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I. INTRODUCTION

In Nelson v. Dean,¹ a recent opinion by the Chief Judge of the Northern District of Florida, Robert L. Hinkle discusses numerous aspects of the con-

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stitutionality of the Florida primary voting process. Among the issues discussed, although not thoroughly explored, is the funding of Florida’s primary voting process. Specifically, Chief Judge Hinkle presents this question where he writes at the end of his opinion:

To be sure, plaintiffs hinted at oral argument that if their constitutional and Voting Rights Act challenges to the DNC’s exclusion of Florida delegates was rejected—as has now occurred—plaintiffs might assert that the change of the primary date itself was unconstitutional or violated the Voting Rights Act. Plaintiffs carefully did not, however, actually assert that claim. The claim will not be addressed unless and until actually presented. Leave to amend will be granted. The granting of leave ought not, however, be read as a suggestion that claims of this type would, or would not, have merit.

Thus, is it unconstitutional for Florida to fund the primary voting system, yet simultaneously employ a closed primary system that precludes all except registered Democrats from voting in Democratic primaries, and precludes all except registered Republicans from voting in Republican primaries, without implicating the constitutional right to the freedom of association and the competing Equal Protection Clause of the Fourteenth Amendment.

Furthermore, is it unconstitutional for the state to fund the participation of the Democratic and Republican parties in the primary voting system, yet refuse to fund the participation of a minor party in the primary voting system? At the very least, the rights to the freedoms of assembly, association, and equal protection are implicated. Interestingly, Florida appears to have established one of the most exclusive primaries, in that it is a closed primary which specifically precludes minor political parties from participating in the primaries, thereby denying minor political parties funding which is available for the Republican and Democratic state funded primaries. These very relevant and timely issues are explored below.

1. 528 F. Supp. 2d 1271 (N.D. Fla. 2007).
2. See generally id.
3. Id. at 1274–75.
4. Id. at 1283.
5. Id. at 1279–80.
7. Id. at 1279–80.
II. BACKGROUND OF PRESIDENTIAL PRIMARIES AND THEIR FUNDING IN THE UNITED STATES

The Democratic and the Republican parties select their presidential nominees at the "national party convention[s] held [in] the summer of each presidential election year." In each state, presidential nominees receive delegates to the national conventions through caucuses, state conventions, or primary elections. Caucuses and conventions are party funded meetings where attendees choose nominees for the national convention. In a primary, the registered voters choose the nominee by voting through a secret ballot.

States employing the primary election system do so through state statutes providing for one of four different types of primaries: closed, open, blanket, or semi-closed. In a closed primary, which Florida has adopted, "only persons who are members of the political party . . . can vote on its nominee" who must be from their party. Independents or members of another political party cannot vote in the closed primary. Each party sets a specific deadline before the election by which one must register with that party or change their party affiliation in order to vote in the primary. In a semi-closed primary, "a political party may invite only its own registered members and voters registered as Independents to vote in its primary." In open primaries, anyone, "regardless of party affiliation, may vote for a party’s nominee, . . . limited to that party’s nominees for all offices . . . [thus one] may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general." In a blanket primary, voters are not limited to voting only for candidates of one party, but instead they can vote for any candidate even if that candidate is affiliated with a different party.

9. Id.
10. See Nelson, 528 F. Supp. 2d at 1272.
11. See Wagner v. Gray, 74 So. 2d 89, 91 (Fla. 1954) (stating that a primary election is a "selective mechanism by which the members of a political party express their preference in . . . selection of . . . party's candidates for public office . . . [and] are not in reality elections, but are simply nominating devices").
15. See id. at 606.
16. Id. at 581.
18. Id. at 570.
For decades, the primary system has been the most used delegate selection system in the United States.\textsuperscript{19} The primary election was developed as a way to choose presidential nominees within the context of political parties.\textsuperscript{20} Although the United States Constitution does not mention political parties, they emerged due to a clash of notions between Alexander Hamilton’s idea of a strong federal government and limited government advocated by Thomas Jefferson.\textsuperscript{21} As political debate over the form of government continued, “[b]y the 1796 elections, Federalists and Republicans” began organizing separate campaigns with party leaders having power over the nominations.\textsuperscript{22} The Republican Party soon split into two smaller factions, the Democratic-Republican Party and the National-Republican Party.\textsuperscript{23} Each party organized caucuses—informal meetings—to choose party candidates for the national convention.\textsuperscript{24} Because of the concerns that small caucuses do not represent the will of the population, party members began choosing delegates for the formal nomination meetings in a convention.\textsuperscript{25} Conventions, however, were criticized for a lack of transparency, since party leaders influenced the nominations.\textsuperscript{26} Therefore, in late nineteenth/early twentieth century, a primary developed as a delegate selection process, which, through secret vote, eliminated the problems raised by the informal selection process of caucuses and conventions.\textsuperscript{27} Once the states began conducting primary nomination elections, the states became involved


\textsuperscript{20} Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 629 (2d Cir. 1989).


\textsuperscript{27} Id.
in supervising the conduct of those elections, including the regulation of who could vote in party primaries. However, the original justification for that regulation was to ensure that the nominees of the parties were elected in a fair and impartial manner by the members of the party. The primary soon became not only a delegate selection process of a particular party, but it was enacted as a law in many states. In 1903, Wisconsin was the first state to pass a law requiring the presidential nominees for the national convention to be elected in the primary. Since then, states have passed laws which specify the criteria for state elections.

Although political parties run presidential primaries, states fund and pass various laws regarding the primaries. In the 1970s, campaign reform proposals were elevated by the national attention paid to campaign fundraising abuses brought in light by the Watergate investigations. In 1974, at the height of the Watergate crisis, the federal government instituted a system of matching public funds for presidential primaries and full public financing of presidential general elections by amending the Federal Election Campaign Act. In 1976, public money was used to fund a United States presidential election for the first time.

"[T]he first public financing within the jurisdiction of the United States" took place in Puerto Rico in 1957. Costa Rica and Argentina, in 1954 and 1955, respectively, "were the first modern countries to formally provide public fund[ing] for political parties." Iowa, Maine, Rhode Island, and Utah became the first states in America to enact public financing. Maryland, Minnesota, and New Jersey followed suit in 1974 with "the first partial public financing systems." By 2007, there were twenty-seven states that pro-

28. See id. at 332.
29. See id. at 332–33.
30. See Klonsky, supra note 19; Stark, The Presidential Primary, supra note 26, at 333.
31. Foster, supra note 25, at 452.
32. See id.
33. See id. at 453.
38. Id.
39. Id.
40. Id.
vided some form of public subsidy in state elections. Out of those states, eleven offered public funds to political parties for both general elections and primary campaigns. Maine, Arizona, and Vermont follow the Clean Elections Plan under which the candidates may only receive public funds.

III. THE FOUNDATION OF THIS REPUBLIC—NO STATE GOVERNMENT SHALL INTERFERE WITH ANY INDIVIDUAL’S FREEDOMS OF ASSOCIATION OR ASSEMBLY

Necessarily, whether a party has a closed, semi-closed, open, or blanket primary, one’s First Amendment rights will be implicated; specifically, the First Amendment right of the freedom to associate and the First Amendment right to the freedom to assemble. Most notably, a closed primary system creates a prohibition on who one can vote for. Let’s address, in turn, how the freedom of assembly and the freedom of association are implicated, and how some courts have dealt with them.

A. Freedom of Assembly

The First Amendment to the United States Constitution provides that “Congress shall make no law... abridging... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The right of assembly guaranteed in the Federal Constitution to the people is not restricted to the literal right of meeting together to petition the Government “for a redress of grievances.” According to one federal district court, “the First Amendment itself is merely a limitation against federal abridgment of the rights embodied in that amendment.” However, “the [F]ramers of the Fourteenth Amendment, [which was] adopted after the Civil War, made clear that no state or local government could censor political ex-

41. Id.
42. Wyatt, supra note 37.
43. Id.
46. U.S. Const. amend. I.
pression." The Due Process Clause of the Fourteenth Amendment "prevents any denial of [this right] by the states." When the First Congress was debating the Bill of Rights, it was contended that there was no need to separately assert the right of assembly because it was subsumed in freedom of speech. Mr. Page of Virginia responded, however, that at times "such rights have been opposed, and [that] people have . . . been prevented from assembling together on their lawful occasions. . . . If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." The motion to strike "assembly" was defeated.

B. Freedom of Association

Although the word "association" does not appear in the First Amendment, the freedom of association is derived from the First Amendment freedoms of speech and assembly. The freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only."

A political party's right to choose its own nominees is a core associational activity. This is because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions." As the United States Supreme Court has repeatedly stated, political parties have associational rights, and one of those rights is the right to choose the "standard bearer who best represents the party's ideologies." In Tashjian v. Republican Party of Connecticut, the United States Supreme Court held that the Connecticut statute requiring voters of any party primary to be registered

50. Thompson, 421 F. Supp. at 881.
51. 1 ANNALS OF CONG. 731–32 (Joseph Gales ed., 1834).
52. Id. at 732.
53. Id. at 733.
56. See Timmons, 520 U.S. at 359–60.
57. La Follette, 450 U.S. at 122.
members of the party, conflicted with the Republican Party's rule permitting "voters not affiliated with any political party—to vote in [the] Republican primaries," and "depriv[e]d the Party of its First Amendment right to enter into political association with individuals of its own choosing."  

The Court observed that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."  

While "[t]he State has wide latitude to regulate elections to ensure that they are fair and honest. . . . the State cannot first require parties to nominate by primary election, and then structure the primary elections to deprive the parties of their First Amendment rights."

IV. GOVERNMENTALLY FUNDED CLOSED PRIMARY SYSTEM AND THEIR IMPLICATIONS ON THE FREEDOM TO ASSOCIATE

Florida's statute establishing its closed primary system specifically states:

In a primary election a qualified elector is entitled to vote the official primary election ballot of the political party designated in the elector's registration, and no other. It is unlawful for any elector to vote in a primary for any candidate running for nomination from a party other than that in which such elector is registered.

Also, Florida case law has, for more than seventy years, held that "no one is entitled to vote in a party primary absent a declaration of his party affiliation as a member of the particular party whose primary is being held."  

Although no one appears to have challenged whether the aforementioned law

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60. Id. at 210-11.
61. Id. at 224.
62. Brief for the Petitioners-Appellant at 19, Cal. Democratic Party v. Jones, No. 99-401 (9th Cir. Mar. 3, 2000). "California need not have a primary system at all. But if California chooses to conduct primary elections, it must respect the political parties' freedom of association."  
64. State ex rel. Gandy v. Page, 170 So. 118, 120 (Fla. 1936).

The primary election laws of this state clearly require participants in primary elections, whether as voters or candidates, to specially register for that purpose. . . . For primary elections a declaration of party affiliation on the primary election books is indispensable to qualify one to participate in such primary elections. Absent such declaration of party affiliation, the registrant is not entitled to be considered as a legally registered member of the party whose affairs he seeks to participate in so far as primary elections . . . are concerned.

State ex rel. Hall v. Hildebrand, 168 So. 531 (Fla. 1936).
violates a Florida citizen's freedoms to associate and assemble, the United States Supreme Court has addressed this issue on several occasions.65

The United States Supreme Court has recognized the government's ability to restrict the rights of individuals to participate in the primary process for numerous reasons. For example, in *Rosario v. Rockefeller (Rosario II)*,66 the United States Supreme Court rejected the citizens' argument that "their First and Fourteenth Amendment right of free association with the political party of their choice" was violated because of New York's delayed enrollment scheme.67 An integral part of the scheme was that to participate in a primary election, a person must enroll before the preceding general election.68 As the Second Circuit Court of Appeals stated: "Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another."69 For this reason, New York's scheme required an insulating general election between enrollment and the next party primary.70 "The resulting time limitation for enrollment [was] thus tied to a particularized legitimate purpose, and [was] in no sense invidious or arbitrary."71 Further, "the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."72

The United States Supreme Court again recognized the propriety of restricting participation in the primary process in *Anderson v. Celebrezze.*73 In fact, the Court specifically recognized that "[a]lthough these rights of voters are fundamental, not all restrictions imposed by the [s]tates on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."74 The Court recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."75 The Court concluded:

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66. Id. at 752.
67. Id. at 758.
68. See id. at 757.
70. See *Rosario II*, 410 U.S. at 758.
71. Id. at 762.
72. Id. at 757.
74. Id.
75. Id. (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).
To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.76

In New York State Board of Elections v. López Torres,77 regarding a New York State Supreme Court justice election—as opposed to a presidential election—the Court “considered it to be ‘too plain for argument,’ that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot. . . . That prescriptive power is not without limits.”78 In California Democratic Party v. Jones,79 for example, the Court invalidated California's blanket primary on First Amendment grounds, reasoning that it permitted non-party members to determine the candidate bearing the party’s standard in the general election.80 The Court “acknowledged an individual’s associational right to vote in a party primary without undue state-imposed impediment.”81

In Kusper v. Pontikes,82 the Court invalidated an Illinois law that required a voter wishing to change his party registration so as to vote in the primary of a different party to do so almost two full years before the primary date.83 But Kusper does not cast doubt on all state-imposed limitations upon primary voting.84 In Rosario II, the Court upheld a New York State requirement that a voter enroll in the party of his choice at least thirty days before the previous general election in order to vote in the next party primary.85

Similar to the facts in Rosario II, in Florida, party changes must be made by the end of the twenty-ninth day before the primary election.86 As such, it would appear that, in and of itself, Florida Statutes, section 101.021, making it “unlawful for any elector to vote in a primary for any candidate

76. Id.
78. Id. at 798.
80. Id. at 586.
81. See López Torres, 128 S. Ct. at 798.
82. 414 U.S. 51 (1973).
83. Id. at 57, 61.
85. Id. at 757, 762.
running for nomination from a party other than that in which such elector is registered" would pass constitutional muster. Furthermore, the twenty-nine day requirement to change party affiliation, based on United States Supreme Court precedent, is not overly burdensome and does not violate one’s freedoms to associate and assemble.

V. IF GOVERNMENTS ARE INVOLVED IN FUNDING PRIMARIES, CAN THEY LIMIT FUNDING TO JUST THE DEMOCRATIC AND REPUBLICAN PARTIES?

A. Framers’ Views on Parties

The Framers abhorred the “idea of political parties, representing institutionalized divisions of interest.” This is the type of divisive political thinking that the Framers attempted to flee. In fact, the Framers “attempted to design a ‘Constitution Against Parties’” and curtail any tide of political competition that might “divide coalitions of officeholders and cut through the constitutional boundaries between . . . branches.” Notwithstanding, in 1790, the Treasury Secretary, Alexander Hamilton, “began to recruit members of Congress” to support “his economic development program.” Thomas Jefferson and James Madison intensely opposed the program, and the two sides began to collect public support for their respective positions.

By 1796, there were two competing parties: the Federalists and the Republicans. By 1797, its members were not only specifically identified as Federalist or Republican, but they regularly and almost strictly voted along party lines. The institutionalized division of interest that the Framers had so desperately tried to steer clear of had been born.

Such partisan politics that propagated divisive interests was harmful to the separation of powers doctrine, and the Framers knew it. Pursuant to the separation of powers doctrine, the executive branch has to be “genuinely

87. FLA. STAT. § 101.021.
88. See FLA. STAT. § 97.055; Rosario II, 410 U.S. at 758 (holding that a New York law establishing a thirty day deadline for voter affiliation is valid).
89. Levinson & Pildes, supra note 22, at 2320.
90. See id.
91. Id.
92. Id.
93. Id.
94. Levinson & Pildes, supra note 22, at 2320.
95. Id.
96. Id.
97. Id.
In fact, the Framers initially rejected ideas that the President should obtain appointment by Congress. Any such requirement would be wholly antithetical to executive independence. Notwithstanding, party caucuses in Congress were the primary vehicle for selecting presidential candidates. In fact, the Framers’ vision of numerous candidates, as opposed to the presidential electoral process with just two political parties, was meant to preclude the political and fundraising dominance that the Republicans and Democrats enjoy today. Contrary to the Framers’ intent, members of smaller parties have little to no chance of having a successful presidential campaign.

B. The State Funding of Democratic and Republican Party Primaries to the Exclusion of All Others Implicates and Perhaps Violates the Equal Protection Clause of the Fourteenth Amendment

Limiting the state funding of primaries to the Democratic and Republican parties contributes to the political and fundraising dominance discussed above. First Amendment freedoms to assemble and associate necessarily conflict with equal protection concerns, because the support of one or two political organizations with public financing to the exclusion of others implicates the Equal Protection Clause of the Fourteenth Amendment. Of course, these First Amendment freedoms are entitled under the Fourteenth Amendment to protection from infringement by the States. Consequently, limiting the state funding of primaries exclusively to the Democratic and Republican parties is the centerpiece of the constitutional uneasiness because of the potential violation of the Equal Protection Clause of the Fourteenth Amendment. That is, does limiting funding of primaries to just two political parties invidiously discriminate against all other parties in violation of the Equal Protection Clause?

98. Id. at 2321.
100. Id.
101. Id.
102. See id.
103. See Benjamin D. Black, Note, Developments in the State Regulation of Major and Minor Political Parties, 82 Cornell L. Rev. 109, 111 (1996).
104. See id. at 111–12.
105. See id.
1. United States Supreme Court Decisions

In one of the most cited and well recognized cases regarding the limiting of funding to the Democratic and Republican primaries, *Williams v. Rhodes*,\(^{108}\) the Court was confronted with a state electoral structure that "favor[ed] two particular parties—the Republicans and the Democrats—and in effect tend[ed] to give them a complete monopoly."\(^{109}\) The Court held unconstitutional the election laws of Ohio as they violated the Equal Protection Clause of the Fourteenth Amendment insofar as in combination they "made it virtually impossible for a new political party, even though it [had] hundreds of thousands of members, or an old party, which [had] a very small number of members, to be placed on the state ballot" in the 1968 presidential election.\(^{110}\) The state laws made "no provision for ballot position for independent candidates as distinguished from political parties,"\(^{111}\) and a new political party, in order to be placed on the ballot, had "to obtain petitions signed by qualified electors totaling [fifteen percent] of the number of ballots cast in the last preceding gubernatorial election."\(^{112}\) But this requirement was only a preliminary hurdle.\(^{113}\) Although the Ohio American Independent Party in the first six months of 1968 had obtained more than 450,000 signatures—well over the [fifteen percent] requirement\(^{114}\)—Ohio had nonetheless denied the party a place on the ballot, by reason of other statutory "burdensome procedures, requiring extensive organization and other election activities by a very early date,"\(^{115}\)—"including the early deadline for filing petitions and the requirement of a primary election conforming to detailed and rigorous standards."\(^{116}\) Justice Douglas candidly stated:

Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined “political party”

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109. *Id.* at 32.
110. *Id.* at 24.
111. *Id.* at 26.
112. *Id.* at 24–25.
114. *Id.* at 26.
115. *Id.* at 33.
116. *Id.* at 27.
in such a way as to exclude virtually all but the two major parties.\textsuperscript{117}

While \textit{Williams} seemed adamantly opposed to a state law that appeared to create a duopoly shared by the Democrats and Republicans,\textsuperscript{118} in \textit{American Party of Texas v. White},\textsuperscript{119} the Court found other differential treatment towards the minor parties constitutional.\textsuperscript{120} The Court was confronted with whether a state law prohibiting a minor party from not having a primary election, but relegating it to a convention, was invidiously discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{121} The Court rejected assertions of invidious discrimination.\textsuperscript{122} Specifically, the Court rather conclusorily refused to find that “the convention process [was] invidiously more burdensome than the primary” process.\textsuperscript{123} The appellant could not demonstrate discrimination of “some substance” nor could the appellant demonstrate any offense to the Constitution.\textsuperscript{124}

The \textit{White} Court, however, did seem to validate a threshold requirement for a government funded primary election for a minor political party when it dealt with whether a Texas provision “provid[ing] for public financing from state revenues for primary elections of only those political parties casting 200,000 or more votes for governor in the [prior] general election” violated the Equal Protection Clause.\textsuperscript{125} The Court upheld the validity of the provision, reasoning that a political party should not be made to bear the burden of the additional expense of a state required primary election.\textsuperscript{126} Furthermore, the Court also held that the State was justified in not providing funding to political parties which had not previously shown such widespread public support.\textsuperscript{127} The Court specifically stated: “[W]e cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group seeking to organize itself.”\textsuperscript{128}

\textsuperscript{117} \textit{Id.} at 35–36 (Douglas, J., concurring) (footnotes omitted).

\textsuperscript{118} See \textit{Williams}, 393 U.S. at 32.

\textsuperscript{119} 415 U.S. 767 (1974).

\textsuperscript{120} \textit{Id.} at 794–95.

\textsuperscript{121} \textit{Id.} at 781.

\textsuperscript{122} \textit{Id.} at 793–94.

\textsuperscript{123} \textit{Id.} at 781.

\textsuperscript{124} \textit{White}, 415 U.S. at 781–82.

\textsuperscript{125} \textit{Id.} at 791–92.

\textsuperscript{126} See \textit{id.} at 793.

\textsuperscript{127} See \textit{id.} at 794.

\textsuperscript{128} \textit{Id.}
2. Florida Statutes Outright Deny Primaries—Let Alone Funding for Primaries—to Minor Political Parties

In each year in which a general election is held, a primary election for nomination of candidates of political parties shall be held on the Tuesday 10 weeks prior to the general election. The candidate receiving the highest number of votes cast in each contest in the primary election shall be declared nominated for such office. If two or more candidates receive an equal and highest number of votes for the same office, such candidates shall draw lots to determine which candidate is nominated.\(^{129}\)

Whenever any special election or special primary election is held as required in s. 100.101, each county incurring expenses resulting from such special election or special primary election shall be reimbursed by the state. Reimbursement shall be based upon actual expenses as filed by the supervisor of elections with the county governing body. The Department of State shall verify the expenses of each special election and each special primary election and authorize payment for reimbursement to each county affected.\(^ {130}\)

So how do these laws apply to minor political parties seeking to conduct a primary election—they do not.\(^{131}\) The primary election method of nominating candidates is not available to minor political parties.\(^{132}\) Pursuant to section 97.021(17), Florida Statutes, a minor political party is defined as follows: A "[m]inor political party' is any group as defined in this subsection which on January 1 preceding a primary election does not have registered as members [five] percent of the total registered electors of the state."\(^ {133}\)

\(^{129}\) FLA. STAT. § 100.061 (2008).
\(^{130}\) FLA. STAT. § 100.102 (2008).
\(^{131}\) See State ex rel. Merrill v. Gerow, 85 So. 144, 146 (Fla. 1920).
\(^{132}\) See generally State ex rel. Barnett v. Gray, 144 So. 349 (Fla. 1932); Gerow, 85 So. at 146 (stating that the rights and powers conferred and granted by the primary election laws are limited to those political parties that, at the general election for state or county officers preceding a primary, polled more than five percent of the entire vote cast in the state).

While the Florida Election Code provides that qualified candidates for nomination to an office are entitled to have their names printed on the official primary election ballots, this provision necessarily means the qualified candidates of the so-called major political parties because the primary election laws apparently apply only to such parties.

\(^{21}\) FLA. JUR. 2d Elections § 120 (2005).
\(^{133}\) FLA. STAT. § 97.021(17) (2008).
Notably, the aforementioned statutory requirements are similar to the statutory requirements set forth in White and Williams v. Rhodes. In light of the historically significant failure of laws like this to provide any footing for third parties who seek a primary election, it seems clear that the application of this in Florida raises constitutional concerns and this issue needs to be revisited. In Florida, if a third party wished to conducted a primary election, and on January 1, 2008, decided that it wanted to be placed on the presidential primary ballot for the primary election that took place on January 29, 2008—the date of Florida’s primary—the third party would have to rely on whether it met the five percent threshold during the last race, which was the gubernatorial race which took place in November 2006.\(^\text{134}\) This is a deadly blow to any third party, as historically, third parties tend to grow their support and constituents nationally, as exemplified by the significant support garnered by Abraham Lincoln, Theodore Roosevelt, Robert LaFollette, Eugene Debs, Henry Wallace, Strom Thurmond, George Wallace, John Anderson, and H. Ross Perot, each of whom garnered at least seven percent of the votes during the elections.\(^\text{135}\) However, the chance of third parties reaching the five percent threshold in Florida at the time of the previous gubernatorial election is practically nonexistent given the nature of our political history and how third parties, or any political party, are formed and emerge to national prominence. Indeed, the first two parties, the Federalists and the Antifederalists, were formed around supporting and opposing national issues and agendas.\(^\text{136}\) Of course, during any particular primary, the Democrats and Republicans have their established base, and that established base will likely remain intact from one primary to the next.\(^\text{137}\) However, that maintenance of an established base is not necessarily with any of the third parties, which usually flow from national grassroots efforts that are catalyzed by some financial and/or political distress that occurred since the previous primary.\(^\text{138}\) It is this national uprising, as opposed to the limited likelihood of a statewide uprising, that gives any third party a chance to succeed. Clearly, the present primary system institutionally supports the maintenance of the Democratic and Republican bases of support.

\(^{134}\) See id.


\(^{136}\) See Levinson & Pildes, supra note 22, at 2319.

\(^{137}\) See generally James Bennet & Keith Bradsher, Republicans Again Courting Democrats and Independents, N.Y. TIMES, Feb. 21, 2000, at A1.

\(^{138}\) See generally id.
Moreover, the present primary system financially supports the maintenance of these respective bases of support. In fact, the state funding for the Democratic and Republican primaries in Florida averaged over $5 million in 2008.\textsuperscript{139} Third parties do not get any support through state funding. Thus, each of the two established major parties has a $5 million advantage over any third party seeking to have a primary.\textsuperscript{140}

Notwithstanding the unlikely occurrence of any minor party achieving the five percent threshold, if the threshold is hurdlesed,

\begin{quote}
[a]ny group of citizens organized for the general purposes of electing to office qualified persons and determining public issues under the democratic processes of the United States may become a minor political party of this state by filing with the department a certificate showing the name of the organization, the names of its current officers, including the members of its executive committee, and a copy of its constitution or bylaws. It shall be the duty of the minor political party to notify the department of any changes in the filing certificate within 5 days of such changes.\textsuperscript{141}
\end{quote}

More importantly, if a Florida citizen has concluded that her political interests are not represented by the major political parties, and she seeks to exercise her rights to political association and assembly via a minor political party, pursuant to section 103.091(4), \textit{Florida Statutes}, she will not be allowed to participate in the primary:

Any political party other than a minor political party may by rule provide for the membership of its state or county executive committee to be elected for 4-year terms at the primary election in each year a presidential election is held. The terms shall commence on the first day of the month following each presidential general election; but the names of candidates for political party offices shall not be placed on the ballot at any other election. The results of such election shall be determined by a plurality of the votes cast. In such event, electors seeking to qualify for such office shall do so with the Department of State or supervisor of elections not earlier than noon of the 71st day, or later than noon of the 67th day, preceding the primary election. The outgoing chair of each county executive committee shall, within 30 days after the committee members take office, hold an organizational meeting of all newly elected members

\textsuperscript{139} See generally Beth Reinhard & Rob Barry, \textit{Florida Lucrative for McCain}, MIAMI HERALD, Feb. 22, 2008, at 6B.

\textsuperscript{140} See generally id.

\textsuperscript{141} FLA. STAT. § 97.021(17) (2008).
for the purpose of electing officers. The chair of each state executive committee shall, within 60 days after the committee members take office, hold an organizational meeting of all newly elected members for the purpose of electing officers.\textsuperscript{142}

The burden created by the Florida Legislature appears to have overstepped its constitutional boundaries as delineated by the Equal Protection Clause.\textsuperscript{143} As discussed in \textit{Williams v. Rhodes}, the state legislature violates the Equal Protection Clause of the Fourteenth Amendment when it makes it "virtually impossible for a new political party . . . to be placed on the state ballot."\textsuperscript{144} Like the Ohio statute in \textit{Williams}, Florida statutes have placed on minority parties an unconstitutionally high hurdle in front of third party candidates running for president.\textsuperscript{145} In light of the clear enhancement that the Florida statutes give to the two major parties by aiding their members ability to engage in the freedoms to associate and assemble by funding their primaries with upwards of $5 million each, in conjunction with their failure to aid minor parties in the same way, and the considerable tension with the Equal Protection Clause stemming from, the application of the Florida statutes, as well as the United States Supreme Court's rulings, make it "virtually impossible for a new political party . . . to be placed on the state ballot."\textsuperscript{146} Accordingly, a serious constitutional challenge could be mounted against Florida's presidential primary as it is presently constituted.\textsuperscript{147} As previously stated, historically, third parties only emerge from presidential election cycles, not gubernatorial election cycles. As such, relying on gubernatorial election cycles deliberately inhibits the growth of third parties to the benefit of the two major parties making this state action constitutionally suspect. Florida has debilitated any opportunity for a third party to succeed as a presidential candidate.\textsuperscript{148} In effect, Florida has unconstitutionally institutionalized a two party system.\textsuperscript{149}

\section*{VI. CONCLUSION}

The First Amendment rights to associate and assemble for the purpose of advancing shared beliefs, including political beliefs, are two of the most

\footnotesize{\begin{itemize}
\item \textsuperscript{142} \textit{FLA. STAT.} § 103.091(4) (2008).
\item \textsuperscript{143} \textit{See id.}
\item \textsuperscript{144} \textit{Williams v. Rhodes}, 393 U.S. 23, 24 (1968).
\item \textsuperscript{145} \textit{FLA. STAT.} § 103.091(4); \textit{see generally Williams}, 393 U.S. at 23.
\item \textsuperscript{146} \textit{Williams}, 393 U.S. at 24.
\item \textsuperscript{147} \textit{See generally id.}
\item \textsuperscript{148} \textit{See generally FLA. STAT.} § 103.091(4).
\item \textsuperscript{149} \textit{See generally id.}
\end{itemize}}
precious rights provided to each citizen of this nation. The Framers held an unabashed obsession for protecting these rights, and these rights are to be protected by the Equal Protection Clause of the Fourteenth Amendment from infringement by any state. Only time will tell whether the Supreme Court will opine on the constitutionality of Florida’s statutes, but application of previous Supreme Court case law, and the facts of how modern third parties emerge in American politics, appear to make the constitutional viability of Florida’s statutes increasingly suspect.

150. See generally Williams, 393 U.S. at 23.
TORT LAW: 2005–08 REVIEW OF FLORIDA CASE LAW

WILLIAM E. ADAMS, JR.*

I. INTRODUCTION

This survey reviews major tort cases decided by the Supreme Court of Florida and Florida District Courts of Appeal that cover substantive tort issues that were published between the time period of July 2005 until July 2008. It will also cover some federal cases that address Florida substantive tort law issues. In addition, section XIII deals with tortious conduct that occurs on cruise ships. Although these cases are primarily controlled by admiralty law, the cruise ship industry is a growing and important business in Florida and elsewhere, and the liability of the cruise industry for injuries occurring on cruise ships is becoming an area of concern to the increasing number of persons taking cruises as well as governmental officials. The time period begins where the last Tort Law Review Survey created for Nova Law Review ended.1 It will thus discuss cases that interpret the provisions of statutes and defenses that deal with elements that constitute the definitions of the same. It will focus on cases that address provisions or issues for the first time, clarify areas that have created confusion, or change existing under-


https://nsuworks.nova.edu/nlr/vol33/iss1/1
standings. Therefore, this article will follow the conventions followed in selecting cases for discussion utilized in prior Tort Law Survey articles.2

II. DUTY

The dispute over what creates a duty is a legal question that frequently arises in Tort cases, and the past three years have been no different in Florida's appellate courts. As can be seen, the question of who has a duty and its extent has arisen in a range of contexts.3 As is the custom, a number of cases have concerned duties to persons injured in automobile accidents.4 Cases have arisen concerning the obligations of public utilities and schools.5

In Hewitt v. Avis Rent-A-Car System, Inc.,6 the First District Court of Appeal addressed the duty owed to someone injured by a stolen vehicle, in which the owner had not secured the keys.7 At this particular Avis car lot, at least thirty-seven cars, between November 1999 and May 2000, were removed by employees and "rented" or entrusted to other drivers.8 "[B]y February 2001, managerial employees . . . were aware that vehicles had been missing from the lot . . . ."9 Despite this knowledge, Avis did not establish safeguards to prevent theft or other wrongful removal and use of its cars.10 The stolen car at issue in this case "was last seen in Avis's possession on February 23, 2001, and Avis determined [that] it was missing [on] February..."11

2. See, e.g., id. As in past articles, it does not address every single appellate opinion, but instead focuses on cases that deal with substantive elements. See, e.g., id. Therefore, it does not deal with cases primarily focused on evidentiary or procedural issues.


4. See Vining, 354 So. 2d at 54; Hewitt, 912 So. 2d at 682; Roos, 913 So. 2d at 59.

5. See Franco, 947 So. 2d at 514; Almarante, 921 So. 2d at 703; Pascual, 911 So. 2d at 152.

6. 912 So. 2d at 682.
7. Id. at 683.
8. Id.
9. Id.
10. See id. at 683–84.
26, 2001, [but] did not report it [as] stolen until April 5, 2001." 11 On April 7, the car collided with the vehicle in which the plaintiff was a passenger. 12 At the time of the accident, it was Avis’s policy to not report a car as stolen until thirty to forty-five days after it was missing to avoid “customer[s] legitimately in possession” from being charged with theft. 13 After the accident, Avis implemented security measures to prevent theft, which included “chang[ing] gate locks, park[ing] vans in front of the gates, install[ing] security cameras, and hir[ing] a night security guard.” 14

The defendant argued that it had no duty to prevent theft, and that the theft was a superseding, intervening cause. 15 The court correctly analogized this case to those involving vehicle owners leaving keys inside the vehicle. 16 Although those cases referenced Florida’s statute directing vehicle owners to not “leave a vehicle unattended without removing the key,” the court extended the rationale to other situations where a defendant creates a foreseeable zone of risk. 17 In this case, where theft was rampant, management failed to take prompt action, and thefts were not promptly reported, the court deemed it up to the fact finder to determine whether the “defendant’s conduct created a foreseeable zone of risk, giving rise to a duty to lessen the risk.” 18 Since duty is a question of fact, it would be more accurate to say that the jury should determine if the duty was breached, but holding that Avis could be considered liable seemed appropriate. 19 The court also accurately concluded that it was a jury question as to whether the intervening act of the theft was a superseding cause. 20

The First District Court of Appeal considered whether a vehicular passenger could undertake a duty to others by providing advice to a driver in Roos v. Morrison. 21 The “plaintiff was a passenger on a motorcycle” struck by a sport utility vehicle, in which the “[d]efendant, Christopher Morrison, was a rear seat passenger.” 22 Morrison was asked by the driver of the SUV if

11. Hewitt, 912 So. 2d at 684.
12. Id. at 684.
13. Id.
14. Id.
15. Id.
17. Id. at 685–86.
18. Id. at 686.
19. See id. (citing Deese v. McKinnonville Hunting Club, Inc., 874 So. 2d 1282, 1287 (Fla. 1st Dist. Ct. App. 2004)).
20. See id.
22. Id.
he could safely back up on a roadway, which was blocked by traffic. The court held that Morrison could be held liable if it was decided that he “agreed to determine whether the . . . path of travel was clear and failed to use reasonable care in making that determination.” Recognizing the potential impact of transferring liability from “driver[s] with mandated insurance coverage to . . . passenger[s] who may” not have coverage, the court certified to the Supreme Court of Florida the following question as “one of great public importance:”

MAY A VEHICULAR PASSENGER BE HELD LIABLE TO ANOTHER VEHICULAR PASSENGER IN CIRCUMSTANCES WHERE THE POTENTIALLY LIABLE PASSENGER WAS IN A SUPERIOR POSITION TO THE DRIVER OF THAT PASSENGER’S VEHICLE TO OBSERVE A POTENTIAL HAZARD AND GAVE AFFIRMATIVE ADVICE TO THE DRIVER WHICH RESULTED IN A COLLISION WITH THE OTHER PASSENGER’S VEHICLE?

What duty is owed by a utility company in providing power for traffic signals? This issue was considered in Pascual v. Florida Power & Light Co., by the Third District Court of Appeal. Carlos “Pascual’s vehicle collided with a . . . police car” at an intersection with “an inoperable traffic signal.” Florida Power and Light (FPL) sent technicians to repair a transformer the day before the accident. The plaintiffs alleged that “the presence of rodent droppings around the transformer” should have caused the utility company to realize that rodents were the cause of the power outages. The plaintiffs also alleged that FPL negligently turned off “the grid and traffic signal” when they returned to repair the transformer on the day of the accident. FPL filed a motion to dismiss, denying that they owed a legal duty to the plaintiffs. The court held that by undertaking to repair the failed transformer, it “assumed a duty to do so in a non-negligent manner.” Further, FPL assumed a duty to warn pursuant to its contractual agreement “with

23. Id.
24. Id. at 67.
25. Id. at 68.
27. Id. at 153.
28. Id.
29. Id.
30. Id.
31. Pascual, 911 So. 2d at 153.
32. Id.
33. Id. at 154.
the [c]ounty to notify them of . . . power [outages] within 15 minutes or less." However, the court refused to find that FPL had a duty "to maintain electrical current to the intersection."35

The Third District Court of Appeal found no duty to exist for a pharmacy in a case involving a motorist who fell asleep and collided with plaintiff's vehicle in Dent v. Dennis Pharmacy, Inc.36 Garrett Dent "allege[d] that the prescribing doctor told [Paula] Sparenberg not to drive while taking the [medication]," but that the pharmacist "placed a 'use caution driving' label on the prescription bottle," thus, negligently causing her to drive when she should not have.37 The plaintiff asserted that this created a voluntarily undertaken duty by the pharmacy.38 The court found that the pharmacy had done no more than required by Florida law, and that Dent was an unknown or unidentifiable third party beyond the foreseeable zone of risk.39

What duty does a school district owe a student injured on an alleged field trip? The Third District Court of Appeal considered this in Fernandez v. Florida National College, Inc.40 Iris Yadira Fernandez . . . was injured and her daughter, Claudia Lorena Fernandez . . . died" in an accident in a motor vehicle operated by Jorge Luis Cisneros, a teacher at Florida National College (FNC).41 FNC offers classes in English for Speakers of Other Languages, which includes required field trips.42 Teachers are "required to submit a field trip authorization form to FNC" and students are "to submit a signed form releasing FNC from liability."43 Field trips were to "take place during the scheduled class period," participation would affect grades, and students were to "provide their own transportation."44 Mr. Cisneros took the students on a field trip to Key West after the end of the class period.45 He "did not inform FNC [nor] ask the students to sign . . . release[s]."46 "[T]he excursion [also] did not affect the students' grades . . . ."47 Mr. Cisneros

34. Id.
35. Id. at 155 (citing Levy v. Fla. Power & Light Co., 798 So. 2d 778, 781 (Fla. 4th Dist. Ct. App. 2001)).
36. 924 So. 2d 927, 928, 930 (Fla. 3d Dist. Ct. App. 2006).
37. Id. at 928–29.
38. Id. at 929.
40. See 925 So. 2d 1096, 1100 (Fla. 3d Dist. Ct. App. 2006).
41. Id. at 1098.
42. Id. at 1099.
43. Id.
44. Id.
45. Fernandez, 925 So. 2d at 1099.
46. Id.
47. Id.
"us[ed] his personal credit card" to rent two vans that were used to transport the students.48 "Mr. Cisneros lost control of the van" that he drove, in which Mrs. Fernandez and her daughter were passengers.49 The court held that Mr. Cisneros was not "acting within the course and scope of his employment" and "the plaintiffs failed to allege that [he] was [acting as] FNC’s apparent agent at the time of the accident."50

The Third District Court of Appeal reviewed another duty issue in Franco v. Miami-Dade County.51 A unit of Miami-Dade County Fire Rescue arrived at the home of Ida Franco pursuant to a call concerning Wessner’s mother, Ida Franco.52 Franco was suffering from chest pains and Fire Rescue determined that her condition was "‘critical’ and ‘unstable.’"53 Wessner asked that her mother be transported to South Miami Hospital where a cardiologist was waiting to treat Franco.54 Instead, she was transported to "the closest facility that provided” critical care pursuant to Fire Rescue protocol.55 The court ruled that Fire Rescue had a “duty when it diagnoses, treats, and transports patients in ... emergency situation[s],” but that it did not breach it when it adhered to its protocol that determined “the closest appropriate hospital.”56

The Third District Court of Appeal considered the duty of a homeowners association in regard to a tree that it had planted in Miami-Dade County v. Deerwood Homeowners’ Ass’n.57 Patricia Perdomo “tripped and fell on a [c]ounty sidewalk.”58 She and her husband “alleged that roots from a tree near the sidewalk ... created a vertical separation” that caused the fall.59 In addition to suing the County, the plaintiffs also sued the Deerwood Homeowners’ Association that planted the tree and its lawn maintenance company, Techlawn.60 The County argued that it, and the Perdomos, relied upon Deerwood and Techlawn to maintain the tree.61 The court noted that the Supreme Court of Florida has previously “held that private landowners are not

48. Id.
49. Id. at 1099–100.
50. Fernandez, 925 So. 2d at 1100–01.
52. Id. at 514.
53. Id.
54. Id.
55. Id.
56. Franco, 947 So. 2d at 517.
57. 979 So. 2d 1103, 1103 (Fla. 3d Dist. Ct. App. 2008).
58. Id. at 1104.
59. Id.
60. Id.
61. Id.
liable for injuries caused by subterranean roots growing under public rights-of-way.” 62 Therefore, absent specific facts that showed that either “Deerwood or Techlawn undertook to maintain the” roots or repair the sidewalk, the county could not show that either had voluntarily undertaken a duty. 63 Gratuitous planting and maintaining of a tree for nine years was insufficient. 64 The court noted that the pleadings did not allege that either party had “trimmed a tree root near the sidewalk, repaired the sidewalk, or agreed with the County to perform...such tasks.” 65

In Grunow v. Valor Corp. of Florida, 66 the Fourth District Court of Appeal considered the duty owed by a wholesale sporting goods distributor in regard to a firearm legally sold. 67 Pamela Grunow, “personal representative of the estate of Barry Grunow, appeal[ed]...a final judgment notwithstanding the verdict” entered on behalf of the defendant. 68 Nathaniel Brazill was a suspended student, who retrieved a gun from his grandfather’s bedroom and returned to school to shoot his school counselor. 69 First, however, he stopped at a classroom, in which Barry Grunow was the teacher, to speak to two of his friends. 70 When Grunow refused to permit the students to leave the classroom, Brazill shot and killed him with a Raven MP-25, also known as a “Saturday Night Special.” 71 Grunow’s lawsuit claimed that Valor was “liable for failing to implement feasible safety mechanisms such as external locks and/or lock boxes.” 72 The court acknowledged that “Florida does not recognize a cause of action for negligent distribution of a non-defective firearm.” 73 The court found that “no special relationship [existed] between Valor and either Brazill or Grunow,” that Brazill’s criminal conduct was not foreseeable, and that a product is not negligently designed 74 “because the design used was not the safest possible.” 75

62. Deerwood Homeowners’ Ass’n, 979 So. 2d at 1104 (citing Sullivan v. Silver Palm Props., Inc., 558 So. 2d 409, 411 (Fla. 1990)).
63. Id.
64. Id.
65. Id. at 1105.
66. 904 So. 2d 551 (Fla. 4th Dist. Ct. App. 2005).
67. See id. at 553.
68. Id. at 553.
69. Id.
70. Id.
71. Grunow, 904 So. 2d at 553.
72. Id.
73. Id. at 554.
74. Id. at 556.
75. Id. (quoting Husky Indus., Inc. v. Black, 434 So. 2d 988, 991 (Fla. 4th Dist. Ct. App. 1983)).
In Biglen v. Florida Power & Light Co., the Fourth District Court of Appeal also considered the duty element in relation to a utility company. The plaintiff, Michael Biglen, operated “an aerial lift machine, that came into contact with an overhead power line owned and maintained by” Florida Power & Light. Biglen’s job “included parking the machines for storage and . . . raising the booms.” The power lines “were ‘open and obvious to . . . the casual observer,’” and nothing blocked the plaintiff’s line of vision. The court upheld the summary final judgment in favor of the defendant, holding that it owed no duty to the aerial lift operator because:

[I]t was not reasonably foreseeable that an employee would carelessly and unreasonably violate the company’s guidelines, training, and the clear warning labels on the machine itself, and lift the boom far beyond the one or two feet necessary to complete the task, so high that it contacted a power line.

In Horton v. Freeman, the Fourth District Court of Appeal reviewed the duty owed by a married couple to a minor child in their custody and care while his mother attended to a family emergency. The plaintiff appealed her dismissed complaint in the wrongful death action concerning her son’s death from a drug overdose. The plaintiff alleged that “the defendants created an environment for the use of drugs, . . . negligently allowed the use of illegal drugs, . . . [and] failed to call an ambulance, . . . [or] provide appropriate care when they knew or should have known that the decedent had overdosed.” The court held that the defendants voluntarily assumed “a duty to care for and supervise a minor.” It clarified that it was “not expand[ing] premises liability . . . [for] social host[s] to seek medical attention for a guest unless [the] host . . . voluntarily undertak[es the] duty.”

In Almarante v. Art Institute of Fort Lauderdale, Inc., the Fourth District Court of Appeal considered the duty element owed by a private school

76. 910 So. 2d 405 (Fla. 4th Dist. Ct. App. 2005).
77. Id. at 408.
78. Id. at 406.
79. Id. at 407.
80. Id.
81. Biglen, 910 So. 2d at 412.
82. 917 So. 2d 1064 (Fla. 4th Dist. Ct. App. 2006).
83. Id. at 1065.
84. Id.
85. Id.
86. Id. at 1067.
87. Horton, 917 So. 2d at 1067.
88. 921 So. 2d 703 (Fla. 4th Dist. Ct. App. 2006).
to its students in a busy urban environment. The plaintiff was "struck by a speeding motorcycle" while crossing a busy highway, "returning to her residence." The school dormitory buildings were constructed on each side of the highway. "There [was] no pedestrian signal, cross-walk, bridge or other safety device" to cross the highway. "Two previous accidents involving pedestrian crossings [had] recently occurred ... [and s]chool officials [had] contacted the Florida Department of Transportation" seeking installation of safety devices. The student claimed that she was compelled to cross the highway to conduct routine student functions. The court reversed a dismissal of the complaint, holding that the school’s placement of its dormitories "on either side of a busy urban highway, requiring [students to cross] on a daily basis" created a foreseeable zone of danger.

What duty is owed by a fitness center to a customer suffering a cardiac event while using its equipment? The Fourth District Court of Appeal considered this duty in L.A. Fitness International, L.L.C. v. Mayer. "Alessio Tringali died as a result of a cardiac arrest ... while using a stepping machine at L.A. Fitness ..." The defendant’s sales representative “told the receptionist to call 911.” Because the representative believed “that Tringali was having a seizure or a stroke,” he did not attempt cardiopulmonary resuscitation (CPR). The plaintiff’s medical expert testified that the deceased’s “condition was treatable with defibrillation [and that] CPR could have been ‘used to increase the likelihood’” that defibrillation would have been successful when applied later. Another expert testified that the defendant fell below industry standards by not having a defibrillator, by not “screen[ing] individuals prior to their commencing exercise and by failing to employ a medical liaison.”

89. See id. at 704.
90. Id.
91. Id.
92. Id.
93. Almarante, 921 So. 2d at 704.
94. Id.
95. Id. at 705.
97. Id. at 557.
98. Id. at 552.
99. Id.
100. Id.
101. Mayer, 980 So. 2d at 553.
102. Id. at 555.
The court observed that "the duty owed by a health club owner" to a patron was a matter of first impression. It reviewed cases from other jurisdictions concerning the duty of business owners to injured patrons and found that, as a general principle, "summoning medical assistance within a reasonable time" is what is required. The court held that even if it was required to render first aid, it was not required "to perform skilled treatment, such as CPR." The court also refused to find that the defendant had a "duty to have a defibrillator."

The Fourth District reversed a jury verdict in a restaurant slip and fall case in Izquierdo v. Gyroscope, Inc. Izquierdo obtained a verdict against the defendant, owner and operator of Giorgio's Grill, where the plaintiff "slipped and fell on a wet napkin." The "restaurant, which became a night club after certain hours . . . had a tradition of both . . . wait staff and customers [tossing] paper napkins into the air as the music played." "No one would pick . . . up" the napkins from the floor, which sometimes became wet as drinks were spilled. The plaintiff had been to the restaurant five or six times and "knew of the napkin-throwing tradition." The jury found for the defendant, finding "no negligence on its part." The appellate court reversed the trial court's denial of a motion for a new trial, finding that the verdict was "contrary to the undisputed evidence." Although the plaintiff was aware of the napkin-throwing tradition and the danger was arguably open and obvious, the court held that such knowledge did not negate the defendant's duty to make "reasonable efforts to keep the premises free from transitory foreign objects."

In Kazanjian v. School Board of Palm Beach County, the Fourth District Court also considered the duty element in another school case; this one involving a public high school. The father of a student who was killed in a car accident after she and her friends left the school without authorization,
brought suit against the school board.\textsuperscript{116} Although the school made automated calls to parents when students were absent from class, the deceased student’s friend testified that the deceased intercepted the calls before her parents could receive them.\textsuperscript{117} The court refused to hold the school board responsible for supervising students off school property.\textsuperscript{118} After reviewing similar cases from other jurisdictions, the court concluded that a high school student skipping school does not “pose an ‘unreasonable risk’” that creates a duty.\textsuperscript{119} The court further held that sovereign immunity applied to the School Board because its decision concerning its attendance policies was a “discretionary planning level polic[y].”\textsuperscript{120}

In \textit{Luque v. Ale House Management, Inc.},\textsuperscript{121} the Fifth District Court of Appeal considered the duty of a bar for serving alcohol to an obviously intoxicated person who was then injured in an automobile accident.\textsuperscript{122} “Luque was a regular customer” of the Orlando Ale House.\textsuperscript{123} On the day in question, “he was served . . . several beers.”\textsuperscript{124} While driving home, a car “cut in front of him,” causing him to swerve and have an accident.\textsuperscript{125} The plaintiff claimed that section 768.125 of the \textit{Florida Statutes}, which states that “[a] person who sells or furnishes alcoholic beverages” may be liable if he “knowingly serves [someone] habitually addicted to the use of” alcohol and the person is injured as a result of the intoxication,\textsuperscript{126} defined a cause of action.\textsuperscript{127} The court agreed that the plaintiff had a cause of action and denied the defendant’s argument that it could not be found to be the cause of the accident because of the independent negligence of the driver who cut in front of the plaintiff.\textsuperscript{128}

\textsuperscript{116} \textit{Id.}.
\textsuperscript{117} \textit{Id.} at 262–63.
\textsuperscript{118} \textit{Id.} at 264.
\textsuperscript{119} \textit{Kazanjian}, 967 So. 2d at 267.
\textsuperscript{120} \textit{Id.} at 268.
\textsuperscript{121} 962 So. 2d 1062 (Fla. 5th Dist. Ct. App. 2007).
\textsuperscript{122} \textit{Id.} at 1063.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} FLA. STAT. § 768.125 (2007).
\textsuperscript{127} \textit{Luque}, 962 So. 2d at 1063.
\textsuperscript{128} \textit{Id.} at 1065–66.
Although generally a question of fact, appellate courts do review causation cases, particularly those involving questions of proximate cause. The question of when an intervening cause becomes a superseding one is a question that is sometimes difficult to resolve. During the time period covered by this article, a number of cases have arisen.

The Third District Court of Appeal upheld a summary judgment on proximate cause grounds in East Coast Electric v. Dunn. Allen Dunn and Clifford Stewart, while employed by Florida Power and Light, "were seriously injured while testing an uncovered bus bar." The "bar was manufactured by General Electric [and] shipped . . . to East Coast without the proper covers (‘end caps’)." "East Coast, a licensed electrical contractor," installed the bus bars. Dunn and Stewart sued both General Electric (GE) and East Coast. GE "filed motions for summary judgment," arguing that East Coast’s "decision to supply power to the building," which caused a "phase flash" that injured the plaintiffs, was a "superseding and intervening cause" that absolved GE. GE had warned East Coast "that the busway system should not be energized." The court upheld the summary judgment for GE, holding that East Coast’s "act of energizing the busway system should not be held liable for the Plaintiffs’ injuries."

The Fourth District Court of Appeal considered a proximate cause issue in a products liability case in Lindsey v. Bell South Telecommunications, Inc. Mark Lindsey, a mechanic, "used a tire changing machine" that was supposed "to handle tires with a rim diameter of up to 20 inches," but was problematic with "19 inch or 19.5 inch tires." Lindsey used a tire iron to help the machine break the bead on the tire. Other employees told the plaintiff’s employer that the machine was having problems with "19 and 19.5

129. E. Coast Elec. v. Dunn, 979 So. 2d 1018, 1021 (Fla. 3d Dist. Ct. App. 2008).
130. Id.
131. Id. at 1019.
132. Id.
133. Id.
134. Dunn, 979 So. 2d at 1019.
135. Id.
136. Id. at 1020.
137. Id. at 1021.
138. 943 So. 2d 963, 964–65 (Fla. 4th Dist. Ct. App. 2006).
139. Id. at 964.
140. Id.
inch tires." Once, while using the tire iron, it slipped and Lindsey almost fell over, which caused a herniated disk. The manufacturer argued that Lindsey's use of the metal bar was a superseding intervening cause. The court noted that the jury could have found that his conduct was not "so unusual, extraordinary or bizarre" as to relieve the defendant of liability.

The Fourth District Court of Appeal reviewed the liability of the Department of Children and Family Services (DCF) in regard to a child abuse complaint in State v. Amora. "The Miami Children's Hospital (MCH) called the DCF hotline because" of concern about a child, Marissa Amora, who had been admitted to the hospital. The child's x-ray revealed "a fractured clavicle, for which the mother had no explanation." Despite this and other concerns expressed to the Department, DCF failed "to contact the father, to staff the case with a [Child Protection Team] and to conduct a home study [before the child] was released from the hospital." After release, the child was physically abused by the mother's boyfriend, causing serious, permanent injuries. Marissa's adoptive parents sued DCF for negligently investigating the complaint. DCF argued that it was not "the legal cause of the injuries." The court ruled that there was competent substantial evidence to support a verdict against the Department.

The Fourth District Court of Appeal considered whether the deceased's illegal conduct was a superseding cause in Kaminer v. Eckerd Corp. of Florida. "Kaminer died as a result of ingesting Oxycontin" obtained from a fraternity brother. "The fraternity brother got the drug from his roommate, a pharmacy technician who had stolen it from his employer, Eckerd . . . Eckerd did not argue that it was not negligent, but [instead argued that the deceased's] criminal conduct in ingesting the drug" precluded recovery. Although "there was no evidence . . . that [the deceased] knew the nature of

141. Id.
142. Id.
143. Lindsey, 943 So. 2d at 965.
144. Id. at 965–66 (quoting Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105, 1116 (Fla. 2005)).
145. 944 So. 2d 431, 432 (Fla. 4th Dist. Ct. App. 2006) (per curiam).
146. Id.
147. Id. at 433.
148. Id. at 435.
149. Id.
150. Amora, 944 So. 2d at 435.
151. Id.
152. Id. at 436.
153. 966 So. 2d 452, 453 (Fla. 4th Dist. Ct. App. 2007).
154. Id.
155. Id.
the drug,” the court held that “knowledge of the illicit nature of a controlled substance can be presumed from actual possession.”

The court further agreed that the criminal conduct of the deceased did absolve Eckerd of liability.

IV. IMPACT RULE

Over the years, the impact rule has caused disagreement and confusion in Florida appellate courts. This has continued to be the trend in recent decisions. During the past three years, the Supreme Court of Florida has issued two opinions concerning its scope. In addition, the district courts have also tried to discern when it should be applied. The debate about what types of causes should not be bound by the rule also continues.

The Supreme Court of Florida reviewed a conflict amongst the district courts concerning the impact rule in Willis v. Gami Golden Glades, L.L.C. The Court reviewed an appeal of a “summary judgment in favor of the defendant[,]” the hotel. The plaintiff, Mrs. Willis, was robbed at gunpoint in a parking lot across the street from the hotel, which the plaintiff asserted was the location where she was instructed to park and assured that it was safe by the security guard employed by the service that was contracted to provide security to the hotel. “[A] gun was placed to her head as she” exited her rental car and the gunman also instructed her to lift her clothing as he “pat[ed] down her exposed body.” She also claimed that “the security guard refused to provide assistance” after the robbery. The Court, in a per curiam opinion, held that a negligence case could proceed because the plain-

156. Id. (citing Scott v. State, 808 So. 2d 166, 171 (Fla. 2002)).
158. See Fla. Dep’t of Corr. v. Abril, 969 So. 2d 201, 202 (Fla. 2007) (per curiam); Willis v. Gami Golden Glades, L.L.C. (Willis II), 967 So. 2d 846, 847–48 (Fla. 2007) (per curiam).
159. See generally id.
160. See id.
162. Willis II, 967 So. 2d at 846, 848.
163. Id.
164. Id. at 848–49 (citing Willis v. Gami Golden Glades, L.L.C. (Willis I), 881 So. 2d 703, 704 (Fla. 3d Dist. Ct. App. 2004)).
165. Id. at 849 (citing Willis I, 881 So. 2d at 704).
166. Id. (citing Willis I, 881 So. 2d at 704).
tiff had "sustained multiple types of contact [that] qualify as an impact."167 Chief Justice Lewis, in a concurring opinion, sought to clarify that a physical injury is not required when there has been an impact upon the plaintiff’s person.168 Justice Pariente agreed with this interpretation of the rule, but concurred to express her opinion that the Court should recede from the rule.169 She would replace it with a traditional foreseeability analysis.170 On the other hand, Justice Wells argued in dissent that the rule required the Court to "objectively test[] the reliability of claims for emotional distress," which he apparently believes requires a "physical injury or manifestation."171 Similarly, Justice Cantero argued in dissent that the rule in Florida has always required "physical injury or 'manifestation.'"172 After reviewing the case law and disagreeing with the interpretations of that line of cases by the majority and concurring opinions, he argued that if some physical manifestation is no longer required, then the plaintiff should be required to "prove, by clear and convincing evidence, that she [sustained] severe emotional distress" which was foreseeable.173

The Supreme Court of Florida also reviewed the rule’s application in an HIV claim in Florida Department of Corrections v. Abril.174 The plaintiff, "a senior licensed practical nurse at the Hendry County Correctional Institution (HCCI), [gave] unprotected mouth-to-mouth resuscitation to an inmate," who "was infected with hepatitis C."175 Abril sought to have HIV and hepatitis testing “through the department’s workers’ compensation [center], which declined . . . because it [decided] that the resuscitation did not expose her to a risk of infection.”176 “[T]he institution’s chief medical officer submitted a blood sample . . . to . . . a laboratory under contract with the State . . . .”177 The laboratory faxed results indicating that Abril had tested positive for HIV to “unsecured fax machine[s] in the institution’s business office and . . . in . . . the [Department of Corrections’] offices of Chief Health Servic-
It was later determined that the test results were a false positive and therefore incorrect. The plaintiff argued that section 381.004(3)(f), Florida Statutes, which outlines that HIV test results are confidential, created a duty on the part of the defendant. The Court agreed that this statute, along with those recognizing confidentiality in medical records, created a duty to handle the test results with reasonable care. It also ruled that the impact rule does not bar the action because the damages arising from the statutory breach would be emotional in nature. In a concurring opinion, Justice Pariente repeated her argument that the impact rule should be replaced with a traditional foreseeability analysis. Similarly, Justice Cantero argued that the Court should not continue to create ad hoc fact-specific exceptions. Justice Bell argued in dissent that creating a new tort cause of action in addition to the criminal and administrative remedies provided by the statute was contrary to legislative intent.

The First District Court of Appeal reviewed claims for negligent handling of a dead body in Brady v. SCI Funeral Services of Florida, Inc. The court reversed a directed verdict in favor of the defendant funeral service, which acknowledged that it had buried the plaintiffs' newborn son in an unlawfully shallow grave. The trial court had ruled that the "impact rule precluded an award . . . under a negligence [claim]." The appellate court held that the plaintiffs could proceed under a negligence claim where the "alleged misconduct is willful and wanton," rejecting the trial court's requirement that a claim be made of "gross negligence, or tortious interference with a dead body."

Who qualifies as a close personal relative for the purpose of bringing an emotional distress claim? The First District Court of Appeal considered whether stepchildren could qualify in Watters v. Walgreen Co. The appellants claimed that the pharmacy negligently provided instructions "on prescription pain medication," resulting in their stepfather dying from an over-
The trial court granted summary judgment for the defendants in the negligent infliction of emotional distress action because the appellants were not related by blood or adoption. The First District Court of Appeal concluded that this interpretation was too narrow and the close family relationship requirement needed to be assessed on a "case-by-case" basis, rejecting interpretations from the "Third and Fourth District[s] . . . to the extent that they require[d] a formal 'legal relationship.'"

In *Matsumoto v. American Burial & Cremation Services, Inc.*, the Second District Court of Appeal decided an appeal that reviewed a directed verdict in favor of the defendant funeral home in an emotional distress case. The case was filed by Ms. Matsumoto claiming that the defendant had "tortiously interfered with the body of her deceased father" by cremating it. The court determined that the claim was not one "for outrageous conduct causing severe emotional distress." The plaintiff had been estranged and not in contact with her father for over two years, but claimed that he desired a "military funeral and burial." On the other hand, the deceased's companion, who "held a general power of attorney," and the deceased's brother, testified that the deceased had directed "them to cremate his remains." The court correctly held that the conduct of the funeral home was not only not outrageous, but in fact in compliance with section 470.002(18), *Florida Statutes*, which specifies that a deceased body is to be disposed of by the "legally authorized person," who was, in this case, the deceased's brother. The court further held that the funeral home was not under "a due diligence requirement" to search for relatives of a higher priority, such as the daughter in this case, whom the brother and companion had claimed had no knowledge of how to contact Ms. Matsumoto.

The Fourth District Court of Appeal considered a "negligent infliction of emotional distress" claim in *Woodard v. Jupiter Christian School, Inc.* (*Woodard I*) "The minor plaintiff was a student at the [defendant’s institu-
tion], a private Bible-centered school... Administrators at the school directed Todd Bellhorn, a secondary teacher/chaplain, "to question and counsel [the plaintiff] about his sexual orientation." Bellhorn assured the [plaintiff that] their conversation was confidential. The plaintiff "disclose[d that] he was homosexual." Bellhorn relayed the information to . . . school[']s administrators, who . . . disclosed the information to others . . . [and] expelled the student . . . The plaintiff claimed that he "was berated by the press and the [school's] president . . . and shunned by his schoolmates as a result of the disclosure." The plaintiff argued that the court should recognize it as another exception to the impact rule, analogous to the exception approved by the Supreme Court of Florida for breaches of confidentiality between a psychotherapist and patient in Gracey v. Eaker. The court declined to create another exception and instead certified to the Supreme Court of Florida the following question: "Does the impact rule preclude a claim for negligent infliction of emotional distress arising out of the breach of confidential information provided to a clergyman?"

Judge Stone concurred, arguing "that a teacher designated as a 'chaplain' . . . even [at] a Christian school, is not a [clergy] member." On the other hand, Judge Farmer dissented, arguing that "the impact rule does not apply [in cases] in which the injury is predominantly emotional . . . 'such as . . . invasion of privacy [cases]." Thus, he opined that it should "not apply to breach of confidentiality" cases, such as allegedly occurred in this case.

The Supreme Court of Florida discharged jurisdiction of the case—leaving it somewhat clear what their position on the issue might be. Justice Pariente dissented to the discharge, arguing that the Fourth District Court of Appeal's opinion is at odds with the Supreme Court of Florida's decisions in Gracey and Abril, discussed above. Justice Pariente repeated her assen-
tion that Florida should abandon the impact rule.\textsuperscript{217} Further, she argued that the "case is substantially similar to [other cases where the Court has] recognized exceptions to the impact rule."\textsuperscript{218} As explained by Justice Pariente, the treatment received by Woodard by the press, the president of the school, and his schoolmates "is at least equal to that typically suffered by the victim of a defamation or an invasion of privacy."\textsuperscript{219} Certainly, it should be no more difficult to recognize that emotional distress probably resulted from "the breach of the confidentiality in this case" than it was in the \textit{Gracey} and \textit{Abril} cases.\textsuperscript{220} Further, as the dissent points out, the discharge leaves unclear whether the Court was deciding that the impact rule precluded recovery or that the plaintiff did not have "a valid underlying cause of action" in regard to the act of the teacher.\textsuperscript{221}

The Fifth District Court of Appeal applied the impact rule in \textit{Reiser v. Wachovia Corp.},\textsuperscript{222} in which Scott Reiser, the plaintiff, "was confronted in the bank's lobby by four hooded, armed" bank robbers.\textsuperscript{223} One of the "gunmen held a rifle" to Reiser's head while the other robbers opened the vault and stole cash.\textsuperscript{224} Reiser claimed emotional trauma, but "[t]he trial court entered summary judgment in favor of the bank."\textsuperscript{225} The appellate court held that a negligent infliction of emotional distress claim cannot be recognized "in the absence of a physical impact or injury."\textsuperscript{226}

V. \textbf{DANGEROUS INSTRUMENTALITIES}

The liability for the use of a dangerous instrumentality has been addressed in a number of cases.\textsuperscript{227} As will be seen, at least one case has also considered the impact of federal legislation in this doctrinal area.\textsuperscript{228} What

\begin{itemize}
\item 217. \textit{Id.} at 171.
\item 218. \textit{Id.}
\item 219. \textit{Id.} (quoting \textit{Gracey v. Eaker}, 837 So. 2d 348, 356 (Fla. 2002)).
\item 220. \textit{See} \textit{Woodard II}, 972 So. 2d at 171.
\item 221. \textit{Id.} at 172 n.1.
\item 222. 935 So. 2d 1236, 1236 (Fla. 5th Dist. Ct. App. 2006) (per curiam).
\item 223. \textit{Id.}
\item 224. \textit{Id.}
\item 225. \textit{Id.}
\item 226. \textit{Id.}
\item 228. \textit{See} \textit{Kumarsingh}, 983 So. 2d at 601.
\end{itemize}
vehicles should be considered dangerous instrumentalities for purposes of this doctrine has also been considered. 229

The Second District Court of Appeal considered the impact of legislative modifications of the dangerous instrumentality doctrine in *Fischer v. Alessandrini*. 230 "Dean James Alessandrini was killed after Jeffrey Salerno," who was driving a truck belonging to Salerno’s father-in-law, John Fischer, hit the motorcycle driven by Alessandrini. 231 Fischer had loaned the truck to his son, who then lent it to the defendant. 232 The court held that the legislation's limit on liability was applicable in this case. 233 It rejected the trial court’s interpretation that Fischer was not protected because he did not lend the truck to Salerno, noting that the doctrine to which this limitation applied made owners liable for use by someone other than the original permissive user. 234

The Second District Court of Appeal also considered an appeal in a dangerous instrumentality case in *Estate of Villanueva v. Youngblood*. 235 T. Patton "Youngblood took [his] Lexus to Extreme Auto Sales & Accessories, Inc., and consigned it there for sale." 236 One of the latter’s principals, Teddy Aponte, drove the car home and to a Christmas party where he "was involved in [an] accident that killed Mr. [Reinaldo] Villanueva." 237 Although Youngblood did not expressly limit Extreme Auto’s use, he assumed that it would be used "solely for test drives." 238 The court refused "to extend the 'shop' exception to the” dangerous instrumentality doctrine to this situation. 239 The court also held that summary judgment was not appropriate for Youngblood on the issue of whether “the theft or conversion exception” was appropriate and on the issue of the scope of the consent. 240

The Third District Court of Appeal considered the impact of the federal Graves Amendment upon the dangerous instrumentality doctrine in *Kumarsingh v. PV Holding Corp.* 241 "Juan Ortiz crashed his rental car into the Ku-

230. 907 So. 2d at 571.
231. *Id.* at 570.
232. *Id.*
233. *Id.* at 571–72 (interpreting FLA. STAT. § 324.021(9)(b)(3) (2005)).
234. *Id.*
235. 927 So. 2d 955, 956 (Fla. 2d Dist. Ct. App. 2006).
236. *Id.* at 956.
237. *Id.* at 957.
238. *Id.* at 956.
239. *Id.* at 959.
240. *Villanueva*, 927 So. 2d at 960.
marsinghs’ vehicle,” injuring Mr. Kumarsingh. The plaintiffs filed suit against [the defendants,] . . . alleging vicarious liability as owners/lessors of the car, and negligent entrustment.” The appellate court held that the act “supersedes and abolishes all state vicarious liability laws as . . . appl[ied] to lessors of motor vehicles for causes of action filed . . . after . . . the effective date of [the] statute,” August 10, 2005.

