NOVA LAW REVIEW

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I. INTRODUCTION

This article reviews decisions by the Supreme Court of Florida in the substantive area of criminal law issued between May 1, 2000 and May 1, 2002. The time period begins where the last Criminal Law Survey created for this Law Review ended. This article will follow the conventions in selecting cases for discussion utilized in prior Criminal Law Survey articles.

1. The author has selected as the beginning and ending points of this article decisions reported in volumes 761 through 803 of the Southern Second Reporter.


3. As in past criminal law surveys, this article will not address issues concerning criminal procedure such as search and seizure. Although significant to the practitioner, those
As in past surveys, this article will focus on significant cases decided by the Supreme Court of Florida, but it will not address district courts of appeal decisions that have not been appealed to the supreme court. 4

During this two-year period most of the cases selected have clarified conflicts between the district courts of appeal concerning the interpretation of a variety of criminal statutory provisions. For the most part, the supreme court has taken a logical approach to the issues utilizing traditional statutory interpretational doctrines. Although some splits have arisen over some of the interpretations, this is reflective of the fact that some of the traditional approaches will dictate contradictory results depending upon how ambiguous the legislature has been in drafting the provision at issue.

One area where statutory interpretation has been particularly difficult is discussed in Section II. As highlighted by the number of cases decided, the court has struggled with outlining the appropriate parameters of burglary law in the state, in part because the Florida Legislature seems determined to expand the state’s statutory definition of the crime beyond that of the common law and most other contemporary approaches. The exact parameters of the crime and how the court will deal with cases decided during its alternative interpretation of the statute before its most recent amendments probably will not be completely resolved until the court addresses some of the lingering questions.

Similarly, in Section III, the court addresses a problem that has perplexed courts through the ages: when does a touching of something connected to a person constitute a battery? Section IV discusses problems

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4. The article does not cover every decision issued by the Supreme Court of Florida during this time period. As in past Criminal Law Survey articles, cases that simply apply standard fact patterns to well-settled rules of law are not discussed. Instead, the survey attempts to identify and discuss cases that have settled conflicts, interpreted statutes for the first time or altered existing understandings of a statutory provision, or otherwise clarified or changed the substantive criminal law in Florida.
that have also troubled many courts. First, can the attempt doctrine be applied to crimes that do not require a specific intent? Second, how far should the doctrines of proximate cause and excusable homicide extend, and what are the appropriate standards for lower courts to follow? Section V deals with a case discussing the application of the complicity doctrine to the Florida statute concerning crimes committed while wearing a mask. In Section VI, the article discusses the court’s attempt to explain the rationale of two prior cases that attempt to establish the appropriate presumption to apply in possession cases where the defendant denies knowledge of a critical element.

Section VII reviews some of the constitutional challenges considered by the Supreme Court of Florida during the time period of the survey. First, the court discusses a familiar complaint about criminal statutes, vagueness. The article next reviews a decision in which the court attempts to clarify earlier decisions concerning double jeopardy where there is a dispute as to whether the acts arose from a single criminal episode. Finally, the article discusses a separation of powers challenge to a criminal sentencing statute. As can be seen from this summary, the Supreme Court of Florida has considered a number of challenges involving new statutory interpretation questions and has also revisited some recurring issues.

II. BURGLARY

A. Remaining in the Premises

A 4-3 decision by the Supreme Court of Florida in 2000 spawned a response from the Florida Legislature repudiating the court’s interpretation of the state’s burglary statute. In Delgado v. State, the court overturned the defendant’s murder convictions because it held that the grounds for the predicate burglary were inadequate to support the felony murder charges. In that case, the State prosecuted the defendant based upon the factual premise that he entered the home with the victims’ consent, but at

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5. 776 So. 2d 233 (Fla. 2000). In a subsequent case, Jimenez v. State, 810 So. 2d 511, 513 (Fla. 2001), the court rejected a motion to apply this decision retroactively to the defendant who had been convicted under the court’s interpretation of the statute before it was amended.

6. The relevant portion of the burglary statute at the time of this case stated, “‘[b]urglary’ means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.” FLA. STAT. § 810.02(1) (1989).
some point before the killings, the consent was withdrawn. The court had interpreted the consent part of the burglary statute to constitute an affirmative defense. In construing that provision, the court referred to the commentary of the Model Penal Code that explained that the crime of burglary developed to compensate for perceived defects in the common law’s definition of attempt. It also noted that the Code’s drafters limited its definition of burglary to reflect that the primary objective of the crime is to punish perpetrators who invade premises under circumstances likely to terrorize its occupants. Furthermore, the Code comment urges states that adopt the concept of “remaining in the premises” as an alternative to “breaking and entering” attempt to limit the language to narrow circumstances involving suspects who surreptitiously remain. The court noted that this limitation has been supported by several legal commentators. As the court further noted, several states that include “remaining in” the premises as part of burglary expressly include “surreptitiously” or similar language in the statute itself. It also noted that New York, which includes “remaining in” language within its burglary statute, had refused to permit the commission of a criminal act to convert a lawful entry into an unlawful remaining that would support a burglary conviction.

The court reviewed the reasoning of the Third District Court of Appeal in Ray v. State, one of the cases to which the Florida Legislature referred with approval. The third district had declined to interpret “remaining in” to refer only to situations where the defendant surreptitiously remained as inappropriately injecting words into the statute. However, the supreme court correctly noted that to interpret otherwise essentially eliminates the clause “unless ... the defendant is licensed or invited to enter.”

7. Delgado, 776 So. 2d at 236.
8. Id.
9. Id. (citing MODEL PENAL CODE § 221.1 cmt. 2 at 66 (1980)).
10. Id. (citing MODEL PENAL CODE § 221.1 cmt. 2 at 67 (1980)).
11. Delgado, 776 So. 2d at 237 (citing MODEL PENAL CODE § 221.1 cmt. 3(a) at 68–71 (1980)).
12. Id. (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.13(b), at 795 (2d ed. 1986); 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 329, at 197–98 n.29 (14th ed. 1980)).
13. Delgado, 776 So. 2d at 240.
14. Id. at 237–38.
15. 522 So. 2d 963 (Fla. 3d Dist. Ct. App. 1988).
16. Delgado, 776 So. 2d at 240.
17. Id.
18. Id.
In an opinion joined by Justices Lewis and Quince, Chief Justice Wells dissented from the majority opinion on the grounds of *stare decisis* and statutory interpretation. In regard to the former, Wells noted that the court had accepted the contrary interpretation of withdrawal of consent in three of the cases cited by the Florida Legislature. In regard to the latter, the Chief Justice argued that the majority's insertion of the word "surreptitiously" into the statute, when the legislature had not chosen to so amend the statute after the court’s prior interpretations, amounted to judicial lawmaking. Wells also argued that it was reasonable to permit circumstantial evidence of criminal conduct to be considered by the jury as proof that consent had been withdrawn.

In response to the *Delgado* case, the Florida Legislature amended section 810.02 of the *Florida Statutes*. The legislature specifically found that this case was decided contrary to legislative intent and prior case law relating to burglary. The findings further state that it is not necessary for the licensee or invitee to remain surreptitiously in the dwelling, structure, or conveyance, and that consent remains an affirmative defense to burglary.

19. *Id.* at 242 (Wells, C.J., dissenting).
20. *Id.* (Wells, C.J., dissenting) (citing *Raleigh v. State*, 705 So. 2d 1324, 1329 (Fla. 1997); *Jimenez v. State*, 703 So. 2d 437, 440 (Fla. 1997); and *Robertson v. State*, 699 So. 2d 1343, 1346-47 (Fla. 1997)).
23. The statutory amendment in pertinent part added:
(1)(b) For offenses committed after July 1, 2001, "burglary" means:

2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
   a. Surreptitiously, with the intent to commit an offense therein;
   b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
   c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.
24. Ch. 2001-58, § 1, 2001 Fla. Laws 404, 404 (to be codified at FLA. STAT. § 810.015).
25. The legislature directed that section 810.02(1)(a) of the *Florida Statutes* be construed in conformity with *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997) (ample circumstantial evidence for jury to conclude that consent of victim withdrawn when defendant shot several times and beat victim so viciously that gun bent, broken and bloody); *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997) (ample circumstantial evidence to support withdrawal of consent where victim brutally beaten and stabbed multiple times); *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997) (jury could conclude that consent withdrawn when defendant bound and blindfolded victim and stuffed brassiere down her throat); *Routly v. State*, 440 So. 2d 1257 (Fla. 1983) (burglary statute satisfied when defendant remains; unlawful entry not required).
Although it is the prerogative of the legislature to define crimes, and it is somewhat troubling that the Supreme Court of Florida did not choose to interpret the statute differently the first time it had the opportunity to do so, the court certainly seems to have the more persuasive argument if one wants coherency in the separation of crimes into logical and distinct categories. The expansion of common law definitions of crimes is understandable in light of the changing conditions of modern society, but to fundamentally alter the definition of a crime can subvert its purposes. Understandably, the terror caused by the forced entrance of an intruder who plans further criminal mischief in the dwelling or structure that he has invaded warrants severe criminal penalties to the act of intrusion. The legislature's new definition of burglary now treats this act the same as one where a visitor exceeds the scope of his visit by engaging in aggressive behavior. The latter conduct is also worthy of criminal penalties, but it does not have to be penalized by the evisceration of the definition of the crime of burglary. It may also be important to more severely penalize the prior type of invasion for the policy reasons given by the drafters of the Model Penal Code and other legal commentators.

It is further troubling that the legislature seems to be exceeding its authority by stating its intention that the ruling in Delgado be nullified.26 This attempt has caused further confusion in the courts as demonstrated by a recent case from the Third District Court of Appeal, Braggs v. State.27 As the court of appeal correctly pointed out, only the court can recede from its ruling and the appellate court ruled that it had not yet done so.28 The appellate court certified a question to the Supreme Court of Florida to clarify whether it did plan to recede from its Delgado decision.29 Chief Judge Schwartz pointed out another fundamental problem with the legislature's act, the ex post facto clause.30 By seeking to overrule Delgado and retroactively apply the statute to cases that were on appeal when it was

26. Id.
27. 815 So. 2d 657 (Fla. 3d Dist. Ct. App. 2002).
28. Id.
29. The court certified the following question: "WHETHER SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO V. STATE, 776 So. 2d 233 (Fla. 2000), FOR CRIMES COMMITTED ON OR BEFORE JULY 1, 2001." Id. at 661.
30. Id. at 663. See also U.S. CONST. art. I, § 10, cl. 1.
decided, the legislature arguably seeks to retroactively apply the law in a manner forbidden by the United States Constitution.31

B. Open to the Public

In another opinion concerning the coverage of the burglary statute, the Supreme Court of Florida resolved confusion about the application of some of its prior cases in Johnson v. State.32 In that case, the defendant argued that he was wrongly convicted of burglary of a convenience store because it was open to the public when he entered.33 Although the court had previously held, in Miller v. State,34 that it was a complete defense to the charge of burglary where the premises entered were open to the public, it was unclear whether this defense would also frustrate a burglary conviction where the defendant entered a structure open to the public, and then further entered a part of those premises not open to the public.35 The court held that it was a question of fact for the jury to decide if the area behind the counter of the store was open to the public and, therefore, a burglary conviction could be upheld even if the store was open.36 In Johnson, the question of whether the area behind the counter was open to the public was properly left to the jury to determine.37

C. Burglary of a Conveyance

The court also resolved a conflict between the district courts of appeal concerning the proper application of the burglary statute to the removal of hubcaps or tires from vehicles in Drew v. State.38 In Drew, the defendant and his accomplice removed tires from a car parked at an auto sales

31. Id.
32. 786 So. 2d 1162 (Fla. 2001).
33. Id. at 1163.
34. 733 So. 2d 955 (Fla. 1998). For a further discussion of the impact of Miller, warning that its extension should be limited so as to permit burglary convictions where part of the premises are not open to the public, see William E. Adams, Jr., & Mark M. Dobson, Criminal Law: 2000 Survey of Florida Law, 25 NOVA L. REV. 1, 2–6 (2000).
35. See State v. Butler, 735 So. 2d 481, 482 (Fla. 1999), and State v. Laster, 735 So. 2d 481, 481 (Fla. 1999) (rejecting State’s argument that area behind counter not open to the public).
36. Johnson, 786 So. 2d at 1164.
37. Id. at 1162–63.
38. 773 So. 2d 46 (Fla. 2000).
business.\textsuperscript{39} They were charged with petit theft, possession of burglary tools, and burglary.\textsuperscript{40} Drew filed a motion to dismiss the burglary and possession charges, arguing that the undisputed facts failed to establish a prima facie showing of guilt.\textsuperscript{41} As was noted in the above cases, Florida's burglary statute is more expansive in its coverage than common law burglary.\textsuperscript{42} One of its expansions, which is consistent with other contemporary American jurisdictions, is coverage of burglary of a conveyance.\textsuperscript{43} Florida Statutes define conveyance to include "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car,"\textsuperscript{44} and entry to include "taking apart any portion of the conveyance."\textsuperscript{45}

In a prior constitutional challenge for vagueness to this statutory provision, the Supreme Court of Florida interpreted the burglary statute to require that the removal of a part of the conveyance be executed in order to facilitate the commission of an offense within the conveyance.\textsuperscript{46} In a subsequent case concerning this issue, the court clarified that burglary of a conveyance could be proven even when the underlying offense was stealing the conveyance itself.\textsuperscript{47} The court in Drew, however, refused to extend the statute to cover thefts of hubcaps or tires attached to the outside of the car without any entry into any enclosed portion of it.\textsuperscript{48} Acknowledging that its prior decisions had accepted that taking apart any portion of a conveyance constituted an entry, the court nevertheless required there also be proof of the requisite statutory intent to commit a crime within the conveyance.\textsuperscript{49} The court additionally warned lower courts to not end the analysis once entry has occurred because it is also necessary to find an intent to commit an offense therein.\textsuperscript{50} The supreme court noted that its holding was consistent with other jurisdictions with statutes similar to Florida's.\textsuperscript{51}

\textsuperscript{39} Id. at 47.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 48.
\textsuperscript{43} FLA. STAT. § 810.02(4) (1997).
\textsuperscript{44} § 810.011(3).
\textsuperscript{45} Id.
\textsuperscript{46} Van Edwards v. State, 377 So. 2d 684, 685 (Fla. 1979).
\textsuperscript{47} State v. Stephens, 601 So. 2d 1195, 1196–97 (Fla. 1992).
\textsuperscript{48} Drew v. State, 773 So. 2d 46, 50–51 (Fla. 2000).
\textsuperscript{49} Id. at 51.
\textsuperscript{50} Id. at 52.
\textsuperscript{51} Id.
Justice Shaw concurred in the result, but did not issue a separate opinion expressing his concern with the reasoning of the majority. Justice Quince dissented in an opinion, joined by Chief Justice Wells, that Briefly cited the notion that entry into a conveyance includes taking apart any portion of the conveyance. The failure of the dissent to address the need to find a separate intent to commit an offense within the conveyance seems particularly problematic with this offense. Not only was the intent to commit a separate offense within a dwelling an essential element of the common law crime of burglary, it seems even more appropriate for an unoccupied automobile where there does not appear to be an intent to actually enter the vehicle beyond the constructive entry recognized by the court. As noted by the majority, a contrary interpretation turns what is otherwise a larceny automatically into the crime of burglary.

D. Unoccupied Dwellings

In yet another case clarifying the application of the state burglary statute, the Supreme Court of Florida was called upon to consider its application to unoccupied dwellings in State v. Huggins. In a case involving a certified conflict between the district courts of appeal, Huggins sought clarification as to whether burglary of an unoccupied dwelling is an enumerated felony in the Prison Release Reoffender Act. Coverage by this Act would have mandated a fifteen-year sentence for the defendant. The court was asked to resolve whether “occupied” as used in this statutory provision modifies only the word “structure” or both it and “dwelling.” The court rejected the arguments of both parties that the statute was unambiguous, arguing that the two were arguing contrary interpretations of the provision, both of which were plausible. Noting that the Act requires that its provisions be “strictly construed,” and “when the language is

52. Id.
53. Drew, 773 So. 2d at 52–53 (Quince, J., dissenting).
54. Id.
55. 802 So. 2d 276 (Fla. 2001).
56. Id. at 276. Section 775.082(8)(a)(1) provides that “[p]rison releasee reoffender” means any defendant who commits, or attempts to commit: . . . (q) Burglary of an occupied structure or dwelling; or . . . within three years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.” Fla. Stat. § 775.082(8)(a)(1) (1997).
57. Huggins, 802 So. 2d at 277.
58. Id.
59. Id.
susceptible of differing constructions, it shall be construed most favorably to
the accused,” the court deemed itself bound to construe the language most
favorably to the defendant and held that it did not apply to the defendant. In
light of the statute’s own interpretational mandate, the court’s conclusion
seems logical and persuasive.

III. BATTERY

The Supreme Court of Florida also resolved a conflict in the lower
courts concerning whether the touching of a vehicle can constitute a battery
in Clark v. State. Clark, the defendant, was discovered while removing
construction materials from a storage site with his truck. An employee of
the entity owning the site and his supervisor attempted to block Clark’s exit
with their trucks, but “Clark intentionally crashed his truck into the [other]
vehicles.” The supervisor testified that his truck was struck and spun by
the defendant, who was found guilty of aggravated battery and felony
criminal mischief. In this case, the court first acknowledged that the
aggravated battery statute, section 784.045(1)(a) of the Florida Statutes,
could be satisfied if the elements of simple battery were proven.

The defendant in Clark argued that the court should adopt a per se rule
that the intentional striking of an automobile could not constitute the
touching of the other vehicle’s occupant so as to satisfy the requirements
of battery. The court rejected the adoption of such a per se rule and instead
held “the circumstances of the case will determine whether a vehicle is

60. § 775.021(1).
61. Huggins, 802 So. 2d at 279. Chief Justice Wells and Justice Lewis dissented with
spirited arguments as to why the statute should be construed to apply to unoccupied dwellings,
but the arguments fall short of overcoming the interpretational presumption that the Act itself
requires. Id. at 279–81 (Wells, C.J., dissenting; Lewis, J., dissenting).
62. 783 So. 2d 967 (Fla. 2001).
63. Id.
64. Id.
65. Id. at 967–68.
66. Id. at 968. The defendant was found not guilty of aggravated battery on the
employee. Clark, 783 So. 2d at 968.
67. This statute states “[a] person commits aggravated battery who, in committing
battery: 1. Intentionally or knowingly causes great bodily harm, permanent disability, or
68. “The offense of battery occurs when a person: 1. Actually and intentionally
touches or strikes another person against the will of the other; or 2. Intentionally causes
bodily harm to another person.” Fla. Stat. § 784.03(1)(a) (1999).
69. Clark, 783 So. 2d at 968.
sufficiently closely connected to a person so that the striking of the vehicle would constitute a battery on the person.\textsuperscript{70} The court held that there was sufficient evidence to support the jury's conclusion in this case where the impact of the defendant's vehicle spun the occupant of the other truck.\textsuperscript{71} Subsequent to this case, the court remanded another case, in light of this opinion, where the defendant reversed his truck and rammed it into a police cruiser that had stopped him.\textsuperscript{72} This resolution appears to be a reasonable standard and consistent with prevailing legal norms.

IV. HOMICIDE

A. Attempted Murder

The Supreme Court of Florida also answered a question from the Fifth District Court of Appeal that asked if the crime of attempted second-degree murder existed in Florida in \textit{Brown v. State}.\textsuperscript{73} In a prior case, the court had held that attempted second-degree murder does not require proof of the specific intent to kill.\textsuperscript{74} The court reaffirmed that the crime of attempted second-degree murder exists in Florida and stated that the crime requires a showing of an intentional act that would have resulted in death except that someone prevented him or he otherwise failed to kill the victim, and the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.\textsuperscript{75}

Justice Harding dissented with an opinion criticizing the logical inconsistencies inherent in recognizing this attempt crime.\textsuperscript{76} As noted by Harding, second-degree murder is a general intent crime.\textsuperscript{77} He also noted that the court had indicated in other cases that attempt crimes require a specific intent to commit a particular crime.\textsuperscript{78} He also noted that the court had encountered difficulty in other instances where it tried to recognize an

\textsuperscript{70.} \textit{Id.} at 969.

\textsuperscript{71.} \textit{Id.} Justice Pariente entered a separate concurrence encouraging the legislature to separately criminalize this type of conduct. \textit{Id.} (Pariente, J., concurring).

\textsuperscript{72.} Wingfield v. State, 799 So. 2d 1022, 1024 (Fla. 2001).

\textsuperscript{73.} Brown, 790 So. 2d 389 (Fla. 2000).

\textsuperscript{74.} Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983).

\textsuperscript{75.} \textit{Brown}, 790 So. 2d at 390.

\textsuperscript{76.} \textit{Id.} (Harding, J., dissenting).

\textsuperscript{77.} \textit{Id.} at 391 (Harding, J., dissenting).

\textsuperscript{78.} \textit{Id.} (Harding, J., dissenting) (citing Thomas v. State, 531 So. 2d 708, 710 (Fla. 1988); Gustine v. State, 97 So. 207, 208 (Fla. 1923)).
attempt crime where the completed crime only required a general intent. 79 In
supporting this argument, he points out that the court has inconsistently
stated that attempted sexual battery requires either a general intent 80 or a
specific intent. 81 Finally, he noted that Florida finally rejected the crime of
attempted felony murder, in part because it recognized that attempt crimes
require proof of the specific intent to commit the underlying crime. 82

Justice Harding’s dissent points out that the overwhelming majority of
jurisdictions hold that attempt crimes require a specific intent to commit the
completed crime. 83 These holdings are consistent with the common law
definition of attempt and the conclusions of most criminal law scholars. As
argued by noted criminal law scholars Professors LaFave and Scott,
attempted murder requires that the perpetrator specifically intend the result
of death. 84 Such a result is not the intent of a person who acts with an intent
to do serious bodily injury or with reckless disregard of human life, the kind
of intent required for second-degree murder. 85

The confusion in Florida case law is not surprising in light of the
logical incoherency of saying that a person can apply a criminal concept that
normally requires a specific intent to a person who does not specifically
intend the result that would have occurred had the defendant been successful
in his actions. There are sound policy reasons for the common law’s
requirement that persons have a specific intent to commit an attempt
crime. Attempt crimes, which can be satisfied by only minimal overt acts,
more ambiguously indicate the underlying intent of the perpetrator. The
requirement of proof of a higher level of intent protects innocent persons
from being convicted of attempt crimes when they have engaged in
ambiguous conduct whose underlying intent is unclear or who have not yet
reached a point in effectuating criminal inclinations to warrant criminal
punishment. This is particularly relevant when one notes that Florida’s
attempt statute is satisfied when the defendant does “any act toward the

79. Id. (Harding, J., dissenting).
80. Brown, 790 So. 2d at 392 (Harding, J., dissenting) (citing Sochor v. State, 580 So.
2d 595, 601 (Fla. 1991), vacated on other grounds, 504 U.S. 227 (1992); Sochor v. State, 619
So. 2d 285, 290 (Fla. 1993)).
81. Id. (Harding, J., dissenting) (citing Gudinas v. State, 693 So. 2d 953, 962 (Fla.
1997); Rogers v. State, 660 So. 2d 237, 241 (Fla. 1995)).
82. Id. (Harding, J., dissenting) (citing State v. Gray, 654 So. 2d 552 (Fla. 1995)).
83. Id. at 392–93 (Harding, J., dissenting) (citations omitted).
84. LAFAVE & SCOTT, supra note 12 § 6.2(c)(1), at 501.
85. Brown, 790 So. 2d at 397 (citing LAFAVE & SCOTT, supra note 12 § 6.2(c)(1), at
501).
commission of such offense." With such a lax *actus reus* requirement, Florida should follow the majority of jurisdictions in rejecting the illogical crime of attempted second-degree murder. As noted by Justice Harding, such perpetrators can "still be [found] guilty of aggravated battery, a second-degree felony." 87

B. Excusable Homicide

In *Weir v. State*, 88 the Supreme Court of Florida further explored two issues that have consistently plagued law students, legal commentators, and courts throughout time—excusable homicide and proximate cause. 89 Weir was a houseguest of the sister of the victim, Michael Martin, who was also staying with his sister. 90 During an argument between Weir and his wife, Martin intervened, telling Weir to calm down and go take a walk. 91 Rather than heed the advice, Weir punched Martin once between the eyes. 92 Martin fell, got up, staggered and collapsed. 93 He was transported to the hospital, where he died. 94

Martin had suffered a head injury in an automobile accident years earlier before the punch from Weir. 95 The medical examiner found that Martin died of a subdural and a subdural hemorrhage and found no evidence of an aneurysm. 96 It was her opinion that death was caused by the blunt head trauma that resulted from the "blow to the face." 97 The defendant’s expert, a forensic neuropathologist, testified that the prior head injury received in the automobile accident could have caused an aneurysm and that ruptures of aneurysms are the most common cause of acute hemorrhage at the base of the brain in younger persons. 98 Weir was found guilty of manslaughter by culpable negligence. 99

86. FLA. STAT. § 777.04(1) (2001).
87. *Brown*, 790 So. 2d at 398.
88. 777 So. 2d 1073 (Fla. 2001).
89. *Id.*
90. *Id.* at 1074.
91. *Id.*
92. *Id.*
93. *Weir*, 777 So. 2d at 1074.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Weir*, 777 So. 2d at 1074–75.
99. *Id.* at 1074.
The defendant moved for a judgment of acquittal, arguing that his acts resulted in an excusable homicide. Florida Statutes include sudden combat as a defense in its excusable homicide provisions. As noted by the court, the record supported the defendant's argument that the act producing the fatal blow was but a single punch delivered during unarmed combat and that the defendant and victim were of similar stature. However, after reviewing other cases where sudden combat was raised as a defense, the court rejected Weir's argument because the victim in this case did not engage in any type of physical assault. The court's conclusion appears correct in viewing the totality of the circumstances of this case. As the record indicated, the victim's hands were down by his side when Weir struck him.

The defendant also argued that he was not the cause of the victim's death. First, he argued that the victim's prior head injury may have made him more susceptible to being killed by the punch. The court rejected this argument, noting what every first-year law student learns in torts and criminal law, that generally, one usually must take his victim as he finds him and is not excused from liability or guilt by the frailty of the victim's physical condition.

The court did not end its causation analysis on this note, however. It recognized that it should address proximate cause issues even if cause in fact

100. Id. at 1075.
101. Manslaughter is defined as: "(1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification . . . and in cases in which such killing shall not be excusable homicide." FLA. STAT. § 782.07(1) (2001). Excusable homicide is defined as homicide:
when committed by accident and misfortune in doing any lawful act by lawful means
with usual ordinary caution, and without any unlawful intent, or by accident and
misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon
a sudden combat, without any dangerous weapon being used and not done in a cruel or
unusual manner.
§ 782.03.
102. Weir, 777 So. 2d at 1075.
103. Id. at 1076.
104. Id. at 1074.
105. Id. at 1076.
106. Id.
107. Weir, 777 So. 2d at 1077. In a related argument the court rejected the defendant's objection to the judge's instruction on pre-existing injury which told the jury that "[d]efendants take their victims as they find them." Id. at 1075, 1077.
Adams

had been established.\textsuperscript{108} It noted that Florida courts had established the following test for proximate cause:

- (1) whether the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct, and
- (2) whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result.\textsuperscript{109}

On the first question, the court held that this requirement was satisfied by the testimony of the medical examiner that a single punch could cause the type of injury and death inflicted in this case.\textsuperscript{110} On the second question, the court noted that the statutory definition of excusable homicide delineates when a manslaughter conviction would be unjust, and this defendant's conduct fell outside of its parameters.\textsuperscript{111} Once again, the court's handling of an issue that sometimes confuses courts seems to be a reasonable assessment of the causation and policy issues present in this case.

V. COMPLICITY

In addition to the issues discussed above, the Supreme Court of Florida considered the question of whether an accomplice to a masked offense could be convicted of enhanced charges in \textit{Wright v. State}.\textsuperscript{112} Wright was the driver of a vehicle from which two masked cohorts emerged to rob another driver of his cell phone and bag, and also unsuccessfully attempted to steal his car.\textsuperscript{113} Wright was convicted of "robbery with a mask and attempted carjacking with a mask."\textsuperscript{114} Under \textit{Florida Statutes}, a criminal offense can be reclassified to the next higher degree if the offender wears a hood, mask, or other device that conceals identity.\textsuperscript{115} The State conceded that Wright was not wearing a mask during the commission of the offenses.\textsuperscript{116} The court rejected the State's argument that a defendant could have his offenses

\textsuperscript{108} Id. at 1076.
\textsuperscript{109} Id. (citing \textit{Eversley v. State}, 748 So. 2d 963, 967 (Fla. 1999)).
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} 810 So. 2d 873 (Fla. 2002).
\textsuperscript{113} Id. at 874.
\textsuperscript{114} Id.
\textsuperscript{115} Id. (citing \textit{FLA. STAT.} § 775.0845 (1997)).
\textsuperscript{116} Wright, 810 So. 2d at 874.
enhanced based upon the conduct of his codefendants.\textsuperscript{117} Justice Pariente concurred in part and dissented in part, believing that double jeopardy barred conviction on both robbery and attempted carjacking because the taking was part of a single forceful transaction separated neither in time nor place.\textsuperscript{118} Chief Justice Wells dissented, arguing that by use of the term “offender[],” the legislature intended that the offense apply to accomplices.\textsuperscript{119}

VI. CONTROLLED SUBSTANCES

The Supreme Court of Florida rejected a claim about jury instructions in a controlled substance case in \textit{Scott v. State}.\textsuperscript{120} Scott was charged with introduction or possession of contraband in a correctional facility.\textsuperscript{121} His counsel asked that the jury be instructed that the element of knowledge required that the defendant know the illicit nature of the substance possessed.\textsuperscript{122} In the case of \textit{State v. Medlin},\textsuperscript{123} the court had previously ruled that possession of a controlled substance raises a rebuttable presumption that the possessor was aware of the nature of the drug possessed.\textsuperscript{124} In \textit{Chicone v. State},\textsuperscript{125} the court had held that knowledge of both the substance and illicit nature of the substance are essential elements of possession of an illegal substance.\textsuperscript{126} In trying to reconcile these two decisions, the court argued that the presumption of knowledge only applies to cases of actual possession.\textsuperscript{127} In this case, the drugs were found in the defendant’s locker in an eyeglass case.\textsuperscript{128} Therefore, the court held that the jury must be instructed on the element of knowledge and when it may be inferred.\textsuperscript{129} Chief Justice

\begin{thebibliography}{99}
\item Id.
\item Id. at 874–75 (Pariente, J., concurring).
\item Id. at 875–76 (Wells, C.J., dissenting).
\item 808 So. 2d 166 ( Fla. 2002).
\item Id. at 168.
\item Id.
\item 273 So. 2d 394 (Fla. 1973).
\item Id. at 397.
\item 684 So. 2d 736 (Fla. 1996).
\item Id. at 737.
\item \textit{Scott}, 808 So. 2d at 171.
\item Id. at 172.
\item Id.
\end{thebibliography}
Adams

Wells argued in a dissent that lack of knowledge should be an affirmative defense.130

VII. CONSTITUTIONAL CHALLENGES

A. Vagueness

The Supreme Court of Florida reversed a vagueness challenge to the statute criminalizing the unlawful luring of a child in State v. Brake.131 Brake was charged with violation of section 787.025 of the Florida Statutes, which makes it illegal for a person convicted of certain specified sexual offenses from "intentionally lur[ing] or entic[ing]...a child under 12 into a structure, dwelling, or conveyance for other than a lawful purpose."132 Brake, previously convicted of indecency with a child in Texas, approached a ten-year-old girl and asked her to come to his house and get a toy.133 While inside his house, Brake hugged and kissed the girl and touched a mark on her left inner thigh.134 Brake filed a motion to dismiss, arguing that the phrase "other than a lawful purpose" was unconstitutionally vague.135 The trial court denied the motion, but the Second District Court of Appeal reversed.136 The court noted that the standard for vagueness was whether a statute provides "adequate notice of the conduct it prohibits when measured by common understanding and practice."137 The court found that "the dictionary definition of lawful" provided adequate notice of the prohibited conduct and upheld the statute.138

130. Id. at 173 (Wells, C.J., dissenting). Justice Harding argued in dissent that the issue was not properly reserved because the defendant's counsel did not submit the requested jury instructions in writing. Id. at 173–75 (Harding, J., dissenting).
131. 796 So. 2d 522 (Fla. 2001).
132. The statute provides:
A person over the age of 18 who, having been previously convicted of a violation of chapter 794 [sexual battery] or s. 800.04 [lewd or lascivious offenses with minors under 16], or a violation of a similar law of another jurisdiction, intentionally lures or entices, or attempts to lure or entice, a child under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
Id. at 525 n. 1 (FLA. STAT. § 787.025(2)(a) (1997)).
133. Brake, 796 So. 2d at 525–26.
134. Id. at 526.
135. Id.
136. Id.
137. Id. at 527.
138. Brake, 796 So. 2d at 529.
The court also addressed the finding of the district court that the statute created an unconstitutional mandatory rebuttable presumption in section 787.025 of the Florida Statutes, which provides that luring a child "without the consent of the child’s parent or legal guardian shall be prima facie evidence of other than a lawful purpose." 139 Mandatory presumptions [are] violat[ive] of the Due Process Clause if they relieve the state from the burden of persuasion on an element of the offense." 140 The court found this part of the defendant’s argument persuasive and found the presumption unconstitutional. 141 It held that, by permitting the State to prove "other than a lawful purpose" by lack of parental consent, the trial court had approved an impermissible presumption of unlawful intent. 142 The court posited that a neighbor could innocently invite a child into his house without parental permission for innocent reasons. 143

The Supreme Court of Florida also rejected a vagueness challenge to the statute criminalizing the conduct of contributing to the delinquency of a minor in State v. Fuchs. 144 The Fuchs case involved a report of an eleven-year-old boy left alone with his four-year-old and five-year-old sisters. 145 Ms. Fuchs was charged with misdemeanor counts of contributing to the delinquency or dependency of a child in violation of section 827.04(1)(a) of the Florida Statutes. 146 Fuchs complained that the criminal statute did not define “delinquent,” “dependent,” or “child in need of services.” 147 The legislature arguably contributed to this dispute by deleting the words “as defined under the laws of Florida” after the terms in question when it amended the statute in 1996. 148 The court noted that the terms in question are defined in other parts of the Florida Statutes. 149 Therefore, the court

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139. Id.
140. Id.
141. Id.
142. Id.
143. Brake, 796 So. 2d at 529.
144. 769 So. 2d 1006 (Fla. 2000).
145. Id. at 1007.
146. Id. at 1008. The statute provides “(1) Any person who commits: Commits any act which causes, tends to cause, encourages, or contributes, to a child becoming a delinquent or dependent child or a child in need of services...commits a misdemeanor of the first degree.” FLA. STAT. § 827.04 (2001).
147. Fuchs, 769 So. 2d at 1008.
148. Id. at 1009.
149. Id. at 1010.
Adams rejected the vagueness claim relying upon settled principles of statutory construction.  

B. **Double Jeopardy**

The Supreme Court of Florida resolved conflicts between the district courts in two cases dealing with assertions by defendants of violations of the Double Jeopardy Clause of the United States and Florida Constitutions. In *Hayes v. State*, the defendant was convicted of armed robbery, armed burglary of a structure, and grand theft of a motor vehicle. Hayes and two cohorts entered a residence and stole a variety of items, including keys to the victim's van. After leaving the residence, the defendant and his cohorts used the keys to steal the van parked outside the residence. Hayes argued that the court's prior decision in *Sirmons v. State* prevented him from being convicted of both armed robbery and grand theft of a motor vehicle because both acts arose out of a single criminal episode and are degree variants of the core offense of theft. The court noted that multiple convictions and punishments may be imposed for separate offenses committed in a single criminal transaction or episode. It also noted that it explained its application of the Double Jeopardy Clause in *Borges v. State*, where the court stated that the clause "seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." In *Sirmons*, the court held that a defendant who was convicted of both robbery and grand theft had been so

150. *Id.* at 1011.
152. 803 So. 2d 695 (Fla. 2001). The court noted that the first district had reached a similar conclusion in *Henderson v. State*, 778 So. 2d 1046 (Fla. 1st Dist. Ct. App. 2001) as the third district had in *Hayes* and that both of these decisions conflicted with the decision of the fifth district in *Castleberry v. State*, 402 So. 2d 1231 (Fla. 5th Dist. Ct. App. 1981). *Id.* at 698.
153. *Id.* at 697.
154. *Id.*
155. *Id.*
156. 634 So. 2d 153 (Fla. 1994).
157. *Hayes*, 803 So. 2d at 698.
158. *Id.* at 700 (citing FLA. STAT. § 775.021(4)(a) (1997)).
159. 415 So. 2d 1265 (Fla. 1985).
160. *Hayes*, 803 So. 2d at 699 (citing *Borges v. State*, 415 So. 2d 1265, 1267 (Fla. 1982)).
convicted in violation of double jeopardy in an incident in which he robbed the victim of the motor vehicle at knife point.\textsuperscript{161}

The court noted that the guiding principle in cases such as this one involves the assessment of whether the taking arose from distinct and independent acts, a factual issue dependent upon the circumstances.\textsuperscript{162} It noted that it had adopted the single larceny rule in \textit{Hearn v. State},\textsuperscript{163} which looked at whether the theft occurred at the same time, same place, and under the same circumstances with the same intent.\textsuperscript{164} It then looked at the "spectrum of approaches" that other jurisdictions have taken in assessing whether a theft constituted the same or separate larcenies.\textsuperscript{165} The court established that its guideline would require an assessment of whether there was a separation of time, place, or circumstances between the initial robbery and subsequent theft.\textsuperscript{166} In making this determination, courts are advised to "consider the location of the items taken, the lapse of time between takings, the number of owners of the items taken, and whether intervening events occurred between the takings."\textsuperscript{167} In applying this standard to this case, the court held that the robbery was complete before Hayes exited the residence and that the taking of the motor vehicle occurred at a different time and place.\textsuperscript{168} Despite the fact that there was a single owner, the court felt that the separation was sufficient to constitute distinct and independent criminal acts.\textsuperscript{169} It distinguished \textit{Sirmons} on the theory that the transaction in that case involved a single taking of a motor vehicle.\textsuperscript{170}

As the court noted, it is difficult to formulate a bright-line rule in these fact specific cases.\textsuperscript{171} This difficulty is reflected in the spectrum of approaches utilized in other jurisdictions as described in the opinion. Nonetheless, the results in \textit{Hayes} and \textit{Sirmons} can be distinguished, and the guidelines set out by the court assist in reaching opposite determinations. How helpful they will be in future cases in which the factors fall somewhere between the factual scenarios of these cases remains to be seen.

\textsuperscript{161} \textit{Id.} at 700 (citing \textit{Sirmons}, 634 So. 2d at 153–54).
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} 55 So. 2d 559 (Fla. 1951).
\textsuperscript{164} \textit{Hayes}, 803 So. 2d at 701.
\textsuperscript{165} \textit{Id.} at 702–04.
\textsuperscript{166} \textit{Id.} at 704.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Hayes}, 803 So. 2d at 704.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 705.
C. Separation of Powers

In *State v. Cotton*, the Supreme Court of Florida rejected a separation of powers challenge to the Prison Release Reoffender Punishment Act. The court was called upon to resolve a conflict between the district courts in determining this question. The argument raised by the defendants was that the Act “deprives” the judiciary of all sentencing discretion and placed it “in the hands of the state attorney, who is a member of the executive branch.” The court found that the legislature’s intent in the Act was to give the state attorney the authority to determine whether or not to seek sentencing under it. The court noted that Florida courts have traditionally applied a strict separation of powers doctrine and under this theory, this Act does not violate the doctrine. The court also rejected cruel or unusual punishment, overbreadth, and substantive due process claims.

VIII. Conclusion

As can be seen by this review, the Supreme Court of Florida has not issued any opinions in the past two years that seem to radically alter settled criminal law principles in this jurisdiction. The battle over the proper interpretation of Florida’s burglary statute reflects some of the ongoing debate between the Florida courts and the state legislature over the difference between interpretation of the law and creating law. In this area, unlike most of the other substantive decisions, the court’s interpretation of burglary and attempt in this state does seem out of step both with common law principles and the general trends in other jurisdictions. In most of the other areas addressed, however, Florida’s criminal law and its interpretation by its highest court seems to be in line with the approach taken by most American jurisdictions at this point in time.

172. 769 So. 2d 345 (Fla. 2000).
175. *Id.* at 349.
176. *Id.* at 353–54.
177. *Id.* at 353–58. Justice Quince argued in dissent that placement of the sentencing discretion in the hands of the state attorney was a violation of separation of powers doctrine. *Id.* at 358–59 (Quince, J., dissenting).
2002 Survey of Florida Public Employment Law

John Sanchez*

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I. INTRODUCTION

This article surveys the various stages of public employment in Florida, starting logically enough with the law governing the hiring, retention, and promotion of employees. Part II encompasses such issues as employers conducting background checks on potential employees, as well as liability a public employer may face for such emerging torts as negligent hiring. The question of who owns inventions produced by employees at work is also considered. Moreover, the recurring knotty issue of employers hiring family members is addressed.

Part III plumbs the law governing the terms of employment. This area of the law addresses issues arising over the hours and wages of public employees. It then turns to the array of employee benefits that pose legal issues concerning disability benefits, death benefits, public pensions, health benefits, family medical leave act benefits, and unemployment benefits, among other miscellaneous items such as privacy in the workplace, and occupational health and safety issues.

Part IV delves into the law governing the disciplining and dismissal of public employees. This wide ranging area encompasses dismissals in retaliation for legal acts committed by public employees, whistle-blowers who are fired for exposing public corruption, and public employees who are cashiered for exercising their First Amendment rights in the workplace. Next, Part IV summarizes current cases and issues arising out of employment discrimination: race, gender, age, disability, and religion. Part IV also touches on procedural due process, remedies for wrongful discharge, Section 1983 claims, and finally turns to a recent United States Supreme Court case.
limiting the remedies available to illegal workers who are targeted for discrimination. Finally, Part V explores recent labor issues involving public sector unions and arbitration.

II. HIRING, RETENTION, AND PROMOTION

A. Privatization

Privatization is the process of converting governmental agencies into private entities that are more responsive to market forces. Florida has taken the lead in this area, but the movement has come under heavy criticism. For example, two years ago services to disabled Floridians seeking work were placed under private management. But recently state auditors recommend ending the project, finding that private management increased costs and delivered far poorer services. Indeed, the agency that oversees the states’ federal vocational rehabilitation funding has tagged Florida as the only state likely to lose its federal funding.

B. Selection of Trial Judges

On June 27, 2002, the United States Supreme Court held that rules barring judicial candidates from discussing legal and political issues during the campaign are unconstitutional. The Court struck down, 5-4, limits on Minnesota judicial candidates. The dissenters in the case worried that unbridled judicial campaigns would erode the impartiality of the bench. Florida’s Code of Judicial Conduct forbids a would-be judge to “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” This type of restriction on judicial speech was called into question by the Supreme Court ruling in Republican Party of Minnesota v. White.

1. Carol Marbin Miller, Privatization Panel Ripped For High Costs, Poor Service, MIAMI HERALD, Jan. 9, 2002, at 1B.
2. Id.
3. Id.
4. Id.
6. White, 122 S. Ct. at 2528; Reinhard & Clark, supra note 5, at 18A.
7. White, 122 S. Ct. at 2546; Reinhard & Clark, supra note 5, at 18A.
Court ruled that a Minnesota rule, similar to Florida’s, unconstitutionally violated the candidate’s free speech rights. As one commentator has noted, the ruling does not prevent judicial candidates from signing a voluntary code agreeing to say nothing that might tie their hands to rule a certain way.

C. Term Limits

In *Cook v. City of Jacksonville*, voters imposed a two-term limit on the office of clerk of the circuit court. Plaintiff Cook challenged the term limits ordinance after the supervisor of elections refused to accept Cook’s application to run for a third term as clerk of the circuit court. The trial court ruled in favor of Cook, finding nothing in the Florida Constitution that enabled the city to set additional qualifications or disqualifications for the Jacksonville clerk position. On appeal, the Supreme Court of Florida affirmed, concluding that the county charter term limits measure amounted to an unconstitutional effort to create another disqualification from election to office.

D. Background Checks

Many employers are hiring companies that offer outsourcing services to help with background checks in the hiring process. Since the terrorist attacks on September 11, 2001, far more employers are conducting background checks. School districts that fail to ensure that molesting teachers do not continue teaching elsewhere are being sued for civil damages.

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10. *Id.* at 2542.
12. 823 So. 2d 86 (Fla. 2002).
13. *Id.* at 87.
14. *Id.* at 88.
15. *Id.*
16. *Id.* at 95.
when the teacher abuses again. Some states protect employers, who give unfavorable references, from lawsuits.

E. Promotions

In Herold v. University of South Florida, an associate professor at a public university contested its refusal to give him a formal evidentiary forum regarding the denial of his promotion to full professor. In concluding that the professor suffered no deprivation of liberty or property interests stemming from his damaged professional reputation, the court ruled that no substantial interest was adversely affected that would warrant an evidentiary hearing. In other words, denial of a promotion, to a higher faculty rank, did not implicate a substantial interest that would entitle the professor to a hearing.

F. Nepotism

Nepotism is the disfavored practice of hiring one's own relatives when new jobs become available. While not illegal under federal law, Florida has enacted anti-nepotism laws with loopholes. Two state lawmakers sponsored a bill that would omit a loophole for school boards after a Miami-Dade County School Board member hired her husband for her personal staff.

G. Negligent Hiring

The Supreme Court of Florida, in Malicki v. Doe, ruled that the First Amendment ban on government involvement in religion does not afford a

20. Id. Laws in at least twenty-six states protect employers from these types of "defamation lawsuits." Id.
22. Id. at 639–40.
23. Id. at 642.
24. Id. at 640 (citation omitted).
27. Nepotism Targeted In Board Hiring, MIAMI HERALD, Jan. 30, 2002, at 9B.
28. 814 So. 2d 347 (Fla. 2002).
29. U.S. CONST. amend. I.
shield behind which a church may avoid liability for negligent hiring and supervision of its clergy members.\(^{30}\)

H. **Patent Rights**

In *City of Cocoa v. Leffler*,\(^{31}\) city employees invented a bacterial-based system for removing hydrogen sulfide from the Florida aquifer and also hit upon a better method of cleaning the water treatment tanks.\(^{32}\) In the patent application process, three of the inventors refused to assign their patent rights to the city.\(^{33}\) During the trial it became known that the city sought a more efficient and cheaper plan which never envisioned that anything new would be invented.\(^{34}\) The trial court found that the plaintiffs need not assign their patent rights to the city and found no conflict of interest because both parties benefited from the discovery.\(^{35}\) On appeal, the Fifth District Court of Appeal affirmed.\(^{36}\)

III. **TERMS OF EMPLOYMENT**

A. **Hours and Wages**

The average American works 42.4 hours per week, according to a survey of working hours conducted by RoperASW.\(^{37}\) In terms of total hours, Americans work, on average, thirty-six more hours per year than a decade ago.\(^{38}\)

While the national average public school teacher’s pay rose thirty-one percent to $43,000 in the 1990s, Florida’s average teacher’s salary was under the national average at $38,230.\(^{39}\) While Florida teachers’ pay rose twenty-five percent in the 1990s, it still fell four percent when factoring in

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31. 803 So. 2d 869 (Fla. 5th Dist. Ct. App. 2002).
32. *Id.* at 870–71.
33. *Id.* at 871.
34. *Id.* at 872.
35. *Id.*
36. *Leffler*, 803 So. 2d at 874.
38. *Id.* According to the International Labor Organization, Americans work 1,978 hours per year, an increase from 1,942 hours per year just ten years ago. *Id.*
39. *Average Teachers’ Pay Jumped 31% in 1990s to $43,000, Union Says*, MIAMI HERALD, Apr. 8, 2002, at 10A.
Nationally, elementary school principals average $73,000; middle school principals earn $78,000; and high school principals earn about $84,000.41

The Supreme Court denied certiorari of a 2001 federal appeals court ruling that Congress acted constitutionally when it rejected cost-of-living raises for federal judges.42 Article III of the Constitution ensures to federal judges “a Compensation, which shall not be diminished during their Continuance in Office.”43 Studies indicate that federal judges have lost more ground to inflation than public and private employees in other occupations.44

The events of September 11, among other things, reduced Florida’s revenues dramatically, creating a budget crunch that has led many school boards to take many drastic cost-cutting measures.45 For example, “[t]he Miami-Dade School Board voted . . . to impose a two-day emergency pay cut on almost all district employees.”46 Without economizing, the district “would be ‘teetering on the possibility’ of operating at a deficit, which is illegal under state law.”47

The Eleventh Circuit ruled, in Bailey v. Gulf Coast Transportation, Inc.,48 that Fair Labor Standards Act49 remedies for violation of its anti-retaliation provision are greater than those recoverable for violations of the Act’s wage and overtime provisions.50

The Hollywood City Commission has come up with an innovative way of financing pay raises for police: allow thirty-one officers to retire early.51 Instead of waiting twenty-five years to retire with full benefits, the proposal would allow the thirty-one eligible officers to retire sooner and receive a

40. Id.
41. Id.
44. Greenhouse, supra note 42.
45. Charles Savage, Pay Cut for Dade School Workers, MIAMI HERALD, May 23, 2002, at 1B.
46. Id.
47. Id.; FLA. STAT. § 129.07 (2001).
48. 280 F.3d 1333 (11th Cir. 2002).
pension at once, so long as "they first pay into the pension fund the amount
they would have paid by their 25th year." 52

B. Benefits

1. Disability and Death Benefits

Florida law recognizes a legal presumption that fire fighters that
develop heart disease, hypertension, or tuberculosis contracted it in the line
of duty. 53 Disability benefits are more generous for impairments deemed to
have occurred in the line of duty than those that are not considered to be job
related. 54 Efforts to extend this legal presumption to police and corrections
officers have met with resistance in light of its cost. 55

On June 25, 2002, President Bush signed a bill, the Mychal Judge
Act, 56 authorizing the extension of death benefits to domestic partners of
firefighters and police officers that die in the line of duty. 57 The law allows
a $250,000 federal death benefit for police and fire officers' survivors who
are listed as beneficiaries on the decedents' life insurance policies. 58 No
longer will only spouses, children, and parents be eligible for such benefits.
By contrast, only a spouse or child is entitled to death benefits of members
of the military. 59

2. Public Pensions

a. Public Pension Legislation

For the first time, "American workers now put more money into
pension and retirement savings plans sponsored by their employers than the

52. Id.
55. Proposed Police Perk Draws Ire of City Leaders, MIAMI HERALD, Apr. 13, 2002,
at 3B.
56. Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of
Act of 1968, 42 U.S.C. § 3796(b)).
57. Mike Allen, U.S. Extends Death Benefits for Gay Cops, Firefighters, MIAMI
HERALD, June 26, 2002, at 1A.
58. Id.
59. Id.
companies themselves do. 60 Traditionally, public pensions have followed
the defined-benefit model in which the employer provides a fixed pension
amount for eligible retirees. 61 But increasingly, public pensions are
converting from defined-benefit plans to defined-contribution plans, similar
to 401(k)s found in the private sector. 62

Indeed, Florida adopted a new 401(k)-style retirement plan option in
which state and local government employees can choose from among fifty
investment options. 63 The Florida Legislature approved the new plan in the
2000 session. 64 The plan envisions converting "between $8 billion and $30
billion [of the state's] $96 billion pension [fund into] employee-controlled
investment accounts." 65 In 2002, all 650,000 public employees are choosing
between staying with the traditional fixed-pension formula which guarantees
a certain income or opting for the new defined contribution plan. 66 On
November 20, 2001, the Florida Retirement System selected Prudential
Financial, Fidelity Investments, and Nationwide Financial to administer
401(k)-like retirement plans for state and local public employees. 67

b. Public Pension Fund Investments

The trustees of the Florida Retirement System approved a number of
investment firms that will offer comprehensive investment services for state
workers who opt to direct their own retirement portfolios. 68 The retirement
plan for 650,000 public employees in Florida will, for the first time, be
allowed to decide if they should shift from defined benefits plans that
guarantee retirees a certain amount of money until death, to defined
contribution plans where individual employees decide how to invest their
pensions. 69

60. Edward Wyatt, Pension Change Puts the Burden on the Worker, N.Y. TIMES,
Apr. 5, 2002, at 1A.
61. Id.
62. Id.
63. Joni F. James, New State Retirement Plan May Include Market Option, MIAMI
HERALD, Nov. 15, 2001, at 1C.
64. Id.
65. Id.
66. Id.
67. John Dorschner, Firms Picked for Pension Plan, MIAMI HERALD, Nov. 21, 2001,
at 3C.
68. John Dorschner, Trustees Approve Four Firms for Pension Plan, MIAMI HERALD,
Nov. 28, 2001, at 3C.
69. James, supra note 63.
Several public pension plans with substantial holdings in Enron and WorldCom stock have sustained enormous losses as these corporations collapsed in 2002.\textsuperscript{70} For example, Florida's public pension fund lost $329 million, much of it from its now worthless Enron holdings.\textsuperscript{71} In addition, Florida lost about $92 million owing to its investments in WorldCom.\textsuperscript{72} Moreover, Florida is pursuing "a lawsuit against a money management firm whose [hapless] Enron investments cost the fund $281 million."\textsuperscript{73}

Florida's Attorney General is probing whether Enron violated federal racketeering laws in connection with the state's public employee pension fund's $306 million loss on Enron stock.\textsuperscript{74} The state is also investigating Alliance Capital Management, the New York financial firm that bought 7.6 million Enron shares for the state pension fund, of which 2.7 million were purchased after an SEC investigation was launched.\textsuperscript{75} An Alliance executive was also a board member of Enron.\textsuperscript{76} Alliance was fired by the pension fund in December 2001.\textsuperscript{77} The pension fund lost one third of one percent of its $96 billion balance as a result of its holdings in Enron stock.\textsuperscript{78}

c. Taxation

The IRS has ruled that an employee is not taxed on deferred compensation payments transferred to an ex-spouse in divorce proceedings.\textsuperscript{79}

d. Double-Dipping

Double-dipping is the suspect practice of allowing retired public employees who are drawing a pension to go back to work in a public-paying job.\textsuperscript{80} The City of Miami's pension laws prohibit this practice but a majority

\textsuperscript{70} Joni James, \textit{State Fund Takes Big Plunge in Value}, \textit{MIAMI HERALD}, June 28, 2002, at 1C.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Joni James, \textit{Pension Board Hires Two Law Firms to Consider Suit Over Enron Losses}, \textit{MIAMI HERALD}, Apr. 10, 2002, at 9B.
\textsuperscript{74} Joni James, \textit{Enron Under Scrutiny}, \textit{MIAMI HERALD}, Jan. 18, 2002, at 1C.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{80} Editorial, \textit{For Fiscal Responsibility Don't Change Pension Law}, \textit{MIAMI HERALD}, June 13, 2002, at 6B.
of Miami's commissioners approved a measure that would allow managers with the city to engage in double-dipping. A *Miami Herald* editorial deplored the proposed tolerance of such a practice. Somewhat inconsistently, the editorial tolerates double-dipping by retired firefighters and police officers.

