

6-1-1979

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Recommended Citation

Guy B. Bailey Jr. and Robbie M. Colaluca, *Business, Professional and Other Torts*, 33 U. Miami L. Rev. 1345 (1979)

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Business, Professional and Other Torts

GUY B. BAILEY, JR.* AND ROBBIE M. COLALUCA**

The authors examine the 1978 developments in the law of torts. Particular emphasis is placed upon recent Florida decisions in the areas of professional malpractice and the business torts of fraud and deceit, conspiracy, and intentional interference with an advantageous business relationship.

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I. INTENTIONAL TORTS

A. *Tortious Interference with Advantageous Business Relations*

One who intentionally and unjustifiably interferes with another's advantageous business relationship, if such interference re-

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sults in injury, is liable in tort under Florida law.¹ The traditional elements are: (1) the existence of a business relationship (not necessarily evidenced by an enforceable contract); (2) knowledge of the relationship; (3) intentional and unjustified interference; and (4) resulting damage.²

In *Sutton v. Stewart*,³ the District Court of Appeal, First District, held that a licensed real estate broker's knowledge of an unexpired, exclusive brokerage agreement satisfied both elements two and three.⁴ The court did not make clear whether the broker's special training or her requirement to adhere to professional ethics was critical to its equation of knowledge with lack of justification.⁵ Nor did it discuss the traditional factors rendering conduct "unjustified."⁶

In *Kotler v. Morris Kroop, Inc.*,⁷ a broker sued a seller for breach and a buyer for interference with his nonexclusive listing. The broker's failure to demonstrate that he was the procuring cause

1. *Symon v. J. Rolfe Davis, Inc.*, 245 So. 2d 278, 280 (Fla. 4th DCA) (citing *Franklin v. Brown*, 159 So. 2d 893 (Fla. 1st DCA 1964)), *cert. denied*, 249 So. 2d 36 (Fla. 1971).

2. *Sutton v. Stewart*, 358 So. 2d 119 (Fla. 1st DCA 1978) (quoting *Smith v. Ocean State Bank*, 335 So. 2d 641 (Fla. 1st DCA 1976)).

3. *Id.*

4. *Id.* at 120-21.

5. Not only had the owner told broker Sutton and her fiancé of his prior brokerage agreement, but they had also visited the lot and saw the other broker's "for sale" sign there. The agreement between the owner and other broker had a 90-day term which called for written revocation. Moreover, written termination was required by the local real estate board. The owner mistakenly assumed the contract expired automatically after 90 days and never sent a written revocation. Sutton's failure to ask the owner whether he had made such termination was thought to be inexcusable since she was an experienced real estate salesperson. *Id.* at 120.

6. Compare this with the treatment of "privileged" behavior. To decide whether behavior is privileged, it is necessary to inquire into the mental and moral character of defendant's conduct. If defendant is acting to promote the interest of others, himself or the public, the jury must determine whether the invasion "is in furtherance of a social interest of greater public import than is the social interest involved in the protection of the plaintiff's individual interest." *Carpenter, Interference with Contractual Relations*, 41 HARV. L. REV. 728, 745 (1928), *cited in* HARPER & JAMES, *infra* note 164, at 515. There is no rule of thumb to apply and the jury must use its good sense in each circumstance to determine whether the defendant's interest is "inferior" to the plaintiff's interest. The jury may consider the type of contract with which the defendant interfered, the method the defendant used and the defendant's object or purpose. HARPER & JAMES, *infra* note 164, at 515. Professors Harper and James note:

[A] parent's interference with a child's engagement to marry presents a different motive from a businessman's interference with a competitor's trade, and a labor union's interference with a "yellow dog" contract may proceed from a motive of different social significance than interference with a contract of one businessman by another who desires to appropriate the advantages of the contract for himself.

Id. See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 128, at 915 (4th ed. 1971) [hereinafter cited as W. PROSSER].

7. 354 So. 2d 110 (Fla. 3d DCA), *cert. denied*, 359 So. 2d 1217 (Fla. 1978).

of the sale was fatal to both claims.⁸

Apparently believing that the borrower's defensive counterclaim was spurious, in *International Funding Corp. v. Krasner*,⁹ the District Court of Appeal, Third District, affirmed a mortgage foreclosure and dismissal of an interference counterclaim for failure to allege the business relationships with which the lender had interfered. The borrower claimed that the lender had, in effect, slandered its credit. Legally, dismissal of the counterclaim is perhaps supportable on the ground that trade libel,¹⁰ like libel per quod, requires proof of actual damages.¹¹ Refusal to permit amendment, however, must have proceeded from doubt as to the validity of the claim.¹² In point of fact, the only business relation which appears to have been implied is that with the lender.

In *Eshkenazi v. Las Fabricas, Inc.*,¹³ Eshkenazi, lessee of the upper floor of a commercial building, sued to have his lease of ground floor space declared valid and to have the conflicting lease of the ground floor lessee, Las Fabricas, invalidated. Las Fabricas counterclaimed for compensatory and punitive damages for tortious interference with a business relationship. The trial judge struck Las Fabricas' claim for punitive damages.

The trial court found that in April of 1976, the lessor told Eshkenazi that the additional space he needed would become available when the Las Fabricas lease expired on April 24, 1977. Eshkenazi executed a lease which was to become effective as of that date. Subsequently, the lessor advised Eshkenazi that a mistake had been made and that Las Fabricas was going to exercise its option to renew under its prior lease. In addition to claiming that the Las Fabricas lease was invalid, Eshkenazi claimed that the option to renew had been fraudulently added after execution of his April 1976 lease. Las Fabricas counterclaimed that Eshkenazi had advised suppliers that it would be going out of business because of the expired lease and, as a result, at least one supplier had stopped doing business with

8. *Id.* The court relied on *Shuler v. Allen*, 76 So. 2d 879 (Fla. 1955); *Dixson v. Kattel*, 311 So. 2d 827 (Fla. 3d DCA 1975); *Symon v. J. Rolfe Davis, Inc.*, 245 So. 2d 278 (Fla. 4th DCA), *cert. denied*, 249 So. 2d 36 (Fla. 1971).

9. 360 So. 2d 1156 (Fla. 3d DCA 1978).

10. Trade libel has also been called "disparagement of property." Like defamation, it involves interferences by falsehood with business or economic relations resulting in pecuniary loss. Unlike defamation, the interference by falsehood is not personally defamatory. *W. Prosser*, *supra* note 6, § 128, at 915.

11. *Id.* at 917-18.

12. The opinion does not state whether defendants ever sought leave to amend their counterclaim.

13. 360 So. 2d 430 (Fla. 3d DCA 1978).

it. At the close of Eshkenazi's case, the trial court directed a verdict for Las Fabricas, and the jury awarded Las Fabricas \$35,000.

Noting that the record failed to support or justify the jury award, the District Court of Appeal, Third District, reversed the judgment for Las Fabricas.¹⁴ On cross-appeal, the court found that the claim for punitive damages was meritless because "it failed to demonstrate the requisite malicious and/or fraudulent conduct on the part of Eshkenazi."¹⁵

Liability for alleged tortious interference with an advantageous business relationship also was denied in *Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*¹⁶ Noting that the first element of the alleged tort is the existence of a business relationship under which the plaintiff has legal rights regardless of the existence of an enforceable contract,¹⁷ the District Court of Appeal, Fourth District, stated that "[a] mere offer to sell a business which the buyer says he will consider, does not by itself give rise to legal rights which bind the buyer or anyone else with whom he deals."¹⁸

The *Lake Gateway* facts were undisputed. The former lessee operator of a motel gift shop was trying to negotiate a sale of the gift shop operations to his successor. His lease allowed cancellation for cause. After receiving a written cancellation of the lease, the former operator requested a reprieve, stating that the problems cited in the cancellation notice were in the process of being cor-

14. The record reflected that only one supplier had ceased doing business with Las Fabricas and that Las Fabricas was able to obtain needed merchandise from other suppliers. *Id.* In fact, Las Fabricas appeared to have no actual damages.

15. *Id.* at 432 (citing *Southeast Title & Ins. Co. v. Caldwell*, 326 So. 2d 12 (Fla. 1975), *cert. denied*, 423 U.S. 1088 (1976)); see *City of Hollywood v. Coley*, 258 So. 2d 828 (Fla. 4th DCA 1971) (where evidence indicates presence of fraud or malice, punitive damages should be awarded regardless of whether such conduct is part of the gravamen of the tort); *Adams v. Whitfield*, 290 So. 2d 49 (Fla. 1974).

Since the tort is one of *unjustified* interference, can legal malice be implied? See 9A FLA. JUR. DAMAGES § 127 (1972 & Supp. 1979) and cases cited therein. Of course, malice does not necessarily mean anger or malevolent feelings towards the plaintiff. "A wrongful act without reasonable excuse is malicious within the legal meaning of the term." *Richards Co. v. Harrison*, 262 So. 2d 258, 262 (Fla. 1st DCA), *cert. denied*, 268 So. 2d 165 (Fla. 1972). Malice has been established by proof of an intentional act. *Dade Enterprises, Inc. v. Wometco Theaters, Inc.*, 119 Fla. 70, 160 So. 209 (1935).

16. 361 So. 2d 769 (Fla. 4th DCA 1978).

17. *Id.* at 772; see *Symon v. J. Rolfe Davis, Inc.*, 245 So. 2d 278 (Fla. 4th DCA), *cert. denied*, 249 So. 2d 36 (Fla. 1971); *John B. Reid & Assocs. v. Jimenez*, 181 So. 2d 575 (Fla. 3d DCA 1965).

18. 361 So. 2d at 772. *But see Allen v. Leybourne*, 190 So. 2d 825 (Fla. 3d DCA 1966) (allegation that testator had fixed *intention* to make bequest in favor of plaintiff and strong possibility that this intention would have been carried out but for the wrongful act of defendant, states a cause of action). For a catalogue of cases in which Florida courts have given a broad scope to the tort of "inducing breach of contract," that is, tortious interference, see *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 609-10 (5th Cir. 1967).

rected. He was granted sixty days in which to satisfy the motel that he was maintaining "a first class gift shop."¹⁹

During the next eight months, while the former operator remained as lessee, he attempted to negotiate a sale to his successor. The former operator claimed that before he received irrevocable notice of termination,²⁰ his negotiations with his prospective successor collapsed. He attributed the collapse to the motel which had been talking to his successor about buying the gift shop for the sum the motel would be required to pay the former operator under the "buy out" clause of the lease.

The jury found tortious interference had been committed by both the motel and the successor operator. The Fourth District reversed as to both parties. It found that the motel's course of action was not unjustified and did not interfere with an advantageous business relationship.

As noted above, the court said that a "mere offer to sell" did not constitute a relationship giving rise to legal rights. Consequently, it held that there was no advantageous relationship established with which the motel could interfere. Furthermore, the court stated that there was no evidence that the motel's activities were the legal cause of the breakdown in negotiations between the former and the successor operator.²¹ The court also held that no tort was committed by the successor operator. The court reasoned:

Such competition seems to us to be par for the course in the free enterprise system. Can not the IBM salesman solicit this court to change over from a Xerox copier? Of course he can, unless he suggests to us that we violate a contract with Xerox in so doing.²²

As the court viewed the situation, the successor had solicited the motel to change from its present operator to himself. Not only was there evidence indicating that the lease would have been cancelled regardless of who took over, but the successor, by paying sums due under the lease to the former operator, ensured that the former operator received all rights due under his contract with the motel.

19. 361 So. 2d at 770. The letter from the motel concluded with a request that the former operator notify the motel of his intent to follow their instructions. This request went unheeded.

20. The termination was pursuant to a clause which allowed a 30-day right to terminate for any reason. Under the terms of the lease, the motel reimbursed the former operator for \$12,920.78. *Id.* at 771-72.

21. *Id.* at 772.

22. *Id.* The court was apparently referring to the principle that where the contract interfered with is terminable at will, the privilege of competition has been recognized. See W. PROSSER, *supra* note 6, §§ 129-130, at 942-46, 954.

The court, therefore, held that the claim of interference was unfounded. In so doing it ignored its own 1976 decision in *Frank Coulson, Inc.-Buick v. Trumbull*, holding an analogous issue to be a jury question.²³

Accepting the statement of "no evidence" of causation,²⁴ the holding of the case is beyond criticism. Unfortunately, the discussion concerning a "mere offer to sell" may mislead some to interpret it as suggesting that the relationship must be founded on an enforceable contract. In some circumstances, mere negotiations can constitute a relationship giving rise to legal rights.²⁵ Expectancies, such as the expectancy of employment, a gift or a legacy, also can constitute advantageous relationships which the courts will protect.²⁶

The District Court of Appeal, Second District, delimited *Lake Gateway* in a subsequent decision. In *Azar v. Lehigh*,²⁷ defendant Azar sought review of a temporary restraining order. Lehigh Corporation owned and operated the only motel near a project known as Lehigh Acres. As part of its promotional campaign, Lehigh provided free accommodations at the motel to prospective purchasers, enabling them to see Lehigh's property and talk to salesmen about the property. Azar, a former employee of Lehigh, began following customers to the motel and offering to handle the rescission of their contracts if they would move out of the motel and purchase a lot from Azar. Relying strongly on *Lake Gateway*, Azar argued he was merely providing the customers an opportunity to exercise their rights under federal law to rescind the contracts within three days and to obtain comparable property for lower prices.