In Festival Fun Parks, L.L.C. v. Gooch, the Fourth District Court of Appeal considered whether “a go-kart amusement ride operated on an enclosed track” could be considered a dangerous instrumentality. The plaintiff was injured when his go-kart crashed into a wall after being bumped by another go-kart driven by an unidentified driver. Concession go-karts at such tracks “range in top speed from 14 MPH at a family-type track to 18-20 MPH at tracks . . . for older drivers.” The court looked at various Florida Statutes that define “motor vehicle” and concluded that a go-kart amusement ride did not fit comfortably in those definitions, but acknowledged that such definitions were not controlling in any event. Instead, it examined whether the instrumentality was “peculiarly dangerous in its operation” and compared the go-kart to golf carts, which were deemed by the Supreme Court of Florida to be dangerous instrumentalities in Meister v. Fisher. The court noted that golf carts were extensively regulated similar to automobiles and that they were capable of causing serious injury. By contrast, the court did not feel that this type of go-kart was similar in either of these aspects. It, therefore, “conclude[d] that the dangerous instrumentality doctrine does not apply to concession go-karts.”

In Ming v. Interamerican Car Rental, Inc., the Fifth District Court of Appeal also addressed the dangerous instrumentality doctrine. The defen-
dant, Interamerican, rented a car to Callie Robinson. Robinson’s daughter, Leslie, struck and killed Robert Doyle in the rental car on the way “to her mother’s workplace.” Leslie was on probation and had her driver’s license revoked “at the time of the accident.” Callie never gave express permission to her daughter to drive the car. The court noted that rental car companies were still responsible for damages caused by the operation of the rental vehicle unless the breach of custody of the vehicle amounted to conversion or theft. The court reversed the summary judgment entered on behalf of Interamerican, because of “issue[s] of material fact on the [conversion] issue.” These included the fact that the car was used “during the rental term,” neither Interamerican nor Callie reported the car as stolen prior to or after the accident, “Interamerican made no demand to possess the car,” and “Leslie was driving the car to give it to her mother” so she “had no intent to possess the car . . . longer than necessary to” give possession to the authorized driver. Chief Judge Pleus dissented on this part of the holding because he deemed it unreasonable to believe that Interamerican would have agreed to permit Leslie to drive the car with a suspended license and that it had no knowledge of her use prior to the accident. The court also reversed the summary judgment entered on behalf of Callie Robinson because it believed there was evidence to support implied consent to drive the car because she knew that Leslie had driven her vehicles previously, the keys were arguably left in the open, there was a familial relationship, and her conduct after the accident reflected a lack of consent.

The Fifth District Court of Appeal considered this doctrine as applied to the lessee of the tractor of a tractor-trailer in Saullo v. Douglas. “Jessie Douglas, a professional truck driver, was driving a tractor-trailer rig . . .” “[T]he trailer was fully owned by Dart” Transit Company, but “[t]he tractor was owned by Mr. Douglas” and permanently leased to Dart. Douglas “detached the trailer in the far right-hand lane of a four-lane roadway” so that

257. Id. at 652.
258. Id.
259. Id.
260. Ming, 913 So. 2d at 652.
261. Id. at 653 (citing Stupak v. Winter Park Leasing, Inc., 585 So. 2d 283, 284 (Fla. 1991)).
262. Id. at 654.
263. Id. at 655.
264. Id. at 658 (Pleus, C.J., concurring in part and dissenting in part).
265. Ming, 913 So. 2d at 657–58.
266. 957 So. 2d 80, 82 (Fla. 5th Dist. Ct. App. 2007).
267. Id.
268. Id.
he could use the tractor to help his brother remove his brother's car from mud in which it was stuck. 269 Douglas "directed his brother's girlfriend to park her car behind the trailer and to activate the [car's] emergency" [flashing signals]. 270 Saullo swerved his automobile in order "to avoid the trailer and the automobile," and was killed when his car "slammed into a tree." 271 The court first discussed competing interpretations of federal statutes and regulations governing the liability of interstate motor carriers in regard to leased vehicles. 272 Some courts had interpreted the regulations to impose strict liability upon the lessees, while others only held the carrier liable if the driver was acting within the scope of his employment. 273 The court concluded that the latter view was the better interpretation. 274 The appellate court concluded that the trial court had correctly concluded that "Douglas was not acting within the scope of his employment" in leaving the trailer on the roadway in order to extricate his brother's car from the mud. 275 Nevertheless, as lessee of the tractor, and as the entity that permitted Douglas to operate it, the court held that Dart was in the best position to assure safe operation and was "subject to vicarious liability for" Douglas' negligence. 276

VI. TOBACCO CASES

The Supreme Court of Florida again visited the ongoing tobacco litigation in Engle v. Liggett Group, Inc. 277 As previously discussed in earlier summaries in this law review, Florida courts have been dealing with litigation against tobacco companies for the past few years. 278 In addition to the Engle case, the district courts are also reviewing tort claims brought against various cigarette-makers. 279 The Supreme Court of Florida case involved a number of issues and split the court on some of them. 280

269. Id.
270. Id.
271. Saullo, 957 So. 2d at 82.
272. Id. at 84.
273. Id. at 84–85.
274. Id. at 86.
275. Id.
276. Saullo, 957 So. 2d at 87.
277. 945 So. 2d 1246, 1254 (Fla. 2006) (per curiam).
279. See Engle, 945 So. 2d at 1282 (Wells, J., concurring in part and dissenting in part).
280. Id. at 1254–55.
The case originated as a nationwide class action of smokers and their survivors, but the Third District “reduced the class to” Florida smokers. The trial court then divided this complex action into three separate trial phases. “Phase I consisted of a year-long trial [devoted entirely to] the issues of liability and entitlement to punitive damages [to] the class as a whole.” On July 7, 1999, “the jury rendered a verdict for the Engle Class and against” the tobacco companies on all counts. “Phase II was divided into two [parts] . . . ” Phase II-A was to resolve “entitlement and amount of compensatory damages [to] the three individual class representatives—Frank Amodeo, Mary Farnan, and Angie Della Vecchia.” Phase II-B was to determine the “total lump sum punitive damage award . . . [to] the class as a whole.”

“At the conclusion of Phase II-A, the jury” awarded a total of $12.7 million dollars in compensatory damages offset by the comparative fault of the individual class members. At the conclusion of Phase II-B, the jury awarded a lump sum to the entire class of $145 billion in punitive damages. Post verdict motions and appeals followed.

First, the Court addressed the claim by defendants of the res judicata effect of the settlement agreement reached by the State of Florida and many of the defendants in this action in a prior lawsuit filed by the State in 1995, seeking reimbursement of Medicaid funds expended to treat victims of tobacco-related illnesses. Settlement was reached in 1997. The Court unanimously concluded that the settlement agreement between the State of Florida and many of the defendants in that case did not preclude a punitive damages award in this case because “the Engle Class relied on . . . injuries personal to the class members,” as opposed to the claims of the State based on the general interest of all citizens.

281. Id. at 1256.
282. Id.
283. Id.
284. Engle, 945 So. 2d at 1256–57.
285. Id. at 1257.
286. Id.
287. Id.
288. Id.
289. Engle, 945 So. 2d at 1257.
290. Id. at 1257–58.
291. Id. at 1258.
292. Id.
293. Id.
294. Engle, 945 So. 2d at 1261.
"A majority of the Court ([Justices] Anstead, Pariente, Lewis, and Quince) conclude[d] that an award of compensatory damages [was] not [required before] a finding of entitlement to punitive damages."\(^{295}\) This is because this group believed that the two types of awards serve distinct purposes.\(^{296}\) A different majority—Justices "Wells, Anstead, Pariente, and Bell—conclude[d, however, that] a finding of liability is required before [an] entitlement to punitive damages can be determined, and that liability is more than a breach of duty."\(^{297}\) Further, the Court determined that the amount of "the punitive damages award[ed] was . . . excessive."\(^{298}\) Although declining "to impose a bright-line ratio" between the amount of compensatory damages and punitive damages, the Court found the disparity between the two in this case to violate constitutional notions of due process.\(^{299}\) It explained that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree," would satisfy this standard.\(^{300}\) Thus, the ratio of 145 to 1 in this case was problematic.\(^{301}\) Further, it stated that before determining the appropriateness of the amount of the punitive damages, as opposed to simply entitlement to the same, a determination of the compensatory damages for the entire class needed to be made, as opposed to the assessment here of compensatory damages for the three representatives alone.\(^{302}\)

The Court agreed with the Third District that the original trial plan needed to be altered.\(^{303}\) Originally, Phase III of the trial was "to decide the individual liability and compensatory damages claim[] for each" member of the class—estimated to be approximately 700,000.\(^{304}\) The Court concluded that continued treatment of the matter as a class action was not feasible because of individualized issues of "legal causation, comparative fault, and damages."\(^{305}\) The Court held that class members could individually litigate their claims with "the Phase I common core findings . . . hav[ing] res judicata effect in those [individual] trials."\(^{306}\) These would not include findings of fraud, intentional infliction of emotional distress, and punitive damages,

\(^{295}\) Id. at 1262.
\(^{296}\) Id.
\(^{297}\) Id.
\(^{298}\) Id. at 1265 n.8.
\(^{299}\) See Engle, 945 So. 2d at 1264–65.
\(^{300}\) Id. at 1264.
\(^{301}\) Id. at 1265.
\(^{302}\) Id.
\(^{303}\) Id.
\(^{304}\) Engle, 945 So. 2d at 1258.
\(^{305}\) Id. at 1268.
\(^{306}\) Id. at 1269.
which the Court deemed to require individualized determinations.\textsuperscript{307} The Court also reminded trial counsel to guard against improper arguments, although it declined to reverse the judgments because of the statements made in this case.\textsuperscript{308} The Court noted that some of counsel's arguments that were race-based or pled for nullification of the law had been subject to successful objection.\textsuperscript{309}

The Second District considered the application of design defect theory to tobacco cases in \textit{Philip Morris USA, Inc. v. Arnitz}.\textsuperscript{310} Arnitz, who obtained a jury verdict, argued that the cigarettes were defectively designed because of a curing process that increased the level of carcinogenic substances in the tobacco and additives that made them easier to inhale and increased the speed of nicotine absorption into the cells.\textsuperscript{311} The court rejected the defendant's argument that federal law pre-empted "the design defect claim."\textsuperscript{312}

The Fourth District has also considered the application of tort law to tobacco cases in \textit{Ferlanti v. Liggett Group, Inc.}\textsuperscript{313} It also held that the plaintiff was not pre-empted from bringing tort claims in tobacco cases.\textsuperscript{314} Further, it reversed the summary judgment for the defendants because there were genuine issues of material fact concerning the design of the cigarettes and "whether the risks associated with smoking cigarettes were open, obvious, and common knowledge."\textsuperscript{315} Finally, it ruled, that judicial notice of "whether the dangers of smoking were common knowledge [was inappropriate] when ruling on the" summary judgment motion.\textsuperscript{316}

The Fourth District further considered the application of \textit{Engle} and the other Florida tobacco cases in \textit{Liggett Group, Inc. v. Davis}.\textsuperscript{317} Liggett appealed a jury verdict in favor of Beverly Davis, who prevailed on the theories of negligence and defective design.\textsuperscript{318} Davis smoked Chesterfield cigarettes from 1951–74.\textsuperscript{319} "In 2001, [she] was diagnosed with lung cancer."\textsuperscript{320} Her

\textsuperscript{307} Id.
\textsuperscript{308} Id. at 1271.
\textsuperscript{309} \textit{Engle}, 945 So. 2d at 1273 (agreeing that some of the remarks injecting race into the case were improper).
\textsuperscript{310} 933 So. 2d 693, 695 (Fla. 2d Dist. Ct. App. 2006).
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 698.
\textsuperscript{313} 929 So. 2d 1172, 1173 (Fla. 4th Dist. Ct. App. 2006).
\textsuperscript{314} Id. at 1174.
\textsuperscript{315} Id. at 1175.
\textsuperscript{316} Id. at 1176.
\textsuperscript{317} 973 So. 2d 467, 470–73 (Fla. 4th Dist. Ct. App. 2007).
\textsuperscript{318} Id. at 469.
\textsuperscript{319} Id.
\textsuperscript{320} Id.
negligence claim was based upon her argument that Liggett was negligent in continuing to manufacture cigarettes after it became known that cigarettes posed a significant health risk to smokers. 321 Liggett argued that the negligence claim was pre-empted by federal law, which permits the continued production of cigarettes. 322 The court agreed that the negligence claim in this case was barred because Congress had refused to ban tobacco products and the allowance of negligence claims for continued production, therefore, conflicted with congressional intent. 323

The court next addressed the strict liability design defect claim. 324 First, the court held that the federal government’s decision to permit the continued manufacture of cigarettes prevented the application of the risk-utility test to this particular design defect claim, even if Florida ultimately recognized it as an appropriate test for other design defect cases. 325 The court next addressed how the ordinary consumer test applied to this claim. 326 The trial court had instructed the jury in regard to this claim that “[a] product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect, when used as intended or in a manner reasonably foreseeable by the manufacture.” 327 It rejected Liggett’s claim that plaintiffs must prove that its cigarettes presented dangers greater than that “expected by the ordinary consumer.” 328 Although Congress recognized in 1968 that health risks existed and ordered warnings on cigarette packs, the court noted that there was evidence presented up until that time that “the average consumer may not have known of the dangers.” 329 The court also rejected Liggett’s argument that the plaintiff was required to prove a safer alternative design, and instead stated that it was a factor to consider in design defect cases. 330

VII. RELEASES

In 2003, the Forth District Court of Appeal ruled that a mother could not bind her child to an agreement “to arbitrate potential personal injury
claims” in *Shea v. Global Travel Marketing, Inc.* Since that case, Florida district courts have tried to determine the limits of its holding. This section will review some of those cases which have tried to discern which criteria will void a waiver provision signed by a parent of a minor child.

The Second District Court of Appeal considered the enforceability of an exculpatory clause in a release in *Murphy v. Young Men’s Christian Ass’n of Lake Wales, Inc.* When Elizabeth Murphy joined the YMCA, she signed a waiver “which include[d] the following . . . provision[s]: . . . ‘I understand that even when every reasonable precaution is taken, accidents can sometimes still happen . . . I understand that this release includes any claims based on negligence.”

Murphy was injured “while using exercise equipment at the YMCA[]” facility. Noting that “[e]xculpatory clauses are disfavored and . . . construed against the party claiming” waiver, the court ruled that the “reasonable reader might be led to believe that the waiver [only] extends . . . to . . . injuries that were unavoidable ‘even when every reasonable precaution’ had been taken.” Therefore, summary judgment for the defendant was reversed.

The Third District also considered the enforceability of a waiver provision signed by a parent in *Krathen v. School Board of Monroe County.* Krathen and her parent signed a release from liability so that Krathen could participate as a cheerleader. She was injured during a practice. After reviewing other district court cases and the *Shea* case, the court held that this release was binding because the parent in this case had decided that cheerleading was a beneficial activity for her daughter.

The Fourth District Court of Appeal considered the ability of parents to bind their children with pre-injury releases in *Fields v. Kirton.* “Bobby

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331. 870 So. 2d 20, 23 (Fla. 4th Dist. Ct. App. 2003), rev’d, 908 So. 2d 392 (Fla. 2005).
334. *Id.*
335. *Id.*
337. *Id.* at 567–68.
338. *Murphy*, 974 So. 2d at 569.
339. 972 So. 2d 887, 888 (Fla. 3d Dist. Ct. App. 2007).
340. *Id.*
341. *Id.*
342. *Id.* at 889.
343. 961 So. 2d 1127, 1128 (Fla. 4th Dist. Ct. App. 2007).
Jones was the primary residential parent for his fourteen year old son, Christopher. 344 Christopher lost control of his all terrain vehicle at the Thunder Cross Motor Sports Park, and was killed in the accident. 345 His father had signed a release for the activity. 346 The court, referencing cases such as Shea, acknowledged that parents may execute waivers for “obtaining medical care, insurance, or participation in school or community sponsored activities.” 347 The court, however, indicated that these waivers were different from one which “impacts the minor’s estate and . . . property rights.” 348 The court held that “a pre-injury release executed by a parent” will not be enforced. 349 The court recognized that the decision conflicted with one from the Fifth District. 350 The court, therefore, certified the following question to the Supreme Court of Florida:

WHETHER A PARENT MAY BIND A MINOR’S ESTATE BY THE PRE-INJURY EXECUTION OF A RELEASE. 351

The Southern District of Florida also attempted to discern Florida law on parental releases for minors’ injuries in In re Complaint of Royal Caribbean Cruises Ltd. 352 The father and his son were injured when the jet ski that they rented from an entity owned by Royal Caribbean was hit by another jet ski, also rented from the same entity. 353 After reviewing the Florida case law discussed in this article, it held that this was “a private activity provided by a for-profit business” and therefore the release signed by the father could “not be enforced against his minor child.” 354 Despite winning on this issue, the court granted summary judgment because the plaintiffs were unable to demonstrate negligence by the defendants. 355

344. Id.
345. Id.
346. Id.
347. Id. at 1129 (citing In re Complaint of Royal Caribbean Cruises Ltd., 403 F. Supp. 2d 1168, 1173 (S.D. Fla. 2005)).
348. Fields, 961 So. 2d at 1129–30.
349. Id. at 1130.
350. Contra Lantz v. Iron Horse Saloon, Inc., 717 So. 2d 590, 592 (Fla. 5th Dist. Ct. App. 1998); see id.
351. Fields, 961 So. 2d at 1130.
353. Id. at 1169–70.
354. Id. at 1173.
355. Id.
Florida courts have also had the opportunity to decide when the persons or entities who engage in tortuous conduct are immunized from liability. This has most often arisen in regard to actions by governmental agents acting within the scope of their duties. Who qualifies and what types of actions are protected have been reviewed in a number of cases during the time period covered by this article.

In *Jibory v. City of Jacksonville*, 356 the First District Court of Appeal refused to permit sovereign immunity or a good faith defense from allowing the plaintiff’s case to proceed beyond summary judgment. 357 Jibory brought a false imprisonment claim for an arrest on a warrant that was void because he had previously been arrested on the warrant over two years earlier. 358 The City had “failed to delete the warrant from its computer records.” 359 The City argued “that it had no legal duty under principles of sovereign immunity to accurately maintain its records and that [its] officers . . . acted in good faith.” 360 The court rejected the arguments that the defendant had no duty or was protected by sovereign immunity. 361 Because the warrant was void because it had previously been executed, the court also refused to allow the City to claim the good faith defense. 362

The First District Court addressed another immunity issue in regards to child abuse reports in the case of *Urquhart v. Helmich*, 363 which involved an appeal of a final summary judgment of a claim for intentional infliction of emotional distress in a claim against a doctor who erroneously reported to authorities that the plaintiffs had abused their daughter. 364 The plaintiffs “took their then twenty-eight day old daughter to the Fort Walton Beach Medical Center emergency room” because of breathing problems that she was experiencing. 365 Pursuant to a CT scan ordered by defendant, “the radiologist who interpreted the scan,” Dr. Helmich, indicated that the child had a skull fracture that was caused by either birth trauma or child abuse. 366 The plaintiffs told the physician that the child had been removed “from the birth

357. *Id.* at 667.
358. *Id.* at 666–67.
359. *Id.* at 667.
360. *Id.*
361. *Jibory*, 920 So. 2d at 667.
362. *Id.* at 668.
363. 947 So. 2d 539 (Fla. 1st Dist. Ct. App. 2006).
364. *Id.* at 540.
365. *Id.*
366. *Id.*
canal with forceps,” but she did not think that the fracture was caused by that.\textsuperscript{367} She recommended other tests, which were declined by the parents.\textsuperscript{368}

The court interpreted the immunity provisions found in the \textit{Florida Statutes} regarding child abuse reports.\textsuperscript{369} Section 39.203, provides “a general grant of immunity to a person who makes” a good faith report that a child has been abused.\textsuperscript{370} Section 39.201, requires “medical doctors and other health care professionals who have reasonable cause to suspect” abuse or neglect, to report their suspicions to the appropriate state authorities.\textsuperscript{371} The court read the two provisions together to conclude that the doctor would have immunity if there was objective evidence of reasonable cause to suspect abuse.\textsuperscript{372} Further, it found that even lacking reasonable cause, the doctor retained immunity from civil liability if the report was made in good faith.\textsuperscript{373} In this case, the court still held that, as a matter of law, the court could determine reasonable cause existed despite allegations by the plaintiffs that a subsequent CT scan showed no skull fracture and that the doctor made the report out of spite because of arguments with the parents.\textsuperscript{374}

The First District considered the provisions of another immunity statute in \textit{Andrew v. Shands at Lake Shore, Inc.}\textsuperscript{375} The plaintiffs alleged that their fifteen year-old son, Dustin, died as a result of a radiologist at Shands Hospital whose unreasonable failure to properly examine a CT scan, which would have revealed a malignant tumor.\textsuperscript{376} Shands is engaged in a joint venture with the University of Florida College of Medicine, acting through the Board of Trustees, in which all radiologists permitted staff privileges are employed by the College of Medicine.\textsuperscript{377} The appellate court held that section 768.28(9)(a) of the \textit{Florida Statutes}, which immunized the radiologist from tort liability in this case, does not protect a third party private entity such as Shands, which is “jointly responsible for the radiologist’s conduct.”\textsuperscript{378}

The Fourth District considered the qualified immunity of inspectors from the Department of Agriculture and a sheriff’s deputy who arrested the

\begin{thebibliography}{99}
\bibitem{367} Id. at 540–41.
\bibitem{368} \textit{Urquhart}, 947 So. 2d at 540–41.
\bibitem{369} See id. at 541.
\bibitem{370} Id.; see FLA. STAT. § 39.203 (2008).
\bibitem{371} \textit{Urquhart}, 947 So. 2d at 541; see FLA. STAT. § 39.201 (2008).
\bibitem{372} \textit{Urquhart}, 947 So. 2d at 542.
\bibitem{373} Id.
\bibitem{374} Id. at 543.
\bibitem{375} 970 So. 2d 887, 888 (Fla. 1st Dist. Ct. App. 2007).
\bibitem{376} Id.
\bibitem{377} Id.
\bibitem{378} Id. at 889.
\end{thebibliography}
plaintiff in *Vaughan v. Florida Department of Agriculture & Consumer Services*. The inspectors entered Vaughan's property to inspect his citrus trees without a warrant. After Vaughan refused entry, the inspectors called the Broward County Sheriff's Office and Deputy Weller appeared and arrested Vaughan. The court considered whether section 581.031(15)(a), *Florida Statutes*, which gives a general grant of power to inspectors “to enter into . . . any place” thought to house or contain anything that could threaten agricultural interests” and section 581.184, *Florida Statutes*, which requires the sheriff to assist and protect department employees in obtaining such access, immunized the defendants from suit. The majority conceded that the defendants' actions violated the Fourth Amendment, the arrest was invalid, and that the sheriff's office and state could be required to compensate the plaintiff. However, the court held that “reasonable public officials in the same circumstances and possessing the same knowledge as the defendants could have believed [that] the law authorized entry without a warrant.” The majority believed this, in part, because inspectors at the time were routinely entering property without warrants. Judge Farmer argued vigorously in dissent that the actions of the defendants violated settled Fourth Amendment law, and that a general immunity statute did not shield their actions. As he noted, the statutes do not dispense with “the requirement of a warrant” and there were no exigent circumstances giving the inspectors the right to claim a good faith belief.

The Fourth District Court of Appeal considered the immunity of a hospital in a false imprisonment case in *Montejo v. Martin Memorial Medical Center (Montejo II)*. Luis Alberto Jimenez, an undocumented Guatemalan, “sustained brain damage and severe physical injuries” in an automobile accident. He “was transported to Martin Memorial Medical Center [and then] transferred to a skilled nursing facility.” Because his injuries rendered him mentally incompetent, Montejo Gaspar Montejo was appointed his
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"Jimenez was readmitted to [the hospital] on an emergency basis" on January 26, 2001. He was still in the hospital in November, and "Montejo filed a guardianship plan," seeking skilled care for the following twelve months. Martin Memorial intervened, seeking "permission to discharge Jimenez" and transport him to Guatemala. The circuit court granted the hospital's request, but "Montejo filed a motion to stay the court’s . . . order." Although the court ordered the hospital to respond to the motion, the hospital proceeded to transport Jimenez to the airport in an ambulance and then to Guatemala via private plane. The district court reversed the trial court’s order because of "insufficient evidence that Jimenez could receive adequate care in Guatemala [and] because ‘the trial court lacked subject matter jurisdiction to authorize’” Jimenez’s deportation.

Montejo then filed a lawsuit claiming that Jimenez had been falsely imprisoned “in the ambulance and on the airplane.” The defendant argued that it was immune because its actions were done pursuant to an order valid at the time of its actions. The court pondered the question of whether the action was done without legal authority or color of authority. The court held that legal authority may be met “by irregular or voidable process, but” not void process. It held that an order that lacked subject matter jurisdiction was void. The hospital claimed that it was entitled to absolute immunity for an act occurring during the course of a judicial proceeding, but the court rejected that these acts were protected by the litigation privilege because the actions were not during the proceeding or pursuant to “an effort to prosecute or defend [the] lawsuit.” It also rejected the defendant’s claim of qualified immunity as afforded state agents because the hospital was not acting as a governmental agent executing the order. While reversing the dismissal of the plaintiff’s complaint, the court indicated that it was a

391. Id.
392. Id.
393. Montejo II, 935 So. 2d at 1267.
394. Id.
395. Id. at 1267–68.
396. Id. at 1268.
397. Id. at 1268 (citing Montejo v. Martin Mem’l Med. Ctr., Inc., (Montejo I), 874 So. 2d 654, 658 (Fla. 4th Dist. Ct. App. 2004)).
398. Montejo II, 935 So. 2d at 1268.
399. Id.
400. Id. at 1268–69.
401. Id. at 1269.
402. Id.
403. Montejo II, 935 So. 2d at 1270.
404. Id. at 1271.
question of fact to be resolved at trial as to whether the hospital’s “actions were unwarranted and unreasonable.”

The Fourth District Court of Appeal considered how immunity statutes applied in a defamation case against a psychologist who reported suspected sexual abuse to the Department of Children and Families (DCF) in *Ross v. Blank.* The plaintiff’s “wife met with Blank, a practicing psychologist . . . in connection with [her] divorce.” In one session, she brought her older daughter to discuss a situation in which the daughter had showered with the plaintiff. After consulting with a colleague who advised Blank that “there was sufficient evidence” to report possible child abuse, “Blank made a report to DCF.” The plaintiff sued, arguing in part that because Blank waited from March 19, when she was informed of the alleged showering episode, until June 10, when she actually reported it, she did not suspect child abuse had occurred. The plaintiff argued that the report was made to retaliate against him for banning her “from further involvement with the children.”

Citing *Urquhart,* the court agreed with the First District that motivation was irrelevant where a professional with mandatory reporting allegations has a reasonable basis to suspect abuse. The court held that a reasonable basis existed. In addition to being told of the showering episode, the plaintiff’s wife also told Blank that the plaintiff “kept naked pictures of the daughters on his desk and in his car.” The court also rejected defamation claims against Blank for statements that she made to a court-appointed custodial evaluator and the guardian ad litem involved in the custody dispute that Blank believed the plaintiff was a pedophile. These statements were protected by the litigation privilege.

The Fourth District considered another defamation appeal and the issue of immunity in *Cassell v. India.* India was a police officer injured while attempting to arrest a suspect. He asked for light duty work, but “contin-

405. *Id.* at 1272.
406. 958 So. 2d 437, 439 (Fla. 4th Dist. Ct. App. 2007).
407. *Id.* at 439.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Ross,* 958 So. 2d at 439.
412. *Id.* at 441 (citing *Urquhart v. Helmich,* 947 So. 2d 539, 542 (Fla. 1st Dist. Ct. App. 2006)).
413. *Id.*
414. *Id.*
415. *Id.*
416. *Ross,* 958 So. 2d at 441.
417. 964 So. 2d 190, 191 (Fla. 4th Dist. Ct. App. 2007).
418. *Id.*
uled to work out using light[] weights," activity approved by his doctor.419
His supervisor, Cassell, believed that his weight training "was inconsistent with [the] light duty assignment and" reported this to his superior officer and the city's insurance department, who "placed India under surveillance."420
After observing India lifting weights, the "department [then] contacted the Florida Department of Insurance (DOI) to request a fraud investigation."421
Another officer approached Cassell on three separate occasions to ask about "rumors that India was . . . to be arrested."422 On the third occasion, Cassell indicated that he was.423 Cassell also told a PBA representative that India had not gotten hurt on duty.424 The PBA representative believed "that Cassell was trying to influence him to deny India a disability pension, [so the representative] complained to Internal Affairs" about Cassell's accusation.425
The court concluded that it had no difficulty concluding that Cassell's statements to "superior officers and representatives" were absolutely privileged because he was authorized to report suspected fraud.426 Cassell was also privileged to tell the PBA representative that he believed a fraudulent claim was being considered.427 The court was more troubled about the statements to a subordinate, but ultimately held that a statement concerning "a department rumor of worker's compensation fraud . . . [by someone with] personal knowledge of the circumstances [and in response to an inquiry was] sufficient to bring [it] within the scope of Cassell's duties."428 It also concluded that the immunity applied to an intentional infliction of emotional distress claim also brought by India.429

The Fifth District Court of Appeal reviewed the "liability of law enforcement officers and their governmental employers in [relation to] the execution of an arrest warrant and . . . taking [a person] into custody" in Willingham v. City of Orlando.430 Mr. Willingham's wallet was stolen and soon thereafter he discovered that his identity had been used unlawfully by Craig Caldwell when the latter was charged for speeding.431 Mr. Willingham got

419. Id.
420. Id. at 191–92.
421. Id. at 192.
422. Cassell, 964 So. 2d at 192.
423. Id.
424. Id.
425. Id.
426. Id. at 194.
427. Cassell, 964 So. 2d at 195.
428. Id.
429. Id. at 196.
430. 929 So. 2d 43, 45 (Fla. 5th Dist. Ct. App. 2006).
431. Id.
the speeding charge dismissed because of mistaken identity.\textsuperscript{432} Several years later, Officer Wayne Costa of the Orlando Police Department arrested Willingham outside of his residence on an outstanding warrant "for failure to redeliver a hired vehicle."\textsuperscript{433} Willingham protested "that his identity had been stolen and . . . offered to get documentation," but Costa chose not to investigate the mistaken identity assertion.\textsuperscript{434} Willingham was confined for five days, until an investigation of his assertions was completed.\textsuperscript{435} Willingham sued the officer for false arrest and sued his employer, the City of Orlando, and Orange County, which operated the jail where he was taken, for false imprisonment and false arrest.\textsuperscript{436} Officer Costa claimed immunity under section 768.28(9)(a) of the \textit{Florida Statutes}, which immunizes officers from tort liability or suit for acts within the scope of employment "unless [the] officer . . . acted in bad faith or with malicious purpose."\textsuperscript{437} The court held that summary judgment for the officer is not appropriate if "a reasonable trier of fact could possibly conclude that the conduct was willful and wanton," and also that probable cause is an affirmative defense in a false arrest claim.\textsuperscript{438} The court noted that false imprisonment requires that "the detention [be] without color of legal authority," unlike malicious prosecution where "the detention is malicious, but under . . . due form[] of law."\textsuperscript{439} The court held that the officer was immune because he "acted reasonably under the circumstances in fulfilling the nondiscretionary requirements of his position . . . even if it was mistakenly issued."\textsuperscript{440} It also upheld summary judgment for the city and county on the ground that "[t]he responsibility to enforce the law[] for the [public] good [does not create] a duty to act with care toward[s] any . . . individual."\textsuperscript{441}

IX. PRIVACY/DEFAMATION

The First District Court of Appeal reversed a jury verdict in a false light invasion of privacy case in \textit{Gannett Co. v. Anderson}.\textsuperscript{442} The plaintiff in the case, Joe Anderson, Jr., sued the Pensacola News-Journal and its parent

\begin{itemize}
\item \textsuperscript{432} Id.
\item \textsuperscript{433} Id.
\item \textsuperscript{434} Id.
\item \textsuperscript{435} Willingham, 929 So. 2d at 46.
\item \textsuperscript{436} Id.
\item \textsuperscript{437} Id. at 46–47 (quoting \textit{FLA. STAT.} § 768.28(9)(a) (2003)).
\item \textsuperscript{438} Id. at 48.
\item \textsuperscript{439} Id.
\item \textsuperscript{440} Willingham, 929 So. 2d at 49.
\item \textsuperscript{441} Id. at 50.
\item \textsuperscript{442} 947 So. 2d 1, 2 (Fla. 1st Dist. Ct. App. 2006).
\end{itemize}
companies for an article that he argued "impl[jed] that he . . . murdered his wife."\textsuperscript{443} He originally filed a claim for libel, but because some of the articles were beyond the two-year statute of limitations for libel, he amended his complaint and argued that the privacy claim was controlled by the four-year statute for unspecified torts, section 95.11(3)(p), \textit{Florida Statutes}\.\textsuperscript{444} After noting that the false light tort is not universally accepted and that the Supreme Court of Florida had not directly recognized it, the court concluded that the Supreme Court of Florida had tacitly recognized its potential existence.\textsuperscript{445} The court held that since "the plaintiff's false light claim [was] not distinguishable from" its libel claim, it was bound by the two-year statute.\textsuperscript{446} It reached this conclusion because this claim was based upon the harm to the plaintiff's reputation as a result of the alleged false impression raised by the article.\textsuperscript{447} It certified, however, that this decision conflicted with a case from the Second District Court of Appeal.\textsuperscript{448}

Can a witness in a medical malpractice case sue defendant doctors who try to get him disciplined for testimony provided? In \textit{Fullerton v. Florida Medical Ass'n} (\textit{Fullerton II}),\textsuperscript{449} the First District Court of Appeal addressed this issue.\textsuperscript{450} Dr. John Fullerton testified "in a medical-malpractice [case] brought against [Dr.] Jonathan B. Warach, [Dr.] Pravinchandra Zala, and [Dr.] Joseph O. Krebs."\textsuperscript{451} The lawsuit "resulted in a judgment exonerating them."\textsuperscript{452} The defendant doctors sent a letter to the Florida Medical Association (FMA) seeking discipline against Fullerton, complaining that Fullerton's "testimony fell below reasonable professional standards, [and] was made 'for the sole purpose of propagating a frivolous lawsuit for financial gain,' and that he . . . 'presented false testimony and false theories.'"\textsuperscript{453} Fullerton sued, alleging several theories, including defamation.\textsuperscript{454} The defendants argued that "section 766.101, Florida Statutes (2003), and the federal Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–11152 (HCQIA), immu-

\begin{itemize}
\item \textsuperscript{443} \textit{Id.}
\item \textsuperscript{444} \textit{Id.} at 2, 4.
\item \textsuperscript{445} \textit{Id.} at 6 (citing Agency for Health Care Admin. v. Assoc'd Indus. of Fla., Inc., 678 So. 2d 1239, 1252 (Fla. 1996)).
\item \textsuperscript{446} \textit{Id.} at 7.
\item \textsuperscript{447} \textit{Gannett Co.}, 947 So. 2d at 10.
\item \textsuperscript{448} \textit{Id.} at 11 (citing Heekin v. CBS Broad., Inc., 789 So. 2d 355, 357 (Fla. 2d Dist. Ct. App. 2001)).
\item \textsuperscript{449} 938 So. 2d 587 (Fla. 1st Dist. Ct. App. 2006).
\item \textsuperscript{450} \textit{See id.} at 589.
\item \textsuperscript{451} \textit{Id.}
\item \textsuperscript{452} \textit{Id.}
\item \textsuperscript{453} \textit{Id.}
\item \textsuperscript{454} \textit{Fullerton II}, 938 So. 2d at 589.
\end{itemize}
ize[d] the FMA” and individual doctors from these claims.\textsuperscript{455} The court held that Florida’s peer-review statute was created to “evaluat[e] and improv[e] the quality of health care” so it refused to extend the immunity provisions to review testimony given by a doctor.\textsuperscript{456} The court noted that defamatory statements in judicial proceedings are absolutely privileged.\textsuperscript{457} In reviewing the HCQIA, the court agreed that it also did not immunize the defendants in this case.\textsuperscript{458}

In \textit{University of Miami v. Ruiz},\textsuperscript{459} the Third District Court of Appeal reviewed the right of physicians to claim the protection of the Neurological Injury Compensation Act (NICA), section 766.316, \textit{Florida Statutes}.\textsuperscript{460} The Ruiz’ “pre-registered at Jackson North Maternity Center” for medical care.\textsuperscript{461} Mrs. Ruiz received a pamphlet that indicated that the hospital participated in Florida Birth-Related Neurological Injury Compensation Plan.\textsuperscript{462} “The hospital representative did not discuss the brochure” nor did the brochure indicate that any staff physicians were participants in the plan.\textsuperscript{463} Three weeks later, Ruiz’s “baby was delivered . . . and was born with significant and permanent brain damage.”\textsuperscript{464} In their malpractice action, the plaintiffs complained that they were not given proper notice of NICA.\textsuperscript{465} The court rejected that the defendant physicians were excused from giving notice because Mrs. Ruiz arrived in an emergency condition.\textsuperscript{466} The court accepted the plaintiffs’ arguments that the physicians had three weeks after registration with the hospital to provide notice and that the hospital’s notice was inadequate to provide notice of the physicians’ participation.\textsuperscript{467}

The Third District Court of Appeal considered a defamation case against an employer and its human resources manager in \textit{American Airlines, Inc. v. Geddes}.\textsuperscript{468} The plaintiff became involved in disputes with fellow employees concerning the placement and use of personal computers brought to

\footnotesize{\textsuperscript{455} Id.}
\footnotesize{\textsuperscript{456} Id. at 591.}
\footnotesize{\textsuperscript{457} Id. at 592 (citing Fariello v. Gavin, 873 So. 2d 1243, 1245 (Fla. 5th Dist. Ct. App. 2004)).}
\footnotesize{\textsuperscript{458} Id.}
\footnotesize{\textsuperscript{459} 916 So. 2d 865 (Fla. 3d Dist. Ct. App. 2005).}
\footnotesize{\textsuperscript{460} Id. at 868.}
\footnotesize{\textsuperscript{461} Id. at 867}
\footnotesize{\textsuperscript{462} Id.}
\footnotesize{\textsuperscript{463} Id.}
\footnotesize{\textsuperscript{464} Ruiz, 916 So. 2d at 867.}
\footnotesize{\textsuperscript{465} Id.}
\footnotesize{\textsuperscript{466} Id. at 869.}
\footnotesize{\textsuperscript{467} Id.}
\footnotesize{\textsuperscript{468} 960 So. 2d 830, 831 (Fla. 3d Dist. Ct. App. 2007) (per curiam).}
work by the employees.\textsuperscript{469} One employee reported that the plaintiff "had threatened to 'cut out his intestines.'\textsuperscript{470} Plaintiff denied the statement, although "he admitted to using other than 'church talk'" to the complainant.\textsuperscript{471} Meenan, the human relations supervisor, investigated and talked to various employees who were identified as witnesses.\textsuperscript{472} She then gave the plaintiff a "'first advisory'" which apparently included a suspension.\textsuperscript{473} The plaintiff alleged that the "investigation was maliciously motivated because of a prior suit against his employer."\textsuperscript{474} The jury, in a confusing verdict, exonerated the human relations supervisor, but found American Airlines guilty.\textsuperscript{475} The court reversed the verdict because there was no evidence of a defamatory statement made to a third party.\textsuperscript{476} All statements made between "executive/managerial employees are considered to be the corporation talking to itself," statements made to persons identified as witnesses were a part of the investigation, and statements made to other employees in the plaintiff's department who wanted to know why the plaintiff was disciplined were in the interest of "the disciplinary practices of [the] employer and . . . the safety and security of [the] workplace."\textsuperscript{477}

In \textit{Charles v. State},\textsuperscript{478} the Fourth District Court of Appeal reviewed the defamation claim of a discharged employee.\textsuperscript{479} Charles, an employee of the Department of Children and Families (Department), was, pursuant to departmental policy, advised of termination of his employment in the presence of another employee.\textsuperscript{480} In this instance, the witness was a Department human resources employee.\textsuperscript{481} Charles repeatedly asked why he was being dismissed and was told it was "because of his 'criminal lifestyle.'" Charles alleged that this statement was" untrue and defamatory.\textsuperscript{482} The appellate court ruled that the statement was not actionable where the communication was invited by the claimant under the invited defamation defense.\textsuperscript{483}

\begin{thebibliography}
\bibitem{469} Id.
\bibitem{470} Id. at 832.
\bibitem{471} Id.
\bibitem{472} Id.
\bibitem{473} Geddes, 960 So. 2d at 832 (emphasis added).
\bibitem{474} Id.
\bibitem{475} Id. at 833.
\bibitem{476} Id. at 834.
\bibitem{477} Id.
\bibitem{478} 914 So. 2d 1 (Fla. 4th Dist. Ct. App. 2005).
\bibitem{479} Id.
\bibitem{480} Id. at 2.
\bibitem{481} Id.
\bibitem{482} Id.
\bibitem{483} Charles, 914 So. 2d at 3-4.
\end{thebibliography}
When are words that can be viewed differently by different groups considered defamatory? This issue was one of the ones considered by the Fourth District Court of Appeal in *Rapp v. Jews for Jesus, Inc.* The plaintiff's stepson, an employee and member of the defendant, Jews for Jesus, Inc. (Jews for Jesus), provided copy for the latter's newsletter, which was also posted on the group's website, that implied that the plaintiff had converted her religious beliefs and had become a member of the organization. The plaintiff sued, claiming: "1) false light invasion of privacy, 2) defamation, and 3) intentional infliction of emotional distress," in addition to "negligent training and supervision." The court first considered whether the information could be considered defamatory since the members of Jews for Jesus would have considered the alleged actions to reflect positively about the plaintiff's character. However, the website was viewed by others beside the members, and in fact, the plaintiff discovered the material by one of her relatives. The court acknowledged that one view of defamation considers information "defamatory if the plaintiff is prejudiced in the eyes of a substantial and respectable minority of the community." In fact, this is a position expressed by Comment e to section 559 of the Restatement (Second) of Torts. However, because the Supreme Court of Florida has not adopted this comment, the court declined to adopt it, and upheld dismissal of the defamation claim. Similarly, because the organization considered the alleged actions positively, the claim for intentional infliction of emotional distress could not succeed. The court was more troubled by the false light claim. False light claims permit persons to argue that something "highly offensive to a reasonable" man could be recognized. It noted that depth of feelings about religion could cause someone to feel aggrieved when falsely accused of converting religion. However, it also recognized that no Florida appellate court had expressly affirmed a judgment on a false light claim, although tacit acknowledgment existed. Therefore, it reversed dismissal.

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485. *Id.* at 462.
486. *Id.* at 462–63.
487. *Id.* at 465.
488. *Id.* at 466.
489. *Rapp,* 944 So. 2d at 465.
490. *Id.* at 465–66.
491. *Id.* at 466.
492. *Id.* at 467.
493. *See id.* at 468.
494. *Rapp,* 944 So. 2d at 467.
495. *Id.* at 468.
496. *Id.*
of this count and certified "the following question as being one of great public importance: Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?"\(^{497}\)

The Fourth District Court of Appeal decided an invasion of privacy appeal in \textit{Straub v. Scarpa}.\(^{498}\) The defendant sent a letter to members of her homeowners association asking them "to provide her with proxy rights to vote for a slate of" candidates for board positions.\(^{499}\) The letter asserted that the "owners would be better represented by" persons who only included necessary expenditures in the operating budget and that the upcoming budget "contain[ed] very expensive items . . . hav[ing] nothing to do with the operation of [the] community."\(^{500}\) The court upheld the dismissal of the suit, noting that it was an attempt to stifle political speech, because it did not mention the defendant by name nor describe him and its content "was not "highly offensive to a reasonable person.\(^{501}\)

In \textit{Alan v. Palm Beach Newspapers, Inc.},\(^{502}\) the Fourth District Court of Appeal addressed a defamation claim by a practicing attorney arrested and "charged with [being] accessory after the fact to murder, threats or extortion, tampering with a witness, and solicitation to commit perjury."\(^{503}\) "Alan visited an alleged eyewitness to the murder," which his client was accused of committing.\(^{504}\) Alan was acquitted of the two charges that were not dropped by the State.\(^{505}\) The Post used information obtained from the arrest warrant, probable cause affidavit, and "evidence and testimony presented" at trial.\(^{506}\)

Noting that "[a] newspaper 'has a qualified privilege to report accurately on information received from government officials,'" the appellate court agreed with the trial court that "the published statements were fair, accurate and impartial."\(^{507}\)

The Fifth District Court of Appeal decided an appeal of an alleged slander in \textit{Scott v. Busch}.\(^{508}\) Plaintiff Marie Melton-Treworgy ran a "bed and

\(^{497}\) \textit{Id.}.
\(^{498}\) 967 So. 2d 437, 438 (Fla. 4th Dist. Ct. App. 2007).
\(^{499}\) \textit{Id.} at 439.
\(^{500}\) \textit{Id.}
\(^{501}\) \textit{Id.} at 438–39 (quoting \textit{RESTATEMENT (SECOND) OF TORTS § 652E} (1977)).
\(^{502}\) 973 So. 2d 1177 (Fla. 4th Dist. Ct. App. 2008).
\(^{503}\) \textit{Id.} at 1178.
\(^{504}\) \textit{Id.}
\(^{505}\) \textit{Id.}
\(^{506}\) \textit{Id.} at 1178–79.
\(^{507}\) \textit{Alan}, 973 So. 2d at 1180.
\(^{508}\) 907 So. 2d 662, 663 (Fla. 5th Dist. Ct. App. 2005).
breakfast business by renting rooms in her home.”509 The defendant, “Randy Bush, and her husband own[ed the] home adjacent to Treworgy.”510 After “bad feelings developed between the parties,” Bush ran for a seat on the Flagler Beach City Commission.511 During a public meeting, the defendant, “[w]hile looking directly at the [p]laintiff, . . . angrily stated that a person in her neighborhood had obtained an illegal permit.”512 The plaintiff alleged that both persons who had and some who had not attended the meeting questioned her “about obtaining illegal permits and . . . questioned her honesty and integrity.”513 The appellate court disagreed with the trial court that this “statement was a pure opinion,” which is not actionable, because the defendant “did not disclose the factual basis [for] her opinion . . . [nor state that] it was just her opinion.”514

The federal Southern District Court of Florida considered Florida defamation law in a case brought by a professional basketball player against a newspaper, a newspaper columnist, and the owner of the Phoenix Suns professional basketball team in Fortson v. Colangelo.515 Fortson, a professional basketball player with a history of committing flagrant fouls and a reputation of being a rough player, sued the defendants concerning statements made about him following an incident in a game in which he was called for a flagrant foul that caused a Suns player to break his wrist, and that earned Fortson a $1000 fine and three-game suspension.516 Colangelo made statements that were broadcast and published in the media, after the game, that referred to Fortson as a “thug.”517 The columnist, Peter Vecsey, wrote a column that also referred to Fortson as a “vacant lot[ ]” and “meaningless mass.”518 Vecsey also accused Fortson of “mugging” defenseless rivals, “maliciously destabilizing a player in mid-flight,” “thugg[ing] out,” and “attempted murder.”519 The court refused to find that these statements were defamatory.520 First, the court explained that pure opinion or rhetorical hyperboles are not actionable.521 The court stated that the line between factual statements and

509. Id. at 664.
510. Id.
511. Id.
512. Id.
513. Scott, 907 So. 2d at 664.
514. Id. at 668.
516. Id. at 1373–75.
517. Id. at 1376.
518. Id.
519. Id. at 1376–77.
520. Fortson, 434 F. Supp. 2d at 1385.
521. Id. at 1379.
these kinds of comments is difficult to draw, but one for the court to determine as a matter of law. The court noted that the test is one that requires the statement to be considered in its totality and in context. The court held that Colangelo’s statements about the plaintiff being a thug would not lead the “reasonable listener of any sports program” or any reasonable reader of a sports section to infer that Fortson “was a vicious criminal of [any] sort.” Similarly, the court found that the reasonable reader would not have inferred from Vecsey’s statements that Fortson was a criminal. It also noted that these statements were published in a column that clearly would lead the reader to believe that at least some of the assertions were matters of opinion.

X. PREMISES LIABILITY

The duty owed by a landowner towards persons who enter his property has been an issue long debated in the common law. Historically, the common law has varied the duty depending upon the status of the entrant and the condition that injures him. As has been the case in past survey articles, Florida courts have considered various aspects of this doctrinal area during the past three years. This includes a Supreme Court of Florida case attempting to clarify one of its precedents.

The Supreme Court of Florida considered the duty of a landowner in regard to conditions on the land that extend into the public right-of-way so as to create a foreseeable traffic hazard in Williams v. Davis. "Twanda Green, an employee of Diamond Transportation Services, Inc., was ... transporting vehicles in a procession from one rental car location to another." Green was killed when the car she was driving "was struck by a dump truck" while Green was attempting a turn at an intersection. Green’s estate “claimed that foliage on the property” of Williams, which abutted the intersection, “obstructed Green’s view of other traffic as she approached the in-
The Court noted that the evidence did not indicate that the foliage "extended [beyond] the bounds of the property," which was critical for its holding. The Court referenced the holding of Whitt v. Silverman, which held that a commercial landowner could be liable for injuries to pedestrian passers-by for a failure "to provide safe egress to vehicles exiting the premises." However, the Court was unwilling to extend this duty to private owners of residential property in regard to foliage that does not extend beyond the property.

When is the owner responsible for injuries on property that it has leased? The Second District Court of Appeal considered this issue in Russ v. Wollheim. Russ was injured "while descending a ladder on the premises of Dinettes Unlimited, Inc., during his employment with the corporation." Dinettes leased the property from the Wollheims. Mr. Wollheim was "president and chief executive officer of Dinettes." Although a lessor can avoid liability for injuries to an invitee, the court held that it could not if the lease fails to confer complete and exclusive possession and control of the premises to the lessee. The lessor had not done so in this case where the lease permitted "the lessee to 'alter, add to and improve the [p]roperty subject to [l]essor's prior written approval.'"

Does a business invitee lose that status by engaging in violent acts toward another customer? The Second District Court of Appeal addressed that question in Byers v. Radiant Group, L.L.C. A violent conflict erupted between the occupants of two vehicles in the parking lot of a convenience store owned by the defendant. Tragically one person was killed and another seriously injured when the driver of one of the cars "drove his vehicle directly into" the other two. The injured survivor and estate of the deceased brought a negligence action against the driver and the owner of the store. The trial court concluded that the deceased and the survivor changed their

533. Williams, 974 So. 2d at 1055.
534. Id. at 1055–56.
535. 788 So. 2d 210 (Fla. 2001).
536. Williams, 974 So. 2d at 1058–59 (citing Whitt, 788 So. 2d at 222).
537. Id. at 1063.
538. 915 So. 2d 1285, 1286 (Fla. 2d Dist. Ct. App. 2005).
539. Id.
540. Id.
541. Id.
542. Id. at 1287.
543. Russ, 915 So. 2d at 1287.
544. 966 So. 2d 506, 507 (Fla. 2d Dist. Ct. App. 2007).
545. Id.
546. Id.
547. Id.
status from business invitees to uninvited licensees or trespassers by being instigators of violence.\textsuperscript{548} The appellate court refused to equate this situation to those where an invitee changes status “by going to a part of the premises that was off-limits” or by staying past the expiration of the invitation.\textsuperscript{549} Although the court conceded that “a particular act of violence” could potentially cause someone to forfeit his status, such as committing a robbery on the premises, it was unwilling, as a matter of law, to say that the acts in this case rose to that level at the summary judgment stage.\textsuperscript{550} A concurrence by Judge Altenbernd clarified that he thought that a jury could ultimately determine that the status was lost if an invitee “intentionally . . . remain[s] on the property to engage in a . . . brawl, [instead of] as a matter of self-defense.”\textsuperscript{551} Altenbernd noted that depending upon which version of the facts that a jury believed, the deceased may have been committing a felony by beating another person and a car with a baseball bat and thus would be precluded from recovery by “section 768.075(4), which prevents a property owner from being held liable under a negligence theory to an individual who is injured while committing or attempting to commit a felony.”\textsuperscript{552} It was also under dispute whether the survivor “was [also] committing or attempting to commit a felony” during the brawl.\textsuperscript{553}

The Third District Court of Appeal considered the duty owed a tenant in \textit{Smith v. Grove Apartments, L.L.C.}\textsuperscript{554} The plaintiff, Franklin L. Smith, “fell from his step ladder [while] attempting to clear and trim overgrown foliage above the parking lot” of the apartment complex where he was a tenant.\textsuperscript{555} “Smith had repeatedly complained to the landlord . . . [that] tree branches and vines over the parking lot . . . were scratching vehicles, causing power outages, and hitting motorists in the eyes as they . . . enter[ed] and exit[ed] their vehicles.”\textsuperscript{556} Florida Power and Light trimmed trees that impacted power lines, but “declined Smith’s request to [do further] trim[ming].”\textsuperscript{557} Smith then decided to engage in self-help by taking it upon himself to do the trimming of vegetation that he considered necessary to alleviate the remaining problems.\textsuperscript{558} The landlord argued, and the trial court agreed, that the

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\textsuperscript{548} Id. at 508 (referencing circuit court ruling).
\textsuperscript{549} Byers, 966 So. 2d at 509.
\textsuperscript{550} Id. at 510.
\textsuperscript{551} Id. at 511 (Altenbernd, J., concurring).
\textsuperscript{552} Id. at 512–13.
\textsuperscript{553} Id. at 513.
\textsuperscript{554} 976 So. 2d 582, 583 (Fla. 3d Dist. Ct. App. 2007).
\textsuperscript{555} Id.
\textsuperscript{556} Id.
\textsuperscript{557} Id.
\textsuperscript{558} Id. at 584.
\end{flushleft}
landlord was not the proximate cause of the plaintiff’s injuries. The appellate court recognized that a landlord has a “statutory duty to [keep] common areas in a safe condition.” The court held that the plaintiff was clearly within the class meant to be protected by the statute. The court then held that summary judgment for the defendant had to be reversed because the issue “of whether the tenant’s own actions was an intervening and independent cause . . . so as to relieve the landlord of any liability” was a factual one upon which reasonable minds could disagree.

The Fourth District Court of Appeal considered the liability of a landlord in regard to an injury off premises in Ramirez v. M.L. Management Co. A child, who was a tenant in the defendant’s apartment complex, was bitten by another tenant’s pit bull “in a park adjacent to the . . . complex.” “The park was advertised by the . . . complex as an amenity” to its tenants. The complex rules specifically prohibited pit bulls. The fact that the pit bulls were “occasionally . . . loose in the complex” had been reported to the management, but the owner “had not been asked to leave for violation of the rules.” The court held that a jury could find a landlord liable for injuries beyond its premises if it extends its operations, which could be found here where the landlord invited its tenants to take advantage of the park as an amenity. Further, the landlord had a duty to undertake reasonable precautions to protect its tenants from a vicious dog owned by another tenant of which it had knowledge.

The Fourth District Court of Appeal considered the liability of a landowner in a case to a plaintiff who “aggravated a knee injury while ‘shooing cows’ that had wandered onto his property from adjacent property” in Florida Power & Light Co. v. Morris (Morris II). “The cows were owned by Jose Ruiz who occupie[d] the F[lorida] P[ower &] L[ight] property under a written license . . . .” In a prior appeal of the case, the court had reversed a

559. Smith, 976 So. 2d at 585.
560. Id. at 586 (referencing FLA. STAT. § 83.51(2)(a)(3) (2007)).
561. Id. at 587.
562. Id. at 589.
563. 920 So. 2d 36, 36 (Fla. 4th Dist. Ct. App. 2005).
564. Id. at 36–37.
565. Id. at 36.
566. Id. at 37.
567. Id.
568. Ramirez, 920 So. 2d at 38.
569. Id. at 39.
570. 944 So. 2d 407, 408 (Fla. 4th Dist. Ct. App. 2006).
571. Id.
dismissal of the complaint. The court noted that a landowner could “be liable to a third party if . . . he retain[ed] a possessory interest in the property . . . [or] responsibility for maintenance and inspection” of it. As owners of stock are statutorily liable for damages caused when such stock are willfully, intentionally, carelessly, or negligently allowed to stray or run at large, the court held that FPL was not liable absent assumption of liability in the license. The court therefore reversed the judgment against FPL because the license agreement did “not impose a duty upon [the landowner] to construct, repair, or maintain the fence.” In addition, FPL’s retention of the “right to enter the premises” did not constitute control so as to impose a duty.

Judge Farmer disagreed in a dissent which argued that the license needed to shift the duty to maintain the fence to the licensee before FPL could avoid liability. He also argued that as a licensee, the plaintiff did not exclusively occupy the land as a tenant would and thus FPL did retain “plenary rights of control as [an] owner.”

Is a parking lot bumper an open and obvious dangerous condition? That depends upon the circumstances according to the Fifth District in Aaron v. Palatka Mall, L.L.C. A shopping mall patron tripped over the bumper and claimed that the mall did not “maintain the premises in a reasonably safe condition” or warn “of the dangerous condition.” The court held that summary judgment was inappropriate where the plaintiff alleged that the bumpers were “almost the same color as the base of the . . . lot; . . . there were only two bumpers;” it was dark, raining and misty, and the “lot was poorly lit.”

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573. Morris II, 944 So. 2d at 410.
575. Morris II, 944 So. 2d at 413.
576. Id. at 413.
577. Id.
578. Id. at 415 (Farmer, J., dissenting).
579. Id.
580. 908 So. 2d 574, 577 (Fla. 5th Dist. Ct. App. 2005).
581. Id. at 576.
582. Id. at 578–79.
XI. PRODUCT LIABILITY

Some of the district courts have also dealt with a number of product liability claims in the past three years. This has included whether a motor home can be considered a product for strict liability purposes. Courts have also been asked to clarify the extent of design defect liability doctrine. As was discussed in Section VI, this doctrine has also been at issue in the tobacco cases.

In Cataldo v. Lazy Days R.V. Center, Inc., the Second District Court of Appeal considered a matter of first impression in Florida, concerning the possibility of strict liability doctrine to sellers of "used and reconditioned motor home[s]." Approximately nineteen months after purchasing the motor home, Mr. Cataldo "inadvertently engaged the switch," retracting the steps to the motor home while turning on the lights for it. Cataldo later fell while stepping from the door, and sustained injuries ultimately causing his death. The appellate court first held that although a motor vehicle can be a dangerous instrumentality, the injury in this case "arose from its function as a home," not a motor vehicle. The court then noted that other district courts in Florida had refused to extend strict liability to sellers of used products in design defect cases. After reviewing cases from other jurisdictions, concerning the liability of sellers of used products, the court found that there was no consensus on extending liability. Although the Second District refused to extend the doctrine in this case, it did certify as a question of great importance, the following question: "CAN A FLORIDA COURT IMPOSE STRICT LIABILITY ON THE SELLER OF A USED AND RECONDITIONED MOTOR VEHICLE THAT IS DEFECTIVELY DESIGNED AND UNREASONABLY DANGEROUS?"

584. Cataldo, 920 So. 2d at 175.
585. Plaza, 971 So. 2d at 919.
586. See Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1254 (Fla. 2006) (per curiam).
587. 920 So. 2d 174 (Fla. 2d Dist. Ct. App. 2006).
588. Id. at 175.
589. Id. at 176.
590. Id.
591. Id. at 177.
592. Cataldo, 920 So. 2d at 178.
593. Id. at 179.
594. Id. at 180.
The Second District also considered a product liability case in *Vincent v. C.R. Bard, Inc.*, 595 which involved "a patient controlled analgesia (PCA) pump . . . [that] allegedly malfunctioned [during surgery,] delivering an overdose of morphine . . . that . . . totally and permanently disabled" the plaintiff. 596 The court rejected the argument of defendants, who designed the pump, that they could not be held liable for negligent design where "an intervening manufacturer or distributor" existed. 597

The Third District Court of Appeal reviewed a products liability case in *Kohler Co. v. Marcotte*. 598 Kohler manufactured the engine in a lawn mower that injured Timothy Marcotte whose "hand came [into] contact with the rotating plastic air intake screen." 599 "Magic Circle Corporation . . . manufacturer of the lawn mower," "unilaterally decided not to" cover the screen with a protective guard. 600 The court held that since "[t]he engine was not ‘defective in itself . . . operated . . . as it was designed’ and any danger ‘was open and obvious, . . . Kohler had no duty to warn.’" 601 The court deemed it Magic Circle's responsibility to determine if a guard was necessary. 602

Whether something is a product or not was addressed in *Plaza v. Fisher Development, Inc.*, 603 by the Third District Court of Appeal. 604 The plaintiff, "an employee of Pottery Barn, was . . . injured when he fell onto a conveyor system" that delivered products from the storage area to the retail area. 605 Fisher was the general contractor for construction of the store where the plaintiff was injured. 606 The Third District upheld the summary judgment for Fisher because the conveyor system was "a structural improvement to real property," and therefore not a product subject to strict liability. 607

The Fourth District considered the liability of a distributor of baby strollers in *Rivera v. Baby Trend, Inc.* 608 Baby Trend, the distributor and marketer, was granted summary judgment because it did not possess "the stroller at any point in the chain of distribution." 609 The court held that possession was...
a factor to be considered in a strict liability action, but lack of possession would not preclude liability.\textsuperscript{610} Where, as here, the defendant was the seller and marketer and "had some control over the design," summary judgment was deemed inappropriate.\textsuperscript{611}

\section*{XII. MALPRACTICE}

The Supreme Court of Florida reviewed an attorney malpractice claim in \textit{Law Office of David J. Stern, P.A. v. Security National Servicing Corp. (Stern II)}.\textsuperscript{612} The appellee, Security National, accused Stern of accidentally dismissing a timely filed mortgage foreclosure action instead of the untimely filed action that he had filed on the same cause.\textsuperscript{613} His pursuit of the untimely action was fruitless as it was ultimately rejected at summary judgment.\textsuperscript{614} "[T]he mortgage and note were assigned several times," and Security National was assigned both during appeal of the botched foreclosure.\textsuperscript{615} Stern, who accidentally dismissed the wrong action, admitted that he had committed malpractice.\textsuperscript{616} Stern represented Security National during the first month or two of the appeal.\textsuperscript{617} The trial court judge in the malpractice action entered summary judgment against Security National because it lacked an attorney-client relationship with Stern when the malpractice occurred.\textsuperscript{618} The Fourth District reversed, holding "that 'the malpractice action was transferred incident to the transfer of the note and [action].'"\textsuperscript{619} Justice Bell, speaking for the Court, first explained that Security National lacked standing for the legal malpractice action for acts committed by Stern while representing a prior holder of the note and mortgage.\textsuperscript{620} Further, he argued that Florida follows the majority rule that legal malpractice claims are not assignable.\textsuperscript{621} This required him to explain that it was different from the case of \textit{Cowan Liebowitz & Latman, P.C. v. Kaplan},\textsuperscript{622} which permitted assign-

\begin{thebibliography}{99}
\bibitem{610} Id. at 1104.
\bibitem{611} Id. at 1105.
\bibitem{612} 969 So. 2d 962, 964 (Fla. 2007).
\bibitem{613} Id.
\bibitem{614} Id.
\bibitem{615} Id.
\bibitem{616} Id. at 965.
\bibitem{617} \textit{Stern II}, 969 So. 2d at 965.
\bibitem{618} Id.
\bibitem{619} Id. (quoting Sec. Nat'l Servicing Corp. v. Law Office of David J. Stern P.A. (\textit{Stern I}), 916 So. 2d 934, 936 (Fla. 4th Dist. Ct. App. 2005)).
\bibitem{620} Id. at 966.
\bibitem{621} Id. at 967.
\bibitem{622} 902 So. 2d 755 (Fla. 2005).
\end{thebibliography}
ment where it was expressly assigned and the malpractice involved prepara-
tion of placement memoranda intended to benefit not just the corporation,
but all those relying upon the documents in the case.623 In a concurring op-
inion, Chief Justice Lewis agreed with the result, but disagreed that Kaplan
was wrongly applied by the district court.624 As he noted, any detrimental
actions taken by an attorney in regard to a foreclosure will clearly flow to
"subsequent holders of the note and mortgage."625 Justice Pariente dissented,
arguing that this case was similar to Kaplan because both involved "general
assignment[s] in a commercial setting . . . [of] a panoply of . . . rights, duties
and obligations."626 She also noted that the rule in this case protected a "neg-
ligent attorney at the expense of [a] mortgage holder[], who [was] engaged in
legitimate commercial transactions."627 Justice Quince wrote a separate dis-
sent, also arguing that the "sale of mortgage loans" does not involve the type
of unique and personal duties that preclude the assignment of malpractice
actions.628

The Supreme Court of Florida resolved a conflict concerning the appli-
cation of the physician financial responsibility law629 in medical malpractice
actions against hospitals where the physician holds staff privileges.630 Ulti-
mately, the Supreme Court of Florida concluded "that the Legislature did not
intend to impose civil liability on hospitals [that do not] ensure that physi-
cians . . . granted staff privileges comply with [statutory] financial responsi-
bility requirements."631 Lena Horowitz claimed that Dr. Derek V. Jhagroo
negligently "examin[ed] and treat[ed] her right thumb in his office."632 Ulti-
mately, her thumb had to be amputated by Dr. Jhagroo at the Plantation Gen-
eral Hospital.633 After obtaining a final judgment against Dr. Jhagroo, the
plaintiff was unable to collect the judgment because of his "fail[ure] to main-
tain malpractice insurance or otherwise comply with [statutory] financial
responsibility requirements."634 The Court first acknowledged that it had
"recognized a common law duty on the part of . . . hospitals . . . in granting

623. Stern II, 969 So. 2d at 968.
624. Id. at 971 (Lewis, C.J., concurring).
625. Id. at 972.
626. Id. at 972–73 (Pariente, J., dissenting).
627. Id. at 973.
628. Stern II, 696 So. 2d at 974–75 (Quince, J., dissenting).
631. Id. at 178.
632. Id.
633. Id.
634. Id.
staff privileges to physicians." However, it noted that this duty had been to select medically competent physicians. It declined to extend the "common law duty . . . to monitor the financial responsibility of physicians" and further concluded that the text "stat[ing] intent, purpose, and general regulatory [intent] of chapter 458" did not support imposing a statutory duty on hospitals to do so.

The Third District Court of Appeal considered agency and proximate cause issues in a medical malpractice case in *Guadagno v. Lifemark Hospitals of Florida, Inc.* The plaintiff's wife injured her leg in a minibike accident. At the emergency room, "she signed admission documents stating she understood that the emergency room doctor was an independent contractor." Although the "discharge instructions did not [advise] how to avoid deep vein thrombosis," the doctor testified that he verbally advised her to stay mobile. In fact, the decedent stayed immobile, "[a] clot . . . dislodged and traveled to her heart, causing sudden death." The appellate court held that even if the doctor's instructions fell below the standard of care that alone was not enough to establish that proper instructions would have prevented the injury. It held that proximate cause required that the plaintiff show that it was more likely than not that the allegedly negligent instruction caused the injury. It also rejected the apparent authority argument because the principal needs to create the appearance of authority for the claim to succeed, and the hospital here expressly disavowed that the emergency room doctor was its agent. It is the action of the principal, not the belief "of the person dealing with the purported agent" nor the acts of the purported agent, that controls.

The Fourth District Court of Appeal considered the standard to be applied in a medical malpractice case in *Edwards v. Simon.* The plaintiff visited Dr. Strain seeking treatment for her shoulder, which was injured in a

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635. *Horowitz*, 959 So. 2d at 180.
636. *Id.*
637. *Id.* at 181, 186–87.
638. 972 So. 2d 214, 218 (Fla. 3d Dist. Ct. App. 2007).
639. *Id.* at 216.
640. *Id.* at 217.
641. *Id.*
642. *Id.*
643. *See Guadagno*, 972 So. 2d at 218.
644. *Id.*
645. *Id.*
646. *Id.*
647. 961 So. 2d 973, 974 (Fla. 4th Dist. Ct. App. 2007).
fall in the shower. He advised against surgery. "She then went to Dr. Simon who recommended [and performed] surgery," which did not relieve the pain. Dr. Strain testified that surgery was not necessary, but declined to testify "whether defendant negligently performed the surgery" or whether it violated the standard of care. The appellate court held this was sufficient to present a triable issue on the standard of care. In dissent, Judge May argued that she would have treated the testimony differently and it did not raise an issue of whether the defendant had violated the standard of care.

The Fourth District Court considered the application of the National Childhood Vaccine Injury Compensation Act to a malpractice action in Nwosu ex rel. Ibrahim v. Adler. The plaintiff was vaccinated by her pediatrician, who "negligently injected the needle into her buttocks causing [permanent] nerve damage to the sciatic nerve." The first complaint was dismissed for failure by the plaintiff to follow "administrative procedures in the Vaccine Act." The court ruled that this harm was not a vaccine related injury as defined in the act because it was an injury caused by the way that the vaccine was administered as opposed to the liquid in the vaccine.

