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Torts

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Torts: 1991 Survey of Florida Law

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I. INTRODUCTION

Although Florida appellate courts did not issue numerous landmark opinions this past survey year, several well-recognized Florida legal doctrines were reexamined and in some instances, the preexisting boundary lines of those legal doctrines were changed. Several significant appellate court decisions have recognized further exceptions to the exclusiveness of liability afforded employers for injuries that occur to employees during the course and scope of their employment found in

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Florida's Workers' Compensation Act.[1] Additionally, various appellate court decisions have caused the Florida Supreme Court to reexamine the parameters of Florida's dangerous instrumentality doctrine which holds owners of automobiles liable for injuries occasioned by the negligent operation of their automobiles by others with the owner's permission.[2] Appellate courts at the intermediate appellate level have been confronted with applying and attempting to harmonize statutes and a rule of civil procedure which are aimed at producing more settlements and less litigation in Florida courts by allowing parties to offer to settle civil cases, accompanied by the sanction of the award of costs and attorney's fees awarded against the party who unreasonably rejects a settlement offer.[3]

Finally, the legislature has been somewhat active in amending statutes which impact upon Florida's tort laws. Specifically, the legislature has acted to immunize employers from civil liability for disclosure of information concerning the performance of a prior employee.[4] Additionally, the legislature has acted to allow motorsport race course operators to immunize themselves from liability by obtaining a signed waiver from the participant.[5] These areas are discussed in the text below and in the order introduced.

II. EXCEPTIONS TO THE "EXCLUSIVITY OF REMEDY" FOUND IN FLORIDA'S WORKERS' COMPENSATION ACT

A. *Florida Courts Expressly Recognize an Intentional Tort Exception to an Employer's Immunity for On-the-Job Injuries*[6]

For the first time in Florida, the First District Court of Appeal in

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1. FLA. STAT. § 440.11(1) (1991).

2. The decision in Anderson v. Southern Cotton Oil Co., 74 So. 975 (1917), is recognized as the genesis of Florida's dangerous instrumentality doctrine.

3. FLA. STAT. § 45.061 (1991); FLA. STAT. § 768.79 (1991); FLA. R. CIV. P. 1.442.

4. FLA. STAT. § 768.095 (1989).

5. FLA. STAT. § 549.09 (1989).

6. FLA. STAT. § 440.11(1) (Supp. 1990). This statute reads in pertinent part:

> The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee, the legal representative thereof . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

Id.

Cunningham v. Anchor Hocking Corp. expressly recognized that an employee's remedy for work-place injuries does not rest exclusively in Florida's Workers' Compensation Act when it is alleged that the employer committed an intentional tort.[7] In *Cunningham* though, the First District Court of Appeal started from the erroneous premise that the Florida Supreme Court in *Fisher v. Shenandoah General Construction Co.*[8] and *Lawton v. Alpine Engineered Products, Inc.*[9] held that an employee can bring a cause of action for an intentional tort against his employer.[10] Instead, the Florida Supreme Court in *Fisher* and *Lawton* expressly declined the offer to decide whether Florida's workers' compensation law precludes an action sounding in intentional tort against employers.[11] In both *Fisher*[12] and *Lawton*,[13] the cases failed to present a record and allegations which demonstrated the existence of an intentional tort. Accordingly, the question of whether such employer conduct is excepted from civil liability pursuant to Florida's Workers' Compensation Act was not reached by the Florida Supreme Court.

In *Fisher*, the Florida Supreme court held that the allegation Fisher was killed when the employer knowingly exposed him to noxious gases and "in all probability" knew such exposure would cause injury or death did not allege sufficient facts demonstrating the existence of an intentional tort.[14] In *Lawton*, the Florida Supreme Court rejected Lawton's claims of intentional tort where grounded upon allegations that Lawton's employer fraudulently failed to provide guards on a punch press that crushed Lawton's hand, after the employer was informed of the need for the guards by numerous written notifications by the manufacturer.[15]

The First District in *Cunningham* also referred to *Byrd v. Richardson-Greenshields Security, Inc.* in support of its ruling.[16] However, the Florida Supreme Court in *Byrd* did not hold that an action sound-

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7. 558 So. 2d 93, 95 (Fla. 1st Dist. Ct. App.), *rev. denied*, 574 So. 2d 139 (1990).

8. 498 So. 2d 882 (Fla. 1986).

9. 498 So. 2d 879 (Fla. 1986).

10. *Cunningham*, 558 So. 2d at 95.

11. *See Fisher*, 498 So. 2d at 882; *Lawton*, 498 So. 2d at 879.

12. 498 So. 2d 882.

13. 498 So. 2d 879.

14. 498 So. 2d at 883-84.

15. 498 So. 2d at 880-81.

