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Torts

Scott A. Mager*

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Torts: 1995 Survey of Florida Law

Scott A. Mager*

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* Scott A. Mager leads the appellate group at Mager & Associates, P.A. He presently chairs the Appellate Practice Section, Publication Section, and Continuing Legal Education Section of the Academy of Florida Trial Lawyers. His firm concentrates in the area of appellate practice and litigation support in the state and federal courts. The author would like to extend his thanks to attorney Prince Albert Donnahoe, IV, Esq., an associate at Mager & Associates, P.A., for his hard work and devoted assistance to the research, writing and editing of this article. The author would also like to thank law clerks Glenn Siegel, Len Wilder, and Michael Wood for their assistance in the initial stages of this article. A special thanks goes to attorney Gary S. Gaffney, Esq., for his devoted editing and commentary.

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I. INTRODUCTION

The last year has been an explosive one in the tort arena. In lawyer advertising, "Went For It" went for it, but the Supreme Court of the United States did not. Defendants "discovered" more discovery from non-parties, and an expert's expertise was expertly blocked when plaintiffs were barred from seeking to obtain certain financial discovery from defendants' experts. With regard to the psychotherapist-patient privilege, we learned that just because you say it doesn't mean they get it. We were also educated on the "fees" ability of obtaining attorney's fees, whether or not you had a reservation. On bringing certain claims after they have previously been adjudicated, the "res" is history.

The "*Fabre* monster" reared its ugly head, but two state supreme court justices nearly stabbed it to death. The court took another bite out of dog owners and warned physicians once again about the "duty to warn." We learned that you don't always win with the "economic loss rule," and that you still need to make an "impact" to succeed in certain tort cases. Another court gave life to wrongful death cases involving a fetus. We were informed that the "misuse" absolute defense is absolutely dead in products liability cases. The Florida Department of Corrections learned that they won't get away with an escapee getting away. With regard to the seatbelt defense, we buckled down on buckling up, as *Bulldog* remained the big dog in town. "You got without having," as our supreme court eliminated the need for permanent injury to recover in tort. We were told that absolute immunity absolutely immunized a party in certain situations. Finding voluntary dismissal different from an adjudication on the merits, we were informed that just because you're done doesn't mean you're finished. Although lawyers are talented people, they were unable in contribution cases to make ten equal one hundred. Our supreme court stated that it is no longer fairly debatable that it is fairly debatable, and we saw insurance companies come out from hiding (behind defendants). We learned that you should not "prejudge" the "interest"ing prejudgment development, and courts expressed the vitality of implied covenants. We close with the punitive warning that you may be damaged if you damage others.

II. PERSONAL INJURY SOLICITATION: "WENT FOR IT" CAN'T GO FOR IT

Rules 4-7.4(b)(1) and 4-7.8(a) of the *Rules Regulating the Florida Bar* prohibit personal injury lawyers from engaging in targeted direct-mail

solicitation to victims or their relatives until at least thirty days following an accident or disaster.¹ The rules also prevent a lawyer from accepting a referral of a client that has been solicited in such a manner.² The Supreme Court of the United States in *Florida Bar v. Went For It, Inc.*³ upheld this restriction, finding that lawyer solicitation was commercial speech entitled only to limited First Amendment protection.⁴

The Court found that the restriction satisfied all three prongs of the intermediate scrutiny test.⁵ More particularly, the Court reasoned that 1) the Bar had a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers;⁶ 2) the harms targeted by the prohibition were real,

1. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2374 (1995). The rules at issue in *Florida Bar* prohibited lawyers from soliciting victims, or relatives of victims, by means of targeted direct-mail advertising for 30 days following a disaster or accepting a referral for a client that had been solicited in such a manner. R. REGULATING FLA. BAR 4-7.4, 4-7.8.

2. *Florida Bar*, 115 S. Ct. at 2374.

3. *Id.* In March of 1992, G. Stewart McHenry, an attorney, and his lawyer referral service, *Went For It, Inc.*, claimed that the restriction of their direct-mail campaign was a violation of the First and Fourteenth Amendments in their action for declaratory and injunctive relief. *Id.* Before trial, another Florida lawyer, John Blakely, was substituted in McHenry's place. *Id.* The district court entered summary judgment for the plaintiffs, and the Eleventh Circuit affirmed based upon *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), and its progeny. *Florida Bar*, 115 S. Ct. at 2374-75. The Court, however, noted that it was "disturbed that *Bates* and its progeny require[d] the decision' that it reached." *Id.* at 2375 (quoting *Florida Bar*, 21 F.3d 1038 (11th Cir. 1994)).

4. *Id.* In 1989, the Florida Bar completed a two-year study regarding the effects of lawyer advertising on public opinion and determined that changes to the rules governing lawyer solicitation were required. *Id.* at 2374. In 1990, the Supreme Court of Florida adopted the Bar's proposed amendments. *Id.* (citing *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar Advertising Issues*, 571 So. 2d 451 (Fla. 1990)).

5. *Florida Bar*, 115 S. Ct. at 2376-81. The three-prong test is taken from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *Florida Bar*, 115 S. Ct. at 2376. In *Central Hudson*, the Court stated that if commercial speech is not misleading and does not concern unlawful activity, then it may be freely regulated if: 1) the government asserts a substantial interest in support of regulating the commercial speech; 2) the government demonstrates that the restriction directly and materially advances that interest; and 3) the regulation is narrowly drawn. *Central Hudson*, 447 U.S. at 564-65.

6. The Court had "little trouble" finding a substantial interest for the Bar's regulation, citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), among others. *Florida Bar*, 115 S. Ct. at 2376.

demonstrable, and sufficient to justify restriction of such speech;⁷ and 3) the ban's scope was reasonably well-tailored to meet the stated objectives.⁸

The dissent⁹ asserted that the majority misapplied *Shapero v. Kentucky Bar Ass'n*¹⁰ and that the three-prong test of *Central Hudson* was not met.¹¹ It found the first prong was not satisfied because the *Shapero* case—which approved a similar form of advertising—was indistinguishable from the case at bar.¹² The dissent asserted the second prong of *Central Hudson* was *not* met either, in that the restriction on speech did not support the state's asserted interest in a direct and material way.¹³ Finally, according to the four justices, the third prong was not met because “the relationship between the Bar's interests and the means chosen to serve them [was] not a reasonable fit.”¹⁴

III. DISCOVERY

A. “What's Up Doc?”

Reiterating the general discovery rule of nondisclosure of the names of a private physician's patients who are not parties to the action, the First

7. The Court distinguished *Edenfeld v. Fane*, 113 S. Ct. 1792 (1993), finding that contrary to the 106-page study proffered in *Florida Bar*, the State Board of Accountancy in *Edenfeld* had presented no studies in support of its regulation. *Florida Bar*, 115 S. Ct. at 2377. In fact, the Court found “the only evidence in the record tended to ‘contradict[] rather than strengthe[n] the Board's submissions.’” *Id.* (quoting *Edenfeld*, 113 S. Ct. at 1801). Therefore, the Court invalidated the regulation banning in-person solicitation by C.P.A.'s. *Id.*

8. *Id.* at 2380. The 30-day waiting period was not overly restrictive and numerous alternatives exist to direct-mail solicitation in order for injured parties to become aware of legal representation. *Id.* However, the Court admitted it may have had greater difficulty in upholding the Florida Bar rules had the restriction not been limited to a brief period, and if other ways to learn about the availability of legal representation had not existed. *Florida Bar*, 115 S. Ct. at 2380.

9. The dissenting opinion was authored by Justice Kennedy, joined by Justices Stevens, Souter, and Ginsberg. *Id.* at 2381.

10. 486 U.S. 466 (1988).

11. *Florida Bar*, 115 S. Ct. at 2382-86.

12. *Id.* at 2382-83. The dissent's principal disagreement in this regard was based on the finding in *Shapero* that direct-mail advertising was not “overreaching and undue influence.” *Id.* at 2382.

13. *Id.* at 2383-84.

14. *Id.* at 2384. The dissent described the Florida Bar's rule as a “flat ban” which prohibited more speech than necessary to achieve the state's purported interest. *Florida Bar*, 115 S. Ct. at 2384.

District Court of Appeal in *Staman v. Lipman*¹⁵ held that non-party patients have a privacy interest in not having their names revealed in a medical malpractice action.¹⁶ The court reasoned that the names of the non-party patients of the private physician are not relevant to 1) whether the defendant physician obtained informed consent from the plaintiff or 2) whether he deviated from the community standard of care while treating the plaintiff.¹⁷ In refusing to allow discovery of the doctor's sign-in logs in *Staman*, the court distinguished *Big Son Health Care Systems, Inc. v. Prescott*,¹⁸ on the basis that the discovery of hospital records (i.e., emergency room sign-in records) in that case were subject to limited disclosure by statute.¹⁹

Interestingly, the Supreme Court of Florida, in *Amente v. Newman*,²⁰ held *Florida Statutes* section 455.241(2) *inapplicable* to requests for complete medical records, as long as those medical records are properly redacted so as to protect the patient's identity.²¹ The court found no violation of the patients' rights of privacy where all identifying information

15. 641 So. 2d 453 (Fla. 1st Dist. Ct. App. 1994). *Staman* concerned sign-in logs from a physician's private office, where disclosure of the patients' names would not only violate those non-party patients' privacy interests but allegedly would cause irreparable injury to the physician's professional reputation. *Id.* at 455.

16. *Id.*

17. *Id.*

18. 582 So. 2d 756, 758 (Fla. 5th Dist. Ct. App. 1991) (holding hospital sign-in logs containing limited information are discoverable because patients listed on them have no reasonable expectation of privacy with respect to the logs since any other patient who signs in could view the names of patients who signed previously).

19. *Staman*, 641 So. 2d at 454-55 (citing *Prescott*, 582 So. 2d at 758). Chief Judge Zehmer dissented, asserting that there was no privacy interest in allowing disclosure of the names appearing on the "sign-in" log, as they were "open and available for inspection by all persons who signed in at the doctor's office on a given day." *Id.* at 455 (Zehmer, J., dissenting).

20. 653 So. 2d 1030 (Fla. 1995).

21. *Id.* at 1032

was eliminated,²² but conceded that there may be circumstances where the privacy of one's medical records would be constitutionally protected.²³

22. *Id.* at 1033. The court approved *Amisub, Inc. v. Kemper*, 543 So. 2d 470 (Fla. 4th Dist. Ct. App. 1989), and *Ventimiglia ex rel. Ventimiglia v. Moffit*, 502 So. 2d 14 (Fla. 4th Dist. Ct. App. 1986), but expressly disapproved the following cases: *Leikensohn v. Cornwell*, 434 So. 2d 1030, 1030-31 (Fla. 2d Dist. Ct. App. 1983) (holding medical malpractice defendant could not be compelled to answer interrogatory which requested non-party patient's initials, date of surgery, and name of hospital where surgery was performed); *North Miami Gen. Hosp. v. Royal Palm Beach Colony, Inc.*, 397 So. 2d 1033, 1035 (Fla. 3d Dist. Ct. App. 1981) (holding hospital was not required to answer interrogatory concerning hospitalization records of patients not involved in the suit because this would "impermissibly compromise their right to the confidentiality of their medical records"); *Teperson v. Donato*, 371 So. 2d 703, 704 (Fla. 3d Dist. Ct. App. 1979) (holding order requiring production of non-parties' medical records was error because the question of medical malpractice is whether the doctor used a standard of care commensurate with that used in the community, and this question can be answered by methods other than invading the medical records of strangers); and *Argonaut Ins. Co. v. Peralta*, 358 So. 2d 232, 233 (Fla. 3d Dist. Ct. App.) (holding order requiring production of medical records and photographs of non-parties was in error because "to permit a party to inject into the public record medical information of a stranger to the suit, under the guise that it has a bearing on the competency of the doctor, would be unconscionable"), *cert. denied*, 364 So. 2d 889 (Fla. 1978).

23. *Amente*, 653 So. 2d at 1033. The impact of this decision is evident in *Bassette v. Health Management Resources Corp.*, 20 Fla. L. Weekly D1938 (Fla. 2d Dist. Ct. App. Aug. 23, 1995). In this case, the plaintiff alleged she suffered physical and psychological injuries from the purchase and consumption of a powdered diet food product. Thereafter, the respondent, Health Management, sought and was granted non-party discovery of the medical records of Dr. Bassette, the father of the plaintiff, on the basis of its assertion that such discovery would be useful in confirming whether there is a history of depression or other mental illnesses in plaintiff's family. *Id.* at D1938. The Second District Court of Appeal held that "[j]ust because one family member files a lawsuit that places her medical condition at issue does not mean that the medical history of her entire, or even immediate family, becomes relevant for discovery purposes." *Id.* For another case addressing the issue of the disclosure of a non-party's medical records, see *In re Fink*, 876 F.2d 84, 85 (11th Cir. 1989) (applying Florida law in granting writ of mandamus to prohibit the discovery of medical records of non-parties, also stating that "[t]he Florida courts have consistently refused to permit discovery of the medical records of non-parties to an action"); *accord Dierick v. Cottage Hosp. Corp.*, 393 N.W.2d 564, 567 (Mich. Ct. App. 1986) (stating that although medical records relating to the patient's siblings might have been relevant to the defendant's theory of a genetically transmitted defect, the records were privileged and not subject to discovery).

B. *A Prescription for Compulsion*

A plaintiff can be compelled to sign, execute, and deliver medical authorization forms to the defendant so as to allow the defendant to directly obtain the plaintiff's out-of-state medical records. In *Rojas v. Ryder Truck Rental, Inc.*,²⁴ the plaintiffs, residents of Massachusetts, sustained injuries in an auto accident that occurred in Florida.²⁵ The plaintiffs filed suit seeking damages for their injuries and for aggravation of other previously existing medical conditions.²⁶ When the defendant was unsuccessful in obtaining discovery of the plaintiffs' Massachusetts medical records, they petitioned the court to compel such discovery.²⁷ The court's ruling required the plaintiff to execute a blank medical authorization form, without requiring the defendants to institute a separate action in Massachusetts.²⁸ The court apparently treated the Massachusetts medical providers like Florida residents, reasoning that this discovery method provided the most practical and least burdensome method for obtaining the records, in that neither party should be placed in a different position or be prejudiced just because a medical facility is located out-of-state.²⁹ The court also noted that the out-of-state medical records requested by the defendants were "non-

24. 641 So. 2d 855 (Fla. 1994).

25. *Id.* at 856.

26. *Id.* During discovery, the defendants attempted to obtain the plaintiffs' medical records using subpoenas filed pursuant to rule 1.351 of the *Florida Rules of Civil Procedure*. *Id.* However, the medical facilities in Massachusetts, where the plaintiffs were treated, refused to supply the records. *Id.*

27. *Rojas*, 641 So. 2d at 856.

28. *Id.* at 857.

29. *Id.* The court stated that "[i]t makes no sense to impose a more costly and time-consuming discovery process on the seeking party solely because the medical providers are located out-of-state. The rules . . . do not prohibit judges from using their discretion to fashion an appropriate remedy to obtain out-of-state records." *Id.*

privileged, potentially relevant, and discoverable documents.”³⁰ In so holding the court harmonized *Rojas* with *Johnston v. Donnelly*³¹ and *Reinhardt v. Northside Motors Inc.*³²

C. *An Expert’s Expertise Expertly Protected*

Finding oppressive and burdensome the discovery relating to independent medical examinations performed by an expert, the Third District Court of Appeal in *Syken v. Elkins*³³ prohibited discovery of information relating to 1) the defendant expert’s income amount received from testifying, as well as 2) the total number of independent medical examination performed in this regard.³⁴ During discovery in *Syken*, the plaintiff’s counsel requested that the defendant’s expert witness produce documentation of the income the expert earned from independent medical examinations since January 1, 1990.³⁵ The court found that “[t]he production of the information ordered . . . causes annoyance and embarrassment, while providing little useful information”³⁶ and, therefore, discovery could be limited.³⁷ Although recognizing conflict with prior decisions and other district courts, the court

30. *Id.* The supreme court added that it made no sense to burden the seeking party with a discovery process which requires more time and money just because the medical providers are out-of-state residents. *Rojas*, 641 So. 2d at 857; *accord* *Kennedo v. U.S.*, No. CV-94-2552, 1995 WL 428660, at *3 (E.D.N.Y. July 6, 1995) (holding it was inappropriate for plaintiff’s attorney to interview treating psychiatrist employed by medical negligence defendant without defendant’s consent).

