating that she was not the owner of the dogs, as required by statute. The trial court granted her motion for summary judgment on the statutory cause of action and both the Third District Court of Appeal and the Florida Supreme Court affirmed based on the theory of non-ownership. *Kilpatrick*, 548 So. 2d at 215.
60. According to FLA. STAT. § 767.04 (1981) (liability of owners).
61. Kilpatrick v. Sklar, 497 So. 2d 1289 (Fla. 3d Dist. Ct. App. 1986). As the Third District Court of Appeal decision conflicted with that of the First District Court of Appeal in Sanderson v. Freedom Savings & Loan Ass'n, 496 So. 2d 954 (Fla. 1st Dist. Ct. App. 1986), the Florida Supreme Court granted conflict *certiorari* to hear the question. *Kilpatrick*, 548 So. 2d at 216.
62. *Kilpatrick*, 548 So. 2d at 216.
63. *Id.*

conduct or to warn of known hidden dangers.[64] Further, as noted in Prosser's hornbook, since rescuers enter the premises under emergency situations, the owner of the premises has little or no opportunity to make the property safe for them.[65] To hold otherwise would have the effect of deterring people from summoning the police or firefighters, or at least make people delay calling them in circumstances where minutes may make the difference between a successful call and a disaster.[66] Finally, the court noted that professional rescuers were not deprived of a remedy since, "because of the dangers inherent in duties performed by both policemen and firemen, special funds and programs have been established to compensate them in the event they suffer injury or death while acting in the course of their employment."[67]

However, the Fireman's Rule operated only to counter the common law cause of action. The statute which created Kilpatrick's second cause of action created not merely the right itself,[68] but a finite and precise list of available defenses.[69] The statutory claim therefore did not supplement available common law causes of action, but replaced them.[70] Similarly, the statutory defenses did not exist to augment those which existed at common law, but replaced them as well. As the Fireman's Rule is one of common law not mentioned in Florida's statutes,[71] Sklar could not use it to defeat Kilpatrick's claim.

On the same day as it decided *Kilpatrick*, the Florida Supreme Court handed down a *per curiam* decision in *Sanderson v. Freedom*

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64. *See, e.g.*, P.J.'s of Daytona, Inc. v. Sorenson, 520 So. 2d 613 (Fla. 5th Dist. Ct. App. 1987), *rev. denied*, 529 So. 2d 695 (Fla. 1988), and other cases cited in *Kilpatrick*, 548 So. 2d at 216.

65. W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS §61 (5th ed. 1984).

66. *Cf.* Rishel v. Eastern Airlines, Inc., 466 So. 2d 1136, 1138 (Fla. 3d Dist. Ct. App. 1985). However, Justice Ehrlich in a separate opinion argued that despite its historic links with premises liability, the Fireman's Rule should not be seen in that context. He argued for a "rule which would bar recovery for injuries caused by the very risk that initially required the fireman's or policeman's presence . . . . [R]ecovery would not be barred for acts of negligence which occur subsequent to the fireman's or officer's arrival on the scene and either materially enhance the risk of harm or create a risk of harm different than that to which the plaintiff was responding." *Kilpatrick*, 548 So. 2d at 218-19 (Ehrlich, J., concurring in part and dissenting in part).

67. *Kilpatrick*, 548 So. 2d at 218.

68. FLA. STAT. § 767.01 (1981).

69. FLA. STAT. § 767.04 (1981).

70. *See* Belcher Yacht, Inc. v. Stickney, 450 So. 2d 1111 (Fla. 1984).

71. FLA. STAT. § 767.04 (1981).

Savings & Loan Association.[72] Taylor, a police officer, responded to a silent alarm warning of a bank robbery in progress.[73] A bank officer made a statement which alerted the robbers to the approach of a police officer.[74] Having been warned, one of the robbers left by the rear entrance to the bank, circled about to the front, and shot Taylor to death.[75] The bank interposed the Fireman's Rule as a defense to the wrongful death claim brought by Taylor's estate,[76] and the trial court dismissed the complaint.[77] The First District Court of Appeal affirmed.[78] The Florida Supreme Court agreed, holding that absent allegations of willful and wanton misconduct the Fireman's Rule bars a professional rescuer's claim for injuries resulting from the course of the rescuer's business.[79]

As he did in *Kilpatrick*, Justice Ehrlich wrote a separate opinion, this time dissenting from the result: "Officer Taylor reasonably could have anticipated that he might be shot by the robbers at the scene of the robbery.[80] However, the defendant's alleged negligent warning of the officer's arrival could be found either to have materially enhanced the risk of harm which reasonably could be anticipated or to have created a new risk of harm."[81]

