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Tort Law: 2001-2003 Survey of Florida Law

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TORT LAW: 2001–2003 SURVEY OF FLORIDA LAW

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I. INTRODUCTION 317
II. MEDICAL MALPRACTICE LEGISLATION 317
III. SLIP AND FALL LITIGATION 320
IV. "CRASHWORTHINESS" AND COMPARATIVE FAULT 326
V. THE TOBACCO LITIGATION 327
VI. MARITIME LAW 330
VII. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP 332
VIII. SPOLIATION OF EVIDENCE 334
IX. PRIVILEGES 337
X. INVASION OF PRIVACY 338
XI. MISCELLANEOUS 342
XII. CONCLUSION 350

I. INTRODUCTION

This article reviews selected tort law decisions by the Supreme Court of Florida and Florida's district courts of appeal published between July 31, 2001 and July 31, 2003. The time period begins where the last tort law review survey created for this law review ended. This article will follow the conventions in selecting cases for discussion utilized in prior tort law survey articles. Although these survey articles have in the past exclusively reviewed Florida state court cases, this article will review a federal decision of interest and discuss the highlights of the recently passed medical malpractice reform legislation.

II. MEDICAL MALPRACTICE LEGISLATION

As previously mentioned, prior tort law survey articles have focused on Florida appellate court cases, but because of the import of the legislative changes adopted in the medical malpractice area, this piece will discuss the most significant changes adopted by the legislature in its special session. The number and breadth of changes are so extensive that such changes preclude a thorough review of the impact of this legislation and are worthy of a

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separate article or series of articles to discuss the many potential ramifications. This summary will only briefly highlight the most significant changes.

First, section 766.102 of the *Florida Statutes*, has been amended to add more requirements for expert witnesses.[2] For claims against specialists, not only must the witness specialize in the same or similar specialty, but must also have relevant practice, instruction, or research experience within three years immediately preceding the date of the occurrence that forms the basis of the action.[3] For general practitioners, the experience must be within five years of the incident.[4] The amended statute now expressly allows qualified physicians to testify as experts in cases involving non-physician medical staff.[5] It also sets standards for experts who testify in medical negligence actions against a hospital, or other health care or medical facility.[6] The amended statute also precludes experts from testifying on a contingency basis,[7] and requires attorneys to certify that experts proffered "[have] not been found guilty of fraud or perjury in any jurisdiction."[8]

The new amendments also change some of the pre-filing and "informal discovery" aspects of medical negligence actions.[9] These changes include a requirement that, "[u]pon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery.[10] Failure to do so is grounds for dismissal of claims or defenses ultimately asserted."[11] In addition to existing references in the statute to statements, documents, and examinations, the statute now requires responses within twenty days and not more than thirty questions from a party or his attorney.[12] In addition, "claimant[s] must execute a medical information release that allows a prospective defendant or his or her legal representative to take unsworn statements of the claimant's treating physicians."[13] Failure to cooperate with these presuit procedures can result in the striking of a claim or defense.[14] The mandatory settlement conference section has been amended to add mandatory mediation within 120 days after filing of the suit

2. FLA. STAT. § 766.102(5)(a) (2002).
3. *Id.*
4. § 766.102(5)(b).
5. § 766.102(6).
6. § 766.102(7).
7. § 766.102(10).
8. § 766.102(11).
9. § 766.106(6).
10. § 766.106(6)(a).
11. *Id.*
12. § 766.106(6)(b)(4).
13. § 766.106(6)(b)(5).
14. § 766.106(7).

unless all parties agree to extend or the parties have agreed to binding arbitration.[15]

Of primary importance to the governor and legislature in proposing this legislation, and also of significance to parties and attorneys litigating in the area of medical negligence, are the limitations placed on the amount of noneconomic damages that can be awarded in medical negligence actions. Under the amended statute, noneconomic damages are limited to $500,000 per claimant, regardless of the number of practitioners included in a particular cause of action, and no practitioner shall be liable for more than $500,000 in noneconomic damages in a cause of action, regardless of the number of claimants.[16] An exception is permitted if the negligence results in a permanent vegetative state or death, which than allows total noneconomic damages up to $1 million.[17] However, for this exception to apply, the trial court must determine that a manifest injustice would occur because the injury was particularly severe and the trier of fact must determine that the negligence caused a catastrophic injury.[18] Finally, "[t]he total noneconomic damages recoverable by all claimants from all practitioner defendants . . . shall not exceed $1 million in the aggregate."[19] Similar caps are placed on noneconomic damages for negligence of nonpractioner defendants except that the respective caps are $750,000 and $1.5 million for injuries resulting in a permanent vegetative state or death.[20] The statutory language provides no guidance on how one would determine that death or an injury placing one in a "permanent vegetative state" could not be catastrophic or particularly severe.[21]

The statutory amendments also limit damages for medical negligence claims involving the provision of emergency services and care. For practitioners, the noneconomic damages cap is limited to $150,000 per claimant.[22] "[T]he total [amount of] noneconomic damages recoverable by all claimants from all such practitioners shall not exceed $300,000."[23] The provision indicates it applies "to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship . . . ."[24] The limitation applies to acts or omissions prior to the time that the patient is stabilized and

15. § 766.108(1).
16. § 766.118(2)(a).
17. § 766.118(2)(b).
18. § 766.118(2)(b)(1)-(2).
19. § 766.118(2)(c).
20. § 766.118(3)(a)-(b).
21. § 766.118(3)(b).
22. § 766.118(4)(a).
23. § 766.118(4)(b).
24. § 766.118(4).

is capable of receiving medical treatment as a nonemergency patient, unless surgery is required as a result of the emergency within a reasonable time after stabilization.[25] The limit also applies to acts or omissions after the stabilization following the surgery.[26] For nonpractitioners, the damages shall not exceed $750,000 per claimant.[27] The total noneconomic damages for all nonpractitioners by all claimants with respect to a particular cause of action in relation to the provision of emergency care or services shall not exceed $1.5 million.[28] "Nonpractitioner defendants may receive a full setoff for payments made by practitioner[s] . . . ."[29]

The amendments also set out detailed rules with specific time limits concerning bad faith actions against a medical malpractice insurer relating to its professional liability insurance coverage.[30] The Good Samaritan Act[31] is also amended to provide immunity to health care practitioners who, in a hospital, voluntarily provide care or treatment to a patient with whom the practitioner does not then have an existing patient-practitioner relationship, and the care or treatment is necessitated by a sudden or unexpected situation demanding immediate attention, "unless that care or treatment is proven to amount to conduct that is willful and wanton and would likely result in injury so as to affect the life or health of another."[32]

As stated at the beginning of this section, this summary does not cover all of the changes in the legislation passed in the amendments to the medical negligence statutes. As should be apparent from the summary, significant issues may arise over how to interpret some of the provisions. The impact of these amendments should provide an interesting source of review and debate in the coming years.

III. SLIP AND FALL LITIGATION

The Supreme Court of Florida addressed the issue of constructive knowledge of a foreign substance on the floor of public premises in slip and fall cases in *Owens v. Publix Supermarkets, Inc.*[33] In this case, Evelyn Owens, a Publix employee, slipped on a discolored piece of banana lying on

25. § 766.118(4)(b).
26. *Id.*
27. § 766.118(5)(a).
28. § 766.118(5)(b).
29. § 766.118(5)(c).
30. § 766.118(5).
31. FLA. STAT. § 768.13 (2002).
32. *Id.*
33. 802 So. 2d 315 (Fla. 2001).

the store's floor.[34] "Owens did not present any direct evidence of the length of time the . . . banana [had been] on the floor" before she slipped on it.[35] The trial court directed a verdict for the defendant because of this failure to present evidence concerning the defendant's actual or constructive knowledge about the banana by Publix.[36] In an en banc rehearing on the appeal, the Fifth District Court of Appeal affirmed the verdict because it held that there were at least two theories as to how the banana peel got on the floor, and one of these theories supported an inference that the banana had aged before it landed on the floor.[37] In a companion case, Elvia Soriano also fell on a discolored piece of banana on a grocery store floor.[38] In that case, the Fourth District Court of Appeal upheld a directed verdict for the defendant on similar grounds, holding that the plaintiff was obligated to prove that the aging of the banana occurred on the floor; and thus, the store was negligent for not removing it in a timely fashion.[39]

The Supreme Court of Florida agreed that the plaintiff in such cases must ordinarily prove, with the significant exception of the mode of operation theory explained below, that "the premises owner had actual knowledge or constructive knowledge of the dangerous condition"[40] for a sufficient length of time that "the premises owner should have known of it and taken action to remedy it."[41] However, it stated that circumstantial evidence might establish constructive knowledge.[42] It also acknowledged that appellate and trial courts in Florida have struggled in this type of case to determine what evidence was sufficient to create a jury question on the constructive notice issue.[43]

The court also noted that it had previously held that the nature of some businesses or their mode of operation altered or eliminated the requirement to establish constructive knowledge.[44] It had so previously held in cases involving places of amusement that a higher degree of diligence might be applicable in such venues where large numbers of patrons would foreseeably be