The Fifth District Court of Appeal considered whether a doctor has a duty to a person about whom he was consulted, but never accepted as a patient in Jackson v. Morillo. Jackson went to St. Cloud Hospital because of extreme pain in his eye, which had a foreign object enter it the previous day. The emergency room physician consulted Dr. Morillo by telephone. "Morillo was listed on a consultation directory available to emergency room physicians." Morillo never consulted with the plaintiff and specifically told the emergency room physician that he was not accepting the plaintiff as a patient. The district court held that summary judgment was
inappropriate as there was a factual question whether he owed a duty of care.\footnote{Jackson, 976 So. 2d at 1129.}

XIII. CRUISE SHIPS

As has been discussed in a previous law review article, the application of tort law principles to maritime law is one that has caught the attention of federal courts in Florida.\footnote{Adams, Tort Law I, supra note 278, at 331–32.} Although generally bound by maritime law, the cruise industry has not been able to completely avoid liability by registering their ships in other countries.\footnote{See id. at 331.} As cases in the prior article and the ones discussed below indicate, American courts will not relieve the industry from having any duty towards their passengers.\footnote{See id. at 332.}

The Southern District Court of Florida reviewed a claim involving a cruise ship passenger who contracted bacterial enteritis from food ingested on her cruise in \textit{Bird v. Celebrity Cruise Line, Inc.} \footnote{428 F. Supp. 2d 1275, 1277 (S.D. Fla. 2005).} After concluding that the claim was controlled by admiralty law, the court then addressed the plaintiff’s breach of warranty of merchantability claim.\footnote{Id. at 1279.} The court refused to recognize such a claim, particularly in this case, where the contract specifically disclaimed any warranty as to food or drink.\footnote{Id. at 1280.} The court also refused to recognize a strict liability claim, noting that the Eleventh Circuit and United States Supreme Court had only recognized strict liability in cruise ship cases in which crew members engaged in wrongful intentional acts.\footnote{Id. at 1281–82.}

The Southern District granted a summary judgment in another cruise case in \textit{Isbell v. Carnival Corp.} \footnote{462 F. Supp. 2d 1232, 1234 (S.D. Fla. 2006).} The plaintiff’s cruise was re-routed because of a hurricane and stopped at Belize, where “the [d]efendant’s [cruise director] described the ‘Cave Tubing and Rain Forest Exploration’ excursion.”\footnote{Id. at 1234.} “[P]assengers [had been] advised not to travel in Belize without joining a Carnival approved and supported excursion.”\footnote{Id.} Amongst other allegations, the plaintiff claimed that the defendant told her “that ‘any 90-year old woman’ could safely enjoy the excursion.”\footnote{Id.} “Plaintiff [also] al-
lege[d] that she . . . asked [d]efendant’s employee who was selling the tickets to the excursion ‘if there were any alligators, snakes, bugs, spiders, anything she needed to be concerned about.’” Plaintiff claimed that she was told “that there was no need for concern.” The excursion consisted of floating down a river in [a] rain forest, in and out of caves, [in] an inner tube. Plaintiff was “bitten by a snake.” The court ruled “that ‘a general promise that the trip will be “safe and reliable” does not constitute a guarantee that no harm will’” occur. The court also ruled that the plaintiff needed to demonstrate that the defendant had actual or constructive knowledge of the dangerous condition, herein, the poisonous snake. Additionally, the court found that the danger was apparent or obvious.

XIV. MISCELLANEOUS

The Third District Court of Appeal decided a rear-end collision case in Department of Highway Safety & Motor Vehicles v. Saleme. Trooper Lozano left the right shoulder of a highway to pursue a speeding motorcyclist by crossing from the right hand lane across the center and into the left lane. Saleme, who was pursuing the speeding motorcycle over a hill, skidded into the rear of the patrol car. Florida has recognized three different fact patterns that may rebut the presumption that the negligence of the rear driver in a rear-end collision is the sole proximate cause of the accident. The defendant argued that the fact pattern concerning sudden and unexpected stops or lane changes applied to this case. The court held that this could not apply where the motorcyclist had testified that he saw the lane change and the defendant’s other witness did not testify that there was a sudden lane change. It also held that the presumption was not rebutted even if there had been a sudden lane change because the defendant was accelerating his

676. Id.
677. Isbell, 462 F. Supp. 2d at 1234.
678. Id.
679. Id. at 1234–35.
680. Id. at 1237 (quoting Wilson v. Am. Trans Air, Inc., 874 F.2d 386, 391 (7th Cir. 1989)).
681. Id.
682. Isbell, 462 F. Supp. 2d. at 1238.
683. 963 So. 2d 969, 970 (Fla. 3d Dist. Ct. App. 2007).
684. Id. at 970–71.
685. Id. at 971.
686. Id. at 972.
687. See id.
688. Saleme, 963 So. 2d at 973.
vehicle and was at least one-hundred yards ahead of the nearest vehicle behind him.\textsuperscript{689} The dissent argued that the majority incorrectly engaged in fact finding and should have permitted the case to proceed without the presumption because the defendant had submitted conflicting evidence.\textsuperscript{690}

The Fourth District Court of Appeal reviewed a conversion case in \textit{Joseph v. Chanin}.\textsuperscript{691} The plaintiff, “Lena Chanin, lived with Meyer Joseph in his condominium . . . until his death” and made contributions to a checking account in the latter’s name only.\textsuperscript{692} The roommates agreed to pool their joint living expenses and to each contribute $1100 a month into the account for shared expenses.\textsuperscript{693} After Joseph’s death, the plaintiff “discovered that [the] average joint expenses had been only $900 per month [and that Joseph] had taken money from the . . . account to pay personal expenses and . . . fund a separate savings account.”\textsuperscript{694} The plaintiff sued Joseph’s daughter, Barbara, as beneficiary of the savings account on three different theories.\textsuperscript{695} The jury found for the plaintiff on the conversion theory.\textsuperscript{696} The appellate court held that the checking account was held in joint tenancy with a right of survivorship and that a “joint tenant may bring a conversion action against another joint tenant who wrongfully appropriates more than his share of the money.”\textsuperscript{697} As beneficiary of the funds in the savings account, she became liable by exercising dominion over those funds, knowing of the plaintiff’s claim.\textsuperscript{698}

The Fourth District Court considered the liability of an employer in \textit{Martin v. Gulfstream Metal Plating, Inc.}\textsuperscript{699} The plaintiff was walking her employer’s dog who ran around her “to reach another dog owned by” another employee of the company, which was unattended.\textsuperscript{700} The dogs were behaving in playful behavior, but the plaintiff’s feet became entangled in the leash, which caused her to fall.\textsuperscript{701} The other dog was regularly brought to work and left unattended.\textsuperscript{702} The court noted that landowners are not liable
for injuries off premises involving a dog not owned, maintained, nor controlled by the landowner.\textsuperscript{703} It also re-affirmed that

an employer is not liable for injury caused to a third party by [an] employee’s dog if . . . bringing . . . the dog to [the] work site: 1) “is not consented to or encouraged by the employer,” 2) is “of no benefit to the employer,” 3) is “not within the scope of the employee’s duties,” and 4) “the employer has no knowledge of the vicious propensities of the animal.”\textsuperscript{704}

The Fourth District Court found that the Underground Facility Damage Prevention and Safety Act (UFDPSPA)\textsuperscript{705} exculpated a utility company and locating contractor for failure to mark underground utilities prior to excavation work.\textsuperscript{706} “[T]he City of Margate [called] in a locate request to One-Call,” a statutorily-created corporation that “serves as the interface between excavators and underground facility operators” so that the former can give notice to all utilities of intent to excavate for work to be performed; but, the address given was inaccurate, and the work did not commence within the time period designated.\textsuperscript{707} The plaintiff was injured from an electrical shock sustained at the excavation site.\textsuperscript{708} The court held that the statutory scheme exculpated the utility and its locating contractor and also “supersede[d] any common law on the” subject.\textsuperscript{709}

The Fourth District Court of Appeal resolved a lawsuit between law firms in a tortious interference with contract claim in \textit{Kreizinger v. Schlesinger}.\textsuperscript{710}

Patricia Gates [retained] Loreen Kreizinger to represent her and her daughter in a medical malpractice action. After five years of . . . representation, . . . on the eve of docket call for . . . trial, . . . Gates contacted Scott Schlesinger and the Sheldon J. Schlesinger, P.A., law firm. Gates made Schlesinger aware of Kreizinger’s re-
presentation . . . . The next day Schlesinger arranged and paid for Gates to fly to Fort Lauderdale from . . . Pensacola. 711

Gates terminated employment with Kreizinger and retained Schlesinger. 712 Kreizinger argued that the “purchase of the plane ticket constituted an act of intentional and unjustified interference.” 713 Because “[t]he lawyer-client relationship is an ‘at will’ contract” and Gates sought out Schlesinger, the court held that “no intentional and unjustified interference is present.” 714

The Fifth District Court of Appeal rejected a third-party claim by the owner and driver of an automobile involved in an accident in Huet v. Mike Shad Ford, Inc. 715 The defendant Huets claimed that the accident was caused by the negligent repair by Mike Shad Ford. 716 The court ruled that indemnification and contribution from subsequent tortfeasors was not recognized. 717 Instead, the remedy for the Huets was to file an “equitable subrogation [claim] against Mike Shad Ford.” 718

The Eleventh Circuit Court of Appeals applied Florida law concerning false imprisonment in Johnson v. Barnes & Noble Booksellers, Inc. 719 Johnson was accused by a store clerk of inappropriately touching her while he was shopping in the defendant’s store. 720 Two store managers and a security guard escorted him to an office, “where he was detained for one to two hours.” 721 The court ruled that if the employees’ allegations were true, Johnson would have been guilty of breach of the peace, a misdemeanor. 722 However, the court also held that it was unlawful for persons who had not witnessed the misdemeanor to detain him. 723

XV. CONCLUSION

As the preceding discussion indicates, Florida courts continued to clarify doctrine in a number of areas. The Supreme Court of Florida has sought

711. Id.
712. Id.
713. Id.
714. Id. at 433.
715. 915 So. 2d 723, 724 (Fla. 5th Dist. Ct. App. 2005).
716. Id. at 725.
717. Id. at 726.
718. Id. at 726–27.
719. 437 F.3d 1112, 1114 (11th Cir. 2006).
720. Id.
721. Id.
722. Id. at 1117.
723. Id.
to provide more guidance on the application of the impact rule. Based upon the split of opinions and the attempts by courts to subsequently apply their decisions, more guidance appears to be necessary in the future. In addition, Florida courts continue to struggle with the disposition of the individual claims in the massive class action filed against tobacco companies. More appeals will most likely occur requiring more clarification of the many issues involved in this litigation. It is likely that more clarification will also be necessary to determine when parents can sign binding releases for their minor children. Otherwise, it is likely that courts will continue to determine the scope of the duty and proximate cause elements.

Barbara Landau*

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I. INTRODUCTION

Hundreds of Florida appellate decisions rendered in the past year could be said to affect the conduct of business in Florida.¹ This survey does not attempt to deal with them all. Only cases addressing matters of first impression, involving conflicts between the District Courts of Appeal or questions stated by a District Court to be of great public importance and certified to the Supreme Court of Florida, or cases clarifying or expanding existing principles of law have been included.²

¹. See Barbara Landau, 2006–2007 Survey of Florida Law Affecting Business Owners, 32 Nova L. Rev. 21, 22 (2007) [hereinafter Landau, 2006–2007 Survey]. This survey picks up where last year’s survey left off. Id. The topics included are similar to last year’s survey, there being noteworthy cases in most of the same areas, and several new topics have been added. Id. at 22–23.

². See id. A few cases did not fit squarely into any of these categories, but the facts or application of the law was unusual. Id.
II. ALTERNATIVE DISPUTE RESOLUTION

A. Arbitration

Mr. Johnson, the chief operating officer of Rocksolid Granite, Inc. (Corporation), executed an agreement with All Top Granite, Inc. (All Top) signing "only in his capacity as the chief operating officer of [the Corporation.]" The agreement contained an arbitration clause. A dispute developed and All Top began arbitration against both Mr. Johnson, in his individual capacity, and the Corporation. Mr. Johnson first asked the arbitrator, and then the trial court, to prohibit the arbitration against him since he signed the agreement only in his official capacity and not individually. Although All Top conceded that the agreement had been signed by Mr. Johnson only in his official capacity, the trial court, relying on Alterra Healthcare Corp. v. Estate of Linton, ruled that Mr. Johnson had to arbitrate the claims against him. The ruling was appealed by Mr. Johnson, and the Fourth District Court of Appeal reversed. The appellate court distinguished Alterra Healthcare Corp., stating that the situation there was the reverse of the case under consideration. In Alterra Healthcare Corp., it was a party bound by the arbitration provision who was seeking to avoid arbitration, the party there being found to be a third-party beneficiary of the contract. On the other hand, explained the Fourth District, in Johnson v. Pires, it was a nonparty who sought to avoid arbitration. The Fourth District Court of Appeal noted that there are several theories under which a non-signatory may be bound by an arbitration agreement, one of which is agency theory. However, the court found that the agency exception does not apply when a person signs only in

4. Id.
5. Id.
6. Id.
7. 953 So. 2d 574 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
8. Johnson, 968 So. 2d at 701.
9. Id. at 701-02.
10. Id. at 701.
11. Alterra Healthcare Corp., 953 So. 2d at 579. It should be noted that Alterra Healthcare Corp. involved both situations, that is, a nonparty to the agreement seeking to compel a nonparty to arbitrate. See id. at 578-79. The nonparty who sought arbitration was found to be subject to the arbitration clause under the doctrine of "respondeat superior." Id.; see also McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994).
12. 968 So. 2d at 700
13. Id. at 701.
14. Id.
his or her corporate capacity, citing Charter Air Center, Inc. v. Miller and McCarthy v. Azure. The Fourth District concluded that arbitration could not be forced on Mr. Johnson, although "[i]t is thus apparent that . . . [he] could have enforced the arbitration provision against [All Top] who agreed to arbitrate."  

B. Enforcement of Settlement Agreement

In an earlier incarnation of Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd. (Architectural Network I), discussed in the last survey, the Second District Court of Appeal remanded the case to the trial court for an evidentiary hearing to determine if Architectural Network, Inc.'s attorney "had [the] authority to settle" the litigation between Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd. (Architectural Network II), discussed in the last survey, the Second District Court of Appeal remanded the case to the trial court for an evidentiary hearing to determine if Architectural Network, Inc.'s attorney "had [the] authority to settle" the litigation between Architectural Network, Inc.

15. Id. at 702.
17. 22 F.3d 351 (1st Cir. 1994).
18. Johnson, 968 So. 2d at 702. Unlike the Fourth District Court of Appeal in Johnson, the United States Court of Appeals for the First Circuit, in McCarthy, held that a nonparty to the arbitration agreement, the appellant there could not compel a party to the agreement to arbitrate. McCarthy, 22 F.3d at 363. Although, as the First Circuit noted, there are exceptions to this rule. See id. at 356–57. The court stated that:

[perhaps most important from a policy standpoint, adopting appellant's proposal would introduce a troubling asymmetry into the law. . . . In appellant's scenario, then, the agent, though he could not be compelled to arbitrate, nonetheless could compel the claimant to submit to arbitration. In other words, an agent for a disclosed principal would enjoy the benefits of the principal's arbitral agreement, but would shoulder none of the corresponding burdens. He would have found a way, contrary to folklore, to run with the hare and hunt with the hounds.

Id. at 361. The First District Court of Appeal in Alterra Healthcare Corp. allowed a nonparty—the employee of Alterra Healthcare Corporation—to bring the arbitration action. Alterra Healthcare Corp. v. Estate of Linton, 953 So. 2d 574, 579 (Fla. 1st Dist. Ct. App. 2007) (per curiam). The First District Court of Appeal held that the doctrine of respondeat superior applied to make Alterra Healthcare Corporation's employees subject to the arbitration agreement. Id. at 578–79. However, the First District was not called upon to address what would have happened had the situation been reversed, that is, if it was the other party—here a third-party beneficiary—that had sought arbitration against the employee of Alterra Healthcare Corporation. Id. at 579. If the employee had then objected to the arbitration, under the court's reasoning, it appears that the employee would have been compelled to arbitrate. See id. On the other hand, the Fourth District did not explain in Johnson why it was "apparent" that Johnson, the employee/officer, could enforce arbitration, while it could not be enforced against him. Johnson, 968 So. 2d at 702. Johnson brings into clear focus the First Circuit's expression of concern in McCarthy about "a rule that [would] allow a party to use the courts to vindicate his rights while at the same time foreclosing his adversary from comparable access." McCarthy, 22 F.3d at 361.

Inc. and Gulf Bay Land Holdings II, Ltd. 21 The trial court held the required evidentiary hearing and enforced the settlement agreement, with final judgment entered for Gulf Bay Land Holdings II, Ltd. 22 Architectural Network, Inc. appealed, and the Second District Court of Appeal reversed. 23 Gulf Bay Land Holdings II, Ltd. failed to meet its burden of proof, which required it to show that Architectural Network’s attorney had the “clear and unequivocal” authority to settle the case on behalf of Architectural Network, with the Second District Court of Appeal reiterating that the “courts have been very stringent in what they find to be . . . ‘clear and unequivocal.’” 24

III. BUSINESS ENTITIES AND AGREEMENTS

A. Franchises

Can an officer or a shareholder of a corporate franchisor be held personally accountable for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), sections 501.201–501.213 of the Florida Statutes, or the Florida Franchise Act, section 817.416 of the Florida Statutes? 25 Yes, according to the Fifth District Court of Appeal in KC Leisure, Inc. v. Haber. 26 KC Leisure, Inc. (KC) alleged that it paid $50,000 to Relay Transportation, Inc. (Relay) for what Relay described as a “license” but that, according to KC, was actually a franchise agreement allowing KC to sell and rent electric vehicles. 27 Eleven months after the payment was made, KC tried, without success, to have the agreement rescinded, sending “written notice to Relay” and its officer and stockholder, Mr. Haber. 28 KC then sued Relay, Mr. Haber, and others alleging that Mr. Haber was an active participant in a scheme by Relay to provide misleading, incomplete, and incorrect information to KC as the franchisee, thus violating FDUTPA and the Florida Franchise Act. 29 The trial court concluded that liability under FDUTPA is imposed only “on ‘sellers and not their shareholders or individuals who act for

23. Id. at 663.
24. Id. (quoting Weitzman v. Bergman, 555 So. 2d 448, 449 (Fla. 4th Dist. Ct. App. 1990)).
26. See KC Leisure, Inc., 972 So. 2d at 1071.
27. Id. at 1071–72.
28. Id. at 1072.
29. Id. at 1072, 1075.
The trial court also "found no specific allegations that Mr. Haber personally participated in" alleged to be in violation of the Florida Franchise Act. The complaint against Mr. Haber was then dismissed by the trial court with prejudice. The trial court was wrong on both counts said the Fifth District Court of Appeal. The allegations were sufficient to state a claim under FDUTPA against Relay. Further, if there is corporate liability, there may be individual liability, provided that it is proved that the "individual defendant actively participated in or had some measure of control over the corporation's deceptive practices." Finding nothing in the case law under the Federal Trade Commission Act that per se prevents suing an officer or shareholder of a corporate franchisor for deceptive trade practices, the Fifth District Court of Appeal concluded that KC's allegations, that Mr. Haber directly participated in the conduct giving rise to FDUTPA violations, were sufficient as against Mr. Haber. Likewise, the allegations set forth a cause of action against Mr. Haber for fraudulent practices under the Florida Franchise Act.

B. Corporations

Minority shareholders who disagree with the majority's decision on major corporate transactions, such as the sale or transfer of all of the corporation's assets, have the right to have their shares valued—appraisal rights—and bought back by the corporation. The issue in Williams v. Stanford was whether or not the statutory appraisal rights procedure was the exclusive remedy available to the dissenting minority. The action causing offense to the minority shareholders in Williams was the majority shareholders' alleged engineering of the transfer of all of the assets held by the old corporation to a

30. Id. at 1072.
31. KC Leisure, Inc., 972 So. 2d at 1075.
32. Id. at 1072, 1075.
33. See id.
34. Id. at 1073.
35. Id.
36. KC Leisure, Inc., 972 So. 2d at 1073. The FDUTPA claim in count one was based on deceptive and unfair trade practices "in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." Id. at 1072.
37. Id. at 1074.
38. Id. at 1075.
39. Id. at 726-27 (Fla. 1st Dist. Ct. App. 2008) (citing FLA. STAT. § 607.1302(1) (2003)).
40. Id. at 722.
41. Id. at 724.
new corporation that excluded the old corporation's shareholders. The old corporation's assets were transferred to the new corporation in return for the new corporation's assumption of the liabilities of the old corporation. No money changed hands. Separate from the exercise of their appraisal rights, the minority shareholders brought a shareholder-derivative action against, inter alia, the new corporation and the majority shareholder asking for rescission of the asset transfer, and the "imposition of a constructive trust" on the profits of the new corporation. The minority shareholders alleged "unfair dealing and breaches of fiduciary duty [over a period of] several years," resulting in the lowering of the value of the old corporation's shares. The essential question in this case, according to the First District Court of Appeal, is whether the appraisal rights statute prevented "judicial scrutiny of the transfer of . . . assets from" the old corporation to the new. The appellate court answered that question in the negative and went on to hold that additional remedies, including rescission and "the imposition of a constructive trust," may be available to the minority shareholders. The court observed that it was the first Florida appellate court's duty "to interpret the governing provision[, . . . section 607.1302] of the Florida Statutes, as amended in 2003." The First District Court of Appeal concluded that if minority shareholders can "raise facially sufficient and serious allegations of unfairness," their relief would not be "limited to the statutory remedy of offering up their shares for a fair price."

Cassedy v. Alland Investments Corp. involved a demand for a corporate accounting. Alland Investments Corporation (Alland) was formed as a Florida corporation for the purpose of buying Texas real estate and developing it. Mr. Cassedy invested $315,000 in the enterprise. The real estate purchase was never completed and, at the end of June 1999, Mr. Cassedy asked Alland for a full accounting. About a week later, Alland sent Mr.
Cassedy "a 'single page accounting summary'" attached to correspondence to the effect that Alland had "'the rest of the year'" to complete a comprehensive accounting. Additional correspondence followed between the parties that summer and, on August 18, 1999, Alland wrote to Mr. Cassedy stating that Mr. Cassedy had the summary since July 6, 1999, and that no paperwork evidencing efforts to buy the real estate was ever sent to Alland. Alland was subsequently dissolved. On June 15, 2006, after the corporation had been dissolved, Mr. Cassedy filed suit seeking a final accounting. Alland moved for summary judgment arguing that the action "was barred by the statute of limitations because [it was] in 1999" and that Mr. Cassedy's claim accrued. The trial court granted the motion, and Mr. Cassedy appealed. The First District Court of Appeal agreed with Alland in that, even though the accounting action was an equitable action, the statute of limitations did apply. However, regardless of whether the five-year contract statute of limitations contained in section 95.11(2)(b) of the Florida Statutes is applicable to written contracts or the four-year statute of limitations on oral contract actions set forth in section 95.11(3)(k) of the Florida Statutes is applied, Mr. Cassedy's suit was not barred. According to the First District Court of Appeal, the statute of limitations did not start "to run in 1999 because there [was] no repudiation of the duty to provide a final accounting."

IV. CHOICE OF LAW AND CONFLICT OF LAWS

The main issue in Lanoue v. Rizk was whether the Ontario or the Florida statute of limitations controlled in an action brought by a lender against a borrower. The borrower, while in Ontario, simultaneously signed a prom-
issory note and a general security agreement which contained a description of the collateral given as security for the loan. The general security agreement (GSA) was referred to in the promissory note; the note providing that “[f]or prepayment terms and special conditions,” the GSA was to “be read in conjunction with [the] note and all said terms shall apply to” the note.

The promissory note did not address the issue of choice of law, but the GSA did. The choice of law provision in the GSA provided that “the laws of the Province of Ontario and the State of Miami” would govern. The reference to “Miami” was determined by the trial judge to be a scrivener’s error—the State of Florida having been intended—and the Third District Court of Appeal agreed. With that issue resolved, the Third District Court of Appeal still had to choose between the law of Ontario and Florida; it chose Ontario. Since the lawsuit was in Florida, Florida choice of law rules had to be consulted first. For causes of action sounding in contract, Florida follows the rule of lex loci contractus.

V. CONSUMER RIGHTS

A. Deceptive Trade Practices

Auto leasing customers of S.D.S. Autos, Inc. (S.D.S.) and Brumos Motor Cars, Inc. (Brumos) brought a class action against S.D.S. and Brumos under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Although the lessees had signed leases requiring arbitration and containing express class action waivers, the trial court denied the motions of S.D.S. and Brumos, and refused to dismiss the class action suit based on the arbitration provision. The leases recited that they were governed by the Federal Arbi-

the appellant Lanoue; 2) a corporation that was dissolved prior to the lawsuit; and 3) a third party who was not made a party to the lawsuit. Lanoue, 987 So. 2d at 725–26.

67. Id. at 726. The opinion does not make a reference to any “collateral” other than the note. See id. at 725–27.

68. Id. at 726.

69. Id.

70. Lanoue, 987 So. 2d at 726.

71. Id.

72. Id. at 727.

73. Id.

74. Id. (citing, among other cases, State Farm Mut. Auto Ins. Co. v. Roach, 945 So. 2d 1160, 1163 (Fla. 2006), noted in Landau, 2006–2007 Survey, supra note 1, at 41–43).


76. Id. at 603.
tration Act (FAA). The First District Court of Appeal acknowledged that the FAA represents "clear federal policy" favoring arbitration, and that states cannot require persons who have consented to arbitration to later resort to a lawsuit, except where contract defenses would render the contractual provisions invalid under state law, citing the United States Supreme Court's decision in *Perry v. Thomas.*

The First District also noted that the United States Supreme Court stated in *Dean Witter Reynolds, Inc. v. Byrd* that arbitration agreements are to be "rigorously enforced." The First District expressed due regard for federal pronouncements on the sanctity of arbitration agreements but observed that state law may "invalidate an arbitration provision without [offending] the FAA 'if the law at issue governs contracts generally and not arbitration agreements specifically.'" The First District Court of Appeal then reviewed the remedial nature of FDUTPA and, affirming the order of the trial court, held that barring auto leasing customers from pursuing class actions where each claim might be small would frustrate the benefits and intent of FDUTPA. The class action waiver in this case was inconsistent with Florida's public policy and therefore unenforceable.

In a related short per curiam decision on consolidated appeals by S.D.S. and Brumos, the First District Court of Appeal upheld the trial court's class action certification in *S.D.S. Autos, Inc. v. Chrzanowski (S.D.S. Autos II)* under Florida Rule of Civil Procedure 1.220(b)(2)-(b)(3) "of two classes of consumers" covered by FDUTPA. The court cited its decision in *Davis v. Powertel, Inc.*, where it held that:

[I]n a class action for damages under FDUTPA, class certification does not require proof of each individual putative class member’s actual reliance on an alleged deceptive act because an actionable deceptive trade practice is one which is "likely to deceive a con-

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77. *Id.* at 604.
78. *Id.* at 603.
79. *Id.* at 605 (quoting *Byrd*, 470 U.S. at 221).
80. 482 U.S. at 483.
82. *S.D.S. Autos I*, 976 So. 2d at 605 (quoting *Perry*, 482 U.S. at 490).
83. *Id.* (quoting *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002)).
84. *Id.* at 608, 611.
85. *Id.* at 611.
86. 982 So. 2d 1 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
87. *Id.* (citing Fla. R. Civ. P. 1.220(b)(2)–(3)).
88. 776 So. 2d 971 (Fla. 1st Dist. Ct. App. 2000).
somer acting reasonably in the same circumstances," not one upon
which any individual plaintiff “actually relied.”

C. Warranties

Larrain and Sotomayor (Buyers) bought a 2001 Ford Expedition from
Bengal Motor Co. Ltd. (Bengal Motor) in 2005. As part of the transaction,
the Buyers were given a limited warranty for the car. They signed a sepa-
rate agreement with Bengal Motor to arbitrate any disputes that might arise
from the dealings between Bengal Motor and the purchasers. The automo-
bile was allegedly defective and Bengal Motor did not successfully repair it
during the term of the warranty. Larrain and Sotomayor then sued Bengal
Motor alleging, among other things, violation of warranties under the Mag-
nuson-Moss Warranty Act. The trial court granted Bengal Motor’s motions
to compel arbitration, and Larrain and Sotomayor appealed. The Third
District Court of Appeal reversed and remanded. The Magnuson-Moss
Warranty Act and the “single document rule,” adopted by the Federal Trade
Commission, recognize that the parties may agree to alternate dispute resolu-
tion, but language to this effect must be in the same document as any warn-

89. S.D.S. Autos II, 982 So. 2d at 1 (quoting Davis, 776 So. 2d at 974).
91. Id.
92. Id. The agreement provided that arbitration applied to any claim, including claims of
the purchaser and the dealer arising “from a ‘relationship with third parties who do not sign’”
the agreement. Id. Could those nonparties be compelled to arbitrate? Could those nonparties
compel the parties to arbitrate? If so, under what circumstances? See McCarthy v. Azure, 22
F.3d 351, 361–63 (1st Cir. 1994) (holding that a nonparty to an arbitration agreement cannot
compel a party to the agreement to arbitrate); Charter Air Ctr., Inc. v. Miller, 348 So. 2d 614,
616–17 (Fla. 2d Dist. Ct. App. 1977) (holding that a non-signatory, under the agency excep-
tion, is not bound by an arbitration agreement when it is signed in his or her official capacity).
93. Larrain, 976 So. 2d at 13.
94. Id. at 13–14.
95. Id. at 14.
96. Id. at 14–15.
97. Larrain, 976 So. 2d at 14.
98. See id.
VI. CONTRACTS

A. Formation

In this offer and acceptance case, Mr. Dougherty, an attorney, represented both “his mother, Kathleen Dougherty, and his fiancée’s solely-owned corporation, Franklin Pond, Inc.” (the buyers).\textsuperscript{99} Specifically, Mr. Dougherty had section 1031 like-kind exchange funds that had to be used for the purchase of other real estate.\textsuperscript{100} Mr. Dougherty had dealt with Mr. and Mrs. Ricci before, and he knew the Riccis were trying to sell certain real estate.\textsuperscript{101} After Mr. Dougherty contacted Mr. Ricci, Mr. Ricci showed up at Mr. Dougherty’s office with “a proposed contract” for the sale of their real estate for 1.5 million dollars.\textsuperscript{102} The proposed contract, an offer, had already been signed by Mr. and Mrs. Ricci.\textsuperscript{103} Mr. Dougherty made some changes to the proposed contract, inserted the names of the buyers, signed and initialed the agreement on their behalf, as buyers, and arranged for the earnest money deposit to be made to Mr. Ricci.\textsuperscript{104} Mr. Ricci also initialed the changes.\textsuperscript{105} When Mr. and Mrs. Ricci did not close the sale after they had been asked, and failed to cure a title defect, the buyers brought an action against Mr. and Mrs. Ricci seeking specific performance.\textsuperscript{106} The action was dismissed, and the buyers appealed.\textsuperscript{107} The Fifth District Court of Appeal affirmed.\textsuperscript{108} A contract for the purchase of real estate that could be specifically enforced did not come into being.\textsuperscript{109} The changes Mr. Dougherty made to the proposed contract amounted to a counteroffer to Mr. and Mrs. Ricci.\textsuperscript{110} Mr. Ricci agreed to the counteroffer, but Mrs. Ricci did not.\textsuperscript{111} The court found no support for the buyers’ “argument that Mr. Ricci had . . . apparent authority

\textsuperscript{99.} Franklin Pond, Inc. v. Ricci, 979 So. 2d 386, 387 (Fla. 5th Dist. Ct. App. 2008).
\textsuperscript{100.} Id.
\textsuperscript{101.} Id.
\textsuperscript{102.} Id.
\textsuperscript{103.} Id.
\textsuperscript{104.} Franklin Pond, Inc., 979 So. 2d at 388.
\textsuperscript{105.} Id.
\textsuperscript{106.} Id. At this point, Mr. Dougherty had become one of the buyers, his mother having assigned to him her interest under “the purported contract.” Id.
\textsuperscript{107.} Id. at 387.
\textsuperscript{108.} Franklin Pond, Inc., 979 So. 2d at 389.
\textsuperscript{109.} See id.
\textsuperscript{110.} Id. at 388.
\textsuperscript{111.} Id.
to act on" Mrs. Ricci’s behalf to accept the counteroffer, and there was no evidence that Mrs. Ricci ratified the changes and Mr. Ricci’s actions.\textsuperscript{112}

**B. Remedies**

*Mastec, Inc. v. TJS, L.L.C.*\textsuperscript{113} involved a complicated fact pattern concerning a protracted real estate sale transaction, title defects, construction of a Florida Association of Realtors preprinted form VAC–6 10/00 and amendments to the form, numerous extensions, and subsequent attempted extensions of the closing date.\textsuperscript{114} The trial court decided that Mastec, Inc. (Seller) breached the contract and granted the request by TJS, L.L.C., and Lakeland Granite and Marble, Inc. (Buyers) for specific performance.\textsuperscript{115} The Seller appealed, and the Second District Court of Appeal held that as provided in the contract,\textsuperscript{116} time was of the essence, the real estate contract expiration date was February 15, 2004, and “the [c]ontract called for concurrent performances by the” Buyers and Seller.\textsuperscript{117} Actually tendering payment to the Seller and demanding conveyance of title by Seller, were conditions precedent to ordering specific performance.\textsuperscript{118} The trial court did not make any finding that there had been a tender prior to February 15, 2004, nor, said the Second District Court of Appeal, could the trial court have so found on the evidence presented.\textsuperscript{119} There having been no tender, the Seller was not obligated to convey.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{112} *Id.* at 388–89. The trial court’s finding that Mr. Dougherty did not have the required express authority to act on behalf of the buyers provided additional support for the Fifth District’s affirmance of the trial court’s dismissal of the action against the Riccis. *Franklin Pond, Inc.*, 979 So. 2d at 389. Ratification by the other buyers of Mr. Dougherty’s acts was not discussed. *Id.* It would appear that the result would have been the same even if the buyers had ratified Mr. Dougherty’s acts, since the appellate court found no acceptance of the counteroffer by Mrs. Ricci. *See id.* at 388–89.
\item \textsuperscript{113} 979 So. 2d 285 (Fla. 2d Dist. Ct. App. 2008).
\item \textsuperscript{114} *Id.* at 286–89.
\item \textsuperscript{115} *Id.* at 290–91.
\item \textsuperscript{116} *Id.* at 292. The Second District Court of Appeal made at least two references to the fact that “[t]he ‘time is of the essence’ provision” was in bold print. *Id.* at 286 n.3.
\item \textsuperscript{117} *Mastec*, 979 So. 2d at 292.
\item \textsuperscript{118} *See id.* at 292 (citing Booth v. Bobbitt, 114 So. 513, 514 (Fla. 1927)).
\item \textsuperscript{119} *See id.*
\item \textsuperscript{120} *See id.*
\end{itemize}
C. Right of First Refusal

Old Port Cove Condominium Ass’n One v. Old Port Cove Holdings, Inc. (Old Port I),121 involving a right of first refusal, and reviewed in the 2006–2007 Survey,122 made its way to the Supreme Court of Florida.123 The Fourth District Court of Appeal had ruled that the common law rule against perpetuities had been retroactively abrogated by section 689.225 of the Florida Statutes—the developer having argued that the rule applied to the right of first refusal at issue—with the result that the right of first refusal was upheld as against the developer.124 The Fourth District acknowledged that its abrogation holding put it in conflict with Fallschase Development Corp. v. Blakley,125 and it certified the question.126 In addition, the Fourth District indicated that it had some doubt as to whether the rule against perpetuities applied to the right of first refusal in the first place, but the Fourth District did not decide that issue because of its determination as to the abrogation of the common law rule against perpetuities.127 The Supreme Court of Florida, as a matter of first impression, held that “the rule against perpetuities does not apply to rights of first refusal.”128 The Supreme Court of Florida also ruled that section 689.225 of the Florida Statutes did not have retroactive effect.129 The Court thereby affirmed the Fourth District Court of Appeal as to result, while agreeing with the First District in Fallschase that section 689.225 of the Florida Statutes did not have retroactive effect.130 Fallschase was disapproved “to the extent it [found] that the common law rule [against perpetuities] apply[ed] to rights of first refusal.”131 Instead, rights of first refusal are to be “analyzed under the rule [against] unreasonable restraints on alienation.”132

121. 954 So. 2d 742 (Fla. 4th Dist. Ct. App. 2007).
123. See Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One (Old Port II), 986 So. 2d 1279 (Fla. 2008).
124. See id. at 1281.
126. Old Port I, 954 So. 2d at 746–47.
127. See id. at 743–44.
128. Old Port II, 986 So. 2d at 1281.
129. See id.
130. Id.
131. Id.
132. Id. at 1288.
D. Exculpatory Clauses

The Applegates’ daughter, age five, was injured at camp while participating in a water skiing wakeboard activity. The Applegates had signed a liability exculpatory agreement on behalf of their daughter and themselves. The Applegates sued Cable Water Ski, L.C. (Cable), the operator of the camp, for negligence and sought damages for injury to their daughter, and included a loss of services claim in the complaint. The trial court awarded summary judgment to Cable finding that the exculpatory clause was an unambiguous waiver of the claims by the Applegates. The Fifth District Court of Appeal affirmed the summary judgment in favor of Cable with respect to the Applegates’ loss of services claim, which was not contested on appeal. The Fifth District Court of Appeal noted that exculpatory agreements are not looked at favorably by the law on public policy grounds. When a minor is the subject of a liability exculpatory clause favoring a commercial enterprise, Florida—as parens patriae—has “a strong intent to protect children from harm.” Consequently, the appellate court concluded that the exculpatory clause was unenforceable for reasons of public policy. However, in so deciding, the court emphasized that its ruling was “limited to commercial enterprises.” The court certified the following question to the Supreme Court of Florida as one of great public importance: “WHETHER A CONTRACT CONTAINING AN EXCULPATORY CLAUSE, SIGNED BY A PARENT ON BEHALF OF HER CHILD, IN FAVOR OF A COMMERCIAL ENTERPRISE, IS ENFORCEABLE TO DEFEAT THE CHILD’S ACTION TO RECOVER FOR PERSONAL INJURIES SUSTAINED BY THE CHILD AS A RESULT OF THE ENTERPRISE’S NEGLIGENCE.” The court also went to some lengths to explain its view that the public policy result might have been different had the defendant been a “not-for-profit, community-based organization.”

134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id. at 1115.
141. Id.
142. Id. at 1116.
143. Applegate, 974 So. 2d at 1115–16.
E. Limitation of Damages

The Second District Court of Appeals set out in detail the facts of *Paul Gottlieb & Co. v. Alps S. Corp.* Briefly stated, Alps South Corp. (Alps) made medical devices and Paul Gottlieb & Co. (Gottlieb) supplied special fabric to Alps. Alps incorporated the fabric into the liners it made for use by amputees with prosthetic devices. Although Alps’ customers were pleased with the new liners, it was not long before the situation changed. After Gottlieb provided different fabric to Alps without Alps’ consent, Alps began to get complaints from its customers. Alps and Gottlieb’s relationship worsened. Alps did not pay a bill from Gottlieb, and Gottlieb sued Alps. Alps filed a counterclaim for damages alleging breach of warranty. Gottlieb was awarded nearly $29,000 in damages on its claim for non-payment. The damage award to Alps on its counterclaim was almost $695,000, consisting mainly of lost profits, and Gottlieb appealed. The Second District Court of Appeal characterized the case as a “‘battle of the forms.’” The back of Gottlieb’s finished goods contract provided that “BUYER SHALL NOT IN ANY EVENT BE ENTITLED TO, AND SELLER SHALL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY NATURE, INCLUDING, WITHOUT BEING LIMITED TO, LOSS OF PROFIT, PROMOTIONAL OR MANUFACTURING EXPENSES, INJURY TO REPUTATION OR LOSS OF CUSTOMER.” The Alps purchase order did not contain the liability limitations of the Gottlieb contract. As the court noted, “[t]his dispute arises from the common, but risky, commercial practice where the seller and buyer negotiate a contract involving goods by exchanging each others’ standardized forms.” However, section 672.207 of the *Florida Statutes*, contained in Florida’s version of the Uniform Commercial Code, is

145. *Id.* at 3.
146. *Id.*
147. *Id.* at 3–4.
148. *Id.* at 4.
149. *Gottlieb*, 985 So. 2d at 4.
150. *Id.*
151. *Id.*
152. *Id.*
154. See *id.* at 5.
155. *Id.* at 4.
156. See *id.* at 5–6.
157. *Id.* at 4.
supposed to resolve the issue of differing forms used between merchants that cover the same transaction.\footnote{Gottlieb, 985 So. 2d at 5-6.} Specifically, a contract between merchants can be formed despite an acceptance that contains new or modified terms, even though a contract may not have been formed under the “common law mirror image rule.”\footnote{Id. at 6.} Under section 672.207(2) of the Florida Statutes, additional terms, for example, Gottlieb’s damage limitation clause, “become a part of the contract unless:” 1) acceptance is limited, by the express terms of the offer, to the terms of the offer; or 2) the additional terms result in a material alteration of the contract; or 3) notice of objection to the additional terms “has already been given or is given within a reasonable time after notice of [the additional terms] is received.”\footnote{Id. (citing FLA. STAT. § 672.207(2) (2007)).} The Second District determined that under the facts of the case, the only issue to be decided was whether the Gottlieb damages limitation clause constituted a material alteration of the contract.\footnote{Id.} Alps, as the party seeking to exclude from the contract the damages limitation clause—which it admitted it had not read at the time—had the burden of proving a material alteration.\footnote{Id. at 6–7.} To carry its burden, Alps had to demonstrate that the damages limitation clause had the effect of causing it unreasonable “surprise or hardship.”\footnote{Gottlieb, 985 So. 2d at 7.} As to surprise, the Gottlieb contract with the damages limitation clause “was the sixth in a series” of contracts between the parties, all of which contracts had the clause, and thus, Alps did not carry its burden of proof as to surprise.\footnote{Id. at 7–8.} As to hardship, Alps failed to inform Gottlieb of major ramifications of Gottlieb’s breach of contract, thus not indicating any severe economic hardship.\footnote{Id. at 8.} Alps did not meet its burden of proving hardship.\footnote{Id. at 8.} Gottlieb’s limitation of damages clause was a part of the contract.\footnote{Id.} Therefore, Alps could not recover lost profits or other consequential damages.\footnote{Id.} However, Alps could recover direct “benefit-of-the-bargain” damages and incidental damages.\footnote{Id.} The case was reversed and remanded for the determination of Alps’ direct and incidental damages.\footnote{Id.}
F. Attorney’s Fees - Prevailing Party

Padula & Wadsworth Construction, Inc. (Contractor) hired Port-A-Weld, Inc. (Subcontractor), and the subcontract between them contained a relatively unique attorney’s fees provision. In addition to providing that the party that did not prevail would be liable for all attorney’s fees and court costs of the prevailing party, the clause provided that “a party shall not be considered as a ‘prevailing party’ if its recovery shall be less than 75% of its claim amount.” The subcontractor sued the contractor, alleging nonpayment of the balance due under the subcontract, and a claim for attorney’s fees and court costs were included. The contractor filed a compulsory counterclaim. The trial court ruled that the contractor prevailed as to the subcontractor’s claim and the subcontractor prevailed on the contractor’s compulsory counterclaim. The trial court said that “attorney’s fees for both sides, [were] a wash” Appeals followed, and the Fourth District Court of Appeal, in Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc., reversed the trial court’s decision as to attorney’s fees and costs. Since “compulsory counterclaims are not, . . . as a matter of law,” claims distinct from the main claim, there cannot, where there is a compulsory counterclaim be more than one winner; “one party must prevail.” The court rejected the idea that there could be a tie in an action for breach of contract. Thus, under the Supreme Court of Florida’s test in Moritz v. Hoyt Enterprises, Inc., the prevailing party is the one in fact winning on the significant issues. Finding that the subcontractor won on the significant issues before the trial court, the Fourth District pointed out that the inquiry could not end there in light of the seventy-five percent requirement in the subcontract. The question presented was “whether the ‘significant issue’ test” under Moritz can be modified contractually. The court noted that

172. Id. at 567–68.
173. Id. at 566.
174. Id. at 569.
175. Id. at 568.
176. Port-A-Weld, 984 So. 2d at 568.
177. Id. at 564.
178. Id. at 566.
179. Id. at 569.
180. Id.
181. 604 So. 2d 807 (Fla. 1992).
182. Id. at 810.
183. Port-A-Weld, 984 So. 2d at 569.
184. Id.
depending on how it was determined, the subcontractor may have been a sixty percent winner or it may have been a more than eighty percent winner. 185 Was “the contractual 75% threshold in” the subcontract enforceable or was it “contrary to public policy?” 186 Calling it “a matter of first impression,” the court determined that the Supreme Court of Florida’s “significant issue” test cannot be altered by contract. 187 The Fourth District agreed with the Fifth District Court of Appeal in P & C Thompson Bros. Construction Co. v. Rowe 188 that a provision under which a party may actually prevail but yet has to pay the other party’s attorney’s fee “can be seen as” against public policy. 189 In addition, the attorney’s fee reciprocity statute, section 57.105(7) of the Florida Statutes, was cited by the court as additional support for the conclusion that the seventy-five percent winner provision in the subcontract was against public policy. 190 The subcontractor was entitled to recover fees and costs. 191

In M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A., 192 decided two months before Port-A-Weld, the Fourth District Court of Appeal found that the parties had “battled to a draw” and concluded that the trial court did not abuse its discretion by refusing to award attorney’s fees under a prevailing party provision where the “court determine[d] that neither party prevailed.” 193 Hajianpour is not mentioned in Port-A-Weld. 194

In another attorney’s fee case, Skylark Sports, L.L.C. (the tenant) obtained a judgment against Islander Beach Club Condominium (the landlord) based on a lease dispute. 195 The trial court awarded attorney fees and costs to the tenant of approximately $192,000 based on the following provision in the lease: “ATTORNEY’S FEES: In the event that either party incurs legal fees or costs in the enforcement of this Lease or any provision hereof, whether

185. Id. at 570.
186. Id. at 569.
187. Id. at 569-70.
188. 433 So. 2d 1388 (Fla. 5th Dist. Ct. App. 1983).
189. Id. at 1389.
190. Port-A-Weld, 984 So. 2d at 569-70. Section 57.105(7) of the Florida Statutes provides, with respect to contracts entered into after October 1, 1988, “[i]f a contract contains a provision allowing attorney’s fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney’s fees to the other party when that party prevails in any action.” FLA. STAT. § 57.105(7) (2008).
191. Port-A-Weld, 984 So. 2d at 570.
192. 975 So. 2d 1288 (Fla. 4th Dist. Ct. App. 2008).
193. Id. at 1290 (citing Merchs. Bonding Co. v. City of Melbourne, 832 So. 2d 184, 186 (Fla. 5th Dist. Ct. App. 2002)).
194. See generally Port-A-Weld, 984 So. 2d at 564.
suit is filed or not, shall be entitled to recover and to receive payment of reasonable attorneys' [fees] and costs incurred by the other party."196 The Fifth District Court of Appeal reversed the fee award because the court found that the fee provision "clearly makes no sense."197 The provision did "not reflect any clear intention ... as to whom, when, and how attorney's fees or costs should be allowed."198 The trial court's reading into and rewriting the clause so as "to make it a prevailing party" clause was improper, as was its interpretation of the word "by" as meaning "from."199

G. Action Against State

ContractPoint Florida Parks, L.L.C. (ContractPoint) "entered into a concessions" contract with the Florida Department of Environmental Protection (DEP).200 DEP had legislative authority to make the contract.201 Eventually, ContractPoint sued DEP for breach of contract.202 ContractPoint won the lawsuit and was awarded damages exceeding $600,000.203 DEP raised section 11.066 of the Florida Statutes as a bar to enforcement of the judgment.204 Specifically, DEP relied on section 11.066(3) which reads in part that "[n]either the state nor any of its agencies shall pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law."205 The trial court ruled in DEP's favor but the First District Court of Appeal reversed, certifying the following question to the Supreme Court of Florida:

DOES SECTION 11.066, FLORIDA STATUTES, APPLY WHERE JUDGMENTS HAVE BEEN ENTERED AGAINST THE STATE OR ONE OF ITS AGENCIES IN A CONTRACT ACTION?206

196. Id. at 1209 (emphasis added).
197. Id. at 1211.
198. Id.
199. Id.
201. Id. at 1263.
202. Id. at 1262.
203. Id.
204. Id.
205. ContractPoint Fla. Parks, L.L.C., 986 So. 2d at 1265 (quoting FLA. STAT. § 11.066(3) (2008)).
206. Id. at 1261–62.
The Supreme Court of Florida answered the question in the negative finding that section 11.066 of the Florida Statutes was intended to apply to judgments against the state in the "exercise of its police powers [citing] the Citrus Canker Eradication Program," and not to judgments resulting from contract actions. The Court noted that its decision in Pan-Am Tobacco Corp. v. Department of Corrections predicted the legislative enactment of section 11.066. The Court opined that, in Pan-Am Tobacco Corp., with respect to legislatively approved contracts, the legislature intended that they be binding on private parties, the state, and "entities of the state." Being deprived of the means to judicially enforce a judgment for breach of contract renders the contract illusory. As a matter of first impression, the Court held "that section 11.066 was not intended to and does not apply to valid judgments arising from the breach of a legislatively authorized express, written contract by the State or any of its agencies." Justice Wells, joined by Justices Cantero and Bell, dissented.

VII. DEEDS AND TAX SALES, MORTGAGES, LIS PENDENS, AND PARTITION

A. Deeds and Tax Sales

In Jones v. Flowers, the United States Supreme Court held that when a taxing authority mails a notice of a real estate tax sale and the notice is returned to it unclaimed, due process requires the taxing authority to "take additional, reasonable steps to attempt to provide notice to the" owner of the property to be sold. The Jones decision was controlling in Patricia Weinhardt Associates, Inc. v. Jocalbro, Inc. The Marion County Clerk sent notices to Patricia Weinhardt Associates, Inc. (Weinhardt) of real estate tax sales for failure to pay real estate taxes with respect to fourteen parcels of real estate. As required by section 197.522(1)(a) of the Florida Statutes,
notices were sent to Weingarten "by certified mail with return receipt requested." The notices were sent "to four different addresses" and all of the notices were returned unclaimed. The Marion County Clerk then "published[ed] the notice of the application for tax deeds" on the property. The notice was published in a local newspaper of general circulation as required by statute. No response from Weingarten to the published notices was received by the Clerk and "tax deeds were issued" to Jocalbro, Inc. (Jocalbro) for Weingarten's parcels. Weingarten had previously given notice to the Marion County Tax Collector of its current Missouri address. In fact, the Marion County Tax Collector sent to Weingarten, at its correct Missouri address, tax bills for other Marion County property owned by Weingarten. Jocalbro successfully brought an action against Weingarten to quiet title to the property. Weingarten appealed, and the Fifth District Court of Appeal reversed and remanded. The notice of the tax sale, as provided, did not satisfy the due process requirements under Jones. Publishing notice of the sale in a local newspaper was inadequate under the circumstances. Once the notices were returned to the clerk as unclaimed, it was incumbent on the clerk to take additional, reasonable steps to give adequate notice as required under Jones.

In a slightly later case, South Investment Properties, Inc. v. Icon Investments L.L.C., the Fifth District Court of Appeal reached a different result on facts similar to the facts of Patricia Weingarten Associates, Inc. What were the factual differences that distinguished South Investment Properties, Inc. from Patricia Weingarten Associates, Inc.? In South Investment Properties, Inc., the property owner, Icon Investments, changed its address, but did not give notice to the property appraiser. In addition, no forwarding address was given to the post office. The clerk of court mailed tax sale no-

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219. Id. at 562.
220. Id. at 563.
221. Id. at 564.
222. Patricia Weingarten Assocs., 974 So. 2d at 564.
223. Id. at 561.
224. Id.
225. Id.
226. Id.
227. Patricia Weingarten Assocs., 974 So. 2d at 561.
228. Id. at 561, 565.
229. Id. at 564.
230. Id. at 563–64 (citing Jones v. Flowers, 547 U.S. 220, 225 (2006)).
231. 988 So. 2d 1114 (Fla. 5th Dist. Ct. App. 2008).
232. Id. at 1118.
233. Id.
234. Id.
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prises to Icon Investments by certified mail, return receipt requested, at the last address of Icon Investments known to the property appraiser. In this case, someone, but not the owner, signed for the certified mail and receipts were returned to the clerk. The clerk also published notice in the appropriate newspaper, and the sheriff posted notice at the property address known to it. The notice given satisfied due process in this case.

B. Mortgages

Alma O'Connell, her son, and O'Con Manufacturing, Inc., a company owned by them, borrowed $825,000 from Union Planters Bank—now Regions Bank—and gave the bank a promissory note (Note 1) secured by Alma O'Connell's guaranty and "a security interest in the assets of her company." She then borrowed another $400,000 from the bank. For this loan, she gave the bank another promissory note (Note 2) and Note 2 "was secured by a mortgage on real [estate she] owned." The mortgage was recorded and referenced as Note 2. Note 2 contained what is known as a "dragnet clause." The dragnet clause not only referred to the mortgage as securing the $400,000 loan, but also as security for "any other liabilities, indebtedness or obligations of [O'Connell] to [Regions] Bank, however or whenever created." This language is broad enough to include Note 1. Note 2 was not recorded and did not refer to Note 1. Starlines International Corp. (Starlines) bought a fifty percent interest in the mortgaged real estate from Alma O'Connell. Starlines read Note 2, which contained the dragnet clause, and apparently asked Alma O'Connell if there was any pre-existing debt owed to the bank. According to Starlines, she said "no."

235. Id.
236. S. Inv. Props., Inc., 988 So. 2d at 1118.
237. Id. at 1116.
238. Id. at 1118.
239. Starlines Int'l Corp. v. Union Planters Bank, 976 So. 2d 1172, 1173 (Fla. 4th Dist. Ct. App. 2008).
240. Id.
241. Id. at 1173–74.
242. Id. at 1174.
243. Id.
244. Starlines Int'l Corp., 976 So. 2d at 1174.
245. Id.
246. Id. at 1176.
247. Id. at 1174.
248. Id. at 1177.
249. Starlines Int'l Corp., 976 So. 2d at 1177.
did not inquire of "the [b]ank as to the existence of a pre-existing debt". The bank foreclosed its mortgage. As a result, Starlines lost its equity in the property. Starlines' position in the trial court was that "its interest in the . . . property was superior to that of the [b]ank." It was "a subsequent purchaser without notice" of Note 1. The trial court entered summary judgment for the bank finding that the mortgage secured Note 1 because of the dragnet clause in Note 2. The trial court reasoned that the mortgage itself was recorded, and it referred to Note 2, which placed Starlines on "inquiry notice" of Note 1. Thus, the trial court found that Starlines had notice and its interest was not superior to the bank's interest. On appeal, the Fourth District Court of Appeal aligned itself with the Third District Court of Appeal in United National Bank v. Tellam, finding the rule in Tellam to be the appropriate rule to apply when the issue presented involves the enforcement of a dragnet clause against a person who is not the borrower. The Fourth District Court of Appeal noted that the Third District Court of Appeal, in Tellam, held that in order for a dragnet clause to be enforceable with respect to pre-existing obligations and debts, the clause must "specifically identif[y] by name" the debt or obligations secured. The Fourth District, however, noted that there is an exception to the specificity requirement of Tellam. If "it can be shown that the third party otherwise had notice that the specific pre-existing debt at issue was to be included within the grasp of the dragnet clause," the clause will be enforced. The Fourth District acknowledged that it had upheld dragnet clauses as against borrowers, but not, as here, as against a third party. The summary judgment was reversed because of the existence of an issue of fact: Whether

250. Id.
251. Id. at 1173.
252. Id. at 1176.
253. Id. at 1175.
254. Starlines Int'l Corp., 976 So. 2d at 1175.
255. Id.
256. Id.
257. Id.
258. 644 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994).
259. Starlines Int'l Corp., 976 So. 2d at 1176.
260. Id. at 1175 (citing United Nat'l Bank v. Tellam, 644 So. 2d 97, 98 (Fla. 3d Dist. Ct. App. 1994)).
261. Id. at 1176.
262. Id.
264. Starlines Int'l Corp., 976 So. 2d at 1176.
Starlines had implied actual notice of Note 1, there having been "no express actual notice."  

C. Lis Pendens

Watermark Marina of Palm City, L.L.C. (Watermark), as buyer, and the Nickersons, as seller, entered into a contract for purchase and sale of real estate. When the Nickersons did not close on the sale, Watermark sued them seeking specific performance. Watermark filed a notice of lis pendens, and the trial court required a $200,000 bond to be filed by Watermark. When the lis pendens expired, Watermark did not extend it. Watermark then requested that the bond be discharged and that Watermark be permitted to substitute corporate stock to cover payment of damages, if any, to the Nickersons for damages found to have resulted from the prior recording of the lis pendens. The Nickersons objected to the substitution, but the trial court allowed it. Certiorari review was sought by the Nickersons. The Fourth District Court of Appeal granted the writ and quashed the lower court order that allowed the substitution of the stock for the lis pendens bond. The court agreed with the Nickersons that section 48.23(3) of the Florida Statutes, as implemented by Florida Rule of Civil Procedure 1.610(b), required a bond. The statute "allow[s] courts to control notices of lis pendens as injunctions" and under the rule a bond is required before a temporary injunction may be granted. The trial court's decision to require a bond in the first place is a matter of discretion. But once the trial court exercises its discretion to require a bond, a bond must be posted. "A pledge of collateral simply is not a bond." Judge Polen dissented, and would not have granted certiorari.
How strong does a litigant's claim to real property have to be to support maintenance of a lis pendens placed on the subject property? That was the question considered by the Fifth District Court of Appeal in *Nu-Vision, L.L.C. v. Corporate Convenience, Inc.* Corporate Convenience, Inc. (lessor) entered into a commercial lease agreement with Nu-Vision, L.L.C. (lessee). Prior to the execution of the lease agreement, the lessee sent the lessor a letter that contemplated a purchase of the property by the lessee. The letter went on to say that "a contract will follow" if the letter was signed by both of the parties. The letter was signed by both parties, but a contract never followed. The parties signed the lease agreement, which had only "one oblique reference" to a possible purchase of the leased property by the lessee, and a contract for sale and purchase was never made between the parties. The lessor sued the lessee for eviction based on nonpayment of rent. The lessee counterclaimed for specific performance based on its "purchase option" agreement, and the lessee filed a notice of lis pendens against the real estate. The lessor moved to discharge the lis pendens and its motion was granted. The lessee petitioned for certiorari review of the dissolution of the lis pendens. Certiorari was denied. The Fifth District Court of Appeal noted that a writing signed by the person to be charged containing essential terms for the sale and purchase of real estate, was required to support an action for specific performance. All the lessee had was a letter naming the parties, with the address of the property, "and a sliding scale for the purchase price." The majority of the court found those elements "insufficient to support [an action] for specific performance."

281. *Id.* at 232, 234.
282. *Id.* at 233.
283. *Id.*
284. *Id.*
286. *Id.* at 233–34.
287. *Id.*
288. *Id.* at 234.
289. *Id.* at 233.
291. *Id.*
292. *Id.* at 234 (citing *De Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 681 (Fla. 1st Dist. Ct. App. 2007)). *De Vaux* was reviewed in Landau, *2006–2007 Survey, supra* note 1, at 55–56.
294. *Id.* at 234–35.
295. *Id.* at 235.
Since the lessee's counterclaim for specific performance failed to state a claim on which relief could be granted, lessee failed, as a matter of law, to "establish a fair nexus between the apparent legal or equitable ownership of the property and the [underlying] dispute [described] in the lawsuit." 296 Fair nexus requires a "good faith, viable claim." 297 The claim here failed to pass that test. 298 The majority said it would be unfair and "contrary . . . to public policy to allow" flimsy claims to support lis pendens. 299 Judge Thompson dissented. 300 He would have quashed the lower court's order based on Chiusolo v. Kennedy. 301

In Shields v. Schuman, one of several additional lis pendens cases decided during the survey period, 303 Shields was a twenty-five percent shareholder in a corporation that owned certain real estate. 304 Schuman owned the remaining seventy-five percent of the stock in the corporation. 305 Schuman caused the corporation to enter into a contract to sell the real estate to Blue Water VII, L.L.C. (Blue Water), despite the fact that Shields objected. 306 Shields sought to enjoin the consummation of the sale claiming that the price was not high enough. 307 A notice of lis pendens was also filed by Shields. 308 Posting of a bond of $8,500,000 was required by the trial court as a condition "to maintain the lis pendens." 309 The bond was not posted, which resulted in the dissolution of the lis pendens. 310 Blue Water then sought dismissal of two counts of the complaint, claiming there was a cloud on Blue Water's title. 311 Blue Water requested, as an alternative, that Shields be required to post a bond to maintain the two counts. 312 The trial court, although reluctant

296. 1d. at 234 (quoting Chiusolo v. Kennedy, 614 So. 2d 491, 492 (Fla. 1993)).
297. 1d. (quoting Bergmann v. Slater, 922 So. 2d 1110, 1112 (Fla. 4th Dist. Ct. App. 2006)).
299. Id. at 235.
300. Id. at 236 (Thompson, J., dissenting).
301. Id. (relying on Chiusolo, 614 So. 2d at 493).
302. 964 So. 2d 813 (Fla. 4th Dist. Ct. App. 2007).
304. Shields, 964 So. 2d at 813.
305. Id.
306. Id.
307. Id. at 813–14.
308. Id. at 814.
309. Shields, 964 So. 2d at 814.
310. Id.
311. Id.
312. Id.
to do so, required Shields to post bond if he wished to continue the lawsuit.\textsuperscript{313} Shields filed a petition for certiorari.\textsuperscript{314} The Fourth District Court of Appeal granted the writ and the order requiring bond was quashed.\textsuperscript{315} The trial court’s order requiring a bond “not related to a lis pendens, violate[d] [Shields’s] constitutional right of access to the courts.”\textsuperscript{316} 

\subsection*{D. Partition}

Brothers Nick and Peter Geraci owned approximately 290 acres of real estate in Hillsborough County described as “ripe for development.”\textsuperscript{317} The brothers did not get along; Peter wanted out of the business relationship, and eventually, Peter sued Nick alleging that the real estate “was not divisible without prejudice to the owners” and sought an order directing that the property be sold.\textsuperscript{318} Nick denied that the real estate was indivisible and counter-claimed seeking the appointment of three commissioners pursuant to section 64.061(1) of the \textit{Florida Statutes} for the purpose of effectuating the partition.\textsuperscript{319} Instead, the trial court held “an evidentiary hearing to determine whether the property could be [partitioned] without prejudice to either brother.”\textsuperscript{320} At the conclusion of the hearing, the trial court ruled that the real estate could not be partitioned and a public sale of the real estate was ordered.\textsuperscript{321} Nick appealed arguing that the trial court was required to appoint commissioners who would make the call as to whether the real estate could be divided in kind without prejudice to the parties, citing sections 64.061(1) and 64.071(1) of the \textit{Florida Statutes}.\textsuperscript{322} Describing the case as “a matter of first impression,”\textsuperscript{323} the Second District Court of Appeal affirmed the trial court on the strength of section 64.061(4) of the \textit{Florida Statutes}.\textsuperscript{324} The Second District Court of Appeal held that section 64.061(4) allowed the trial court to bypass the appointment of commissioners process and go directly to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{313} \textit{Id.} at 813–14.
\item\textsuperscript{314} \textit{Shields}, 964 So. 2d at 813.
\item\textsuperscript{315} \textit{Id.} at 814.
\item\textsuperscript{316} \textit{Id.}
\item\textsuperscript{317} Geraci v. Geraci, 963 So. 2d 904, 905 (Fla. 2d Dist. Ct. App. 2007).
\item\textsuperscript{318} \textit{Id.}
\item\textsuperscript{319} \textit{Id.}
\item\textsuperscript{320} \textit{Id.}
\item\textsuperscript{321} \textit{Id.} at 905–06.
\item\textsuperscript{322} \textit{Geraci}, 963 So. 2d at 907.
\item\textsuperscript{323} \textit{Id.} at 905.
\item\textsuperscript{324} \textit{Id.} at 907.
\end{enumerate}
\end{footnotesize}
the issue of whether the property could be divided in kind without prejudice to the parties.325

VIII. EMINENT DOMAIN

A. Condemnation

The Florida Department of Transportation (DOT), in connection with “the widening of State Road 40 west of Ocala,” filed a suit seeking to condemn part of the real estate owned by System Components Corporation (System Components).326 System Components then purchased additional real estate on which to build a new facility and, in the interim, leased space to which it temporarily relocated the business.327 DOT and System Components agreed on everything but the proper calculation of damages to the business pursuant to section 73.071(3)(b) of the Florida Statutes.328 System Components argued that damages were measured by “the total value of the business” on the date of taking—as if the company no longer existed.329 DOT’s position was that the measure of damages was “actual damages” less, or mitigated by, value that could be attributed to “the relocation and continued operation of the business.”330 The trial court instructed the jury to make both calculations.331 According to the jury, “the total value of the business was $2,394,964.00,” but considering “the relocation and continuing operation of the business,” damages were $1,347,911.00.332 The trial court awarded System Components the latter amount, and System Components appealed.333 System Components relied on Department of Transportation v. Tire Centers, L.L.C.,334 where the Fourth District Court of Appeal held that business damages provided in section 73.071(3)(b) of the Florida Statutes are not subject to mitigation by an “‘off-site cure.’”335 The Fifth District Court of Appeal noted that while there might not be a “‘duty to mitigate’

325. Id.
327. Id.
328. Id. at 688–89.
329. Id. at 689.
330. Id.
332. Id.
333. See id.
334. 895 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2005).
335. Sys. Components Corp., 985 So. 2d at 689 (citing Tire Ctrs., L.L.C., 895 So. 2d at 1113).
business damages” on the part of the condemnee, once relocation of the business was accomplished and business continued, the benefit of doing so must be offset against the total value of the business.\textsuperscript{336} The Fifth District Court of Appeal affirmed the trial court and certified such conflict with the Fourth District Court of Appeal.\textsuperscript{337}

In another case, the DOT obtained an order of taking, in July 2001, for Parcel 104 in Indian River County alongside State Road 60 for the purpose of widening the road.\textsuperscript{338} St. John’s Water Control District filed a counter-claim for inverse condemnation of Parcel 104A.\textsuperscript{339} After trial on May 30, 2006, on the counterclaim, the trial court awarded the Board of Supervisors of St. John’s Water Control District more than five million dollars for Parcel 104A, using the trial date for valuation and compensation under section 73.071(2) of the \textit{Florida Statutes}.\textsuperscript{340} The Fourth District Court of Appeal reversed and remanded for a new trial and re-valuation.\textsuperscript{341} “[I]n an inverse condemnation proceeding,” “the better rule” is to use the date of appropriation for purposes of valuing compensation.\textsuperscript{342}

\textbf{IX. EMPLOYMENT LAW}

\textbf{A. Workers’ Compensation}

Gayer was employed by Labor Finders of Broward, Inc. (Labor Finders), a provider of temporary workers.\textsuperscript{343} Labor Finders paid Gayer an hourly wage, and Gayer received workers’ compensation coverage through Labor Finders.\textsuperscript{344} Fine Line Construction & Electric, Inc. (Fine Line) “leased” Gayer from Labor Finders and put him to work.\textsuperscript{345} His job required the use of “a tall folding ladder and an electric drill,” and while performing the work, Gayer fell off the ladder that had been furnished to him by Fine Line.\textsuperscript{346} He

\begin{itemize}
  \item 336. \textit{Id.} at 692.
  \item 337. \textit{Id.} at 693.
  \item 338. Dep’t of Transp. v. Bd. of Supervisors, 981 So. 2d 605, 605 (Fla. 4th Dist. Ct. App. 2008).
  \item 339. \textit{Id.} at 606.
  \item 340. \textit{Id.}
  \item 341. \textit{Id.}
  \item 342. \textit{Id.} (quoting County of Volusia v. Pickens, 439 So. 2d 276, 277 (Fla. 5th Dist. Ct. App. 1983)).
  \item 344. \textit{See id.}
  \item 345. \textit{Id.}
  \item 346. \textit{Id.}
\end{itemize}
was severely injured. Was the ladder defective in some way and its manufacturer liable? That was difficult to determine because the ladder "could not be located." Gayer sued Fine Line claiming spoliation of evidence, that is, the ladder. Fine Line successfully moved for summary judgment, arguing that it had no duty to preserve the ladder under section 440.39(7), [of the] Florida Statutes, because [it] was not Gayer's 'employer.' The Fourth District Court of Appeal reversed. The claim for spoliation depends on there being a "duty to preserve evidence." The Fourth District found this duty in section 440.39 of the Florida Statutes and quoted the Third District Court of Appeal in General Cinema Beverages of Miami, Inc. v. Mortimer, stating that "[t]he point of section 440.39 is to preserve causes of action against third-party tortfeasors and to impose a duty of cooperation to that end." But was Gayer an employee of Fine Line and thus owed a duty by Fine Line to preserve evidence? The Fourth District referred to what it called "the majority rule under the doctrine of lent employment," stating that "[i]f the general employer simply arranges for labor without heavy equipment, the transferred worker then becomes the employee of the special employer." From there, the court had little difficulty concluding that Fine Line was "a special employer of a borrowed employee"—Gayer—and fit within the definition of "employer" used in section 440.39.