The upshot of *Kilpatrick*[82] and *Sanderson*[83] has the Fireman's Rule very much alive and well in Florida. The Court has adopted a wide sweeping version, which does not merely limit its effect to barring causes of action based on injuries which occur due to the condition of the real property onto which professional rescuers must venture. Rather, the Fireman's Rule precludes any actions for negligence brought by professional rescuers who receive injuries in the course of performing their duties, unless they can demonstrate that the defendant

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72. 548 So. 2d 221, 223 (1989).
73. *Id.* at 222.
74. *Id.*
75. *Id.*
76. *Id.* at 222. The complaint contained no allegation that the bank officer had acted in a willful or wanton manner.
77. *Sanderson*, 548 So. 2d at 222.
78. Sanderson v. Freedom Savings & Loan Ass'n, 496 So. 2d 954 (Fla. 1st Dist. Ct. App. 1986).
79. *Sanderson*, 548 So. 2d at 221.
80. *Id.* at 223 (Erlich, J., dissenting).
81. *Id.*
82. *Id.* at 215.

acted in a willful and wanton manner. We can also assume that the Fireman's Rule will not block causes of action based on intentional torts.

Duty and Causation

For owners of multi-family living facilities and facilities open to the public, the problem of liability for criminal acts of others committed on their premises remains vexing. Although stating the general rule comes easily—you owe no duty to protect those on your premises from criminal acts absent either a special relation or knowledge that the acts may occur[84]—dealing with the rule is no simple matter. Normally, the case comes down to one of evidence and the plaintiff must not only demonstrate the existence of prior criminal acts on the property, but must also demonstrate their similarity to the crime as well as their proximity in time.[85] Three cases in the district courts of appeal during the survey year attempted to clarify the issue.

In the first, a mugger emerged from overgrown brush flanking a nature trail in a public park to rob and shoot a jogger.[86] The jogger sued the county, arguing that it knew "that homosexual activity, illicit drug dealing and arson attempts had occurred in the park . . ."[87] When the trial court granted the defendant's motion for summary judgment and the plaintiff appealed, the Third District Court of Appeal affirmed.[88] Even assuming the plaintiff's complaint accurately stated the facts, "[t]he landowner's duty arises only when he has actual or constructive knowledge of *similar* criminal acts committed on his premises.[89] In [this] case . . . Ameijeiras introduced no evidence that Dade County knew of the existence of violent criminal activity in Bird Drive Park."[90]

Three months later, the same court again confronted the issue. A condominium owner was raped by an intruder who used a ladder to

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84. *Kilpatrick*, 548 So. 2d at 215.

85. *See generally*, W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 33 (5th ed. 1984).

86. Ameijeiras v. Metropolitan Dade County, 534 So. 2d 812 (Fla. 3d Dist. Ct. App. 1988).

87. *Id.* at 813.

88. *Id.* at 812.

89. *Id.* at 813 (citing Paterson v. Deeb, 972 So. 2d 1210 (Fla. 1st Dist. Ct. App. 1985)).

90. *Id.*

enter her second-story window.[91] In this instance, however, the plaintiff was able to demonstrate that the association knew of at least two instances in the prior five years where violent crimes had taken place on the property.[92] One of the crimes was rape.[93] Even though the crimes had occurred in the common areas of the condominium, the court decided summary judgment was improper.[94] The crimes were sufficiently close in time and nature to put the association on notice of the potential for harm by criminal acts, and so long as they had occurred within the limits of the condominium, it did not matter if they took place in units or common areas.[95]

In the final case, an assailant beat a motel guest who was walking to his room.[96] At trial, the court excluded a proffer intended to show that two months earlier a car had been stolen from the motel's parking lot.[97] The First District Court of Appeal held that the court erred in excluding the evidence, but that the error was harmless: "Apart from the single episode of the stolen car, appellant presented no evidence of any significant criminal activity against motel guests within five miles of the location of this motel."[98] As a result, there was insufficient evidence to conclude the motel should have known of an unreasonably high risk of harmful criminal activity by third persons.[99]

Courts continue to speak of the question as one of duty, yet at the same time discuss whether the defendant could "foresee" the criminal activity. This language, particularly in those cases dealing with hotel guests where the duty owed by the defendant is clear, suggests that courts believe the issue to be one of causal relationship rather than that of duty. As the *Satchwell*[100] decision demonstrates, the distinction is not one of great moment, for even if the question revolves around causation, the courts will have no hesitation in avoiding the jury.

