Torts

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Abstract

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I. INTRODUCTION

Florida courts experienced an unusually active period during the last survey year, handing down a large number of significant opinions in the area of torts. Of these, the Florida Supreme Court's doctrinally sound and well-reasoned opinion in *First Florida Bank, N.A. v. Max Mitchell & Co.* led the way. Mitchell, an accountant, attempted to negotiate a loan from the bank on behalf of his client, C.M. Systems (C.M.). Mitchell showed the bank audited financial statements of C.M., which he had prepared, indicating that C.M. had no liability to any bank. Mitchell, in the course of oral negotiations, reaffirmed that C.M. owed no money to any bank. Ultimately, the bank extended a $500,000 line of credit to C.M. which C.M. fully utilized and never repaid. The bank later discovered that at the time Mitchell prepared the audited statement and made the oral representations, C.M. owed over $750,000 to a number of banks.

The bank sued Mitchell, the trial court granted summary judgment to Mitchell, and the Second District Court of Appeal uneasily affirmed, believing itself bound by precedent to dismiss any claim against an accountant brought by a person not in privity. Granting certiorari to review a question of great public importance, the Florida Supreme Court reversed:

Because of the heavy reliance upon audited financial statements in the contemporary financial world, we believe permitting recovery only from those in privity or near privity is unduly restrictive. On the other hand, we are persuaded by the wisdom of the rule which limits liability to those persons or classes of persons whom an ac-
accountant "knows" will rely on his opinion rather than those he "should have known" would do so because it takes into account the fact that an accountant controls neither his client's accounting records nor the distribution of his reports.⁴

Particularly impressive in Justice Grimes' literate opinion was his handling of the formative cases written by Justice Cardozo, then sitting on the New York Court of Appeals. Most courts focus on the directly relevant Ultramares Corp. v. Touche, Niven,⁵ in which an accounting firm was held not liable for negligently auditing a financial statement when sued by plaintiffs not in privity. However, Justice Grimes went further and recognized that any discussion of Ultramares is incomplete without a collateral consideration of Cardozo's earlier opinion in Glanzer v. Shepard.⁶ In that case, a public weigher, hired by the seller of beans, was contractually bound to transmit the weight of the beans not only to the seller, but to the buyer as well. When the beans arrived weighing less than the certificate indicated, the buyer sued the weigher even though no privity of contract existed between the two. As the weigher actually knew of the buyer's existence, he incurred liability for his misstatement despite the lack of privity.⁷

Justice Grimes correctly noted that privity of contract between a professional and one injured by that professional's malpractice normally forms an integral part of the plaintiff's cause of action.⁸ However, Justice Grimes added that the plaintiff can also satisfy the duty proven by privity through a showing that the defendant knew his or her acts would necessarily affect the plaintiff as well as persons in privity with the professional.⁹ Stressing the uniqueness of the facts in the instant case, Justice Grimes concluded that "Mitchell vouched for the integrity of the audits and that his conduct in dealing with the bank sufficed to meet the requirements of the rule which we have adopted in this opinion."¹⁰

⁴ *First Florida Bank*, 558 So. 2d at 15.
⁵ 255 N.Y. 170, 174 N.E. 441 (1931).
⁶ 233 N.Y. 236, 135 N.E. 275 (1922).
⁷ *Id.* at 238-39, 135 N.E. at 275.
⁸ *First Florida Bank*, 558 So. 2d at 16.
⁹ *Id.*
¹⁰ *Id.* A lower court, however, noted that privity would bar a suit by a member of the public at large against a physician who approved of a psychotic patient's return to work as a member of the police force. *See* Joseph v. Shafey, 15 Fla. L. Weekly D2343 (Fla. 3d Dist. Ct. App. Sept. 28, 1990).
The Florida Supreme Court also decided *Upjohn Co. v. MacMurdo*, which clarified the often difficult task of determining the adequacy of warnings in cases involving products liability. Upjohn manufactured the contraceptive pharmaceutical, Depo-Provera, with which MacMurdo was injected by her physician. The insert in the Depo-Provera package warned that the drug might cause vaginal bleeding. MacMurdo, after a second injection of Depo-Provera, experienced continual vaginal bleeding which ultimately resulted in her doctor performing a hysterectomy. MacMurdo sued Upjohn, and at trial the judge permitted the issue of the adequacy of the warning to go to the jury. The Fourth District Court of Appeal affirmed, but on conflict certiorari the Florida Supreme Court reversed, holding that the warnings were so "accurate, clear, and unambiguous" the judge should have found them adequate as a matter of law.

The plaintiff's experts failed to demonstrate "that the package insert was insufficient to put a doctor on notice that the symptoms . . . could result from the use of Depo-Provera." Although MacMurdo's bleeding was more than the breakthrough bleeding or spotting mentioned in the package insert, the company did not have the duty to warn specifically of the degree of blood flow the product might induce. Thus, the test for adequacy of warnings after *Upjohn Co.* seems to be whether the warning would adequately convey the danger to the person the warning was designed to reach. As *Upjohn Co.* dealt with warnings to a learned intermediary, the warnings needed to convey the danger to that intermediary. In cases of direct consumer warnings, a judge can take the issue of warnings from the jury if the warnings

11. 562 So. 2d 680 (Fla. 1990).
12. The package insert specifically warned of vaginal bleeding in several sections, with the clearest statement coming in the "Adverse Reactions" portion, which noted: "The following adverse reactions have been observed in women taking progestin including Depo-Provera: breakthrough bleeding[,] spotting[, and] change in menstrual flow . . . ." *Id.* at 682.
14. *Upjohn Co.*, 562 So. 2d at 683 (quoting Felix v. Hoffman-LaRoche, Inc., 540 So. 2d 102 (Fla. 1989)).
15. *Id*.
16. "It would be unreasonable to hold Upjohn liable for not characterizing the bleeding as excessive, continuous, or prolonged." *Id.* In dissent, Justice Shaw argued that because Upjohn knew prolonged bleeding had resulted from Depo-Provera and because the physician anticipated lack of bleeding rather than increased bleeding, the package insert should have been more specific and the jury could have found it was inadequate. *Id.* at 684 (Shaw, J., dissenting).
clearly conveyed the danger to the person purchasing the product.17

In 1987, in Bankston v. Brennan,18 the court determined that a social host could not be liable to a third party injured by a minor guest who had become intoxicated at the host's home. This year, in Dowell v. Gracewood Fruit Co.,19 it faced the issue of damages caused by an inebriated guest served alcoholic beverages by a host who knew the guest was a chronic alcoholic. Gracewood Fruit employed Abbey, and knew that he suffered from alcoholism. At a company outing, Abbey drank alcoholic beverages and later caused an automobile accident injuring Dowell. Dowell sued Gracewood, the trial court entered summary judgment in favor of the defendant, and the Fourth District Court of Appeal affirmed.20 Dowell then obtained certiorari from the Florida Supreme Court based on a question of great public interest.

The court clarified its 1987 opinion in Bankston, stating that “[w]hile Dowell attempts to characterize Bankston as only deciding the liability for serving alcoholic beverages to a minor, the opinion unmistakably rejected the contention that section 768.125 created a cause of action against a social host.”21 The court continued to stress that in matters where the legislature has spoken, any variation from the language of the statute must rest with the legislature itself.22 Again the court demonstrates that while it might willingly change judge-made law, it will continue to defer to the legislature in any case where the legislature has not specifically covered a situation within the bounds of an existing general statute.23

These three cases, although coming from different fields of tort

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18. 507 So. 2d 1385 (Fla. 1987).
19. 559 So. 2d 217 (Fla. 1990). Florida statutes impose liability on a “person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages . . . .” Fla. Stat. § 768.125 (1989) (emphasis supplied). Bankston dealt with the first clause of the statute; Dowell addressed the second.
21. Dowell, 559 So. 2d at 218.
22. As the legislature had not addressed the subject since the court decided Bankston, the court concluded that “the legislature is content with our interpretation of the statute.” Id.
law, seem to signal a resurgence of concentration by the Florida Supreme Court on the duty element of tort law. First Florida Bank certainly stresses the requirement that the defendants must owe a duty to the plaintiffs who sue them. The entire concept of privity arose as an alternative means of expressing the necessity for a prior, litigatable relationship between two parties in order for one to successfully pursue a tort action against the other.\footnote{See generally Richmond, The Development of Duty: Langridge to Palsgraf, 31 St. Louis U. L.J. 903, 940-43 (1987).} Upjohn Co., in permitting the judge — instead of the jury — to decide clear-cut matters, treats the question of warnings in a duty-oriented manner instead of a causation-oriented one.\footnote{The judge decides questions of duty; the jury decides questions of causation. See generally 3 F. Harper, F. James & O. Gray, The Law of Torts ch. 16 (2d ed. 1986).} Finally, Dowell stresses that in the absence of common-law duties and a clearly defined legislatively created duty, the court will take no steps to enlarge on a highly specific, limited duty the legislature may have enacted. The concentration on the necessity for plaintiffs to demonstrate duty reaffirms Florida’s continuing approval of the principles espoused by Justice Cardozo in the misrepresentation cases and embodied in the famous Palsgraf opinion.\footnote{Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).}

