Torts

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Abstract

Developments in the law of torts this past survey year took a secondary role to the bitter battle for votes to prevent amendment of Florida’s Constitution.

KEYWORDS: liability, malpractice, duty
that the former was holding the property exclusively and adversely to the latter, the court reaffirmed the necessity for communication mandated by the common law rule. The court also expressed its dissatisfaction of the reasoning in Adkins v. Edwards, which had altered the established principles regarding possession by former spouses or tenants. The court emphasized "that it is in the best interest of all the parties that property dispositions in matrimonial matters be concluded, if at all possible in the dissolution proceedings including a determination, if possible, of possession of any property held in a co-tenancy."

VI. Conclusion

The courts of Florida have once again announced several decisions of significance in the area of real property law. The various decisions presented in the area of mortgage law indicate the courts' emphasis on the formality of the mortgage encumbrance on real property, as well as its relative priority position vis-a-vis other types of real estate encumbrances.

In the area of marital property, the courts of Florida reaffirmed the long-standing principles concerning tenancy-in-common of real property in post-marital circumstances.

Finally, in what will continue to be one of the areas of emerging legal precedent, the Florida courts once again have attempted to grapple with the application of condominium law to non-condominium forms of property. There is little doubt that future court decisions and, perhaps legislation, will evolve from the Downey controversy.

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ganizations, and others besought the voters of the state to cap sub-
noneconomic damages as pain and suffering at $100,000. After a no-
campaign marked on both sides by misrepresentation and acrimony,
the people of Florida rejected the proposed amendment.

For the most part, the courts quietly went about their business. No
cases dramatically changed the common law, and few cases expanded
existing doctrine. Yet in a year with no cases having received the pro-
duction publicity of a Walt Disney World Co. v. Wood,2 the Florida
Supreme Court put to rest one proposed extension of tort law
breached the wall of interspousal tort immunity,3 and limited the avail-
ability of punitive damages.4

Nora Newry came to the automobile dealership of Vic Potamkin
Chevrolet and took a test drive accompanied by a Potamkin employee.
Newry had a driver's license permitting her to operate a motor vehicle
only when in the company of a fully licensed driver. The salesperson
freely acknowledged the harrowing nature of the test drive and even
predicted that Newry would inevitably get into an accident after
purchasing a car. Newry later returned to the lot and, while paying for
the car, saw a friend and offered to drive her home. Within one mile from
the showroom, Newry caused an accident which injured her
friend, Horne.5

Horne sought damages from the dealership, arguing that a car
dealer who sells a vehicle to a person known by the dealer's agent to be
an incompetent driver must incur liability to a third party injured by
the negligent purchaser in driving the vehicle.6 The Third District
Court of Appeal reversed a jury verdict in Horne's favor, but certified

1. 515 So. 2d 1006 (Fla. 1987). See generally Richmond, (1987 Survey of Florida
Torts, 12 Nova L. Rev. 667, 667-68 (1988)).
5. The facts recited here come from the dissent. Horne, 533 So. 2d at 261.
(Kogan, J., dissenting).
6. Id.

One who supplies . . . a chattel for the use of another whom the supplier
knows or has reason to know to be likely . . . to use it in a manner involv-
ing unreasonable risk of physical harm to himself and others whom the
supplier should expect to share in or be endangered by its use, is subject to
liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965).

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the issue to the Florida Supreme Court, which affirmed.7 Initially, the
court felt reasons of policy dictated rejection of the doctrine proposed
by Horne. The rule would leave the interpretation of "knowing"
whether a potential purchaser has the requisite competence to handle
the vehicle open to unacceptable doubt. The rule "would become an
added source of litigation placing a new and uncertain burden on com-
merce and ordinary business relations. Sellers would find it necessary to
protect themselves from liability by inquiring into and verifying the
competency of the purchaser to operate the vehicle."8

Yet perceived policy alone did not dictate the court's decision.
Since 1947, statutory law in Florida has held without significant legis-
locative change that a seller of a motor vehicle shall not "be deemed the
owner or coowner of such vehicle, . . . so as to be subject to civil lia-
ability for the operation of such vehicle."9 Since the statute's initial
enactment, Florida courts have held on several occasions that it bars
suit against sellers of automobiles based on the negligent operation of
the automobile by the driver.10 The legislature has not seen fit in the
interim to change the statute, and neither should courts now change
their interpretation of the legislature's intent.11

Finally, even if policy did favor creation of such a cause of action,

1987). The actual certified question answered by the Florida Supreme Court was that
posed by the dissenting judges below: "Is a seller of an automobile negligent under
section 390 of Restatement (Second) of Torts (1965) when it knowingly sells a car to a
driver who, after demonstrating driving incompetence, nevertheless intends to drive the
vehicle?" Horne, 533 So. 2d at 261 n.1. The intermediate appellate court decision
formed the basis of two law journal case comments: Comment, Who's Driving Any-
way? The Status of Negligent Entrustment in Florida After Horne v. Vic Potamkin
Chevrolet, Inc., 12 Nova L. Rev. 939 (1988) (authored by Daniel S. Whitlock);
Stamian, Vic Potamkin Chevrolet v. Horne: Rejecting Negligent Sale, 6 Trial Advoc-
ate Q. 91 (1987).
8. Horne, 533 So. 2d at 262. "The uncertainty of the definition of a 'defective'
consumer not only leaves the duty at the heart of the negligent commercial transaction
open to unlimited expansion; it poses an uncertain risk of liability that businesses
might well find too great to assume or insure against." Comment, The Negligent Com-
mercial Transaction Torts: Impinging Common Law Liability on Merchants for Sales
and Leases to 'Defective' Consumers, Duke L. J. 755, 780 (1988) (commenting favor-
ably on Horne).
10. See, e.g., Rutherford v. Allen Parker Co., 67 So. 2d 763 (Fla. 1955); Palmer
v. R. S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955); Whalen v. Hill, 219 So.
11. Horne, 533 So. 2d at 262.
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Horne sought damages from the dealership, arguing that a car dealer who sells a vehicle to a person known by the dealer’s agent to be an incompetent driver must incur liability to a third party injured by the negligent purchaser in driving the vehicle.7 The Third District Court of Appeal reversed a jury verdict in Horne’s favor, but certified the issue to the Florida Supreme Court, which affirmed.8 Initially, the court felt reasons of policy dictated rejection of the doctrine proposed by Horne. The rule would ‘‘leave the interpretation of “knowing” whether a potential purchaser has the requisite competence to handle the vehicle open to unacceptable doubt. The rule “would become an added source of litigation placing a new and uncertain burden on commerce and ordinary business relations. Sellers would find it necessary to protect themselves from liability by inquiring into and verifying the competency of the purchaser to operate the vehicle.”’9

Yet perceived policy alone did not dictate the court’s decision. Since 1947, statutory law in Florida has held without significant legislative change that a seller of a motor vehicle shall not “be deemed the owner or coowner of such vehicle, . . . so as to be subject to civil liability for the operation of such vehicle.”10 Since the statute’s initial enactment, Florida courts have held on several occasions that it bars suit against sellers of automobiles based on the negligent operation of the automobile by the driver.11 The legislature has not seen fit in the interim to change the statute, and neither should courts now change their interpretation of the legislature’s intent.12

Finally, even if policy did favor creation of such a cause of action,

5. The facts as recited here come from the dissent. Horne, 533 So. 2d at 263 (Kogan, J., dissenting).
6. Id.
7. One who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. RESTATEMENT (SECOND) OF TORTS § 390 (1966).
and even if it did not run against the presumed intent of the legislature, courts should not resolve an issue better left to legislative determination. ["The proposed change is one with broad implications which requires input from the various interests involved and a societal consensus.""] This stance seems once again to indicate an increasing unwillingness of the court to take upon itself the resolution of issues with which it earlier gladly grappled. The Court has again deferred to the legislature despite in the past having strongly advocated a judicial responsibility to modify the common law without waiting for legislative action. In the past two years, in addition to Horne, the Court has deferred to the legislature on at least three critical occasions. Justice Kogan in his dissent argued that the legislature should not receive the question posed by Horne, as the "change is evolutionary not revolutionary." If, however, the Court has shown itself increasingly deferential to the legislature, it still remains willing to alter rules of law created purely by cases and on which the legislature has not spoken. In Sturiano v. Brooks the Court revisited its doctrine of interspousal tort immunity. Vito Sturiano drove his car negligently, struck and injured his wife, Josephine. Vito died in the accident, and Josephine sued his estate. The court appointed a guardian ad litem for the estate, and the trial judge reduced a jury verdict for Josephine to the limits of Vito's applicable insurance coverage. The Fourth District Court of Appeal affirmed the award, as did the Florida Supreme Court. With the exception of suits by the estate of one spouse against the estate of the other, the doctrine of interspousal tort immunity has permitted the Florida Supreme Court to tackle difficult social issues without waiting for the legislature to grind to a decision. Richmond, supra note 2, at 667.

12. Id.
14. The comment in last year's survey no longer seems merited: "[I]t does not seem possible that the Court now wishes to abandon the strong line of precedent which has permitted the Florida Supreme Court to tackle difficult social issues without waiting for the legislature to grind to a decision," Richmond, supra note 2, at 667.
15. Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986) (refusal to hold wife liable for medical bills of deceased husband); Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987) (refusal to adopt social host liability); Walt Disney World Co. v. Wood, 515 So. 2d 198, 202 (Fla. 1987) (refusal to modify or abolish joint and several liability).
16. Horne, 53 So. 2d at 264 (Kogan, J., dissenting).
17. 523 So. 2d 1126 (Fla. 1988).
18. Id. at 1127.

https://nsuworks.nova.edu/nlr/vol13/iss3/12

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without the rigor of time and the attacks of Florida plaintiffs. Although initially grounded in the archaic doctrine of unity of husband and wife, today the doctrine remains supported by positive considerations of marital harmony and negative concerns of potential fraud. While no way affects cases which contain elements of these policies. However, when one spouse has died and the marital unit no longer exists, the first justification dies with the spouse. When a guardian ad litem exists to protect the interests of the decedent's estate and no lineal descendants exist to claim against the estate, the surviving spouse cannot collude with any other person, and the second justification also no longer exists.

Although the Court's reasoning makes sense in the case of a deceased spouse, the Court's language gives reason to pause. The Court abrogates the common law immunity to the extent the negligent spouse maintains insurance, but only when it will neither disrupt the family unit nor lead to collusion. However, one may readily argue that not only does a divorce destroy the family unit, but as the spouses may later harbor significant resentment, it also terminates any danger of fraud or collusion. Substantial counter-arguments do exist to any effort to extend Sturiano to divorced spouses. Yet as written, Sturiano might lead the court into an unwarranted extension of its rule to cases where the spouses have obtained a decree of divorce or have merely separated.

The Court also rejected an attempt to extend the common law award of punitive damages to suits against the estate of a deceased tortfeasor. Lohr, driving while intoxicated, caused a crash in which he died and Byrd received injuries. Byrd received a jury verdict for both compensatory and punitive damages. Although the trial court ordered the amount of punitive damages "in order to avoid dissipation of the estate's assets," Lohr's estate rejected the offer and the trial court

20. Most recently, the Florida Supreme Court reaffirmed the validity of the defense in Raisen v. Raisen, 379 So. 2d 532 (Fla. 1979).
21. See, e.g., Coren v. Coren, 47 So. 2d 774 (Fla. 1950).
22. Sturiano, 523 So. 2d at 1128. The court also considered conflict of laws questions not relevant to this survey discussion.
23. Similarly, the court abrogated interspousal tort immunity to the extent of applicable insurance. See Ard v. Ard, 414 So. 2d 1066 (Fla. 1982).
24. Sturiano, 523 So. 2d at 1128.
25. For example, continuing rancor among the ex-spouses, fueled by ongoing tort litigation, may further harm relationships between the individual spouses and other members of the now broken family.
and even if it did not run against the presumed intent of the legislature, courts should not resolve an issue better left to legislative determination. "[T]he proposed change is one with broad implications which requires input from the various interests involved and a societal consensus." This stance seems once again to indicate an increasing unwillingness of the court to take upon itself the resolution of issues with which it earlier gladly grappled. The court again has deferred to the legislature despite in the past having strongly advocated a judicial responsibility to modify the common law without waiting for legislative action. In the past two years, in addition to Horne, the court has deferred to the legislature on at least three critical occasions. Justice Kogan in his dissent argued that the legislature should not receive the question posed by Horne, as the "change is evolutionary not revolutionary." If, however, the court has shown itself increasingly deferential to the legislature, it still remains willing to alter rules of law created purely by cases and on which the legislature has not spoken. In Sturiano v. Brooks the court again revisited its doctrine of interspousal tort immunity. Vito Sturiano drove his car negligently, struck a tree, and injured his wife Josephine. Vito died in the accident, and Josephine sued his estate. The court appointed a guardian ad litem for the estate, and the trial judge reduced a jury verdict for Josephine to the extent of Vito's applicable insurance coverage. The Fourth District Court of Appeal affirmed the award, as did the Florida Supreme Court. With the exception of suits by the estate of one spouse against the estate of the other, the doctrine of interspousal tort immunity has

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18. Id. at 1127.
ordered a new trial on damages. The Fifth District Court of Appeal affirmed the award of punitive damages, but the Florida Supreme Court reversed.27

As with interspousal tort immunity, the courts created the law which permitted the imposition of punitive damages.28 Accordingly, the courts retained the power to alter and explain the doctrine. Although the court had earlier indicated actions for punitive damages might survive a defendant’s death, its statement constituted mere dicta.29 In any event, the law should not countenance imposition of punitive damages against an estate purely for purposes of deterrence.

