Tort Law

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I. INTRODUCTION

As usual, the past year saw numerous appellate cases concerning tort law. This article will not attempt to review them all. Instead, it will look at cases from the Supreme Court of Florida and important cases from the district courts of appeal. The latter will include discussion of cases that considered novel questions, conflicted with other districts, involved questions certified as of great public importance, or raised interesting factual scenarios.

Last year the courts grappled with questions concerning the dangerous instrumentality doctrine as applied to automobiles, and those cases will be reviewed in Section II. The courts again considered the coverage and application of the Medical Malpractice Act to a variety of situations, which will be discussed in Section III. There are also some cases reviewed in Section IV that looked at other forms of professional malpractice. Section V will look at appellate cases that discussed how the element of duty applies to a variety of factual scenarios. Whether violations of statutes equal a
presumption of negligence was also the subject of a number of decisions, which are covered in Section VI of this article. The always important question of how to calculate and apportion damages is the subject of cases included in Section VII. Section VIII will look at a fraud case involving a real estate transaction. Section IX includes new standard jury instructions, which include instructions for some types of tort cases.

II. DANGEROUS INSTRUMENTALITY DOCTRINE (AUTOMOBILES)

The Fourth District Court of Appeal considered the liability of the lessee of a car involved in an accident while driven by a person without the consent of the lessee in *Barnett v. State Farm Fire & Casualty Co.* In *Barnett*, one of the friends of the teenage stepson of the lessee took the keys to the car and drove it without permission from the lessee or his stepson. The court deemed that this was the equivalent of conversion or theft, which the Supreme Court of Florida had previously stated would relieve an owner of a car from liability for its use or misuse.

The First District Court of Appeal also looked at the dangerous instrumentality doctrine in *Christenson-Sullins v. Raymer.* The trial court granted summary judgment to the defendant in this case, where the defendant loaned her car to a former roommate whose boyfriend took the car without permission and was involved in a collision with one of the plaintiffs. Because the roommate did not report that the car was missing when she discovered it, but rather went to a local bar to play darts, the appellate court felt that summary judgment was improper. The dissent argued that the affidavits refuting that the defendant knew or consented to the driver’s use of the car warranted a summary judgment, and that an obligation of an owner or user to report a conversion or theft had not previously been imposed by Florida courts.

The Fifth District Court of Appeal considered another dangerous instrumentality claim in *Toombs v. Alamo Rent-A-Car.* This wrongful death action involved an automobile accident in which the surviving minor

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1. 775 So. 2d 395 (Fla. 4th Dist. Ct. App. 2000).
2. Id. at 396.
3. Id. at 397 (citing Susco Car Rental Sys. v. Leonard, 112 So. 2d 832 (Fla. 1959)).
5. Id. at 957.
6. Id.
7. Id. at 961–62.
8. 762 So. 2d 1040 (Fla. 5th Dist. Ct. App. 2000).
children sued Alamo for an accident in which their mother was killed while their father was driving.\(^9\) The court certified a conflict with the Second District Court of Appeal in *Enterprise Leasing Co. v. Alley*,\(^10\) by holding that the dangerous instrumentality doctrine could not be applied to a situation where a co-bailee is killed by the negligence of the other co-bailee.\(^11\) Therefore, it held that the children's cause of action did not survive.\(^12\) The *Toombs* decision seems to be the better-reasoned one, in part because as the concurring opinion of Judge Harris notes, in this situation it was the deceased who entrusted the vehicle to a negligent driver, and therefore, she was in a better position than the rental car company to make the determination as to the condition and fitness of the driver.\(^13\)

The Third District Court of Appeal reviewed the evidence necessary for a dangerous instrumentality claim in *Leal v. Nunez*.\(^14\) Under the dangerous instrumentality doctrine, "an owner who gives authority to another to operate the owner's vehicle, by either express or implied consent, has a nondelegable obligation to ensure that the vehicle is operated properly."\(^15\) In this case the defendant argued that her brother-in-law, who was also her employee, took her car without permission.\(^16\) The court held that the trial court's entry of summary judgment was error regarding the material fact of consent because of the familial and business relationship between the driver and owner as well as the behavior of both after the accident.\(^17\)

### III. Medical Malpractice

The application of the Medical Malpractice Act\(^18\) to a wrongful death suit under the Florida Nursing Home Act was considered by the Fourth District Court of Appeal in *Preston v. Health Care & Retirement Corp. of America*.\(^19\) In the case, defendant, Health Care and Retirement Corporation of America ("Health Care"), argued that the plaintiff's failure to follow the

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9. Id. at 1041.
10. 728 So. 2d 272 (Fla. 2d Dist. Ct. App. 1999), rev. denied, 741 So. 2d 1135 (Fla. 1999).
11. *Toombs*, 726 So. 2d at 1042.
12. Id.
13. Id. at 1043.
15. Id. at 975. (citing Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993)).
16. Id.
17. Id. at 975.
Malpractice Act’s pre-suit requirements\textsuperscript{20} required a dismissal of his wrongful death action.\textsuperscript{21} Although the Supreme Court of Florida stated in \textit{Weinstock v. Groth}\textsuperscript{22} that a defendant is entitled to notice under the Act when it is directly or vicariously liable under the medical negligence standard of care set forth in section 766.102 of the \textit{Florida Statutes}, this court noted that chapter 400 of the \textit{Florida Statutes} had been amended to include its own pre-suit investigatory requirement and to limit vicarious liability for the actions of health care providers.\textsuperscript{23} It therefore concluded that the pre-suit requirements of the nursing home statute, which was a special, as opposed to a general statute, and which was passed subsequent to the Malpractice Act, controlled where the allegations concern the deprivation of a nursing home resident’s statutory rights.\textsuperscript{24}

