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Death of a Sales Tax and Other Stories: A Review of the 1987 Florida Supreme Court Cases Dealing With Taxation

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Abstract

In an average year the Florida Supreme Court hears as many as five cases dealing with taxation, whether it needs to, or not.

KEYWORDS: taxation, union, D.O.R

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I. Introduction

In an average year the Florida Supreme Court hears as many as five cases dealing with taxation, whether it needs to, or not.¹ In 1987, the court did not deviate from its pattern. One could argue that the intensity level of a tax case is so great, that the court cannot possibly endure the excitement of more than five tax cases per year. Rather than making such an argument, however, I will simply review the tax cases decided by the Florida Supreme Court in 1987, and update a case decided by the Florida Supreme Court in 1986, which will be re-

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1. At least that has been the pattern for the past three years. Please see the surveys of state tax law for 1985 and 1986 appearing at 10 NOVA L.J. 1153-66 (1986), and 11 NOVA L. Rev. 1501-17 (1987).

viewed by the United States Supreme Court.

First, however, because taxation is inherently a legislative area, I will discuss the implications of the death of the tax imposed on the sale of services in Florida. The service tax was clearly the most important and controversial tax issue for the year 1987.

II. Death of a Sales Tax

The Florida Constitution gives the Florida Supreme Court jurisdiction to review district court decisions regarding the constitutional validity of statutes.² Unfortunately, there is nothing in the Florida Constitution which allows the supreme court to strike a statute, merely because that statute is ill-advised. That is, it is within the prerogative of the state legislature to enact bad laws. A case in point was the tax imposed on the sale of services in Florida,³ which died an early (but not necessarily an unwelcome) death in 1987.⁴

There was never any doubt that the sales tax on services (hereinafter the service tax) would be an unpopular tax,⁵ but the governor and the legislature estimated that it would generate as much as 156.7 million dollars in revenues.⁶ Consequently, the governor believed that the tax was a necessary evil, and recommended its enactment by the legislature.⁷ The effect of that legislation was that many service providers which had been exempted from sales taxation lost both their exemptions,⁸ and their tempers in the process.

Those expressing the greatest displeasure regarding the service tax were attorneys, advertisers, contractors, and newspapers. In fact, opposition from those groups was so strong that the governor felt compelled,

2. The court must review district court decisions which hold statutes to be invalid. FLA. CONST. art. V, § 3(b)(1). The court may review district court decisions which hold a statute to be valid. FLA. CONST. art. V, § 3(b)(3).

3. 1987 Fla. Laws 87-6.

4. 1987 Fla. Laws 87-548. There were no statistics available at the time I wrote this article, but the cost of holding a special session of the legislature, for the express purpose of repealing a statute that the legislature had created only a few months before, probably cost the state more revenue than the service tax generated.

5. In fact, it is quite possible that there is no such thing as a popular tax.

6. These figures were provided in the conference report of the House of Representatives as prepared on July 7, 1986 by the committee on Finance and Taxation.

7. The governor is authorized to make recommendations concerning legislative matters, when it appears that revenues for a year will be insufficient to fund appropriations. FLA. STAT. § 216.168 (1987).

8. The exemptions were found in FLA. STAT. § 212.08(7) (e) (1949).

on May 12, 1987, to ask the Florida Supreme Court for an Advisory Opinion discussing challenges to the validity of the service tax on several different grounds.⁹ The governor believed that he was entitled to an advisory opinion, because the attacks upon the validity of the service tax affected his constitutional duties.¹⁰ Specifically, the governor was concerned that the efficacy of the service tax would have a tremendous impact on his duty to insure that revenue sources would be sufficient to meet projected state expenditures.¹¹

Opponents of the tax asserted that the tax was unconstitutional on several grounds.¹² Attorneys argued that a service tax denied their clients the fundamental rights of due process¹³ and equal protection,¹⁴ and they maintained that it impermissibly restricted access to state and federal courts,¹⁵ as well as the right to counsel.¹⁶ Advertisers and the mass media based their opposition to the service tax on the grounds that the tax violated their right to free speech,¹⁷ as well as the commerce clause of the Constitution of the United States.¹⁸ Finally, the construction industry contended that the act arbitrarily exempted certain services as being essential,¹⁹ without ever defining the term essen-

9. *In re Advisory Opinion to The Governor*, 509 So. 2d 292 (Fla. 1987).

10. FLA. CONST. art. IV, § 1(c) of the Florida Constitution allows the state supreme court to issue advisory opinions on matters affecting the constitutional powers and duties of the governor.

11. FLA. CONST. art. VII, § 1(d).

12. All of these grounds are raised in *In re Advisory Opinion to the Governor*, 509 So. 2d at 298, 299.

13. U. S. CONST. amend. XIV. FLA. CONST. art. 1, § 9.

14. U. S. CONST. amend. XIV. FLA. CONST. art. 1, § 2.

15. U. S. CONST. art III. U.S. CONST. amends. V, VI, and XIV. FLA. CONST. art. 1, § 21.

16. Attorneys claimed that they were required to give client fee information to the Department of Revenue. They argued that such a requirement would force them to breach the attorney-client privilege, which would, in turn, impermissibly burden the client's right to counsel under the 6th and 14th Amendments of the U.S. Constitution, and Article I, section 16 of the Florida Constitution.

17. U. S. CONST. amends. I and XIV. FLA. CONST. art. 1, § 4.

18. U.S. CONST. art. I, § 8 The advertisers claimed that they were paying for services which were usually produced and distributed outside of the state of Florida. They argued that they were in fact buying advertising space from television networks, who then broadcast the advertisements to all fifty states, and that a tax by any state on the sale of that advertising would interfere with interstate commerce. In fact, many advertisers would not allow their commercials to be shown in Florida, in order to avoid (and protest) the Florida service tax.

19. FLA. STAT. § 212.059. 1987 Fla. Laws 87-6 § 3.

tial,²⁰ and that provisions of the act interfered with existing contracts in violation of the Constitution of the State of Florida.²¹

The governor requested that the supreme court address each of these arguments, as well as other miscellaneous contentions which had been raised.²² Generally, the supreme court cannot issue Advisory Opinions on the validity of a legislative enactment,²³ nor can it advise private parties of their legal rights and duties, absent an actual controversy.²⁴ In this instance, however, the court determined that the question of the validity of the service tax had such an impact on the fiscal duties of the governor, that it could address his concerns.²⁵ However, the court limited its examination to a question of the facial validity of the tax, and did not address the validity of the law as applied to any specific set of facts.²⁶

The majority of the justices determined that most provisions of the tax were facially constitutional, and that in their opinion the service tax would withstand almost all of the challenges raised.²⁷ The court did find, however, that portions of the act violated article I, section 10 of the Florida Constitution, which is known as the "contract clause."²⁸ The contract clause states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."²⁹

In essence, the court found that, in some situations, sections of the act imposed the service tax on contracts entered into prior to the actual

20. *In re Advisory Opinion of the Governor*, 509 So. 2d at 305.

21. FLA. CONST. art I, § 10.

22. *In re Advisory Opinion of the Governor*, 509 So. 2d at 300. These miscellaneous contentions included arguments that: the service tax was actually an income tax in violation of the Florida Constitution. FLA. CONST. art. VII, § 5. The service tax violated the single subject rule of the Florida Constitution. FLA. CONST. art. III, § 6. The service tax violated the supremacy clause of the United States Constitution, because it taxed legal services rendered in federal courts. U.S. CONST. art. VII.

23. FLA. CONST. art. IV, § 1(a). *In re Advisory Opinion to the Governor*, 225 So. 2d 512, 514 (Fla. 1969).

24. *In re Advisory Opinion to the Governor*, 113 So. 2d 703, 705 (Fla. 1959).

25. *In re Advisory Opinion of the Governor*, 509 So. 2d at 301. The court cited *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971) for this proposition. In that case, Governor Askew asked for the court's advice on the validity of the corporate income tax, and the court agreed to issue an opinion. *Id.*

26. *In re Advisory Opinion to the Governor*, 509 So. 2d at 302.

27. *Id.* at 315.

28. *Id.* at 313, 314.

29. FLA. CONST. art. I, § 10.

passage of the service tax.³⁰ Consequently, those sections of the act retroactively burdened construction contracts that were in existence "before any party could have reasonably been on notice of the impending tax."³¹ The court reasoned that the additional and unexpected costs could impair the obligations of parties under existing contracts, thus, rendering facially invalid those portions of the act affecting contracts signed prior to May 1, 1987, which was the effective date of the service tax.³² Such a defect would not be difficult to cure; the legislature would only need to strike Section 31(4) of Chapter 87-6 of the Laws of Florida, which required taxation of contractual services established prior to May 1, 1987 to the extent those services were not completed by June 30, 1988.

Thus, while the justices emphasized that "an advisory opinion is for the benefit of the chief executive and, therefore, does not carry with it the mandate of the Court,"³³ it seemed that, for the most part, the advisory opinion had been a success for the governor. After all, only one, relatively small portion of the act was considered to be unconstitutional, notwithstanding all of the potential problems raised by the various interested groups.

Yet, even with a favorable advisory opinion under his belt, the governor, with help from the legislature, finally gave into the pressure asserted by adversaries of the service tax. In the Special "D" Session of the 1987 Legislature, held from December 8 through December 10, 1987, the lawmakers voted to repeal the service tax.³⁴ Accordingly, the service tax died after a short and tumultuous existence; it will not be missed.

One thing that can be said in defense of the service tax is that during its brief life it raised many legal questions, which in turn re-

30. The portions of the act in question were 1987 Fla. Laws 87-6 section 5, 31. Sections 5 and 31 of the act created section 212.0594 of the Florida Statutes. Section 212.0594 imposed a tax on all contractors, and required the services of subcontractors to be included in the calculation of the tax. FLA. STAT. sections 212.0594(6) and 212.0594(8). Section 31 of the act created an exemption from the tax for any written contracts signed before May 1, 1987, provided that the services were actually purchased prior to June 30, 1988. Consequently, a contractor entering into a contract prior to the adoption of the service tax would be responsible for the tax on all services rendered after June 30, 1988.

31. *In re Advisory Opinion of the Governor*, 509 So. 2d at 314.

32. *Id.*

33. *Id.* at 315.

34. 1987 Fla. Laws 87-548.

quired clients to seek counsel and pay fees which generated the sales tax. In fact, a tax on the fees of the more than eighty³⁵ attorneys hired to represent parties interested in the outcome of the advisory opinion might have generated enough revenue to make the whole thing worthwhile.

III. A Challenge to the Franchise Tax Imposed Upon Banks and Savings and Loans: *D.O.R. v. First Union National Bank of Florida*.³⁶

Each bank and savings and loan institution operating in Florida is required to pay a franchise tax³⁷ equal to five and one-half percent of its franchise base.³⁸ The franchise base is essentially the bank's federal adjusted gross income.³⁹ Consequently, the amount of franchise tax owed by an institution will increase as its income increases. Furthermore, because interest from obligations of the United States is included in a bank's federal adjusted income⁴⁰ the amount of interest from those obligations will affect the total tax due.

In 1987, the bank franchise tax withstood scrutiny by the Florida Supreme Court.⁴¹ The tax was challenged by several banks and savings institutions who argued that it violated the Federal Public Debt Statute,⁴² which prohibits states from taxing federal obligations.

At trial, the banks had lost their challenge concerning the validity of the franchise tax when the trial court granted a motion for summary

35. *In re Advisory Opinion of the Governor*, 509 So. 2d at 295-97. There were eighty attorneys of record listed in the case. A tax of five cents on each dollar charged for services rendered surrounding the advisory opinion probably raised a large amount of revenue for the state. Maybe the governor knew that a tax on services, including legal services, would cause a tremendous amount of controversy, which in turn would cause a tremendous amount of litigation regarding the validity of the tax. Since the state would have a stake in all fees arising out of such litigation, maybe the tax was not such a bad idea?!

36. 513 So. 2d 114 (Fla. 1987).

37. FLA. STAT. § 220.63 (1987).

38. FLA. STAT. § 220.63(2) (1987).

39. Actually, the franchise base is the bank's federal adjusted income, minus the deduction allowed under section 220.13 of the Florida Statutes, and \$5000. FLA. STAT. § 220.63(3) (1987).

40. FLA. STAT. § 220.16 (1987).

41. *First Union Nat'l Bank*, 513 So. 2d at 120.

42. 31 U.S.C. § 3124 (1982).

judgment in favor of the Department of Revenue.⁴³ The First District Court of Appeal, however, reversed the decision of the trial court, and declared that the tax was unconstitutional to the extent that it included federal instrumentalities in the computation of a bank's franchise tax base.⁴⁴ Accordingly, the supreme court had mandatory jurisdiction to review the district court's holding.⁴⁵

Essentially, the district court concluded that, because the amount of tax was determined by the bank's income, and because the income from federal obligations was included in calculating a bank's franchise base, the tax was actually an income tax. The Public Debt Statute, 31 U.S.C. Section 3124 states that obligations of the United States are exempt from all state and local taxes, other than nondiscriminatory franchise taxes⁴⁶ or estate taxes.⁴⁷ Thus if the franchise tax was really an income tax, it would be contrary to the express language of the federal law.

The supreme court disagreed with the district court's opinion, and held that the tax in question was a nondiscriminatory franchise tax, notwithstanding the fact that it operated in a manner identical to a tax on income.⁴⁸ In reaching this conclusion, the court relied on several opinions rendered by the United States Supreme Court holding that the Public Debt Statute did not prohibit nondiscriminatory taxes imposed on discreet property interests such as corporate shares or business franchises, even though that interest was measured by the underlying assets, which included federal obligations.⁴⁹ The Florida court added further that the formal, but economically meaningless distinction between taxes on government obligations and taxes on separate interests was "firmly embedded in the law."⁵⁰

Thus, the Florida Supreme Court upheld the bank franchise tax

43. *First Union Nat'l Bank*, 513 So. 2d at 115.

44. *First Union National Bank v. D.O.R.*, 502 So. 2d 964 (Fla. 1st Dist. Ct. App. 1987).

