Tort Law: 2003-05 Review of Florida Law

William E. Adams*
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WILLIAM E. ADAMS, JR.*

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I. INTRODUCTION

This survey will review major cases decided by the Supreme Court of Florida and the Florida District Courts of Appeal from July 2003 until July 2005. It does not cover every single appellate opinion from that time period, but does address those that dealt with substantive tort issues for the first time or clarified existing doctrines and issues. It does not deal with cases that dealt primarily with evidentiary rule violations or restated, well-established principles.

Part II addresses a variety of situations clarifying when or whether a duty exists on behalf of a number of actors. Part III covers cases that resolved causation disputes. The remaining parts deal with recurring situations or special rules that have resulted in multiple opinions being issued during this time period. For example, a number of cases during the past two years have tried to clarify the extent of coverage of Florida’s nursing home resident rights statutes. In addition, Florida courts continue to develop and explain the contours of the evolving area of emotional distress claims. Finally, the last part includes a number of cases involving a broad range of issues. The number of cases decided indicates that Florida courts are still quite busy in refining and clarifying the contours of various tort doctrines.

* Professor of Law, Shepard Broad Law Center, Nova Southeastern University, J.D., Indiana University, 1978; B.A., Indiana University, 1975.
II. Duty

The Supreme Court of Florida addressed the question of duty in relation to streetlight maintenance in *Clay Electric Cooperative, Inc. v. Johnson.*¹ This case involved "fourteen-year-old Dante Johnson . . . [who] was struck and killed by a truck" in the early morning "where a streetlight was inoperative."² His grandmother sued the truck driver, truck owner, and streetlight maintenance company, Clay Electric Cooperative, Inc. (Clay Electric).³ In the trial court, Clay Electric "moved for summary judgment, which was granted."⁴

The Supreme Court of Florida addressed the issue of whether Clay Electric assumed a legal duty to the plaintiffs to act with reasonable care in maintaining the streetlights.⁵ The court ruled that it created an increased risk by failing to maintain the light and rejected the argument that an inoperative light was no worse than the risk would have been absent a streetlight.⁶ The court also stated that the deceased’s grandmother relied upon Clay Electric to maintain the lights in foregoing other precautions for the deceased.⁷ It also rejected the defendant’s immunity argument.⁸ Justice Cantero argued in dissent that the holding “places Florida in the decided minority of states that have considered this issue.”⁹ He also argued that the decision to hold the utility company liable involved a legislative policy decision.¹⁰

In *Smith v. Florida Power & Light Co.*,¹¹ the Second District Court of Appeal also addressed the duty of a public utility.¹² Smith appealed the entry of a summary judgment in favor of Florida Power & Light (FPL).¹³ Smith was injured while working at a construction site.¹⁴ “[P]ower passed from an uninsulated overhead power transmission line through the boom of a crane while Smith was working below ground and touching the cable of the crane.”¹⁵ Smith’s employer had determined that its employees could safely

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1. 873 So. 2d 1182, 1184 (Fla. 2003).
2. Id.
3. Id.
4. Id.
5. Id. at 1185.
7. Id.
8. Id. at 1188.
9. Id. at 1195 (Cantero, J., dissenting).
10. Id. at 1202–05.
12. Id. at 227.
13. Id.
14. Id.
15. Id.
work around the electrical lines. The court held that the power company's general knowledge that a construction project would be conducted in proximity to its power lines was insufficient to establish a foreseeable zone of risk creating a duty.

In *Bowling v. Gilman*, the Second District Court of Appeal considered another duty issue in a construction site accident. Bowling was a carpenter working for a subcontractor engaged in the construction of an adult congregate living facility. The subcontractor engaged defendant Gilman and his solely owned corporation for the use of cranes. It was alleged that a foreman on the site was negligent in directing a crane. The court noted that Florida law deems a crane to be inherently dangerous and that the owner and operator of such has a non-delegable duty to use due care. The court held that a crane operator could assign its performance to another, but not liability for negligent breach of that duty, and thus remanded the case for a new trial so that the jury could be instructed on Gilman's potential vicarious liability.

The Third District Court of Appeal dealt with the issue of duty in *Fisher v. Miami-Dade County*. The case involved a claim by the personal representative of Fisher, who died in an automobile accident as a passenger in a car driven by a friend who was speeding and being pursued by a Miami-Dade police vehicle. The trial court granted summary judgment to the defendant based upon the conclusion that a police officer owes no duty to a passenger in a fleeing vehicle unless the officer knows or should know of the passenger's presence.

The court noted that the Supreme Court of Florida has held that "police owe a duty to innocent bystanders or third parties injured as a result of high speed chases." It also noted that courts in other states have split on the issue of whether the police owe a duty of care to passengers in a fleeing vehicle. The court decided that the chilling effect of imposing upon law en-

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17. *Id.* at 235.
18. 870 So. 2d 42 (Fla. 2d Dist. Ct. App. 2003).
19. *Id.* at 43.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Bowling*, 870 So. 2d at 43.
24. *Id.* at 43-44.
26. *Id.* at 335-36.
27. *Id.* at 337.
28. *Id.* at 336 (citing City of Pinellas Park v. Brown, 604 So. 2d 1222, 1225 (Fla. 1992)).
29. *Id.* at 337.
forcement the duty to determine if there was a passenger in the vehicle and also to determine if the passenger was involved in a crime, was too burdensome to impose, and, therefore, affirmed the decision that no duty was owed in this case. 30

In Royal & Sunalliance v. Lauderdale Marine Center, 31 the Fourth District considered a spoliation of evidence case. 32 Royal & Sunalliance (Royal) insured vessels which were burned while being repaired in a space leased by Cay Marine, located at the Lauderdale Marine Center (LMC). 33 Royal filed a subrogation action to recover amounts paid to the owner of one of the vessels against Cay Marine. 34 In 2002, Royal added LMC as a defendant. 35 Royal asserted in its fourth amended complaint that LMC “had a common law duty to preserve debris” that was collected by fire inspectors from the fire and placed in barrels. 36 The debris had been discarded in July 1998. 37 According to the court, because Royal did not allege a contractual or statutory duty to preserve the evidence, nor did they allege that a discovery request was served, the complaint against LMC was properly dismissed. 38 The court refused to accept Royal’s argument that “there was a common law duty to preserve the evidence in anticipation of litigation.” 39

In K.M. v. Publix Super Markets, Inc., 40 the Fourth District again considered the duty issue. 41 K.M., a minor, and her father appealed a granted motion to dismiss an action which claimed that her mother’s employer should have warned her about another employee’s criminal background. 42 K.M.’s mother arranged for Robert Woodlard, another Publix employee, to babysit for seven-year-old K.M. 43 The store manager was aware that Woodlard was doing the babysitting and “also knew that Woodlard was on parole from a previous conviction for attempted sexual battery on a minor under [twelve].” 44 “Woodlard sexually abused K.M. on at least two occasions.” 45

30. Fisher, 883 So. 2d at 337.
31. 877 So. 2d 843 (Fla. 4th Dist. Ct. App. 2004).
32. Id. at 844.
33. Id.
34. Id.
35. Id.
36. Royal & Sunalliance, 877 So. 2d at 844–45.
37. Id. at 845.
38. Id. at 845–46.
39. Id. at 846.
40. 895 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2005).
41. Id. at 1116.
42. Id.
43. Id.
44. Id.
45. K.M., 895 So. 2d at 1116.
The court refused to find a special relationship that imposed a duty on Publix to warn in this case.\textsuperscript{46} The court held that "[a]n employer does not owe a duty to persons who are injured by its employees while the employees are off duty, not then acting for the employer's benefit, not on the employer's premises, and not using the employer's equipment."\textsuperscript{47}

The Fourth District Court of Appeal resolved an appeal of a dismissal of a negligence claim in \textit{Marinacci v. 219 South Atlantic Blvd.}\textsuperscript{48} The "plaintiff sued the defendant, a night club, for negligently advising her to park at a nearby city-owned parking lot, late at night," where she was assaulted.\textsuperscript{49} The plaintiff alleged that the club knew or should have known about similar criminal incidents at that lot.\textsuperscript{50} The court ruled that the fact that the club did not own the lot did not absolve it of liability if it was negligent in advising its patrons to park there.\textsuperscript{51}