34. *Id.* at 317.
35. *Id.*
36. *Id.* at 318; *see also* Soprano v. B&B Cash Grocery Stores, Inc., 757 So. 2d 514, 515 (Fla. 4th Dist. Ct. App. 1999).
37. *Owens*, 802 So. 2d at 318.
38. *Soprano*, 757 So. 2d at 515.
39. *Id.* at 515–16; *see also Owens*, 802 So. 2d at 319.
40. *Owens*, 802 So. 2d at 320.
41. Colon v. Outback Steakhouse of Fla., Inc., 721 So. 2d 769, 771 (Fla. 3d Dist. Ct. App. 1998).
42. *Owens*, 802 So. 2d at 320.
43. *Id.* at 321.
44. *Id.* at 323.

present.[45] The court also recognized that premises liability rules have evolved in a variety of ways in other jurisdictions.[46] Thus, it did not feel bound to strictly adhere to prior standards.[47]

In the companion cases before it, the supreme court first held that "[t]he aging condition of the banana in each case . . . [supported] a reasonable inference that the aging occurred on the floor."[48] The court also concluded that the nature of the defendants' business posed a substantial risk of injury to customers from slip-and-fall accidents.[49] It then held "that the existence of a foreign substance on the floor of a business" that causes a fall "creates a rebuttable presumption that the premises . . . [were not maintained] in a reasonably safe condition."[50] The court stated that this holding supported the policy of encouraging premises owners "to take protective measures to prevent foreseeable risks."[51] Furthermore, it does not permit them to benefit from inadequate record keeping, a problem for plaintiffs in trying to prove when the defendant had last checked the floors of its premises.[52]

The supreme court also dealt with a slip and fall action in a different venue, a nursing home, in *Markowitz v. Helen Homes of Kendall Corp.*[53] Mrs. Markowitz "slipped and fell on a grape in the main area of the nursing home facility," Helen Homes, where her mother was a resident.[54] "Helen Homes permitted . . . [residents] to carry food from the dining room to their rooms,"[55] a practice that the plaintiffs claimed was negligent.[56] The Markowitzes also alleged that three nursing home employees were in the immediate vicinity of the fall and should have been aware of the grape's presence on the floor.[57] In response to the nursing home's motion for summary judgment, the plaintiffs attached an affidavit from an expert witness who concluded that "[i]t [was] not reasonable to allow residents to remove food from the dining area."[58] Nonetheless, the trial court entered final summary judgment for the defendant, and the Third District Court of Appeal affirmed on the basis that

45. *Id.* (citing Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (1948)).
46. *Id.* at 324.
47. *Owens*, 802 So. 2d at 321.
48. *Id.* at 329.
49. *Id.* at 330–31.
50. *Id.* at 331.
51. *Id.*
52. *Owens*, 802 So. 2d at 331.
53. 826 So. 2d 256 (Fla. 2002).
54. *Id.* at 257.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Markowitz*, 826 So. 2d at 258.

the plaintiff failed to prove constructive knowledge of the grape's presence on the floor.[59] The District Court of Appeal also rejected the negligent mode of operation claim made by the plaintiffs.[60]

The supreme court explained that its decision in *Owens* had clarified that if a "premises owner could reasonably anticipate that dangerous conditions would arise as a result of its mode of operation then . . . actual or constructive knowledge of the specific foreign substance is not an issue."[61] It went on to state that a premises owner's duty to maintain safe conditions includes a duty to take "actions to reduce, minimize, or eliminate foreseeable risks before they" arise.[62] The court characterized this distinction as being one that "looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident."[63] Following these arguments, the court logically concluded that permitting residents to carry food to their rooms raised a genuine issue of material fact.[64] It also concluded that the fact that three employees were in the vicinity of where the fall occurred was sufficient to raise a question as to whether the home exercised reasonable care.[65] Finally, the court declined to discuss the effect upon the case of a newly enacted statute "involving 'transitory foreign objects or substances.'"[66] Judge Wells dissented, arguing that the rationale of *Owens* should not be applied here because it involved a supermarket, and this case involved a nursing home.[67] He asserted that, "[u]nlike supermarkets, there has not been a substantial history of difficulty in adjudicating liability in cases involving nursing homes."[68] He also argued that the unique service and critical role played by nursing homes should dissuade courts from altering liability rules that are applicable to them.[69]

As the court correctly noted, the statutory revision indicated that it would apply to cases pending on or after May 30, 2002, and its effect would

59. *Id.*
60. *Id.*
61. *Id.* at 259 (quoting Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 332 (Fla. 2001)).
62. *Id.*
63. *Markowitz*, 826 So. 2d at 260 (quoting Chiara v. Fry's Food Stores of Ariz., Inc., 733 P.2d 283, 285 (Ariz. 1987)).
64. *Id.* at 261.
65. *Id.*
66. *Id.* at 262 (citing FLA. STAT. § 768.0710 (2002)).
67. *Id.* at 264.
68. *Markowitz*, 826 So. 2d at 264.
69. *Id.*

need to be considered upon remand.[70] That statutory change is supportive of the policies advanced by the court's decisions. It indicates:

> (2) In any civil action for negligence involving loss, injury, or damage to a business invitee as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:
>
> . . . .
>
> (b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence . . . .[71]

This statute clearly eases the burden on plaintiffs in slip and fall cases, by eliminating the need for proof of what otherwise might be considered an essential fact, as opposed to shifting the burden of proof, as required by the *Owens* case. In addition, it does not limit the types of business premises covered in the manner that the cases suggest under the negligent mode of operation theory. This is arguably a superior approach, as the cases had not made it clear how to distinguish businesses to which the mode of operation theory should apply from those that it should not. The dissent by Judge Wells exemplifies this problem. Although nursing homes may provide a unique service, it is also arguable that the reasonable nursing facility should be even more diligent in keeping foreign substances and objects off of the floors because of the fragility and visual impairments of their residents. How this statute will be interpreted and how it will affect the interpretation of these two cases are developments that will be interesting to follow.

The Fourth District Court of Appeal considered a constructive notice issue in a slip and fall case in *Mashni v. LaSalle Partners Management Ltd.*[72] Saed Mashni sued LaSalle Partners Management Ltd., the owners and operators of the Pompano Square Mall, and the corporation contracted to provide janitorial services for the mall, Southeast Service Corporation.[73] Mashni testified in his deposition that he noticed a puddle of water on the floor when he entered the mall's restroom, but when he left, he slipped and fell in an-

70. *Id.* at 262; *see* FLA. STAT. § 768.0710.
71. § 768.0710(2)(b).
72. 842 So. 2d 1035 (Fla. 4th Dist. Ct. App. 2003).
73. *Id.* at 1036.

other puddle which was approximately three steps from the first puddle.[74] He also testified that the restroom was dark and that the water on the floor was dirty.[75] The trial court entered summary judgment for the defendants on the grounds that Mashni failed to exercise due care in light of an open and obvious danger, and that there was no evidence as to actual or constructive notice on the part of the defendants of the dangerous condition.[76]

The appellate court reversed the summary judgment on the basis that there was a genuine issue of fact as to whether there was constructive notice of the hazardous condition.[77] The court noted that constructive knowledge could be shown by circumstantial evidence.[78] In this case, the testimony that the water was dirty could support an inference that the water was on the floor for a sufficient period of time to create constructive notice.[79] The court also noted that after the trial court's ruling, the Supreme Court of Florida had addressed the issue of constructive notice in the slip and fall case of *Owens v. Publix Supermarkets, Inc.*[80] The court declined to address the statute dealing with negligence actions involving transitory foreign objects or substances because it had not yet been raised in the trial court.[81]

The Fourth District Court of Appeal also rejected the trial court's finding that the defendants could not be held liable because the condition was open and obvious.[82] The court held that, pursuant to precedent, the fact that a hazardous condition is open and obvious does not completely discharge the landowner from "a duty to maintain the property in a reasonably safe condition."[83] In taking into account all of the relevant circumstances, the court noted that a jury could find that even if the plaintiff was aware of the water, the landowner could still be held liable if it could not be negotiated with reasonable safety because the landowner could be deemed to expect that customers would proceed to encounter the danger where premises are held open to the public.[84] In this case, a jury could find that the defendants should have been aware that shoppers would encounter the water, as it was in the mall's restroom.[85]

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Mashni,* 842 So. 2d at 1038.
78. *Id.* at 1037.
79. *Id.*
80. 802 So. 2d 315 (Fla. 2001).
81. *Mashni,* 842 So. 2d at 1038.
82. *Id.* at 1039.
83. *Id.*
84. *Id.*
85. *Id.* at 1040.