16. *Cunningham*, 558 So. 2d at 95 n.1 (citing Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989)).

ing in intentional tort by the employer is outside the ambit of Florida's workers' compensation law. Rather, the court found that the sexual harassment claim involved an injury to one's dignity and self esteem, which is not compensable under Florida's workers' compensation law.[17] The *Byrd* court, in following *Strothers v. Morrison Cafeteria*,[18] expressly stated that it did not matter whether the act of sexual harassment by the employer is intentional. Furthermore, the court used a two-part test to determine what types of injuries are compensable:

> First the injury must 'arise out of' the employment in the sense it is caused by a risk inherent in the nature of the work in question. *It is immaterial whether the injury is caused by an intentional or unintentional act, so long as the act arose out of this type of risk . . . .*[19]

In any event, the *Cunningham* court examined the allegations in the third amended complaint which attempted to allege fraud and battery as intentional torts committed by the employer. The plaintiff alleged that the employer consciously and intentionally failed to warn her of the presence of toxic substances in the plant where she worked "with a deliberate intent to injure" and that the conduct was "substantially certain" to "cause injury or death."[20] The plaintiff alleged that she was "deliberately" and "intentionally" battered by reason of the employer "knowingly" exposing the plaintiff to toxic substances by removing labels from containers and by "deliberately" diverting a smoke stack so that noxious fumes were delivered back to the plant where she worked.[21] The complaint further alleged a knowing and intentional failure to provide ventilation[22] with a specific intent to injure the plaintiff.[23]

The *Cunningham* court found that these allegations were sufficient

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17. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1104 (Fla. 1989) (noting that an injury to self-esteem does not inhere in the work place).

18. 383 So. 2d 623, 628 (Fla. 1980).

19. *Byrd*, 552 So. 2d at 1104 n.7 (emphasis added) (citing *Strother*, 383 So. 2d at 624-26).

20. *Cunningham*, 558 So. 2d at 95.

21. *Id.* at 95-96.

22. *Id.* The plaintiffs also alleged that the employer engaged in a "fraudulent and malicious" scheme to save money which included the false representations made to the plaintiffs regarding the ventilation and the need for safety equipment. *Id.*

23. *Id.* at 96.

to state a cause of action amounting to intent against the employer.[24] The court distinguished *Fisher*[25] on the basis that the plaintiff's allegations in *Fisher* alleged that injury or death would occur "in all probability" instead of to a "substantial certainty."[26] Accordingly, the "substantial certainty" standard was recognized by the *Cunningham* court as sufficient to support a claim for intentional tort as an exception to Florida's Workers' Compensation Act.[27]

Following on the heels of *Cunningham* was the recent Third District Court of Appeal decision in *Connelly v. Arrow Air, Inc.*[28] *Connelly* involved an appeal from the trial court's entry of final summary judgment which was based on the theory that Workers' Compensation is the plaintiff's exclusive remedy.[29] Karen Connelly brought the action against her husband's employer, Arrow Air, Inc., for the wrongful death of her husband, a co-pilot killed on take-off from Gander, Newfoundland. Mr. Connelly was on board flight 920 which was traveling from the Middle East under a contract which Arrow Air had with the Multinational Force and Observers to transport troops between the Middle East and the United States.[30]

There was some evidence, mostly in the form of congressional testimony, that the management of Arrow Air consciously disregarded Federal Aviation Administration regulations and disregarded proper maintenance practices.[31] The Third District found that because there was evidence that Arrow Air's officials knew of the allegedly poor maintenance practices, such evidence created a jury issue as to whether Arrow Air acted in the belief that harm was substantially certain to occur.[32] The dissent noted that the Florida Supreme Court in *Lawton*[33] required that the evidence show that the employer's conduct would cause injury to a "virtual certainty" and that violation of safety regula-

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24. *Id.* at 97.

25. 498 So. 2d 882 (Fla. 1986).

26. *Cunningham*, 558 So. 2d at 97.

27. *Id.* Unfortunately, in deciding *Cunningham*, the court failed to state the legal basis for reaching the conclusion that an intentional tort exception exists to the exclusivity of remedy found in Florida's workers' compensation law.

28. 568 So. 2d 448 (Fla. 3d Dist. Ct. App. 1990), *rev. denied*, 581 So. 2d 1307 (1991).

29. *Id.* at 449.

30. *Id.*

31. *Id.* at 449-50.

32. *Id.* at 451.

33. 498 So. 2d at 880.

tions and negligent maintenance practices do not equal intent.[34]

It may now be sufficient in Florida to allege the formula that negligence plus negligence equals intent, and as a result, employers will probably be subjected to another wave of lawsuits despite the "exclusivity of remedy" provision found in workers' compensation law. If employers intentionally injure their employees, they should not be able to find haven under Florida's Workers' Compensation Act. However, it now appears that negligent conduct, when magnified by adjectives and coupled with conclusory allegations, can elevate an employer's conduct from negligent to intentional.

B. *The Third District Court of Appeal has Recognized an Exception to the Exclusivity of Remedy Found in Florida's Workers' Compensation Law Based upon the "Dual Persona" Doctrine*

The recent case of *Percy v. Falcon Fabricators, Inc.* was initially brought by an employee, Percy, against her employer and others for injuries sustained during the course and scope of her employment and caused by an allegedly defective pressure cooker at a Kentucky Fried Chicken (KFC) outlet.[35] The trial court entered summary judgment for the employer, KFC National Management Company, on the basis of the exclusivity of remedy found in Florida's workers' compensation law.[36]

Although not found in the record before the trial court, on appeal, the plaintiff contended that KFC National Management could be liable to her in tort on the basis of the "dual persona" doctrine.[37] The dual persona doctrine provides that a corporate employer is liable in tort for injuries caused to employees by a defective product manufactured by a corporation which merges with the corporate employer after the product is manufactured. The basis for the doctrine rests upon the theory that a corporate successor is liable for the torts of the predecessor corporation, because the predecessor's corporate liability is not extin-

34. *Connelly*, 568 So. 2d at 451 (Jorgenson, J., dissenting).