3. Privacy and Surveillance

Florida is a national leader in making public records open and accessible to its citizenry, but state legislators have enacted some exemptions for public school teachers. For example, legislators voted to keep teachers' identities secret to protect records of their classroom performance in order to allow principals to assist teachers in improving their performance. Moreover, public employees' addresses and phone numbers are confidential.

On another privacy front, the federal courts issued guidelines for monitoring the Internet use of judges, striking language that said the country's 30,000 court employees enjoyed no right of privacy when they sent e-mail or surfed the Web.

4. Health Benefits

Sixty-five percent of Americans have health insurance through their jobs. COBRA, the Consolidated Omnibus Budget Reconciliation Act, enables former employees to keep their health insurance through their employers' group health plan. But, COBRA coverage costs so much that only twenty percent of those eligible, 4.7 million people, chose COBRA coverage in 1999. Instead, many jobless individuals forego healthcare

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81. *Id.*
82. *Id.*
84. *Id.*
85. *Id.*
89. *Id.*
90. *Supra* note 87.
coverage altogether. To continue under a former employer’s policy, eligible persons pay the whole premium and as much as two percent in overhead fees. Florida offers “mini-COBRA” for some laid off workers who are ineligible for federal COBRA. The Eleventh Circuit ruled, in Wright v. Hanna Steel Corp., that penalties under COBRA may be recoverable only by plan participants, not by plan beneficiaries.

The medical privacy regulation, required by the Health Insurance Portability and Accountability Act (HIPAA), affords federal protection while allowing states to enact tougher laws governing disclosure of patient medical information. A group of insurers have joined to analyze the fifty state privacy laws to aid employers in efforts to meet the HIPAA privacy regulation’s deadline of April 14, 2003.

5. Occupational Health and Safety Issues

The South Florida Building Code prescribes how fire walls between rooms should be constructed to shield building inhabitants in a fire. A former Fort Lauderdale building inspector alleged, in a federal district court suit, that the fire walls were improperly sealed, posing the risk of smoke inhalation to those inside. The city, in turn, alleged that the inspectors forced contractors to use fire-retardant caulk to seal the fire walls, in violation of the building code.

Florida law bans smoking inside all state correctional facilities except death row or employee housing. Only outdoor smoking is allowed under state law. A corrections department spokeswoman claims the ban on

91. Id.
92. Id.
93. Id.
94. 270 F.3d 1336 (11th Cir. 2001).
95. Id. at 1343.
100. Brad Bennett, Lauderdale Sued Over Fire-Safety Inspections, Miami Herald, Oct. 10, 2001, at 3B.
101. Id.
102. Monica Rhor, Inmates Say Ban on Smoking Indoors Is Ignored, Miami Herald, Oct. 28, 2001, at 1BR.
indoor smoking is enforced. Besides inmates, some guards also complain about indoor smoking. So far, the state has refused to ban the sale of any tobacco products in correctional facilities. Some prison officials argue that tolerating smoking in prison aided in controlling inmates and cut down on smuggling of cigarettes. A 1993 United States Supreme Court ruling, however, makes clear that prisoners who can show second-hand smoke poses a health threat can sue.

6. Family Medical Leave Act

On June 24, 2002, the United States Supreme Court agreed to hear an appeal filed by the State of Nevada that contests Congress’ authority, pursuant to the Family and Medical Leave Act (FMLA), to force states to accord public employees leave. At issue is whether the Act should receive only minimal judicial scrutiny or heightened scrutiny because the Act is related to Congress’ interest in rooting out sex discrimination.

The Eleventh Circuit has ruled that the FMLA provision enabling “employees” to sue their employers includes former employees.

Under a Department of Labor regulation, “[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” On March 19, 2002, in a 5-4 opinion, the Supreme Court struck down this regulation, ruling that it incorrectly set up an irrebuttable presumption without requiring the employee to prove that he or she was prejudiced by the lack of notice. The decision has been hailed as a victory for employer groups who claimed the regulation penalized employers for

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104. Rhor, supra note 102.
105. Id.
106. Id.
107. Id.
108. Id.
110. Hibbs v. Dep’t of Human Res., 273 F.3d 844 (9th Cir. 2001).
113. 29 C.F.R. § 825.700(a) (2000).
114. Id.
bestowing benefits beyond those set out in federal law. The case is the first ruling addressing the scope of the 1993 FMLA.

7. Unemployment Benefits

In 2001, about forty-percent of unemployed Americans received benefits, down from fifty-five percent in the 1950s. Moreover, the average level of benefits had declined and some states have enacted stricter eligibility rules.

As part of the Job Creation and Worker Assistance Act of 2002, federal funds will be distributed to the states to supplement unemployment benefit trust funds in the wake of September 11. Eligible persons will receive an additional thirteen weeks of jobless benefits.

According to Labor Department officials, about eight percent of the $30 billion in unemployment benefits paid in 2001 were fraudulent claims or overpayments. Almost 3000 claims were paid to people using Social Security numbers that did not exist or belonged to dead people.

On November 13, 2001, the Department of Labor issued a new rule lifting eligibility restrictions for disaster unemployment assistance.

IV. DISCIPLINE AND DISCHARGE

A. Retaliation

Federal anti-discrimination statutes enable public (and private) employees to sue their employers when employees are retaliated against for

116. Greg Stohr, High Court Strikes Down Leave Penalty, MIAMI HERALD, Mar. 20, 2002, at 1C.
117. Id.
119. Id.
121. See id.
122. Shannon Tan, Jobless Benefits Expanded, MIAMI HERALD, Mar. 13, 2002, at 3C.
123. Leigh Strope, Fraud Grows in Jobless Insurance System, MIAMI HERALD, June 12, 2002, at 3C.
124. Id.
exercising any of their statutorily protected right. The employee must prove that the employer took an adverse employment action against her because, for example, she filed a claim of sexual harassment. The circuit courts are split over whether a reassignment constitutes an adverse employment action. For example, the Eleventh Circuit affirmed, in *Barrios v. Florida Board of Regents*, the trial court’s holding that reassignment to another job with different hours and conditions of employment can amount to an adverse employment action for purposes of establishing a retaliation claim.

**B. Whistle-Blowing**

On April 30, 2002, the House of Representatives enacted the Notification and Federal Employee Anti-discrimination and Retaliation Act that requires federal agencies to pay out of their own budgets any judgments against them in whistle-blower cases. The Senate enacted an amended version of the bill which went to the President for his signature.

The First Circuit has ruled that states retain sovereign immunity from federal administrative proceedings invoked by state employees' federal whistle-blower protection statutes.

**C. The First Amendment**

A controversy arose after three firefighters removed the American flag from their fire truck four days after the terrorist attack. While the three

127. *Id.*
128. *See e.g.* Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011 (8th Cir. 2000); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).
133. *R.I. Dep't of Envtl. Mgmt. v. United States,* 286 F.3d 27 (1st Cir. 2002) (holding a state official is a person who may be sued in an individual capacity in a federal whistle-blower action) withdrawn and superseded by 2002 WL 1974389 at *1 (1st Cir. Aug. 30, 2002).
134. Nicole White, *Firefighters Didn't Refuse to Fly Flag on Truck, Chief Says,* MIAMI HERALD, Oct. 26, 2001, at 1B.
firefighters regarded the flag as an emblem of oppression for African-Americans, they insisted that they removed the flag because it blocked their view.\textsuperscript{135} Two of the firefighters who were out on administrative leave with pay, were cleared to return to work after an investigation.\textsuperscript{136} Two days after the incident, the fire department ordered all trucks to display the American flags. The three firefighters expressed concerns about their safety after several firefighters said they would refuse to back them up in a fire.\textsuperscript{137}

Does a public school teacher have a first amendment right to appear in an online pornographic video? The Broward County School Board voted to suspend without pay an elementary school physical education teacher whose appearance in a pornographic movie prompted complaints by educators and parents.\textsuperscript{138} Some parents have urged the Broward County School Board to fire him and seek revocation of his teaching license.\textsuperscript{139} The complaint against the teacher specifically alleges that his actions have publicly disgraced the education profession as a whole and violated the school board's policies.\textsuperscript{140} In response, the teacher's attorney plans to appeal the suspension, claiming his client has done "absolutely nothing illegal or criminal."\textsuperscript{141} An informal poll of high school students was taken and a majority said they would feel uneasy around the teacher.\textsuperscript{142}

In McKinley v. Kaplan,\textsuperscript{143} a former member of a Miami-Dade County Film Board alleged that she was dismissed from her post in retaliation for a public statement she made about a controversial county policy.\textsuperscript{144} The Eleventh Circuit affirmed the district court's grant of summary judgment to the county, concluding that plaintiff's removal from her at-will appointed position did not constitute a violation of her free speech rights under the First Amendment.\textsuperscript{145} In coming to this conclusion, the court applied the four-part First Amendment retaliation test, assumed her speech touched on a matter of public concern, and focused on the balancing part of the \textit{Pickering} test.\textsuperscript{146}

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Sonji Jacobs, \textit{Board Suspends Teacher in Video: Online Porn Film "Crossed the Line,"} \textit{MIAMI HERALD}, June 19, 2002, at 1B.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 262 F.3d 1146 (11th Cir. 2001).
\textsuperscript{144} Id. at 1147.
\textsuperscript{145} Id.
Relying on the public employer's need to trust policy-making employees, the court ruled that the plaintiff's First Amendment right was outweighed by the county's interest.\footnote{Id. at 1150 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).}

In Mason v. Village of El Portal, a chief of police claimed that he was not reappointed in retaliation for speaking out at a public safety commission meeting about the commission's undue emphasis on gender and race in discussing the replacement of a black police officer who had resigned.\footnote{Id.} The Eleventh Circuit addressed only the third part of the First Amendment retaliation test: whether the employee's speech played a substantial part in the employer's decision not to reappoint him.\footnote{Id. at 1338–39.} In light of the evidence that a majority of the council who voted not to reappoint the chief did not even know of his controversial comments, the court concluded that the vote not to reappoint the chief could not have resulted from those statements.\footnote{Id. at 1340.}

In Littleford v. Department of Highway Safety & Motor Vehicles, a Florida Highway Patrol supervisor was fired for a string of incidents of "verbal abuse, profanity, use of racist or sexist epithets and one incident of making a false statement under oath during the investigation."\footnote{Id. at 1259.} On appeal from the Public Employees Relations Commission order sustaining Littleford's dismissal, the Fifth District Court of Appeal ruled that Littleford was not injured by the Commission's failure to follow its own rules and procedures in disciplining him.\footnote{Id. at 456.}

In Stueber v. Gallagher, a public high school art teacher appealed the revocation of his teaching license on grounds that the Education Practices Commission deprived him of his right to due process of law by allowing the commission to raise claims not found in the complaint.\footnote{Id. at 457.} At the administrative hearing, the teacher admitted that he accessed pornography on his school computer (but denied accessing teenage pornography) and that he had battered his wife.\footnote{Id.} The district court refused to reverse the revocation of
the teacher's license since the teacher failed to preserve his rights when he failed to properly object to the presentation of evidence by the Commissioner of Education during the informal hearing.\textsuperscript{158}

A former Fort Lauderdale building inspector alleged in a federal suit that the city threatened him with disciplinary action after he insisted that contractors use fire-retardant caulk to seal fire walls.\textsuperscript{159} The inspector, who sought back pay and other damages, claimed that the city violated his First Amendment right to free speech because it barred him from properly enforcing the building code.\textsuperscript{160}

The various circuit courts have applied three different tests in assessing the free speech rights of public school teachers over classroom speech.\textsuperscript{161} An Iranian medical technician at the University of Miami lost his job over remarking on his birthday, September 11, "[s]ome birthday gift from Osama bin Laden!"\textsuperscript{162}

D. Employment Discrimination

1. Generally

Many employers have purchased insurance policies to cover employment discrimination claims.\textsuperscript{163} But with the increase in damages assessed by juries (twenty-percent are for $1 million or higher), insurers are doubling or tripling their rates.\textsuperscript{164} Liability insurance for employment practices became popular after Congress passed the Civil Rights Act of 1991,\textsuperscript{165} which made

\textsuperscript{158.} Id. at 456-57.
\textsuperscript{159.} Brad Bennett, Lauderdale Sued Over Fire Safety Inspections, MIAMI HERALD, Oct. 10, 2001, at 3B.
\textsuperscript{160.} Id.
\textsuperscript{161.} E.g., Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141 (9th Cir. 2001) (noting, without deciding, the issue); Vega v. Miller, 273 F.3d 460 (2d Cir. 2001) (asking if there are content-based differences under the First Amendment between academic speech involving political matters and academic speech involving other matters); Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (6th Cir. 2001) (applying Pickering balancing test while noting that some circuits apply the reasoning from Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)).
\textsuperscript{162.} Gail Epstein Nieves, UM Employee Lost His Job For Remarks on September 11, MIAMI HERALD, Nov. 16, 2001, at 1A.
\textsuperscript{163.} Reed Abelson, Surge in Bias Cases Punishes Insurers, and Premiums Rise, N.Y. TIMES, Jan. 9, 2002, at C1.
\textsuperscript{164.} Id.
jury trials and punitive damages available. As a general rule, however, employers may not insure against punitive damages. While the number of claims made annually to the Equal Employment Opportunity Commission (EEOC) has not risen, awards in settlements and mediation have climbed two-thirds over three years.

The Supreme Court, in EEOC v. Waffle House, Inc., ruled that the EEOC, the federal agency charged with eliminating job discrimination, can sue for damages on behalf of workers who have agreed to resolve all on-the-job disputes by arbitration. Since the EEOC was not a party to the arbitration agreement, the high court ruled the EEOC is not bound by the arbitration agreement. The EEOC has an independent mandate to pursue lawsuits that serve the public's interest.

On March 19, 2002, the Supreme Court ruled, in Edelman v. Lynchburg College, that an EEOC regulation enabling a plaintiff to "verify" at a future date an unsworn discrimination charge that was timely filed was permissible. Under section 706(e)(1) of Title VII of the United States Code, discrimination charges must be filed within 180 days of the alleged injury or within 300 days in a deferral state that has an agreement with the EEOC to handle such claims. But the Supreme Court ruled that a claimant may "verify" by oath after the filing deadline an unsworn charge filed before the deadline.

The Supreme Court ruled, in Swierkiewicz v. Sorema N.A., that, in order to survive a motion to dismiss, a complaint alleging employment discrimination, need not spell out specific facts which proves a prima facie case in order to survive a motion to dismiss. Under McDonnell Douglas Corp. v. Green, a complaint need only set out a "short and plain statement

166. Id.
167. Abelson, supra note 163.
169. Anne Gearan, EEOC Can Sue When Worker Can't, Court Rules, MIAMI HERALD, Jan. 16, 2002, at 4C.
171. Id. at 764.
173. Id. at 1147.
175. Id.
178. Id. at 998.
of the claim." The Supreme Court has also ruled that illegal aliens who have been discriminated against under federal labor law may not recover back pay.

2. Race

The relationship between white administrators for the City of Fort Lauderdale and its black employees has continued to deteriorate over the past year. The city attorney has been accused, by black community leaders, of illegally keeping separate personnel files. According to critics, this enables the city to hide smoking gun information on white administrators who may be accused of discrimination.

3. Gender

In Danskine v. Miami Dade Fire Department, a county fire department's affirmative action program was challenged both under equal protection and Title VII. The program aimed to hiring more female firefighters during the 1994-97 period, specifically thirty-six percent females for entry-level posts. In rejecting the equal protection claims of male applicants, the Eleventh Circuit concluded that the plan was substantially related to the interest in remedying the after effects of earlier unlawful discrimination. Moreover, the thirty-six percent goal did not amount to an inflexible quota. Finally, plaintiffs could not establish any injury.

On June 10, 2002, the Supreme Court ruled, in National Railroad Passenger Corp. v. Morgan, that an employee who raises a hostile work
environment claim under Title VII may recover for the whole term of hostile environment as long as one act takes place within the filing period.\textsuperscript{192}

In \textit{Miles v. Florida A&M University},\textsuperscript{193} a state university dismissed the general manager of the radio station for allegedly harassing female students more than sixty days after some of the abuse allegedly took place.\textsuperscript{194} Mr. Miles sought a formal administrative hearing under Florida law.\textsuperscript{195} After a formal evidentiary hearing, Mr. Miles' dismissal was upheld.\textsuperscript{196} On appeal, the court ruled that the administrative law judge's findings were supported by the weight of the evidence.\textsuperscript{197} The court concluded the sixty-day filing limit in no way prohibited the University from investigating complaints filed later.\textsuperscript{198}

4. Age Discrimination

The EEOC has changed its view that employee benefit plans, that stop or reduce benefits once a retiree becomes eligible for Medicare, violate the ADEA.\textsuperscript{199} The EEOC will no longer challenge these Medicare bridge cases.\textsuperscript{200}

On September 13, 2001, the Senate Health, Education, Labor, and Pensions Committee voted 12-9 to approve the Older Workers Rights Restoration Act of 2001.\textsuperscript{201} This amendment requires states receiving federal funding to waive its immunity against ADEA lawsuits brought by state employees.\textsuperscript{202}

The Supreme Court ultimately decided not to rule on whether the federal age discrimination law allows "disparate impact" suits, an issue that has split lower federal courts.\textsuperscript{203} The Supreme Court would have reviewed

\textsuperscript{192} Id. at 2076.
\textsuperscript{193} 813 So. 2d 242 (Fla. 1st Dist. Ct. App. 2002).
\textsuperscript{194} Id. at 244-45.
\textsuperscript{195} Id. at 244; FLA. STAT. § 120.57(1) (2001).
\textsuperscript{196} Miles, 813 So. 2d at 244.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 245.
\textsuperscript{200} Id.
\textsuperscript{202} Id.
claims by former Florida Power Corporation employees that the company committed age discrimination when seventy percent of those let go during company reorganizations were age forty or older.\textsuperscript{204} Previously, the Eleventh Circuit ruled out the disparate impact framework under the ADEA.\textsuperscript{205}

5. Disability

The Supreme Court ruled on June 17, 2002, in \textit{Barnes v. Gorman},\textsuperscript{206} that punitive damages are not recoverable against a municipal government under section 504 of the Rehabilitation Act of 1973\textsuperscript{207} or section 202 of the Americans with Disabilities Act of 1990.\textsuperscript{208}

In \textit{US Airways, Inc. v. Barnett},\textsuperscript{209} the Supreme Court ruled that if reassignment to accommodate a disabled employee would violate an established seniority system, then that reassignment is not a reasonable accommodation.\textsuperscript{210}

In \textit{Chevron U.S.A. Inc. v. Echazabal},\textsuperscript{211} the Supreme Court ruled that the ADA does not force employers to hire individuals whose own health or safety would be placed at risk by the job.\textsuperscript{212} In that case, a refinery employee suffered from a liver disease that rendered it hazardous for him to continue laboring in a chemical-laden environment.\textsuperscript{213}

In January, 2002, the Supreme Court unanimously ruled, in \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams},\textsuperscript{214} that a worker’s inability to perform manual tasks substantially limits a major life activity only if the impairment prevents the worker from performing tasks of central importance to daily life.\textsuperscript{215} This case is one of several this year in which the Supreme Court has made it harder than the ADA’s advocates envisioned for plaintiffs

\textsuperscript{204} Anne Gearan, \textit{Court to Rule on Age Bias}, MIAMI HERALD, Dec. 4, 2001, at 7A.
\textsuperscript{205} Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001).
\textsuperscript{206} 122 S. Ct. 2097, 2103 (2002).
\textsuperscript{208} 42 U.S.C. § 12132 (2000).
\textsuperscript{209} 122 S. Ct. 1516 (2002).
\textsuperscript{210} \textit{Id.} at 1524–25.
\textsuperscript{211} 122 S. Ct. 2045 (2002).
\textsuperscript{212} \textit{Id.} at 2047.
\textsuperscript{213} \textit{Id.} at 2048.
\textsuperscript{214} 534 U.S. 184 (2002).
\textsuperscript{215} \textit{Id.} at 198.
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to prevail, or even to make it into court at all under narrower definitions of disability.\footnote{216}{Linda Greenhouse, Justices Narrow Breadth of Law on Disabilities, N.Y. TiMES, Jan. 9, 2002, at A1.}

The Eleventh Circuit, in Johnson v. K Mart Corp.,\footnote{217}{273 F.3d 1035 (11th Cir. 2001). The opinion was originally vacated and a rehearing en banc was granted on December 19, 2001, but the court stayed all proceedings when K Mart filed for Chapter 11 bankruptcy protection. Johnson v. K Mart Corp., 281 F.3d 1368 (11th Cir. 2002).} reversed one of its earlier decisions\footnote{218}{Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523 (11th Cir. 1996).} and ruled that Title I of the ADA permits a former employee to sue for post-employment benefits.\footnote{219}{Johnson, 273 F.3d at 1048.} In Johnson, the court ruled that a disability plan violates the ADA when it grants fewer benefits for mentally disabled employees than for physically disabled employees.\footnote{220}{Id. at 1059.}

In Chenoweth v. Hillsborough County,\footnote{221}{250 F.3d 1328 (11th Cir. 2001).} the Eleventh Circuit ruled that an inability to drive to work does not substantially limit the major life activity of working.\footnote{222}{Id. at 1329.} Therefore, the plaintiff was unable to establish a prima facie case of disability discrimination.\footnote{223}{Id. at 1330.}

In Waddell v. Valley Forge Dental Associates Inc.,\footnote{224}{276 F.3d 1275 (11th Cir. 2001) for petition for cert. filed March 20, 2002.} the Eleventh Circuit ruled that a dental hygienist, who was HIV-positive, posed a direct threat to others owing to the substantial risk of transmission.\footnote{225}{Id. at 1284.} At least facially, this decision seems at odds with the Supreme Court decision in Bragdon v. Abbott\footnote{226}{524 U.S. 624 (1998).} which held individuals who are HIV-positive are protected under the ADA.\footnote{227}{Id. at 631.}

In Olmstead v. Walter Industries Inc.,\footnote{228}{275 F.3d 1087 (11th Cir. 2001) (unpublished table opinion).} the Eleventh Circuit affirmed the Middle District of Florida’s order that dismissed an employee’s claim that held it is not a reasonable accommodation for a disabled worker to insist upon an indefinite leave of absence.\footnote{229}{See generally id. (affirming Olmstead v. Walter Indus., Inc., No. 99 Civ. 746 (M.D. Fla. Feb. 26, 2001)).}
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The EEOC asserts that employers may select any effective accommodation and need not be limited to the most effective accommodation option.\(^{230}\)

In Florida, any Highway Patrol Trooper who is more than fifteen pounds over the department’s weight limit is ineligible for a five hundred dollar performance bonus.\(^{231}\)

6. Religion

The Pentagon reversed itself and decided to no longer require female service members in Saudi Arabia to wear a traditional veil while off the military base.\(^{232}\) Even so, the new rule recommends the use of the veil to avoid offending Muslims.\(^{233}\)

Even though employees are entitled to the free exercise of their religion at work, there are limits to what an employer must put up with.\(^{234}\) For example, an employer will not violate federal law if the company terminates the employment of a worker who insists on proselytizing at work.\(^{235}\) While religious employees can discuss their religious beliefs at work, an employer may legitimately impose discipline when talk turns into harassment.\(^{236}\)

A Palestinian professor at the University of South Florida is challenging his dismissal over his purported terrorist associations.\(^{237}\) The University regards the professor as a security risk and also believes his controversial views have cost the University financial support.\(^{238}\)

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233. Id.
234. *Tennessee: Suit Says Company Discouraged Religion*. N.Y. TIMES, May 4, 2002, at A10. The Equal Employment Opportunity Commission has dismissed nine grievances filed by current and former workers of the Whirlpool plant in La Vergne, Tennessee. *Id.* The workers had filed federal lawsuits against the company, claiming that supervisors followed them into restrooms to see if the workers were praying after warning them not to pray on breaks. *Id.*
236. Id.
238. Id.
E. **Procedural Due Process**

In *Cannon v. City of West Palm Beach*, the Eleventh Circuit addressed the denial of a promotion of a firefighter who claimed he was stigmatized by a letter of reprimand placed in his personnel file. The firefighter claimed he was deprived of a liberty interest without due process of law. The court applied the "stigma-plus" test, in which plaintiff "must establish the fact of the defamation 'plus' the violation of some more tangible interest before [he] is entitled to the procedural protections of the Due Process Clause." The court concluded that absent a discharge, injury to reputation, alone, is not a protected liberty interest.

In *Jones v. Miami-Dade County, Public Schools*, Mr. Jones was employed as a school principal for a one-year-at-a-time basis using annual employment contracts. In June 2001, Mr. Jones learned he would not secure another annual contract as principal, but was entitled to re-employment as a teacher. Mr. Jones sued, alleging that he had a property interest under the Due Process Clause that entitled him to notice and an opportunity to be heard. The court rejected these due process claims, concluding that there was no entitlement to continued employment beyond the contract year.

F. **Remedies for Wrongful Discharge**

The ABA's ethics committee has ruled that it is not unethical for a former in-house corporate counsel to bring a wrongful discharge claim against his former employer provided the attorney does not disclose more client information than necessary to prove his claim.

239. 250 F.3d 1299 (11th Cir. 2001).
240. *Id.* at 1300–01.
241. *Id.* at 1301.
242. *Id.* at 1302 (citing Paul v. Davis, 424 U.S. 693, 701–02 (1976)).
243. *Id.*
244. *Cannon*, 250 F.3d at 1303.
245. 816 So. 2d 824 (Fla. 3d Dist. Ct. App. 2002).
246. *Id.* at 824.
247. *Id.* at 825.
248. *Id.*
249. *Id.* at 826.
G. Section 1983 Claims

The Eleventh Circuit ruled, in Griffin v. City of Opa Locka, that a city manager acted under "color of state law" when he raped a female subordinate in her apartment. In Wilson v. Clay County, Florida, School Board, the Eleventh Circuit ruled that legislative immunity does not protect a school board from a former employee's Section 1983 claim.

H. Illegal Workers' Remedies

The Supreme Court ruled, in a 5-4 decision, that undocumented aliens, who are victims of discrimination at the workplace, are not entitled to back pay. This ruling affects seven million illegal employees who have jobs in the United States.

V. PUBLIC SECTOR UNIONS AND ARBITRATION

A. Public Unions

According to the Bureau of Labor Statistics, thirty-seven percent of government employees were union members in 2001.

Florida law prohibits anyone from giving or taking political contributions in government buildings. What remains in dispute, however, is whether payroll deductions to pay union dues violates this ban when a portion of these dues are used for political purposes.

252. Id. at 1303.
254. Id.
256. Gina Holland, Illegal Workers Not Owed Restitution, MIAMI HERALD, Mar. 28, 2001, at 2B.
259. Steve Harrison, Schools at Risk Over Union Dues, MIAMI HERALD, Aug. 18, 2001, at 2B.
By executive order, citing national security concerns, President Bush prohibited union representation at the United States Attorneys’ office, and at four other agencies in the Justice Department.\textsuperscript{260}

B. Arbitration

On January 15, 2002, the United States Supreme Court settled this split in authority, in \textit{EEOC v. Waffle House, Inc.}\textsuperscript{261}. In \textit{Waffle House, Inc.}, the Court ruled that a contract between an employee and employer to arbitrate all employment-based conflicts did not bar the EEOC, relying on statutory authority, from suing for injunctive and other relief, including back pay, reinstatement, and damages, under the Americans with Disabilities Act.\textsuperscript{262}

The circuit courts are split over who should decide whether an arbitration clause is invalid. The Seventh,\textsuperscript{263} Eighth,\textsuperscript{264} and Eleventh\textsuperscript{265} Circuits have ruled that the court should determine whether the clause is invalid. The Third\textsuperscript{266} and Ninth\textsuperscript{267} Circuits take the view that the court is entitled to determine whether the contract is void, but the arbitrator should decide whether the clause is voidable. Finally, the Sixth Circuit maintains that the district court should decide both questions.\textsuperscript{268}

An arbitration agreement requiring the parties to share arbitration costs and fees equally may violate the employee’s right to seek a complete awards of fees and costs under Title VII.\textsuperscript{269}

VI. CONCLUSION

Public sector employment and labor law covers considerable ground. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, gives rise to its own array of issues at the federal, state, and local levels. Post retirement also

\textsuperscript{261} 122 S. Ct. 754 (2002).
\textsuperscript{262} Id. at 760.
\textsuperscript{263} We Care Hair Dev., Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999).
\textsuperscript{264} Barker v. Golf U.S.A., Inc. 154 F.3d 788 (8th Cir. 1998).
\textsuperscript{265} Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002).
\textsuperscript{266} Sandvik AB v. Advent Int’l Corp., 220 F.3d 99 (3d Cir. 2000).
\textsuperscript{268} Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483 (6th Cir. 2001).
\textsuperscript{269} Flyer Printing Co. v. Hill, 805 So. 2d 829, 833 (Fla. 2d Dist. Ct. App. 2001).
covers such issues as public pensions, disability retirement, and death benefits. Finally, September 11 has also left its imprint on employment law ranging from stepped up background checks for many public employees, to prolonged unemployment benefits for those affected by the terrorist attacks.
Regulating Watershed Restoration: Why the Perfect Permit Is the Enemy of the Good Project

Keith Rizzardi

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I. INTRODUCTION

Water resource restoration projects have become essential components of public policy due to the ecological connection between land and water and the economic benefits.1 Ironically, despite the resulting improvements to water quality, flood control, water supplies, and natural resources, watershed restoration projects can be subjected to the same types of environmental regulations that were designed for industrial activities and other intense land uses. In many ways, this type of regulation of restoration is beneficial, providing due process and adequate review of environmental issues. However, through the regulatory process, the law of unintended consequences emerges, and environmental protection laws and regulations can actually hamper implementation of important environmental restoration efforts.

This article explores the problems of regulating watershed restoration, especially in the Florida Everglades. Part II discusses the reasons for regulating watershed restoration. Part III explores the consequences, based on examples and experiences of the South Florida Water Management District in its effort to obtain permits for the Everglades restoration. Part IV then considers the range of options available for regulating watershed restoration projects, and Part V provides the author’s recommendations and conclusions.

II. REASONS FOR REGULATING RESTORATION

At first, the concept of regulating environmental restoration seems oxymoronic. Why use laws to protect the environment from projects designed to protect or benefit the environment? Because Florida’s history is spotted with well-intentioned projects that had severe environmental impacts—from the construction of the canal systems carving up the Everglades to the channelization of the Kissimmee River to the Cross-Florida Barge

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   [T]he Everglades ecological system not only contributes to South Florida’s water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life. The system is unique in the world, and one of Florida’s great treasures. The Everglades ecological system is endangered as a result of adverse changes in water quality, and in the quantity, distribution and timing of flows, and, therefore, must be restored and protected.

   Everglades Forever Act, FLA. STAT. § 373.4592(1)(a) (2001).
As a result, there is a clear need for environmental regulation—even for watershed restoration projects.

A. Ensuring Review of Environmental Impacts

To avoid unintentionally creating environmental problems at the federal level, Congress passed the National Environmental Policy Act (NEPA) in 1974, requiring an environmental impact statement to be conducted for projects with potential environmental consequences. Environmental permitting laws and regulations take an additional step, ensuring that permitted projects meet established standards, such as state water quality standards, by requiring compliance with permit conditions. These types of review ensure adequate analysis of environmental issues, and in theory prevent governmental entities from implementing measures that adversely impact the environment.

B. Providing Opportunities for Public Participation

Through the environmental permitting process, the permittee and the interested members of the public also ensure compliance with the well-established principles of due process in administrative law requiring notice and the opportunity to be heard. Typically, the development of an environmental permit involves a public comment period or a workshop to openly discuss the project and its requirements. In some cases, pursuant to Florida's Administrative Procedures Act, parties whose substantial interests are affected will file petitions to administratively challenge proposed agency decisions.
actions. This gives the permittee and the public an opportunity to question whether a regulatory agency has met its burden, and whether the permit provides "reasonable assurances"—the legal standard typically used for environmental permits—that the requirements of law will be met.

C. Creating a Permit Shield for the Permittee

Another benefit of the environmental permitting process is its creation of a "permit shield," an assurance that compliance with the permit constitutes compliance with the law, and a freedom from future liability related to any pollutants regulated by that permit. Although not without its opponents, this concept is an outgrowth of the basic principles of good faith reliance and prosecutorial discretion. It has been formally codified in some state and federal environmental laws, and has been upheld in court. Notably, the federal Clean Water Act and Florida's National Pollutant

9. § 120.569.
12. Some environmental groups criticize this concept, however, fearing that permits themselves will become the law and that environmental protection could be undermined. See, e.g., MISSOURI COALITION FOR THE ENVIRONMENT, 1998 ENVIRONMENTAL BRIEFING BOOK: A GUIDE FOR THE STATE LEGISLATURE ch. 8 (1998).
13. See Shell Oil Co. v. Envtl. Prot. Agency, 950 F.2d 741, 762 (D.C. Cir. 1991). "[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion." Id. at 763 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).
14. See, e.g., 45 Fed. Reg. 33,290, 33,312 (May 19, 1980) (establishing RCRA permit shield rule, and stating that EPA "will not take enforcement action against any person who has received a final RCRA permit except for noncompliance with the conditions of that permit"); 30 TEX. ADMIN. CODE § 122.148 (2002).
15. See Shell Oil, 950 F.2d at 762.
Discharge Elimination System (NPDES) rules both state that compliance with an NPDES permit constitutes compliance with the law, thus giving the permittee a permit shield.

Thus, the issuance of an environmental permit provides significant benefits to the permittee by clearly defining the objectives and standards which need to be met by the project. The permit benefits the holder by allowing the permittee to move forward with fewer concerns about litigation due to enforcement measures or citizen suits, so long as the permittee complies with those terms. This protection is useful even in the area of environmental restoration, because despite their positive attributes, even environmental restoration projects can be challenged.

III. REALITIES OF REGULATION: EXAMPLES FROM THE EVERGLADES

While governmental entities are traditionally thought of as the permitting agency, sometimes they become the permittee. Construction of a watershed restoration project, like any other construction project, is subject to environmental regulation. In those cases, the value of the permit shield becomes readily apparent. Indeed, the experience of the South Florida Water Management District (Water Management District) with the Everglades restoration effort demonstrates the difficulties that occur when rules of law meet laws of nature.

In 1994, after many years of litigation over the Everglades restoration, the Everglades Forever Act (EFA), was passed to provide a roadmap for

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17. FLA. ADMIN. CODE ANN. r. 62-620.301 (2000); FLA. ADMIN. CODE ANN. r. 62-650.300 (1999). The Florida rules do provide exceptions to the permit shield in four instances: 1) when the permittee is not in compliance with the permit; 2) when the permittee provides false information; 3) when the permittee fails to provide information; or 4) when the permittee violates the operating requirements for a wastewater facility. FLA. ADMIN. CODE ANN. r. 62-600.740 (1999).

18. E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977) [hereinafter Du Pont] (interpreting the clean water act to provide a permit shield to permittees, protecting them from permit changes); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1128 (3d Cir. 1979).

19. See Du Pont, 430 U.S. at 138 n.28.


the restoration effort. The EFA required the implementation of the Everglades Construction Project (ECP). The ECP is one of the largest environmental restoration projects ever undertaken, and includes the construction of over 40,000 acres of marshlands in agricultural areas north of the Everglades, known as Stormwater Treatment Areas (STAs). The marshes use natural vegetation to filter excess nutrients, especially phosphorus, from upstream agricultural discharges before those waters reach the Everglades. Ironically, the construction and operation of the STA marshes, which are a critical component of the Everglades restoration effort, have been delayed by the permitting requirements of environmental laws.

A. Dredge and Fill Permits

Pursuant to section 404 of the federal Clean Water Act, the Water Management District’s construction of the STAs needed a dredge and fill permit from the United States Army Corps of Engineers (Corps). The situation was ironic, since these wetland protection provisions of the federal Clean Water Act were being used to regulate the construction of new wetlands on previous agricultural lands. Further adding to the irony, decades of discharges from those same lands had been unregulated by the Clean Water Act due to agriculture’s exemption from that law.

The 404 permit for the ECP would prove unique, because instead of focusing upon STA construction, the federal 404 permits issued to the Water Management District included operating conditions regulating the water quality of discharges—an issue normally reserved for federal National Pollutant Discharge Elimination System (NPDES) permitting. In support

23. § 373.4592(4).
24. § 373.4592(1)(h).
29. See id.
of this unprecedented action, the record of decision for the 404 permit explained that since water quality issues had not yet been clearly addressed by an NPDES permit, the Corps was exercising its authority to protect the public interest. The Corps eventually conceded that operational issues were best addressed by federal NPDES permits, and agreed to modify its initial draft permit to include a condition stating that the permit would "eliminate duplicate, conflicting, or unnecessary terms" to conform with the NPDES permits.

Until those NPDES permits were in place, the Corps' conditions required a substantial research and monitoring program to continue. Concerns over the sweeping scope of the 404 permit even reached the Florida Legislature, which held hearings on the subject, calling the Corps' District Engineer to testify. Ultimately, the legislature passed a law creating a Joint Legislative Committee on Everglades Oversight to monitor permitting issues related to the Everglades. But the Water Management District was still left holding an unprecedented 404 permit as its reward for constructing a massive environmental restoration project.

B. NPDES Permits

The anticipated NPDES permits regulating the operation of the Everglades Construction Project proved just as complicated and controversial as the 404 permit that authorized the project's construction. Pursuant to the Clean Water Act, NPDES permits regulate the addition of a pollutant to navigable waters from a point source discharge. Initially, the District argued that the STAs did not fit this criteria, because STAs were non-point sources that added pollutants to waters of the United States. Rather, STAs were point source stormwater systems that removed pollut-

33. See id.
34. See generally Bush Signs Law to Help Restore Everglades, ST. PETERSBERG TIMES (Fla.), May 17, 2000, at 5B.
35. Ch. 97-258, § 1, 1997 Fla. Laws 4604 (codified at Fla. Stat. § 11.80 (2001)).
36. Notably, the Water Management District never signed the 404 permit. See United States Army Corps of Engineers, Permit No. 199404532 (Mar. 13, 1997).
Furthermore, the District argued that the STAs, which treated agricultural waters, also deserved the benefit of the agricultural exemption from NPDES regulation. The United States Environmental Protection Agency (EPA) concluded that these interpretations of the NPDES rules were not applicable to the high-profile Everglades restoration effort. Instead, EPA informed the District's counsel that even though the STAs removed pollutants, they were treatment systems that actively "collected" pollutants, and, therefore, fell within NPDES review. Rather than continue a history of litigation in the Everglades, and given the Corps' expansive interpretations of its 404 permits, the Florida Department of Environmental Protection (Florida DEP) and the Water Management District agreed to process NPDES permits for the STAs, although Florida Governor Jeb Bush would later insist that the permits be issued by the state, and not the federal government.

Having lost the struggle over whether an NPDES permit was needed, the Water Management District then sought to limit the scope of the permit. In the past, courts ruled that NPDES permits should not hold a permittee responsible for the pollutants already existing in the watershed, concluding that "[c]onstituents occurring naturally in the waterways or occurring as a result of other [upstream]... discharges [did] not constitute pollutants." 42

38. See Memorandum from Paul Nettleton, Attorney, to Barbara Markham, General Counsel, South Florida Water Management District (Nov. 29, 1993) (on file with author).
39. Id.
40. Id.
41. Id.
42. Memorandum from Thomas K. MacVicar, Deputy Executive Director, and Barbara A. Markham, General Counsel, South Florida Water Management District, to South Florida Water Management District Governing Board Members (Dec. 6, 1993) (on file with author). See also Comm. to Save the Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993).
43. See Letter from Jeb Bush, Governor of Florida, to Carol Browner, Administrator, United States Environmental Protection Agency (Feb. 28, 1999) (on file with author) and Letter from Carol Browner to Jeb Bush (Mar. 8, 1999). The Florida DEP administers a federally-approved NPDES program pursuant to an interagency agreement and in accordance with state administrative codes. See National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Florida and the United States Environmental Protection Agency, Region 4 (May 1, 1995) (on file with author).

Although the issue had remained unresolved prior to the Governor's intervention, the debate over NPDES permitting actually began in 1993 when the Water Management District's Governing Board agreed to apply for its first NPDES permit for the Everglades Nutrient Removal project, the prototype STA. See MacVicar and Markham Memorandum, supra note 42.
an addition of pollutants."\textsuperscript{44} Florida DEP rules for the NPDES program specifically acknowledge this reality through regulations governing "pollutants in intake water."\textsuperscript{45} The Florida DEP did not apply this "pass-through" pollution concept to the Water Management District's discharges.

Instead, to obtain its NPDES permits, the Water Management District was required to provide the Florida DEP with reasonable assurances that its STA discharges were not likely to cause pollution\textsuperscript{46} and that the discharges would comply with applicable rules and regulations.\textsuperscript{47} For a project that was substantially improving water quality, proving that it would "not discharge or cause pollution" should have been an easy task.\textsuperscript{48} But in reality, that evaluation required the Florida DEP to consider: 1) whether the discharges will meet numeric or narrative water quality criteria for individual chemical constituents;\textsuperscript{49} 2) whether the discharges will interfere with the designated uses and classifications of the receiving waterbody;\textsuperscript{50} and 3) whether the discharges meet anti-degradation requirements.\textsuperscript{51} Thus, application of NPDES permitting rules to the Everglades proved particularly difficult because the STAs only improve conditions and did not completely solve all the water quality problems in the watershed.\textsuperscript{52}

In the Everglades ecosystem, phosphorus is a critical water quality parameter, because phosphorus enrichment in the watershed can cause significant changes to the ecosystem.\textsuperscript{53} At the time that the Water Management District sought its NPDES permits, the water quality criterion for phosphorus in the Everglades was a narrative standard preventing "imbalance of flora and fauna,"\textsuperscript{54} although rulemaking was imminent to

\textsuperscript{44} E.g., Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976).
\textsuperscript{45} FLA. ADMIN. CODE ANN. r. 62-620.620(2)(h) (2000).
\textsuperscript{46} r. 62-620.320(1).
\textsuperscript{47} r. 62-620.320(2).
\textsuperscript{48} r. 62-620.320(1).
\textsuperscript{49} FLA. ADMIN. CODE ANN. r. 62-302.500 (2002).
\textsuperscript{50} FLA. STAT. § 403.088(2)(b) (2001).
\textsuperscript{52} See S. FLA. WATER MGMT. DIST., supra note 25.
\textsuperscript{53} See § 373.4592(1)(d) (legislative finding that Everglades contains excessive phosphorus). See also S. FLA. WATER MGMT. DIST., supra note 25 (evaluating ecological effects of phosphorus enrichment in the Everglades); Letter from John H. Hankinson, Jr., Regional Administrator, Region IV, United States Environmental Protection Agency, to Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida (May 23, 1999) (on file with author) (approving tribal water quality standards).
\textsuperscript{54} FLA. ADMIN. CODE ANN. r. 62-302.530 (2002). The standard is currently under revision, and in accordance with the Everglades Forever Act (EFA), sections 373.4592 and
develop a new numeric criterion for phosphorus.\textsuperscript{55} While research suggested that the number would later be ten parts per billion (ppb),\textsuperscript{56} as already recommended by the Florida DEP,\textsuperscript{57} and as indicated in the state’s Everglades Forever Act,\textsuperscript{58} the STAs were only designed to achieve fifty ppb.\textsuperscript{59}

Despite being a substantial improvement over existing water quality, fifty ppb was not good enough for the Clean Water Act and its NPDES permits. Until the Florida DEP had reasonable assurances that the state’s water quality criteria would be met, permits could not be issued, and the treatment systems could not be operated.\textsuperscript{60} Eventually, after nearly two years of interagency negotiations, the Water Management District, the Florida DEP and the United States EPA all agreed on an NPDES permit for STA-1 West.\textsuperscript{61} The STA-1 West permit was issued in conjunction with an administrative order acknowledging that phosphorus water quality criterion would not be met,\textsuperscript{62} and allowing the District until 2006 to comply with all water quality standards in accordance with the state’s Everglades Forever Act.\textsuperscript{63} This approach was authorized by the federal Clean Water Act, and was based on the concept of a compliance schedule.\textsuperscript{64} Unfortunately, under federal law, compliance with an administrative order provides less of a permit shield for the permittee than compliance with a permit,\textsuperscript{65} thereby

373.4592(4) of the \textit{Florida Statutes}. The Florida Environmental Regulation Commission will establish a numeric criterion for phosphorus in the Everglades no later than December 31, 2003.

\begin{itemize}
\item \textsuperscript{55} See § 373.4592(4)(d).
\item \textsuperscript{56} Evidence suggests that changes in Everglades flora and fauna are seen at levels as low as ten parts per billion. \textit{See S. FLA. WATER MGMT. DIST., supra} note 25.
\item \textsuperscript{58} § 373.4592(4)(e).
\item \textsuperscript{59} Additional treatment technologies capable of reaching lower levels of phosphorus are also part of ongoing research. \textit{See} § 373.4592(4)(d), (9)(j).
\item \textsuperscript{60} See § 373.4592(9)(e). \textit{See also} Fla. Dep’t of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st Dist. Ct. App. 1981).
\item \textsuperscript{61} Florida Department of Environmental Protection, NPDES Permit No. FL0177962 (1999). Additional NPDES permits will be needed, or already have been developed, for STA-2, STA-3/4, and STA-5.
\item \textsuperscript{62} National Pollutant Discharge Elimination System Permit No. FL0177962, Florida Department of Environmental Protection, Administrative Order No. AO-001-EV (Apr. 13, 1999) [hereinafter Administrative Order].
\item \textsuperscript{63} § 373.4592(10).
\item \textsuperscript{65} Whereas administrative orders issued by the Florida DEP are final agency action, subject to review under Chapter 120 of the \textit{Florida Statutes}, they are not considered final
\end{itemize}
exposing the permittee to the potential for more liability and litigation over violations of water quality standards. In fact, fear of an administrative challenge to the permit and administrative order was so pervasive that the Florida Legislature enacted an expedited process for challenging Everglades-related permits.

Thus, in the end, the District and other agencies spent hundreds, if not thousands, of staff hours to develop an incomplete permit that would require future modifications and that did not even create an adequate permit shield. Adding insult to injury, the District's environmental restoration project was classified as "industrial" and charged significant permitting fees. Perhaps most significantly, the permit will eventually hold the District responsible for achieving water quality standards, despite the fact agency action under federal law and therefore do not provide a permit shield. See Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, 20 F.3d 1418 (6th Cir. 1994); S. Pine Assoc. v. United States, 912 F.2d 713 (4th Cir. 1990).

66. Despite the successful negotiation of and compliance with an administrative order, permittees could still face enforcement actions and citizen suits for violations of water quality standards and the federal Clean Water Act. See United States v. Avatar Holdings, Inc., 1995 WL 871260 (M.D. Fla. 1995) (stating government may seek enforcement of water quality violations even after negotiating administrative order); Wash. Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883 (9th Cir. 1993) (holding citizen suits may be brought against a permittee alleging violations of the federal Clean Water Act even if USEPA is content with an existing administrative order).

