Torts

Michael L. Richmond*
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Abstract

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KEYWORDS: medical, malpractice, negligence
Torts

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I. Introduction

Sparked in large part by concerns raised by the skyrocketing cost of insurance, particularly in medical malpractice cases, the Florida Legislature enacted the Tort Reform and Insurance Act of 1986. Going well beyond simple medical malpractice, the act legislates dramatic changes in most civil litigation — contract as well as tort. The Florida Supreme Court has for the most part upheld the constitutionality of the statute, affirming most of the opinion of Judge Miner of the Second Judicial Circuit.

Given the sweeping nature of the statute and the recession of the supreme court’s opinion, detailed discussion of the provisions of the act is best left for another day. This survey will instead concentrate on the developments in the last year in the common law of Florida as it re-

2. Prosser indicates the problem has existed for well over ten years. Many states have accordingly responded with legislation limiting tort litigation, particularly in the medical malpractice area. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 192-93 (5th ed. 1984) (hereinafter PROSSER & KEETON).


4. Id. § 768.71 (1986).

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the doctrine in three cases.

The first of these, *Marrero v. Goldsmith*, expanded the use of the doctrine into cases where the plaintiff could not adequately determine the identity of a specific defendant who caused the harm or establish a specific instrumentality which caused the harm. Marrero had two operations while under anesthesia, each performed by a different surgeon. After surgery, she suffered pain in her left arm and sued the anesthesiologist, both surgeons, and the hospital. Unconscious throughout both surgical procedures and unable to adequately identify the cause of her injury, she sought to invoke the doctrine of res ipsa loquitur against all four.

The Florida Supreme Court held the trial court should have given the jury an instruction permitting it to draw an inference of negligence. On the one hand,

under traditional res ipsa loquitur analysis the defendant doctors in this case cannot be said to have each possessed exclusive control at all times when plaintiff’s injury may have occurred. Yet the patient is in no position to prove which defendant or combination of defendants caused her injury to an area of her body remote from the site of surgery, because she was unconscious when it occurred.14

In determining that the instruction is appropriate, the court noted with approval *Ybarra v. Spangard*, a California case. The court did men-

1339 (Fla. 1978). Most recently, the doctrine was applied to a washing machine which exploded after several months’ use in the plaintiff’s home. Cassis v. Maytag Co., 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981).

12. 486 So. 2d 530 (Fla. 1986).

13. Id. at 531. Marrero established expert testimony that her injury did not normally occur absent negligence. Id. at 531. It would appear from the opinion that Marrero introduced some direct evidence of specific acts of negligence, but not so much to prohibit her from using the doctrine. It remains unclear from the opinion when a plaintiff will prove too much to take advantage of the res ipsa loquitur inference. Cf. Prosser & Keeton supra note 2, at 260-61.


15. 25 Cal. 2d 486, 154 P.2d 687 (1944). Prosser feels that *Ybarra* represents “a deliberate policy . . . which requires the defendants to explain or pay, and goes beyond any reasonable inference from the facts; and one may surmise that this is not unconnected with the refusal of the medical profession to testify against one another.” Prosser & Keeton, supra note 2, at 253. One must question whether, in light of today’s ready availability of medical experts and open discovery, this underlying policy retains a basis in fact. Despite this, Prosser notes at least seven other jurisdictions which have adopted *Ybarra*, four of which have done so in the last ten years. Id. at 252 n. 19.


17. Id. at 537 (McDonald, J., dissenting).


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In direct contrast to Lee, the final case stressed the need for the plaintiff to demonstrate exclusive control by the defendant in most cases. *Pinecrest Stables, Inc. v. Hill*, which dealt with a horse incurring a rib injury at some point between its leaving the defendant's stable and arriving at the owner's farm. There was no evidence to demonstrate that the animal had incurred the injury prior to being loaded on the van. The stable had no control over the van used to transport the horse. The plaintiff testified that injuries to horses can occur in transit while in horse vans, and indeed that injuries to horses can occur with no negligence at all.

Not only did the facts in *Hill* fail to demonstrate the exclusive control of the defendant, they affirmatively showed the harm could have occurred without any negligence at all. At trial, however, the judge gave a res ipsa loquitur instruction to the jury. On appeal, the district court of appeal reversed, holding specifically that the horse "left the exclusive control of Pinecrest and passed to Hill when it was loaded onto the van, and the evidence reflects that the injury could have occurred during transport when Hill had exclusive control." 24

In sum, it would appear that things remain unsettled regarding the extent to which the plaintiff may avoid the need to show exclusive control by the defendant before invoking the inference raised by res ipsa loquitur. Given the cautionary language by both the majority and concurring opinions in *Marrero*, it seems quite unlikely that further incursions such as Lee will occur. *Yarborough* seems to indicate the continued adherence by the district courts of appeal to the traditional limiting tests.

Another questionable area of applicability has arisen with the use of res ipsa loquitur in products liability cases. In *Gencorp, Inc. v. Wolfe*, the jury in a products liability case involving an allegedly defective automobile tire was instructed: "when a product malfunctions during normal operation, a legal inference ... of product defectiveness arises." 25 The First District Court of Appeal (the same court which

had earlier decided *Cassis v. Maytag Co.*, which first approved a res ipsa loquitur instruction for Florida courts hearing products liability cases) held the instruction to be erroneous. "This language is tantamount to directing a verdict in the product liability plaintiff's favor, which here was not supported by the evidence." 26 The degree to which courts may now use the res ipsa loquitur inference in products cases seems dramatically foreshortened, although the circumstances permitting its use are at best hazy after Gencorp.

Finally, the question often arises whether evidence of specific negligence that caused harm to the plaintiff will preclude the plaintiff from using the res ipsa loquitur inference. Although courts have decided this in the affirmative, 27 the issue still remains what amount of evidence can plaintiffs present before proving themselves out of court on the res ipsa loquitur issue. In *Lord v. J.B. Ivey & Co.*, 28 the plaintiff sought recovery for injuries sustained in an elevator fall. She introduced substantial evidence of the stopping distance of the elevator to prove the abruptness of the stop and fragmented evidence relating to the cause of the stop. Although the evidence of the sudden stop was specific, it did not go to demonstrating the cause of the stop. In language indicating a continued reluctance to destroy the inference with anything less than a great deal of proof, the court suggested that plaintiffs could introduce some direct proof of cause without foregoing an instruction on res ipsa loquitur. 29

B. Negligence Per Se

Several cases arose in the district courts of appeal presenting novel attempts to create new causes of action on negligence per se principles. 30 One, the rejection of a cause of action for social host liability to a person injured by an intoxicated guest, is pending before the Florida

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23. 487 So. 2d 82 (Fla. 5th Dist. Ct. App. 1986).
24. Id. at 83.
25. The majority, as Justice Ehrlich did, clearly stated that it would "expressly limit our holding to the facts presented." *Marrero*, 486 So. 2d at 533.
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Brennan, a minor, left a party hosted by Ladika and in an intoxicated condition drove his car into that driven by Bankston. Injured in the crash, Bankston sued Ladika based on the language in the Florida Statutes that "a person who willfully and unlawfully ... furnishes alcoholic beverages to a person who is not of lawful drinking age ... may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." The district court of appeal at first noted that no cause of action existed at common law on behalf of a third party suing the dispenser of alcohol to the minor who was responsible for any injuries. As the legislature intended by the passage of the statute to limit existing third party recovery even more stringently than it was limited at common law, no cause of action beyond those recognized at common law could be permitted. Accordingly, the district court affirmed the dismissal of the complaint, but certified the question to the Florida Supreme Court. The court heard argument in October, but as of this writing has not decided the case.

Similar in theory to Bankston was the attempt to impose liability on the vendor of a revolver by the estate of the third party killed by the minor for whom the weapon was purchased. Carter, a minor, came into Gunn's gun shop and asked to purchase a .44 magnum revolver. Gunn knew Carter's age, and also that a federal statute prohibited sales of firearms to minors. When Gunn refused to sell Carter the gun, Carter gave Gunn a twenty dollar deposit and told Gunn that his mother would be back the next day to buy it for him. His mother did come in and purchased the weapon, filling in all forms using her name as the purchaser. Gunn, however, knew full well that Carter would be the one in possession of, and using, the gun. Six weeks later, Carter shot and killed Everett.

The trial court granted a summary judgment to Gunn, and the Second District Court of Appeal affirmed. Everett's estate argued that Gunn violated the federal statute when he sold the revolver knowing it was to be used by a minor, and hence Gunn should be found negligent per se. However, although the sale would be illegal, no statute prohibits minors above the age of eighteen from possessing a firearm. Accordingly, the delivery of the weapon to Carter's mother, even with the knowledge she would give it to Carter could not have in itself been negligent let alone violative of the statute. The court also based its decision on the concept that the intentional tort committed by Carter, being outside the range of foreseeability of Gunn, operated to supersede the negligence, if any, of Gunn.

One court, after finding duty owed to tenants through violation of a municipal housing ordinance, went remarkably far in finding causation due to the violation. In violation of a Dade County ordinance, the defendant in Bennett M. Lifster, Inc. v. Varnado failed to supply hot water to its tenants. As a result, one of the tenants, Varnado, decided to boil water on the stove and carry it in pots to the bathtub. While engaged in this process, Varnado's mother spilled a pot of boiling water on Varnado's four year old son. Although no party seriously disputed

35. The court phrased the question: "Does Section 768.125, Florida Statutes (1983) create a cause of action in favor of a person injured by an intoxicated minor driver who was served alcoholic beverages by a private party host?" Bankston, 480 So. 2d at 248.
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41. Everett, 490 So. 2d at 193.
42. Id. at 193.
43. Id. at 194.
44. In a similar case, an automobile dealer who sold a car to a person in its agent knew could not drive was not liable for damage to a person injured by the purchaser. Newry came to the Potamkin lot to purchase a car. Potamkin's salesman noticed that Newry drove the Potamkin's saleswoman noticed that Newry was unsteady on his feet and Newry was not steady on his feet and Newry was not steady on his feet. Newry aug. 12, 1986). After that afternoon, the saleswoman closed the deal, knowing Newry intended to drive the car herself. She invited her friend, Horne, to drive home with her and on route had a severe accident. The Third District Court of Appeal held there was no duty to provide notice of the accident. The Third District Court of Appeal held there was no duty to provide notice of the accident. In a strongly-worded and persuasive dissent Judge Jorgenson argued against the rule, stating it "establishes a new doctrine that Newry, law of negligence,"". In another rehearing en banc, however, the district court reversed its decision and, in an opinion by Judge Jorgenson, found for the defendant, but certified the issue to the Florida Supreme Court. Vice Potamkin Chevrolet, Inc. v. Horne, 12 Fla. L. Weekly 968 (Fla. 3d Dist. Cl. App. Apr. 7, 1987).
45. Cf. Prosser & Keeton, supra note 2, at 201.
46. 480 So. 2d at 1338.
that tenants were in the class the ordinance requiring hot water was intended to protect, the issue of liability turned on the question of causation. 57

The trial court had refused to direct a verdict in favor of the defendant, and after a verdict for plaintiff the defendant appealed. 58 Despite a New York case dictating a summary judgment for the defendant under virtually identical circumstances, 59 the Third District Court of Appeal affirmed. 60 It reasoned that when the question comes down to causation the issue should remain with the jury. 61

One must question whether the case is indeed one of causation rather than one of duty. True, the ordinance was violated and the plaintiff was in the protected class. The court, however, failed to discuss other limitation on the doctrine of negligence ipso facto — that the hazard be one against which the legislative body intended to protect. 62 Although there are many reasons for which a landlord should supply hot water to a tenant, sanitation and cooking for example, one can hardly suppose the legislative intent would have included avoiding accidents from people boiling their own water. Accordingly, the propriety of finding duty from the violation of the ordinance was for the judge’s initial determination.