The Fifth District Court of Appeal was confronted with another case trying to decipher the application of the pre-suit filing requirements of the Medical Malpractice Act\textsuperscript{25} in \textit{Pavolini v. Bird}.\textsuperscript{26} The claimants in this case filed a derivative loss of consortium claim in a medical malpractice action without filing a separate pre-suit notice.\textsuperscript{27} The appellate court held that the spouse or minor child who sought loss of consortium damages was not the recipient of the medical care or treatment and therefore was not a claimant under the Act.\textsuperscript{28} The dissent by Judge Pleuss argued that this interpretation placed defendants in the difficult situation of not knowing how to realistically calculate an appropriate settlement when not all of the plaintiffs had yet been identified.\textsuperscript{29}

In \textit{Bell v. River Memorial},\textsuperscript{30} the parents of a stillborn baby asked that the body be returned to them after an autopsy, but the remains were disposed of in an unknown manner.\textsuperscript{31} The trial court granted a motion to dismiss on the ground that the action violated the pre-suit requirements of the medical

\begin{thebibliography}{9}
\bibitem{20} § 766.106.
\bibitem{21} \textit{Preston}, 785 So. 2d at 571.
\bibitem{22} 629 So. 2d 835 (Fla. 1993).
\bibitem{23} \textit{Preston}, 785 So. 2d at 572.
\bibitem{24} \textit{Id.} The court also noted that the decision was consistent with a case decided by the Second District Court of Appeal, \textit{Integrated Health Care Servs., Inc. v. Lang-Redway}, 783 So. 2d 1108 (Fla. 2d Dist. Ct. App. 2001). \textit{Id.}
\bibitem{25} § 766.106.
\bibitem{26} 769 So. 2d 410 (Fla. 5th Dist. Ct. App. 2000).
\bibitem{27} \textit{Id.} at 411.
\bibitem{28} \textit{Id.} at 413.
\bibitem{29} \textit{Id.} at 414.
\bibitem{30} 778 So. 2d 1030 (Fla. 4th Dist. Ct. App. 2001).
\bibitem{31} \textit{Id.} at 1031.
\end{thebibliography}
malpractice statute and was beyond the statute of limitations for medical malpractice. The court ruled that because the disposal of the child's remains did not involve diagnosis, treatment, or care nor involved medical skill or judgment, it was error to apply the medical malpractice statute of limitations.

The applicability of the medical malpractice statutes to a contribution suit was considered by the First District Court of Appeal in Virginia Insurance Reciprocal v. Walker. In this case, the plaintiffs had been sued for medical malpractice for failure to diagnose hypothyroidism in an infant. The defendant also treated the child without testing for the condition, but were not sued by the parents of the child. The plaintiffs settled with the parents and brought this action for contribution from the defendant. If the statute had not been tolled while the plaintiff conducted the pre-suit screening requirements of the Act, the statute of limitations had expired. The appellate court ruled that this was a medical malpractice action subject to its pre-suit screening procedure because the underlying basis of the contribution action sounded in medical negligence. The court noted that other jurisdictions have split over this issue and that its decision is in direct conflict with a decision from the Fourth District Court of Appeal. In considering the policy of the medical malpractice statute to encourage pre-suit resolution of medical malpractice claims, the First District Court of Appeal interpretation seems more logical in a suit where the contribution claim is based upon medical malpractice.

33. Bell, 778 So. 2d at 1034; see also Fla. Stat. § 95.11(4)(b) (2001).
34. Id.
35. 765 So. 2d 229 (Fla. 1st Dist. Ct. App. 2000).
36. Id. at 230.
37. Id.
38. Id.
39. Id.
40. Walker, 765 So. 2d at 232.
41. Id. at 234–35 (certifying conflict with Wendell v. Hauser, 726 So. 2d 378 (Fla. 4th Dist. Ct. App. 1999)).
IV. OTHER FORMS OF PROFESSIONAL MALPRACTICE

A. Attorney Malpractice

The Second District Court of Appeal considered the effect of attorney malpractice on a client in *Woodall v. Hillsborough Co. Hospital Authority*. Woodall's complaint was dismissed for her attorney's failure to comply with pre-suit discovery requests. The appellate court agreed with the trial court that the attorney's actions amounted to gross negligence, but felt that the client should not be punished for the misdeeds of her attorney. The court looked at the following factors in determining whether dismissal was an appropriate sanction:

1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
2) whether the attorney has been previously sanctioned;
3) whether the client was personally involved in the act of disobedience;
4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
5) whether the attorney offered reasonable justification for noncompliance; and
6) whether the delay created significant problems of judicial administration.

Only factor five supported the hospital's position in this case. The court noted that sanctions against the attorney would be appropriate.

The Fourth District Court of Appeal considered the potential negligence of two separate law firms in *Kates v. Robinson & Spence, Payne, Masington & Needle, P.A.* The first law firm in this case represented the Kates' in a...
personal injury action. The plaintiffs entered into a consent judgment that did not include lessees who might have been liable, but were not joined in the litigation. The Kates subsequently hired Scott Jay to collect on the judgment. The court held that the Kates had alleged a cause of action against the first firm for failure to file suit against all of the potentially liable parties, failure to advise the Kates of the existence of the lessees, and for advising the Kates that no other parties were liable. However, the court held that Jay could not be held liable for failure to discover additional potential defendants when he was hired to collect a judgment.

The Fifth District Court of Appeal considered the perplexing problem concerning conflicts of interest when an attorney prepares a will for a client that removes beneficiaries whom he has also represented in *Chase v. Bowen*. In this case, Bowen prepared and revised a will for the plaintiff’s mother. At various times, he also represented the plaintiff and the beneficiaries of the second will who were business associates of the plaintiff’s mother. The district court held that a lawyer who prepares a will owes no duty to previous beneficiaries, even if he represents them in another matter, to oppose the changing of the will.