Under Florida law, however, an administrative order is a final agency action. 1800 Atl. Developers v. Dep't of Envtl. Regulation, 552 So. 2d 946 (Fla. 1st Dist. Ct. App. 1989); Booker Creek Pres., Inc. v. Mobil Chem. Co., 481 So. 2d 10 (Fla. 1st Dist. Ct. App. 1985).


68. A quick look at the bottom line clearly demonstrates how NPDES permitting is misapplied to environmental restoration projects. Despite their benefits, these STAs, which cleanse agricultural runoff from rainfall, were classified as industrial wastewater publicly owned treatment works (POTW). Fl. Admin. Code Ann. r. 62-620.200(21) (2001). This conclusion was reached by process of elimination, because the treatment facilities were not domestic wastewater treatment facilities. r. 62-620.200(15). Unfortunately, this apparently unavoidable conclusion had other consequences, because industrial discharge facilities must pay application processing and operating fees. See Fla. Stat. §§ 403.087(6)(a), 403.0885(1) (2001), and Fl. Admin. Code Ann. r. 62-620.310(5) (2000), 62-4.050 (2001), 62-4.052 (2002). As a result, the Florida DEP may charge the Water Management District over $30,000 per year in administrative fees for the privilege of building and operating facilities that clean up waters flowing into the Everglades. The first STA was assessed a fee of $5,800 per year by the Florida DEP. See Florida Department of Environmental Protection Bureau of Finance and Accounting, Invoice No. 1411 (Dec. 2, 1999).
that all the pollutants generated by upstream agricultural activities were exempt from regulation under the Clean Water Act. All these problems are a product of the obvious reality that NPDES permitting regulations were simply not designed for watershed restoration projects.

C. Everglades Forever Act Permits

Compared to the problems of federal permitting, the permitting process under Florida law was simple for the Everglades Construction Project. Through the Everglades Forever Act (EFA), the Everglades Construction Project was mandated, funding mechanisms were provided, and regulatory mechanisms were established. Unlike federal law, which treated the Water Management District’s environmental restoration projects no differently than an industrial factory, the EFA established an alternative approach to regulating watershed restoration.

In the EFA, a special set of permits was established for the Everglades Construction Project, with criteria designed to meaningfully regulate the watershed restoration project. These permits were in lieu of other environmental permits that would normally apply. Instead of requiring absolute compliance with the narrative phosphorus criterion, the EFA permits required the STAs to achieve reasonable performance and "design objectives." Instead of looking only at the quality of waters at the discharge point, the EFA permits require the quality of waters discharged from the STAs to be "of equal or better quality than the inflows." Instead of applying strict mitigation criteria for wetland impacts, the EFA acknowledged the fact that the Everglades Construction Project was actually constructing wetlands, and required the "minimiz[ation of] wetland impacts, to the maximum extent practicable." Finally, the EFA required assurances

70. FLA. STAT. § 373.4592(4)(a) (2001).
71. § 373.4592(6)–(8).
72. § 373.4592(9)–(10).
73. See infra Part II.A.
74. See also infra Part III.D.
75. § 373.4592(9)(e).
76. § 373.4592(9)(h)(1).
77. § 373.4592(9)(h)(2).
78. § 373.4592(9)(e)(3).
that the "STAs [did] not pose a serious danger to the public health, safety, or welfare."\textsuperscript{79}

So far, this state permitting process has produced four permits for STAs, with hundreds of pages of conditions and appendices. Each one includes substantial reporting requirements, which are being met through the annual publication of the Water Management District's \textit{Everglades Consolidated Report}.\textsuperscript{80} Thus, even the EFA permitting process, custom tailored for the Everglades Construction Project, had its drawbacks and difficulties.\textsuperscript{81} So the fundamental question remains: whether the complexity and rigors of permitting watershed restoration are truly necessary, or whether an alternative and more simplistic approach can be found?

D. \textit{Aquifer Storage and Recovery Permits}

While the EFA presents an example of moderately successful state regulation of watershed restoration, the future of state regulation of Aquifer Storage and Recovery (ASR) systems is not as bright. During the 2000 session of the Florida Legislature, a huge debate erupted over the permitting of ASR systems. These systems can help manage the fluctuations of water levels in a natural system by injecting excess surface waters deep underground for storage, which would allow for later recapture of the waters in times of drought or need.\textsuperscript{82} By injecting freshwater into the saline Florida aquifer, an underground freshwater bubble is created.\textsuperscript{83} The proposed legislation\textsuperscript{84} would have authorized these projects, which are an essential water storage component of the Comprehensive Everglades Restoration Plan.\textsuperscript{85}

\textsuperscript{79} § 373.4592(9)(h)(3).

\textsuperscript{80} \textit{See, e.g.}, S. FLA. WATER MGMT. DIST., supra note 25.

\textsuperscript{81} Although the EFA permitting criteria was designed especially for the Everglades Construction Project, it still had limitations—especially because dissolved oxygen levels in the outflow discharges from the STAs were, on occasion, lower than inflows. However, since the problem was a result of natural fluctuations in marsh environments, EFA permits were issued by the Florida DEP with another administrative order establishing special conditions to monitor dissolved oxygen and ensure environmental protection. \textit{See, e.g.}, Everglades Forever Act, Permit No. 503074709, Florida Department of Environmental Protection, Administrative Order No. AO-002-EV (Apr. 23, 1999).


\textsuperscript{83} \textit{COMPREHENSIVE EVERGLADES RESTORATION PLAN AQUIFER STORAGE AND RECOVERY PROGRAM, at} http://www.evergladesplan.org/docs/asr_whitepaper.pdf (last visited Sept. 6, 2002).

\textsuperscript{84} Fla. SB 854 (2001) (proposed \textit{FLA. STAT.} § 403.065) (regulating aquifer storage and recovery).
Plan. However, absent treatment of the surface waters, ASR technology was not expected to be able to meet the requirements of the federal Safe Drinking Water Act nor the associated state regulations governing underground injections.

One major concern with ASR was that biological organisms, including coliform bacteria in the surface waters, would be injected into the aquifer. However, these organisms were expected to die-off once injected into the oxygen-deficient waters. Based on that scientific expectation, the Florida Legislature proposed a bill to allow a zone of impact provided that there was no adverse risk to human health. After initially passing the House and Senate, the bill was later reconsidered, and public concerns with the scientific uncertainties of ASR led to the bill’s death.

Those public concerns may prove wise, and the effort to expedite permitting of ASR may have been premature. However, in the meantime, the Water Management District’s efforts to implement experimental ASR facilities will be significantly burdened. Despite the fact that ASR technology is designed for surface waters and is never intended to be used for consumption, it will be subjected to the very same regulatory framework usually reserved for drinking waters. In addition, once the ASR waters are discharged from the ASR system back into their original surface waters, they could also face NPDES permitting problems if they are considered a point source discharge of pollutants into waters of the United States. Thus, as

89. Id.
90. Id.
93. Perhaps the most significant problem ahead for ASR is the potential for regulation of nutrients. Consider, for example, an ASR well near Lake Okeechobee, which is widely recognized as being impacted by phosphorus. Currently, the Florida DEP is implementing Total Maximum Daily Loads (TMDLs) in the region, and has adopted a TMDL of forty ppb for Lake Okeechobee. As of the writing of this article, that standard is not being met, and
difficult as the 2000 Legislative Session was for ASR advocates, their problems may have just begun.

E. Problems of Permit Compliance

Even when watershed restoration projects are able to obtain permits, it simply signals the beginning of a new series of regulatory problems. Once the exposure to an Administrative Procedures Act challenge passes, the next task of complying with existing permit conditions—sometimes an extraordinarily difficult task—begins.

1. Unexpected Events and Permit Modifications

For the Water Management District, a perfect example of the difficulties of permit compliance was the NPDES permit for the Water Management District's Everglades Nutrient Removal (ENR) Project—the prototype for the STAs. That permit required mercury monitoring. According to the permit conditions, the district was required to monitor mercury accumulation in fish trapped inside mesh cages. Unfortunately, due to the lower dissolved oxygen levels and the inability of the fish to search for food, the fish died when confined in those cages, making compliance with the permitting conditions impossible. Similarly, the ENR project required the monitoring of atmospheric deposition in order to evaluate the amount of phosphorus coming from rainfall and dust. Once again, nature made the monitoring efforts extremely difficult because wading birds often perched indeed, water quality standards in the region are not anticipated to be met until at least 2015. See Fla. Stat. § 373.4595 (2001). If the Water Management District withdraws phosphorus-laden waters from a tributary to Lake Okeechobee and injects those waters into an ASR well, regulatory problems could occur.

94 United States Environmental Protection Agency, NPDES Permit No. FL0043885 (July 1, 1997).
95 Id.
96 Id. at Conditions 22-23.
97 Letter from Ronald Bearzotti, Staff Environmental Analyst, South Florida Water Management District, to Roy Herwig, Enforcement Division, Region IV, United States Environmental Protection Agency (Oct. 30, 1997). Letter from Roosevelt Childress, Surface Water Permits Section, Region IV, United States Environmental Protection Agency, to C. Alan Hall, Ecosystems Restoration Department, South Florida Water Management District (Mar. 9, 1998).
98 EPA, supra note 94 at Conditions 22-23.
and defecated upon the ground-level collectors.\textsuperscript{99} Efforts to use airborne buckets atop poles and towers encountered similar contamination problems with high-flying vultures and nesting cormorants.\textsuperscript{100} As a result of these types of unexpected events, environmental permits for watershed restoration projects can require frequent modification, which, in turn, creates administrative burdens for both the permitting agency and the permittee.

Even when agencies anticipate the unexpected, permitting problems can still occur. For example, the absence of knowledge surrounding environmental restoration projects is problematic in the context of environmental permitting, where regulatory certainty—or at least reasonable assurances—is essential. The EPA, Army Corps of Engineers, and the Florida DEP have all issued permits to the Water Management District with long lists of monitoring requirements just to make sure that environmental problems will not occur, and with the promise to remove those monitoring requirements after collecting a year or more of data or after new information becomes available.\textsuperscript{101} While this approach seems reasonable, it is also resource intensive, and substantial modifications of a permit can trigger another window of opportunity for legal challenges.\textsuperscript{102}

2. Revision to Water Quality Standards

Another major problem to permit compliance is presented when state water quality standards are revised. As mentioned above, in Florida, the current state water quality criterion for phosphorus is a narrative standard preventing an imbalance of flora and fauna.\textsuperscript{103} However, on December 31, 2006, a numeric water quality criterion for phosphorus in the Everglades will

\textsuperscript{99} Interview with Larry Grosser, Staff Environmental Scientist, and Larry Fink, Mercury Program Manager, South Florida Water Management District, West Palm Beach, Fla. (Mar. 9, 2000). See also ATMOSPHERIC DEPOSITION INTO SOUTH FLORIDA: MEASURING NET ATMOSPHERIC INPUTS OF NUTRIENT, Symposium, South Florida Water Management District (Oct. 20-22, 1997).

\textsuperscript{100} Interview with Larry Grosser and Larry Fink, supra note 99.

\textsuperscript{101} See, e.g., Florida Department of Environmental Protection, Permit No. 0126704 (Sept. 29, 2000) (regulating STA-2, with Specific Condition 29 allowing removal of parameters from the monitoring table after one year of data is collected); see also infra Part II.B.


\textsuperscript{103} FLA. ADMIN. CODE ANN. r. 62-302.530 (2002).

https://nsuworks.nova.edu/nlr/vol27/iss1/1
take effect. This new criterion will be established either by the State of Florida, through the Environmental Regulation Commission, or, if the state fails to adopt a criterion, by the EFA, as a default phosphorus criterion of ten ppb. In either event, the Water Management District will be required to meet for all discharges to the Everglades by December 31, 2006.

Unfortunately, only one technology—chemical treatment—has been identified that is capable of reaching the low levels of phosphorus that may be needed for the Everglades, and the costs and chemical by-products of that technology may make it impracticable to implement. But the Clean Water Act (CWA) generally does not recognize practicability; rather, the CWA simply says that water quality standards must be met. Thus, despite the fact that the Everglades Construction Project has been able to dramatically reduce phosphorus levels flowing into the Everglades, if it cannot achieve the new state water quality criterion, then the facility will be in violation of its permit. At that point, the regulatory agencies and Water Management District will be back to the beginning—wrestling with how to apply the strict requirements of NPDES permitting rules to the realities of watershed restoration.

105. § 373.4592(4)(e).
106. See Administrative Order, supra note 62.; see also § 373.4592(10).
107. See S. FLA. WATER MGMT. DIST., supra note 25.
108. See § 373.4592(10).
109. See S. FLA. WATER MGMT. DIST., supra note 25.
110. Once effluent limits are established in a permit, the CWA does not allow subsequent permits to contain less stringent effluent limits. 33 U.S.C. § 1342(o)(1) (2000); 40 C.F.R. § 122.45(l)(2) (2001). This concept of “antibacksliding” in the Clean Water Act means that there is very little room for error when it comes to the regulation restoration and the establishment of discharge limits. While there are exceptions when new information becomes available, see, e.g., 33 U.S.C. § 1342(o)(2)(B)(i) (2000); 40 C.F.R. § 122.45(l)(2)(I)(B)(I) (2001), exceptions are very narrowly construed by EPA, and the agency’s interpretations are generally granted great deference by the courts. See U.S. ENTVL. PROT. AGENCY, NPDES PERMIT WRITERS’ MANUAL, § 10.3.1 (illustrating with examples 1 and 2 that even new information leading to changes in water quality standards might not justify changes to effluent limits and that changes are only allowed when the effluent limits become more stringent.); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
IV. THE RANGE OF REGULATORY OPTIONS

As the Water Management District's experience with the regulation of the Everglades restoration demonstrates, watershed restoration projects can present unique regulatory problems, requiring special solutions. These problems will continue as the federal, state, and local governments continue to implement the Central and South Florida Project Comprehensive Review Study, known as the "Comprehensive Everglades Restoration Plan" or CERP. That project, which will be jointly implemented by the Water Management District and the United States Army Corps of Engineers, will include dozens of environmentally beneficial projects—restoring Lake Okeechobee and other Florida lakes, lagoons, and estuaries; improving delivery of waters to Everglades National Park, reducing salt water intrusion into the aquifer, and otherwise protecting and improving water, fish, and wildlife resources in the Everglades.

CERP is an even more ambitious undertaking than the Everglades Construction Project. And while the objective of both of these projects may be to eventually achieve compliance with water quality standards, environmental restoration of the massive Everglades watershed takes time. Indeed, the Everglades Forever Act, passed in 1994, codified a twelve-year implementation schedule with two phases. First, from 1999 to 2003, the District is required to construct the STAs, designed to achieve interim improvements in water quality standards. Later, additional treatment technologies may be constructed as necessary to achieve all water quality standards by December 31, 2006. This implementation schedule accounted for scientific uncertainty, research needs, and the practicalities of spreading the costs of the Everglades restoration over time.

Unfortunately, and as all of the above examples show, environmental permitting laws do not appreciate the uncertain nature of watershed restoration projects. Of course, in an ideal world, all water quality standards would be met. But the reality is that seventy percent of the

111. See FINAL IMPACT STATEMENT, supra note 85.
112. Id.
115. See § 373.4592(1)(g)–(h) (showing legislative findings that a reasonable approach to Everglades restoration required implementation of immediate and long-term efforts).
waterbodies in the United States are impaired. While some form of regulation of environmental restoration projects in the Everglades may be needed to ensure adequate environmental protection and to preserve due process, the current methods are crude, burdensome, and highly inefficient. In fact, in the opinion of the author, the past regulatory efforts in the Everglades have succeeded solely due to the creativity of well-meaning agency officials. Alternative approaches, including exemptions, general permits, variances, and new legislation must be explored.

A. Exemptions and De Minimus Permits

Exemptions from environmental permitting requirements are frequently found in state and federal environmental laws. The federal Clean Water Act and its regulations specifically exempt certain discharges, such as the controversial exemption for agricultural discharges.\(^\text{117}\) At the state level, the Florida DEP and regional Water Management Districts also have the ability to issue exemptions from environmental regulations for certain projects.\(^\text{118}\) These “de minimus” exemptions are for activities which are determined to have only minimal or insignificant individual or cumulative adverse impacts on water resources.\(^\text{119}\)

Exemptions and de minimis authorizations could be used for some watershed restoration projects. Theoretically, the de minimus exemption in Florida law could be used for many environmental restoration projects since these types of projects should not have any significant individual or cumulative adverse impacts on the water resources; rather, they should have environmental benefits. Indeed, this type of exemption was repeatedly used for the construction of a temporary pump station in south Dade County,


\(^{118}\) FLA. STAT. § 373.406 (2001).

\(^{119}\) § 373.406(9).
where waters were being diverted to protect the endangered Cape Sable Seaside Sparrow.\textsuperscript{120}

Project-specific exemptions have also been passed in Florida legislation. For example, Florida's Everglades Forever Act granted the Everglades Construction Project a clear exemption from certain permitting requirements of Florida law.\textsuperscript{121} In addition, due to the immediate need for Everglades restoration, the district was empowered to begin construction on the STAs prior to obtaining construction permits through final agency action.\textsuperscript{122} In the 2000 session, the Florida Legislature even passed a special exemption for environmental restoration or water quality improvement projects on agricultural lands.\textsuperscript{123}

The use of exemptions for environmental restoration projects, however, should be exercised with caution. In the case of the Everglades Construction Project, the legislature already had a copy of the proposed engineering design documents for the project when it passed the Everglades Forever Act,\textsuperscript{124} and the engineering designs were developed with the cooperation of Florida and federal agencies, along with numerous public interest groups. In such cases, where the project details and benefits are already well defined, where the public interest in the project is high, where the need for action is imminent, and where public input and support has already been obtained, a legislatively granted exemption from environmental permitting is clearly the quickest and most efficient way to ensure implementation of the project.

The exemptions, however, have consequences as well. First, even though an environmental restoration project may be in the public interest, the need for immediate implementation must be balanced with the public interest

\textsuperscript{120} See Emergency Authorization to Operate the S-332B and S-332D Pump Stations and Construct the Accelerated C-111 Project Features, Florida Department of Environmental Protection, Office of General Counsel, Case Nos. 00-0889 and 99-2242, Sixth Amended Emergency Final Order (Mar. 28, 2002). For more information on the efforts to save the endangered Cape Sable Seaside Sparrow, see Keith W. Rizzardi, \textit{The Everglades in Jeopardy: A Drama of Water Management and Endangered Species}, 27 FLA. ST. U. L. REV. 349 (2000).

\textsuperscript{121} FLA. STAT. § 373.4592(9)(b) (2001).

\textsuperscript{122} Id.

\textsuperscript{123} § 373.406(9). This exemption, however, is more akin to a general permit, as discussed \textit{infra} Part IV.B., because it requires a case-by-case review and a determination that the activity will have "minimal or insignificant individual and cumulative adverse impact on the water resources of the state." Id.

\textsuperscript{124} See § 373.4592(2)(f) (incorporating by reference the engineering designs). \textit{See also} BURNS & MCDONNELL, EVERGLADES PROTECTION PROJECT CONCEPTUAL DESIGN (Feb. 15, 1994).
in due process. \footnote{125} Through the permitting process, projects are given a degree of public scrutiny they may not otherwise obtain, and, as a result, defects may be discovered and remedied before they lead to unanticipated consequences. Absent an opportunity for public participation, opponents of the project may continue to contest the project, creating new roadblocks until they obtain their opportunity to be heard. Second, creative attorneys may attempt to claim exemptions for their projects simply to avoid environmental regulation, so exemptions should be narrowly written. Finally, it may seem inappropriate for governmental agencies to exempt themselves from the laws that are applied to the rest of the public. In the case of the Water Management District, an agency known for the issuance of environmental permits to developers and other permittees, an exemption from environmental permitting for its own projects creates a perception of a double standard. Thus, while exemptions from environmental permitting provide a potential solution to some of the problems created by the regulation of restoration, it is a solution that should be used sparingly.

B. General Permits

Occasionally, environmental permitting programs provide for a streamlined review, not quite an exemption, but not a comprehensive permit with project-specific conditions either. Instead, these "general permits" provide a process for authorizing projects with limited environmental impacts and avoiding unnecessary duplication of regulatory control. \footnote{126} For example, the United States Army Corps of Engineers' dredge and fill permitting program, also administered pursuant to the Clean Water Act, includes a "nationwide permit" to authorize discharges of dredged or fill material that will have minimal adverse effects on the aquatic environment. \footnote{127} This nationwide permit, which has been frequently modified, \footnote{128} and which also

\footnote{125. See Deborah Stone, Policy Paradox Pt. II (1997) (discussing the tension between equity and efficiency in the development of public policy).}

\footnote{126. See, e.g., 33 C.F.R. § 322.2(f) (2001); Fla. Admin. Code Ann. r. 40E-40.042 (2002).}


\footnote{128. See Proposal to Issue and Modify Nationwide Permits, 63 Fed. Reg. 36,041 (July 1, 1998); Press Release, United States Army Corps of Engineers, U.S. Army Corps of Engineers Announces Replacement Nationwide Permits, (March 6, 2000), available at...
has been subject to controversy and debates,\(^\text{129}\) provides a streamlined approval process for small-scale projects, including dredge and fill projects affecting less than ten acres.\(^\text{130}\) Similarly, Florida’s Water Management Districts administer Environmental Resource Permitting programs, which include a series of general permits for minor projects such as road resurfacing, dock maintenance, mosquito control, underground cables, and utility infrastructure.\(^\text{131}\) One general permit, in fact, is specifically designed for environmental restoration efforts implemented by the Florida DEP.\(^\text{132}\) The general permit pre-approves projects that do not significantly impede navigation\(^\text{133}\) and that provide vegetative stability to areas subject to erosion.\(^\text{134}\)

While general permits may provide a greater degree of regulation for projects than exemptions, their use should also be limited for environmental projects. General permits typically include predetermined permit conditions and, as a result, are unlikely to be able to address all the uncertainties associated with environmental restoration projects.\(^\text{135}\) The general permit for Florida DEP’s environmental restoration activities, for example, only authorizes a few types of environmental restoration projects that are implemented in accordance with other statutes.\(^\text{136}\) Furthermore, general permits may be subject to some of the same critiques as exemptions, including insufficient public review and unfair special treatment of government, although to a lesser degree. Thus, while general permits may be an excellent approach for regulating small-scale environmental


\(^{131}\) See, e.g., FLA. ADMIN. CODE ANN. r. 40E-400 (2001).

\(^{132}\) See r. 40E-400.485.

\(^{133}\) r. 40E-400.485(3)(a).

\(^{134}\) r. 40E-400.485(3)(b). A similar noticed general permit is available to water management districts for environmental restoration or enhancement efforts. FLA. ADMIN. CODE ANN. r. 62-341.485 (2002).

\(^{135}\) Consider, for example, the difficulty of developing a general permit that would address the uncertainties related to ASR implementation. See infra Part III.D.

\(^{136}\) r. 40E-400.485(2).
restoration projects, they are not an ideal solution for regulating large ones. Larger projects, such as the Everglades restoration, require increased regulatory flexibility while also granting an appropriate degree of public scrutiny to ensure adequate environmental review and public support.\textsuperscript{137}

C. Variances

Variances provide a third tool for the regulation of environmental restoration. These variances require the regulatory agencies to conclude that the particular project presents a special situation, warranting a deviation from the otherwise applicable requirements.\textsuperscript{138} Additionally, both state and federal laws already allow variances for some water-related projects.

At the federal level, the NPDES permitting program authorizes multiple types of variances, allowing a permittee to deviate from otherwise applicable effluent limitations that would regulate its discharges.\textsuperscript{139} These variances can authorize discharges that do not comply with otherwise applicable effluent limits due to "fundamentally different factors" or "non-conventional pollutants," provided that best available technologies are used.\textsuperscript{140} For some ecosystems, including the Chesapeake Bay, Great Lakes, Long Island Sound, and Lake Champlain, the Clean Water Act even includes custom-tailored provisions.\textsuperscript{141}

Variances are available in Florida law as well. Water resource laws allow the Florida DEP to grant variances from laws and regulations where there is no available method of pollution control, where compliance needs to be measured over a period of time, or to relieve hardship for a period of up to twenty-four months.\textsuperscript{142} The state Administrative Procedures Act even includes a broad provision empowering agencies to grant relief from regulations where application of the rule creates a substantial hardship or violates principles of fairness.\textsuperscript{143}

State and federal variance provisions like the ones above could be applied to environmental projects. But again, as with regulatory exemptions

\textsuperscript{137} See STONE, supra note 125, at 287–382 (discussing the tension between flexibility and precision in the establishment of administrative rules).

\textsuperscript{138} See, e.g., BLACK'S LAW DICTIONARY 1553 (6th ed. 1990).

\textsuperscript{139} See, e.g., 40 C.F.R. § 122.21(n), pt. 125(D) (2001). At the state level, the Florida DEP implements NPDES compliance schedules based upon section 403.0885 of the Florida Statutes.

\textsuperscript{140} 40 C.F.R. § 125.31 (2001).


\textsuperscript{142} FLA. STAT. § 403.201 (2001).

\textsuperscript{143} § 120.542(2).
and general permits, variances have limitations. As noted above, variances are often allowed for only a limited period of time. Watershed restoration projects, however, though they may provide substantial benefits for an unlimited period of time, might never achieve the desirable goal of full compliance with existing standards. In some cases, such as the ECP, where the ultimate goal for 2006 is compliance with all water quality standards in the Everglades, a variance for a defined period of time may be the appropriate solution. But in other cases, when improvements will be made immediately but no further modifications are expected, variances may be an imperfect mechanism for regulating restoration.

D. Project-Specific Statutory Permitting Criteria

A fourth way to resolve the problems of regulating restoration uses a case-by-case approach. Through project specific legislation, simplified and specially-tailored regulatory programs can be created. Indeed, over the past ten years, the Florida Legislature has passed numerous laws providing alternative regulatory procedures for environmental restoration efforts, including the Everglades,\textsuperscript{144} Florida Bay,\textsuperscript{145} Kissimmee River,\textsuperscript{146} Lake Apopka,\textsuperscript{147} and most recently, Lake Okeechobee.\textsuperscript{148} Similarly, at the federal level, historic examples of project-specific legislation include the Tennessee Valley Authority Act,\textsuperscript{149} and the Colorado River Salinity Control Act.\textsuperscript{150}

These project-specific laws can be narrowly tailored to meet the needs of each project. The regulatory requirements in the EFA, as explained in Part III.C above, were designed specifically for the permitting of the STAs. Custom-made legislation was developed for CERP as well, including the Comprehensive Everglades Restoration Plan Regulation Act. Demonstrating awareness of the difficulties of regulating restoration, the Florida Legislature and Governor enacted sections 373.1501 and 373.1502, creating a two-step process for the regulation of CERP. First, the Water Management District and Florida DEP must conduct an initial evaluation of CERP projects during the development phase, and determine with reasonable certainty that the

\textsuperscript{144} § 373.4592.
\textsuperscript{145} § 373.4593.
\textsuperscript{147} § 373.461 (2001).
\textsuperscript{148} § 373.4595.
projects could be permitted and operated as proposed. Later, when the project is ready to be implemented, the project must be permitted, and reasonable assurances are required that the project will achieve design objectives, and will not pose serious danger to public health, safety, or welfare. But the most significant clause in the Comprehensive Everglades Restoration Plan Regulation Act states that “[s]tate water quality standards will be met to the maximum extent practicable. Under no circumstances shall the project component cause or contribute to violation of state water quality standards.”

This provision is remarkable in that it explicitly accepts non-conformance with state water quality standards, a permitting concept that has been upheld by Florida courts. Indeed, the concept of achieving compliance with water quality standards to the maximum extent practicable was recognized as providing additional flexibility to the reasonable assurances concept, considering the limitations of time, money, staff resources, technology, and information, although it does not provide unbridled discretion to exceed or violate state water quality standards. The question remains, however, whether Florida’s use of this “maximum extent practicable” concept for CERP will be accepted by the United States Environmental Protection Agency and the federal government as consistent with the Clean Water Act.

This piecemeal approach to environmental restoration can be effective, but is obviously labor intensive. Agencies and legislators work together to craft new laws, which are then reshaped and debated in the legislature, before finally being codified and implemented. The process also increases the number of laws on the book—reversing Florida’s recent efforts to reduce laws and regulations. These problems are compounded when mistakes are made during the legislative process, requiring “glitch bills” in subsequent years. Even the custom-made Everglades Forever Act permitting process

152. § 373.1502(3)(b).
153. § 373.1502(3)(b)(2).
155. Miccosukee Tribe, 98 EL FALR 119, at 7, 16.
156. Id. at 18.
158. Id.
generated the need for remedial legislative efforts.\textsuperscript{159} So, like all the other options for regulating restoration, project-specific statutes have their problems and limitations.

E. Comprehensive Legislation

The final option for regulating watershed restoration would be a programmatic solution. In the opinion of this author, reforms are needed in both federal and Florida law. Through these reforms, greater efficiency in permitting of watershed restoration projects could be achieved without unnecessarily burdening the implementing or regulatory agencies, while adequate due process and project scrutiny could be preserved.

Ultimately, watershed restoration projects raise four major concerns: impacts to water quality, water supplies, flood control, and natural resources such as watershed habitat. Permitting at both the state and federal levels could be simplified to ensure that these four basic concerns are understood, and that the projects will not adversely impact them.

1. Amend the Clean Water Act to Exempt Restoration

At the federal level, Congress should amend the Clean Water Act to exempt watershed restoration activities from regulation. After all, if agriculture—widely recognized as a major source of non point source pollution—does not warrant federal scrutiny, then neither does a project that improves water quality, flood control, water supply, and associated natural resources. If a state chooses to undertake a watershed restoration project, and develops an adequate permitting regime for the project, then no additional federal permits should be needed.

2. Create a Single State Watershed Restoration Law

At the state level, instead of addressing the problem on a project-by-project basis, Florida should pass a new state law with new criteria governing the permitting of watershed restoration projects—a sample proposal follows this article as Appendix B. Any state legislation should address each of the four major watershed concerns: water quality, water supplies, flood control, and natural resource projection. In addition, the state

\textsuperscript{159} See, e.g., ch. 99-11, §1, 1999 Fla. Laws 533, 534–35 (amending section 403.088 of the Florida Statutes to modify administrative orders process and the rights of parties to challenge EFA permits).
law should address four basic principles that can be learned from experiences in regulating the Everglades.

First, it must provide criteria for what a watershed restoration project is, and what it must achieve. For example, the proposed project must be primarily for environmental improvements to a watershed, even if it does not achieve absolute compliance with law. Watershed restoration also must not include any project that adversely impacts natural resources or third parties. Limiting the definition of watershed restoration projects to those projects undertaken by governmental entities could ensure that projects are implemented for a public purpose as opposed to private projects, which might simply be seeking to characterize themselves as watershed restoration to escape more rigorous environmental scrutiny.

Second, the legislation should provide the public with its opportunity to be heard. The intense interest in the Everglades demonstrates that projects should not escape all regulatory review. However, reasonable criteria would help focus the scope of future litigation.

Third, the legislation should require reevaluation of the project and its success. Adaptability is essential to watershed restoration projects, where the decision-making process requires trial and effort, monitoring, and feedback. Indeed, the concept of “adaptive management” is increasingly recognized by natural resource protection agencies. Periodic performance assessments will ensure that the watershed restoration project remains beneficial to the public, and does not become another Florida case study on the law of unintended consequences.

Finally, the concept of adaptability fits neatly with the concept of doing the maximum extent practicable—the standard that should be embraced for watershed restoration. As discussed above, this standard is already used in Florida law for the Everglades restoration. But this concept is found in the Clean Water Act as well, which regulates urban stormwater through a program known as MS4—short for municipal separate storm sewer systems. Rather than requiring absolute compliance with all state water quality standards, MS4 permits “require controls to reduce the discharge of pollutants to the maximum extent practicable.”

161. See, e.g., Coleman, supra note 116, at 186.
162. See infra Part II.A.
Admittedly, this is a substantial departure from the rigorous pollution control requirements imposed upon the pulp and paper mills and other industrial facilities that can be found throughout Florida and the United States. But there is an important difference between those facilities and watershed restoration projects—whereas industrial facilities have the potential to generate pollution, watershed restoration projects simply wrestle with the pollution that was already generated elsewhere upstream. Thus, the rigorous use of strict water quality standards in environmental law should be reserved for potential sources of pollution. The law should recognize common sense, and authorize watershed restoration projects that represent the maximum extent practicable to protect water quality, water supplies, flood control, and natural resources.

V. CONCLUSION

The regulation of watershed restoration is an ironic necessity. It is ironic because environmental laws, designed to protect the environment, are being applied to projects designed to improve and protect the environment. However, it is also a necessity to ensure adequate protection of natural resources, to avoid unintended consequences, and to ensure due process for the public and the permittee. Therefore, it is the duty of the regulatory agency to find a balance that provides reasonable regulation without over-regulating.

This article has exposed some of the problems of using environmental laws to regulate restoration by demonstrating that inflexible enforcement of absolute standards only creates unwelcome barriers to worthy public projects. Exemptions, variances, and project specific legislation may all be useful tools in certain situations, but a comprehensive, programmatic approach may be the best way to find the appropriate regulatory balance. Of course, it will also have detractors. Environmental groups are likely to object to any measure that accepts any amount of pollution. But such purist objections would obscure reality. Environmental permits, developed to protect the environment, are creating a needless maze of regulation for watershed restoration projects. Permitting an imperfect restoration project that achieves partial improvement is certainly better than the grossly inefficient, usually all-or-nothing, approach of existing environmental laws.

Sometimes, the perfect is the enemy of the good.\textsuperscript{165} In the context of regulating watershed restoration, the maximum extent practicable is good

\textsuperscript{165} Voltaire, Dictionnaire Philosophique, “Le mieux est l’ennemi de bien.”
enough. The United States Congress and the Florida Legislature—and indeed, the rest of the nation—should act accordingly.
APPENDIX A.

Diagram of the Everglades Construction Project.
APPENDIX B.
Proposed Florida Legislation

Be It Enacted by the Legislature of the State of Florida:
Section 1. This bill is entitled the “Florida Watershed Restoration Policy Act.”
Section 2. Sec. 403.08, Florida Statutes, is created to read:
   (1) FINDINGS.
      (a) The Legislature finds that watershed restoration projects have substantial public benefits to water quality, water supply, flood control and natural resources, even though projects may also produce other short-term and incidental adverse impacts, such as construction impacts.
      (b) The Legislature finds that permitting requirements of Chapters 373 and 403 can present substantial regulatory obstacles to these otherwise beneficial watershed restoration projects, and that it is in the public interest to reduce these obstacles to enable efficient and reasonable regulation and implementation of these projects.
   (2) DEFINITIONS. For purposes of this section:
      (a) Watershed Restoration Projects include projects undertaken by an agency for the primary purpose of improving environmental conditions in a watershed, including wetland construction, hydropattern improvements, stream or river bank improvements, and other similar projects designed to benefit water quality, water supplies, flood control, and natural resources.
      (b) Agency includes all political subdivisions of the state.
   (3) WATERSHED RESTORATION ENVIRONMENTAL IMPACT STATEMENTS. In lieu of the permitting requirements of Chapters 373 and 403, except for permits issued under delegated or approved federal programs, agencies implementing watershed restoration projects may submit a watershed restoration environmental impact statement to the Secretary that contains:
      (a) a description of the project, including location, current environmental conditions, and proposed physical alterations;
      (b) resources needed to implement the project, availability of those resources, and a projection of the future availability of the resources;
      (c) anticipated maintenance of the project, and consequences of failing to adequately maintain the project; and
      (d) a description of the design objectives of the project, including an evaluation of the benefits and consequences of the project, reasonable alternatives to the project, and the consequences of not implementing the project.
(4) PERMITTING OF WATERSHED RESTORATION PROJECTS.
   (a) The Secretary shall permit the watershed restoration project if
        the environmental impact statement provides reasonable assurances that:
        (1) water quality, if impacted, is substantially improved
            when compared to pre-project conditions, except that naturally-occurring
            reductions in water quality constituents may be authorized if the water
            quality improvements substantially outweigh any adverse water quality
            impacts and if the decreases are not likely to impact public health, safety or
            welfare;
        (2) water supplies, if impacted, are enhanced, and are not
            likely to produce adverse effects on legally existing users resulting from the
            project;
        (3) flood control, if impacted, is enhanced, and adverse
            flooding impacts are not likely to result upon upstream, downstream or
            otherwise hydrologically-connected privately-owned properties;
        (4) natural resources, including native flora and fauna, if
            impacted, are beneficially affected by the project, and those beneficial
            effects substantially outweigh any incidental adverse effects that result;
        (5) the watershed restoration project contains a program for
            maintaining, monitoring and evaluating the environmental effects of the
            watershed restoration, including benefits and adverse impacts to water
            quality, water supply, flood control and natural resources, as applicable; and
        (6) the goal of watershed restoration is achieved to the
            maximum extent practicable, and is otherwise in the public interest.
   (b) Any watershed restoration project permitted by the Secretary
        shall be required to substantially conform with the environmental impact
        statement, and shall implement the monitoring and evaluation program as
        described in the environmental impact statement, the results of which shall
        be reported to the Secretary on an annual basis.
   (c) If monitoring and evaluation of the watershed restoration
        project demonstrate unanticipated adverse impacts that are not in accordance
        with subsection (3) above, then the Secretary shall require the agency to
        supplement the environmental impact statement with additional information
        to provide reasonable assurances in accordance with subsection (3) above,
        and if the project is substantially modified, then the Secretary shall issue a
        revised watershed restoration project permit that includes additional permit
        conditions, as appropriate.
   (5) Notice of watershed restoration projects permits shall be published
        in the Florida Administrative Weekly by the agency implementing the
project, and shall otherwise be in accordance with and subject to Chapter 120, Florida Statutes and Title 28, Florida Administrative Code.

(6) In cases where the department is the agency implementing a watershed restoration project, the permit will be issued by the water management district with jurisdiction over the location of the project.
Legal Malpractice in Florida

Warren R. Trazenfeld*

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I. INTRODUCTION

As Sir Thomas More says in A Man for All Seasons, "[t]he law is not a 'light' for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it a citizen may walk safely." An attorney is charged with helping "citizens" in the twists and turns along this causeway and even helping them back to the causeway when they have lost their direction. When an attorney fails in carrying out his responsibilities, one remedy available to the injured "citizen" or person is an action for legal malpractice.

II. ELEMENTS OF A LEGAL MALPRACTICE ACTION

A legal malpractice plaintiff must plead and prove: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the negligence resulted in, and was the proximate cause of, loss to the plaintiff. 2

1. ROBERT BOLT, A MAN FOR ALL SEASONS, Act II (1960).
A. The Attorney's Employment

The first element of the cause of action, that an attorney must be employed by the plaintiff/client,\(^3\) is addressed in *Ginsberg v. Chastain*.\(^4\) The issue before the court in *Ginsberg* was whether attorney Daniel Ginsberg’s one-time representation of Fred Chastain in a real estate matter entitled Chastain to believe that Ginsberg was also representing him at a meeting between Chastain and Annmarie Ahlers, one of Ginsberg’s long-time clients.\(^5\)

Where the record is devoid of any evidence, which indicates that an attorney-client relationship existed for legal services related to the particular meeting at issue, the element is not proven.\(^6\) Chastain testified at trial that he never discussed the subject of the meeting with Ginsberg, that he never asked Ginsberg to perform any services in connection with drafting the agreement between the parties, that Ginsberg never billed Chastain for any services in connection with the agreement, that Chastain never requested a bill, and that the parties had no fee agreement.\(^7\) Chastain thus failed to establish employment of the attorney and had no cause of action for legal malpractice.\(^8\)

Whether an attorney-client relationship existed in *Giedzinski v. Palmer*\(^9\) was deemed to be a factual issue resulting in a summary judgment being reversed.\(^10\) Palmer claimed that attorney Giedzinski breached his fiduciary duty and confidential relationship to her when she purchased an interest in a land trust from him.\(^11\) Giedzinski claimed he was not acting as Palmer’s attorney or as an attorney for the land trust when Palmer purchased her

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3. Riccio v. Heitner, 559 So. 2d 609 (Fla. 3d Dist. Ct. App. 1990) (holding law firm estopped from denying the attorney-client relationship existed due to failure to advise clients that law firm had been dissolved while continuing to represent the clients).
5. Id. at 28.
8. Id.
10. Contra Voutsinas v. Stutin, 626 So. 2d 300 (Fla. 5th Dist. Ct. App. 1993) (showing no facts to indicate attorneys ever agreed to handle the matter).
11. Giedzinski, 595 So. 2d at 295.
interest. Due to the disputed issues of fact, the case was "simply not a case that lends itself to disposition via summary judgment." Due to the disputed issues of fact, the case was "simply not a case that lends itself to disposition via summary judgment."13

Even if an attorney-client relationship exists, the action complained of must be within the scope of the attorney's initial employment. The aggrieved client in Atkin v. Tittle & Tittle15 sued a lawyer for failing to properly investigate zoning issues prior to the client purchasing an unimproved lot. The trial court entered a directed verdict for the attorney, overruling a jury verdict in favor of the former client.16 The Third District Court of Appeal reinstated the jury verdict.17

The Atkin trial court relied upon Maillard v. Dowdell18 in concluding that the lawyer had "performed the duties for which he was employed, investigated issues brought to his attention, and was not required to render additional land use and zoning opinions for which he was not retained."19 This limited view of the attorney's duty was rejected by the appellate court due to the expert testimony presented at trial and the language in the contract regarding zoning issues.20 The court concluded:

Although Maillard provides the general rule as to an attorney's duties when representing a client in a real estate transaction, that rule is not absolute. An attorney may not disregard matters that arise and reasonably signal potential legal problems although those matters may not fall precisely within the general rule.21

1. Privity

A cause of action against an attorney for malpractice requires privity of contract unless excepted.22 The Supreme Court of Florida in Angel, Cohen

12. Id.
13. Id.
15. 730 So. 2d 376 (Fla. 3d Dist. Ct. App. 1999).
16. Id.
17. Id. at 378.
18. 528 So. 2d 512 (Fla. 3d Dist. Ct. App. 1988).
19. Atkin, 730 So. 2d at 377.
20. Id. at 377-78.
21. Id. at 378 (citing Maillard, 528 So. 2d at 515).
22. Nat'l Union Fire Ins. Co. v. Salter, 717 So. 2d 141 (Fla. 5th Dist. Ct. App. 1998) (holding insurance company could not sue attorneys for insured since they were not in privity with attorneys or an intended third-party beneficiary).
and Rogovin v. Oberon Inv., N.V. set forth the general controlling law as to who may bring an action for legal malpractice. In Angel, the court stated, “Florida courts have uniformly limited attorneys’ liability for negligence in the performance of their professional duties to clients with whom they share privity of contract.”

2. Third-Party Beneficiary Exception

The Angel court recognized that in Florida, the privity requirement had been relaxed when “it was the apparent intent of the client to benefit a third party.” The area of will-drafting was cited as the most obvious example of this limited exception to the privity requirement. The First District Court of Appeal in Greenberg v. Mahoney, Adams & Criser, P.A. understood the Angel decision to encompass those situations where “it was the apparent intent of the client to benefit the third party.” The facts of the underlying malpractice case in Greenberg are not set forth in the opinion. Therefore, no guidance is provided as to what areas outside of the will-drafting arena may overcome the privity requirement.

In the case of Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, the court explained the “so-called will-drafting exception.” The Third District Court of Appeal found that “[o]nly where the testator’s intent as expressed in the will itself, not as shown by extrinsic evidence, is frustrated due to the negligence of the testator’s attorney—does the frustrated beneficiary of the will have a legal malpractice action against the testator’s lawyer.”

23. 512 So. 2d 192 (Fla. 1987).
24. Id. at 194. See also Voutsinas v. Stutin, 626 So. 2d 300 (Fla. 5th Dist. Ct. App. 1993) (failing to establish employment); Nickolauson v. Rhyne, 529 So. 2d 365 (Fla. 2d Dist. Ct. App. 1988) (alleging privity sufficiently, details to be determined from the evidence).
25. Angel, 512 So. 2d at 194.
28. Id. at 605.
29. See id.
31. Id. at 1223.
32. Id.; accord Miami Beach Cmty. Church, Inc. v. Stanton, 611 So. 2d 538 (Fla. 3d Dist. Ct. App. 1992) (“[A] beneficiary of a will does not have a legal malpractice action against the testator’s lawyer unless the testator’s intent as expressed in the will, not as shown by extrinsic evidence, is frustrated due to the lawyer’s negligence.”) (citing Espinosa, 586 So.
Espinosa cited the following as an example of the privity exception:

[W]here (1) the testator makes a will leaving all her property to her daughter and remarries thereafter, (2) hires a lawyer to make certain that her daughter remains the sole beneficiary under the will after her remarriage, and is negligently assured by the lawyer that no change was necessary to effect this intention, and (3) upon her death, her husband takes a statutory share of her estate as a pretermitted husband—it has been held that the daughter has a legal malpractice action against the testator's lawyer; this is so because the testamentary intent, as expressed in the will, to leave all her property to her daughter was frustrated due to the lawyer's negligent failure to draft a new will specifically excluding the testator's new husband and again leaving all her property to the daughter. 33

The court in Espinosa found that “[a]n attorney preparing a will has a duty not only to the testator-client, but also to the testator’s intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third-party beneficiaries).” 34 The Third District’s decision was approved by the Supreme Court of Florida. 35 Since there was no intention in any of the wills or codicils to provide for the person suing the testator’s attorney, the court held that the claimant was not a third-party beneficiary and had no cause of action against the attorney. 36

The Supreme Court of Florida, in its Espinosa decision, stated “we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator’s intent as expressed in the will is frustrated by the negligence of the testator’s attorney.” 37 The Fourth District Court of Appeal denied the plaintiffs’ cause of action in Babcock v.

2d at 1223); DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. 3d Dist. Ct. App. 1983) (lacking any indication that the testator’s intent had been frustrated, the complaint failed to state a cause of action for legal malpractice); O’Neill v. Sacher, 526 So. 2d 771 (Fla. 3d Dist. Ct. App. 1988); Martin v. Nemec, 526 So. 2d 157 (Fla. 4th Dist. Ct. App. 1988); Arnold v. Carmichael, 524 So. 2d 464 (Fla. 1st Dist. Ct. App. 1988).

33. Espinosa, 586 So. 2d at 1223 (citing McAbee v. Edwards, 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976)).
34. Id.; see Espinosa v. Sparber, Shevin, Shapo and Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993).
35. Id.; see also Hare v. Miller, Canfield, Paddock and Stone, 743 So. 2d 551 (Fla. 4th Dist. Ct. App. 1999).
36. Id. at 1380.
37. Espinosa, 612 So. 2d at 1380.
Malone. The plaintiffs in Babcock sued a lawyer for failure "to timely prepare a new will for their uncle." Their uncle died before signing the new will, which resulted in the plaintiffs’ obtaining nothing. The appellate court affirmed the trial court’s dismissal of the complaint for failure to state a cause of action. The appellate court relied upon Espinosa in holding that although the would-be beneficiaries had alleged that the attorney knew that the uncle was very ill, no cause of action existed because their uncle never signed the new will.

Although Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A. involves a lawsuit by a frustrated beneficiary against the attorney who drafted her son’s will, the court decided the matter on lack of proximate cause. Because the court determined that the intended bequest in Lorraine was homestead property, the property passed to the decedent’s children pursuant to article X of the Florida Constitution rather than to the decedent’s mother as designated in the will. The mother sued the attorney who drafted the will. The appellate court affirmed a summary judgment in favor of the attorney finding that the “testamentary intent was not frustrated by [the attorney’s] professional negligence, but rather by Florida’s constitution and statutes.”

The Lorraine appellate court distinguished McAbee v. Edwards by stating that “[t]he attorney in McAbee could have drafted the will to” obtain the result sought by the testator; however, in Lorraine, Florida’s homestead provisions made drafting the desired result impossible.

A cause of action did not exist against the attorney who drafted the will at issue in Kinney v. Shinholser. The personal representative and

38. 760 So. 2d 1056 (Fla. 4th Dist. Ct. App. 2000).
39. Id.
40. Id.
41. Id. at 1057.
42. Id. (citing Espinosa, 612 So. 2d at 1380).
43. 467 So. 2d 315 (Fla. 3d Dist. Ct. App. 1985).
44. Id. at 316–17.
45. FLA. CONST. art. X, § 4(c).
46. Lorraine, 467 So. 2d at 319.
47. Id. at 317–18.
48. Id. at 319.
49. Id. at n.7; see also Mann v. Cooke, 624 So. 2d 785, 788 (Fla. 1st Dist. Ct. App. 1993) (holding that an attorney is not liable to third-party beneficiary of husband’s revocable trust because terms were clear and unambiguous); Rosenstone v. Satchell, 560 So. 2d 1229, 1229–30 (Fla. 4th Dist. Ct. App. 1990) (relaxing strict privity requirement in area of will drafting).
50. 663 So. 2d 643, 646 (Fla. 5th Dist. Ct. App. 1995).
beneficiary under a trust sued the lawyer who had drafted the will, claiming that the lawyer “knew or should have known that the inclusion of the general power of appointment in the trust would frustrate [the] intent [of the testator] and cause an increase in [estate] taxes.” 51 The only evidence of such intent was the will’s “direction that the just taxes be paid.” 52 This was insufficient to allow the personal representative and beneficiary under the trust to sue the attorney who drafted the will for damages resulting from having to pay taxes because of the inclusion of the general power of appointment. 53 However, in the same case, the appellate court held that a cause of action did exist against the attorney retained to probate the will because he allegedly failed to timely advise the client that disclaiming the power of appointment within nine months after the death of the decedent would overcome the inclusion of the general power of appointment in the trust. 54 The Kinney court found that Espinosa’s third-party beneficiary test had been satisfied since the client was the ultimate beneficiary under the wills and trusts at issue. 55 The Fourth District in Stept v. Paoli, 56 citing to Kinney, also found an attorney not liable to revocable living trust beneficiaries who claimed that taxes were paid unnecessarily since the trust did not contain the “expressed intent of the testator to avoid or minimize taxes.” 57

The third-party intended beneficiary exception to the privity requirement for bringing a legal malpractice action is not limited to will drafting; it extends to adoptees. The case of Rushing v. Bosse 58 established that “privity between the child and attorney” is not required in a legal malpractice action “against the attorney who institutes and proceeds with a private adoption.” 59 The Rushing court stated that it did not read Angel, Cohen and Rogovin v. Oberon Inv. 60 as “creating an exception to the privity requirement limited solely to the area of will drafting.” 61

Furthermore, the Florida courts have considered the third-party beneficiary exception to the privity requirement in other areas, specifically in condominium and association law. In Hunt Ridge at Tall Pines, Inc. v.