\section*{III. CAUSATION}

In \textit{Deese v. McKinnonville Hunting Club, Inc.},\textsuperscript{52} the First District Court of Appeal addressed the classic tort issue of proximate causation.\textsuperscript{53} The \textit{Deese} case involved an accident that occurred during a dog hunt organized by the defendant hunt club in which dogs were used to drive deer into open areas to be shot by the hunters.\textsuperscript{54} During this hunt, the dogs drove the deer toward a county highway with a speed limit of fifty-five miles per hour.\textsuperscript{55} While parked alongside the road, the appellant's twelve-year-old son asked the appellant if he could help catch the dogs.\textsuperscript{56} After being given permission, he exited the appellant's truck and was struck by a vehicle traveling down the highway.\textsuperscript{57} Three days later, he died.\textsuperscript{58} The appellant alleged that the hunt club "breached its duty to promulgate, draft, and enforce rules and regulations to ensure that club activities would be conducted in the safest manner

\begin{footnotesize}
\begin{enumerate}
\item[46.] \textit{id.} at 1120.
\item[47.] \textit{id.} (footnote omitted).
\item[48.] 855 So. 2d 1272, 1272 (Fla. 4th Dist. Ct. App. 2003).
\item[49.] \textit{id.}
\item[50.] \textit{id.}
\item[51.] \textit{id.} at 1273.
\item[52.] 874 So. 2d 1282 (Fla. 1st Dist. Ct. App. 2004).
\item[53.] \textit{id.} at 1284.
\item[54.] \textit{id.}
\item[55.] \textit{id.}
\item[56.] \textit{id.}
\item[57.] \textit{Deese}, 874 So. 2d at 1284.
\item[58.] \textit{id.}
\end{enumerate}
\end{footnotesize}
The defendant successfully moved for summary judgment, arguing that it was not negligent as a matter of law and that “its actions were not the proximate legal cause of the accident.” However, the court of appeal held that it was not appropriate to grant summary judgment on these facts where reasonable persons could conclude that conducting a hunt near a highway in which dogs might enter and where club members were directed to catch when possible could foreseeably lead to some injury as occurred in this case. Furthermore, the court held that to the extent that the appellant’s part in permitting his son to exit the vehicle contributed to the accident, it was a question of comparative negligence as opposed to a superseding intervening cause relieving the appellee from liability.

The Second District Court of Appeal reversed a final judgment on a proximate cause issue in *Murphy v. Sarasota Ostrich Farm/Ranch, Inc.* This case involved a claim by the ostrich farm that dogs owned by one of the defendants and kept on the property of another caused death or injury to some of its ostriches. At issue on appeal was whether the defendants could be held liable for lost bird production caused by the dogs’ harassment of the ostriches. The plaintiff’s expert “testified that a male ostrich can be stressed to the point where he will not breed,” but because he failed to state that the acts of the dogs were “more likely than not... a substantial factor in bringing about any loss in production,” the court found the evidence insufficient to support that their acts were a legal cause of the injury.

In *Trembath v. Beach Club, Inc.*, the Fourth District Court of Appeal also decided a case on appeal on the issue of proximate cause. Beach Club, Inc., sued Trembath for crashing his rental car into its building. Amongst the damages awarded, it claimed expenses for the installation of a sprinkler system. The club had managed to avoid being cited for failure to have such a system in an earlier routine inspection, but pursuant to the inspection conducted after the crash, which permitted a more thorough inspection, the club

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59. *Id.*
60. *Id.* at 1286.
61. *Id.* at 1290.
62. *Deese*, 874 So. 2d at 1290.
63. 875 So. 2d 767, 769 (Fla. 2d Dist. Ct. App. 2004).
64. *Id.* at 768.
65. *Id.*
66. *Id.* at 768–69.
67. 860 So. 2d 512 (Fla. 4th Dist. Ct. App. 2003).
68. *Id.* at 513.
69. *Id.*
70. *Id.*
was found to be in violation of relevant safety codes.\textsuperscript{71} Testimony at trial indicated “that the club was not in compliance with the code before the accident,” but had simply managed to avoid being discovered as out-of-compliance until the inspection after the accident.\textsuperscript{72} The court held that the defendant could not be held responsible for the cost of installing the sprinkler system because it was not a cause-in-fact of that requirement, which was a duty existing separate and apart from the accident.\textsuperscript{73}

IV. PREMISES LIABILITY

In the case of Poe v. IMC Phosphates MP, Inc.,\textsuperscript{74} Scotty Poe drove a vehicle containing his three minor children from a public highway onto a paved driveway through an abandoned entrance to a mine owned by the defendant, IMC Phosphates, and hit a large metal pipe placed about twenty feet inside the entrance by the defendant.\textsuperscript{75} The paved portion at the entrance, which lacked a sign or other warning, appeared to be a continuation of the highway and was not illuminated.\textsuperscript{76} The pipe, which was a rusty brown color that was neither bright nor reflective, was placed at the point where the pavement ended.\textsuperscript{77} In opposition to the defendant’s motion for summary judgment, the plaintiffs submitted the affidavit of an expert who opined that the defendant could have used a different type of fencing and an easily visible lightweight barricade along with a sign to minimize possible collisions.\textsuperscript{78} The Second District Court of Appeal addressed the trial court’s analysis which focused on the issue of the status of the Poes as entrants to the defendant’s property.\textsuperscript{79} The court noted that courts from several jurisdictions have held “that a traveler who enters private land that appears to be a continuation of the public highway becomes an implied invitee.”\textsuperscript{80} For implied invitees, the landowner has a duty to exercise due care.\textsuperscript{81} Noting that legal commentators have criticized the “transparent legal fiction” of the “implied invitee,”

\textsuperscript{71} Id.
\textsuperscript{72} Trembath, 860 So. 2d at 514.
\textsuperscript{73} Id. at 515.
\textsuperscript{74} 885 So. 2d 397 (Fla. 2d Dist. Ct. App. 2004).
\textsuperscript{75} Id. at 398–99.
\textsuperscript{76} Id. at 399.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 399–400.
\textsuperscript{79} Poe, 885 So. 2d at 400. The court noted that the accident occurred before the 1999 amendments to section 768.075 of the Florida Statutes, which immunized property owners from liability for injuries to trespassers. Id. at 400 n.3.
\textsuperscript{80} Id. at 401.
\textsuperscript{81} Id.
the court instead referenced the modern approach which focuses on the cause of the traveler leaving the public road.\textsuperscript{82} Thus, it held that the classification of the visitor was irrelevant, and, instead, the analysis should depend upon whether the actor's conduct misled the traveler into reasonably believing that the land entered is a highway.\textsuperscript{83} The court noted that the Third and Fourth Districts have also adopted this approach,\textsuperscript{84} which is consistent with section 367 of the \textit{Second Restatement of Torts}.\textsuperscript{85} Therefore, in this particular case, summary judgment was obviously inappropriate because of factual issues concerning the placement and visibility of the pipe in addition to issues under section 368 of the \textit{Second Restatement of Torts} concerning artificial conditions near a highway.\textsuperscript{86}

The Second District also dealt with a premises liability case in \textit{St. Joseph's Hospital v. Cowart},\textsuperscript{87} in which a patient at the defendant St. Joseph's Hospital was bitten by a black widow spider in the emergency room.\textsuperscript{88} The court noted the general rule is:

\begin{quote}
[a] landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining its premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils that are or should be known to the landowner and that are unknown to the invitee and cannot be discovered through the exercise of due care.\textsuperscript{89}
\end{quote}

Florida law does not impose a general duty to protect invitees from harm caused by wild animals except in special circumstances.\textsuperscript{90} The District Court reversed the jury award because "[t]here was no evidence that the pest control company was not performing its services satisfactorily," nor that it knew that a black widow spider was on its premises.\textsuperscript{91} Further, the plaintiff's ex-

\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at 402.
\item \textsuperscript{83} \textit{Poe}, 885 So. 2d at 402.
\item \textsuperscript{84} \textit{Id.} at 403 (citing Felton v. W. Gables Homes, Inc., 484 So. 2d 639 (Fla. 3d Dist. Ct. App. 1986); Hollywood Corporate Circle Assocs. v. Amato, 604 So. 2d 888 (Fla. 4th Dist. Ct. App. 1992)).
\item \textsuperscript{85} Section 367 states:
\begin{quote}
A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.
\end{quote}
\textit{Restatement (Second) of Torts} § 367 (1965).
\item \textsuperscript{86} \textit{Poe}, 885 So. 2d at 404; \textit{Restatement (Second) of Torts} § 368 (1965).
\item \textsuperscript{87} 891 So. 2d 1039 (Fla. 2d Dist. Ct. App. 2004).
\item \textsuperscript{88} \textit{Id.} at 1040.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 1041.
\item \textsuperscript{91} \textit{Id.} at 1042–43.
\end{itemize}
pert testified that "he did not think [that] the hospital employees should have suspected [the spider's] presence." Of more interest is a claim by the plaintiff for negligent infliction of emotional distress based upon the plaintiff feeling that the hospital employees were not taking his condition seriously and the emergency room physician joking about the situation with one of his colleagues. Fortunately for the defendant hospital, Florida's reliance upon the impact rule prevented liability because the court correctly held that the impact of the spider's bite was not caused by negligence.