Accepting this argument would result in our adopting a principle that would allow a decedent’s widow and children to be placed on welfare for the decedent’s wrong. . . . If deterrence is justified in this instance, it would also be justified to require a decedent’s family to pay a fine or be imprisoned for the decedent’s criminal conduct. With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice.30

Thus, over the past few years, the court seems to have begun to formulate a cohesive approach to deferring to the legislature. Once the Florida Legislature has spoken on a subject, the court has adopted a “hands-off” attitude to change—even where the legislature has modified a doctrine stemming from the common law. On the other hand, the court will continue to take the lead in developing areas of the common law the legislature has not touched directly.31

27. Id. at 847.
30. Lohr, 522 So. 2d at 847.
31. As Justice Grimes noted in his dissent to Lohr, the legislature had adopted a broad survival statute which could have easily included actions for punitive damages. "Fla. Stat. § 46.021 actions; surviving death of party. — No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law." Justice Grimes felt the inclusion of "and defended" meant causes of action survived the death of the defendant, and this could readily include causes seeking the remedy of punitive damages. The majority, however, did not respond to Justice Grimes’s concern and did not feel it necessary to look to the language of the statute in reaching its decision. One can only speculate why the majority did not feel the statute controlled (as noted earlier, the Atlas Properties court felt it was relevant) yet it would peremptorily relevant statute.
32. AFM Corp. v. Southern Bell Tel. & Tel. Co., 555 So. 2d 180 (Fla. 1989). See also Richmond, supra note 2, at 669-70.
35. Latte Roofing, 528 So. 2d at 1383.
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A. Generally

In its last term, the Florida Supreme Court determined that a contract-

trary party suffering only economic harm could not sue in negli-
gence, but had to resort exclusively to contractual remedies.32 This past year, the Fourth District Court of Appeal found the rule inapplicable in a case seemingly on all fours with the Florida Supreme Court's de-

termination. Latite, a roofer, had completed the majority of a shopping

mall roof when it had to suspend operations. Urbanek then purchased

the mall and after its completion sued Latite for negligently construct-

ing the roof. Latite appealed from an adverse jury verdict.33

Unquestionably, Florida has adopted the majority position in hold-
ing harm from a contract, exclusively economic, cannot form the basis of a tort recovery. However, the court in deciding AFM CORP. also

notated an earlier Florida case which held that in the absence of any

alternative contractual theory on which to base its recovery, a plaintiff

could recover purely economic harm in tort.34 Accordingly, the fourth
district concluded that the Florida Supreme Court meant to limit the
general rule to cases where "there are alternative theories of recovery be-

ing better suited to compensate the damaged party for a peculiar kind of

loss."35

Yet the fourth district court's analysis seems to fall short of the

mark. Assuming for the moment it correctly concluded that the Florida

Supreme Court meant for A.R. Moyer to retain its vitality, the court

still failed to demonstrate a factual nexus between Urbanek's claim and

that asserted in A.R. Moyer. The earlier case dealt with a third party

beneficiary to a contract who, having purchased a building from a gen-

eral contractor, sought to sue the architect who designed the building

for negligent supervision of the construction process, amounting to pro-

fessional malpractice. Parties not in privity to contracts for professional

services may not maintain a cause of action for breach of contract un-

less they clearly enjoy the status of third party beneficiaries to the

peripherally relevant statute.

32. AFM CORP. v. Southern Bell Tel. & Tel. Co., 555 So. 2d 140 (Fla. 1987).
33. See also Richmond, supra note 2, at 669-70.
34. Latite Roofing Co. v. Urbanek, 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988).
35. Latite Roofing, 528 So. 2d at 1383.

Published by N Dwright, 1984
tract. Accordingly, the purchaser had no contractual claim against the architect.

Latte Roofing presented an inapposite situation. The purchaser of a building still in the process of construction, if not having direct contractual remedies against the roofing contractor, certainly enjoys third party beneficiary status against the nonprofessional contractors. A.R. Moyer rested on the unique nature of a contract for professional services, as stressed by the strenuous dissenting opinion. A roofing contractor can claim no such professional relationship, and the special rule of almost absolute privity will not apply in such a case. In fact, the court in AFM Corp. took pains to note that A.R. Moyer posed the situation where the Florida Supreme Court reached the express determination that "the plaintiff was not the beneficiary, either directly or as a third-party beneficiary, of the underlying contract." Accordingly, Latte Roofing did not present a case where the plaintiff had no contractual remedy, or at the very least where the court expressly found the plaintiff had no contractual remedy. Even accepting the premise that A.R. Moyer remains good law and not limited to its facts, it could not have controlled.

As contract plaintiffs cannot seek recovery in tort, so also has the Florida Supreme Court barred products liability claims not in contractual privity from seeking recovery under warranty. In response to a certified question from the Eleventh Circuit Court of Appeals, the Florida Supreme Court held that passengers in a light plane could not sue the manufacturer for breach of warranty. When Florida judicially adopted strict products liability as a theory of recovery, at the same time it rejected breach of warranty as a coordinate theory, save for

37. [To extend professional liability generally beyond the one who contracts, pays for and receives and relies upon, that professional skill is a dangerous enlargement and is unsuited in my judgment. Such liability cannot be reasonably anticipated by a professional when there is no privity between the parties; neither can he guard against it under this new hind-sight approach in the pursuit of tort liability against him. It would apparently apply able to other professionals such as lawyers, accountants and others rendering services to a designated client.]

Id. at 403. (Dekle, J., dissenting) (emphasis added).
38. See infra text accompanying notes 156-61.
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38. See infra text accompanying notes 156-61.
39. *AFM Corp.*, 515 So. 2d at 181.
41. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).
42. *Fla. Stat. § 672.318* (1987) provides in relevant part: A seller's warranty whether express or implied extends to any natural per­son who is in the family or household of his buyer, who is a guest in his home or who is an employee, servant or agent of his buyer if it is reason­able to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. The implied warranty cause of action remains unaltered where privity of contract exists and in those cases which fall within the scope of *Fla. Stat. § 672.318* (1985) of the Florida Uniform Commercial Code. "Kramer, 520 So. 2d at 39.
44. Affiliate for Evaluation & Therapy, Inc. v. Viessmann Corp., 500 So. 2d 688,
692 (Fla. 3d Dist. Ct. App. 1987), cited with approval in Kramer, 520 So. 2d at 38.
45. This would seem to imply that cases interpreting "guest in his home" to ex­clude to guests in automobiles and other vehicles no longer retain their validity.
46. See Richmond, supra note 2, at 669-70.
47. Kramer points out another reason why the courts will likely continue the rigid distinction. Kramer brought suit in Federal court seeking recovery for a plane crash that occurred in Virginia, which has the same two year statute of limitations for tort and contract actions. Kramer successfully sought to apply Florida law and then rejected the argument that the action sounded in contract to benefit from a longer contract statute of limitations under Florida law. Since the Florida legis­
B. Negligence Per Se

Although no significant cases this past year dealt with negligence per se in the traditional context of violation of statute, two cases from the Third District Court of Appeal discussed the effect a defendant’s violation of its own regulations would have on liability. In the first, a private school had established a set of rules for its staff governing, among other things, supervision of children on the playground. The rules provided that “[a]t least one supervisor must be in each yard that is occupied by children in order for each child to be in view . . . .” A child fell from a tree in the playground and sued on the theory that the school’s personnel failed to properly supervise the playground. The child requested that the judge instruct the jury that any violation of rules it might find would be evidence, albeit not conclusive, of defendant’s negligence. The judge refused the request, and the plaintiff appealed from an adverse jury verdict.

An internal rule promulgated by a defendant should not establish the standard of care to which the defendant must adhere. “This unquestionably desirable goal was set by the defendant itself, and that it was not met should not result in the court permitting the jury to ipso facto find the defendant negligent.” The requested instruction would not only give the evidence more weight than it deserves, it would permit the court to improperly comment on the evidence.

The same result occurred in a case where a hospital failed to live up to its own internal rules. The rules required the hospital to obtain from a patient a release from responsibility either for refusal of treatment or for discharge. Mr. Swartz came to the hospital’s emergency room and left having signed neither of these forms. The following day he suffered a fatal heart attack. As in Steinberg, the plaintiff sought to have the jury instructed that the failure to obey rules constituted evi-


dence of negligence; as in Steinberg the trial court refused the request; and as in Steinberg the Third District Court of Appeal affirmed.

Of the many very sound reasons underlying the court’s rejection of the plaintiffs’ position in these cases, Judge Baskin may have singled out the best. “[A] contrary result would discourage the voluntary setting of standards higher than those customarily employed in the community.” Undoubtedly, the realization that their own regulations can establish legal duty will act in a chilling manner on people seeking to set the highest possible standards of behavior for themselves. The law requires nothing more than reasonable prudence, yet in no way does it wish to keep people from attempting to adhere to higher standards. If one’s own standards set the mark one must meet to avoid liability, one will do little to set those standards above the norm.

C. Vicarious Liability

1. Respondeat Superior

Lower Florida appellate courts added considerable gloss to many areas of the law relating to vicarious liability. The most significant of these cases centered on the area of respondeat superior. In two cases of great import, the Fourth District Court of Appeal did much to clarify an area severely muddled by a series of conflicting and poorly-reasoned opinions from other courts.

In Wink Dixie Store, Inc. v. Akin, an employee arrived at his employer’s parking lot one-half hour before his work day commenced. As he walked to the store, another Wink Dixie employee driving a company truck on company business struck and killed him. Akin’s estate argued that he was not acting within the course of his employment and thus his employer could not claim the exclusivity of workers’ compensation coverage as a bar to the action. After an appeal by Wink Dixie from an adverse verdict, the Fourth District Court of Appeal reversed. “Arriving thirty minutes early for punctuality’s sake is not unreasonable. There was . . . no reason to suppose a personal motive for early arrival in the case at bar.”

53. Steinberg, 531 So. 2d at 201 (Baskin, J., concurring).
54. 533 So. 2d 829 (Fla. 4th Dist. Ct. App. 1988). This case may seem to fall beyond the time frame of this survey issue. However, it represents a revised opinion on rehearing of a case decided on March 2, 1988, the original opinion of which was withdrawn but may be found at 13 Fla. L. Weekly 554 (Fla. 4th Dist. Ct. App. 1988).
55. Wink Dixie, 533 So. 2d at 830.
B. Negligence Per Se

Although no significant cases this past year dealt with negligence per se in the traditional context of violation of statute, two cases from the Third District Court of Appeal discussed the effect a defendant’s violation of its own regulations would have on liability. In the first, a private school had established a set of rules for its staff governing, among other things, supervision of children on the playground. The rules provided that “[a]t least one supervisor must be in each yard that is occupied by children in order for each child to be in view.” A child fell from a tree in the playground and sued on the theory that the school’s personnel failed to properly supervise the playground. The child requested that the judge instruct the jury that any violation of rules it might find would be evidence, albeit not conclusive, of defendant’s negligence. The judge refused the request, and the plaintiff appealed from an adverse jury verdict.

An internal rule promulgated by a defendant should not establish the standard of care to which the defendant must adhere. “This unquestionably desirable goal was set by the defendant itself, and that it was not met should not result in the court permitting the jury to ipso facto find the defendant negligent.” The requested instruction would not only give the evidence more weight than it deserves, it would permit the court to improperly comment on the evidence.