II. NEGLIGENCE

A. Negligence Per Se

Courts confronted with plaintiffs attempting to prove negligence through violation of a statute occasionally must cope with the effect a violation of an administrative regulation will have in a civil suit. This has proven a knotty issue, particularly when the regulating agency is not of the same state as the court hearing the issue. Courts have split on the dignity to accord the regulation.\footnote{See generally Restatement (Second) of Torts § 286 (1965).} Dicta in the recent Fifth District Court of Appeal decision in Murray v. Briggs\footnote{569 So. 2d 476 (Fla. 5th Dist. Ct. App. 1990).} indicates that Florida courts will not accord federal regulations the same status as Florida statutes and ordinances. Briggs ran his pick-up truck into the rear of a parked flat bed truck owned by Hughes Supply. Briggs’ passenger, Murray, sued Hughes, arguing that the truck was used in interstate commerce and its violation of a safety regulation promulgated by

the Interstate Commerce Commission (I.C.C.) proximately caused his injuries. 29 At trial, the court refused to instruct the jury on Hughes' failure to have a rear bumper which met the I.C.C. regulation. The jury found for Hughes, and Murray appealed to the Fifth District Court of Appeal, which affirmed. 30

Judge Griffin's opinion actually turns on the determination that Hughes was not engaged in interstate commerce and that the regulation did not apply to its trucks. 31 However, Judge Griffin went on to note that even had the regulation applied to Hughes, the trial judge correctly refused to give the requested instruction: "[A]lthough several courts seem comfortable with the concept, we are not satisfied that a federal regulation should necessarily control state law questions of negligence by enlarging common law duties or creating new duties." 32 According to the court, the regulation itself fails to provide definite standards for the design of the bumper, and in fact does not even specify the proper location of the bumper. Furthermore, a court cannot permit such a vague regulation to supplant traditional common law notions of reasonable prudence. 33

B. Vicarious Liability

1. Respondeat Superior

Two significant opinions from the Third District Court of Appeal solidified the rule that employers will not incur vicarious liability for the acts of their employees in driving to and from work, even though those same acts might entitle the employees to workers' compensation benefits. In the first opinion, the wife of the president of a corporation also served as a part-time employee of the corporation. 34 The corpora-

29. See Rear End Protection, 49 C.F.R. § 393.86 (1989). This regulation provides that vehicles engaged in interstate commerce must have rear bumpers meeting certain specifications designed for the protection of other vehicles in rear-end collisions. Murray alleged that Hughes' bumper failed to meet the specific requirements of the regulation. Murray, 569 So. 2d at 478.
30. Id. at 481.
31. Although Hughes engaged in interstate trading, it had two fleets of trucks. The truck in question was used exclusively in intrastate transactions within Florida. Id. at 479-80.
32. Id. at 480.
33. Id. at 481.
tion was a franchise of United Consumers Club (UCC), and admittedly the agent of UCC. The corporation provided its president with a van, which his family was entitled to use. One day, the president called his wife to request that she come in to work. While driving the corporation's van, she caused an accident which injured Robelo. Robelo sued UCC, arguing that the wife's actions caused UCC to incur vicarious liability.35

The trial court granted UCC's motion for summary judgment, and the Third District Court of Appeal affirmed.36 Robelo attempted to use two theories of liability, both of which the court rejected. He first argued that the wife's travel subjected UCC to liability either because it was in the nature of a special errand or because she was an "on call" employee. The court rejected the first prong of the argument simply because the facts demonstrated that she "was merely traveling to the office,"37 and the second because even though she did not work unless needed, her employment relationship did not require her to come in each time she was summoned. As to the second theory, even though the corporation provided the van which she drove, since she was allowed to drive it for other purposes than business the simple use of the van without a specific employment connection would not subject the employer to liability.38

In the second opinion, the Third District Court joined with the Fourth District Court of Appeal in noting the difference between the workers' compensation test for "course of employment" and the respondent superior test for "scope of employment."39 In Sussman v. Florida East Coast Properties, Inc.,40 the manager of a health spa called Paraiso, one of his fitness instructors, and asked her to stop on her way to work and pick up a birthday cake for another employee. She bought the cake, testifying later that she did so without regard to her manager's instructions.41 As she drove from the supermarket, the cake be-

35. Id. at 396.
36. Id. at 397.
37. Id. at 396.
38. Id. at 397.
40. 557 So. 2d 74 (Fla. 3d Dist. Ct. App. 1990).
41. "[W]e were friends, like aerobics teachers and fitness instructors and we just decided to give him a cake because it was his birthday . . . . I didn't do it because it was my boss. I didn't do it because my boss said so . . . ." Id. at 76 n.1.
gan to slip from the seat next to her. She reached for the cake and lost control of the car, which careened into Sussman as he sat on a bus bench. Sussman sued Paraiso's employer and appealed to the Third District Court of Appeal when the trial court granted the defendant's motion for summary judgment.\textsuperscript{2}

On appeal, Sussman argued that Paraiso's unquestioned entitlement to workers' compensation benefits also demonstrated that she acted within the scope of her employment for purposes of vicarious liability.\textsuperscript{4} The appellate court disagreed. According to the court, different policy considerations govern workers' compensation qualification than govern vicarious liability. Respondeat superior demands a "narrower analysis."\textsuperscript{44} Thus, even though Paraiso "was enroute to her place of employment . . . she was outside the scope of the employer's business as a matter of law."\textsuperscript{45} As noted in an earlier survey of tort law, the reasoning adopted by the these two district courts of appeal has the firmest base in logic, and the rule they have stated should take precedence over conflicting cases from other districts.\textsuperscript{46}

2. Borrowed Servants

Two cases during the last survey year cast new light on the interface between workers' compensation immunity and suits by borrowed servants. The Florida Supreme Court determined conclusively that the lending employer of a negligent worker can block a suit by the employee of the borrowing employer, based on workers' compensation immunity. In \textit{Halifax Paving, Inc. v. Scott & Jobalia Construction Co.},\textsuperscript{47} Halifax gratuitously loaned a crane and operator to the Scott & Jobalia Construction Co. (S & J). Obeying hand signals from S & J's employees, the Halifax operator attempted to move pipe by using a sling attached to the crane. The pipe slipped from the sling and injured Grier, an employee of S & J. Grier collected workers' compensation benefits from S & J, and then sued Halifax, seeking damages on a respondeat superior theory. After a jury found that the operator was a

\begin{itemize}
\item \textsuperscript{42} Id. at 75.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. The court relied on the nature of the errand — purchasing refreshments for a social occasion — as well as Paraiso's statement that the purchase was not work-related to determine that the trip was outside the scope of her employment. Id.
\item \textsuperscript{46} See 1988 Tort Survey, \textit{supra} note 23, at 1256.
\item \textsuperscript{47} 565 So. 2d 1346 (Fla. 1990).
\end{itemize}
borrowed servant and held in favor of Grier, the Fifth District Court of Appeal reversed, finding the lending employer was entitled to the workers' compensation immunity accorded to the borrowing employer.\textsuperscript{48} The Florida Supreme Court granted conflict certiorari\textsuperscript{49} and approved the Fifth District Court's opinion.

The crane operator, working under the specific control of S & J's employee, was a borrowed servant. Since prior opinions establish that leased equipment becomes "the working tool of the employer,"\textsuperscript{50} injuries caused by use of the equipment are exclusively remedied through the workers' compensation process. The court reasoned that if the owner of leased dangerous equipment can claim workers' compensation immunity, it seems only logical that the owner of loaned dangerous equipment can claim the immunity as well.\textsuperscript{51} Although the owner of the crane "certainly had no duty to provide worker's compensation to the injured party, neither did the third party [owner] in any logical sense contribute to the work-place injury that actually occurred."