The dissenting opinion of Judge Sharp asserted that a remand was appropriate to permit the plaintiff to replead. Judge Sharp noted that the plaintiff was disabled and lived with her mother, who supported and cared for her. Therefore, her complete disinheretance in favor of the beneficiaries, who were friends of the attorney, at least raises the appearance of potential ethical conflicts. Of course, even if the attorney committed an ethical violation, that does not mean that malpractice has occurred. However, Judge Sharp noted that Florida recently recognized the tort of intentional interference with inheritance, and enough facts were alleged in this case to

49. *Id.* at 62.
50. *Id.* at 63.
51. *Id.*
52. *Id.* at 64.
53. *Kates*, 786 So. 2d at 65.
54. 771 So. 2d 1181 (Fla. 5th Dist. Ct. App. 2000).
55. *Id.* at 1182.
56. *Id.*
57. *Id.*
58. *Id.* at 1183.
59. *Chase*, 771 So. 2d at 1183.
60. *Id.* at 1184.
raise the possibility that the plaintiff could have potentially stated a claim under this theory if given another opportunity.  

B. Other Professions

The Supreme Court of Florida had the occasion to look at accountant malpractice in *KPMG Peat Marwick v. National Union Fire Insurance Co.*  

In this case, National Union Fire Insurance Company was the fidelity bond insurer of Bank Atlantic, for whom KPMG Peat Marwick had conducted independent audits. National Union filed a negligence suit against KPMG, but the trial court granted the latter’s motion for judgment on the pleadings because National Union was not entitled to relief as an assignee, contractual subrogee, or equitable subrogee. KPMG asserted that *Forgione v. Dennis Pirtle Agency Inc.*, in which the court prohibited the assignment of a personal tort in an attorney malpractice case, supported its position. The court disagreed, stating that legal malpractice claims were not assignable because of the personal nature of legal services that entailed a confidential, fiduciary relationship with undivided loyalty to the client. The court argued that independent auditors have a public responsibility to the corporation’s creditors and stockholders with a total independence from the client. The court declined, however, to decide whether accountant malpractice claims other than those involving audits could be assigned.

The First District Court of Appeal looked at a claim of legal malpractice and illegal attorney’s fees in *Olmsted v. Emmanuel.* In this case, defendant attorneys represented the plaintiff in an employment discrimination case against Taco Bell under Title VII of the Civil Rights Act of 1964 and title 42, section 1981 of the *United States Code.* Olmsted, a white male, argued that he was fired for complaining to superiors about

61. *Id.* at 1186.
62. 765 So. 2d 36 (Fla. 2000).
63. *Id.* at 37.
64. *Id.*
65. 701 So. 2d 557 (Fla. 1997).
66. *KPMG,* 765 So. 2d at 37–38.
67. *Id.* at 38.
68. *Id.*
69. *Id.* at 38–39.
70. 783 So. 2d 1122 (Fla. 1st Dist. Ct. App. 2001).
72. *Olmsted,* 783 So. 2d at 1124.
discriminatory practices against blacks at the restaurant.\footnote{73} After a jury verdict of damages in excess of $3,000,000, Taco Bell was able to get a reduction to $300,000 because of limits on Title VII claims found in title 42, section 1981a(3) of the United States Code.\footnote{74} The damages would not have been so limited under the section 1981 claim, but it was not invoked as a basis for relief in the pretrial stipulation.\footnote{75} The court ruled that the attorneys neglected a reasonable duty by failing to invoke the section 1981 claim in the stipulation.\footnote{76}

The court looked at a judicial estoppel argument made by the plaintiff.\footnote{77} In appealing the reduction of damages to the United States Court of Appeals for the Eleventh Circuit,\footnote{78} the attorneys understandably argued that the plaintiff had a valid 1981 claim justifying the jury verdict.\footnote{79} In the malpractice case, the attorneys changed their position to argue that the plaintiff’s claim that he would have been successful on the section 1981 claim, had it been preserved, was mere speculation.\footnote{80} The court noted that judicial estoppel requires that the parties and issues involved must be the same, which was not true here where the attorneys were not parties in the appeal of the underlying claim.\footnote{81} It also upheld the trial court’s dismissal of the malpractice claim.\footnote{82}

What makes this a more difficult question is that arguably the Eleventh Circuit has not squarely addressed the issue of whether a white person can succeed on a section 1981 claim in a retaliation case. Although other federal courts have recognized such a claim,\footnote{83} the court concluded that the Eleventh Circuit would not, based upon its statements in similar cases.\footnote{84} The court also rejected the claim by plaintiff that contingent fee contracts are illegal in cases involving federal law in federal court.\footnote{85} The court concluded the Rules

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73. Id.
74. Id.
75. Id.
76. Id. at 1125–26.
77. Olmsted, 783 So. 2d at 1126.
78. Olmsted v. Taco Bell Corp., 141 F.3d 1457 (11th Cir. 1998).
79. Olmsted, 783 So. 2d at 1125.
80. Id. at 1126.
81. Id.
82. Id.
83. Id. at 1127.
84. Olmsted, 783 So. 2d at 1128.
85. Id.
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Regulating the Florida Bar\textsuperscript{86} did not bar contingent fee contracts in this type of case.\textsuperscript{87}

V. OTHER CASES INVOLVING DUTY

The Supreme Court of Florida examined the application of the Agrarian rule in relationship to landowner obligations in \textit{Whitt v. Silverman},\textsuperscript{88} a case where the owners of a gas station were sued by pedestrians struck by a customer of the station whose view was obstructed because of a stand of foliage.\textsuperscript{89} The Agrarian rule provides that “a landowner owes no duty to persons . . . not on [his] property and therefore . . . is not responsible for any harm caused . . . by natural conditions on the land.”\textsuperscript{90} Despite its seemingly dated view of the rights of property owners, some courts continue to apply it in circumstances where conditions on property hinder the view of motorists. Such courts have argued that motorists are better positioned to prevent accidents.\textsuperscript{91} Even courts that have retained the rule in part, however, have disagreed about whether the protection should extend to both natural and artificial conditions or whether the rule should be applicable to property located in an urban setting.\textsuperscript{92} The \textit{Restatement (Second) of Torts} excuses liability for rural land, but recognizes a duty for urban property owners where harm results from failure to exercise reasonable care to prevent unreasonable risks to persons using adjoining public roads.\textsuperscript{93}

After a long discussion in \textit{Whitt} concerning the role of foreseeability in both the duty and proximate cause elements of negligence, the court rejected a blanket rule that immunized landowners from foreseeable consequences.\textsuperscript{94} The court reaffirmed the principles that it announced in \textit{McCain v. Florida Power Corp.}.\textsuperscript{95} It remanded the case for a determination as to whether the landowners’ conduct created a foreseeable zone of risk that posed a general threat of harm toward the patrons of the business and the pedestrians and motorists who used the abutting streets and sidewalks reasonably affected by

\textsuperscript{86} See \textit{R. REGULATING THE FLA. BAR 4-1.5(f)}.