IV. "CRASHWORTHINESS" AND COMPARATIVE FAULT

The Supreme Court of Florida also addressed another area of confusion by reviewing the application of comparative fault principles to the "crashworthiness" doctrine in *D'Amario v. Ford Motor Co.*[86] These cases are also known as "secondary collision" or "enhanced injury" cases because the claim is based upon a subsequent collision caused by a manufacturing defect which is unrelated to the original accident, but causes additional, distinct injuries.[87] This claim was first recognized by the Eighth Circuit Court of Appeal in *Larsen v. General Motors Corp.*[88] Florida adopted the principle in *Ford Motor Co. v. Evancho.*[89]

"In *D'Amario*, Clifford Harris, a minor, was injured when the car in which he was riding as a passenger collided with a tree and then burst into flames."[90] He and his mother, Karen D'Amario, sued Ford alleging that Harris' injuries were caused by a defective relay switch in the automobile.[91] The plaintiffs claimed that this defect caused the fire.[92] The parties stipulated that the driver's negligence and excessive speed caused the initial accident.[93] In a companion case, Maria Nash was killed in a car crash caused by an intoxicated driver.[94] Nash's estate sued General Motors ("GM"), alleging that it was liable for the defective design of her seat belt and the jury found that GM was not liable.[95]

The Supreme Court of Florida first noted that a majority of jurisdictions apply comparative fault principles in these crashworthiness cases.[96] The reasons in support of doing so have included: 1) there is often not a clear delineation between primary and secondary injuries in these cases; 2) the rules applied in these cases do not prevent the plaintiff from suing a negligent third party; and 3) additional proximate causes of an injury do not usually relieve the original tortfeasor from responsibility for his conduct.[97] In contrast, the courts adopting the minority view have concluded that: 1) the issue is not the precipitating cause of the injury, but the enhancement of inju-

86. 806 So. 2d 424 (Fla. 2001).
87. *Id.* at 426.
88. 391 F.2d 495 (8th Cir. 1968).
89. 327 So. 2d 201, 204 (Fla. 1976).
90. *D'Amario*, 806 So. 2d at 427.
91. *Id.* at 428.
92. *Id.*
93. *Id.*
94. *Id.* at 429.
95. *D'Amario*, 806 So. 2d at 430.
96. *Id.* at 431.
97. D'Amario v. Ford Motor Co., 806 So. 2d 424, 432 (Fla. 2001).

ries; 2) evidence of the driver's fault may be unfairly prejudicial to the plaintiff; and 3) comparison of driver fault may shield manufacturers from liability.[98] The Supreme Court of Florida decided to adopt the minority view.[99] The court analogized the choice to medical negligence cases in which the cause of the initial injury is not compared with the negligence of the medical provider who negligently treats the injury and causes additional, distinct harm.[100] The court held that these cases involve "two different causes-the cause of the accident and the cause of the enhanced injury."[101] The court noted that the focus in both of these cases had improperly been shifted from the negligence of the manufacturer to that of an intoxicated driver.[102]

V. THE TOBACCO LITIGATION

The Third District Court of Appeal issued an opinion in the controversial area of tobacco manufacturer liability for diseases caused by smoking in *Liggett Group Inc. v. Engle*.[103] This appeal arose from a judgment of $12.7 million in compensatory damages and $145 billion in punitive damages in a smokers' class action lawsuit against the major domestic cigarette companies and two industry organizations.[104] The claims were based upon theories of strict liability, negligence, breach of warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress.[105] In a prior opinion, the court had reduced the class in this action to include only Florida smokers.[106] The complexity of the case had necessitated an extensive trial plan that divided the trial proceedings into three phases.[107] The Phase One trial lasted for one year and focused on liability and entitlement to punitive damages claims.[108] In Phase Two, the jury was to consider the compensatory damages and comparative fault issues of three of the individual class representatives.[109] In Phase Three, which had not yet begun, new juries were to determine the damages claims for each class member.[110]

98. *Id.* at 433.
99. *Id.* at 435.
100. *Id.*
101. *Id.* at 437.
102. *D'Amario*, 806 So. 2d at 441.
103. 853 So. 2d 434 (Fla. 3d Dist. Ct. App. 2003).
104. *Id.*
105. *Id.* at 441.
106. R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. 3d Dist. Ct. App. 1996).
107. *Liggett Group, Inc.*, 853 So. 2d at 441.
108. *Id.*
109. *Id.*
110. *Id.* at 442.

The court first reversed the trial court's class certification.[111] The court noted that Rule 1.220(d)(1) of the *Florida Rules of Civil Procedure* permits class certification orders to be altered or amended at any time before entry of a judgment.[112] It then recognized that virtually all courts that have considered issues similar to this have ruled that class certification is unworkable and improper in smokers' cases.[113] A significant difficulty in permitting class claims in these cases to proceed involves the problem that each individual smoker's unique issues preclude the required finding that common issues of law predominate.[114] This lack of commonality problem is particularly acute in relation to the complex causation issues raised in these smoker cases. The claimants must demonstrate that in the claims based upon misrepresentation, there was an actual and reasonable reliance by the smoker on a false statement of material fact.[115] Similarly, the damage claims may differ significantly for individual claimants because the type and extent of illnesses and injuries suffered by the smokers will vary.[116] Furthermore, choice-of-law problems in determining the state with the most significant relationship to the claim arise in this type of case, where a variety of issues concerning liability may occur in different states, because the nature of the activity may occur across several decades.[117] This is a particularly acute problem in a state such as Florida, which has a large number of transients and immigrants.[118] In addition to the procedural and substantive tort law problems, the court also opined that decertification was also necessitated by due process and fair trial concerns in regard to the above problems.[119]

The court also reversed the punitive damages award, because it ruled that the jury had awarded punitive damages without first appropriately finding that the defendants were actually liable for injury to the claimants.[120] It held that even if the Phase One verdict constituted a finding that the defendants had "'breached a duty'" that was insufficient to support a finding of liability because there are other necessary elements that need to be estab-

111. *Id.* at 470.
112. *Liggett Group, Inc.*, 853 So. 2d at 434.
113. *Id.* at 444–45.
114. *Id.* at 445.
115. *Id.* at 446.
116. *Id.*
117. *Liggett Group, Inc.*, 853 So. 2d at 448.
118. *Id.* (citing Reed v. Philip Morris Inc., No. 96–5070, 1997 WL 538921, at *4 (D.C. Super. Ct. Aug. 18, 1997) (stating smokers may have started smoking, learned of the dangers, tried to quit, been diagnosed, or changed brands in different states)).
119. *Id.* at 450.
120. *Id.*

lished to prove a tort claim.[121] Again, the court deemed that the causation and damages issues needed to be litigated on an individual basis with each smoker.[122] In addition, the court found that the punitive damage award was excessive.[123] It noted that the award was "the largest punitive damage verdict in American legal history" and that it was roughly eighteen times the net worth of the defendants.[124] Without being precise as to what exactly made this verdict unlawful, it argued that at the very least, a punitive damage award cannot be so great as to result in bankruptcy.[125]

The court also reversed the awards because of inflammatory arguments made by plaintiffs' counsel.[126] The court severely criticized the conduct and statements of the counsel at great length.[127] First, it concluded that several statements made by counsel amounted to improper racial pandering and nullification arguments.[128] The court asserted that the nullification arguments violated "due process by exposing defendants to liability and punishment based upon lawful conduct."[129] This was exacerbated by the racially charged statements.[130] The court asserted that the statements were so excessive as to warrant reversal, even if no objections had been made, although there were repeated objections in this particular trial.[131] The court further chastised plaintiffs' counsel for "vouch[ing] to the jury that the defendants would not go bankrupt" by arguing that the award would be payable in future installments.[132] Not only were the defendants ordered to pay the punitive damage award immediately into the registry in this case, the court noted that punitive damages are to be measured by the defendants' ability to pay at the time of

121. *Id.* at 453.

122. *Liggett Group, Inc.*, 853 So. 2d at 455 (citing R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 41 (Fla. 3d Dist. Ct. App. 1996)).

123. Liggett Group Inc. v. Engle, 853 So. 2d 434, 456 (Fla. 3d Dist. Ct. App. 2003).

124. *Id.*

125. *Id.*

126. *Id.* at 458.

127. *Id.*

128. *Liggett Group, Inc.*, 853 So. 2d at 459. Amongst other statements, the court noted that counsel "juxtaposed defendants' conduct with genocide and slavery." *Id.* He also compared laws making it lawful to sell and market cigarettes to positions taken by defenders of slavery and the holocaust. *Id.* He also told the jury to stand up to the defendants' lawful conduct with comparisons to the acts of "civil disobedience of Martin Luther King and Rosa Parks." *Id.* at 460.

129. *Id.* at 461 (citing Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998)).

130. *Liggett Group, Inc.*, 853 So. 2d at 461. The court also noted that "[t]hese statements were made to a predominantly African-American jury." *Id.*

131. *Id.* at 456.