Other cases centered around genuine questions of causation. In

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91. Czerwinski v. Sunrise Point Condominium, 540 So. 2d 199, 200 (Fla. 3d Dist. Ct. App. 1989).
92. *Id.* at 200.
93. *Id.*
94. *Id.* at 201.
95. *Id.*
96. Satchwell v. LaQuinta Motor Inns, Inc., 532 So. 2d 1348 (Fla. 1st Dist. Ct. App. 1988).
97. *Id.*
98. *Id.* at 1350.
99. *Id.*
100. *Id.* at 1348.

one case, a traffic signal failed to operate due to the power company's negligence.[101] A driver entered the intersection totally heedless of whether a traffic light existed, let alone whether it was operational.[102] When an accident ensued, she sued the power company, which argued that her actions cut off their negligence.[103] The Third District Court of Appeal agreed with the defendant:[104] "Surely, inoperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located; such a bizarre occurrence is, in our view, beyond the scope of any fair assessment of the danger created by the inoperable traffic light."[105]

Damages

At common law, courts refused to award punitive damages unless the plaintiff had recovered a compensatory award or, at the very least, nominal damages.[106] In response to a certified question from the Eleventh Circuit Court of Appeals,[107] the Florida Supreme Court rejected the common law approach and permitted an award of punitive damages without any other award of damages, so long as the jury had made a specific finding of breach of duty:[108] "[N]ominal damages are in effect zero damages and are defined as those damages flowing from the establishment of an invasion of a legal right where actual or compensatory damages have not been proven . . . . [N]ominal damages will be presumed from an encroachment upon an established right."[109] In a concurring opinion, Justice Ehrlich stressed that this result could not obtain in an action where actual damages were an element of the action

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101. Derrer v. Georgia Elec. Co., 537 So. 2d 593, 594 (Fla. 3d Dist. Ct. App. 1988).

102. *Id.* at 594.

103. *Id.*

104. *Id.*

105. *Id.* The Florida Supreme Court considered whether a power company breaches a duty to a person not a customer when it negligently causes an intersection signal to lose power. However, it had taken the case on conflict *certiorari* and found on closer analysis that since no conflict existed, it had improvidently granted *certiorari*. Arenado v. Florida Power & Light Co., 541 So. 2d 612 (Fla. 1989).

106. W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS §2 (5th ed. 1984).

107. Lohr v. Florida Dept. of Corrections, 835 F.2d 1402 (11th Cir. 1988).

108. Ault v. Lohr, 538 So. 2d 454, 456 (Fla. 1989).

109. *Id.* at 457.

itself, such as negligence.[110] The case before the Court, however, was for violation of civil rights under a federal statute and required no actual damages for the plaintiff to recover.[111]

Professional Negligence

Medical Malpractice

The most significant case in the area of medical malpractice saw the Florida Supreme Court hold constitutional the statute of repose in medical malpractice cases.[112] At the birth of Carr's child in 1975, her physician diagnosed the baby as having severe brain damage.[113] In 1985, Carr sued her hospital and treating physicians for malpractice.[114] When they moved to dismiss based on the statute of repose, Carr argued the statute was contrary to the Florida Constitution.[115] The trial court, unconvinced, granted the motion[116] and the Fourth District Court of Appeal affirmed.[117] The Florida Supreme Court, hearing the case on conflict *certiorari*,[118] affirmed.

Quoting liberally from the Fourth District Court's opinion, the supreme court noted that, unlike statutes of repose in other areas of the law, the legislature had demonstrated its concern for public policy by appending a preamble to the medical malpractice statute of repose.[119] The preamble, noting the severe economic and personal hardships imposed by the expense of medical malpractice insurance, concluded that a statute of repose was needed to curb a situation of "crisis proportion

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110. *Id.*

111. *Id.*; *see also* Platte v. Whitney Realty Co., Inc., 538 So. 2d 1358 (Fla. 1st Dist. Ct. App. 1989) (dealing with defamation and intentional interference with business relationships, both of which the First District Court of Appeal seems to imply do not require compensatory damages in order for the plaintiff to recover).

112. Carr v. Broward County, 541 So. 2d 92 (Fla. 1989). The statute involved is FLA. STAT. § 95.11(4)(b) (1975). In brief, it provides that no person may maintain an action sounding in medical malpractice in which the complaint was filed more than four years after the date of the incident from which the cause of action accrued.

113. *Carr*, 541 So. 2d at 92.

114. *Id.* at 93.

115. *Id.* at 94 (referring to FLA. CONST. art. 1, § 21).

116. *Id.* at 93.