\textsuperscript{87} \textit{Olmsted}, 783 So. 2d at 1129.

\textsuperscript{88} 788 So. 2d 210 (Fla. 2001).

\textsuperscript{89} \textit{Id.} at 213.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Id.} at 215.

\textsuperscript{92} \textit{Id.} at 215-16.

\textsuperscript{93} \textit{RESTATEMENT (SECOND) OF TORTS} § 363(2) (1965).

\textsuperscript{94} \textit{Whitt} \textit{v. Silverman}, 788 So. 2d 210, 218 (Fla. 2001).

\textsuperscript{95} 593 So. 2d 500 (Fla. 1992).
Chief Justice Wells dissented, expressing concern that the change would result in extensive exposure of liability to property owners, including homeowners.97

In Sanderson v. Eckerd Corp.,98 the Fifth District Court of Appeal examined the duty of pharmacists in relation to providing warnings to customers.99 There is Florida case law asserting that retail pharmacists have no duty to warn customers or their physicians of potential adverse drug reactions.100 However, the court notes that three other states have applied the voluntary assumption of a duty doctrine to pharmacists and believes that it could also apply in Florida.101

The Fourth District Court of Appeal also considered the duty of a business that stores keys in a publicly accessible area in Michael & Philip, Inc. v. Sierra.102 The defendant in Sierra was a gym that had a key board located near the gym’s entrance, directly across from the front desk.103 A patron stole a set of keys from the board and rear-ended the plaintiff’s vehicle, causing injuries.104 The personnel on desk duty did not monitor the keyboard.105 The court ruled that this circumstance did not call for an exception from the general rule that there is no duty to prevent the misconduct of third persons.106 It compared the Supreme Court of Florida’s rulings that held owners of vehicles liable for collisions by thieves who stole vehicles with keys left in the ignition107 or in an open glove compartment.108 The district court felt that the factual dissimilarity was dispositive where the keys were not left in the car and the gym did own the car.109 Judge Klein dissented, noting that Florida courts have treated automobile negligence

96. Whitt, 788 So. 2d 222–23.
97. Id. at 223.
98. 780 So. 2d 930 (Fla. 5th Dist. Ct. App. 2001).
99. Id.
102. 776 So. 2d 294 (Fla. 4th Dist. Ct. App. 2000).
103. Id. at 295.
104. Id. at 295–96.
105. Id. at 297.
106. Id. at 298.
109. Sierra, 776 So. 2d at 299.
differently, asserting that whether the theft was foreseeable was a question for the jury.\textsuperscript{110}

The Fourth District Court of Appeal reversed a jury verdict in a slip and fall case in \textit{Lester's Diner II, Inc. v. Gilliam},\textsuperscript{111} where the plaintiff presented no evidence as to how an alleged oily substance reached the floor or how long it had been there.\textsuperscript{112} The court noted that "conjecture and pyramiding inferences" cannot be relied upon to establish the important facts necessary to show the actual or constructive notice needed by the property owner to establish negligence.\textsuperscript{113}

The Fifth District Court of Appeal considered the duty of law enforcement officers pursuing fleeing felons in \textit{Bryant v. Beary}.\textsuperscript{114} In this case, a sheriff's deputy pursued a teen without a license who was driving a car without permission of the owner and ran through a stop sign.\textsuperscript{115} Despite advising dispatch and his superior that he was terminating the chase, he continued to pursue the teen.\textsuperscript{116} The teen ran another stop sign, killing himself and a motorcyclist.\textsuperscript{117} Although recognizing a duty to bystanders, the court rejected the argument by the teen's estate that law enforcement owes a duty to a violator fleeing the law as a result of his criminal misconduct.\textsuperscript{118}

Although not a case that establishes new law, one with curious facts is the case of \textit{Jackson v. Sweat},\textsuperscript{119} in which the First District Court of Appeal ruled that the plaintiff stated a cause of action where the owner of a store left it lit and unlocked, creating the appearance that it was open, although he set the silent burglar alarm.\textsuperscript{120} The police responded and arrested the plaintiff.\textsuperscript{121}

In \textit{Tudor v. Florida Department of Law Enforcement},\textsuperscript{122} the First District Court of Appeal found that a plaintiff did not have a cause of action

\textsuperscript{110} \textit{Id.} at 300.
\textsuperscript{111} 788 So. 2d 283 (Fla. 4th Dist. Ct. App. 2000).
\textsuperscript{112} \textit{Id.} at 285.
\textsuperscript{113} \textit{Id.} at 286.
\textsuperscript{114} 766 So. 2d 1157 (Fla. 5th Dist. Ct. App. 2000).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 1158.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 1160.
\textsuperscript{119} 783 So. 2d 1207 (Fla. 1st Dist. Ct. App. 2001).
\textsuperscript{120} \textit{Id.} at 1207–08.
\textsuperscript{121} \textit{Id.} at 1208.
\textsuperscript{122} 768 So. 2d 1242 (Fla. 1st Dist. Ct. App. 2000).
against the Florida Department of Law Enforcement for failure to comply with a court order to expunge criminal records.  