31. 581 So. 2d 909 (Fla. 2d Dist. Ct. App. 1991) (holding execution of a blanket medical authorization release will not allow for disclosure of medical records).

32. 479 So. 2d 240 (Fla. 4th Dist. Ct. App. 1985) (denying request for execution of a medical release where the requesting party had made no known attempts to get the medical records by any other means). One wonders whether a party may use this case in other ways for the purpose of bypassing the requirements of another state’s regulations.

33. 644 So. 2d 539 (Fla. 3d Dist. Ct. App. 1994).

34. *Id.* at 544-45.

35. *Id.* at 541. Apparently, the plaintiff’s counsel sought these documents in an effort to demonstrate the bias of defendant’s expert witness.

36. *Id.* at 545.

37. *Id.* Discovery of relevant, non-privileged information may be limited or prohibited in order to prevent annoyance, embarrassment, oppression, or undue burden or expense. FLA. R. CIV. P. 1.280(c), 1.410(b), 1.410(d)(1); *see also* *South Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. 3d Dist. Ct. App. 1985); *cf.* *Crandall v. Michaud*, 603 So. 2d 637, 639-40 (Fla. 4th Dist. Ct. App. 1992) (limiting the holding to its facts, the court said an independent medical examining doctor was not required to reveal the reports of medical examinations of patients other than plaintiff, as such disclosure was unduly burdensome in comparison with the benefit to the plaintiff).

established new guidelines³⁸ regarding discovery of an opposing medical expert for impeachment purposes.³⁹

38. *Syken*, 644 So. 2d at 546. Under the new guidelines, discovery of an opposing medical expert (for impeachment) is limited by the following criteria:

1. The medical expert may be deposed either orally or by written deposition.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
6. The production of expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
7. The patient's privacy must be observed.
8. An expert may not be compelled to compile or produce nonexistent documents.

Id.

39. *Id.* at 544-45. The court noted support for its conclusion. *Id.* at 544; *see* LeJeune v. Aikin, 624 So. 2d 788, 789 (Fla. 3d Dist. Ct. App. 1993) (Schwartz, C.J., concurring specially); *Trend South, Inc. v. Antomarchy*, 623 So. 2d 815, 816 (Fla. 3d Dist. Ct. App.) (Jorgenson, J., dissenting) (finding that the trial court's order compelling expert witness to provide information on tax returns and other sources of income was an unreasonable "fishing expedition"), *review denied*, 630 So. 2d 1103 (Fla. 1993); *see also Ex parte Morris*, 530 So. 2d 785, 787 (Ala. 1988); *Allen v. Superior Court of Contra Costa County*, 198 Cal. Rptr. 737, 741 (Ct. App. 1984) (explaining that lower court abused its discretion when it required medical expert to produce documents that may have been obtained through less intrusive means); *Jones v. Bordman*, 759 P.2d 953, 964 (Kan. 1988) (stating that if sole purpose of discovery request is to obtain evidence which could impeach witness' veracity, then information is not discoverable, especially when party could have acquired evidence through less obtrusive means); *Ede v. Atrium S. OB-GYN, Inc.*, 642 N.E.2d 365, 368 (Ohio 1994) (holding evidence of common insurance interests among defendant and expert witness is sufficiently probative of expert's bias to outweigh any prejudice evidence might cause); *Mohn v. Hahnemann Medical College & Hosp.*, 515 A.2d 920, 924 (Pa. Super. Ct. 1986); *Russell v. Young*, 452 S.W.2d 434, 435 (Tex. 1970) (reasoning that non-party witness' records are not discoverable prior to trial if sought for purposes of impeaching witness).

D. *Just Because I Said It Doesn't Mean You Get It*

A party's right to invoke the psychotherapist-patient privilege does not necessarily terminate because others are aware that the party was receiving treatment.⁴⁰ In *Yarborough v. Lewis*,⁴¹ the Second District Court of Appeal found the defendant's right to invoke the psychotherapist-patient privilege was protected, notwithstanding that plaintiff admitted during a deposition that his family, physician, associates, office staff, and some friends were aware of his hospitalization.⁴² The court distinguished *H.J.M., M.D., P.A. v. B.R.C. & R.H.C.*,⁴³ a case that found a waiver can occur through disclosure, finding it not to be controlling where a party consistently and frequently asserted the privilege prior to complying with any court order.⁴⁴

E. *You Can't Party on a Non-party*

The Department of Insurance is not considered a "defendant" for purposes of service under rule 1.070 of the *Florida Rules of Civil Proce-*

40. *Yarborough v. Lewis*, 652 So. 2d 834 (Fla. 2d Dist. Ct. App. 1994). *But see* *Nelson v. Womble*, 657 So. 2d 1221, 1222 (Fla. 5th Dist. Ct. App. 1995) (holding that there is no privilege for discovery of psychological records where mental and emotional condition is at issue); *Castillo-Plaza, M.D. v. Green*, 655 So. 2d 197, 200 (Fla. 3d Dist. Ct. App. 1995) (explaining statutory privilege of doctor-patient confidentiality does not apply in a medical negligence action where a health care provider is or reasonably expects to be named as a defendant). The *Castillo-Plaza* court reasoned that even if the statutory privilege under § 455.241(2) applied, the trial court could not preclude *ex parte* conversations between defense counsel and the plaintiff's non-party treating physician on unprivileged subjects by restricting counsel to formal discovery. *Castillo-Plaza*, 655 So. 2d at 202.

41. 652 So. 2d 834 (Fla. 2d Dist. Ct. App. 1994).

42. *Id.* at 835. In *Yarborough*, the defendant was being sued for medical malpractice arising out of a surgery. The plaintiff never alleged that the defendant's negligence or failure to obtain the patient's informed consent was the result of the defendant's impairment due to drugs or alcohol. Nevertheless, the plaintiff attempted to obtain any information relating to defendant's drug and alcohol abuse through interrogatories and production requests. During the defendant's deposition, he admitted having been treated at a medical facility for alcohol use for one month in 1991. *Id.* at 834.

43. 603 So. 2d 1331 (Fla. 1st Dist. Ct. App.), *review denied*, 613 So. 2d 834 (Fla. 1992).

44. *Yarborough*, 652 So. 2d at 835. In *H.J.M.*, the defendant admitted to participating in a substance abuse program while being deposed. *H.J.M.*, 603 So. 2d at 1332. The First District Court of Appeal concluded the defendant had "effectively waived the psychotherapist-patient privilege" because he provided part of the information ordered disclosed by the court before he raised any objection to such an order. *Id.* at 1334.

dure. In *Turner v. Gallagher*,⁴⁵ the court defined “defendant” as “a party named in a lawsuit against whom some type of relief or recovery is sought or who claims an interest adverse to the plaintiff.”⁴⁶ Since the Department of Insurance in *Turner* was not named as a “defendant,” it did not have to be served with process within 120 days of the filing of the initial complaint.⁴⁷ The court also found that chapter 768 does not require the Department of Insurance to be made a “party” to an action, presumably because relief in such cases is not sought or obtained from the Department.⁴⁸

IV. OFFER OF JUDGMENT & ATTORNEY’S FEES

Originally, there were two statutory sections and one rule governing a party’s right to obtain an award of attorney’s fees from a rejection of an offer to settle: 1) section 768.79,⁴⁹ 2) section 45.061,⁵⁰ and 3) rule 1.4-42.⁵¹

The defendant who files an “offer of judgment” under section 45.061 which is not accepted within thirty days⁵² may recover attorney’s fees if the judgment is of no liability⁵³ or at least 25% less than the offer.⁵⁴ The

45. 640 So. 2d 120 (Fla. 5th Dist. Ct. App. 1994).

46. *Id.* at 121. The defendant, Sheriff Walter J. Gallagher, moved to dismiss the plaintiff’s complaint, alleging they had failed to serve the Department of Insurance within 120 days after filing of the complaint, as required by § 768.28(6)(a) of the *Florida Statutes*. *Id.*

47. *Id.* at 121-22. The Fifth District Court of Appeal certified conflict with the First District Court of Appeal, which decided *Austin v. Gaylord*, 603 So. 2d 66 (Fla. 1st Dist. Ct. App. 1992).

48. *Turner*, 640 So. 2d at 121-22. The court concluded that merely serving someone with process does not make them a defendant, and even a strict application of the 120-day rule could not make it applicable to an entity that is not a “defendant.” *Id.* at 123.

49. FLA. STAT. § 768.79 (1993), entitled “Offer of Judgment and Demand for Judgment.”

50. FLA. STAT. § 45.061 (1993), entitled “Offers of Settlement.”

51. FLA. R. CIV. P. 1.442. Rule 1442 was repealed in 1992, and parties are now directed to “comply with the procedure set forth in section 768.69 of the *Florida Statutes* (1991).” *Id.*; see also *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992) (adopting § 768.79 of the *Florida Statutes* as the rule).

52. *Cf. Puleo v. Knealing*, 654 So. 2d 148, 149-50 (Fla. 4th Dist. Ct. App. 1995) (applying the enlargement of time set forth for court-ordered mediation in § 44.102 of the *Florida Statutes*, but certifying the question in light of *Timmons* of whether § 44.102 represented an unconstitutional intrusion into the rule-making authority of the supreme court).

53. *Timmons*, 608 So. 2d at 1. In *State Farm Mutual Automobile Insurance Co. v. Malmberg*, 639 So. 2d 615 (Fla. 1994), the Malmbergs sued the defendant, State Farm, to

amount awarded is set off against the plaintiff's award.⁵⁵ If the fees and costs exceed the amount awarded to the plaintiff, the court will enter a judgment for the defendant less the amount of plaintiff's award.⁵⁶ Correspondingly, the plaintiff may receive attorney's fees if its "demand for judgment" under section 768.79 is not accepted within thirty days and it recovers at least 25% more than the demand.⁵⁷ A court may deny such an award if the offer was made in bad faith.

The two statutes differ in their application. A party may avail itself of section 768.79 of the *Florida Statutes* and secure an award of attorney's fees.⁵⁸ An award of attorney's fees under section 768.79 does not depend on the "reasonableness" of the rejection.⁵⁹ Once the requirements of section 768.79 have been met, the offering party can be denied attorney's fees only if the offer made was a "bad faith" offer.⁶⁰ The nature, validity, and enforceability of an offer are factors to consider when deciding whether the offer was made in good faith.⁶¹

Contrary to section 768.79, section 45.061 allows a party to collect attorney's fees after the court has made an express finding on the record that the rejection of the offer was unreasonable.⁶² A defense verdict, under

recover damages under their uninsured motorist coverage. *Id.* at 615. After the Malmbergs rejected State Farm's offer to settle, the case went to trial, and the jury returned a verdict for State Farm. *Id.* at 616. Although the court agreed with the district court's finding that the statutory presumption of unreasonable rejection is not conclusive, it found no support either in § 45.061 of the *Florida Statutes* or *Timmons* for the proposition that the presumption should not apply to defendants' verdicts. *Malmberg*, 639 So. 2d at 616. The court in *Malmberg* noted that § 768.79 grants defendants attorney's fees only on policies issued or renewed after October 1, 1990, thus finding it inapplicable to the Malmberg's 1987 accident. *Id.* *But see* *Pickett v. Tequesta Dev. Co.*, 639 So. 2d 1133, 1134 (Fla. 5th Dist. Ct. App. 1994) (holding pre-amendment version of § 768.79, which applied to these plaintiffs, denied a defendant an award of fees where the judgment was of no liability).

54. *Malmberg*, 639 So. 2d at 616.

55. FLA. STAT. § 45.061 (1993).

56. *Id.*

57. *Id.*

58. *Accord* *Baker Protective Servs. v. F.P. Inc.*, 659 So. 2d 1120 (Fla. 3d Dist. Ct. App. 1995).

59. FLA. STAT. § 768.79 (1993). The prerequisites of § 768.79 are a finding of no liability and a judgment obtained by the plaintiff that is at least 25% less than the defendant's offer of judgment. *Id.*

60. A court may not deny attorney's fees on the basis of the reasonableness of the rejection. *Government Employee's Ins. Co. v. Thompson*, 641 So. 2d 189, 190 (Fla. 2d Dist. Ct. App. 1994).

61. *Id.*

62. FLA. STAT. § 45.061 (1993).

section 45.061, creates a rebuttable presumption that the plaintiff must have unreasonably rejected the defendant's previous offer of judgment.⁶³ The presumption of an unreasonable rejection present in *Florida Statutes* section 45.061⁶⁴ applies even when there is a verdict for the plaintiff. The court's holding in *Malmberg*⁶⁵ makes clear that the unreasonable rejection presumption applies to defendants' verdicts as well as judgments for plaintiffs.⁶⁶

A. *The "Res" Is History*

A defendant who prevails on a motion for summary judgment based on the doctrine of res judicata is entitled to attorney's fees pursuant to *Florida Statutes*. In *Olson v. Potter*,⁶⁷ the Second District Court of Appeal determined that the plaintiffs failed to plead any justiciable issue of law or fact because they attempted to litigate issues which had previously been determined by summary judgment.⁶⁸ The court thus awarded attorney's fees pursuant to section 57.105 of the *Florida Statutes*.⁶⁹

63. *Henson v. Haslam*, 644 So. 2d 1031, 1032 (Fla. 2d Dist. Ct. App. 1994). The court remanded for express findings that the plaintiff's rejection was "reasonable," thus rebutting the presumption that the rejection is unreasonable when there is a verdict for the defendant. *Id.*; see also *Malmberg*, 639 So. 2d at 616 (holding that the presumption of an unreasonable rejection, present in § 45.061, applies even when there is a verdict for the defendant).

64. FLA. STAT. § 45.061 (1993). Subsection (2) provides, in pertinent part:

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected.

Id.

65. *Malmberg*, 639 So. 2d at 616; see also *Timmons*, 608 So. 2d at 1.

66. Section 768.79 of the *Florida Statutes* which allows prevailing defendants to receive attorney's fees, applies only to policies issued after § 768.79 was amended on October 1, 1990. FLA. STAT. § 768.79 (1993).

67. 650 So. 2d 635 (Fla. 2d Dist. Ct. App. 1995).

68. *Id.* at 637.

69. *Id.* Section 57.105 allows the prevailing party to collect attorney's fees when no justiciable issue of either law or fact is raised by either the complaint or defense of the losing party. *Id.*; cf. *Skubal v. Cooley*, 650 So. 2d 169, 170 (Fla. 4th Dist. Ct. App. 1995) (holding that prevailing party entitled to fees under § 772.11 where plaintiff's claim lacked substantial factual or legal support). As a result, it is not necessary to find a "complete absence" of legal or factual support as provided in § 57.105. *Id.*

B. *Sometimes It's "Fees" able to Get a Table Even without a Reservation*

In *Amlan v. Detroit Diesel Corp.*⁷⁰ and *Wyatt v. State*,⁷¹ the Fourth District Court of Appeal reiterated the rule that, where you can meet the "independent and collateral" test, you may proceed to recover on certain motions, even if a notice of appeal has been filed.⁷² Determining that motions to assess fees and costs as a sanction for discovery violations is a collateral and independent claim, the Fourth District Court of Appeal reiterated that a trial court has continuing jurisdiction to entertain a post-trial motion once a notice of appeal is filed.⁷³ There may even be times where you can secure fees upon a motion made after judgment.⁷⁴

C. *Operation Lodestar*

Agreeing with the Third⁷⁵ and Fourth⁷⁶ District Courts of Appeal, the Supreme Court of Florida, in *Searcy, Denney, Scarola, Barnhart & Shipley*,

70. 651 So. 2d 701 (Fla. 4th Dist. Ct. App. 1995).

71. 652 So. 2d 453 (Fla. 4th Dist. Ct. App. 1995).

72. *Wyatt*, 652 So. 2d at 454; *Amlan*, 651 So. 2d at 706. This usually occurs in motions directed to recovery of attorney's fees. The court in *Amlan*, however, found the trial court correct in declining to consider the motion because the appeal dealt with the same discovery sanctions. *Amlan*, 651 So. 2d at 706.

73. *Wyatt*, 652 So. 2d at 454; *see also* *Roberts v. Askew*, 260 So. 2d 492 (Fla. 1972). In *Roberts*, the court held that "costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded." *Roberts*, 260 So. 2d at 494. "However, the motion to tax costs should be made within a reasonable time after the appeal has been concluded." *Id.*; *see also* *Finkelstein v. North Broward Hosp. Dist.*, 484 So. 2d 1241, 1243 (Fla. 1986) (finding that post-judgment motion for attorney's fees raises "collateral and independent claim" which a trial court has continuing jurisdiction to entertain within reasonable time, notwithstanding that litigation of main claim may have been concluded with finality).