117. Carr v. Broward County, 505 So. 2d 568 (Fla. 4th Dist. Ct. App. 1987).

118. *Carr*, 541 So. 2d at 92. The Fourth District Court of Appeal decision conflicted with Phelan v. Hanft, 471 So. 2d 648 (Fla. 3d Dist. Ct. App. 1985), *appeal dismissed*, 488 So. 2d 531 (Fla. 1986).

119. *Carr*, 541 So. 2d at 94.

in Florida."[120] As a result, the legislature, in enacting the statute of repose determined that public policy must subordinate the private desire to maintain lawsuits to "an overpowering public necessity."[121] Thus, the legislature had taken all necessary concerns into consideration and its action did not contravene the Florida Constitution.[122]

Procedural concerns also manifested themselves in cases from the district courts of appeal. In one case, the plaintiff, Solimando, sent notice of intent to file a malpractice claim by regular mail, rather than the statutorily-mandated[123] certified mail.[124] After suit, Solimando sent notice by certified mail.[125] Some of the defendants in the suit had insurance carriers who acknowledged receiving the notices sent by regular mail.[126] The trial court, determining that the notice requirements of the statute had not been met, dismissed the action for lack of jurisdiction.[127] The Second District Court of Appeal reversed.

Although the two attempts at notice fell short of statutory requirements and were invalid for the purposes of the statute, their invalidity did not affect the jurisdictional power of the court to hear the action.[128] Although a complaint in a medical malpractice action must contain allegations of compliance with the notice requirements to invoke jurisdiction, failure in fact to prove the allegations will not destroy the jurisdiction once invoked, but will lead to dismissal of the cause of action once the proof has failed.[129] As such, the notice requirements may be waived by defendants.[130] Where a plaintiff seeks to demonstrate satisfaction of notice requirements by waiver rather than by means accepted in the statute, the complaint must have "substituted the facts asserted to constitute waiver of the notice requirements . . . for the allegation of compliance with the statute."[131]

Two other cases considered discovery issues. Even where a physi-

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120. *Id.*
121. *Id.*
122. *See* FLA. CONST. art. 1, § 21 (access to courts).
123. FLA. STAT. § 768.57(2), (3)(a) (1987).
124. Solimando v. International Med. Centers, H.M.O., 544 So. 2d 1031, 1032 (Fla. 2d Dist. Ct. App. 1989).
125. *Id.* at 1032.
126. *Id.*
127. *Id.* at 1031.
128. *Id.*
129. *Solimando*, 544 So. 2d at 1033.
130. *Id.*
131. *Id.* at 1034.

cian neglects responding to questions until after the plaintiff has filed suit, and even if the neglect may not be excusable, the court cannot respond by striking the physician's affirmative defenses.[132] The plaintiff cannot argue prejudice due to a lack of opportunity to enter into meaningful settlement, because the entire function of presuit discovery is to facilitate settlement by the insurer, rather than the plaintiff.[133] Mere neglect in making presuit discovery is not the extreme situation which calls for the sanction of striking defenses.[134]

In the second case, the First District Court of Appeal continued the philosophy of many Florida cases[135] in rejecting attempts to discover the minutes and other papers of peer review programs.[136] The plaintiff, arguing that the theory of his case centered around the negligence of a hospital in permitting an alcoholic physician to retain privileges, sought discovery of the peer review documents in an attempt to learn the state of mind of the corporate policy-making officials. The trial court ordered discovery, but the First District Court of Appeal reversed. The operative statutes protect from discovery peer evaluations "arising out of the matters which were the subject of evaluation and review."[137] The statutory privilege protected the peer reports because the "very circumstances respondent [sought] to discover [were] the ones considered by the various committees and boards."[138]

Attorneys Fees

As noted in last year's tort survey,[139] the Florida courts have been struggling to interpret the late, unlamented, statutory provision for attorneys fees in medical malpractice cases.[140] In *Miami Children's Hospital v. Tamayo*,[141] the Florida Supreme Court determined that coun-

132. Morris v. Ergas, 532 So. 2d 1360, 1361 (Fla. 2d Dist. Ct. App. 1988).
133. *Id.* at 1361.
134. *See also* Pinellas Emergency Mental Health Serv. v. Richardson, 532 So. 2d 60 (Fla. 2d Dist. Ct. App. 1988) (holding the trial court cannot dismiss an answer and affirmative defenses without determining that the failure to comply was unreasonable, rather than that the health care provider failed to act in good faith).
135. *See, e.g.*, Holly v. Auld, 450 So. 2d 217 (Fla. 1984).
136. Bay Medical Center v. Sapp, 535 So. 2d 308 (Fla. 1st Dist. Ct. App. 1988).
137. FLA. STAT. §§ 395.011(9), 395.0115(4), 768.40(5) (1987).
138. *Bay Medical Center*, 535 So. 2d at 311.
139. Richmond, *1988 Survey of Florida Law: Torts*, 13 NOVA L. REV. 1245, 1275 (1989).
140. FLA. STAT. § 768.56 (1983) (repealed by 1985 Fla. Laws 85-175).
141. 529 So. 2d 667 (Fla. 1988).