45. Whenever a district court holds a statute invalid, the Supreme Court must review the district court's decision. FLA. CONST. art. V, § 3(b)(1).

46. 31 U.S.C. § 1324(a)(1) (1983).

47. 1 U.S.C. § 1324 (a)(2) (1982).

48. *First Union Nat'l Bank*, 513 So. 2d at 120.

49. *Id.* at 116. The Florida Supreme Court cited several cases regarding this proposition, including *Werner Mach. Co. v. Director of Taxation*, 350 U.S. 492 (1956), and *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103 (1923).

50. *First Union Nat'l Bank*, 513 So. 2d at 116 (citing *Society for Savings v. Bowers*, 349 U.S. 143 (1955)).

and thereby reversed the opinion of the district court.⁵¹ It would seem that the court took the position that, as long as the state legislature called a tax a franchise tax, and as long as that tax did not discriminate in its operation between federal obligations and other obligations, it should be upheld, even if it was actually an income tax. That is, the form of the legislation should be elevated above its substance.

For federal income tax aficionados, this concept is not new. It seems that whenever the form of a tax law, or of a transaction works to the disadvantage of a taxpayer, that form will be recognized, notwithstanding the actual substance of the law or transaction in question.⁵² On the other hand, if a taxpayer avails himself of a form that works to his advantage, the government can ignore that form, and look to the substance of the transaction.⁵³

It is true that the Florida Supreme Court in *First Union* looked to more than just the fact that the state legislature had called the tax a franchise tax. In fact, the justices looked to the congressional intent as well, and found that "[c]ongress must have believed that franchise and estate and inheritance taxes required federal obligations to be considered, directly or indirectly, in the computation of the tax; otherwise the specific exemptions for these taxes would have been superfluous."⁵⁴ Yet, it is still a bit unsettling that the state legislature can avoid the ambit of a pervasive federal statute, simply by calling a tax a franchise tax, even if it operates as an income tax.

51. *First Union Nat'l Bank*, 513 So. 2d at 120.

52. See, e.g., *Financial Dynamics, Ltd. v. U.S.*, 531 F. Supp. 187 (M.D. Fla. 1980), in which the taxpayers were bound to be treated as a general partners for non-tax purposes, since they had been formed as a general partnership for tax purposes. This was true even though the taxpayers were forced to act as general partnership for tax purposes, in order to avoid being taxed as a corporation. Treas. Reg. §§ 301.7701-2, -3. At all times, the partners remained, in substance, limited partners.

53. There are numerous cases on this point. One example would be the case of *Diedrich v. C.I.R.*, 457 U.S. 191 (1982), in which the taxpayer created a loan between himself and a family member, but did not charge interest on that loan. In form, the loan was completely legitimate. In substance, the court held that interest is an inherent part of any loan, and stated that, in effect, the taxpayer had charged a market rate of interest, and then returned that interest as a gift to the borrower. This "gift" then became a taxable gift under 26 U.S.C. § 2501 (1982).

54. *First Union Nat'l Bank*, 513 So. 2d at 117.

IV. Florida's Version of the Full Payment Rule:⁵⁵ *Bystrom v. Diaz* and *Marshall v. Perkins*⁵⁶

When a taxpayer challenges a tax assessment for one year, he must be sure to pay all uncontested taxes for all subsequent years before they become delinquent.⁵⁷ Otherwise, the court hearing his challenge will lose jurisdiction over his cause of action. For example, if a taxpayer challenges a property tax assessment for the year 1982, but allows his uncontested 1984 taxes to become delinquent while his suit is pending, the trial court will lose jurisdiction over his case. This result is clearly dictated by the Florida Statutes.⁵⁸

Yet, there is nothing in the Florida Statutes which indicates whether the jurisdictional bar arising from a taxpayer's delinquency can be cured. After all, the argument could be made that if a taxpayer pays his delinquent taxes, and amends his complaint under the Florida Rules of Civil Procedure,⁵⁹ the jurisdictional bar should be removed. On the other hand, one might argue that once the taxpayer becomes delinquent in his payments for later years, his cause should be dismissed with prejudice.

Interestingly enough, two district courts faced that exact dilemma in 1986. In *Diaz v. Bystrom*,⁶⁰ the Third District Court of Appeal held that a taxpayer's challenge to an assessment should not be permanently barred just because he was late in paying taxes for a subsequent year. The court in *Diaz*⁶¹ decided that jurisdiction could be restored as long

55. In federal tax law, a taxpayer is required to make full payment of all disputed taxes, penalties, or interest before he can maintain a suit for a refund in a district court. 28 U.S.C. § 1346(a) (1982). This requirement is known as the "full payment rule." One question surrounding the full payment rule that is not completely resolved is whether a taxpayer must pay interest and, penalties, if he is only contesting the taxes assessed. See, e.g., *Flora v. U.S.* 362 U.S. 145 (1960).

In essence, the Florida rule surrounding jurisdiction in suits filed to challenge tax assessments is a full payment rule, because a taxpayer must not be delinquent in paying any taxes arising while the action is pending. FLA. STAT. § 197.0124 (1987).

56. 514 So. 2d 1072 (Fla. 1987).

57. FLA. STAT. § 197.0124 (1987).

58. FLA. STAT. § 197.0124(4) (1987).

59. FLA. R. CIV. P. 1.190(c).

60. 487 So. 2d 1112 (Fla. 3d Dist. Ct. Ap. 1986).

61. *Bystrom* is the tax appraiser, thus the case is referred to as the *Diaz* decision. A similar problem often arises in federal taxation, because many of my students refer to cases as the "Helvering decision," when Helvering was the Commissioner of Internal Revenue in those cases, rather than merely an overly litigious individual.

as delinquent taxes where paid prior to actual dismissal. The court reasoned that a complete jurisdictional bar was counterproductive to the legislative objective of insuring prompt payment of taxes due. After all, a taxpayer would have no incentive to pay taxes once they became delinquent, if the jurisdictional bar was permanent.

Yet, *Diaz* did not settle the issue, because the Second District Court of Appeal held that the jurisdictional bar was incurable in *Marshall v. Perkins*.⁶² The court stated that the plain language of the statute leaves no doubt that if a challenge to an assessment is attempted, the challenge will not relieve the challenger of the obligation to pay successive years' taxes. "Indeed, the threat of an absolute impediment to continuing a judicial attack upon an assessment is a vastly greater source of inducement to meet the tax paying obligation than would be present in sanctioning the delayed delinquent payment by those disputing an assessment,"⁶³ the court reasoned.

Because of the conflict between *Diaz* and *Marshall*, the supreme court had jurisdiction to consolidate the cases for review.⁶⁴ The majority of justices agreed with the second district court of appeal, holding that a taxpayer who was delinquent in paying undisputed taxes would be barred from continuing any pending cause of action regarding tax assessments, and that such a bar would be incurable.⁶⁵ The Supreme Court was not persuaded by the argument that a taxpayer should be able to pay the late taxes and amend his complaint.⁶⁶ In essence, the justices stated that there was no way for the taxpayer to claim that delinquent taxes where paid on time, even though claims or defenses asserted in an amended pleading can relate back to the date of the original pleading under the Florida Rules of Civil Procedure.⁶⁷

Thus, in 1987 the Florida Supreme Court established that as a prerequisite to maintaining suit a taxpayer must pay, prior to delinquency, the undisputed amount of taxes assessed while the suit is pending.⁶⁸ While the court understood that such a full payment rule could cause some harsh results, it maintained that the state legislature had been clear in its mandate.⁶⁹

62. 494 So. 2d 506 (Fla. 2d Dist. Ct. App. 1986).

63. *Id.* at 507.

64. FLA. CONST. art. V., § 3(b)(3).

65. *Marshall*, 514 So. 2d at 1072, 1075.

66. *Id.*

67. FLA. R. CIV. P. 1.190(c).

68. *Marshall*, 514 So. 2d at 1072.

69. *Id.* at 1074.

V. Tax Exempt Entities: *Markham v. Evangelical Covenant Church of America*⁷⁰

Charitable organizations are afforded special treatment under Florida's tax laws,⁷¹ in much the same way as they receive favored status under the federal *Internal Revenue Code of 1986*.⁷² In order to achieve this special status, however, any charitable organization must meet strict standards, not generally required of noncharitable enterprises. For example, any home operated to serve the state's elderly population must meet the rigid and extensive requirements of the Florida Statutes⁷³ in order to qualify for tax exempt status.

While courts recognize the need for strict limits on charitable homes for the elderly, sometimes they find that legislative restrictions are unconstitutional. That was the situation in the supreme court's 1974 decision in *Presbyterian Homes v. Wood*,⁷⁴ a case in which the court struck down a statutory income test for old age homes.⁷⁵ Essentially, the income test required the tax appraiser to consider the income of each charitable home's residents in determining the extent of the home's exemption.

The supreme court expressed its concerns with the income test thusly:

The "income test" has reference more to the personal economics of a resident or residents of an apartment or room in a home for the aged or disabled than to the overall purpose or use of a home as a religious or charitable institution. It is restrictive in that it is applied pecuniarily and selectively to particular individuals and their apartments or rooms rather than to the general objects of a home provided by church or charitably oriented organizations for their eleemosynary programs.

Inasmuch as an "income test" is the primary determinant of the eligibility for tax exemption of a home, other factors tradition-

70. 502 So. 2d 1239 (Fla. 1987).

71. Most importantly, charities, such as homes for the aged, are granted exemption from taxes imposed by the state of Florida. FLA. CONST. art. VII, § 3; FLA. STAT. § 196.1975 (1987).

72. 26 U.S.C. § 501(c)(3) provides that charities shall be exempt from all taxes imposed by the federal government.

73. 1987 Fla. Laws 196 provides an extensive list of types of exempt entities, as well as the requirements for maintaining exempt status.

74. 297 So. 2d 556 (Fla. 1974).

75. FLA. STAT. § 196.1975(4) (1987).

ally used in determining the status of such a home are minimized contrary to the intent of the constitutional limitation.⁷⁶

Therefore, the income test was found to be unconstitutional as applied to homes for the aged.

In 1976, however, the state legislature attempted to cure the constitutional defects of the income test by: 1) increasing the maximum income limits prescribed in the section, 2) tying these income limits to a cost-of-living index rather than future acts of Congress or future federal standards for determining the eligibility of the elderly for federal housing assistance, and 3) adding a statement of legislative intent.⁷⁷ Based on the new and improved income test established in 1976, the Broward county property appraiser refused to grant a full tax exemption to the Evangelical Covenant Church of America (hereinafter Covenant) for the year 1980.

Covenant filed suit in the Circuit Court of Broward County alleging that the income test remained unconstitutional, notwithstanding the changes made by the legislature in 1976. The circuit court disagreed, and upheld the statute.

On appeal to the Fourth District Court of Appeal, however, the statute was found to be unconstitutional,⁷⁸ and the court certified the following question to the supreme court as one of great public importance:⁷⁹

Does the Court's ruling in *Presbyterian Homes v. Wood*, 297 So. 2d 556 (Fla. 1974), continue to have vitality and, if so, does the "income test" in section 196.1975(4) Florida Statutes (1985), pass constitutional muster?⁸⁰

The supreme court answered emphatically by reaffirming the vitality of *Presbyterian Homes*,⁸¹ and by striking down the income test, once again.⁸² The court was not impressed by the changes made in the

76. *Presbyterian Homes*, 297 So. 2d at 558.

77. 1987 Fla. Laws 76-234.

78. *Evangelical Covenant Church v. Bauer*, 482 So. 2d 551 (Fla. 4th Dist. Ct. App. 1986).

79. The supreme court has jurisdiction to review cases certified by the district courts to be of great public importance. FLA. CONST. art. V., § 3(b)(4).

80. *Bauer*, 482 So. 2d at 552.

81. *Markham*, 502 So. 2d at 1239, 1240.

82. *Id.* at 1241.

test by the state legislature. In fact, the court found that the changes were "superficial rather than meaningful or substantive."⁸³ Thus the income level of residents in homes for the aged in Florida cannot be used in determining the extent of tax exemptions granted to such homes.

VI. An Update on a Florida Case With National Implications: *Shell Oil v. D.O.R.*⁸⁴

In 1986, the Florida Supreme Court held that the state department of revenue could tax oil from the Outer Continental Shelf (hereinafter OCS), as long as that oil was sold after being removed from the OCS.⁸⁵ This holding seemed to be in direct contradiction with 43 U.S.C. Section 1333,⁸⁶ and in particular it seemed to contradict the express language of 43 U.S.C. Section 1333(a)(3) which provides:

The provisions of this section for the adoption of state law as the law of the United States shall never be interpreted as a basis for claiming any interest on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.⁸⁷

Furthermore, the Florida court seemed to ignore the decision of the United States Supreme Court in *Ramah Navajo School Board v. Bureau of Revenue*,⁸⁸ which held that no state has jurisdiction to tax in an area of exclusive federal jurisdiction. The OCS is clearly intended to be an area of exclusive federal jurisdiction.⁸⁹ Thus it seemed imperative that the United States Supreme Court would take review of the *Shell Oil* decision,⁹⁰ because of the impact that such a decision might have

83. *Id.* at 1240.

84. 496 So. 2d 789 (Fla. 1986). For a complete discussion of the *Shell Oil* case, see Gershon, "The Greatest Show on Earth," Or Just Another Shell Game?: A Review of the Florida Supreme Court Decisions Concerning Taxation, 11 NOVA L. REV. 1501, 1503-06 (1987).

85. *Shell Oil*, 496 So. 2d at 789.

86. 43 U.S.C. § 1333 (1982) exempts OCS oil from state taxation. The State of Florida argued that the OCS oil was exempt, but that the revenue from such oil was taxable if sales occurred outside of the OCS.

87. *Id.* at § 1333(a)(3) (emphasis supplied).

88. 458 U.S. 832 (1982).

89. 43 U.S.C. § 1333(a)(3) (1982).

90. See Gershon, *supra* note 84, at 1505.

on a national level.