132. *Id.* at 463.

trial.[133] The court also held that plaintiffs' counsel engaged in misconduct by "ma[king] derogatory personal remarks about opposing counsel" and witnesses, referring to matters outside of the evidence, and by expressing personal opinions about the case.[134]

The court also reversed the punitive award against defendant Liggett as being unsupported by the evidence.[135] Although all defendants were found liable in Phase One of the trial, "the jury allocated zero fault to Liggett" in the first part of Phase Two "with respect to the non-punitive counts" of the complaint.[136] Because "there was no evidence that Liggett/Brooke had any knowledge about the health effects of smoking prior to" the relevant time period, and none of the class representatives had purchased or smoked Liggett/Brooke cigarettes, the court reversed this award.[137]

Furthermore, the court found the punitive award precluded by the settlement agreement reached in the lawsuit filed by the state of Florida against the tobacco industry.[138] Also, the court held that once a matter of public rights or interests had been resolved by a government agency, the same matter could not be relitigated by private parties.[139] Finally, the court held that the claims for punitive damages were based upon allegations of the same misconduct.[140]

VI. MARITIME LAW

A case that could have significant impact because it rejects a long line of precedent was decided by the Third District Court of Appeal in *Carlisle v. Carnival Corp.*[141] In this case, the Carlisle family was aboard a Carnival cruise ship when fourteen year-old Elizabeth felt ill and consulted the ship's physician, Dr. Mauro Neri.[142] Dr. Neri repeatedly advised the Carlisles over the course of several days that Elizabeth was suffering from the flu and, in response to questions, assured them that she did not have an appendicitis.[143] The family left the ship, and upon return to their home in Michigan, discov-

133. *Id.*
134. *Liggett Group, Inc.*, 853 So. 2d at 464.
135. *Id.* at 466.
136. *Id.*
137. *Id.*
138. *Id.* at 467.
139. *Liggett Group, Inc.*, 853 So. 2d at 468.
140. *Id.*
141. No. 3D01-1518, 2003 WL 22014591, at *1 (Fla. 3d Dist. Ct. App. Aug. 27, 2003).
142. *Id.*
143. *Id.*

ered that Elizabeth in fact had a ruptured appendix.[144] The Carlisles claimed that Carnival was negligent in hiring Neri and that it should also be held vicariously liable.[145] Neri had a contract with Carnival to provide services as the ship's physician and was issued a uniform.[146] He agreed to permit his photograph, name, and likeness to promote Carnival cruises and was considered a ship officer.[147] The ticket issued to the plaintiffs indicated that if a physician was on board the ship that he:

> shall not be considered in any respect whatsoever, as the employee, servant or agent of the carrier and the carrier shall not be liable for any act or omission of such person or those under his order or assisting him with respect to treatment, advice or care of any kind given to any guest.[148]

After noting that torts committed within maritime jurisdiction fell within maritime law, the court noted that a carrier still owed a duty to exercise reasonable care with its passengers.[149] The court cited *Barbetta v. S/S Bermuda Star*,[150] and a line of cases following its rationale, including two from federal courts in Florida,[151] for the proposition that the negligence of doctors employed by carriers could not be imputed to the carrier.[152] The court rejected this line of cases in favor of a rationale supported by commentators and other modern cases.[153] The court argued that *Barbetta* wrongly assumed that an ailing cruise passenger had a meaningful opportunity to forego treatment by the ship's doctor and demand that the ship's captain fulfill his duty of providing reasonable care in some other fashion.[154] The court also noted that the cruise line did not employ the physician "merely for the

144. *Id.*
145. *Id.*
146. *Carlisle*, 2003 WL 22014591, at *1.
147. *Id.*
148. *Id.*
149. *Id.* at *2.
150. 848 F.2d 1364 (5th Cir. 1988).
151. *See* Doe v. Celebrity Cruises, 145 F. Supp. 2d 1337 (S.D. Fla. 2001); Mascolo v. Costa Crociere, 726 F. Supp. 1285 (S.D. Fla. 1989).
152. Carlisle v. Carnival Corp., No. 3D01-1518, 2003 WL 22014591, at *2 (Fla. 3d Dist. Ct. App. Aug. 27, 2003).
153. *Id.* at *4 (citing Nietes v. Am. President Lines, Ltd., 188 F. Supp. 219, 220 (N.D. Cal. 1959)); MARLIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 3:10 (4th ed. 1990); Beth-Ann Erlic Herschaft, Note, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 NOVA L. REV. 575 (1992); Michael J. Compagno, Note, *Malpractice on the Love Boat*: Barbetta v. S/S Bermuda Star, 14 TUL. MAR. L.J. 381 (1990).
154. *Carlisle*, 2003 WL 22014591, at *4.

'convenience of the passenger,'"[155] but rather enjoyed a benefit in today's competitive cruise industry.[156] The court rejected the assertion that the cruise line could not control the doctor's medical services.[157] The court recognized that cruise lines are already vicariously liable for the negligence of its doctor in treating the crew.[158] In dealing with the exculpatory language on the ticket, the court held that it violated federal statutes.[159] Although this decision departs from precedent, it arguably reflects the realities in regard to the constantly growing cruise ship industry and the limited choices that an ill passenger has while aboard a ship.

VII. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP

In the past two years, Florida appellate courts have also had the opportunity to review tortious interference claims. In *Central States v. Florida Society of Pathologists*,[160] the Fifth District Court of Appeal considered a tortious interference with business relationships claim.[161] "Central States is a multi-employer/employee health and welfare plan . . . ."[162] It was sued by the Florida Society of Pathologists along with individual pathology practitioners.[163] Central States sent letters to the pathologists' organization and its members asserting "that Central States paid the hospitals for the laboratory services, but denied payment for the pathologists' professional component in the absence of evidence that the pathologist performed a specific, identifiable service for the individual patient who was charged for the professional component."[164] In addition to claiming tortious interference, the plaintiffs also claimed that the letters constituted unfair and deceptive trade practices.[165] Agreeing with the plaintiffs in a declaratory judgment order, the trial court noted that the defendant's description of a decision by the Seventh Circuit

155. *Id.* at *5.
156. *Id.*
157. *Id.* at *2.
158. *Id.* at *3–4.
159. *Carlisle*, 2003 WL 22014591, at *6. Section 183c of the *Unites States Code* states:
> any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner . . . . All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. § 183c(a) (2000).
160. 824 So. 2d 935 (Fla. 5th Dist. Ct. App. 2002).
161. *Id.* at 936.
162. *Id.*
163. *Id.*
164. *Id.* at 937.
165. *Cent. States*, 824 So. 2d at 937.

Court of Appeals,[166] was not a legitimate interpretation of that decision.[167] The District Court of Appeal reversed, holding that the pathologists failed to prove that they had an existing relationship with the patients or the members of Central States.[168]

The Fourth District Court of Appeal also considered a tortious interference claim against an attorney in *Richard Bertram, Inc. v. Sterling Bank & Trust.*[169] This case involved an appeal from a summary judgment entered on behalf of the plaintiff yacht brokers, who sued Sterling Bank & Trust ("Sterling"), their attorney, Dennis Wald, and Haluk Ergulec.[170] Sterling acquired a yacht through repossession.[171] Wald notified Bertram and French about the yacht, who then contacted Ergulec, a prior customer, about it.[172] Ergulec made an offer through the brokers that was refused.[173] A few weeks later, Ergulec negotiated with Sterling for the purchase of the yacht.[174] The appellate court agreed with the trial court that, "an agent is not liable for tortious interference with a contract of which his or her principal is a party."[175] It also held that the plaintiffs had not properly pled that the agent had a personal stake in the activities separate from the principal, nor had he made fraudulent statements, either of which would have established liability.[176]

In *LRX, Inc. v. Horizon Assocs. Joint Venture*, the Fourth District Court of Appeal considered claims for libel, slander, and tortious interference.[177] LRX, which conducted a lease auditing business, represented seven tenants of the landlord, Horizon.[178] LRX determined that Horizon had overcharged them, [and one of its principals].[179] Alan Marcus, a suspended attorney, informed Horizon of the overcharges in a report demanding payment.[180] Horizon responded by claiming that some of the report's statements constituted

166. Cent. States S.E. & S.W. Areas Health & Welfare Fund v. Pathology Labs. of Ark., P.A., 71 F.3d 1251 (7th Cir. 1995).
167. *Cent. States*, 824 So. 2d at 938.
168. *Id.* at 940.
169. 820 So. 2d 963 (Fla. 4th Dist. Ct. App. 2002). Plaintiffs also claimed breach of contract, conspiracy and fraud. *Id.* at 964.
170. *Id.* at 964–65.
171. *Id.* at 965.
172. *Id.*
173. *Richard Bertram, Inc.*, 820 So. 2d at 965.
174. *Id.*
175. *Id.* (citing Abruzzo v. Haller, 603 So. 2d 1338, 1339–40 (Fla. 1st Dist. Ct. App. 1992)).
176. *Id.* at 966.
177. 842 So. 2d 881, 881–82 (Fla. 4th Dist. Ct. App. 2003).
178. *Id.* at 883.
179. *Id.*
180. *Id.* at 883–84.