51. Id. at 644–45.
52. Id. at 645.
53. Id. at 645–46.
54. Id. at 646.
55. Kinney, 663 So. 2d at 646.
56. 701 So. 2d 1228 (Fla. 4th Dist. Ct. App. 1997).
57. Id. at 1229 (citing Espinosa, 586 So. 2d at 1221).
58. 652 So. 2d 869 (Fla. 4th Dist. Ct. App. 1995).
59. Id. at 873.
60. 512 So. 2d 192, 193–94 (Fla. 1987).
61. Rushing, 652 So. 2d at 873.
a homeowners’ association sued an attorney claiming that its “declaration of covenants, conditions, and restrictions” was invalid, precluding the association from “perform[ing] its duties, including collecting fees.” Relying upon Espinosa, the appellate court affirmed the dismissal of the complaint because the general partner of the limited partnership which developed the residential community, not the homeowners’ association, had retained the attorney who drafted the declaration. The homeowner’s association’s argument that it was a third-party beneficiary was unpersuasive since the declaration explicitly stated, “that its provisions were intended for the benefit of the owners. It did not indicate that it was for the benefit of the homeowners’ association.”

Individual condominium unit owners, in Silver Dunes Condominium of Destin, Inc. v. Beggs and Lane attempted to establish that they were intended third-party beneficiaries of the representation by the condominium association’s attorney. The unit owners claimed “they were the apparent intended third-party beneficiaries of the legal services contract between the association and [its attorneys] because the association was at all times acting on behalf of and for the benefit of the unit owners as their fiduciary.” The court held that the members “were not the apparent intended third-party beneficiaries.” As a result of the association’s lawyer having “threated legal action against some unit owners,” the court could not conclude that the lawyer was representing both the individual unit owners and the association while the individual unit owners and the association were adverse to each other.

As demonstrated in the results above and herein, the third-party beneficiary exception to the privity requirement is not unlimited. In

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62. 766 So. 2d 399 (Fla. 2d Dist. Ct. App. 2000).
63. Id. at 400.
64. Id. at 400–01 (citing Espinosa, 612 So. 2d at 1378).
65. Id.
67. Id. at 1275.
68. Id. at 1276.
69. Id. at 1277.
71. Vargas v. Reinert, 547 So. 2d 264 (Fla. 3d Dist. Ct. App. 1989) (concluding lack of privity precluded suit against City of Hialeah attorney who agreed to court order to preserve
A lawsuit was brought by a “disgruntled minority shareholder of a closely held corporation” against the attorney representing the corporation. The Fourth District Court of Appeal affirmed a final summary judgment and found “that an attorney-client relationship did not exist between [such] shareholder and the [corporate] attorney,” notwithstanding the fact that such attorney had drafted a shareholder’s agreement that directly affected the shareholder’s rights. The appellate court was no doubt influenced by a previous lawsuit instituted by the disgruntled minority shareholder against the other shareholders in which the disgruntled minority shareholder claimed that he “was not represented by counsel in the negotiation of the shareholder’s agreement.”

Similarly, in Chaiken v. Lewis, no error was found where the trial court instructed the jury that “counsel for a partnership represents the partnership entity, but does not thereby become counsel for each partner individually.” In contrast to the Brennan ruling, Greenberg v. Mahoney, Adams & Criser, P.A. held that the mere assertion by the client that it was an intended third-party beneficiary was sufficient to obtain a reversal of the lower court’s decision dismissing a professional malpractice suit.

Assertion of privity failed in Athans v. Soble. The client in Athans claimed that the attorney caused the loss of a potential buyer’s deposit in a real estate transaction. Due to record evidence supporting the client’s assertion that although the attorney dealt only with the daughter of the plaintiff, the attorney knew that their legal services were rendered on behalf of the plaintiff, the appellate court overturned a summary judgment in favor of the attorney.

City vehicle involved in an accident but failed to inform City of order resulting in destruction of vehicle.

72. 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).
73. Id. at 144.
74. Id.
75. Id.
76. Id. at 146–47.
77. Brennan, 640 So. 2d at 145.
78. 754 So. 2d 118 (Fla. 3d Dist. Ct. App. 2000).
79. Id.
81. Id. at 605.
82. 553 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1989).
83. Id. at 1362.
84. Id. at 1361–63.
3. Effect of Negligent Misrepresentation and Fraud

Privity is not required when an attorney makes a negligent misrepresentation to a nonclient, and lack of privity will not protect an attorney from direct fraudulent acts or statements. Although the underlying facts of the case are not discussed, Bongard v. Winter holds that "an attorney may properly be held liable for his or her own fraudulent misrepresentations even if acting on behalf of a disclosed client." However, where different counsel represents each party, one party’s counsel is not liable to the other party for malpractice.

The malpractice claim was dismissed for failing to allege an attorney-client relationship in Gutter v. Wunker, however, the fraud claim survived. The fraud in Gutter allegedly involved failure to disclose material facts in limited partnership documents related to a restaurant venture. The court described those situations in which a claim for fraud would lie as follows:

To state a cause of action for fraud, a party must allege: (1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation. Lance v. Wade, 457 So.2d 1008 (Fla. 1984); A.S.J. Drugs, Inc. v. Berkowitz, 459 So.2d 348 (Fla. 4th DCA 1984). A defendant’s knowing concealment or nondisclosure of a material fact may also support an action for fraud where there is a duty to disclose. See Don Slack Ins., Inc. v. Fidelity & Cas. Co. of N.Y., 385 So.2d 1061 (Fla. 5th DCA 1980) and RESTATEMENT (SECOND) OF TORTS §§ 550, 551 (1977). Furthermore, where a party in an arm’s length transaction

87. 516 So. 2d 27 (Fla. 3d Dist. Ct. App 1987).
88. Id.
90. 631 So. 2d 1117 (Fla. 4th Dist. Ct. App. 1994).
91. Id. at 1119.
92. Id. at 1118.
undertakes to disclose information, all material facts must be disclosed. Vokes v. Arthur Murray, Inc., 212 So.2d 906 (Fla. 2d DCA 1986). 93


The issue of whether an insurance company is vicariously liable for the malpractice of the attorney it selects to defend an insured was examined in Aetna Casualty and Surety Co. v. Protective National Insurance Co. of Omaha. 94 After acknowledging that cases in other jurisdictions were split on this issue, the court was "persuaded by the reasoning of those cases which have held that an insurance company is not vicariously liable for the malpractice of the attorney it selects to defend the insured." 95 This reasoning prevented Protective, an excess general liability insurance carrier, from suing Aetna, the primary general insurance carrier and its counsel under an equitable subrogation theory for allegedly not raising a statute of limitations defense. 96

Marlin v. State Farm 97 held that an insured could not sue his carrier for negligence in failing to exercise control over the insurance company’s appointed attorney after an excess verdict was rendered against the insured. 98 The court succinctly stated "[a]s the insurer has no obligation or right to supervise or control the professional conduct of the attorney, it is not liable for the litigation decisions of counsel." 99

In Don Reid Ford, Inc. v. Feldman, 100 after taking over a bankrupt insurance carrier, the Florida Insurance Guaranty Association, Inc. (FIGA), sued the attorney appointed to represent an insured for failing to defend. 101 The result was a final judgment against the insured that was paid by FIGA. 102 A summary judgment in favor of the attorney was affirmed upon a finding that the statute of limitations began when the judgment against the insured was entered, not when the judgment was paid. 103

93. Id. at 1118–19.
95. Id.
96. Id. at 305–06.
97. 761 So. 2d 380 (Fla. 4th Dist. Ct. App. 2000).
98. Id. at 380–81.
99. Id. at 381 (citations omitted).
100. 421 So. 2d 184, 185 (Fla. 5th Dist. Ct. App. 1982).
101. Id.
102. Id.
103. Id.
B. Reasonable Duty

Secondly, a malpractice plaintiff must plead and prove neglect of a reasonable duty. As is more fully set out below, fulfillment of this duty does not require the attorney to be a predictor of the future in unsettled areas of the law, nor does it require him to inform his client of conflicting law unless the conflicting question will soon be answered by controlling authority. The attorney's duty does require him to exercise good faith and to make diligent inquiry in order to be protected by judgmental immunity.

A cause of action exists against an attorney who neglects to perform the services that he explicitly or impliedly agrees to when he accepts employment. However, an attorney's failure to accurately predict changes on unsettled points of law is not actionable. A cause of action against the attorneys in Kaufman v. Stephen Cahen, P.A. for their failure to timely file a wrongful death claim did not exist since the law regarding the statute of limitations for such cause of action was changed by a Supreme Court of Florida decision during the course of the representation.

However, Stake v. Harlan holds that an attorney has a duty to inform his or her clients of a possible change in the law known to the attorney that could have a materially adverse effect upon the clients. In Stake, the attorney had actual knowledge of the certification of a question to the Supreme Court of Florida, evidenced by his citation of the pending case in a letter he wrote to the client. The Second District Court of Appeal held that the attorney breached his duty to make his clients aware of the implications of the certified question, and thereby, denied his clients the...
opportunity to make an informed decision on whether or not to transact the subject real estate closing in the manner suggested by the attorney.  

In Crosby v. Jones, the Supreme Court of Florida held that the evaluation of an attorney’s judgment could be determined as a matter of law. The Supreme Court of Florida exercised jurisdiction because of a conflict between districts in Jones v. Crosby and Kaufman v. Stephen Cahan, P.A. The client in Crosby released the driver of the vehicle that collided with him, but the client did not release the driver’s employer. The employer obtained a summary judgment at the trial level, which was affirmed on appeal. The attorney obtained summary judgment upon the trial court’s holding that JFK Medical Center, Inc. v. Price set forth the longstanding law in Florida on the doctrine of judgmental immunity. JFK Medical Center specifically disapproved the Jones v. Gulf Coast Newspapers, Inc. holding, thereby establishing that the attorney acted properly.

“The rule of judgmental immunity is premised on the understanding that an attorney, who acts in good faith and makes a diligent inquiry into an area of law, should not be held liable for providing advice or taking action in an unsettled area of law.” At the time the attorney entered into the dismissal with prejudice both Sun First National Bank v. Batchelor, which was a decade old Supreme Court of Florida decision, and case law in the attorney’s district supported his decision. The only contrary decision was outside his district. The Supreme Court of Florida went on to hold that there is not always an absolute duty to inform the client of conflicting case law. “Attorneys cannot be placed in the position of having to accept

114. Id. at 1186.
115. 705 So. 2d 1356 (Fla. 1998).
116. Id. at 1357.
118. 507 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987).
119. Crosby, 705 So. 2d at 1357.
121. 647 So. 2d 833 (Fla. 1994).
122. See Crosby, 705 So. 2d at 1357.
123. Id. (citing JFK Medical Center, Inc., 647 So. 2d at 833).
125. 321 So. 2d 73 (Fla. 1975).
126. See, e.g., Crosby, 705 So. 2d at 1358, 1359.
127. Id. at 1359 (citing Walsingham v. Browning, 525 So. 2d 996 (Fla. 1st Dist. Ct. App. 1988)).
128. Id.
direction from clients on intricate interpretations of the correct or current state of the law. The attorney, not the client, is the individual trained to interpret the law." 129 The Kaufman holding was approved in Crosby. 130 Stake was distinguished "because the issue was pending on a certified question before this Court at the time the attorney rendered the advice; thus the attorney had the duty to inform the client that issue would soon be decided by a higher court." 131

The attorney's good faith and diligent inquiry are questions of fact. The appellate court in DeBiasi v. Snaith 132 indicated that the attorney's actions in failing to timely seek a motion for certification were not "fairly debatable" and did not deal with an "unsettled area of the law" to which judgmental immunity would apply; thus, it reversed a summary judgment in the attorney's favor. 133 The DeBiasi court held that "Crosby v. Jones teaches that the lawyer who seeks the protection of judgmental immunity must have acted in good faith and made a diligent inquiry into that area of the law." 134 Since the issues of good faith and diligent inquiry remained unresolved, the "case was not ripe for summary disposition." 135

Judgmental immunity does not insulate the attorney from exercising ordinary care. Both Crosby and DeBiasi were relied upon in Sauer v. Flanagan and Maniotis, P.A. 136 Sauer sued her attorneys alleging their failure to properly advise her regarding her rejection of a million dollar offer of judgment. 137 The underlying trial resulted in a defense verdict and the imposition of attorney's fees and costs against the client. 138 In the malpractice action, the attorneys argued that the defense of judgmental immunity should apply to settlement recommendations. 139 The court could "discern no basis for concluding that an attorney is insulated from liability

129. Id.
130. Id. (citing Kaufman, 507 So. 2d at 1152).
131. Crosby, 705 So. 2d at 1359 n.3.
133. Id. at 16.
134. Id.
135. Id.
137. Sauer, 748 So. 2d at 1080.
138. Id.
139. Id. at 1081.
for failing to exercise ordinary skill and care in resolving settlement
issues."\textsuperscript{140}

It was undisputed that the attorney accused of malpractice in \textit{Herig v. Akerman, Senterfitt \& Edison}\textsuperscript{141} "acted in good faith and made a diligent
inquiry into the law [that] was not disputed."\textsuperscript{142} Accordingly, the summary
judgment in favor of the attorney was affirmed since, at the time the attorney
was engaged to prepare a personal management contract for a minor, "there
was no statute or case law governing artistic management contracts of
minors per se."\textsuperscript{143} The enactment of the Child Performer and Athlete
Protection Act,\textsuperscript{144} adopted several years after the agreement was signed,
allowed the agreement to be set aside.\textsuperscript{145} Therefore, the attorney was
protected by the doctrine of judgmental immunity.\textsuperscript{146}

An attorney does not owe a duty in a real estate closing to any party
other than the attorney's client,\textsuperscript{147} or in a will drafting to a previous
beneficiary when an attorney omits the beneficiary at the request of the
testator or testatrix.\textsuperscript{148} "[V]iolation of the Rules of Professional Conduct ...
[is not] negligence per se[; however, a violation] may be used as some
evidence of negligence."\textsuperscript{149} The \textit{Rules of Professional Conduct} do not create
a legal duty on a lawyer.\textsuperscript{150} However, evidence that an attorney did not
conduct himself or herself as reasonably as an attorney, with respect to the

\begin{flushright}
\begin{tabular}{l}
\textsuperscript{140.} \textit{Id.} at 1082. \\
\textsuperscript{141.} 741 So. 2d 591 (Fla. 1st Dist. Ct. App. 1999). It should be noted that the correct
name of the law firm is Akerman, Senterfitt \& Eidson, but the official reporter misspelled the
firm name. \\
\textsuperscript{142.} \textit{Id.} at 593. \\
\textsuperscript{143.} \textit{Id.} \\
\textsuperscript{144.} FLA. STAT. § 743.08 (3)(b) (1997). \\
\textsuperscript{145.} \textit{Herig}, 741 So. 2d at 594. \\
\textsuperscript{146.} \textit{Id.} \\
\textsuperscript{147.} Assad v. Mendell, 511 So. 2d 682 (Fla. 3d Dist. Ct. App. 1987) (stating that a
bank's attorney owed no duty to borrower); Southworth v. Crevier, 438 So. 2d 1011 (Fla. 4th
Dist. Ct. App. 1983) (stating that a seller's attorney in real estate transaction had no duty to
buyer); Amey, Inc. v. Henderson, Franklin, Starnes \& Holt, P.A., 367 So. 2d 633, 634 (Fla. 2d
Dist. Ct. App. 1979) (stating that a bank's law firm owed no duty to buyer for the negligent
performance of a title search); Adams v. Chenowith, 349 So. 2d 230 (Fla. 4th Dist. Ct. App.
1977) (stating that a seller's attorney owed no duty to purchaser since seller's and purchaser's
interests were adverse and there was no allegation of intentional misrepresentation against the
attorneys). \\
\textsuperscript{148.} Chase v. Bowen, 771 So. 2d 1181, 1182 (Fla. 5th Dist. Ct. App. 2000). \\
\textsuperscript{149.} Pressley v. Farley, 579 So. 2d 160, 161 (Fla. 1st Dist. Ct. App. 1991), \textit{dis missed},
583 So. 2d 1036 (Fla. 1991). \\
\textsuperscript{150.} \textit{Id.}
\end{tabular}
\end{flushright}
Code of Professional Responsibility, is evidence of a failure to use due care as an attorney.\textsuperscript{151}

Moreover, an attorney has no duty to pursue faultless or judgment proof parties. During the investigation of a potential lawsuit arising from an automobile accident, the law firm, which was sued in \textit{Williams v. Beckham \& McAliley, P.A.}, \textsuperscript{152} had determined that no liable party had insurance or assets.\textsuperscript{153} The law firm had filed a lawsuit prior to the expiration of the statute of limitations for the purpose of preserving the cause of action.\textsuperscript{154} When no action was taken in the lawsuit, the court dismissed the suit for lack of prosecution.\textsuperscript{155} Affirming the summary judgment in favor of the law firm, the appellate court held that the law firm had no duty to pursue any party it felt, after investigation, was not culpable or collectible.\textsuperscript{156}

Finally, an attorney’s duty does not require him to take futile action on behalf of his client. In \textit{Hunzinger Construction Corp. v. Quarles \& Brady General Partnership}, \textsuperscript{157} the client claimed that its lawyers should have submitted a claim to its insurance company in a construction litigation case.\textsuperscript{158} If the claim had been submitted, the client argued, the insurance company would have provided a defense and paid for the attorney’s fees which the client had to pay.\textsuperscript{159} The client suffered an adverse summary judgment.\textsuperscript{160} The appellate court found no error in the trial court’s determination “that there was no duty \textit{owed to the client} on the part of the lawyer to submit the defense to the insurance company, where the complaint did not allege any cause of action which arguably came within the coverage of the policy.”\textsuperscript{161}

C. \textit{Proximate Cause of Loss}

The third element that a legal malpractice plaintiff must plead and prove is that the attorney’s negligence resulted in and was the proximate

\begin{itemize}
\item \textsuperscript{152} 582 So. 2d 1206 (Fla. 2d Dist. Ct. App. 1991).
\item \textsuperscript{153} \textit{Id.} at 1207.
\item \textsuperscript{154} \textit{Id.} at 1208.
\item \textsuperscript{155} \textit{Id.} at 1207.
\item \textsuperscript{156} \textit{Id.} at 1208.
\item \textsuperscript{157} 735 So. 2d 589 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{158} \textit{Id.} at 592.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 593.
\end{itemize}
cause of loss to the plaintiff.\textsuperscript{162} The general tort law that "[n]o damages may be recovered where losses do not usually result from or could not have been foreseen as a proximate result of a particular negligence" is set forth in the legal malpractice case of Chadwick v. Corbin.\textsuperscript{163} However, "once a negligent act occurs, the actor will be liable for injury flowing therefrom, unless 'an act unforeseeable to him and independent of his negligence intervenes to cause the loss.'"\textsuperscript{164}

An attorney who drafts documents is not ipso facto a guarantor that the documents will be litigation free or will accomplish everything that the client might want . . . . The rationale is that if there were malpractice liability under those circumstances, an attorney would in effect insure his work; but since insurance coverage ordinarily calls for premium payment, attorneys fees would inevitably increase substantially to provide for that type of insurance.\textsuperscript{165}

In Hatcher v. Roberts,\textsuperscript{166} a client-mortgagor brought a legal malpractice action against its attorney and law firm contending that in the underlying foreclosure proceeding the lawyer negligently withdrew an affirmative defense of prepayment.\textsuperscript{167} The First District Court of Appeal found, as did the trial court, "that, under all the facts, circumstances, and law existing at the time of the foreclosure suit, the prepayment defense asserted and then withdrawn in the foreclosure proceeding could not possibly have succeeded, even with diligent preparation and litigation by" the attorney.\textsuperscript{168} Therefore, since the attorney’s acts were not the proximate cause of the client’s alleged damages, no legal malpractice had occurred.\textsuperscript{169}

\begin{thebibliography}{9}
\bibitem{162} Home Furniture Depot, Inc. v. Entevor AB, 753 So. 2d 653, 655 (Fla. 4th Dist. Ct. App. 2000).
\bibitem{163} 476 So. 2d 1366, 1368 (Fla. 1st Dist. Ct. App. 1985) (citing 17 FLA. JUR. 2d DAMAGES § 38); \textit{accord} Ferrari v. Vining, 744 So. 2d 480 (Fla. 3d Dist. Ct. App. 1999).
\bibitem{165} Daytona Dev. Corp. v. McFarland, 505 So. 2d 464, 467 (Fla. 2d Dist. Ct. App. 1987).
\bibitem{166} 478 So. 2d 1083 (Fla. 1st Dist. Ct. App. 1985).
\bibitem{167} \textit{id. at} 1085.
\bibitem{168} \textit{id. at} 1086.
\bibitem{169} \textit{id. at} 1087; \textit{accord} Pennington v. Caggiano, 723 So. 2d 931 (Fla. 5th Dist. Ct. App. 1999) (holding attorneys who withdrew were not responsible for former client’s failure or inability to obtain substitute counsel prior to loss on a summary judgment in a medical malpractice proceeding).
\end{thebibliography}
An attorney will not be liable if "some separate force or action is the active and efficient intervening cause, the sole proximate cause or an independent cause." However, if the negligent attorney sets off a chain of events resulting in harm, or if the intervening cause is foreseeable, his negligence may be considered the proximate cause notwithstanding the intervening cause.

If the client causes his own damages, the attorney will not be held liable. In Goodwin v. Alexatos, an attorney represented both the seller and purchaser of an orange grove. Problems developed after the closing of the transaction, and the purchaser demanded a return of his money for, among other reasons, the attorney's failure to clear certain title impediments which were known at the time of closing. When the money was not forthcoming, the purchaser sued the seller and the attorney. One of the claims against the attorney was for malpractice in failing to clear the title to the property. The directed verdict on the malpractice claim was upheld on appeal upon a finding that the "proximate cause was [the purchaser's] decision to abandon the transaction, not any delay allegedly caused by [the attorney]."

The issue in Boyd v. Brett-Major was "whether the attorney followed the explicit directions of his client." The jury found that the client had instructed his attorney to delay, rather than win, a mortgage foreclosure. Accordingly, the lawyer did not plead the absolute defense provided by section 903.14 of the Florida Statutes against the bonding company.

171. DWL, Inc., 396 So. 2d at 728 (citing Gibson, 386 So. 2d at 522). See also Daytona Dev. Corp. v. McFarland, 505 So. 2d 464 (Fla. 2d Dist. Ct. App. 1987) (reversing summary judgment for determination of whether lawyer was proximate cause of client's damages in a real estate matter).
172. Davenport v. Stone, 528 So. 2d 45, 46 (Fla. 3d Dist. Ct. App. 1988) (noting client who was fully advised and voluntarily signed property settlement agreement suffered no loss due to attorneys incompetence).
173. 584 So. 2d 1007 (Fla. 5th Dist. Ct. App. 1991).
174. Id. at 1009.
175. Id.
176. Id. at 1009–10.
177. Id. at 1010.
178. Goodwin, 584 So. 2d at 1010.
179. 449 So. 2d 952 (Fla. 3d Dist. Ct. App. 1984).
180. Id. at 954.
181. Id.
which was foreclosing upon its mortgage, resulting in a summary judgment adverse to the client. Finding no cases in Florida on point, the court cited to Orr v. Knowles, for the following proposition:

It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client’s best interests and then act according to the wishes of [the] client within the limits of the law.

The Boyd court was not impressed by the argument that its ultimate holding in favor of the attorney would allow lawyers to avoid liability by saying they followed their client’s instructions. The lawyer in Lawyers Professional Liability Ins. Co. v. McKenzie was sued for the profit allegedly lost by the client who had to go through two foreclosure sales before the litigation was complete. In the first foreclosure sale, the mortgagor did not redeem the property, and the client-mortgagee was the highest bidder at the sale. The mortgagee had been negotiating with a third party to purchase the property after the completion of the foreclosure. After the sale, the lawyer realized that the legal description was wrong, which ultimately resulted in the scheduling of another foreclosure sale. Before the second sale, the mortgagor located a buyer for the property who paid off the mortgagee. The court found that the attorney, though negligent, did in fact do what he was employed to do. He foreclosed on the mortgage and [the client] received all that she was entitled to under the terms of the instrument. She did

183. Boyd, 449 So. 2d at 953.
186. Id.
187. 470 So. 2d 752 (Fla. 3d Dist. Ct. App. 1985).
188. Id. at 753.
189. Id.
190. Id. at 752.
191. Id. at 753.
not prove that [the attorney's] negligence was a proximate cause of
her failure to get the property back. 193

Similarly, the lawyer in *Snaith v. Haraldson*, 194 who drafted balloon
mortgage language and represented both the mortgagor and mortgagee, had
no liability to the mortgagor for failing to properly provide for the legend
required by section 697.05(2)(a) of the *Florida Statutes*, because the
deficiency did not cause any damages to the mortgagor. 195 Although the
Fourth District Court of Appeal in *Lefebvre v. James* 196 did not mention the
lack of proximate cause as its reasoning for overturning the jury verdict, its
reversal was based upon the fact that the lawyer's failure to amend the
complaint to add a cause of action did not result in any damages to the
client. 197 The case involved damages to a farmer's livestock allegedly
because of a problem with the feed delivered to the farmer. 198 The company
that delivered the feed became bankrupt, and its insurer denied coverage
based upon the pleadings that set forth a defective product theory. 199 Negligent delivery would have been covered under the policy. The attorney
considered adding a claim for negligent delivery, but he did not amend
because he thought that the amendment would not have related back to the
original cause of action and would therefore be barred by the statute of
limitations. 200 The trial court disagreed and ruled as a matter of law that the
amendment would have related back. 201 The appellate court agreed with the
lawyer's assessment and found that "an amendment to the complaint alleging
negligent delivery of the feed would have constituted a new cause of action,
would not have related back to the filing of the claim, and would have been
barred by the statute of limitations." 202 Therefore, the appellate court
instructed the lower court to enter a directed verdict in favor of the attorney.\textsuperscript{203}

In another example of lack of proximate cause, the attorney who filed an Age Discrimination in Employment Act claim on behalf of his client in \textit{Bolves v. Hullinger}\textsuperscript{204} escaped liability for his failure to timely file suit based upon the appellate court’s finding that “[t]here was a complete absence of evidence of intentional or reckless disregard for whether [the employer’s] actions were in violation of the ADEA.”\textsuperscript{205} Since no damages were available in the underlying action, even if the lawsuit had been timely filed, the attorney’s “negligence in allowing the statute of limitations to expire on the federal claim did not result in damage to [the client].”\textsuperscript{206}

Lack of proximate cause is determinative of a cause of action even where the attorneys’ negligence, as in \textit{Olmsted v. Emmanuel},\textsuperscript{207} is clear. In the pretrial stipulation, the plaintiff’s attorneys failed to invoke Title 42, section 1981 of the \textit{United States Code}\textsuperscript{208} as a basis for recovery.\textsuperscript{209} The only basis for recovery invoked was Title VII of the Civil Rights Act of 1964.\textsuperscript{210} Accordingly, the $3,460,000 jury award was reduced to $300,000 because of the $300,000 cap under Title VII, which would not have applied to a section 1981 action.\textsuperscript{211} The court summarized the law on proximate cause after setting out the elements of a legal malpractice cause of action:\textsuperscript{212}

“To be liable for malpractice arising out of litigation, the attorney must be the proximate cause of the adverse outcome of the underlying action which results in damage to the client.” The plaintiff must “demonstrate [ ] that there is \textit{an amount of damages} which [he] would have recovered but for the attorney’s negligence.” Thus, in a case such as this, the plaintiff has to prove that he “would have prevailed on the underlying action but for the attorney’s negligence.” In this case, there is no dispute about the facts that Olmsted retained appellees and that appellees neglected a reasonable duty owed to Olmsted when they failed to invoke 42

\begin{thebibliography}{9}
\bibitem{203} Id.
\bibitem{204} 629 So. 2d 198 (Fla. 5th Dist. Ct. App. 1993).
\bibitem{205} Id. at 201.
\bibitem{206} Id.
\bibitem{207} 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001).
\bibitem{209} \textit{Olmsted}, 783 So. 2d at 1124.
\bibitem{210} 42 U.S.C. § 2000e-3.
\bibitem{211} \textit{Olmsted}, 783 So. 2d at 1124.
\bibitem{212} \textit{See generally, supra} note 2 (citing cases that describe the elements of a legal malpractice cause of action).
\end{thebibliography}
U.S.C. § 1981 as a basis for relief in the pretrial stipulation, resulting in the holding that any claim pursuant to section 1981 had been abandoned. Here, the dispute relates to the third element, i.e., whether Olmsted can establish that appellees' negligence was the proximate cause of a loss to him.\(^{213}\)

After examining Eleventh Circuit cases involving section 1981 claims, the court concluded that the client could not establish that he would have met the legal requirements of a section 1981 claim.\(^{214}\) Accordingly, since the client could not satisfy the proximate cause element, the court affirmed the dismissal of the legal malpractice claim under section 1981.\(^{215}\)

The malpractice plaintiff may use expert testimony to establish that the client would have recovered damages but for the actions of the attorney or that the client would have recovered more in damages but for the attorney's actions. The use of expert testimony to establish causation was examined in \textit{Tarleton v. Arnstein & Lehr}.\(^{216}\) The client sued her lawyer as a result of losing the right to sue upon certain promissory notes due to the release clause in her divorce proceeding settlement agreement.\(^{217}\) After indicating that one element of a legal malpractice case is proving that "the attorney's negligence resulted in and was the proximate cause of loss to the client,"\(^{218}\) which requires the client to demonstrate that "there is an amount of damages which the client would have recovered but for the attorney's negligence,"\(^{219}\) the court stated that the appeal "focuses on whether the Former Wife presented sufficient evidence to satisfy the third element."\(^{220}\)

The client produced a legal expert who testified as to standard of care and an accountant who testified regarding damages.\(^{221}\) The trial court judge overturned a jury verdict in favor of the client, reasoning that she had not established proximate cause because she failed to present testimony indicating that a more favorable result would have occurred in the divorce.

\(^{213}\) \textit{Olmsted}, 783 So. 2d at 1125–26 (alterations in original) (citations omitted).
\(^{214}\) \textit{Id.} at 1128.
\(^{216}\) 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).
\(^{217}\) \textit{Id.} at 327.
\(^{218}\) \textit{Id.} at 328.
\(^{219}\) \textit{Id.}
\(^{220}\) \textit{Id.}
\(^{221}\) \textit{Tarleton}, 719 So. 2d at 328.
proceeding had the attorney acted differently. The Fourth District Court of Appeal reinstated the jury verdict finding “that the lay jury was competent to determine that Former Wife would have been awarded more but for the Firm’s negligence.” The Court went on to state as follows:

Under the “trial within a trial” standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, in this case the dissolution action, before determining whether the client would prevail in the malpractice action. Because the jury is substituting its judgment for the fact finder of the dissolution proceeding, no expert testimony specifically stating that a reasonable judge would have given her more than she received in the settlement agreement would be required to establish proximate causation. To establish proximate causation, Former Wife must demonstrate that there is an amount of damages which she would have recovered but for the Firm’s negligence. From the evidence noted above, the jury, sitting as the trier of fact in the dissolution action, determined the amount Former Wife would have been awarded if she went to trial and concluded that the amount was greater than she received under the settlement agreement. Thus, Former Wife has established the proximate cause element.

Whether an attorney’s negligence is the proximate cause of his client’s injury is a question of fact. Although the Fourth District Court of Appeal found that the attorney’s conduct fell below a reasonable standard of care in *Spaziano v. Price,* a jury verdict in favor of the attorney was upheld because “the question submitted to the jury was whether there was negligence on the part of [the attorney] which was a legal cause of loss, injury or damage to Spaziano. The jury chose to answer that question in the negative.” Since there was conflicting evidence on whether the client suffered any injuries from the airplane crash, which formed the basis for the underlying case that was dismissed because of the Warsaw Convention’s two-year statute of limitations, the jury’s resolution of the disputed issues of fact was not disturbed.

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222. *Id.* at 330.
223. *Id.*
224. *Id.* (citations omitted).
225. 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).
226. *Id.* at 1049.
227. *Id.* at 1049–50.
III. EFFECT OF MULTIPLE REPRESENTATIONS

Multiple attorney representation of a client affects an attorney's liability for malpractice. Subsequent representation by another attorney may relieve an attorney of malpractice liability, and referral by an attorney spreads the liability. An attorney is not liable for his omission if subsequent counsel had the opportunity to perform the act and avoid the problem. This issue is examined in Frazier v. Effman. Lisa Frazier retained attorney Steven Effman in a medical malpractice action. Effman did not join Florida Patient's Compensation Fund as a defendant. Gary Rotella replaced Effman as Frazier's attorney. Although he could have done so during his stewardship of the case, Rotella did not join the Compensation Fund either. Frazier retained a third lawyer who discovered the non-joinder by Frazier and Effman and the expiration of the limitations period to join the Compensation Fund. Frazier sued both Rotella and Effman for legal malpractice. The appellate court affirmed the trial court's dismissal of the action against Effman with prejudice. "Under the circumstances of this case, where the complaint shows that the defendant lawyer was discharged and new counsel retained long before the claim became barred, a claim of negligence cannot be maintained." The court made no mention of the proceeding against Rotella.

The extent of a referring lawyer's responsibility for the negligence of the trial attorney was resolved in Norris v. Silver. The trial attorney and the referring attorney had shared fees on other cases without any written agreement. Under rule 4-1.5 of the Rules Regulating the Florida Bar, when fees are divided "each lawyer assumes joint legal responsibility for the representation." Therefore, a division of fees automatically spreads the

228. 501 So. 2d 114 (Fla. 4th Dist. Ct. App. 1987).
229. Id. at 115.
230. Id.
231. Id.
232. Id.
233. Frazier, 501 So. 2d at 115.
234. Id.
235. Id.
236. Id.
237. 701 So. 2d 1238 (Fla. 3d Dist. Ct. App. 1997).
238. Id. at 1239.
239. Id. at 1240 (citing R. Regulating Fla. Bar 4-1.5(g)(2)).
liability between the two attorneys.\textsuperscript{240} The plaintiffs were required to "prove an express or implied agreement to divide the fee."\textsuperscript{241}

IV. PLEADING REQUIREMENTS

Proper pleading of an action against an attorney for malpractice requires pleading more than bare legal assertions; however, even such a complaint should not be dismissed where capable of being cured. The naked legal conclusion that an attorney was negligent will not satisfy the pleading requirements for legal malpractice.\textsuperscript{242} Nevertheless, as with other causes of action, a court will only examine the "four corners of the complaint" to determine if the allegations are sufficient to overcome a motion to dismiss for failure to state a cause of action.\textsuperscript{243}

A dismissal with prejudice was affirmed in \textit{Bankers Trust Realty, Inc. v. Kluger}.\textsuperscript{244} This harsh sanction resulted from the failure to "state any of the specifics of the alleged malpractice."\textsuperscript{245} The complaint merely stated the "insufficient legal conclusion that the attorneys 'negligently, carelessly, unskillfully and tardily conducted the . . . action and delayed obtaining a judgment therein.'\textsuperscript{246} However, \textit{Breakers of Ft. Lauderdale, Ltd. v. Cassel}\textsuperscript{247} overturned a trial court ruling dismissing a complaint for legal malpractice with prejudice because the complaint, "while deficient in that it

\textsuperscript{240} R. Regulating Fla. Bar 4-1.5(g)(2)(A) (2002).
\textsuperscript{241} Norris, 701 So. 2d at 1241.
\textsuperscript{242} Rios v. McDermott, Will & Emery, 613 So. 2d 544, 545 (Fla. 3d Dist. Ct. App. 1993); Pressley v. Farley, 579 So. 2d 160 (Fla. 1st Dist. Ct. App. 1991), \textit{cause dismissed}, 583 So. 2d 1036 (Fla. 1991); Dillard Smith Constr. Co. v. Greene, 337 So. 2d 841, 843 (Fla. 1st Dist. Ct. App. 1976) (holding that a client's allegation that attorney had neglected to keep client informed, without more, lacks specificity as well as a causative relationship to client's alleged loss and is insufficient to state cause of action for legal malpractice).
\textsuperscript{243} Bricker v. Kay, 446 So. 2d 1151, 1152 (Fla. 3d Dist. Ct. App. 1984). \textit{See also} Baycon Indus. v. Shea, 714 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1998); Thompson v. Martin, 530 So. 2d 495 (Fla. 2d Dist. Ct. App. 1988) (a complaint need only indicate that a cause of action exists and need not anticipate affirmative defenses).
\textsuperscript{245} \textit{Bankers Trust Realty, Inc.}, 672 So. 2d at 898.
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} 528 So. 2d 985 (Fla. 3d Dist. Ct. App. 1988).
failed to establish conclusively when appellant actually knew that its attorney’s conduct constituted malpractice, was not beyond cure."^{248}

V. VENUE

In general, the venue for a negligence suit is where the plaintiff suffers his or her injuries.\(^{249}\) In legal malpractice suits, this rule is not always easily applied.\(^{250}\) In *Tucker v. Fianson*,\(^{251}\) the attorney being sued practiced and resided in Broward County, Florida.\(^{252}\) The malpractice complaint alleged that the attorney had rendered negligent advice regarding a condominium conversion in Dade County, Florida, and the client chose to sue in Dade County, Florida.\(^{253}\) The trial court denied the attorney’s motion to transfer the case to Broward County.\(^{254}\) In affirming the trial court’s ruling, the Third District Court of Appeal relied upon section 47.011 of the *Florida Statutes*,\(^{255}\) and the court adopted the rule that “for venue purposes, a tort claim is deemed to have accrued where the last event necessary to make the defendant liable for the tort took place.”\(^{256}\) The court graphically described its ruling by invoking a bow and arrow theme.\(^{257}\) “In sum, it is claimed that, while lawyer Tucker negligently shot his arrow into the air of Broward County, it did no harm and had no effect until it fell to earth in Dade. It is therefore here that he must answer for his asserted error.”\(^{258}\)

The bow and arrow analogy was also attempted in *Roberts v. Cason*,\(^{259}\) where one concurring justice could not tell from the record whether “the arrow shot into the air in Orange County fell to earth in Orange or Lake County.”\(^{260}\) In the same case, the dissenting judge suggested that the arrow

\(^{248}\) *Id.* at 986. *See also* Parker v. Gordon, 442 So. 2d 273 (Fla. 4th Dist. Ct. App. 1983) (amended complaint explicit on facts but obscure as to causes of action dismissed); Kartikes v. Demos, 214 So. 2d 86 (Fla. 3d Dist. Ct. App. 1968) (dismissing case without leave to amend reversed).

\(^{249}\) Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743, 745 (Fla. 1967).

\(^{250}\) The lack of a transcript of the motion to transfer venue hearing prevented review in McFadden v. Wolfman & Greenfield, P.A., 616 So. 2d 500 (Fla. 5th Dist. Ct. App. 1993).

\(^{251}\) *Id.* at 1371.

\(^{252}\) *Id.*

\(^{253}\) *Id.*

\(^{254}\) *Id.*

\(^{255}\) *FLA. STAT. § 47.011 (2001).*

\(^{256}\) *Tucker*, 484 So. 2d at 1371.

\(^{257}\) *Id.* at 1372.

\(^{258}\) *Id.*

\(^{259}\) 652 So. 2d 439 (Fla. 5th Dist. Ct. App. 1995).

\(^{260}\) *Id.* at 440–41 (Harris, C.J., concurring specially).
“did not land (i.e., accrue) any place at all based upon the plaintiffs’ amended complaint, which is woefully inadequate.” The underlying facts in Roberts indicate that a real estate closing involving property located in Lake County was held in Orange County. The plaintiff filed suit in Orange County against attorneys having a place of business only in Lake County. The Roberts court, relying upon Tucker, held that venue was properly placed in Orange County because that is where the allegedly negligent closing took place.

The allegedly injured client in Weiner v. Prudential Mortgage Investors, Inc. brought suit in Dade County, Florida against its attorneys who lived and practiced in Marion County, notwithstanding a claim that a foreclosure suit had not been brought in Alachua County as instructed. The aggrieved client attempted to construct a claim based upon false communications in Dade County. The court deemed the attempt “chimerical,” and it was disregarded for venue purposes.

The dates of service of process, of filing for legal malpractice, and of filing an action for fees were critical in Hollywood Lakes Country Club, Inc. v. Silver & Waldman, P.A. The law firm of Silver and Waldman, P.A., was served with a suit for malpractice in Broward County, Florida, on October 27, 1998. At the time of service, Hollywood Lakes Country Club was not a plaintiff in the Broward County proceeding. In Miami-Dade County, Florida, on October 29, 1998, Silver and Waldman filed suit to recover attorneys’ fees against Hollywood Lakes. Hollywood Lakes was added as a party plaintiff in the Broward proceeding on November 25, 1998. On November 19, 1998, six days prior to becoming a party plaintiff in the Broward action, Hollywood Lakes sought to have the Miami-Dade

261. Id. at 442 (Cobb, J., dissenting).
262. Id. at 440.
263. Id.
264. Roberts, 652 So. 2d at 442. See also Williams v. Goldsmith, 619 So. 2d 330 (Fla. 3d Dist. Ct. App. 1993) (holding legal malpractice claim and other claims properly venued where last event necessary to make the defendant liable for the tort took place).
266. Id. at 913.
267. Id. at 913 n.1.
268. Id.
269. 737 So. 2d 1194 (Fla. 3d Dist. Ct. App. 1999).
270. Id. at 1194–95.
271. Id.
272. Id. at 1195.
273. Id.
case transferred to Broward County. The trial court denied the motion. The appellate court relied upon rule 1.170(a) of the Florida Rules of Civil Procedure, and it held that the Miami-Dade case was a compulsory counterclaim. Since the plaintiffs perfected service of process over Silver and Waldman in the Broward County case before the Miami-Dade action was filed, the appellate court remanded the case with instructions to transfer the Miami-Dade action to Broward County.

Venue was proper in two different counties in Ivey v. Padgett. The legal malpractice claim was filed both as a contract action, for which venue would be where the alleged breach occurred, and in tort, for which venue would be where the act (or omission) occurred. The alleged malpractice was for failure to timely file a medical malpractice case against a Volusia County doctor. The attorney resided in Putnam County. The court found that venue was proper in Volusia County because that is where the lawsuit was to be filed. The county in which the defendants resided was also proper from a venue perspective. Since the plaintiff’s choice of venue is generally favored, the case proceeded where the plaintiff filed suit, in Volusia County.

VI. JURISDICTION

Legal services are often provided to Florida citizens by non-resident law firms. In Florida, in order to sue a non-resident lawyer, two requirements must be met. First, Florida’s long arm statute must be applicable. Second, minimum contacts must exist in order to satisfy due process requirements.

275. Id.
276. The court cited to Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A., 621 So. 2d 507 (Fla. 2d Dist. Ct. App. 1993) (holding that a “malpractice action and a fee dispute based upon the same representation invokes the compulsory counterclaim provision of FLA. R. CIV. P. 1.170(a)).
277. 502 So. 2d 22 (Fla. 5th Dist. Ct. App. 1986).
278. Id. at 23.
279. Id.
280. Id.
281. Id.
282. Ivey, 502 So. 2d at 23.
283. Id.
The first consideration is Florida's long arm statute. A retainer agreement spanning several years can satisfy the requirements of Florida's long arm statute. The denial of a law firm's motion to abate for lack of personal jurisdiction was affirmed in Windels, Marx, Davies & Ives v. Solitron Devices, Inc.\(^{286}\) The law firm was retained by its client, monthly, over a period of several years.\(^{287}\) The court found that there was "record of substantial activity in Florida,"\(^{288}\) which satisfied section 48.193 of the Florida Statutes.

If Florida's long arm statute is satisfied, further analysis is necessary. After satisfying itself that the plaintiff had not established jurisdiction under Florida's long arm statute, the court in Horowitz v. Laske\(^{289}\) did not reach the minimum contacts analysis. In that case, the lawyer's "brief and insubstantial" contacts with Florida did not amount to engaging in a business venture, and the alleged tortious acts were not committed in Florida.\(^{291}\) Since neither section 48.193(1)(a) nor 48.193(1)(b) of the Florida Statutes was satisfied, the court found no personal jurisdiction.\(^{292}\)

Establishing jurisdiction under Florida's long arm statute must be accomplished by establishing minimum contacts. In Florida, minimum contacts are not established where an out-of-state law firm delivers a legal opinion for use in Florida. A nonfinal order finding personal jurisdiction over a New York law firm that rendered an opinion regarding a Florida real estate transaction was overturned on appeal in Fleming & Weiss, P.C. v. First American Title Ins. Co.\(^{293}\) "To render a nonresident defendant subject to jurisdiction in a Florida court, the statutory requirements of the long-arm statute and the minimum contacts requirement must be met."\(^{294}\) The New York law firm had delivered its legal opinion in Florida for use by a Florida

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286. 510 So. 2d 1177, 1179 (Fla. 4th Dist. Ct. App. 1987).
287. Id. at 1177.
288. Id. at 1178.
289. 751 So. 2d 82 (Fla. 5th Dist. Ct. App. 1999), overruled by Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002).
290. Id. at 85.
291. Id. at 86.
292. Id. See Hill v. Sidly & Austin, 762 F. Supp. 931, 935 (S.D. Fla. 1991) (noting long arm jurisdiction requirements were satisfied, but minimum contacts were insufficient in an attorney law firm dispute).
293. 580 So. 2d 646 (Fla. 3d Dist. Ct. App. 1991).
294. Id. at 647 (citing Venetian Salami Co. v. Parthenais, 554 So. 2d at 499 (Fla. 1989).
bank in transacting a Florida loan. The appellate court found these acts insufficient to establish the required minimum contacts.

Florida lacked jurisdiction over a Washington law firm in Foster, Pepper & Riviera v. Hansard, which involved investors in a limited partnership suing a law firm that had prepared a private placement memorandum. The court found that the law firm’s

[S]ole act of preparing a part of the private placement memorandum, in the absence of any other contacts with Florida or the purchasers of the securities, was insufficient to constitute engaging in business in Florida for purposes of long-arm jurisdiction. Moreover, subjecting Foster[,] Pepper[, and Rivera] to Florida jurisdiction under these circumstances does not satisfy the minimum contacts requirements of due process.

VII. MALPRACTICE IN CRIMINAL DEFENSE

Legal malpractice proceedings stemming from representation in criminal matters differ from those stemming from other types of legal representation. The case of Orr v. Black & Furci, P.A. is a good example. Orr holds that “[w]hile proximate causation ordinarily is a factual issue, in certain cases proximate cause may be determined as a matter of law, based on fairness and considerations of public policy.” The issue in Orr was whether Florida courts would adopt the majority rule that a criminal defendant’s guilty plea foreseeably and substantially caused the injury from a conviction. The court adopted the majority rule and held that “when criminal defendants plead guilty to a crime, as malpractice plaintiffs they must prove their innocence in order to maintain a cause of action against their attorney.” Since the plaintiff in Orr pled guilty, the court ruled that the motion for summary judgment against the client on the professional malpractice claim was correctly granted.

295. Id.
296. Id. at 648.
298. Id.
299. Id. at 582.
301. Id. at 1276 (citation omitted).
302. Id.
303. Id.
304. Id. at 1278.
In addition to proximate cause being determined as a matter of law in some criminal cases, and criminal defendants being required as malpractice plaintiffs to prove their innocence after pleading guilty, a criminal defendant-malpractice plaintiff has a condition precedent to a malpractice suit. In *Steele v. Kehoe*, the Supreme Court of Florida answered the following certified question in the affirmative: "when a convicted defendant alleges that his or her attorney agreed to file a postconviction motion on his or her behalf, but failed to do so in a timely manner... must a defendant prevail in having his or her conviction or sentence reduced before filing a legal malpractice action?"

After reviewing policy arguments from various cases, the court determined "that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action." However, the statute of limitations for the malpractice action does "not commence until the defendant has obtained final appellate or postconviction relief."

In *Rowe v. Schreiber*, the Fourth District Court of Appeal followed the *Steele* holding, prior to it being rendered, in finding that "a defendant must successfully obtain post-conviction relief for the cause of action to accrue in a case involving the legal malpractice of a criminal defense attorney." *Rowe* goes one step further and requires a plaintiff suing a criminal defense attorney for negligence "to prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceeding."

Collateral estoppel is an affirmative defense to malpractice in criminal defense. The Supreme Court of Florida in *Zeidwig v. Ward* answered the following rephrased certified question in the negative: "whether identity or mutuality of the parties or their privies is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-

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305. 747 So. 2d 931 (Fla. 1999).
306. Id. at 932.
307. Id. at 933.
309. 725 So. 2d 1245 (Fla. 4th Dist. Ct. App. 1999).
310. In so doing, the court followed the district court decision in *Steele v. Kehoe*, 724 So. 2d 1192 (Fla. 5th Dist. Ct. App 1998).
311. *Rowe*, 725 So. 2d at 1249.
312. Id. at 1251.
313. 548 So. 2d 209 (Fla. 1989).
The criminal client in Zeidwig had unsuccessfully asserted an "ineffective assistance of counsel" argument in the criminal proceeding with regard to certain recorded conversations that he alleged would have exonerated him.\(^{315}\) The malpractice case was based upon the use of the same tapes.\(^{316}\) The attorney’s argument—that the client was collaterally estopped from proceeding on the same theory that was lost in the criminal proceeding—trumped the client’s argument that the identity of the parties in the two proceedings were not the same, rendering the doctrine inapplicable.\(^{317}\)

VIII. DEFENSES

Various affirmative defenses have been asserted in malpractice actions against attorneys. *Res judicata* and a variety of estoppel defenses are available. An attorney may also plead the comparative negligence of his client. *In pari delicto* and fraud by the client are additional affirmative defenses to be used where appropriate.

A. Estoppel

Regarding malpractice in a civil case, the affirmative defenses of *res judicata*, collateral estoppel, estoppel based upon taking a position inconsistent with one taken in a prior suit involving the same party, and *estoppel in pais* are all discussed in *Keramati v. Schackow*.\(^{318}\) The Keramatis’ child suffered a profound loss of hearing due to the alleged medical malpractice of a doctor who failed to promptly diagnose streptococcus bacteria that caused spinal meningitis.\(^{319}\) The Roberts’ child, born at approximately the same time, born at the same hospital, and attended by the partner of the doctor who attended to the Keramatis’ child, was severely retarded based upon the same alleged failure to diagnose.\(^{320}\) Both families retained Schackow and McGalliard to prosecute medical malpractice actions.\(^{321}\) The attorneys filed separate civil suits, which were assigned to

\(^{314}\) *Id.*

\(^{315}\) *Id.* at 210.

\(^{316}\) *Id.* at 211.

\(^{317}\) *Id.* at 212.

\(^{318}\) 553 So. 2d 741 (Fla. 5th Dist. Ct. App. 1989). *See also* Terminello v. Alman, 710 So. 2d 728 (Fla. 3d Dist. Ct. App. 1998) (holding res judicata and collateral estoppel barred second lawsuit against attorney after first case was dismissed with prejudice).

\(^{319}\) *Id.* at 743.

\(^{320}\) *Id.*

\(^{321}\) *Id.*
different judges. The judge overseeing the Roberts case granted the defendants a summary judgment on statute of limitation grounds, and the appellate court affirmed on appeal. The facts giving rise to the Roberts decision were equally applicable to Keramati. The attorneys reached a settlement on behalf of the Keramatis for $200,000. The Keramatis, thereafter, filed a legal malpractice suit claiming the settlement was less than the claims were worth because of the statute of limitation problems created by the lawyers’ untimely filing of the medical malpractice action. Although the trial court entered a summary judgment in favor of the attorneys on various estoppel theories, the appellate court reversed on appeal.