The Third District Court of Appeal decided a premises liability action in Longmore v. Saga Bay Property Owners Ass'n, a case in which the plaintiff's sixteen-year-old child drowned in a man-made lake owned by appellee. The parents claimed that the appellee knew that its lake had a precipitous drop-off from less than sixty-nine inches to over forty feet, which created a duty to either "warn or provide life guards to protect children from this 'exceptionally dangerous concealed peril.'" The court refused to find that a sudden drop-off constituted a dangerous condition or trap because such a condition was also characteristic of conditions existing in natural lakes. The court also rejected the parents' argument that, because the defendant had previously been sued, it had a duty to warn because of its superior knowledge of the drop. The court held that such a warning was not required because the drop "did not constitute a concealed dangerous condition."

In Weissberg v. Albertson's, Inc., the Fourth District addressed the breadth of the "dangerous instrumentality doctrine" in a case involving an injury suffered by the plaintiff, who was struck by a "powerized" shopping cart in the defendant's grocery store. The court considered the appropriateness of dismissal of the complaint by the trial court. The appellate court noted that, although Florida's relevant statute prevented defendant from being liable for the negligence of the operator of the shopping cart, it did not prevent Albertson's from being liable for its own negligence in entrusting the

92. St. Joseph's Hosp., 891 So. 2d at 1042.
93. Id. at 1042-43.
94. Id. at 1043.
95. 868 So. 2d 1268 (Fla. 3d Dist. Ct. App. 2004).
96. Id. at 1268.
97. Id.
98. Id. at 1270.
99. Id.
100. Longmore, 868 So. 2d at 1270.
101. 886 So. 2d 305 (Fla. 4th Dist. Ct. App. 2004).
102. Id. at 306.
103. Id. at 307.
Further, the court held that the defendant could be held liable under a premises liability theory, which the plaintiff alleged was violated by a failure to provide safety warning devices.  

The Fourth District Court of Appeal also decided another premises liability case in *Burns International Security Services Inc. of Florida v. Philadelphia Indemnity Insurance Co.*, 106 which dealt with a final judgment in a case dealing with liability for a theft. 107 Defendant Burns was the security company for Parkway Commerce Center, in which D & H Distributing Corporation (D & H) was a tenant insured by Philadelphia Indemnity for a theft that occurred at D & H's warehouse space. 108 Burns argued on appeal that it had no duty to secure the premises until there was evidence of similar prior criminal activity. 109 After noting the various categories of cases involving premises liability, the court noted that the duty of security providers arises from a different basis. 110 The court correctly noted that the security provider contracts to provide security, and thus should not be able to argue that it is not liable for a criminal act simply because it was the first of its type upon the premises. 111

The *Burns* case also dealt with an issue of the proper apportionment of fault between parties pursuant to section 768.81 of the *Florida Statutes*. 112 The verdict form also included two prior parties who had been voluntarily dismissed from the action, whom the jury also determined to be at fault. 113 The court noted that it should "first determine the amount of damages for which Burns is liable based upon its own percentage of fault." 114 Because Burns was found forty-five percent at fault, the court should then add the amount for which it was jointly liable, up to an additional $500,000. 115

The Fourth District Court of Appeal also considered a premises liability case that involved the scope of duty of a security company in *Robert-Blier v. Statewide Enterprises, Inc.* 116 This case involved a lawsuit against a security company hired by a condominium association "to provide one unarmed

104. *Id.* (citing *FLA. STAT.* § 768.093(2) (2002)).
105. *Id.*
106. 899 So. 2d 361 (Fla. 4th Dist. Ct. App. 2005).
107. *Id.* at 362–63.
108. *Id.* at 363.
109. *Id.*
110. *Id.* at 364.
111. *Burns Int'l Sec. Servs. Inc. of Fla.*, 899 So. 2d at 365.
112. *Id.*; *FLA. STAT.* § 768.81 (2004).
113. *Burns Int'l Sec. Servs. Inc. of Fla.*, 899 So. 2d at 365.
114. *Id.* at 367.
115. *Id.*
guard to patrol the community . . . to escort residents to their homes upon request, and to observe and report suspicious incidents.”

A visitor to one of the buildings “was forced into her car, driven off the premises, and raped.” The court noted that the association “owed a duty to visitors to protect or warn them of known dangers in the common areas,” but that it had only contracted “for the appearance of security” with this security company. Although it rejected the defendant’s argument that it owed no duty to the plaintiff, the court was unwilling to hold that the company had assumed the association’s broad duty to protect invitees, but instead held the company only had a duty to provide the services contractually agreed upon.

The Fourth District Court of Appeal considered the liability of social hosts in *Estate of Massad v. Granzow*. This case involved a claim by the Estate of Roger P. Massad, who was a guest in Dee Janet Granzow’s home. Massad became drunk, in part on alcoholic beverages served by Granzow, and fell and struck his head in the home “sustaining a concussion with significant bleeding.” “Granzow gave Massad a prescription pill not prescribed for his use, which worsened his intoxication.” She abandoned him next to an unfenced pool, into which he later fell and drowned.

Granzow argued that section 768.125 of the Florida Statutes, which provides immunity for serving alcohol to guests, should be available to social hosts, as well as vendors of alcohol. The court agreed that both the common law and the statute shield social hosts from liability for “dispensing or furnishing alcohol.” However, pursuant to the theory found in section 324 of the *Second Restatement of Torts*, the court noted that the defendant was not entitled to dismissal of the complaint because she could still be held liable based upon her conduct when she “took charge of Massad,” when he was helpless and unable to adequately aid or protect himself.

117. *Id.*
118. *Id.*
119. *Id.* at 523.
120. *Id.* at 524.
121. 886 So. 2d 1050, 1051 (Fla. 4th Dist. Ct. App. 2004).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Massad, 886 So. 2d at 1052 (citing FLA. STAT. § 768.125 (2003)).
127. *Id.*
128. *Id.* at 1052–53. Section 324 states, in part:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
V. NURSING HOME LIABILITY

The Supreme Court of Florida addressed the interplay between Florida's Wrongful Death Act and Florida's statute covering nursing home Patient's Bill of Rights in *Knowles v. Beverly Enterprises-Florida, Inc.* The case was filed by the personal representative of Gladstone Knowles, who died from severe bedsores and other ailments while residing at the defendant's nursing home. The trial court granted summary judgment for the defendant on the claim based upon violation of the Patient's Bill of Rights statute because none of the statutory violations caused the death. The case proceeded to trial upon a common law negligence theory, but after the verdict, the court ruled "that it had erred in granting a summary judgment on the statutory claim." The Fourth District Court of Appeal, sitting en banc, held that the trial court was initially correct in dismissing the statutory claim. The relevant statutory section stated:

Any resident whose rights ... are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident ... or by the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights.

The import of this decision has been lessened by statutory amendments during the pendency of the legislation that have added language indicating that the representative may file an action for violation of the resident's rights "regardless of the cause of death." The Supreme Court of Florida held that the plain meaning of the language prevented the action and rejected arguments that its conclusion wrongfully failed to consider the language in con-

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(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

**RESTATEMENT (SECOND) OF TORTS § 324 (1965).**

129. 898 So. 2d 1, 2 (Fla. 2004).
130. *Id.* at 2–3.
131. *Id.* at 3.
132. *Id.*
133. *Id.* (citing Beverly Enterprises-Fla., Inc. v. Knowles, 766 So. 2d 335, 336 (Fla. 4th Dist. Ct. App. 2000)).
cert with the Survival Statute and Wrongful Death Acts.\textsuperscript{136} The concurring opinion of Justice Cantero\textsuperscript{137} and the dissenting opinion by Justice Lewis\textsuperscript{138} provide an interesting debate concerning the role of the court in referring to legislative intent when the language of the statute is arguably ambiguous.\textsuperscript{139} As the opinions exemplify, this old canard of statutory construction depends upon the willingness to accept that language as ambiguous.