74. *Tampa Letter Carriers, Inc. v. Mack*, 649 So. 2d 890, 891 (Fla. 2d Dist. Ct. App. 1995) (finding defendant's right to attorney's fees may not be "thwart[ed]" by plaintiff's voluntary dismissal of its case); *see also* *Ganz v. HZJ, Inc.*, 605 So. 2d 871, 872-73 (Fla. 1992) (holding that rule announced in *Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991), that requires requests for contractual attorney fees, does not apply to § 57.105 of the *Florida Statutes*). The court in *Tampa Letter Carriers* extended the supreme court's holding by "conclud[ing] that the *Ganz* analysis applies to fee requests under section 768.79." *Tampa Letter Carriers*, 649 So. 2d at 891.

75. *Stabinski, Funt & DeOliveira, P.A. v. Law Offices of Frank H. Alvarez*, 490 So. 2d 159 (Fla. 3d Dist. Ct. App.), *review denied*, 500 So. 2d 545 (Fla. 1986).

76. *Faro v. Romani*, 629 So. 2d 872 (Fla. 4th Dist. Ct. App. 1993), *quashed on other grounds*, 641 So. 2d 69 (Fla. 1994).

P.A. v. Poletz,⁷⁷ held that the lodestar method for determining reasonable attorney's fees does *not* apply to a fee dispute between a discharged attorney and a former client, where the fee will be paid for by the client.⁷⁸ The supreme court in *Searcy* found the lodestar approach is "ill-suited for the task of assessing attorney's fees due as damages for breach of an agreement for the payment of fees because it does not allow for consideration of the 'totality of the circumstances surrounding the professional relationship.'"⁷⁹

D. Section 57.105 May Be "Teething"

The Fourth District Court of Appeal, putting some bite in section 57.105 of the *Florida Statutes*, entered an order *sua sponte* directing the trial court to assess costs and fees pursuant to section 57.105. In doing so, the court in *Brahmbhatt v. Allstate Indemnity Co.*⁸⁰ reiterated the standard for determining a frivolous appeal:

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research.⁸¹

E. You Gotta Know What You Have to Know What You Can Do

An order determining liability for attorney's fees is not an appealable non-final order unless it determines the *amount* of the fee. As the court noted in *Winkelman v. Toll*,⁸² "[r]ule 9.130 (a)(3)(C)(iv), [of the *Florida Rules of Civil Procedure*] authorizes the appeal from non-final orders which determine 'the' issue of liability, not 'an' issue of liability."⁸³ Accordingly,

77. 652 So. 2d 366 (Fla. 1995).

78. *Id.* at 368-69.

79. *Id.* (citing *Rosenberg v. Levin*, 409 So. 2d 1016, 1022 (Fla. 1982)).

80. 652 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1995).

81. *Id.* at 1225 (citations omitted); *cf.* *Olson v. Potter*, 650 So. 2d 635, 637 (Fla. 2d Dist. Ct. App. 1995) (stating "trial court should have awarded [§ 57.105] attorney's fees to the appellees/cross-appellants since they prevailed on the motion for summary judgment on the doctrine of *res judicata*").

82. 632 So. 2d 130 (Fla. 4th Dist. Ct. App. 1994).

83. *Id.* at 131.

the Fourth District Court of Appeal recently dismissed the appeal of an order of entitlement to attorney's fees.⁸⁴

In *Winkelman*, the appellant challenged a post-judgment order which had determined the appellee's entitlement to (but not the amount of) attorney's fees.⁸⁵ The appellate court found that it lacked jurisdiction to review an order as to the "entitlement" to attorney's fees when the amount had yet to be determined.⁸⁶ Indeed, even in cases where an appellant is completely justified in challenging "entitlement," jurisdiction will still not lie from that order (in the absence of a judicial determination of the amount).⁸⁷

84. *Reliable Reprographics Blueprint & Supply, Inc. v. Florida Mango Office Park, Inc.*, 645 So. 2d 1040 (Fla. 4th Dist. Ct. App. 1994).

85. *Winkelman*, 632 So. 2d at 131. The court considered an order for entitlement to attorney's fees similar to a partial summary judgment, which was governed by rule 9.130(a)(3)(C)(iv), stating that the rule authorizes the appeal of non-final orders which determine "the" issue of liability, not "an" issue of liability. *Id.* at 131.

86. *Id.* The court explained that:

Allowing appeals from such an order as this one would mean that any time a court enters an order determining a party is entitled to attorney's fees, costs, or some other type of relief which could be construed as "affirmative relief," it could generate two appeals, one from the order of entitlement, and a second from the order determining the amount, even before a final judgment, which could then produce a third appeal. Another reason why orders merely determining entitlement to attorney's fees should not be appealable is because consideration of entitlement and amount are frequently overlapping considerations which cannot be separated.

Id. at 132; *see also* *Hunt v. Hunt*, 648 So. 2d 764, 766 (Fla. 2d Dist. Ct. App. 1994); *Trans Atl. Distrib., L.P. v. Whiland & Co., S.A.*, 646 So. 2d 752, 752 (Fla. 5th Dist. Ct. App. 1994) (appealing an order which determined entitlement to attorney's fees but not amount must be dismissed for lack of jurisdiction); *First Oak Brook Corp. Syndicate, Inc. v. Swiss Beach Holdings, Inc.*, 644 So. 2d 1030, 1030 (Fla. 4th Dist. Ct. App. 1994); *Gonzalez Eng'g, Inc., v. Miami Pump & Supply Co.*, 641 So. 2d 474, 474 (Fla. 3d Dist. Ct. App. 1994) (finding court was without jurisdiction to review post-final judgment order which determined appellant was entitled to attorney's fees but § 57.105 of the *Florida Statutes* did not fix amount.); *Cooper v. Cooper*, 641 So. 2d 198, 198 (Fla. 4th Dist. Ct. App. 1994).

87. *See* *Noggle v. Turner Cattle Co.*, 656 So. 2d 619, 620 (Fla. 2d Dist. Ct. App. 1995); *see also* *Hernando County v. Leisure Hills, Inc.*, 648 So. 2d 257, 258 (Fla. 5th Dist. Ct. App. 1994) (stating that until damage amount is assessed, no appeal may lie for judgment of liability); *McIlveen v. McIlveen*, 644 So. 2d 612, 612 (Fla. 2d Dist. Ct. App. 1994); *Trans Atl. Distrib., L.P.*, 646 So. 2d at 752; *Gonzalez Eng'g, Inc.*, 641 So. 2d at 474; *Adlow, Inc. v. Mauda, Inc.*, 632 So. 2d 714, 714 (Fla. 5th Dist. Ct. App. 1994); *Knight v. Mastrianni*, 626 So. 2d 338, 338 (Fla. 4th Dist. Ct. App. 1993) ("We decline review of the order granting attorney's fees since it does not fix the amount of the fee awarded. Thus, the issue of attorney's fees is not ripe for appellate review."); *Hobbs v. Hobbs*, 518 So. 2d 439, 441 (Fla.

V. IMPACT OF THE *FABRE* DECISION

A. *All's "Wells" That Ends Well*

When interpreting the infamous footnote three in *Fabre v. Marin*,⁸⁸ our supreme court has determined that a non-settling defendant is not entitled to a setoff from non-economic damages based on the amount paid by the settling defendant.⁸⁹ The court reasoned that the set-off statutes were applicable to economic damages, and for purposes of calculating the non-settling defendant's obligation, the settlement proceeds were to be apportioned between economic and non-economic damages in the same proportion as the jury's award.⁹⁰ Arguing that the set-off statutes are only

1st Dist. Ct. App. 1988); *cf. Reliable Reprographics*, 645 So. 2d at 1042 (distinguishing *Winkelman* on ground that order may be appealable where trial court denies motion for attorney's fees, since issue of attorney fees is completely resolved).

88. *Fabre v. Marin*, 623 So. 2d 1182, 1186 (Fla. 1993). There are a number of recently decided cases which apply or interpret *Fabre*. See, e.g., *Wells Fargo Guard Servs., Inc. v. Nash*, 654 So. 2d 155, 156 (Fla. 1st Dist. Ct. App. 1995); *Ashraf v. Smith*, 647 So. 2d 892, 893 (Fla. 3d Dist. Ct. App. 1994) (holding hospital should have been included on verdict form), *review denied*, 658 So. 2d 989 (Fla. 1995); *City of Homestead v. Martins*, 645 So. 2d 187, 187 (Fla. 3d Dist. Ct. App. 1994) (concluding trial court erred in entering judgment against hospital for amount exceeding percentage of liability apportioned to it by jury); *Schindler Elevator Corp. v. Viera*, 644 So. 2d 563, 564 (Fla. 3d Dist. Ct. App. 1994) (holding that despite fact that county was not party to suit at trial, court should have instructed jury to apportion liability of county which owned building in which accident occurred even though county had settled with victim's estate); *Owens-Illinois v. Baione*, 642 So. 2d 3, 4 (Fla. 2d Dist. Ct. App.) (stating apportionment of fault is precluded where evidence is insufficient for jury to make accurate assessment of fault of other entities who manufactured asbestos products), *review denied*, 649 So. 2d 870 (Fla. 1994); *BellSouth Human Resources Admin., Inc. v. Colatarci*, 641 So. 2d 427, 428 (Fla. 4th Dist. Ct. App. 1994) (finding it was error to fail to include non-party tortfeasors on verdict form); *East West Karate Ass'n, Inc. v. Riquelme*, 638 So. 2d 604, 605 (Fla. 4th Dist. Ct. App. 1994) (holding trial court erred in not submitting name of karate student who administered kick which caused plaintiff's injury together with name of karate association on jury verdict form; despite fact that student was not party to suit, association was only required to pay non-economic damages in amount proportionate to percentage of fault); *Graham v. Brown*, No. 93-1110-CIV-T-17A, 1994 WL 456631, at *2 (M.D. Fla. Aug. 18, 1994) (holding fault can be apportioned to third party even where defendant has caused removal of third party from action).

89. *Wells v. Tallahassee Memorial Regional Medical Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995).

90. *Id.* at 252-53; *cf. Hoch v. Allied-Signal, Inc.*, 29 Cal. Rptr. 2d 615 (Ct. App. 1994) (reasoning that to apply set-off provisions in situations of several liability would discourage rather than encourage settlement). The *Hoch* court stated if the settlement was "low," the plaintiff would receive less than the non-economic damages awarded by the jury. *Hoch*, 29

applicable where there is common liability, as in the case of economic damages, Wells asserted that the payment by one tortfeasor should only extinguish that tortfeasor's liability and have no effect on another tortfeasor's liability.⁹¹ Thus, Wells contended, where liability is determined by the jury as a percentage of fault, section 768.81(3) would apply and there would be no set-off.⁹² Using the language in section 46.015, the court reasoned⁹³ that a defendant sued under section 768.81 may not be jointly liable with other defendants for non-economic damages.⁹⁴ In light of this determination, the court needed only to categorize the damages to ascertain the non-settling defendants' obligation.⁹⁵ As the court noted, "the settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury's award."⁹⁶

Cal. Rptr. 2d at 617. If the settlement was "high," the non-settling defendant would reap the benefit, paying less than their fault-share of the non-economic damages. This would be inequitable and provide "little incentive for the injured person to settle with one or fewer and all of the tortfeasors." *Id.*; see also *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1467-70 (1994); *Neil v. Kavena*, 859 P.2d 203, 206 (Ariz. Ct. App. 1993) (no set-off of settlement amounts where liability of defendants is several rather than joint and several); *Thomas v. Solberg*, 442 N.W. 2d 73 (Iowa 1989); *Wilson v. Gault*, 668 P.2d 1104 (N.M. Ct. App.), *cert. denied*, 668 P.2d 308 (N.M. 1983). *But see Curtis v. Canyon Highway Dist. No. 4*, 831 P.2d 541 (Idaho 1992), *overruled on other grounds sub nom. Laughten v. City of Pocatello*, 886 P.2d 330 (Idaho 1994).

91. *Wells*, 659 So. 2d at 251.

92. *Id.*

93. The court distinguished *Dionese v. City of West Palm Beach*, 500 So. 2d 1347 (Fla. 1987), on the basis that the apportionment in question was among different causes of action and not between economic and non-economic damages. *Wells*, 659 So. 2d at 254.

94. *Wells*, 659 So. 2d at 253. The court reasoned the § 46.015 does not apply to non-economic damages. *Id.* The court also held that § 768.041 does not apply to non-economic damages. *Id.*

95. *Id.* The court also reasoned that a jury verdict as the basis for allocation would buffer possible collusion between settling parties as to the allocation of economic and non-economic damages. *Id.*

96. *Wells*, 659 So. 2d at 254. The concurrence is well taken. Justice Wells, joined by Justice Kogan, suggested that there are potential due process problems in having a jury apportion the liability of settling parties who are no longer parties to the judicial proceedings. *Id.* (Wells, J., concurring). These settling parties present no evidence, cross-examine no witnesses, and make no arguments. *Id.* It may be time to reexamine *Fabre* and *Allied-Signal* in light of the ponderable, substantive, and procedural problems which have become evident since these decisions were released. *Id.* It is also significant to note that similar statutes have been held unconstitutional. See *Newville v. Department of Family Servs.*, 883 P.2d 793, 803 (Mont. 1994) (holding allocation of percentages of liability to non-parties violated substantive due process as to plaintiff).

B. *An Unsettling Experience*

A nonsettling defendant is not entitled to a credit against what it owes the plaintiff when another defendant settles for less than what that defendant would have owed. In *Dewitt Excavating, Inc. v. Walters*,⁹⁷ the Fifth District Court of Appeal held that it was a violation of section 768.81 to require the defendant to pay the first \$25,000 and 25% of the remainder of the plaintiff's noneconomic damages.⁹⁸ The court also reiterated the statutory dictate that the doctrine of joint and several liability has no application where damages exceed \$25,000.⁹⁹

VI. DUTY

A. *Service with a Smile*

A retail establishment is not subject to liability under section 768.125 of the *Florida Statutes* when it sells alcohol in closed containers to an adult to be consumed off of the premises of the establishment.¹⁰⁰ In *Persen v. Southland Corp.*,¹⁰¹ the Supreme Court of Florida reasoned that since the legislature used the words "knowingly serves," they must have intended that the habitual drunkard exception apply only to bars, taverns, or restaurants.¹⁰² The court's construction of section 768.125 also appears consis-

97. 642 So. 2d 833, 834 (Fla. 5th Dist. Ct. App. 1994).

98. *Id.* Section 768.81(5) of the *Florida Statutes* provides that "[n]otwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed \$25,000." FLA. STAT. § 768.81(5) (1993).

99. *Dewitt*, 642 So. 2d at 834; *cf.* *PAM Transp. v. Freightliner Corp.*, 57 F.3d 746, 747 (9th Cir. 1995) (holding Arizona statute which almost completely destroyed joint and several liability eliminated right of contribution where settling defendant's liability is "several only").

100. *See* FLA. STAT. § 768.125 (1993). Section 768.125 entitled "[l]iability for injury or damage resulting from intoxication," provides:

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

Id.

101. 656 So. 2d 453 (Fla. 1995).

102. *Id.* at 455. The court interpreted the legislative intent of the statutory language "knowingly serves" as referring to a habitual drunkard, rather than the statutory language

tent with the legislature's decision that there is a distinction between liability under 1) the habitual drunkard exception and 2) the criminal statute.¹⁰³ Through this holding, the Supreme Court of Florida appears to have extended much greater protection to retail establishments that sell alcoholic beverages to be consumed off of the premises.

B. *Don't Punish the Parents Unless They Did Something Too*

Rejecting that *Winn-Dixie v. Robinson*¹⁰⁴ imposed an alternative avenue of direct liability for punitive damages in the absence of fault, the court in *Schropp v. Crown Eurocars, Inc.*¹⁰⁵ stated that there are only two methods of imposing liability for punitive damages against a (parent) corporation: 1) The traditional *Mercury Motors*¹⁰⁶ additional fault requirement; and 2) direct liability (i.e. without the need to show additional fault) where the plaintiff can show the actions in question were committed by an "owner" or "managing agent" of the corporation.¹⁰⁷

C. *Taking Another Bite out of Dog Owners*

Dog owners beware: The "independent contractor exception" to the "dangerous instrumentality doctrine" is not available to a dog owner as a

"sells or furnishes," which refers to minors. *Id.*

103. *Id.* The criminal statute would extend liability to "[a]ny person who shall sell, give away, dispose of, exchange, or barter" any alcoholic beverage to a habitual drunkard. FLA. STAT. § 562.50 (1993).