A question of more pragmatic import to practitioners arose in Bass v. Morgan, Lewis & Bockius, 63 where Castillo, an attorney, sent a demand letter to another attorney, Bass. In the course of the letter, Castillo stated that if Bass did not deliver certain funds to Castillo, “we will hold you liable for conspiring with [your client] to steal those funds from [our client] and for converting those funds to your own use and purposes.” 64 Bass sued Castillo immediately for damages based on violation of a criminal statute making anyone guilty of a felony who “maliciously threatens to accuse another of any crime or offense ... with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened ... to do any act ... against his will.” 65

The Third District Court of Appeal found that the legislature designed the statute to protect the class of people threatened by “assaults upon [their] rights to physical or mental security,” 66 and accordingly the statute would support a cause of action upon its violation. Additionally, the court found liability was supported by the rules governing professional responsibility which prohibit an attorney from threatening criminal prosecution to gain an unfair advantage in the course of a civil action. 67 Accordingly, it reversed the dismissal of the extortion count of the complaint. 68

C. Vicarious Liability

An occasional opinion, while not necessarily carving out new law, so thoroughly discusses and clarifies existing rules that it deserves close attention. Such is the case with Garcia v. Duffy, 69 written by Judge Schoonover of the Second District Court of Appeal. Joule Yacht Transport, after conducting a background investigation consisting of inquiries of former employers, hired Duffy to be one of its drivers. Duffy had two prior convictions for night prowling and assault and battery. It permitted Duffy to keep a dog in the cab of the truck while Duffy delivered boats. Unfortunately, on one occasion the dog ran out of the cab and was struck and killed when Garcia drove his car into it. Engaged, Duffy struck Garcia in the face as Garcia got out of his car. Garcia sued Joule on the joint theories of respondent superior and negligent hiring. The trial court dismissed the complaint. 70

The court of respondent superior caused little trouble. As alleged, 71

47. Id.
48. Id. at 1337.
50. Bennett M. Lifier, Inc., 480 So. 2d at 1341.
51. “The very existence of so many cases which wrestle with variations on the basic issue is certainly some clue as to whether the harm which resulted from the defendant’s omission was so bizarre that in the course of human experience it could not have been reasonably anticipated. More important, given the nature of the proximate cause question in this case, the wiser course was to submit the question to the jury to decide using their common sense upon appropriate instructions.” Id. at 1340.
52. “The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part ... (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.” Restatement (Second) of Torts § 286 (1965).
53. 11 Fla. L. Weekly at 889.
54. Id. at 889.
55. Fla. STAT. § 836.05 (1983).
57. Fla. BAR CODE PROF. RESP. D.R. 7-105(A).
58. Bass, 11 Fla. L. Weekly at 840. The entire Third District has since heard the case en banc; no decision has yet been released.
59. 492 So. 2d 435 (Fla. 1986).
60. Id. at 437.
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One must question whether the case is indeed one of causation rather than one of duty. True, the ordinance was violated and the plaintiff was in the protected class. The court, however, failed to discuss the other limitation on the doctrine of negligence per se — that the hazard be one against which the legislative body intended to protect.52 Although there are many reasons for which a landlord should supply hot water to a tenant, sanitation and cooking for example, one can hardly suppose the legislative intent would have included avoiding accidents from people boiling their own water. Accordingly, the propriety of finding duty from the violation of the ordinance was for the judge's initial determination.

A question of more pragmatic import to practitioners arose in Bass v. Morgan, Lewis & Bockius,53 where Castillo, an attorney, sent a demand letter to another attorney, Bass. In the course of the letter, Castillo stated that if Bass did not deliver certain funds to Castillo, "we will hold you liable for conspiring with [your client] to steal those funds from [our client] and for converting those funds to your own use and purposes."54 Bass sued Castillo immediately for damages based on violation of a criminal statute making anyone guilty of a felony who "maliciously threatens to accuse another of any crime or offense . . . with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened . . . to do any act . . . against his will."55

The Third District Court of Appeal found that the legislature designed the statute to protect the class of people threatened by "assaults upon [their] rights to physical or mental security,"56 and accordingly the statute would support a cause of action upon its violation. Additionally, the court found liability was supported by the rules governing professional responsibility which prohibit an attorney from threatening criminal prosecution to gain an unfair advantage in the course of a civil action.57 Accordingly, it reversed the dismissal of the extortion count of the complaint.58

C. Vicarious Liability

An occasional opinion, while not necessarily carving out new law, so thoroughly discusses and clarifies existing rules that it deserves close attention. Such is the case with Garcia v. Duffy,59 written by Judge Schoonover of the Second District Court of Appeal. Joule Yacht Transport, after conducting a background investigation consisting of inquiries of former employers, hired Duffy to be one of its drivers. Duffy had two prior convictions for night prowling and assault and battery. It permitted Duffy to keep a dog in the cab of the truck while Duffy delivered boats. Unfortunately, on one occasion the dog ran out of the cab and was struck and killed when Garcia drove his car into it. Enraged, Duffy struck Garcia in the face as Garcia got out of his car. Garcia sued Joule on the joint theories of respondeat superior and negligent hiring. The trial court dismissed the complaint.60

The count of respondeat superior caused little trouble. As alleged,
the facts in no way could support the conclusion that Duffy acted within the scope of his employment when he struck Garcia. This essential element of recovery missing, that count of the complaint failed.\textsuperscript{61}

Of far greater import to Judge Schoonover was the issue of negligent hiring. The first problem lay with defining those people to whom the employer owed the duty to hire employees in a reasonably prudent manner. Dissatisfied with cases limiting the duty to those on the premises of the employer\textsuperscript{62} and those limiting it to those in privity of contract with the employer,\textsuperscript{63} Judge Schoonover sought a broader rule which would extend duty beyond the obvious cases while retaining the concept of a limited class of people to whom the employer would owe the duty. His ultimate rule met both needs. "We believe the duty is best described as a legal duty, arising out of the relationship between the employment in question and the particular plaintiff, owed to a plaintiff who is within the zone of foreseeable risks created by the employment."\textsuperscript{64}

The question then remained whether the employer had discharged his duty to the plaintiff. At first, did the employer need to conduct an investigation at all, and second, was the investigation conducted in the proper manner? In light of prior cases, an investigation is seldom required when the employee would work outside and have only minimal contacts with others.\textsuperscript{65} The reason for the limited need in these cases is that the risk of affecting other people is quite small. Even in those cases indicating a need for inquiry, the need to check beyond prior employers is not always manifest, and the need to check with law enforcement authorities comes about even less frequently.\textsuperscript{66} Indeed, even when the check demonstrates a prior criminal record the need to rehabilitate criminals establishes a societal permission to hire those who have served their time, at least for some positions.\textsuperscript{67}

\textsuperscript{61} Id. at 438.
\textsuperscript{62} Id. at 437-38. \textit{Cf. Prosser & Keeton, supra note 2, at 505-07.}
\textsuperscript{63} E.g., Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954).
\textsuperscript{65} Duffy, 492 So. 2d at 440.
\textsuperscript{66} Id. at 441.
\textsuperscript{67} Id.
\textsuperscript{68} Id. This was the same holding in Jenkins v. Milliken, 498 So. 2d 495 (Fla. 2d Dist. Ct. App. 1986). The Second District Court of Appeal further noted that where the plaintiff fails to prove negligent investigation by the employer at the pretrial stage, the plaintiff cannot seek discovery of financial information from the employer to support a claim for punitive damages. At a later time, if the plaintiff makes a sufficient showing the court can order such discovery.

D. \textit{Defenses}

1. \textit{Assumption of Risk}

Since the decision of the Florida Supreme Court in \textit{Blackburn v. Doria},\textsuperscript{69} courts considering the defense of implied assumption of risk have simply instructed juries to weigh the plaintiff's actions along with those of the defendant, just as they would with the negligence of the defendant. However, for cases of express assumption of risk the court must direct a verdict for the defendant. The problem has come with cases of non-transactional assumption of risk, primarily those involving participants in athletic events who "expressly" assume the normal risks of the sport.\textsuperscript{70} The plaintiff will only assume those risks which are in

\textsuperscript{69} Duffy, 492 So. 2d 442.
\textsuperscript{70} 495 So. 2d 1230 (Fla. 5th Dist. Ct. App. 1986).
\textsuperscript{71} Id. at 1231.
\textsuperscript{72} Id.
\textsuperscript{73} 348 So. 2d 287 (Fla. 1977).
\textsuperscript{74} \textit{See, e.g., Kuehner v. Green, 436 So. 2d 78 (Fla. 1983) (karate), Gary v.}
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Joule owed no duty to Garcia. His interaction with Duffy came about for reasons entirely unrelated to Duffy's employment: he killed Duffy's dog. He "was neither an actual nor potential customer, licensee, or invitee of the employer."\textsuperscript{69}

Even if a duty existed flowing to Garcia from Joule, there was no breach. Given the outside nature of the work, with contact limited to incidental discussions with customers, a check of former employers exceeded the standard of reasonable care in required hiring. The complaint was properly dismissed.

Another question in vicarious liability deals with the liability of a person for suggesting a course of action to another. In Kilgus v. Kilgus,\textsuperscript{70} during a backyard barbecue a father suggested that his son use lighter fluid to add some spark to a dying fire. When the can caught fire and the son dropped it, the daughter-in-law was seriously burned. Mere advice on the proper method will not render a person liable when the other party follows that advice.\textsuperscript{71} Actual assistance of some sort is needed, at the very least. Accordingly, the father was not liable to his daughter-in-law.\textsuperscript{72}

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from the person promoting or presenting the event. One can expect judges to submit cases of this nature to the jury on an increasing basis.

2. Interspousal Tort Immunity

Two district court of appeal cases dealt with the defense of interspousal tort immunity, clarifying the circumstances under which a defendant may assert the doctrine. Chatmon v. Woodard was based upon an automobile accident between Ernestine Chatmon and Milford Woodard. Some time afterwards the two married, and while in that state of connubial bliss, Ernestine filed suit against Milford based on the earlier accident. Some time after that, and subsequent to various pre-trial proceedings and discovery devices, Milford moved to amend his answer to assert the defense of interspousal tort immunity. The trial judge granted the motion and dismissed the case. Despite the later stage of proceedings, the Third District Court of Appeal affirmed. Chatmon thereby reinforces the critical concept that during the course of the marriage one spouse cannot sue another, even for events which transpired prior to the marriage itself.

In Krouse v. Krouse the same court also considered a suit by the father of a deceased child against the mother whose negligent driving caused the child's death. Steven Krouse, divorced from his wife, sued her in his capacity as personal representative of his son's estate. The trial court granted her motion for summary judgment on the grounds of interspousal and parental tort immunity, and the Third District Court of Appeal reversed in part. As personal representative, Krouse sued for three distinct categories of harm: damage to him for mental suffering and loss of support and services, damage to the estate for medical and funeral expenses (paid by the father but reimbursable from the estate), and damage to the estate due to loss of earning power.

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85. 492 So. 2d at 1115.
86. Id. at 1116.
87. Id.
88. 489 So. 2d 106 (Fla. 3d Dist. Ct. App. 1986).
89. Id. at 109.
90. Id. at 108.
herent in the sport or which the plaintiff subjectively understood to be inherent in the sport. The plaintiff does not, in any event, assume the risk of deliberate attempts to actually inflict injury.

In Ashcroft v. Calder Race Course, Inc., a jockey riding at Calder Race Course suffered serious injury when his horse veered toward an exit gap. When his horse fell, he was trampled by another horse in the race. The horsevealed on the theory it had negligently placed the exit gap in a position where horses would be likely to attempt to leave the track in the middle of a race. On these facts, the Third District Court of Appeal had found Ashcroft had expressly assumed the risk and was barred from recovery. The Supreme Court of Florida quashed the district court's decision and remanded. "Assuming that express assumption of risk applies to horse racing, it is clear...that express assumption of risk waives only risks inherent in the sport itself. Riding on a track with a negligently placed exit gap is not an inherent risk in the sport of horse racing."