The First District Court of Appeal considered damages issues in nursing home cases in \textit{Estate of Williams v. Tandem Health Care of Florida, Inc.}\textsuperscript{140} This case was brought by the estate of Lucille Williams, who fell while a resident of the defendant nursing home and later died as a result.\textsuperscript{141} The estate brought an action alleging infringement of a resident’s rights and wrongful death under the appropriate statutes.\textsuperscript{142} Pursuant to new rulings issued by the Supreme Court of Florida,\textsuperscript{143} the court ordered a new trial because it deemed that those rulings precluded non-economic damages to survivors resulting from medical malpractice.\textsuperscript{144} The estate argued that damages available to heirs under the wrongful death statute should be incorporated under the resident’s rights provision.\textsuperscript{145} The court disagreed, noting that the statute refers to the rights of the resident and refused to add or imply that survivors’ rights to damages are also available under that statute.\textsuperscript{146}

The Fourth District Court of Appeal also decided a case involving nursing home negligence in \textit{Carr v. Personacare of Pompano East, Inc.},\textsuperscript{147} which considered an appeal of a complaint dismissal.\textsuperscript{148} The court reversed the trial court decision that chapter 400 remedies preclude a common law negligence action.\textsuperscript{149} This decision is consistent with a relatively recent Supreme Court of Florida decision.\textsuperscript{150}

The Fifth District Court of Appeal also considered a nursing home resident’s rights case in \textit{Extendicare Health Services, Inc. v. Estate of Patter-
son,\textsuperscript{151} in which the decedent was alleged to have died as a result of the deprivation of rights.\textsuperscript{152} Extendicare, the alleged operator of the home, appealed the trial court’s denial of a motion to compel arbitration.\textsuperscript{153} The arbitration provision appeared in a contract between the alleged operator and owner of the nursing home and the manager of the home.\textsuperscript{154} Extendicare argued “that their only connection to the nursing home was through this agreement” and the financial support that they provided the manager.\textsuperscript{155} The court ruled that since the deceased was not a party to the contract, nor an intended third party beneficiary, he could not be bound by its arbitration provision even though it arguably provided a basis for Extendicare’s responsibility because the suit was brought pursuant to statutory and negligence claims.\textsuperscript{156}

The Fifth District Court of Appeal considered an appeal of a nursing home liability claim in \textit{Jackson v. York Hannover Nursing Centers}.\textsuperscript{157} The claim was filed by the personal representative of a nursing home patient who died three weeks after admission to the nursing home.\textsuperscript{158} The defendants claimed that the death occurred because the medical center from which she was transferred “was negligent in its care and treatment,” and they subsequently placed the medical center on the verdict form even though it was not a party.\textsuperscript{159} The plaintiff’s expert then testified that the medical center’s care fell below the standard of care.\textsuperscript{160} The court held that the trial court properly permitted the jury to apportion damages because there was only a single injury to which both parties contributed, as opposed to two distinguishable injuries.\textsuperscript{161}

VI. EMOTIONAL DISTRESS CLAIMS

The Supreme Court of Florida decided a case concerning emotional distress injuries in a claim of the tort of negligent interference with parental rights in \textit{Southern Baptist Hospital of Florida, Inc. v. Welker}.\textsuperscript{162} In this case, the plaintiff filed an action against a psychologist employed by the defendant

\begin{thebibliography}{99}
\bibitem{151} 898 So. 2d 989 (Fla. 5th Dist. Ct. App. 2005).
\bibitem{152} \textit{Id.} at 990.
\bibitem{153} \textit{Id.} at 990.
\bibitem{154} \textit{Id.}.
\bibitem{155} \textit{Id.}.
\bibitem{156} \textit{Extendicare Health Servs., Inc.}, 898 So. 2d at 990.
\bibitem{157} 876 So. 2d 8, 9 (Fla. 5th Dist. Ct. App. 2004).
\bibitem{158} \textit{Id.} at 9–10.
\bibitem{159} \textit{Id.} at 10.
\bibitem{160} \textit{Id.}.
\bibitem{161} \textit{Id.} at 13.
\bibitem{162} 908 So. 2d 317, 318 (Fla. 2005).
\end{thebibliography}
hospital, which gave an opinion to a court that the appellant had abused his children while in his custody, which resulted in an injunction removing custody of his minor children from him to his former wife and denied him access to the children. The court declined to answer the certified question as to whether the impact rule precludes recovery for emotional injuries in an action for negligently interfering with parental rights because the courts below had not addressed whether an action for negligent interference with parental rights exists. Although the court acknowledged that it had previously determined that Florida recognizes an intentional interference with parental rights cause of action, it still declined to indicate whether it would recognize an action for negligent interference with parental rights.

The First District Court of Appeal addressed a case dealing with an emotional distress claim in Hernandez v. Tallahassee Medical Center, Inc. Ms. Hernandez, a surgical nurse, appealed the dismissal of her complaint against her employer which stated that the defendant was aware that she suffered from an epileptic-seizure disorder that her neurologist had advised prevented her from driving to work. The hospital, which informed her that her job was in jeopardy because of missed work, instructed her to take a taxi and obtain reimbursement for travel to and from work while on call. The plaintiff called work, claiming to be sick, but was told to come “right away”, although they were allegedly aware that she would be forced to drive to work herself. As she drove to work, she “suffered a seizure, lost control of her car, and suffered serious and permanent injuries” as a result. The court found that ordering an employee to work right away, despite awareness of her suffering from a serious condition, “did not exceed all bounds of decency” as required for intentional infliction of emotional distress. Of perhaps even more importance was the finding by the court that the employer did not have a duty to its employee to avert the harm for negligence purposes. The court noted that driving to work was normally outside the scope of employment and that awareness of the threatened harm did not create a duty.

163. Id. at 318–19.
164. Id. at 320.
165. Id.
166. 896 So. 2d 839, 840 (Fla. 1st Dist. Ct. App. 2005).
167. Id.
168. Id.
169. Id. at 840–41.
170. Id. at 841.
171. Hernandez, 896 So. 2d at 841.
172. Id. at 842.
173. Id. at 842–43.
include an express order to drive to work and that the plaintiff could have chosen to decline to come to work or to seek other means of transportation.\textsuperscript{174}

The First District also decided an emotional distress claim in the area of veterinary malpractice in \textit{Kennedy v. Byas}.\textsuperscript{175} The plaintiff, Robert Kennedy, filed an action for veterinary malpractice and emotional distress based upon the treatment received for his pet basset hound.\textsuperscript{176} The defendant won a partial summary judgment motion on the emotional distress claim and moved for transfer of venue to county court from circuit court because the remaining damages for the malpractice claim were under the jurisdictional limit for circuit court.\textsuperscript{177} The court accepted the plaintiff's writ of certiorari to quash the order of transfer so that the substantive issue could be reached.\textsuperscript{178} The court refused to abandon the impact rule for this veterinary malpractice case.\textsuperscript{179} Acknowledging that the Supreme Court of Florida permitted damages to be recovered in a case involving the malicious destruction of a dog in \textit{La Porte v. Associated Independents, Inc.}\textsuperscript{180} and that other jurisdictions are split on the issue of permitting recovery of emotional distress claims for negligent provision of veterinary care, the court opted to not permit an exception to the impact rule out of fear of placing an unnecessary burden on courts by expanding this tort.\textsuperscript{181}

The Third District Court of Appeal dealt with an emotional distress claim in \textit{LeGrande v. Emmanuel},\textsuperscript{182} in which "a Baptist minister ... sued two congregational members ... for slander, slander per se, negligent infliction of emotional distress, intentional infliction of emotional distress, and loss of consortium."	extsuperscript{183} The Pastor's complaint, which was dismissed, alleged that his congregation members had accused him of stealing money from the church to purchase a Mercedes and "referred to [him] as 'Satan' and 'Makout,'" a name typically used for oppressive secret police from Duvalier's regime.\textsuperscript{184} The court correctly reversed the dismissal of the slander and slander per se claims because the minister alleged that he was falsely accused of criminal acts, which are actionable per se.\textsuperscript{185} The court also correctly up-

\textsuperscript{174} Id. at 844.
\textsuperscript{175} 867 So. 2d 1195, 1196 ( Fla. 1st Dist. Ct. App. 2004).
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 1196–97.
\textsuperscript{178} Id. at 1196.
\textsuperscript{179} Id. at 1198.
\textsuperscript{180} 163 So. 2d 267, 269 (Fla. 1964).
\textsuperscript{181} Kennedy, 867 So. 2d at 1198.
\textsuperscript{182} 889 So. 2d 991, 993 (Fla. 3d Dist. Ct. App. 2004).
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 994.
held the dismissal of the infliction of emotional distress claims because it deemed the comments to not rise to the level of extreme and outrageous conduct as to satisfy the requirements for an intentional infliction claim and because his allegations of memory loss and aggravation of a pre-existing diabetic condition were wholly insufficient for a negligent infliction action.186