In Doe v. Footstar Corp., the parents of a minor child, as her next friends and guardians, brought an action against Footstar Corporation (Footstar) for damages resulting from the alleged negligent hiring of their daughter's supervisor at Footstar, claiming the supervisor had assaulted their daughter. The trial court ruled that the action against Footstar was barred

347. Id.
348. See Gayer, 970 So. 2d at 426 n.1.
349. Id. at 425.
350. Id.
351. Id. at 426.
352. Id.
353. Gayer, 970 So. 2d at 426 (quoting Flagstar Cos. v. Cole-Ehlinger, 909 So. 2d 320, 322–23 (Fla. 4th Dist. Ct. App. 2005)).
354. 689 So. 2d 276 (Fla. 3d Dist. Ct. App. 1995).
355. Gayer, 970 So. 2d at 427 (quoting Mortimer, 689 So. 2d at 279).
356. See id. at 426–28.
357. Id. at 428.
358. Id. at 427 (quoting Folds v. J.A. Jones Constr. Co., 875 So. 2d 700, 703 (Fla. 1st Dist. Ct. App. 2004)).
359. Id. at 428–29.
360. 980 So. 2d 1266 (Fla. 2d Dist. Ct. App. 2008).
361. Id. at 1267. Some of the other allegations were negligent retention, assault, and battery. Id.
by the workers’ compensation exclusivity rule, section 440.11 of the Florida Statutes.\(^{362}\) The Second District Court of Appeal acknowledged that the result seemed harsh, but that “[t]here is no exception to the exclusive remedy” rule under section 440.11.\(^{363}\) Therefore, the decision of the trial court was affirmed.\(^{364}\)

B. Reasonable Expectation of Privacy

\textit{State v. Young}\(^{365}\) is a Fourth Amendment search and seizure case involving a warrantless search by police of a computer furnished by an employer to an employee at the employer’s place of business—in this case, a church.\(^{366}\) Suffice it to say, that if the employer does not have a clearly articulated, widely circulated, written policy allowing it to search computers it has provided its employees at work, then in the absence of valid consent or a valid warrant, search of a computer by police will be subject to fact laden scrutiny under the Fourth Amendment as to whether the employee had a legitimate expectation of privacy.\(^{367}\) In \textit{Young}, the police seized a clergyman’s computer at the church relying on permission to do so from another employee of the church who was not the clergyman’s supervisor.\(^{368}\) The evidence obtained from the computer and later related statements by the clergyman were suppressed by the trial court.\(^{369}\) The State appealed, and the First District Court of Appeal affirmed.\(^{370}\) The church did not have a specific policy regarding its access to employees’ computers.\(^{371}\) In the absence of an explicit policy concerning inspection of computers, can it be said that the employee had a legitimate expectation of privacy concerning his computer?\(^{372}\) Under the facts of this case—“focus[ing] on the operational realities of the workplace”—the court concluded that this employee did.\(^{373}\) The employee’s office was not regularly shared with anyone else, the office could be locked—there were three keys to the office door and the employee had two

\begin{thebibliography}{99}
\bibitem{362} Id.
\bibitem{363} Id. at 1267–68.
\bibitem{364} Footstar Corp., 980 So. 2d at 1268.
\bibitem{365} 974 So. 2d 601 (Fla. 1st Dist. Ct. App. 2008).
\bibitem{366} Id. at 606, 608.
\bibitem{367} See id. at 609 (citing State v. Purifoy, 740 So. 2d 29, 30 (Fla. 1st Dist. Ct. App. 1999)).
\bibitem{368} Id. at 606–07.
\bibitem{369} Id. at 608.
\bibitem{370} Young, 974 So. 2d at 606.
\bibitem{371} Id. at 612.
\bibitem{372} See id. at 608–09.
\bibitem{373} Id. at 609.
\end{thebibliography}
of the keys—when absent, the employee kept the door locked, and the employee’s computer was not on a network with any other computer. The employer’s ownership of the computer did not matter because the employee “was the sole regular user.” However, an employee would not have a reasonable expectation of privacy if a third party has or “reasonably appears to have common authority over the” property—a computer—and the third party gave consent to the search. That circumstance was not present here. The court noted that police may rely on a third party’s apparent common authority to give consent if the reliance is reasonable, even in the absence of actual authority. The appellate court found that in this case, the facts did not support a finding that the church employee giving permission to the police search had common authority, nor was it reasonable for the police to think that he did. The clergyman’s statements given to the police after the recitation of the Miranda warning were also suppressed as being “fruit of the poisonous tree.”

X. FIDUCIARY DUTY AND GOVERNANCE

The President of the Greenwich Association, Inc. (Association), “on behalf of the unit owners,” signed an agreement with Greenwich Apartments, Inc. that settled a dispute over the use of a parking garage. In May 2001, shortly after the agreement was signed, the circuit court entered a final order dismissing the lawsuit, and the settlement was incorporated into the order. There was no appeal. The problem was that the settlement agreement was never put to a vote of the Association’s unit owners. The Association brought suit against Greenwich Apartments, Inc. in April 2005. The Association asked the court to reform or cancel the settlement agreement alleging

374. Id. at 611.
375. Young, 974 So. 2d at 611.
376. Id. at 609 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).
377. Id. at 612.
378. Id. at 610.
379. Id. at 612.
380. Young, 974 So. 2d at 607.
381. Id. at 610 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963), and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 387 (1920)).
383. Id.
384. Id.
385. Id.
386. Id.
an ultra vires act on the part of its then president that amounted to fraud. The trial court granted Greenwich Apartment Inc.'s motion for summary judgment on the basis of *Florida Rule of Civil Procedure* 1.540(b). According to the trial court, this rule required the Association to bring its action "within one year of the" court's earlier final order, that is, by May 2002, which it did not do. *Florida Rule of Civil Procedure* 1.540(b) requires that relief from a court's final judgment, decree, or order based on, inter alia, intrinsic or extrinsic fraud, "misrepresentation, or other misconduct of an adverse party" must be brought within a year of the court's order. The Third District Court of Appeal found the 2001 judgment to be voidable, but not void, and therefore, the exception to the one year rule applicable to void judgments did not apply. The rule, however, does not put a limit on the relief from judgment a court may grant for fraud on the court. As to fraud on the court, the Third District Court of Appeal determined that cognizable "fraud upon the court" in this case had to be extrinsic fraud defined as "where a party is prevented from 'trying an issue before the court and the prevention itself becomes a collateral issue to the cause.'": By contrast, intrinsic fraud is "the presentation of misleading information on an issue before the court that was tried or could have been tried." The Third District Court of Appeal found that the complaint of fraud on the court was intrinsic, if fraud at all, and was time barred by *Florida Rule of Civil Procedure* 1.540(b).

**XI. INTELLECTUAL PROPERTY AND INTERNET**

Mr. O'Shea sued Cordis Corporation (Cordis) and Johnson & Johnson alleging that he was injured as a result of a defective "stent implanted in him." As part of the discovery process, Mr. O'Shea made requests for production of documents which Cordis claimed were confidential proprietary

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387. *Greenwich Ass'n*, 979 So. 2d at 1118.
388. *Id.* at 1117; FLA. R. CIV. P. 1.540(b).
389. *See id.*; *see Greenwich Ass'n*, 979 So.2d at 1117.
390. *Id.* at 1118 (quoting FLA. R. CIV. P. 1.540(b)).
391. *Id.* at 1118–19.
392. *Id.* at 1118; *see* FLA. R. CIV. P. 1.540(b).
393. *Greenwich Ass'n*, 979 So. 2d at 1118 (quoting Parker v. Parker, 950 So. 2d 388, 391 (Fla. 2007)).
394. *Id.* (quoting *Parker*, 950 So. 2d at 391).
395. *Id.* at 1119.
Mr. O'Shea’s attorney asked for an order that would allow him to disclose to other lawyers confidential information gleaned during discovery. The trial court issued such an order containing procedures designed to maintain confidentiality. The trial court also denied Cordis’s motion to prohibit Mr. O'Shea’s attorney from sharing the confidential information with other attorneys, regardless of their involvement in collateral litigation concerning the stent. Cordis petitioned for certiorari review of the trial court’s order. The petition was granted, and the trial court’s order was quashed. By not limiting “sharing” confidential information to counsel in collateral litigation over the stent, the trial court’s order was too broad. Cordis demonstrated the order’s potential of causing it irreparable harm. Judge Farmer dissented.

XII. JURISDICTION AND VENUE

A. Jurisdiction

Aspsoft, Inc. (Aspsoft) sued WebClay, Inc. (WebClay), and Mr. Allen alleging “breach of an oral contract.” Mr. Allen, a North Carolina resident, was the registered agent and president of WebClay. WebClay’s principal place of business was also in North Carolina. Did Florida’s long-arm statute, section 48.193 of the Florida Statutes, justify the trial court’s exercise of personal jurisdiction over both WebClay and Mr. Allen?


Id. at 764.

Id. at 765. The Fifth District Court of Appeal’s description of the contents of the affidavits submitted by the parties does not include an indication that payments by WebClay to Aspsoft were expressly required to be made in Florida. Id. at 764. The Fifth District Court of Appeal concluded that:

[T]he facts set forth in Aspsoft’s amended complaint and affidavits are sufficient to support the conclusion that personal jurisdiction over WebClay by the Florida courts is proper pursuant to Florida’s long-arm statute since the affidavits state that WebClay breached the parties’ oral contract by failing to make payments which were due to be made in Florida.
alleged that WebClay, represented by Mr. Allen, hired Aspsoft to do software consulting for WebClay and agreed to pay Aspsoft in response to invoices to be sent to WebClay by Aspsoft every two weeks. Aspsoft submitted affidavits stating that all work done by Aspsoft for WebClay occurred in Florida. The trial court, relying on the recommendations of a General Magistrate, dismissed the suit against WebClay and Mr. Allen with prejudice. The trial court found that the defendants did not have the minimum amount of contacts with Florida for the court's exercise of personal jurisdiction over them. The trial court also found that Florida's statute of frauds, section 725.01 of the Florida Statutes, barred the breach of contract claim. The Fifth District Court of Appeal affirmed the trial court's dismissal with prejudice in favor of Mr. Allen. However, it reversed the trial court as to WebClay. Citing Venetian Salami Co. v. Parthenais, the Fifth District subjected the facts to a two-part jurisdictional analysis: "(1) whether the facts set forth one or more of the predicate acts enumeration in section 48.193 of the Florida Statutes; and, if so, then (2) whether the facts set forth the defendant's minimum contacts with Florida necessary to satisfy federal constitutional due process requirements." "[M]inimum contacts are established if the court finds that 'the defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there.'" The court observed that under sections 48.193(1)(a) and (g) of the Florida Statutes, "[o]perating, conducting, engaging in, or carrying on a business or business venture in [the] state [and b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state," are sufficient acts to justify personal jurisdiction over an entity, therefore, paying Aspsoft's invoices conferred jurisdiction on Florida courts over Webclay. The Fifth District Court of Appeal had no problem concluding WebClay had these minimum contacts with Florida and could "rea-

Aspsoft, Inc., 983 So. 2d at 766. However, in its amended complaint, Aspsoft alleged that some payments were made to it in Florida. Id. at 763–64.
410. Id. at 764.
411. Id.
412. Id.
413. See Aspsoft, Inc., 983 So. 2d at 764.
414. Id. at 768–69.
415. Id. at 769.
416. Id.
417. 554 So. 2d 499 (Fla. 1989).
418. Aspsoft, Inc., 983 So. 2d at 765.
419. Id. (citing Glovegold Shipping, Ltd. v. Sveriges Angfartygs Assurans Forening, 791 So. 2d 4, 11 (Fla. 1st Dist. Ct. App. 2000)).
420. Id. at 766.
reasonably anticipate being haled into court there". As to the statute of frauds ground for dismissing Aspsoft's lawsuit, the Fifth District Court of Appeal held that only if the oral contract could not possibly be performed within the statute's threshold of one year could the statute of frauds be said to apply. Aspsoft's complaint against WebClay was reinstated.

In Renaissance Health Publishing, L.L.C. v. Resveratrol Partners, L.L.C., Renaissance Health Publishing, L.L.C. (Renaissance), a Florida corporation, brought a trade libel action in Florida against Resveratrol Partners, L.L.C. (Resveratrol), "a Nevada limited liability company." Renaissance asserted that the court had jurisdiction over Resveratrol under Florida's long-arm statute, section 48.193 of the Florida Statutes. The trial court granted [Resveratrol's] motion to dismiss” for lack of personal jurisdiction. Renaissance appealed. Resveratrol did not maintain an office, employ agents, own any real estate, have any bank accounts in Florida, or solicit customers by direct mail or advertise in “magazine[s] or periodical[s] delivered to Florida” or by means of “Florida based broadcast or cable advertising.” Resveratrol sold its competing product, Longevinex, on its interactive website. During the same period, eighty-six of its books and e-books were sold to Florida residents for a total of $2101.83. The Fourth District Court of Appeal not only found that the requirements of section 48.193 were satisfied, it also found sufficient minimum contacts to satisfy the due process requirements under Venetian Salami Co. What tipped the scales in this case is that Resveratrol's website was an interactive website as opposed to a passive website.
B. Venue

The genesis of the appeal in *McWane, Inc. v. Water Management Services, Inc.* was a lawsuit against several defendants from several states for breach of contract and breach of warranty based on damages alleged to have resulted “from the structural failure of” a pipeline that carried water to St. George Island, in Florida’s panhandle. It appears that the plaintiff, Water Management Services, Inc., a Florida corporation, objected to “the enforcement of a . . . contractual forum selection provision” to jurisdictions other than Florida. The trial court agreed that the contractual forum selections should not be enforced. The First District Court of Appeal affirmed. A contractual forum selection provision will not be enforced if it can be shown that by enforcing the provision, the party’s “trial in the agreed-upon forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” Some inconvenience and extra expense is not enough to overcome a contractual provision. In the case presented, the “legally and factually interrelated claims and cross-claims alleging structural damage to a single line of pipe by multiple defendants from multiple states” supported the trial court’s decision.

XIII. LANDLORD AND TENANT RELATIONSHIP

A. Assignment of Lease

In *Leesburg Community Cancer Center v. Leesburg Regional Medical Center, Inc.*, Leesburg Regional Medical Center (Regional), as lessor, in 1985, made “a thirty-year ground lease with Leesburg Real Estate Associates, Inc.” (Associates), as lessee. The purpose of the lease was to allow “Associates to develop and operate [a] . . . cancer treatment center on the property.” The lease forbade Regional from operating “a competing can-

435. 967 So. 2d 1006 (Fla. 1st Dist. Ct. App. 2007).
436. *Id.* at 1007.
437. *Id.*
438. *Id.*
439. *Id.* at 1007–08.
440. *McWane, Inc.*, 967 So. 2d at 1007 (quoting Manrique v. Fabbri, 493 So. 2d 437, 440 n.4 (Fla. 1986)).
441. *Id.*
442. *Id.*
443. 972 So. 2d 203 (Fla. 5th Dist. Ct. App. 2007).
444. *Id.* at 205.
445. *Id.*
cer treatment center . . . within . . . Regional’s ‘primary service area’ during the” lease term. 446 Associates had the right to assign or sublet “all or part of its leasehold.” 447 All assignments and subleases were to be made “subject to the terms” of the original ground lease, and the ground lease’s terms had to be incorporated by Associates “into any assignment or sublease” made by it. 448 Associates promptly sublet the property to Leesburg Community Cancer Center (Cancer Center), “a limited partnership formed by” Associates’ shareholders. 449

In 2000, Regional bought Associates’ leasehold interest for $1,900,000, with the intention of allowing Regional to participate in a nearby competing cancer treatment facility. 450 Regional’s position was “that the exclusivity clause” in the lease was personal between it and Associates. 451 Regional argued that its purchase of Associates’ leasehold interest extinguished the exclusivity clause. 452 Cancer Center, as sublessee, sought declaratory relief on the issue of the extinguishment of the exclusivity clause. 453 The trial court granted summary judgment to Regional and Cancer Center appealed. 454 The Fifth District Court of Appeal affirmed. 455

The general rule is that privity of contract does not exist between a les- sor and sublessee. 456 Without privity between Regional and Cancer Center, Cancer Center had no right to enforce any of the lease covenants. 457 Had this been an assignment of the leasehold interest from Associates to Cancer Cen- ter, then Cancer Center would be standing “in the shoes of the assignor.” 458 The Fifth District Court of Appeal found that it was clear that a sublease, not an assignment, was intended, and the parties behaved in this fashion. 459 “If the parties had intended to create a non-compete covenant between Leesburg Regional and any sublessee of Real Estate Associates, they could have easily said so in the ground lease.” 460

446. Id.
447. Id.
448. Leesburg Cnty., 972 So. 2d at 205.
449. Id.
450. Id.
451. Id.
452. Id.
453. Leesburg Cnty., 972 So. 2d at 205.
454. Id. at 204.
455. Id.
456. Id. at 206.
457. See id.
458. Leesburg Cnty., 972 So. 2d at 206 (quoting Lauren Kyle Holdings, Inc. v. Heath-Peterson Constr. Corp., 864 So. 2d 55, 58 (Fla. 5th Dist. Ct. App. 2003)).
459. Id.
460. Id. at 207.
B. Personal Guarantee of Lease

In *Fairway Mortgage Solutions, Inc. v. Locust Gardens,* Fairway Mortgage Solutions (tenant) "entered into a five-year" lease with Locust Gardens (landlord). The lease was signed "on behalf of the tenant" by Fernando Recalde, its president. "Directly below the signature line" was the following, which was hand-printed: "FERNANDO RECALDE, PRESIDENT." Below that line, was the following: "*NOTE—PERSONAL GUARANTY THE TENANT SIGNATURE ABOVE ALSO INDICATES ACCEPTANCE OF PERSONALLY GUARANTEEING THIS LEASE AND IS BEING FREELY GIVEN AS PER SECTION ‘G’ OF THIS LEASE.*"

The lease agreement provided that the tenant and guarantor would be "jointly and severally liable." "In March 2006, the tenant contacted a real estate [agent], who had [been] the landlord’s leasing agent" and informed the agent that the tenant was relocating and needed "assistance in finding a sub-tenant." The tenant failed to make the April 2006 and later rent payments. The landlord sued for possession, "damages, and breach of guaranty." The tenant argued that the landlord "failed to mitigate damages," and Mr. Recalde claimed that the guaranty language had been added to the lease agreement after the lease was signed "without his knowledge or consent." The trial court entered summary judgment in favor of the landlord on the issue of mitigation of damages and Mr. Recalde’s guaranty. The tenant and Mr. Recalde appealed, and the Fourth District Court of Appeal left undisturbed the summary judgment in favor of the landlord concerning mitigation of damages.

The landlord’s duty to mitigate damages by trying to re-let the property did not begin until it had retaken possession. That occurred in August

461. 988 So. 2d 678 (Fla. 4th Dist. Ct. App. 2008).
462. Id. at 679.
463. Id.
464. Id.
465. Id. at 679–80.
466. *Locust Gardens,* 988 So. 2d at 680.
467. Id.
468. Id.
469. Id.
470. Id.
471. *Locust Gardens,* 988 So. 2d at 680. The parties stipulated that the landlord was entitled to possession. Id.
472. Id. at 681.
473. Id.
2006, and by November 2006, the landlord had obtained a replacement tenant for part of the square footage leased. The landlord had, in fact, mitigated damages. However, the Fourth District Court of Appeal reversed the summary judgment with respect to the guaranty finding that there were still genuine issues of material fact regarding the validity of the guaranty. A signature on a document that follows the word “by,” plus descriptive words identifying the signor “as a corporate officer or . . . similar [position], does not create personal liability for the” signor unless the contract has language to the contrary.

C. Payment into Court Registry

In Blandin v. Bay Porte Condominium Ass’n, Mr. Blandin owned land on which “a ten-unit condominium building” is located. In 1971, Mr. Blandin, as lessor, made “a 99-year land lease with the building’s developer,” as lessee. As the developer sold the units, it assigned a percentage interest in the ground lease to the buyers—unit owners—as lessees. The land lease had “a rent escalation clause . . . based [on] the consumer price index.” In 2006, “[Mr.] Blandin notified the association and unit owners” of the amount of the increased rent. “[T]he unit owners failed to pay . . . .” Mr. Blandin then sent a three-day notice, but there still was no payment. He then filed an action “for breach of the land lease, [asking for] possession and damages.” The unit owners asked the court to “determine the amount of the accrued rent [they must] place[] in the court registry [under] section 83.232” of the Florida Statutes.

474. Id.
475. Locust Gardens, 988 So. 2d at 681.
476. Id.
477. Id. (citing Robert C. Malt & Co. v. Carpet World Distribs., Inc., 763 So. 2d 508, 510 (Fla. 4th Dist. Ct. App. 2000) (where the scope of the guaranty was not spelled out in the agreement)).
478. 988 So. 2d 666 (Fla. 4th Dist. Ct. App. 2008).
479. Id. at 667.
480. Id.
481. Id.
482. Id.
483. Blandin, 988 So. 2d at 667.
484. Id.
485. Id.
486. Id.
487. Id.
"On August 22, 2007, the trial court ordered the unit owners" to pay rent at the old rate until the new amount could be determined. On November 2, 2007, Mr. Blandin moved "for immediate final default judgment of possession," alleging that the unit owners did not make the October or November payments. The association's new management company took the blame for missing the payments. "[T]he trial court denied Mr. Blandin's motion" and ordered him instead to accept the late rent payments which had been offered, as good cause had been shown for the delay. Mr. Blandin appealed the denial of his motion. The Fourth District Court of Appeal reversed and remanded the matter "for the issuance of immediate writs of possession."

Subsections (1) and (5) of section 83.232 of the Florida Statutes, when read together, allow the trial court to extend the tenant's time to make rent payments only if the court exercises its discretion before the payment due date, not after. If "a tenant fails to timely pay pursuant to a court order, the court" loses the discretion to extend the due date and must "enter an immediate default for possession, without further notice or hearing."

XIV. PIERCING THE CORPORATE VEIL

In Braswell v. Ryan Investments, Ltd., Mrs. Braswell had obtained judgments against her husband, now deceased, resulting from "his failure to make payments" to her under a marital settlement agreement entered into in 2000. The marital home—which Mrs. Braswell no longer occupied—"had been titled in the name of Ryan Investments, Ltd.," (Corporation) since its purchase in 1997. Relying on what is called "outsider reverse corporate piercing' theory," Mrs. Braswell tried to execute her judgments by levy on the home alleging that the Corporation was her husband's "alter ego and that he" titled the property in the corporate name to defraud her.

488. Blandin, 988 So. 2d at 667.
489. Id.
490. Id.
491. Id. at 668.
492. Id.
493. Blandin, 988 So. 2d at 670.
494. Id. at 669.
495. Id.
496. 989 So. 2d 38 (Fla. 3d Dist. Ct. App. 2008).
497. Id. at 38.
498. Id.
499. Id. (citing Estudios, Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A., 507 So. 2d 1119, 1120 (Fla. 3d Dist. Ct. App. 1987), review denied, 518 So. 2d 1274 (Fla. 1987)).
500. Id.
trial court rebuffed her attempt to execute on the home.\textsuperscript{501} The Third District Court of Appeal affirmed.\textsuperscript{502} The Third District acknowledged that the corporate veil can be pierced when the "controlling shareholder form[s] or use[s] the corporation to defraud creditors" for pre-existing obligations.\textsuperscript{503} The corporation itself can also be held liable to satisfy the debts of the controlling shareholders when they "have formed or used the corporation to secrete assets" thus avoiding "preexisting personal liability."\textsuperscript{504} These remedies were not available to Mrs. Braswell.\textsuperscript{505} The marital home had been held in the Corporation's name for three years prior to the marital settlement agreement.\textsuperscript{506}

The obligations of Mr. Braswell to Mrs. Braswell came into being after the home had been titled in the corporate name, not before.\textsuperscript{507} It was no secret to Mrs. Braswell that the home was titled in the name of the corporation.\textsuperscript{508}

XV. TORTS

A. Negligence

Mr. Tringali was a member of L.A. Fitness International (L.A. Fitness), a health club.\textsuperscript{509} Mr. Tringali fell from the stepping machine he was using at an L.A. Fitness facility, and he died of heart failure.\textsuperscript{510} Mr. Tringali's "daughter, as personal representative of" her father's estate, sued L.A. Fitness for wrongful death, alleging that the health club had a "duty to render aid during a medical emergency" and: 1) failed to medically screen her father; 2) failed to use cardiopulmonary resuscitation (CPR); 3) failed to have an automatic external defibrillator (AED) on its premises and to use it on [her father]; and 4) failed to properly train its employees" to deal with medical emergencies.\textsuperscript{511} A judgment was entered against L.A. Fitness, awarding

\textsuperscript{501} Braswell, 989 So. 2d at 39.
\textsuperscript{502} Id. at 41.
\textsuperscript{503} Id. at 38 (quoting Estudios, 507 So. 2d at 1120).
\textsuperscript{504} Id. at 39 (quoting Estudios, 507 So. 2d at 1120).
\textsuperscript{505} Id.
\textsuperscript{506} Braswell, 989 So. 2d at 39.
\textsuperscript{507} Id. at 38.
\textsuperscript{508} Id. at 38–39.
\textsuperscript{510} Id. at 552.
\textsuperscript{511} Id.
damages of $619,650, and L.A. Fitness appealed. At trial, there was testimony to the effect that Mr. Strayer, an employee of L.A. Fitness, was certified in CPR. Immediately upon learning that a patron was in distress, Mr. Strayer "told the receptionist to call 911," which she did. Testimony of the employees and witnesses differed as to how much time elapsed between the time of the 911 call and the arrival of the paramedics, as well as to the amount of time that elapsed between the time Mr. Tringali collapsed and the emergency medical technicians arrived. The estimates were generally about four minutes after the 911 call, but perhaps up to twelve minutes after Mr. Tringali collapsed. Mr. Strayer examined Mr. Tringali in the meantime and decided against CPR as he thought it might "make matters worse." The Fourth District Court of Appeal noted that it appeared that the duty of an owner of a health club to an injured customer was a matter of first impression in Florida. Referring to its decision in Estate of Starling v. Fisherman's Pier, Inc., the Fourth District Court of Appeal approved the Restatement (Second) of Torts, section 314A, "that a proprietor is under an ordinary duty of care to render aid to an invitee after he knows or has reason to know the invitee is ill or injured." Citing decisions from other states, the Fourth District concluded that L.A. Fitness fulfilled its duty to Mr. Tringali by calling for paramedics "within a reasonable time." The court reversed the trial court's judgment and remanded. Along the way, the Fourth District also pointed out that the Florida Legislature had failed to strengthen Florida's Good Samaritan Act, section 768.13 of the Florida Statutes. The Fourth District Court of Appeal found that statutory protection for persons like Mr. Strayer was illusory. Had Mr. Strayer performed CPR on Mr. Tringali, he could have been subjected to liability for failure to per-

512. Id. at 556.
513. Id. at 552.
514. Mayer, 980 So. 2d at 552.
515. Id. at 552–53.
516. Id.
517. Id. at 552.
518. Id. at 557.
520. Mayer, 980 So. 2d at 557 (citing Hovermale v. Berkeley Springs Moose Lodge, 271 S.E.2d 335, 338 (W. Va. 1980)).
521. Id. at 561–62.
522. Id. at 562.
523. Id. at 561 n.2.
524. Id.
form it properly. Mr. Strayer's assessment of Mr. Tringali's condition and decision to forego CPR did not expose him to liability.

B. Negligent Hiring

Mr. Stander's death resulted from an automobile accident with Mr. Braswell. Mr. Braswell, an independent contractor, had been hired by Dispoz-O-Products, Inc. to transport paper goods to Florida. The personal representative of Mr. Stander's estate sued Dispoz-O-Products for damages. The personal representative contended that Dispoz-O-Products should be held liable for Mr. Braswell's alleged negligence on several grounds, in particular, because Dispoz-O-Products was negligent in hiring Mr. Braswell. It was further "alleged that Dispoz-O-Products was negligent because it knew or should have known that "the independent contractor it hired was inexperienced, dangerous, negligent, and unfit for the job." The trial court dismissed the personal representative's complaint with prejudice, ruling that the complaint was only conclusory and alleged no facts in support of a cause of action for negligent hiring. The personal representative appealed. The Fourth District Court of Appeal stated the pertinent general rule as "the employer of an independent contractor is not liable for the negligence of the independent contractor because the employer has no control over the manner in which the work is done." The Fourth District acknowledged that its decision in Suarez v. Gonzalez is "an exception to the general rule." In Suarez, a landlord hired a man to install cabinets in her garage that she was getting into condition to rent. The work was paid for in cash, there was no written contract, and the landlord had no knowledge as to whether or not the cabinet installer was licensed. The landlord did not

525. See Mayer, 980 So. 2d at 561 n.2.
526. See id. at 563 (Stevenson, J., concurring).
528. Id.
529. See id.
530. Id.
531. Id.
532. Stander, 973 So. 2d at 605.
533. Id. at 604.
534. Id. (quoting Suarez v. Gonzales, 820 So. 2d 342, 344 (Fla. 4th Dist. Ct. App. 2002)).
535. 820 So. 2d at 342.
536. Stander, 973 So. 2d at 604.
537. Id. at 605.
538. Id.
even know the installer’s name. 539 Later, “one of the cabinets fell, [and t]he
tenant was seriously injured.” 540 Because of the duty owed by a landlord to a
tenant, the exception to the general rule applied in Suarez, so the landlord
could be held liable. 541 Here, on the other hand, Mr. Stander’s personal rep-
resentative alleged no facts that took this case out of the general rule. 542 Ab-
sent such facts, Dispoz-O-Products owed no duty to third parties such as Mr.
Stander. 543 Judge Emas dissented. 544 Judge Emas would have held, “as a
matter of law, [that] a cause of action exists [in Florida] for negligent selection
of an independent contractor [with respect to the shipment of] non-
hazardous goods on the highway.” 545

C. Punitive Damages

Mr. Hipple, an invitee of Tiger Point Golf and Country Club (Tiger
Point), with the help of “two others, forcibly removed a handrail on Tiger
Point’s” property. 546 During the process, the handrail fell on Mr. Hipple’s
foot, and a bone in his toe was broken. 547 Mr. Hipple sued Tiger Point for
negligence. 548 An affidavit filed in the action stated that “the handrail ‘was
very badly rusted and in terrible shape.’” 549 There was also evidence to the
effect that Tiger Point had notice of the handrail’s state of disrepair for al-
most two weeks before Mr. Hipple was injured. 550 Tiger Point unsuccessful-
ly moved for summary judgment on the issue of punitive damages, and the
jury then awarded Mr. Hipple comparative negligence compensatory damag-
es of slightly less than $6500 plus $85,000 in punitive damages. 551 Tiger
Point appealed, and the First District Court of Appeal held that the trial court
should have granted “summary judgment [to Tiger Point] on the issue of
punitive damages.” 552 Mr. Hipple failed to make a reasonable showing of
entitlement to punitive damages under section 768.72(1) of the Florida Sta-

539. Id.
540. Id.
541. Stander, 973 So. 2d at 604.
542. Id. at 605.
543. See id.
544. Id. at 606 (Emas, J. dissenting).
545. Id.
App. 2007).
547. Id.
548. See id.
549. Id. at 610.
550. Id.
551. Hipple, 977 So. 2d at 609.
552. Id. at 611.
He failed to demonstrate that Tiger Point's conduct was "outrageous, because of . . . evil motive or . . . reckless indifference to the rights of others." According to the First District Court of Appeal, punitive damages require evidence of "willful and wanton misconduct of a character no less culpable than what is necessary to convict of criminal manslaughter." Neglecting, even for a considerable period of time, to repair a clearly defective handrail which results in an injury is conduct not culpable enough to warrant punitive damages.

D. Liability Disclaimer

The Loewes contracted with Seagate Homes, Inc. (Seagate) to build a home for them. There was an exculpatory provision in the contract that provided, among other things, that Seagate was released from any liability to the Loewes for personal injury resulting from Seagate's "negligence, gross negligence, strict liability or the intentional conduct of [Seagate], its officers, directors, owners, employees, their successors, legal representatives, and assigns." The Loewes sued Seagate, alleging that shortly after they closed on the purchase and moved into the home, "a bathroom closet door fell off its track and [hit] Mrs. Loewe in the eye, causing serious . . . permanent injur[y]." Their negligence action included a claim for damages based on Mrs. Loewe's injuries, and a count for loss of consortium. Relying on the exculpatory clause, the trial court dismissed the Loewe's complaint with prejudice. The Loewes appealed, and the Fifth District Court of Appeal found several reasons to reverse. First, the exculpatory clause could not absolve Seagate of liability based on intentional torts. Second, and assuming a building code violation may be an issue, a party cannot contract away—in a contract with a person whom the building codes are designed to

553. See id. at 610 n.2 (referencing Fla. Stat. § 768.72(1) (2006)).
554. Id. at 610 n.4 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).
555. Id. at 610.
556. Hipple, 977 So. 2d at 610.
558. Id. at 759–60.
559. Id. at 759.
560. Id.
561. Id.
562. Loewe, 987 So. 2d at 759.
563. Id. at 760 (citing Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817 (Fla. 5th Dist. Ct. App. 1985)).
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protect—its responsibilities under building codes. Finally, the exculpatory clause could not prevent the Loewes from bringing a claim for negligence because of public policy protecting purchasers and the public from personal injury resulting from improper construction by a building contractor, citing sections 489.101 and 553.781(1) of the Florida Statutes.

E. Tortious Interference with Business Relationship

Weitnauer Duty Free, Inc. (Weitnauer) had a duty-free store in Port Everglades, and Imperial Majesty Cruise Line, L.L.C. (Cruise Line), which sailed from Port Everglades, had a duty-free store on the ship. Cruise Line "barricaded and prevented" shopping by its passengers at Weitnauer's store while in port. Weitnauer sued Cruise Line for "tortious interference with a contract or business relation[ship]." After a bench trial, the judge entered judgment in favor of Weitnauer, awarding it $1000 in nominal damages even though the court had found that Weitnauer failed to present sufficient evidence to prove actual damages. The judge also awarded $750,000 of punitive damages. The trial court judge found Cruise Line's actions to be "calculated, predatory, and excessive." Cruise Line appealed, and the Fourth District Court of Appeal reversed and remanded. The Fourth District disagreed with the punitive damage award. The court relied on its decision in Hospital Corp. of Lake Worth v. Romaguera where it said that when the issue is an award of punitive damages in the context of "tortious interference with a business relationship, . . . the two most important criteria are: 1. Whether the interference was justified, 2. The nature, extent and enormity of the wrong." The Fourth District Court of Appeal found that Cruise Line's conduct was not outrageous or egregious enough to support punitive damages. The court also reversed the award of nominal damag-

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564. Id. (citing John's Pass Seafood Co. v. Weber, 369 So. 2d 616, 618 (Fla. 2d Dist. Ct. App. 1979)).
565. Id. at 760–61.
567. Id. at 708.
568. Id. at 707.
569. Id.
570. Id.
571. Imperial Majesty, 987 So. 2d at 708.
572. Id.
573. Id.
574. 511 So. 2d 559 (Fla. 4th Dist. Ct. App. 1986).
575. Imperial Majesty, 987 So. 2d at 708 (quoting Romaguera, 511 So. 2d at 561).
576. Id.
es. 577 "[P]roof of actual damages is an element of a cause of action for tortious interference" and Weitnauer did not prove actual damages. 578

F. False Light Invasion of Privacy

In Rapp v. Jews for Jesus, Inc. (Rapp I), 579 the Fourth District Court of Appeal asked the Supreme Court of Florida if Florida recognizes the tort of false light invasion of privacy, and in Gannett Co., Inc. v. Anderson, 580 the First District Court of Appeal asked the Supreme Court of Florida what statute of limitations applies to the tort of false light invasion of privacy. 581 In Jews for Jesus, Inc. v. Rapp (Rapp II), 582 the Supreme Court of Florida answered the first question in the negative thus mooting the question raised in Anderson v. Gannett Co., Inc. 583 The Supreme Court of Florida, in Rapp II, found that the tort of false light invasion of privacy was virtually indistinguishable from a cause of action for defamation by implication—"false suggestions, impressions and implications arising from otherwise truthful statements." 584 The Court, citing Boyles v. Mid-Florida Television Corp. 585 and

577. Id.
578. Id.
581. The question certified by the Fourth District Court of Appeal: "[d]oes Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?" Rapp, 944 So. 2d at 468. The question certified by the First District Court of Appeal: "[i]s an action for invasion of privacy based on the false light theory governed by the two-year statute of limitations that applies to defamation claims or by the four-year statute that applies to unspecified tort claims?" Gannett Co., Inc., 947 So. 2d at 11.
582. 33 Fla. L. Weekly S849, S849 (Oct. 23, 2008).
583. Anderson v. Gannett Co., Inc., 33 Fla. L. Weekly S856, S856 (Oct. 23, 2008). In Straub v. Lehtinen, Vargas & Riedi, P.A., the plaintiff appealed the trial court's dismissal of "his second amended complaint for false light invasion of privacy." 980 So. 2d 1085, 1086 (Fla. 4th Dist. Ct. App. 2007). The Fourth District Court of Appeal found that the plaintiff's allegations set forth the necessary elements to support a false light invasion of privacy claim under Florida law, relying on Rapp v. Jews for Jesus, Inc. (Rapp I) and Gannett Co., Inc. v. Anderson, but noted that it "previously questioned the vitality of a claim for false light invasion of privacy" and joined in certifying the question previously certified by it in Rapp. Id. at 1086–87. The Supreme Court of Florida stayed Straub v. Lehtinen, Vargas & Riedi, P.A., pending the Court's decision in Rapp II. Rapp II, 33 Fla. L. Weekly at S855–56 n.14.
585. 431 So.2d 627 (Fla. 5th Dist. Ct. App. 1983).
Brown v. Tallahassee Democrat, Inc., confirmed that Florida recognizes the tort of defamation by implication. Defamation by implication, being "a well-recognized species of defamation," comes with a substantial body of law and First Amendment protections. The tort of false light invasion of privacy is lacking in this regard.

Of particular interest in Rapp II is the Court's adoption of comment e to section 559 of the Restatement (Second) of Torts as "stating the appropriate 'community' standard for analyzing a defamation claim." Specifically, "a communication is defamatory if it prejudiced the plaintiff in the eyes of a 'substantial and respectable minority of the community.'" The Court's adoption of the Restatement's "community" standard prompted an opinion from Justice Wells, dissenting in part, who found it "plainly too vague."

XVI. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

A. Garnishment

DOES AN ATTORNEY GARNISHEE HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER FOR A CHECK DRAWN ON HIS OR HER TRUST ACCOUNT AND DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK?

That was the question certified to the Supreme Court of Florida by the Second District Court of Appeal as being "of great public importance" in Arnold, Matheny & Eagan, P.A. v. First American Holdings, Inc. As a matter of first impression, the Court answered in the affirmative. Arnold, Matheny and Eagan, P.A. (the law firm) represented Preclude, Inc. (Preclude) in an action against Greenleaf Products, Inc. (Greenleaf). A $50,000

588. Id.
589. Id. at S849.
590. Id. at S855.
592. Id. at S855.
594. Id.
595. Id. at 630–31.
596. Id. at 631.
settlement was obtained by the law firm on behalf of Preclude. Sometime before that settlement, a $26,000 judgment against Preclude had been obtained by First American Holding, Inc. (First American) in an action unrelated to the matter between Preclude and Greenleaf. First American served the law firm with a writ of garnishment on June 19, 2002. When served with the writ, the law firm had not yet received the $50,000 settlement check from Greenleaf. The law firm responded to the writ by stating that it held no funds of Preclude. On June 21, 2002, the Greenleaf settlement check was received and deposited to the law firm’s trust account, and the law firm issued a net settlement check to Preclude. “On June 25, 2002, First American served a second writ of garnishment on [the law firm] . . . .” The law firm again responded to the effect that it did not have “possession or control of any funds” belonging to Preclude. However, the check the law firm had written from its trust account to Preclude on June 21 “was not presented to [the law firm’s] bank for payment until June 28.” Focusing on the requirement of section 77.06(2) of the Florida Statutes that the garnishee be in “possession or control” of the judgment debtor’s property, the Court held that the law firm retained control of the funds represented by the check until the check was presented for payment, and therefore, the law firm had a duty to request a stop payment order to the bank. The law firm should have inquired of its bank on June 25, 2008, “as to whether its check had been presented for payment.” Next, the Court found “no reason” to distinguish between “bank and non-bank garnishees.” The fact that an attorney trust account was involved made no difference. In response to the argument that the law firm was exposed to liability to its client for issuing a stop payment order or to a third party holder in due course to whom the check might have been negotiated, the Court said the “good faith” exception to a garnishee’s liability in section 77.06(3) of the Florida Statutes would have to be
protection enough. The law firm was liable to the garnishor, First American Holdings, Inc.

B. Homestead

The Supreme Court of Florida in *Chames v. DeMayo*, asked: "Should this Court recede from longstanding precedent holding that the Florida Constitution's exemption from forced sale of a homestead cannot be waived?" The Court answered with a resounding "'no.'" The case was based on a retainer agreement Mr. DeMayo made with the law firm of Heller & Chames, P.A. The agreement read in part that "the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs." The day came when the law firm "obtained a charging lien and final judgment against DeMayo . . . [and the] trial court applied the lien to DeMayo's home." The Third District Court of Appeal reversed the trial court on the waiver of homestead issue, and the Supreme Court of Florida upheld the District Court's decision. Article X, section 4, subsection (a)(1) of the Florida Constitution sets out the Florida homestead exemption from forced sale. There are well-known exceptions to the exemption for: 1) real estate taxes and assessments; 2) mortgages; and 3) mechanics and materialmen's liens. The Court in *Chames*, which cited to *Carter's Administrators v. Carter* and *Sherbill v. Miller Manufacturing Co.*, noted that it has held for over a hundred years that the exemption from forced sale of the homestead "cannot be waived in an unsecured agreement." The Court found no reason why this precedent should not be followed. Acknowledging that personal constitutional rights can be waived, the Court held that the homestead exemption was more than personal to the

610. *Id.* at 641 (citing FLA. STAT. § 77.06(3)).  
611. *Id.*  
612. *Id.*  
613. *Id.*  
614. *Id.*  
615. *Id.*  
616. *Id.*  
617. *Id.*  
618. *Id.*  
619. FLA. CONST. art. X, § 4(a)(1); *Chames*, 972 So. 2d at 852.  
621. *Chames*, 972 So. 2d at 852 (citing Carter's Adm'rs v. Carter, 20 Fla. 558 (1884); Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956)).  
622. *Chames*, 972 So. 2d at 860.
The homestead exemption also protects the owner's family and the State of Florida.  

C. Construction Lien  

Mary Niehaus (Niehaus) contacted Big Ben's Tree Service, Inc. (Big Ben's) and arrangements were made for Big Ben's to cut down and remove a damaged tree located on Niehaus's property.  

Although not stated explicitly, Big Ben's apparently did not take the remains of the tree off the property after cutting it down, and Niehaus did not pay Big Ben's.  

It seems that Niehaus thought that "remove" meant hauling away the tree after it had been cut down. Big Ben's thought that "remove" meant simply moving the tree which, according to Big Ben's, is what "remove" means in the tree trade. The trial court found that this trade "parlance" was not explained to Niehaus and also found that her understanding of the word "remove" was reasonable. The trial court, however, concluded that Big Ben's had a valid construction lien on Niehaus' land. Niehaus appealed to the circuit court, and the circuit court affirmed. She then filed a petition for a writ of certiorari, which the First District Court of Appeal granted, quashing the order of the circuit court. The trial court determined that "removal" meant something different to each of the parties, and therefore, agreement on a material term of the contract was missing. Thus, there was no contract entered into between the parties. And without a valid express contract, there could be no imposition of a construction lien. Even if an implied contract existed, an issue which the First District Court of

623. Id.  
624. Id.  
626. Id.  
627. See id.  
628. Id.  
629. Id.  
630. Niehaus, 982 So. 2d at 1254.  
631. Id.  
632. Id.  
633. Id. at 1254–55.  
634. Id.  
635. Niehaus, 982 So. 2d at 1255.  
636. Id.
Appeal did not decide, an implied contract is a "legal fiction" to prevent unjust enrichment, and "not a contract at all."

D. **Bank Deposit Agreement v. UCC**

The Deposit Agreement between Bank of America, N.A. (Bank) and its customer, Putnal Seed and Grain, Inc. (Putnal), required Putnal to notify the Bank of any "problems or unauthorized transactions" taking place during a bank account statement period within sixty days, as a condition to asserting liability against the Bank for negligence. Under section 674.406(6) of the *Florida Statutes*, described by the trial court as the default rule, a bank customer has to notify the bank of "an unauthorized signature or alteration within one year of the [pertinent bank] statement being sent to the customer." Putnal’s bookkeeper made deposits for Putnal and somehow managed to fraudulently obtain, in thirteen transactions, over $51,000 in cash from the Putnal deposits made by her. When Putnal found out about the bookkeeper’s actions, it obtained copies of bank statements. Putnal then demanded that the Bank replace the funds in its account. The Bank refused on the ground "that Putnal failed to notify it of [the] 'problems or unauthorized transactions' within 60 days, as required [by] the Deposit Agreement." Putnal sued the Bank for negligence and won on summary judgment. The trial court determined that chapter 674 of the *Florida Statutes* applied and that the Deposit Agreement was void, finding that the effect of the agreement was an invalid disclaimer of the Bank’s liability. The First District Court of Appeal reversed. The Bank was permitted to reduce the statutory notification time from one year to sixty days. This provision did not amount to

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637. *Id.* at 1255 n.1.
638. *Id.*
640. *Id.* at 301 (citing *Fla. Stat.* § 674.406(6) (2002)). It is not disclosed in the opinion when, under the terms of the parties’ agreement, the sixty-day period began to run, but that was not an issue on appeal. *Id.*
641. *Id.* at 300 (emphasis added).
642. *Id.* It is not stated in the opinion as to how Putnal found out about the fraud. See Bank of Am., N.A., 965 So. 2d at 300.
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.* at 301.
647. Bank of Am., N.A., 965 So. 2d at 302.
648. See *id.* at 301.
a forbidden disclaimer of responsibility on the part of the Bank under section 674.103(1) of the Florida Statutes.  

E. Exempt Property

The Florida Legislature amended section 222.25(4) of the Florida Statutes, and that statute now reads, in part

[t]he following property is exempt from attachment, garnishment, or other legal process:

(4) A debtor's interest in personal property, not to exceed $4000, if the debtor does not claim . . . the benefits of a homestead exemption under s. 4, Art. X of the State Constitution— the real estate homestead exemption. Article X, section 4, subsection (a)(2) of the Florida Constitution also grants a $1000 personal property exemption, and has for some time. The United States Bankruptcy Court for the Middle District of Florida was called upon to decide if section 222.25(4) increases the personal property exemption by $3000 to $4000, or by $4000 to $5000, for Floridians not claiming the real estate homestead exemption. The court stated that the legislative history of the amendment to section 222.25(4) clearly shows a legislative intention to increase by $3000 to $4000. However, the court, adopting the debtor’s argument, ruled that a maximum $4000, rather than $5000, interpretation of the section would amount to the legislature impermissibly altering or amending a constitutional provision, that is, article X, section 4, subsection (a)(2). The total maximum personal property exemption under the constitution and the statute was held to be $5000 for “a person who does not own homestead [real estate] or claim a homestead [real estate] exemption.”

649. Id.
651. See id.
652. Id.
653. Id.
654. Id. at 415.
WYCHE v. STATE: A CASE ANALYSIS

MILTON HIRSCH*

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I. INTRODUCTION

A wretched man, for love of a woman and of “the child she had borne him,” finding himself bereft of all resources, had counterfeited money. “[C]ounterfeiting was still punished [by] death” in those days. “The woman was arrested for” spending the very first counterfeit bill the man had printed. She was held, but there was no evidence against anyone else but her. She alone could identify her lover, the source of the counterfeit funds. She refused. The police pressed her. She continued to refuse. Finally the chief investigator had an idea: he insinuated that the woman’s lover had become unfaithful to her; he even arranged to present her with scraps of letters to persuade her that there was another woman that her lover was cheating on her. Driven to desperation “by jealousy, she denounced her lover” and confessed everything. The man was doomed. The two would be tried and condemned together.

By playing the jealousy card, the chief investigator had traded truth for anger, justice for vengeance. All this was related to the bishop. He listened in silence. Then he asked, Where will the man and the woman be judged?

At the court of assizes, he was told.

“And where,” he asked, “will the chief investigator be judged?”¹

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Earl Wyche was in custody in small-town Florida on a charge of probation violation. Unbeknown to him, he was also a suspect in a rape case. The police, eager to obtain a Deoxyribonucleic acid (DNA) sample from Wyche for the rape investigation—something they could have done easily without any subterfuge—hit upon an ingenious, if shameful, stratagem.

They lied to him.

What they told him was that a local supermarket had been burgled and that he could exonerate himself by providing a DNA sample. Wyche did not know that the whole thing was a fairy tale: There was no supermarket and there was no burglary. What he did know was that he hadn’t burgled any supermarkets lately, so if that was the reason the police wanted his DNA, well, why shouldn’t he provide it?

They lied to him in another way, too.

The police lied to Wyche by what they didn’t tell him. They didn’t tell him about the rape case they were investigating, and they didn’t tell him that his DNA profile, once obtained, would be made available to other government agencies conducting other investigations at other times and places.

In the event, the DNA test exonerated Wyche of the rape of which he had been suspected. But it implicated him in an unrelated burglary. Prior

3. See id.
4. Id. at 1144. The police could have gotten a tissue sample from which Wyche’s DNA could have been profiled in any number of ways. See, e.g., Elizabeth E. Joh, Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy, 100 NW. U. L. REV. 857, 860–61 (2006). Recall that Wyche was in custody. Wyche I, 906 So. 2d at 1143. Did he eat with a fork, spoon, or “spork” provided by the jail? See Joh, supra note 4, at 860–61. Did he drink from a glass or cup? See id at 861. Did he throw away the butt of a cigarette, or the crust of an unfinished sandwich? See id. at 860–61. Any of these things would contain cell tissue from which DNA might be recovered, and Wyche would have no assertable legal interest in any of them. See id.; see also discussion infra notes 184, 185, and 190 (regarding FLA. STAT. § 943.325 (2007)).
5. Wyche I, 906 So. 2d at 1143.
6. Id.
7. Id.
9. Id. at 27 (majority opinion).
10. See id. at 27–28 (emphasis added).
11. Id. at 27. As discussed infra note 198, Wyche’s DNA profile is now permanently on display to every CODIS licensee, and may be examined and re-analyzed at any time without notice to Wyche.
12. Wyche I, 906 So. 2d at 1143.
to trial on that burglary he moved to suppress the DNA evidence, arguing that the consent pursuant to which his cell tissue was seized and analyzed was, as a result of the deception worked upon him by the police, no consent at all.\textsuperscript{14} The motion to suppress was denied, and the ensuing conviction was affirmed on appeal to Florida’s First District Court of Appeal.\textsuperscript{15}

The Supreme Court of Florida has no general criminal appellate jurisdiction.\textsuperscript{16} It is empowered, however, to review the decision of an intermediate appellate court upon a certification of conflict by that court with a decision of another intermediate appellate court.\textsuperscript{17} The First District Court of Appeal, in affirming Wyche’s conviction, in the process approving the denial of his motion to suppress,\textsuperscript{18} certified conflict with the opinion of the Fourth District Court of Appeal in \textit{State v. McCord};\textsuperscript{19} thus providing the jurisdictional basis for the Supreme Court of Florida’s review.\textsuperscript{20}

In a four to three ruling, the Supreme Court of Florida concluded that Wyche’s consent was constitutionally valid, the conduct of the police notwithstanding.\textsuperscript{21} The Court excerpted with approval the following language from the opinion of the First District:

\begin{quote}
“[Wyche] was clearly aware of the fact that the officer wanted the DNA sample in order to investigate a crime, and the officer did not misrepresent the fact that he had no search warrant. The officer did not indicate that [Wyche] had no choice regarding whether to provide a DNA sample. [Wyche] did not acquiesce to a claim of lawful authority.”\textsuperscript{22}
\end{quote}

In addition, the Supreme Court of Florida noted that “Wyche was not a stranger to police procedure, . . . he knew that his DNA was requested for use in a criminal investigation, [and he] was not deluded as to the import of his consent to search.”\textsuperscript{23} Viewing these circumstances as relevant, and taking them as a whole, the Court found nothing constitutionally objectionable in Wyche’s consent.\textsuperscript{24}

\begin{itemize}
\item[13.] \textit{Id.}
\item[14.] \textit{Id.}
\item[15.] \textit{Id.} at 1143, 1148.
\item[16.] \textit{See} FLA. R. APP. P. 9.030(a)(1).
\item[18.] \textit{Wyche I}, 906 So. 2d at 1143, 1148.
\item[19.] 833 So. 2d 828 (Fla. 4th Dist. Ct. App. 2002); \textit{Wyche I}, 906 So. 2d at 1144.
\item[21.] \textit{Wyche II}, 987 So. 2d 23, 29 (Fla. 2008).
\item[22.] \textit{Id.} (quoting \textit{Wyche I}, 906 So. 2d at 1147).
\item[23.] \textit{Id.}
\item[24.] \textit{Id.}
\end{itemize}
Justice Bell concurred dubitante for himself and Chief Justice Quince.\(^{25}\) Justice Bell confessed himself "disturbed by the level of intentional police misrepresentation" visited upon Wyche, and by the prospect that similar police "tactics, if they were to become commonplace, would destroy the integrity of the criminal justice system."\(^{26}\) Triumphing over these concerns, however, Justice Bell and Chief Justice Quince voted with the majority.\(^{27}\)

It is the thesis of this case note that *Wyche II* is wrong twice over. The law setting forth when and in what circumstances the police may use deceit to obtain consent to search or seize is well-settled. The majority in *Wyche II* ignored that well-settled law, in the process ignoring decisions from a host of jurisdictions, state and federal, that speak with one voice as to that law.\(^{28}\) This is more troubling because Florida's Constitution has a dependent, not an independent, guarantee against unreasonable search and seizure.\(^{29}\) Although article I, section 12 of the Florida Constitution promises that the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures... shall not be violated," section 12 was amended in 1982 to add language providing that it was to:

> be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.\(^{30}\)

In effect, the Florida Constitution instructs the reader, "Where the law of search and seizure is concerned, go consult general American law; I have nothing to add to that."\(^{31}\) Yet the court's opinion in *Wyche II* ignores the ample body of American jurisprudence on point—jurisprudence that compels a result at odds with the one reached by the *Wyche II* majority.\(^{32}\) Consideration of this jurisprudence, and the outcome it compels on the *Wyche II* facts, forms the first section of this case note.

\(^{25}\) *Id.* at 31–32 (Bell, J., specially concurring).

\(^{26}\) *Wyche II*, 987 So. 2d at 32.

\(^{27}\) *Id.* at 31 (majority opinion).

\(^{28}\) *See id.* at 42–43 (Lewis, J., dissenting).

\(^{29}\) *See FLA. CONST.* art. I, § 12.

\(^{30}\) *Id.*

\(^{31}\) *See id.*

\(^{32}\) *See Wyche II*, 987 So. 2d at 63–64 (Lewis, J., dissenting).
It is apodictic that a search or seizure that exceeds the scope of consent is—unless supported by a warrant—unconstitutional, and the fruits of such a search or seizure inadmissible. 33 The Supreme Court of Florida’s opinion in Wyche II gives no more than passing consideration to the problems of scope of consent presented by the Wyche II facts. 34 In a more conventional context, this might be a merely venial sin; no profound legal issues are in play when a court considers—or fails to consider—whether, for example, consent to search the trunk of a car subsumes consent to search packages contained within the trunk. 35 But the context in which Earl Wyche gave consent was anything but conventional. 36 He was asked to provide a minute amount of his cell tissue, from which whole libraries of scientific information could and would be derived. 37 That scientific information, in turn, would be made permanently available for use by the forensic community nation-wide and even world-wide, now and for years to come, for examination in connection with crimes past, present, and future. 38 The Supreme Court of Florida opinion in Wyche II gives no consideration whatever to the scope of consent issues that arise when DNA analysis and data storage is involved. 39 Those issues are addressed in the second section of this case note.

II. OF DECEIT AND CONSENT

It is sometimes said that the police may lie to obtain consent to search, and that the ensuing search will not be deemed unlawful by reason of the lie. 40 In some sense, this is true. Suppose, for example, that a man dressed in ordinary street clothing rings my doorbell in the middle of the night, explains that he is interested in purchasing drugs, and asks if I have any drugs to sell him. If I let him into my house to sell him drugs, my consent to his entry will not be invalidated after the fact when it turns out that he is an undercover detective and I am arrested for possession or sale of narcotics. 41

34. See Wyche II, 987 So. 2d at 27–28.
36. See Wyche II, 987 So. 2d at 27.
37. Id.
38. See Joh, supra note 4, at 875.
39. See generally Wyche II, 987 So. 2d 23 (Fla. 2008).
40. See, e.g., id. at 31; see also People v. Zamora, 940 P.2d 939, 942 (Colo. App. 1996).
41. See, e.g., Lewis v. United States, 385 U.S. 206, 210 (1966). Once upon a time, in that “antique world, [w]hen service sweat for duty, not for meed,” WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 3, some courts condemned police deceit even in the undercover context. See, e.g., United States v. Reckis, 119 F. Supp. 687, 690 (D. Mass. 1954) (“Reckis cannot be held to have consented to a search before he had any knowledge that the persons he was
Now suppose that when I answer my doorbell I confront, not a scruffy would-be drug buyer, but a uniformed police officer. Suppose further that the officer informs me that he is trying to rescue my neighbor’s cat which has become stuck in a tree, and that he would like to look out my back window to get a better view of the cat’s plight. Suppose finally that these representations by the officer are all false: There is no cat, there is no tree, and the officer’s true purpose is to gain entry to my house to see if I have drugs. The consent I give the officer to enter my house, having been obtained by deceit, is not a knowing and valid consent for Fourth Amendment purposes, and any contraband or evidence seized by the officer in my house will not be admissible at trial. The difference in the two hypothetical’s turns on a single, simple legal principle: All citizens have a “duty to cooperate with the police.” It therefore must follow that if a police officer comes to me bearing the accouterments of office—uniform, or badge, or formal ID—I can and must rely upon the truth of his representations to me; and if those representations prove to be willfully false, my ensuing consent is a legal nullity. “[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the [F]ourth [A]mendment’s bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government’s investigation.” Conversely, if the officer comes to me in an undercover disguise, identifying himself not as a member of the constabulary, but as a drug buyer, I deal with him at my peril. I have no duty to cooperate with him, and he has no corresponding duty to tell me the...
truth. If I consent to his entry into my home, I must take the consequences. The Fifth Circuit Court of Appeals drew the distinction with particularity:

When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent. Thus we have disapproved the entry of federal narcotics agents accomplished with the assistance of local law enforcement officers who knocked on the suspect's door and asked permission to investigate a fictitious robbery.

This language from SEC v. ESM Government Securities, Inc., was excerpted with approval by the Ninth Circuit in United States v. Bosse. Distinguishing an earlier Ninth Circuit case, United States v. Allen, the Bosse court drew the undercover-versus-under-color-of-office distinction: the earlier case "is best understood as involving concealment by [an officer] of the fact that he was a government agent, a permissible deception, rather than as involving misrepresentation by a known government agent of his purpose for seeking entry."

The recent opinion of the Supreme Court of Kentucky in Krause v. Commonwealth involves facts not dissimilar to those of Wyche II. Trooper Manar of the Kentucky State Police made an arrest for cocaine

47. See, e.g., id.
48. See id.
49. Id. at 316.
50. United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (per curiam) (citation omitted).
51. 645 F.2d 310 (5th Cir. 1981).
52. 898 F.2d 113, 115 (9th Cir. 1990) (per curiam).
53. 675 F.2d 1373 (9th Cir. 1980).
54. Bosse, 898 F.2d at 116.
55. 206 S.W.3d 922 (Ky. 2006).
56. See Wyche II, 987 So. 2d 23, 24 (Fla. 2008).
possession. The arrestee told Manar that he had obtained the drugs at Krause’s home. Manar then showed up at Krause’s residence at four o’clock in the morning with a tale as false as the one given to Wyche: he told Krause “that a young girl had just reported being raped by [Krause’s roommate] in the residence. He asked if he could look around in order to determine whether her description of the residence and its furnishings was accurate.” Manar’s ensuing search turned up drugs and drug paraphernalia, for the possession of which Krause was prosecuted and convicted.

The Krause court recognized the distinction between undercover and under-color-of-office police work. “The use of undercover agents and stratagems in police investigations has long been sanctioned, and we do not question such a practice in this opinion.” But clearly Trooper Manar had not been acting in an undercover capacity. He had knocked on Krause’s door bearing the customary accouterments of office, and he had asked in his capacity as a law-enforcement officer for Krause’s cooperation. Therein lay the problem. “Trooper Manar exploited a citizen’s civic desire to assist police in their official duties for the express purpose of incriminating that citizen.” Krause was entitled, in deciding whether to consent to Manar’s request to search, to rely upon the truth and bona fides of Manar’s representations to him.

If the type of ruse utilized by Trooper Manar was sanctioned by this Court, citizens would be discouraged from “aiding to the utmost of their ability in the apprehension of criminals” since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them.

57. Krause, 206 S.W.3d. at 923.
58. Id.
59. Id. at 924.
60. Id.
61. See id. at 926–27.
62. Krause, 206 S.W.3d at 927.
63. See id.
64. See id. at 924.
65. See id.
66. Id. at 927.
67. See Krause, 206 S.W.3d at 927.
An appellate court in Washington State reached identical conclusions in *State v. McCrorey*. The *McCrorey* court began by acknowledging the widespread acceptance of "the use of ruse entries in conjunction with undercover police activity." It then drew the critical distinction: "The case at hand is distinguishable, however. It does not present the issue of undercover police activity, but rather the failure to disclose the actual police purpose."

It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given.

*Krause* and *McCrorey* involved consent to search a residence. *Graves v. Beto*, like *Wyche*, involved consent to the seizure of bodily tissue. *Graves* was arrested "on a charge of public drunkenness." Shortly afterward the police learned "that an elderly woman had been raped" and that "[h]er description of her assailant [matched] Graves." Blood had been recovered from the scene of the rape, so the police chief asked Graves to consent to giving a blood sample, assuring him "that the sample would be used only to determine the alcoholic content of his blood" for purposes of the public drunkenness charge. Graves was then charged with the rape, and evidence that his blood type—derived from the blood he had "consented" to

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70. *Id.* at 1239.
71. *Id.* at 1240.
72. *Id.* (citations omitted).
73. Krause v. Commonwealth, 206 S.W.3d 922, 923–24 (Ky. 2006); McCrorey, 851 P.2d at 1236.
74. 424 F.2d 524 (5th Cir. 1970).
75. *Id.* at 524. Although this may make the *Graves* facts closer to the *Wyche* facts, it is a distinction without a difference. Whether a law enforcement officer seeks consent to enter and search a home, or consent to seize a tissue sample, the Fourth Amendment considerations are, for purposes of the jurisprudence of consent, the same. *Id.* at 525.
76. *Id.* at 524.
77. *Id.*
78. *Graves*, 424 F.2d at 524.
79. *Id.* at 525.
give—matched that found at the rape scene was offered at trial. On habeas review the federal court found Graves' "consent" to be constitutionally invalid; to hold otherwise "would allow the state to secure by stratagem what the [F]ourth [A]mendment requires a warrant to produce."

The defendants in State v. Petersen were suspected of having stolen certain power tools from their former employer. One of the defendants, Rogers, was approached by police officers, who told him that they wanted his consent to search his car. The reason they gave for wanting to search, however, was not the true one, i.e., their desire to locate the stolen power tools and inculpate Rogers and Petersen for the theft. Instead, the officers told Rogers that they believed that the previous owner of the car, from whom Rogers had only recently purchased it, had stashed something in the vehicle of evidentiary value to another, unrelated, investigation. Rogers "consented to the search only because he was told the officers were searching for an object hidden in the car by a previous owner. Since his consent was obtained by deceit, Rogers cannot be said to have waived his Fourth Amendment rights voluntarily."

The Hay Transportation Assistance Program (HTAP) is a federally-funded rebate program benefiting the agricultural industry. It is of little day-to-day interest in South Florida, but it is of a great deal of interest in the Western District of Wisconsin, venue of United States v. Hrdlicka. In Hrdlicka, Special Agent Lenckus, a criminal investigator in the Office of the Inspector General of the Department of Agriculture, was deputed to determine whether Joseph Hrdlicka, his two brothers, and their businesses—collectively the "Hrdlicka defendants"—had conspired to defraud the government in connection with HTAP claims.

Agent Lenckus contacted Joseph Hrdlicka and informed him that he, Lenckus, was conducting a criminal investigation, not into the conduct of the

80. Id. at 524.
81. Id. at 524–25.
83. Id. at 268.
84. Id.
85. See id.
86. Id.
87. Peterson, 604 P.2d at 269; see also Barnato v. State, 501 P.2d 643, 644 (Nev. 1972) (Consent to an animal control officer's entry into an enclosed yard for the "ostensible purpose of checking a cat trap . . . did not constitute a waiver of" Fourth Amendment rights when the real reason for the entry was to seize a leaf from a marijuana plant).
88. See generally In re Voorhees, 294 N.W.2d 646, 647 (S.D. 1980).
89. 520 F. Supp. 403, 403 (W.D. Wis. 1981).
90. Id. at 407. Lenckus came bearing the accouterments of office: He "showed Joseph Hrdlicka his badge and identification card." Id.
Hrdlicka defendants, but into the conduct of others; in that regard, he asked to see the Hrdlicka defendants' books and records.91 Hrdlicka "asked Lenckus if his investigation would involve [the] Hrdlicka businesses: . . . [t]o this question, Lenckus replied that no audit or investigation of Hrdlicka businesses was contemplated and that the investigation did not pertain to the Hrdlickas' farms, but only to other farmers to whom the Hrdlickas had sold and delivered hay."92 Relying on Lenckus's representations, Joseph Hrdlicka consented to produce various business records.93 But "Agent Lenckus's statement to Joseph Hrdlicka . . . that the Hrdlicka businesses and farms were not under investigation was untrue"94 at the time it was made, and the Hrdlicka defendants were indicted based upon information in the business documents produced to Lenckus.95

The district court took it as "well-established that the official use of fraud, trickery or misrepresentation to gain consent to a search 'naturally undermines the voluntariness of any consent,'"96 and "therefore renders such a search 'unreasonable under the Fourth Amendment.'"97 The misrepresentations at issue here were described by the court as being both active and passive.98 "By passive misrepresentations, I refer to Lenckus's conceded failure to inform Hrdlicka that his farms were suspected of having made false duplicate claims under HTAP . . . ."99 Telling half the truth and leaving a false implication simply isn't good enough when a badge-carrying law enforcement officer asks a citizen to waive the protections of the Fourth Amendment.100 Lenckus may well have been investigating, or at least interested in information about, HTAP abuses by farmers other than the Hrdlickas.101 But by failing to inform the Hrdlickas that he was also interested in their putative misconduct, he rendered their ensuing consent a nullity.102

The notion that a half-truth by the police is as damning as a complete lie appears again in State v. Schweich.103 There the police wanted to search the

91. Id.
92. Id.
94. Id. at 408.
95. Id. at 407.
96. Id. at 409 (quoting United States v. Griffin, 530 F.2d 739, 743 (7th Cir. 1976)).
97. Id. (quoting United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977)).
99. Id.
100. See id.
101. See id.
102. Id.
defendant’s home for two reasons: to find a gun belonging to an acquaintance of the defendant, and to see if the defendant had narcotics. 104 In seeking the defendant’s consent, the police told him about the first purpose, but not about the second. 105 This deception by omission—or by less than complete candor—was sufficient to invalidate the defendant’s consent. 106 “[T]he officers intended the scope of their search to include drugs. However, respondent was led to believe the search was necessary only to locate [his friend]’s rifle . . . in connection with the assault charge against” his friend. 107 “The trial court properly suppressed” the narcotics for which the police were looking, and which they found. 108 The police statement to Schweich that they wanted to search his apartment for his friend’s gun or for evidence of his friend’s gun was true, as far as it went; but it didn’t go far enough. 109 The police were obliged to tell Schweich that another purpose of their search was their desire to determine if he was in possession of narcotic drugs. 110 Having withheld this information, the police obtained Schweich’s purported consent on false pretenses, and that consent was a nullity for Fourth Amendment purposes. 111

The defendant in Commonwealth v. Slaton 112 was the proprietor of a pharmacy. 113 Narcotics detectives presented themselves at the pharmacy, indicated that they were investigating the conduct of one Merriweather in connection with forged prescriptions—which was, at the time, their true purpose—and asked to see Slaton’s pharmacy records. 114 The detectives returned on a second occasion, purportedly for follow-up review of the records. 115 In the interim, however, their investigation had expanded to embrace their suspicions that Slaton himself was involved in the forgeries. 116 This change in focus of the investigation was not communicated to Slaton, who continued to cooperate with what he had been led to believe was an

104. Id. at 228–29.  
105. Id. at 229.  
106. Id. at 230.  
107. Id.  
108. Schweich, 414 N.W.2d at 231.  
109. See id. at 230.  
110. See id.  
111. Id. at 231.  
113. Id. at 6.  
114. Id.  
115. Id.  
116. Id.
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investigation of someone else. As the Supreme Court of Pennsylvania explained:

[U]ntil the first search was completed, the agents' investigation was focused upon Merriweather, as the agents truthfully disclosed. As a result of this search, however, the focus of the agents' investigation changed, and the agents returned to Slaton's pharmacy with the belief that Slaton's conduct was improper. Notwithstanding this new focus, the agents obtained entry to the premises without any additional disclosure of purpose. One can only conclude that in consenting to the search, Slaton relied on the agents' earlier representations. By permitting him to continue this reliance, the agents obtained [Slaton's] consent through deception. Such acts amount to implied coercion. [Slaton's] consent, therefore, was constitutionally invalid, and the search was illegal.