In fact, in June of 1987, the Supreme Court invited the Solicitor General of the United States to file a brief expressing the views of the United States regarding *Shell Oil*.⁹¹ Consequently, the question of whether a state can ever tax oil derived from the outer Continental Shelf is still unresolved. It would seem that the Supreme Court of the United States will have to reverse the Florida Supreme Court, in order for the tax exemption for OCS oil to have any meaning at all.⁹²

VII. Conclusion

It is easy to see that 1987 was at least as thrilling a year for Florida Supreme Court tax decisions as any other year. Yet, even if producers in Hollywood, California (or, Hollywood, Florida for that matter) will not be fighting over the movie rights to any of the cases involved, the legal implications of the 1987 tax cases were important. After all, the bank franchise tax was held to be valid in the *First Union* case,⁹³ while the income test for applying tax exemptions to homes for the aged was struck down in *Evangelical Covenant Church*.⁹⁴ Additionally, the Florida full payment rule was clarified; it is now clear that, if a taxpayer becomes delinquent in paying uncontested taxes while he is engaged in challenging a tax appraisal, he will be barred permanently from maintaining his challenge.⁹⁵

Of course, the most important development for 1987 was the death of the tax on sales of services.⁹⁶ No one knows what the Florida lawmakers will have in store in the years to come. One can hope, however, that new taxes created by the legislature will be given a great deal more thought than was given to the service tax.

91. 107 S. Ct. 2479 (1987).

92. This is because the vast majority of OCS oil is sold after it has been removed from the OCS. If the Florida Court's decision is upheld, the only time that OCS oil would be exempt from state taxes would be when it is actually sold at the wellhead.

93. 513 So. 2d 114 (Fla. 1987).

94. 502 So. 2d 1239 (Fla. 1987).

95. *Bystrom v. Diaz*, 514 So.2d 1072 (Fla. 1987).

96. 1987 Fla. Laws 87-548.

Torts

Michael L. Richmond*

I. Introduction

In 1987, the Florida Supreme Court handed down its decision in two eagerly awaited cases. The results were markedly anticlimactic, with the Court deferring to the legislature on the question of abolition of joint and several liability,¹ and approving the Tort Reform and Insurance Act of 1986² only after gutting it of an essential element of the compromise that led to its passage.³

Walt Disney World Co. v. Wood carried with it the potential for the Florida Supreme Court to continue the tradition of meeting hard issues it had established in *Hoffman v. Jones*⁴ fifteen years earlier.⁵ In *Hoffman*, the Court overturned years of decisions and abrogated the defense of contributory negligence in favor of the mitigating rule of pure comparative negligence. As a reason, the Court stated: "If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise."⁶ Rather than deferring to the legislature, the Court cited an earlier opinion and provided emphasis to these words: "Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to recon-

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1. *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987).

2. FLA. STAT. § 768.71-.81 (1986); 1986 Fla. Laws 160.

3. *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987).

4. 280 So. 2d 431 (Fla. 1973).

5. One casebook author has selected *Hoffman* as the first case in his section entitled *The Tide of Judicial Change*, G. CHRISTIE CASES & MATERIALS ON THE LAW OF TORTS 422 (1983).

6. *Hoffman*, 280 So. 2d at 436.

sider an old and unsatisfactory court-made rule."⁷

Thus, apportionment of loss among wrongdoers, as a judicial matter, should not be relegated to the legislature. The Court continued in this vein in the later case of *Lincenberg v. Issen*,⁸ where it determined that defendants found to be joint tortfeasors had the right to contribution from each other. Again, the Court referred to apportionment of harm among those at fault when it said: "[I]t would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault."⁹

In *Walt Disney World*, the court entered judgment against Disney for 86% of Wood's injuries after a jury found the plaintiff 14% at fault; one defendant (the plaintiff's fiancé¹⁰) 85% at fault; and Disney 1% at fault.¹¹ On appeal, Disney argued for the Court to abolish the doctrine of joint and several liability and consequently hold it responsible for 1% of Wood's injuries.¹² The Court acknowledged that "[j]oint and several liability is a judicially created doctrine."¹³ However, the legislature did make significant changes to the doctrine of joint and several liability as part of its 1986 tort reform package.¹⁴ Accordingly, the Court held,

we cannot say with certainty that joint and several liability is an unjust doctrine or that it should necessarily be eliminated upon the adoption of comparative negligence. In view of the public policy considerations bearing on the issue, this Court believes that the viability of the doctrine is a matter which should best be decided by the legislature.¹⁵

The dissent took a dim view of the majority's willingness to leave

7. *Id.*, quoting from *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971) (establishing cause of acting for loss of consortium).

8. 318 So. 2d 386, 391 (Fla. 1975).

9. *Id.* at 391 (referring to *Hoffman*).

10. The two married after the accident but before the decision. 515 So. 2d 199 n. 1 (1987).

11. *Id.*

12. "According to Disney, this Court in *Hoffman* set for itself the goal of creating a tort system that fairly and equitably allocated damages according to the degrees of fault. Therefore, a defendant should only be held responsible to the extent of his fault in the same way as a plaintiff under comparative negligence." *Id.* at 200.

13. *Id.*

14. FLA. STAT. § 768.81 (1986).

15. 515 So. 2d at 202.

the issue to the legislature. The Chief Justice stated: "The majority opinion may make social sense, but it defies legal logic."¹⁶ Justice Overton dealt even less kindly with the majority, feeling their decision "is both an abdication of our responsibility to address judicially established legal principles and, in this instance, hypocritical."¹⁷

Having deferred to the legislature, the Court turned *Walt Disney World* into a non-event.¹⁸ More to the point, it seems to have cast considerable confusion as to when in future cases it will leave matters for legislative resolution. A simplistic view of the case would hold that any time the legislature has made some changes to a common law doctrine, the Court's hands are tied. However, the Court itself does not permit this reading. "The fact that the new statute did not entirely abolish the doctrine but provided for apportionment of fault only under certain circumstances further indicates the complexity of the problem and suggests there may be no one resolution of the issue which will satisfy the competing interests involved."¹⁹ If the Court suggests that it will now consider legislative enactments which partially speak to a point of law as evidence that the point of law is not fit for judicial review, such an interpretation runs the danger of mandating deference on virtually any issue. By the same token, it does not seem possible that the Court now wishes to abandon the strong line of precedent which has permitted the Florida Supreme Court to tackle difficult social issues without waiting for the legislature to grind to a decision.²⁰ Thus, the Court seems to have left itself without sufficient guidance in those cases where the legislature has formulated some manner of law which does not totally preempt the field.

Further, as the dissenting justices noted, *Walt Disney World* presented the ideal opportunity to establish a uniform philosophy of law when more than one party to a lawsuit has contributed to the total loss.

By adopting pure comparative negligence in *Hoffman*, this Court

16. *Id.* at 202 (McDonald, C.J., dissenting).

17. *Id.* at 206 (Overton, J., dissenting).

18. This author has elsewhere suggested that the Court's action was "cowardly," not going to the extent of Justice Overton's characterization of the decision as "hypocritical." Hladky, *Court Won't Tackle Tough Issue*, BROWARD REVIEW, Feb. 22, 1988, at 18B, 22B, col. 2 (quoting M. Richmond).

19. 515 So. 2d at 201.

20. "We have in the past, with hesitation, modified the common law in justified instances, and this is as it should be." *Hoffman*, 280 So. 2d at 435.

set for itself the goal of creating a tort system that fairly and equitably allocates damages. Basing a defendant's liability on the ability of others to pay runs counter to *Hoffman's* pronouncement that the liability of the defendant should not depend upon what damages were suffered, but upon what damages the defendant caused.²¹

In addition, Florida's pure comparative negligence rule does not even fit in with the majority of other jurisdictions. This is particularly troublesome as, "[j]oint and several liability, as it is applied to the instant case, is a judicially established rule. As such, it is our responsibility to address it in a manner that will establish sound logical justice for all parties."²² In short, the Court which had earlier taken the initiative for establishing allocation of harm according to fault has now failed to follow its lead and remove the last stumbling block to the full implementation of that principle.

The other eagerly-awaited decision of the Court was its finding constitutional in large part the legislature's 1986 effort at tort reform.²³ Unfortunately, the Court's opinion was not unflawed. Any omnibus piece of legislation of necessity contains within it major compromises, lending the overall picture at least a semblance of parity. Although the majority found the legislative scheme in the Tort Reform and Insurance Act of 1986 did not essentially include placing a monetary cap on noneconomic damages,²⁴ the dissent disagreed. "It appears to me the record can also be read to conclude that the \$450,000 limitation on damages for noneconomic losses was an important factor in assuring that more tortfeasors will be covered by insurance and thereby allow more victims a source of recovery."²⁵ Accordingly, when the Court found the statute constitutional except for the cap on noneconomic damages²⁶ it removed a critical element of compromise which went into the making of the statute. As a result, the approval of the statute by

21. *Walt Disney World*, 12 Fla. L. Weekly at 559 (McDonald, C.J., dissenting).

22. *Id.* at 206 (Overton, J., dissenting).

23. *See supra* note 2.

24. The majority had to hold this, or it would not have been able to sever section 59 from the remainder of the act. Accordingly, it could not have found only section 59 violated the Florida Constitution, but of necessity would have had to void the entire act. *Smith v. Dept. of Ins.*, 507 So. 2d at 1089, 1090.

25. *Id.* at 1096 (Overton, Acting C.J., specially concurring).

26. The Court also held unconstitutional one section which would have changed the premium amount payable under existing contracts of insurance, thus impairing the obligation of existing contracts. *Id.* at 1094-95.

the Court creates a mixed blessing. On the one hand, much needed reforms to the tort system have occurred. On the other hand, the reforms do far less than the legislature hoped they would accomplish.²⁷

II. Negligence

A. Generally

What may ultimately prove the most important case of the past year for the theoretical development of the law of torts received far less publicity than *Walt Disney World* or *Smith*. In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*,²⁸ the Florida Supreme Court had to decide whether parties to a contract suffering economic loss can sue each other in tort for negligent performance of the contract. AFM had placed an order with Southern Bell for an advertisement in the yellow pages. Not only did Southern Bell list an erroneous telephone number in the advertisement, it disconnected a referral service which would have directed potential AFM customers calling the wrong number to the proper number. As a result, AFM lost substantial business and sued Southern Bell in federal district court claiming tort damages.²⁹ The Eleventh Circuit ultimately received the case, and certified questions of law to the Florida Supreme Court.³⁰

The Court rejected the notion of a suit in tort for negligent performance of a contract by a party to the contract or a third-party beneficiary,³¹ at least where neither personal injury nor property damage

27. This article does not discuss the Court's treatment of the "single subject rule."

28. 515 So. 2d 180 (Fla. 1987).

29. Damages in contract would be limited to those damages stemming directly from the contract, but only those incidental and consequential damages squarely within the contemplation of the parties — those of which the parties knew — at the time of contracting. See *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In tort, on the other hand, damages are limited only by the issue of whether the actor could have "foreseen" the type of harm at the time of the negligent conduct. See RESTATEMENT (SECOND) OF TORTS § 435 (1965). See generally, Richmond, *The Development of Duty: Langridge To Palsgraf*, 31 ST. LOUIS U. L.J. 903, 929 n. 182 (1987).

30. *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 796 F.2d 1467 (11th Cir. 1986). The Florida Supreme Court restated the three certified questions into one: "Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?" *AFM Corp.*, 515 So. 2d at 180.

31. *Id.* at 181. The Court specifically noted that total outsiders to the contract might have the ability to sue in tort. *AFM Corp.*, 515 So. 2d at 181, citing A.R.

ensues. The Court held, "We conclude that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses."³² The implications of *AFM Corp.* for other cases are substantial. Consider only the issue of whether economic losses without accompanying physical harm are compensable in strict products liability cases. Although the Restatement limits the reach of its "strict liability" section to physical harm only,³³ some cases do extend the doctrine to pure economic loss.³⁴ *AFM Corp.* would thus seem to relegate plaintiffs in privity with their defendants to U.C.C. warranty remedies for their pure economic harm.³⁵

B. *Res Ipsa Loquitur*

Florida courts in 1986 demonstrated a continued willingness to use the doctrine of *res ipsa loquitur* even in questionable circumstances.³⁶ In 1987 two District Courts of Appeal decided cases significantly limiting the applicability of the doctrine.³⁷ In each case, the plaintiff incurred an injury due to the sudden stop of an escalator. In each case,

Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973).

32. *AFM Corp.*, 515 So. 2d at 181-82.

33. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

34. See, e.g., *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965). *Contra Brown v. Western Farmers Ass'n, Inc.*, 521 P.2d 537 (Or. 1974). At least one intermediate appellate court in Florida has rejected claims only for economic harm in products liability cases even where the plaintiff proceeds on a theory of negligence. *GAF Corp. v. Zack Co.*, 445 So. 2d 350 (Fla. 3d Dist. Ct. App.), *review denied*, 453 So. 2d 45 (Fla. 1984). See also *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.* (Fla. 3d Dist. Ct. App. 1987) and discussion accompanying notes *infra* at 139-44.

35. In contrast, the Florida Supreme Court decided in 1988 that parties not in privity to a contract must sue based on strict products liability in tort, and could not pursue a warranty claim in contract. "[T]his Court in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) abolished the no-privity, breach of implied warranty cause of action for personal injury upon its adoption of the doctrine of strict liability in tort." *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (1988). *Kramer* may have in effect overruled *A.R. Moyer*, and the combination of the two cases may mean that non-privity plaintiffs suffering economic harm only will have no ability to recover these damages.