The court rejected Azar's theory, distinguishing *Lake Gateway* by stating that "the business relationship allegedly interfered with [in *Lake Gateway*] had already deteriorated to the point that it could hardly be considered . . . advantageous."²⁸ The court ex-

23. 328 So. 2d 271 (Fla. 4th DCA 1976) (issue of privilege for the jury). In *Lake Gateway*, the court questioned in passing whether the relationship between the gift shop operator and the motel was *mutually* advantageous. 361 So. 2d at 772. The court indicated that it was less inclined to find tortious interference where the relationship was not mutually beneficial. The apparent rationale was that the party to the relationship who reaps no benefits is more likely to terminate the relationship regardless of the actions of an outsider.

24. Plaintiff must prove a causal relationship between defendant's actions and the harm suffered. *Lingard v. Kiraly*, 110 So. 2d 715, 717 (Fla. 3d DCA 1959).

25. See Holmes, *A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation*, 39 U. Prrr. L. Rev. 381, 435-52 (1978).

26. See, e.g., *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887); *Allen v. Leybourne*, 190 So. 2d 825 (Fla. 3d DCA 1966); *John B. Reid & Assocs. v. Jimenez*, 181 So. 2d 575 (Fla. 3d DCA 1965); *Lingard v. Kiraly*, 110 So. 2d 715 (Fla. 3d DCA 1959).

27. 364 So. 2d 860 (Fla. 2d DCA 1978).

28. *Id.* at 862 n.2.

plained: "There is a narrow line between what constitutes vigorous competition in a free enterprise society and malicious interference with a favorable business relationship "Though trade warfare may be waged to the bitter end, there are certain rules of combat which must be observed."'²⁹ The court wrote that the ultimate issue was whether the conduct would be considered "unfair" according to contemporary business standards. In this case, the court determined Azar's conduct unfair and affirmed the trial court's order.

In *Calvary Church, Inc. v. Siegel*,³⁰ the District Court of Appeal, Third District, continued the trend of Florida courts to give a broad scope to the tort.³¹ The court was called upon to decide whether an agreement to sell property sufficed as a predicate for a tortious interference suit. The court recognized that Florida law does not require a defendant actually to "induce" a breach of contract; wanton conduct which either destroys the subject matter of the contract or unlawfully renders performance impossible constitutes a cause of action. Here, defendant owner agreed to sell land to plaintiff Siegel. The owner later changed its mind and sold the property for a higher price to a second defendant (which knew of the earlier agreement). Both owner and buyer were found liable for conspiracy to defeat Siegel's contract. The buyer appealed on the ground that the agreement was insufficient to confer a right to purchase on Siegel. The court held that an agreement, albeit an incomplete agreement, could constitute "a contract sufficient to set forth an advantageous contractual undertaking, whether it was to sell or to contract to sell."³²

B. *Fraud and Deceit*

1. PLEADING FRAUD

The traditional elements of fraud are: (1) a false statement concerning a specific material fact; (2) knowledge that the representation is false; (3) intention that the representation induce another to act on it; and (4) injury to the other party acting in reliance on the representation.³³ Moreover, to recover in a fraud suit a litigant must both plead and prove his actual damages.³⁴

29. *Id.* at 862 (quoting W. PROSSER, *supra* note 6, § 130, at 956).

30. 358 So. 2d 1134 (Fla. 3d DCA 1978).

31. See note 18 *supra*.

32. 358 So. 2d at 1136.

33. *Osborne v. Delta Maintenance & Welding, Inc.*, 365 So. 2d 425 (Fla. 2d DCA 1978); see 14 FLA. JUR. *Fraud & Deceit*, § 9 (1957 & Supp. 1979) and cases cited therein.

34. See *National Equip. Rental v. Little Italy Rest. & Deli., Inc.*, 362 So. 2d 339 (Fla. 4th DCA 1978).

In Florida, the second element, scienter, can be established by showing: (1) actual knowledge of falsity; or (2) lack of knowledge of either truth or falsity; or (3) circumstances in which the representor ought to have known, if he did not actually know, of falsity.³⁵

In *Tampa Farm Services, Inc. v. Cargill, Inc.*,³⁶ seller Cargill sued buyer Tampa Farm for the contract price of corn sold and delivered and for wrongful rescission of the contract. Tampa Farm defended by claiming that it had relied on Cargill's promise of a certain quality of corn and that the corn shipped was of a far inferior grade. The District Court of Appeal, Second District, affirmed a summary judgment for the seller on this point, stating that "[t]he allegations must include the intent to deceive in order to state a cause of action in fraud."³⁷ In so ruling, the Second District failed to recognize longstanding Florida precedent. As early as 1894, the Supreme Court of Florida stated that intent to deceive can be inferred.³⁸ Florida courts also have held that there is a species of constructive fraud where a misrepresentation of material fact induces entry into a contract, even absent intentional deceit.³⁹ The *Cargill* decision cites *Houchins v. Case*,⁴⁰ an action for deceit, a distinct tort which does require actual knowledge of falsity.⁴¹

2. FRAUD AS A DEFENSE

While the general rule is that an oral agreement may not be introduced to vary the terms of a written agreement, evidence showing that a written agreement was procured by fraudulent means is admissible.⁴² In *Pena v. Tampa Federal Savings & Loan Association*,⁴³ where fraud was pleaded as a counterclaim in a foreclosure action, the District Court of Appeal, Second District, reversed a partial summary judgment directing a sale of part of the property, because the borrower had not been given an opportunity

35. *Kutner v. Kalish*, 173 So. 2d 763, 765 (Fla. 3d DCA 1965).

36. 356 So. 2d 347 (Fla. 2d DCA 1978).

37. *Id.* at 351. The court did say that on remand, the trial court could allow an amendment to Tampa Farm's defense so that it could recast properly its allegations of fraud. *Id.*

38. *Wheeler v. Baars*, 33 Fla. 696, 15 So. 584, 588 (1894).

39. *See, e.g., Entron, Inc. v. General Cablevision*, 435 F.2d 995 (5th Cir. 1970); *Emerson Elec. Co. v. Farmer*, 427 F.2d 1082 (5th Cir. 1970); *Joiner v. McCullers*, 158 Fla. 562, 28 So. 2d 823 (1947); *Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899). *Cf. Plantation Key Developers v. Colonial Mortgage Co.*, 589 F.2d 164, 173 (5th Cir. 1979) (intent to deceive cannot arise from ordinary business decisions and dilemmas without some proof of a sinister intent).

40. 138 Fla. 368, 189 So. 402 (1939).

41. *Williams v. McFadden*, 23 Fla. 143, 1 So. 618 (1887).

42. *Pena v. Tampa Fed. Sav. & Loan Ass'n*, 363 So. 2d 815 (Fla. 2d DCA 1978).

43. *Id.*

to prove his counterclaim.⁴⁴

A summary judgment dismissing a claim against the owner, driver and insurer of a vehicle on the grounds of a written release is improper where plaintiff's complaint seeks to set aside the release as having been obtained by fraud.⁴⁵ Even though the release in *McCurley v. Auto-Owners Insurance Co.*⁴⁶ recited that the payment was in full settlement of all claims, there was testimony from which the jury could have found that the insurance agent fraudulently misrepresented the effect of the release.⁴⁷ The District Court of Appeal, First District, held that a jury should have been allowed to decide whether plaintiff justifiably relied on the asserted misrepresentations and whether he was negligent in failing to ascertain the true facts.⁴⁸

3. MISREPRESENTATION OF OPINION OR FACT

Historically, deceit was required to be based upon misrepresentations of "fact" rather than of legal opinion.⁴⁹ In 1969, in *Nantell v. Lim-Wick Construction Co.*,⁵⁰ the District Court of Appeal, Fourth District, held actionable a false assertion that a zoning ordinance could be changed.⁵¹ Since the *Nantell* defendant had not appeared to argue before the appellate court, the case was not thought to be strong authority. In *Zuckerman-Vernon Corp. v. Rosen*,⁵² however, the Fourth District decided, without discussing

44. The Supreme Court of Florida recently held that proof of fraud, misrepresentation or other affirmative deception is necessary for a party successfully to maintain a suit under a theory of equitable estoppel. *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co.*, 361 So. 2d 156 (Fla. 1978). Therefore, where a bank mortgagee made no statements which were fraudulent, untrue or misrepresentative to subcontractors who furnished labor and materials for mortgagor contractor, the bank could not be held to have waived the priority of its recorded mortgage over mechanic's liens filed by subcontractors. To hold otherwise, the court said, "would inject an unnecessary amount of uncertainty into the construction loan industry." *Id.* at 159. Such a misperception of public policy seems very dubious. The supreme court's decision in *Rinker* was not mentioned in the subsequent case of *Grauer v. Occidental Life Ins. Co.*, 363 So. 2d 583 (Fla. 1st DCA 1978). In *Grauer*, the court stated that the theory of equitable estoppel "precludes a person from maintaining a position inconsistent with another position which is sought to be maintained at the same time or which was asserted at a previous time . . ." *Id.* at 585.

45. *McCurley v. Auto-Owners Ins. Co.*, 356 So. 2d 68 (Fla. 1st DCA 1978).

46. *Id.*

47. *Id.* at 69. *McCurley* testified that the agent represented to him that the release was solely for automobile damage and not for bodily injury. *Id.*

48. *Id.* (citing *Florida E. Coast Ry. v. Thompson*, 93 Fla. 30, 111 So. 525 (1927)); *Bryant v. Small*, 236 So. 2d 150 (Fla. 3d DCA 1970).

49. See, e.g., *Marks v. Fields*, 160 Fla. 789, 36 So. 2d 612, 614 (1948).

50. 228 So. 2d 634 (Fla. 4th DCA 1969).

51. *Id.* at 635.

52. 361 So. 2d 804 (Fla. 4th DCA 1978).

the fact-legal opinion dichotomy, that a misrepresentation as to zoning status was actionable.⁵³ The appeal followed dismissal with prejudice of a deceit action. Zuckerman had contracted to buy acreage from defendants⁵⁴ who allegedly induced Zuckerman to close by misrepresentations that the acreage was approved as planned unit development (PUD) land⁵⁵ by the city council. In fact, the city council had not approved the PUD zoning and would not approve the building permit or plat plans submitted by Zuckerman. Consequently, Zuckerman claimed losses of anticipated profits, incidental damages, and brokerage fees and deposits.

Zuckerman alleged that the defendants' claim of sophistication had diverted him from making further inquiry into the zoning matter. The court applied the rule that inducement not to make an independent investigation precludes the defense of failure to discover the falsity of statements made.⁵⁶ Since the complaint claimed an *intentional* tort, deceit, the Fourth District ruled that the exculpatory language of the contract, which purported to absolve the sellers from liability even for misrepresentations, was void.⁵⁷ The court remanded for determination of whether Zuckerman should have made a more exhaustive investigation of defendant's representations. If he could prove that he was fraudulently induced to enter the contract, Zuckerman could sue the defendant in equity for rescission.⁵⁸

In both *McCurley* and *Zuckerman*, the "facts" misrepresented were easily discoverable, but *McCurley* never read the release and Zuckerman never attempted to ascertain if the land was PUD land. Arguably, the plaintiffs in both cases were relying, not upon misrepresentations of fact, but upon opinions as to legal matters. That is, they relied upon the effect of the release and the approval of PUD zoning. That argument suggests that the courts might have dismissed both claims as nonactionable; instead, they treated the representations as representations of fact. The cases could be read as

53. The court ignored the possibility that, arguably, zoning status is a nonactionable, legal opinion.

54. The vendors and brokers of the property in question, the present and former mayor of the City of Miramar, the city itself, and the former city attorney, were all named as defendants. 361 So. 2d 804 (Fla. 4th DCA 1978).

55. PUD zoning here allowed a density of 30 units per acre. *Id.* at 806.

56. *Id.*

57. The contract read, in relevant part, "In any event the provisions of this paragraph and the representation of fact herein made shall not survive or extend beyond closing." *Id.*

58. *Id.* at 807. When the case went up on appeal, the mortgage had been foreclosed and the sellers had taken back most of the property and kept the deposit which had been paid them. *Id.* at 805.

implicitly deciding that representations made by one who holds himself out as having expertise in such matters will be considered representations of fact. A closer reading reveals these cases as indications that the frequently unworkable and artificial distinction between fact and opinion is properly being discarded by Florida courts. Such a development parallels the historical development of the law of evidence: often what is called "opinion" is recognized to be "fact."⁵⁹

C. Conspiracy

In *Lake Gateway Motor Inn v. Matt's Sunshine Gift Shops*,⁶⁰ the District Court of Appeal, Fourth District, reversed a judgment in favor of a claim of civil conspiracy, stating: "[I]f the underlying tort which forms the basis for a civil conspiracy is not proved, then there can be no recovery for the alleged conspiracy itself."⁶¹ While this dictum states the general rule, it overlooks the supreme court's 1977 decision in *Churruca v. Miami Jai-Alai, Inc.*⁶² In *Churruca* the court held that, "some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess," or some special economic power, renders a conspiracy an independent tort.⁶³

The Court of Appeals for the Fifth Circuit also failed to recognize *Churruca* in *Fulton v. Hecht*.⁶⁴ *Fulton*, a greyhound breeder and racer, sued the owner and managers of a dog track, West Flagler Kennel Club, for, *inter alia*, common law conspiracy. *Fulton* contended that Flagler's refusal to renew his contract was retaliation for his testimony before the Board of Business Regulation. *Fulton's* testimony preceded the Board's allocation of summer racing dates to another kennel club.⁶⁵ When Flagler took away this contract, *Fulton* also lost the use of certain facilities provided for dog owners, based on the number of tracks at which they raced.⁶⁶ The Fifth

59. See generally 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1919 (3d ed. 1940 & Supp. 1977).

60. 361 So. 2d 769 (Fla. 4th DCA 1978); See notes 16-29 and accompanying text *supra*.

61. 361 So. 2d at 772.

62. 353 So. 2d 547 (Fla. 1977).

63. *Id.* at 550.