"the unauthorized practice of law," and sent copies of a letter and a supreme court opinion concerning Marcus' problems with the Florida Bar to the seven tenants.[181] The appellate court reversed the trial court's finding that the letter contained pure opinion because the statements included opinions mixed with facts, some of the facts contained in the letter were alleged to be false, and there was sufficient evidence of improper motive.[182]

The Fifth District Court of Appeal reviewed and dismissed a tortious interference complaint in *Sobi v. Fairfield Resorts, Inc.*[183] Sobi was a front line sales person employed at a Fairfield resort in Sandestin, who resigned his position to accept a position as marketing manager at Intrawest Resort ("Intrawest") in the same city.[184] Fairfield demanded that he resign the new position because of a part of his contract with Fairfield required that he not provide timeshare, vacation club, or related services to any entity within fifty miles of Fairfield's sales office in Destin for "six months after his employment with Fairfield ended."[185] After he failed to resign, Fairfield filed suit against him and Intrawest.[186] Intrawest then terminated him, Fairfield dismissed its suit, and Sobi filed the suit from which this appeal followed.[187] Sobi alleged that the non-compete clause in the Fairfield contract was void and unenforceable.[188] The appellate court ruled that it was an error for the trial court to go outside the four corners of the complaint to decide whether the agreement justified the interference by Fairfield.[189] The court rejected Fairfield's argument that it could not be held liable for an interference claim where it was a party to any business relationship that Sobi undertook in violation of his contract with Fairfield.[190]

VIII. SPOLIATION OF EVIDENCE

The Second District Court of Appeal dealt with a spoliation of evidence claim in *Townsend v. Conshor, Inc.*[191] Mr. Townsend sued his employer for a fall from a second story building under construction, claiming that the stair

181. *Id.* at 884.
182. *LRX, Inc.*, 842 So. 2d at 885–87.
183. 846 So. 2d 1204, 1205 (Fla. 5th Dist. Ct. App. 2003).
184. *Id.*
185. *Id.* at 1206.
186. *Id.*
187. *Id.*
188. *Sobi*, 846 So. 2d at 1206.
189. *Id.* at 1208.
190. *Id.*
191. 832 So. 2d 166, 167 (Fla. 2d Dist. Ct. App. 2002).

railing was defective.[192] At the same time, he sued the manufacturer and installer of the railing.[193] Despite the fact that Townsend settled a workers' compensation claim against his employer and did not allege any act that would overcome the bar that resulted by electing this remedy, the court held that this did not void his spoliation claim that the employer destroyed or discarded the railing.[194] The court noted that the spoliation claim is an independent action "that 'does not arise until the underlying action is completed,'" and that the claim against the manufacturer was still pending.[195]

The Third District Court of Appeal also reviewed a spoliation claim in *Lincoln Insurance Co. v. Home Emergency Services, Inc.*[196] This appeal involved a declaratory action sought by Lincoln Insurance that it was not obligated to defend and indemnify its insured, Home Emergency Services ("HES"), on this claim.[197] The underlying lawsuit involved a claim by Albert Milian, an employee of HES, who fell when a ladder purchased by HES collapsed.[198] The employee settled a workers' compensation claim against HES and filed a separate negligence action against the manufacturer of the ladder and Home Depot, where the ladder was purchased.[199] Milian claimed that HES violated section 440.39(7) of the *Florida Statutes*, which requires employers to aid their employees in third party actions filed by the worker for injuries sustained while employed.[200] Milian claimed that his attorney obtained an agreement with HES to maintain the ladder during the pendency of his negligence lawsuit and that it failed to do so.[201] Lincoln then filed the declaratory action claiming that it was not obligated to defend the spoliation claim pursuant to a general liability policy covering "bodily injury" or "property damage" liability.[202]

The court recognized that the spoliation claim "does not arise until the underlying action is" resolved because the plaintiff cannot prove a loss until that time.[203] The court also concluded that the spoliation claim involved an

192. *Id.*
193. *Id.*
194. *Id.* at 167–68.
195. *Id.* (quoting Lincoln Ins. Co. v. Home Emergency Servs., Inc., 812 So. 2d 433, 434–35 (Fla. 3d Dist. Ct. App. 2001).
196. 812 So. 2d at 434.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Lincoln Ins. Co.*, 812 So. 2d at 434.
202. *Id.*
203. *Id.* at 435.

"intangible" benefit.[204] The court deemed this important because the liability policy defined "property damage" as an injury to "tangible property."[205] Further, it argued that it agreed with a recent case from the Fourth District Court of Appeal,[206] which held that the bodily injury suffered by the claimant was not causally related to the destruction of property that was the source of the spoliation claim.[207] Judge Schwartz entered a vigorous dissent, claiming that the policy interpretation by the two appellate courts "embodies the kind of pettifoggery and hairsplitting which would have undoubtedly delighted Miss Snow, my seventh grade English teacher, who taught us how to rip sentences into unrecognizable (but diagramable) shreds."[208] After noting that insurance policies are to be construed most favorably to the insured, he argued that, because the policy provided that a "bodily injury must be caused by 'an occurrence,' defined as 'an accident,'" the proper interpretation of the provision was to require coverage because the same bodily injury was the source of both claims.[209] At a rehearing en banc, the panel agreed that the spoliation claim was "within the scope of the insuring agreement."[210] However, the panel concluded that the claim was excluded by a specific provision that it would not cover bodily injuries that arose out of and in the course of employment.[211] Judge Schwartz accepted this interpretation.[212] Judge Levy, in a separate concurrence, joined by Judges Green and Fletcher, argued that the finding of the claim being covered by the general agreement was in conflict with the *Norris* decision and should have been certified as being so.[213]

The Fourth District Court of Appeal considered a spoliation claim in relation to a negligence suit filed pursuant to an injury allegedly occurring when a shopping cart collapsed in *Martino v. Wal-Mart Stores, Inc.* [214] Ms. Martino and her husband alleged that the cart collapsed when she was asked to lift a bag of water softener salt by the cashier.[215] In addition to their negligence claim, the Martinos filed a spoliation claim, alleging that Wal-Mart

204. *Id.* (citing DiGiulio v. Prudential Prop. & Cas. Co., 710 So. 2d 3, 5 (Fla. 4th Dist. Ct. App. 1998)).
205. *Id.* at 435.
206. Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th Dist. Ct. App. 2000).
207. Lincoln Ins. Co. v. Home Emergency Servs., Inc., 812 So. 2d 433, 436 (Fla. 3d Dist. Ct. App. 2001).
208. *Id.* (citation omitted).
209. *Id.* at 437.
210. *Id.* at 438 (citation omitted).
211. *Id.* at 439.
212. *Lincoln Ins. Co.*, 812 So. 2d at 439.
213. *Id.* at 441.
214. 835 So. 2d 1251, 1252 (Fla. 4th Dist. Ct. App. 2003).
215. *Id.* at 1252–53.

had failed to preserve the shopping cart or a security video that may have recorded the accident.[216] Wal-Mart sought dismissal alleging that it had no "legal or contractual duty to preserve the evidence."[217]

The court noted that it had never squarely addressed the issue of whether a cause of action can be recognized where the defendant in the spoliation claim is the same defendant as the defendant in the underlying claim.[218] The court noted that jurisdictions were split as to whether this should be permitted.[219] It noted that the Third District Court of Appeal had concluded that such an action could be maintained in a medical malpractice case.[220] Citing, with approval, a case from the Supreme Court of California,[221] the court ruled that it preferred that a party to an action that engaged in such conduct be subjected to litigation sanctions instead.[222] To support it's holding, the court held that the failure to produce the shopping cart and video could support an inference that the evidence would have been unfavorable to Wal-Mart.[223]

IX. PRIVILEGES

The Third District Court of Appeal upheld a dismissal of a complaint on the basis of the litigation privilege in *Boca Investors Group, Inc. v. Potash.*[224] This case arose from a tortious interference with a business relationship complaint alleging that three lawsuits filed by the defendants had disrupted Boca Investors' efforts to purchase property on Fisher Island.[225] The court stated that the Supreme Court of Florida has held that absolute immunity applies to any act during the course of a judicial proceeding.[226] In this case, all of the acts alleged were related to the defendants' legal proceedings.[227] The concurring opinion of Judge Cope noted that a malicious prosecution

216. *Id.* at 1253.
217. *Id.*
218. *Id.* at 1254.
219. *Martino*, 835 So. 2d at 1255.
220. *Id.* (citing Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d Dist. Ct. App. 1984)).
221. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998).
222. *Martino,* 835 So. 2d at 1254 (citing *Cedars-Sinai Med. Ctr.*, 954 P.2d at 511).
223. *Id.* at 1257. The court held that counsel could argue the adverse inference, but a jury instruction on such would not have been inappropriate. *Id.* at 1257 n.2. The court also held that the plaintiff could pursue a negligent mode of operation theory of liability. Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251, 1258 (Fla. 4th Dist. Ct. App. 2003).
224. 835 So. 2d 273, 274 (Fla. 3d Dist. Ct. App. 2002).
225. *Id.*
226. *Id.* (citing Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606 (Fla. 1994)).
227. *Id.* at 275.

claim could be available in the future, but was premature where the underlying lawsuits were still pending.[228]

The Fourth District Court of Appeal dealt with a different type of privilege in *Byxbee v. Reyes.*[229] This action involved the plaintiff's psychotherapy records, which were protected by the psychotherapist patient privilege.[230] It involved a personal injury action arising from an automobile accident.[231] The court held that the exception to the statutory privilege[232] was not triggered here because the plaintiff's mental condition was not an element of his claim where he merely claimed a loss of enjoyment of life.[233]

In *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*,[234] the same court held that the defendants were not protected by the litigation privilege in an action for "abuse of process, malicious prosecution, tortious interference, conspiracy, and intentional infliction of emotional distress."[235] This case was the continuation of a lawsuit in which the District Court of Appeal had upheld the summary judgment on behalf of a different defendant, a law firm, because the law firm's action was pursuant to court orders.[236] In this appeal, the court noted that the review standard was different in this case, which involved a dismissal of the action.[237]

X. INVASION OF PRIVACY

The Second District Court of Appeal considered an invasion of privacy claim in *Heekin v. CBS Broadcasting, Inc.*[238] Heekin sued CBS in relation to "a *60 Minutes* segment concerning domestic violence."[239] Heekin alleged