It would appear that the question remains fairly open to debate as to what constitute the normal risks of the sport or activity. The cases collected by one commentator, however, indicate that one will not assume the risk of deliberate or reckless activity by one's co-participants. On the other hand, it does make considerable sense to hold that recovery from another player should be more limited than recovery from the person promoting or presenting the event. One can expect judges to submit cases of this nature to the jury on an increasing basis.

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75. C.f. Van Tuyn v. Zurich American Ins. Co., 447 So. 2d 318 (Fla. 4th Dist. Ct. App. 1984). In Van Tuyn, however, the plaintiff was a rank amateur attempting to ride a mechanical bull. In the principal case as well as Babine v. Gilley's Bronco Shop, Inc., 498 So. 2d 1176 (Fla. 1st Dist. Ct. App. 1986), the plaintiff was a professional or at least one well trained in the activity. See supra note 235.
76. Kuehner, 436 So. 2d at 80.
77. 492 So. 2d 1309.
78. Id. at 1310.
80. Ashcroft, 492 So. 2d at 1309.
81. Id. at 1311.
82. Horow, supra note 74, at 190-200.
85. 492 So. 2d at 1115.
86. Id. at 1116.
87. Id.
88. 489 So. 2d 106 (Fla. 3d Dist. Ct. App. 1986).
89. Id. at 109.
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As to the damages payable for Krouse's own suffering, there should be no recovery. Although the personal representative must sue for their recovery,91 the suit is essentially one by a spouse to recover in tort against the other spouse. Accordingly it is barred by interspousal tort immunity.92

On the other hand, the medical and funeral expenses incurred by the father and payable ultimately by the estate go to deplete the overall assets available to the family. Accordingly, to the extent the wife had insurance she waived her defense of parental tort immunity.93 Although ultimately Krouse would receive the money, it was for an item properly recoverable by the estate.

Not so with the case of the claim for lost future earnings. Ard v. Arz94 only infringed on parental tort immunity to a limited extent — the parent must have liability insurance and the waiver extended only to the limits of the insurance. Further, Ard was limited in its purpose to prevention of loss from the overall family coffers.95 Permitting recovery for loss of future earnings of a child would increase family disharmony while adding little or nothing to the resources available to the family as a whole.96

Accordingly, Krouse emphasizes the strict adherence of Florida courts to, and the continuing vitality of, family oriented tort immunities. The exception carved out by the Florida Supreme Court in Arz holds only the most limited sway, not only in the amount of the recovery but also in the instances in which courts will permit its application. At the same time, Chatmon emphasizes the rigid interdiction on suits by one spouse against another.

As the year drew to a close, however, the Fourth District Court of Appeal attempted to distinguish a long line of Florida Supreme Court cases97 and hold the immunity waived to the extent of insurance only where the tortfeasant spouse dies in the same accident for which the

93. Ard v. Arz, 414 So. 2d 1066 (Fla. 1982).
94. Id.
95. Id. at 1068-69.
96. Krouse, 489 So. 2d at 109.
97. Raisen v. Raisen, 379 So. 2d 352 (Fla. 1980); Roberts v. Roberts, 414 So. 2d 190 (Fla. 1982); Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1985); Snowman v. United States Fidelity & Guar. Co., 475 So. 2d 1211 (Fla. 1985).

plaintiff spouse is suing.98 Feeling that none of the policy considerations underlying interspousal tort immunity would be served by applying it in the case of a live spouse against a deceased one for insurance proceeds only, the court affirmed a final judgment against the guardian ad litem of the husband's estate.99 It did, however, certify the question for the Florida Supreme Court to consider.100

3. Governmental Employees

Another immunity issue concerns the immunity of governmental employees for their own negligent acts, at least in the presence of existing insurance. Police officers have a statutory immunity for their negligent acts, given the concomitant statutory imposition of liability on the sovereign.101 However, North Bay Village purchased an insurance policy covering its police officers as individuals. Officer Ort came under the coverage of that policy, and when he negligently injured Braelow in the course of his employment, Braelow sued him for the policy limits. In City of North Bay Village v. Braelow,102 the Florida Supreme Court permitted a judgment against Ort for policy limits to stand. By statute, governmental bodies can purchase insurance covering their employees as individuals only if they waive immunity to the extent of coverage limits.103 As a result, in purchasing the policy North Bay Village automatically waived the immunity on Ort's behalf.104

4. Workers' Compensation

In cases where an employee sues his or her employer, the employer will point in defense to the exclusive remedy provided by the Workers' Compensation Act and seek dismissal of the civil claim.105 Unclear,
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99. Id. at 978.
100. In a separate dissent, Judge Glickstein felt it inappropriate to decide the case. "[W]hen the supreme court has not established policy, for us to establish it in a given case - pending that court's subsequent consideration - I would be satisfied if we spoke our mind without establishing policy." Id. at 980 (Glickstein, J., dissenting) (emphasis added).
102. 498 So. 2d 417 (Fla. 1986).
104. Braelow, 498 So. 2d at 418.
However, is the continued exclusivity of the Act in cases of intentional torts. Observers of the Florida Supreme Court had hoped this issue would be resolved this past year, but the court declined the opportunity. Instead, in *Fisher v. Shenandoah General Construction Co.*, it considered when a tort would be considered intentional.

Although supervisory personnel of Shenandoah knew of the existence of methane gas in an underground pipe, they sent their employee, Fisher, into the pipe to clean it out without giving him any safety equipment. After his death due to exposure to the methane fumes, Fisher's estate sued Shenandoah claiming they knew "in all probability" that Fisher would be injured. The Florida Supreme Court held the complaint failed to allege an intentional tort. In order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death. A strong probability is different from substantial certainty and cannot constitute intentional wrongdoing. The complaint was therefore fatally defective.

In dissent, Justice Adkins argued the majority placed too great an emphasis on the pleading of the legal conclusion. More than enough facts appeared in the complaint to support the conclusion that the company's officials were substantially certain that injury would occur. Simply because the complaint worded its conclusion from those facts erroneously is not adequate reason for its dismissal.

Justice Adkins has considerable reason on his side. The Florida Rules of Civil Procedure provide simply that a pleading setting forth a claim for relief need only contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." To require a complaint to precisely plead the legal conclusion stemming from the facts goes well beyond the requirements of the Rules. Although Justice Adkins may be incorrect in his belief that intentional torts are exempted from the exclusivity of the Workers' Compensation Act, his argument that the court should have reached the issue in the case before it makes great sense.

E. Premises Liability

1. Business Invitees

Two cases this past year considered the continuing legacy of the now-muddled rule of *Schoen v. Gilbert*. The question revolves around the fall of an invited guest when the floor level changes. *Schoen* held the change in levels itself would not render the landowner liable, and engendered a number of later cases attempting to determine what additional conditions would be needed to impose liability.

In *Northwest Florida Crippled Children's Association v. Harigel*, a shopper stepped up on a platform elevated about six inches from the regular floor level. While looking at a rack of clothing hanging from a pipe at roughly eye level she stepped off the edge of the platform (painted yellow) and fell. The trial court refused to grant defendant's motion for a directed verdict, and after a jury verdict for plaintiff, defendant appealed. The First District Court of Appeal held that the nature of a display which caught the shopper’s attention was a sufficient additional fact when added to the change in floor level to permit a jury to determine whether the defendant acted negligently.

The second case, *Krivaneck v. Pasternak*, found the acts of the defendant's employee sufficient cause to impose liability when combined with a drop in floor levels. A voter, arriving at a polling place, was greeted by a deputy sheriff with a cheery “Good morning” as he opened the door for her. Looking at him, she stepped forward and stumbled due to a five and three-quarter inch drop in floor levels. Until he opened the door the change was not evident. Under these facts, the Second District Court of Appeal held the trial court properly submitted


115. 436 So. 2d 75 (Fla. 1983).

116. Id. at 76.

117. 479 So. 2d at 831.

118. Id. at 832.

119. Id. at 833.

120. Krivaneck, 490 So. 2d at 253.
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the case to the jury for its determination.\textsuperscript{121} Taken together, the two cases indicate the pattern noted earlier\textsuperscript{122} of courts allowing issues to go to the jury which in the past might have been decided by the court on a motion to dismiss.

Three additional cases arising in the district courts of appeal considered when the obvious nature of a hazard would relieve the owner of the property from liability.\textsuperscript{123} In \textit{Storr v. Proctor},\textsuperscript{124} Proctor hired Storr to build a patio on her property. She supplied all materials, including a rusty roll of wire mesh. While Storr, who had twenty-five years of experience in construction, was unrolling the wire an end broke loose and injured his leg. He sued Proctor, and appealed from a summary judgment in her favor.\textsuperscript{125}

Although Storr was a business invitee, Proctor did not owe him the duty to warn of unknown hidden dangers. Similarly, she did not have to warn him of dangers which were obvious. The only warning she would have to give would be of dangers of which she had a knowledge superior to his own.\textsuperscript{126} As Storr himself, a person experienced in using the type of wire mesh which injured him, had inspected it and found nothing wrong Proctor had no knowledge of the mesh superior to his own.\textsuperscript{127}

Earlier in the year, the same court which decided \textit{Storr} had considered the duty owed to a licensee to warn of dangers on property.\textsuperscript{128} Smith, a policeman, chased a suspect across property owned by Markowitz. In the course of the chase he tripped on a water pipe which lay above the ground, open to plain view. Appealing from an adverse summary judgment, Smith urged the court to modify prior law\textsuperscript{129} and hold that he as a police officer was an invitee rather than a licensee.\textsuperscript{130} The court refused, and noted the only duty owed by Markowitz to Smith was to warn of known hidden dangers.\textsuperscript{131}

In contrast to the two cases from the Third District Court of Appeal, the Fourth District Court of Appeal has taken a more lenient approach. Although reciting precisely the same rule regarding liability to a business invitee, the Fourth District has seen fit to let the cases go to the jury. In \textit{Stewart v. Boho, Inc.},\textsuperscript{132} a bar had a stoop outside its entrance door. Stewart, a somewhat inebriated patron, had tripped while dancing, and leaned on the entrance door to steady himself. Unfortunately, just at that moment another patron opened the door from the outside and Stewart fell through the door and off the stoop, injuring himself. Stewart had been to the bar a number of times before and was familiar with the layout of the premises.\textsuperscript{133}

On the facts, the Fourth District Court of Appeal reversed a summary judgment for the defendant.\textsuperscript{134} Although the owner has no duty to warn of dangers when the knowledge of the patron is equal to his own,

\begin{quote}
the facts . . . that are shown do not preclude the possibility that a jury . . . could reasonably find that the defendants were negligent in permitting Stewart, who had consumed between two and four beers, to dance close to the entrance door near the front of a parked truck, notwithstanding Stewart's general familiarity with defendants' bar and the surrounding circumstances when the incident occurred.\textsuperscript{135}
\end{quote}

The court also expressed the feeling that the case might better be determined on principles of comparative negligence.\textsuperscript{136}

The rule of law emerging from the cases is certainly consistent: the owner of property owes no duty to warn even business invitees of overt dangers of which both have equal knowledge. However, depending on the district in which the case is heard, the issue is to be resolved by the reclassification would have assisted Smith. With a danger as obvious as the raised water pipe, it would be at best difficult to say the owner had superior knowledge to the invitee.

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121. \textit{Id.} The property owner is also prohibited from engaging in willful or wanton conduct, but that was not an issue in the case.
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124. \textit{Id.}
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125. \textit{Id.}
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126. \textit{Id.}
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127. \textit{Id.} at 137. In a brief dissent, Judge Baskin suggested that the issue of superior knowledge would be better left for the jury's determination than for that of the judge. \textit{Id.} (Baskin, J., dissenting).
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129. \textit{Id.} at 136. In light of \textit{Storr}, however, one questions whether
\end{quote}
the case to the jury for its determination.\textsuperscript{124} Taken together, the two cases indicate the pattern noted earlier\textsuperscript{122} of courts allowing issues to go to the jury which in the past might have been decided by the court on a motion to dismiss.