35. 584 So. 2d 17 (Fla. 3d Dist. Ct. App. 1991).

36. *Id.*

37. *Id.* The dual persona doctrine has its origin in basically two sources. *See* Billy v. Consolidated Mach. Tool Corp., 412 N.E.2d 934 (N.Y. 1980); 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 72.80, 78.83 (1990).

guished by reason of the merger.[38] The employee/plaintiff is then allowed to circumvent the exclusivity of remedy provision of the Workers' Compensation Act upon the theory that the employer is viewed as having a second persona as a third party tortfeasor since a separate corporation manufactured the product prior to the merger, and the plaintiff had no employment relationship with the predecessor corporation. As stated by the Florida Supreme Court in *Celotex Corp. v. Pickett*, " '[w]e will not allow such an acquiring corporation to jettison inchoate liabilities into a never-never-land of transcorporate limbo.' "[39] However, it is recognized by the dissents in *Pickett* that a corporation should not be held vicariously liable for an act that it did not commit or authorize.[40]

In line with these dissents, one court has rejected the dual persona doctrine where the injury occurs following the corporate merger.[41] That court reasoned that no tort liability can be transferred to the successor corporation if the injury and damages occur after the merger since there is no tort liability until there are damages.[42] Florida also adheres to the rule that there can be no tort liability until there is an injury.[43] A conceptual problem with the reasoning underlying the dual persona doctrine is that a predecessor corporation should not escape liability due to merger with the employer corporation; also, potential plaintiffs should still have a remedy even after the merger, so that employees have a remedy against the successor corporation in the position of the employer, under Florida workers' compensation law. Thus, the obligation for injuries is not jettisoned into "transcorporate limbo."

Currently, the *Percy* decision is still under appellate review as it apparently conflicts with *Roberson v. Nooter Corp.* which declined to apply the "dual capacity" doctrine as a vehicle for the plaintiff to sue his employer for injuries sustained while using a product manufactured by a subsidiary of the parent corporate employer.[44] The Third District Court of Appeal attempted to distinguish *Roberson* by stating that the "dual capacity" doctrine and not the dual persona doctrine was rejected and that *Roberson* did not involve a corporate merger between

38. *See* FLA. STAT. § 607.1106(1)(c) (Supp. 1990).

39. 490 So. 2d 35, 38 (Fla. 1986) (quoting Wall v. Owens Corning Fiberglass Corp., 602 F. Supp. 252, 255 (N.D. Tex. 1985)).

40. *Id.* at 39 (Overton and McDonald, JJ., dissenting).

41. Quick v. All Tell Mo., Inc., 694 S.W.2d 757 (Mo. Ct. App. 1985).

42. *Id.*

43. McIntyre v. McCloud, 334 So. 2d 171, 172 (Fla. 3d Dist. Ct. App. 1976).

44. 459 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1984).

the corporate employer and the manufacturer.[45] However, *Roberson* did involve the merger between a manufacturer of a product and the employer after the product was manufactured.[46] In addition, in a corporate merger situation, there is little reason for a court to distinguish between the terms "dual capacity" and dual persona because the term "dual capacity" refers to the theory that an employer can be liable by acting in another capacity, such as a landlord, vendor or products manufacturer.[47] However, a merger occurred in both *Roberson* and *Percy*; thus, the theory of liability in each case is really grounded upon the dual persona doctrine. In any event, the Third District Court of Appeal has added the dual persona doctrine to a growing list of exceptions to the exclusivity of remedy found in Florida's workers' compensation law.

III. THE FLORIDA SUPREME COURT REEXAMINES THE "DANGEROUS INSTRUMENTALITY" DOCTRINE

Recently, the Florida Supreme Court reexamined Florida's dangerous instrumentality doctrine in the course of determining whether that doctrine applied to long-term lessors of motor vehicles.[48] In *Kraemer v. General Motors Acceptance Corp.*[49] and in *Abdala v. World Omni Leasing*,[50] the Florida Supreme Court was asked to revisit the applicability of the dangerous instrumentality doctrine with a view towards determining whether Florida Statute section 324.021(9)(b) exempted long-term lessors of motor vehicles from tort liability under the dangerous instrumentality doctrine if certain insurance and contract requirements outlined in the statute are met.[51]

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45. *Percy*, 584 So. 2d at 18 n.3.

46. *See Roberson*, 459 So. 2d at 1156.

47. *See generally* 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.81(a) (1990). The "dual capacity" doctrine has been criticized by Larson as subject to misapplication and abuse. *Id.*

48. The first decision that recognized the "dangerous instrumentality doctrine" in Florida holds an owner of a motor vehicle liable for injuries caused by operators of that vehicle with the owner's permission. Anderson v. Southern Cotton Oil Co., 74 So. 975 (Fla. 1917).

49. 572 So. 2d 1363 (Fla. 1990)

50. 583 So. 2d 330 (Fla. 1991).