sel for plaintiffs could not receive a greater fee than that provided for in a contingency agreement with their clients. This year, the Court turned its attention to defense counsel.[142] Confined by a contract with the insurance carrier limiting his fees to $60 per hour, the successful attorney for the physician sought to recover a greater amount under the statute. Although the attorney argued *Tamayo* should apply only to contingency fees, the Court remained unconvinced: "To rule that one side is limited to a prior fee arrangement while the other is not would be unfair. The playing field must remain balanced . . . ."[143]

Earlier in the year, the Court had before it a professional association suing in its name for attorneys fees incurred in successfully defending a medical malpractice action.[144] A nurse anesthesist employed by the association had sedated Gershuny prior to shock therapy. Gershuny claimed the nurse anesthetist acted negligently and the association was vicariously liable. The nurse anesthetist acted independently of any physician, and the association ultimately won the suit. The association, whose members were all physicians, sought attorneys fees under a statute providing for recovery by "any medical or osteopathic physician, podiatrist, hospital, or maintenance organization."[145] The Florida Supreme Court held the association could not recover.

> The record shows that the nurse anesthesist who administered the anesthesia to Gershuny was acting independently and not under the direct supervision of a physician within the meaning of the statute. Accordingly, no physician-shareholder could have been held liable for the nurse anesthesist's negligence. Only the Association as a corporation could have been subject to liability under the circumstances presented here . . . . The Association is recognized in law as a legal corporate entity separate and distinct from the persons comprising it . . . . The professional association here is indistinguishable from any other corporation that employs a nurse, and it is not one of the health care providers enumerated in the statute.[146]

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142. Perez-Borroto v. Brea, 544 So. 2d 1022 (Fla. 1989).

143. *Id.* at 1023.

144. Gershuny v. Martin McFall Messenger Anesthesia, P.A., 539 So. 2d 1131 (Fla. 1989).

145. FLA. STAT. § 768.56 (1983).

146. *Gershuny*, 539 So. 2d at 1132-33 (citations omitted). *See also* North Broward Hosp. Dist. v. Johnson, 538 So. 2d 876 (Fla. 4th Dist. Ct. App. 1988), in which the court held statutory provisions could, like contract provisions, limit the award of statutory attorneys fees). By statute, a governmental agency cannot be assessed more than twenty-five percent of any recovery for attorneys fees. FLA. STAT. § 768.28(8) (1986).

Other Professions

In *Zeidwig v. Ward*,[147] the Supreme Court of Florida recently rendered a highly significant opinion in the area of legal malpractice. Ward retained Zeidwig to represent him in a criminal matter. Subsequent to his conviction and imprisonment, Ward sought to vacate his sentence based on Zeidwig's ineffective assistance at the trial and appellate stages.[148] According to Ward, he had obtained exculpatory evidence which Zeidwig refused to introduce at any stage of the proceeding. Zeidwig countered by explaining that he believed the evidence to have been obtained illegally and his knowledge of its contents would jeopardize the confidential nature of his attorney/client relationship.[149] The federal district court agreed and denied Ward's motion to vacate.[150] Ward later sued Zeidwig for malpractice, and Zeidwig moved for summary judgment on the grounds of collateral estoppel. Although the trial court granted the motion, the Fourth District Court of Appeal reversed[151] and the Florida Supreme Court granted certiorari on the basis of the question of great public importance presented by the case.

The motion in the federal district court did not have perfect identity of parties with the civil suit against Zeidwig. Florida precedent seems to indicate that in cases where a party asserts collateral estoppel offensively, there must be mutuality of parties.[152] However, when used defensively, collateral estoppel is asserted against a party who had a full and fair opportunity to litigate the issues raised in the second suit. In a civil case involving issues earlier litigated in a criminal action, the parties will often necessarily not have perfect mutuality.

> If we were to allow a claim in this instance, we would be approving a policy that would approve the imprisonment of a defendant for a criminal offense after a judicial determination that the defendant has failed in attacking his conviction on grounds of ineffective assistance of counsel but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned.[153]

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147. 548 So. 2d 209 (Fla. 1989).
148. *Id.* at 210.
149. *Id.* at 211.
150. *Id.*
151. Ward v. Zeidwig, 521 So. 2d 215 (Fla. 4th Dist. Ct. App. 1988).
152. *Cf.* Trucking Employees of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984).
153. *Zeidwig*, 548 So. 2d at 214.