In \textit{Maxson v. Air Products & Chemicals, Inc.},\textsuperscript{53} the First District Court of Appeal considered the obverse side of the borrowed servant coin — whether an injured employee can successfully sue a borrowing employer in negligence, or is limited to workers' compensation remedies. Project Construction furnished manpower to Air Products under an agreement providing that Project would pay the workers and Air Products would reimburse Project. Maxson worked under this agreement for a period of time, but then requested a transfer to a different job, supervised exclusively by Air Products' personnel, and which offered him a significantly higher chance of promotion. Maxson was injured on the job, and sued Air Products in negligence. The trial court reserved ruling on Air Products' motion to dismiss and, after a jury verdict for Maxson, set aside the verdict. The First District Court of

\textsuperscript{49} The First District Court of Appeal had reached a contrary result in Mann v. Pensacola Concrete Constr. Co., 448 So. 2d 1132 (Fla. 1st Dist. Ct. App.), review denied, 461 So. 2d 115 (Fla. 1984).
\textsuperscript{50} \textit{See} Smith v. Ryder Truck Rentals, Inc., 182 So. 2d 422, 424 (Fla. 1966).
\textsuperscript{51} \textit{Halifax Paving}, 565 So. 2d at 1347.
\textsuperscript{52} \textit{Id.} at 1348. The court also discussed the function of the workers' compensation remedy: "[T]he central policies of worker's compensation are to provide employees with a swift and adequate means of compensation for injury, and to insulate employers from potentially bankrupting tort liability for work-place accidents." \textit{Id.} at 1347.
\textsuperscript{53} 554 So. 2d 1212 (Fla. 1st Dist. Ct. App. 1990).
Appeal affirmed.54

The testimony at trial conclusively demonstrated that Maxson was doing work exclusively to benefit Air Products, and performing his duties exclusively under the control of Air Products’ employees. Regardless of the contractual relationship between the two employers, the court had to look at the actual employment relationship governing the employee. Even though there was no specific contract between Maxson and Air Products, the facts clearly demonstrated that the “work being done . . . was essentially that of the special employer, and . . . that the special employer had the right to control the details of the work.”55 Thus, Air Products was the de facto special employer of Maxson, and entitled to raise workers’ compensation immunity as a defense to the suit.56

C. Defenses

The Florida Supreme Court decided two significant cases dealing with different defenses to actions in negligence. In one, the court refused to permit workers’ compensation immunity to block a suit alleging sexual harassment.57 In the other, the court attempted to further define the distinction between express assumption of risk and implied assumption of risk.58 The assumption of risk case did little more than further cement the Blackburn v. Dorta59 fallacious treatment of assumption of risk into Florida law. The sexual harassment case, however, may have paved the way for substantial inroads into workers’ compensation immunity in the limited case of intentional torts.

A number of Richardson-Greenfields’ female employees experienced frequent sexual advances, both verbal and physical, from male employees. They sued the company, claiming various intentional torts and sought damages for the emotional distress and humiliation occasioned by the sexual harassment. The company moved to dismiss the suit, arguing that the plaintiffs’ sole remedy lay in workers’ compensation. The trial court granted the motion and the Second District Court

54. Id. at 1213-14.
55. Id. at 1213 (citing Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98, 101 (Fla. 1971)).
56. Id. at 1214.
58. Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989).
59. 348 So. 2d 287 (Fla. 1977).
of Appeal affirmed. The Florida Supreme Court granted certiorari to review the issue as one of great public interest.

The workers' compensation statute provides an exclusive remedy for any "injury or death" arising in the course of employment, but permits tort suits against employers for damages other than those arising from injury or death. Thus, the Florida Supreme Court first had to determine whether the emotional distress suffered by the plaintiffs in Byrd constituted an injury within the meaning of the statute. The workers' compensation statute has been liberally construed in the past, and courts have read the definitional sections to include damage-causing occurrences so that workers would not go without a remedy for their harm. However, the inclusion of sexual harassment claims in workers' compensation actions would work to frustrate legislative intent. As the Byrd court noted, "both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment." An examination of the various statutes enacted by the Florida legislature supports the conclusion that the courts should read statutes to effectuate this policy of doing away with sexual harassment in employment. To permit an employer the shield of workers' compensation immunity would run contrary to all existing Florida law. Thus, the complaint alleged an injury not protected by the workers' compensation statute — one "to intangible personal rights."

The Florida Supreme Court has yet to determine whether the exclusivity of the workers' compensation remedy will bar suits based on intentional torts. Byrd will give no guidance in those instances where

61. The certified question read: "Whether the workers' compensation statute provides the exclusive remedy for a claim based on sexual harassment in the workplace." Byrd, 552 So. 2d at 1100.
64. Byrd, 552 So. 2d at 1102.
65. "Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law." Id. at 1104.
66. Id.
plaintiffs claim damages for physical injury or death. However, where a plaintiff claims emotional damages or nominal damages due to an intentional tort, it would seem that the plaintiff seeks to remedy harm to the very intangible rights of which the Florida Supreme Court spoke. Thus, Byrd should open the door to substantial claims involving punitive damages against employers, but only for intentional torts not involving personal injury.

With Blackburn v. Dorta in 1977, the Florida Supreme Court drew the distinction between "strict assumption of the risk" and "qualified assumption of the risk." The court reiterated this reasoning in Mazzeo v. City of Sebastian, stating again the hypothetical situation it used in Blackburn:

The tenant returns from work to find the premises on fire with his infant child trapped inside. He rushes in to save the child and is burned in the fire. Under the pure or strict doctrine of assumption of risk, the tenant is precluded from recovery because he voluntarily exposed himself to a known risk even though his conduct was reasonable under the circumstances.

Unfortunately, the very example given by the court demonstrates the lack of distinction the court seeks to draw. Can we truly say the act of saving one's own child from a burning building is voluntary in nature? One commentator argues that

[w]here the defendant puts [the plaintiff] to a choice of evils, there is a species of duress, which destroys the idea of freedom of election . . . . Those who dash in to save their own property, or the lives or property of others, from a peril created by the defendant’s negligence, do not assume the risk where the alternative is to allow the threatened harm to occur.

67. In Fisher v. Shenandoah General Construction Co., 498 So. 2d 882 (Fla. 1986), the Florida Supreme Court procedurally declined to consider the effect of workers' compensation on intentional tort claims. However, in Fisher the plaintiff died as the result of an intentional industrial accident. Byrd would have no effect on a case of this nature. See generally Richmond, 1986 Survey of Florida Law (Torts), 11 NOVA L. REV. 1519, 1535-37 (1987).

68. 348 So. 2d 287 (Fla. 1977).

69. 550 So. 2d 1113 (Fla. 1989).

70. Id. at 1115 (emphasis supplied).

Thus, there is no true distinction between the two types of assumption of risk perceived by the Florida Supreme Court. Carrying the logic further, with the breakdown of the logic underlying *Blackburn v. Dorta*, the Florida Supreme Court's decision to merge assumption of the risk in with comparative negligence also fails.

*Mazzeo* presents a clear example of the evils of the rule espoused in *Blackburn*. An experienced swimmer, after standing in the shallow water at the base of a platform at a municipal lake, and after hearing the warnings of her boyfriend that the water was too shallow to permit diving, dove headfirst off the platform. She broke her neck and sued the city which maintained the park. There were no signs warning swimmers not to dive, but there was a faded statement reading "no diving" painted on the dock itself. The trial court permitted the jury to consider whether Mazzeo had assumed the risk. The jury found the city negligent, but also found that Mazzeo knew perfectly well the risk in diving from the platform "and having had a reasonable opportunity to avoid it, voluntarily and deliberately exposed herself to the danger by diving into the water." On appeal, the Fourth District Court of Appeal affirmed. The Florida Supreme Court granted certiorari, as the case involved a matter of great public interest, and reversed.