64. 580 F.2d 1243 (5th Cir. 1978).

65. The summer dates are more lucrative and Flagler had usually been awarded those dates. There was conflicting testimony regarding whether Hecht, the managing partner, had refused to renew the contract as a retaliatory measure or because *Fulton* had "always been a troublemaker [who] resisted . . . innovations." *Id.* at 1245.

66. The local rule was that a dog owner racing at all four tracks in the area could lease two kennels; if he raced at three or less tracks, he could lease only one kennel. *Id.*

Circuit characterized Fulton's tort claim as "intentional infliction of economic harm" which it found to be an unrecognized tort under Florida law.⁶⁷ The court stated: "Even if defendants did intentionally inflict economic harm on the plaintiff, such behavior is tolerated by the law because of the state's interest in protecting the individual freedom to enter, or to refrain from entering, into contractual relationships."⁶⁸

This reasoning flies in the face of *Churruca's* recognition of actionable conspiracy based upon allegations that jai-alai frontons had agreed collectively to inflict economic harm on certain players by refusing to employ them in retaliation for their prior demands. The Supreme Court of Florida stated: "The essential elements of the tort [of conspiracy] are malicious motive and coercion through numbers or *economic* influence."⁶⁹ Under the *Churruca* holding, Fulton could have prevailed by showing either evil motive, or undue influence.⁷⁰

D. False Arrest and False Imprisonment

The doctrine of respondeat superior dictates that an employer will not be liable for an employee's unlawful detention of another if the wrongful conduct is not within the scope of the employee's authority.⁷¹ The District Court of Appeal, Third District, was called upon to apply this doctrine to a bizarre factual situation in *Sturman v. City of Golden Beach*.⁷²

In *Sturman*, Golden Beach policeman Granata was following an automobile with New York license plates. Granata wished to verify his suspicion that the driver had an expired registration decal. Upon

67. *Id.* at 1250; accord, *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. 3d DCA 1978) (no cause of action exists for retaliatory discharge of a private employee).

68. 580 F.2d at 1251. It is true that established Florida law permits either party to terminate employment where the term is discretionary with either party or indefinite. *Wynne v. Ludman Corp.*, 79 So. 2d 690 (Fla. 1955); *Sher v. Shower Door Co. of Am.*, 197 So. 2d 333 (Fla. 3d DCA 1967). The seminal study by Professor Kessler, however, suggests that freedom of contract among unequals opens the door to inequitable results. He suggests a good faith limitation on the agreement process. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943).

69. 353 So. 2d at 550 (emphasis added).

70. Referring to the frontons' refusal to employ jai alai players, the supreme court, in *Churruca*, stated that if the concerted effort of the fronton owners was designed maliciously for the purpose of beggaring the players by depriving them of their livelihood, the employers were guilty of tortious conspiracy. *Id.* The facts of *Fulton* could fit within this holding. See also *Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164 (Fla. 1958) (recognizing claim of conspiracy by dog track owners to drive a racer out of the business based upon their force of numbers and economic power in combination).

71. 14 *FLA. JUR. False Imprisonment* § 7 (1957). See also Annot., 92 *A.L.R.2d* 15 (1963).

72. 355 So. 2d 453 (Fla. 3d DCA 1978).

stopping driver Polizzi, Granata discovered that the decal was current and then engaged in a "friendly chat" with Polizzi.⁷³

At this time a Mrs. Sturman drove by, rolled down her window and advised Polizzi to drive away since the Golden Beach officer was in Hallandale and had no authority to stop or detain the New York driver. After Mrs. Sturman ignored his request for her to leave, Officer Granata informed her that she was under arrest. Upon pulling her car over, Mrs. Sturman jumped out and ran to telephone her husband from a nearby building.

Arriving moments later, Mrs. Sturman's husband and son joined her in shouting and heaping abuse on Granata. Granata summoned Officer Carlson for assistance. When Carlson arrived, Mr. Sturman told Mrs. Sturman to leave, but Granata removed her ignition keys. Incensed, Mr. Sturman attacked Granata who wrestled with and subdued Mr. Sturman in short order. Mrs. Sturman, unable to take the sight of Granata prevailing over her husband in their wrestling match, began to pull the officer's hair. In what the court described as "a true, though unlawful outward manifestation of family solidarity,"⁷⁴ her son entered the fray. The neighbors, by this time, had gathered to witness the show. Soon Hallandale police officers arrived. When Mrs. Sturman was being escorted to the police car, the Golden Beach officers left Mr. Sturman alone for a moment, whereupon he fell to the ground, clutching his heart and announcing that he was having a coronary. Until the arrival of four emergency vehicles, he thereafter remained supine, except to raise himself at one point to announce his belief that, since this was not Nazi Germany, the officers should not all be acting like the Gestapo.⁷⁵ After being examined at the hospital, Mr. Sturman was released; the heart attack "had miraculously dissipated."⁷⁶ The two officers arrested Mr. Sturman and his wife for assault and battery, obstructing justice and resisting an officer without violence.

Although the City of Golden Beach never filed formal charges against the Sturmans, the favor was not returned. Mr. Sturman sued the officers and the city for assault and battery and false imprisonment. The trial judge directed a verdict for the city, and the officers won a jury verdict. On appeal, the District Court of Appeal,

73. *Id.* at 454.

74. *Id.*

75. *Id.* at 455. Stanley had gallantly refused the oxygen resuscitator offered by Carlson, saying, "I'm on Hallandale soil. I want a Hallandale ambulance and I want Hallandale oxygen." *Id.* True to form, he chose from the four emergency vehicles, two of which were from nearby communities, a Hallandale unit to deliver him to the hospital.

76. *Id.*

Third District, affirmed the directed verdict for the city. Since the officers went beyond the limits of their statutory authority,⁷⁷ the city was relieved of liability for their ultra vires acts.⁷⁸ The court affirmed the jury verdicts for Granata and Carlson, holding that the officers possessed a common law right, as private individuals, to arrest anyone committing a misdemeanor which amounted to a breach of the peace.⁷⁹

Although at first blush the facts of *Sturman* are amusing, the court's declaration that "[t]here is no doubt that appellant's peculiar behaviour amounted to a breach of the peace"⁸⁰ should not be taken lightly. Mrs. Sturman was originally arrested for the "offense" of refusing to move on at Granata's request. If, as the court admits, a private citizen has no right to arrest a person for a traffic infraction,⁸¹ then it seems illogical that an officer, acting as a private citizen, should have a right to arrest a person for refusing to heed his instructions to move on. As to the subsequent arrest of Mr. Sturman and his wife, it is difficult to understand why the officers, again acting as private citizens, could arrest the Sturmans for breach of the peace when it was the officers' original ultra vires arrest which led to the breach.

E. *Misuse of Legal Proceedings*

1. MALICIOUS PROSECUTION

The six elements of malicious prosecution are: (1) a prior judicial proceeding was commenced or continued; (2) it was brought by the present defendant against the present plaintiff; (3) it was brought without probable cause; (4) it was brought with malice; (5) it resulted in a bona fide termination in favor of the present plaintiff; and (6) it resulted in damage to the present plaintiff.⁸²

In *Clayton v. City of Cape Canaveral*,⁸³ the District Court of Appeal, Fourth District, reversed on rehearing its prior decision and held that a municipality is not immune from liability for malicious prosecution. The appellants in *Clayton* filed an action for malicious

77. See FLA. STAT. § 901.25 (1975) (current version at *id.* § 901.25 (Supp. 1978)).

78. 355 So. 2d at 455.

79. *Id.* at 455-56.

80. *Id.* at 456.

81. *Id.*

82. *Arison Shipping Co. v. Hatfield*, 352 So. 2d 539, 539 (Fla. 3d DCA 1977); see *Applestein v. Preston*, 335 So. 2d 604 (Fla. 3d DCA 1976).

83. 354 So. 2d 147 (Fla. 4th DCA 1978), *reversing in part Clayton v. City of Cape Canaveral*, 349 So. 2d 722 (Fla. 4th DCA 1977) (decision withdrawn from the reporter at the request of the court).

prosecution against the City of Cape Canaveral and its chief of police, resulting from a series of arrests and prosecutions of appellants for alleged violations of city zoning ordinances. The prosecutions were terminated in favor of appellants by a circuit court judgment.

After first deciding that the evidence indicated a prima facie case of malicious prosecution against the municipality, precluding a directed verdict,⁸⁴ the court turned to the question, answered affirmatively on the first hearing, of whether the city was immune from suit.

The original opinion was largely predicated on two decisions: *Calbeck v. Town of South Pasadena*⁸⁵ and *Middleton v. City of Fort Walton Beach*.⁸⁶ *Calbeck* and *Middleton* had erroneously interpreted an earlier Supreme Court of Florida decision⁸⁷ as extending municipal tort liability solely for negligent torts. In the case of *City of Miami v. Simpson*,⁸⁸ the Supreme Court of Florida, however, clarified that earlier decision and held that cities could be liable for both negligent *and* intentional torts, under the doctrine of respondeat superior.

The Fourth District then quoted its outline of the status⁸⁹ of municipal tort liability:

"1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation; 2) as to those activities which fall in the category of governmental functions ' . . . a municipality is liable in tort, under the doctrine of respondent [sic] superior, only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.' [citation omitted]; 3) as to those activities which fall in the category of judicial, quasi judicial, legislative, and quasi-legislative functions, a municipality remains immune."⁹⁰

84. The facts were as follows: Appellants were the owners and operators of a "bottle club," a club which permits the consumption of alcoholic beverages after the operating hours of other bars and cocktail lounges. City officials who opposed the club's operation had, on numerous occasions, arrested appellants for violations of a city zoning ordinance. The evidence tended to show that the plaintiff's property was not subject to the ordinance and that the officials were aware of the inapplicability of the law. *Id.* at 148.

85. 128 So. 2d 138 (Fla. 2d DCA 1961).

86. 113 So. 2d 431 (Fla. 1st DCA 1959).

87. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

88. 172 So. 2d 435 (Fla. 1965). This case was not cited in the *City of Cape Canaveral* brief. *Clayton v. City of Cape Canaveral*, 354 So. 2d at 150.

89. The *Clayton* case arose prior to the enactment of FLA. STAT. § 768.28 (Supp. 1978), concerning the waiver of sovereign immunity in tort cases.

90. *Clayton v. City of Cape Canaveral*, 354 So. 2d at 149 (quoting *Gordon v. City of West*

The court concluded that the acts complained of occurred in the performance of a governmental function against one with whom the city officials had direct contact; therefore, since malicious prosecution was an intentional tort for which the city could be held liable, the trial court's judgment for the city was reversed.⁹¹

A few Florida courts have taken an aberrant position on the issue of whether, in an action for malicious prosecution, the determination of probable cause presents a question of fact for the jury or a question of law for the court.⁹² In *Owens v. City of Pensacola*,⁹³ the trial court directed a verdict for the defendant in an action for malicious prosecution. Appellant contended that the trial judge had erred in taking the case from the jury. Appellees urged that since there were no disputed factual issues the sole matter for the trial judge's determination had been whether the arresting officers had probable cause to believe appellant had committed an offense, a determination within the judge's province. The District Court of Appeal, First District, disagreed with appellees, reversed and certified the questions posed to the Supreme Court of Florida. On certiorari, the Supreme Court of Florida quashed and remanded the case. It held that where the facts are undisputed, probable cause is a question of law.

In a suit for false arrest, assault and battery and malicious prosecution, the latter count was barred by the fact that plaintiff had pleaded guilty to assault and battery, resisting arrest and indecent exposure in a prior criminal action arising out of charges defendant was claimed maliciously to have instituted.⁹⁴ In *Hatfield v. York*,⁹⁵ the court noted that for purposes of the other counts, the guilty pleas were admissible in evidence as admissions against interest but were not conclusive as to the two counts which were not

Palm Beach, 321 So. 2d 78 (Fla. 4th DCA 1975), *cert. denied*, 349 So. 2d 160 (Fla. 1977)).

91. *Id.* at 150.

92. The "majority view" is that it is the function of the court and not the trier of fact to determine the question of probable cause, the basis for this view being the very dubious apprehension that the question of probable cause could not be entrusted to a jury. See *Stone v. Hamic*, 189 So. 2d 908 (Fla. 2d DCA 1966); *Cold v. Clark*, 180 So. 2d 347 (Fla. 2d DCA 1965); *RESTATEMENT OF TORTS* § 673 (1938); *Annot.*, 87 A.L.R.2d 183 (1963). *Contra*, *Owens v. City of Pensacola*, 355 So. 2d 1266, 1267 (Fla. 1st DCA 1978), *rev'd*, 369 So. 2d 328 (Fla. 1979); *Food Fair Stores, Inc. v. Kincaid*, 335 So. 2d 560 (Fla. 2d DCA 1976); *Oosterhoudt v. Montgomery Ward & Co.*, 316 So. 2d 582 (Fla. 1st DCA 1975), *cert. denied*, 333 So. 2d 463 (Fla. 1976).

93. 369 So. 2d 328 (Fla. 1979). The plaintiff had constructed signs saying "Speed Trap Ahead" and placed them on both sides of an intersection where he had seen police officers using radar equipment. He was arrested for obstructing a police officer in the performance of his duties. Later the charges were dismissed.

94. *Hatfield v. York*, 354 So. 2d 426 (Fla. 4th DCA 1978).

95. *Id.*

legally barred. Because an essential element of malicious prosecution is a bona fide termination of the original criminal charges in favor of the claimant, however, the guilty plea barred the subsequent malicious prosecution action.

In *Atlantic Plaza Partnership v. Daytona Sands, Inc.*⁹⁶ the District Court of Appeal, First District, decided that parties who never authorized the filing of the initial lawsuit could not be held liable in a subsequent malicious prosecution action.