Three additional cases arising in the district courts of appeal considered when the obvious nature of a hazard would relieve the owner of the property from liability.\textsuperscript{128} In \textit{Storr v. Proctor},\textsuperscript{124} Proctor hired Storr to build a patio on her property. She supplied all materials, including a rusty roll of wire mesh. While Storr, who had twenty-five years of experience in construction, was unrolling the wire an end broke loose and injured his leg. He sued Proctor, and appealed from a summary judgment in her favor.\textsuperscript{125}

Although Storr was a business invitee, Proctor did not owe him the duty to warn of unknown hidden dangers. Similarly, she did not have to warn him of dangers which were obvious. The only warning she would have to give would be of dangers of which she had a knowledge superior to her own.\textsuperscript{126} As Storr himself, a person experienced in using the type of wire mesh which injured him, had inspected it and found nothing wrong Proctor had no knowledge of the mesh superior to his own.\textsuperscript{127}

Earlier in the year, the same court which decided \textit{Storr} had considered the duty owed to a licensee to warn of dangers on property.\textsuperscript{128} Smith, a policeman, chased a suspect across property owned by Markowitz. In the course of the chase he tripped on a water pipe which lay above the ground, open to plain view. Appealing from an adverse summary judgment, Smith urged the court to modify prior law\textsuperscript{128} and hold that he as a police officer was an invitee rather than a licensee.\textsuperscript{126} The court refused, and noted the only duty owed by Markowitz to Smith was to warn of known hidden dangers,\textsuperscript{130}

In contrast to the two cases from the Third District Court of Appeal, the Fourth District Court of Appeal has taken a more lenient approach. Although reciting precisely the same rule regarding liability to a business invitee, the Fourth District has seen fit to let the cases go to the jury. In \textit{Stewart v. Boho, Inc.},\textsuperscript{120} a bar had a hoop outside its entrance door. Stewart, a somewhat inebriated patron, had tripped while dancing, and leaned on the entrance door to steady himself. Unfortunately, just at that moment another patron opened the door from the outside and Stewart fell through the door and off the stoop, injuring himself. Stewart had been to the bar a number of times before and was familiar with the layout of the premises.\textsuperscript{128}

On the facts, the Fourth District Court of Appeal reversed a summary judgment for the defendant.\textsuperscript{124} Although the owner has no duty to warn of dangers when the knowledge of the patron is equal to his own,

the facts . . . that are shown do not preclude the possibility that a jury . . . could reasonably find that the defendants were negligent in permitting Stewart, who had consumed between two and four beers, to dance close to the entrance door near the front of a parked truck, notwithstanding Stewart's general familiarity with defendants' bar and the surrounding circumstances when the incident occurred.\textsuperscript{131}

The court also expressed the feeling that the case might better be determined on principles of comparative negligence.\textsuperscript{128}

The rule of law emerging from the cases is certainly consistent: the owner of property owes no duty to warn even business invitees of overt dangers of which both have equal knowledge. However, depending on the district in which the case is heard, the issue is to be resolved by

the reclassification would have assisted Smith. With a danger as obvious as the raised water pipe, it would be at best difficult to say the owner had superior knowledge to the invitee.

\textsuperscript{131} \textit{Id.} The property owner is also prohibited from engaging in willful or wanton conduct, but that was not an issue in the case.

\textsuperscript{132} \textit{Stewart v. Boho, Inc.}, 493 So. 2d 95 (Fla. 4th Dist. Ct. App. 1986).

\textsuperscript{133} \textit{Id.} at 96.

\textsuperscript{134} \textit{Id.} at 97.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}
either the judge or the jury. It would seem the cases present an instance suitable for consideration by the Florida Supreme Court under its conflict certiorari powers, and future cases should present the opportunity to unify the law among the several districts.

2. Fireman's Rule

The “Fireman’s Rule” provides a defense for landowners against actions brought by public servants entering premises in discharge of their duties. To these people the landowner owes only the duty to refrain from willful or wanton conduct. In Sanderson v. Freedom Savings & Loan Association,138 the plaintiff challenged the strict prohibition of the rule on the theory that it applied only to bar passive negligence of the sort normally encountered in cases of premises liability. Taylor, a police officer, went to the bank to help avert a bank robbery in progress. A bank officer negligently informed the robbers that the police had been called and were on their way, so that when Taylor arrived he was killed in a cross fire laid down by the robbers.

The theory on which the plaintiff proceeded was that active negligence should not be immunized by the fireman’s rule. The trial court disagreed and dismissed the complaint; the First District Court of Appeal agreed.139 Public policy demands that people in need of police or fire department assistance be free to call for it without worrying whether they have failed to act in a reasonably prudent manner. This is true whether the potential negligence lies in the manner in which the premises have been maintained or in the manner in which the victims have conducted themselves.140 The court did, however, certify the matter to the Florida Supreme Court as one of potential conflict among the districts.141

3. The Attractive Nuisance Doctrine

When a child is injured by a condition on land, the suit often involves the “attractive nuisance doctrine.” When applied, this doctrine causes the duty owed by the landowner to rise from that owed to a trespasser to that owed to an invitee. However, where the child is a business invitee to begin with the need to invoke the doctrine vanishes, and any exceptions in the favor of the landowner vanish as well.142 This was the holding of the Fifth District Court of Appeal when a child drowned in a waterway at Walt Disney World's Magic Kingdom.143 As a result, a jury was free to find that failure of Walt Disney World to erect higher fences to keep children from the waterways was negligent and thus rendered Walt Disney World liable to the child's estate. The dissent, however, felt liability should attach only in cases where the waterways constituted an unusual trap or abnormal danger.144

III. Medical Malpractice

A. Generally

Two unique cases arose in the district courts of appeal this past year attempting to create novel causes of action.145 Both failed. In Tappan v. Florida Medical Center, Inc.,146 the plaintiff argued that the failure of a chiropractic, treating the decedent for back pain, to diagnose the decedent’s cancer shortened the remaining life span of the decedent. There was no allegation that the failure to diagnose caused the death (the cancer was terminal), merely that the decedent would have lived a few months longer had the chiropractor noticed the disease in a timely manner. The plaintiff brought the wrongful death action as personal representative of the estate. The Fourth District Court of Appeal affirmed a summary judgment in favor of the defendant.147

Under the wrongful death statute, the personal representative must prove that the acts of the defendant in fact caused the death of the decedent.148 In Tappan, the lack of causation of death was ac-

138. 496 So. 2d 954 (Fla. 1st Dist. Ct. App. 1986).
139. Id. at 955.
140. Id. at 956 (citing Risher v. Eastern Airlines, Inc., 466 So. 2d 1136, 1138 (Fla. 3d Dist. Ct. App. 1985)).
143. Id.
144. Id. at 628 (Cobb, J., dissenting).
146. 488 So. 2d at 630.
147. Id. at 632.
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Under the wrongful death statute, the personal representative must prove that the acts of the defendant in fact caused the death of the decedent. In Tappan, the lack of causation of death was acquired.
signed a release authorizing treatment. In the release she stated that
Dr. Parikh had explained the nature of the surgical procedure and the
risks it entailed. At trial, Parikh argued for a conclusive presumption
that Cunningham’s consent was valid.¹⁰⁷

The Florida Supreme Court held that the presumption should not
be applied automatically upon proof of the validity of the signature on
the release form.¹⁰⁸ Instead, the statute requires a further showing
before the court can impose the conclusive presumption.¹⁰⁹ The physician
seeking to apply the presumption must initially demonstrate that
the warnings given both complied with standards set by the profession
and also reasonably conveyed the necessary information. However, the
statute itself could not be read to permit the mere signature to prove
the ultimate fact of due care in making the consent an informed one.¹¹⁰

In addition to informed consent, the courts on several occasions
confronted the statute of limitations for medical malpractice. The
Supreme Court of Florida found it necessary on two separate occasions
to reiterate the rule of Taddeken v. Florida Patient’s Compensation
Fund¹¹¹ that the two year statute of limitations applies just as fully in
cases against the Patient’s Compensation Fund as in all other medical
malpractice cases. Indeed, in one case the plaintiff had to confess er-
ror.¹¹² Although hardly new law, it seems the issue is so firmly settled

１４９．Tappon, 488 So. 2d at 631. See also Williams v. Bay Hosp., Inc., 471 So.
¹⁵⁰．Beam, 486 So. 2d at 672.
¹⁵１．Id.
¹⁵２．Id. at 673.
¹⁵３．Id.
¹⁵４．493 So. 2d 999 (Fla. 1986).
¹⁵５．FLA. STAT. § 768.46 (1983).
¹⁵６．Parikh, 493 So. 2d at 1001-02.

１５７．Id. at 1001.
１５８．Id.
１５９．Id. Fla. STAT. §§ 768.46(3)(a)(1) and (2) provide in relevant part as fol-
lows: “The action of the physician . . . in obtaining the consent of the patient . . . was
in accordance with an accepted standard of medical practice among members of the
medical profession with similar training and experience in the same or similar medical
community; and (2) A reasonable individual, from the information provided . . . would
have a general understanding of the procedure, the medically acceptable alternative
procedures or treatments, and the substantial risks and hazards inherent in the pro-
tected treatment or procedures . . . .”
¹⁶０．“It is crucial, therefore, that trial courts make clear to the trier of fact that
the presumption becomes relevant only upon a jury finding that a valid informed con-
sent has been obtained.” Parikh, 493 So. 2d at 1001-02.
¹⁶１．The Fifth District Court of Appeal also considered the circumstances under
which the limitations period would run in legal malpractice actions. In Richards En-
ters., Inc. v. Swofford, 495 So. 2d 1210 (Fla. 5th Dist. Ct. App. 1986), the court found
the operative event to start the running of the statute was the final decision of an
appeal court on the cause of action on which the plaintiff based the malpractice
claim.

¹６２．478 So. 2d 1038 (Fla. 1985).
¹６３．Florida Patient’s Compensation Fund v. Cohen, 488 So. 2d 56 (Fla. 1986).
See also Florida Patient’s Compensation Fund v. Tillman, 487 So. 2d 1032 (Fla.)
knowledged by the plaintiff. Consequently the action failed. The court did note, however, that an action brought under the survival statute might lie and accordingly remanded the case with permission to file an amended complaint alleging the appropriate cause of action.\textsuperscript{149}

The second case dealt with negligent treatment of a patient by an emergency room physician.\textsuperscript{180} Beam, brought to the emergency room of Memorial Hospital in Jacksonville, was treated by the attending staff physician, Dr. Collins. Collins had no medical malpractice liability insurance, and when the treatment did not achieve the results Beam desired he sued the hospital. His remarkable theory of recovery was that the hospital was negligent in its own right for permitting staff privileges to an uninsured physician.\textsuperscript{181}

After the trial court dismissed Beam's complaint, the First District Court of Appeal affirmed.\textsuperscript{182} The hospital had no reason to believe Collins would render anything but capable treatment, and accordingly did not act negligently in assigning him to emergency room duties. Lack of financial responsibility does not reflect adversely on the ability of a physician to properly perform duties.\textsuperscript{183} As an aside, one cannot imagine public policy dictating anything but this result. Fledgling physicians, more often than not incapable of meeting insurance premium payments, would be precluded from ever gaining the kind of experience only available through staff privileges at a hospital. To permit this action would have jeopardized the entire concept of training used to develop needed skills in our health care industry.

B. 