The appellate court first rejected the notion that res judicata or collateral estoppel were viable defenses. "Both doctrines require the identity of the parties or their privies to be applicable." An additional reason cited for rejecting the collateral estoppel argument is that the actions and issues in the underlying case and the legal malpractice case were "clearly not the same." "In the medical malpractice case, the adequacy of the amount settled for was not litigated, nor was the adequacy of Schackow’s and McGalliard’s representation in recommending such a settlement."

Also absent was an "equitable basis to apply those cases which hold a party estopped in subsequent litigation to take a position inconsistent with one taken in a prior suit involving the same party." The $200,000 settlement may have been the best obtainable because of the lawyers’ negligence. Moreover, because the attorneys would be entitled to a set off for the malpractice settlement, such settlement "appears to benefit them more than to harm them."

Holding that the Keramatis’ acceptance of the settlement did not amount to a false representation, the appellate court also rejected the doctrine of estoppel in pais. Moreover, such a defense would in any event create a jury issue. Furthermore, Keramati is the only reported decision in

322. Id.
323. Roberts v. Casey, 413 So. 2d 1226, 1227 (Fla. 5th Dist. Ct. App. 1982).
324. Keramati, 553 So. 2d at 742.
325. Id. at 743.
326. Id.
327. Id. at 744.
328. Id.
329. Keramati, 553 So. 2d at 745.
330. Id. at 744.
331. Id. at 745.
332. Id.
Florida to squarely address the issue of whether the acceptance of a settlement precludes suit against the attorney who negotiated such settlement.\textsuperscript{333} Collateral estoppel did not bar a claim for legal malpractice in \textit{Smith v. Perry},\textsuperscript{334} which involved an ex-wife’s claim against an attorney who allegedly failed to properly present her loss of consortium claim in a personal injury lawsuit brought by her ex-husband. The lawyer unsuccessfully claimed that the malpractice issues were previously litigated in the divorce action.\textsuperscript{335} The court stated that collateral estoppel is applicable:

\begin{quote}
[W]here a subsequent cause of action between the same parties is upon a different claim or demand from the first cause of action. In such a case, the judgment of the prior action estops the parties from litigating in the second suit issues or questions common to both causes of action which were actually adjudicated in the prior litigation.\textsuperscript{336}
\end{quote}

The court determined that the issues presented in the dissolution action would not overlap the issues in the malpractice proceeding and overturned a contrary trial court summary judgment.\textsuperscript{337}

Judicial estoppel as a malpractice defense is examined in \textit{Ramsey v. Jonassen},\textsuperscript{338} where the appellate court reversed a summary judgment in favor of the attorney. The attorney argued at the trial court level that the client “had waived her malpractice claim by failing to disclose that claim to the bankruptcy court in a Chapter 11 bankruptcy proceeding she had filed before she filed the malpractice action.”\textsuperscript{339} After explaining the concept of judicial estoppel at length, the court summed up by stating “judicial estoppel is used to prevent a party from raising a claim that should have been raised in another action, and the failure to raise it was relied upon by a third party to

\textsuperscript{333} See also Sauer v. Flanagan & Maniotis, P.A., 748 So. 2d 1079, 1082 (Fla. 4th Dist. Ct. App. 2000) (stating that failing to exercise ordinary skill and care in resolving settlement issues did not insulate attorney from liability); Bolves v. Hullinger, 629 So. 2d 198, 200 n.2 (Fla. 5th Dist. Ct. App. 1993) (citing Keramati, 553 So. 2d at 741).

\textsuperscript{334} 635 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1994).

\textsuperscript{335} See also Torres v. Nelson, 448 So. 2d 1058, 1060 (Fla. 3d Dist. Ct. App. 1984) (finding that malpractice action for failing to settle within insurance policy limits not barred by prior verdict in favor of insurance company on bad faith claim).

\textsuperscript{336} Smith, 635 So. 2d at 1020 (citations omitted).

\textsuperscript{337} \textit{Id.} at 1021.

\textsuperscript{338} 737 So. 2d 1114 (Fla. 2d Dist. Ct. App. 1999).

\textsuperscript{339} \textit{Id.} at 1115.
his or her detriment."340 Since the attorney was not involved in the bankruptcy proceeding, he could not avail himself of the judicial estoppel doctrine.341

Judicial estoppel was also rejected as a defense to a malpractice claim in Olmsted v. Emmanuel.342 The client (Olmsted) claimed that the attorneys (appellees) could not argue in the legal malpractice action that a cause of action under title 42, section 1981 of the United States Code would not have been successful since the same attorneys had made a contrary argument in the underlying case.343 The court describes the law in Florida regarding judicial estoppel as follows:

Olmsted contends, first, that appellees are estopped from "claim[ing] that [his] damages in excess of $310,000 are now a matter of 'speculation,' . . . since they took a contrary position on the matter throughout the proceedings in the Federal Court." In other words, Olmsted maintains that, because appellees argued throughout the federal litigation that he had a valid claim under section 1981, they should be precluded from taking a contrary position in their defense of this malpractice action. We are unable to agree.

Florida recognizes the equitable doctrine of judicial estoppel, which prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party. E.g., Chase & Co. v. Little, 116 Fla. 667, 156 So. 609, 610 (1934); Ramsey v. Jonassen, 737 So.2d 1114 (Fla. 2d DCA 1999); Dunne v. Somoano, 550 So.2d 5, 7 (Fla. 3d DCA 1989). However, in order to work an estoppel, the parties must be the same, the same issues must be involved, and the position assumed in the former trial must have been successfully maintained. Chase, 156 So. at 610; Ramsey, 737 So.2d at 1116. Here, appellees were not parties in the federal litigation, and the issue of whether Olmsted had a claim under section 1981 was never addressed on the merits in the federal litigation. Accordingly, we conclude that appellees are not estopped from arguing that the section 1981 claim would not have been successful. Although there are no Florida cases directly on

340. Id. at 1116.
341. See also Berman v. Stern, 731 So. 2d 148 (Fla. 4th Dist. Ct. App. 1999) (reversing summary judgment in favor of client based upon judicial estoppel due to issues of fact).
343. Id. at 1125.
point, our conclusion is supported by *Shapiro v. Butler*, 273 A.D.2d 657, 709 N.Y.S.2d 687, 690 (App.Div.2000), which held that the doctrine of judicial estoppel did not bar an attorney and law firm from arguing in their former clients’ legal malpractice action against them that the former clients would not have prevailed in a federal civil action against the clients for alleged illegal interception and disclosure of telephone conversations where the attorney and law firm had not been parties to the federal action and the attorney’s position in that action had not been adopted by the court.\(^{344}\)

Judicial estoppel prevented the client from suing his former attorney in *Monyek v. Klein*.\(^{345}\) A law firm and its client embarked upon two real estate acquisitions. After disagreements about the terms of the deal, a lawsuit resulted involving, among other matters, a claim that the law firm and its attorneys had breached their fiduciary duty. The trial judge ruled that the law firm had not breached its fiduciary duty.\(^{346}\) Over one year later, the client sued the law firm for negligence related to the same real estate transactions that were the subject of the previous lawsuit. After stating that “[u]nder the principle of estoppel by judgment, parties are estopped from litigating in a second suit points and questions which were common to both the first and second causes of action and which actually were adjudicated in the prior litigation,”\(^{347}\) the court affirmed the summary judgment in favor of the attorneys.\(^ {348}\)

B. **Comparative Negligence**

Although not explicitly stated in the cases which discuss the comparative negligence defense in a legal malpractice proceeding, the analysis appears to turn on whether the client’s actions contributed to his damages, in which case the defense is viable, or whether the client is required to second guess his attorney’s advice or get a second opinion, in which case the defense is not applicable.

A double comparative negligence situation is involved in *Michael Kovach, P.A. v. Pearce*.\(^{349}\) The underlying proceeding in which legal

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344. Id. at 1126.
346. Id. at 26.
347. Id.
348. Id.
349. 427 So. 2d 1128 (Fla. 5th Dist. Ct. App. 1983).
malpractice allegedly occurred involved an automobile accident. When Pearce was found to have negligently operated his vehicle, Pearce sued his trial counsel claiming that Todter, the person who had sued Pearce, was at fault in the accident and that Pearce’s lawyer (Kovach) failed to properly assert the comparative negligence of Todter.\footnote{350}

Accordingly it was necessary for the jury in the malpractice action to literally “re-try” the Todter v. Pearce case to correctly determine Todter’s negligence, if any, and Pearce’s negligence, if any, causing Todter’s injuries and, if both were negligent, to compare their negligence, in order to determine how much of the $600,000 verdict was properly chargeable to Pearce’s negligence in injuring Todter, how much was chargeable to Todter’s own negligence, and how much resulted from the alleged negligent failure to properly defend. In the malpractice action, Kovach asserted as a comparative negligence defense that Pearce was contributively negligent in the defense of the Todter action.\footnote{351}

Pearce found himself having to prove a “case within a case” in the malpractice action.

The verdict against the attorney was reversed because of an error in the verdict form. Instead of providing the jury with the opportunity to apportion negligence between Pearce and Kovach as to the negligent defense in the injury case, and Todter and Pearce in the injury case, the verdict form only allowed for apportionment of fault between Pearce and Kovach in the malpractice action.\footnote{352}

Another Florida case in which the comparative negligence defense was used is Solomon v. Meyer.\footnote{353} In attempting to purchase assets from a bankruptcy trustee, Solomon paid monies directly to the bankruptcy trustee who did not provide the assets to Solomon. Solomon’s lawsuit against the trustee was unsuccessful. The federal court held that Solomon’s own negligence caused his loss.\footnote{354} In the malpractice action, the appellate court could not affirm summary judgment in favor of the attorneys because Solomon had alleged that his attorneys’ advice had caused Solomon’s negligence, and genuine issues of material fact existed as to whether the

\footnote{350. Id. at 1129.}
\footnote{351. Id.}
\footnote{352. Id.}
\footnote{353. 116 So. 2d 37 (Fla. 3d Dist. Ct. App. 1959).}
\footnote{354. Id. at 38.}
damages were caused by advice provided by the attorneys or the acts of the bankruptcy trustee.\textsuperscript{355}

The Fourth District Court of Appeal ignored both Kovach and Solomon in \textit{Tarleton v. Arnstein \\ & Lehr},\textsuperscript{356} when it boldly stated “[a] client cannot be found to be comparatively negligent for relying on an attorney’s erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise.”\textsuperscript{357} Thus, the appellate court found that the trial court erred in failing to issue a directed verdict in favor of the client on the issue of comparative negligence. The law firm had argued that the client was sophisticated in matters of business and should have seen the error of her attorney’s actions in advising her to sign a settlement agreement that served to waive a cause of action regarding certain promissory notes. “Simply because she was somewhat sophisticated in business matters does not impose upon her the burden to second guess her attorney’s advice or to hire a second attorney to see if such advice was proper.”\textsuperscript{358}

\textbf{C. In Pari Delicto and Fraud}

In \textit{Turner v. Anderson},\textsuperscript{359} which was a case of first impression in Florida, the Fourth District labored to answer “[t]he question of whether a client who does an illegal act on advice of counsel can sue counsel for damages resulting therefrom.”\textsuperscript{360} After examining cases from other jurisdictions, the court held that “no public policy should allow appellant to recover damages as a result of engaging in criminal conduct such as occurred in this case.”\textsuperscript{361} The court considered the appellant’s sophisticated background and his deposition testimony in which he admitted committing perjury with full knowledge of his conduct. What the court did not decide is more telling. “We need not decide whether the doctrine of \textit{in pari delicto} is a bar where the client’s misconduct is far less in degree than counsel’s . . . nor need we decide whether the client can recover fees paid to counsel, because this is not part of appellant’s claim.”\textsuperscript{362}

\begin{itemize}
\item \textsuperscript{355} \textit{Id.} at 38–39.
\item \textsuperscript{356} 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{357} \textit{Id.} at 331 (citations to Oregon and California cases omitted).
\item \textsuperscript{358} \textit{Id.}
\item \textsuperscript{359} 704 So. 2d 748 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{360} \textit{Id.} at 750.
\item \textsuperscript{361} \textit{Id.} at 751.
\item \textsuperscript{362} \textit{Id.}
\end{itemize}
False and inconsistent information provided during discovery resulted in a legal malpractice case being dismissed with prejudice in Cox v. Burke.\textsuperscript{363} The former client sued her attorneys after being informed the day after the statute of limitations had expired that they were not going to handle her medical malpractice case.\textsuperscript{364} During the course of the malpractice litigation, and after a year of discovery, the defendant attorneys were able to prove that the former client had misled them about her identity, driver’s license history, social security numbers, and prior injuries.\textsuperscript{365} The court found that a clear showing of “false or misleading answers in sworn discovery that either appear calculated to evade or stymy discovery on issues central to her case”\textsuperscript{366} justified dismissal. It is interesting to note that the appellate court deferred to the trial court’s “discretion to fashion the apt remedy”\textsuperscript{367} but suggested that it “might have imposed a lesser sanction.”\textsuperscript{368}

D. Statute of Limitations

1. Background

A lawsuit against an attorney for professional malpractice, with whom the client has privity,\textsuperscript{369} must be commenced within two years from the time the cause of action is discovered or should have been discovered with the exercise of due diligence.\textsuperscript{370} The applicable statute reads as follows:

Actions other than for recovery of real property shall be commenced as follows:

\[
\text{* * *}
\]

\[(4) \text{WITHIN TWO YEARS} -\]

\begin{itemize}
\item \textsuperscript{363} 706 So. 2d 43 (Fla. 5th Dist. Ct. App. 1998).
\item \textsuperscript{364} Id. at 44.
\item \textsuperscript{365} Id.
\item \textsuperscript{366} Id. at 47.
\item \textsuperscript{367} Id.
\item \textsuperscript{368} Cox, 706 So. 2d at 47.
\item \textsuperscript{369} Hickey v. Dunn & Corey, 761 So. 2d 1245 (Fla. 3d Dist. Ct. App. 2000) (holding that since a member of a pre-paid legal services plan was not in privity with attorney, four-year rather than two-year statute of limitations applied).
\item \textsuperscript{370} FLA. STAT. § 95.11(4) (2001); Abbott v. Friedsam, 682 So. 2d 597 (Fla. 2d Dist. Ct. App. 1996) (reversing summary judgment because affidavits did not conclusively show when plaintiffs knew or should have known that they had a cause of action to trigger the running of the statute of limitations).
\end{itemize}
(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional. 371

The difficult question is when the two-year period begins. 372 In Peat, Marwick, Mitchell & Co. v. Lane, 373 the Supreme Court of Florida analogized the accrual of a cause of action for legal malpractice to the accrual of a cause of action against accountants. 374 "A clear majority of the district courts have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney." 375 The court wanted to avoid the quandary that would require a party to file a malpractice proceeding against a professional claiming negligence while taking a totally inconsistent position during an appeal by alleging that the attorney was correct and a lower court’s ruling was incorrect. The Peat case holds that the cause of action does not begin to accrue until the injured party knew or should have known of the "redressable harm or injury." 376 When the client knew or should have known of the attorney’s negligence is a question of fact not ordinarily capable of determination on summary judgment. 377 However, if a client incurs the expense of having to defend a lawsuit that should have been settled, except for the attorney’s malpractice, the accrual of the cause of action begins at that time, not, as urged by the client in Breakers of Fort

371. § 95.11-.11(4)(a).
372. Rosa v. Roth, 442 So. 2d 323 (Fla. 3d Dist. Ct. App. 1983) (reversing summary judgment in favor of attorney because issue of fact existed as to when client should have discovered malpractice).
373. 565 So. 2d 1323 (Fla. 1990).
374. Id. at 1325.
375. Id.; see also Ramsey v. Jonassen, 737 So. 2d 1114, 1115 (Fla. 2d Dist. Ct. App. 1999).
376. Lane, 565 So. 2d at 1325.
377. Freel v. Fleming, 489 So. 2d 1209 (Fla. 1st Dist. Ct. App. 1986) (holding that affidavit provided by client in trying to set aside a default judgment did not establish client knew a cause of action had accrued against lawyer who allowed default to be entered); Green v. Bartel, 365 So. 2d 785 (Fla. 3d Dist. Ct. App. 1978) (holding that when client discovered wrongful act is a question of fact).
Lauderdale, Ltd. v. Cassel,\textsuperscript{378} when damages were paid to the claimant on the lawsuit that should have been settled.

The earlier case of Sawyer v. Earle\textsuperscript{379} was disapproved to the extent it conflicted with Peat. In Sawyer, the Second District Court of Appeal held that the statute of limitations had been tolled notwithstanding that the claimant was unable to "determine his exact amount or full extent of damages"\textsuperscript{380} at the time the statute would have expired. The difference between the two cases turns on the fact that in Peat the client maintained that its legal position was correct until after the United States Tax Court had ruled against such position, while in Sawyer, the client believed his representation to be improper when he discharged his first lawyer, which was well within the two-year period.

The clients in Spivey v. Trader\textsuperscript{381} retained an attorney who advised them that transferring certain assets owned as tenants by the entireties to a corporation would not place such assets at risk in a pending personal injury action.\textsuperscript{382} A judgment was rendered in supplemental proceedings to the personal injury action finding such assets subject to attachment contrary to the attorney's advice.\textsuperscript{383} The Spivey court, relying upon Peat, held that the two-year countdown began when the judgment on the supplemental proceedings was rendered, not when the client suspected that the attorney's advice was wrong. This was because the client had "vigorously contested the fact that the real estate, or his interest therein, was subject to attachment in the personal injury action filed against him personally."\textsuperscript{384}

Since 1989, the Florida courts have been attempting to refine a rule of accrual applicable to transactional and litigational malpractice.

2. Transactional Malpractice

In the area of transactional malpractice, Peat was further analyzed in Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell,
in which a dismissal based upon the statute of limitations having expired was reversed. The *Throneburg* court stated:

We understand *Peat Marwick* to draw a distinction between knowledge of actual harm from legal malpractice and knowledge of potential harm. The former begins the limitations period; the latter does not. Legal services, like accounting services, are often subject to differing views among practitioners. Lawyers often disagree with one another on the same transaction. It seems clear to us that *Peat Marwick*, properly understood, means that the limitations period on claims of legal malpractice should not commence until it is reasonably clear that the client has actually suffered some damage from legal advice or services.

Based upon the court’s view of *Peat*, the filing of the lawsuit against the attorney in *Throneburg* more than two years after the real estate document in question was prepared, but less than two years after a decision holding the document to be invalid, was deemed to have been timely filed.

The preparation of a Florida postnuptial agreement was deemed transactional in *Robbat v. Gordon.* After reviewing *Peat* and *Throneberg*, the court stated:

Read together, *Peat, Marwick* and *Throneberg* stand for the proposition that knowledge of an adverse decision by a lower tribunal is not sufficient to start the running of the statute of limitations in a transactional malpractice claim where the client chooses to defend the actions of the defendant on appeal, since to require the client to pursue the malpractice claim while at the same time defending the professional’s actions on appeal would place the client “in the wholly untenable position of having to take directly contrary positions in [the] two actions.”

It was not until after the litigation involving the postnuptial agreement was resolved that the statute of limitations began to run against the attorney who provided advice regarding the post-nuptial.

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385. 659 So. 2d 1134 (Fla. 4th Dist. Ct. App. 1995).
386. *Id.* at 1136 (emphasis added).
387. 771 So. 2d 631 (Fla. 4th Dist. Ct. App. 2000).
3. Litigational Malpractice

The process of refining the accrual rule has been fraught with difficulty. A practical review of the difficulty in determining when the statute of limitations begins to run is set forth in the dissenting opinion in *Silvestrone v. Edell*.389 "Unfortunately, in practice it is unclear in Florida case law exactly when the statute of limitations begins to run in attorney malpractice cases."390 The majority opinion in the Fifth District's decision in *Silvestrone* found that the statute begins to run before a final judgment is rendered.391 Due to various post trial motions, including the amount of attorney's fees owed to the attorney for the prevailing party who later sued the attorney, approximately two years expired between the return of the jury verdict in the underlying federal antitrust action and the final judgment.392 The case turned on the fact that the client had instructed his attorney not to appeal the jury verdict, to request a new trial, or to seek additur.393 Thus, the court found that the client "had all the information necessary to establish his cause of action"394 when the jury returned its verdict. An alternative argument that the cause of action should be tolled under the continuing representation doctrine was not considered because it was not presented below, although the court found that the argument had some "appeal."395

In contrast to *Silvestrone*, the statute of limitations did not commence until the day after the court rendered final judgment in *Zakak v. Broida and Napier, P.A.*396 The court ordered the Zakaks to perform according to the settlement made by their attorney despite the Zakaks' protest that the attorney was not authorized to enter into such settlement.397 When they refused to pay, the court ordered settlement and entered a final judgment against them.398 The Zakaks initiated a legal malpractice suit within two

389. 701 So. 2d 90 (Fla. 5th Dist. Ct. App. 1997), vacated by 721 So. 2d 1173 (Fla. 1998).
390. *Id.* at 94.
391. *Id.*
392. *Id.*
393. *Id.*
394. *Silvestrone*, 701 So. 2d at 91. *See also* Eldred v. Reber, 639 So. 2d 1086 (Fla. 5th Dist. Ct. App. 1994) (holding statute of limitations began to run when opinion, not mandate, was issued by appellate court).
395. *Id.* at 91–92; *see infra* the section on Resurrecting, Delaying & Tolling the Statute of Limitations for a discussion of that doctrine.
396. 545 So. 2d 380 (Fla. 2d Dist. Ct. App. 1989).
397. *Id.* at 381.
398. *Id.*
years of the judgment, but more than two years after the order enforcing the settlement. 399

In recognition of the conflict with Zakak, the Supreme Court of Florida accepted Silvestrone v. Edell 400 for review “on the issue of whether the two-year statute of limitations for legal malpractice, in a litigation context, begins to run when the verdict is rendered or when final judgment is entered.” 401 In Silvestrone, the Supreme Court of Florida attempted to create a “bright line rule” 402 in order to “provide certainty and reduce litigation over when the statute starts to run.” 403 Since the law was “not clear as to when the limitations period for legal malpractice, in a litigation-related context, begins to run.” 404

The Supreme Court of Florida held in Silvestrone that there is a “bright line” rule that requires commencement of a cause of action for litigation legal malpractice within two years of the final conclusion of the underlying litigation. 405 The court held that the statute of limitations begins to run when the final judgment becomes final. 406 The Supreme Court of Florida did not address the knowledge of harm as required by the statute. A review of the facts from the Fifth District’s opinion indicates “[t]here is no question that Mr. Silvestrone knew about the alleged malpractice when the jury returned an unsatisfactory verdict.” 407 Thus, the client knew about the malpractice at the time judgment became final. In footnote two of the Silvestrone decision, the court distinguished Birnholz v. Blake 408 because it involved transactional malpractice.

Unlike the client in Silvestrone, the client in Pinkerton v. West 409 first learned of her attorney’s misadvice more than two years later from a

399. Id.
400. 721 So. 2d 1173 (Fla. 1998).
401. Id. at 1174.
402. Id. at 1176.
403. Id.
404. Id. at 1175.
405. Silvestrone, 721 So. 2d at 1175–76.
406. See Slapikas v. Llorente, 766 So. 2d 440, 441 (Fla. 4th Dist. Ct. App. 2000) (applying Silvestrone to determine if attorney’s fees were properly awarded); Gaines v. Russo, 723 So. 2d 398 (Fla. 3d Dist. Ct. App. 1999) (reversing a dismissal in reliance upon Silvestrone); Hold v. Manzini, 736 So. 2d 138 (Fla. 3d Dist. Ct. App. 1999) (holding redressable harm cannot be established until an adverse final judgment has been rendered against the client).
407. Silvestrone, 701 So. 2d at 91.
408. 399 So. 2d 375 (Fla. 3d Dist. Ct. App. 1981).
409. 353 So. 2d 102 (Fla. 4th Dist. Ct. App. 1977).
California attorney. The attorney successfully argued before the trial court that the statute of limitations had expired because the former client had read an article contrary to the Florida lawyer's advice and wrote letters to the attorney questioning his conduct more than two years before suit was filed. In reversing the trial court's summary judgment in favor of the attorney, Schetter v. Jordan, was cited for the following proposition:

The applicability of the statute of limitations to the plaintiffs' cause of action for malpractice against the attorney-defendant is dependent upon when the attorney's alleged act of negligence became known to the client which matter is a question of fact to be determined by the trier of fact and not by the court in a summary proceeding.

Unlike a literal reading of the Supreme Court of Florida's decision in Silvestrone, which ignores the statutory requirement of knowledge by the client that the attorney committed malpractice, the Schetter approach is consistent with the requirements of the statute.

The Third District Court of Appeal, in Watkins v. Gilbride Heller & Brown, P.A., overturned the trial court's ruling that the statute of limitations commenced after the district court of appeal's ruling was final, rather than after any attempt to seek supreme court review was final. "[A] final judgment is not final until a timely filed appeal to, or petition for review by, the supreme court is resolved." However, due to the "recent nature of Silvestrone and the rapid dispute over the bright line rule" the following question was certified to the Supreme Court of Florida:

WHERE REVIEW OF A DISTRICT COURT DECISION IN AN ACTION UNDERLYING A LEGAL MALPRACTICE CLAIM IS SOUGHT IN THE FLORIDA SUPREME COURT, DOES THE TWO-YEAR STATUTE OF LIMITATIONS PERIOD OF SECTION 95.11(4)(A), FLORIDA STATUTES, BEGIN TO RUN FROM THE DATE THE DECISION BECOMES FINAL BY

410. Id.
411. Id. at 103.
412. 294 So. 2d 130 (Fla. 4th Dist. Ct. App. 1974).
413. Id. at 131.
414. Id.
415. 754 So. 2d 759 (Fla. 3d Dist. Ct. App. 2000).
416. Id. at 762.
417. Id. at 763.
Judge Sorondo’s concurring opinion in Watkins emphasizes the importance of exercising caution in applying the statute of limitations defense:

The statute of limitations is an onerous defense which should be limited in its application to those cases where its applicability is unavoidable. See Pezzi v. Brown, 697 So. 2d 883, 886 (Fla. 4th DCA 1997) ("statutes restricting access to the courts must be narrowly construed in a manner favoring access."); Angrand v. Fox, 552 So. 2d 1113, 1116 (Fla. 3d DCA 1989) ("it is well established that a limitations defense is not favored, . . . and that therefore any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period."). This Court has historically emphasized that "Florida policy dictates a strong preference that cases be decided on their merits." City of Miami v. Rivas, 723 So. 2d 393, 393 (Fla. 3d DCA 1999); Venero v. Balbuena, 652 So. 2d 1271 (Fla. 3d DCA 1995); Cinkat Transp., Inc. v. Maryland Cas. Co., 596 So. 2d 746 (Fla. 3d DCA 1992).

Where courts have discretion in determining the applicability of a statute of limitations, such discretion should be exercised in favor of affording the Florida Constitution’s guarantee of access to courts contained within Article I, Section 21.419

The Supreme Court of Florida accepted review of Watkins,420 approved the Third District Court of Appeal’s ruling, and held "the statute of limitations begins to run from the date the decision becomes final by this Court’s resolution of the case."421

A transactional malpractice case that resulted in the client’s litigation with a third party ultimately puts the accrual of the cause of action, the running of the statute of limitations, and five of the cases on the issues into perspective. Taracido v. Perez-Abreu, Zamora & De La Fe, P.A.,422 involved an allegedly improperly prepared contract for sale of corporate

418. Id.
419. Id. (Sorondo, J., concurring).
420. Watkins, 783 So. 2d at 225.
421. Id.
422. 705 So. 2d 41 (Fla. 3d Dist. Ct. App. 1997).
stock that later became the subject of litigation.\textsuperscript{423} The client filed the malpractice suit within two years of the settlement of the litigation with the third party.\textsuperscript{424} In reversing a summary judgment in favor of the attorneys, the court stated:

\begin{quote}

The existence of legal malpractice is often difficult to ascertain. A client should not be placed in the position of having to file a potentially baseless claim prematurely fearing that otherwise an action will be precluded by the statute of limitations. Thus we hold that a cause of action for legal malpractice based upon a prior transaction accrues at the conclusion of subsequent litigation between the client and a third party.\textsuperscript{425}

\end{quote}

\textit{Taracido} was accepted for review by the Supreme Court of Florida due to conflict with \textit{Edwards v. Ford},\textsuperscript{426} although \textit{Peat, Marwick, Mitchell & Co. v. Lane}\textsuperscript{427} found \textit{Edwards} to be “clearly distinguishable.”\textsuperscript{428} In \textit{Edwards}, the law firm had drafted a contract for its clients and a third party that was later asserted by the third party to be usurious.\textsuperscript{429} The drafter allegedly agreed on behalf of the law firm, sometime during 1963, to undertake corrective measures without charge.\textsuperscript{430} The client filed the malpractice suit in 1968, in response to a suit by the law firm, to recover its unpaid attorneys fees.\textsuperscript{431} The client was unsuccessful as a result of the court’s holding that the statute of limitations had expired.\textsuperscript{432} The \textit{Edwards} court quoted at length from the case of \textit{Downing v. Vaine},\textsuperscript{433} in holding that “the event which triggers the running of the statute of limitations is notice to or knowledge by the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act which caused the damages was actually committed.”\textsuperscript{434} The damages incurred in \textit{Edwards} were only minimal at the time their cause of action accrued.\textsuperscript{435}

\begin{thebibliography}{9}
\bibitem{423} Id. at 42.
\bibitem{424} Id.
\bibitem{425} Id. at 43 (citations omitted).
\bibitem{426} 279 So. 2d 851 (Fla. 1973).
\bibitem{427} 565 So. 2d 1323 (Fla. 1990).
\bibitem{428} Id. at 1327.
\bibitem{429} \textit{Edwards}, 279 So. 2d at 851.
\bibitem{430} Id.
\bibitem{431} Id. at 852.
\bibitem{432} Id.
\bibitem{433} 228 So. 2d 622 (Fla. 1st Dist. Ct. App. 1969).
\end{thebibliography}
The Supreme Court of Florida in Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido approved the Third District Court of Appeal’s decision and receded from Edwards.

Consistent with Peat, Marwick, we hold that, in the circumstances presented here, a negligence/malpractice cause of action accrues when the client incurs damages at the conclusion of the related or underlying judicial proceedings or, if there are no related or underlying judicial proceedings, when the client’s right to sue in the related or underlying proceeding expires. If a negligence/malpractice action is filed prior to the time that a client’s right to sue in the related or underlying judicial proceeding has expired, or if a negligence/malpractice action is filed during the time that a related or underlying judicial proceeding is ongoing, then the defense can move for an abatement or stay of the claim on the ground that the negligence/malpractice action has not yet accrued. The moving party will have the burden of demonstrating that the related or underlying judicial proceeding will determine whether damages were incurred which are causally related to the alleged negligence/malpractice. The determination of this will be for the trial court. Similarly, if a party raises an affirmative defense that a negligence/malpractice action has expired, the party bringing the action may file a reply asserting the avoidance of the statute of limitations due to a related or underlying judicial proceeding.

The court in Taracido held that “even though the related or underlying judicial proceeding was not complete until 1967, the cause of action accrued in 1963, and therefore the statute of limitations began to run at that time.” The Supreme Court of Florida tied together the previous three most significant cases dealing with the statute of limitations by stating, “[m]oreover, this Court’s decisions in Peat, Marwick, Mitchell & Co. v. Lane, Silvestrone v. Edell, and Blumberg were intended to: (1) provide certainty and reduce litigation over when the statute starts to run and (2)...

1986); Richards Enter., Inc. v. Swofford, 495 So. 2d 1210, 1212 (Fla. 5th Dist. Ct. App. 1986), cause dismissed, 515 So. 2d 231 (Fla. 1987).
435. Edwards, 279 So. 2d at 853.
436. 790 So. 2d 1051 (Fla. 2001).
437. Id.
438. Id. at 1054 (citing Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1065 (Fla. 2001)).
439. Taracido, 790 So. 2d at 1054.
prevent clients from having to take directly contrary positions in the two actions.\textsuperscript{440}

4. Resurrecting, Delaying, & Tolling the Statute of Limitations

The appellate courts have disagreed as to whether an otherwise time-barred action for legal malpractice may be resurrected as a counterclaim to an action by the attorney against the former client to collect attorneys fees. The First District Court of Appeal allowed affirmative relief against the attorney in the guise of recoupment in \textit{Cherney v. Moody}.\textsuperscript{441} However, in non-legal malpractice cases, two other decisions only allow recoupment to be used defensively as a set off rather than offensively as a counter claim.\textsuperscript{442}

An attorney who misleads his client as to his ability to cure a known problem may also extend the time period in which a lawsuit may be brought. In \textit{Burnside v. McCrary},\textsuperscript{443} the attorney reassured the client that the attorney could cure the dismissal of the client’s cause of action by filing motions.\textsuperscript{444} The court found that the claim of the attorney’s reassurances was sufficient to create an issue of material fact as to whether the malpractice action had yet accrued.\textsuperscript{445} No such question as to the accrual of the cause of action was evident in \textit{Howard v. Minnesota Muskies, Inc.}\textsuperscript{446} Several years before he filed the malpractice suit, the client learned that a judgment had been entered against him allegedly because of his attorney’s withdrawal from the case without the client’s knowledge or consent.\textsuperscript{447} The appellate court affirmed the summary judgment in favor of the attorney.\textsuperscript{448}

In a legal malpractice case, the statute of limitations does not commence until after the attorney no longer represents the aggrieved client. In \textit{Wilder v. Meyer},\textsuperscript{449} the court explained Florida’s continuing representation doctrine:

\begin{flushright}
440. \textit{Id.} (internal citations omitted).
441. 413 So. 2d 866, 869 (Fla. 1st Dist. Ct. App. 1982).
442. Allie v. Ionata, 503 So. 2d 1237, 1242 (Fla. 1987) (stating no affirmative right of recovery, whether by recoupment or setoff, once it is barred by statute of limitations); Horace Mann Ins. Co. v. DeMirza, 312 So. 2d 501 (Fla. 3d Dist. Ct. App. 1975).
443. 382 So. 2d 75 (Fla. 3d Dist. Ct. App. 1980).
444. \textit{Id.}
446. 420 So. 2d 652 (Fla. 3d Dist. Ct. App. 1982).
447. \textit{Id.} at 653.
448. \textit{Id.}
\end{flushright}
The Plaintiff’s negligence and breach of fiduciary duty claims are governed by a two-year statute of limitations applicable to professional malpractice claims. This two-year statute of limitations begins to run from the date the cause of action is discovered or should have been discovered with the exercise of due diligence.

However, this two-year statute of limitations is subject to the continuing representation doctrine. The continuing representation tolls the statute of limitations as long as the attorney continues to represent the client.450

The Second District has confirmed the federal district court’s understanding of Florida law: “we note that in Florida the statute of limitations for legal malpractice generally does not begin to run while the attorney continues to represent the client.”451

“The continuing representation [doctrine] tolls the statute of limitations as long as the attorney continues to represent the client.”452 The attorney-defendant in Wilder provided advice on tax issues through the date of filing suit.453 Therefore, the suit was timely filed.454 The impact of Silvestrone v. Edell,455 holding that a litigation legal malpractice case must be commenced within two years of the judgment becoming final, upon the continuing representation doctrine, is uncertain.456 It is unclear if the statute of limitations is to be extended if an attorney were to continue to represent the client more than two years after the final judgment becomes final.

The issue for determination in Garrido v. Markus, Winter & Spitale Law Firm,457 was “whether the amended complaint relates back to the original complaint so as to toll the statute of limitations.”458 The former client sought to amend the legal malpractice complaint to add individual partners of a law partnership after the statute of limitations had expired against the individual partners.459 In finding that the statute of limitations

450. Id. at 169 (quoting Birnholz v. Blake, 399 So. 2d 375 (Fla. 3d Dist. Ct. App. 1981) (citations omitted)).
452. Wilder, 779 F. Supp. at 169 (quoting Birnholz, 399 So. 2d at 375).
453. Id.
454. Id.
455. 721 So. 2d 1173 (Fla. 1998).
456. Id. at 1175.
457. 358 So. 2d 577 (Fla. 3d Dist. Ct. App. 1978).
458. Id. at 579.
459. Id. at 578.
barred the addition of the individual partners, the court stated that the general rule for “relation back” of party defendants as follows:

“Corporations, partnerships, associations or individuals. Generally, whether an amendment of process or pleading, or both, will be allowed which changes the description or characterization of a party after the statute of limitations has run, from a corporation to an individual, partnership, or other association, or vice versa, seems to depend upon whether the misdescription or mischaracterization is interpreted as merely a misnomer or defect in the description or characterization, or whether it is deemed a substitution or entire change of parties; in the former case an amendment will be held to relate back to the commencement of the action, while in the latter the amendment will be held to amount to the institution of a new action.”

The court noted “a total absence of covert behavior” on the part of the lawyers as to who the proper parties were and implied that such conduct would have altered the result in the case. Under any circumstances, “[i]f the face of the complaint does not show the cause is time barred, but the defendant wishes to challenge the suit on that basis, the defendant must raise the affirmative defense of statute of limitations in his answer.”

5. The Premature Legal Malpractice Suit

The premature filing of a legal malpractice suit occurred in Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A. The law firm had prepared a mortgage on which the client had to foreclose. However, the borrower contested the validity of the mortgage because the property was homestead property and the wife did not join in the mortgage. The foreclosure proceeding was ongoing when the client filed a legal malpractice suit. The appellate court reversed a summary judgment

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460. Id. at 581 (quoting 51 AM. JUR. 2D Limitation of Actions § 295 (1970)).
461. Id. at 580.
463. 670 So. 2d 1050 (Fla. 3d Dist. Ct. App. 1996).
464. Id. at 1051.
465. Id.
466. Id.
in favor of the attorneys premised upon the client’s knowledge of the potential defect more than two years before suit was filed.\textsuperscript{467}

Here, unless Zuckerman is unable to foreclose on the mortgage, he will not have suffered damages proximately caused by Ruden Barnett’s alleged failure to obtain the wife’s signature on the mortgage. Only when the foreclosure action has been entirely resolved will the statute of limitations on the malpractice action begin to run.\textsuperscript{468}

The filing of a legal malpractice suit was also found to be premature in \textit{Bierman v. Miller},\textsuperscript{469} resulting in a stay until the underlying federal case was finalized.\textsuperscript{470} Miller sued his former lawyer, Bierman, during the pendency of a lawsuit brought against Miller by a corporation with whom he had entered into a severance agreement containing a covenant not to sue.\textsuperscript{471} The corporation claimed the severance agreement was unenforceable because of Miller's fraud, which induced the corporation to sign the severance agreement.\textsuperscript{472} The viability of the severance agreement had not been determined at the time Miller brought suit against his former attorney in which he claimed that Bierman's negligence in drafting the severance agreement permitted the corporation to sue him resulting in considerable attorneys fees.\textsuperscript{473} “Until the validity of the agreement is decided in federal court there can be no determination in the malpractice action as to whether Bierman was negligent in negotiating and drafting that agreement.”\textsuperscript{474} In \textit{Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., v. Sun NLF Ltd.},\textsuperscript{475} the client was also deemed to have been premature in having a stay lifted prior to the resolution of the pending unjust enrichment action upon which the malpractice was based.\textsuperscript{476}

When there is a concern about the expiration of a statute of limitations, a practical safety net is to enter into a tolling agreement with the potentially

\textsuperscript{467} Id.
\textsuperscript{468} Zuckerman, 670 So. 2d at 1051 (citations omitted).
\textsuperscript{469} 639 So. 2d 627 (Fla. 3d Dist. Ct. App. 1994). See also Miller v. Lindback Constr. Corp., 782 So. 2d 903 (Fla. 3d Dist. Ct. App. 2001) (legal malpractice action severed and abated, determination of redressable harm was premature).
\textsuperscript{470} Bierman v. Miller, 639 So. 2d 627, 628 (Fla. 3d Dist. Ct. App. 1994).
\textsuperscript{471} Id. at 627.
\textsuperscript{472} Id. at 628.
\textsuperscript{473} Id.
\textsuperscript{474} Id.
\textsuperscript{475} 719 So. 2d 1029 (Fla. 3d Dist. Ct. App. 1998).
\textsuperscript{476} Id.
culpable attorney in which the parties agree that the statute of limitations will not commence until a certain date. Alternatively, as suggested in Birnholz v. Blake, the malpractice action can be stayed pending a resolution of the claim giving rise to the malpractice action. Dismissing the malpractice complaint until the underlying case is resolved was found to be an error in Bartlett v. Bennett.

E. Abandonment

"The circumstances in which a client's subsequent actions constitute an abandonment of a legal malpractice claim, as a matter of law, are very narrow." A summary judgment in favor of an attorney was overturned in Lenahan v. Russell L. Forkey, P.A., holding that the dismissal of a lawsuit in Virginia did not preclude a malpractice suit in Florida. However, the court stated that if proof of the viability of the Virginia lawsuit, independent of the actions of the attorney in Florida, were sufficiently established, then "the voluntary dismissal of the Virginia lawsuit may very well constitute an intervening superseding cause."

Abandonment can occur when the client settles the underlying action while the malpractice action is pending. In Pennsylvania Insurance Guarantee Ass'n v. Sikes, an insurance company, which hired an attorney to defend a client in a personal injury case, sued the attorney that it had hired for malpractice, and then settled the personal injury case rather than appeal a loss deemed to have been caused by judicial error, which "in all likelihood" would have been corrected on appeal. Accordingly, the summary judgment in favor of the attorney was affirmed. "We hold, on the facts of this case, that the settlement of the underlying personal injury case, while the

478. A judicial stay was imposed upon the legal malpractice claims in Watts v. Buck because the right to maintain the suit was suspended due to the plaintiff's status as a felon. 454 So. 2d 1079 (Fla. 2d Dist. Ct. App. 1984).
479. 360 So. 2d 1144 (Fla. 2d Dist. Ct. App. 1978).
481. Id. at 612.
482. Id.
484. Sikes, 590 So. 2d at 1053.
485. Id.
appeal was pending, constituted an abandonment of any claim that PIGA's loss resulted from legal malpractice rather than judicial error.\textsuperscript{486}

Although not cited in \textit{Sikes}, the Third District dealt with a similar issue two years before in \textit{Oteiza v. Braxton}.\textsuperscript{487} \textit{Oteiza} involved a summary judgment in favor of an attorney who had been sued by his former doctor client for failing to perfect an appeal of a final order by the Board of Medical Examiners.\textsuperscript{488} The standard for not timely filing an appeal was explained as follows:

In order to recover damages for legal malpractice, a party who has been denied his right to appeal due to an attorney's failure to timely file a petition for review to the appropriate court must show that but for the attorney's negligence, the appeal most probably would have been successful.\textsuperscript{489}

After examining what would have been the appellate issue, the \textit{Oteiza} court reversed the summary judgment holding that "but for the attorney's negligence, the appeal most probably would have been successful."\textsuperscript{490}

The Third District, in \textit{Segall v. Segall},\textsuperscript{491} helped to clarify when a client must file an appeal in order to perfect a later malpractice case, but it did not adopt a bright line test.

Our cases should not be read to require every party who suffers a loss and attributes that loss to legal malpractice to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice. The test for determining when a cause of action for attorney malpractice arises remains when "the existence of redressable harm has been established." \textit{Diaz v. Piquette}, 496 So.2d 239, 240 (Fla. 3d DCA 1986), \textit{rev. denied}, 506 So.2d 1042 (Fla.1987). In some cases, redressable harm caused by errors in the course of litigation can only be determined upon completion of the appellate process. \textit{See Sikes}, 590 So.2d at 1053. In other cases, the failure to obtain appellate review should not bar an action for malpractice. \textit{See, e.g., Zitrin}, 621 So.2d 748 (where attorney failed to include requested provisions in employment contract, malpractice plaintiff not required to confirm attorney's error on ap-

\textsuperscript{486} \textit{Id.}
\textsuperscript{487} 547 So. 2d 948 (Fla. 3d Dist. Ct. App. 1989).
\textsuperscript{488} \textit{Id.} at 949.
\textsuperscript{489} \textit{Id.} (citations omitted).
\textsuperscript{490} \textit{Id.} at 950.
\textsuperscript{491} 632 So. 2d 76 (Fla. 3d Dist. Ct. App. 1993).
peal); \textit{Breakers of Fort Lauderdale, Ltd. v. Cassel}, 528 So.2d 985 (Fla. 3d DCA 1988) (when attorney improperly failed to consummate settlement of lawsuit, cause of action for legal malpractice accrued when client learned that lawsuit was revived). We are unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. To do so would, in many cases, violate the tenet that the law will not require the performance of useless acts.\textsuperscript{492}

\textit{Segall} was somewhat unusual in that the court dismissed the appeal of the underlying jury verdict for the plaintiff’s failure to comply with discovery orders.\textsuperscript{493} The deemed waiver of the malpractice case was predicated upon the conduct that led to the appeal being dismissed which “foreclosed any determination that judicial error rather than attorney malpractice caused their loss in the underlying litigation.”\textsuperscript{494}

The abandonment defense was narrowly construed in \textit{Parker v. Graham \& James}.\textsuperscript{495} The malpractice plaintiffs had retained Graham \& James to prosecute a federal suit for crop loss. The verdict form in the federal suit required the jury to itemize the damages under theories of contract, negligence, and strict liability. The jury awarded $50,000 on the contract and negligence theories and $6,800,000 on strict liability. The Eleventh Circuit Court of Appeals remanded for a new trial on damages because of the discrepancies in the verdict.\textsuperscript{496} The plaintiffs discharged Graham \& Jones and settled for $4,000,000. The clients sued Graham \& Jones for malpractice and sought damages for the attorneys’ failure to submit a general verdict form that requested a single damage amount on all three theories and for failure to seek prejudgment interest. The trial court dismissed the case with prejudice on the notion that the plaintiffs had abandoned their legal malpractice suit when they settled the underlying case.

The Third District reversed the trial court since “the settlement did not thwart any review process which could have cured the malpractice . . . . After issuance of the \textit{Overseas Private Investment} opinion, anything further that plaintiffs could have done would only have served to mitigate their damages.”\textsuperscript{497} Only considerations of appeal were viewed in this abandon-

\begin{itemize}
  \item \textsuperscript{492} \textit{Id.} at 78.
  \item \textsuperscript{493} Segall \textit{v. Downtown Assocs.}, 546 So. 2d 11 (Fla. 3d Dist. Ct. App. 1989).
  \item \textsuperscript{494} \textit{Segall}, 632 So. 2d at 78.
  \item \textsuperscript{495} 715 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1998).
  \item \textsuperscript{496} See \textit{Overseas Private Inv. Corp. v. Metro. Dade County}, 47 F.3d 1111 (11th Cir. 1995).
  \item \textsuperscript{497} \textit{Parker}, 715 So. 2d at 1048.
\end{itemize}
ment analysis. The plaintiffs were not required to retry the case and obtain the same, or even a larger verdict, than the first trial in order to avoid the abandonment defense. Seemingly, the attorney-defendants would be able to claim that no damages would have been suffered if a second trial had occurred.

The directed verdict, based upon the abandonment defense, was reversed in favor of the law firm in Hunzinger Construction Corp. v. Quarles & Brady.498 Before an appeal was completed, Hunzinger settled the underlying case in which the trial court held that a mechanic’s lien was filed late. During the malpractice case, the attorneys argued that the client could not proceed on a malpractice claim because Hunzinger had not completed the appeal. However, the client was successful because the appellate court could not “say, as the court could in Sikes, that the mistake in the original proceedings would ‘in all likelihood’ have been corrected on appeal.”499

In Eastman v. Flor-Ohio, Ltd.,500 the law firm urged the court to expand the abandonment defense to require the filing and prosecution of an appeal before filing a legal malpractice case based upon negligence occurring in the underlying case. The following three policy reasons were set forth for not extending the abandonment theory as requested:

Perhaps the least compelling reason is the negative effect such a ruling would have on the work load of the appellate courts . . . . [S]uch a ruling would also discourage parties from settling pending appeals and would be inconsistent with the party’s legal duty to mitigate their damages . . . . A more important reason is that such a ruling would require litigants to spend yet more of their resources prosecuting an appeal to judicial conclusion even though they may disagree with the theory of the appeal they would be required to maintain.501

IX. COLLECTIBILITY

The collectibility of the judgment that would have been recovered in the underlying action may be an issue depending upon the circumstances. The

498. 735 So. 2d 589 (Fla. 4th Dist. Ct. App. 1999). See also Coble v. Aronson, 647 So. 2d 968 (Fla. 4th Dist. Ct. App. 1994) (reversing summary judgment since malpractice cause of action was not eliminated by settlement of related lawsuit against third party).
499. Hunzinger Constr. Corp., 735 So. 2d at 595.
500. 744 So. 2d 499 (Fla. 5th Dist. Ct. App. 1999).
501. Id. at 504.
attorney who filed suit in *Fernandes v. Barrs* failed to do so in a timely fashion against Lake Community College for personal injuries sustained by his client at the college campus. After an award of $398,670 rendered at the conclusion of a bench trial, the attorney appealed claiming, in part, that damages were limited by section 768.28 of the *Florida Statutes*, which caps damages against state agencies at $100,000. The court indicated the “general rule is that the client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and that any judgment which could have been recovered would have been collectible.” The policy reason for this general rule is to prevent “a windfall to the client by preventing him from recovering more from the attorney than he could have actually obtained from the tortfeasor in the underlying action.”

“The plaintiff may ordinarily satisfy this burden with evidence of the original tortfeasor’s financial status, insurance coverage, property ownership, and so forth if such evidence can be obtained.” If such evidence cannot be obtained because the negligence of the attorney makes it impossible, then the burden shifts to the attorney to prove that the judgment or any portion thereof was uncollectible.

**X. IMMUNITY**

In some situations, an attorney is immune to a malpractice suit by his client. This is exemplified where an attorney represents the Department of Revenue as a program attorney in child support proceedings and where an attorney represents union members at the behest of a labor union. Mensh and Macintosh, P.A. represented the Department of Revenue as program attorneys in a child support proceeding for Donna Hand. Hand later sued the law firm for malpractice in a complaint that alleged “many facts which would be sufficient to support an action for negligence.” The case was

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503. *Id.* at 1375 (citing Hand v. Hustad, 440 So. 2d 518 (Fla. 4th Dist. Ct. App. 1983)) (reversing directed verdict in favor of defendant-attorney because plaintiff had offered sufficient evidence of collectibility to present a jury question).

504. *Id.* at 1376.

505. *Id.*


507. *Id.* at 235.
dismissed with prejudice because of the immunity provisions set forth in section 409.2564(6) of the Florida Statutes, which provides:

The department and its officers, employees, and agents and all persons and agencies acting pursuant to contract with the department are immune from liability in tort for actions taken to establish, enforce, or modify support obligations if such actions are taken in good faith, with apparent legal authority, without malicious purpose, and in a manner not exhibiting wanton and willful disregard of rights or property of another. 508

Donna Hand represented herself in the proceeding against her former attorneys. 509 She informed the trial judge that she was unable to amend her complaint to avoid statutory immunity. 510 This fact undoubtedly influenced both the trial judge and appellate court in not allowing the complaint to be further amended.