36. See "1986 Survey," *supra* at 1521-25.

37. *Otis Elev. Co. v. Chambliss*, 511 So. 2d 412 (Fla. 1st Dist. Ct. App. 1987); *Roffman v. Sears, Roebuck & Co.*, 12 Fla. L. Weekly 2525 (Fla. 4th Dist. Ct. App. 1987).

experts testified that many possible reasons existed for an escalator to stop. Some of these reasons involved the negligence of the manufacturer;³⁸ some involved the negligence of the maintenance company;³⁹ and some involved the negligence of the store in which the escalator was located.⁴⁰ Other reasons existed, however, which carried no implication of negligence at all.⁴¹

Both the First and Fourth District Courts of Appeal decided the trial judge should not have given the jury an instruction permitting the inference of *res ipsa loquitur*. The court in *Chambliss* held: "The plaintiffs in the instant case totally failed to carry their initial burden of showing by appropriate evidence that negligence was the probable cause for the escalator's stopping."⁴² In *Roffman*, however, the plaintiffs did prove that the escalator probably stopped as a result of a tripped circuit breaker. "However, appellants failed to present evidence from which the jury could have concluded that the breaker would not have tripped but for negligence on the part of appellees."⁴³

One element of a claim relying on *res ipsa loquitur* is that the incident would not have normally occurred in the absence of some negligence. Both *Chambliss* and *Roffman* failed due to the strong possibility that a power failure caused the stoppage rather than the negligence of one of the defendants. In contrast, the Fifth District Court of Appeal approved a trial court's *res ipsa loquitur* instruction where an elevator had dropped 15 inches when the plaintiff was leaving the cab.⁴⁴ The plaintiff also proved that an overload caused the cab to drop. Al-

38. For example, the motor could have burned out. *Roffman*, 12 Fla. L. Weekly at 2526.

39. There could have been a major malfunction of some part of the escalator other than the motor. *Roffman*, 12 Fla. L. Weekly at 2526. In the other case, *Chambliss* failed to demonstrate any evidence tending to show negligent maintenance. *Chambliss*, 511 So. 2d at 412.

40. Safety switches at either end of the escalator, when manually operated, would cause a sudden stop. *Roffman*, 12 Fla. L. Weekly at 2526. Although neither plaintiff seemed to have used the theory, negligent oversight of the escalator by the store would have permitted an unauthorized person to trip the switch.

41. An electrical power failure or power surge would have caused a circuit breaker to trip and shut down the machine. *Roffman*, 12 Fla. L. Weekly at 2526.

42. *Chambliss*, 511 So. 2d at 414. The court had earlier noted that "[a]t no time did the plaintiffs attempt to introduce evidence of why the escalator stopped or evidence to indicate that it was not stopped as a result of the activation of one of the emergency shutdown switching mechanisms." *Id.* at 413.

43. *Roffman*, 12 Fla. L. Weekly at 2526.

44. *Davis v. Otis Elev. Co.*, 515 So. 2d 777 (Fla. 5th Dist. Ct. App. 1987).

though the exact cause of the overload remained a mystery, "with appropriate maintenance the system would not have failed."⁴⁵ As a result, plaintiffs seeking to utilize the inference of *res ipsa loquitur* must rule out a significant possibility of non-negligent causation.

Certainly the point is a fine one, however to some extent these three intermediate-level cases must be viewed carefully. In each instance, a court has insisted on the use of expert evidence to prove that an accident would not have happened barring negligence. In both *Roffman* and *Chambliss*, the plaintiff who could not produce an expert willing to preclude non-negligent causes failed to reach the jury. The entire point of *res ipsa loquitur*, however, is to give some leeway to the plaintiff having inadequate ability to pinpoint the exact cause of harm. Defendants can overcome the inference by proof of the existence of alternate forces. The key has traditionally been that under normal circumstances the accident would not have occurred without negligence. The abnormality has been left to the defendant's proof rather than remaining with the plaintiff to demonstrate.

C. *Negligence Per Se*

During the past year, the Florida Supreme Court put to rest any thought that Florida, absent statutory change, would adopt social host liability for injuries to guests due to their own intoxication or to others due to the intoxication of the guests.⁴⁶ In *Bankston v. Brennan*,⁴⁷ a plaintiff injured by a drunken driver sued the host of the party at which the driver had become intoxicated, arguing that the Florida legislature intended such liability to arise.⁴⁸ The Florida Supreme Court soundly rejected the notion.

The history of the statute, as consistently read by the Florida courts, has shown the legislature's intent to limit and not expand common law liability. "It would therefore be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would

45. *Id.*

46. At the time of last year's review, the issue was still pending. "1986 Survey," *supra* at 1525-26.

47. 507 So. 2d 1385 (Fla. 1987).

48. FLA. STAT. § 768.125 (1985) provides in relevant part:

[A] person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age . . . may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law and which has heretofore been unrecognized by statute or judicial decree."⁴⁹ Nor should the Court attempt to create new law in an area where the legislature has entered the field. The policy reasons on either side of the argument are many, and the legislature is far better capable than the Court of determining their proper resolution.⁵⁰

On the other hand, the Fourth District Court of Appeal in deciding a case involving the liability of a vendor of liquor, may have gone too far in interpreting the same statute.⁵¹ The plaintiff argued that when she was a minor the Banana Boat restaurant served her an intoxicating beverage, and as a result she was injured in an accident later that evening. As noted earlier,⁵² the statute in question permits the imposition of liability on one who willfully serves liquor to a minor. Plaintiff did not claim the Banana Boat or its agents knew she was a minor, but only stated in her complaint that she, "appeared to be a minor and . . . was in fact a minor" on the date she received the liquor."⁵³ The district court concluded that this allegation, combined with one alleging the defendant had the duty to check her identification, furnished "the underpinning for the further allegation that appellees either knew or should have known that appellant was a minor and therefore the sale to such a person constituted a willful sale in violation of the aforementioned statutes."⁵⁴

This interpretation of the word "willful" poses many problems. Negligent conduct falls far short of willful conduct, and is frequently based on acts taken when the defendant does not know of surrounding danger but should have known. In these cases, the actual knowledge will transform the negligent act into a willful, or reckless, one. To suggest that a willful sale of alcohol to a minor is one where the defendant "should have known" of the minor's age, subverts the entire purpose of the statute—to distinguish between culpable willful sale and non-culpable negligent sale. The Fourth District has taken an unwise step down a dark and dangerous path, for in so doing it has blurred a dis-

49. *Bankston*, 507 So. 2d at 1387.

50. *Id.*

51. *French v. City of West Palm Beach*, 513 So. 2d 1356 (Fla. 4th Dist. Ct. App. 1987).

52. *See supra* note 48.

53. *French*, 513 So. 2d at 1357.

54. *Id.* at 1358.

inction jealously guarded by Florida's courts between negligent behavior and willful and wanton misconduct.

Liquor statutes did not prove the only ones on which plaintiffs sought to base their causes of action during the past year. The Florida Supreme Court finally set to rest the question of whether a judge must inform a jury that a traffic violation is evidence of negligence.⁵⁵ Addison, driving his pickup truck, tried to beat a train to a crossing without stopping before entering.⁵⁶ The train blew its whistle to no avail, and Addison was injured in the resulting collision. He sued the railroad, claiming the train exceeded its speed limit.

At trial, the railroad requested the judge to instruct the jury that it take Addison's violation of the statute as negligence per se and thus applicable to the jury's evaluation of comparative negligence. The judge refused, and the First District Court of Appeal affirmed, holding: "Setting aside our belief in the jury's ability to discern that driving in front of an oncoming train evidences negligence, the comment to [the Standard Jury Instruction] advises against giving such right-of-way charges because of the overbalance created in favor of the railroad."⁵⁷

Accepting the case on conflict certiorari, the Florida Supreme Court reversed. The party who adduces evidence that the other has committed a traffic infraction which has played some part in the accident is entitled to an instruction that the infraction is evidence that the other party was negligent. The court held, "This is simply a specific application of the equally established rule of law that a party is entitled to have the jury instructed upon his theory of the case when there is evidence to support the theory."⁵⁸ With this decision, the Florida Supreme Court has reaffirmed Florida's long-standing adherence to a strict application of the negligence per se rule. A statute designed to promote the public safety is exactly the type of statute entitled to the negligence per se instruction.

In a different twist, the Fourth District Court of Appeal held that a small airport need not have a control tower absent a Federal regulations requirement.⁵⁹ Famiglietti, while flying his light aircraft near the

55. Seaboard Coastline R.R. Co. v. Addison, 502 So. 2d 1241 (Fla. 1987).

56. This constituted a violation of Fla. Stat. § 316.1575 (1985).

57. Seaboard Coastline R.R. Co. v. Addison, 481 So. 2d 3, 5 (Fla. 1st Dist. Ct. App. 1985); *Contra* City of Tamarac v. Garchar, 398 So. 2d 889 (Fla. 4th Dist. Ct. App. 1981); Menard v. O'Malley, 327 So. 2d 905 (Fla. 3d Dist. Ct. App. 1976).

58. 502 So. 2d 1242.

59. Boca Aviation Inc. v. Famiglietti, 502 So. 2d 1287 (Fla. 4th Dist. Ct. App. 1987).

Boca Raton airport, narrowly missed another airplane but his own plane crashed in the course of his evasive maneuvers. Famiglietti was killed, and his estate sued on the theory that the airport was negligent for not having a control tower to monitor air traffic. Federal Aviation Administration regulations only require the federal government to fund a control tower for airports having twice the traffic of the little Boca Raton field. An expert for the plaintiff did testify that the field needed a tower and that the airport should have privately funded its construction. The judge refused to direct a verdict for the defendant and it appealed from an adverse jury verdict.

The Fourth District Court of Appeal reversed. "Liability does not arise simply because a local safety regulation or requirement could have been more stringent than FAA requirements."⁶⁰ There was no duty to exceed federal mandates, and the motion for directed verdict should have been granted. Thus, violations of safety statutes will constitute evidence of negligence, but adherence to safety regulations will in many cases satisfy a common law duty.

Finally, we may tend to lose sight of the requirement that even where there might be a violation of statute, the opposing party must still demonstrate the violation caused the harm. If a superceding, intervening force occurs subsequent to the violation, the negligence will not be deemed actionable. A convenience store clerk at Shop & Go permitted Billy Ferry to fill a pail with gasoline and pay for the gas. Ferry then carried the pail to a nearby Winn Dixie store, threw the gasoline on customers and employees, and ignited the gas.⁶¹ In permitting the sale of gasoline in an open container, the Stop & Go clerk violated a statute.⁶² The injured customers and employees sued Stop & Go based on a theory of negligence per se, but the trial judge dismissed the complaint. The Second District Court of Appeal affirmed.

Undeniably, a violation of the statute occurred, "and it is possible that had Ferry unintentionally sloshed the gasoline while carrying the pail, causing an undesigned conflagration resulting in injuries, Shop & Go could be exposed to liability."⁶³ However, the bizarre and intentionally tortious nature of Ferry's acts could not possibly have been foreseen at the time of sale. "To conclude otherwise in the instant setting would expose every common-place purveyor of gasoline to liability for a

60. *Id.* at 1288.

61. *Roberts v. Shop & Go, Inc.*, 502 So. 2d 915 (Fla. 2d Dist. Ct. App. 1986).

62. FLA. STAT. § 526.141 (1985).

63. 502 So. 2d at 918.

virtually boundless spectrum of acts beyond those which may reasonably and logically be anticipated."⁶⁴ The intentional tort was a superceding, intervening force and broke the chain of causation stemming from the clerk's initial statutory violation.⁶⁵

D. *Vicarious Liability*

Three appellate cases last year cast new light on Florida's dangerous instrumentality doctrine. Generally speaking, the owner of a motorized vehicle designed for land transportation is liable for the torts committed by a permissive user of the vehicle.⁶⁶ The courts have applied the rule to a wide variety of vehicles, including the somewhat unlikely golf cart.⁶⁷ This past year, the Fourth District Court of Appeal made it clear that in order for the rule to apply, the primary criterion is that the vehicle be motorized.⁶⁸ In *Pullman, Inc. v. Johnson*, a tractor-trailer became involved in an accident, and the owner of the tractor crossclaimed against the owner of the trailer for contribution. The trailer owner appealed from an adverse verdict, and the Fourth District Court of Appeal reversed. Although the trailer might well have in some way contributed to the accident, it is not the motorized portion of the rig. Accordingly, it does not fall within the doctrine of vicarious liability of the owner of a motorized vehicle.

As noted earlier with regard to negligence per se,⁶⁹ the violation of a duty does not necessarily give rise to liability. The existence of a superceding, intervening intentional tort will cut off the liability of the owner-defendant. When a jilted daughter borrowed her father's car, he could hardly have anticipated that she would run down her ex-boyfriend and his present female companions.⁷⁰ They sued the father for their injuries, claiming vicarious liability on the permissive user theory. The First District Court of Appeal disagreed.

64. *Id.* at 917.

65. Compare *Caetano v. Bridges*, 502 So. 2d 51 (Fla. 1st Dist. Ct. App. 1987), and discussion accompanying notes *infra* at 66-76.

66. See, e.g., *Susco Car Rental System of Fla. v. Leonard*, 112 So. 2d 832 (Fla. 1959).

67. *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984).

68. *Pullman, Inc. v. Johnson*, 12 Fla. L. Weekly. 2528 (Fla. 4th Dist. Ct. App. 1987).

69. See *supra* notes 46-56.

70. *Caetano v. Bridges*, 502 So. 2d 51 (Fla. 1st Dist. Ct. App. 1987).

A car owner's liability grows out of his obligation to have a vehicle, dangerous in its use, properly operated when it is by his authority upon the public highway; however, he is liable only if the operator is *negligent* under the circumstances and is not accountable if the operator is involved in intentional misconduct which is not foreseeable.⁷¹

Accordingly, the trial court erroneously granted the motion for summary judgment of one of the female companions, and the First District reversed. One cannot foresee intentional conduct, absent special circumstances known specifically to the defendant.

The third case in the trilogy⁷² did much to clarify the somewhat hazy exception to the dangerous instrumentality doctrine initially created by *Castillo v. Bickley*.⁷³ *Castillo* held that owners who had voluntarily given over control of their automobiles to service agencies were not liable for injuries caused by the tortious operation of the automobile by the service agency. Only one year after *Castillo*, the First District Court of Appeal limited its application to instances where the person making repairs drove the car "for work-related purposes."⁷⁴

June Shumate had called Ralph's Car Cleaning to pick up her car for cleaning. As Ralph's employee was driving Shumate's car out of her parking lot, he struck Michalek's car, injuring Michalek. Michalek sued Shumate, basing his suit on the dangerous instrumentality doctrine. The Second District affirmed a summary judgment in Shumate's favor. Unlike the earlier opinion of the First District,⁷⁵ the concept of transporting a car is not limited to road tests or similar driving.