51. FLA. STAT. § 324.021(9)(b) (1987). The statute reads:

> Owner/lessor. Notwithstanding any other provision of the Florida Statutes or existing case law, the lessor, under an agreement to lease a motor vehicle for one year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than $100,000.00/

Initially, numerous intermediate appellate courts were confronted with attacks upon this statute. *Perry v. GMAC Leasing Corp.* was the first case where a district court considered such attacks and held that a long-term lessor is exempt from liability under the dangerous instrumentality doctrine by reason of section 324.021(9)(b).[52] The court stated that the statute did not conflict with Florida's constitutional right of access to the courts[53] and that there was no right at common law to sue long-term lessors.[54] Therefore, the court determined that the plaintiff was not unconstitutionally denied a prior right to sue long-term lessors.[55] Essentially, the Second District Court of Appeal analogized the position of the long-term lessor, such as GMAC, with that of a conditional vendor who held only legal title and had no beneficial use of, or right of control over, the motor vehicle. Further, the court noted that the statute did not place a cap on damages which limited the plaintiff's right to recovery since the plaintiff had an unlimited right of recovery against the lessee.[56] For these reasons, the court held that the long-term lessor should not be exposed to liability under the dangerous instrumentality doctrine.[57]

The Second District Court of Appeal reaffirmed *Perry* in *Kraemer v. General Motors Acceptance Corp.*[58] In addition to reiterating the basis for its decision in *Perry*, the Second District rejected the plaintiff's contention that there is no reason for distinguishing those cases which hold a short term lessor of a vehicle liable under the dangerous

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> 300,000.00 bodily injury liability and $50,000.00 property damage liability, shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

Id.

52. 549 So. 2d 680 (Fla. 2d Dist. Ct. App. 1989).

53. *Id.* at 681; *see* FLA. CONST. art. I, § 21.

54. *Perry*, 549 So. 2d at 681.

55. *Id.*

56. *Id.* Indeed, section 324.021(9)(b) requires the highest *minimum* level of liability and property damage insurance mandated by the Florida Legislature. *See* FLA. STAT. § 324.021(9)(b) (1987).

57. *Perry*, 549 So. 2d at 682 (citing Palmer v. Evans, 81 So. 2d 635 (Fla. 1955)).

58. 556 So. 2d 431 (Fla. 2d Dist. Ct. App. 1989), *quashed*, 572 So. 2d 1363 (1990).

instrumentality doctrine from long-term lessors.[59] The *Kraemer* court noted that in short term rental agreements, the owner retains much more control over the use of the motor vehicle since the owner can direct who can drive the automobile, where it is to be driven and where the automobile must be returned.[60] Subsequently, numerous other intermediate appellate courts have followed the reasoning found in *Perry* and *Kraemer* and have come to the same conclusion.[61]

Nevertheless, on review, the Florida Supreme Court quashed the Second District's decision in *Kraemer*.[62] The Florida Supreme Court rejected the argument that long-term lessors should not be liable under the dangerous instrumentality doctrine by reason of the long-term lessor's lack of beneficial use and control over the vehicle.[63] The court noted that the same notion was rejected in *Lynch v. Walker*[64] and in *Susco Car Rental System v. Leonard*,[65] which involved a short term lease. The supreme court reaffirmed that the dangerous instrumentality doctrine has been applied with very few exceptions since the 1920s and therefore, refused to adopt the requirement that a long-term lessor of a motor vehicle must have beneficial use and control over the vehicle before liability for its negligent use can attach under the dangerous instrumentality doctrine.[66]

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59. *Kraemer*, 556 So. 2d at 434. An excellent discussion of the distinction and the interplay between the dangerous instrumentality doctrine and the legislatively mandated minimum financial responsibility requirements for operation of motor vehicle is found in Judge Altenbernd's concurrence. *See id.* (Altenbernd, J., concurring).

60. *Id.*

61. *See, e.g.*, Raynor v. De La Nuez, 558 So. 2d 141 (Fla. 3d Dist. Ct. App. 1990); Tsiknakis v. Volvo Finance N. Am., 566 So. 2d 520 (Fla. 3d Dist. Ct. App. 1990); *approved sub nom.* Abdala v. World Omni Leasing, Inc., 583 So. 2d 330 (1991); Folmar v. Young, 560 So. 2d 798 (Fla. 4th Dist. Ct. App. 1990), *amended*, 16 Fla. L. Weekly D1688 (4th Dist. Ct. App. June 26, 1991) (en banc).

62. 572 So. 2d 1363.

63. *Id.* at 1364-65.

64. 31 So. 2d 268 (Fla. 1947).

65. 112 So. 2d 832 (Fla. 1959).