A Dade County School Board employee was denied the opportunity to sue her attorney who represented her on behalf of the United Teachers of Dade in an administrative dismissal proceeding in Stafford v. Meek. 511 The Stafford court cited to DeGrio v. American Federation of Government Employees 512 for the following proposition that “attorneys may not be held individually liable for their malpractice in representing union members where the union provides the attorneys’ services as part of its duty of fair representation to an employee in a grievance or termination proceeding.” 513 Although the Stafford court acknowledged that the DeGrio court’s language was dicta, it provided the weight of persuasive authority in affirming a final judgment in favor of the attorney. 514

The public defender has not escaped liability for malpractice under the doctrine of judicial immunity. As stated in Windsor v. Gibson: 515

Considerations which require that a judge and prosecutor be immune from liability for the exercise of duties essential to the administration of justice, do not require that the same immunity be

509. Hand, 718 So. 2d at 235.
510. Id.
511. 762 So. 2d 925 (Fla. 3d Dist. Ct. App. 2000).
512. 484 So. 2d 1, 3 (Fla. 1986).
513. Stafford, 762 So. 2d at 926.
514. Id.
515. 424 So. 2d 888 (Fla. 1st Dist. Ct. App. 1982).
extended to the public defender. While the prosecutor is an officer of the state whose duty it is to see that impartial justice is done, the public defender is an advocate, who once appointed owes a duty only to his client, the indigent defendant. His role does not differ from that of privately retained counsel. 516

The Third District Court of Appeal, in Wilcox v. Brummer,517 quoted the above language from Windsor and also held that the public defender’s exposure for malpractice is equal to that of private counsel. Both of the courts’ certified questions to the Supreme Court of Florida, concerning whether a public defender is shielded from liability due to judicial immunity, went unanswered.

XI. DAMAGES

A. Attorneys’ Fees

In Florida, absent a contractual or statutory basis, attorneys’ fees are not compensable.518 However, if a client sues a third party to recover a portion of the damages caused by the negligent attorney, the attorney’s fees incurred in suing the third party may be recovered pursuant to the Wrongful Act Doctrine,519 which provides as follows:

One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney’s fees and other expenditures thereby suffered or incurred in the earlier action.520

The client in De Pantosa Saenz v. Rigau & Rigau, P.A.521 alleged that without her authorization, her attorney filled in a blank deed that she signed at his request with the name of his mother-in-law in return for the mother-in-

516. Id. at 889.
517. 739 So. 2d 1282 (Fla. 5th Dist. Ct. App. 1999).
518. See generally Florida Patient’s Comp. Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985).
519. See State Farm v. Pritcher, 546 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1989) (stating an attorney is not entitled to fees under the “wrongful act doctrine” against third party after client dismissed malpractice action).
520. RESTATEMENT (SECOND) OF TORTS § 914(2) (1977).
The mother-in-law agreed to rescind the transaction after reimbursement of her investment in the property. The Second District permitted a claim for attorney’s fees in the malpractice suit for the attorney’s fees incurred in the litigation against the mother-in-law. “Typically, a plaintiff has the right to recover attorneys’ fees incurred in litigation with a third party, as an element of compensatory damages, if that litigation was caused by the defendant’s breach of contract or wrongful act.”

In Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, the court dismissed the complaint with prejudice for failure (and inability) to plead the necessary privity requirement. The Third District Court of Appeal affirmed, stating that the pretermitted heir could not maintain the malpractice action; however, the court reversed as to the Estate. The appellate court held that the law firm was responsible to the Estate for the costs of defending the pretermitted heir’s lawsuit holding that:

Clearly, the testator’s estate should be entitled to a return of the attorney’s fee paid by the testator to the lawyer, as well as any costs and fees incurred in defending the estate against any action generated by the lawyer’s negligence, such as an action brought by the omitted beneficiary to receive a share of the estate.

B. Prejudgment Interest

A malpractice plaintiff is entitled to prejudgment interest from the date of loss. Since the amount of damages was disputed and there was no date certain upon which such damages were owed, the First District Court of Appeal upheld a trial court ruling denying prejudgment interest in Chadwick v. Corbin. The requirements for prejudgment interest were satisfied in deManio v. Burns. “[W]hen a verdict liquidates damages on a plaintiff’s out-of-pocket, pecuniary losses, [the] plaintiff is entitled, as a matter of law,

522. Id. at 685.
523. Id.
524. Id.
525. De Pantosa Saenz, 549 So. 2d at 685.
527. Espinosa, 586 So. 2d at 1224–25.
528. Id. at 1223–24 (citations omitted).
530. 642 So. 2d 807 (Fla. 2d Dist. Ct. App. 1994).
to prejudgment interest at the statutory rate from the date of that loss." The verdict in _deManio_ awarded pecuniary losses as of a certain date. Therefore, the court awarded prejudgment interest. The court also awarded prejudgment interest in _Fisher v. Ackerman_ and _Tarleton v. Arnstein & Lehr_, since the jury awards had the effect of liquidating damages as of a certain date.

C. _Punitive Damages_

An attorney who gives improper or erroneous advice to a client who suffers damage as a result may be subject to a malpractice action for compensatory damages. However, such negligence, if it exists, and even if gross, does not warrant an award of punitive damages absent the necessary allegations and proof of wantonness or reckless indifference. The fact that an attorney who allegedly gave bad advice had listed his name with a lawyer referral service as being proficient in that particular field of law, by itself, does not rise to the level of wantonness or reckless indifference required for punitive damages. Similarly, an attorney’s failure to file a security interest with the Secretary of State was not sufficient to warrant punitive damages in _Chadwick v. Corbin_.

Another Florida case involving legal malpractice and punitive damages is _De Pantosa Saenz v. Rigau & Rigau, P.A._ The former client sought punitive damages, alleging fraud in the sale of certain real estate. The Court stated, “Moreover, the plaintiff seeks punitive damages against Mr. Rigau. Assuming the plaintiff can establish facts warranting punitive

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531. _Id._ (citing Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985)).
532. _deManio_, 642 So. 2d at 807.
534. 744 So. 2d 582 (Fla. 2d Dist. Ct. App. 1999).
535. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).
536. _De Pantosa Saenz v. Rigau & Rigau, P.A._, 549 So. 2d 682 (Fla. 2d Dist. Ct. App. 1989); _Solodky v. Wilson_, 474 So. 2d 1231, 1233 (Fla. 5th Dist. Ct. App. 1985); _see also_ _DeToro v. Dervan Investments Ltd. Corp._, 483 So. 2d 717 (Fla. 4th Dist. Ct. App. 1985) (allowing evidence of punitive damages to be introduced against an attorney in a breach of fiduciary duty lawsuit).
537. _Solodky_, 474 So. 2d at 1232.
539. 549 So. 2d 682 (Fla. 2d Dist. Ct. App. 1989).
540. _Id._ at 684.
damages, the previously received remedy of rescission would not bar an additional award of punitive damages.”

Punitive damages were awarded against the attorneys in *Stinson v. Feminist Women’s Health Center, Inc.* The Court found that the trial judge properly awarded punitive damages since the lawyers’ behavior was “egregious,” “self-serving,” and “unconscionable.” The attorney’s conduct in *Medel v. Republic National Bank of Miami* was determined to be an issue for trial rather than summary judgment.

Applying Florida law, federal courts have also found punitive damages against attorneys to be warranted. Florida law is clear: under appropriate circumstances punitive damages can be awarded against an attorney in a malpractice proceeding.

**XII. ATTORNEY-CLIENT PRIVILEGE**

Communications between attorneys and their clients are generally protected from discovery. However, there are at least three exceptions to the attorney-client privilege that are relevant to a malpractice action: (1) the defense exception, (2) the common interest exception, and (3) the fraud exception. The defense exception to the attorney-client privilege found in section 90.502(4)(c) of the *Florida Statutes*, provides “[t]here is no lawyer-client privilege under this section when... a communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.”

541. *Id.* at 685.
542. 416 So. 2d 1183, 1185 (Fla. 1st Dist. Ct. App. 1982).
543. *Id.*
544. 365 So. 2d 782, 784–85 (Fla. 3d Dist. Ct. App. 1978).
545. *See, e.g.*, Singleton v. Foreman, 435 F.2d 962, 971 (5th Cir. 1970) (holding “that Foreman’s alleged conduct was sufficient to state an independent tort action, and, since that alleged conduct was both oppressive and showed such a great indifference to the persons and property rights of others, malice may be imputed, thus justifying punitive damages”); Gay v. McCaughan, 272 F.2d 160, 162 (5th Cir. 1959) (holding that the action of the attorney would form the basis on which a jury could award punitive damages).
546. Documents not related to any pending claim, defense, or that are not reasonably calculated to lead to the discovery of admissible evidence, as in all litigation, are also protected. *See* Richard Mulholland & Assocs. v. Polverari, 698 So. 2d 1269, 1270 (Fla. 2d Dist. Ct. App. 1997).
Exceptions to the attorney-client privilege have been interpreted very narrowly. The case of *Shafnaker v. Clayton* is particularly illustrative. In *Shafnaker*, the clients claimed the second law firm, which represented them in a case involving a lawsuit against Orkin for negligent application of hazardous chemicals, committed malpractice. The defendant law firm in the malpractice proceeding sought production of documents from the first law firm that had represented the clients. The court held that the documents maintained by the first law firm were not discoverable. The law firm in *Shafnaker* claimed that the privileged information was vital to their defense. The First District Court of Appeal was not impressed with this argument and stated that the “mere possibility that petitioners may not have been fully candid with respondents does not constitute a waiver of attorney-client privilege with other attorneys.” However, if a party has introduced issues in the litigation that go to the very heart of the litigation, discovery cannot be avoided because of the attorney-client privilege.

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548. Courville v. Promedco of S.W. Fla., Inc., 743 So. 2d 41, 42–43 (Fla. 2d Dist. Ct. App. 1999) (waiving the attorney-client privilege is limited to communications on the same matter); see also Reed v. State, 640 So. 2d 1094, 1097–98 (Fla. 1994) (waiving privilege only as to matters specifically at issue in court action); Del Prado v. Robert K. Estes, P.A., 532 So. 2d 1101, 1101 (Fla. 3d Dist. Ct. App. 1988) (lacking any basis to claim privilege as to requested documents for matter allegedly mishandled); Procacci v. Seitlin, 497 So. 2d 969, 969–70 (Fla. 3d Dist. Ct. App. 1986) (finding that exception applies only to a particular transaction which resulted in malpractice and not to any other aspect of the attorney-client relationship).


550. See also Adelman v. Adelman, 561 So. 2d 671, 673 (Fla. 3d Dist. Ct. App. 1990) (holding that an ex-lawyer may only reveal confidential information necessary to defend against malpractice claim).

551. *Shafnaker*, 680 So. 2d at 1110.

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.* at 1111 (citing Cuillo v. Cuillo, 621 So. 2d 460, 462 (Fla. 4th Dist. Ct. App. 1993)) (holding that the occurrence of privileged communications regarding a specific transaction, which is later litigated, does not eliminate the privilege, even if there is a possibility that the credibility of a party could be impeached by such communications); Long v. Murphy, 663 So. 2d 1370, 1372 (Fla. 5th Dist. Ct. App. 1995) (holding that proof of privileged communications to dispute reasonable reliance may well be relevant to the defense, but that alone does not waive the privilege).

The Shafnaker decision was cited with approval in both Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A. and Volpe v. Conroy, Simberg & Ganon, P.A. In both cases, decided less than one month apart, certiorari review was sought of trial court orders seeking production of communications between the plaintiffs and attorneys who were not defendants in the malpractice proceeding. The defendant lawyers' claim that communications with other lawyers were critical to the defense of the plaintiffs' allegations did not override the attorney-client privilege. "The attorney-client privilege cannot be set aside simply because the opposing party claims that the information held by the attorney is necessary to prove the opposing party's case."

Interestingly, the clients obtained different relief in Volpe and Coyne. In Coyne, the court remanded the case with instructions for the trial court to hold an in camera inspection to determine the applicability of the privilege. The Volpe court merely quashed the trial court's order. The relief afforded in Volpe seems more logical and promotes closure on the issue.

The Second District Court of Appeal in Barnett Banks Trust Co. v. Compson was required to answer the question of "whether a trust beneficiary who litigates a position adverse to the trust may obtain from the trustee materials ordinarily protected by the attorney-client privilege and work product doctrine." The court responded negatively to the inquiry. The court found that the attorney-client privilege is paramount to section 737.303(3) of the Florida Statutes, which requires a trustee to provide any vested beneficiary with relevant information about the assets of a trust relating to administration.

The attorney in Ferrari v. Vining wanted to take the deposition in the malpractice lawsuit of the prior counsel in the underlying action. The
trial court allowed the discovery. In overturning the trial court’s decision, the Third District Court of Appeal cited to Adelman v. Adelman, and stated:

*Adelman* supports the proposition that the attorney-client privilege between Ferrari and Vining as to what they discussed pertinent to the issue of Vining’s alleged malpractice could be reached. That does not mean the court could order the deposition and violation of attorney-client privilege as to *other counsel* with whom Ferrari discussed Vining’s performance.

The court in *Ferrari* went on to limit the client’s waiver of the attorney-client privilege to “confidential information relating to his representation only to the extent necessary to defend himself.” Therefore, an attorney cannot disclose everything about the attorney-client relationship; he may only respond to specific allegations.

The common interest exception to the attorney-client privilege found in section 90.502(4)(e) of the *Florida Statutes* reads as follows:

A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

This “common interest exception” was examined in *Cone v. Culverhouse*. The court held that the prism through which this exception must be examined is “from the perspective of an objectively reasonable client, not from a particular client’s subjective expectations or from the attorney’s perspective.” The client who sued her attorneys for negligence and intentional infliction of emotional distress in *Richard Mulholland and Associates v. Polverari* requested production of every “authority to represent” agreement between the law firm and its clients for a five-year

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570. Id. at 481.
571. 561 So. 2d 671 (Fla. 3d Dist. Ct. App. 1990).
572. *Ferrari*, 744 So. 2d at 481–82.
573. Id. at 482.
574. See id. at 481–82.
576. 687 So. 2d 888, 891 (Fla. 2d Dist. Ct. App. 1997).
577. Id. at 892.
578. 698 So. 2d 1269 (Fla. 2d Dist. Ct. App. 1997).
period.\textsuperscript{579} The court issued a protective order in favor of the law firm since the "representation agreements between . . . [the attorneys] and their other clients are not related to any pending claim or defense, nor was the information shown to be reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{580}

Finally, the crime-fraud exception to the attorney-client privilege was at issue in \textit{State v. Marks}.\textsuperscript{581} The court indicated that "the 'crime fraud' exception to the attorney-client privilege is simply a shorthand expression recognizing that the privilege may not be used to protect communications with a lawyer for the purpose of receiving advice for the commission of a future criminal fraud."\textsuperscript{582} Once the privilege is asserted, "the state must make an evidentiary showing plausibly implicating the possible application of the exception."\textsuperscript{583} The "party invoking [the] privilege has absolute right to be heard by testimony and argument."\textsuperscript{584} The criminal charges against the attorneys in the case were dismissed because of \textit{ex parte} communications between the prosecutor and the judge.\textsuperscript{585}

\textbf{XIII. ACTION NOT ASSIGNABLE}

A legal malpractice action is not assignable. The assignability of a legal malpractice action in Florida was first raised in \textit{Washington v. Fireman's Fund Insurance Co.}\textsuperscript{586} The \textit{Washington} court as a matter of public policy agreed with the "majority of jurisdictions [which] prohibit the assignment of such actions because of the personal nature of legal services which involve highly confidential relationships."\textsuperscript{587} The \textit{Washington} case was cited with approval, but little discussion, in \textit{Mickler v. Aaron}\textsuperscript{588} and \textit{Kozich v. Shahady}.\textsuperscript{589} The Supreme Court of Florida delved into the reasoning behind the prohibition of assigning a cause of action for legal malpractice in responding to a certified question regarding the assignability

\begin{itemize}
  \item \textsuperscript{579} \textit{Id.} at 1270.
  \item \textsuperscript{580} \textit{Id.}
  \item \textsuperscript{581} 758 So. 2d 1131, 1132 (Fla. 4th Dist. Ct. App. 2000).
  \item \textsuperscript{582} \textit{Marks}, 758 So. 2d at 1133 n.2 (citing United States v. Zolin, 491 U.S. 554, 565 (1989)).
  \item \textsuperscript{583} \textit{Id.} at 1134.
  \item \textsuperscript{584} \textit{Id.}
  \item \textsuperscript{585} \textit{Id.} at 1133.
  \item \textsuperscript{586} 459 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1984).
  \item \textsuperscript{587} \textit{Id.} at 1149.
  \item \textsuperscript{588} 490 So. 2d 1343 (Fla. 4th Dist. Ct. App. 1986).
  \item \textsuperscript{589} 702 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1997).
\end{itemize}
of a cause of action against an insurance agent in *Forgione v. Dennis Pirtle Agency, Inc.*:590

As an Illinois appellate court noted in *Christison v. Jones*, 83 Ill.App.3d 334, 39 Ill. Dec. 560, 562, 405 N.E.2d 8, 10 (1980), the duty breached in legal malpractice arises out of a contract for legal services and the resulting injuries are pecuniary injuries to intangible property interests, rather than personal injuries in the strict sense of injuries to the body, feelings, or character of the client. While these aspects might indicate that legal malpractice falls within the class of actions that are assignable, the Illinois court concluded that legal malpractice is not subject to assignment because "the real basis and substance of the malpractice suit" is a breach of the duties within the personal relationship between the attorney and client. *Id.* Thus, it is "the unique quality of legal services, the personal nature of the attorney's duty to the client[,] and the confidentiality of the attorney-client relationship" that have led other courts to conclude that legal malpractice claims are not subject to assignment. *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal.Rptr. 83, 87 (1976).591

The next opportunity to review the assignability doctrine was presented in *National Union Fire Insurance Co. v. Salter*.592 Using a subrogation theory in its malpractice action, National Union sued the attorneys who had represented one of its insureds. The dismissal of the case was affirmed upon a holding that the same analysis that prohibited the assignment of a legal malpractice claim also prohibited "the subrogation of a debtor's legal malpractice claim."593 The fact that the actual client was not a party to the lawsuit was critical to the court's holding which noted that the client "may not even be interested or believe that it has a legal malpractice action against its attorneys," and the attorneys might need to reveal the "work product" and "confidences" of its client in order to properly defend its position.594

After acknowledging that a cause of action for legal malpractice is not assignble under Florida law, the court in *Northcutt v. BankAtlantic*595 discussed whether or not a bankruptcy trustee could assign a legal

590. 701 So. 2d 557, 559 (Fla. 1997).
591. *Id.*
592. 717 So. 2d 141 (Fla. 5th Dist. Ct. App. 1998).
593. *Id.* at 143.
594. *Id.*
595. 767 So. 2d 563 (Fla. 4th Dist. Ct. App. 2000).
malpractice claim. Without deciding the issue, the court cited to several cases from other jurisdictions, suggesting that a tort action that arose during a bankruptcy proceeding could not be sold or assigned. Northcutt went on to argue that if the assignment was void, the trustee had abandoned the claim and the claim then reverted to Northcutt. The summary judgment, which held that certain proceeds of a legal malpractice claim could be garnished, was reversed due to a finding that there were issues of material fact.

Northcutt was also involved in Northcutt v. Bryan, in which he argued that the sale of his legal malpractice claim by the trustee appointed in his bankruptcy case to the attorney he had sued was void because such a claim was not assignable. Although the court held that Northcutt “may well be correct on his theory that, because legal malpractice claims are not assignable under Florida law, a bankruptcy trustee cannot assign a claim,” since the bankruptcy order approving the sale was not appealed, he did not have standing to bring his legal malpractice claim.

XIV. EXPERT TESTIMONY

A trial court erred in determining that an affidavit as to breach of duty or causation was sufficient to shift the burden of proof in a summary judgment hearing to the client, notwithstanding the lack of any contrary affidavit in Heitmeyer v. Sasser. The conclusory nature of the affidavit was the underlying basis of the court’s ruling. This ruling is in direct contrast to Manner v. Goldstein Professional Ass’n, in which a summary

596. Id. at 564.
598. Northcutt, 767 So. 2d at 564.
599. Id. (citing to In re Bennett, 13 B.R. 643 (Bankr. W.D. Mich. 1981)).
600. Northcutt, 767 So. 2d at 565.
601. 775 So. 2d 976 (Fla. 4th Dist. Ct. App. 2000).
602. Id. at 977.
603. Id.
604. Id.
605. Id. at 978.
606. 664 So. 2d 358 (Fla. 4th Dist. Ct. App. 1995).
judgment in favor of an attorney was upheld due to “an unrebutted affidavit by a prominent member of the bar of this state on file stating that the action of her counsel . . . did not depart from the expected degree and care of conduct of counsel for a mother of [sic, in] a domestic relation [sic] matter.” Under any circumstances, the court cannot review affidavits and make a credibility judgment in a summary judgment context.

The case of Willage v. Law Offices of Wallace and Breslow, P.A., held that legal malpractice can not be inferred merely because of a defendant’s verdict in a slip and fall case. “Without expert testimony, a lay jury could only speculate as to whether an attorney’s conscious decision not to call a purported witness constituted negligence, where in the attorney’s opinion, the witness on cross examination could have given testimony damaging to plaintiff’s case.” The plaintiff in Warwick, Paul & Warwick v. Dotter, sued his divorce lawyer for failure to attend a divorce trial on behalf of the husband. The attorney for the wife was called as an expert in the malpractice proceeding and asked a “hypothetical question to prove the possibility that a more financially favorable divorce decree could have been obtained had not the firm been negligent.” The court found such testimony sufficient to establish the appropriate standard of care and pointed out that with the exception of the chancellor, the wife’s attorney was “the most informed available person as to the facts and law involved in the divorce case.”

Certain kinds of malpractice may be so apparent that expert testimony is not mandatory. The client suffered a dismissal of his suit in Suritz v. Kelner, due to his attorney’s failure to tell his client to respond to interrogatories. “In the instant case, if the jury finds the facts to be as

608. Manner, 436 So. 2d at 432.
610. 415 So. 2d 767 (Fla. 3d Dist. Ct. App. 1982).
611. Id. at 768.
612. Id. (citations omitted).
613. 190 So. 2d 596 (Fla. 4th Dist. Ct. App. 1966).
614. Id.
615. Id. at 597.
616. Id. at 598.
617. 155 So. 2d 831 (Fla. 3d Dist. Ct. App. 1963).
618. Id. at 832.
presented by the plaintiff, the negligence of the attorney may appear from these facts without the need of expert testimony."^{619} 

Galloway v. Law Offices of Merkle, Bright and Sullivan, P.A.,^{620} involves both an affidavit and the need for expert testimony. A summary judgment in favor of the attorney was obtained based upon the attorney’s unrebutted affidavit. Such affidavit “merely stated that appellant’s file was handled in accordance with the community standard of care, but the affidavit nowhere attempts to explain why this case was not filed within the statute of limitations as alleged in the complaint.”^{623} The summary judgment was reversed upon a finding that a counter affidavit was not necessary. The court went on to state, “[w]e think the unexplained failure to file within a statute of limitations as described in this complaint is such an apparent breach of a duty of care as to obviate the need for expert testimony from appellant on a motion for summary judgment.”^{625} 

XV. JURY INSTRUCTIONS

Florida Standard Jury Instruction 4.2(c) can be used in an attorney malpractice case. Since all attorney malpractice proceedings involve a “case within a case,” the jury instructions often reflect the cause of action from the underlying case. The plaintiff’s theory against the lawyer in Cunningham v. Koon,^{627} was that he drafted a note that was usurious. A deficient jury instruction on usury resulted in the reversal of the verdict in favor of the client. 

In Spaziano v. Price,^{630} the court discussed the distinction in jury instructions between negligence and liability. \(^{631}\) Florida Standard Jury

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619. Id. at 834. Without indicating the extent of expert testimony in the trial court, the appellate court in Spaziano v. Price found the attorneys’ conduct “clearly fell below a reasonable standard of care.” 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).
621. Id. at 1206.
622. Id.
623. Id. at 1207.
624. Id.
625. Galloway, 596 So. 2d at 1207.
626. See FLA. STD JURY INSTR. IN CIVIL CASES § 4.2(c) (1967) (amended 2001).
627. 762 So. 2d 572 (Fla. 4th Dist. Ct. App. 2000).
628. Id.
629. Id.
630. 763 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1999).
631. Id. at 1050.
Instruction (Civil) 3.1(c) and 3.6(c) are to be used when negligence has been determined either by admission or a directed verdict.632 This set of instructions leaves open the question of whether the attorney's acts were the cause of the injury. Florida Standard Jury Instruction (Civil) 3.1(d) applies when there is a directed verdict on liability and only requires the jury to determine the amount of damages.633

XVI. CONCLUSION

In Florida, a plaintiff in a legal malpractice action must prove that he is in privity with the attorney or the third-party beneficiary to the attorney's work, that the attorney neglected a reasonable duty, and that the attorney's negligence proximately caused the plaintiff's loss. Further, the plaintiff may have to prove that the judgment in the underlying transaction was collectible. An attorney may be absolved of liability by the involvement of a subsequent attorney, and the attorney's loss may be spread between or among others sharing in the representation. Proving malpractice in criminal defense means proving different elements and perhaps a higher standard of proof than in transactional and civil litigational malpractice. Generally, the malpractice plaintiff will need expert testimony to make his case. The malpractice plaintiff may not assign his cause of action. The successful plaintiff is entitled to compensatory fees and prejudgment interest; however, punitive damages are limited in their availability.

The attorney defendant may affirmatively defend using various estoppel defenses, comparative negligence, in pari delicto and fraud, statute of limitations, and abandonment. Under some circumstances, the attorney may affirmatively defend that the underlying judgment was not collectible. In certain limited circumstances, the attorney may be immune to suit. Although defense of a malpractice suit is a situation that allows invasion of the attorney-client privilege, the invasion is not an unlimited one.

Revisiting Sir Thomas More's thoughts in A Man for All Seasons, "The law is not a 'light' for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which so long as he keeps to it a citizen may walk safely,"634 As with any other "citizen," the law provides an attorney a causeway. If the attorney keeps to the causeway, he avoids professional liability and legal malpractice.

632. Id.
633. Id.
634. Bolt, supra note 1.
The Mentally Ill Attorney
Len Klingens

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I. INTRODUCTION

ABC Excavating is a small construction firm specializing in site preparation work. The company has been successful for a number of years on a small scale, providing a comfortable existence for the company's

1. Although the names of the parties are fictional, in all other respects this is a true story. This case is ongoing. Disbarment proceedings may be public record, but revelation of them would jeopardize client confidentiality in the present action against the attorney and his partners.
shareholders, Jack Brown and his wife. Early in 1999, the firm orally contracted to perform some work in a South Florida county. As is sometimes the case, the property owner paid the general contractor, and the general contractor did not pay ABC Excavating. ABC Excavating filed a lien against the property and, failing any response from either the owner or the general contractor, ABC Excavating sought to foreclose. With that in mind, the owners of ABC Excavating turned over all of their meager paperwork to their attorney, Mike Pfenning of Rodriguez, Marko & Pfenning, P.A. A year went by, and the statute of limitations for lien foreclosure expired. Another year went by, and the statute of limitations for suing on an oral contract expired. During this period, ABC Excavating was regularly assured by Pfenning that he was filing pleadings and that everything was going well.

However, nothing was going well. As Pfenning later said in his letter to the Florida Bar, he was afflicted with a mental disorder that made him put all of his work into various desk drawers and then forget about it. Pfenning would spend the remainder of his days staring out of the windows of his office, or would simply not show up for work. His partners were aware of his behavior but were reluctant to intervene. They were even more reluctant to inform his clients. Pfenning’s partners let their malpractice insurance lapse. Ultimately, they dissolved the partnership. Since then, Pfenning has been disbarred. All three partners have liquidated their assets or moved them into the names of others. Two of the three partners have filed for bankruptcy and the third is not far behind. ABC Excavating is now seeking to recover from the attorneys personally, but the bankruptcy actions have all but eliminated their chances for recovery.

Although the incidence of mental illness and drug abuse among attorneys is far from negligible, stories this egregious are, fortunately, not played out every day. Several questions raised by this case include the following:

- What could the Browns have done to mitigate the damage caused by their attorney?
- What could the attorney have done to mitigate or prevent the damage his illness has caused?
- What were the responsibilities of the partners to the clients, to the mentally ill partner, and to the Florida Bar?

2. Incredibly, the original complaint to the bar was filed by a client of Pfenning’s for whom he was prosecuting a malpractice suit against another attorney for neglecting a client’s case.
The purpose of this article is to look at the factors involved in these questions and to attempt to frame answers that may be useful to both clients and attorneys in looking at the effect mental illness can have on the attorney-client relationship and on the parties thereto.

Mental illness is a subset of a broad range of conditions of unfitness, which could preclude an attorney from practicing law. It may, in and of itself, render an attorney unfit for practice, or it may be the catalyst for other conduct that violates the rules of professional responsibility.

The overriding issue regarding the conduct precipitated by an attorney's illness lies in the public policy concern that attorneys act in the public interest; the public is entitled to a presumption that an attorney licensed to practice is fit to do so. Failure of this presumption is a failure of the public's trust, and the consequences of such a failure may be far-reaching.

Given that the public policy concern revolves around the attorney's inability to carry out his or her professional duties, a mental illness that does not prevent an attorney from effective practice is not at issue here. The fact that it does not noticeably affect a lawyer's performance makes the incidence of such illness difficult to track. Such "non-actionable" mental illnesses

3. FLA. RULES OF PROF'L CONDUCT R. 4-8.4 cmt. (1988). Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Id.


[I]n disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi-offense, consideration of the interest and safety of the public os [sic] of the utmost importance . . . [i]t would be wrong to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable legal profession when he, by his misconduct, has exhibited a lack of integrity and common honesty. And it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong . . . the public has a right to protection against his activities in the practice of law.

Id.

5. Id.
would include many of the disorders formerly labeled as neuroses by the American Psychiatric Association.\(^6\)

Mental illness is more difficult to detect in others—and in oneself—than a physical illness such as hepatitis or tuberculosis.\(^7\) To the casual lay observer, as most of us are, a mental illness will generally manifest itself through conduct outside of the generally accepted norm; it will become cause for concern or investigation when it violates the Rules of Professional Conduct.\(^8\)

Attorneys are not subject to disciplinary action for being mentally ill, only for conduct which violates the rules.\(^9\) On the other hand, violations of the rules are not evidence of mental illness, and those attorneys who plead such illness as the cause of their violations must show that it directly caused the misconduct.\(^10\) When a showing of causation is made, disciplinary action

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6. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 9–10 (3d ed. 1980). In 1980, the American Psychiatric Association omitted the former major class of disorders called “neuroses” from its diagnostic manual and replaced it with several categories such as “affective, anxiety, somatoform” and so on. Id. The rationale for this change was the absence of a general consensus on the definition of neuroses. Id. For the purposes of this article, the old adage that neurotics build castles in the sky and psychotics actually live in them will provide an adequate, if folkloric, distinction.

7. Hepatitis C “[s]ymptoms may include fever, fatigue, abdominal pain, jaundice, and elevated liver enzymes.” HCV Advocate Glossary, at http://www.hepatitis-c-advocate.org/hepatitis-c-symptoms.htm (last visited Sept. 12, 2002). Tuberculosis consists of constant coughing fits along with spitting up blood; common symptoms of this illness include fever, inflammation, headache, soreness of throat, palate, breast and lungs. (Tuberculosis, at http://www.aidsmeds.com/OIs/TB2.htm (last visited Sept. 12, 2002)). On the other hand, the Canadian Mental Health Association states that the symptoms of depression include feelings of worthlessness, helplessness or hopelessness, difficulty with concentration or decisions, avoidance of other people, overwhelming feelings of sadness, and thoughts of death or suicide, which are also among the symptoms of manic depression. Depression & Manic Depression Symptom Questionnaire, at http://www.truehope.com/non_online_forms/forms3.htm (last visited Sept. 12, 2002).

8. Id.

9. However, evidence of mental illness may be a bar to admission. Since the introduction of the Americans with Disabilities Act in 1990, 42 U.S.C. §§ 12101–12213, the profession’s methods of regulating attorney fitness where mental health is an issue have come under attack as violative of the ADA. This is particularly true with regard to mental health questions posed on bar applications. See, e.g., Erica Moeber, Yes: The Public Has the Right to Know About Instability, A.B.A.J., Oct. 1994, at 36; Kathi Pugh, No: Mental Health Treatment Should Not Block a Career, A.B.A.J., Oct. 1994, at 37.

10. In order for an attorney’s alleged illness to be taken into account as a mitigating circumstance in a disciplinary proceeding, the attorney must “establish any causal link between his health problems and his pattern of serious professional misconduct.” In re Stein,
will ensue, and the illness will often be treated as a mitigating factor in the imposition of sanctions. Sanctions will range from disbarment to censure, but will often include suspension pending effective treatment for the attorney’s disorder.

There are certain primary participants in the attorney-client relationship: the client, the attorney, and, under the imputed knowledge doctrine of the Model Rules of Professional Conduct, the attorney’s firm. The remainder of this article will review the various ways the attorney’s mental illness affects these participants and what, if anything, may be done to mitigate the effects of the illness on the attorney’s work.

II. THE CLIENT

What risks do clients run if they are among those whose cases are affected by the mental or emotional instability of their attorney? They run many of the same risks that the Browns encountered in their relationship with Mr. Pfenning of the earlier example. The possible permutations of attorney misconduct are numerous, running the gamut from loss of the action due to statute of limitations problems, to simple cases of inadequate settlement due to attorney carelessness.

Before continuing, it is worth noting that the risk of a client being an actual victim of an attorney’s mental or emotional instability is extremely low. Although some fifteen-percent of Florida’s attorneys will suffer from career-affecting mental illness or addiction at some point in their lives, the number of cases these attorneys will negatively affect will probably be small.


12. Fla. Bar v. Horowitz, 697 So. 2d 78, 83 (Fla. 1997) (holding that an attorney may be disbarred for neglect of clients and for failure to respond to communications from the Bar despite attorney’s clinical depression).


15. Model Rules of Prof’l Conduct R. 1.10 (2002); see also Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051 (Fla. 5th Dist. Ct. App. 1979).

16. See infra Part III.

17. See infra Part III.
To try to establish some order of magnitude, assume that an attorney practices thirty years, handles 250 matters per year (a number that may vary greatly depending on the branch of the law in which one practices), and that each mentally or emotionally unstable attorney ruins five cases. There are some 70,000 attorneys in Florida. Using the figures just mentioned, the mentally or emotionally unstable attorneys will cause problems with some 52,000 matters. Fifty-two thousand matters may sound like the makings of a plague or a scourge, until one considers that during that same period of time, some 700,000,000 matters will be handled normally. In other words, the chances of one’s case being among those negatively affected by the mental state of the attorney could well be less than one in thirteen thousand.

A. Client Responsibilities to the Attorney and the Court

Although the client is the raison d'être of the attorney’s representation, there is very little in the Rules of Professional Conduct governing responsibilities of the client for his or her case. By their very nature, the rules cannot directly address client conduct, and what rules there are concern only an attorney’s responses to the implied duties of the client. These implied duties include a client’s candor to the attorney and to the tribunal, a client’s obligation to pay for services, and a client’s obligation to assist in determining the scope of the representation. Despite its strong fiduciary overtones, the relationship between an attorney and a client is nevertheless essentially a contractual relationship.

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19. This hypothetical assumes a forty-year-long career for each of Florida’s 70,000 attorneys and 250 cases per attorney per year.

20. In the year ending August 1, 2001, the Florida Bar spent $7,915,314 of the $12,859,897 it collected in dues on disciplinary matters. In the same time period, there were 38 disbarments, 155 suspensions and 57 public reprimands. The number of bar complaints filed was 9280 for the period, or one complaint for, approximately, every seven attorneys. The Florida Bar, updated August 1, 2001, as reported in Christopher C. Copeland, Disciplinary Proceedings, Practical Legal Issues in Florida: Issues and Answers, National Business Institute, Inc., 2001.


22. MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (2002).


25. THE FLA. BAR, FLORIDA CIVIL PRACTICE BEFORE TRIAL § 1.38 (6th ed. 2000) [hereinafter FLA. CIVIL PRACTICE BEFORE TRIAL]; see also, Gerlach v. Donnelly, 98 So. 2d
and both sides of the relationship have duties and obligations. The obligations of clients, other than for payment and the implied duties mentioned above, revolve primarily around selecting an attorney with whom they are comfortable. The word "vibe" is regularly used when selecting an attorney. A general feeling of competence and caring (and reasonableness of fees) is desirable, as well as a sense that honest communication will flow in both directions. Often, novice or distraught clients will look to the lawyer as much more than merely legal counsel and will transfer to counsel "dependencies for guides to conduct in strange circumstance, for nonlegal advice, and often for approval." A lawyer is not one's minister, psychic advisor or friend. A lawyer is no more than an advisor or advocate in legal matters.

26. The terms of the contractual relationship are governed by the express terms of the written agreement between the attorney and the client, insofar as they do not violate the Rules Regulating the Florida Bar themselves, the by-laws adopted thereunder, the Code of Professional Responsibility, Chapter 454 of the Florida Statutes, the Oath of Admission, case law which has developed and elucidated these rules, relevant opinions promulgated by the Professional Ethics Committee of the Florida Bar, and "the attorney is under a duty at all times to represent his client and handle his client’s affairs with the 'utmost degree of honesty, forthrightness, loyalty and fidelity.'" Smyrna Developers, 177 So. 2d at 18; see also Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970); Gerlach, 98 So. 2d at 498.

B. Potential Harms Caused by the Attorney's Mental Illness

From a client's perspective, an attorney may ruin a client's case in two ways, either through his or her negligence, or through no clearly provable fault of the attorney. In the case of clear attorney negligence, cases may be lost for the following reasons:

- The attorney lets the statute of limitations lapse.\(^{32}\) Failing alternative causes of action, rare in the type of straightforward cases making up the vast majority of legal work, the client's recourse against the hoped-for defendant simply no longer exists.\(^{33}\)
- The attorney fails to file responsive pleadings.\(^{34}\) If the attorney fails to file an answer to an adversary's complaint, the client is faced with a default judgment;\(^{35}\) failure to comply with discovery requests or court orders can similarly lead to default judgments.\(^{36}\) In these cases, recourse against the erstwhile adversaries is extremely difficult and may be barred by \textit{res judicata}.
- The attorney simply fails to prosecute diligently or intelligently.\(^{37}\) The risk of default is heightened if the attorney fails to appear for hearings or is persistently late, if the attorney neglects to prosecute the case, or if he or she forgets straightforward but vital elements

\(^{32}\) \textit{FLA. STAT.} § 95.011 (2001) (failing to initiate an action within the time limitations defined by the statute is a complete defense, regardless of the cause of the failure.)

A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

\textit{Id.}

\(^{33}\) \textit{Id.}

\(^{34}\) \textit{FLA. R. CIV. P.} 1.110(e). Failure to respond to a complaint is tantamount to a failure to deny. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading." \textit{Id.}

\(^{35}\) \textit{FED. R. CIV. P.} 55(a) (2000). "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." \textit{Id.}

\(^{36}\) \textit{See, e.g.}, \textit{FED. R. CIV. P.} 16(e), (b)(2)(C) (2000).

\(^{37}\) \textit{MODEL RULES OF PROF'L CONDUCT R.} 1.3.
such as service of process, *lis pendens* notices in property disputes, or notices of appearance.\(^{38}\)

Although the experienced client might have enough familiarity with the law to understand statutes of limitations and responsive pleadings, and thus know to ask appropriate questions of the attorney, the third scenario is largely beyond the client’s ability and control. In cases where attorney negligence is not at all clear, cases may be lost in three ways:

- On the merits;\(^{39}\)
- Through actions of the attorney where the client is unaware that these actions constitute malpractice;\(^{40}\)
- Through actions of the attorney where the client will be unable to show that the actions constitute malpractice.\(^{41}\)

Client recourse against the attorney in these cases is very limited. In the case of a loss on the merits, there would (or should) be no action.\(^{42}\) If the client is unaware of the malpractice, then there would be no recourse

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38. FLA. R. CIV. P. 1.070(j). Failure to serve a complaint on a defendant within the prescribed 120 days and absent “good cause or excusable neglect” will result in a court order for service within a prescribed time, “dismiss[al] [of] the action without prejudice,” or dismissal from the action of the defendant who was not timely served. *Id.* A notice of *lis pendens* preserves to litigants the status of property involved in litigation and “place[s] persons who may have an interest in the property on notice of a claim against . . . [said] property.” FLA. CIVIL PRACTICE BEFORE TRIAL, *supra* note 25, § 9-5. See FLA. STAT. § 48.23 (2001).

39. In the absence of malpractice, a loss on the merits is a loss based on the substantive issues of the case. The merits are the elements or grounds of a claim, the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, especially of procedure. BLACK’S LAW DICTIONARY 1003 (7th ed. 1999). A trial on the merits is a trial on the substantive issues of the case, as opposed to motion hearing or interlocutory matter. *Id.* at 1512.

40. If the client is unaware of the *Rules of Professional Conduct* and the *Rules of Civil Procedure* (*see*, *e.g.*, discussion *supra* notes 32–38), it follows that the client will be unaware of any violations of these Rules by an attorney.

41. Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999). “[I]n a claim for legal malpractice, a plaintiff must plead and prove the following elements: (1) the attorney’s employment; (2) the attorney’s neglect of a reasonable duty; and (3) the attorney’s negligence was the proximate cause of the client’s loss.” *Id.* See, *e.g.*, Companion v. McClain, 645 So. 2d 1109, 1110 (Fla. 5th Dist. Ct. App. 1994); Bolves v. Hullinger, 629 So. 2d 198, 200 (Fla. 5th Dist. Ct. App. 1993); Freeman v. Rubin, 318 So. 2d 540, 542 (Fla. 3d Dist. Ct. App. 1975); Weiner v. Moreno, 271 So. 2d 217, 219 (Fla. 3d Dist. Ct. App. 1973).

42. If a case is lost on the merits and there has been no malpractice by the attorney, the client would have no grounds for a malpractice claim.
because the client did not know there was a basis for a claim. The third scenario requires the client to show that, had the former attorney been sober, diligent, timely or sane, the client would not have lost the case. Such a suit involves, in essence, retrying the underlying case, while at the same time showing that the former attorney’s actions materially affected the outcome. This is expensive, often lengthy, and almost always unpleasant. Furthermore, chances of success may be low.

C. Protecting Oneself as the Client

How can clients protect themselves if they suspect their attorney is emotionally or mentally unstable? The answer to that lies in the comments

43. A basic requirement of recourse is the ability to state a cause of action. Fed. R. Civ. P. 12 (b)(6). If, as is postulated in supra note 40, the client is unaware of possible malpractice because of a lack of knowledge of procedural fundamentals, it follows that the client lacks the requisite knowledge to formulate a cause of action.

44. Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999). "In a claim for legal malpractice, the plaintiff must plead and prove following elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence was proximate cause of client's loss." Id. See, e.g., Companion v. McClain, 645 So. 2d 1109, 1110 (Fla. 5th Dist. Ct. App. 1994); Bolles v. Hullinger, 629 So. 2d 198, 200 (Fla. 5th Dist. Ct. App. 1993); Freeman v. Rubin, 318 So. 2d 540, 542 (Fla. 3d Dist. Ct. App. 1975); Weiner v. Moreno, 271 So. 2d 217, 219 (Fla. 3d Dist. Ct. App. 1973).

In a legal malpractice action, where a client alleges damage resulting from an attorney's failure to properly prosecute or defend an action, the client may be required to prove that he or she would have been successful in prosecuting or defending the underlying action, if not for the attorney's negligence or other improper conduct. This has resulted in placing the burden upon the client in a legal malpractice action to prove a "case within a case", and as it has been described, participate in a "trial within a trial."

Id.

46. Id.
[W]itnesses and records may be difficult to obtain or unavailable and memories may have faded by the time the legal malpractice action is tried. Legal malpractice actions are frequently predicated upon an attorney's failure to commence an underlying action within the time prescribed by the statute of limitations, making difficulties such as these, because of long lapses in time, significant probabilities. Similar problems exist where the plaintiff in the legal malpractice action was the defendant in the underlying action and is required to establish that there was a meritorious defense to the underlying action.

Id. See also Gautam v. De Luca, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987) (explaining that "it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action").
made by Harnett regarding the selection of the attorney.\footnote{Harnett, supra note 27, at 187–89.} Once the “vibe” is gone, the client needs to give very serious consideration to changing attorneys.\footnote{Id. at 187. “Trust is a key client attitude. Without it, the relationship is never good and the results are often suspect.” Id. at 189.} No reason need be given.\footnote{Id. at 187. “A client may discharge the attorney at any time, with or without cause, subject to liability for payment of any outstanding attorneys’ fees.” Id.} If the client pulls out of the attorney-client relationship prior to adjudication, the case could possibly be set back on track by a competent new attorney.\footnote{Model Rules of Professional Conduct R. 8.3 (2002) requires that attorneys report such misconduct, but no such requirement exists for clients. See id. However, for the reasons stated, this writer would urge clients to do so if the conduct of their attorney caused damage to them or to their case.}

If the client has something more specific than the loss of “vibe” or loss of trust, such as instances of attorney conduct that violate the law or the\footnote{See infra part III. Egregious conduct toward the court or in court may warrant judicial complaints.} Model Rules of Professional Conduct, the attorney should be reported to the appropriate authorities.\footnote{Commentary by Robert B. McKay, former Dean of New York University Law School, The Lawyer’s Professional Independence, An Ideal Revisited, John B. Davidson, Ed., American Bar Association, Tort and Insurance Practice Section, p. 35. The legal profession has been and remains remarkably free from external control. Somehow we have arrogated for ourselves the right of self-regulation from admission to law school… to the practice of law… and on to discipline as conducted by lawyers and judges, all of whom are law-trained. It’s a self-contained world. The public can take over if the profession overreaches itself… and if the profession does not regulate itself in ways that are satisfactory to the public… The obligation is to keep our house in order… We must make sure that we [regulate] in behalf of the public trust.} The state bar associations are by and large self-policing, but do not have a “police force” of any kind.\footnote{Although attorneys, and not clients, are bound by the Model Rules of Professional Conduct, this author believes that any audit of this kind would risk exposing aspects of the attorney-client relationship meant to remain protected by the confidentiality doctrines expressed in Model Rules of Professional Conduct R. 1.6, Canon 4 (Rev. 1984).} The very nature of attorney-client privilege prevents the bar from, for example, conducting audits of attorney conduct or attorney effectiveness among randomly selected clients.\footnote{See infra part II. Egregious conduct toward the court or in court may warrant judicial complaints.} Without client complaints regarding an attorney’s failures, the bar will never know.
III. THE ATTORNEY

The mentally disordered attorney may be psychotic, neurotic, alcoholic, drug dependent, merely emotionally unstable, or some combination of these. Alcoholism is widespread in this country and is said to be the third most serious public health problem, after cancer and heart disease. One third of all suicides involve alcohol as a contributory factor. Although problem drinkers account for about eight percent of the general population, alcoholism and other addictions will impair approximately fifteen percent of the members of the Florida Bar “at some time during their careers.” This figure does not include impairment due to mental illness that is not manifested through addiction, nor does it include the emotional problems that harm an attorney’s ability to practice effectively.

A. The Attorney’s Responsibility

An attorney who finds himself or herself sufficiently impaired by any of these factors has several responsibilities. On a personal level, the first responsibility should be to seek help. Professionally, the first responsibil-


Alcohol misuse is associated with considerable morbidity and mortality (100,000 deaths annually), social and legal problems, acts of violence, and accidents. Alcoholism is among the most common psychiatric disorders in the general population: the lifetime prevalence of alcohol dependence, the severe form of alcoholism, is 8 to 14 percent. The ratio of alcohol dependence to alcohol abuse is approximately two to one. The incidence of alcoholism is still more common in men, but it has been increasing in women, and the female to male ratio for alcohol dependence has narrowed to one to two. Nearly all alcoholics have a comorbid psychiatric disorder, most commonly anxiety and mood disorders in women and drug abuse and antisocial personality disorders in men.

Id.


57. Marx, supra note 18, at 14.

58. See id.

59. This author believes that an attorney has a duty to her or himself, to family, and to colleagues to seek to cure, treat, or at least minimize the potentially debilitating effects of impairment.
ity should be to the attorney’s clients, then to the attorney’s employers or partners, and finally, to the bar. Rule 1.16 (a)(2) of the Model Rules of Professional Conduct requires that an attorney terminate the attorney-client relationship if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” Failure to do so violates other rules, including the requirement of competence, candor to the tribunal, and “truthfulness in statements to others.” By not revealing the impairment, however, the lawyer runs the greater risk of misconduct and of being found out. The problem is thus doubled because, in addition to an illness or addiction to overcome, a misconduct violation may lead to sanctions fatal to the lawyer’s career.

This last thought calls attention to an important distinction: an attorney suffering from an addiction or a mental illness is not necessarily unable to practice law effectively. Neither the courts nor the bar examiners have ever been able to prove that fitness to practice is directly related to an absence of mental illness or addiction. Many attorneys with emotional problems are effective, sometimes excellent, attorneys; many with no diagnosable mental disorders are disciplined for misconduct. Unfitness to practice manifests itself primarily through conduct.

Cessation or suspension of practice because of mental disorder could be accomplished either voluntarily or involuntarily: the attorney may understand that he or she cannot continue without treatment, or may engage in actionable misconduct. The private nature of the former necessitates a dearth of research and statistics, but the latter and its consequences have

60. See Model Rules of Prof’l Conduct 1.16(a)(2) (Rev. 2002). Inability to effectively represent a client or failure to withdraw from representation when an attorney’s mental condition affects his or her capabilities are violations of the Model Rules. Id.

61. Failure to inform an employer of an incapacity affecting the ability to practice law may result in liability to the firm. See infra part IV.

62. R. Regulating Fla. Bar. 3-7.13. An attorney may seek inactive status during rehabilitation. Id.


69. Id.

70. Id.

71. Id. at 71.

72. Id. at 71.
produced a wealth of cases and articles. Attorney disciplinary proceedings are a matter of public record, and a Florida suspension or disbarment requires an appearance before the Supreme Court of Florida.

1. Voluntary Removal

Attorneys who, despite the nature of their illness or addiction, have the presence of mind and the courage to temporarily remove themselves from the practice of law may voluntarily seek treatment, apply to the bar for placement on inactive status, or seek hospitalization. Seeking hospitalization carries with it the risk of an involuntary adjudication of incompetence. Attorneys who voluntarily seek treatment are luckier today than they were just ten years ago. Several counseling organizations exist to assist drug or alcohol dependent professionals, and the stigma of mental illness, while still strong, is much less than it once was. Dramatic improvements in medications over the last decade permit many psychological problems to be treated on an outpatient basis. More serious problems may often be taken care of on an outpatient basis after an initial inpatient observation and treatment. The same is true for


74. Not only are the proceedings before the Supreme Court available through the Court Reporter and legal databases, but many of the sanctions imposed have a public aspect to them. For example, among the requirements of a suspension is that attorneys send a copy of the suspension to each of their clients. Marx, supra note 18, at 16.