The same result occurred in a case where a hospital failed to live up to its own internal rules. The rules required the hospital to obtain from a patient a release from responsibility either for refusal of treatment or for discharge. Mr. Swartz came to the hospital’s emergency room and left having signed neither of these forms. The following day he suffered a fatal heart attack. As in Steinberg, the plaintiff sought to have the jury instructed that the failure to obey rules constituted evidence of negligence; as in Steinberg the trial court refused the request; and as in Steinberg the Third District Court of Appeal affirmed. Of the many very sound reasons underlying the court’s rejection of the plaintiffs’ position in these cases, Judge Baskin may have singled out the best. “[A] contrary result would discourage the voluntary setting of standards higher than those customarily employed in the community.” Undoubtedly, the realization that their own regulations can establish legal duty will act in a chilling manner on people seeking to set the highest possible standards of behavior for themselves. The law requires nothing more than reasonable prudence, yet in no way does it wish to keep people from attempting to adhere to higher standards. If one’s own standards set the mark one must meet to avoid liability, one will do little to set those standards above the norm.

C. Vicarious Liability

1. Respondent Superior

Lower Florida appellate courts added considerable gloss to many areas of the law relating to vicarious liability. The most significant of these cases centered on the area of respondent superior. In two cases of great import, the Fourth District Court of Appeal did much to clarify an area severely muddied by a series of conflicting and poorly-reasoned opinions from other courts.

In Winn Dixie Stores, Inc. v. Akin, an employee arrived at his employer’s parking lot one-half hour before his work day commenced. As he walked to the store, another Winn Dixie employee driving a company truck on company business struck and killed him. Akin’s estate argued that he was not acting within the course of his employment and thus his employer could not claim the exclusivity of workers’ compensation coverage as a bar to the action. After an appeal by Winn Dixie from an adverse verdict, the Fourth District Court of Appeal reversed. “Arriving thirty minutes early for punctuality’s sake is not unreasonable. . . . There was . . . no reason to suppose a personal motive for early arrival in the case at bar.”

53. Steinberg, 531 So. 2d at 201 (Baskin, J., concurring).
54. 333 So. 2d 829 (Fla. 4th Dist. Ct. App. 1988). This case may seem to fall beyond the time frame of this survey issue. However, it represents a revised opinion on rehearing of a case decided on March 2, 1988, the original opinion of which was withdrawn but may be found at 13 Fla. L. Weekly 554 (Fla. 4th Dist. Ct. App. 1988).
55. Winn Dixie, 533 So. 2d at 830.
Judge Anstead’s scholarly concurrence, however, went far beyond the narrower scope of the majority’s opinion. Noting a series of cases superior with “course of employment” as used in responsibility, the judge continued to point out the significant policy reasons requiring the two tests to remain separate in our jurisprudence. Ultimately, Judge Anstead concluded:

Because of the different policy considerations underlying the compensation and liability issues, there may be situations where it may be proper to hold an employer liable for compensation benefits to employee’s conduct in causing injury to a third person arising out of the same situation.

As Judge Anstead noted, Florida courts must avoid using a test devised for workers’ compensation claims in determining liability of employer. The policy underlying the broad sweep of the compensation benefit doctrine does not justify an equally broad range of cases in which respondent superior should apply.

The same court, in an earlier opinion by Judge Glickstein, distinguished between servants for whose acts a principal would incur liability and independent contractors (whose acts would not give rise to a contract with Miami Rug, delivered carpet to a condominium unit. Neal’s parked its truck (which it owned) blocking the condominium’s walkway, and in going around the truck, Wiseman fell over a hidden obstacle and received injuries. The Fourth District Court of Appeal affirmed a summary final judgment for Miami Rug, holding as a matter of law that Neal’s was an independent contractor. The Second Restatement of Agency, adopted as ruling law in Florida, establishes a series of factors which courts should use to determine the status of an agent.

In this case, Neal’s provided its own equipment and insurance, selected its own employees, worked at its own hours, and worked without supervision by Miami Rug. Miami Rug, in turn, paid Neal’s strictly on a piece work basis, paid neither fringe benefits nor social security to Neal’s, and could terminate the relationship at any time. Under these circumstances, Neal’s meets the Restatement test for an independent contractor. The detail of description given by the district court has done much to establish clear guidelines for future cases interpreting employment relationships.

Where the Fourth District Court of Appeal reached the proper result by adhering to the Restatement, the second district court ignored the Restatement muddied the waters of respondent superior. A first-attendant at a Boy Scout camp treated a camper, but went on to inflict a medically impermissible homosexual touching on the boy. The boy sued the Boy Scouts for the intentional tort of its agent.

The court began its analysis of the case by quite properly distinguishing cases dealing with workers’ compensation from cases involving respondent superior. In this regard, it mirrors the actions of the district court and gives a hopeful sign that Florida district courts will now distinguish between the two types of cases as a matter of course. Unfortunately, it then continued to hold that liability of the employer in this case depended primarily on “whether the employee was doing what his employment contemplated.” Yet this test, correct in most instances, presents only part of the picture in the case of intentional torts.

64. Id. at 1249, (quoting Morrison Motor Co. v. Masheim Services Corp., 346 So. 2d 102 (Fla. 2d Dist. Ct. App. 1977), cert. denied, 354 So. 2d 983 (Fla. 1978)).
65. The intentional nature of the servant’s tort bears significance for certain defenses as well as requiring added elements of the plaintiff’s case. During the terminal stages of a child’s illness, her mother specifically refused permission to donate the cornea to an eye bank. Despite the clear notation of lack of permission in the file, upon examination later falsified an autopsy to indicate the eyes remained in the body. In a suit against the county, the Fifth District Court of Appeal affirmed the dismissal holding sovereign immunity was not waived in the case of intentional torts by governmental employees. Since the doctor acted in a wilful and wanton manner, the plaintiff could not recover from the county. Kirker v. Orange County, 519 So. 2d 682 (Fla. 5th Dist. Ct. App. Jan. 28, 1988). Compare Sistrunk v. Hoshall, 530 So. 2d 953 (Fla. 1st Dist. Ct. App. 1988) (although intentional battery by physician would supersede causation...
Judge Anstead’s scholarly concurrence, however, went far beyond the narrower scope of the majority's opinion.\textsuperscript{56} Noting a series of cases which erroneously confused “scope of business” as used in respondent superior with “course of employment” as used in workers’ compensation,\textsuperscript{57} the judge continued to point out the significant policy reasons requiring the two tests to remain separate in our jurisprudence. Ultimately, Judge Anstead concluded:

Because of the different policy considerations underlying the compensation and liability issues, there may be situations where it may be proper to hold an employer liable for compensation benefits to the employee and yet not hold the employer responsible for that employee’s conduct in causing injury to a third person arising out of the same situation.\textsuperscript{58}

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The same court, in an earlier opinion by Judge Glickstein, distinguished between servants (for whose acts a principal would incur liability) and independent contractors (whose acts would not give rise to a principal’s liability).\textsuperscript{60} Neal’s Carpet Service, pursuant to a contract with Miami Rug, delivered carpet to a condominium unit. Neal’s parked its truck (which it owned) blocking the condominium’s walkway, and in going around the truck, Wiseman fell over a hidden obstruction and received injuries. The Fourth District Court of Appeal affirmed a summary final judgment for Miami Rug, holding as a matter of law that Neal’s was an independent contractor. The Second Restatement of Agency,\textsuperscript{61} adopted as ruling law in Florida,\textsuperscript{62} establishes a series of factors which courts should use to determine the status of an agent. In this case, Neal’s provided its own equipment and insurance, selected its own employees, worked at its own hours, and worked without supervision by Miami Rug. Miami Rug, in turn, paid Neal’s strictly on a piece work basis, paid neither fringe benefits nor social security to Neal’s, and could terminate the relationship at any time. Under these circumstances, Neal’s meets the Restatement test for an independent contractor. The detail of description given by the district court has done much to establish clear guidelines for future cases interpreting employment relationships.

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\textsuperscript{56} This author wrote an amicus brief in the case, to which Judge Anstead referred in his opinion. Id. at 831. (Anstead, J., concurring).

\textsuperscript{57} See, e.g., Saudi Arabian Airlines Corp. v. Dunn, 438 So. 2d 115 (Fla. 1st Dist. Ct. App. 1983), for the most egregious example.

\textsuperscript{58} Winn Dixie, 533 So. 2d at 832 (Anstead, J., concurring).

\textsuperscript{59} See Richmond, Scope of Business and Course of Employment: Maintaining the Distinction in Florida, 8 Trial Advocate Q. 25 (1989).

\textsuperscript{60} Wiseman v. Miami Rug Co., 524 So. 2d 726 (Fla. 4th Dist. Ct. App. 1988).

\textsuperscript{61} Restatement (Second) of Agency § 220(2) (1958).

\textsuperscript{62} Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966).
The Restatement requires that a plaintiff satisfy a four-prong test before a master will incur liability for intentional torts of a servant involving the use of force. The attendant in this case did perform the type of conduct within his job description and did so within the physical limits of his job as well. However, although he began the treatment with the purpose of serving his master, when he moved to the criminal touching he had no intent of serving anyone other than himself. For example, when the employee of a moving company absconded with cash he found in a bank locker he was moving, he in no way furthered his master’s business even though he did the same type of job the company had employed him to perform. Similarly, one can hardly argue that the homosexual touching in this case constituted a use of force contemplated by the employer.

2. Liability of Individual Tortfeasors

James Guyton sought entrance to the Shriner’s Fraternal Organization. As part of his initiation ceremony, the Shriner’s enacted a scene of harm by initial tortfeasor, defense could only show technical battery due to lack of informed consent.

66. Restatement (Second) of Agency § 228 (1) provides:
   Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is sanctioned, at least in part, by a purpose to serve the master; and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.


68. “Force” as used by the Restatement, encompasses a broad spectrum of acts generally Restatement (Second) of Agency § 245, comment a (1958).

69. Compare id. comment f, illustration 9.

P employs A as a switchman. A is often annoyed by boys who invade his premises and interfere with his duties. In exasperation he shoots a child four years old who is so doing. In view of the child’s age, A’s act is so outrageous that it is not within the scope of his employment and P is not liable because of it under the rule stated in this Section.

“The fact that the servant acts in an outrageous manner or inflicts a punishment out of all proportion to the necessities of his master’s business is evidence indicating that the servant has departed from the scope of employment in performing the act.” Id. at comment f. See also id. illustration 14.


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in which a member in close proximity to Guyton fired a shotgun loaded with blanks. The member fired the gun at Guyton, although normally the member would have aimed at the gun at the floor or ceiling. A projectile from the gun struck Guyton in the eye, blinding him. He sued the national Shrine and several individual members of the unincorporated local chapter (or “temple”) who participated in some way in the initiation ceremony. Guyton received a judgment against the national Shrine as a corporation and some of the local members, but three members who did not directly participate in the ceremony received directed verdicts. Guyton appealed on the basis that members of an unincorporated association incur vicarious liability for the tortious acts of other members of the association acting on the association’s behalf.

A blanket rule establishing liability for all members of unincorporated associations for the torts of other members would lead to improper allocation of risk. Those members neither directly negligent nor participating in some manner in the negligence of others should not incur liability. “Horizontal vicarious liability among members of an unincorporated association formed for fraternal or social purposes does not exist in Florida until the legislature adopts such a concept.” On the other hand, ratification or other authorization of a tort will subject an individual member to liability. The knowledge and approval of the dangerous initiation skit by the three members for whom the trial court directed verdicts were sufficient to have a jury to consider their liability.

Thus, the first district court rejected any form of joint enterprise or partnership approach for unincorporated social organizations, but grounded potential liability strictly in traditional agency concepts. The court has adopted the correct approach, particularly in the case of organizations not formed for business purposes. Both joint enterprise and partnership liability (or “horizontal vicarious liability”) as the court phrased it) require a business or profit motive before they will attach.

71. The requested instruction, denied by the trial judge, read in relevant part: You are advised that individual members of an unincorporated association (such as the local temple of the Shrine) are personally liable for wrongful acts which they individually commit, participate in, authorize, consent to, or ratify. A member may have liability without personal participation if the member acts the proceedings in motion or agrees to a course of action which culminates in the wrongful conduct.

Id. at 950, n.5 (citations omitted).

72. Id. at 957.

73. “A ‘partnership’ is an association of two or more persons to carry on a busi-
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68. “Force” as used by the Restatement, encompasses a broad spectrum of acts. Generally Restatement (Second) of Agency § 245, comment a (1958).

The battery of a homosexual touching falls well within the spirit of this concept. See id. comment f, id. 92

69. Compare id. comment f, illustration 9. P employs A as a switchman. A is often annoyed by boys who invade his premises and interfere with his duties. In exasperation he shoots a child outrageous that is not within the scope of his employment and P is not liable because of it under the rule stated in this Section.

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73. “It is not uncommon for an association of two or more persons to carry on a busi-
The court correctly refused to adopt blanket liability for non-negligent and non-approving members of organizations which do not operate to seek financial gain.