As the foregoing sampling of case law indicates, it is the universal American rule that if a police officer comes to a citizen as a police officer, bearing the insignia of a police officer, entitled to the cooperation due to a police officer, there is a correlative duty on the part of that police officer to tell that citizen the truth. Breach of that duty renders any ensuing

18. Id. at 10.
19. See Boulos v. Wilson, 834 F.2d 504, 508 (5th Cir. 1987) ([C]onsent to a warrantless search obtained through coercion, duress or trickery, is not sufficient to overcome constitutional infirmities); United States v. Varona-Algos, 819 F.2d 81, 83 (5th Cir. 1987); United States v. Maudlin, No. 83-1743, 1984 U.S. App. LEXIS 13534, at *7 (6th Cir. Dec. 3, 1984) (citing United States v. Turpin, 707 F.2d 332, 335 (8th Cir. 1983)); McCall v. People, 623 P.2d 397, 403 (Colo. 1981) (en banc). The same principle is applied in federal tax cases in which a revenue agent obtains documents or admissions via consent while at the same time failing to disclose to the taxpayer that the agent's investigation may result in criminal charges. See, e.g., United States v. Tweel, 550 F.2d 297, 298-99 (5th Cir. 1977); see also United States v. Peters, 153 F.3d 445, 450 (7th Cir. 1998); United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1985).
20. See infra pp. 2-13. There is no more reckless act on the part of the writer of a law review article than to characterize a rule of law as "universal." Of course there is the occasional aporetic voice. In United States v. Montes-Reyes, police obtained entry into Defendant's hotel room by telling him that they were urgently engaged in the search for a missing little girl; once in the room, the officers searched for and found illegal weapons, which had been the object of their investigation all along. 547 F. Supp. 2d 281, 283-84 (S.D.N.Y. 2008). The court canvassed the case law and granted suppression, but was unwilling to characterize as a "per se rule" the doctrine that an officer acting under color of law may not obtain consent by deceit. See id. at 287 n.7. To the same effect, see United

https://nsuworks.nova.edu/nlr/vol33/iss1/1
"consent" involuntary. But the Supreme Court of Florida’s majority opinion in Wyche II makes no reference whatsoever to any of the cases discussed supra; not a single citation to, or acknowledgment of, Little, Bosse, Krause, McCrorey, Petersen, Hrdlicka, Schweich, Slaton, et al. 121 These authorities are not distinguished. They are not discussed. It is as if they never existed.122

Writing for the majority in Wyche II, Justice Wells framed the issue as, "whether the fact that Wyche consented to the saliva swabs upon being told that the DNA sample was for use in a fictitious burglary investigation requires that the saliva swabs containing Wyche’s DNA not be used in the prosecution of an actual burglary."123 In Justice Wells’s view, the question was largely foreclosed by the prior opinion of the Court in Washington v. State, 124 in which the Court held that if the police obtained a tissue sample from an arrestee, not by deceit, but by telling him frankly and candidly what use they intended to make of that tissue sample, they could subsequently make additional use of that tissue sample in another, unrelated, case.125 As Justice Wells and the majority saw it, Washington stands for the proposition that:

[W]hen a defendant validly consents to the giving of the bodily substance, whether saliva, hair, or blood, for use in a criminal
investigation, the characteristics of the substance can be used in investigations unrelated to the one for which the defendant was told the sample was collected. This holding is logical because the DNA profile derived from a bodily substance like saliva, hair, or blood is a constant identifying fact that does not change or disappear.126

The first sentence of the excerpted paragraph flies in the face of all American jurisprudence dealing with the scope of consent. Consent to search or seize is a waiver of the constitutional right to be free from warrantless search or seizure.127 The citizen is not obliged to consent; if he chooses to consent, he can tailor the terms of the consent as he chooses.128 Silly as it sounds, a householder could, as a matter of constitutional law, tell a police officer: "You have my consent to search my house without a warrant for as long as your partner can stand on one foot and yodel."129 Anything found within the time that the searching officer’s partner remained standing on one leg yodeling would be admissible; anything found after that time would be inadmissible.130 If a police officer asks an arrestee to provide a tissue sample for blood- or DNA-typing as to case X, then the scope of the consent is as to case X and as to no other case.131 The officer, of course, is free to ask for a tissue sample for testing without limiting the use or purpose to which the sample will be put.132 If the arrestee consents on those terms, he is stuck with them; but only if he is asked for, and consents to, something so capacious.133 Justice Wells’ extrapolation from Washington that a consent to provide cell tissue for testing in case X is a consent to the use of that cell tissue in all cases, anywhere and anytime, stands the doctrine of scope of consent on its head.134

126. Wyche II, 987 So. 2d at 27.
127. U.S. CONST. amend. IV.
128. See Florida v. Jimeno, 500 U.S. 248, 252 (1991) (noting that “[a] suspect may of course delimit as he chooses the scope of the search to which he consents”).
129. See, e.g., United States v. Dichiarinte, 445 F.2d 126, 129–30 n.3 (7th Cir. 1971) (noting that “if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is necessary to search for such an item”) (emphasis added).
130. See id. at 129 (quoting that “[a] consent search is reasonable only if kept within the bounds of the actual consent”) (citing Honig v. United States, 208 F.2d 916, 919 (8th Cir. 1953)).
131. Wyche II, 987 So. 2d 23, 27 (Fla. 2008).
132. See id. at 29.
133. See id.
134. Id. at 27–28.
Nor is this radical reinterpretation of the law of scope of consent salvaged by the second sentence of the excerpted paragraph—that because a DNA profile “is a constant identifying fact that does not change or disappear,” it must follow that a defendant’s consent to the profiling of his DNA in one case morphs magically into a consent to the profiling of his DNA in all cases.135 The scope of any consent is fixed by the intent of the human being consenting, not by the nature—permanent or protean—of the object as to which consent is given.136 The notion of scope of consent is entirely straightforward: The officer must ask for what he wants, and confine himself to what he gets.137 If he wants a consent broad in scope, but is given a consent narrow in scope, he must confine himself to what he got and not help himself to what he wanted, on pain of suppression.138 If he wants consent to use a defendant’s cell tissue for testing on an ongoing basis, without limitation, but he asks for and gets consent to use a defendant’s cell tissue for testing on a single occasion, he must confine himself to that single occasion.139 His failure to do so is what is known in the law, and to every child, as “lying.”140 And this is true whether the object he seeks to seize or search is as evanescent as the dew or as “constant as the northern star, [o]f whose true-fix’d and resting quality [t]here is no fellow in the firmament.”141

Proceeding on his “consent-for-one-purpose-is-consent-for-all-purposes” premise, Justice Wells quite rightly observed that the only remaining issue “is whether Wyche’s otherwise apparently voluntary consent was rendered involuntary by the fact that the Winn-Dixie burglary and investigation were fictitious,”142 or in plain language whether it is permissible for the police, relying upon the duty of all of us to cooperate with them, to lie to all of us.143 He begins by referencing a case having nothing to do with Fourth Amendment consent,144 Frazier v. Cupp.145 Its inapplicability to the

135. See id. at 27.
137. See id. “The scope of a search is generally defined by its expressed object.” Id. (quoting United States v. Ross, 456 U.S. 798, 799 (1982)).
138. See Jimeno, 500 U.S. at 252.
139. See id. at 251 (holding “[t]he scope of a search is generally defined by its expressed object”).
142. Wyche II, 987 So. 2d 23, 28 (Fla. 2008).
143. See generally id.
144. Id. at 28.
145. 394 U.S. 731 (1969). Frazier is a confession case, not a consent case. See id. at 737. The Wyche II majority cites repeatedly to confession cases. Id. at 28. See, e.g., Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005) (per curiam); Conde v. State, 860 So. 2d 930 (Fla. 2003) (per curiam); Davis v. State, 859 So. 2d 465 (Fla. 2003) (per curiam); Nelson v. State, 850 So.
consent-obtained-by-deceit context was explained four decades ago by Judge Wisdom in his opinion in *Graves v. Beto*.\(^{146}\)

*Frazier* involved the admissibility of a confession under pre-*Miranda* standards. When the defendant Frazier refused to confess, the interrogating officer told him falsely that his cousin and companion Rawls had already confessed his part. ... Frazier ultimately confessed .... The confession, which was otherwise voluntary, was not fatally tainted by the interrogator’s misrepresentations. But in this case we do not void the consent as to the purpose for which it was given. In the presence of misrepresentation in its acquisition, we simply limit the state to the purposes represented. If *Frazier* were applicable, and if we were considering the quality of the consent, we would note that *Frazier* dealt with the voluntariness of a confession rather than the waiver of a right not to be searched and that in *Frazier* there was a partial warning of constitutional rights whereas Graves received no warnings.\(^{147}\)

Apart from its reliance on confession jurisprudence, the *Wyche II* Court notes time and again that there was no duress or coercion, no threats or promises, that induced Wyche to consent to the seizure of his DNA.\(^{148}\)

[The police] informed Wyche that he was suspected of committing a burglary, albeit a fictitious burglary, and requested a saliva sample. He did not threaten Wyche or make any promises of leniency in exchange for Wyche’s consent. Accordingly, no threat or promise influences our evaluation of the totality of the circumstances of Wyche’s consent.\(^{149}\)

Entirely true—and entirely beside the point.

It is apodictic that consent, to be valid, must be voluntary and knowing.\(^{150}\) “Consent” obtained at the business end of a Louisville slugger is not voluntary.\(^{151}\) "Consent" obtained by mendacious and deceitful

\(^{146}\) 424 F.2d 524 (5th Cir. 1970).

\(^{147}\) *See Wyche II*, 987 So. 2d at 30–31.

\(^{148}\) *Id.* at 31.


\(^{150}\) See, e.g., *Wyche II*, 987 So. 2d at 31.
exploitation is not knowing.\textsuperscript{152} To Wyche's claim that his purported consent was anything but knowing—to his claim that he was deliberately, outrageously, and successfully hoodwinked—the Supreme Court of Florida answers, in effect, "well, at least you weren't beaten with a Louisville slugger."\textsuperscript{153} Entirely true—and entirely beside the point.

But what is more fundamentally troubling is the Wyche II majority's failure to consider the substantial body of case law addressing this question—case law from a host of jurisdictions, state and federal, that speaks with one voice and sets forth one rule: "[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the [F]ourth [A]mendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation."\textsuperscript{154} As noted previously, all citizens have a "duty to cooperate with the police."\textsuperscript{155} It therefore must follow that if a police officer comes to me bearing the signs and symbols of his office, I can and must rely upon the truth of his representations to me; and if those representations prove to be willfully false, the consent he elicits from me is a legal nullity.\textsuperscript{156} The Wyche II court does not consider this rule and reject it; it fails to consider it at all.\textsuperscript{157}

Even more disappointing is some of the language appearing in Justice Bell's opinion: "My hope is that law enforcement will resist the temptation to interpret this decision as an endorsement of intentional deception as acceptable, routine police practice."\textsuperscript{158} But it requires no interpretation to read the majority opinion "as an endorsement of intentional deception as acceptable, routine police practice;" the majority opinion is "an endorsement of intentional deception as acceptable, routine police practice."\textsuperscript{159} And surely Justice Bell is aware of how such things filter down to the level of the officer on the street: The lengthy rescript authored by the jurist is read and reduced to ever-more distilled versions by a succession of prosecutorial and law enforcement authorities. By the time it reaches the station-house, it takes the form, "Hey, the Supreme Court of Florida says it is okay to lie to the bad guys to get them to consent!" If that was a result Justice Bell hoped to avoid, his duty was to dissent, not to beat his breast while concurring.

\textsuperscript{152} Id. at 29 n.6 (citing Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984)).
\textsuperscript{153} See, e.g., id. at 28.
\textsuperscript{154} United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984).
\textsuperscript{155} United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998).
\textsuperscript{156} See SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. 1981).
\textsuperscript{157} See Wyche II, 987 So. 2d at 28.
\textsuperscript{158} Id. at 32 (Bell, J., concurring).
\textsuperscript{159} Id. (emphasis added).
Conceding as a prefatory matter that Florida “case law has done little to provide concrete examples of when . . . trickery or intentional deception will render a consent involuntary,” Justice Anstead offered a dissent joined by Justice Pariente centered around the theme “that the degree and the flagrant nature of the deception intentionally used by the police to secure Wyche’s consent” rendered that consent invalid. Justice Anstead was prepared to hold as a matter of law “that consent is not voluntary where the government obtains it by intentionally and falsely informing a person in custody that the person is suspected of a completely fabricated crime.”

Justice Lewis, in an even more protracted dissent—also joined by Justice Pariente—took the opposite approach: For him, the question was not one of law but of fact, and required an examination of the totality of

160. Wyche II, 987 So. 2d at 38 (Anstead, J., dissenting). Justice Anstead’s dissent relied upon Krause v. Commonwealth, 206 S.W.3d 922 (Ky. 2006). See id. at 39–40. It also referenced United States v. Carter, 884 F.2d 368 (8th Cir. 1989) and United States v. Andrews, 746 F.2d 247 (5th Cir. 1984). See id. at 37 n.11. Carter concerns itself exclusively, or nearly so, with the Fifth Amendment law of confession, not the Fourth Amendment law of consent. See Carter, 884 F.2d at 373–74. The Andrews court, after attempting to avoid the force of its own precedent in both the United States v. Tweel line of cases and the Graves v. Beto line of cases, concludes tepidly that although “the district court could have found from the evidence that [the police] did trick Andrews . . . [and that therefore] this Court might remand to the district court for such a determination,” it would not do so. Andrews, 746 F.2d at 249 n.3.


162. Id. at 42. In the first post-Wyche II case, State v. Bartling, the Fourth District appeared to apply elements of both the majority holding in Wyche II and Justice Anstead’s dissent. See State v. Bartling, 989 So. 2d 757, 759 (Fla. 4th Dist. Ct. App. 2008). In Bartling, Deputy Castando, eager to search Bartling’s residence for drugs, obtained permission to enter by claiming falsely “that he had received an anonymous tip that someone was dragging a dead body in a rug outside of the apartment. When [Bartling was] asked if he would mind if [the police] looked for a dead body, he permitted them to enter the . . . apartment.” Id. at 758–59. Exploiting this pretext, the police searched for and found the drugs for the possession of which Bartling was subsequently prosecuted. Id. at 759. Affirming the trial court’s grant of Bartling’s motion to suppress, the Fourth District purported to cite Wyche II for the proposition that where, as here, the lie told by the police was such a whopper—“we recognize . . . [Bartling’s] understandable desire to clear his . . . name of the stigma of a rape accusation,”—suppression remains the appropriate remedy. Id. at 762. By implication, then, the Fourth District understands Wyche II to mean that when the police tell a reasonable lie—as, presumably, they did to Earl Wyche—suppression is excessive. See id. Whether other Florida courts will embrace this distinction is a nice question. The Bartling court based its decision on a second ground: that of scope of consent. Bartling, 989 So. 2d at 762. Mr. Bartling’s consent to the police entry and search was predicated upon an alleged need to find a dead body. Id. at 758–59. The “cocaine and drug paraphernalia” which the officers found, and which subsequently formed the basis of Bartling’s prosecution, were in a cigarette pack. Id. at 759. “[T]he search clearly exceeded the scope of consent when the police searched for a dead body in a cigarette pack.” Id. at 762. This argument seems a good deal more forcible.
circumstances, including but certainly not limited to the circumstance of the police having lied to Wyche. Examples of other circumstances considered relevant by Justice Lewis include: "[T]he [nature] and extent of the police deception"; "whether the defendant was informed of" any relevant rights; "whether the defendant was in custody" at the relevant time; "whether the police possessed probable cause" as to the crime under investigation and the defendant’s role in it; and whether the police made any promises or representations to the defendant to induce his consent. Applying this totality of circumstances test, Justice Lewis would have found Wyche’s consent involuntary.

Although both Justice Anstead’s involuntary-as-a-matter-of-law dissent and Justice Lewis’s involuntary-in-the-circumstances dissent have much to commend them, they suffer from the fundamental infirmity that also characterizes the majority opinion: They overlook the unifying principle behind the considerable body of case law prohibiting the conduct visited upon Wyche. When the police ask us—you, me, Earl Wyche—for help or information, we have a public duty to help them if we can do so without infracting our own rights. But the police—when we know it is the police with whom we are dealing—have a correlative duty to be truthful in framing their requests for help or information. Breach of their duty of truthfulness deracinetes our duty of cooperation. Nothing could be more destructive of the role of the constabulary in a free society than a general perception that the police exploit the appurtenances of their office to deceive and trap, and that therefore only a fool would provide help or truthful information to an officer who sought those things of him.

Thus, if Wyche is considered solely in light of existing precedent and traditional principles governing the jurisprudence of consent—precedent and

163. Wyche II, 987 So. 2d at 64–65 (Lewis, J., dissenting). Although Justice Lewis cited to cases involving the law of confession, he clearly appreciated the distinction drawn in Frazier v. Cupp between that law and the law governing consent. Id. at 49–50 (citing Frazier v. Cupp, 394 U.S. 731 (1969)). Dilating on Frazier, which upheld the admissibility of a confession obtained after the defendant had been falsely told by the police that his codefendant had already confessed, Justice Lewis offered this highly engaging and instructive explanation:

This form of police deception is fair because it is similar to merely bluffing in a poker game: It does not compel suspects to incriminate themselves any more than a large bet in a poker game compels an opponent to believe that the betting player has a stronger hand and that he or she should correspondingly fold.

Id. at 56.

164. Wyche II, 987 So. 2d at 59 (Lewis, J., dissenting).

165. Id.

166. Id. at 43 (Anstead, J., dissenting).

167. Id. at 44, 46 (Lewis, J., dissenting).
principles as to which there is national consensus—it fails. But a
diacritical feature of the Wyche case—the fact that the object of the police
search and seizure was a tissue sample from which a DNA profile was to be
derived—gives rise to a separate, albeit equally irrefragable, refutation of the
reasoning and result in Wyche.

III. HOW DNA BEARS UPON THE SCOPE OF CONSENT TO A SEARCH OR
SEIZURE

T[he] time was 9:05 on September 10, 1984. Professor Sir Alec
Jeffreys remembers the moment distinctly. The X-ray films of his
tests had just emerged from the machine. “At first the images
looked [like] a complicated mess,” he recalls. “Then the penny
dropped. We had found a method of DNA-based biological
identification.”

“The ‘double helix’ discovery” of the nature and structure of DNA was
made by Watson and Crick at Cambridge in 1953.” Sir Alec Jeffrey’s
DNA identification technique was first employed in a British deportation
proceeding in 1985, and shortly thereafter in a paternity dispute. It leapt
onto the stage of history in what the British press rejoiced to refer to as, “the
infamous Enderby murder case.”

Since Sir Alec’s epiphany in 1984, forensic DNA science has advanced
at a forced-march pace. By 1994, the obvious relevance of DNA science to
criminal investigation and prosecution prompted Congress to pass the
Violent Crime Control and Law Enforcement Act, authorizing the FBI to

168. Id. at 44, 46 (Lewis, J., dissenting).
169. Wyche II, 987 So. 2d at 44 (Lewis, J., dissenting).
170. Francis Gibb, The DNA Scientist Who Made Individuals of Us All, THE TIMES, Dec. 6,
2005, available at http://business.timesonline.co.uk/tol/business/career_and_jobs/legal/article745719.ece
171. Id.
172. Id.
173. Id.

The case had begun with the murder and rape of Lynda Mann, 15, in 1983 in the
Leicestershire village [of Enderby]. Dawn Ashworth, 15, died in a copycat killing
three years later. Police arrested a man who confessed to the second murder but
denied the first. The DNA showed that the same man had murdered both girls but he
was not the prime suspect. Some 5,000 local men gave blood samples. One, Colin
Pitchfork, eventually confessed; he had persuaded a friend to give blood on his
behalf. His DNA was a match.
establish a national index of DNA samples from convicted offenders. The FBI exercised this authority by linking databanks via the Combined DNA Index System (CODIS), a software infrastructure. All fifty state legislatures "enacted statutes requiring convicted offenders to provide DNA samples for . . . entry into the CODIS system." CODIS enables crime laboratories around the country "to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system." In December of 1998, "the FBI requested that Congress enact [more explicit] statutory authority" to allow the FBI to take DNA samples from federal offenders for inclusion in CODIS. On December 19, 2000, Congress passed the DNA Analysis Backlog Elimination Act. Pursuant to this statute, individuals "convicted of a qualifying Federal offense" must provide "a tissue, fluid, or other bodily sample" for analysis. After a

175. See FEDERAL BUREAU OF INVESTIGATION, PRIVACY IMPACT ASSESSMENT: NATIONAL DNA INDEX SYSTEM, (Feb. 24, 2004), http://foia.fbi.gov/ndispi.htm [hereinafter NATIONAL DNA INDEX SYSTEM]. It is a mistake, albeit a common one, to conceive of CODIS as a databank, a database, a computer or group of computers. See President's DNA Initiative, What is CODIS?, http://www.dna.gov/uses/solving-crimes/cold_cases/howdatabasesaidcodis/ (last visited Oct. 26, 2008). It is no such thing. See id. Such databanks and databases do exist. See NATIONAL DNA INDEX SYSTEM, supra. The databank of DNA profiles maintained by the FBI is NDIS, the national DNA index system. Id. Around the country various local crime labs—in Florida, the Miami-Dade Crime Lab, for example, or the Palm Beach County Crime Lab—maintain their own databanks; these are referred to as LDIS's, local DNA index systems. NGA.ORG, IMPROVING PUBLIC SAFETY BY EXPANDING THE USE OF FORENSIC DNA, http://www.nga.org/Files/pdf/0702FORENSICDNA.PDF. Each such LDIS in Florida supports and feeds into the SDIS in Tallahassee, the state DNA index system maintained by the Florida Department of Law Enforcement. See id. CODIS "is the automated DNA information processing and telecommunications system that supports," links, and unifies the various LDIS/SDIS/NDIS databases. President's DNA Initiative, Advancing Justice Through DNA Technology, Levels of the Database, http://www.dna.gov/uses/database/levels (last visited Oct. 26, 2008).
177. Id.
178. Id. at 9.
sample is collected and analyzed, the resulting DNA profile is input into CODIS, and thereafter is available to CODIS licensees.  

Similarly, Florida Statute section 943.325 provides for, as to every person convicted of a felony, compulsory drawing of blood, DNA analysis, and DNA data banking.  

Pursuant to the statute, the Florida Department of Law Enforcement (FDLE), Florida’s statewide police agency, and the statewide criminal laboratory analysis system shall establish, implement, and maintain a statewide automated personal identification system capable of, but not limited to, classifying, matching, and storing analyses of DNA. . . . The system shall be available to all criminal justice agencies.

DNA profiles are to be expunged from the CODIS system by the FBI director only if the director receives a final court order establishing that the conviction giving rise to the DNA profile has been overturned. As a condition of CODIS licensure, states are also directed to expunge DNA records of an individual if his conviction is overturned. There is, however, so far as appears in the statute, no enforcement mechanism as to this requirement. Neither the FBI nor any other federal entity audits the SDIS’s to confirm that states are meeting their obligation to expunge records as to defendants who were acquitted or whose convictions were overturned.


182. See generally FLA. STAT. § 943.325 (2007). The statute also extends to juvenile offenders, who under Florida law are found “delinquent” rather than “guilty.” Id. § 943.325(10)(d). Florida Statutes section 947.1405(7)(a)10 and 948.03(1)(n) apply the same requirements—redundantly, at least in part—to inmates admitted to controlled release programs, probation, and community control.

183. FLA. STAT. § 943.325. The chief judges of Florida’s Fifteenth Judicial Circuit (the felony trial court having jurisdiction over Palm Beach County) and Seventeenth Judicial Circuit (the felony trial court having jurisdiction over Broward County, the county located between Palm Beach and Miami-Dade) have entered administrative orders tracking the language of the statute. In re: Required DNA Testing for Non-Sexual Offenders, Fla. Admin. Order No. III-OO-J-1 (Aug. 9, 2000); In re: Required DNA Testing for Non-Sexual Offenders, Fla. Admin. Order No. 4.045-8/99 (Sept. 2, 1999); see In re: Required DNA Testing for Certain Sexual Offenders & Sexual Predators, Fla. Admin. Order No. 4.044-8/99 (Sept. 1, 1999).

184. FLA. STAT. § 943.325(8).


186. Id. § 14132(d)(2).

187. See id. § 14132.
on appeal. The burden to seek expunction is on the defendant, but no provision of Florida law obliges any judge or any other player in the criminal justice system to inform a defendant whose case was dismissed or conviction overturned that he may seek, and should obtain, expunction of his DNA profile from the CODIS system. Thus, the clear requirement of the federal statute notwithstanding, it is unlikely that any Floridian has ever benefitted from a record expunction.

Such protection against information abuse as exists comes in two forms. First, access to CODIS data is limited for use by criminal justice agencies for use in judicial proceedings, and for use in research and development of identification methods and quality control purposes. Disclosure of data for any other purpose is a misdemeanor. Second, forensic analysis is done by decoding sequences of what is referred to as "junk DNA," DNA believed not to be associated with physical or medical characteristics (other, of course, than the characteristics sufficient to identify the donor of the DNA).

This is gossamer armor. The universe of people employed by or affiliated with "criminal justice agencies" of one kind or another who can lawfully root around in CODIS and its databases is large and growing; so is


188. See generally id.
189. A Floridian convicted of a felony does not merely forfeit forever whatever expectation of privacy he once had in his DNA profile; he actually pays for the privilege. See FLA. STAT. § 943.325(12). Section 943.325(12) provides that unless he "has been declared indigent by the court, the convicted person shall pay the actual costs of collecting the blood specimens" from which his DNA profile will be derived. Id. By operation of Florida Constitution Art. I § 19, however, such costs cannot be collected until the conviction upon which they are based becomes final, i.e., until it is affirmed on appeal. FLA. CONST. art. I § 19. Thus, the State of Florida can force a needle into a convicted felon's arm, withdraw his life's-blood, analyze that blood, post the fruits of that analysis to data banks from which they will never be removed, and where they can be examined who-knows-when by who-knows-whom, all before the first step has been taken in an appellate process designed to determine whether the conviction in question was lawful. But the state of Florida cannot demand payment of the few dollars in costs associated with the blood-drawing process until the court of appeal has satisfied itself that the conviction in question was lawful. See id.
191. Id. § 14133(b)(1)(A)–(B).
192. Id. § 14133(b)(2). A defendant may also obtain access to his data and the samples from which the data were derived for criminal defense purposes. Id. § 14133(b)(1)(C).
193. Id. § 14135e(c).
the population of those who may have occasion to employ CODIS-type data for research and development. The defendant who compliantly provides a piece of himself for DNA analysis—Wyche, for example—likely does not know that the fruits of that analysis will remain in databases until the end of time.

A year from now, or two years, or twenty, unknown and unknowable pairs of hands and eyes, in unknown and unknowable locations, may access that data for good or bad reasons. The Floridian [—Wyche, for example— whose DNA records they are] will never learn that [those] records have been examined, or when, or where, or by whom, or for what reason. And perhaps next year, or the year after that, as DNA science leaps forward, the data stored in CODIS will enable an informed examiner of that data to know if [a given donor, Wyche, for example,] has a genetic disposition toward [jaywalking], Aretifism, or rooting for the Chicago Cubs. “No one [yet] knows what sort of information—such as propensity to disease or psychological characteristics—will eventually be able to be extracted from DNA.”

Nor is there great comfort to be taken from the statutory promise that such valuable and sensitive data will be seen only by those authorized to see it. CODIS is relatively neoteric; the internal controls intended to guard it, even more so. But as the data it contains burgeon, and the number of authorized users burgeons, the chances for and likelihood of a loss of control

197. Section 943.325 of the Florida Statutes concerns itself with convicted Floridians. See FLA. STAT. § 943.325(1)(a), (b). But Rule 3.220(c)(1)(G) of the Florida Rules of Criminal Procedure may result in the permanent recordation of the DNA profile of an arrested Floridian, even if he is later exonerated. See FLA. R. CRIM. P. 3.220(c)(1)(G) (granting Florida courts discretion to require from a defendant “samples of defendant’s blood, hair, and other materials of defendant’s body . . . after the filing of the charging document”). And because Wyche “consented” to the analysis of his DNA, his DNA profile will remain in the CODIS system in perpetuity, whether or not he had been convicted, whether or not his conviction had been affirmed on appeal. See Hirsch, supra note 197.
198. Hirsch, supra note 197, at 52.
199. Hirsch, supra note 197, at 52–53 (quoting Stewart Tendler, DNA Pioneer Accuses the Police of Being Overzealous, THE TIMES (London), Nov. 2, 2006, at 7). Under the present state of the law, such a convicted person has no protected Fourth Amendment expectation of privacy in the data derived from analysis of his biological tissue. See Hirsch, supra note 197, at 54; see also United States v. Stewart, 468 F. Supp. 2d 261, 281 (D. Mass 2007) (stating “a ‘re-search’ of the DNA database once constructed may not implicate the Fourth Amendment”) (citing Johnson v. Quander, 440 F.3d 489, 498 (D.C. Cir. 2006)).
200. See FLA. STAT. § 943.325(7).
of data, whether intentional or negligent, must be assumed to burgeon as well.  

It is against the foregoing backdrop, and not in a more traditional context, that Wyche’s putative consent to the seizure of his genetic material and its subsequent analysis must be considered. In the more traditional context, cases involving consent issues were often, as Abraham Lincoln said of his politics, “short and sweet, like the old woman’s dance.”  

If the police pull the next Earl Wyche over and ask to search his car, that search will take a matter of minutes. The search will reveal something of interest to the police or it won’t. If it does, Wyche will be arrested or investigated further. If it doesn’t, Wyche will be sent along his way. When the search is over, it’s over. There will be no sequels, no residual consequences. 

If Wyche’s cell tissue is seized by the police, the seizure is a matter of minutes. But there the similarity ends. The cell tissue will, as discussed supra, be sent to the local crime lab where it will be DNA-profiled. The cell tissue itself will be preserved by the crime lab in perpetuity. The DNA profile will be uploaded to CODIS. As of November 2005, all fifty American states and 39 sites in 24 countries—“Belgium, Botswana, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, England, Estonia, Finland, France, Hong Kong, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Singapore, Slovakia, Spain, Sweden, and Switzerland”—had received the CODIS software from the FBI and thus had access to the system. 

Wyche’s DNA profile will remain in the system unless and until it is removed, which is to say that in all likelihood it will remain in perpetuity. If the local crime lab which holds Wyche’s tissue sample wants to re-test it next year, or the year after that, employing some new test designed to elicit new information, Wyche is entitled to neither notice nor hearing and will receive neither. If any crime lab, anywhere, wants to

201. See generally Hirsch, supra note 197. In England, “[t]wo computer disks bearing addresses, bank account numbers and other details of about 25 million people—almost half the British population—were popped into internal government mail and never arrived.” Jill Lawless, Data on 25M People Lost in the Mail, DESERET NEWS, Nov. 22, 2007, at AO4.  


203. See Hirsch, supra note 197, at 53.  

204. See FLA. STAT. § 943.325(5).  

205. Hirsch, supra note 197, at 54.  

206. See FLA. STAT. § 943.325(6).  


208. See, e.g., Hirsch, supra note 197, at 54.  

209. See id.
examine or analyze Wyche's DNA profile next year, or the year after that, employing some new test designed to elicit new information, Wyche is entitled to neither notice nor hearing and will receive neither.210

Traditionally, "[t]he standard for measuring the scope of a suspect's consent [to a search or seizure] under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"211 In Florida v. Jimeno,212 the United States Supreme Court distinguished the opinion of the Supreme Court of Florida in State v. Wells.213

There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.214

Whether it is reasonable to understand a consent to search a trunk to include a paper bag in that trunk, but not to include a locked briefcase in that trunk, is something that can be resolved by reference to common experience and common expectations of privacy.215 With respect to DNA profiling and the CODIS system, there is little or no common experience and less common understanding. Earl Wyche was not told that the DNA sample he was asked to give would result in information that would be available to and examined by the police department that ultimately arrested him, for the crime for which he was ultimately arrested; nor that it would remain available for comparison to crime-scene evidence past, present, and future by police departments all over the country and the world.216 He was told that he was giving a DNA sample that could be used to exonerate him as to a burglary that neither he nor anyone else actually committed.217 That is all he was told.218 In the words of the Wyche II majority:

210. See id.
212. Id. at 248.
213. 539 So. 2d 464 (Fla. 1989), aff'd on other grounds, 495 U.S. 1 (1990).
214. Jimeno, 500 U.S. at 251–52.
215. See, eg., id. at 251–52.
216. See Wyche II, 987 So. 2d 23, 27 (Fla. 2008).
218. Id.
Wyche was asked to consent and did consent to the saliva swabs for use in a burglary investigation. [The lead investigator] truthfully represented that the police desired a sample of Wyche's DNA for purposes of an ongoing investigation. Wyche was informed that the requested evidence could match or exclude him in respect to a crime and that he was a suspect in a police investigation.\textsuperscript{219}

Wyche was told he was consenting to the testing of his DNA in a burglary investigation, a particular burglary investigation.\textsuperscript{220} He was told that there was an ongoing investigation, a particular investigation of a particular burglary.\textsuperscript{221} He was told that DNA testing would match or exclude him as to a crime, the particular crime as to which there was a police investigation already in train.\textsuperscript{222} He was never told—he was deliberately prevented from knowing—that information derivative from his DNA would be examined in connection with other pending crimes as to which the police were presently interested, and other future crimes any time the police became interested.\textsuperscript{223} At the end of the paragraph captioned above the Supreme Court of Florida concluded that "Wyche was not deluded as to the import of his consent."\textsuperscript{224} It would be impossible for him to have been more deluded. Wyche was led, deliberately, to believe that he was consenting to the one-time examination of his DNA for the purposes of determining his involvement or non-involvement in one crime.\textsuperscript{225} His consent extended to that one examination for that one purpose, not to any other examination for any other purpose.\textsuperscript{226} Yet he was convicted based upon the comparison of his DNA in another case, a comparison not within the scope of his consent.\textsuperscript{227}

The Wyche II court and parties were not unaware of section 943.325 of the Florida Statutes.\textsuperscript{228} On October 19, 2006, the court entered an order "directing the parties to serve supplemental briefs specifically addressing the applicability and impact of section 943.325, Florida Statutes."\textsuperscript{229} Wyche took the position that as section 943.325 of the Florida Statutes read at the

\textsuperscript{219} Wyche II, 987 So. 2d at 30 (Fla. 2008) (emphasis added).
\textsuperscript{220} Id. at 24 (emphasis added).
\textsuperscript{221} Id. (emphasis added).
\textsuperscript{222} Id. at 30 (emphasis added).
\textsuperscript{223} See id. at 27.
\textsuperscript{224} Wyche II, 987 So. 2d at 30.
\textsuperscript{225} See id.
\textsuperscript{226} See id.
\textsuperscript{227} See id.
\textsuperscript{228} See Amended Supplemental Brief of Petitioner, supra note 217, at 1.
\textsuperscript{229} Id.
time of his prior convictions he had not been obliged to provide tissue samples, and his orders of judgment and sentence had not required him to do so.\textsuperscript{230} That being the case, the police had no statutory authority to compel his genetic material, and could obtain such material only pursuant to consent—or, of course, a warrant; which conceded was not employed here.\textsuperscript{231} Because, in Wyche’s view, his consent was constitutionally defective, the resulting DNA profile was “fruit of the poisonous tree;” and section 943.325 of the \textit{Florida Statutes} was inapplicable and irrelevant.\textsuperscript{232} The prosecution took the position that the version of section 943.325 of the \textit{Florida Statutes} in effect at the time when Wyche’s tissue samples were taken provided that such samples could be taken from a probationer presently in custody, and that therefore the police were empowered to obtain Wyche’s genetic material for DNA profiling with or without his consent.\textsuperscript{233}

In the event, none of the opinions in \textit{Wyche II} made reference to section 943.325 of the \textit{Florida Statutes}. The majority opinion, as well as the two dissenting opinions, confined themselves to the certified conflict between the First and Fourth District Courts of Appeal on the constitutionality of consent obtained by gross deceit under color of law.\textsuperscript{234} Whatever the proper interpretation of former iterations of section 943.325 of the \textit{Florida Statutes}, Earl Wyche’s DNA profile is now in the CODIS system to stay, available for inspection by all CODIS licensees at all times, for all reasons, or even for no reason.\textsuperscript{235} Whatever Earl Wyche consented to, he never consented to that.\textsuperscript{236}

\textbf{IV. CONCLUSION}

Whatever else can be said of the Supreme Court of Florida’s decision in \textit{Wyche II}, this much can be said with certainty: Justice Bell’s professed fears

\begin{itemize}
\item \textsuperscript{230} \textit{Id.} at 16-17.
\item \textsuperscript{231} \textit{See id.} at 18.
\item \textsuperscript{232} \textit{Id.} at 4.
\item \textsuperscript{233} \textit{See Supplemental Answer Brief of Respondent at 7, Wyche v. State, 987 So. 2d 23 (Fla. 2008) (No. SC04-1509).}
\item \textit{Id.} (citation omitted).
\item \textsuperscript{234} \textit{See generally Wyche II, 987 So. 2d 23 (Fla. 2008).} As noted, Justice Bell’s concurring opinion, for himself and Chief Justice Quince did not discuss the merits of the case but simply posed concerns about how the majority opinion would be interpreted and applied. \textit{Id.} at 32 (Bell, J., concurring).
\item \textsuperscript{235} \textit{See, e.g., Hirsch, supra note 197.}
\item \textsuperscript{236} \textit{See Wyche II, 987 So. 2d at 25.}
\end{itemize}
will surely be realized. The Reader’s Digest version of the Wyche II holding—that police are free to tell any lie, however outrageous, however false, to obtain a valid waiver of a homeowner’s or suspect’s Fourth Amendment rights—will race through the Florida law enforcement community like wildfire. This is no criticism of the police. On the contrary; the police are permitted, indeed they are obliged, to avail themselves of all investigative techniques expressly determined by the courts to be lawful. Police officers would be recreant in their duty if they failed to employ the extraordinary weapon that Wyche II has made available to them. That Wyche II is at odds with all American jurisprudence in all American jurisdictions to consider the question is of no concern to the officer on the street.

The holding in Wyche II is no doubt of profound concern to judges on Florida’s trial and intermediate appellate benches. But with respect to the issue actually addressed and resolved by Wyche II, little remains to be said or done. Absent the use or threat of brute force, consents obtained as a result of police deception will be valid consents, and evidence obtained as a result of such consents will be admissible evidence. 237

Perhaps more consequential, however, is the issue that the Wyche II majority opinion did not address: That of scope of consent. 238 Trial and appellate judges before whom that issue comes must look beyond Wyche II.

Such judges should begin by acknowledging that consent to the seizure of biological material for purposes of DNA profiling is a qualitatively different thing from consent to the search of a car or a house. The homeowner who is asked by the police, “May we search your house?” can be expected to understand the consequences of his assent: The police will search, and if they find evidence or contraband it will be seized, and if evidence or contraband is seized the householder will likely be going to jail. The suspect who is asked by the police, “May we have a cheek swab or a blood sample?” cannot be expected to understand the consequences of his assent: His DNA will be profiled, and the resulting profile will be posted to interlinked databases around the country and around the world where it may be analyzed without notice to him in connection with any and every crime that has been, or may some day be, committed. 239 The householder almost certainly has an accurate understanding of the scope of his consent. The donor of a tissue sample almost certainly has none. Florida courts must acknowledge that distinction, and its consequences.

238. See generally Wyche II, 987 So. 2d at 23 (emphasis added).
DNA science, to the extent that it makes the criminal justice system a less blunt instrument for separating the speckled flock from the clean, is a boon and a blessing. As DNA science becomes more refined, its power to aid the criminal justice process will become more profound. But the increased sophistication and complexity of the science will increase the gap by which the ordinary arrestee—the next Earl Wyche—will fall short of understanding what, exactly, he is consenting to when he consents to the seizure of his flesh. That shortfall cannot be ignored. The law must place the burden squarely upon the prosecution and its law enforcement functionaries to make sure that each of us understands the material consequences of his consent. Failure to do so would be a betrayal of a core purpose of the Fourth Amendment and its traditional protection of individual choice as to matters implicating privacy and personal security.
2007–2008 Survey of Florida Public Employment Law

John Sanchez*

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I. INTRODUCTION

This survey examines the key developments in constitutional, statutory, regulatory, administrative, and case law governing public employment in Florida during 2007-08. Part II looks at such hiring issues as privatization, background checks, nepotism, immigration, ethics, budget cuts, negligent hiring, and the Hatch Act among others. Part III, Terms of Employment, covers an array of issues, such as hours and wages, health benefits, workers' compensation, unemployment compensation, public pensions, safety issues, the internet, and post-employment restrictions. Part IV addresses legal issues involving discipline, retaliation against whistleblowers, the First Amendment, and remedies. Finally, Part V, Employment Discrimination, surveys the major developments in the past year involving bias on grounds of race, gender, age, disability, religion, and military service. Part VI ends with a roundup of employment discrimination remedies.

II. HIRING ISSUES

A. Hiring Veterans

The Department of Labor runs a Web campaign, HireVetsFirst, aimed at raising "employer awareness about the value of hiring veterans."1 Despite


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this effort, veterans groups criticized “a veterans outreach program” that all-lots $161 million to states to help vets find employment as substandard.\(^2\) In 2008, the United States Senate approved a bill that “would help civilian em-ployers keep jobs available for [employees] called to active military duty.”\(^3\) In 2007, the Office of Federal Contract Compliance Programs promulgated a rule putting into effect the 2002 Jobs for Veterans Act,\(^4\) which directs federal contractors not to discriminate against, and to take affirmative action to hire military veterans.\(^5\)

B. **Privatization**

Privatization, the conversion of governmental agencies into private enti-ties,\(^6\) continued to fuel controversy over the past year in Florida. “For years, state and local governments have been privatizing certain functions, such as trash collection, payroll processing and road maintenance.”\(^7\) Now, “15 or so [United States] municipalities . . . have outsourced their libraries,” and critics charge that this development constitutes “a backdoor method of union-busting.”\(^8\) Moreover, “workers will lose the right to participate in [the public] pension system for public employees and instead will qualify for a 401(k) program.”\(^9\)

The Miami-Dade Housing Agency faced “a range of financial and man-agement scandals” since 2006, leading to a “9-month-old federal takeover” of the troubled agency.\(^10\) But under a deal brokered between the federal government and the county, the United States Department of Housing and Urban Development will end its control if the county agrees “to privatize management of the multimillion-dollar rental-assistance program.”\(^11\) Again, critics complain that privatizing the agency will free it “of many of the government

\(^2\) Id.


\(^5\) Id. at 44,398–99.

\(^6\) BLACK'S LAW DICTIONARY 1234 (8th ed. 2004).


\(^8\) Id.

\(^9\) Id.

\(^10\) Matthew I. Pinzur, U.S. Easing Grip on Dade HUD, MIAMI HERALD, July 15, 2008, at 1A.

\(^11\) Id.
regulations, as well as the county pay scale, benefits and employment protections."\(^\text{12}\)

In 2007, Broward County “trimmed expenses by privatizing park ranger positions.”\(^\text{13}\) In addition, “Broward County Transportation plans to privatize a handful of bus routes.”\(^\text{14}\) As a result of budget cuts, Florida International University plans to “outsource services such as construction management, real estate development and e-mail support.”\(^\text{15}\)

C. Background Checks on Employees

The Census Bureau announced “that it would fingerprint and [undertake] background checks on . . . [500,000] temporary workers who will go door to door for the 2010 [census] count” to weed out criminals.\(^\text{16}\) In 2008, a United States House subcommittee held hearings on a measure that would force states to provide specified “state criminal history information to employers of security guards.”\(^\text{17}\)

The National Association of State Directors of Teacher Education and Certification has compiled a “nationwide list of 24,500 teachers who have been” disciplined for a wide range of misconduct.\(^\text{18}\) The “list is the only nationwide” attempt by school districts to weed out “teachers who get into trouble,” but the public is denied access to it.\(^\text{19}\)

In 2008, Florida’s Department of Children & Families (DCF) “outlined plans to better scrutinize the agency’s 13,500 employees” after “a shocking arrest of a DCF employee,” in which the agency failed to discover he had “a DUI arrest in Georgia and an outstanding warrant for his arrest . . . in Texas.”\(^\text{20}\) In response, DCF will be fingerprinting “all employees hired after November [6], 2006 . . . as part of a more thorough background check.”\(^\text{21}\) In a similar vein, “Miami-Dade County’s rules for issuing chauffeur’s licenses”

\(^{12}\) Id.

\(^{13}\) Amy Sherman, *Deeper Broward Cuts Loom*, MIAMI HERALD, Nov. 8, 2007, at 1B.

\(^{14}\) Id.

\(^{15}\) Oscar Corral, *FIU Planning Layoffs to Save Money*, MIAMI HERALD, Apr. 16, 2008, at 1B.

\(^{16}\) Census Workers to Be Fingerprinted, N.Y. TIMES, June 12, 2008, at A22.


\(^{19}\) Id.

\(^{20}\) Carol Marbin Miller, *DCF Will Fingerprint Its Workers*, MIAMI HERALD, Feb. 5, 2008, at 6B.

\(^{21}\) Id.
came under scrutiny after learning that "a man who'd killed his grandmother was granted a permit to drive a cab."\textsuperscript{22} As a result, "the Consumer Services Department has reassigned the staffer who backgrounded" the cabbie, who was once found unfit for trial by reason of insanity, "[a]nd it is rechecking the backgrounds of the county's 4200 cab drivers."\textsuperscript{23} The Department also set up "an emergency-only paging system" by which wayward cabbies can have their licenses pulled immediately.\textsuperscript{24}

About seventy percent of employers check applicants' credit scores "before they decide to hire a candidate."\textsuperscript{25} "The fear is that credit problems at home create tension and distraction at work . . . ."\textsuperscript{26} Moreover, employers do not relish having to garnish employee's wages, sought by creditors, after workers fall behind in their bills.\textsuperscript{27}

D. Nepotism

Florida's Anti-Nepotism Law generally prohibits public employers from hiring members of their families or other relatives.\textsuperscript{28} In 2008, "[t]he Miami-Dade School Board's Ethics Advisory Committee . . . proposed a new nepotism policy that would make it more difficult for employees to indirectly supervise their relatives."\textsuperscript{29} The Committee framed three recommendations: "1) All employees must disclose relatives employed anywhere in the school system; 2) [d]istrict employees cannot . . . oversee a relative without School Board approval; [and 3] f]ailure to disclose should result in penalties up to and including dismissal."\textsuperscript{30}

News accounts of preferential treatment, that a "Fort Lauderdale police chief's wife" received from prosecutors, was incorrectly referred to as nepotism after she was not charged with attempted murder for shooting—but missing—"her husband in their home."\textsuperscript{31} Instead of nepotism, a criminal law

\begin{itemize}
\item \textsuperscript{22} Erika Beras, \textit{Chauffeur Licenses Reviewed}, \textit{MIAMI HERALD}, Mar. 9, 2008, at 3B.
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} Julie Sturgeon, \textit{Weak Credit Raises Bills, Threatens Jobs and More}, \textit{MIAMI HERALD}, July 13, 2008, at 1E.
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} \textit{See generally id}.
\item \textsuperscript{28} FLA. STAT. §§ 112.3135(2)(a), 760.10(8)(d) (2008).
\item \textsuperscript{29} Kathleen McGrory, \textit{Limitations Proposed on School Nepotism}, \textit{MIAMI HERALD}, Apr. 30, 2008, at 6B.
\item \textsuperscript{30} \textit{Id}.
\end{itemize}
professor more accurately labeled the preferential treatment "a matter of classism."\textsuperscript{32}

E. Immigration

1. Federal Developments

a. E-Verify

E-Verify is a voluntary federal program that allows employers to confirm "electronically their newly hired employees' legal [eligibility] to work in the United States."\textsuperscript{33} In the past year alone, use of the Web-based system grew from 14,265 to 52,000 employers.\textsuperscript{34} The growth of E-Verify was most pronounced "in Arizona, where a new state law" forces employers to use the system.\textsuperscript{35} By contrast, Illinois passed a law barring employers from using E-Verify "over questions about its accuracy."\textsuperscript{36} In response, the Bush Administration sued Illinois to enjoin the state from implementing its ban on employer use of E-Verify.\textsuperscript{37} The suit claims that the Illinois law is preempted by federal immigration law.\textsuperscript{38} In 2008, Virginia employers defeated bills forcing all employers to take part in the E-Verify program.\textsuperscript{39}

E-Verify "matches photographs from green cards and other immigrant work permits against a database of" over 14 million pictures.\textsuperscript{40} Currently, the federal government is drafting "regulations that would require all new federal contractors to use the E-Verify system."\textsuperscript{41} Under the system, "[i]f an employee's photo doesn't match, the company has eight days to report the discrepancy to the Department of Homeland Security, which investigates within two days."\textsuperscript{42} In June 2008, by executive order, federal contractors are forced

\textsuperscript{32. Id.}
\textsuperscript{34. Id. By June 2008, the number had grown to 69,000 employers. Mickey McCarter, E-Verify Faulted for Lack of Resources, Protections, HOMELAND SEC. TODAY, June 11, 2008, available at http://www.hstoday.us/index2.php?option=com_content&dopdf=1&id=3746.}
\textsuperscript{35. Archibold, Worker Status Growing, supra note 33.}
\textsuperscript{36. Id.}
\textsuperscript{38. Id.}
\textsuperscript{40. Eunice Moscoso, New Tool Verifies Workers, MIAMI HERALD, Sept. 26, 2007, at 1C.}
\textsuperscript{41. Id.}
\textsuperscript{42. Id.}
to use E-Verify, "greatly expanding the reach of the administration’s crack-
down on employers who hire illegal immigrants." Critics of E-Verify al-
lege that the system is "vulnerable to cheating by immigrants who used real
identity documents belonging to other people." Already, a "separate rule
proposed by the administration that would use the Social Security database to
verify immigration status has been blocked by a federal court in San Francis-
có."45

In 2007, the Department of Homeland Security issued a final rule ex-
panding the definition of "constructive knowledge" of an employee who has
provided a fake Social Security number and spells out what steps employers
should take in response to no-match letters issued by the Social Security
Administration.46

In 2007, the United States Citizenship and Immigration Services revised
its Employment Eligibility Verification Form, I-9, to implement a rule that
modified the types of documents a new hire must hand to an employer in
order to prove identity and employment eligibility.47

b. Harsher Penalties Against Employers and Illegal Workers

One telling index illustrates the growing anti-immigration climate in the
United States: Fewer immigrants "are sending money home, and many cite
increased difficulties in finding well-paying jobs and mounting discrimina-
tion." At the same time, "those who do send money home, now send more,
an average of $325 per remittance compared to $300 in 2006."49 "[P]roponents of stricter immigration enforcement," however, point to the
slower growth of remittances as evidence "that the policies tightening what
was once a virtual open door to immigration are working."50

43. Julia Preston, Bush Orders Contractors to Vet Status of Workers, N.Y. TIMES, June
44. Id.
45. Id. A California federal district court extended an injunction preventing the federal
government from warning employers that they could incur liability for civil and criminal
violations of immigration law if, after finding out an employee’s Social Security number does
not match government databases, they do not quickly unravel the discrepancy. Am. Fed’n of
47. U.S. DEP’T OF HOMELAND SEC., EMPLOYMENT ELIGIBILITY VERIFICATION, FORM I-9
49. Id.
50. Id.
In 2008, the federal government announced it would "increase fines against employers who hire illegal immigrants by 25 percent, the first hike in almost a decade." 51 Plans are also being drafted "to increase criminal penalties against 'the most egregious employer offenders.'" 52 "The fines for employers caught knowingly hiring illegal immigrants now range from $275 to $11,000." 53 Not all stricter immigration laws, however, have withstood judicial scrutiny. For example, in August of 2007, "a federal judge in San Francisco temporarily held up a new federal rule that would have forced employers to dismiss illegal immigrants after 90 days." 54 The "92 criminal arrests of employers still amount to a drop in the bucket of a national economy that includes [six] million companies that employ more than [seven] million unauthorized workers." 55

By contrast to the harsher penalties surveyed above, on November 16, 2007, the United States Immigration and Customs Enforcement Agency issued guidelines spelling out "best practices" for agents to follow to identify undocumented workers arrested during worksite enforcement actions who are sole caregivers or have other pressing humanitarian concerns. 56

c. Visa Program for Seasonal Farm Workers

The federal visa program for seasonal farm workers, the H-2A visa program, has been increasingly tapped by farmers despite "its reputation for being bureaucratic and expensive" thanks to "[c]ompetition for unskilled labor" and the crackdown on illegal immigrants. 57 States have taken the lead with "programs to help farmers get visas for workers . . . [after] Congress failed to pass immigration legislation" in 2007. 58 "Unlike other visa programs, there's no cap on the number of temporary agricultural visas . . . ." 59 But the H-2A program fills only a fraction of farmers' needs and seventy

52. Id.
53. Id.
54. Preston, U.S. Sues Illinois, supra note 37.
55. Spencer S. Hsu, Bosses Elude Worker Crackdown, MIAMI HERALD, Dec. 26, 2007, at 3A.
57. Emily Bazar, Farmers Find Help Getting Workers' Visas, USA TODAY, July 3, 2008, at 3A.
58. Id.
59. Id. In 2007, "the State Department issued 50,791 of the H-2A visas." Id.
percent "of hired help on farms" are illegal immigrants. Before qualifying for the H-2A program, an employer must "advertise locally to prove the positions [cannot] be filled by U.S. workers." Once an application is approved, "a farmer is required to provide the workers with transportation to the U.S. and housing." The United Farm Workers union "has agreements with Mexico and Thailand to streamline immigrants’ paperwork." The Department of Labor announced on July 3, 2007, steps for obtaining H-2B visas for temporary foreign workers for tree planting and reforestation jobs.

An employer group, "Colorado Employers for Immigration Reform, is pressing Congress for a much larger and more flexible guest worker program." Legislators in Arizona took up a bill, that "would have been the first state guest worker program in the country."

d. Border Security

Under Operation Jump Start, a two-year federal program, 6000 National Guard members "in Arizona, California, New Mexico, and Texas . . . helped to secure the border with Mexico." Although the program is set to end July 15, 2008, "an effort is intensifying to have [the National Guard] stay put." While the Border Patrol aims at doubling its size to 18,000 agents by the end of 2008, state and federal officials worry that the agency will not meet its target. Moreover, work on a "virtual fence, a suite of cameras, radars and other technology . . . has been plagued with delays and glitches." Since the 6000 National Guard members have been deployed at the border, there has been "a 39 percent drop in arrests for illegal border crossings."

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60. Id.
61. Bazar, supra note 57.
62. Id.
63. Id.
65. Preston, Employers Fight, supra note 39.
66. Id.
67. Randal C. Archibold, Second Thoughts on Pulling the Guard from the Border, N.Y. TIMES, June 12, 2008, at A17.
68. Id.
69. See id.
70. Id.
71. Id.
2. State and Local Activity

a. Legislation

In 2008, over “1100 immigration-related bills” were introduced in forty-four states and new laws went into effect in twenty-six states.\textsuperscript{72} In Florida alone, “[t]hirteen bills were introduced” in 2008 dealing with immigration.\textsuperscript{73} The states seized “the initiative on immigration [in 2007] when Congress abandoned an immigration overhaul pushed by President Bush.”\textsuperscript{74} While some of the legislation includes pro-immigration measures, most clamp down on “immigrant access to services and employment.”\textsuperscript{75} Besides bills forcing employers to use the E-Verify system, many toughened employer sanctions for hiring undocumented workers.\textsuperscript{76} For example, a new law in Arizona would “suspend or revoke business licenses of employers who ‘knowingly’ hire illegal immigrants.”\textsuperscript{77} In 2008, employers won approval in the Arizona Legislature of a measure aimed at narrowing the law to exclude workers hired before 2008.\textsuperscript{78} Immigration bills died in Indiana and Kentucky “in part to warnings from business groups that the measures could hurt the economy.”\textsuperscript{79}

In 2008, Mississippi became “the first state to make it a felony for an illegal immigrant to work. The measure also allows terminated employees to sue their employer if they were replaced by an illegal immigrant.”\textsuperscript{80}

In the last decade, “over three million new residents settled in Florida;” one-third of them were immigrants.\textsuperscript{81} Critics of immigration claim that this influx of immigrants to Florida “is bringing traffic, pollution, overcrowded


\textsuperscript{73} John P. Horan, Florida Immigration Legislation: From “Fixing Stupid” to “Dumb and Dumber,” SE. CONSTR., June 2008, at 63.

\textsuperscript{74} Id.

\textsuperscript{75} See id.


\textsuperscript{77} Preston, Employers Fight, supra note 39.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Federation for American Immigration Reform (FAIR), Immigration in Florida, http://www.fairus.org/site/PageServer?pagename=research_focus3cd6_sup (last visited Nov. 9, 2008).
schools, and lack of affordable housing to the state, decreasing quality of life and straining natural resources.82

A Haitian-American immigrant organization near Fort Lauderdale, Florida, was being investigated for representing Haitian and other Caribbean immigrants from other states that they could obtain work permits and amnesty if they “paid a $450 application fee to obtain a Social Security card and a work permit.”83

b. Judicial Challenges

In response to the toughest crackdown “in two decades, employers . . . are fighting back in state legislatures, the federal courts and city halls.”84 While courts, by and large, in 2007, struck down “state and local laws cracking down on illegal immigration,” several significant federal court decisions have sustained such laws in 2008.85 For example, a federal court in Arizona refused to enjoin “what is widely considered the nation’s toughest law against employers who hire illegal immigrants.”86 After a trial on the merits, the court rejected plaintiffs’ claims “that the Arizona law invaded legal territory belonging exclusively to the federal government.”87 Similarly, a federal district judge in Missouri upheld a local ordinance cracking down on “employers of illegal immigrants.”88

By contrast, in 2007, a federal court in Pennsylvania ruled that a local ordinance bolstering sanctions on employers who hired illegal immigrants was preempted by federal immigration law and “violated the due process rights of employers.”89

3. Employment Rights of Undocumented Workers

Paradoxes emerge when courts try to reconcile two seemingly conflicting federal labor laws: the 1986 Immigration Reform and Control Act

82. Id.
84. Preston, Employers Fight, supra note 39.
85. Preston, Reversal, supra note 72.
87. Preston, Reversal, supra note 72.
88. Id.
89. Id.

https://nsuworks.nova.edu/nlr/vol33/iss1/1
(IRCA) and the National Labor Relations Act (NLRA).\footnote{90. See Michael Doyle, \textit{Rulings Diverge on Laborer Rights}, \textit{MIAMI HERALD}, Jan. 9, 2008, at 3A.} While the IRCA "made it illegal for [employers] to knowingly hire undocumented workers," courts have interpreted the NLRA to make clear that even illegal employees enjoy collective bargaining rights.\footnote{91. Id.} In 2002, the United States Supreme Court ruled, in \textit{Hoffman Plastic Compounds, Inc. v. NLRB},\footnote{92. 535 U.S. 137 (2002).} that illegally laid-off undocumented workers could not recover back-pay from employers who violated the NLRA.\footnote{93. \textit{Id.} at 151–52.} In 2008, however, the United States Court of Appeals for the District of Columbia Circuit ruled that employers must "bargain with unions that" hire undocumented workers even though, under the IRCA, it is illegal to knowingly employ such workers.\footnote{94. Doyle, supra note 90.} The United States Court of Appeals for the District of Columbia Circuit supported its ruling in part on language in the IRCA, making clear "that employer sanctions weren't meant to 'undermine or diminish in any way labor protections in existing law.'"\footnote{95. Id.}

4. Immigration Reform

In 2008, Hispanic organizations urged the two presidential candidates, Senators John McCain and Barack Obama, to "support—and force Congress to pass—comprehensive immigration legislation that would create a guest-worker program and put millions of illegal immigrants on paths to citizenship."\footnote{96. Dave Montgomery, \textit{Hispanics Press Candidates on Immigration, Employment}, \textit{MIAMI HERALD}, July 8, 2008, at A5.} Moreover, Hispanic organizations urged the candidates "to reverse decades of inadequate representation by Hispanics in the federal workforce. Hispanics constitute about 15 to 16 percent of the population but hold just slightly more than 7 percent of federal jobs."\footnote{97. Id.}

5. How the United States Economy Benefits from Illegal Workers

“The Social Security Administration estimates that about three-quarters of illegal workers pay taxes that contribute to the overall solvency of Social Security and Medicare.”\(^9\) By one estimate, undocumented workers paid nine billion dollars in Social Security taxes alone in 2005.\(^{10}\) “[Y]et many illegal immigrants fearful of deportation won’t risk the government attention that will come from filing a return even if they might qualify for a refund.”\(^{11}\) In addition, such illegal workers are unlikely to draw Social Security and Medicare benefits even if they remain in the United States after retirement.\(^{12}\)

F. Ethics

1. Disclosure Rules

In Miami-Dade County, public officials “can accept gifts of any value, including trips, but any worth more than $100 must be reported.”\(^{13}\) An editorial in the Miami Herald recommends placing a ban on all gifts because “the recipients of the gifts are employed by the county and may be in a position to make business decisions that could affect the givers’ financial well-being.”\(^{14}\)

In 2008, the Miami Police Chief was fined $500 “for failing to disclose his free use of a luxury vehicle.”\(^{15}\) The “executive director of the Miami-Dade Commission on Ethics and Public Trust” recommends a blanket ban on “gifts from vendors seeking business.”\(^{16}\)

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99. Travis Loller, Illegal Workers Add Billions to Treasury, MIAMI HERALD, APR. 13, 2008, at 3A.
100. Id.
101. Id.
104. Id.
106. Id.
2. Double-Dipping

Miami-Dade County employees must request permission to moonlight on a second job, a practice known as double-dipping. A former aide to Miami-Dade’s Mayor allegedly failed to secure the necessary approval “by working for a private company while he still held a job in county hall.”

3. Lobbying

Miami-Dade County is also weighing a recommendation “[t]hat lobbyists or their charges report how much they are paid to influence government.” Surprisingly, there is no Florida law “against elected officials parlaying their status into lobbying fees—while still holding office.”

A 2008 task force warned Miami-Dade commissioners that voters would only approve a pay raise “as part of a package that included term limits and a ban on commissioners holding other jobs.”

4. Recovery of Costs and Attorney’s Fees in Defense of Ethics Violations

Under Florida law, a public official is entitled to recover costs and attorney’s fees after successfully defending herself against an ethics violation charge by proving “that 1) the complaint was made with a malicious intent to injure the official’s reputation; 2) the person filing the complaint knew that the statements made about the official were false or made the statements about the official with reckless disregard for the truth; and 3) the statements were material.” A Florida court read this statutory provision as not requiring the official to prove the actual malice standard of New York Times Co. v. Sullivan.  

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108. Id.
110. Fred Grimm, Real Sludge in This Case Was Lobbying, MIAMI HERALD, Feb. 17, 2008, at 3B.
111. Matthew I. Pinzur, Dade Leaders Favor Raises, Not Reforms, MIAMI HERALD, July 19, 2008, at 5B.
114. Id. at 560 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
5. Websites and E-Mail Regulation

In 2007, “Cooper City, [Florida] commissioners approved a Web policy [barring] elected officials from [posting] links to personal Web pages on the city’s website.” 115 Also, other Florida public employers warned employees that they consider a public record all e-mails sent on publicly-owned computers. 116

G. Budget Cuts

On January 29, 2008, Florida voters approved a constitutional amendment that “increase[d] exemptions on homesteads and business properties as well as allow[ed] people to transfer built-up Save Our Homes property tax savings to another homestead.” 117 “Revenues could fall further if property values continue dropping . . . .” 118 As a result, many state and local public employees will either lose their jobs, see a cut in benefits or hours of work, or end up privatized. 119 For example, Florida International University must lay off about 200 employees. 120 “[E]ven tenured professors could lose their jobs if the university decides to eliminate entire programs.” 121 Consequently, the only growth sector is likely to be campus police. 122

In Miami-Dade, budget cuts forced “pay cuts and layoffs . . . [of] courthouse employees.” 123 The Miami-Dade School Board “discussed changing school police officers’ contracts to reduce their work year from 12 months to 10.” 124 But in July 2008, Miami-Dade Schools Superintendent “scrapped a proposal to cut 11 schools police officers and restructure the department.” 125 In the face of deeper cuts in the 2008–09 budget, the school board must ei-


116. Id.

117. Sherman, supra note 13; Mary Ellen Klas, Tax Cut Receives Winning Assist in S. Fla., MIAMI HERALD, Jan. 30, 2008, at 1A.