Defenses

In \textit{Parikh v. Cunningham},\textsuperscript{184} the Florida Supreme Court determined the Medical Consent Law\textsuperscript{185} to be constitutional. In so doing, it also determined the circumstances under which a written consent to treatment would be conclusively presumed to be valid under the statute.\textsuperscript{186} Prior to undergoing surgery by Dr. Parikh, Rosann Cunningham signed a release authorizing treatment. In the release she stated that Dr. Parikh had explained the nature of the surgical procedure and the risks it entailed. At trial, Parikh argued for a conclusive presumption that Cunningham's consent was valid.\textsuperscript{187}

The Florida Supreme Court held that the presumption should not be applied automatically upon proof of the validity of the signature on the release form.\textsuperscript{188} Instead, the statute requires a further showing before the court can impose the conclusive presumption.\textsuperscript{189} The physician seeking to apply the presumption must initially demonstrate that the warnings given both complied with standards set by the profession and also reasonably conveyed the necessary information. However, the statute itself could not be read to permit the mere signature to prove the ultimate fact of due care in making the consent an informed one.\textsuperscript{190}

In addition to informed consent, the courts on several occasions confronted the statute of limitations for medical malpractice.\textsuperscript{191} The Supreme Court of Florida found it necessary on two separate occasions to reiterate the rule of \textit{Tuddalen v. Florida Patient's Compensation Fund},\textsuperscript{192} that the two year statute of limitations applies just as fully in cases against the Patient's Compensation Fund as in all other medical malpractice cases. Indeed, in one case the plaintiff had to confess error.\textsuperscript{193} Although hardly new law, it seems the issue is so firmly settled

\textsuperscript{149} Tapan, 488 So. 2d at 631. \textit{See also} Williams v. Bay Hosp., Inc., 471 So. 2d 626 (Fla. 1st Dist. Ct. App. 1985).

\textsuperscript{150} Beam, 486 So. 2d at 672.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 673.

\textsuperscript{153} Id.

\textsuperscript{154} 493 So. 2d 999 (Fla. 1986).

\textsuperscript{155} \textit{Fla. STAT.} § 768.46 (1983).

\textsuperscript{156} Parikh, 493 So. 2d at 1001-02.
that attorneys should refrain from raising it in the future.

Several lower court decisions considered the time when the statute of limitations would be tolled. In the first, the patient instituted suit on February 10, 1986, to recover for alleged acts of medical malpractice which took place on February 16, 1984. In so doing, however, she neither gave notice of her intent to sue nor included a statement in her complaint alleging good faith observance of the statutory prerequisites to filing suit. Despite these failures, the trial court permitted her to abate the action and cure the defects in her complaint. The defendants sought a writ of prohibition to enjoin the judge from revive the case.

The Comprehensive Medical Malpractice Reform Act of 1985 established an integrated scheme to streamline medical malpractice litigation. The plaintiff who did not, for example, decide to commence suit until after ninety days of the limitation period, would be able to toll the statute during that time. In light of the comprehensive scheme envisioned by the Legislature, the plaintiff who fails to adhere to its prerequisites of notice, grace period, and certification cannot toll the statute of limitations merely by filing a complaint.

Another case concerned one Dr. Frankowitz who worked for the Sunrise Medical Group. Several physicians with the Group treated Propst, and when dissatisfied with her treatment she sued them and the Group. She did not at the time include Frankowitz in the cause of action, although his name was readily located through hospital and other records. She did amend her complaint to add him to the action, but only after more than two years had elapsed from the time the statute of

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166. Id. § 768.57(3)(a) (1985).

167. Id. § 768.495 (1985).

168. Public Health Trust, 495 So. 2d at 834.

169. 1985 Fla. Laws Ch. 55.


171. Pub. Health Trust, 495 So. 2d at 834. See also Pearlstein v. Malunney, 500 So. 2d 585 (Fla. 2d Dist. Ct. App. 1986). Pearlstein also held the notice provisions of the Medical Malpractice Reform Act of 1985 to be constitutional and not to deprive plaintiffs of their access to the courts.


173. Id. at 52.

174. Id. at 51.

175. Id. at 52.

176. Id.

177. Id. at 566-67. See also Lynn v. Miller, 498 So. 2d 1011 (Fla. 2d Dist. Ct. App. 1986).


179. Finkelstein, 484 So. 2d at 1243.

180. Id. Accord Foltz, 493 So. 2d at 440.
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The judge should not have let the jury determine whether Propst should have discovered Frankowitz’ involvement in the case within the two year period of the statute. When his name plainly appeared in the records of the case, the plaintiff could not rest on her own delay in locating the name to argue non-applicability of the statute. When the plaintiff argued in the alternative that Frankowitz was on notice of the lawsuit due to the naming of his employer and his associates, the court disagreed as well. At first, he shared no identity of interest with them in defending against allegations of their negligence. Further, the facts in the complaint did not in any way reveal his potential jeopardy through the suit.

C. Attorney’s Fees

The Florida Supreme Court clarified in several significant ways the operation of the statute permitting the award of attorney’s fees to the prevailing party in a medical malpractice action. Initially, it determined that the award of attorney’s fees was collateral to the malpractice claim. Accordingly, when the trial court hands down a final judgment on the claim in chief, even without reserving judgment as to the attorney’s fees, it retains the right to enter judgment at a later time as to the award of fees. In the same case the court noted that the attorney’s fees portion of the statute applied only to the classes of health care providers specifically enumerated therein. As a result the trial court could not have awarded attorney’s fees in favor of the prevailing plaintiff against a nurse who was a defendant in the case as she was not a member of any of the classes enumerated in section 768.56 of

166. Id. § 768.57(3)(a) (1985).
167. Id. § 768.495 (1985).
168. Public Health Trust, 495 So. 2d at 834.
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173. Id. at 52.
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179. Finkelstein, 484 So. 2d at 1243.
the Florida Statutes.\textsuperscript{181}

In another case, decided on a certified question from the United States Court of Appeals for the Eleventh Circuit,\textsuperscript{182} the Florida Supreme Court determined that attorney’s fees can be awarded to the prevailing party for each distinguishable claim of a multi-count complaint.\textsuperscript{183} Folta brought a five count complaint against Tarpon Springs General Hospital. Each count dealt with a separate and distinct act of malpractice. Folta prevailed on one count, Tarpon Springs on three, and it is unclear who prevailed on the fifth. Folta’s motion for attorney’s fees for the counts on which he prevailed was denied by the trial court and the Eleventh Circuit sought the guidance of the Florida Supreme Court on the issue of the propriety of awarding fees under the circumstances.\textsuperscript{184}

Stressing that the case involved five claims each of which could have been heard independently, as opposed to five different theories of recovery on the same claim, the court held the motion should have been granted.\textsuperscript{185} Given the liberal joinder permitted by contemporary civil procedure, it would be anomalous to hold that had the claims been brought as separate cases fees could be awarded, but merely because the claims were joined for convenience of litigation fees would be prohibited. The same result would prevail in the case of claims against multiple parties where some prevail and some lose.\textsuperscript{186} Folta could recover for his fees based on the claim on which he prevailed; the hospital could recover from Folta for its fees based on the three claims on which it prevailed.\textsuperscript{187}

181. Finkelstein, 488 So. 2d at 1243. See also Tapan v. Florida Medical Center, 488 So. 2d 630 (Fla. 4th Dist. Ct. App. 1986), holding the statutory authorization inapplicable in cases against chiropractors.


183. Folta, 493 So. 2d at 442.

184. Folta, 758 F.2d at 523.

185. Folta, 493 So. 2d at 442.


187. Folta, 493 So. 2d at 443. Justice Adkins argued that the hospital should not recover its attorney’s fees for the claims on which it prevailed merely because it was successful in reducing the amount of damages sought by a plaintiff. Id. at 445 (Adkins, J., concurring). However, Justice Adkins does not meet head on the limitation expressed by the majority that the award of attorney’s fees in medical malpractice actions containing multiple claims applies only in cases where the claims “are separate and distinct and would support an independent action . . . .” Id. at 443. Thus, there is not a net approach taken within a single cause of action. The net effect of a number of independent law suits should be irrelevant in determining the applicability of fees under the statute.


767.04 Dog owner’s liability for damages to persons bitten.— The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners’ knowledge of such viciousness. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner thereof; provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall maliciously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words “Bad Dog.”


190. Noble, 490 So. 2d at 20.


192. Id. § 767.04 (1985).
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\textsuperscript{182} Folta v. Bolton, 758 F.2d 520 (11th Cir. 1985).

\textsuperscript{183} Folta, 493 So. 2d at 442.

\textsuperscript{184} Folta, 758 F.2d at 523.

\textsuperscript{185} Folta, 493 So. 2d at 442.

\textsuperscript{186} Fla. Stat. § 766.56 (1983).

\textsuperscript{187} Folta, 493 So. 2d at 443. Justice Adkins argued that the hospital should not recover its attorney's fees for the claims on which it prevailed merely because it was successful in reducing the amount of damages sought by a plaintiff. \textsuperscript{Id. at 445 (Adkins, J., concurring).} However, Justice Adkins does not heed the limitation expressed by the majority that the award of attorney's fees in medical malpractice actions containing multiple claims applies only in cases where the claims "are separate and distinct and would support an independent action . . . ." \textsuperscript{Id. at 443.} Thus, there is not a net approach taken within a single cause of action. The net effect of a number of independent law suits should be irrelevant in determining the applicability of fees under the statute.

\textsuperscript{188} Fla. Stat. § 767.04 (1981).

\textsuperscript{189} 767.04 Dog owner's liability for damages to persons bitten.—The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners' knowledge of such viciousness. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner thereof; provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall maliciously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog."

\textsuperscript{189} Noble v. Yorke, 490 So. 2d 29 (Fla. 1986); Godfrey v. Drechner, 492 So. 2d 800 (Fla. 2d Dist. Ct. App. 1986).

\textsuperscript{190} Noble, 490 So. 2d at 30.

\textsuperscript{191} Fla. Stat. § 767.04 (1985).

\textsuperscript{192} Id. § 767.04 (1985).
notice” to those coming upon the property. An act of the owner directly aimed at circumventing the statute’s purpose will estop the owner from claiming its protection.

Note the procedure employed by the Florida Supreme Court. The plaintiff’s complaint will allege strict liability, and the answer will assert the defense of the “bad dog” sign. At this juncture the equitable estoppel doctrine will come into play to prevent the defendant from asserting the sign as a defense. To raise this at the earliest possible moment, the plaintiff should immediately move to strike the defense from the answer, supporting the motion with an appropriate affidavit. If the motion is not granted, the trial court can still give a partial summary judgment on the defense subsequent to discovery establishing the prerequisites for estoppel.

In Godfrey v. Dresner, decided three months later, a prospective tenant was repeatedly assured by her landlord that the dog on the premises was old and gentle, and the “bad dog” sign was designed merely to ward off intruders. As she was moving into her apartment, the dog bit her on the arm. As in Noble v. Yorke, the trial court granted a summary judgment for the defendant which was reversed on appeal. Again, it would seem that plaintiffs should not wait for the defendant to move for summary judgment, but should act more aggressively at an early stage to properly preclude the assertion of the defense where estoppel would apply.

Another issue raised by the statute is the possibility of contribution from an active tortfeasor by a defendant found liable due to the strict liability imposed by statute. Strassel threw a frisbee to a dog owned by Wallace, with Wallace’s permission. Unfortunately, he threw it in the direction of Guest, who was riding his bicycle. The dog struck the bicycle and Guest was injured. He sued both Strassel and Wallace, and Wallace sought contribution from Strassel. The trial court granted Strassel’s motion for summary judgment, and Wallace appealed. In reversing, the Fourth District Court of Appeal held that although it is true the owner of a dog by statute is a virtual insurer of the dog’s conduct, this does not preclude contribution from a co-defendant who would be liable on the grounds of simple negligence. Even an insurer is entitled to contribution under the Act.