Note particularly the limited scope of the Court's ruling. *Zeidwig* applies only in the context of the civil case brought by a defendant in an earlier criminal action, seeking to litigate in a civil arena issues necessarily decided in a criminal context. Bearing in mind the different burdens of proof borne by the state and by a civil litigant, the Court may well confine *Zeidwig* in the future to the civil-from-criminal context.

A significant conflict regarding legal malpractice appears to be percolating up through the district courts. Tradition indicates that a legal malpractice cause of action does not accrue until the case under scrutiny has completed its path through the entire appellate process, or through final judgment if not appealed.[154] This past year, the Second District Court of Appeal challenged this doctrine. In *Sawyer v. Earle*,[155] it held that the cause of action accrues prior to termination of the action in which malpractice occurred if the client had prior notice of the malpractice.

Brought before a bar disciplinary committee in August of 1979, Sawyer retained Earle to represent him. He discharged Earle in March of 1981, and the disciplinary proceedings did not terminate until July of 1982.[156] Sawyer's own testimony reveals that "he believed he was being poorly represented [in 1979] and thereafter until he substituted another attorney for Earle in March of 1981. He also testified . . . that he suffered a loss of income in 1980 because of Earle's alleged malpractice."[157] Sawyer sued Earle for malpractice in June of 1984. Earle moved for summary judgment, which the trial court granted, and the Second District Court of Appeal affirmed the trial court's action.[158]

The court was aware of the earlier cases adopting the strict rule that the cause does not accrue until the conclusion of litigation. However, it also pointed to the explicit language of the limitations statute, providing "that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence."[159] Sawyer's stated knowledge of the poor representation, combined with his assertion that his loss of income in

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154. *See, e.g.*, Haghayegh v. Clark, 520 So. 2d 58 (Fla. 3d Dist. Ct. App. 1988).

155. 541 So. 2d 1232 (Fla. 2d Dist. Ct. App. 1989).

156. Sawyer received an eighteen month suspension from the practice of law. Florida Bar v. Sawyer, 420 So. 2d 302 (Fla. 1982), *cert. denied*, 460 U.S. 1043 (1983).

157. *Sawyer*, 541 So. 2d at 1233.

158. *Id.* at 1235.

159. FLA. STAT. § 95.11(4)(a) (1989). The court erroneously cites the statute as § 94.11(4)(a).

1980 was due to the malpractice, demonstrates that he knew well in advance of termination of litigation that Earle had committed malpractice. Thus, the specific language of the statute provides that the limitations clock had started ticking for more than two years prior to his having filed the action. On the other hand, as the court itself noted in certifying the issue to the Florida Supreme Court, *Sawyer v. Earle* conflicts with decisions of at least two other district courts of appeal.[160]

The Florida Supreme Court will probably resolve the conflict in the current term, but not in *Sawyer v. Earle*.[161] The same issue arose in the Third District Court of Appeal in the context of malpractice of accountants in *Lane v. Peat, Marwick, Mitchell & Co.*.[162] The Lanes hired Peat-Marwick as their tax advisors. In connection with an investment, Peat-Marwick advised the Lanes to deduct losses sustained from a limited partnership. The Internal Revenue Service notified the Lanes of a deficiency in 1981. Litigation followed, in the course of which the IRS consistently refused to alter its position. The litigation culminated in a judgment adverse to the Lanes in 1983. The Lanes filed a malpractice action against Peat-Marwick in 1985, but the trial court granted Peat-Marwick's motion for summary judgment on the ground the suit was time-barred.[163]

The Third District Court of Appeal reversed, certifying conflict with *Sawyer v. Earle*. It reasoned that "[t]he Lanes did not suffer redressable harm until the tax court entered judgment against them. Until that time, the Lanes knew only that Peat Marwick might have been negligent; however, if the tax court did not uphold the deficiency, the Lanes would not have a cause of action against Peat, Marwick for accounting malpractice."[164] The firm appealed to the Florida Supreme

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160. *See, e.g.*, Diaz v. Piquette, 496 So. 2d 239 (Fla. 3d Dist. Ct. App. 1986), *rev. denied*, 506 So. 2d 1042 (1987); Richards Enter. v. Swofford, 495 So. 2d 1210 (Fla. 5th Dist.Ct. App. 1986), *dismissed*, 515 So. 2d 231 (1987). The Second District Court of Appeal noted in a later case that *Sawyer* only applies when "the facts of the case clearly show that the legal malpractice was or should have been discovered at an earlier date . . . [than the date] litigation [was] concluded by final judgment, or if appealed, until a final appellate decision is rendered." Zakak v. Broida & Napier, P.A., 14 Fla. L. Weekly 1356 (Fla. 2d Dist. Ct. App. 1989).