The court first reviewed *Blackburn*, and then discussed the extremely limited exception it had carved out for cases involving assumption of the risks for participation in contact sports. It then refused to extend the exception to the instant case: "To expand this exception to include aberrant conduct in noncontact sports collides with the merger of assumption of risk into comparative negligence . . . ." Yet the court willingly characterized Mazzeo's behavior as "foolhardy conduct." To permit a jury to award damages in such a situation, particularly where the plaintiff's conduct rises to the level of recklessness in comparison with the defendant's mere negligence, seems contrary to the concepts of fault which underlie our system of tort law. Justice McDonald, joined by Justice Overton, also found problems with the majority's opinion. They, however, would have avoided the *Blackburn*

72. Although conflicting evidence existed, these are the facts taken in the light most favorable to the losing party — the defendant. *Mazzeo*, 550 So. 2d at 1114.
73. *Id.*
75. See, e.g., *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).
76. *Mazzeo*, 550 So. 2d at 1116.
77. *Id.* at 1117.
problem by holding that the city’s failure to post signs did not cause Mazzeo’s harm since her deliberate and intentional conduct would have broken any claimed causal nexus.78

D. Causation

1. Generally

An interesting and troubling case from the Second District Court of Appeal presented the question of the adequacy of a plaintiff’s proof on the issue of foreseeability. In Florida Power Corp. v. McCain,79 the blade of a mechanical trencher severed a subsurface power line, injuring the trencher’s operator. He sued the power company, and testimony at trial demonstrated that the company had designed the power line to deenergize the moment it was severed. A power company employee also testified that he knew of no instance in an eight year period when the person who severed a power cable received an electric shock. The plaintiff presented no other evidence on the issue. The defendant moved for a directed verdict, but the court denied the motion and the jury found for the plaintiff. The Second District Court of Appeal reversed.80

In order to recover, a plaintiff must demonstrate that the defendant could have foreseen the harm which occurred. A judge may properly determine the issue of foreseeability, or causation, although normally the court should submit it to the jury. The court found that if a plaintiff fails to produce evidence that the defendant could have anticipated the type of harm which the plaintiff suffered, the court should take the issue of foreseeability from the jury.81 From the limited proof adduced by the plaintiff at trial, he failed to demonstrate “that Florida Power reasonably could have foreseen any injury resulting from a trencher severing this type of power cable.”82

Judge Threadgill, in dissent, would have left the issue of foreseeability in the case to the jury. Quoting from the trial court’s opinion denying the motion to dismiss, Judge Threadgill noted that a jury should have determined whether “Florida Power could not foresee that if an insulated electrical line carrying 7,200 volts of electricity were cut by a mechanical device the operator of the device might receive an

78. Id. (McDonald, J., dissenting).
80. Id. at 1269-70.
81. Id. at 1271.
82. Id. at 1270.
electrical shock and an accompanying injury. Indeed, the majority's opinion leaves behind a nagging doubt. If Florida Power had designed the power line to deenergize upon being severed, it must have had some concern that severing the line would cause a shock to the person causing the break were the line not deenergized. In other words, Florida Power's own actions demonstrated it actually foresaw the possibility of this type of harm occurring. If the "fail-safe" mechanism failed to deenergize the line, then the electric shock could have readily resulted. The fact that the employee knew of no instances of electrocution does not mean that Florida Power could not have foreseen the type of harm, but it might permit a jury to find Florida Power had taken reasonable care to prevent the harm.

2. Superseding Intervening Causes

In the last year, courts have begun to deal with questions involving the conduct of plaintiffs not as a defense, but as a superseding intervening cause which will destroy the causal nexus between the act of the defendant and the injury to the plaintiff. The dissent in Mazzeo suggested this approach with a plaintiff who had acted intentionally. District courts of appeal have also determined that a plaintiff's negligence might supersede that of the defendant. Although one cannot at this early point identify these cases as creating a trend, they do tend to show the germ of a dissatisfaction by intermediate Florida courts with the merger of assumption of risk into comparative negligence.

For example, in Garcia v. Metropolitan Dade County, a mother was walking to school with her child. When they came upon an intersection, the child walked out into the street without his mother's permission. The county had not maintained a crosswalk at the intersection even though it had suggested the intersection as a safe one for children going to school. The child stopped in the middle of the intersection, and a car struck and injured him. He and his parents sued the county. The trial court entered summary judgment for the defendant, and the Third District Court of Appeal affirmed.

The court emphasized that had the county maintained traffic signals, the boy still would have been injured:

83. Id. at 1272 (Threadgill, J., dissenting).
84. See supra text accompanying note 78.
85. 561 So. 2d 1194 (Fla. 3d Dist. Ct. App. 1990).
86. Id. at 1195.
No number of traffic signals, traffic control devices, or safe route to school maps can provide any greater protection for a child than the attendant supervision of his parent. . . . The sole proximate cause of George's injuries was his act of stepping into the street without keeping a proper lookout, while under his mother's control. 87

Thus, the negligence of the parent and child combined to supercede any possible negligence of the county in failing to provide proper safety precautions at the intersection.

A later panel of the Third District Court of Appeal, however, reached a contrary result where the child's parent did not accompany the child. 88 An additional distinction lay in the special instructions given to that plaintiff regarding the route to school, and in the plaintiff's special status. Lagarian Brunson needed a speech therapist, and the Dade School Board transferred him to a school some distance from his home. The school board failed to provide a school bus for Lagarian, and his father took him to school via public transportation by a route designated by the school board. The route involved crossing a dangerous city intersection. After two weeks, the nine-year old boy's father ceased to accompany him. As Lagarian crossed the intersection, a car struck and killed him. 89

In the ensuing action by Lagarian's estate, the school board acknowledged that it had breached a duty to provide transportation to the new school. However, it moved for and was granted summary judgment on the theory that the father's intervening negligent act of failing to accompany his son on the dangerous trip superseded any breach of duty in failing to provide the school bus. On appeal, the Third District Court of Appeal reversed. 90

Were it not for the failure to provide transportation, the father would not have had the opportunity to act negligently. Since his "allegedly deficient conduct 'was set in motion by the original wrongful act [it was] not such a new and independent cause as to create an intervening cause." 91 Yet the question remains open whether, had the father accompanied the child to the intersection and negligently permitted him to attempt to cross the street, the second panel from the Third

87. Id.
88. See Brunson v. Dade County School Board, 559 So. 2d 646 (Fla. 3d Dist. Ct. App. 1990).
89. Id. at 647.
90. Id.
91. Id. at 648 (citations omitted).
District would have found the father's negligence superseded that of the school board.

Later in the year, the First District Court of Appeal found that the act of a man in attempting to board a moving freight train constituted a superseding intervening cause, relieving the railroad company of any liability for his injuries. Pickard, a man who traveled from place to place by hitchhiking or hopping a moving freight train and subsisted by working odd jobs, asked two men he believed to be railroad company employees where he could hop a train. They directed him to a bridge over the tracks. After some equivocating, and having left the premises of the railroad and then returning, Pickard made up his mind to jump a train. As he approached the tracks in the rain, a train came towards him at about 30 miles per hour. He tried to hop the train, but was instead thrown from it when it suddenly lurched. Pickard sustained severe injuries. He sued the railroad company and successfully won a jury verdict after the trial court denied the company's motion to dismiss. On appeal, the First District Court of Appeal reversed.

After a lengthy discussion of Pickard's status as trespasser or licensee, the court considered whether the acts of the railroad company employees caused Pickard's injuries at law. Although the employees may have been the cause in fact of the injuries in directing Pickard to the bridge crossing, their acts were not the cause at law of the injuries. "[T]he inquiry becomes whether the negligence of FEC's employees set in motion the chain of events leading to Pickard's injuries or simply provided the occasion for Pickard's own gross negligence." Stressing Pickard's own lack of resolve and the extreme danger of his attempt to board the fast freight in bad weather, the court held his actions constituted "an active, independent and efficient intervening cause that severed the tenuous chain of causation between the negligence of FEC's employees and Pickard's injuries." The utilization of proximate causation to limit the liability of defendants to plaintiffs who take unusual risks, or whose injuries come

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93. *Id.* at 852-53.
94. The court seems to have assumed that Pickard's identification of the two men as employees of the railroad sufficed to send that issue to the jury, which found in Pickard's favor.
95. *Id.* at 858.
96. *Id.* at 859.
about due to negligence occurring subsequent to that of the named defendant, seems a natural development. Intentional torts have always superseded negligence, although when the intentional act was that of the plaintiff courts have spoken of it in terms of assumption of the risk. The rationale of both doctrines is the same: a defendant incurs liability only for those injuries which one can anticipate at the time of the negligent conduct. At law, one cannot anticipate an intervening intentional harmful act — whether the act jeopardizes third parties or the plaintiffs themselves.

E. **Premises Liability**

1. **Dangerous Interior Conditions**

The nature of proof required of the plaintiff in a slip and fall case provided the basis for two district court of appeal opinions this past year. In the first, the plaintiff slipped on a foreign substance on the floor of a grocery store. At trial, she introduced no evidence that the store's employees caused the material to fall to the floor, and also produced nothing to demonstrate that they knew the material was there. Additionally, she produced nothing indicating the length of time the substance had been on the floor before she slipped on it. Despite her lack of evidence, the trial court denied defendants' motion to dismiss at the close of the plaintiff's case and sent the case to the jury. The jury found for the plaintiff, but on appeal, the Fifth District Court of Appeal reversed.