104. 472 So. 2d 722 (Fla. 1985). Here, an assistant store manager expressly approved of the torts which had been committed against the plaintiff. *Id.* at 723. The acts of the store manager provided the jury with evidence of misconduct sufficient for direct liability under the managing-agent rule. *Id.*

105. 654 So. 2d 1158 (Fla. 1995). Plaintiff, Schropp, purchased a new Mercedes-Benz from the defendant, Crown Eurocars, Inc. Shortly thereafter, Schropp complained about spots on the finish of the car. After several unsuccessful attempts by Schropp to have the defect corrected, he finally left the car with the defendant for several days at the request of the sales manager. Again, Schropp was not satisfied with the defendant's attempts to remove the spots. This suit followed when the defendant refused to exchange Schropp's car for a new one. *Id.* at 1158-59.

106. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981). Under the vicarious liability theory, a corporation can be held liable for punitive damages if the plaintiff establishes that the conduct of the employee was willful and wanton and establishes some additional fault on the part of the corporate employer. *Id.* at 549.

107. *Bankers Multiple Life Ins. Co. v. Farish*, 464 So. 2d 530 (Fla. 1985).

defense to an action brought pursuant to section 767.04¹⁰⁸ of the *Florida Statutes*.

In *Wipperfurth v. Huie*,¹⁰⁹ the defendant was boarding his canine with the plaintiff's employer.¹¹⁰ The plaintiff was bitten by the dog while it was being boarded and he sued the defendant. The defendant alleged the kennel was liable while the kennel was watching the dog.¹¹¹ Relying on *Belcher Yacht, Inc. v. Stickney*,¹¹² the supreme court contrarily defined the term "owner" in section 767.04 as applying only to the dog's *actual* owner.¹¹³ Thus, the court held that defendant remained liable while his dog was in the kennel.¹¹⁴ The court's holding thus extends the duty of dog owners to kennel employees where they board their dogs.¹¹⁵

108. Section 767.04 of the *Florida Statutes* provides:

The owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. However, any negligence on the part of the person bitten that is a proximate cause of the biting incident reduces the liability of the owner of the dog by the percentage that the bitten person's negligence contributed to the biting incident. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner. However, the owner is not liable, except as to a person under the age of 6, or unless the damages are proximately caused by a negligent act or omission of the owner, if at the time of any such injury the owner had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog." The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute or common law.

FLA. STAT. § 767.04 (1993).

109. 654 So. 2d 116 (Fla. 1995).

110. *Id.* at 116. The independent contractor exception to the doctrine is inapplicable because the dangerous instrumentality doctrine itself is inapplicable to an action brought pursuant to § 767.04 of the *Florida Statutes*. *Id.* at 117; *see also* *Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 358 So. 2d 21, 26 (Fla. 1978) (holding that jury should not have been instructed on assumption of risk, but only on defenses expressed in § 768.04).

111. *Wipperfurth*, 654 So. 2d at 116-17.

112. 450 So. 2d 1111 (Fla. 1984).

113. *Wipperfurth*, 654 So. 2d at 117.

114. *Id.*

115. *Id.*

D. *Physicians Are Warned about the Duty to Warn*

Doctor's take heed: Physicians may be held liable to third persons who are not their patients for failing to warn them of known dangers. In *Pate v. Threlkel*,¹¹⁶ the plaintiff alleged that a doctor had a duty to warn the plaintiff's mother of the risks to her children of a genetically transmitted disease.

In *Pate*, the doctor's failure to warn prevented early detection of the plaintiff's (child's) cancer, significantly reducing her chances of successfully treating the disease.¹¹⁷ In rejecting privity as necessary to establish liability between a patient's child and a health care provider,¹¹⁸ the court reasoned that the prevailing standard of care may create a duty to certain identified third parties where the physician knows of the existence of those third parties.¹¹⁹ The court noted that this duty to warn could be satisfied by warning the patient, whom it is presumed will inform the third parties.¹²⁰ The court through this holding joined the large number of jurisdictions that protect innocent third parties from harm by imposing a greater duty upon a doctor to persons other than his patients.¹²¹

116. 20 Fla. L. Weekly S356 (July 20, 1995). The author claims a hollow victory in this court's rejection as to the application of *Boynton v. Burglass*, 590 So. 2d 446 (Fla. 3d Dist. Ct. App. 1991), as his argument was exactly what the supreme court adopted in *Pate*.

117. *Id.*

118. *Id.* at S358.

119. *Id.* "[L]ack of privity does not necessarily foreclose liability if a duty of care is otherwise established." *Id.* at S357 (quoting *Baskerville-Donovan Eng'rs, Inc. v. Pensacola Exec. House Condominium Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991)).

120. *Pate*, 20 Fla. L. Weekly at S358.

121. *See, e.g., White v. United States*, 780 F.2d 97, 101-02 (D.C. Cir. 1986) (deciding that psychotherapist in certain circumstances bears a duty to exercise reasonable care to protect foreseeable victim from danger); *Jablonski v. United States*, 712 F.2d 391, 398 (9th Cir. 1983) (holding liability exists against psychotherapists for failure to warn where victim was foreseeable and identifiable); *Reiser v. District of Columbia*, 563 F.2d 462, 479 (D.C. Cir. 1977) (applying similar duty to warn to decision of paroling dangerous sex-offender), *modified on other grounds*, 580 F.2d 647 (D.C. Cir. 1978) (en banc); *Hicks v. United States*, 511 F.2d 407, 422 (D.C. Cir. 1975) (stating attack on wife by patient was foreseeable because it was closely related to reason he was receiving treatment); *Brady v. Hopper*, 570 F. Supp. 1333, 1339 (D. Colo. 1982) (stating that "specific threats to specific victims" states workable, reasonable, and fair boundary upon sphere of therapist's liability for acts of patients), *aff'd*, 751 F.2d 329 (10th Cir. 1984); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980) (recognizing psychiatrist had duty to initiate whatever precautions were reasonably necessary to protect potential victims from violence when staff knew or should have known of patient's dangerous propensities); *Williams v. United States*, 450 F. Supp. 1040, 1046 (D.S.D. 1978) (recognizing liability of government for shooting death of

three persons one day after mental patient was released from V.A. Hospital); *Smith v. United States*, 437 F. Supp. 1004, 1010 (E.D. Pa. 1977) (holding psychotherapist liable for failure to predict dangerousness of patient), *rev'd on other grounds*, 587 F.2d 1013 (3d Cir. 1978); *Greenberg v. Barbour*, 322 F. Supp. 745, 747-48 (E.D. Pa. 1971) (explaining failure of physicians to admit homicidal patient can be negligent); *Merchants Nat'l Bank & Trust Co. v. United States*, 272 F. Supp. 409, 418-20 (D.N.D. 1967) (stating psychiatrist is liable for failure to predict dangerous propensities of patient); *Hamman v. County of Maricopa*, 775 P.2d 1122, 1128 (Ariz. 1989) (en banc) (psychiatrist in some circumstances owes duty to protect possible victim); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (stating when therapist determines or should determine that patient poses serious risk of violence to another, therapist must use reasonable care to protect that person which may require duty to warn); *Mero v. Sadoff*, 37 Cal. Rptr. 769, 776 (Ct. App. 1995) (stating physician may be liable for examination even where there is no physician-patient relationship); *Reisner v. Regents of the Univ. of Cal.*, 37 Cal. Rptr. 2d 518, 520 (Ct. App. 1995) (stating where defendant doctor negligently failed to tell 12-year-old girl, his surgical patient, or her family that she received AIDS-tainted blood and three years later, young woman innocently infected her boyfriend by their sexual relations, defendant's duty to warn extended to boyfriend notwithstanding that at time of AIDS-tainted transfusion boyfriend was unknown and unidentified third person); *Myers v. Quesenberry*, 193 Cal. Rptr. 733, 735 (Ct. App. 1983) (holding doctor's liability to extend to unknown but foreseeable third party when doctor failed to warn patient of risk of driving in her condition); *Perreira v. State*, 768 P.2d 1198, 1212 (Colo. 1989) (en banc) (explaining psychiatrist owes duty of care to make sure that patient does not pose a danger to third parties); *Naidu v. Laird*, 539 A.2d 1064, 1072 (Del. 1988) (upholding judgment against psychiatrist based on his failure to take reasonable steps to protect potential victim from violence resulting from release of committed patient who killed victim in auto accident while in psychotic state); *Nova Univ. v. Wagner*, 491 So. 2d 1116, 1118 (Fla. 1986) (deciding that child care institution that accepted emotionally disturbed children it knew or should have known had propensity to commit acts that might harm others owes duty to exercise reasonable care in its operation to avoid harm to general public); *Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947, 948 (Fla. 1983) (holding seller of insurance has duty to investigate where it has actual knowledge of beneficiary's murderous intentions to its insured); *Boynton v. Burglass*, 590 So. 2d 446, 448 (Fla. 3d Dist. Ct. App. 1991) (stating exception to general rule that there is no duty to control conduct of another or to give warning to those placed in danger by that conduct arises where there is special relationship between defendant and person whose actions need to be controlled or person whose injury is foreseeable from failure to control conduct); *Tucker v. Lavernia*, 451 So. 2d 972, 973 (Fla. 4th Dist. Ct. App. 1984) (explaining whether harm inflicted by particular patient was actionable was question of fact precluding summary judgment); *Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. 4th Dist. Ct. App. 1970) (explaining physician has duty to warn if patient poses threat to third parties); *Bradley v. Wessner*, 287 S.E.2d 716, 721 (Ga. Ct. App.) (holding lack of privity between physician and ultimate victim not sufficient to eliminate duty to warn), *aff'd*, 296 S.E.2d 693 (Ga. 1982); *Eckhardt v. Kirts*, 534 N.E.2d 1339, 1344 (Ill. App. Ct. 1989) (deciding cause of action arises against psychiatrist for failure to warn); *In re Votteler*, 327 N.W.2d 759, 762 (Iowa 1982) (holding duty to warn exists where foreseeable victim does not know of danger); *Freese v. Lemmon*, 210 N.W.2d 576, 580 (Iowa 1973) (stating complaint that alleges physician knew of patient's danger but failed

to warn not dismissable for failure to state cause of action); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 604 (Kan. 1991) (finding no cause of action for failure to report); *Durflinger v. Artilles*, 673 P.2d 86, 94 (Kan. 1983) (recognizing cause of action against psychiatrist for negligence for failure to protect ultimate victims of patient, his mother and younger brother); *Evans v. Morehead Clinic*, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988) (holding therapist owes duty of ordinary care to protect reasonably foreseeable victim of danger from assault by patient); *Joy v. Eastern Maine Medical Ctr.*, 529 A.2d 1364, 1366 (Me. 1987) (recognizing it is jury question whether physician should have warned under particular set of circumstances); *Furr v. Spring Grove State Hosp.*, 454 A.2d 414, 418 (Md. 1983) (following *Restatement*, stating duty applies if special relationship exists); *Bardoni v. Kim*, 390 N.W.2d 218, 226-27 (Mich. Ct. App. 1986) (explaining whether psychiatrist should have known patient was dangerous specifically to his brother was fact issue, precluding summary judgment); *Welke v. Kuzilla*, 375 N.W.2d 403, 406 (Mich. Ct. App. 1985) (holding doctor's injection given night before accident raised cause of action for third party victim); *Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 854-55 (Mo. 1993) (deciding where defendant clinic negligently failed to administer RhoGam to Rh-negative expectant mother, causing her to develop antibodies that attacked blood cells of her subsequently conceived Rh-positive child, clinic was liable for such preconception negligence to then unconceived and later born child); *Fosgate v. Corona*, 330 A.2d 355, 358 (N.J. 1974) (holding doctor liable to relatives of tubercular patient for negligently having failed to diagnose the disease that led to infection of relatives); *McIntosh v. Milano*, 403 A.2d 500, 508 (N.J. Super. Ct. Law Div. 1979) (deciding substantial fact issue as to whether psychiatrist owed duty to warn victim precluded summary judgment); *Wilschinsky v. Medina*, 775 P.2d 713, 717 (N.M. 1989) (holding physician owed duty to public after administering drugs to patient with known side effects that might impair patient's judgment); *Homere v. State*, 361 N.Y.S.2d 820, 824-25 (N.Y. Ct. Cl. 1974) (holding hospital liable in negligence for releasing patient who assaulted plaintiff), *aff'd*, 370 N.Y.2d 246 (N.Y. App. Div. 1975); *Pangburn v. Saad*, 326 S.E.2d 365, 367 (N.C. Ct. App. 1985) (holding complaint against psychiatrist stated claim for relief in negligence for patient who stabbed plaintiff's sister shortly after release); *Leverett v. State*, 399 N.E.2d 106, 109 (Ohio Ct. App. 1978) (explaining motions to dismiss are inappropriate in negligence claims involving physicians' duty to take precautionary measures); *Wharton Trans. Corp. v. Bridges*, 606 S.W.2d 521, 526-27 (Tenn. 1980) (holding physician liable for failure to take precautionary steps if his conduct falls below recognized standard of accepted professional practice in medical profession and specialty thereof, if any, that is prevailing in community in which he practiced); *Gooden v. Tips*, 651 S.W.2d 364, 369 (Tex. Ct. App. 1983) (explaining that under proper facts, physician can owe duty to use reasonable care to protect public); *Peck v. Counseling Serv.*, 499 A.2d 422, 427 (Vt. 1985) (recognizing psychiatrist had duty to warn third party that patient was likely to cause property damage); *Peterson v. State*, 671 P.2d 230, 237 (Wash. 1983) (holding psychiatrist who diagnosed patient as "gravely disabled" had duty to take reasonable precautions to protect persons who might be endangered by the patient's dangerous propensities); *Kaiser v. Suburban Transp. Sys.*, 398 P.2d 14, 16 (Wash. 1965) (holding where plaintiff's truck driver had accident injuring several people, and plaintiff-employer thereafter settled with victims and sought indemnity from doctor alleging doctor negligently failed to diagnose driver's disabilities and warn driver, it was expectable that if doctor negligently certified unfit person as qualified to drive commercial vehicle, any injury

VII. ECONOMIC LOSS DOCTRINE: YOU CAN'T ALWAYS WIN WITH THE ECONOMIC LOSS RULE

During the last year, the courts in Florida decided several cases¹²² involving the application of the “economic loss rule.”¹²³ The economic

to third person from highway accident was well within range of apprehension), *modified*, 401 P.2d 350 (Wash. 1965); *Schuster v. Altenburg*, 424 N.W.2d 159, 162 (Wis. 1988) (recognizing complaint stated cause of action for relief based on psychiatrist’s failure to take reasonable measures to protect from patient).

122. *See, e.g.*, *Florida Bldg. Inspection Serv., Inc. v. Arnold Corp.*, 20 Fla. L. Weekly D1703, D1703 (3d Dist. Ct. App. July 26, 1995) (deciding to decline any further erosion of the economic loss doctrine); *Greens of Town & Country Condominium Ass’n v. Greens of Tampa, Inc.*, 653 So. 2d 1136, 1137 (Fla. 2d Dist. Ct. App. 1995) (holding economic loss rule bars negligence claims where no additional personal injury or damages to any other property occurs); *see also Palau Int’l Traders, Inc., v. Narcam Aircraft, Inc.*, 653 So. 2d 412, 416 (Fla. 3d Dist. Ct. App. 1995) (explaining economic loss doctrine precluded subsequent airplane purchaser from recovering from airplane inspector for economic losses arising out of negligence in failing to locate flaw in airplane, despite absence of privity of contract and no personal injury or property damage to property other than airplane); *C.A. Oaks Constr. Co., Inc. v. Ajax Paving Indus. Inc.*, 652 So. 2d 914, 915 (Fla. 2d Dist. Ct. App. 1995) (stating dismissal of counter claim based on negligent performance of contract work was proper where economic loss rule bars tort recovery as between parties for purely economic losses); *City of Tampa v. Thornton-Tomasetti, P.C.*, 646 So. 2d 279, 281-82 (Fla. 2d Dist. Ct. App. 1994) (recognizing economic loss doctrine precluded City’s recovery in negligence claim from engineering consulting firm for City’s economic losses flowing from construction of public building); *see also Hoseline, Inc. v. USA Diversified Prods., Inc.*, 40 F.3d 1198, 1199-2000 (11th Cir. 1994) (holding economic loss doctrine barred manufacturer’s recovery of damages against supplier for common law fraud and theft, where claims arose from breach of contractual duty, and manufacturer did not allege any physical or property damage; economic loss doctrine bars claims between parties who lack contractual privity; economic loss doctrine bars tort recovery for contract claims which involve no injury to person or property).