2. ABUSE OF PROCESS

Abuse of process exists where "one . . . uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed."⁹⁷ Unlike malicious prosecution, it is unnecessary to prove that the prior proceedings were terminated in the present plaintiff's favor or that the proceeding was initiated without probable cause.⁹⁸

In *Burchell v. Bechert*,⁹⁹ Burchell won reversal of a summary judgment in favor of defendant in a suit for malicious prosecution. Burchell had been sued twice by Bechert for fraud and misrepresentation. Bechert took voluntary dismissals in both actions.¹⁰⁰ On appeal, the court held, *inter alia*, that "[w]hether or not Bechert had probable cause to sue Burchell depend[ed] at least in part upon whether or not Burchell made the statements alleged by Bechert to form the basis of his suits."¹⁰¹ The cause was remanded for resolution of that question.

Burchell claimed that Bechert's lawsuits for fraud and misrepresentation were instituted solely to force the payment of a debt which Burchell did not owe.¹⁰² Had he sued for abuse of process, any lack of probable cause would have been irrelevant.

96. 357 So. 2d 761 (Fla. 1st DCA 1978).

97. RESTATEMENT OF TORTS § 682 (1938). Section 682, comment a, reads in part: "Liability . . . is imposed . . . [for] the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Professor Prosser explains that "abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. PROSSER, *supra* note 6, § 121, at 856.

98. See Orlovsky, *Torts, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 1233, 1244 & n.56 (1978).

99. 356 So. 2d 377 (Fla. 4th DCA 1978).

100. The second dismissal operated as an adjudication on the merits against Berchert. *Id.* at 378.

101. *Id.* Where facts are disputed, probable cause is a jury question. See, e.g., *Stamatinos v. Northeast Airlines, Inc.*, 258 So. 2d 62 (Fla. 3d DCA), *cert. denied*, 262 So. 2d 443 (Fla. 1972).

102. 356 So. 2d at 378.

F. Defamation

1. LIBEL AND SLANDER

The Supreme Court of Florida refused to assert jurisdiction to reconsider a district court ruling that, in an action for libel by a public official, the plaintiff failed to show by clear and convincing evidence that the defamatory statement was a false statement of fact and made with knowledge that it was false or with reckless disregard of whether or not it was false.¹⁰³ The trial judge had denied a motion for judgment n.o.v. after a \$1,000,000 verdict for a school superintendent whom the newspaper had apparently set out to remove from office. The District Court of Appeal, Fourth District, had reversed, holding that plaintiff's evidence did not prove the elements of the tort as set out above. Justice Adkins dissented from the denial of certiorari, arguing that the Fourth District had improperly reweighed the evidence.¹⁰⁴

Publication is a necessary element of a cause of action for libel and slander. Failure to allege publication adequately renders a complaint for defamation insufficient.¹⁰⁵ Another necessary element is falsity. Truth, belief in truth by the one making an otherwise libelous publication, or mistake or inadvertence are all defenses to the tort.¹⁰⁶

In *Axelrod v. Califano*,¹⁰⁷ a summary judgment for the defendant was reversed in a slander action. Defendant told a former part-time employee that plaintiff, who had been fired, was a thief and a

103. *Early v. Palm Beach Newspapers, Inc.*, 354 So. 2d 351 (Fla. 1977).

104. *Id.* at 351-52 (Adkins, J., dissenting). Mr. Justice Adkins concluded:

The question of whether a reader of the newspaper thought that the newspaper was charging plaintiff with the commission of a criminal offense was clearly a jury question. In this respect the District Court substituted its judgment for that of the jury and the trial judge. If statements which are published have a different effect on the common mind of the reader than that which the truth would have, then the jury is authorized to return a verdict for the plaintiff. *McCormick v. Miami Herald Publishing Co.*, 139 So. 2d 197, 200 (Fla. 2d DCA 1962); *Hammand v. Times Publishing Co.*, 162 So. 2d 681, 682 (Fla. 2d DCA 1964); *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234, 238 (1933); *Johnson v. Finance Acceptance Co.*, 118 Fla. 397, 159 So. 364 (1935); *Joopanen v. Gavagan*, 67 So. 2d 434 (Fla. 1953); *Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495 (Fla. 1953); *Commander v. Pedersen*, 116 Fla. 148, 156 So. 337 (1934).

105. *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134 (Fla. 3d DCA 1978). In *DeMarco*, plaintiff was fired after bringing a tort action, on behalf of his daughter, against his employer. DeMarco alleged, in the libel and the slander count, only that his reputation had been damaged in that his firing imputed that he was unreliable or incompetent. *Id.* at 136.

106. 20 FLA. JUR. *Libel and Slander* §§ 55-57 (1958).

107. 357 So. 2d 1048 (Fla. 1st DCA 1978).

forger. The District Court of Appeal, First District, held that there were disputed issues of fact as to whether the statement was privileged, knowingly untrue or malicious. It might be qualifiedly privileged if made in regard to a business, by one having an interest in that business and solely to others interested in that business.¹⁰⁸

The District Court of Appeal, Fourth District, held that section 768.28 of the Florida Statutes,¹⁰⁹ waiving sovereign immunity, does not deprive a sheriff of an absolute privilege as to any defamatory statements made incidental to official duties.¹¹⁰ The court, in *Cobb's Auto Sales, Inc. v. Coleman*,¹¹¹ said: "There is nothing in Section 768.28 to indicate that the legislature intended to take away the defense of absolute privilege. In fact, sheriffs were less affected than others by the passage of the statute because they had no sovereign immunity."¹¹²

In *Sussman v. Damian*,¹¹³ absolute privilege was recognized as extending to statements made by lawyers in taking a deposition or in other judicial proceedings if they are relevant to the proceedings, no matter how false or malicious such statements may be. The District Court of Appeal, Third District, added that if the statements were not relevant to the proceedings they were qualifiedly privileged. That is, unless and until it was shown that the statements were uttered with malice, they were prima facie privileged.¹¹⁴

In *Damian*, on deposition, attorney Sussman called attorney Damian a liar after Damian accused him of not producing certain documents. The argument was revived following a hearing on Damian's motion to compel. In the hallway and the elevator descending to the ground floor of the courthouse, in the presence of another lawyer and a stranger, the conversation became so heated that Damian attacked Sussman's professional integrity and his handling of certain matters unrelated to the lawsuit which had brought them to the courthouse.

The court held that the statement made at the deposition was absolutely privileged and the statement made in the elevator only qualifiedly privileged. The adverse summary judgment as to the suit on the second statement, therefore, was held proper since "[that statement] was as much prompted by Sussman's own inexcusable

108. *Id.* at 1051.

109. FLA. STAT. § 768.28 (Supp. 1978).

110. *Cobb's Auto Sales, Inc. v. Coleman*, 353 So. 2d 922 (Fla. 4th DCA 1978).

111. *Id.*

112. *Id.* at 923.

113. 355 So. 2d 809 (Fla. 3d DCA 1977).

114. *Id.* at 811.

conduct as by anything else and . . . [was] not . . . uttered with deliberate and premeditated malice."¹¹⁵ The circumstances of this case were unique. It is unfortunate that the language and the holding were not more explicitly restricted to the operative facts.

A letter composed by an assistant city attorney was also held absolutely privileged. The letter recommended that a police officer not be reinstated because of his allegedly perjured testimony at a trial in which he was convicted of a crime involving moral turpitude.¹¹⁶ Upholding dismissal of the libel suit, the District Court of Appeal, Third District, in *Johnsen v. Carhart*,¹¹⁷ explained that the privilege extends to any executive official's statements made in connection with the performance of his duties. The court noted that the reason governmental officials are granted immunity is that, while recognizing that public officials who have been truant in their duties should be punished, courts are reluctant to expose honestly mistaken officials to suit by anyone who has suffered from their errors.¹¹⁸

2. SLANDER OF TITLE

Slander of title is "a publication of a false and malicious statement, oral or written, disparaging a person's title to real or personal property or some right of his causing him special damage."¹¹⁹ The gist of the tort is the interference with the prospect of sale or some other advantageous relation.¹²⁰ Malice is presumed if the disparagement is false, causes damage and is not privileged.¹²¹ Defendant's belief in the disparaging matter and lack of intent to influence a third party are immaterial.¹²²

In *Continental Development Corp. v. Duval Title & Abstract Co.*,¹²³ plaintiff failed to prove special damages. The District Court of Appeal, Second District, therefore held it harmless error to have required plaintiff to prove that the filing of the lien, which gave rise to the slander of title suit, was done with malice. Continental, a

115. *Id.* at 812.

116. *Johnsen v. Carhart*, 353 So. 2d 874 (Fla. 3d DCA 1977).

117. *Id.*

118. *Id.* at 876 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)).

119. BENDER'S FLORIDA FORMS, *Slander of Title* § 217.01 (1968). For a summary of the status of the tort of injurious falsehood, see Lynn, *Injurious Falsehood*, 52 FLA. B.J. 360 (1978).

120. *Gates v. Utsey*, 177 So. 2d 486 (Fla. 1st DCA 1965).

121. BENDER'S FLORIDA FORMS, *supra* note 119, at § 217.04.

122. *Id.* at § 217.03.

123. 356 So. 2d 925 (Fla. 2d DCA 1978).

corporate landowner, attempted to refinance a condominium project. It contracted with defendant Duval to provide title insurance. The refinancing agreement fell through, and Continental informed Duval it no longer needed insurance. When Continental refused to pay a cancellation fee, Duval filed a mechanic's lien against Continental's property for "title services." Continental sued for slander of title and Duval counterclaimed for the \$10,000 cancellation fee.¹²⁴ The Second District stated that even though the trial court mistakenly believed malice could not be presumed, Continental's conclusory allegations were insufficient to prove damages. Therefore, "even if the trial court had applied the proper standard there would have been no basis to have awarded . . . damages."¹²⁵

G. Conversion

At the core of the tort of conversion is wrongful deprivation of or interference with the legal rights incidental to ownership of personal property.¹²⁶

Following the general Florida rule that invasion of a legal right requires at least nominal damages, the District Court of Appeal, Second District, specifically ruled nominal damages available for conversion.¹²⁷ In *King v. Saucier*,¹²⁸ a directed verdict for the defense was reversed. The plaintiff automobile owner testified that she had paid a repairman for work previously done. The repairman, however, had her car towed away under a claim of lien. The court stated that if the factual question was resolved by the jury in plaintiff's favor, she was entitled to nominal damages.¹²⁹

Where a debtor specifically earmarked payments for a certain debt and the creditor unilaterally applied overpayments to another debt, the creditor's refusal to return the overpayment was held to be conversion.¹³⁰ Reversing a dismissal, the District Court of Appeal, Third District, in *All Cargo Transport, Inc. v. Florida East Coast Railway*,¹³¹ stated, "It cannot be successfully argued that the overpayments of funds was undesignated The entire check was

124. The appellate court upheld Duval's recovery on the counterclaim since there was substantial evidence to support the trial court's award. *Id.* at 927.

125. *Id.* at 928.

126. *International Mail Order, Inc. v. Capital Nat'l Bank*, 192 So. 2d 287 (Fla. 3d DCA 1966).

127. *King v. Saucier*, 356 So. 2d 930 (Fla. 2d DCA 1978).

128. *Id.*

129. *Id.* at 931.

130. *All Cargo Trans. Inc. v. Florida E. Coast Ry.*, 355 So. 2d 178 (Fla. 3d DCA 1978).

131. *Id.*

designated for application to a particular debt, not just the portion which would pay off the debt."¹³²

The defendant in *Barnett Bank, N.A. v. Lipp*¹³³ presented three principal arguments for reversing plaintiff's final judgment against the bank. First, defendant asserted that a payee cannot "recover against a collecting bank which has allegedly failed to exercise due care in cashing a check bearing the forged endorsement of the payee."¹³⁴ The District Court of Appeal, Third District, quickly rejected this argument by finding that a payee is the beneficial owner of a check.¹³⁵ The bank next claimed that section 673.419(3) of the Florida Statutes¹³⁶ protected it from liability for conversion.¹³⁷ The Third District responded that section 673.419(3) does not relieve a defendant of liability for conversion if defendant failed to present evidence of the "reasonable commercial standards in the industry" with which it allegedly complied.¹³⁸ The court stated: "In light of appellant's failure to present evidence concerning the applicable standards of the banking industry, we cannot say, as a matter of law, that the jury erroneously determined that the appellant's blind reliance on the endorsement amounted to negligence."¹³⁹ Finally, the bank claimed that the forged signature of the payee was "effective" as to a collecting bank under section 673.405(1)(c).¹⁴⁰ Noting that the policy of the statute was to shift the risk of loss to the party better able to guard against forgery, the Third District held that there was no reason to shift the loss to the payee when the bank was in a superior position to prevent fraud.¹⁴¹

132. *Id.* at 179.

133. 364 So. 2d 28 (Fla. 3d DCA 1978).

134. *Id.* at 29.

135. The court cited as authority *Jett v. Lewis State Bank*, 277 So. 2d 37 (Fla. 1st DCA 1973) (beneficial ownership of check is in payee, therefore, payee may have a cause of action against a collecting bank for conversion of the check).

136. FLA. STAT. § 673.419(3) (1977). Section 673.419(3) provides as follows:

Subject to the provisions of this code concerning restrictive endorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

137. 364 So. 2d at 30.

138. *Id.*

139. *Id.* There was testimony to the effect that, notwithstanding the fact that the check was for \$7,000.00 and was one month old, no attempt was made by appellant's cashier to obtain the initials of a bank officer prior to cashing it. Moreover, the appellants failed to counter the appellee's argument to the jury that this was not a sound banking principle.