The court explained that a plaintiff in a slip and fall case can recover from the owner of the premises by demonstrating that the owner failed to use due care, either in keeping foreign materials from the floor or in removing them within a reasonable period of time. As to the second alternative, the plaintiff can show either that the owner knew of the dangerous condition and failed to remedy it, or that the owner should have known of the dangerous condition because, in the exercise of due care, the owner would have discovered it within the period of time it had existed. Where the plaintiff fails to introduce evidence demonstrating any of these three ways the owner failed to exercise reasona-

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98. *Id.*
99. *Id.* at 214-15.
ble care, the plaintiff cannot reach the jury. Any jury determination in the absence of this evidence would be mere speculation.\textsuperscript{100}

The second case, from the Second District Court of Appeal, accorded with the first.\textsuperscript{101} Wilson, shopping in a supermarket, returned to an aisle he had visited shortly before. He slipped on some liquid detergent on the floor, which had spilled from a tipped-over bottle on the top shelf, and injured himself. On his earlier trip down the aisle, he had not seen any detergent on the floor. Wilson sued the supermarket. At trial, the store manager testified that he had inspected the aisle no more than fifteen minutes prior to the accident and had not noticed any spill. The case went to the jury, and after it rendered a verdict in Wilson's favor, the trial judge granted a judgment notwithstanding the verdict, which the Second District Court of Appeal affirmed: "Appellants' case fails in its required burden of proof for lack of any evidence that appellee had actual knowledge of a dangerous condition prior to Mr. Wilson's injury. There is likewise no evidence as to the length of time a dangerous condition existed prior to Mr. Wilson's fall."\textsuperscript{102}

In Fitzgerald v. Cestari,\textsuperscript{103} the Fourth District Court of Appeal determined that a homeowner has no duty to discover whether a sliding glass door contains safety or plate glass, and the Supreme Court of Florida later affirmed.\textsuperscript{104} Brandi Fitzgerald, visiting a house owned by the Cestaris, walked through a plate glass door and suffered severe injuries. When she sued the Cestaris, the trial judge granted their motion

\textsuperscript{100} Id. at 215. The court continued:
Where, as here, there is no evidence the premises possessor had actual knowledge of the dangerous condition prior to the injury, and there is no evidence as to the length of time the dangerous condition existed prior to the injury, the premises possessor is entitled to a judgment as a matter of law and a jury is not authorized to speculate or arbitrarily impose strict liability based on the mere contention or general assertion that the premises possessor "should have known of" the dangerous condition.


\textsuperscript{102} Id. at 263-64.

\textsuperscript{103} 553 So. 2d 708 (Fla. 4th Dist. Ct. App. 1989).

\textsuperscript{104} Fitzgerald v. Cestari, 569 So. 2d 1258 (Fla. 1990). The Florida Supreme Court echoed the rationale of the Fourth District. This case presents the difficulty the author of a survey faces when a case during the survey year is considered by a superior tribunal in an opinion which appears subsequent to the survey year. The author of this survey has elected to preserve the integrity of the survey year, but notes the later affirmation for those seeking precedential guidance.
for summary judgment and the appellate court affirmed. The Cestaris had submitted to the trial court an affidavit demonstrating they had no knowledge that the glass door, which was the same one installed by the builders of the house, contained plate glass rather than safety glass. The affidavit also noted that a reasonable inspection would not have disclosed the type of glass in the door. The court held that under these circumstances, the owner of the house had no duty to go beyond a reasonable inspection to determine the nature of the glass. Although the plaintiff had a cause of action against the original builder of the house, she had no cause of action against the owners.

The First District Court of Appeal had occasion to consider the duty owed by the owner of a building to those individuals working to correct a dangerous condition within the building. Champion owned a pre-world war II building and hired Brown & Root to demolish it. Brown & Root subcontracted the removal of asbestos to A & A Insulation, and Mozee worked for A & A. During the course of removal, A & A's superintendent asked Champion to turn off the electricity to the building, but Champion's contact person could not comply with this request. He told the superintendent that there were no schematics for much of the old wiring, and A & A should assume the wiring was still hot. Mozee was working in a part of the building with charged wires, grasped a wire, and was electrocuted. His estate sued Champion, which recovered a summary final judgment from the trial court, and the plaintiff appealed to the First District Court of Appeal.

The owner of property incurs liability to independent contractors working on the property only if the owner intermeddles with the work, or if the owner creates or approves of a dangerous condition on the property. Even though Champion did not attempt to take control of the work performed by A & A, Mozee's estate argued that Champion approved of the dangerous condition in failing to give adequate warning. However, the district court agreed with the trial judge, who concluded that "under the circumstances Champion adequately informed the contractor of the existence of electrical lines in the building and to assume

105. See, e.g., Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).
106. Fitzgerald, 553 So. 2d at 709. Florida law seems to run contrary to that of some other jurisdictions, noted by Judge Dell in his exhaustively researched dissent. Id. at 709-12 (Dell, J., dissenting).
108. Id. at 596-97.
that they were hot, and the contractor's supervisor knew of the existence of hot lines in the building and especially those lines [in the area of the accident]." The appellate court affirmed the summary judgment in favor of Champion.

2. Dangerous Exterior Conditions

In Sullivan v. Silver Palm Prop., Inc., the Florida Supreme Court determined that the owner of property from which subterranean roots protrude will incur no liability for damages from those roots. An automobile went out of control on a bumpy road. Roots from Australian pine trees on Silver Palm's property caused the bumps in the road, and a passenger in the car, Sullivan, sued Silver Palm for her injuries. The trial court allowed the case against Silver Palm to reach the jury. The Third District Court reversed, and the Florida Supreme Court, hearing the case as a matter of great public interest, affirmed. It quoted extensively from the lower court's opinion, stressing the distinction between unobservable root growth and obvious danger from overhanging limbs and vision-obstructing shrubbery. The court noted that Florida has now adopted a rule of law consistent with that of several sister states.

Unlike Sullivan, Dawson v. Ridgley presented the case of a landowner maintaining an entrance to a public road in such a way that a telephone pole partially obstructed the view of the road by exiting motorists. In leaving the defendant's shopping center, motorists would have their view of the street partially blocked by a concrete telephone pole which did not lie on the property. Dawson, a passenger on a motorcycle travelling on a public road adjacent to the shopping center, suffered injuries in an accident caused by a car leaving the shopping

109.  Id. at 598. Judge Smith, in dissent, felt the warning inadequate under the circumstances, particularly because Champion's contact person "did not know the location of the proper switch and... made no effort to seek the assistance of other Champion personnel who did know." Id. at 599 (Smith, J., dissenting).

110. 558 So. 2d 409 (Fla. 1990), aff'd Silver Palm Prop., Inc. v. Sullivan, 541 So. 2d 624 (Fla. 3d Dist. Ct. App. 1989); see also Richmond, 1988 Tort Survey, supra note 23, at 1270-71.

111. Sullivan, 558 So. 2d at 410. The question certified read as follows: "Does a landowner have a duty to retard the subterranean root growth of trees which are located adjacent to a public right of way?" Id.

112. See id. at 411.

center and striking the motorcycle. The trial court granted the defendant's motion for summary judgment, and the Third District Court of Appeal affirmed.\textsuperscript{114} Although the landowner might owe a duty of reasonable care to business invitees, the duty does not extend to those travelling along an adjacent public road.\textsuperscript{115}

In \textit{Aventura Mall Venture v. Olson},\textsuperscript{116} the Third District Court of Appeal held that maintaining a normal sidewalk curb without painting it to distinguish it from the adjacent roadway does not constitute an act of negligence which would subject a landowner to liability to a business invitee. Olson fell when stepping off a sidewalk curb adjacent to the Aventura Mall. The mall had not painted the curb, and at trial Olson introduced evidence that other malls in the same county with similar curbs had painted the curbs yellow to warn of the difference in levels. The jury found for Olson, but on appeal the Third District reversed.\textsuperscript{117}

Undeniably, a landowner owes a duty to business invitees to warn them of latent or concealed dangers. On the other hand, a landowner owes no duty to warn of an overt danger. Since nothing obstructed Olson's view, the normal curb presented nothing more than a danger she could have easily observed. As one early Florida case held, raised curbs adjacent to sidewalks are a common instance of life in the United States, and people should not need warning of their location.\textsuperscript{118} The \textit{Aventura Mall} court reasoned that "[t]o hold that an ordinary sidewalk curb, without more, is inherently dangerous would make every municipality and business establishment the virtual insurer of the safety of every pedestrian."\textsuperscript{119}