Any such transport is as much a part of securing the service or repairs as is moving the vehicle about the service agency's premises during the actual repairs. An owner should be able to rely upon a clearly defined objective standard of liability or limitation of liability and not a standard that is subjectively applied to varying situations that are infinitesimally distinguishable.⁷⁶

71. *Id.* at 53.

72. *Michalek v. Shumate*, 511 So. 2d 377 (Fla. 2d Dist. Ct. App. 1987).

73. 363 So. 2d 792 (Fla. 1978).

74. *Jack Lee Buick, Inc. v. Bolton*, 377 So. 2d 226, 227 (Fla. 1st Dist. Ct. App. 1979).

75. *Id.* at 228.

76. *Michalek*, 511 So. 2d at 380.

E. Defenses

The Florida Supreme Court took steps to clarify at least one small area of the confused field of sovereign immunity, deciding that the state has not waived its immunity from federal civil rights actions.⁷⁷ Hill, a prisoner in the Florida penal system, sued the state claiming among other things violation of his civil rights by a probation officer, arguing the officer acted in contravention of 42 United States Code Section 1983.⁷⁸ The state's motion to dismiss the civil rights portion of the complaint was granted by the trial court and the Third District Court of Appeal affirmed.⁷⁹ On certiorari, the Florida Supreme Court affirmed as well.

The state would be liable only if it had waived its common law sovereign immunity, for the federal statute did nothing to abrogate the immunity accorded to the states at common law.⁸⁰ By statute, Florida has waived immunity to a limited extent for torts committed by its employees.⁸¹ However, federal courts which have exhaustively examined the statute and its legislative history have concluded that the waiver related only to traditional torts,⁸² and "the Florida legislature's intent to limit the waiver of sovereign immunity solely to tort claims and to the exclusion of federal civil rights suits is abundantly clear."⁸³ The Court approved of the reasoning of the federal cases, and held Florida has not consented to suits based on federal civil rights claims.

In 1987, Florida courts wrote yet another chapter in the continuing saga of interspousal tort immunity.⁸⁴ After Anton Bumberger died,

77. *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987).

78. "Every person who, under color of any statute . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

79. The district court certified the following question to the Florida Supreme Court: "Has the State of Florida, pursuant to section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. Section 1983?" *Dept. of Corrections v. Hill*, 490 So. 2d 118 (Fla. 3d Dist. Ct. App. 1986).

80. *Hill*, 513 So. 2d at 131.

81. FLA. STAT. § 768.28(1) (1987).

82. *Gamble v. Department of Health & Rehabilitative Services*, 779 F.2d 1509, 1515 (11th Cir. 1986).

83. *Shinholster v. Graham*, 527 F. Supp. 1318, 1332 (N.D. Fla. 1981).

84. *Bumberger v. Bumberger*, 504 So. 2d 432 (Fla. 4th Dist. Ct. App. 1987).

his widow sued his estate seeking compensation for injuries from negligent acts he performed during his life. The Fourth District Court of Appeal affirmed the dismissal of the case on the pleadings. The Florida Supreme Court had earlier refused to abrogate the doctrine of interspousal immunity for an action brought by a widow against the husband's estate based on an intentional tort.⁸⁵ Even though the legislature subsequently permitted interspousal tort actions based on battery,⁸⁶ its act was strictly limited to that specific tort. Absent any further act by the legislature, courts cannot create other inroads attacking the doctrine. In fact, this case presents a sound example of the continuing public policy favoring the immunity. The sole heir of the husband's estate was his son by a prior marriage. Abrogation of the doctrine would substantially act to his detriment and consequently to the advantage of the second wife.⁸⁷

Finally, one court discussed a rather strange application of the defense of express assumption of risk.⁸⁸ Potter, playing golf at Green Meadows, teed off from behind a "tee box" — a concrete slab in which a rubber tee once stood. The slabs no longer could be used for tee locations, and had become overgrown with grass and weeds. Potter mishit his drive, so that the ball struck the near edge of the box and rebounded into his eye. Potter sued the golf course, which raised as an absolute defense express assumption of risk. The First District Court of Appeal reversed a summary judgment in favor of the golf course.

Initially, the court treated the case not as implied assumption of risk, but as one of express assumption of the risks of a sporting event.⁸⁹ Even granting the characterization, the motion for summary judgment should not have been granted. The risk of striking a concrete slab immediately in front of a tee is not a risk inherent in golf. Further, since

85. *Roberts v. Roberts*, 414 So. 2d 190 (Fla. 1982).

86. "The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons." FLA. STAT. § 741.235 (1987).

87. *Bumberger*, 504 So. 2d at 434 (Stone, J., concurring).

88. *Potter v. Green Meadows*, Par 3, 510 So. 2d 1225 (Fla. 1st Dist. Ct. App. 1987).

89. The court itself seemed ill at ease with this characterization. "[G]olf is not generally recognized as a 'contact sport.' However, the doctrine of express assumption of risk has been expanded to cases involving professional horse racing, diving into shallow water, riding a 'mechanical bull,' and horseback riding with two riders on one saddle." *Id.* at 1226, n.1 (citations omitted).

weeds and grass hid the slab from view, Potter could hardly have known of the risk, let alone appreciate or assume it.

F. *Duty and Causation*

Some years ago, the English House of Lords wrestled with the issue of to which people does a member of society owe a duty, defining the essential question as: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply."⁹⁰ Last year, the Florida Supreme Court considered which of our fellow drivers constituted our neighbors.⁹¹ Severson, driving north on the left inside lane of a four lane road, stopped his car in heavy traffic. Waychoff had stopped in a left turn lane, facing south. Severson waved his hand to motion for Waychoff to turn in front of Severson's car. Waychoff, whose vision of the left outside lane was obstructed, started to make his turn based on Severson's hand signal. Unfortunately, as Waychoff turned he struck Kerfoot who was riding his motorcycle in the left outside lane adjacent to Severson's car. Kerfoot sued both Waychoff and Severson for his injuries. The trial court directed a verdict for Severson and although the Fourth District Court of Appeal affirmed, it certified the issue to the Florida Supreme Court as being of great public importance.⁹²

The Court noted that given the extremely heavy flow of traffic in his own lane, the driver who signalled "was in an almost impossible position to determine if the adjacent lane was clear of motor vehicles."⁹³ Thus, unlike the situation where a driver who signals has a clear view of all lanes of the road, the case should not go to the jury. In heavy traffic, the wave of the hand "was a manifestation . . . that as far as he was concerned [the other driver] could proceed" rather than one that it was safe to proceed.⁹⁴ Under the circumstances of the case, the duty to the turning driver and the driver in the adjacent lane was

90. *Donoghue v. Stevenson*, [1932] App. Cas. 562, 580 (opinion of Lord Atkin).

91. *Kerfoot v. Waychoff*, 501 So. 2d 588 (Fla. 1987).

92. "Does an automobile driver who, by signals, relinquishes his right of way to another vehicle, owe any duty to reasonably ascertain whether traffic lanes, other than his own, will safely accommodate the other vehicle?" *Kerfoot v. Waychoff*, 469 So. 2d 960 (Fla. 4th Dist. Ct. App. 1985).

93. *Kerfoot*, 501 So. 2d at 589.

94. *Id.* at 589 (quoting from *Devine v. Cook*, 3 Utah 2d 134, 147-48, 279 P.2d 1073, 1082 (1955)).

neither owed nor breached. However, the Court made plain that its "holding in this case is limited to its circumstances and should not be broadly construed to hold that drivers who give gratuitous signals to other drivers cannot be guilty of negligence for causing an accident."⁹⁵

While issues of duty are issues of law for the court to decide, issues of causation are issues of fact for the finder of fact.⁹⁶ On rare occasions, however, courts will take issues of causation from the jury. In the past, Florida courts seemed to demonstrate an undue solicitude to juries, even to the extent of expanding the panoply of issues for juries to decide.⁹⁷ This past year, the courts took steps to reverse the trend and established parameters permitting them to take issues of causation from juries, particularly when the question involved a superceding, intervening cause.

Anglin's husband drove their pickup truck through a deep puddle by a railroad crossing.⁹⁸ A short distance further, the engine died as a result of being drenched by the water in the puddle. Anglin and her brother-in-law pushed the truck about one hundred yards while her husband sat behind the wheel, attempting to start the car. A truck passed them in the opposite direction, made a U-turn, and returned toward Anglin's truck. The driver could not stop, rammed into the back of the truck, and pinned her between the two vehicles. Anglin sued the Department of Transportation on the theory that the negligent design of the tracks and the roadway permitted the accumulation of water which caused the initial motor failure. The trial court's grant of summary judgment was reversed by the First District Court of Appeal.⁹⁹ However, the Florida Supreme Court quashed the opinion of the district court.

Even if one assumes that the defendant was negligent and caused the accident, this still would not render him liable. "[A]s a matter of law, the actions of [the second driver] constituted an independent, efficient, intervening cause of the Anglins' injuries."¹⁰⁰ The reckless behav-

95. *Id.* at 590.

96. Thode, *Tort Analysis: Duty Risk v. Proximate Cause and the Rational Allocation of Functions between Judge and Jury*, 1977 UTAH L. REV. 1.

97. This threatened to "seriously interfere with the orderly and sensible growth of the law at the expense of an occasional verdict which, although it yields emotional gratification, strains the law considerably." "1986 Survey," *supra* at 1566.

98. Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987).

99. Anglin v. Department of Transportation, 472 So. 2d 784 (Fla. 1st Dist. Ct. App. 1985).

100. *Anglin*, 502 So. 2d at 898.

ior, totally unrelated to any possible negligence of the defendant, broke the chain of factual cause and made it necessary to take the case from the jury.¹⁰¹

A later First District case also considered the effect of intervening criminal acts on negligence.¹⁰² Two telephone repairmen could not start on a repair job until after dark because Gulf Power had to repair its own negligently maintained lines before they could start. Working late into the evening, the two were surprised by assailants who beat and severely injured them. They sued Gulf Power, arguing its negligence exposed them to additional risks. The trial court granted Gulf's motion for summary judgment. Echoing *Anglin*, the First District Court of Appeal affirmed. "The defendant's negligence, at most, provided the occasion for the attack and the resulting injuries to the plaintiffs."¹⁰³

F. Premises Liability

1. Dangerous Interior Conditions

The muddle caused by *Schoen v. Gilbert*¹⁰⁴ plagued the lower appellate courts with all the vigor of previous years. In one case last year, Casby attended a party at the Flint's home.¹⁰⁵ A great many people circulated around the house, allegedly more than the building could hold safely, and obscured the difference in floor levels. Casby tripped due to the differing levels, and was injured. The Fourth District Court of Appeal, feeling *Schoen* governed, affirmed the dismissal of Casby's complaint. However, it certified the issue arising from the facts to the Florida Supreme Court as one of great public interest.¹⁰⁶ A clearer pro-

101. "While it may be arguable that petitioners, by creating a dangerous situation which caused the respondents to require assistance, could have reasonably foreseen that someone may attempt to provide such assistance, it was not reasonably foreseeable that DuBose would act in such a bizarre and reckless manner. Petitioners' negligent conduct did not set in motion a chain of events resulting in injuries to respondents; it simply provided the occasion for DuBose's gross negligence." *Id.* at 899-900.

102. *Barnes v. Gulf Power Co.*, 517 So. 2d 717 (Fla. 1st Dist. Ct. App. 1987).

103. *Id.* at 718. The case is marked by a particularly scholarly concurring analysis by Judge Ervin. *Id.*

104. 436 So. 2d 75 (Fla. 1983). See "1986 Survey," *supra* at 1537.

105. *Casby v. Flint*, 501 So. 2d 689 (Fla. 4th Dist. Ct. App. 1987).

106. "Where plaintiff slips, falls, and is injured because of a difference in floor levels, is an allegation that the difference was obscured either by (1) other social guests, or (2) by an excessive number of other social guests sufficient as an allegation of an inherently dangerous condition giving rise to a duty to warn, thus being distin-

nouncement from the Court would go far to prevent cases of this nature from taking the time of lower courts, and the Court would do well to take this opportunity to give greater guidance than it did in *Schoen*.

In another instance, the Third District Court of Appeal did not yield to timidity as it refused to send a premises liability case to the jury.¹⁰⁷ The defendant had propped a chair against a door to keep the door open, leaving ample room for people to avoid the chair. The plaintiff, having noticed the chair, claimed she was distracted and tripped over the chair anyway. Despite a strong dissent urging the issue belonged with the jury¹⁰⁸ the court held: "A chair used to hold a door open, which the plaintiff plainly saw but tripped over owing to an admitted momentary distraction, was not a dangerous condition, where there was sufficient space and lighting for easy passage."¹⁰⁹

Once the courts permit a case to go beyond its preliminary stages, they will exercise control over those cases with a weak foundation of circumstantial proof. When a plaintiff slips on foreign material, she must prove either direct knowledge of the condition or constructive notice. Dorothy Schmidt, shopping at Publix, slipped and fell near the deli counter.¹¹⁰ Although neither Dorothy nor any other witness had seen anything on the floor, she noticed a greasy stain on her skirt after the accident. She could prove no recent spill had occurred. Still, Dorothy received a jury verdict in her favor.

The Fourth District Court of Appeal reversed. "Regardless of whether the jury could conclude that plaintiff slipped on a greasy substance, there was no proof that Publix or its employees were at fault, or that the substance was on the floor for a sufficient length of time to put defendant on notice."¹¹¹ Leaving the matter for the jury's resolution required the members to impermissibly erect a tower of inference and speculation.

2. *Dangerous Exterior Conditions*

Of the cases decided in this area by Florida courts during the past

guishable from *Schoen v. Gilbert*?" *Id.* (citations omitted).

107. *Schoenbach v. VMS Realty, Inc.*, 503 So. 2d 382 (Fla. 1987).

108. *Id.* (Nesbitt, J., dissenting).

109. *Id.*

110. *Publix Super Markets, Inc. v. Schmidt*, 509 So. 2d 977 (Fla. 4th Dist. Ct. App. 1987).