66. *Kraemer*, 572 So. 2d at 1365. It is interesting to note that although the Florida Supreme Court rejected the element of beneficial use and control over the vehicle as a predicate to impose liability upon a long-term lessor for its use, the supreme court's opinions issued during the same era as Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920), indicate that the dangerous instrumentality doctrine was adopted upon the ground that there must be an element of control by the owner over the driver. In White v. Holmes, 103 So. 623, 624 (1925), the court reversed a finding that an owner of an automobile for hire was vicariously liable for the operation of the motor vehicle. The Florida Supreme Court based its decision on the fact that the owner did

In *Kraemer*, the Florida Supreme Court further rejected the notion that a lease is analogous to a conditional sales contract and thus, that the long-term lessor is exempt from ownership liability under Florida Statute section 324.021(9)(a) (1986).[67] The court noted that the lease in *Kraemer* imposed numerous restrictions on the use of the vehicle, thus evincing that GMAC still retained control over it, unlike the terms of a conditional sales agreement or mortgage.[68] Although the court held the long-term lessor liable as an owner under the dangerous instrumentality doctrine, the Florida Supreme Court left open the door as to application of section 324.021(9)(b) which, by its enactment, the legislature intended to exempt long-term lessors from ownership liability under the dangerous instrumentality doctrine if certain statutory contractual and insurance requirements are met.[69] The Florida Supreme Court eventually closed the door opened by *Kraemer* in *Abdala v. World Omni Leasing, Inc.* where the court confronted the contentions that the statute unconstitutionally denied the rights to access to the courts, equal protection, and due process.[70]

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not furnish the driver. *Id.* The court distinguished the holding in *Southern Cotton Oil Co. v. Anderson* and explained: "The rules of liability stated in Anderson v. Southern Cotton Oil Company, 73 Fla. 432, 74 So. 975, (Fla. 1917) . . . and Southern Cotton Oil Company v. Anderson, 80 Fla. 441, 86 So. 629 . . . have referenced to the facts of those cases showing a relation of employer and employee or principal and agent." *White*, 103 So. at 264. Indeed, the supreme court in Engelman v. Traeger, 136 So. 527 (1931), expressly rejected strict application of the dangerous instrumentality doctrine to owners unless there existed a principal/agent—master/servant relationship between the owner and the driver. This rejection of the dangerous instrumentality doctrine was recognized by the Florida Supreme Court and overruled in Lynch v. Walker, 31 So. 2d 268, 271-72 (1947).

67. *Kraemer*, 572 So. 2d at 1366. The pertinent Florida statute provides:

> Owner/Lessor.—a person who holds the legal title of a motor vehicle; or, in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the condition stated in the agreement with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this Chapter.

FLA. STAT. § 324.021(9)(b) (1987). The supreme court failed to address section 324.021(9)(b) in *Kraemer* since neither party argued that it even applied. *See* 572 So. 2d at 1366 n.5.

68. *Kraemer*, 572 So. 2d at 1366.

69. Regarding legislative intent, see the excerpts of the legislative debate quoted in *Kraemer*, 572 So. 2d at 1364-67.

70. 583 So. 2d 330, 332 (Fla. 1991).

The court began by reiterating its holding in *Kraemer* that long-term lessors are liable for the damages caused by their lessees under the dangerous instrumentality doctrine.[71] Next, the court addressed whether the statute which exempts long-term lessors from that liability violates the constitutional provision guaranteeing access to Florida courts.[72] The supreme court rejected the argument that there had always been a right of action against persons standing in the position of long-term lessors at common law in Florida.[73] The court explained that the legislature has stated that Florida's common law consists of the common and statutory laws of England in existence on July 4th, 1776.[74] No cause of action existed against lessors of instrumentalities in England on July 4th, 1776 or even in Florida prior to *Kraemer*.[75] The court thus found that the statute was not violative of Florida's constitutional right of access to the courts.[76]

The Florida Supreme Court also rejected the claim that the statute violated the plaintiff's equal protection and due process rights.[77] The court stated that there is a rational basis for the legislation due to the legislative recognition that a long-term lease is really an alternative financing arrangement and that long-term lessors, similar to banks that hold mortgages on vehicles, were properly excluded from the definition of "owner" for purposes of determining vicarious responsibility for operation on the motor vehicle.[78] Furthermore, the court disposed of the petitioner's contention that the statute violated the right to equal protection by finding that plaintiffs that are injured most are not discriminated against[79] since all plaintiffs, regardless of the severity of their injuries, have the right to sue the long-term lessees in the event of injury.[80]

As the progression of recent appellate decisions illustrate, the

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71. *Id.* at 331-32.
72. *Id.*; *see* FLA. CONST. art. I, § 21.
73. *Abdala*, 583 So. 2d at 333.
74. *Id.* at 332; *see* FLA. STAT. § 2.01 (1989).
75. *Abdala*, 583 So. 2d at 332; *see Kraemer*, 572 So. 2d 1363.
76. *Abdala*, 583 So. 2d at 333.
77. *Id.* at 333-34.
78. *Id.*
79. *Id.* at 334.
80. *Id.* The court failed to note that Florida Statute section 324.091(9)(b) requires the highest minimum amount of liability and property damage coverage in the state and which also provides a higher minimum source of recovery for injured plaintiffs. *See* FLA. STAT. § 324.091(9)(b) (1987).

"dangerous instrumentality doctrine" is applied with the same vitality as ever. However, the Florida Supreme Court has properly recognized that long-term lessors are excepted from vicarious liability as "owners" of motor vehicles, because they, like other financial institutions, are institutions through which the public may acquire automobiles and should not be liable in tort for the operation of those vehicles.