The Third District also considered an emotional distress claim in Williams v. Worldwide Flight Services Inc.,187 which involved an appeal of a dismissal of an action for intentional infliction of emotional distress and negligent retention.188 The complaint alleged that the plaintiff was exposed to intentionally discriminatory behavior by his general manager on the basis of race.189 Amongst other complaints, the plaintiff alleged that he was called a "nigger" and a "monkey" as well as being subjected to false accusations of theft.190 The court found that the behavior did not rise to the level of outrageousness to permit recovery.191 Whether this is accurate in the abstract is debatable, but the court did correctly note that the federal and state employment discrimination statutes are available to remedy such conduct.192

The Fourth District Court of Appeal also considered a negligent infliction of emotional distress claim in Thomas v. Ob/Gyn Specialists of the Palm Beaches, Inc.,193 which dealt with an appeal of summary judgment against the plaintiff.194 The case involved a claim by the husband for the alleged malpractice of a doctor who performed a D & C (dilatation and curettage) procedure upon the plaintiff’s pregnant wife.195 The existence of the fetus had not been diagnosed and did not survive the procedure.196 The court refused to expand the abrogation of the impact rule in this line of cases,197 distinguishing it from the wrongful stillbirth exception recognized by the Supreme Court of Florida in Tanner v. Hartog.198

The Eleventh Circuit Court of Appeal also considered Florida law in relation to an emotional distress claim in Gonzalez-Jiminez De Ruiz v. United
States, a case brought under the Federal Tort Claims Act by survivors of a prisoner who died from cancer. In dismissing the infliction of emotional distress claims by the children of the prisoner and his alleged common-law wife, the court noted that substandard medical care, failure to provide access to the deceased while he was ill, failure to inform the family of his death, and delay in transporting his remains did not constitute intentional infliction. The court also held that, without physical injury, it could not recognize a negligent infliction of emotional distress claim.

VII. MEDICAL MALPRACTICE

The Fourth District Court of Appeal, in an en banc decision, reversed the dismissal of a medical malpractice complaint in Burke v. Snyder, in which the plaintiff alleged that she was the victim of a sexual battery during a medical examination by the defendant at the Nova Southeastern University Osteopathic Treatment Center. The plaintiff alleged that Nova was vicariously liable for the doctor's conduct and also negligent in hiring, supervising, and retaining him in its employ, but "the plaintiff did not comply with the notice and pre-suit screening requirements for medical malpractice actions [n]or file suit within the two-year statute of limitations for such [actions]." Noting that it had decided to the contrary in an earlier opinion, O'Shea v. Phillips, it also acknowledged that other district courts had disagreed with its interpretation of the relevant Florida Statutes, including Florida Statutes section 766.110. It receded from its prior decision because it deemed that the sexual misconduct did not arise "out of the rendering of . . . medical care or services."

The Fourth District also decided an appeal of a medical malpractice claim in Grobman v. Posey, a case involving the right of non-settling de-
fendants to obtain a setoff for amounts paid by a settling defendant. The case involved a malpractice claim against a number of physicians, an anesthesiologist, a hospital, and Prudential Insurance Company, which provided HMO (Health Management Organization) coverage. Two of the physicians and Prudential settled with the plaintiff before trial. Prudential was sued under vicarious liability and negligent credentialing theories, but the settlement did not indicate the causes of action, nor did it allocate between economic and non-economic damages. At trial, the remaining defendants, Dr. Grobman and Mercy Hospital, asked for the jury to apportion fault to the other physicians and anesthesiologist, but not the HMO/health insurer. In order to resolve the dispute, the court was forced to consider the applicability of section 768.81, which "eliminates joint and several liability for non-economic damages and limits joint and several liability for economic damages." However, vicarious liability would not result in apportionment because the vicariously liable party is liable for all of the harm caused by the primary actor. Furthermore, the court ruled that the negligent credentialing claim was derivative in nature and therefore, like vicarious liability, would not require apportionment of damages. Therefore, the court held that Prudential was not a proper defendant to be placed on the verdict form, and its payment required a complete set-off against the verdict under sections 46.015 and 768.041 of the Florida Statutes.

VIII. SOVEREIGN IMMUNITY

The Supreme Court of Florida addressed the issue of sovereign immunity in Pollock v. Florida Department of Highway Patrol, an appeal of two actions brought by the survivors of a deceased driver and passenger of a car that "collided into the back of an unlit tractor-trailer which had stalled . . . on the Palmetto Expressway." A driver had earlier called 911 and was transferred to the Florida Highway Patrol (FHP), informing a dispatcher of

210. Id. at 1232.
211. Id. at 1232–33.
212. Id. at 1233.
213. Id.
214. Grobman, 863 So. 2d at 1233.
215. Id. at 1234 (citing D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003)).
216. Id. at 1235.
217. Id. at 1235–36.
218. Id. at 1237.
219. 882 So. 2d 928 (Fla. 2004).
220. Id. at 930.
the existence of the hazard in the highway.\textsuperscript{221} He was informed by the dispatcher that a unit would be dispatched, but apparently the dispatcher failed to enter the call into the computer for assignment.\textsuperscript{222} FHP has internal operational rules requiring the dispatch of a trooper to the scene of a stalled vehicle, and evidence at trial revealed that officers were available.\textsuperscript{223} Its rules also indicate that crash prevention and crash investigation are primary functions of the FHP.\textsuperscript{224} The trial courts in both cases entered judgments for the plaintiffs, but the decisions were reversed by the Third District Court of Appeal, which certified a conflict with decisions by the Second District.\textsuperscript{225}

As noted by the Supreme Court of Florida, Florida has waived sovereign immunity in tort actions "'for any act for which a private person under similar circumstances would be held liable.'"\textsuperscript{226} The issue before the court was whether the FHP owed a common law or statutory duty to the plaintiffs.\textsuperscript{227} Although the court acknowledged the duty of a public or private entity that owns, operates, or controls property to maintain it and to warn of and correct dangerous conditions thereon,\textsuperscript{228} it held that FHP was not bound because it lacked ownership or control over the highways.\textsuperscript{229} The court noted that the operation and maintenance of the roads is the province of the Florida Department of Transportation and the local governments in which the roads are located and that Florida law permits, but does not require, FHP to remove stalled or abandoned vehicles from state highways.\textsuperscript{230} It also opined that the responsibility of enforcing laws for the public good does not create a duty towards a particular individual, absent the officers becoming directly involved in circumstances that place a person within a "zone of risk."\textsuperscript{231} The court examined a number of instances in which a special duty could arise and found that this situation did not fit within any of them.\textsuperscript{232} It also rejected the argument that the internal procedures created an independent duty of care.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{221} \textit{Id.} at 931.
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Pollock, 882 So. 2d at 931.}
\item \textsuperscript{225} \textit{Id. at 931–32.}
\item \textsuperscript{226} \textit{Id. at 932 (quoting Henderson v. Bowden, 737 So. 2d 532, 534–35 (Fla. 1999)).}
\item \textsuperscript{227} \textit{Id. at 933–34.}
\item \textsuperscript{228} \textit{Id. at 933 (citing Bailey Drainage Dist. v. Stark, 526 So. 2d 678, 681 (Fla. 1988)).}
\item \textsuperscript{229} \textit{Pollock, 882 So. 2d at 934 (citing Alderman v. Lamar, 493 So. 2d 495, 498 (Fla. 5th Dist. Ct. App. 1986)).}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id. at 935–36. (citing Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989); Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985)).}
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} \textit{Id. at 936–37.}
\end{itemize}
Justice Pariente dissented, arguing that FHP’s actions were operational in nature and therefore not within the protection of sovereign immunity.\(^{234}\) She argued that the general duty/special duty dichotomy had been abandoned after the passage of section 768.28 of the *Florida Statutes*.\(^{235}\) Although acknowledging that some decisions seem to have receded from this abandonment, she argues that the court should focus on conventional tort principles, particularly foreseeability.\(^{236}\) Justice Pariente argued that because the FHP assured the caller that a unit would be sent, it therefore assumed control over the situation and its failure to so respond created a foreseeable “zone of risk” of harm.\(^{237}\)

The First District Court of Appeal also addressed sovereign immunity in *Rudloe v. Karl*,\(^{238}\) an action in which a Florida State alumnus and the corporation of which he was president and “closely affiliated” sued Florida State University (FSU) and another alumnus for statements made in the FSU Department of Oceanography Newsletter.\(^{239}\) The newsletter in question included responses to the Department’s request for students to relate their experiences of departmental history.\(^{240}\) One of the experiences was an account by Dr. Karl that Rudloe may have stolen a priceless specimen from the department.\(^{241}\) The plaintiffs’ second amended complaint alleged that FSU was negligent in failing to verify the facts contained in Dr. Karl’s submission to the newsletter.\(^{242}\) The court held that sovereign immunity was not a bar to the action because it did not involve basic law enforcement or governmental policy making, nor discretionary planning or judgment.\(^{243}\)