228. *Id.* (Cope, J., concurring).
229. 850 So. 2d 595 (Fla. 4th Dist. Ct. App. 2003).
230. *Id.* at 596.
231. *Id.*
232. FLA. STAT. § 90.503(4)(c) (2003).
233. *Byxbee*, 850 So. 2d at 596.
234. 810 So. 2d 996 (Fla. 4th Dist. Ct. App. 2002).
235. *Id.* at 997.
236. Am. Nat'l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co., 748 So. 2d 1054 (Fla. 4th Dist. Ct. App. 1999), *rev. denied*, 767 So. 2d 453 (Fla. 2000).
237. *Am. Nat'l Title*, 810 So. 2d at 998. The court also reversed the dismissal of the intentional infliction of emotional distress claim, stating that it has held that if the plaintiff could prove that the defendants had conspired to make false statements to the authorities resulting in the plaintiff's arrest, she had stated a cause of action. *Id.* at 999 (citing Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992)). In addition, the court also reversed the dismissal of the tortious interference claim where the plaintiff alleged that the defendant interfered with its relationship with third persons. *Id.*
238. 789 So. 2d 355, 357 (Fla. 2d Dist. Ct. App. 2001).
239. *Id.*

that he was named during an interview with his former spouse that included photos of her and their children.[240] The segment included "stories and pictures of women who had been abused, battered, and killed by their domestic partners."[241] Although acknowledging the specific facts stated about him, he argued that the interview's "juxtaposition . . . with the other stories created the false impression that Heekin had abused and battered his wife and children."[242] The court first addressed a statute of limitations defense.[243] Florida statutes of limitation do not specifically include the invasion of privacy tort.[244] The trial court applied the two-year statute of limitation for libel and slander.[245] Noting that the Supreme Court of Florida had recognized the invasion action as a distinct tort, rejecting defenses and burden of proof rules recognized in libel and slander actions, the appellate court deemed the statute of limitation for those actions to be inapplicable.[246] The court also noted that three of the four types of conduct that constituted the tort did not involve defamation.[247] It also noted that two other Florida appellate courts had also applied the four-year provision.[248] Although it recognized an exception where the same facts alleged for the invasion claim constitute a claim for libel or slander, the court held such was not the case with this claim where the plaintiff alleged truthful, nondefamatory facts in support of his claim.[249]

The appellate court also reversed the trial court's holding that the claim should be dismissed because Heekin failed to allege that CBS had broadcast the segment with knowledge of its falsity or reckless disregard of its truthfulness.[250] The court distinguished the defendant's reliance on *Time, Inc. v. Hill,*[251] because that case dealt with a limited public figure and with the interpretation and application of a New York misappropriation statute.[252] The appellate court held that the appropriate question for resolution is "whether

240. *Id.*
241. *Id.*
242. *Id.*
243. *Heekin,* 789 So. 2d at 357.
244. *Id.*; *see* FLA. STAT. § 95.11 (2002).
245. *Heekin,* 789 So. 2d at 357.
246. *Id.* at 357–58 (citing Cason v. Baskin, 20 So. 2d 243 (Fla. 1944)).
247. *Id.* at 358 (citing Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239, 1252 n.20 (Fla. 1996)).
248. *Id.* (citing Putnam Berkley Group, Inc., v. Dinin, 734 So. 2d 532, 533 (Fla. 4th Dist. Ct. App. 1999); Houston v. Fla.-Ga. Television Co., 192 So. 2d 540, 542 (Fla. 1st Dist. Ct. App. 1966)).
249. *Id.*
250. *Id.* at 359.
251. 385 U.S. 374 (1967).
252. Heekin v. CBS Broadcasting, Inc., 789 So. 2d 355, 359 (Fla. 2d Dist. Ct. App. 2001).

the defendant acted with knowledge of the false light in which the plaintiff would be cast or in reckless disregard of such false light."[253]

Finally, the appellate court ruled that the trial court's summary judgment order for the defendant was erroneous in finding as a matter of law that "Florida's fair reporting privilege barred an action for invasion of privacy based on the broadcast of information contained in public records."[254] The district court of appeal first held that the plaintiff did not allege that the invasion was based on public disclosure of private facts; thus, the complaint was grounded on its use, not its source.[255] Second, the trial court record did not indicate that the broadcast was compared with public records, and even if it did, the broadcast of the interview with plaintiff's spouse and narrative by the correspondent were not public records.[256]

The Third District Court of Appeal also considered an invasion of privacy claim in *Walker v. Florida Department of Law Enforcement.*[257] The plaintiff, a teacher, appealed a dismissal of his complaint that a television report based part of its story on information contained on the Florida Department of Law Enforcement's web site.[258] First, the district court of appeal ruled that the defendant failed to comply with the notice requirements of section 768.28(6)(a) of the *Florida Statutes*.[259] The information on the web site was erroneously included in contravention of an order to seal and expunge the records.[260] The appellate court held that this error did not give rise to an independent privacy action.[261] The teacher's remedy was to seek a remedy from the trial court that ordered the expungement for economic losses.[262]

In a case filed in federal court, the Eleventh Circuit Court of Appeals considered an appeal of an invasion of privacy claim in *Tyne v. Time Warner Entertainment Co.*[263] This interesting case involved a claim involving the movie, *The Perfect Storm*,[264] released by Warner Brothers, which was based upon a book authored by Sebastian Junger, *The Perfect Storm: A True Story*

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 360.
257. 845 So. 2d 339 (Fla. 3d Dist. Ct. App. 2003).
258. *Id.* at 340.
259. *Id.*; FLA. STAT. § 768.28(6)(a) (2002).
260. *Walker*, 845 So. 2d at 360.
261. *Id.*
262. *Id.*
263. 336 F.3d 1286 (11th Cir. 2003).
264. THE PERFECT STORM (Warner Brother Pictures 2000).

of Men Against the Sea.[265] The movie was loosely based upon a true event in which a fishing vessel was lost at sea in a "'massively powerful'" storm.[266] This cause of action was brought by the survivors of two of the crewmembers of the lost vessel, Billy Tyne and Dale Murphy, Sr.[267] The motion picture "concededly dramatized" the actual event and fabricated some depictions of actions.[268] However, it did indicate at the beginning that "THIS FILM IS BASED ON A TRUE STORY."[269] On the other hand, during the closing credits, the film stated: "This film is based on actual historical events contained in 'The Perfect Storm' by Sebastian Junger. Dialogue and certain events and characters in the film were created for the purpose of fictionalization."[270]

In regard to the relational right of privacy claim brought by the Tyne children, the district court ruled that false light invasion of privacy claims are non-descendible.[271] The children, however, appealed, arguing that they had their own relational right of privacy claim.[272] The Eleventh Circuit noted that Florida courts tended to disfavor invasion of privacy actions brought by relatives, but that they had expressly declined to foreclose all such actions.[273] The court noted that Florida courts had recognized this exception pursuant to the policy that relatives of a deceased person "have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication."[274] It also found, however, that the exception had only been recognized in rare circumstances.[275] Thus, it held that the standard established by Florida courts was that the depiction needed to be sufficiently egregious and while the portrayal of the plaintiffs' father may have been "not entirely ingenuous . . . [it fell] considerably short of this standard."[276]

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265. *Tyne*, 336 F.3d at 1288.
266. *Id.*
267. *Id.* at 1288 n.1. In addition to the false light invasion of privacy claim, the plaintiffs also claimed a statutory claim of commercial misappropriation, from which the appellate court certified a question to the Supreme Court of Florida. *Id.* at 1289, 1291.
268. *Id.* at 1288.
269. *Tyne*, 336 F.3d at 1289.
270. *Id.*
271. *Id.* at 1292.
272. *Id.*
273. Tyne v. Time Warner Entm't Co., 336 F.3d 1286, 1292 (11th Cir. 2003) (citing Loft v. Fuller, 408 So. 2d 619, 624 (Fla. 4th Dist. Ct. App. 1981)).
274. *Id.*
275. *Id.*
276. *Id.*

XI. MISCELLANEOUS

The First District Court of Appeal overturned a summary judgment order in a case involving claims of false imprisonment and slander in *Spears v. Albertson's, Inc.*[277] Spears, an Albertson's employee, was accused by the store's manager, Craig Sopetto, and investigator, Kim Hires, "of stealing $600 by failing to make a cash register 'drop.'"[278] Because the parties disagreed about statements allegedly made by the principals, the court held that disputed issues of material fact existed as to whether she was held against her will, noting that plaintiffs in false imprisonment cases are not required to show that force was used or that they orally protested against the detention.[279] On the slander claim, the plaintiff alleged that Sopetto yelled as she was being taken through the store in handcuffs, "I want my money."[280] The trial court ruled that these words do not constitute slander.[281] The appellate court disagreed, ruling that a trier of fact could infer from this comment that Sopetto was accusing the plaintiff of theft as she was being taken from the store in handcuffs.[282] Furthermore, the appellate court ruled that a question of fact remained as to whether any qualified privilege Sopetto may have had was waived because his statement might have been "made with malice or too wide of an audience."[283]