140. FLA. STAT. § 673.401(1)(c) (1977).

141. 364 So. 2d at 29-30. FLA. STAT. § 673.405 (1977) provides as follows: (1) An indorse-

II. NEGLIGENCE

The four elements necessary to sue for negligence are: (1) a defendant's legal duty to conform to the standard of conduct established by law for plaintiff's protection (the question of duty must, in the first instance, be determined by the court); (2) defendant's failure to conform to the standard of conduct (breach of duty); (3) the breach of duty must be a legal cause of harm; and (4) legally compensable harm (damages) suffered by plaintiff.¹⁴²

A. Legal Duties

Florida enacted a statute in 1949 imposing liability on dog owners for their dogs' bites even where the owners were unaware of their dogs' propensities to bite.¹⁴³ In *Flick v. Malino*,¹⁴⁴ the dog owned by defendant's deceased husband had bitten a three year-old visitor to the home. Interpreting the statute in *Flick*, the District Court of Appeal, First District, held that since there had never been a transfer of legal ownership of the dog from the dog's owner to the owner's wife, the wife was not subject to the statute. The common law liability for "failure to use reasonable care to protect [others] from a dog known to be dangerous on the land" still existed as to the wife, however.¹⁴⁵ Furthermore, the wife was not entitled to the statutory defense which exempts from liability owners who post prominent, easily readable warning signs.¹⁴⁶

*Marhefka v. Monte Carlo Mangement Corp.*¹⁴⁷ held that a hotel owner's duty to keep the hotel's premises in a reasonably safe condition extends beyond the hotel's premises to steps on other property if those steps provide the exclusive means of access to the ocean, and the facility represents an invitation to guests to use the steps for

ment by any person in the name of a named payee is effective if: (a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or (b) A person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or (c) An agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest. (2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

142. J. DOOLEY, MODERN TORT LAW § 3.03 (1977) [hereinafter cited as J. DOOLEY].

143. FLA. STAT. § 767.04 (1949).

144. 356 So. 2d 904 (Fla. 1st DCA 1978).

145. *Id.* at 905. It was uncontested that the dog owner's wife, Mrs. Malino, knew of the dog's temperament. Mrs. Malino had posted a "bad dog" sign which the child's mother had seen. *Id.*

146. *Id.*

147. 358 So. 2d 1171 (Fla. 3d DCA 1978).

that purpose. In reversing the dismissal of plaintiff's suit,¹⁴⁸ the court relied on the authority of *Shields v. Food Fair Stores*¹⁴⁹ which held that an owner's duty does not always end at the property line.

A county has no duty to maintain a private road, but by virtue of a Florida statute,¹⁵⁰ a private road may become public because of county maintenance and repair "continuously and uninterruptedly for four years." In *Continental Insurance Co. v. Belflower*,¹⁵¹ the District Court of Appeal, First District, reversed a judgment entered for plaintiff who had relied upon the statute. The court held that the evidence that the county commissioners had caused the road to be cut many years ago and that twice thereafter other commissioners had caused shell to be placed on the road for the convenience of hunters, was insufficient to show that the private road had become a public road.

The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. Common carriers have traditionally been held to a higher standard of conduct to protect those passengers entrusted to their care.¹⁵² In *Metropolitan Dade County v. Asusta*,¹⁵³ the defendant bus company appealed the denial of a requested instruction that its driver had no duty to wait for a passenger to sit down before putting the vehicle in motion. The District Court of Appeal, Third District, affirmed, stating that the requested instruction was not a proper statement of law. A sudden stop by a bus, *with no other circumstances given*, would *not* make out a prima facie case of negligence by the bus driver;¹⁵⁴ however, the fact that a passenger was not seated was a circumstance the jury could have considered as evidence of breach of the duty of care.

A private company can be held liable for an assault committed by a police officer who is off duty and acting as a security guard for the company. The fact that he is also a police officer does not automatically relieve the company of liability for the officer's acts.¹⁵⁵

148. Plaintiff had been injured when floating debris struck her as she was using the steps during high tide. *Id.* at 1172.

149. 106 So. 2d 90 (Fla. 3d DCA 1958).

150. FLA. STAT. § 95.361 (1977).

151. 355 So. 2d 840 (Fla. 1st DCA 1978). Plaintiff was damaged when his car struck a concrete slab off the surface of the narrow dirt road.

152. W. PROSSER, *supra* note 6, § 34, at 180.

153. 359 So. 2d 58 (Fla. 3d DCA 1978).

154. *Id.* at 60. *Accord*, *Nicholson v. City of St. Petersburg*, 163 So. 2d 775 (Fla. 2d DCA 1964); *Miami Transit Co. v. Ford*, 159 So. 2d 261 (Fla. 3d DCA 1964).

155. *McWain v. Greyhound Lines, Inc.*, 357 So. 2d 780, 781 (Fla. 3d DCA 1978) (quoting

Absent evidence of a special duty of an employer to guarantee the mechanical condition of the car lent to one of its salesmen for personal use, the dealer was held not liable for the injuries sustained when the car failed to stop at an intersection. In *Vecciarelli v. Johnson Ford, Inc.*,¹⁵⁶ the District Court of Appeal, Third District, declared: "In the absence of any evidence that the check of the . . . automobile was negligently conducted or that Johnson Ford knew or should have known of the defects claimed, there was no proof of actionable negligence."¹⁵⁷

Acts and omissions to act are factual questions and must be resolved by a fact finder.¹⁵⁸ In *Blythe v. Williams*,¹⁵⁹ plaintiff claimed a swing located on defendants' campgrounds was unsafe because it extended over an area of shallow water and no warnings were given as to that fact. Defendant obtained a summary judgment by contending that because plaintiff checked the depth of the water in some places he was precluded from recovering for injuries sustained while diving into the swimming hole from the swing. The District Court of Appeal, Third District, reversed, holding that reasonable persons could differ on these factual issues.¹⁶⁰

The plaintiff in *Wallace v. P.L. Dodge Memorial Hospital*,¹⁶¹ appealed a summary judgment, contending there was a genuine issue of material fact as to defendant hospital's negligent failure to provide adequate attendants to protect her as an invitee against a violent attack by one of its patients. The District Court of Appeal, Third District, agreed and reversed.

In *Gulf Life Insurance Co. v. McCabe*,¹⁶² plaintiff was attacked by an assailant when walking to her car in an enclosed parking garage. Her case was based upon a showing of previous assaults upon females working in the Gulf Life Tower, which were admitted into evidence as establishing constructive knowledge on the part of the owner and as evidence of inadequate security. Plaintiff re-

Annot., 55 A.L.R. 1197, 1198-99 (1928) (scope of powers and duties of police officers employed by private companies). Before the private company is held liable, the jury must determine the capacity in which the policeman was working when he committed the alleged assault.

156. 356 So. 2d 1258 (Fla. 3d DCA 1978).

157. *Id.* at 1260; see *Blanford v. Nourse*, 120 So. 2d 830 (Fla. 3d DCA 1960); *Lanville v. Glen Burnie Coach Lines, Inc.*, 195 A.2d 717 (Md. Ct. Spec. App. 1963).

158. J. DOOLEY, *supra* note 142, at § 3.03.

159. 356 So. 2d 334 (Fla. 4th DCA 1978).

160. *Id.* See also *Monroe v. Badanes*, 359 So. 2d 913 (Fla. 3d DCA 1978) (where plaintiff slipped and fell on an unlighted stairway of an apartment house owned by defendants, the court declared there were issues of material fact which had not been eliminated and reversed a summary judgment for the defendant).

161. 355 So. 2d 855 (Fla. 3d DCA 1978).

162. 363 So. 2d 846 (Fla. 1st DCA 1978).

covered a substantial verdict for several facial fractures she received from her assailant. The case implicitly held that the owner of an office building has a duty to protect its tenants from foreseeable assaults.¹⁶³ The \$150,000 jury verdict was upheld on appeal.

B. Premises Liability

Landowners have always been held to owe certain duties to those who come upon their land. Anachronistically, the scope of that duty in Florida still depends on whether the person is accorded the arbitrary, outcome-determinative label of trespasser, licensee or invitee.¹⁶⁴

In *Downtown Development Authority v. Snediker*,¹⁶⁵ the District Court of Appeal, Third District, reversed an award of damages given to a plaintiff who was injured when she tripped on a sidewalk. The court held that plaintiff had failed to present sufficient evidence to show that an autonomous bureaucratic body, distinct from the municipality, owed any duty to maintain the sidewalk.

An employer having work done on his premises by an independent contractor owes a duty to give a warning of, or to furnish protection against, latent or potential dangers of which he has actual or constructive knowledge.¹⁶⁶ If the employer engages the independent contractor to correct those same conditions, however, the independent contractor cannot recover for injuries sustained as a result of that condition.¹⁶⁷ A corporation had no duty, therefore, to warn a cleaning person about a dangerous patch of greasy substance in the hallway since she had been hired to clean the hallway.¹⁶⁸

Even if a condition of the land is proved dangerous by an injured plaintiff, defendant will not be held liable if the condition is obvious, or is made obvious to plaintiff.¹⁶⁹ In *Bucher v. Dade County*,¹⁷⁰ the District Court of Appeal, Third District, applied this

163. For other relevant cases, see *Commodore Cruise Line, Ltd. v. Kormendi*, 344 So. 2d 896 (Fla. 3d DCA 1977); *Rotbart v. Jordan Marsh Co.*, 305 So. 2d 255 (Fla. 3d DCA 1974); *Cooper v. IBI Security Serv.*, 281 So. 2d 524 (Fla. 3d DCA 1973); *Homan v. County of Dade*, 248 So. 2d 235 (Fla. 3d DCA 1971).

164. F. HARPER & F. JAMES, 2 THE LAW OF TORTS 1430-1533 (1956) [hereinafter cited as HARPER & JAMES].

165. 355 So. 2d 456 (Fla. 3d DCA 1978).

166. *McCarty v. Dade Div. of Am. Hosp. Supply*, 360 So. 2d 436, 437 (Fla. 3d DCA 1978).

167. *Id.*

168. *Id.*

169. 2 HARPER & JAMES, *supra* note 164, at 1491.

170. 354 So. 2d 89 (Fla. 3d DCA 1978).

principle. It held that a fifteen year-old boy should have been aware that the natural condition of a beach, a sloping incline, was an obvious danger. The court said that the condition was not "so dangerous that the county should have warned swimmers thereof."¹⁷¹ The county, therefore, was not liable for injuries which plaintiff sustained when he slipped on the incline.¹⁷²

A Canadian airline is under "no duty to go looking for possible perils on premises exclusively owned and controlled by the . . . government of Canada," according to the District Court of Appeal, First District.¹⁷³ Plaintiff in *Air Canada v. Smith*,¹⁷⁴ had tripped over a baggage cart at the airport. The government, and not the airline, had exclusive control over the area and owned the cart which caused the injury. The First District went on to hold that the danger was obvious and that no fault was shown on the part of the common carrier.¹⁷⁵

The same result was reached in *Kaufman v. A-One Bus Lines, Inc.*¹⁷⁶ The District Court of Appeal, Third District, held that a complaint alleging that the plaintiff was injured on premises to which he was taken on the tour, but which were owned by another defendant, was properly dismissed. Plaintiff's failure to allege that the bus line "had any right or duty to control, operate, maintain, or care for" such premises was apparently fatal. This result, however, is open to question because, taking the allegations of the complaint as true, the bus line "knew or reasonably should have known of the dangerous condition."¹⁷⁷ Given this circumstance, there should have been a duty to warn.¹⁷⁸

In fact, the District Court of Appeal, Second District, has held that a common carrier is under a duty to warn passengers of dangers that are reasonably foreseeable and which might cause harm. In *Werndli v. Greyhound Corp.*,¹⁷⁹ appellant and her child rode a Grey-

171. *Id.* at 91.

172. Plaintiff had been playing on the beach all morning when he slipped on the incline, fell head first into the water and fractured his neck, which caused permanent paralysis from the neck down. *Id.*

173. *Air Canada v. Smith*, 357 So. 2d 789, 791 (Fla. 1st DCA 1978).

174. *Id.*

175. The fact that the dangerous condition is on someone else's property, however, does not necessarily mean there is no duty to warn. For a criticism of the holding in this case, see 190 ACAD. FLA. TRIAL LAW. J. 18 (1978).

176. 363 So. 2d 61 (Fla. 3d DCA 1978).

177. *Id.* at 62.

178. See also *Marhefka v. Monte Carlo Management Corp.*, 358 So. 2d 1171 (Fla. 2d DCA 1978); 62 AM. JUR. 2d *Premises Liability* § 5 (1972).

179. 365 So. 2d 177 (Fla. 2d DCA 1978).

hound bus to Fort Myers, arriving at 4:15 a.m. The bus station was in a high crime area and was "darkened, closed, and locked."¹⁸⁰ Since the restrooms were not open, plaintiff left the station to use the facilities at a service station nearby. She was attacked and severely beaten by an unknown assailant. The trial court dismissed her suit against Greyhound, but the Second District reversed.

Greyhound maintains that any duty on its part terminated absolutely when appellant left its premises after completing her trip. We find it unnecessary to reach that point because Greyhound's duty arose and was breached at the time appellant purchased her ticket. A common carrier is under a duty to warn . . . especially . . . where the passenger would not . . . be likely to anticipate and apprehend the danger.¹⁸¹

An issue of first impression was decided in *Simmons v. Owens*.¹⁸² The court decided that where a building contractor negligently creates a latent defect in a building, he can be held liable to a remote purchaser. The court stated that the rights of the original purchaser could be exercised by the remote purchaser.