77. Id. “A lawyer who has been adjudicated insane or mentally incompetent . . . under the Florida Mental Health Act shall be [placed on an inactive list] and shall refrain from the practice of law.” Id.

78. In addition to the various “Anonymous” groups such as Alcoholics Anonymous, Florida Lawyers Assistance (FLA) provides rehabilitation assistance. It is the organization to which the Supreme Court of Florida sends attorneys if rehabilitation is a condition of their probation. Marx, supra note 18, at 16.

79. “Fortunately, for almost 20 years the Florida Supreme Court has . . . looked favorably on a lawyer’s efforts at rehabilitation.” Id.

80. See text infra note 146.

81. Id.
addiction problems. Any absences due to inpatient treatment will often entail filing notices of unavailability in an attorney’s active cases,\textsuperscript{82} and will require informing all clients of the unavailability.\textsuperscript{83} Also, if the length of treatment will affect the requirement for expeditious litigation,\textsuperscript{84} cases may be assigned to other attorneys in the firm. Solo practitioners may file requests for substitution of counsel and transfer their cases to outside counsel.\textsuperscript{85} Explanation of the reasons for such a temporary retirement need not be made public.\textsuperscript{86} The \textit{Model Rules of Professional Conduct} require termination only in the case of material impairment of the ability to represent the client.\textsuperscript{87} Out-patient treatment and continuing in practice will not create a conflict unless the materiality requirement is met.\textsuperscript{88} An attorney should be entitled to no less privacy than an ordinary citizen, at least until the ability to practice is impaired.

Voluntary treatment carries with it the heavy burden of self discipline. The attorney should continue treatment as directed by his or her doctors and must have the wherewithal to return to treatment in case of a relapse. In-house counseling and support may not be available on a formal basis in most firms. However, candor with one’s employers may elicit informal support, an allowance for needed time off, and most importantly, the respect and gratitude of the partnership for coming forth with the concerns before a manifestation by misconduct.

\textsuperscript{82} The notice of unavailability is a legal nullity, but is regularly filed as a matter of courtesy. Said notices are often taken into consideration in setting hearing and docket dates, but not always.

Requests to change the time or place of oral argument are disfavored . . .[c]ounsel normally are expected to reschedule their other obligations to eliminate any conflicts. Nevertheless, counsel faced with an irreconcilable conflict may request a change in the date or time of oral argument. But they must make a showing of \textit{good cause} before the court will grant the requested change. [Circuit Rule 34-2]. Advance notice of unavailability: Counsel should apprise the court by letter \textit{before the argument date} is set if a potential conflict (e.g., a prolonged absence from the country) is known.

\textsuperscript{83} Failure to do so would violate \textit{Model Rules of Prof'L Conduct} R. 1.4 (1983-2001).

\textsuperscript{84} \textit{Model Rules of Prof'L Conduct} R. 3.2 (Rev. 1984).

\textsuperscript{85} \textit{Model Rules of Prof'L Conduct} R. 1.16 (Rev. 1984).

\textsuperscript{86} Nowhere in the \textit{Model Rules} is there a requirement that an attorney reveal personal matters to clients. Only when such personal matters may impair the ability of the attorney’s duties towards clients do the \textit{Model Rules} come into play. \textit{See id.} at 1.16(a)(2).

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.}
2. Inactive Bar Status

An attorney may also apply to the Bar for placement on inactive status. An attorney who has not been adjudicated incompetent, but who is incapable of practicing law because of physical or mental illness, may be classified as an inactive member. Once so classified, the lawyer is required to refrain from the practice of law even though there have been no allegations of misconduct. Proceedings regarding inactive members are processed under the Rules of Discipline in the same manner as proceedings involving misconduct. Inactive members may be reinstated upon petition to and approval by the Board of Governors, and if such a petition is rejected, it is subject to review by the Supreme Court of Florida.

To take such a step is certainly more drastic than the voluntary treatment described above. First, it prevents the attorney from practicing and, in so doing, takes away his or her livelihood. The inability to earn a living may have serious consequences on the attorney’s personal life, which may in turn exacerbate the very reasons he or she requested inactive status in the first place. Second, inactive status is a matter of public record. The attorney will have exposed the most private of concerns to the world at large, and be subject to greater scrutiny from the bar and colleagues than in the case of voluntary treatment. Finally, the attorney runs the risk of not being able to be reinstated.

89. R. Regulating Fla. Bar 3-7.13(a).
90. Id.
91. Id.
92. Id.
93. Id.
94. Attorney status is provided along with the attorney’s name on the Florida Bar’s website at http://www.flabar.org/.
95. Although the Florida Board of Bar Examiners asks bar applicants a series of questions relating to mental illness (see Coleman & Shellow, supra note 68), this author has found no requirement that practicing attorneys keep the Bar abreast of the status of their mental or physical health, as long as any problems remain below the materiality threshold in MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(2). Even compliance with Rule 1.16(a)(2)—voluntary withdrawal from representation—has no reporting requirement. In the absence of a reporting requirement, an attorney’s private concerns would remain private. There would be no scrutiny because no one would (or should) know that the attorney has sought treatment.
96. Reinstatement is by petition to and approval by the Board of Governors, subject to Supreme Court review. R. Regulating Fla. Bar 3-7.13.
B. Adjudication of Insanity or Mental Illness

Adjudication of insanity or mental illness will assure an attorney of inactive status. Even in the absence of misconduct, the courts will suspend the license of an attorney found to be mentally incompetent. In *The Florida Bar v. Worthington*, the court stated that Article II of the Florida Bar's Integration Rule requires that "a lawyer who has been adjudged mentally incompetent shall be suspended from the practice of law . . . subject to any rights he may have to apply for reinstatement at the proper time and upon proper showing." If the attorney waits until the illness or addiction manifests itself through misconduct, the costs might increase dramatically. Although mental illness may be considered a mitigating factor in the severity of the discipline meted out, the defense of NGRI (not guilty by reason of insanity) appears not to exist when applied to the rules of professional conduct. The various state bars appear to have applied the equivalent of a doctrine of strict liability regarding attorney compliance, especially regarding the handling of trust funds. Even innocent negligence resulting in no damage to any party may be grounds for suspension or disbarment.

The Supreme Court of Louisiana declared that "mental defects [which render] an [officer] of the [court] incapable of distinguishing between right

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97. A lawyer who has been adjudicated insane or mentally incompetent under the Florida Mental Health Act shall be placed on an inactive list and shall refrain from the practice of law. R. Regulating Fla. Bar 3-7.13(b).
98. 276 So. 2d 39 (Fla. 1973).
99. FLA. STAT. § 32 (1999). Superseded. The superseding provisions to the Bylaws Under the Integration Rule of the Florida Bar may be found in Chapter 2, Bylaws of the Florida Bar of the Rules Regulating the Florida Bar.
100. Worthington, 276 So. 2d at 39-40.
101. For example, "disbarment may be excessive discipline when mitigating evidence of mental or substance abuse problems cast doubt upon the intentional nature of the attorney's misconduct." Fla. Bar v. Condon, 632 So. 2d 70, 72 (Fla. 1994). See generally Sarno, supra note 4, at 995.
102. "[M]isuse of trust account funds is one of the most serious offenses a lawyer can commit and disbarment is normally presumed to be the appropriate discipline." Condon, 632 So. 2d at 71.
103. Mark Sturman, a former attorney in North Miami, opted for a voluntary resignation of five years rather than face possibly greater discipline. Controls over his firm's trust account were weak. Although all parties were paid, and there was no hint of deliberate impropriety, some parties were paid later than they should have been, which precipitated the original complaint and the Bar's subsequent action. From a presentation by Mr. Sturman at Nova Southeastern University Shepard Broad Law Center in April, 2002.
and wrong [may] exempt him from criminal responsibility... or even... civil liability for a tort.”\textsuperscript{104} However, such defects will not "exonerate a lawyer from the consequences of his professional misconduct."\textsuperscript{105} While it might “not be humane to punish by” incarceration a person unable to understand the wrongfulness of his acts, “it is quite another matter to permit such a person to continue as an officer of the court.”\textsuperscript{106} Unlike the considerations of punishment or restitution in criminal or civil matters, the interest and safety of the public are of the utmost importance in disbarment proceedings.\textsuperscript{107} The public has a right to protection from a lawyer who, regardless of the cause, exhibits a lack of integrity and common honesty.\textsuperscript{108}

A New Jersey court believed that the public also had a right to protection from attorneys who abused the potential promise of mitigated punishment for misconduct available to the mentally impaired.\textsuperscript{109} The court expressed concern over the growing number of attorneys charged with misconduct who admitted themselves to hospitals for treatment of depression or anxiety, and then used the excuse of temporary mental disorder as the cause of their misconduct.\textsuperscript{110}

C. Mitigation

Regardless of the form of mental disorder, any mitigation of discipline for misconduct will be contingent upon a showing of causation.\textsuperscript{111} The attorney will be required to demonstrate to the satisfaction of the court that, but for the mental disorder, the attorney would not have engaged in the misconduct.\textsuperscript{112} Further, an attorney must show that he or she is actively seeking treatment, or that he or she has been rehabilitated.\textsuperscript{113}

\textsuperscript{104} La. State Bar Ass’n v. Theard, 62 So. 2d 501, 503 (La. 1952) (citations omitted).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 504.
\textsuperscript{108} Id.
\textsuperscript{109} In re McManus, 381 A.2d 352, 353 n.1 (N.J. 1978).
\textsuperscript{110} Id.
\textsuperscript{111} 7 N.Y. JUR. 2d Attorneys at Law § 405 (1997). On the other hand, in Clement, the Florida Bar disbarred an attorney where it was shown that his "misconduct was not a direct result of his bipolar disorder." Fla. Bar v. Clement, 662 So. 2d 690, 700 (Fla. 1995).
\textsuperscript{112} Clement, 662 So. 2d at 700.
\textsuperscript{113} See, e.g., In re Berkowitz, 730 N.Y.S.2d 118, 121 (App. Div. 2001). Sanction of less than disbarment, given an attorney’s “expressed remorse, the absence of venal
Gregory G. Sarno, author of several articles dealing with mental illness and attorney discipline, divides his review of the relevant cases into five categories: alcoholism, drug dependence, neuroses, psychoses, and other disorders. Addiction to alcohol and other drug dependencies are often included in discussions of mental illness, in part because they are considered mental disorders in and of themselves, and also because they are often symptomatic of, or comorbid with, some other mental disorder.

1. Alcoholism

It has generally been held that alcoholism is not an excuse for unethical behavior, but courts differ as to whether it should be considered a mitigating factor in discipline. The courts must weigh the public policy factors of a disapproval of alcohol addiction against the counterproductive effect on the goal of sobriety which a lengthy suspension would have on the affected attorney.

Attorneys asserting alcoholism as a defense to charges of professional misconduct have been met with varying degrees of success. Punishments have ranged from disbarment to reprimand, the severity predicated more on the nature of the misconduct than on its cause. For example, Thomas intent . . . [and the] commencement of psychotherapy to combat his depression." Id. at 121; In re Milloy, 571 N.W.2d 39 (Minn. 1997).

[Psychological disability will mitigate discipline if the attorney proves by clear and convincing evidence that five factors are met: (1) the attorney has a severe psychological problem; (2) the psychological problem was the cause of the misconduct; (3) the attorney is undergoing treatment and making progress; (4) the recovery has arrested the misconduct; and (5) the misconduct is not apt to recur. Milloy, 571 N.W.2d at 46 (citing In re Weyrich, 339 N.W.2d 274, 279 (Minn. 1983)).

114. Sarno, supra note 4, § 1.
117. Id. See, e.g., People ex. rel. 11. State Bar Ass'n v. Tracey, 145 N.E. 665, 666 (III. 1924).
118. Sarno, supra note 4, § 9(a); see, e.g., In re Houtchens, 555 S.W.2d 24 (Mo. 1977) (mitigation considered); In re Laury, 706 P.2d 935 (Or. 1985) (mitigation not considered).
119. See Sarno, supra note 4, § 2.
120. Id.
122. See, e.g., La. State Bar Ass'n v. Mundy, 423 So. 2d 1126 (La. 1982); In re Johnson, 322 N.W.2d 616 (Minn. 1982).
Larkin was suspended by the Florida Bar for failing to appear at the continuation of a trial, and for neglecting other legal matters, after it was shown that the misconduct was “totally from [the] effects of alcohol abuse.” His willingness to seek rehabilitation resulted in a suspension of ninety-one days and until such time as rehabilitation was established to the satisfaction of the Bar. Similarly, Ray Hill and William Blalock were indefinitely suspended from practice until restitution was made for the fees collected from the clients who were affected by their misconduct as well as for the cost of the proceedings against them, and until they were able to convince the court of their rehabilitation. In New Jersey, Mr. Gilliam’s misappropriation of client funds was grounds for disbarment, given that his comprehension and will power were not sufficiently impaired by his alcohol addiction to excuse his misconduct.

2. Drug Dependence

Drug dependence as a defense to misconduct has been met with responses similar to those found in cases where alcoholism was asserted as a defense, except there are no reported cases of discipline being reduced to mere censure or reprimand. There is no evidence to indicate if this is because drug-dependent attorneys commit more egregious ethical violations than their alcoholic counterparts, whether the courts have less sympathy for drug abuse than for alcohol abuse, or if the courts believe that rehabilitation from drug dependency is more arduous than recovery from alcohol dependency. In any event, the least severe punishment rendered against an attorney for misconduct linked to drug abuse was suspension for a definite time. However, disbarment is not uncommon. Remorse, rehabilitation,

123. Fla. Bar v. Larkin, 420 So. 2d 1080, 1081 (Fla. 1982).
124. Id.
125. In re Hill, 298 So. 2d 161, 163 (Fla. 1974).
127. Hill, 298 So. 2d at 163.
129. Sarno, supra note 4, § 9.
130. Id.
131. Disbarment was the proper discipline for an attorney who was convicted for drug abuse, misappropriated client’s funds, neglected his duties as executor of estate, and ignored orders of probate court and court hearing disciplinary matter. Disciplinary Counsel v. Connaughton, 665 N.E.2d 675, 675–76 (Ohio 1996); “Addiction to . . . drugs will not excuse conduct on the part of the attorney warranting disbarment.” In re Abney, 447 S.E.2d 848, 850 (S.C. 1994); In re Schlesinger, 607 N.Y.S.2d 462 (App. Div. 1994) (disbarring attorney,
full restitution, and a willingness to help others recover from addiction will assist the attorney in mitigating punishment. Alan Larkin avoided the presumptive sanction of disbarment for misappropriation of client funds in this way. The Supreme Court of Florida overruled the Florida Bar’s request for disbarment and held that Larkin’s misconduct was directly caused by his addiction. It noted that his remorse, subsequent rehabilitation and his efforts to help others militated in his favor, and reduced the proposed punishment to a three-year suspension.

3. Anxiety and Dissociative Disorders

Neurosis is no longer considered a distinct category of mental disorder by the American Psychiatric Association due to the absence of consensus regarding its meaning. The classification has been replaced by several categories, including affective, anxiety, somatoform, dissociative, and psychosexual disorders. However, in lay terms, “neurotics” can be

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132. See, e.g., In re Berkowitz, 730 N.Y.S.2d 118, 121 (App. Div. 2001); In re Milloy, 571 N.W.2d 39 (Minn. 1997).
133. Larkin, 420 So. 2d at 1081.
134. Id.
135. Id.
136. Sarno, supra note 4, § 2.
137. “Some clinicians limit the term to its descriptive meaning [as indicating a painful symptom in someone with intact reality testing] whereas others also include the concept of a specific etiological process,” an unconscious conflict arousing anxiety, leading to maladaptive use of defense mechanisms, and resulting in symptom formation. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 9 (3d ed. 1980).
138. Sarno, supra note 4, § 2.

Mood disorders (affective disorders): A group of heterogeneous, typically recurrent illnesses including unipolar (depressive) and bipolar (manic-depressive) disorders that are characterized by pervasive mood disturbances, psychomotor dysfunction, and vegetative symptoms; [Anxiety disorders: Excessive, almost daily, anxiety and worry for greater than six months about a number of activities or events.] Somatoform disorders: A group of psychiatric disorders characterized by physical symptoms that suggest but are not fully explained by a physical disorder and that cause significant distress or interfere with social, occupational, or other functioning; Dissociative disorders: Failure to integrate one’s memories, perceptions, identity, or consciousness normally; Psychosexual disorders include sexual dysfunctions, the most common form of psychosexual disorder seen by the practicing physician; gender identity disorders; and paraphilias.
distinguished from "psychotics" by their general ability to maintain insight and to be less affected in their day-to-day living. Attorneys invoking one of the neuroses as a defense or a mitigating factor to their professional misconduct have been disbarred or suspended, sometimes indefinitely, sometimes until rehabilitated. Probationary terms often accompany a suspension.

4. Psychosis

A diagnosis of psychosis would at one time have been the death knell for an attorney's career. Traditionally, the term psychosis has been used to denote mental disorders so severe that the affected individual is out of touch with reality. Psychoses are profound, sweeping mental disorders characterized by severe disturbances of perception, thought processes, feelings and behavior, and often include a retreat from, or perversion of, social relationships and a disintegration of the personality structure. Fortunately, recent advances in psychiatric treatment and medication allow some psychotics to lead much improved lives, and the promise of more complete recoveries may be possible as research continues in this rapidly developing field. Other than disbarment or suspension, further types of discipline for attorneys claiming psychosis as a mitigating factor in...
misconduct have included the ability to continue practicing subject to compliance with the recommendation of voluntary psychiatric aid and consultation for several years. 145

5. Other Disorders

Sarno’s final category of mental disorder is labeled “Other Disorders,” and includes “burn-out” and emotional distress brought on by trauma or by severe family or financial difficulties. 146 Suffering from intense emotional upheaval, precipitated by the dissolution of his marriage, saved Val Patarini from disbarment after he hired a “muscle man” to threaten his ex-spouse and inflict harm on his ex-spouse’s counsel. 147 Although the court seriously considered disbarment, it found that the attorney’s long, unblemished record combined with the severity of the distress caused by the divorce was sufficient to preclude a more serious punishment than the one-year suspension it imposed. 148

Actual misconduct or findings of misconduct are not always a prerequisite to suspension. 149 In 1973, the Florida Bar temporarily suspended M. C. Scofield for being intoxicated in open court, denying ever having seen clients who had given him a retainer, and pulling a pistol on clients. 150 The court stopped short of finding him guilty of specific acts of misconduct, perhaps as a kindness in view of his advanced age 151 and perceived senility. 152 In making its decision, the court relied on the Integration Rule, 153 which provides that an attorney not adjudicated incompetent or accused of misconduct shall be placed on the inactive list (suspended) when it is shown that he or she is incapable of practicing law. 154 If inability to practice is suspected by conduct unrelated to the practice of law, the court may order a psychiatric evaluation with an emphasis on determining the attorney’s competence. 155 Failure to comply with a request

145. Id.
146. Sarno, supra note 4, § 7.
148. Id.
150. Scofield, 287 So. 2d at 285.
151. Id. at 287. He was admitted to the Florida Bar in 1916.
152. Id.
153. R. Regulating Fla. Bar, 11.02.
154. Scofield, 287 So. 2d at 286.
155. Hughes, 504 So. 2d at 751.
for such an evaluation will result in suspension until the evaluation is performed.\textsuperscript{156} In \textit{Florida Bar re Arthur},\textsuperscript{157} attorney’s petition for her removal from suspension was denied while she still refused to comply with the evaluation request.\textsuperscript{158}

6. The Effect of the ADA in Attorney Misconduct Proceedings

Attempts by some attorneys to invoke the ADA\textsuperscript{159} as precluding punishment for mental disorders have failed.\textsuperscript{160} In \textit{The Florida Bar v. Clement},\textsuperscript{161} the court held that, although Clement’s bipolar disorder was a disability under the ADA, the ADA did not prevent the court from sanctioning Clement for misconduct.\textsuperscript{162} Furthermore, the court found that the misconduct was not caused by Clement’s disorder and that ADA protection was therefore not available.\textsuperscript{163} The court went on to point out that, even if the disorder were the direct cause of Clement’s misconduct, and given that Clement suffered from a recognized disability, he was not a “qualified” individual under the definition of the ADA.\textsuperscript{164} The court held that Clement was not qualified to be an attorney “because he committed serious misconduct and reasonable accommodations were not possible.”\textsuperscript{165} Three years later, the Supreme Court of Ohio cited \textit{Clement} in finding that the ADA does not preclude disbarment of an attorney with bipolar disorder for misappropriation of client funds.\textsuperscript{166}

Malpractice insurance is unlikely to protect the mentally disordered attorney from the pecuniary consequences of misconduct.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} 22 Fla. L. Weekly at S551.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} Americans with Disabilities Act, 42 U.S.C. §§ 12101–12131 (2002).
\item \textsuperscript{160} The first of these cases was \textit{In re Wolfram}, 7 Nat’l Disability Law Rep. (NDLR) 45, 149 (Cal. Bar Ct. Aug. 22, 1995). \textit{See also State ex rel. Okla. Bar Ass’n v. Busch}, 919 P.2d 1114 (Okla. 1996); \textit{Fla. Bar v. Clement}, 662 So. 2d 690 (Fla. 1995).
\item \textsuperscript{161} \textit{Id.} at 699–700.
\item \textsuperscript{162} \textit{Id.} at 700.
\item \textsuperscript{163} \textit{Id.} at 700.
\item \textsuperscript{164} \textit{Id. See} 42 U.S.C. § 12131. The ADA requires that employers make “‘reasonable modification’” for individuals who are otherwise qualified to perform the demands of a certain job (in the case of mental disorder, an employer may grant the employee permission to seek treatment during working hours). \textit{Clement}, 662 So. 2d at 700.
\item \textsuperscript{165} \textit{Clement}, 662 So. 2d at 700.
\item \textsuperscript{166} Cincinnati Bar Ass’n v. Komarek, 702 N.E.2d 62, 67 (Ohio 1998).
\item \textsuperscript{167} \textit{Prasad v. Allstate Ins. Co.}, 644 So. 2d 992 (Fla. 1994). Intentional act exclusions are typical for all insurance policies, and professional liability insurance is no exception. \textit{Id.}
caused by mental illness is generally viewed by insurance carriers even more narrowly than it is viewed by the Bar.\textsuperscript{168} Any act which the attorney commits is considered intentional, and the concept of mens rea is inapplicable to the insurance adjuster's analysis.\textsuperscript{169}

IV. THE ATTORNEY'S FIRM

Mental disorders may have severe consequences for attorneys and clients, but the structure of the \textit{Model Rules} and their progeny is such that

The Supreme Court of Florida held that the actions of the insane are not "accidents" and are thus not exempt from intentional act exclusions. \textit{Id.}

We hold that an injury inflicted by an insured who is psychotic is not an 'accident' and is an intentional act within the meaning of the policy provisions at issue if the insured intends to cause the injury even if the insured's conduct is the result of the insured's mental condition.

\textit{Id.} at 992.

[A] second line of authority concludes that an injury inflicted by an insane person is intentional if the actor understands the physical nature and consequences of the act. This is true even if the actor is unable to distinguish right from wrong. This second line of authority is embraced by a number of other state supreme courts. \textit{See} Shelter Mut. Ins. Co. \textit{v.} Williams, 248 Kan. 17, 804 P.2d 1374 (Kan. 1991) (an injury inflicted by an insane who is mentally ill is intentional within the meaning of the policy provision excluding coverage for intentional acts of the insured if the insured understands the nature and quality of his acts and intends to cause the injury, even though the insured may have been unable to recognize his conduct as wrongful); \ldots\ Economy Preferred Ins. Co. \textit{v.} Mass, 242 Neb. 842, 497 N.W.2d 6 (Neb. 1993) (shooter who was found not guilty in criminal trial by reason of insanity still "intended" the results of his actions because he knew he was shooting a gun; however, if he thought he was peeling banana at the time he fired the gun, insanity might preclude application of intentional injury exclusion clause); Johnson \textit{v.} Ins. Co. of N. Am., 350 S.E.2d 616 (Va. 1986) (coverage of mentally ill insured who shot and injured friend was precluded by intentional injury exclusion clause where insured was aware of fact that he was shooting friend, but believed God ordered him to do so); Municipal Mutual Ins. Co. \textit{v.} Mangus, 443 S.E.2d 455 (W.Va. 1994) (coverage under an intentional injury exclusion clause may be denied when the one who commits a criminal act has a minimal awareness of the nature of his or her act; the test for criminal insanity is appropriate only in a criminal trial and has no applicability to the interpretation of this issue). We agree with the latter line of authority because we find that a person who is considered insane may still be capable of entertaining the intent to commit certain acts, even if that intent is the consequence of a delusion or affliction. For instance, an insane or mentally ill person can still make plans to harm another, going so far as to obtain the weapon to be used and to seek out the victim. By any stretch of the imagination, the person "intended" the act against the victim, even if the person did not fully understand what he or she was doing at the time of the crime.

\textit{Id.} at 994–95.

168. \textit{See} Prasad, 644 So. 2d at 995.
169. \textit{Id.}
the attorney's firm will not be immune from repercussions either. The following section discusses the far-reaching consequences of mental disorder and misconduct for the attorney’s employers or partners.

Will the misconduct of the mentally disordered attorney give rise to liability on the part of his or her employer? The firm employing the mentally disordered has two duties in this regard. The Rules of Professional Conduct provide that law firms must have in place managerial controls reasonably designed to give “reasonable assurance that all lawyers in the firm conform to the Rules.” Secondly, a lawyer having knowledge that another lawyer has committed a violation of the rules which is to “a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects [is required to] inform the appropriate professional authority.” In other words, law firms are responsible for catching, reporting, and correcting the misconduct of their associates and partners, and failure to do so may lead to sanctions against the partners.

The use of the word “reasonable” in Chapter Five of the Model Rules implies a recognition that no amount of office procedures could catch every instance of misconduct. A determined attorney could conceal misconduct for quite some time without giving rise to a Rule 5.1 violation on the part of the firm. There have, nevertheless, been limits to the court’s willingness to interpret what is reasonable. In a case cited three times for the same issue, Florida’s Court of Appeal for the Fifth District held that “presumed access of a partner [in a law firm] to confidential information imputes knowledge of that information to others in [the] firm,” implying that only deliberate efforts at concealment by the wrongdoer will excuse a firm’s lack of knowledge and thus, shield it from liability.

171. MODEL RULES OF PROF’L CONDUCT R. 8.3 (a) (1983).
172. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (Rev. 1984). “A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Id.
174. Id. at 1053.
175. Id. Courts appear to be split on this issue. For example, Florida and Illinois impute knowledge to partners, but South Carolina requires actual knowledge. See Sears, Roebuck & Co., 374 So. 2d at 1051. The Bankruptcy Court for the Northern District of Illinois, in In re Georgou, 145 B.R. 36 (Bankr. N.D.Ill. 1992), cited the Illinois Partnership Act as controlling the vicarious liability of partners in a law firm: §13, Partnership Bound by Wrongful Partner’s Act states as follows:

[Relevant Legal References and Citations]
A. The Attorney’s Duty to Mitigate

The comments to Florida’s Rule 4-5.1, modeled after the ABA’s rule 5.1, state that “[t]he supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.” 176 The comments add that, “if a supervising lawyer knows that a subordinate [has] misrepresented a matter to an opposing party in negotiation, [both] the supervisor [and] the subordinate ha[ve] a duty to correct the resulting misunderstanding.” 177 Thus, beyond the duty to report misconduct, which will be discussed below, it should be clear that supervisory attorneys and, by extension, law firms, have an affirmative duty to mitigate the damage to the client and to the judicial process as a whole.

In this author’s opinion, there is also an additional duty found nowhere in the rules. It is a duty toward a coworker that is both professional and humanitarian. In the event a coworker exhibits signs of mental disorder, but has not yet committed misconduct, it should be incumbent upon the partners to recommend counseling and to assist to the extent possible. Such assistance may include reassigning the attorney’s cases so as to put them out of reach of the potential for damage through misconduct. It may also include bar or firm sponsored rehabilitation programs, or simply mandating time off to seek treatment. No matter what form it may take, or however painful, early intervention is vastly preferable to the harm caused to all parties by preventable misconduct.

There are some nuances to the extent that liability will accrue to a law firm for the misconduct of one of its members. While the general rule is that

Where, by any wrongful act or omission of any partner acting in the ordinary course of business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefore to the same extent as the partner so acting or omitting to act.

Id. South Carolina emphasized the need for actual knowledge of wrongdoing in In re Anonymous Member of South Carolina Bar, 552 S.E.2d 10 (S.C. 2001). It cited Rule 5.1(c)(1) and (2) of the state’s Rules of Professional Conduct. These sections provide: (c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id. 176. FLA. RULES OF PROF’L CONDUCT R. 4-5.1 cmt. (1988).
177. Id.
a "firm is liable for the attorney/drafter's misconduct to the same extent as he is," an agency relationship must exist between the attorney and the firm in order for the firm to incur liability. Moreover, liability will not extend beyond the attorney if the attorney is "of counsel" and not held out as acting on behalf of the firm. This holds true even if the attorney's name is on the firm letterhead. Attempts by plaintiffs to extend "of counsel" liability to the firm on the theory of agency by estoppel have also failed. Recognizing generally accepted practices in partnership law, some courts have stated that firms may not be liable for the misconduct of attorneys acting outside of the scope of their authority. In *David v. Schwarzwald, Robiner, Wolf, & Rock Co.*, the Ohio Eighth District Court of Appeals held that the determination of the attorney's scope of authority was a question for the finder of fact, and refused to hold the respondent law firm liable for the actions of its employee, pending further investigation.

**B. Duty to Report Another Attorney's Misconduct**

While there is some latitude and interpretation permitted concerning the duty to prevent misconduct, there is none at all regarding its reporting once misconduct has been found. Cases such as *Himmel* and *Skolnick v.*
Altheimer & Gray\textsuperscript{187} are an indication of the gravity with which the courts regard the reporting of misconduct. The courts have consistently held that the requirement to report misconduct is absolute,\textsuperscript{188} leaving attorneys to wander about in a minefield where reporting is required, but where the determination of what constitutes misconduct remains open for interpretation.

Comments to the \textit{Model Rules of Professional Conduct} Rule 8.3 read as follows:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.\textsuperscript{189}

Generally speaking, the type of misconduct to be reported is no surprise: misappropriation of client funds, bribery, blatant violations of confidentiality, fraud, forgery of a client’s signature, and so on.\textsuperscript{190} Difficulties arise when the misconduct is not so clearly defined,\textsuperscript{191} where the reporting

\textsuperscript{187} 730 N.E.2d 4 (Ill. 2000).

\textsuperscript{188} "Ten states follow the Model Code of Professional Responsibility’s formulation that requires reporting of all ethical violations including technical infractions. (Alabama, Colorado, Georgia, Hawaii, Iowa, Illinois, Louisiana, Nebraska, Ohio and Vermont). The majority of states including Texas, follow the Model Rules of Professional Conduct, which requires a substantial violation." Bruce A. Campbell, \textit{To Squeal or Not to Squeal: A Thinking Lawyer’s Guide to Reporting Lawyer Misconduct}, 1 FLA. COASTAL L.J. 265, 268 n.12 (1999) [hereinafter Campbell]; see also Skolnick, 730 N.E.2d at 14.

\textsuperscript{189} \textit{MODEL RULES OF PROF’L CONDUCT} R. 8.3 cmt. (2002).

\textsuperscript{190} Campbell, \textit{supra} note 188, at 274.

\textsuperscript{191} For example, in \textit{Attorney U v. The Mississippi Bar}, 678 So. 2d 963, 972 (Miss. 1996), the Supreme Court of Mississippi held that U did not have sufficient knowledge of S’s misconduct to require him to report it. In so holding, the court stated:

\begin{quote}
\textit{[t]hat standard must be an objective one, however, not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects. Id.}
\end{quote}

Additionally, Bruce Campbell states:
attorney notices a pattern of incidents that as a group are reportable but individually are not,192 and particularly, where the reporting attorney must make a judgment call and knows he or she could be mistaken.193 This is further exacerbated by the feeling that reporting is “squealing.”194 To quote Campbell: “Few rules . . . stir more emotion and potential controversy than the ‘squealer’ or ‘snitch’ rule. . . . [t]he ‘schoolyard’ refrain of tattletale still rings . . . in our minds.”195 Tattletale or not, failure to “squeal” can be costly. A Texas attorney was suspended for thirty-nine months for violating “rules regarding candor toward the tribunal [for failing] to report another lawyer’s misconduct.”196

If one covers for a partner at a hearing once because the partner was still intoxicated from the previous night’s activities, does the intoxication raise a substantial question as to the partner’s fitness? If one covers for the partner a second, a third, or a fourth time? Who decides when conduct becomes reportable misconduct? An attorney confronted with such a situation may consult the state’s ethics committee for guidance,197 but the final determination rests with the state’s highest court of appeal.198 If the ethics committee and the court differ in an interpretation, the court prevails and the attorney may face sanctions despite his reliance on the ethics committee’s opinion.199

See Nebraska Ethics Op. 89-4; “Because knowledge in the reporting rule means more than a suspicion, a lawyer need not report mere suspicions of code violations.” Id. New Mexico’s position is that the mandatory obligation to report occurs “when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information.” New Mexico Ethics Op. 1988-8 (undated). The Committee on Professional Ethics of the Association of the Bar of the City of New York Bar states that a “reporting lawyer must be in possession of facts that clearly establish a violation of the disciplinary rules.” New York City Ethics, Op. 1990-3 (1990). The District of Columbia Bar Ass’n has concluded that a lawyer is compelled to report “only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts.” District of Columbia Bar, Op. 246 (Revised 1994).

Campbell, supra note 188, at 277.
192. See Attorney U, 678 So. 2d at 972.
193. Id.
194. Campbell, supra note 188, at 265.
195. Id.
197. See, generally, Campbell, supra note 188; Attorney U, 678 So. 2d at 963.
198. Id.
199. Id.
C. Risks of Reporting

Reporting misconduct is a two-edged sword. Those who fail to report run afoul of the state’s disciplinary authorities.\textsuperscript{200} Those who report run the risk of expulsion from the partnership, and with it, attendant loss of work, financial hardship, and dubious reputation as a whistleblower.\textsuperscript{201} Although a fiduciary duty exists between partners in a law firm, such a duty “does not encompass a duty to remain partners.”\textsuperscript{202} Despite arguments that such an extension of a partner’s duty is necessary to prevent retaliation against a partner who in good faith reports suspected misconduct, the court in Bohatch held that “[j]ust as a partner can be expelled . . . over disagreements about firm policy . . . a partner can be expelled for accusing another partner of [misconduct] without subjecting the partnership to tort damages.”\textsuperscript{203} The court’s majority understood the dissent’s concern that “retaliation against a partner . . . virtually assures that others will not take these appropriate steps in the future,”\textsuperscript{204} but stated that a lawyer’s “duties sometimes necessitate difficult decisions . . .,” and that “[t]he fact that the ethical duty to report may create an irreparable schism between partners [does not] excuse the failure to report.”\textsuperscript{205}

A mentally disordered attorney may be in a difficult professional position, but failure to take action on his or her own behalf places partners in a more difficult position. The partners will likely agonize over decisions forced on them when the illness or addiction reaches the point where it impairs the ability to practice. The firm may, as mentioned above, suggest counseling or threaten expulsion, but once the illness manifests itself by misconduct, it will be forced to report him or her. The interpersonal difficulties that such action poses may well be fatal to the survival of the firm, especially in a small partnership where the principals share something more than just a professional relationship.

The partnership discussed in the opening anecdote chose to do nothing. It stood by, wringing its collective hands, as Pfenning’s cases dissolved into a collection of nonactionable disputes, whose statutes of limitations had long since passed. There is plenty of blame to go around here. Although

\textsuperscript{200} The watershed case here is In re Himmel, 533 N.E.2d 790 (Ill. 1988). See discussion of this and other issues related to “whistleblowing” in Campbell, supra note 188.
\textsuperscript{201} See Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).
\textsuperscript{202} Id. at 546.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 547 (quoting Spector, J., dissenting).
\textsuperscript{205} Bohatch, 977 S.W.2d at 547.
Pfenning had ultimate responsibility for his conduct, illness or not, the inaction of his partners exacerbated an arguably correctible situation. Their inaction ruined them and, more importantly, ruined the cases of their clients and made a mockery of the judicial process.

V. CONCLUSION

Although the incidence of malpractice due to mental illness is statistically not high, such a revelation is of small comfort to those clients forever prevented from pursuing their claims because of unanticipated attorney misconduct. Of the three parties to an attorney’s mental illness—the client, the attorney, and the law firm—the client is least able to protect him or herself, and the most likely to suffer damage in the professional setting.

Measures in place to arrest lawyer misconduct before it has irretrievable consequences are necessarily inadequate to guarantee complete security for clients. Nevertheless, clients should have some responsibility for their own cases. This responsibility should never be abdicated in the expectation that the attorney is some form of savior. Greater client vigilance in selecting, monitoring, and where necessary, abandoning an attorney may have prevented many unhappy endings and malpractice suits.

The second party in the trial is the attorney. The justice system will be well served if the disordered attorney is able to seek help or withdraw from practice before the consequences of misconduct damage reputations and lives. This is an impossible step for some attorneys, and is where the third party comes into play.

It is understood that attorneys have a duty to abide by the Rules of Professional Conduct, and to seek treatment or removal when they are unable to do so. It is also clear that no attorney works in utter isolation—even solo practitioners generally have family or friends. The attorney’s employers or partners are the next line of defense, and they have a moral and ethical duty to protect the interests of all of their clients. They also have a duty to protect their mentally disordered colleague from further damage to self and to the profession.

206. See discussion infra notes 18–19.
207. Id.
208. See infra part III.
209. Id.
Mental illness rarely gives rise to the same measure of compassion as physical illness or damage. A diagnosis of influenza or a broken leg in a partner elicits compassion; a diagnosis of paranoid schizophrenia may still elicit suspicion, fear, and flight. This must change for two reasons: moral and pragmatic. The moral question is deeply personal, but the pragmatic question points straight to the Rules of Professional Responsibility. Failure to address the existence of a mental disorder in a colleague leads to disaster for clients, for the attorney, and quite rightly, for the law firm. The spineless response of Pfenning’s partners hurt them all.

Appropriate action by the law firm at the first substantial hint of a problem or misconduct may be painful, but the consequences of cowardice are so great that a de facto decision to do nothing is impossible to justify.
Florida's Slip-and-Fall Law, Abandoned and Re-Established: *Owens v. Publix Supermarkets, Inc.* Versus Florida's Legislature: A Tug of War on Who Bears the Burden of Proof

**Venus Zilieris**

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Supervisors in the United States annually spend $450 million to defend slip-and-fall claims. In Florida, slip-and-fall cases are one of the most common types of premises liability suits. Under Florida law, premises owners, such as supermarkets, owe a duty toward invitees, such as shoppers, to exercise reasonable care in the safe maintenance of their premises. Traditionally, invitees who slipped and fell on a transitory foreign substance, such as a banana peel, were required to prove that the premises owner had actual or constructive knowledge of the dangerous condition.  

Constructive knowledge could be established by circumstantial evidence, such as the length of time a substance had been on the floor, or that spills occurred frequently such that the premises owner should have known about them. Thus, the invitee bore the burden of proof. However, the court's holding in *Owens v. Publix Supermarkets, Inc.*, changed more than thirty years of Florida law by eliminating the need to prove actual or constructive knowledge of the dangerous condition.

3. "Invitee" generally refers to "someone who entered the premises of another for purposes connected with the business of the owner or occupier." *Id.* at 563 (citations omitted).
5. Transitory foreign substance is referred to as "any liquid or solid substance, item, or object located where it does not belong . . . [a] substance found . . . where it is not supposed to be found." *Id.* at 317 n.1 (citing BLACK'S LAW DICTIONARY 660 (7th ed. 1999)).
7. 6 SAWAYA, supra note 2, § 10.12, at 598.
9. 802 So. 2d 315 (Fla. 2001).
constructive knowledge and shifting the burden of proof from the invitee to the premises owner. As a result of this ruling, the Florida Retail Federation, representing 6000 retailers statewide, began damage control and formed the Banana Peel Coalition in seeking legislative redress. In 2002, Florida’s legislature unanimously passed Senate Bill 1946, also known as the Banana Peel Legislation, creating section 768.0710 of the Florida Statutes, that will codify the burden of proof in slip-and-fall cases. The bill, in part, retained the decision in Owens by eliminating the requirement of actual and constructive knowledge. However, the burden of proof essentially shifted back from the premises owner to the invitee, thus undoing the Supreme Court of Florida’s ruling in Owens.

This article will examine the Owens decision, its effect, and the effect of Senate Bill 1946. Beginning with Part II, this article will review Florida’s old slip-and-fall law by examining the general rule, elements, burdens of proof, and applicable liability theories. Part III will present an overview of the facts and the court’s analysis in Owens, outlining how the court came to its decision. Part IV will examine the impact of Owens by discussing how the ruling has changed Florida’s slip-and-fall law regarding the duties of both the plaintiff shopper and the defendant supermarket. Part V will examine the business community’s response to Owens, and the Florida Legislature’s approval of Senate Bill 1946. Part VI will examine the effect of Senate Bill 1946 by discussing whether the plaintiff shopper and the defendant supermarket have been equally placed regarding the burden of proof. Part VII will conclude that although Senate Bill 1946 has settled the burden of proof in slip-and-fall actions, the plaintiff shopper remains in a disadvantaged position when compared to that of the defendant supermarket, because the plaintiff shopper’s burden of proof remains great and arguably difficult to satisfy. Further, in accordance with the Supreme Court of Florida’s notation in Owens, the defendant supermarket is in a superior

15. See id. § 1(2)(b).
16. See id. § 1(2).
position because it has immediate access to its own reports, records, and in today's supermarkets, surveillance of the premises.\textsuperscript{17}

II. FLORIDA'S SLIP-AND-FALL LAW BEFORE OWENS V. PUBLIX SUPERMARKETS, INC.

Prior to the court's decision in Owens, Florida's slip-and-fall law was clear: in order for a premises owner to be liable for an invitee's injuries, the injured invitee had to prove the premises owner had actual or constructive knowledge of the dangerous condition.\textsuperscript{18}

A. Actual and Constructive Knowledge Required in Slip-and-Fall Actions

Under Florida law, a premises owner owes a legal duty to exercise reasonable care in the maintenance of his or her premises against dangerous conditions.\textsuperscript{19} The exercise of reasonable care toward an invitee includes:

\begin{quote}
[T]wo legal duties . . . . First . . . [the premises owner shall] ascertain that the premises are reasonably safe for invitees [including] . . . reasonable care to learn of (i.e. to acquire actual knowledge as to) the existence of any dangerous conditions on the premises. Secondly, the premises [owner] has a . . . legal duty to use reasonable care to protect invitees from dangerous conditions of which the [premises owner] has actual knowledge.\textsuperscript{20}
\end{quote}

If a premises owner had actual knowledge of a dangerous condition, such as a slippery substance on the floor, then the premises owner had a legal duty to remedy the condition.\textsuperscript{21} If a premises owner lacked actual knowledge of a slippery substance on the floor, but the substance was there for a sufficient length of time, the premises owner could be charged with constructive knowledge.\textsuperscript{22} Thus, premises owners were required to conduct timely inspections in order to discover those dangerous conditions of which they did not actually know.\textsuperscript{23} Constructive knowledge could be established

\begin{itemize}
\item \textsuperscript{17} Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 330 (Fla. 2001).
\item \textsuperscript{18} Id. at 320.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 214 (Fla. 5th Dist. Ct. App. 1989) (citations omitted).
\item \textsuperscript{21} 6 SAWAYA, supra note 2, § 10.6, at 566.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\end{itemize}
Sufficient circumstantial evidence shows either, "(1) . . . the dangerous condition existed for such a length of time that in the exercise of ordinary care, the [premises owner] should have known of the condition . . . or (2) . . . the condition occurred with regularity and was therefore foreseeable."

In the former situation, whether the length of time a transitory foreign substance remained on the floor was sufficient to establish constructive knowledge depended on the facts and circumstances of each case. However, the general guideline has been fifteen to twenty minutes. Typically, the length of time would be determined by the slip-and-fall plaintiff's ability to describe the condition and appearance of the substance. However, Florida appellate courts have differed on whether the description was sufficient to charge the premises owner with constructive knowledge. The Third District has held that the description of transitory foreign substance as "'very dirty,' 'trampled,' 'containing skid marks, scuff marks' . . . 'chewed up,'" is sufficient circumstantial evidence to establish a jury question of constructive knowledge. For example, evidence of water around a bag of peas lying on the floor in the frozen food section could be enough for a jury to conclude that the water was a result of the bag of peas thawing out over some time, and thus the defendant supermarket was put on notice of the dangerous condition. Still, other Florida appellate courts have held the description of the substance, without more, as insufficient circumstantial evidence to charge the defendant supermarket with constructive knowledge. For example, if a shopper slipped and fell on a piece of cake on the floor and the shopper could not describe the condition of the

25. Brooks, 560 So. 2d at 341 (emphasis added) (citations omitted).
26. 6 Sawaya, supra note 2, § 10.13, at 603 (citations omitted).
28. Woods, 621 So. 2d at 711.
29. Id.
30. Teate, 524 So. 2d at 1061.
cake to suggest its length of time on the floor, the issue of constructive knowledge would be precluded from the jury.\textsuperscript{32} Yet, the Second District has held that, even if the description of the transitory foreign substance was available to suggest its length of time on the floor, the description was still insufficient circumstantial evidence.\textsuperscript{33}

Florida courts have also held that constructive knowledge may be established under the theory of foreseeability.\textsuperscript{34} Foreseeability is based on the idea that when an occurrence or spill occurs with regularity, the occurrence is foreseeable, and the premises owner is charged with a legal duty to reasonably inspect the premises so as to determine whether a substance has been spilled.\textsuperscript{35} For example, the Second District noted that, in a supermarket setting, it is foreseeable that shoppers will handle fruits and vegetables, will open packages, and will drop parts of those items on the floor.\textsuperscript{36} Because such occurrences are foreseeable, the supermarket owes a duty toward shoppers to reasonably inspect the floors in order to discover the presence of hazards, such as slippery substances.\textsuperscript{37} Reasonable inspection of the floors would prevent a shopper from falling and sustaining injury.\textsuperscript{38}

\textbf{B. Negligent Mode of Operation Theory}

The negligent mode of operation theory is an alternative method available to meet the requirement of constructive knowledge for injured parties who slipped and fell as a result of a transitory foreign substance on the floor.\textsuperscript{39} This method is most crucial in cases where the timespan in which a transitory foreign substance had been on the floor cannot be

\textsuperscript{32} Sanchez, 700 So. 2d at 406.
\textsuperscript{34} Marcotte, 553 So. 2d at 215; Cain v. Brown, 569 So. 2d 771, 772 (Fla. 4th Dist. Ct. App. 1990); Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075, 1077 (Fla. 3d Dist. Ct. App. 1983); Amended Petitioners Initial Brief at 14–15, Owens (No. 95, 667); 6 SAWAYA, supra note 2, § 10.13, at 602.
\textsuperscript{35} 6 SAWAYA, supra note 2, § 10.13, at 603.
\textsuperscript{36} Cain, 569 So. 2d at 772.
\textsuperscript{37} 6 SAWAYA, supra note 2, § 10.13, at 602.
\textsuperscript{38} Id.
\textsuperscript{39} John H. Hickey, Slip and Fall Cases: Alternative Theories of Liability or Using the Negligent Method of Operation and Negligent Maintenance Theories, ATLA ANNUAL CONVENTION REFERENCE MATERIALS, MOTOR VEHICLE COLLISION, HIGHWAY, AND PREMISES LIABILITY SECTION, 779 (July 2001).
established. Rather, liability rests on the idea that the premises owner created a dangerous condition through his or her own repeated conduct.

A negligence action based on the mode of operation theory requires the injured party to prove "1) either the method of operation is inherently dangerous, or the particular operation is being conducted in a negligent manner; and 2) the [dangerous] condition of the floor was created as a result of the negligent method of operation."

One commentator explained the application of the two-prong test in a supermarket setting. If grocery items are being served in open bins and are likely to drop on the floor and thus cause a fall, the method of operation is inherently dangerous and thus the first prong of the test is satisfied. If the injured party could then show that the grocery item on the floor was in close proximity to where it was shelved or being served, the second prong of the test should also be satisfied. However, Florida courts have been reluctant to accept the negligent method of operation theory in a supermarket setting, primarily because displays are not inherently dangerous.

The negligent mode of operation theory has been more easily applied to public amusement places. More than fifty years ago, the Supreme Court of Florida was faced with the application of this theory in *Wells v. Palm Beach Kennel Club*. In that case, large groups of individuals went to the racetrack. The racetrack sold bottled beverages but failed to provide any bins to dispose of the empty bottles. The patrons threw the empty bottles on the floor. A patron tripped and fell on an empty bottle in one of the

40. Id.
41. Id.
42. 6 SAWAYA, supra note 2, § 10.13, at 603–04.
43. Hickey, supra note 39, at 3.
44. Id.
45. Id.
47. Wells v. Palm Beach Kennel Club, 35 So. 2d 720, 721 (Fla. 1948).
48. 35 So. 2d 720 (Fla. 1948)
49. Id.
50. Id.
51. Id.
aisles and sued the racetrack.\textsuperscript{52} Based on the negligent mode of operation theory, the court held it was for the jury to decide whether the racetrack was negligent in the manner in which it sold its bottled beverages.\textsuperscript{53} Thus, the issue for the jury was whether the racetrack’s failure to provide garbage bins for the disposal of its empty bottles created a dangerous condition.\textsuperscript{54} If a jury found that the racetrack implemented a negligent method of operation, then it follows that it was the creator of the dangerous condition.\textsuperscript{55} Therefore, constructive knowledge is not an issue.\textsuperscript{56}

III. OWENS V. PUBLIX SUPERMARKETS, INC.

A. Owens v. Publix Supermarkets, Inc.: A Plaintiff’s Attorney’s Dream Come True

Because the Supreme Court of Florida was faced with the issue of whether the condition of a transitory foreign substance in a slip-and-fall action is, alone, sufficient to charge the premises owner with constructive knowledge in two cases,\textsuperscript{57} the court consolidated these cases into one opinion.\textsuperscript{58}

1. Facts of Owens v. Publix Supermarkets, Inc.

Evelyn Owens ("Owens") was a part-time employee of Publix Supermarkets, Inc.\textsuperscript{59} After finishing her day at work, Owens decided to do some grocery shopping.\textsuperscript{60} While walking down an aisle and looking at the shelved merchandise,\textsuperscript{61} Owens slipped and fell.\textsuperscript{62} At trial, Owens testified

\begin{itemize}
\item \textsuperscript{52}Id.
\item \textsuperscript{53}Wells, 35 So. 2d at 721.
\item \textsuperscript{54}Id.
\item \textsuperscript{55}Id.
\item \textsuperscript{56}Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 323 (Fla. 2001).
\item \textsuperscript{57}Owens v. Publix Supermarkets, Inc., 729 So. 2d 449 (Fla. 5th Dist. Ct. App. 1999) (en banc); Soriano v. B & B Cash Grocery Stores, Inc., 757 So. 2d 514 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{58}Owens, 802 So. 2d at 317 n.2.
\item \textsuperscript{59}Amended Petitioners Initial Brief on Merits at 1, Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001) (No. 95, 667).
\item \textsuperscript{60}Id.
\item \textsuperscript{61}Id.
\item \textsuperscript{62}Owens, 802 So. 2d at 317.
\end{itemize}
that she did not see what caused her to slip and fall. However, a witness in close proximity to Owens at the time of the incident testified that Owens had slipped on a small piece of slightly discolored banana. Although the witness could not testify as to the length of time the banana had been on the floor, she was able to describe it as "a piece of banana without the peel . . . about an inch or longer and 'kind of mashed . . . where she hit it . . . kind of squashed down.' . . . It wasn't black, but it was dark." It was undisputed by Publix that Owens was an invitee at the time of her slip-and-fall incident. As a result of Owens's fall, she was transported to the hospital, treated and released, but was unable to work for several weeks. Owens provided two theories charging Publix liable for her injuries: "[1] the length of time the substance was on the floor [and] . . . [2] foreseeability and failure to warn." Through discovery it was revealed that, on average, Publix experienced one or more slip-and-falls per month, in the nine months prior to Owens's incident. On the day of trial, but before presenting testimony, Owens asked the court's permission for a jury demonstration to show the length of time it would take a small piece of fresh peeled banana to discolor. Owens reasoned that, "'[the] banana . . . must have been sitting there for a while, because it takes more than a few minutes for it to turn brown.'" Nevertheless, the court denied the request because the "[demonstration] didn't matter: There was insufficient evidence to show Publix was liable."