The Second District Court of Appeal considered a temporary injunction restraining order in *East v. Aqua Gaming, Inc.*[284] William East ("East"), one of the defendants, was an employee of plaintiff Aqua Gaming, which operated a casino gaming renovation and resale business in parts of the United States, the Caribbean, and South America.[285] East resigned and formed co-defendant, Gaming Technology, with his wife.[286] Gaming Technology was formed to buy, sell, and refurbish casino gaming equipment.[287] After resignation, "East took with him a list of casinos, vendor names, telephone numbers, addresses, and contact persons compiled by Aqua Gaming . . . ," which he used to solicit customers for his new venture.[288] The appellate court held

277. 848 So. 2d 1176 (Fla. 1st Dist. Ct. App. 2003).
278. *Id.* at 1178.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Spears*, 848 So. 2d at 1179.
283. *Id.*
284. 805 So. 2d 932 (Fla. 2d Dist. Ct. App. 2001).
285. *Id.* at 933.
286. *Id.*
287. *Id.*
288. *Id.*

that the trial court correctly found that the customer list and other information was a trade secret covered by section 688.002(4) of the *Florida Statutes*.[289] The appellate court agreed with the trial court that the plaintiff had made the proper allegations to support the portions of the restraining order that precluded the defendants from using the confidential information obtained by East while employed by the plaintiff, and that the defendants return this information.[290] However, it overturned the portion of the order that prevented the defendants from competing with the plaintiff where there was no covenant to not do so.[291] The appellate court also held that it was error for the trial court to enter the temporary injunction without requiring the posting of a bond to pay costs and damages in event of a wrongful entry, which violated Rule 1.610(b) of the *Florida Rules of Civil Procedure*.[292]

The same appellate court considered a negligent infliction of emotional distress ("NIED") claim by an employee against her employer in *Rivers v. Grimsley Oil Co.* [293] The plaintiff claimed the psychological injuries she suffered as a result of a robbery could have been prevented by her employer had the employer provided security at her workplace, "a gas station/convenience store."[294] "The store had been robbed two weeks earlier."[295] She claimed that the failure to provide a silent alarm or other common security measures was negligent.[296] "The robber [was armed, but] did not shoot or otherwise physically harm the [plaintiff]."[297] After the robbery, the plaintiff sought medical assistance for her emotional trauma, and she suffered side effects including nausea, cramps, and confusion.[298] She alleged that these psychological injuries with physical manifestations warranted a recovery because of the defendant's negligence.[299]

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289. *East*, 805 So. 2d at 934.

290. *Id.* at 934–35. In such an action, the party seeking an injunction must prove:

> (1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (2) the substantial likelihood of success on the merits, (3) that the threatened injury to the petitioner outweigh[s] any possible harm to the respondent, and (4) that the granting of the injunction will not disserve the public interest.

Id. (citing P.M. Realty & Invs. Inc. v. Tampa, 779 So. 2d 404, 406 (Fla. 2d Dist. Ct. App. 2000)).

291. *Id.* at 935.

292. *Id.*

293. 842 So. 2d 975 (Fla. 2d Dist. Ct. App. 2003).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Rivers*, 842 So. 2d at 976.

299. *Id.*

After first denying a motion by the defendant that the action was barred by workers compensation immunity, the trial court entered summary judgment for the defendant because of the impact rule.[300] The appellate court noted that the law of negligence traditionally required protection for the physical well-being of the party and the physical security of property.[301] It did acknowledge that courts had expanded tort liability to include the economic loss and impact rules.[302] The appellate court noted that the impact rule, which requires that a plaintiff sustain some type of physical impact in conjunction with the negligence, remains the law in Florida.[303] Although recognizing that Florida courts had developed significant exceptions to the impact doctrine, it was unwilling to expand the doctrine in this case.[304] The court noted that Florida courts had permitted recovery in cases where the claimant suffered significant discernable physical injury after witnessing an accident in which a friend or family member was physically harmed;[305] where a professional, who had a fiduciary relationship with the plaintiff, violated a duty of confidentiality,[306] and where a doctor misdiagnosed a plaintiff's condition, causing the plaintiff to undergo invasive medical treatment or suffer physical effects of "prescriptions of caustic medication."[307] After noting that "the Third District had held that an invitee who is robbed at a motel . . ." had no NIED claim,[308] the court held that the *R.J.* decision was not intended "to open the courts to all claims involving side effects from . . ." properly-prescribed medications.[309]

The Third District Court of Appeal considered the proper calculation of a lost profits damages award in *Sostchin v. Doll Enterprises, Inc.*[310] In this case, the plaintiff, Doll Enterprises, sued its landlord, Guillermo Sostchin, trustee, in negligence for causing a fire that destroyed the commercial building in which the plaintiff was a tenant.[311] The plaintiff received a jury award

300. *Id.* The court ruled that the workers compensation statute did not authorize recovery for "mental or nervous injuries due to stress, fright or excitement only." *Id.*; *see* FLA. STAT. § 440.02(1) (2002).

301. *Rivers*, 842 So. 2d at 976.

302. Rivers v. Grimsley Oil Co., 842 So. 2d 975, 976 (Fla. 2d Dist. Ct. App. 2003).

303. *Id.* (citing Gracey v. Eaker, 837 So. 2d 348 (Fla. 2002)).

304. *Id.* at 977.

305. *Id.* (citing Champion v. Gray, 478 So. 2d 17 (Fla. 1985)).

306. *Id.* at 977 (citing *Gracey*, 837 So. 2d at 353).

307. Rivers, 842 So. 2d at 977 (citing R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 364 (Fla. 1995)).

308. *Id.* (citing Ruttger Hotel Corp. v. Wagner, 691 So. 2d 1177 (Fla. 3d Dist. Ct. App. 1997)).

309. *Id.*

310. 847 So. 2d 1123 (Fla. 3d Dist. Ct. App. 2003).

311. *Id.* at 1124.

of $1.3 million which included $1.18 million in "future lost profits" from the date of the fire to the end of the ten-year lease.[312] The appellate court held that the award was improperly based upon assumptions about gross profits by failing to deduct officer compensation as part of the corporation's expenses.[313] Furthermore, the plaintiff had suffered losses for the first three years of operation before a modest profit in the year prior to the fire.[314] After the fire, the business moved to a different building a block and a half away, and it incurred losses prior to closing.[315] In addition to improperly using gross profit figures, the court held that the plaintiff must, upon remand, '"provide competent evidence sufficient to satisfy the mind of a prudent impartial person as to the amount of profits lost as a result' of the fire."[316] It held that the evidence of the modest and sporadic pre-fire profits was too remote and speculative to satisfy the reasonable certainty requirement for proving the loss of future profits claim.[317] The Fourth District Court of Appeal considered the liability of multiple tortfeasors in a medical malpractice action in *Caccavella v. Silverman*.[318] Dr. Silverman performed surgery on Michael Caccavella.[319] "[S]ubsequently and separately, Dr. Topper treated Mr. Caccavella post-operatively."[320] Caccavella and his wife, Jennifer, sued both physicians and settled with Silverman, who signed a release.[321] Following the settlement, the trial court entered summary judgment in favor of Topper because Silverman was the initial tortfeasor, Topper a subsequent tortfeasor, and the plaintiffs had mistakenly failed to expressly reserve rights against Topper in their settlement with Silverman.[322]

The appellate court stated that Florida law holds an initial tortfeasor responsible for all subsequent injuries, thus requiring that settlements with initial tortfeasors be specific with respect to the damages that it and the release encompass, referring to its prior decision in *Mosley v. American Medical International, Inc.*[323] in noting its approval.[324] To avoid this limitation,

312. *Id.* at 1125.
313. *Id.*
314. *Id.*
315. *Sostchin*, 847 So. 2d at 1125.
316. *Id.* at 1128 (citing North Dade Cmty. Dev. Corp. v. Dinner's Place, Inc., 827 So. 2d 352 (Fla. 3d Dist. Ct. App. 2002)).
317. *Id.*
318. 814 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).
319. *Id.* at 1146.
320. *Id.*
321. *Id.*
322. *Id.*
323. 712 So. 2d 1149 (Fla. 4th Dist. Ct. App. 1998) (on motion for rehearing), *rev. denied*, 719 So. 2d 893 (Fla. 1998).
324. *Caccavella*, 814 So. 2d at 1146–47.

the plaintiffs argued that the physicians are joint tortfeasors, which the court noted is a question of fact.[325] The appellate court agreed with the trial court that the allegations demonstrate that the tortfeasors were not joint.[326] The plaintiffs alleged that Silverman negligently sutured a nerve and that Topper negligently failed to post-operatively diagnose the cause of the pain suffered by Caccavella, which the court held demonstrated that Topper's alleged negligence could only enhance or aggravate the original injury.[327] However, the court was less certain of how the Tort Reform and Insurance Act of 1986[328] affected the rule of *Stuart v. Hertz*,[329] which held that an initial tortfeasor is liable for subsequent medical malpractice.[330] How broadly the statute should be interpreted caused the court to again certify the following questions to the Supreme Court of Florida that it had previously certified in *Letzter v. Cephas*:[331]

> (1) Has the doctrine of *Stuart v. Hertz* been abrogated by the Tort Reform and Insurance Act of 1986, Chapter 86–160, Laws of Florida? (2) Does *Stuart v. Hertz* apply when the initial cause of action is one in medical malpractice and both the initial and subsequent tortfeasors are sued in the same action?[332]