IV. OFFERS AND DEMANDS FOR JUDGMENT OR SETTLEMENT

Numerous cases are weaving their way through Florida's appellate courts involving the issues of how and whether the offer of or demand for judgment provisions found in two Florida statutes[81] and a rule of civil procedure promulgated by the Florida Supreme Court[82] apply in a given case. Both the statutes and the rule have as their goal the early termination of civil litigation, including tort litigation, via settlement. However, because both the Legislature and the Florida Supreme Court have attempted to reach the goal of attaining rapid and reasonable settlements, appellate courts have been confronted with the task of deciding whether the statutes conflict with the supreme court's constitutional rule making authority.[83]

The history of the offer of judgment rule began in 1972 when the Florida Supreme Court added Rule 1.442 to the Rules of Civil Procedure.[84] At this time, rule 1.442 was the same as rule 68 of the Federal Rules of Civil Procedure.[85] Both provided that the sanction of costs be awarded against a party after an offer of judgment is made by a party who rejects the offer if the judgment obtained was not more favorable than the offer.[86]

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81. FLA. STAT. § 45.061 (1987); FLA. STAT. § 768.79 (1986). Section 45.061 has been effectively repealed by the Florida Legislature for all causes of action arising after October 1, 1990. FLA. STAT. § 45.061(6) (1991). Section 768.79 is applicable only to those causes of action arising October 1, 1990. FLA. STAT. § 768.79 n.1 (1991).

82. FLA. R. CIV. P. 1.442.

83. FLA. CONST. art. V, § II(a). This constitutional provision reads: "The Supreme Court shall adopt rules for the practice and procedure in all courts . . . ." *Id.*

84. *In re* The Florida Bar: Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972).

85. *See* FED. R. CIV. P. 68. It is interesting to note that the Rules Committee at the time of adopting Rule 1.442 could not foresee the extent of its use when it commented: "The committee believes that it will not be used often based on information about the equivalent Federal Rule." *In re* Florida Bar: Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972).

86. FLA. R. CIV. P. 1.442. The writer will not delve into, or compare, the various

Thereafter in 1986, the legislature enacted Florida Statute section 768.79[87] which allowed recovery of reasonable costs and attorney's fees from the date of filing to demand for judgment.[88] The statute provided that if the judgment obtained by the plaintiff is twenty-five percent less

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time limitations and the procedural complexities of the rule, or each statute, regarding accepting or rejecting offers as it is beyond the scope of the survey. For an examination of these aspects of the rule and statutes see Bruce J. Berman & Jamie A. Cole, *New Offer of Judgment Rule in Florida: What Does One Do Now?* 64 FLA. B.J. 38 (1990)

87. Section 768.79 states:

> (1)(a) In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.
>
> (b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of the trial.
>
> (2)(a) If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.
>
> (b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
>
> 1. The then apparent merit or lack of merit in the claim that was subject to the offer.
>
> 2. The number and nature of offers made by the parties.
>
> 3. The closeness of questions of fact and law at issue.
>
> 4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.
>
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
>
> 6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

FLA. STAT. § 768.79 (1986).

88. FLA. STAT. § 768.79(1)(a).

than the original offer, costs and attorney's fees would be awarded against the plaintiff.[89] However, if the plaintiff recovered a judgment twenty-five percent greater than the offer of judgment, then an award of costs and attorney's fees is made against the defendant.[90]

Next in 1987, the legislature promulgated Florida Statute section 45.061 which again sought to impose sanctions for unreasonable rejection of an offer of settlement.[91] The statute dictated that an award of

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89. *Id.*

90. *Id.*

91. FLA. STAT. § 45.061 (1987). This statute provides:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a 'test-case', presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this

costs and attorney's fees be entered by the court if the offer was unreasonably rejected.[92] The offer is presumed to have been unreasonably rejected if the judgment entered was at least twenty-five percent less than, or greater than, the offer, depending upon whether made by the defendant or the plaintiff respectively.[93]

Since both the Florida Supreme Court and the legislature spoke on the same subject, the appellate courts have been faced with the task of deciding whether any constitutional conflict exists and thus, whether the statutes or the rule are constitutionally infirm. The Florida Supreme Court was first to address the issue of whether the statutes conflicted with rule 1.442 in *The Florida Bar re: Amendment to Rules of Civil Procedure (offer of judgment)*.[94] In this opinion, the court declined to address the rule committee's concerns that the adoption of Rule 1.442 by the Florida Supreme Court infringed upon the legislature's power to enact substantive law, and the court implicitly recognized that it was not so clear that the sanction provided for in Rule 1.442 is solely procedural in nature.[95] The court also declined to rule on the constitutionality of the substantive aspects of sections 768.79 and

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section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28.

FLA. STAT. § 45.061 (1987); *see also supra* note 81 and accompanying text.

92. FLA. STAT. § 45.061(2)(b) (1987).

93. *Id.*

94. 550 So. 2d 442 (1989).

95. *Id.*

45.061 in that non-adversarial setting.[96] However, the court held that to the extent the statutes conflicted with the procedural aspects of the rule, the statutes were unconstitutional.[97]

The Fifth District Court of Appeal in *Milton v. Leapai* ruled that section 45.061 unconstitutionally infringed upon the Florida Supreme Court's rule making authority.[98] The Fifth District recognized the supreme court's prior holding that the statute's procedural aspects infringed upon the court's rule making authority.[99] The district court determined that the substantive portion of the statute could not be severed from the procedural aspects of the statute and declared the statute unconstitutional in its entirety.[100] In rendering its decision, the court attempted to distinguish the conflict created between its decision and *A.G. Edwards & Sons v. Davis*, which held section 45.061 as substantive in its entirety.[101] However, it is interesting to note that in *Curenton v. Chester*,[102] a different panel of the Fifth District Court of Appeal seemed to narrow *Milton*'s holding by reading it to declare section 45.061 unconstitutional only as to its procedural aspects.