D. Defense

In the most significant case coming from the district courts of appeal in this area, the first district court held that an owner who permits a drunken friend to drive his car cannot use the defense of express assumption of risk to defeat absolutely the action of his friend for negligent entrustment of the vehicle. Fire and Brown, after a night of heavy drinking, found themselves driving in Faris's car to Alabama. Brown, knowing he was intoxicated and tired but concerned that Faris seemed to nod off behind the wheel and to permit the car to wean all over the road, agreed to take the wheel. After the resulting accident thrusting him with the vehicle. The trial court granted Faris's motion for summary judgment.

Blackburn v. Doria abanabolished the absolute bar of express assumption of risk in all but a very limited range of cases. In all cases in which the plaintiff's assumption of risk of harm equates with contributory negligence, the defense merges with that of comparative negligence so the plaintiff may recover damages reduced by the appropriate percentage of fault. The only instance in which non-contractual express assumption of risk has survived, at least as recognized by post-Blackburn courts, is in voluntary participation in "contact sports." In light of the limited scope of express assumption of risk in current Florida law,

ness for profit as coowenere, Fla. Stat. § 620.585(1) (1987) (emphasis added). Prosser notes that with the exception of cases involving automobiles, joint enter-
prise liability (being an offshoot of partnership law) has attached only to profit-mot-
ized enterprises. He continues: Unless the limitation to business ventures of a character really approach-
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ation and accommodation, where there is not at all the same reason for placing all risks upon the enterprise itself.... It has been said that the courts do not regard the doctrine with favor. The courts should be expected to continue to narrow the scope of the doctrine in order to amelio-
rate its rigor.

Prosser & Keeton, supra note 28, at § 72.

the First District Court of Appeal reversed the trial court.

We are persuaded, in view of the existence of the comparative negli-
gen rule in Florida, that the liability for negligent entrustment under the circumstances indicated by the pleadings and the proofs thus far submitted in this case must be determined by the trier of fact after a comparative fault trial.

However, two considerations cast the determination in Gordan into doubt. The first district court relied, at least in part, on the decision of the third district in Vic Potamkin Chevrolet, Inc. v. Horne. However, as noted earlier, the Florida Supreme Court subsequent to the Gordan decision rejected the doctrine of negligent entrustment of chattel by a seller. Whether the Florida Supreme Court's reasoning would alter the result in Gordan remains open to substantial question.

Second, the first district ignored a far more basic consideration. Some courts have refused to permit a plaintiff who has acted in a will-
ful and wanton manner to recover any amount from a merely negligent defendant, even in comparative fault jurisdictions. If we accept the proposition that driving an automobile, knowing that excessive consumption of liquor has dulled one's reflexes, constitutes willful and wanton behavior, then the court had to take into consideration the question of the inapplicability of comparative negligence in this case. It

76. Gordan, 523 So 2d 1219.
77. 505 So. 2d 560 (Fla. 3d Dist. Ct. App. 1987) (approving concept of negligent entrustment, but finding exception in case of sale of automobile).
78. See supra text accompanying notes 71-76.
79. On the other hand, the First District Court of Appeal did hold negligent entrustment of a firearm would give rise to liability in Foster v. Arthur, 519 So. 2d 1092 (Fla. 1st Dist. Ct. App. 1988). The extreme nature of Foster's action almost certainly led to her liability in the case. Foster shared a home with Merchant, a con-

victed murderer. "Foster knew that Merchant had murdered one man over a card game; that he had been involved in another shooting incident which did not lead to imprisonment; and that he was a life parolee, and as such, forbidden to possess or use a firearm." Id. at 1093. Despite this, Foster brought a gun into the house, told Merchant she had the gun, and then placed the gun between the mattress and the box spring. She then asked Merchant to fix the bed. He found the gun, took it, and later shot Arthur with it. Thus, given her knowledge of Merchant's dangerous propensities and her di-
recting him to a location where she knew he would find the gun, the jury could infer her consent to his possession and use of the dangerous instrumentality.
80. F. Harper, F. James & O. Gray, THE LAW OF TORTS § 22.6 (2d ed. 1986). The courts which have considered the issue show no clear trend either to permitting the action or rejecting it.
The court correctly refused to adopt blanket liability for non-negligent and non-consenting members of organizations which do not operate in seeks financial gain.

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Blackburn v. Dorts84 abolished the absolute bar of express assumption of risk in all but a very limited range of cases. In all cases in which the plaintiff’s assumption of risk is found to be proper, the defense merges with that of comparative negligence so the plaintiff may recover damages reduced by the appropriate percentage of fault. The only instance in which non-contractual express assumption of risk has survived, at least as recognized by post-Blackburn courts, is in voluntary participation in “contract sports.” In light of the limited scope of express assumption of risk in current Florida law.

footnote 17


Proximate cause that with the exception of cause involving automobiles, joint enterprise liability (being an offshoot of partnership law) has attached only to professional enterprises. He contends:

Unless the limitation to business ventures of a character really approaching a partnership is to be accepted, the doctrine will most often be applied to enterprises which are not commercial and are not in the character of a co-ownership and accommodation, where there is not at all the same reason for placing all risks upon the enterprise itself. It has been said that the courts do not regard the doctrine with favor. The courts should be expected to continue to narrow the scope of the doctrine in order to accommodate its functions.

Prout & Kasten, supra note 28, at § 72.

75. 548 So. 2d 287 (Fla. 1977).
77. See supra text accompanying notes 71-76.
78. On the other hand, the First District Court of Appeal did hold negligent entrustment of a firearm would give rise to liability in Foster v. Archer, 519 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1988). The extreme nature of Foster’s action almost certainly led to her liability in the case. Foster acted as a card dealer; he had been involved in another shooting incident which did not lead to imprisonment; and that he was a life preserver, and as such, forbidden to possess or use a firearm.” Id. at 1095. Despite this, Foster brought a gun into the house, told Merchant she had the gun, and then placed the gun between the mattress and the box spring. She then asked Merchant to fix the bed. He found the gun, took it, and later shot Arthur with it. Thus, gives her knowledge of Merchant’s dangerous propensities and her directing him to a location where she knew he would find the gun, the jury could infer her consent to his possession and use of the dangerous instrumentality.
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Published by NSUWorks, 1999
did not, and accordingly the validity of Gorday becomes questionable on this ground as well.

Another case from the first district, however, provides an excellent exposition of the application of the statute of limitations in cases of later discovered latent defects.81 Almand built a home, which he immediately sold to Evans in 1972. By 1978 Evans realized that the house had begun to settle, and in 1979 Almand attempted to repair the problem. The house continued settling, and in 1982 a structural engineer informed Evans that an unsuitable fill lay under the house and that the situation was beyond cure. Until this time, Evans had no idea what problem caused the settlement of the house. Evans commenced suit against Almand in 1985, claiming misrepresentation in sale, breach of implied warranty, and negligent repair. Based on the statute of limitations, the trial court granted summary judgment as to all counts of the complaint, but the first district court reinstated all but the count for negligent repair.

Between 1979 and 1985 Almand performed no repairs. Evans knew the 1979 repairs bore no fruit as the house continued to settle. Thus, he should have brought suit within the statutory period. However, until 1982 he had no way of knowing the reason for the settling even though he knew of the settling itself. He had no reason to know that inadequate fill caused the problem as it took an expert to make that determination. Thus, his cause of action arose due to a latent defect, and the statute of limitations for the misrepresentation and implied warranty claims did not begin to run until he knew the latent defect existed — in 1982.

E. Duty and Causation

The First District Court of Appeal extended the duty of a former homeowner to the lessee of a purchaser of the home.82 Jones, the owner of the house, installed a fireplace by himself without obtaining an inspection of the work. The work did not meet applicable building codes. Although a purchaser would not have discovered this upon a reasonable inspection. Jones later sold the house, which IBM ultimately purchased and leased to Bass. Due to the faulty construction of the fireplace and flue, the house burned to the ground destroying Bass's personal property. Bass sued Jones, alleging he failed to disclose a hazardous condi-


83. 108 So. 2d 462 (Fla. 1959).
84. Bass, 533 So. 2d at 782 (citing RESTATEMENT (SECOND) OF TORTS § 353 (1965)).
86. See generally, Prosser & Keeton, supra note 28, at § 37.
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The First District Court, reviewing a summary judgment in Jones's favor, first had to confront Slavin v. Kay, which held that the acceptance of a building in its dangerous condition by a purchaser would cut off the liability of a contractor to a later third party. However, the court noted that Slavin did not apply to latent, or undetectable, defects in the building for as the Slavin court itself noted, the unknowing acceptance would not constitute intervening independent fault and thus could not supersede the negligence of the seller.

Jones, however, maintained that as he did not sell to Bass and had no knowledge of him at all, he owed no duty to Bass. Citing the Restatement of Torts, the court held that in the case of failure to disclose a dangerous condition the duty needed for a cause of action in negligence extends "to the vendee and others who are on the land with the consent of the vendee or a sub-vendee..." As a result, Jones owed a duty to all owners and their invitees up to the point when the dangerous condition of the fireplace first came to light.

In an unusual step, the Third District Court of Appeal held that a trial court should have removed the issue of breach of duty from the jury, even though the defendant met the appropriate standard of care. Normally remains for the trier of fact, Valdes pulled up to the self-service island of an Exxon station and sought to add water to his radiator. The attendant told him to get it from the full service island, which was the only place where water was available, and Valdes walked to that island with a bucket. When he got there, another customer had parked at the full-service island lifted his own hood and opened his radiator cap. Scalding water burst from the radiator, severely burning Valdes, who sued the Exxon station. The Third District Court reversed a jury verdict in Valdes's favor.

The station owed Valdes the duty reserved for a business invitee, and accordingly it had to maintain reasonably safe premises and warn of known or discoverable concealed dangers. Reasonable prudence, however, does not require a gas station to maintain water service at all service islands, nor does it require the station to employ more than one attendant at all times. Similarly, service stations do not have
to require patrons at full-service islands to remain in their cars. Finally, as Valdez came to the full-service station before Exxson's attendant, he possessed superior knowledge of the condition of the other car to the driver of the station's agent. Thus, "measured against this standard, it is clear, as a matter of law, that Westchester breached no duty owed to Valdez." 87

On issues of causation, the district courts of appeal found much to say. One quite interesting case from the third district considered potential acts liability for a physical reaction which had never before appeared. 88 Silva gave Stein a permanent wave with a solution which contained a formula to which Stein had adverse susceptibilities. Although Stein informed Silva of her problems with the chemical, Silva proceeded to use it anyway. Stein's reaction so exceeded what Silva might have anticipated that the court termed it "literally unprecedented" in medical history. 89 In defense to Stein's suit, Silva claimed she could not incur liability for an injury of such unforeseeable magnitude.

Both the trial court and the district court of appeal disagreed.

[F]oreseeability and proximate cause principles are applicable only in the determination of the defendant's liability for the initial adverse contact with the plaintiff. They have no pertinence to the issue of whether, once that contact has occurred, the defendant is responsible for whatever adverse consequences the plaintiff suffers. The doctrine that 'the tortfeasor takes the plaintiff as he finds him' which is instead controlling. 90

Law students wrestle, often in vain, with the concept of the person with the eggshell-skinned skull. Silva, with its unique facts, presents exactly such a case, and the third district reached precisely the correct result. Silva, knowing of her customer's prior reactions to the chemicals, knew the solution would cause some harm to Stein's scalp. She cannot later avoid liability by claiming she could not appreciate the magnitude of the same type of harm. 91

87. Westchester Exxson, 524 So. 3d at 454-55.
89. Id. at 943.
90. Id. at 943-44.
91. If, however, an entirely different reaction occurred than that which Silva Stein's formula to turn black, for example — Silva would not have incurred liability in 92.
94. "Danger inviting rescue. The cry of distress is the summons to relief. . . . The risk of rescue, if only be not wanton, is born of the occasion. The emergency begets the risk. The rescuer may not have foresaw the coming of a deliverer. He is accountable as if he had." Wagner v. International Ry. Co., 322 N.Y. 437, 438 (1921) (Cardozo, J.).
95. Shaffer v. Wells Fargo Guard Services, 482 So. 2d 389 (Fla. 3d Dist. Ct. App. 1988).
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Two other cases considered issues of superseding intervening cause. Zwinge, driving his car in the early morning hours on an interstate highway, saw a man waving a white towel warning oncoming motorists of a collision obstructing the road ahead. 92 He slowed his car intending to offer his assistance, but the car behind him maintained its speed and hit him in the rear end sending his car into another which had stopped on the roadside to render aid to the people involved in the accident. Zwinge sued both the driver who hit him and the driver who had created the first accident, but the trial court granted a directed verdict for the first driver.