The District Court of Appeal, First District, declared:

We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where the defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy or recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of *anyone* who may foreseeably be endangered by their negligence. Prosser, *Torts*, p. 519 (2d ed. 1955). But this is for our Supreme Court to decide. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). We urge it to do so

The allegations of the complaint dismissed by the trial court are sufficient to state a cause of action. To hold otherwise would result in the anomaly of fault without liability and wrong without a remedy, contrary to our sense of justice and directly conflicting with the express mandate of the Florida Constitution, Declara-

180. *Id.* at 178.

181. *Id.*

182. 363 So. 2d 142 (Fla. 1st DCA 1978).

tion of Rights, that "every person for any injury done him . . . shall have remedy" ¹⁸³

The District Court of Appeal, First District, affirmed, without opinion, a summary judgment for the defense in *Gardner v. Jacksonville Electric Authority*.¹⁸⁴ In that case, a 2400-volt electric wire caused injuries to a man wandering through a privately owned wooded area. Judge Erwin argued in his dissent that the electric company knew trees were growing around the wires but had not trimmed the trees, that there was evidence that the "fuse disconnect" circuit breaker may have failed to operate properly and that the question of constructive knowledge was for the jury. He noted that several courts had found electric companies liable for damages caused when the device which should have cut off the continued energizing of a line was not properly operating.¹⁸⁵

A summary judgment for a defendant was reversed in *Schmidt v. Bowl America Florida, Inc.*¹⁸⁶ In *Schmidt*, plaintiff slipped on a marking crayon left on the floor in a bowling alley. The court said that "evidence that no inspection had been made during a particular time prior to an accident may warrant an inference that the exercise of reasonable care would have resulted in discovery."¹⁸⁷

Although previous Florida decisions were based upon the invitee-licensee distinction, the District Court of Appeal, Third District, in *Whitten v. Miami-Dade Water & Sewer Authority*,¹⁸⁸ relied instead upon the so called "fireman's rule" in barring recovery against the water plant operator. The "fireman's rule" is that a defendant who creates a risk of the type normally dealt with by firemen and which necessitates the fireman's presence on the premises is not liable to the fireman, except for willful negligence. The court, in applying the rationale of the "fireman's rule," held that

the same duty owed by the owner or occupant of premises to a policeman or fireman who is injured upon the premises while in the discharge of his professional duties likewise applies to a policeman or fireman whose injuries stem from the same discharge of duties but do not actually occur on the premises.¹⁸⁹

183. *Id.* at 143-44. The court urged extension of the duty of care owed to persons not in privity with the contractor. If the supreme court adopts this reasoning, the case would support the argument of plaintiffs in the accountants case discussed in text accompanying notes 230-237 *infra*.

184. 358 So. 2d 124 (Fla. 1st DCA 1978).

185. *Id.* at 125.

186. 358 So. 2d 1385 (Fla. 4th DCA 1978).

187. *Id.* at 1387.

188. 357 So. 2d 430 (Fla. 3d DCA 1978).

189. *Id.* at 432.

The court stated that it was not abandoning the licensee-invitee distinction for firemen who actually entered upon the premises since, for all practical purposes, the licensee concept "is no different from the 'discharge of duty' concept" except for the more widespread application of the latter.¹⁹⁰ The real reasons for limiting the liability of landowners to firemen may be the infrequency of visits by firemen and the unpredictability of the time and place of their visit. A duty to foresee their arrival and make premises reasonably safe for them all the time was thought to be a severe burden.¹⁹¹

In *Castillo v. Bickley*,¹⁹² the Supreme Court of Florida held that "the owner of a motor vehicle is not liable for injuries caused by the negligence of the repairman or serviceman with whom the vehicle has been left, so long as the owner does not exercise control over the injury-causing operation of the vehicle . . . and is not otherwise negligent."¹⁹³ In so deciding, the court receded from *Susco Car Rental System v. Leonard*.¹⁹⁴ The supreme court stated that an automobile owner rarely has authority and control over the vehicle once it is entrusted to a serviceman or repairman. Without control, he cannot "ensure the public safety until the vehicle is returned."¹⁹⁵ Injured persons are not without a remedy; they can look to the garage or service agency for protection for their losses. The court reasoned, therefore, that the policy arguments supporting the doctrine of respondeat superior were not valid.

Justice Adkins dissented, stating that the dangerous instrumentality doctrine was based, not upon respondeat superior, but upon the practical fact that an owner of a dangerous instrumentality should have to answer for misuse of it by someone using it with the owner's knowledge and consent.¹⁹⁶

Justice Boyd also dissented, writing:

The decision prevents innocent third parties from recovery from fully insured owners if damages are caused by a garage owner or his mechanic. As between a serviceman in control of the injury-causing operation of the vehicle and the vehicle's owner, I agree that the serviceman should be primarily liable. But where the

190. *Id.* at 433.

191. HARPER & JAMES, *supra* note 164, at § 27.14.

192. 363 So. 2d 792 (Fla. 1978).

193. *Id.* at 793.

194. 112 So. 2d 832 (Fla. 1959).

195. *Id.*

196. *But see* Fahey v. Raftery, 353 So. 2d 903, 905 (Fla. 4th DCA 1977) (citing Patrick v. Faircloth Buick, 185 So. 2d 522, 524 (Fla. 2d DCA 1966) ("The dangerous instrumentality doctrine . . . has always been grounded exclusively upon respondeat superior.")).

serviceman, for insolvency or lack of insurance, is unable to cover the loss, I think it is better that the owner of the dangerous instrumentality bear the loss rather than the innocent injured party.¹⁹⁷

In *Lubell v. Roman Spa, Inc.*,¹⁹⁸ the Supreme Court of Florida accepted jurisdiction based on conflict with *Slavin v. Kay*.¹⁹⁹ In *Lubell*, the District Court of Appeal, First District, had, in the supreme court's view, misapplied the *Slavin* rule. When a dangerous condition created by a contractor was not discoverable by inspection, *Slavin* held that the owner was relieved from liability for resulting injuries. In *Lubell*, however, the supreme court said there was evidence that the defect could have been discovered; and, therefore, the First District should not have disturbed the jury's determination that the spa, which owned the property where plaintiff was injured, was liable. Nor should the First District have reversed the denial of the spa's motion for a directed verdict in its indemnity action against the contractor, since the jury had found for the contractor on that issue as well.

C. *Res Ipsa Loquitur*

The Supreme Court of Florida has apparently halted the expansion of the doctrine of *res ipsa loquitur* in *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*²⁰⁰ Writing that the doctrine had "developed a judicial gloss which was never intended,"²⁰¹ the court, through Justice England, said the doctrine was of extremely limited applicability and should not be used to allow the development of inferences "not only as to the incident itself but also as to pre-incident acts, such as manufacture or production."²⁰²

In *Goodyear*, the District Courts of Appeal, First and Fourth Districts, had allowed the jury to be charged as to *res ipsa* in tire blowout suits against manufacturers, despite the fact that in both suits substantial evidence was presented to prove negligence in the manufacturing process.²⁰³ The supreme court rejected application of the doctrine stating that not only was the inference of negligence inappropriate because the facts were discoverable and provable, but

197. 363 So. 2d at 794. For a comment on the practical aspects of the problem, see 194 ACAD. FLA. TRIAL LAW. J. 6 (1978).

198. 362 So. 2d 922 (Fla. 1978).

199. 108 So. 2d 462 (Fla. 1959).

200. 358 So. 2d 1339 (Fla. 1978).

201. *Id.* at 1341.

202. *Id.* at 1341-42.

203. *Id.* at 1340.

also because plaintiffs failed to allege and prove the essential element of defendants' exclusive control over the injury-causing instrumentality.²⁰⁴

The court explained that the line of "exploding bottle" cases was not disturbed by the *Goodyear* decision since in those cases plaintiffs had satisfied the "showing of control" requirement. To the extent that other Florida cases conflicted with *Goodyear*, however, they were expressly disapproved.²⁰⁵

Goodyear's importance was demonstrated in two subsequent district court cases, wherein the refusal to give a *res ipsa* instruction was held appropriate.²⁰⁶

D. *Negligence Per Se and Building Inferences Upon Inferences*

In *Florida Freight Terminals, Inc. v. Cabanas*,²⁰⁷ the District Court of Appeal, Third District, held that a violation of a Federal Aviation Administration safety regulation was negligence per se. Applying the general rule that it is negligence per se to violate a statute passed by the legislature to protect a particular type of person from a particular type of injury,²⁰⁸ the Third District reversed the trial court's refusal to instruct the jury that it was negligence per se not to secure cargo by a tie-down of sufficient strength to eliminate the possibility of shifting under normally anticipated flight and ground conditions.

On the other hand, in *Levin v. Hanks*,²⁰⁹ a boat collision case, the District Court of Appeal, Fourth District, upheld a trial court's refusal to instruct the jury that a moving vessel is presumed to be at fault when, during daylight hours, it strikes an anchored vessel. Although under admiralty law such an instruction would have been proper, the court stated that the presumption did not apply under the peculiar factual circumstances.²¹⁰

In *Vance v. Miller*²¹¹ and *Roach v. Raubar*,²¹² the District Court

204. *Id.* at 1342.

205. *See id.* at 1343 n.12 for those cases.

206. *Beach v. Halifax Hosp. Dist.*, 360 So. 2d 114 (Fla. 1st DCA 1978) (where negligence has been apportioned at 90% to plaintiff and 10% to defendant, refusal to give *res ipsa* instruction appropriate); *Small v. Tomasello, Inc.*, 356 So. 2d 869 (Fla. 4th DCA 1978) (where circumstances do not establish that events would not occur in the absence of negligence, *res ipsa* doctrine is inapplicable).

207. 354 So. 2d 1222 (Fla. 3d DCA 1978).

208. *deJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198, 201 (Fla. 1973).

209. 356 So. 2d 21 (Fla. 4th DCA 1978).

210. The anchored vessel had willingly participated as a marker boat in a high speed ocean boat race. *Id.*

211. 360 So. 2d 1150 (Fla. 3d DCA 1978).

212. 362 So. 2d 84 (Fla. 3d DCA 1978).

of Appeal, Third District, succumbed to the analysis-stopping shibboleth prohibiting the stacking of "an inference upon another inference" in order to create liability. *Vance* involved a claim that defendant's car had hit plaintiff's minor son. Plaintiff appealed from a judgment notwithstanding the verdict. The evidence showed defendant to have been near where the child was injured, but no one identified defendant's car as the one which struck plaintiff's son. The Third District affirmed the judgment, stating the jury could not have inferred from the evidence presented that defendant had struck the child in order to infer that defendant had been negligent in striking the child. The court stated:

In the case at bar, a finding that the defendant's negligence in operating her vehicle was the proximate cause of the plaintiff's injuries would plainly require the stacking of inferences. While negligence may be inferred from known or established facts or circumstances, the ultimate conclusion cannot be conjectured from other inferences.²¹³

In *Roach*, the court reversed a directed verdict for the defendant. Plaintiff had sued to recover for injuries suffered when she fell on the steps of an apartment house owned and operated by defendant. Plaintiff testified that she was stepping up to the third step. Photographs showed that the third step was badly damaged, with large chunks broken from its lip. The court held erroneous the contention that liability predicated on these facts would be "an inference upon an inference." The first alleged inference was that the step was defective. The second inference was that plaintiff fell *because* the step was damaged. The Third District, however, disagreed that the defective condition of the step needed to be inferred. Proof of the defective condition of the step was sufficient to entitle the jury to infer liability.²¹⁴

E. *Rescue Doctrine*

In *Ryder Truck Rental, Inc. v. Korte*,²¹⁵ the District Court of Appeal, Fourth District, affirmed an award of damages to a policeman who injured his back while rescuing the victim of an accident caused by defendant. For the first time in Florida, the court considered the application of comparative negligence principles to the rescue doctrine. It held that a plaintiff who negligently performs a

213. 360 So. 2d at 1152.

214. 362 So. 2d at 84-85.

215. 357 So. 2d 228 (Fla. 4th DCA 1978).

rescue may recover only that portion of the damages he has sustained "as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."²¹⁶

Also for the first time, the court held that a professional rescuer, such as the plaintiff policeman, could recover under the rescue doctrine "when, during a rescue attempt, he is injured as the result of having performed an act or incurred a risk beyond the call of his normal duties" or when his injury results from a danger not reasonably foreseeable.²¹⁷ Whether or not the rescue "act" is beyond normal duties or unforeseeable is a question of fact. The factfinder's ruling, therefore, is not subject to reversal unless it is a clearly erroneous interpretation of the evidence.

In *State v. Simer*,²¹⁸ the District Court of Appeal, First District, reversed a decision finding the state, through its agent, a police officer, twenty-five percent liable for the injuries of a passer-by who attempted to assist the officer with an arrest. The officer had detained a driver for speeding and erratic driving. When the driver attacked the officer, plaintiff Simer stopped his car to assist the plainclothes officer and was asked to radio for help. After making the call, without further instructions from the officer, Simer tried to disable the driver's car by pulling out ignition wires. Unfortunately, while Simer was so engaged, the driver bolted from the officer's custody and escaped in his car, running over Simer in the process. After noting that foreseeability and legal cause are essential principles of negligence which must be alleged and proved, the court wrote:

While Special Investigator Eaton might be charged with notice that his well-intended civilian assistant would *possibly* leave his position of safety and engage in the unrequested act of attempting to disable Maloney's running car by standing in front of it and *might* thereby be run over by Maloney, who unexpectedly bolted from custody and made good his escape, we hold under the specific facts of this case that the series of events leading to Simer's unfortunate injuries were not "foreseeable" and, therefore, that the evidence was insufficient to support the jury's finding of negligence against the State.²¹⁹

216. *Id.* at 230. Here, since the record supported the trial judge's finding that plaintiff had not been negligent, apportionment of damages was unnecessary.

