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Abstract

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KEYWORDS: wrong, death, live birth

Wrongful Death: Florida Still Requires "Live Birth" as Prerequisite to Recovery: Duncan v. Flynn

Morace C. Duncan brought an action for the wrongful death of his son, John Norris Duncan. He named as defendants Dr. John D. Flynn, an obstetrician; St. Joseph's Hospital; and their insurers, alleging that the doctor's negligent failure to recognize the necessity of a Caesarian section resulted in the death of the baby during the process of delivery. The trial court entered summary judgment in favor of all defendants, holding that the plaintiff had no claim for the wrongful death of the "unborn fetus."[1] The Second District Court of Appeal affirmed the summary judgment[2] and held that: 1) as a matter of law the decedent was not born alive, and 2) the "unborn viable fetus" was not a "person" under Florida's former wrongful death statute.[3] The Florida Supreme Court upheld the district court's ruling on both issues in a 4-3 decision with a dissent filed by Justice Karl.[4]

The facts showed that, after Dr. Flynn induced labor and the baby's head emerged, it became apparent that his shoulders were too broad to pass through the birth canal. Dr. Flynn and two assisting physicians tried various procedures for about twenty critical minutes with no success. They then realized that the baby's heartbeat had ceased and determined that the child could not be saved. At this point the physicians concentrated their efforts on saving the mother's life. With plaintiff's permission, they severed the child's head and removed the rest of its body by Caesarian section. The baby was full term and weighed fourteen pounds, eight ounces (head and torso). The death certificate listed cardiovascular failure due to strangulation as the cause of death.[5]

This case marks Florida's most recent failure to divorce itself from the ranks of the dwindling minority of states which still require a live

1. Duncan v. Flynn, 342 So. 2d 123, 124 (Fla. 2d DCA 1977).
2. *Id.* at 127.
3. §§ 768.01-.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973).
4. Duncan v. Flynn, 358 So. 2d 178, 179 (Fla. 1978), *rehearing denied* May 24, 1978.
5. 342 So. 2d at 124.

birth before allowing a wrongful death claim.[6] It was decided under the former Wrongful Death Act[7] because the death occurred three and one-half (3½) months prior to the effective date of the current Wrongful Death Act.[8] It is likely that the outcome would have been similar if decided under the current Wrongful Death Act, as each provides a cause of action for the wrongful death of any "person."[9] Thus, it is a noteworthy decision because it is a reaffirmation of the view that Florida courts have embraced under both the old and the new Wrongful Death Acts.[10] Florida has once again followed the old common law doctrine that it is cheaper to kill someone than to hurt him. Ironically,while adhering to this doctrine, the justices have previously conceded that the policy arguments in favor of recovery are compelling.[11] Why should Florida cling

6. Of the thirty-eight states which have confronted the issue to date, only twelve states, including Florida, have required that the death be subsequent to a live birth before allowing a claim for wrongful death. These states include, Arizona: Kilmer v. Hicks, 22 Ariz. App. 552, 529 P. 2d 706 (1974); California: Bayer v. Suttle, 23 Cal. App. 3d 361, 100 Cal. Rptr. 213 (Dist. Ct. App. 1972); Iowa: McKillp v. Zimmerman, 191 N.W. 2d 706 (Iowa 1971); Missouri: State v. Sanders, 538 S.W. 2d 336 (Mo. 1976); Nebraska: Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. 2d 229 (1951); New Jersey: Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); New York: Endresz v. Friedberg, 24 N.Y. 2d 478, 248 N.E. 2d 901, 301 N.Y.S. 2d 65 (1969); North Carolina: Gay v. Thompson, 266 N.C. 394, 146 S.E. 2d 425 (1966); Pennsylvania: Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A. 2d 502 (1966); Tennessee: Durrett v. Owens, 212 Tenn. 614, 371 S.W. 2d 433 (1963); Virginia: Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E. 2d 440 (1969).

7. §§ 768.01-.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973).

8. §§ 768.16-.27 FLA. STAT. (1977). This current wrongful death statute became effective July 1, 1972, and the decedent's death occurred March 20, 1972. The current wrongful death statute's format and language has remained the same since it became effective in 1972. Section 768.18(2), however, was amended in 1977. *See* FLA. STAT. 768.18(2) *as amended by* ch. 77-468, § 40, 1977 Fla. Sess. Law Serv.

9. The court noted this similarity in Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978), where it wrote: "[I]t is clear that our decision in *Stern* interpreting the scope of the term 'person' as used in the new Wrongful Death Act applies with equal force to the identical term as it appeared in the old Wrongful Death Act." *Id.* at n.3.