123. This rule prohibits plaintiffs from raising tort claims without evidence of personal injury or property damage for the sole purpose of recovering economic damages arising from a breach of contract. *See Jones v. Childers*, 18 F.3d 899, 904 (11th Cir. 1994). The two most commonly referred cases are *Casa Clara Condominium Ass’n, Inc. v. Charlie Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993) and *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). In *Casa Clara*, homeowners sued a concrete supplier under a negligence theory for having provided defective concrete which caused damage to buildings it was used in. *Casa Clara*, 620 So. 2d at 1245. Because no damage to other property occurred and nothing more than economic losses were involved, the plaintiff had no tort claim against the concrete supplier. *Id.* at 1247-48. In *AFM Corp.*, the court held that AFM, which contracted with Southern Bell to have its name advertised in the yellow pages, could not maintain a tort claim solely for economic losses. *AFM Corp.*, 515 So. 2d at 180-81. The court concluded that without a showing of some conduct resulting in personal injury or

loss rule bars recovery even where there was “no alternative remedy” outside of the tort claims.¹²⁴ The court in *SFC Valve Corp. v. Wright Machine Corp.* reasoned that to recognize a “no alternative remedy” exception to the rule would “cut[] against the purpose[s] of the economic loss rule.”¹²⁵ The court’s holding strengthened the economic loss rule and demonstrated the court’s preference for encouraging parties to negotiate for warranty protection or to take other steps, such as purchasing insurance, in order to protect their economic interests.¹²⁶

The economic loss rule will not defeat the claims of a “foreseeable plaintiff” even if there is no contract between the parties. In *Southland Construction, Inc. v. Richeson Corp.*,¹²⁷ a general contractor, sued the defendant, an engineer, for negligence in failing to meet professional engineering standards in designing a wall.¹²⁸ Although there was no contract between the plaintiff and the defendant, the court permitted the tort action, finding that “Richeson, as an individual professional, owed Southland a duty to perform his professional duties in a professional, competent manner.”¹²⁹

The economic loss rule also does *not* apply to tort claims where a finished product causes damage to property other than itself.¹³⁰ The

property damage, there could be no independent tort claim. *Id.* at 181-82.

124. *SFC Valve Corp. v. Wright Mach. Corp.*, 883 F. Supp. 710, 715 (S.D. Fla. 1995). In *SFC Valve*, the defendant, Wright, sold valve stems to Southern Corporation pursuant to a contract between the parties. *Id.* at 712. The certifications provided by Wright to Southern, which were required by the contract, were falsified. When Southern filed for bankruptcy, the plaintiff, SFC Valve, purchased Southern’s assets, including the contract with Wright. After SFC discovered the falsified certifications, it reopened Southern’s bankruptcy case in order to determine any causes of action Southern may have had against Wright for the falsified certifications. The bankruptcy court auctioned off these causes of action as assets, which Wright acquired by being the highest bidder. *Id.* at 712-13.

125. *Id.* at 715. The purpose of the economic loss rule is to encourage parties to protect their economic losses by purchasing insurance or negotiating for warranty protection. *Id.*

126. In addition, the court relied on *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir. 1994), finding no distinguishing facts in *SFC Valve* to warrant a different result. *SFC Valve*, 883 F. Supp. at 716.

127. 642 So. 2d 5 (Fla. 5th Dist. Ct. App. 1994).

128. *Id.* at 8-9. Economic losses consist of disappointed economic expectations and include damages for inadequate value, cost of repair and replacement of a defective product, or consequential loss of profits. *Casa Clara*, 620 So. 2d at 1246.

129. *Southland*, 642 So. 2d at 8; accord *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973). The holding of this case, which is limited to its facts, stated that a general contractor has a cause of action for the alleged negligent supervisory performance by an architect. *A.R. Moyer, Inc.*, 285 So. 2d at 402.

130. *Casa Clara*, 620 So. 2d at 1246.

Second District Court of Appeal, in *E.I. Du Pont de Numours & Co. v. Finks Farms, Inc.*,¹³¹ permitted an action in tort because the defendant's fungicide caused damage to other property, the plaintiff's tomato crop.¹³² In finding liability, the court distinguished this case from *Casa Clara*.¹³³ In addition, the court found that the product used here was not "ineffective," but rather "defective" because it damaged other property.¹³⁴ Equally significant, the Third District Court of Appeal has also recently ruled that the economic loss rule does not bar claims for fraud in the inducement.¹³⁵

VIII. NEGLIGENCE

A. *You Still Need to Make an Impact for Success*

Two recent cases¹³⁶ illustrate the supreme court's reluctance to join the majority of jurisdictions that have abolished the "impact rule."¹³⁷ In *R.J. v. Humana of Florida Inc.*,¹³⁸ the plaintiff sought recovery for psychological injuries caused by a negligent diagnosis that the plaintiff was HIV positive.¹³⁹ The court rejected the plaintiff's claim and upheld the

131. 656 So. 2d 171 (Fla. 2d Dist. Ct. App. 1995).

132. *Id.* at 172. "The economic loss rule prohibits tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself." *Id.* at 172 (citing *Casa Clara*, 620 So. 2d at 1246).

133. *Id.* at 173. In *E.I. DuPont*, the fungicide as a finished product damaged plaintiff's "other property," namely his tomato crop. *Id.* at 172-73.

134. *E.I. DuPont*, 656 So. 2d at 173. The defendant's fungicide, purchased independently by the plaintiff, damaged the plaintiff's plants. *Id.* at 173. This holding was not precluded by the facts of *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), because the plaintiff did not purchase his plants with the fungicide already sprayed on them. *E.I. Dupont*, 656 So. 2d at 173. *Contra Monsanto Agric. Prods. Co. v. Edenfield*, 426 So. 2d 574 (Fla. 1st Dist. Ct. App. 1982).

135. *See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 20 Fla. L. Weekly D2086, D2086 (3d Dist. Ct. App. Sept. 13, 1995).

136. *R.J. v. Humana of Fla. Inc.*, 652 So. 2d 360 (Fla. 1995); *Gonzalez v. Metro. Dade County Public Health Trust*, 651 So. 2d 673 (Fla. 1995); *cf. City of Hollywood v. Karl*, 643 So. 2d 34 (Fla. 1st Dist. Ct. App. 1994). *But see K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995).

137. Under the impact rule, before a plaintiff can recover damages for the negligent infliction of emotional distress, the distress suffered must flow from physical injuries the plaintiff sustained in an impact. *Gonzalez*, 651 So. 2d at 676; *see Reynolds v. State Farm Mut. Auto. Ins. Co.*, 611 So. 2d 1294, 1296 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 623 So. 2d 494 (Fla. 1993).

138. 652 So. 2d at 360.

139. *Id.* at 362.

validity of the impact rule.¹⁴⁰ In *Gonzalez*, the plaintiff sued the defendants for psychological injuries resulting from inaccurate statements that the plaintiff's child, who had died months earlier, had actually never been buried and remained in the refrigerator at the hospital morgue.¹⁴¹ The Supreme Court of Florida found the claim uncognizable without willful or wanton misconduct or physical injury.¹⁴² The court also refused to adopt section 868 of the *Restatement (Second) of Torts*.¹⁴³

140. Cf. *K.A.C.*, 527 N.W.2d at 553 (stating actual exposure to HIV must be alleged in order to establish claim for emotional distress resulting from fear of contracting AIDS).

141. *Gonzalez*, 651 So. 2d at 674.

142. *Id.* at 675.

143. *Id.* at 676. By holding this way, the court reaffirmed *Donahoo v. Bess*, 200 So. 541 (Fla. 1941), which held that absent physical injury, Florida law will not permit a suit for emotional distress caused by the negligent handling of a dead body, and refused to adopt § 868 of the *Restatement (Second) of Torts*. Under § 868 "one who intentionally, recklessly or negligently removes, withholds, mutilates, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." RESTATEMENT (SECOND) OF TORTS § 868 (1977).

The Impact Rule continues to be liberalized. See *Zell v. Meek*, 20 Fla. L. Weekly S515 (Fla. Oct. 5, 1995) (holding plaintiff who witnessed her father's death when his apartment was bombed stated claim for negligent infliction of emotional distress although plaintiff did not begin experiencing physical impairment until nine months after bombing).

It is time to abolish the impact rule in favor of a fair and equitable traditional pleading and proof system that requires the plaintiff seeking damages for mental and emotional harm to similarly plead and produce fact witnesses, expert testimony, or other relevant evidence for jury consideration. *Accord Angrand v. Key*, 657 So. 2d 1146 (Fla. 1995) (stating under certain circumstances, grief experts may testify).

The impact doctrine was first enunciated in England in 1888 in the case of *Victorian Railway Commission v. Coultas* 13 App. Cas. 222; see also *Stewart v. Gilliam*, 271 So. 2d 466 (Fla. 4th Dist. Ct. App. 1972). Significantly, it was quickly rejected in England but not until after having been accepted into our system of jurisprudence. See *Dulieu v. White & Sons*, 2 K.B. 669 (1901).

While the impact rule remained a thorn in the side of those parties who rightfully suffered from psychic injury (unfortunately or fortunately) unaccompanied by physical impact, recent decisions of our and other courts began to recognize the harsh inequity of the rule. In 1985, for example, the Supreme Court of Florida in *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), was faced with a claim by the estate of a mother who sought damages for psychic injury when she had a heart attack after seeing her daughter at the scene of the accident just after she was killed by a car driven by the defendant. *Id.* at 18. The court decided that now it was time to recognize:

that the price of death or significant discernible physical injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action

exists.

Id. at 18-19. Although not going as far as other jurisdictions which permitted recovery for psychic trauma alone, without either physical injury or a "zone of danger" fright, see, e.g., *Molien v. Kaiser Foundation Hospital*, 616 P.2d 813 (Cal. 1980), this court conceded that psychic injury should be cognizable in certain situations. *Champion*, 478 So. 2d at 18-19.

The litmus test of "impact" (or the arbitrary "zone of danger" exception) as a prerequisite to recovery for psychic trauma simply does not comport with reality and the present day medical advancements. The apparent arbitrary diminution in the "severity" or "value" of those claiming psychic injury (by not permitting such claims) is neither warranted nor justified. Society has come to recognize and accept the reality and often indelible severity of mental or emotional distress (psychic injury) and thus, now is the time for a positive change in the law, which will respond to our medical advancement and inure to the benefits of society as a whole.

Indeed, as well-regarded former Chief Judge Gerald Mager of the Fourth District similarly noted:

The beauty of our judicial system is its flexibility in the pursuit of justice -- its adherence to precedent yet its ability to reevaluate the continued vibrancy of such precedent. It is certainly more forthright to review and reject an unsound principle than to resort to judicial exceptions in order to obviate the harshness of such principle.

Jones v. Hoffman, 272 So. 2d 529, 532 (Fla. 4th Dist. Ct. App. 1973), *rev'd on other grounds*, 280 So. 2d 431 (Fla. 1973).

It is a great and honorable function of the supreme court to modify the law with society's advancement and change. Quoting an earlier decision of the supreme court, Judge Mager also reminds us in *Jones* that "[t]he law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." *Id.* (quoting *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971)).

Medical technology has advanced remarkably in detection and treatment of mental or emotional distress. Pharmaceutical companies are now making billions of dollars on tricyclic antidepressants, Mono-oxidase inhibitors, beta blockers, etc., all designed and (apparently effective in) detection and treatment of the admittedly debilitating condition associated with emotional and mental distress ("psychic injury").

Emotional or mental distress, whether accompanied by physical trauma, is real. Ironically, the emotional or mental "trauma" can be far more devastating and indelible than a physical injury from which an individual often recovers. We as a loving society cannot dispute that scars of the heart often run deeper and are more "permanent" than those of the skin. What we feel, our emotional state, often can weigh heavier than our body. We should not send a message that this harm to this truly innocent person only becomes real if there is some accompanying "impact." We, as a society, recognize the reality and severity of psychological injury and the need for treatment (and redress). Therefore, persons who claim justifiable psychological injury ought to have the right to present evidence to a jury.

Judge Mager's explanation in the Fourth District Court of Appeal's decision in *Jones* quite aptly responds to the three counter-arguments raised in support of the impact rule that were mentioned or discussed in our supreme court's previous decisions such as *Gilliam* and *Champion*: 1) the difficulty of proving causation between the damages and the alleged fright or traumatic event; 2) the fear of fraudulent or exaggerated claims; and 3) the possibility of

B. *A Step in the Right Direction for the Unborn Fetus*

While reluctantly admitting that the present law in Florida prohibits an action for the wrongful death of an unborn child,¹⁴⁴ the First District Court of Appeal in *Young v. St. Vincent's Medical Center, Inc.*,¹⁴⁵ urged the supreme court to join the majority of jurisdictions in recognizing such an action.¹⁴⁶ It remains to be seen if the supreme court will follow the district court's suggestion¹⁴⁷ that Florida law should change and conform with the majority of states which recognize a cause of action for the death of an unborn, but viable child.¹⁴⁸

opening the flood gates to litigation. *Jones*, 272 So. 2d at 530-33.

In light of the above, and the recognition that mental suffering is already an actionable damage in certain cases, the impact rule should be abolished. See *Miami Herald Publishing Co. v. Brown*, 66 So. 2d 679, 681 (Fla. 1953) (holding mental suffering constitutes recoverable damages in cases of negligent defamation); *Carson v. Baskin*, 20 So. 2d 243 (Fla. 1944) (regarding an invasion of privacy); accord RESTATEMENT (SECOND) OF TORTS §§ 569, 570, 652H, cmt. b (1977).

144. *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977). Both cases stand for the proposition that actions for wrongful death when the child is "envetre sa nere" (in the womb of the mother) do not exist in Florida.

145. 653 So. 2d 499 (Fla. 1st Dist. Ct. App. 1995). The plaintiff, who had been pregnant with twins brought suit against the defendant "alleging negligent prenatal care and the resulting wrongful death of her unborn daughter." *Id.* at 500. A doctor, who was in training, tried to determine the maturity of the babies' lungs by withdrawing amniotic fluid, but instead withdrew blood. A test was not performed to determine if the fetus was still bleeding. As a result, one of the twins whose lungs were punctured was stillborn. A doctor entered a sworn statement that the stillborn child was viable. *Id.* at 499-500.

146. *Id.* at 500.

147. Although one shudders to think it possible, if there is no change in the law regarding wrongful death actions for unborn children, it would appear to become beneficial for a defendant to actively or through inaction cause the demise of an unborn child in order to escape personal liability.

148. *Jones*, 653 So. 2d at 503. The burden of proving viability, injury, and damages rests upon the claimant. Thirty-four state courts have judicially created a cause of action permitting the recovery for the death of a fetus which was viable but delivered stillborn. In three other states, the legislatures have created a statutory cause of action. Five states have not passed on the matter, and seven states, including Florida, still deny recovery. See generally *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995) (holding parents can sue for wrongful death of nonviable fetus); T.A. Borowski, Jr., Comment, *No Liability for the Wrongful Death of Unborn Children—The Florida Legislature Refuses to Protect the Unborn*, 16 FLA. ST. U. L. REV. 835, 839 (1988); Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Children*, 84 A.L.R.3d 411, 422-25 (1978 & Supp. 1994).

C. *Can't Cross the Road with that Chicken*

An administrative decision of a professional's misconduct is not conclusive proof of negligence in a subsequent civil action.¹⁴⁹ In *Stogniew v. McQueen*,¹⁵⁰ the supreme court stated that the lack of mutuality¹⁵¹ of obligation barred a party from using an administrative decision as conclusive proof of negligence.¹⁵²

D. *He Who Has Gas Better Have Class*

In an exception to the general rule that one is not responsible for the unexpected criminal behavior of a third person, the Second District Court of Appeal in *Butala v. Automated Petroleum & Energy Co. Inc.*,¹⁵³ found that a retailer has a higher standard of care to protect a customer from a known ongoing attack.¹⁵⁴ The court found in favor of the plaintiff when a third party, known by the station employees to be in a "foul mood," while at the station to purchase gasoline, set the plaintiff customer on fire.¹⁵⁵ The court found that the self-service station owner had a duty to take reasonable steps to protect patrons from on-premises gasoline fires that could result from the unsupervised use of its pumps.¹⁵⁶ This holding may be a springboard to extend liability to other retailers who fail to take

149. *Stogniew v. McQueen*, 656 So. 2d 917 (Fla. 1995).