The Fifth District was next confronted with the flip side of the constitutional contention that section 45.061 infringed upon the Florida Supreme Court's rule making authority.[103] In *Reinhardt v. Bono*, the court was concerned that promulgation of Rule 1.442 may have encroached upon the legislature's constitutional authority to create substantive law,[104] but declined to rule on the issue, holding only that the Florida Supreme Court can consider the constitutionality of its own

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96. *Id.* at 443.

97. *Id.* However, the Second District Court of Appeal has held section 45.061(2) and (3) to be substantive in nature. *See* A.G. Edwards & Sons v. Davis, 559 So. 2d 235 (Fla. 2d Dist. Ct. App. 1990) (following Richardson v. Honda Motor Co., 686 F. Supp. 303 (M.D. Fla. 1988) and Hemmerle v. Bramalea, Inc., 547 So. 2d 203 (Fla. 4th Dist. Ct. App. 1989)); *see also* Tarpon Springs Arcade Ltd. v. City of Tarpon Springs, 16 Fla. L. Weekly D1924 (2d Dist. Ct. App. July 26, 1991).

98. 562 So. 2d 804 (Fla. 5th Dist. Ct. App. 1990) (currently on review in the Florida Supreme Court).

99. *Id.* at 807.

100. *Id.* at 807-08.

101. *Id.* at 808 (citing A.G. Edwards & Sons v. Davis, 559 So. 2d 228 (Fla. 2d Dist. Ct. App. 1990)).

102. 576 So. 2d 969 (Fla. 5th Dist. Ct. App. 1991).

103. Reinhardt v. Bono, 564 So. 2d 1233, 1234 (Fla. 5th Dist. Ct. App. 1990).

104. *Id.* at 1234 (citing The Florida Bar re: Amendment to Rules of Civil Procedure Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989)).

rules.[105]

Additionally, section 768.79 has also failed to withstand a constitutional attack brought in the First District Court of Appeal.[106] In *Hughes v. Goolsby*, the First District expressly declared the statute unconstitutional.[107] The court stated that the reasoning of the Fifth District Court of Appeal in *Milton* when declaring section 45.061 unconstitutional also applied to section 768.79.[108] Thereafter, the court certified to the Florida Supreme Court the question of section 768.79's constitutionality as being one of great public importance.[109]

In practice, section 45.061 is the only statute that sanctions both defendants and plaintiffs for rejecting offers of settlement in truly meritless cases; the defending party is allowed to recover its costs and attorney's fees where the plaintiff fails to obtain any judgment.[110] A requirement that a plaintiff recover a judgment before a defendant can be awarded a sanction against the plaintiff has the effect of rewarding plaintiffs bringing truly meritless claims but who still reject reasonable offers of settlement or judgment. The purpose of the statute and the rules is not furthered by this result.[111]

In any event, it will ultimately be up to the Florida Supreme

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105. *Id.* at 1235.

106. *See* Hughes v. Goolsby, 578 So. 2d 348, 349 (Fla. 1st Dist. Ct. App. 1991).

107. *Id.*

108. *Id.* (citing FLA. STAT. § 768.79 (1989)).

109. *Id.*

110. FLA. STAT. § 45.061 (1987); *see, e.g.*, Memorial Sales v. Pike, 579 So. 2d 778, 779-80 (Fla. 3d Dist. Ct. App. 1991) (holding that, unlike section 768.79(1)(a) and Rule 1.442, section 45.061(2)(b) *does not* require that a judgment be entered in favor of the plaintiff in order for that statute to apply). However, the Second District Court of Appeal has recently followed those cases construing Rule 1.442 and section 768.79 requiring that a judgment in favor of the plaintiff must be recovered in order for that rule to operate; therefore, a defendant is not entitled to sanctions pursuant to section 45.061 unless the plaintiff recovers a judgment. Westover v. Allstate Ins. Co., 581 So. 2d 988 (Fla. 2d Dist. Ct. App. 1991). The *Westover* court erroneously followed Kline v. Publix Supermarkets, Inc., 568 So. 2d 928 (Fla. 2nd Dist.Ct.App. 1990), which construed section 768.79 and Rule 1.442 to require that a judgment must be recovered by the plaintiff since both expressly required that a judgment be entered in favor of the plaintiff. *Id.*

111. It now appears that the legislature has acted to resolve any conflict created by Florida Statute section 45.061 by effectively repealing section 45.061 and inserting the curious provision, which apparently conflicts with the historical note and applies to policies, or contracts, after the effective date of 10-1-90: "This section does not apply to causes of action that accrue after the effective date of this act." FLA. STAT. § 45.061(6) (Supp. 1990).

Court and the legislature to harmonize, or eliminate the redundancy, between the rule and the statutes. Regardless of whether by rule or by statute, sanctions should be awarded to those who present meritless claims or defenses and thereafter, unreasonably reject offers to compromise cases requiring useless judicial labor be expended.