111. *Id.* at 978.

year, few received the attention of *Walt Disney World Co. v. Goode*.¹¹² An extended and exhaustive comment discussing the case and criticizing its holding has earlier appeared in this journal,¹¹³ and another detailed discussion of the case seems unduly duplicative. Briefly, however, the case revolves around the regrettable death by drowning of four-year old Joel Goode at Disney World. After 11 P.M., Joel's mother noticed he was missing. Joel drowned in one of the man-made canals which, surrounded by short fences, interlace the Disney World amusement park. The Third District Court of Appeal, finding the attractive nuisance doctrine inapplicable under the circumstances, affirmed a jury verdict for Goode's estate in a wrongful death action. This appears the farthest any Florida court has taken liability for man-made waterways on the property of a defendant, and without belaboring the point made so acutely and so well in an earlier article, "to expand liability to this extent would have an undesirable and far reaching negative impact on Florida property owners."¹¹⁴

Two other cases in the area yielded more predictable results. A church landscaped its trees by encircling them with bricks.¹¹⁵ A child, playing catch with a football, tripped and struck his knee on one of the bricks. The case reached the Fifth District Court of Appeal, which affirmed a summary judgment in favor of the church. "[W]e do not think that a tree with a surrounding brick border constitutes a dangerous condition or concealed peril. There was therefore no duty on the part of the church to warn or take other precautionary measures, such as installing better lighting."¹¹⁶

Seitz, familiar with the shallow waters surrounding the South Beach Oceanfront Motel, evaded motel security and climbed onto its private pier.¹¹⁷ He dived from the pier into the water. After a short while he was pulled from the ocean and later diagnosed as a quadriplegic. He sued the motel on a theory of negligent maintenance of the premises, but the trial judge granted the motel's motion for summary judgment. In affirming, the Third District Court of Appeal noted that the only duty owed to a trespasser is to warn of known hidden

112. 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986).

113. Comment, 12 NOVA L. REV. 247 (1987).

114. *Id.* at 272.

115. *K.G. v. Winter Springs Community Evangelical Congregational Church*, 509 So. 2d 384 (Fla. 5th Dist. Ct. App. 1987).

116. *Id.* at 385.

117. *Seitz v. Surfside, Inc.*, 517 So. 2d 49 (Fla. 3d Dist. Ct. App. 1987). Seitz was not a guest of the motel.

dangers, and then only upon discovering the trespasser's presence. Even if Seitz was able to surmount the fact that the motel had no knowledge of his presence, the only cause of his injuries was his own negligence.

Unless the dangerous conditions which exist in natural bodies of water are such that they constitute a trap or embody some unusual danger not generally existent in similar bodies of water, a property owner generally cannot be held liable for those conditions. . . . The shallow waters about the South Beach Oceanfront's pier, although insufficient for diving, did not constitute a trap.¹¹⁸

As a result, Seitz had no right to recover.

3. *Intervening Causes*

One court adopted an unfortunate argument in discussing the requisite proof in a premises liability case involving an intervening cause.¹¹⁹ Raped in her apartment by an unknown assailant, Williams sued not the property owner but the security service the owner had hired. Williams proved serious dereliction of duty by the guards hired to protect the complex.¹²⁰ However, the trial court granted OSI's motion for a directed verdict feeling the jury could only find causation by impermissible inference.¹²¹ The Third District Court of Appeal reversed, feeling the trial court should have submitted the issue of causation to the jury.

Had the court stopped here, it would have kept itself well within the bounds of standard analysis. However, it engaged in dicta which, if taken literally, dangerously permits a shift in burden at trials of this nature.

For their part, the defendants did not show that the intruder would not have been seen and stopped from entering the apartment if reasonable security had been present or 'that the crime would not even have been attempted in the face of the deterrent effect of such

118. *Id.* at 51.

119. *Williams v. Office of Security & Intelligence, Inc.*, 509 So. 2d 1282 (Fla. 3d Dist. Ct. App. 1987).

120. The guards "slept, watched television, stayed in their apartments, socialized with their girlfriends, and left the premises." *Id.* at 1283.

121. "[O]nly by sheer coincidence could the defendant's guards have been in the right place to prevent this rape and, therefore, their negligence was not a proximate cause of the plaintiff's injuries." *Id.* (quoting from trial court's ruling).

protection.¹²²

Even if the court were to hold the acts of the defendants in this case constituted gross negligence, the burden of production would not shift to the defendants merely upon a showing of negligence. The burden still would remain with the plaintiff to show causation. The court's requirement that the defendants make some showing of lack of causation varies from established precedent and common sense. The plaintiff could not possibly have created an inference of causation from a showing of breach of duty.

III. Professional Negligence

A. Generally

So often courts speak of the special rule applied to the negligence of professionals, but so seldom do they have the occasion to determine what constitutes a profession. Pierce sued an insurance agent who, in writing automobile coverage for Pierce, negligently omitted to tell Pierce about the various options regarding uninsured motorist coverage.¹²³ Pierce's suit, filed more than two but less than four years from the date of the tort, met with a motion for summary judgment based on the statute of limitations. If an insurance agent is a professional, Pierce had to bring suit within two years;¹²⁴ if not, Pierce had four years to file.¹²⁵ Arguing the traditional concept of professional has blurred over the years,¹²⁶ the Fifth District Court of Appeal felt insurance agents now fell within the definition of a professional. Rather than concentrate on the service performed by the individual, the court looked instead to the act in question.

Here, the act was failing to give proper advice by one of superior

122. *Id.* at 1702-03 (citing *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98, 101-02 (Fla. 3d Dist. Ct. App. 1980)).

123. *Pierce v. AALL Insurance, Inc.*, 513 So. 2d 160 (Fla. 5th Dist. Ct. App. 1987).

124. FLA. STAT. § 95.11(4)(a) (1983).

125. FLA. STAT. § 95.11(3)(a) (1983).

126. "But 'tradition' has been overcome in modern times, with lawyers hawking their wares in public advertisements, doctors forming vertical corporations offering all sorts of health-related services and supplies, and architects and engineers becoming builders and landlords, too." *Pierce*, 513 So. 2d at 161.

Florida courts have uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they share privity of contract. . . . The only instances in Florida where this rule of privity has been relaxed is where it was the apparent intent of the client to benefit a third party. The most obvious example of this is the area of will drafting. . . . Florida courts have refused to expand this exception to include incidental third-party beneficiaries.¹⁴⁰

The firm acted solely for the benefit of Treister. Particularly, the Court noted that if the firm knew of the conflict *it* could not have meant to benefit Oberon. As a result, the trial court properly granted the motion for summary judgment.

The question of accountant liability to third parties came before an intermediate appellate court in 1987. The court reaffirmed the doctrine that accountants do not have liability to those with whom they have not contracted.¹⁴¹ Gordon entered into a complicated investment involving A.T. Bliss and Company, a publicly-held corporation for which Etue, Wardlaw had prepared a statement of financial condition. When things fell through and Gordon suffered a substantial loss, he sued Etue, Wardlaw among others, alleging negligence in the preparation of the statement of financial condition.¹⁴² Etue, Wardlaw's motion to dismiss the negligence count was granted by the trial court, and the First District Court of Appeal affirmed.

Although some courts may have relaxed the privity barrier protecting accountants from third-party negligence suits,¹⁴³ Florida has not. Although Florida courts have carved out a limited exception for abstractors who know the abstract will be used for resale,¹⁴⁴ the excep-

App.), cert. denied 376 So. 2d 68 (Fla. 1979); *Drawdy v. Sapp*, 365 So. 2d 461 (Fla. 1st Dist. Ct. App. 1978).

140. *Angel*, 512 So. 2d at 194 (citations omitted).

141. *Gordon v. Etue, Wardlaw & Co., P.A.*, 511 So. 2d 384 (Fla. 1st Dist. Ct. App. 1987).

142. The case as reported contained discussion of a number of other allegations, including a civil RICO count, which have little relevance to this portion of the annual survey. See *id.* at 385.

143. See, e.g., *Int'l Mtg. Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (Cal. App. 4th Dist. 1986).

144. *First American Title Ins. Co. v. First Title Service Co. of the Florida Keys, Inc.*, 457 So. 2d 467 (Fla. 1984). See also *Carr Smith & Assoc., Inc. v. Fence Masters, Inc.*, 512 So. 2d 1027 (Fla. 3d Dist. Ct. App. 1987), and discussion accompanying notes 133-34, *infra*.

tion goes no farther. With an abstractor, only one person ultimately will rely on the statement in the abstract as only one person can buy the property. In contrast, any number of people might have relied on the financial statement for any number of different purposes. Accordingly, the court properly referred to Justice Cardozo's classic opinion in *Ultramares Corp. v. Touche, Niven & Co.*¹⁴⁵ and dismissed the complaint. The court, perhaps prompted by a strong but misguided dissent,¹⁴⁶ did certify the issue to the Florida Supreme Court.¹⁴⁷

The courts also considered the liability of surveyors to third parties.¹⁴⁸ Florida Packaging sought to sell a parcel of land to Ernst and Troutman, and hired Carr Smith to survey the property. Ernst and Troutman ultimately bought the land and then leased it to Fence Masters, which constructed a building on the property. Fence Masters' surveyor relied on the negligently prepared Smith survey and as a result the building encroached on land owned by the Florida East Coast Railway. In the ensuing action for encroachment and the appended third party action against Smith for damages, the trial court granted partial summary judgment against Smith on the issue of liability.

Smith argued on appeal that he did not know that the survey was to be used for resale of the property. Further, even if he did know this, Fence Masters' relation to the property did not even exist at the time Smith performed the survey. The Third District Court of Appeal agreed, feeling these presented significant issues of fact yet to be determined. The liability of surveyors to third parties is rigidly limited only to those parties who the surveyor knew at the time of contracting would be shown the final survey.¹⁴⁹

A bizarre set of facts caused another court to consider the liability of architects for patent design defects.¹⁵⁰ Easterday, a prisoner in the

145. 255 N.Y. 170, 174 N.E. 441 (1931).

146. *Gordon*, 511 So. 2d at 390. Judge Ervin strongly argued that the protection of privity has crumbled in other areas, and cited Cardozo's opinion in *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), in support. However, Judge Ervin did not even mention *Ultramares*, which postdated *McPherson* and specifically dealt with negligent misrepresentation by accountants.

147. *Gordon*, 511 So. 2d at 389-90.

148. *Carr Smith & Assoc., Inc. v. Fence Masters, Inc.*, 512 So. 2d 1027 (Fla. 3d Dist. Ct. App. 1987).

149. "Since these issues must be resolved in order to determine whether Smith owed a duty to Ernst, Troutman or Fence Masters, . . . the trial court erred in entering summary judgment against Smith on the issue of liability." *Id.* at 1028.

150. *Easterday v. Masiello*, 518 So. 2d 260 (Fla. 4th Dist. Ct. App. 1987).

Palm Beach jail, hung himself from a projecting piece of the air conditioning system. The trial court dismissed a complaint for wrongful death brought by his estate and the Fourth District Court of Appeal affirmed, relying on *Slavin v. Kay*,¹⁵¹ which had held a contractor bore no liability to third parties for latent defects in construction. The Florida Supreme Court recently had the opportunity to reconsider the *Slavin* doctrine but instead distinguished the case before it on the facts.¹⁵² As *Slavin* came before comparative negligence, the court felt the Supreme Court might wish to reconsider the doctrine in that light and, although affirming, certified the issue.¹⁵³

IV. Strict Liability — Animals

The Florida Supreme Court clearly established that young children, although perhaps not capable of negligence, could still provoke a dog under the "dog bite statute"¹⁵⁴ to the extent the dog's owner would have a defense.¹⁵⁵ A dog owned by the Bowens bit Shaun Reed, a four-year old child, while he was on their property. The Bowens argued that Shaun had provoked the dog, and the trial court judge submitted the issue of provocation to the jury. Shaun appealed from an adverse jury verdict, and after the intermediate appellate court affirmed,¹⁵⁶ the Florida Supreme Court heard the case on conflict certiorari.¹⁵⁷

While a very young child under Florida case law cannot be negligent,¹⁵⁸ the Florida legislature can change that law by statute. The act provides for liability to "any person" unless "such person" provokes the dog. The sweeping language of the act therefore "has made the affirmative defense available without regard to the age (or other disability) of the person committing the act."¹⁵⁹ Thus, although the wording "mis-

151. 108 So. 2d 462 (1958).

152. *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So. 2d 551 (Fla. 1986).

153. "Does *Slavin v. Kay* preclude recovery against the architects and/or engineers for a personal injury to a third party caused by a patent design defect in a structure?" Easterday, 518 So. 2d at 260.

154. FLA. STAT. § 767.04 (1985).

155. *Reed v. Bowen*, 512 So. 2d 198 (Fla. 1987).

156. *Reed v. Bowen*, 503 So. 2d 1265 (Fla. 2d Dist. Ct. App. 1986).

157. *Harris v. Moriconi*, 331 So. 2d 353, overruled by 512 So. 2d 200 (Fla. 1st Dist. Ct. App. 1976), had held that a very young child could not provoke a dog within the meaning of the statute.

158. *Swindell v. Hellkamp*, 242 So. 2d 708 (Fla. 1970) (child under 6 years old).

159. *Reed*, 512 So. 2d at 200 (quoting *Harris v. Moriconi*, 331 So. 2d at 356 (Rawls, J., dissenting)).

chievously or carelessly provoke" might be read as establishing a negligence standard, in this instance young children are capable of negligence. An alternative theory of the case, not discussed by the Court, would seem to reach the same result without unduly straining the language of the statute. While "carelessly" certainly suggests negligence,¹⁶⁰ the statute disjunctively couples it with "mischievously," a word suggesting a malicious or intentional act. Courts have never had trouble in holding that very young children, although incapable of negligence, are quite capable of mischief.¹⁶¹

A more troubling case extended liability beyond the owner of the dog to reach the owner's landlord by making an end run around the statute itself.¹⁶² Trevino, a tenant in a building owned by Lopez, kept a pit bull. Lopez visited the building twice a year and knew Trevino owned the dog. Trevino had posted several "bad dog" signs around the building. Trevino was caring for Vasques, a child, when the dog bit Vasques. Vasques sued Lopez, arguing that the landlord knew of the vicious animal and acquiesced in its presence by not requiring its removal. Thus, Vasques argued not statutory strict liability but negligence. The trial court granted Lopez' motion for a directed verdict, holding Vasques had produced no direct evidence that Lopez knew Trevino kept a dangerous animal on the premises. The Fourth District Court of Appeal reversed.