10. *See, e.g.*, Stokes v. Liberty Mutual Ins. Co., 213 So. 2d 695 (Fla. 1968); Stern v. Miller, 348 So. 2d 303 (Fla. 1977).

11. The supreme court in *Stern* conceded, "[T]he reasons for recovery are compelling . . . it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death." 348 So. 2d at 306. *See also* Simon v. United States, 438 F. Supp. 759 (S.D. Fla. 1977) where Judge Atkins wrote: "I am sympathetic to the compelling arguments in favor of recovery and cognizant of the inequities inherent in allowing a tortfeasor who so severely injures a fetus that it dies before birth to escape the liability which would have been imposed had the child survived birth, however briefly." *Id.* at 761.

to the minority view while recognizing the policy reasons for allowing recovery?

This was addressed in *Duncan v. Flynn,*[12] where the Supreme Court of Florida relied on the principles set forth in two earlier cases[13] in pronouncing that a baby must die subsequent to a live birth to give rise to an action for wrongful death.[14] In *Stokes v. Liberty Mutual Insurance Co.*[15] the Supreme Court of Florida held that an unborn fetus was not a "minor child" under Florida's former Wrongful Death Act.[16] However, that court specifically noted[17] that it did not determine whether a still-born fetus is a "person" under the old general Wrongful Death Act.[18] It is puzzling that the court in *Stokes* took pains to make that distinction, but phrased its holding in the all-encompassing terms "a right of action for wrongful death can arise only after the live birth and subsequent death of the child."[19] If the court truly meant to espouse such a broad rule of law, then the distinction it made between Sections 768.01 and 768.03 of the Florida Statutes would be senseless. If the baby must die after a live birth to give rise to a wrongful death action, then it would follow that the unborn fetus[20] can be neither a "minor child" nor a

12. 358 So. 2d 178.

13. Stokes v. Liberty Mutual Ins. Co., 213 So. 2d 695 (Fla. 1968); Stern v. Miller, 348 So. 2d 303 (Fla. 1977).

14. 358 So. 2d at 178.

15. Stokes v. Liberty Mutual Ins. Co., 213 So. 2d 695 (Fla. 1968) (parents had no cause of action for death of stillborn fetus from prenatal injuries which resulted from negligence of a motorist).

16. *Id. See* § 768.03 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973) which read:

> Whenever the death of any minor child shall be caused by the wrongful act, . . . the father of such minor child . . . may maintain an action . . . and may recover not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess.

17. 213 So. 2d at 698.

18. *Id. See* § 768.01 FLA. STAT. (1971), superseded by §§ 768.16-.27 FLA. STAT. (1973) which read:

> Whenever the death of any person in this state shall be caused by the wrongful act, . . . of any individual . . . or . . . corporation . . . and the act . . . is such as would, if the death had not ensued, have entitled the party thereby to maintain an action . . . and to recover damages in respect thereof, then and in every case the person or persons who . . . would have been liable to an action for damages, . . . notwithstanding the death of the person injured. . . .

19. 213 So. 2d at 700.

20. "Unborn" and "stillborn" are used interchangeably in this discussion. Ac-

"person." But the court in *Stokes* cautioned, "[w]e are not here called upon to determine whether the still-born fetus is a 'person'."[21] Obviously the court intended to leave unanswered the question of whether an unborn fetus is a "person" under the general wrongful death statute and merely required a live birth for a claim under the special Wrongful Death of a Minor provisions.[22] This does not, however, preclude a claim under the general wrongful death statute.

In *Stern v. Miller*,[23] decided under the current wrongful death statute,[24] the Florida Supreme Court reaffirmed the broad rule of law mentioned in *Stokes*,[25] but failed to recognize the internal inconsistency[26] of the *Stokes* decision. The court in *Stern* restricted the scope of its review to a determination of the legislative intent behind the new Wrongful Death Act.[27] The court reasoned that, because *Stokes* was decided before the new wrongful death statute was enacted, the legislature is deemed to have implicitly accepted the judicial construction of the word "person" contained therein by failing to further define it when the opportunity arose.[28] At first glance, this argument may seem valid, but the court ignored the immutable fact that the *Stokes* decision did not even purport to construe the word "person," but expressly limited its inquiry to the proper construction of "minor child" under the former Wrongful Death of a Minor Child statute.[29]

The Supreme Court of Florida now reaffirms that fallacy by holding in *Duncan v. Flynn*[30] that *Stern*[31] is dispositive of the issue—this in the face of the clear trend toward allowing wrongful death claims for

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tually, "unborn" refers to the child while it is still *in utero*, whereas "stillborn" refers to the child which died *in utero* and has been expelled from the mother's body. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGAUGE, unabr. (1971).