The Fifth District Court of Appeal decided a sovereign immunity issue in *City of Ocala v. Graham*,\(^{244}\) a case involving a claim that a woman was shot because of the negligence of one of the city’s police officers.\(^{245}\) Appellant called the Ocala police to complain about a death threat from her former husband.\(^{246}\) She alleged that the officer agreed that he, or someone else from

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235. *Id.* at 940 (citing Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1016 (Fla. 1979)).
236. *Id.* at 941.
237. *Id.* at 942 (citing McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992)).
238. 899 So. 2d 1161 (Fla. 1st Dist. Ct. App. 2005).
239. *Id.* at 1162–63.
240. *Id.* at 1163.
241. *Id.*
242. *Id.*
244. 864 So. 2d 473 (Fla. 5th Dist. Ct. App. 2004).
245. *Id.* at 474–76.
246. *Id.* at 475.
the department, would talk to her former husband, which she believed would deter him from carrying out his threat. Two days later, the appellant engaged in three different conversations with her husband, and she acknowledged that she realized that no one from the police department had contacted him. The estranged husband appeared at her residence, got into a fist fight with their adult son and shot at the son, hitting the appellant instead.  

The court first noted that "there is no common law duty to prevent the misconduct of third persons." The court observed that in relation to law enforcement and public safety, "sovereign immunity may disappear" if a special relationship exists between the victim and the governmental official. In looking at the required elements for such a relationship, the court held that the appellant could not establish justifiable reliance upon the officer's assurance that he would talk to the assailant and that the failure to contact the estranged husband was not the proximate cause of the appellee's injuries. First, the court noted that the threats occurred in a jurisdiction outside of the control of the Ocala Police Department and that the officer informed the appellant of the appropriate law enforcement authority to contact. In addition, it found that it was sheer speculation to posit that the officer's failure to contact the assailant caused the harm and the physical attack by the adult son upon the estranged husband was a superseding cause of the injuries.

IX. TORTIOUS INTERFERENCE

The Second District Court of Appeal resolved a tortious interference with a business relationship issue in Advantage Digital Systems, Inc. v. Digital Imaging Services, Inc. The appeal arose from an injunction obtained by Digital Imaging (Digital) against three of its former employees who were subsequently employed by Advantage Digital (Advantage), which was incorporated by one of the employees and a customer of Digital Imaging. The court ruled that the injunction was too broad against the former employ-
An appeal of a dismissal of a “tortious interference with a business relationship” claim was decided by the Third District Court of Appeal in *Rubin v. Alarcon*. In the case, the plaintiff law firm undertook representation of Benito Santiago against Morena Monge. Defendant Alarcon, a mutual friend of Santiago and Monge, proceeded to act as Monge’s agent in settling the case with Santiago. In the second amended complaint, the plaintiffs allege that Alarcon urged Santiago not to tell his attorneys about the negotiations, but instead to tell them that he no longer wanted to pursue the lawsuit. In addition, it was alleged that Santiago was urged to not disclose the payments made to him in settlement of the case. Although acknowledging that parties may settle cases without attorney intervention, the court held that they may not engage in fraud or collusion in order to interfere with the

258. *Id.; Advantage Digital Sys., Inc., 870 So. 2d at 114–15.*
259. *Advantage Digital Sys., Inc., 870 So. 2d at 115–16.*
260. *Id. at 116.*
261. *Id. at 116–17.*
262. *Id. at 116.*
264. *Id.*
265. *Id. at 502.*
266. *Id.*
267. *Id.*
agreement between the attorney and client.\textsuperscript{268} The court also noted in dicta, however, that a provision in the contingent fee agreement that the client could not settle the case without prior written approval of the law firm was void.\textsuperscript{269}

The Fourth District Court of Appeal also considered a case involving tortious interference of a contract for attorneys’ fees in \textit{Ingalsbe v. Stewart Agency, Inc.}\textsuperscript{270} The trial court dismissed the complaint on the basis of absolute immunity.\textsuperscript{271} In the case, the lawyers “were retained by their client to sue appellees [Stewart Agency] under the Lemon Law.”\textsuperscript{272} The client won a jury verdict, which was reversed on appeal.\textsuperscript{273} After remand, the appellees approached the client and urged settlement without involving the lawyers.\textsuperscript{274} The appellees and client then agreed on how much the appellees would pay in attorneys’ fees to the appellants, which met only one of the alternatives available in the fee agreement between the client and the appellants.\textsuperscript{275} The appellees argued that the appellant’s claim was barred by the “litigation privilege.”\textsuperscript{276} This privilege has been defined as one that applies to “any act occurring during the course of a judicial proceeding.”\textsuperscript{277} However, as the court noted, although the appellee was privileged to propose and conclude a settlement, it was not entitled “to interfere with a fee contract between one of the settling parties and his lawyer.”\textsuperscript{278} Judge Gross dissented, arguing that the decision “impinge[d] on a client’s right to settle a lawsuit,” noting that the settlement far exceeded the damages awarded at the initial trial.\textsuperscript{279} The dissent argued that the settlement did comply with one of the alternatives in the fee contract and did not involve a design or defeat payment of attorney’s fees.\textsuperscript{280} Upon a motion for rehearing, the court did certify the following question to the Supreme Court of Florida:

\textit{Does the litigation privilege of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United State Fire Insurance Co.,}\textsuperscript{268} 892 So. 2d at 503.
\textsuperscript{269} Id. at 504 n.5.
\textsuperscript{270} 869 So. 2d 30, 31 (Fla. 4th Dist. Ct. App. 2004).
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} \textit{Ingalsbe}, 869 So. 2d at 31.
\textsuperscript{276} Id.
\textsuperscript{277} Id. at 32 (quoting Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994)).
\textsuperscript{278} Id. at 33.
\textsuperscript{279} Id. at 35–36 (Gross, J., dissenting).
\textsuperscript{280} \textit{Ingalsbe}, 869 So. 2d at 36.
The Fifth District Court of Appeal considered an appeal of an injunction involving a "tortious interference with business relationships" claim in Animal Rights Foundation of Florida, Inc. v. Siegel. Plaintiff Siegel was president of a timeshare development that hired a production company to conduct entertainment for potential buyers that included twice weekly animal shows. The complaint alleged that defendant foundation's supporters picketed at the plaintiff's residential community and business offices as well as circulated leaflets that claimed Siegel abused animals. The court ruled that the injunction's prohibition on picketing that would impede the flow of traffic was improper in light of a lack of record evidence that "the Foundation had impeded or was likely to impede the free flow of traffic." It also ruled that the noise restrictions were an improper burden on speech "because they enjoin[ed] all shouting and all uses of bull horns or megaphones, rather than tailoring a prohibition against impermissible conduct." Additionally, the court invalidated restrictions on the number of protestors and location of demonstrations absent evidence showing the need for such regulation. It also struck bans on videotaping passers-by because of a failure to demonstrate irreparable harm. Furthermore, it struck parts of the injunction that banned certain statements from being made. Finally, the court noted that because the speech involved was pure speech and because the foundation was not a competitor of Siegel or the development and it was not promoting an economic interest, the speech "was not properly restrained to prevent the tortious interference alleged." In a partial concurrence and dissent, Chief Judge Sawaya argued that the conduct engaged in by the defendant was har-
assessment as opposed to speech\textsuperscript{291} and that some of the speech was not political, but commercial in nature.\textsuperscript{292}

X. "SLAVIN" DOCTRINE

The Fourth District Court of Appeal considered the application of the Slavin doctrine in \textit{Gonsalves v. Sears, Roebuck and Co.}\textsuperscript{293} The plaintiff's mother purchased carpeting for her staircase from Sears, which was installed by its contractor, Flamingo.\textsuperscript{294} The first installation was incorrect and had to be replaced.\textsuperscript{295} A problem became apparent after the second installation, which the mother made several unsuccessful attempts to get rectified.\textsuperscript{296} She was reassured by Sears that it would remedy the problem so she did not seek an independent company to repair the problem.\textsuperscript{297} Before the problem was remedied, she "fell on the staircase sustaining [a] serious injury."\textsuperscript{298} The trial court granted a motion for summary judgment filed by Sears and Flamingo pursuant to the \textit{Slavin} doctrine.\textsuperscript{299} This doctrine refers to the case of \textit{Slavin v. Kay}\textsuperscript{300} and holds that "a contractor is relieved of liability for damages caused by a patent defect after control of the completed premises has been turned over to the owner."\textsuperscript{301} The court noted that this case involved a patent defect, but held that it could not be conclusively established that the work was ever completed.\textsuperscript{302} It also noted that this case did not really fit into the rationale of \textit{Slavin}, as Sears had actually been asked to fix the problem.\textsuperscript{303}