The key to liability is the actual knowledge by the owner of the premises that a dangerous condition exists. Knowledge in the past was shown by direct proof,¹⁶³ but this does not preclude a showing by circumstantial evidence. The jury had the right to draw its conclusion based on the circumstances. This holding, however, presents landlords wishing to permit their tenants to keep pets with a classic dilemma. On the one hand, if the tenants post a "bad dog" sign to insulate themselves from statutory liability, the owner's knowledge of the sign may serve as circumstantial evidence of the dog's vicious nature. On the other hand, the owner who does not permit tenants to post "bad dog" signs may become liable in a third party action to the tenant. The

160. This formed the basis of the opinion in *Harris v. Morconi*, 331 So. 2d at 355; also FLA. STAT. § 767.04 (1987).

161. This theory formed the basis of the lower court's holding as well as that of *Porter v. Allstate Ins. Co.*, 497 So. 2d 927 (Fla. 5th Dist. Ct. App. 1986). See generally "1986 Survey," *supra* at 1549.

162. *Vasques v. Lopez*, 509 So. 2d 1241 (Fla. 4th Dist. Ct. App. 1987).

163. *E.g.*, *Ward v. Young*, 504 So. 2d 528 (Fla. 2d Dist. Ct. App. 1987); *Anderson v. Walthal*, 458 So. 2d 291 (Fla. 1st Dist. Ct. App. 1985).

owner's only other option is to refrain from visiting the premises — an option which makes little sense from a business or a common sense viewpoint.

V. Products Liability

A. Generally

As noted earlier in this article,¹⁶⁴ the Florida Supreme Court has considered the propriety of awarding only economic damages based on negligence. This question surfaced in the lower courts as well in the context of products liability.¹⁶⁵ Affiliates had purchased a computer manufactured by Viasyn from Unicom. The computer malfunctioned so severely that Affiliates lost thousands of hours attempting to repair it and suffered considerable lost profits. It sued Viasyn alleging negligence in selection of a retailer and breach of warranty. The trial court dismissed both counts, and Affiliates appealed.

At the outset, *GAF Corp. v. Zack Co.*¹⁶⁶ clearly held that in a products liability context no action for economic damages alone would lie based on negligence. The case maintains its vitality and lies squarely within the mainstream of cases around the country.¹⁶⁷ Second, in order to claim warranty protection under the U.C.C., the plaintiff must be in privity with the seller. Although earlier cases might have held to the contrary, *West v. Caterpillar Tractor Co.*¹⁶⁸

fundamentally altered products liability law in Florida by creating a new products liability tort action — strict liability in tort — out of the prior breach of implied warranty cases which had done away with privity of contract. In so doing, *West* necessarily swept away such no-privity, breach of implied warranty cases in favor of the new action of strict liability in tort.¹⁶⁹

Accordingly the trial court properly dismissed both the negligence and

164. See discussion accompanying notes 28 - 35, *supra*.

165. *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.*, 500 So. 2d 688 (Fla. 3d Dist. Ct. App. 1987).

166. 445 So. 2d 350 (Fla. 3d Dist. Ct. App. 1984), *review denied* 453 So. 2d 45 (Fla. 1984).

167. *Affiliates*, 500 So. 2d at 691, 691.

168. 336 So. 2d 80 (Fla. 1976).

169. *Affiliates*, 500 So. 2d at 692.

warranty claims.

*Cassisi v. Maytag Co.*¹⁷⁰ permitted a plaintiff to use the inference of *res ipsa loquitur* in a strict products liability action. In 1987, the First District Court of Appeal noted how limited an effect courts should give that holding.¹⁷¹ Faxon had purchased an exercise machine manufactured by DP. The first time he used it, an eyebolt on the curl bar broke and Faxon injured his spine. He sued DP, and having established that the incident occurred, moved for partial summary judgment on the issue of liability. The trial judge granted the motion, but the First District Court of Appeal reversed. In a products liability action, the plaintiff must establish that the defect in the product existed at the time of sale and that at the same time the product was in the hands of the manufacturer or retailer. *Cassisi* permitted plaintiffs who proved a malfunction of the product in its normal usage to use an inference to reach the jury on these issues. On the other hand, "*Cassisi* specifically held that the inference cast neither the burden of proof nor the burden of producing evidence upon the defendant, except in the very limited sense that if the defendant failed to produce any evidence, it would run the risk of having the jury find against it."¹⁷² With this highly limited view of *Cassisi*, the court reversed the grant of summary judgment.

B. Defenses

Judicial and legislative tinkering with the products liability statute of repose¹⁷³ which culminated in its repeal in 1985 left in its wake a mass of confusion. In a series of cases, the Florida Supreme Court attempted to set the record straight. In 1980, the Court seemed to hold the 12 year statute of repose unconstitutional,¹⁷⁴ but only 5 years later in *Pullum v. Cincinnati, Inc.*¹⁷⁵ it retreated from its earlier stance and held the statute constitutional. In 1986, the legislature compounded the problem by abolishing the statute of repose entirely.¹⁷⁶ The effect of all of this was to leave plaintiffs with causes of action accruing between 1980 and 1985 uncertain as to their ability to sue. Greater confusion

170. 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981).

171. *Diversified Products Corp. v. Faxon*, 514 So. 2d 1161 (Fla. 1st Dist. Ct. App. 1987).

172. *Cassisi v. The Maytag Co.*, 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981).

173. FLA. STAT. § 95.031(2) (1983) (repealed in 1986).

174. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980).

175. 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 106 S. Ct. 1626 (1986).

176. FLA. STAT. § 95.11 (1986).

was created for those plaintiffs who filed suit between 1980 and 1985 but whose cause of action accrued more than 12 years after the initial sale of the product.

One plaintiff caught on both horns of the dilemma was Joseph Melendez, injured in 1982 while operating a press-brake machine sold initially in 1963.¹⁷⁷ Melendez filed suit in 1983, and sought the Florida Supreme Court's review of a summary judgment for the manufacturer which was affirmed by the lower appellate court.¹⁷⁸ Addressing first the possible retrospective application of the repealing statute, the Court held that the legislature must clearly indicate its intent before a court can hold a statute to be retroactive in effect. The only discussion related to retroactivity in the statute was the establishment of July 1, 1986, as its effective date.¹⁷⁹ Thus, the Court could not give retroactive effect to the statute. In addressing the combined effect of *Battilla* and *Pullum*, the Court applied a different rule to judicial pronouncements.

As a general rule, a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only. The *Pullum* decision was silent on the question of retroactivity, thereby indicating that it was to apply retrospectively as well as prospectively.¹⁸⁰

As a result, Melendez could not maintain his cause of action.¹⁸¹

However, in wrongful death cases the statute of repose would not bar cases brought after the twelve year period but in which death occurred within the twelve year period. Jay Phlieger was killed in 1981 in a crash involving his Nissan truck, purchased initially in 1970.¹⁸² His

177. *Melendez v. Dreis & Krump Mfg. Co.*, 515 So. 2d 735 (Fla. 1987).

178. *Melendez v. Dreis & Krump Mfg. Co.*, 503 So. 2d 365 (Fla. 3d Dist. Ct. App. 1987). The court certified both issues to the Supreme Court as being of great public importance.

179. *Melendez*, 515 So. 2d at 735.

180. *Id.*

181. A number of other decisions showed the Court's unwillingness to make any exceptions to the *Melendez* ruling. It rejected attempts to distinguish each of the following situations: *Pait v. Ford Motor Co.*, 515 So. 2d 1278 (Fla. 1987) (wrongful death); *Brackenridge v. Ametek, Inc.*, 517 So. 2d 667 (Fla. 1987) (no reliance on earlier *Battilla* holding); *Wallis v. Grumman Corp.*, 515 So. 2d 1276 (Fla. 1987) (duty to warn within meaning of statute); *Clausell v. Hobart Corp.*, 515 So. 2d 1275 (Fla. 1987) (no deprivation of due process).

182. *Nissan Motor Co. v. Phlieger*, 508 So. 2d 713 (Fla. 1987).

widow did not file a wrongful death action until 1983, beyond the 12 year statute of repose. Nissan had argued that although in form the action was for wrongful death, in substance the claim was for products liability and should be governed by the statute of repose. The court did not agree that this required the statute to bar this cause of action. The wrongful death statute which permitted Mrs. Phlieger to sue¹⁸³ procedurally allowed her to litigate those rights of her husband at the time of his death. Since his cause of action had accrued within the period permitted by the statute of repose, she had the right to pursue the substantive cause of action through the wrongful death procedure.¹⁸⁴

The supreme court also decided that the "government contractor defense" to products liability actions applies in Florida, although the defendant must bear a heavy burden in order to take advantage of it.¹⁸⁵ Dorse, a coppersmith working in the Brooklyn Navy Yards during World War II, was exposed to asbestos manufactured by Eagle-Picher and others. He contracted asbestosis. After his death his wife filed a wrongful death action in federal court. Eagle-Picher interposed as a defense that its manufacture of asbestos-related products was only subject to strict government regulations with which it had to comply. No Florida law existed on the subject, and the Eleventh Circuit Court of Appeals certified the question to the Florida Supreme Court.¹⁸⁶

The Florida Supreme Court found such a defense exists in Florida, but subject to the following conditions:

(1) "The government contract must relate to the supplying of military, non-commercial products, as the defense stems from the "federal war-making and defense power";¹⁸⁷

(2) "[T]he contractor must show compliance with the specifications material to the dispute at bar that were precisely prescribed and

183. FLA. STAT. § 768.19 (1983).

184. *Compare* Pait v. Ford Motor Co., 512 So. 2d 1278 (Fla. 1987), where the accident did not occur until more than 12 years after the initial sale of the product and the statute of repose barred the wrongful death cause of action.

185. *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1269 (Fla. 1987).

186. "May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and supplied its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware?" *Dorse v. Armstrong World Indus., Inc.*, 798 F.2d 1372, 1377 (11th Cir. 1986).

187. *Dorse*, 513 So. 2d at 1268.

required by a contract between it and the government",¹⁸⁸

(3) The contractor can have no discretion as to the design specifications of the product; and

(4) The contractor must have warned the government "of every reasonably known material risk inherent in the proposed specifications and every reasonably known material alternative for avoiding or reducing such risks, that were unknown to the military."¹⁸⁹

One district court of appeal case also presented a unique question relating to defense of products liability causes of action.¹⁹⁰ Delisa rode as a passenger in his own automobile, allowing a drunken friend to drive. His car had seat belts, but they did not operate properly. Delisa's dealer had promised to repair the belts, but parts had not arrived. As a result, Delisa was not wearing a seat belt when his drunken friend got into an accident and injured Delisa. Delisa sued the dealer which sold him the car, arguing he had incurred injuries as a result of the dealer's negligence and breach of warranty in failing to provide working seat belts. The dealer defended, arguing Delisa had assumed the risk of any injury. After an instruction that it could consider the intoxication of the driver and any lack of care on the part of Delisa, the jury returned with a verdict holding the dealer 40% negligent and Delisa 60% negligent.

The Fourth District Court of Appeal found the instruction proper and affirmed. The doctrine of implied assumption of risk no longer functions as an independent defense, but rather has merged into the defense of comparative negligence. Accordingly, "in defense of a products liability claim, a defendant may raise the obviousness of a hazard to show that the plaintiff failed to exercise the degree of reasonable care required by the circumstances."¹⁹¹ Thus, the issue of Delisa's due care quite properly should have gone to the jury.

C. Defendants Liable

Two lower court cases dealt with products liability issues involving multiple defendants. In the first, a retailer sought indemnity and contri-

188. *Id.* at 1269.

189. *Id.* at 1270.

190. *Delisa v. Stewart Agency, Inc.*, 515 So. 2d 426 (Fla. 4th Dist. Ct. App. 1987).

191. *Id.* at 427-28 (citing *Auburn Machineworks Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979)).

bution against the manufacturer of a defective product.¹⁹² K-Mart sold a porch swing distributed by Chairs and manufactured by C & S. When the swing proved defective, the purchaser sought recovery from K-Mart, which lost a jury verdict of \$115,000. The purchaser had earlier settled with Chairs and C & S for \$20,000. As the jury found the purchaser 30% liable, K-Mart ultimately paid \$64,700 to the purchaser and his wife. K-Mart then sued Chairs and C & S for contribution and indemnity, but the trial court entered summary judgment against K-Mart. On appeal, the Fifth District Court of Appeal reversed.

The liability of a retailer in a products liability claim derives from that of the manufacturer and distributor. Without more, the retailer has no "fault" or responsibility beyond acting as a conduit. The manufacturer must bear the ultimate responsibility, and as a result common law indemnity lay against both the manufacturer and the distributor.¹⁹³ On the other hand, a defendant who obtains a good-faith release from the plaintiff and pays the negotiated settlement by statute "is discharged from all liability for contribution to any tortfeasor."¹⁹⁴ As K-Mart did not plead the settlement was in bad faith, the contribution claim could not stand.

Another case determined that misuse of a product by one defendant will not force the manufacturer to incur liability to a third party.¹⁹⁵ Georgia-Pacific sold a liquid soap dispenser to Sambo's, telling Sambo's to use only Georgia-Pacific pink soap and not to use any other soap. Sambo's filled the dispenser with green liquid soap from a manufacturer other than Georgia-Pacific and the soap dripped on the floor. Reid, a Sambo's patron, slipped on the soap and sued both Sambo's and Georgia-Pacific. After an adverse jury verdict, Georgia-Pacific appealed and gained a reversal. Sambo's misuse of the dispenser might have caused it to incur liability, but not Georgia-Pacific. If the dispenser had been used properly there would have been no leakage, and accordingly the product was not defective. "Nor can it reasonably be contended that Georgia-Pacific had the duty to warn users of its product that liquid soap is slippery. That is simply common sense."¹⁹⁶

192. *K-Mart Corp. v. Chairs, Inc.*, 506 So. 2d 7 (Fla. 5th Dist. Ct. App. 1987).