VI. NEGLIGENCE PRESUMPTIONS

The Supreme Court of Florida clarified the rebuttable presumption of negligence that attaches to a rear driver in a rear-end collision established in a case from the Second District Court of Appeal in McNulty v. Cusack, which it endorsed in Gulle v. Boggs. In Clampitt v. D.J. Spencer Sales, it considered whether a sudden stop, standing alone, is sufficient to overcome the presumption. The Clampitt case involved a three-vehicle collision in which the plaintiff was in the middle vehicle. At trial, the plaintiff was granted summary judgment on the issue of fault. The district court reversed, ruling that the evidence presented by the defendant was sufficient to overcome the presumption. The court stated that the presumption is grounded in the belief that the rear driver is more likely to have the evidence of why he was unable to stop and the policy that such a driver is charged with being prepared to stop without hitting the vehicle in front because he is in control of the following distance. Despite testimony by the defendant that he did not see the front vehicle activate its turn signal or illuminate its brake lights nor did he see the plaintiff’s vehicle slow or activate her brake lights, the court held that the trial court properly granted the motion for summary judgment.

123. Id. at 1243.
124. 104 So. 2d 785 (Fla. 2d Dist. Ct. App. 1958).
125. 174 So. 2d 26 (Fla. 1965).
126. 786 So. 2d 570 (Fla. 2001).
127. Id.
128. Id. at 571.
129. Id. at 570.
130. Id. at 572.
131. Clampitt, 786 So. 2d at 573.
132. Id. at 576. The court also noted that section 316.0895(1) of the Florida Statutes requires that “the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent . . . .” Id. at 575.
133. Id. at 576.
134. Id.
135. Clampitt, 786 So. 2d at 575.
The court noted that the accident took place on a stretch of a two lane roadway bordered by several commercial establishments, residential complexes, and Central Florida Junior College. Thus, it apparently believed that turns and stops should have been anticipated.

The Fourth District Court of Appeal analyzed the applicability of a statute regulating self-service gasoline stations in *Chevron U.S.A., Inc. v. Forbes.* In this case, the plaintiff slipped and fell in a puddle of gas approximately six feet in circumference at a service station. Section 526.141(3) of the *Florida Statutes* requires that self-service stations have at least one attendant on duty whose responsibilities include immediately handling accidental spills. The court applied the Supreme Court of Florida case that outlines the doctrine of negligence per se in statutory violations in *deJesus v. Seaboard Coast Line Railroad Co.* In looking at the statute as a whole, the court determined that it was meant to protect the general public, as opposed to a particular class of persons, from injury caused by fire. This seems to be a reasonable interpretation as evidenced by references in the statute to flammable and combustible liquids, sources of ignition, and fire extinguishers. Thus, the court ruled that a violation of the statute was not negligence per se because the plaintiff did not suffer the type of injury protected by the statute; and it was one meant to protect the general public. Therefore, violation was merely evidence of negligence.

The Second District Court of Appeal also considered the negligence per se rule in *Golden Shoreline Ltd. Partnership v. McGowan.* In this case, the plaintiff was injured when an elevator malfunctioned. Within three days preceding the incident, problems necessitated the service company being called six times, including three calls on the day of the accident. Section 399.02(5)(b) of the *Florida Statutes* makes an elevator owner responsible for the safe operation and proper maintenance of its elevators. The court held that violation of this statute was negligence per se as long as

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136. *Id.* at 573.
137. 783 So. 2d 1215 (Fla. 4th Dist. Ct. App. 2001).
138. *Id.* at 1217.
140. 281 So. 2d 198 (Fla. 1973).
141. *Forbes,* 783 So. 2d at 1219.
144. 787 So. 2d 109 (Fla. 2d Dist. Ct. App. 2001).
145. *Id.* at 110.
146. *Id.*
plaintiff could demonstrate that the defendants violated their duty to properly maintain the elevator.147

The Fifth District Court of Appeal considered the relevance of the unattended motor vehicle statute to a car accident in which the thief is killed in Graham v. Stephens.148 Section 316.1975(1) of the Florida Statutes makes it a noncriminal traffic violation to leave a motor vehicle without stopping the engine, locking the ignition, and removing the key. In this case, the deceased, a seventeen-year-old girl, took a car in which the key was left in the ignition and let a thirteen-year-old boy drive it.149 The boy lost control of the vehicle, killing the girl and another passenger.150 The court ruled that the person who stole the vehicle could not be considered part of the class protected by the statute.151 The court noted that the duty arising from this statute extends to members of the public who use the highways and are injured by these stolen vehicles.152

VII. DAMAGES

The Supreme Court of Florida considered the noneconomic damages limit in the medical malpractice statute in St. Mary's Hospital, Inc. v. Phillipe.153 This appeal involved a consolidation of two cases with similar legal issues.154 In both cases, the claimants were awarded noneconomic damages that totaled more than $250,000.155 First, the court rejected the argument of appellants that section 766.212(2) of the Medical Malpractice Act's limitation on the ability to stay the execution of an arbitration award unconstitutionally encroached on the court's rule making authority, which provides for an automatic stay of a money judgment under rule 9.310(b) of the Florida Rules of Appellate Procedure.156 The court held that the parties'
voluntary participation in the arbitration process also entailed consent to the limited stay and review procedures of the Act.\(^{157}\)

Next the court considered the application of the Act’s limit of $250,000 in noneconomic damages per incident.\(^{158}\) The court first noted that this provision was neither clear nor unambiguous.\(^{159}\) It held that the cap was a limit on each individual claimant, but did not prevent the total noneconomic damages of all of the claimants in a particular case from exceeding $250,000.\(^{160}\) The majority concluded that the contrary interpretation would present equal protection problems.\(^{161}\) The court also rejected the argument that the economic damages available in medical negligence cases that result in death are limited by the Wrongful Death Act, which provides a narrower range of damages.\(^{162}\) Justice Anstead dissented, arguing that the plain language of the statute and the court’s prior interpretation of the statute in *University of Miami v. Echarte*\(^{163}\) required that the cap of $250,000 be applied to each incident of medical malpractice.\(^{164}\)