In \textit{Foreline Security Corp. v. Scott},\textsuperscript{304} the Fifth District Court of Appeal also applied the \textit{Slavin} doctrine.\textsuperscript{305} This case involved liability for a 1999 bank robbery.\textsuperscript{306} "Foreline installed a bank security system at the Mount Dora branch of the United Southern Bank (USB) in 1993."\textsuperscript{307} Scott, who was

\begin{thebibliography}{99}
\bibitem{291} Siegel, 867 So. 2d at 464 (Sawaya, C.J., concurring in part, dissenting in part).
\bibitem{292} \textit{Id.} at 468.
\bibitem{293} 859 So. 2d 1207, 1208 (Fla. 4th Dist. Ct. App. 2003).
\bibitem{294} \textit{Id.}
\bibitem{295} \textit{Id.}
\bibitem{296} \textit{Id.}
\bibitem{297} \textit{Id.}
\bibitem{298} \textit{Gonsalves}, 859 So. 2d at 1208.
\bibitem{299} \textit{Id.}
\bibitem{300} 108 So. 2d 462 (Fla. 1958).
\bibitem{301} \textit{Gonsalves}, 859 So. 2d at 1209.
\bibitem{302} \textit{Id.}
\bibitem{303} \textit{Id.}
\bibitem{304} 871 So. 2d 906 (Fla. 5th Dist. Ct. App. 2004).
\bibitem{305} \textit{Id.} at 909.
\bibitem{306} \textit{Id.} at 908.
\bibitem{307} \textit{Id.} (internal quotation marks omitted).
\end{thebibliography}
a teller at the bank at the time of the robbery, was shot and rendered a quadriplegic as a result. Scott sued Foreline, alleging several causes of action. The jury found that Foreline was fifty percent at fault and that USB was fifty percent at fault for the injury, but the trial court entered judgment against Foreline for the full amount of the damages pursuant to section 768.81 of the Florida Statutes. The court first noted that a majority of states have adopted a “completed and accepted rule” for this type of factual situation. Having completed installation of the security system six years prior to the robbery, Foreline argued that it should have received a jury instruction on the Slavin doctrine. The court agreed. The court also held that it was error to instruct the jury to allocate fault between USB and Foreline and then ignore the allocation as the jury may have decided differently had it been aware that Foreline would bear responsibility for the entire amount of the verdict.

XI. MISCELL ANEOUS

In Indemnity Insurance Co. of North America v. American Aviation, Inc., the Supreme Court of Florida responded to certified questions of law concerning the economic loss rule from the United States Court of Appeals for the Eleventh Circuit. Indemnity Insurance Company (Indemnity) and Profile Aviation Services, Inc. (Profile) sued American Aviation (American) for negligent maintenance and inspection of an aircraft’s landing gear on a Profile aircraft. The court noted that the economic loss rule, which prohibits tort actions in certain cases where the only damages are economic losses, is applied to those in contractual privity to prevent the circumvention of the allocation of such losses set forth in the contract. Thus, it would be inappropriate to permit a tort action where the only breach of duty was a breach of the contract. Similarly, the products liability economic loss rule developed in order to prevent manufacturers from being held liable for economic

308. Id.
309. Scott, 871 So. 2d at 908.
310. Id. at 908–09.
311. Id. at 909 (footnote omitted).
312. Id. at 909–10.
313. Id. at 910.
314. Scott, 871 So. 2d at 911.
315. 891 So. 2d 532 (Fla. 2004).
316. Id. at 534.
317. Id.
318. Id. at 536.
319. Id. at 537.
damages beyond that provided for by warranty law. The latter limitation has generally been applied to products which damage themselves as a result of a defect in the product. The court held that the economic loss rule did not apply in this case where the plaintiffs were not in privity and noted that it continued to recognize the "other property" exception to products liability economic loss cases.

In Allstate Insurance Co. v. Ginsberg, the Supreme Court of Florida decided an invasion of privacy claim. The case was responsive to several certified questions of law from the Eleventh Circuit Court of Appeals involving claims by Elaine Scarfo that, while employed by corporations owned by Victor Ginsberg, she was subjected to "unwelcome offensive conduct, including physical touching and comments of a sexual nature." Amongst the claims brought by Scarfo was a claim of invasion of privacy, and the case required a resolution of whether this conduct fit within that tort as recognized in Florida. The court held that the tort does not include this type of intrusion to the plaintiff's body as opposed to physical space or holding the person free from public gaze.

The First District Court of Appeal also considered a warning issue in McGraw v. R & R Investments, Ltd. In this case, Patricia McGraw appealed from a final summary judgment finding R & R, an equine activity sponsor, not liable for injuries that she suffered as an equine trainer employed by R & R after she was thrown by a horse owned by R & R. The resolution of the case depended upon analysis of the immunity provided to equine sponsors by section 773.02 of the Florida Statutes. Section 773.04 requires that equine sponsors post notices and give written warnings announcing that the sponsor is not liable for injuries from inherent risks of equine activities, but provides no consequences for failure to provide such warnings. The court reversed the summary judgment, holding that the

320. Indemnity Ins. Co. of N. Am., 891 So. 2d at 538.
321. Id. at 542 (citing Moransais v. Heathman, 744 So. 2d 973, 984 (Fla. 1999) (Wells, J., concurring)).
322. Id. at 543.
323. 863 So. 2d 156 (Fla. 2003).
324. Id. at 157.
325. Id.
326. Id. at 158.
327. Id. at 162.
328. 877 So. 2d 886, 888 (Fla. 1st Dist. Ct. App. 2004).
329. Id.
330. Id.
331. Id. at 889 (citing Fla. Stat. § 773.04 (2000)).
statutory obligation to provide the notice was mandatory if the sponsor was to be afforded the statutory immunity. 332

In Hopkins v. Boat Club, Inc., 333 the First District Court of Appeal considered an appeal of a case involving a release. 334 This case, filed by Ruby and Ronald Hopkins, involved injuries suffered by Mrs. Hopkins when she was thrown from a boat operated by Mr. Hopkins under the direction and supervision of one of the boat club’s employees. 335 The plaintiffs signed an agreement with the boat club for use of the club’s boats and then signed individual releases which included a clause entitled “Assumption and Acknowledgment of Risks and Release of Liability Agreement.” 336 Although controlled by federal maritime law, the court stated that it was consistent with Florida law to look unfavorably upon exculpatory clauses seeking to absolve a party from its own negligence and to find such clauses ineffective absent clear and unequivocal language. 337 The court found the language in this release to be sufficient in its specific reference to a number of risks, including “ship’s wakes,” which caused the injury in this case and the reference to release all “principals, directors, officers, agents, [and] employees . . . from any and all liability . . . for any and all injury or damage.” 338

The Third District Court of Appeal decided a case dealing with a claim of interference with testamentary capacity in In re Hatten. 339 The case, an appeal of a summary judgment in favor of the defendant, dealt with an allegation that the decedent had disinherited three relatives, including her brother, Louis. 340 The plaintiffs filed an adversary action against Louis, alleging that he had taken away the will of the deceased and destroyed it. 341 The evidence supporting the existence of the will consisted of statements from the three plaintiffs, who were beneficiaries of the alleged will. 342 The defendant argued that the evidence should be barred by the hearsay rule and the Dead Man’s Statute. 343 After quickly disposing of the hearsay objection by noting the specific exemption for statements relating to wills, the court

332. Id. at 893.
334. Id. at 109.
335. Id. at 110.
336. Id. at 109.
337. Id. at 111.
338. Hopkins, 866 So. 2d at 112.
339. 880 So. 2d 1271, 1272 (Fla. 3d Dist. Ct. App. 2004).
340. Id.
341. Id. at 1273.
342. Id.
343. Id. at 1274.
next addressed the Dead Man's Statute issue. Because the Dead Man's Statute applies to a person interested in an action in a representative capacity, the court held that it did not apply to this action, in which the defendant was being sued for damages in his personal capacity for his tortious act.