Quite correctly, the Second District Court of Appeal reversed. Once a defendant's negligence creates an ongoing condition of peril, the defendant will incur liability to any person who attempts to ameliorate the dangerous situation. 93 Although the later negligence of the second driver certainly intervened between that of the first and the harm suffered by Zwinge, it did not supersede. The first driver could anticipate that his negligent acts would create a substantial risk of later negligent acts resulting in further accidents, and accordingly in harm to those attempting to help victims of the one he had caused.

Finally, in a genuinely bizarre case, a bank employee assaulted at work by a man accusing him of having an affair with the man's wife (also an employee of the bank) found his complaint dismissed against the company hired to guard the bank. 94 Wells Fargo had contracted to provide a "system of protection for its assets and employees against certain hazards" to the bank where Shaffer worked. Wells Fargo failed to protect Shaffer from the man.

The trial court dismissed Shaffer's complaint, and the Third District Court of Appeal affirmed. "Shaffer's complaint alleges facts not so foreseeable as to give rise to a duty to protect," said Judge Baskin in

negligence. The harm which occurs must be of the same nature the reasonably prudent person would have sought to avoid in deciding whether to act in the manner adopted by the defendant.

93. "Danger invites rescue. The cry of distress is the summons to relief. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." Wagner v. International Ry. Co., 232 N.Y. 176, 180, 133 N.E. 437, 437-38 (1921) (Cardozo, J.).
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dissent. The majority, which affirmed the dismissal of the contract count of the complaint that Judge Baskin would have reversed, also felt the complaint stated no tort cause of action. "Extracurricular dalliances — whether real or imagined — with fellow employees, while surely forms of carrying on, are certainly none of the bank's business." Although neither opinion went into detail, the case accurately reflects the prevailing rule that intentional intervening torts supersede the negligence of a defendant when the defendant could not foresee the intentional act itself. Although one can anticipate a robbery in a bank, one cannot anticipate an attack on an employee based on a personal motive.

F. Premises Liability

1. Dangerous Interior Conditions

When noting the intermediate appellate opinion in Casby v. Flint, this survey last year noted its certification to the Florida Supreme Court and commented: "A clearer pronouncement from the court would go far to prevent cases of this nature from taking the time of lower courts, and the court would do well to take this opportunity to give greater guidance than it did in Schoen v. Gilbert." Over the past five years, intermediate appellate courts have struggled with determining when a change in floor levels is sufficiently obscured to require the property owner to warn invitees of its existence. In Casby, a guest fell into a sunken living room at a dimly-lit party, attended by a large number of people. She proceeded on the theory that the lighting and the press of bodies took the case out of the general rule of Schoen precluding liability.

95. Id. at 391 (Baskin, J. dissenting).
96. Id. at 389-90.
97. See Proser & Keeton, supra note 28, at § 44.
98. The bulk of the opinions dealt with the interpretation of the contract between third-party beneficiary status, the contract did not cover the hazard which occurred. This was the gist of the first opinion, and a later opinion on rehearing, Shaffer v. Wells Fargo Guard Services, 528 So. 2d 389 (Fla. 3d Dist. Ct. App. 1988) (on rehearing).
100. 101. Id. at 682. See also Richmond, survey note 2, at 682-83.
103. Casby v. Flint, 520 So. 2d 281 (Fla. 1988).
104. Id.
105. Compare.
106. I Shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that.
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The Florida Supreme Court did not agree with her. Although some circumstances might give rise to liability, this case did not fall among them. Using the term "common knowledge," the court found the press of a party more akin to dim lighting by itself than to those cases presenting "an uncommon design or mode of construction creating a hidden danger which a prudent invitee would not anticipate." The plaintiff erroneously argued that the issue revolved around her own comparative negligence, for the host owed her no duty at the outset.

The question remains whether future courts can look to Casby for the guidance they will require in cases not directly factually apposite. Ultimately, the court's operative language reads as follows: "Multiple floor levels in a dimly lit or overcrowded room are not inherently dangerous conditions. They are so commonplace that the possibility of their existence is known to all. Warning of such common conditions goes beyond the duty of reasonable care owed to the invitee." The court seems to labor in the fruitless vineyard of knowing it when it sees it, but without attaining an adequate definable statement. One can hardly suppose that all residents of this state know that some buildings may have sunken living rooms, and the court could not have meant that implication.

Some things, however, lie within the common experience of such a large number of members of society that reasonably prudent people can safely assume they need not warn others of them. At times, the common experience takes on a local definition — one need not warn people eating New England fish chowder in Boston that bones may lurk in the murky broth. At other times, the common experience is universal — one need not warn people that eating broken glass might cut their mouths. Perhaps the court sought to enunciate a test concentrating on the generally-held knowledge of members of society. In any

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Published by NSUWorks, 1999
event, the court’s meaning remains unclear, and we can once more anticipate further litigation in the area.108

Courts have also wrestled for many years in determining whether a plaintiff has submitted enough evidence to send the issue of contributory negligence to the jury. Two cases this past year added to the gloss. In one, a plaintiff slipped in a pool of a clear cart. The store had no provision for regular inspection of its aisles, and in fact had not inspected the location for four hours prior to the accident. The two factors in combination led the Third District Court of Appeal to affirm the trial judge’s submission of the case to the jury.109

In the other case, a patron of a grocery store slipped and fell on peas in the frozen food section.110 Some water had collected around the peas, and Winn-Dixie had not inspected the area for fifteen or twenty minutes before the accident. The plaintiff and defendant differed as to the source of the water; the plaintiff suggesting it came from the thawing peas; the defendant that it came from the very thin layer of ice which collects on the containers of frozen food. The store’s version would have meant the bag sat on the floor for a brief period of time before the water formed. The existence of the water, however, left the explanation of why it surrounded the peas to the jury’s consideration.111

In a slip and fall case, Chief Judge Schwartz of the Third District Court of Appeal commented:

In the absence of a generalized principle which can serve the appellate purpose — perhaps because it is impossible to articulate one — I think we should acknowledge that we necessarily have been and still are making these determinations on what is more or less a "gut reaction" to the facts and circumstances and the order below in the particular instance. (Schwartz, C.J., dissenting). Perhaps the court finds itself in this uncomfortable twilight zone with cases presenting the Schoen paradigm.108 See also Gomez v. Plascencia, 522 So. 2d 423 (Fla. 3d Dist. Ct. App. 1988). 109. Zayre Corp. v. Bryant, 528 So. 2d 516 (Fla. 3d Dist. Ct. App. Jul. 19. 1988). The court also indicated that either the tracks in the liquid or the lack of regular inspection standing alone might have supported submission of the case to the jury. 110. Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1988). 111. Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1988).

The resolution of this issue did not require the jury to build one inference on another as Winn-Dixie contends. Since it was established that there was some water on the floor, it was completely within the jury's province to draw an inference from direct evidence to reach a decision as to the defendant's con-

2. Dangerous Exterior Conditions

Given the traditional distinction at common law between duties owed to trespassers and duties owed to licensees and invitees, a plaintiff who avoids the label of trespasser stands a fair better chance of recovery. The Third District Court of Appeal further defined the concept of trespasser in Johnson v. Rinker Materials, Inc.112 Rinker, operating a sand quarry, necessarily maintained a number of large hills of sand, dirt, and other minerals on its property. As it filled orders for the various minerals, new hills arose and old hills changed shape or disappeared entirely.

The prospect of riding all terrain cycles (ATC) on such a challenging landscape appealed to Johnson, who had on several occasions sneaked on the property with his friends to ride their cycles over the hills and dunes. Avoiding fences, signs warning of "no trespassing," and guards alike, the ATC riders charged across Rinker's property. Rinker had posted the guards, knowing of the ATC riders' unauthorized use of its property.

On one occasion, Johnson and his passenger crested a hill which Johnson had climbed only the previous day. Unfortunately, what Johnson had expected to be a downslope had turned into a sheer drop in the intervening twenty-four hours. Flying over the top of the hill, Johnson crashed to his death on the hard ground below. His estate sued Rinker, arguing it failed to warn him of the danger of riding up that hill. The trial court granted summary judgment to Rinker. The district court agreed.

Initially, Johnson had no status other than that of trespasser. Not only did Rinker take substantial measures to keep riders from entering the property, Johnson knew of these measures and deliberately attempted to circumvent them. "The fact that [Johnson] and his companions were clever enough to frequently evade Rinker's security measures on a number of occasions, including the subject accident, does not convert them into uninvited licensees."113 Since Rinker only had to warn of known hidden dangers, and Johnson could easily have discovered the condition of the hill, Rinker breached no duty. As the lights


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Courts have also wrestled for many years in determining when a plaintiff has submitted enough evidence to send the issue of contributory notice of a dangerous condition to the jury. Two cases this past year added to the gloss. In one, a plaintiff slipped in a pool of a clear but slimy liquid, through which ran black tracks made by a grocery cart. The store had no provision for regular inspection of its aisles, and in fact had not inspected the location for four hours prior to the accident. The two factors in combination led the Third District Court of Appeal to affirm the trial judge’s submission of the case to the jury.109

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Id. (citations omitted).

112. 520 So. 2d 684 (Fla. 3d Dist. Ct. App. 1988).

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hundred feet away the engineer realized that a person was sitting on
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He sued Seaboard, and the trial judge granted his motion in
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Seaboard appealed from an adverse jury award, claiming that the court
should have permitted it to demonstrate Mells was a trespasser, and it
accordingly owed him a reduced duty. The First District Court of Ap-
peal disagreed.

Had Mells tripped on the track, or suffered injury due to any other
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However, a landowner owes a trespasser not merely the duty to warn of
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its active negligence once the engineer saw Mells sitting on the track.115

One final case from the district courts of appeal considering the
nature of a landowner's duty dealt with liability for parts of vegetation
extending from the property.116 Silver Palm owned avocado groves and
had planted a row of Australian pine trees by the groves to serve as a
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struction. The roots grew with the trees, causing the roadway to buckle
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car driving along that road, suffered an injury when the driver lost con-
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the rain had obscured. She sued Silver Palm, but after a jury verdict in
her favor the third district court reversed.

Sullivan attempted to analogize her case to those holding landown-
ers liable for failing to remove shrubbery which obscures traffic
signs.117 The court rejected her argument.

Vegetation that overhangs and blocks out a traffic control device
constitutes an obvious condition and presents an imminent danger of
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In another case limiting liability of landowners, the third district
held owners of property did not incur liability when their tenants kept
animals on the property for which the tenants would be strictly li-
able.119 Levine leased his land to a tenant for the purpose of mainta
in wild animals. Sharp, while employed by the tenant, died when gored by
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would he have any right to control them.120

Sharp's widow sued, claiming Levine had a duty to Sharp as Le-
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117. See Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d Dist. Ct.
App. 1983); Morales v. Costa, 427 So. 2d 297 (Fla. 3d Dist. Ct. App.), rev. denied,
434 So. 2d 886 (Fla. 1983), rehe'd denied, 104 S.Ct. 1720 (Fla. 1983).
118. Silver Palm, 13 Fla. L. Weekly at 1567.
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In another case limiting liability of landowners, the third district held owners of property did not incur liability when their tenants kept animals on the property for which the tenants would be strictly liable. Levine leased his land to a tenant for the purpose of maintaining wild animals. Sharp, while employed by the tenant, died when gored by a wild bull elephant. The contract between Levine and the tenant provided that Levine would have no responsibility for the animals, nor would he have any right to control them.

Sharp's widow sued, claiming Levine had a duty to Sharp as Levine was the keeper of a wild animal. The district court disagreed, holding the concept of "keeper" implied the ability to control the animal. Here, the terms of the contract expressly precluded Levine from having anything to do with the animals, let alone having the right

115. See also Florida East Coast Ry. Co. v. Gomiorowski, 418 So. 2d 382 (Fla. 4th Dist. Ct. App. 1982); Hix v. Billen, 284 So. 2d 209 (Fla. 1973).
117. See Armas v. Metropolitan Dade County, 429 So. 2d 59 (Fla. 3d Dist. Ct. App. 1983); Morales v. Costa, 427 So. 2d 297 (Fla. 3d Dist. Ct. App.), rev. denied, 434 So. 2d 866 (Fla. 1983), reh'g denied, 104 So. Ct. 1720 (Fla. 1983).
118. Silver Palm, 13 Fla. L. Weekly at 1567.
120. The contract provided in relevant part: "[Levine] will not be responsible for feeding, watering or maintaining the animals in any manner and you will be responsible for any liabilities connected with any animals kept on the premises." Id. at 1370.
III. Professional Negligence

A. Medical Malpractice

1. Procedural Considerations

As Florida courts struggled to interpret the intricate web of statutes governing medical malpractice actions, they almost inevitably turned their attention primarily to matters of procedure. Although the Court handed down a significant decision in the area of failure to pro-"cure a medical malpractice action one day before the statute of lim-itations would have run. More than a year followed, in which time not only did the file show no record activity, but no defendant had received service of the complaint. After the trial court issued an order to show cause, Diaz's attorney filed an affidavit stating she had consulted with the court stayed defendants—seventeen months after the initial filing. Finally, the trial court decided to prose and dismissed the action nunc pro tunc.