As noted earlier,\textsuperscript{120} Florida courts have begun to hold that the act of the plaintiff, while perhaps not serving as a defense to a cause of action in negligence, will act as a superseding intervening cause to cut off liability stemming from the defendant's negligence. This concept also found its way into the jurisprudence of premises liability. In \textit{Ruiz}

\begin{itemize}
  \item \textsuperscript{114} The court, however, reversed the summary judgment in a suit brought against Ridgley by the driver of the car which was leaving his property. The driver "was, without dispute, a business invitee of the defendant landowner at the time of the subject accident . . . ." \textit{Id.} at 625.
  \item \textsuperscript{115} \textit{Id.} at 624-25.
  \item \textsuperscript{116} 561 So. 2d 319 (Fla. 3d Dist. Ct. App. 1990).
  \item \textsuperscript{117} \textit{Id.} at 319-20.
  \item \textsuperscript{118} \textit{See} Bowles v. Elkes Pontiac Co., 63 So. 2d 769, 772 (Fla. 1952).
  \item \textsuperscript{119} \textit{Aventura Mall}, 561 So. 2d at 321.
  \item \textsuperscript{120} \textit{See supra} text accompanying note 96.
\end{itemize}
v. Westbrooke Lake Homes, Inc.,\textsuperscript{121} a young boy, playing tag on a set of monkey bars, jumped from one bar to another and broke his collarbone when he failed to catch the second bar. He sued the owner of the property on which the monkey bars were situated, arguing negligence in maintenance of the apparatus. The trial court granted the defendant's motion for summary judgment, and the Third District Court of Appeal affirmed.\textsuperscript{122}

The Ruiz court pointed out that cases from Florida and other jurisdictions consistently hold that where children suffer injuries from objects on real property, and they have acted in a way to misuse the objects, the owner of the property will incur no liability to them.

In other words, whatever negligence there may have been on the part of the landowner, the negligence of the child superseded it and became, as a matter of law, the proximate cause of the child's injury. Applying this to Ruiz, although faulty maintenance was alleged, this is of no consequence, as the proximate cause of Dennis' injuries was that of his own careless attempt to jump from the monkey bar to the slide.\textsuperscript{123}

Indeed, the court specifically points out that it adopts the causation analysis to avoid the removal of the strict bar to recovery created by Blackburn \textit{v. Dorta}'s abrogation of the defense of implied assumption of risk.\textsuperscript{124}

\section*{III. Professional Negligence}

\subsection*{A. Medical Malpractice}

Florida courts this past term turned their attention to when the statute of limitations should begin to run in medical malpractice actions. The Florida Supreme Court noted that the statutory period com-

\begin{itemize}
\item \textsuperscript{121} 559 So. 2d 1172 (Fla. 3d Dist. Ct. App. 1990).
\item \textsuperscript{122} \textit{Id.} at 1173.
\item \textsuperscript{123} \textit{Id.} at 1174. Of particular interest is the court's dicta indicating that "liability will not lie where the child's own act, rather than an alleged insufficiency of supervision, is the sole cause of the injury." \textit{Id.} (emphasis supplied). The court thus suggests that the case may be taken from the jury even when the plaintiff might argue that, but for the negligent supervision, the child would not have been allowed to act negligently.
\item \textsuperscript{124} \textit{Id.} at 1174 n.1. Judge Jorgenson's dissent notes his belief that the causation analysis is inappropriate in light of Blackburn \textit{v. Dorta}. \textit{See id.} at 1174 (Jorgenson, J., dissenting).
\end{itemize}
mences when the plaintiff first knows either of the negligence of the
defendant or of the injury itself. Subsequent to an operation to re-
move polyps in his colon, Shapiro began to lose his eyesight. Less than
three months after the operation, in December of 1979, doctors diag-
nosed Shapiro as blind. In January, 1982, Shapiro received the opinion
of another physician that Dr. Barron, who removed the polyps, had
caused Shapiro’s blindness when he neglected to give Shapiro antibiot-
ics prior to the operation. In late January of 1982, Shapiro sued Bar-
ron, who moved for summary judgment, arguing that Shapiro insti-
tuted the suit more than two years after the cause of action accrued. The
trial court granted the motion but the Fourth District Court of
Appeal reversed. Accepting the case on conflict certiorari with its
earlier decision in Nardone v. Reynolds, the Florida Supreme Court
reversed.

Nardone concerned an earlier, four-year, statute of limitations.
After a series of operations, a young boy left the hospital comatose,
blind, and with irreversible brain damage. More than four years later,
his parents sued for medical malpractice. The Florida Supreme Court
held the case time-barred. The plaintiff in Shapiro argued that the new
statute of limitations meant Nardone no longer governed. The court
disagreed. The consequences of surgery were immediately apparent,
and the plaintiff had constant and total access to all medical records.
As to the argument that the legislature’s enactment of a new statute
meant Nardone was no longer good precedent, the court concluded:

While the current statute does not say that the cause of action oc-
curs at the time of the injury, neither did the statute under consid-
eration in Nardone. In fact, it could be argued that by using the
word “incident” the legislature envisioned that there would be
some factual circumstances in which the statute would begin to run
before either the negligence or the injury became known.

126. The statute in effect read: “An action for medical malpractice shall be com-
menced within 2 years from the time the incident giving rise to the action occurred or
within 2 years from the time the incident is discovered, or should have been discovered
128. 333 So. 2d 25 (Fla. 1976).
129. Barron, 565 So. 2d at 1321. Accord, Jackson v. Georgeopolous, 552 So. 2d
215 (Fla. 2d Dist. Ct. App. 1989). Justice Shaw, however, dissented in Barron, as he
believed the term “incident” applied only to the negligent act and not to its conse-
quences as well. Barron, 565 So. 2d at 1322 (Shaw, J., dissenting).
However, a First District Court of Appeal opinion pointed out that regardless of when the statute should begin to run, the start can be delayed if the physician in some way prevents the plaintiff from discovering either the injury or its cause.\textsuperscript{130} Dr. Drylie performed a surgical procedure in October of 1982 to relieve Martin's urological problems. Unfortunately, Martin had difficulty walking, which Drylie told her was due to positioning of her body during surgery. Drylie assured her the problems with her leg were temporary and she should suffer no permanent injury as a result. In December of 1982, Martin's family doctor told her Drylie was at fault for the problems with her leg, but Martin continued to see Drylie until August of 1983, when a colleague of Drylie's told her nothing further could be done for her leg. In March of 1985, Martin sued Drylie for malpractice. Drylie moved for summary judgment, which the trial court granted. On appeal, the district court reversed: "[A] fact issue was created when Dr. Drylie continued to treat her and assure her that the condition of her leg was only temporary and would presumably clear up with the passage of time."\textsuperscript{131}

B. Other Professions

As it did with medical malpractice, the Florida Supreme Court considered a case involving the statute of limitations applicable to professional negligence generally.\textsuperscript{132} In an action for negligent preparation of and advice regarding a tax return by an accountant, the plaintiff brought suit more than two years from the date the Internal Revenue Service issued a Notice of Deficiency, but less than two years from the date of an order by the United States Tax Court determining the matter.\textsuperscript{133} Believing that the statute of limitations began to run on the same date as the Notice of Deficiency, the trial court granted the accountant's motion for summary judgment. The Third District Court of Appeal disagreed and reversed.\textsuperscript{134} On conflict certiorari, the Florida

\textsuperscript{130} Martin v. Drylie, 560 So. 2d 1285 (Fla. 1st Dist. Ct. App. 1990).
\textsuperscript{131} Id. at 1288. The court also disagreed with Drylie's contention that he should have been granted summary judgment as an employee of the state at the time of treating Martin. The court held that the case presented the factual issue of whether Drylie was wearing two hats — state employee as a teaching physician and private treating physician — and that the jury must determine which of the hats Drylie was wearing when treating Martin.
\textsuperscript{132} FLA. STAT. § 95.11(4)(a) (1983).
\textsuperscript{133} Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990).
\textsuperscript{134} Lane v. Peat, Marwick, Mitchell & Co., 540 So. 2d 922 (Fla. 3d Dist. Ct.}
Supreme Court agreed that the statute did not begin to run until the final order by the Tax Court.