In Haskins v. City of Fort Lauderdale, the Fourth District Court of Appeal decided an appeal of an invasion of privacy and negligent investigation claim. The plaintiff, Robin Haskins, alleged that while working as a civilian employee for the City of Fort Lauderdale Police Department, her office was illegally searched for illegal diet pills. In the criminal case in which she was charged with possession of a controlled substance with intent to sell and/or deliver, the evidence obtained in the search was suppressed and the state nolle prossed the charge. Her labor union filed a grievance in relation to her job termination, which resulted in a finding that there was not just cause for her dismissal. The appellate court upheld the trial court's summary judgment on the basis of the statute of limitations. The appellate court rejected the arguments that the statute was either tolled until the criminal court ruled that the search was illegal or until the arbitration proceedings on the labor grievance were completed.

The Fourth District Court of Appeal considered an appeal of malicious prosecution and false arrest claims in Daniel v. Village of Royal Palm Beach. In this case, Felicia Daniel filed a malicious prosecution claim for her arrest for aggravated assault. According to witnesses, Daniel was driving carelessly and harassing an unmarked police car. The court held that "the arresting officer had probable cause to arrest Daniel for reckless driving." She was later tried and acquitted of this charge. Despite the fact that she was arrested for aggravated assault and disputed many facts alleged by the witnesses, the court held that a summary judgment was appropriate because "[t]he validity of an arrest does not turn on the [charge] announced

344. Hatten, 880 So. 2d at 1274–75.
345. Id. at 1276.
346. 898 So. 2d 1120 (Fla. 4th Dist. Ct. App. 2005).
347. Id. at 1122.
348. Id.
349. Id.
350. Id.
351. Haskins, 898 So. 2d at 1124.
352. Id. at 1123.
353. 889 So. 2d 988, 990 (Fla. 4th Dist. Ct. App. 2004).
354. Id.
355. Id.
356. Id.
357. Id.
by the officer at the time" of an arrest and the factual disputes are not mate-
rial to the existence of probable cause at the time of arrest.358

The Fourth District also decided a claim concerning a loss of consort-
tium set forth by a child who was a fetus at the time of injury in Larusso v. Garner.359 The mother was three months pregnant with the child, Braden, when she was in an automobile accident that resulted in her sustaining severe brain injuries.360 Despite being in a coma, she carried Braden to term.361 The court evaluated the claim under the Florida Statutes establishing a child's right to loss of parental consortium—section 768.0415.362 It was argued that the defendants did not fit within the statutory term "unmarried dependent" so as to qualify for the damages.363 However, the court held that "[b]ecause Florida follows the 'born alive' doctrine," which permits minors who are "born alive" to seek compensation for injuries occurring to them or their parents, it would deem the statute to provide coverage.364 It did, however, find that the lower court erred in awarding filial consortium damages beyond Braden's reaching the age of majority, although it agreed that Braden's dam-
ages could so extend.365

In Broz v. Rodriguez,366 the Fourth District Court of Appeal considered the application of a release.367 The plaintiff, Grace Broz, appealed a final judgment in favor of a number of defendant doctors.368 Broz fell at the Rock-
ing Horse Ranch and first sued the ranch in a lawsuit that was settled.369 She then filed suit against the defendants in this action for surgery on her injuries, which she claimed was negligently performed.370 In the general release signed with the ranch, she did not reserve a claim against the defendants in this action.371 In interpreting section 768.041, Florida Statutes, the court held that she must have so reserved to hold subsequent tortfeasors liable.372

358. Daniel, 889 So. 2d at 991.
359. 888 So. 2d 712, 716 (Fla. 4th Dist. Ct. App. 2004).
360. Id. at 715.
361. Id.
362. Id. at 720; see Fla. Stat. § 768.0415 (2004).
363. Larusso, 888 So. 2d at 719.
364. Id.
365. Id. at 721.
366. 891 So. 2d 1205 (Fla. 4th Dist. Ct. App. 2005).
367. Id. at 1206.
368. Id.
369. Id.
370. Id.
371. Broz, 891 So. 2d at 1206.
372. See id. at 1207-08.
The res ipsa loquitur doctrine was applied by the Fourth District Court of Appeal in *Nodurft v. Servico Centre Ass’n*.\(^{373}\) The plaintiff, Colleen Nodurft, alleged that she was injured in the ladies’ restroom of an Omni Hotel when “a wall-mounted trash receptacle fell from the wall and struck her foot.”\(^{374}\) Two witnesses testified that receptacles in the restrooms were loose.\(^{375}\) The plaintiff requested a jury instruction on res ipsa loquitur, which was denied.\(^{376}\) The court noted that Florida courts had expanded the doctrine beyond its origins, including the notion that the defendant had exclusive control of the instrumentality causing injury.\(^{377}\) The court then held that although the receptacle “was in a public place and accessible to . . . the public, the Omni had ‘sufficient exclusivity’ [of its control] to rule out the chance that [it] fell from the wall as a result of the actions of some other agency.”\(^{378}\) Accordingly, the court reversed and remanded for a new trial.\(^{379}\)

The Fifth District Court of Appeal decided a malicious prosecution appeal in *Doss v. Bank of America, N.A.*\(^{380}\) Bank of America sued Doss for payment on bogus checks, endorsed by a forger.\(^{381}\) Doss opened a savings account at the bank, but did not have a checking account with it.\(^{382}\) The forger, who forged Doss’ name on the checks, presented identification indicating that she was Doss.\(^{383}\) The bank’s fraud investigator concluded that Doss had nothing to do with the check-cashing scheme and recommended that no collection action be taken against Doss.\(^{384}\) The bank could not explain why the lawsuit had been filed.\(^{385}\) Doss agreed to a joint stipulation for dismissal of the bank’s collection action.\(^{386}\) In Doss’ malicious prosecution action, the bank asserted that Doss had not received “a ‘bona fide’ termination of the collection suit” because of the joint stipulation of dismissal.\(^{387}\)

Although the court noted that cases that terminate due to settlements or joint stipulations do not normally qualify as bona fide terminations for mali-
cious prosecution actions, such is not always the case. 388 It noted that courts must look at “the total circumstances.” 389 Although the bank agreed to restitution of $37.14, which it had set-off when it first discovered the forged checks, the court held that such was actually an admission by the bank that it recognized Doss’ innocence. 390 Further, it deemed her waiver of interest to be de minimus because the interest on the $37.14 would have been miniscule and her waiver of attorney’s fees in the action was not significant since there was no basis to claim them. 391 It held that her failure to seek attorney’s fees pursuant to section 57.105 in the collection suit was also not fatal. 392

The Fifth District Court of Appeal decided a defamation case in *Fariello v. Gavin*. 393 Fariello appealed the dismissal of his complaint on the basis of the litigation privilege. 394 Fariello claimed that Craig Gavin, president of the Crystal Hills Mini Farms Unit 1 and 2 Association, Inc., made slanderous comments about Fariello that “Fariello had committed the crime of perjury in connection with certain of his professional qualifications.” 395 The trial court granted motions for summary judgment on the basis that it felt it permissible for Gavin to question the credibility of “Fariello publicly because the two men were adversaries in the prior lawsuit.” 396 Because immunity is an affirmative defense, the court held that it would normally be inappropriate to dismiss the complaint unless it demonstrated on its face that the defense applied. 397 The court held that it was not so apparent in this case. 398

The United States Court of Appeals for the Eleventh Circuit applied Florida’s crashworthiness doctrine in *Bearint v. Dorel Juvenile Group, Inc.* 399 The plaintiff’s parents appealed a verdict that Cosco, manufacturer of an automobile safety seat in which their son, Kagan, was seated at the time of an accident was not liable for the injuries that he sustained. 400 Saturn automobile company, which was also sued, settled prior to trial. 401

388. *Id.* at 995.
389. *Id.*
390. *Doss*, 857 So. 2d at 995.
391. *Id.* at 995–96.
392. *Id.* at 996.
393. 873 So. 2d 1243, 1244 (Fla. 5th Dist. Ct. App. 2004).
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.* at 1245.
398. *Fariello*, 873 So. 2d at 1245.
399. 389 F.3d 1339, 1348 (11th Cir. 2004).
400. *Id.* at 1343.
401. *Id.* at 1344.
In considering the applicable Supreme Court of Florida case, *D'Amario v. Ford Motor Co.*, the Eleventh Circuit Court of Appeals discussed the applicability of the crashworthiness doctrine, which precludes consideration of the fault of initial tortfeasor who cause a crash when a device in the car causes enhanced injuries. In this case, in which the design of Saturn’s front seat was considered a cause of the injury, the court ruled that a proper application of the doctrine would permit the jury to consider Saturn’s contribution to the injury of the infant.

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402. 806 So. 2d 424 (Fla. 2001).
403. *See Bearint*, 389 F.3d at 1345–47.
404. *See id.* at 1348.