The question of sovereign immunity was considered in *Cunningham v. City of Dania*,\(^{165}\) by the Fourth District Court of Appeal.\(^{166}\) This case involved the fatal shooting of a minor in a public park.\(^{167}\) A wrongful death action was commenced against the City of Dania and the Broward County Sheriff.\(^{168}\) The park in which the drive-by shooting occurred was the location of at least seven shootings over eight years as well as a “high incidence of gang related activity, assault, battery, sexual battery, robbery, illegal possession of various weapons, and drug-related offenses.”\(^{169}\)

In determining the applicability of governmental tort liability, the court looked at the controlling Supreme Court of Florida precedent, *Trianon Park Condominium Ass’n v. City of Hialeah*,\(^{170}\) which established that there must

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157. *Phillipe*, 769 So. 2d at 967.
158. Id. Section 766.207(7)(b) of the Florida Statutes provides: “[n]oneconomic damages shall be limited to a maximum of $250,000 per incident.”
159. *Phillipe*, 769 So. 2d at 968.
160. Id. at 971.
161. Id.
162. Id. at 973.
163. 618 So. 2d 189 (Fla. 1993).
164. *Phillipe*, 769 So. 2d at 974.
165. 771 So. 2d 12 (Fla. 4th Dist. Ct. App. 2000).
166. Id.
167. Id. at 13.
168. Id.
169. Id.
170. 468 So. 2d 912 (Fla. 1985).
be "an underlying common law or statutory duty of care." The district court held that the City had a duty to maintain and operate the park, which would include the duty to protect invitees from reasonably foreseeable criminal acts on the premises. Because of the history of violent criminal acts, the court felt that a duty of care could arise on behalf of the City, but not on behalf of the Sheriff because a law enforcement officer's duty is to the public as a whole as opposed to an individual.

In Value Rent-A-Car, Inc. v. Grace, the Second District Court of Appeal was asked to apply the parental immunity doctrine in an indemnity action by the plaintiff rental car company. In this action, the wife and child of the driver of the rental car sued Value, which sought indemnity from Mr. Grace pursuant to contractual and common law theories. Mr. Grace filed an affirmative defense arguing that the parental immunity doctrine prevented recovery by his minor child or persons claiming on his behalf. The court noted that the Supreme Court of Florida has held that parents are immune from suits by their children except to the extent of applicable liability coverage. The court rejected the argument by the defendant that the plaintiff was required to plead the existence of liability coverage in its complaint. The court argued that plaintiffs are not generally required to plead facts negating every potential affirmative defense that may be raised.

Of perhaps more interest in this case is the concern raised by acting Chief Judge Altenbemd's concurring opinion. In Altenbernd's concurring opinion, the judge notes that it is an unresolved issue as to whether family immunity should bar an indemnity claim brought by a party who is only vicariously liable for the damages. As noted, the family immunity doctrine is often asserted as a protection of family resources, but a payment by a vicariously liable party in a case like this one would actually increase

171. Id. at 917.
172. Cunningham, 771 So. 2d at 14.
173. Id. at 16.
175. Id.
176. Id.
177. Id.
178. Id. (citing Ard v. Ard, 414 So. 2d 1066 (Fla. 1982); Joseph v. Quest, 414 So. 2d 1063 (Fla. 1982)).
179. Grace, 26 Fla. L. Weekly at D737.
180. Id.
181. Id.
182. Id.
family resources.\textsuperscript{183} Thus, allowing family immunity in this type of case would arguably turn such defendants into insurers with no protection in family claims without advancing the major justification for parental immunity.\textsuperscript{184} One hopes that this interesting policy question will be resolved in the future in this case or a similar one where the question is at issue.

The Fifth District Court of Appeal also considered an apportionment of damages issue in \textit{Doig v. Chester}.\textsuperscript{185} In \textit{Doig}, the plaintiff sued Dr. Doig and Halifax Hospital for medical malpractice.\textsuperscript{186} Halifax settled for $150,000 during pre-suit proceedings, and the plaintiff recovered $507,321 through arbitration with Doig, of which $250,000 was for non economic damages.\textsuperscript{187} The issue was "whether the Halifax recovery should be offset against the Doig award."\textsuperscript{188} The plaintiff did not want the per-incident limit on total noneconomic damages in the medical malpractice statute\textsuperscript{189} to limit her total non economic damages from the two defendants.\textsuperscript{190} The appellate court held that the plaintiff was entitled to only $250,000 in total noneconomic damages.\textsuperscript{191} It did however certify the following question to the Supreme Court of Florida as one of great public importance: "IS IT APPROPRIATE TO SETOFF AGAINST THE NON ECONOMIC DAMAGES PORTION OF AN AWARD AGAINST ONE TORTFEASOR IN AN ARBITRATION OF A MEDICAL MALPRACTICE ACTION THE AMOUNT RECOVERED FROM SETTLEMENT FROM ANOTHER RESPONSIBLE FOR THE SAME INCIDENT CAUSING THE INJURY?"\textsuperscript{192}

In the case of \textit{Letzter v. Cephas},\textsuperscript{193} the Fourth District Court of Appeal has certified two questions to the Supreme Court of Florida: 1) "Has the doctrine of \textit{Stuart v. Hertz}\textsuperscript{194} been abrogated by the Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida?;" and 2) "Does \textit{Stuart v. Hertz} apply when the initial cause of action is one in medical