Two cases in the district courts of appeal considered the response of dog owners to suits brought by very young plaintiffs. In addition to the statutory defense of the “bad dog” sign, owners will avoid liability when the plaintiff has provoked the dog to biting. Michael Porter, a four-year-old child, was pulling the ears of a cocker spaniel when the dog bit him on the nose. The trial court found as a matter of law that a child of the age of four could not carelessly provoke the dog, but sent the issue of malicious provocation to the jury, which found for the defendant. On appeal, the Fifth District Court of Appeal affirmed. It noted, however, that very young children for the purposes of the dog bite statute could be deemed to have acted carelessly as well as maliciously. The Second District Court of Appeal reached the same conclusion, again with a four-year-old child abusing a dog.

[T]here is no precise age at which a child may be said, as a matter of law, to have acquired such knowledge and discretion as to be held accountable for all his actions and ... the question of the capacity of a child at a particular age to be capable of committing a willful or malicious act or to avoid a particular danger is one of fact falling within the province of the jury.

200. Wallace, 492 So. 2d at 235 (citing FLA. STAT. § 768.31(2)(e) (1983)).
201. Id.
203. “[N]o owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage...” FLA. STAT. § 767.04 (1985).
204. Porter, 11 Fla. L. Weekly at 2367.
205. The rule at common law would hold very young children incapable of negligent conduct. Swindell v. Hellkamp, 242 So. 2d 708 (Fla. 1970) (dealing, however, with contributory negligence). The statute, however, is in contravention of the common law and does not exempt children of any age from its provisions. Porter, 497 So. 2d at 929. Contra Harris v. Moriconi, 331 So. 2d 353 (Fla. 1st Dist. Ct. App.), cert. denied 341 So. 2d 1084 (Fla. 1976). Accord Reed, 11 Fla. L. Weekly at 2254. The discord among the districts would indicate the potential for the Florida Supreme Court to decide the matter at some future date.
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Just as these cases acknowledged the statutory preemption of the common law in the case of very young children, another found the statute precluded a defendant from asserting the "fireman’s rule." A police officer who responded to a ringing burglar alarm on Sklar’s property was injured while escaping from several Great Danes who chased him over a fence. Sklar attempted to raise the "fireman’s rule" as a defense, arguing he should be liable only for willful and wanton conduct. The trial court agreed, and granted Sklar’s motion for summary judgment, but the Third District Court of Appeal reversed. The supersession of the common law by the dog bite statute applies to all defenses as well. Accordingly, defendants are limited strictly to those defenses created by the statute itself. The defense of the "fireman’s rule" is not among these.

V. Products Liability

A. Specific products

Two lower court cases considered the liability of manufacturers of weapons for harm to others when the guns themselves were neither poorly designed nor poorly manufactured. International Armament manufactured handguns popularly known as "Saturday Night Specials." These weapons had no purpose for use by sportsmen or law enforcement officers; their sole purpose (according to the complaint) was for sale to criminals for use in the perpetration of crimes. The complaint alleged that either the guns were defective products or that their intended use by the criminal element rendered their manufacture an ultrahazardous enterprise. In a short per curiam opinion the Fourth District Court of Appeal upheld the dismissal of the complaint and rejected both theories advanced by the plaintiff.

A similar case was filed against the manufacturer and all those in the sales chain of a “riot shotgun.” An insane gunman purchased the weapon and shot down eight people, one of whose estate brought suit. The Third District Court of Appeal disposed of the claim in strict products liability by noting that a perfectly made weapon has no defect, nor is a product with “inherently dangerous qualities” necessarily defective. To be defective, a product must fail to operate in the manner anticipated by the consumer, and this gun regrettably did fail. Since sale of this weapon was not illegal and the weapon was not defective, the sellers and manufacturer breached no duty to the plaintiff, and the negligence count of the complaint failed as well.

Liability under a strict products theory for improvements to reality also came under judicial scrutiny this past year. Edward M. Chadbourne, Inc. resurfaced a county road with paving material it manufactured. Eight months later an investigation revealed that the left lane had eroded to the extent there was a two-inch drop between the right and left lanes. Three weeks after the inspection Vaughn lost control of her car due to the difference in levels and died in the ensuing accident. The Supreme Court of Florida decided that the paver of a public road has not supplied a product in the sense that a person injured can claim strict products liability in a later lawsuit. “[P]ublic roads are not available for purchase in the sense that they are offered in the stream of commerce in the way that, for instance, soft drinks or automobiles are. Hence, the principal policy reasons for invoking the doctrine of strict liability are absent here.”

Unlike Edward M. Chadbourne, Inc. v. Vaughn, an earlier district court of appeal case dealt with a paving contractor on a private road who did not manufacture the paving material as well. Although not faced with the more difficult situation of the seller/manufacturer,
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the court nonetheless found that paving a road constituted an improvement to real property, and thus not a sale of a consumer good.\(^{223}\) It noted, however, that “the contractor essentially was rendering services for the improvement of real property and that the supplying of goods was a minor element of the transaction.”\(^{224}\)

Injured in an accident on a water slide, Craft sued Wet ‘N Wild in a multi-count complaint alleging strict liability among other things.\(^{225}\) After a judgment on the pleadings on the strict liability claim, the plaintiff appealed. The slide, consisting of poured concrete surrounded by soil, was an improvement to the real property and as such not a product.\(^{226}\)

These three cases evidence what may be the beginning of a trend to look at the product in light of its intended users. Where a product is intended for use by an individual in a consumer setting the courts will have little problem employing strict products liability concepts. On the other hand, products — at least those affixed permanently to real property — intended for use by the entire public will not give rise to an action based on strict products liability. The courts may rest at this point, continuing to base their opinions on the personality/realty distinction. However, the language of the Florida Supreme Court drawing the further distinction between products traditionally sold in a consumer context and those not intended for consumers per se\(^{227}\) seems likely to promote further discussion in the courts. Defendants will likely seek to narrow the scope of liability based on the “consumer protection” aspect of products liability.\(^{228}\)

B. Defenses

Although the negligence of a plaintiff may not preclude an action for strict products liability or even diminish the plaintiff’s recovery proportionate to the plaintiff’s negligence, the defendant may plead as a defense the plaintiff’s voluntarily confronting a known hazard in the use of a product which might be in a defective condition.\(^{229}\) In *Alderman v. Wysong and Miles, Co.*,\(^{230}\) Alderman, knowing of the tendency of press brakes to tip over, assisted in moving a press brake through a series of complicated raising and lowering procedures. The brake toppled, and crushed Alderman to death. The trial court, despite a request for the instruction, refused to inform the jury that “the failure of decedent or his co-riggers to discover or guard against the possibility of the press brake’s alleged design defect was not a legal defense to a strict liability claim.”\(^{231}\) Instead of arguing that the plaintiff’s decedent failed to discover the defect, the defendant had established that Alderman and his co-riggers knew of the machine’s propensity to tip over when being moved. Thus, since they knew of the danger either the product was not defective as it met consumer expectations, or the defendant had established that the decedent assumed a known risk.\(^{232}\) With either of these theories, the defendant would establish an effective counter to the plaintiff’s claim and the instruction would only have confused the issue.

Actual knowledge of hazards is not the only obstacle to a plaintiff’s claim. In circumstances where the plaintiff should have known of a hazard in using a product due to adequate warnings supplied by the seller or manufacturer, the plaintiff will not be permitted to recover.\(^{233}\) In *Grove Manufacturing Co. v. Storey*,\(^{234}\) the manufacturer of a crane had placed throughout the machine warnings of hazards in operating the crane near power lines. Warnings appeared on the door of the crane, inside the cab of the crane, and in extensive detail in the manual provided with the crane. Nonetheless, Storey was injured when the boom of the crane he was operating contacted power lines and claimed negligence of the manufacturer in failing to warn him of the dangers. In rejecting the claim, the Fifth District Court of Appeal noted the relationship of warnings and knowledge of the consumer: “We also fail to see how any additional warning would have added anything to the warnings of danger already given or to the plaintiff’s own knowledge of

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\(^{228}\) Cf. *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 90-92 (Fla. 1976); Tri-County Truss Co. v. Leonard, 467 So. 2d 370 (Fla. 4th Dist. Ct. App. 1985), review denied, 476 So. 2d 676 (Fla. 1985).

\(^{229}\) 486 So. 2d 673 (Fla. 1st Dist. Ct. App. 1986).

\(^{230}\) Id. at 677.

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the dangers involved. 224  
That the overt nature of the danger can furnish an adequate defense argument was evidenced in a case involving a mechanical bull. 225 Babine was injured in a fall from a mechanical bull when he hit the ground precisely at the point where there was a gap in the mattresses provided by the nightclub operating the bull. He sued the manufacturer, claiming the product was defective when supplied without adequate landing apparatus. The trial court granted the motion for summary judgment by the manufacturer for three reasons. 226 First, he noted that the danger of falling was obvious to the plaintiff, who had assumed the risk. Indeed, "Plaintiff had knowledge of the actual hazards superior to that of the Defendant who knew nothing of the 'El Toro's' location or padding in use at the time of the accident." 227 Further, as the manufacturer warned all purchasers of the bull to use it only with adequate landing pads, the warning had been given in an adequate manner. Finally, the manufacturer of a product has no duty to supply safety equipment for use with the product; the manufacturer need only warn the purchaser of the need to install it. 228 The First District Court of Appeal affirmed the summary judgment, and in doing so virtually adopted the entire holding of the trial court. 229  
Although not truly a matter of defense, one Florida court stressed the need for the plaintiff to fully prove all elements of his case. 230 Adkins fell from a scissors-lift platform and was injured. He sued the manufacturer and supplier on the theory that the platform was defective in that the side railings were too low to prevent falls from the platform. Neither the plaintiff nor any of his witnesses was able to state under what circumstances the plaintiff fell from the platform. The height of the railings, however, was not the only reason the plaintiff might have fallen: "However, other equally reasonable assumptions are possible, such as that plaintiff was sitting or standing or climbing on the railings, in which case the alleged low height of the railings would have had no effect on preventing the fall." 231 Adkins v. Economy Engineering Co. 232 stands in contrast to the res ipsa loquitur cases stemming from Cassisi v. Maytag Co., 233 in that it requires the plaintiff to prove the causative effect of the alleged defect even before the inference of res ipsa loquitur is permitted. Another view of Adkins in relation to res ipsa loquitur is that when the plaintiff may have played an active role the defendant can successfully counter the res ipsa loquitur claim. It would be for the plaintiff to prove in the first instance that he had no fault in the matter, rather than for the defendant to demonstrate this as a matter of defense (that of plaintiff's comparative negligence). 234 Recall, though, that res ipsa loquitur was not raised in Adkins. Rather, the case presents several alternative ways for defendants to defeat its inference.  
Taken together, these cases seem to indicate a relaxing of the stringent requirements previously placed on defendants in products liability cases and fit in with other cases dealing with the use of evidentiary inferences in products cases. 235 Although by no means adverse to entertaining products liability claims, it might seem that Florida courts are taking the first tentative steps to adopting a more circumspect view of this as yet infant cause of action.  
C. Defendants Liable  
One nagging question in products liability cases has long been the extent of liability incurred by a corporation for products manufactured by a predecessor it had acquired after the sale of the products. 236 Bernard v. Kee Manufacturing Co. 237 had established that unless the terms

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245. See supra discussion accompanying notes 26-29.
247. 409 So. 2d 1047 (Fla. 1982).
of the acquisition so provide, a corporation does not incur liability for the obligations of its predecessor. In deciding Bernard, the Supreme Court of Florida expressly declined to adopt the “product line” theory imposing liability on corporations continuing to market the predecessor’s products.248

Thus, there was little question that the surviving corporation in a merger under the Florida Business Corporations Act249 would be liable for the debts of a predecessor. The question then open to determination was not whether compensatory damages would carry over to the successor corporation — they clearly constitute a corporate liability — but whether punitive damages would carry over as well. The Florida Supreme Court answered this question in the affirmative in Celotex Corp. v. Pickett.250 One corporation, according to the court, upon merging with another, “cannot . . . disclaim its lineage.”251

Two justices dissented, feeling the rule directly conflicted with the purpose of awarding punitive damages at all. Justice McDonald reasoned that “I fail to see how society would be benefited by punishing [a corporation] . . . in the 1980’s . . . which by operation of law assumed the liabilities of another corporation in 1972 for the acts committed by that corporation in 1965-1968 or earlier . . . .”252 Justice Overton also disagreed with the majority. Noting that the assumption of liability was not an express assumption, but one implied by statute, he argued: “I find no justification whatever to punish any business entity vicariously for something that it clearly did not do and that it could have avoided through the use of another method of acquiring the business.”253

A later case, Johnson v. Supro Corp.,254 dealt with the liability of a predecessor business which, rather than merging with the successor, merely sold all of its assets to a competitor. Supro had modified a large dry wall blender prior to the sale of the business to FRM, Inc. An FRM employee was injured while using the blender and sued Supro as a seller. The Third District Court of Appeal affirmed a summary judgment for Supro.255 In order to be liable on a strict products liability theory of recovery, a defendant must have put the product into the stream of commerce.