150. 656 So. 2d at 917.

151. The court was unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirement of mutuality in the application of collateral estoppel. *Id.* at 919-20.

152. *Id.* In this case, the plaintiff sought counseling from the defendant, a licensed family therapist, and later filed a complaint with the Florida Department of Business & Professional Regulation ("DPR") alleging that the defendant violated § 491.009(2)(s) of the *Florida Statutes* by failing to meet the minimum standards of performance in his professional relationship with the plaintiff. The DPR found for the plaintiff. The plaintiff, who also filed a civil suit for negligence, then tried to assert collateral estoppel and requested the trial court to follow the DPR ruling. *Id.* at 918-19; *cf. Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064, 1066 (Fla. 1995) (holding rule requiring that there be mutuality of parties in order for doctrine of collateral estoppel to apply has been abrogated by statute in context of civil theft claim).

153. 656 So. 2d 173 (Fla. 2d Dist. Ct. App. 1995).

154. *Id.* at 175.

155. *Id.* at 174.

156. *Id.* at 175.

reasonable steps to protect a customer from the dangerous use of instrumentalities by third persons on the premises.¹⁵⁷

E. *The "Misuse" Absolute Defense is Absolutely Dead*

The Supreme Court of Florida, in *Standard Havens Products, Inc. v. Benitez*,¹⁵⁸ abolished the absolute defense of product misuse in product liability actions alleging negligence.¹⁵⁹ The Supreme Court of Florida concluded that "much like the earlier demise of the absolute defense of contributory negligence, product misuse merges into the defense of comparative negligence. Consequently, product misuse reduces a plaintiff's recovery in proportion to his or her comparative fault."¹⁶⁰

F. *Department of Corrections May Get Away with Prisoners Getting Away*

Applying Florida law,¹⁶¹ the Florida Department of Corrections has only a general duty to protect.¹⁶² The First District Court of Appeal in *Department of Corrections v. McGhee*,¹⁶³ noted that it felt bound by its earlier decision of the issue in *Department of Corrections v. Vann*,¹⁶⁴

157. Cf. *Hall v. Billy Jacks, Inc.*, 458 So. 2d 760 (Fla. 1984); *Surat v. Nu-Med Pembroke, Inc.*, 632 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1994); *Faverty v. McDonald's Restaurants, Inc.*, 892 P.2d 703 (Or. Ct. App. 1995) (stating employer liable for third party's injuries caused by off-duty employee who had worked 17 hours and fell asleep at wheel while driving home).

158. 648 So. 2d 1192 (Fla. 1994).

159. *Id.* at 1192.

160. *Id.* at 1197; see also *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

161. *Department of Corrections v. McGhee*, 653 So. 2d 1091 (Fla. 1st Dist. Ct. App. 1995). The court applied the "significant relationships" or "center of gravity" test from § 145 of the *Restatement (Second) of Conflict of Laws*. *Id.* at 1092; see also *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987); cf. *Department of Health & Rehabilitative Servs. v. B.J.M.*, 656 So. 2d 906, 917 (Fla. 1995) (stating department is not liable for negligent placement of child unless done in bad faith or with malicious purpose, or if placement occurs in manner that exhibits wanton and willful disregard of human rights, safety, or property).

162. See *Department of Health & Rehabilitative Servs. v. Whaley*, 574 So. 2d 100 (Fla. 1991).

163. 653 So. 2d 1091, 1091 (Fla. 1st Dist. Ct. App. 1995) (affirming trial court's ruling to apply Florida law where escaped prisoners fled from Florida to Mississippi and murdered Robert McGhee).

164. 650 So. 2d 658 (Fla. 1st Dist. Ct. App. 1995).

however it recertified the same question as in *Vann*.¹⁶⁵ The court also held that “[t]he determination of whether a state agency may be held liable for its conduct within the state of Florida is properly determined pursuant to Florida law.”¹⁶⁶

IX. INSURANCE

A. *It's No Longer “Fairly Debatable” That It Is “Fairly Debatable”*

The Supreme Court of Florida recently found that the “fairly debatable” standard is not applicable to the determination of bad faith.¹⁶⁷ The court also reasoned that the statute which provides as a penalty damages recoverable from an uninsured motorist insurer in a bad faith action includes the total amount of the claimant’s damages, including the amount in excess of the policy limits, and is therefore not to be applied retroactively.¹⁶⁸

165. *McGhee*, 653 So. 2d at 1093. The certified question was:
 WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD
 LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED
 PRISONER?

Id.

166. *Id.*

167. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995).

168. *Id.* at 61. The court itemized several other district courts that had rejected the fairly debatable standard in both first party unfair insurance trade practices and third party bad faith actions. *Id.* at 62. The case represents a significant step in giving insured’s rights to recover for the unfair practices of insurers. The author also notes that the recent decision of *Auto Owners Insurance Co. v. Conquest*, 658 So. 2d 928 (Fla. 1995), which provides that the “any person” language in § 624.155 means “any person,” not any insured, should “open the door” to a wide range of “bad faith” actions against insurers. It is also significant to note that in *Punervold v. Fortune Insurance Co.*, No.89-01819, *sua sponte dismissed on other grounds*, the author asserted the same “any person means any person” argument. See Appellants Initial Brief at 6-17 (No. 89-01819). While the Fourth District Court of Appeal appeared poised to issue an opinion similar to the result reached in *Conquest*, it was forced to dismiss without issuing an opinion on the substantive claim, due to a procedural trial defect. Indeed, while the section does contain the terms “insured” and “insurer,” it also refers to “third party claimants,” and “beneficiaries,” as well as to “any person or persons” indicating that the legislature knew the difference between the terms, and used them intentionally. See, e.g., *Heredia v. Allstate Ins. Co.*, 358 So. 2d 1353 (Fla. 1978). Perhaps even more significantly, § 624.155(1)(a) of the *Florida Statutes* itemizes other statutory sections wherein the phrase “any person” *must* be read to include others than the first party insured. See, e.g., FLA. STAT. § 626.9651(i)(2) (1987) (“any other person with any interest in the proceeds payable under such contract or policy”); *id.* § 626.9541(1)(x) (“refusal to insure . . . because of race, color, creed, marital status, sex or national origin . . .”); *id.* §

B. *Permanently Happy*

In *Auto Owners Ins. Co. v. Tompkins*,¹⁶⁹ the Supreme Court of Florida recently ruled that future economic damages may be recovered when such damages are established with reasonable certainty and without the need to show permanent injury.¹⁷⁰ Although permanent injury is not a prerequisite to the recovery of future economic damages, it is a significant factor in establishing reasonable certainty of future damages.¹⁷¹

626.9551 (all releases “[u]nreasonably disapprove the insurance policy . . .”); *id.* § 626.9705 (provision that “[n]o life or disability insurer shall refuse to . . . sell, or issue a life or disability insurance policy . . .”).

169. 651 So. 2d 89 (Fla. 1995).

170. *Id.* at 90. The plaintiff, after being involved in an auto accident, settled with his tortfeasor’s insurance company for \$25,000, the liability limits of his policy. To recover the damages which exceeded the \$25,000 limit, the plaintiff sued his own insurance carrier, Auto-Owners Insurance Company, for underinsured motorist benefits. At trial, the court denied the plaintiff’s request for a jury instruction which would have allowed the jury to award future economic damages even where the jury failed to find that the plaintiff suffered permanent injuries. *Id.* The instructions given to the jury only permitted them to award future economic damages if permanent injury was found. *Id.* Since the jury did not find that the plaintiff suffered permanent injuries, they only awarded the plaintiff for past economic damages. *Id.* at 90. The plaintiff appealed and the Second District Court of Appeal reversed, finding that the lower court erred in requiring the jury to find permanent injury as a prerequisite to awarding future economic damages. *Tompkins*, 651 So. 2d at 90. The case arrived before the court based on a conflict between the Second District Court of Appeal’s decision and the Fourth District Court of Appeal’s ruling in *Josephson v. Bowers*, 595 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1992) (holding that there must be “permanent injury before a defendant may be held liable for future loss of income and other future damages in a personal injury claim”).

171. *Tompkins*, 651 So. 2d at 91. The impact of this decision was to clear up any confusion among the districts about what needs to be established before future economic damages can be awarded. This holding established the “reasonable certainty” test and thus clearly rejected any showing of permanent injury as a prerequisite for recovering future economic damages. *Id.* at 90-91.

C. *You Can't Give Away What You Don't Have*

Although certifying the question,¹⁷² the First District Court of Appeal held that an estate may recover under both the liability and uninsured motorist coverage of a deceased driver's policy, even though the uninsured motorist coverage excluded the car from coverage.¹⁷³ Dianna Warren died from injuries sustained on May 5, 1990 while a passenger in an automobile involved in a single-vehicle accident.¹⁷⁴ The car owned by Edward Chancey was driven by his daughter, Celeste Chancey Bryant, who was also killed.¹⁷⁵ As personal representative, Mr. Warren instituted a wrongful death action and sought recovery for his wife's injuries on the theory that the injuries resulted from the wife's negligent operation and/or negligent maintenance of the automobile which was insured by Travelers under a policy Mr. Chancey had purchased from Phoenix.¹⁷⁶ The estate settled with the appellees for the liability coverage policy limits of \$50,000, but reserved all claims for benefits under the uninsured motorist provisions of the policy.¹⁷⁷ On behalf of the estate, Mr. Warren then filed the present complaint for declaratory judgment seeking uninsured motorist benefits.¹⁷⁸ The trial court entered summary judgment in favor of appellees, finding that the estate could not recover under both the liability and uninsured motorists provisions of the same policy.¹⁷⁹ Because *Reid v. State Farm Fire & Casualty Co.*¹⁸⁰ and its progeny¹⁸¹ did not consider the validity of the

172. *Warren v. Travelers Ins. Co.*, 650 So. 2d 1082 (Fla. 1st Dist. Ct. App.), *review granted*, 658 So. 2d 994 (Fla. 1995). The First District Court of Appeal certified the following question:

MAY AN INJURED PERSON WHO IS ENTITLED TO RECOVER BODILY INJURY LIABILITY BENEFITS, BUT WHOSE DAMAGES EXCEED THE POLICY LIMIT FOR LIABILITY COVERAGE, ALSO RECOVER UNDER THE SAME POLICY FOR UNINSURED MOTORIST BENEFITS, WHERE THE POLICY EXCLUDES THE INSURED VEHICLE FROM ITS DEFINITION OF "UNINSURED VEHICLE"?

Id. at 1084.

173. *Id.* Travelers argued that because of an exclusion in the policy, the automobile involved in the accident was not "uninsured." *Id.* at 1083. As a result, the trial court refused to allow the estate of Dianna Warren to recover under both the liability and uninsured motorist provisions of the same policy. *Id.*

174. *Warren*, 650 So. 2d at 1082-83.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Warren*, 650 So. 2d at 1083.

180. 352 So. 2d 1172 (Fla. 1977).

“your car” exclusion, the court in distinguishing the two cases, reasoned that “[e]xclusions to [uninsured motorist] coverage are not enforceable if the injured person is covered by the [bodily injury liability] provisions of the policy.”¹⁸²

D. *Peek-a-boo, We Can See You!*

An uninsured or underinsured motorist carrier who has been lawfully sued and properly joined as a party in a lawsuit should be disclosed to the jury in its actual status as a party defendant. In *Krawzak v. Government Employees Insurance Co.* (“GEICO”),¹⁸³ GEICO was the real party in interest, being both the liability insurer and underinsured motorist carrier.¹⁸⁴ In requiring disclosure, the court reasoned that “[i]f there had been a settlement with the tortfeasor, there would be no question that GEICO would have been the only party before the jury.”¹⁸⁵ In stating that “GEICO could not have been made invisible or disguised in the courtroom” as merely “the tortfeasor’s co-counsel,” the court reasoned:

An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute.¹⁸⁶

181. *See, e.g.,* *Smith v. Valley Forge Ins. Co.*, 591 So. 2d 926 (Fla. 1992); *Brixius v. Allstate Ins. Co.*, 589 So. 2d 236 (Fla. 1991).

182. *Warren*, 650 So. 2d at 1083; *see also* *Travelers Ins. Co. v. Chandler*, 569 So. 2d 1337, 1339 (Fla. 1st Dist. Ct. App. 1990) (citing *Mullis v. State Farm Mut. Auto. Ins. Co.*, 253 So. 2d 229, 233-34 (Fla. 1971)); *cf.* *World Wide Underwriters Ins. Co. v. Welker*, 640 So. 2d 46, 50 (Fla. 1994) (holding driver who was generally insured under mother’s policy as “resident relative” could not collect uninsured motorist benefits from mother’s insurer where driver had accepted financial responsibility for vehicle by obtaining his own liability coverage, but had expressly rejected uninsured motorist coverage when he was operating his vehicle).

183. 660 So. 2d 306 (Fla. 4th Dist. Ct. App. 1995).

184. *Id.* at 307.

185. *Id.* at 309.

186. *Id.* The court rejected the analysis set forth in *Colford v. Braun Cadillac, Inc.*, 620 So. 2d 780 (Fla. 5th Dist. Ct. App.), *review denied*, 626 So. 2d 1367 (Fla. 1993).

E. *If You Choose to Jump in the Water, Expect to Get Wet*

If an insurer assumes the defense of an action where it could have denied coverage and the insured can demonstrate that the assumption of the defense resulted in prejudice to the insured, the insurer is estopped from subsequently raising the defense of non-coverage. In *Doe v. Allstate Insurance Co.*,¹⁸⁷ the supreme court reasoned that once an insurer begins to fulfill its promissory obligation to defend an insured by hiring counsel, conducting a pre-trial investigation, and controlling the insured's defense, a fiduciary duty arises which requires the exercise of good faith.¹⁸⁸

X. OTHER INTERESTING DEVELOPMENTS

A. *Buckling Down on the Buckle Up Defense*

The seat belt defense cannot be submitted to a jury, unless the plaintiff presents "competent evidence"¹⁸⁹ that the failure to wear the seat belt caused or substantially contributed to the injuries. The plaintiff in *Zurline v. Levesque*,¹⁹⁰ sued the driver of the car in which she was a passenger.¹⁹¹ Even though she was not wearing a seat belt, the court prohibited the defendant from informing the jury of that fact because there was no proof of causation.¹⁹²

187. 653 So. 2d 371 (Fla. 1995).

188. *Id.* at 373-74. See cases cited *infra* note 226 for other cases on the emergence and application upon the implied covenant of good faith.

189. See *Burns v. Smith*, 476 So. 2d 278 (Fla. 2d Dist. Ct. App. 1985); see also *State Farm Mut. Auto. Ins. Co. v. Smith*, 565 So. 2d 751 (Fla. 5th Dist. Ct. App.), *dismissed*, 570 So. 2d 1306 (Fla. 1990).

190. 642 So. 2d 1169 (Fla. 4th Dist. Ct. App. 1994).

191. *Id.*

192. *Id.* at 1170. The court used the *Pasarkanis* test from *Insurance Co. of N. Am. v. Pasarkanis*, 451 So. 2d 447 (Fla. 1984), which states that before a jury can consider the seat belt defense, the defendant must plead and prove the following: 1) the plaintiff failed to use "an available and fully operational seat belt;" 2) the nonuse was reasonable under the circumstances; and 3) the plaintiff's failure to use the seat belt caused or contributed substantially to his or her damages. *Id.* at 454. The court found that the defendant met the first two elements (as interpreted in *Bulldog Leasing Co. v. Curtis*, 630 So. 2d 1060 (Fla.), *cert. denied*, 115 S. Ct. 141 (1994)), but failed to meet the third requirement. *Zurline*, 642 So. 2d at 1170.

B. *Bulldog Remains the Big Dog on the Block*

The standard set by the Supreme Court of Florida in *Bulldog Leasing Co. v. Curtis*¹⁹³ applies in *all* cases where the defendant asserts the seat belt defense, and *not* only in cases where the plaintiff has possession or control of the vehicle.¹⁹⁴ The Second District Court of Appeal in *Osgood Industries Inc. v. Schlau*¹⁹⁵ applied the *Bulldog* test in its determination that the trial court erred in granting its motion for directed verdict as to the defendant's seat belt defense.¹⁹⁶

C. *It's Not What You Say, It's Where You Say It*

Absolute immunity is afforded to any act which occurs during the course of judicial proceedings, including the tortious interference with a business relationship, so long as the act has some relation to the proceeding.¹⁹⁷ Answering a question certified from the Eleventh Circuit, the Supreme Court of Florida in *Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, P.A. v. United States Fire Insurance Co.*¹⁹⁸ extended the well-established rule of absolute immunity, which traditionally applied only to acts of slander, libel, perjury,¹⁹⁹ and other tort claims.²⁰⁰ In so holding,

193. 630 So. 2d 1060 (Fla.), *cert. denied*, 115 S. Ct. 141 (1994).