161. The plaintiff in Sawyer v. Earle did not file an appeal in a timely manner, and the case is concluded. Telephone interview with Ted R. Manry, Counsel for Appellee (Feb. 13, 1990).

162. 540 So. 2d 922 (Fla. 3d Dist. Ct. App. 1989).

163. *Id.* at 923.

164. *Id.* at 924.

Court,[165] which heard oral argument in the case on January 10, 1990.[166] As of the date this article was written, the case remains unresolved.

One additional Florida case considered accountant malpractice, this time dealing with a plaintiff seeking to avoid the strict privity requirement of prior cases.[167] Mitchell, an accountant, approached First Florida Bank seeking a line of credit for one of his clients.[168] He gave the bank audited financial statements which overstated both assets and income, while understating liabilities. The bank granted the line of credit and when the client defaulted, the bank sued Mitchell. The bank appealed from the trial court's grant of summary judgment to Mitchell on the negligence and gross negligence counts of the complaint.

The Second District Court of Appeal affirmed with misgivings, feeling prior Florida precedent strictly required privity between plaintiff and accountant in order for the plaintiff to maintain a malpractice action.[169] Judge Hall, in a carefully crafted opinion, noted that the rule hearkened back to Judge Cardozo's opinion in the New York case of *Ultramares Corp. v. Touche*.[170] However, he noted that Judge Cardozo also had written the opinion in *Glanzer v. Shepard*,[171] in which a cause of action for negligent misrepresentation was held to extend to parties not in privity to a contract if the contract itself identified them as parties who would be affected by the contract's operation. In this light, the court expressed concern that "a modification of the doctrine . . . may be justified where the accountant knows that the third party is going to act in reliance on the financial statements he has prepared."[172]

Strict Liability

Recently, the First District Court of Appeal had to determine whether the controlled burning of brush to clear land fit within the

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165. *Lane*, 540 So. 2d at 922, *appeal docketed*, Case No. 74,031 (Fla. 1989).

166. Telephone interview with Shelley Leinicke, Counsel for Appellant (Feb. 13, 1990).

167. *See, e.g.*, Gordon v. Etue, Wardlaw & Co., 511 So. 2d 384 (Fla. 1st Dist. Ct. App. 1987).

168. First Florida Bank, N.A. v. Max Mitchell & Co., P.A., 541 So. 2d 155 (Fla. 2d Dist. Ct. App. 1989).

169. *Id.* at 157.

170. 255 N.Y. 170, 174 N.E. 441 (1931) (opinion by Cardozo, J.).

171. 233 N.Y. 236, 135 N.E. 275 (1922).

172. *Max Mitchell & Co.*, 541 So. 2d at 157.

same category as blasting and crop dusting.[173] Midyette, seeking to clear his land located less than one mile from an interstate highway, entered into a contract with Reaves which provided for "pushing, raking, piling and burning."[174] Reaves obtained a permit to burn off the brush and debris, and began the burn. The burn created smoke so dense that when it blew across the highway it obscured the vision of drivers. An accident ensued, in the course of which Madison received injuries.

Madison sued Midyette, arguing a vicarious liability theory of recovery.[175] In reviewing the trial court's grant of Midyette's motion for summary judgment, the First District Court of Appeal in a thorough and well-reasoned opinion by Judge Ervin, initially determined that Reaves was an independent contractor rather than a servant of Midyette's.[176] Accordingly, Madison could not recover from Midyette on a theory of *respondeat superior*.[177] However, when one employs another to perform an inherently dangerous activity, the principal is liable for any damage caused by the activity.[178] Thus, if clearing land by burning is inherently dangerous, any physical harm due to its necessary by-product—smoke—will render the principal liable. Since the Florida Supreme Court has determined "that fire is a dangerous agency,"[179] logic demands that burning is necessarily a dangerous activity. As to the question of whether smoke produced by a fire will render the principal liable along with fire damage, the court concluded: "One may reasonably anticipate that large piles of burned debris, if left unattended and smoldering during the night, can cause a large accumulation of smoke within the immediate area, including a nearby interstate highway,

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173. Madison v. Midyette, 541 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1989). For an accounting of what courts have considered inherently (or abnormally) dangerous activities, *see* W. PROSER & W.KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 549 at nn.65-77 (5th ed. 1984).

174. *Madison*, 541 So. 2d at 1317.