It is clear that Supro does not fall within this rule. It was in the business of manufacturing dry wall products with the machine which it adapted for that very use and purpose; it was decidedly not in the business of manufacturing and distributing the machine itself. Furthermore, the one-time sale of its entire operation, which happened to include the ribbon blender, cannot render it liable. . . .256

Johnson would appear to buttress the conclusion that courts will consider more closely the nature of the sale, not only to determine whether the product is designed for public consumption,257 but also whether the sale itself subjects the defendant to strict products liability. Here, the courts are not creating a new exception to existing law, but rather enforcing more stringently the restrictions already in place on use of the doctrine. The seller of a product, to be liable, must be in the business of selling that type of product.258

Another case, equally restrictive of the use of strict products liability, held that the dealer of a used product would be entitled to a directed verdict on a strict products liability claim.259 Bundy had purchased a used roll slicing machine manufactured by Alto and resold it to Keith’s employer. Keith’s hand was injured while using the machine and she sued Bundy in strict products liability cause of action. The jury found the product was defective, and found Bundy equally liable with Alto.260 The Fifth District Court of Appeal held that a directed verdict should have been granted in Bundy’s favor.261 As the purpose of strict products liability is to reduce the risk of harm from products, liability should be designed to effect that purpose. Dealers in used products can in no way assist in risk reduction, and accordingly should not be subject to a cause of action in strict products liability.262

248. Id. at 1049.
250. 490 So. 2d 35 (Fla. 1986).
251. Id. at 38.
252. Id. at 39 (McDonald, J., dissenting).
253. Id. (Overton, J., dissenting).
254. 498 So. 2d 528 (Fla. 3d Dist. Ct. App. 1986).
255. Id.
256. Id. at 529.
257. See supra discussion accompanying notes 217 to 223.
260. Id.
261. Id. at 1227.
262. [T]he sale of used products does not generate the kind of expectations
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D. PUNITIVE DAMAGES

In the closing months of the year, the Florida Supreme Court decided two cases which dramatically limited the use of punitive damages in cases of strict products liability based on inadequate warnings and inadequate testing. The first, American Cyanamid Co. v. Roy, considered the liability of the manufacturer of an industrial grout used for waterproofing sewers. Although highly effective for the purpose, physical contact with the product could cause neurologic and dermatologic disorders. A worker who suffered nerve damage from using the grout sued its manufacturer and the manufacturer appealed from an adverse jury award of punitive damages.

In general, the character of negligent conduct supporting punitive damages in the case of products liability must be equivalent to that which would support a conviction for negligent manslaughter—"wanton intentionally, exaggerated recklessness, or such an extreme degree of negligence as to parallel an intentional and reprehensible act." The recurring question has concerned what type of conduct will satisfy this heightened test. In this case, American Cyanamid, after learning of the dangerous character of its grout, appointed a committee to design a warning to place on the label. The warning ultimately read:

Contains Acrylamide. Warning: Repeated skin contact, inhalation or swallowing may cause nervous system disturbances. Do not get in eyes, on skin, on clothing. Do not breathe dust. Wash thoroughly after handling. Wear clean work clothes daily. In case of contact, immediately flush eyes or skin with plenty of water. Wash contaminated clothing before reuse.

In addition to preparing the warning, American Cyanamid conducted exhaustive research, frequently with the help of university and other outside laboratories. It distributed manuals on the proper use of the product and its dangers if misused, and even conducted seminars and made available filmsstrips on using the product.

Under the circumstances, the company acted not recklessly, but with "a high degree of conscientiousness and concern," and could hardly be held liable for punitive damages. The evidence demonstrated responsibility sufficiently to keep the issue from going to the jury. One additional point is that American Cyanamid could not be held liable for failing to place a skull and crossbones symbol, or even the word "danger," on the package. The standards of the United States Department of Transportation actually prohibited it from so doing. Accordingly, its meeting industry guidelines, while not establishing freedom from negligence, clearly went to establishing its freedom from the exaggerated negligence needed to support a claim for punitive damages.

Chrysler Corp. v. Wolmer dealt with the substantial testing to which the Chrysler corporation had subjected its Plymouth Volare station wagon. The tests showed the gas tank, upon a rear-end impact, would go upwards and forward and ultimately strike the shock absorber but do so without rupturing. There was some leakage due to the straps holding the tank on the car, but this design was changed to avoid the leakage. There was also some leakage during a roll-over collision.

268. Id. at 862.
269. Id. Opposed to this evidence was the statement of one "expert" witness that "the warning on bags of AM-9 should make clear that acrylamide is a contact poison, and that brain and nerve damage can result from repeated exposure." American Cyanamid Co. v. Roy, 466 So. 2d 1079, 1083 (Fla. 4th Dist. Ct. App. 1984).
270. American Cyanamid, 498 So. 2d at 862.
271. Id.
272. Cf. The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).
273. American Cyanamid, 498 So. 2d at 863.
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> of safety created by the introduction of a new product into the stream of commerce, since the used market generally operates on the apparent understanding that the seller makes no particular representations about the quality being offered for sale. [There is] no risk reduction benefit, since the used dealer is normally entirely outside of the chain of distributorship and, thus, no ready channel of communication between the dealer and the manufacturer exists concerning possible dangerous defects in particular product lines or actual or potential liability claims.

*Id.* at 1228 (citing Tillman v. Vance Equip. Co., 286 Or. 747, 596 P.2d 1299 (1979)).

263. *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986); *American Cyanamid Co. v. Roy*, 498 So. 2d 859 (Fla. 1986).

264. 498 So. 2d at 859.

265. *Id.* at 859.

266. Tampa Drug Co. v. Waitt, 103 So. 2d 603 (Fla. 1958); Carraway v. Revel, 116 So. 2d 16 (Fla. 1959); Ingram v. Petit, 340 So. 2d 922 (Fla. 1976); Lassiter v. Int’l Union of Operating Eng’ns, 349 So. 2d 622 (Fla. 1976); Mercury Motor Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981); Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983); Como Oil Co. v. O’Loughlin, 466 So. 2d 1061 (Fla. 1985).

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Wolmer's wife died in a rear-end collision so severe that the gas tank was pushed forward with such force as to break the shock absorber, which in turn ruptured the gas tank. Leaking fuel ignited and caused the explosion in which Mrs. Wolmer died. After a jury verdict granting punitive damages the trial court granted Chrysler's motion for directed verdict on the issue, the Fourth District Court of Appeal reversed.276 The Florida Supreme Court granted review under its powers of certiorari.277

Chrysler's testing led to results perfectly acceptable in the industry. Whether it should have done more to avoid fuel leakage than the industry required might render it negligent, but in no way constituted sufficient conduct to support a jury award of punitive damages. "Therefore, an award of punitive damages in this case is not only unjust, but also ignores the threshold requirements for such an award."278

American Cyanamid and Wolmer should have a salutary effect on the conduct of products liability cases in years to come. It has become almost de rigueur for a plaintiff to include a punitive damages claim in a products liability complaint, even though the test has long established the extraordinary nature of such relief.279 Both cases should go far toward halting this practice, and permitting courts to concentrate on the real issues before them. So much wasted time and energy now spent on dispensing with claims for punitive damages, almost frivolous in nature, could be channeled to more productive ends.

275. 15 U.S.C. §§ 1392(a) and (f)(3) (1976) authorize the Secretary of Transportation to promulgate standards for automobile safety. Pursuant to the act, the Secretary promulgated 49 C.F.R. § 571.301, S5.5 (1976), dealing with the integrity of the fuel tank system.


277. Justice Barkett dissented from the majority opinion on the ground that conflict certiorari was granted improvidently. Chrysler Corp., 499 So. 2d at 827 (Barkett, J., dissenting).

278. Id. at 826. Justice Adkins dissented, feeling that the case was one properly submitted to the jury for its determination. Id. at 827. (Adkins, J., dissenting).


1987]

VI. Dignitary Torts

A. Defamation

Alphonse Della-Donna, an attorney, drafted a charitable remainder trust for Goodwin as part of Goodwin's estate plan. At the time of Goodwin's death he had named no beneficiaries to the trust. Five years after Goodwin's death the trustees designated the beneficiaries of the trust, one of which was Nova University. Della-Donna and the Nova corporate leadership had a falling out and the trustees of the Goodwin funds refused to make any distribution to Nova. Nova sued the trust for a distribution.280 In covering the controversy, the Gore Newspaper Company ran a number of articles in the Fort Lauderdale News. Della-Donna sued Gore, claiming it defamed him in a number of these articles. Della-Donna lost a motion for summary judgment and appealed.281 The Fourth District Court of Appeal affirmed.282

If the plaintiff in a defamation action against a member of the media is a private figure, he need prove only that the defendant acted negligently in publishing the defamatory matter.283 On the other hand, the plaintiff who is a "public figure" must prove malice — either actual malicious intent, or reckless disregard of the truth — as an essential element of the cause of action,284 at least where the subject matter of the defamation is of public concern.285 The question of whether Nova University would obtain the funds bore great importance to its community, and was clearly one of public concern. Accordingly, the question became whether Della-Donna was a public figure who would have to prove "New York Times malice" in order to recover.

As trustee and lawyer for the Goodwin trust, Della-Donna played a pivotal role in the litigation and the distribution. He did so not involuntarily, but deliberately. "Della-Donna initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role. . . . That Della-Donna was motivated by fiduciary obligations or ethical responsibilities is irrelevant."


281. Id.

282. Id.


286. Della-Donna, 489 So. 2d at 77.
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281. Id.

282. Id.


286. Della-Donna, 489 So. 2d at 77.
Della-Donna was therefore a limited public figure, and any news stories regarding his role in the controversy between the trustees and the University were protected by the enhanced privacy required by the New York Times test of malice or recklessness.\textsuperscript{287} As the proof adduced at the motion for summary judgment demonstrated, no real issue of material fact existed as to malice. The trial court had properly granted the motion.\textsuperscript{288}

In three instances, lower courts acknowledged the existence of an absolute privilege to make defamatory statements.\textsuperscript{289} A physician testifying before a medical review board has the protection of an absolute privilege for statements made before that panel.\textsuperscript{290} "[T]he language of the statute creates an absolute privilege and means that any existing defamation action has been totally abolished."\textsuperscript{291} Similarly, a person complying with the statutory requirements surrounding complaints before the Internal Police Review Panel\textsuperscript{292} has an absolute privilege to make those statements, and a complaint for defamation based on them would be dismissed.\textsuperscript{293}

Absolute privileges can arise at common law as well by operation of statute. In Skoblow v. Ameri-Manage, Inc.,\textsuperscript{294} four executive officers of a public hospital had made disparaging statements about Dr. Skoblow, leading to his discharge from employment. He sued them for defamation and appealed from an order granting them partial summary judgment.\textsuperscript{295} A public employee is entitled to an absolute immunity from suit for defamation, so long as "the defamation was within the scope of the employee's duties."\textsuperscript{296} Since the defendants either supervised Skoblow or were directly involved in the personnel process, and their comments were made in connection with a hearing on his termination, they were entitled to the privilege.\textsuperscript{297}

\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{290} F.L.A. STAT. § 768.40(4) (1983).
\textsuperscript{291} Feldman, 488 So. 2d at 575.
\textsuperscript{292} F.L.A. STAT. § 112.532 (1983).
\textsuperscript{293} Gray, 481 So. 2d at 1298.
\textsuperscript{294} 483 So. 2d at 809.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 811 (citing City of Miami v. Wardlow, 403 So. 2d 414 (Fla. 1981)).
\textsuperscript{297} Id.