21. 213 So. 2d at 698.

22. For the distinction between those two sections *see* notes 16 and 18 *supra*.

23. 348 So. 2d 303 (Fla. 1977) (a fetus, which was alleged to have been viable and to have been fatally injured by defendant's negligence in an automobile accident, was held not a "person" for purposes of the Wrongful Death Act).

24. §§ 768.16-.27 FLA. STAT. (1973). The court in *Stern* cited the "current wrongful death statute" as shown. 348 So. 2d at 303. *See* note 8 *supra*.

25. 213 So. 2d at 700.

26. *Id.*

27. 348 So. 2d at 307.

28. *Id.* at 307-08.

29. *See* text accompanying notes 16 and 18 *supra*.

30. 358 So. 2d 178.

31. 348 So. 2d 303.

the death of a viable fetus.[32] The court's rationale is that it is following the legislative intent, yet the only convincing indication of that intent is found in the new statute itself,[33] and the result in *Duncan* appears to be contrary to the express intent of the legislature. Not only does Florida continue to adhere to the anachronistic view denying recovery for the wrongful death of the unborn child, but it has now adopted a very restrictive definition of "live birth."

The Florida Supreme Court found, *as a matter of law,* that the

32. Verkenner v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 (1949) was the first case to allow such an action. Since then, twenty-five other states have adopted that view. The court in *Stern v. Miller,* 348 So. 2d at 305 listed the following cases from those twenty-five states: Alabama: Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Alaska: Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1972); Connecticut: Gorke v. LeClerc, 23 Conn. Supp. 256, 181 A. 2d 448 (1962); District of Columbia: Simmons v. Howard University, 323 F. Supp. 529 (D.D.C. 1971); Delaware: Worgan v. Greggo & Ferrara, Inc., 11 Terry 258, 50 Del. 258, 128 A. 2d 557 (1956); Georgia: Porter v. Lassiter, 91 Ga. App. 712, 87 S.E. 2d 100 (1955); Illinois: Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E. 2d 88 (1973); Pleasant v. Certified Growers of Ill., Inc., 39 Ill. App. 3d 83, 350 N.E. 2d 65 (1976); Indiana: Britt v. Sears, 150 Ind. App. 487, 277 N.E. 2d 20 (1971); Kansas: Hale v. Manion, 189 Kan. 143, 368 P. 2d 1 (1962); Kentucky: Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955); Orange v. State Farm Mutual Auto Ins. Co., 443 S.W. 2d 650 (Ky. App. 1969); Rice v. Rizk, 453 S.W. 2d 732 (Ky. App. 1970); Louisiana: Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951); Massachusetts: Mone v. Greyhound Lines, Inc., 331 N.E. 2d 916 (Mass. 1975); Maryland: State Use of Odham v. Sherman, 234 Md. 179, 198 A. 2d 71 (1964); Michigan: O'Neill v. Morse, 385 Mich. 130, 188 N.W. 2d 785 (1971); Minnesota: Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838, 10 A.L.R. 2d 634 (1949); Pehrson v. Kistner, 301 Minn. 299, 222 N.W. 2d 334 (1974); Mississippi: Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Nevada: White v. Yup, 85 Nev. 527, 458 P. 2d 617 (1969); New Hampshire: Poliquin v. MacDonald, 101 N.H. 104, 135 A. 2d 249 (1957); Oklahoma: Evans v. Olson, 550 P. 2d 924 (Okla. 1976); Ohio: Stidham v. Ashmore, 109 Ohio App. 431, 11 Ohio Ops. 2d 383, 167 N.E. 2d 106 (1959); Oregon: Libbee v. Permanente Clinic, 268 Or. 258, 518 P. 2d 636 (1974), *rehearing denied,* 520 P. 2d 361 (Or. 1974); Rhode Island: Presley v. Newport Hosp., 365 A. 2d 748 (R.I. 1976); South Carolina: Fowler v. Woodward, 244 S.C. 608, 138 S.E. 2d 42 (1964); Todd v. Sandidge Constr. Co., 341 F. 2d 75 (4th Cir. 1974); Washington: Moen v. Hanson, 85 Wash. 2d 597, 537 P. 2d 266 (1975); West Virginia: Baldwin v. Butcher, 155 W. Va. 431, 184 S.E. 2d 428 (1971); Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); Wisconsin: Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 148 N.W. 2d 107 (1967).

33. § 768.17 FLA. STAT. (1977) entitled "[l]egislative intent" states that "[i]t is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-.27 are remedial and *shall be liberally construed.*" (emphasis added).