Although the district court of appeal felt that the dismissal was improper since the trial court abused its discretion in waiting the extra time to dismiss the action, the Florida Supreme Court disagreed. The plaintiff could not claim injurious reliance or estoppel because the litigation does not constitute sufficient harm to support either theory. The intermediate ruling created a logical impossibility.

By its ruling the court below inadvertently created a “catch 22” under which the erroneous denial of a motion to dismiss for lack of prosecution would be impervious to appeal. A defendant cannot ap-"peal a nonfinal order which denies a motion to dismiss for lack of prosecution. Hence, the defendant would have no alternative but to defend the subsequent prosecution of the case. If the plaintiff suc-

121. Public Health Trust v. Diaz, 529 So. 2d 682 (Fla. 1988).
124. Public Health Trust, 529 So. 2d at 684.
125. The Fifth District Court of Appeal decided two technical matters worthy of mention. First, although the plaintiff must serve notice of intent to file suit with a defendant in order to trigger the ninety day tolling period, the statute in its early form did not require the plaintiff to actually file the notice as well. Abston v. Bryan, 519 So. 2d 1125 (Fla. 5th Dist. Ct. App. Feb. 11, 1988) (construing FLA. STAT. § 768.57 (4)) (1985), later amended by 1985 Fla. Laws 86-287, § 9, to change the word “filed” to “served”). Second, the notice of intent itself must be in writing. Even actual oral notice will not satisfy the statutory mandate. Gloneck v. Lentz, 524 So. 2d 458 (Fla. 5th Dist. Ct. App. Mar. 31, 1988) (construing FLA. STAT. § 768.57(2) (1987)). Note that if the defendant failed to adopt an artificial rigid approach to statutory interpretation in these cases. In the first, where he is able to clearly state contrary to the fact that he also knew of the negligence by cease in obtaining a judgment, the defendant could then raise as a point on appeal the erroneous denial of the motion to dismiss for lack of prosecution. However, . . . the defendant could never prevail because the plaintiff would have always relied upon the erroneous order in further prosecuting the case. 124

The district courts of appeal also handled some provocative cases dealing with the statute of limitations. Initially, the first district held that unless the complaint itself discloses, without drawing inferences, sufficient facts to support a motion to dismiss based on the statute of limitations, the trial court should not grant the motion. Jackason filed a complaint alleging that in March and May of 1983 Lytle had performed three surgical operations on her foot, with Yant assisting on the first and third procedures. In July of 1984, Lytle recommended another operation, but Jackson had Dr. Hocker perform that operation in July of 1984. Not until March of 1985, after Hocker had received Jackson's medical records from Lytle, did Jackson learn of facts supporting an action in medical malpractice. She sued Lytle in March of 1985, but did not serve Yant until December of 1986. Yant moved for dismissal of the complaint based on the statute of limitations, and the trial court granted the motion only to have its order reversed on appeal.

Undeniably, the medical records adequately disclosed Yant's role in the surgery, and equally undeniably, Jackson knew of the continuing problem with her foot. Although these two facts taken together might give rise to the inference that Jackson also knew of the negligence by
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III. Professional Negligence

A. Medical Malpractice

1. Procedural Considerations

As Florida courts struggled to interpret the intricate web of statutes governing medical malpractice actions, they almost inevitably turned their attention primarily to matters of procedure. Although the question of limitation of actions predominated, the Florida Supreme Court handed down a significant decision in the area of failure to prosecute in the context of the medical malpractice statutes.118 Diaz brought a medical malpractice action one day before the statute of limitations would have run. More than a year followed, in which time not only did the file show no record of activity, but no defendant had recurred service of the complaint. After the trial court issued an order to show cause, Diaz’s attorney filed an affidavit stating she had consulted with other firms, attempting to refer the case to them. The court stayed dismissal, and after two further extensions plaintiff finally served the defendants—seventeen months after the initial filing. Finally, the trial court concluded it should have granted the initial motion to dismiss for failure to prosecute and dismissed the action nunc pro tunc. Although the district court of appeal felt that the dismissal was improper since the trial court abused its discretion in waiting the extra time to dismiss the action,119 the Florida Supreme Court disagreed.

The plaintiff could not claim injurious reliance or estoppel because her litigation does not constitute sufficient harm to support either theory.120 The intermediate ruling created a logical impossibility.

By its ruling the court below inadvertently created a “catch 22” under which the erroneous denial of a motion to dismiss for lack of prosecution would be impervious to appeal. A defendant cannot appeal a nonfinal order which denies a motion to dismiss for lack of prosecution. Hence, the defendant would have no alternative but to defend the subsequent prosecution of the case. If the plaintiff suc-

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Yant at the time of the operations, the complaint also alleged that
she only learned of Yant's actions in March of 1985, well within the
two year period of the statute. "[W]hether the plaintiff has such
knowledge or constructive knowledge is a question of fact and in de-
ciding a motion to dismiss, the trial court is limited to the considera-
matters within the four corners of the amended complaint. In that re-
gard, all well-pleaded facts must be accepted as true." Thus, the in-
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knowledge, at least for purposes of a motion to dismiss.

Indeed, the issue of when the plaintiff had sufficient knowledge to
tigger the statutory period remains for the trier of fact, not the judge.
Smith performed a bilateral mastectomy on Sitomer in June of 1981. After
a series of attempts by Smith to rectify severe problems with
rejection of the implants, Smith performed Sitomer in December of 1982
that she had extensive and permanent scarring. She then obtained a
second opinion and learned of Smith's negligence in the initial opera-
tion and in his attempts to rectify her problem thereafter. She sued
Smith within the statutory period, but did not sue the Fund until
December of 1984. Had she not known sufficient facts to justify the
cause of action until December of 1982, her action against the Fund
would not have violated the statute of limitations.

The trial judge asked the jury to respond to the question: "When
should Mrs. Sitomer have discovered that she was injured by the negli-
gence of Dr. Smith?" The jury found her knowledge occurred on or
after December 26, 1982, and thus found in her favor. The Fourth Dis-
itract practice is one of fact for the jury. The instruction given to the jury need
not demonstrate that the statute begins to run when the plaintiff has
notice of either the injury or the negligent act, for the law requires both
in order to begin the statutory period. Finally, an interrogatory ver-

127. Jackson would thus have known of her injury more than the statutory two
128. Jackson, 528 So. 2d at 96.
129. Florida Patient's Compensation Fund v. Sitomer, 524 So. 2d 671 (Fla. 4th
130. The relevant statute at the time was Fla. Stat. § 95.11(4)(b) (1981).
131. The actual instruction, as approved by the appellate court, read: "To dis-
cover an incident the Plaintiff either must have discovered or should have discovered
three things. They are: One, that a medical procedure was performed. Two, that the
medical procedure was negligently performed. Three, that the Plaintiff suffered an in-
dict which asks the jury to establish whether the plaintiff discovered all
necessary facts on or after a specific date enables the judge to take the
finding of fact and then reach the legal conclusion whether the statu-
ary period had elapsed prior to the plaintiff having filed the complaint.

2. Attorneys' Fees

Although the Florida legislature repealed the statute permitting the
prevailing party in a medical malpractice action to recover attor-
neys' fees, the statute's legacy lived on in those cases commenced
under its aegis. Confounding the issue are cases such as Miami Chil-

133. 529 So. 2d 667 (Fla. 1988).
134. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla.
1985).
135. Tamayo v. Miami Children's Hospital, 511 So. 2d 1091 (Fla. 3d Dist. Ct.
App. 1987).
136. See, e.g., RULES REGULATING THE FLORIDA BAR Rule 4-1.5 (1987).
Yant at the time of the operations, she only learned of Yant’s actions in March of 1985, well within the two year period of the statute. “[W]hether the plaintiff has sufficient knowledge or constructive knowledge is a question of fact and in deciding a motion to dismiss, the trial court is limited to the consideration of matters within the four corners of the amended complaint. In that regard, all well-pleaded facts must be accepted as true.” Thus, the inference of knowledge must give way to the specific allegation of late knowledge, at least for purposes of a motion to dismiss.

Indeed, the issue of when the plaintiff had sufficient knowledge to trigger the statutory period remains for the trier of fact, not the judge. After a series of attempts by Smith to rectify severe problems with rejection of the implants, Smith informed Sitomer in December of 1982 that she had extensive and permanent scarring. She then obtained a second opinion and learned of Smith’s negligence in the initial operation and in his attempts to rectify her problem thereafter. She sued Smith well within the statutory period, but did not sue the Fund until December of 1984. Had she not known sufficient facts to justify the cause of action until December of 1982, her action against the Fund would not have violated the statute of limitations.

The trial judge asked the jury to respond to the question: “When should Mrs. Sitomer have discovered that she was injured by the negligence of Dr. Smith?” The jury found her knowledge occurred on or after December 26, 1982, and thus found in her favor. The Fourth District Court of Appeal affirmed. Initially, the issue of discovery of malpractice is one of fact for the jury. The instruction given to the jury need not demonstrate that the statute begins to run when the plaintiff has notice of either the injury or the negligent act, for the law requires both in order to begin the statutory period. Finally, an interrogatory ver-

Which asks the jury to establish whether the plaintiff discovered all necessary facts on or after a specific date enables the judge to take the finding of fact and then reach the legal conclusion whether the statutory period had elapsed prior to the plaintiff having filed the complaint.

2. Attorneys’ Fees

Although the Florida legislature repealed the statute permitting the prevailing party in a medical malpractice action to recover attorneys’ fees, the statute’s legacy lives on in those cases commenced under its aegis. Confounding the issue are cases such as Miami Children’s Hospital v. Tamayo, in which the Florida Supreme Court had to determine the applicability of its holdings interpreting the short-lived statute to facts arising prior to those cases. The court had decided that awards under the statute, even if computed according to a “lodestar” formula, could not exceed the amount of any payment under a valid contingency fee contract between counsel and client. Tamayo presented the question of the applicability of Rowe to contingency fee agreements into which the parties had entered prior to Rowe.

The Third District Court of Appeal held that Rowe would not compel a limited fee recovery in cases where the parties had arrived at their contractual understanding before knowing of the limitation. The Florida Supreme Court disagreed. Rowe did no more than establish guidelines for determining fees paid to counsel, much in the same way that the court established formal fee guidelines. These procedural rules simply provide that in cases where Rowe applies, courts should determine the amount of the fee to award as damages by the lodestar approach.

Hard on the heels of Tamayo came Brea v. Perez-Borroto, again from the Third District Court of Appeal. Here, the parties had contracted on a non-contingent basis, and when the contractual fee awarded by the trial court yielded less than the lodestar approach, the parties appealed. The court reversed, but certified the issue to the Flori.
3. Substantive Issues

Acts of a physician during a medical examination may constitute torts other than medical malpractice, and accordingly the specific procedural provisions governing malpractice actions will not apply. Buchanan alleged in a complaint that during an office visit to Liebman, her physician, he fondled her breast and kissed her while holding her down. She sued for battery, but the trial court dismissed the complaint finding that the cause of action sounded in medical malpractice, and since Buchanan filed it over two years from the date it arose, it violated the shorter statute of limitations. Although, as the trial court noted, the incident stemmed from the relationship of physician-patient existing between the parties, the Fifth District Court of Appeal reversed.

To constitute medical malpractice, the act must have arisen from "diagnosis, treatment, or care by any provider of health care." Per cases it has determined that liability for acts collateral to the furnishing of health care did not arise in medical malpractice. Courts have earlier excepted the following areas from the specialized governing medical battery and slander, water left by hospital employees on a bathroom floor, and utilization of a dirty needle in drawing.

10. See Fla. Stat. § 91.11(4)(b) (1997) rather than the four-year limitation period noted.


15. Buchanan, 526 So. 2d at 974.

In this case, any relationship of physician and patient had nothing to do with the tort. "Had Dr. Lieberman assaulted Mrs. Buchanan at a bar, that act would not be considered 'medical malpractice.' The result should not be any different simply because of the locality of the act." Although Florida has enacted a statute prohibiting sexual misconduct in the practice of medicine, in this case the acts in no way related to treatment of a patient. Thus, Buchanan's action did not constitute medical malpractice.