Undeniably, the Lanes had reason to know of the malpractice by their accountants at the time they received the I.R.S. notice. However, in contesting the assessment of deficiency, the Lanes had to adopt the position that the return in question was correct. If the statute of limitations began to run when they received the notice, they would then have to pursue their malpractice action at the same time they contested the I.R.S. deficiency assessment. According to the Florida Supreme Court,

Such a course would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. In the tax court, the Lanes would be asserting that the deduction Peat Marwick advised them to take was proper, while they would simultaneously argue in a circuit court malpractice action that the deduction was unlawful and that Peat Marwick's advice was malpractice. To require a party to assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice is illogical and unjustified.135

The court seems to have created a conflict with its medical malpractice determination that the statute started running for medical malpractice when the plaintiff knew either of the injury or of the negligence.136 However, the court adroitly avoided this conflict by noting that the Lanes' action in prosecuting the appeal from the I.R.S. determination of deficiency meant they did not have notice of the negligence of Peat, Marwick: "Until the tax court determination, both the Lanes and Peat Marwick believed the accounting advice was correct; consequently, there was no injury."137

Like the Florida Supreme Court in First Florida Bank,138 lower Florida courts turned their attention to questions of privity in cases involving professionals. The first of these, decided without the benefit of the First Florida Bank decision, reached the same conclusion. Athans' daughter, Nickitas, sought assistance of counsel to sell a parcel of land


135. Peat, Marwick, 565 So. 2d at 1326.
136. See supra notes 125-129 and accompanying text.
137. Peat, Marwick, Mitchell, & Co., 565 So. 2d at 1326.
138. 558 So. 2d 9 (Fla. 1990). See supra notes 1-10 and accompanying text.
which Athans owned.\textsuperscript{139} She retained James Soble, and Soble dealt exclusively with her, although he knew that Athans owned the property. Having found a buyer, Soble drafted a contract for sale of the property, providing that notice to seller go to “Nicholas Athans c/o Irene J. Nickitas,” and providing for a deposit which Soble would retain as escrow agent. The buyer paid the deposit, but the sale fell through and Soble lost the deposit. Athans sued Soble in a malpractice action to recover the amount of the deposit, and Soble moved to dismiss the action based on lack of privity. The trial court granted the motion, but the Second District Court of Appeal reversed.

In his deposition, Soble admitted knowing Athans was the true owner of the property. In any event, ample documentary evidence bolsters the conclusion that Soble knew Nickitas was acting for Athans. Accordingly, “the legal services . . . rendered were on [Athans’] behalf.”\textsuperscript{140} The Second District Court thus seems to have avoided the issue of privity by looking to traditional agency principles, although it stops short of fully discussing the issue. Nickitas acted on Athans’ behalf in engaging Soble, and thus acted as Athans’ agent. Since Soble knew of Athans’ true ownership of the property, and knew of the agency between Nickitas and Athans, Athans as a disclosed principal of Nickitas had every right to sue on the contract.\textsuperscript{141}

The same concept that knowledge of the affected party will defeat privity supports the Fourth District Court of Appeal per curiam opinion in a legal malpractice case.\textsuperscript{142} Satchell prepared Rosenstone’s will, which allegedly did not adequately convey Rosenstone’s wishes as to the disposition of his property. Rosenstone’s wife sued Satchell, claiming alternatively that she was a client as well as her husband or that Satchell knew that Rosenstone intended for her to benefit from the will. The appellate court reversed the trial court’s dismissal of the complaint, noting that established law holds that “an attorney may be held liable for breach of his duties to one who engages his services \textit{or to one who he knows is the intended beneficiary}.”\textsuperscript{143}

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\textsuperscript{139} Athans v. Soble, 553 So. 2d 1361 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{140} Id. at 1362.
\textsuperscript{141} Id.
\textsuperscript{142} Rosenstone v. Satchell, 560 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1990).
\textsuperscript{143} Id. at 1229-30 (emphasis supplied).
\end{flushleft}
IV. STRICT LIABILITY

A. Dangerous Activities and Instrumentalities

Florida courts have consistently adhered to the traditional rule of Rylands v. Fletcher\(^{144}\) and held owners of property strictly liable for harm to adjacent property from non-normal usage of their own land.\(^{145}\) However, Florida courts have rarely received the opportunity to define what will constitute a non-normal usage. In Midyette v. Madison,\(^{146}\) the Florida Supreme Court considered damage caused by smoke from a deliberately-set brush fire which obscured vision on an adjacent public highway. The trial court had granted the motion for summary judgment of the landowner, Midyette, on the grounds that he could not incur vicarious liability for the acts of the independent contractor he hired to clear his land. The First District Court of Appeal reversed, holding that the independent contractor exception would not apply where the principal hired the agent to perform an inherently dangerous activity, and that burning brush was such an activity.\(^{147}\) Granting certiorari to review a question of great public interest, the Supreme Court of Florida affirmed.

The court initially determined that an activity is one of inherent danger when, "'[a]s is self-evident, all parties... are on notice as to its dangerous propensities.'"\(^{148}\) Setting a fire constitutes a dangerous activity, and just as fire creates a danger from burning, so does it create a danger from the smoke it engenders. Accordingly, Midyette had contracted for an activity involving inherent danger, and was vicariously liable for the automobile accident caused by the blowing smoke.\(^{149}\)

However, the court refused to hold that Midyette would have been strictly liable for the burning. It needed to go no farther to impose vicarious liability than to find that the smoke from the fire constituted an inherent danger, much as an automobile is a dangerous instrumentality. "[A] danger that is merely 'inherent' does not give rise to strict

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144. L.R. 3 H.L. 330 (1868), 1861-1873 All E.R. 1.
145. See, e.g., Bunyak v. Yancey & Sons Dairy, Inc., 438 So. 2d 891 (Fla. 2d Dist. Ct. App. 1983). The Second District Court of Appeal held a dairy strictly liable when a liquified manure pond overflowed to adjacent property, damaging existing crops and future arability of the soil, in addition to causing other unpleasant results.
146. 559 So. 2d 1126 (Fla. 1990).
148. Midyette, 559 So. 2d at 1128.
149. Id.
liability.” The court merely sent the case back to the trial court for a determination of whether the person burning brush acted negligently. If he did not, Midyette would not incur liability for his acts.

Accordingly, the Florida Supreme Court has again refused an opportunity to clarify what acts will expose a person to strict liability for their consequences. It continues to elaborate on the middle ground of “inherent” danger, however, and this may well lead to semantic confusion. Acts of inherent danger expose the person instigating them to vicarious liability for the negligence of the actor, as the negligence of the user of a dangerous instrumentality exposes the owner to vicarious liability to injured third parties.

B. Animals

Floridians owning dogs may avoid statutorily-imposed liability for harm their pets might cause by posting “bad dog” signs on their property. Porter owned a junkyard, on which he maintained guard dogs. On the fence surrounding the yard he had posted four “Bad Dog” signs immediately adjacent to the entrance gate. Registe, a Haitian immigrant, could neither read nor speak English. He claims he went to the junkyard, did not see the signs, and entered the yard. Even if he had seen the signs, he would not have understood them. Porter’s dogs attacked and injured Registe, and he sued Porter. The trial court grant Porter’s motion for summary judgment. Registe ap-

150. Id. at 1128 n.2 (emphasis in original).
151. Id. at 1128 n.3.
152. The owner of a vehicle leased on a long-term basis, however, will not be vicariously liable for the negligence of the user. See Enterprise Leasing Co. v. Almon, 559 So. 2d 214 (Fla. 1990); Kottmeier v. General Motors Acceptance Corp., 561 So. 2d 1366 (Fla. 2d Dist. Ct. App. 1990); Folmar v. Young, 560 So. 2d 798 (Fla. 4th Dist. Ct. App. 1990); Raynor v. De La Nuez, 558 So. 2d 141 (Fla. 3d Dist. Ct. App. 1990); Kraemer v. General Motors Acceptance Corp., 558 So. 2d 431 (Fla. 2d Dist. Ct. App. 1990).
153. The lower Florida courts were not silent in this area during the past year. The Second District Court of Appeal added forklifts driven on a public highway to the growing list of “dangerous instrumentalities,” noting that if a golf cart belongs on the list, so does “this larger, four-wheel vehicle with protruding steel tusks . . . .” Harding v. Allen-Laux, Inc., 559 So. 2d 107 (Fla. 2d Dist. Ct. App. 1990).
156. The court noted that Porter’s witnesses conclusively established “existence of the visible, conspicuous signs surrounding [Porter’s] junkyard.” Id.
pealed, and the Second District Court of Appeal affirmed.