217. *Id.* at 231.

218. 363 So. 2d 357 (Fla. 1st DCA 1978).

219. *Id.* at 360. This holding was criticized on the basis that it is not necessary that the precise hazards or consequences encountered be foreseen in order to find legal cause; it is "only necessary that it was reasonable to expect that the act in question (in this case,

F. Legal Cause

In *Vining v. Avis Rent-A-Car Systems, Inc.*,²²⁰ the Supreme Court of Florida held that one who leaves the ignition key in his unlocked car in violation of section 316.097 of the Florida Statutes²²¹ is liable for the conduct of a thief who steals the car and injures someone while negligently operating the stolen vehicle. Avis had left one of its cars unattended in its airport parking lot, with the keys in the ignition, the door open and the car lights flashing. The car was stolen, and Vining was injured when the thief collided with him while negligently operating the vehicle. Recognizing that the reasonable man should foresee the theft of an automobile left unattended with the keys in the ignition in a high crime area, and the increased risk of injury to the general public using the highways should such a theft occur, the supreme court quashed the district court's holding that an intervening criminal act is by definition unforeseeable and breaks the chain of causation necessary to establish liability. If an act is foreseeable, whether criminal or not, the chain of causation is not broken and the original negligence may be a legal cause of the damage sustained. The Supreme Court of Florida later extended the *Vining* principle in *Schwartz v. American Home Assurance Co.*,²²² when it held that a car owner who left his keys, not in the ignition, but in the glove compartment, could be liable to an innocent bystander injured after a thief stole the auto. The court determined that a jury question existed as to whether the owner's failure to remove his keys from the car was the legal cause of the injuries sustained.

In *Angell v. F. Avanzini Lumber Co.*,²²³ the District Court of Appeal, Second District, reversed a dismissal of a wrongful death complaint. Angell sued F. Avanzini, a gun dealer, alleging that the dealer's employee had sold a gun to a woman who fatally shot Angell's decedent. The employee made the sale even *after* noting that the buyer was acting strangely and after calling the sheriff's office and being advised that she did not have to sell the woman a gun. The court held that such facts would subject defendant to liability. The saleswoman could have reasonably foreseen the consequences of a gun sale to a disturbed customer. The customer's intervening

releasing the violent man) might cause injury to plaintiff in one way or another." 194 ACAD. FLA. TRIAL LAW. J. 7 (1978).

220. 354 So. 2d 54 (Fla. 1978).

221. FLA. STAT. § 316.097 (1975) (renumbered *id.* § 316.1975 (1977)).

222. 360 So. 2d 383 (Fla. 1978).

223. 363 So. 2d 571 (Fla. 2d DCA 1978).

criminal act would not negate the existence of legal cause.

The District Court of Appeal, Fourth District, has interpreted section 767.04 of the Florida Statutes²²⁴ to hold that a dog owner will not be held liable in a dog bite case if the legal cause of the injury is another's intervening negligence. *Wendland v. Akers*²²⁵ applied that principle to a suit brought by an assistant bitten while she was helping the veterinarian draw blood from the dog's leg. The court reversed the trial court's refusal to direct a verdict for the defendant dog owners. On the facts, and absent active negligence by the owner, it held that the veterinarian was an independent contractor, solely responsible for the dog's actions while he had possession and control of the dog.

III. PROFESSIONAL MALPRACTICE

A. Attorneys

To recover in a negligence action against an attorney, a plaintiff generally must prove: (1) the attorney's employment; (2) his neglect of a reasonable duty,²²⁶ and (3) resulting loss.²²⁷

Because there was no showing of elements two and three above in *Adams, George & Wood v. Travelers Insurance Co.*,²²⁸ the District Court of Appeal, Third District, reversed the summary judgment in favor of Travelers. Travelers alleged that its attorneys negligently failed to consolidate two actions brought against it. The plaintiffs in the two actions were distinct insureds, but both suits arose from one fire in a restaurant insured by Travelers. The actions were both resolved adversely to Travelers and resulted in Travelers' having to satisfy two judgments which Travelers claimed were for the same property loss. The court held that a factual issue was raised with respect to whether the insured parties' interests in the property were the same. The court noted that a motion to consoli-

224. FLA. STAT. § 767.04 (Supp. 1978).

225. 356 So. 2d 368 (Fla. 4th DCA 1978).

226. The client may instruct the attorney to perform certain tasks or to act in a specified manner. The undertaking then becomes contractual in nature and the failure to perform results in virtual strict liability for any resulting injury. The basic rule is that when an attorney is specifically instructed by the client, he must follow those instructions with reasonable care and promptness or be liable for all damages proximately caused by his failure.

R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 218 (1977). See also *Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962); *Kartikes v. Demos*, 214 So. 2d 86 (Fla. 3d DCA 1968); *Solomon v. Meyer*, 116 So. 2d 37 (Fla. 3d DCA 1959).

227. *Adams, Georgia & Wood v. Travelers Ins. Co.*, 359 So. 2d 457, 458 (Fla. 3d DCA 1978).

228. *Id.*

date might not have been granted even if it had been made.²²⁹ Therefore, issues of material fact remained, and summary judgment was improper.

B. Accountants

In a case presently before the District Court of Appeal, Third District, plaintiff appellant seeks to have abolished the "privity" requirement in a negligence action against certified public accountants.²³⁰ The suit, brought by a limited partnership representing hundreds of public investors, grew out of a certified financial statement prepared by a national accounting firm for and about another public company.²³¹ After the public company's bankruptcy, plaintiff sued the certified public accountants for negligence, gross negligence and fraud, contending that the accountants had concealed the true financial status of the company in the financial statement which the plaintiff had relied upon to its detriment. At the close of plaintiff's case, the trial court directed a verdict because the complaint, lacking an allegation of privity, failed to state a cause of action.

The privity requirement in this precise context has not been evaluated by a Florida court since the supreme court, in *A. R. Moyer, Inc. v. Graham*,²³² apparently abolished the requirement. In *Moyer*, the court allowed a third party general contractor to recover for economic damages caused by an architect's negligent performance of a contractual duty, where the loss to the contractor was foreseeable.²³³ *Krutel v. Stolberg*,²³⁴ decided five years after *Moyer*, held for a plaintiff who purchased a substantial amount of a corporation's stock relying upon a financial statement which was "materially incorrect and contained substantial departures from the

229. *Id.* The consolidation of actions rests within the discretion of the court. FLA. R. CIV. P. 1.270.

230. Affirmed since this article was written, but pending on certiorari because in conflict with *Kovaleski v. Tallahassee Title Co.*, 363 So. 2d 1156 (Fla. 1st DCA 1978) (see discussion at note 278 below); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So. 2d 689 (Fla. 2d DCA 1979); and *Luciani v. High*, 372 So. 2d 530 (Fla. 4th DCA 1979); *Investors Tax Sheltered Real Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath*, 370 So. 2d 815 (Fla. 3d DCA 1979). Since one of the authors of this article represents the plaintiff in the above case, he wishes to point out that his comments in this section are not being made from a completely neutral corner.

231. The financial statement, on its face, showed "a solvent company with a sound financial position." Brief for Appellant at 8, *Investors Tax Sheltered Real Estate, Ltd. supra* (quoting from the statement).

232. 285 So. 2d 397 (Fla. 1973).

233. *Id.* at 402.

234. 356 So. 2d 1299 (Fla. 3d DCA 1978).

true assets and liabilities"²³⁵ The *Restatement of Torts*²³⁶ and recent decisions in other jurisdictions²³⁷ appear to support liability without privity.

C. Brokers

The District Court of Appeal, Fourth District, held that a broker's failure to deliver a purchase offer to a restaurant owner in time for her to accept it was actionable negligence.²³⁸

235. *Id.* at 1300.

236. RESTATEMENT OF TORTS § 552 (1938). Section 552 provides as follows:

One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by the reliance upon the information if

(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

The trial court, in *Investors Tax Sheltered Real Estate*, also held that "deceit" was required in the action for gross negligence. Plaintiff has appealed this ruling too. It argues that under Florida law, a plaintiff who lacks privity still can "recover upon 'a showing on the part of the plaintiff third party that the accountant had been guilty of gross negligence, or, having knowledge that the third party intended to rely upon the statements prepared by him, was guilty of fraud in connection therewith.'" Brief for Appellant at 16 (quoting *Canaveral Capital Corp. v. Bruce*, 214 So. 2d 505 (Fla. 3d DCA 1968) (citing *Investment Corp. v. Buchman*, 208 So. 2d 291 (Fla. 2d DCA 1968))). See also *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

237. See, e.g., *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs*, 455 F.2d 847 (4th Cir. 1972) (accountants owe duty to those whom they can expect to rely upon their report); *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (D.R.I. 1968) (expressing strong disapproval of privity requirement); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976) (where accountant knew state examiner would rely upon his work in appraising insurance company's solvency, accountant was liable to state examiner for malpractice); *Schwartz v. Greenfield, Stein & Weisinger*, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (Sup. Ct. 1977) (holding attorney liable in malpractice despite the absence of privity); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 833 (Tex. Ct. App. 1971) (accountant may be liable to third party who relies upon financial statements). See also *Simmons v. Owens*, 363 So. 2d 142 (Fla. 1st DCA 1978); *Barrett, Daffin & Figg, Inc. v. McCormick*, 362 So. 2d 966 (Fla. 1st DCA 1978) (engineer liable for certificates of inspection which a lender would foreseeably rely upon in making loans to builder. See also text accompanying nn. 182-183, *supra*).

In a recent article in *The Florida Bar Journal*, the author, a certified public accountant, recognized that "unlike the lawyer, an auditor's principal responsibility is not to his client, but to the third party users of financial statements who rely on his report." Slaten, *The Great Compromise Fails*, 51 FLA. BAR J. 665, 667 (1977).

238. *Devlyn v. Bomstein*, 354 So. 2d 404 (Fla. 4th DCA 1978). In *Morsey v. Green*, No. 78-1973 (5th Cir., filed _____), a case now on appeal to the Court of Appeals for the Fifth Circuit, plaintiffs argue that a private right of action for malpractice should be implied under

D. Medical Malpractice

Several 1978 Florida medical malpractice decisions involved the statute of limitations.²³⁹ One such case was *Almengor v. Dade County*.²⁴⁰ In that case, plaintiffs sued Jackson Memorial Hospital for malpractice, claiming their infant child had suffered serious brain damage because of negligent delivery and care. The District Court of Appeal, Third District, reversed a summary judgment for the defendant which had applied the then-applicable four year statute of limitations; it perceived a genuine factual issue as to when plaintiff was on notice.

The court held that it was erroneous to decide, as a matter of law, that signs of mental retardation and abnormal development put plaintiff on notice that the baby was injured during birth. There was evidence that the hospital nurse might have misled plaintiff as to the baby's true physical condition. There was also doubt that the doctors knew or should have known of the injury but failed to inform plaintiff. If resolved in plaintiff's favor, "non-disclosure resulting in successful concealment" would have tolled the running of the statute.²⁴²

the Florida real estate brokers statute for violation of the standards provided in that act. See FLA. STAT. § 475.25 (Supp. 1978).

239. FLA. STAT. § 95.11(4)(b) (Supp. 1978). This statute has been amended several times, and cases presently decided often are governed by an earlier version. Section 95.11(4)(b) provides as follows:

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health-care provider and persons in privity with the provider of health care. In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

A discussion of cases involving the medical mediation provisions of the Florida Medical Malpractice Act, FLA. STAT. §§ 768.40-.54 (1977), is beyond the scope of this article. For a discussion of the act, see Spence & Stillman, *The Medical Malpractice Reform Act of 1975: The Unanswered Issues of Carter v. Sparkman, 1978 Developments in Florida Law*, 33 U. MIAMI L. REV. 1155 (1979).

240. 359 So. 2d 892 (Fla. 3d DCA 1978).

241. FLA. STAT. § 95.11(4) (1969) (current version at *id.*, § 95.11(4)(b) (Supp. 1978)).

242. 359 So. 2d at 895. *Almengor* explains the leading case on this issue, *Nardone v.*

In *Brooks v. Cerrato*,²⁴³ the patient appealed an adverse final summary judgment. After first determining that the applicable statute provided for a two year period in which to sue,²⁴⁴ the court held that the existence of general factual issues mandated reversal.

The plaintiff in *Brooks* suffered from neurofibromas. After surgical removal of tumors in plaintiff's neck, she experienced pain and immobility of one arm. In February 1973, she believed the problems to be temporary, post-operative symptoms. She had no actual knowledge that the paralysis was permanent until August, 1973. The court held that a jury question was raised as to whether she should have made that discovery prior to June 27, 1973. If she should have known prior to that date, then her filing of the suit on June 27, 1975, would have been after the statute had run. Because of the physician's duty to disclose known facts,²⁴⁵ the evidence indicating affirmative misrepresentation by the doctor could have persuaded a jury of his failure to perform this duty, which would have tolled the statute.²⁴⁶

Even if a negligent diagnosis is made, plaintiff must exercise reasonable care to discover the negligence or the statute will run. In *MacMurray v. Board of Regents*,²⁴⁷ the District Court of Appeal, First District, recited the following facts:

- 1) The physicians at Shands Teaching Hospital negligently interpreted [plaintiff's] x-rays and tomograms as being normal;
- 2) if properly interpreted, the presence of Hodgkins Disease would have been known;
- 3) plaintiff was hospitalized at Orange Memorial Hospital where chest x-rays led to a prompt diagnosis of the existence of Hodgkins Disease, and that such condition was known to the plaintiff in December, 1973; and
- 4) in November, 1973, the plaintiff, through her husband, acquired possession and control over the Shands x-rays and tomograms, and retained them from November, 1973 until January, 1977, when the same were returned to defendant.²⁴⁸

Reynolds, 333 So. 2d 25 (Fla. 1976). *Nardone* was also relied upon in a subsequent decision on the same issue, *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47 (Fla. 3d DCA 1978).