In a thorough and scholarly opinion by Judge Orfinger, the Fifth District Court also determined that a psychiatrist who believes a patient not hospitalized at the time of consultation may commit suicide breaches no duty in recommending hospitalization without actually voluntarily committing the patient. Paddock attempted suicide, and shortly thereafter saw Dr. Chacko, a psychiatrist. Chacko diagnosed Paddock as having had a severe nervous breakdown, and recommended continuing psychiatric care. Two days later, she called Chacko and told him she had hallucinations and felt upset and confused. Chacko suggested that Paddock be hospitalized to both Paddock and her mother, and shortly thereafter he reserved a bed for Paddock at a local mental hospital. Paddock's father then telephoned Chacko, but rejected the doctor's repeated recommendation of hospitalization. Two days later, without hospitalization, Paddock ran from her parents' home, made shallow cuts on her wrists, and set fire to her house. Paddock recovered and sued Chacko for failing to hospitalize her.

Paddock, not in a hospital at the time Chacko offered his advice, had every right to refuse the treatment Chacko offered. Chacko had only two other options: suggest alternative, albeit inferior, treatment, or


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16. FIS. Stat. § 458.329 (1987). Although the defendants argued that "Florida has declared sexual misconduct to be professional malpractice by statute," Buchanan's language of the statute is not vague and thus suggests the conclusion. The statute concludes merely "Sexual misconduct in the practice of medicine is prohibited". FIS. Stat. § 458.329 (1987) (emphasis added). In fact, the statute specifically notes that sexual misconduct by definition falls outside the scope of medical treatment.


16. The court's opinion suggests that the visit occurred on the same date as this phone call, but also notes the visit was on a Wednesday and the call on a Friday. Id. at 411.

15. In fact, Chacko had surrendered the right to make decisions regarding her health to her father, who rejected Chacko's advice. Id. at 412.
ida Supreme Court.\textsuperscript{138} Clearly, we will continue to see further litigation spawned by this ill-advised piece of legislation.\footnote{Id.}

3. Substantive Issues

Acts of a physician during a medical examination may constitute torts other than medical malpractice, and accordingly the specific procedural provisions governing malpractice actions will not apply.\textsuperscript{139} Buchanan alleged in a complaint that during an office visit to Lieberman, her physician, he fondled her breast and kissed her while holding her down.\textsuperscript{140} She sued for battery, but the trial court dismissed the complaint finding that the cause of action sounded in medical malpractice, and since Buchanan filed it over two years from the date it arose, it violated the shorter statute of limitations. Although, as the trial court noted, the incident stemmed from the relationship of physician/patient existing between the parties, the Fifth District Court of Appeal reversed.

To constitute medical malpractice, the act must have arisen from "diagnosis, treatment, or care by any provider of health care."\textsuperscript{141} Prior cases had determined that liability for acts collateral to the furnishing of health care did not arise in medical malpractice. Courts had earlier excepted the following areas from the specialized governing medical malpractice: battery and slander,\textsuperscript{142} water left by hospital employees at a bathroom floor,\textsuperscript{143} and utilization of a dirty needle in drawing blood.\textsuperscript{144} In this case, any relationship of physician and patient had nothing to do with the tort. "Had Dr. Lieberman assaulted Mrs. Buchanan at a bar, that act would not be considered 'medical malpractice'. The result should not be any different simply because of the locality of the act."\textsuperscript{145} Although Florida has enacted a statute prohibiting sexual misconduct in the practice of medicine,\textsuperscript{146} in this case the acts in no way related to treatment of a patient. Thus, Buchanan's action did not constitute medical malpractice.

In a thorough and scholarly opinion by Judge Orfinger, the fifth district court also determined that a psychiatrist who believes a patient not hospitalized at the time of consultation may commit suicide breaches no duty in recommending hospitalization without actually involuntarily committing the patient.\textsuperscript{147} Paddock attempted suicide, and shortly thereafter saw Dr. Chacko, a psychiatrist. Chacko diagnosed Paddock as having had a severe nervous breakdown, and recommended continuing psychiatric care. Two days later, she called Chacko and told him she had hallucinations and felt upset and confused. Chacko suggested that Paddock be hospitalized to both Paddock and her mother, and shortly thereafter he reserved a bed for Paddock at a local mental hospital. Paddock's father then telephoned Chacko, but rejected the doctor's repeated recommendation of hospitalization. Two days later, without hospitalization, Paddock ran from her parents' home, made shallow cuts on her wrists, and set fire to her blouse. Paddock recovered and sued Chacko for failing to hospitalize her.\textsuperscript{148}

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\item[138] Id. The question appears as follows: "Is the trial court limited by the contingent fee agreement between attorney and client when the trial court applies the principles set forth in Florida Patient's Compensation Fund v. Rowe to determine attorney's fee award pursuant to [the] Florida Statutes? Id. at 826 (citations omitted).\textsuperscript{140} nothing against one defendant because the court totally set off a settlement with other defendants against a favorable jury verdict could nonetheless recover attorneys' fees. Pysz v. Ande, 523 So. 2d 698 (Fla. 4th Dist. Ct. App. 1988).\textsuperscript{141} See Fla. STAT. § 95.11(4)(B) (1987) (rather than the four-year limitation period for tort actions in general, medical malpractice actions carry only a two-year limitation period).\textsuperscript{142} Buchanan v. Lieberman, 526 So. 2d 969 (Fla. 5th Dist. Ct. App. 1988).\textsuperscript{143} FLA. STAT § 95.11(4)(B) (1987).\textsuperscript{144} Jackson v. Biscayne Med. Center, Inc., 347 So. 2d 721 (Fla. 3d Dist. Ct. App. 1977).\textsuperscript{145} Zobac v. Southeastern Hosp. Dist., 382 So. 2d 829 (Fla. 4th Dist. Ct. App. 1980).\textsuperscript{146} Durden v. American Hosp. Supply Corp., 375 So. 2d 1096 (Fla. 3d Dist. Ct. App. 1979), cert. denied, 386 So. 2d 633 (Fla. 1980).\textsuperscript{147} Buchanan, 526 So. 2d at 974.\textsuperscript{148} FLA. STAT. § 458.329 (1987). Although the defendant argued that "Florida has declared sexual misconduct to be professional malpractice by statute," Buchanan, 526 So. 2d at 974, the language of the statute in no way suggests this conclusion. The statute specifically notes that sexual misconduct by definition falls outside the scope of medical treatment.\textsuperscript{149} Paddock v. Chacko, 522 So. 2d 410 (Fla. 5th Dist. Ct. App. 1988). Chacko's opinion suggests that the office visit occurred on the same date as this phone call, but also notes the visit was on a Wednesday and the call on a Friday. Id. at 411.\textsuperscript{150} In fact, Chacko had surrendered the right to make decisions regarding her health to her father, who rejected Chacko's advice. Id. at 412.
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commit Paddock against her will and that of her family. He chose the first option, and the court thus had to decide whether his failure to elect the second amounted to a breach of duty. Judge Ortinger, after meticulously discussing precedent from other jurisdictions and relevant secondary authorities, concluded:

To impose liability on Dr. Chasco for his failure to involuntary retain the plaintiff for examination, where he was already under the care and custody of her parents, who had refused his advice for hospitalization, would create an intolerable burden on psychiatry and the practice of psychiatry, ... Under the circumstances and facts of this case, we are unwilling to extend the duty of custodial supervision and care to the outpatient relationship between a psychiatrist and a patient.

Finally, one court considered whether under the "captain of the ship" doctrine a surgeon would incur vicarious liability for the negligent acts of an uncertified specialist assisting in an operation. Vargas attempted cardiac bypass surgery on Duizades. The perfusionist (a technical specialist who operated the heart-lung machine) negligently failed to attend the machine, and air entered Duizades's body causing irreversible damage. Duizades's widow sued Vargas, claiming he acted negligently and additionally that the court should impose vicarious liability for the negligence of the perfusionist. The trial verdict denied Vargas's motion for directed verdict on the vicarious liability issue, and he appealed from an adverse jury verdict.

A surgeon will incur liability for the negligent acts of those assisting under the common law doctrine of "captain of the ship." However, an exception to the liability exists involving the surgeon of vicarious liability where the negligence of another specialist, not necessarily subject to the control of the surgeon, caused harm to the patient. However, prior Florida cases applying the exception have done so only where licensed professionals acted negligently. Although perfusionists can gain certification, in this instance the perfusionist had no

153. Florida's Baker Act would have permitted Chasco to take this action. See Fla. Stat. § 394.45 (1987).
154. Paddock, 52 So. 2d at 413.
156. Id.
157. The court reserved judgment on whether correctly certified perfusionists would fall within the exception. Id. at 308, n.3.

158. Pierce v. AAL Ins. Inc., 511 So. 2d 84 (Fla. 1988).
160. Pierce, 531 So. 2d at 96.
161. Id. at 87. See also Hardy Equip. Co. v. Travis Corey & Assoc., Inc., 530 So. 2d 521 (Fla. 1st Dist. Ct. App. 1988).

B. Other Professions

In the most significant case of the year in the area of professional liability, the Florida Supreme Court decided what constitutes a profession. Pierce purchased automobile insurance from an agent who failed to fully inform him of his options regarding uninsured motorist coverage. Injured by an uninsured motorist, Pierce sought payment from his insurance company only to be informed that he had not purchased uninsured motorist coverage, although he had requested the coverage and the agent assured him he had full coverage. More than three years from the date of the accident, Pierce sued the agent in negligence. The agent moved for summary judgment on the ground that the action violated the two-year statute of limitations applicable to professional malpractice actions. The trial court granted the motion, and the Fifth District Court of Appeal affirmed. The Florida Supreme Court, however, disagreed.

At common law, the concept of "professional" applied only to doctors, lawyers, teachers, and the clergy. This limited definition, however, does not have the breadth needed in a society dominated by an expanding technology. On the other hand, the dictionary meaning which focuses on the counseling function of a professional goes much farther than the limits needed to make the test manageable. Accordingly, the court adopted this test for "professional:" "[[If]] the law and administrative rules of the state, a person can only be licensed to practice an occupation upon completion of a four-year college degree in that field, then that occupation is a profession." As insurance agents need no baccalaureate degree to practice their trade, they cannot claim the protection of the shorter statute of limitations for professional malpractice. The court also noted that "insurance agents are not subject to discipline for violations of an ethical code. . . While no specific code of ethics is required for a vocation to attain the status of profession, we nevertheless fully encourage the adoption of such codes for all professions."
commit Paddock against her will and that of her family.  He chose the first option, and the court thus had to decide whether his failure to elect the second amounted to a breach of duty. Judge Ortinger, after meticulously discussing precedent from other jurisdictions and relevant secondary authorities, concluded:

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At common law, the concept of "professional" applied only to doctors, lawyers, teachers, and the clergy. This limited definition, however, does not have the breadth needed in a society dominated by an expanding technology. On the other hand, the dictionary meaning which focuses on the counselling function of a professional goes much too far beyond the limits needed to make the test manageable. Accordingly, the court adopted this test for "professionals" "If, under the laws and administrative rules of this state, a person can only be licensed to practice an occupation upon completion of a four-year college degree in that field, then that occupation is a profession." As insurance agents need no baccalaureate degree to practice their trade, they cannot claim the protection of the shorter statute of limitations for professional malpractice. The court also noted that "insurance agents are not subject to discipline for violations of an ethical code... while no specific code of ethics is required for a vocation to attain the status of profession, we nevertheless fully encourage the adoption of such codes for all professions."
Pierce represents a significant effort by the Florida Supreme Court to place meaningful limits on the amorphous concept of professional negligence. It raises a profession above the level of a simple trade and accordingly emphasizes the "professional" nature of a "profession." One might only have wished that the court would have required a profession to have adopted a code of ethics before receiving favored statutory treatment. In view of the Florida Bar's recent initiative to promote "professionalism" among its ranks, particularly with an emphasis on renewed vigor in policing ethical violations, the court could easily have required ethical standards as a hallmark of a professional in addition to that of advanced education. Hopefully, future cases will see the court modify its stance to include an ethical component for professions.

In another case dealing with professionals, the court placed itself firmly among traditional common law states in dealing with issues of privity in legal malpractice cases. Moss, an attorney, represented Sunburst in a transaction where Sunburst leased a service station to Zafiris. Unfortunately, Sunburst did not hold good title to the station, and the true owner evicted Zafiris, who sued Sunburst and Moss claiming negligence and fraud. The Third District Court of Appeal held that the case could proceed on both counts, but the Florida Supreme Court reversed as to the count of negligent misrepresentation.