193. The court also allowed K-Mart's claim for contractual indemnity against Chairs. *Id.* at 10.

194. *Id.* at 10 (citing FLA. STAT. § 768.31(5) (1981)).

195. *Georgia-Pacific Corp. v. Reid*, 501 So. 2d 653 (Fla. 5th Dist. Ct. App. 1986).

196. *Id.* at 655.

VI. Dignitary Torts

A. Defamation

Significant Florida cases dealing with defamation revolved around the defense of privilege. Forman, a police lieutenant, filed a report describing a conversation in which Murphy, a police sergeant, made critical comments about the force.¹⁹⁷ Murphy, later discharged from the force, sued Forman for libel and won a substantial jury verdict against him. The Fourth District Court of Appeal reversed. As a police lieutenant, Forman had the duty to file reports concerning improper conduct of police officers.¹⁹⁸ Since Forman acted in the scope of his official duties, his statement was entitled to an absolute privilege from defamation and the court should have directed a verdict in his favor.

The Deputy Commissioner of the Florida Department of Law Enforcement testified at a hearing held by a subcommittee of the United States House of Representatives that Eduardo Ortega was involved in a money laundering scheme.¹⁹⁹ A reporter for WPLG-TV covered the hearings. The station aired a story which was "a fair and accurate abridgement of Edwards' testimony before the subcommittee and of information contained in public records and the FDLE's files."²⁰⁰ Ortega sued the station for defamation and appealed from an adverse summary judgment.

Unlike the *New York Times Co. v. Sullivan*²⁰¹ line of cases, this did not involve defamation of a public figure. However, a different issue of privilege came into play — the "qualified privilege of the media to report on matters brought out in public proceedings."²⁰² So long as the media reports fairly and accurately on public proceedings, it may raise the defense of privilege against defamation suits based on its reporting. Courts only require that the report of the proceeding must be accurate

197. *Forman v. Murphy*, 501 So. 2d 640 (Fla. 4th Dist. Ct. App. 1986).

198. "Murphy's hallway conversation violated that section of the department's Duty Manual which prohibits employees from criticizing or ridiculing the department, its policies or other employees in a manner which is defamatory or obscene, or which tends to interfere with the department's efficiency or supervisors' ability to maintain its discipline." *Id.* at 642.

199. *Ortega v. Post-Newsweek Stations, Florida, Inc.*, 510 So. 2d 972 (Fla. 3d Dist. Ct. App. 1987).

200. *Id.* at 974.

201. 376 U.S. 254 (1964).

202. *Ortega*, 510 So. 2d at 975.

— the statements made at the proceeding need not be independently verified by the media source. Even the knowledge by the reporter that the statements made at the proceedings are false will not vitiate the privilege.

The privilege to report on official proceedings exists so that the public may be kept informed of the workings of government. That purpose is served, notwithstanding any inaccuracy of the information, when the information brought out in official proceedings is reported. . . . The press has no duty to go behind statements made at official proceedings and determine their accuracy before releasing them.²⁰³

The trial court properly granted the motion for summary judgment.

B. *Malicious Prosecution*

In 1987, the key cases in the area of malicious prosecution also centered on defense-oriented issues. A customer of GCC, upon receiving a bill in the mail, told the company it had paid the bill in cash to James Burns, then a GCC employee.²⁰⁴ GCC contacted the police department. After its investigation an officer on affidavit obtained a warrant from a magistrate for Burns' arrest. After a trial at which he was found not guilty, Burns sued GCC for malicious prosecution. GCC's motion for summary judgment was granted, and in affirming the First District Court of Appeal, it certified the issue to the Florida Supreme Court.²⁰⁵

The cause of action for malicious prosecution requires a plaintiff to prove a negative — that probable cause did not exist to arrest. In this case, the police obtained a warrant in an *ex parte* proceeding in which Burns had no opportunity to plead his case. Adopting a conclusive presumption of probable cause with exceptions only for fraud or corruption would mean that most plaintiffs would have no opportunity to challenge warrants granted in an *ex parte* manner.

203. *Id.* at 976.

204. *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986).

205. "In a suit for malicious prosecution, does a presumption of the existence of probable cause arise from a magistrate's finding of probable cause for an arrest warrant, that presumption being conclusive absent proof of fraud or other corrupt means employed by the person initiating the prosecution?" *Burns v. GCC Beverages, Inc.*, 469 So. 2d 806, 809 (Fla. 1st Dist. Ct. App. 1985) (en banc).

[A] balancing of the various interests involved has appropriately resulted in imposing a particularly heavy burden of proof upon an individual claiming malicious prosecution. . . . This burden includes the onerous requirement of proving that the criminal proceeding was initiated by the defendant without probable cause [T]he mere issuance of a warrant does not guarantee that its issuance was reasonable . . . [and] [t]his is especially true when a warrant is issued at an *ex parte* hearing.²⁰⁶

As a result, the conclusive presumption of probable cause will only apply to warrants issued when "the defendant had the opportunity to be heard by the magistrate on the issue of probable cause."²⁰⁷

In *Burns*' case, however, the *ex parte* nature of the magistrate's hearing did not preclude summary judgment against him. His past employer had the right to ask the police to investigate the matter upon receiving the customer's statement. It did not abuse its privilege, as the statements given to the police "merely reported the customer's allegations to the sheriff's department."²⁰⁸

Good faith reliance on advice of counsel to initiate criminal proceedings will provide an effective defense to a cause of action for wrongful prosecution.²⁰⁹ In attempting to collect a defaulted loan, Royal Trust Bank sought assistance from its attorney, Penzell. Penzell recommended that Royal Trust consider prosecuting Von Zamft for selling a car under lien to Royal Trust. Royal Trust fully disclosed all relevant facts to Penzell before Penzell gave his opinion. Receiving permission from his client, Penzell then asked the office of the State's Attorney to press charges against Von Zamft. When Royal Trust sued Von Zamft for damages for selling the car, he cross-claimed for malicious prosecution. Royal Trust appealed from an adverse jury verdict.

Action taken on advice of counsel provides a valid defense to a cause of action for malicious prosecution. The defendant must demonstrate that he provided all relevant facts in order for his attorney to have made a knowing recommendation. Having surmounted this hur-

206. *Burns*, 502 So. 2d at 1219-20.

207. *Id.* at 1220.

208. *Id.* In dissent, however, Justice Boyd argued that summary judgment was inappropriate. "An employer has an obligation to perform more than just a perfunctory internal investigation before making a criminal complaint to a law enforcement agency." 502 So. 2d at 1221 (Boyd, J., dissenting).

209. *Royal Trust Bank, N.A. v. Von Zamft*, 511 So. 2d 654 (Fla. 3d Dist. Ct. App. 1987).

dle, a defendant may take advantage of the defense. Accordingly, the Third District Court of Appeal reversed the judgment.

Finally, sovereign immunity remains a valid defense to a cause of action for malicious prosecution. An electric utility operated by a municipality has the right to claim the immunity as if it were the municipality itself.²¹⁰ Sicher sued the Sebring Utilities Commission, operated by the city of Sebring, for malicious prosecution. The Commission did not plead sovereign immunity as an affirmative defense in its answer, but raised the issue at a later time in the proceedings. The Commission appealed from an adverse jury verdict.

At first, sovereign immunity is not a true affirmative defense because a plaintiff has the burden of pleading "the specific methods by which the governmental entity has waived its sovereign immunity and the waiver must be clear and unequivocal."²¹¹ As a result, the Commission could raise the issue at any point in the law suit. Second, the Commission is indeed entitled to claim sovereign immunity. In interpreting the statute delineating entities entitled to immunity²¹² courts have held that it encompasses electrical utilities owned and operated by municipalities.²¹³ Finally, since in a cause of action for malicious prosecution the plaintiff must prove malice, the action is necessarily barred by the specific statutory grant of immunity "for the acts or omissions of an officer, employee, or agent committed . . . with malicious purpose."²¹⁴

C. Privacy

The privacy rights of rape victims outweigh any possible interest in the public in discovering their identity. Over 75 years ago the Florida legislature made it a misdemeanor to publish the name of a female rape victim.²¹⁵ This past year, the First District Court of Appeal in a regrettably brief per curiam opinion made it plain that a civil cause of

210. *Sebring Utilities Com'n v. Sicher*, 509 So. 2d 968 (Fla. 2d Dist. Ct. App. 1987).

211. *Id.* at 969.

212. FLA. STAT. § 768.28(2) (1985), which provides that governmental units subject to claiming immunity include "municipalities; and corporations primarily acting as instrumentalities of municipalities."

213. *Jetton v. Jacksonville Electric Authority*, 399 So. 2d 396 (Fla. 1st Dist. Ct. App. 1981).

214. FLA. STAT. § 768.28(9)(a) (1985).

215. 1911 FLA. LAWS ch. 6226. Currently codified as FLA. STAT. § 794.03 (1985), the statute now extends its protection to "the victim of any sexual offense."

action would lie against those who violate the statute.²¹⁶ It would appear that the court grounded its decision in the bootstrapping of the civil cause from the statute, rather than in an independent civil action for violation of privacy.²¹⁷

In another decision, the Florida Supreme Court also had to balance the right to privacy against the need to know.²¹⁸ This time, the right of the press did not come into play but rather the discovery process in tort litigation. Rasmussen, injured in an automobile accident, claimed that he contracted AIDS from a blood transfusion he received while in the hospital. South Florida Blood Service had supplied the blood. Rasmussen sued only the driver of the car which struck him, but sought discovery from the Blood Service as a non-party of "any and all records, documents and other material indicating the names and addresses of the blood donors" who had contributed the blood he received.²¹⁹ The Blood Service moved to quash the discovery subpoena, and appealed from the denial of its motion. The Third District Court of Appeal felt discovery was inappropriate, but certified the issue to the Florida Supreme Court as of great public importance.²²⁰ The Court felt

216. *Florida Star v. B.J.F.*, 499 So. 2d 883 (1986).

217. The United States Supreme Court rejected a cause of action for invasion of privacy brought by the father of a deceased rape victim against a television station which had disclosed his daughter's name. However, the information revealed by the station was of public record. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Florida courts do recognize the tort in general, however. *See, e.g., Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945) (plaintiff described in Marjorie Rawlings' autobiography, *Cross Creek*); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. 3d Dist. Ct. App. 1961) ("Wanna hear a sexy telephone voice? Call _____ and ask for Louise.") Florida has also adopted an amendment to its constitution protecting the right of privacy. Fla. Const. Art. V, §23 (1980). The Florida Supreme Court has intimated that this provision may form the basis for an independent civil action, holding that the people of Florida "thus provid[ed] an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions." *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987).

218. *Rasmussen*, 500 So. 2d 533 (Fla. 1987).

219. *Id.* at 534.

220. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. 3d Dist. Ct. App. 1985).

Do the privacy interests of volunteer blood donors and a blood service's and society's interest in maintaining a strong volunteer blood donation system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted AIDS from transfusions necessitated by inju-

that as the case lent itself to determination through traditional discovery means, it did not need to engage in even stricter scrutiny mandated in constitutional review. As a result, the Court balanced the interests of the donors against the interest of Rasmussen.²²¹

Florida, having adopted a constitutional amendment securing the right to privacy,²²² meant to "afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life."²²³ Particularly in an atmosphere where the public's fear of AIDS can come close to hysteria, we should protect the individual from disclosure of information that would link one with the disease. In this case, if "petitioner queries the donors' friends and fellow employees, it will functionally [sic] impossible to prevent occasional references to AIDS."²²⁴ Furthermore, the need for a large number of willing blood donors in society makes it highly dangerous to engage in acts which would tend to discourage people from donating blood. Potential donors whose identity might be subject to disclosure may very well opt out of the program, thus endangering the sources of the blood supply for emergency transfusions.

Balanced against these individual and public concerns is the need of the litigant to gain sufficient information to prove a case. This also is both a substantial individual right and a manifestation of the compelling state interest to "ensure full compensation for the victims of negligence."²²⁵ In this case, however, Rasmussen cannot state with any degree of confidence that the discovery would bear fruit. The discovery sought would do little to advance the interest he claims, while severely interfering with the rights of the donors and threatening harm to the blood donor program as a whole. As a result, Rasmussen should not be allowed to discover the names of his donors.

ries which are the subject of his suit?

221. "Upon motion . . . by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including . . . that the discovery not be had." FLA. R. Civ. P. 1.280(c)(1).

222. *Florida Star v. B.J.F.*, 499 So. 2d 883 (1986).

223. *Rasmussen*, 500 So. 2d at 536.

224. *Id.* at 537.

225. *Id.* at 538.

VII. Conclusion

Despite rather neutral results by the Florida Supreme Court in two cases which carried the potential to take great strides forward, Florida courts in general handed down encouraging decisions in the area of torts. Most heartening is a renewed willingness to decide marginal cases at the judicial level rather than letting juries hear them.²²⁶ In several areas, judges are taking firm control of the lawsuits which come before them, and this can only augur well for judicial economy and rapid resolution of claims.

The courts also made positive strides in several substantive areas of law, most notably in their willingness to protect the privacy of individual citizens. At the same time, the court denied tort remedies to those who are essentially contract claimants. In doctrinally maintaining the separate character of both contract and tort law, claimants are ensured remedies to which they are justifiably entitled. One final area deserves special mention. The courts clarified several muddy areas of the law, although intermediate courts desperately need clear guidance from the Florida Supreme Court in the field of premises liability.

On the whole, the year proved quite positive. The courts showed a healthy sensitivity to the development of the law as well as to the equities of the individual cases, and that bodes well for the future.

226. As noted last year, "Florida judges need to be bolder in determining cases. They should not timidly send cases to juries when evidence is lacking to support the proper legal conclusions or in cases where the determination is one of law and not of fact." "1986 Survey," *supra* at 1566.