243. 355 So. 2d 119 (Fla. 4th DCA), *cert. denied*, 361 So. 2d 831 (Fla. 1978).

244. FLA. STAT. § 95.11(6) (1973) (current version at *id.* § 95.11(4)(b) (Supp. 1978)). Plaintiff had argued that *id.* § 95.11(4) (Supp. 1974) applied, however, the court found no express legislative intent that it should be applied retroactively. The court rejected plaintiff's argument that the "saving clause" at *id.* § 95.022 (Supp. 1974) supplied the clear legislative intent. Rather, the court explained that § 95.022 only saved causes of action which were shortened by the amendments. 355 So. 2d at 120.

245. *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976).

246. 355 So. 2d at 120.

247. 362 So. 2d 969 (Fla. 1st DCA 1978).

248. *Id.* at 971.

The court reasoned that, although the abnormalities in the 1973 Shands x-rays were not specifically made known to plaintiff until they were examined by her experts in 1976, because they were under her control, an earlier and timely examination of them would have enabled her to present her claim within the time prescribed. Affirming the judgment in favor of defendants, the court quoted from an earlier Supreme Court of Florida decision: "[M]ere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the statute of limitations as to the party plaintiff."²⁴⁹

*Argonaut Insurance Co. v. Peralta*²⁵⁰ determined the limits on discovery in a malpractice action arising from unsuccessful cosmetic surgery. Plaintiff requested production of all of the doctor's medical records relating to silicone injections for a period of some eleven years preceeding the suit. In addition to holding the request burdensome and unreasonable, the District Court of Appeal, Third District, discussed the relationship of the doctor-patient privilege to persons not party to the suit. The court noted that when one brings a malpractice suit, he waives any claim of privilege he might have as to his own medical history. The medical records of strangers to the suit, however, are inviolate. "The question in medical malpractice is whether or not the doctor, in treating the plaintiff, used a standard of care commensurate with that used in the community and that question can be answered by utilizing other methods of proof than the invasion into medical records of strangers."²⁵¹ The court did not suggest any such methods.

Florida doctors may be liable for failure to treat as well as for negligent treatment. A circuit court in Broward County awarded a substantial verdict to two children in a malpractice action for the wrongful death of their mother despite the fact that she was an alcoholic who was divorced from the children's father, and did not have custody of the children.²⁵² Her current husband also received a substantial verdict even though they had had marital problems during their eight week marriage.

The basis of the claim was that the doctor and hospital stopped treating the decedent, even though meningitis had been diagnosed, once the doctor learned she had no money or insurance. The jury's verdict did not include punitive damages, but the substantial award

249. *Id.* (citing *Nardone v. Reynolds*, 333 So. 2d 25, 40 (Fla. 1976)).

250. 358 So. 2d 232 (Fla. 3d DCA 1978).

251. *Id.* at 233 (citing *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966)).

252. *Nobel v. Community Hosp.*, 187 ACAD. FLA. TRIAL LAW. J. 13 (1978) (Broward County, Fla. Cir. Ct. verdict Feb. 10, 1978).

of compensatory damages apparently resulted from expert testimony to the effect that the standard of care used by the physician was "shocking and incredibly callous."²⁵³

Whether a hospital has a duty of care to an apparent drug addict who was having seizures and who was a nonadmitted patient in the emergency room was held to present a jury question in *Hunt v. Palm Springs General Hospital*.²⁵⁴ The attending physician determined that the patient's condition was not critical,²⁵⁵ and the patient was moved from the emergency room into the hall, where he remained, allegedly unattended for several hours, until he was transferred to another hospital. The patient died from brain damage allegedly resulting from prolonged seizures.²⁵⁶ The issue of causation also raised a jury question; although the court acknowledged that the absence of causation would be rendered moot by the absence of duty, it also found causation to be a question for the jury. The District Court of Appeal, Third District, reversed the directed verdict and remanded for determination of the hospital's duty to the decedent.²⁵⁷

To the extent that malpractice is an action based on negligence, a breach of the duty "to exercise that degree of care — knowledge and skill ordinarily possessed and exercised by the average member of the profession practicing in his field"²⁵⁸ — comparative negligence²⁵⁹ may reduce the amount of recovery in a malpractice action.

In *Vandergrift v. Fort Pierce Memorial Hospital, Inc.*,²⁶⁰ the District Court of Appeal, Fourth District, upheld a jury verdict which found plaintiff ninety percent negligent in a malpractice action against a hospital for inadequate or improper treatment. Vandergrift did not seek assistance from the hospital until eight hours after becoming aware that he had the "bends" due to ascending too

253. *Id.*

254. 352 So. 2d 582 (Fla. 3d DCA 1977).

255. Plaintiff's decedent, the patient, owed the hospital for previous services. The hospital refused to admit him because of the debt, unless it was first determined by his physician that he was in critical condition. *Id.* at 583.

256. This was plaintiff's decedent's second trip to the hospital that night. His first visit followed his experiencing convulsions at home resulting from his not having on hand any of the medication which he had been taking for years and to which he was apparently addicted. His doctor had prescribed medicine by telephone after plaintiff's decedent was examined by a resident physician at the hospital. *Id.* at 583.

257. *Id.* at 584 (relying on *Parmeter v. Osteopathic Gen. Hosp.*, 196 So. 2d 505 (Fla. 3d DCA 1967)).

258. 2 J. DOOLEY, *supra* note 142, at § 34.12.

259. Comparative negligence was judicially established in Florida. *Jones v. Hoffman*, 272 So. 2d 529 (Fla. 4th DCA), *certified question answered*, 280 So. 2d 431 (Fla. 1973).

260. 354 So. 2d 398 (Fla. 4th DCA), *cert. denied*, 362 So. 2d 1057 (Fla. 1978).

rapidly after scuba diving.²⁶¹

In *Dawson v. Weems*,²⁶² the District Court of Appeal, Fourth District, reviewing the "captain of the ship" doctrine, held that a physician in general charge of a patient but not acting in concert with the doctors who conducted the injury-causing operation could not be vicariously liable for malpractice.²⁶³ There is a line of cases, however, which imposes vicarious liability on physicians when a common purpose exists.²⁶⁴

Although the court affirmed the directed verdict for the doctor above, the hospital was in a different posture. The hospital, in *Dawson*, claimed that there was no direct evidence that the decedent would have lived had fresh blood been supplied, rather than that from a blood bank. The Fourth District held, however, that evidence showing that decedent would have had a better chance of survival with fresh blood was sufficient to reverse a directed verdict in favor of the hospital.²⁶⁵ In another case arising from the same incident,²⁶⁶ an order granting plaintiff a new trial was upheld based upon the trial judge's broad discretion to grant a new trial even when there is substantial competent evidence to sustain the verdict.²⁶⁷

261. Apparently, the only treatment for the bends is a recompression chamber, and the hospital had none. The plaintiff testified that he was "not up to the long drive" to Gainesville, where it was recommended that he go for treatment. According to plaintiff, the hospital made no effort to find him a closer recompression chamber.

262. 352 So. 2d 1200 (Fla. 4th DCA 1977), *cert. denied*, 359 So. 2d 1221 (Fla. 1978).

263. *Id.* at 1202. The court applied the rule of *Dohr v. Smith*, 104 So. 2d 29 (Fla. 1958) (where doctors' responsibilities are not inextricably bound together, one is not vicariously liable for the malpractice of the other).

264. *See, e.g.*, *Hudson v. Weiland*, 150 Fla. 523, 8 So. 2d 37 (1942) (joint liability imposed where the acts of two or more physicians concur in producing a single injury, although there was no common duty, design or concerted action); *O'Grady v. Wickman*, 213 So. 2d 321 (Fla. 4th DCA 1968) (one physician is a joint tortfeasor with another and liable for his actions when common purpose exists).

265. 352 So. 2d at 1203. The plaintiff had fallen one story and landed on a wheelbarrow during a construction job. He was taken to the hospital and subsequently his right kidney was removed. The alleged negligence took place during the post operative period. The experts were not in agreement as to whether another operation should have been undertaken to find the cause of and remedy for the plaintiff's continued internal bleeding. The experts agreed that while using fresh blood transfusions might not have saved plaintiff, it would have increased his chances for survival. *Id.* For a discussion of tort liability of doctors and physicians in connection with organ or tissue transplants, see *Annot.*, 76 A.L.R.3d 890 (1977).

266. *Weems v. Dawson*, 352 So. 2d 1196 (Fla. 4th DCA 1977).

267. *Accord*, *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959); *Dubois Fence & Garden Co. v. Stevens*, 296 So. 2d 116 (Fla. 1st DCA), *cert. denied*, 302 So. 2d 765 (Fla. 1974).

E. Architects and Engineers

When an engineer delivers certificates of inspection in blank to a builder, he will be held to foresee that those certificates may be used to demonstrate the scope of work completed, upon which a lender would rely in making loans to the builder.²⁶⁸ In *Barrett, Daffin & Figg, Inc. v. McCormick*,²⁶⁹ a professional engineer employed by Barrett, Daffin & Figg appealed an adverse judgment in a suit brought by McCormick Mortgage Investors, purchasers of a construction loan issued to D-J Builders. For each disbursement under the loan, D-J Builders furnished McCormick with an inspection certificate carrying the signatures of both the engineer and the principal of D-J Builders.

While the engineer denied issuing any certificates on the particular project involved, he admitted, and the evidence demonstrated, that some surveying work had been done on the subject project by his firm. The principal of D-J Builders testified that the engineer had signed some certificates in blank and left them at his office.

After discovering that the office building was not completed in accordance with the inspection certificates, McCormick acquired the building at a foreclosure auction. Judgment was entered against the engineer and his firm for the total damages to McCormick. On appeal, the District Court of Appeal, First District, determined that the appellants' arguments, lack of privity and foreseeability, were meritless and affirmed the judgment below.²⁷⁰

Relying on *A.R. Moyer v. Graham*,²⁷¹ certain subcontractors cross-claimed against other subcontractors in *Montgomery Industries International, Inc. v. Southern Baptist Hospital, Inc.*,²⁷² to recover for damages allegedly sustained by defendant architects' refusal to alter their original plans for a disposal system which the subcontractors installed for the hospital.

The subcontractors alleged that the architects' refusal to change their plans in the manner the subcontractors deemed neces-

268. *Barret, Daffin & Figg, Inc. v. McCormick*, 362 So. 2d 966 (Fla. 1st DCA 1978).

269. *Id.*

270. *Id.* at 967 (citing *Vining v. Avis Rent-A-Car Sys., Inc.*, 354 So. 2d 54 (Fla. 1977) (if danger is foreseeable, then duty arises toward those who may be injured by such danger); *Nicholas v. Miami Burglar Alarm Co.*, 339 So. 2d 175 (Fla. 1976) (if intervening criminal act is foreseeable, the chain of causation is not broken and original negligence may be proximate cause of injury sustained); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973); *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932) (privity of contract not necessary to support action in tort for breach of duty implied by law)).

271. 285 So. 2d 397 (Fla. 1973); see discussion in text accompanying notes 91-92 *supra*.

272. 362 So. 2d 145 (Fla. 1st DCA 1978).

sary led them to alter the waste disposal system from the components specified in the architects' plans. When the hospital sued the subcontractors, architects and general contractors because of the malfunctioning system, the subcontractors filed a third-party complaint against the architects. The subcontractors alleged negligent preparation of the plans, negligent supervision of installation and negligent refusal to authorize the necessary changes.

The court indicated that it would not have hesitated to apply *Moyer* had the subcontractors alleged the "essential ingredient of negligence, proximate causation."²⁷³ Had the subcontractors alleged that they had built the system in accordance with the architects' plans, their complaint would not have been dismissed. The court stated, however, that "[t]here is nothing in *Moyer* . . . which holds a subcontractor may unilaterally alter an architect's plans and sue the architect when the resulting construction becomes deficient."²⁷⁴

An architect's duty of due care in submitting plans in conformance with local zoning ordinances²⁷⁵ is discharged when he reasonably relies upon his client's lawyer's legal advice concerning the nature of the applicable zoning classification. *Krestow v. Wooster*²⁷⁶ held an architect not negligent when plans he submitted did not conform to the local building and zoning ordinance, because "there can be no action against the architect in tort or contract if it later develops, as here, that the legal advice was wrong and the zoning classification is different from that represented by the lawyer."²⁷⁷

F. Abstractors

In *Kovaleski v. Tallahasee Title Co.*,²⁷⁸ the trial court had dismissed the plaintiff's complaint against an abstractor because the plaintiff was not in privity with the abstractor. Recognizing that *A.R. Moyer v. Graham*²⁷⁹ had destroyed the legal underpinning of any application of the privity concept, the District Court of Appeal, First District, reversed. It replaced privity with foreseeability as the proper test to be applied.

273. *Id.* at 146. The appropriate term is now "legal causation."

274. *Id.* For a discussion of the liability of architects and engineers to third parties, see 53 NOTRE DAME LAW. 306 (1977).

275. The law is clear that an architect owes a duty of due care to his client in arranging plans in conformance with zoning and building codes and similar local ordinances. *Robsol, Inc. v. Garris*, 358 So. 2d 865 (Fla. 3d DCA 1978).

276. 360 So. 2d 32 (Fla. 3d DCA 1978).

277. *Id.* at 33.

278. 363 So. 2d 1156 (Fla. 1st DCA 1978).

279. *Supra*, note 232.