The court held that where a sign clearly and prominently displays the warning of the presence of a dog on premises, it satisfies the statutory demands.\textsuperscript{157} Although the Supreme Court of Florida has noted in dicta that in a given case the plaintiff had actual notice of the presence of a dog on property,\textsuperscript{158} the court has never actually held the statute demands the visitor to the property receive actual notice. According to the court, the statute itself merely demands that the words posted be "easily readable," and this means "[c]apable of being read easily; legible."\textsuperscript{159} Accordingly, the statute requires "a sign that is capable of being read and is not a requirement that any possible victim of a dog-bite be 'capable of reading' the sign."\textsuperscript{160}

The court did note the Fifth District Court of Appeal's earlier decision in \textit{Flick v. Malino},\textsuperscript{161} which held that a sign would not protect a dog owner from a suit by a young child incapable of reading its language. However, the court held the inability of a child to read the words not analogous to the inability of an adult to comprehend the words when conspicuously posted in English:

If that were the case . . . it would force a return to the common law to determine the respective rights and duties of the parties because no dog owner could be expected to post a sign in the particular language of every conceivable victim. We do not believe that to have been the legislative intent.\textsuperscript{162}

\section*{C. Products Liability}

The Third District Court of Appeal determined that the manufacturer of a product does not incur strict liability for injuries to a worker dismantling the product after its useful life has passed, even when the product contains highly toxic materials.\textsuperscript{163} Westinghouse manufactured transformers, using valuable metals as well as PCB's.\textsuperscript{164} Florida Power

\begin{itemize}
\item \textsuperscript{157} \textit{Registe}, 557 So. 2d at 215.
\item \textsuperscript{158} Belcher Yacht, Inc. v. Stickney, 450 So. 2d 1111 (Fla. 1984).
\item \textsuperscript{159} \textit{Registe}, 557 So. 2d at 216 (citing \textit{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} (New College Ed. 1979)).
\item \textsuperscript{160} \textit{Id.} (emphasis in original).
\item \textsuperscript{161} 374 So. 2d 89 (Fla. 5th Dist. Ct. App. 1979).
\item \textsuperscript{162} \textit{Registe}, 557 So. 2d at 215-16.
\item \textsuperscript{163} High v. Westinghouse Elec. Corp., 559 So. 2d 227 (Fla. 3d Dist. Ct. App. 1989).
\item \textsuperscript{164} PCB's, or "polychlorinated biphenyls," are highly toxic materials contained
\end{itemize}
Richmond & Light purchased the transformers and at the end of their useful life sold them to a scrap metal salvage dealer. His employee, High, dismantled the transformers, seeking to salvage the metals used by Westinghouse to make the transformers. In the course of dismantling, High poured the liquid containing the PCB's on the ground and received injuries when the liquid came in contact with his body. High sued Westinghouse, and the trial court granted Westinghouse's motion for summary judgment. The Third District Court of Appeal affirmed. 

The court held that "[w]hile the transformers were sealed and intact there was no harm. . . . Westinghouse's product as it had originally been sold to FP&L, for practical purposes, had ceased to exist at the time the alleged injuries occurred." Although the court might have based its decision on the termination of the useful life of the product, instead it chose to affirm the summary judgment "based upon a substantial change in the product from the time it left the manufacturer's control . . . ." The defect accordingly stemmed from the transformation of the product, rather than from its manufacture. In resting its decision on these grounds, the court paid lip service to cases from federal district courts holding that manufacturers could not foresee salvage operations which involved the dismantling of their products. However, the court elected not to adopt foreseeability as its ratio decidendi.

In Knox v. Delta International Machinery Corp., the Third District Court of Appeal, in a per curiam decision, reiterated the rule that manufacturers who supply their products with safety devices incur no liability to those injured by the product after the device has been removed, even though the manufacturer may not have warned against its removal. Delta manufactured a jointer machine with a safety guard, but the guard could be easily removed. It did not warn against removal of the guard, and Knox used the machine after the guard had been removed. Knox lost two fingers, and sued Delta. The trial court granted Delta's motion for summary judgment, and the appellate court affirmed: "[A] manufacturer is, as a matter of law, under no duty to

within electrolytic fluids in the transformer. Id. at 229.

165. Id.
166. Id. at 228.
167. Id.
169. 554 So. 2d 6 (Fla. 3d Dist. Ct. App. 1989).
produce a fail-safe product, so long as the product poses no unreasonable dangers for consumer use."

The jointer machine, when it left Delta's factory, was perfectly safe. Delta had no duty to prevent users from removing those design elements which contributed to its safety.

V. EMOTIONAL DISTRESS

Over the years, Florida's protective attitude regarding causes of action for emotional distress has consistently withstood numerous challenges. Most recently, with its decision in *Eastern Airlines, Inc. v. King*, the Florida Supreme Court reiterated its commitment to allowing damages for emotional distress not stemming from physical injury only in restricted circumstances. Improper inspection and maintenance caused engine failure on an Eastern flight on which King was a passenger. Although at one point all three engines failed to operate and the passengers prepared to ditch, the crew managed to restart one engine and the plane limped to a safe landing. King sued Eastern, alleging reckless or intentional infliction of emotional distress and after judgment for Eastern on the pleadings, the Third District Court of Appeal reversed. Accepting the case on conflict certiorari, the Florida Supreme Court reversed.

Florida recognizes the tort of intentional infliction of emotional distress as expressed in the Restatement (Second) of Torts, which requires the defendant act in an "extreme and outrageous" manner before liability will attach. King's pleadings alleged Eastern's mechanics had failed to discover a missing O-ring in the engines, which caused them to fail. Additionally, King alleged that Eastern mechanics had failed to discover missing O-rings on at least a dozen prior occasions. However, as the court noted, these allegations at best amount to claims of mere negligence. The court found that Eastern's conduct did not rise to the level of outrageousness needed to support the tort

170. *Id.*
171. 557 So. 2d 574 (Fla. 1990).
173. The court noted conflict with Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985), and Brown v. Cadillac Motor Car Div., 468 So. 2d 903 (Fla. 1985).
174. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ." *Restatement (Second) of Torts* § 46 (1965).
claimed by King.\textsuperscript{175}

Chief Justice Ehrlich, in his concurring opinion, noted that King's complaint did not even allege adequate facts to support a cause of action for negligent infliction of emotional distress.\textsuperscript{176} Although Florida no longer limits recovery for the tort to those instances in which the distress accompanies physical impact, the plaintiff seeking to recover must still demonstrate "a clearly demonstrable physical impairment [accompanies] or occur[s] within a short time after the negligently inflicted psychic injury."\textsuperscript{177} King failed to demonstrate either impact or resulting physical harm.

Also noteworthy is Justice Barkett's brief concurrence:

I concur in the Court's judgment that prior decisions would bar relief for the intentional infliction of mental distress in this case. I believe, however, that persons who have suffered great mental anguish through the extreme negligence of a tortfeasor, such as Eastern's in this case, should be permitted a remedy.\textsuperscript{178}

VI. CONCLUSION

As noted last year,\textsuperscript{179} the Florida Supreme Court continues on a relatively even keel, favoring on an overall basis neither defendants nor plaintiffs. During the past year, however, Florida judges have shown an increasing distaste for awarding damages to litigants who, having voluntarily placed themselves in existing positions of danger, seek to recover damages from those who created the danger. Blocked by precedent from dismissing these claims based on the defense of assumption of risk, Florida courts at all levels have instead viewed the actions of the plaintiffs as the single effective cause of their harm. Accordingly, they have found as a matter of law that the negligence of the defendant did not cause the injuries of which the plaintiff complains.

In this instance, what seems an end run around an unworkable rule instead mirrors the philosophy underlying tort law. Plaintiffs recover from others for their injuries only because the others have acted

\textsuperscript{175} King, 557 So. 2d at 578.

\textsuperscript{176} Id. at 579 (Ehrlich, C.J., concurring).

\textsuperscript{177} Id. (citations omitted).

\textsuperscript{178} Id. at 580 (Barkett, J., concurring).

in a socially irresponsible manner, and because the irresponsibility has led directly to the harm the plaintiffs have suffered. Danger caused by irresponsibility does not produce harm to people when they have recognized the danger and, confronting it without compulsion, suffered the type of harm they could have anticipated the danger would produce. The irresponsibility has done no more than give people the potential for harming themselves, and in this light, courts cannot fairly expect one who merely establishes a potential for voluntary injury to recompense those who willingly take the risk of harm on themselves.

The stand of Florida courts on this issue underlies a more significant truth about the development of Florida tort law. Although at times courts in our state may seek to bend the fabric of the law in an effort to award damages to an injured person, the law will ultimately spring back to comport with its underlying theory. This resilience shows that Florida courts have maintained a keen sense of the theory of law, even when the equities of the case might seem to militate otherwise. Unfortunately, as an English jurist noted years ago, "[h]ard cases, it has been frequently observed, are apt to introduce bad law." Fortunately, Florida’s courts have continued to resist the temptation to alter the law to permit unjustified recovery in the isolated case.

180. See, e.g., King, 557 So. 2d at 580 (Barkett, J., concurring), discussed supra note 178 and accompanying text.