\textsuperscript{183} \textit{Id.} at D738.
\textsuperscript{184} \textit{Grace}, 26 Fla. L. Weekly at D738.
\textsuperscript{185} \textit{776 So. 2d 1043 (Fla. 5th Dist. Ct. App. 2001); see also FLA. STAT. § 766.207 (2001).}
\textsuperscript{186} \textit{Id.} at 1044.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{FLA. STAT. § 766.207(7)(h) (2000).}
\textsuperscript{190} \textit{Doig, 776 So. 2d at 1044.}
\textsuperscript{191} \textit{Id.} at 1045.
\textsuperscript{192} \textit{Id.} at 1047.
\textsuperscript{193} \textit{Letzter v. Cephas, 792 So. 2d 481 (Fla. 4th Dist. Ct. App. 2001).}
\textsuperscript{194} \textit{351 So. 2d 703 (Fla. 1977).}
malpractice and both the initial and subsequent tortfeasors are sued in the
same action? 195

In Letzter, Mr. Cephas, a diabetic, consulted Dr. Letzter concerning a
wound on the little toe of his right foot. 196 It was alleged that Letzter was
negligent in not performing distal bypass surgery in a timely manner. 197
Because of continuing pain in his foot, the plaintiff sought treatment at an
emergency room in a nearby hospital where Dr. Armand performed a fore-
foot amputation and a femoral-to-popliteal artery bypass on Cephas’ right
leg. 198 Experts testified that Armand’s actions also were negligent in some
respects. 199 Eventually Cephas required a below the knee amputation. 200
The trial court agreed to give the Stuart v. Hertz instruction. The instruction
generally states that one who negligently causes another’s personal injuries
is also liable as a proximate cause of damages suffered when the injured
party exercises reasonable care in securing the services of a competent
physician or surgeon, but suffers aggravation or increased injury by the
negligence, mistake, or lack of skill of the physician or surgeon. 201

Dr. Letzter argued that the instruction was erroneous because he and
Dr. Armand were joint tortfeasors. 202 Although it would not have been
appropriate to present such an instruction in that case, the court ruled that
whether the doctors were joint tortfeasors was a jury question from which
the evidence could support either conclusion. 203 However, because the jury
found that Dr. Armand was the legal cause of damage, but allocated fault
between the two medical practitioners, the court ruled that the jury must
have rejected joint liability, and therefore held that the trial judge’s refusal to
apportion non-economic damages was error under section 768.81 of the
Florida Statutes. 204 As noted in the concurring opinion of Judge Klein,
chapter 86-160 of the Tort Reform and Insurance Act of 1986 provides that
courts shall enter judgments against parties based upon each party’s

195. Letzter, 792 So. 2d at 488.
196. Id. at 484.
197. Id.
198. Id.
199. Id.
200. Letzter, 792 So. 2d at 485.
201. Id.
202. Id.
203. Id.
204. Id. at 486.
percentage of fault and not on the basis of joint and several liability.\textsuperscript{205} Thus, the court questions whether \textit{Stuart} is still good law.\textsuperscript{205}

The Fourth District Court of Appeal considered the applicability of drunk driving by a nonparty in a comparative negligence context in \textit{Hyundai Motor Co. v. Ferayorni}.\textsuperscript{207} In this case, the deceased was killed in a car accident in which she was improperly wearing her shoulder harness under her arm.\textsuperscript{208} Her death was due to internal injuries caused by the underarm use of the seatbelt.\textsuperscript{209} Two trials ensued in which, in addition to other claims, the plaintiff argued that Hyundai provided inadequate warnings about improperly using the seatbelt in this manner.\textsuperscript{210} The court ruled that the negligence of the drunk driver who caused the accident should have been considered in apportioning fault even though the drunk driver was not a defendant in this action.\textsuperscript{211} This decision puts the court in conflict with the Third District Court of Appeal, which in \textit{Nash v. General Motors Corp.}\textsuperscript{212} held that drunk driving was an intentional tort and thus, should not be considered.\textsuperscript{213}

The First District Court of Appeal considered the effects of a release signed pursuant to a settlement in a damages action against a jointly liable defendant in \textit{Schnepel v. Gouty}.\textsuperscript{214} In \textit{Schnepel}, plaintiff Gouty was injured by a bullet fired from Schnepel’s gun.\textsuperscript{215} Gout sued Schnepel and the gun manufacturer, Glock, with whom he settled for $137,500 before trial.\textsuperscript{216} At trial, the jury found that the plaintiff suffered $250,000 damages, of which half were economic, and that Schnepel, but not Glock, was at fault.\textsuperscript{217} The court noted that the jurisdictions are split as to whether a release of one person from liability in tort is affected by the fact that the person was not in

\begin{footnotesize}
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\item[205.] \textit{Letzter}, 792 So. 2d at 488.
\item[206.] \textit{Id.} Judge Klein notes some courts have held the Act only applies to joint tortfeasors and is therefore not applicable to cases where there are sequential, but not joint, tortfeasors. \textit{See, e.g., Beverly Enters. Fla., Inc. v. McVey}, 739 So. 2d 646 (Fla. 2d Dist. Ct. App. 1999); \textit{Ass’n for Retarded Citizens-Volusia, Inc. v. Fletcher}, 741 So. 2d 520 (Fla. 5th Dist. Ct. App. 1999).
\item[208.] \textit{Id.}
\item[209.] \textit{Id.}
\item[210.] \textit{Id.}
\item[211.] \textit{Id.} at D1985.
\item[212.] 734 So. 2d 437, 440–41 (Fla. 3d Dist. Ct. App. 1999).
\item[213.] \textit{Id.}
\item[214.] 766 So. 2d 418 (Fla. 1st Dist. Ct. App. 2000).
\item[215.] \textit{Id.} at 419.
\item[216.] \textit{Id.}
\item[217.] \textit{Id.} at 420.
\end{itemize}
\end{footnotesize}
The court decided that Florida's setoff statutes required a setoff in this case. However, the court certified the following question as one of great public importance:

Where the plaintiff has delivered a written release or covenant not to sue to a settling defendant allegedly jointly and severally liable for economic damages, should the settlement proceeds apportionable to economic damages be set off against any award for economic damages even if the settling defendant is not found liable?