B. Malicious Prosecution

Stoll repaired Lindeman's car and after she determined the repairs were poorly done, she stopped payment on her check. Although Lindeman attempted to explain the nature of her complaints with the work, Stoll refused to discuss the matter without full payment and swore out a warrant against Lindeman for removing property subject to a lien. Lindeman was arrested and released on bail; the case was later disposed of by a nolle prosequi.\textsuperscript{298} When Lindeman sued Stoll for malicious prosecution, the court granted Stoll's motion for summary judgment.\textsuperscript{299}

Prior to civil action for malicious prosecution, the criminal proceedings must have been terminated in favor of the plaintiff.\textsuperscript{300} The Second District Court of Appeal found that the declaration to prosecute is a sufficient termination of the criminal case to support a malicious prosecution action.\textsuperscript{301} Further, the issuance of the warrant, obtained under circumstances where the defendant was still actively trying to settle the dispute, shows bad faith sufficient to withstand a motion for summary judgment.\textsuperscript{302}

An interesting opinion from the First District Court of Appeal considered the circumstances under which a malicious prosecution action would lie for failure to divulge information which would bring to a close an existing criminal action.\textsuperscript{303} Harris received a statement from the Lewis State Bank for an account she did not believe she had. The
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bank informed her that someone must have opened it in her name, and permitted her to continue drawing funds on it. In fact, the account belonged to John Lewis whose daughter also had the right to draw on it. The bank informed Lewis that the numerous withdrawals came due to some person forging his daughter’s signature, although they could have told him the true facts. Lewis swore out a warrant against Harris, who was arrested the next time she entered the bank.304

Harris sued the bank, which defended the malicious prosecution claim on the grounds it had not been the party which instigated the criminal proceedings.305 It further claimed that once the proceedings were underway it owed no duty to Harris to divulge the true facts to the police (which would have caused immediate termination of the criminal case).306 The First District Court of Appeal found the summary judgment for the bank should not have been granted.307

The instigation of a criminal proceeding, although most readily proved by the filing of a criminal complaint, can come about in a number of ways.308 The purpose of a malicious prosecution action is to lay liability at the feet of the actor responsible for the imprisonment and criminal proceedings.309 Thus, when a person gives false information knowing it is likely to engender criminal proceedings, that person is subject to suit for malicious prosecution. Similarly, a person cannot escape liability by withholding information improperly when that information would cause the end of a criminal action.310

VII. Miscellaneous Considerations

A. Joint and Several Liability

Now pending before the Florida Supreme Court311 is the appeal of

304. Id. at 1381.
305. Id.
306. Id. at 1384.
307. Id. at 1382.
308. Id.
309. Some courts do not distinguish, as does Florida, between “malicious prosecution” for criminal cases and “abuse of process” for civil cases. Cf. Prosser & Keeton, supra note 2, at §120.
310. “The real instigator cannot escape liability by showing he was not the prosector of record. The test is whether the defendant’s action was the proximate and efficient cause of putting the law in motion.” Harris, 482 So. 2d at 1381.
311. Walt Disney World Co. v. Wood, No. 68,647 (Fla. filed April, 1986).

B. Wrongful Death

Paul, an adult, died in an accident with Johnson.312 His parents survived him, but did not depend on him for support or for services. Although his parents could not bring a wrongful death action in their own right,313 the question remained whether his estate could sue for prospective net accumulations given the fact Paul’s parents survived him. The estate sued Johnson in federal court, which certified the question of its right to recover to the Florida Supreme Court.314

312. 489 So. 2d 61 (Fla. 4th Dist. Cl. App. 1986).
313. Id.
314. Id.
315. Id.
316. The Florida Legislature has evidenced its displeasure with the doctrine by abolishing it in many cases, as part of the Tort Reform and Insurance Act of 1986. Fla. Stat. § 768.81 (1986). See supra notes 3-7.
317. “We are conscious that the problem is one of extraordinary public importance and we are also conscious that the controlling case out of our Supreme Court, Lenczenberg v. Issen, involved a plaintiff who was entirely blameless, whereas the plaintiff at bar is not without fault.” Walt Disney World Inc. v. Wood, 489 So. 2d at 62 (citations omitted). For a thorough discussion of the subject of joint and several liability in Florida, see Note, Modification of the Doctrine of Joint and Several Liability in Florida: Who Bears the Risk?, 11 NOVA L. REV. 165 (1986).
320. If he had died without surviving parents, the estate would clearly have been
bank informed her that someone must have opened it in her name, and permitted her to continue drawing funds on it. In fact, the account belonged to John Lewis whose daughter also had the right to draw on it. The bank informed Lewis that the numerous withdrawals came due to some person forging his daughter's signature, although they could have told him the true facts. Lewis swore out a warrant against Harris, who was arrested the next time she entered the bank.  

Harris sued the bank, which defended the malicious prosecution claim on the grounds it had not been the party which instigated the criminal proceedings. It further claimed that once the proceedings were underway it owed no duty to Harris to divulge the true facts to the police (which would have caused immediate termination of the criminal case). The First District Court of Appeal found the summary judgment for the bank should not have been granted.

The instigation of a criminal proceeding, although most readily proved by the filing of a criminal complaint, can come about in a number of ways. The purpose of a malicious prosecution action is to lay liability at the feet of the actor responsible for the imprisonment and criminal proceedings. Thus, when a person gives false information knowing it is likely to engender criminal proceedings, that person is subject to suit for malicious prosecution. Similarly, a person cannot escape liability by withholding information improperly when that information would cause the end of a criminal action.

VII. Miscellaneous Considerations

A. Joint and Several Liability

Now pending before the Florida Supreme Court is the appeal of

304. Id. at 1381.
305. Id.
306. Id. at 1384.
307. Id. at 1382.
308. Id.
309. Some courts do not distinguish, as does Florida, between "malicious prosecution" for criminal cases and "abuse of process" for civil cases. Cf. Prosser & Keeton, supra note 2, at §120.
310. "The real instigator cannot escape liability by showing he was not the prosecutor of record. The test is whether the defendant's action was the proximate and efficient cause of putting the law in motion." Harris, 482 So. 2d at 1381.
311. Walt Disney World Co. v. Wood, No. 68,647 (Fla. filed April, 1986).

1987] Walt Disney World Co. v. Wood, a case which may produce a fundamental change in the way we think about the law of torts and the concept of fault. While engaging in a simulated automobile race ride, Wood was struck by her fiancé in the car behind. Seriously injured, she sued both her fiancé and Walt Disney World which maintained the ride. At trial, fault was allocated 85% to the fiancé, 14% to Wood, and 1% to Walt Disney World. Wood took judgment against Walt Disney World for 86% of her total damages, and then married her fiancé.

Walt Disney World argued that the concept of joint and several liability, when applied in a jurisdiction which has adopted comparative negligence, is irrational and outmoded. The Fourth District Court of Appeal found the argument more proper for the legislature or the supreme court. Therefore, it certified the issue of the continued vitality of the doctrine for the supreme court to consider.

B. Wrongful Death

Paul, an adult, died in an accident with Johnson. His parents survived him, but did not depend on him for support or for services. Although his parents could not bring a wrongful death action in their own right, the question remained whether his estate could sue for prospective net accumulations given the fact Paul's parents survived him. The estate sued Johnson in federal court, which certified the question of its right to recover to the Florida Supreme Court.

312. 489 So. 2d 61 (Fla. 4th Dist. Ct. App. 1986).
313. Id.
314. Id.
315. Id.
316. The Florida Legislature has evidenced its displeasure with the doctrine by abolishing it in many cases, as part of the Tort Reform and Insurance Act of 1986. Fla. Stat. § 768.81 (1986). See supra notes 3-7.
317. "We are conscious that the problem is one of extraordinary public importance and we are also conscious that the controlling case out of our Supreme Court, Lenczberg v. Isen, involved a plaintiff who was entirely blameless, whereas the plaintiff at bar is not without fault." Walt Disney World Inc. v. Wood, 489 So. 2d at 62 (citations omitted). For a thorough discussion of the subject of joint and several liability in Florida, see Note, Modification of the Doctrine of Joint and Several Liability in Florida: Who Bears the Risk?, 11 Nova L. Rev. 165 (1986).
320. If he had died without surviving parents, the estate would clearly have been
The Wrongful Death Act only permits recovery of net accumulations in the estate where the decedent is neither a minor nor has surviving relatives, given the strictest reading of the statute. This strict reading, however, "would create an irrational classification which violates the constitutional guarantee of equal protection of law." It makes little sense to permit the estate to recover when the decedent leaves no surviving parents, but to preclude recovery when the parents do survive. Accordingly, rather than giving the broad meaning to the word "survivors" in the statute, the Florida Supreme Court opted for a much narrower view. "Accord[ing]ly, when the legislature defined 'survivors' under the act the legislature is presumed to have meant parents who could recover for pain and suffering because the deceased was a minor child or parents who could recover because they were dependent upon the child for support or services." Under this reading, Paul left no "survivors," and the estate could recover prospective net accumulations under the terms of the Wrongful Death Statute.

VIII. Conclusion

Two major trends became evident this past year in the development of the law of torts in Florida. One is most disquieting: the propensity of trial and intermediate appellate courts to permit the jury to consider issues previously not in its domain. The dichotomy of judge and jury has long permitted an effective but delicate balance of equities in tort cases. Shifting the determination of cases increasingly to the tender mercies of jurors will seriously interfere with the orderly and sensible growth of the law at the expense of an occasional verdict which, although it yields emotional gratification, strains the law considerably. Florida judges need to be bolder in determining cases. They should not timidly send the cases to their juries when evidence is lacking to support the proper legal conclusions or in cases where the determinations is one of law and not of fact.

The retribution in many areas of products liability cases, however, is quite beneficial. Limiting the use of the inference of res ipsa loquitur, confining the doctrine to consumer-oriented products, and substantially delimiting the instances of awards of punitive damages all go to keeping this relatively new cause of action from expanding far beyond its purpose: to spread the risk of consumer loss among all members of the consuming public.

Many issues remain for resolution in the coming year, and it should prove most active. The year to come should prove both interesting and exciting.

321. FLA. STAT. § 768.18(1) (1975); and can bring an action under its aegis, Owens v. Jackson, 493 So. 2d 507 (Fla. 1st Dist. Ct. App. 1986).

326. One is reminded, however, that to the Chinese the wish "May you live in interesting times" is a curse rather than a blessing.
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323. Vidauban, 492 So. 2d at 1050.
324. In another case dealing with the definition of "survivors," the First District Court of Appeal held that children over the age of majority who are still students and rely on their parent either wholly or in large part for financial and other support qualify as "survivors" under Fla. Stat. § 768.18(1) (1975), and can bring an action under its aegis. Owens v. Jackson, 493 So. 2d 507 (Fla. 1st Dist. Ct. App. 1986).
325. See supra discussion accompanying notes 51, 83, 122, and 175.
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