Duncan baby was not born alive.[34] This raises two questions: 1) Were the criteria used to define "live birth" valid; and 2) Was a strict rule of law defining "live birth" warranted?

Consider the factors used to determine whether or not there was a live birth. The court held that the child must acquire a "separate and independent existence of its mother"[35] evidenced by "expulsion (or in a Caesarian section, by the complete removal) of the child's body from its mother with evidence that the cord has been cut and the infant has an independent circulation of blood."[36] It appears that the court has identified the most commonly used criteria[37] (although respiration is often mentioned),[38] but has inexplicably required proof of every factor. The plaintiff pointed out that the baby's head was born spontaneously and life existed for at least twenty minutes until death occured by "cardiovascular failure due to strangulation."[39] These facts would certainly tend to indicate that the baby had achieved an independent circulation and respiration before the cessation of his heartbeat tones led the doctors to believe that he could not be saved. The only elements of "live birth" not satisfied were expulsion from the mother's body and severance of the umbilical cord. These are precisely the acts which plaintiff claimed were prevented by defendant's negligence. Although the criteria used were not unprecedented, the reason for requiring proof of each one is unclear.

A strict rule of law defining live birth is neither necessary nor useful. Justice Karl recognized this fact in his dissenting opinion,[40] in which Justices Adkins and Hatchett joined. That such a rule is unnecessary becomes apparent upon perusal of the relevant case law. Several jurisdictions allow the jury to decide the issue as a question of fact.[41] Moreover, the variety of circumstances and contexts to which the rule

34. 358 So. 2d at 179.

35. 342 So. 2d at 126.

36. *Id.*

37. Annot., 65 A.L.R. 3d 413 (1975). The question of when a live birth occurs usually arises in the context of homicide statutes.

38. *See, e.g.*, Jackson v. Commonwealth, 265 Ky. 295, 96 S.W. 2d 1014 (1936); States v. Collington, 259 S.C. 446, 192 S.E. 2d 856 (1972); Bennett v. State, 377 P. 2d 634 (Wyo. 1963).

39. 342 So. 2d at 124.

40. 358 So. 2d at 179.

41. *See* Bennett v. State, 377 P. 2d 634 (Wyo. 1963); State v. Toney, 98 W. Va. 236, 127 S.E. 35 (1925); Hubbard v. State, 72 Ala. 164 (1882); People v. Chavez, 77 Cal. App. 2d 621, 176 P. 2d 92 (1947); *But see* Justus v. Atchison, 53 Cal. App. 3d 556, 126 Cal. Rptr. 150 (1975) (restricting application of *Chavez* to homicide cases).

must be applied make it somewhat less than useful, especially when compared with the alternative. The most logical resolution of the issue would be to present the evidence and expert medical testimony to the jury and let that panel decide whether or not a live birth occurred. A fact finder's determination would eliminate the need for a strict, inflexible rule of law and allow for a complete consideration of all relevant facts in each case. The facts of the present case provide us with a sterling example of the disadvantages of the rule adopted in Florida. The death certificate showed cardiovascular failure due to strangulation as the cause of death. Strangulation denotes compression of the windpipe until death occurs by cessation of breathing.[42] The physicians noticed that the baby's heartbeat tones disappeared some twenty minutes after the head had emerged from the birth canal. Surely these facts would be sufficient to raise a *permissible* inference of live birth. This is especially true since there has never been formulated a satisfactory definition of live birth on which the courts could agree.[43]

There are several public policy considerations which support the majority view.[44] First, the viable fetus is a human life capable of existence independent of the mother and there should be a remedy for the wrongful extinguishment of such a life. Otherwise there is a wrong with no remedy. Is not the purpose of tort law to avoid this situation?[45] The majority view achieves the desirable goal of shifting the loss from the survivors to the wrongdoer. Since an action for prenatal injuries can be brought once a child is born,[46] it seems incongruous to preclude recovery where the injury is so severe as to cause death *in utero*.[47] The instant case presents the precise situation cited by commentators and courts to discredit the position taken by the supreme court.[48] It appears that the

42. C. TABER, TABER'S CYCLOPEDIC MEDICAL DICTIONARY (13th ed. 1977); WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, unabr. (1971).

43. Annot., 65 A.L.R. 3d 413 (1975).

44. Annot., 15 A.L.R. 3d 994 (1967).

45. Dean Prosser states that the purpose of tort law is "to afford compensation for injuries sustained by one person as a result of the conduct of another," the goal being to "adjust these losses." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 1 at 6 (4th ed. 1971).

46. Day v. Nationwide Mutual Ins. Co., 328 So. 2d 560 (Fla. 1976); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 55 at 336-7 (4th ed. 1971).