175. *Id.*

176. *Id.*

177. "A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business . . . unless he was under a duty to have the act performed with due care." RESTATEMENT (SECOND) OF AGENCY § 250 (1959).

178. Baxley v. Dixie Land & Timber Co., 521 So. 2d 170 (Fla. 1st Dist. Ct. App. 1988).

179. *Madison*, 541 So. 2d at 1318 (citing Cobb v. Twitchell, 91 Fla. 539, 543, 108 So. 186, 187 (1926)).

thereby causing a hazard to passing motorists."[180]

Products Liability

A mixture of cases from the district courts of appeal complemented that of the Florida Supreme Court in *Felix v. Hoffman-La-Roche*.[181] One stressed that consumers must reasonably anticipate some hazards inherent in the products they use, and if they incur injury from an expected hazard they cannot recover damages from the seller.[182] While eating clam chowder purchased at Publix, Koperwas fractured a molar on a small piece of clam shell,and she sued Publix and the manufacturer. However, the trial judge directed a verdict on behalf of the defendants.[183] The Third District Court of Appeal affirmed. Florida has adopted the "reasonable expectation test," which provides that a court must direct a verdict for a defendant in a products liability action where reasonable minds would agree that the hazard encountered is one consumers would anticipate occurring in the product.[184] "An occasional piece of clam shell in a bowl of clam chowder is so well known to a consumer of such product that we can say the consumer can reasonably anticipate and guard against it."[185]

Another district court of appeal adopted the doctrine of *Johnson v. Supro Corp.*[186] and held that the seller of machinery sold as a part of the sale of a business unit is not a seller for purposes of products liability.[187] International Paper designed and built a conveyor belt in one of its paper mills. It later sold the mill to Southwest Forest. Lane, a Southwest Forest employee, received severe injuries when she caught her arm in the conveyor belt and later sued International Paper for products liability.[188] In affirming the defendant's motion for summary

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180. *Id.*

181. 540 So. 2d 102 (Fla. 1989).

182. Koperwas v. Publix Supermarkets, Inc., 534 So. 2d 872 (Fla. 3d Dist. Ct. App. 1988).

183. *Id.* at 873.

184. *See* Zabner v. Howard Johnson's, Inc., 201 So. 2d 824 (Fla. 4th Dist. Ct. App. 1967) (apparently decided on a theory of breach of warranty).

185. *Koperwas*, 534 So. 2d at 873 (citations omitted).

186. 498 So. 2d 528 (Fla. 3d Dist. Ct. App. 1986). *See* Richmond, *1986 Survey of Florida Law: Torts*, 11 NOVA L. REV. 1520, 1556 (1987).

187. Lane v. International Paper Co., 545 So. 2d 484 (Fla. 1st Dist. Ct. App. 1989).

188. *Id.* at 485.

judgment, the First District Court of Appeal initially noted that International Paper was not in the business of selling conveyors, but rather in the business of manufacturing and selling paper. Although it had indeed sold the machine as a part of its sale of the mill, "[t]he one time sale of the entire paper mill, of which the broke conveyor is only a small part, does not render [International] liable under any products liability theory."[189]

Finally, the Fourth District Court of Appeal in a *per curiam* opinion stressed that inadequate warnings not causally related to the harm suffered by a plaintiff from a product will not support a cause of action in products liability.[190] Parker, who suffered a stroke after ingesting birth control pills, sued Ortho on several grounds.[191] Before trial, the court dismissed Parker's claim that she had received an inadequate warning, but allowed the case to proceed to trial on the theory that it had inadequately warned her physician of the dangers of stroke.[192] A jury determined that the literature regarding its birth control pills inadequately warned of an increased risk of stroke. However, the jury also determined that the lack of warnings bore no causal relationship to the stroke suffered by the plaintiff.[193] The plaintiff appealed dismissal of her complaint on the theory that she should have received a warning. The Fourth District Court of Appeal affirmed because the jury verdict on the other theory rendered the appeal moot. If lack of warning to the physician was not causally related to the injury, then lack of warning to the patient could not have been causally related either.[194]

Conclusion

No significant trends developed during the past survey year in torts, although conflicts among the district courts of appeal and questions of first impression suggest that in the coming few years we will see significant developments abounding. With a fairly recent change in its membership, the Florida Supreme Court still seems to be without a firm philosophy of tort law. However, as the court has produced a healthy mix of cases favoring plaintiffs and defendants alike, we can

189. *Id.* at 486 (citations omitted).
190. Parker v. Ortho Pharmaceutical Corp., 536 So. 2d 390 (Fla. 4th Dist. Ct. App. 1989).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

say with equal validity that the court's philosophy is to blend law and justice in producing the fairest results in the troubled field of torts.