194. *Osgood Indus. Inc. v. Schlau*, 654 So. 2d 959, 961 (Fla. 2d Dist. Ct. App. 1995); *see also* *Safety Kleen Corp. v. Ridley*, 20 Fla. L. Weekly D842, D842 (1st Dist. Ct. App. Apr. 6, 1995) (jury must be instructed that violation of § 316.614 constitutes evidence of negligence).

195. 654 So. 2d at 959.

196. *Id.* at 961.

197. *Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 607 (Fla. 1994). The certified question which brought this case to the court was:

WHETHER CERTIFYING TO A TRIAL COURT AN INTENT TO CALL OPPOSING COUNSEL AS A WITNESS AT TRIAL IN ORDER TO OBTAIN COUNSEL'S DISQUALIFICATION, AND LATER FAILING TO SUBPOENA AND CALL COUNSEL AS A WITNESS AT TRIAL, IS AN ACTION THAT IS ABSOLUTELY IMMUNE FROM A CLAIM OF TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP BY VIRTUE OF FLORIDA'S LITIGATION PRIVILEGE.

Id.

198. *Id.* at 606.

199. This absolute immunity has its roots in several cases. *See* *Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992) (quoting in part *Levin*, 639 So. 2d at 607) (holding defamatory statements made in course of judicial proceedings are absolutely privileged, "no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry"); *see also* *Cox v. Klein*, 546 So. 2d 120, 122 (Fla. 1st Dist. Ct. App. 1989)

the Supreme Court of Florida appears to have greatly extended the scope of this immunity, again leaving the “[r]emedies for perjury, slander, and the like committed during judicial proceedings . . . to the discipline of the courts, the bar association, and the state.”²⁰¹

D. *If You Sell It, Will They Come?*

The mere hope of a plaintiff that some of its past customers may again choose to buy from them cannot be a basis for a tortious interference claim. The Supreme Court of Florida, in answering a certified question²⁰² in

(holding immunity afforded to statements made during course of judicial proceeding extends not only to parties in proceeding but to judges, witnesses, and counsel as well); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th Dist. Ct. App. 1984) (holding torts of perjury, libel, slander, defamation, and similar proceedings that are based on statements made in connection with judicial proceeding are not actionable); *Sussman v. Damian*, 355 So. 2d 809, 811 (Fla. 3d Dist. Ct. App. 1977) (finding participants in judicial proceedings must be free from fear of later civil liability as to anything said or written during litigation so as not to chill actions of participants in immediate claim).

200. *Levin*, 639 So. 2d at 608. In the bad faith action, it was revealed that an attorney with the plaintiff firm was one of the people who had knowledge of the defendant’s alleged bad faith. *Id.* at 607. The trial court granted the defendant’s motion to disqualify the plaintiff firm in which the defendant certified that it would be calling an attorney from that firm as a witness at trial. *Id.* The defendant never called or subpoenaed that attorney at trial, and never notified the court that it would not be calling that attorney. *Id.* After the trial, the plaintiff firm sued the defendant for tortious interference with a business relationship, alleging that the defendant intentionally disqualified the attorney to prevent the plaintiff’s firm from representing their client. *Id.* The defendant moved to dismiss on the grounds that its actions were protected by the absolute immunity afforded to statements or actions taken during a judicial proceeding. *Levin*, 639 So. 2d at 607. The supreme court upheld the dismissal. *Id.*; see also *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309, 310 (Fla. 3d Dist. Ct. App.) (holding tortious claim of extortion, which was based on alleged fraud and delaying tactics of counsel in course of litigation, was improper because conduct at issue was committed during course of judicial proceeding and was immune from civil liability in any subsequent proceeding), *review denied*, 554 So. 2d 1170 (Fla. 1989); *Sailboat Key, Inc. v. Gardner*, 378 So. 2d 47, 49 (Fla. 3d Dist. Ct. App. 1979) (“injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all the privileges recognized both in cases of personal defamation and in those of other types of interference with economic advantage”) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 114 (4th ed. 1971)).

201. *Levin*, 639 So. 2d at 608 (quoting *Wright*, 446 So. 2d at 1164).

202. The certified question before the supreme court was:

Under Florida law, in a tortious interference with business relationships tort action, may a plaintiff recover damages for the loss of goodwill based upon future sales to past customers with whom the plaintiff has no understanding that they will continue to do business with the plaintiff, or is the plaintiff’s recovery

Georgetown Manor, Inc. v. Ethan Allen, Inc.,²⁰³ held that a plaintiff may not recover damages for the tortious interference with a business relationship, where the relationship is based on speculation regarding future sales to past customers.²⁰⁴ The court distinguished *Insurance Field Services, Inc. v. White & White Inspection & Audit Services, Inc.*,²⁰⁵ because the ongoing relationship that the tortfeasor interfered with there was "far different" than in *Georgetown*, where there was a retail furniture dealer with 89,000 past customers.²⁰⁶ The court thus held that, while *Georgetown* could recover damages reasonably flowing from its existing relationships, it could not recover for tortious interference based on a speculative contention that past customers would return to purchase furniture.²⁰⁷

E. *If You're Finished, You May Be Done*

Voluntary dismissal of an active tortfeasor with prejudice entered by the agreement of parties pursuant to a settlement agreement is not the equivalent of an adjudication on the merits²⁰⁸ that will serve as a bar to

of damages limited to harm done to existing business relationships pursuant to which plaintiff has legal rights . . . ?

Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 813 (Fla. 1994).

203. 47 F.3d 1099 (11th Cir. 1995).

204. *Id.* at 1101.

205. 384 So. 2d 303, 305 (Fla. 5th Dist. Ct. App. 1980) (company had regularly been performing underwriting inspections, premiums, audits, and loss control work for 16 insurance company clients).

206. *Georgetown*, 47 F.3d at 1100 n.1. The case from which this question arose centers around a dissolution of a business relationship between a manufacturer and its former dealer. See *Georgetown Manor Inc. v. Ethan Allen Inc.*, 991 F.2d 1533, 1535 (11th Cir. 1993). During the dissolution of their relationship, the manufacturer placed an ad in a newspaper which was the basis of the tortious interference claim. The advertisement announced the split between the parties and related that manufacturer had discontinued distributing to dealer, because dealer was not current on its debts. The ad also stated that manufacturer was opening new outlets and asked those customers who had unfilled orders with dealer to contact the new outlets where their orders would be filled expeditiously. The dealer then brought suit claiming that the ad interfered with its prospective relationship with former customers who had shopped with them in the past and might shop with them again in the future. *Id.* at 1535-36.

207. *Georgetown*, 47 F.3d at 1101. As a general rule, an action for the tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if there had not been interference. *Id.*

208. *JFK Medical Ctr., Inc. v. Price*, 647 So. 2d 833, 834 (Fla. 1994). In *JFK*, the plaintiff sued her doctor (active tortfeasor) for medical malpractice. The suit included a claim against his employer, JFK Medical Center. The plaintiff agreed to dismiss her suit

continued litigation against the passive tortfeasor.²⁰⁹ The Supreme Court of Florida in *JFK Medical Center, Inc. v. Price* also held that the voluntary dismissal of the active tortfeasor would not affect the passive tortfeasor's right to indemnification, reasoning that "[i]t would be unconscionable to require a passive tortfeasor to compensate an injured party, while at the same time barring indemnification from the active party."²¹⁰

F. *An Interest(ing) Prejudgment Development*

A successful personal injury claimant is entitled to prejudgment interest on the claim from the time of the jury verdict to the entry of the final judgment.²¹¹ In *Palm Beach County School Board v. Montgomery*,²¹² some six months after entry of the verdict, the trial court decided post trial motions and entered a final judgment.²¹³ The school board contested the award of interest from the date of the verdict that was entered by the trial court rather than from the date of the final judgment.²¹⁴ The court applied the analysis as set forth in the seminal case of *Argonaut Insurance Co. v. May Plumbing Co.*²¹⁵ in awarding prejudgment interest on a personal injury claim from the date of the rendition of the jury verdict up to the time

(with prejudice) against the doctor, but "the claim against the Center would not be affected." *Id.* at 833. The trial court granted JFK'S motion for summary judgment on the grounds that the dismissal of the physician operated as an adjudication on the merits. *Id.* at 833-34. The district court reversed and JFK asked the supreme court to quash the lower court's decision. *Id.* at 834.

209. *Id.*

210. *JFK Medical Ctr.*, 647 So. 2d at 834.

211. *Palm Beach County Sch. Bd. v. Montgomery*, 641 So. 2d 183, 184 (Fla. 4th Dist. Ct. App. 1994).

212. 641 So. 2d at 183.

213. *Id.* at 184.

214. *Id.*

215. 474 So. 2d 212 (Fla. 1985). In *Argonaut*, the court established the following principles:

1) An unliquidated claim becomes liquidated and susceptible of bearing prejudgment interest when a jury verdict has the affect of fixing the amount of damages;

2) Once a verdict has liquidated damages as of a certain date, computation of prejudgment interest is merely a ministerial mathematical computation to be performed by the court; and

3) Prejudgment interest is calculated at the same rate as postjudgment interest. *Palm Beach County Sch. Bd.*, 641 So. 2d at 184 (referring to *Argonaut*, 470 So. 2d at 215); see also *Sullivan v. McMillan*, 19 So. 340, 342-43 (Fla. 1896) (holding person injured should receive interest from time verdict liquidates damage claim).

of entry of the final judgment. The court distinguished *Zorn v. Britton*²¹⁶ which held that prejudgment interest would not be recoverable for personal injuries, on the basis that the case was limited to “unliquidated damages for personal injuries.”²¹⁷

G. *Even an Attorney’s Magic Won’t Make 10 Equal 100*

Under Florida’s Wrongful Death Act,²¹⁸ a defendant cannot be required to pay 100% of the damages where one of the parents of the deceased child has been held to bear the majority of the fault.²¹⁹ Defendants can seek contribution despite the operation of the statute.²²⁰ In *Hudson v. Moss*,²²¹ the Third District Court of Appeal reasoned that the policy underlying parent/child tort immunity disappears entirely in the unfortunate case where the child has died and the parent is suing for their own damages as a survivor,²²² and found that requiring a third party

216. 162 So. 879 (Fla. 1935).

217. *Palm Beach County Sch. Bd.*, 641 So. 2d at 184 (quoting *Zorn*, 162 So. at 881).

218. FLA. STAT. § 768.20 (1993) (“A defense that would bar or reduce a survivor’s recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor”).

219. *Hudson v. Moss*, 653 So. 2d 1071, 1073 (Fla. 3d Dist. Ct. App. 1995). This issue arose out of a wrongful death claim by the parents of a child drowning victim against the owners of the swimming pool where the child drowned. *Id.* at 1072. The trial court held the father to be 90% at fault for the child’s drowning and held Larry and Sharon Hudson each five percent at fault. *Id.* at 1072. The trial court allowed full recovery to the mother by not reducing that amount by the percent of negligence attributed to the father. *Id.* The trial court held that this result was clearly mandated based upon the interplay of the Comparative Fault Act and the Wrongful Death Act of §§ 768.20, 768.71, and 768.81 of the *Florida Statutes*. *Id.*

220. *Hudson*, 653 So. 2d at 1073. The appellate court found error in the trial court’s application of *Joseph v. Quest*, 414 So. 2d 1063, 1065 (Fla. 1982), which held that a contribution claim for a child’s damages against a negligent parent is allowed only to the extent of the parent’s liability insurance. *Hudson*, 653 So. 2d at 1073. Instead, the court found that the reasoning of *Shor v. Paoli*, 353 So. 2d 825 (Fla. 1977), was applicable to this case. *Hudson*, 653 So. 2d at 1073. The court did agree with the extension of the *Joseph* case that was adopted by the Fourth District Court of Appeal in *Johnson v. School Board*, 537 So. 2d 685, 685-86 (Fla. 4th Dist. Ct. App. 1989), which held that parent/child immunity was not applicable to a contribution claim where the child was deceased and the parents were suing for their own damages as survivors. *Hudson*, 653 So. 2d at 1073.

221. 653 So. 2d at 1071.

222. *Id.* (holding parent/child liability will deter parent from bringing action for damages on behalf of injured child).

tortfeasor to bear more than their proportionate share of liability unfairly denied them their right to contribution.²²³

H. *Doctors Medicate Hospital*

In a case which could “open the door” to other similar avenues of relief, the Supreme Court of Pennsylvania has held that doctors could sue a hospital for damages that resulted from poor peer reviews.²²⁴

I. *Expressing the Implied Covenant*

The implied covenant of good faith and fair dealing is gaining recognition as a weapon against bad faith conduct by organizations which are often in a superior bargaining position.²²⁵

223. *Id.*

224. *Cooper v. Delaware Valley Medical Ctr.*, 654 A.2d 547, 551 (Pa. 1995).

225. This has been especially apparent in the franchise arena. With franchise litigation on the rise, it is extremely important that both franchisors and franchisees (and their counsel) be aware of the emerging theories based on the requirement of good faith and fair dealing in contract performance.

One begins with the sentinel discussion as set out in *Scheck v. Burger King Corp.*, 756 F. Supp. 543, 548-49 (S.D. Fla. 1991):

It is axiomatic that a contract includes not only its written provisions, but also the terms and matters which, though not actually expressed, are implied by law, and these are as binding as the terms which are actually written or spoken. *Sharp v. Williams*, 141 Fla. 1, 192 So. 476, 480 (1939). One such implied term of a contract, recognized by Florida law, is the implied covenant of good faith and fair dealing. *Fernandez v. Vazquez*, 397 So. 2d 1171, 1174 (Fla. App. 1981) (“One established contract principle is that a party’s good faith cooperation is an implied condition precedent to performance of a contract”); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (seller of property has duty to disclose material defects of which she is aware in accord with principles of fair dealing and good faith).

Id. at 548-49; *see also* *Burger King Corp. v. Weaver*, 798 F. Supp. 684 (S.D. Fla. 1992).

As the court similarly stated in *Idaho First Nat’l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841, 862 (Idaho 1992), in reiterating a particular jury instruction:

Every contract imposes on all partes to the contract an obligation of good faith and fair dealing in its performance or enforcement. “Good faith” means honesty in fact in the conduct or the transaction concerned. Each party owes a duty to exercise good faith in its dealing and transactions with the other party. If a party fails to deal honestly with the other party, it is liable for a breach of the duty of good faith.

Id.; *see also* *First Nationwide Bank v. Florida Software Servs., Inc.*, 770 F. Supp. 1537, 1542 (M.D. Fla. 1991) (under Florida law, a party’s good faith cooperation is an implied condition precedent).

This fundamental concept of good faith and fair dealing was also articulated by renowned contract specialist Corbin:

If the purpose of contract law is to enforce the reasonable expectations of parties induced by promises, then at some point it becomes necessary for courts to look to the substance rather than the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith", as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than [sic] words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.

LAWRENCE A. CUNNINGHAM & ARTHUR A. JACOBSON, CORBIN ON CONTRACTS § 570 (Supp. 1984).