V. Recent Legislative Enactments that have Impacted Upon Florida Tort Law

The Florida legislature, by enacting Florida Statute section 768.095 codified the common law qualified privilege employers had previously enjoyed when communicating their opinions about former employees to potential employers.[112] The statute provides that employers who disclose information about a prior employee pursuant to a request by the prospective employer are presumed to be acting in good faith.[113] The plaintiff has the burden of demonstrating by clear and convincing evidence that the prior employer lacked good faith.[114] In order to rebut the presumption of good faith, the plaintiff must show

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112. The text of section 768.095 reads:

> 768.095 Employer Immunity from Liability; Disclosure of information regarding former employees.
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> (1) An employer who discloses information about a former employee's job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employees presume to be acting in good faith, and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil right of the former employee protected under Chapter 760.
>
> (2) This act shall take effect July 1, 1991, or upon becoming a law, whichever occurs later, and shall apply to causes of action accruing after that date.

FLA. STAT. § 768.095 (Supp. 1990).

Prior to enactment of section 768.096, case law recognized that an employer had a qualified common law privilege to communicate their opinions of their former employee's performance to prospective employers. Boehm v. American Bankers Ins. Group, Inc., 557 So. 2d 91 (Fla. 3d Dist. Ct. App. 1990); Kellums v. Freight Sales Centers, Inc., 467 So. 2d 816 (Fla. 5th Dist. Ct. App. 1985); Biggs v. Cain, 406 So. 2d 1202 (Fla. 4th Dist. Ct. App. 1981).

113. *See* FLA. STAT. § 768.095 (1989).

114. *Id.*

that the employer disclosed information which the employer knew to be false, deliberately misleading, was given with a malicious purpose or which violated a right of the employee under Florida Statutes chapter 760 which prohibits discrimination against a person on the basis of race, color, religion, national origin, handicap, or marital statutes.[115]

The Florida legislature's enactment of section 768.095 clarified the burden of proof allocated to litigants in actions brought by employees against their former employers for untrue or inaccurate comments. Additionally, the statute identifies what type of evidence is necessary for a plaintiff to overcome the statutory presumption of good faith. These evidentiary standards and burdens were absent from previous decisional law which recognized that an employer has a qualified privilege to communicate his opinions about an employee's performance to a prospective employer.

The legislature has also taken action to exempt operators of a closed course motorsport facility from liability to nonspectators. By enacting Florida Statute section 549.09,[116] the legislature now allows an

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115. *See* FLA. STAT. § 760.01 (1977).

116. 549.09 Motorsport nonspectator liability release.

(1) As used in this section:

(a) "Closed-course motorsport facility" means a closed-course speedway or racetrack designed and intended for motor vehicle competition, exhibitions of speed, or other forms of recreation involving the use of motor vehicles, including motorcycles.

(b) "Nonspectator area" means a posted area within a closed-course motorsport facility, admission to which is conditioned upon the signing of a motorsport liability release, which is intended for event participants, and which excludes the "spectator area" as defined in paragraph (c).

(c) "Spectator area" means a specified area within a closed-course motorsport facility intended for admission to the general public, whether or not an admission price is charged, or to which admitted persons of the general public have unrestricted access including the grandstands and other general admission seating or viewing areas.

(d) "Posted" means a nonspectator area enclosed by a fence or wall at least 6 feet high in all areas where nonparticipants might gain entrance, and at least 3 feet high in any other areas, with signs having letters at least 4 inches high restricting entry, including, but not limited to, signs reading "Nonspectator Area," displayed not more than 500 feet from the entrance to the nonspectator area and at each entrance to the nonspectator area.

(e) "Negligence" means all forms of negligence, whether misfeasance or nonfeasance and failure to warn against an existing or future dangerous condition but does not include gross negligence, recklessness, or willful and

operator of a closed course motorsport facility to require the signing of a liability release form as a condition of entry into any nonspectator part of the facility. The statute further sets forth the requirements regarding contents of the form.

VI. CONCLUSION

This survey year, Florida courts have further attenuated the already beleaguered statutory immunity previously afforded employers by the Workers' Compensation Act. As an unintended counter balance, the courts have eliminated a potential party defendant in automobile negligence cases by recognizing the conditional statutory tort immunity given long-term lessors by the legislature. It appears that this past survey year, through common law decisions, the courts have expanded avenues of recovery for plaintiffs. At the same time, the courts have also respected legislative directives regarding limiting tort liability.

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wanton conduct.

(f) "Motor vehicle" means an automobile, motorcycle, or any other vehicle propelled by power, other than muscular power, used to transport persons and which operates within the confines of a closed-course motorsports track.

(g) "Nonspectators" means event participants who have signed a motorsport liability release.

(2) Any person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator, or his heirs, representative or assigns, for negligence which proximately causes injury or property damage to the nonspectator within a nonspectator area during the period of time covered by the release.

(3) A motorsport liability release may be signed by more than one person so long as the release form appears on each page, or side of a page, which is signed. A motorsport liability release shall be printed in 8 point type or larger.

Section 2. This act shall take effect October 1, 1991.

FLA. STAT. § 549.09 (1989).