119. See id.

120. Corral, supra note 15.

121. Id.

122. Id.

123. Pinzur, Budget Woes, supra note 118.

124. Nirvi Shah, Budget Cuts Have Avoided Cutting Jobs, MIAMI HERALD, May 14, 2008, at 8B.

125. Kathleen McGrory, Police Jobs Spared Budget Ax, MIAMI HERALD, July 16, 2008, at 5B.
ther freeze promised increases in teachers' pay "or lay off 1188" employees.\textsuperscript{126}

H. \textit{Negligent Hiring, Retention, and Supervision}

Under the emerging torts of "negligent hiring, retention, [and] supervision," an employer may be liable for foreseeable torts committed by its employees against either third parties or co-workers, even if the employee's wrongdoing arises outside the scope of his employment, if the employer should have known of the employee's propensity for wrongdoing.\textsuperscript{127} In 2008, a Florida court ruled that whether a school breached its duty to properly train and supervise field trip chaperones was a question of fact for a jury.\textsuperscript{128} Another Florida court ruled that a child care center was not liable under the theory of negligent supervision for an injury sustained when "a bathroom door slammed on [a child's] hand, partially amputating his pinky finger."\textsuperscript{129} Furthermore, employers planning a holiday party for their employees "should consider whether they want to serve alcohol."\textsuperscript{130} "Things can and do go wrong at company-sponsored gatherings—someone gets drunk and falls down or gets in an accident on the way home. Or an employee can make an unwanted pass at another guest."\textsuperscript{131} Even street harassment of passing women by construction workers may lead to discipline.\textsuperscript{132}

I. \textit{Hatch Act}

Modeled after the federal Hatch Act, a measure that regulates the political activities of public employees,\textsuperscript{133} Florida has enacted its own law in this area governing state and local public employees.\textsuperscript{134} For example, "state law makes it illegal to solicit political contributions from local or state govern-

\begin{footnotesize}
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\item[126.] Kathleen McGrory, \textit{Crew's Grim Budget Forecast: Layoffs and Cuts to Programs}, \textit{Miami Herald}, July 16, 2008, at 1B.
\item[127.] 27 AM. JUR. 2D \textit{Employment Relationship} §§ 389, 391 (2004).
\item[128.] Gearhart-Soto v. Delsman, 976 So. 2d 1150, 1151 (Fla. 4th Dist. Ct. App. 2008); see Bonica v. Dade County Sch. Bd., 549 So. 2d 220, 221 (Fla. 3d Dist. Ct. App. 1989) (per curiam).
\item[129.] Newlan v. Acad. for Little People of W. Palm Beach, Inc., 980 So. 2d 1247, 1248 (Fla. 4th Dist. Ct. App. 2008) (per curiam).
\item[131.] Id.
\item[132.] See Federica Narancio, \textit{Hey, Baby! Catcalls Are on Decline}, \textit{Miami Herald}, July 6, 2008, at 3A.
\item[134.] See FLA. STAT. § 110.233 (2007).
\end{itemize}
\end{footnotesize}
ment employees."\textsuperscript{135} A candidate for Congress apologized in 2008 after "[t]housands of e-mails that promoted a candidate . . . were sent to Miami-Dade County employees."\textsuperscript{136} Similarly, "[c]ampaigning for a candidate while at a city commission meeting could be misuse of a public position."\textsuperscript{137} Florida law also imposes "criminal penalties for public officials who campaign while working at their government jobs."\textsuperscript{138} In 2007, Florida's Insurance Commissioner apologized for "using a state computer to help a friend's political campaign."\textsuperscript{139} "Under [Miami-Dade] School Board rules, the district's e-mail system cannot be used for political activities."\textsuperscript{140} In 2008, a Miami-Dade School Board member running for reelection was criticized after sending e-mails to teachers endorsing a candidate.\textsuperscript{141} Under Florida's Code of Judicial Conduct, candidates running for the bench must "refrain from inappropriate political activity."\textsuperscript{142} The Supreme Court of Florida ruled that the Code of Judicial Conduct is violated when a candidate for the bench commends or criticizes "jurors for their verdict, 'other than in a court pleading, filing, or hearing in which the candidate represents a party in the proceeding in which the verdict was rendered.'"\textsuperscript{143}

"Active-duty military personnel are [also] prohibited from taking part in partisan politics."\textsuperscript{144} By contrast, retired officers enjoy full rights to engage in political activism.\textsuperscript{145} In 2008, the Department of Veterans Affairs prohibited voter "registration drives among the veterans living at federally run nursing homes, shelters for the homeless and rehabilitation centers across the country."\textsuperscript{146} "Although veterans are not federal employees, department offi-

\textsuperscript{135} Charles Rabin, \textit{Martinez Campaign Apologies for E-mails}, MIAMI HERALD, Apr. 18, 2008, at 5B.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} Todd Wright, \textit{Politicking from Dais Angers Candidates in Race}, MIAMI HERALD, Dec. 31, 2007, at 3B.
\textsuperscript{138} \textit{Commissioner's Apology Accepted}, MIAMI HERALD, Aug. 22, 2007, at 3C.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} Kathleen McGrory & Ketty Rodriguez, \textit{Candidate's Sending of E-mails Questioned}, MIAMI HERALD, July 15, 2008, at 1B.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{In re Amendment to the Code of Judicial Conduct—Amendments to Canon 7, 985 So. 2d 1073, 1076 (Fla. 2008).}
\textsuperscript{143} \textit{Id.} at 1074.
\textsuperscript{145} \textit{Id.}
cials based their decision in part on the Hatch Act, which bans federal employees from engaging in partisan political activity."147

"A watchdog report found that former Justice Department officials previously broke the law by politicizing decisions on jobs and internships."148 The report "found that officials disproportionately weeded out those with liberal credentials over those with conservative affiliations who were applying for the department’s honors program and summer internships."149 "The report by the department’s inspector general and Office of Professional Responsibility found that in some instances, especially involving the hiring of immigration judges, the improper screening was ‘systematic.’"150

J. Innovative Ways of Recruiting Police Officers

In South Florida, many cities are having trouble filling vacant police jobs.151 To remedy this chronic shortage of officers, South Florida cities have come up with innovative techniques. For example,

[i]n Fort Lauderdale, recruiters are traveling to New York in hopes of grabbing cops from a top criminal justice college, and to military bases to pursue people leaving the armed services. In Hallandale Beach, police have started a partnership with the local high school in hopes of getting young people interested early. And in Miami-Dade County, police have sponsored radio ads and a recruitment Web page.152

Hallandale Beach is even asking retired police officers "to come back and work with rookies."153

K. Cities Hiring Panhandlers

In 2008, Daytona Beach, Florida hopes to recruit "panhandlers to clean the city, paying them with a stipend and a place to stay."154 Costing the city

147. Id.
148. Marisa Taylor, Past Hiring Bias Found at Justice, MIAMI HERALD, June 25, 2008, at 3A.
149. Id.
152. Id.
153. Id.
154. Editorial, Panhandlers May Be Paid to Clean City, MIAMI HERALD, July 6, 2008, at 3B.
about $2500 per person, hired panhandlers would also be put through drug and alcohol screenings. 155

L. Appointing v. Electing Judges in Wake of Involuntary Retirement

In 2008, a Florida court ruled that a county court vacancy caused by an involuntary retirement of a judge must be filled by election, rather than gubernatorial appointment, where the vacancy occurred during the statutory qualifying period. 156

III. TERMS OF EMPLOYMENT: INTRODUCTION

A. Hours and Wages

1. Fair Labor Standards Act Issues

a. State of Florida’s Economic Growth

Although “Florida is ranked fourth in the nation for tech industry employment, and South Florida is the state’s leading area for the high-tech industry, . . . industry experts say unless state officials nurture this industry, Florida’s economy will lose valuable tech businesses to other states.” 157 Historically, Florida’s economy relied heavily on “tourism, agriculture and the service sector,” but a 2003 study highlighted “some of the road blocks on Florida’s path to attract high-paying tech jobs, . . . education, investment and innovation.” 158 For example, “Florida ranks 31st in the nation in terms of new patents per worker.” 159 Florida’s workers are “beset by the triple threat of high property taxes, high insurance premiums and falling property values.” 160 “Florida has the largest percentage of renters spending 30 percent or more of their income on rent and utilities . . . .” 161

“Florida’s minimum wage [went] . . . up to $6.79 per hour” on January 1, 2008. 162 “[A]bout 2 percent of the state’s workforce earns a minimum

156. See In re Advisory Opinion to the Governor re Appointment or Election of Judges, 983 So. 2d 526, 527–29 (Fla. 2008).
159. Id.
161. Id.
"Florida's [minimum wage] is higher than the federal standard of $5.85 an hour." The federal minimum wage rose to $6.55 an hour in July 2008 but is still worth less than the 1997 minimum in 2008 dollars.\(^{165}\)

b. Overtime

In 2008, the Government Accountability Office (GAO) charged that the Wage and Hour Division of the Labor Department "mishandled many overtime and minimum-wage complaints and delayed investigating hundreds of cases for a year or more."\(^{166}\) The GAO "also faulted the wage division for reducing the number of enforcement actions it pursues each year to 29,584 in the 2007 fiscal year, down 37 percent from 46,758 10 years earlier."\(^{167}\)

In 2007–08, the Department of Labor (DOL) issued three opinion letters involving overtime issues: 1) Public employees who work part-time and make above the minimum wage can receive compensatory time when they are not eligible for overtime, but work more than their allotted hours;\(^{168}\) 2) "putting on and taking off" protective safety equipment worn by meat packing employees is not a "principal activity" and, therefore, not compensable under the FLSA;\(^{169}\) and 3) police officers who work for another city while off-duty are ineligible to have that off-duty time count in the calculation of their overtime or regular rate of pay.\(^{170}\)

The FLSA carves out a number of exemptions from its overtime rules and the following federal cases speak to the nature of these exemptions. In 2007–08, the Eleventh Circuit ruled: 1) The FLSA overtime exemption for recreational and amusement businesses did not apply to two Florida dog racing firms because the firms did not functionally operate as separate units;\(^{171}\) 2) paramedics fall under the exemption from FLSA overtime rules for employees who "have the 'responsibility to engage in fire suppression'" and so do not qualify for overtime;\(^{172}\) 3) workers providing services such as plant-
ing, fertilizing, herbiciding, and harvesting were employed in "secondary agriculture" and thus expressly exempt from FLSA's overtime rules for "workers 'employed in agriculture."

4) "mandatory travel time is exempted from [overtime pay] under the Portal-to-Portal Act" amendments to the FLSA, and 5) "the primary duty of [defendant's] store managers was not management" and, thus, were not exempt under the FLSA's executive employees' exemption from overtime rules.

In 2007, the U.S. Labor Department's Wage and Hour Division concluded that "[t]he Florida Department of Children & Families illegally denied overtime to 126 Palm Beach County abuse investigators between August 2004 and September 2005." Ultimately, "the state agreed to pay $166,516.51 in back wages."

c. FLSA Remedies

A provision of the 2008 Genetic Information Nondiscrimination Act amends the FLSA to raise the penalty for child labor violations from $10,000 to $11,000 per violation. House and Senate Democrats introduced the 2008 Civil Rights Act, giving state employees the right to sue their state employers for damages for alleged overtime pay violations, thus overriding the states' Eleventh Amendment immunity.

In 2007–08, the Eleventh Circuit addressed the following issues involving FLSA remedies: 1) while traditional class action suits may be brought under the FLSA, the Act also recognizes a hybrid suit known as a collective action; 2) a trial court should instruct the jury on how to calculate back pay for unpaid overtime according to the regular rate of pay standard spelled out in the DOL bulletin where an employee is hired on a weekly salary basis;
3) district court’s finding that defendant lacked good faith and post-verdict award of liquidated damages was not inconsistent with jury’s verdict that employees failed to establish by “‘preponderance of the evidence that’” defendant “had willfully violated the FLSA;” 182 4) attorney’s fees deducted from overall FLSA settlement amount should be reduced in accordance with the lodestar method of calculation—i.e., hourly rate times number of hours devoted to case; 183 and 5) in determining reasonable number of hours devoted to case, attorney’s fee is limited to “time spent drafting the complaint,” not hours that were “either of a clerical nature, unnecessary, duplicative, and/or excessive.” 184 An award of attorney’s fees is “mandatory for prevailing plaintiffs in FLSA cases.” 185

2. Teachers’ Pay

Just “[t]o make ends meet,” many poorly paid teachers take on second jobs rather than give up working in a profession they love. 186 Nationwide, roughly “16 percent of teachers [work second] jobs outside the [school] district during the school year.” 187 The percentage is even greater in urban areas “where the cost of living exceeds the national average.” 188

Nationwide, the “average classroom teacher salary for 2005–06 [was] $49,109 [while t]he average annual salary for Broward [County, Florida] teachers [was] $44,000. The salary schedule for a teacher with a bachelor’s degree tops out at $70,000” in Broward. 189

The Broward School District proposed an innovative incentive to lure poorly-paid teachers to move here: It is “solicit[ing] ideas from developers for four sites in Fort Lauderdale and Pompano Beach, including some existing school parking lots, on which to create as many as 300 rentals for starting

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187. Kathleen McGrory, Spurred by the High Cost of Living in South Florida, Teachers Across the Region are Dashing from Their Schools to Second Jobs, MIAMI HERALD, Feb. 12, 2008, at 1A.
188. Id.
189. Hannah Sampson, Deal Lifts Teachers’ Pay 5.6%, MIAMI HERALD, Aug. 23, 2007, at 1B.
teachers."\textsuperscript{190} One limitation is that "[t]he district can only use land it already owns for the apartments."\textsuperscript{191}

3. Wage Gap Between Men and Women

On average, men earn more pay than women.\textsuperscript{192} Though the gap has narrowed over the years,\textsuperscript{193} several factors contribute to this fact: Women go in and out of the workforce with greater frequency than men to raise families; women prefer to work fewer hours to spend more time with children;\textsuperscript{194} and residual sex discrimination still lingers.\textsuperscript{195} But times are changing.

According to the United States Census Bureau, "[a]s women have children later [in life, and larger numbers] work outside the home, they are also working longer into pregnancy and returning to work" sooner than was the case in the 1960s.\textsuperscript{196}

With the increase of the rate of women in college vastly surpassing the increase of men in higher education, "the average inflation-adjusted weekly pay of women has [gone up] 26 percent since 1980," while men's pay has risen only "as much as their college graduation rate"—one percent.\textsuperscript{197}

"The female out-earns the male in one of every three households, a figure that has increased every year since 2000 and will rocket to about half by 2025."\textsuperscript{198}

In response to a 2007 United States Supreme Court ruling that set "time restrictions on lawsuits over pay discrimination," Senate Democrats proposed the Lilly Ledbetter Fair Pay Act, aimed at "giv[ing] those who believe they were discriminated against a fair opportunity to challenge their employers in court."\textsuperscript{199}

\textsuperscript{190} Hannah Sampson, Board's Aim: Rental Units for Teachers, MIAMI HERALD, Sept. 9, 2007, at 1BR.
\textsuperscript{191} Id.
\textsuperscript{192} See David Leonhardt, A Diploma's Worth? Ask Her, N.Y. TIMES, May 21, 2008, at Cl.
\textsuperscript{193} Id.
\textsuperscript{194} See Cindy Krischer Goodman, Luring Moms Back to Work, MIAMI HERALD, Dec. 20, 2006, at 1C.
\textsuperscript{195} Leonhardt, supra note 192.
\textsuperscript{197} Leonhardt, supra note 192.
\textsuperscript{198} Cindy Krischer Goodman, Who's the Boss?, MIAMI HERALD, Feb. 13, 2008, at 1C.
\textsuperscript{199} Carl Hulse, G.O.P. Set to Block Bill Easing Limits on Pay Discrimination Suits, N.Y. TIMES, Apr. 23, 2008, at A11.
4. Farm Workers' Wages

In 1996, the Eleventh Circuit ruled that farm owners, not labor contractors, are the legal employers of farm workers "and must bear the burden of complying with federal wage and hour laws."\(^{200}\) In 2008, Haitian field workers filed a class action "lawsuit against a South Miami-Dade farmer . . . alleging they and hundreds of others were paid less than minimum wage."\(^{201}\)

In 2008, "[f]arm-worker advocates sought to present more than 80,000 signatures to Burger King officials . . . urging the fast-food giant to join McDonald's and Taco Bell and help boost the wages of Florida tomato pickers."\(^{202}\) Burger King resisted this pressure "because it buys tomatoes from repackers, not from growers, so it says it has no way to get money to the workers."\(^{203}\)

5. Income Inequality

A 2008 study "found that the wealth gap in [Florida] has been increasing every year."\(^{204}\)

[Overall], Florida ranks 15th in income inequality, and the gap between Florida's richest families and those in the middle is 7th largest in the nation . . . [M]edian household income in Broward, adjusted for inflation, increased just 7 percent from 1990 through 2006 and was flat in Miami-Dade for the same time period.\(^{205}\)

Even among Miami-Dade government workers, bonuses are "heavily skewed toward the bureaucracy's top earners. Of the nearly 400 [bonuses], only 14 went to employees earning less than the county's median salary of about $45,000. More than half, 211, went to employees earning more than $100,000."\(^{206}\)

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200. Tere Figueras Negrete, Field Laborers Sue for Wages, MIAMI HERALD, Jan. 9, 2008, at 1C.
201. Id.
203. Lesley Clark, Tomato Pickers' Pay-Probe Sought, MIAMI HERALD, Apr. 16, 2008, at 1C.
204. Nancy Dahlberg, This Trifecta Shows We're Stuck in Our Tracks, MIAMI HERALD, Apr. 14, 2008, at G3.
205. Id.

Published by NSUWorks, 2008
6. Unpaid Wages

A Florida court ruled that a bonus agreement entered into by a lawyer with her paralegal, while in violation of Florida Bar Rules prohibiting fee-sharing with nonlawyers, was enforceable because the paralegal "was not in pari delicto" with the attorney. The Fourth District Court of Appeal distinguished Chandris, S.A. v. Yanakakis, where the Supreme Court of Florida ruled "that a contingent fee agreement that does not [measure up] to the Rules of Professional Conduct is void as against public policy."  

7. Wage Gap Between Races

According to a 2007 study, "[i]ncomes among black men have ... declined in the past" thirty years while black women have made gains. Among the reasons for the gap between black and white wage earners, the study blamed racial discrimination in employment. "In 2004, a typical black family had an income that was only 58 percent of a typical white family's. In 1974, median black incomes were 63 percent of those of whites." The gap might have been greater but for the role unions have played in raising African-Americans' wages.

[A 2008] study found that unions have been especially important for black Americans, helping them earn 12 percent more than their nonunion colleagues and increasing the chance that they receive health and retirement benefits. . . . Black union members earn an average of $17.60 per hour, compared to $12.74 for nonunion black workers.

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208. 668 So. 2d 180 (Fla. 1995).
209. Patterson, 980 So. 2d at 1236 (citing Chandris, 668 So. 2d at 185–86).
211. See id.
212. Id.
214. Id.
B. Health Benefits

1. Health Insurance

In 2007, the United States Senate passed the Mental Health Parity Act, directing employers to offer identical medical benefits for mental health care as they do for other medical conditions when it comes to patient deductibles, copayments, annual and lifetime coverage limits, and covered hospital days and visits.\(^{215}\)

Nationwide, in 2007, the cost of health insurance “rose by 10.1 percent.”\(^{216}\) In 2007, the seven largest health insurers in Florida “made $550 million in total profits . . . irk[ing] those individuals and employers paying higher health insurance costs.”\(^{217}\) In response, some Florida public school districts have “decided to self-insure—meaning [they] would pay [their] own medical bills instead of the insurer.”\(^{218}\) For the last decade, Miami-Dade teachers did not have to pay premiums for health insurance and a 2008 proposal forcing teachers to pay part of their health insurance premiums for the first time was soundly rejected.\(^{219}\) “[B]aby boomers who retire or are laid off before 65” are finding that it costs “at least $300 in monthly premiums for single coverage . . . Early retirees once could depend on employer-subsidized health plans until Medicare began at 65, but companies hit by new accounting rules and escalating medical costs have scaled back retiree health coverage.”\(^{220}\) Recently, however, “a number of insurers have begun to market policies specifically geared to the 50-to-64 age group.”\(^{221}\) Florida “law says that if you have a health policy, an insurer can’t dump you, although it can raise the rates. If you have no coverage, an insurer can reject you for many reasons.”\(^{222}\)

A 2008 Miami Herald survey found that South Florida employers “pay about 20 percent of [employees’ health insurance] premiums, compared with the national average of 16 percent. For families, South Florida employees

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216. Kevin G. Hall, Prices Slam Middle Class, MIAMI HERALD, Jan. 17, 2008, at 3C.
217. Phil Galewitz, Health Insurers’ Profits Rankle, MIAMI HERALD, Apr. 18, 2008, at 3C.
218. \textit{Id.}
219. Kathleen McGrory, Teachers Reject Health Insurance Increase, MIAMI HERALD, Feb. 12, 2008, at 8B.
221. \textit{Id.}
222. John Dorschner, Should You Cuddle up with COBRA?, MIAMI HERALD, July 27, 2008, at 1E.
pay 25 percent of premiums compared with the national average of 20 percent."\(^{223}\)

While, nationally, more employers are moving away from Health Maintenance Organizations (HMOs) for their employees and toward Preferred Provider Organizations (PPOs), Florida employers "are more likely to have workers participate in [HMOs]."\(^{224}\)

2. Wellness Programs

Ten "of the 15 states with the largest percentage of obese adults are in the South."\(^{225}\) "In 2007, 22.9 percent of Floridians were considered obese . . . putting Florida 34th among all states."\(^{226}\)

In an effort to reduce their health care costs, employers encourage healthy habits in efforts known as "wellness programs."\(^{227}\) A 2007 survey "found that 46 percent of employers offer [wellness programs with] economic incentives and another 26 percent plan to do so in 2008."\(^{228}\) For example, a 2007 survey found that one third of employers with two hundred or more employees "offer smoking cessation as part of their employee benefits package."\(^{229}\) The University of Miami School of Medicine’s Wellness program "focuses on preventative care, lifestyle management and fitness programs."\(^{230}\)

"More employers are covering preventive medical care and even preventive drugs at 100 percent and not subjecting these to a deductible."\(^{231}\) A 2007 study found that "[p]eople will lose weight for money, even a little money . . . when the payout is as little as $7 for dropping just a few

\(^{225}\) Fred Tasker, More Floridians Packing on the Fat, MIAMI HERALD, Aug. 28, 2007, at 4A.
\(^{226}\) Id.
\(^{227}\) Michelle Singletary, Changing Health Plans Could Save You Money, MIAMI HERALD, Sept. 30, 2007, at 3E.
\(^{228}\) Id.
\(^{229}\) Milt Freudenheim, Seeking Savings, Employers Help Smokers Quit, N.Y. TIMES, Oct. 26, 2007, at A1. Smoking "is blamed for 435,000 premature deaths . . . each year" and it costs over seventy-five billion dollars annually in healthcare. Id.
\(^{230}\) Nancy Cole, Employers Promote Healthy Living, MIAMI HERALD, Dec. 31, 2007, at 13G.
Fire departments in South Florida "have used a portion of $660,000 in Fire Act Grants awarded between 2002 and 2006 to buy treadmills, recumbent bikes, and other exercise equipment."\(^{232}\)

Relying on the Supreme Court of Florida's precedent that public employers can refuse to hire smokers,\(^{234}\) Escambia County government, starting October 1, 2008, will require all applicants to take a drug test.\(^{235}\) "Any applicant testing positive for tobacco will not be eligible."\(^{236}\)

### 3. Domestic Partnership Benefits

To date, "[d]omestic partnerships are recognized in Broward and Palm Beach counties, and insurance benefits are offered in the Miami-Dade school district."\(^{237}\) But, in 2008, Miami-Dade County is close to officially recognizing domestic partnerships for all county employees by "guaranteeing hospital visitation rights and allowing county workers to buy health insurance for their partners."\(^{238}\) In this regard, domestic partnerships are defined as "[a]ny pair of unmarried adults who live together and are not related by blood . . . regardless of sexual orientation."\(^{239}\)

In 2008, "[t]he Florida Attorney General’s Office . . . agreed to [permit] employees to use sick leave to care for their [ill] domestic partners."\(^{240}\)

Perversely, "pets of Palm Beach Community College employees . . . qualify for discounted group medical insurance . . . but domestic partners are” not entitled to similar benefits.\(^{241}\)

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234. See City of N. Miami v. Kurtz, 653 So. 2d 1025, 1028–29 (Fla. 1995) (holding that there was no privacy violation for the city to require job applicants to sign affidavits avowing they have not used tobacco for a year).


236. Id.


238. Id.

239. Id.


4. Insuring the Uninsured and Underinsured

The ranks of the uninsured rose “to 47 million in 2006, a one-year increase of 2.2 million.” The percentage of employees who enjoy employer-based health coverage fell “to 60 percent from 64 percent in 2000.” According to a 2008 study, “each percentage-point rise in” the jobless rate amid an economic downturn increases the ranks of the “uninsured by 1.1 million.” “The number of Floridians under 65 without health insurance rose from 2.8 million—20.5 percent—in 2000 to 3.7 million, or 24.4 percent, in 2005.”

In 2008, Florida enacted a law “aimed at providing low-cost health [insurance] to the uninsured by allowing the sale of [bare bones] insurance policies” that may sell for $150 a month, “about 60 percent less than the average cost of a policy for a single person in Florida.” The policies would be available to any Floridian 19 to 64 who has been uninsured for at least six months and who is not eligible for public insurance. In a critical provision, insurers would be prohibited from rejecting applicants based on age or health status. . . . The low-cost plans have to include preventive services, office visits, screenings, surgery, prescription drugs, durable medical equipment and diabetes supplies.

A 2008 study found that twenty-five million Americans are underinsured, defined as lacking sufficient coverage to protect them from financial straits should “they end[] up in the emergency room or [become] seriously ill.” The biggest increase in the ranks of the “underinsured were middle-class families [shouldering] . . . medical costs equal to 10 percent . . . of their incomes.”

243. Id.
247. Id.
249. Id.
5. Rising Health Costs

“National health spending first exceeded $1 trillion in 1995;” it exceeded $2 trillion in 2006.250 “Health spending by [employers rose] 5.7 percent in 2006, . . . the slowest rate of increase since 1997.”251 Private businesses pay 25 percent of all health costs.252 Nationwide, “the cost of employer-sponsored [health] premiums [went up] 6.1 percent in 2007, more than double the inflation rate.”253 A 2007 study found that “job-bassed [sic] family health coverage rose from $6,351 to $12,106 from 2000 to 2007. Workers’ share of the premium increased from $1,656 to $3,281.”254

In Florida, “the number of employers offering health coverage increased from 195,622 in 2001 to 209,474 in 2005, although . . . [t]he percentage of people under 65 who had private coverage in Florida fell from 67.6 percent in 2000–01 to 63.1 percent in 2005–06.”255 “About “3.9 million nonelderly Floridians—about a quarter of the state’s under-65 population . . . are expected to spend more than 10 percent of their income on healthcare in 2008 . . . . That’s a 62 percent increase over the 2.4 million who paid more than 10 percent of income in 2000.”256 “In Florida, 1.21 million non-elderly people—nearly three quarters of whom have insurance—are in families that will spend more than 25 percent of their pretax income on healthcare costs in 2008.”257

In Florida, between 2001 and 2005, “[f]amily health-insurance premiums [rose] 29 percent . . . while median family income remained almost flat.”258 “The average Floridian spent $5,483 on healthcare in 2004 . . . . That’s above the national average of $5,283 . . . .”259

A 2007 study found that Florida faced “$69 billion in lost productivity” and “$18 billion to treat some 10 million reported cases of the most common

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251. Id.
252. See id.
255. Dorschner, Health Premiums Outpace Incomes, supra note 245.
258. Dorschner, Health Premiums Outpace Incomes, supra note 245.
259. Floridians Pay More, MIAMI HERALD, Sept. 18, 2007, at 1C.
chronic ailments in 2003, including diabetes, heart disease, hypertension and pulmonary conditions.”

6. Health Care Gap by Race and Region

A 2008 study found that “[r]ace and place of residence [play a key factor] on the course and quality of . . . medical treatment a patient receives.”

For example, African-Americans “with diabetes or vascular disease are . . . five times more likely than whites to have a leg amputated and that women in Mississippi are far less likely to have mammograms than those in Maine.”

7. Retiree Health Care

In the face of new federal accounting rules, state and local employers must disclose each year the cost of present and future liability for retirees’ health care. Public employers have a huge financial incentive to reduce such liability or else risk lower credit ratings, making the cost of borrowing more expensive.

While vested retiree health benefits usually cannot be reduced or modified without violating either the Contract Clause in federal or state constitutions, public employers are capitalizing on ambiguous contract language to reduce or eliminate retiree health benefits.

An actuarial study conducted for the Broward Sheriff’s Office (BSO) found that “2,005 employees had accrued $270 million in retirement health benefits.” Broward County must pay $40 million a year “to fully pre-fund those retirement benefits without borrowing.” “Covered BSO retirees and their dependents get a 2 percent monthly discount for every year of service

262. Id.
264. See id.
266. Dan Christensen, Retiree Benefits Drain County Dry, MIAMI HERALD, July 14, 2008, at 1B.
267. Id.
up to a maximum of 50 percent off the total cost of their future health insurance premiums. Retired employees are covered for life.\footnote{268}

C. Workers' Compensation

Effective January 1, 2008, "[w]orkers' compensation rates paid by Florida employers [dropped] 18.4 percent," owing to a decrease in the "frequency of injured workers' claims."\footnote{269} Since an overhaul of the system in 2003, employers' workers' compensation rates have fallen fifty percent, "mainly because of less fraud and abuse."\footnote{270}

"Workers' comp rates are set by job type. Roofers pay some of the highest rates for the insurance because of the perilous nature of their work."\footnote{271} In 2008, roofers "could see their rates drop more than 20 percent. That would put workers' comp rate[s] at their lowest level since mid-1980s."\footnote{272}

In 2003, the Florida Legislature "eliminated hourly fees for plaintiff attorneys as part of [an] overhaul of the workers' comp system."\footnote{273} Under the new system, "judges now must follow a lower, set fee schedule for trial attorneys when they prevail—10 percent to 20 percent of the award."\footnote{274} As a result, thousands of "employees feel they have been shut out of the legal system."\footnote{275} At the same time, "[w]orkers' comp rates in Florida, at times the highest in the nation, have come down more than 50 percent."\footnote{276}

Even though Florida law presumes job-related stress contributes to "heart attacks suffered by firefighters and police officers," such public employees may still be fired if deemed unable to do the job and face the loss of workers' compensation benefits and health benefits.\footnote{277}

In 2007–08, Florida courts have ruled on a number of workers' compensation issues. What follows is a sampling of key decisions:

• A judge of compensation claims erred in denying an award of expenses for water and utility bills—in addition to rent—on the ground that the expenses “were not medically necessary.” 278
• An employer failed to rebut the presumption that heart attacks sustained by firefighters and police officers are covered by workers’ compensation under heart and lungs acts, because the employer did not offer “evidence of a specific non-occupational cause of” the police officer’s heart disease. 279
• Injuries sustained when an employee tripped “on a pile of debris left in a county right-of-way” after a hurricane, while walking from his vehicle parked “in the parking lot of a nearby shopping center” to his workplace, are compensable under the special hazard exception if claimant’s means of travel to and from work was usual, and if claimant was not expressly banned from parking in the shopping center parking lot by his employer. 280
• Where “claimant worked an average of 36 hours a week in the year” before his injury, a question of fact is raised over whether he was a full or part-time employee. 281 Calculation of average weekly wages will depend on which subsection of section 440.14(1) of the Florida Statutes applies. 282
• A prevailing employer may recover court costs even if the claim for workers’ compensation “benefits was not fraudulent or frivolous.” 283
• A workers’ compensation settlement agreement does “not comply with section 440.20(11) [of the] Florida Statutes if claimant was not represented by counsel when he signed the release.” 284
• Workers’ compensation is the exclusive remedy for claims against an employer for negligent hiring, retention, supervision and training of a store manager who allegedly “assaulted and sexually battered” a sales clerk. 285

282. See id.
• A workers’ compensation claimant was not the statutory employee of an employee leasing company where the employee leasing company was not a contractor in privity of contract with a third party. 286

D. Unemployment Issues

1. Federal Legislation

"[E]mployers pay a federal unemployment tax . . .—$56 per employee per year—and state unemployment taxes as well. On average, benefits replace about a third of a worker’s previous weekly earnings and run out after 23 weeks . . . [O]nly about one-third of jobless workers qualify to collect benefits." 287

In 2007, Congress considered bills that would give "$7 billion over five years to states that” pass overdue reforms to their unemployment programs such as offering “better coverage for part-time workers, families with children, workers who [enroll in] retraining programs and the long-term unemployed." 288 Under a measure introduced in Congress in 2008, the longstanding rule that unemployment compensation claimants “must have worked full time for at least 20 weeks to qualify for benefits” would be eliminated. 289 In 2008, the United States Senate voted seventy-five to twenty-two to “extend unemployment benefits by 13 weeks nationwide, with an additional 13 weeks for [employees] in states with high unemployment.” 290

2. Unemployment Rates

In 2008, the rate of unemployment among Latino workers stood at "6.5 percent, compared with 4.7 percent” jobless rate among non-Latin workers. 291 Latinos in the construction industry were particularly hard hit, with “7.5 percent unemploy[ed] in the first three months of 2008.” 292 “[T]he job market of 2008 is shaping up as the weakest in more than half a century for

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288. Id.
290. Pear, Veterans’ Benefit Bill, supra note 3.
292. Id.
teenagers looking for summer work . . . ." 293 "Employment among American teenagers has been sliding continuously for the last decade . . . dropping steadily since the late 1970s, when nearly half of all 16- to 19-year-olds had summer jobs." 294 In 2008, black leaders in South Florida met to talk about summer jobs for black teenagers. 295 For the first time,

[W]omen in their prime earning years . . . are retreating from the work force, either permanently or for long stretches . . . [a]fter moving into virtually every occupation, women are being afflicted on a large scale by the same troubles as men: downturns, layoffs, outsourcing, stagnant wages or the discouraging prospect of an outright pay cut. And they are responding as men have, by dropping out or disappearing for a while. 296

"More and more mid-grade officers and enlisted soldiers are leaving the military as multiple deployments to war take its toll . . . . For the Department of Defense, unemployed veterans are costly. In 2006, the agency paid $518 million in unemployment benefits, and $365 million through the first three quarters of 2007." 297

Between June 2006 and June 2007, "Florida lost more jobs . . . — 74,700—than any other state in the nation." 298 By contrast, in 2005, Florida was "No. 1 in jobs created in the entire country." 299 By the end of July 2008, "Florida’s job-loss rate will be higher [than] the nation’s for the first time since 2002." 300 The only growth areas were "in the health, education and the low-paying services fields." 301 Oddly enough, Florida’s "unemployment rate actually went down" during the same period, to 5.5 from 5.6 percent. 302 "The June 2007 rate was 4 percent." 303 While South Florida lost 17,400 jobs

293. Peter S. Goodman, Toughest Summer Job This Year Is Finding One, N.Y. TIMES, May 25, 2008, at Al.
294. Id.
295. Andrea Robinson, Black Leaders to Discuss Lack of Jobs, MIAMI HERALD, May 1, 2008, at 9B. While Miami-Dade "[C]ounty offers some [summer] jobs through parks and recreation," the city of Miami Gardens does not. Id.
298. Marc Caputo, A Bleak Forecast for Florida, MIAMI HERALD, July 17, 2008, at 1C.
299. Id.
300. Id.
301. Id.
303. Id.
between June 2007 and June 2008, local government employment actually rose by 4400 new jobs.\textsuperscript{304} For "the first time since 1992 Florida... experienced 10 straight months of consecutive job declines in [construction]" in 2007.\textsuperscript{305}

"Job loss ranks in the top 10 most traumatic things that can happen to a person."\textsuperscript{306}

E. Public Pensions

1. Accounting Rules

In 2008, the Governmental Accounting Standards Board investigated "whether the accounting rules must be changed to stop [government employees from] systematically undercounting [public] pension costs."\textsuperscript{307} Cities and states have used an array of subterfuges to disguise the true cost of future public pension liabilities.\textsuperscript{308} For example:

[M]any places had given retirees retroactive pension increases without recognizing the added cost... [N]early one-fourth of large public pension plans had used "skim funds"—accounting devices that allow officials to declare certain investment income to be "excess," skim it out of the pension fund, and [use] it on other things. Skim funds are not allowed in the private sector.\textsuperscript{309}

Critics of more stringent accounting rules, however, warn "[t]hese changes are so daunting and potentially costly that some governments are likely to stop offering pensions altogether and start giving their workers inferior benefits."\textsuperscript{310}

2. Deferred Retirement Option Plans

A Deferred Retirement Option Plan (DROP) is a form of retirement benefit that allows employees to continue working while accumulating a savings account consisting of the benefits that would have been received had

\textsuperscript{304} Id.
\textsuperscript{305} Niala Boodhoo, \textit{Labor Pains, Miami Herald}, Jan. 19, 2008, at 1C.
\textsuperscript{307} Walsh, \textit{Rules for Pensions, supra} note 265.
\textsuperscript{308} \textit{See id.}
\textsuperscript{309} Id.
\textsuperscript{310} Id.
the employee actually retired. In other words, it is a chance for an employee to earn two incomes at the same time, with one of them being saved and invested without current tax liability.

In 2007, a public school principal in Weston regretted that he enrolled in DROP: "The program lets educators earn retirement money and their salary when they enroll. They collect the money when the five years is up, but they must stop working." The school principal wants to continue as school principal, but such a decision will cost him dearly. If DROP enrollees return to work as teachers, their retirement payments continue intact. "If they return as an administrator, however, they lose 11 months of their retirement checks." In 2008, the Miami-Dade School Board turned down a school principal's offer to continue working "for $1 a year plus benefits" after five years elapsed as a DROP enrollee because a "position budgeted at $1 a year plus benefits could not be filled if [the principal] left before year's end."

A 2001 amendment "allowed DROP retirees to work their five years, take 30 days off and go right back onto the public payroll." But this loophole has cost Florida $300 million with "8,000 'retired' public employees collecting both a pension and a salary, including 131 employees collecting two state pensions—triple dippers." Miami-Dade schools stand to save $13.9 million by closing the DROP loophole and critics consider ending the loophole statewide, a "sensible policy."

311. See, e.g., In re Marriage of Davis, 16 Cal. Rptr. 3d 220, 223 (Cal. 2d Ct. App. 2004).
312. See generally id.
313. Nirvi Shah, School's 'Kahuna' on Retirement Wave, MIAMI HERALD, Aug. 29, 2007, at 1B.
314. See id.
315. Id.
316. Id.
317. Kathleen McGrory, Principal's $1-a-Year Pay Offer Turned Down, MIAMI HERALD, Apr. 30, 2008, at 1A.
318. Fred Grimm, $1 Principal Not a Pricey Double Dipper, MIAMI HERALD, May 8, 2008, at 1B.
319. Id.
320. Id.
3. Investments

In 2008, "[t]he Florida Senate passed a bill allowing the state to invest up to 1.5 percent of state retirement funds, or about $1.8 billion, into high-growth industries in Florida."  

Along with California, Louisiana, and Missouri, Florida refuses to invest state pension funds in companies "doing business in Iran."  

In 2007, the State Board of Administration, the Florida agency charged with handling investments, "reported that it has more than $2.5 billion in downgraded investments in several accounts, including the state retirement fund." Florida’s public "pension fund has $756 million in investments that have fallen below purchase guidelines," largely stemming from "the turmoil in the mortgage industry."

4. Litigation

In 2008, "[a] Broward County police union threatened to file a lawsuit against Hallandale Beach after the city introduced a law that would ban residents from serving on the police and fire pension board." After the city ultimately did pass the measure allowing only city commissioners to serve on the police and fire pension board, the union claimed "that city commissioners are serving two offices, which is against state law."

In 2007, several South Florida public pension plans brought arbitration claims against Merrill Lynch, accusing it "of conflicts of interests in its role as consultant to government pension plans . . . [seeking] to generate excessive fees and commissions for itself . . . [r]ather than looking out for the interests of city employees." At the same time, federal regulators were "investigating a Merrill Lynch pension fund consultant for misleading public
officials throughout Florida about the fees he collected and the reasons he recommended money managers.”

In 2008, the Jacksonville Police and Fire Pension Fund sued “embattled American International Group . . . accus[ing] the insurance giant and a number of its top executives . . . of understating the company’s exposure to the subprime mortgage crisis in order to inflate its stock price artificially.”

Although traditional pension plans, known as defined benefit plans, are more common in the public sector than defined contribution plans, increasingly, government employers are converting defined benefit plans into defined contribution plans—e.g., 401(k)s—as yet another way of cutting labor costs. In 2008, the United States Supreme Court ruled that employees can file lawsuits against employers or firms suspected of mishandling their 401(k) accounts.

5. Forfeiture of Pension

A Florida court ruled that a retired police officer, who had given “a false, sworn statement to investigators to hide the actions of his fellow officers” and had been adjudicated guilty in federal court of “conspiracy to obstruct justice and deprive . . . citizens of rights, privileges, and immunities,” forfeited any portion of his public pension other than his own accumulated contributions as required by Florida law. Any felony involving breach of public trust triggers the state forfeiture statute, and the administrative forfeiture determination is not a civil proceeding subject to the four-year limitations period under Florida law.

A former Broward County Sheriff, who “plead[ed] guilty to mail fraud conspiracy and tax charges,” appealed Florida’s decision that his public pension was forfeited since “his crimes were job-related.” The former

334. Joan Fleischman, Money Matters, MIAMI HERALD, May 4, 2008, at 8A.
public official argues that his crimes are not on the list of specific crimes “that call for pension forfeiture.”

F. Safety Issues

1. Anti-Bullying Bill

One study “reported that the emotional toll of workplace bullying is more severe than that of sexual harassment.” The study unearthed a few surprises: Many “bullying cases involve health care settings . . . academia and the legal profession . . . [and] 40 percent of workplace bullies are women.”

In 2008, “legislation has been introduced in 13 states to allow people to sue their employers for bullying or offensive behavior even when the conduct doesn’t meet standards for discrimination or infliction of emotional distress.” A recent poll “revealed that 37 percent of U.S. workers, or 54 million people, have been bullied at work.” “[E]mployers generally have a defense if they have used reasonable care to prevent and/or correct the problem and employees failed to avail themselves of the measures.”

On April 30, 2008, the Florida Senate unanimously approved, and on June 10, 2008, Governor Crist signed, the Jeffrey Johnston Stand Up for All Students Act, a bill that while largely aimed at prohibiting bullying directed at students, also prohibits “bullying or harassment of any . . . school system employee for any reason.” “Money for ‘safe schools’ programs—nearly $77 million statewide . . . would only be released to districts once their policies on bullying and harassment are approved by the state.” In July 2008, Broward became “the first Florida school district to put in place a new anti-bullying policy . . . as required by law.”

335. Id.
337. Id.
339. Id. at 17.
340. Id.
343. Sampson, School Bullying, supra note 342.
344. Ely Portillo, Schools Get Tough on Bullies, MIAMI HERALD, July 29, 2008, at 1B.
ment of Education will use Broward’s policy as a model for the state’s 66 other school districts.\(^{345}\)

2. Violence in the Workplace

On January 7, 2008, a new federal law, the Court Security Improvement Act of 2007, went into effect, aiming at bolstering security measures for federal and state judges and prosecutors, among others.\(^{346}\)

Law enforcement officers are “two or three times more” likely to commit suicide.\(^{347}\) “[T]he stress of the job and easy access to” firearms may account for this higher risk.\(^{348}\) Between 400 to 450 officers die by their own hands, “compared with 150 to 200 who die in the line of duty.”\(^{349}\)

3. Overcrowded Classrooms

The Broward school district’s safety director recommended that a Lauderdale Lakes charter school be closed “for packing too many kids into classrooms.”\(^{350}\) The school’s president “faces 10 second-degree misdemeanor charges” stemming from the overcrowding and a string of fire code violations.\(^{351}\)

4. Guns at the Workplace

In April 2008, “Gov[ernor] Charlie Crist signed [the] so-called guns-at-work legislation . . . allowing employees with concealed-weapons permits to begin stashing their firearms in their locked cars at work starting July 1.”\(^{352}\) “Business groups have heatedly opposed the bill on the grounds it impinges on their private property rights and their ability to lay the ground rules for employment.”\(^{353}\) The law exempts the following worksites: “[S]chools, correctional institutions, nuclear-power facilities, defense and homeland-

345. \textit{Id.}
348. \textit{Id.}
349. \textit{Id.}
351. \textit{Id.}
security firms and employers whose ‘primary business’ concerns explosives and combustibles.”

In 2008, Florida business groups challenged the constitutionality of the new guns-at-work law, claiming it “violates private property rights and conflicts with the federal Occupational Safety and Hazard Act.” It remains to be seen what impact the 2008 Supreme Court ruling upholding an individual right to bear arms, District of Columbia v. Heller, will have on this issue, especially in light of the fact that the High Court decision only narrowly applies to the federal government.

Walt Disney World claims its employees are exempt from Florida’s new guns-at-work law, citing the law’s exemption “for employers with a federal explosives permit, which Disney has for its massive, daily fireworks shows.” Acting on this assumption, Walt Disney World fired a guard after he refused “to let Disney authorities search his car.” “[T]he company maintains a zero-tolerance policy for employees who bring guns onto the property.”

G. Websites and E-mail

“[M]ore governments have turned to clear-cut e-mail and Web policies aimed at erasing gray areas in cyberspace.” Florida’s public employers are “reminding employees and [public] officials to be careful what they send, because on city- or county-owned e-mail accounts, they consider everything a public record.” Florida “law generally requires [government e-mails] to be kept on e-mail servers or on disk for at least three years.”

355. Editorial, Business Groups Sue over New Gun Law, MIAMI HERALD, Apr. 22, 2008, at 3C. “A federal court recently halted a similar . . . law in Oklahoma because it ran afoul of OSHA regulations requiring employers to provide a safe work environment.” Id.
357. See id. at 2799.
358. Caputo, Disney’s Gun Stance, supra note 354.
359. Editorial, Disney Fires Guard in Gun-Law Challenge, MIAMI HERALD, July 9, 2008, at 3C.
360. Id.
361. Gilpatrick, Cities Tighten Rules, supra note 115.
362. Id.
363. Id.
H. Post-Employment Restrictions

Non-disclosure provisions, barring departing employees from talking "about the circumstances of their departure or even disclosing the existence of the agreements" "in order to obtain severance pay or benefits," while usually found in the private sector, are now also cropping up in public employment.364 "Some experts said that the nondisclosure agreements run counter to the presumption in state law that public employees are free to speak about the function and conduct of government agencies."365 The fear exists that such confidentiality agreements will silence whistleblowers.366

A Florida appellate court ruled that a preliminary injunction may be issued to enforce the terms of a non-competition covenant where "'actual threat of harm exists when an employee possesses knowledge of an employer's trade secrets and begins working in a position that causes him or her to compete directly with the former employer or the product line that the employee formerly supported.'"367

I. Family Medical Leave Act

[If] you work for a company with more than 50 workers: You are one of the 96 million people covered by The Family Medical and Leave Act of 1993. The FMLA allows you to take time off work for up to 12 weeks a year and still hang on to your job.368

On December 12, 2007, the United States House of Representatives adopted the National Defense Authorization Act for Fiscal Year 2008 conference report,369 which includes provisions to extend the FMLA to family

365. Id.
366. See id.
members of wounded soldiers. Under the measure, families of wounded military personnel are entitled "to six months of unpaid leave." In 2008, the United States House approved a measure, the Airline Flight Crew Technical Corrections Act, extending FMLA protection to flight attendants and pilots.

In 2008, the Department of Labor (DOL) proposed changes to update its FMLA regulations. The changes address "joint employers, waivers of FMLA rights, . . . the relationship between employer approval," and the commencement of leave and medical notification requirements. One DOL proposal "would guarantee [employees] up to seven paid sick days a year." In a defeat for employers, the DOL declined to alter the period of time an employee can take intermittent leave of less than a day.

Under Florida’s 2007 Domestic Violence Leave Law, persons living in households hit by domestic violence are entitled "to take up to three days off during any twelve month period to: 1) seek an injunction for protection; 2) obtain medical care; 3) obtain mental health care; 4) [bolster] household security . . . ; or, 5) [secure] legal [aid] or either prepare for or attend court-related proceedings."

IV. DISCIPLINE, RETALIATION AGAINST WHISTLEBLOWERS, FIRST AMENDMENT AND REMEDIES

A. Discipline

1. Job-Related Misconduct

Increasingly, public employees are being disciplined for activities involving the Internet, websites, e-mail, and blogging. Typically, the public

371. Id.
374. Id.
employee makes improper use of an employer-owned computer either at work or at home. For example, Burger King "fired two employees following the disclosure that a top official secretly posted blogs slamming a farmworker advocacy group." The fired employees "participated in unauthorized activity on public websites which did not reflect the company’s views and which were in violation of company policy." A judge on the Ninth Circuit Court of Appeals was criticized for "contribut[ing] to a Web site that featured sexually explicit materials" and was weighing whether to disqualify himself from presiding over an obscenity case. A candidate for the position of Broward’s "airport director lost the job after MiamiHerald.com posted the vulgar e-mails he sent from his last government job, in which he insulted Broward commissioners and the county’s main airport." A "Pompano Beach High School teacher was suspended without pay after an investigation concluded he showed his students his MySpace page, which included profanity and talk about drugs and sex." A North Florida state representative "outraged many of Miami-Dade’s legislators when he used his state-issued e-mail account to forward a cartoon implying taxpayers were subsidizing illegal aliens."

"A confidential, nationwide list of 24,500 teachers who have been punished for a wide array of offenses was made available to the public" in 2007. "Sexual misconduct, financial misconduct, criminal convictions and other misbehavior all can bring disciplinary actions against teacher licenses." A Tampa public school teacher had her teacher’s license revoked for "academic fraud" after "she helped students taking the FCAT." "The number[] of what is officially called ‘academic fraud’ [is] tiny when compared to about 15,000 investigations the state has conducted since 1997 for all types of teacher misconduct, including drug, alcohol, sexual and physical abuse." In 2007, Broward’s school district weighed whether "to fire a teacher with a history of drinking alcohol at school."

379. Id.
381. Gilpatrick, Cities Tighten Rules, supra note 115.
382. Id.
383. Id.
384. Tanner, supra note 18.
385. Id.
386. Bill Kaczor, Teacher: Penalty Was Excessive, MIAMI HERALD, Apr. 7, 2008, at 6B.
387. Id.
388. Teacher May Lose Job over Drinking at School, MIAMI HERALD, Dec. 6, 2007, at 3B.
In 2008, Florida's Judicial Qualifications Commission found that a state appellate court judge "violated judicial ethics by writing a concurring opinion suggesting that another appellate judge cast a corrupt vote." 389 Apparently, no Florida judge or any other judge on record, "has ever been disciplined for what he or she wrote in an appellate opinion." 390

In 2008, the Judicial Conference of the United States released compulsory guidelines on how complaints alleging wrongdoing by federal judges should be processed. 391 Judicial wrongdoing covers areas such as conflicts of interest, bias, incompetence, and claims that a judge's mental or physical disability undermines his or her ability to manage a case. 392

2. Off-Duty Misconduct

A few states, like "Colorado and Minnesota have laws explicitly protecting all employees from discrimination for engaging in any lawful activity off premises during nonworking hours." 393

But not Florida. For example, a Key West police officer lost her "job after pictures she posted on her MySpace page were deemed 'conduct unbecoming' of an officer." 394 In another instance, Miami's personnel director warned all employees about "zooming through highway toll plazas by choosing the automated SunPass lane—without paying" in city vehicles. 395 Miami's personnel director warned that "'[d]isregard for the law as well as for city policies will result in disciplinary action.'" 396

"[P]ublic officials have historically been removed from office only for felonies or misdemeanors having to do with their public duties, such as theft from city coffers." 397 A former Miami City Commissioner sued to be reinstated, arguing that his conviction for misdemeanor battery and disorderly

390. Id.
394. Officer Loses Job over Racy Pictures, MIAMI HERALD, July 21, 2008, at 2B.
395. Michael Vasquez, City Employees Rack up Tollbooth Tickets, MIAMI HERALD, Nov. 17, 2007, at 1A.
396. Id.
397. Michael Vasquez, Ousted Commissioner Sues for a Comeback, MIAMI HERALD, Aug. 26, 2007, at 3B.
intoxication while off-duty does not fall within any type of crime that should disqualify him from reinstatement.\textsuperscript{398}

B. Retaliation Against Whistleblowers

In 2008, the United States Supreme Court handed down two decisions prohibiting employers from retaliating against employees who charge age and race discrimination.\textsuperscript{399} In \textit{Gomez-Perez v. Potter},\textsuperscript{400} by a vote of six to three, the Court ruled that even though the statute barring age discrimination against federal employees does not specifically prohibit retaliatory discharges, "that understood in the context of its enactment, the provision did cover retaliation."\textsuperscript{401} In \textit{CBOCS West, Inc. v. Humphries},\textsuperscript{402} by a vote of seven to two, the Court "held that Congress intended to cover retaliation claims brought under the provision of the Civil Rights Act of 1866 that is usually referred to as Section 1891."\textsuperscript{403}

"The federal whistle-blower law, known as the False Claims Act (FCA), has been a potent tool for keeping government contractors honest since it was last amended in 1986."\textsuperscript{404} In 2008, members of a Senate committee are weighing changes to the FCA that would make it easier for whistle-blowers to prevail on their claims of governmental corruption.\textsuperscript{405} One contentious issue is whether the Act "allow[s] government employees to file suit under the False Claims Act."\textsuperscript{406} One senator recommends "allow[ing] government employees to sue under the [False Claims Act] if they first exhausted all other channels without success."\textsuperscript{407} For its part, the Justice Department opposes allowing "government officials [to] sue contractors on the basis of information they collected in the ordinary course of doing their jobs."\textsuperscript{408}

In 2008, the United States Supreme Court resolved a circuit court split over whether liability under the FCA requires presentment of a fraudulent
claim to the government. In Allison Engine Co. v. United States ex rel. Sanders, the Court ruled that proof that “government money was used to pay [a] fraudulent claim” is insufficient to support a plaintiff’s claim under two FCA sections that do not require actual presentment of a claim to the government.

In the past year, Congress has also weighed strengthening the 1989 Whistle-Blower Protection Act.

The reforms would provide stronger outside review protection for whistle-blowers and would make it more difficult for their security clearances to be revoked, a common shunning device. Workers would also be freer to share classified information with Congress—when necessary to reveal the details of abuse and fraud—and would have a strengthened court review process for appealing disputed cases.

Other possible changes include “extending whistle-blower protection to workers at the F.B.I. and national intelligence agencies.”

C. First Amendment

In Garcetti v. Ceballos, the United States Supreme Court severely limited what public employee speech is protected by the First Amendment by ruling that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.” Post-Garcetti cases raise thorny questions about what public employee speech is job-related and therefore, unprotected, and what speech is not job-related. For example, the Eleventh Circuit Court of Appeal ruled, in Green v. Barrett, that a public employee’s in-court testimony is

410. Id. at 2123.
411. Id. at 2125–26 (quoting Allison Engine Co. v. United States ex rel Sanders (Allison Engine I), 471 F.3d 610, 622 (6th Cir. 2006)).
413. Protection for Endangered Whistle-Blowers, supra note 420.
414. Id.
416. Id. at 421.
417. See, e.g., Green v. Barrett, 226 F. App’x 883, 886 (11th Cir. 2007) (per curiam).
418. Id. at 883.
protected under the First Amendment when speech is not performed pursuant to his or her official duties, but is merely based on facts that the employee learned because of his or her employment.\textsuperscript{419}

In 2008, "[t]he panel that oversees Florida's public university system has asked a federal judge to overturn part of a 2006 state law that bans universities from spending money to travel to Cuba and four other nations on the U.S. terrorist list."\textsuperscript{420} The panel contends that "the travel act's prohibition runs afoul of the academic freedom accorded to universities under the First Amendment."\textsuperscript{421} Surprisingly, "[o]ne of the defendants, the board that runs the state's university system, has sided with the plaintiffs" that the ban "is an unconstitutional curtailment of academic freedom."\textsuperscript{422}

D. Remedies

Under Florida's Whistle Blower Act, a prevailing plaintiff may recover "back pay and future wages."\textsuperscript{423} The Act bars employers "from taking retaliatory action against employees for objecting to illegal conduct."\textsuperscript{424}

An issue arose in 2008 over whether a former Miami city attorney who pleaded no-contest to misdemeanors involving misuse of city funds should be entitled to $120,000 in severance pay.\textsuperscript{425} An editorial in the Miami Herald made its position clear: "City officials who abuse the public trust shouldn't be rewarded as they slink out the door."\textsuperscript{426}

The doctrine of "election of remedies" posits that at some point a plaintiff in a civil suit must make up his or her mind over which one of two or more remedies he or she is seeking.\textsuperscript{427} For example, in a breach of contract case, the plaintiff must choose whether to sue on the contract and ask for damages or seek to unravel the agreement through rescission.\textsuperscript{428} The two

\textsuperscript{419} See id. at 886.
\textsuperscript{420} Gary Fineout, Board: Undo Law on Travel to Cuba, MIAMI HERALD, Jan. 2, 2008, at 1B.
\textsuperscript{421} Id.
\textsuperscript{422} Editorial, An Unwarranted Curb on Academic Freedom, MIAMI HERALD, Jan. 9, 2008, at 20A.
\textsuperscript{423} Patrick Danner, Ex-Worker Challenges Firing, MIAMI HERALD, Feb. 6, 2008, at 3C.
\textsuperscript{424} Id.
\textsuperscript{425} Opinion, Punish Wrongdoing; Don't Pay for It, MIAMI HERALD, Feb. 22, 2008, at 20A.
\textsuperscript{426} Id.
\textsuperscript{427} See, e.g., City of Jacksonville v. Cowen, 973 So. 2d 503, 506 (Fla. 1st Dist. Ct. App. 2007).
\textsuperscript{428} Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1279 (11th Cir. 2004).
remedies are mutually exclusive. The issue of election of remedies arose in a 2007 Florida appellate court case where the issue was whether an enforcement officer "had waived his right to" arbitrate his disciplinary dismissal under a collective bargaining agreement by electing to appeal an earlier suspension "to the Civil Service Board and then having that appeal dismissed." The court ruled that whether the plaintiff had waived his right to arbitration was a question for the trial court, not the arbitrator, but because no waiver occurred "the parties must participate in arbitration as ordered by the trial court."

V. EMPLOYMENT DISCRIMINATION

A. Generally

In 2007-08, the United States House of Representatives considered bills to overturn Ledbetter v. Goodyear Tire & Rubber Co., making clear that the time limit for filing pay discrimination claims begins to run each time an employee receives a paycheck that reflects discrimination, not only when the employer makes a discriminatory pay decision. In the Senate version, time limits for filing pay bias claims begin to run when the employee "knew or should have known" of the discrimination.

On June 9, 2008, the United States Supreme Court ruled in Engquist v. Oregon Department of Agriculture that public employees who are the targets of arbitrary treatment by their employers may not bring a class of one equal protection claim, unless the discrimination is grounded on "race, sex, or another protected [class]."

In 2007, the Eleventh Circuit rendered two decisions bearing on elements of the prima facie case for employment discrimination under Title VII. In Crawford v. City of Fairburn, the court ruled that when an em-

429. Id. (quoting Deemer v. Hallett Pontiac, Inc., 288 So. 2d 526, 527–28 (Fla. 3d Dist. Ct. App. 1974) (per curiam)).
430. Cowen, 973 So. 2d at 506.
431. Id. at 504.
437. See Crawford v. City of Fairburn, 482 F.3d 1305 (11th Cir. 2007); McMillan v. DeKalb County, 211 F. App’x 821 (11th Cir. 2006) (per curiam).
ployer produces multiple legitimate, non-discriminatory reasons for firing an employee, the employee needs to rebut each and every reason—rebutting one is now sufficient.\(^\text{439}\) In *McMillan v. DeKalb County*,\(^\text{440}\) the court noted a circuit split over the proper application of the qualified immunity defense in mixed-motive cases.\(^\text{441}\)

In 2008, the Equal Employment Opportunity Commission (EEOC) issued a final rule deleting a regulation allowing dismissal of federal employment discrimination claims when the plaintiff could not be found, was uncooperative, or rejected a fair remedy.\(^\text{442}\) Instead, under the new rule, the EEOC authorizes dismissal of a charge only when the agency finds no rational basis for the claim, or the charge does not state a claim on which relief can be granted.\(^\text{443}\)

**B. Race**

The Eleventh Circuit and a federal district court in the Eleventh Circuit each decided one notable race discrimination case in 2008.\(^\text{444}\) In *Goldsmith v. Bagby Elevator Co.*,\(^\text{445}\) the court ruled that an African-American fired after refusing to sign a waiver of an EEOC charge pending against his employer, established a causal relation between the filing of plaintiff's complaint of discrimination and his dismissal, especially since a white employee, who refused to sign a waiver, was given an opportunity to reconsider.\(^\text{446}\) By contrast, the Eleventh Circuit ruled in another case that the employer was entitled to summary judgment owing to plaintiff's failure "to establish a prima facie case of rac[ial] discrimination."\(^\text{447}\) The plaintiff was unable to show that similarly situated employees were treated differently or that she was qualified for the job she lost.\(^\text{448}\) Even if plaintiff did establish a prima facie

\(^{438}\) 482 F.3d at 1305.

\(^{439}\) Id. at 1308.

\(^{440}\) 211 F. App'x at 821.

\(^{441}\) Id. at 822–23.


\(^{443}\) Id. at 3387–88.


\(^{445}\) 513 F.3d at 1261.

\(^{446}\) See id. at 1271–77.

\(^{447}\) Dawson, 2008 WL 1924266, at *19.

\(^{448}\) Id. at *8.
case, she failed to show that the defendant’s non-discriminatory reason for her dismissal was pretextual. In *Davis v. Coca-Cola Bottling Co.*, the Eleventh Circuit, along with three other circuits, rejected the EEOC’s view that “a pattern or practice claim may be brought [either] as an individual action or a class action as the plaintiff chooses.”

A Miami-Dade jury, in 2008, ruled that “Florida International University discriminated against a black employee when it reorganized his department and fired him in 2004.”

A former North Miami Police Chief filed a complaint with the EEOC in 2007, “saying she was fired out of retaliation for filing previous complaints with the same board. . . . She claimed she was discriminated against based on race and gender.”

Presidential candidates John McCain and Barack Obama disagree on the issue of affirmative action in employment. While McCain backs “an effort to end state and locally run minority preferences. . . . Obama say[s] policies that consider race need to continue.”

C. Gender, Same-Sex, Transsexuals

Since the 1960's, “a number of developments [provide] more opportunities for pregnancy leave, paid and unpaid, and increased protections for pregnant women against job discrimination.” But, a backlash has recently emerged from employees without children who oppose special benefits for pregnant workers and employees with children. “Childless singles feel put upon, taken for granted and exploited—whether because of fewer benefits, less compensation, longer hours, mandatory overtime or less flexible schedules or leaves—by married and child-rearing co-workers . . . .”

449. *Id.* at *19.*
450. 516 F.3d 955 (11th Cir. 2008).
451. *Id.* at 967 n.25, 969 n.30 (concluding that a pattern or practice claim against employer not filed as class action was properly dismissed).
455. *Id.*
458. *Id.*
Three cases from the United States Court of Appeals for the Eleventh Circuit have addressed the prima facie case for proving sexual harassment.\(^{459}\) In *Reeves v. C.H. Robinson Worldwide, Inc.*,\(^{460}\) the court ruled that "harassment in the form of offensive language can be ‘based on’ the plaintiff’s membership in a protected group even when the plaintiff was not the target of the language and other employees were equally exposed to the language."\(^{461}\) In a second decision, the court found that a “[c]ounty exercised reasonable care to prevent and correct any . . . harassing behavior, and that [the plaintiff] unreasonably failed to take advantage of [the] employers [sic] corrective measures or to avoid any harm to her.”\(^{462}\) In addition, the plaintiff failed to demonstrate that failure to transfer plaintiff to a school resource officer position at a certain middle school was in retaliation for plaintiff’s complaints about workplace harassment.\(^{463}\) In *Dar Dar v. Associated Outdoor Club, Inc.*,\(^{464}\) the court ruled that “two sexually inappropriate comments and two incidents” when a woman’s buttocks was touched, were no more serious than conduct deemed insufficient to constitute hostile work environment in governing precedent.\(^{465}\)

In 2008, Attorney General Michael B. Mukasey signed a new equal employment opportunity policy that bans discrimination on the basis of sexual orientation at the Department of Justice.\(^{466}\) Moreover, an organization for gay, lesbian, bisexual, and transgender employees and contractors of the Department of Justice received permission to use department bulletin boards and other avenues of communication.\(^{467}\)

In 2007, Congress considered a measure, the Employment Non-Discrimination Act (ENDA),\(^{468}\) "which would put bias involving sexual orientation and gender identity in the workplace on the same legal footing as

\(^{459}\) See generally Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139 (11th Cir. 2008); Webb-Edwards v. Orange County Sheriff’s Office, 525 F.3d 1013 (11th Cir. 2008); Dar Dar v. Assoc. Outdoor Club, Inc., 248 F. App’x. 82 (11th Cir. 2007).
\(^{460}\) 525 F.3d at 1139.
\(^{461}\) Id. at 1143. Daily exposure to male-co-workers’ use of “bitch” to refer to women was pervasive enough to be actionable. Id. at 1141, 1147.
\(^{462}\) Webb-Edwards v. Orange County Sheriff’s Office, 525 F.3d 1013, 1016 (11th Cir. 2008).
\(^{463}\) Id. at 1028.
\(^{464}\) 248 F. App’x 82 (11th Cir. 2007).
\(^{465}\) Id. at 85–86 (citing Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 585 (11th Cir. 2000)).
\(^{467}\) See Darryl Fears, Attorney General Reverses Curbs on Gay Group at Justice Department, WASH. POST, Feb. 5, 2008, at A17.
discrimination on the basis of race, color, gender, religion, national origin, age and disability. Thirty-one states do not ban sexual orientation discrimination in employment. Before the United States’ House passed ENDA by a 235-184 vote, however, the provision protecting transgendered employees was eliminated, “fractur[ing] the nation’s gay organizations.”

Some courts accord transgendered workers protection under Title VII under the doctrine of sexual stereotyping developed by the United States Supreme Court in Price Waterhouse v. Hopkins, which outlaws discrimination against an employee based on “stereotyped notions of appropriate female [or male] appearance and behavior.”

In 2008, Broward County made “it illegal to deny housing or jobs to transgender or pregnant residents.” In 2007, “Oakland Park became the eighth city in Florida to enact legal protections for transgendered people. West Palm Beach, Miami Beach, Gulfport, Tequesta, Key West, Largo, and Lake Worth each have included gender identity and expression in their policies.

In 2008, gay-rights groups rated eighty-eight hospitals “on how they treat[ed] same-sex partners.”