The Third District Court of Appeal considered the application of the economic loss rule to a tort action independent of a contractual breach in *American Express Travel Related Services, Co. v. Symbiont Software Group, Inc.*[333] This case involved a claim against Symbiont, its president, David Schilling, and its former employee, David Prouty, for negligent hiring, retention, and security in connection with the theft of financial information of American Express members.[334] Symbiont sold point-of-sale systems for payment by charge cards to retail and service establishments.[335] The injuries

325. *Id.* at 1148.
326. *Id.*
327. *Id.*
328. *Id.* Section 768.81(3) of the *Florida Statutes* provides that "the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability . . . ." § 768.81(3) (2002).
329. 351 So. 2d 703 (Fla. 1977).
330. Caccavella v. Silverman, 814 So. 2d 1145, 1148 (Fla. 4th Dist. Ct. App. 2002).
331. 792 So. 2d 481 (Fla. 4th Dist. Ct. App. 2001), *disapproved on other grounds by* Barth v. Khubani, 748 So. 2d 260 (Fla. 1999), *rev. granted*, 796 So. 2d 535 (Fla. 2001)).
332. *Caccavella,* 814 So. 2d at 1149.
333. 837 So. 2d 434 (Fla. 3d Dist. Ct. App. 2002).
334. *Id.*
335. *Id.*

resulted from the misuse of the information by Prouty.[336] Although the economic loss rule normally bars tort claims where there is no personal injury or property damage, the appellate court noted that an exception existed for tort actions independent of contractual breach.[337] The court ruled that the claims in this case were totally independent of any contracts between Symbiont and buyers or users of its point-of-sale systems, and thus reversed dismissal of the complaint.[338]

The Fourth District Court of Appeal considered the application of the Wrongful Death Act in *Dourado v. Ford Motor Co.*[339] The plaintiff in this case prevailed in a wrongful death action raised pursuant to the death of her husband caused by the defective design of a seat belt.[340] The appellate court upheld the damage award's failure to include "medical expenses not charged against the estate or paid by or on behalf of the decedent."[341] In this case, no claim was made by the hospital in excess of the sums paid by the decedent's insurance.[342]

The Fourth District Court of Appeal considered the coverage of the Volunteer Protection Act in *Campbell v. Kessler.*[343] In this case, the defendant, Reuben Berger, rear-ended the plaintiff's car while he was in uniform driving a citizen patrol car belonging to the Palm Beach Sheriff's Office as a volunteer member of its Citizen Observer Patrol.[344] The defendant's estate was granted a summary judgment pursuant to Florida's Volunteer Protection Act,[345] which nominally provides immunity from personal injury or property damage actions for volunteers of nonprofit organizations.[346] The appellate court reversed because there were genuine issues of material fact as to whether Berger acted as an ordinarily prudent person.[347] The Fourth District Court of Appeal appropriately overruled the trial court's holding that the reasonable person standard did not apply to volunteers.[348] The plain lan-

336. *Id.* at 435.
337. *Id.*
338. *Symbiont Software Group, Inc.*, 837 So. 2d at 435.
339. 843 So. 2d 913 (Fla. 4th Dist. Ct. App. 2003).
340. *Id.* at 914.
341. *Id.*
342. *Id.*
343. 848 So. 2d 369 (Fla. 4th Dist. Ct. App. 2003).
344. *Id.* at 370.
345. FLA. STAT. § 768.1355(1) (2003).
346. *Campbell*, 848 So. 2d at 370.
347. *Id.* at 371–72.
348. *Id.* at 371.

guage of the statute indicates otherwise,[349] even though that makes the immunity protection of minimal value to volunteers.

The Fourth District Court of Appeal also reversed an award of attorney fees in *Murphy v. Centlivre*.[350] The underlying claim in this case involved a personal injury action for injuries sustained by a minor child, Carlee Murphy, by a car driven by James Centlivre.[351] Carlee's mother, Nancy Murphy, entered a contingency fee agreement with attorney Brian Hersh.[352] "On or about February 5, 2001, Hersh received an offer from Centlivre's liability insurer in the amount of $300,000 to settle the matter."[353] The offer was never conveyed to Murphy, and Hersh was discharged on February 20, 2001.[354] Hersh filed a notice of intent to impose a retaining and charging lien for services rendered in the lawsuit filed by Murphy's new attorney.[355] At the hearing on Hersh's motion to impose the lien, his expert testified that, in addition to negotiating the offer, Hersh was able to waive subrogation claims in the amount of $75,000 from the health care providers.[356]

The appellate court first noted that in a quantum meruit recovery of an attorney discharged without cause prior to resolution of the case, several factors need to be considered.[357] The trial court, in awarding $100,000 in attorney's fees, had given great weight to the results obtained.[358] The appellate court found that the evidence in support of the subrogation waivers did

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349. The relevant part of section 768.1355(1) of the *Florida Statutes* provides:

> Such person shall incur no civil liability for any act or omission by such person which results in personal injury or property damage if:
> (a) Such person was acting in good faith within the scope of any official duties performed under such volunteer service and such person was acting as an ordinary reasonably prudent person would have acted under the same or similar circumstances . . . .

§ 768.1355(1).

350. 850 So. 2d 600 (Fla. 4th Dist. Ct. App. 2003).

351. *Id.*

352. *Id.*

353. *Id.* at 601.

354. *Id.*

355. *Murphy*, 850 So. 2d at 601.

356. *Id.*

357. *Id.* at 602. These include:

> the time and labor required, the novelty, complexity and difficulty of the issues involved, the likelihood that acceptance of the case will preclude other employment, the customary rate charged in the locality, the significance of or amount involved in the representation and result obtained, special demands or time limitations, the nature and length of the professional relationship with the client, the reputation and experience of the attorney, and whether the fee is fixed or contingent.

Id. (citing Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz, 652 So. 2d 366, 369 n.4 (Fla. 1995)).

358. *Id.*

not support the trial court's ruling.[359] Testimony from representatives of the health insurers deposed after the hearing indicated that the amount of liens from them totaled $15,219.07.[360] In addition, the representative for one of these lienholders indicated that Hersh had never negotiated with it.[361] Furthermore, he expended only 14.20 hours over ten months and never communicated the settlement offer to his client.[362] The appellate court remanded with a direction to grant Hersh compensation for the time expended at a reasonable rate for like attorneys in the community.[363] It is also noteworthy that the concurring opinion of Judge Klein expressed a desire to call to the Florida Bar's attention the misrepresentations of fact made in regard to the waiver of subrogation liens at trial and in the appellate brief.[364]

The Fourth District Court of Appeal considered the appropriateness of a punitive damages claim in *Zuckerman v. Robinson*.[365] The case involved a hit-and-run, rear-end collision in which the defendant was intoxicated above the legal limit.[366] The jury assessed $243,952 in compensatory damages and $250,000 in punitive damages.[367] The defendant testified that he had $4,500 in assets and his income in previous year was a little more than $2,600.[368] In deposition, he had stated that he did not feel that he deserved punishment and that a punitive damages award would have to exceed $200,000 "to get his attention."[369]

The appellate court noted that punitive damages can be awarded in intoxicated driving cases.[370] In reviewing the history of Florida case law on the issue, the court noted that the Supreme Court of Florida stated in *Arab Termite & Pest Control of Florida v. Jenkins*,[371] that, "[p]unitive damages should be painful enough to provide some retribution and deterrence, *but should not be allowed to destroy the defendant*."[372] Feeling compelled to apply this precedent that punitive damages may not exceed the defendant's financial ability, the court nevertheless proceeded to explain why it did not

359. *Murphy*, 850 So. 2d at 602.
360. *Id.*
361. *Id.*
362. *Id.* at 603.
363. *Id.*
364. *Murphy*, 850 So. 2d at 603.
365. 846 So. 2d 1257 (Fla. 4th Dist. Ct. App. 2003).
366. *Id.*
367. *Id.* at 1258.
368. *Id.*
369. *Id.*
370. *Zuckerman*, 846 So. 2d at 1258.
371. 409 So. 2d 1039 (Fla. 1982).
372. *Zuckerman*, 846 So. 2d at 1260 (citing *Jenkins*, 409 So. 2d at 1043).

really wish to do so in this case.[373] First, it noted that the financial worth of this defendant was based completely on his testimony.[374] It also noted that the legislature had singled out DUI cases as particularly suitable for punitive damages.[375] Furthermore, it argued that criminal DUI fines are not dependent upon the defendant's ability to pay and argued that the court should remove its self-imposed judicial limitation on civil cases where intoxicated driving is involved.[376] Therefore, it certified to the Supreme Court of Florida, as a question of great public importance, whether the "economic castigation limitation on punitive damages should be eliminated entirely or at least amended in cases of injury caused by driving while intoxicated."[377]

XII. CONCLUSION

As can be seen from this summary, Florida appellate courts have been busy during the past two years addressing a wide variety of issues. As some of the decisions indicate, and as the new medical negligence amendments clearly demonstrate, further clarification on some of these issues also remains to be done.

373. *Id.*
374. *Id.* at 1261.
375. *Id.* (citing FLA. STAT. § 768.736 (2002)).
376. Zuckerman v. Robinson, 846 So. 2d 1257, 1261 (Fla. 4th Dist. Ct. App. 2003).
377. *Id.* at 1262.