Judge Van Nortwick dissented on the interpretation of the setoff statutes by the majority. Judge Nortwick reasoned that the statutes do apply to economic damages where the parties are jointly and severally liable, but that they were not applicable here, where Schnepel was found to be 100% at fault. On policy grounds, the dissent argues that if a party is to benefit from such a settlement, it should be the injured party as opposed to the tortfeasor, and that the majority's construction of the statute discourages settlements with less than all of the defendants with potential joint and several liability.

In Somberg v. Florida Convalescent Centers, Inc., the Third District Court of Appeal reviewed the issue of survival of pre-death pain and suffering in a nursing home statutory violation case. The Florida Statutes require that nursing home residents "receive adequate and appropriate health care" and creates a private right of action for deprivation of the statutory rights of nursing home residents. The nursing home was granted summary judgment pursuant to its argument that the Wrongful Death Act excludes claims for personal injuries that result in death. In an area in which the

218. Id. at 420–23 (citing Goldsen v. Simpson, 783 So. 2d 46 (Ala. Civ. App. 2000)).
220. Schnepel, 766 So. 2d at 423.
221. Id. at 419.
222. Id. at 424.
223. Id. at 425.
224. Id.
225. 779 So. 2d 667 (Fla. 3d Dist. Ct. App. 2001).
226. Id. at 668.
228. § 400.023(1).
229. § 768.20.
districts are divided, the court concluded that the claim survives because the nursing home statute provides that suits claiming infringements or deprivations of rights survive the death of the resident.

The Third District Court of Appeal considered the application of the offer of judgment statute to personal injury protection (PIP) actions in U.S. Security Insurance Co. v. Cahuasqui. The plaintiff refused an offer of judgment from U.S. Security Insurance. The jury found that the plaintiff was not entitled to recovery. Subsequently, U.S. Security filed for attorneys’ fees under the offer of judgment statute, section 768.79 of the Florida Statutes. The plaintiff argued that this was not permissible because of the attorney’s fees section of the PIP statute, which only provides for attorneys’ fees for insureds or beneficiaries. The appellate court held that the offer of judgment statute applied to all civil actions and did not conflict with the PIP statute. It would appear from looking at the language of the latter statute, that the dissent by Judge Fletcher provides the better interpretation of that statute under normal statutory construction of specific statutes governing over more general ones.

The Fifth District Court of Appeal considered the relationship of the dangerous instrumentality doctrine and indemnity theory in Hertz Corp. v. Rhode Island Hospital. Both doctrines establish vicarious liability. In this case, the former creates vicarious liability for automobile lessors and the latter under the doctrine of respondeat superior. Citing Hertz Corp. v. Ralph M. Parsons, Co., the court argued that the negligence of the driver and its employer is primary as compared to the secondary negligence of the owner, and therefore an indemnification action by the latter is allowed.

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232. 760 So. 2d 1101 (Fla. 3d Dist. Ct. App. 2000).
233. Id. at 1103–04.
234. Id.
235. Id. at 1104.
237. Cahuasqui, 760 So. 2d at 1104.
238. Id.
239. Id. at 1108.
240. 784 So. 2d 506 (Fla. 5th Dist. Ct. App. 2001).
241 Id. at 507.
242. 419 F.2d 783 (5th Cir. 1969).
against an employer of an employee driving a rental car in the course and scope of employment.\textsuperscript{243}

VII. FRAUD

A fraud claim was considered by the Fourth District Court of Appeal in \textit{Azam v. M/I Schottenstein Homes, Inc.}\textsuperscript{244} The \textit{Azam} case dealt with a claim by the plaintiff that defendant developer falsely claimed that a site where a school was to be built was going to be a permanent natural preserve.\textsuperscript{245} The defendant claimed that an action for fraud in inducement or negligence cannot exist in the sale of a home where the information relied upon is a matter of public record.\textsuperscript{246} The \textit{Azam} court disagreed with the defendant, holding that the statements concerning public records could form the basis of a fraud action as a question of fact.\textsuperscript{247}

IX. JURY INSTRUCTIONS

The Supreme Court of Florida also published new standard jury instructions, some of which relate to tort cases.\textsuperscript{248} These include new instructions concerning parental loss of filial consortium.\textsuperscript{249} Included in the new instructions are explanations of expenses for care and treatment, loss of services and earnings, as well as loss of companionship, society, love, affection, and solace.\textsuperscript{250} In addition, the instructions include amendments to the instructions on negligent misrepresentation claims.\textsuperscript{251} These include instructions concerning comparative negligence\textsuperscript{252} as recognized by the Supreme Court of Florida in \textit{Gilchrist Timber Co. v. ITT Rayonier, Inc.}\textsuperscript{253}

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\textsuperscript{243} \textit{Hertz}, 784 So. 2d at 507–08.
\textsuperscript{244} 761 So. 2d 1195 (Fla. 4th Dist. Ct. App. 2000).
\textsuperscript{245} \textit{id.} at 1195–96.
\textsuperscript{246} \textit{id.} at 1196 (citing \textit{Pressman v. Wolf}, 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999)).
\textsuperscript{247} \textit{id.}
\textsuperscript{248} Standard Jury Instructions–Civil Cases, 777 So. 2d 378 (Fla. 2000).
\textsuperscript{249} \textit{id.} at 379.
\textsuperscript{250} \textit{id.} at 380.
\textsuperscript{251} \textit{id.} at 380–82.
\textsuperscript{252} \textit{id.} at 383.
\textsuperscript{253} 696 So. 2d 334 (Fla. 1997).
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X. CONCLUSION

As can be seen, Florida appellate courts have again been busy during the past year in clarifying the constantly evolving area of tort law. Courts have attempted to clarify the breadth of the dangerous instrumentality doctrine as applied to automobiles and the coverage of the Medical Malpractice Act. They have also revisited the persistent problems of the existence of legal duties, the application of the negligence per se doctrine, and the calculation of damages. Although some points have been clarified, new questions have been raised in other areas. Perhaps some of these new questions will be answered in the next year.