D. Age Discrimination

In 2008, the United States Supreme Court handed down four decisions involving age discrimination in employment. In Federal Express Corp. v. Holowecki, the Court ruled that any document filed with the EEOC that may fairly be read as a request for agency action to safeguard a worker’s rights, or otherwise resolve a dispute with the employer, counts as a “charge” that triggers the waiting period for filing a suit under the Age Discrimination

470. Id.
in Employment Act (ADEA).\textsuperscript{479} In \textit{Kentucky Retirement Systems v. Equal Employment Opportunity Commission},\textsuperscript{480} the Court ruled that a public pension plan that intentionally affords differing amounts of retirement benefits to employees based on their age does not violate the ADEA.\textsuperscript{481} In \textit{Sprint/United Management Co. v. Mendelsohn},\textsuperscript{482} the Court ruled that evidence introduced by an ADEA plaintiff that other workers at the firm sustained age bias by bosses outside of plaintiff's supervisory chain is "neither \textit{per se} admissible nor \textit{per se} inadmissible."\textsuperscript{483} In \textit{Gomez-Perez v. Potter},\textsuperscript{484} the Court ruled that federal employees may bring retaliation claims based on age even though the ADEA is silent on the issue.\textsuperscript{485}

Since 1960, the Federal Aviation Administration (FAA) has imposed mandatory retirement for airline pilots at age sixty.\textsuperscript{486} In 2007, thirty House members asked the FAA to waive its age cap for one year while Congress framed legislation "to raise the mandatory retirement age."\textsuperscript{487} On December 13, 2007, the United States House of Representatives approved legislation, the Fair Treatment for Experienced Pilots Act, raising the mandatory retirement age for airline pilots to sixty-five from age sixty.\textsuperscript{488}

In 2008, House and Senate Democrats introduced the Civil Rights Act of 2008, aimed at entitling state employees the right to sue their state employers for damages for alleged age discrimination.\textsuperscript{489}

In 2007, the EEOC published a final rule amending 29 C.F.R. part 1625 to reflect that the ADEA does not bar employers from favoring older workers over younger ones, even if all employees are older than forty.\textsuperscript{490} In 2007, the EEOC issued a final rule permitting employers to alter, reduce, or eliminate retiree health benefits once a retiree becomes eligible "for Medicare or com-
parable [s]tate health benefits program[s]" without committing age discrimi-
nation.491

In 2008, the United States Court of Appeals for the Eleventh Circuit
ruled, in Van Voorhis v. Hillsborough County Board of County Commis-
nioners,492 that plaintiffs may establish disparate treatment either by direct or
circumstantial evidence.493

E. Disability Discrimination

In 2008, the House of Representatives passed a measure aimed at over-
turning Murphy v. United Parcel Service, Inc.,494 by instructing courts not to
"consider the effects of 'mitigating measures'" in assessing whether a worker
is disabled.495 In addition, the proposed legislation would delete the words
"substantially limits'" and replace it with "'materially restricts' a major life
activity," rendering far more workers disabled under the Americans with
Disabilities Act (ADA).496

In 2008, President Bush signed a law that prohibits genetic discrimina-
tion in employment.497 The Genetic Information Nondiscrimination Act bars
employers from dismissing, refusing to hire, or in any way targeting em-
ployees on grounds of genetic information.498 The law bans the gathering of
genetic information by employers but permits workplace genetic testing only
in specified circumstances, such as monitoring the harmful effects of toxic
workplace exposures.499

In 2008, the EEOC issued an opinion letter discouraging periodic medi-
cal exams for city bus drivers whose job, unlike police officers and firefig-
hters, "does not exist for the [key] purpose of [shielding] the public from out-
side harm."500

492. 512 F.3d 1296 (11th Cir. 2008).
493. Id. at 1300. Employer's statement that he "'didn't want to hire any old pilot'" consti-
tuted direct evidence of age bias that warranted a jury trial under the ADEA. Id.
495. Robert Pear, House Votes to Expand Civil Rights for Disabled, N. Y. TIMES, June 26,
496. Id.
122 Stat. 881, 907.
498. See id. § 202(a)(1).
499. See id. § 202(a)(5).
500. EEOC Notes Issues in Periodic Medical Exams for City Bus Drivers, Says Other
In 2007, a New York Times editorial bemoaned the fact that "[i]t still takes almost half a year for the average veteran’s claim for disability benefits to be decided in a tortuous process that can involve four separate hearings . . . [and urged] wholesale changes in the veterans’ benefit system, which hasn’t been modernized since 1945." 501

A 2007 study found that chronic diseases like “diabetes and hypertension cost the” United States economy over one trillion dollars annually in lost productivity. 502 Another study found that “[e]mployers who screen and guide depressed [employees] through treatment [programs enjoy] an average of three extra weeks of productivity” from such employees annually. 503 Finally, a 2007 study found that seven percent of full-time employees suffered from depression, women were more likely to suffer from it, and that younger employees scored “higher rates of depression than older” workers. 504 Three categories of workers battled depression the most: “11 percent of personal-care workers,” 10.3 percent of “[w]orkers who prepare and serve food,” and 9.6 percent of healthcare and social workers. 505

Three Eleventh Circuit Court of Appeals cases dealt with disability issues in 2007. 506 In Sheely v. MRI Radiology Network, P.A., 507 relying on Title VI and Spending Clause precedents, the court ruled that victims of intentional discrimination may recover non-economic damages under the Rehabilitation Act. 508 In Smith v. Olin Corp., 509 the court ruled that in a retaliation case, in assessing the proximity of an adverse employment activity to a protected activity, the causal connection analysis runs from the date of the latest protected activity, and not from the earliest ADA protected activity. 510 In Littleton v. Wal-Mart Stores, Inc., 511 the court noted a circuit split over

504. Kevin Freking, Depression Hits Care Workers Hardest, MIAMI HERALD, Oct. 14, 2007, at 3A.
505. Id.
506. See generally Littleton v. Wal-Mart Stores, Inc., 231 F. App’x 874 (11th Cir. 2007) (per curiam); Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007); Smith v. Olin Corp., No. 06-15830 (11th Cir. May 23, 2007).
507. 505 F.3d at 1173.
508. Id. at 1191-92 (allowing recovery of emotional distress damages).
509. No. 06-15830 (11th Cir. May 23, 2007).
511. 231 F. App’x at 874.
whether interaction with others, or social interaction, amounts to a "'major life activit[y]' under the ADA."512

F. Religion

In 2008, "[t]he Bush administration wants to require all recipients of aid under federal health programs to certify that they will not refuse to hire nurses and other providers who object to abortion and even certain types of birth control."513 "Such certification would also be required of state and local governments, forbidden to discriminate, in areas like grant-making, against hospitals, and other institutions that have policies against providing abortion."514

G. Veterans

"Many veterans have a hard time transitioning from the military life into civilian work."515 One survey "found that 76 percent of veterans felt unable to effectively translate their military skills in civilian terms and 72 percent felt unprepared to negotiate a salary."516

Under the Federal Uniformed Services Employment and Reemployment Rights Act (USERRA),517 employers are prohibited "from discriminating against military personnel."518 In 2008, "the Justice Department settled a class-action USERRA suit against American Airlines over allegations the company didn’t allow 353 pilots to accrue vacation time and sick-leave benefits while on military leave."519 In 2007, "[t]he Labor Department opened 1,366 USERRA cases . . . [of] those, 75 were in Florida, down from 81 in 2006."520 In 2007, "[t]he Defense Department’s Employer Support for the Guard and Reserve, which mediates disputes between employers and reservists, reported having 100 cases in Florida."521 "A Pentagon survey of reservists in 2005–2006 . . . found that 44 percent [of returning troops] said they

512. See id. at 876 (quoting 29 C.F.R. § 1630.2(i) (2003)).
514. Id.
515. Milburn, supra note 297.
516. Id.
518. Patrick Danner, Suit Says Service Cost Vet His Job, MIAMI HERALD, May 1, 2008, at 1C.
519. Id.
520. Id.
521. Id.
were dissatisfied with how the Labor Department handled their complaint of employment discrimination based on their military status, up from 27 percent in 2004."\(^{522}\)

In 2007, the United States House Veterans’ Affairs Subcommittee on Economic Opportunity questioned “whether federal money dedicated to finding vets employment is being spent wisely and fairly.”\(^{523}\) The Labor Department “runs a separate Web campaign called HireVetsFirst that aims to raise employer awareness about the value of hiring veterans.”\(^{524}\)

H. Remedies

The Class Action Fairness Act of 2005,\(^{525}\) aimed at removing most class action suits from state courts to federal courts where it was thought such suits would be assessed more objectively.\(^{526}\) A 2006 study found that CAFA had an immediate effect and time-series analysis show statistically significant increases in class action filings and removals after the effective date of CAFA for certain natures of suit.\(^{527}\)

A measure introduced in both houses of Congress, the 2008 Civil Rights Act,\(^{528}\) would, among other things, eliminate the cap on Title VII damage awards and curtail the use of mandatory arbitration clauses in individual employment contracts.\(^{529}\)

Under the Federal Arbitration Act (FAA),\(^{530}\) a court must confirm an arbitration award unless it is vacated or modified on grounds such as fraud in procuring the award or arbitrator partiality.\(^{531}\) In 2008, resolving a circuit split, the United States Supreme Court ruled, in Hall Street Associates, L.L.C. v. Mattel, Inc.,\(^{532}\) that the FAA’s grounds for vacating and modifying

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\(^{522}\) Hope Yen, Reservists Want Jobs Back, MIAMI HERALD, Nov. 10, 2007, at 1C.

\(^{523}\) Kerr, supra note 1.

\(^{524}\) Id.


\(^{526}\) Id. § 2.


\(^{529}\) Id. § 423.


\(^{531}\) See id. §§ 9–10.

\(^{532}\) 128 S. Ct. 1396 (2008).
an arbitration ruling are exclusive and may not be expanded by agreement of parties seeking judicial review. 533

In 2008, the Eleventh Circuit handed down two decisions involving remedies. 534 In *Advanced Bodycare Solutions, L.L.C. v. Thione International, Inc.* 535 the court ruled that mediation is not arbitration for purposes of compelling the mediation process under the FAA, in contrast with several district court rulings that mediation contracts are enforceable under the FAA. 536 In *Davis*, the court joined three other circuits in rejecting the EEOC’s view “that a pattern or practice claim may be brought [either] as an individual action or [as] a class action as the plaintiff chooses.” 537

VI. PUBLIC SECTOR UNIONS

“[U]nion membership as a share of the total work force rose [in 2007] for the first time in a quarter-century, inching up to 12.1 percent from 12 percent the year before. A total of 7.5 percent of private-sector workers were in unions, and 35.9 percent of public-sector workers.” 538

Surprisingly, “George W. Bush is in line to be the first president since World War II to preside over an economy in which federal government employment rose more rapidly than employment in the private sector.” 539 “Under [Bush], federal job growth has averaged 0.73 percent per year, but employment rolls at state and local governments have grown even more rapidly, at rates of 0.88 percent for state governments and 1.21 percent for local governments.” 540

According to a 2007 study, the ranks of tenured professors is thinning out as the ranks of part-time instructors and contract professors have grown, owing largely to administrators’ need for greater “flexibility in hiring, firing and changing course offerings.” 541 In response, the American Federation of

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533. *Id.* at 1404.
534. *See* *Advanced Bodycare Solutions, L.L.C. v. Thione Int’l, Inc.*, 524 F.3d 1235, 1241 (11th Cir. 2008); *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967 (11th Cir. 2008).
535. 524 F.3d 1235 (11th Cir. 2008).
536. *See id.* at 1238–40.
537. *Davis*, 516 F.3d at 967, n.25, 969 (holding that pattern or practice claim against employer not filed as class action was properly dismissed).
540. *Id.*
Teachers is supporting measures "in 11 states to [require] that 75 percent of classes be taught by tenured or tenure-track teachers."\textsuperscript{542}

After five bargaining sessions over raises between the Miami-Dade teachers' union and the school district, little progress toward a compromise was made.\textsuperscript{543} The union "declared an impasse in negotiations," triggering a procedure whereby "a state-appointed special magistrate . . . will issue a nonbinding opinion . . . . The School Board will then have to decide whether to accept the magistrate's recommendation about the raises."\textsuperscript{544}

The Police Benevolent Association (PBA) has represented Broward Sheriff's Office "deputies for more than a decade," but that may change as deputies vote over whether to stay with the PBA or to switch to the International Union of Police Associations, a rival public union promising "smoother relations between management and the rank and file."\textsuperscript{545}

\textbf{VII. CONCLUSION}

This survey merely skims the tip of the iceberg of Florida public employment law in 2007–08. Every stage of employment, from hiring, to the terms of employment, to discipline and retaliation against whistleblowers, to employment discrimination, creates a wide array of legal issues at the federal, state, and local levels. As evidenced by the pervasive citation to news articles, public sector employment invites widespread media attention, and news stories provide a wealth of insight and supplements the usual source of legal precedent: constitutional, statutory, regulatory, administrative, and the common law.

\textsuperscript{542} Id.
\textsuperscript{543} See Kathleen McGrory, \textit{Unions Intensify Battle over Raises}, \textit{MIAMI HERALD}, July 8, 2008, at 1A.
\textsuperscript{544} Id.
\textsuperscript{545} Jennifer Lebovich, \textit{BSO Deputies Urged to Switch Unions}, \textit{MIAMI HERALD}, Oct. 2, 2007, at 3B.
I. INTRODUCTION

This survey discusses developments in Florida gambling law that took place during the period July 1, 2007 to June 30, 2008. It was a busy year, beginning with the publication of the first book on Florida’s gambling history1 and ending with the Florida Supreme Court poised to rule on the validity of the state’s gambling compact with the Seminoles.2

II. ADULT ARCADES

Although Florida prohibits both slot machines and gambling parlors,3 in 1996 it passed the “Chuck E. Cheese Law,”4 which permits “games of skill” in adult arcades.5 But because the statute contains no standards, law en-

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2. See infra Part IX.
4. Id. § 849.161. The law is so named because legislators had in mind the type of games found in family restaurants like Chuck E. Cheese. See Fred Grimm, Cheesy Loophole Lets 2-Bit Slot Joints Cash In, MIAMI HERALD, May 24, 2005, at 1B.
forcement officials often claim that such machines are being operated as illegal "games of chance."6

In Rowe v. County of Duval,7 the First District Court of Appeal reversed and remanded a trial court’s ruling that the Chuck E. Cheese Law was inapplicable because the appellants' machines accepted both coins and paper bills, instead of just the former (as contemplated by the statute).8 The majority considered this conclusion premature, however, because of the failure to determine whether the machines were games of skill.9 If they were, the appellants then would have the opportunity to renew their argument that the Chuck E. Cheese Law should be extended in light of technological advances that have made it possible for machines to accept both coins and bills.10 In a dissent, Judge Van Nortwick insisted that the statute’s wording was clear and that no remand was necessary.11

III. BINGO

Bingo’s popularity in Florida has been declining for years, putting a serious crimp in the budgets of many charities.12 Nevertheless, in Bradenton Group, Inc. v. State,13 the game managed to produce an opinion that will serve as a cautionary tale for years to come.

Philip Furtney was the owner of three businesses that collectively made money by renting out bingo halls.14 In 1995, prosecutors accused Furtney and his companies of violating the bingo statute and sought an order of forfeiture under Florida’s RICO statute.15 In response, Furtney successfully

8. Rowe, 975 So. 2d at 527.
9. Id. at 529.
10. Id. at 528-29.
11. Id. at 529-30 (Van Nortwick, J., dissenting).
13. 970 So. 2d 403 (Fla. 5th Dist. Ct. App. 2007), review denied, 987 So. 2d 1210 (Fla. 2008).
14. Bradenton Group, 970 So. 2d at 405 n.1.
15. Id. at 405.
moved for an order requiring the government to post a $1.4 million bond.\textsuperscript{16} The dispute eventually reached the Florida Supreme Court, which in 1998 ruled that bingo offenses are not predicate RICO acts,\textsuperscript{17} seemingly bringing the matter to an end. In 1999, however, the government refiled the complaint, and, following numerous pre-trial motions, in 2005 a jury convicted the defendants of racketeering.\textsuperscript{18}

On appeal, the Fifth District Court of Appeal reversed and remanded.\textsuperscript{19} Finding that the Supreme Court's 1998 decision had been ignored, the panel sharply rebuked the state's attorneys:

\begin{quote}
\textit{The defendants' bingo offenses could not form the basis for RICO liability and forfeiture. Bradenton II [the Supreme Court's 1998 decision] and collateral estoppel barred the action below. We are intrigued by the State's zealousness in this prosecution in light of the Florida Supreme Court's ruling in Bradenton II and Pondella Hall for Hire, Inc. v. City of St. Cloud, 837 So.2d 510, 510-11 (Fla. 5th DCA 2003). During oral argument, the State contended that minor changes in the amended complaint, additional parties and reliance on [the] federal [RICO] statute supported the revised prosecution. The argument is specious. The American Bar Association Standards for Criminal Justice, Prosecution Function Standard 3-1.1(b) and 3-1.1(c) (2nd ed. 1986 Supp.) states:}

\begin{enumerate}
\item[(b)] The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her functions.
\item[(c)] The duty of the prosecutor is to seek justice, not merely to convict.
\end{enumerate}

We recommend this section to the prosecutors for their edification and enlightenment.\textsuperscript{20}
\end{quote}

IV. CASINOS

While Florida has no land-based casinos of its own,\textsuperscript{21} two cases during the year found Floridians suing over other states' casinos. In \textit{FLA Consult-}

\begin{footnotesize}
\textsuperscript{16} Id.
\textsuperscript{17} See Department of Legal Affairs v. Bradenton Group, Inc., 727 So. 2d 199 (Fla. 1998).
\textsuperscript{18} Bradenton Group, 970 So. 2d at 406-08.
\textsuperscript{19} Id. at 412.
\textsuperscript{20} Id. at 411-12.
\end{footnotesize}
ing, Inc. v. Rymax Corp., 22 a Florida company called FLA Consulting, Inc. agreed to assist two New Jersey companies that were seeking casino business in such places as Connecticut, Nevada, and New Jersey. 23 When the relationship soured, FLA Consulting filed suit in a Florida state court, which the defendants timely removed to federal court and then sought to have dismissed for lack of personal jurisdiction. 24

Finding that the defendants had fair notice that they might be sued in Florida, and had not only paid FLA Consulting in Florida but had shipped merchandise into the state and attended two trade shows here, the court had little difficulty denying the defendants’ motion. 25 Although the defendants also argued that their contract with FLA Consulting required all disputes to be heard in New Jersey, the court held that the parties had operated under a later contract that lacked such a requirement. 26

The other casino case of the period was Certegy Transaction Services, Inc. v. Travelers Express Co. 27 In 2004, Certegy purchased all of the stock of Game Financial Corporation, a wholly-owned subsidiary of Travelers that provided cash advances to casino customers. 28 Although Certegy paid Travelers $43 million, the parties agreed that this amount would be reduced if, within a specified time, Game lost certain customers. 29

One of the designated customers was the MGM Grand Hotel in Las Vegas, which Game did end up losing. 30 As a result, Certegy asked Travelers to adjust the purchase price by refunding $4.8 million. 31 When Travelers refused, claiming that MGM had remained a Game customer throughout the adjustment period (which ended on November 30, 2005), Certegy took it to

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21. Proposals to authorize them, of course, have appeared on the ballot three times. In 1978, a plan to allow casinos in Miami Beach failed by a vote of 71%-29%. In 1986, a plan to allow each county to decide for itself whether to have casinos failed 68%-32%. And in 1994, a plan to allow casinos at selected sites, including pari-mutuel facilities and riverboats, failed 62%-38%. See Patrick A. Pierce & Donald E. Miller, Gambling Politics: State Government and the Business of Betting 110-24 (2004), and Florida Department of State—Division of Elections, Initiatives/Amendments/Revisions, http://election.dos.state.fl.us/initiatives/initiativelist.asp (last visited July 15, 2008).
23. Id. at *1.
24. Id.
25. Id. at *2-*3.
26. Id. at *4.
28. Id. at *1.
29. Id.
30. Id. at *2.
31. Id. at *2-*3.
court. While Certegy admitted that MGM's termination had occurred in December 2005, it pointed out that MGM had given notice of its intention to cancel on November 11, 2005. Not surprisingly, the court, finding it impossible to resolve these factual disputes without a trial, denied the parties' cross-motions for summary judgment.

V. INTERNET GAMBLING

No internet gambling cases were reported during the survey period, although in November 2007 Attorney General Bill McCollum, responding to an inquiry from Cedar Grove Police Chief Guy J. Turcotte, reconfirmed that such betting is illegal in Florida. Local newspaper accounts, however, left little doubt regarding the popularity of web-based wagering.

VI. PARI-MUTUELS

Despite anecdotal evidence that the growing number of slot machines in South Florida is leading to an increase in gambling addictions, in January

33. Id.
34. Id. at *6-*7.
35. See 2007 FLA. ATT'Y GEN. ANN. REP. 188. Turcotte decided to seek McCollum's advice after area businesses began selling telephone calling cards that came with free sweepstakes points which can be redeemed to play the sweepstakes games. The sweepstakes games are displayed on an interactive computer terminal, the object of which is to line up various symbols and characters in a winning combination. Each ticket contains a configuration of 3 to 25 symbols; winning combinations of which entitle the bearer to money prizes ranging in value from $1.00 to $1,000.00. Each terminal communicates with a server, which causes the terminal's screen to display whether the participant has won any "win credits" which can be redeemed for cash or prizes.

Id. at 188-89.
36. See, e.g., Saundra Amrhein, Gambling Raid Shuts Internet Site, ST. PETERSBURG TIMES, June 6, 2008, at 3 (South Shore & Brandon Times) (Sun City computer center discovered to be serving as cover for a gambling house); Andrew Ba Tran, 12 Accused of Running Betting, Loan Sharking Ring, S. FLA. SUN-SENT., May 24, 2008, at 1B (internet gambling operation headquartered in Coral Springs restaurant broken up); Todd Leskanic, Professor Avoids Jail, Will Repay Club, TAMPA TRIB., May 16, 2008, at 4 (Pasco) (former University of Tampa accounting professor ordered to repay $120,000 she stole to support her internet gambling habit); 2 Accused of Extortion Over Gambling Debts, MIAMI HERALD, Oct. 3, 2007, at B3 (Broward County men arrested for threatening gambler who lost $1.2 million placing internet sports bets).

37. See Amy Driscoll, Slot Machines Get Most Gambling Help Line Calls, MIAMI HERALD, Aug. 1, 2007, at B6, and Jon Burstein, Gambling Help Line Reveals Increase in Slot Addictions, S. FLA. SUN-SENT., Aug. 5, 2007, at 5 (Community News). On the other hand, slot machines were found to have no measurable impact on the region's crime statistics. See

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2008 voters in Miami-Dade agreed to let their county’s pari-mutuels have
them, thereby reversing their March 2005 “no” vote. Yet even as propo-
nents celebrated their victory, the performance of Broward’s “racinos” put
a damper on the party. Due to the high (50%) taxes imposed on them by
the Florida Legislature, the profits generated by Broward’s pari-mutuels have
been far below projections, so much so that Las Vegas’s Boyd Corporation
has, at least for the time being, shelved its plans to put slot machines in the
Dania Jai-Alai fronton (despite paying $152 million for the property).

Although their financial difficulties are their most immediate problem,
the biggest threat facing the racinos actually lies elsewhere. In Floridians for
a Level Playing Field v. Floridians Against Expanded Gambling, the Flori-
da Supreme Court, finding that it lacked jurisdiction to hear the case, kept
alive a challenge to Amendment 4, which paved the way for Broward and
Miami-Dade to have racinos. The dispute is now back before a Leon Coun-
ty circuit court judge for a decision on whether the backers of Amendment 4


In an interesting twist, the government in Waite v. Astrue, No. 1:07-cv-00045-MP-AK, 2008 WL 2477657 (N.D. Fla. June 16, 2008) argued that because the plaintiff regularly gambled (often for long stretches of time), he was not disabled and therefore not did not qualify for enhanced Social Security benefits. The court agreed and wrote:

The ALJ gave weight to Dr. Mata’s opinion that Plaintiff was capable of performing simple work, and found that Plaintiff’s gambling activities showed a strong ability to socialize, to accom-
plish demanding tasks, and to be familiar with elaborate game rules and strategies. Because a [residual functional capacity (RFC)] assessment is based on all of the relevant evidence in the case record, not just the medical evidence, the Court agrees with the Magistrate that the
ALJ properly formulated Plaintiff’s RFC.

Id. at *1.

38. See Amy Driscoll, Jackpot for Dade Slots, MIAMI HERALD, Jan. 30, 2008, at B1, and


41. 967 So. 2d 832 (Fla. 2007).

42. Id. at 833-35.
failed to collect enough valid signatures to put the initiative on the ballot. Of course, such a finding would shut down the racinos.

Meanwhile, three lawsuits during the year shone a spotlight on the working conditions at pari-mutuels. In *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, the Eleventh Circuit ruled that a dog track that deliberately withheld the overtime pay of a maintenance worker was liable for liquidated damages. Similarly, in *Tafarella v. Hollywood Greyhound Track, Inc.* and *Wajcman v. Hartman & Tyner, Inc.*, poker dealers at the Mardi Gras Racetrack and Gaming Center were granted permission to file "collective actions" (the employment law equivalent of class actions) after claiming they had been forced to share their tips with non-tipped employees.

The period's two remaining decisions both involved licensing disputes. In *Florida Department of Business & Professional Regulation v. Gulfstream Park Racing Ass'n*, the Florida Supreme Court found that a statute barring Gulfstream Park in Hallandale from broadcasting its races to nearby Pompano Park was a special law because, as a practical matter, it applied only to Gulfstream. And because it had been enacted using the more liberal procedures specified for general laws, the court found that it was invalid. In a concurring opinion, Chief Justice Lewis, joined by Justice


44. The racinos, however, insist they are not worried. See, e.g., Amy Driscoll, *Supreme Court to Hear Anti-Slots Case*, MIAMI HERALD, Sept. 17, 2007, at B1 (quoting Bruce Rogow, the racinos' lawyer, as saying, "In the long run, this is much ado about very little. . . . The parimutuels will prevail in one fashion or another. We can rest assured that parimutuels will continue to operate.").

45. 515 F.3d 1150 (11th Cir.), rehearing denied, 518 F.3d 1302 (11th Cir. 2008).

46. *Alvarez Perez*, 515 F.3d at 1168.


50. Of course, how a license is interpreted can have enormous consequences. Despite opposition from one of its leading competitors, see *Gulfstream Tries to Block Rival*, S. FLA. SUN-SENT., Apr. 10, 2008, at 3B, in June 2008 Mardi Gras was given permission to "stack" its license with that of the defunct Biscayne Kennel Club to get around regulations that currently limit pari-mutuels to 12 hours of poker per day per license. See Nick Sortal, *Poker Room to Go 24 Hours*, S. FLA. SUN-SENT., June 24, 2008, at 4B.

51. 967 So. 2d 802 (Fla. 2007).


53. *Gulfstream*, 967 So. 2d at 808-09.

54. Id. at 809-10.
Bell, chided the majority for failing to address the statute’s non-severability clause.\textsuperscript{55}

Lastly, in \textit{Florida Division of Pari-Mutuel Wagering v. Florida Standardbred Breeders & Owners Ass’n},\textsuperscript{56} the Division of Pari-Mutuel Wagering sought to have a lawsuit filed against it in Broward County transferred to Leon County, where it maintains its headquarters.\textsuperscript{57} The case had arisen after the Division granted a slots license to The Isle Casino & Racing at Pompano Park, despite the track’s failure to reach an agreement with its horsemen as to how to divide future slot monies.\textsuperscript{58} Finding that the Division was entitled to assert its common law “home venue privilege,” the Fourth District Court of Appeal ordered the case to be either dismissed or transferred.\textsuperscript{59}

\textbf{VII. SHIPBOARD GAMBLING}

The trial of the three men accused of killing SunCruz Casinos founder Konstantinos “Gus” Boulis in Fort Lauderdale in 2001 remained pending during the year, although in June 2008 Adam Kidan, who had purchased the company from Boulis shortly before the slaying, had his 70-month federal prison sentence cut in half after he helped officials investigate the circumstances surrounding Boulis’s death.\textsuperscript{60}

Boulis’s former company and its competitors suffered greatly during the year, buffeted by competition from land-based operators and the skyrocketing price of fuel.\textsuperscript{61} Adding to their woes, in June 2008 Governor Charlie Crist signed SB 1094, dubbed the “Gambling Vessels/Clean Ocean Act.”\textsuperscript{62}

\begin{itemize}
  \item \textsuperscript{55} \textit{Id.} at 810-11 (Lewis, C.J., concurring).
  \item \textsuperscript{56} 983 So. 2d 61 (Fla. 4th Dist. Ct. App. 2008).
  \item \textsuperscript{57} \textit{Id.} at 62.
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{Id.} at 62-63.
  \item \textsuperscript{60} \textit{See} Vanessa Blum, \textit{Fraud Convict’s Sentence Halved}, S. FLA. SUN-SENT., June 26, 2008, at 3B.
\end{itemize}
Championed by Senator Mike Haridopolos (R-Melbourne), a longtime boats foe due to his connections with the pari-mutuel industry, the law requires “day cruises” to pay for wastewater pump-out facilities at their home ports (at present, such water normally is dumped at sea after being partially treated). In addition, the ships will have to pick up the state’s oversight costs. Although the legislation’s overall financial burden is likely to be

63. While running to fill the seat left vacant by the death of Senator Howard Futch, Haridopolos was criticized for accepting thousands of dollars from the pari-mutuel industry. See Haridopolos Best in Primary, ORLANDO SENT., Mar. 7, 2003, at A18. After being elected, Haridopolos immediately introduced SB 2800, which sought to ban casino boats from Florida’s waters. See Haridopolos’ Gambling Ban a Reckless Move, FLA. TODAY, Apr. 17, 2003, at 14. When this effort failed, he tried to lift the state ban on nighttime thoroughbred racing and sought permission for a new track in Ocala. See Steven Isbitts, Bill Sheds Light on Night Racing, TAMPA TRIB., Apr. 17, 2004, at 10 (Sports).

64. Day cruises, also known as “cruises to nowhere,” are gambling excursions that normally last five or six hours and sail just far enough (three miles on Florida’s east coast, nine miles on Florida’s west coast) to reach international waters, where they are able to open their casinos. For a further discussion, see Florida Dep’t of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954 (Fla. 2005).

65. See GV/COA, supra note 62, at § 4. Cruise ships that embark on multi-day voyages are expressly exempted, id. § 2(e), as are casino boats equipped with a marine waste system that “eliminates the need to pump out or dump wastewater.” Id. § 8(e).

66. Id. § 7.
small,\(^{67}\) the perilous condition of the industry makes a court challenge on federal preemption grounds a strong possibility.\(^{68}\)

In the meantime, shipboard gambling produced the year’s most dramatic opinion. In \textit{Luyao v. State},\(^{69}\) Dr. Asuncion Mendoza Luyao, who had been given a 50-year jail sentence for overprescribing the painkiller OxyContin, thereby causing the deaths of six of her patients, was granted a new trial by the Fourth District Court of Appeal after it found that references to her fondness for gambling on the casino ship M/V PALM BEACH PRINCESS had prejudiced the jury.\(^{70}\) According to the court, while Luyao might have be-

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Elsewhere, however, it has been claimed that the typical casino boat dumps 79,800 gallons of wastewater per week, see Surfrider Foundation, \textit{Florida Gambling Boat Pollution}, http://www.surfrider.org/sebastianinlet/news/gambling.htm (last visited July 15, 2008), and that the cost to treat 1,000 gallons of waste water is $5. See Lyndsey Lewis, \textit{Senate Postpones Vote on Waste Dumping Bill}, \textit{Bradenton Herald}, Mar. 23, 2007, at 10 (Local). As such, operators can expect to annually pay roughly $20,000 per ship, in addition to the state’s administrative expenses (which could add another $10,000 a year if, as seems likely, two full-time staffers are hired). Alternatively, for a one-time cost of approximately $100,000, a casino boat can be equipped with a marine waste system known as “Dragonfly” that makes pumping unnecessary. See Donna Balancia, \textit{Dragonfly Creates Buzz in Cruise Ship Industry}, \textit{Fla. Today}, Aug. 22, 2007, http://www.ajt.com/look/news/articles/0807_DragonflyCruiseBuzz.html.

68. The GV/COA has been crafted to try to avoid running afoul of United States v. Locke, 529 U.S. 89 (2000), which makes it clear that states cannot regulate vessel design. By instead focusing on the ports at which casino boats tie up, and making use of their facilities optional (annual registration with the state and payment to the port being the only actual requirements), the bill’s supporters hope to come within the holding of \textit{Askew v. American Waterways Operators, Inc.}, 411 U.S. 325 (1973), which gives states a relatively free hand when overseeing shoreside activities. For a further discussion of what is and is not permissible, see Stephen Thomas, Jr., \textit{State Regulation of Cruise Ship Pollution: Alaska’s Commercial Passenger Vessel Compliance Program as a Model for Florida}, 13 \textit{J. TRANSNAT’L L. & POL’Y} 533 (2004), and Laura K.S. Welles, Comment, \textit{Due to Loopholes in the Clean Water Act, What Can a State Do to Combat Cruise Ship Dumping of Sewage and Gray Water?}, 9 \textit{OCEAN & COASTAL L.J.} 99 (2003).

69. 982 So. 2d 1234 (Fla. 4th Dist. Ct. App. 2008) (per curiam).

70. \textit{id.} at 1235.
come more willing to issue prescriptions as her gambling losses mounted, the
government had not done enough to prove its theory.\textsuperscript{71}

The period’s four other maritime cases all turned on highly technical
Petersburg,\textsuperscript{72}} the Eleventh Circuit reinstated the arrest of the M/V CASINO
ROYALE after slot machines belonging to PDS Gaming, and originally
placed aboard the M/V OCEAN JEWEL, were transferred without PDS’s
permission to the CASINO ROYALE.\textsuperscript{73} According to the court, the trial
judge had used the wrong standard in concluding that PDS had failed to
show that it was entitled to have the arrest continued.\textsuperscript{74}

In \textit{Azevedo v. Carnival Corp.,}\textsuperscript{75} a slot technician aboard the M/V
CELEBRATION whose appendectomy was misdiagnosed as menstrual pains
was found not to be subject to an arbitration clause and therefore entitled to
sue in state court.\textsuperscript{76}

In \textit{In re: SunCruz Casinos, LLC,}\textsuperscript{77} a seaman injured in an elevator mi-
shap aboard the M/V SUNCRUZ VIII was permitted to file a late claim in
the line’s bankruptcy proceeding, the court finding that at the time of the
original deadline the seaman had mistakenly believed he was fully recovered
from the accident.\textsuperscript{78}

And in \textit{Lee v. Oceans Casino Cruises, Inc.},\textsuperscript{79} which arose from a colli-
sion between two cars, one being driven by a casino boat employee and the
other by a husband and wife (the latter of whom suffered fatal injuries), the
Third District Court of Appeal held that the defendant vessel owner had

\textsuperscript{71} Id. at 1236-37. The information about Luyao’s gambling habits had been excluded
from her 2005 trial, which ended in a hung jury, but was allowed in by a different judge at her
2006 retrial. \textit{See} Derek Simmonsen, \textit{Former PSL Doctor Luyao May Be Granted a New

\textsuperscript{72} No. 07-10088, 2007 WL 2988798 (11th Cir. Oct. 15, 2007) (per curiam). Through-
out its opinion the court consistently misidentified the ship by misspelling the word “jewel.”
Built in 1982 as the Russian car ferry M/V MIKHAIL SUSLOV, the vessel assumed its
present name in 2004 when it was brought to St. Petersburg. \textit{See} Caryn Baird & Angie Holan,
\textit{Ocean Jewel History, St. Petersburg Times, Dec. 29, 2005}, at 1D.

\textsuperscript{73} \textit{PDS}, 2007 WL 2988798, at *1.

\textsuperscript{74} Id.

\textsuperscript{75} No. 08-20518-CIV, 2008 WL 2261195 (S.D. Fla. May 30, 2008).

\textsuperscript{76} Id. at *8.

\textsuperscript{77} 377 B.R. 741 (Bkrtcy. S.D. Fla. 2007).

\textsuperscript{78} Id. at 745-48.

\textsuperscript{79} 983 So. 2d 791 (Fla. 3d Dist. Ct. App. 2008).
failed to preserve for appeal the question of whether the plaintiffs’ lawyer had improperly impeached one of its experts.\textsuperscript{80}

VIII. STATE LOTTERY

During the year officials in Tallahassee looked into the idea of privatizing the Florida Lottery, a step that could net the state between $17 billion and $31 billion.\textsuperscript{81} Any such move, however, will likely run into problems, inasmuch as the Florida Constitution prohibits private companies from conducting lotteries.\textsuperscript{82}

The only lottery case reported during the year was \textit{Womack v. Commissioner of Internal Revenue},\textsuperscript{83} but the decision turned out to be a blockbuster. Roland Womack and Maria Spiridakos, supported by 59 other past Florida lottery winners, appealed to the Eleventh Circuit after the Tax Court held that when future lottery payouts are sold for an immediate lump sum, the money realized from the transaction is taxable as ordinary income.\textsuperscript{84} The players had argued that the payouts constituted a long-term capital asset, and as such qualified for the more favorable tax treatment accorded such property.\textsuperscript{85} In rejecting this contention, the Eleventh Circuit wrote:

\begin{quote}
In defining “capital asset,” Congress used the term “property” to mean “not income”—that is, “property” serves to distinguish assets suitable for capital gains treatment from mere income. “Property” in the most general sense means anything owned, which would also include income and any rights or claims to it. Even if other statutes use “property” in this broad sense, to exclude substitutes for income in determining what constitutes a capital asset is 
\end{quote}

\textsuperscript{80} Id. at 794. According to the court, any other result would “encourag[e] an attorney to sit silently during trial, await the outcome, and complain only if [there was] an unfavorable result.” Id. at 795.


\textsuperscript{82} \textit{See Fla. Const.} art. X, § 7, which provides: “Lotteries . . . are hereby prohibited in this state.” As a result, when it was decided in 1986 to have a state lottery, a constitutional amendment was needed to overcome the ban. Because the language used says, “Lotteries may be operated by the state,” see \textit{Fla. Const.} art. X, § 15(a), it is unclear whether the state can lease its lottery to a private outfit.

\textsuperscript{83} 510 F.3d 1295 (11th Cir. 2007).

\textsuperscript{84} Id. at 1297-98.

\textsuperscript{85} Id. at 1302-07.
consistent with the word “property.” No other interpretation of “property” would harmonize with the statute’s purpose, as the very nature of the term “capital asset” excludes what is in essence ordinary income. 86

IX. TRIBAL GAMING

In November 2007, after 16 years of contentious negotiations, Florida and the Seminoles signed a gambling compact, thereby giving the tribe the exclusive right to offer baccarat and blackjack (and, outside Broward and Miami-Dade, the exclusive right to have Las Vegas-style slot machines). 87 Even before the ink had a chance to dry, however, Marco Rubio (R-West Miami), the Speaker of the Florida House of the Representatives, filed suit in the Florida Supreme Court, alleging that the governor had overstepped his bounds and, in the process, violated the Florida Constitution’s separation-of-powers clause. 88

Although oral argument took place in January 2008, 89 by June 2008 no decision had been issued. 90 As a result, the Seminoles decided to begin offering blackjack and baccarat, as well as various other table games, at their Hard Rock casino in Hollywood. 91 Despite a steady rain, the grand opening, starring actress Carmen Electra, drew a huge crowd, 92 and in the days that

86. Id. at 1304-05.
88. See Michael C. Bender, Rubio Seeks Halt to Crist-Seminole Deal, PALM BEACH POST, NOV. 20, 2007, at 4A; Mary Ellen Klas, Rubio Asks Court to Block Seminole Deal, MIAMI HERALD, NOV. 20, 2007, at A1; Alex Leary, Rubio Fights Gaming Pact, ST. PETERSBURG TIMES, NOV. 20, 2007, at 1A.
90. The ruling finally came on July 3, 2008, and agreed with Rubio’s position. See Florida House of Representatives v. Crist, 990 So. 2d 1035 (Fla. 2008). Although this seemed to spell the end for the tribe’s games, five days later a federal judge said they could continue. See PPI, Inc. v. Kempthorne, No. 4:08cv248-SPM, 2008 WL 2705431 (N.D. Fla. July 8, 2008).
92. See Amy Driscoll, Amid Glitz, Blackjack's in the Cards, MIAMI HERALD, June 23, 2008, at B1, and Charles Passy, Casino’s Blackjack Debut a Big Deal, PALM BEACH POST, June 23, 2008, at 1A. Despite her fame and good looks, Electra admitted she was an odd choice to host the grand opening: “I’m not a gambler at all. I’d rather be shopping.” See Madeleine Marr, Carmen Electra: She’s A Big Deal, MIAMI HERALD, June 24, 2008, at A8.
followed South Floridians eagerly lined up for a chance to lose their money. 93

X. CONCLUSION

While it is already being described as a gambling mecca by some, 94 Florida currently poses no threat to either Atlantic City or Las Vegas. But it is certainly gaining ground fast, and the future looks bright.

93. See Michael Mayo, Seminoles Hold All the Cards, S. FLA. SUN-SENT., June 24, 2008, at 1B.

COMBATING THE “BABY DUMPING” EPIDEMIC: A LOOK AT FLORIDA’S SAFE HAVEN LAW

STACIE SCHMERLING PEREZ*

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I. INTRODUCTION

Headlines read “100 Babies Safe Thanks to Safe Haven.” On May 30, 2008, Florida reached a milestone as a healthy baby boy became the hun-
dredth newborn safely relinquished under the State’s infant abandonment
law, commonly referred to as the “Safe Haven law.” The infant’s mother,
estimated to be in her twenties, explained that she was going through a bad
time as she handed the infant to a paramedic at a Pinellas County fire rescue
station and walked away. The baby boy was named “Nicholas” by those
who “saved” him. Nicholas will now be able to be adopted into a loving
home with parents who are ready and willing to care for him, while his
mother can have peace of mind knowing that she gave her son a chance at
life. In a time where media coverage has increasingly alerted the public to
repeated occurrences of abandoned babies tragically found discarded in
dumpsters, trash cans, toilets, canals, and other horrific places, Florida’s
Safe Haven law is saving babies lives.

Many women are faced with unwanted pregnancies each year, but un-
fortunately some feel that they have no option other than to keep their preg-
nancy a secret and dispose of the baby after birth. Florida’s Safe Haven law

thank Professor Michael Dale for his guidance and direction, and the staff of Nova Law Re-
view for all of their hard work and dedication.

1. Kelly Allen, 100 Babies Safe Thanks to Safe Haven, SEMINOLE CHRON., June 18,
4982007. Several private adoption agencies recently submitted cases of safe surrenders occurring over the last eight years that had not previously been included in the state’s statistics, thereby putting the number of safe surrenders well over one hundred and indicating that this milestone may have been reached sooner. Telephone Interview with Nick E. Silverio, Founder, A Safe Haven for Newborns, The Gloria M. Silverio Foundation (Oct. 8, 2008).

2. Elinor J. Brecher, Haven for Newborns, Safety for 100th, MIAMI HERALD, June 8,
2008, at 1BR.

3. Id.

4. Id.


6. Debbe Magnusen, From Dumpster to Delivery Room: Does Legalizing Baby Aban-
donment Really Solve the Problem?, 22 J. Juv. L. 1, 3 (2001-02).

7. Margaret Graham Tebo, Texas Idea Takes off: States Look to Safe Haven Laws as
Protection for Abandoned Infants, 87 A.B.A. J., 30, 30 (Sept. 2001); Nick E. Silverio, Editorial,
Help Educate Community About Alternative for Information, SUN SENT., Sept. 8, 2003, at
21A.

8. Gary Taylor, Surrendered Infant Law Turns 8 Years Old, 100 Babies Saved,
ORLANDO SENT., July 1, 2008, at A1; Allen, supra note 1; Brecher, supra note 2.

COMBATING THE "BABY DUMPING" EPIDEMIC

offers an alternative to the above scenario by allowing parents to anonymously surrender newborn babies, approximately seven days old, at any hospital, emergency medical services station, or fire station with no questions asked, as long as there are no signs of abuse or neglect. Florida was one of many states to enact Safe Haven legislation in the early 2000s after what seemed to be a rash of unsafe infant abandonments. Florida’s legislation was prompted by the discovery of six discarded newborns in the span of a single month in early 2000. While some “dumped” babies are fortunate enough to be found in time to survive, sadly, many are not so lucky. Critics of the Safe Haven law argue that it encourages abandonment, it is not likely to help those it is intended for, and that it deprives children knowledge of their family and genealogical histories.

Part II of this article will discuss the phenomenon of newborn abandonment and the reasons why some parents choose to dispose of their children in such a manner. Part III will discuss the history of infant abandonment laws. It will begin with a brief introduction of the European system and will trace how the laws developed in the United States. Part IV of this article will discuss the history of Florida’s Safe Haven law. It will then address the various provisions that must be complied with in order to legally relinquish a child in Florida, as well as the rights and responsibilities of the child’s parents, the Safe Haven locations, and adoption agencies. It will also outline the recent amendments to the law. Part V will give an overview of the agency that promotes Florida’s Safe Haven law and will discuss some criticisms of the law. Part VI of the article will detail the need for certain changes that will make the law even more effective. Finally, Part VII will conclude that there is still some room for improvement, but Florida’s Safe Haven law is saving the lives of unwanted newborns.

defined as “[t]he act of killing a newborn child, esp. by the parents or with their consent.” BLACK'S LAW DICTIONARY 793 (8th ed. 2004).


15. Adam Pertman, Measure Aims at Saving Abandoned Babies, Statewide “Safe Havens” Eyed, BOSTON GLOBE, May 5, 2000, at B3 [hereinafter Pertman, Measure].


II. THE PLIGHT OF ABANDONED NEWBORNS

A. The Prevalence of Infant Abandonment

Baby abandonment "is when an infant under the age of [twelve] months is discarded or left alone for an extended period of time in a public/private setting with an intention to dispose of the baby."\textsuperscript{18} It is unknown exactly how prevalent baby abandonment really is since "[t]he federal government does not have a formal" system to gather the data, and states do not maintain the information uniformly.\textsuperscript{19} However, in 1998, the United States Department of Health and Human Services conducted a survey of nationwide media reports which found that one hundred and five infants were discovered abandoned in public places throughout the country, thirty-three of which were found dead.\textsuperscript{20}

Although baby abandonment is not a new problem, it only began to gain public attention in the 1990s as "newspaper and media coverage" increasingly publicized instances of abandoned babies found in dumpsters, trash cans, and other outrageous places.\textsuperscript{21} Two high profile cases made their way around the media circuit nationwide. In 1997, Melissa Drexler, an eighteen year old New Jersey high school senior, gave birth to a baby boy in the restroom at her senior prom.\textsuperscript{22} Dubbed the "Prom Mom," Drexler hid her pregnancy from her boyfriend and her parents.\textsuperscript{23} She delivered the baby in a toilet, strangled him, and threw his body in a trash can before heading back to the dance floor.\textsuperscript{24} Seven months prior to this, college students Amy Grossberg and Brian Peterson killed their baby minutes after he was born.
throwing his body in the trash outside of the Delaware motel room Grossberg gave birth in. Grossberg had also concealed her pregnancy.

B. Parents Who Kill or Otherwise Discard of Their Children

Experts have found that mothers who abandon or kill their infants are often "motivated by panic, shame, or both," and feel "that they have no alternative." While these mothers span across "all age[s], ethnicit[ies], and socioeconomic status[es]," they are most often young, single girls who live with family. These girls feel isolated, they are in denial, and they conceal their pregnancies out of fear that they will not be supported, or that they will be rejected by their family or boyfriends. They feel completely alone and are left in their isolation to deal "with problems that they are not psychologically or emotionally equipped to handle." Because some girls are in such "complete denial of their pregnancy," they do not even realize when they are in labor. They typically give birth alone and panic when they see a newborn, since they never acknowledged their pregnancy. Some even think they are having menstrual cramps or that they have to defecate so they give birth on the toilet, often passing out from the strain and exhaustion of labor and leaving the baby to drown or otherwise die from neglect. Others are in such a dissociative state that they do not remember giving birth and are shocked when they find out what happened to their child. Older women who abandon their infants often cannot handle the emotional and financial

26. Id.
27. Id.
29. Id.
30. See generally MEYER ET AL., supra note 9 (describing the common characteristics throughout multiple cases of mothers who have killed their children).
32. See MEYER ET AL., supra note 9, at 52-53.
34. MEYER ET AL., supra note 9, at 53. Some women are in such deep denial that their bodies do not even change during pregnancy and they continue to menstruate and gain very little weight. Id.
35. See id. at 53–54.
37. MEYER ET AL., supra note 9, at 53–54.
strain of parenthood, but they realize this too late in their pregnancy for an abortion.\textsuperscript{38}

The primary goal of the Safe Haven law is to save the lives of unwanted babies by reducing the number of unsafe infant abandonments.\textsuperscript{39} The objective is to give desperate parents who are clearly unprepared for parenthood an alternative that allows them to save not only the child, but themselves, "from a lifetime of guilt and criminal prosecution."\textsuperscript{40} Mothers who might have killed or otherwise "recklessly abandon[ed] their newborns" can legally drop off their babies at designated locations with no questions asked.\textsuperscript{41}

\section*{III. \textbf{THE HISTOR Y OF NEWBORN ABANDONMENT LAWS}}

\textbf{A. \textit{E}uropean \textit{F}oundlings}

Child abandonment is not a new phenomenon in the United States or throughout the world,\textsuperscript{42} and the concept of Safe Havens has been well established for quite some time.\textsuperscript{43} In the thirteenth century, the Catholic Church introduced the foundling home system in Europe to combat the large number of abandoned infants.\textsuperscript{44} A revolving cradle or "wheel" was placed on the side of churches or houses, and mothers would place their babies in the cradle in the middle of the night, ring a bell, and flee.\textsuperscript{45} The cradle was then rotated into the church and the baby was saved.\textsuperscript{46} Foundling homes became prominent throughout Italy, and eventually made their way to France, Spain, and Portugal.\textsuperscript{47} Thousands of babies were saved in this manner before the system was abandoned in the nineteenth century.\textsuperscript{48} However, several other countries in Europe and even one in Africa currently utilize various methods of legalized baby relinquishment.\textsuperscript{49} Germany uses a "baby slot" system,
Hungary has various “anonymous drop-off locations,” and Johannesburg, South Africa uses “the revolving crib” system as a form of legalized abandonment.\(^{50}\)

B. Activists Take Action

Grass roots activists in several jurisdictions throughout the United States also implemented unofficial Safe Haven laws prior to the enactment of any legislation.\(^{51}\) A nurse in Pittsburgh, Pennsylvania began “Baskets for Babies,” after a newborn baby was found discarded in a plastic trash bag behind her church.\(^{52}\) She initially lined an old laundry basket with a warm blanket and placed it on her porch.\(^{53}\) After initiating a public-awareness campaign targeted at young mothers who think they have no options, 608 Pittsburgh families began “leav[ing] their porch lights on” with warm baskets ready to save a newborn and help a desperate mother.\(^{54}\) Similarly, a local television reporter in Mobile, Alabama initiated a movement after she covered two tragic cases of infant abandonment in 1998.\(^{55}\) With the help of district attorney, John Tyson, “A Secret Safe Place for Newborns” began.\(^{56}\) In an effort to save babies from the grim fate of being “dumped,” mothers were permitted to abandon their newborns at hospitals within Mobile and then walk away with no questions asked.\(^{57}\) Tyson “agreed not to prosecute the mothers” as long as the infants were brought in unharmed within three days of their birth.\(^{58}\)

C. Texas Paves the Way

In 1999, Texas became the first state to officially adopt a Safe Haven statute.\(^{59}\) The law allows unwanted newborns to be legally abandoned at certain designated locations—safe havens—without fear of criminal prosecu-

\(^{50}\) Id.
\(^{51}\) See Timothy Roche, A Refuge for Throwaways, Time, Feb. 21, 2000, at 50.
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Roche, supra note 51.
\(^{57}\) Id.
\(^{58}\) Id.
It was enacted after a disturbing pattern of infant abandonments began to emerge in the state, as thirteen babies were discarded within a ten month period in Houston alone. The Texas Safe Haven law has often been referred to as the “Baby Moses law,” based on the Bible story where baby Moses was placed in a basket by his mother, cast to sea down the Nile River, and “watched over by an anonymous protector until” being taken in by an Egyptian pharaoh’s daughter, who provided necessary love and care. Like the Bible story, under the law, newborns are provided with a protector and the desperate mothers who choose this safe, “responsible alternative to abandonment” are provided with anonymity.

In 2000, fourteen states, including Florida, followed Texas’ lead and enacted similar legislation. Between 2001 and 2002, twenty-seven more states passed infant abandonment laws, and as of 2008, “[a]ll [fifty] states have . . . some version of [a] ‘Safe Haven’” law. Safe Haven laws vary from state to state, but they all address the ages of children that may be left, where children may be left, and who can leave them. Additionally, all

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63. The Baby Moses Project, supra note 62.
64. See CWLA, Baby Abandonment Project, supra note 11.
65. See id.
67. Magnusen, supra note 6, at 7–8. The age limit of newborns that can be relinquished typically ranges anywhere from seventy-two hours up to one year of age. Id. at 7; CWLA, Baby Abandonment Project, supra note 11. Nebraska was the last state to enact safe haven legislation and the law stated that any “child” could be abandoned at a hospital, but this proved to be very problematic since the term “child” was not defined and was interpreted to include minors up to nineteen. See Kimberly Ross, “Safe Haven” Law Backfires, Sun Sentinel, Sept. 27, 2008, at 8A. Since the law became effective in July 2008, thirty-six children were abandoned, ranging in age from one to seventeen, including nine from one family and several from out of state. Id.; Age Limit for Nebraska Safe-Haven Law Debated, L.A. Times, Nov. 18, 2008, at A18; Boy Left in Nebraska as Law is Changed, N.Y. Times, Nov. 23, 2008, at A30. The law was meant to protect at risk infants so state lawmakers were forced to call a special legislative session due to the unintended loophole. Age Limit for Nebraska Safe-Haven Law Debated, supra note 67. On November 21, 2008, the law was changed to limit the age at which children can be surrendered to thirty days old or less. Boy Left in Nebraska as Law is Changed, supra note 67. Designated Safe Haven locations vary from state to state, and include anything from hospital emergency rooms only, to emergency medical services stations, fire stations, clinics, churches, and any appropriate person or suitable location. Magnusen, supra note 6, at 8–9 & n.62; CWLA, Baby Abandonment Project, supra note 11.
laws offer anonymity to the parents and either immunity from prosecution, or an affirmative defense. 69

IV. FLORIDA'S SAFE HAVEN LAW

A. The Newborn Baby Dumping Epidemic

Congress began to address the issue of baby abandonment when it enacted the Abandoned Infants Assistance Act in 1988. 70 However, the Act only pertained to "boarder babies," infants who were typically exposed to drugs or HIV perinatally and abandoned in hospitals. 71 By 2000, many states had also begun to enact legislation geared at addressing the problem of unsafely abandoned newborns. 72 The legislation provided anonymity and limited immunity to parents who relinquish newborns at certain designated safe locations; however, Florida had no such law. 73

In 2000, Senator John Grant and Representative Sandra L. Murman sponsored House Bill 1901 after a baby boy, estimated to be approximately two hours old, was discovered in a garbage bag next to an apartment complex trash can in Tampa. 74 His nurses named him Benjamin, and the lucky boy survived, although doctors stated that he would not have been so fortunate had he been outside in the morning cold another half-hour or so. 75 Baby Benjamin was one of six newborns found discarded in a public place throughout the state in a one month period. 76

As media reports continued to indicate that mothers of all ages were abandoning infants in various public places, the Legislature determined that the newborn abandonment epidemic was of "significant public interest and... concern." 77 Finding that newborns in Florida and across the country had "suffered and died as the result of abandonment in life-threatening situations," that "the parents of newborn infants are often under severe emotional...

68. CWLA, Baby Abandonment Project, supra note 11. States vary as to who can leave a child at a Safe Haven, designating anyone from just the mother, to either parent, to a person with custody, to a person authorized by the parent, and the broadest category designates any person at all. Id.
69. Magnusen, supra note 6, at 7–8.
70. HB 1901 Staff Analysis, supra note 20, at 2.
71. Id. at 2 & n.2.
72. Id. at 2.
73. Id.
74. See Oppel, supra note 13.
75. Id.
76. Id.
77. HB 1901 Staff Analysis, supra note 20, at 2.
stress,” and that “anonymity, confidentiality, and freedom from prosecution for parents may encourage them to leave a newborn infant safely and thus save the newborn infant’s life.” The Legislature almost unanimously passed House Bill 1901. The legislation amended existing abandonment laws and specifically focused “on the problem of parents abandoning newborn infants.” The legislation was signed by Governor Jeb Bush on June 2, 2000, and Florida’s Safe Haven law became effective on July 1, 2000.

B. Florida’s Fight to Save the Lives of Discarded Infants

1. Legally Relinquishing a Newborn Infant

Until 2008, Florida’s statute defined a newborn infant as “a child that a licensed physician reasonably believes to be approximately 3 days old or younger at the time the child is left at a hospital, emergency medical services station, or fire station.” Although the Safe Haven law does not apply to babies older than the age limit, Safe Havens do not reject these children. In August 2007, a “[seventeen] year old mother” dropped off her healthy eight month old daughter at a Florida fire station saying that she could no longer care for the child. The mother hoped to be protected under the Safe Haven law, but the protections afforded by it were not available in this case due to the baby’s age. Even though the child could not be legally surrendered under the law, staff at the fire station took her in to avoid a potentially fatal result that could have occurred had her mother been turned away. The baby was placed in the custody of the Florida Department of Children and Families pending a search for her parents.

Under Florida law, either parent can legally relinquish a newborn at a designated Safe Haven location. The law presumes that a “parent who
leaves [a] newborn infant in accordance with this [law] intended to leave the newborn infant and consented to termination of parental rights."

As originally enacted section 383.50 of the Florida Statutes allowed parents to leave their newborn infants at hospital emergency rooms or fully staffed fire stations. This offered parents an alternative to abandoning their baby "in an area that may threaten the [child's] health and safety." However, in 2001, Safe Haven designations were expanded to include "emergency medical services station[s]." "Each emergency medical services station or fire station staffed with full-time firefighters, emergency medical technicians, or paramedics shall accept any newborn infant left with a firefighter, emergency medical technician, or paramedic." The newborn must be left with a designated person at one of the designated locations in order to be afforded protection under the law. Consequently, if a newborn is left at a location that is not a designated Safe Haven, the parents will likely face harsh legal penalties even if they leave the child somewhere that seems like a safe place such, as a church.


When a parent leaves a child with a designated person at a designated Safe Haven location "and expresses an intent to leave the newborn infant and not return, [he or she] has [an] absolute right to remain anonymous and to leave at any time," unless there are signs of "child abuse or neglect." Parents relinquishing a child in compliance with the law may be questioned about relevant medical and family history; however, they do not have to answer any questions, and they cannot be pursued if they walk away. Furthermore, "[t]he identity of a parent who leaves" a child at a designated Safe Haven location is confidential and will not be disclosed to anyone except "a person claiming to be a parent of the [child]."

89. Id.
91. HB 1901 Staff Analysis, supra note 20, at 4.
94. See id. § 383.50(9).
97. See, e.g., Griffith, supra note 95.
Additionally, parents relinquishing a child under the law are immune from prosecution. A criminal investigation will not be initiated “unless there is actual or suspected child abuse or neglect” other than the legal abandonment of a child at a designated Safe Haven location.

3. Protocols After Relinquishment

When a newborn is left with a “firefighter, emergency medical technician, or paramedic,” he or she is to consider this “as implied consent to and shall . . . [p]rovide emergency medical services to the newborn infant to the extent he or she is trained to provide those services.” After providing necessary emergency medical services, “[t]he firefighter, emergency medical technician, or paramedic [is to a]rrange for the immediate transportation of the newborn infant to the nearest hospital having emergency services.”

Similarly, when a newborn is left at a hospital by a parent, this act is considered “implied consent for treatment” and the hospital is “to perform all necessary emergency [medical] services and care.” Hospitals providing emergency services are required to admit any newborn left at the facility while hospitals without emergency rooms may exercise discretion in whether or not to admit the newborn for treatment. Newborns admitted to the hospital in accordance with the law are presumed eligible for Medicaid coverage.

Fire departments, firefighters, emergency medical technicians, and paramedics who treat or transport a newborn infant, and hospitals and licensed health care professionals who treat newborns are “immune from criminal or civil liability for acting in good faith [pursuant to] this section.” However, liability is not limited for acts of negligence.

After a newborn is admitted, hospitals are immediately required to “contact a local licensed child-placing agency or” the state’s “central abuse hotline for the name of” such an agency in order to facilitate the transfer of physical custody of the child. The state adoption information center is required to maintain “a list of licensed child-placing agencies [able] to take

100. Id. § 383.50(10).
101. Id.
102. Id. § 383.50(3)(a).
103. Id. § 383.50(3)(b).
104. FLA. STAT. § 383.50(4).
105. See id.
106. Id. § 383.50(8).
107. Id. §§ 383.50(3)(b), (4).
108. Id.
109. FLA. STAT. § 383.50(7).
custody of and place newborn[s]” abandoned under the Safe Haven law, and
the names of these agencies are to be provided to the state’s central abuse
hotline on a rotating basis. 110 A newborn left at a designated Safe Haven
location is not considered abandoned under the state’s child abuse laws, so
there is no requirement for mandatory reporting to the child abuse hotline or
for an investigation by a child protective agency “unless there is actual or
suspected abuse.” 111 However, if there is evidence of “actual or suspected
child abuse or neglect, the hospital” is to report such suspicion to the state-
wide central abuse hotline instead “of contacting a licensed child-placing
agency.” 112

Once “[a] licensed child-placing agency . . . takes physical custody of [a
newborn]” from the hospital, it “assume[s] responsibility for all medical
[and] other costs.” 113 The agency must immediately seek an emergency court
order for custody of the child, which “remain[s] in effect until the court or-
ders preliminary approval of placement of the [child] in [a] prospective
[adoptive] home.” 114 Within twenty-four hours after taking physical custody
of the child, the child-placing agency must seek “assistance from law en-
forcement” to ensure that the infant is not listed as a missing child with any
of the national or state missing children databases. 115 Up until 2008, the
child-placing agency was required to “initiate a diligent search” within seven
days of taking custody of the child in order “to notify and to obtain consent
from a parent whose identity is known but whose location is unknown.” 116 In
addition, “[c]onstructive notice [was required to] be provided . . . in the
county where the [child] was abandoned.” 117

4. Change of Heart

A Tampa woman who had cared for her baby boy for the “first three
days of his life,” ultimately made the difficult decision that she could not
keep him.” 118 On Mother’s Day 2007, she delivered the clean, swaddled
baby to the Hillsborough County Fire Station in accordance with the Safe

110. FLA. STAT. § 63.167(2)(f) (2007).
111. FLA. STAT. § 383.50(9).
112. Id. § 383.50(7).
113. FLA. STAT. § 63.0423(1) (2007).
114. Id. § 63.0423(2).
115. Id. § 63.0423(3).
Laws 1012, 1014).
117. Id.
118. Michael A. Mohammed, Mother Asks to Reclaim Baby, ST. PETERSBURG TIMES, May
16, 2007, at 3B.
Haven law. 119 Two days later, she went back to the fire station wanting to reclaim her baby. 120 This was the third time a mother in Florida had asked for her child back under the State’s Safe Haven law. 121 Pursuant to the law, parents of a newborn left at a designated Safe Haven location may reclaim the child at any time “up until the court enters [an order] terminating . . . parental rights.” 122 Such a claim must either “be made to the entity [that has] physical or legal custody of the [child] or to the . . . court [where] proceedings involving the [child] are pending.” 123

A “termination of parental rights [petition] may not be filed until [at least] 30 days after the date the [newborn] was” abandoned. 124 Until 2008, “[a] petition for termination of parental rights [would] be granted” if the parents consented to adoption, or if “an affidavit of nonpaternity [was] executed by a parent;” if a parent “failed to reclaim or claim the [newborn] within the time . . . specified in s[ection] 383.50;” or if parental consent was “waived by the court.” 125 When a parent seeks to reclaim an abandoned infant, the court may order DNA “testing to establish maternity or paternity.” 126 The court is required to appoint a guardian ad litem for the child, and can order an “investigation, home evaluation, and [a] psychological evaluation” of the parent seeking to reclaim the child in order to determine whether it is in the child’s best interest to be placed with that parent. 127

In addition to the ability to reclaim a child prior to the termination of parental rights, the birth parent of an abandoned newborn may file a motion to set aside a judgment of termination of parental rights within one year after such a judgment has been entered. 128 If “the court finds that a person knowingly gave false information that prevented the birth parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental rights,” any “judgment terminating parental rights” or ordering subsequent adoption of that child is voidable. 129

119. Id.
120. Id.
121. Id.
122. FLA. STAT. § 383.50(6) (2008).
123. Id.
125. FLA. STAT. § 63.0423(5) (2007).
126. FLA. STAT. § 63.0423(7)(a) (2008).
127. Id. § 63.0423(7)(b).
128. Id. § 63.0423(9)(a).
129. Id.
C. House Bill 7007: Expanding the Law and Eliminating the Stigma

In 2008, House Bill 7007 proposed several amendments to Florida's Safe Haven law.\(^{130}\) House Bill 7007 was unanimously passed by both the House and the Senate.\(^{131}\) It was approved by Governor Charlie Crist on May 28, 2008, and the amendments became effective on July 1, 2008.\(^{132}\)

Under the amendments, the term "abandoned" was replaced with the term "surrendered" throughout applicable statutes.\(^{133}\) This change was made because the word "abandoned" has many negative connotations and psychologically, it can discourage women from utilizing the law.\(^{134}\) The hope is that some of the stigma associated with giving up a baby will now be taken away.\(^{135}\)

The amendments also extended the time in which a newborn infant may be safely surrendered from three days to seven days.\(^{136}\) This extension gives parents "more time to make a constructive and life affirming decision for the infant and themselves."\(^{137}\) The goal is to prevent unsafe abandonment by mothers who make the decision that they cannot care for their child after the child is three days old.\(^{138}\)

The requirement that licensed child-placing agencies conduct "a diligent search to notify and to obtain consent" from the known parent of a surrendered newborn was eliminated by the amendments.\(^{139}\) It has been replaced with a provision stating that a parent surrendering an infant in accordance with the law "is presumed to have consented to termination of parental rights, and express consent is not required."\(^{140}\) In addition, child-placing agencies are now prohibited from attempting "to pursue, search for, or notify" the parent of adoption proceedings unless there is actual or suspected abuse or neglect.\(^{141}\)


\(^{131}\) Brecher, supra note 2.

\(^{132}\) Act effective July 1, 2008, Ch. 2008-90, § 3, 2008 Fla. Laws 1012, 1017.

\(^{133}\) See generally id.

\(^{134}\) Id.

\(^{135}\) See Brecher, supra note 2.

\(^{136}\) Ch. 2008-90, § 3, 2008 Fla. Laws at 1016 (amending FLA. STAT. § 383.50(1) (2007)).

\(^{137}\) Allen, supra note 1.


\(^{139}\) Ch. 2008-90, § 3, 2008 Fla. Laws at 1015 (amending FLA. STAT. § 63.0423(4)).

\(^{140}\) Id.

\(^{141}\) Id.
Under the new amendments, a petition for termination of parental rights may only be granted if “a parent has failed to reclaim or claim the surrendered” child within the specified timeframe. The provisions allowing for a termination of parental rights petition to be granted if a parent consented to adoption, filed an affidavit of nonpaternity, or if the court waived consent have been eliminated.

Additionally, if a parent leaves a child at the hospital, the newborn must be left with emergency room staff in order for the surrender to comply with the law. However, in practice, the surrender of a child anywhere in the hospital has been treated as a safe abandonment. Because the identity of hospital patients is known, another provision has been added to the law in order to further protect the confidentiality of the birth mother of a surrendered newborn. If a mother gives birth in a hospital and “expresses [an] intent to leave the infant and not return,” the hospital is now to “complete the [child’s] birth certificate without naming the mother” if she so requests.

V. A SUCCESS OR A QUICK FIX?

A. The Gloria M. Silverio Foundation: A Safe Haven for Newborns

Since July 2000, over one hundred newborns have been saved thanks to Florida’s Safe Haven law. All of the newborns who have been legally surrendered have been placed in homes through private adoption agencies. Much of Florida’s success is due to the Gloria M. Silverio Foundation’s (Foundation), “A Safe Haven for Newborns,” a nonprofit organization established by Nick Silverio in 2001 “in response to the tragedy of newborn abandonment in Florida.” The mission of “A Safe Haven for Newborns” is to

142. Id. (amending Fla. Stat. § 63.0423(5) (2007)).
143. Id.
144. See HB 7007 Staff Analysis, supra note 138, at 3.
145. Id.
146. Id.
147. Ch. 2008-90, § 4, 2008 Fla. Laws at 1017 (amending Fla. Stat. § 383.50(5)).
148. Taylor, supra note 8; Allen, supra note 1; Brecher, supra note 2.
150. A Safe Haven for Newborns, The Beginning, http://www.asafehavenfornewborns.com/aboutus.htm (last visited Oct. 26, 2008); Brecher, supra note 2. Nick Silverio began the foundation after his wife of thirty-one years, Gloria, was tragically killed in a 1999 car accident. A Safe Haven for Newborns, The Beginning, supra note 150; Brecher, supra note 2. Silverio, himself, has been widely credited with raising the law’s profile and saving the lives of newborns that may “have ended up in canals, trash bins, or toilets.” Brecher, supra note 2. Over the past seven years, he has talked about the

https://nsuworks.nova.edu/nlr/vol33/iss1/1
save the lives of newborn infants “in danger of abandonment and to help preserve the health of their mothers and future of their mothers and fathers.”151 Its vision is “[t]o eliminate infant abandonment in Florida thru [sic] education, prevention and community involvement and to assist pregnant girls/women to realize a productive future.”152 The Foundation promotes and maintains greater awareness of Florida’s Safe Haven law.153 It is also the primary source for compiling and maintaining information and statistics on the law’s effectiveness.154

Originally established in Miami, the Foundation has “Partnered’ with the Florida Fire Chiefs Association, Emergency Medical Services, many [h]ospitals, and many other organizations,” and now has chapters in sixty-seven counties throughout the state.155 The organization has an advisory board and a twenty-four hour, seven days a week multi-lingual referral help line in English, Spanish, and Creole.156 The help line was initially created to educate young mothers wanting to know more about the Safe Haven law, but it has expanded to help girls, women, and mothers in crisis deal with a wide variety of problems.157 Counselors are available around the clock to speak with desperate mothers in their moment of need.158 Mothers can even call in advance to arrange for the surrender of their child.159 Baby Iris’s mother found out about the law from literature at a clinic, and she made arrangements with a volunteer at the Safe Haven hotline to surrender her baby a week before giving birth.160 She contacted the hotline again after delivering her daughter and met with a counselor who handed the baby over to a waiting firefighter as the mother looked on from the car.161

There are more than seventeen thousand Safe Haven locations throughout Florida.162 In 2007, the Foundation launched a statewide marketing campaign equipped “with billboards and advertisements on bus-stop [coverings] and mall benches to educate the public on” Florida’s Safe Haven law.163 The

foundation, its goals, “raising money for the helpline, billboards,” and other marketing methods to anyone who would listen. Id.
151. A Safe Haven for Newborns, Our Mission, supra note 5.
152. Id.
153. Id.
154. See id.
156. See id.
157. Id.
158. Brecher, supra note 2.
159. Lundy, supra note 149.
160. Id.
161. Id.
162. Griffith, supra note 95.
163. Id.
Foundation sponsors public service announcements for television, radio, and print, as well as “training videos for Safe Haven locations” and schools. Earlier this year, Broward Sheriff’s Office emergency rescue vehicles began displaying stickers promoting the law. Additionally, Polk County officials have launched an ongoing “campaign to better train [its] fire and rescue personnel” on the law.