Virtually every state agrees with this axiomatic principle. *See, e.g.*, *Dunkin' Donuts of Am., Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1569-70 (11th Cir. 1991) (holding under Massachusetts law, "implied obligation of good faith exists by operation of law"); *Louis Glunz Beer, Inc. v. Martlet Importing Co.*, 864 F. Supp. 810, 817 (N.D. Ill. 1994) (applying implied covenant of good faith and fair dealing in contract and fraud action); *Jo-Ann's Launder Ctr. v. Chase Manhattan Bank, N.A.*, 854 F. Supp. 387 (D.V.I. 1994); *Peoples Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 166 (D. Me. 1993) (finding that "[e]very contract or duty . . . imposes an obligation of good faith in its performance or enforcement"); *Union Sav. Am. Life Ins. Co. v. North Cent. Life Ins. Co.*, 813 F. Supp. 481, 489 (S.D. Miss. 1993) (holding that under Minnesota law, every non-sales contract contains implied covenant of good faith and fair dealing); *Metro Communications Co. v. Ameritech Mobil Communications, Inc.*, 788 F. Supp. 1424, 1431 (E.D. Mich. 1992) (finding that "implied covenant attaches to every contract and 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract'" (quoting *Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 974 (Ill. App. Ct. 1984))), *aff'd*, 984 F.2d 739 (6th Cir. 1993); *Zeno Buick-GMC, Inc. v. GMC Truck & Coach*, 844 F. Supp. 1340, 1348-50 (E.D. Ark. 1992) (holding implied covenant of good faith and fair dealing applies under Michigan common law), *aff'd*, 9 F.3d 115 (8th Cir. 1993); *Colville Envtl. Servs., Inc. v. North Slope Borough*, 831 P.2d 341, 344 (Alaska 1992) ("In every contract . . . there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other . . ." (quoting *Guin v. Ha*, 591 P.2d 1281, 1292 (Alaska 1979))); *McAlister v. Citibank*, 829 P.2d 1253, 1259 (Ariz. Ct. App. 1992); *Traumann v. Southland Corp.*, 858 F. Supp. 979, 983 (N.D. Cal. 1994) (noting that implied covenant of good faith and fair dealing applies, and "[e]ven where one party retains, by virtue of the contract, a right of approval or disapproval or a discretionary power over the rights of the other, such powers must be exercised 'within the parameters of the duty of good faith' . . . *good faith requires that each party act 'reasonably' in light of the 'justified expectations' of the other party.*" (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1361 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987))); *Ervin v. Amoco Oil Co.*, 885 P.2d 246, 250 (Colo. Ct. App. 1994) (holding every contract, regardless of type, contains an implied

J. *You Need a “Hickey” to Be Together*

Two injuries arising out of two accidents may be joined together in a suit as a matter of right where 1) the second accident contributed to the injury from the first accident and 2) separate trials would create the risk of inconsistent verdicts. In *Hickey v. Pompano K of C*,²²⁶ the Fourth District Court of Appeal stated that if an injury sustained by a person while on one property is later aggravated by an injury sustained on another person’s

covenant of good faith); *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1362 (Colo. Ct. App. 1994) (adding that Colorado has recognized separate cause of action for bad faith breach of an insurance contract); *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650, 655 (Mass. App. Ct. 1992); *Katz v. Oak Indust., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986) (noting that “[m]odern contract law has generally recognized an implied covenant to the effect that each party to a contract will act with good faith towards the other”); *Idaho First Nat’l Bank v. Bliss Valley Foods*, 824 P.2d 841, 862 (Idaho 1992); *Waller v. Maryland Nat’l Bank*, 620 A.2d 381, 387 (Md. Ct. Spec. App. 1993) (implying duty of good faith and fair dealing); *Lemay Bank & Trust Co. v. Harper*, 810 S.W.2d 690, 693 (Mo. Ct. App. 1991); *Lachenmaier v. First Bank Sys., Inc.*, 803 P.2d 614, 617 (Mont. 1990) (“[e]very contract, regardless of type, contains an implied covenant of good faith. . . . [B]reach of an express contractual term is not a prerequisite to breach of the implied covenant.” (quoting *Story v. City of Bozeman*, 791 P.2d 767, 775 (Mont. 1990))); *Morris v. Bank of Am. Nev.*, 886 P.2d 454, 457 (Nev. 1994) (“Where one party to a contract ‘deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing.’” (quoting in part *Hilton Hotels Corp. v. Butch Lewis Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991))); *Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prod. Inc.*, 351 A.2d 349 (N.J. 1976) (applying implied covenant of good faith); *A.W. Fuir Co. v. Ataka & Co., Ltd.*, 422 N.Y.S.2d 419, 422 (1979) (holding provision giving “absolute and exclusive right to reject any order for any reason whatsoever” does not give party right to arbitrarily refuse to perform); *Richard Bruce & Co. v. J. Simpson & Co.*, 243 N.Y.S.2d 503, 506 (Sup. Ct. 1963) (noting that “absolute discretion” means discretion based on fair dealing and good faith—a reasonable discretion); *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (1933) (finding every contract contains an implied covenant of good faith and fair dealing); *Dull v. Mutual of Omaha Ins. Co.*, 354 S.E.2d 752 (N.C. Ct. App.), *review denied*, 358 S.E.2d 518 (N.C. 1987); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 481-83 (Tex. Ct. App. 1989) (concluding all contracts contain an implied covenant of good faith); *First Nat’l Bank & Trust Co. of Vinita v. Kissee*, 859 P.2d 502, 509 (Okla. 1993) (holding implied covenant of good faith imposed upon all contracting parties by common law); *Nelson v. Web Water Dev. Ass’n, Inc.*, 507 N.W.2d 691, 697-98 (S.D. 1993); *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 300-01 (Utah App. 1994) (upholding an award based on breach of implied covenant of good faith); *Betchard-Clayton, Inc. v. King*, 707 P.2d 1361, 1364 (Wash. Ct. App. 1985) (finding that “there is an implied duty of good faith and fair dealing imposed on the parties to a contract”); *Lonsdale v. Chesterfield*, 662 P.2d 385, 387 (Wash. 1983) (finding implied covenant of good faith applies to assignee of contract).

226. 647 So. 2d 270 (Fla. 4th Dist. Ct. App. 1994).

property, those two claims can be joined in a suit against both property owners.²²⁷ The court reasoned that if the cases are tried separately, the jury in the first trial could hold that the damages resulted from the second accident, and a subsequent jury in the second suit could determine that the injuries resulting from the second accident were the result of the damages from the first accident.²²⁸ A low verdict in both trials could thus be entered which would not require a new trial. It would be highly unlikely that a plaintiff would be able to get post-trial or appellate relief in these circumstances, and therefore the plaintiff would not have an adequate remedy by appeal.²²⁹

227. *Id.* at 271. The plaintiff's complaint alleged claims against two defendants resulting from separate slip and fall accidents occurring three weeks apart. Plaintiff alleges that the first fall on A's premises injured her knee and made her more susceptible to falling on B's premises and that the second fall aggravated her initial knee injury. To require her to conduct separate trials against both defendants could result in inconsistent verdicts for "which there would be no adequate remedy by appeal." *Id.*

228. *Id.*

229. *Id.*; see *Lawrence v. Hethcox*, 283 So. 2d 41, 44 (Fla. 1973) (holding joinder required where plaintiff sued defendant for injuries sustained in auto accident and later amended complaint to add second defendant involved in second accident about six weeks later). The court so held because injuries from both accidents were overlapping and not apportionable if the cases were tried separately and each defendant might be able to convince the jury that the injuries were caused by the other defendant. *Lawrence*, 283 So. 2d at 44; see also *Pages v. Dominguez*, 652 So. 2d 864, 867 (Fla. 4th Dist. Ct. App. 1995) (holding consolidation of two brother's claims arising out of same accident was properly denied by trial court because claims would require separate and distinct elements of damages and testimony); *Maharaj v. Grossman*, 619 So. 2d 399 (Fla. 4th Dist. Ct. App. 1993); *Meyers v. Shore Indus., Inc.*, 575 So. 2d 783 (Fla. 2d Dist. Ct. App. 1991); *U-Haul Co. of N. Fla., Inc. v. White*, 503 So. 2d 332 (Fla. 1st Dist. Ct. App. 1986). In *Kraft v. Smith*, 148 P.2d 23 (Cal. 1944), the court held the negligence of both defendants contributed approximately to cause an injury for which a plaintiff was entitled to recover. Extreme difficulty of proof as to amount each defendant was responsible required joinder to prevent difficulties of proof which tended to obstruct rather than promote justice arising from separate actions and separate in such a situation. *Id.* at 26. With regard to an injury caused or contributed to by two or more people, see *McDonald v. Florida Department of Transportation*, 655 So.2d 1164, 1168 (Fla. 4th Dist Ct. App. 1995) (holding intervening act will absolutely absolve original tortfeasor of liability only when it is independent of original negligence and not set in motion by original negligent act—two separate acts can be proximate cause of same injury; if injury is caused by concurring negligence of two or more parties, each of them is liable to same extent as if injury had been caused by each alone); *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091, 1092 (Me. 1995) (where single negligent actor, by aggravating a plaintiff's preexisting injury produces aggregate injury that is incapable of apportionment, that negligent actor is liable for plaintiff's entire amount of damages). The single injury rule, which was previously limited to situations in which tortfeasors caused a single injury that was incapable of

K. *You're Liable to Be Liable*

An attorney can be held liable for legal malpractice even where the plaintiff is neither a client nor in privity of contract with the attorney.²³⁰ In *Rushing v. Bosse*,²³¹ the Fourth District Court of Appeal held that the special nature of an adoption proceeding permits a cause of action against an attorney for professional negligence even in the absence of privity between the child and the attorney.²³²

apportionment, has been expanded.

230. *Rushing v. Bosse*, 652 So. 2d 869, 872-73 (Fla. 4th Dist. Ct. App. 1995). *Accord* *Baskerville-Donovan Eng'rs, Inc. v. Pensacola House Condominium Ass'n, Inc.*, 581 So. 2d 1301, 1303 (Fla. 1991) (holding "lack of privity does not necessarily foreclose liability if a duty of care is otherwise established"); *Angel, Cohen & Rogovin, P.A. v. Oberon Inv., N.V.*, 512 So. 2d 192, 193-94 (Fla. 1987) (finding limited exception to privity requirement where plaintiff is intended third party beneficiary of attorney's actions); *Greenberg v. Mahoney, Adams & Criser, P.A.*, 614 So. 2d 604 (Fla. 1st Dist. Ct. App.), *review denied*, 624 So. 2d 267 (Fla. 1993); *see also* *Meighan v. Shore*, 40 Cal. Rptr. 2d 744, 754 (Ct. App. 1995) (stating "in California, professional liability is not dependent upon privity of contract, but the presence or absence of a client's intent that the plaintiff benefit from or rely upon the attorney's services is particularly significant in the determination of duty. Intended reliance may be express or implicit, obvious or subtle"); *Brennan v. Ruffner*, 640 So. 2d 143, 145-46 (Fla. 4th Dist. Ct. App. 1994) (holding rule of privity in legal malpractice actions is relaxed when plaintiff is intended third party beneficiary of contract between attorney and client); *Auric v. Continental Casualty Co.*, 331 N.W.2d 325, 329 (Wis. 1983) (holding beneficiary of will may maintain legal malpractice action against attorney who negligently drafts or supervises execution of will even though beneficiary is not in privity with attorney). *Contra* *Aglira v. Julien & Schlesinger, P.C.*, No. 55165, 1995 WL 567485, at *4 (N.Y. App. Div. Sept. 21, 1995) (holding lack of privity between attorney and infant in medical malpractice case prevents claim based on legal malpractice); *C.K. Indus. Corp. v. C.M. Indus. Corp.*, 623 N.Y.S.2d 410, 411 (App. Div. 1995) (holding legal malpractice plaintiff must establish existence of attorney-client relationship because in absence of fraud, collusion, malicious acts, or other special circumstances, attorney is not liable for harm caused by professional malpractice to third parties).

231. 652 So. 2d 869 (Fla. 4th Dist. Ct. App. 1995). The facts surrounding this decision arose from the alleged misconduct of the attorneys who initiated and continued a private adoption proceeding which resulted in the child being removed from her grandmother and great-grandmother's care for ten months.

232. *Id.* at 872-73. Similarly, in *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995), the court held that the legal duty of attorneys to non-clients must be determined by weighing the following six factors: 1) the existence of a specific intent by the client that the purpose of the attorney's services was to benefit the plaintiffs; 2) the foreseeability of the harm to plaintiffs as a result of the attorney's negligence; 3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct; 4) the closeness of the connection between the attorney's conduct and the injury; 5) the policy of preventing future harm; and 6) the burden on the profession of recognizing liability under

L. *Caveat Builder*

The Supreme Court of New Jersey has held that builder-developers and their selling brokers may be held liable for failing to disclose to unwary home buyers offsite conditions which will affect the value and enjoyment of their new homes, which in this case were built near a hazardous waste dump.²³³

M. *If It's Damaged, It May Be Worth More*

Courts, by upholding significant punitive damage awards, are showing how they have become tired of defendants' lack of responsibility.²³⁴

the circumstances. In *Duffey Law Office, S.C. v. Tank Transp., Inc.*, 535 N.W.2d 91, 92 (Wis. Ct. App. 1995), the court held that an attorney who represents to a client that the attorney has expertise greater than that of the average lawyer is to be held to the standard of professional care that is consistent with the claimed expertise.

233. *Strawn v. Canuso*, 657 A.2d 420, 431 (N.J. 1995). The author expects this case to launch a series of actions against real estate organizations, their brokers and other similarly situated persons.

234. *See, e.g.*, *Continental Trend Resources, Inc. v. Oxy USA Inc.*, 44 F.3d 1465, 1478 (10th Cir. 1995). In *Continental*, the court held that a punitive damages award of \$30 million was not excessive, even in light of actual damage award being only \$269,000. *Id.* at 1479. "The jury apparently considered the wealth of the defendant . . . in determining the amount needed to punish and deter." *Id.* at 1478. Similarly, in *Tierney v. Community Memorial General Hospital*, 645 N.E.2d 284 (Ill. 1st Dist. App. Ct. 1994), the court held that a \$16 million award was not excessive in a medical malpractice case where the injuries were substantial and the suffering was unique. *Id.* at 294. In *Oberg v. Honda Motor Co., Ltd.*, 888 P.2d 8 (Or. 1995), a punitive damages award of \$5 million in a products liability action was found to be within the range of what a rational jury would be entitled to award where the defendant knew or should have known, before developing its product that it was likely to cause death or serious bodily injury. *Id.* at 12. The Louisiana Fourth Circuit Court of Appeal, in *Department of Transportation & Development v. Schwegmann Westside Expressway, Inc.*, 651 So. 2d 1359 (La. 4th Cir. Ct. App. 1995), found a severance damages award of \$4.85 million was proper where the defendant's appropriation of land for public purposes resulted in a loss of visibility and access to plaintiff's property and subsequently a loss of value of plaintiff's property. *Id.* at 1364-65. In *Koplewicz v. Colony Ticket Service, Inc.*, 620 N.Y.S.2d 384, 384 (N.Y. App. Div. 1995), an award of \$680,000 plus attorney's fees, interest, and costs did not materially deviate from a reasonable award for a fractured clavicle. In *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995), a further reduction of punitive damages award which had been reduced from \$19.5 to \$15 million was not supported by a consideration of the defendant's financial position. *Id.* at 915. In *Williams v. Rene*, 886 F. Supp. 1214 (D.V.I. 1995), an award of \$4.5 million was not excessive where an expert testified that the victim's economic damages could reach almost \$6 million. *Id.* at 1242. The Supreme Court of Illinois, in *Wagner v. City of Chicago*, 651 N.E.2d 1120, 1125 (Ill. 1995), upheld a \$2.1 million award where the

plaintiff's comparative negligence had already reduced the award and defendant had breached its duty to maintain its property in a reasonably safe condition. In *Batiste v. New Hampshire Insurance Co.*, 657 So. 2d 168 (La. Ct. App. 1995), an increase of the jury's damage award to \$250,000 was proper where the evidence showed that the victim suffered a 15% disability of his body as a whole as a result of the accident. *Id.* at 170. An award of \$4.20 million was held not to be excessive in *Washington v. Barnes Hospital*, 897 S.W.2d 611, 611 (Mo. 1995), where a child sustained severe and permanent brain damage as the result of negligent care received immediately prior to and during delivery. *Id.* Similarly, in *Luther v. Norfolk & West Railway Co.*, 649 N.E.2d 1000, 1009 (Ill. App. Ct. 1995), an award of over \$1.57 million was not excessive for back injuries which aggravated a degenerative disc disease, resulting in permanent injury and an inability to return to a past position as laborer, absent any indication that the worker presented argument to inflame the passions or prejudices of the jury. *Id.* at 1009. In *Doe v. Doe*, 657 So. 2d 628, 632 (La. Ct. App. 1995), the court held an award of \$750,000 was justified in light of a psychologist's sexual abuse of a patient while the patient was in a severely depressed and suicidal state. *Contra Chung v. New York City Transit Auth.*, 624 N.Y.S.2d 224, 225 (App. Div. 1995) (holding award of \$1.5 million for past pain and suffering for plaintiff who, after falling from a subway platform lost both legs, was excessive and a reduction to \$600,000 was proper); *Thibodeaux v. U.S.A.A. Casualty Ins. Co.*, 647 So. 2d 351, 360-61 (La. Ct. App. 1994) (finding \$90,000 award for loss of future earning capacity not error despite expert witness' estimate of \$440,000 to \$540,000).