At the end of Owens's case-in-chief, Publix moved for a directed verdict. Publix argued Owens failed to present evidence that it had actual or constructive knowledge of the banana peel on the floor. The trial court relied on *Bates v. Winn-Dixie Supermarkets, Inc.*, because the facts in that

63. *Id.*
64. Amended Petitioners Initial Brief at 1, *Owens* (No. 95, 667).
65. *Owens*, 802 So. 2d at 317.
66. Amended Petitioners Initial Brief at 1, *Owens* (No. 95, 667).
67. *Id.*
68. *Id.* at 4.
69. *Id.*
70. *Owens*, 802 So. 2d at 318 n.3.
71. Amended Petitioners Initial Brief at 6, *Owens* (No. 95, 667).
72. *Court's Banana-Peel Act Is No Joke, supra note 10.*
74. *Owens*, 802 So. 2d at 318.
75. *Id.*
76. 182 So. 2d 309 (Fla. 2d Dist. Ct. App. 1966).
case were similar to the facts in *Owens*.\textsuperscript{77} In that case, a shopper also fell on a banana peel described as "'dark,' 'over ripe,' 'black,' 'old,' and 'nasty looking.'"\textsuperscript{78} The *Bates* court ruled in favor of the premises owner, holding that the color and condition of the banana peel, as the only evidence, would require a jury to impermissibly stack inferences.\textsuperscript{79} In other words, the jury would be required to "stack a second inference (because of the color of the item the premises owner should have known of its existence) upon the first inference (the item was not that color when it was placed on the floor)."\textsuperscript{80} Thus, applying the holding in *Bates* to *Owens*, the trial court concluded that the condition of the banana was insufficient evidence to hold Publix liable.\textsuperscript{81} Therefore, the trial court granted the directed verdict in favor of Publix.\textsuperscript{82} Owens appealed.\textsuperscript{83}

On appeal, the Fifth District reversed the directed verdict but upon rehearing en banc, it affirmed the trial court’s decision.\textsuperscript{84} In doing so, the Fifth District framed the issue to be: "'Does the fact that a piece of discolored banana is found on the floor give rise to an inference that [it] had been there long enough to give this critical constructive knowledge?'"\textsuperscript{85} The court’s response was "'it depends on the other circumstances of the case.'"\textsuperscript{86} Reviewing the circumstances in *Owens*, the Fifth District pointed out two possible theories as to how the banana got on the floor.\textsuperscript{87} First, the aging of the banana may have occurred on the floor; second, the aging of the banana may have occurred in the store’s fruit bin from which a shopper took it and gave it to an infant being pushed in a shopping cart, who then dropped it on the floor just prior to Owens walking down the aisle in which it lay.\textsuperscript{88} In
order for Publix to be charged with constructive knowledge, the Fifth District would have had to agree with the former theory and not the latter.  

The Fifth District held that because there were two possible theories as to how the banana got on the floor, Owens bore the burden of proof in regards to where the aging of the banana actually occurred. In reaching its conclusion, the Fifth District relied on Montgomery v. Florida Jitney Jungle Stores, Inc., where the plaintiff provided the court with “additional circumstances” to establish the length of time the transitory foreign substance was on the floor. These additional circumstances included 1) the time span the plaintiff was in the area of the fall prior to the accident; 2) whether other individuals were in the area of the fall; 3) whether store employees swept the floor during that period; 4) whether store employees were in the area of the fall; and 5) the description of the transitory foreign substance. Thus, when comparing the evidence in that case with the Owens’s case, the Fifth District, in a 6-2 vote, concluded that there were no “additional circumstances” to justify the inference that Publix had constructive knowledge.

Judge Sharp, in his dissenting opinion, agreed that the Montgomery court was not faced with the issue of whether the condition of the item, by itself, was sufficient to create a jury question on constructive knowledge. However, Judge Sharp stated that the decision in Montgomery should not be extended to include the proposition that additional evidence is needed other than the condition of the substance for an injured party to withstand a directed verdict. In Owens, Judge Sharp stated that Owens presented sufficient evidence to charge Publix with constructive knowledge even though Owens did not see what caused her fall. More specifically, Judge Sharp pointed out that there was sufficient circumstantial evidence because there was a witness who testified that she was 1) in close proximity to where Owens fell; 2) saw what caused Owens’s fall; 3) described the substance as a

89. Id.
90. Id.
91. 281 So. 2d 302 (Fla. 1973).
92. Owens, 802 So. 2d at 318 (citing Montgomery, 281 So. 2d at 306).
93. Montgomery, 281 So. 2d at 303. In Montgomery, the transitory foreign substance was collard leaves that the slip-and-fall plaintiff described as “old, wilted and dirty looking.” Id.
95. Id. at 452.
96. Id.
97. Id. at 451.
piece of banana that was discolored, kind of mushed, squashed down, and dark; and 4) that it looked like it was there for a while.98


Elvia Soriano ("Soriano") was a frequent shopper at B & B Cash Grocery Stores, Inc. ("B & B Grocery").100 After finishing her Sunday afternoon of shopping at B & B Grocery, she proceeded to the store's exit, and while pushing her shopping cart, she slipped and fell to the ground.101 After a store manager helped Soriano get up, he pointed out that she had slipped and fallen on a banana peel and scraped it off the sole of her shoe.102 Soriano described the piece of banana peel as "brown with very little yellow on it,"103 and stated, "it looked like a rotten banana because of the condition of the peel."104 At trial, Soriano was able to testify to the description of the banana peel but unable to testify to the length of time the banana peel was on the floor.105 In an attempt to rebut the inference that the banana peel was rotten because it was on the floor for a sufficient length of time, B & B's store manager, Jose Alvarez ("Alvarez"), testified "the store sold only clean, nice, yellow bananas... not... darkened, browned out bananas, since customers generally do not like to buy brown bananas."106 Alvarez also testified that, based on his knowledge, the length of time a banana takes to turn from yellow to brown is one to two days.107 However, he also stated that it was not uncommon for shoppers to eat the store's grocery items while shopping and then drop some of the item on the floor.108 Further, he testified "that he considere[d] a banana on the floor a hazard... [and] something he would want picked up 'immediately.'"109

98. Id.
101. Id.
102. Id.
103. Id.
104. Id. However, it was revealed that Soriano did not see the banana nor did she know how long it had been on the floor. Brief of Petitioners at 1 n.1, Soriano (No. 96, 235).
105. Id. at 2.
106. Id.
107. Id.
108. Id.
Although B & B Grocery required employees to make an hourly inspection of the store’s premises and fill out a report after each inspection, Alvarez admitted that these reports were only completed at one time—rather than hourly or even daily—by the assistant manager on duty on Saturday nights. Furthermore, none of the reports ever indicated that any substances or debris were found on the floor. Based on Alvarez’s admission, these reports were being falsified. Apparently, falsified reports were common practice among all B & B Grocery stores. Although an assistant manager filled out an accident report on the day of Soriano’s accident, the report failed to describe the color of the banana or indicate whether an employee had been in the area of the accident shortly before Soriano fell. This information might have made a critical difference in the outcome of Soriano’s case. As a result of the accident, Soriano sustained a fractured kneecap and sued B & B Grocery for her injury based on two theories.

Soriano alleged, first, that B & B Grocery had constructive knowledge that the banana peel was on the floor because it was there for a sufficient length of time, and second, that B & B Grocery had a negligent method of operation. The trial court granted a directed verdict for B & B Grocery and the Fourth District affirmed. The Fourth District held that Soriano’s contention that B & B Grocery had constructive knowledge was based upon an impermissible stacking of inferences. Also, the Fourth District held that the condition of the banana peel, by itself, was insufficient evidence. Rather, the Fourth District held that additional evidence like “cart tracks, footprints, dirt, or even grit,” was necessary to establish that the banana peel had been on the floor for a sufficient length of time necessary to charge B & B Grocery with constructive knowledge. As to Soriano’s contention that B & B Grocery was negligent in its mode of operation, the Fourth District rejected the application of this theory to a supermarket setting as an

110. Id. at 3.
111. Id. at 3–4.
112. Id. at 4.
113. Id.
114. Brief of Petitioners at 5, Soriano (No. 96,235).
115. Id. at 6.
116. Id.
117. Id.
118. Id.
119. Brief of Petitioners at 6–7, Soriano (No. 96,235).
120. Id. at 7.
121. Id.
alternative to the traditional requirement of establishing actual or constructive knowledge in a slip-and-fall action.\textsuperscript{122}

\section*{B. Analysis of Owens: An Overview of the Law as it Was}

In analyzing Owens, the Supreme Court of Florida's forty-two page opinion began with an overview of Florida's slip-and-fall law by first targeting the required element of actual or constructive knowledge as related to transitory foreign substance cases,\textsuperscript{123} followed by a review of the mode of operation theory,\textsuperscript{124} and ending with an examination of what other jurisdictions have done.\textsuperscript{125}

1. Plaintiffs Traditionally Required to Prove Actual or Constructive Knowledge

In the Supreme Court of Florida's decision to eliminate the required element of actual or constructive knowledge, the court first considered the type of circumstantial evidence that is sufficient to create a jury issue.\textsuperscript{126} In doing so, the court referred to its decision almost thirty years ago in Montgomery v. Fla. Jitney Jungle Stores, Inc.\textsuperscript{127}

In that case, the plaintiff had slipped and fallen on a collard leaf.\textsuperscript{128} The evidence presented was that

[1] she had been in the area of the fall for fifteen minutes before falling; [2] no other shoppers were in the area when she fell; [3] no employee swept the floor while she was there; [4] two employees were nearby when the accident occurred; [5] the collard leaf upon which she slipped was old, wilted and dirty looking; and [6] water was on the floor where she fell.\textsuperscript{129}

In Montgomery, the Supreme Court of Florida was not faced with the issue of whether the condition of the collard leaf, by itself, was enough to

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 320 (Fla. 2001).
\item \textsuperscript{124} \textit{Id.} at 323.
\item \textsuperscript{125} \textit{Id.} at 324.
\item \textsuperscript{126} \textit{Id.} at 320.
\item \textsuperscript{127} \textit{Id.} (citing Montgomery v. Fla. Jitney Jungle Stores, Inc., 281 So. 2d 302, 303 (Fla. 1973)).
\item \textsuperscript{128} Montgomery, 281 So. 2d at 303.
\item \textsuperscript{129} Owens, 802 So. 2d at 321 (citing Montgomery, 281 So. 2d at 303).
\end{itemize}
charge the premises owner with constructive knowledge. Rather, the Montgomery court noted that circumstantial evidence could be used, and because there was conflicting evidence as to the timespan the collard leaf was on the floor, the issue was for the trier of fact.

Acknowledging the unclear standard set by the court in Montgomery, Florida appellate courts were left with little guidance. To illustrate the effect of the ruling in Montgomery, the court cited to those appellate courts that have held the description of the transitory foreign substance as sufficient. For example, the First District held in favor of the injured party who described the substance as partially melted butter with lumps in it. Likewise, the Third District held the description of a substance as "'very dirty,' 'trampled,' 'containing skid marks, scuff marks' and 'chewed up,'" and "ice cream [that] was thawed, dirty, and splattered," as sufficient. The Fourth District has also agreed that the description of the substance was enough where the plaintiff described the substance to look like "'gunky, dirty and wet and black,'" or where the plaintiff described the substance as "'old, nasty' and 'looked liked [it] had been there for a quite a while.'" Hence, if a plaintiff were unable to provide the trial court with at least the description of the transitory foreign substance so as to establish the length of time it was on the floor, appellate courts have affirmed the trial court's ruling in favor of the premises owner.

130. Id. (citing Owens, 729 So. 2d at 451 (Sharp, J., dissenting)).
131. Id. (citing Montgomery, 281 So. 2d at 303).
132. Id. (stating that since Montgomery, Florida appellate courts have been split on whether the condition and description of the transitory foreign substance are sufficient circumstantial evidence to create a jury issue of constructive knowledge).
133. Id.
135. Id. (quoting Woods v. Winn Dixie Stores, Inc., 621 So. 2d 710, 710–11 (Fla. 3d Dist. Ct. App. 1993)).
136. Id. (citing Camina v. Parliament Ins., Co., 417 So. 2d 1093, 1094 (Fla. 3d Dist. Ct. App. 1982)).
137. Id. (quoting Ress v. X-tra Super Food Ctrs., Inc., 616 So. 2d 110, 110–11 (Fla. 4th Dist. Ct. App. 1993)).
138. Id. (quoting Washington v. Pic-N-Pay Supermarket, Inc., 453 So. 2d 508, 509 (Fla. 4th Dist. Ct. App. 1984)).
139. Owens, 802 So. 2d at 321–22. The following cases were provided as illustrations where the issue of constructive knowledge was precluded from the jury because the plaintiff could not describe the substance:
Conversely, the court noted that even in those cases where the plaintiff offered some evidence of the transitory foreign substance's aging or deterioration, one appellate court nevertheless affirmed the trial court's holding in favor of the premises owner. To illustrate this decision, the court utilized the Bates case relied on by the majorities in Owens and Soriano. In that case, the shopper slipped and fell on a banana peel, just as in Owens and Soriano. As evidence of the supermarket's constructive knowledge, the shopper offered the description of the banana peel as "'dark, over ripe, black, old and nasty looking.'" Even with the description of the banana peel as evidence of its aging, the Second District affirmed the trial court's holding in favor of the supermarket because the inference drawn from the color and condition of the banana (i.e. the length of time it was on the floor) would first have to be drawn from the inference that it was not already deteriorated when it first fell to the floor. The Second District stated, "'that this is the type of mental gymnastics [that is] prohibited...since the latter inference...is not to the exclusion of all other reasonable inferences.'"

However, that holding was rejected by the Third District in Teate v. Winn-Dixie Stores, Inc., where the shopper provided the description of the substance on the floor so as to charge the supermarket with constructive knowledge. In Teate, the shopper

Publix Super Market, Inc. v. Sanchez, 700 So. 2d 405, 406 (Fla. 3d Dist. Ct. App. 1997) (a piece of cake was on the floor, but there was no evidence as to how long it had been on the floor); Wal-Mart Stores, Inc. v. King, 592 So. 2d 705, 707 (Fla. 5th Dist. Ct. App. 1991) (slippery, oily, clear substance, but no evidence of "signs of age, such as skid marks, smudges, or the like"); Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 214 (Fla. 5th Dist. Ct. App. 1989) (slippery substance, but no evidence as to how or when it got on the floor, or the length of time it was there before the fall); Winn Dixie Stores, Inc. v. Gaines, 542 So. 2d 432, 432 (Fla. 4th Dist. Ct. App. 1989) (loose dried rice and beans, but no evidence that they appeared old or were ground into the floor or crushed, and no evidence of broken packages).

Id. at 322.  
140. Id. at 322 (citing Bates v. Winn Dixie Supermarkets, Inc., 182 So. 2d 309, 310 (Fla. 2d Dist. Ct. App. 1966)).  
141. Id.  
142. Id.  
143. Id. (quoting Bates, 182 So. 2d at 309).  
144. Id. (citing Bates, 182 So. 2d at 311).  
145. Owens, 802 So. 2d at 322 (quoting Bates, 182 So. 2d at 311) (citations omitted) (emphasis added).  
146. 542 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1988).  
147. Owens, 802 So. 2d at 322 (citing Teate v. Winn Dixie Stores, Inc., 542 So. 2d 1060, 1061 (Fla. 3d Dist. Ct. App. 1988)).
Zilieris presented evidence that there was some water on the floor around the peas... contend[ing] that the water was there because the peas had been on the floor for some time and had thawed. The jury could believe this and find that the peas had been on the floor for a sufficient time to put Winn Dixie on notice of the dangerous condition. Winn Dixie counter[ed] that the water was a result of "permafrost" or ice crystals on the bag of peas that instantly melted when it hit the floor. The jury could choose to believe this argument, find the peas had fallen perhaps only seconds before the fall, and decide there was insufficient notice.

Because there was conflicting evidence as to how the water around the peas resulted, the Third District held the issue was for the trier of fact to determine and rejected the supermarket's contention that the jury would be impermissibly stacking inferences. To explain its holding, the Third District stated that the existence of the water on the floor was for the jury to decide based on the direct evidence offered by the plaintiff shopper and the defendant supermarket. Based on that direct evidence, the jury was only required to make one inference.

In reviewing the required element of actual and constructive knowledge, the court recognized that case law has created constructive knowledge as the linchpin of liability. Thus, an injured party's likeliness of surviving a directed verdict or summary judgment depended on the injured party's ability to actually see the condition of the transitory foreign substance that caused his or her fall.

2. Negligent Mode of Operation Theory Historically Restricted from the Supermarket Setting

In reviewing the mode of operation theory as an alternative to the required element of constructive knowledge, the court recognized it had never extended the mode of operation theory to a supermarket setting. Rather, the court explained that this theory had been more easily applied to business premises such as racetracks where a large number of people

148. Id. (quoting Teate, 542 So. 2d at 1061) (alteration in original).
149. Id.
150. Id. at 322 (citing Teate, 542 So. 2d at 1061).
151. Id. at 323.
152. Owens, 802 So. 2d at 323.
153. Id.
154. Id.
congregate by invitation.\textsuperscript{155} In such a scenario, the court stated that by the very nature of the business or its mode of operation, the required element of constructive knowledge is irrelevant.\textsuperscript{156} “Although [the] court has never extended the mode of operation theory to a supermarket . . . setting, neither has th[e] [c]ourt . . . rejected [it].”\textsuperscript{157} The court reflected back to its decision over fifty years ago in Carls Markets, Inc. v. Meyer,\textsuperscript{158} where it stated that if the premises owner was the creator of the dangerous condition, logic dictates that the creator had knowledge of the dangerous condition, and would thus be liable for the creation of it, as was the case in Wells.\textsuperscript{159}

3. Overview of Other Jurisdictional Approaches in Slip-and-Fall Cases

Struggling with what to make of Florida’s precedence on constructive knowledge in slip-and-fall cases, the Supreme Court of Florida examined how other jurisdictions have handled transitory foreign substance actions.\textsuperscript{160} The court noted that other jurisdictions, such as Kansas, have acknowledged

\begin{itemize}
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id. In Wells, the court rejected the racetrack’s contention that the patron failed to prove actual or constructive knowledge holding that a heightened standard of reasonable care is applied to places of public amusement where thousands of people are invited, and the premises owner sells bottled beverages and fails to provide a place for their disposal causing the bottles to be thrown anywhere on the premises. Therefore, the failure to provide a place of disposal for the empty bottles charged the premises owner with negligence as to its mode of operation. Owens, 802 So. 2d at 323 (citing Wells, 35 So. 2d at 721 (citations omitted in original)).
  \item \textsuperscript{157} Owens, 802 So. 2d at 323.
  \item \textsuperscript{158} 69 So. 2d 789 (Fla. 1953).
  \item \textsuperscript{159} Owens, 802 So. 2d at 324 (citing Carls Mkts., Inc. v. Meyer, 69 So. 2d 789, 791 (Fla. 1953)). The court referred to the following listed examples rejecting the negligent mode of operation theory in supermarket settings: Rowe v. Winn-Dixie Stores, Inc., 714 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1998) (rejecting the application of the negligent mode of operation theory to a supermarket holding that the supermarket was not the creator of a dangerous condition by having an unattended seafood salad display where another customer spilled the salad causing another shopper to slip-and-fall); Publix Super Mkt., Inc. v. Sanchez, 700 So. 2d 405, 406 (Fla. 3d Dist. Ct. App. 1997) (rejecting application of negligent mode of operation theory to supermarket where supermarket had an unattended cake sample table, against store policy, at time plaintiff slipped and fell); Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831, 833–34 (Fla. 1st Dist. Ct. App. 1991) (rejecting the application of negligent mode of operation theory to supermarket that implemented a “cookie program” giving out free cookies to children where plaintiff alleged supermarket’s program was inherently dangerous causing plaintiff’s slip-and-fall on what was described as a small piece of cookie).
  \item \textsuperscript{160} Owens, 802 So. 2d at 324.
\end{itemize}
the principles of premises liability as traditional, thus requiring "a broad [modern] trend toward liberalizing the rules restricting recovery by one injured on the premises of another."\textsuperscript{161} In taking a modern approach, the court stated that other jurisdictions first identified historical observations and policy considerations.\textsuperscript{162} Borrowing from other jurisdictions, the Supreme Court of Florida provided four policy considerations to justify a liberal trend away from the traditional principles of premises liability law:

[1] the evolution of modern merchandise marketing techniques, including self-service, have increased the likelihood of spills and breaks occurring.\textsuperscript{163} [2] A store adopting the self-service technique should reasonably anticipate certain types of accidents and therefore is already on notice . . . .\textsuperscript{164} [3] Because the self-service technique allows for lower overhead and greater profits, the businesses that adopt [this] . . . technique are in a better position to prevent and attend to the risks involved.\textsuperscript{165} [4] It is unfair to place the burden on the customer to establish actual or constructive notice of the condition on the part of the premises owner or operator when the defendant is in control of its own premises and the evidence on which notice is based.\textsuperscript{166}

Giving great weight to these policy considerations, the Supreme Court of Florida stated that other jurisdictions have, as a result, shifted the burden of proof from the injured party to the premises owner, and extended the mode of operation theory to a supermarket setting in transitory foreign substance actions.\textsuperscript{167} The Supreme Court of Florida found holdings in other jurisdictions justifying the burden-shifting analysis based on the premises owner being in a superior position to know of how the dangerous condition

\textsuperscript{161} Id. at 324–25 (quoting Jackson v. K-Mart Corp., 840 P.2d 463, 467 (Kan. 1992) (citations omitted)).
\textsuperscript{162} Id. at 325.
\textsuperscript{163} Id. (citing Safeway Stores, Inc. v. Smith, 658 P.2d 255, 257 (Colo. 1983); Gonzales v. Winn Dixie La., Inc., 326 So. 2d 486, 488 (La. 1976)).
\textsuperscript{164} Id. (citing Chiara v. Fry’s Food Stores of Ariz., Inc., 733 P.2d 283, 286 (Ariz. 1987)).
\textsuperscript{165} Owens, 802 So. 2d at 325 (citing Gump v. Wal-Mart Stores, Inc., 5 P.3d 418, 434 (Haw. Ct. App. 1999), aff’d in part, rev’d in part, 5 P.3d 407 (Haw. 2000) (citations omitted in original); Pimentel v. Roundup Co., 666 P.2d 888, 891 (Wash. 1983) (citations omitted in original)).
\textsuperscript{166} Id. at 325 (citing Wollerman v. Grand Union Stores, Inc., 221 A.2d 513, 514–15 (N.J. 1966)).
\textsuperscript{167} Id.
was created when compared to the position of customers. In addition, self-service stores, by their very nature, display items on the shelves that may likely be dropped by customers. Therefore, stores are required to minimize that risk through reasonable care by conducting timely inspections and cleanups. This consideration, as the Owens court stated, lead the Supreme Court of Louisiana to create a rebuttable presumption of negligence, thus shifting the burden of proof from the customer to the storeowner to prove that it was not negligent. Even if the dangerous condition was the created by a third party, the Supreme Court of Louisiana still held that the burden was on the storeowner to prove that it exercised reasonable care by conducting timely inspections, because in supermarket settings, it is foreseeable that spills and breaks will occur. However, subsequent to the Supreme Court of Louisiana’s holding, the Louisiana Legislature codified “the requirement of actual or constructive knowledge into [the state’s] statute,” thus overruling that court’s ruling.

Likewise, the Supreme Court of Colorado was in accordance with Louisiana and New Jersey in recognizing an exception to the requirement of constructive knowledge in cases where the store’s mode of operation created dangerous conditions, and were thus foreseeable. Referring to Safeway Stores, Inc. v. Smith, the Supreme Court of Florida stated that the Supreme Court of Colorado found that in supermarkets a customer’s access to shelved items carries with it the increased risk of spills and breaks, thus creating a dangerous condition. As such, actual or constructive knowledge is inconsequential. In considering the evidence presented in Smith, the court gave great weight to the testimony of the store manager who had over eighteen years of experience. In his testimony, he stated that spills were

168. Id. (citing Wollerman, 221 A.2d at 514–15 (citations omitted)).
169. Id. at 326 (citing Gonzales, 326 So. 2d at 488).
170. Owens, 802 So. 2d at 326 (citing Gonzales, 326 So. 2d at 488 (citations omitted)).
171. Id. (citing Kavlich v. Kramer, 315 So. 2d 282, 285 (La. 1975) (citations omitted in original) (affirming that once the plaintiff establishes that the piece of banana was there and that he or she slipped and fell because of it, the burden shifts to the premises owner to rebut the presumption of negligence)).
172. Id. at 326–27 (citing Gonzales, 326 So. 2d at 488–89).
173. Id. at 326 n.9.
174. Id. at 327 (citing Safeway Stores, Inc. v. Smith, 658 P.2d 255, 257 (Colo. 1983) (citations omitted)).
175. 658 P.2d 255 (Colo. 1983).
176. Owens, 802 So. 2d at 327 (citing Smith, 658 P.2d at 257 (footnote omitted)).
177. Id. at 328.
178. Id. at 327–28 (citing Smith, 658 P.2d at 257 n.3).
common, and the existence of substances on the floor was not unusual. Further, the Smith court stated that it would be unreasonable to place the burden on the plaintiff to prove that the store was negligent when it was within the store owner’s own knowledge whether the store took reasonable steps to discover the dangerous condition.

In surveying other jurisdictional approaches in premises liability cases, the Supreme Court of Florida noted that although not all jurisdictions have adopted a burden-shifting analysis, other jurisdictions have instead extended the negligent mode of operation theory to the supermarket setting, thereby eliminating the requirement of constructive knowledge. The Supreme Court of Florida referred to Chiara v. Fry’s Food Stores of Arizona, Inc., where the Supreme Court of Arizona stated, “[t]he ‘mode-of-operation’ rule looks to a business’s choice of a particular mode of operation and not events surrounding the plaintiff’s accident. Under this rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise.”

That holding was consistent with, and accepted by, other jurisdictions that have also held that, because storeowners implement self-service systems as its mode of operation, the storeowners are imputed with the knowledge of their customers’ conduct; and where the store’s mode of operation creates the dangerous condition, the dangerous condition is thus foreseeable and the element of notice is irrelevant.

The Supreme Court of Florida continued by noting that other jurisdictions, such as Wisconsin and Vermont, that are reluctant to eliminate constructive knowledge, have at least made it easier for a plaintiff to meet the requirement by first eliminating the burden of proving that the substance existed for a sufficient amount of time prior to the fall and the failure of the storeowner to provide evidence of reasonable care.

Overall, the Supreme Court of Florida noted that there is “clearly . . . [a] modern jurisprudential trend of departing from the traditional

179. Id. at 328.
180. Id. (citing Smith, 658 P.2d at 258 (citations omitted in original)).
181. Owens, 802 So. 2d at 328.
184. Id. (quoting Dumont v. Shaw’s Supermarkets, Inc., 664 A.2d 846, 849 (Me. 1995)).
186. Id. at 328–29 (citations omitted).
rule of premises liability when a plaintiff slips and falls on a transitory
foreign substance."\textsuperscript{187} The Supreme Court of Florida reiterated the fact that
other jurisdictional case law has recognized the unfairness placed on
plaintiffs by requiring them to meet the element of constructive knowledge
particularly in a supermarket setting where items regularly fall and the risk
of slips are foreseeable.\textsuperscript{188}

C. Outcome of Owens: A Drastic Departure from Florida’s Precedent

After the Supreme Court of Florida’s in-depth overview of Florida’s
precedent and other jurisprudential trends, it decided that today’s supermar-
et settings in Florida required a little change in premises liability law
involving transitory foreign substance actions.

1. Proof of Actual and Constructive Knowledge Eliminated

The Supreme Court of Florida reached several conclusions in both
\textit{Owens} and \textit{Soriano}.\textsuperscript{189} First, the court held that the directed verdicts granted
to the defendant supermarkets were erroneous because even under prior case
law the plaintiffs offered sufficient evidence, that is, the condition of the
banana peel, which gave rise to a reasonable inference that the aging
occurred on the floor.\textsuperscript{190} Thus, the Supreme Court of Florida rejected the
holdings of other appellate courts regarding the theory of impermissible
inference stacking.\textsuperscript{191} Rather, the Supreme Court of Florida agreed with the
Third District’s holding in \textit{Teate} where the court stated “the mere fact that
there may be alternative explanations inconsistent with the deterioration
occurring on the floor does not render the circumstantial evidence of
constructive knowledge fatally deficient.”\textsuperscript{192} Moreover, the Supreme Court
of Florida stated that the appropriate analysis in these cases is that of
\textit{Montgomery} and held that the substance’s condition gave rise to a
reasonable inference that it aged on the floor.\textsuperscript{193} Further, the issue of
whether the dangerous condition was a result of the store’s failure to make

\begin{itemize}
  \item \textsuperscript{187} \textit{Id.} at 329.
  \item \textsuperscript{188} \textit{Owens}, 802 So. 2d at 329.
  \item \textsuperscript{189} \textit{Id.}
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} \textit{Id.} (citing \textit{Teate}, 524 So. 2d at 1061).
  \item \textsuperscript{193} \textit{Owens}, 802 So. 2d at 329.
\end{itemize}
timely inspections and discover it is a question for the jury to decide.\textsuperscript{194} Therefore, the Supreme Court of Florida rejected the appellate court's reliance on \textit{Bates} and approved Judge Sharp's dissenting opinion in \textit{Owens},\textsuperscript{195} where Judge Sharp stated that the condition of a substance is sufficient to create a jury issue on constructive knowledge.\textsuperscript{196}

Based on premises liability case law and its interpretation and application of traditional rules, the Supreme Court of Florida believed that prior case law had improperly deviated its focus from the duty of premises owners to exercise reasonable care in the maintenance of their premises to an injured party's ability to prove actual or constructive knowledge.\textsuperscript{197} The effect of doing so left the success of plaintiff's case being tried dependent on whether the plaintiff could essentially provide an exact description of the condition of the transitory foreign substance.\textsuperscript{198} Further, the court observed that premises owners were unjustly benefiting from their own lack of record-keeping because plaintiffs, as in \textit{Owens} and \textit{Soriano}, are often unable to prove when the floors were last maintained.\textsuperscript{199}

In \textit{Soriano}, the injured customer produced evidence of 1) the condition of the banana peel; 2) the supermarket's lack of record-keeping establishing the stores inability to know when the area was last maintained; and 3) the testimony of the store manager who stated that it was common for customers to eat and drop food on the floor.\textsuperscript{200} Thus, the issue considered by the court was whether the store's lack of record-keeping should give rise to an inference that the store failed to exercise the degree of care proportionate to the foreseeable risk of injury.\textsuperscript{201} Because the store manager testified that it was common for shoppers to eat and drop grocery items on the floor, the court noted it was foreseeable that such hazards would occur.\textsuperscript{202}

Reiterating that premises owners owe a legal duty to maintain the premises in a reasonably safe condition, the Supreme Court of Florida held that a transitory foreign substance on the floor is an unsafe condition.\textsuperscript{203}

\begin{itemize}
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Owens v. Publix Supermarkets, Inc., 729 So. 2d 449 (Fla. 5th Dist. Ct. App. 1999) (en banc) (Sharp, J., dissenting).
\item \textsuperscript{196} Owens, 802 So. 2d at 330.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Owens, 802 So. 2d at 330.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\end{itemize}
Therefore, the court concluded that supermarkets, particularly nowadays, should be aware of potentially unsafe conditions created as a result of the operation in which the supermarket is carried out. The court explained that today's supermarket shoppers are forced to focus on items that are shelved and are thus distracted from the floor on which they walk. Moreover, because supermarkets are in a superior position to show when the premises were last maintained, they are also in a better position to know what actually happened by instigating an immediate investigation including interviews with witnesses and taking photographs. Based on these factors, the court concluded that the burden-shifting analysis, as adopted by other jurisdictions, is appropriate for Florida’s transitory foreign substance cases.

Thus, the court placed the burden on the storeowner to prove that he or she exercised reasonable care under the circumstances. As a result, the shopper's obligation to prove that the storeowner had actual or constructive knowledge of the unsafe condition was eliminated. Therefore, in transitory foreign substance cases the plaintiff's burden is substantially diminished because the plaintiff, in addition to proving the premises owner owed a duty, is now only required to prove 1) a substance was on the floor; 2) the plaintiff slipped on the substance and fell; and 3) the plaintiff suffered injuries. Once the plaintiff establishes these elements, "a rebuttable presumption . . . arises" and shifts the burden to the storeowner to prove, "by the greater weight of evidence, that it [did] exercise reasonable care in the maintenance of the premises." The court justified its adoption of the burden-shifting analysis from a policy perspective stating that premises owners, as a result of this decision, will adopt or increase the "protective measures [necessary] to prevent foreseeable risks." The basic effect is to allow a jury to make the ultimate factual determination of "whether the

204. Id. (including self-service marts, cafeterias, fast food restaurants and similar businesses).
205. Id.
206. Owens, 802 So. 2d at 330.
207. Id.
208. Id. at 331.
209. Id.
210. Id. (finding a plaintiff's burden to establish the length of time a substance was on the floor as artificial).
211. Owens, 802 So. 2d at 331.
212. Id. (holding that "circumstances could include the nature of the . . . hazard and the nature of the . . . [premises owner's] business").
213. Id.
premises owner...exercised reasonable care” in the maintenance of its premises.214

As a result, the Supreme Court of Florida held that because in both Owens and Soriano the condition of the banana peel was sufficient circumstantial evidence to establish the supermarket’s constructive knowledge, both cases were remanded where a jury would decide whether the aging occurred before or after the banana fell to the floor.215 In addition, each supermarket will bear the burden to rebut the presumption that it failed to maintain its floors in a reasonably safe manner.216

2. Negligent Mode of Operation Theory Extended to Supermarket Settings

In regard to the mode of operation theory and its traditionally restricted application to a supermarket setting, the Supreme Court of Florida rejected its restriction and acknowledged the theory as one of “continued viability.”217 The issue under this theory would be “whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence.”218 Thus, actual or constructive knowledge is not an issue.219 Rather, the plaintiff need only produce evidence of a “specific negligent mode of operation such that the premises owner could reasonably foresee an unsafe condition arising because of that method.”220 In other words, a supermarket “must prove [it] exercised reasonable care” by inspecting and “cleaning up spills rather than requiring injured [shoppers] to prove [that the] store employees were negligent.”221

However, the Owens court rejected the application of the negligent mode of operation theory in Soriano because Soriano only produced evidence establishing that the supermarket employees failed to sweep as required by store policy and timely fill out inspection reports.222 The court found Soriano’s allegation to be a “general claim of negligence” in

214. Id.
215. Id. at 332.
216. Owens, 802 So. 2d at 319, 332.
217. Id. at 332.
218. Id. (emphasis added).
219. Id.
220. Id.
222. Owens, 802 So. 2d at 332.
maintaining the floors rather than a "specific claim of negligent mode of operation." 223

Chief Justice Wells emphasized in his concurring opinion that the duty owed by premises owners toward invitees to "maintain [their floors] in a reasonably safe condition" is the real issue, rather than, whether the premises owner had "constructive knowledge of an unsafe condition." 224 Moreover, Chief Justice Wells noted that evidence of establishing lack of actual knowledge and issues of care are determinations based on apportionment of fault and not duty. 225 Because these issues focus on facts, Chief Justice Wells concluded that these factual issues are for the jury and not the judges. 226 Although Chief Justice Wells concurred with the Owens majority, he disagreed with the majority's opinion concerning the viability of the negligent mode of operation theory as applied to supermarkets. 227

In addition, Justice Harding concurred with the majority, however, he disagreed with the majority's discussion on "the shortcomings of traditional premises liability" law, finding that the majority unnecessarily rewrote Florida's slip-and-fall law. 228

IV. IMPACT OF OWENS

Plaintiffs' attorneys were ecstatic, defense attorneys were stunned, and business premises owners were in a panic. Legal experts labeled the Owens decision a landmark case because the Supreme Court of Florida did away with Florida's traditional slip-and-fall standard established in Montgomery. 229 Prior to the decision in Owens, a shopper had to prove the supermarket had constructive knowledge of the dangerous condition, that is, the supermarket "knew or should have known that the treacherous mess was on the floor and still failed to clean it up, an almost impossible burden." 230 As a result of the Owens ruling, the shopper is merely required to prove that he or she slipped and fell and was injured. 231 At that point, the supermarket must

223. Id.
224. Id. at 333 (Wells, C.J., concurring in result only).
225. Id. (Wells, C.J., concurring in result only).
226. Id. (Wells, C.J., concurring in result only).
227. Owens, 802 So. 2d at 332 (Wells, C.J., concurring in result only).
228. Id. at 333–34 (Harding, J., concurring in result only).
231. Owens, 802 So. 2d at 331.
prove that it exercised reasonable care to keep the premises safe. The rebuttable presumption was viewed as a translation into “guilty until proven innocent,” because to rebut the presumption storeowners must produce “evidence such as inspection reports, surveillance video[s], or testimony” on what precautions it took to ensure the safe condition of its floors.

Now armed with the court's ruling, Owens was ready to go back to court. Envious attorneys only wished this decision came sooner, because prior to Owens, attorneys were forced to reject roughly “nine out of ten slip-and-fall cases” solely because the burden of proof was so hard to meet.

One recent commentator stated that the Owens decision “strained an already tense relationship between” the Supreme Court of Florida and Florida’s “republican leadership and business community.” As such, a “lobbying battle...over legislation to protect the owners of [business] premises” was a possibility in the very near future. Defense attorneys believed the Owens decision “set a dangerous precedent [by opening the] floodgates to frivolous lawsuits.” While, on the other end, plaintiffs’ attorneys argued that Florida’s old law prevented cases from going to the jury due to the unclear guidelines set in Florida’s precedent. As a result of this decision, plaintiffs’ attorneys believed Florida’s new rule provided clearer guidelines with the burden of proof fairly allocated. As one attorney stated, “the real significant difference...is that...[plaintiffs will] never...get a directed verdict anymore.” However, business defense attorneys argued that the “ruling undermine[d] the fundamental principle that plaintiffs bear the burden of proof in negligence actions.”

Puzzled and shocked by the court’s flip-flop of Florida law, accusations of financial motivation were made where one attorney stated, “[t]his is just another example of shifting financial responsibility to those that the judicial

232. Id.
234. Miller I, supra note 1.
236. Miller I, supra note 1.
237. Id.
238. Id.
239. Id.
240. Id.
242. Id.
243. Id.
system perceives can afford to pay.'"\textsuperscript{244} Thus, the court is viewed by some as just "another government mechanism for the redistribution of wealth."\textsuperscript{245} Moreover, to avoid the risk of large jury awards, storeowners will be forced to settle.\textsuperscript{246}

Because of \textit{Owens}, storeowners will not only be forced to better maintain their floors but must also develop better inspection methods that will enable them to prove the precautionary safety measures implemented so as to avoid allegations of negligence.\textsuperscript{247} The exercise of reasonable care in maintaining premises in a safe condition is not a new duty but one traditionally imposed on premises owners.\textsuperscript{248} What this duty entails, as the \textit{Owens} decision reflects, is that supermarkets must do more than declare that a floor maintenance system exists. Rather, the maintenance system must be implemented and religiously carried out if a supermarket wishes to avoid liability.\textsuperscript{249} Some supermarkets, like B & B Grocery in \textit{Soriano}, theoretically had inspection and maintenance methods for the purpose of fulfilling its duty as a premises owner.\textsuperscript{250} However, as the store manager of B & B Grocery testified, the inspections were not carried out as scheduled and required by store policy.\textsuperscript{251} Further, the inspection reports were all completed at one time, by one person, and were falsified.\textsuperscript{252} Based on these facts, it is fair to say that B & B Grocery is the poster supermarket for failing to fulfill its legal duty to exercise reasonable care toward its shoppers in the maintenance of its floors in a safe condition.

Conversely, supermarkets that do implement and carry out a floor maintenance system have still been accused of negligence by shoppers that alleged they slipped and fell.\textsuperscript{253} However, some allegedly injured shoppers were arrested in South Florida because they were "staging falls in supermar-

\textsuperscript{244} Id.
\textsuperscript{247} Miller I, \textit{supra} note 1.
\textsuperscript{248} Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 214 (Fla. 5th Dist. Ct. App. 1989).
\textsuperscript{249} Major, \textit{supra} note 246.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} \textit{Law: Case on a Peel, supra} note 245.
kets to collect awards and settlements. Thus, the ruling in Owens could also shield a supermarket by compelling it to implement better precautionary protective measures because those measures will prove the supermarket is free from liability in instances where the shopper is faking to make a buck. However, a National Floor Safety Institute representative stated that even though supermarkets spend $1.5 billion each year in the maintenance of their premises, they have been inattentive toward slip-and-fall incidents because supermarkets have traditionally had an upper hand under the old Florida law. Supermarkets did not have to implement better preventive methods because supermarkets had a “history of winning these types of [cases].” In other words, no supermarket would improve a faulty system when the lower and higher courts had traditionally protected it from liability. Now that supermarkets have to perfect their systems and, for some, implement a system to avoid the likeliness of a jury trial, supermarkets will be forced to actually train employees, conduct regular scheduled floor walks, and maintain accurate and detailed records, such as sweep logs. Or will they?

V. EVERYONE BUT THE PLAINTIFF’S RESPONSE TO OWENS: NO WAY!

A. Florida Retail Federation Takes Immediate Action

In response to Owens, the Florida Retail Federation (“Federation”) immediately took action to reduce the damage caused by what it called an “errant decision” and formed the Banana Peel Coalition. It believed the Supreme Court of Florida created a “new profit center for trial lawyer industry,” by increasing the number of slip-and-fall cases to go before the jury. With nowhere else to turn, the Federation worked on legislative approaches stating that “[l]egislation is the only thing you have left when the Supreme Court [of Florida] dumps you out the front door.” Thus, a two-page bill was drafted in an attempt to undo the Owens decision by

254. Id.
255. Miller I, supra note 1.
256. Id.
257. A Slippery Slope, supra note 11.
258. Major, supra note 246.
259. A Slippery Slope, supra note 11.
260. Susan R. Miller, Slip and Fall into Spring, BROWARD DAILY BUS. REV., Feb. 8, 2002, at 3 [hereinafter Miller III].
261. Major, supra note 246.
262. Miller I, supra note 1.
shifting the burden back to the plaintiff. The Federation’s vice-president of governmental affairs and political action, Bill Herrle, stated that the bill was not an attempt to overrule the decision in Owens but only an “effort to exert the [legislature’s] prerogative in writing statutes,” that included returning back to the common law standard implemented under Florida law.

After negotiations between the Federation and the Academy of Florida Trial Lawyers, a joint letter was sent to the Florida Senate in attempt to have the bill passed in 2002. The joint letter expressed that Senate Bill 1946 was a “compromise to both sides...[that would] avoid a protracted legislative battle.” While the Federation’s attempts were threatening to plaintiffs, the general counsel for the Academy of Florida Trial Lawyers was not too worried when he stated that the Florida Legislature would be too busy to even consider the bill. Even the Federation believed that the odds of receiving legislative redress in 2002 would be unlikely since the Florida Legislature is “busy, distracted, and strained.” However, that viewpoint proved to be wrong.

B. Florida Legislature Quickly Reacts and Unanimously Passes Senate Bill 1946 Settling the Burden of Proof

Senate Bill 1946, considered the most significant litigation-related bill, was unanimously passed in Florida’s 2002 legislative second session


264. *Id.*

265. Miller VI, *supra* note 263.

266. Joint Letter from Rick McAllister, President & CEO, Florida Retail Federation and Scott Carruthers, Executive Director, The Academy of Florida Trial Lawyers, to the Honorable John McKay, Florida Senate (Mar. 21, 2002) (on file with the Florida Retail Federation).

267. *Id.*

268. Miller VI, *supra* note 263.


An act relating to the burden of proof in negligent actions involving transitory foreign objects or substances; creating s. 786.0710, F.S.; providing requirements with respect to the burden of proof in claims against persons or entities in possession or control of business premises; providing for the application of the act; providing an effective date.

WHEREAS, on November 15, 2001, the Florida Supreme Court decided the case of Owens v. Publix Supermarkets, Inc., Case No. SC95667 & SC96235, and
and became effective as of May 30, 2002. In response to the ruling in Owens, the bill created section 768.0710, of the Florida Statutes, to settle the burden of proof in transitory foreign substance cases involving business premises owners. The bill is said to "reassert an equitable division of burdens in slip-and-fall cases." The bill retained the traditional rule of imposing a legal duty on premises owners to exercise reasonable care in the maintenance of their premises in a safe condition, including the maintenance of premises free from foreseeable hazards. Like the ruling in Owens, the bill does not require the plaintiff to prove actual or constructive knowledge and extends the negligent mode of operation to the supermarket setting. However, unlike the decision in Owens, the bill essentially shifts the burden of proof back to the plaintiff who must now show

[1] The...[premises owner] owed a duty to the [plaintiff]; [2] The [premises owner] acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises; [and] [3] The failure to exercise reasonable care was the legal cause of the loss, injury, or damage.

Thus, Senate Bill 1946 now arms the plaintiff with additional liability theories, including the duty to exercise reasonable care in warning. This theory was argued by the supermarket in Owens as "inviting the court to

WHEREAS, the Florida Legislature has considered the issues raised and law surveyed in the Owens case when balancing rights and duties between possessors of land and invitees upon the land, NOW, THEREFORE, Be It Enacted by the Legislature of the State of Florida.

Id.

273. Id.
276. See id. § 1(2)(b), 2002 Fla. Sess. Law Rep. at 873. Although the bill does not require the plaintiff to prove actual or constructive knowledge, evidence establishing notice, or lack of it, may be submitted and considered by either party. Id.
proceed down the path to strict liability against premises owners. 278 Under this theory, supermarkets would presumably have to place signs such as "[w]arning, it is foreseeable that food can fall to the floor. Please watch for that possibility." 279 However, the Florida Legislature clearly disagreed with that argument by including it in Senate bill 1946. After all, supermarkets post warning signs of wet floors as common practice. Thus, it is not unfair to expect at least that same level of reasonable care for other hazardous conditions, such as slippery grocery items.

VI. PLAINTIFF SHOPPER OR DEFENDANT SUPERMARKET: WHICH HAS THE UPPER HAND NOW?

Hence, the decision in Owens was undone, as sought by the Florida Retail Federation. 280 Nevertheless, Senate Bill 1946 is considered a compromise and noted "as a rare agreement between the plaintiff bar and the business community." 281 For the plaintiff, the only significant compromise is the elimination of constructive knowledge because it was this element that "erected a roadblock to recovery." 282 For the defendant supermarket, the real significant compromise is shifting the burden back to the plaintiff. 283 The new Florida burden of proof statute requires the plaintiff, who has been acknowledged by the Supreme Court of Florida as an inferior party, 284 to prove issues of care prior to even litigating the issue before a jury. 285 As Chief Justice Wells noted in his concurring opinion in Owens, issues of care are based on facts not as a matter of law and should thus be left to the trier of fact. 286 Although the statute provides a plaintiff shopper with a number of liability claims against defendant supermarkets, the plaintiff shopper's burden of proof remains great because the plaintiff shopper's knowledge remains inferior, as the Owens court and other jurisdictions have held. 287 As the Owens court stated, supermarkets have access to its inspection records, and the opportunity to immediately investigate, interview witnesses, and take

279. Id.
280. Miller I, supra note 1.
281. Pendleton, supra note 272.
282. Miller I, supra note 1.
283. Miller II, supra note 230.
285. Id.
286. Id. at 333 (Wells, C.J., concurring in result only).
287. Id. at 330 (citations omitted).
photographs. Thus, the Florida Legislature did more than put business premises owners in a "more level playing field," because as it was revealed in Soriano, it is fair to say that supermarkets are likely to have a common practice of falsifying inspection records. Therefore, the Florida Legislature, in effect, lends support to the defendant supermarket's lack of record keeping, a sloppy habit the Supreme Court of Florida intended to correct.

VII. CONCLUSION

The tug of war on who bears the burden of proof in slip-and-fall actions is now settled law. By passing Senate Bill 1946, the Florida Legislature shifted the burden of proof back to the slip-and-fall plaintiff. In accordance with the Supreme Court of Florida, the plaintiff shopper is no longer required to prove actual or constructive knowledge of the slippery substance that caused his or her fall. Still, the plaintiff shopper does bear the burden to prove that the defendant supermarket failed to exercise reasonable care in maintaining the premises free from hazards, including those that are foreseeable, through its inspection, repair, warning, or mode of operation. In one way, the effect of Senate Bill 1946 benefits the slip-and-fall plaintiff by eliminating the burden to prove constructive knowledge, a requirement that once barred the case from the jury. In another way, Senate Bill 1946 benefits the defendant supermarket by shifting the burden of proof back to the plaintiff. Whether the plaintiff shopper or the defendant supermarket is more, less, or equally likely to prevail under Florida's new law will ultimately be determined by the plaintiff shopper's likeliness of meeting his or her new burden. Although the plaintiff shopper's burden of proof has changed by extending the number of liability theories under which the defendant supermarket may be charged, the burden remains great, as it was in prior case law.

288. Id.
289. Miller II, supra note 230.
291. Owens, 802 So. 2d at 330.