Except in certain specific instances, third parties to the contract between an attorney and a client cannot sue the attorney for professional negligence. Accordingly, the negligence count against Moss could not stand. However, fraud presents an entirely different matter. Even for professionals, fraud extends privity beyond the bounds of the agreement or retainer to reach those parties normally put at risk by the nature of the underlying subject of representation.

163. Where a named beneficiary in a will held invalid sees the attorney who drafted the will for frustrating the purpose of the testator, a cause of action for malpractice will lie. See Arnold v. Carmichael, 524 So. 2d 464 (Fla. 1st Dist. Ct. App. 1988) (beneficiary in residuary clause which was negligently omitted in redraft of will can sue attorney).
164. Angel, Cohen & Rogovin v. Oberon Inv., 512 So. 2d 192 (Fla. 1987). The Third District Court of Appeal, in deciding Moss, did not have Angel on which to rely.
165. Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), aff'd on remand, 224 So. 2d 420 (Fla. 3d Dist. Ct. App.), cert. denied, 232 So. 2d 181 (Fla. 1969).
166. Scandinavian World Cruises Ltd. v. Ergle, 525 So. 2d 1012 (Fla. 4th Dist. Ct. App. 1988).
167. Id. at 1014.

IV. Dignitary Torts

1. Public Figures and Officials

Representatives of Scandinavian World Cruises (SWC) stated in a newspaper interview that the harbormaster and port pilot of Fort Pierce "is unreasonable, is milking the cow to death and the total charges are too high." Ergle, the harbormaster, sued SWC for defamation, but on appeal from a jury verdict in his favor, he suffered a reversal by the Fourth District Court of Appeal. As a public official, Ergle had to surmount the hurdle of demonstrating malice on the part of SWC. At trial Ergle failed to demonstrate the falsity of SWC's statement, other than arguing that a vague implication of falsity that SWC's refusal to return to Fort Pierce Harbor related to excessive charges.

Even if there might have been other reasons for SWC's decision to leave Fort Pierce, making the reason implied for its decision expressed in the article not entirely true, there was no clear and convincing proof that SWC's representatives made the statements complained of with knowledge of their falsity or with reckless disregard of whether they were false or not.

Interestingly, the court discussed the lack of proof of malice exclusively in terms of the lack of proof of falsity. This approach echoes the rationale of the United States Supreme Court in requiring that "public official" plaintiffs prove falsity: "A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statement at issue if convinced that the relevant statements were false." A plaintiff who is unable to show falsity by clear and convincing evidence (the standard adopted in Florida) of necessity cannot show malice by the same standard.

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ing with a public figure for a limited purpose. In a New York trial which received significant public notoriety, a jury found Charles Friedgood guilty of murdering his wife. His daughter, Esther, became the public face of the case and had some role in it. The police had charged her with obstruction of justice but later dropped the charges. About five years later, a book appeared discussing the case. Us magazine reviewed the book, and in the review, Esther sued Us for defamation.

The question before the court revolved around Esther's status as a public figure for a limited purpose; therefore the trial focused on demonstrating malice to succeed. The Friedgood trial attracted a great deal of media attention and generated substantial public interest; Esther served as a central prosecution witness in that trial. She had called many press conferences and thus had access to the media. Of greatest import, her own voluntary actions at the investigation stage of the case marked her as a public figure. Her actions in hiding the items from the police, wiping off the fingerprints, and concealing the items in a place where they could not be discovered showed her deeply into the murder investigation and prosecution.

With her father still incarcerated and claiming innocence, the case retained its potential to evoke public comment. Esther remained a public figure. Thus, any defamation in further discussion relating specifically to her actions in the investigation and conduct of the case would require Esther to show malice in order to recover.

2. Privileges

In some instances, statutes grant defendants the privilege to defame where the need for information outweighs the risk of defamatory communication. In order to regulate themselves, professions make use of review committees to ensure continuing service of high calibre and to weed out incompetent practitioners in the field. Accordingly, statutes protect statements made during the proceedings of these review panels, as exemplified by that relating to medical review boards.

A medical review board called by Parkway Hospital determined that the hospital should not make its facilities available for a type of pediatric operation performed by Dr. Feldman, among others. Based on documents Feldman obtained through a collateral proceeding not protected from discovery by statute, Feldman sued Parkway for defamation. The trial court entered summary judgment for the defendants, which the Third District Court of Appeal affirmed, on the ground that the protective statute effectively abolished any action for defamation stemming from a medical review board proceeding. The Florida Supreme Court reversed.

The statute in question does not abolish a cause of action, but adds an additional element for any plaintiff seeking damages for defamatory statements by members of review boards. Defendants avoid liability by acting "without malice or fraud," but they do not avoid liability entirely. The member of a review board who acts from malice will incur liability for statements made during board proceedings just as surely as if the statements came negligently outside the board room. Where the efficient and competent practice of medicine makes it imperative that doctors have the freedom to discuss matters frankly and openly within the structure of their boards, and the fear of liability for defamation from honestly formulated statements should not deter them from hard decisions. However, the statute does not permit a physician carte blanche to attack a colleague. Frankness and openness do not permit venality to taint the review process.
ing with a public figure for a limited purpose. In a New York trial which received significant public notoriety, a jury found Charles Friedgood guilty of murdering his wife. His daughter, Esther, became involved in the initial investigation of the case and had some role in securing, and perhaps secreting, evidence critical to the state's case. The police had charged her with obstruction of justice but later dropped the charges. About five years later, a book appeared discussing the Friedgood case. Us magazine reviewed the book, and in the review stated that Friedgood had convinced Esther to hide the evidence. Esther sued Us for defamation.

The question before the court revolved around Esther's status, with Us claiming her as a public figure for a limited purpose; therefore she was required to demonstrate malice to succeed. The Friedgood criminal trial attracted a great deal of media attention and generated substantial public interest; Esther served as a central prosecution witness in that trial. She had called many press conferences and thus had access to the media. Of greatest import, her own voluntary actions at the investigation stage of the case marked her as a public figure. "Her actions in hiding the items from the police, washing off the fingerprints, and concealing the items in a place where she then disclosed to her father, can be characterized, at the very least, as conduct destined to inject her deeply into the murder investigation and prosecution."

With her father still incarcerated and claiming innocence, the case retained its potential to evoke public comment. Esther remained a public figure for the limited purpose of comment on the case against her father. Thus, any defamation in further discussion relating specifically to Esther's role in the investigation and conduct of the case would require Esther to show malice in order to recover.

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In some instances, statutes grant defendants the privilege to defame where the need for information outweighs the risk of defamatory communication. In order to regulate themselves, professions make use

171. Id. at 237. A full account of Esther's actions in secreting and then disclosing critical evidence appears in Judge Anstead's opinion.
173. Friedgood, 521 So. 2d at 230.

of review committees to ensure continuing service of high calibre and to weed out incompetent practitioners in the field. Accordingly, statutes protect statements made during the proceedings of these review panels, as exemplified by that relating to medical review boards. A medical review board called by Parkway Hospital determined that the hospital should not make its facilities available for a type of podiatric operation performed by Dr. Feldman, among others. Based on documents Feldman obtained through a collateral proceeding not protected from discovery by statute, Feldman sued Parkway for defamation. The trial court entered summary judgment for the defendants, which the Third District Court of Appeal affirmed, on the ground that the protective statute effectively abolished any action for defamation stemming from a medical review board proceeding. The Florida Supreme Court reversed.

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174. "There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee . . . if the committee member or health care provider acts without intentional fraud." Fla. Stat. § 768.40(3)(a) (1987). (Subsection 5 of the statute also provides that the record of the committee's proceedings "shall not be subject to discovery or introduction into evidence in any civil action . . . arising out of the matters which are the subject of evaluation and review by such committee. . . .")
178. Feldman had not alleged malice in his complaint. The Florida Supreme Court reversed the district court of appeal to permit Feldman to amend the pleadings to allege a showing of malice, if merits. Feldman, 522 So. 2d at 798.
B. Malicious Prosecution

The Fourth District Court of Appeal clarified the difference between malicious prosecution and false arrest, in holding that a determination in an action based on one will not collaterally estop an action based on another.\(^{179}\) Nail worked for Rinker, whose employee accused him of theft and prepared a file on the basis of which the Broward County State Attorney's office prosecuted Nail. After a jury verdict exonerating him, Nail sued Rinker for malicious prosecution. However, the trial court dismissed his complaint with prejudice. Rather than appealing, Nail filed a new action against Rinker for false arrest. This time, the trial court denied Rinker's motion for summary judgment, and Nail received a jury verdict in his favor.

The appellate court affirmed. Malicious prosecution presupposes a lawful criminal process initiated for spurious reasons, while false arrest lies where the process of arrest and imprisonment occurred without legal authority. The first complaint raised different issues than the second, and the first dismissal in no way compromised the integrity of the second complaint.

One final case considered the proof necessary for a plaintiff to make a sufficient showing of malice to support a claim for malicious prosecution. Gazelle's wife, taking advantage of his overseas tour of duty with the Navy, signed his name to nine worthless checks.\(^{180}\) Winn-Dixie, the recipient of these checks, sent four letters to Gazelle, who never responded. Winn-Dixie then sent the checks to the state attorney's office, which had Gazelle arrested, although later dropping all charges. Gazelle then sued Winn-Dixie for malicious prosecution, and the jury awarded him compensatory and punitive damages. On appeal, the First District Court of Appeal affirmed as to compensatory damages but reversed as to punitive.

Winn-Dixie had no probable cause on which to file charges against Gazelle. A jury may infer malice from the lack of probable cause, and so the compensatory damage award rested solidly within the purview of the finder of fact.\(^ {181}\) On the other hand, the inference of malice standing by itself will not support an award of punitive damages. In order to recover punitive damages, a plaintiff must demonstrate actual malice—a willful and wanton disregard for the rights of another. Winn-Dixie acted in a manner constituting legal malice, but sending the checks to the prosecutor after four futile attempts to contact the maker, particularly when done in attempting to comply with laws governing bad checks,\(^ {182}\) falls far short of the willful and wanton misconduct presupposed by actual malice.

V. Conclusion

Few trends in tort law emerged in a year without a headline case. However, the Florida Supreme Court did continue to develop a consistent theory for deferring cases to the legislature or considering the matters judicially. The court has shown an increasing reluctance to expand areas of law in which the legislature has spoken, even in an oblique manner. Still, in areas of great public interest and controversy where the legislature has not acted, the court continues to forge ahead without waiting for legislative guidance.

The lower courts should have produced a number of issues for continuing review by the Florida Supreme Court. Chief among the contributions by the district courts of appeal is the clarifying of the distinction between scope of business and course of employment. With the spotlight removed from efforts to reform tort law through public ballot, Florida courts can expect renewed scrutiny of their efforts. The coming year once again should cast courts into clearer focus.

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181. Atlantic v. Whitfield, 290 So. 2d 49 (Fla. 1974).
B. Malicious Prosecution

The Fourth District Court of Appeal clarified the difference between malicious prosecution and false arrest, in holding that a determination in an action based on one will not collaterally estop an action based on another.\(^{179}\) Nail v. Rinker was an example of a false arrest where a plaintiff claimed that he was arrested on a trumped-up charge.\(^{180}\) Winn-Dixie, on the other hand, involved a malicious prosecution where the plaintiff claimed that he was arrested based on false evidence.

The trial court dismissed Nail’s complaint with prejudice. The appellate court affirmed, finding that the complaint was insufficient to support a claim for malicious prosecution. The appellate court noted that the complaint did not adequately allege that the defendant acted with a specific intent to harm the plaintiff.

In Winn-Dixie, the defendant, Winn-Dixie, was alleged to have conspired to cause the plaintiff, Gazelle, to be arrested on trumped-up charges. The trial court dismissed the complaint, finding that the complaint did not adequately allege that the defendant acted with a specific intent to harm the plaintiff.

The appellate court affirmed, finding that the complaint did not adequately allege that the defendant acted with a specific intent to harm the plaintiff. The appellate court noted that the complaint did not adequately allege that the defendant acted with a specific intent to harm the plaintiff.

One final case considered was the proof necessary for a plaintiff to make a sufficient showing of malice to support a claim for malicious prosecution. The plaintiff was a member of the Navy, and the defendant was alleged to have falsely arrested the plaintiff for violating a naval rule. The appellate court found that the plaintiff had failed to prove that the defendant acted with a specific intent to cause harm to the plaintiff.

In conclusion, few trends in tort law emerged in a year without a headline case. However, the Florida Supreme Court did continue to develop a consistent theory for deferring cases to the legislature or considering the matter judicially. The court has shown an increasing reluctance to expand areas of law in which the legislature has spoken, even in an oblique manner. Still, in areas of great public interest and controversy where the legislature has not acted, the court continues to forge ahead without waiting for legislative guidance.

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