Catholic high schools throughout the state have implemented a program developed by the Foundation in order to educate teens on the Safe Haven law. Students are given a scenario about a teenage girl who is a successful student, has a close relationship with her parents, and has lots of friends. She becomes quiet and withdrawn, drops out of gym class, “and starts wearing baggy clothes” after “her boyfriend breaks up with her.” Based on her behavior, she may be pregnant and trying to hide it. Students are asked to play the role of the girl’s best friend and get her to talk about the situation. The goal is to get her “to talk to her parents or” another adult that she knows, but if that fails the goal is to get her to talk to someone at the Safe Haven hotline. The Foundation is hoping to get public schools to implement the program as well.

Unfortunately, although the Safe Haven law provides parents with a safe, legal alternative to infant abandonment, there is still the occasional tragedy of a newborn dying due to being unsafely abandoned. The Garden of Innocence is a special place to honor the memory of these precious little babies. Woodlawn Park Cemeteries donated a plot and headstone which “provide[s] a dignified, peaceful, final resting place for any newborn that is abandoned in Florida, tragically resulting in their death.” The hope is that an innocent child never has to be placed in this Garden. However, suppor-
COMBATING THE "BABY DUMPING" EPIDEMIC

letters of the Safe Haven law say that it is worthwhile even if it only saves one infant’s life.\(^{179}\)

B. Critics Take Aim

When Florida’s Safe Haven law was enacted, the Department of Health and the Department of Children and Family Services were required to “produce a media campaign to promote” it.\(^{180}\) The campaign was “to inform the public” that parents relinquishing a newborn under the law are entitled to confidentiality, “limited immunity from criminal prosecution,” and the right to reclaim the newborn.\(^{181}\) Although “the law went into effect in July 2000,” there was initially little public awareness since funding for the marketing campaign did not come through until January 2002.\(^{182}\) Early reports indicated that the law did not work because no one knew it existed.\(^{183}\) In 2002, Florida’s Department of Health and Department of Children and Family Services were finally given one hundred thousand dollars to initiate a media campaign designed “to inform the public about the law.”\(^{184}\) However, even though Florida’s Safe Haven law has been in place for eight years, many people still do not know it exists.\(^{185}\)

Although the law authorizes the anonymous, legal abandonment of newborns, infants are still being discarded in unsafe places.\(^{186}\) Approximately five newborns are abandoned unsafely each year in Florida.\(^{187}\) Since 2000, forty-two newborns have been left in risky places including dumpsters, front porches, bushes, hotel trash cans, the beach, a canal, and a church.\(^{188}\) While eighteen of these infants were found alive, tragically, twenty-four were not.\(^{189}\) Miami-Dade County has seen the most unsafe infant abandonments with eight since 2000, followed closely by Broward County with five.\(^{190}\)

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179. Crary, supra note 17.
181. Id.
182. Tom Zucco, The Cradle’s Empty at Florida’s Safe Havens, ST. PETERSBURG TIMES, Aug. 8, 2002, at 1D.
183. See id.
184. Id.
185. See Griffith, supra note 95; see Ani Martinez, Women Reminded of Safe Haven Law, MIAMI HERALD, July 13, 2007, at 2B.
186. Griffith, supra note 95.
189. Id.
highest number of unsafe abandonments since the law was enacted was in 2003, when nine babies were discovered throughout the state, four of which were found dead.¹⁹¹

During the research for this article, a thirty year old woman gave birth to a baby and attempted to dispose of the newborn in the trash.¹⁹² On June 14, 2008, Meisha Morant gave birth to the baby girl by herself at a friend’s Broward County home.¹⁹³ She never admitted to being pregnant and she hid her growing belly beneath layers of baggy clothes.¹⁹⁴ After giving birth, Morant cut the newborn’s umbilical cord with scissors and stuffed the baby in a garbage bag filled with trash.¹⁹⁵ When the homeowner came home, he discovered a trail of blood and found Morant holding the bag with the baby struggling inside.¹⁹⁶ As the homeowner questioned her as to the contents of the bag, Morant continued to deny that she had even given birth.¹⁹⁷ Baby Destiny is currently in the care of the couple who found her, while her mother, who could have dropped her off at a fire station five minutes away, is facing attempted murder charges.¹⁹⁸

In the summer of 2007, two young mothers were “accused of killing their newborns in Broward County.”¹⁹⁹ Ashley Truitt, a teenager on a family vacation from Iowa, delivered a baby girl alone in her Pompano Beach hotel room.²⁰⁰ She cut the umbilical cord with a knife, wrapped the crying infant in towels, placed her in a plastic garbage bag, and threw her down the hotel’s trash chute.²⁰¹ The baby fell seventy feet to the dumpster beneath where she died of blunt force head trauma.²⁰² Similarly, Lindsey Scott gave birth alone, cut the umbilical cord with scissors, and suffocated her newborn with towels before placing the body in a trash bag outside of her Oakland Park home.²⁰³ Both girls concealed their pregnancies by wearing baggy clothes and both

¹⁹¹. A Safe Haven for Newborns, Babies Abandoned, supra note 188; see also A Safe Haven for Newborns, Babies Statistics, supra note 190 (detailing the number of safe and unsafe infant abandonments in Florida by year and by county).
¹⁹². Marino, supra note 166.
¹⁹³. Id.
¹⁹⁴. Id.
¹⁹⁵. Id.
¹⁹⁶. Id.
¹⁹⁷. Marino, supra note 166.
¹⁹⁸. Id.
¹⁹⁹. Martinez, supra note 185.
²⁰⁰. Wanda J. DeMarzo, Teen Charged in Death of Her Baby, MIAMI HERALD, June 29, 2007, at 1B.
²⁰¹. Id.
²⁰². Id.
²⁰³. Andrew Tran, Mother Suffocated Newborn, Officials Say Baby Girl Was Breathing, Medical Examiner Finds, SUN-SENT., July 13, 2007, at 1B.
denied being pregnant when questioned by their parents. Neither girl took advantage of the State’s Safe Haven law. Twenty-three other newborns have died due to unsafe abandonment since Florida’s Safe Haven law was enacted.

Adoptees rights groups, such as Bastard Nation, oppose the Safe Haven law. Critics argue that it encourages women to abandon their newborns rather than getting counseling, placing the babies with family, or raising the children themselves with assistance. Some also claim that the law “encourage[s] women to conceal their pregnancies,” and that it discourages them from obtaining “pre-natal and post-natal medical care.” Women who conceal their pregnancies are more likely to give birth unsafely which can endanger the health and lives of both the mother and the child. Critics argue that legalized abandonment provides a “no hassle” way to get out of parental responsibility that undermines established and effective adoption policies. Some allege that the law puts forth a message that abandoning a newborn is “a socially acceptable way of” dealing with a difficult problem under undesirable circumstances, and that this could actually lead to more unwanted pregnancies and abandonments.

Critics say that the law is a “feel good measure” and a “bandaid solution” that does not address the circumstances that cause a mother to kill or dump her newborn, including “poverty, substance abuse, physical abuse, shame, and mental illness.” Some claim that “the women most likely to respond to [media] campaigns are not [the ones who are] likely to endanger their [newborns] to begin with,” and that “‘baby dumpers’” will not utilize the law. They further contend that “it is unrealistic to expect young, traumatized” women who have just secretly given birth to seek out a Safe Ha-

204. Id.; DeMarzo, supra note 200.
205. See Martinez, supra note 185. Iowa also has a Safe Haven law similar to Florida’s. DeMarzo, supra note 200.
206. See A Safe Haven for Newborns, Babies Abandoned, supra note 188. Ashley Truitt’s case is not included in Florida’s statistics. See id.
207. Bastard Nation: Legalized Baby Abandonment Safe Haven Laws, supra note 16.
208. Pertman, Measure, supra note 15.
209. Crary, supra note 17.
211. Crary, supra note 17.
212. Id.
214. Garrison, supra note 36.
216. Zucco, supra note 182.
Most of the mothers who kill their newborns or unsafely abandon them are confused, upset, and in denial. These girls are extremely unlikely to drive or ask for a ride to a designated Safe Haven to legally relinquish their newborn, especially one that is staffed with authority figures.

Opponents of the Safe Haven law contend that it prevents relinquished children from knowing their social, medical, and genealogical history. They further allege that research indicates that adoptees tend to be “healthier mentally, if they [are able to] learn about their personal histories,” however, children relinquished under the Safe Haven law are almost guaranteed not to have access to this information due to the anonymity provision. Critics of the Safe Haven law also argue that it denies birth fathers, who may not even know that they have a child let alone that it was relinquished under the law, their due process rights.

VI. SHAPING THE FUTURE

The recent amendments to Florida’s Safe Haven law will likely help save more newborns since parents now have more time to make the crucial decision of whether to give up their baby. Additionally, many parents may be more willing to utilize the law now that their action is considered surrendering their child rather than abandoning him or her. Furthermore, the amendments will help newborns legally surrendered under the law achieve permanency faster since the time consuming requirement of conducting a diligent search for known parents has been eliminated. A court may now enter an order terminating parental rights, thereby freeing the child for adoption, once the parents fail to claim the child within the allotted timeframe.

218. Zucco, supra note 182.
219. Pertman, Politicians, supra note 213.
220. Id.
221. Crary, supra note 17; Bastard Nation: Legalized Baby Abandonment Safe Haven Laws, supra note 16.
222. Pertman, Politicians, supra note 213.
225. See id.
226. See id. at 1015.
227. Id. § 3(5), 2008 Fla. Laws at 1015.
However, even though the amendments have expanded the law to help both the parents and the child, they will not achieve their desired goal of saving newborns from the grim fate of being discarded unless more people know about it. Florida’s Safe Haven law is finding success, but many people still do not know it exists. There is a tremendous need for continued promotion of this safe, legal alternative to baby dumping. The Florida Legislature needs to allot more funding to help promote the law, especially in those counties most affected by unsafe abandonments. Additionally, the public and private school systems need to continue to educate teens on pregnancy prevention so fewer teens and young adults find themselves facing unwanted pregnancies. Along with the need for increased education, is the need to eliminate the stigma associated with unplanned, unwanted teenage pregnancies when they do occur. The reality is that some teenagers and young adults will get pregnant, and they need to know that they will not be rejected by the community or their families. Girls facing unwanted pregnancies also need to be informed early about the various alternatives to baby dumping, including, but not limited to, the Safe Haven law. Hospitals, clinics, and doctors’ offices should be required to promote the law by having literature readily accessible to patients. Finally, hospitals should do thorough medical screenings on children safely surrendered under the law to check for possible genetic conditions that adoptive parents should be aware of.

VII. CONCLUSION

By allowing parents to surrender newborn infants up to seven days old at any fire station, emergency medical services station, or hospital with no questions asked, Florida’s Safe Haven law offers parents a safe, legal alternative to baby dumping. While surrendering a newborn under the law is a compassionate way to protect an innocent baby, it “is the last option.” Mothers are urged “to talk to someone” at the Safe Haven hotline before they give birth. They are also encouraged to obtain prenatal care and to either keep the child or go through the normal adoption process. Children surrendered under the law do not have access to their family or medical histories; however, the purpose of the law “is to save the lives of newborns,” and proponents argue that a newborn safely surrendered “without medical

230. Id.
231. Id.
records is prefer[red] to an unsafe abandonment” that is likely to result in death.232

Supporters of the law have said that it is worthwhile even if one life is saved.233 Florida has greatly surpassed this goal by saving over one hundred newborns and counting.234 The Safe Haven law is not expected to rescue every baby, however, one hundred infants is quite an accomplishment.235 Eight more newborns were safely surrendered in Florida during the writing of this article.236 While there is a continued need for greater public awareness and education, Florida’s success means that, slowly but surely, the word is getting out about the law, and babies are being saved as a result.237

232. Id.
233. A Safe Haven for Newborns, Our Mission, supra note 5.
234. See Taylor, supra note 8; Allen, supra note 1; Brecher, supra note 2.
236. See A Safe Haven for Newborns, Babies Statistics, supra note 190.
237. Brecher, supra note 2. For more information about the Gloria M. Silverio Foundation’s “A Safe Haven for Newborns,” visit http://www.asafehavenfornewborns.com, or contact the twenty-four hour helpline at 1-877-767-BABY (2229). Id.
ARTICLE I. THE ROLE OF THE FLORIDA COURTS IN PROTECTING THE UNINSURED FROM BEING OVERCHARGED FOR EMERGENCY MEDICAL SERVICES

DAVID STAHL*

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I. INTRODUCTION

In 2003, a series of Wall Street Journal articles brought to the American public’s attention a problem that had been brewing for decades. The prob-

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lem was that hospitals were charging uninsured patients rates that were much higher than rates that the hospitals accepted as full payment from the government and private insurers. 2 The price differences cited in many articles were astonishing. One article described a woman being charged $14,000 for a hospital stay, when the same hospital would regularly accept $2500 from private insurance. 3 Similar stories were being disclosed across the country including here in Florida where typical examples included an emergency room bill of $12,000 when the hospital accepted less than $3000 as full payment from private insurers. 4 Similarly, in another Florida case, a woman was charged $48,000 for inpatient care when a private insurance company would only be billed $7000. 5

In response to the public reaction to these stories and success in class action suits against the tobacco industry, many class action suits were filed on behalf of the uninsured to try to stop the seemingly outrageous prices the uninsured were charged for necessary medical services. 6 Under pressure from the public outcry, threat of legislation, and the cost of defending class action suits, many hospitals claimed to have changed their policies. 7 Nevertheless, the number of uninsured in America continues to grow and was reported as over forty-six million in 2006. 8 The problem is especially prevalent in Florida, which ranks third worst in terms of the total number of uninsured—close to three million—and in terms of the percentage of uninsured. 9 Furthermore, Florida has one of the highest charge-to-cost ratios in the United States, which means that, on average, Florida hospitals' standard charges

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2. Id. at 100–01.
4. Bob LaMendola, Uninsured Patients Sue Kendall Hospital for Bills; Group Wants Same Discount as Insured, SUN SENT., May 12, 2005, at 5B.
5. Frank Gluck, Woman Sues over Hospital Bill; She Says Lakewood Ranch Center Charged Her $40,000 More Because She is Uninsured, SARASOTA HERALD TRIB., Aug. 9, 2006, at BM1.
7. See Gerald F. Anderson, From 'Soak the Rich' to 'Soak the Poor': Recent Trends in Hospital Pricing, 26 HEALTH AFF. 780, 786–87 (2007).
9. Id.
represent a much higher markup over costs than hospitals in other states.\textsuperscript{10} Although hospitals claim to have changed their policies, hospitals are still free to charge whatever they want and some continue to fight lawsuits regarding overcharges to the uninsured.\textsuperscript{11}

Although there has been some success in terms of settlements to class action lawsuits, results from cases where the parties did not settle are now starting to find their way to the appellate courts for determination of what each state’s laws permit. This article will evaluate the way courts can and should be utilized to help the uninsured obtain reasonable charges for medical services.

Part II of this article will discuss the most likely causes of action that an uninsured party may have against a medical service provider that has charged the uninsured unreasonable rates. Part III evaluates issues that such uninsured parties may have with trying to achieve class certification. Part IV is a case analysis of a federal court case where an uninsured party tried to pursue a class action against a hospital for overcharging her and other similarly situated uninsured patients. Part V evaluates the Florida legislative response to the issue of determining reasonable rates for medical services for the uninsured and others that utilize the hospitals services without a pre-negotiated contract rate. Finally, part VI evaluates the best course of action for an uninsured person that believes he or she has been overcharged by an emergency medical service provider.

\section{II. Possible Causes of Action}

Although commentators have suggested numerous causes of action that uninsured patients who have been overcharged by emergency medical service providers could pursue, the two most viable causes of action under Florida law appear to be breach of the reasonable price term implied into open priced contracts and violation of Florida consumer protection law.\textsuperscript{12} This section will evaluate what an uninsured person would need to prevail on either of these claims.

\subsection{A. Breach of Open Priced Contract}

Under Florida common law, if a contract does not contain any fixed price or rate, the contract is considered an open priced contract and the law

\begin{thebibliography}{12}
\bibitem{10} See generally Anderson, \textit{supra} note 7, at 783.
\bibitem{11} See id. at 786--87.
\end{thebibliography}
implies a reasonable price to make the contract valid.\textsuperscript{13} In \textit{Payne v. Humana Hospital Orange Park},\textsuperscript{14} the First District Court of Appeal held that under this rule of law, where the agreement with the medical service provider indicates a patient is to pay the "standard and current rates," a patient is only bound to pay reasonable charges.\textsuperscript{15} Even if the patient could have accessed the service provider's list of charges—commonly referred to as a charge master—prior to agreeing to the terms of the contract, he or she would not have been able to truly consent to all of the charges as these charge masters are generally hundreds of pages long and codified.\textsuperscript{16} Thus, unlike situations where the payor can know the market price based on prior dealings or market conditions, patients have no real means of determining what charges to expect prior to accepting the hospital's terms.\textsuperscript{17} The inherent nature of emergency room services, where at the time the patient is asked to sign a contract, neither the hospital staff nor physicians can know which services will be needed, ensures that Florida courts are likely to continue to consider admission contracts for emergency room services as open priced contracts under Florida law.\textsuperscript{18}

Many courts around the country, however, have held that prices of hospital admission agreements are definite—therefore, the courts do not need to imply a fair and reasonable price—where the agreements refer to the hospitals' "regular charges," and where the hospitals' price lists are obtainable through outside sources.\textsuperscript{19} The courts seem to be deferential to the hospitals since the alternative would be for the hospitals to give every emergency room patient a contract that was hundreds of pages long listing the prices of all services even though the patient would never be able to read and under-

\textsuperscript{14} \textit{Id.} at 1239.
\textsuperscript{15} \textit{Id.} at 1241 (citing Mercy Hosp., Inc. v. Carr, 297 So. 2d 598, 599 (Fla. 3d Dist. Ct. App. 1974)).
\textsuperscript{16} \textit{Id.} at 1242 n.3.
\textsuperscript{17} \textit{See id.} at 1242.
\textsuperscript{19} \textit{See}, e.g., Nygaard v. Sioux Valley Hosps. & Health Sys., 731 N.W.2d 184, 191–92 (S.D. 2007) (holding that the patients' own allegations that the price terms were present showed "the charges [were] ascertainable through reference to outside sources" and there was "no need to judicially impute a fair and reasonable price term"); Cox v. Athens Reg'l Med. Ctr., Inc., 631 S.E.2d 792, 796 (Ga. Ct. App. 2006) (holding that the contracts authorized the hospital to charge patients the rate it normally charged uninsured patients); Shelton v. Duke Univ. Health Sys., 633 S.E.2d 113, 116 (N.C. Ct. App. 2006) (holding that "rates of services contained in the 'charge master' were necessarily implied in the contract signed by plaintiff").
stand the entire contents prior to agreeing to treatment.\textsuperscript{20} Thus, as one court concluded, it would be "entirely reasonable and predictable that patients would agree to pay the hospital’s regular rates for whatever services might be necessary."\textsuperscript{21} This logic is especially prevalent in states such as Arizona, where state law requires the hospital to submit their pricing lists to the state for approval and publication.\textsuperscript{22}

The question remains whether Florida courts will allow hospitals to distinguish the language of their form admission contracts from those in Payne.\textsuperscript{23} For example, in Doe v. HCA Health Services of Tennessee, Inc.,\textsuperscript{24} the Supreme Court of Tennessee held that a hospital’s form contract had an indefinite price term because the contract did not have a specific reference to any extrinsic document from which the patient could have ascertained the meaning of the word “charges.”\textsuperscript{25} The language of the opinion suggests that if the contract did indicate a reference to a means of obtaining the standard charges, then the contract price would be definite and the contract would be valid.\textsuperscript{26} In fact, in a recent appeals court decision in Tennessee, the court made such a distinction indicating that the contract in that case was sufficient and the price term definite where the contract used the terms “facility’s rates and terms” instead of “charges.”\textsuperscript{27} The court held that the language of the contract showed that the hospital had established rates which the patient

\begin{thebibliography}{27}
\bibitem{21} Shelton, 663 S.E.2d at 116.
\bibitem{22} Banner Health v. Med. Sav. Ins. Co., 163 P.3d 1096, 1101 (Ariz. Ct. App. 2007). Arizona law requires hospitals to file their customary rates and charges with the Arizona Department of Health for approval. \textit{Id.} After the Department of Health approves the rates, the department then publishes the rates. \textit{Id.} at 1100. After this, a hospital cannot change its rates without approval from the department. \textit{Id.} In this case, the signed admission agreements stated that the patients would “pay the hospital’s usual and customary charges, which are those rates filed annually with the Arizona Department of Health Services.” \textit{Id.} at 1098. Based on the Arizona statutes and the reference to the published list in the admission agreement, the court held that the contracts did not contain any open price terms and that the court would not imply a reasonable price term into the contracts. \textit{Banner Health}, 163 P.3d at 1101.
\bibitem{23} See generally Hall & Schneider, supra note 18.
\bibitem{24} 46 S.W.3d 191 (Tenn. 2001).
\bibitem{25} \textit{Id.} at 197. Where the contract contained text that the patient was “‘financially responsible to the hospital for charges not covered by this authorization.’” \textit{Id.}
\bibitem{26} \textit{See id.} The court held that that the contract without a definite price term was invalid. \textit{Id.} The court applied a quantum meruit equitable action to come to the same result as in Florida—the hospital was entitled to a reasonable price for its services. \textit{HCA Health Servs.}, 46 S.W.3d at 197–98.
\end{thebibliography}
could evaluate for reasonableness.\textsuperscript{28} The recent passing of the Health Care Consumer’s Right to Information Act will require hospitals to make certain financial information as well as the costs for some services publicly available.\textsuperscript{29} Thus, Florida courts may be influenced by Arizona precedent and no longer consider the price of hospital admission contracts to be fixed if the admission contracts refer to this publicly available information.\textsuperscript{30}

1. Declaratory Relief

Although the claim that a hospital admission contract implies a reasonable price term can serve as a defense to a collection suit by a hospital or collection agency, the uninsured patient has the right under Florida law to preemptively seek declaratory judgment to determine his or her obligation under the contract rather than defaulting and waiting for the medical provider to sue.\textsuperscript{31} Section 86.031, \textit{Florida Statutes}, states that a plaintiff can seek declaratory judgment on a contract “before or after there has been a breach of it.”\textsuperscript{32} Ironically, the plaintiff that has already paid the hospital’s full charges may not have a cause of action for damages if the court finds that the plaintiff paid the bill in full because of a mistake of law—that is, the plaintiff did not know that the contract was an open priced contract and that the plaintiff was only required to pay a reasonable fee.\textsuperscript{33} The patient might be able to recover the overpayment if he or she can show the hospital indicated it would not provide the necessary services before payment was received.\textsuperscript{34} This is unlikely to be the case, however, because hospitals usually send their bills after treatment—again because of the difficulty of knowing what treatment will be needed in advance.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at *8.
\item \textsuperscript{29} \textit{See Health Care Consumer’s Right to Information Act, ch. 2008-47, § 1, 2008 Fla. Laws} 739, 739–40.
\item \textsuperscript{31} \textit{See FLA. STAT.} § 86.021 (2008).
\item \textsuperscript{32} \textit{FLA. STAT.} § 86.031 (2008).
\item \textsuperscript{33} \textit{Compare Payne v. Humana Hosp. Orange Park,} 661 So. 2d 1239, 1240–41 (Fla. 1st Dist. Ct. App. 1995) (per curiam) (holding that plaintiff does have a cause of action to recover overpayment on an open priced hospital contract), \textit{with Hall v. Humana Hosp. Daytona Beach,} 686 So. 2d 653, 657 (Fla. 5th Dist. Ct. App. 1996) (holding that a mistake of law regarding the enforceability of an open priced contract for medical services did not warrant “equitable relief once payment” had been made).
\item \textsuperscript{34} \textit{See Hall,} 686 So. 2d at 657 & n.6.
\item \textsuperscript{35} \textit{See generally id.}
\end{itemize}
2. Determining a Reasonable Price for Emergency Medical Services

Once the uninsured plaintiff has convinced the court that the hospital admission contract contained an indefinite price term, the plaintiff must also allege facts that could lead a reasonable juror to infer that the charged price is unreasonable.\(^3\) The common theme in Florida case law is that determining the reasonableness of a particular hospital charge is a matter for the trier of fact to determine.\(^7\) The Second District Court of Appeal has offered some guidance for making this determination by indicating "that evidence of . . . contractual discounts, standing alone, is insufficient to prove that . . . charges [are] unreasonable."\(^38\) From this, courts have inferred that reasonableness of charges is based on a multitude of factors of which evidence of contractual discounts is one.\(^39\) Florida courts have also been reluctant to hold that a reasonable charge could always be determined based on a multiplier of the Medicare reimbursement rate.\(^40\)

In *Colomar v. Mercy Hospital, Inc.* (*Colomar II*),\(^41\) a federal district court judge interpreting Florida law in a class action case evaluated Florida

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37. *Id.* (holding that where legislation left the term "reasonable" medical expenses undefined, "[t]he fact-finder must construe the word 'reasonable'.")
38. *Hillsborough County Hosp. Auth. v. Fernandez*, 664 So. 2d 1071, 1072 (Fla. 2d Dist. Ct. App. 1995) (holding that the hospital was entitled to the full amount of its charges in a statutory lien against an uninsured's recovery in a personal injury case where the only evidence offered that the hospital's full charges were unreasonable was that it offered discounts to managed care providers).
40. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1196 (Fla. 4th Dist. Ct. App. 2006) (indicating that a Health Maintenance Organizations (HMOs) could not base its statutory duty to reimburse non-contracted emergency service providers based on simply a percentage above Medicare reimbursement rates). Section 641.513(5), *Florida Statutes*, dictates how an HMO must reimburse non-participating emergency service providers who provide services for the HMO members. *Fla. Stat.* § 641.513(5) (2008). The statute requires the HMO to reimburse the provider "the lesser of: (a) The provider's charges; (b) [t]he usual and customary provider charges for similar services in the community where the services were provided; or (c) [t]he charge mutually agreed to by the health maintenance organization and the provider within 60 days of the submittal of the claim." *Id.* At issue in this case was how the court should determine the HMO's liability to the non-participating providers. *Merkle*, 940 So. 2d at 1196. A court decision establishing a means of calculating "[t]he usual and customary provider charges for similar services in the community where the services were provided" could offer guidance on how to determine reasonable charges for uninsured patients. *Fla. Stat.* § 641.513(5)(b); see Leah Snyder Batchis, *Comment, Can Lawsuits Help the Uninsured Access Affordable Hospital Care? Potential Theories for Uninsured Patient Plaintiffs*, 78 TEMP. L. REV. 493, 525 (2005).
case law as well as case law from other states to establish a multiple factor approach for determining whether or not hospital charges were reasonable.\textsuperscript{42} These factors included an analysis of what other hospitals in the surrounding market charged for similar services (market analysis), a comparison of the rate that a hospital actually charges and what it accepts as full payment for those services from other patients (differential pricing), and an analysis of the hospital's actual costs for providing the service (actual costs).\textsuperscript{43} The factors had to be analyzed together as no single factor was sufficient to establish that the charges were or were not reasonable.\textsuperscript{44}

\textbf{a. Market Analysis}

The first factor, market analysis, simply compares the prices that the hospital actually charged to the uninsured patient with what other hospitals in the same market would have charged for those services.\textsuperscript{45} At the pleading stage, the court may be willing to infer that this factor weighs in favor of the hospital's charges being unreasonable if the hospital's charges are in the top twenty-five percent of hospitals nationwide.\textsuperscript{46} Nevertheless, the court will probably require that during discovery, the patient produce evidence that the charges for the specific services provided were higher than those of hospitals in the same market.\textsuperscript{47} Considering that hospitals rarely collect their full standard rates, the prices actually charged by hospitals are probably not truly market driven.\textsuperscript{48} As a result, other area hospitals might also have standard charges that could be deemed unreasonable with respect to the cost of providing the services and with respect to what is actually paid in the community for those services.\textsuperscript{49} Thus, comparing the standard rates might give a false sense of reasonableness.\textsuperscript{50} This is the reason, however, that a market analysis is only one of several factors in determining reasonableness.\textsuperscript{51}

\textsuperscript{42} Id. at 1269.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Colomar II, 461 F. Supp. 2d at 1270.
\textsuperscript{48} See Hall & Schneider, supra note 18, at 687 (citing testimony that health economist Gerard Anderson gave to Congress).
\textsuperscript{49} See id.
\textsuperscript{50} Colomar II, 461 F. Supp. 2d at 1272.
\textsuperscript{51} Id. For example, data based on standard charges reported by California hospitals being forced to make their charge masters public illustrates standard charges do vary greatly among hospitals. See Lucette Lagnado, \textit{Medical Markup: California Hospitals Open Books, Showing Huge Price Differences; State Law Requires Disclosing Charges for Goods, Servic-
b. **Differential Pricing**

The next factor, price differentials, takes into account discounts that the hospitals will give to other patients that are covered by private insurance or government programs.\(^{52}\) Florida courts have held that differential pricing by itself is not sufficient to establish that prices are unreasonable.\(^{53}\) This implies, however, that differential pricing, although not dispositive, is an important factor in determining whether or not prices for medical services are reasonable.\(^{54}\) Evidence of differential pricing can be used to support the case that the hospital’s costs, as well as the fair market value of the services are well below the hospital’s standard charges.\(^{55}\) A hospital is unlikely to contract with private insurers to accept payments that are below its actual cost of providing those services.\(^{56}\) Although not binding, some courts from other jurisdictions have held that the reasonable value should be determined based on what the service provider normally accepts as full payment for the service and not what the provider charges.\(^{57}\) This is especially true with respect to hospital billing where, according to one expert witness, some hospitals receive their “full published charges in only one to three percent of [their] cases.”\(^ {58}\) Evidence of differential pricing, therefore, can strongly support a patient’s case that the billed charges are unreasonable.\(^ {59}\)

\(^{52}\) Colomar II, 461 F. Supp. 2d at 1271–72 (citing Payne v. Humana Hosp., 661 So. 2d 1239, 1242 (Fla. 1st Dist. Ct. App. 1995) (per curiam)).


\(^{54}\) See id. at 1272.


\(^{56}\) Id. at 508. The same expert witness also testified that the same hospital receives “eighty percent or less” of its published charges in ninety-four percent of its cases. Id.

\(^{57}\) See id.

\(^{58}\) See id. (showing that in one case a simple blood test which costs $97 at one hospital costs $1733 at another). Thus, even if overall the standard rates are in line with others in the community, there is a chance that at least some of the charges will be out of proportion. See id.
c. Costs

The other major factor that the trier of fact will need to evaluate to determine if a hospital's charges for particular services are reasonable is the actual cost to the hospital for providing those services. 60 This factor is designed to take into consideration a hospital's internal costs for providing particular services—evidence of higher costs when compared to other hospitals could explain why that hospital's standard charges are higher. 61 Thus, the higher than market price rates might be reasonable when considering these internal costs. 62 As with the other factors, actual cost alone is not dispositive; therefore, a showing of a high markup from the hospital's actual costs will not by itself prove that the standard rates are unreasonable. 63 Thus, a hospital with lower costs, but similar prices to area hospitals, will not be penalized for its efficiency. 64 Nevertheless, this factor might not be highly probative because there is little correlation between hospitals' standard prices and their internal costs. 65

A hospital's internal costs will be the most difficult factor for the patient to prove since almost all of the facts regarding costs are within the hospital's control. 66 A court might be willing to look at overall hospital statistics—i.e., the hospital's overall ratio of its charges to costs—for the purpose of stating a claim. 67 After discovery, however, the patient will have to prove that the charges for the particular services in question greatly exceeded the hospital's costs for those services. 68 An additional problem with analyzing costs is that a hospital might be able to show that the cost of treating an uninsured patient is not the same as treating one that is either insured or covered by a government program where the hospital has more assurance that a portion of the bill

60. Colomar II, 461 F. Supp. 2d at 1272.
61. Id.
62. Id.
63. See id.
64. Id.
65. See Anderson, supra note 7, at 782–83.
67. See id.
68. See, e.g., Colomar IV, No. 05-22409, 2007 WL 2083562, at *5 (S.D. Fla. July 20, 2007) (explaining that where the court, in determining whether or not there was sufficient evidence for a reasonable juror to infer that the hospital's charges were unreasonable, indicated that it expected the plaintiff/patient to have provided evidence of the hospital's actual cost for providing the specific services to that patient and that such an inference could not be made based solely on the hospital's overall ratio of its charges to costs for a general category of care).
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will be paid. Furthermore, the hospital could argue that the contracts with some private insurance companies generate volume and that this additional revenue would have to be reduced from the costs of providing service to patients covered by such contracts.

Even if the patient is able to produce sufficient evidence from which a reasonable jury could infer that the billed charges are unreasonable, the trier of fact will still have to make a determination of what a reasonable charge should be. Some courts and commentators have suggested that a reasonable rate should be based on the hospital’s own collection data and should be the average amount that the hospital has actually received and accepted from government payers, contracted private insurers, and non-contracted private insurers. Because the rates paid by government agencies are fixed by statute and are not the result of any bargaining with the hospital, some have suggested that the reasonable price an uninsured should be required to pay should be based only on what the hospital collects from private insurers. Rather than setting the reasonable rate as the average of what a provider has accepted from private insurers, the reasonable rate could be set at either the maximum or seventy-fifth percentile. This would put the hospital in better position than with most private insurers. In Florida, the court might also look to what the provider of emergency service has accepted as usual and customary charges from HMOs with which the hospital has no contract for services provided to those HMOs’ members. This situation is analogous to

69. Galvan v. Nw. Mem. Hosp., 888 N.E.2d 529, 538–39 (Ill. App. Ct. 2008) (holding that it was not an unfair trade practice to charge uninsured patients twice what insured patients were charged because the patients were not similarly situated.)

Underlying the plaintiff’s claim that charging uninsured patients a higher price amounts to oppressive pricing is a suggestion that the insured and uninsured patients are similarly situated. They are not. The plaintiff ignores the obvious difference between an insured patient and one uninsured. An insured patient by definition has medical insurance .... In return for the insurance premiums, his insurance company contracts with a hospital for medical services at a reduced rate. The contract benefits the hospital because payment is guaranteed. There is no such guarantee from uninsured patients.

Id.

70. See id. at 539.


72. See Nation, supra note 3, at 135–36 (suggesting that “[a]n uninsured patient should [only] be required to pay the average amount [that] the hospital actually [collected] and accepted” from governmental agencies and private insurers).

73. Id. at 104.

74. See Maldonado v. Ochsner Clinic Found., (Maldonado II) 493 F.3d 521, 526 n. 10 (5th Cir. 2007).

75. See id.

76. See generally Batchis, supra note 40, at 525.
the uninsured patient since there is no benefit provided by the HMO of referrals as is the case with contracted private insurers. 77

B. Violation of the Florida Unfair and Deceptive Practice Act

An uninsured patient that has been charged an unreasonable amount for emergency room services might also have a statutory cause of action based on the Florida Deceptive and Unfair Trade Practice Act (FDUTPA). 78 One of the primary purposes of this act is "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." 79 The act specifically prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." 80 The act also provides for individual remedies that include a declaratory judgment that a particular act or practice violates FDUTPA and injunctive relief to stop such violations or prevent them in the future. 81 While the Florida Legislature never defined "deceptive" or "unfair," the Supreme Court of Florida in PNR, Inc. v. Beacon Property Management, Inc. 82 has affirmed the definition of an unfair practice or act as "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" 83 The Court has approved the definition of a deceptive act to be one where there is a "'representation, omission, or practice that is

77. See id.
79. Id. § 501.202(2).
80. Id. § 501.204(1).
81. Id. § 501.211(1).
82. 842 So. 2d 773 (Fla. 2003).
83. Id. at 777 (quoting Samuels v. King Motor Co., 782 So. 2d 489, 499 (Fla. 4th Dist. Ct. App. 2001)). Section 501.203(3)(b), Florida Statutes, states that in determining violations of the Act, courts should use "[t]he standards of unfairness and deception set forth and interpreted by the Federal Trade Commission [(FTC)] or the federal courts." Fla. Stat. § 501.203(3)(b). Thus, although this definition of unfair and deceptive acts is currently used by many Florida courts, the definition could be challenged because it differs from the FTC's definition of unfair acts or practices. See David J. Federbush, The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act, 73 Fla. B.J. 26, 30 (May 1999). The current FTC definition of an unfair act or practice is an act or practice which "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2008). Public policy considerations can now serve as evidence of an unfair practice but cannot be the primary basis for considering an act or practice to be unfair. Id.
likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment."

Although there are no appellate decisions affirming that emergency service providers may be violating FDUTPA by charging unreasonable amounts, there is sufficient case law to suggest that such billing practices, if proven, would violate the act. First, in PNR, the Supreme Court of Florida held that even a single breach of contract can result in a claim under FDUTPA if the action which led to the breach of contract would also be deemed "an unfair or deceptive act" or practice under prevailing case law. Furthermore, although some states exclude members of the medical profession from their deceptive and unfair trade practices acts, Florida law does not have any such exclusion. Finally, there are no state or federal laws that might grant an exemption from FDUTPA to hospitals and authorize them to charge unreasonable rates to uninsured patients.

One main reason that pursuing a FDUTPA claim is so important for the uninsured patient is that the statute permits the court to award attorney’s fees to the prevailing party. The recovery of attorney’s fees can be especially important in claims of unreasonable charges for emergency services for two reasons. First, the uninsured party is unlikely to have the financial resources to hire a lawyer regardless of whether the party is the plaintiff seeking decla-

84. *PNR, Inc.*, 842 So. 2d at 777 (quoting Millennium Commc’ns & Fulfillment, Inc. v. Office of the Att’y Gen., 761 So. 2d 1256, 1263 (Fla. 3d Dist. Ct. App. 2000)).
86. *PNR, Inc.*, 842 So. 2d at 777 & n.2.
89. See *Colomar I*, 2006 U.S. Dist. LEXIS 95834 at *17. Section 501.212(1), Florida Statutes, states that “[a]n act or practice required or specifically permitted by federal or state law” is exempt from FDUTPA. FLA. STAT. § 501.212(1) (2008). Nevertheless, the court in *Colomar I* did not find that statutes which permitted the defendants to offer discounts to private insurers, nor statutes that required them to produce an itemized bill on request specifically authorized the defendants to charge unreasonable rates to uninsured patients. *Colomar I*, 2006 U.S. Dist. LEXIS 95834 at *17.
90. See FLA. STAT. § 501.2105(1) (2008) (“In any civil litigation resulting from an act or practice involving a violation of this part, . . . the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney’s fees and costs from the nonprevailing party.”).
ratory judgment or a defendant in a collection suit.91 Second, without the recovery of attorney’s fees, many claims against emergency service providers would be “negative-value suits” where the cost of attorney’s fees exceeds the total expected recovery from the claim.92

Those pursuing causes of action, under FDUTPA, however, have to be careful because the explicit language of the statute allows the court to award attorney’s fees to the prevailing party.93 The statute’s award of attorney’s fees was even riskier prior to a 1994 amendment when the “award of reasonable attorney’s fees to the prevailing party” was mandatory and not left to the discretion of the court.94 A recent decision by the Fourth District Court of Appeal rejected the notion that the trial court judge could only award attorney’s fees to the prevailing defendant in a FDUTPA claim if the plaintiff’s claim was “frivolous, unreasonable, or without foundation.”95 The court indicated that the statute clearly left the award of attorney’s fees to the discretion of the trial judge.96 The trial judge’s decision to award attorney’s fees to the prevailing defendant might have been influenced by the fact that both parties were charity organizations.97 Unfortunately, another recent decision to award attorney’s fees, which was also upheld by the same district court, suggests that trial judges are likely to award attorney’s fees in contract dis-

91. See Colomar v. Mercy Hosp., Inc. (Colomar III), 242 F.R.D. 671, 682 (S.D. Fla. 2007) (indicating that class action is not superior because plaintiffs could recover attorney’s fees under FDUTPA). An uninsured patient is most likely going to be from a household “with less than $25,000” where at least one person does work full time. James McGrath, Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government, 26 QUINNIPAC L. REV. 173, 193 (2007).

92. See J. Maria Glover, Note, Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 VAND. L. REV. 1735, 1737 (2006) (addressing how class action waiver agreements can be unconscionable because they essentially remove one’s right to recovery in cases where the cost of pursuing a claim will exceed the expected recovery for that claim).

93. FLA. STAT. § 501.2105(1).

94. See David J. Federbush, Entitlement to Attorneys’ Fees Under FDUTPA, 78 FLA. B.J. 26, 26 (Jan. 2004) [hereinafter Federbush, Attorneys’ Fees].

95. Humane Soc’y of Broward County, Inc. v. Fla. Humane Soc’y, 951 So. 2d 966, 968 (Fla. 4th Dist. Ct. App. 2007). Prior to this ruling, Mr. Federbush had theorized that the trial courts would likely only award attorney’s fees to the prevailing defendant if the plaintiff’s claims were frivolous because the courts would follow the Supreme Court of Florida’s precedent for other public policy cases such as discrimination cases. Federbush, Attorneys’ Fees, supra note 94, at 29. The plaintiff in Humane Society tried to apply Mr. Federbush’s exact arguments as to why attorney’s fees should not be granted, but the court disagreed. Humane Soc’y, 951 So. 2d at 968.

96. Id.

97. See id. (acknowledging in a motion for fees and costs that “both groups are doing good work and ultimately donations are going to be used to pay attorney’s fees, whichever way it goes”).
protes where the court believes the party adding the FDUTPA claim has only increased the risk for both parties by adding the extra claim.\textsuperscript{98} In theory, this means that if the uninsured patient were to lose, not only would he or she be liable for the full hospital bill and his or her attorney’s fees, but he or she could also be liable for the hospital’s legal fees as well.\textsuperscript{99}

\section*{III. ISSUES WITH CLASS CERTIFICATION}

A key for uninsured patients to succeed in using litigation as a means of redressing their overcharges by emergency service providers is class certification.\textsuperscript{100} Class certification is important because the uninsured face two major obstacles in pursuing litigation.\textsuperscript{101} First, uninsured people are likely to lack the financial resources to contest the hospital’s charges in court.\textsuperscript{102} Second, even if the uninsured people do have the financial resources, the cost of litigation might far exceed any gain they hope to achieve—either a reduction in their debt obligation to the hospital or a return of overcharges they have already paid.\textsuperscript{103} If, however, the uninsured can certify themselves as a class against a particular provider, then they have a much better chance of success as the cost of the legal fees will be distributed amongst the class and the risk for the provider will be greatly increased.\textsuperscript{104} In fact, in many cases, once courts granted class certification, hospitals sought prompt settlement.\textsuperscript{105} Although there was some initial success with class certification,\textsuperscript{106} the current trend in both Florida and federal courts seems to be that class certification for the uninsured, with respect to the rates they have been charged for emergency services, is not appropriate.\textsuperscript{107}

If the uninsured do certify a class, either the uninsured themselves or the defending service providers could remove the case to a federal court un-

\textsuperscript{98} See Mandel v. Decorator’s Mart, Inc., 965 So. 2d 311, 313 n.1 ( Fla. 4th Dist. Ct. App. 2007) (noting that it was “not uncommon for litigants to inject claims of . . . deceptive . . . practices into a contractual dispute” and that the tactic was rarely successful).
\textsuperscript{99} See id.
\textsuperscript{100} See Anderson, supra note 7, at 787 (indicating that hospitals were usually quick to settle once class certification was granted).
\textsuperscript{101} See McGrath, supra note 91, at 193.
\textsuperscript{102} See id. (explaining that an uninsured person is more likely to have an income of less than $25,000, with at least one family member working full time).
\textsuperscript{103} See Glover, supra note 92, at 1737 (discussing how class action waivers can prevent potential plaintiffs from ever bringing suits).
\textsuperscript{104} See generally id.
\textsuperscript{105} Anderson, supra note 7, at 787.
\textsuperscript{106} Cohen, supra note 1, 143-45.
\textsuperscript{107} See, e.g., Maldonado II, 493 F.3d 521, 526 (5th Cir. 2007).
der the Class Action Fairness Act of 2005.\textsuperscript{108} According to this Act, the federal courts will have original subject matter jurisdiction if the amount in controversy exceeds five million dollars, the class action has over one hundred members, and there is minimal diversity.\textsuperscript{109} Minimal diversity is established when "any member of a class of plaintiffs is a citizen of a State different from any defendant."\textsuperscript{110} Although the federal court must decline jurisdiction if two-thirds of the class and the primary defendants are both citizens of Florida, many class actions, especially against for-profit hospitals, will satisfy these requirements.\textsuperscript{111}

A. Numerosity, Commonality, Typicality, and Adequacy Factors

Whether the case is tried in federal or state court will have little bearing on whether the class can be certified because the Florida and Federal Rules of Civil Procedure requirements for class certification are almost identical.\textsuperscript{112} Under the Federal Rules of Civil Procedure:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: 1) the class is so numerous that joinder of all members is impracticable [(numerosity)]; 2) there are questions of law or fact common to the class [(commonality)]; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [(typicality)]; and 4) the representative parties will fairly and adequately protect the interests of the class [(adequacy)].\textsuperscript{113}

These requirements are generally referred to as the "numerosity, commonality, typicality, and adequacy factors."\textsuperscript{114}

To satisfy the numerosity requirement, the party seeking to certify the class must be able to prove with reasonable certainty that the class size will be so large that joinder of individual members would be impracticable.\textsuperscript{115}

While it might be easy for an uninsured person trying to certify a class to

\textsuperscript{109} Id. § 1332(d)(2).
\textsuperscript{110} Id. § 1332(d)(2)(A).
\textsuperscript{111} See id. § 1332(d)(2)(A)(i)(I).
\textsuperscript{113} Fed. R. Civ. P. 23(a).
\textsuperscript{114} Colomar III, 242 F.R.D. 671, 674 n.3 (S.D. Fla. 2007). Satisfying the adequacy factor for purposes of establishing a class action is not a problem that is unique to patients contesting the reasonableness of charges for emergency medical services and is beyond the scope of this article. See id. at 677–80.
\textsuperscript{115} Fed. R. Civ. P. 23(a)(1).
determine how many uninsured patients received treatment from the same hospital, this information alone is not sufficient. The patient will probably also have to show that a certain percentage of those patients, like themselves, are still obligated to pay an unreasonable sum or have already paid an unreasonable amount. Since many of the uninsured that were treated at hospitals may have already been offered discounts or had their bills subsequently paid by a government program such as Medicaid, the absolute number of uninsured patients that were treated would be insufficient. This problem can be overcome; however, it might require significant expenditure just to reasonably identify the class prior to filing suit.

To satisfy the requirement of commonality, the party seeking class certification only needs to show that there is at least one “common question of law or fact” as long as that single common question “affects all class members” the same way. The courts in the Eleventh Circuit and in Florida do not require much to prove commonality. Nevertheless, uninsured people trying to show that the hospital charged them an unreasonable amount may have a difficult time showing commonality, unless they can establish that the hospital intentionally raised prices for uninsured patients. Without evidence of a common pricing scheme, and considering that some hospitals’ charge master lists comprise of tens of thousands of items, the only common question would be whether or not the hospital was obligated to charge a reasonable amount. The defendant hospital could concede that the pricing term is open and at the same time argue that the prices on its charge master list are reasonable. Thus, proving commonality could be difficult if the hospital wants to avoid class status.

Even if the uninsured parties could establish commonality, typicality is even more difficult to prove. In order to satisfy the typicality requirement, the representative plaintiff must be able to prove the claims of other class members in proving his or her own claim. Thus, typicality is usually es-

117. See id.
118. Id. at 676.
119. See generally id.
120. Id.
121. See Colomar III, 242 F.R.D. at 676 ("The threshold for commonality is not high.") (quoting Cheney v. Cyberguard Corp., 213 F.R.D. 484, 490 (S.D. Fla. 2003)).
122. See id. at 680.
123. See id.
124. See id. at 680.
125. Id. at 676–77.
127. Id.
established when the elements required to prove the representative’s claims are the same elements required to prove the claims of the entire class. 128 Courts across the country seem unwilling to find that, in general, all of a hospital’s charges are unreasonable or even to define a reasonable charge as a percentage of some government established rate—such as Medicare reimbursement rates. 129 Thus, courts will require that the uninsured prove that each charge itself is unreasonable. 130 Regardless of how this is measured, a representative member that proves his or her charges were unreasonable, would only establish that other patients charged the same amount for the same services during the same time period were also charged unreasonable amounts. 131 A party seeking to certify a class could try to convince the court that a reasonable rate should be calculated based on the range of fees the hospital actually accepts for those charges. 132 If the court agrees to this definition of reasonableness, the plaintiff might be able to establish typicality as the same source of hospital records could be used to prove the claims of other class members. 133

B. Predominance and Superiority

Even if the court were to accept that the representative member could establish typicality, in order to certify a class for monetary damages, the representative would still have to show that “the questions of law or fact common to class members predominate over any questions affecting only individual members” (predominance). 134 To establish predominance, the issues that are common to proving the claims of the class as a whole must predominate over issues that only need to be proven for individual claims. 135 If after all of the issues which are common to the entire class have been adjudicated, class members must still introduce a great deal of proof specific to individual claims, then the claim does not satisfy the predominance requirement. 136 Whereas in Florida, courts cannot establish unreasonableness based solely on price differentials and discounts offered to insured patients, the courts are

128. Id.
129. See, e.g., Maldonado II, 493 F.3d 521, 526 (5th Cir. 2007).
130. See id. at 525–26.
132. See Maldonado II, 493 F.3d at 526 n.10 (rejecting the proposal that a reasonable rate could be established as a weighted average of amounts the hospitals receive from insurers and government programs saying that “[u]nder this approach, contrary to common sense, approximately half of the insurers would have negotiated an ‘unreasonable’ rate”).
133. See id.
136. Id.
unlikely to find that predominance is satisfied. In addition to proving predominance, the party seeking class certification for money damages must also show "that a class action is superior to other available methods" for the fair and efficient adjudication of the controversy. The main factor that works against class action being a superior method to resolve the claims of hospital overcharging uninsured patients is the difficulty the court might encounter trying to manage all of the claims. Since each class member will have been billed for different services and at different times, each additional member will add to the amount of evidence the court needs to manage. Those uninsured people who seek to certify the class are likely to claim that without class certification they lack the financial resources to seek a remedy for their injury. However, federal courts have determined that where there is a statutory basis for recovering attorney's fees, class action is not superior to other methods of adjudication. Thus, if plaintiffs include the FDUTPA claim in their complaint, they may actually hurt their chances of class certification based on superiority alone.

C. Injunctive Relief

If the plaintiffs seeking to certify the class seek injunctive relief, then in addition to the first four requirements, they must show that the medical service provider has acted on "grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This type of injunctive class relief is generally applicable when a defendant has charged all of its customers an undifferentiated fee. Thus, plaintiffs seeking to certify a class for injunctive relief would need to show that the service providers had some generally applicable system such as "systematically raising prices for uninsured patients by a set percentage." Furthermore, based on the Florida definition of reasonable

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138. See id.
139. FED. R. CIV. P. 23(b)(3).
141. See id.
142. See id.
143. Id.
144. See id. at 680.
145. FED. R. CIV. P. 23(b)(2).
147. Id. (quoting Maldonado v. Ochsner (Maldonado I), 237 F.R.D. 145, 151 (E.D. La. 2006)).
charges, a court could not impose injunctive or class-wide relief across the whole class because an order requiring a service provider to stop "overcharging" uninsured patients would lack the specificity required for injunctive relief. In fact, many courts see the request for injunctive relief in these types of cases as a violation of the separation of powers by asking the court to legislate.

D. Florida’s Specific Class Certification Issues

Plaintiffs filing their claims in Florida state courts rather than federal courts must comply with the same class certification requirements. Moreover, the Florida courts require evidentiary support before granting class certification if the nonmoving party objects to the certification. Thus, the court cannot simply rely on the pleadings when one party objects to certification and must actually have an evidentiary hearing to determine if certification is appropriate. Florida law allows for an interlocutory appeal of class certification. The court may find that the "trial court abused its discretion" if the class determination was made without the evidentiary hearing. This provides an obstacle to class certification in state courts because the plaintiffs

148. Id.
149. See Howard v. Willis-Knighton Med. Ctr., 924 So. 2d 1245, 1259 (La. Ct. App. 2006) (concluding that plaintiffs’ request for the court to "establish what constitutes reasonable prices" for medical services was "a novel and untested theory" and not appropriate for class certification); Kolari v. N.Y.-Presbyterian Hosp., 382 F. Supp. 2d 562, 565–66 (S.D.N.Y. 2005) ("Plaintiffs here have lost their way; they need to consult a map or a compass or a Constitution because Plaintiffs have come to the judicial branch for relief that may only be granted by the legislative branch."). If the Court were to issue an injunction against [the hospital] to prevent it from charging "unreasonable" prices, the court would also have to determine what prices were "reasonable" for not only [plaintiff’s] procedure, but every other hospital procedure. This goes against constitutional Article III considerations of justiciability and separation of powers. Medical regulation issues have typically been resolved by the legislative process. It is not within the scope of judicial powers to decide medical billing procedures and pricing, and the Court may not issue an advisory opinion in this regard.

150. See Fla. R. CIV. P. 1.220(a).
152. Id.
153. See, e.g., id. at 582 (where Second District Court of Appeal reverses a trial court’s grant of class certification even though there had been no final adjudication in the case).
154. Id.
seeking class certification will need to show that a sufficient number of the class was overcharged for medical services.  

IV. CASE STUDY: COLOMAR V. MERCY HOSPITAL, INC.

Barbara Colomar, who at the time did not have medical insurance and did not qualify for any governmental assistance, went to Mercy Hospital in Miami, Florida, because she was having trouble breathing after exposure to pesticides in her house. Prior to receiving any treatment at the hospital, Colomar signed an "Authorization and Guarantee" form in which she agreed to "pay any and all unpaid bills . . . which are not covered by insurance or otherwise paid." The authorization form did not indicate what treatment she would receive or how much she would be charged. Colomar's treatment at the hospital for her respiratory problems lasted approximately twenty-six hours. Colomar later received a bill from the hospital for $12,863. She paid $1750 of this bill and the hospital sent the remaining balance to collections.

After Mercy Hospital allegedly threatened to damage Colomar's credit if she did not pay the bill in full, Colomar filed suit on behalf of herself and other uninsured patients who had received treatment at Mercy Hospital. Colomar did not allege any problems with the care that she received at Mercy, but rather alleged that Mercy Hospital had breached its contract with her by charging her an unreasonable amount and that Mercy had violated FDUPTA with its unfair billing practices. The case was removed to fede-

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155. See id. Florida has allowed class certification for physicians that are contesting the reimbursement they have received from HMOs with which they had no contract for emergency services they provided to the HMOs' members. See Merkle v. Health Options, Inc., 940 So. 2d 1190, 1200 (Fla. 4th Dist. Ct. App. 2006). Those claims are based on a Florida statute that requires the HMOs to reimburse them at the reasonable and customary rate. Id. at 1196. The court will face the same challenges in determining the usual and customary rates in those cases as it will when determining reasonable rates for the uninsured and managing the physicians as a single class. See id.


157. Id. at *6.


160. Id.

161. Id. at *5.

162. Id. at *2–3, 5; Colomar III, 242 F.R.D. at 673.

163. Colomar I, 2006 U.S. Dist. LEXIS 95834, at *6. In her first amended complaint, Colomar had also alleged that the hospital had been unjustly enriched and had violated its duty of good faith and fair dealing. Id. at n.3. The court dismissed these two charges along with a claim alleging that Mercy violated FUDPTA via deceptive practices that would lead the ordi-
al court under the Class Action Fairness Act of 2005, which gave the federal court original jurisdiction over certain class action cases with at least minimal diversity.164

A. The Good: Cause of Action Exists

In denying Mercy’s motion to dismiss Colomar’s second amended complaint, the court acknowledged that a cause of action does exist in Florida for uninsured patients that claim to have been charged unreasonable amounts by hospitals.165 In her second amended complaint, Colomar alleged that although she was charged $12,863, the hospital’s internal costs for the services she received were only $2,098.166 She also alleged that Mercy, on average, charges uninsured patients four times the Medicare reimbursement rates.167 Furthermore, she alleged that hospitals owned by Mercy’s parent corporation ranked “among the top 13% of all hospitals nationwide in charges” and “in the top 10% of hospitals nationwide in terms of cost-to-charge ratio”—charging uninsured patients, on average, four times the actual costs.168

The court agreed that because the contracts with uninsured patients had open pricing terms, Mercy was obligated to charge Colomar and other uninsured patients that signed similar agreements reasonable amounts.169 The court held that under Florida law, the court had to analyze several nonexclusive factors to determine if the charges were reasonable.170 First, the court examined the overall market for hospital services to determine if Mercy’s charges were within the range of what other hospitals in the community would charge for similar services.171 Because the court was only analyzing the sufficiency of the complaint, the court was willing to infer from the alleged facts that Mercy’s charges were more than what most hospitals charged for the same services.172 The court noted that if Mercy’s charges were not in the top twenty-fifth percentile, then the court would most likely have inferred

164. Id. at *16, *22.
166. Id. at 1268.
167. Id.
168. Id.
169. Id.
171. Id.
172. Id. at 1270.
that the charges were similar to other similarly situated hospitals.\footnote{Id.} Even if this were the case, however, the court could still hold that the charges were unreasonable based on other factors.\footnote{Id. at 1271.}

The second factor the court looked at was the price the hospital charged other patients for the same services.\footnote{Colomar II, 461 F. Supp. 2d. at 1271.} The fact that the hospital will accept much lower payments from other patients implies that the actual value of the services may be less than what the hospital charges.\footnote{Id. at 1272.} In this case, Colomar had alleged that the hospital offered significant discounts to insured patients and those covered by government benefits.\footnote{Id.} The court held that proving this differential pricing along with other factors could support the allegation that the charges were unreasonable.\footnote{Id. at 1272.}

Finally, the court analyzed the hospital’s actual costs to determine if the price was reasonable.\footnote{Id.} Colomar alleged in her complaint that the hospital had charged her more than six times the cost of treating her.\footnote{Colomar I, 461 F. Supp. 2d. at 1273.} Accepting the allegations as true for the purpose of the motion to dismiss, the court held that it could not conclude as a matter of law that the charges were reasonable.\footnote{Id. at 1274.} The court then held that the complaint alleged sufficient facts to support a claim that Mercy’s charges for the services it provided to Colomar were unreasonable.\footnote{Id. at 1273 (determining she had not yet suffered monetary damages because she had not yet paid what she alleged in her complaint the services actually cost the hospital to provide).} The court also held that the same facts were sufficient to support a claim that the hospital’s billing methods constituted an unfair practice in violation of FUDPTA.\footnote{Id.} Furthermore, even though Colomar may not have suffered any monetary damages since she had not yet paid an unreasonable amount, the court held she was entitled to declaratory judgment to determine the amount she lawfully owed.\footnote{Id. at 1274.}
B. The Bad: Case Not Suitable for Class Certification

After her initial success, however, Colomar suffered a major setback when the court denied her motion for class certification.185 The court first held that Colomar failed to prove that the class size was "so numerous that joinder of all members [was] impracticable."186 Although Colomar was able to identify "over 24,000 uninsured patients" that Mercy treated during the class period, Colomar was unable to show which of those patients had either paid the full bill or at least were never offered discounts or write-offs.187 The court was unwilling to infer that a minimal number of these uninsured patients had either paid or were still liable for an unreasonable portion of their bills without further evidence from Colomar.188 The court implied that Colomar would establish the requirement of numerosity if she could specifically identify forty such members.189

Nevertheless, even if Colomar could prove that the class size was sufficient, the court would most likely still have denied class status because of the fact specific nature of proving that Mercy’s charges were unreasonable.190 That is, each bill from each class member would have to be evaluated separately and compared with market conditions, internal costs, and other contractual prices to determine if each charge were unreasonable.191 Proving that Mercy’s charges to Colomar were unreasonable would not prove that charges to any other class member were unreasonable.192 Colomar requested that the court analyze Mercy’s average charges to all class members to determine the reasonableness of the charges.193 The court refused this proposal indicating that averages would not prove that a particular charge was unreasonable.194 Thus, the court held that Colomar’s claim failed to satisfy the requirements of commonality and typicality.195 Although Colomar might have been able to show some question of law in common under commonality, it was unlikely that she could show that proving her claim would neces-

186. Id. at 675 (quoting Fed. R. Civ. P. 23(a)(1)).
187. Id.
188. Id. at 676.
189. See id. at 675–76.
190. Colomar III, 242 F.R.D. at 677 n.7 (indicating that although plaintiff might be able to plead sufficient facts to satisfy numerosity and commonality, this effort would prove futile because of inherent problems with proving the other factors).
191. See id. at 677.
192. Id.
193. Id. at 678.
194. Id.
sarily prove any other class member's claim. The court also held that the difficulty in obtaining reasonableness of each particular charge to every patient prevented the case from meeting the requirements of class certification for money damages under Federal Rule of Civil Procedure 23(b)(3) or injunctive relief under Federal Rule of Civil Procedure 23(b)(2). The main problem was that Colomar did not allege any facts showing that the hospital was raising its prices by a set percentage to uninsured patients. The complaint was that the undiscounted prices the hospital charged were unreasonable. Because each charge would have to be evaluated separately, the case would become extremely difficult to manage as a class, and therefore class action was not "superior to other available methods" for the fair and efficient adjudication of the controversy. Colomar had argued that without class action status, plaintiffs would be deterred from bringing suit due to a lack of financial resources to hire a lawyer. The court's response was that the statutory claim under FDUTPA allowed recovery of legal fees so that class status was not superior in this case.

C. The Ugly: Insufficient Evidence to Prove Price Was Unreasonable

Although failing to have her class certified was a major setback, Colomar's next setback was even greater when the court granted summary judgment to Mercy Hospital because Colomar had failed to produce enough evidence upon which a reasonable juror could conclude that Mercy's charges were unreasonable. The court emphasized that its holding did not indicate that the hospital's charges were reasonable, but that Colomar had not produced sufficient evidence to carry her burden.

196. Id. at 677.
197. Id. at 681–83.
198. Id. at 683.
199. Id.
201. Id. at 682.
202. Id. (citing FLA. STAT. § 501.2105 (2008)).
204. Id. Colomar's failure to produce sufficient evidence might have been particular to her case rather than indicative of challenges that face other uninsured patients that believe they were charged unreasonable amounts. Id. For example, the undisputed facts showed that she was only charged 155% of the Medicare reimbursement rate rather than the 436% that she alleged Mercy on average charges uninsured patients. Id. at *5 & n.4. Colomar's own expert witness had testified that charges in the range of 150% of Medicare would be reasonable. Id. at *5. Furthermore, she did not introduce any evidence to show what Mercy's actual cost to treat her was even though she originally alleged that Mercy's cost was just over two thousand
V. LEGISLATIVE RESPONSE

A common theme among the courts across the country seems to be that resolving medical billing issues is a legislative function. While the courts are equipped to analyze individual cases to determine if prices are reasonable for a particular service on a particular date, the courts are not empowered to make more far reaching resolutions. This section will focus on the actions that the Florida Legislature has taken to address issues with the open-ended nature of medical service pricing in the absence of contractual agreements.

There are five major situations where patients are treated in the absence of contractual agreements that prevent hospitals from charging their standard rates. The five classes are the uninsured, those covered by insurance but going to a provider that has not contracted with the insurance company, patients seeking treatment after automobile accidents that are covered by car insurance Personal Injury Protection requirements, and patients seeking treatment for work related injuries that are covered by workers’ compensation plans. Section 440.13, Florida Statutes, provides for a maximum fee schedule for cases where patients are being treated for ailments or injuries covered by workers compensation insurance. Just recently, the Florida Legislature imposed maximum reimbursement rates for most services that are covered by Personal Injury Protection policies for those that seek medical treatment related to an automobile accident. For most non-emergency services, this maximum rate is set to 200% of the Medicare reimbursement rate. In the case of emergency services, the maximum reimbursement rate for hospitals is set to be “75 percent of the hospital’s usual and customary charges,” and for physicians’ services provided in a hospital, the maximum reimbursement is set to be “the usual and customary charges in the community.” According to the legislative history, this maximum reimbursement rate was added because determining “the amount of reasonable charges is

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206. See Maldonado II, 493 F.3d 521, 526 (5th Cir. 2007).
207. See Anderson, supra note 7, at 781.
208. Id.
211. Id.
212. Id.
often litigated in Florida courts between providers and insurers which further increases costs."²¹³ Only time will tell if these provisions will reduce the amount of litigation between the providers and insurers given the reference to usual and customary charges in the statute.²¹⁴

The Florida Legislature has also tried to address the issue of protecting the uninsured from being overcharged in several ways. In 2007, a bill was introduced that would have required hospitals to charge any uninsured patients with a “household income of less than $125,000,” a fee no higher than the highest contracted fee the hospital has agreed to accept for the same service from private insurers.²¹⁵ The bill was never passed, perhaps because of concerns from lobbyists for health insurance companies that such a bill could discourage providers from negotiating with health insurance companies—since lowering rates with the insurance companies would also lower the maximum they could charge to some uninsured.²¹⁶

Although this bill to set a maximum that health care providers could charge to some uninsured patients failed, the Senate has passed two new laws in 2008 which may help in some situations. The Health Care Consumer’s Right to Information Act, among other provisions, requires health care providers to automatically provide estimates to uninsured patients for any scheduled non-emergency medical services and requires the providers to automatically inform the patients of any “discount or charity policies” that might be available from that provider.²¹⁷ The act also requires hospitals to disclose their standard charges for some of the most common services as well as other pertinent financial information that is to be made publicly available by the Agency for Health Care Administration.²¹⁸ While this act may help the uninsured shop for reasonable rates and pre-negotiate prices with the service providers for non-emergency services, the bill will probably do little to help in dealing with overcharging for emergency services. Actually, the bill could hurt the patient’s chances of proving the charges are unreasonable if they were readily available before the emergency situation arose.

Even though the Florida Legislature may believe that price transparency will help the uninsured make more informed decisions, the primary focus of

²¹⁶. Id. at 3.
²¹⁸. See id. at 739, 742–43.
the legislature for resolving this crisis is to reduce the number of uninsured Floridians. A new law which passed in May, 2008, creates the Cover Florida Health Care Access Program. The program creates a special type of health insurance that does not have to meet the same level of minimum coverage as other health insurance programs. The hope is that private insurance companies will be able to offer affordable health insurance plans, with premiums of only around $150 a month, with this minimal coverage. The plan has been criticized because the law allows for the insurance companies to cover so little as to make the plans undesirable. Nevertheless, as long as this minimal coverage at least guarantees contractual discounts similar to those which other insurance plans provide, the program could help to alleviate the issue of determining reasonable charges as there would be fewer forced to pay without pre-negotiated rates.

VI. CONCLUSION

Because Florida law requires that determination of a reasonable charge be based on multiple factors which require individual analysis of each charge, class certification will probably remain elusive for uninsured patients that seek declaratory or injunctive relief. Nevertheless, all is not lost. Case law shows that Florida courts will most likely consider the hospital admission contracts, especially in emergency care situations, to be open priced contracts and will therefore infer a reasonable price term. Although the cost of litigation may prevent potential plaintiffs from seeking declaratory relief to have the courts clarify how much is actually owed, the patients can use this as a defense if they are sued by the hospitals or physicians that provided the emergency services for the charged prices. Courts may even place a higher burden on hospitals to prove their costs are reasonable when they are the plaintiffs in the action. Furthermore, the uninsured debtor might even be able to use unconscionability as a defense in such actions. Finally, the uninsured patient can file a counterclaim for a violation of the FDUTPA. Since many of the hospital contracts require the patient to pay legal fees as-

220. Id.
221. See id.
223. See id.
associated with debt collection, the patients have little to lose should they not prevail on their claim of the FDUTPA violation. On the other hand, if the court finds that the charged prices are unreasonable, the court is unlikely to award legal fees to the hospital even if the court does not believe the hospital’s actions are an unfair or unconscionable act as defined by the statute. The fact that the hospital is actually trying to enforce the full debt via the courts, however, may make the trier of fact more inclined to find that the billing practices are unfair.

Thus, the best strategy for uninsured patients that believe they have been charged unreasonable amounts and cannot reach a reasonable settlement with the hospital, is to pay a reasonable amount—perhaps paying what Medicare would reimburse since this information is readily available—and forcing the hospital to bring legal action to collect the rest. The patients will have the right to dispute any reports to collection agencies and the hospital or collection agencies cannot attach any liens or other means of payment without court orders. Alternatively, the uninsured patient might contact the office of the state attorney—the enforcing authority under FDUTPA—and persuade the office to bring a claim on the patient’s behalf. Under FDUTPA, the enforcing authority can seek to impose a $10,000 civil penalty for every violation in addition to the remedies available to individuals. Proving that one has tried to make a reasonable settlement agreement which the hospital has refused might be persuasive in convincing the state attorney to pursue the claim.

Thus, although the courts are probably not the appropriate means in Florida of changing the practice by preventing medical service providers from overcharging uninsured patients, the courts may offer some protection to individuals who have already been overcharged.