47. *See* Comment, *The Conditional Liability Rule—A Viable Alternative for the Wrongful Death of a Stillborn Child,* 28 U. FLA. L. REV. 187. *See also* §§ 768.16-.27 FLA. STAT. (1977).

48. *See generally* Stern v. Miller, 348 So. 2d 303, 306 (Fla. 1977); Todd v.

statute in Florida disallows a wrongful death action where the injury is serious enough to cause death of the fetus before birth, but allows an action for damages if the child suffers less serious injury not resulting in death.[49] This allows the tortfeasor to avoid liability by inflicting the ultimate injury.[50] It has been argued that since this factor refers to intentional conduct it is not relevant to cases involving the presumably more prevalent negligent conduct.[51] But the fact remains that the tortfeasor, whether acting negligently or intentionally, is provided with a legal incentive to prevent this "live birth" of the child. Surely such an unthinkable result was not intended by the legislature and should be avoided by the courts.

Aside from these policy considerations, the unique facts of the instant case emphasize the problems inherent in the position adopted in Florida. This case can be distinguished from the cases discussed above because here the child died during an attempt at delivery, allegedly as the result of the negligent methods and procedures of the defendant. In the other cases discussed, the child died either in the uterus or subsequent to delivery. Those cases invariably involved pre-natal or post-natal injuries, never injuries *during* parturition. The facts of this case are unique and do not admit of the simplistic characterization of the child as an "unborn viable fetus," a "stillbirth" or a "live birth." The requirement of live birth precluded recovery to the survivors for the death of their child without any rational basis or justification. The pain and suffering directly experienced by the mother may give rise to a separate case of action, but that relates to a separate and distinct injury. While it is true that the wrongful death statute is in derogation of common law and might, therefore, be strictly construed, both the legislature and the courts have recognized its remedial nature and have agreed that a liberal construction is called for.[52] Where is this liberal construction?

Due to its strict rather than liberal construction of the statute, the court entered summary judgment against the defendant. Summary judgment is appropriate when there is no genuine issue of material fact and

Sandidge, 341 F. 2d 75, 77 (4th Cir. 1964). *See also* note 47 *supra.*

49. 328 So. 2d 560.

50. 341 F. 2d at 77.

51. 62 AM. JUR. 2d *Prenatal Injuries* § 15 at 623 (1972).

52. *See* § 768.17 FLA. STAT. (1977); Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955) (pertaining to the old wrongful death statute). § 768.17 FLA. STAT. (1977) states that, "[s]ections 768.16-768.27 are remedial and shall be liberally construed."

the moving party is entitled to judgment as a matter of law.[53] The question of "live birth" has been held to constitute a genuine issue of material fact in other jurisdictions.[54] The court's insistence on infringing upon what is generally the jury's domain is totally unjustifiable. Keeping in mind that Florida courts have not previously ruled on when "live birth" occurs, instituting a strict rule of law could defeat the purpose of the Wrongful Death Act.[55]

Case law in Florida clearly disfavors summary judgments in negligence cases.[56] This is especially true with regard to medical malpractice cases such as the one at hand.[57] Summary judgment is a harsh remedy which should be administered very cautiously,[58] so as not to deprive a litigant of a full and fair trial on the merits of the case. In view of the close question of whether a live birth ever occurred, the propriety of a summary judgment in this case was indeed questionable.

In *Duncan,* a young couple lost their child through the negligence of another, yet were not afforded the opportunity to try the case on its merits. After recognizing the compelling nature of the public policy arguments in favor of recovery, the Florida Supreme Court based its position on a questionable "legislative intent" rationale. The court also pronounced a flat rule of law defining live birth as "expulsion of the child's body from its mother with evidence that the cord has been cut and the infant has independent circulation of blood,"[59] which seems to be an injustice to the plaintiff in this case.

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53. FLA. R. CIV. P. 1.510(c).

54. *See* note 41 *supra.*

55. As stated, the purpose of the Wrongful Death Act is "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17 FLA. STAT. (1977).

56. Holl v. Talcott, 191 So. 2d 40 (Fla. 1965); Visengardi v. Tyrone, 193 So. 2d 601 (Fla. 1966).

57. *Id.*

58. Pearson v. St. Paul Fire and Marine Ins. Co., 187 So. 2d 343 (Fla. 1st DCA 1966); Jones v. Stoutenburgh, 91 So. 2d 299 (Fla. 1957); Seven-Up Bottling Co. of Miami v. George Const. Corp., 166 So. 2d 155 (Fla. 3d DCA 1964).

59. 358 So. 2d at 179 (Karl, J., dissenting).